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CH. 45
SENTENCING

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§45-1
Construction and Validity of Statutes

§45-1(a)
Generally

Bifulco v. U.S., 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) Any doubt in the construction of a criminal statute must be resolved in favor of defendant. Defendant was convicted of conspiracy to manufacture or distribute a certain drug and was sentenced to a prison term, a fine, and a five-year special parole term. The imposition of the parole term was improper where, under the relevant statute, conspiracy is punishable by imprisonment or fine or both and imprisonment does not include parole. See also, **People v. Jordan**, 103 Ill.2d 192, 469 N.E.2d 569 (1984) (penal statutes are to be strictly construed in favor of the accused; however, the court must give effect to the legislative intent and must not read a statutory enactment to defeat that intent; in determining the legislature's intent, the statute must be read as a whole, and all relevant parts must be considered); **People v. Bratcher**, 63 Ill.2d 534, 349 N.E.2d 31 (1976) (discussing how to ascertain the legislature's intent and holding that defendant, who was convicted of aggravated battery under Ch. 38, §12-4(b)(6), was properly sentenced for a Class 3 felony (one to ten years) pursuant to §12-4, instead of from one to five years (as set out in §12-4(b)(9)); the retention of the penalty provision in §12-4(b)(9) was a legislative oversight).

Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) A jury sentenced defendant under the habitual criminal statute before it was declared unconstitutional. Defendant was prejudiced -- had the jury been properly instructed, it could have imposed a lesser sentence. Defendant was denied due process of law.

Witte v. U.S., 515 U.S. 389, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995) Although double jeopardy prohibits a defendant from being prosecuted or punished more than once for the same offense, a defendant is not "punished" when uncharged crimes are used to enhance the sentence on another offense, at least where the enhanced sentence is still within the range statutorily authorized for the offense. Double jeopardy did not prohibit prosecution of offenses that had previously been considered as aggravation at sentencing in an earlier prosecution for other crimes.

Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) State statute which increases a sentence for any crime in which the victim was intentionally selected based on "race, religion, color, disability, sexual orientation, national origin or ancestry" does not violate the First Amendment and is not overbroad. See also, **People v. Johnston**, 267 Ill.App.3d 526, 641 N.E.2d 898 (1st Dist. 1994) (Illinois ethnic intimidation statute does not violate federal or state constitutions).

McMillan v. Pennsylvania, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) State statute, which subjected defendant convicted of certain felonies to a mandatory minimum sentence of five years if the sentencing judge found, by a preponderance of the evidence, that defendant visibly possessed a firearm during the offense, was upheld. The state legislature expressly provided that the visible possession of a firearm was a sentencing factor rather than an element of the offense. Thus, possession of a firearm does not alter the maximum sentence or create a separate offense; instead, it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available without the special finding. But see **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348 (2000) (limiting **McMillan** to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict).

Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) The Eighth Amendment requirement of individualized sentencing applies only to capital cases; thus, a state law requiring a life sentence for possession of more than 650 grams of cocaine does not violate the Eighth Amendment although its mandatory nature deprives the sentencer of any opportunity to consider mitigating evidence.

People v. Moore, 69 Ill.2d 520, 372 N.E.2d 666 (1978) A statute providing that the sentence for attempt murder "shall not exceed the sentence for a Class 1 felony" merely imposes a limitation on the maximum sentence, and not on the minimum. Thus, the clear language of the provision does not make attempt murder a Class 1 felony, and the minimum sentence for attempt murder may be lower than the four-year minimum sentence authorized for Class 1 felonies. See also, **People v. Eddington**, 77 Ill.2d 41, 394 N.E.2d 1185 (1979) (solicitation).
People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344 (1981) The Court rejected various constitutional challenges to the statute permitting the imposition of a sentence of natural life imprisonment where conduct is accompanied by exceptionally brutal or heinous behavior, indicative of wanton cruelty. See also, **People v. English**, 287 Ill.App.3d 1043, 679 N.E.2d 494 (3d Dist. 1997) (mandatory life for double murder not a violation of Illinois Constitution, even where defendant was convicted solely as an accomplice); **People v. Patrasso**, 271 Ill.App.3d 1087, 649 N.E.2d 428 (1st Dist. 1994) (the phrase "exceptionally brutal or heinous behavior indicative of wanton cruelty" is not unconstitutionally vague).

People v. Williams, 66 Ill.2d 179, 361 N.E.2d 1110 (1977) Matters of parole, furlough, and work and day release fall within the legislature's power relating to prison government and discipline, and do not constitute an infringement upon judicial authority.

People v. Cervantes, 189 Ill.2d 80, 723 N.E.2d 265 (1999) Public Act 88-680, which enhanced sentences for several offenses, violated the single-subject rule. See also, **People v. Walls**, 323 Ill.App.3d 436, 752 N.E.2d 456 (1st Dist. 2001) (where at the time of the offense armed violence was subject to a minimum term of 15 years in prison, but the act creating the 15-year minimum was subsequently held unconstitutional in **People v. Cervantes**, a subsequent reenactment of the mandatory minimum could not apply retroactively to defendant's case).

People v. Wooters, 188 Ill.2d 500, 722 N.E.2d 1102 (1999) Public Act 89-203, which created a mandatory life term for certain offenses, violated the single-subject rule.

People v. Reedy, 186 Ill.2d 1, 708 N.E.2d 1114 (1999) Public Act 89-404, which enacted the "truth-in-sentencing" law effective August 1995, violated the "single-subject" rule of the Illinois Constitution. Although the legislature reenacted the truth-in-sentencing scheme in P.A. 90-592, the new statute applies only to offenses committed after June 19, 1998.

Sayles v. Thompson, 99 Ill.2d 122, 457 N.E.2d 440 (1983) The transfer of inmates to an out-of-state prison does not violate the transportation clause of the Illinois Constitution.

People v. Nicks, 62 Ill.2d 350, 342 N.E.2d 360 (1976) Provision in the Unified Code that limited the aggregate minimum for consecutive sentence, but applied only to persons sentenced after the effective date of the Unified Code, violated equal protection. The limit must be applied to all cases on direct appeal.

People v. Hickman, 163 Ill.2d 250, 644 N.E.2d 1147 (1994) The sentencing provision of the criminal drug conspiracy statute, which provides that a person convicted of criminal drug conspiracy "may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy," is not unconstitutionally vague because it fails to provide a minimum sentence; the provision

satisfies the fair-notice requirement and the fair-administration requirement.

People v. Cox, 82 Ill.2d 268, 412 N.E.2d 541 (1980) Statute which purported to alter the standard for appellate review of sentences from "abuse of discretion" to "rebuttable presumption" is "null and void" because it "infringes upon the exclusive power of this court to regulate by rule matters of appellate practice and procedure."

People v. Moss, 274 Ill.App.3d 77, 654 N.E.2d 248 (5th Dist. 1995) A person on electronic home detention through the Department of Corrections is "committed" to DOC for purposes of the Criminal Code. Although defendant was not physically "held" by DOC while he was on electronic home detention, he was properly convicted of unlawful possession of cocaine in a penal institution where he brought cocaine from his house to sell in a neighbor's driveway.

People v. Smith, 307 Ill.App.3d 414, 718 N.E.2d 640 (1st Dist. 1999) The legislature's oversight in failing to provide a penalty for indecent solicitation predicated on predatory criminal sexual assault of a child "does not in any way negate the clear legislative intent to prevent" the conduct in question. See also, **People v. Tellez**, 295 Ill.App.3d 639, 693 N.E.2d 516 (2d Dist. 1998) (although no penalty is provided for criminal neglect of a disabled person under 720 ILCS 5/12-21(a)(2), the legislature intended to impose the same Class 3 penalty provided for neglect of an elderly person).

People v. Belton, 184 Ill.App.3d 1001, 540 N.E.2d 990 (1st Dist 1989) Statute requiring a consecutive sentence for a felony committed while on pretrial release for another felony charge was upheld. See also, **People v. Allen**, 202 Ill.App.3d 487, 559 N.E.2d 1145 (1st Dist. 1990).

Cumulative Digest Case Summaries **§45-1(a)**

Miller v. Alabama, 567 U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2012 WL 2368659 (No. 10-9646, 6/25/12)

1. The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. This flows from the precept that criminal punishment should be graduated and proportioned to both the offender and the offense.

Two strands of precedent reflect the court's concern with proportionate punishment. The first adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. This line of cases includes **Roper v. Simmons**, 543 U.S. 551 (2005) (invalidating the death penalty for juvenile offenders), and **Graham v. Florida**, 560 U.S. ___, 130 S. Ct. 2011, ___ L.Ed.2d ___ (2010) (invalidating life without parole for non-homicide juvenile offenders). The second line of precedent prohibits mandatory imposition of capital punishment and requires that the sentencer consider the characteristics of the offender and the details of the offense before sentencing him to death.

2. The confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for offenders under 18 violate the Eighth Amendment.

Roper and **Graham** establish that children are constitutionally different than adults for the sentencing purposes as they have diminished culpability and greater prospects for reform. Mandatory life-without-parole statutes prohibit assessment of whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. They contravene **Roper** and **Graham**'s foundational principle that imposition of life without parole on juveniles cannot proceed as though they were not children.

Graham's treatment of juvenile life sentences as analogous to capital punishment makes relevant the second line of cases demanding individualized sentencing when imposing the death penalty. A sentencer

must have the ability to consider the mitigating qualities of youth. Mandatory penalties by their nature preclude consideration of an offender's age and the wealth of characteristics and circumstances attendant to it, by treating every child like an adult. By making youth and all that accompanies it irrelevant to imposition of the harshest prison sentence, mandatory penalties pose too great a risk of disproportionate punishment.

3. This holding does not effectively overrule **Harmelin v. Michigan**, 501 U.S. 957 (1991), which upheld mandatory life without parole for adult offenders. Sentencing rules permissible for adults may not be so for children. Just as death is different, children are different too.

The fact that 29 jurisdictions have some form of mandatory life imprisonment for juvenile offenders does not defeat an Eighth Amendment challenge. The absence of a national consensus is relevant when the court considers a categorical bar to a form of punishment, not where, as here, it only requires that the sentencer follow a certain process. Moreover, fewer states allow mandatory life for homicide offenders than allowed mandatory life for non-homicide offenders in **Graham**. And, as in **Graham**, the fact that juvenile transfer statutes were enacted independently of mandatory life statutes makes it impossible to conclude that legislators actually endorsed the penalty of mandatory life without parole for children.

4. The presence of some discretion in some jurisdictions' transfer statutes is insufficient to eliminate the Eighth Amendment violation. The question at transfer hearings and the resources available may differ dramatically from the issue at post-trial sentencing. The ruling may reflect only a choice between light sentencing as a juvenile and standard sentencing as an adult. The discretion available to a judge at the transfer stage therefore cannot substitute for discretion at post-trial sentencing in adult court.

Breyer, J., joined by Sotomayor, J., concurred. Sentencing a juvenile to natural life without a finding that the juvenile killed or intended to kill the victim, violates the Eighth Amendment, whether its application is mandatory or discretionary.

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

The court rejected defendant's argument that on appeal from denial of post-conviction relief, he could argue for the first time that a mandatory life sentence for a person who was a minor at the time of the offense violates **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In **Miller**, the Supreme Court held that the Eighth Amendment is violated by a mandatory life sentence without parole for persons who were under the age of 18 at the time of their crimes. **Miller** did not prohibit sentencing juveniles to life imprisonment without parole, but held that the mandatory imposition of such a sentence violates the Constitution.

The court noted that under **People v. Williams**, 2012 IL App (1st) 111145, a sentence which violates **Miller** is not void *ab initio.* In addition, because defendant's petition did not satisfy the cause and prejudice test for successive post-conviction petitions, the court could have considered the issue only if the mandatory life sentence was void.

The court also noted that a sentence is void only if the court which rendered it lacked jurisdiction to do so. Unless a statute is unconstitutional on its face, the fact that the sentence which it authorizes is applied improperly does not mean that the trial court lacked jurisdiction. In reaching its holding, the court rejected the reasoning of **People v. Luciano**, 2013 IL App (2d) 110792, which held that a sentence which violates **Miller** is void.

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

People v. Crutchfield, 2015 IL App (5th) 120371 (No. 5-12-0371, 6/29/15)

A statute that has been declared unconstitutional because it was adopted in violation of the single subject rule is void in its entirety, and the legislature may revive the statute only by reenacting the same provision.

Defendant was sentenced to life imprisonment pursuant to 730 ILCS 5/5-8-1(a)(1)(c)(ii), which mandates a sentence of life imprisonment when a person over the age of 17 murders a person under the age

of 12. The Appellate Court vacated defendant's sentence since the public act which enacted this sentencing provision (Public Act 89-203) had been declared unconstitutional in violation of the single subject rule (**People v. Wooters**, 188 Ill. 2d 500 (1999)), and the legislature had never reenacted the sentencing provision.

The Appellate Court specifically rejected the State's argument that the legislature cured the single subject violation by enacting Public Act 89-462 which "recodified" the sentencing provisions in another public act that had also been declared in violation of the single subject rule. The Court stated that it found "no indication that Public Act 89-462 addressed the single subject rule violation in Public Act 89-203." Instead it "merely reenacted the change from discretionary to mandatory natural life sentences for certain offenses," and hence did not cure the infirmity of Public Act 89-203.

The Court remanded defendant's case for resentencing without applying the mandatory life sentence provision of section 5-8-1(a)(1)(c)(ii).

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

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

1. The Eighth Amendment cruel-and-unusual-punishments clause embodies two distinct propositions. One prohibits the imposition of inherently barbaric punishments under all circumstances. The other embodies a narrow proportionality principle that forbids extreme sentences grossly disproportionate to the crime.

Prior to the decision in **Graham v. Florida**, 560 U.S. ___, 130 S.Ct. 2011, ___ L.Ed.2d ___ (2010), cases challenging the proportionality of a sentence to the crime were divided into two discrete categories: those involving a term of years and those involving the death penalty. In cases challenging a term-of-years sentence, the analysis begins by comparing the gravity of the offense to the severity of the sentence. In cases challenging a capital sentence, the death penalty may be found categorically cruel and unusual based on either the nature of the offense or the characteristics of the offender. In **Graham**, the court for the first time recognized a categorical limitation on a non-capital sentence of natural life without parole for juvenile, non-homicide offenders.

2. Defendant received consecutive sentences totaling 97 years for 16 aggravated battery convictions based on his behavior toward DOC employees. The court held that his aggregated sentence resulting from multiple convictions could not be considered a life-without-parole sentence. A sentence of life without parole is tied to a single conviction and is absolute in its duration for the offender's natural life. The Eighth Amendment allows state to punish offenders for each crime they commit, regardless of the number of convictions or the duration of the sentences they have already accrued.

3. A two-step analysis is employed to determine whether a punishment is categorically unconstitutional. First, the court considers objective indicia of society's standards as expressed in legislative enactments and state practice to determine if there is a national consensus against the sentencing practice at issue. Second, the court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Punishing mentally-ill prisoners by sentencing them to natural life without parole is not categorically cruel and unusual. There is no consensus against punishment of mentally-ill offenders. Unlike persons with abnormally-diminished intellectual functioning, offenders whose mental illness falls short of criminal insanity are not less culpable than other offenders generally. The penological ends of retribution and incapacitation are also met by allowing courts to sentence mentally-ill persons as severely as others.

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

People v. Harris, 2012 IL App (1st) 092251 (No. 1-09-2251, 4/20/12)

1. The proportionate penalties clause is violated where two offenses have identical elements but carry different authorized sentences. Because armed robbery while armed with a firearm and aggravated kidnaping while armed with a firearm consist of the same elements as armed violence predicated on robbery and kidnaping, but the former offenses carry more severe sentences when the mandatory 15-year enhancement

for being armed with a firearm is added, the proportionate penalties clause was violated.

2. The court rejected defendant's argument that the convictions should be reduced to simple robbery and simple kidnaping and the cause remanded for sentencing on those offenses. In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Supreme Court held that the proper remedy in this situation is to remand the cause for resentencing in accordance with the relevant statute as it existed before the enactment of Public Act 91-404, which added the 15-year enhancement.

3. The court rejected the argument that defendant waived the proportionate penalties arguments because he failed to present them on direct appeal and raised them for the first time in a post-conviction petition. Whether a statute is unconstitutional may be raised at any time.

4. The court found that the convictions for armed robbery and aggravated kidnaping were improper although the trial court refused to impose the 15-year enhancement, and instead imposed 20-year-sentences which were within the authorized sentencing range for armed violence. One purpose of resentencing is to allow the trial court to reevaluate the length of the defendant's sentence for each offense in the context of the total sentence for all the offenses. Furthermore, the trial court did not decline to impose the enhancement because it was aware of the proportionate penalties problem, but because the State failed to give proper notice that it would seek the enhancement.

5. The court rejected the argument that the proportionate penalties clause was violated because the defendant is required to serve 85% of the sentence for aggravated kidnaping, but would be eligible for release after serving 50% of an armed violence conviction predicated on kidnaping (so long as the trial court found that the conduct did not result in great bodily harm). The court concluded that proportionate penalties analysis focuses only on whether offenses which consist of identical elements have different sentencing ranges, and not on the manner in which sentences are carried out.

Similarly, the court rejected the argument that disparities in truth in sentencing provisions violate equal protection. The court concluded that there is no equal protection right to have good-time credit calculated identically for offenses consisting of the same elements.

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

People v. Harris, 2011 IL App (1st) 092251 (No. 1-09-2251, 7/22/11)

1. A statute violates the proportionate penalties clause of the Illinois Constitution where two offenses have identical elements but one carries a greater sentencing range than the other. Ill. Const. 1970, art I, §11. Penalties for offenses with identical elements do not violate the proportionate penalties clause when the difference in the sentencing structure only affects the manner in which the sentence is carried out, and not the sentencing range. When an amended statute is found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment.

A. Armed robbery while armed with a firearm and armed violence predicated on robbery contain identical elements, as do aggravated kidnaping (while armed with a firearm) and armed violence predicated on kidnaping, but the sentencing ranges for armed robbery while armed with a firearm and aggravated kidnaping are greater than the range for armed violence. Armed robbery with a firearm and aggravated kidnaping are Class X felonies punishable by a term of 6 to 30 years and a mandatory 15-year enhancement, for a total of 21 to 45 years, 720 ILCS 5/18-2(a)(2), 10-2(b), while armed violence is punishable by a sentence ranging from 15 to 30 years. 720 ILCS 5/33A-3(a). Therefore, defendant's sentences for armed robbery with a firearm and aggravated kidnaping violate the proportionate penalties clause.

Before the armed robbery and aggravated kidnaping statutes were amended to provide for the 15-year enhancement, those offenses carried a sentencing range of 6 to 30 years, which is not harsher than the sentencing range for armed violence. When the defendant was sentenced, the court declined to impose the 15-year enhancement, and therefore the 20-year sentences imposed on defendant were proper. The Appellate Court nonetheless remanded for resentencing in accordance with the unamended statute, because the court

had declined to impose the enhancement only due to the State's failure to provide defendant notice that it would seek the enhancement upon conviction.

B. Under the truth-in-sentencing law, a defendant convicted of aggravated kidnaping is required to serve 85% of his sentence in every case, but a defendant convicted of armed violence is required to serve that same percentage of his sentence only if the trial court finds that his conduct resulted in great bodily harm. Without that finding, defendant would be eligible for release after serving 50% of his sentence. 730 ILCS 5/3-6-3(a)(2)(ii), (a)(2)(iii), (a)(2.1). Because these provisions do not affect the sentencing range imposed for these offenses, but only the manner in which the sentence is carried out, they do not violate the proportionate penalties clause.

2. The equal protection clause of the Fourteenth Amendment requires equality between groups of people who are similarly situated. Unlike the proportionate penalties clause, the equal protection clause does allow offenses with the same elements to have different punishments. A prosecutor may exercise his discretion to charge under one of two statutes with identical elements, so long as he does not discriminate against any class of defendants. Therefore, disparities in treatment under the truth-in-sentencing statute between inmates who committed different crimes that have the same elements do not violate the equal protection clause.

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

People v. Holman, 2016 IL App (5th) 100587-B (5-10-0587, 3/3/16)

1. Under United States Supreme Court case law, the Eighth Amendment prohibits a mandatory natural life sentence without the possibility of parole for offenses committed by juveniles. The Eighth Amendment requires that the sentencing court take into account factors which differentiate children from adults, including that juveniles are less mature than adults, are more likely to be rehabilitated, are more susceptible to outside influences, and have both diminished culpability and heightened capacity for change.

The court noted a conflict in authority concerning the duty of a court sentencing a juvenile to consider mitigating evidence. Some jurisdictions have required the sentencing court to consider a specified list of mitigating factors, while other jurisdictions require only that mitigation be considered, without mandating a specific list of factors. Still other jurisdictions provide that the Eighth Amendment is satisfied so long as the sentencing court has discretion to impose a sentence other than natural life without the possibility of parole.

The Appellate Court resolved this conflict by finding that the sentencing court must consider mitigating circumstances relating to a juvenile defendant's youth but need not consider a specified list of factors. Thus, the Eighth Amendment is satisfied if the record shows that the trial court considered mitigating circumstances concerning the juvenile's situation.

2. The court rejected defendant's argument that at sentencing, the trial court failed to consider mitigating circumstances. Defendant was sentenced to natural life without the possibility of parole for a murder which occurred five weeks before he turned 18.

The court concluded that the sentencing court was aware of several mitigating factors which were mentioned in the presentence report, and knew that defendant was a juvenile at the time of the offense. A sentencing court is presumed to take into account mitigating evidence which is before it.

In addition, there was substantial aggravating evidence. Under these circumstances, the trial court's statement that it found "no mitigating factors" did not indicate that it had refused to consider mitigating evidence related to the minor's youth.

3. The court rejected the argument that **Miller** should be extended to require a categorical bar against discretionary sentences of natural life in prison without the possibility of parole for offenses committed by juveniles. The court found that there is no reason to believe that the "societal standards of decency" have evolved since **Miller v. Alabama**, 567 U.S. ___, 132 S. Ct. 2455, 183 L.Ed. 2d 407 (2012) and **Montgomery v. Louisiana**, 577 U.S. ___, 136 S. Ct. 718, 193 L.Ed. 2d 599 (2016) so as to require the Appellate Court to go beyond the scope of those opinions.

(Defendant was represented by Assistant Defender Robert Burke, Mt. Vernon.)

People v. Hunter, 2016 IL App (1st) 141904 (No. 1-14-1904, modified upon denial of rehearing 8/12/16)

1. Defendant, age 16 at the time of the offense, was tried as an adult under the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130), and was convicted of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking. The trial court sentenced him to 21 years imprisonment, which included a 15-year enhancement for his use of a firearm.

Defendant argued that he should be resentenced under the provisions of 730 ILCS 5/5-4.5-105 which took effect while his case was on appeal. Defendant argued that these provisions, which require the sentencing court to consider several factors, including age, impetuosity, and level of maturity when sentencing a defendant under age 18, should apply retroactively to his case. Defendant also argued that if the statute was not applied retroactively, the mandatory firearm enhancement violated the Eighth Amendment and the proportionate penalties clause of the Illinois Constitution.

Defendant also argued that the amendments to the automatic transfer statute, 705 ILCS 405/5-130(1)(a), which also took effect while defendant's case was on appeal and which removed the offenses of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking from the automatic transfer statute, should be applied retroactively to his case.

The court rejected all of defendant's arguments.

2. First, the court held that section 5-4.5-105 did not apply retroactively to defendant's case. Section 5-4.5-105 states that the sentencing court must consider certain sentencing factors "on or after the effective date of this amendatory act." Thus the statute clearly indicates that a court is required to apply its provisions only at hearings held on or after its effective date of January 1, 2016. Since defendant was sentenced before that date, section 5-4.5-105 did not apply to his case.

3. Second, the court held that the mandatory firearm enhancement was not unconstitutional as applied to defendant. Once the 15-year enhancement was applied, the sentencing range for defendant's offenses was only 21 to 45 years, a substantial penalty but not one comparable to a life sentence. Additionally, the trial court considered substantial mitigating evidence before imposing the minimum sentence of 21 years for each of defendant's convictions. Under these facts, the mandatory firearm enhancement did not violate the Eighth Amendment or the proportionate penalties clause.

4. Finally, the court held that the amendments to section 5-130 of the Juvenile Court Act did not apply retroactively. Statutes like section 5-130, which do not themselves contain a clear indication of legislative intent regarding temporal reach, are presumed to be framed in view of section 4 of the Statute on Statutes. Under section 4, a procedural amendment may not be applied retroactively if it would have a retroactive impact that would impair the rights a party possessed when acting, attach new legal consequences, or impose new duties with respect to transactions already completed.

The court held that applying the amendments retroactively would have a retroactive impact as it would abolish automatic transfers and require the State to file new petitions for criminal jurisdiction or suffer the legal consequences from failing to do so.

(Defendant was represented by Assistant Defender Katie Anderson, Chicago.)

People v. Mischke, 2014 IL App (2d) 130318 (No. 2-13-0318, 12/29/14)

Under 625 ILCS 5/11-501(d)(2)(A), a person convicted of aggravated driving while under the influence (DUI) is guilty of a Class 4 felony. But under subsection (d)(2)(B), a third violation of "this Section" is a Class 2 felony. The trial court sentenced defendant for aggravated DUI as a Class 2 felony. Defendant argued on appeal that he should have been sentenced as a Class 4 felony since he had two prior convictions for non-aggravated DUI, and the statute requires two prior convictions for aggravated DUI.

The Appellate Court held that the language of subsection (d)(2)(B), "this Section," refers to all of section 11-501, not simply to subsection (d)(2)(B). Section 11-501 includes non-aggravated as well as aggravated DUI, while subsection (d)(2)(B) only includes aggravated DUI. The enhancement to a Class 2

felony thus occurs whenever a defendant has two prior convictions for any form of DUI, not just aggravated DUI. The trial court therefore properly sentenced defendant to a Class 2 felony.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Ortiz, 2016 IL App (1st) 133294 (No. 1-13-3294, 10/17/16)

Defendant, age 15 at the time of the offense, was convicted of first degree murder and sentenced to 60 years imprisonment.

The court held that defendant's sentence violated the Eighth Amendment. A juvenile's mandatory or discretionary sentence of life imprisonment is constitutionally valid only where the sentencing judge takes into consideration his youth and attendant characteristics to determine whether the defendant is the rarest of juvenile offenders whose crimes reflect permanent incorrigibility.

The court held that since defendant must serve 100% of his 60-year sentence and hence will not be eligible for release until he is 75 years old, his sentence is effectively a life sentence. Although the trial court considered defendant's young age and his personal history in sentencing defendant, it did not consider the corresponding characteristics of his youth as required by **Miller v. Alabama**, 567 U.S. ___, 132 S. Ct. 2455 (2012).

The court vacated defendant's sentence and remanded the cause for a new sentencing hearing.

(Defendant was represented by Assistant Defender Elena Penick, Elgin.)

People v. Pohl, 2012 IL App (2d) 100629 (No. 2-10-0629, 5/3/12)

1. The Clerks of Court Act provides that the "clerk shall be entitled to costs in all criminal . . . cases from each person convicted . . . as follows: (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75. 705 ILCS 105/27.2(w)(1)(B).

The plain language of the statute authorizes imposition of a fee for a defendant convicted pursuant to a misdemeanor complaint. Defendant was convicted of three counts of domestic battery but only one complaint was filed. Therefore, only one clerk's fee could be imposed.

2. The Counties Code authorizes a county to enact an ordinance to defray the costs of the sheriff in providing court security. 55 ILCS 5/5-1103. Pursuant to this section, the DuPage County Board enacted an ordinance that provides "[i]n criminal . . . cases, such fee [of $25] shall be assessed against the defendant upon . . . findings of guilty resulting in a judgment of conviction."

The plain language of this ordinance indicates that the court security fee must be imposed against a defendant who is found guilty in a criminal case, but the language refers to cases, not individual convictions. Therefore, defendant convicted of three counts of domestic battery could only be assessed one fee.

3. The Unified Code of Corrections provides that "[i]n addition to any other penalty imposed, a fine of $200 shall be imposed upon any person who . . .is convicted of . . . domestic battery." 730 ILCS 5/5-9-1.5.

The Appellate Court found this statute ambiguous with respect to whether defendant should be liable for a single fine or multiple fines upon conviction of multiple counts of domestic battery. The court looked for guidance to **People v. Elliott**, 272 Ill. 592, 112 N.E. 300 (1916). In **Elliott**, the court upheld imposition of multiple sentences of fines for multiple convictions of unlawfully selling intoxicating liquor, because defendants were knowing and willful violators of the law and therefore there was no reason whatsoever for leniency. Like **Elliott**, the court saw no reason why defendant should escape liability for three separate domestic violence fines where he was convicted of three counts of domestic battery. To hold that only one fine should be imposed would result in the unjust consequence that a defendant who battered several people would be punished no differently than a defendant who battered one person.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Rinehart, 406 Ill.App.3d 272, 943 N.E.2d 698 (4th Dist. 2010)

Generally, 730 ILCS 5/5-8-1(d)(2) provides a two-year-term of MSR for a Class 1 or Class 2 felony.

However, the MSR term for convictions of criminal sexual assault, predatory criminal sexual assault of a child, and aggravated criminal sexual assault "shall range from a minimum of three years to a maximum of the natural life of the defendant." 720 ILCS 5/5-8-1(d)(4).

At defendant's sentencing for criminal sexual assault, the trial court did not impose a term of MSR. Instead, it stated that DOC would impose a term of MSR between three years and natural life. Defendant then received a natural life MSR term from DOC.

Because MSR is a component of the authorized sentence and is included in the sentencing statute, the Appellate Court concluded that the legislature intended for the trial court to set a specific MSR term. The court acknowledged that 730 ILCS 5/3-3-8 permits the Prisoner Review Board to terminate MSR early under certain circumstances, but held that the authority to initially specify the term lies with the trial judge. The court rejected **People v. Schneider**, 403 Ill.App.3d 301, 933 N.E.2d 384 (2d Dist. 2010), which held that the legislature intended for the trial court to set an indeterminate MSR term and for DOC to decide when MSR is to be terminated.

The court vacated the natural life MSR term imposed by DOC and remanded the cause with directions for the trial court to set a MSR term.

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

People v. Taylor, 2016 IL App (1st) 141251 (No. 1-14-1251, 10/18/16)

Attempt murder is generally subject to a Class X sentence. However, 720 ILCS 5/8-4(c)(1)(E) provides that if a person convicted of attempt murder:

> proves by a preponderance of the evidence . . . that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony.

The Appellate Court concluded that §5/8-4(c)(1)(E) is intended to apply where the defendant attempts to kill a person who has provoked him but negligently or accidentally kills a third person (i.e., "transferred intent"). The court rejected the trial court's finding that the statute applies only where the defendant unsuccessfully attempts to kill his provoker, but had he succeeded the killing would have been negligent or accidental. The Appellate Court noted that under the trial judge's interpretation it would be impossible for a defendant convicted of attempt murder to obtain a reduction classification based upon provocation, because specific intent to kill is required for attempt murder but is fundamentally incompatible with the requirement that had the provoker died the death would have been negligent or accidental.

2. In addition, the trial court abused its discretion by finding that defendant was not acting under a sudden and intense passion sufficient to entitle him to a reduction in classification. Defendant fired a weapon at the driver of a car which struck a vehicle in which defendant's child was a passenger. The trial court found that defendant did not act in a sudden and intense passion because the car at which defendant fired had come to a stop at the time of the shooting.

The Appellate Court concluded that because the events took place in quick succession, there was little time for defendant's anger to subside. Under these circumstances, defendant was acting under a sudden and intense passion.

3. To obtain a sentence classification reduction under §8-4(c)(1)(E), defendant was also required to show that his passion was the result of serious provocation by the person whom he shot. The trial court did not reach this issue because it concluded the defendant was not acting under a sudden and intense passion. The cause was remanded to allow the lower court to make this determination.

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

People v. Winningham, 391 Ill.App.3d 476, 909 N.E.2d 363 (4th Dist. 2009)

625 ILCS 5/11-501(d)(2), which requires a sentence of 3 to 14 years imprisonment for aggravated driving under the influence which results in death unless the court determines that "extraordinary circumstances exist and require probation," is neither unconstitutionally vague on its face nor unconstitutionally vague because it is susceptible to arbitrary and discriminatory application.

People v. Yoselowitz, 2011 IL App (4th) 100764 (No. 4-10-0764, 9/20/11)

Neither the proportionate penalties clause of the Illinois Constitution nor equal protection principles were violated by 720 ILCS 550/5(g), which provides a Class X sentence for the manufacture, delivery, or possession of more than 5000 grams of cannabis with intent to deliver or manufacture.

The court acknowledged recent studies showing that cannabis is neither addictive nor likely to lead to great bodily harm, but found that the legislature imposed the Class X sentencing provision to combat illegal drug use by directing law enforcement efforts to commercial traffickers and large scale purveyors of illegal substances. The court found that such legislative intent constituted a rational basis for the Class X sentencing scheme, and that imposing a Class X sentence on purveyors of large quantities of marijuana was not shocking to the moral sense of the community. The court also noted that defendant's arguments concerning the effects of marijuana use should be addressed to the legislature rather than the courts.

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§45-1(b)
Due Process, Separation of Powers, and Proportionate Sentencing Requirement

§45-1(b)(1)
Due Process and Separation of Powers Generally

Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959) Due process does not require a state to fix or impose any particular penalty for any crime it may define, or to impose the same or proportionate sentences for separate and independent crimes.

People v. Lombardi, 184 Ill.2d 462, 705 N.E.2d 91 (1998) The penalty of 15 to 30 years' imprisonment for armed violence does not violate due process.

People v. Sharpe, 216 Ill.2d 481, 839 N.E.2d 492 (2005) The 25-year to life sentence enhancement applicable to first degree murder when committed with the use of a firearm does not violate due process.

People v. Hill, 199 Ill.2d 440, 771 N.E.2d 374 (2002) The 15-year "add-on" provision for home invasion, under which a mandatory term is added to the sentence where the intruder was armed with a firearm and used force or threatened the imminent use of force against a person within a dwelling place, does not violate the separation of powers doctrine.

People ex rel. Scott v. Israel, 66 Ill.2d 190, 361 N.E.2d 1108 (1977) The mandatory parole provision of the Unified Code of Corrections does not violate either due process or the separation of powers clause of the Illinois Constitution.

People v. Hickman, 163 Ill.2d 250, 644 N.E.2d 1147 (1994) 720 ILCS 570/405.1(c), which provides that a person convicted of criminal drug conspiracy "may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy," does not violate due process. Due

process requires only that citizens have fair notice of sentencing provisions, and not that every crime necessarily includes a minimum sentence.

People v. Dunigan, 165 Ill.2d 235, 650 N.E.2d 1026 (1995) The Habitual Criminal Act does not violate due process or the separation of powers doctrine (by giving the prosecutor authority to request a particular sanction).

People v. Farmer, 165 Ill.2d 194, 650 N.E.2d 1006 (1995) The felony sentencing provisions for possession of contraband in a penal institution do not violate due process (because there is a rational relationship between the statute and a legitimate state goal).

People ex rel. Scott v. Israel, 66 Ill.2d 190, 361 N.E.2d 1108 (1977) The mandatory parole provision of the Unified Code of Corrections does not violate either due process or the separation of powers clause of the Illinois Constitution.

People v. Bainter, 126 Ill.2d 292, 533 N.E.2d 1066 (1989) Ch. 38, §§1005-8-1(f) and 1005-8-4(a) of the Unified Code of Corrections do not violate the separation of powers doctrine. (Section 1005-8-1(f) allowed an Illinois court to order that any time served by a defendant on a subsequently imposed sentence in another jurisdiction be credited on defendant's previously imposed Illinois sentence, and §1005-8-4(a) allowed an Illinois court to order that a previously imposed Illinois sentence run concurrent with a subsequent sentence in another jurisdiction.)

People v. McGee, 341 Ill.App.3d 1029, 794 N.E.2d 855 (1st Dist. 2003) The court rejected defendant's argument that the aggravated UUW statute violated due violate process for lacking a culpable mental state and for punishing potentially innocent conduct. See also, **People v. Grant**, 339 Ill. App. 3d 792, 791 N.E.2d 100 (1st Dist. 2003).

People v. Marsh, 329 Ill.App.3d 639, 768 N.E.2d 108 (1st Dist. 2002) The Class 4 felony penalty provision for failure to register as a sex offender does not violate due process (or double jeopardy).

People v. Braman, 327 Ill.App.3d 1091, 765 N.E.2d 500 (3rd Dist. 2002) Extended-term sentence based on defendant's prior DUI convictions did not violate defendant's due process rights.

People v. Beltran, 327 Ill.App.3d 685, 765 N.E.2d 1071 (2d Dist. 2002) Presumptive transfer to adult court of 15-year-old accused of Class X offenses or certain firearm, gang, or drug-related offenses does not violate due process.

People v. Marsh, 329 Ill.App.3d 639, 768 N.E.2d 108 (1st Dist. 2002) The Class 4 felony penalty for failure to register as a sex offender does not violate due process, double jeopardy, or the proportionate penalties clause.

People v. Cooks, 271 Ill.App.3d 25, 648 N.E.2d 190 (1st Dist. 1995) The statute authorizing mandatory natural life sentences (730 ILCS 5/5-8-1(a)(1)(c)(ii)) does not violate due process or the Eighth Amendment.

Cumulative Digest Case Summaries **45-1(b)(1)**

In re Derrico G., 2014 IL 114463 (No. 114463, 8/4/14)

Under §5-615 of the Juvenile Court Act, the State may object to the entry of an order of continuance

under supervision in a juvenile case. 705 ILCS 405/5-615. The circuit court held that this statutory provision was unconstitutional both facially and as applied because it: (1) was arbitrarily enforced in violation of due process; (2) violated the separation of powers clause of the Illinois constitution; and (3) violated equal protection.

The Illinois Supreme Court reversed the circuit court's ruling, holding that the statute was neither facially unconstitutional nor as applied to defendant.

1. For a statute to be facially unconstitutional, there must be no set of circumstances under which the statute would be valid. If a statute is constitutional as applied to a defendant, it usually cannot be challenged on the ground that it might be unconstitutional as applied to others. In other words, if the statute is constitutional as applied to defendant, "his facial challenge necessarily fails."

2. Prosecutorial discretion is firmly entrenched in American law. The Supreme Court noted that several of its cases have held that courts may not require prosecutors to defend their decision to seek the death penalty. If prosecutors have discretion to seek the death penalty, then they clearly have discretion to object to supervision.

Additionally, several factors show that the prosecutor's decision to object to supervision was justified in this case, including: (1) the nature of the offense, (2) battery of a police officer; (3) defendant's prior criminal conduct and pending charges; (4) defendant's family environment, which was not conducive to helping defendant stay out of trouble; (5) defendant's failure to acknowledge the seriousness of the offense; and (6) the fact that this case involved a negotiated guilty plea, where the State dismissed certain charges and recommended a sentence of probation in exchange for the plea.

Taking all these facts into account, the Supreme Court concluded that it was "quite frankly inconceivable that anyone could find" the State's exercise of discretion in this case to be arbitrary and a violation of due process.

3. The separation of powers clause of the Illinois Constitution provides that none of the three branches of government "shall exercise powers properly belonging to another." Ill. Const. 1970 art. II, §1. The purpose of this provision is to ensure that the whole power of more than one branch does not reside in the same hands. But the provision was not designed to achieve a complete divorce among the three branches, and it does not divide governmental powers into rigid, mutually exclusive compartments. The three branches are parts of a single operating government and there will be areas where their functions overlap. As such, the separation of powers clause was not designed to effect a complete divorce between the branches.

The defendant argued that the prosecution's discretion to object to supervision infringed on the circuit court's sentencing authority. The Supreme Court rejected this argument, noting that it had previously decided that a statute which allowed prosecutors to decide when a juvenile would be subjected to prosecution as an adult did not violate separation of powers even though the statute gave the prosecution significant discretion to dictate the range of penalties to which a juvenile would be subject. The discretionary authority afforded the prosecution by §5-615 "pales by comparison."

Furthermore, under the version of the statute in effect here, the court may only continue the case under supervision before proceeding to adjudication. Thus, the State's objection must also occur before adjudication. Since defendant had not been adjudicated when the State objected and sentencing was not an issue, the State did not infringe on the court's right to impose sentence.

4. The equal protection clause requires the government to treat similarly situated individuals in a similar fashion unless it can demonstrate an appropriate reason to treat them differently. But the clause does not forbid the legislature from drawing proper distinctions among different categories of people unless it does so on the basis of criteria wholly unrelated to the legislation's purpose.

Defendant argued that equal protection was violated by the State's right to object to juvenile supervision but not adult supervision. The court rejected this argument on a number of grounds.

First, defendant could not show that he was similarly situated in all relevant aspects to the adult offenders he compared himself to. Equal protection does not forbid all classifications, only those that apply different treatment to people who are alike in all relevant respects. Here, defendant was not similarly situated to adult offenders charged with a felony, because such adult offenders are not eligible for supervision at all.

Second, defendant entered into a fully negotiated guilty plea. Having received significant consideration in return for his plea, defendant could not repudiate the very sentence he agreed to on the basis that it violated equal protection. The court found that defendant's position violated fundamental principles of fairness in the enforcement of guilty pleas.

Third, minors in delinquency proceedings are not comparable to adult offenders because they are generally not subject to the same deprivation of liberty. Delinquency proceedings are protective and intended to correct and rehabilitate rather than to punish. That difference extends to the role of the State.

The dissent would have held that as applied to this case, §5-615 violated the separation of powers clause. The circuit court had already accepted defendant's guilty plea when it continued the case under supervision. Although the circuit court did not enter a finding of guilt, the acceptance of the guilty plea was itself a conviction. Conviction marks the traditional boundary beyond which the State's constitutionally permissible role in decisions affecting sentencing comes to an end. Accordingly, the State's objection to supervision violated the separation of powers doctrine.

People v. McChriston, 2014 IL 115310 (No. 115310, 1/24/14)

The trial court's failure to mention a term of mandatory supervised release (MSR) in its oral and written sentencing orders did not mean that the Department of Corrections (DOC) impermissibly added MSR to defendant's sentence in violation of the separation of powers clause of the Illinois Constitution or the federal constitutional right to due process.

1. Under the Illinois Constitution, the legislative, executive and judicial branches are separate, and the power to impose a sentence is exclusively a function of the judiciary. At the time defendant was sentenced (2004), the Unified Code of Corrections (Code) mandated that the term of MSR for defendant's Class X felony was three years. 730 ILCS 5/5-8-1(d)(1). The code also provided that "every sentence shall include as though written therein a term in addition to the term of imprisonment." 730 ILCS 5/5-8-1(d). Consequently, the plain language of the Code provides that the sentence shall include a period of MSR as if it were written within the sentence. The sentencing order issued by the trial court thus included a term of MSR even if the court did not mention MSR at sentencing or in the sentencing order. Since MSR was automatically included "as though written therein," the DOC did not add to defendant's sentence by imposing a term of MSR, and no violation of the separation of powers occurred.

The subsequent legislative history of section 5-5-1(d) provides further evidence that no violation occurred. In 2011, this section was amended and now reads "the mandatory supervised release term shall be written as part of the sentencing order." The amended statute requires the court to explicitly write the MSR term in the sentencing order, and stands in contrast to the language in the previous statute, "as though written therein," whose plain and ordinary meaning suggests that the legislature intended the mandatory MSR term to apply even if not specifically written in the sentencing order. The purpose of the amendment was to change the prior rule and now require the court to specify the MSR term in its sentencing order.

2. The trial court's failure to mention MSR in its oral and written sentencing orders did not mean that the DOC impermissibly imposed MSR in violation of defendant's federal due process rights. The cases relied on by defendant, **Hill v. United States ex rel. Wampler**, 298 U.S. 460 and **Earley v. Murray**, 451 F.3d 71,do not require a different result.

In **Wampler**, the United States Supreme Court held that it was impermissible for a clerk to add a provision to the trial court's sentencing order requiring the defendant to remain in prison until he paid his fines. Since the addition of this requirement was discretionary, the decision to impose it was committed entirely to the trial court and must be expressed in the court's sentence. The provision added by the clerk was therefore void.

In **Earley**, the Second Circuit Court of Appeals applied **Wampler** to a case where a New York court failed to mention MSR in the oral or written sentencing order. **Earley** recognized that New York law mandated a specific term of MSR and the trial court thus had no discretion about whether to impose MSR. **Earley** nonetheless found that **Wampler** stood for the proposition that only the court's judgment establishes

a defendant's sentence, and therefore a sentence may not be increased by a non-judicial agency.

Decisions of the Second Circuit Court of Appeals construing New York law have no power to enjoin the enforcement of Illinois statutes. **Earley** thus has no consequence in Illinois until an Illinois court endorses its analysis. Moreover, **Earley's** broad reading of **Wampler** is unpersuasive. **Wampler** involved a discretionary sentencing option, while **Earley** and the present case involve a mandatory sentence with no discretionary power afforded to the trial court. Unlike **Wampler**, the enforcement of a mandatory MSR term in this case was not an increase in sentence since the MSR term attached to defendant's sentence automatically as though written into the sentence. Accordingly, no due process violation occurred in this case.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

The automatic transfer statute requires juveniles who are at least 15 years old and are charged with one of the enumerated offenses to be prosecuted in adult criminal court. The enumerated offenses are first degree murder, aggravated battery with a firearm (if the minor personally discharged the weapon), armed robbery with a firearm, aggravated vehicular hijacking with a firearm, and aggravated criminal sexual assault. 705 ILCS 405/5-130.

Defendant argued that the transfer statute either alone or in conjunction with the consecutive sentencing scheme (730 ILCS 5/5-8-4(a)(ii)) and the truth in sentencing statute requiring him to serve at least 85% of his sentence (730 ILCS 5/3-6-3(a)(2)(ii)), violated (1) the eighth amendment and the proportionate penalties clause of the Illinois Constitution, and (2) state and federal due process, because this statutory scheme does not take the distinctive characteristics of juveniles into account.

1. The eighth amendment protects defendants against cruel and unusual punishments, while the Illinois proportionate penalties clause similarly bars the imposition of unreasonable sentences. U.S. Const., amend. VIII; Ill. Const. 1970, art. I §11. The Illinois proportionate penalties clause is co-extensive with the eighth amendment. Neither clause applies unless a punishment is imposed.

Defendant argued that three recent United States Supreme Court cases, **Roper v. Simmons**, 543 U.S. 551 (2005), **Graham v. Florida**, 560 U.S. 48 (2010), and **Miller v. Alabama**, 567 U.S. ___ (2012), make it unconstitutional to apply adult sentencing standards to juveniles without first taking into account the distinctive characteristics of juveniles.

The court rejected this argument, holding that access to juvenile court is not a constitutional right and trying a defendant in juvenile or criminal court is purely a matter of procedure. Even accepting the assertion that criminal courts always involve lengthier sentences and harsher prison conditions, the court found nothing in defendant's argument that would convert a procedural statute into a punitive one.

In previous cases, the court had already determined that the purpose of the transfer statute was to protect the public, not to punish defendants. The automatic transfer statute reflects the legislature's reasonable decision that criminal court is the proper venue for juveniles charged with certain felonies, and the court declined to second-guess the validity of the legislature's judgment.

2. The court also rejected defendant's argument that the combination of the transfer statute and the applicable sentencing provisions was unconstitutional as applied to non-homicide offenders. Here defendant was sentenced to three consecutive terms of 12 years imprisonment for a total of 36 years, and must serve at least 85% of his sentence. Although lengthy, the court did not find that term comparable to either the death penalty or natural life imprisonment, the sentences involved in **Roper**, **Graham**, and **Miller**. The court thus refused to extend the reasoning of those cases to the sentence imposed in this case.

3. The court also rejected defendant's due process attack. The court noted that it had already previously upheld the automatic transfer statute against a due process challenge in **People v. J.S.**, 103 Ill. 2d 395 (1984) and **People v. M.A.**, 124 Ill. 2d 135 (1988). It found defendant's reliance on **Roper**, **Graham**, and **Miller**, to be inapplicable since those cases involved the eighth amendment, not due process.

The dissenting justice would have found that the automatic transfer statute was punitive and violated

the eighth amendment and the proportionate penalties clause.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

In re A.C., 2016 IL App (1st) 153047 (No. 1-15-3047, 5/18/16)

The combination of the Sex Offender Registration Act (730 ILCS 150/1) and the Sex Offender Community Notification Law (730 ILCS 152/101) (SORA) as applied to juveniles does not violate due process or the eighth amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between SORA's restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction and there is no need for further hearings. And SORA does not violate the eighth amendment/proportionate penalties clause since it does not involve punishment.

In re M.A., 2014 IL App (1st) 132540 (No. 1-13-2540, 5/28/14)

The subsections of the Illinois Murderer and Violent Offender Against Youth Registration Act, 730 ILCS 154/1 *et seq.*, that make the Act automatically applicable to juveniles are facially unconstitutional since they violate procedural due process and equal protection.

1. The Act applies to juveniles who have been adjudicated delinquent for committing or attempting to commit a variety of violent crimes when the victim is under age 18, including aggravated battery and aggravated domestic battery, the offenses at issue here. The registration period lasts for 10 years. The juvenile must register within five days after entry of the sentencing order and must register as an adult within 10 days of turning 17 years old. There is no provision for a juvenile to be taken off the registry.

The Act requires the police to send the registration information to the offender's school district, and to all child care facilities, colleges and libraries in the county. The Act allows the police to disclose the offender's information to "any person likely to encounter a violent offender." Once the juvenile turns 17 and registers as an adult, the registration information is accessible to the public through a statewide database.

The 10-year period is automatically extended for another 10 years when an offender violates any registration requirement. Failure to register is a Class 3 felony and each subsequent violation is a Class 2 felony.

2. Procedural due process claims challenge the procedures used to deny a person life, liberty, or property. The primary components of due process are notice and an opportunity to be heard. In assessing procedural due process claims, courts consider the following factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest; (3) the probable value of additional or substitute procedures; and (4) the State's interest, including the fiscal and administrative burdens of new or additional procedures.

Since the Act affects liberty and privacy interests, but does not entirely deprive a juvenile of those rights, it does not impair any fundamental constitutional rights. Thus, its provisions are analyzed under the rational basis test.

The mandatory requirement that juveniles who commit certain offenses must register as adults under the Act violates procedural due process. The Act automatically requires juvenile offenders to register as adults, with its attendant statewide publication of registration information, without any individualized assessment of their continuing risk to society.

While the initial registration following conviction might not violate due process under the rational basis test, the requirement that juveniles register as adults without any further process does. This is especially true given the transitory nature of youth and the absence of any significant administrative burdens that would be imposed in requiring a hearing to determine whether juveniles remain a danger to society at the time of adult registration.

3. An equal protection challenge asks whether a statute treats similarly situated individuals in a similar manner. Equal protection does not prohibit the legislature from drawing proper distinctions among

different categories of people. Unless fundamental rights are at issue, the classification does not violate equal protection if it bears a rational relationship to the purpose of the statute.

The registration provisions for juvenile violent offenders against youth violate equal protection when compared to the registration procedures for juvenile sex offenders. The two groups are similarly situated because, although they were convicted of different offenses, they both belong to the same class of juvenile offenders who are required to register with the police.

The disparate treatment of the two groups does not bear a rational relationship to the purposes of the Act. The goal of registering both groups is the same: protection of the public. Juvenile sex offenders, however, do not have to register as adults and may petition to be taken off the registry after five years. The same legislative purposes would be served by providing these features to juvenile violent offenders against youth. The failure to do so results in disparate treatment for violent offenders and thus violates equal protection.

4. Although the Act violates procedural due process and equal protection, it does not violate substantive due process. A statute violates substantive due process if it impermissibly restricts a person's life, liberty, or property interests. In the absence of a fundamental right, the statute need only show a rational relationship to the legislative purpose behind its enactment.

In **In re J.W.**, 204 Ill.2d 50 (2003), the Illinois Supreme Court rejected a substantive due process challenge to the registration provisions for juvenile sex offenders, finding a rational relationship between registering juvenile sex offenders and the need to protect the public. The result in **In re J.W.** controls this case. There is a rational relationship between registering juvenile violent offenders against youth and protecting the public. The Act thus does not violate substantive due process.

5. The dissent agreed that the Act did not violate substantive due process, but disagreed with the majority's conclusion that it violated procedural due process and equal protection. The dissent argued that the registration requirements are a collateral consequence of an adjudication of delinquency and juveniles receive due process during their adjudicatory hearings. There is thus no procedural due process violation.

Moreover, juvenile violent offenders against youth are not comparable to juvenile sex offenders, so disparate treatment does not violate equal protection. In providing early termination to sex offenders, the legislature recognized that many sex offenses by juveniles were the result of sexually immature rather than predatory conduct. The legislature has not recognized any similar concern with violent behavior by juveniles. Accordingly, there is a rational basis to treat the two groups differently.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Guyton, 2014 IL App (1st) 110450 (No. 1-11-0450, 7/15/14)

1. The State charged defendant with first degree murder of one man and attempt first degree murder of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second. Defendant was sentenced to 18 years' imprisonment for second degree murder and 36 years' imprisonment (including a mandatory 20-year add-on for personal discharge of a firearm) for attempt first degree murder.

On appeal, defendant argued that his 36-year sentence for attempt first degree murder violated due process and equal protection since it "shocks the conscience" to punish an attempt to kill more severely than the completed offense of murder.

2. The proportionate penalties clause of the Illinois constitution is violated in two ways: (1) where the penalty is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; and (2) where offenses with identical elements are given different sentences. Defendant's due process argument was based on the first of these tests. He argued that his sentence for attempt first degree murder was grossly disproportionate to the offense, and hence violated due process, since it was twice as long as his sentence for second degree murder.

The Appellate Court rejected this argument. The Illinois Supreme Court has already held that

because Illinois does not recognize the crime of attempt second degree murder, it does not violate the first test of the proportionate penalties clause to sentence a defendant to a longer term for attempt first degree murder than for the completed offense of second degree murder. **People v. Lopez**, 166 Ill. 2d 441 (1995). Accordingly, the sentence disparity between the two offenses in this case did not violate due process.

3. The Appellate Court also rejected defendant's equal protection argument. To raise an equal protection argument, a defendant must allege that there are others similarly situated to him, that they are treated differently, and that there is no valid basis for this disparate treatment. The first step in this analysis is to determine whether the defendant is similarly situated to the comparison group.

Here, defendant failed to show that he was similarly situated to any comparison group. He only alleged that a person who commits attempt first degree murder receives a harsher sentence than one who commits second degree murder. But defendant "failed to identify a suspect class or identify others convicted of attempt first degree murder that have been treated unequally under the law." The court thus rejected defendant's equal protection argument.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Larue, 2014 IL App (4th) 120595 (No. 4-12-0595, 5/14/14)

1. A statute violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11) if it contains the same elements as another offense but carries a greater penalty. Defendant argued that his sentence of 10 years imprisonment for unlawful possession of a weapon by a felon (UPWF) violated the proportionate penalties clause because it is a lesser-included offense of aggravated unlawful use of a weapon (AUUW), but carries a greater penalty. (AUUW is a Class 2 felony with a sentencing range of three to seven years imprisonment; UPWF is a Class 3 felony with a range of two to 10 years imprisonment.)

Defendant conceded that the two offenses are not truly identical, since AUUW contains an additional element (that the firearm be uncased, immediately accessible, and loaded) not in the UPWF statute, but argued that treating the two offenses as identical is consistent with the purpose of the proportionate penalties clause.

The court rejected this argument, holding that the proportionate penalties clause only applies to statutes that have truly identical elements. Any expansion of the clause to lesser-included offenses would run afoul of the Illinois Supreme Court's directive in **People v. Sharpe**, 216 Ill.2d 481 (2005) to abandon the cross-comparison analysis of the proportionate penalties clause.

2. Defendant argued that his 10-year sentence for UPWF violated the due process clause of the Illinois Constitution (Ill. Const. 1070, art. I §2) because it is a lesser-included offense of AUUW but is punished more harshly.

The legislature possesses wide discretion in prescribing penalties for offenses, but its power is limited by the due process clause, which requires that a penalty must be reasonably designed to remedy the particular evil being targeted. Courts will not invalidate a statute unless the penalty "is clearly in excess of the very broad and general constitutional limitations applicable.

Defendant relied on **People v. Bradley**, 79 Ill. 2d 410 (1980), where the Supreme Court found that the penalty for possession of a controlled substance (one to 10 years imprisonment) violated due process since the penalty for delivery of the same substance had a lesser sentence (one to three years). In reaching its decision, the Supreme Court observed that the Illinois Controlled Substances Act expressly stated that the legislature intended the heaviest penalties to apply to drug traffickers. Therefore punishing possession offenses more harshly than delivery offenses contravened the express intent of the legislature and violated due process.

The Appellate Court rejected defendant's reliance on **Bradley**. Here, defendant failed to show that the sentence for UPWF is contrary to the legislature's intent, and has thus failed to show that the sentence is not reasonably designed to remedy the particular evil being targeted.

3. Defendant also argued that his 10-year sentence for UPWF violated the equal protection clauses of the United States and Illinois Constitutions (U.S. Const., amend XIV, §1; Ill. Const. 1970, art. I, §2),

because the different sentencing ranges for AUUW and UPWF treated those who committed similar offenses in a different manner.

The equal protection clause requires the government to treat similarly situated individuals in the same fashion unless it can show an appropriate reason for dissimilar treatment. Where, as here, the case does not involve a fundamental right and the affected individuals are not a suspect class, courts utilize a rational basis test to determine whether there is an equal protection violation. Under this test, courts must determine whether the statute bears a rational relationship to a legitimate governmental purpose.

The court held that defendant's argument failed because he could not show that he was similarly situated to someone who was convicted of AUUW. By the very definition of offenses, individuals convicted of different offenses are dissimilarly situated from each other. Since AUUW and UPWF are different offenses, defendant cannot show that he is similarly situated to someone convicted of AUUW, and hence cannot show an equal protection violation.

4. Depending on the statutory language, certain fees may be imposed only once per case, or may be imposed for each conviction. Here, the court determined that four fees could only be imposed once while two could be imposed for each of defendant's two convictions.

The statute authorizing the document storage fee (705 ILCS 105/27.3c(a)) states that a fee shall be imposed for each "matter," which the court concluded was synonymous with "case." Accordingly, this fee can only be imposed once per case.

The statutes authorizing the automation fee (705 ILCS 105/27.3a(1)), and the court security fee (55 ILCS 5/5-1103) both state that a fee shall be imposed for each "case," and hence can only be imposed once per case.

The circuit clerk fee statute (705 ILCS 105/27.1a(w)(1)(A)) states that the fee shall be imposed for each felony complaint. Since the two counts filed by the State in this case constituted one felony complaint, only one fee could be imposed.

By contrast, the statute authorizing the court finance fee (55 ILCS 5/1101(c)) states that a fee shall be imposed on a "judgment of guilty," and thus allows the imposition of a fee on each judgment.

Similarly, the statute authorizing the state's attorney fee (55 ILCS 5/4-2002(a)), states that a fee shall be imposed for "each conviction." Here, defendant was found guilty of two counts and thus two court finance and state's attorney fees could be imposed.

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

People v. Lewis, 2016 IL App (4th) 140852 (No. 4-14-0852, 12/20/16)

Defendant was convicted under section 120(a) of the Methamphetamine Control and Community Protection Act (MCCPA) which prohibits a person with a prior conviction under the MCCPA from purchasing or possessing a methamphetamine (meth) precursor (such as pseudoephedrine) without a prescription. Defendant argued that the MCCPA (1) violates due process by punishing wholly innocent conduct and (2) violates due process, equal protection, and the proportionate penalties clause because a violation of the MCCPA is a felony, while a violation of the Methamphetamine Precursor Act (MPA) which involves similar or less culpable conduct is only a misdemeanor. The court rejected these arguments and upheld the constitutional validity of the MCCPA.

1. In deciding whether a statute that does not implicate fundamental rights violates due process (Ill. Const. 1970, art. I, §2; U.S. Const., amend. XIV), the proper inquiry is whether it bears a rational relationship to a legitimate state goal. Such a rational relationship is lacking where a statute punishes wholly innocent conduct. Wholly innocent conduct is conduct unrelated to the legislative purpose and devoid of criminal intent.

The purpose of the MCCPA is to protect the public from the use and distribution of meth. The MCCPA reasonably serves this purpose by regulating the possession of meth precursors by people who have demonstrated a tendency to misuse those substances. Possession of a meth precursor without a prescription by people previously convicted under the MCCPA is not innocent conduct and thus the MCCPA does not

violate due process by punishing innocent conduct.

2. A statute may violate the proportionate penalties clause (Ill. Const. 1970, art. I, §11), where it contains a penalty greater that the penalty imposed for an offense with identical elements. Violation of the MCCPA is a Class 4 felony, while violation of the MPA is a Class A misdemeanor. But the MCCPA and the MPA do not have identical elements. The MPA prohibits a person with a prior conviction for any meth-related crime from purchasing or acquiring 7500 milligrams of ephedrine or pseudoephedrine within a 30-day period. 720 ILCS 648/20(b), 40(a)(2)(A). The MCCPA merely requires a prescription to purchase or possess a meth precursor.

The MCCPA also does not violate due process by punishing less culpable conduct more seriously than the MPA. It is within the legislature's purview to determine the seriousness of the crime and it has properly determined that violating the MCCPA involves more serious conduct than violating the MPA. For similar reasons, the MCCPA does not violate equal protection. The existence of different punishments for different offenses does not offend equal protection.

(Defendant was represented by Assistant Defender Kadi Weck, Chicago.)

People v. Pollard, 2016 IL App (5th) 130514 (No. 5-13-0514, 5/10/16)

The Sex Offender Registration Act (730 ILCS 150/1) and its attendant statutory restrictions (SORA) do not violate due process or the Eighth Amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between the SORA restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction which provides all the procedural protections required by due process. And SORA does not violate the Eighth Amendment/Proportionate Penalties Clause since it does not involve punishment.

(Defendant was represented by Assistant Defender Joshua Bernstein, Chicago.)

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§45-1(b)(2)
Proportionate Penalties

Ewing v. California, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) The Eighth Amendment includes a "narrow proportionality principle" applicable to non-capital sentences. Whether a sentence is so disproportionate as to violate the Eighth Amendment depends on: (1) the gravity of the offense and harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. California's "three-strike" law, under which a felon who has been previously convicted of one or more felonies may receive an enhanced sentence of 25 years to life, did not violate the Eighth Amendment, although the crime for which defendant was sentenced involved the theft of $1,200 worth of golf clubs and could have been charged as a misdemeanor. See also, **Lockyer v. Andrade**, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) A mandatory life sentence for possessing more than 650 grams of cocaine is not unconstitutionally disparate to the offense.

People v. Sharpe, 216 Ill.2d 481, 839 N.E.2d 492 (2005) 1. Overruling numerous cases, the Court abolished the cross-comparison test for proportionate penalties analysis (thus, the proportionate penalties clause of the state constitution cannot be used to judge a penalty in relation to the penalty for an offense with different elements). See also, **People v. Klepper**, 234 Ill.2d 337, 917 N.E.2d 381 (2009)

2. But, proportionate penalties challenges may still be raised where the penalty for a particular offense is "cruel" or "degrading," or where a penalty is harsher than the sentence for a different offense

which has identical elements. Also, a defendant may challenge a penalty under the due process clause by showing that the sentence is not reasonably designed to remedy the particular evil that the legislature was targeting.

3. The "15-20-25-year to life" sentencing enhancements are not so cruel and degrading as to violate the proportionate penalties clause when applied to first degree murder. Also as applied to first degree murder, the 25-year to life enhancement does not violate the "identical elements" test of proportionate penalties analysis. See also, **People v. Sawczenko-Dub**, 345 Ill.App.3d 522, 803 N.E.2d 62 (1st Dist. 2003) (the 25-year to life component of the "15-20-25 to life" provision as applied to first degree does not violate the proportionate penalties clause (not cruel or degrading), the separate of powers doctrine, double jeopardy, or the rule against double enhancement).

People v. Espinoza, 184 Ill.2d 252, 702 N.E.2d 1275 (1998) In determining whether the proportionate penalties clause is violated because offenses consisting of identical elements are punished differently, the focus is on the statutorily-defined elements of the offenses, not on defendant's actual conduct as alleged in the charging instrument. Here, the proportionate sentencing clause was not implicated because the factual allegations of the armed violence and aggravated battery charges were not identical.

People v. Hauschild, 226 Ill.2d 63, 871 N.E.2d 1 (2007) 1. **Sharpe** applies retroactively to cases which were on direct appeal at the time **Sharpe** was decided; although the trial court's sentence complied with relevant caselaw at the time of sentencing, **Sharpe** revived the mandatory 15-year-enhancement for attempt murder while armed with a firearm.

2. Under the "identical elements" test, the 15-year-enhancement for armed robbery while armed with a firearm is unconstitutionally disproportionate to the sentence for the equivalent offense of armed violence predicated on robbery. See also, **People v. Harvey**, 366 Ill.App.3d 119, 851 N.E.2d 182 (1st Dist. 2006) (the 15-year-enhancement for armed robbery while possessing a firearm and the 25-year-enhancement for armed robbery while discharging a firearm and causing great bodily harm violate the identical elements test of proportionate penalties analysis because both offenses contain the same elements as armed violence predicated on robbery, but have greater sentences). (Note: 720 ILCS 5/33A-2(a), as enacted by Public Act 95-688, §4, eff. 10-23-07, removes robbery as a possible predicate offense for armed violence.)

3. When an amended sentencing statute results in a violation of the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the law as it existed prior to the amendment.

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

720 ILCS 5/26-1(a)(4), which provides a Class 4 felony for the offense of disorderly conduct for knowingly making a false complaint to a police officer or public employee, and 720 ILCS 5/26-1(a)(12), which provides a Class A misdemeanor penalty for filing a false 911 complaint, are not composed of identical elements. Therefore, the trial court erred by finding that imposition of a Class IV felony sentence violated the proportionate penalties clause.

People v. Graves, 207 Ill.2d 478, 800 N.E.2d 790 (2003) Unauthorized theft of more than $10,000 from a person who is over the age of 60, which carries an extended-term sentence of 7 to 14 years in prison, is not identical to theft by deception of $20,000 from a victim over the age of 60, which carries a prison term of 3 to 7 years, because one offense requires proof that control of property was unauthorized, while the other requires proof that control was obtained by deception. Thus, no proportionate penalties violation occurred.

People v. Koppa, 184 Ill.2d 159, 703 N.E.2d 91 (1998) Armed violence charges – one predicated on aggravated criminal sexual abuse (based on bodily harm) and the other predicated on aggravated kidnaping (based on concealment of identity) did not have elements identical to the aggravated criminal sexual abuse

charges or the aggravated kidnaping charges; therefore, the different penalties for the offenses did not violate the proportionate penalties clause under the identical elements test.

People v. Christy, 139 Ill.2d 172, 564 N.E.2d 770 (1990) Penalties for aggravating kidnaping and armed violence were unconstitutionally disproportionate under the identical elements test. See also, **People v. Baker**, 341 Ill.App.3d 1083, 794 N.E.2d 353 (4th Dist. 2003) (the penalty for aggravated kidnaping (while armed with a firearm) is greater than that for armed violence predicated on kidnaping while carrying a Category I weapon, an identical offense, and thus, violates the proportionate penalties clause).

People v. Lewis, 175 Ill.2d 412, 677 N.E.2d 830 (1996) Because armed violence with a Category I weapon involves the same elements as armed robbery, but carries a 15- to 30-year sentence while armed robbery carries a sentence of 6 to 30 years, the legislature has created "two substantially identical offenses which, illogically, are punished with disparate penalties." **Note:** Armed violence statute now specifically excludes "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."

People v. Bailey, 167 Ill.2d 210, 657 N.E.2d 953 (1995) The stalking and aggravated stalking statutes do not violate the proportionate penalties clause of the state constitution. Assault, disorderly conduct, and stalking do not contain identical elements and do not protect the same interests. Also, there was a rational basis for the legislature to conclude that stalking is a more serious offense than disorderly conduct and assault, and therefore requires a more serious sentence. See also, **People v. McGee**, 341 Ill.App.3d 1029, 794 N.E.2d 855 (1st Dist. 2003) (penalty for aggravated unlawful use of a weapon (UUW) is not unconstitutionally disproportionate under the identical elements test of the proportionate penalties clause, when compared with misdemeanor UUW, because aggravated UUW and misdemeanor UUW are not the same offenses).

People v. Fuller, 187 Ill.2d 1, 714 N.E.2d 501 (1999) The Class 2 felony for falsely reporting a vehicle theft is not so cruel or degrading as to violate the proportionate penalties clause.

People v. Hill, 199 Ill.2d 440, 771 N.E.2d 374 (2002) The 15-year "add-on" provision for home invasion, under which a mandatory term is added to the sentence where the intruder was armed with a firearm and used force or threatened the imminent use of force against a person within a dwelling place, does not violate the proportionate penalties clause (because the penalty is not cruel, degrading, and shocking to the moral conscience).

People v. Farmer, 165 Ill.2d 194, 650 N.E.2d 1006 (1995) The felony sentencing provisions for possession of contraband in a penal institution do not violate the proportionate penalties clause (because felony sentencing for the offense could not be said to be so cruel, degrading, or disproportionate to the offense as to shock the moral sense of the community).

People v. Huddleston, 212 Ill.2d 107, 816 N.E.2d 322 (2004) Mandatory life sentence upon conviction of predatory criminal sexual assault of a child against two or more persons is not cruel, degrading, and shocking to the moral sense of the community and, thus, does not violate the proportionate penalties clause.

People v. Hickman, 163 Ill.2d 250, 644 N.E.2d 1147 (1994) The sentencing provision of the criminal drug conspiracy statute violates neither the due process clause nor the proportionate penalties clause, though defendant claimed that one convicted of criminal drug conspiracy could receive a sentence greater than if convicted of a more serious offense of calculated criminal drug conspiracy, depending on the amount of drugs that is the subject of the conspiracy. Both offenses of criminal drug conspiracy and calculated criminal

drug conspiracy are serious, the plain language of the Controlled Substances Act expresses different reasons for punishing each offense severely, and the penalty that the sentencing provision of criminal drug conspiracy imposes is not cruel or degrading.

People v. Lopez, 166 Ill.2d 441, 655 N.E.2d 864 (1995) The offense of attempt second degree murder does not exist under Illinois law. See also, **People v. Reagan**, 99 Ill.2d 238, 457 N.E.2d 1260 (1983) (there is no offense of attempt voluntary manslaughter; "it is impossible to intend an unreasonable belief"). Although a defendant convicted of attempt first degree murder could receive a greater sentence than if the victim had died (and defendant was convicted of second degree murder), any disparity in the authorized sentencing range for murder is not so "cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community." Therefore, the proportionality requirement is not violated.

People v. Wade, 131 Ill.2d 370, 546 N.E.2d 553 (1989) The availability of different punishments for separate offenses based on the same acts does not result in an unconstitutionally disproportionate sentencing scheme so as to violate due process and the proportionate penalties clause.

People v. Lee, 167 Ill.2d 140, 656 N.E.2d 1065 (1995) The legislature "acted well within its broad discretion when it determined that the offense of aggravated battery with a firearm is more serious than" battery not involving use of a firearm.

People v. Dunigan, 165 Ill.2d 235, 650 N.E.2d 1026 (1995) The Habitual Criminal Act does not violate the proportionate penalties clause (the proportionate penalties clause does not prevent the legislature from enacting a mandatory minimum sentence where, in view of the seriousness of the offense, no lesser sentence would be appropriate).

People v. Miller, 202 Ill.2d 328, 781 N.E.2d 300 (2002) The proportionate penalties clause was violated by the operation of three statutes, which mandated a life sentence for a 15-year-old who was convicted of first degree murder as an accomplice, but who had only a moment to contemplate whether to participate in the offense and who acted only as a lookout. See also, **People v. McCoy**, 337 Ill.App.3d 518, 786 N.E.2d 1052 (2d Dist. 2003) (distinguishing **Miller** and holding that the mandatory natural life term for multiple murder does not violate the proportionate penalties clause of the Illinois Constitution, even where defendant was convicted only on the basis of accountability).

People v. Ruiz, 342 Ill.App.3d 750, 795 N.E.2d 912 (1st Dist. 2003) The Truth-In-Sentencing Act, which requires defendant to serve 100% of his sentence for first degree murder, does not violate the proportionate penalties clause of the Illinois Constitution or the Illinois constitutional objective of restoring offenders to useful citizenship. See also, **People v. Gorgis**, 337 Ill.App.3d 960, 787 N.E.2d 329 (1st Dist. 2003).

People v. Andrews, 364 Ill.App.3d 253, 845 N.E.2d 974 (2d Dist. 2006) 1. Penalty for aggravated vehicular hijacking while carrying a firearm is harsher than the penalty for armed violence with a Category I weapon predicated on vehicular hijacking, a greater offense, and, thus, violates the proportionate penalties clause. The unconstitutional 15-year enhancement could not be severed from the substantive offense of aggravated vehicular hijacking while carrying a firearm.

2. A proportionate penalties challenge based on the identical elements test is not limited to comparing offenses with which defendant is charged.

People v. Beard, 287 Ill.App.3d 935, 679 N.E.2d 456 (1st Dist. 1997) The sentences for armed violence based on aggravated vehicular hijacking and armed robbery were unconstitutionally disproportionate to the sentences for the predicate felonies. The elements of the armed violence and predicate offenses are identical,

but armed violence carries a much higher sentence.

People v. Garza, 298 Ill.App.3d 452, 699 N.E.2d 181 (2d Dist. 1998) Armed violence based on aggravated battery in a public place is not identical to aggravated battery with a firearm or aggravated discharge of a firearm. The latter two offenses do not require a showing that the offense occurred on or about a public place, but do require the discharge of a firearm, which is not required for armed violence.

People v. Myers, 359 Ill.App.3d 341, 833 N.E.2d 421 (4th Dist. 2005) The four-year-mandatory minimum sentence for child pornography was not so grossly disproportionate to the circumstances of the case as to shock the moral sense of the community and violate the proportionate penalties clause. Also, offense of child pornography does not violate the proportionate penalties clause when compared to the offense of sexual exploitation of a child under the identical elements test because the two offenses do not contain identical elements.

People v. Marsh, 329 Ill.App.3d 639, 768 N.E.2d 108 (1st Dist. 2002) The Class 4 felony penalty provision for failure to register as a sex offender does not violate the proportionate penalties clause (the penalty is not cruel, degrading, or shocking to the moral sense).

Cumulative Digest Case Summaries **§45-1(b)(2)**

Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (No. 08-7412, 5/17/10)

The Supreme Court concluded that the "cruel and unusual punishment" clause of the 8th Amendment prohibits a sentence of life imprisonment without parole for a juvenile offender who is convicted of an offense other than homicide. (See **JUVENILE**, §33-6(a)).

People v. Blair, 2013 IL 114122 (No. 114122, 3/21/13)

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the court held that the sentence for armed robbery while armed with a firearm, which included a 15-year mandatory enhancement, violated the proportionate penalties clause because it was more severe than the penalty for the identical offense of armed violence based on robbery with a category I or II weapon. The legislature's subsequent enactment of P.A. 95-688 (eff. 10/23/07) to amend the armed violence statute to eliminate robbery as a predicate offense remedied the disproportionality and revived the sentencing enhancement for armed robbery.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Clemons, 2012 IL 107821 (No. 107821, 4/19/12)

People v. Hauschild, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), held that the sentence for armed robbery while armed with a firearm violates the proportionate penalties clause of the Illinois Constitution because the sentence for that offense is more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. The Illinois Supreme Court declined to overrule **Hauschild** or abandon the identical-elements test.

1. When **Hauschild** was decided, the armed violence statute excluded armed robbery, but not robbery as a predicate offense. Subsequent to **Hauschild**, P.A. 95-688 amended the armed violence statute to delete the reference to armed robbery and exclude as a predicate offense "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."

The court agreed with the State that under the amended statute, robbery may no longer serve as a predicate offense. The court disagreed that P.A. 95-688 was a clarifying amendment that should be treated as a legislative declaration of the meaning of the prior statute. An amendment can serve to clarify the

legislature's original intent only where it is adopted prior to a court's construction of the preamended statute. While the General Assembly can prospectively change a judicial construction of a statute if it believes that the judicial interpretation is at odds with legislative intent, it cannot effect a change in that construction by a later declaration of what it had originally intended.

2. Armed violence is a broader offense compared to the more specific offense of armed robbery with a firearm in that it can be committed with weapons other than a firearm. But the identical-elements test has never required that the two offenses be equally specific. It is enough that the elements of armed robbery with a firearm and armed violence based on robbery with a category I or II weapon are identical. **Hauschild** did not misapply the identical-elements test.

3. The identical-elements test is supported by the constitutional text of the Illinois Constitution of 1970, which provides that "[a]ll penalties shall be determined [] according to the seriousness of the offense." The test provides a method for determining whether the legislature satisfied that constitutional requirement. If the legislature determines that the exact same elements merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense because the legislature has made two different judgments about the seriousness of one offense.

4. The Illinois proportionate-penalties clause is not synonymous with the cruel-and-unusual-punishments clause of the eighth amendment as it contains a requirement that all penalties be set with the objective of restoring the offender to useful citizenship. In any event, the United States Supreme Court has never addressed the question whether the eighth amendment permits different penalties for identical offenses.

5. The Illinois Supreme Court adopted the identical-elements test because it found it illogical that identical offenses could result in different penalties. Reliance on common sense and sound logic does not render the identical-elements test of questionable origin as argued by the State. "Common sense and sound logic need not be strangers to the law."

6. The identical-elements test does not invade the province of the legislature to set penalties for offenses because a key feature of the test is objectivity. The court does not make a subjective determination of the gravity of an offense or the severity of the penalty imposed. Therefore, there is no risk that the court will second-guess the legislature.

7. In response to the State's argument that **Hauschild** created a new disparity because the sentence for armed violence predicated on robbery with a category I or II weapon (15 to 30 years) is now greater than the sentence for armed robbery with a firearm (6 to 30 years), the court disagreed that the mere opportunity for a new constitutional attack means that the test is unworkable.

8. The State complained that prosecutors can no longer obtain an enhanced penalty for armed robbery with a firearm because **Hauschild** rendered that enhancement void *ab initio*, and the legislature eliminated robbery as a predicate offense to armed violence when it enacted P.A. 95-688, but did not re-enact the armed-robbery enhancements. This problem does not implicate the workability of the identical-elements test. The solution is for the legislature to engage in more careful drafting.

9. When an amended sentencing statute has been found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment.

While armed violence based on robbery with a category I or II weapon has the identical elements as armed robbery with a firearm, the court rejected the State's request that it remand for resentencing under the armed violence statute. Defendant was not charged and convicted under the armed violence statute. The State cited no authority for the proposition that the charging instrument may be modified on appeal. The State elected to prosecute defendant under the armed robbery statute, and having been convicted of that offense, defendant must be sentenced pursuant to that statute.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Davis, 2014 IL 115595 (No. 115595, 3/20/14)

1. The Eighth Amendment to the United States Constitution prohibits the imposition of cruel and

unusual punishments. This prohibition flows from the basic principle that criminal punishment should be graduated and proportioned to the offender and the offense. In applying the Eighth Amendment to juveniles, the United States Supreme Court has recognized three general ways that juveniles differ from adults: (1) they lack maturity and have an underdeveloped sense of responsibility; (2) they are more vulnerable to negative influences and outside pressure; and (3) their character is not as well formed. ***Roper v. Simmons***, 543 U.S. 551 (2005); ***Graham v. Florida***, 560 U.S. 48 (2010); ***Miller v. Alabama***, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

In ***Miller***, the Supreme Court held that because juveniles "are constitutionally different from adults for purposes of sentencing," it is impermissible to impose a mandatory sentence of natural life imprisonment on juveniles under 18. A mandatory sentence precludes consideration of mitigating circumstances such as: the juvenile's age; his family and home environment; the circumstances of the offense, including the extent of his participation; his ability to interact with police, prosecutors, and to assist in his defense; the effect of family or peer pressure; and the possibility of rehabilitation.

For these reasons, a sentencing court must have the opportunity to consider mitigating circumstances before imposing a sentence of natural life imprisonment on a juvenile. The Supreme Court refused to declare categorically that a juvenile can never receive natural life imprisonment, but believed such sentences will be uncommon.

2. Defendant argued that under ***Miller*** the statutory scheme mandating natural life imprisonment in this case was facially unconstitutional. If a new constitutional rule renders a statute facially unconstitutional, the statute is void ab initio, meaning that the statute was constitutionally infirm and unenforceable from the moment it was enacted. Any sentence imposed under an unconstitutional statute is void and may be attacked at any time. A facial challenge is the hardest to mount since a statute is facially unconstitutional only if there are no set of circumstances in which the statute could be validly applied.

Defendant was sentenced pursuant to section 5-8-1(a)(1)(c) of the Unified Code of Corrections which provides that if a defendant is convicted of murdering more than one individual, the court shall sentence him to natural life imprisonment. Defendant argued that this provision is facially unconstitutional because it never permits a sentencer to consider any of the mitigating factors required by ***Miller***.

The Illinois Supreme Court rejected this argument since ***Miller*** was expressly limited to mandatory life sentences imposed on juveniles. Section 5-8-1(a)(1)(c) by contrast can be validly applied to adults and thus it is not unconstitutional in all of its applications. Additionally, the transfer statute in effect when defendant was tried provided for a permissive transfer that specifically required the court to consider all relevant circumstances attendant to defendant's age, as required by ***Miller*****,** before transferring the juvenile to adult court. Ill. Rev. Stat. 1989, ch. 37,¶805-4. Under these circumstances, the sentencing scheme, including the transfer statute, was not facially unconstitutional.

3. The Illinois Supreme Court, however, held that ***Miller*** applies retroactively to cases on collateral review. In ***Teague v. Lane***, 489 U.S. 288 (1989) (adopted in Illinois in ***Flowers***, 138 Ill. 2d 218 (1990)), the Supreme Court held that new constitutional rules generally do not apply retroactively to cases on collateral review. But substantive rules that narrow the scope of a criminal statute or that place particular conduct or persons beyond the State's power to punish are not subject to ***Teague's*** bar. ***Schirro v. Summerlin***, 542 U.S. 348 (2004).

While ***Miller*** does not forbid a sentence of life imprisonment, it does require that every minor receive a sentencing hearing where a sentence other than life imprisonment is an available outcome. ***Miller*** thus places a particular class of persons (juveniles) beyond the State's power to punish with a particular punishment (mandatory life imprisonment). ***Miller*** thus declared a new substantive rule not subject to ***Teague's*** retroactivity bar.

4. Defendant established cause and prejudice allowing him to raise this issue for the first time in a successive post-conviction petition. ***Miller's*** new substantive rule, which was decided after defendant filed his prior post-conviction petition, constitutes cause because it was not available earlier to counsel. It constitutes prejudice because it applies retroactively to defendant's sentencing hearing, rendering his

mandatory life sentence unconstitutional. The court vacated defendant's mandatory life sentence and remanded for a new sentencing hearing. The trial court may still sentence defendant to life imprisonment so long as the sentence is discretionary rather than mandatory.

5. Defendant's natural life sentence did not violate the proportionate penalties clause or the due process clause of the Illinois Constitution. Ill. Const., art. I, §§2,11. These arguments were raised and rejected previously, ***Davis***, No. 1-93-1821 (1995) (unpublished order under Supreme Court Rule 23); ***Davis***, 388 Ill. App.3d 869 (2009), and hence are res judicata and cannot be relitigated.

6. In ***Graham v. Florida***, 560 U.S. 48 (2010), the United States Supreme Court held that life imprisonment may not be imposed on a juvenile who did not commit homicide. Defendant argued that his sentence was unconstitutional under ***Graham*** because he did not kill or intend to kill. The Illinois Supreme Court rejected this argument, holding that ***Graham*** by its own terms does not apply to this case because defendant was convicted of murdering two victims.

People v. Ligon, 2016 IL 118023 (No. 118023, 2/19/16)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. Ill. Const. 1970, art. I, §11. A sentence violates the clause if it is: (1) so cruel, degrading, or disproportionate to the offense that it shocks the moral sense of the community; (2) greater than the sentence for an offense with identical elements.

Under the second, "identical elements" test, if the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of aggravated vehicular hijacking with a dangerous weapon other than a firearm (AVH/DW). Defendant was armed with a BB gun and the State charged this as "a dangerous weapon, to wit: a bludgeon." Since this was his third Class X felony conviction, the trial court adjudged him an habitual criminal and sentenced him to natural life imprisonment.

Defendant eventually filed a 2-1401 petition arguing that his sentence violated the proportionate penalties clause because AVH/DW had the identical elements as armed violence with a category III weapon but was punished as a Class X felony with a minimum of seven years imprisonment, while armed violence with a category III weapon was only punished as a Class 1 felony.

3. In the Supreme Court, the State first argued, citing **People v. Cummings**, 375 Ill. App. 3d 513 (1st Dist., 2007), that it was not appropriate in this case to conduct an identical elements comparison between AVH/DW and armed violence because defendant was not sentenced under the AVH/DW statute, but rather was sentenced as an habitual criminal. The court rejected the State's argument, holding that an identical elements test may be conducted where a defendant is ultimately sentenced as an habitual criminal.

The Habitual Criminal Act (Act) mandates the imposition of a natural life sentence on defendants convicted of three Class X felonies within a 20-year period. 720 ILCS 5/33B-1(a). The act does not create an independent offense, but simply prescribes the circumstances where a defendant may be more severely punished because of his prior convictions. The Act is a recidivist sentencing statute that does not define any crime and has no elements to compare with another statute. Since the identical elements test requires a comparison between the elements of different offenses, it cannot be applied to the Act.

The court thus overruled **Cummings** and held that a defendant's sentence as an habitual criminal has no effect on a court's determination of whether a qualifying offense violates the identical elements test.

4. But the court found that the offense of AVH/DW as charged in this case did not have the identical elements as armed violence with a category III weapon.

A defendant commits AVH/DW as charged here when he takes a motor vehicle from another person by force and is armed with a dangerous weapon other than a firearm. 720 ILCS 18-4. The charging instrument identified the dangerous weapon here as a bludgeon. In comparison, a defendant commits armed violence with a category III weapon when he commits any felony and is armed with "a bludgeon, black-jack,

slungshot, sand-bag, sand club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1, 33A-2.

The AVH/DW statute does not define dangerous weapons. Instead, the definition is derived from common law and includes any object capable of being used in a manner likely to cause serious injury. Many objects, including the BB gun in this case, can be used in a deadly fashion as bludgeons and are thus properly classified as dangerous weapons even if they were not actually used in that manner. It is sufficient that they have the potential for such use.

By contrast, the armed violence statute specifically defines what constitutes a dangerous weapon. In **People v. Davis**, 199 Ill. 2d 130 (2002), the court held that a BB gun was not a bludgeon or other dangerous weapon of like character as defined by the statute. Although a BB gun might be used aa a bludgeon, it is not typically identified as such and thus is not "of like character" to the bludgeon-type weapons included as category III weapons.

Accordingly, the elements of AVH/DW are not identical to the elements of armed violence with a category III weapon.

5. The court also held that the State was not equitably barred from arguing that the two statutes did not have identical elements. Defendant argued that since the State took the position during prior proceedings, including trial and direct appeal, that defendant was armed with a bludgeon, it could not now assert that defendant's weapon was not a bludgeon.

Under the common law, weapons are divided into four categories: (1) objects that are dangerous *per se*, such as knives and loaded guns; (2) objects that are never dangerous, such as a four-inch plastic toy gun; (3) objects that are not necessarily dangerous weapons, but can be used in a dangerous manner, such as an unloaded gun made of heavy material, that can be used as a bludgeon; and (4) objects that are not necessarily dangerous, but were actually used in a dangerous manner.

At trial, defendant was properly convicted of using a BB gun as a common-law dangerous weapon of the third type, one that can be used as dangerous weapon. The court thus found that it was irrelevant that the indictment used the term "bludgeon" instead of "BB gun." The State consistently contended in the prior proceedings that defendant was armed with an object that could have been used as a bludgeon. It was not inconsistent for the State to also argue that the BB gun was not an actual bludgeon. Accordingly, the State was not equitably barred from making its current argument before the Supreme Court.

Defendant's conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

The automatic transfer statute requires juveniles who are at least 15 years old and are charged with one of the enumerated offenses to be prosecuted in adult criminal court. The enumerated offenses are first degree murder, aggravated battery with a firearm (if the minor personally discharged the weapon), armed robbery with a firearm, aggravated vehicular hijacking with a firearm, and aggravated criminal sexual assault. 705 ILCS 405/5-130.

Defendant argued that the transfer statute either alone or in conjunction with the consecutive sentencing scheme (730 ILCS 5/5-8-4(a)(ii)) and the truth in sentencing statute requiring him to serve at least 85% of his sentence (730 ILCS 5/3-6-3(a)(2)(ii)), violated (1) the eighth amendment and the proportionate penalties clause of the Illinois Constitution, and (2) state and federal due process, because this statutory scheme does not take the distinctive characteristics of juveniles into account.

1. The eighth amendment protects defendants against cruel and unusual punishments, while the Illinois proportionate penalties clause similarly bars the imposition of unreasonable sentences. U.S. Const., amend. VIII; Ill. Const. 1970, art. I §11. The Illinois proportionate penalties clause is co-extensive with the eighth amendment. Neither clause applies unless a punishment is imposed.

Defendant argued that three recent United States Supreme Court cases, **Roper v. Simmons**, 543 U.S. 551 (2005), **Graham v. Florida**, 560 U.S. 48 (2010), and **Miller v. Alabama**, 567 U.S. ___ (2012), make

it unconstitutional to apply adult sentencing standards to juveniles without first taking into account the distinctive characteristics of juveniles.

The court rejected this argument, holding that access to juvenile court is not a constitutional right and trying a defendant in juvenile or criminal court is purely a matter of procedure. Even accepting the assertion that criminal courts always involve lengthier sentences and harsher prison conditions, the court found nothing in defendant's argument that would convert a procedural statute into a punitive one.

In previous cases, the court had already determined that the purpose of the transfer statute was to protect the public, not to punish defendants. The automatic transfer statute reflects the legislature's reasonable decision that criminal court is the proper venue for juveniles charged with certain felonies, and the court declined to second-guess the validity of the legislature's judgment.

2. The court also rejected defendant's argument that the combination of the transfer statute and the applicable sentencing provisions was unconstitutional as applied to non-homicide offenders. Here defendant was sentenced to three consecutive terms of 12 years imprisonment for a total of 36 years, and must serve at least 85% of his sentence. Although lengthy, the court did not find that term comparable to either the death penalty or natural life imprisonment, the sentences involved in **Roper**, **Graham**, and **Miller**. The court thus refused to extend the reasoning of those cases to the sentence imposed in this case.

3. The court also rejected defendant's due process attack. The court noted that it had already previously upheld the automatic transfer statute against a due process challenge in **People v. J.S.**, 103 Ill. 2d 395 (1984) and **People v. M.A.**, 124 Ill. 2d 135 (1988). It found defendant's reliance on **Roper**, **Graham**, and **Miller**, to be inapplicable since those cases involved the eighth amendment, not due process.

The dissenting justice would have found that the automatic transfer statute was punitive and violated the eighth amendment and the proportionate penalties clause.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Reyes, 2016 IL 119271 (No. 119271, 9/22/16)

Defendant, who was 16 years old at the time of the offense, was tried as an adult and convicted of first degree murder and two counts of attempted murder. The trial court imposed a mandatory minimum sentence of 45 years for first degree murder which included a 25-year mandatory firearm enhancement. The court also sentenced defendant to 26 years for the two attempt murder convictions, both of which included a 20-year mandatory firearm enhancement. All of the sentences were required to run consecutively resulting in a mandatory minimum sentence of 97 years. Defendant was required to serve a minimum of 89 years before he would be eligible for release.

The Illinois Supreme Court held that defendant's sentence was a *de facto* mandatory life sentence that was unconstitutional under **Miller v. Alabama**, 567 U.S. ___, 132 S.Ct. 2455 (2012). A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect as an actual mandatory life sentence. In either situation the defendant will die in prison. **Miller** held that a juvenile may not be sentenced to a mandatory unsurvivable prison term unless the court first considers his youth, immaturity, and potential for rehabilitation.

Here defendant was 16 when he committed the offense and since he must serve 89 years, he will remain in prison until he is 105. Defendant's sentence is therefore a mandatory *de facto* life sentence.

The court vacated defendant's sentence and remanded for a new sentencing hearing under the newly enacted sentencing scheme in 730 ILCS 5/5-4.5-105 which requires the sentencing court to take into account specific factors in mitigation when sentencing a juvenile. Additionally, the court has discretion to not impose the firearm enhancements. Without those enhancements defendant's minimum aggregate sentence would be 32 years, a term that is not a *de facto* life sentence.

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

People v. Rizzo, 2016 IL 118599 (No. 118599, 6/16/16)

1. A proportionate penalties challenge under the Illinois constitution can be based on either of two

theories. First, the defendant can argue that the penalty for an offense is harsher than the penalty for a different offense which contains identical elements. Second, the defendant can argue that the penalty for a particular offense is so disproportionate that it shocks the moral sense of the community or is cruel and degrading.

Here, the trial court concluded that the prohibition of supervision for aggravated speeding (i.e., more than 40 mph in excess of the speed limit (625 ILCS 5/11-601.5(b)) was cruel and degrading. In making the finding, the trial court compared aggravating speeding to other misdemeanors for which supervision is also precluded, and concluded that aggravated speeding is a less serious offense because it does not involve bodily injury or physical harm.

The Supreme Court rejected the trial court's finding, concluding that the lower court had in effect revived the discredited cross-comparison test for evaluating proportionate penalties claims. The court concluded that even assuming that supervision, which is a statutory deferral of prosecution, constitutes a "penalty," the prohibition of supervision is not in any sense so shocking or degrading as to violate the proportionate penalties clause:

> [T]he legislature's prohibition of the dispositional option of supervision . . . does not even approach the "cruel and degrading" standard requisite for a finding of unconstitutionality. We do not believe our society has devolved to the permissive point that the legislature is obligated to provide an escape hatch for those who have shown such a blatant disregard for posted speed restrictions.

2. The court also found that the trial judge erred by considering the collateral consequences of a misdemeanor conviction, such as being required to disclose a conviction on job or loan applications, as factors in determining whether there is a proportionate penalties violation. The proportionate penalties clause applies only to the criminal process involving direct action by the government to inflict punishment, and not to possible actions by non-governmental actors.

3. The court also rejected the argument that due process is violated by the prohibition of supervision for aggravated speeding. Where legislation does not affect a fundamental constitutional right, the rational basis test is applied to determine whether a statute violates due process. A statute attacked on due process grounds will be upheld so long as it bears a reasonable relationship to the public interest sought to be protected and the means employed are a reasonable method of achieving the desired objective. The court concluded that because the legislature intended to address excessive speeding, which has a potential of creating grave injury to the public, placing restrictions on the dispositional option of supervision is not an unreasonable or arbitrary means of addressing the perceived evil.

The trial court's finding of unconstitutionality was reversed and the cause remanded for further proceedings.

People v. Schweihs, 2015 IL 117789 (No. 117789, 12/3/15)

The court held that under its recent decision in **People v. Williams**, 2015 IL 117470, the offense of aggravated unlawful use of a weapon (AUUW) under 720 ILCS 5/24-1.6(a)(1),(a)(3)(C) did not have the identical elements as the offense of violation of the Firearm Owners Identification Card Act (FOID Card Act) under 430 ILCS 65/2. Thus the penalty for AUUW, a Class 4 felony, was not disproportionate to the penalty for violating the FOID Card Act, a Class A misdemeanor.

The court reversed the judgment of the circuit court declaring this section of the AUUW statute unconstitutional.

People v. Taylor, 2015 IL 117267 (No. 117267, 1/23/15)

1. Under 720 ILCS 5/18-2(a)(2), a 15-year term is added to the sentence for armed robbery where the perpetrator was armed with a firearm. In **People v. Hauschild**, 226 Ill.2d 63, 871 N.E.2d 1 (2007), the court concluded that the sentencing add-on violated the proportionate penalties clause of the Illinois

constitution. The General Assembly then cured the proportionate penalties violation by enacting P.A. 95-688 (eff. 10/23/07).

The court concluded that where defendant's offense and sentencing occurred after **Hauschild** but before the legislature enacted P.A. 95-688, the 15-year enhancement could not be imposed. Because the sentence enhancement was unconstitutional, defendant's sentence was void. The cause was remanded for re-sentencing without the sentencing enhancement.

2. The court declined defendant's request to vacate the 15-year add-on so that defendant would serve the remaining nine years of the original 24-year-sentence. The court concluded that the sentence must be viewed as a whole rather than as separate nine and 15-year components, and declined to exercise its power to reduce the sentence because the 24-year-term was not manifestly disproportionate to the offense and defendant did not argue that the term was excessive.

The court concluded that the most appropriate action was to reconfigure the sentence to comply with the parties' expectations when they entered the plea agreement. Because the plea agreement provided that defendant would serve no more than 30 years and the applicable sentencing range was six to 30 years, the cause was remanded for re-sentencing to no more than 30 years without the firearm enhancement.

The court rejected the argument that the sentence should be capped at the 24-year-term imposed at the original sentencing. Although a sentence cannot be increased upon resentencing where there is a reasonable likelihood of vindicativeness, that rule does not apply where the original sentence was void. The court also noted that defendant waived the issue of a sentencing cap by raising it for the first time in the reply brief, and that the issue was premature unless and until on remand a sentence greater than 24 years is imposed.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Williams, 2015 IL 117470 (No. 117470, 11/19/15)

Under the identical elements test of the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11), when different offenses contain identical elements but different sentences, the penalties are unconstitutionally disproportionate and the offense with the greater penalty cannot stand.

The court held that the offense of aggravated unlawful use of a weapon (AUUW) under 720 ILCS 5/24-1.6(a)(1),(a)(3)(C) and (a)(2), (a)(3)(C) did not have the identical elements as the offense of violation of the Firearm Owners Identification Card Act (FOID Card Act) under 430 ILCS 65/2(a)(1). Thus the penalty for AUUW, a Class 4 felony, was not disproportionate to the penalty for violating the FOID Card Act, a Class A misdemeanor.

A defendant violates section 2(a)(1) of the FOID Card Act by possessing a firearm without having a FOID card in his possession. A defendant violates section 24-1.6(a)(1), (a)(3)(C) of the AUUW statute by carrying a firearm outside the home without a valid FOID card. A defendant violates section 24-1.6(a)(2), (a)(3)(C) of the AUUW statute by carrying or possessing a firearm on any public way without a valid FOID card. The State must prove the additional location element to establish the offense of AUUW. By contrast, the FOID Card Act has no location element. A defendant can violate the FOID Card Act by possessing a firearm in his home, but such conduct would not be a violation of AUUW. The elements of the two offenses are thus not identical.

The court reversed the judgment of the circuit court declaring these sections of the AUUW statute unconstitutional and remanded the cause with directions to reinstate the charges against defendant

In re Shermaine S., 2015 IL App (1st) 142421 (No. 1-14-2421, 1/9/15)

Under the habitual juvenile offender statute, a minor who is adjudicated delinquent for certain serious felonies, such as first degree murder, criminal sexual assault, or robbery, and has two prior felony adjudications, is adjudged an habitual juvenile offender and must be committed to Department of Juvenile justice until his 21st birthday. 705 ILCS 405/5-815.

Defendant argued that the statute violated the Eighth Amendment because it precludes the court from

considering individualized factors about the minor, including his youth and attendant circumstances, as required by **Miller v. Alabama**, 132 S.Ct. 2455 (2012). He also argued that it violated the proportionate penalties clause of the Illinois Constitution which requires a court to consider rehabilitation in imposing sentence.

The Appellate Court rejected both arguments. The court first noted that the Illinois Supreme Court has held that the Eighth Amendment and the proportionate penalties clause do not apply to juvenile proceedings since they only apply to the criminal process and juvenile proceedings are not criminal in nature. **In re Rodney H.**, 223 Ill. 2d 510 (2006). But even if they did apply, the statute would not violate either constitutional provision.

In **People ex rel. Carey v. Chrastka**, 83 Ill. 2d 67 (1980), the Illinois Supreme Court held that sentencing a habitual juvenile offender until the age of 21 did not violate the Eighth Amendment. **Miller** does not change this result because unlike this case, **Miller** involved juveniles who were tried as adults. Moreover, **Miller** did not prohibit all mandatory penalties, but only mandatory life sentences.

The statute also does not violate the proportionate penalties clause. Although the Illinois Supreme Court stated in **People v. Clemons**, 2012 IL 107821, that the language of the clause requiring all penalties to have "the objective of restoring the offender to useful citizenship," indicated that it goes beyond the Eighth Amendment, elsewhere, both before and after **Clemons**, the court has held that the clause is co-extensive with the Eighth Amendment. **In re Rodney H.**; **People v. Patterson**, 2014 IL 115102. Since the court held in **Chrastka** that the statute did not violate the Eighth Amendment, it similarly cannot violate the co-extensive proportionate penalties clause.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Aikens, 2016 IL App (1st) 133578 (Nos. 1-13-3578 & 1-15-1522, 9/12/16)

The proportionate penalties clause of the Illinois Constitution was violated by application of the adult sentencing scheme for attempt murder of a peace officer with a firearm to a 17-year-old who was tried as an adult. The minor was sentenced to the mandatory minimum term totaling 40 years - 20 years for attempted murder of a peace officer plus 20 years for personally discharging a firearm in the course of that offense. In sentencing defendant, the trial court noted that defendant had no prior record and had a difficult upbringing, and that the mandatory minimum sentence "seems to be an unimaginable amount of time . . . for a teenage child." A mitigation specialist testified that defendant had more potential than any client she had evaluated, that defendant had a supportive adopted family, and that the Illinois Institute of Technology had granted defendant early acceptance due to his academic excellence.

1. An "as applied" constitutional challenge requires defendant to show that the statute at issue violates the Constitution as applied to his or her particular case. A challenge under the proportionate penalties clause contends that the penalty in question was not determined according to the seriousness of the offense. A violation may be shown where the penalty imposed is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.

The Illinois Supreme Court has not defined what kind of punishment is cruel, degrading, or wholly disproportionate to the offense, because concepts of elemental decency and fairness evolve as society evolves. Thus, to determine whether a penalty shocks the moral sense of the community, courts must consider objective evidence as well as the community's changing standards of moral decency.

2. Noting that no one was injured in the offense, the court concluded that as applied to defendant the sentencing scheme violated the proportionate penalties clause because defendant had no prior criminal history, was described by the mitigation specialist as full of potential and able to fully rehabilitate as a contributing member of society, and was sentenced to the statutory minimum by the trial court who noted that defendant was young, had no criminal history, and had a "quite troubling" background. The court stressed that recent changes to the Juvenile Court Act, while inapplicable to this case, illustrate a "changing moral compass in our society when it comes to trying and sentencing juveniles as adults."

Defendant's sentence was reversed and the cause remanded for resentencing.

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

People v. Applewhite, 2016 IL App (1st) 142330 (No. 1-14-2330, 12/9/16)

Defendant, who was 17 at the time of the offense, entered a fully negotiated guilty plea to first degree murder in exchange for the minimum sentence of 45 years imprisonment. The sentence included a 25-year mandatory firearm enhancement.

The court held that defendant's sentence did not violate the Eighth Amendment (U.S. Const., amend. VIII) or the Proportionate Penalties Clause (Ill. Const. 1970, art. I, § 11). Defendant was not subject to a sentencing scheme that mandated a life sentence. Defendant negotiated and agreed to his sentence, and the trial judge had discretion to accept or reject the plea agreement. And his sentence was not a *de facto* life sentence since defendant will be eligible for release when he is 62 years old.

(Defendant was represented by Assistant Defender Elena Penick, Elgin.)

People v. Brown, 2012 IL App (1st) 091940 (No. 1-09-1940, 4/16/12)

1. Both the Eighth Amendment of the federal constitution and the proportionate-penalties clause of the state constitution incorporate the concept of proportionality in criminal sentencing. A proportionality analysis under either provision involves a consideration of evolving standards of decency and fairness to determine the validity of any particular sentence.

2. **Graham v. Florida**, 560 U.S. ___, 130 S. Ct. 2011, ___ L.Ed.2d ___ (2010), for the first time recognized a categorical limitation on a term-of-years sentence, which had previously been recognized only in the death-penalty context. A categorical challenge requires that a court first consider objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue.

Next, guided by the standards elaborated by controlling precedents and by the court's own understanding and interpretation of the constitution's text, history, meaning, and purpose, the court must determine in the exercise of its own independent judgment whether the punishment in question violates the constitution. Community consensus, while entitled to great weight, is not determinative. The court must consider the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. The court also considers whether the challenged sentencing practice serves legitimate penological goals.

3. Relying on **Graham**, the defendant challenged the constitutionality of his mandatory sentence of life without parole when imposed on mentally-retarded 19-year-old adults, guilty only by accountability of multiple murders. The Appellate Court dismissed the argument that age should be considered as part of the categorical analysis on the ground that defendant did not "identify why, at age 19, his 'youthfulness' should be considered. In any case, defendant was 19 at the time of the murders and was thus not a minor or a 'youth.'"

Finding no evidence of a national consensus against a mandatory sentence of life without parole for a mentally-retarded adult convicted of multiple murders on an accountability theory, the Appellate Court turned to the second step of the analysis. With respect to defendant's mental retardation, the Appellate Court acknowledged in accordance with **Atkins v. Virginia**, 536 U.S. 304 (2002), that mentally-retarded persons have diminished personal culpability. But, "[d]espite such concerns . . . , this court has previously upheld the mandatory sentencing scheme at issue here in the face of a constitutional challenge brought by a mentally retarded defendant."

While defendant was convicted of the "highest crime[s] known to the law," he was convicted on a theory of "accountability, for which a somewhat lower sense of moral culpability attaches." "Despite this fact, we again note that the very sentence imposed here has previously survived similar constitutional challenges brought by defendants convicted on an accountability theory."

The Appellate Court considered that **Graham** noted that a sentence of life without parole was second in severity only to the death penalty, and shares some characteristics with the death penalty in that it alters

the offender's life by a forfeiture that is irrevocable and deprives the convict of the most basic liberties without giving hope of restoration except through the remote possibility of executive clemency. "We again must note, however, that the very sentence defendant now challenges has been found constitutional by our supreme court."

The Appellate Court also considered the fact that defendant was an admitted gang member with a significant criminal history and was aware of the robbery plan, that the co-defendant's gun was loaded, and that the co-defendant intended to kill one of the victims. Although the goal of rehabilitation would not be served by defendant's sentence, the fact that this one goal is not served by the sentence did not render it invalid. The sentence did serve the legitimate goals of retribution for defendant's actual culpability, deterrence, and incapacitation.

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

People v. Brown, 2012 IL App (5th) 100452 (No. 5-10-0452, 2/29/12)

In **People v. Hauschild**, 226 Ill.2d 63, 871 N.E.2d 1 (2007), the court held that the 15-year enhancement for armed robbery while armed with a firearm was unconstitutionally disproportionate to the sentence for the offense of armed violence predicated on robbery with a category I or II weapon, as the elements of the offenses were identical but the penalty for armed robbery was more severe than the penalty for armed violence.

Thereafter, the legislature amended the armed violence statute by Public Act 95-688, effective October 23, 2007, to except from its application "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated of enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." Public Act 95-866 cured the proportionate-penalties violation by making it impossible to generate an armed-violence conviction predicated on robbery, even though the amendment did not alter the 15-year enhancement for armed robbery committed with a firearm.

Because the armed robbery for which defendant was convicted was committed on May 26, 2009, defendant could not rely on **Hauschild** to claim his 15-year sentencing enhancement was unconstitutional. The court rejected defendant's argument that the armed-robbery statute was void *ab initio* as an unconstitutional law. Public Act 95-866 revived the sentencing scheme in the armed-robbery statute by fixing the proportionate-penalties violation.

(Defendant was represented by Assistant Defender Ed Anderson, Mt. Vernon.)

People v. Davis, 2015 IL App (1st) 121867 (No. 1-12-1867, 1/20/15)

Defendant argued that his convictions and sentences for armed robbery in 1985 violated the proportionate penalties clause since, based on the facts of his case, armed robbery had the identical elements as armed violence with a category II weapon, but armed robbery was a Class X felony, while category II armed violence was a Class 2 felony.

In 1985, the Class X offense of armed robbery was defined as committing robbery while armed with a dangerous weapon. Ill. Rev. Stat. 1985, ch. 38, ¶18-2(a), (b). Armed violence was defined as committing any felony while armed with a dangerous weapon. Ill. Rev. Stat. 1985, ch. 38, ¶ 33A-2. If the dangerous weapon was a category I weapon, including firearms, the offense was a Class X felony. Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1(b), 33A-3(a). If, however, the dangerous weapon was a category II weapon, such as a bludgeon, the offense was a Class 2 felony. Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1(c), 33A-3(b).

Defendant argued that the juries in his cases were never asked to identify the dangerous weapons used during the offenses and there was no evidence the weapons met the statutory definition of a firearm. Accordingly, the dangerous weapons used in his cases were category II weapons, such as bludgeons. And if this were the case, his sentences for armed robbery violated the identical elements test.

The court rejected this argument. The trial records showed that the main issue in each case was whether the weapon was a real or toy gun. Defendant argued that the weapons were toy guns, not dangerous

weapons. The court concluded that by finding defendant guilty, the juries rejected defendant's arguments that he was only armed with toy guns and thereby implicitly found that the weapons were real guns. Defendant's armed robbery convictions thus may not be properly compared to armed violence with a category II weapon. The sentences did not violate the identical elements test.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Fernandez, 2014 IL App (1st) 120508 (No. 1-12-0508, 7/17/14)

Defendant was convicted of selling more than 1000 grams of cocaine in 2010, and based on his guilty pleas to drug offenses in 1992 and 1999 was sentenced as a habitual criminal to a natural life sentence. 730 ILCS 5/5-4.5-95(a) defines a habitual criminal as a person who has been twice convicted in state or federal court of an offense that contains the same elements as an offense which is now classified as a Class X felony in Illinois, and who thereafter is convicted of a Class X felony which is committed after the two prior convictions were entered.

1. The court rejected defendant's argument that the 1999 federal conviction did not qualify as a prior conviction under the Habitual Criminal Act. The court acknowledged that under Illinois law the type and amount of drugs are substantive elements of the offense, while under federal law such matters are sentencing factors rather than elements. In determining whether the requirements of the Habitual Criminal Act are satisfied, however, Illinois courts have rejected a formalistic interpretation of the Habitual Criminal Act. Instead, the focus is on the criminal conduct in question. The court concluded that had the federal offense in question been prosecuted as a State offense, it would have been a Class X felony. Therefore, the federal offense qualified as a prior conviction under the Act.

The court also noted that if defendant's argument was accepted, a federal drug conviction could never serve as a prior conviction under the Habitual Criminal Act despite the clear intent of the General Assembly.

2. Defendant argued that under **Taylor v. United States**, 495 U.S. 575 (1990) and **Descamps v. United States**, 570 U.S. ___, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013), when determining whether there is a prior conviction for purposes of the Habitual Criminal Act the sentencing court may look only to the elements of the prior conviction and not to the conduct underlying the conviction. Defendant contended that his Sixth Amendment right to a jury trial was violated because the sentencing court looked beyond the elements of the federal conviction and examined the conduct involved in that conviction.

The court concluded that defendant's argument carried "some persuasive force" and that a constitutional issue could arise if the sentencing court considered facts which had not been proven beyond a reasonable doubt before a jury. However, the court concluded that the issue was forfeited in this case because defendant stipulated to testimony at the sentencing hearing concerning the facts underlying the prior offense and failed to object when the State used his federal guilty plea to establish the quantity of drugs in question.

3. The court also found, as a matter of first impression, that a natural life sentence under the Habitual Criminal Act does not violate the proportionate penalties clause of the Illinois Constitution even where the defendant has been convicted only of non-violent offenses. Although a mandatory life sentence for three nonviolent offenses is a harsh sentence, defendant was not a juvenile, had been convicted of the first offense when he was 36 years old and the third when he was 55, and was convicted as a principal. Furthermore, defendant's sale of cocaine was not a spontaneous decision, but resulted from careful planning and the recruitment of an accomplice.

Noting that the legislature limited the Habitual Criminal Act to Class X offenses and to persons who have exhibited recidivist tendencies, the court concluded that three convictions for distributing large quantities of narcotics constitutes serious criminal conduct for which a natural life sentence can be deemed proportionate. Defendant's natural life sentence was affirmed.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

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

1. The Eighth Amendment cruel-and-unusual-punishments clause embodies two distinct propositions. One prohibits the imposition of inherently barbaric punishments under all circumstances. The other embodies a narrow proportionality principle that forbids extreme sentences grossly disproportionate to the crime.

Prior to the decision in **Graham v. Florida**, 560 U.S. ___, 130 S.Ct. 2011, ___ L.Ed.2d ___ (2010), cases challenging the proportionality of a sentence to the crime were divided into two discrete categories: those involving a term of years and those involving the death penalty. In cases challenging a term-of-years sentence, the analysis begins by comparing the gravity of the offense to the severity of the sentence. In cases challenging a capital sentence, the death penalty may be found categorically cruel and unusual based on either the nature of the offense or the characteristics of the offender. In **Graham**, the court for the first time recognized a categorical limitation on a non-capital sentence of natural life without parole for juvenile, non-homicide offenders.

2. Defendant received consecutive sentences totaling 97 years for 16 aggravated battery convictions based on his behavior toward DOC employees. The court held that his aggregated sentence resulting from multiple convictions could not be considered a life-without-parole sentence. A sentence of life without parole is tied to a single conviction and is absolute in its duration for the offender's natural life. The Eighth Amendment allows state to punish offenders for each crime they commit, regardless of the number of convictions or the duration of the sentences they have already accrued.

3. A two-step analysis is employed to determine whether a punishment is categorically unconstitutional. First, the court considers objective indicia of society's standards as expressed in legislative enactments and state practice to determine if there is a national consensus against the sentencing practice at issue. Second, the court determines in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Punishing mentally-ill prisoners by sentencing them to natural life without parole is not categorically cruel and unusual. There is no consensus against punishment of mentally-ill offenders. Unlike persons with abnormally-diminished intellectual functioning, offenders whose mental illness falls short of criminal insanity are not less culpable than other offenders generally. The penological ends of retribution and incapacitation are also met by allowing courts to sentence mentally-ill persons as severely as others.

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

People v. Gibson, 403 Ill.App.3d 942, 934 N.E.2d 611 (2d Dist. 2010)

The proportionate penalties clause of the Illinois Constitution requires that all penalties be determined according to the seriousness of the offense and the objective of restoring the offender to useful citizenship. The proportionate penalties clause is violated if the sentence for an offense is greater than the sentence for an offense composed of identical elements. The court accepted the State's concession that the proportionate penalties clause was violated by the 15-year enhancement for being armed with a firearm while committing aggravating kidnapping, which resulted in a sentencing range of 21 to 45 years, because armed violence predicated on kidnapping is comprised of identical elements but is punishable by a prison term of only 15 to 30 years.

The court rejected defendant's argument that the appropriate remedy was to strike the enhancement and leave intact the 12-year unenhanced sentence. The proper remedy for a proportionate penalties violation is to remand for resentencing to allow the trial court to re-evaluate defendant's sentence in light of the available sentencing options once the unconstitutional provision is omitted. The court noted that at sentencing the trial court did not state that it would have sentenced defendant to 12 years even if the 15-year enhancement was unavailable.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

People v. Gipson, 2015 IL App (1st) 122451 (No. 1-12-2451, 5/27/15)

1. Defendant, who was 15 years old at the time of the offense, was automatically transferred to adult

court and convicted of two counts of attempt first-degree murder. The facts at trial showed that defendant approached the driver's side of a car where two victims were sitting and fired shots at one of the victims, hitting him once. At the same time, the co-defendant approached the passenger side of the car and fired shots at the other victim, hitting him several times.

The trial court found that the 20-year enhancement applied to both of defendant's convictions under 720 ILCS 5/8-4(c)(1)(C), requiring that 20 years be added to the sentence where the defendant "personally discharged a firearm" during the commission of the offense. The court imposed the minimum sentence of 26 years (including the 20-year firearm enhancement) for both convictions, to be served consecutively for a total of 52 years.

2. Defendant argued on appeal that the firearm add-on only applied to one of his convictions since his personal discharge of a firearm injured only one victim and he was merely accountable for the other attempt murder. The Appellate Court rejected this argument. Although the add-on only applies when an accountable defendant personally discharges a firearm, it does not require that he personally discharge his firearm at the victim or injure the victim. The word "personally" only modifies the clause "discharged a firearm." The trial court thus properly imposed two firearm enchantments in this case.

3. Defendant also argued that the automatic transfer statute combined with the sentencing provisions violated the Eighth Amendment as applied to him. The Court rejected this argument, holding that defendant's 52-year sentence was not a *de facto* sentence of life imprisonment. Taking into account available sentencing credit, the Court determined that defendant could be released from prison at age 60, while the average life expectancy for someone in his position was 67.8 years. Defendant thus could, and likely would, spend the last several years of his life outside of prison. The Court found that, strictly speaking, defendant's sentence did not constitute life imprisonment and thus did not violate the Eighth Amendment.

4. The Court agreed, however, that the statutory scheme was unconstitutional as applied to defendant under the proportionate penalties clause of the Illinois Constitution. The Illinois Constitution states that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. To show a violation of the clause, a defendant must show that the penalty is degrading, cruel "or so wholly disproportionate to the offense that it shocks the moral sense of the community." The clause provides a limitation on punishment beyond the eighth amendment.

The Court found that defendant's penalty shocked the moral sense of the community. Although this was a serious offense, and one of the victims suffered severe injuries, there were numerous factors that diminished "the justification for a 52-year prison term." The incident was not planned long before it occurred, but was instead the result of rash decision making. Defendant was a mentally ill juvenile who was prone to impulsive behavior, and wanted to impress his older co-defendant. And defendant did not personally inflict serious harm, even though that was primarily the result of bad aim.

The court found it meaningful that defendant had been found unfit to stand trial and thus was clearly not "at his peak mental efficiency" when the offense occurred. Defendant's inability to process information may have affected his judgment, which diminished his culpability and the need for retribution. At the same time, defendant's mental health had improved in the recent past, showing he may yet be rehabilitated. And the trial judge clearly would have imposed a shorter sentence if that had been possible. The Court found it "unsettling" that the trial court's discretion in sentencing a juvenile was frustrated by the mandatory minimum in the case. "Under these circumstances, defendant's sentence shocks the conscience and cannot pass constitutional muster."

As a remedy, the court ordered the trial court on remand to impose any appropriate Class X sentence without the mandatory firearm enhancement.

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

People v. Gillespie, 2012 IL App (4th) 110151 (No. 4-11-0151, 8/29/12)

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Illinois Supreme Court held that

the penalty for armed robbery while armed with a firearm violated the proportionate-penalties clause because it was more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. Armed robbery with a firearm was a Class X offense punishable by a term of 6 to 30 years' imprisonment with a mandatory 15-year add-on, for a total of 21 to 45 years, while armed violence carried a penalty of only 15 to 30 years' imprisonment.

P.A. 95-688 subsequently amended the armed violence statute so as to make it impossible to base an armed violence conviction on robbery. The amendment did not alter the 15-year enhancement for armed robbery committed with a firearm that had been found unconstitutional in **Hauschild**.

Disagreeing with the conclusion reached by the court in **People v. Brown**, 2012 IL App (5th) 100452, the Appellate Court concluded that P.A. 95-688 did not revive the 15-year enhancement. P.A. 95-866 left the armed-robbery statute unchanged and could not validate a statute that was void *ab initio* by reason of its unconstitutionality.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Guyton, 2014 IL App (1st) 110450 (No. 1-11-0450, 7/15/14)

1. The State charged defendant with first degree murder of one man and attempt first degree murder of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second. Defendant was sentenced to 18 years' imprisonment for second degree murder and 36 years' imprisonment (including a mandatory 20-year add-on for personal discharge of a firearm) for attempt first degree murder.

On appeal, defendant argued that his 36-year sentence for attempt first degree murder violated due process and equal protection since it "shocks the conscience" to punish an attempt to kill more severely than the completed offense of murder.

2. The proportionate penalties clause of the Illinois constitution is violated in two ways: (1) where the penalty is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; and (2) where offenses with identical elements are given different sentences. Defendant's due process argument was based on the first of these tests. He argued that his sentence for attempt first degree murder was grossly disproportionate to the offense, and hence violated due process, since it was twice as long as his sentence for second degree murder.

The Appellate Court rejected this argument. The Illinois Supreme Court has already held that because Illinois does not recognize the crime of attempt second degree murder, it does not violate the first test of the proportionate penalties clause to sentence a defendant to a longer term for attempt first degree murder than for the completed offense of second degree murder. **People v. Lopez**, 166 Ill. 2d 441 (1995). Accordingly, the sentence disparity between the two offenses in this case did not violate due process.

3. The Appellate Court also rejected defendant's equal protection argument. To raise an equal protection argument, a defendant must allege that there are others similarly situated to him, that they are treated differently, and that there is no valid basis for this disparate treatment. The first step in this analysis is to determine whether the defendant is similarly situated to the comparison group.

Here, defendant failed to show that he was similarly situated to any comparison group. He only alleged that a person who commits attempt first degree murder receives a harsher sentence than one who commits second degree murder. But defendant "failed to identify a suspect class or identify others convicted of attempt first degree murder that have been treated unequally under the law." The court thus rejected defendant's equal protection argument.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Harris, 2016 IL App (1st) 141744 (No. 1-14-1744, 12/27/16)

The proportionate penalties clause of the Illinois Constitution provides that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender

to useful citizenship." Ill. Const. 1970, art. I §11. A sentence violates the clause if it is "cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." The proportionate penalties clause is more expansive that its federal counterpart, the prohibition on cruel and unusual punishments. U.S. Const., amend. VIII.

Defendant, who was 18 years old at the time of the offense, was convicted of first degree murder of one victim and attempt first degree murder of another. Defendant used a firearm that proximately caused the death of the murder victim and proximately caused great bodily harm to the attempt victim. The court sentenced defendant to the minimum sentence of 45 years for murder (20 years plus a 25-year firearm enhancement) and a minimum consecutive term of 31 years for attempt murder (six years plus a 25-year firearm enhancement), for a total of 76 years. The murder sentence had to be served at 100% and the attempt sentence at 85%, meaning defendant would have to serve at least 71 years of imprisonment. The court found that this was a *de facto* life sentence since defendant would be imprisoned until he was at least 89 years old.

The court held that defendant's sentence violated the proportionate penalties clause, in particular the language in the clause that all penalties should have the objective of restoring defendants to useful citizenship. Research on juvenile maturity and brain development shows that the brain does not finish developing until the mid-20s. Young adults are in many ways more similar to adolescents than fully mature adults. Accordingly, the analysis of **Miller v. Alabama**, 132 S.Ct. 2455 (2012) and many of the concerns and policies underlying the juvenile court system apply "with equal force under the Illinois Constitution" to young adults like defendant.

Defendant had no criminal history, had grown up in a stable family environment, had continuing family support, and had completed his GED while in pretrial custody. These facts show that defendant might be able to rehabilitate himself if given the chance. The sentencing statutes which mandate a *de facto* life sentence are thus "absolutely contrary" to the constitutional objective of rehabilitation. Such a sentence shocks the moral sense of the community.

The court vacated defendant's sentence and remanded for resentencing.

(Defendant was represented by Assistant Defender David Berger, Chicago.)

People v. Harris, 2012 IL App (1st) 092251 (No. 1-09-2251, 4/20/12)

1. The proportionate penalties clause is violated where two offenses have identical elements but carry different authorized sentences. Because armed robbery while armed with a firearm and aggravated kidnaping while armed with a firearm consist of the same elements as armed violence predicated on robbery and kidnaping, but the former offenses carry more severe sentences when the mandatory 15-year enhancement for being armed with a firearm is added, the proportionate penalties clause was violated.

2. The court rejected defendant's argument that the convictions should be reduced to simple robbery and simple kidnaping and the cause remanded for sentencing on those offenses. In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Supreme Court held that the proper remedy in this situation is to remand the cause for resentencing in accordance with the relevant statute as it existed before the enactment of Public Act 91-404, which added the 15-year enhancement.

3. The court rejected the argument that defendant waived the proportionate penalties arguments because he failed to present them on direct appeal and raised them for the first time in a post-conviction petition. Whether a statute is unconstitutional may be raised at any time.

4. The court found that the convictions for armed robbery and aggravated kidnaping were improper although the trial court refused to impose the 15-year enhancement, and instead imposed 20-year-sentences which were within the authorized sentencing range for armed violence. One purpose of resentencing is to allow the trial court to reevaluate the length of the defendant's sentence for each offense in the context of the total sentence for all the offenses. Furthermore, the trial court did not decline to impose the enhancement because it was aware of the proportionate penalties problem, but because the State failed to give proper notice that it would seek the enhancement.

5. The court rejected the argument that the proportionate penalties clause was violated because the

defendant is required to serve 85% of the sentence for aggravated kidnaping, but would be eligible for release after serving 50% of an armed violence conviction predicated on kidnaping (so long as the trial court found that the conduct did not result in great bodily harm). The court concluded that proportionate penalties analysis focuses only on whether offenses which consist of identical elements have different sentencing ranges, and not on the manner in which sentences are carried out.

Similarly, the court rejected the argument that disparities in truth in sentencing provisions violate equal protection. The court concluded that there is no equal protection right to have good-time credit calculated identically for offenses consisting of the same elements.

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

People v. Harris, 2011 IL App (1st) 092251 (No. 1-09-2251, 7/22/11)

1. A statute violates the proportionate penalties clause of the Illinois Constitution where two offenses have identical elements but one carries a greater sentencing range than the other. Ill. Const. 1970, art I, §11. Penalties for offenses with identical elements do not violate the proportionate penalties clause when the difference in the sentencing structure only affects the manner in which the sentence is carried out, and not the sentencing range. When an amended statute is found to violate the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment.

A. Armed robbery while armed with a firearm and armed violence predicated on robbery contain identical elements, as do aggravated kidnaping (while armed with a firearm) and armed violence predicated on kidnaping, but the sentencing ranges for armed robbery while armed with a firearm and aggravated kidnaping are greater than the range for armed violence. Armed robbery with a firearm and aggravated kidnaping are Class X felonies punishable by a term of 6 to 30 years and a mandatory 15-year enhancement, for a total of 21 to 45 years, 720 ILCS 5/18-2(a)(2), 10-2(b), while armed violence is punishable by a sentence ranging from 15 to 30 years. 720 ILCS 5/33A-3(a). Therefore, defendant's sentences for armed robbery with a firearm and aggravated kidnaping violate the proportionate penalties clause.

Before the armed robbery and aggravated kidnaping statutes were amended to provide for the 15-year enhancement, those offenses carried a sentencing range of 6 to 30 years, which is not harsher than the sentencing range for armed violence. When the defendant was sentenced, the court declined to impose the 15-year enhancement, and therefore the 20-year sentences imposed on defendant were proper. The Appellate Court nonetheless remanded for resentencing in accordance with the unamended statute, because the court had declined to impose the enhancement only due to the State's failure to provide defendant notice that it would seek the enhancement upon conviction.

B. Under the truth-in-sentencing law, a defendant convicted of aggravated kidnaping is required to serve 85% of his sentence in every case, but a defendant convicted of armed violence is required to serve that same percentage of his sentence only if the trial court finds that his conduct resulted in great bodily harm. Without that finding, defendant would be eligible for release after serving 50% of his sentence. 730 ILCS 5/3-6-3(a)(2)(ii), (a)(2)(iii), (a)(2.1). Because these provisions do not affect the sentencing range imposed for these offenses, but only the manner in which the sentence is carried out, they do not violate the proportionate penalties clause.

2. The equal protection clause of the Fourteenth Amendment requires equality between groups of people who are similarly situated. Unlike the proportionate penalties clause, the equal protection clause does allow offenses with the same elements to have different punishments. A prosecutor may exercise his discretion to charge under one of two statutes with identical elements, so long as he does not discriminate against any class of defendants. Therefore, disparities in treatment under the truth-in-sentencing statute between inmates who committed different crimes that have the same elements do not violate the equal protection clause.

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

People v. Hawkins, 409 Ill.App.3d 564, 948 N.E.2d 676 (1st Dist. 2011)

The proportionate penalties clause of the Illinois Constitution requires that all penalties be "determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill.Const. 1970, Art. I, §11. There are two distinct proportionality challenges that may be asserted based on this constitutional provision. First, a penalty violates the proportionate penalties clause if it is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community. Second, the clause is violated where offenses with identical elements are given different sentences.

The court rejected the argument that defendant's sentence for aggravated criminal sexual assault violated the proportionate penalties clause because the elements of that offense are identical to the elements of aggravated kidnapping, yet the sentences are different because aggravated criminal sexual assault is subject to mandatory consecutive sentencing.

The elements of aggravated criminal sexual assault and aggravated kidnapping were not identical as charged. Under certain counts, to convict defendant of aggravated criminal sexual assault, the State had to prove criminal sexual assault plus aggravated kidnapping (kidnapping plus criminal sexual assault). To prove aggravated kidnapping, the State only had to prove kidnapping plus criminal sexual assault. "The lack of a need to prove an aggravating factor for criminal sexual assault under [the kidnapping] counts created differences between the elements of the two offenses in this case." Under other counts, to convict defendant of aggravated kidnapping, the State had to prove that the defendant committed kidnapping while armed with a knife. These counts were not identical to aggravated criminal sexual assault because they did not include any of the sexual assault elements.

Even assuming that the elements of the offenses were identical, the court found no violation of the proportionate penalties clause. The offenses of aggravated criminal sexual assault and aggravated kidnapping have the exact same sentencing range as both are classified as Class X felonies. The mandatory consecutive sentencing structure for aggravated criminal sexual assault, 730 ILCS 5/5-8-4(a)(ii), affects only the manner by which the sentence is carried out and not the punishment itself. Therefore, the provision creates no proportionate penalties violation.

People v. Herron, 2012 IL App (1st) 090663 (No. 1-09-0663, 2/14/12)

1. The proportionate penalties clause requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. A sentence violates the proportionate penalties clause if it is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community, or if it is greater than the sentence for an offense which consists of identical elements.

2. The State conceded that the 15-year sentence enhancement for aggravated kidnaping while armed with a firearm (720 ILCS 5/10-2(a)(6)) violates the proportionate penalties clause because aggravated kidnaping with the 15-year enhancement carries a sentence of 21 to 45 years, while armed violence predicated on kidnaping, which consists of the same elements, carries a sentence of 15 to 30 years. The parties disagreed on the appropriate remedy, however. Defendant argued that the improper sentence should be vacated and his concurrent sentences of five years for intimidation, nine years for home invasion, nine years for armed robbery, and nine years for aggravated kidnaping left intact. The State argued that because the trial court was unaware of the invalidity of the 15-year enhancement and did not state that it would have imposed a nine-year-sentence had it known that the 15-year-enhancement was invalid, the cause should be remanded to allow the trial court to impose an appropriate sentence.

The Appellate Court agreed with the State, stressing that trial court did not indicate whether its sentence for the remaining charges had been affected by its belief that defendant would serve an additional 15 years under §10-2(a)(6). The cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. House, 2015 IL App (1st) 110580 (No. 1-11-0580, 12/24/15)

1. The proportionate penalties clause of the Illinois Constitution requires that "all penalties shall be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. A sentence violates the clause if it is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.

2. Defendant was sentenced to a mandatory term of natural life imprisonment after being convicted of murdering two people. Defendant was 19 years old at the time of the offense. Although defendant was present and armed when the victims were surrounded and forced into a vehicle at gunpoint, he was not actually present at the scene of the murder and did not inflict any of the fatal shots. He merely acted as a lookout and was convicted based on a theory of accountability. There was also no evidence defendant helped plan the offense. Instead, defendant simply followed the orders of higher ranking gang members.

3. The Appellate Court held that the statute mandating natural life imprisonment was unconstitutional as applied to defendant due to his age and minimal involvement in the offense. While defendant was not a juvenile, the court found that his young age of 19 was an important mitigating factor. The court found that the qualities distinguishing juveniles from adults do not disappear at age 18 and there are significant differences between young adults like defendant and fully mature adults.

But under the mandatory life sentencing statute, court's are afforded no discretion in considering mitigating factors such as a defendant's young age and lack of full maturity. Given the facts of this case, the court found that the mandatory sentence of life imprisonment shocked the moral sense of the community and violated the proportionate penalties clause.

The court vacated defendant's sentence and remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Jessica Fortier, Chicago.)

People v. Hunter, 2016 IL App (1st) 141904 (No. 1-14-1904, modified upon denial of rehearing 8/12/16)

1. Defendant, age 16 at the time of the offense, was tried as an adult under the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130), and was convicted of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking. The trial court sentenced him to 21 years imprisonment, which included a 15-year enhancement for his use of a firearm.

Defendant argued that he should be resentenced under the provisions of 730 ILCS 5/5-4.5-105 which took effect while his case was on appeal. Defendant argued that these provisions, which require the sentencing court to consider several factors, including age, impetuosity, and level of maturity when sentencing a defendant under age 18, should apply retroactively to his case. Defendant also argued that if the statute was not applied retroactively, the mandatory firearm enhancement violated the Eighth Amendment and the proportionate penalties clause of the Illinois Constitution.

Defendant also argued that the amendments to the automatic transfer statute, 705 ILCS 405/5-130(1)(a), which also took effect while defendant's case was on appeal and which removed the offenses of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking from the automatic transfer statute, should be applied retroactively to his case.

The court rejected all of defendant's arguments.

2. First, the court held that section 5-4.5-105 did not apply retroactively to defendant's case. Section 5-4.5-105 states that the sentencing court must consider certain sentencing factors "on or after the effective date of this amendatory act." Thus the statute clearly indicates that a court is required to apply its provisions only at hearings held on or after its effective date of January 1, 2016. Since defendant was sentenced before that date, section 5-4.5-105 did not apply to his case.

3. Second, the court held that the mandatory firearm enhancement was not unconstitutional as applied to defendant. Once the 15-year enhancement was applied, the sentencing range for defendant's offenses was only 21 to 45 years, a substantial penalty but not one comparable to a life sentence. Additionally, the trial court considered substantial mitigating evidence before imposing the minimum sentence of 21 years for each of defendant's convictions. Under these facts, the mandatory firearm

enhancement did not violate the Eighth Amendment or the proportionate penalties clause.

4. Finally, the court held that the amendments to section 5-130 of the Juvenile Court Act did not apply retroactively. Statutes like section 5-130, which do not themselves contain a clear indication of legislative intent regarding temporal reach, are presumed to be framed in view of section 4 of the Statute on Statutes. Under section 4, a procedural amendment may not be applied retroactively if it would have a retroactive impact that would impair the rights a party possessed when acting, attach new legal consequences, or impose new duties with respect to transactions already completed.

The court held that applying the amendments retroactively would have a retroactive impact as it would abolish automatic transfers and require the State to file new petitions for criminal jurisdiction or suffer the legal consequences from failing to do so.

(Defendant was represented by Assistant Defender Katie Anderson, Chicago.)

People v. Jackson, 2016 IL App (1st) 143025 (No. 1-14-3025, 9/30/16)

Defendant, who was 16 at the time of the offense, was convicted of first degree murder in adult court. Because he personally discharged a firearm that proximately caused death, defendant was subject to a 25-years-to-life firearm enhancement, making his sentencing range 45 years to life. Defendant was ultimately sentenced to 50 years imprisonment.

The court found that defendant's sentence did not violate the Eighth Amendment's prohibition on cruel and unusual punishments. The court noted that the Illinois Supreme Court held that juveniles may be sentenced to life imprisonment so long as the sentence is discretionary. **People v. Davis**, 2014 IL 115595. Here defendant was subject to minimum sentence of 45 years and received a discretionary sentence of 50 years. There was thus no Eighth Amendment violation.

(Defendant was represented by Assistant Defenders Sharon Nissim, Chicago, and Yasemin Eken, Elgin.)

People v. Larue, 2014 IL App (4th) 120595 (No. 4-12-0595, 5/14/14)

1. A statute violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11) if it contains the same elements as another offense but carries a greater penalty. Defendant argued that his sentence of 10 years imprisonment for unlawful possession of a weapon by a felon (UPWF) violated the proportionate penalties clause because it is a lesser-included offense of aggravated unlawful use of a weapon (AUUW), but carries a greater penalty. (AUUW is a Class 2 felony with a sentencing range of three to seven years imprisonment; UPWF is a Class 3 felony with a range of two to 10 years imprisonment.)

Defendant conceded that the two offenses are not truly identical, since AUUW contains an additional element (that the firearm be uncased, immediately accessible, and loaded) not in the UPWF statute, but argued that treating the two offenses as identical is consistent with the purpose of the proportionate penalties clause.

The court rejected this argument, holding that the proportionate penalties clause only applies to statutes that have truly identical elements. Any expansion of the clause to lesser-included offenses would run afoul of the Illinois Supreme Court's directive in **People v. Sharpe**, 216 Ill.2d 481 (2005) to abandon the cross-comparison analysis of the proportionate penalties clause.

2. Defendant argued that his 10-year sentence for UPWF violated the due process clause of the Illinois Constitution (Ill. Const. 1070, art. I §2) because it is a lesser-included offense of AUUW but is punished more harshly.

The legislature possesses wide discretion in prescribing penalties for offenses, but its power is limited by the due process clause, which requires that a penalty must be reasonably designed to remedy the particular evil being targeted. Courts will not invalidate a statute unless the penalty "is clearly in excess of the very broad and general constitutional limitations applicable.

Defendant relied on **People v. Bradley**, 79 Ill. 2d 410 (1980), where the Supreme Court found that the penalty for possession of a controlled substance (one to 10 years imprisonment) violated due process

since the penalty for delivery of the same substance had a lesser sentence (one to three years). In reaching its decision, the Supreme Court observed that the Illinois Controlled Substances Act expressly stated that the legislature intended the heaviest penalties to apply to drug traffickers. Therefore punishing possession offenses more harshly than delivery offenses contravened the express intent of the legislature and violated due process.

The Appellate Court rejected defendant's reliance on **Bradley**. Here, defendant failed to show that the sentence for UPWF is contrary to the legislature's intent, and has thus failed to show that the sentence is not reasonably designed to remedy the particular evil being targeted.

3. Defendant also argued that his 10-year sentence for UPWF violated the equal protection clauses of the United States and Illinois Constitutions (U.S. Const., amend XIV, §1; Ill. Const. 1970, art. I, §2), because the different sentencing ranges for AUUW and UPWF treated those who committed similar offenses in a different manner.

The equal protection clause requires the government to treat similarly situated individuals in the same fashion unless it can show an appropriate reason for dissimilar treatment. Where, as here, the case does not involve a fundamental right and the affected individuals are not a suspect class, courts utilize a rational basis test to determine whether there is an equal protection violation. Under this test, courts must determine whether the statute bears a rational relationship to a legitimate governmental purpose.

The court held that defendant's argument failed because he could not show that he was similarly situated to someone who was convicted of AUUW. By the very definition of offenses, individuals convicted of different offenses are dissimilarly situated from each other. Since AUUW and UPWF are different offenses, defendant cannot show that he is similarly situated to someone convicted of AUUW, and hence cannot show an equal protection violation.

4. Depending on the statutory language, certain fees may be imposed only once per case, or may be imposed for each conviction. Here, the court determined that four fees could only be imposed once while two could be imposed for each of defendant's two convictions.

The statute authorizing the document storage fee (705 ILCS 105/27.3c(a)) states that a fee shall be imposed for each "matter," which the court concluded was synonymous with "case." Accordingly, this fee can only be imposed once per case.

The statutes authorizing the automation fee (705 ILCS 105/27.3a(1)), and the court security fee (55 ILCS 5/5-1103) both state that a fee shall be imposed for each "case," and hence can only be imposed once per case.

The circuit clerk fee statute (705 ILCS 105/27.1a(w)(1)(A)) states that the fee shall be imposed for each felony complaint. Since the two counts filed by the State in this case constituted one felony complaint, only one fee could be imposed.

By contrast, the statute authorizing the court finance fee (55 ILCS 5/1101(c)) states that a fee shall be imposed on a "judgment of guilty," and thus allows the imposition of a fee on each judgment.

Similarly, the statute authorizing the state's attorney fee (55 ILCS 5/4-2002(a)), states that a fee shall be imposed for "each conviction." Here, defendant was found guilty of two counts and thus two court finance and state's attorney fees could be imposed.

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

People v. Lewis, 2016 IL App (4th) 140852 (No. 4-14-0852, 12/20/16)

Defendant was convicted under section 120(a) of the Methamphetamine Control and Community Protection Act (MCCPA) which prohibits a person with a prior conviction under the MCCPA from purchasing or possessing a methamphetamine (meth) precursor (such as pseudoephedrine) without a prescription. Defendant argued that the MCCPA (1) violates due process by punishing wholly innocent conduct and (2) violates due process, equal protection, and the proportionate penalties clause because a violation of the MCCPA is a felony, while a violation of the Methamphetamine Precursor Act (MPA) which involves similar or less culpable conduct is only a misdemeanor. The court rejected these arguments and

upheld the constitutional validity of the MCCPA.

1. In deciding whether a statute that does not implicate fundamental rights violates due process (Ill. Const. 1970, art. I, §2; U.S. Const., amend. XIV), the proper inquiry is whether it bears a rational relationship to a legitimate state goal. Such a rational relationship is lacking where a statute punishes wholly innocent conduct. Wholly innocent conduct is conduct unrelated to the legislative purpose and devoid of criminal intent.

The purpose of the MCCPA is to protect the public from the use and distribution of meth. The MCCPA reasonably serves this purpose by regulating the possession of meth precursors by people who have demonstrated a tendency to misuse those substances. Possession of a meth precursor without a prescription by people previously convicted under the MCCPA is not innocent conduct and thus the MCCPA does not violate due process by punishing innocent conduct.

2. A statute may violate the proportionate penalties clause (Ill. Const. 1970, art. I, §11), where it contains a penalty greater that the penalty imposed for an offense with identical elements. Violation of the MCCPA is a Class 4 felony, while violation of the MPA is a Class A misdemeanor. But the MCCPA and the MPA do not have identical elements. The MPA prohibits a person with a prior conviction for any meth-related crime from purchasing or acquiring 7500 milligrams of ephedrine or pseudoephedrine within a 30-day period. 720 ILCS 648/20(b), 40(a)(2)(A). The MCCPA merely requires a prescription to purchase or possess a meth precursor.

The MCCPA also does not violate due process by punishing less culpable conduct more seriously than the MPA. It is within the legislature's purview to determine the seriousness of the crime and it has properly determined that violating the MCCPA involves more serious conduct than violating the MPA. For similar reasons, the MCCPA does not violate equal protection. The existence of different punishments for different offenses does not offend equal protection.

(Defendant was represented by Assistant Defender Kadi Weck, Chicago.)

People v. Malone, 2012 IL App (1st) 110517 (No. 1-11-0517, 9/28/12)

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Illinois Supreme Court held that the penalty for armed robbery while armed with a firearm violated the proportionate-penalties clause because it was more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. Armed robbery with a firearm was a Class X offense punishable by a term of 6 to 30 years' imprisonment with a mandatory 15-year add-on, for a total of 21 to 45 years, while armed violence carried a penalty of only 15 to 30 years' imprisonment.

P.A. 95-688 subsequently amended the armed violence statute so as to make it impossible to base an armed violence conviction on robbery. The amendment did not alter the 15-year enhancement for armed robbery committed with a firearm that had been found unconstitutional in **Hauschild**.

Agreeing with the conclusion reached by the court in **People v. Brown**, 2012 IL App (5th) 100452, and disagreeing with the decision in **People v. Gillespie**, 2012 IL App (4th) 100126, the Appellate Court concluded that P.A. 95-688 revived the 15-year enhancement. P.A. 95-688 was enacted in response to the decision in **Hauschild.** By eliminating the offense of armed violence predicated on robbery with a category I or II weapon, P.A. 95-866, the legislature intended to cure the proportionate-penalties violation found in **Hauschild**.

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

People v. McFadden, 2012 IL App (1st) 102939 (No. 1-10-2939, 11/30/12)

People v. Hauschild, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), held that the 15-year firearm sentencing enhancement for armed robbery with a firearm violates the proportionate-penalties clause of the Illinois Constitution because it is more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or category II weapon. After **Hauschild** was decided, P.A. 95-688 amended the armed violence statute to exclude robbery as a predicate offense to armed violence. A split of authority exists

among Appellate Courts whether P.A. 95-688 revived the sentencing enhancement of the armed robbery statute by eliminating the constitutional defect found in **Hauschild**.

The Appellate Court concluded that P.A. 95-688 could not revive the armed robbery enhancement statute. Because **Hauschild** effectively found the enhancement statute void *ab initio*, it could not be revived by an amendment to a different statute, and it is of no consequence that the statute was found unconstitutional prior to the amendment.

Sterba, J., dissented. The 15-year sentencing enhancement to the armed robbery statute was revived by the amendment to the armed violence statute. The legislature amended the statute after the decision in **Hauschild** with the intent to cure the constitutional defect in the armed robbery statute. The chronology of the amendment to the statute being held unconstitutional is legally significant.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Nieto, 2016 IL App (1st) 121604 (No. 1-12-1604, 3/23/16)

1. Under the Post-Conviction Hearing Act, any claim not raised in the original or amended post-conviction petition is waived. This rule is more than a suggestion and reviewing courts generally may not overlook forfeiture caused by defendant's failure to raise the issue in his petition.

2. A jury convicted defendant, who was 17 years old at the time of the offense, of first degree murder and aggravated battery with a firearm, and additionally found that defendant personally discharged a firearm which proximately caused death, making the minimum sentence 51 years imprisonment. The court sentenced defendant to 78 years imprisonment. In imposing sentence, the court stated that it had considered defendant's "young age" and the fact that everyone can change their lives.

The Appellate Court affirmed defendant's conviction and sentence on direct appeal, specifically holding that his sentence was not excessive. Defendant filed a post-conviction petition raising several claims, but did not argue that his sentence was unconstitutional. After the trial court dismissed his petition at the first stage, the United States Supreme Court held in **Miller v. Alabama**, 567 U.S. ___ (2012) that the Eighth Amendment prohibited mandatory sentences of life imprisonment for juveniles.

On appeal from the denial of his post-conviction petition, defendant argued for the first time that his sentence was unconstitutional under **Miller**. Defendant conceded that he did not raise this issue in his petition, but argued that an as-applied constitutional challenge to a sentence can be raised for the first time on appeal.

3. The Appellate Court examined several cases that followed **Miller** and determined that it could reach defendant's claim. In **People v. Davis**, 2014 IL 115595, the Illinois Supreme Court held that the sentencing statute mandating life sentences was not facially unconstitutional since it could be validly applied to adults. In **People v. Thompson**, 2015 IL 118151, the court held that a judgment based on facially unconstitutional statute is void and may be attacked at any time. The same was not true for an as-applied challenge.

But **Thompson** also discussed **People v. Luciano**, 2013 IL App (2d) 110792, which held that an as-applied sentencing challenge by a juvenile could be raised at any time. The Supreme Court did not expressly find that **Luciano** was incorrect in it's forfeiture holding, but instead distinguished it on the merits since the defendant in **Thompson** was not a juvenile. The Appellate Court thus concluded that "considered as a whole, **Thompson** implies that courts must overlook forfeiture and review juveniles' as-applied Eighth Amendment challenges under **Miller**."

Additionally, in **Montgomery v. Louisiana**, 577 U.S. ___(2016), the United States Supreme Court held that **Miller** announced a substantive rule that barred life sentences for all but the rarest of juvenile defendants, and courts lack authority to leave in place a sentence which violates a substantive rule. **Thompson** and **Montgomery** thus suggest that forfeiture cannot apply to juvenile defendants raising **Miller** claims.

4. The Appellate Court held that defendant's sentence was unconstitutional as applied to him. Since defendant would not be released from prison until he is 94 years old, the court found that he effectively

received a natural life sentence.

Montgomery held that a life sentence was impermissible "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Even if a court considers a defendant's age, as the court did here, a life sentence is still impermissible for a defendant whose crime "reflects unfortunate yet transient immaturity."

Here the trial court's reasoning in imposing sentence did not comport with the factors required by **Miller** and **Montgomery**. The trial court considered defendant's young age but did not consider the corresponding characteristics of his youth. His sentence thus violated **Miller**.

Although relief following a first-stage dismissal typically involves remand for second-stage proceedings, the proper relief for this claim was to vacate defendant's sentence and remand for resentencing.

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

People v. Ortiz, 2016 IL App (1st) 133294 (No. 1-13-3294, 10/17/16)

Defendant, age 15 at the time of the offense, was convicted of first degree murder and sentenced to 60 years imprisonment.

The court held that defendant's sentence violated the Eighth Amendment. A juvenile's mandatory or discretionary sentence of life imprisonment is constitutionally valid only where the sentencing judge takes into consideration his youth and attendant characteristics to determine whether the defendant is the rarest of juvenile offenders whose crimes reflect permanent incorrigibility.

The court held that since defendant must serve 100% of his 60-year sentence and hence will not be eligible for release until he is 75 years old, his sentence is effectively a life sentence. Although the trial court considered defendant's young age and his personal history in sentencing defendant, it did not consider the corresponding characteristics of his youth as required by **Miller v. Alabama**, 567 U.S. ___, 132 S. Ct. 2455 (2012).

The court vacated defendant's sentence and remanded the cause for a new sentencing hearing.

(Defendant was represented by Assistant Defender Elena Penick, Elgin.)

People v. Pace, 2015 IL App (1st) 110415 (No. 1-11-0415, modified on denial of rehearing 10/16/15)

1. A trial court violates a defendant's privilege against self-incrimination during sentencing where the court believes defendant's silence shows that he lacked remorse and uses defendant's silence as an aggravating factor in imposing sentence.

Here defendant declined to exercise his right of allocution at sentencing. In imposing sentence, the trial court stated that it would consider "the defendant's right of allocution, which he did not avail himself of." The Appellate Court held that based on this statement, the "record affirmatively shows that defendant was punished for choosing to remain silent during the sentencing hearing." Accordingly, the court vacated defendant's sentence and remanded for a new sentencing hearing.

2. The trial court also committed error during sentencing by considering its personal beliefs about gang violence and evidence that was outside the record. For example, the court stated that it would "bring to bear" its "personal experience" about the effects of gang violence in imposing sentence. The judge also discussed walking his daughter to school and hypothesized about the feelings of other parents who take their children to school, and then stated that he knew the parents of the victim in this case "kissed him goodbye and told him they loved him." The judge then aligned himself with the victims' families, stating that there were "way, way more of us" than there were guns, gang members, or "young punks."

The court also referred to evidence outside the record. The court stated as a fact that only "one or two percent" of the population causes all the problems, even though there was no evidence supporting this proposition. The court also stated without support in the record that "children from Deerfield" face challenges similar to defendant, but have not committed similar crimes.

The trial court's extensive remarks along these lines denied defendant a fair sentencing hearing. The Appellate Court vacated defendant's sentence and remanded for a new sentencing hearing before a different

judge.

3. Based on his convictions for first degree murder in which he personally discharged a firearm proximately causing death and two counts of aggravated battery with a firearm, defendant (who was 16 years old at the time of the offense) was subject to both the mandatory 25-to-life firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii)) and to mandatory consecutive sentences (730 ILCS 5/5-8-4), making his sentencing range 57-years-to-life. Defendant received a sentence of 100 years imprisonment.

Defendant argued that the mandatory firearm enhancement and mandatory consecutive sentences violated the Eighth Amendment of the federal Constitution and the Illinois Constitution's proportionate penalties' clause. The Appellate Court rejected both arguments.

a. The court first rejected defendant's argument that the sentencing statutes violated the Eighth Amendment because his minimum sentence of 57 years was an improper *de facto* life sentence under **Miller v. Alabama**, 132 S. Ct. 2455. Under the current law in Illinois, a 57-year aggregate sentence is not the equivalent of a life sentence.

The court also rejected defendant's argument that the statutes violated **Miller** by encroaching on the trial court's discretion to impose any sentence it wants. **Miller** merely held that the state cannot impose the adult mandatory maximum penalty on a juvenile without first allowing the court to consider the defendant's youth and other attendant characteristics. Here, the trial court was able to consider defendant's age and culpability before imposing a sentence between 57 years and life imprisonment.

b. The court also rejected defendant's argument that the statutes violated the proportionate penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I §11. The court first determined that the proportionate penalties clause is not coextensive with the Eighth Amendment. Although the Illinois Supreme Court has issued conflicting decisions on this point, the Appellate Court concluded that the correct reading of those cases shows that the proportionate penalties clause, which focuses on rehabilitation, goes beyond the requirements of the Eight Amendment.

Nonetheless, the court held that the statutes did not violate the proportionate penalties clause. A penalty violates this clause where it is "cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community." The sentencing statutes at issue here, while subjecting defendants to substantial minimum sentences and restricting the scope of a trial court's discretion in imposing sentence, did not shock the moral sense of the community. The legislature's power necessarily includes the authority to establish minimum sentences even if they do restrict sentencing discretion. Moreover, trial courts retain significant sentencing discretion under the statutes.

(Defendant was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Pelo, 404 Ill.App.3d 839, 942 N.E.2d 463 (4th Dist. 2010)

The proportionate penalties clause of the Illinois Constitution is violated where offenses consisting of identical elements are punished differently.

The penalty for aggravated criminal sexual assault with a firearm (720 ILCS 5/12-14(a)(8)) violates the proportionate penalties clause because it is punished more harshly that an offense with the identical elements – armed violence based on criminal sexual assault with a firearm (720 ILCS 5/33A-2(a)). Both offenses require that the offender commit criminal sexual assault while armed with a firearm. The penalty for aggravated criminal sexual assault with a knife (720 ILCS 5/12-14(a)(1)) does not violate the proportionate penalties clause when compared with armed violence based on criminal sexual assault with a knife because aggravated criminal sexual assault only requires that the offender threaten to use a knife, while armed violence requires that the offender be actually armed with a knife.

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

People v. Span, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-3037, 6/30/11)

1. The proportionate penalties clause of the Illinois Constitution is violated where offenses with identical elements carry different penalties.

2. The proportionate penalties clause was violated by a 25-year sentence for attempt armed robbery committed with a bludgeon, because that offense has the same elements but a more severe sentence than attempt armed violence with a category III weapon (which includes bludgeons). The court rejected the State's argument that attempt armed violence predicated on robbery can be committed only if the defendant completes the predicate offense of robbery, and that the offenses therefore have different elements. The court noted that the offense of attempt armed violence predicated on robbery can be committed by attempting to secure a dangerous weapon or by attempting to complete the predicate while armed with a dangerous weapon.

Here, defendant committed a substantial step toward attempt armed violence by attempting to commit a robbery with a bludgeon. This offense contained the same elements as attempt armed robbery committed with a bludgeon.

3. Because attempt armed robbery committed with a bludgeon is a Class 1 felony with a sentencing range of four to 15 years and an extended term sentence of 15 to 30 years, while attempt armed violence while armed with a bludgeon is a Class 3 felony with a normal sentencing range of two to five years and an extended term range of five to 10 years, different penalties are imposed for offenses carrying the same elements. Thus, the penalties for attempt armed robbery violate the proportionate penalties clause.

The defendant's conviction and sentence for attempt armed robbery were vacated and the case was remanded for sentencing on the Class 3 felony of attempt armed violence.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Toy, 2013 IL App (1st) 120580 (No. 1-12-0580, 12/20/13)

1. The proportionate penalties clause of the Illinois Constitution holds that all penalties are to be determined according to the seriousness of the offense. Two types of proportionate penalties challenges may be raised. First, the proportionate penalties clause is violated where the penalty for a particular offense is so cruel, degrading, or wholly disproportionate to the offense as to shock the moral sense of the community. Second, the proportionate penalties clause is violated if offenses with identical elements carry different sentences.

In **People v. Hauschild**, 226 IL 2d 63, 871 N.E.2d 1 (2007), the sentence for armed robbery while armed with a firearm violated the proportionate penalties clause because it was more severe than the sentence for armed violence predicated on robbery with a firearm. Although at the time the armed violence statute excluded armed robbery as a predicate for armed violence, robbery was not similarly excluded. In **Hauschild**, the Supreme Court concluded that because every armed violence predicated on robbery also constituted an armed robbery, and armed robbery carried a more severe sentence than armed violence predicated on robbery, the proportionate penalties clause was violated.

In response to **Hauschild**, the legislature enacted P.A. 95-688, which modified the armed violence statute to remove certain offenses from serving as predicates for armed violence. However, for cases which arose prior to the enactment of P.A. 95-688, **Hauschild** remains the applicable law. (See **People v. Clemons**, 2012 IL 107821.)

2. On appeal from the denial of his post-conviction petition, defendant argued for the first time that the proportionate penalties clause was violated by his sentences for aggravated criminal sexual assault with a 15-year-firearm enhancement, because armed violence based on sexual assault contains identical elements but a lesser penalty. Because defendant was sentenced prior to the effective date of P.A. 95-688, the **Hauschild** rule and preamended version of the armed violence statute applied. That version of the statute excluded aggravated criminal sexual assault as the predicate for armed violence, but permitted the use of criminal sexual assault as a predicate.

The court concluded that under the prior version of the statute, armed violence predicated on criminal sexual assault had identical elements to aggravated criminal sexual assault based on committing criminal sexual assault while armed with a firearm (720 ILCS 5/12-14(a)(8)). However, the former offense had an authorized sentencing range of 15 to 30 years, while the latter had a sentencing range of six to 30 years plus

a mandatory 15-year-enhancement. Thus, under **Hauschild**, a proportionate penalties violation occurred.

Although the instant appeal was from the summary dismissal of a post-conviction petition, the court found that it was unnecessary to remand the matter for second-stage post-conviction hearings. The order dismissing the post-conviction petition was reversed, post-conviction relief was granted, the sentences for aggravated criminal sexual assault were vacated, and the cause was remanded for resentencing without the 15-year firearm enhancement.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

People v. Ybarra, 2016 IL App (1st) 142407 (No. 1-14-2407, 11/3/16)

The proportionate penalties clause of the Illinois Constitution requires all penalties to "be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art I, § 11. A statute may be deemed unconstitutional under this clause if the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.

Defendant, age 20 at the time of the offense, was convicted of the first degree murder of three people and as such was subject to a mandatory sentence of natural life imprisonment. 730 ILCS 5/5-8-1(a)(1)(c)(ii). Despite the mandatory sentence, defendant introduced substantial mitigating evidence at his sentencing hearing. The trial court acknowledged the mandatory sentence, but also indicated that it reviewed the mitigating evidence. In imposing a natural life sentence, the court stated that even if it had discretion it would still have imposed a life sentence.

The Appellate Court held that defendant's sentence did not violate the proportionate penalties clause as applied to him. Defendant was a legal adult who was convicted of being the actual shooter in the death of three unarmed teenagers. Under these circumstances, a mandatory natural life sentence did not shock the moral sense of the community.

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

People v. Yoselowitz, 2011 IL App (4th) 100764 (No. 4-10-0764, 9/20/11)

Neither the proportionate penalties clause of the Illinois Constitution nor equal protection principles were violated by 720 ILCS 550/5(g), which provides a Class X sentence for the manufacture, delivery, or possession of more than 5000 grams of cannabis with intent to deliver or manufacture.

The court acknowledged recent studies showing that cannabis is neither addictive nor likely to lead to great bodily harm, but found that the legislature imposed the Class X sentencing provision to combat illegal drug use by directing law enforcement efforts to commercial traffickers and large scale purveyors of illegal substances. The court found that such legislative intent constituted a rational basis for the Class X sentencing scheme, and that imposing a Class X sentence on purveyors of large quantities of marijuana was not shocking to the moral sense of the community. The court also noted that defendant's arguments concerning the effects of marijuana use should be addressed to the legislature rather than the courts.

Top

§45-1(b)(3)
Apprendi

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) Due process and the right to a jury trial require that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." For a sentence to be imposed under New Jersey's "hate crime" law, which authorized an

extended term where the offense was committed with the "purpose to intimidate" a person due to "race, color, gender, handicap, religion, sexual orientation or ethnicity," the "hate crime" factor must be determined by the jury instead of the sentencing court. See also, **Almendarez-Torres v. U.S.**, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (there is no constitutional requirement that recidivism be treated as an element of an offense, which must be pleaded in the charging instrument, rather than as a factor authorizing an enhanced sentence).

Oregon v. Ice, ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009) (No. 07-901) Where a state elects to make concurrent sentencing the norm, and authorizes consecutive sentencing only upon the finding of certain additional facts, **Apprendi** does not require that the additional facts be proven to the jury. The Sixth Amendment does not require additional findings before consecutive sentences may be imposed; a state is free to make consecutive sentencing the norm and authorize concurrent sentencing only if additional mitigating factors are found. Applying **Apprendi** to predicate facts for consecutive sentencing would likely require bifurcated or trifurcated trials in order to avoid substantially prejudicing defendant at the guilt phase of a trial.

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) **Apprendi** applies to a death penalty statute that authorizes a death sentence only if trial court finds that certain factors are present.

Schrioro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) **Ring v. Arizona** created a "procedural" rule that is not fundamental to an accurate verdict; thus, **Ring** does not apply retroactively to cases that were final before **Ring** was decided. See also, **People v. De La Paz**, 204 Ill.2d 426, 791 N.E.2d 489 (2003) (**Apprendi** does not apply retroactively to cases in which direct appeals were exhausted before **Apprendi** was decided); **People v. Lee**, 207 Ill.2d 1, 796 N.E.2d 1021 (2003); **Lucien v. Briley**, 213 Ill.2d 340, 821 N.E.2d 1148 (2004) (a criminal defendant may not bring an **Apprendi**-based state *habeas corpus* challenge once his direct appeal has been completed); **People v. Kelley**, 366 Ill.App.3d 676, 852 N.E.2d 324 (1st Dist. 2006) (**De La Paz** was not limited to an interpretation of the second **Teague** exception (for constitutional "bedrock" rules"), and retroactive application was not required by **Schrioro**).

Harris v. U.S., 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) **Apprendi** does not apply to factors that trigger a mandatory minimum sentence.

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) The Court applied **Apprendi** to a state sentencing scheme which authorized a maximum sentence of 10 years for second degree kidnapping but limited the "standard range" for the offense to between 49 and 53 months, and held defendant was entitled to have a jury decide whether the prosecution had proven factors which authorized a sentence greater than the standard range.

Also, under **Apprendi**, the "statutory maximum" sentence is the maximum sentence authorized under the facts found by the jury or admitted by defendant in a guilty plea. See also, **Cunningham v. California**, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) (the "statutory maximum" is the maximum sentence which the judge may impose solely on the basis of facts reflected in the jury verdict or admitted by defendant; in other words, the statutory maximum is the maximum which may be imposed without any additional findings by the judge).

U.S. v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) The Sixth Amendment right to a jury trial, as construed in **Apprendi** and **Blakely v. Washington**, applies to the federal sentencing guidelines, and the federal sentencing guideline procedure violates the Sixth Amendment. The remedy for the constitutional violation is to sever 18 U.S.C.A. §3553(b)(1), which makes the guidelines mandatory, so the guidelines are "effectively advisory." Thus, the sentencing court must consider the ranges authorized by the

federal sentencing guidelines, but is free to modify the sentence in light of other appropriate concerns. Also, sentencing decisions are to be reviewed for unreasonableness. See also, **Rita v. U.S.**, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007) (the court of appeals may apply a presumption of reasonableness to a sentence that is within the sentencing guidelines; the presumption is not binding, and does not reflect "strong judicial deference" such as that which applies to a lower court's findings of fact).

Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) California's determinate sentencing law, which authorized the trial judge (not jury) to find by a preponderance of the evidence facts exposing defendant to elevated upper term sentence, violated defendant's right to trial by jury under **Apprendi**. The Court rejected the contention that California's determinate sentencing law is equivalent to the post-**Booker** federal system, under which the federal sentencing guidelines are merely advisory. Under the post-**Booker** federal system, the judge has discretion to pose any sentence within the authorized range. In California, by contrast, only three fixed sentences are authorized, and the trial judge lacks discretion to select any other sentence. Also, the Court rejected the argument that determinate sentencing law satisfies **Apprendi** so long as the finding of an aggravating mitigating factor is reasonable.

Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) An **Apprendi** error is not "structural," and therefore is subject to harmless error analysis. See also, **People v. Thurow**, 203 Ill.2d 352, 786 N.E.2d 1019 (2003) (**Apprendi** violations are subject to harmless error analysis); **People v. Jones**, 219 Ill.2d 1, 845 N.E.2d 598 (2006) (rejecting argument that under **Blakely v. Washington**, an **Apprendi** error cannot be harmless); **People v. Davis**, 217 Ill.2d 472, 841 N.E.2d 884 (2005) (defendant, who was charged with first degree murder but convicted of the lesser-included offense of involuntary manslaughter and sentenced to a Class 2 sentence based on the trial court's holding that the victim was a "family or household member," was unable to show prejudice from the indictment's failure to allege that the victim had been a household member); **People v. Peacock**, 324 Ill.App.3d 749, 756 N.E.2d 261 (1st Dist. 2001) (failure to allege victim's age in charge and submit question to jury was harmless error where parties "basically stipulated" to age at trial and jury would have found victim was over 60); **People v. Black**, 327 Ill.App.3d 662, 765 N.E.2d 1046 (2d Dist. 2002) (error was not harmless where the State failed to present any evidence of the victims' ages at plea hearing).

United States v. Cotton, 535 U.S. 625 (2002) An **Apprendi** error did not require reversal under the federal plain error rule in light of the overwhelming evidence against defendant. See also, **People v. Crespo**, 203 Ill.2d 335, 788 N.E.2d 1117 (2003) (a 75-year extended term based on the "exceptionally brutal and heinous" extended-term factor did not constitute plain error where there was no basis to conclude that the **Apprendi** violation "seriously affected the fairness, integrity or public reputation of judicial proceedings"); **People v. Kaczmarek**, 207 Ill.2d 288, 798 N.E.2d 713 (2003) (**Apprendi** violation did not constitute plain error where there was overwhelming evidence that the offense was exceptionally brutal and heinous); **People v. Nitz**, 219 Ill.2d 400, 848 N.E.2d 982 (2006) (defendant could not show that the **Apprendi** violation amounted to plain error). But see, **People v. Alvarez**, 344 Ill.App.3d 179, 799 N.E.2d 694 (1st Dist. 2003) (plain error occurred where the evidence was not overwhelming and a properly instructed jury might have concluded that the offense was not brutal and heinous); **People v. Golden**, 342 Ill.App.3d 820, 795 N.E.2d 1011 (1st Dist. 2003) (**Apprendi** error constituted plain error where the jury might have found that the crimes were not brutal and heinous; further, the State failed to prove beyond a reasonable doubt that the error was harmless).

People v. Wagener, 196 Ill.2d 269, 752 N.E.2d 430 (2001) **Apprendi** applies where the case was on direct appeal when **Apprendi** was decided. See also, **People v. Ford**, 198 Ill.2d 68, 761 N.E.2d 735 (2001). Defendant did not forfeit **Apprendi** argument by not raising it at trial where **Apprendi** was not decided until two years after defendant's trial.

People v. Ford, 198 Ill.2d 68, 761 N.E.2d 735 (2001) There was no due process violation where defendant was found death-eligible but was sentenced to 100-year extended term; once death-eligibility finding was made, maximum authorized sentence was death even where extended term was based on factor that had not been an issue at death hearing. See also, **People v. Ballard**, 206 Ill.2d 151, 794 N.E.2d 788 (2002) (the State is not required under **Apprendi** and **Ring** to prove beyond a reasonable doubt, at the second stage of a death hearing, that there are no mitigating factors sufficient to preclude a death sentence; **Ring** referred only to aggravating factors); **People v. Thompson**, 222 Ill.2d 1, 853 N.E.2d 378 (2006) (same).

Hill v. Cowan, 202 Ill.2d 151, 781 N.E.2d 1065 (2002) **Apprendi** challenges may not be raised where the underlying conviction was entered pursuant to a guilty plea. Defendant, who raised an **Apprendi** challenge in a state *habeas corpus* petition, waived the issue by pleading guilty despite the lack of notice in the charge or the guilty plea admonitions that he could be sentenced to an extended term based on the "exceptionally brutal or heinous" factor. The sentencing statute is not void *ab initio*, for the "void *ab initio*" doctrine applies only to statutes that are unconstitutional on their face. See also, **People v. Jackson**, 199 Ill.2d 286, 769 N.E.2d 21 (2002) (defendant waived **Apprendi** argument by pleading guilty); **People v. Townsell**, 209 Ill.2d 543, 809 N.E.2d 103 (2004) (**Apprendi** claim that is waived pursuant to a guilty plea may not be considered on appeal under the plain-error rule); **People v. Beronich**, 334 Ill.App.3d 536, 778 N.E.2d 385 (2d Dist. 2002) (defendant who pleaded guilty before **Apprendi** was decided was not entitled to withdraw his plea because, in light of **Apprendi**, the trial court's admonishments of the possible maximum penalties were inaccurate, or because the trial court failed to advise him that he had the right to have a jury decide extended term factors).

People v. Green, 225 Ill.2d 612, 870 N.E.2d 394 (2007) **Apprendi** was not violated where the verdict form for robbery of a person over the age of 60 omitted the victim's age. **Apprendi** does not hold that a verdict form must include all elements of the offense - it merely requires that any "fact" which increases the penalty for a crime beyond the prescribed statutory maximum, other than a prior conviction, must be submitted to the jury and proven beyond a reasonable doubt. See also, **People v. Jones**, 219 Ill.2d 1, 845 N.E.2d 598 (2006).

People v. Hopkins, 201 Ill.2d 26, 773 N.E.2d 633 (2002) Where at least one extended term eligibility factor is valid under **Apprendi**, an extended term is not precluded because other extended term factors are not presented to the jury and proven beyond a reasonable doubt. Where the age of the victim was an element of one of the offenses for which defendant was convicted, and was therefore found by the jury to have been proven beyond a reasonable doubt, reversal was not required because the trial court also found two extended-term factors that were not proven beyond a reasonable doubt.

People v. Rivera, 227 Ill.2d 1, 879 N.E.2d 876 (2007) The court rejected the argument that the Illinois Constitution contains a broader right to have the jury decide extended term factors than does **Apprendi**.

People v. Carney, 196 Ill.2d 518, 752 N.E.2d 1137 (2001) **Apprendi** does not apply to consecutive sentencing. See also, **People v. Wagener**, 196 Ill.2d 269, 752 N.E.2d 430 (2001).
People v. Swift, 202 Ill.2d 378, 781 N.E.2d 292 (2002) The Illinois extended term statute, which at the time of defendant's sentence allowed a sentence in excess of 60 years based on the trial court's finding that the offense was accompanied by "exceptionally brutal or heinous" conduct, violated **Apprendi**. The extended-term statute was not unconstitutional on its face.

People v. Thurow, 203 Ill.2d 352, 786 N.E.2d 1019 (2003) **Apprendi** does not require that enhancing factors be alleged in charging instrument. See also, **People v. Jackson**, 199 Ill.2d 286, 789 N.E.2d 21 (2002). Statute which authorized sentence enhancement when victim of involuntary manslaughter was a member of

defendant's family or household was not facially unconstitutional for failure to give notice of the sentence-enhancing facts.

People v. Mata, 217 Ill.2d 535, 842 N.E.2d 686 (2005) The governor's commutation of defendant's death sentence does not preclude or render moot her attack to the sufficiency of the proof of the element that triggered the death sentence because it is the functional equivalent of an element of the offense.

In re Matthew M., 335 Ill.App.3d 276, 780 N.E.2d 723 (2d Dist. 2002) Statute governing extended jurisdiction juvenile (EJJ) prosecutions does not violate **Apprendi**. An EJJ designation amounts to a determination of the appropriate forum and not a substantive determination of the authorized maximum sentence.

People v. Perea, 347 Ill.App.3d 26, 807 N.E.2d 26 (1st Dist. 2004) The juvenile presumptive transfer statute does not violate **Apprendi**.

People v. Askew, 341 Ill.App.3d 548, 793 N.E.2d 56 (1st Dist. 2003) By enacting Public Act 91-953, the legislature intended to conform Illinois law to the requirements of **Apprendi**. The legislature intended to exempt from the reasonable doubt standard "extended term eligibility factors based upon prior convictions," although the plain language of the amended version of 730 ILCS 5/5-8-2 contains no such exemption. The version of section 5-8-2(a) under which defendant was sentenced should be read to include an exception for the fact of prior convictions.

People v. McClain, 343 Ill.App.3d 1122, 799 N.E.2d 322 (1st Dist. 2003) P.A. 91-953, which conformed Illinois law to **Apprendi**, concerning "only the *procedural* aspects of complying with **Apprendi**" and therefore could be applied to offenses which occurred before its effective date of February 23, 2001. Because **Apprendi** did not render any Illinois statute facially unconstitutional, a particular sentence satisfies due process so long as the procedures used to obtain it satisfied **Apprendi**. P.A. 91-953 is constitutional though it allows the State to charge elements of an offense by written notice rather than by information or indictment.

People v. O'Quinn, 339 Ill.App.3d 347, 791 N.E.2d 1066 (5th Dist. 2003) Even before P.A. 91-953, which attempted to conform Illinois sentencing law to **Apprendi**, was enacted, the extended-term statute did not violate **Apprendi** if the jury was required to determine the extended-term factor under the reasonable doubt standard. Use of a special interrogatory to determine the victim's age (i.e., the sentence enhancing factor) did not usurp legislative function and did not add an element of the offense, in violation of the *ex post facto* clause. Also, though special interrogatories are not favored in criminal cases, they may be used where the defense is not prejudiced.

People v. Norwood, 362 Ill.App.3d 1121, 841 N.E.2d 514 (1st Dist. 2005) Illinois statutes passed in response to **Apprendi** do not give defendant the right to a bifurcated hearing at which different finders of fact determine issues of guilt and extended term eligibility. (Note: effective July 1, 2006, Supreme Court Rule 451 authorizes trial judges to order bifurcated trials in enhanced sentencing cases).

People v. Fikara, 345 Ill.App.3d 144, 802 N.E.2d 260 (2d Dist. 2003) Statute requiring a new trial when a sentence is vacated on collateral attack due to an **Apprendi** violation does not require a new trial when the State seeks an extended sentence based solely on defendant's prior convictions.

People v. Johnson, 372 Ill.App.3d 772, 867 N.E.2d 49 (1st Dist. 2007) The trial court's use of a presentence investigation report to determine the existence of a prior conviction (to impose an extended-term sentence)

does not violate **Apprendi** or **Shepard v. U.S.**, 544 U.S. 13 (2005).

People v. Matthews, 362 Ill.App.3d 953, 842 N.E.2d 750 (1st Dist. 2005) **Shepard v. U.S.**, 544, U.S. 13 (2005), did not extend **Apprendi** to facts other than the mere conviction, such as defendant's age at the time of the prior conviction and the dates on which the prior offenses occurred. Factors, such as the sequence of prior convictions and defendant's age at the time of those convictions, concern facts "of" a prior conviction, and therefore may be determined by the sentencing judge.

Defendant failed to show that the presentence report was unreliable (to establish eligibility for a Class X sentence). Accord, **People v. Rivera**, 362 Ill.App.3d 815, 841 N.E.2d 532 (1st Dist. 2005); **People v. Yancy**, 368 Ill.App.3d 381, 858 N.E.2d 454 (1st Dist. 2005).

People v. Ware, 323 Ill.App.3d 47, 751 N.E.2d 81 (1st Dist. 2001) Recidivist sentencing statute is not unconstitutional based on lack of sentencing requirement that jury determine fact of prior convictions beyond a reasonable doubt. See also, **People v. Brown**, 327 Ill.App.3d 816, 764 N.E.2d 562 (4th Dist. 2002) (defendant's extended-term sentence, under statute authorizing imposition of extended sentence when defendant has prior convictions without requiring submission of issue to jury to be proved beyond a reasonable doubt, did not violate due process).

People v. Cabrera, 326 Ill.App.3d 555, 760 N.E.2d 1041 (3rd Dist. 2001) Natural life sentence based on murder conviction in another state qualifies for recidivism exception; no due process violation.

People v. Chanthaloth, 318 Ill.App.3d 806, 743 N.E.2d 1043 (2d Dist. 2001) Extended-term sentence for home invasion was not permissible where the statutory factors warranting the extended sentence (that the crime was exceptionally brutal and heinous, that the victim was over the age of 60, and that the victim was physically handicapped) were required to be submitted to the jury and proven beyond a reasonable doubt.

People v. Bell, 327 Ill.App.3d 238, 764 N.E.2d 551 (3rd Dist. 2002) Truth-in-sentencing provision did not violate defendant's due process and jury trial rights under **Apprendi**; the provision did not increase the maximum penalty to which defendant could be sentenced. See also, **People v. Fender**, 325 Ill.App.3d 168, 757 N.E.2d 645 (5th Dist. 2001).

Cumulative Digest Case Summaries **§45-1(b)(3)**

Alleyne v. United States, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 2922116 (No. 11-9335, 6/17/13)

Any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime. The Sixth Amendment guarantees defendants the right to have a jury find those facts beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

These principles apply to facts that increase the mandatory minimum sentence to which the defendant is subject. A fact triggering a mandatory minimum alters the prescribed range of sentences to which the defendant is exposed. Both the floor and the ceiling of sentence ranges define the legally prescribed penalty. Facts that increase the legally prescribed floor aggravate the punishment by requiring a judge to impose a higher punishment than he might wish. The core crime and the fact triggering the mandatory minimum sentence together constitute a new aggravated crime, each element of which must be submitted to the jury.

There being no basis in principle or logic to distinguish facts that increase the maximum from those that increase the minimum, the Court overruled **Harris v. United States**, 536 U.S. 545 (2002), which held that **Apprendi** did not apply to mandatory minimum sentences.

In the case before it, defendant received a mandatory minimum sentence of seven years based on the

judge's finding by a preponderance of the evidence that a firearm was "brandished." The Court vacated the sentence and remanded for resentencing consistent with the jury's verdict.

Descamps v. United States, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 3064407 (No. 11-9540, 6/20/13)

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Any findings that go beyond merely identifying a prior conviction raise serious Sixth Amendment concerns.

Where a statute provides that a prior conviction qualifies a defendant for an enhanced penalty, the fact of the prior conviction can enhance defendant's penalty without the need for judicial fact finding in two circumstances: (1) where the prior conviction is for violation of a statute whose elements are the same as, or narrower than, those of the qualifying offense (the "categorical approach") or (2) where the prior conviction is for violation of a "divisible" statute involving alternative elements, some of which may match the elements of the generic offense, but others of which may not (the "modified categorical approach"). Under the modified categorical approach, a court may consult a limited class of documents, such as the charging instrument or jury instructions, to determine which of the statute's alternative elements formed the basis for the defendant's conviction. **Shepard v. United States**, 544 U.S. 13 (2005). Both of these approaches focus on the elements, rather than the facts, of a crime and thereby avoid judicial fact finding that would violate the Sixth Amendment.

A prior conviction cannot qualify a defendant for an enhanced penalty without the need for judicial fact finding where the conviction is based on violation of a statute that is "indivisible," in that it does not contain alternative elements but criminalizes conduct that is broader than the qualifying offense. In that circumstance, a court must examine the case's underlying facts to determine whether defendant committed a qualifying offense. This kind of evidence-based inquiry that evaluates the facts that the judge or jury found violates the Sixth Amendment, which does not allow a sentencing court to make findings about non-elemental facts to increase a defendant's sentence.

Defendant was previously convicted under an indivisible statute whose elements were broader than the elements of the qualifying offense. The district court violated the Sixth Amendment when it enhanced defendant's penalty by looking behind the conviction to search for record evidence that defendant actually committed the qualifying offense.

Southern Union Co. v. United States, 567 U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2012 WL 2344465 (No. 11-94, 6/21/12)

Other than the fact of a prior criminal conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

No principled basis exists under **Apprendi** for treating criminal fines differently from sentences of imprisonment or a death sentence. So far as **Apprendi** is concerned, the relevant question is not whether a fine is insubstantial as compared to imprisonment or a death sentence. The question is whether the fine at issue is substantial enough to trigger the Sixth Amendment right to trial by jury. Where a fine is so insubstantial that the underlying offense is considered petty, the right of jury trial is not triggered and no **Apprendi** issue arises. Where a fine is substantial enough to trigger the Sixth Amendment's jury-trial guarantee, **Apprendi** applies in full.

The statute at issue subjected Southern Union to a maximum fine of $50,000 for each day of a violation. In light of the seriousness of that penalty, the company was properly accorded a jury trial. Judicial factfinding that enlarged the maximum punishment beyond what the jury's verdict allowed therefore violated **Apprendi**.

The court found support for this conclusion in the historical role of the jury at common law. A

review of state and federal decisions discloses that the predominant practice, where the amount of the fine was pegged to a determination of specific facts, was for such facts to be alleged in the indictment and proved to the jury. The court found unpersuasive the remaining arguments of the Government, and voiced by the dissent, as they had been rejected by **Apprendi**.

In re M.I., 2013 IL 113776 (No. 113776, 5/23/13)

Any fact other than the fact of a prior conviction that increases a defendant's punishment beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). The "statutory maximum" for **Apprendi** purposes is the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

The Extended Juvenile Jurisdiction (EJJ) statute does not violate **Apprend**i. An EJJ hearing does not adjudicate guilt or determine a specific sentence. The trial court only makes a procedural determination whether a juvenile should receive an adult sentence that is stayed pending successful completion of a juvenile sentence. The stayed sentence is based on the criminal offense for which the juvenile was convicted by the finder of fact and does not exceed the maximum for the offense provided by the Code of Corrections. As the Juvenile Court Act is a purely statutory creature, for purposes of **Apprend**i, the statutory maximum is the maximum sentence allowed for the offense by the Code of Corrections, not the juvenile sentence allowed by the Juvenile Court Act.

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

People v. Jones, 2016 IL 119391 (No. 119391, 10/20/16)

Under 730 ILCS 5/5-5-3.2(b)(7), an adult offender's prior juvenile delinquency adjudication may be considered as a factor in deciding whether to impose an extended-term sentence on the adult conviction if: (1) the prior adjudication involved an act which, if committed by an adult, would be a Class X or Class 1 felony, and (2) the instant conviction occurred within 10 years of the juvenile adjudication. In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the United States Supreme Court held that other than a prior conviction, any fact which increases the penalty for a crime beyond the statutory maximum must be submitted to the trier of fact and proven beyond a reasonable doubt. In response to **Apprendi**, the Illinois legislature passed 725 ILCS 5/111-3(c-5), which provides that if an alleged fact other than a prior conviction is not an element of the offense but is to be used to increase the range of penalties beyond the statutory maximum, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to the trier of fact as an aggravating factor, and proven beyond a reasonable doubt.

Defendant was convicted as an adult of aggravated robbery and sentenced to an extended term of 24 years based on a prior juvenile adjudication for residential burglary. Noting a conflict in national authority, the court held that as a matter of first impression in Illinois, a prior juvenile adjudication which qualifies an adult defendant for an extended term sentence falls within both **Apprendi's** prior conviction exception and the same exception in §111-3(c-5). The court concluded that proceedings which result in a juvenile adjudication contain the same constitutional procedural safeguards as proceedings which result in a prior conviction except, in most cases, the right to a jury trial. Because there is no constitutional right to a jury trial in juvenile proceedings, however, (**McKeiver v. Pennsylvania**, 403 U.S. 528 (1971) (plurality opinion)), both juvenile adjudications and prior convictions result from proceedings in which the minor or defendant received constitutionally sufficient procedural safeguards. Thus, a juvenile adjudication is a no less valid or reliable means of judging recidivism than is a prior conviction.

Because a juvenile adjudication is not subject to **Apprendi** or §111-3(c-5), the trial court did not err by relying on the pre-sentence report in deciding to impose an extended term.

2. Furthermore, the pre-sentence report was sufficiently reliable to establish that defendant had a delinquency adjudication for residential burglary. A pre-sentence report is compiled pursuant to statutory

guidelines which require the inclusion of certain information, including any history of delinquency. In addition, at the sentencing hearing defendant challenged some aspects of the pre-sentence report by asserting that he was a father, but did not dispute the accuracy of the representation that he had a prior delinquency adjudication. Under these circumstances, the pre-sentence report was sufficiently reliable to justify imposition of the extended term.

3. In a dissenting opinion, Justices Burke, Garman, and Kilbride found that under Illinois statutory law, a juvenile adjudication delinquency is not equivalent to an adult conviction and therefore does not qualify for the statutory exception in §111-3(c-5).

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

In re A.C., 2016 IL App (1st) 153047 (No. 1-15-3047, 5/18/16)

The combination of the Sex Offender Registration Act (730 ILCS 150/1) and the Sex Offender Community Notification Law (730 ILCS 152/101) (SORA) as applied to juveniles does not violate due process or the eighth amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between SORA's restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction and there is no need for further hearings. And SORA does not violate the eighth amendment/proportionate penalties clause since it does not involve punishment.

In re Omar M., 2012 IL App (1st) 100866 (No. 1-10-0866, 6/29/12)

The Extended Jurisdiction Juvenile Prosecutions (EJJ) statute allows imposition of both a juvenile sentence and an adult criminal sentence on a juvenile where the court has designated the proceeding as an EJJ proceeding. The designation may be made where the prosecution files a petition alleging commission of a felony offense by a minor 13 and older where the court finds probable cause to believe that the allegations in the petition are true. The minor may rebut the presumptive EJJ designation with clear and convincing evidence that sentencing as an adult would not be appropriate. A minor who is the subject to an EJJ prosecution has the right to a public trial by jury. 705 ILCS 405/5-810.

The EJJ statute does not violate **Apprendi v. New Jersey**, 530 U.S. 466 (2000). First, EJJ prosecutions are not adjudicatory, but dispositional. The EJJ procedure does not determine the minor's guilt or the specific sentence he will receive. It only determines the forum in which his guilt may be adjudicated. Adjudicatory hearings are subject to the due process requirement of proof beyond a reasonable doubt. Dispositional hearings are not.

Second, even if **Apprendi** did apply to EJJ prosecutions, the statute is constitutional. **Apprendi** requires that any fact other than the fact of a prior conviction that increases the penalty beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt. The statutory maximum for **Apprendi** purposes is not the maximum punishment allowed in the juvenile system. It is the sentence allowed in criminal court. Moreover, in an EJJ prosecution, a jury is required to find every element required for the statutory sentence beyond a reasonable doubt.

(Respondent was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Crawford, 2011 IL App (2d) 100533 (No. 2-10-0533, 11/21/11)

Except for the fact of a prior conviction, any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Every fact affecting the defendant's sentence is not an element of the offense, even though it may have a substantial impact.

Defendant was charged with a Class 3 felony, which is punishable by a period of probation, a term of periodic imprisonment, a term of conditional discharge, or a term of imprisonment of not less than two years and not more than five years. The Code of Corrections also contains a provision that the court "shall

impose a sentence of probation" unless it makes one of the enumerated findings. 730 ILCS 5/5-6-1(a).

This provision did not convert the maximum sentence to which defendant could be sentenced without an additional finding from five years' imprisonment to probation. The enumerated findings that the court was required to make before imposing a sentence other than probation were mere sentencing factors that guided the court's discretion in imposing a sentence at or below the statutory maximum.

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

People v. Daniel, 2014 IL App (1st) 121171 (No. 1-12-1171, 5/22/14)

The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Defendant argued that due to this instructional error a fact used to enhance his sentence (that he was armed with a firearm) was not properly submitted to the jury as required by **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

Under **Apprendi**, any fact (other than a prior conviction) that increases a penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. An **Apprendi** violation occurred here because the fact of being armed with a firearm (which increased defendant's sentence by 15 years) was never submitted to the jury since the instructions erroneously referred to being armed with a dangerous weapon, not a firearm.

This error, however, failed to satisfy either prong of the plain-error test. The plain-error doctrine permits a reviewing court to consider a forfeited error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence.

The first prong of the plain-error doctrine did not apply because there was overwhelming evidence that defendant was armed with a firearm, and indeed it was undisputed at trial that he carried a firearm. And the Illinois Supreme Court has specifically held that **Apprendi** errors do not fall within the narrow category of structural errors that qualify for the second prong of plain error. **People v. Crespo**, 203 Ill.2d 335 (2003).

The conviction was affirmed.

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

People v. Fernandez, 2014 IL App (1st) 120508 (No. 1-12-0508, 7/17/14)

Defendant was convicted of selling more than 1000 grams of cocaine in 2010, and based on his guilty pleas to drug offenses in 1992 and 1999 was sentenced as a habitual criminal to a natural life sentence. 730 ILCS 5/5-4.5-95(a) defines a habitual criminal as a person who has been twice convicted in state or federal court of an offense that contains the same elements as an offense which is now classified as a Class X felony in Illinois, and who thereafter is convicted of a Class X felony which is committed after the two prior convictions were entered.

1. The court rejected defendant's argument that the 1999 federal conviction did not qualify as a prior conviction under the Habitual Criminal Act. The court acknowledged that under Illinois law the type and amount of drugs are substantive elements of the offense, while under federal law such matters are sentencing factors rather than elements. In determining whether the requirements of the Habitual Criminal Act are satisfied, however, Illinois courts have rejected a formalistic interpretation of the Habitual Criminal Act. Instead, the focus is on the criminal conduct in question. The court concluded that had the federal offense in question been prosecuted as a State offense, it would have been a Class X felony. Therefore, the federal offense qualified as a prior conviction under the Act.

The court also noted that if defendant's argument was accepted, a federal drug conviction could never serve as a prior conviction under the Habitual Criminal Act despite the clear intent of the General Assembly.

2. Defendant argued that under **Taylor v. United States**, 495 U.S. 575 (1990) and **Descamps v.**

United States, 570 U.S. ___, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013), when determining whether there is a prior conviction for purposes of the Habitual Criminal Act the sentencing court may look only to the elements of the prior conviction and not to the conduct underlying the conviction. Defendant contended that his Sixth Amendment right to a jury trial was violated because the sentencing court looked beyond the elements of the federal conviction and examined the conduct involved in that conviction.

The court concluded that defendant's argument carried "some persuasive force" and that a constitutional issue could arise if the sentencing court considered facts which had not been proven beyond a reasonable doubt before a jury. However, the court concluded that the issue was forfeited in this case because defendant stipulated to testimony at the sentencing hearing concerning the facts underlying the prior offense and failed to object when the State used his federal guilty plea to establish the quantity of drugs in question.

3. The court also found, as a matter of first impression, that a natural life sentence under the Habitual Criminal Act does not violate the proportionate penalties clause of the Illinois Constitution even where the defendant has been convicted only of non-violent offenses. Although a mandatory life sentence for three nonviolent offenses is a harsh sentence, defendant was not a juvenile, had been convicted of the first offense when he was 36 years old and the third when he was 55, and was convicted as a principal. Furthermore, defendant's sale of cocaine was not a spontaneous decision, but resulted from careful planning and the recruitment of an accomplice.

Noting that the legislature limited the Habitual Criminal Act to Class X offenses and to persons who have exhibited recidivist tendencies, the court concluded that three convictions for distributing large quantities of narcotics constitutes serious criminal conduct for which a natural life sentence can be deemed proportionate. Defendant's natural life sentence was affirmed.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Jones, 2015 IL App (3d) 130053 (No. 3-13-0053, 5/15/15)

In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Here defendant was sentenced to an extended term of imprisonment based on a prior juvenile adjudication that was introduced at sentencing. Defendant argued that a juvenile adjudication does not fall within the **Apprendi** exception for prior convictions, and thus his extended term sentence was unconstitutional since his prior juvenile adjudication was not submitted to the jury or proved beyond a reasonable doubt.

As a matter of first impression in Illinois, the Appellate Court found that **Apprendi's** exception for prior convictions applies to juvenile adjudications. The prior-conviction exception was justified by the procedural safeguards (fair notice, right to jury trial, proof beyond a reasonable doubt) in place at the time of the prior conviction. The Court found that an adjudication of juvenile delinquency, while not containing all the procedural safeguards of a criminal trial, provided "a no less reliable basis for the enhancement of a sentence than is a standard adult criminal conviction," and was "sufficiently analogous to a prior criminal conviction to fall under the exception in **Apprendi**."

Accordingly, the State was not required to include the fact of defendant's prior adjudication in the indictment, present the fact to a jury, or prove it beyond a reasonable doubt. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

People v. Messenger, 2015 IL App (3d) 130581 (No. 3-13-0581, 9/1/15)

Under **Apprendi**, any fact other than a prior conviction which increases the maximum penalty for a crime must be charged, submitted to a jury, and proven beyond a reasonable doubt. The court found that taking judicial notice of an element of a crime does not violate **Apprendi** so long as the jury has the option to accept or reject the fact concerning which judicial notice was taken. An IPI instruction (Criminal 4th No.

1.01) informs the jury that it need not accept as conclusive any fact that has been judicially noticed.

In an aggravated battery case in which the trial court took judicial notice that the jail was owned by the county, the trial court failed to give IPI Criminal 4th No. 1.01. Instead, the court gave a non-IPI instruction stating that the "entire county jail is public property." The Appellate Court found that the failure to give the IPI instruction constituted error, but that error was harmless in light of the overwhelming evidence of guilt, the trial court's oral admonishment to the jury during trial that the court had taken judicial notice that the jail was public property but that judicially noticed facts are not conclusive, and the inability of the defense to produce any evidence to rebut the fact that the jail was public property.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Gavin Dow, Chicago.)

People v. Mimes, ___ Ill.App.3d ___, 953 N.E.2d 55 (1st Dist. 2011) (No. 1-08-2747, 6/20/11)

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

Defendant was charged with attempt first degree murder and was subject to an additional mandatory term of 25 years to life based on his personal discharge of a firearm that caused great bodily harm. 720 ILCS 5/8-4(c)(1)(D). The indictment alleged that defendant committed attempt first degree murder in that "he, without lawful justification, with intent to kill, did any act, to wit: shot Lenard Richardson about the body with a firearm, which constituted a substantial step toward the commission of the offense of first degree murder," and cited to subsection (a), but not subsection (c), of the attempt statute, as well as the first degree murder statute.

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

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

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

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

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

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

725 ILCS 5/111-3(c) provides that where the State seeks an enhanced sentence based on a prior conviction, the charge must give notice of the intent to seek an enhanced sentence and allege the prior conviction. "However, the fact of such prior conviction and the State's intention to seek an enhanced

sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial."

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

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

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

People v. Owens, 2016 IL App (4th) 140090 (No. 4-14-0090, 8/2/16)

Under **Apprendi**, any fact (other than the fact of a prior conviction) that increases a penalty beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Illinois has codified **Apprendi** in the code of criminal procedure. 725 ILCS 5/111-3(c-5).

Defendant was convicted of driving with a revoked license, which is ordinarily a Class A misdemeanor. 625 ILCS 5/6-303(a). But when a defendant has been previously convicted of driving with a revoked license and the original revocation was for driving under the influence, it is a Class 4 felony. 625 ILCS 5/6-303(d). Defendant conceded that the existence of the prior revocation was a prior conviction not covered by **Apprendi**, but argued that the reason for the revocation was more than the mere fact of a prior conviction and thus under **Apprendi** had to be proved to a jury beyond a reasonable doubt.

The court rejected defendant's argument. It held that the difference between a prior conviction and the reason for the prior conviction was "a distinction without a difference," and thus **Apprendi** did not apply.

The dissent believed that the reason for the original revocation was a fact that went beyond the mere existence of a prior conviction and thus **Apprendi** should apply.

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

People v. Pollard, 2016 IL App (5th) 130514 (No. 5-13-0514, 5/10/16)

The Sex Offender Registration Act (730 ILCS 150/1) and its attendant statutory restrictions (SORA) do not violate due process or the Eighth Amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between the SORA restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction which provides all the procedural protections required by due process. And SORA does not violate the Eighth Amendment/Proportionate Penalties Clause since it does not involve punishment.

(Defendant was represented by Assistant Defender Joshua Bernstein, Chicago.)

People v. Wade, 2015 IL App (3d) 130780 (No. 3-13-0780 & 3-13-0781, 10/7/15)

Defendants were tried in a joint trial under charges of: (1) attempt murder alleging that defendants performed a substantial step toward the commission of attempt murder when they "shot [the victim] about the body with a handgun," and (2) aggravated battery with a firearm alleging that in the course of committing a battery, defendants knowingly and without legal justification caused an injury "by means of discharging a firearm, in that [they] shot [the complainant] about the body with a handgun." The jury was instructed that if it convicted of attempt murder it was required to also determine whether the defendants personally discharged a firearm and proximately caused great bodily harm, permanent disability, or permanent disfigurement. 725 ILCS 5/8-4(c)(1)(D) provides a 25-year sentencing enhancement where the defendant

"personally discharged a firearm that proximately caused" great bodily harm, permanent disability, permanent disfigurement, or death.

On appeal, defendants argued that the trial court committed plain error by instructing the jury concerning the enhancement where the indictments did not make the same allegations.

1. In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the Supreme Court held that a fact other than a prior conviction which enhances a penalty beyond the statutory maximum must be proven to the jury beyond a reasonable doubt. In response to **Apprendi**, the Illinois General Assembly adopted 725 ILCS 5/111-3(c-5), which states that when an alleged fact other than a prior conviction is not an element of the offense but is sought to be used to increase the range of penalties beyond the statutory maximum that could otherwise be imposed, the alleged fact "must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt."

2. The Appellate Court found that defendants were placed on notice that the State would seek the enhanced sentence. Although the indictments were inartfully drafted, the allegations that defendants shot the victim "about the body with a handgun" alleged that defendants personally discharged a weapon. In addition, the indictments for aggravated battery with a firearm stated that defendants caused injury to the victim "by means of the discharging of a firearm." All counts of a multiple count indictment are to be read as a whole, and elements missing from one count of an indictment may be supplied by another count.

The court also held that defendants were placed on notice of the "proximate cause" factor where the indictments for aggravated battery with a firearm stated that defendants caused the victim's injuries. Although the phrase "proximately caused" was not used, it was reasonable for the defendants to infer that the jury would consider whether defendants caused bodily harm. The court also noted that at the arraignment, the trial judge discussed the possible sentencing ranges and mentioned that there would be a 25-year enhancement if the evidence showed that gunshot wounds caused great bodily harm. Under these circumstances, defendants could not claim that they were unaware that the State would seek the enhancement.

The court also noted that the State's discovery disclosed that it would call an expert to testify about the victim's injuries and that the State presented overwhelming evidence that the gunshot wounds caused great bodily harm. Because defendants had ample notice that the State would seek the enhancement based on the injuries which the gunshots caused, the trial court's instructions did not constitute error.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

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§45-2
Change in Sentencing Provision; Right to Election

Bradley v. U.S., 410 U.S. 605, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973) Narcotic offenses committed under prior law are to be punished as provided under prior law, despite the fact that sentencing was subsequent to effective date of new law.

People v. Gancarz, 228 Ill.2d 312, 888 N.E.2d 48 (2008) 1. If the applicable sentencing provisions have been changed by an amendment which took effect after the offense was committed but before the sentencing hearing, defendant may elect to be sentenced under the law in effect at the time of sentencing. See also, **People v. Jackson**, 99 Ill.2d 476, 459 N.E.2d 1362 (1984); **People v. Hillenbrand**, 121 Ill.2d 537, 521 N.E.2d 900 (1988); **People v. West**, 142 Ill.App.3d 876, 492 N.E.2d 566 (1st Dist. 1986).

2. There is no such right to elect where a new statute changes the substance of the existing offense

instead of merely mitigating the punishment.

3. Where a defendant has the right to choose between sentencing provisions, due process requires that he be advised of that right. See **People v. James**, 46 Ill.2d 71, 263 N.E.2d 5 (1970) (the failure to admonish defendant of his right to elect sentencing under the law at the time of the offense, which provided for sentencing by the jury, denied due process); **People v. Strebin,** 209 Ill.App.3d 1078, 568 N.E.2d 420 (4th Dist. 1991) (because the trial court failed to advise defendant of his right to elect the sentencing law in effect at the time of the offense or sentencing, defendant's sentence of 24 months' periodic imprisonment (which was improper under an amendment to the statute that was made after defendant was sentenced) was improper; the issue was not waived for appeal). But see **People v. Gonzales**, 56 Ill.2d 453, 308 N.E.2d 587 (1974) (the trial judge's failure to admonish defendant concerning his right to be sentenced under the statute in effect at the time of the offense did not deny due process or equal protection; whether defendant would have benefitted under the prior law is merely speculative, and defendant's delay in filing a post-conviction petition prejudiced the possibility of a trial); **People v. Crooks**, 78 Ill.App.3d 711, 397 N.E.2d 561 (3d Dist. 1979) (defendant's election to be sentenced under the statute in effect at the time of the offense was not invalid because the record failed to show his counsel advised him about the effects of his election). See also, **People v. Peoples**, 71 Ill.App.3d 842, 390 N.E.2d 554 (3d Dist. 1979) (a trial judge is not required to advise defendant of the specific sentences he would impose under the alternative sentencing laws).

4. Here, the public act (Public Act 93–213), which removed parts of the reckless homicide statute and added and amended parts of the aggravated DUI statute, resulted in substantive changes to the reckless homicide statute, not merely a mitigation of the sentence for reckless homicide. Therefore, defendant was not entitled to be sentenced under the reckless homicide statute as it existed at the time of his sentencing.

People v. Gersch, 135 Ill.2d 284, 553 N.E.2d 281 (1990) Where a sentencing statute or statutory amendment has been struck down as unconstitutional, that statute or statutory amendment is void *ab initio* and the previous sentencing statute or statutory provision applies to defendant. See also, **People v. Tellez-Vallencia**, 295 Ill.2d 122, 692 N.E.2d 407 (1998).

Roth v. Yackley, 77 Ill.2d 423, 396 N.E.2d 520 (1979) Where the legislature disagrees with the judicial interpretation of a statute, it may amend the statute to apply prospectively. But, any legislative attempt to apply such an amendment to events occurring before the effective date represents an improper attempt to annul or overrule a judicial decision.

People v. Grant, 71 Ill.2d 551, 377 N.E.2d 4 (1978) The provision of the Sentencing Act of 1977 under which a defendant sentenced under the Unified Code of Corrections before that date "shall not have the right to election [to be sentenced under the Unified Code or the new Sentencing Act] even though his case has not been finally adjudicated on appeal," was upheld.

People v. Rea, 80 Ill.App.3d 77, 399 N.E.2d 302 (5th Dist. 1979) After defendant's conviction was reversed on direct appeal, defendant, at his second trial, was entitled to elect to be sentenced under the pre-1978 or post-1978 sentencing law. Compare, **People v. Cretton**, 86 Ill.App.3d 182, 407 N.E.2d 1025 (5th Dist. 1980) (no right to election where conviction affirmed on appeal but sentence vacated). See also, **People v. Lowther**, 85 Ill.App.3d 735, 407 N.E.2d 1038 (2d Dist. 1980).

People v. Perkins, 67 Ill.App.3d 911, 385 N.E.2d 184 (4th Dist. 1979) Where defendant was placed on probation before February 1, 1978, but his probation was revoked after that date, he was not entitled to elect to be sentenced under the sentencing statute effective on February 1, 1978. See also, **People v. Denier**, 76 Ill.App.3d 214, 394 N.E.2d 1073 (2d Dist. 1979).

People v. Johnson, 133 Ill.App.2d 818, 263 N.E.2d 901 (4th Dist. 1970) Statutory amendment that increases

punishment after offense is *ex post facto* law. Where a statutory sentencing amendment can result to the disadvantage of a previously sentenced defendant, its application to defendant would violate the proscription against *ex post facto* laws.

People v. Balle, 379 Ill.App.3d 146, 882 N.E.2d 1275 (1st Dist. 2008) The trial court's failure to advise defendant under which version of the Habitual Criminal Act he wanted to be sentenced constituted harmless error.

Cumulative Digest Case Summaries **§45-2**

Peugh v. U.S., ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2013) (No. 12-62, 6/10/13)

1. The *ex post facto* clause prohibits the passage of laws which increase the severity of an offense or inflict greater punishment than was authorized when the crime was committed. The *ex post facto* clause applies to laws which criminalize conduct that was innocent when committed, make a crime more serious than it was when committed, inflict greater punishment than attached to the crime when it was committed, or reduce the burden of evidence required to convict below what was required at the time of the offense.

A law may violate the *ex post facto* clause even where it does not affect the maximum sentence for which the defendant is eligible, and even where the sentencing authority retains some sentencing discretion. An *ex post facto* violation is not created by mere speculation or conjecture that a change in the law will retrospectively increase the punishment for the crime. Instead, the touchstone of an *ex post facto* inquiry is whether a given change in the law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes.

The court concluded that the *ex post facto* clause was violated where the trial court applied federal sentencing guidelines which were adopted after the crime was committed.

2. Although federal sentencing guidelines are advisory only, they represent the starting point of an appropriate sentence. The district court must then consider the arguments of the parties and specified statutory factors to determine the appropriate sentence. The trial court may not presume that the guideline range is reasonable, and must explain the basis for its sentence on the record.

Error occurs where the trial court fails to calculate the guideline range correctly or treats the guidelines as mandatory. A reviewing court may, but need not, presume that a sentence that is within the guidelines is reasonable.

The court concluded that application of the amended guidelines presented a substantial risk that the punishment for the crime would be increased. First, the new guidelines resulted in a sentencing range that was more than double that which would have been suggested by the guidelines in effect at the time of the offense. Second, because the trial court is required to use the guidelines as a starting point in its analysis, the guidelines provide the framework for sentencing even if the trial court ultimately decides to give a sentence outside the guidelines. The court concluded that the guidelines impose a series of requirements that limit the exercise of discretion by sentencing courts and in general "steer" courts to impose sentences that are within the guidelines. Thus, using guidelines which increase the suggested sentence poses a substantial risk that a higher sentence will be imposed.

The court rejected the prosecution's argument that because the guidelines are not mandatory, they do not constitute a "law" for purposes of the *ex post facto* clause. The court noted that a change in the applicable law need not be binding on the sentencing authority in order for an *ex post facto* violation to occur. Furthermore, because district courts must begin their sentencing analysis with the guidelines and reviewing courts may regard a sentence within the guidelines as reasonable, the guidelines "anchor both the district court's discretion and the appellate review process."

Because there was a substantial risk of greater punishment where application of the new guidelines increased the suggested sentence for bank fraud from 30 to 37 months to 70 to 87 months, the *ex post facto*

clause was violated. The court reversed the sentence and remanded the cause for resentencing.

People v. Reyes, 2016 IL 119271 (No. 119271, 9/22/16)

Defendant, who was 16 years old at the time of the offense, was tried as an adult and convicted of first degree murder and two counts of attempted murder. The trial court imposed a mandatory minimum sentence of 45 years for first degree murder which included a 25-year mandatory firearm enhancement. The court also sentenced defendant to 26 years for the two attempt murder convictions, both of which included a 20-year mandatory firearm enhancement. All of the sentences were required to run consecutively resulting in a mandatory minimum sentence of 97 years. Defendant was required to serve a minimum of 89 years before he would be eligible for release.

The Illinois Supreme Court held that defendant's sentence was a *de facto* mandatory life sentence that was unconstitutional under **Miller v. Alabama**, 567 U.S. ___, 132 S.Ct. 2455 (2012). A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect as an actual mandatory life sentence. In either situation the defendant will die in prison. **Miller** held that a juvenile may not be sentenced to a mandatory unsurvivable prison term unless the court first considers his youth, immaturity, and potential for rehabilitation.

Here defendant was 16 when he committed the offense and since he must serve 89 years, he will remain in prison until he is 105. Defendant's sentence is therefore a mandatory *de facto* life sentence.

The court vacated defendant's sentence and remanded for a new sentencing hearing under the newly enacted sentencing scheme in 730 ILCS 5/5-4.5-105 which requires the sentencing court to take into account specific factors in mitigation when sentencing a juvenile. Additionally, the court has discretion to not impose the firearm enhancements. Without those enhancements defendant's minimum aggregate sentence would be 32 years, a term that is not a *de facto* life sentence.

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

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§45-3
Sentencing Hearing

§45-3(a)
General Considerations

People v. LaRocco, 123 Ill.App.2d 123, 260 N.E.2d 52 (1st Dist. 1970) The right to a sentencing hearing entitles a defendant to a reasonable time to prepare for the hearing and to present mitigating evidence as to his moral character, life, family, occupation, and criminal record.

People v. Jones, 94 Ill.2d 275, 447 N.E.2d 161 (1982) A defendant does not have the right to cross-examine all sources of information presented at sentencing.

People v. Ramirez, 98 Ill.2d 439, 457 N.E.2d 31 (1983) The Fifth Amendment privilege against self-incrimination applies at sentencing hearings. See also, **People v. Iseminger**, 202 Ill.App.3d 581, 560 N.E.2d 445 (4th Dist. 1990) (a trial judge may properly make inquiries of a defendant at a sentencing hearing, regardless whether he testifies or exercises his right of allocation; here, the judge should have held a hearing on defendant's Fifth Amendment claim, which he made after being held in direct civil contempt for refusing to answer the judge's questions); **People v. Moman**, 201 Ill.App.3d 293, 558 N.E.2d 1231 (1st Dist. 1990); **People v. Anderson**, 284 Ill.App.3d 708, 672 N.E.2d 1314 (4th Dist. 1996) ("defendant has no right to refuse to answer the trial court's questions at the sentencing hearing except - perhaps - when fifth amendment concerns are legitimately implicated").

People v. Hobbs, 86 Ill.2d 242, 427 N.E.2d 558 (1981) At the sentencing hearing, the trial judge did not specifically offer defendant an opportunity to make a statement prior to imposition of sentence. Because defendant did not request an opportunity to speak and was represented by counsel who spoke at length on his behalf, "formal, but not reversible" error was committed.

People v. Terrell, 132 Ill.2d 178, 547 N.E.2d 145 (1989) A sentencing judge is presumed to have considered only proper evidence unless the contrary is affirmatively shown on the record. See also, **People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989); **People v. Beyah**, 102 Ill.App.3d 434, 430 N.E.2d 83 (1st Dist. 1981); **People v. Sawyer**, 139 Ill.App.3d 383, 487 N.E.2d 662 (3d Dist. 1985) (a judge is presumed to have considered mitigating evidence absent some indication to the contrary).

People v. Burnett, 385 Ill.App.3d 610, 897 N.E.2d 827 (1st Dist. 2008) Under 730 ILCS 5/5-3-2(b) and 730 5/5-3-3, the trial court may order physical and mental examinations before sentencing if the judge desires more information than is available in the presentence report. The failure to order such examinations is reviewed for abuse of discretion.

The trial court did not abuse its discretion by failing to order physical or mental examinations where defendant's hospitalization in a mental health facility occurred more than 20 years earlier, the presentence report adequately recounted defendant's history of drug abuse and present physical condition, and the minor physical problems indicated by the report did not demonstrate any special need for further investigation. Because the record did not indicate that a complete medical and physical examination would have discovered facts not in the presentence report, additional examinations were unnecessary.

People v. Miller, 58 Ill.App.3d 1019, 374 N.E.2d 1118 (4th Dist. 1978) Where defendant was convicted of separate offenses before separate judges, it was not improper for the judges to hold a joint sentencing hearing with defendant's consent.

Cumulative Digest Case Summaries **§45-3(a)**

People v. Goods, 2016 IL App (1st) 140511 (No. 1-14-0511, 9/12/16)

The federal constitution guarantees a public trial as a restraint on the possible abuse of judicial power. But the presumption of openness may be overcome where closure is essential to preserve higher values.

At his sentencing hearing, defendant asked to present certain mitigating evidence regarding his cooperation with the State *in camera* since he feared for his safety if he were to be labeled a "snitch." The trial court denied the request, stating that it could not hear such evidence *in camera* unless there was a statute permitting it.

In a case of first impression in Illinois. the Appellate Court held that the trial court erred in not allowing defendant to present his mitigation *in camera*. The court held that a defendant should be allowed to present mitigation *in camera* when he shows good cause for doing so. Here defendant's concern for his safety showed good cause. The trial court was essentially asking defendant to choose between his safety and his ability to present mitigation. Defendant was thus denied a fair hearing.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

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§45-3(b)
Rules Governing the Admission of Evidence, Including Hearsay Evidence, Polygraph Evidence, and Suppressed Evidence

People v. Crews, 38 Ill.2d 331, 231 N.E.2d 451 (1967) A sentencing court is not bound by the usual rules of evidence, but may search anywhere within reasonable bounds for facts which tend to aggravate or mitigate the offense. Before relying on such information, the court must determine its accuracy, and it must shield its mind from what might be the prejudicial effect of unreliable or improper evidence. See also, **People v. Adkins**, 41 Ill.2d 297, 242 N.E.2d 258 (1968); **People v. Meeks**, 81 Ill.2d 524, 411 N.E.2d 9 (1980); **People v. Jett**, 294 Ill.App.3d 822, 691 N.E.2d 145 (5th Dist. 1998) (the ordinary rules of evidence are relaxed during a sentencing hearing; the only requirement for admission is that the trial court determine, in its sound discretion, that the evidence is reliable and relevant).

People v. Foster, 119 Ill.2d 69, 518 N.E.2d 82 (1987) Although double hearsay is not necessarily so unreliable that it should be excluded from sentencing hearings, "where this court has approved the admission of double hearsay, at least some parts of the double hearsay have been corroborated by other evidence." See also, **People v. Tigner**, 194 Ill.App.3d 600, 551 N.E.2d 304 (1st Dist. 1990) (providing that hearsay is not *per se* inadmissible at a sentencing hearing and that double hearsay should be corroborated at least in part by other evidence); **People v. Spears,** 221 Ill.App.3d 430, 582 N.E.2d 227 (2d Dist. 1991) (the trial judge committed prejudicial error by relying on double and triple hearsay allegations in the presentence report; there was a defense objection, and no reliable evidence was introduced to support the allegations).

People v. Jett, 294 Ill.App.3d 822, 691 N.E.2d 145 (5th Dist. 1998) Hearsay evidence is not *per se* inadmissible - the fact that evidence is hearsay affects only weight and not admissibility, and hearsay evidence may be found relevant and reliable due to corroborating evidence. The trial court properly admitted the non-testifying co-defendant's statement where there was sufficient *indicia* of reliability to overcome the presumption that a co-defendant's confession is unreliable.

People v. Szabo, 94 Ill.2d 327, 447 N.E.2d 193 (1983) Polygraph evidence may not be used at sentencing. See also, **People v. Ackerman**, 132 Ill.App.2d 251, 269 N.E.2d 737 (2d Dist. 1971); **People v. Lamkin**, 9 Ill.App.3d 771, 291 N.E.2d 512 (5th Dist. 1972).

People v. Rose, 384 Ill.App.3d 937, 894 N.E.2d 156 (2d Dist. 2008) The trial judge did not err by considering, at defendant's sentencing, evidence which had been suppressed in an unrelated case several years earlier. Evidence which is illegally seized is not inherently unreliable, and there was no reason to believe that the evidence was unreliable in this case. Thus, the evidence was admissible.

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§45-3(c)
Victim-Impact Statements

Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) The Eighth Amendment does not prohibit a capital sentencing jury from considering victim impact evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family, or precluding a prosecutor from arguing such evidence at a capital sentencing hearing. See also, **People v. Felella**, 131 Ill.2d 525, 546 N.E.2d 492 (1989) (victim impact statements may be used at non-capital sentencing hearings).

People v. Felella, 131 Ill.2d 525, 546 N.E.2d 492 (1989) The statutory provision providing that the sentencing court "shall consider any statements made by the victim," does not violate the separation of powers doctrine. See also, **People v. Young**, 187 Ill.App.3d 977, 543 N.E.2d 986 (1st Dist. 1989).

People v. Richardson, 196 Ill.2d 225, 751 N.E.2d 1104 (2001) Considering multiple victim impact

statements during sentencing violates the Rights of Crime Victims and Witnesses Act. But, defendant was not entitled to relief. Article I, §8.1 of the Illinois Constitution, which provides that nothing in the "Crime Victim's Rights" amendment "or any law enacted under [that amendment] shall be construed as creating a basis for vacating a conviction or a ground for appellate relief in any criminal case," limits the general grant of appellate jurisdiction in Article VI, §6 of the Illinois Constitution and removes victim's rights "from the spectrum of issues which a criminal defendant may appeal." The Constitution's prohibition of appellate relief does not relieve the trial court of responsibility to exercise appropriate discretion at sentencing, however. The Crime Victim's Rights Act does not indicate the weight to be given to such evidence, and due process may be violated where victim impact evidence is so prejudicial as to render the trial fundamentally unfair. See also, **People v. Benford**, 295 Ill.App.3d 695, 692 N.E.2d 1285 (1st Dist. 1998) (any error resulting from the consideration of more than one victim impact statement "would have availed defendant nothing"; the Act was "intended as a shield to protect the rights of victims and witnesses," not "as a sword by criminal defendants seeking appellate relief").

People v. Ellzey, 173 Ill.App.3d 509, 527 N.E.2d 1058 (3d Dist. 1988) Victim may properly testify at the sentencing hearing even though no written impact statement was prepared.

People v. Wallace, 170 Ill.App.3d 329, 524 N.E.2d 677 (2d Dist. 1988) Victim's written statement may be introduced at sentencing, even where the victim is not present in court.

Cumulative Digest Case Summaries **§45-3(c)**

People v. Raney, 2014 IL App (4th) 130551 (No. 4-13-0551, 4/4/14)

1. 725 ILCS 120/6 provides that where the defendant has been convicted of a violent crime and a victim or representative of the victim is present at the sentencing hearing, the victim or representative shall have the right to address the court concerning the impact of defendant's conduct on the victim. In addition, immediate family members may be permitted to address the court regarding the impact of defendant's criminal conduct on them and on the victim.

While details of crimes other than those for which the defendant is being sentenced are relevant as aggravation because they illuminate the character and record of a defendant, the impact of a prior crime on its victim does not provide assistance to the sentencing court and is inadmissible as aggravation. Furthermore, although evidence of unrelated criminal conduct for which the defendant has not been convicted may be considered at sentencing, such evidence should be presented by witnesses who can be confronted and cross-examined rather than by hearsay allegations in the pre-sentence report. In addition, the defendant must have an opportunity to rebut such testimony. Finally, while hearsay evidence is permitted at a sentencing hearing, it should be presented by live testimony rather than by allegations in the pre-sentence report.

2. Where defendant was sentenced for aggravated battery, battery, unlawful violation of an order of protection and criminal trespass to a residence, the trial court erred by considering a victim impact statement by the son of defendant's ex-wife. The statement was contained in the pre-sentence report, and the statement concerned misconduct other than that for which defendant was being sentenced. The court noted that had the son been called as a witness at the sentencing hearing, his testimony concerning uncharged crimes could have been considered as reflecting on defendant's character. However, it was error for the trial court to consider a statement that was merely included in the pre-sentence report and not presented through live testimony.

The court concluded, however, that the error did not constitute plain error because defendant was not unduly prejudiced in light of the evidence that was properly presented. First, defendant's ex-wife read an extensive victim impact statement which covered many of the same areas as the son's statement and was subject to questioning by defense counsel. Second, the pre-sentence report showed that defendant had eleven convictions over a 20-year period, and that one of the prior convictions involved the same victim as the

charge in this case. Third, the State did not rely on the son's statement when making its argument at sentencing. Finally, the record showed that the trial judge would have imposed the same sentence had the son's statement not been considered.

(Defendant was represented by Supervisor Larry Bapst, Springfield.)

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§45-3(d)
Requirement of Presentence Report

People v. Harris, 105 Ill.2d 290, 473 N.E.2d 1291 (1985) A presentence report is required before a defendant can be sentenced on a felony conviction following revocation of probation. See also, **People v. York,** 230 Ill.App.3d 874, 596 N.E.2d 187 (3d Dist. 1992) (unless there is an agreed sentence, a presentence report must be considered prior to sentencing on a felony conviction).

People v. Youngbey, 82 Ill.2d 556, 413 N.E.2d 416 (1980) Statutory provision requiring that a presentence investigation and written report is not an unconstitutional encroachment by the legislature upon either the judicial or executive powers.

The presentence investigation and report requirement is mandatory and cannot be waived. See also, **People v. Childress**, 306 Ill.App.3d 755, 715 N.E.2d 1194 (4th Dist. 1999) (because a criminal defendant is not allowed to waive preparation of a presentence report, he cannot forfeit a presentence report through some sort of procedural default).

People v. Young, 124 Ill.2d 147, 529 N.E.2d 497 (1988) On a remand for resentencing, the trial judge is not required to order a supplemental presentence report. See also, **People v. Brown**, 198 Ill.App.3d 156, 555 N.E.2d 794 (4th Dist. 1990).

People v. Meeks, 81 Ill.2d 524, 411 N.E.2d 9 (1980) The presentence report did not comply with the statutory requirements because it failed to include information relating to special resources available in the community to assist defendant's rehabilitation. But, defendant failed to preserve the issue for review, for defense counsel, who inspected the report and corrected certain errors, did not alert the trial court of the deficiency. Thus, the "requirement that the trial judge consider the presentence report was complied with in the present case; any objections to the sufficiency of the report must first be presented to the trial court."

People v. Bean, 137 Ill.2d 65, 560 N.E.2d 258 (1990) Where a defendant is sentenced to death after a capital sentencing hearing, the trial judge may impose sentences of imprisonment on the other convictions without requiring a presentence report. The sentencing judge received information during the trial and the capital sentencing hearing that "was the substantial equivalent of any information about defendant's background, criminal history, and physical and mental condition that would have been included in a presentence investigation report." See also, **People v. Lewis**, 191 Ill.App.3d 155, 547 N.E.2d 599 (4th Dist. 1989) (a presentence report is not required for a capital sentencing hearing); **People v. Boston**, 271 Ill.App.3d 358, 648 N.E.2d 1002 (1st Dist. 1995) (trial court need not consider formal presentence report before imposing non-death sentence after jury rejects death sentence at second stage of death hearing).

People v. Evans, 273 Ill.App.3d 252, 651 N.E.2d 1143 (5th Dist. 1994) Prosecutor's recitation of defendant's felony record was not a finding of prior criminal history so as to obviate need for written presentence report where statement did not reveal pending and misdemeanor charges; because trial court might not have accepted plea agreement had defendant's full criminal history been known, the cause was

remanded for resentencing.

People v. York, 230 Ill.App.3d 874, 596 N.E.2d 187 (3d Dist. 1992) Defendant was entitled to a new sentencing hearing where the trial judge failed to order a presentence investigation and, at the judge's request, both parties agreed to waive the report. That the trial judge may have been familiar with defendant from sentencing him on another case was insignificant where the prior case was a year before the instant one and the judge did not explicitly consider the old report before imposing sentence.

People v. Andrus, 210 Ill.App.3d 878, 568 N.E.2d 1388 (5th Dist. 1991) A trial judge may not order that the presentence report contain less than the matters statutorily required. Thus, the judge erred by ordering that the presentence report be limited exclusively to defendant's criminal history.

People v. Stuckey, 231 Ill.App.3d 550, 596 N.E.2d 646 (1st Dist. 1992) Defendant's sentence was vacated and the cause was remanded for a new sentencing hearing due to the omission of defendant's adult criminal history from the presentence investigation report.

People v. Torres, 146 Ill.App.3d 250, 496 N.E.2d 1060 (1st Dist. 1986) The trial judge properly sentenced defendant based upon a presentence report that had been prepared six weeks earlier for another sentencing hearing. Defense counsel did not object to the timeliness of the earlier report, and stated that there was no need for an updated one. See also, **People v. Stinson**, 200 Ill.App.3d 223, 558 N.E.2d 642 (4th Dist. 1990) (presentence report filed four months earlier was expressly adopted by defendant); **People v. Burba**, 134 Ill.App.3d 228, 479 N.E.2d 936 (1st Dist. 1985) (trial judge did not err by relying on a 13-month-old presentence report without, *sua sponte*, ordering a more timely report; defendant forfeited this issue by failing to object to the timeliness of the report).

People v. Lynch, 122 Ill.App.3d 121, 460 N.E.2d 817 (1st Dist. 1984) A presentence report is required when a defendant is tried *in absentia*. See also, **People v. Fortune,** 234 Ill.App.3d 531, 600 N.E.2d 501 (2d Dist. 1992) (defendant was tried *in absentia*; most of the deficiencies in defendant's presentence report were caused by defendant's willful absence).

People v. Cole, 23 Ill.App.3d 620, 321 N.E.2d 71 (3d Dist. 1974) Presentence reports necessarily contain hearsay and other normally inadmissible evidence.

People v. Hemphill, 62 Ill.App.3d 977, 379 N.E.2d 1284 (1st Dist. 1978) Defendant's sentences were vacated and the cause remanded for resentencing because the presentence report was not part of the record and available to the appellate court. Also, the report had not been made available to the defense three days prior to the sentencing hearing, as required, and there was no evidence that defendant waived this requirement. See also, **People v. Spurlark**, 67 Ill.App.3d 186, 384 N.E.2d 767 (1st Dist. 1978) (State's improper failure to tender the presentence report to defendant three days before sentencing was not prejudicial).

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§45-3(e)
Sentencing Hearing Following Guilty Plea

People v. Barto, 63 Ill.2d 17, 344 N.E.2d 433 (1976) When defendant enters a negotiated plea and the trial judge concurs in the recommended disposition, no formal sentencing hearing is required. See also, **People v. Cooper**, 33 Ill.App.3d 367, 342 N.E.2d 413 (5th Dist. 1975). But see, **People v. Bradford**, 1 Ill.App.3d

38, 272 N.E.2d 258 (4th Dist. 1971) (as a minimum requirement for sentencing following a guilty plea, the trial court had the duty to obtain information concerning the commission of the offense and background of defendant, despite the fact that both the prosecution and defense waived the right to present evidence in aggravation and mitigation).

People v. Easley, 119 Ill.2d 535, 519 N.E.2d 914 (1988) Statutory provision requiring that the judge who presided at the trial or guilty plea "shall impose the sentence unless he is no longer sitting as a judge in that court" was not violated where the same judge who presided at defendant's guilty plea did not sentence defendant after his probation was revoked. The statutory language refers to the particular division of the particular county in which the trial was held. Because the judge presiding at defendant's trial was no longer sitting in the Clay County court when the post-probation revocation sentencing hearing occurred, he was not required to conduct the sentencing hearing.

People v. Gibson, 106 Ill.App.3d 912, 436 N.E.2d 732 (4th Dist. 1982) Where defendant pleaded guilty as part of negotiated plea agreement, and agreed to waive a sentencing hearing, the trial court could properly order restitution.

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§45-4
Sentencing Factors – Proper and Improper

§45-4(a)
Generally

People v. Morgan, 59 Ill.2d 276, 319 N.E.2d 764 (1974) The sentencing judge may consider the seriousness of the crime, the stimuli that motivated defendant's conduct, and defendant's general moral character, mentality, habits, social environments, abnormal or subnormal tendencies, age, and natural inclination or aversion to commit crime. See also, **People v. Sowinski**, 148 Ill.App.3d 231, 498 N.E.2d 650 (1st Dist. 1986) (in addition to the above factors, a penitent attitude or its absence may be considered).

People v. Heider, 231 Ill.2d 1, 896 N.E.2d 239 (2008) A sentence based on an improper factor will be affirmed if the reviewing court can determine from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence. Resentencing was required here. The court concluded that defendant's perceived future dangerousness was the primary aggravating factor in the trial court's decision to impose a 10-year-sentence, and that resentencing was therefore required. See also, **People v. Bolyard**, 61 Ill.2d 583, 338 N.E.2d 168 (1975) (where the record shows that the trial judge relied upon an improper factor in imposing sentence, defendant is entitled to a new hearing to determine his sentence based upon the consideration of proper factors); **People v. Kopczick**, 312 Ill.App.3d 843, 728 N.E.2d 107 (3d Dist. 2000) (a trial judge's reliance on an improper aggravating factor impinges upon the fundamental right to liberty, and therefore constitutes plain error; the trial court did not act improperly by considering that defendant was a police officer and was obligated to prevent criminal offenses); **People v. Dowding**, 388 Ill.App.3d 936, 904 N.E.2d 1022 (2d Dist. 2009) (in determining whether the weight placed on the improper factor was so insignificant it did not lead to a greater sentence, the reviewing court should consider whether the trial court made any dismissive or emphatic comments concerning the improper factor and whether the sentence received was less than the maximum authorized; because it was unclear how much weight the trial court placed on the improper factor and the sentence was just four years short of the maximum, it could not be said that only insignificant weight was placed on the improper factor).

People v. Shatner, 174 Ill.2d 134, 673 N.E.2d 258 (1996) No error occurs where the trial court considers as aggravation evidence that was presented as mitigation.

People v. Dowding, 388 Ill.App.3d 936, 904 N.E.2d 1022 (2d Dist. 2009) There is a strong presumption that the trial court based its sentencing determination on proper factors, and defendant has the burden to establish that a sentence was based on an improper consideration. In determining whether the trial court used an improper aggravating factor, the reviewing court must consider the record as a whole.

People v. Markiewicz, 246 Ill.App.3d 31, 615 N.E.2d 869 (2d Dist. 1993) Although a sentencing court has discretion to decide the weight to be given to mitigating evidence, it may not refuse to consider such evidence altogether. Cause was remanded for a new sentencing hearing where, after outlining several pieces of mitigating evidence, the court refused to consider the evidence.

People v. Escobar, 168 Ill.App.3d 30, 552 N.E.2d 191 (1st Dist. 1988) The trial judge is not required to impose the minimum sentence if no statutory aggravating factors are present.

People v. Cooper, 146 Ill.App.3d 596, 497 N.E.2d 157 (3d Dist. 1986) In imposing sentence upon revocation of probation, the trial judge erred by finding no factors in mitigation where two mitigating factors found at the original sentencing were still present at the sentencing following revocation. Because the court could not determine what effect the factors might have had, the cause was reversed and remanded for resentencing.

Cumulative Digest Case Summaries **§45-4(a)**

People ex rel. City of Chicago v. Le Mirage, 2013 IL App (1st) 093547 (Nos. 1-09-3547 & 1-09-3549 cons., 11/14/13)

1. Evidence of criminal conduct may be considered at sentencing even if the defendant had previously been acquitted of that conduct. The concern is only that the evidence considered at sentencing be relevant and reliable. Generally, harm resulting from defendant's conduct may not be considered in aggravation where there is no reliable evidence that defendant proximately caused the injury, *i.e.*, that the injury is of a type that a reasonable person would see as a likely result of his or her conduct.

Defendants were convicted of indirect criminal contempt for violating a court order that they vacate the second floor of a building due to building code violations that made occupancy of that floor unsafe. Deaths and injuries occurred when they violated that order by allowing the second floor to be occupied. Those deaths and injuries did not result from the structural defects that made occupancy of the second floor unsafe, but occurred when 21 people were crushed to death in a panic after security guards released pepper spray in an attempt to subdue a fight. While the State's failure to convict defendants of involuntary manslaughter did not bar consideration of those deaths and injuries in aggravation at sentencing, they were not properly considered by the court in aggravation where there was no reliable evidence that defendants' contumacious conduct was the proximate cause of those deaths and injuries.

2. When a sentencing court considers an improper factor in aggravation, a reviewing court must reverse unless it can determine from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence.

While the trial court did not expressly consider at sentencing the deaths and injuries that occurred when the defendants violated the court's order, it was a fair inference that the court did rely on those circumstances. The trial court denied defendants' motion to bar such evidence at sentencing, the State focused on the deaths and injuries in argument, and the trial court referred to the serious nature of the offense in imposing sentence. The length of the defendants' sentences also evidences the court's reliance on those circumstances where defendants received two years' imprisonment for violating the order of non-occupancy, although no harm proximately resulted from that violation.

The Appellate Court vacated defendants' sentences and remanded for resentencing.

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

People v. Minter, 2015 IL App (1st) 120958 (No. 1-12-0958, mod. op. 9/3/15)

1. The trial court abuses its discretion by considering bare arrests or pending charges as aggravation of a sentence. However, a sentencing court may rely on evidence of other criminal activity, even if that conduct has not resulted in a conviction, where it finds that the evidence is relevant and accurate. A mere listing of arrests or charges in a pre-sentence report, unsupported by live testimony or other evidence, does not constitute relevant and accurate evidence of other criminal activity.

2. The court concluded that the trial court improperly considered defendant's pending charges for possession of contraband and aggravated battery as aggravation when imposing a sentence for armed robbery. The pre-sentence report showed that defendant had been charged with the two offenses while he was in custody awaiting trial in this case. The State presented no evidence concerning the charges, but argued that they showed defendant had continued to commit acts of violence.

In discussing the aggravating factors, the trial court twice referred to the pending charges and said that defendant had "continued" to commit crimes. Under these circumstances, the trial judge improperly considered the mere fact that defendant had pending charges as aggravating evidence.

3. The court rejected the State's argument that the trial court did not consider the pending charges as aggravation but merely as evidence of the likelihood that defendant would recidivate. The court held that the distinction between considering the charges as aggravation or as evidence of the likelihood of recidivism was "meaningless," because the pending charges could be considered as evidence of likely recidivism only if the trial court assumed that defendant had in fact committed the unproven offenses. One reason for the rule that pending charges may not be considered as aggravation is that the underlying facts have not been proven.

4. Where the trial court considers an improper factor in aggravation, re-sentencing is required unless the reviewing court determines that the weight given to the improper factor was minimal.

Here, the trial court imposed a sentence that was two years greater than the statutory minimum and mentioned only limited factors in aggravation other than the pending charges. In addition, the trial court mentioned the pending charges twice and stated that those charges did not "go well for" defendant. Under these circumstances, the court concluded that the pending charges played more than a minimal role in the sentencing decision. The sentence was vacated and the cause remanded for re-sentencing.

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

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§45-4(b)
Prior Convictions/Adjudications of Delinquency

U.S. v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) Convictions obtained in which defendant did not have, or waive, counsel may not be used at sentencing hearing. See also, **Loper v. Beto**, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972); **People v. Martin-Trigona**, 111 Ill.2d 295, 489 N.E.2d 1356 (1986); **People v. Phinnizee**, 92 Ill.App.3d 590, 416 N.E.2d 55 (5th Dist. 1981) (where the trial judge has reason to believe that defendant's prior convictions may be invalid under **Gideon v. Wainwright** and nevertheless considers them in sentencing defendant, the cause must be remanded in order for the judge to determine whether defendant's prior convictions are invalid and, if they are, for the purpose of holding a new sentencing hearing); **People v. Nolan**, 188 Ill.App.3d 251, 543 N.E.2d 1384 (5th Dist. 1989) (it was error to use defendant's prior conviction in aggravation in the absence of a showing that defendant had waived

counsel in that case). But see, **Nichols v. U.S.**, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994) (prior misdemeanor conviction for which defendant was not entitled to counsel because no jail term was imposed could be used to enhance sentence on subsequent offense).

People v. Powell, 53 Ill.2d 465, 292 N.E.2d 409 (1973) In determining the sentence, the trial judge may properly consider defendant's prior juvenile record.

People v. Hayes, 55 Ill.2d 78, 302 N.E.2d 37 (1973) Sentencing judge committed reversible error by considering an alleged prior conviction where the sole evidence of the conviction came from an unidentified document that the prosecutor read.

People v. Holloman, 304 Ill.App.3d 177, 709 N.E.2d 969 (4th Dist. 1999) In light of the trial court's specific reference to an erroneous conviction listed in defendant's criminal history, the erroneous consideration of the non-existent trafficking conviction was not insignificant. See also, **People v. Whitney**, 297 Ill.App.3d 965, 697 N.E.2d 815 (1st Dist. 1998) (trial court committed plain error by considering non-existent prior conviction) (affirmed 188 Ill.2d 91, 720 N.E.2d 225 (1999)).

Cumulative Digest Case Summaries **§45-4(b)**

Descamps v. United States, U.S. , S.Ct. , L.Ed.2d , 2013 WL 3064407 (No. 11-9540, 6/20/13)

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000). Any findings that go beyond merely identifying a prior conviction raise serious Sixth Amendment concerns.

Where a statute provides that a prior conviction qualifies a defendant for an enhanced penalty, the fact of the prior conviction can enhance defendant's penalty without the need for judicial fact finding in two circumstances: (1) where the prior conviction is for violation of a statute whose elements are the same as, or narrower than, those of the qualifying offense (the "categorical approach") or (2) where the prior conviction is for violation of a "divisible" statute involving alternative elements, some of which may match the elements of the generic offense, but others of which may not (the "modified categorical approach"). Under the modified categorical approach, a court may consult a limited class of documents, such as the charging instrument or jury instructions, to determine which of the statute's alternative elements formed the basis for the defendant's conviction. **Shepard v. United States**, 544 U.S. 13 (2005). Both of these approaches focus on the elements, rather than the facts, of a crime and thereby avoid judicial fact finding that would violate the Sixth Amendment.

A prior conviction cannot qualify a defendant for an enhanced penalty without the need for judicial fact finding where the conviction is based on violation of a statute that is "indivisible," in that it does not contain alternative elements but criminalizes conduct that is broader than the qualifying offense. In that circumstance, a court must examine the case's underlying facts to determine whether defendant committed a qualifying offense. This kind of evidence-based inquiry that evaluates the facts that the judge or jury found violates the Sixth Amendment, which does not allow a sentencing court to make findings about non-elemental facts to increase a defendant's sentence.

Defendant was previously convicted under an indivisible statute whose elements were broader than the elements of the qualifying offense. The district court violated the Sixth Amendment when it enhanced defendant's penalty by looking behind the conviction to search for record evidence that defendant actually committed the qualifying offense.

In re Antoine B., 2014 IL App (3d) 110467-B (No. 3-11-0467, 2/4/14)

The sentence for theft is elevated from a misdemeanor to a Class 4 felony if the defendant has been previously convicted of theft. 720 ILCS 5/16-1(b)(2). A prior juvenile adjudication for theft does not constitute a prior theft conviction permitting the elevation of the sentence to a felony. **Taylor**, 221 Ill. 2d 157.

The existence of the prior conviction is not an element of the offense. It is only used to enhance the sentence. 720 ILCS 5/16-1(b)(2). Therefore, when a court has incorrectly used a prior juvenile adjudication to elevate the sentence for theft, it is not appropriate to vacate the theft conviction (or, in this case, the juvenile adjudication for theft). Instead, the proper remedy is to reduce the sentence from a felony to a misdemeanor and remand for a new sentencing hearing.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

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(Defendant was represented by Assistant Defender by Larry O'Neill, Mt. Vernon.)

People v. Billups, 2016 IL App (1st) 134006 (Nos. 1-13-4006 & 1-13-4007 cons., 5/24/16)

Defendant's pre-sentence investigation report listed numerous prior convictions, including three convictions for weapons offenses. Two of the weapons offenses were based on statutes that had been declared unconstitutional in **Aguilar**, 2013 IL 112116. The other weapons offense, unlawful possession by a felon, was not based on an unconstitutional statute, but the underlying felony may have been one of the improper gun offenses. Defense counsel did not object to the information in the PSI and the trial court stated in imposing sentence that defendant had been "in the penitentiary for narcotics and gun cases."

The Appellate Court held that counsel provided ineffective assistance by failing to object to the trial court's consideration of the two improper convictions. The Appellate Court noted that **Aguilar** had been decided before the sentencing hearing in this case, and found that competent counsel would have objected to the convictions. The failure to object could not have served any strategic purpose.

And because the trial court specifically relied on defendant's gun convictions in imposing sentence, there was a reasonable probability that the court would have imposed a lesser sentence if counsel had objected. Defendant was thus prejudiced by counsel's error.

The case was remanded for resentencing.

(Defendant was represented by Assistant Defender Josh Bernstein, Chicago.)

People v. Jones, 2015 IL App (3d) 130053 (No. 3-13-0053, 5/15/15)

In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Here defendant was sentenced to an extended term of imprisonment based on a prior juvenile adjudication that was introduced at sentencing. Defendant argued that a juvenile adjudication does not fall within the **Apprendi** exception for prior convictions, and thus his extended term sentence was unconstitutional since his prior juvenile adjudication was not submitted to the jury or proved beyond a reasonable doubt.

As a matter of first impression in Illinois, the Appellate Court found that **Apprendi's** exception for

prior convictions applies to juvenile adjudications. The prior-conviction exception was justified by the procedural safeguards (fair notice, right to jury trial, proof beyond a reasonable doubt) in place at the time of the prior conviction. The Court found that an adjudication of juvenile delinquency, while not containing all the procedural safeguards of a criminal trial, provided "a no less reliable basis for the enhancement of a sentence than is a standard adult criminal conviction," and was "sufficiently analogous to a prior criminal conviction to fall under the exception in **Apprendi**."

Accordingly, the State was not required to include the fact of defendant's prior adjudication in the indictment, present the fact to a jury, or prove it beyond a reasonable doubt. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

People v. Smith, 2016 IL App (2d) 130997 (No. 2-13-0997, 2/8/16)

At defendant's sentencing for armed robbery with a firearm, the trial court erred by considering as aggravation a prior conviction for aggravated unlawful use of a weapon under 720 ILCS 5/24-1.6(a)(3)(A). The prior AUUW was a Class 2 felony due to defendant's prior convictions.

1. The court acknowledged that in **People v. Aguilar**, 2013 IL 112116, the Supreme Court invalidated only the Class 4 version of aggravated unlawful use of a weapon. However, in **People v. Burns**, 2015 IL 117387, the court reconsidered the issue and found that the statute is facially unconstitutional in its entirety. Thus, both the Class 2 and Class 4 versions of aggravated unlawful use of a weapon violate the constitution.

2. A sentencing court may not consider, as a factor in aggravation, a prior conviction that was based on a statute which was later declared unconstitutional. Because the prior aggravated unlawful use of a weapon conviction was based on the statute held unconstitutional in **Aguilar** and **Burns**, defendant's sentence was vacated and the cause remanded for re-sentencing.

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

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§45-4(c)
Convictions That Were Subsequently Reversed

People v. Wunnenberg, 85 Ill.2d 188, 421 N.E.2d 905 (1981) Sentencing judge erred in considering defendant's prior conviction under the Federal Youth Corrections Act where that conviction was subsequently set aside. Under the legislative history of the Act, set-aside convictions should not have subsequent repercussions, either criminal or non-criminal.

People v. Alejos, 97 Ill.2d 502, 455 N.E.2d 48 (1983) In determining whether a sentencing remand is required when a defendant is convicted of two offenses and one of the convictions is later reversed, there are two applicable standards. First, courts have focused on whether it can be affirmatively determined from the record whether the sentence was influenced by consideration of improper factors (i.e., the reversed convictions). Second, courts have required defendant to come forward with convincing evidence that the judge was influenced. The second standard was satisfied here. See also, **People v. Lopez**, 147 Ill.App.3d 127, 497 N.E.2d 859 (3d Dist. 1986) (when one or more multiple convictions are vacated on appeal, a new sentencing hearing is required when either a single sentence was imposed or it appears from the record that the vacated conviction influenced the sentence for the conviction that is affirmed; here, "defendant was given a single sentence and there is no clear indication whether or not the [trial] court considered the now vacated conviction in determining the length of his sentence"); **People v. McDermott**, 141 Ill.App.3d 996, 490 N.E.2d 1293 (1st Dist. 1986) (sentence for reckless homicide reversed and remanded for resentencing where

DUI conviction was reversed); **People v. Hurt**, 175 Ill.App.3d 970, 530 N.E.2d 698 (2d Dist. 1988) (sentences for armed violence, aggravated battery, and aggravated assault remanded for resentencing where convictions on another count of aggravated battery and aggravated assault were reversed); **People v. Mitchell**, 105 Ill.2d 1, 473 N.E.2d 1270 (1984) (defendant was entitled to new sentencing hearing on two counts of aggravated battery where she was convicted of two counts of attempt murder and two counts of aggravated battery and sentenced to concurrent terms of 14 years on each count, where the convictions for the more serious Class X felonies -- attempt murder -- were later reversed and where the judge imposed the maximum extended term for aggravated battery); **People v. Coty**, 105 Ill.App.3d 398, 434 N.E.2d 432 (1st Dist. 1982) (defendant is entitled to a new sentencing hearing where the sentencing court considered a conviction that was subsequently reversed, even where the sentence imposed might otherwise have been warranted); **People v. Woollums**, 143 Ill.App.3d 814, 493 N.E.2d 696 (4th Dist. 1986) (new sentencing hearing required where the judge specifically relied on the reversed conviction in sentencing defendant); **People v. Scott**, 318 Ill.App.3d 46, 740 N.E.2d 1201 (2d Dist. 2000) (same); **People v. Durdin**, 312 Ill.App.3d 4, 726 N.E.2d 120 (1st Dist. 2000) (new sentencing hearing required where the record did not establish that the sentence was uninfluenced by the reversed conviction); **People v. Johnson**, 314 Ill.App.3d 400, 732 N.E.2d 100 (1st Dist. 2000) (resentencing was required where the record failed to show that a reversed conviction had no effect on defendant's sentence for the remaining conviction).

People v. Payne, 98 Ill.2d 45, 456 N.E.2d 44 (1983) A new sentencing hearing was not required, even though one of the three convictions for which defendant was convicted and sentenced was reversed after the sentencing hearing, where the record did not show that the judge was influenced by the reversed conviction in sentencing defendant for the other offenses. See also, **People v. Hines**, 105 Ill.App.3d 35, 433 N.E.2d 1137 (1st Dist. 1982) (defendant was not entitled to resentencing where there was no indication that the trial court considered the reversed conviction when imposing sentence).

People v. Fischer, 100 Ill.App.3d 195, 426 N.E.2d 965 (1st Dist. 1981) The trial judge abused his discretion at sentencing by considering defendant's 1965 conviction for possession of marijuana, because the statute upon which that conviction was based was later declared unconstitutional in **People v. McCabe**, 49 Ill.2d 338, 275 N.E.2d 407 (1971).

People v. Brown, 91 Ill.App.3d 163, 414 N.E.2d 249 (2d Dist. 1980) Although a presentence report may contain a brief account of a prior offense, it is error to include information about charges on which convictions have been reversed. Here, a new sentencing hearing was required where, at defendant's sentencing hearing for indecent liberties, the presentence report included an entry concerning a prior misdemeanor conviction for contributing to the sexual delinquency of a minor and details of the prior offense, including that defendant had originally been charged with and convicted of rape and indecent liberties, but after the convictions were reversed on appeal defendant pleaded guilty to the misdemeanor. The detailed account of the prior offense was improperly included; because there was no indication as to the source of the information, its accuracy and reliability were not established. Also, the general presumption that the trial court only considered proper information cannot be used here; the trial court overruled an objection to the evidence, indicating that it believed the evidence to be proper, and the court stated that the prior offense caused it "much concern," which would have been unlikely had the additional background information not been included.

People v. Morrison, 137 Ill.App.3d 171, 484 N.E.2d 329 (1st Dist. 1985) Three defendants were convicted of seven counts of home invasion and six counts of attempt armed robbery. On appeal, the court vacated six of the seven counts of home invasion because they were all based on a single entry. The court remanded for resentencing as to all defendants on the conviction for home invasion, finding that the total number of counts may have influenced the court in imposing sentence for home invasion. The court did not remand for resentencing on the attempt armed robbery convictions, reasoning that the home invasion conviction did not

influence the court when it sentenced defendants for attempt armed robbery.

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§45-4(d)
Conduct Not Resulting in Conviction

People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344 (1981) Under certain circumstances, a trial judge may receive proof of criminal conduct for which no prosecution and conviction ensued. Though trial judges should be cautious in admitting such proof and sensitive to the possibilities of prejudice to defendant if inaccurate information is considered, the judge here properly considered the testimony of defendant's acquaintance, who said that defendant asked him to participate in a robbery and smuggle drugs into jail. The evidence appeared trustworthy -- it came in the form of sworn testimony, was presented in open court, and was subjected to cross-examination. And, the evidence was relevant to a determination of a proper sentence. See also, **People v. Collins**, 106 Ill.2d 237, 478 N.E.2d 267 (1985); **People v. Blanck**, 263 Ill.App.3d 224, 635 N.E.2d 1356 (2d Dist. 1994) (new sentencing hearing ordered where sentencing judge erroneously considered hearsay allegations of unrelated criminal conduct for which defendant had not been prosecuted; to avoid the possibility of unfair prejudice, evidence of unprosecuted criminal conduct should be presented by witnesses who can be cross-examined and not merely by placing hearsay in the presentence report, as occurred here).

People v. Jackson, 149 Ill.2d 540, 599 N.E.2d 926 (1992) Defendant was not entitled to resentencing though the sentencing court explicitly relied on unrelated offenses of which defendant was subsequently acquitted. There is no inconsistency in allowing a sentencing court to consider reliable and relevant evidence concerning other crimes even if, at a later trial, the State is unable to prove those crimes beyond a reasonable doubt.

People v. Mertz, 218 Ill.2d 1, 841 N.E.2d 618 (2005) Evidence of defendant's involvement in other criminal activity was reliable based on his own admissions.

People v. Johnson, 347 Ill.App.3d 570, 807 N.E.2d 1171 (1st Dist. 2004) Although the sentencing court may consider reliable evidence of criminal conduct that is unrelated to the offense for which defendant is being sentenced, the mere fact of an arrest or pending charge is not an appropriate factor in aggravation. See also, **People v. Thomas**, 111 Ill.App.3d 451, 444 N.E.2d 288 (4th Dist. 1983). In sentencing defendant for home invasion and residential burglary, the trial court erred by considering an Arkansas arrest for aggravated criminal sexual assault, because no conviction resulted and there was no evidence of the underlying conduct.

People v. Thomas, 111 Ill.App.3d 451, 444 N.E.2d 288 (4th Dist. 1983) The mere listing of prior arrests not resulting in convictions in a presentence report does not satisfy the accuracy requirement of **LaPointe**; thus, the sentencing judge erred by considering defendant's prior arrests, which were listed in the presentence report, where no testimony was presented at the sentencing hearing to support the allegations.

People v. Gaines, 21 Ill.App.3d 839, 316 N.E.2d 14 (1st Dist. 1974) Evidence of defendant's prior arrest for similar crime was incompetent but not prejudicial. Such evidence was relevant to the court's determination of defendant's rehabilitative potential. The evidence was not based upon the bare fact of arrest, but came from trustworthy sources (direct testimony, subject to cross-examination, by the alleged victim and a police officer). "Highly relevant matter should not be excluded from sentencing hearing merely because a narrative of the defendant's past activity mentions an arrest which followed that activity. The unvaried application of the prior arrest exclusionary rule would deny courts access to valuable information where, as

here, a previous arrest is only incidental to testimony that the defendant has behaved in a similar, aberrant fashion in the non-distant past." See also, **People v. Jones**, 65 Ill.App.3d 435, 382 N.E.2d 697 (4th Dist. 1978) (testimony concerning defendant's acts of criminal damage to property and sodomy while in jail was properly admitted at his sentencing hearing; although evidence of mere arrests is not admissible, firsthand evidence of the commission of misconduct, which amounted to a crime, is admissible because it bears upon defendant's general moral character, abnormal tendencies, and natural inclination or aversion to crime).

People v. Wallace, 145 Ill.App.3d 247, 495 N.E.2d 665 (2d Dist. 1986) The sentencing judge erred in considering testimony of an alleged rape committed by defendant in South Carolina. The evidence came from the testimony of a naval intelligence officer, who called the naval intelligence in South Carolina, where defendant had been stationed, and learned about a rape that was similar to the instant case, and who then sent a photo of a lineup which included defendant, and learned from a South Carolina detective that the woman had selected defendant's photo. The judge questioned the reliability of the evidence and, thus, would only consider the fact that defendant had been charged with the South Carolina rape. Once the judge decided not to consider the evidence of the underlying facts, he was left with the mere fact of a pending charge, and consideration of that fact was erroneous. Reversed and remanded for resentencing.

People v. Loomis, 132 Ill.App.2d 903, 271 N.E.2d 66 (2d Dist. 1971) Evidence of defendant's conduct in the jail was proper at sentencing hearing.

Cumulative Digest Case Summaries **§45-4(d)**

People ex rel. City of Chicago v. Le Mirage, 2013 IL App (1st) 093547 (Nos. 1-09-3547 & 1-09-3549 cons., 11/14/13)

1. Evidence of criminal conduct may be considered at sentencing even if the defendant had previously been acquitted of that conduct. The concern is only that the evidence considered at sentencing be relevant and reliable. Generally, harm resulting from defendant's conduct may not be considered in aggravation where there is no reliable evidence that defendant proximately caused the injury, *i.e.*, that the injury is of a type that a reasonable person would see as a likely result of his or her conduct.

Defendants were convicted of indirect criminal contempt for violating a court order that they vacate the second floor of a building due to building code violations that made occupancy of that floor unsafe. Deaths and injuries occurred when they violated that order by allowing the second floor to be occupied. Those deaths and injuries did not result from the structural defects that made occupancy of the second floor unsafe, but occurred when 21 people were crushed to death in a panic after security guards released pepper spray in an attempt to subdue a fight. While the State's failure to convict defendants of involuntary manslaughter did not bar consideration of those deaths and injuries in aggravation at sentencing, they were not properly considered by the court in aggravation where there was no reliable evidence that defendants' contumacious conduct was the proximate cause of those deaths and injuries.

2. When a sentencing court considers an improper factor in aggravation, a reviewing court must reverse unless it can determine from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence.

While the trial court did not expressly consider at sentencing the deaths and injuries that occurred when the defendants violated the court's order, it was a fair inference that the court did rely on those circumstances. The trial court denied defendants' motion to bar such evidence at sentencing, the State focused on the deaths and injuries in argument, and the trial court referred to the serious nature of the offense in imposing sentence. The length of the defendants' sentences also evidences the court's reliance on those circumstances where defendants received two years' imprisonment for violating the order of non-occupancy, although no harm proximately resulted from that violation.

The Appellate Court vacated defendants' sentences and remanded for resentencing.

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation

and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

People v. Minter, 2015 IL App (1st) 120958 (No. 1-12-0958, mod. op. 9/3/15)

1. The trial court abuses its discretion by considering bare arrests or pending charges as aggravation of a sentence. However, a sentencing court may rely on evidence of other criminal activity, even if that conduct has not resulted in a conviction, where it finds that the evidence is relevant and accurate. A mere listing of arrests or charges in a pre-sentence report, unsupported by live testimony or other evidence, does not constitute relevant and accurate evidence of other criminal activity.

2. The court concluded that the trial court improperly considered defendant's pending charges for possession of contraband and aggravated battery as aggravation when imposing a sentence for armed robbery. The pre-sentence report showed that defendant had been charged with the two offenses while he was in custody awaiting trial in this case. The State presented no evidence concerning the charges, but argued that they showed defendant had continued to commit acts of violence.

In discussing the aggravating factors, the trial court twice referred to the pending charges and said that defendant had "continued" to commit crimes. Under these circumstances, the trial judge improperly considered the mere fact that defendant had pending charges as aggravating evidence.

3. The court rejected the State's argument that the trial court did not consider the pending charges as aggravation but merely as evidence of the likelihood that defendant would recidivate. The court held that the distinction between considering the charges as aggravation or as evidence of the likelihood of recidivism was "meaningless," because the pending charges could be considered as evidence of likely recidivism only if the trial court assumed that defendant had in fact committed the unproven offenses. One reason for the rule that pending charges may not be considered as aggravation is that the underlying facts have not been proven.

4. Where the trial court considers an improper factor in aggravation, re-sentencing is required unless the reviewing court determines that the weight given to the improper factor was minimal.

Here, the trial court imposed a sentence that was two years greater than the statutory minimum and mentioned only limited factors in aggravation other than the pending charges. In addition, the trial court mentioned the pending charges twice and stated that those charges did not "go well for" defendant. Under these circumstances, the court concluded that the pending charges played more than a minimal role in the sentencing decision. The sentence was vacated and the cause remanded for re-sentencing.

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

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§45-4(e)
Perjury and Lack of Remorse

U.S. v. Dunnigan, 507 U.S. 87, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) The trial court properly enhanced defendant's sentence for committing perjury at her federal trial (she testified that she did not commit the crime) under a provision of the Federal Sentencing Guidelines authorizing a trial court to increase a sentence when it believes defendant committed perjury at trial.

1. A criminal defendant commits perjury, and is subject to sentence enhancement, when, with willful intent to provide false testimony, she gives false testimony concerning a material matter. A defendant is not subject to an enhanced sentence where her testimony was inaccurate due to confusion, mistake or poor memory, or where the trier of fact may have found her testimony truthful but insufficient to excuse criminal liability.

2. Where a defendant objects to having her sentence enhanced on the ground that her testimony was perjurious, the trial court must consider the evidence and make independent findings concerning each

element of perjury.

3. Enhancement of a sentence for the willful presentation of false testimony does not inhibit defendant's right to testify in one's defense.

People v. Meeks, 81 Ill.2d 524, 411 N.E.2d 9 (1980) A trial judge may properly consider defendant's perceived perjury at trial as a factor in sentencing. Accord, **U.S. v. Grayson**, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978); **People v. Speed**, 129 Ill.App.3d 348, 472 N.E.2d 572 (2d Dist. 1984).

People v. Ward, 113 Ill.2d 516, 499 N.E.2d 422 (1986) Defendant's continued protestation of innocence and his lack of remorse following a determination of guilt must not be automatically and arbitrarily applied as aggravating factors. But, in some cases, such conduct may convey a strong message to the trial judge that defendant is an unmitigated liar and at continued war with society. Such impressions are proper factors to consider in imposing sentence. Defendant's sentence upheld.

People v. Speed, 129 Ill.App.3d 348, 472 N.E.2d 572 (2d Dist. 1984) Defendant's "lack of a penitent spirit" and "lack of veracity on the witness stand" may be considered as bearing on his rehabilitative potential. Defendant's sentence was improperly influenced by his persistent denial of guilt.

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§45-4(f)
Defendant's Assertion of Right to Trial – Increasing Sentence Because Defendant Went to Trial

People v. Ward, 113 Ill.2d 516, 499 N.E.2d 422 (1986) A defendant may not be penalized for asserting his right to trial. See also, **People v. Love**, 139 Ill.App.3d 104, 486 N.E.2d 1337 (1st Dist. 1985) (defendant's sentence was a penalty for choosing his right to a jury trial and violated due process); **People v. Young**, 20 Ill.App.3d 891, 314 N.E.2d 280 (1st Dist. 1974) (defendant's sentence reduced because he received a higher sentence for going to trial); **People v. Dennis**, 28 Ill.App.3d 74, 328 N.E.2d 135 (1st Dist. 1975) (trial court imposed harsh sentence because defendant chose a jury trial, instead of pleading guilty).

People v. Morgan, 59 Ill.2d 276, 319 N.E.2d 764 (1974) Standing alone, the fact that the trial court imposes a greater sentence after trial than it would have imposed upon a guilty plea does not taint the sentence.

People v. Latto, 304 Ill.App.3d 791, 710 N.E.2d 72 (1st Dist. 1999) The judge did not improperly increase defendant's sentence for going to trial. Although a nine-year-sentence was imposed after trial and the State had offered to recommend three years as part of a tentative plea bargain, the three-year-sentence was merely a recommendation and not a sentence in which the trial judge concurred. Also, the sentencing judge's remarks did not explicitly state that a lesser sentence would have been imposed had defendant pleaded guilty.

Where immediately after sentencing defendant indicated his intention to file a post-sentencing motion, and he subsequently filed a timely motion claiming that the sentence was "excessive," he preserved the issue that his sentence was increased because he went to trial.

People v. Scott, 256 Ill.App.3d 844, 628 N.E.2d 456 (1st Dist. 1993) Defendant's conviction was reversed and remanded on appeal due to a jury instruction error. Before defendant's first trial, the trial court offered to sentence him to 10 years' imprisonment if he pled guilty. Because it is improper to increase a sentence in retaliation for refusing to plead guilty, if defendant is convicted in the second trial, the sentencing court must consider the original offer.

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§45-4(g)
Defendant's Failure to Testify/Defendant's Silence

Mitchell v. U.S., 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1998) A guilty plea does not waive the Fifth Amendment right against self-incrimination concerning the details and circumstances of the offense. Thus, the sentencing judge erred by considering defendant's failure to testify concerning the amount of cocaine involved in a conspiracy to distribute cocaine.

Where defendant chooses to make statements or admissions during a plea hearing, those statements are admissible in later proceedings. "A statement admissible against a defendant, however, is not necessarily a waiver of the privilege against self-incrimination" as to other matters.

People v. Swank, 344 Ill.App.3d 738, 800 N.E.2d 864 (4th Dist. 2003) The sentencing judge erred by considering, as an aggravating factor, defendant's refusal to name his drug supplier.

People v. Smith, 243 Ill.App.3d 358, 612 N.E.2d 57 (1st Dist. 1993) Sentencing judge erroneously considered defendant's refusal to exhibit his tattoos (which, according to the State, linked defendant and co-defendant to certain evidence) at co-defendant's trial. Although a trial judge may consider a defendant's conduct and demeanor as factors in aggravation, in this case defendant's actions occurred not in his own trial, but in the "entirely distinct and separate trial" of co-defendant. A sentencing court is permitted to consider only information which comes to its attention during defendant's trial and sentencing hearing, where defendant is afforded the assistance of counsel and other necessary safeguards. Remanded for new sentencing hearing before different judge.

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§45-4(h)
Judge's Private Investigation or Knowledge; Judge's Personal Beliefs/Policies

People v. Dameron, 196 Ill.2d 156, 751 N.E.2d 1111 (2001) Due process is violated where a trial court bases its sentencing determination on its private investigation or private knowledge, "untested by cross-examination . . . or any of the rules of evidence." Here, the trial judge erred by referring to: (1) a book which reminded him of defendant's upbringing but which conflicted with some of the evidence, and (2) remarks made by the judge's father, who had also been a circuit judge, when imposing a death sentence in 1966.

People v. Mote, 255 Ill.App.3d 757, 627 N.E.2d 1253 (4th Dist. 1994) A trial judge's deliberations must be strictly limited to the record made in open court; private communications are improper because defendant "cannot be expected to know the scope and extent of any private inquiry made by the court outside of open court. . . ." The trial court erred by meeting privately with the victims to determine their reaction to a non-prison sentence. Also, though the trial court disclosed its intentions of the *ex parte* communication to the parties before the interview and the defense consented, the consent was not voluntary where the trial court said it would refuse to consider probation if the defense refused to consent. The sentence was vacated and the cause remanded for sentencing before a different judge. See also, **People v. Sumner**, 40 Ill.App.3d 832, 354 N.E.2d 18 (4th Dist. 1976) (trial court erred by engaging in private conversations with other judges and members of the public concerning the possible sentence before imposing defendant's sentence, because defendant had no opportunity to challenge the basis of the information obtained).

People v. Bolyard, 61 Ill.2d 583, 338 N.E.2d 168 (1975) The trial judge improperly denied probation

because he believed that narcotic sellers should not receive probation. See also, **People v. Kendrick**, 104 Ill.App.3d 426, 432 N.E.2d 1054 (1st Dist. 1982) (judge was predisposed to impose imprisonment); **People v. Coleman,** 212 Ill.App.3d 997, 571 N.E.2d 1035 (1st Dist. 1991) (defendant did not receive an adequate sentencing hearing where the trial court stated, without allowing the parties to propose sentencing alternatives, that it was considering the maximum sentence just to get defendant off the streets and to try to get him some treatment; the court's remarks indicated that it had predetermined defendant's sentences prior to considering any of the factors mandated in the sentencing statute). Compare, **People v. Hall**, 143 Ill.App.3d 766, 491 N.E.2d 757 (2d Dist. 1986) (no showing that judge was predisposed to impose imprisonment).

People v. Ross, 303 Ill.App.3d 966, 709 N.E.2d 621 (1st Dist. 1999) The sentencing judge committed plain error by relying on his belief that the offense was motivated by defendant's gang membership. Defendant and the victim were members of the same gang, and fought each other "notwithstanding a common gang affiliation." Consideration of the erroneous aggravating factor was not harmless where the trial judge "spent more time discussing gang motive than any other factor."

People v. Sawyer, 42 Ill.2d 289, 251 N.E.2d 230 (1969) A defendant who is sentenced to the penitentiary only because the judge wants a test case has not been fairly sentenced.

People v. Henry, 254 Ill.App.3d 899, 627 N.E.2d 225 (1st Dist. 1993) Remanded for resentencing where the judge improperly relied on his personal opinion of the crime and, though the judge said he had considered all aggravating and mitigating circumstances, his statements suggested that the sentence was based on his subjective feelings and not solely authorized facts.

People v. Bolyard, 61 Ill.2d 583, 338 N.E.2d 168 (1975) Where judge at original sentencing hearing expressed an opinion that perpetrators of the sale of narcotics should not receive probation, the cause was remanded for resentencing before a different judge. See also, **People v. Vance**, 76 Ill.2d 171, 390 N.E.2d 867 (1979).

People v. Jeter, 247 Ill.App.3d 120, 616 N.E.2d 1256 (1st Dist. 1993) Remanded for resentencing where the trial judge sentenced defendants for punishment based on his personal beliefs that rehabilitation does not occur in prison. The judge did not consider each defendant's *individual* rehabilitative potential. See also, **People v . Lang**, 366 Ill.App.3d 588, 853 N.E.2d 90 (1st Dist. 2006) (new sentencing hearing required where the judge failed to consider defendant's rehabilitative potential and fashioned sentenced based on his personal view of the prison system).

People v. Clemons, 175 Ill.App.3d 7, 529 N.E.2d 57 (1st Dist. 1988) The trial court abused its discretion in denying defendant's motion to vacate sentence based on court's "personal policy" not to disturb a sentence without the victim's approval because a court is not authorized to base sentencing on any such "personal policy."

Cumulative Digest Case Summary **§45-4(h)**

People v. Cervantes, 2014 IL App (3d) 120745 (No. 3-12-0745, 12/3/14)

It is a violation of due process for a trial court to make a sentencing determination based upon private investigation or knowledge. Here, at the end of the sentencing hearing, the court left the bench to look up life expectancy tables. The court then imposed a sentence equal to defendant's life expectancy (33 years imprisonment).

The Appellate Court held that the trial court's actions were plain error. Neither party asked the court

to consider defendant's life expectancy and neither party had a chance to review or evaluate the court's information. The trial court thus improperly imposed a sentence based on his own private investigation.

The dissenting justice would have held that the record did not support a finding that the trial court relied on life expectancy in imposing sentence. The reference about life expectancy came in a single comment amid a thorough discussion of proper sentencing factors. Accordingly, the dissent would have affirmed defendant's sentence.

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

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any

offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

People v. Miller, 2014 IL App (2d) 120873 (No. 2-12-0873, 5/1/14)

A trial court abuses its discretion in imposing sentence when, among other things, it bases the sentence on its own beliefs or arbitrary reasons. Here, defendant was eligible for first-offender probation under 720 ILCS 570/410(a). Defendant was guilty of a qualifying offense (unlawful possession of a controlled substance), she had never been placed on probation or court supervision for a controlled substance or cannabis offense, and she consented to being placed on first-offender probation.

The trial court nonetheless refused to sentence defendant to first-offender probation based on its "strong" belief that this disposition should be limited to defendants who plead guilty. Since pleading guilty is not a proper statutory prerequisite to first-offender probation, the court abused its discretion by basing defendant's sentence on its own beliefs. The case was remanded for a new sentencing hearing.

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

People v. Pace, 2015 IL App (1st) 110415 (No. 1-11-0415, modified on denial of rehearing 10/16/15)

1. A trial court violates a defendant's privilege against self-incrimination during sentencing where the court believes defendant's silence shows that he lacked remorse and uses defendant's silence as an aggravating factor in imposing sentence.

Here defendant declined to exercise his right of allocution at sentencing. In imposing sentence, the trial court stated that it would consider "the defendant's right of allocution, which he did not avail himself of." The Appellate Court held that based on this statement, the "record affirmatively shows that defendant was punished for choosing to remain silent during the sentencing hearing." Accordingly, the court vacated defendant's sentence and remanded for a new sentencing hearing.

2. The trial court also committed error during sentencing by considering its personal beliefs about gang violence and evidence that was outside the record. For example, the court stated that it would "bring to bear" its "personal experience" about the effects of gang violence in imposing sentence. The judge also discussed walking his daughter to school and hypothesized about the feelings of other parents who take their children to school, and then stated that he knew the parents of the victim in this case "kissed him goodbye and told him they loved him." The judge then aligned himself with the victims' families, stating that there were "way, way more of us" than there were guns, gang members, or "young punks."

The court also referred to evidence outside the record. The court stated as a fact that only "one or two percent" of the population causes all the problems, even though there was no evidence supporting this proposition. The court also stated without support in the record that "children from Deerfield" face challenges similar to defendant, but have not committed similar crimes.

The trial court's extensive remarks along these lines denied defendant a fair sentencing hearing. The Appellate Court vacated defendant's sentence and remanded for a new sentencing hearing before a different judge.

3. Based on his convictions for first degree murder in which he personally discharged a firearm proximately causing death and two counts of aggravated battery with a firearm, defendant (who was 16 years old at the time of the offense) was subject to both the mandatory 25-to-life firearm enhancement (730 ILCS

5/5-8-1(a)(1)(d)(iii)) and to mandatory consecutive sentences (730 ILCS 5/5-8-4), making his sentencing range 57-years-to-life. Defendant received a sentence of 100 years imprisonment.

Defendant argued that the mandatory firearm enhancement and mandatory consecutive sentences violated the Eighth Amendment of the federal Constitution and the Illinois Constitution's proportionate penalties' clause. The Appellate Court rejected both arguments.

a. The court first rejected defendant's argument that the sentencing statutes violated the Eighth Amendment because his minimum sentence of 57 years was an improper *de facto* life sentence under **Miller v. Alabama**, 132 S. Ct. 2455. Under the current law in Illinois, a 57-year aggregate sentence is not the equivalent of a life sentence.

The court also rejected defendant's argument that the statutes violated **Miller** by encroaching on the trial court's discretion to impose any sentence it wants. **Miller** merely held that the state cannot impose the adult mandatory maximum penalty on a juvenile without first allowing the court to consider the defendant's youth and other attendant characteristics. Here, the trial court was able to consider defendant's age and culpability before imposing a sentence between 57 years and life imprisonment.

b. The court also rejected defendant's argument that the statutes violated the proportionate penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I §11. The court first determined that the proportionate penalties clause is not coextensive with the Eighth Amendment. Although the Illinois Supreme Court has issued conflicting decisions on this point, the Appellate Court concluded that the correct reading of those cases shows that the proportionate penalties clause, which focuses on rehabilitation, goes beyond the requirements of the Eight Amendment.

Nonetheless, the court held that the statutes did not violate the proportionate penalties clause. A penalty violates this clause where it is "cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community." The sentencing statutes at issue here, while subjecting defendants to substantial minimum sentences and restricting the scope of a trial court's discretion in imposing sentence, did not shock the moral sense of the community. The legislature's power necessarily includes the authority to establish minimum sentences even if they do restrict sentencing discretion. Moreover, trial courts retain significant sentencing discretion under the statutes.

(Defendant was represented by Assistant Defender Yasaman Navai, Chicago.)

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§45-4(i)
Matters Not Proved/Unreliable Evidence

People v. Dempsey, 242 Ill.App.3d 568, 610 N.E.2d 208 (5th Dist. 1993) The trial judge relied on fear and prejudice relating to HIV and on speculation and conjecture in sentencing defendant (for knowingly transmitting HIV and criminal sexual assault of a child). In so doing, the judge failed to make a reasoned and dispassionate determination of the appropriate statutory factors and defendant's rehabilitative potential. Remanded for resentencing.

People v. Gant, 18 Ill.App.3d 61, 309 N.E.2d 265 (1st Dist. 1974) The judge erred in considering that defendant's actions were a contributing factor in the complainant's death two days later, an allegation that was neither charged nor proved. The record showed that the trial judge was affected by the complaining witness's death. See also, **People v. Maldanado**, 80 Ill.App.3d 1046, 400 N.E.2d 656 (3d Dist. 1980) (court erred by considering fact that complainant never recovered from offense; no casual connection established between defendant's actions and allegation that complainant never recovered).

People v. Hammock, 68 Ill.App.3d 34, 385 N.E.2d 796 (5th Dist. 1979) Sentence reduced where judge based sentence on improper factors -- that defendant inflicted mental abuse on decedent (which was not

supported by the record) and that defendant was a persistent law violator (defendant had no criminal record).

People v. Washington, 127 Ill.App.3d 365, 468 N.E.2d 1285 (1st Dist. 1984) Police officer's testimony that defendant was a gang leader, testimony which was based on information from an unnamed informer, was improperly admitted at defendant's sentencing hearing because there was no showing that the informer was reliable or that his information was accurate.

People v. Zapata, 347 Ill.App.3d 956, 808 N.E.2d 1064 (1st Dist. 2004) The trial court erred by relying on its "distaste for gang violence" when sentencing defendant for first degree murder because there was no evidence that the murder was gang-related. Though the presentence report indicated that defendant had previously been a gang member, the State failed to show how the past gang membership was relevant to the murder in question.

People v. Joe, 207 Ill.App.3d 1079, 566 N.E.2d 801 (5th Dist. 1991) The trial judge erred by finding that defendant involved his younger brother in the offense where there was no evidence that the younger brother agreed to participate at defendant's urging.

Cumulative Digest Case Summaries **§45-4(i)**

People ex rel. City of Chicago v. Le Mirage, 2013 IL App (1st) 093547 (Nos. 1-09-3547 & 1-09-3549 cons., 11/14/13)

1. Evidence of criminal conduct may be considered at sentencing even if the defendant had previously been acquitted of that conduct. The concern is only that the evidence considered at sentencing be relevant and reliable. Generally, harm resulting from defendant's conduct may not be considered in aggravation where there is no reliable evidence that defendant proximately caused the injury, *i.e.*, that the injury is of a type that a reasonable person would see as a likely result of his or her conduct.

Defendants were convicted of indirect criminal contempt for violating a court order that they vacate the second floor of a building due to building code violations that made occupancy of that floor unsafe. Deaths and injuries occurred when they violated that order by allowing the second floor to be occupied. Those deaths and injuries did not result from the structural defects that made occupancy of the second floor unsafe, but occurred when 21 people were crushed to death in a panic after security guards released pepper spray in an attempt to subdue a fight. While the State's failure to convict defendants of involuntary manslaughter did not bar consideration of those deaths and injuries in aggravation at sentencing, they were not properly considered by the court in aggravation where there was no reliable evidence that defendants' contumacious conduct was the proximate cause of those deaths and injuries.

2. When a sentencing court considers an improper factor in aggravation, a reviewing court must reverse unless it can determine from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence.

While the trial court did not expressly consider at sentencing the deaths and injuries that occurred when the defendants violated the court's order, it was a fair inference that the court did rely on those circumstances. The trial court denied defendants' motion to bar such evidence at sentencing, the State focused on the deaths and injuries in argument, and the trial court referred to the serious nature of the offense in imposing sentence. The length of the defendants' sentences also evidences the court's reliance on those circumstances where defendants received two years' imprisonment for violating the order of non-occupancy, although no harm proximately resulted from that violation.

The Appellate Court vacated defendants' sentences and remanded for resentencing.

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§45-4(j)
Misconduct Committed by Someone Other Than Defendant

People v. McPhee, 256 Ill.App.3d 102, 628 N.E.2d 523 (1st Dist. 1993) The conduct of a person besides defendant cannot be considered in aggravation unless defendant was involved in the improper actions. The trial court erred in considering defendant's daughter's alleged perjury as an aggravating factor. Because there was no evidence that defendant had urged his daughter to commit perjury (and, in fact, no reason to suspect perjury), the daughter's testimony was not a legitimate factor in aggravation. See also, **People v. McAfee**, 332 Ill.App.3d 1091, 774 N.E.2d 469 (3d Dist. 2002) (it is improper to impose a harsher sentence because a criminal defendant exercises his constitutional right to present witnesses in his or her defense; the trial court erred by considering, as an aggravating factor, that defendant had presented a witness whom the judge believed had testified falsely).

People v. Barber, 20 Ill.App.3d 977, 313 N.E.2d 491 (2d Dist. 1974) Where sentencing judge made reference to and showed his displeasure with the misconduct of defendant's mother and girlfriend, it was a fair inference that the sentence was based on the misconduct of persons other than defendant. Remanded for resentencing before a different judge.

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§45-4(k)
Other Factors

People v. Heider, 231 Ill.2d 1, 896 N.E.2d 239 (2008) The fact that a defendant is mentally retarded is not a proper factor in aggravation. But, the fact that defendant presents a danger to the community due to his retardation is a proper factor in aggravation (it is the future dangerousness, not the mental retardation, which is the aggravation). The trial court errs by using future dangerousness as an aggravating factor if the evidence does not support the conclusion that defendant is dangerous.

Here, there was insufficient evidence to support the trial court's belief that due to his mental retardation, defendant presented a danger to the community. Defendant was a 19-year-old who functioned at the level of a 10-year-old. Although defendant was convicted of predatory criminal sexual assault, the record showed that he did not initiate the relationship with the 12-year-old girl in question, did not have a record of committing violent or sexual crimes, and sought the company of children because they were his emotional peers, not as targets for criminal offenses.

People v. Emerson, 189 Ill.2d 436, 727 N.E.2d 302 (2000) A co-defendant's sentence is not a relevant mitigating factor. Therefore, the trial court did not err at the second stage of a death hearing by excluding evidence that a co-defendant had received a 60-year prison term.

People v. Bennett, 222 Ill.App.3d 188, 582 N.E.2d 1370 (2d Dist. 1991) 1. Judge erred in considering defendant's unemployment because many people are unemployed for various reasons. See also, **People v. Birge**, 137 Ill.App.3d 781, 485 N.E.2d 37 (2d Dist. 1985).

2. Also, the judge erred in considering in aggravation defendant's problems with alcohol because "alcoholism has traditionally been considered as a factor in mitigation rather than aggravation." But see **People v. Blumstengel**, 61 Ill.App.3d 1016, 378 N.E.2d 401 (5th Dist. 1978) (the judge properly considered defendant's alcoholism as a factor in imposing sentence; however, the judge was concerned almost exclusively with defendant's addiction to alcohol and did not consider defendant's prior criminal record or defendant's limited participation in the burglaries).

People v. Fisher, 135 Ill.App.3d 502, 481 N.E.2d 1233 (3d Dist. 1985) Sentencing judge may properly consider psychological harm to the victim as an aggravating factor.

People v. Short, 66 Ill.App.3d 172, 383 N.E.2d 723 (5th Dist. 1978) It was improper at sentencing for the State to call and examine leading members of the community as to their opinions of an appropriate sentence.

People v. Evans, 143 Ill.App.3d 236, 492 N.E.2d 1036 (5th Dist. 1986) Sentencing judge may properly consider the factor of "deprecating the seriousness of the offense."

People v. Smith, 148 Ill.App.3d 655, 499 N.E.2d 1038 (4th Dist. 1986) Sentencing judge may properly consider the amount of "good-time credit" that will be available to defendant. See also, **People v. Clankie**, 180 Ill.App.3d 726, 536 N.E.2d 176 (2d Dist. 1989).

People v. Behl, 279 Ill.App.3d 1071, 666 N.E.2d 357(4th Dist. 1996) A trial judge may properly consider the goal of deterrence when imposing a sentence for second degree murder. While passion or unreasonable belief might *itself* be undeterrable, a defendant's *voluntary choice* to act upon that passion or belief can be deterred.

People v. Wardell, 230 Ill.App.3d 1093, 595 N.E.2d 1148 (1st Dist. 1992) Remanded for new sentencing hearing because the trial judge improperly considered the cross-racial nature of the crimes in imposing sentence.

People v. Joe, 207 Ill.App.3d 1079, 566 N.E.2d 801 (5th Dist. 1991) It was error to consider that the victim was a doctor and that defendant had not only "deprived the community of another human life, but also a role model." The personal traits of victims are not relevant to the question of the proper sentence.

People v. Smothers, 70 Ill.App.3d 589, 388 N.E.2d 1114 (5th Dist. 1979) The judge improperly considered defendant's lifestyle (i.e., living with a woman who was not his wife) and several arrests which did not result in convictions. Also, the judge should have given greater weight to several mitigating factors. Sentence reduced.

People v. Negrete, 258 Ill.App.3d 27, 629 N.E.2d 687 (1st Dist. 1994) The right to procreate is protected by the federal constitution and is not lost upon conviction of a felony. Thus, the trial judge erred by imposing a criminal sentence to prevent a female defendant from becoming pregnant. See also, **People v. Benenkop**, 252 Ill.App.3d 419, 625 N.E.2d 123 (1st Dist. 1993) (trial court's statements that a seven-year sentence following probation revocation was intended to prevent defendant from becoming pregnant disturbed the appellate court).

People v. McCumber, 132 Ill.App.3d 339, 477 N.E.2d 525 (3d Dist. 1985) The lawful exercise of one's constitutional right to have an abortion is not a factor in aggravation or mitigation. Here, the judge imposed a harsher sentence because, according to the presentence investigation report, defendant had three abortions. Remanded for a new sentencing hearing before a different judge.

People v. Warwick, 123 Ill.App.3d 692, 463 N.E.2d 206 (3d Dist. 1984) Trial court erred in sentencing defendant, a police officer, for official misconduct, a crime not involving physical harm, by finding that the statutory aggravating factor, "defendant's conduct caused or threatened serious harm," was present because the court believed that defendant's conduct "caused or threatened the serious harm of official corruption." This aggravating factor does not apply to offenses that threaten nonphysical serious harm only to society at

large.

People v. Sterling, 62 Ill.App.3d 986, 379 N.E.2d 660 (1st Dist. 1978) The trial court erred in prohibiting defendant from introducing evidence concerning injuries he received on the day of his arrest to show that he already suffered from his conduct, because information relating to defendant's life is proper mitigation.

People v. Gonzalez, 238 Ill.App.3d 303, 606 N.E.2d 304 (1st Dist. 1992) Defendant was sentenced to 40 years for murder and attempt murder after the trial judge referred to the offense as a typical "Chicago street gang murderous assault" and a "typically mindless, stupid, cowardly, callous and . . . mindless gang conflict." The trial judge also stated that "there has been nothing more stupid or cowardly ever conceived of than this continuous street gang rivalry in this city" and that "it was a cold-blooded shooting and murder." The judge referred to the belief of "many" that with day-to-day good-time, a 40-year maximum sentence is "inadequate" for murder. A new sentencing hearing was required because the judge failed to consider statutory aggravating and mitigating factors, emphasized the widespread nature of street gang crimes, and stressed the inadequacy of the maximum available sentence.

People v. Hill, 14 Ill.App.3d 20, 302 N.E.2d 373 (5th Dist. 1973) The judge erred by commenting that defendant could have been charged with a felony instead of a misdemeanor. Defendant was not charged with the felony, so it is improper to use this for sentencing.

People v. Myers, 292 Ill.App.3d 757, 686 N.E.2d 363 (3d Dist. 1997) The statutory aggravating factor that defendant, "by the duties of his office or by his position, was obliged to prevent the particular offense committed," applies only where defendant has some "substantive indicia of responsibility," such as that exercised by a manager or supervisor or by an employee "assigned . . . to guard the business, prevent fines, report crimes or otherwise provide security," and not "a store employee hired merely to deliver goods and collect accounts payable."

People v. Daniels, 173 Ill.App.3d 752, 527 N.E.2d 993 (1st Dist. 1988) At resentencing following a remand, the judge erred by refusing to consider defendant's activities while in prison since the initial sentence.

Cumulative Digest Case Summaries **§45-4(k)**

People v. Calhoun, 404 Ill.App.3d 362, 935 N.E.2d 663 (1st Dist. 2010)

The Unified Code of Corrections requires the sentencing court to consider factors in mitigation, including that defendant acted under a strong provocation and that there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense. 730 ILCS 5/5-5-3.1(a)(3) and (4).

Defendant's motive for her participation in first degree murder was her belief that the deceased had raped her infant daughter. The trial court imposed a maximum 60-year sentence, considering in aggravation that defendant had resorted to vigilantism, while giving no weight to the extreme nature of the provocation.

The Appellate Court remanded for resentencing, directing the court to give due consideration to the mitigating factors of provocation, defendant's minimal criminal background, and the unlikelihood of her recidivism, expressing the belief that a proper sentence would be at a "minimal level."

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Harris, 2013 IL App (1st) 110309 (No. 1-11-0309, 11/6/13)

1. Second degree murder is defined as first degree murder accompanied by one of two mitigating factors - serious provocation or unreasonable belief in the need for self-defense. Under Illinois law, the crime

of attempt second degree murder does not exist. **People v. Lopez**, 166 IL 2d 441, 655 NE 2d 864 (1995). Under **Lopez**, the failure to recognize the offense of attempt second degree murder creates the possibility that a perpetrator could be punished more severely for attempt first degree murder than if the victim had died and a second degree murder conviction resulted.

2. In 720 ILCS 5/8-4(c)(1)(E), the legislature removed this possible disparity in sentencing by providing that attempt murder carries only a Class 1 sentence if the defendant proves by a preponderance of the evidence at sentencing that at time of an attempt murder, he or she was acting under a sudden and intense passion resulting from serious provocation. Here, the court concluded that the phrase "serious provocation" carries the same meaning under §8-4(c)(1)(E) as for second degree murder. Thus, the only categories of serious provocation recognized under Illinois law are for substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse.

3. Defendant failed to prove by a preponderance of the evidence that he was acting under a sudden and intense passion resulting from serious provocation when he stabbed a man whom he believed was reaching for a gun from under a car seat. The court noted that defendant was not injured, was not engaged in a mutual quarrel, and in fact had no interaction at all with the victim before the stabbing occurred. Furthermore, there is no evidence of an illegal arrest or adultery. Under these circumstances, the evidence failed to show any of the recognized classes of serious provocation.

4. The court rejected the argument that the act of brandishing a deadly weapon should be held to constitute serious provocation where the offender responds in the belief that self defense is justified. The court noted that in enacting §8-4(c)(1)(E), the legislature chose to recognize only one of the mitigating factors that reduce a first degree murder to second degree - the presence of serious provocation. Had the legislature intended to also recognize an unreasonable belief in the need for self defense as a factor under §8-4(c)(1)(E), it would have done so explicitly. In light of the legislature's failure to act, the court declined to expand the definition of "serious provocation" to include an unreasonable belief in the need for self-defense.

Defendant's Class X sentence of eight years for attempt murder was affirmed.

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

People v. Hillier, 392 Ill.App.3d 66, 910 N.E.2d 181 (3d Dist. 2009)

The trial court has authority to require a sex offender evaluation of a convicted defendant even where the conviction is for a non-probationable offense. Furthermore, a convicted defendant need not be warned that any statements made during such an evaluation may be used against him at sentencing. (See **CONFESSIONS**, §10-11).

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

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

People v. Maurico, 2014 IL App (2d) 121340 (No. 2-12-1340, 3/17/14)

Although a trial court may consider a victim's personal traits to the extent they are necessary to understand the seriousness of the crime, it is improper to consider a victim's personal traits as such when imposing sentence. For example, victim-impact evidence is admissible because it shows the harm caused by the offense. By contrast, evidence of a victim's status within his community is not admissible since it does not show that the crime itself is more serious. A sentencing court may thus rely on a crime's specific harm, but not on the victim's mere status.

When a sentencing error is properly preserved, the reviewing court will reverse unless it can determine from the record that the weight placed on the improper factor "was so insignificant that it did not lead to a greater sentence." It is only in the context of a plain-error analysis that defendant must prove that the trial court's reliance on an improper factor was prejudicial.

Here, the trial court improperly focused on the personal traits of the victim, such as his status as a veteran and the court's belief that he was "a very good man," in imposing a 60-year sentence for first degree

murder. This focus went beyond factors that would be relevant to the seriousness of the offense and instead emphasized the victim's mere status.

Defendant raised this issue in his motion to reconsider sentence, and the record did not show that the trial court's reliance on the victim's status, which it repeated throughout the hearing, was an insignificant factor in the sentence imposed on defendant. The Appellate Court thus vacated defendant's sentence and remanded for resentencing.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

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§45-5
Double Enhancement

People v. Guevara, 216 Ill.2d 533, 837 N.E.2d 901 (2005) 1. "A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." Double enhancement is not permitted unless clearly intended by the legislature. See also, **People v. Phelps**, 211 Ill.2d 1, 809 N.E.2d 1214 (2004); **People v. Chaney**, 379 Ill.App.3d 524, 884 N.E.2d 783 (1st Dist. 2008).

2. An impermissible double enhancement does not occur where possession of a firearm is used both as an element of home invasion and to enhance the sentence with a mandatory 15-year sentencing provision. See also, **People v. Dixon**, 359 Ill.App.3d 938, 835 N.E.2d 925 (4th Dist. 2005) (the 25-year to life addition applicable to murder for one who personally discharges a firearm that proximately causes great bodily harm or death is not a double enhancement - although death is an element of the offense, only the use of a firearm triggers the enhancement).

People v. Conover, 84 Ill.2d 400, 419 N.E.2d 906 (1981) The statutory aggravating factor that "defendant received compensation for committing the offense" does not apply to theft or burglary merely because property was taken. Thus, the trial judge improperly considered defendant's taking of the proceeds as an aggravating factor in sentencing for burglary and theft. Remanded for a new sentencing hearing. See also, **People v. Bourke**, 96 Ill.2d 327, 449 N.E.2d 1338 (1983) (in sentencing defendant for burglary and deceptive practices, trial judge erred by noting the fact that defendant received compensation for the offenses, where compensation was the proceeds of the offense, but sentences upheld); **People v. Gardner**, 105 Ill.App.3d 103, 433 N.E.2d 1318 (5th Dist. 1982) (burglary and theft); **People v. Hicks**, 101 Ill.App.3d 238, 427 N.E.2d 1328 (4th Dist. 1981) (armed robbery); **People v. Krug**, 97 Ill.App.3d 938, 424 N.E.2d 98 (3d Dist. 1981) (deceptive practices); **People v. Sorice**, 182 Ill.App.3d 949, 538 N.E.2d 834 (1st Dist. 1989) (burglary).

People v. White, 114 Ill.2d 61, 499 N.E.2d 467 (1986) In imposing sentence for aggravated battery of a child, the fact that the victim is under 13 may not be considered as an aggravating factor because a necessary element of a conviction for aggravated battery of a child is that the victim is less than 13 years of age. The Court upheld the sentence here, finding that consideration of the improper factor did not result in a greater sentence. See also, **People v. Ferguson**, 132 Ill.2d 86, 547 N.E.2d 429 (1989) (when the victim's age is an element of the offense for which defendant is being sentenced, age may not also be considered as an aggravating factor to impose an extended-term sentence); **People v. Milka**, 211 Ill.2d 150, 810 N.E.2d 33 (2004) (defendant's extended-term sentence was the result of an improper double enhancement where the victim's age was both an element of the predicate offense for felony murder and a basis for the extended term).

People v. Saldivar, 113 Ill.2d 256, 497 N.E.2d 1138 (1986) In sentencing defendant for voluntary manslaughter, the trial court may, in applying the statutory aggravating factor that defendant's conduct caused serious harm to the victim, consider the force employed and the physical manner in which the victim's death was brought about. Here, the court's finding of aggravation (the "terrible harm" caused to the victim and fact that defendant's conduct caused death) was not directed at the degree or gravity of defendant's conduct, i.e., the force employed and the physical manner in which the victim's death was brought about or the nature and circumstances of the offense. Rather, the court focused primarily on the end result of defendant's conduct, i.e., the death of the victim, a factor which is implicit in the offense of voluntary manslaughter and which, under **Conover**, cannot be considered in aggravation. Defendant's sentence was reduced where this improper factor was the primary factor on which the trial court relied in imposing sentence. See also, **People v. Martin**, 119 Ill.2d 453, 519 N.E.2d 884 (1988) (the sentencing judge's consideration, as an aggravating factor (in involuntary manslaughter case), that defendant inflicted serious bodily harm to another resulting in death was plain error); **People v. Smith**, 195 Ill.App.3d 878, 552 N.E.2d 1061 (5th Dist. 1990) (trial judge erred by considering the victim's death as an aggravating factor in imposing sentence for voluntary manslaughter; it is implicit in the offense); **People v. Stoneking**, 193 Ill.App.3d 98, 549 N.E.2d 931 (3d Dist. 1990) (in imposing sentence for first degree murder, a judge cannot consider in aggravation fact that defendant inflicted serious injury by causing a person's death, for serious injury is implicit in every murder, but a judge can consider "the degree of harm caused by the defendant and the gravity of his conduct"); **People v. Sperow**, 170 Ill.App.3d 800, 525 N.E.2d 268 (4th Dist. 1988) (in imposing sentence for murder, the trial judge did not err by considering the amount and type of force employed).

People v. Hobbs, 86 Ill.2d 242, 427 N.E.2d 558 (1981) It is improper to impose an extended-term sentence where the sentencing offense is a misdemeanor enhanced to a felony by the same prior conviction which would allow the extended-term sentence. But see, **People v. Thomas**, 171 Ill.2d 207, 664 N.E.2d 76 (1996) (**Hobbs** does not prohibit a sentencing court from considering a prior conviction both to find eligibility for an enhanced penalty and as aggravation when determining the appropriate sentence within the enhanced range; **Hobbs** merely prohibited the use of the same prior conviction both to enhance the class of the offense *and* to increase the range of authorized punishment for that offense; also, "double enhancement" is not improper where the legislature specifically intended to allow a single factor to be considered in more than one way); **People v. Gonzalez,** 151 Ill.2d 79, 600 N.E.2d 1189 (1992) (a single prior conviction cannot be used to both establish defendant's status as a felon for purposes of proving the crime *and* as an aggravating factor authorizing an extended-term sentence); **People v. Phelps**, 211 Ill.2d 1, 809 N.E.2d 1214 (2004) (separate sentences for heinous battery and aggravated kidnapping did not violate the rule against double enhancement where, although the infliction of severe and permanent disability was used to enhance battery, and the same injury was used as "great bodily harm" to enhance kidnapping to aggravated kidnapping, the factor was used only once for each offense).

People v. Chaney, 379 Ill.App.3d 524, 884 N.E.2d 783 (1st Dist. 2008) The trial court erred by using one of defendant's two prior Class 2 felony convictions both to aggravate the offense of unlawful use of a weapon by a felon from a Class 3 to a Class 2 felony, and also as one of the two Class 2 or greater prior convictions required to impose a Class X sentence. See also, **People v. Owens**, 377 Ill.App.3d 302, 878 N.E.2d 1189 (1st Dist. 2007).

People v. James, 255 Ill.App.3d 516, 626 N.E.2d 1337 (1st Dist. 1993) In sentencing defendant for aggravated arson, the trial court stated that because defendant was angry at his girlfriend, he had "planned to perile [sic] a number of innocent people who had nothing to do with his relationship." The trial court erred by considering an aggravating factor which was inherent in the offense -- one element of aggravated arson is that defendant knew, or reasonably should have known, that one or more persons was present in the

structure he was burning. Defendant did not forfeit review of this issue by failing to object; consideration of an improper sentencing factor is plain error because it affects the fundamental rights to liberty and to be sentenced only on proper information, and it is impractical to expect counsel to interrupt the trial judge during sentencing to object.

People v. Dowding, 388 Ill.App.3d 936, 904 N.E.2d 1022 (2d Dist. 2009) In sentencing defendant for aggravated DUI, the court improperly considered the victim's death as an aggravating factor. Though the trial court properly have mentioned the victim's death in its discussion concerning defendant's failure to accept responsibility for the offense and to comply with the original probation sentence, it could not expressly consider the victim's death as an aggravating factor.

People v. Warwick, 123 Ill.App.3d 692, 463 N.E.2d 206 (3d Dist. 1984) The judge erred by relying on the statutory aggravating factor that "the defendant [a police officer convicted of official misconduct], by the duties of his office or by his position, was obliged to prevent the particular offense, etc." Implicit in the offense of official misconduct is that defendant, under the duties of his position as a police officer, was obliged to prevent the particular offense committed.

People v. Allen, 97 Ill.App.3d 38, 422 N.E.2d 254 (4th Dist. 1981) In imposing sentence for burglary, the judge found that the statutory aggravating factor, "defendant's conduct threatened serious harm," was present, based on "defendant's sticking his body out of a window and then withdrawing it back into the building and his hiding and ducking back and forth." The judge stated that "hiding and ducking back and forth and something like that and the hour at night someone could have gotten hurt." The judge erred in finding the presence of this aggravating factor where the threat of harm extended to the burglary and was no greater than that inherently undertaken by almost all burglars, and where almost all burglaries inherently impose a threat of serious harm to police if they attempt to capture the burglar. For the aggravating factor to be applied properly, the risk of harm must be greater than that inherent in almost all burglaries. Remanded for resentencing.

People v. Maxwell, 167 Ill.App.3d 849, 522 N.E.2d 288 (4th Dist. 1988) In imposing sentence for delivery of cocaine, the judge erroneously considered that defendant's conduct caused or threatened serious harm, though there was no evidence that defendant inflicted or attempted to inflict bodily harm. This factor cannot be considered because the issue of widespread harm from the use of cocaine is implicit in the crime of delivery.

People v. Smith, 198 Ill.App.3d 695, 556 N.E.2d 307 (3d Dist. 1990) In sentencing defendant for delivery of cocaine, the judge erred by considering compensation as an aggravating factor because it is a factor in most drug deliveries. See also, **People v. Atwood**, 193 Ill.App.3d 580, 549 N.E.2d 1362 (4th Dist. 1990); **People v. Vue**, 353 Ill.App.3d 774, 818 N.E.2d 1252 (2d Dist. 2004) (in sentencing defendant for armed robbery, the trial court committed harmless error by considering that compensation was received for the offense because this factor was inherent in the offense).

People v. Rhodes, 141 Ill.App.3d 362, 490 N.E.2d 169 (4th Dist. 1986) In sentencing for armed robbery, the threat of bodily harm or the presence of a weapon may not be considered in aggravation; such factors are inherent in the offense. See also, **People v. Flanery**, 229 Ill.App.3d 497, 594 N.E.2d 401 (3d Dist. 1992) (the judge erroneously considered the "threat of harm" aggravating factor where the evidence showed only the use of a weapon, a fact inherent in any armed robbery; the error was prejudicial because "deterrence" was the only other factor in aggravation, and defendant had a minor prior record). But see, **People v. Shutz**, 201 Ill.App.3d 154, 559 N.E.2d 289 (4th Dist. 1990) (distinguishing **Rhodes** and holding that in sentencing for armed robbery, the trial judge may consider whether defendant's conduct threatened serious harm "to a

degree greater than that inherent to the offense" and that the judge properly considered defendant's conduct as an aggravating factor where the conduct was more serious than that in a conventional armed robbery). See also, **People v. Duffie**, 193 Ill.App.3d 737, 550 N.E.2d 691 (2d Dist. 1990) (armed violence based on aggravated battery).

People v. Davis, 121 Ill.App.3d 916, 460 N.E.2d 471 (1st Dist. 1984) Extended-term sentence based on judge's finding that the crime was brutal and heinous because defendant intended to kill was improper, for the judge relied on conduct inherent in the offense as an aggravating factor to impose the extended term and record did not show brutal and heinous acts.

People v. Corn, 358 Ill.App.3d 825, 832 N.E.2d 897 (5th Dist. 2005) Where defendant was convicted of conspiring to manufacture a large amount of methamphetamine, the quantity of methamphetamine which could have been produced is presumed to have been considered by the legislature in authorizing a mandatory minimum term of 15 years, and should not have been used to enhance the sentence to 25 years. The court rejected the State's argument that the trial court imposed the sentence based on the potential harm to workers at the plant where the theft of anhydrous ammonia occurred and to the arresting officers as the result of defendant's possession of two loaded handguns, for there was no evidence of any potential harm to the workers and defendant did not attempt to use the handguns. Although the *potential* threat of harm can always be argued as an aggravating factor, the degree of aggravation assigned to potential outcomes that might have but did not actually materialize cannot justify a 66% increase of an already severe sentence of 15 years in prison.

Cumulative Digest Case Summaries **§45-5**

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

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

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

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

3. The court also rejected the argument that defendant was subjected to an improper double enhancement where a single prior felony conviction was used both to prove an element of unlawful use of a weapon by a felon and to elevate the severity of the offense from Class 3 to Class 2. Because the prior conviction was an element of the offense and defendant received the only sentence authorized by the Illinois law, double enhancement did not occur.

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

People v. Siguenza-Brito, 235 Ill.2d 213, 920 N.E.2d 233 (2009)

The rule against double enhancement precludes use of a single factor as both an element of an offense and as a basis for a harsher sentence, or use of a single factor twice to elevate the severity of the offense itself. The rule against double enhancement was not violated because defendant was convicted of two offenses – aggravated kidnapping predicated on criminal sexual assault and aggravated criminal sexual assault predicated on kidnapping – which relied on proof of the same facts.

First, the court stressed that defendant was separately charged and convicted of aggravated kidnapping on two theories – asportation and confinement – and that either theory could have been the predicate felony for aggravated criminal sexual assault. Therefore, an enhanced offense was not used to enhance another offense which involved the same conduct.

Furthermore, the double enhancement rule does not prohibit use of a single factor to enhance separate and distinct offenses. (Overruling **People v. McDarrah**, 175 Ill.App.3d 284, 529 N.E.2d 808 (2d Dist. 1988)). Here, each predicate felony (criminal sexual assault and kidnapping) was used only once – to create separate enhanced offenses of aggravated kidnapping and aggravated criminal sexual assault.

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

People v. Abdelhadi, 2012 IL App (2d) 111053 (No. 2-11-1053, 7/18/12)

1. Although the trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor at sentencing. Consideration of a single factor as both an element of the offense and as a basis for imposing a harsher sentence than might otherwise have been imposed is prohibited. The legislature has already considered the factor when setting the range of penalties and therefore it cannot be considered again as a justification for a greater penalty.

Mere mention of a factor inherent in the offense is not error. Nor is it error for the court to reference a factor inherent in the offense at sentencing in conjunction with consideration of the nature and circumstances of the offense, or the degree or gravity of defendant's conduct.

Defendant was convicted of aggravated arson in that he committed an arson of a residence when he knew or should have known that a person was present therein. At sentencing, the court considered in aggravation that defendant's conduct "did in fact endanger the lives of individuals." Although the court also considered other legitimate factors, the court's consideration of a factor inherent in the offense, with no further discussion or elaboration of that factor, was improper.

2. A double-enhancement error may be considered as plain error under the second prong of the plain-error rule, i.e., that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. When a trial court considers erroneous aggravating factors in determining the appropriate sentence of imprisonment, the defendant's fundamental right to liberty is unjustly affected.

3. When a court considers an improper factor in aggravation, the case must be remanded for resentencing unless it appears from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence. To determine whether the court accorded significant weight to a factor, a reviewing court may consider: (1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) whether the sentence received was substantially less than the maximum sentence permitted by statute.

The trial court's comments, which were neither dismissive nor emphatic, do not reveal how much weight it placed on the improper factor. The defendant's sentence also did not allow the Appellate Court to determine how much weight the trial court placed on the improper factor because it was four years above the minimum sentence, even though it was substantially below the maximum. Remand for resentencing was thus required.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Chambers, 2011 IL App (3d) 090949 (No. 3-09-0949, 8/12/11)

The State conceded that the trial court erred by imposing extended term sentences where a single

prior conviction was used both to elevate domestic battery to a felony and to impose extended term sentences.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide

where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

People v. Griham, 399 Ill.App.3d 1169, 929 N.E.2d 1213 (4th Dist. 2010)

Defendant was convicted of unlawful possession of a weapon by a felon, which was elevated to a Class 2 felony based on defendant's 1996 Class 2 felony conviction under the Controlled Substances Act. The same conviction was also used at sentencing as one of the prior offenses authorizing a Class X sentence under 730 ILCS 5/5-5-3(c)(8).

On appeal, the court held that the sentence was an improper double enhancement because a single prior conviction was used to both elevate the charge to a Class 2 felony and to impose a Class X sentence. Although double enhancement is proper if clearly authorized by the legislature, the court concluded that nothing in 730 ILCS 5/5-5-3(c)(8) expressly indicates an intention to allow double enhancement for Class X sentencing.

The court rejected the State's argument that defendant's 1993 felony conviction had not been used at sentencing, and could therefore be used to enhance the instant offense to a Class 2 felony. Because a prior conviction is an essential element of unlawful use of a weapon by a felon, the jury must find beyond a reasonable doubt that there is a qualifying conviction. Where the State chose not to present evidence of the 1993 conviction, the jury obviously did not make the required finding concerning that conviction.

Although defendant did not raise the issue until appeal, a sentence which exceeds the permissible statutory range is void and subject to attack at any time. Defendant's Class X sentence was vacated and the cause remanded for imposition of a sentence within the statutorily-authorized range for unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Hall, 2014 IL App (1st) 122868 (No. 1-12-2868, 10/20/14)

1. A double enhancement occurs where a single factor is used as both an element of an offense and a basis for imposing a harsher sentence, or where a single factor is used twice to elevate the severity of the offense itself. A double enhancement is improper unless in enacting the statute in question, the legislature intended that a single factor could be used more than once.

Any portion of a sentence that is not statutorily authorized is void and can be challenged at any time. By contrast, an order that is improper because of a mistake of law or fact is voidable rather than void and is forfeited if not challenged at an appropriate time.

2. Defendant was convicted of violating the Sex Offender Registration Act (730 ILCS 150/6) because he failed to register after having been convicted of aggravated criminal sexual assault and of a prior failure to register. As charged, the offense was a Class 2 felony. The trial court imposed a Class X sentence based on two prior convictions - the same aggravated criminal sexual assault conviction that was an element of the offense, and a prior DUI conviction.

The court concluded that the legislature did not intend for a single conviction to be used both as an element of the offense of failing to register as a sex offender and as a reason to enhance the sentence to a Class X. Thus, the Class X sentence was void and could be challenged for the first time on appeal from the denial of a post-conviction petition.

3. The court rejected the argument that the issue was moot, noting that the defendant was serving a three-year-period of mandatory supervised release on the Class X conviction, and that if he was resentenced on a Class 2 felony he would be subject to a two-year MSR term. Thus, relief could be granted in the form of a shorter MSR term.

4. The court rejected the State's argument that re-sentencing was not required because the same seven-year-sentence that was ordered as part of the Class X sentence could have been ordered as a non-enhanced, Class 2 sentence. Although the sentence that was actually imposed fell within the permissible sentencing range for a Class 2 felony, re-sentencing was required because the trial court relied on the wrong authorized sentencing range when it imposed the Class X sentence.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Melvin, 2015 IL App (2d) 131005 (No. 2-13-1005, 7/16/15)

1. A double enhancement occurs when a factor is used to enhance an offense or penalty and is then used again to subject the defendant to an additional enhanced offense or penalty. Here, defendant pleaded guilty to attempt predatory criminal sexual assault of a child, a Class 1 offense, but was eligible for a Class X sentence of six to 30 years under 730 ILCS 5/5-5-3(c)(8), which at the time of the offense provided a Class X sentence where a defendant was convicted of a Class 1 or 2 felony after having been twice convicted of a Class 2 or greater felony.

However, as part of the negotiated plea agreement the parties agreed to an extended term Class X sentence of 60 years based on the fact that one of the prior offenses used to authorize a Class X sentence under 5/5-5-3(c)(8) was itself a Class X felony. Under 730 ILCS 5/5-5-3.2(b)(1), an extended term is authorized where a felon has been convicted of the same or greater class felony within the last 10 years.

Thus, a single prior Class X conviction was used to both authorize a Class X sentence of six to 30 years on defendant's Class 1 conviction and to authorize a Class X extended term. The court found that under these circumstances, an impermissible double enhancement occurred. Because the 60-year extended term included in the plea agreement was unauthorized, the sentence was void and could be challenged in an appeal from a denial of a motion for leave to file a subsequent post-conviction petition.

2. The court stressed that a trial court lacks authority to impose an unauthorized sentence even if the parties agree to it. The court also found that the rule against double enhancement applies where the sentence is enhanced twice by the same factor and not just where the factor is used to enhance the offense and also used to enhance the punishment.

The court vacated the entire plea agreement, finding that it could not merely reduce the sentence to 30 years without essentially altering an essential provision of the plea agreement. The court remanded the cause with instructions that defendant could plead anew, but stated that if the State wished to accept defendant's offer to persist in his guilty plea and accept a 30-year sentence, it could file a petition for rehearing to that effect and the Appellate Court would enter a new judgment without remand.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Powell, 2012 IL App (1st) 102363 (No. 1-10-2363, modified on grant of rehearing 5/8/12)

1. The rule against double enhancement prohibits use of a single factor both as an element of an offense and as a basis for imposing a more harsh sentence. However, the rule does not apply where the legislature clearly expresses its intention to enhance the penalty based upon some aspect of the crime. The best indication that the legislature intended such an enhancement lies in the statutory language itself.

2. 720 ILCS 5/24-1.1(e) provides that unlawful use of a weapon by a felon is a Class 3 felony with a sentence of two to 10 years if the prior conviction was for a non-forcible felony, but a Class 2 felony with a sentence of three to 14 years if the prior conviction was for a forcible felony. The court concluded that §5/24-1.1(e) does not involve an enhancement of a Class 3 felony to a Class 2 felony based on the nature of the prior conviction. Instead, the legislature chose to define unlawful use of a weapon by a person who has been convicted of a forcible felony as a Class 2 felony. Thus, under the plain language of the statute there is no enhancement of a lesser offense due to the nature of the prior conviction.

3. The court also found that if §5/24-1.1(e) was found to involve an enhancement based on whether the prior conviction was for a forcible felony, the plain language of the statute demonstrates clear legislative intent to increase the class of the offense based on the fact that the prior conviction was for a forcible felony.

Therefore, the rule against double enhancement would not be violated.

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

People v. Sanders, 2016 IL App (3d) 130511 (No. 3-13-0511, 6/13/16)

1. Generally, the sentencing court may not consider as aggravation a fact which is inherent in the offense of which the defendant was convicted. Where the trial court gives weight to a factor which is inherent in the offense, the cause must be remanded for re-sentencing unless the court can determine that the weight given to the improper factor was insignificant.

The court concluded that the trial court erroneously considered a factor inherent in the offense of murder - that defendant's conduct threatened or caused serious harm - where it noted the improper factor, acknowledged that it was inherent in the offense, but considered it nonetheless.

2. The court concluded that the erroneous consideration of a factor inherent in the offense constitutes second prong plain error. Although some precedent has equated second prong plain error with structural error, the Illinois Supreme Court recently held that the second prong is not limited to structural error. **People v. Clark**, 2016 IL 118845.

The court concluded that consideration of a sentencing factor that is inherent in the offense affects the fundamental right to liberty because it impinges on the basic right not to be sentenced based on an improper factor. Therefore, where more than insignificant weight is given to an inherent factor, second prong plain error occurs.

Defendant's sentence was reversed and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Vicki Kouros, Ottawa.)

People v. Walker, 392 Ill.App.3d 277, 911 N.E.2d 439 (1st Dist. 2009)

Defendant's 60-year-sentence for felony murder was vacated, and the cause was remanded for a new sentencing hearing, because the trial judge considered as an aggravating factor that the victim's death was caused by a firearm, where defendant had already been subjected to the mandatory 25-year enhancement for causing death with a firearm. The court stressed that the trial judge's extended remarks at sentencing showed that defendant's use of a firearm was a significant factor in the trial court's sentencing decision. Although a sentencing court may enhance a sentence by considering "the degree of harm" that was caused, the judge "considered not a particular degree of harm, but simply the harm itself, which was already the subject of a sentencing enhancement."

The Appellate Court noted that "the events unfolded fairly quickly" and "there was no evidence that defendant brandished his weapon in front of others or forced the victim to perform tasks at gunpoint . . . or that psychological or physical harm was inflicted prior to the killing." Because such facts "do not show a degree of harm beyond the elements required for felony murder and for the firearm enhancement," a new sentencing hearing was required.

(Defendant was represented by Assistant Defender Elena Penick, Chicago.)

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

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§45-6
Statement of Reasons for the Sentence

Rita v. U.S., 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007) The sentencing court should set forth a sufficient statement of reasons for the sentence to show that it considered the parties' arguments and exercised its discretion in a reasonable manner.

People v. Davis, 93 Ill.2d 155, 442 N.E.2d 855 (1982) Statutory provisions requiring a sentencing court to state its reasons for a particular sentence do not impose a mandatory, non-waivable requirement necessitating remand for failure to comply; provisions are directory. Further, defendants waived their rights under the statutes by failing to request a statement of reasons at the sentencing hearing.

People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344 (1981) The Illinois constitutional provision that all sentences must be determined with the objective of restoring the offender to useful citizenship does not require the sentencing judge "to detail for the record the process by which he concluded that the penalty he imposed was appropriate." Here, the judge properly considered the evidence within the prescribed statutory framework. See also, **People v. Clark**, 97 Ill.App.3d 953, 424 N.E.2d 9 (1st Dist. 1981) (the court could not determine whether the judge properly exercised his discretion in sentencing defendant where the record did not reveal what factors the judge considered in imposing sentence).

People v. Meeks, 81 Ill.2d 524, 411 N.E.2d 9 (1980) Judge's failure to mention defendant's educational background and employment history in imposing sentence does not show that the judge ignored these factors. Defendant, a defense witness, and defense counsel commented on these matters during the sentencing hearing. Also, "[t]he requirement that the trial judge set forth his reasons . . . for the particular sentence imposed does not obligate the judge to recite, and assign a value to, each fact presented in evidence at the sentencing hearing." See also, **People v. Gornick**, 107 Ill.App.3d 505, 437 N.E.2d 892 (1st Dist. 1982). But see, **People v. Goodman**, 98 Ill.App.3d 743, 424 N.E.2d 663 (2d Dist. 1981) (the record failed to adequately demonstrate that the judge considered the proper criteria in imposing sentence where evidence in mitigation was presented at the sentencing hearing but the judge's findings referenced only the aggravating factors).

People v. Hicks, 101 Ill.2d 366, 462 N.E.2d 473 (1984) Statutory requirement that the sentencing court set forth in the record the basis for its determination that consecutive sentences are required to protect the public from further criminal conduct by defendant is permissive, rather than mandatory.

People v. Pittman, 93 Ill.2d 169, 442 N.E.2d 836 (1982) Although it is better practice for the sentencing judge to state his findings in the language of the sentencing statute, the failure to do so does not necessarily require reversal. Instead, the record must show that the sentencing court is of the opinion that a consecutive term is necessary for the protection of the public. The judge satisfied this requirement here.

People v. Span, 337 Ill.App.3d 239, 785 N.E.2d 975 (3d Dist. 2003) Although the trial court stated that it had considered the trial record, the updated presentence report, and the new evidence presented at the sentencing hearing, the court failed to articulate a sufficient rationale to show that it believed consecutive sentences were required to protect the public. A general statement that evidence has been considered does not show a belief that such sentences were required to protect the public. The "record of the hearing fails to set forth a clear basis for the court's belief that consecutive sentences were warranted."

People v. Dorosz, 217 Ill.App.3d 1016, 578 N.E.2d 67 (1st Dist. 1991) The trial judge did not articulate a precise finding that the public protection required consecutive sentences for defendant's drug convictions (simple possession), and the record does not disclose a sufficient rationale for the sentence. Contrary to the State's argument, the judge could not be considering the protection of society when he referred to defendant's drug use as "part of the seed of commerce in illegal drugs." The "the same would be true of any unlawful drug use, yet consecutive sentences are not required." See also, **People v. Jones,** 232 Ill.App.3d

1083, 598 N.E.2d 380 (4th Dist. 1992) (the trial court failed to make sufficient findings to justify consecutive sentences where it stated only that it would not impose the minimum sentence on a defendant with a prior conviction for a similar offense).

People v. Acevedo, 275 Ill.App.3d 420, 656 N.E.2d 118 (2d Dist. 1995) While the sentencing judge is required to "consider the financial impact statement filed with the clerk of the court by the Department of Corrections," a judge is not required to specifically state on the record that it has made the requisite consideration. Absent evidence to the contrary, it must be presumed that the judge considered the financial impact before imposing sentence. Also, where the record is silent on whether DOC filed the financial impact statement, as required by 730 ILCS 5/3-2-9, courts will presume that DOC has performed its statutory duty. Defendant, who had the burden to show that DOC failed to file the report, did not carry his burden of proof.

People v. Hanna, 185 Ill.App.3d 1069, 542 N.E.2d 131 (1st Dist. 1989) Extended-term sentence vacated where judge said he considered the requisite aggravating factors but did not state what those considerations were. Without the specific considerations of the trial judge, the court had difficulty understanding why the extended term was warranted. Also, record did not show that extended murder sentence was warranted where defendant intended to rob the victim with a loaded gun and shot the victim as a result of his refusal to submit.

People v. Wilson, 303 Ill.App.3d 1035, 710 N.E.2d 408 (1st Dist. 1999) The trial judge committed plain error by failing to make an on-the-record statement of the basis for the extended-term sentence. While the trial judge need not recite every factor involved in a sentencing decision, it "must nevertheless enumerate its consideration of the requisite aggravating factor supporting the imposition of an extended-term sentence."

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§45-7
Restitution, Fines, and Court Costs and Fees

§45-7(a)
Restitution

People v. Mahle, 57 Ill.2d 279, 312 N.E.2d 267 (1974) Restitution in excess of monies wrongfully obtained, as charged in deceptive practice information, was not a proper condition of probation. A trial court is not empowered to order restitution of sums extraneous to the informations. See also, **People v. Smith**, 198 Ill.App.3d 695, 556 N.E.2d 307 (3d Dist. 1990); **People v. Lusietto**, 167 Ill.App.3d 251, 521 N.E.2d 174 (3d Dist. 1988).

People v. Hasprey, 194 Ill.2d 84, 740 N.E.2d 780 (2000) Statute authorizing restitution for offenses under the Criminal Code which resulted in injury to a person or damage to real or personal property does not authorize restitution for offenses created under the Illinois Vehicle Code. The Vehicle Code has a restitution provision for vehicle theft, but does not authorize restitution for reckless driving.

People v. Lowe, 153 Ill.2d 195, 606 N.E.2d 1167 (1992) The Court rejected the claim that the legislature did not intend to authorize restitution for non-violent crimes, and found that the restitution statute does not deprive criminal defendants of due process by imposing civil liability at criminal sentencing.

People v. Brooks, 158 Ill.2d 260, 633 N.E.2d 692 (1994) Under Ch. 38, §1005-5-6(f) (730 ILCS 5/5-5-6), the five-year period within which restitution must be paid need not commence at sentencing; a judge may order that restitution be paid within a period not to exceed five years after defendant is released from prison.

Also, where the judge orders that restitution be paid after a lengthy prison term, payment is to be made by lump sum unless a specific schedule is ordered. (**Note**: Effective January 1, 1994, §5/5-5-6 was amended to provide that periods of incarceration are not included in calculating the five-year period.)

People v. Felton, 385 Ill.App.3d 802, 896 N.E.2d 910 (4th Dist. 2008) 730 ILCS 5/55-6(d) provides that a defendant may enter a plea agreement requiring restitution on charges that have been dismissed. Where the plea agreement contains no explicit provision to that effect, however, the portion of the restitution order relating to the dismissed charges is void.

In re T.W., 268 Ill.App.3d 744, 644 N.E.2d 438 (2d Dist. 1994) Restitution statute requiring trial court to order defendant to pay restitution for "out-of-pocket expenses, damages, losses, or injuries" proximately caused by defendant's conduct does not authorize the trial court to require defendant to pay for security measures added to the victim's home after the offense. Accord, **People v. Fitzgerald**, 313 Ill.App.3d 76, 728 N.E.2d 1271 (1st Dist. 2000). See also, **People v. McCormick**, 332 Ill.App.3d 491, 774 N.E.2d 392 (4th Dist. 2002) (the trial court committed plain error by ordering defendant, who had been convicted of making telephone calls "with the intent to abuse, threaten[,] or harass" the complainant, to pay $270 in restitution for parking tickets which the complainant received because she was afraid to park in public garages after she received the calls; the fines were the penalty incurred by the complainant for violating the law, and "[c]ourts will not award damages growing out of the claimant's own illegal act or assist parties in relieving themselves of the consequences of their illegal activities").

People v. Mocaby, 378 Ill.App.3d 1095, 882 N.E.2d 1162 (5th Dist. 2007) The Southern Illinois Drug Task Force is not a "victim" under the restitution statute. See also, **People v. Chaney**, 188 Ill.App.3d 334, 544 N.E.2d 90 (3d Dist. 1989) (an investigatory agency, like the Department of Criminal Investigation of the Illinois State police, is not a "victim"); **People v. Velez**, 336 Ill.App.3d 261, 783 N.E.2d 226 (2d Dist. 2003) (a police department is not considered a "victim" within the meaning of the restitution statute; because a torn uniform is a "reasonably expected law enforcement expense," and it appeared from the record that the officer in question could seek reimbursement from the city, the trial court erred by ordering defendant to pay restitution for trousers that were torn during the arrest). But see, **People v. Gray,** 234 Ill.App.3d 441, 600 N.E.2d 887 (4th Dist. 1992) (legislature intended that restitution be paid to unnamed victims and insurers, including public agencies, which provide free services to indigent victims (such as Illinois Department of Public Aid) for injuries related to the offense).

People v. Haskins, 364 Ill.App.3d 375, 846 N.E.2d 145 (3d Dist. 2006) The Unified Code of Corrections authorizes a trial court to withhold of a portion of defendant's DOC wages for payment of a restitution order.

People v. Jones, 176 Ill.App.3d 460, 531 N.E.2d 88 (3d Dist. 1988) Sentencing judge may not reserve determination of defendant's ability to pay restitution. If the judge deems restitution appropriate, a definite amount of restitution should be set at the sentencing hearing. See also, **People v. Stinson**, 200 Ill.App.3d 223, 558 N.E.2d 642 (4th Dist. 1990) (remedy for trial court reserving question of restitution is remandment to comply with the statute; reversal of a restitution order without remand should apply only as a special remedy in unusual situations); **People v. White**, 146 Ill.App.3d 998, 497 N.E.2d 888 (4th Dist. 1986) (restitution order was improper where it left open (and subject to increase) the amount of restitution until the victim completed medical care; further, a restitution order that is subject to increase at a later date is not complete, clear, or definite, which is required of a final judgment or sentence); **People v. Daminski**, 80 Ill.App.3d 903, 400 N.E.2d 708 (5th Dist. 1980) (the judge erred by requiring defendant to make restitution but leaving up to probation authorities the amount of restitution and method of payment).

People v. Visor, 313 Ill.App.3d 567, 730 N.E.2d 574 (2d Dist. 2000) The trial court need not consider

defendant's ultimate ability to pay when determining whether restitution is required, but must do so when determining the method and time of payment. The trial court erred by ordering payment of an unknown amount in restitution within two years of defendant's release; without knowing the amount of money involved, the court could not have considered defendant's ability to pay. Also, the trial court erred by entering a restitution order *nunc pro tunc* some 3½ months after the sentencing hearing where the order added new findings concerning the sum of money to be repaid, and did not merely reflect action taken at an earlier date.

People v. Mitchell, 241 Ill.App.3d 1094, 610 N.E.2d 794 (4th Dist. 1993) Defendant's ability to pay is relevant to restitution in three circumstances: in determining the manner of payment, when assessing restitution for the victim's counseling services, and where the State attempts to revoke restitution for defendant's failure to pay. Ability to pay need not be considered in determining whether restitution is an "appropriate" sentence. It is also irrelevant that the money will never be collected.

People v. Guajardo, 262 Ill.App.3d 747, 636 N.E.2d 863 (1st Dist. 1994) 1. Restitution for counseling can be ordered only where the trial court calculates, on the record, the expenses involved. Because the restitution statute has no waiver provision, defendant's failure to request an accounting in the trial court did not waive this requirement. The restitution order was vacated and the cause remanded for the trial court to determine the amount of restitution for counseling expenses.

2. Because the judge ordered restitution taken from defendant's bail, ability to pay is presumed.

People v. Short, 66 Ill.App.3d 172, 383 N.E.2d 723 (5th Dist. 1978) While restitution may be imposed as a condition of probation, defendant's inability to make immediate restitution may not be the ground for denying probation.

People v. Powell, 199 Ill.App.3d 291, 556 N.E.2d 896 (4th Dist. 1990) In setting the amount of restitution, the sentencing judge may rely on information in the presentence report and, absent some claim that the report is inaccurate, additional information is not required.

People v. White, 135 Ill.App.3d 563, 482 N.E.2d 134 (4th Dist. 1985) 1. Remanded for a hearing on the amount of restitution and manner of payment where there was no evidence of complainants' medical expenses and the manner of payment was not addressed. The trial court can determine the manner and time of payment only after determining the amount of restitution.

2. The restitution provision does not require the court to hold a hearing to assess defendant's financial capacity to make restitution. Defendant's financial capacity is a required consideration only (1) when determining the manner of payment and (2) if a petition to revoke restitution is filed.

3. The judge may order defendant to apply the balance of the cash bond to the payment of restitution. See also, **People v. Fulkerson**, 326 Ill.App.3d 1124, 762 N.E.2d 1199 (4th Dist. 2002) (the circuit clerk erred by transmitting defendant's bail bond deposit to the victims without a judicial order authorizing disbursement; defendant did not forfeit his right to seek return of the deposit by failing to request a stay of disbursement before the deposit was paid to the victims).

4. The fact that defendant has been sentenced to prison does not mean that defendant has no future ability to pay. The term of imprisonment is a factor to be considered in assessing defendant's ability to pay and in determining the manner and time of payment.

People v. Jones, 81 Ill.App.3d 367, 401 N.E.2d 287 (2d Dist. 1980) A judge may order restitution only for losses arising out of the offense for which defendant was convicted. Here, the judge erred in ordering defendant to pay restitution to the victim of a robbery, a crime which he committed while on probation for burglary. "A crime alleged in a petition to revoke probation is a separate offense for which the defendant may

not be sentenced until he has been charged, tried and convicted in the manner set forth by law." See also, **People v. Knowles**, 92 Ill.App.3d 537, 414 N.E.2d 1322 (4th Dist. 1980) (vacating portion of restitution (in case where defendant was convicted of arson for setting fire to a student dormitory) that was based on the loss suffered by certain residents of the dormitory because defendant was not charged with damaging students' property); **People v. Exum**, 307 Ill.App.3d 1000, 719 N.E.2d 342 (4th Dist. 1999) (the trial judge erred by requiring restitution in the amount of $305, which the trial judge believed to be the full amount of three forgeries defendant had allegedly committed, where defendant was charged with and pleaded guilty to only a single count of forgery in the amount of $100, for a judge may order restitution only for the loss caused by the offense to which defendant pleaded guilty).

People v. McClard, 359 Ill.App.3d 914, 834 N.E.2d 984 (3d Dist. 2005) Trial court was not authorized to order restitution for unrelated attempts to cash checks on dates other than that for which defendant was convicted. Section providing that a defendant who faces multiple charges may enter a plea agreement requiring the payment of restitution to victims of charges that have been dismissed under the terms of the agreement did not apply where defendant was convicted in a trial rather than by a plea.

In re F.D., 89 Ill.App.3d 223, 411 N.E.2d 1200 (2d Dist. 1980) 1. The trial judge erred by computing the amount of restitution on the basis of depreciated replacement cost. The amount of restitution must be computed using the fair market value of the property at the time and place of the theft.

2. The fact that the victim recovered insurance money, which reimbursed him for all or part of his actual out of pocket expenses or loss proximately caused by defendant, does not decrease the amount of the loss. But see, **People v. Jones**, 145 Ill.App.3d 835, 495 N.E.2d 1371 (3d Dist. 1986) (finding that the trial court erred by failing to consider, in a case of felony criminal damage to property, the money the complainant received for the sale of her car to a junk yard, and that the sale amount should be deducted in determining restitution).

People v. Jones, 145 Ill.App.3d 835, 495 N.E.2d 1371 (3d Dist. 1986) The trial court erred in failing to consider defendant's interest in his estranged wife's car, which he drove into, where the car was marital property in which defendant had an interest, and his interest should be deducted in determining the amount of restitution owed to his wife. Also, the trial court did not abuse its discretion in setting the value of the car.

People v. Bouyer, 329 Ill.App.3d 156, 769 N.E.2d 145 (2d Dist. 2002) The trial judge erred, upon revoking defendant's probation, by continuing the sentencing hearing at three-month intervals while defendant's family paid restitution, but imposing a five-year-sentence when the family stopped making payments. Defendant was legally blind and had limited assets, and the judge failed to determine whether the failure to pay restitution was willful. Further, although defendant's ability to borrow from relatives may be a proper factor in determining ability to pay, where "the family balks at making further payments, it does not necessarily follow that defendant wilfully refused to pay."

People v. Rupert, 148 Ill.App.3d 27, 499 N.E.2d 93 (3d Dist. 1986) Defendant was not financially able to pay restitution of $12,730 at $200 per month. Payments of $200 per month would absorb at least 40% of defendant's annual income and would be an impossible financial burden that would frustrate the purpose of restitution. The court modified the amount of restitution to 10% of defendant's net monthly income, extended the restitutionary period to five years, and noted that defendant will not be held liable in any further criminal proceedings should any deficiency remain at the end of five years. See also, **People v. Knowles**, 92 Ill.App.3d 537, 414 N.E.2d 1322 (4th Dist. 1980) (modifying amount of restitution to prevent financial burden to defendant and finding that a percentage of defendant's net income, rather than a fixed amount, was more appropriate); **People v. Reece,** 228 Ill.App.3d 390, 591 N.E.2d 993 (5th Dist. 1992) (restitution amount was excessive for defendant and the "better approach" was to establish a fixed percentage of defendant's

income as restitution).

People v. Johnson, 106 Ill.App.3d 171, 435 N.E.2d 799 (3d Dist. 1982) Restitution order reversed and remanded where the judge failed to sufficiently determine defendant's financial ability to pay it. See also, **People v. Krug**, 97 Ill.App.3d 938, 424 N.E.2d 98 (3d Dist. 1981).

Cumulative Digest Case Summaries **§45-7(a)**

People v. Allen, 2012 IL App (4th) 110297 (Nos. 4-11-0297 & 4-11-0298, 10/22/12)

625 ILCS 5/11-501.01(c) provides that a person who is convicted of driving under the influence and whose "operation of a motor vehicle . . . proximately caused any incident resulting in an appropriate emergency response" is liable for the cost of the emergency response. 625 ILCS 5/11-501.01(i) defines "emergency response" as "any incident requiring a response by a police officer, a fire fighter carried on the rolls of a regularly constituted fire department, or an ambulance."

Noting that the legislature included a proximate cause requirement in the statute, the court concluded that §5/11-501.01(i) authorizes restitution only if the incident requiring an "appropriate emergency response" was separate from the underlying DUI violation. Therefore, the trial court erred by ordering that defendant pay restitution where the only official response was that police officers conducted a traffic stop which led them to believe that defendant was intoxicated.

The trial court's restitution order was vacated.

(Defendant was represented by Assistant Defender Michael Vonnahmen, Springfield.)

People v. Brown, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2011) (No. 4-10-0058, 3/18/11 (withdrawn 4/6/11)

By statute, an individual convicted of DUI, whose operation of a motor vehicle while in violation of the DUI statute "proximately caused an incident resulting in an appropriate emergency response, shall be required to make restitution to a public agency for the costs of that emergency response." The statute defines "emergency response" as "any incident requiring a response by a police officer, a firefighter carried on the rolls of a regularly constituted fire department, or an ambulance." 625 ILCS 5/11-501.01(i).

Defendant was ordered to pay restitution to the police department, which included costs not only for the officers' time and "vehicle hours," but also for the costs of preparation of a DUI restitution report and a supervisor's report. The preparation of the two reports constituted costs of the emergency response for which restitution could be ordered.

Appleton, J., dissenting in part, concluded that no restitution should have been ordered. An employee of a gas station called the police because defendant appeared to be under the influence while pumping gas at the station. There was "no nexus between [the defendant's act of driving to the station impaired] and an emergency response. Sending patrol cars to investigate a possible DUI, making an arrest, and then writing reports does not, in my view, constitute an emergency response. Rather, it constitutes the police doing their job."

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

People v. Cameron, 2012 IL App (3d) 110020 (No. 3-11-0020, 10/12/12)

A crime victim is entitled to recover restitution for the actual out-of-pocket losses proximately caused by the criminal conduct of the defendant, even if those losses were not set forth in the charging instrument. 730 ILCS 5/5-5-6(a), (b).

When a defendant is convicted of theft, losses for items that were taken as part of the same theft, but not specifically listed in the charging instrument, may be included in a restitution order because the theft of multiple items from one victim involves a single course of conduct that constitutes one offense of theft. Where a defendant is convicted of theft by possession of stolen property, however, the defendant may only

be required to pay restitution for those losses associated with the stolen items in his possession, even if some of those items are not listed in the charging instrument. Defendant may not be required to pay for all of the losses associated with the initial taking.

Defendant was convicted of theft by possession of stolen property – a stolen driver's license. He was not charged with or convicted of the initial taking of the purse containing the license. Therefore, he could only be ordered to pay restitution for losses associated with his possession of the license, not the losses associated with the initial taking of the purse.

(Defendant was represented by Assistant Defendant Jessica Fortier, Chicago.)

People v. Day, 2011 IL App (2d) 091358 (No. 2-09-1358, revised op. 10/27/11)

1. Defendant was convicted of 10 counts of theft and 16 counts of forgery for taking money from her law practice without her partner's consent. The Appellate Court rejected defendant's argument that the trial court erred by imposing $137,937.25 in restitution to be paid in monthly installments of $2,873.

730 ILCS 5/5-5-6(b) authorizes restitution for "actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge." The court concluded that defendant was liable for restitution for the entire amount which she wrongfully took from the firm, without deducting any amount to which she would have been entitled under the firm's partnership agreement. "We do not read the out-of-pocket loss limitation in the restitution statute to require apportionment of funds unlawfully taken from the firm or [the partner]."

2. Furthermore, the trial court did not abuse its discretion by ordering monthly restitution payments of $2,873. The trial court's order concerning the timely manner of payment of restitution is reviewed for abuse of discretion.

The court rejected the argument that the trial court failed to consider defendant's ability to pay. The trial court is required to determine a reasonable time and manner for the payment of restitution, and need consider the defendant's ability to pay only when considering the time and manner of payment or when evaluating a petition to revoke restitution. Here, the judge specifically stated that he was familiar with the defendant and knew that she was unemployed and about to relinquish her law license. It also expressed its understanding of the magnitude of the monthly restitution payments, but denied a request to lower the payment. The court found that under the circumstances, the judge did not abuse his discretion.

The Appellate Court also rejected defendant's request to modify the restitution payments to 10% of any monthly income. The court stressed that it was unable to determine whether defendant's unemployment status would be long term or only for a temporary period; "[a]lthough defendant will not be working as an attorney for the majority of the restitution period, she is a highly educated and experienced person who should be able to obtain work earning an above-average salary." The court also noted that if it turned out that defendant's income was insufficient to allow the restitution payments, she could petition the trial court for a modification.

Defendant's convictions and sentences were affirmed.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Dickey, 2011 IL App (3d) 100397 (No. 3-10-0397, 11/16/11)

The court is required to order restitution when, among other things, the defendant's criminal actions caused personal injury. 730 ILCS 5/5-5-6. The court must determine the actual costs incurred by the victim; a guess is not sufficient. The court is also required to consider the defendant's ability to pay in determining whether restitution should be paid in a single payment or in installments. If the court orders that the restitution be paid over a period of greater than six months, the court is required to order that defendant make monthly payments, unless the court waives this requirement by making a specific finding of good cause for waiver. 730 ILCS 5/5-5-6(f).

The trial court's order that defendant make restitution in a specific amount was supported by the presentence report containing the victim's bills for medical care in that amount. The court ordered that the

restitution be paid within the 30-month term of probation, but did not consider defendant's ability to pay in setting the time for payment of restitution. Nor did the court make any finding of good cause to waive the required monthly payments. The cause was remanded for the trial court to consider defendant's ability to pay in setting the time within which restitution must be paid.

People v. Ford, 2016 IL App (3d) 130650 (No. 3-13-0650, 2/22/16)

1. The restitution statute authorizes courts to order restitution when a defendant through a criminal act has damaged another person's property. A "victim" under the statute is someone who has incurred property damage or financial loss. 730 ILCS 5/5-5-6.

The vast weight of authority holds that a police department is not considered a victim under the restitution statute and should not be compensated for the public money it spends for law enforcement. There are two reasons for this rule: (1) merely investigating offenses does not make the police a "victim" of the offenses; and (2) were the rule otherwise, the police would receive restitution in almost every criminal case, and would thus be compensated twice for performing their basic function, once by the taxpayers and once by the offender

But there is no per se rule prohibiting police from receiving restitution. Here defendant recklessly damaged a police van. The trial court ordered defendant to pay restitution to repair the van. The Appellate Court upheld the order since it did not reimburse the police for their normal costs of investigating crime, but instead covered their out-of-pocket cost of repair required because of defendant's criminal act.

2. The parties and the court agreed that the circuit court clerk improperly imposed fines and fees against defendant. The imposition of a fine is a judicial act and the circuit clerk has no authority to impose fines, even if they are mandatory. Any fine imposed by the circuit clerk is void. The proper remedy is to vacate the assessments in full and remand to the trial court to properly impose the appropriate fines and fees.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

People v. Graham, 406 Ill.App.3d 1183, 947 N.E.2d 294 (5th Dist. 2011)

The term "victim" in the statute authorizing restitution to a crime victim, 730 ILCS 5/5-5-6(b), includes "a single representative who may be the spouse, parent, child or sibling" of the victim, except where that person is also the defendant. 725 ILCS 120/3(a); 730 ILCS5/3-1-2(n). Use of the word "may" indicates a permissive or directory reading. The statute should also be construed broadly to effect its remedial purpose and to avoid an absurd or unjust result. The word "victim" may thus be construed to include a grandparent who has custody of the minor victim and has assumed the role of a parent.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Hanson, 2014 IL App (4th) 130330 (No. 4-13-0330, 12/30/14)

Under 730 ILCS 5/5-4.5-50(d) a defendant must file a written motion challenging "the correctness of a sentence or any aspect of the sentencing hearing" within 30 days of the imposition of sentence. The written post-sentencing motion allows the trial court to review defendant's contentions of sentencing error and save the delay and expense of waiting until appeal to correct any errors. It also gives the Appellate Court the benefit of the trial court's reasoned judgment on potential issues.

1. Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant's claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made no effort to point this error out at trial and create a clear record of the trial court's actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to "use the transcript of the sentencing hearing as a crystal ball" to understand the trial court's thinking. The Appellate

Court refused to engage in "mind-reading" and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain error since the right to be sentenced lawfully affects a defendant's fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

2. The court also declined to review as plain error, despite the State's agreement, defendant's claim that the trial court imposed a restitution order without an evidentiary basis for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts "a few ten-dollar phrases" such as "substantial rights," "grave error," and the "fundamental right to liberty." Since all sentencing errors arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court's error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Korzenewski, 2012 IL App (4th) 101026 (No. 4-10-1026, 6/7/12)

In addition to any other fine or penalty, an individual who is convicted of DUI concerning an incident in which the operation of a motor vehicle proximately caused an appropriate emergency response must pay restitution for the cost of that response. (625 ILCS 5/11-501.01(i)). The Appellate Court concluded that a routine traffic stop for speeding does not qualify as "an appropriate emergency response" under the meaning of §11-501.01(i). Applying **Gaffney v. Board of Trustees of the Orland Fire Protection District**, 2012 IL 110012, the court concluded that the word "emergency" should be interpreted to mean "an unforseen circumstance involving imminent danger to a person or property requiring an urgent response."

Where the arresting officer testified that he was conducting speed enforcement as part of his assignment to the traffic enforcement detail, and that he stopped the defendant's car for going 19 miles over the speed limit, the court concluded that the officer was conducting a routine stop rather than reacting to a situation which required an urgent response. Because defendant did not proximately cause an incident requiring an emergency response, restitution to the police department was not authorized under §11-501.01(i).

The court vacated the restitution order requiring the payment of $133 to the police department which stopped defendant for speeding.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. Moore, 2013 IL App (3d) 110474 (No. 3-11-0474, 6/11/13)

Defendant was placed on probation for burglary and ordered to pay restitution to the complainant in the two counts for which he was convicted, and also to a separate complainant named in two counts which were dropped as part of a plea agreement. The State filed a petition to revoke probation and requested that defendant's bond be applied first to restitution. The trial court agreed and checked the box in the sentencing order which stated that bond was to be applied first to restitution. However, the court left the section blank which would have required defendant to pay restitution, and did not check the box indicating that restitution was being ordered.

1. When probation is revoked, an entirely new sentence is imposed. Thus, upon revocation of probation the defendant is no longer subject to the original conditions of probation, including to pay restitution.

Thus, when probation was revoked the original restitution order ceased to exist. Although at the resentencing the trial judge left blank the portion of the sentencing order establishing restitution, it addressed the issue of restitution during the sentencing hearing and responded to the State's request by checking the

box in the sentencing order applying defendant's bond first to restitution. The court concluded under these circumstances, the trial judge intended to reestablish a restitution order. Thus, defendant was subject to a restitution order after probation was revoked.

2. However, the provision requiring restitution on the dismissed counts was improper. Generally, a defendant can be required to pay restitution for conduct which did not result in conviction only if the plea agreement includes defendant's agreement to pay such restitution. Because there was no such agreement here, the order requiring restitution concerning the dismissed counts was vacated.

3. The court also concluded that the trial court erred by applying defendant's bond to restitution rather than to paying court costs. 730 ILCS 5/5-5-6(e) provides that the trial court may "require the defendant to apply the balance of his cash bond, ***after payment of court costs, and any fine that may be imposed***[,] to the payment of restitution." Under the plain language of the statute, the trial judge lacks authority to apply defendant's bond to restitution in preference to court costs and fines. Therefore, the portion of the sentencing order applying the bond first to restitution is void because it violates the plain language of the statute.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

Top

§45-7(b)
Fines

Williams v. Illinois, 899 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) The State cannot constitutionally imprison someone beyond the statutory maximum term because of his inability to satisfy monetary provisions of the sentence. See also, **Tate v. Short**, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971); **Bearden v. Georgia**, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); **People v. Davis**, 2 Ill.App.3d 106, 276 N.E.2d 134 (1st Dist. 1971).

U.S. v. Bajakajian, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) 1. The Excessive Fines Clause of the Eighth Amendment is intended to limit "the government's power to extract payments, whether in cash or in kind," as "punishment" for a criminal offense.

2. For purposes of the Eighth Amendment, forfeitures are "fines" if they constitute "punishment" for a criminal offense. Forfeiture of $357,144 under a federal statute requiring forfeiture of "any property . . . involved" in the offense of failing to report the taking of more than $10,000 out of the country constituted "punishment " because it was imposed at the conclusion of the criminal proceedings and only against persons who were convicted of the criminal offense. The government's action was not a forfeiture *in rem*, which is considered "nonpunitive," because it "does not bear any of the hallmarks of traditional civil *in rem* forfeitures." The government sought to convict respondent of the criminal charge rather than proceed against the currency itself, and the forfeiture action was triggered by the entry of judgment on the criminal conviction. Under these circumstances, forfeiture did not serve the remedial purpose of an *in rem* forfeiture, but was designed as "punishment" for the underlying crime.

3. The Excessive Fines Clause is violated where the amount of a fine is "grossly disproportionate to the gravity of the defendant's offense." The clause was violated here, for forfeiture of $357,144 was grossly disproportionate to the offense of failing to report the transportation of more than $10,000 out of the country.

People v. Jones, 223 Ill.2d 569, 861 N.E.2d 967 (2006) A criminal defendant who is sentenced to pay a fine is entitled to $5.00 per day credit for each day of incarceration on a bailable offense. This credit applies only to fines, and not to fees. Generally, a "fine" is a pecuniary punishment imposed as part of the sentence on a conviction, while a "fee" is a collateral consequence of the conviction and is intended to compensate the State for some expenditure it incurred in prosecuting defendant. The $4.00 criminal/traffic conviction

surcharge, the $500 assessment for controlled substance violation, and the $100 trauma fund charge are all "fines" and therefore subject to the $5.00 per day credit. The $5.00 charge against drug offenders to fund spinal cord injury and paralysis does not violate due process. Although this charge was labeled a fee, it has the attributes of a fine and should be treated as a fine. "A defendant has no basis for protesting the usage to which his criminal fines are put." See also, **People v. Fort**, 373 Ill.App.3d 882, 869 N.E.2d 950 (1st Dist. 2007) (the "drug assessment" mandated by 720 ILCS 570/411.2(a)(3) constitutes a "fine" to which the $5.00 credit for each day of presentence incarceration applies).

People v. Caballero, 228 Ill.2d 79, 885 N.E.2d 1044 (2008) 1. Although the $5.00 per day credit against a fine for pretrial incarceration concerns a statutory right, and is not cognizable under the Post-Conviction Hearing Act, it is a claim which may be raised at any time. Where the basis for granting the credit is clear from the record, the appellate court may choose to grant the credit in an appeal from a post-conviction proceeding, rather than requiring defendant to file a separate request. Here, defendant was entitled to the $5 per day credit although he did not raise the issue until the appeal from the denial of his post-conviction petition.

2. The $5.00 per day credit under §110-14 applies to incarceration that occurs either before defendant is convicted or between the conviction and sentencing. The court rejected the argument that once a defendant is convicted, the offense is no longer "bailable." See also, **People v. Rivera**, 378 Ill.App.3d 896, 882 N.E.2d 1169 (2d Dist. 2008) ($5 per day credit under 725 ILCS 5/110-14 applies to incarceration before conviction as well as while awaiting sentencing; defendant entitled to credit requested for first time on appeal).

People v. Jamison, 229 Ill.2d 184, 890 N.E.2d 929 (2008) Under the Violent Crime Victims Assistance Act, a defendant who is sentenced to pay a fine is required to also pay an "additional penalty" of $4 "for each $40, or fraction thereof" of the fine (725 ILCS 340/10(b)). Under the same act, a defendant who is not sentenced to pay a fine must pay a $25 "penalty" for a crime of violence and $20 for any other felony or misdemeanor (except conservation offenses). (725 ILCS 240/10(c)). Subsections (b) and (c) provide a bifurcated system for imposing a violent crimes victims assistance penalty, depending on whether another fine is imposed. Here, the judge erred by imposing the $20 penalty under subsection (c) where defendant was ordered to pay a $4 Criminal/Traffic Conviction Surcharge under 730 ILCS 5/5-9-1(c-9). Because the $4 surcharge constituted a "fine," the "additional penalty" under §240/10(b) should have been applied. However, that "additional penalty" should have been $4, not 40¢, as the parties assumed. Section (b) requires a fine of $4 for each fraction of a fine up to $40, rather than 10% of whatever fine is imposed.

People v. Maldonado, 109 Ill.2d 319, 487 N.E.2d 610 (1985) In determining the amount and method of payment of a fine, the judge shall consider defendant's financial resources and future ability to pay the fine. The judge's statement ("I would note that the defendant has been gainfully employed, and that . . . he's been on unemployment") was sufficient to indicate that the judge made the requisite considerations. See, **People v. Bergman**, 121 Ill.App.3d 100, 458 N.E.2d 1370 (2d Dist. 1984) (vacating the fine because the record did not show that the trial judge considered "the financial resources and future ability of the offender to pay the fine").

People v. Morrison, 111 Ill.App.3d 997, 444 N.E.2d 1144 (3d Dist. 1983) The facts before the trial court were insufficient to show that defendant had the financial resources and future ability to pay a $350 fine. That defendant posted a $100 cash bond does not necessarily indicate financial ability to pay because the bail money may have been borrowed or paid by relatives or friends. Also, though defendant was receiving unemployment compensation, the record did not indicate the amount of those benefits. Finally, there was no information about the expenses incurred by defendant, whether his wife had income, or whether any property or other sources of income were available. See also, **People v. Echols**, 146 Ill.App.3d 965, 497 N.E.2d 321 (1st Dist. 1986).

People v. Oravis, 81 Ill.App.3d 717, 402 N.E.2d 297 (4th Dist. 1980) Fine of $2,000 reduced because of defendant's inability to pay. Defendant was working only part time, had liabilities of $2,000, and lived at home while his two-year-old son lived with the mother.

People v. Rolland, 73 Ill.App.3d 531, 392 N.E.2d 163 (5th Dist. 1979) Imposition of a $500 fine on resentencing after defendant's conditional discharge was revoked for failure to pay a $50 installment of his fine was error. "If defendant could not make timely payments of $50 per month for 10 months, the trial court surely could not have considered defendant's financial resources and future ability to pay in imposing an additional fine of $500." Also, defendant had completely paid his initial fine ahead of schedule before the sentencing hearing, and the court failed to see how the additional fine has any relationship to either the seriousness of the offenses or the objective of restoring defendant to useful citizenship.

People v. Mancilla, 331 Ill.App.3d 35, 770 N.E.2d 1262 (2d Dist. 2002) Rejecting **People v. Watson**, 318 Ill.App.3d 140, 743 N.E.2d 147 (4th Dist. 2000), the court found that 735 ILCS 5/12-801 authorizes withholding orders against DOC wages paid to a DOC inmate. But, the withholding order in this case was improper because the court failed to follow the required statutory procedure, for the withholding was not discussed at sentencing and was merely part of a standard sentencing form. Also, it was improper to order that 25% of defendant's DOC wages be withheld because wage withholding orders are limited to the lesser of 15% of debtor's gross weekly wages or the amount by which disposable earnings for the week exceed 45 times the federal minimum hourly wage. See also, **People v. Despenza**, 318 Ill.App.3d 1155, 744 N.E.2d 912 (3d Dist. 2001) (the trial court may enter a withholding order to collect the amount of a "fine" imposed in a criminal case, but not to recover court costs; an order to withhold 50% of defendant's DOC wages would have been improper). But see **People v. Scott**, 324 Ill.App.3d 641, 756 N.E.2d 466 (4th Dist. 2001) (under **Watson**, the trial court lacks authority to order the Department of Corrections to withhold an inmate's wages to pay fines and court costs).

People v. White, 333 Ill.App.3d 777, 776 N.E.2d 836 (2d Dist. 2002) Under the plain language of 725 ILCS 5/110-14, the $5.00 credit against a fine for each day of incarceration on a bailable offense is unavailable for financial obligations other than "fines," such as court costs, probation fees, or lab fees.

People v. Beler, 327 Ill.App.3d 829, 763 N.E.2d 925 (4th Dist. 2002) Where a defendant is sentenced to probation, conditional discharge, or supervision, the Unified Code authorizes imposition of a fine to reimburse a local anti-crime program.

People v. Reed, 376 Ill.App.3d 121, 875 N.E.2d 167 (3d Dist. 2007) In a controlled substances case, a street value fine shall be imposed. The trial court is to determine the amount of the fine based on testimony by law enforcement personnel and defendant as to the amount of controlled substance seized, as well as any other testimony that may be required. Although the evidence required to establish street value varies from case-to-case, the trial court must have a concrete, evidentiary basis for the fine. Fine was vacated where there was no evidentiary basis for the $200 street value fine imposed in the lower court. The court rejected the State's argument that the street value fine should be set at $120 - the amount for which defendant sold the two grams of cocaine in question to a police informant - because the court's sentencing decision was "not based upon that testimony." See also, **People v. Gonzalez**, 316 Ill.App.3d 354, 736 N.E.2d 157 (1st Dist. 2000) (trial judge committed plain error by relying on an arrest report to set the street value fine in a cannabis case); **People v. Simpson**, 272 Ill.App.3d 63, 650 N.E.2d 265 (4th Dist. 1995) (it was plain error for the trial judge to merely accept the prosecutor's suggestion of street value and base the street value fine solely on the prosecutor's suggestion; also, a trial judge may not be presumed to know the appropriate street value of a substance based upon his or her experience in other drug cases).

People v. Nixon, 278 Ill.App.3d 453, 663 N.E.2d 66 (3d Dist. 1996) Under **People v. Robinson**, 167 Ill.2d 397, 657 N.E.2d 1020 (1995), the State need not test samples from each of several containers of drugs in order to prove the amount of controlled substance for purposes of the street value fine. Thus, defendant's street value fine could properly be based on possession of 6.6 grams of cocaine though only 2.2 grams were tested.

People v. Roberts, 338 Ill.App.3d 245, 788 N.E.2d 782 (2d Dist. 2003) Because a judge is authorized to impose a street value fine only if defendant is convicted of possession or delivery of cannabis or a controlled substance, the trial court erred by imposing a street value fine on a conviction for possession of a look-alike substance.

People v. Price, 227 Ill.App.3d 253, 591 N.E.2d 99 (4th Dist. 1992) A trial judge normally cannot impose a street value fine that includes contraband involved in a charge that has been dismissed. But, where defendant knowingly entered a plea agreement providing for what would otherwise be an unauthorized sentence, the street value fine properly included the substance involved in the dismissed count.

People v. Matthews, 273 Ill.App.3d 148, 652 N.E.2d 437 (4th Dist. 1995) The trial judge erred by seizing jewelry in defendant's possession at the time of his arrest to pay fines imposed upon his conviction. A judge is not statutorily authorized to seize a defendant's property in payment of a fine, particularly where, as here, the sentencing order provided for defendant to make monthly payments against the fine.

People v. Nearn, 178 Ill.App.3d 480, 533 N.E.2d 509 (1st Dist. 1988) The trial court erred by imposing a fine because "the trial had cost the county money through services of the public defender and payment of a fee to private [appointed] counsel." Also, "[f]ines are disfavored for defendants who lack the ability to pay them."

Cumulative Digest Case Summaries **§45-7(b)**

Southern Union Co. v. United States, 567 U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___, 2012 WL 2344465 (No. 11-94, 6/21/12)

Other than the fact of a prior criminal conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466 (2000).

No principled basis exists under **Apprendi** for treating criminal fines differently from sentences of imprisonment or a death sentence. So far as **Apprendi** is concerned, the relevant question is not whether a fine is insubstantial as compared to imprisonment or a death sentence. The question is whether the fine at issue is substantial enough to trigger the Sixth Amendment right to trial by jury. Where a fine is so insubstantial that the underlying offense is considered petty, the right of jury trial is not triggered and no **Apprendi** issue arises. Where a fine is substantial enough to trigger the Sixth Amendment's jury-trial guarantee, **Apprendi** applies in full.

The statute at issue subjected Southern Union to a maximum fine of $50,000 for each day of a violation. In light of the seriousness of that penalty, the company was properly accorded a jury trial. Judicial factfinding that enlarged the maximum punishment beyond what the jury's verdict allowed therefore violated **Apprendi**.

The court found support for this conclusion in the historical role of the jury at common law. A review of state and federal decisions discloses that the predominant practice, where the amount of the fine was pegged to a determination of specific facts, was for such facts to be alleged in the indictment and proved to the jury. The court found unpersuasive the remaining arguments of the Government, and voiced by the

dissent, as they had been rejected by **Apprendi**.

People v. Graves, 235 Ill.2d 244, 919 N.E.2d 906 (2009)

1. In considering a constitutional challenge to a "fee," the court must first determine whether the charge is a "fee" or a "fine." A "fine" violates due process only if the amount is grossly disproportionate to the underlying offense, while a "fee" must be based on a rational relationship between the purpose of the charge and the offense of which the defendant was convicted.

A "fee" is defined as a charge which seeks to compensate the State for some expenditure incurred in prosecuting the defendant. A "fine" is defined as a monetary punishment imposed as part of the sentence imposed upon conviction of an offense. A charge that is labeled as a "fee" by the legislature may in fact be a "fine," depending on whether the charges are intended to compensate the State for a cost incurred in the prosecution.

Other factors to be considered in determining whether a charge is a "fee" or a "fine" include the entity to which the payment is made and whether the charge is imposed only after conviction.

2. A mental health court fee of $10 and a youth diversion/peer court fee of $5.00 are both "fines" rather than "fees," because the charges were not intended to compensate the State for any costs incurred in prosecuting the defendant. Because neither fine was disproportionate to the Class 2 felony offense of possession of a stolen motor vehicle, both were constitutionally permissible.

3. The court rejected defendant's argument that the charges should be considered "fees" because they were imposed by the county board and were paid to a county fund rather than to the State treasury. By enacting legislation permitting county boards to adopt certain monetary charges, the legislature clearly "intended to grant to county boards the limited authority to set 'fines' as punishment for various violations."

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

People v. Jackson & Lee, 2011 IL 110615 (Nos. 110615 & 110702, 9/22/11)

1. 730 ILCS 125/17 creates the "Arrestee's Medical Cost Fund" to reimburse counties for medical expenses of arrestees. The fund is created by imposition of a $10 fee for each criminal conviction. In the Supreme Court, the parties agreed that the amended version of §17, which took effect August 15, 2008, expressly allows the $10 medical cost assessment to be levied against all arrestees, including those who did not receive any medical services. The defendants claimed, however, that the pre-amended version of §17, which was in effect at the time of these offenses but had been amended by the time of the sentencing hearings, authorized the $10 fee only where the county incurred medical expenses on behalf of an arrestee.

The Supreme Court rejected this argument, finding that the first paragraph of §17 "unequivocally mandates that the county is entitled to medical costs assessment for each conviction." The court also noted that the legislature created an exception to the fee for convictions of petty and business offenses, but provided no similar exemption for persons who did not receive medical care.

The court acknowledged that the second paragraph of the pre-amended version of §17 provided that the money collected was to be used "solely" to reimburse medical expenses "relating to the arrestee while he or she is in the custody of the sheriff," but concluded that the second paragraph relates solely to the use of the fund and not to the collection of the assessment. Thus, the language of the second paragraph does not limit the collection of the fee under the first paragraph.

The court also noted that defendants' interpretation of §17 would be irrational because an arrestee with the ability to pay is already required to reimburse the county for medical care. Requiring an additional contribution of $10 only from arrestees who have received medical care would serve no purpose.

2. The court rejected the argument that when the legislature amended §17 to explicitly allow the $10 fee to be collected from all arrestees, it is presumed to have intended to make a change in the statute. The court found that the clear legislative intent of the amendment, as shown by legislative debates, was to clarify the statute rather than to substantively change its meaning.

3. Under the rule of "lenity," a court strictly construes ambiguous criminal statutes to afford leniency

to the accused. However, the cardinal principle of statutory construction, to which all other rules are subordinate, is that a court must ascertain and give effect to the intent of the legislature. The rule of lenity does not allow a court to construe a statute so rigidly as to defeat the legislature's intent.

The court concluded that the rule of lenity did not justify limiting the $10 fee to arrestees who receive medical treatment while incarcerated, because that construction of §17 would conflict with the express legislative intent.

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

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

People v. Lewis, 234 Ill.2d 32, 912 N.E.2d 1220 (2009)

Imposition of a "street value" fine without a sufficient evidentiary basis satisfies the "fundamental fairness" prong of the plain error rule. (See **NARCOTICS**, §35-4 & **WAIVER – PLAIN ERROR – HARMLESS ERROR**, §§56-2(a),(b)(5)). The court also concluded that the notice of appeal was sufficient to initiate review. (See **APPEAL**, §2-2(a)).

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

In re Davontay A. and Donavon A., 2013 IL App (2d) 120347 (Nos. 2-12-0347 & 2-12-0376, 12/30/13)

1. 730 ILCS 5/5-9-1.7(b)(1) provides that in addition to any other penalty, a $200 fine "shall be imposed upon any person who pleads guilty or who is convicted of, or who receives a disposition of court supervision for, a sexual assault or attempt of a sexual assault." The court concluded that under the plain language of the statute, minors who were adjudicated delinquent after an adjudicatory hearing are not subject to the fine.

Minors who are adjudicated delinquent after an adjudicatory hearing have not pleaded guilty, and juvenile adjudications do not constitute "convictions." Furthermore, respondents who are adjudicated delinquent are ineligible for court supervision.

Because the statutory language is clear and unambiguous, it must be applied as written. Thus, the sexual assault fines against the respondents must be vacated.

2. The court rejected the State's argument that it would be "absurd" to impose the fine on juveniles who plead guilty to sexual assault but not on those who are adjudicated delinquent on such offenses after an adjudicatory hearing, and that the "disparate impact" of not imposing the fine on the latter indicates that the legislature intended that the term "convicted" include delinquency adjudications. "[T]his argument is nothing more than an attempt, under the guise of statutory interpretation, to remedy an apparent legislative oversight by rewriting [the statute] in a way that is inconsistent with its clear and unambiguous language.

3. The court added that its conclusion would be the same even if §5-9-1.7(b)(1) was determined to be ambiguous. Under the rule of statutory construction known as *expressio unius est exclusio alterius,* when the legislature includes a listing of things to which a statute applies, there is an inference that items omitted from the list were intended to be excluded. Because the legislature did not include persons who were adjudicated delinquent after an adjudicatory hearing in the list of persons subject to the fine, it should be inferred that such persons were intended to be excluded.

(Defendant was represented by Assistant Defender Barb Paschen, Elgin.)

People v. Alghadi, 2011 IL App (4th) 100012 (No. 4-10-0012, 10/17/11)

1. A defendant charged with multiple counts with a single case number may be assessed only: (1) one document-storage fee, (2) one court automation fee, (3) one circuit-clerk fee, (4) one court-security fee, (5) one arrestee's-medical assessment, (6) one court-finance fee, (7) one State's Attorney assessment, (8) one Violent Crime Victim's Act fine, and (9) one drug-court fee. Where defendant's residential burglary and robbery charges were severed, but the same case number was used for both, duplicate fees were not authorized although defendant was convicted of one count in a jury trial and pleaded guilty to the second count several months later.

2. Imposition of a fine is a judicial act. The circuit clerk has no authority to levy fines, including mandatory fines. Fines imposed by the circuit clerk's office are void from inception.

Here, the fines and fees assessed by the circuit clerk were vacated. Because the record was unclear, the cause was remanded for the trial court to determine which fees and fines concerned the residential burglary conviction, which was before the court, and which were related to the earlier robbery conviction, which was not before the court. The trial court was also directed to consider the application of presentence credit to the fines and fees.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Anderson, 402 Ill.App.3d 186, 931 N.E.2d 773 (3d Dist. 2010)

1. 730 ILCS 5/5-8-1(d)(5) requires a four-year-term of mandatory supervised release where the defendant is convicted of a "second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse" and the victim was under the age of 18. The Appellate Court held that a defendant who pleads guilty in a single proceeding to separate counts of aggravated criminal sexual abuse stemming from a single incident has not been convicted of a "second or subsequent offense," and is therefore not subject to an enhanced MSR term.

Although § 5-8-1(d)(5) concerns the enhancement of an MSR term, the court applied principles which govern the enhancement of other sentences after the commission of subsequent crimes. Under these principles, an enhanced MSR term is available under § 5-8-1(d)(5) only if the second or subsequent offense occurs after the first conviction has been entered.

2. 730 ILCS 5/5-9-1.7(b)(1), which authorizes a $200 fine for a person convicted of sexual assault or attempted sexual assault, gives the trial court discretion to impose multiple $200 fines in a multi-count aggravated criminal sexual abuse prosecution. Thus, the trial court was not limited to a single $200 fine where the defendant pleaded guilty to multiple counts arising from a single occurrence.

3. Because the imposition of fines not authorized by statute challenges the integrity of the judicial process, the court found as a matter of plain error that the trial judge erred in calculating fines under the Violent Crimes Victims Assistance Act (725 ILCS 240/10). Applying **People v. Jamison**, 229 Ill.2d 184, 890 N.E.2d 929 (2008), the court found that the maximum additional fine for each $200 fine ordered under 730 ILCS 5/5-9-1.7(b)(1) was $20, rather than the $40 ordered by the trial court.

4. The trial court's order imposing an enhanced four-year mandatory supervised release term under 730 ILCS 5/5-8-1(d)(5), and imposing fines, was "voidable" rather than "void." A judgment is void only if entered by a court which lacks jurisdiction. Defendant challenged only the specific term of MSR and the amount of the fines, and did not challenge the authority of the court to impose such sentences. Because the sentencing order was clearly within the court's jurisdiction, it was merely "voidable."

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Anthony, 408 Ill.App.3d 799, 951 N.E.2d 507 (1st Dist. 2011)

1. The $5.00 court system fee authorized by 55 ILCS 5/5-1101(a) may be entered only if the defendant is convicted of violating the Illinois Vehicle Code or a similar county or municipal ordinance. The fee was vacated where the defendant was convicted of unlawful use of a weapon by a felon.

2. The $25 court services fee to defray the cost of court security, which is authorized by 55 ILCS 5/5-1103, may be imposed even where the defendant is not convicted of an offense specified under the statute.

3. The $10 County Jail Medical Fund fee, which is authorized by 730 ILCS 125/17, is to be imposed without regard to whether the defendant incurred an injury or required treatment while in custody. The court concluded that the fee is intended to reimburse the county for the cost of providing medical services to arrestees, and is not a "fine" to which the presentence incarceration credit may be applied.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Blalock, 2012 IL App (4th) 110041 (No. 4-11-0041, 9/10/12)

The circuit court clerk lacked authority to impose $10 drug court and $15 Children Advocacy Center fines which were not explicitly ordered by the trial judge. However, where the county had enacted an ordinance providing for the mandatory assessment of a $10 drug court fee, the Appellate Court had authority to impose that fine.

(Defendant was represented by Supervisor Arden Lang, Springfield.)

People v. Blankenship, 406 Ill.App.3d 578, 943 N.E.2d 111 (2d Dist. 2010)

730 ILCS 5/5-9-1.1 provides that where the defendant is convicted of a drug related offense involving cannabis or a controlled substance, the court shall levy a fine of not less than the full street value of the substance seized. Street value is determined by the trial court based on testimony as to the amount seized "and such testimony as may be required by the court as to the current street value" of the substance. Street value may be set by stipulation, testimony, or reliable evidence.

The court concluded that defendant "tacitly stipulated" to a street value fine of $10 where the trial court asked the parties for input concerning the fine, and the defense did not dispute the prosecutor's representation of the street value. "Stipulations by silence have been found under comparable circumstances."

(Defendant was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Breeden, 2016 IL App (4th) 121049-B (No. 4-12-1049, 5/9/16)

The trial court imposed a fine of $255 for Sexual Offender Registration, less than the minimum fine of $500 required by the statute. 730 ILCS 150/10(a). The Appellate Court held that following the decision in **Castleberry**, 2015 IL 116916, the challenged fine was voidable rather than void and the State lacked the authority to request on appeal an increase in the amount of the fine imposed. The Appellate Court thus left the $255 fine in place.

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

People v. Buffkin, 2016 IL App (2d) 140792 (No. 2-14-0792, 5/16/16)

Defendant argued for the first time on appeal from the dismissal of his post-conviction petition that he was entitled to pre-sentence credit against his fines and that he was improperly assessed a DNA fee. The State confessed error on both claims.

The court first held that even though the issue was forfeited and the error was no longer considered void after **Castleberry**, it could award defendant credit against his fines. In **Caballero**, 228 Ill. 2d 79 (2008), the Supreme Court held that under 725 ILCS 5/110-14, a defendant could apply for pre-sentence credit "at any time and at any stage of the court proceedings, even on appeal in a post-conviction proceeding."

Caballero, however, did not apply to the DNA fee. And since the fee was no longer void after **Castleberry**, defendant could not collaterally attack the fee. Additionally, Supreme Court Rule 615(b)(1)&(4), which permits a court to modify the judgment order and reduce a defendant's sentence did not apply because the judgment appealed here was the dismissal of defendant's post-conviction petition, not his sentence. Because the time to directly attack his sentence was long past, the court held that it would normally lack jurisdiction to modify the sentence.

But since the State confessed error, the State revested the court with jurisdiction. The revestment doctrine provides that the parties may restore the court's jurisdiction if both parties: (1) actively participate in the proceedings; (2) fail to object to the timeliness of a late filing; and (3) assert positions that are inconsistent with the merits of the prior judgment and support setting it aside. Although the revestment doctrine typically is applied in trial court, the court saw no basis for not applying it on appeal.

Here, both parties participated in the appeal, the State failed to object to the timeliness of defendant's attack on his sentence, and both parties agreed to set the prior judgment aside. The court thus remanded the cause to the trial court to apply sentencing credit against defendant's fine and vacate the DNA fee.

(Defendant was represented by Assistant Defender Erin Johnson, Elgin.)

People v. Burnett, 2016 IL App (3d) 140837 (No. 3-14-0837, 12/9/16)

When defendant pled guilty, the circuit court did not mention or discuss any fines, and neither the sentencing order nor the mittimus included any fines. The deputy circuit clerk later issued a document called the "Case Transactions Summary" which included 11 fines totaling $1046.50.

On appeal from the first-stage dismissal of his post-conviction petition, defendant argued for the first time that the fines should be vacated. The Appellate Court agreed. The imposition of a fine is a judicial act and the circuit clerk has no authority to impose fines. Fines imposed by the clerk are void from their inception.

The court rejected the State's argument that it lacked jurisdiction to review this claim in an appeal from the dismissal of a post-conviction petition since defendant's claim did not involve a constitutional deprivation cognizable in post-conviction proceedings. The viability of a challenge to a void assessment does not depend on the procedural mechanism used to raise the issue. A void order may be attacked at any time in any court.

The court vacated defendant's fines.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

People v. Carreon, 2011 IL App (2d) 100391 (No. 2-10-0391, 10/31/11)

Although labeled as a fee, the $50 Performance-Enhancing Substance Testing Fund fee, imposed upon conviction of certain drug offenses pursuant to 730 ILCS 5/5-9-1.1(d), is a fine. It qualifies as a fine because it is included in a section labeled "Fines," is imposed only upon conviction of a crime, is not designed to compensate the State for the costs of prosecution, and is expressly exempt from reduction for time spent in presentencing custody.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Carter, 2016 IL App (3d) 140196 (No. 3-14-0196, mod op 9/2/16)

In **People v. Castleberry**, 2015 IL 116916, the Supreme Court abolished the void sentence rule, which allowed the Appellate Court to increase illegally low sentences to conform with minimum statutory requirements. The court concluded that after **Castleberry**, the Appellate Court may no longer remand a cause to the trial court for imposition of fines that were improperly imposed by the circuit clerk. The court concluded that it should merely vacate improperly imposed fines rather than remanding for the trial court to impose the fines.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

People v. Chester, 2014 IL App (4th) 120564 (No. 4-12-0564, 1/28/14)

The Appellate Court refused to accept the State's concession that defendant was entitled to a $5 per day credit against a $15 Children's Advocacy Center fee and a $10 drug court fee. The court found that the fines were imposed by the clerk rather than the trial court, and that the cause should be remanded for the trial court to impose mandatory fines. The court also stated that where statutory credit issues are raised, the statement of facts should identify whether specific fines were imposed by the trial court or the circuit clerk.

The circuit clerk's assessment of fines was vacated and the cause remanded for reimposition of mandatory fines.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Dalton, 406 Ill.App.3d 158, 941 N.E.2d 428 (2d Dist. 2010)

Both the Federal and State Constitutions prohibit *ex post facto* laws that disadvantage a defendant by either criminalizing an act that was innocent when done, increase the punishment for a previously-committed offense, or alter the rules of evidence by making a conviction easier to obtain. The prohibition

of *ex post facto* laws applies only to punitive laws. It does not apply to fees that are compensatory rather than punitive.

The central characteristic separating fees from fines is whether the charge compensates the state for costs incurred as the result of prosecution of the defendant, in which case the cost is a fee. Compensation for labor or services, especially professional services that are collateral consequences of the defendant's conviction, are fees.

A statute that authorizes the court to impose an additional $500 fine on offenders convicted of certain sex offenses provides that 10% of the assessment is to be retained by the circuit court clerk to cover costs incurred in administrating and enforcing the statute, and that this penalty should not be considered part of the fine. 730 ILCS 5/5-9-1.15. This part of the assessment is a fee since it constitutes compensation for services and costs that are a consequence of defendant's conviction. Imposition of this fee is not barred by *ex post facto* principles.

The statute also provides that $100 of the $500 fine should be provided to the State's Attorney who prosecuted the case. This part of the fine is a fee as it is compensation for professional services and therefore also not affected by *ex post facto* principles.

The remaining $350, which by statute is deposited into the Sex Offender Investigation Fund, is a fine. Because the statute authorizing the fine was not in effect when the offense was committed, it may not be assessed against the defendant.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Devine, 2012 IL App (4th) 101028 (No. 4-10-1028, 9/6/12)

Under 730 ILCS 5/5-9-1.1(a), the sentence for a drug related offense involving possession or delivery of cannabis or a controlled substance must include a fine equal to the full street value of the cannabis or controlled substance in question. The court found that there is no *de minimis* exception to this requirement; thus, the trial court erred by failing to impose a street value fine although the prosecutor asked that no fine be imposed because defendant had possessed only cocaine residue.

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

People v. Dillard, 2014 IL App (3rd) 121020 (No. 3-12-1020, 7/29/14)

Defendant was convicted in a stipulated bench trial and, pursuant to an agreement reached by the parties, received a 21-year sentence. At sentencing, the trial court stated that "judgment would be entered for costs." In addition, the written sentencing order stated that "a judgment be entered against the defendant for costs."

The record on appeal contained a document entitled "CASE PAYMENTS," which was dated several weeks after the sentencing hearing and the hearing on defendant's post-sentencing motion. The document did not indicate that it had been reviewed by the trial court or tendered to the defendant before the sentencing hearing or within the time for filing a post-sentencing motion. The document included assessments for several items, including the Violent Crime Victims Assistance Fund (725 ILCS 240/10(c)), the State Police Services Fund (730 ILCS 5/5-9.17), the drug court fine (55 ILCS 5/5-1101(f)), the $15 State Police Operations Assistance Fund fine (705 ILCS 105/27.3a (6)), and the $50 court fund fine (55 ILCS 5/5-1101(c)).

1. Even mandatory fines may be imposed only by a specific order from the trial judge. Although the sentencing court may delegate the task of calculating statutorily mandated fines and costs to the clerk, it has a responsibility to oversee the clerk's calculations and correct any improper charges. "[T]he clerk's tally sheet is not a substitute for a written court order regarding fines.

Because there was no indication in the record that the trial court intended to impose any mandatory fines and the assessments were imposed by the circuit clerk, the fines were vacated and the cause remanded for the trial court to determine whether such charges should be imposed.

2. The court acknowledged that defendant failed to raise any issue concerning the fines in the trial

court, but noted that it did not appear that defendant received a copy of the clerk's calculations before the deadline for filing the post-sentencing motion. The court noted that in the past it had declined to apply forfeiture and simply corrected the clerk's financial miscalculations. Although "this approach has not reduced the number of errors in both fines and costs that continue to originate with a well-intentioned circuit clerk in the trial court," the court did not apply the forfeiture doctrine here.

In dissent, Justice Schmidt stated that the trial court's order should be affirmed because defendant forfeited the issue by failing to raise it in the lower court.

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

People v. Folks, 406 Ill.App.3d 300, 943 N.E.2d 1128 (4th Dist. 2010)

After vacating and reimposing several "fines" which had been imposed by the clerk as "fees," crediting defendant with the $5 per day credit for pretrial custody, and imposing a DNA assessment fee that the judge had ordered but the clerk failed to impose, the Appellate Court made the following observations:

> This court recognizes the morass of fines, fees, and costs created by the legislature. The calculation of these sums is a monumental feat which has commonly been accomplished by the clerk after the sentencing, in the clerk's office with the aid of computers. . . . Further complicating the computations are recent cases which have recharacterized many fees as fines, thereby eliminating the clerk's authority to impose the assessments. This court also recognizes the daily dilemma faced by the court and clerks, even for those who have staff and computers to support the prompt assessment of the multitude of specific fines, fees, and costs in the courtroom with the defendant present. The myriad of legislative requirements and the complexity of their precise application based on a number of legislative and situational variables make the task immensely difficult. The possibility of error because of the complicated nature of the assessment process is high and is of great concern to the court and to the elected court clerks in the 102 counties in the state of Illinois.
>
> The current situation calls for a comprehensive legislative revision in the assessment of fines, fees, costs and the $5-per-day credit for time spent in custody prior to sentencing. The judicial and clerical time expended on accurate calculation of the precise assessment of these monies, much of which may never be collected, is phenomenal.

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

People v. Ford, 2016 IL App (3d) 130650 (No. 3-13-0650, 2/22/16)

1. The restitution statute authorizes courts to order restitution when a defendant through a criminal act has damaged another person's property. A "victim" under the statute is someone who has incurred property damage or financial loss. 730 ILCS 5/5-5-6.

The vast weight of authority holds that a police department is not considered a victim under the restitution statute and should not be compensated for the public money it spends for law enforcement. There are two reasons for this rule: (1) merely investigating offenses does not make the police a "victim" of the offenses; and (2) were the rule otherwise, the police would receive restitution in almost every criminal case, and would thus be compensated twice for performing their basic function, once by the taxpayers and once by the offender

But there is no per se rule prohibiting police from receiving restitution. Here defendant recklessly damaged a police van. The trial court ordered defendant to pay restitution to repair the van. The Appellate Court upheld the order since it did not reimburse the police for their normal costs of investigating crime, but instead covered their out-of-pocket cost of repair required because of defendant's criminal act.

2. The parties and the court agreed that the circuit court clerk improperly imposed fines and fees against defendant. The imposition of a fine is a judicial act and the circuit clerk has no authority to impose fines, even if they are mandatory. Any fine imposed by the circuit clerk is void. The proper remedy is to vacate the assessments in full and remand to the trial court to properly impose the appropriate fines and fees.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

People v. Grubbs, 405 Ill.App.3d 187, 937 N.E.2d 1201 (3d Dist. 2010)

A fee reimburses the State for the costs of prosecuting the defendant. Any costs connected to the collection of a defendant's DNA for genetic marker analysis are incurred after his conviction and sentence and are not related to the costs of prosecution. Therefore, the $200 genetic marker analysis assessment (730 ILCS 5/5-4-3(j)) is not a fee, but a fine eligible for the $5-per-day credit for each day defendant is incarcerated on a bailable offense prior to sentencing. 725 ILCS 5/110-14(a).

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

People v. Gutierrez, 405 Ill.App.3d 1000, 938 N.E.2d 619 (2d Dist. 2010)

1. The mental health court assessment is labeled a fee, 55 ILCS 5/5-1101(d-5), but it is a fine and therefore may be offset by a $5 per day credit for the time defendant served in custody prior to sentencing. 725 ILCS 5/110-14(a).

2. Imposition of fines is a judicial function and the court clerk has no power to levy even mandatory fines that are not authorized by the court. Where the clerk assesses mandatory fines, the Appellate Court may vacate the fines and impose them itself.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Hible, 2016 IL App (4th) 131096 (No. 4-13-1096, 4/26/16)

1. Under Illinois statutory law, fines levied by the circuit clerk are void. In **People v. Castleberry**, 2015 IL 116916, the Supreme Court abolished the "void sentence rule," which held that any judgment which failed to conform to a statutory requirement had been entered without jurisdiction and was therefore void.

Here, the court concluded that **Castleberry** has no effect on the rule that fines imposed by the circuit clerk are void. The rule concerning circuit clerks is based on the clerk's lack of statutory authority, and not the issue of court jurisdiction that was at issue in **Castleberry**. In other words, the circuit clerk's authority, or lack thereof, is not based on the Illinois Constitution's grant of jurisdiction to courts.

2. Thus, the clerk's entry of fines is void even after **Castleberry**. Because void judgments can be challenged in a §2-1401 petition beyond the two-year-statute of limitations during which such petitions generally must be filed, the court had jurisdiction to reach the improper imposition of fines although the issue was raised for the first time on appeal from the denial of a §2-1401 petition.

(Defendant was represented by Assistant Defender Erica Nichols Cook, Springfield.)

People v Hunter, 2014 IL App (3d) 120552 (No. 3-12-0552, 1/16/14)

When a monetary assessment does not compensate the state for costs incurred as a result of prosecuting defendant, the assessment should be viewed as a fine even if it has been labeled a fee by the legislature. The $50 court systems fee assessed against defendant was a fee, not a fine, because 55 ILCS 5/5-1101(g) states that the court systems fee must "be placed in the county general fund and used to finance the court system in the county."

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)

People v. Isaacson, 409 Ill.App.3d 1079, 950 N.E.2d 1183 (4th Dist. 2011)

The imposition of a fine is a judicial act. The clerk of the court is a non-judicial member of the court and, as such, has no power to impose sentences or levy fines. Where the clerk imposes fines not imposed by the court, the Appellate Court will vacate the fines, but then can reimpose the fines itself.

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

People v. Johnson, 2015 IL App (3d) 140364 (No. 3-14-0364, 12/23/15)

The imposition of fines is a judicial act. Because the clerk of the court has no power to levy fines, a fine imposed by the circuit clerk is void. A challenge to a void order imposing financial sanctions is not subject to forfeiture and may be raised for the first time in a reviewing court.

The court vacated several fines that had been imposed by the clerk and remanded the cause for the trial court to determine whether those fines should be imposed. In addition, "for the purpose of providing guidance to the trial courts" which are struggling with the "very complex process" of calculating fines and fees, the court issued an appendix concerning fines and costs.

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

People v. Martino, 2012 IL App (2d) 101244 (No. 2-10-1244, 6/7/12)

Whether statutes and ordinances that authorize fees or fines allow for imposition of multiple charges depends on the legislative authority's intent as revealed by the plain language of the statute or ordinance.

1. The County Clerks Act authorizes county boards to enact ordinances to defray the costs of maintaining automated record-keeping systems and document storage. The DuPage County ordinance provides that the applicable fee "shall be paid *** by the defendant in any felony, misdemeanor, traffic, ordinance or conservation matter on a judgment of guilty." DuPage County Code §9-10.

Because the use of the word "matter" evidences an intent that a fee be imposed for each case rather than for each conviction, only one fee could be imposed in a case resulting in multiple convictions.

2. The Clerks Act provides that the clerk is entitled to "costs in all criminal and quasi-criminal cases from each person convicted or sentenced to supervision therein as follows: (A) Felony complaints, a minimum of $80 and a maximum of $125 (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75." 705 ILCS 105/27.2(w)(1)(A) and (B). The plain language of this statute authorizes one fee per charging instrument.

Defendant was charged with both felonies and misdemeanors in a single indictment. Logic dictates that a complaint setting out a felony is a felony complaint even if it also charges a misdemeanor. Therefore, defendant could be assessed one fee for a felony complaint.

3. The Counties Code authorizes a county board to enact an ordinance to defray the costs of the sheriff in providing court security. DuPage County enacted an ordinance providing that "[i]n criminal, local ordinance, [c]ounty ordinance, traffic and conservation cases, such fee [of $25] shall be assessed against the defendant upon a plea of guilty, stipulation of facts or findings of guilty resulting in a judgment of conviction or order of supervision." DuPage County Code §20-30.

Because the language of the ordinance refers to cases not individual convictions, only one fee may be imposes in each case.

4. The County Jail Act provides: "The county shall be entitled to a $10 fee for each conviction or order of supervision for a criminal violation, other than a petty offense or business offense." 730 ILCS 125/17.

The plain language of this Act provides that a fee may be imposed on each of defendant's convictions.

5. The Counties Code authorizes county boards to enact ordinances that allow for imposition of fees to defray the costs of financing a court system: "A fee to be paid by the defendant on a judgment of guilty or a grant of supervision *** as follows: (1) for a felony, $50; (2) for a class A misdemeanor, $25." 55 ILCS 5/5-1101(c)(1) and (2). DuPage County enacted such an ordinance.

The plain language of the Counties Code provides that the fee may be imposed on a per-conviction basis.

6. The Counties Code provides that a State's Attorney's fee may be imposed "[f]or each conviction." 55 ILCS 5/4-2002. Therefore it is proper to impose a fee for each conviction.

7. The Counties Code provides that county boards may enact a "$10 fee to be paid by the defendant on a judgment of guilty or grant of supervision *** to finance the county mental health court, the county drug court, or both." 55 ILCS 5/5-1101(d-5). DuPage County enacted an ordinance providing that the fine should be imposed for each "count" on which there was a "judgment of guilty."

The plain language of the ordinance allows imposition of the fine on each count.

8. A Violent Crimes Victims Assistance Fund fine may be imposed on each conviction based on a "reading of various portions of the statute in tandem." The statute refers to collection of the penalty from each defendant upon conviction and provides for a fine in a specified amount depending on the nature of the conviction.

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

People v. McCray, 2016 IL App (3d) 140554 (No. 3-14-0554, 9/27/16)

After defendant's bench trial, the trial court imposed a six-year sentence for unlawful possession of heroin and unlawful possession of cannabis with intent to deliver. The defendant filed a notice of appeal six days later.

Nine days after the notice of appeal was filed, the trial court filed a written judgment which added the requirement that defendant pay a drug assessment in the amount of $2000. The Appellate Court vacated the $2000 assessment as an improper modification of the sentence.

1. Once a notice of appeal is filed, the Appellate Court's jurisdiction attaches. At this point, the trial court may not modify the order or judgement or take any action which interferes with appellate review.

The entry of a written judgement order is a ministerial act that merely evidences the oral pronouncement of sentence, which is the judicial act comprising the judgment of the court. Thus, the trial court has jurisdiction to complete the ministerial act of filing a written judgment order even after notice of appeal has been filed.

2. However, the trial court lacked jurisdiction to modify the sentence after the notice of appeal had been filed. Because the $2000 drug assessment was not imposed during the trial court's oral pronouncement, the court could not assess that amount in the written judgement order. The court acknowledged that during the oral pronouncement the trial court ordered that defendant pay costs, but found that the drug assessment is a "fine" rather than a "cost.

(Defendant was represented by Assistant Defender Editha Rosario-Moore, Ottawa.)

People v. McCreary, 393 Ill.App.3d 402, 915 N.E.2d 745 (2d Dist. 2009)

Rejecting the reasoning of **People v. Jolly**, 357 Ill.App.3d 884, 830 N.E.2d 860 (4th Dist. 2005), the court concluded that a defendant who pleads guilty to a controlled substances offense which results in the imposition of a "street value" fine may challenge that fine on appeal even where no challenge was raised in the post-plea motion. "We see no reason why, when it comes to reviewing an unpreserved claim that a street-value fine was improperly imposed, a defendant who pleaded guilty should be treated any differently than a defendant who was found guilty following a trial." The court also noted that Supreme Court Rule 615(a) does not make the plain error rule inapplicable to persons who plead guilty.

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

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

The Child Advocacy Center fee, 55 ILCS 5/5-1101(f-5), though labeled a fee is a fine. The assessment is mandatory upon conviction of a felony or other listed offenses. It does not relate to the costs of prosecution. There is no relevant connection between the offense committed by the defendant and the public endeavor funded by the fee.

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

People v. Millsap, 2012 IL App (4th) 110668 (No. 4-11-0668, 11/29/12)

1. The Children's Advocacy Center assessment is a fine, notwithstanding the statutory label of a fee. 55 ILCS 5/5-1101(f-5). The charge is mandatory for a convicted defendant and does not reimburse the State for money expended in prosecuting the defendant.

2. The State Police operations assistance fee is also a fine. A circuit clerk in any county that imposes a fee for maintaining automated record-keeping systems pursuant to §27.3a(1) of the Clerks of the Court Act must collect an additional fee, the State Police operations assistance fee, to be paid by the defendant in any felony, traffic, misdemeanor, or local ordinance violation upon a judgment of guilty or grant of supervision. 705 ILCS 105/27.3a(1.5). Such fee is to be deposited in the State Police Operations Assistance Fund to be used by the State Police to finance any of its lawful purposes and functions. Therefore it does not reimburse the State for costs incurred in defendant's prosecution.

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

People v. Mingo, 403 Ill.App.3d 968, 936 N.E.2d 1156 (2d Dist. 2010)

1. 730 ILCS 5/5-9-2 authorizes the trial court, upon good cause, to revoke all or part of any fine in a criminal case or to modify the method of payment. Because the plain language of §5-9-2 does not impose a time limit for filing a petition to revoke fines, such petitions were intended to be free standing, collateral actions which need not be filed within 30 days of judgment. Thus, the trial court had authority to consider a petition to revoke fines filed more than 30 days after judgment and while appeals from the same conviction were pending.

2. The court concluded that a $200 DNA assessment imposed under 730 ILCS 5/5-4-3(j) is a "fine" rather than a "fee," and therefore may be satisfied by the $5.00 per day credit for time served in presentencing custody. Because the defendant was entitled to a credit of $1,565 for time served before sentencing, the $200 DNA fee was satisfied.

3. Because the DNA assessment is a "fine," a defendant against whom a DNA fee is imposed is also subject to a fine under 725 ILCS 240/10(b), which requires a $4.00 fine for every $40, or part thereof, of any other fine imposed. Because the only fine imposed against the defendant was the $200 DNA assessment, a $20 fine should have been assessed under §10(b). Furthermore, because §10(b) specifically provides that the $5.00 per day credit does not apply, the $20 fine could not be offset by defendant's unused credit for presentencing custody.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Nelson, 2013 IL App (3d) 110581 (No. 3-11-0581, 4/10/13)

Defendant entered a plea agreement which provided for a reduction in the charge to a Class II felony, but contained no agreement on sentencing. At the sentencing hearing, the trial court asked the prosecutor whether he had prepared an order for the street value fine. The prosecutor replied that the street value fine should be $600. Defendant was sentenced to probation and ordered to pay a $600 street value fine.

1. Although defendant did not respond to the prosecutor's assertion concerning the street value fine, object to the fine, or raise the issue in his post-trial motion, the plain error doctrine applies where the trial court imposes a street value fine without a proper evidentiary basis. (**People v. Lewis**, 234 Ill.2d 32, 912 N.E.2d 1220 (2009)). The evidentiary basis for a street value fine may be provided by testimony at the sentencing hearing, the parties' stipulation as to the value of the substance, or reliable evidence presented at an earlier stage of the proceedings. Because there was no evidentiary basis for the street fine, the cause was remanded for a new hearing on the fine.

2. The court rejected the State's argument that defendant's failure to object when the prosecutor claimed a $600 value for the controlled substances amounted to a stipulation by silence. Rejecting **People v. Blankenship**, 406 Ill. App. 3d 578, 943 N.E.2d 1111 (2d Dist. 2010), the court concluded that the defendant's silence when the State offers an opinion on street value cannot amount to a stipulation. The court noted that in **Mitchell v. U.S.**, 526 U.S. 314, ___ S.Ct. ___, ___ L.Ed.2d ___ (1999), the Supreme Court

concluded that even a defendant who pleads guilty has a Fifth Amendment right against self-incrimination throughout the sentencing hearing, and that the sentencing court imposes an impermissible burden on that right by drawing an adverse inference from the defendant's silence concerning facts relating to the crime.

Because the street value fine is part of the sentence, the value of the controlled substances in question relates to the facts of the crime. Thus, under **Mitchell**, the trial court could not draw an adverse inference from defendant's silence in response to the prosecutor's statement of opinion concerning the value of the substances. "[U]ntil the judgment of conviction against defendant became final, his silence on matters relating to the street value of the drugs could not be construed as a stipulation to the amount."

3. The court added that finding a stipulation by silence under these circumstances would violate established law. Stipulations are agreements between the parties or their attorneys with respect to an issue before the court. To be enforceable, a stipulation must be clear, certain, and definite in its material provisions, and must be agreed to by the parties or their representatives. A stipulation can be found only if it is clear that the parties intended to stipulate to a fact.

Here, the only evidence supporting a stipulation is that defendant was silent when the prosecutor offered an opinion concerning the value of the substances. The court concluded that it could not find that defendant intended to be bound by the State's opinion, and that a stipulation therefore could not be found.

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

People v. Newlin, 2014 IL App (5th) 120518 (No. 5-12-0518, 9/23/14)

On defendant's direct appeal challenging the sentence for his first degree murder conviction, the Appellate Court concluded that it lacked jurisdiction to consider the State's attempt to raise the trial court's failure to impose mandatory fines. First, the court noted that the record failed to support the argument that mandatory fines had not been imposed, rejecting the State's attempt to use a printout of the circuit clerk's online records to show what assessments were allegedly made. Second, the court stated that the failure to impose mandatory fines is not a matter which can be appealed by the State under Supreme Court Rule 604(a).

The court concluded:

> What the State is essentially trying to do . . . is to piggyback an appeal on defendant's appeal. We can find no authority for such practice and will not allow the State to raise the issue of fines in such a manner.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. O'Laughlin, 2012 IL App (4th) 110018 (No. 4-11-0018, 11/29/12)

The Driver's Education Fund fine provides that "[t]here is added to every fine imposed upon conviction of an offense reportable to the Secretary of State under the provisions of subdivision (a)(2) of Section 6-204 of this Act an additional penalty of $4 for each $40 or fraction thereof, of fine imposed." 625 ILCS 5/16-104a(a).

The Lump Sum Surcharge fine provides "[t]here shall be added to every fine imposed in sentencing for a criminal or traffic offense, except an offense related to parking or registration, or offense by a pedestrian, an additional penalty of $10 for each $40, or fraction thereof, of fine imposed." 730 ILCS 5/5-9-1(c).

These fines are not assessed on each individual fine when a trial court imposes multiple fines on a defendant. When read as a whole, these statutes each provide for imposition of one fine calculated based on the sum total of all of defendant's other applicable fines.

(Defendant was represented by Assistant Defender Molly Corrigan, Springfield.)

People v. Pohl, 2012 IL App (2d) 100629 (No. 2-10-0629, 5/3/12)

1. The Clerks of Court Act provides that the "clerk shall be entitled to costs in all criminal . . . cases from each person convicted . . . as follows: (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75. 705 ILCS 105/27.2(w)(1)(B).

The plain language of the statute authorizes imposition of a fee for a defendant convicted pursuant to a misdemeanor complaint. Defendant was convicted of three counts of domestic battery but only one complaint was filed. Therefore, only one clerk's fee could be imposed.

2. The Counties Code authorizes a county to enact an ordinance to defray the costs of the sheriff in providing court security. 55 ILCS 5/5-1103. Pursuant to this section, the DuPage County Board enacted an ordinance that provides "[i]n criminal . . . cases, such fee [of $25] shall be assessed against the defendant upon . . . findings of guilty resulting in a judgment of conviction."

The plain language of this ordinance indicates that the court security fee must be imposed against a defendant who is found guilty in a criminal case, but the language refers to cases, not individual convictions. Therefore, defendant convicted of three counts of domestic battery could only be assessed one fee.

3. The Unified Code of Corrections provides that "[i]n addition to any other penalty imposed, a fine of $200 shall be imposed upon any person who . . .is convicted of . . . domestic battery." 730 ILCS 5/5-9-1.5.

The Appellate Court found this statute ambiguous with respect to whether defendant should be liable for a single fine or multiple fines upon conviction of multiple counts of domestic battery. The court looked for guidance to **People v. Elliott**, 272 Ill. 592, 112 N.E. 300 (1916). In **Elliott**, the court upheld imposition of multiple sentences of fines for multiple convictions of unlawfully selling intoxicating liquor, because defendants were knowing and willful violators of the law and therefore there was no reason whatsoever for leniency. Like **Elliott**, the court saw no reason why defendant should escape liability for three separate domestic violence fines where he was convicted of three counts of domestic battery. To hold that only one fine should be imposed would result in the unjust consequence that a defendant who battered several people would be punished no differently than a defendant who battered one person.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Reed, 2016 IL App (1st) 140498 (No. 1-14-0498, 1/27/16)

1. Although Illinois precedent holds that fees which are improperly imposed are void and may be challenged at any time, the Appellate Court concluded that such a rule did not survive **People v. Castleberry**, 2015 IL 116916. Under **Castleberry**, an order is void only if it was entered by a court which lacked jurisdiction.

Thus, the defendant forfeits a sentencing issue that is not raised through a contemporaneous objection and a written post-sentencing motion. However, the rules of waiver and forfeiture also apply to the State, which in this case failed to make a timely argument that defendant forfeited the issue whether three "fees" imposed by the trial court were actually "fines" and were therefore subject to the $5 per day credit against fines for time served in custody while awaiting trial.

2. It is the nature of an assessment, and not its statutory label, that determines whether it is a "fee" or a "fine." A "fee" seeks to recoup expenses incurred by the State or compensate the State for some cost of prosecution, while a "fine" is a pecuniary punishment imposed as part of a sentence.

The court accepted the State's concession that the $50 Court System Fee (55 ILCS 5/5-1101(c)) is a "fine" that is subject to the $5 per day credit. However, the court concluded that both the State's Attorney Record's Automation Fee (55 ILCS 5/4-2002.1(c)) and the Public Defender Records Automation Fee (55 ILCS 5/3-4012) are compensatory in nature because the assessments are intended to compensate the State and the Public Defender for the costs of establishing and maintaining an automated record keeping system. Thus, defendant is not entitled to the $5 per day credit against those charges.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Rogers, 2014 IL App (4th) 121088 (No. 4-12-1088, 7/25/14)

Defendant was convicted in a jury trial of aggravated battery, and was sentenced to five years imprisonment with credit for time served. The trial court did not impose any fines as part of the sentence, but the circuit clerk issued various assessments. The Appellate Court concluded that fines assessed by the

circuit clerk must be vacated.

1. The circuit clerk has authority to assess fees, but may not assess fines. In addition, assessments which are labeled by the legislature as "fees" are actually "fines" if the General Assembly intended the charge to be part of a pecuniary punishment imposed as part of the sentence. A fee, by contrast, is a collateral consequence of a conviction and is intended to reimburse the State for expenses related to the prosecution.

2. Error occurred where the circuit clerk imposed assessments for several fines, including a $5 fine for child advocacy (55 ILCS 5/5-1101(f-5)), $5 drug court charge (55 ILCS 5/5-1101(f)), and $100 assessment for violent crime victims assistance (725 ILCS 240/10(b)). The Appellate Court vacated those assessments and remanded the cause for the trial court to reimpose the fines. The court also noted that if the fines were reimposed defendant would be entitled to the $5 per day credit for pretrial incarceration.

3. The court declined to accept the State's concession that the $2 State's Attorney automation charge (55 ILCS 5/4-2002(a)) was a fine and could only be imposed by the trial court. The court concluded that the assessment was a "fee" because it was intended to reimburse the State's Attorney for expenses related to automated record keeping systems.

In addition, because the charge was a fee, it could be assessed in this case even though it was authorized by legislation which became effective after the crimes in this case occurred. The prohibition against *ex post facto* laws applies only to punitive laws. Fee statutes are compensatory and therefore do not come under the *ex post facto* clause.

4. The court noted that the circuit clerk erroneously imposed a $15 State Police operations assistance fine (705 ILCS 105/27.3(a)(1), (1.5), (5)). In addition, because the charge is a fine that was authorized by legislation which became effective after the criminal conduct in question, the *ex post facto* clause prohibited its assessment even by the trial court.

5. The court concluded that the $10 probation operation assistance assessment (705 ILCS 105/27.3a(1.1)) may be a fine or a fee, depending on the circumstances. Where the defendant was eligible for probation and the probation office conducted a pre-sentence report, the charge is compensatory in nature because it reimburses the State for costs incurred as a result of the prosecution. Under such circumstances, the charge is a fee.

By contrast, where the probation office was not involved in the prosecution, the probation operation assistance assessment constitutes a fine because it does not compensate the State for costs of the prosecution.

The cause was remanded with instructions to the trial court to reimpose fines which had been imposed by the clerk.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

People v. Schneider, 403 Ill.App.3d 301, 933 N.E.2d 384 (2d Dist. 2010)

Imposition of a fine is a judicial function and the clerk of the circuit court has no power to levy even mandatory fines that are not authorized by the court. Where the clerk has purported to order a fine not authorized by the court, the reviewing court can vacate that order and impose the fine itself.

(Defendant was represented by Assistant Defender Patrick Carmody, Elgin.)

People v. Smith, 2013 IL App (2d) 120691 (No. 2-12-0691, 12/5/13)

The Counties Code provides that a county board may enact a fee of $50 to be paid by a defendant on a judgment of guilty or a grant of supervision for a felony. 55 ILCS 5/5-1101(c). The statutory label of this assessment as a fee is not dispositive of whether it is a fee or a fine. The central characteristic that separates a fee from a fine is whether it seeks to compensate the state for any costs incurred for prosecuting the defendant.

The $50 assessment is a fine rather than a fee because it is punitive and not compensatory. It is only payable upon conviction of a criminal offense. It is not geared to compensate for the cost of prosecution as it is a flat amount correlated to the severity of the offense and is not tied to the actual expense of prosecution.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

People v. Smith, 2014 IL App (4th) 121118 (No. 4-12-1118, 9/19/14)

1. The circuit clerk does not have the power to impose "fines," but does have authority to impose "fees."A "fee" is a charge which seeks to recoup the State's expenses for prosecuting the defendant. A "fine" is punitive in nature and is a pecuniary punishment imposed as part of the sentence imposed for a criminal offense. To determine whether an assessment is a "fine" or a "fee," the court examines the language of the statutes which create the assessment. Similarly, the language used to create an assessment controls whether it may be imposed on each conviction or only once per case.

2. The following assessments are "fees" which may be imposed only once in each case: (1) the $10 automation fee (705 ILCS 105/27.3a), (2) the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), (3) the $25 court security fee (55 ILCS 5/5-1103), and (4) the $5 document storage fee (705 ILCS 105/27.3c(a)).

3. The court concluded that the $40 State's Attorney's assessment (55 ILCS 5/4-2002) is a fee which can be imposed on each count for which a conviction is entered.

4. The court concluded that the following assessments are "fines" and were therefore improperly imposed by the clerk: (1) the $10 arrestee medical assessment (730 ILCS 125/17), (2) the $50 court finance fee(55 ILCS 5/5-1101(c)), (3) the $5 drug court assessment fee (55 ILCS 5/5-1101(f)), (4) the $25 Victims Assistance Act fee (725 ILCS 240/10(c)(1)). In addition, the court concluded that the latter assessment was improperly calculated and on remand must be recalculated by the trial court.

5. The court concluded that the $30 juvenile expungement assessment (730 ILCS 5/5-9-1.17) is a "fine." In addition, application of the fine in this case would violate the *ex post facto* clause because the statute creating the assessment took effect after the date of the offense for which defendant was convicted.

6. The court also found that the trial court failed to impose three mandatory fines, and ordered that such fines be imposed on remand. First, the criminal surcharge fine (730 ILCS 5/5-9-1(c)) must be imposed on each count on which a conviction was entered. Because the amount of the surcharge depends on the other fines imposed, on remand the trial court must calculate and impose the appropriate surcharge.

Second, the mandatory $200 sexual assault fine (730 ILCS 5/5-9-1.7(b)(1)) applies to each count for which a conviction for sexual assault was entered, unless the trial court in its discretion and at the request of a victim finds that the assessment would impose an undue burden on the victim. Because the victim made no such request in this case, the trial court must impose the fine on each sexual assault conviction.

Finally, the mandatory $500 sex offender fine (730 ILCS 5/5-9-1.15(a)) must be imposed on each count on which a conviction for a sex offense was entered.

7. The court found that the circuit clerk erred by imposing a $43.50 late fee (725 ILCS 5/124A-10) and a $100.05 collection fee (730 ILCS 5/5-9-3(a)). The court noted the State's argument that the late fees and collection fees are civil penalties that cannot be challenged in a criminal appeal, but found that the record did not support the imposition of such fees in this case because the defendant was not afforded a minimum of 30 days from the date of the judgment to pay the assessments.

8. The court concluded that because defendant was incarcerated awaiting trial on a charge of sexual assault, he was not entitled to the $5 per day credit against fines for time in which he was in custody. (725 ILCS 5/110-14(b)).

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Vara, 2016 IL App (2d) 140848 (No. 2-14-0848, 12/21/16)

Noting a conflict in authority, the court found that in light of **People v. Castleberry**, 2015 IL 116916, the Appellate Court may vacate fines that were improperly imposed by the circuit clerk but may not reimpose the fines or remand the cause with directions to the trial court to impose them. **Castleberry** abolished the "void sentence" rule, which held that any sentence that does not comply with statutory requirements is void. Where the circuit clerk improperly imposes fines, the State's remedy is to seek collateral relief rather than to ask to have the fines imposed by the Appellate Court or trial judge.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Wade, 2016 IL App (3d) 150417 (No. 3-15-0417, 7/28/16)

1. The imposition of a fine is a judicial act. Because the circuit clerk lacks authority to levy fines, any fines imposed by the clerk are void at their inception. The court concluded that **People v. Castleberry**, 2015 IL 116916, does not preclude the defendant from challenging, as void, fines which were imposed by the circuit clerk.

Castleberry abolished the "void sentence rule" on the ground that the circuit courts are granted general jurisdiction by the constitution and do not derive their authority from statute. Because the circuit clerk is a nonjudical officer and has no jurisdiction to sentence criminal defendants, **Castleberry** does not apply to the unauthorized imposition of fines by a circuit clerk. The court vacated the fines and fees and remanded the cause with directions to the trial court to impose each proper fine, fee, assessment and court costs.

2. In a partial concurrence and partial dissent, Justice Schmidt found that the majority should not have remanded the cause for reimposition of the vacated fines. Fines are part of a criminal sentence. In **Castleberry**, the Supreme Court held that the Appellate Court may not increase a sentence on appeal, even if the sentence is illegally low. Under **Castleberry**, the only recourse to correct an illegally low sentence is for the State to seek a writ of *mandamus*.

Thus, Justice Schmidt would conclude that the fines imposed by the circuit clerk should be vacated without remand.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Wade, 2016 IL App (3d) 150417 (No. 3-15-0417, 9/14/16)

Acknowledging a conflict with other appellate districts, the court concluded that under **People v. Castleberry**, 2015 IL 116916, the Appellate Court lacks jurisdiction to remand the cause to allow the trial court to impose mandatory fines that were erroneously ordered by the circuit clerk. Instead, a reviewing court must vacate fines that were imposed by the circuit clerk without ordering a remand to the trial court. If the State wishes to pursue the mandatory fines, its remedy is to file a petition for writ of mandamus with the Supreme Court.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Walker, 2016 IL App (3d) 140766 (No. 3-14-0766, 10/28/16)

The imposition of fines is a judicial act. The clerk of the court is a nonjudicial member of the court and has no authority to impose fines. A fine imposed by a clerk is void from its inception.

At sentencing, the trial court ordered defendant to "pay court costs in this matter." The clerk entered a written cost sheet which included several fines.

The Appellate Court held that the fines were imposed without authority by the clerk and were thus void and must be vacated. The State agreed but argued that the cause should be remanded to the trial court to properly impose any mandatory fines. The court disagreed, holding that after **Castleberry** the Appellate Court may no longer increase a sentence which is illegally low. Since a fine is part of the criminal sentence, the court had no authority to remand the case for the imposition of mandatory fines since it would impermissibly increase defendant's sentence.

The dissenting justice would have held that the fines were not void since the circuit court had jurisdictional authority to delegate the task of calculating the amount of costs to the circuit clerk. Accordingly, defendant waived the issue by not objecting in the trial court.

(Defendant was represented by Assistant Defender Katherine Strohl, Ottawa.)

People v. Warren, 2016 IL App (4th) 120721-B (No. 4-12-0721, mod. op. 5/26/16)

1. Rejecting its own opinion in **People v. Alghadi**, 2011 IL App (4th) 100012, the court found that the legislature may intend to authorize the imposition of certain fees and fines on each judgment or order of supervision, and not to limit the trial judge to imposing one charge for each case. The court concluded that

the following fees and fines could be imposed on each count on which a conviction is entered: (1) the $50 court finance fee (55 ILCS 5/5-1101(c), (g)), the $40 State's Attorney's fee (55 ILCS 5/4-2002), the $2 State's Attorney's automation fee (55 ILCS 5/4-2002(a)), the $10 arrestee's medical fine (730 ILCS 125/17), the $30 juvenile expungement fund fine (730 ILCS 5/5-9-1.17), the $5 drug-court fine (55 ILCS 5/5-1101(f)), the $25 court-finance fee (55 ILCS 5/5-1101(c), (g)), and the Violent Crimes Victims Assistance Act fine (725 ILCS 240/10(b)).

The court noted, however, that several other fines and fees could be imposed only once in each case, including the $5 document storage fee (705 ILCS 105/27.3c(a)), the $10 circuit clerk automation fee (705 ILCS 105/27.3a), the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), the $25 court security fee (55 ILCS 5/5-1103), and the $10 State Police Operations fine (705 ILCS 105/27.3a(1.5)).

2. A "fee" is a charge which seeks to recoup expenses incurred by the State or to compensate the State for some expenditure incurred in prosecuting the defendant. A "fine" is punitive in nature and is imposed as part of the sentence for a criminal offense. Furthermore, a charge that is labeled by the legislature as a "fee" is a "fine" if it is pecuniary in nature.

"Fines" may be imposed only by the trial court, while "fees" may be imposed by the circuit clerk. Any "fine" that is imposed by the clerk must be vacated and the cause remanded for imposition of the fine by the trial court.

The court vacated several "fines" which had been imposed by the circuit clerk and remanded the cause with instructions that such fines must be imposed by the trial court. The court held that **People v. Castleberry**, 2015 IL 116916 (2015), which abolished the void sentence rule, has no effect on the rule that fines may not be imposed by the clerk. However, the court concluded that **Castleberry** does preclude the State from seeking to increase a fine which was imposed by the trial court in an amount that was less than required by statute.

3. While noting that **Castleberry** may help to lessen the courts' burden concerning mandatory fines and fees, the court reiterated its call for "comprehensive legislative revision" of mandatory fines and fees. The court stated, "The legislature continues to enact new fines, fees, and costs - in this case, leading to the imposition of 33 separate assessments. . . . This adds more complexity to many cases where the monetary assessments may not even be collected."

The cause was remanded with instructions to the trial court to impose applicable fines.

(Defendant was represented by Supervisor Marty Ryan, Springfield.)

People v. Williams, 2011 IL App (1st) 091667-B (No. 1-09-1667-B, revised op. 12/15/11)

A "fine" is part of the punishment for a conviction, while a "fee" seeks to reimburse the State for its expenses in prosecuting a defendant. Even where the statute creating a financial penalty labels it as a "fee," a "fee" which is not intended to reimburse the State for the costs of prosecution is construed as a "fine." A "fine" is subject to the $5 per day credit for pretrial incarceration.

The court concluded that the $10 mental health "fee" (55 ILCS 5/5-1101(d-5)), $5 youth diversion/peer court (55 ILCS 5/5-1101(a)), $30 children's advocacy center "fee" (55 ILCS 5/5-1101(f-5)), and $5 drug court "fee" (55 ILCS 5/5-1101(f)) do not reimburse the State for the expense of prosecuting the defendant, and are therefore "fines." Thus, defendant was entitled to $5 per day credit against these charges for his presentence custody.

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

People v. Williams, 2013 IL App (4th) 120313 (No. 4-12-0313, 6/24/13)

The imposition of a fine is a judicial act. The clerk of the court is a nonjudicial member of the court and as such has no power to impose sentences or levy fines. The clerk has authority only to collect judicially imposed fines.

Noting that its decision clarifying that the clerk of the court had no authority to impose fines was almost a decade old, but that it continued to deal with fines imposed by circuit court clerks, the Fourth

District Appellate Court observed that "such actions by the clerks flagrantly run contrary to the law, and we trust that this unauthorized practice will end without the necessity of this court issuing rules to show cause."

The Appellate Court vacated the fines imposed by the clerk. It reimposed the mandatory fines that were assessed by the clerk, as well as additional mandatory fines requested by the State. Noting the "tremendous amount of appellate resources expended in this case and many others just like it to correctly determine and assist the myriad of fines and fees our legislature has created," the court attached as an appendix to its opinion a reference sheet to assist circuit courts, prosecutors and defense counsel in ensuring that fines and fees are properly imposed.

The appendix lists fines and fees often at issue in criminal cases, the statutory authority for each, and the amount where fixed by statute, as well as noting against which fines pretrial detention credit is available, which fines are discretionary, and which fines require evidentiary support.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Wynn, 2013 IL App (2d) 120575 (No. 2-12-0575, 12/26/13)

1. Whether a charge is a "fine" or a "fee" depends on its intended purpose. A "fine" is punitive and seeks to penalize a defendant who has been convicted of a crime. By contrast, a "fee" is intended to reimburse the State for some cost incurred in the prosecution.

2. As a matter of first impression, the court held that the $30 juvenile expungement fee (730 ILCS 5/5-9-1.17) and $50 court system finance fee (55 ILCS 5/5-1101(c)(1)) are both "fines" because they are intended as punishment and are imposed based on the mere fact of conviction. Because both charges are fines, they are subject to the $5 per day credit for pre-sentencing custody.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

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§45-7(c)
Court Costs and Fees

Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966) State statute authorizing jury to impose cost of prosecution on defendant acquitted of a misdemeanor was unconstitutionally vague and violated due process.

People v. Estate of Scott, 66 Ill.2d 522, 363 N.E.2d 823 (1977) The statutory cost scheme does not have an unconstitutional, chilling effect on the exercise of rights such as a jury trial, preliminary hearing, or subpoena of witnesses, does not deny procedural due process by failing to provide for a hearing, and is not unconstitutional because of the manner in which it might be applied.

People ex rel. Dir. of Corr. v. Booth, 215 Ill.2d 416, 830 N.E.2d 569 (2005) Section 12-1001(h)(4) of the Code of Civil Procedure, which exempts $7,500 made on account of personal injury, applies to actions by the DOC for reimbursement for incarceration.

People v. Terneus, 239 Ill.App.3d 669, 607 N.E.2d 568 (4th Dist. 1992) Persons convicted of crimes must pay court costs. Because it would be pointless to require trial judges to hold hearings where they have no discretion to exercise, due process does not require notice or a hearing before a defendant is ordered to pay court costs.

People v. Campbell, 325 Ill.App.3d 569, 758 N.E.2d 504 (4th Dist. 2001) Portion of a conditional discharge

order which required defendant to pay periodic imprisonment fees from an earlier, unrelated offense was reversed. Illinois sentencing law does not authorize the reimposition of unpaid fees from a previous offense when conditional discharge is ordered for a subsequent, unrelated offense.

People v. Hodges, 120 Ill.App.3d 14, 457 N.E.2d 517 (3d Dist. 1983) The trial court lacks authority to assess costs against defendant for a mistrial. Costs may be paid by any person who is convicted, and while a mistrial is not an acquittal, it is not a conviction.

Defendant did not waive his right to challenge the costs by failing to file a motion to retax in the trial court; the trial judge had no authority to impose such costs.

People v. Fales, 247 Ill.App.3d 681, 617 N.E.2d 421 (3d Dist. 1993) Because only persons who are "convicted" may be assessed costs or fines, and because a sexually dangerous person proceeding is not a criminal prosecution and does not result in a "conviction," cost and fine orders may not be entered against an individual who has been adjudicated a sexually dangerous person. Also, the propriety of the orders could be challenged for the first time on respondent's appeal from the denial of a recovery petition, because such orders are void and can be attacked at any time.

People v. Vaughn, 75 Ill.App.3d 121, 394 N.E.2d 19 (5th Dist. 1979) The trial court may impose court costs as an incident to probation or conditional discharge.

People v. Keagbine, 77 Ill.App.3d 1039, 396 N.E.2d 1341 (5th Dist. 1979) Remanded for assessment of court costs where the trial court did not impose costs against defendant following his conviction and sentence, for a trial court is statutorily required to impose costs.

People v. Winkler, 77 Ill.App.3d 35, 395 N.E.2d 671 (5th Dist. 1979) Order requiring defendant to pay jurors' fees and expenses vacated. Illinois law does not authorize the assessment of jurors' fees and expenses as "costs of prosecution."

People v. Blakley, 357 Ill.App.3d 477, 829 N.E.2d 527 (4th Dist. 2005) 55 ILCS 5/4-5001 authorizes a sheriff's fee of 50¢ per mile for returning a charged defendant to the State of Illinois, and provides that the fees authorized are the "maximum fees that may be collected" unless the county board increases the fees based on "an acceptable cost study showing" that the authorized amount is insufficient "to cover the cost of providing the service." Where only one trip was made to retrieve defendant, §4-5001 did not authorize a fee of 50¢ per mile in each of two pending cases.

People v. Alexander, 369 Ill.App.3d 955, 862 N.E.2d 240 (3d Dist. 2007) The trial court lacked authority to impose a $10 DNA collection fee on a convicted defendant. The relevant statute does not authorize an additional collection fee. Also, Supreme Court Rule 21, which permits circuit judges to adopt rules and authorizes the chief judge of each circuit to enter "general orders . . . providing for assignment of judges, general or specialized division, and times and places of holding court," does not authorize creation of a $10 DNA collection fee.

People v. Hunter, 358 Ill.App.3d 1085, 831 N.E.2d 1192 (4th Dist. 2005) Statute requiring extraction and storing of DNA for felony conviction did not require defendant to pay his own collection fee.

Cumulative Digest Case Summaries **§45-7(c)**

People v. Graves, ___ Ill.2d ___, ___ N.E.2d ___ (2009) (No. 106541, 9/24/09)

1. In considering a constitutional challenge to a "fee," the court must first determine whether the charge is a "fee" or a "fine." A "fine" violates due process only if the amount is grossly disproportionate to the underlying offense, while a "fee" must be based on a rational relationship between the purpose of the charge and the offense of which the defendant was convicted.

A "fee" is defined as a charge which seeks to compensate the State for some expenditure incurred in prosecuting the defendant. A "fine" is defined as a monetary punishment imposed as part of the sentence imposed upon conviction of an offense. A charge that is labeled as a "fee" by the legislature may in fact be a "fine," depending on whether the charges are intended to compensate the State for a cost incurred in the prosecution.

Other factors to be considered in determining whether a charge is a "fee" or a "fine" include the entity to which the payment is made and whether the charge is imposed only after conviction.

2. A mental health court fee of $10 and a youth diversion/peer court fee of $5.00 are both "fines" rather than "fees," because the charges were not intended to compensate the State for any costs incurred in prosecuting the defendant. Because neither fine was disproportionate to the Class 2 felony offense of possession of a stolen motor vehicle, both were constitutionally permissible.

3. The court rejected defendant's argument that the charges should be considered "fees" because they were imposed by the county board and were paid to a county fund rather than to the State treasury. By enacting legislation permitting county boards to adopt certain monetary charges, the legislature clearly "intended to grant to county boards the limited authority to set 'fines' as punishment for various violations."

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

People v. Jackson & Lee, 2011 IL 110615 (Nos. 110615 & 110702, 9/22/11)

1. 730 ILCS 125/17 creates the "Arrestee's Medical Cost Fund" to reimburse counties for medical expenses of arrestees. The fund is created by imposition of a $10 fee for each criminal conviction. In the Supreme Court, the parties agreed that the amended version of §17, which took effect August 15, 2008, expressly allows the $10 medical cost assessment to be levied against all arrestees, including those who did not receive any medical services. The defendants claimed, however, that the pre-amended version of §17, which was in effect at the time of these offenses but had been amended by the time of the sentencing hearings, authorized the $10 fee only where the county incurred medical expenses on behalf of an arrestee.

The Supreme Court rejected this argument, finding that the first paragraph of §17 "unequivocally mandates that the county is entitled to medical costs assessment for each conviction." The court also noted that the legislature created an exception to the fee for convictions of petty and business offenses, but provided no similar exemption for persons who did not receive medical care.

The court acknowledged that the second paragraph of the pre-amended version of §17 provided that the money collected was to be used "solely" to reimburse medical expenses "relating to the arrestee while he or she is in the custody of the sheriff," but concluded that the second paragraph relates solely to the use of the fund and not to the collection of the assessment. Thus, the language of the second paragraph does not limit the collection of the fee under the first paragraph.

The court also noted that defendants' interpretation of §17 would be irrational because an arrestee with the ability to pay is already required to reimburse the county for medical care. Requiring an additional contribution of $10 only from arrestees who have received medical care would serve no purpose.

2. The court rejected the argument that when the legislature amended §17 to explicitly allow the $10 fee to be collected from all arrestees, it is presumed to have intended to make a change in the statute. The court found that the clear legislative intent of the amendment, as shown by legislative debates, was to clarify the statute rather than to substantively change its meaning.

3. Under the rule of "lenity," a court strictly construes ambiguous criminal statutes to afford leniency to the accused. However, the cardinal principle of statutory construction, to which all other rules are subordinate, is that a court must ascertain and give effect to the intent of the legislature. The rule of lenity does not allow a court to construe a statute so rigidly as to defeat the legislature's intent.

The court concluded that the rule of lenity did not justify limiting the $10 fee to arrestees who receive medical treatment while incarcerated, because that construction of §17 would conflict with the express legislative intent.

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

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

People v. Johnson, 2011 IL 111817 (No. 111817, 12/1/11)

Any person convicted of a felony must submit a DNA sample to the Illinois State Police for analysis and pay a $200 analysis charge. 730 ILCS 5/5-4-3. The primary purpose of §5-4-3 is to create a DNA database of the genetic identities of offenders. A court may order that defendant submit a DNA sample only where the defendant is not currently registered in the DNA database. Since the analysis charge is intended to cover the costs of the DNA analysis, by extension, only one analysis fee is necessary as well. **People v. Marshall**, 242 Ill.2d 285, 950 N.E.2d 668 (2011).

Because the DNA analysis charge is a one-time charge intended to cover the cost of analyzing the offender's DNA, it is compensatory, rather than punitive. It compensates the state for professional services and is not a pecuniary punishment imposed as part of a sentence. Therefore, the charge is a fee, and not a fine. Because only fines may be offset by the $5 credit for each day of presentence incarceration (725 ILCS 5/110-14(a)), defendant is not entitled to any such offset against the DNA analysis charge.

(Defendant was represented by Assistant Defenders Jessica Arizo and Brett Zeeb, Chicago.)

People v. Marshall, 242 Ill.2d 285, 950 N.E.2d 688 (2011)

1. Qualifying offenders are required by statute to submit a DNA sample and pay an analysis fee of $200. 730 ILCS 5/5-4-3. The primary purpose of this statute is to create a DNA database of the genetic identities of recidivist offenders. The Illinois Supreme Court held that the statute authorizes a judge to order a defendant to submit a sample and pay a fee only where the defendant is not currently registered in the DNA database.

2. The statutory language is silent on the question of whether offenders are required to submit duplicative samples upon each qualifying event, creating an ambiguity in the statute that permits a court to look to extrinsic aids of construction. Substantial weight and deference must be given to the interpretation of an ambiguous statute by the agency charged with its administration and enforcement. The administrative code that guides agencies in implementing §5-4-3 requires collection of a DNA sample only if "the qualifying offender has not previously had a sample taken." Therefore, in practice, a facility or agency charged with administering the statute would not interpret it to require collection of DNA from an offender who has already submitted a sample.

Accordingly, the statutory language requiring "[a]ny [qualifying] person" to submit a DNA sample only identifies the population whose DNA must be present in the database. 730 ILCS 5/5-4-3(a). Similarly, the $200 analysis fee required by subsection (j) "shall" be paid only when the actual extraction, analysis and filing of the qualifying offender's DNA occurs.

The court found support for this interpretation by comparing the language of §5-4-3 to that of 730 ILCS 5/5-5-3(g), which provides for collection of biological data from certain offenders. The plain language of that statute directs that "[w]henever," i.e., each and every time, an offender commits an enumerated offense, he is subject to the testing requirement.

3. The court dismissed the argument that a loophole might exist that allows a qualifying offender to escape inclusion in the database unless multiple samples are collected. The court was confident that the statute contains sufficient failsafes to ensure that the DNA of all qualifying offenders will through some method set forth in the statute be continuously maintained in the database.

4. Because the court exceeded its statutory authority in ordering defendant to pay the DNA fee where his DNA was already in the database pursuant to an earlier conviction, the order assessing the fee was void.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Smith, 236 Ill.2d 162, 923 N.E.2d 259 (2010)

55 ILCS 5/4-2002.1(a), which provides that the State's Attorney is entitled to a $20 fee for "preliminary examinations for each defendant held to bail or recognizance," applies only to preliminary hearings at which a probable cause determination is made. The court rejected the State's argument that the fee is authorized for bail hearings.

The court stressed that "preliminary examination" is a familiar legal expression with a settled meaning, and that the legislature is presumed to have intended to apply that meaning when it enacted §4-2002.1(a).

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

People v. Anthony, 408 Ill.App.3d 799, 951 N.E.2d 507 (1st Dist. 2011)

1. The $5.00 court system fee authorized by 55 ILCS 5/5-1101(a) may be entered only if the defendant is convicted of violating the Illinois Vehicle Code or a similar county or municipal ordinance. The fee was vacated where the defendant was convicted of unlawful use of a weapon by a felon.

2. The $25 court services fee to defray the cost of court security, which is authorized by 55 ILCS 5/5-1103, may be imposed even where the defendant is not convicted of an offense specified under the statute.

3. The $10 County Jail Medical Fund fee, which is authorized by 730 ILCS 125/17, is to be imposed without regard to whether the defendant incurred an injury or required treatment while in custody. The court concluded that the fee is intended to reimburse the county for the cost of providing medical services to arrestees, and is not a "fine" to which the presentence incarceration credit may be applied.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Bomar, 405 Ill.App.3d 139, 937 N.E.2d 1173, 2010 WL 4123996 (3d Dist. 2010)

Any person convicted of a felony must submit a DNA sample to the State police and pay a DNA analysis fee. 730 ILCS 5/5-4-3(a)(3.5) and (j) (West 2006).

The court ordered defendant to submit a DNA sample and pay an analysis fee when he was placed on probation for a felony offense. The statute did not authorize the court to order the defendant to submit a new sample and pay a new fee when he was resentenced after being found in violation of that probation.

The statute did not prohibit the court from ordering defendant to submit a new sample and pay a new fee when he was convicted of a separate felony. Nothing in the language of the statute limits the application of the statute to defendant's first felony conviction.

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

People v. Buffkin, 2016 IL App (2d) 140792 (No. 2-14-0792, 5/16/16)

Defendant argued for the first time on appeal from the dismissal of his post-conviction petition that he was entitled to pre-sentence credit against his fines and that he was improperly assessed a DNA fee. The State confessed error on both claims.

The court first held that even though the issue was forfeited and the error was no longer considered void after **Castleberry**, it could award defendant credit against his fines. In **Caballero**, 228 Ill. 2d 79 (2008), the Supreme Court held that under 725 ILCS 5/110-14, a defendant could apply for pre-sentence credit "at any time and at any stage of the court proceedings, even on appeal in a post-conviction proceeding."

Caballero, however, did not apply to the DNA fee. And since the fee was no longer void after **Castleberry**, defendant could not collaterally attack the fee. Additionally, Supreme Court Rule 615(b)(1)&(4), which permits a court to modify the judgment order and reduce a defendant's sentence did not apply because the judgment appealed here was the dismissal of defendant's post-conviction petition, not his sentence. Because the time to directly attack his sentence was long past, the court held that it would

normally lack jurisdiction to modify the sentence.

But since the State confessed error, the State revested the court with jurisdiction. The revestment doctrine provides that the parties may restore the court's jurisdiction if both parties: (1) actively participate in the proceedings; (2) fail to object to the timeliness of a late filing; and (3) assert positions that are inconsistent with the merits of the prior judgment and support setting it aside. Although the revestment doctrine typically is applied in trial court, the court saw no basis for not applying it on appeal.

Here, both parties participated in the appeal, the State failed to object to the timeliness of defendant's attack on his sentence, and both parties agreed to set the prior judgment aside. The court thus remanded the cause to the trial court to apply sentencing credit against defendant's fine and vacate the DNA fee.

(Defendant was represented by Assistant Defender Erin Johnson, Elgin.)

People v. Coleman, 404 Ill.App.3d 750, 936 N.E.2d 789, 2010 WL 3768082 (1st Dist. 2010)

The pre-amendment version of the statute providing for payment upon conviction of a $10 fee into a medical costs fund (730 ILCS 125/17) could be assessed against the defendant even though he was not injured and did not generate any medical expenses for the county while he was in custody. The fund benefits the defendant because it serves as a medical insurance policy while he is in custody. The money in the fund is used for either medical expenses of arrestees or the administration of the fund.

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

People v. Dalton, 406 Ill.App.3d 158, 941 N.E.2d 428 (2d Dist. 2010)

Both the Federal and State Constitutions prohibit *ex post facto* laws that disadvantage a defendant by either criminalizing an act that was innocent when done, increase the punishment for a previously-committed offense, or alter the rules of evidence by making a conviction easier to obtain. The prohibition of *ex post facto* laws applies only to punitive laws. It does not apply to fees that are compensatory rather than punitive.

The central characteristic separating fees from fines is whether the charge compensates the state for costs incurred as the result of prosecution of the defendant, in which case the cost is a fee. Compensation for labor or services, especially professional services that are collateral consequences of the defendant's conviction, are fees.

A statute that authorizes the court to impose an additional $500 fine on offenders convicted of certain sex offenses provides that 10% of the assessment is to be retained by the circuit court clerk to cover costs incurred in administrating and enforcing the statute, and that this penalty should not be considered part of the fine. 730 ILCS 5/5-9-1.15. This part of the assessment is a fee since it constitutes compensation for services and costs that are a consequence of defendant's conviction. Imposition of this fee is not barred by *ex post facto* principles.

The statute also provides that $100 of the $500 fine should be provided to the State's Attorney who prosecuted the case. This part of the fine is a fee as it is compensation for professional services and therefore also not affected by *ex post facto* principles.

The remaining $350, which by statute is deposited into the Sex Offender Investigation Fund, is a fine. Because the statute authorizing the fine was not in effect when the offense was committed, it may not be assessed against the defendant.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Daniels, 2015 IL App (2d) 130517 (No. 2-13-0517, 3/6/15)

Under 725 ILCS 5/113-3.1(a), the trial court may order a defendant to pay a reasonable amount to reimburse the county or state for the cost of appointed counsel. But prior to ordering reimbursement, the court must conduct a hearing regarding defendant's financial resources.

Here, the trial court ordered defendant to pay a $750 public defender fee without conducting any hearing at all. The Appellate Court held that where the trial court fails to conduct any hearing at all, the

proper remedy is to vacate the fee outright. If the court conducts an inadequate hearing, the remedy is to remand for a proper hearing.

Since the trial court conducted no hearing at all, the Appellate Court vacated defendant's fee outright.

(Defendant was represented by Assistant Defender Richard Harris, Elgin.)

People v. Dillard, 2014 IL App (3rd) 121020 (No. 3-12-1020, 7/29/14)

Defendant was convicted in a stipulated bench trial and, pursuant to an agreement reached by the parties, received a 21-year sentence. At sentencing, the trial court stated that "judgment would be entered for costs." In addition, the written sentencing order stated that "a judgment be entered against the defendant for costs."

The record on appeal contained a document entitled "CASE PAYMENTS," which was dated several weeks after the sentencing hearing and the hearing on defendant's post-sentencing motion. The document did not indicate that it had been reviewed by the trial court or tendered to the defendant before the sentencing hearing or within the time for filing a post-sentencing motion. The document included assessments for several items, including the Violent Crime Victims Assistance Fund (725 ILCS 240/10(c)), the State Police Services Fund (730 ILCS 5/5-9.17), the drug court fine (55 ILCS 5/5-1101(f)), the $15 State Police Operations Assistance Fund fine (705 ILCS 105/27.3a (6)), and the $50 court fund fine (55 ILCS 5/5-1101(c)).

1. Even mandatory fines may be imposed only by a specific order from the trial judge. Although the sentencing court may delegate the task of calculating statutorily mandated fines and costs to the clerk, it has a responsibility to oversee the clerk's calculations and correct any improper charges. "[T]he clerk's tally sheet is not a substitute for a written court order regarding fines.

Because there was no indication in the record that the trial court intended to impose any mandatory fines and the assessments were imposed by the circuit clerk, the fines were vacated and the cause remanded for the trial court to determine whether such charges should be imposed.

2. The court acknowledged that defendant failed to raise any issue concerning the fines in the trial court, but noted that it did not appear that defendant received a copy of the clerk's calculations before the deadline for filing the post-sentencing motion. The court noted that in the past it had declined to apply forfeiture and simply corrected the clerk's financial miscalculations. Although "this approach has not reduced the number of errors in both fines and costs that continue to originate with a well-intentioned circuit clerk in the trial court," the court did not apply the forfeiture doctrine here.

In dissent, Justice Schmidt stated that the trial court's order should be affirmed because defendant forfeited the issue by failing to raise it in the lower court.

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

People v. Folks, 406 Ill.App.3d 300, 943 N.E.2d 1128 (4th Dist. 2010)

After vacating and reimposing several "fines" which had been imposed by the clerk as "fees," crediting defendant with the $5 per day credit for pretrial custody, and imposing a DNA assessment fee that the judge had ordered but the clerk failed to impose, the Appellate Court made the following observations:

> This court recognizes the morass of fines, fees, and costs created by the legislature. The calculation of these sums is a monumental feat which has commonly been accomplished by the clerk after the sentencing, in the clerk's office with the aid of computers. . . . Further complicating the computations are recent cases which have recharacterized many fees as fines, thereby eliminating the clerk's authority to impose the assessments. This court also recognizes the daily dilemma faced by the court and clerks, even for those who have staff and computers to support the prompt assessment of the multitude of specific fines, fees, and costs in the

> courtroom with the defendant present. The myriad of legislative requirements and the complexity of their precise application based on a number of legislative and situational variables make the task immensely difficult. The possibility of error because of the complicated nature of the assessment process is high and is of great concern to the court and to the elected court clerks in the 102 counties in the state of Illinois.
>
> The current situation calls for a comprehensive legislative revision in the assessment of fines, fees, costs and the $5-per-day credit for time spent in custody prior to sentencing. The judicial and clerical time expended on accurate calculation of the precise assessment of these monies, much of which may never be collected, is phenomenal.

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

People v. Ford, 2016 IL App (3d) 130650 (No. 3-13-0650, 2/22/16)

1. The restitution statute authorizes courts to order restitution when a defendant through a criminal act has damaged another person's property. A "victim" under the statute is someone who has incurred property damage or financial loss. 730 ILCS 5/5-5-6.

The vast weight of authority holds that a police department is not considered a victim under the restitution statute and should not be compensated for the public money it spends for law enforcement. There are two reasons for this rule: (1) merely investigating offenses does not make the police a "victim" of the offenses; and (2) were the rule otherwise, the police would receive restitution in almost every criminal case, and would thus be compensated twice for performing their basic function, once by the taxpayers and once by the offender

But there is no per se rule prohibiting police from receiving restitution. Here defendant recklessly damaged a police van. The trial court ordered defendant to pay restitution to repair the van. The Appellate Court upheld the order since it did not reimburse the police for their normal costs of investigating crime, but instead covered their out-of-pocket cost of repair required because of defendant's criminal act.

2. The parties and the court agreed that the circuit court clerk improperly imposed fines and fees against defendant. The imposition of a fine is a judicial act and the circuit clerk has no authority to impose fines, even if they are mandatory. Any fine imposed by the circuit clerk is void. The proper remedy is to vacate the assessments in full and remand to the trial court to properly impose the appropriate fines and fees.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

People v. Glass, 2017 IL App (1st) 143551 (No. 1-14-3551, 2/14/17)

The trial court may order the defendant to pay a reasonable sum to reimburse the county for the cost of appointed counsel, but only after holding a hearing where the court must consider the defendant's financial circumstances. 725 ILCS 5/113-3.1. The hearing must be held within 90 days and must focus on the ability of the defendant to pay.

Here, after the State filed a motion for reimbursement of funds, the trial court merely asked how many times defense counsel had appeared on this case. After counsel answered "eight times," the court stated: "And plus it was a jury trial. $500 would be appropriate."

The parties agreed on appeal that the trial court did not conduct a sufficient hearing to impose the reimbursement fee, but disagreed about the proper remedy. Defendant argued that his fee should be vacated outright since the trial court failed to hold a hearing within 90 days. The State argued that remand was proper where the court did hold a hearing, even if insufficient, within 90 days.

Remand is proper if "some sort of hearing" has been held within 90 days. But caselaw is not yet clear on whether that hearing has to focus on defendant's ability to pay or whether it may focus more generally on the State's motion to recoup fees. Acknowledging the split in authority, the Appellate Court here adopted the latter position and held that remand was proper since the trial court held "some sort of hearing" regarding

the State's motion. Accordingly, the Appellate Court vacated the fee and remanded for a new hearing.

(Defendant was represented by former Assistant Defender Nicole Burns, Chicago.)

People v. Grayer, 403 Ill.App.3d 797, 935 N.E.2d 518 (1st Dist. 2010)

730 ILCS 5/5-4-3(a) provides that a person convicted or found guilty of a felony "shall, regardless of the sentence or disposition imposed, be required to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police." 730 ILCS 5/5-4-3(j) provides that a person required to submit such specimens shall be required to pay a $200 fee for DNA analysis.

Noting a conflict in appellate authority, the court found that the General Assembly did not intend to require that a defendant submit samples and pay the $200 fee for only his or her first conviction. The court found that there are at least two justifications for requiring DNA samples upon subsequent convictions - to obtain "fresh" samples, and to subject the new samples to DNA analysis which might not have been available at the time of the first conviction.

Because a defendant is required to submit new samples upon conviction of subsequent offenses, an additional $200 fee may be collected with each sample.

(Defendant was represented by Assistant Defenders Katherine Donahue and James Chadd, Chicago.)

People v. Hill, 2014 IL App (3d) 120472 (Nos. 3-12-0472 & 3-12-0473, 3/13/14)

1. Defendant argued that the trial court improperly required him to pay a $200 DNA analysis fee. The Appellate Court observed that defendant did not preserve the error in the trial court. Typically defendants avoid the consequences of forfeiture by arguing that the sentence is void, but defendant did not argue voidness in this case. Nonetheless, in the interest of maintaining a uniform body of law, the Court *sua sponte* considered whether the imposition of the DNA fee was void.

2. In arguing that the DNA fee was improperly imposed, defendant relied on an information sheet provided by the ISP Division of Forensic Services showing that defendant submitted a blood sample for analysis on July 11, 1995. The Court held that although this document was not presented to the trial court, it would take judicial notice of it as a public record. The Court therefore recognized that defendant submitted a DNA sample in 1995.

In 1995, however, the sentencing code did not require trial courts to order felons to submit a DNA sample and pay an analysis fee. That requirement was applied to certain sex offenders on January 1, 1998. 730 ILCS 5/5-4-3(a)(j). It was later applied to all convicted felons on August 22, 2002. 730 ILCS 5/5-4-3(a)(3.5). The Court thus held that defendant was obligated to pay his first DNA analysis fee in this case.

3. The Court refused to consider information from the website "judici.com," in deciding whether defendant was improperly assessed two DNA fees. Instead, the Court relied exclusively on the clerk's "payment status information," included in the common law record. The Court noted that printouts from "judici.com," were appended to the brief, but were not part of the record on appeal. The Court cautioned the parties against attempting to supplement the record with information from the internet without first obtaining leave of the Court.

(Defendant was represented by Assistant Defender Gabrielle Green, Chicago.)

People v. Johnson, 2015 IL App (3d) 140364 (No. 3-14-0364, 12/23/15)

The imposition of fines is a judicial act. Because the clerk of the court has no power to levy fines, a fine imposed by the circuit clerk is void. A challenge to a void order imposing financial sanctions is not subject to forfeiture and may be raised for the first time in a reviewing court.

The court vacated several fines that had been imposed by the clerk and remanded the cause for the trial court to determine whether those fines should be imposed. In addition, "for the purpose of providing guidance to the trial courts" which are struggling with the "very complex process" of calculating fines and fees, the court issued an appendix concerning fines and costs.

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

People v. Larue, 2014 IL App (4th) 120595 (No. 4-12-0595, 5/14/14)

1. A statute violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11) if it contains the same elements as another offense but carries a greater penalty. Defendant argued that his sentence of 10 years imprisonment for unlawful possession of a weapon by a felon (UPWF) violated the proportionate penalties clause because it is a lesser-included offense of aggravated unlawful use of a weapon (AUUW), but carries a greater penalty. (AUUW is a Class 2 felony with a sentencing range of three to seven years imprisonment; UPWF is a Class 3 felony with a range of two to 10 years imprisonment.)

Defendant conceded that the two offenses are not truly identical, since AUUW contains an additional element (that the firearm be uncased, immediately accessible, and loaded) not in the UPWF statute, but argued that treating the two offenses as identical is consistent with the purpose of the proportionate penalties clause.

The court rejected this argument, holding that the proportionate penalties clause only applies to statutes that have truly identical elements. Any expansion of the clause to lesser-included offenses would run afoul of the Illinois Supreme Court's directive in **People v. Sharpe**, 216 Ill.2d 481 (2005) to abandon the cross-comparison analysis of the proportionate penalties clause.

2. Defendant argued that his 10-year sentence for UPWF violated the due process clause of the Illinois Constitution (Ill. Const. 1070, art. I §2) because it is a lesser-included offense of AUUW but is punished more harshly.

The legislature possesses wide discretion in prescribing penalties for offenses, but its power is limited by the due process clause, which requires that a penalty must be reasonably designed to remedy the particular evil being targeted. Courts will not invalidate a statute unless the penalty "is clearly in excess of the very broad and general constitutional limitations applicable.

Defendant relied on **People v. Bradley**, 79 Ill. 2d 410 (1980), where the Supreme Court found that the penalty for possession of a controlled substance (one to 10 years imprisonment) violated due process since the penalty for delivery of the same substance had a lesser sentence (one to three years). In reaching its decision, the Supreme Court observed that the Illinois Controlled Substances Act expressly stated that the legislature intended the heaviest penalties to apply to drug traffickers. Therefore punishing possession offenses more harshly than delivery offenses contravened the express intent of the legislature and violated due process.

The Appellate Court rejected defendant's reliance on **Bradley**. Here, defendant failed to show that the sentence for UPWF is contrary to the legislature's intent, and has thus failed to show that the sentence is not reasonably designed to remedy the particular evil being targeted.

3. Defendant also argued that his 10-year sentence for UPWF violated the equal protection clauses of the United States and Illinois Constitutions (U.S. Const., amend XIV, §1; Ill. Const. 1970, art. I, §2), because the different sentencing ranges for AUUW and UPWF treated those who committed similar offenses in a different manner.

The equal protection clause requires the government to treat similarly situated individuals in the same fashion unless it can show an appropriate reason for dissimilar treatment. Where, as here, the case does not involve a fundamental right and the affected individuals are not a suspect class, courts utilize a rational basis test to determine whether there is an equal protection violation. Under this test, courts must determine whether the statute bears a rational relationship to a legitimate governmental purpose.

The court held that defendant's argument failed because he could not show that he was similarly situated to someone who was convicted of AUUW. By the very definition of offenses, individuals convicted of different offenses are dissimilarly situated from each other. Since AUUW and UPWF are different offenses, defendant cannot show that he is similarly situated to someone convicted of AUUW, and hence cannot show an equal protection violation.

4. Depending on the statutory language, certain fees may be imposed only once per case, or may be imposed for each conviction. Here, the court determined that four fees could only be imposed once while two could be imposed for each of defendant's two convictions.

The statute authorizing the document storage fee (705 ILCS 105/27.3c(a)) states that a fee shall be imposed for each "matter," which the court concluded was synonymous with "case." Accordingly, this fee can only be imposed once per case.

The statutes authorizing the automation fee (705 ILCS 105/27.3a(1)), and the court security fee (55 ILCS 5/5-1103) both state that a fee shall be imposed for each "case," and hence can only be imposed once per case.

The circuit clerk fee statute (705 ILCS 105/27.1a(w)(1)(A)) states that the fee shall be imposed for each felony complaint. Since the two counts filed by the State in this case constituted one felony complaint, only one fee could be imposed.

By contrast, the statute authorizing the court finance fee (55 ILCS 5/1101(c)) states that a fee shall be imposed on a "judgment of guilty," and thus allows the imposition of a fee on each judgment.

Similarly, the statute authorizing the state's attorney fee (55 ILCS 5/4-2002(a)), states that a fee shall be imposed for "each conviction." Here, defendant was found guilty of two counts and thus two court finance and state's attorney fees could be imposed.

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

People v. Marshall, 402 Ill.App.3d 1080, 931 N.E.2d 1271 (3d Dist. 2010)

Under 730 ILCS 5/5-4-3(j), a person convicted of specified offenses must submit specimens of blood, saliva, or tissue to the Illinois State Police, and "in addition to any other disposition, penalty, or fine imposed, shall pay an analysis fee of $200." Noting a conflict in appellate authority, the court held that a DNA sample and $200 fee is required even where the defendant submitted a DNA sample in connection with an unrelated conviction.

The court noted that 730 ILCS 5/5-4-3(f-1) authorizes expungement of a DNA sample if the conviction is reversed for reasons of actual innocence, or if a pardon is granted based on a claim of actual innocence. Taking defendant's argument to its logical conclusion, a defendant convicted of two qualifying offenses would have no DNA sample on file if the first conviction was subsequently reversed or a pardon was obtained. "We do not believe this was the legislature's intent."

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Martino, 2012 IL App (2d) 101244 (No. 2-10-1244, 6/7/12)

Whether statutes and ordinances that authorize fees or fines allow for imposition of multiple charges depends on the legislative authority's intent as revealed by the plain language of the statute or ordinance.

1. The County Clerks Act authorizes county boards to enact ordinances to defray the costs of maintaining automated record-keeping systems and document storage. The DuPage County ordinance provides that the applicable fee "shall be paid *** by the defendant in any felony, misdemeanor, traffic, ordinance or conservation matter on a judgment of guilty." DuPage County Code §9-10.

Because the use of the word "matter" evidences an intent that a fee be imposed for each case rather than for each conviction, only one fee could be imposed in a case resulting in multiple convictions.

2. The Clerks Act provides that the clerk is entitled to "costs in all criminal and quasi-criminal cases from each person convicted or sentenced to supervision therein as follows: (A) Felony complaints, a minimum of $80 and a maximum of $125 (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75." 705 ILCS 105/27.2(w)(1)(A) and (B). The plain language of this statute authorizes one fee per charging instrument.

Defendant was charged with both felonies and misdemeanors in a single indictment. Logic dictates that a complaint setting out a felony is a felony complaint even if it also charges a misdemeanor. Therefore, defendant could be assessed one fee for a felony complaint.

3. The Counties Code authorizes a county board to enact an ordinance to defray the costs of the sheriff in providing court security. DuPage County enacted an ordinance providing that "[i]n criminal, local ordinance, [c]ounty ordinance, traffic and conservation cases, such fee [of $25] shall be assessed against the

defendant upon a plea of guilty, stipulation of facts or findings of guilty resulting in a judgment of conviction or order of supervision." DuPage County Code §20-30.

Because the language of the ordinance refers to cases not individual convictions, only one fee may be imposes in each case.

4. The County Jail Act provides: "The county shall be entitled to a $10 fee for each conviction or order of supervision for a criminal violation, other than a petty offense or business offense." 730 ILCS 125/17.

The plain language of this Act provides that a fee may be imposed on each of defendant's convictions.

5. The Counties Code authorizes county boards to enact ordinances that allow for imposition of fees to defray the costs of financing a court system: "A fee to be paid by the defendant on a judgment of guilty or a grant of supervision *** as follows: (1) for a felony, $50; (2) for a class A misdemeanor, $25." 55 ILCS 5/5-1101(c)(1) and (2). DuPage County enacted such an ordinance.

The plain language of the Counties Code provides that the fee may be imposed on a per-conviction basis.

6. The Counties Code provides that a State's Attorney's fee may be imposed "[f]or each conviction." 55 ILCS 5/4-2002. Therefore it is proper to impose a fee for each conviction.

7. The Counties Code provides that county boards may enact a "$10 fee to be paid by the defendant on a judgment of guilty or grant of supervision *** to finance the county mental health court, the county drug court, or both." 55 ILCS 5/5-1101(d-5). DuPage County enacted an ordinance providing that the fine should be imposed for each "count" on which there was a "judgment of guilty."

The plain language of the ordinance allows imposition of the fine on each count.

8. A Violent Crimes Victims Assistance Fund fine may be imposed on each conviction based on a "reading of various portions of the statute in tandem." The statute refers to collection of the penalty from each defendant upon conviction and provides for a fine in a specified amount depending on the nature of the conviction.

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

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

The Child Advocacy Center fee, 55 ILCS 5/5-1101(f-5), though labeled a fee is a fine. The assessment is mandatory upon conviction of a felony or other listed offenses. It does not relate to the costs of prosecution. There is no relevant connection between the offense committed by the defendant and the public endeavor funded by the fee.

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

People v. Millsap, 2012 IL App (4th) 110668 (No. 4-11-0668, 11/29/12)

1. The Children's Advocacy Center assessment is a fine, notwithstanding the statutory label of a fee. 55 ILCS 5/5-1101(f-5). The charge is mandatory for a convicted defendant and does not reimburse the State for money expended in prosecuting the defendant.

2. The State Police operations assistance fee is also a fine. A circuit clerk in any county that imposes a fee for maintaining automated record-keeping systems pursuant to §27.3a(1) of the Clerks of the Court Act must collect an additional fee, the State Police operations assistance fee, to be paid by the defendant in any felony, traffic, misdemeanor, or local ordinance violation upon a judgment of guilty or grant of supervision. 705 ILCS 105/27.3a(1.5). Such fee is to be deposited in the State Police Operations Assistance Fund to be used by the State Police to finance any of its lawful purposes and functions. Therefore it does not reimburse the State for costs incurred in defendant's prosecution.

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

People v. Pohl, 2012 IL App (2d) 100629 (No. 2-10-0629, 5/3/12)

1. The Clerks of Court Act provides that the "clerk shall be entitled to costs in all criminal . . . cases from each person convicted . . . as follows: (B) Misdemeanor complaints, a minimum of $50 and a maximum of $75. 705 ILCS 105/27.2(w)(1)(B).

The plain language of the statute authorizes imposition of a fee for a defendant convicted pursuant to a misdemeanor complaint. Defendant was convicted of three counts of domestic battery but only one complaint was filed. Therefore, only one clerk's fee could be imposed.

2. The Counties Code authorizes a county to enact an ordinance to defray the costs of the sheriff in providing court security. 55 ILCS 5/5-1103. Pursuant to this section, the DuPage County Board enacted an ordinance that provides "[i]n criminal . . . cases, such fee [of $25] shall be assessed against the defendant upon . . . findings of guilty resulting in a judgment of conviction."

The plain language of this ordinance indicates that the court security fee must be imposed against a defendant who is found guilty in a criminal case, but the language refers to cases, not individual convictions. Therefore, defendant convicted of three counts of domestic battery could only be assessed one fee.

3. The Unified Code of Corrections provides that "[i]n addition to any other penalty imposed, a fine of $200 shall be imposed upon any person who . . .is convicted of . . . domestic battery." 730 ILCS 5/5-9-1.5.

The Appellate Court found this statute ambiguous with respect to whether defendant should be liable for a single fine or multiple fines upon conviction of multiple counts of domestic battery. The court looked for guidance to **People v. Elliott**, 272 Ill. 592, 112 N.E. 300 (1916). In **Elliott**, the court upheld imposition of multiple sentences of fines for multiple convictions of unlawfully selling intoxicating liquor, because defendants were knowing and willful violators of the law and therefore there was no reason whatsoever for leniency. Like **Elliott**, the court saw no reason why defendant should escape liability for three separate domestic violence fines where he was convicted of three counts of domestic battery. To hold that only one fine should be imposed would result in the unjust consequence that a defendant who battered several people would be punished no differently than a defendant who battered one person.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Reed, 2016 IL App (1st) 140498 (No. 1-14-0498, 1/27/16)

1. Although Illinois precedent holds that fees which are improperly imposed are void and may be challenged at any time, the Appellate Court concluded that such a rule did not survive **People v. Castleberry**, 2015 IL 116916. Under **Castleberry**, an order is void only if it was entered by a court which lacked jurisdiction.

Thus, the defendant forfeits a sentencing issue that is not raised through a contemporaneous objection and a written post-sentencing motion. However, the rules of waiver and forfeiture also apply to the State, which in this case failed to make a timely argument that defendant forfeited the issue whether three "fees" imposed by the trial court were actually "fines" and were therefore subject to the $5 per day credit against fines for time served in custody while awaiting trial.

2. It is the nature of an assessment, and not its statutory label, that determines whether it is a "fee" or a "fine." A "fee" seeks to recoup expenses incurred by the State or compensate the State for some cost of prosecution, while a "fine" is a pecuniary punishment imposed as part of a sentence.

The court accepted the State's concession that the $50 Court System Fee (55 ILCS 5/5-1101(c)) is a "fine" that is subject to the $5 per day credit. However, the court concluded that both the State's Attorney Record's Automation Fee (55 ILCS 5/4-2002.1(c)) and the Public Defender Records Automation Fee (55 ILCS 5/3-4012) are compensatory in nature because the assessments are intended to compensate the State and the Public Defender for the costs of establishing and maintaining an automated record keeping system. Thus, defendant is not entitled to the $5 per day credit against those charges.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Rogers, 2014 IL App (4th) 121088 (No. 4-12-1088, 7/25/14)

Defendant was convicted in a jury trial of aggravated battery, and was sentenced to five years imprisonment with credit for time served. The trial court did not impose any fines as part of the sentence, but the circuit clerk issued various assessments. The Appellate Court concluded that fines assessed by the circuit clerk must be vacated.

1. The circuit clerk has authority to assess fees, but may not assess fines. In addition, assessments which are labeled by the legislature as "fees" are actually "fines" if the General Assembly intended the charge to be part of a pecuniary punishment imposed as part of the sentence. A fee, by contrast, is a collateral consequence of a conviction and is intended to reimburse the State for expenses related to the prosecution.

2. Error occurred where the circuit clerk imposed assessments for several fines, including a $5 fine for child advocacy (55 ILCS 5/5-1101(f-5)), $5 drug court charge (55 ILCS 5/5-1101(f)), and $100 assessment for violent crime victims assistance (725 ILCS 240/10(b)). The Appellate Court vacated those assessments and remanded the cause for the trial court to reimpose the fines. The court also noted that if the fines were reimposed defendant would be entitled to the $5 per day credit for pretrial incarceration.

3. The court declined to accept the State's concession that the $2 State's Attorney automation charge (55 ILCS 5/4-2002(a)) was a fine and could only be imposed by the trial court. The court concluded that the assessment was a "fee" because it was intended to reimburse the State's Attorney for expenses related to automated record keeping systems.

In addition, because the charge was a fee, it could be assessed in this case even though it was authorized by legislation which became effective after the crimes in this case occurred. The prohibition against *ex post facto* laws applies only to punitive laws. Fee statutes are compensatory and therefore do not come under the *ex post facto* clause.

4. The court noted that the circuit clerk erroneously imposed a $15 State Police operations assistance fine (705 ILCS 105/27.3(a)(1), (1.5), (5)). In addition, because the charge is a fine that was authorized by legislation which became effective after the criminal conduct in question, the *ex post facto* clause prohibited its assessment even by the trial court.

5. The court concluded that the $10 probation operation assistance assessment (705 ILCS 105/27.3a(1.1)) may be a fine or a fee, depending on the circumstances. Where the defendant was eligible for probation and the probation office conducted a pre-sentence report, the charge is compensatory in nature because it reimburses the State for costs incurred as a result of the prosecution. Under such circumstances, the charge is a fee.

By contrast, where the probation office was not involved in the prosecution, the probation operation assistance assessment constitutes a fine because it does not compensate the State for costs of the prosecution.

The cause was remanded with instructions to the trial court to reimpose fines which had been imposed by the clerk.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

People v. Smith, 2014 IL App (4th) 121118 (No. 4-12-1118, 9/19/14)

1. The circuit clerk does not have the power to impose "fines," but does have authority to impose "fees."A "fee" is a charge which seeks to recoup the State's expenses for prosecuting the defendant. A "fine" is punitive in nature and is a pecuniary punishment imposed as part of the sentence imposed for a criminal offense. To determine whether an assessment is a "fine" or a "fee," the court examines the language of the statutes which create the assessment. Similarly, the language used to create an assessment controls whether it may be imposed on each conviction or only once per case.

2. The following assessments are "fees" which may be imposed only once in each case: (1) the $10 automation fee (705 ILCS 105/27.3a), (2) the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), (3) the $25 court security fee (55 ILCS 5/5-1103), and (4) the $5 document storage fee (705 ILCS 105/27.3c(a)).

3. The court concluded that the $40 State's Attorney's assessment (55 ILCS 5/4-2002) is a fee which can be imposed on each count for which a conviction is entered.

4. The court concluded that the following assessments are "fines" and were therefore improperly imposed by the clerk: (1) the $10 arrestee medical assessment (730 ILCS 125/17), (2) the $50 court finance fee(55 ILCS 5/5-1101(c)), (3) the $5 drug court assessment fee (55 ILCS 5/5-1101(f)), (4) the $25 Victims Assistance Act fee (725 ILCS 240/10(c)(1)). In addition, the court concluded that the latter assessment was improperly calculated and on remand must be recalculated by the trial court.

5. The court concluded that the $30 juvenile expungement assessment (730 ILCS 5/5-9-1.17) is a "fine." In addition, application of the fine in this case would violate the *ex post facto* clause because the statute creating the assessment took effect after the date of the offense for which defendant was convicted.

6. The court also found that the trial court failed to impose three mandatory fines, and ordered that such fines be imposed on remand. First, the criminal surcharge fine (730 ILCS 5/5-9-1(c)) must be imposed on each count on which a conviction was entered. Because the amount of the surcharge depends on the other fines imposed, on remand the trial court must calculate and impose the appropriate surcharge.

Second, the mandatory $200 sexual assault fine (730 ILCS 5/5-9-1.7(b)(1)) applies to each count for which a conviction for sexual assault was entered, unless the trial court in its discretion and at the request of a victim finds that the assessment would impose an undue burden on the victim. Because the victim made no such request in this case, the trial court must impose the fine on each sexual assault conviction.

Finally, the mandatory $500 sex offender fine (730 ILCS 5/5-9-1.15(a)) must be imposed on each count on which a conviction for a sex offense was entered.

7. The court found that the circuit clerk erred by imposing a $43.50 late fee (725 ILCS 5/124A-10) and a $100.05 collection fee (730 ILCS 5/5-9-3(a)). The court noted the State's argument that the late fees and collection fees are civil penalties that cannot be challenged in a criminal appeal, but found that the record did not support the imposition of such fees in this case because the defendant was not afforded a minimum of 30 days from the date of the judgment to pay the assessments.

8. The court concluded that because defendant was incarcerated awaiting trial on a charge of sexual assault, he was not entitled to the $5 per day credit against fines for time in which he was in custody. (725 ILCS 5/110-14(b)).

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Unander, 404 Ill.App.3d 884, 936 N.E.2d 795 (4th Dist. 2010)

Persons convicted of qualifying offenses are required to submit specimens of blood, saliva, or tissue to the Illinois State Police to be placed in the state or national DNA database. 725 ILCS 5/5-4-3(a). Any person who is required to submit such specimen is also required to pay an analysis fee of $200.

The circuit court ordered that the defendant submit a DNA sample to the Illinois State Police "if he has not already done so," and that he would then be required to pay a $200 DNA analysis fee. The record established that defendant had already submitted a DNA specimen to the Illinois State Police.

The court vacated the fee, reasoning that defendant was not required to submit a specimen and therefore could not be required to pay the fee. The court reached this conclusion considering: (1) the plain language of the statute providing that only persons *required* to submit DNA specimens pay the analysis fee; (2) the conditional language of the circuit court's order that defendant submit a sample only if he had not already done so; and (3) **People v. Evangelista**, 353 Ill.App.3d 395, 912 N.E.2d 1242 (2d Dist. 2009), which held that once a defendant has submitted a DNA sample, requiring him to submit additional samples would serve no purpose.

(Defendant was represented by Assistant Defender Molly Corrigan, Springfield.)

People v. Warren, 2016 IL App (4th) 120721-B (No. 4-12-0721, mod. op. 5/26/16)

1. Rejecting its own opinion in **People v. Alghadi**, 2011 IL App (4th) 100012, the court found that the legislature may intend to authorize the imposition of certain fees and fines on each judgment or order of supervision, and not to limit the trial judge to imposing one charge for each case. The court concluded that the following fees and fines could be imposed on each count on which a conviction is entered: (1) the $50

court finance fee (55 ILCS 5/5-1101(c), (g)), the $40 State's Attorney's fee (55 ILCS 5/4-2002), the $2 State's Attorney's automation fee (55 ILCS 5/4-2002(a)), the $10 arrestee's medical fine (730 ILCS 125/17), the $30 juvenile expungement fund fine (730 ILCS 5/5-9-1.17), the $5 drug-court fine (55 ILCS 5/5-1101(f)), the $25 court-finance fee (55 ILCS 5/5-1101(c), (g)), and the Violent Crimes Victims Assistance Act fine (725 ILCS 240/10(b)).

The court noted, however, that several other fines and fees could be imposed only once in each case, including the $5 document storage fee (705 ILCS 105/27.3c(a)), the $10 circuit clerk automation fee (705 ILCS 105/27.3a), the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), the $25 court security fee (55 ILCS 5/5-1103), and the $10 State Police Operations fine (705 ILCS 105/27.3a(1.5)).

2. A "fee" is a charge which seeks to recoup expenses incurred by the State or to compensate the State for some expenditure incurred in prosecuting the defendant. A "fine" is punitive in nature and is imposed as part of the sentence for a criminal offense. Furthermore, a charge that is labeled by the legislature as a "fee" is a "fine" if it is pecuniary in nature.

"Fines" may be imposed only by the trial court, while "fees" may be imposed by the circuit clerk. Any "fine" that is imposed by the clerk must be vacated and the cause remanded for imposition of the fine by the trial court.

The court vacated several "fines" which had been imposed by the circuit clerk and remanded the cause with instructions that such fines must be imposed by the trial court. The court held that **People v. Castleberry**, 2015 IL 116916 (2015), which abolished the void sentence rule, has no effect on the rule that fines may not be imposed by the clerk. However, the court concluded that **Castleberry** does preclude the State from seeking to increase a fine which was imposed by the trial court in an amount that was less than required by statute.

3. While noting that **Castleberry** may help to lessen the courts' burden concerning mandatory fines and fees, the court reiterated its call for "comprehensive legislative revision" of mandatory fines and fees. The court stated, "The legislature continues to enact new fines, fees, and costs - in this case, leading to the imposition of 33 separate assessments. . . . This adds more complexity to many cases where the monetary assessments may not even be collected."

The cause was remanded with instructions to the trial court to impose applicable fines.

(Defendant was represented by Supervisor Marty Ryan, Springfield.)

People v. Williams, 2011 IL App (1st) 091667-B (No. 1-09-1667-B, revised op. 12/15/11)

A "fine" is part of the punishment for a conviction, while a "fee" seeks to reimburse the State for its expenses in prosecuting a defendant. Even where the statute creating a financial penalty labels it as a "fee," a "fee" which is not intended to reimburse the State for the costs of prosecution is construed as a "fine." A "fine" is subject to the $5 per day credit for pretrial incarceration.

The court concluded that the $10 mental health "fee" (55 ILCS 5/5-1101(d-5)), $5 youth diversion/peer court (55 ILCS 5/5-1101(a)), $30 children's advocacy center "fee" (55 ILCS 5/5-1101(f-5)), and $5 drug court "fee" (55 ILCS 5/5-1101(f)) do not reimburse the State for the expense of prosecuting the defendant, and are therefore "fines." Thus, defendant was entitled to $5 per day credit against these charges for his presentence custody.

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

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§45-8
Drug Abuse Treatment

(Note: The General Assembly frequently modifies the provisions of the Alcoholism and Other Drug Abuse

and Dependency Act (the Act) (20 ILCS 301/1-1 *et al*). The Act is commonly known as the Treatment Alternatives Act, which was preceded by a number of different acts. Counsel should always check the applicable portions of the Act to determine whether the relevant provisions have changed.)

People v. Richardson, 104 Ill.2d 8, 470 N.E.2d 1024 (1984) The Dangerous Drug Abuse Act requires the trial judge to inform every defendant whom he knows or has reason to believe is an addict of the possibility of treatment under the Act even where, as here, acceptance into a treatment program may be vetoed by defendant's parole or probation officer. (Note: a prior version of the statute was merely directory, not mandatory.)

People v. McCoy, 63 Ill.2d 40, 344 N.E.2d 436 (1976) Robbery is not a "crime of violence" under the Dangerous Drug Abuse Act; thus a defendant convicted of robbery is not ineligible for drug treatment. By deleting "robbery" from the list of "crimes of violence," and by substituting "armed robbery," the legislature is presumed to have intended to remove the disqualification for robbery. See also, **People v. Robinson**, 255 Ill.App.3d 1067, 627 N.E.2d 262 (1st Dist. 1993) (defendant's conviction for armed violence could not be considered a "crime of violence" under the Alcoholism and Other Drug Dependency Act, as there was no use or threat of physical force, physical restraint, or confinement).

People v. Warren, 69 Ill.2d 620, 373 N.E.2d 10 (1977) A trial judge is not required to order a defendant to be examined by the Department of Mental Health, or to consider the Department's report, before denying a petition for treatment under the Drug Abuse Act. It is only after the trial court has made a tentative determination to treat a defendant under the Act, and defendant has elected to proceed in that manner, that such an exam is to be ordered for the purpose of securing the Department's consent and recommendations.

People v. Phillips, 66 Ill.2d 412, 362 N.E.2d 1037 (1977) The provision of the Dangerous Drug Abuse Act authorizing the probation officer to deny treatment to persons who have been charged with, but not convicted of, a criminal offense does not infringe upon the court's constitutional right to impose sentence.

People v. Wallace, 331 Ill.App.3d 822, 772 N.E.2d 785 (1st Dist. 2002) Defendant was eligible for TASC, despite the fact that he had been adjudicated delinquent of residential burglary, because juvenile adjudications are not "convictions" for purposes of TASC.

People v. Meeks, 236 Ill.App.3d 193, 603 N.E.2d 757 (1st Dist. 1992) Where a defendant is eligible for treatment under the Alcoholism and Other Drug Dependency Act, the trial judge is required to allow him to petition for treatment and undergo a drug treatment evaluation. Although the judge has discretion to refuse to allow treatment, that discretion can be exercised only *after* defendant has been evaluated. Here, the trial court erred by refusing to allow defendant to undergo a TASC evaluation on the ground that he was a "danger to other people and a habitual offender."

People v. Morguez, 90 Ill.App.3d 471, 413 N.E.2d 128 (1st Dist. 1980) A person is not eligible for treatment under the Dangerous Drug Abuse Act if other criminal proceedings alleging commission of a felony are pending against the addict. Defendant was not ineligible for treatment where, as here, only the sentencing on five charges to which defendant had pleaded guilty was pending. The cause was remanded to the trial court "for its discretionary determination of whether defendant is properly subject to referral under the Act."

In re Matthew M., 335 Ill.App.3d 276, 780 N.E.2d 723 (2d Dist. 2002) 20 ILCS 301/40-5, which permits a licensed program to establish conditions under which an individual is accepted for drug or alcohol treatment, and to exercise discretion in deciding whether offering treatment best utilizes limited resources,

does not authorize a program to reject persons based on factors unrelated to treatment, including age.

People v. Johnson, 338 Ill.App.3d 213, 788 N.E.2d 152 (1st Dist. 2003) A defendant who is ineligible for probation under the Unified Code of Corrections cannot be sentenced to T.A.S.C. probation. But see, **People v. Young**, 334 Ill.App.3d 795, 779 N.E.2d 293 (1st Dist. 2002).

People v. Elsner, 27 Ill.App.3d 957, 327 N.E.2d 592 (4th Dist. 1975) Defendant is entitled to a new sentencing hearing where, based on the evidence presented to the sentencing judge, there was reason to believe that defendant was addicted, yet neither the judge nor counsel made reference to examination and treatment under the Dangerous Drug Abuse Act.

People v. Saddler, 231 Ill.App.3d 544, 596 N.E.2d 65 (1st Dist. 1992) Evidence, including defendant's trial testimony and presentence report, which indicated a history of drug and alcohol abuse and unsuccessful attempts at rehabilitation, was sufficient to give the trial judge reason to believe that defendant was an addict or alcoholic. Thus, the judge was required to inform defendant of his right to elect treatment as a sentencing alternative. See also, **People v. Wallace**, 331 Ill.App.3d 822, 772 N.E.2d 785 (1st Dist. 2002) (the trial court had reason to believe that defendant was addicted to drugs and alcohol based on presentence report and defense counsel's statement that defendant wanted to ask if TASC was an option).

People v. Lillard, 247 Ill.App.3d 683, 617 N.E.2d 420 (3d Dist. 1993) The cause was remanded for resentencing because the trial court failed to advise defendant of his right to elect treatment under the Illinois Alcoholism and Other Drug Dependency Act. The court had reason to believe that defendant was an addict or alcoholic where defendant testified he had been an alcoholic for 12 years and suffered blackouts for six years, defendant had been previously treated for alcoholism, and defendant suffered from cirrhosis of the liver and required medical treatment while incarcerated. Further, the trial court specifically asked defendant how long he had been an alcoholic and found that substance abuse had affected defendant's memory.

People v. O'Bannon, 195 Ill.App.3d 430, 552 N.E.2d 397 (4th Dist. 1990) The trial judge did not err by failing to advise defendant of treatment under the Alcoholism and Other Drug Dependency Act where defendant's uncorroborated and self-serving statement that he was a regular user of drugs and alcohol was insufficient to establish a reason to believe that defendant was an alcoholic or addict. See also, **People v. Atterberry**, 201 Ill.App.3d 641, 559 N.E.2d 193 (1st Dist. 1990) (evidence did not establish a "reason to believe").

People v. Hamelin, 181 Ill.App.3d 350, 537 N.E.2d 3 (2d Dist. 1989) The trial court abused its discretion in revoking defendant's TASC probation (which was imposed along with a jail term) before defendant had the opportunity to participate in the drug rehab program. The court revoked defendant's TASC probation when defendant tried to bring drugs into jail.

People v. Carter, 165 Ill.App.3d 169, 518 N.E.2d 1068 (2d Dist. 1988) The trial court sentenced defendant to TASC probation, but defendant attended outpatient treatment because there were no openings in the inpatient program. The court revoked probation after defendant committed retail theft, and sentenced defendant to a prison term, despite the prosecutor's and defense counsel's contrary advice. In so doing, the court stated that prison would get defendant off drugs. The trial court abused its discretion by imposing the prison term and by refusing to grant defendant inpatient drug treatment. There was a link between defendant's drug use and his continued patterns of theft, and defendant never got the opportunity to participate in the inpatient program that the judge initially prescribed. Furthermore, both the State and defense were in agreement that the only way to address defendant's therapeutic needs was by an inpatient drug program. "The prisons of our State are not intended to serve as drug rehabilitation facilities, nor do they

typically serve such a function."

People v. Paxton, 135 Ill.App.3d 680, 482 N.E.2d 180 (3d Dist. 1985) 1. Defendant was not afforded minimal due process at hearing on State's petition for termination of supervision with TASC treatment. The evidence supporting defendant's discharge from the treatment program was based entirely on speculation and hearsay testimony, and defendant could not cross-examine the counselor whose report resulted in defendant's discharge from TASC.

2. "[I]n light of the general lenient purpose of the act, the flexibility in such proceedings should be applied in a defendant's favor."

3. The court erred by ruling that it had no discretion in conducting the proceedings upon proof that TASC had determined that defendant could not be further treated and was discharged. "The trial court's discretion in such matters lies in its determination of the fairness or arbitrariness of the treatment program's subjective decision. If, upon remand, the court finds that defendant's discharge from the program resulted from the fact that he was rehabilitated and not for another reason related to the rehabilitation goal, then it may, in its discretion, deny the State's petition." Reversed and remanded.

People v. Beckler, 121 Ill.App.3d 436, 459 N.E.2d 672 (2d Dist. 1984) A trial court may terminate supervision of TASC if the licensed program determines that defendant cannot further be treated. But, due process requires the trial court to hold a hearing before making a determination on the licensed program's decision. Thus, "the individual subject to termination should be accorded the following rights: (1) written notice of the reasons the individual cannot be further treated; (2) an opportunity to be heard and to present witnesses; (3) disclosure to him of the evidence against him, and (4) the right to confront and cross-examine adverse witnesses." Because defendant was not afforded these procedural safeguards (the trial court terminated defendant's supervision based on a letter from TASC and without a hearing), the order terminating supervision was reversed and remanded.

People v. Sinclair, 85 Ill.App.3d 688, 407 N.E.2d 225 (3d Dist. 1980) Defendant's treatment under Ch. 91½, §120.9 was improperly terminated based on defendant's failure to keep certain appointments (a condition of treatment). Chapter 91½, §120.9 provides only one applicable basis for terminating supervision - where the Department of Mental Health advises the trial court that defendant can no longer be treated as a medical problem. Because there was no such determination in this case, the termination cannot stand.

People v. Moore, 108 Ill.App.3d 260, 439 N.E.2d 98 (4th Dist. 1982) The trial court deferred a finding of guilt (on theft charge) to allow defendant treatment under the Dangerous Drug Abuse Act. After the Department of Mental Health (DMH) discharged defendant, he moved to dismiss the theft charge, but the trial court dismissed the motion. The trial court erred, for the discharge document and letter certified that defendant had successfully completed the DMH treatment program within the meaning of Ch. 95½, §120.9. Because the language of ¶120.9 requires that the pending charge shall be dismissed upon such certification, the trial court erred by failing to dismiss the theft charge. Conviction reversed.

Cumulative Digest Case Summaries **§45-8**

People v. Demsco, 2013 IL App (3d) 120391 (No. 3-12-0391, 5/24/13)

1. Under the Alcoholism or Other Drug Abuse Dependency Act, a person who is charged with or convicted of a crime and who suffers from alcoholism or drug addiction may elect to submit to treatment by a designated TASC program. 29 ILCS 301/40-10(a). Once the election is made, an examination is conducted by a designated program, which makes a report to the trial court. If the court finds that the defendant suffers

from alcoholism or other drug addiction and is likely to be rehabilitated through treatment, he or she is placed on probation under the supervision of the TASC program.

The trial judge may deny treatment under TASC if it finds that there is no significant relationship between the defendant's addiction or alcoholism and the crime or that defendant's imprisonment is necessary to protect the public. The trial court must specify on the record the particular evidence, information or reasons that form the basis of such an opinion. The trial court's determination of a defendant's eligibility for treatment and sentence under TASC will not be reversed absent an abuse of discretion. However, the policy of the Alcoholism or Other Drug Abuse Dependency Act is to place alcoholics and drug addicts on probation and afford rehabilitative services so they may be restored to good health and become productive members of the community. The discretion afforded the trial court under the Act should be exercised with a view toward implementing the strong legislative policy reflected by the creation of the rehabilitation program.

2. The trial court abused its discretion by denying defendant TASC treatment. The revised report from the TASC program indicated that defendant was eligible to participate in the rehabilitative program, that there was a nexus between defendant's abuse of alcohol and drugs and his criminal activity, and that defendant was likely to be rehabilitated by treatment. The trial court found that all the eligibility requirements had been met, that rehabilitative services would be needed based on defendant's alcohol and drug abuse, and that defendant was likely to successfully complete the program. In light of these findings, the Alcoholism and Other Drug Abuse Dependency Act requires TASC treatment unless the trial court makes a specific determination that no significant relationship exists between defendant's addiction and the crime or that imprisonment is required to protect the community. Because the trial court made neither finding, and in fact found that defendant was an ideal candidate for TASC probation and treatment, the court abused its discretion by denying treatment under the Act.

Defendant's sentence was reversed and the cause remanded with instructions to sentence defendant to TASC probation.

People v. McGregor, 405 Ill.App.3d 776, 939 N.E.2d 1009 (2d Dist. 2010)

The Alcoholism and Other Drug Abuse and Dependency Act (20 ILCS 301/1-1 *et seq*.) allows eligible defendants who suffer from alcoholism or other drug addiction to elect to be sentenced to probation conditioned on substance abuse treatment instead of traditional sentencing. If the court does sentence defendant to probation with treatment, and the defendant successfully completes probation, defendant may move to vacate the conviction if he has not been previously convicted of any felony and has not previously moved to vacate a conviction under the statute. The court has the discretion to vacate the conviction "unless, having considered the history, character and condition of the individual, the court finds that the motion should not be granted." 20 ILCS 301/45-10(e).

The court did not abuse its discretion in denying defendant's motion to vacate. Defendant pled guilty to aggravated unlawful use of a weapon. He had attempted to hide a gun in the glove box of a car upon the approach of the police to cover up the participation of fellow gang members in an armed robbery. The simple fact that defendant was older when he successfully completed probation is entitled to no weight because that fact is implicit in defendant successfully completing probation. That defendant obtained employment, though admirable and indicative of a positive direction in defendant's life, did not overcome the court's finding regarding the seriousness of the offense.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

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§45-9
Consecutive Sentences

§45-9(a)
Generally

People v. Williams, 179 Ill.2d 331, 688 N.E.2d 1153 (1997) The Unified Code of Corrections does not authorize consecutive sentences of imprisonment and probation for a single criminal offense. **People v. Wendt**, 163 Ill.2d 346, 645 N.E.2d 179 (1994), approved consecutive sentences of imprisonment and probation only where multiple convictions are entered. See also, **People v. Spera**, 303 Ill.App.3d 834, 708 N.E.2d 1259 (2d Dist. 1999) (rationale of **Williams** prohibits concurrent sentences of imprisonment and probation on single offense).

People v. Palmer, 218 Ill.2d 148, 843 N.E.2d 292 (2006) Five consecutive natural life sentences were improper; sentences could only be served concurrently, as serving consecutive natural life sentences was an impossibility. See also, **People v. Spears**, 371 Ill.App.3d 1000, 864 N.E.2d 758 (1st Dist. 2007) (consecutive sentences of natural life and a term of years are void under **Palmer**). See also, **People v. Pugh**, 325 Ill.App.3d 336, 758 N.E.2d 319 (1st Dist. 2001) (under **People v. Terrell**, 132 Ill.2d 178, 547 N.E.2d 145 (1989), a death sentence may not run consecutively to a term of imprisonment). But see **People v. Leger,** 208 Ill.App.3d 333, 567 N.E.2d 68 (5th Dist. 1991) (a prison term may be imposed consecutively to a death sentence; although the consecutive sentence will have no effect if the death sentence is carried out, it will become effective should the death sentence be modified or commuted).

People v. Singleton, 103 Ill.2d 339, 469 N.E.2d 200 (1984) Statutory provision providing that an "offender serving a sentence for a misdemeanor who is convicted of a felony and sentenced to imprisonment shall be transferred to the Department of Corrections, and the misdemeanor sentence shall be merged in and run concurrently with the felony sentence," is mandatory. Defendant's consecutive sentence is improper under this provision.

People v. Battle, 378 Ill.App.3d 817, 882 N.E.2d 1088 (1st Dist. 2008) When defendant is charged with intentional or knowing murder and felony murder and there is an evidentiary basis for a felony murder conviction, the denial of defendant's request for a separate verdict form for felony murder precludes a consecutive sentence for the predicate offense of felony murder.

People ex rel. Willis v. Brantley, 6 Ill.App.3d 645, 285 N.E.2d 571 (5th Dist. 1972) Where conviction for which defendant was incarcerated at time a consecutive sentence was imposed was subsequently reversed, defendant began serving his second sentence from the date it was imposed.

People v. Thompson, 229 Ill.App.3d 606, 593 N.E.2d 154 (3d Dist. 1992) A trial judge has no authority to impose a felony sentence to run consecutively to a juvenile commitment. The court distinguished **People v. Bridges,** 188 Ill.App.3d 961, 545 N.E.2d 367 (1989) on the ground that it involved a juvenile DOC prisoner who was already serving an adult felony sentence at the time of his subsequent crime.

People v. Reed, 237 Ill.App.3d 561, 604 N.E.2d 1107 (3d Dist. 1992) A sentence cannot run consecutively to a sentence that has not yet been imposed. Here, the cause was remanded for resentencing where defendant's sentence for a crime in one county was ordered served consecutively to any sentence imposed on a pending charge in another county. See also, **People v. McNeal**, 301 Ill.App.3d 889, 704 N.E.2d 793 (1st Dist. 1998).

People v. Moore, 250 Ill.App.3d 906, 620 N.E.2d 583 (4th Dist. 1993) Although the judge here had discretion to impose consecutive sentences, resentencing was required because the judge erroneously believed that consecutive sentencing was mandatory. (**People v. Bole**, 223 Ill.2d 247, 585 N.E.2d 135 (1991),

which held that three offenses occurring on separate days, with substantial interruptions of time, could not be considered a "single course of conduct," applied where the offenses occurred 18 months apart.) See also, **People v. River**, 212 Ill.App.3d 519, 571 N.E.2d 202 (2d Dist. 1991) (consecutive sentencing for escape was improper where defendant was charged with and pleaded guilty to escape under Ch. 38, §31-6(a), which makes consecutive sentencing discretionary (rather than under Ch. 38, §1003-6-4, which mandates consecutive sentences); trial court erroneously believed that a consecutive sentence was mandatory, and thus failed to exercise its discretion); **People v. Clodfelder**, 176 Ill.App.3d 339, 530 N.E.2d 1173 (4th Dist. 1988) (consecutive sentencing improper where judge believed that such sentencing was required because defendant committed separate felonies while on pretrial release but statute at time of offenses did not mandate consecutive sentences; reversed and remanded for resentencing).

People v. Brown, 235 Ill.App.3d 945, 601 N.E.2d 1380 (4th Dist. 1992) §1005-8-4(a) applies to criminal contempt. Criminal contempt is an "offense" for purposes of the Unified Code of Corrections, and consecutive sentences of 180 days would violate the rule that a defendant charged with contempt is entitled to a jury trial if the aggregate sentence exceeds six months.

Cumulative Digest Case Summaries **§45-9(a)**

People v. Horrell, 235 Ill.2d 235, 919 N.E.2d 952 (2009)

Where the defendant was sentenced to a term of probation on one count of a multi-count indictment, and the probation term was to commence during the mandatory supervised release period imposed as part of concurrent prison terms for several other counts, the probation term was a permissible concurrent sentence and not an impermissible consecutive sentence. (See **PROBATION**, §40-1).

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Petrenko, 237 Ill.2d 490, 931 N.E.2d 1198 (2010)

In **People v. Palmer**, 218 Ill.2d 148, 843 N.E.2d 292 (2006), the Illinois Supreme Court held that consecutive sentences of natural life imprisonment are improper.

The court rejected defendant's claim that imposition of a ten-year term consecutive to his natural life sentence violated **Palmer**. The court noted that **Palmer** involved a defendant sentenced to natural life under the Habitual Criminal Act, not the murder statute, as was defendant. The court acknowledged that **Palmer** also purported to hold that consecutive life sentences violated the consecutive sentencing statute (730 ILCS 5-8-4(a)) and natural law. It found that this holding was a "mistake" as it was not essential to the decision in **Palmer**, and also wrong on its merits, as it was within the purview of the legislature to make such a determination. The court therefore overruled that holding of **Palmer**. The court found that *stare decisis* was not a bar because **Palmer** was wrongly decided.

The court affirmed the Appellate Court's judgment that defendant's consecutive sentences were not void.

Freeman, J., specially concurred, concluding that **Palmer** should be abandoned altogether.

Burke, J., dissented in part, defending the decision in **Palmer**.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Snyder, 403 Ill.App.3d 637, 935 N.E.2d 137 (3d Dist. 2010)

Defendant entered a plea of guilty where there was no agreement regarding the sentence she would receive. The court did not admonish her about the possibility of restitution, but then ordered defendant to pay restitution when it imposed sentence. Relying on **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), the Appellate Court vacated the restitution order because of the defective admonition.

People v. Wuebbels, ___ Ill.App.3d ___, 919 N.E.2d 1122 (4th Dist. 2009) (No. 4-09-0461, 12/15/09)

1. Under **People v. Palmer**, 218 Ill.2d 148, 843 N.E.2d 292 (2006), multiple natural life sentences cannot be served consecutively. The court concluded that the rationale of **Palmer** – that it is impossible to serve a sentence after a previous life sentence has been satisfied – applies equally to multiple sentences involving terms of years. Thus, prison terms of less than natural life may only be served concurrently with natural life sentences.

2. The court concluded that sentences that are improper under **Palmer** are void because the trial court lacked authority to order consecutive sentencing. Therefore, terms of 30 and 60 years to be served consecutively to a natural life sentence could be challenged in a §2-1401 petition that was filed more than 11 years after the conviction. (See also **COLLATERAL REMEDIES**, §§9-2(a), (c)).

The order denying defendant's §2-1401 petition was reversed, and the consecutive 30-and 60-year terms were modified to run concurrently to the natural life sentence.

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

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§45-9(b)
Aggregate Consecutive Sentences

People v. Hillenbrand, 121 Ill.2d 537, 521 N.E.2d 900 (1988) Defendant, who committed murders before 1973 and then escaped (for 13 years) before sentencing, was entitled to be sentenced under the more lenient sentencing statute. Pursuant to the relevant statutory provision, the aggregate minimum period of consecutive sentences could not exceed the lowest minimum term authorized for the most serious felony involved. Because the lowest minimum term for murder at that time was 14 years, defendant's minimum aggregate consecutive sentence could not exceed 28 years. Thus, defendant's consecutive sentences of 50 to 140 years and 80 to 240 years were improper because the aggregate minimum is 130 years. Because the evidence at the sentencing hearing supported the lengthy sentences imposed, the court affirmed the sentences and ordered that they run concurrently.

People v. Tucker, 167 Ill.2d 431, 657 N.E.2d 1009 (1995) Defendant was sentenced to consecutive 60-year prison terms for home invasion and criminal sexual assault. Defendant was subsequently convicted of residential burglary and sentenced to a 30-year sentence, to be served consecutively to the 60-year sentence. The consecutive 30-year sentence violated 730 ILCS 5/5-8-4(c)(2), which provides that the "aggregate of consecutive sentences shall not exceed the sum of the maximum terms authorized under Section 5-8-2 for the 2 most serious felonies involved." The Court ordered that the 30-year sentence be served concurrently with the two consecutive 60-year sentences.

The Court rejected the State's argument that the statutory limitation on consecutive sentences was not intended to apply to separate offenses committed at different times.

See also, **People v. Pullen**, 192 Ill.2d 36, 733 N.E.2d 1235 (2000) (noting that the legislature amended the statute after **Tucker** to provide that the limitation would not apply for offenses that were not committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, and finding that consecutive sentences in **Pullen** exceeded maximum term and were void).

People v. Snyder, 77 Ill.2d 459, 397 N.E.2d 799 (1979) Unified Code of Corrections does not proscribe the

imposition of a consecutive sentence where the aggregate minimum or maximum sentences were less than those which could have been imposed by a concurrent sentence. Also, the record supported the trial judge's conclusion that consecutive sentences were "required to protect the public from further criminal conduct by the defendant."

People v. Taylor, 171 Ill.App.3d 278, 525 N.E.2d 246 (3d Dist. 1988) Where defendant is convicted only of a misdemeanor, the imposition of consecutive sentences that total more than the maximum for one Class A misdemeanor is prohibited.

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§45-9(c)
Mandatory Consecutive Sentences

§45-9(c)(1)
Triggering Offenses

People v. Curry, 178 Ill.2d 509, 687 N.E.2d 877 (1997) Where consecutive sentences are mandatory, they are required only on the triggering offenses. Thus, sentences on any "nontriggering" offenses of which defendant is simultaneously convicted "may be served concurrently to one another after any consecutive sentences for triggering offenses have been discharged."

People v. Whitney, 188 Ill. 2d 91, 720 N.E.2d 225 (1999) Murder is not a triggering offense because it is neither a Class X nor a Class 1 felony. Thus, where death is the only severe bodily injury, that severe bodily injury could not be combined with the Class X or Class 1 felony to trigger consecutive sentences. (Note: in 2000, the legislature made murder a triggering offense.)

People v. Johnson, 149 Ill.2d 118, 594 N.E.2d 253 (1992) Because attempt murder is subject to a Class X sentence, it is a Class X felony for purposes of 730 ILCS 5/5-8-4(a). See also, **People v. Perkins**, 274 Ill.App.3d 834, 655 N.E.2d 325 (5th Dist. 1995) (the court properly concluded that consecutive sentences were mandatory for two convictions of attempt murder). (But see **People v. Pullen**, 304 Ill.App.3d 294, 709 N.E.2d 980 (3rd Dist. 1999) (**Perkins** does not accurately reflect Illinois law after **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998)).

Cumulative Digest Case Summaries **§45-9(c)(1)**

People v. Martin, 2012 IL App (1st) 093506 (No. 1-09-3506, 3/16/12)

At the time of the commission of the offenses for which defendant was convicted, Illinois law provided that "[w]hen multiple sentences of imprisonment are imposed on a defendant . . . who is already subject to sentence in this State . . . , the sentences shall run concurrently or consecutively as determined by the court. . . . The court shall impose consecutive sentences if: (i) one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(a)(i) (2006).

The plain language of this statute requires a court to order that defendant's current sentence run consecutively to his pre-existing sentence where his pre-existing sentence was for a Class X felony involving severe bodily injury. Nothing in the language of the statute suggests that subsection (a)(i) only applies where the Class X felony involving severe bodily injury is a conviction for which defendant is currently being sentenced.

The court rejected the argument that the only statutory provision for mandatory consecutive sentences applicable to pre-existing and current sentences is contained in 730 ILCS 5/5-8-4(f) through (i) (2006) (which require consecutive sentences where the defendant commits the offense of escape or attempted escape, or commits an offense while a DOC inmate, or while on pretrial or post-conviction release or detention).

Because defendant's pre-existing sentence was for a Class X felony involving severe bodily injury, the court did not err in ordering defendant's current sentence to run consecutively to his pre-existing sentence.

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

People v. Pace, 2015 IL App (1st) 110415 (No. 1-11-0415, modified on denial of rehearing 10/16/15)

1. A trial court violates a defendant's privilege against self-incrimination during sentencing where the court believes defendant's silence shows that he lacked remorse and uses defendant's silence as an aggravating factor in imposing sentence.

Here defendant declined to exercise his right of allocution at sentencing. In imposing sentence, the trial court stated that it would consider "the defendant's right of allocution, which he did not avail himself of." The Appellate Court held that based on this statement, the "record affirmatively shows that defendant was punished for choosing to remain silent during the sentencing hearing." Accordingly, the court vacated defendant's sentence and remanded for a new sentencing hearing.

2. The trial court also committed error during sentencing by considering its personal beliefs about gang violence and evidence that was outside the record. For example, the court stated that it would "bring to bear" its "personal experience" about the effects of gang violence in imposing sentence. The judge also discussed walking his daughter to school and hypothesized about the feelings of other parents who take their children to school, and then stated that he knew the parents of the victim in this case "kissed him goodbye and told him they loved him." The judge then aligned himself with the victims' families, stating that there were "way, way more of us" than there were guns, gang members, or "young punks."

The court also referred to evidence outside the record. The court stated as a fact that only "one or two percent" of the population causes all the problems, even though there was no evidence supporting this proposition. The court also stated without support in the record that "children from Deerfield" face challenges similar to defendant, but have not committed similar crimes.

The trial court's extensive remarks along these lines denied defendant a fair sentencing hearing. The Appellate Court vacated defendant's sentence and remanded for a new sentencing hearing before a different judge.

3. Based on his convictions for first degree murder in which he personally discharged a firearm proximately causing death and two counts of aggravated battery with a firearm, defendant (who was 16 years old at the time of the offense) was subject to both the mandatory 25-to-life firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii)) and to mandatory consecutive sentences (730 ILCS 5/5-8-4), making his sentencing range 57-years-to-life. Defendant received a sentence of 100 years imprisonment.

Defendant argued that the mandatory firearm enhancement and mandatory consecutive sentences violated the Eighth Amendment of the federal Constitution and the Illinois Constitution's proportionate penalties' clause. The Appellate Court rejected both arguments.

a. The court first rejected defendant's argument that the sentencing statutes violated the Eighth Amendment because his minimum sentence of 57 years was an improper *de facto* life sentence under **Miller v. Alabama**, 132 S. Ct. 2455. Under the current law in Illinois, a 57-year aggregate sentence is not the equivalent of a life sentence.

The court also rejected defendant's argument that the statutes violated **Miller** by encroaching on the trial court's discretion to impose any sentence it wants. **Miller** merely held that the state cannot impose the adult mandatory maximum penalty on a juvenile without first allowing the court to consider the defendant's youth and other attendant characteristics. Here, the trial court was able to consider defendant's age and

culpability before imposing a sentence between 57 years and life imprisonment.

b. The court also rejected defendant's argument that the statutes violated the proportionate penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I §11. The court first determined that the proportionate penalties clause is not coextensive with the Eighth Amendment. Although the Illinois Supreme Court has issued conflicting decisions on this point, the Appellate Court concluded that the correct reading of those cases shows that the proportionate penalties clause, which focuses on rehabilitation, goes beyond the requirements of the Eight Amendment.

Nonetheless, the court held that the statutes did not violate the proportionate penalties clause. A penalty violates this clause where it is "cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community." The sentencing statutes at issue here, while subjecting defendants to substantial minimum sentences and restricting the scope of a trial court's discretion in imposing sentence, did not shock the moral sense of the community. The legislature's power necessarily includes the authority to establish minimum sentences even if they do restrict sentencing discretion. Moreover, trial courts retain significant sentencing discretion under the statutes.

(Defendant was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Stanford, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0420, 6/16/11)

Consecutive sentences are mandatory where one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury. 730 ILCS 5/5-8-4(a)(i) (2006). Any consecutive sentences imposed for triggering offenses must be served prior to, and independent of, any sentences imposed for non-triggering offenses. Any sentence that does not conform to this statutory requirement is void.

The court imposed sentence on three triggering offenses, and ordered that they run consecutively to each other. The court also ordered that defendant's sentences on non-triggering offenses run concurrently with each other and with one of the triggering offenses. Defendant's sentences on the non-triggering offenses could not be served until defendant had served his sentences on the triggering offenses. Therefore, that portion of the sentencing order directing that the non-triggering offenses be served concurrently with one of the triggering offenses was void.

The court had imposed the mandatory minimum sentence on all of the convictions. Rather than remand for resentencing, the Appellate Court ordered that the sentences on the non-triggering offenses run consecutively to the sentences on the triggering offenses.

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

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§45-9(c)(2)
Single Course of Conduct During Which There Was No Substantial Change in the Nature of the Criminal Objective

People v. Bole, 155 Ill.2d 188, 613 N.E.2d 740 (1993) Although a "course of conduct" can include "a range of activity" and is not "necessarily confined to a single incident," instant offenses occurred on separate days and with substantial interruptions of time and were not part of a single course of conduct.

People v. Bell, 196 Ill.2d 343, 751 N.E.2d 1143 (2001) To determine whether defendant's acts are part of a single course of conduct during which there was no substantial change in the criminal objective, the "independent motivation" test applies. Under this test, the question is whether there has been a substantial change in the nature of defendant's conduct. See also, **People v. Arrington**, 297 Ill.App.3d 1, 696 N.E.2d

1229 (2d Dist. 1998) (consecutive sentences were prohibited where the crimes were part of the same course of conduct and no substantial change in the nature of the criminal objective occurred).

People v. Embry, 249 Ill.App.3d 750, 619 N.E.2d 246 (4th Dist. 1993) Offenses (two counts of aggravated criminal sexual assault and two counts of aggravated criminal sexual abuse against two females) were part of a "single course of conduct" for purpose of consecutive sentencing. "Conduct" is "an act or series of acts, and the accompanying mental state." A "single course of conduct" may encompass more than one incident. Although there were two separate victims here, the offenses occurred within a single 10-minute-period while defendant and the victims were lying on the floor. See also, **People v. Brown,** 235 Ill.App.3d 945, 601 N.E.2d 1380 (4th Dist. 1992) (imposition of consecutive sentences for convictions of two counts of direct criminal contempt for fleeing courtroom during an appearance on two traffic charges was improper where both "acts" for which defendant was held in contempt — failing to sign bond papers and fleeing the courtroom — were motivated by a desire to escape the court's jurisdiction and were part of a single course of conduct with no change in objective).

People v. Pence, 267 Ill.App.3d 461, 641 N.E.2d 933 (1st Dist. 1994) Consecutive sentences were not required where defendant was convicted of two counts of aggravated criminal sexual assault (one victim) and the multiple acts were committed in separate courses of conduct. Count I of the indictment charged that the youth had committed an act of fellatio on defendant between August 1, 1989, and March 10, 1990. Count II alleged an act of fellatio by defendant between the same dates. The State introduced evidence of at least six different acts, over a several-month-period, which would have fit the allegations of the indictment. Although two of these acts had occurred on a single day, the Court concluded that "the language of the charging document, the evidence at trial, and the general verdict of the jury" did not permit the conclusion that the jury had convicted defendant of these two acts rather than of offenses committed on separate days.

People v. Falcon, 292 Ill.App.3d 538, 685 N.E.2d 962 (1st Dist. 1997) Judge improperly imposed mandatory consecutive sentences because there was no evidence that the offenses were part of a single course of conduct. Resentencing was necessary because the judge imposed three consecutive terms of imprisonment. Upon remand, the judge may not impose mandatory consecutive sentences because it was impossible to determine whether the jury convicted defendant of three counts that occurred in a single course of conduct or three separate and distinct offenses on different days. The State presented evidence of at least eight different acts of criminal sexual assault, but failed to allege in the indictments or at trial that any of the offenses were part of a "single course of conduct."

People v. Miller, 193 Ill.App.3d 918, 552 N.E.2d 988 (1st Dist. 1989) Consecutive sentences for two convictions of voluntary manslaughter which arose out of the shooting of two people at a tavern were improper where there was no showing of a substantial change in defendant's objective.

People v. Morgan, 44 Ill.App.3d 459, 358 N.E.2d 280 (5th Dist. 1976) In imposing the consecutive sentences (for burglary and arson), the trial judge stated that defendant "went in there to steal, became mad and decided to burn it . . . [so] there was a substantial change in the nature of the criminal objective and therefore a consecutive sentence should be granted." The court held there was nothing in the record upon which to base a finding of a change in objective — it is plausible that burning the building was part of defendant's whole scheme, and a judge must limit himself to the evidence adduced of record when imposing sentence.

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§45-9(c)(3)

Severe Bodily Injury

People v. Whitney, 188 Ill.2d 91, 720 N.E.2d 225 (1999) To warrant consecutive sentences based on fact that defendant was convicted of a triggering offense and inflicted severe bodily injury, the injury must have been inflicted during the commission of the triggering felony in question. Here, where the only severe bodily injury was for a non-triggering offense, consecutive sentences were not mandatory. See also, **People v. Thompson**, 331 Ill.App.3d 948, 773 N.E.2d 15 (1st Dist. 2002) (the "severe bodily harm" need not be "proximately connected" to the triggering crime, but consecutive sentences are required if the triggering offense and the infliction of bodily harm occurred "essentially simultaneously"; thus, consecutive sentences were mandatory for first degree murder and armed robbery where the decedent, a cab driver, was killed during an armed robbery (though first degree murder is not a triggering offense under the applicable statute) because the bodily harm (death) was simultaneously inflicted with armed robbery, the triggering offense).

People v. Deleon, 227 Ill.2d 322, 882 N.E.2d 999 (2008) 1. A trial court's finding of "severe bodily injury" may be reversed only if it is against the manifest weight of the evidence. A finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the finding itself is unreasonable, arbitrary, or not based on the evidence.

2. The evidence was more than sufficient to support the trial court's finding that the victim suffered "severe bodily injury" where there was testimony that defendant shot the victim in the chest from a distance of three feet, State photographs showed a bullet wound to the left center of the victim's chest, the victim testified that the bullet passed through his body and exited through his back and that after being shot, the victim felt a burning in his chest. Neither the fact that the victim was able to drive away from the scene nor the absence of testimony concerning the nature and length of his medical treatment indicated that the trial court's finding was against the manifest weight of the evidence. See also, **People v. Primm**, 319 Ill.App.3d 411, 745 N.E.2d 13 (1st Dist. 2000) (gunshot wound to the rear thigh constituted "severe bodily injury"). But see, **People v. Murray**, 312 Ill.App.3d 685, 728 N.E.2d 512 (1st Dist. 2000) (victim of an attempt murder did not suffer "severe" bodily injury; although gunshot "fractured" his big toe, he was able to run from the scene and was released from the hospital after 2½ hours of treatment); **People v. Ruiz**, 312 Ill.App.3d 49, 726 N.E.2d 704 (1st Dist. 2000) (victim of attempt murder did not suffer "severe" bodily injury; although he was shot in the knee, the wound was barely visible in a photograph taken on the day of the offense and victim did not realize he had been shot, did not immediately seek medical treatment, and testified only that at one point he felt a sharp pain in his knee); **People v. Jones**, 323 Ill.App.3d 451, 752 N.E.2d 511 (1st Dist. 2001) (defendant did not inflict "severe bodily injury" where a bullet merely "grazed" the complainant's cheek, requiring only a band-aid as medical treatment).

People v. Sangster, 91 Ill.2d 260, 437 N.E.2d 625 (1982) Statute authorizing consecutive sentences in certain situations if defendant inflicted severe bodily injury applies when injury is inflicted either by defendant personally or by another for whom defendant is accountable.

People v. Harris, 203 Ill.2d 111, 784 N.E.2d 792 (2003) Where defendant was convicted of attempt first degree murder (a Class X felony) and caused severe bodily injury, and was also convicted of aggravated criminal sexual assault (one of the specified sex crimes), consecutive sentences were mandatory without regard to whether the offenses were part of single or separate courses of conduct.

Cumulative Digest Case Summaries **§45-9(c)(3)**

People v. Alvarez, 2016 IL App (2d) 140364 (No. 2-14-0364, 6/20/16)

Under 730 ILCS 5/5-8-4(d)(1), consecutive sentencing is mandatory where the defendant is convicted of a Class X felony during which he inflicted "severe bodily injury." In addition, under 720 ILCS

5/8-4(c)(1)(D) a 25-year to life enhancement is required where the defendant committed attempt first degree murder during which he personally discharged a firearm and caused "great bodily harm and permanent disfigurement."

Defendant was convicted of two counts of attempt first degree murder under an indictment which charged that he had personally discharged a firearm causing great bodily harm, permanent disability, or permanent disfigurement. At sentencing, the trial court stated that consecutive sentences were mandatory because, "as previously found," defendant personally discharged a firearm and inflicted "severe bodily injury." In reality, the trial court had not made a specific finding about "severe bodily injury," and made only a finding concerning "great bodily harm." The trial judge also imposed 25-year enhancements under 720 ILCS 5/8-4(c)(1)(D).

1. The Appellate Court held that the legislature's use of "great bodily harm" and "severe bodily injury" were not equivalent and were intended by the legislature to mean different things. Thus, a finding of having inflicted "great bodily harm" does not equate to inflicting "severe bodily injury" for purposes of mandatory consecutive sentencing. "[W]ithout the trial court's explicit finding of 'severe bodily injury,' we decline to uphold the imposition of consecutive sentences pursuant to section 5-8-4(d)(1) of the Code solely on its finding of 'great bodily injury' in connection with a sentencing enhancement."

2. The court rejected the argument that the sentences could be merely modified to run concurrently, and remanded the cause for the trial court to determine whether consecutive sentences were required.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Harris, 2013 IL App (1st) 120498 (No. 1-12-0498, 9/10/13)

The statute in effect at the time of the commission of the offenses for which defendant was convicted provided that the court shall not impose consecutive sentences for offenses committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury. 730 ILCS 5/5-8-4(a) (1992).

Defendant was properly sentenced to mandatory consecutive terms of imprisonment based on his infliction of severe bodily injury during the commission of an attempt armed robbery. Attempt armed robbery, a Class 1 felony, qualifies as a triggering offense. Defendant inflicted severe bodily injury during the commission of that offense when he shot and killed the attempt armed robbery victim after his accomplice unsuccessfully attempted to remove the victim from his car at gunpoint. The victim of the triggering felony and the murder was the same. The two offenses were connected and occurred essentially simultaneously.

It is insignificant that on direct appeal the Illinois Supreme Court concluded that the convictions for first degree murder and attempt armed robbery were based on separate acts. That issue is distinct from the issue of whether the death occurred during the commission of the triggering offense.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

People v. Pace, 2015 IL App (1st) 110415 (No. 1-11-0415, modified on denial of rehearing 10/16/15)

1. A trial court violates a defendant's privilege against self-incrimination during sentencing where the court believes defendant's silence shows that he lacked remorse and uses defendant's silence as an aggravating factor in imposing sentence.

Here defendant declined to exercise his right of allocution at sentencing. In imposing sentence, the trial court stated that it would consider "the defendant's right of allocution, which he did not avail himself of." The Appellate Court held that based on this statement, the "record affirmatively shows that defendant was punished for choosing to remain silent during the sentencing hearing." Accordingly, the court vacated defendant's sentence and remanded for a new sentencing hearing.

2. The trial court also committed error during sentencing by considering its personal beliefs about gang violence and evidence that was outside the record. For example, the court stated that it would "bring

to bear" its "personal experience" about the effects of gang violence in imposing sentence. The judge also discussed walking his daughter to school and hypothesized about the feelings of other parents who take their children to school, and then stated that he knew the parents of the victim in this case "kissed him goodbye and told him they loved him." The judge then aligned himself with the victims' families, stating that there were "way, way more of us" than there were guns, gang members, or "young punks."

The court also referred to evidence outside the record. The court stated as a fact that only "one or two percent" of the population causes all the problems, even though there was no evidence supporting this proposition. The court also stated without support in the record that "children from Deerfield" face challenges similar to defendant, but have not committed similar crimes.

The trial court's extensive remarks along these lines denied defendant a fair sentencing hearing. The Appellate Court vacated defendant's sentence and remanded for a new sentencing hearing before a different judge.

3. Based on his convictions for first degree murder in which he personally discharged a firearm proximately causing death and two counts of aggravated battery with a firearm, defendant (who was 16 years old at the time of the offense) was subject to both the mandatory 25-to-life firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii)) and to mandatory consecutive sentences (730 ILCS 5/5-8-4), making his sentencing range 57-years-to-life. Defendant received a sentence of 100 years imprisonment.

Defendant argued that the mandatory firearm enhancement and mandatory consecutive sentences violated the Eighth Amendment of the federal Constitution and the Illinois Constitution's proportionate penalties' clause. The Appellate Court rejected both arguments.

a. The court first rejected defendant's argument that the sentencing statutes violated the Eighth Amendment because his minimum sentence of 57 years was an improper *de facto* life sentence under **Miller v. Alabama**, 132 S. Ct. 2455. Under the current law in Illinois, a 57-year aggregate sentence is not the equivalent of a life sentence.

The court also rejected defendant's argument that the statutes violated **Miller** by encroaching on the trial court's discretion to impose any sentence it wants. **Miller** merely held that the state cannot impose the adult mandatory maximum penalty on a juvenile without first allowing the court to consider the defendant's youth and other attendant characteristics. Here, the trial court was able to consider defendant's age and culpability before imposing a sentence between 57 years and life imprisonment.

b. The court also rejected defendant's argument that the statutes violated the proportionate penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I §11. The court first determined that the proportionate penalties clause is not coextensive with the Eighth Amendment. Although the Illinois Supreme Court has issued conflicting decisions on this point, the Appellate Court concluded that the correct reading of those cases shows that the proportionate penalties clause, which focuses on rehabilitation, goes beyond the requirements of the Eight Amendment.

Nonetheless, the court held that the statutes did not violate the proportionate penalties clause. A penalty violates this clause where it is "cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community." The sentencing statutes at issue here, while subjecting defendants to substantial minimum sentences and restricting the scope of a trial court's discretion in imposing sentence, did not shock the moral sense of the community. The legislature's power necessarily includes the authority to establish minimum sentences even if they do restrict sentencing discretion. Moreover, trial courts retain significant sentencing discretion under the statutes.

(Defendant was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Ramirez, 2015 IL App (1st) 130022 (No. 1-13-022, modified upon denial of rehearing 5/27/15)

Under 730 ILCS 5/5-8-4(d)(1), consecutive sentences are mandatory where defendant was convicted of a Class X or Class 1 felony and inflicted "severe bodily injury." Here defendant was convicted of the Class X offense of attempt first degree murder involving "great bodily harm." The State argued that the jury's finding of great bodily harm mandated consecutive sentences.

The Appellate Court disagreed. It held that the jury's finding of great bodily harm at trial was not the equivalent of a finding at sentencing that defendant inflicted severe bodily injury. Instead, severe bodily injury requires a degree of harm that is more than great bodily harm. The imposition of concurrent sentences was affirmed.

(Defendant was represented by Assistant Defender Allison Shah, Chicago.)

People v. Russell, 143 Ill.App.3d 296, 492 N.E.2d 960 (2d Dist. 1986) There can be a difference between the degree of great bodily harm which a trier of fact may find sufficient to find a defendant guilty of aggravated battery, and the degree of severe bodily injury which the court may find to be one of the factors warranting a consecutive sentence.

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§45-9(c)(4)
Protect the Public

People v. O'Neal, 125 Ill.2d 291, 531 N.E.2d 366 (1988) Consecutive sentences for murder, rape, and aggravated kidnapping were not necessary to protect the public, in light of defendant's age (19), background, and criminal history.

People v. Rucker, 260 Ill.App.3d 659, 633 N.E.2d 146 (2d Dist. 1994) Consecutive sentences were modified to run concurrently where the record did not establish that consecutive sentences were necessary to protect the public, even though the second victim suffered severe injuries, where defendant was a 17-year-old high school student with no prior criminal history; defendant had been a good student until he experienced a series of personal problems including the death of his grandmother, moving out of his mother's home and breaking up with his girlfriend; a co-defendant, who "cajoled" defendant into participating, planned the offenses; defendant accepted responsibility for his actions by pleading guilty without any agreement as to the sentence; and defendant expressed his willingness to pay compensation.

People v. Gray, 121 Ill.App.3d 867, 460 N.E.2d 354 (1st Dist. 1984) The trial court erroneously ordered that defendant's sentence for concealment of a homicidal death run consecutively to his sentences for involuntary manslaughter and obstructing justice because the consecutive sentence was not required to protect the public from defendant's further criminal conduct where defendant was in his early twenties, with no prior record, and where the death of the victim and attendant circumstances did not apply to the concealment offense.

People v. Clark, 278 Ill.App.3d 996, 664 N.E.2d 146 (1st Dist. 1996) Consecutive sentences, based on trial court's belief that such sentences were necessary to protect the public from defendant's conduct, were improper where, in imposing the sentences, the trial court said that there was no reason to believe that defendant was a "danger to the community" or a "violent or dangerous man." The trial court's remarks clearly showed that there was no basis for consecutive sentences, and ordered that the sentences be served concurrently. See also, **People v. Merz**, 122 Ill.App.3d 972, 461 N.E.2d 1380 (2d Dist. 1984) (trial court's finding -- that defendant was unlikely to commit another crime -- was incompatible with the statutory requirement that the court believe that a consecutive sentence is necessary to protect the public from defendant's further criminal conduct).

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§45-9(c)(5)

Other Bases for Consecutive Sentences and Related Matters

People v. Karmatzis, 373 Ill.App.3d 714, 871 N.E.2d 118 (4th Dist. 2007) For purposes of statute mandating consecutive sentencing when a defendant charged with a felony commits a separate felony while on pretrial release or pretrial detention, where defendant who had pending charges was mistakenly released by DOC on a separate sentence, crimes which he committed while released occurred on "pretrial release." Thus, consecutive sentences were required. The cause was remanded with instructions that defendant's six-year-terms for crimes committed while he was mistakenly released be served consecutively to the term for the charges which were pending during that release.

People v. Dover, 312 Ill.App.3d 790, 728 N.E.2d 90 (2d Dist. 2000) The statutory requirement that a sentence for concealment of a homicidal death "shall be imposed separately and in addition" to any sentence on simultaneous convictions of first degree murder, second degree murder, or involuntary manslaughter, does not require consecutive sentences for concealment and the enumerated offenses.

People v. Moncrief, 276 Ill.App.3d 533, 659 N.E.2d 106 (2d Dist. 1995) A defendant on electronic home detention as a condition of parole is "committed to the Department of Corrections" within the meaning of 730 ILCS 5/5-8-4(f), which requires consecutive sentencing for crimes committed by such persons.

People ex rel. Gibson v. Cannon, 65 Ill.2d 366, 357 N.E.2d 1180 (1976) The provision of the Unified Code requiring consecutive sentences for crimes occurring while the offender is "committed to the Department of Corrections" does not apply to an offense committed by a person on parole.

Cumulative Digest Case Summaries **§45-9(c)(5)**

People v. Davis, 2013 IL App (4th) 110785 (Nos. 4-11-0785, 4-11-0786 & 4-11-0787 cons. 5/31/13)

"If a person charged with a felony commits a separate felony while on pre-trial release ***, the sentences imposed upon conviction of these felonies shall be served consecutively regardless of the order in which the judgments of conviction are entered." 730 ILCS 5/5-8-4(h).

Under the plain language of this statute, a defendant who is convicted of multiple separate felonies committed while on bond on a felony must serve his sentences on those felonies consecutively to the sentence imposed on the felony for which defendant was on bond. The statute does not require that the sentences imposed on the felonies committed while on bond also run consecutively to each other.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Flaugher, ___ Ill.App.3d ___, 920 N.E.2d 1262 (4th Dist. 2009) (No. 4-08-0484, 12/23/09)

1. Under Illinois law, there are two situations in which the trial court has jurisdiction to reconsider the State sentence of a defendant who also faces a federal proceeding. First, under 730 ILCS 5/5-8-1(f), a defendant who has an unexpired State prison sentence, and who is subsequently sentenced to a term of imprisonment by another state or federal court, has 30 days after completing the non-Illinois sentence to apply for credit against the Illinois sentence for time served on the non-Illinois sentence. Second, under 730 ILCS 5/5-8-4(a), a defendant who has a prison sentence in Illinois may apply within 30 days of imposition of a subsequent non-Illinois sentence to have the sentences run concurrently.

Where the defendant took no action until his federal sentence expired, the trial court was limited to ordering credit under §5-8-4(f). Thus, the court could not modify defendant's consecutive 15-year State prison terms to run concurrently under a motion filed after defendant's federal sentence had been completed.

2. The court held, however, that a defendant subject to mandatory consecutive sentences under 730 ILCS 5/5-8-4(h), which requires consecutive sentencing where a felony is committed while on pretrial release

or on pretrial detention for a separate felony, applies to both federal and state sentences. Therefore, where the defendant committed the federal felony offenses while he was on pretrial release on Illinois charges, the State sentences were required to be served consecutively to the federal sentences. The court also held that where sentences are required to be served consecutively, the defendant is ineligible for sentence credit for a federal sentence under §5-8-1(f).

People v. Lashley, 2016 IL App (1st) 133401 (No. 1-13-3401, 6/30/16)

If the defendant was "in the custody of the Department of Corrections" when he committed an offense, the sentence shall be served consecutively to the sentence under which he was "held" in custody. 730 ILCS 5/5-8-4(d).

Defendant was sentenced to Cook County's impact incarceration program, which lasts from 120 to 180 days, followed by a mandatory term of monitored release. 730 ILCS 5/5-8-1.2. When defendant committed the current offense, he was on monitored release from the impact incarceration program. The trial court ordered the sentence for the current offense to run consecutive to the impact incarceration sentence.

The Appellate Court held that the consecutive sentences were improper. The court found that it was ambiguous whether section 5-8-4(d) applied to defendant and thus under the rule of lenity the statute had to be interpreted in defendant's favor. The statute's applicability was ambiguous for two reasons. First, the phrase "in the custody of the Department of Corrections" could reasonably refer only to the Illinois Department of Corrections, not a Cook County impact program. Second, the word "held" could reasonably exclude a defendant on monitored release.

Under the rule of lenity, ambiguous criminal statutes will generally be construed in a defendant's favor. Since section 5-8-4(d) was ambiguous as applied to defendant, the rule of lenity required that the construction of the statute favoring defendant must be applied, making consecutive sentences inapplicable.

The trial court's mistaken belief that consecutive sentences were required constituted second prong plain error because the right to be lawfully sentenced is a substantial right. The case was remanded for resentencing to concurrent terms.

(Defendant was represented by Assistant Defender Mike Orenstein, Chicago.)

People v. Wilson, 2015 IL App (4th) 130512 (No. 4-13-0512, 12/3/15)

1. Under **Graham v. Florida**, 560 U.S. 48 (2010), the "cruel and unusual punishment" clause of the Eighth Amendment is violated by a mandatory life sentence without the possibility of parole for a juvenile offender who did not commit a homicide. Here, the court concluded that **Graham** was violated by imposition of natural life sentences without the possibility of parole on three counts of predatory criminal sexual assault of a child which were committed about six months before defendant's 18th birthday. The natural life sentences were imposed under 720 ILCS 5/12-14.1(b)(1.2), which mandates sentences of life without parole for convictions of predatory criminal sexual assault of a child which were committed against two or more persons, "regardless of whether the offenses occurred as the result of the same act or several related or unrelated acts."

2. The court rejected the State's request to affirm two natural life sentences for counts of predatory criminal sexual assault of a child which occurred after defendant turned 18. First, because both counts were committed against a single victim, they did not trigger natural life sentencing on their own.

Second, the court rejected the argument that the three counts on which the natural life sentences were vacated because the offenses occurred when defendant was a minor could be used to impose natural life sentences on the two counts which were committed after defendant turned 18. "It is contrary to the analysis in **Graham** to permit the conduct for which a defendant could not receive a life sentence to trigger a life sentence for a second offense, committed after defendant's 18th birthday."

(Defendant was represented by Supervisor Martin Ryan, Springfield.)

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§45-10
Other Types of Enhanced or Extended Sentences

§45-10(a)
Generally

U.S. v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) Convictions obtained in violation of defendant's right to counsel cannot be used to subsequently obtain enhanced penalties. See also, **Burgett v. Texas**, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).

Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) The Court affirmed defendant's sentence of mandatory natural life under the state's recidivist statute. Defendant's first conviction was for the fraudulent use of a credit card to obtain $80 worth of goods or services, his second conviction was for passing a forged check in the amount of $28.36, and his third conviction was for obtaining $120.75 by false pretense. The mandatory life sentence under the recidivist statute did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments.

Deal v. U.S., 508 U.S. 129, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) In a single prosecution, defendant was convicted of six counts of "carrying and using a firearm during and in relation to a crime of violence." The offenses involved six bank robberies occurring on six different dates. The relevant federal statute provides a five-year sentence for the first offense, and a mandatory 20-year-sentence "[i]n the case of his second or subsequent conviction." Although "conviction" can have several meanings, in this context Congress intended the term to refer only to a finding of guilt by a judge or jury, with no requirement that a sentence or final judgment be entered. Thus, in a multi-count indictment, each count after the first is a "second or subsequent conviction." The trial court acted properly by imposing 20-year-sentences on convictions obtained in a single proceeding involving a multiple-count indictment.

Parke v. Raley, 506 U.S. 20, 113 S.Ct. 517, 126 L.Ed.2d 391 (1992) Due process does not prohibit a State from requiring that the defense rebut a presumption of validity concerning prior convictions introduced to impose an enhanced sentence. Defendant claimed that two prior burglary convictions could not be used to impose an enhanced sentence because there were no transcripts to show that the trial court complied with **Boykin v. Alabama,** 395 U.S. 238 (1969), which requires that guilty pleas be entered knowingly and voluntarily. The Court found that although the absence of such transcripts would require a reversal on direct appeal, it is appropriate to require a defendant who raises the issue on collateral attack to overcome the "presumption of regularity," which attaches to final judgments.

People v. Allen, 382 Ill.App.3d 594, 888 N.E.2d 686 (1st Dist. 2008) 1. Supreme Court Rule 451(g), which provides that in noncapital cases the trial court may conduct a bifurcated trial where the State intends to seek an enhanced sentence under 725 ILCS 5/111-3(c-5), applies *only* where an enhanced sentence is sought under §111-3(c-5). Rule 451(g) does not apply where the legislature has chosen to make a prior felony conviction an element of the offense.

2. Where defendant's prior felony conviction is an element of the offense, the least prejudicial means of introducing the prior conviction is for the parties to stipulate. The name, date, and nature of the prior felony conviction are needless surplusage, and should not be submitted to the jury.

People v. Davis, 233 Ill.App.3d 878, 600 N.E.2d 88 (3d Dist. 1992) The reasonable doubt standard applies to a death eligibility determination. Here, evidence did not establish defendant's death eligibility (based on

factor that murder occurred during a burglary). See also, **People v. Harrison**, 196 Ill.App.3d 298, 553 N.E.2d 746 (3d Dist. 1990) (aggravating factor (murder in the course of another felony) not proved where defendant's actions did not evince that he intended to kill the victim or acted with knowledge that his actions created a strong probability of death or great bodily harm).

Cumulative Digest Case Summaries **§45-10(a)**

Montgomery v. Louisiana, ___ U. S. ___, 136 S.Ct. 718, ___ L.Ed.2d ___ (2016) (No. 14-280, 1/25/16)

Under **Miller v. Alabama**, 567 U. S. ___, 132 S.Ct. 2455 (2012), a juvenile convicted of homicide cannot be sentenced to life imprisonment without the possibility of parole unless the trial court first considers the minor's special circumstances in light of the principles and purposes of juvenile sentencing. **Miller** did not bar a life sentence without parole in all cases, but limited such sentences to the rare juvenile offenders whose crimes reflect "irreparable corruption."

The court concluded that **Miller** announced a substantive rule because it barred the imposition of a mandatory life sentence without parole upon juvenile offenders "whose crimes reflect the transient immaturity of youth." Thus, **Miller** rendered life without parole an unconstitutional penalty for a class of defendants because of their status.

Because **Miller** announced a substantive rule, it must be applied retroactively in state collateral review proceedings. The court noted, however, that giving **Miller** retroactive effect does not require States to relitigate sentences or convictions in every case in which a juvenile offender received life without parole. Instead, a **Miller** violation may be remedied by permitting juvenile homicide offenders to be considered for parole.

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

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

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

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

3. The court also rejected the argument that defendant was subjected to an improper double enhancement where a single prior felony conviction was used both to prove an element of unlawful use of a weapon by a felon and to elevate the severity of the offense from Class 3 to Class 2. Because the prior conviction was an element of the offense and defendant received the only sentence authorized by the Illinois law, double enhancement did not occur.

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

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

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

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

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

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

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

People v. Jackson, 2016 IL App (1st) 133823 (No. 1-13-3823, 10/27/16)

The court found that the sentences for aggravated vehicular highjacking and attempted armed robbery must be vacated because they included firearm enhancements that had been declared unconstitutional at the time of the offenses. Although the General Assembly enacted curative legislation, that legislation did not take effect until several months after the offense. Thus, at the time of the offense the sentencing enhancement had been held unconstitutional.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

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

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

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

On appeal, defendant argued that the State failed to provide him with notice of its intent to seek an enhanced sentenced as required by section 111-3. The Appellate Court agreed, holding that the State sought an enhanced sentence due to a prior conviction and that the charging instrument failed to state the

prosecutor's intention to seek an enhanced sentence. The court also held that the charging instrument failed to state the prior conviction which served as the basis of the enhancement since the charge only mentioned the case number of defendant's prior conviction.

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

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

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

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

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

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

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

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

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

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

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

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

Because the State relied on another prior conviction (other than the prior Wisconsin drug conviction that was charged as an element of the offense) to enhance defendant's sentence to a Class 2 felony, **Easley**

did not control the outcome of this case. Instead, the State was required to provide defendant with notice under section 11-3(c) that it intended to seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

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

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

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

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

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

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

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

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

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

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

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

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

The Appellate Court rejected this argument finding that vehicular hijacking falls squarely within the

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

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

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

People v. Zimmerman, 394 Ill.App.3d 124, 914 N.E.2d 1221 (3d Dist. 2009)

1. Under 725 ILCS 5/100-2, when the State seeks an enhanced sentence due to a prior conviction, the prior conviction is not an element of the offense and is not to be disclosed to the jury unless it is relevant for other reasons. An "enhanced sentence" is one in which the classification of the offense is increased due to the prior conviction.

2. A prior conviction is not an element of aggravated unlawful use of a weapon based on a prior conviction. Instead, the prior conviction merely enhances the classification of unlawful use of weapon from a Class A misdemeanor to a Class 4 felony. Thus, under §100-2, the defendant's prior delinquency adjudication for an act that would have been a felony if committed by an adult should not have been disclosed to the jury.

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

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§45-10(b)
Habitual Criminal

Solem v. Helm, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) Defendant's life sentence without the possibility of parole for uttering a $100 bad check under a habitual offender statute constituted cruel and unusual punishment because it was grossly disproportionate to the crime.

People v. Brown, 229 Ill.2d 374, 892 N.E.2d 1034 (2008) 1. The Habitual Criminal Act mandates a life sentence for a person with three convictions for Class X felonies, criminal sexual assault, aggravated kidnapping, or first degree murder, if the third offense was committed after conviction of the second offense and the second offense was committed after conviction of the first offense.

2. The State bears the burden of proving by a preponderance of the evidence that the defendant is eligible for habitual criminal sentencing. By introducing "duly authenticated" copies of the prior convictions the State presents a *prima facie* case and creates a permissive rebuttable presumption that defendant is eligible for enhanced sentencing. Although defendant has no burden to produce evidence that he is not eligible, the failure to do so creates the risk that the trial court will find that the State has carried its burden of persuasion.

3. Defendant forfeits the right to contest habitual criminal eligibility on direct appeal if he fails to present evidence to contradict the rebuttable presumption at trial, unless the State's evidence affirmatively

shows a lack of eligibility. But, a defendant who is ineligible for habitual criminal sentencing may file a post-conviction petition alleging ineffective assistance of counsel for failing to introduce evidence of his lack of eligibility.

4. Here, the State proved by a preponderance that defendant was eligible for habitual criminal sentencing where it submitted certified records showing that defendant had been convicted of the required prior offenses and that the convictions occurred on separate occasions. Also, the State introduced a presentence report showing the dates on which defendant was arrested for committing the offenses leading to the prior convictions. Finally, the prosecutor stated that defendant had been on parole when he committed the second and third offenses. Such evidence created a rebuttable presumption that defendant was eligible for habitual criminal sentencing. Defendant did not contest the presumption, and in fact admitted that he was eligible. See also, **People v. Robinson**, 167 Ill.2d 53, 656 N.E.2d 1090 (1995).

People v. Palmer, 218 Ill.2d 148, 843 N.E.2d 292 (2006) Multiple convictions connected to the same transaction are counted as one conviction for purposes of determining whether the Habitual Criminal Act applies. However, the statutory provision does not require that such convictions be merged into a single conviction. Therefore, where defendant had previously been convicted of offenses which triggered habitual criminal status, and was thereafter convicted of five Class X offenses, judgment could be entered - and a natural life sentence imposed - on each of the five convictions. But, it was improper to impose *consecutive* natural life sentences. Because *consecutive* natural life sentences cannot be served, only concurrent natural life sentences may be imposed.

People v. Abdullah, 336 Ill.App.3d 940, 785 N.E.2d 863 (4th Dist. 2002) For purposes of the Habitual Criminal Act, the time during which defendant was imprisoned on the second offense and time during which he was on parole both count as "custody" and are therefore excepted from calculation of the 20-year period.

People v. Banks, 212 Ill.App.3d 105, 569 N.E.2d 1388 (5th Dist. 1991) A juvenile adjudication may be considered as a prior conviction for purposes of the Habitual Criminal Act. See also, **People v. Bryant**, 278 Ill.App.3d 578, 663 N.E.2d 105 (1st Dist. 1996).

Cumulative Digest Case Summaries **§45-10(b)**

People v. Ligon, 2016 IL 118023 (No. 118023, 2/19/16)

1. The proportionate penalties clause of the Illinois Constitution provides that all penalties shall be determined according to the seriousness of the offense. Ill. Const. 1970, art. I, §11. A sentence violates the clause if it is: (1) so cruel, degrading, or disproportionate to the offense that it shocks the moral sense of the community; (2) greater than the sentence for an offense with identical elements.

Under the second, "identical elements" test, if the legislature provides two different penalties for the exact same elements, then one of the penalties has not been set in accordance with the seriousness of the offense. Where identical offenses yield different penalties, the penalties are unconstitutionally disproportionate and the greater penalty cannot stand.

2. Defendant was convicted of aggravated vehicular hijacking with a dangerous weapon other than a firearm (AVH/DW). Defendant was armed with a BB gun and the State charged this as "a dangerous weapon, to wit: a bludgeon." Since this was his third Class X felony conviction, the trial court adjudged him an habitual criminal and sentenced him to natural life imprisonment.

Defendant eventually filed a 2-1401 petition arguing that his sentence violated the proportionate penalties clause because AVH/DW had the identical elements as armed violence with a category III weapon but was punished as a Class X felony with a minimum of seven years imprisonment, while armed violence

with a category III weapon was only punished as a Class 1 felony.

3. In the Supreme Court, the State first argued, citing **People v. Cummings**, 375 Ill. App. 3d 513 (1st Dist., 2007), that it was not appropriate in this case to conduct an identical elements comparison between AVH/DW and armed violence because defendant was not sentenced under the AVH/DW statute, but rather was sentenced as an habitual criminal. The court rejected the State's argument, holding that an identical elements test may be conducted where a defendant is ultimately sentenced as an habitual criminal.

The Habitual Criminal Act (Act) mandates the imposition of a natural life sentence on defendants convicted of three Class X felonies within a 20-year period. 720 ILCS 5/33B-1(a). The act does not create an independent offense, but simply prescribes the circumstances where a defendant may be more severely punished because of his prior convictions. The Act is a recidivist sentencing statute that does not define any crime and has no elements to compare with another statute. Since the identical elements test requires a comparison between the elements of different offenses, it cannot be applied to the Act.

The court thus overruled **Cummings** and held that a defendant's sentence as an habitual criminal has no effect on a court's determination of whether a qualifying offense violates the identical elements test.

4. But the court found that the offense of AVH/DW as charged in this case did not have the identical elements as armed violence with a category III weapon.

A defendant commits AVH/DW as charged here when he takes a motor vehicle from another person by force and is armed with a dangerous weapon other than a firearm. 720 ILCS 18-4. The charging instrument identified the dangerous weapon here as a bludgeon. In comparison, a defendant commits armed violence with a category III weapon when he commits any felony and is armed with "a bludgeon, black-jack, slungshot, sand-bag, sand club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1, 33A-2.

The AVH/DW statute does not define dangerous weapons. Instead, the definition is derived from common law and includes any object capable of being used in a manner likely to cause serious injury. Many objects, including the BB gun in this case, can be used in a deadly fashion as bludgeons and are thus properly classified as dangerous weapons even if they were not actually used in that manner. It is sufficient that they have the potential for such use.

By contrast, the armed violence statute specifically defines what constitutes a dangerous weapon. In **People v. Davis**, 199 Ill. 2d 130 (2002), the court held that a BB gun was not a bludgeon or other dangerous weapon of like character as defined by the statute. Although a BB gun might be used aa a bludgeon, it is not typically identified as such and thus is not "of like character" to the bludgeon-type weapons included as category III weapons.

Accordingly, the elements of AVH/DW are not identical to the elements of armed violence with a category III weapon.

5. The court also held that the State was not equitably barred from arguing that the two statutes did not have identical elements. Defendant argued that since the State took the position during prior proceedings, including trial and direct appeal, that defendant was armed with a bludgeon, it could not now assert that defendant's weapon was not a bludgeon.

Under the common law, weapons are divided into four categories: (1) objects that are dangerous *per se*, such as knives and loaded guns; (2) objects that are never dangerous, such as a four-inch plastic toy gun; (3) objects that are not necessarily dangerous weapons, but can be used in a dangerous manner, such as an unloaded gun made of heavy material, that can be used as a bludgeon; and (4) objects that are not necessarily dangerous, but were actually used in a dangerous manner.

At trial, defendant was properly convicted of using a BB gun as a common-law dangerous weapon of the third type, one that can be used as dangerous weapon. The court thus found that it was irrelevant that the indictment used the term "bludgeon" instead of "BB gun." The State consistently contended in the prior proceedings that defendant was armed with an object that could have been used as a bludgeon. It was not inconsistent for the State to also argue that the BB gun was not an actual bludgeon. Accordingly, the State was not equitably barred from making its current argument before the Supreme Court.

Defendant's conviction and sentence were affirmed.
(Defendant was represented by Assistant Defender Pat Cassidy, Chicago.)

People v. Coleman, 409 Ill.App.3d 869, 948 N.E.2d 795 (1st Dist. 2011)

The Armed Habitual Criminal Statute (720 ILCS 5/24-1.7) prohibits the receipt, sale, possession, or transfer of a firearm after having been convicted two or more times of a forcible felony or certain specified offenses. Defendant was convicted of violating the Armed Habitual Criminal Statute based upon his commission of unlawful use of a weapon by a felon and aggravated unlawful use of a weapon after having been previously convicted of unlawful use of a weapon by a felon and burglary.

Defendant argued that the State failed to prove that he had been previously convicted of two qualifying offenses because the name on one of the certified copies of prior conviction was for "Jessie Coleman," rather than for "Jesse Coleman," the name by which defendant was charged. The Appellate Court rejected the argument that the proof of the prior conviction was inadequate.

Identity of name gives rise to a rebuttable presumption of identity. If the presumption is not rebutted, the certified copy of the prior felony conviction, without more, meets the burden of proving the prior conviction beyond a reasonable doubt. However, if the presumption does not apply or is rebutted, the State must introduce additional evidence to meet its burden of showing that the defendant is the person who was convicted.

The Appellate Court concluded that where the defense did not object at trial to the State's request to admit the certified copy of the prior conviction and failed to claim that defendant was not the person named in the certified copy, the variance between "Jesse" and "Jessie" did not defeat the presumption of identity. Because defendant failed to rebut the presumption, the evidence was sufficient to establish that he had the required prior convictions. Defendant's conviction for armed habitual criminal was affirmed.

The court adopted recent precedent holding that the Armed Habitual Criminal Statute does not violate the Second Amendment by criminalizing the mere possession of a firearm. The court adopted the reasoning of **People v. Ross**, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-1463, 3/11/11), which concluded that the decisions in **District of Columbia v. Heller**, 554 U.S. 570, ___ S.Ct. ___, ___ L.Ed.2d ___ (2008) and **McDonald v. City of Chicago**, ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) did not recognize a Second Amendment right for a convicted felon to possess a handgun, either in or outside of the home.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Fernandez, 2014 IL App (1st) 120508 (No. 1-12-0508, 7/17/14)

Defendant was convicted of selling more than 1000 grams of cocaine in 2010, and based on his guilty pleas to drug offenses in 1992 and 1999 was sentenced as a habitual criminal to a natural life sentence. 730 ILCS 5/5-4.5-95(a) defines a habitual criminal as a person who has been twice convicted in state or federal court of an offense that contains the same elements as an offense which is now classified as a Class X felony in Illinois, and who thereafter is convicted of a Class X felony which is committed after the two prior convictions were entered.

1. The court rejected defendant's argument that the 1999 federal conviction did not qualify as a prior conviction under the Habitual Criminal Act. The court acknowledged that under Illinois law the type and amount of drugs are substantive elements of the offense, while under federal law such matters are sentencing factors rather than elements. In determining whether the requirements of the Habitual Criminal Act are satisfied, however, Illinois courts have rejected a formalistic interpretation of the Habitual Criminal Act. Instead, the focus is on the criminal conduct in question. The court concluded that had the federal offense in question been prosecuted as a State offense, it would have been a Class X felony. Therefore, the federal offense qualified as a prior conviction under the Act.

The court also noted that if defendant's argument was accepted, a federal drug conviction could never serve as a prior conviction under the Habitual Criminal Act despite the clear intent of the General Assembly.

2. Defendant argued that under **Taylor v. United States**, 495 U.S. 575 (1990) and **Descamps v. United States**, 570 U.S. ___, 133 S. Ct. 2276, 186 L.Ed.2d 438 (2013), when determining whether there is a prior conviction for purposes of the Habitual Criminal Act the sentencing court may look only to the elements of the prior conviction and not to the conduct underlying the conviction. Defendant contended that his Sixth Amendment right to a jury trial was violated because the sentencing court looked beyond the elements of the federal conviction and examined the conduct involved in that conviction.

The court concluded that defendant's argument carried "some persuasive force" and that a constitutional issue could arise if the sentencing court considered facts which had not been proven beyond a reasonable doubt before a jury. However, the court concluded that the issue was forfeited in this case because defendant stipulated to testimony at the sentencing hearing concerning the facts underlying the prior offense and failed to object when the State used his federal guilty plea to establish the quantity of drugs in question.

3. The court also found, as a matter of first impression, that a natural life sentence under the Habitual Criminal Act does not violate the proportionate penalties clause of the Illinois Constitution even where the defendant has been convicted only of non-violent offenses. Although a mandatory life sentence for three nonviolent offenses is a harsh sentence, defendant was not a juvenile, had been convicted of the first offense when he was 36 years old and the third when he was 55, and was convicted as a principal. Furthermore, defendant's sale of cocaine was not a spontaneous decision, but resulted from careful planning and the recruitment of an accomplice.

Noting that the legislature limited the Habitual Criminal Act to Class X offenses and to persons who have exhibited recidivist tendencies, the court concluded that three convictions for distributing large quantities of narcotics constitutes serious criminal conduct for which a natural life sentence can be deemed proportionate. Defendant's natural life sentence was affirmed.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Sanderson, 2016 IL App (1st) 141381 (No. 1-14-1381, 4/20/16)

A defendant is guilty of armed habitual criminal if he possesses a firearm and has been previously convicted of two or more forcible felonies. As defined by the Criminal Code, a forcible felony includes several specifically enumerated offenses, including residential burglary, or any other felony involving "the use or threat of physical force or violence." 720 ILCS 5/2-8.

An unenumerated felony falls within the residual clause if the defendant contemplated and was willing to use force or violence, but he does not need to actually use violence. Crimes may fall within the residual clause in two ways: (1) one of the crime's elements is a specific intent to carry out a violent act; or (2) the particular facts of the case show that the defendant contemplated and was willing to use force.

Defendant was convicted of armed habitual criminal based on having a prior conviction for attempted residential burglary. The only evidence of the prior conviction was a certified copy of conviction which provided no details about the circumstances of the prior offense.

The court held that defendant's conviction for attempted residential burglary, which was not a specifically enumerated forcible felony, also did not fall within the residual clause since it was "neither by definition nor by circumstance a forcible felony."

First, the elements of the offense do not include a specific intent to carry out a violent act. Residential burglary is defined as entering or remaining within a dwelling place with the intent to commit a felony or theft. 720 ILCS 5/1903(a). A defendant could be guilty of attempted residential burglary by simply testing the window of a home that he knew was vacant, or by casing a home, finding it unexpectedly occupied and leaving precisely to avoid a violent confrontation. In both examples, the defendant did not contemplate using force or violence, and yet would still be guilty.

Second, since the State presented no evidence about the circumstances of defendant's prior conviction, there was no showing that defendant contemplated the use of force in this particular offense.

The court reversed defendant's conviction for armed habitual criminal.

(Defendant was represented by Assistant Defender Ben Wimmer, Chicago.)

People v. White, 2015 IL App (1st) 131111 (No. 1-13-1111, 12/16/15)

Defendant was charged with being an armed habitual criminal for knowingly or intentionally possessing a handgun after having been convicted of domestic battery and first degree murder. 720 ILCS 5/24-1.7(a) provides that a person is an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted two or more times of certain offenses, including "a forcible felony as defined in Section 2-8." Section 2-8 defines forcible felonies as several specified offenses "and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8.

1. Domestic battery is not listed as one of the specified offenses, and therefore may be a forcible felony only if: (1) the specific circumstances of the prior conviction in question actually involved the use or threat of physical force or violence, or (2) the offense falls within the residual clause because it inherently involves force or violence. Because the State failed to present evidence concerning the specific circumstances of defendant's domestic battery conviction, that conviction was a forcible felony only if domestic battery inherently involves the use or threat of force or violence.

The court noted that domestic battery can be based either on bodily harm or on physical contact of an insulting or provoking nature with a family or household member. (720 ILCS 5/12-3.2(a)) Clearly, domestic battery based on contact of an insulting or provoking nature does not inherently involve the use or threat of violence, and therefore is not a forcible felony.

By contrast, domestic battery based on inflicting bodily harm to a family or household member, "at first blush, . . . would appear to constitute a forcible felony." Considering the statute as a whole, however, the court concluded that it would be absurd to find that domestic battery based on bodily harm constitutes a forcible felony where §2-8 was amended in 1990 to provide that aggravated battery constitutes a forcible felony only if it is based on great bodily harm. The court concluded that in light of the 1990 amendments, the legislature could not have intended that domestic battery based on mere bodily harm qualified as a forcible felony.

Because defendant's aggravated battery conviction did not qualify as a forcible felony for purposes of the habitual criminal statute, the habitual criminal conviction was vacated.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

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§45-10(c)
Extended Term

§45-10(c)(1)
Generally

People v. Jordan, 103 Ill.2d 192, 469 N.E.2d 569 (1984) 1. An extended-term sentence may be imposed on a defendant convicted on the basis of accountability.

2. An extended-term sentence "may only be imposed for offenses within the most serious class of offense of which the accused is convicted." Where defendant is convicted of murder and kidnapping, or murder and armed robbery, an extended-term sentence may not be imposed for kidnapping (or armed robbery) because those offenses are not within the most serious class of offense. However, where defendant is convicted of attempt murder, armed robbery, and deviate sexual assault, extended terms may be imposed on all the offenses because they are all within the same class (Class X). See also, **People v. Kane**, 140 Ill.App.3d 928, 489 N.E.2d 500 (1st Dist. 1986) (murder and armed robbery); **People v. Howard**, 130

Ill.App.3d 967, 474 N.E.2d 1345 (2d Dist. 1985) (murder and home invasion).

People v. Coleman, 166 Ill.2d 247, 652 N.E.2d 322 (1995) **Jordan** does not apply where unrelated charges resulting from separate courses of conduct are consolidated in a single prosecution. Because defendant's convictions for first degree murder and three counts of armed robbery were unrelated and arose from separate courses of conduct, the court did not err by imposing extended terms of 50 years for each armed robbery and an extended term of 85 years for murder. See also, **People v. Peacock**, 359 Ill.App.3d 326, 833 N.E.2d 396 (4th Dist. 2005) (courses of conduct are unrelated where "there was a substantial change in the nature of the defendant's criminal objective"; here, the offenses were not unrelated, for there was no evidence of any change in the nature of defendant's criminal objective (defendant committed home invasion, aggravated battery, and domestic battery to dissuade the complainant from breaking up with him).

People v. Neal, 111 Ill.2d 180, 489 N.E.2d 845 (1985) Extended-term sentence for armed robbery was not precluded by defendant's conviction for murder where defendant was sentenced to death, not a term of years, for murder. The statute allows the imposition of an extended-term sentence of imprisonment for the class of the most serious offense of which defendant was convicted when defendant was sentenced to a term of years, and this is so even though defendant was also separately sentenced to death for murder. See also, **People v. Young**, 124 Ill.2d 147, 529 N.E.2d 497 (1988); **People v. Hines**, 165 Ill.App.3d 289, 518 N.E.2d 1352 (4th Dist. 1988). But see, **People v. Askew**, 273 Ill.App.3d 798, 652 N.E.2d 1041 (1st Dist. 1995) (**Young** was implicitly overruled by **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990); thus, defendant sentenced to death or natural life for murder may not be given extended term on lesser offense).

People v. Bell, 196 Ill.2d 343, 751 N.E.2d 1143 (2001) In determining whether offenses arise from "unrelated courses of conduct" for purposes of extended term sentencing, "independent motivation" test is the appropriate standard. Extended terms may be imposed for different class offenses only if there was a "substantial change in the nature of the defendant's criminal objective" between the two offenses.

Where defendant and two accomplices beat and robbed the complainant after following him into an alley and the trial court found that the offenses were part of a "single course of conduct" for purposes of mandatory consecutive sentencing, the offenses were not part of "unrelated courses of conduct" for purposes of extended term sentencing. Therefore, an extended term could be ordered only on armed robbery, the most serious conviction.

See also, **People v. Terry**, 183 Ill.2d 298, 700 N.E.2d 992 (1998) (where a defendant is sentenced to death or natural life imprisonment, an extended term may be imposed on the next most serious offense of which he was convicted); **People v. Pittman**, 316 Ill.App.3d 245, 736 N.E.2d 662 (5th Dist. 2000) (trial court erred by imposing an extended term for possession of cannabis in a penal institution, a Class 3 felony, where defendant was also convicted of the Class 1 felony of unlawful possession of cocaine in a penal institution).

People v. Baumann, 314 Ill.App.3d 947, 733 N.E.2d 417 (2d Dist. 2000) In determining whether a defendant is eligible for a Class X or extended-term sentence, unclassified offenses are classified according to the sentences they carry. Thus, the trial court should treat an attempt armed robbery conviction as a Class 1 offense and an attempt residential burglary conviction as a Class 2 offense. Accord, **People v. Gonzales**, 314 Ill.App.3d 993, 734 N.E.2d 77 (2d Dist. 2000) (although criminal drug conspiracy is itself an unclassified offense, it carries the same sentence as the offense that was the object of the conspiracy; where the object of the conspiracy was a Class X felony, defendant was guilty of a Class X offense for purposes of determining credit for pretrial detention).

People v. Blanck, 286 Ill.App.3d 583, 676 N.E.2d 731 (2d Dist. 1997) Where the conviction and extended term on the most serious offense were vacated on appeal, on remand the trial court could not impose an

extended term on the next most serious offense of which defendant was convicted.

People v. Matthews, 304 Ill.App.3d 514, 711 N.E.2d 435 (5th Dist. 1999) Illinois law does not authorize an extended term for aggravated DUI.

People v. Anderson, 201 Ill.App.3d 75, 559 N.E.2d 267 (3d Dist. 1990) Defendant was not eligible for an extended murder sentence where the judge based the extended term on non-authorized factors.

People v. King, 248 Ill.App.3d 253, 618 N.E.2d 709 (1st Dist. 1993) Instead of reducing defendant's sentence to non-extended term (after finding that the extended-term sentence was unauthorized at the time of the crime), the court remanded the cause for a new sentencing hearing because it refused to assume that the trial judge would simply resentence defendant to the maximum non-extended term.

Cumulative Digest Case Summaries **§45-10(c)(1)**

People v. Brooks, 2012 IL App (4th) 100929 (No. 4-10-0929, 3/7/12)

A defendant convicted of a felony is subject to an extended-term sentence if the defendant has been convicted in Illinois of any felony of the same or greater class in the previous ten years. 730 ILCS 5/5-5-3.2(b)(1). A misdemeanor enhanced to a felony in accordance with the legislature's direction qualifies as a felony within the meaning of this statute.

Violation of an order of protection is a Class 4 felony if the defendant has a prior conviction for unlawful restraint. 720 ILCS 5/12-30(d). Where the prosecution intends to seek an enhanced sentence based on a prior conviction, it is required to notify the defendant of such intention in the charging instrument. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted. . . ." 725 ILCS 5/111-3(c).

Defendant was properly convicted of the Class 4 felony of violating an order of protection based on a prior unlawful conviction for unlawful restraint. The State properly disclosed its intent to seek the enhancement based on that conviction in the indictment. The trial court took judicial notice of the conviction outside the presence of the jury. Therefore, defendant was convicted of a felony as required by §5-5-3.2(b)(1) to make him eligible for an extended term.

The court rejected defendant's reliance on **People v. Palmer**, 104 Ill.2d 340, 472 N.E.2d 795 (1984), as support for the argument that the unlawful restraint conviction was an element of the offense that had to be proved to the jury. **Palmer** was decided prior to the legislature's enactment of 725 ILCS 5/111-3(c).

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

People v. Robinson, 2015 IL App (1st) 130837 (No. 1-13-0837, 6/26/15)

Under 730 ILCS 5/5-8-2(a), a defendant with multiple convictions may normally receive an extended-term sentence only for the convictions within the most serious class of offense. But when there was a substantial change in the nature of the criminal objective, the defendant's offences are part of an unrelated course of conduct and an extended-term sentence may be imposed on a less serious class of offense.

Here the tenant discovered defendant in his apartment trying to steal a television set. When defendant saw the tenant standing near the doorway, he ran at him and the two struggled for several minutes before other individuals detained defendant. Defendant was convicted of residential burglary and aggravated battery, and was sentenced to extended-term sentences on both offenses, even though aggravated battery was a lesser class of offense.

The Appellate Court held that the trial court erred in imposing an extended-term sentence for aggravated battery. Defendant's actions in fighting with the tenant did not constitute a substantial change in

the nature of his criminal objective. Instead, the Court held that a burglar maintains a constant objective to escape throughout the burglary. When the tenant discovered defendant, he was near the doorway blocking defendant's only means of escape. The struggle with the tenant which led to the aggravated battery conviction, was merely a means to effectuate defendant's objective of escaping, and thus there was no change in criminal objective.

The Court reduced defendant's sentence to the maximum of five years for a Class 3 felony.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

People v. White, 2016 IL App (2d) 140479 (No. 2-14-0479, 8/1/16)

Under 730 ILCS 5/5-8-2(a) and Illinois Supreme Court precedent, a trial court may impose an extended-term sentence only for the conviction of the most serious class of offense. However, extended-term sentences may be imposed on separately charged, differing class offenses that arise from unrelated courses of conduct.

Where defendant was charged in one indictment with unlawful sale of a firearm to a felon and being an armed habitual criminal, and both offenses arose from obtaining a firearm and making arrangements to sell it to a previously convicted felon, an extended-term sentence was permitted only on the Class X offense of being an armed habitual criminal. Because the trial court failed to impose an extended-term sentence on the Class X offense and instead imposed an extended-term only on the Class 3 offense of unlawful sale of a firearm to a felon, the court reduced the sentence on the Class 3 offense to the maximum nonextended term of five years.

(Defendant was represented by Assistant Defender Josette Skelnick, Elgin.)

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

Defendant was convicted, on a guilty plea, of unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing cap of 25 years' imprisonment.

The offense was a Class 2 felony. However, several sentencing statutes arguably applied. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a second or subsequent conviction under the Controlled Substances Act carries a maximum sentence of twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

1. The Appellate Court found that the above sentencing statutes conflicted with 730 ILCS 5/5-8-2, which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1).

In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

2. The court concluded that where statutes conflict, the most recently enacted statute controls. Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. In other words, because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

Because the trial court erroneously admonished defendant that he was subject to a maximum sentence of 60 years, the order denying defendant's motion to withdraw his plea was reversed and the cause

remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

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§45-10(c)(2)
Extended Term Based on a Prior Felony Conviction

People v. Harvey, 196 Ill.2d 444, 753 N.E.2d 293 (2001) Defendant's prior conviction for attempted murder was the same or greater class felony as his subsequent conviction for armed robbery, though the prior conviction occurred in 1974 when attempt murder was a Class 1 felony, because by the time defendant was sentenced in the instant case, attempt murder had been reclassified as a Class X felony. The *ex post facto* clause did not prohibit use of the 1974 attempt murder conviction as an aggravating factor.

People v. Olivo, 183 Ill.2d 339, 701 N.E.2d 511 (1998) A defendant has not been convicted of a Class X felony where the sentence for a lesser offense was enhanced to a Class X sentence due to prior convictions - the fact that a defendant receives a Class X sentence on a lesser offense does not elevate the class of the conviction. Thus, the trial court may not impose a Class X extended-term sentence (pursuant to § 5/5-3.2(b)(1)) on a defendant who has never been convicted of a Class X felony but who has received a Class X enhanced sentence.

People v. Lemons, 191 Ill.2d 155, 729 N.E.2d 489 (2000) For purposes of the statute under which any felony will support an extended-term sentence for a similar class felony or greater class felony conviction occurring within 10 years of the prior conviction, the 10-year-period begins on the date the final sentence is pronounced on a defendant who was originally sentenced to probation. Where defendant was sentenced to probation in 1985 but had probation revoked in 1996, a crime that occurred in 1997 qualified for extended-term sentencing.

People v. Harden, 113 Ill.2d 14, 495 N.E.2d 490 (1986) A prior conviction obtained in a federal court sitting in the state of Illinois may be properly used to impose an extended-term sentence.

People v. Robinson, 89 Ill.2d 469, 433 N.E.2d 674 (1982) Defendant's prior state and federal convictions for robbery could be used to impose an extended term, for the time defendant spent in federal custody had to be excluded from the 10-year limitation period; therefore, the prior convictions occurred within 10 years, excluding the time spent in custody, of defendant's current conviction.

People v. Richardson, 104 Ill.2d 8, 470 N.E.2d 1024 (1984) A "conviction" is a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty. Thus, defendant's prior conviction which resulted from a guilty plea could be used to trigger the extended term.

People v. Vaughn, 301 Ill.App.3d 242, 703 N.E.2d 916 (4th Dist. 1998) Where defendant pleaded guilty in a single plea agreement to counts arising from unrelated cases, he was "convicted" of the first offense (for purposes of 730 ILCS 5/5-5-3.2(b)(1)) when the trial court accepted his guilty plea and imposed a sentence for that offense. When defendant immediately thereafter pleaded guilty to a second offense, he stood previously convicted of the "same . . . or greater class felony" for purposes of extended-term sentencing. If the legislature intended to make an extended term available only if defendant committed the second offense after having been convicted of the first, it would have imposed the sort of "specific timing requirements" contained in the Habitual Criminal Act. Also, the proceedings satisfied the statutory requirements that the

convictions be "separately brought and tried" and "arise out of different series of acts" where the first charge was completely unrelated to the second one. Because "no trial occurred regarding either" charge and the charges were combined in a single guilty plea proceeding "simply as a matter of judicial efficiency," the offenses were separately brought and tried within the meaning of the statute.

People v. Lieberman, 107 Ill.App.3d 949, 438 N.E.2d 516 (1st Dist. 1982) There is a "judgment of conviction" only *after* sentence is imposed. Defendant's extended-term sentence based on defendant's prior conviction of rape was improper because that rape conviction had not proceeded to sentencing at the time of defendant's sentencing hearing. Because no sentence had yet been imposed on the prior conviction, it did not constitute a "conviction" and could not trigger an extended-term sentence. See also, **People v. Lieberman**, 332 Ill.App.3d 193, 772 N.E.2d 896 (1st Dist. 2002) (eligibility for extended-term sentencing is to be determined on the date a final sentence is ordered; where defendant's extended term was vacated on appeal because it was based on a prior conviction which was not "final" at the time of sentencing because no sentence had been entered, but by the time defendant was sentenced on remand he had been sentenced on the "prior conviction," an extended term was authorized on remand).

People v. Frey, 126 Ill.App.3d 484, 467 N.E.2d 302 (5th Dist. 1984) Extended-term sentence vacated because the judge did not properly consider the full range of sentencing alternatives available, where the only applicable aggravating factor under the extended-term provision was defendant's 1977 burglary conviction and the trial judge believed he was required to impose the extended term in light of the aggravating factor, though the factor merely authorized the judge to impose an extended term.

People v. Lenninger, 88 Ill.App.3d 801, 410 N.E.2d 1157 (2d Dist. 1980) Defendant's extended-term sentence (based on factors that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or that defendant had been convicted within 10 years of the same or greater class felony) vacated and cause remanded for resentencing where the record did not show that the trial judge considered either factor.

Cumulative Digest Case Summaries **§45-10(c)(2)**

People v. Garcia, 241 Ill.2d 416, 948 N.E.2d 32 (2011)

1. 730 ILCS 5/5-5-3.2(b)(1) provides that an extended term may be imposed where the defendant is convicted of a felony after having been previously convicted of the same or greater class felony within the past 10 years, excluding time spent in custody, and the charges are separately brought and tried and arise from different series of acts. Because the purpose of §5-5-3.2(b)(1) is to impose harsher sentences on offenders whose repeat convictions show that they are resistant to corrective measures, the court concluded that the 10-year period is tolled by time lapsed when the defendant wrongfully delays or avoids criminal proceedings by becoming a fugitive from justice. "In our view, the legislature could not have intended to allow a defendant subject to an extended-term sentence to avoid increased punishment by violating bond and remaining a fugitive from justice until the 10-year statutory limitation period expires." Furthermore, unless the time during which a defendant is a fugitive from justice is excluded from the 10-year period, §5-5-3.2(b)(1) would both permit the defendant to benefit from his own wrongdoing and impose more serious punishment on defendants who participate in criminal proceedings than those who flee to avoid prosecution.

2. The court rejected defendant's argument that the legislature did not intend to exclude periods during which a defendant is a fugitive, because it did not expressly exclude such periods but did exclude periods when the defendant is in custody. The court deemed it more likely that the legislature did not contemplate that the statute would be construed as excluding an extended term when the defendant fled the jurisdiction.

3. Although the rule of lenity generally requires that a penal statute be strictly construed in favor of the accused, the rule of lenity does not require a reviewing court to construe a statute so rigidly as to circumvent the legislature's intent. "[T]he primacy of legislative intent is paramount, and all other rules of statutory construction are subordinate to it."

The Appellate Court's order vacating defendant's extended term sentence was reversed.

(Defendant was represented by Assistant Defender Deborah Nall, Chicago.)

People v. Williams, 2016 IL 118375 (No. 118375, 1/22/16)

1. Under section 408(a) of the Illinois Controlled Substance Act (Act), the trial court may sentence a defendant who has been convicted of "a second or subsequent offense under this Act" to a term of imprisonment "up to twice the maximum term otherwise authorized." 720 ILCS 570/408(a).

2. Defendant pled guilty to unlawful delivery of a controlled substance, a Class 2 felony, in exchange for a sentencing cap of 25 years. Prior to accepting the plea, the trial court admonished him that if he did not plead guilty, he would be sentenced as a Class X offender (due to his prior convictions) and (due to his prior conviction under the Act) his maximum potential sentence could be doubled under section 408(a) to a total of 60 years imprisonment. The trial court accepted defendant's plea and sentenced him to 25 years imprisonment.

Defendant filed a motion to withdraw his plea alleging that he was improperly admonished that he faced a 60-year sentence under section 408(a). The trial court denied the motion.

3. The Supreme Court held that defendant had been improperly admonished about the maximum potential sentence he faced. The court was "unable to say with certainty" that section 408(a) only applied to offenses in violation of the act (and thus would only double the maximum permissible sentence for defendant's Class 2 conviction) or whether it also applied to double the maximum penalty of 30 years for a Class X sentence.

Since the meaning of section 408(a) was ambiguous, the court invoked the rule of lenity and resolved the ambiguity in favor of defendant. The court thus held that section 408(a) only applies to offenses committed in violation of the Act and could not be used to double the Class X maximum sentence of 30 years.

The court reversed defendant's conviction and encouraged the legislature to revisit section 408(a) and clarify its meaning.

(Defendant was represented by Assistant Defender Brian Kohut, Ottawa.)

People v. Bailey, 2015 IL App (3d) 130287 (No. 3-13-0287, 8/28/15)

730 ILCS 5/5-5-3.2(b)(1) authorizes an extended term where the defendant is convicted of any felony "after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony," where the instant conviction occurred within 10 years of the prior conviction not counting time spent in custody. The court noted that the statute does not define the term "same or similar class" felony, and that in other statutes the legislature specifically provided that in comparing sentences between jurisdictions courts are limited to examining the elements of the respective offenses. Because the legislature did not include a similar limitation here, the court concluded that the trial judge was required to consider both the sentencing ranges and elements of the crimes to determine whether a conviction in another jurisdiction is of "the same or similar class felony" as a conviction in Illinois.

Because in this case the trial court considered only the elements of a California conviction for unlawful taking or driving of a vehicle before finding that the offense was equivalent to the Class 2 Illinois offense of possession of a stolen or converted vehicle, the cause was remanded with instructions that the court also consider the sentencing range of the California offense before determining whether extended term sentencing applied.

(Defendant was represented by Assistant Defender Steven Varel, Ottawa.)

People v. Chambers, 2011 IL App (3d) 090949 (No. 3-09-0949, 8/12/11)

The State conceded that the trial court erred by imposing extended term sentences where a single prior conviction was used both to elevate domestic battery to a felony and to impose extended term sentences.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Johnson, 2013 IL App (1st) 120413 (No. 1-12-0413, 8/7/13)

1. 730 ILCS 5/5-5-3.2(b)(1) authorizes an extended term for a defendant who is convicted of any felony after having been previously convicted of the "same or similar class felony or greater class felony" within the past 10 years, excluding time in custody. 730 ILCS 5/5-5-3.2(b)(7) authorizes an extended term for a person who is at least 17, commits "a felony," and within the past 10 years (excluding time in custody) was "adjudicated a delinquent minor . . . for an act which would be a Class X or Class 1 felony if committed by an adult." Thus, under the plain language of the statute, an adult who commits any felony within 10 years of having been adjudicated delinquent for a Class X or Class 1 felony is subject to an extended term, while an adult repeat offender is subject to an extended term only if the second conviction is for "the same or greater class offense" as the original conviction.

Although the State conceded that the statute was unconstitutional on its face when applied to the defendant, who was convicted of armed robbery while armed with a firearm after having been adjudicated delinquent for residential burglary, the court elected to reject the concession and find that the legislature's failure to include the phrase "same or greater class felony" in section (b)(7) was inadvertent. The court concluded that the legislative intent underlying both sections (b)(1) and (b)(7) was to impose harsher sentences on offenders whose repeat offenses show that they are resistant to correction. The court found that the legislature could not have intended to authorize an extended term for a repeat offender who is convicted of any felony after having been adjudicated delinquent, but exclude extended term sentences for adult repeat offenders unless the prior conviction was for the same or greater class felony. Thus, the court concluded that the phrase "same or greater class felony" should be read into section (b)(7).

Because defendant's delinquency adjudication for residential burglary was not for the same or greater class felony as armed robbery while armed with a firearm, defendant was not eligible for an extended term under section (b)(7).

2. The court remanded the cause for resentencing, rejecting the State's request to merely impose a reduced sentence. While a reviewing court has the power to reduce a sentence imposed by the trial court, this power should be exercised sparingly and with caution. Because the trial court rejected the State's request for the maximum extended term sentence for which it believed defendant was eligible, the court found that the trial judge might have imposed less than the 30-year maximum non-extended term which actually applied to the offense.

(Defendant was represented by Assistant Defender Benjamin Wimmer, Chicago.)

People v. Jones, 2015 IL App (3d) 130053 (No. 3-13-0053, 5/15/15)

In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Here defendant was sentenced to an extended term of imprisonment based on a prior juvenile adjudication that was introduced at sentencing. Defendant argued that a juvenile adjudication does not fall within the **Apprendi** exception for prior convictions, and thus his extended term sentence was unconstitutional since his prior juvenile adjudication was not submitted to the jury or proved beyond a reasonable doubt.

As a matter of first impression in Illinois, the Appellate Court found that **Apprendi's** exception for prior convictions applies to juvenile adjudications. The prior-conviction exception was justified by the procedural safeguards (fair notice, right to jury trial, proof beyond a reasonable doubt) in place at the time of the prior conviction. The Court found that an adjudication of juvenile delinquency, while not containing

all the procedural safeguards of a criminal trial, provided "a no less reliable basis for the enhancement of a sentence than is a standard adult criminal conviction," and was "sufficiently analogous to a prior criminal conviction to fall under the exception in **Apprendi**."

Accordingly, the State was not required to include the fact of defendant's prior adjudication in the indictment, present the fact to a jury, or prove it beyond a reasonable doubt. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

Defendant was convicted, on a guilty plea, of unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing cap of 25 years' imprisonment.

The offense was a Class 2 felony. However, several sentencing statutes arguably applied. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a second or subsequent conviction under the Controlled Substances Act carries a maximum sentence of twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

1. The Appellate Court found that the above sentencing statutes conflicted with 730 ILCS 5/5-8-2, which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1).

In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

2. The court concluded that where statutes conflict, the most recently enacted statute controls. Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. In other words, because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

Because the trial court erroneously admonished defendant that he was subject to a maximum sentence of 60 years, the order denying defendant's motion to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

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

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

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

Defendant argued that he was improperly convicted of a Class 2 felony because the State did not give him notice that it would seek an enhanced sentence. Defendant further argued that **Easley** did not apply to

his case because vehicular hijacking is not per se a forcible felony. Vehicular hijacking is not one of the specifically enumerated offenses in the forcible felony statute and, according to defendant, does not fall within the residual clause definition of forcible felony.

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

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

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

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§45-10(c)(3)
Extended Term Based on Brutal and Heinous

People v. Nielson, 187 Ill.2d 271, 718 N.E.2d 131 (1999) An extended-term sentence is authorized under the "exceptionally brutal and heinous" factor only where defendant's behavior demonstrates "wanton cruelty," which requires proof that defendant "consciously sought to inflict pain and suffering on the victim of the offense." Because one cannot consciously seek to inflict pain and suffering on a corpse, the "exceptionally brutal or heinous" aggravating factor is inapplicable to concealment of a homicidal death.

People v. Andrews, 132 Ill.2d 451, 548 N.E.2d 1025 (1989) Judge erroneously imposed extended-term sentence based on finding that murder was senseless and unresisted where facts did not show a brutal or heinous offense to justify the extended sentence. Though defendant could have achieved his goal of robbing the victim without shooting the victim, every murder by its nature is unnecessary. Also, all murders are brutal and heinous to a certain degree, and murdered robbery victims are defenseless when killed. Statute authorizing extended sentence for brutal and heinous behavior was not intended to convert every offense into an extraordinary offense subject to an extended-term sentence. **People v. LaPointe**, 88 Ill.2d 482, 431 N.E.2d 344 (1981), is distinguishable. Unlike **LaPointe**, defendant's criminal history contained no crimes of violence, there is no evidence that defendant indicated before the crime that he intended to kill the victim or that he exhibited a callous attitude or complete lack of remorse following the murder.

See also, **People v. Curtis**, 244 Ill.App.3d 241, 614 N.E.2d 389 (1st Dist. 1993) (extended term improper where defendants had no history of violence and did not act in such a way as to indicate a lack of remorse); **People v. Phillips**, 244 Ill.App.3d 237, 614 N.E.2d 256 (1st Dist. 1992) (under **Andrews**, extended-term sentence was improper for first degree murder of armed robbery victim); **People v. Anderson**, 200 Ill.App.3d 75, 559 N.E.2d 267 (3d Dist. 1990) (extended murder sentence unwarranted; if extended-term statute applied to this killing, it would be difficult to conceive of a murder to which the extended-term sentence would not apply); **People v. Fields**, 198 Ill.App.3d 438, 555 N.E.2d 1136 (5th Dist. 1990) (because circumstances of murder were no more indicative of wanton cruelty than those in **Andrews**, trial court abused its discretion in sentencing defendant to an extended term); **People v. Lindsay**, 247 Ill.App.3d 518, 617 N.E.2d 389 (2d Dist. 1993) (defendant's "conscious indifference" to the decedent's fate cannot support a finding of exceptionally brutal or heinous behavior, because indifference to the fate of the victim is inherent in most murders; **Andrews** held that conscious disregard of the life of a defenseless victim is not necessarily

exceptionally brutal or heinous even where first-degree murder is charged, and the same rule applies to second degree murder); **People v. Cunningham**, 253 Ill.App.3d 642, 625 N.E.2d 413 (3d Dist. 1993) (though there was "no reason" for defendant's conduct, the mere fact that an offense was unnecessary does not mean that it was "exceptionally" brutal; sentence reduced to maximum non-extended term).

People v. Evans, 87 Ill.2d 77, 429 N.E.2d 520 (1981) 1. The greater offense of which defendant was convicted (involuntary manslaughter) was not accompanied by wanton cruelty, and extended-term sentence for this offense was improper because the victim was an unintended victim and none of defendant's actions was directed toward him.

2. Defendant's conduct in the lesser offense (aggravated battery) was not indicative of wanton cruelty where his actions were committed under a subjective belief, albeit unreasonable, that they were in self defense. See also, **People v. Lindsay**, 247 Ill.App.3d 518, 617 N.E.2d 389 (2d Dist. 1993) (**Evans** does not preclude a finding of exceptional brutality and heinousness when defendant acted in an unreasonable belief of self-defense; **Evans** was a fact-specific finding that all of defendant's actions were committed in unreasonable belief of self-defense and could not have been exceptionally brutal or heinous, but because the mental state requirement of second degree murder focuses on one's state of mind at the time of the actual killing and the extended-term statute focuses on the behavior that accompanies the offense, acts other than those that caused death may show exceptional brutality or heinousness; trial court erred by basing finding of exceptional brutality or heinousness on fact that defendant strangled decedent twice, for the evidence showed that both acts of strangulation were committed while defendant unreasonably believed that he was acting in self-defense).

People v. Smallwood, 102 Ill.2d 190, 464 N.E.2d 1049 (1984) The fact that defendant shot victim after receiving fruits of armed robbery from victim supported imposition of extended sentence under enhancement where offense is accompanied by exceptionally brutal or heinous acts, notwithstanding defendant's argument that the armed robbery was completed prior to the shooting and fact that the shooting gave rise to the lesser crime of aggravated battery.

People v. Jackson, 299 Ill.App.3d 104, 700 N.E.2d 736 (1st Dist. 1998) The trial judge committed plain error by imposing an extended-term sentence for heinous battery under the "exceptionally brutal or heinous" aggravating factor. Because heinous battery "is by definition heinous," the nature of the offense is presumed to have been taken into account by the legislature in establishing the penalty for the offense.

People v. Lindsay, 247 Ill.App.3d 518, 617 N.E.2d 389 (2d Dist. 1993) In determining whether an offense is accompanied by exceptionally brutal or heinous behavior, the trial court should consider the presence of premeditation or torture, the infliction of unnecessary pain, the amount of force used, defendant's age and prior record, and any expression of remorse. Extended sentence unwarranted. See also, **People v. Wilson**, 303 Ill.App.3d 1035, 710 N.E.2d 408 (1st Dist. 1999) (the record did not justify an extended-term sentence under the "exceptionally brutal and heinous behavior" factor where defendant's behavior did not exhibit the characteristics of "prolonged pain, torture, or premeditation" required for a finding of "brutal and heinous" behavior); **People v. Bedony**, 173 Ill.App.3d 613, 527 N.E.2d 916 (1st Dist. 1988) (beating and shooting of victim was not brutal and heinous, and there were persuasive mitigating factors, such as defendant's family background, education, work record, lack of drug or alcohol abuse, and lack of criminal history). But see **People v. Douglas**, 362 Ill.App.3d 65, 839 N.E.2d 1039 (1st Dist. 2005) (defendant's remorse and lack of a serious prior record are not factors which the jury is required to consider in determining whether an offense is exceptionally brutal and heinous; in determining whether an offense is exceptionally brutal or heinous, courts focus on the totality of the facts surrounding the offense, including whether the attack was unprovoked or senseless, the number of wounds inflicted, and the extent of the victim's injuries).

People v. Gleason, 240 Ill.App.3d 249, 608 N.E.2d 344 (1st Dist. 1992) The trial judge erred by imposing extended-term sentence based on the victims' serious injuries, fact that defendant brought a gun into a tavern, and on defendant's failure to call the police after the shootings. Defendant's behavior was not exceptionally brutal or heinous. Defendant was a first-time offender who still lived with his parents and who had been employed by the same company for 10 years, and 40 witnesses were present at sentencing to testify to his good character. He also expressed remorse and testified that he had believed that his life was in danger. Further, the circumstances surrounding the incident were emotionally charged. See also, **People v. Gonzalez,** 231 Ill.App.3d 1071, 596 N.E.2d 783 (1st Dist. 1992).

People v. Mangum, 260 Ill.App.3d 631, 632 N.E.2d 1097 (2d Dist. 1994) Behavior was not exceptionally brutal and heinous. The jury believed that defendant was either acting under a sudden or intense passion resulting from serious provocation or in an unreasonable belief that self-defense was justified when he killed the victim. Defendant expressed regret at the sentencing hearing. Further, the expert testimony indicated that the decedent's injuries were consistent with a fist fight and that death could have resulted from a single blow. Also, the offense was not exceptionally brutal or heinous based on defendant's pursuit of the decedent (when decedent tried to flee defendant after fight) or because defendant bound the decedent after the latter fell to the ground. Given the victim's greater size and the "turmoil which inevitably characterizes such physical confrontations," defendant could reasonably perceive the decedent as a continuing threat. The fact that defendant left a helpless victim does not establish exceptionally brutal or heinous behavior, because indifference to the survival of the victim is inherent in the crime of murder. Finally, defendant did not leave the decedent to die where he believed that the latter was not fatally injured and turned him on his stomach to prevent him from choking.

People v. Thomas, 139 Ill.App.3d 163, 486 N.E.2d 1362 (1st Dist. 1985) Extended-term sentence unwarranted because murder was not so cold-blooded as to constitute exceptionally brutal or heinous behavior indicative of wanton cruelty where murder occurred during an attempted armed robbery and defendants were not so calm and cold-blooded. Sentences reduced. See also, **People v. Kane**, 140 Ill.App.3d 928, 489 N.E.2d 500 (1st Dist. 1986).

People v. Green, 177 Ill.App.3d 492, 532 N.E.2d 442 (1st Dist. 1988) Judge sentenced defendant to extended term after finding defendant's conduct was brutal and heinous because of defendant's use of a knife, the victim's young age, defendant's relationship to victim (his daughter), and specific acts that were by their very nature heinous behavior indicative of wanton cruelty. Extended sentence improper, for victim was not cut by the knife or physically abused (she was slapped once), and the other factors on which the judge relied were elements of the offenses of which defendant was convicted. In so concluding, the court noted defendant's remorse, lack of prior convictions, and his history of mental illness.

People v. Warfel, 67 Ill.App.3d 620, 385 N.E.2d 175 (4th Dist. 1979) Trial court properly imposed an extended term after finding the existence of "wanton cruelty." Regardless of the propriety of the trial court's definition of wanton cruelty (as "reckless indifference or disregard of others' personal integrity"), the trial court did not abuse its discretion in finding that defendant's conduct (assaulting without provocation, grabbing by the throat, throwing to sidewalk, and beating against the sidewalk) constituted "wanton cruelty."

People v. Fyke, 190 Ill.App.3d 713, 546 N.E.2d 1101 (5th Dist. 1989) An extended-term sentence for murder was upheld where the victim was lured to the scene and killed to protect defendant's drug business. "The dispassionate and calculated manner in which [the victim's] murder was planned and carried out, and the motive behind it, demonstrates a lack of regard for human life which is so fundamentally evil that it cannot be said to be anything but brutal, heinous, and indicative of wanton cruelty."

People v. Taylor, 278 Ill.App.3d 696, 663 N.E.2d 1126 (2d Dist. 1996) Defendant pulled a knife during a fight in a bar, and defendant and the victim brought the fight outside. The men eventually made up and gave each other a hug. But, as the men "broke apart," defendant slashed the victim's neck and throat with a second knife, which he had been holding behind his leg. While an offense is not exceptionally brutal and heinous merely because a knife is used, the crime was exceptionally brutal and heinous here because defendant lulled the victim into a false sense of security by a conciliatory embrace, all the while planning to inflict a potentially mortal wound with a utility knife which defendant concealed during the embrace. This "places the wounding in the category of shockingly evil, flagrantly criminal, or cruel and cold-blooded conduct which may be considered to be exceptionally brutal or heinous behavior indicative of wanton cruelty."

People v. Clemons, 179 Ill.App.3d 667, 534 N.E.2d 676 (2d Dist. 1989) Trial court properly found that the offense was brutal and heinous where defendant beat the victim with a hammer.

People v. Rodriguez, 275 Ill.App.3d 274, 655 N.E.2d 1022 (1st Dist. 1995) Murder was not exceptionally brutal or heinous where defendant struck a three-year-old when she defecated in her pants and would not stop crying. The fatal blows were "swift and her death relatively quick," and there was no evidence of torture or premeditation. Although there was evidence that defendant had previously abused the child, the prior acts of abuse could not be used to impose an extended term where those acts neither caused death nor were inflicted contemporaneously with the acts that caused death. But, the trial judge failed to consider whether an extended term should be imposed because the victim was under 12 years of age, so the cause was remanded for the trial judge to consider whether to reimpose an extended term sentence under that factor.

People v. Killen, 106 Ill.App.3d 65, 435 N.E.2d 533 (4th Dist. 1982) Trial court erred in imposing the maximum non-extended term sentence based on its finding that the crime was accompanied by exceptionally heinous behavior indicative of wanton cruelty. The trial court may consider the "exceptionally heinous" factor as a reason to impose an extended term, not a non-extended term. The offense in this case was not accompanied by heinous behavior indicative of wanton cruelty. Although the crime is "repugnant to society," the victim "was not battered and apparently received no physical injury." Sentence vacated and remanded for resentencing.

People v. Douglas, 362 Ill.App.3d 65, 839 N.E.2d 1039 (1st Dist. 2005) Defense counsel was not ineffective for failing to request a jury instruction defining the terms, "brutal," "heinous," and "wanton cruelty." The trial court was not required to *sua sponte* define these terms. The trial court does not have the duty to submit a jury instruction over defense counsel's specific objection, and the trial court appropriately balanced defense counsel's objection and the need for instructions on the legal principles of the case by concluding that definitions of the terms would be given if the jury asked for them during deliberations.

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§45-10(c)(4)
Other Bases for Extended-Term Sentences

People v. Anderson, 142 Ill.App.3d 240, 488 N.E.2d 557 (1st Dist. 1985) Section authorizing an extended-term sentence for crime where the victim is over 60 years of age or under 12 years of age applies to residential burglary.

People v. Almore, 241 Ill.2d 387, 948 N.E.2d 574 (2011)

Under 720 ILCS 5/9-3(d), involuntary manslaughter is a Class 3 felony for which a term of two to five years imprisonment may be ordered. Where the victim was a "family or household member," however, the offense is a Class 2 felony with an extended term of not less than three or more than 14 years. "Persons who share or formerly shared a common dwelling" are included within the definition of "family or household members." (725 ILCS 5/112A-3(3)).

1. The court concluded that by authorizing an extended term based on the decedent's status as a "family or household member," the legislature intended to capture all types of past and present "familial" relationships as well as various forms of cohabitation and shared living arrangements. Whether persons are "family or household members" by virtue of having "shared a common dwelling" is decided on specific facts of each case. The factors to be considered include: (1) the amount of time the parties resided together, (2) the nature of the living arrangements, (3) whether the parties had other living accommodations, (4) whether the parties kept personal items at the shared residence, and (5) whether the parties shared in the privileges and duties of a common residence such as contributing to household expenses and helping with maintenance. Persons who have no real connection other than occasionally sleeping under the same roof, such as occupying the same homeless shelter, do not share a common dwelling. (See **People v. Young**, 362 Ill.App.3d 843, 840 N.E.2d 825 (2d Dist. 2005)).

2. The court concluded that on this record, the two-year-old child of the defendant's girlfriend "shared a common dwelling" with the defendant. The mother and the defendant had dated for 18 months, and on several occasions lived together at her family's residence or at the defendant's temporary residence. Whenever the defendant and the mother stayed together, the child stayed as well. Furthermore, the defendant provided child care when the mother went to work.

The court also noted that for five days preceding the child's death, the child and his mother stayed with the defendant at the latter's temporary residence. During those five days, the child and his mother slept in the same room with the defendant. In addition, the child's clothes, food, and medicine were kept at defendant's residence.

Under these circumstances, the evidence showed that the child and defendant shared a common dwelling, although that dwelling was sometimes the mother's family home and sometimes the defendant's temporary residence. Defendant's 12-year extended term for involuntary manslaughter was reinstated.

People v. Gipson, 2015 IL App (1st) 122451 (No. 1-12-2451, 5/27/15)

1. Defendant, who was 15 years old at the time of the offense, was automatically transferred to adult court and convicted of two counts of attempt first-degree murder. The facts at trial showed that defendant approached the driver's side of a car where two victims were sitting and fired shots at one of the victims, hitting him once. At the same time, the co-defendant approached the passenger side of the car and fired shots at the other victim, hitting him several times.

The trial court found that the 20-year enhancement applied to both of defendant's convictions under 720 ILCS 5/8-4(c)(1)(C), requiring that 20 years be added to the sentence where the defendant "personally discharged a firearm" during the commission of the offense. The court imposed the minimum sentence of 26 years (including the 20-year firearm enhancement) for both convictions, to be served consecutively for a total of 52 years.

2. Defendant argued on appeal that the firearm add-on only applied to one of his convictions since his personal discharge of a firearm injured only one victim and he was merely accountable for the other attempt murder. The Appellate Court rejected this argument. Although the add-on only applies when an accountable defendant personally discharges a firearm, it does not require that he personally discharge his firearm at the victim or injure the victim. The word "personally" only modifies the clause "discharged a firearm." The trial court thus properly imposed two firearm enchantments in this case.

3. Defendant also argued that the automatic transfer statute combined with the sentencing provisions violated the Eighth Amendment as applied to him. The Court rejected this argument, holding that defendant's

52-year sentence was not a *de facto* sentence of life imprisonment. Taking into account available sentencing credit, the Court determined that defendant could be released from prison at age 60, while the average life expectancy for someone in his position was 67.8 years. Defendant thus could, and likely would, spend the last several years of his life outside of prison. The Court found that, strictly speaking, defendant's sentence did not constitute life imprisonment and thus did not violate the Eighth Amendment.

4. The Court agreed, however, that the statutory scheme was unconstitutional as applied to defendant under the proportionate penalties clause of the Illinois Constitution. The Illinois Constitution states that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. To show a violation of the clause, a defendant must show that the penalty is degrading, cruel "or so wholly disproportionate to the offense that it shocks the moral sense of the community." The clause provides a limitation on punishment beyond the eighth amendment.

The Court found that defendant's penalty shocked the moral sense of the community. Although this was a serious offense, and one of the victims suffered severe injuries, there were numerous factors that diminished "the justification for a 52-year prison term." The incident was not planned long before it occurred, but was instead the result of rash decision making. Defendant was a mentally ill juvenile who was prone to impulsive behavior, and wanted to impress his older co-defendant. And defendant did not personally inflict serious harm, even though that was primarily the result of bad aim.

The court found it meaningful that defendant had been found unfit to stand trial and thus was clearly not "at his peak mental efficiency" when the offense occurred. Defendant's inability to process information may have affected his judgment, which diminished his culpability and the need for retribution. At the same time, defendant's mental health had improved in the recent past, showing he may yet be rehabilitated. And the trial judge clearly would have imposed a shorter sentence if that had been possible. The Court found it "unsettling" that the trial court's discretion in sentencing a juvenile was frustrated by the mandatory minimum in the case. "Under these circumstances, defendant's sentence shocks the conscience and cannot pass constitutional muster."

As a remedy, the court ordered the trial court on remand to impose any appropriate Class X sentence without the mandatory firearm enhancement.

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

People v. Pace, 2015 IL App (1st) 110415 (No. 1-11-0415, modified on denial of rehearing 10/16/15)

1. A trial court violates a defendant's privilege against self-incrimination during sentencing where the court believes defendant's silence shows that he lacked remorse and uses defendant's silence as an aggravating factor in imposing sentence.

Here defendant declined to exercise his right of allocution at sentencing. In imposing sentence, the trial court stated that it would consider "the defendant's right of allocution, which he did not avail himself of." The Appellate Court held that based on this statement, the "record affirmatively shows that defendant was punished for choosing to remain silent during the sentencing hearing." Accordingly, the court vacated defendant's sentence and remanded for a new sentencing hearing.

2. The trial court also committed error during sentencing by considering its personal beliefs about gang violence and evidence that was outside the record. For example, the court stated that it would "bring to bear" its "personal experience" about the effects of gang violence in imposing sentence. The judge also discussed walking his daughter to school and hypothesized about the feelings of other parents who take their children to school, and then stated that he knew the parents of the victim in this case "kissed him goodbye and told him they loved him." The judge then aligned himself with the victims' families, stating that there were "way, way more of us" than there were guns, gang members, or "young punks."

The court also referred to evidence outside the record. The court stated as a fact that only "one or two percent" of the population causes all the problems, even though there was no evidence supporting this proposition. The court also stated without support in the record that "children from Deerfield" face

challenges similar to defendant, but have not committed similar crimes.

The trial court's extensive remarks along these lines denied defendant a fair sentencing hearing. The Appellate Court vacated defendant's sentence and remanded for a new sentencing hearing before a different judge.

3. Based on his convictions for first degree murder in which he personally discharged a firearm proximately causing death and two counts of aggravated battery with a firearm, defendant (who was 16 years old at the time of the offense) was subject to both the mandatory 25-to-life firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(iii)) and to mandatory consecutive sentences (730 ILCS 5/5-8-4), making his sentencing range 57-years-to-life. Defendant received a sentence of 100 years imprisonment.

Defendant argued that the mandatory firearm enhancement and mandatory consecutive sentences violated the Eighth Amendment of the federal Constitution and the Illinois Constitution's proportionate penalties' clause. The Appellate Court rejected both arguments.

a. The court first rejected defendant's argument that the sentencing statutes violated the Eighth Amendment because his minimum sentence of 57 years was an improper *de facto* life sentence under **Miller v. Alabama**, 132 S. Ct. 2455. Under the current law in Illinois, a 57-year aggregate sentence is not the equivalent of a life sentence.

The court also rejected defendant's argument that the statutes violated **Miller** by encroaching on the trial court's discretion to impose any sentence it wants. **Miller** merely held that the state cannot impose the adult mandatory maximum penalty on a juvenile without first allowing the court to consider the defendant's youth and other attendant characteristics. Here, the trial court was able to consider defendant's age and culpability before imposing a sentence between 57 years and life imprisonment.

b. The court also rejected defendant's argument that the statutes violated the proportionate penalties clause of the Illinois Constitution. Ill. Const. 1970, art. I §11. The court first determined that the proportionate penalties clause is not coextensive with the Eighth Amendment. Although the Illinois Supreme Court has issued conflicting decisions on this point, the Appellate Court concluded that the correct reading of those cases shows that the proportionate penalties clause, which focuses on rehabilitation, goes beyond the requirements of the Eight Amendment.

Nonetheless, the court held that the statutes did not violate the proportionate penalties clause. A penalty violates this clause where it is "cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community." The sentencing statutes at issue here, while subjecting defendants to substantial minimum sentences and restricting the scope of a trial court's discretion in imposing sentence, did not shock the moral sense of the community. The legislature's power necessarily includes the authority to establish minimum sentences even if they do restrict sentencing discretion. Moreover, trial courts retain significant sentencing discretion under the statutes.

(Defendant was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

Defendant was convicted, on a guilty plea, of unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing cap of 25 years' imprisonment.

The offense was a Class 2 felony. However, several sentencing statutes arguably applied. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a second or subsequent conviction under the Controlled Substances Act carries a maximum sentence of twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

1. The Appellate Court found that the above sentencing statutes conflicted with 730 ILCS 5/5-8-2,

which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1).

In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

2. The court concluded that where statutes conflict, the most recently enacted statute controls. Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. In other words, because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

Because the trial court erroneously admonished defendant that he was subject to a maximum sentence of 60 years, the order denying defendant's motion to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

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§45-10(d)
Class X Sentencing

People v. Levin, et al., 157 Ill.2d 138, 623 N.E.2d 317 (1993) Double jeopardy does not apply to resentencing under the Class X sentencing provision.

People v. Thomas, 171 Ill.2d 207, 664 N.E.2d 76 (1996) The recidivist statute applies to second degree murder.

People v. Jameson, 162 Ill.2d 282, 642 N.E.2d 1207 (1994) A defendant sentenced as a Class X felon has not been *convicted* of a Class X offense.

People v. Baumann, 314 Ill.App.3d 947, 733 N.E.2d 417 (2d Dist. 2000) In determining whether a defendant is eligible for a Class X or extended-term sentence, unclassified offenses are classified according to the sentences they carry. Accord, **People v. Gonzales**, 314 Ill.App.3d 993, 734 N.E.2d 77 (2d Dist. 2000).

Morrow v. Dixon, 108 Ill.2d 223, 483 N.E.2d 876 (1985) Trial judge was aware of defendant's prior convictions, as the State offered certified copies of them to impeach defendant at his bench trial and the priors were listed in the presentence report, and was, therefore, required to sentence defendant as a Class X offender.

People v. Williams, 149 Ill.2d 467, 599 N.E.2d 913 (1992) The State does not bear the burden of proving the order of the prior convictions for Class X sentencing (where a defendant has two prior Class 2 or greater class felonies in Illinois, with the first committed after the law's effective date, the second committed after conviction on the first, and the third committed after conviction on the second). The statute does not specifically require the State to prove the prior convictions, and prior criminal records are normally proven by presentence report rather than by introducing evidence. A defendant has the obligation to bring inaccuracies in the presentence report to the trial court's attention; by failing to inform the trial judges that the presentence reports did not include the order of the convictions, defendants waived any right to raise the issue on appeal.

People v. Jackson, 223 Ill.App.3d 331, 584 N.E.2d 836 (4th Dist. 1991) Defendant's prior convictions did not occur in the chronological order required for Class X sentencing where his first conviction was reversed on appeal and he was not reconvicted until after he had committed the second felony.

People v. Baaree, 315 Ill.App.3d 1049, 735 N.E.2d 720 (1st Dist. 2000) A defendant is "convicted" for purposes of mandatory Class X sentencing when he is adjudicated guilty. Defendant, who turned 21 between his trial and sentencing was only 20 when "convicted"; thus, Class X sentencing was not mandatory.

People v. Mendoza, 342 Ill.App.3d 195, 795 N.E.2d 316 (2d Dist. 2003) Statute mandating Class X sentencing for a Class 1 or Class 2 felony where defendant is "over the age of 21 years" and has been previously convicted of separate Class 2 or greater felonies, applies to a defendant who has passed his 21st birthday but not yet turned 22.

People v. Keene, 296 Ill.App.3d 183, 693 N.E.2d 1273 (4th Dist. 1998) Out-of-state convictions may not be used to satisfy the prior conviction requirements of 730 ILCS 5/5-5-3(c)(8) even if they are the "equivalent" of Class 2 or higher felonies in Illinois.

Cumulative Digest Case Summaries **§45-10(d)**

People v. Smith, 2016 IL 119659 (No. 119659, 12/30/16)

730 ILCS 5/5-4.5-95(b) provides that in specified circumstances, a defendant "over the age of 21 years" who is convicted of a Class 1 or Class 2 felony after having twice been convicted of an offense which contains the same elements as a Class 1 or Class 2 felony is sentenced as a Class X offender. Noting a conflict in Appellate Court precedent, the Supreme Court held that eligibility for Class X sentencing is determined by the age of the defendant at the time of conviction. The court rejected Appellate Court precedent holding that the defendant must be over the age of 21 at either the time of the offense or the time of the charge in order to be eligible for Class X sentencing.

The court concluded that the plain language of the statue was unambiguous and holds that a defendant is eligible for Class X sentencing if he is 21 at the time of conviction. Because this defendant was 21 both when he was found guilty and when he was sentenced, the court found that it was not required to decide whether a defendant is "convicted" at the time he is found guilty or at the time of sentencing.

People v. Brown, 2015 IL App (1st) 140508 (No. 1-14-0508, 12/23/15)

Under 730 ILCS 5/5-4.5-95(b), "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony," and has two prior convictions for a Class 2 or greater Class felony, he "shall be sentenced as a Class X offender."

Defendant committed a Class 1 felony when he was 20 years old. He was still 20 years old when the State charged him with the offense. He turned 21 the next day and was 21 when he was convicted of the offense. He was sentenced as a Class X offender based on his two prior Class 2 felony convictions.

The Appellate Court held that defendant was not eligible to be sentenced as a Class X offender because he had not turned 21 when the State charged the offense.

The court noted that there was a split in authority about what constitutes the correct triggering event, with two cases (**People v. Stokes**, 393 Ill. App 3d 335 (1st Dist., 2009) and **People v. Williams**, 358 Ill. App 3d 363 (1st Dist., 2005)) holding it was the date defendant was convicted and another (**People v. Douglas**, 2014 IL App (4th) 120617) holding it was the date defendant was charged. The court "found persuasive" the reasoning of **Douglas**, which applied the "last antecedent rule" of statutory construction. Under that rule, qualifying phrases apply to the immediately preceding words, and hence the phrase "over the age of 21" applies to the word defendant. And since a person becomes a defendant only when charged with an offense, the triggering event is being charged, not committing the offense.

Nonetheless, the court ultimately held that the statute was ambiguous and thus employed the rule of lenity to interpret the statute in defendant's favor. The court remanded the case for resentencing as a Class 1 felony.

The dissent disagreed with the reasoning of **Douglas**, since the word "defendant" merely defines a person's status, not the time an event occurred. Instead, the dissent believed that the statute unambiguously made the date of conviction the triggering event.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Douglas, 2014 IL App (4th) 120617 (No. 4-12-0617, 7/2/14)

1. The age requirements of the Class X sentencing statute,730 ILCS 5/5-5-3(c)(8), state that "when a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony," he is eligible for Class X sentencing. Section 5-1-7 of the Code of Corrections defines a defendant as "a person charged with an offense." 730 ILCS 5/5-1-7. The Class X sentencing statute thus applies to a person who is over 21 when he is charged with an offense. The key point in time is therefore not the age at the time of conviction, but the age at the time of being charged. Since defendant was under 21 when the State charged him, he was not eligible for Class X sentencing.

2. Defendant agreed to plead guilty knowing that he would be sentenced as a Class X offender in exchange for a sentencing cap of 10 years imprisonment. Since the court had no authority to sentence defendant as a Class X offender, that portion of the plea deal could not stand. But the appropriate remedy was not to vacate the plea agreement. Instead, since defendant was eligible for an extended term on his Class 2 offense (with a sentencing range of 3 -14 years), the interests of both parties could be served by remanding the matter to resentence defendant for his Class 2 offense, with a permissible sentence of between three and 10 years.

(Defendant was represented by Deputy Defender Jackie Bullard, Springfield.)

People v. Holmes, 405 Ill.App.3d 179, 937 N.E.2d 762 (3d Dist. 2010)

1. 730 ILCS 5/5-5-3(c)(8) mandates Class X sentencing for a person who is over the age of 21, convicted of a Class 1 or Class 2 felony, and twice "convicted" of a Class 2 or greater felony, provided that: (1) the convictions resulted from charges that were separately brought and tried and which arose from different series of acts, (2) the second felony was committed after "conviction" on the first, and (3) the third felony was committed after "conviction" on the second.

A "conviction" occurs only when a sentence is imposed. (730 ILCS 5/5-1-5; 5/5-1-12). Thus, a defendant who at the time of the third offense had pleaded guilty on the second charge, but who was awaiting sentencing, had not yet been "convicted" of the second charge. Thus, §5-5-3(c)(8) did not authorize Class X sentencing on the third offense.

2. A sentence that does not conform to a statutory requirement is void, and can be attacked at any time. A judgment is void, as opposed to voidable, if the court that entered it lacked jurisdiction. The jurisdictional failure may be due to the absence of personal or subject matter jurisdiction, or to a lack of authority to render the particular judgment in question.

The trial court lacked authority to order Class X sentencing under §5-5-3(c)(8) where the defendant was awaiting sentencing on his second offense when he committed the act which constituted the third offense. Therefore, the Class X sentence was void and could be challenged on appeal although defendant had not raised the issue in the trial court.

Defendant's Class X sentence for unlawful delivery of a controlled substance was vacated, and the cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. McKinney, 399 Ill.App.3d 77, 927 N.E.2d 116 (2d Dist. 2010)

Where the defendant stands convicted of a Class 2 felony but is sentenced as a Class X offender due

to his criminal history, the mandatory supervised release term applicable to a Class X felony must be imposed. The court rejected the argument that only the Class 2 MSR term is authorized.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Perkins, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2009) (No. 1-07-2020, 7/22/09)

First offender probation under the Controlled Substances Act (720 ILCS 570/410) constitutes a "conviction" for purposes of the Class X offender statute (730 ILCS 5/5-5-3(c)(8)). The court stressed that first offender probation can be imposed only as a sentence after a conviction, although the conviction may subsequently be vacated if the defendant satisfactorily completes the probation and is discharged.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

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§45-10(e)
Other Enhanced Penalties

Busic v. U.S., 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980) Defendants were convicted of assaulting a federal officer using a deadly weapon, in violation of 18 USC 111, which provides for an enhanced penalty when the perpetrator uses a deadly weapon. Defendants were also convicted of using or carrying a firearm in the commission of a felony (the same armed assault) in violation of 18 USC 924(c), which also authorizes an enhanced penalty. Defendants received sentences under both §111 and §924(c). The Court held that §924(c) may not be applied to a defendant who uses a firearm in the course of a felony that is proscribed by a statute that itself authorizes enhancement if a dangerous weapon is used. Thus, the sentence in such a case may only be enhanced under the enhancement provision in the statute defining the felony (§111), and not under §924(c).

Smith v. U.S., 507 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) Offering to trade an automatic weapon and silencer for cocaine qualifies as "us[ing]" the weapon "during and in relation to" a drug crime, so as to mandate a 30-year-sentence under 18 USC §924(c)(1). Congress did not intend to limit the mandatory sentence to situations in which a firearm is used as a weapon, and use of a weapon occurs "in relation to" an offense when it has some "purpose or effect" with respect to that offense. See also, **Bailey v. U.S.**, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) (the term "used" was intended to cover only the "active employment" of a firearm, and not mere storage of a weapon in the general area of a drug offense; neither defendant "used" a weapon within the meaning of §924(c)(1) where one defendant had a loaded gun in the trunk of his car and drugs were found in the passenger compartment of his car and the other defendant had an unloaded gun in a locked trunk in her bedroom and she sold drugs out of her bedroom).

Burgess v. United States, 128 U.S. 1572, 128 S.Ct. 1572, 170 L.Ed.2d 478 (2008) The Federal Controlled Substances Act doubles the mandatory minimum sentence for certain drug offenses if defendant has been previously convicted of a "felony drug offense." A State drug conviction constitutes a "felony drug offense" if it is punishable by a prison sentence in excess of one year, even if the offense was classified as a misdemeanor by state law.

Castillo v. U.S., 530 U.S. 120, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000) Under 18 USC §924(c)(1), which authorizes an additional prison term of five years where the perpetrator of a crime of violence "uses or carries a firearm" and an additional term of 30 years if the firearm is a machine gun, use of a weapon is an element

of a separate, aggravated crime rather than a sentencing factor that may be determined by the trial judge. See also, **Jones v. U.S.**, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (the legislative intent of the federal carjacking statute was to make the enhanced sentencing requirements elements of the offense, rather than mere sentencing factors; thus, an enhanced sentence can be imposed only where serious bodily injury or death is alleged in the indictment, proven beyond a reasonable doubt, and submitted to the trier of fact at trial).

Begay v. United States, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) New Mexico felony offense of DUI is not a "violent felony" under the section of the Armed Career Criminal Act imposing special mandatory 15-year prison term on felons who unlawfully possess a firearm and who have three or more convictions for violent felonies. Whether a crime is a "violent felony" is determined by the definition of the crime, not the manner in which an individual might have committed it. As defined by New Mexico law, DUI was a felony because of defendant's prior record, not because the offense involved the use of physical force against another person. Even if DUI could be presumed to involve conduct which presents a serious risk of physical injury, it is "simply too unlike" the other crimes listed in the statute to be included in the definition of a "violent felony." The inclusion of specified crimes within the Act indicates that the statute was intended to cover only similar crimes, and not every crime which presents a serious potential risk of physical injury.

People v. Rodriguez, 229 Ill.2d 285, 891 N.E.2d 854 (2008) The mandatory 15-year statutory enhancement to a sentence for first degree murder committed while armed with a firearm applies to a defendant who is convicted on an accountability theory. See also, **People v. Dixon**, 359 Ill.App.3d 938, 835 N.E.2d 925 (4th Dist. 2005) (statute providing that a person who "personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person" must receive a 25-year to life enhancement in addition to the term of sentence imposed for the murder, requires such an enhancement when defendant discharges a firearm and causes harm to a person *other than himself*).

People v. Donoho, 204 Ill.2d 159, 788 N.E.2d 707 (2003) The trial court's enhancement of defendant's sentence for criminal sexual assault (under 720 ILCS 5/12-13(b)(4)) from a Class 1 felony to a Class X felony, based on defendant's prior conviction of indecent liberties with a child, was improper. Section 12-13(b)(4) provides that a second or subsequent conviction of certain criminal sexual assaults, or of convictions "under any similar statute of this State or any other state for any offense involving criminal sexual assault that is substantially equivalent to or more serious than the sexual assault prohibited" under certain subsections of the Illinois statute, constitutes a Class X felony. Under this statute, criminal sexual assault may be enhanced to a Class X felony for sentencing only if defendant's prior conviction is for criminal sexual assault, aggravated criminal sexual assault, or rape.

People ex rel. Daley v. Strayhorn, 119 Ill.2d 331, 518 N.E.2d 1047 (1988) A natural life sentence is mandatory for a defendant convicted of multiple murders. See also, **People v. Taylor**, 102 Ill.2d 201, 464 N.E.2d 1059 (1984) (statute requiring a sentence of natural life upon a conviction for murdering more than one victim does not violate Art. I, §11 of the Illinois Constitution).

People v. Magnus, 262 Ill.App.3d 362, 633 N.E.2d 869 (1st Dist. 1994) Statute requiring natural life sentence for first degree murder where defendant "is found guilty of murdering more than one victim" requires a natural life sentence only where defendant is found guilty of multiple *first* degree murders, and not where he is convicted of two murders of differing degrees. Because defendant here had been convicted of one first degree murder and one second degree murder, a natural life sentence was not mandatory.

People v. West, 323 Ill.App.3d 858, 753 N.E.2d 510 (1st Dist. 2001) Statute mandating a natural life sentence for first degree murder where defendant has been previously convicted of first degree murder under

a state or federal law requires a natural life sentence where defendant pleaded guilty to "murder" before the name of that offense was changed to "first degree murder."

People v. Dicostanzo, 304 Ill.App.3d 646, 710 N.E.2d 173 (1st Dist. 1999) Statute authorizing enhancement of retail theft under $150 to a Class 4 felony when defendant has a prior conviction of any type of theft, robbery, armed robbery, burglary, residential burglary, possession of burglary tools, or home invasion does not include attempt burglary. Alternatively, the court found that inchoate offenses (including attempt) are not "types" of completed offenses, because "inchoate forms of offenses lack fulfillment of intent or completion."

People v. Jones, 306 Ill.App.3d 793, 715 N.E.2d 256 (2d Dist. 1999) A defendant is subject to a Class 4 felony sentence for domestic battery where he has a previous "violation" of the domestic battery statute, whether or not the prior violation resulted in a criminal conviction.

People v. Phillips, 56 Ill.App.3d 689, 371 N.E.2d 1214 (5th Dist. 1978) The trial court erred by imposing an enhanced penalty (under Ch. 56½, §1408) where defendant was convicted twice on the same day for drug offenses. An enhanced penalty may only be imposed when: (1) defendant is convicted of a specified drug offense, (2) defendant then commits another drug offense which leads to his second or subsequent conviction, and (3) the enhanced penalty provision is specifically invoked by the trial court when imposing sentence.

People v. Gaines, 235 Ill.App.3d 239, 601 N.E.2d 949 (1st Dist. 1992) Natural life sentence based on aggravating factor that defendant was the triggerman and the offense occurred during an armed robbery vacated where the State failed to prove that defendant was the triggerman. The only witness to so identify defendant had a brief opportunity to observe the offense, was under the influence of marijuana and alcohol, gave incredible testimony concerning his location and actions, and had never met defendant or his co-defendant. Further, there was substantial evidence that co-defendant fired the fatal shots.

People v. Gapski, 283 Ill.App.3d 937, 670 N.E.2d 1116 (2d Dist. 1996) Judge erred by imposing Class X sentence under 720 ILCS 5/12-13(b) based on a Wisconsin conviction for second degree sexual assault. The evidence concerning the Wisconsin offense showed that had the offense been charged in Illinois, it would have been aggravated criminal sexual abuse (a Class 2 felony) rather than criminal sexual assault. Because the Wisconsin defense was not "substantially equivalent to or more serious" than the instant offense, defendant was not eligible for a Class X sentence.

People v. Austin, 267 Ill.App.3d 469, 641 N.E.2d 970 (1st Dist. 1994) Trial judge erroneously sentenced defendant to natural life under Ch. 38, §1005-8(1)(a)(1)(b), which permits a natural life sentence where death penalty aggravating factors are present but a death sentence was not imposed. The judge found that Ch. 38, §9-1(b), which makes a defendant eligible for death where he was been convicted of murdering "two or more individuals under subsection (a) of this Section or any law . . . of any state which is substantially similar to subsection (a) of this Section," applied because defendant had been convicted of second degree murder in Michigan in 1977. But, because Michigan does not recognize the defense of imperfect self-defense, a second degree murder conviction from Michigan is not "substantially similar" to first degree murder in Illinois. Therefore, the natural life sentence was improper.

People v. Carmichael, 343 Ill.App.3d 855, 799 N.E.2d 401 (1st Dist. 2003) Defendant's sentence for unlawful use of a weapon by a felon could not be enhanced due to a prior armed violence conviction because armed violence is a "forcible felony" only where it is committed by the use or threat of violence and the State

failed to present any evidence of the circumstances of the previous arrest. Resentencing was required because it was unclear from the record whether the sentence was influenced by the trial court's mistaken belief that a Class 2 sentencing range applied.

Cumulative Digest Case Summaries **§45-10(e)**

Montgomery v. Louisiana, ___ U. S. ___, 136 S.Ct. 718, ___ L.Ed.2d ___ (2016) (No. 14-280, 1/25/16)

Under **Miller v. Alabama**, 567 U. S. ___, 132 S.Ct. 2455 (2012), a juvenile convicted of homicide cannot be sentenced to life imprisonment without the possibility of parole unless the trial court first considers the minor's special circumstances in light of the principles and purposes of juvenile sentencing. **Miller** did not bar a life sentence without parole in all cases, but limited such sentences to the rare juvenile offenders whose crimes reflect "irreparable corruption."

The court concluded that **Miller** announced a substantive rule because it barred the imposition of a mandatory life sentence without parole upon juvenile offenders "whose crimes reflect the transient immaturity of youth." Thus, **Miller** rendered life without parole an unconstitutional penalty for a class of defendants because of their status.

Because **Miller** announced a substantive rule, it must be applied retroactively in state collateral review proceedings. The court noted, however, that giving **Miller** retroactive effect does not require States to relitigate sentences or convictions in every case in which a juvenile offender received life without parole. Instead, a **Miller** violation may be remedied by permitting juvenile homicide offenders to be considered for parole.

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

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

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

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

3. The court also rejected the argument that defendant was subjected to an improper double enhancement where a single prior felony conviction was used both to prove an element of unlawful use of a weapon by a felon and to elevate the severity of the offense from Class 3 to Class 2. Because the prior conviction was an element of the offense and defendant received the only sentence authorized by the Illinois law, double enhancement did not occur.

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

People v. Smith, 2015 IL 116572 (No. 116572, 2/5/15)

The court concluded that **People v. White**, 2011 IL 109616, which held that the trial court must impose a mandatory sentencing enhancement which is supported by the factual basis for a guilty plea even

if the plea agreement provides that the enhancement will not be sought, imposed a "new" rule that does not apply retroactively to convictions which were already final when **White** was decided.

(Defendant was represented by Assistant Defender Mario Kladis, Ottawa.)

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

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

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

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

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

People v. Anderson, 402 Ill.App.3d 186, 931 N.E.2d 773 (3d Dist. 2010)

1. 730 ILCS 5/5-8-1(d)(5) requires a four-year-term of mandatory supervised release where the defendant is convicted of a "second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse" and the victim was under the age of 18. The Appellate Court held that a defendant who pleads guilty in a single proceeding to separate counts of aggravated criminal sexual abuse stemming from a single incident has not been convicted of a "second or subsequent offense," and is therefore not subject to an enhanced MSR term.

Although §5-8-1(d)(5) concerns the enhancement of an MSR term, the court applied principles which govern the enhancement of other sentences after the commission of subsequent crimes. Under these principles, an enhanced MSR term is available under § 5-8-1(d)(5) only if the second or subsequent offense occurs after the first conviction has been entered.

2. 730 ILCS 5/5-9-1.7(b)(1), which authorizes a $200 fine for a person convicted of sexual assault or attempted sexual assault, gives the trial court discretion to impose multiple $200 fines in a multi-count aggravated criminal sexual abuse prosecution. Thus, the trial court was not limited to a single $200 fine where the defendant pleaded guilty to multiple counts arising from a single occurrence.

3. Because the imposition of fines not authorized by statute challenges the integrity of the judicial process, the court found as a matter of plain error that the trial judge erred in calculating fines under the Violent Crimes Victims Assistance Act (725 ILCS 240/10). Applying **People v. Jamison**, 229 Ill.2d 184, 890 N.E.2d 929 (2008), the court found that the maximum additional fine for each $200 fine ordered under 730 ILCS 5/5-9-1.7(b)(1) was $20, rather than the $40 ordered by the trial court.

4. The trial court's order imposing an enhanced four-year mandatory supervised release term under 730 ILCS 5/5-8-1(d)(5), and imposing fines, was "voidable" rather than "void." A judgment is void only if entered by a court which lacks jurisdiction. Defendant challenged only the specific term of MSR and the amount of the fines, and did not challenge the authority of the court to impose such sentences. Because the sentencing order was clearly within the court's jurisdiction, it was merely "voidable."

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Butler, 2013 IL App (1st) 120923 (No. 1-12-0923, 6/28/13)

"If during the commission of the offense [of first-degree murder], the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(3).

A statute is unconstitutionally vague if the terms as so ill defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts. In the context of a vagueness challenge, due process is satisfied if: (1) the statute's prohibitions are sufficiently definite, when measured by common understanding and practices, to give a person of ordinary intelligence fair warning as to what conduct is prohibited; and (2) the statute provides sufficiently definite standards for law enforcement officers and triers of fact that its application does not depend merely on their private conceptions.

The firearm enhancement for first-degree murder provides sufficiently definite standards for its application by triers of fact to withstand a vagueness challenge, even though confusion could be avoided if the legislature provided more explicit guidance. While the enhancement provides for a wide range of sentences, the scope of the sentencing range is clear and definite. The court has no discretion whether to impose the enhancement. The standards for imposing the enhancement are clear. Depending on the injury caused by the firearm, the trial court exercises its discretion to impose a sentence in the 25-years-to-life range, allowing the trial court to engage in fact-based determinations based on the unique circumstances of each case.

The Appellate Court rejected the argument that because all defendants convicted of first-degree murder cause death, the injury standards of great bodily harm, permanent disability, permanent disfigurement, or death provide the court with no guidance. Situations could exist where the firearm would not be the proximate cause of death.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

The court rejected defendant's argument that on appeal from denial of post-conviction relief, he could argue for the first time that a mandatory life sentence for a person who was a minor at the time of the offense violates **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In **Miller**, the Supreme Court held that the Eighth Amendment is violated by a mandatory life sentence without parole for persons who were under the age of 18 at the time of their crimes. **Miller** did not prohibit sentencing juveniles to life imprisonment without parole, but held that the mandatory imposition of such a sentence violates the Constitution.

The court noted that under **People v. Williams**, 2012 IL App (1st) 111145, a sentence which violates **Miller** is not void *ab initio.* In addition, because defendant's petition did not satisfy the cause and prejudice test for successive post-conviction petitions, the court could have considered the issue only if the mandatory life sentence was void.

The court also noted that a sentence is void only if the court which rendered it lacked jurisdiction to do so. Unless a statute is unconstitutional on its face, the fact that the sentence which it authorizes is applied improperly does not mean that the trial court lacked jurisdiction. In reaching its holding, the court rejected the reasoning of **People v. Luciano**, 2013 IL App (2d) 110792, which held that a sentence which violates **Miller** is void.

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

People v. Edgecombe, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-2690, 6/30/11)

"[I]f an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that otherwise could be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant though a written notification prior to trial, submitted to a trier of fact

as an aggravating factor, and proved beyond a reasonable doubt." 725 ILCS 5/111-3(c-5).

Defendant was convicted of attempt first-degree murder. By statute, an attempt to commit first-degree murder during which the defendant "personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person" is a Class X felony for which a term of 25 years to natural life shall be added to the term of imprisonment imposed by the trial court. 720 ILCS 5/8-4(c)(1)(D).

The State forfeited any argument that defendant was subject to this mandatory enhancement by failing to request that the jury return a special verdict on whether the State proved the enhancement factor, to ask for imposition of the enhancement at sentencing, and to raise the issue at any post-sentencing proceeding or appeal.

The jury's finding that defendant committed aggravated battery with a firearm of the attempt-murder victim did not supply the requisite finding of the enhancement factor by the jury. To convict defendant of aggravated battery with a firearm, the jury was only required to find that the defendant caused an injury by discharging a firearm. An "injury" is not the same as "great bodily harm, permanent disability, permanent disfigurement, or death." Similarly, to convict defendant of attempt first-degree murder, the jury was required only to find that defendant performed an act constituting a substantial step toward the killing of the victim, which did not require a finding of any injury.

Even if the elements of the enhancement factor and the convicted offenses were identical, the convictions would not suffice for compliance with §111-3(c-5), which requires that the enhancing fact be "submitted to the trier of fact *as an aggravating factor*," not as the elements of an offense. This "statute provides the benefit of placing the defendant on notice as to the exact potential sentencing range he is facing."

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

People v. Flynn, 2012 IL App (1st) 103687 (Nos. 1-10-3687 & 1-11-2379 cons., modified 1/22/13)

1. Section 5-8-1(a)(1)(d) of the Unified Code of Corrections provides for three firearm sentencing enhancements for first degree murder: (i) if the person committed the offense while armed with a firearm, 15 years shall be added to the term of imprisonment imposed by the court; (ii) if, during the commission of the offense, the person personally discharged a firearm, 20 years shall be added to the term of imprisonment imposed by the court; (iii) if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.

Under the plain language of the statute, the 20-year enhancement of subsection (ii) applies to a defendant who is accountable for first degree murder who personally discharges a firearm during its commission. Subsection (i) contains no language limiting its application to persons who personally discharge a firearm, and thus applies to one who is convicted by accountability of committing the offense of first degree murder while armed with a firearm. Subsection (ii) requires that the accountable defendant personally discharge a firearm, but, unlike subsection (iii), contains no language that restricts its application to those who actually cause the injury or death.

2. Similar enhancements apply to attempt to commit first degree murder. 720 ILCS 5/8-4(c)(1). Defendant was therefore also subject to a 20-year enhancement for attempt first degree murder where he was accountable for that offense and personally discharged a firearm during its commission, even though the shots he fired were not directed toward the victim of the attempt first degree murder.

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

People v. Guyton, 2014 IL App (1st) 110450 (No. 1-11-0450, 7/15/14)

1. The State charged defendant with first degree murder of one man and attempt first degree murder of another. At trial, defendant argued that he acted in self-defense when he shot the two men. The jury found

defendant guilty of second degree murder (based on imperfect self defense) as to the first man and attempt first degree murder of the second. Defendant was sentenced to 18 years' imprisonment for second degree murder and 36 years' imprisonment (including a mandatory 20-year add-on for personal discharge of a firearm) for attempt first degree murder.

On appeal, defendant argued that his 36-year sentence for attempt first degree murder violated due process and equal protection since it "shocks the conscience" to punish an attempt to kill more severely than the completed offense of murder.

2. The proportionate penalties clause of the Illinois constitution is violated in two ways: (1) where the penalty is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community; and (2) where offenses with identical elements are given different sentences. Defendant's due process argument was based on the first of these tests. He argued that his sentence for attempt first degree murder was grossly disproportionate to the offense, and hence violated due process, since it was twice as long as his sentence for second degree murder.

The Appellate Court rejected this argument. The Illinois Supreme Court has already held that because Illinois does not recognize the crime of attempt second degree murder, it does not violate the first test of the proportionate penalties clause to sentence a defendant to a longer term for attempt first degree murder than for the completed offense of second degree murder. **People v. Lopez**, 166 Ill. 2d 441 (1995). Accordingly, the sentence disparity between the two offenses in this case did not violate due process.

3. The Appellate Court also rejected defendant's equal protection argument. To raise an equal protection argument, a defendant must allege that there are others similarly situated to him, that they are treated differently, and that there is no valid basis for this disparate treatment. The first step in this analysis is to determine whether the defendant is similarly situated to the comparison group.

Here, defendant failed to show that he was similarly situated to any comparison group. He only alleged that a person who commits attempt first degree murder receives a harsher sentence than one who commits second degree murder. But defendant "failed to identify a suspect class or identify others convicted of attempt first degree murder that have been treated unequally under the law." The court thus rejected defendant's equal protection argument.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

People v. Lavelle, ___ Ill.App.3d ___, 919 N.E.2d 392 (1st Dist. 2009) (No. 1-07-0586, 11/17/09)

730 ILCS 5/5-8-1(a)(1)(d)(iii) provides that a minimum of 25 years shall be added to the sentence imposed for first degree murder where the defendant personally discharged a firearm which proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person. The enhancement was held to be inapplicable here; although the evidence showed that two persons fired at the decedent, it was unclear which person fired the bullet which caused the fatality. Thus, the evidence was insufficient to show that defendant's gunshot was the proximate cause of the death.

The 40-year-enhancement was reduced to 20 years, the enhancement authorized for a person who personally discharges a firearm in the course of first degree murder.

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

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

Defendant was charged with attempt first degree murder and was subject to an additional mandatory term of 25 years to life based on his personal discharge of a firearm that caused great bodily harm. 720 ILCS 5/8-4(c)(1)(D). The indictment alleged that defendant committed attempt first degree murder in that "he, without lawful justification, with intent to kill, did any act, to wit: shot Lenard Richardson about the body

with a firearm, which constituted a substantial step toward the commission of the offense of first degree murder," and cited to subsection (a), but not subsection (c), of the attempt statute, as well as the first degree murder statute.

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

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

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

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

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

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

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

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

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

The Appellate Court noted that in two prior cases, **People v. Easley**, 2012 IL App (1st) 110023 and **People v. Whalum**, 2012 IL App (1st) 110959, the court reached a similar result. The court declined to follow **People v. Nowells**, 2013 IL App (1st) 113209, which held that section 111-3(c) does not apply when the prior conviction used to enhance the offense is an element of the offense. The court also distinguished **Nowells** because there the defendant had been placed on actual notice about the type and class of the prior

offense being relied on by the State. The court noted that **Easley** is pending in the Illinois Supreme Court as No. 115581.

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

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

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

People v. Smith, 2012 IL App (1st) 102354 (No. 1-10-2354, 9/28/12)

Attempt first degree murder is generally a Class X felony which carries a sentence of six to 30 years. However, 720 ILCS 5/8-4(c)(1)(A) authorizes an enhanced Class X sentence of 20 to 80 years for the attempt first degree murder of a peace officer.

In addition, 720 ILCS 5/8-4(c)(1)(B), (C) and (D) authorize mandatory terms of 15 years, 20 years, and 25 years to natural life to be added to the sentence imposed by the trial court for attempt first degree murder. The additional terms are required where the defendant committed attempt first degree murder while armed with a firearm, while personally discharging a firearm, or while personally discharging a firearm which proximately caused great bodily harm, permanent disability, permanent disfigurement, or death.

The court concluded that under the plain language of §5/8-4, the 20-year enhancement for personally discharging a firearm applies to the enhanced Class X sentence under subsection (A) for attempt murder of a peace officer. The court rejected the reasoning of **People v. Douglas**, 371 Ill. App. 3d 21, 861 N.E.2d 1096 (1st Dist. 2007), which concluded that in the absence of some indication that the legislature intended otherwise, the firearm enhancements of subsections (B), (C) and (D) do not apply to the offense of attempt murder of a peace officer.

Thus, where the defendant was convicted of attempt murder of a police officer, the trial court properly applied the 20-year firearm sentencing enhancement for discharging a firearm to the defendant's enhanced 35-year enhanced sentence for attempt murder of a peace officer.

(Defendant was represented by Assistant Defender Jean Park, Chicago.)

People v. Smith, 2014 IL App (1st) 103436 (No. 1-10-3436, 7/17/14)

Defendant was convicted of first-degree murder, attempt first-degree murder, and armed robbery, and was sentenced to consecutive terms of 45, 30, and 21 years. The court accepted the State's concession that in sentencing defendant for armed robbery, the trial court erroneously imposed a 15-year enhancement based on the fact that defendant was armed with a firearm.

The 15-year-enhancement was held unconstitutional in **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), but was revived by Public Act 95-688. **People v. Blair**, 2013 IL 114122. The court concluded that the revived enhancement did not apply in this case, however, because P.A. 95-688 became effective after the offense was committed. Thus, the enhancement was revived after the occurrence of the criminal conduct for which defendant was charged.

Generally, an amendment to a statute is presumed to apply prospectively rather than retroactively. This presumption may be rebutted by either express statutory language or necessary implication. A statute which specifies that it is to take effect upon becoming a law does not contain a clear expression of legislative intent that it is to apply retroactively.

Because the proportionate penalties violation identified in **Hauschild** had not been cured at the time of the criminal conduct in question, the 15-year enhancement had not been revived. The sentence for armed robbery was vacated and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Smith, 2016 IL App (1st) 140496 (No. 1-14-0496, 2/24/16)

Defendant was convicted of Unlawful Use of a Weapon by a felon, which carries a Class 2 felony

sentence when committed by a person who is not confined in a penal institution but who has been convicted of a forcible felony. 720 ILCS 5/24-1.1(e). A "forcible felony" is defined as treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement, and "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8. Defendant contended that his prior conviction for aggravated battery of a peace officer was not a forcible felony and therefore could not be used to enhance his conviction.

The court concluded that because in 1990 the legislature amended the definition of "forcible felony" to include only aggravated batteries resulting in great bodily harm or permanent disability or disfigurement, it did not intend that all aggravated batteries were included in the definition of "forcible felonies." Thus, where defendant's prior conviction of aggravated battery to a peace officer was based on aggravated battery causing bodily harm to a police officer and not on great bodily harm or permanent disability or disfigurement, it was not a forcible felony.

The court rejected the argument that aggravated battery of a peace officer is a forcible felony under the residual clause for felonies that are not specifically listed but which involve the use or threat of violence or force. The court concluded that the residual clause is limited to offenses that are not specifically listed in the statute.

Because the trial court erred by using the prior conviction to enhance the aggravated battery conviction to a Class 2 offense, the cause was remanded for re-sentencing on a Class 3 felony.

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

People v. Tolentino, 409 Ill.App.3d 598, 949 N.E.2d 1167 (1st Dist. 2011)

Attempt first degree murder is a Class X felony which carries a sentence of six to 30 years. However, 720 ILCS 5/8-4(c)(1)(A) authorizes an enhanced Class X sentence of 20 to 80 years for the attempt first degree murder of a peace officer.

In addition, 720 ILCS 5/8-4(c)(1)(B), (C) and (D) authorize mandatory additional terms of 15 years, 20 years, and 25 years to natural life to be added to the sentence imposed by the trial court for attempt first degree murder. The additional terms are required where the defendant committed attempt first degree murder while armed with a firearm, while personally discharging a firearm, or while personally discharging a firearm which proximately caused great bodily harm, permanent disability, permanent disfigurement, or death.

The court concluded that under the plain language of §5/8-4, the 20-year enhancement for personally discharging a firearm applies to the enhanced Class X sentence under subsection (A) for attempt murder of a peace officer. The court rejected the reasoning of **People v. Douglas**, 371 Ill.App.3d 21, 861 N.E.2d 1096 (1st Dist. 2007), which concluded that in the absence of any indication that the legislature intended the firearm enhancements of subsections (B), (C) and (D) to apply to the enhanced sentence under subsection (A), subsections (B), (C) and (D) apply only to simple attempt murder involving a firearm.

In finding that the enhancements applied, the court noted that separate public policy issues are involved in subsection (A) and the firearm enhancement subsections. The court also found that **Douglas** is based on mere speculation concerning the legislature's intent and not on the language of the statute.

Defendant's convictions and sentences for attempt first degree murder of a peace officer, aggravated discharge of a firearm, and armed habitual criminal were affirmed.

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

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

"When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. *** For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of an offense to another higher level of classification of offense

***; it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c).

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

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

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

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

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

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

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

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

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

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

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

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

felony.

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

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

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

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

Defendant was convicted, on a guilty plea, of unlawful delivery of a controlled substance. The trial court advised defendant on several occasions that the maximum sentence for the offense was 60 years. However, the parties agreed to a sentencing cap of 25 years' imprisonment.

The offense was a Class 2 felony. However, several sentencing statutes arguably applied. 730 ILCS 5/5-4.5-95 authorizes a Class X sentence for a defendant who is convicted of a Class 1 or Class 2 felony after having twice been convicted in any state or federal court of an offense which contains the same elements as a Class 2 or greater felony. 720 ILCS 570/408 provides that a second or subsequent conviction under the Controlled Substances Act carries a maximum sentence of twice the maximum term otherwise authorized. The trial court applied the Class X sentencing provision of 730 ILCS 5/5-4.5-95 to find that defendant was subject to a Class X sentence of six to 30 years, and then applied the doubling provision of §408 to calculate a maximum sentence of 60 years.

1. The Appellate Court found that the above sentencing statutes conflicted with 730 ILCS 5/5-8-2, which authorizes a sentence in excess of the base sentence only if a factor in aggravation under 730 ILCS 5/5-5-3.2 is present. The only provision of §5-5-3.2 applicable here was (b)(1), which authorizes an extended term where the defendant is convicted of any felony after having been previously convicted of the same or greater class felony within the past 10 years. 730 ILCS 5/5-5-3.2(b)(1).

In **People v. Olivo**, 183 Ill. 2d 339, 701 N.E.2d 511 (1998), the Supreme Court held that a Class X extended term may be imposed under §5-5-3.2(b)(1) only if the defendant has been convicted of a Class X felony. Because defendant had never been convicted of a Class X felony and faced Class X sentencing solely because of his prior convictions, under **Olivo** he was not eligible for a Class X extended term.

2. The court concluded that where statutes conflict, the most recently enacted statute controls. Because §5-8-2 was enacted after the sentencing doubling provision of §408, it controlled. In other words, because defendant was ineligible for a Class X extended term, he could not receive a sentence greater than the 30-year maximum for a Class X conviction.

Because the trial court erroneously admonished defendant that he was subject to a maximum sentence of 60 years, the order denying defendant's motion to withdraw his plea was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Winningham, 391 Ill.App.3d 476, 909 N.E.2d 363 (4th Dist. 2009)

625 ILCS 5/11-501(d)(2), which requires a sentence of 3 to 14 years imprisonment for aggravated driving under the influence which results in death unless the court determines that "extraordinary circumstances exist and require probation," is neither unconstitutionally vague on its face nor unconstitutionally vague because it is susceptible to arbitrary and discriminatory application.

People v. Zimmerman, 394 Ill.App.3d 124, 914 N.E.2d 1221 (3d Dist. 2009)

1. Under 725 ILCS 5/100-2, when the State seeks an enhanced sentence due to a prior conviction, the prior conviction is not an element of the offense and is not to be disclosed to the jury unless it is relevant for other reasons. An "enhanced sentence" is one in which the classification of the offense is increased due to the prior conviction.

2. A prior conviction is not an element of aggravated unlawful use of a weapon based on a prior conviction. Instead, the prior conviction merely enhances the classification of unlawful use of weapon from a Class A misdemeanor to a Class 4 felony. Thus, under §100-2, the defendant's prior delinquency adjudication for an act that would have been a felony if committed by an adult should not have been disclosed to the jury.

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

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§45-11
Delay in Execution of Sentence

People ex rel. Millet v. Woods, 55 Ill.2d 1, 302 N.E.2d 32 (1973) Petitioner was convicted in 1963 and released on appeal bond. His conviction was affirmed, and leave to appeal was denied in 1965. Petitioner, who was employed at all times, surrendered himself to the Sheriff in 1970. Writ of *habeas corpus* issued discharging petitioner, because an unreasonable delay between pronouncement and imposition of sentence may be a circumstance warranting release. There was no reasonable explanation for the delay, and incarceration at such a late date would not serve the principles of fundamental justice or petitioner's rehabilitation.

People ex rel. Rudin v. Ruddell, 46 Ill.2d 248, 263 N.E.2d 48 (1970) An undue delay between entry of judgment and execution of sentence deprives a court of jurisdiction. Here, a three-year-delay was unexplained and unreasonable. Petitioner discharged.

Walker v. Hardiman, 116 Ill.2d 413, 507 N.E.2d 849 (1987) Once the appellate court mandate is spread of record in the circuit court, any delay is attributable to defendant rather than the State; thus, the delay after the State requested issuance of the appellate court mandate and moved that it be spread of record in the circuit court was chargeable to defendants. See also, **Crump v. Lane**, 117 Ill.2d 181, 510 N.E.2d 893 (1987); **People v. Santos**, 146 Ill.App.3d 818, 497 N.E.2d 374 (1st Dist. 1986).

People v. Sanders, 131 Ill.2d 58, 544 N.E.2d 788 (1989) The trial court did not lose jurisdiction to impose sentence four and a half years after defendant's conviction where the delay was largely attributable to defendant's own actions.

In re E.J., 78 Ill.App.3d 918, 397 N.E.2d 918 (4th Dist. 1979) Respondent was adjudicated delinquent and committed to the Department of Corrections. The order was not executed for about three years, and the commitment order was then executed without a new dispositional hearing. Remanded for a hearing to determine whether sound reasons existed for execution of the commitment order after such a lengthy delay.

People v. Williams, 309 Ill.App.3d 1022, 723 N.E.2d 852 (2d Dist. 2000) Where no specific time limits are provided by law, "reasonable promptness" is required. A trial court may not indefinitely postpone a criminal

proceeding. Whether a particular delay is unreasonable depends on the circumstances of the case. Here, defendant bore no responsibility for the four-year delay before sentencing, though defendant requested a continuance for an alcohol dependency evaluation, where the judge agreed to defendant's request but mistakenly set sentencing for a Saturday and the State offered no explanation for its failure to correct the error for four years. Defendant had no obligation to request a sentencing hearing or otherwise alert the trial court to its scheduling error.

Also, a "trial court has the inherent authority to dismiss the charge when an unreasonable delay clearly violates a defendant's due process rights."

People v. Tonaldi, 297 Ill.App.3d 116, 696 N.E.2d 1184 (2d Dist. 1998) Due process was not violated where a 22-month delay occurred between the time the appellate court issued its mandate and the State moved for defendant to surrender his appeal bond. Defendant had a duty to surrender, regardless of whether the State moved to spread the mandate of record, where defendant signed an appeal bond requiring him to surrender if the judgment was affirmed, the mandate was properly filed in the circuit court, and defendant had actual knowledge that the court had affirmed the judgment. See also, **People v. Barrett**, 307 Ill.App.3d 812, 718 N.E.2d 341 (4th Dist. 1999).

Alternatively, the facts did not warrant discharging the judgment as a matter of due process. Illinois law permits a sentence to be vacated where, due to the passage of time, incarceration would serve neither the principles of fundamental justice nor defendant's rehabilitation. The changes in defendant's life, which included the absence of any further arrests and the fact that defendant's daughter was recovering from cancer, did not meet this standard.

Cumulative Digest Case Summaries **§45-11**

People v. Schlabach, 2012 IL App (2d) 100248 (No. 2-10-0248, 1/31/12)

Seven years after the court had entered no sentence on an aggravated DUI conviction per a plea agreement, the defendant filed a §2-1401 petition seeking vacation of his conviction. The court rejected defendant's argument that due process required that the conviction be vacated due to the extraordinary delay in sentencing.

Unlike cases where the court unreasonably delayed pronouncing sentence, the court in this case did not arbitrarily delay sentencing or attempt to retain jurisdiction indefinitely. Defendant controlled the timing of the filing of his §2-1401 petition, which restored jurisdiction to the trial court.

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

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§45-12
Modification of Sentence by Trial Judge

People ex rel. Carey v. Rosin, 75 Ill.2d 151, 387 N.E.2d 692 (1979) A trial judge is without power to reduce or modify a sentence in a proceeding commenced more than 30 days after the sentence was originally imposed. The trial court erred in granting defendant's motion to modify his unexecuted misdemeanor sentence, on grounds not raised or addressed by the appellate court, after receiving the appellate court's mandate.

People ex rel. Carey v. Collins, 81 Ill.2d 118, 405 N.E.2d 774 (1980) The 30-day period during which the trial court may reduce a sentence is terminated by the filing of a notice of appeal, and jurisdiction is not

reacquired when the mandate of the reviewing court is issued. The trial court lacked jurisdiction to reduce defendant's sentences pursuant to defendant's motion after defendant filed a notice of appeal and the reviewing court affirmed defendant's convictions and issued its mandate. Sentence reductions were vacated and trial court was ordered to issue a new mittimus conforming to the original sentences.

People v. Hills, 78 Ill.2d 500, 401 N.E.2d 523 (1980) The trial judge may not make any "modification" or "correction" that has the effect of increasing the sentence. Thus, a subsequent denial of sentence credit is improper.

People v. Kilpatrick, 167 Ill.2d 439, 657 N.E.2d 1005 (1995) After defendant was sentenced to consecutive terms of six years and nine years, the trial court granted his motion to reconsider sentences, which alleged that consecutive sentences were improper. The trial court vacated the consecutive sentences and imposed a single sentence of 15 years on the two counts. This was an improper increase in defendant's sentence. The Court rejected the State's argument that a sentence is not "increased" so long as the total aggregate of the sentences remains the same. The date on which a defendant becomes eligible for release may change with a single, longer sentence, and a criminal defendant should not "have to run the risk that a challenge to his consecutive sentencing will result in a resentencing of increased length." See also, **People v. Jones**, 168 Ill.2d 367, 659 N.E.2d 1306 (1995) (affirming **Kilpatrick**, and finding that the trial court erred by replacing consecutive 25-year sentences with a single 30-year sentence to cure its error of failing to admonish defendant at time he pled guilty of the possibility of consecutive sentences); **People v. Knowles**, 76 Ill.App.3d 1004, 395 N.E.2d 706 (5th Dist. 1979) (the trial court improperly increased defendants' sentences (four concurrent terms of imprisonment) 11 days after the sentences were imposed by making them consecutive; resentencing defendants from concurrent to consecutive sentences "was in the very real sense an increase in the length of [their] sentence because [their] earliest possible parole release will necessarily be delayed"); **People v. Didier**, 306 Ill.App.3d 803, 715 N.E.2d 321 (2d Dist. 1999) (statute prohibiting a court from increasing a sentence once it has been imposed was not violated where the trial court modified concurrent 10-year sentences to consecutive terms of three and seven years).

People v. Gray, 363 Ill.App.3d 897, 845 N.E.2d 113 (4th Dist. 2006) Requirement that the judge who presided at the trial or who accepted the guilty plea "shall impose a sentence" upon a probation revocation unless he or she is no longer sitting as a judge is directory, not mandatory. The judge improperly increased defendant's sentence when the judge who had ordered the revocation vacated the sentence the presiding judge had imposed and substituted a longer term.

People v. Elliott, 225 Ill.App.3d 747, 587 N.E.2d 639 (4th Dist. 1992) Trial court lacked authority to change defendant's sentence after he pled guilty from sentence of two-year term of periodic imprisonment consisting of work release while confined in the county jail (a sentence which violated the limit on term of periodic imprisonment to one year) to sentence of two years' probation with the first year to be served on work release. "[T]he trial court was without power to do anything other than to reduce defendant's sentence to the maximum periodic imprisonment allowed by law and, thus, correct the error in the original sentence."

People v. Taggart, 268 Ill.App.3d 84, 644 N.E.2d 31 (2d Dist. 1994) 1. A *pro se* motion to reduce sentence that was filed within 30 days of sentencing, but not called to the trial court's attention until after the direct appeal was finished (more than four years later), was not effectively made. The proponent of a motion to reduce sentence must "exercise due diligence in seeking a determination on the motion and the court shall thereafter decide such motion within such reasonable time." A notice of hearing must also be filed with the motion. Because defendant did not comply with the statutory requirements, the trial court did not err by denying the motion to reduce sentence. See also, **People v. Jennings**, 279 Ill.App.3d 406, 664 N.E.2d 699 (4th Dist. 1996) (the trial court did not err by failing to act on *pro se* motion to reduce sentence where

defendant made no effort to bring it to trial court's attention by arranging for a hearing on the motion).

2. **People v. Hook**, 248 Ill.App.3d 16, 615 N.E.2d 6 (2d Dist. 1993), which held that a motion to reduce the sentence filed while a notice of appeal is pending can be treated as an "implicit dismissal" of the appeal, did not apply where the trial court failed to decide the motion because defendant never sought a ruling. Thus, defendant's failure to timely request a hearing was not excused under **Hook**.

People v. Foster, 309 Ill.App.3d 1, 722 N.E.2d 658 (1st Dist. 1999) The trial judge lacked jurisdiction to modify defendant's sentence after defendant filed a notice of appeal, and the State's motion to reconsider the sentence did not revest jurisdiction in the trial court because the State filed its motion *after* defendant filed the notice of appeal. (Note: under recent amendments to Supreme Court Rule 606(b), a timely post-trial motion may take precedence over a timely notice of appeal).

People v. Wyatt, 305 Ill.App.3d 291, 712 N.E.2d 343 (2d Dist. 1999) Although a motion to reconsider sentence must be filed within 30 days after sentencing, a court may grant a continuance if required by the interests of justice. Here the judge granted a continuance because defense counsel needed additional time to communicate with defendant, who was in the Department of Corrections.

Cumulative Digest Case Summaries **§45-12**

People v. Flaugher, ___ Ill.App.3d ___, 920 N.E.2d 1262 (4th Dist. 2009) (No. 4-08-0484, 12/23/09)

1. Under Illinois law, there are two situations in which the trial court has jurisdiction to reconsider the State sentence of a defendant who also faces a federal proceeding. First, under 730 ILCS 5/5-8-1(f), a defendant who has an unexpired State prison sentence, and who is subsequently sentenced to a term of imprisonment by another state or federal court, has 30 days after completing the non-Illinois sentence to apply for credit against the Illinois sentence for time served on the non-Illinois sentence. Second, under 730 ILCS 5/5-8-4(a), a defendant who has a prison sentence in Illinois may apply within 30 days of imposition of a subsequent non-Illinois sentence to have the sentences run concurrently.

Where the defendant took no action until his federal sentence expired, the trial court was limited to ordering credit under §5-8-4(f). Thus, the court could not modify defendant's consecutive 15-year State prison terms to run concurrently under a motion filed after defendant's federal sentence had been completed.

2. The court held, however, that a defendant subject to mandatory consecutive sentences under 730 ILCS 5/5-8-4(h), which requires consecutive sentencing where a felony is committed while on pretrial release or on pretrial detention for a separate felony, applies to both federal and state sentences. Therefore, where the defendant committed the federal felony offenses while he was on pretrial release on Illinois charges, the State sentences were required to be served consecutively to the federal sentences. The court also held that where sentences are required to be served consecutively, the defendant is ineligible for sentence credit for a federal sentence under §5-8-1(f).

People v. Sweeney, 2012 IL App (3d) 100781 (No. 3-10–0781, 3/22/12)

1. Where the trial court enters a sentencing order that is statutorily unauthorized in its entirety, the sentence is void and must be vacated. However, where a trial court with jurisdiction over the parties and the subject matter imposes a sentence in excess of its statutory authority, only the portion of the sentence that exceeds the court's authority is void. In such circumstances, only the void portion of the sentence need be vacated.

A trial court lacks authority to accept a plea agreement which includes a sentencing provision that is not authorized by statute. Even if some parts of a plea agreement are authorized, an agreement may not be enforced in part if the unenforceable portion is an essential part of the agreement. In such an instance, the plea must be vacated in its entirety.

2. 730 ILCS 5/5-8-1 permits the trial court to modify or reduce the sentence within 30 days after it is imposed. The authority of the trial court to modify a sentence terminates after 30 days. Here, the trial court acted without authority where 45 months after the original sentence was entered and stayed, it vacated the original sentence and imposed a 30-month term of probation. Because the 30-month term of probation was void, it was required to be vacated.

The court found that the parties did not revest the trial court with jurisdiction to modify defendant's sentence. Under the revestment doctrine, parties revest the court with jurisdiction by voluntarily appearing and actively participating in proceedings which are inconsistent with the merits of the prior judgment.

The court concluded that revestment was inapplicable where the parties did not appear at the hearing voluntarily, but in response to the trial court's order. A proceeding held by order of the court is not inconsistent with the merits of the final judgment, and the parties' participation is not "voluntary" for purposes of the revestment doctrine.

Furthermore, because defendant was not represented by counsel at the hearing, her participation could not be deemed a knowing and intentional attempt to participate in proceedings that were inconsistent with the previous judgment.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

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§45-13
Trial Judge's Misapprehension of Authorized Sentence; Unauthorized Sentences; Void and Voidable Sentences

People v. Breen, 62 Ill.2d 323, 342 N.E.2d 31 (1976) A trial judge may only impose a sentence that is authorized by statute. The trial judge had no authority to place defendant on "supervision" where such a disposition was not authorized by statute.

People v. Thompson, 209 Ill.2d 19, 805 N.E.2d 1200 (2004) A sentence that is unauthorized by statute is void, and can be challenged in any properly pending proceeding over which the court has jurisdiction. Thus, defendant could challenge a void extended term in a post-conviction proceeding that was properly before the trial court or by an appeal that was properly before the appellate court. See also, **People v. Brown**, 225 Ill.2d 188, 866 N.E.2d 1163 (2007) (sentence that exceeds the statutory maximum or violates the constitution is void from its inception and subject to challenge at any time, even where, as here, the sentence is imposed as part of a negotiated plea); **People v. Chaney**, 379 Ill.App.3d 524, 884 N.E.2d 783 (1st Dist. 2008) (a sentence that is not authorized by statute is void and may be attacked at any time, either directly or collaterally; defendant's designation as a Class X offender is not authorized by statute and is therefore void); **People v. Muntaner**, 339 Ill.App.3d 887, 791 N.E.2d 621 (2d Dist. 2003).

People v. Brown, 225 Ill.2d 188, 866 N.E.2d 1163 (2007) 1. Where defendant's sentence complied with the mandatory sentencing guidelines in effect when the sentence was imposed, defendant is not entitled to a new sentencing hearing merely because some aspect of the law was subsequently determined to be void on the ground that it violated the single-subject rule. Because defendant's sentence is not void, his right to bring a post-conviction challenge to that sentence must conform to the normal requirements governing post-conviction petitions.

2. Where the court imposes an excessive sentence because of a mistake of law or fact, the sentence is merely voidable and the error can be waived.

3. While a sentence, or portion thereof, not authorized by statute is void, it is void only to the extent that it exceeds what the law permits. The legally authorized portion of the sentence remains valid.

People v. Bishop, 218 Ill.2d 232, 843 N.E.2d 365 (2006) Concurrent sentences for aggravated criminal sexual assault were void because consecutive sentences were mandatory.

People v. Torres, 228 Ill.2d 382, 888 N.E.2d 91 (2008) In a footnote, the Court stated that, although the court did not apply the add-on for a firearm, the sentence was not void because it was within the lawful range.

In re T.E., 85 Ill.2d 326, 423 N.E.2d 910 (1981) Dispositional order that placed a minor on probation without specifying a definite term was void because it violated the Juvenile Court Act's mandate that probation be for a definite term; revocation order based on the above probation was reversed.

People ex rel. Carey v. Bentivenga, 83 Ill.2d 537, 416 N.E.2d 259 (1981) The trial judge erred by imposing probation where the statute prohibited probation for the offense. See also, **People v. Wade**, 116 Ill.2d 1, 506 N.E.2d 954 (1987) (order sentencing defendant to probation was void and could be attacked at any time because the judge had no statutory authority to impose probation in this case, regardless of whether the trial judge knew he was exceeding his authority when he entered the order).

People ex rel Daley v. Strayhorn, 119 Ill.2d 331, 518 N.E.2d 1047 (1988) The trial judge erred by not imposing a natural life sentence where such a sentence was mandatory.

People v. Ballard, 59 Ill.2d 580, 322 N.E.2d 473 (1975) Where defendant was fined $25.00 but city ordinance called for fine of $100, the case was remanded for assessment of a fine pursuant to the ordinance.

People v. Holzapple, 9 Ill.2d 22, 136 N.E.2d 793 (1956) The imposition of a life sentence for burglary was "clearly erroneous"; the statute authorized a maximum sentence of up to 20 years. See also, **People v. Turk**, 101 Ill.App.3d 522, 428 N.E.2d 510 (1st Dist. 1981).

People v. Eddington, 77 Ill.2d 41, 394 N.E.2d 1185 (1979) "A misstatement of the understanding of the minimum sentence by the trial judge necessitates a new sentencing hearing only when it appears that the mistaken belief of the judge arguably influenced the sentencing decision." Sentence upheld.

People v. Arna, 168 Ill.2d 107, 658 N.E.2d 445 (1995) Although the State is prohibited from appealing a sentence and the appellate court is not authorized to increase a sentence on appeal, a reviewing court has authority to *sua sponte* order the trial court to impose consecutive sentences where they are mandatory and the trial court did not impose them. A sentencing order which fails to impose a statutorily mandated sentence is void, and a void order may be corrected any time. See also, **People v. Garcia, et al.**, 179 Ill.2d 55, 688 N.E.2d 57 (1997) (on remand under **Arna**, constitutional and statutory provisions limiting increased sentences are inapplicable); **People v. Medrano**, 282 Ill.App.3d 887, 669 N.E.2d 114 (1st Dist. 1996) (while the appellate court has authority to remand the cause for imposition of mandatory consecutive sentences, it is not required to do so; where in the trial court the State failed to seek a sentence on a particular count, the reviewing court may find that the conviction was abandoned; any other rule would allow the State to use the threat of remand for a mandatory consecutive sentence as leverage to persuade defendant to dismiss his or her appeal).

People v. Moore, 69 Ill.2d 520, 372 N.E.2d 666 (1978) Resentencing ordered where the trial judge erroneously believed that the lowest allowable minimum sentence for attempt murder was four years, and imposed a sentence of four to ten years. See also, **People v. Clifford**, 88 Ill.App.3d 305, 410 N.E.2d 537 (3d Dist. 1980).

People v. Cross, 77 Ill.2d 396, 396 N.E.2d 812 (1979) Where defendant was sentenced to the lowest penitentiary sentence authorized and the trial judge was under the misapprehension that periodic imprisonment was not an authorized sentence, the cause was remanded for consideration of periodic imprisonment.

People v. Fales, 247 Ill.App.3d 681, 617 N.E.2d 421 (3d Dist. 1993) Because only persons who are "convicted" may be assessed costs or fines, and because a sexually dangerous person proceeding is not a criminal prosecution and does not result in a "conviction," cost and fine orders may not be entered against an individual who has been adjudicated a sexually dangerous person. Also, the propriety of the orders could be challenged for the first time on respondent's appeal from the denial of a recovery petition, because such orders are void and can be attacked any time.

People v. Davis, 125 Ill.App.3d 568, 466 N.E.2d 331 (5th Dist. 1984) The judge erred in imposing concurrent 30-year-sentences "unless the Board of Prisoner Review decides to release defendant in less than half the time, then the sentence for home invasion is to be served consecutively to the sentence for rape." A trial judge must sentence a defendant to either a concurrent or a consecutive sentence, and the sentencing statute "does not provide for a sentence based on a contingent subsequent event as provided for in the case at bar." Order modified for sentences to run concurrently.

People v. Didier, 306 Ill.App.3d 803, 715 N.E.2d 321 (2d Dist. 1999) The trial judge erred by imposing 10-year sentences for burglary; burglary carries a non-extended sentencing range of three to seven years, and defendant was ineligible for extended terms.

People v. Bradley, M., 352 Ill.App.3d 291, 815 N.E.2d 1209 (3d Dist. 2004) The plain language of P.A. 90-590 requires that violations of statutes which are punishable only by a fine must be prosecuted under the Juvenile Court Act.

Also, where the statute creating an offense provides for only a fine as a sanction, sentences of conditional discharge and community service are void.

People v. Effler, 349 Ill.App.3d 217, 811 N.E.2d 291 (2d Dist. 2004) The final clause of 720 ILCS 5/8-2(c) was intended to provide a maximum punishment of a Class 3 or 4 felony sentence for felony conspiracy offenses that are not specifically enumerated in the statute, and the first clause of the statute was intended to limit the maximum punishment for conspiracy to commit a misdemeanor to the maximum provided for the underlying misdemeanor. Because the trial court erroneously sentenced defendant to a Class 3 felony for conspiracy to commit forgery, the trial court vacated the five-year sentence and modified the sentence to three years, the maximum term for a Class 4 felony.

People v. Hausman, 287 Ill.App.3d 1069, 679 N.E.2d 867 (4th Dist. 1997) As a matter of plain error, the trial court's misstatement of the authorized sentence required reversal. A defendant is entitled to be sentenced by a judge who is aware of the correct minimum and maximum sentences; a misunderstanding of the appropriate sentencing limits constitutes fundamental error that is cognizable under the plain error rule.

People v. Watters, 231 Ill.App.3d 370, 595 N.E.2d 1369 (5th Dist. 1992) The trial court erred in believing that a prison sentence was mandatory for defendant, who was mentally retarded and found guilty but mentally ill of a Class X felony. Although probation generally cannot be imposed for a Class X felony, a prison sentence should not be imposed when an offender is found guilty after special provisions are taken to assure competency and imprisonment would cause severe hardship or would not serve the ends of justice and the interests of society. Where defendant is of borderline fitness, the trial judge has discretion to forego what would otherwise be a mandatory sentence.

People v. Marquis, 54 Ill.App.3d 209, 369 N.E.2d 372 (4th Dist. 1977) Remanded for resentencing where the judge erroneously believed that the offense of which defendant was convicted was a Class A misdemeanor, with a possible sentence of not more than a year, instead of a Class B misdemeanor, with a possible six-month sentence, even though the sentence was within the authorized limits for a Class B misdemeanor. Defendant was entitled to "the benefit of being sentenced under circumstances where there is no misunderstanding as to the limits of the sentence to be imposed." See also, **People v. Frey**, 126 Ill.App.3d 484, 467 N.E.2d 302 (5th Dist. 1984) (trial court erroneously believed that extended-term sentence was required).

People v. Jones, 284 Ill.App.3d 975, 673 N.E.2d 456 (4th Dist. 1996) Because the trial judge appeared to be mistaken as to whether supervision was authorized for DUI, the conditional discharge sentence was vacated and the cause remanded for a new sentencing hearing.

People v. Beard, 287 Ill.App.3d 935, 679 N.E.2d 456 (1st Dist. 1997) Resentencing was required because the trial judge's remarks indicated that 15-year-sentences for armed robbery and aggravated vehicular hijacking were imposed in the belief that the same sentences were required for armed violence. Because it was not clear that such sentences would have been imposed had the trial court been aware that the armed violence convictions were improper, the court remanded the cause for resentencing on the remaining counts.

People v. Myrieckes, 315 Ill.App.3d 478, 734 N.E.2d 188 (3d Dist. 2000) As a matter of plain error, resentencing was required where the trial court misstated the eligibility requirements for extended-term sentencing and did not correct the parties' impression that extended-term sentences were authorized; the judge apparently believed that defendant was eligible for extended terms.

Cumulative Digest Case Summaries **§45-13**

People ex rel Alvarez v. Gaughan, 2016 IL 120110 (No. 120110, 12/1/16)

1. *Mandamus* is an extraordinary remedy used to compel a public official to perform a nondiscretionary official duty. The Supreme Court will award *mandamus* only where there is a clear right to the relief requested, the public official has a clear duty to act, and there is clear authority requiring the official to comply with the writ.

At sentencing, the trial court/respondent refused to apply a mandatory 15-year firearm enhancement to defendant's sentence. On appeal, the State successfully argued in the Appellate Court that the sentence was void. The Supreme Court however granted leave to appeal in this case and struck down the void judgment rule. **Castleberry**, 2015 IL 116916. The Cook County State's Attorney then filed a petition for writ of *mandamus* asking the Supreme Court to order the trial court/respondent to impose the mandatory firearm enhancement.

Defendant made three arguments in opposition to the writ of *mandamus*: (1) the writ was barred by *laches*; (2) there was no clear right to relief; and (3) the Cook County State' Attorney did not have standing to sue in the Supreme Court on behalf of the People of the State of Illinois. The Supreme Court rejected all three arguments.

2. *Laches* is an equitable principal that bars recovery by a party whose unreasonable delay in bringing an action prejudices the opposing party. The party raising *laches* as a bar must show that the delay misled him or caused him to pursue a different course of action.

The court found that there was no indication of delay by the State in this case. The State raised the issue at trial and on appeal under the then-existing void judgment rule. Additionally, defendant suffered no

prejudice since he was already serving a lengthy sentence and it was his decision to put the finality of his sentence in question by appealing his conviction and sentence. *Laches* thus did not apply in this case.

3. Under the Unified Code of Corrections a trial court generally may not increase a defendant's sentence once it is imposed. 730 ILCS 5/5-4.5-50(d). Additionally, when a conviction or sentence has been reversed, the trial court may not impose a greater sentence unless it is based on defendant's conduct after the original sentence was imposed. 730 ILCS 5/5-5-4(a). Defendant argued that these two statutory provisions conflicted with the State's requested relief of an increase in defendant's sentence and thus the State had no clear right to relief.

The court found that there was no conflict between these two statutes and the State's requested relief. Both statutes were designed to protect a defendant who has successfully challenged his conviction or sentence from a potentially vindictive trial court. Here the State was requesting the imposition of a mandatory sentence. There would thus be no reason for the trial court to be vindictive towards defendant. Additionally, the State was not asking the trial court to increase defendant's sentence. It was asking the Supreme Court to order the trial court to correct the sentence. The State thus had a clear right to it's requested relief.

4. The Attorney General is the chief law enforcement officer of the State of Illinois and is afforded broad discretion in the performance of its public duties, including the discretion to institute legal actions. The Attorney General undoubtedly could have instituted the present *mandamus* action. But the Cook County State's Attorney, from whose county the underlying criminal case arose, also had the standing and authority to bring this action. Longstanding case law establishes that the State's Attorney is a constitutional officer with rights and duties "analogous to or largely coincident with" the Attorney General. And none of the statutory provisions enumerating the specific duties of a State's Attorney were meant to be all-inclusive or restrictive, and thus did not deprive by omission the State's Attorney of it's standing in this case.

The court awarded the writ of *mandamus* ordering the trial court/respondent to resentence defendant and apply the mandatory firearm enhancement to his sentence.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

People v. Castleberry, 2015 IL 116916 (No. 116916, 11/19/15)

1. The issue of whether a judgment is void or voidable presents a question of jurisdiction. Jurisdiction is a fundamental prerequisite to a valid judgment and any judgment rendered by a court that lacks jurisdiction is void and may be attacked at any time. By contrast, an erroneous judgment entered by a court having jurisdiction is merely voidable.

Jurisdiction generally consists of two parts: subject matter and personal jurisdiction. Subject matter jurisdiction refers to the court's power "to hear and determine cases of the general class to which the proceeding in question belongs." Personal jurisdiction refers to the court's power "to bring a person into its adjudicative process."

2. Decisions in Illinois have also held that the power to render a particular judgment is "as important an element of jurisdiction" as personal and subject matter jurisdiction. Based on this concept, Illinois courts have developed a rule holding that a circuit court acts without "inherent authority" or "inherent power" if it imposes a sentence that violates a statutory requirement. And since the court has acted without inherent power, it has acted without jurisdiction, making the sentence void. Accordingly, a sentence that does not conform to statutory requirements is void.

3. Defendant was convicted of two counts of aggravated criminal sexual assault. At sentencing, the State argued that defendant was subject to a mandatory 15-year sentencing enhancement on each count because he was armed with a firearm when he committed the offenses. The trial court imposed the add-on on one count, but refused to impose it on the second count.

Defendant appealed and, in response to an argument raised by the State, the Appellate Court held that the add-on was a mandatory statutory requirement that had to be added to each sentence. The court further held that a sentence which lacked the enhancement was void since it did not conform to statutory requirements.

4. The Illinois Supreme Court abolished the void sentence rule. It held that the "inherent power" idea of jurisdiction, on which the void sentence rule was based, was at odds with the grant of jurisdiction given to the circuit courts under Illinois' constitution. The constitution provides that circuits courts "shall have original jurisdiction of all justiciable matters." Ill. Const. 1970, art VI, § 9. Since jurisdiction is granted by the constitution, the failure to satisfy a statutory requirement cannot deprive the court of its power or jurisdiction to hear a cause of action. A judgement is void only if the court lacks jurisdiction over the parties or the subject matter.

Subject matter jurisdiction extends to all "justiciable matters." To invoke the court's "subject matter jurisdiction, a party need only present a justiciable matter, *i.e.*, a controversy appropriate for review by the court." This rule applies to criminal as well as civil cases since in granting jurisdiction Illinois' constitution does not distinguish between civil and criminal cases.

The Supreme Court reversed the Appellate Court's judgment increasing defendant's sentence by 15 years.

5. The court rejected the State's argument that even without the void sentence rule the State could request and the Appellate Court could increase defendant's sentence under Supreme Court Rules 604(a) and 615(b)(1). Rule 604(a) does not permit the State to appeal a sentencing order and hence provides no authority for the State to request an increased sentence on cross-appeal. While the State may raise any argument in support of the court's judgment, a request to increase a defendant's sentence is not in support of the judgment, but is instead a new issue designed to lessen the rights of defendant. Rule 615(b)(1) only grants the reviewing court authority to reduce a defendant's punishment. It does not grant the court plenary power to increase criminal sentences.

The State may, however, seek relief in appropriate circumstances via a writ of *mandamus*. *Mandamus* is an extraordinary remedy to enforce the performance of official duties where no exercise of discretion is involved. Only issues of law are considered in *mandamus*. Factual questions or issues of discretion or judgment are not permitted. The State may use *mandamus* where the circuit court violated a mandatory sentencing requirement, but may not challenge discretionary sentencing decisions.

(Defendant was represented by Assistant Defender Therese Bissell, Chicago.)

People v. Price, 2016 IL 118613 (No. 118613, 12/30/16)

During trial, the court denied defendant's request for separate verdict forms for each of the State's theories of first degree murder (intentional, knowing, and felony). The jury returned a general verdict finding defendant guilty of first degree murder. Years later, defendant filed an untimely 2-1401 petition arguing that the trial court erred in denying his request for separate verdict forms under **People v. Smith**, 233 Ill. 2d 1 (2009). Defendant further argued that the statutory time bar on 2-1401 petitions did not apply because the instructional error created a void judgment under the void sentence rule. By the time defendant's case reached the Illinois Supreme Court, the Court had abolished the void sentence rule in **People v. Castleberry**, 2015 IL 116916.

Defendant argued that the decision in **Castleberry** should not be applied retroactively to his case, leaving the void sentence rule intact and allowing defendant to raise his issue in an untimely 2-1401 petition. Specifically defendant argued that the rule announced in **Castleberry** did not qualify as a new substantive rule or watershed rule of criminal procedure under **Teague v. Lane**, 489 U.S. 288 (1989) and thus did not apply retroactively.

The Supreme Court rejected defendant's argument and held that **Castleberry** applied retroactively to defendant's case and thus he could not use the void sentence rule as a way to raise his issue in an untimely 2-1401 petition. The Court held that **Teague** did not control the retroactivity question in this case. **Teague's** analysis only applies in situations where a new rule could have made a difference in the outcome of a criminal trial. The rule adopted in **Castleberry**, however, has no effect on the outcome of a trial. Neither the void sentence rule nor its absence impacts the accuracy of a defendant's conviction or the fairness of his trial.

In situations where **Teague** does not apply, the general rule of retroactivity holds that appellate

decisions apply to all cases pending when the decisions are announced. **Castleberry** thus applies to defendant's case. Since defendant's 2-1401 petition was untimely and he provided no reason other than the void sentence rule for excusing his failure to timely file the petition, the Court affirmed the judgment of the trial court dismissing defendant's petition.

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

People v. Thompson, 2015 IL 118151 (No. 118151, 12/3/15)

A defendant seeking relief under section 2-1401 must ordinarily file the petition within two years of the judgment being challenged. 735 ILCS 5/2-1401(a), (c). The two-year limitations period, however, does not apply when the petition challenges a void judgment.

Defendant filed an untimely 2-1401 petition 17 years after his conviction and sentence. In his petition, defendant raised several issues challenging his representation at trial. The trial court denied the petition. On appeal, defendant abandoned the claims he raised in his petition and argued instead that the sentencing statute mandating natural life imprisonment (for murdering more than one person) was unconstitutional as applied to him since he was 19 years old at the time of the offense, had no criminal history, and impulsively committed the offense after years of abuse by his father.

Defendant argued that his as-applied constitutional challenge constituted a challenge to a void judgment. Since a voidness challenge can be raised at any time, defendant argued that his claim was excused from the two-year limitations period and could be raised for the first time on appeal from the dismissal of his petition.

The Supreme Court disagreed. A voidness challenge to a final judgment under section 2-1401 is only available in two specific situations. First, a judgment is void where the court that entered the judgment lacked personal or subject matter jurisdiction. Second, a judgment is void when it based on a facially unconstitutional statute that is void ab initio. (A third type of voidness claim, where a sentence does not conform to statutory requirements, was recently abolished in **People v. Castleberry**, 2015 IL 116916.)

Defendant did not rely on either of the two situations where a voidness challenge could be made. He did not argue that the court lacked jurisdiction or that the sentence mandating natural life was facially unconstitutional. Defendant's claim was thus subject to the typical procedural bars of section 2-1401 and could not be raised for the first time on appeal from the dismissal of an untimely 2-1401 petition.

The court specifically rejected defendant's argument that an as-applied constitutional challenge should be treated the same as a facial challenge and be equally exempt from ordinary forfeiture rules. A facial challenge requires a showing that the statute is unconstitutional under any set of facts. An as-applied challenge, by contrast, only applies to the facts and circumstances of the particular case. In the latter case, it is paramount that the record be sufficiently developed in the trial court to establish the necessary facts for appellate review.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

In re Henry P., 2014 IL App (1st) 130241 (No. 1-13-0241, 5/30/14)

Since defendant did not file a notice of appeal within 30 days of the final judgment, the Appellate Court did not have jurisdiction to consider her claim that the Juvenile Court Act's minimum mandatory sentence of five years' probation violated the equal protection clause.

The court rejected defendant's argument that it had jurisdiction to review her claim because it involved a constitutional attack on a statute which, if successful, would render the underlying judgment void. Although a void judgment may be attacked at any time, a judgment is void only where the court that entered the judgment lacked jurisdiction. Even if the Juvenile Court Act violated equal protection, the probation order was entered by a court of competent jurisdiction, and hence the order was merely voidable, not void.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

People v. Anderson, 402 Ill.App.3d 186, 931 N.E.2d 773 (3d Dist. 2010)

1. 730 ILCS 5/5-8-1(d)(5) requires a four-year-term of mandatory supervised release where the defendant is convicted of a "second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse" and the victim was under the age of 18. The Appellate Court held that a defendant who pleads guilty in a single proceeding to separate counts of aggravated criminal sexual abuse stemming from a single incident has not been convicted of a "second or subsequent offense," and is therefore not subject to an enhanced MSR term.

Although §5-8-1(d)(5) concerns the enhancement of an MSR term, the court applied principles which govern the enhancement of other sentences after the commission of subsequent crimes. Under these principles, an enhanced MSR term is available under §5-8-1(d)(5) only if the second or subsequent offense occurs after the first conviction has been entered.

2. 730 ILCS 5/5-9-1.7(b)(1), which authorizes a $200 fine for a person convicted of sexual assault or attempted sexual assault, gives the trial court discretion to impose multiple $200 fines in a multi-count aggravated criminal sexual abuse prosecution. Thus, the trial court was not limited to a single $200 fine where the defendant pleaded guilty to multiple counts arising from a single occurrence.

3. Because the imposition of fines not authorized by statute challenges the integrity of the judicial process, the court found as a matter of plain error that the trial judge erred in calculating fines under the Violent Crimes Victims Assistance Act (725 ILCS 240/10). Applying **People v. Jamison**, 229 Ill.2d 184, 890 N.E.2d 929 (2008), the court found that the maximum additional fine for each $200 fine ordered under 730 ILCS 5/5-9-1.7(b)(1) was $20, rather than the $40 ordered by the trial court.

4. The trial court's order imposing an enhanced four-year mandatory supervised release term under 730 ILCS 5/5-8-1(d)(5), and imposing fines, was "voidable" rather than "void." A judgment is void only if entered by a court which lacks jurisdiction. Defendant challenged only the specific term of MSR and the amount of the fines, and did not challenge the authority of the court to impose such sentences. Because the sentencing order was clearly within the court's jurisdiction, it was merely "voidable."

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Avery, 2012 IL App (1st) 110298 (No. 1-11-0298, 6/21/12)

A sentence that is void may be attacked at any time or in any court, either directly or collaterally.

People v. White, 2011 IL 109616, held that where a defendant pleads guilty to a charge with a firearm enhancement and the factual basis for the plea establishes that a firearm was used in the commission of the offense, a sentence that does not include the firearm enhancement is void because it is not authorized by statute, and the plea must be vacated.

Defendant could not succeed on a claim based on **White** that his sentence was void, however, because **White** announced a new rule that did not apply to convictions such as defendant's that were final when **White** was decided.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

People v. Breeden, 2016 IL App (4th) 121049-B (No. 4-12-1049, 5/9/16)

The trial court imposed a fine of $255 for Sexual Offender Registration, less than the minimum fine of $500 required by the statute. 730 ILCS 150/10(a). The Appellate Court held that following the decision in **Castleberry**, 2015 IL 116916, the challenged fine was voidable rather than void and the State lacked the authority to request on appeal an increase in the amount of the fine imposed. The Appellate Court thus left the $255 fine in place.

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

People v. Buffkin, 2016 IL App (2d) 140792 (No. 2-14-0792, 5/16/16)

Defendant argued for the first time on appeal from the dismissal of his post-conviction petition that he was entitled to pre-sentence credit against his fines and that he was improperly assessed a DNA fee. The State confessed error on both claims.

The court first held that even though the issue was forfeited and the error was no longer considered void after **Castleberry**, it could award defendant credit against his fines. In **Caballero**, 228 Ill. 2d 79 (2008), the Supreme Court held that under 725 ILCS 5/110-14, a defendant could apply for pre-sentence credit "at any time and at any stage of the court proceedings, even on appeal in a post-conviction proceeding."

Caballero, however, did not apply to the DNA fee. And since the fee was no longer void after **Castleberry**, defendant could not collaterally attack the fee. Additionally, Supreme Court Rule 615(b)(1)&(4), which permits a court to modify the judgment order and reduce a defendant's sentence did not apply because the judgment appealed here was the dismissal of defendant's post-conviction petition, not his sentence. Because the time to directly attack his sentence was long past, the court held that it would normally lack jurisdiction to modify the sentence.

But since the State confessed error, the State revested the court with jurisdiction. The revestment doctrine provides that the parties may restore the court's jurisdiction if both parties: (1) actively participate in the proceedings; (2) fail to object to the timeliness of a late filing; and (3) assert positions that are inconsistent with the merits of the prior judgment and support setting it aside. Although the revestment doctrine typically is applied in trial court, the court saw no basis for not applying it on appeal.

Here, both parties participated in the appeal, the State failed to object to the timeliness of defendant's attack on his sentence, and both parties agreed to set the prior judgment aside. The court thus remanded the cause to the trial court to apply sentencing credit against defendant's fine and vacate the DNA fee.

(Defendant was represented by Assistant Defender Erin Johnson, Elgin.)

People v. Cashaw, 2016 IL App (4th) 140759 (No. 4-14-0759, 9/30/16)

Under **Teague v. Lane**, 489 U.S. 288 (1989), new rules of criminal procedure generally do not apply retroactively to final convictions and hence cannot be used in a postconviction attack on a conviction that became final prior to the announcement of the new rule. Illinois has adopted the **Teague** rule to govern retroactivity in State collateral proceedings.

Teague's purpose is to protect the State's interest in final judgments. **Teague** thus only applies when a defendant seeks to overturn his conviction by retroactively applying a new rule that is favorable to him. Under **Teague**, the State, but not the defendant, may object to the application of a new rule to a case on collateral review.

The court held that **People v. Castleberry**, 2015 IL 116916, applied retroactively to defendant's postconviction case for two reasons. First, **Castleberry** did not announce a new rule. Instead, it merely abolished the void sentence rule and thereby reinstated the rule in effect before the void sentence rule was created. Second, in this case defendant sought to prevent the application of a new rule to a collateral proceedings not to preserve the finality of a judgment, but to disturb its finality. A defendant cannot use **Teague** to argue that a new rule should not apply when the defendant is seeking to overturn a judgment.

The court thus concluded that although defendant's fine would have been considered void prior to **Castleberry**, once the rule in **Castleberry** applied to his case, the fine was no longer void and could not be challenged in a successive collateral proceeding.

(Defendant was represented by Assistant Defender Erica Nichols-Cook, Springfield.)

People v. Garza, 2014 IL App (4th) 120882 (Nos. 4-12-0082 & 4-13-0090, 1/28/14)

The firearm enhancement statute, 730 ILCS 5/5-8-1(a)(1)(d), provides for three different levels of sentencing enhancement based on the use of a firearm during the commission of an offense: (1) 15 additional years of imprisonment for being armed with a firearm; (2) 20 years for personally discharging a firearm; and (3) 25 years to natural life for personally discharging a firearm that proximately caused bodily harm, permanent disability, permanent disfigurement, or death.

In **People v White**, 2011 IL 109616, the Illinois Supreme Court held that where the factual basis for defendant's guilty plea showed that a firearm had been used in the commission of the offense, the trial court was required to impose the appropriate mandatory firearm enhancement in sentencing defendant, and the failure to do so made the sentence and the guilty plea based on that sentence void.

Here, defendant entered a negotiated guilty plea to first degree murder in exchange for a 35-year sentence that included a 15-year firearm enhancement. The charge alleged that defendant, or one for whose conduct he was legally responsible, shot and killed the victim in the course of an armed robbery and while armed with a firearm. The factual basis established the following: (1) several witnesses saw an unidentified man take money from the victim and shoot him multiple times; (2) other witnesses saw defendant in a vehicle near the scene in possession of a firearm; (3) they saw defendant exit the vehicle and shots were immediately fired; and (4) when police arrested defendant they recovered a firearm that matched the shell casings found at the scene.

On appeal, defendant argued that his sentence was void because it did not include the 25-to-life mandatory enhancement for personally discharging a firearm that caused death. According to defendant, under **White** the 25-to-life enhancement is triggered if the charging instrument and factual basis "would allow a trier of fact to reasonably infer" that defendant personally discharged a firearm that caused death.

The Appellate Court rejected such a broad reading of **White**. Instead, **White** requires the factual basis to explicitly include the facts triggering the sentencing enhancement. The factual basis should be read for what it states, not for what a hypothetical trier of fact might reasonably infer. Here, the factual basis did not expressly establish that defendant personally discharged the firearm and thus the sentence was not void for failing to include the 25-to-life enhancement.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. Mitros, 2016 IL App (1st) 121432 (No. 1-12-1432, 11/10/16)

A section 2-1401 petition must be filed no more than two years after the entry of the final judgment in a case. 735 ILCS 5/2-1401(c). Until recently, a defendant had been able to challenge as void a sentence that did not conform to statutory requirements even where his petition was filed after the expiration of the two-year deadline. The Illinois Supreme Court, however, abolished the void sentence rule in **Castleberry**, 2015 IL 116916.

In May 1989, defendant entered an open guilty plea to first degree murder. Defendant stipulated that he was eligible for the death penalty since the murder had occurred during the commission of the felony of residential burglary. The court sentenced defendant to natural life imprisonment. Defendant did not move to vacate his guilty plea and did not file a direct appeal.

In December 2011, defendant filed a 2-1401 petition asserting that his life sentence was void. When defendant committed his offense in 1988, a life sentence could be imposed if the victim was killed in the course of one of the forcible felonies listed in the statute, but residential burglary was not one of the listed felonies. Ill. Rev. Stat. 1987, ch. 38, ¶ 9-1(b)(6)(c). Defendant was thus not eligible for life imprisonment.

The court held that under **Castleberry** defendant's sentence was no longer void and thus he could not challenge his sentence in an untimely 2-1401 petition. The court rejected defendant's argument that **Castleberry** should not apply retroactively to his case. A new rule should almost never be applied retroactively to cases on collateral review. A rule is new if it was not dictated by precedent existing at the time defendant's conviction became final.

The court held that **Castleberry** did not announce a new rule. Instead, **Castleberry** merely abolished the prior void sentence rule and reinstated the rule that existed beforehand. Since **Castleberry** did not announce a new rule, it applied to defendant's collateral case, and prevented him from attacking his improper sentence in an untimely 2-1401 petition.

(Defendant was represented by Assistant Defender David Berger, Chicago.)

People v. Monson, 2012 IL App (3d) 100868 (No. 3-10-0868, 6/20/12)

A sentence that does not conform to the statutory authority is void. The County Jail Good Behavior Allowance Act provides for one day of good behavior credit for each day of service of sentence in the county jail, with certain exceptions. 730 ILCS 130/3.

Defendant pled guilty and was ordered to serve probation and a jail term of 180 days without good-conduct credit. Because the court had no statutory authority to deny that credit to defendant, the order denying the credit was void.

The Appellate Court directed the clerk to amend the mittimus to reflect that defendant was entitled to good-conduct credit.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Morfin, 2012 IL App (1st) 103568 (No. 1-10-3568, 11/30/12)

A statute that is unconstitutional on its face – that is where no set of circumstances exists under which it would be valid – is void *ab initio.* A statute that is merely unconstitutional as applied is not void *ab initio*.

Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455, ___ L.Ed.2d ___ (2012), held that the Eighth Amendment is violated by mandatory life imprisonment without the possibility of parole for offenders under the age of 18. **Miller** does not affect the validity of the statute mandating natural-life imprisonment for nonminor defendants, so the statute is not unconstitutional on its face. Nor does it deprive a court of the authority to sentence a minor defendant to natural-life imprisonment.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Nelson, 2016 IL App (4th) 140168 (No. 4-14-0168, 3/10/16)

Defendant argued for the first time on appeal from the second-stage dismissal of his post-conviction petition that he did not receive the correct pre-sentence credit against his sentence. The State did not challenge defendant's claim that he was entitled to more credit, but argued that sentence credit is a statutory claim that cannot be raised in a post-conviction petition.

The court agreed that defendant was entitled to the additional credit, but held that it did not have authority to award defendant the credit. The Post-Conviction Hearing Act is jurisdictional in nature limiting the subject matter reviewable under the act to claims of a substantial denial of constitutional rights. 725 ILCS 5/122-1. The denial of a statutory right is not cognizable under the act.

Although the Illinois Supreme Court held that a sentence with incorrect sentence credit is void and may be attacked at any time, **People v. Roberson**, 212 Ill. 2d 430 (2004), that holding no longer correctly reflects the law after **People v. Castleberry**, 2015 IL 116916, abolished the void judgment rule.

Since the court had no jurisdiction over defendant's statutory claim, it could not grant him the relief he requested. The court noted however that defendant could petition the trial court to correct the "simple error in arithmetic, as trial courts retain jurisdiction to correct non-substantial matters of inadvertence or mistake."

(Defendant was represented by Assistant Defender Joel Wessol, Springfield.)

People v. Patrick, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2010) (No. 2-08-0745, 7/27/10)

Defendant was convicted of involuntary manslaughter pursuant to 720 ILCS 5/9-3(a). The trial court ordered that he serve 85% of his sentence. The Code of Corrections provides that persons convicted of involuntary manslaughter other than pursuant to 720 ILCS 5/9-3(e), are entitled to day-for-day good conduct credit.[1] 730 ILCS 5/3-6-3(a)(2.1) and (2.3). The Appellate Court found that the circuit court's order denying day-for-day credit was void.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

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[1] Subsection (e) has been deleted from the Criminal Code.

People v. Reed, 2016 IL App (1st) 140498 (No. 1-14-0498, 1/27/16)

1. Although Illinois precedent holds that fees which are improperly imposed are void and may be challenged at any time, the Appellate Court concluded that such a rule did not survive **People v. Castleberry**, 2015 IL 116916. Under **Castleberry**, an order is void only if it was entered by a court which lacked jurisdiction.

Thus, the defendant forfeits a sentencing issue that is not raised through a contemporaneous objection and a written post-sentencing motion. However, the rules of waiver and forfeiture also apply to the State, which in this case failed to make a timely argument that defendant forfeited the issue whether three "fees" imposed by the trial court were actually "fines" and were therefore subject to the $5 per day credit against fines for time served in custody while awaiting trial.

2. It is the nature of an assessment, and not its statutory label, that determines whether it is a "fee" or a "fine." A "fee" seeks to recoup expenses incurred by the State or compensate the State for some cost of prosecution, while a "fine" is a pecuniary punishment imposed as part of a sentence.

The court accepted the State's concession that the $50 Court System Fee (55 ILCS 5/5-1101(c)) is a "fine" that is subject to the $5 per day credit. However, the court concluded that both the State's Attorney Record's Automation Fee (55 ILCS 5/4-2002.1(c)) and the Public Defender Records Automation Fee (55 ILCS 5/3-4012) are compensatory in nature because the assessments are intended to compensate the State and the Public Defender for the costs of establishing and maintaining an automated record keeping system. Thus, defendant is not entitled to the $5 per day credit against those charges.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Scarbrough, 2015 IL App (3d) 130426 (No. 3-13-0426, 5/13/15)

1. Under 730 ILCS 5/5-6-1(j), a defendant who has been charged with driving while his license is revoked (625 ILCS 6-303(a)) is ineligible for supervision if: (1) his license was revoked because of a violation of 625 ILCS 11-501 (driving under the influence); and (2) he has a prior conviction under section 6-303 within the last 10 years.

Defendant entered a blind guilty plea to driving on a revoked license. The trial court sentenced him to 12 months of conditional discharge with 30 days in jail, finding that he was ineligible for supervision. On appeal, defendant argued that he was eligible for supervision for two reasons: (1) his license had not been revoked because of a section 11-501 violation; and (2) his prior conviction under section 6-303 had not occurred within the last 10 years. The Appellate Court upheld defendant's sentence, rejecting both of his arguments.

2. Defendant's license had been revoked because of a bond forfeiture conviction based on an underlying DUI case. The Court held that for purposes of the Illinois Driver Licensing Law (625 ILCS 5/6-100 to 6-1013) bond forfeitures constitute convictions. Defendant's bond forfeiture in a DUI case was thus the equivalent of a conviction for DUI. Accordingly, his license had been revoked because of a violation of section 11-501.

3. The Court also rejected defendant's argument that the prior conviction must have occurred within 10 years of the time defendant pled guilty in the present case. Instead, the prior conviction must have occurred within 10 years of the time defendant was charged with the present offense. Here, defendant was charged with the current offense within 10 years from the date he was convicted of the previous 6-303 offense, and thus was not eligible for supervision.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa)

People v. Smith, 2016 IL App (1st) 140887 (Nos. 1-14-0887 & 1-14-0937 (cons), 3/1/16)

1. The post-conviction hearing act typically contemplates the filing of only one petition. The court may normally only allow a defendant to file a successive petition if he demonstrates cause and prejudice. 725 ILCS 5/122-1. But under the void-sentence rule, a sentence which is not authorized by statute is void and may be subject to collateral attack at any time.

2. In a successive post-conviction petition, defendant argued his extended-term sentences were unauthorized by statute and hence void. The trial court denied leave to file the successive petition. On appeal, defendant argued that the trial court improperly dismissed his successive petition since his sentences were void and subject to attack at any time.

After defendant filed his opening brief, the Supreme Court decided **People v. Castleberry**, 2015 IL 116916, abolishing the void-sentence rule. Defendant argued in his reply that since **Castleberry** created a new rule, it should not apply retroactively to cases on collateral review, and thus the void-sentence rule should apply to his case, allowing him to challenge his sentence in a successive petition.

3. Under **Teague v. Lane**, 486 U.S. 288 (1989), a judicial decision that establishes a new rule applies to all criminal cases pending on direct review, but does not apply (with two exceptions inapplicable here) to cases on collateral review. A decision creates a new rule if the result was not dictated by precedent existing at the time defendant's conviction became final.

The Appellate Court held that **Castleberry** did not create a new rule. Instead it abolished an old rule and thereby reinstated the rule that existed before the void-sentence rule was established by **People v. Arna**, 168 Ill. 2d 107 (1995).

Since **Castleberry** "did not announce a new rule and cannot be applied retroactively," defendant could properly challenge his sentences in a successive post-conviction petition. The court vacated the extended-term portion of defendant's sentences.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

People v. Stafford, 2016 IL App (4th) 140309 (No. 4-14-0309, 9/1/16)

Noting a conflict in Appellate Court authority, the Fourth District Appellate Court held that **People v. Castleberry**, 2015 IL 116916 did not create a new rule and therefore applies retroactively. Because **Castleberry** abolished the void sentence rule, the previous rule is reinstated. Thus, a sentence can be challenged as void only if the court lacked personal or subject matter jurisdiction.

(Defendant was represented by Appellate Court James Williams, Springfield.)

People v. Sumler, 2015 IL App (1st) 123381 (No. 1-12-3381, 3/26/15)

It was plain error under the second prong for the trial court to mistakenly believe that defendant was entitled to day-for-day good conduct credit when actually defendant was required to serve 85% of his sentence. Remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Sean Collins-Stapleton, Chicago.)

People v. Sweeney, 2012 IL App (3d) 100781 (No. 3-10–0781, 3/22/12)

1. Where the trial court enters a sentencing order that is statutorily unauthorized in its entirety, the sentence is void and must be vacated. However, where a trial court with jurisdiction over the parties and the subject matter imposes a sentence in excess of its statutory authority, only the portion of the sentence that exceeds the court's authority is void. In such circumstances, only the void portion of the sentence need be vacated.

A trial court lacks authority to accept a plea agreement which includes a sentencing provision that is not authorized by statute. Even if some parts of a plea agreement are authorized, an agreement may not be enforced in part if the unenforceable portion is an essential part of the agreement. In such an instance, the plea must be vacated in its entirety.

2. 730 ILCS 5/5-8-1 permits the trial court to modify or reduce the sentence within 30 days after it is imposed. The authority of the trial court to modify a sentence terminates after 30 days. Here, the trial court acted without authority where 45 months after the original sentence was entered and stayed, it vacated the original sentence and imposed a 30-month term of probation. Because the 30-month term of probation was void, it was required to be vacated.

The court found that the parties did not revest the trial court with jurisdiction to modify defendant's

sentence. Under the revestment doctrine, parties revest the court with jurisdiction by voluntarily appearing and actively participating in proceedings which are inconsistent with the merits of the prior judgment.

The court concluded that revestment was inapplicable where the parties did not appear at the hearing voluntarily, but in response to the trial court's order. A proceeding held by order of the court is not inconsistent with the merits of the final judgment, and the parties' participation is not "voluntary" for purposes of the revestment doctrine.

Furthermore, because defendant was not represented by counsel at the hearing, her participation could not be deemed a knowing and intentional attempt to participate in proceedings that were inconsistent with the previous judgment.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Vara, 2016 IL App (2d) 140848 (No. 2-14-0848, 12/21/16)

Noting a conflict in authority, the court found that in light of **People v. Castleberry**, 2015 IL 116916, the Appellate Court may vacate fines that were improperly imposed by the circuit clerk but may not reimpose the fines or remand the cause with directions to the trial court to impose them. **Castleberry** abolished the "void sentence" rule, which held that any sentence that does not comply with statutory requirements is void. Where the circuit clerk improperly imposes fines, the State's remedy is to seek collateral relief rather than to ask to have the fines imposed by the Appellate Court or trial judge.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Wade, 2016 IL App (3d) 150417 (No. 3-15-0417, 7/28/16)

1. The imposition of a fine is a judicial act. Because the circuit clerk lacks authority to levy fines, any fines imposed by the clerk are void at their inception. The court concluded that **People v. Castleberry**, 2015 IL 116916, does not preclude the defendant from challenging, as void, fines which were imposed by the circuit clerk.

Castleberry abolished the "void sentence rule" on the ground that the circuit courts are granted general jurisdiction by the constitution and do not derive their authority from statute. Because the circuit clerk is a nonjudical officer and has no jurisdiction to sentence criminal defendants, **Castleberry** does not apply to the unauthorized imposition of fines by a circuit clerk. The court vacated the fines and fees and remanded the cause with directions to the trial court to impose each proper fine, fee, assessment and court costs.

2. In a partial concurrence and partial dissent, Justice Schmidt found that the majority should not have remanded the cause for reimposition of the vacated fines. Fines are part of a criminal sentence. In **Castleberry**, the Supreme Court held that the Appellate Court may not increase a sentence on appeal, even if the sentence is illegally low. Under **Castleberry**, the only recourse to correct an illegally low sentence is for the State to seek a writ of *mandamus*.

Thus, Justice Schmidt would conclude that the fines imposed by the circuit clerk should be vacated without remand.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Walker, 2016 IL App (3d) 140766 (No. 3-14-0766, 10/28/16)

The imposition of fines is a judicial act. The clerk of the court is a nonjudicial member of the court and has no authority to impose fines. A fine imposed by a clerk is void from its inception.

At sentencing, the trial court ordered defendant to "pay court costs in this matter." The clerk entered a written cost sheet which included several fines.

The Appellate Court held that the fines were imposed without authority by the clerk and were thus void and must be vacated. The State agreed but argued that the cause should be remanded to the trial court to properly impose any mandatory fines. The court disagreed, holding that after **Castleberry** the Appellate Court may no longer increase a sentence which is illegally low. Since a fine is part of the criminal sentence,

the court had no authority to remand the case for the imposition of mandatory fines since it would impermissibly increase defendant's sentence.

The dissenting justice would have held that the fines were not void since the circuit court had jurisdictional authority to delegate the task of calculating the amount of costs to the circuit clerk. Accordingly, defendant waived the issue by not objecting in the trial court.

(Defendant was represented by Assistant Defender Katherine Strohl, Ottawa.)

People v. Wallace, 2016 IL App (1st) 142758 (No. 1-14-2758, 11/16/16)

A defendant typically waives on appeal any claim not raised in his postconviction petition. Until recently, a defendant had been able on appeal to challenge as void a sentence that did not conform to statutory requirements even if he had not raised the issue in his petition. The Illinois Supreme Court, however, abolished the void sentence rule in **Castleberry**, 2015 IL 116916.

Here defendant argued for the first time on appeal that his negotiated concurrent sentences were void because they were required by statute to be served consecutively. Defendant recognized that **Castleberry** abolished the void sentence rule but argued that it should not apply retroactively to his collateral case. A new rule of criminal procedure generally does not apply to cases on collateral review. A rule is new if it was not dictated by precedent existing at the time defendant's conviction became final.

The court held that **Castleberry** did not announce a new rule. Instead, **Castleberry** merely abolished the prior void sentence rule and reinstated the rule that existed beforehand. **Castleberry** thus applied to this case, making defendant's erroneous sentence merely voidable not void. Defendant was thus barred from challenging his sentence for the first time on appeal from the dismissal of his postconviction petition.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

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§45-14
Excessive Sentences

§45-14(a)
Generally

People v. Fern, 189 Ill.2d 48, 723 N.E.2d 207 (1999) An excessive sentence argument may not be based on a comparison of defendant's sentence to sentences in unrelated cases. See also, **People v. Bien**, 277 Ill.App.3d 744, 661 N.E.2d 511 (4th Dist. 1996) (disagreeing with the "analytical approach" of **People v. Norfleet**, 259 Ill.App.3d 381, 630 N.E.2d 1231 (1st Dist. 1994), which compares sentences imposed in allegedly similar cases to determine whether the trial court in the particular case on appeal has abused its discretion).

Cumulative Digest Case Summaries **§45-14(a)**

People v. Sanders, 2016 IL App (1st) 121732-B (No. 1-12-1732, 6/28/16)

1. A defendant may file a successive petition if he can show cause and prejudice. 725 ILCS 5/122-1(f). To establish cause and prejudice, a defendant must show that an objective impediment precluded him from raising the issue in an earlier proceeding and that the claimed errors resulted in actual prejudice.

2. A jury convicted defendant, who was 17 at the time of the offense, of murder and two counts of attempt murder. The trial court sentenced defendant to consecutive terms of 40 years for murder and 30 years for each count of attempt murder, for a total of 100 years imprisonment. In sentencing defendant, the court

stated that it could sentence him to natural life, "but because of your young age" and potential for rehabilitation "I am not going to do that." But the court stated that it would impose a sufficiently long sentence so that society would not need to worry about defendant committing similar crimes in the future.

Defendant eventually filed a second successive postconviction petition arguing that the trial court did not properly consider his youth in imposing sentence, and that the recent case of **Graham v. Florida**, 560 U.S. 48 (2010) changed the law applicable to juvenile sentencing providing cause for his failure to raise the issue earlier. The trial court denied leave to file.

3. The Appellate Court held that the trial court violated the Eighth Amendment by imposing a *de facto* life sentence without considering the special circumstances of defendant's youth. And the Supreme Court decisions in **Graham** and **Miller v. Alabama**, 567 U.S. ___ (2012), substantially changed the law concerning juvenile sentencing thus providing cause and prejudice for filing a successive petition.

The Appellate Court noted that defendant would need to serve at least 49 years of his 100 year sentence before he would be eligible for parole. A prisoner has a life expectancy of only 64 years, meaning defendant would be effectively imprisoned for the rest of his life. But the trial court did not consider the special circumstances of youth in imposing sentence. The Appellate Court reversed the denial of defendant's successive petition and remanded the cause for further proceedings.

(Defendant was represented by Assistant Defender Ben Wimmer, Chicago.)

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§45-14(b)
Sentences Found Excessive

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) Sentencing mentally retarded persons to death constitutes "cruel and unusual" punishment under the Eighth Amendment.

People v. Walcher, 42 Ill.2d 159, 246 N.E.2d 256 (1969) Death penalty inappropriate and sentence reduced where defendant shot victim during an attempt armed robbery, co-defendants pleaded to lesser charges and testified against defendant, defendant was on parole at the time of the incident, and defendant was an alcoholic who drank before the incident.

People v. Maggette, 195 Ill.2d 336, 747 N.E.2d 339 (2001) Defendant's 10-year prison term for residential burglary was disproportionate to the offense. Although defendant's behavior "was appalling and harmful, it was not severe enough to warrant" more than a five-year-term.

People v. Stacey, 193 Ill.2d 203, 737 N.E.2d 626 (2000) Consecutive 25-year terms for aggravated criminal sexual abuse were manifestly disproportionate, though within the statutory limits, because defendant's conduct consisted of momentarily grabbing the breasts of two young girls, who were fully clothed at the time, and making lewd comments and gestures.

People v. Viser, 62 Ill.2d 568, 343 N.E.2d 903 (1975) Murder sentence reduced because the original sentence frustrated the statutory purpose of an indeterminate sentence, which "is to encourage rehabilitation of prisoners on parole," and because the sentence was unduly severe.

People v. Crews, 42 Ill.2d 60, 244 N.E.2d 593 (1969) Death sentence excessive in light of defendant's background and character – a 34-year-old first offender, a good wife, and attentive parent, who consumed excessive quantities of drugs at the time of the offense. Although society is "outraged by the murder of a child," the punishment must be "appropriate and just."

People v. Gokey, 57 Ill.2d 433, 312 N.E.2d 637 (1974) Sentence for unlawful use of weapons reduced in

light of defendant's uncontradicted explanation that he had the gun because of the large amount of money he carried, and due to the "typical sentences which have been imposed for this offense under more aggravated circumstances."

People v. Steffens, 131 Ill.App.3d 141, 475 N.E.2d 606 (1st Dist. 1985) Defendant's 30-year sentence for murder was excessive where the offense was not a "calculated murder," but arose from an altercation which escalated, defendant was 16 years old, and his only criminal record was a burglary conviction as a juvenile three years earlier.

People v. Treadway, 138 Ill.App.3d 899, 486 N.E.2d 929 (2d Dist. 1985) Extended-term sentences of 60 years for attempt murder and armed violence were reduced where the offenses were "perpetrated in a fleeting moment of intoxicated rage" and the 24-year-old defendant "has rehabilitative potential that would be poorly served by such a long sentence."

People v. Williams, 62 Ill.App.3d 966, 379 N.E.2d 1268 (1st Dist. 1978) Trial court abused its discretion in sentencing defendant to 40 to 140 years for armed robbery and attempt murder where defendant was 21 years old, had no prior convictions, was a victim of a broken home, had undergone treatment for mental problems so serious that he had contemplated suicide, and was the father of a young child. The sentence "cannot possibly result in restoring him to any measure of useful citizenship."

People v. Rickard, 99 Ill.App.3d 914, 425 N.E.2d 1317 (1st Dist. 1981) Sentence of 100 to 300 years for murder was vacated and remanded for resentencing. Rehabilitation was not "accorded proper consideration" in light of defendant's lack of any criminal history, his education, and his good employment history; "the sentence imposed effectively negates any possibility of defendant's rehabilitation." See also, **People v. Goodwin**, 83 Ill.App.3d 203, 403 N.E.2d 1051 (2d Dist. 1980) (attempt murder sentence reduced where the judge "did not give adequate weight to the history and character of the defendant, and defendant's potential for rehabilitation" in light of defendant's "previously unblemished record" and a doctor's testimony that "defendant should have been mentally hospitalized").

People v. Newell, 196 Ill.App.3d 373, 553 N.E.2d 722 (3d Dist. 1990) 60-year sentence imposed on guilty but mentally ill conviction for felony murder was excessive where defendant was in a group of people involved in the shooting, another member of the group brought and used the gun, and defendant repeatedly stated that he did not know about the gun. Also, the judge did not adequately consider defendant's rehabilitative potential in light of defendant's age (17) and mild retardation.

People v. Smith, 178 Ill.App.3d 976, 533 N.E.2d 1169 (3d Dist. 1989) Defendant's 30-year-sentence for murder was vacated and remanded for resentencing where the trial judge failed to give adequate consideration to defendant's rehabilitative potential. The only statutory aggravating factor the judge mentioned was that the sentence was necessary to deter others from committing the same crime. There was no evidence to support the trial judge's suggestion that the crime was gang-related, and several mitigating factors were present (defendant was 17, had no prior criminal record, was mentally retarded, and was of such character and attitude as to indicate that he was unlikely to commit another crime).

People v Williams, 196 Ill.App.3d 851, 544 N.E.2d 1040 (1st Dist. 1990) Judge failed to properly consider defendants' ages and rehabilitative potential; sentences reduced.

People v. Hastings, 72 Ill.App.3d 816, 390 N.E.2d 1273 (1st Dist. 1979) Sentence of 20 to 60 years for deviate sexual assault was reduced to 9 to 27 years in light of defendant's youth, his record of only one misdemeanor conviction, and his successful completion of trade school.

People v. Johnson, 104 Ill.App.3d 572, 432 N.E.2d 1232 (1st Dist. 1982) Consecutive sentences for deviate sexual assault and rape were altered to run concurrently because concurrent sentences provide "the greatest potential of restoring the offender to a useful and productive place in society, while at the same time adequately punishing the offender for his misconduct and safeguarding the public from further offenses."

People v. Merritt, 53 Ill.App.3d 929, 369 N.E.2d 113 (1st Dist. 1977) Though defendant committed repeated violent criminal acts, sentences were reduced "in the interest of his rehabilitation and so that the appearance of vengeance may be avoided," and in light of defendant's youth and prior record, "coupled with comparable sentences in like cases."

People v. Nelson, 106 Ill.App.3d 838, 436 N.E.2d 655 (1st Dist. 1982) Sentences of 20 years for armed robbery were reduced to 10 years where the victims were not physically harmed and defendants' rehabilitative potential would not have been well served by the length of their sentences in light of their ages, prior scholastic records, work histories, and criminal records.

People v. Mick, 86 Ill.App.3d 1022, 408 N.E.2d 1079 (5th Dist. 1980) Sentence of five years for theft of an automobile was reduced to three years. In view of defendant's youth (19-years-old), his steady employment before the offense, and his single, non-violent prior offense, the prospects of rehabilitation are good. Also, a three-year-sentence will adequately protect the public and "will not deprecate the seriousness of defendant's conduct." See also, **People v. Anderson**, 142 Ill.App.3d 240, 488 N.E.2d 557 (1st Dist. 1985) (sentences were excessive in light of defendants' ages (they were 17) and lack of significant or extensive criminal history).

People v. Colter, 181 Ill.App.3d 392, 536 N.E.2d 1372 (3d Dist. 1989) Trial judge erred in giving restitution little if any weight on grounds that it was "speculative," where defendant paid the restitution within two months of sentencing. Also, the judge should have viewed eight of the twelve statutory mitigating factors as favoring mitigation. "[W]e fail to see where imprisonment of the defendant will be of any benefit to her and our system of justice. That her imprisonment might serve as a deterrence to others is highly questionable. It's an academic question as to the effects of imprisonment as far as deterrence is concerned. We certainly do not believe that this is a case where imprisonment would provide any significant deterrence."

People v. Nowman, 87 Ill.App.3d 42, 409 N.E.2d 95 (3d Dist. 1980) Three-year-sentence of imprisonment (imposed upon revocation of probation) excessive and inappropriate; the judge failed to consider available sentencing alternatives. While the judge believed that defendant's attempts to obtain employment (and ability to secure employment at time of sentencing hearing) were made only to impress the judge, these factors should have been considered. Further, three years' incarceration will not help defendant's ex-wife's situation, as he will be unable to pay support of her while he is incarcerated.

People v. Oravis, 81 Ill.App.3d 717, 402 N.E.2d 297 (4th Dist. 1980) Sentence for burglary was reduced. The trial judge's disbelief of defendant's assertions of innocence did not support the sentence because defendant "has no prior juvenile or adult record, and his actions did not threaten or cause physical harm."

People v. Evans, 143 Ill.App.3d 236, 492 N.E.2d 1036 (5th Dist. 1986) Sentence for unlawful possession of a controlled substance with intent to deliver was excessive. The judge's emphasis on defendant's lack of remorse was "misplaced"; because defendant maintained his innocence, he could "hardly be expected to be remorseful for something he contends he did not do." Also, defendant did not have a significant criminal history, and the amount of controlled substances involved "was only slightly in excess of the minimum required to make the offense a Class X felony as opposed to a Class 1 felony."

People v. Kish, 58 Ill.App.3d 215, 374 N.E.2d 10 (3d Dist. 1978) Sentence for unlawful possession of 30 grams of LSD was reduced where defendant's history revealed that he was not an incorrigible criminal, but a young man with a drug problem.

People v. Bailey, 88 Ill.App.3d 416, 410 N.E.2d 545 (3d Dist. 1980) Sentence for aiding a fugitive was reversed and remanded for resentencing where defendant was 24 years old, had no prior history of delinquency or criminal conduct, had strong support from his family, and showed a steady employment record. These strong factors in mitigation, when compared with the single aggravating factor, render the sentence excessive.

People v. Maldonado, 240 Ill.App.3d 470, 608 N.E.2d 499 (1st Dist. 1992) Murder sentence excessive where defendant was 20 years old, had two small children, was engaged to the children's mother, had completed three years of high school, and had no prior felony record. See also, **People v. Brown**, 243 Ill.App.3d 170, 612 N.E.2d 14 (1st Dist. 1993) (murder sentence reduced because the judge gave inadequate consideration to rehabilitative potential where defendant was 20 years old and had no prior criminal history).

People v. Robinson, 221 Ill.App.3d 1045, 582 N.E.2d 1299 (1st Dist. 1991) 20-year-sentence for aggravated criminal sexual assault against a four-year-old was excessive, though the "facts of this crime are reprehensible and heinous," because the judge failed to consider defendant's mental condition as a mitigating factor. Also, the sentencing judge improperly considered the criminal acts of others against the victim in imposing sentence on defendant.

People v. Willis, 231 Ill.App.3d 1056, 597 N.E.2d 672 (1st Dist. 1992) On defendant's second appeal (after the appellate court remanded the cause for resentencing because the trial court relied on the aggravating factor that was inherent in the offense and the trial court imposed the same sentence as it did originally), the court reduced defendant's sentence, stressing the absence of the aggravating factor originally considered and the fact that the new mitigating evidence established considerable potential for rehabilitation.

People v. Gonzalez, 243 Ill.App.3d 238, 611 N.E.2d 1133 (1st Dist. 1993) Arson sentence reduced. The trial court improperly considered harm inherent in the offense, and defendant had no prior criminal history, was employed, did not speak English, had a limited education, was intoxicated at the time of the crime, did not remember what happened, and expressed remorse.

People v. Calva, 256 Ill.App.3d 865, 628 N.E.2d 856 (1st Dist. 1993) Cause remanded for resentencing on three of the six counts where the mitigating factors outweighed the aggravating factors. The sentences were "significantly longer than any reported sentence which was brought to our attention for similar conduct or even for conduct including some additional factors in aggravation."

People v. Margentina, 261 Ill.App.3d 247, 634 N.E.2d 29 (3d Dist. 1994) Trial court abused its discretion by failing to give adequate weight to decedent's harassment toward defendant, defendant's youth, and the circumstances of defendant's psychological and emotional problems and upbringing (he had been physically abused as a child and had lived in five or six homes during his life, his mother was an alcoholic and physically abusive, he had seen his natural father only three times in his life, and he had witnessed his mother stab his stepfather, a drug user who routinely injected drugs in front of defendant).

People v. Thomas, 277 Ill.App.3d 214, 660 N.E.2d 184 (1st Dist. 1995) The trial judge erred by imposing a five-year-extended term for failure to report an accident where neither of the aggravating factors on which the court relied justified an extended-term sentence. Defendant's prior record consisted primarily of prostitution-related misdemeanors, and are "not the type of criminality that resulted in this incident."

Defendant's conduct of fleeing in fear of her life was "not the type of conduct for which a severe sentence would deter others."

People v. Nolan, 291 Ill.App.3d 879, 684 N.E.2d 832 (1st Dist. 1997) Maximum extended-term sentence for second degree murder was excessive because the decedent was the aggressor, defendant attempted several times to "extract himself from the situation," and the shooting was not premeditated. Also, the evidence was close, defendant carried his burden of proving sufficient mitigation to reduce the offense to second degree murder, and defendant's prior record did not indicate that he was a "dangerously aggressive criminal."

Cumulative Digest Case Summaries **§45-14(b)**

People v. Brown, 2015 IL App (1st) 130048 (No. 1-13-0048, 4/20/15)

1. A sentencing judge is given great discretion in determining a sentence, but such discretion "is not totally unbridled." Under Supreme Court Rule 615, a reviewing court has the power to reduce a sentence if the sentence was an abuse of the trial court's discretion. A reviewing court should proceed with care and should not substitute its judgment for the trial court. A sentence should only be deemed excessive if it is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense."

The Appellate Court found that the trial court abused its discretion in sentencing defendant (who was 16 years old at the time of the offense) to 25 years for attempt first degree murder. (Defendant's sentence also included a 25-year firearm add-on sentence, for a total of 50 years. The Appellate Court affirmed the 25-year add-on sentence.) The Appellate Court held that (1) the trial court improperly considered uncertain speculative evidence in imposing the sentence and (2) the sentence failed to satisfy the constitutional objective of restoring defendant to useful citizenship.

2. At trial, the victim testified that defendant followed him onto a bus, fired several shots at him, striking him twice in the left ankle and right thigh. The gun apparently jammed, so defendant walked away, played with the gun, and then fired two more shots. In sentencing defendant, the trial court found that but for the fact that gun jammed, defendant would have inflicted more violence and greater harm. The Appellate Court held that this finding was based on "uncertain speculative evidence" since the testimony actually showed that defendant successfully unjammed the gun and fired two more shots. There was thus no evidence that defendant would have inflicted more harm if the gun had not jammed.

3. The Appellate Court also held that defendant's sentence was excessive and did not satisfy the constitutional objective of restoring defendant to useful citizenship. Ill. Const. 1970, art. I, §11. The court found that several factors weighed in favor of defendant's rehabilitative potential, including his age, family support, education, and limited criminal background. The court also noted that a juvenile's lack of "matured judgment" has long been acknowledged by our society. Neuroscience research suggests that the human brain's capacity to govern risk and reward is not fully developed until the age of 25, and most criminals mature out of illegal behavior by middle age.

Despite this "abundance of authority supporting lessened sentences for juvenile offenders," defendant's sentence of 50 years imprisonment would not end until defendant was 66 years old. Such a sentence did not take proper account of defendant's youth and the objective of restoring him to useful citizenship.

The court reduced defendant's sentence to the minimum of six years.

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

People v. Busse, 2016 IL App (1st) 142941 (No. 1-14-2941, 12/27/16)

A reviewing court may only reduce a sentence where the trial court abused its discretion. A sentence within statutory limits is not excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. In fashioning the correct sentence, the most important factor is the seriousness of the offense.

Defendant was convicted of burglary committed in a school for stealing $44 in loose change from a vending machine located in a building on a college campus. Defendant had 28 prior convictions, including seven felonies. Several of these prior convictions were for burglary or theft from coin-operated machines. Burglary committed in a school is normally a Class 4 felony with a sentencing range of 4 to 15 years. Because of his prior convictions, defendant was sentenced as a Class X offender to 12 years imprisonment, a sentence within the Class X range of 6 to 30 years.

The court held that defendant's sentence was excessive, "grossly disproportionate" to the nature of the offense. Defendant did not break into the campus building. He simply walked inside during the day and stole money from a vending machine. He was not armed and he did not harm or threaten anyone. He did not even damage the vending machine.

The court stated that it felt "confident that the legislature created Class X sentencing to protect the public from murderers and rapists, not penny-ante pilferage." And it did not believe there was any "serious argument" that the 12-year sentence was necessary to protect the public from defendant. Defendant had a lengthy criminal history that was "boringly repetitive" but "hardly serious." Most of his 28 prior convictions were for theft and not one involved violence.

Since defendant had already spent a number of years in prison due to his lengthy prior criminal history, it was "unlikely that a further 12 years of imprisonment" would rehabilitate him. The court thus reduced defendant's sentence to six years.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

People v. Daly, 2014 IL App (4th) 140624 (No. 4-14-0624, 12/1/14)

1. A sentence may be deemed "excessive" where it is within the statutory range authorized for an offense but does not adequately account for the defendant's rehabilitative potential. The Illinois Constitution requires that penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. This constitutional mandate requires the trial court to balance the retributive and rehabilitative purposes of punishment and to carefully consider all factors in aggravation and mitigation.

Because the trial court has a superior opportunity to assess a defendant's credibility and demeanor, deference is afforded to its sentencing judgment. However, "the Appellate Court was never meant to be a rubber stamp for the sentencing decisions of trial courts" and may modify a statutorily authorized sentence if the sentencing court abused its discretion.

2. Generally, Illinois law creates a presumption in favor of probation. For most offenses, 730 ILCS 5/5-6-1(a) requires a sentence of probation unless the court finds that a prison sentence is necessary for the protection of the public or that probation would deprecate the seriousness of the offense. In making the latter determination, the trial court is statutorily required to consider the nature and circumstances of the offense and the history, character and condition of the offender. The trial court is presumed to have considered only proper sentencing factors unless the record affirmatively shows otherwise.

3. The trial court abused its discretion when it rejected probation and imposed a 42-month-sentence for reckless homicide. First, the trial court repeatedly stated that the public policy of the aggravated DUI statute requires incarceration, although defendant pleaded guilty to reckless homicide and the aggravated DUI counts were dismissed. In addition, the trial court compared the instant case to others in which sentences have been imposed for DUI, a further indication that the sentence was based on the dismissed charges and not on the offense to which the defendant pleaded guilty.

Second, the trial court ignored the circumstances of the reckless homicide offense of which defendant was convicted. The factual basis for the plea indicated that the ATV which defendant was driving on private property skidded when turning on wet gravel. The vehicle overturned and threw out the decedent. Although defendant admitted that she had been drinking, the factual basis did not state that she was intoxicated or that she drove under the influence of alcohol, or even that she was speeding. Under these circumstances, the trial court's emphasis on the fact that defendant chose to drink and drive ignored the circumstances of the reckless

homicide and sentenced the defendant as if she had pleaded guilty to aggravated DUI.

Third, the trial court stated that it was imposing incarceration in order to deter similar offenses. However, the Illinois Supreme Court has found deterrence has little significance where an offense involves unintentional conduct. **People v. Martin**, 119 Ill. 2d 453, 519 N.E.2d 884 (1988).

Fourth, the trial judge ignored the defendant's history, character and rehabilitative potential. The evidence showed that defendant is a 24-year-old nurse with no prior convictions. In addition, she does not have a drug or alcohol problem and is the single parent of a 20-month-old son. Furthermore, the decedent was the defendant's cousin, and the decedent's family, the community, and the prosecution all supported a probation sentence.

Fifth, the trial court's comments at sentencing indicated a predisposition against probation for certain types of offenders. A trial judge may not refuse to consider an authorized sentence merely because the defendant is in a class that is disfavored by that judge. Here, the trial court appeared to believe that any offender who drives after drinking should not receive probation if a death results, no matter what offense is charged and without regard for the specific facts of the case. "Such a position results in an arbitrary denial of probation and frustrates the intent of the legislature to provide for a range of sentencing possibilities."

Sixth, the trial judge considered as aggravation a factor inherent in the offense of reckless homicide where it did not merely note the decedent's death in passing, but clearly focused on the death when imposing incarceration.

4. Where the trial court abused its discretion at sentencing, Supreme Court Rule 615(b)(4) authorizes the reviewing court to reduce the sentence. The Appellate Court reduced defendant's sentence to probation and remanded the cause with directions to impose appropriate probation conditions. Furthermore, to remove any suggestion of unfairness, the court ordered that the case be assigned to a different judge on remand.

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§45-14(c)
Sentences Not Excessive

People v. Perruquet, 68 Ill.2d 149, 368 N.E.2d 882 (1977) Sentence of 1 to 20 years for burglary affirmed where the trial judge considered the proper factors in aggravation and mitigation, and his decision that the sentence would provide the opportunity and incentive for rehabilitation, yet protect the public, was not an abuse of discretion in light of defendant's history of criminal activity. See also, **People v. Cox**, 82 Ill.2d 268, 412 N.E.2d 541 (1980) (sentence of two years for reckless homicide was affirmed).

People v. Streit, 142 Ill.2d 13, 566 N.E.2d 1351 (1991) The trial judge properly considered and balanced all the mitigating and aggravating factors and reached a sentencing decision that was not an abuse of discretion; the appellate court decision, which vacated sentences after finding that the trial court ignored compelling mitigation and that imprisonment would not benefit society, was reversed.

People v. LaPointe, 88 Ill.2d 482, 431 N.E.2d 344 (1981) The trial judge's finding that defendant was not under extreme mental or emotional disturbance at the time of the murder was not against the manifest weight of the evidence where, despite evidence of defendant's drug use, an acquaintance who saw defendant before and after the murder said that he did not appear to be under the influence of drugs. The judge also properly found that defendant had a significant history of prior criminal activity based on defendant's prior conviction of burglary and that he was engaged in the illegal use and possession of drugs for two or three years.

People v. Lykins, 77 Ill.2d 35, 394 N.E.2d 1182 (1979) The trial judge did not abuse his discretion by imposing a sentence of 50 to 150 years for murder. The severity of the sentence was "justified by the brutal nature of

the crime," and "conveys to the parole authorities the judge's opinion as to the serious nature of the offense" and that defendant should not be paroled after serving only the time until his eligibility. See also, **People v. Almo**, 108 Ill.2d 54, 483 N.E.2d 203 (1985) (30-year-sentence for murder upheld); **People v. Crete**, 113 Ill.2d 156, 497 N.E.2d 751 (1986) (10-year-sentence for aggravated battery upheld).

People v. Murphy, 72 Ill.2d 421, 381 N.E.2d 677 (1978) Defendant's sentence of 12 to 70 years for indecent liberties with a child was upheld where the judge said that he considered defendant's age, the nature of the offense, defendant's educational and family backgrounds, and the nature and character of defendant himself, including his limited mental acuity. The judge considered the seriousness of the offense, and concluded that defendant should be incarcerated for a sufficient length of time to be treated and that the maximum term should be long enough to protect society in the event defendant does not respond to treatment. See also, **People v. Heflin**, 71 Ill.2d 525, 376 N.E.2d 1367 (1978).

People v. Younger, 112 Ill.2d 422, 494 N.E.2d 145 (1986) Appellate decision, which found that probation plus an appropriate period of weekend incarceration was more suitable to term of imprisonment, was reversed. The trial judge reviewed the presentence report, heard argument, reviewed the testimony, stated which statutory aggravating factors were present, and concluded that a sentence of probation or conditional discharge would deprecate the seriousness of defendant's conduct and would be inconsistent with the ends of justice.

People v. Barrios, 114 Ill.2d 265, 500 N.E.2d 415 (1986) Sentence of imprisonment for perjury was properly proportioned to the nature of the offense and was not at variance with the purpose and spirit of the law where defendant had 10 prior convictions and had lied persistently under oath.

People v. Turk, 101 Ill.App.3d 522, 428 N.E.2d 510 (1st Dist. 1981) Concurrent sentences of 50 to 100 years for murder and attempted murder were affirmed where the trial judge gave full consideration to all factors in aggravation and mitigation and there was no reason to disturb the sentences in light of the heinous nature of the offenses. See also, **People v. Hosty**, 146 Ill.App.3d 876, 497 N.E.2d 334 (1st Dist. 1986) (40-year-sentence for murder upheld); **People v. Staten**, 143 Ill.App.3d 1039, 493 N.E.2d 1157 (2d Dist. 1986) (natural life sentence for murder upheld).

People v. Alexander, 127 Ill.App.3d 1007, 470 N.E.2d 1071 (1st Dist. 1984) Maximum sentence for rape upheld in light of the nature of crime and defendant's prior record. The trial judge's statement that he could not think of anything worse than an assault on a child, except for the taking of a life, did not demonstrate that he refused to exercise discretion in imposing sentence. See also, **People v. Ingram**, 143 Ill.App.3d 1083, 494 N.E.2d 148 (4th Dist. 1986) (12-year-sentence for deviate sexual assault upheld); **People v. Wallace**, 170 Ill.App.3d 329, 524 N.E.2d 677 (2d Dist. 1988) (20-year-sentence for aggravated criminal sexual assault upheld).

People v. Kerans, 103 Ill.App.3d 522, 431 N.E.2d 726 (3d Dist. 1982) Imposition of four concurrent nine-year-sentences for armed violence convictions was affirmed where defendant's conduct inflicted serious bodily harm, he had a "long list of prior offenses," and he threatened potential witnesses.

People v. Wys, 103 Ill.App.3d 273, 431 N.E.2d 38 (3d Dist. 1982) The trial judge did not abuse his discretion by imposing the maximum possible sentence for aggravated battery where defendant had "an extensive criminal history" and repeated attempts at rehabilitation had failed.

People v. Makes, 103 Ill.App.3d 232, 431 N.E.2d 20 (2d Dist. 1981) Sentence of two years for theft was affirmed. The trial judge was not bound to follow the prosecutor's recommendation of probation or work release; further, the judge considered all the relevant sentencing factors, including that defendant had previously committed a similar offense and had no remorse for her actions.

People v. Clemons, 175 Ill.App.3d 7, 529 N.E.2d 57 (1st Dist. 1988) The trial court did not abuse its discretion by imposing a sentence of probation instead of supervision for misdemeanor battery. The sentence was within the statutory limits, and the court properly considered as aggravation the severity of the beating inflicted on the victim.

Cumulative Digest Case Summaries **§45-14(c)**

People v. Geiger, 2012 IL 113181 (No. 113181, 10/18/12)

Defendant was sentenced to 20 years' imprisonment for criminal contempt after refusing to testify at a retrial as a witness for the prosecution, even though the prosecutor offered him use immunity for his testimony and the court informed defendant that he had no Fifth Amendment privilege. Defendant had not been called as a witness at the original trial, but when he was 15 years old had testified at a co-defendant's trial.

The Supreme Court concluded that the 20-year sentence was an abuse of discretion and manifestly disproportionate to the nature of the offense. Defendant willfully and deliberately refused to testify, but based on his mistaken belief that he had a right to do so. His belief was not unreasonable given that his own attorney maintained that defendant could assert the privilege. His refusal may also have been driven by the fact that as a gang member, he feared retaliation. Defendant's testimony was cumulative of other evidence, and his refusal to testify did not hamper the State's ability to prosecute, as it obtained a conviction without defendant's testimony. Defendant's conduct was nonviolent and he was not fragrantly disrespectful to the trial judge.

The court remanded to afford the circuit court the opportunity to enter a more reasonable sentence.

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

People v. Alexander, 239 Ill.2d 205, 940 N.E.2d 1062 (2010)

The power of a reviewing court to reduce a sentence should be exercised cautiously and sparingly. A reviewing court may not alter a sentence absent an abuse of discretion by the trial court. A sentence is an abuse of discretion where it is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. The reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed aggravating and mitigating factors differently.

The trial court sentenced defendant, who was 15 years old at the time of the offense, to 24 years' imprisonment for aggravated discharge of a firearm. Defendant had fired several shots at a fellow student in the crowded hallway of a high school with other students and teachers present. The Appellate Court reduced the sentence to six years, finding that the trial court failed to give due consideration to defendant's social background and facts evidencing his rehabilitative potential, and gave undue weight to factors in aggravation. The Supreme Court concluded that: (1) the trial court had considered the appropriate factors in aggravation and mitigation; (2) the 24-year sentence was not greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense; and (3) the Appellate Court improperly substituted its judgment for that of the trial court because it would have weighed the factors differently.

The court reversed the judgment of the Appellate Court and reinstated the 24-year sentence.

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

People v. Edwards, 2017 IL App (3d) 130190–B (No. 3-13-0190, 1/31/17)

Defendant, who was 17 years old at the time of the offense, was convicted of first degree murder and attempt murder. Because of firearm add-ons, the minimum sentences applicable in this case were 45 years for murder and 31 years for attempt murder, and since the sentences were required to be served consecutively, the total mandatory minimum was 76 years. The court sentenced defendant to consecutive terms of 50 years for murder and 40 years for attempt murder, for a total of 90 years.

Defendant argued that his 76-year mandatory minimum sentence was unconstitutional under **Miller**

v. Alabama, 132 S.Ct. 2455 (2012). The Appellate Court disagreed. Defendant's sentence of 90 years was 14 years over the mandatory minimum, and the Court found no authority allowing a defendant to argue that a sentence he did not actually receive was unconstitutional.

Moreover, **Miller** did not hold that a juvenile could never be sentenced to life imprisonment. It instead held that a mandatory sentence of life imprisonment was unconstitutional since the court had no discretion to consider mitigating factors. Here, the trial court sentenced defendant to a term of imprisonment above the mandatory minimum, and thus **Miller** did not apply.

(On reconsideration of this issue in response to a supervisory order from the Illinois Supreme Court (ordering the Appellate Court to reconsider its holding in light of **Reyes**, 2016 IL 119271, which held that a minor could not receive a statutorily-mandated *de facto* life sentence), the Appellate Court once again affirmed defendant's sentence. The critical distinction between this case and **Reyes** was that **Reyes** was sentenced to the statute-mandated minimum sentence of 97 years. Here, by contrast, defendant was challenging a sentence he never received.)

Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Brian Kohut, Ottawa.)

People v. Geiger, 2011 IL App (3d) 090688 (No. 3-09-0688, 11/10/11)

A reviewing court may not alter a sentence absent an abuse of discretion. A sentence is an abuse of discretion if it is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. A reviewing court cannot substitute its judgment for that of the trial court merely because it would have weighed the relevant sentencing factors differently.

Even though reasonable people could conclude that defendant's 20-year sentence for direct criminal contempt based on his refusal to testify at a double-murder trial was excessive, it was not an abuse of discretion. While the defendant's conduct was not violent, defendant possessed material and significant knowledge of the facts. Although the prosecution obtained a conviction without his testimony, his refusal to testify did real harm to the court and its authority and was calculated to obstruct or hinder the court in its administration of justice. According to the trial judge, defendant's scorn for the judicial system was visible in his face when he refused to testify.

At the age of 25, defendant had already received sentences of six months in jail, two concurrent two-year terms of incarceration, a four-year term and a six-year term. Although he purported to invoke his Fifth Amendment privilege in refusing to testify, the court informed him that he had no Fifth Amendment right to refuse to testify, the defendant could not explain the basis for his belief that he could refuse to testify, and the prosecution offered him immunity for his testimony. The court warned defendant that he could be sentenced to a period of years if he refused to testify, and the State's contempt petition requested that defendant be sentenced to 20 years should he refuse to testify. Thus the record belies defendant's assertion that he operated under a mistaken belief that he had a right not to testify or that he had no idea that he could be sentenced to 20 years should he refuse to testify. That there is no published decision affirming a 20-year sentence for contempt is irrelevant.

(Defendant was represented by Assistant Defender Fletcher Hamill, Ottawa.)

People v. Reyes, 2015 IL App (2d) 120471 (No. 2-12-0471, 5/6/15)

Defendant, who was 16 years old at the time of the offense, was convicted of first degree murder and two counts of attempt first degree murder. He was sentenced 45 years imprisonment for first degree murder and 26 years for each count of attempt murder, all sentences to run consecutively for a total of 97 years. Defendant would have to serve 89 years of that term and would not be eligible for MSR until he was 105 years old.

Defendant argued that his 97-year sentence was a *de facto* natural life sentence that would be unconstitutional under **Miller v. Alabama**, 132 S.Ct. 2455 (2012). The Appellate Court disagreed, declining to extend **Miller** to this case. Unlike the **Miller** defendants, who were sentenced to natural life without the

possibility of parole based on single murder convictions, here defendant received consecutive sentences based on multiple counts and multiple victims. Moreover, "defendant did not receive the most severe of all possible penalties, such as the death penalty or life without the possibility of parole."

Defendant's sentence was affirmed.

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

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§45-15
Disparity in Sentences

§45-15(a)
Generally

People v. Munson, 206 Ill.2d 104, 794 N.E.2d 155 (2002) Although the United States Constitution does not require comparative proportionality review in death penalty cases, the Illinois Supreme Court has a constitutional duty to determine whether a death sentence has been imposed arbitrarily or capriciously, or is unduly severe considering the circumstances of the offense and the character and rehabilitative prospects of defendant. Further, to guarantee the individualized sentencing required by the Eighth Amendment, the Court has compared death sentences to sentences imposed on co-defendants or accomplices. In doing so, the Court focuses on the nature of the offenses and each individual's relative involvement in the offense, character, background, criminal record, and potential for rehabilitation. Defendant's death sentence was not unreasonably disparate to the 60-year sentence imposed on co-defendant where defendant's prior conviction was more serious than co-defendant's prior arrests, defendant was the one who possessed the weapon and shot the decedent, defendant had the last chance to save the decedent's life, defendant bragged about the crime and was not remorseful, and defendant committed the murder within a few months of his release from prison for a prior offense.

People v. House, 98 Ill.App.3d 304, 424 N.E.2d 412 (5th Dist. 1981) Disparate treatment created by a grant of immunity to one co-defendant does not come within the rule that similarly situated defendants may not receive grossly disparate sentences.

People v. Conaway, 101 Ill.App.3d 202, 427 N.E.2d 1302 (3d Dist. 1981) A defendant may not successfully contend that his sentence is disparate with sentences imposed upon other defendants in separate cases.

People v. Brown, 103 Ill.App.3d 306, 431 N.E.2d 43 (2d Dist. 1982) Defendant may not successfully contend that the sentence imposed upon him is disparate with another sentence imposed upon him in another county for a similar offense.

People v. Foster, 199 Ill.App.3d 372, 556 N.E.2d 1289 (4th Dist. 1990) A disparity between the sentences of a codefendant who goes to trial and a codefendant who pleads guilty is not "automatically suspect," because a trial judge may properly grant leniency to the one who pleads guilty. See also, **People v. Abrego**, 142 Ill.App.3d 973, 493 N.E.2d 636 (2d Dist. 1986) (a "sentence imposed as the result of a negotiated guilty plea does not provide a valid basis of comparison for a sentence imposed after trial); **People v. Bean**, 137 Ill.2d 65, 560 N.E.2d 258 (1990) (defendant's death sentence not disproportionate to co-defendants' sentences where one co-defendant pled guilty to murder and received a 25-year-sentence and the other pled guilty to conspiracy and received a seven-year-sentence).

People v. Richardson, 139 Ill.App.3d 598, 487 N.E.2d 716 (2d Dist. 1985) Cause remanded for resentencing

where sentencing judge found defendant guilty as principal, but documents on appeal established that two co-defendants were also sentenced as principals by a different judge. That all three were sentenced as principals for an offense that involved only two principals and the trial judge indicated that the sentence could be affected by whether defendant was a principal or accessory troubled the appellate court.

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§45-15(b)
Improper Disparity

People v. Caballero, 179 Ill.2d 205, 688 N.E.2d 858 (1997) The Court rejected the argument that disparity in sentencing is not a constitutional issue, and held that defendant was entitled to an evidentiary hearing on his post-conviction claim that his death sentence was unconstitutionally disparate to the natural life sentence imposed on his co-defendant.

People v. Henne, 10 Ill.App.3d 179, 293 N.E.2d 172 (2d Dist. 1973) Fundamental fairness and respect for the law require that similarly situated defendants not receive grossly disparate sentences. Defendant's sentence reduced where his sentence, which was higher than co-defendant's, was not justified by his conduct as a juvenile and while awaiting trial.

People v. House, 26 Ill.App.3d 330, 325 N.E.2d 69 (4th Dist. 1975) "Disparity can result when two defendants guilty of equal participation in an offense but with a substantially different background, with substantially different prospects for rehabilitation, of varying age, and an indicated variance in continuing criminal propensities, are given the same sentence."
People v. Jackson, 145 Ill.App.3d 626, 495 N.E.2d 1207 (1st Dist. 1986) Defendant's 80-year-sentence was grossly disparate with co-defendant's 30-year-sentence where co-defendant was "the more active participant in a brutal and heinous crime," defendant had two prior juvenile convictions and two adult convictions, while co-defendant had two prior convictions, and co-defendant had served time in the penitentiary while defendant had not. See also, **People v. Conner**, 177 Ill.App.3d 532, 532 N.E.2d 520 (1st Dist. 1988); **People v. Milton**, 182 Ill.App.3d 1082, 538 N.E.2d 1227 (2d Dist. 1989).

People v. Bares, 97 Ill.App.3d 728, 423 N.E.2d 538 (2d Dist. 1981) Defendant's more dominant role in the crime and more serious prior criminal record justified a more severe sentence than co-defendant, but not the vast disparity actually imposed.

People v. Steg, 69 Ill. App. 2d 188, 215 N.E.2d 854 (3d Dist. 1966) Disparity in sentences among three defendants unjustified, even though they were not all sentenced by the same judge; sentences for two defendants reversed.

People v. Butchek, 22 Ill.App.3d 391, 317 N.E.2d 148 (4th Dist. 1974) Defendant's sentence reduced to sentence co-defendant received, where the degree of culpability by both defendants was the same, and the trial judge gave defendant the higher sentence because of his prior criminal record, but there was no competent evidence in the record establishing that defendant had a prior criminal record. See also, **People v. Krueger**, 21 Ill.App.3d 1084, 316 N.E.2d 189 (2d Dist. 1974) (defendant's sentence reduced to sentence imposed on co-defendant where defendant's accountability was commensurate with that of co-defendant, both participants were the same age, defendant was remorseful, and the probation officer did not oppose probation).

People v. Cook, 112 Ill.App.3d 621, 445 N.E.2d 824 (2d Dist. 1983) Defendant's sentence was improperly

disparate with co-defendants though defendant had a longer criminal history than co-defendants, where defendant's prior crimes did not exceed the violent nature or severity of the crimes co-defendants committed and where defendant's participation in crime was no greater than that of his co-defendants'.

People v. Banks, 241 Ill.App.3d 966, 609 N.E.2d 864 (1st Dist. 1993) Although a defendant who pleads guilty may receive a lesser sentence than would have been imposed had he gone to trial, the discrepancy in this case was fundamentally unfair. Defendant's sentence was unfairly disproportionate to co-defendants' sentences where all defendants were equal participants in the offense, two of the co-defendants had more extensive criminal backgrounds, and defendant's mitigating evidence demonstrated greater rehabilitative potential.

People v. Gildon, 239 Ill.App.3d 984, 607 N.E.2d 290 (3d Dist. 1993) Discrepancy in prior records did not justify an extended term of eight years for defendant and probation with jail time for two co-defendants; although defendant had a prior conviction for burglary, one co-defendant had a prior conviction for retail theft and the other had a pending robbery charge.

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§45-15(c)
No Improper Disparity

People v. Godinez, 91 Ill.2d 47, 434 N.E.2d 1121 (1982) "A disparity between sentences will not be disturbed, however, where it is warranted by differences in the nature and extent of the concerned defendant's participation in the offense." Difference in sentences was justified by defendant's more serious conduct in the commission of the offense, even though the background, prior criminal records, and rehabilitative potential of both offenders were similar. See also, **People v. Foster**, 199 Ill.App.3d 372, 556 N.E.2d 1289 (4th Dist. 1990).

People v. Kline, 92 Ill.2d 490, 442 N.E.2d 154 (1982) Defendant failed to carry his burden to produce a sufficient record relative to his co-defendants; therefore, the Court could not determine whether the trial court abused its discretion in imposing a much greater sentence for defendant than co-defendants.

People v. Foster, 199 Ill.App.3d 372, 556 N.E.2d 1289 (4th Dist. 1990) The record did not include co-defendant's sentencing hearing or presentence report, which prevented the court from comparing the reasons underlying co-defendant's sentence with the reasons for defendant's sentence.

People v. Caballero, 206 Ill.2d 65, 794 N.E.2d 251 (2002) Defendant's death sentence was not unconstitutionally disproportionate to three consecutive natural life sentences imposed on a co-defendant who was tried after defendant was sentenced.

People v. Surges, 101 Ill.App.3d 962, 428 N.E.2d 1012 (1st Dist. 1981) Defendant's sentence was not improperly disparate to co-defendant's sentence because defendant was serving a sentence on another offense and "procured" alibi testimony that was contrary to the State's evidence.

People v. Dimmick, 90 Ill.App.3d 136, 412 N.E.2d 1150 (3d Dist. 1980) Defendant's age and employment record justified slightly disparate probation sentence, though the participation and rehabilitative potential of both offenders were similar.

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

An arbitrary and unreasonable disparity between the sentences imposed on co-defendants who are similarly situated is impermissible, but mere disparity does not violate fundamental fairness. The actual reason for the disparity is determinative of whether the disparity is unconstitutional.

Co-defendants Salgado, Rodriguez, Chaidez, and Muniz were convicted of first degree murder. Salgado was convicted as the principal and the others were convicted on a theory of accountability. Salgado was also convicted of attempt murder. The court sentenced Salgado to consecutive terms of 50 and 20 years, Muniz to 48 years, and Rodriguez and Chaidez to 40 years each. Salgado obtained post-conviction relief vacating his attempt murder conviction and his murder sentence and was resentenced to 28 years for murder, after the court's consideration of his exemplary conduct following his conviction. The remaining defendants then filed a post-conviction petition claiming their sentences were unconstitutionally disparate to Salgado's new sentence. The circuit court denied relief after an evidentiary hearing.

The Appellate Court concluded that the sentence disparity resulted from the post-conviction hearing judge's erroneous decision to grant Salgado a new sentencing hearing after his attempt murder conviction was vacated. Salgado should not have been resentenced because his murder sentence was based on his degree of culpability for the murder as the principal, not based on the fact that he had the additional attempt murder conviction. The 28-year term imposed on Salgado is the arbitrary sentence, not the sentences imposed on the co-defendants, and the Appellate Court could not correct that error.

The Appellate Court affirmed the denial of post-conviction relief.

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

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§45-16
Sentence Credit

§45-16(a)
Generally

People v. Reedy, 186 Ill.2d 1, 708 N.E.2d 1114 (1999) Public Act 89-404, which enacted the "truth-in-sentencing" law effective August 1995, violated the "single-subject" rule of the Illinois Constitution. See also, **People v. Majors**, 308 Ill.App.3d 1021, 721 N.E.2d 753 (4th Dist. 1999) (where defendant was sentenced under the truth-in-sentencing provisions declared unconstitutional in **Reedy**, the cause should be remanded for an amended sentencing order; although the sentencing order made no reference to good time and DOC will calculate day-for-day good time, the "more prudent course is to eliminate any confusion about the nature of defendant's sentence").

Thomas v. Greer, 143 Ill.2d 271, 573 N.E.2d 814 (1991) A defendant is not entitled to credit on state court sentences for time served in a federal penitentiary on federal charges, even where the federal and state charges arose from the same incident. Thus, defendant was not entitled to credit on burglary and escape convictions for time served on federal convictions for kidnaping and transporting a stolen vehicle over state lines because he was not imprisoned in federal prison as a consequence of his burglary and escape sentences.

Johnson v. Franzen, 77 Ill.2d 513, 397 N.E.2d 825 (1979) All inmates are entitled to day-for-day sentence

credit for time served on and after February 1, 1978. Such credit must be awarded regardless whether an inmate was sentenced before or after February 1, 1978, and regardless whether an inmate is serving an indeterminate or determinate sentence. For inmates serving indeterminate sentences, the credit is to be applied to both the minimum and maximum term. Inmates are not entitled to day-for-day credit for time served before February 1, 1978. Instead, inmates are entitled to the statutory and compensatory good time credits in effect at that time. (**Note**: PA 89-404, effective August 20, 1995, amended 730 ILCS 5/5-3-3 to eliminate or restrict day-for-day good-time credit for certain offenses.) See also, **Williams v. Irving**, 98 Ill.App.3d 323, 424 N.E.2d 381 (3d Dist. 1981) (upholding the Department of Corrections' policy of awarding inmates with only a *pro rata* share of the statutory good time; that is, inmates are given statutory good time for actual time served before February 1, 1978, and day-for-day credit for time served after that date, and upholding the Department's policy of continuing to award statutory good time to some inmates after February 1, 1978, when to do so results in a sentence which is shorter than the sentence if day-for-day credit was awarded).

Lane v. Sklodowski, 97 Ill.2d 311, 454 N.E.2d 322 (1983) The Director of the Department of Corrections can "award up to 90 days additional good conduct credit for meritorious service in specific instances as the Director deems proper." The "Director may make multiple awards of less than 90 days each provided that the total number of days awarded to any one prisoner does not exceed a total of 90 days." (This decision is prospective from the date of its original order (July 13, 1983); thus, credits awarded by the Director before July 13, 1983, "are to be honored.") See also, **Baker v. Department of Corrections**, 106 Ill.2d 100, 477 N.E.2d 686 (1985) (upon resentencing, an inmate is entitled to all "meritorious service credit" awarded to him by the Corrections Director before July 13, 1983).

People ex rel. Birkett v. Jorgensen, 216 Ill.2d 358, 837 N.E.2d 69 (2005) The County Jail Good Behavior Allowance Act provides that when a "mandatory minimum sentence" is provided for an offense, defendant cannot receive any good behavior allowance that would reduce his sentence below the mandatory minimum. A defendant convicted for the fourth time of driving with a revoked or suspended license is required to "serve a minimum term of imprisonment of 180 days." Because 180 days is the "mandatory minimum sentence," no good time credit was permitted where the trial court imposed a sentence of 180 days in the county jail and 24 months' probation.

People v. Lindsey, 199 Ill.2d 460, 711 N.E.2d 399 (2002) An individual sentenced to periodic imprisonment is not entitled to day-for-day credit under either 730 ILCS 5/3-6-3, which applies to inmates in the Department of Corrections, or the County Jail Good Behavior Allowance Act (730 ILCS 130/1 *et seq.*), which governs good behavior allowance for county jail inmates. The legislature has specifically excluded periodic imprisonment sentences from good time credit. See also, **People v. McMurl**, 179 Ill.App.3d 1006, 535 N.E.2d 70 (4th Dist. 1989) (the trial judge erred by denying defendants credit for good behavior where defendants were ordered to serve a continuous period of time in the county jail, and not a term of periodic imprisonment); **People v. Kennedy**, 188 Ill.App.3d 1, 543 N.E.2d 617 (2d Dist. 1989) (a defendant who is sentenced to periodic imprisonment as a condition of probation is not entitled to good behavior allowance).

In re J.T., 221 Ill.2d 338, 851 N.E.2d 1 (2006) Juvenile who is committed to the DOC for indeterminate term with maximum sentence of term of years not to exceed period adult would serve for same offense is entitled to predisposition credit.

People ex rel. Ryan v. Roe, 201 Ill.2d 552, 778 N.E.2d 701 (2002) Although plea bargaining plays an important role in the criminal justice system, neither the State nor the trial court may agree to an unauthorized sentence. Thus, the trial court had no authority to order that "truth-in-sentencing" would not be applied to a sentence which the legislature included within the truth-in-sentencing statute.

People v. Williams, 384 Ill.App.3d 415, 892 N.E.2d 129 (4th Dist. 2008) A defendant is not entitled to sentence credit if he agreed to forego such credit as part of a plea agreement.

People v. Cunningham, 365 Ill.App.3d 991, 851 N.E.2d 653 (5th Dist. 2006) For purposes of 730 ILCS 5/3-6-3(a)(2)(iii), which provides that an inmate serving a sentence for several offenses, including home invasion, armed robbery, aggravated vehicular hijacking, aggravated discharge of a firearm, and armed violence with certain weapons may receive no more than 4½ days per month of good conduct credit if the trial court finds that the conduct leading to the conviction resulted in "great bodily harm to a victim," the term "victim" is: (1) a person physically injured as a result of a violent crime committed against him, (2) a person who suffers injury to or loss of property as a result of a violent crime against him, (3) the representative of a person killed as a result of a violent crime perpetrated against that person or against a physically or mentally handicapped relative, (4) the person against whom a violent crime had been committed, or (5) a person who suffers personal injury as a result of certain traffic offenses. Here, the trial court erred by finding that defendant was limited to 4½ days per month good time credit on convictions for home invasion and armed violence. Although a co-defendant was shot and killed by the intended victim of the offenses, the only possible definition of "victim" that could apply to a co-defendant was (4). Because the occupant of a house has a constitutional right to defend himself with deadly force when confronted by an armed invader, however, the killing of the co-defendant did not constitute a crime.

People v. Johnson, 327 Ill.App.3d 252, 762 N.E.2d 1180 (4th Dist. 2002) Defendant, who "intermittently appeared and failed to appear to serve his periodic prison term," was entitled to seven days of sentencing credit for each weekend that he actually served in custody. Because defendant served six weekends of periodic imprisonment, the cause was remanded for imposition of a 42-day-credit against the sentence imposed upon revocation of periodic imprisonment.

People v. Dieu, 298 Ill.App.3d 245, 698 N.E.2d 663 (4th Dist. 1998) Where sentence credit is mandatory, defendant does not waive the issue by failing to raise it in the trial court or by expressly agreeing to an incorrect computation.

Thompson v. Lane, 194 Ill.App.3d 855, 551 N.E.2d 731 (4th Dist. 1990) An inmate subjected to prison disciplinary proceedings is entitled to: (1) written notice of the charges at least 24 hours before the hearing, (2) the opportunity to call witnesses and present documentary evidence, when consistent with institutional safety and correctional goals, and (3) a written statement of the evidence relied on and the reasons for the disciplinary action. An inmate is entitled to the names of his accusers and the times, dates, and places of the alleged infractions. The names of confidential sources or information may be withheld if disclosure "would jeopardize the well-being of other individuals or institutional safety." The statement of reasons should be "sufficient to enable a reviewing body to determine whether good-time credit has been revoked for an impermissible reason or for no reason at all." See also, **People ex rel. Yoder v. Hardy**, 116 Ill.App.3d 489, 451 N.E.2d 965 (5th Dist. 1983) (petitioner was denied due process at the hearing in which his statutory good-time credits were revoked).

Jackson v. Fairman, 94 Ill.App.3d 131, 418 N.E.2d 200 (4th Dist. 1981) If prison review board revokes individual's mandatory supervised release and reconfines him for violation of that release, he shall be given credit against term of reimprisonment or reconfinement for time spent in custody since parole or release which has not been credited against another sentence or period of confinement. The time petitioner spent in jail between February 5, 1980, and April 15, 1980, although it operated to discharge his theft sentence, should have been credited against his sentence upon reimprisonment following revocation of his mandatory supervised release. Reversed and remanded for awarding of credit. Compare, **People v. Kane**, 136 Ill.App.3d 1030, 484 N.E.2d 296 (5th Dist. 1984) (on revocation of probation, defendant was not entitled to credit for time in jail on criminal

charge even though that charge was the basis for revocation).

Hampton v. Rowe, 88 Ill.App.3d 352, 410 N.E.2d 511 (3d Dist. 1980) Equal protection is violated where the Department of Corrections denies compensatory good-time credit for the period defendant served in a county jail.

In re Coppersmith, 108 Ill.App.3d 161, 438 N.E.2d 1267 (1st Dist. 1982) Denial of compensatory good-time credit for time defendant spent in the custody of the Department of Mental Health reversed. Compensatory credit is no longer based upon participation in programs or work assignments, and there is "no logical distinction" why defendant, in the custody of the Department of Mental Health, should be treated differently than a person held in county jail.

People v. Burton, 100 Ill.App.3d 1021, 427 N.E.2d 625 (4th Dist. 1981) The Misdemeanant Good Behavior Allowance Act, under which a person incarcerated for a misdemeanor earns less sentence credit or good time credit than a person who is incarcerated for a felony, does not violate either due process or equal protection. (**Note**: the Misdemeanant Good Behavior Allowance Act was replaced with the County Jail Good Behavior Allowance Act, effective July 1, 1984, providing day-for-day good time credits for misdemeanants. 730 ILCS 130/1.1). But see, **People ex rel. Birkett v. Jorgensen**, 216 Ill. 2d 358 (2005) (holding that defendant was not entitled to day-for-day good time because he was convicted of driving with a suspended license, which requires a minimum sentence of 180 days in jail and awarding good time would result in defendant serving less than the minimum sentence).

People v. Brown, 196 Ill.App.3d 1, 553 N.E.2d 110 (2d Dist. 1990) Defendant was entitled to resentencing because the trial judge misapprehended the statutory provisions regarding good behavior allowances. The judge believed that defendant would receive day-for-day credit for each of the six-month-jail sentences (for DUI and leaving the scene of an accident) and, thus, would be incarcerated for a total of six months (i.e., three months on each sentence). But, defendant was not entitled to good behavior allowance on the DUI sentence because defendant "inflicted physical harm upon another person in committing [that] offense." Thus, defendant would be required to serve nine months of incarceration (i.e., six months on the DUI and three months (with good behavior credit) on the other sentence) rather than the six months intended by the trial judge.

People v. Bailey, 235 Ill.App.3d 1, 600 N.E.2d 1267 (4th Dist. 1992) Though section 3 of the County Jail Good Time Behavior Allowance Act denies good-time credit to those convicted of civil contempt of court, the trial judge had no authority to deny good-time credit to defendant who was convicted of indirect criminal contempt. Also, this issue was not forfeited by defendant's failure to object in the trial court; the trial judge's attempt to deny credit was void and subject to attack at any time.

People v. Davis, 291 Ill.App.3d 552, 683 N.E.2d 1260 (3d Dist. 1997) The trial judge erred by denying defendant good-conduct credit for time spent in the county jail as part of his sentence for disorderly conduct. A defendant sentenced to the county jail is entitled to day-for-day credit unless he: (1) inflicted physical harm upon another in committing the offense, (2) is serving a mandatory minimum sentence, (3) has been sentenced for a felony to probation or conditional discharge with the condition of periodic imprisonment, or (4) is sentenced for civil contempt. None of the exceptions applied here; thus, the trial court exceeded its authority by denying day-for-day credit. See also, **People v. Scott**, 285 Ill.App.3d 95, 673 N.E.2d 1152 (2d Dist. 1996) (record was insufficient to bar credit because defendant "inflicted physical harm on another person"; complainant testified she did not receive any physical injury denying scuffle); **People v. Wenkus**, 171 Ill.App.3d 1064, 526 N.E.2d 534 (2d Dist. 1988) (bodily harm is synonymous with "physical harm").

People v. Gorgis, 337 Ill.App.3d 960, 787 N.E.2d 329 (1st Dist. 2003) The truth-in-sentencing law, which

prohibits first degree murder defendants from receiving good time credit, is not unconstitutional under the Illinois constitutional requirement that all penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Also, because the truth-in-sentencing law treats all first degree murder defendants equally, it does not result in unequal treatment of similarly situated defendants. Nor does the law violate due process.

In re Justin L.V., 377 Ill.App.3d 1073, 882 N.E.2d 621 (4th Dist. 2007) The juvenile court had authority to *sua sponte* conduct a review of custody arrangements 60 days after defendant was initially committed to DOC.

The court lacked jurisdiction to consider respondent's argument that he was entitled to 62 additional days' credit for time served in custody while awaiting arraignment and while on home confinement. Although a request for sentence credit may be raised at any time, it must be raised in the context of a proceeding that is properly pending. The only time at which the credit issue could have been granted was during the original commitment order from which defendant did not appeal; the issue could not be considered in an appeal from the denial of a motion to vacate the commitment. However, the trial court retains jurisdiction over "nonsubstantial matters," such as amendment of the sentencing judgment, even after a notice of appeal has been filed. "Thus, nothing in this ruling precludes respondent from challenging the sentencing judgment in the trial court."

People v. Flores, 378 Ill.App.3d 493, 882 N.E.2d 1051 (2d Dist. 2008) Defendant could raise a sentence credit issue for the first time on appeal from the dismissal of a post-conviction proceeding. The court treated defendant's request for credit as a motion to amend the mittimus, which may be raised at any time. See also, **People v. Andrews**, 365 Ill.App.3d 696, 850 N.E.2d 888 (3d Dist. 2006) (defendant was entitled to an additional day credit for pretrial custody although the issue was raised for the first time on appeal from denial of a post-conviction petition); **People v. Donnelly**, 226 Ill.App.3d 771, 589 N.E.2d 975 (4th Dist. 1992) (the trial court's error in calculating the credit for time spent in custody awaiting trial is not forfeited by defendant's failure to raise the issue in the trial court).

People v. O'Neill, 367 Ill.App.3d 439, 854 N.E.2d 1154 (2d Dist. 2006) The court encouraged attorneys to raise credit issues in the trial court to avoid unnecessary public costs.

Cumulative Digest Case Summaries **§45-16(a)**

People v. Williams, 239 Ill.2d 503, 942 N.E.2d 1257 (2011)

1. Resolving a conflict in the Appellate Court, the Supreme Court held that a sentence of imprisonment commences when the trial court issues the *mittimus*. Thus, for purposes of computing sentence credit, the day on which a defendant is sentenced is treated as the first day of the prison sentence rather than as a day of presentence custody to be credited by the trial court. The court based its holding on the plain language of 730 ILCS 5/5-4.5-100(a), which states that a sentence of imprisonment commences on the day the offender is received by DOC, and 730 ILCS 5/5-8-5, which requires the trial court to commit the offender to the custody of the sheriff or the Department of Corrections upon the rendition of judgment after pronouncement of a prison sentence.

2. The court rejected the argument that a different conclusion is required by 725 ILCS 5/110-14(a), which authorizes a $5 credit against a fine for each day of presentence custody. Case law has interpreted §110-14(a) as requiring the $5 credit whenever any part of a day is spent in presentence custody. Under that precedent, the defendant receives the $5 credit against any fine for the day on which he or she is sentenced.

The court noted that §110-14(a) is part of the Code of Criminal Procedure rather than the Unified Code of Corrections, and that the plain language of the relevant statutes justify different rules for the $5 credit

and sentencing credit.

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

People v. Alvarado, 2013 IL App (3d) 120467 (No. 3-12-0467, 8/9/13)

730 ILCS 5/3-6-3(a)(2)(i) provides that an individual who is serving a term of imprisonment for first-degree murder "shall receive no good conduct credit." 730 ILCS 5/5-8-1(a)(1)(iii) provides that a 25-year to natural life term "shall be added to the term of imprisonment imposed by the court" if the defendant personally discharged a firearm which caused great bodily harm, permanent disability, permanent disfigurement, or death.

The court concluded that under §5-8-1(a), the firearm enhancement is part of the sentence for first-degree murder, and not a separate sentence. Thus, a defendant who receives a sentence for first-degree murder which includes a mandatory firearm enhancement is not eligible for good conduct credit for any part of the sentence.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Evans, 391 Ill.App.3d 470, 907 N.E.2d 935 (4th Dist. 2009)

The court reiterated that a defendant may, as part of a negotiated plea, agree to a specified sentence credit and a public defender fee. Where the plea agreement covers those issues, the defendant may not challenge either the sentence credit or the trial court's failure to hold a hearing on the defendant's ability to pay a public defender fee.

People v. Harris, 2012 IL App (1st) 092251 (No. 1-09-2251, 4/20/12)

1. The proportionate penalties clause is violated where two offenses have identical elements but carry different authorized sentences. Because armed robbery while armed with a firearm and aggravated kidnaping while armed with a firearm consist of the same elements as armed violence predicated on robbery and kidnaping, but the former offenses carry more severe sentences when the mandatory 15-year enhancement for being armed with a firearm is added, the proportionate penalties clause was violated.

2. The court rejected defendant's argument that the convictions should be reduced to simple robbery and simple kidnaping and the cause remanded for sentencing on those offenses. In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Supreme Court held that the proper remedy in this situation is to remand the cause for resentencing in accordance with the relevant statute as it existed before the enactment of Public Act 91-404, which added the 15-year enhancement.

3. The court rejected the argument that defendant waived the proportionate penalties arguments because he failed to present them on direct appeal and raised them for the first time in a post-conviction petition. Whether a statute is unconstitutional may be raised at any time.

4. The court found that the convictions for armed robbery and aggravated kidnaping were improper although the trial court refused to impose the 15-year enhancement, and instead imposed 20-year-sentences which were within the authorized sentencing range for armed violence. One purpose of resentencing is to allow the trial court to reevaluate the length of the defendant's sentence for each offense in the context of the total sentence for all the offenses. Furthermore, the trial court did not decline to impose the enhancement because it was aware of the proportionate penalties problem, but because the State failed to give proper notice that it would seek the enhancement.

5. The court rejected the argument that the proportionate penalties clause was violated because the defendant is required to serve 85% of the sentence for aggravated kidnaping, but would be eligible for release after serving 50% of an armed violence conviction predicated on kidnaping (so long as the trial court found that the conduct did not result in great bodily harm). The court concluded that proportionate penalties analysis focuses only on whether offenses which consist of identical elements have different sentencing ranges, and not on the manner in which sentences are carried out.

Similarly, the court rejected the argument that disparities in truth in sentencing provisions violate equal protection. The court concluded that there is no equal protection right to have good-time credit calculated identically for offenses consisting of the same elements.

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

People v. Lopez-Bonilla, 2011 IL App (2d) 100688 (No. 2-10-0688, 12/14/11)

Under current truth-in-sentencing provisions, a person convicted of home invasion receives no more than 4.5 days of credit for each month of his sentence if the court finds that the conduct leading to the conviction resulted in great bodily harm to the victim. 730 ILCS 5/3-6-3(a)(2)(iii).

While the meaning of the term "great bodily harm" has not been specifically addressed in Illinois case law in connection with the truth-in-sentencing provisions, it has been in connection with the aggravated battery statute. Though not susceptible of a precise definition, "great bodily harm," requires an injury of a greater and more serious character than an ordinary battery. "Bodily harm" as it relates to an ordinary battery requires some sort of physical pain or damage to the body such as lacerations, bruises or abrasions. Great bodily harm does not require hospitalization of the victim or any particular treatment of the injury.

Whether a victim's injuries rise to the level of great bodily harm is a question of fact. The trial court's determination will be upheld on appeal as long as the evidence was sufficient to support such a finding. The State is not subject to the same burden of proof at sentencing as at the guilt phase of trial.

The evidence supported the court's finding of great bodily harm. The victim was struck multiple times, including being hit on the head with a gun and having his head repeatedly slammed into a desk drawer with enough force to splinter the drawer. He bled enough to feel the blood coming out and to lie face down in his own blood. He felt like he was losing consciousness. It was reasonable for the court to conclude that the evidence showed great bodily harm occurred based on the description of the attack, the description of the injuries, and the amount of blood caused by those injuries.

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

People v. Monson, 2012 IL App (3d) 100868 (No. 3-10-0868, 6/20/12)

A sentence that does not conform to the statutory authority is void. The County Jail Good Behavior Allowance Act provides for one day of good behavior credit for each day of service of sentence in the county jail, with certain exceptions. 730 ILCS 130/3.

Defendant pled guilty and was ordered to serve probation and a jail term of 180 days without good-conduct credit. Because the court had no statutory authority to deny that credit to defendant, the order denying the credit was void.

The Appellate Court directed the clerk to amend the mittimus to reflect that defendant was entitled to good-conduct credit.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Montalvo, 2016 IL App (2d) 140905 (No. 2-14-0905, 9/23/16)

Under 730 ILCS 5/3-6-3(a)(4), a pretrial detainee may obtain sentence credit for participating in a "full-time" behavior modification program provided by the county jail. Under 20 Ill. Adm. Code 107.520(d)(4), a "full-time" program requires enrollment for a minimum of 15 hours. Credit for successfully completing such a program is calculated at the rate of one-half day of credit for each day of participation.

Here, defendant enrolled in an anger management program which required him to attend 12 weekly two-hour sessions over a three-month period. The court found that the trial judge erred by not granting sentencing credit.

1. First, the trial court erred by failing to determine at sentencing whether defendant was eligible for sentence credit and by deferring the credit question to DOC. Section 3-6-3 requires that the trial court determine the credit and include that calculation in the sentencing order.

2. In addition, because the 24 hours of required participation exceeded the 15-hour requirement of 20 Ill. Adm. Code 107.520(d)(4), the anger management program was "full-time." Because defendant attended two-hour sessions on 12 separate days, and the credit rate is one-half day for each day of participation, defendant was entitled to six days credit.

3. The court rejected the argument that defendant was entitled to 39 days of credit because the program spanned 78 calendar days from beginning to end, although defendant attended sessions only on 12 of those days. The court concluded that credit is to be given only for days on which defendant actually participates in the program.

(Defendant was represented by Deputy Defender Tom Lilien, Elgin.)

People v. Patrick, 406 Ill.App.3d 548, 956 N.E.2d 443 (2d Dist. 2010)

A person serving a term of imprisonment for reckless homicide, other than the offense of reckless homicide as defined by 720 ILCS 9-3(e), may receive one day of good-conduct credit for each day of his sentence of imprisonment. Those serving a term of imprisonment for reckless homicide pursuant to subsection (e) may receive no more than 4.5 days of good-conduct credit for each month of his sentence of imprisonment. 730 ILCS 3-6-3(a)(2.1) and (a)(2.3). Subsection (e) of 9-3 has been deleted from the criminal code and has read "blank" since 2003.

Defendant was convicted of reckless homicide pursuant to 720 ILCS 5/9-3(a) but the court ordered that he serve 85% of his sentence. The court lacked the authority to enter that order and therefore it was void.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

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§45-16(b)
For Time Awaiting Trial

Reno v. Koray, 515 U.S. 50, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) Under 18 USC 3585(b), which provides that a defendant is entitled to credit for "any time he has spent in official detention prior to the date the sentence commences," a defendant undergoes "official detention" only if he or she is under a "detention order." Thus, a federal defendant is not entitled to sentence credit for time served while on bail, even if the circumstances of confinement are just as onerous as those encountered under a detention order or sentence.

People v. Latona, 184 Ill.2d 260, 703 N.E.2d 901 (1998) Where a defendant receives consecutive sentences, credit for pretrial custody is to be awarded only against the aggregate sentence. Thus, unlike the case with concurrent sentences, a defendant who is simultaneously in custody for multiple offenses, and who subsequently receives consecutive sentences, does not receive credit against each sentence.
People ex rel. Morrison v. Sielaff, 58 Ill.2d 91, 316 N.E.2d 769 (1974) "Custody" under Ch. 38, §1005-8-7(b) means confinement, not bail.

People v. Beachem, 229 Ill.2d 237, 890 N.E.2d 515 (2008) Defendant was in "custody" before trial, for purpose of statute entitling defendant to sentencing credit for time spent in custody as a result of the offense for which the sentence was imposed, on days he reported to the site of the county sheriff's day-reporting program, which was operated pursuant to a consent decree capping the number of inmates in county jail.

People v. Ramos, 138 Ill.2d 152, 561 N.E.2d 643 (1990) A defendant is not entitled to sentence credit for time spent in home confinement as a condition of pretrial bond. Time spent in home confinement is not "time spent in custody" for the purposes of the sentence credit statute. The term "custody" was not intended to "encompass the period of time during which a defendant is released on bond, regardless of the restrictions that might be imposed on him during that time." See also, **People v. Turner**, 77 Ill.App.3d 985, 397 N.E.2d 25 (5th Dist. 1979) (a defendant who is initially found unfit, but who is later found fit, is entitled to credit

for the time spent in the hospital after the finding of unfitness; however, the statute has no application to a person who was not found to be unfit).

(**Note**: PA 88-119, effective July 27, 1993, amended 730 ILCS 5/5-8-7 to permit credit for time spent on home detention or in psychiatric or substance abuse treatment that is custodial.)

Moore v. Strayhorn, 114 Ill.2d 538, 502 N.E.2d 727 (1986) Trial judge erroneously denied defendant credit for time he spent in jail awaiting trial; defendant is statutorily entitled to credit for all time served in jail while awaiting trial.

People v. Robinson, 172 Ill.2d 452, 667 N.E.2d 1305 (1996) While on bond awaiting a murder trial, defendant was arrested for armed robbery. The trial court then increased defendant's bond in the murder case, and defendant surrendered in exoneration of his bond. Defendant pled guilty to armed robbery, and the time he spent in pretrial custody from the date of his arrest on the armed robbery until his guilty plea was credited against his sentence. On the day of his guilty plea, the trial court reduced defendant's bond on murder, and defendant was released. Defendant was convicted of murder and accorded credit for only the jail time before he was originally released on bond and for the period between the second bond was revoked and the date of the sentencing hearing. Defendant contended that he was entitled to additional credit for the period between the date he surrendered in exoneration of his first bond for murder and the date he was released on the second murder bond. The trial court refused to grant the requested credit, finding that the time already credited against the armed robbery sentence could not also be credited against the murder sentence. The Court disagreed, and held that the plain language of 730 ILCS 5/5-8-7(b) requires that defendant be credited with *all* custody time against the sentences for both murder and armed robbery. Defendant's initial bond for murder was "effectively withdrawn or revoked" when it was raised and he surrendered in exoneration. At that point, defendant was "simultaneously in pretrial custody on both the armed robbery charge and the murder charges," and entitled to credit against both sentences. See also, **Feazel v. Washington**, 291 Ill.App.3d 766, 684 N.E.2d 1052 (4th Dist. 1997) (**People v. Robinson** applies only to *concurrent* sentences; where *consecutive* sentences are imposed, 730 ILCS 5/5-8-4(e) provides that defendant is to be treated as if he had been committed "for a single term," with credit for pretrial custody only against that "single term"); **People v. Plair**, 292 Ill.App.3d 396, 686 N.E.2d 28 (5th Dist. 1997) (defendant not entitled to credit against consecutive sentences where same time had previously been credited; distinguishing **Robinson**).

People ex rel. Carroll v. Frye, 35 Ill.2d 604, 221 N.E.2d 262 (1966) Statutory amendment, which allowed credit for defendants in custody while awaiting trial, but only for those convicted after July 1, 1965, is invalid when applied to mandatory minimum sentences.

In re B.L.S., 202 Ill.2d 510, 782 N.E.2d 217 (2002) Habitual juvenile offenders, like other persons serving determinate sentences, are entitled to full credit for time served in pretrial custody.

People v. Roberson, 212 Ill.2d 430, 819 N.E.2d 761 (2004) Defendant's arrest for failure to appear on burglary charge placed defendant in custody for violating terms of bail bond, though the State indicted him eight months later and dismissed the burglary charge. Thus, defendant was entitled to sentencing credit under statute applicable to time spent in custody as a result of the offense for which the sentence was imposed; defendant was arrested for the bail offense, detained, and ultimately convicted and sentenced on that offense. Also, the appeal was not moot although defendant had been released from custody. See also, **People v. Hernandez**, 345 Ill.App.3d 163, 803 N.E.2d 577 (2d Dist. 2004) (defendant, who was arrested for failure to appear on an aggravated criminal sexual abuse charge, was entitled to credit for time he spent in custody after his arrest and before the State dismissed the sexual abuse charge and substituted a charge for failure to appear).

People ex rel. Bradley v. Davies, 17 Ill.App.3d 920, 309 N.E.2d 82 (4th Dist. 1974) Statute, which provides

for credit for time any person is confined to answer to a charge, is not limited to the time spent confined in the State of Illinois, but also applies to time spent in custody in other jurisdictions. Thus, defendant was entitled to credit for time spent in custody in Indiana, where she was apprehended by reason of Illinois process.

People v. Rhoden, 299 Ill.App.3d 951, 702 N.E.2d 209 (1st Dist. 1998) Where defendant is arrested in another state, he is entitled to credit against his sentence for time spent in custody after the date on which he waived extradition to Illinois. See also, **People v. Thomas**, 313 Ill.App.3d 998, 730 N.E.2d 618 (4th Dist. 2000) (defendant, who was arrested in Georgia for an Illinois offense, was entitled to credit against his Illinois sentence for time served in Georgia while awaiting extradition).

People v. Tillery, 141 Ill.App.3d 610, 490 N.E.2d 967 (4th Dist. 1986) Defendant is not entitled to sentence credit for time spent in an alcohol rehabilitation facility.

People v. Gonzales, 314 Ill.App.3d 993, 734 N.E.2d 77 (2d Dist. 2000) Although criminal drug conspiracy is itself an unclassified offense, it carries the same sentence as the offense that was the object of the conspiracy. Where the object of the conspiracy was a Class X felony, defendant was guilty of a Class X offense for purposes of determining credit for pretrial detention.

People v. Williams, 144 Ill.App.3d 994, 495 N.E.2d 685 (3d Dist. 1986) 1. After defendant was adjudicated delinquent of armed robbery and placed on juvenile probation, he was arrested and charged with perjury and obstruction of justice when authorities learned that defendant had lied about his age. Defendant was also charged as an adult with armed robbery, and the perjury and obstruction charges were nolle prossed. Defendant was entitled to credit on his armed robbery conviction for his confinement on the perjury and obstruction charges because those charges arose out of the same conduct for which defendant was later charged and prosecuted (i.e., armed robbery).

2. A defendant held in custody for any part of a day should be granted credit against his sentence for that day.

Cumulative Digest Case Summaries **§45-16(b)**

People v. Williams, 239 Ill.2d 503, 942 N.E.2d 1257 (2011)

1. Resolving a conflict in the Appellate Court, the Supreme Court held that a sentence of imprisonment commences when the trial court issues the *mittimus*. Thus, for purposes of computing sentence credit, the day on which a defendant is sentenced is treated as the first day of the prison sentence rather than as a day of presentence custody to be credited by the trial court. The court based its holding on the plain language of 730 ILCS 5/5-4.5-100(a), which states that a sentence of imprisonment commences on the day the offender is received by DOC, and 730 ILCS 5/5-8-5, which requires the trial court to commit the offender to the custody of the sheriff or the Department of Corrections upon the rendition of judgment after pronouncement of a prison sentence.

2. The court rejected the argument that a different conclusion is required by 725 ILCS 5/110-14(a), which authorizes a $5 credit against a fine for each day of presentence custody. Case law has interpreted §110-14(a) as requiring the $5 credit whenever any part of a day is spent in presentence custody. Under that precedent, the defendant receives the $5 credit against any fine for the day on which he or she is sentenced.

The court noted that §110-14(a) is part of the Code of Criminal Procedure rather than the Unified Code of Corrections, and that the plain language of the relevant statutes justify different rules for the $5 credit and sentencing credit.

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

People v. Anthony, 408 Ill.App.3d 799, 951 N.E.2d 507 (1st Dist. 2011)

1. The $5.00 court system fee authorized by 55 ILCS 5/5-1101(a) may be entered only if the defendant is convicted of violating the Illinois Vehicle Code or a similar county or municipal ordinance. The fee was vacated where the defendant was convicted of unlawful use of a weapon by a felon.

2. The $25 court services fee to defray the cost of court security, which is authorized by 55 ILCS 5/5-1103, may be imposed even where the defendant is not convicted of an offense specified under the statute.

3. The $10 County Jail Medical Fund fee, which is authorized by 730 ILCS 125/17, is to be imposed without regard to whether the defendant incurred an injury or required treatment while in custody. The court concluded that the fee is intended to reimburse the county for the cost of providing medical services to arrestees, and is not a "fine" to which the presentence incarceration credit may be applied.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Brown, 2017 IL App (3d) 140907 (No. 3-14-0907, 1/31/17)

A defendant who is in simultaneous custody on two offenses is entitled to pretrial custody credit on the newer offense beginning on the date he was charged and subject to arrest.

On March 29, 2012, the State filed a complaint against defendant in Will County while defendant was in custody in Cook County. The circuit court issued an arrest warrant the same day. On May 2, 2012, the court issued a *habeas* petition asking the Cook County Sheriff to deliver defendant to Will County on May 9, 2012. Defendant appeared on that day in the custody of the Cook County Sheriff. Defendant pled guilty on May 9, 2013 and the court gave him pretrial credit from May 9, 2012.

The Appellate Court held that defendant was entitled to custody credit from March 29, 2012, the date he was charged and a warrant was issued. The court rejected the State's argument that a defendant is not held on charges relating to an offense until a warrant is actually served.

The court awarded defendant an extra 41 days of pretrial custody.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Centeno, 394 Ill.App.3d 710, 916 N.E.2d 70 (3d Dist. 2009)

Under **People v. Robinson**, 172 Ill.2d 452, 667 N.E.2d 1305 (1996), a defendant is in simultaneous custody for multiple offenses where he surrenders his bond on one offense after being arrested and placed in custody on a second offense. A person who is in simultaneous custody is entitled to credit against both sentences for pretrial detention.

The court concluded that defense counsel was ineffective for failing to surrender defendant's bond on a Will County petition to revoke probation once defendant was placed in custody in Cook County on an unrelated charge. (See **COUNSEL**, §13-4(b)(4)).

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Clark, 2014 IL App (4th) 130331 (No. 4-13-0331, 4-13-0332, 4-13-0333, 4-13-0334 cons, 8/7/14)

730 ILCS 5/5-4.5-100(c) provides that an offender who is "arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest" is entitled to sentence credit "for time spent in custody under the former charge but not credited against another sentence." The court concluded that §5-4.5-100(c) was intended to provide credit where defendant is incarcerated on one charge, tried only on a subsequently brought charge for conduct which occurred before the first arrest, and the time in custody on the first charge is not credited to any other sentence.

Thus, defendant was not entitled to credit against the sentence for the former charge for time spent in custody on a subsequent charge that was later dismissed. The court adopted the reasoning of Justice Pope's dissenting opinion in **People v. Cook**, 392 Ill. App. 3d 147, 910 N.E.2d 208 (4th Dist. 2009).

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Johnson, 401 Ill.App.3d 678, 937 N.E.2d 190 (2d Dist. 2010)

1. Under **People v. Robinson**, 172 Ill.2d 452, 667 N.E.2d 1305 (1996), a defendant who is simultaneously in custody on unrelated offenses is entitled to sentence credit on all the offenses. Under Appellate Court authority interpreting **Robinson**, a defendant is entitled to credit for presentencing custody even if he is serving a prison sentence in an unrelated case.

Here, defendant was entitled to sentence credit from the date on which a complaint charging criminal damage to property was filed, although he was simultaneously incarcerated in a Department of Corrections facility. The court rejected the State's argument that sentence credit should be calculated only from the date on which an indictment replaced the complaint; the complaint marked the start of custody, the indictment charged the same "offense" as the complaint, and defendant was continuously in custody.

The court also noted that 730 ILCS 5/5-8-7(c) requires sentence credit for all confinement resulting from an offense. Thus, even if the indictment had constituted a new "charge," §5-8-7(c) would require credit for all time served from the date of the complaint.

2. The court held that defendant was not limited to 29 days credit under the negotiated plea agreement. Although defense counsel said when describing the plea agreement that defendant was entitled to 29 days credit, his statements concerning the nature of the plea agreement were ambiguous. Thus, it appeared as likely that the parties miscalculated the credit as that they expressly agreed to a sentence credit that was less than that to which the defendant was entitled.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Jones, 2016 IL App (1st) 142582 (No. 1-14-2582, 8/2/16)

1. The use of *nunc pro tunc* orders or judgments is limited to incorporating into the record action which was previously taken by the court but inadvertently omitted through clerical error. Thus, a *nunc pro tunc* order is proper only to reflect action that occurred previously, and not to "backdate" the effective date of an action. A *nunc pro tunc* order must be based on some note, memorandum, or other memorial in the court record.

2. Defendant was released on bond on retail theft charges, and was taken into custody on a different charge while he was on bond. Approximately three weeks after he was taken into custody on the second charge, defense counsel asked the trial court to exonerate the bond on the instant charge *nunc pro tunc* to the date of the arrest, so defendant could receive credit on the sentence in the instant charge from the date of his arrest on the unrelated charge. The prosecution stated that it had no objection to the request.

The Appellate Court concluded that because there had been no court action concerning bond in this case on the date defendant was taken into custody on the second charge, it was improper to use a *nunc pro tunc* order. Defendant was entitled to pretrial custody credit in this case only for the time between the exoneration of his bond and his conviction.

3. In the course of its holding, the court noted that under Supreme Court precedent, a defendant who is arrested and placed in custody for one charge while on bond on an unrelated charge is returned to custody on the latter charge only when his bond on that charge is revoked. Once bond has been revoked, the defendant is in custody on both charges and is entitled to credit for time in custody against the sentences for both charges.

(Defendant was represented by Assistant Defender Bob Hirschorn, Chicago.)

People v. Maldonado, 402 Ill.App.3d 411, 930 N.E.2d 1104 (1st Dist. 2010)

725 ILCS 5/110-14 authorizes a $5 per day credit against a "fine" for each day of pretrial incarceration on a "bailable" offense. The court concluded that the offenses here - first degree murder and attempt first degree murder - were "bailable." (See **BAIL**, §6-1).

In addition, a $10 mental health court fee (55 ILCS 5/5-1101(d-5)) and a $5 youth diversion/peer court fee (55 ILCS 5/5-1101(e)) were "fines," despite being labeled as "fees" by the General Assembly, because there is no relevant connection between defendant's convictions (first degree murder and attempt murder) and either mental health or juvenile justice.

Therefore, defendant was entitled to credit against the $15 in fines.

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

People v. Nelson, 2016 IL App (4th) 140168 (No. 4-14-0168, 3/10/16)

Defendant argued for the first time on appeal from the second-stage dismissal of his post-conviction petition that he did not receive the correct pre-sentence credit against his sentence. The State did not challenge defendant's claim that he was entitled to more credit, but argued that sentence credit is a statutory claim that cannot be raised in a post-conviction petition.

The court agreed that defendant was entitled to the additional credit, but held that it did not have authority to award defendant the credit. The Post-Conviction Hearing Act is jurisdictional in nature limiting the subject matter reviewable under the act to claims of a substantial denial of constitutional rights. 725 ILCS 5/122-1. The denial of a statutory right is not cognizable under the act.

Although the Illinois Supreme Court held that a sentence with incorrect sentence credit is void and may be attacked at any time, **People v. Roberson**, 212 Ill. 2d 430 (2004), that holding no longer correctly reflects the law after **People v. Castleberry**, 2015 IL 116916, abolished the void judgment rule.

Since the court had no jurisdiction over defendant's statutory claim, it could not grant him the relief he requested. The court noted however that defendant could petition the trial court to correct the "simple error in arithmetic, as trial courts retain jurisdiction to correct non-substantial matters of inadvertence or mistake."

(Defendant was represented by Assistant Defender Joel Wessol, Springfield.)

People v. Nesbit, 2016 IL App (3d) 140591 (Nos. 3-14-0591 & 3-14-0695, 9/8/16)

A defendant is entitled to credit against his sentence for each day he spends in pretrial custody. But a defendant who is out on bond on one charge and is subsequently arrested and returned to custody on another charge is not entitled to credit on the first charge until his bond is withdrawn or revoked. Once a defendant withdraws or surrenders his bond, he is considered in custody on both charges and earns credit against each charge.

A month after he was charged in the present case, defendant posted bond and was released from custody. The Department of Corrections immediately took defendant into custody for an earlier conviction. When defendant appeared in court on the present charge, his attorney informed the court that defendant was on bond in this case and in DOC custody on another case.

Following his conviction, defendant filed a post-conviction petition alleging that his counsel had provided ineffective assistance of counsel for failing to surrender his bond. In an affidavit attached to the petition, defendant stated that his counsel never informed him that he could surrender his bond and receive sentencing credit. He further stated that if his counsel had so informed him, he would have surrendered his bond.

The Appellate Court held that defendant's post-conviction claim made a substantial showing of ineffective assistance warranting a third-stage evidentiary hearing. The failure of counsel to notify defendant of his option to surrender bond and receive credit was objectively unreasonable and created prejudice by depriving defendant of sentencing credit.

The case was remanded for a third-stage evidentiary hearing.

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

People v. Purcell, 2013 IL App (2d) 110810 (No. 2-11-0810, 3/21/13)

730 ILCS 5/5-8-7(b) provides that a defendant is to be credited on a determinate sentence for time spent in custody as a result of the offense for which the sentence was imposed. The court concluded that under the current sentencing scheme, a sentence of natural life imprisonment is a determinate sentence because it is "not an indeterminate term subject to termination after service of a set minimum period." Because credit for time served while awaiting trial is mandatory and a sentence that does not award mandatory credit is void, the court concluded that defendant was entitled to 815 days credit. The court noted, however, that "the credit does appear to be meaningless, since it would never benefit the defendant."

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Riley, 2013 IL App (1st) 112472 (No. 1-11-2472, 1/22/13)

Under 725 ILCS 5/110-14, a person who is "incarcerated on a bailable offense" and who "does not supply bail" is entitled to a $5.00 per day credit against a fine ordered as part of his sentence. The Appellate Court found that defendant was not entitled to the $5.00 per day credit for time he spent on home confinement while on an electronic monitoring program.

The court stressed that §110-14 provides the monetary credit only for days on which defendant is actually "incarcerated." By comparison, 730 ILCS 5/5-4.5-100, which authorizes credit against a prison sentence for incarceration awaiting trial or sentencing, provides credit for time spent "in custody." The court concluded that "custody" includes both "actual imprisonment" and "lesser restraints," while "incarceration" is limited to confinement in a jail or penitentiary. Thus, credit for time served may be based on "custody" other than imprisonment, while the monetary credit against a fine applies only for days on which the defendant was physically incarcerated.

The court concluded that a defendant who is on electronic monitoring in his home is not physically incarcerated, and therefore is not entitled to the $5.00 per day credit against his fine.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Smith, 2013 IL App (3d) 110477 (No. 3-11-0477, 2/22/13)

730 ILCS 5/5-4.5-100(b) provides that a defendant is entitled to credit on a determinate sentence or maximum and minimum term of imprisonment for time spent in custody as a result of the offense for which the sentence was imposed. Where the defendant was sentenced to 48 consecutive hours of imprisonment under 720 ILCS 5/31-1(a-5), which mandates a minimum jail sentence of 48 consecutive hours or 100 hours of community service for the offense of obstructing a peace officer, he was entitled to a credit of two days for time served. The fact that the defendant did not serve two consecutive days of pretrial custody is irrelevant to whether he is entitled to the credit, because a defendant who serves any part of a day in custody is entitled to credit for that day.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Smith, 2014 IL App (4th) 121118 (No. 4-12-1118, 9/19/14)

1. The circuit clerk does not have the power to impose "fines," but does have authority to impose "fees."A "fee" is a charge which seeks to recoup the State's expenses for prosecuting the defendant. A "fine" is punitive in nature and is a pecuniary punishment imposed as part of the sentence imposed for a criminal offense. To determine whether an assessment is a "fine" or a "fee," the court examines the language of the statutes which create the assessment. Similarly, the language used to create an assessment controls whether it may be imposed on each conviction or only once per case.

2. The following assessments are "fees" which may be imposed only once in each case: (1) the $10 automation fee (705 ILCS 105/27.3a), (2) the $100 circuit clerk fee (705 ILCS 105/27.1a(w)), (3) the $25 court security fee (55 ILCS 5/5-1103), and (4) the $5 document storage fee (705 ILCS 105/27.3c(a)).

3. The court concluded that the $40 State's Attorney's assessment (55 ILCS 5/4-2002) is a fee which can be imposed on each count for which a conviction is entered.

4. The court concluded that the following assessments are "fines" and were therefore improperly imposed by the clerk: (1) the $10 arrestee medical assessment (730 ILCS 125/17), (2) the $50 court finance fee(55 ILCS 5/5-1101(c)), (3) the $5 drug court assessment fee (55 ILCS 5/5-1101(f)), (4) the $25 Victims Assistance Act fee (725 ILCS 240/10(c)(1)). In addition, the court concluded that the latter assessment was improperly calculated and on remand must be recalculated by the trial court.

5. The court concluded that the $30 juvenile expungement assessment (730 ILCS 5/5-9-1.17) is a "fine." In addition, application of the fine in this case would violate the *ex post facto* clause because the statute creating the assessment took effect after the date of the offense for which defendant was convicted.

6. The court also found that the trial court failed to impose three mandatory fines, and ordered that such fines be imposed on remand. First, the criminal surcharge fine (730 ILCS 5/5-9-1(c)) must be imposed on each count on which a conviction was entered. Because the amount of the surcharge depends on the other

fines imposed, on remand the trial court must calculate and impose the appropriate surcharge.

Second, the mandatory $200 sexual assault fine (730 ILCS 5/5-9-1.7(b)(1)) applies to each count for which a conviction for sexual assault was entered, unless the trial court in its discretion and at the request of a victim finds that the assessment would impose an undue burden on the victim. Because the victim made no such request in this case, the trial court must impose the fine on each sexual assault conviction.

Finally, the mandatory $500 sex offender fine (730 ILCS 5/5-9-1.15(a)) must be imposed on each count on which a conviction for a sex offense was entered.

7. The court found that the circuit clerk erred by imposing a $43.50 late fee (725 ILCS 5/124A-10) and a $100.05 collection fee (730 ILCS 5/5-9-3(a)). The court noted the State's argument that the late fees and collection fees are civil penalties that cannot be challenged in a criminal appeal, but found that the record did not support the imposition of such fees in this case because the defendant was not afforded a minimum of 30 days from the date of the judgment to pay the assessments.

8. The court concluded that because defendant was incarcerated awaiting trial on a charge of sexual assault, he was not entitled to the $5 per day credit against fines for time in which he was in custody. (725 ILCS 5/110-14(b)).

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Trujillo, 2012 IL App (1st) 103212 (No. 1-10-3212, 5/8/12)

A defendant may receive credit against his state sentence for time spent in federal custody if he was in federal custody as a consequence of the offense upon which he seeks credit.

After defendant posted bail and was released from state custody, he was taken into custody by the Immigration and Naturalization Service (INS). Whether he is entitled to credit against his state sentence for time he spent in INS custody depends on the reason for his detention by INS. The court remanded for a determination of whether his time in INS custody was a consequence of the offense upon which he sought credit.

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

People v. Williams, 394 Ill.App.3d 480, 917 N.E.2d 547 (1st Dist. 2009)

Recognizing a split in appellate authority, the Appellate Court concluded that when the mittimus is issued effective the day of sentencing, that day should not be counted as a day of pretrial custody for purposes of providing credit against a sentence for time spent in pretrial custody. Conversely, if the mittimus is not effective on the day of sentencing, the defendant is entitled to credit for that day.

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

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§45-16(c)
On Resentencing

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) Upon resentencing, a defendant is entitled to credit for time served on the first sentence. See also, **People v. Baze**, 43 Ill.2d 298, 253 N.E.2d 392 (1969).

Simpson v. Rice, 395 U.S. 711, 89 S.Ct. 2073, 23 L.Ed.2d 656 (1969) Credit for time served on a sentence given after first trial must be applied to sentence given after second trial.

People v. Scheib, 76 Ill.2d 244, 390 N.E.2d 872 (1979) Upon resentencing after revocation of probation or

conditional discharge, a defendant must be given credit for all time he spent in custody, including time in jail before trial and time in jail served as a condition of probation or conditional discharge. Also, upon resentencing after revocation of probation, a defendant is entitled to credit for the portion of a periodic imprisonment term served as a condition of the probation. This credit is determined on the basis of the portion of the term served and not on the basis of the actual number of days in custody. But see, **People v. Kauffman**, 172 Ill.App.3d 1040, 527 N.E.2d 645 (4th Dist. 1988) (under Ch. 38, §1005-6-4(h), as amended effective January 1, 1988, a defendant sentenced after revocation of probation is *not* entitled to credit for the time spent on probation unless the trial judge expressly orders that such credit be given; the amended statute is applicable to defendants who are sentenced, upon revocation, on or after the effective date, regardless of the date of the crime, the date of conviction, or the date probation was imposed). See also, **People v. Schwartz**, 182 Ill.App.3d 515, 538 N.E.2d 203 (4th Dist. 1989).

People v. Goodman, 102 Ill.2d 18, 464 N.E.2d 250 (1984) The Court rejected the State's argument that defendant could not be given credit for "time served on probation" after an arrest warrant was issued because the issuance of an arrest warrant tolled the period of probation. The purpose of the statutory tolling provision:

> "is simply to ensure that jurisdiction over the probationer is retained and that the period of probation does not expire prior to a hearing upon the petition to revoke. . . . It was not intended, in our judgment, to preclude credit for the interval between service upon defendant of a copy of the revocation petition, summons or warrant and the revocation order, unless the trial court directs otherwise."

People v. Whitfield, 228 Ill.2d 502, 888 N.E.2d 1166 (2008) A defendant who spent eight months on a probation sentence for which he was ineligible was not entitled to have the trial court consider whether to grant him credit against his subsequent prison term.

People v. Miles, 53 Ill.App.3d 137, 368 N.E.2d 187 (3d Dist. 1977) A defendant is not entitled to credit against probation for preconviction jail time. But, a defendant is entitled to credit for preconviction jail time upon sentencing following probation revocation.

People v. Durk, 195 Ill.App.3d 335, 552 N.E.2d 278 (4th Dist. 1990) Defendant was entitled to credit for all time he had served in jail on forgery offense, upon revocation of probation imposed in connection with that offense. Because of the uncertainties regarding sentence credit, the cause was remanded with directions for the trial court "to conduct a hearing to determine the specific number of days to which the defendant is entitled and to enter an amended order accordingly."

To avoid determining how much credit to which defendant is entitled, sentencing orders should specify the number of days' credit. Also, presentence reports, if prepared, should routinely contain dates on which defendant was in jail on offense and a figure representing the total number of such days. And, defense counsel should be asked whether he or she agrees or disagrees with the proposed figure.

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§45-16(d)
Against Fine

People v. Hare, 119 Ill.2d 441, 519 N.E.2d 879 (1988) A defendant who is in custody on a bailable offense, and who receives both a sentence of imprisonment and a fine, is entitled to credit against the imprisonment sentence, *and also* to a $5 per day credit against the fine, for each day spent in custody.

People v. Jones, 223 Ill.2d 569, 861 N.E.2d 967 (2006) The $5.00 per day credit applies only to fines, and not to fees. Generally, a "fine" is a pecuniary punishment imposed as part of the sentence on a conviction, while a "fee" is a collateral consequence of the conviction and is intended to compensate the State for some expenditure it incurred in prosecuting the defendant. The $4.00 criminal/traffic conviction surcharge, the $500 assessment for controlled substance violation, and the $100 trauma fund charge are all "fines" and therefore subject to the $5.00 per day credit. The $5.00 charge against drug offenders to fund spinal cord injury and paralysis does not violate due process. Although this charge was labeled a fee, it has the attributes of a fine and should be treated as a fine. "A defendant has no basis for protesting usage to which his criminal fines are put." See also, **People v. Fort**, 373 Ill.App.3d 882, 869 N.E.2d 950 (1st Dist. 2007) (the "drug assessment" mandated by 720 ILCS 570/411.2(a)(3) constitutes a "fine" to which the $5.00 credit for each day of presentence incarceration applies).

People v. Woodard, 175 Ill.2d 435, 677 N.E.2d 935 (1997) A defendant does not forfeit the $5.00 per day credit against his fine by failing to request it in the trial court. Instead, a defendant is entitled to the credit even where he first requests it on appeal. See also, **People v. Guerrero**, 311 Ill.App.3d 968, 725 N.E.2d 783 (4th Dist. 2000) (a defendant who pleads guilty under a plea agreement imposing a sentencing cap is entitled to a $5 credit against a fine for each day of pretrial custody, even where he failed to request the credit in the trial court or file a motion to vacate the plea).

People v. Bennett, 246 Ill.App.3d 550, 616 N.E.2d 651 (3d Dist. 1993) Defendant was entitled to monetary credit toward his fine for the time he was incarcerated without bail after he was found guilty but before he was incarcerated.

People v. Smith, 258 Ill.App.3d 261, 630 N.E.2d 147 (2d Dist. 1994) The $5 credit applies to each day of incarceration while the case is in the trial court, whether defendant is awaiting trial or sentencing.

People v. McNair, 325 Ill.App.3d 725, 759 N.E.2d 584 (3d Dist. 2001) A defendant whose bond was revoked upon the jury's verdict was not ineligible for the $5 credit because he was convicted of a non-probationable offense.

People v. Green, 375 Ill.App.3d 1049, 874 N.E.2d 935 (2d Dist. 2007) Because the appellate court had jurisdiction after defendant filed a postplea motion requesting relief that was unavailable as a matter of law, it could reach any issue that had not been waived. Therefore, the court could grant defendant a $5.00 per day credit for pre-conviction incarceration.

Cumulative Digest Case Summaries **§45-16(d)**

People v. Butler, 2013 IL App (5th) 110282 (No. 5-11-0282, 2/6/13)

Under 725 ILCS 5/110-14, a person incarcerated on a bailable offense who does not post bail is entitled to a credit of $5 per day of incarceration against any fine imposed as part of the sentence. A $5 credit issue may be raised at any time, including on appeal from denial of a post-conviction petition where the defendant abandoned the issue presented in the petition and raised no constitutional issue in the Appellate Court. Thus, defendant was entitled to raise the $5 per day credit issue on appeal from denial of a post-conviction petition which argued only that before defendant entered a negotiated plea, he was not sufficiently admonished about the two-year period of mandatory supervised release.

The mittimus was modified to reflect a $30 credit against a Children's Advocacy Center fee, which the parties agreed was actually a "fine."

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Chester, 2014 IL App (4th) 120564 (No. 4-12-0564, 1/28/14)

The Appellate Court refused to accept the State's concession that defendant was entitled to a $5 per day credit against a $15 Children's Advocacy Center fee and a $10 drug court fee. The court found that the fines were imposed by the clerk rather than the trial court, and that the cause should be remanded for the trial court to impose mandatory fines. The court also stated that where statutory credit issues are raised, the statement of facts should identify whether specific fines were imposed by the trial court or the circuit clerk.

The circuit clerk's assessment of fines was vacated and the cause remanded for reimposition of mandatory fines.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Guadarrama, 2011 IL App (2d) 100072 (Nos. 2-10-0072 & 2-10-0255, 8/12/11)

Noting a conflict in appellate authority, the court concluded that the DNA analysis fee (730 ILCS 5/5-4-3(j)) is a "fee" rather than a "fine" which can be offset by the $5 a day credit for each day of pretrial custody. The court found that the DNA analysis fee is imposed not as a punishment, but to cover costs incurred in collecting and testing DNA samples from defendants who are convicted of offenses which require the submission of a DNA sample.

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

People v. Gutierrez, 405 Ill.App.3d 1000, 938 N.E.2d 619 (2d Dist. 2010)

1. The mental health court assessment is labeled a fee, 55 ILCS 5/5-1101(d-5), but it is a fine and therefore may be offset by a $5 per day credit for the time defendant served in custody prior to sentencing. 725 ILCS 5/110-14(a).

2. Imposition of fines is a judicial function and the court clerk has no power to levy even mandatory fines that are not authorized by the court. Where the clerk assesses mandatory fines, the Appellate Court may vacate the fines and impose them itself.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Mingo, 403 Ill.App.3d 968, 936 N.E.2d 1156 (2d Dist. 2010)

1. 730 ILCS 5/5-9-2 authorizes the trial court, upon good cause, to revoke all or part of any fine in a criminal case or to modify the method of payment. Because the plain language of §5-9-2 does not impose a time limit for filing a petition to revoke fines, such petitions were intended to be free standing, collateral actions which need not be filed within 30 days of judgment. Thus, the trial court had authority to consider a petition to revoke fines filed more than 30 days after judgment and while appeals from the same conviction were pending.

2. The court concluded that a $200 DNA assessment imposed under 730 ILCS 5/5-4-3(j) is a "fine" rather than a "fee," and therefore may be satisfied by the $5.00 per day credit for time served in presentencing custody. Because the defendant was entitled to a credit of $1,565 for time served before sentencing, the $200 DNA fee was satisfied.

3. Because the DNA assessment is a "fine," a defendant against whom a DNA fee is imposed is also subject to a fine under 725 ILCS 240/10(b), which requires a $4.00 fine for every $40, or part thereof, of any other fine imposed. Because the only fine imposed against the defendant was the $200 DNA assessment, a $20 fine should have been assessed under §10(b). Furthermore, because §10(b) specifically provides that the $5.00 per day credit does not apply, the $20 fine could not be offset by defendant's unused credit for presentencing custody.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Riley, 2013 IL App (1st) 112472 (No. 1-11-2472, 1/22/13)

Under 725 ILCS 5/110-14, a person who is "incarcerated on a bailable offense" and who "does not supply bail" is entitled to a $5.00 per day credit against a fine ordered as part of his sentence. The Appellate

Court found that defendant was not entitled to the $5.00 per day credit for time he spent on home confinement while on an electronic monitoring program.

The court stressed that §110-14 provides the monetary credit only for days on which defendant is actually "incarcerated." By comparison, 730 ILCS 5/5-4.5-100, which authorizes credit against a prison sentence for incarceration awaiting trial or sentencing, provides credit for time spent "in custody." The court concluded that "custody" includes both "actual imprisonment" and "lesser restraints," while "incarceration" is limited to confinement in a jail or penitentiary. Thus, credit for time served may be based on "custody" other than imprisonment, while the monetary credit against a fine applies only for days on which the defendant was physically incarcerated.

The court concluded that a defendant who is on electronic monitoring in his home is not physically incarcerated, and therefore is not entitled to the $5.00 per day credit against his fine.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

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§45-17
Resentencing

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) After a defendant successfully attacks his first conviction, vindictiveness may play no part in the sentence he receives after a new trial. Thus, the judge may not impose a more severe sentence unless: (1) the reasons for doing so are based upon objective information concerning identifiable conduct by defendant after the time of the original sentencing proceeding, and (2) the factual data upon which the increased sentence is based is made a part of the record. See also, **Bordenkircher v. Hayes**, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) (in **Pearce**, the due process violation was the danger that the State might be retaliating against the accused for lawfully attacking his conviction); **People v. Baze**, 43 Ill.2d 298, 253 N.E.2d 392 (1969); **People v. Scott**, 69 Ill.2d 85, 370 N.E.2d 540 (1977); 730 ILCS 5/5-5-4.

Texas v. McCullough, 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986) Increased sentence, which the trial judge imposed after granting defendant's motion for new trial and after defendant was again convicted on retrial, did not violate due process. There was no basis to presume vindictiveness under **Pearce**. The judge had "no motivation to engage in self-vindication since the judge had not been reversed, but instead had herself granted the new trial." Even if the **Pearce** presumption applied, it was overcome by the judge's findings including some based on new evidence, in imposing the higher sentence.

Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) Jury imposition of a higher sentence on retrial does not violate **Pearce** where the jury was not informed of defendant's prior sentence.

North Carolina v. Rice, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) A defendant who is given a more severe and illegal sentence on retrial is entitled to resentencing, but not to have the conviction erased.

Wasman v. U.S., 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984) A defendant may properly be given a greater sentence on retrial, following a successful appeal, where the sentencing judge considered an intervening conviction for acts that occurred before the original sentencing.

People ex rel. Daley v. Strayhorn, 121 Ill.2d 470, 521 N.E.2d 864 (1988) Remand for capital sentencing

hearing, after defendant had originally been sentenced to a term of imprisonment because the judge did not think that defendant was death eligible, would not violate double jeopardy principles where first phase of death penalty sentencing hearing was never conducted. In so holding, the Court distinguished **Bullington v. Missouri**, 451 U.S. 430 (1981) and **Arizona v. Rumsey**, 467 U.S. 203 (1984), where double jeopardy prohibited new death penalty hearings after the sentencer had rejected the death penalty in full hearings.

People v. Kirkpatrick, 167 Ill.2d 439, 657 N.E.2d 1005 (1995) The trial court improperly increased the sentences where, in ruling on defendant's motion to reconsider the sentences, it imposed sentences of equal aggregate length but involving longer individual sentences. See also, **People v. Moore**, 177 Ill.2d 421, 686 N.E.2d 587 (1997) (**Kirkpatrick** applies to cases on collateral review).

People v. Garcia, 179 Ill.2d 55, 688 N.E.2d 57 (1997) Where resentencing is ordered because the trial court imposed concurrent sentences on convictions where consecutive sentencing is mandatory, constitutional and statutory considerations prohibiting any increase in the length of the sentences are inapplicable.

People v. Pierce, 80 Ill.App.3d 514, 400 N.E.2d 62 (1st Dist. 1980) Statutory provision prohibiting increasing sentences after a conviction is set aside "on direct review or on collateral attack," applies to resentencing after a defendant has gained post-trial relief in the trial court by way of a motion for new trial. But see, **People v. Adams**, 169 Ill.App.3d 312, 523 N.E.2d 223 (4th Dist. 1988) (declining to follow **Pierce** and holding the statutory provision discussed in **Pierce** does not apply where defendant's guilty plea was set aside in a motion to withdraw the plea, rather than on either direct appeal or in a collateral attack).

People v. Pittman, 316 Ill.App.3d 245, 736 N.E.2d 662 (5th Dist. 2000) Statutory provision prohibiting increasing sentences after a conviction is set aside (unless the more severe sentence is based on conduct occurring after the original sentencing), does not prohibit a higher sentence than was imposed on a guilty plea that defendant withdrew.

People v. Colter, 237 Ill.App.3d 486, 604 N.E.2d 980 (3d Dist. 1992) Although the balance of aggravating and mitigating factors is left to the trial judge, a reviewing court's determination of an issue is binding on the trial court on remand and on the reviewing court in a subsequent appeal. Thus, a trial judge who is ordered to consider certain mitigating factors on remand is not free to "disagree" and ignore the order.

People v. Yarber, 43 Ill.App.3d 668, 357 N.E.2d 166 (1st Dist. 1976) Resentence was an improper increase in sentence because there was nothing in defendant's conduct after the original sentence to warrant an increase. The court rejected the contention that the new sentence was not an increase from the original sentence because defendant would go before the parole board sooner under the new sentence. Sentenced reduced.

People v. Cunitz, 59 Ill.App.3d 701, 375 N.E.2d 1020 (5th Dist. 1978) On remand for resentencing for misdemeanor theft and felony escape (after appellate court reduced felony theft conviction to misdemeanor theft), the trial judge imposed concurrent sentences of 364 days for theft and 5 to 20 years for escape (escape conviction greater than original). The court reduced the escape conviction, finding that the judge could not increase the sentence on remand unless the increase was based on defendant's conduct since the original sentence was imposed, and rejected the State's argument that the sentence on remand was not an increase because the original sentence, when aggregated, was six years, eight months to twenty years.
People v. MacRae, 78 Ill.App.3d 266, 397 N.E.2d 509 (1st Dist. 1979) Upon remand, the trial judge failed to give "serious consideration to the pertinent statute and [make] a rational determination regarding a sentence of probation." Reversed and remanded for another sentencing hearing before a different judge.

People v. Mikesell, 12 Ill.App.3d 382, 297 N.E.2d 590 (4th Dist. 1973) When the reviewing court finds that

the trial court abused its discretion or acted arbitrarily by denying probation, the cause should be remanded to a different judge for a new sentencing hearing.

People v. Gurga, 176 Ill.App.3d 82, 530 N.E.2d 1059 (1st Dist. 1988) Remand for resentencing before a different judge was required where the trial court, as evidenced by its on-the-record remarks, refused to give serious consideration to statutory sentencing factors relating to a guilty but mentally ill verdict.

People v. Blanck, 286 Ill.App.3d 583, 676 N.E.2d 731 (2d Dist. 1997) Where the conviction and extended term on the most serious offense were vacated on appeal, on remand the trial court could not impose an extended term on the next most serious offense of which defendant was convicted where no evidence was presented regarding defendant's conduct since the original sentencing.

People v. Jackson, 299 Ill.App.3d 104, 700 N.E.2d 736 (1st Dist. 1998) Unless reasons for increased sentence appear on the record, it is presumed that any increase was motivated by vindictiveness. But the presumption does not apply where the second sentence was imposed after a trial and the first sentence was imposed after a guilty plea. Where there is no presumption of vindictiveness, defendant has the burden to show that the second sentence was motivated by actual vindictiveness. Where nothing in the record tended to show that the sentence was increased due to vindictiveness, defendant failed to carry this burden.

People v. Pugh, 325 Ill.App.3d 336, 758 N.E.2d 319 (1st Dist. 2001) Defendant was convicted of murder (for which he received death), as well as armed robbery and forcible detention (for which he received concurrent terms of 30 years and 7 years). On direct appeal, the death sentence was vacated and the cause remanded for resentencing. On remand, the trial judge "effectively increased the amount of time defendant would spend while incarcerated for the armed robbery and forcible detention offenses," though the Supreme Court had not ordered resentencing for armed robbery and forcible detention.

People v. Smith, 258 Ill.App.3d 633, 629 N.E.2d 598 (1st Dist. 1994) Remanded for the trial court to decide whether defendant's sentence should be modified in light of his current state of health (defendant discovered on appeal that he had cancer and was granted an appeal bond).

Cumulative Digest Case Summaries **§45-17**

People v. Inman, 2014 IL App (5th) 120097 (No. 5-12-0097, 2/4/14)

It is a violation of due process to impose a harsher sentence after remand from a successful appeal unless it is based on defendant's conduct subsequent to the original sentence. The imposition of consecutive sentences on remand, which resulted in defendant losing sentence credit against one of his sentences, did not violate due process since the length of the individual sentences was not increased and since one of the original sentences was natural life imprisonment, which could not have been reduced by any type of sentence credit.

Defendant was originally sentenced to concurrent prison terms of natural life for first-degree murder and 30 years for attempted first-degree murder. After his natural life sentence was vacated on appeal, he was resentenced to consecutive terms of 35 years for murder and 30 years for attempt. Defendant argued that by making the sentences consecutive he lost his good time credit against the 30-year attempt sentence, thereby increasing his sentence on remand and violating his right to due process.

The Appellate Court rejected this argument since neither individual sentence was more severe than the original sentences. Consecutive sentencing merely alters the manner in which the sentences are to be served, not the actual sentence. Moreover, defendant's previous natural life sentence could not be reduced by sentence credit and defendant would have remained in prison for the rest of his natural life regardless of whether he received credit against his 30-year sentence. Under the new sentence, the amount of time defendant will spend

in prison on the attempt charge remains unchanged, while the time spent of the murder sentence has been reduced.

The court disagreed with the First District's decision in **People v. Pugh**, 325 Ill. App. 3d 336 (1st Dist. 2001), which held that by ordering the sentences on remand to run consecutively, the trial court effectively and improperly increased the amount of time defendant would be incarcerated on two of his convictions. The court noted that it was not bound by decisions from other districts and did not find **Pugh** persuasive, especially since it was at odds with the many Illinois cases holding that consecutive sentences do not constitute an increase in any individual sentence.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. McBride, 395 Ill.App.3d 204, 916 N.E.2d 1282 (5th Dist. 2009)

The trial court violated 730 ILCS 5/5-1-19, which provides that the court may not increase a sentence once it is imposed, where it resolved defendant's motion to reconsider the sentence by agreeing that an extended term was improper but vacated an order awarding defendant credit for time served on probation. The court also noted that because defendant could have waited until appeal to challenge the extended term sentence, and would have had the extended term vacated without losing the previously-awarded credit for probation time, the trial court in effect penalized the defendant for correcting the erroneous sentence immediately.

The trial court ordered the mittimus corrected to reflect credit for time served on probation.

(Defendant was represented by Assistant Defender Rita Peterson, Mt. Vernon.)

People v. Strawbridge, 404 Ill.App.3d 460, 935 N.E.2d 1104 (2d Dist. 2010)

1. After the Appellate Court vacated defendant's guilty plea, defendant was convicted in a jury trial. At sentencing, the trial judge imposed a 12-year sentence for predatory criminal sexual assault of a child, in lieu of the nine-year-sentence imposed on the guilty plea. The court based the increased sentence on defendant's lack of remorse and the opinion of a social worker that defendant was likely to recidivate.

Where a conviction or sentence has been set aside on direct review or collateral attack, a more severe sentence cannot be imposed on remand unless that sentence is based upon the defendant's "conduct" since the original sentencing hearing. (730 ILCS 5/5-5-4). As a matter of first impression, the court concluded that the term "conduct" covers only "behavior," and does not include either of the factors on which the judge relied.

Because defendant engaged in no "conduct" that justified increasing his sentence for predatory criminal sexual assault of a child, the Appellate Court reduced the sentence to nine years. The court reached the issue as plain error, finding that imposition of an unauthorized sentence constitutes fundamental error.

2. In a concurring opinion, Justice Zenoff noted that §5/5-5-4 is more restrictive than United States Supreme Court precedent, which permits a sentence to be increased where the vacated conviction resulted from a guilty plea and the increased sentence was imposed after a jury trial.

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

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§45-18
Appellate Concerns Generally

§45-18(a)
Preserving Sentencing Issues for Review/Rule 605(a) Admonishments

People v. Reed, 177 Ill.2d 389, 686 N.E.2d 584 (1997) PA 88-311, which took effect August 11, 1993, modified 730 ILCS 5/5-8-1(c) by requiring a written post-sentencing motion in order to preserve sentencing issues for

appeal. See also, **People v. Shields**, 298 Ill.App.3d 943, 700 N.E.2d 168 (1st Dist. 1998) (where the State fails to object to an oral post-sentencing motion, the reviewing court may address issues raised in the oral motion despite defendant's failure to file the required written post-sentencing motion).

People v. Heider, 231 Ill.2d 1, 896 N.E.2d 239 (2008) 730 ILCS 5/5-8-1(c) provides that a challenge to the correctness of the sentence or to any aspect of the sentencing hearing must be made by a written motion filed within 30 days after the sentence is imposed. Sentencing issues not raised in a post-sentencing motion are forfeited. Defendant did not forfeit the trial court's consideration of defendant's dangerousness based upon his mental retardation. The issue raised on appeal - that the trial court erroneously considered mental retardation as an aggravating factor - was not a "completely different" objection than the one raised in the trial court - that defendant suffered from "diminished mental functioning." Also, the trial court had an opportunity to review the "same essential claim" as was raised on appeal.

People v. Henderson, 217 Ill.2d 449, 841 N.E.2d 872 (2005) Where defendant receives incomplete 605(a) admonishments regarding the steps necessary to preserve sentencing issues for appeal, remand is required only where defendant has suffered prejudice or has been denied real justice as a result of the inadequate admonishments. Because defendant raised no potential sentencing issues (besides hypothetical ones), a remand was not required. See also, **People v. Medina**, 221 Ill.2d 394, 851 N.E.2d 1220 (2006) (inadequate 605(a) admonishments did not require a remand where defendant failed to raise any sentencing issues on appeal; remand was not necessary to allow defendant to present "additional information" to the trial court).

People v. Breedlove, 213 Ill.2d 509, 821 N.E.2d 1176 (2004) Defendant who was properly admonished at sentencing under former version of Supreme Court Rule did not have a due process right to a remand for admonishment of the amended version of the rule, which went into effect while defendant's appeal was pending and which added the requirement that defendants be admonished of the need to file a post-sentencing motion in the trial court to preserve appellate review of sentencing issues.

Cumulative Digest Case Summaries **§45-18(a)**

People v. Abdelhadi, 2012 IL App (2d) 111053 (No. 2-11-1053, 7/18/12)

1. Although the trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor at sentencing. Consideration of a single factor as both an element of the offense and as a basis for imposing a harsher sentence than might otherwise have been imposed is prohibited. The legislature has already considered the factor when setting the range of penalties and therefore it cannot be considered again as a justification for a greater penalty.

Mere mention of a factor inherent in the offense is not error. Nor is it error for the court to reference a factor inherent in the offense at sentencing in conjunction with consideration of the nature and circumstances of the offense, or the degree or gravity of defendant's conduct.

Defendant was convicted of aggravated arson in that he committed an arson of a residence when he knew or should have known that a person was present therein. At sentencing, the court considered in aggravation that defendant's conduct "did in fact endanger the lives of individuals." Although the court also considered other legitimate factors, the court's consideration of a factor inherent in the offense, with no further discussion or elaboration of that factor, was improper.

2. A double-enhancement error may be considered as plain error under the second prong of the plain-error rule, i.e., that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. When a trial court considers erroneous aggravating factors in determining the appropriate sentence of imprisonment, the defendant's fundamental right to liberty is unjustly affected.

3. When a court considers an improper factor in aggravation, the case must be remanded for resentencing unless it appears from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence. To determine whether the court accorded significant weight to a factor, a reviewing court may consider: (1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) whether the sentence received was substantially less than the maximum sentence permitted by statute.

The trial court's comments, which were neither dismissive nor emphatic, do not reveal how much weight it placed on the improper factor. The defendant's sentence also did not allow the Appellate Court to determine how much weight the trial court placed on the improper factor because it was four years above the minimum sentence, even though it was substantially below the maximum. Remand for resentencing was thus required.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Hanson, 2014 IL App (4th) 130330 (No. 4-13-0330, 12/30/14)

Under 730 ILCS 5/5-4.5-50(d) a defendant must file a written motion challenging "the correctness of a sentence or any aspect of the sentencing hearing" within 30 days of the imposition of sentence. The written post-sentencing motion allows the trial court to review defendant's contentions of sentencing error and save the delay and expense of waiting until appeal to correct any errors. It also gives the Appellate Court the benefit of the trial court's reasoned judgment on potential issues.

1. Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant's claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made no effort to point this error out at trial and create a clear record of the trial court's actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to "use the transcript of the sentencing hearing as a crystal ball" to understand the trial court's thinking. The Appellate Court refused to engage in "mind-reading" and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain error since the right to be sentenced lawfully affects a defendant's fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

2. The court also declined to review as plain error, despite the State's agreement, defendant's claim that the trial court imposed a restitution order without an evidentiary basis for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts "a few ten-dollar phrases" such as "substantial rights," "grave error," and the "fundamental right to liberty." Since all sentencing errors arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court's error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Tapia, 2014 IL App (2d) 111314 (No. 2-11-1314, 1/9/14)

Defendant entered a negotiated guilty plea in exchange for the State's recommendation of a sentencing cap. At the sentencing hearing, the trial court relied upon incorrect information in the pre-sentence investigation report (PSI) which listed a prior conviction from Georgia as a felony rather than a misdemeanor. Defendant did not object to the court's actions, and filed no post-judgment motions or direct appeal.

Defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to correct the misinformation about the Georgia conviction. At a third-stage evidentiary hearing, the State introduced trial counsel's affidavit which stated that he reviewed the PSI with defendant and defendant never indicated that the description of the Georgia conviction as a felony was inaccurate. Defendant filed an affidavit stating that he did not receive a copy of the PSI until the day of sentencing when trial counsel asked him to quickly look it over. Defendant looked it over but did not notice any errors because he did not understand all the legalese. The circuit court denied the petition and defendant appealed.

The Appellate Court held that defendant forfeited his claim of ineffective assistance by failing to file any post-judgment motions or raise the claim on direct appeal. Ordinarily, forfeiture bars a post-conviction claim that could have been, but was not, raised on direct appeal. Here, support for the claim existed and it could have been raised in a post-judgment motion or on direct appeal. The record shows that defendant reviewed the PSI. Defendant also knew that his Georgia conviction was a misdemeanor. A defendant has the obligation to notify the sentencing court of any inaccuracies in the PSI. By failing to object to the misinformation in the PSI or the court's reliance upon that misinformation, defendant failed to preserve the issue.

Although defendant entered a partially negotiated plea, and thus could not have moved to reconsider his sentence on the sole ground of excessiveness, his claim is not that his sentence was excessive, but rather that due to counsel's ineffectiveness the trial court considered inaccurate information in imposing his sentence. Such claim could have been raised in a post-judgment motion and on direct appeal.

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§45-18(b)
Standards of Review

People v. Perruquet, 68 Ill.2d 149, 368 N.E.2d 882 (1977) The imposition of a sentence is a matter of judicial discretion, and in the absence of an abuse of discretion the sentence may not be altered on appeal. It is not the function of a reviewing court to serve as a sentencing court or to substitute its judgment for that of the trial court merely because the reviewing court feels that it would have imposed a different sentence had that function been delegated to it. See also, **People v. LaPointe**, 88 Ill.2d 482, 431 N.E.2d 344 (1981); **People v. Younger**, 112 Ill.2d 422, 494 N.E.2d 145 (1986); **People v. Crete**, 113 Ill.2d 156, 497 N.E.2d 751 (1986). But see, **People v. Taylor**, 33 Ill.2d 417, 211 N.E.2d 673 (1965) (where it is contended that the punishment imposed in a particular case is excessive, but within the limits prescribed by the legislature, the reviewing court should not disturb the sentence unless it clearly appears that the penalty constitutes a great departure from the fundamental law and its spirit and purpose or is manifestly in excess of the proscription of the Illinois constitution); **People v. Barrios**, 114 Ill.2d 265, 500 N.E.2d 415 (1986); **People v. Christy**, 271 Ill.App.3d 966, 650 N.E.2d 12 (4th Dist. 1995) (a sentence falling within statutory guidelines will not be disturbed on appeal unless it is "manifestly disproportionate" to the nature of the case).

People v. Smith, 177 Ill.2d 53, 685 N.E.2d 880 (1997) A reviewing court will give less deference to the imposition of a death sentence than a non-death sentence. In death cases, the Supreme Court has vacated sentences which it found to be "inappropriate" in view of the relevant mitigation. Each capital case is "unique and must be evaluated on its own facts, focusing on whether the circumstances of the crime and the character of defendant are such that the deterrent and retributive functions of the ultimate sanction will be served by imposing the death penalty." Here, the death sentence was unwarranted where the mitigating factors were comparable to those in cases in which death sentences have been reduced, and the murder was an aberration brought on by special circumstances and not likely to be repeated.

People v. Bolyard, 61 Ill.2d 583, 338 N.E.2d 168 (1975) An abuse of discretion would exist where the sentence fails to reflect the seriousness of the offense and give adequate consideration to the rehabilitative potential

of defendant (**People v. Murphy**, 72 Ill.2d 421, 381 N.E.2d 677 (1978); **People v. Heflin**, 71 Ill.2d 525, 376 N.E.2d 1367 (1978); **People v. Harris**, 187 Ill.App.3d 832, 543 N.E.2d 859 (1st Dist. 1989)), the sentence imposed is not authorized by statute (**People ex rel. Carey v. Bentivenga**, 83 Ill.2d 537, 416 N.E.2d 259 (1981); **In re T.E.**, 85 Ill.2d 326, 423 N.E.2d 910 (1981)), there is an unreasonable disparity between sentences imposed upon similarly situated co-defendants (**People v. Godinez**, 91 Ill.2d 47, 434 N.E.2d 1121 (1982)), the trial judge relied upon improper factors (**People v. Bolyard**, 61 Ill.2d 583, 338 N.E.2d 168 (1975); **People v. Rege**, 64 Ill.2d 473, 356 N.E.2d 537 (1976); **People v. Conover**, 84 Ill.2d 400, 419 N.E.2d 906 (1981); **People v. Saldivar**, 113 Ill.2d 256, 497 N.E.2d 1138 (1986)), the trial judge relied upon inaccurate or unreliable information (**People v. Crews**, 38 Ill.2d 331, 231 N.E.2d 451 (1967); **People v. Meeks**, 81 Ill.2d 524, 411 N.E.2d 9 (1980)), or the trial judge failed to sufficiently consider defendant's nature and character, including defendant's demeanor, credibility, mentality, general moral character, social environment, family background, education, habits, and age (**People v. Murphy**, 72 Ill.2d 421, 381 N.E.2d 677 (1978)).

People v. Deleon, 227 Ill.2d 322, 882 N.E.2d 999 (2008) A trial court's finding of "severe bodily injury" may be reversed only if it is against the manifest weight of the evidence. A finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the finding itself is unreasonable, arbitrary, or not based on the evidence.

People v. Burnett, 385 Ill.App.3d 610, 897 N.E.2d 827 (1st Dist. 2008) The failure to order physical and mental examinations before sentencing if the judge desires more information than is available in the presentence report is reviewed for abuse of discretion.

Cumulative Digest Case Summaries **§45-18(b)**

People v. Lopez-Bonilla, 2011 IL App (2d) 100688 (No. 2-10-0688, 12/14/11)

Under current truth-in-sentencing provisions, a person convicted of home invasion receives no more than 4.5 days of credit for each month of his sentence if the court finds that the conduct leading to the conviction resulted in great bodily harm to the victim. 730 ILCS 5/3-6-3(a)(2)(iii).

While the meaning of the term "great bodily harm" has not been specifically addressed in Illinois case law in connection with the truth-in-sentencing provisions, it has been in connection with the aggravated battery statute. Though not susceptible of a precise definition, "great bodily harm," requires an injury of a greater and more serious character than an ordinary battery. "Bodily harm" as it relates to an ordinary battery requires some sort of physical pain or damage to the body such as lacerations, bruises or abrasions. Great bodily harm does not require hospitalization of the victim or any particular treatment of the injury.

Whether a victim's injuries rise to the level of great bodily harm is a question of fact. The trial court's determination will be upheld on appeal as long as the evidence was sufficient to support such a finding. The State is not subject to the same burden of proof at sentencing as at the guilt phase of trial.

The evidence supported the court's finding of great bodily harm. The victim was struck multiple times, including being hit on the head with a gun and having his head repeatedly slammed into a desk drawer with enough force to splinter the drawer. He bled enough to feel the blood coming out and to lie face down in his own blood. He felt like he was losing consciousness. It was reasonable for the court to conclude that the evidence showed great bodily harm occurred based on the description of the attack, the description of the injuries, and the amount of blood caused by those injuries.

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

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§45-18(c)
Powers of the Reviewing Court – Generally

People v. Jones, 168 Ill.2d 367, 659 N.E.2d 1306 (1995) Supreme Court Rule 615(b)(1) and (b)(4) "clearly and unambiguously" grant reviewing courts the power to reduce a sentence that is an abuse of discretion. Whether an excessive sentence should be reduced or the cause remanded for resentencing depends on the circumstances of each case, including whether there is additional evidence that was not presented at the original sentencing, whether the evidence was "relatively straightforward and uncomplicated," and whether judicial resources would be conserved by reducing the sentence rather than requiring a new sentencing hearing.
People v. Dixon, 91 Ill.2d 346, 438 N.E.2d 180 (1982) A reviewing court has authority under Supreme Court Rule 615(b)(2) to remand for the imposition of sentence on "non-appealed" convictions. See also, **People v. Baldwin**, 256 Ill.App.3d 536, 627 N.E.2d 1228 (2d Dist. 1994) (reviewing court has authority to consider an unsentenced conviction that is intimately related to and dependent on the sentenced conviction; cause remanded for imposition of sentence on unsentenced conviction).

People v. Whitfield, 228 Ill.2d 502, 888 N.E.2d 1166 (2008) The appellate court does not have authority to fashion a sentence that does not conform to statutory guidelines.

People v. Slywka, 365 Ill.App.3d 34, 847 N.E.2d 780 (1st Dist. 2006) Where collateral estoppel barred a conviction for first degree murder based on intent, the court remanded the cause for the trial court to determine "whether a lesser sentence should be imposed" for first degree murder based on the less culpable mental state of knowledge.

Cumulative Digest Case Summaries **§45-18(c)**

People v. Betance-Lopez, 2015 IL App (2d) 130521 (No. 2-13-0521, 2/27/15)

Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a less-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State's request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State's failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State's request was granted. Noting that defendant might have decided to not appeal had the State raised the issue below, the court declined to overlook the State's waiver.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

People v. Isaacson, 409 Ill.App.3d 1079, 950 N.E.2d 1183 (4th Dist. 2011)

The imposition of a fine is a judicial act. The clerk of the court is a non-judicial member of the court and, as such, has no power to impose sentences or levy fines. Where the clerk imposes fines not imposed by the court, the Appellate Court will vacate the fines, but then can reimpose the fines itself.

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

People v. Johnson, 2013 IL App (1st) 120413 (No. 1-12-0413, 8/7/13)

1. 730 ILCS 5/5-5-3.2(b)(1) authorizes an extended term for a defendant who is convicted of any felony

after having been previously convicted of the "same or similar class felony or greater class felony" within the past 10 years, excluding time in custody. 730 ILCS 5/5-5-3.2(b)(7) authorizes an extended term for a person who is at least 17, commits "a felony," and within the past 10 years (excluding time in custody) was "adjudicated a delinquent minor . . . for an act which would be a Class X or Class 1 felony if committed by an adult." Thus, under the plain language of the statute, an adult who commits any felony within 10 years of having been adjudicated delinquent for a Class X or Class 1 felony is subject to an extended term, while an adult repeat offender is subject to an extended term only if the second conviction is for "the same or greater class offense" as the original conviction.

Although the State conceded that the statute was unconstitutional on its face when applied to the defendant, who was convicted of armed robbery while armed with a firearm after having been adjudicated delinquent for residential burglary, the court elected to reject the concession and find that the legislature's failure to include the phrase "same or greater class felony" in section (b)(7) was inadvertent. The court concluded that the legislative intent underlying both sections (b)(1) and (b)(7) was to impose harsher sentences on offenders whose repeat offenses show that they are resistant to correction. The court found that the legislature could not have intended to authorize an extended term for a repeat offender who is convicted of any felony after having been adjudicated delinquent, but exclude extended term sentences for adult repeat offenders unless the prior conviction was for the same or greater class felony. Thus, the court concluded that the phrase "same or greater class felony" should be read into section (b)(7).

Because defendant's delinquency adjudication for residential burglary was not for the same or greater class felony as armed robbery while armed with a firearm, defendant was not eligible for an extended term under section (b)(7).

2. The court remanded the cause for resentencing, rejecting the State's request to merely impose a reduced sentence. While a reviewing court has the power to reduce a sentence imposed by the trial court, this power should be exercised sparingly and with caution. Because the trial court rejected the State's request for the maximum extended term sentence for which it believed defendant was eligible, the court found that the trial judge might have imposed less than the 30-year maximum non-extended term which actually applied to the offense.

(Defendant was represented by Assistant Defender Benjamin Wimmer, Chicago.)

People v. Quevedo, 403 Ill.App.3d 282, 932 N.E.2d 642 (2d Dist. 2010)

Because the statute creating a mandatory natural life sentence was declared unconstitutional in **People v. Wooters**, 188 Ill.2d 520, 722 N.E.2d 1102 (1999), the Appellate Court remanded the cause for a new sentencing hearing. The court rejected defendant's argument that it should merely impose the statutory minimum authorized under the controlling statute, although the trial court stated at the original sentencing hearing that it would have imposed the minimum sentence had natural life not been mandatory.

A reviewing court is authorized to either reduce a sentence on appeal or remand the cause for resentencing. Where the parties have no new evidence to offer on remand and the evidence presented at the original sentencing was uncomplicated, it may be appropriate for the reviewing court to impose a sentence rather than expend judicial resources on a new sentencing hearing.

Here, however, the original sentencing hearing was perfunctory because both parties recognized that a natural life sentence was mandatory. Thus, no mitigation or aggravation was presented. Under these circumstances, a new sentencing hearing was justified.

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

People v. Ware, 2014 IL App (1st) 120485 (No. 1-12-0485, 3/14/14)

A notice of appeal confers jurisdiction on a reviewing court to consider only the judgments or parts thereof specified in the notice of appeal. Here, the Appellate Court found that because the notice of appeal was limited to defendant's current conviction for armed robbery, the Court did not have jurisdiction to determine whether defendant's previous convictions for aggravated unlawful use of a weapon (AUUW), introduced as

aggravation at sentencing, were unconstitutional under **People v. Aguilar**, 2013 Il 112116.

Although the Illinois Supreme Court found that the Class 4 form of AUUW was void in **Aguilar**, that fact alone did not give the Appellate Court jurisdiction over defendant's prior convictions. The Appellate Court is not vested with authority to consider the merits of a case simply because it involves a void judgment. If defendant wants to challenge his prior convictions he must file the appropriate pleadings.

Additionally, since **Aguilar** implied that the Class 2 form of AUUW remains in effect, it is not necessarily true that defendant's prior AUUW convictions are void. The Court rejected defendant's request for resentencing.

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

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