

CH. 46
SEX OFFENSES

§46-1 Generally

- (a) [Right to Confrontation](#)
- (b) [Rape Shield Statute \(CumDigest\)](#)
- (c) [Miscellaneous \(CumDigest\)](#)

§46-2 Criminal Sexual Assault and Abuse Offenses

- (a) [Generally \(CumDigest\)](#)
- (b) [Constitutionality](#)
- (c) [Lesser Included Offenses \(CumDigest\)](#)

§46-3 Decisions under Prior Law

- (a) [Rape and Deviate Sexual Assault](#)
- (b) [Indecent Liberties; Contributing to Sexual Delinquency](#)

§46-4 [Other Sex Related Offenses \(CumDigest\)](#)

§46-5 [Sexually Dangerous Persons Act \(CumDigest\)](#)

§46-6 [Sexually Violent Persons Act \(CumDigest\)](#)

§46-7 [Sex Offender Registration Act \(CumDigest\)](#)

[Top](#)

§46-1

Generally

§46-1(a)

Right to Confrontation

[Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 \(1988\)](#) The Sixth Amendment right to confrontation guarantees not only the opportunity to cross-examine witnesses, but also the right to face-to-face confrontation. Face-to-face confrontation is not only implicit in society's concept of fairness, but like cross-examination insures the integrity of the fact-finding process.

Any exceptions to the right to face-to-face confrontation must be based on individualized findings that the witness in question is likely to be harmed by testifying in open court. A State legislature may not create a blanket exception to the face-to-face confrontation requirement based on a general belief that all alleged victims of sexual abuse need to be protected from testifying in open court.

Where there were no findings that the child witnesses needed to be protected from testifying in open court, it was error to place a screen between the witnesses and defendant.

[Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 \(1990\)](#) The Sixth Amendment right to confrontation is intended to insure that only reliable evidence is admitted, and consists of four elements: a face-to-face encounter between defendant and his or her accuser, testimony under oath, cross-examination, and observation of the witness's demeanor by the trier of fact. The right to face-to-face confrontation, though a vital component of the Sixth Amendment, may be denied where necessary to further an important public interest, provided that the reliability of the evidence is assured by other means.

The Confrontation Clause was not violated by a Maryland statute allowing child witnesses to testify by closed circuit television where the trial court was required to find that the witness was incapable of testifying in the presence of defendant and the reliability of the testimony was assured by use of the oath, observation of the child's demeanor by the trier of fact, and the right to cross-examination.

In determining that the use of closed circuit television is required to protect a child witness from the trauma of testifying in defendant's presence, the trial court need not personally examine the witness in the presence of defendant or consider whether less-restrictive means will allow the witness to testify. However, defendant can be denied face-to-face confrontation only where the witness's inability to testify is caused by the presence of defendant and not by the witness's mere reluctance to testify in the courtroom or before the jury and spectators.

[People v. Fitzpatrick, 158 Ill.2d 360, 633 N.E.2d 685 \(1994\)](#) 725 ILCS 106B-1, which provided that in prosecutions for certain sexual offenses, victims under 18 may testify by closed circuit television if testifying in open court would either result in such serious emotional distress that the child cannot communicate or cause severe emotional distress which is likely to have "severe adverse effects," violated the Illinois Constitution's right to confrontation because it does not provide "face-to-face" confrontation. (**Note:** In the 1994 general election,

Illinois voters amended the Illinois Constitution to eliminate the requirement of face-to-face confrontation. The General Assembly subsequently reenacted [725 ILCS 5/106B-1](#) (now 106B-5) to allow use of televised testimony under specified circumstances.)

[People v. Reed, 361 Ill.App.3d 995, 838 N.E.2d 328 \(4th Dist. 2005\)](#) [725 ILCS 5/115-10](#), which authorizes admission of hearsay statements by the alleged victim of certain child sex offenses, is not facially unconstitutional under [Crawford v. Washington, 541 U.S. 36 \(2004\)](#). The trial judge properly admitted evidence of uncharged crimes under [725 ILCS 5/115-7.3](#).

[People v. Spicer, 379 Ill.App.3d 441, 884 N.E.2d 675 \(1st Dist. 2007\)](#) [725 ILCS 5/115-13](#) provides that in [prosecutions for criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, criminal sexual abuse, and aggravated criminal sexual abuse, statements made by the victim to medical personnel for the purposes of medical diagnosis or treatment shall be admitted as an exception to the hearsay rule. A statement by a 75 or 76-year-old woman to an emergency room doctor fell within §115-13; the doctor's purpose in conducting the examination was to diagnose and treat the victim. However, admission of the statement was held to violate Crawford v. Washington, 541 U.S. 36 \(2004\) \(barring the use of testimonial hearsay statements unless the declarant \(1\) testifies at trial, or \(2\) is unavailable as a witness and defendant had a prior opportunity for cross-examination\).](#)

[Top](#)

§46-1(b)

Rape Shield Statute

[Michigan v. Lucas, 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 \(1991\)](#) In a sexual assault case, defendant attempted to show that he and the complainant had a prior, consensual sexual relationship. However, defense counsel failed to comply with a statutory requirement that he file written notice of the evidence within 10 days after arraignment.

The notice requirement serves legitimate state interests; it protects rape victims against surprise, harassment, and unnecessary invasions of privacy, allows the prosecution an opportunity to investigate the prior sexual relationship, and permits the trial court to make a pretrial determination of relevancy and materiality.

[Stephens v. Miller, 13 F.3d 998 \(7th Cir. 1994\)](#) At defendant's trial for attempt rape, he attempted to testify that the complainant fabricated the complaint after she became enraged at a comment defendant made during consensual intercourse. (Defendant claimed that he asked the complainant whether she liked a particular position and said that "Tim Hall said you did.") The trial court refused to admit defendant's testimony, finding that it was evidence of the complainant's prior sexual conduct and was therefore barred by the Indiana Rape Shield Statute. The trial court's ruling did not violate defendant's constitutional right to offer evidence in his own behalf.

[People v. Santos, 211 Ill.2d 395, 813 N.E.2d 159 \(2004\)](#) The Rape Shield Statute bars evidence of the alleged victim's prior sexual activity or reputation, except where: (1) evidence of past sexual activity with the accused is offered as evidence of consent, or (2) admission of such evidence is constitutionally required. Where defendant was charged with criminal sexual

abuse involving an act of sexual penetration with a person who was between the ages of 13 and 17 and at least five years younger than defendant, the Rape Shield Statute did not permit the defense to introduce: (1) the complainant's statement to medical personnel that she had not had sexual intercourse with anyone other than defendant within 72 hours prior to the incident, or (2) her subsequent admission, upon learning that DNA analysis showed that semen recovered from her person had not come from defendant, that she had sexual intercourse with another man on the date of the alleged offense.

The evidence was not constitutionally required to be admitted, although defendant raised the affirmative defense that he reasonably believed the complainant to be of age and argued that the complainant's falsehood when reporting the offense contradicted her claim that she informed defendant of her age before any sexual activity occurred. The defense was attempting to impeach the complainant with a specific act of untruthfulness, which is prohibited under Illinois law.

Also, the attempted impeachment involved a collateral matter, because the complainant's sexual activity with another person was unrelated to whether defendant reasonably believed her to be of age.

[People v. Sandoval](#), [135 Ill.2d 159](#), [552 N.E.2d 726 \(1990\)](#) [725 ILCS 5/115-7](#) prohibits the introduction of reputation or "specific-act" evidence regarding a complainant's sexual history by *any* party, unless such evidence relates to the past sexual conduct of the complainant with defendant. Therefore, the trial court properly excluded defendant's proffered evidence regarding the complainant's sexual acts with a third party.

Additionally, it was improper for the complainant to testify on direct about her sexual acts, or lack thereof, with third parties. This error "would not have been cured . . . by further compounding the problem with admission of more evidence [i.e., defendant's proffered evidence] precluded by the statute." The complainant's testimony was not reversible error because the trial judge, prior to submission of the case to the jury, properly instructed the jury to disregard the complainant's improper testimony.

Finally:

"Although we certainly recognize that there may be certain situations in which the . . . rape shield statute may not apply because of the defendant's greater constitutional right of confrontation . . . we are not here confronted with an applicable situation demanding emphasis of the right of confrontation over the preclusion of the rape shield statute."

See also, **[People v. Hill](#)**, [289 Ill.App.3d 859](#), [683 N.E.2d 188 \(5th Dist. 1997\)](#) (**Sandoval** does not hold that evidence of prior sexual activity is admissible only where it is relevant to show bias, prejudice, or motive; however, exception for evidence of other activity to rebut "age-inappropriate" knowledge (by the complainant) must be narrowly drawn).

[People v. Kemblowski](#), [201 Ill.App.3d 824](#), [559 N.E.2d 247 \(1st Dist. 1990\)](#) Following a jury trial, defendant was convicted of aggravated criminal sexual assault. Defendant testified that the complainant consented to the sexual acts. Over defense objection, the complainant was allowed to testify that she was a lesbian, that she had never sexually consummated her marriage, and that her husband was a homosexual.

The above testimony was introduced in violation of the rape shield statute. Since the critical issue at trial was whether the complainant consented, and this issue depended on the credibility of the complainant and defendant, admission of the testimony was reversible error.

[People v. Gray, 209 Ill.App.3d 407, 568 N.E.2d 219 \(1st Dist. 1991\)](#) In a prosecution for aggravated criminal sexual assault against a 14-year-old girl, the trial court erred by refusing to allow defendant to cross-examine the complainant about the fact that one week before the alleged offense, she had expressed fear that she was pregnant by a man other than defendant. The defense sought to use this evidence to show that the complainant had a motive to falsely accuse defendant of rape.

Although the express language of the rape-shield statute may preclude such testimony, “[t]he complainant’s statutory protection is superseded because, clearly, the proffered impeachment . . . was both relevant and based upon a showing of the complainant’s motive to testify falsely. . . .”

[People v. Ellison, 123 Ill.App.3d 615, 463 N.E.2d 175 \(2d Dist. 1984\)](#) The trial judge properly excluded, under the rape shield statute, defense evidence concerning the complainant's reputation for chastity.

[People v. Buford, 110 Ill.App.3d 46, 441 N.E.2d 1235 \(1st Dist. 1982\)](#) Evidence of the complainant's prior conviction of solicitation for prostitution was properly excluded. The Court expressed doubt about how the excluded evidence was relevant, and noted that the complainant was fully cross-examined regarding a motive to testify falsely.

[People v. Warren, 162 Ill.App.3d 430, 515 N.E.2d 467 \(3d Dist. 1987\)](#) Evidence concerning the complainant's prior sexual activity was properly excluded. Defendant failed to show any relevance.

[People v. Halcomb, 176 Ill.App.3d 100, 530 N.E.2d 1074 \(1st Dist. 1988\)](#) Following a jury trial, defendant was convicted of aggravated criminal sexual assault. Defendant testified and conceded that the sexual acts took place, but claimed that the complainant had consented.

Defendant sought to testify that during the incident, the complainant told him that she had recently had an abortion. This proffered testimony was excluded on the ground that it was prohibited by the rape shield statute.

Exclusion of that testimony was error. Defendant's testimony "was offered not to establish prior sexual activity," but rather to show that "defendant and complainant engaged in intimate conversation immediately before the sexual acts in question took place." Evidence concerning the relationship between defendant and complainant prior to the alleged crime is relevant to defendant’s claim of consent.

[People v. Alexander, 116 Ill.App.3d 855, 452 N.E.2d 591 \(1st Dist. 1983\)](#) At defendant's trial for rape and deviate sexual assault, he sought to cross-examine the complainant concerning two prior allegations of rape which she made against other men. Cross-examination was properly precluded because the prior allegations of rape were not shown to be false. Thus, the prior allegations of rape were irrelevant.

[People v. McClure, 42 Ill.App.3d 952, 356 N.E.2d 899 \(1st Dist. 1976\)](#) Defendant was charged with rape. He raised a consent defense — that he and the complainant engaged in an act of prostitution and she became upset when he refused to pay what she requested. Defendant should have been allowed to introduce evidence that the complainant had previously accused another man of rape when he refused to pay for acts of prostitution.

[People v. Roy W., 324 Ill.App.3d 181, 754 N.E.2d 866 \(3d Dist. 2001\)](#) The Rape Shield Statute bars admission of evidence concerning the victim's prior sexual conduct, except for previous relations with defendant or where the evidence is "constitutionally required to be admitted." Under the latter exception, evidence that is relevant to a critical aspect of the defense is admissible under due process principles. Thus, a complainant's sexual history may be admissible to explain physical evidence such as semen, pregnancy, or physical indications of intercourse.

Where the State's expert could testify only that the complainant may have had sexual relations, but could not determine when such acts might have occurred, testimony that the complainant had sexual relations with a 14-year-old boy a month or two before making the allegations against her father would have provided a "positive" and "alternative" explanation of the physical evidence. Thus, the evidence would have been admissible under the due process exception to the Rape Shield Statute.

[People v. Sanders, 191 Ill.App.3d 483, 548 N.E.2d 103 \(4th Dist. 1989\)](#) Defendant was convicted of aggravated criminal sexual assault under Ch. 38, ¶12-14(b)(1) (defendant over 16 years of age and victim under 13). The complainant testified that acts of sexual penetration took place on two separate occasions in the fall of 1987, and that she gave birth to a child in July, 1988.

Defendant sought to cross-examine the complainant about sexual relations with another party, who could have caused her pregnancy. The State's objection was sustained on the basis of the rape shield statute. The defense then made an offer of proof that the complainant had engaged in sexual relations with another person in February, 1988.

Defendant was not denied the right of confrontation. The complainant's:

"sexual activity in February 1988 had no connection to the charged offense or to the birth of a child in July 1988. Sexual activity 'prior to that time' could be relevant but the offer of proof was not adequate and the record does not support such a line of inquiry."

[People v. Mason, 219 Ill.App.3d 76, 578 N.E.2d 1351 \(4th Dist. 1991\)](#) Following a jury trial, defendant was convicted of aggravated criminal sexual assault. The offense allegedly occurred while the 17-year-old defendant was babysitting the seven-year-old complainant. The complainant did not testify, but other witnesses testified as to her statements about the incident.

Defendant sought to introduce evidence showing that the complainant had viewed sexually explicit videotapes and had inserted things into her vagina. The trial judge excluded this evidence on the ground that it was barred by the rape-shield statute.

Evidence regarding complainant's viewing videotapes was not barred by the rape-shield statute. This statute applies only to "prior sexual activity" or "reputation"; the viewing of pornographic videotapes by a curious seven-year-old is neither. In addition, the policies behind the rape-shield statute are to prevent harassment and humiliation of victims and to encourage victims to report sexual offenses. These policies cannot be used to prevent a defendant from refuting the evidence which the State introduces to establish his guilt.

In this case, a retired police psychologist testified that a child's inappropriate knowledge of sexual activity is one of the behavioral characteristics of sexually abused children. By testifying that sexual knowledge is evidence of abuse, the State's witness made other possible sources of sexual knowledge relevant.

Also, the rape-shield statute did not bar evidence regarding the complainant's insertion of objects into her vagina. The examining doctor testified that the injury to complainant's vaginal area could have been caused by the insertion of objects, including jumbo crayons. Therefore, evidence that the complainant had engaged in such conduct became relevant. Because the State introduced the injury evidence to show that sexual abuse had occurred, the defense could not be precluded from introducing evidence suggesting that the injury occurred in some other way.

[People v. Hill, 289 Ill.App.3d 859, 683 N.E.2d 188 \(5th Dist. 1997\)](#) Under [People v. Sandoval, 135 Ill.2d 159, 553 N.E.2d 726 \(1990\)](#), the constitutional right to introduce prior sexual activity is not limited to situations where the evidence shows bias, prejudice or motive. A "fair reading of **Sandoval** instructs that prior sexual conduct" should be admitted where it is "relevant to prove a fact in issue." **Sandoval** requires a case-by-case determination of whether the proffered evidence is relevant and admissible.

Prior sexual conduct should be admitted to rebut "age-inappropriate" sexual knowledge by the complainant only if the prior conduct is sufficiently similar to the acts at issue to "account for how the child could provide the testimony's sexual detail without having suffered defendant's alleged conduct."

Here, the evidence in question was properly excluded because it showed at most that the complainant may have engaged in sexual conduct with a prepubescent boy, but did not explain the complainant's detailed knowledge concerning adult male genitalia and physiology.

[People v. Carlson, 278 Ill.App.3d 515, 663 N.E.2d 32 \(1st Dist. 1996\)](#) The Illinois Rape Shield Law prohibits evidence that the complainant was a virgin before the offense. (See, [People v. Kemblowski, 201 Ill.App.3d 824, 559 N.E.2d 247 \(1990\)](#); [People v. Sales, 151 Ill.App.3d 226, 502 N.E.2d 1221 \(1986\)](#)). Although the Court considered the issue as a matter of plain error, it found the error harmless because defendant was convicted in a bench trial, the judge did not refer to the complainant's past sexual history, and the evidence was not closely balanced.

Cumulative Digest Case Summaries §46-1(b)

[People v. Patterson, 2014 IL 115102 \(No. 115102, 10/17/14\)](#)

The Illinois rape shield statute precludes evidence of a complainant's sexual history except under two narrow exceptions for: (1) evidence of past sexual conduct between the complainant and the defendant; and (2) evidence that is constitutionally required to be admitted. [725 ILCS 5/115-7](#).

In defendant's trial for aggravated criminal sexual assault, complainant testified that defendant forced her to have vaginal intercourse, while defendant claimed there had been no intercourse. The treating physician, a State's witness, testified that complainant had some cervical redness consistent with sexual intercourse.

Defendant attempted to introduce evidence that sperm (which did not belong to defendant) was found in complainant's vagina to show that she had engaged in sexual intercourse with someone other than defendant in the days prior to the assault. Defendant argued that although such evidence would normally be barred by the rape shield statute, he had a constitutional right to introduce such evidence to refute the inference that complainant had recent sexual intercourse with defendant by presenting evidence that she had intercourse

with someone else within 72 hours, which was about the amount of time, defense counsel asserted, that sperm lasts in the vagina.

The court held that defendant failed to provide an adequate offer of proof to create an appealable issue. To preserve an appellate claim concerning the denial of a request to admit evidence, a party is required to make a detailed and specific offer of proof if the record would otherwise be unclear.

The sole support for the proffered evidence was counsel's speculation that complainant's cervical inflammation occurred three days before the alleged assault because sperm could persist for 72 hours. Counsel offered no medical testimony to support his bare assertion about the longevity of sperm or about the general persistence of cervical inflammation.

The court rejected defendant's reliance on medical sources cited in the State's appellate brief indicating cervical inflammation can last three days. It was trial counsel's burden to provide a sufficiently detailed offer of proof at trial, not months or years later on appeal. When evaluating an evidentiary ruling for abuse of discretion, the reviewing court must evaluate that discretion in light of evidence actually before the trial judge.

Since defendant did not provide a sufficient offer of proof, his claim was not subject to appellate review.

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

[People v. Cerda, 2014 IL App \(1st\) 120484 \(No. 1-12-0484, 3/7/14\)](#)

1. In sex offense prosecutions, the Rape Shield Statute bars the admission of evidence about the prior sexual activity or reputation of the victim. There are two exceptions to this bar: (1) when consent is an issue and defendant seeks to introduce prior sexual activity between himself and the victim; or (2) when such evidence is constitutionally required to be admitted. [725 ILCS 5/115-7\(a\)](#). If one of the exceptions applies, the court must still determine whether the evidence is relevant and the probative value outweighs the danger of unfair prejudice. [725 ILCS 5/115-7\(b\)](#).

Since consent was not an issue in this case, defendant argued that the second exception applied, and that he was denied his constitutional right to present a defense where the court barred evidence that the victim's initial outcry occurred shortly after she informed her mother about her first sexual experience with a boy her own age. Defendant argued that this evidence showed that the victim had a motive to fabricate her accusations against him.

2. The State argued that the trial court properly barred the evidence since defendant failed to make an adequate offer of proof. The Rape Shield Statute provides that no evidence covered by the statute is admissible unless defendant makes an offer of proof at an *in camera* hearing. The purpose of the hearing is to determine whether defendant has evidence to impeach the witness if she denies prior sexual activity with defendant. [725 ILCS 5/115-7\(b\)](#).

The court held that the hearing's purpose only applies to the first exception, and thus the statute is ambiguous as to whether it requires an offer of proof when the second exception is at issue. Beyond the statutory requirement, however, when a trial court bars evidence, no appealable issue exists in the absence of an offer of proof. The purpose of an offer of proof is to: (1) disclose the evidence to the trial court so that it may take appropriate action; and (2) provide the appellate court with an adequate record to determine whether there was error. By failing to make an adequate offer of proof, a defendant forfeits any claims on appeal that the trial court barred him from presenting evidence necessary to prove his case.

3. Here, defense counsel made an offer of proof by reading from a police report stating that the victim "told her mom days before about having had sex for the first time with a boy her own age." The court held that this offer of proof provided no evidence that the victim's

mother was angry about the consensual sexual experience and defendant only argued “weakly” that the mother “could have been” angry. As a result, the offer of proof did not support defendant’s proposed argument that the victim’s accusations were motivated by a desire to deflect her mother’s anger about the sexual encounter. The trial court thus did not abuse its discretion in excluding the evidence.

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

[People v. Freeman, 404 Ill.App.3d 978, 936 N.E.2d 1110 \(1st Dist. 2010\)](#)

The rape shield statute, [725 ILCS 115-7](#), prohibits admission of evidence of the prior sexual activity or reputation of the victim of a sexual assault with two limited exceptions. Its purpose is to prevent harassment and abuse of sexual assault victims where their sexual history is irrelevant to whether they consented to sexual contact with the accused.

The statement of an alleged victim of a sexual assault to an ER physician that she had not had sex before did not defeat the purpose of the rape shield statute. It was properly admitted as an exception to the hearsay rule as a statement made by a sexual assault victim to medical personnel for the purpose of diagnosis and treatment. [725 ILCS 5/115-13](#).

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

[People v. Maxwell, 2011 IL App \(4th\) 100434 \(No. 4-10-0434, 12/6/11\)](#)

Prior sexual activity of an alleged victim of a sex offense is admissible if constitutionally required. [725 ILCS 5/115-7\(a\)](#). Both the due-process clause of the Fourteenth Amendment and the confrontation clauses of the state and federal constitutions guarantee the defendant a meaningful opportunity to present a complete defense. Fairness, however, does not require admission of evidence that is only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues.

Prior sexual activity by the alleged victim is admissible to explain the alleged victim’s physical condition consistent with sexual penetration, such as damage to the hymen. If the alternative explanation is sexual intercourse with a third party, defendant must be able to implicate a specific third party. Defendant has no right to present evidence in support of the unenlightening truism that it is always possible, theoretically, that some unknown third party is responsible.

Subsection (b) of the rape-shield statute requires a specific offer of proof prior to the admission of evidence of the alleged victim’s prior sexual activity with the defendant. [725 ILCS 5/115-7\(b\)](#). While subsection (b) is not directly applicable where defendant denies ever having sexual intercourse with the alleged victim and does not claim consent, it is applicable by analogy where defendant seeks to present evidence of sexual activity with a third party. It makes sense to require an offer of proof of comparable rigor to admit evidence of sexual activity between the alleged victim and a third party “because the mere theoretical possibility that the alleged victim had sex with someone else has little probative value compared to the danger of humiliating the alleged victim by calling into question his or her chastity—a tactic the rape-shield statute is intended to prevent.”

Because the defense had no evidence implicating a specific third party, no error occurred when the court prohibited the defense from cross-examining the State’s medical expert on whether the physical evidence of sexual penetration could have resulted from intercourse with someone other than the defendant.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

[People v. Patterson, 2012 IL App \(1st\) 101573 \(No. 1-10-1573, modified op. 9/26/12\)](#)

The Illinois Rape Shield law ([725 ILCS 5/115-7\(a\)](#)) bars evidence of the prior sexual history of an alleged sexual assault victim unless: (1) the evidence concerns the alleged victim's prior consensual conduct with the defendant and is offered to show consent, or (2) the constitution requires that the evidence be admitted. Due process requires that evidence of the victim's sexual history be admitted where such evidence is relevant to a critical aspect of the defense. Thus, evidence of the alleged victim's sexual history is admissible to explain physical evidence such as semen, pregnancy, or physical indications of intercourse.

At defendant's trial for aggravated criminal sexual assault, a doctor who examined the complainant after the alleged offense testified that the redness of her cervix indicated that she had recently had intercourse. The prosecution used the doctor's statement to support the inference that defendant had forcible intercourse with the complainant. The trial court held that the rape shield law prevented the defense from showing that the complainant had sexual intercourse with her boyfriend a few days before the alleged offense and that a vaginal swab contained the boyfriend's DNA.

The Appellate Court concluded that such evidence should have been admitted because it supplied a plausible alternative source of the State's physical evidence and as a matter of due process qualified for the constitutional exception provision to the rape shield statute. Thus, if on retrial the State attempts to introduce evidence of the complainant's physical condition to show that she had intercourse within a day or two of the medical examination, the defense must be permitted to introduce evidence that she had intercourse with her boyfriend and that his semen remained in her vagina at the time of the examination.

The State argued that the due process right to admit the complainant's sexual history to explain the physical evidence applies only if the complainant is a minor. The court rejected this argument, stating that "[w]henver the State seeks to use physical evidence of intercourse to support the inference that the alleged victim had intercourse with the defendant, the court must permit the defendant to introduce evidence of the alleged victim's sexual history insofar as that history could provide a plausible alternative explanation for the physical evidence."

Defendant's conviction for aggravated criminal sexual assault was reversed and the cause remanded for a new trial.

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

[Top](#)

§46-1(c)

Miscellaneous

[Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 \(2003\)](#) Due process was violated by a Texas statute prohibiting sodomy between consenting adults of the same gender, overruling [Bowers v. Hardwick, 478 U.S. 186 \(1986\)](#).

[People v. Lopez, 207 Ill.2d 449, 800 N.E.2d 1211 \(2003\)](#) Illinois courts lack authority to order the physical examination of the complainant in a sex offense case. Where the complainant refuses to submit to a physical examination by a defense expert, the court must balance the due process rights of defendant against the privacy rights of the alleged victim and determine whether the State should be permitted to introduce medical evidence to prove the alleged offense.

[People v. Wheeler, 151 Ill.2d 298, 602 N.E.2d 826 \(1992\)](#) Before his trial for aggravated

criminal sexual assault, defendant moved to have a defense expert examine the complainant or, in the alternative, to bar the State from presenting evidence concerning the rape trauma syndrome. The trial court denied the motion because Ch. 38, ¶115-7.1 prevents a trial judge from ordering the victim in a sex offense to undergo a psychological examination, and because Ch. 38, ¶115-7.2 provides that expert testimony on post-traumatic stress syndrome shall be admitted. At trial, the State expert testified that based solely on a personal interview, she concluded that the complainant suffered from rape trauma syndrome.

The combined effect of ¶¶115-7.1 & 115-7.2 denied defendant's due process right to present witnesses in his own behalf. Section 115-7.1 is intended to prevent harassment of victims concerning their credibility and competency. Here, however, defendant was seeking to challenge not the complainant's credibility or competence, but to rebut the State's effort to prove his guilt with evidence of rape trauma syndrome. The State would enjoy an unfair advantage if it could introduce expert testimony based upon a personal examination while the defense expert was restricted to examining written reports and observing the complainant's testimony.

Although a complainant cannot be compelled to submit to an examination by a defense expert, her refusal to do so precludes the State from introducing rape trauma syndrome evidence based on a personal examination.

[People v. Schott, 145 Ill.2d 188, 582 N.E.2d 690 \(1991\)](#) The previous standard of review for sex offenses (that the testimony of the sex-offense victim be "clear and convincing or substantially corroborated") should no longer be followed. Instead, courts are to apply to sex offenses the same standard applied to other criminal cases -- whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The evidence here was "so unsatisfactory that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." The State's "key evidence" was the testimony of the complainant, which was "impeached numerous times" and contained so many "inconsistencies and contradictions" that it lacked credibility. The complainant admitted lying "a lot," making several inconsistent statements about the offense, and telling several people that the accusations were false. She also admitted being sexually active with other children and told the police that she had been molested by another man and boy, although she later recanted that allegation. The complainant was impeached to such a degree that the evidence was insufficient to establish guilt beyond a reasonable doubt.

[People v. Falaster, 173 Ill.2d 220, 670 N.E.2d 624 \(1996\)](#) At defendant's trial for sexual offenses with his daughter, the judge excluded two of defendant's nephews and the grandfather of one of the nephews from the courtroom during the complainant's testimony pursuant to [725 ILCS 5/115-11](#), which provides that in the prosecution of certain offenses in which the complainant is under the age of 18, "the court may exclude from the proceedings while the victim is testifying, all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media."

An order excluding persons who have no direct interest in the case is not subject to U.S. Supreme Court precedent governing the closure of trial to the media and public. The U.S. Supreme Court caselaw concerns cases in which the press and public are excluded from the courtroom as a whole; by contrast, [§5/115-11](#) does not exclude the media or any person with a direct interest in the trial, and affects only persons who have no such interest and only during the testimony of the minor.

[In re M.T., 221 Ill.2d 517, 852 N.E.2d 792 \(2006\)](#) The indecent solicitation of an adult statute ([720 ILCS 5/11-6.5\(a\)](#)) is applicable to a juvenile perpetrator, and does not violate due process.

[People v. Donoho, 204 Ill.2d 159, 788 N.E.2d 707 \(2003\)](#) [725 ILCS 5/115-7.3](#) provides that at a trial for certain sexual offenses, evidence that defendant previously committed other specified sexual offenses “may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant.” Section 115-7.3 was intended to permit trial courts to admit evidence of other crimes to show defendant’s propensity to commit sex offenses.

[People v. Childress, 338 Ill.App.3d 540, 789 N.E.2d 330 \(1st Dist. 2003\)](#) Under [725 ILCS 5/115-7.3](#), where a defendant is accused of certain sex offenses or of crimes that are related to sex offenses, evidence that defendant committed other specified offenses is admissible on “any matter to which it is relevant,” provided that the probative value of the evidence does not exceed its prejudice. In weighing the probative value and prejudicial effect, the court may consider the proximity in time of the charged and predicate offenses, the degree of factual similarity between the offenses, and any other relevant facts and circumstances.

The trial court did not err, at a trial for aggravated criminal sexual assault and criminal sexual assault, by excluding a 13-year-old conviction.

[People v. Harp, 193 Ill.App.3d 838, 550 N.E.2d 1163 \(4th Dist. 1990\)](#) Ch. 38, ¶115-7.2 allows expert witnesses to testify about post-traumatic stress syndrome in sex offense cases.

[People v. Braddock, 348 Ill.App.3d 115, 809 N.E.2d 712 \(1st Dist. 2004\)](#) [720 ILCS 5/11-14.1\(a\)](#), which created the offense of solicitation of sex acts, is not overbroad, rejecting the arguments that it violates the First Amendment right to communicate and is unconstitutionally vague.

[People v. Diestelhorst, 344 Ill.App.3d 1172, 801 N.E.2d 1146 \(5th Dist. 2003\)](#) [720 ILCS 5/11-9.4\(a\)](#), which prohibits a child sex offender from approaching, contacting or communicating with a child under the age of 18 unless the offender is a parent or guardian of the child, is neither a violation of substantive due process nor unconstitutionally vague. The statute bears a reasonable relationship to the interest at stake - protecting children from known sex offenders - and prohibiting known child sex offenders from approaching, contacting, or communicating with children in a public park bears a reasonable relationship to that goal. Also, the statute is not unconstitutionally vague; the terms of the statute are sufficiently defined to place known child sex offenders on notice as to the prohibited conduct.

Cumulative Digest Case Summaries §46-1(c)

[People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 \(2d Dist. 2010\)](#)

In prosecutions for illegal sexual acts, testimony by experts relating to any recognized and accepted form of post-traumatic sex syndrome is admissible. [725 ILCS 5/115-7.2](#). This section is broad enough to include child-sexual-abuse-accommodation-syndrome testimony under the general label of post-traumatic stress syndrome, even though it is not recognized by the Diagnostic and Statistical Manual of Mental Health III (DMS-III).

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

[People v. Johnson, 406 Ill.App.3d 805, 941 N.E.2d 242 \(1st Dist. 2010\)](#)

1. Generally, evidence of other crimes is inadmissible if offered merely to prove a defendant's propensity to commit crime. Under [725 ILCS 5/115-7.3\(c\)](#), however, certain uncharged sex-related offenses may be admitted to show the criminal propensity of a defendant who is charged with a sex offense. Before admitting evidence under §7.3, the trial court must determine whether the probative value of the evidence is substantially outweighed by any undue prejudice in light of the proximity in time of the charged and uncharged offenses, the degree of factual similarity, and any other relevant facts.

In weighing the probative value and prejudicial effect of other crimes evidence, the key is to avoid admitting evidence which persuades the jury to convict merely because it believes the defendant is a bad person who deserves punishment. In addition, other crimes evidence is improper if it will become a focal point of the trial. Finally, other crimes evidence must have a threshold similarity to the crime charged in order to be admitted; the probative value of evidence is greater where there are more factual similarities between the offenses.

2. For two reasons, the trial court erred at a trial for aggravated criminal sexual assault when it admitted evidence that 18 months after the charged offense, defendant and another man sexually assaulted a different complainant. First, the trial court considered only whether the other crimes evidence was probative, and did not weigh the probative value against any undue prejudice. Second, there were substantial dissimilarities between the offenses. In the charged offense, the complainant was accosted by a single man as she walked past an alley. In the uncharged offense, the complainant was forced into a car and assaulted by two men who blew cocaine in her face and gave her alcohol. In addition, the type of penetration differed between the cases.

In view of the "significant dissimilarities" between the offenses, the court concluded that the probative value of the uncharged offense was substantially outweighed by the prejudicial effect. Thus, the trial court abused its discretion by admitting the evidence.

3. However, the error was harmless because it did not likely influence the jury's verdict. The court concluded that a rational trier of fact could easily have convicted defendant based on the complainant's testimony identifying him, the properly admitted medical evidence, and an expert opinion based on DNA analysis.

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

[Top](#)

§46-2

Criminal Sexual Assault and Abuse Offenses

§46-2(a)

Generally

[People v. Simms, 192 Ill.2d 348, 736 N.E.2d 1092 \(2000\)](#) Aggravated criminal sexual assault is a general intent crime. Thus, jury instructions need not include a specific mental state.

[People v. Maggette, 195 Ill.2d 336, 747 N.E.2d 339 \(2001\)](#) Under [720 ILCS 5/12-12\(f\)](#), "sexual penetration" is "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person," or "any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of

another person, . . .”

Reading §12-12(f) as a whole, the legislature did not intend that a hand or finger be regarded as an “object” for purposes of the provision prohibiting “contact” rather than “penetration.” Thus, contact between the victim’s hand and defendant’s penis, or between defendant’s finger and the victim’s vagina, does not constitute “sexual penetration” of the “contact” variety.

[People v. Allensworth, 235 Ill.App.3d 185, 600 N.E.2d 1197 \(3d Dist. 1992\)](#) An indictment for aggravated criminal sexual abuse is sufficient where it alleges that defendant committed "sexual conduct," without specifying that the conduct was for the purpose of sexual gratification or arousal. Furthermore, where there was evidence that defendant was at least 26 years older than the victim, the indictment was not insufficient because it failed to allege that the accused was more than five years older than the victim.

[People v. Daniel, 311 Ill.App.3d 276, 723 N.E.2d 1279 \(2d Dist. 2000\) 720 ILCS 5/12-14\(a\)\(1\)](#), which defines aggravated criminal sexual assault as the commission of criminal sexual assault while defendant “displayed, threatened to use, or used a dangerous weapon or any object fashioned or utilized in such a manner as to lead the victim . . . to reasonably believe it to be a dangerous weapon,” does not require actual possession of a dangerous weapon. The plain language of the statute requires only that the perpetrator threaten to use such a weapon, whether or not a weapon is actually produced.

[People v. Boyer, 138 Ill.App.3d 16, 485 N.E.2d 460 \(3d Dist. 1985\)](#) To prove bodily harm for aggravated criminal sexual assault, "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent" is required. Here, though the complainant answered affirmatively when asked whether she had experienced any pain and testified that defendant slapped her face, “there is no evidence in the record which indicates the presence of the requirements necessary to prove bodily harm, i.e., lacerations, bruises or abrasions.” Conviction reduced to criminal sexual assault.

[People v. Lopez, 222 Ill.App.3d 872, 584 N.E.2d 462 \(1st Dist. 1991\)](#) Defendant was convicted of two counts of aggravated criminal sexual assault arising out of acts of anal intercourse. One of the counts was “aggravated” based upon the infliction of “bodily harm.” The only evidence purporting to show bodily harm was the testimony of a physician that the complainant had a “relaxed” or “decreased” anal sphincter muscle tone. This was insufficient to establish bodily harm.

[People v. White, 195 Ill.App.3d 463, 552 N.E.2d 410 \(3d Dist. 1990\)](#) Defendant was properly convicted of aggravated criminal sexual assault, under ¶12-14(a)(2), for causing bodily harm to the victim during the sexual assault. The evidence showed that defendant hit the victim several times downstairs, followed her upstairs to her bedroom, and sexually assaulted her. The period between the beatings and the sexual assault was sufficiently close that the beatings could be found to have been committed during the sexual assault.

[People v. Douglas, 183 Ill.App.3d 241, 538 N.E.2d 1335 \(4th Dist. 1989\)](#) Evidence was sufficient to prove that defendant "acted in a manner as to threaten or endanger the life of the victim" where he threatened to kill her and throw her body in a river, and she sustained injuries including marks on her throat.

[People v. Higginbotham, 292 Ill.App.3d 725, 686 N.E.2d 720 \(2d Dist. 1997\)](#) “Sexual conduct” did not occur where a 13-year-old parishioner rubbed defendant’s stomach above the waistband of his underwear, because there was no touching *by the accused* of any part of the body of a child or a touching *by the child* of defendant’s *sex organ, anus, or breast*.

[People v. Gann, 141 Ill.App.3d 34, 489 N.E.2d 924 \(3d Dist. 1986\)](#) Defendant's conduct of masturbating in the presence of a child under 13 years of age did not come within the aggravated criminal sexual abuse statute, which provides that an accused is guilty of the offense if the “accused was 17 years of age or over and commits an act of sexual conduct with a victim who was under 13 years of age.” (Ch. 38, ¶12-16(c)(1)). The phrase "with the victim" in the above statute requires more than sexual conduct in the presence of a victim; there must be actual physical contact between the victim and the accused.” Any other interpretation “would elevate conduct constituting public indecency, a Class A misdemeanor, to the status of a Class 2 felony.”

[People v. Allman, 180 Ill.App.3d 396, 535 N.E.2d 1097 \(1st Dist. 1989\)](#) Physical evidence of semen is not required to sustain a conviction for criminal sexual assault.

[People v. Nibbio, 180 Ill.App.3d 513, 536 N.E.2d 113 \(5th Dist. 1989\)](#) Information alleging that defendant violated ¶12-15(b)(1) in that he "fondled the buttocks" of the victim failed to charge the offense of criminal sexual abuse. "Buttocks" should not be considered a sex organ or anus.

Another count alleged that defendant violated §12-15(b)(1) in that he "touched his sex organ to the back of the victim." This was sufficient. The definition of sexual conduct in ¶12-12(e) expressly includes the touching by *either* the victim *or* the accused of the sex organs of *either* the victim *or* the accused.

[People v. Barfield, 187 Ill.App.3d 257, 543 N.E.2d 157 \(1st Dist. 1989\)](#) Under ¶12-14(b)(1), aggravated criminal sexual assault requires an act of sexual penetration by a person over 17 years of age with a victim under 13 years of age. It is no defense that the victim consented or that defendant thought the victim was older than 13.

[People v. Brown, 171 Ill.App.3d 391, 525 N.E.2d 576 \(2d Dist. 1988\)](#) Pursuant to Ch. 38, ¶12-17(b), defendant’s reasonable belief that the victim is 16 is a defense to a charge of criminal sexual abuse under ¶12-16(d) (victim at least 13 but under 16 years of age and defendant at least five years older). The defense in ¶12-17(b) operates in the same manner as does an affirmative defense, and generally may not be raised through cross-examination. Here, the evidence was held insufficient to require an instruction under ¶12-17(b).

[People v. Uptain, 352 Ill.App.3d 643, 816 N.E.2d 797 \(4th Dist. 2004\)](#) Where defendant in an aggravated criminal sexual abuse trial presented evidence that the 16-year-old complainant engaged in playful and flirtatious behavior on the night in question, there was sufficient evidence to require the trial court to instruct the jury on the affirmative defense of a reasonable belief that the complainant was at least 17.

[People v. Gonzalez, 385 Ill.App.3d 15, 895 N.E.2d 982 \(1st Dist. 2008\)](#) Under [720 ILCS 5/12-16\(d\)](#), a reasonable belief that the victim was 17 years old or older is an affirmative defense to aggravated criminal sexual abuse. Once the “reasonable belief” affirmative defense is

raised, the State has the burden of proving defendant guilty beyond a reasonable doubt concerning the defense, as well as on all other elements of the offense.

The trial court's failure to instruct the jury concerning the State's burden of proof and the definition of "reasonable belief" constituted serious error which required reversal, despite the fact that the court informed the jury of the affirmative defense itself.

[People v. Douglas, 381 Ill.App.3d 1067, 886 N.E.2d 1232 \(2d Dist. 2008\)](#) Predatory criminal sexual assault of a child is not a strict liability offense, because the act of sexual penetration must be committed knowingly or intentionally.

However, predatory criminal sexual assault of a child does not include a mental state requirement concerning the age of the child. Thus, a mistaken belief concerning the child's age is not a defense.

[People v. Williams, 191 Ill.App.3d 269, 547 N.E.2d 608 \(4th Dist. 1989\)](#) The failure to instruct on a specific mental state (i.e., intent or knowledge) for criminal sexual assault is not error.

[People v. Hebel, 174 Ill.App.3d 1, 527 N.E.2d 1367 \(5th Dist. 1988\)](#) The term "sex organ" in ¶12-12(f) does not refer only to the vagina; it is meant to be more inclusive.

[People v. Juris, 189 Ill.App.3d 934, 545 N.E.2d 1059 \(2d Dist. 1989\)](#) A prior conviction for attempt rape may not be used to enhance the offense of criminal sexual assault from a Class 1 to a Class X felony under Ch. 38, ¶12-13(b).

Section 12-13(b) provides for the enhanced penalty for "any offense involving criminal sexual assault that is substantially equivalent to or more serious than the sexual assault prohibited under this Section." Even though attempt rape is the same Class felony as criminal sexual assault (i.e., Class 1), it is the *elements* of the offenses which must be compared under ¶12-13(b). Such a comparison shows that attempt rape is not equivalent to or more serious than criminal sexual assault; the latter offense requires sexual penetration, while the former does not.

[People v. Blake, 221 Ill.App.3d 586, 582 N.E.2d 183 \(3d Dist. 1991\)](#) Defendant was convicted of aggravated criminal sexual assault and aggravated criminal sexual abuse allegedly committed in "the summer of 1984." The complainants testified that the sexual acts occurred during the summer of 1984, although they could not specify a precise month or day. The trial judge made no findings as to when the offenses occurred.

Defendant was not proved guilty beyond a reasonable doubt because, in light of the evidence, the offenses could have occurred before July 1, 1984, the effective date of the legislation creating the offenses. Although this issue was not raised in the trial court, it was held to be plain error.

[People v. Burton, 201 Ill.App.3d 116, 558 N.E.2d 1369 \(4th Dist. 1990\)](#) Defendant was charged with and convicted of aggravated criminal sexual assault. In a bill of particulars, the State alleged that the offense occurred sometime during a 33-month period.

Defendant was not denied due process by the time period in the bill of particulars:

"As long as the crime charged allegedly occurred within the applicable statute of limitations period, the State should be required to do no more than provide the defendant with the best

information it has regarding when the offense took place.”

[People v. Barlow, 188 Ill.App.3d 393, 544 N.E.2d 947 \(1st Dist. 1989\)](#) An aggravated criminal sexual assault indictment alleged that the incident occurred on March 2 and 3, 1986. The State was allowed to amend the dates of the incident to March 1st through 3rd, 1986.

The amendment was proper because the date is not an element and the change in dates did not alter the crime charged.

[People v. Wasson, 175 Ill.App.3d 851, 530 N.E.2d 527 \(4th Dist. 1988\)](#) Information charging defendant with aggravated criminal sexual assault for acts committed between January 1, 1983, and April 24, 1985, was defective because it charged an offense for acts committed before July 1, 1984 -- the date on which the aggravated criminal sexual assault statute became effective. The State should have charged defendant with indecent liberties for acts committed between January 1, 1983 and June 30, 1984, and with the instant offense for acts committed between July 1, 1984 and April 24, 1985.

Under the above information, defendant "was hindered in the preparation of his defense because he was forced to answer to crimes for which he could not have been lawfully convicted." Additionally, the jury heard evidence of other crimes — conduct prior to July 1, 1984 - of which defendant was improperly accused.

The guilty verdict was not against the manifest weight of the evidence because the jury could have properly found that at least one incident occurred after July 1, 1984. However, the trial judge's refusal of an instruction which would have included as an essential element of the offense that the act of sexual penetration occurred on or after July 1, 1984, was error because without it, "it is impossible to know whether the jury instead convicted defendant for an act performed as alleged in the [information], during the period which predated the statute under which he was charged." Reversed and remanded for a new trial.

[People v. Denbo, 372 Ill.App.3d 994, 868 N.E.2d 347 \(4th Dist. 2007\)](#) Under [720 ILCS 5/12-17\(c\)](#), initial consent to sexual penetration or conduct does not constitute consent to such conduct occurring after consent is withdrawn.

Withdrawal of consent becomes effective only when communicated to defendant "in some objective manner," so that a reasonable person "in defendant's circumstances" would have understood that consent had been withdrawn. Here, a reasonable person in defendant's circumstances would not have understood a single push on the shoulders as withdrawal of consent:

“[The complainant] did not say no or stop. Instead, she pushed defendant. . . We do not mean to suggest that a push could never signify nonconsent or a withdrawal of consent. In fact, the second push was clearly made with enough force to both be distinguished from a caress and to effectively communicate the withdrawal of consent. . . Under the circumstances of this case, a single push to the shoulders, without more, cannot serve as an objective communication of [the complainant's] withdraw of consent.”

Because defendant ended the penetration “upon the complainant's second, more forceful push,” and the complainant's initial push was not an objective communication that she was withdrawing her consent, the conviction for aggravated criminal sexual assault was reversed.

[People v. Jackson, 178 Ill.App.3d 785, 533 N.E.2d 996 \(1st Dist. 1989\)](#) Defendant's

convictions for aggravated criminal sexual assault, aggravated kidnapping and unlawful restraint were reversed; the evidence of guilt was insufficient and “complainant's version of the morning’s events reeks more of fantasy than fact.”

[People v. Rayfield, 171 Ill.App.3d 297, 525 N.E.2d 253 \(3d Dist. 1988\)](#) Defendant's conviction for attempt criminal sexual assault was reversed based on insufficient evidence. The evidence did not prove that defendant intended to forcibly commit an act of sexual penetration. Defendant did not order the complainant to disrobe, nor did he disrobe himself. Also, defendant's statements did not refer to an act of sexual intercourse, and he did not touch the complainant's breasts or buttocks. Defendant did ask if he could see the complainant’s vagina, but left the apartment when she refused.

[People v. Delgado, 376 Ill.App.3d 307, 876 N.E.2d 189 \(1st Dist. 2007\)](#) In a prosecution for criminal sexual abuse, the failure to instruct the jury with the definition of “sexual conduct” constituted plain error.

[People v. Claybourn, 221 Ill.App.3d 1071, 582 N.E.2d 1347 \(1st Dist. 1991\)](#) Defendant was charged with aggravated criminal sexual assault and armed robbery, and was convicted of both offenses following a jury trial. The State’s evidence showed that defendant approached a man and a woman in an automobile, threatened the couple with a knife, and claimed that he had a gun. Defendant took property from the couple and committed sexual acts on the woman.

The jury instruction for aggravated criminal sexual assault failed to include the element of use of a dangerous weapon. As a matter of plain error, defendant’s conviction for aggravated criminal sexual assault could not stand because the jury was not instructed on an essential element of the offense. Since the instruction did inform the jury of the elements of criminal sexual assault, defendant’s conviction was reduced to that offense and remanded for resentencing.

[People v. Judge, 221 Ill.App.3d 753, 582 N.E.2d 1211 \(1st Dist. 1991\)](#) Following a bench trial, defendant was convicted of aggravated criminal sexual assault upon a seven-year-old. The evidence was insufficient to prove defendant’s guilt beyond a reasonable doubt. The Court specifically *declined* to use the previously-accepted standard of review, which required the complainant’s testimony to be clear and convincing or substantially corroborated, opting instead for the general reasonable doubt standard of review.

The complainant testified that when she was dragged from the couch to defendant’s bedroom, her father was asleep in the trailer and her sister was sitting on the couch. However, the sister did not react to defendant’s actions, and the complainant did not scream for assistance.

In addition, the doctor who examined complainant did not notice any marks or bruises on her body. The doctor discovered redness around complainant’s vagina, but when he was told of the complainant’s previous rash and use of ointment, he stated that it was possible or even probable that complainant could have caused the irritation by applying the ointment. The complainant’s first complaints of sexual abuse were made in response to questioning by her mother, who had been the victim of sexual abuse as a child and who in the past had made a false claim about sexual abuse.

[People v. Vasquez, 233 Ill.App.3d 517, 599 N.E.2d 523 \(2d Dist. 1992\)](#) Defendant’s

convictions for criminal sexual assault were reversed on the basis that no rational trier of fact could have found beyond a reasonable doubt that force was used to accomplish the acts of oral intercourse.

P.L., a 13-year-old boy, testified that on two separate occasions defendant “forced” P.L.’s head onto defendant’s penis. Although useless acts of resistance are not required and a child need not offer as much resistance as an adult, even taking the evidence most favorably toward the State, any resistance at all most likely would have prevented any sexual activity. This conclusion was based primarily upon the fact that when P.L. resisted defendant’s attempts at anal intercourse, defendant desisted. In addition, P.L.’s claims of force were incredible where he did not attempt to leave when defendant went to urinate, did not cry out or seek help from passersby, acknowledged that defendant did not threaten to hurt him, did not believe that defendant intended to harm him, and allowed defendant to drive him home. In addition, P.L. suggested the location in which the second act occurred, although he claimed that he had only wanted to talk, and he never reported the incident to anyone until his foster parents confronted him with a letter from defendant exposing their relationship.

[People v. Bell, 252 Ill.App.3d 739, 625 N.E.2d 188 \(1st Dist. 1993\)](#) Where a body part such as a finger is involved, "sexual penetration" requires an "intrusion, however slight ([720 ILCS 5/12-12](#)). Such an intrusion cannot occur through clothing. Here, the evidence failed to establish even a slight intrusion of the complainant's vaginal area by defendant. Aggravated criminal sexual assault conviction reversed.

[People v. Scott, 271 Ill.App.3d 307, 648 N.E.2d 86 \(1st Dist. 1994\)](#) Defendant was convicted of attempt murder and aggravated criminal sexual assault; the latter conviction was based on evidence that he beat the victim, told her that he had just killed her friend, and ordered her to place her finger in her vagina. On appeal, he argued that he should not have been convicted of aggravated criminal sexual assault because the act of "sexual penetration" involved the complainant's own body and not any part of his body.

At the time of the offense, "sexual penetration" was defined as:

“[a]ny contact, however slight, between the sex organ of one person and the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object in the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration.” (Ch. 38, ¶12-12(f)).

Because "sexual penetration" can occur by use of an "object," and because the victim's finger is an "object" within the meaning of ¶12-12(f), defendant could have been convicted of aggravated criminal sexual assault even if he did not personally perform the intrusion of the complainant's sex organ.

However, because the instructions were erroneous and defendant could not be convicted as an accomplice, defendant could not be convicted of a sexual offense at all. Therefore, the conviction for aggravated criminal sexual assault was reversed.

[People v. Reynolds, 294 Ill.App.3d 58, 689 N.E.2d 335 \(1st Dist. 1997\)](#) [720 ILCS 5/12-13\(a\)\(4\)](#), which provides that criminal sexual assault occurs where a person over the age of 17 commits an act of sexual penetration with a minor to whom he occupies a “position of trust, authority or supervision,” did not apply merely because defendant was a public official (i.e., a U.S. Congressman). However, there was “ample evidence” that defendant had the required relationship to the minor where he was her “mentor,” provided her with money, paid her

tuition to enroll in private school, and was the person called by the school when the complainant had problems.

[State v. Huss, 506 N.W.2d 290 \(Minn. 1993\)](#) Suspecting that her ex-husband had molested their three-year-old daughter, a mother took the child to a therapist who used a book called "*Sometimes It's O.K. to Tell Secrets*." The mother then obtained a copy of the book and an accompanying audiotape. After listening to the tape repeatedly for several months, the child said that she had a "yucky secret" -- that her father had molested her. (The book and tape used the term "yucky secrets" to refer to acts of child abuse.) Until this time, the child had never claimed that she had been abused. A medical examination was inconclusive concerning the possibility of abuse.

The Minnesota Supreme Court reversed the father's conviction for second degree criminal sexual conduct, because the repeated use of the book and tape raised serious questions about the reliability of the child's accusations. The Court stressed that the child gave contradictory and confusing testimony and that the mother admitted waiting "throughout the summer and fall for her daughter to say something about the abuse." In addition, a defense psychologist testified that the book was highly suggestive and might lead to false accusations of sexual molestation. Under these circumstances, the repeated use of the materials, "combined with the mother's belief that abuse had occurred, may have improperly influenced the child's report of events."

Cumulative Digest Case Summaries §46-2(a)

[People v. Giraud, 2012 IL 113116 \(No. 113116, 11/29/12\)](#)

Defendant was convicted of aggravated criminal sexual assault under [720 ILCS 5/12-14\(a\)\(3\)](#), which defines the offense as committing criminal sexual assault where "during . . . the commission of the offense" the defendant "acted in such a manner as to threaten or endanger the life of the victim." Defendant was found guilty of having unprotected forcible intercourse while knowing that he was HIV positive. The Appellate Court reduced the conviction to criminal sexual assault, finding that exposing a sexual assault victim to the possibility of contracting the HIV virus in the future is not threatening or endangering his or her life "during . . . the commission of the offense."

1. The Supreme Court affirmed the Appellate Court's holding, finding that the legislature intended for the aggravating factor of threatening or endangering the life of the victim to apply only if the threat or endangerment occurred during the offense. The court noted that nine of the 10 aggravating factors in §12-14(a) apply only during the commission of the crime, and that when the legislature intended to extend the time in which an aggravating factor could occur, it did so explicitly for the remaining factor (§12-14(a)(7)). Thus, a threat or endangerment that does not occur during the commission of the crime "cannot, as a matter of law, be used to elevate the crime from criminal sexual assault to aggravated criminal sexual assault."

2. The court noted that the State's interpretation of §12-14(a)(3) would have unintended consequences because communicable diseases other than HIV could come within the statute, the victim's HIV status before the offense would become relevant and cause the defense to seek discovery of the victim's medical history, and issues of fact would arise concerning whether a condom was used and was an adequate defense against transmission of the HIV virus.

The court also noted that the legislature enacted a two-tier scheme of punishment

under which an HIV-positive person who has forced sexual intercourse may be convicted of: (1) aggravated criminal sexual assault under §12-14(a)(2) (infliction of bodily harm) if the victim develops HIV, or (2) criminal sexual assault and criminal transmission of HIV if the victim does not contract the HIV virus. In the latter case, the sentences for criminal sexual assault and criminal transmission of HIV must be served consecutively. ([730 ILCS 5/5-8-4](#)).

Because the plain language of §12-14(a)(3) requires that the threat or endangerment to the life of the victim must occur during the commission of the offense, mere exposure to the possibility of contracting the HIV virus at some later date does not constitute aggravated criminal sexual assault. The cause was remanded for sentencing for criminal sexual assault, with instructions that the sentence for criminal transmission of HIV must be served consecutively to defendant's sentences for criminal sexual assault.

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

[People v. Lloyd, 2013 IL 113510 \(No. 113510, 4/18/13\)](#)

[720 ILCS 5/12-13\(a\)](#) provides that the offense of criminal sexual assault is committed where the defendant commits an act of sexual penetration: (1) by the use of force or threat of force, (2) where the accused knew that the victim was unable to understand the nature of or give knowing consent to the act, (3) with a victim who was under the age of 18 when the act was committed and the accused was a family member, or (4) with a victim who is at least 13 but under 18 when the act was committed and the accused was at least 17 and held a position of trust, authority or supervision in relation to the victim.

In this case, defendant was charged under the second alternative. Thus, the State was required to prove that defendant committed an act of sexual penetration with knowledge that the complainant was unable to either understand the nature of the act or give knowing consent. The State's theory was that defendant knew the victim was under the age of legal consent, and therefore incapable of understanding the act or giving knowing consent.

The court rejected the argument that the victim's age, standing alone, showed that she could not understand the nature of the act or give knowing consent. The court concluded that to establish criminal sexual assault under §12-13(a)(2), the State is required to show that the defendant's knew of some fact other than the victim's age which prevented her from understanding the nature of the act or knowingly consenting.

1. Illinois has adopted a scheme of sex offenses based on the ages of the victim and the perpetrator and the type of sexual conduct which occurred. Accepting the State's argument would render superfluous other portions of that scheme, including other subsections of §12-13(a), because the mere fact of defendant's knowledge that the victim was a minor would in every case be sufficient for a conviction of criminal sexual assault.

The court stressed that the proper inquiry in a prosecution under §12-13(a)(2) concerns the defendant's knowledge that a specific victim is incapable of appreciating or consenting to the act, and must be resolved on the particular facts of the case. This determination cannot be made solely on the victim's age, because all minors are deemed incapable of giving consent.

The court also noted that other than the Appellate Court's decision here, there has not been a single reported case in which a prosecution under §12-13(a)(2) was based solely on evidence of the defendant's knowledge that the victim was a minor. Instead, previous prosecutions have involved victims who were unable to understand the nature of the act or give knowing consent because they were mentally disabled, intoxicated, unconscious, or asleep.

The court also criticized the State's theory because it might require minors to answer questions at trial about their motivation or willingness to engage in sexual activity with the accused and concerning their sex education and knowledge. In addition, the State's theory

would cause “havoc” with the statutory scheme of sex offenses because it would allow a 17-year-old who had intercourse with her 16-year-old boyfriend to be prosecuted for a Class 1 felony although the legislature has defined such behavior as a Class A misdemeanor.

2. The court concluded that the record was completely devoid of any evidence to support a finding that defendant knew the victim was unable to understand the nature of the acts or give knowing consent. Although the State presented evidence from which a rational trier of fact could have concluded that defendant committed aggravated criminal sexual abuse, it chose not to charge that offense. In the course of its opinion, the court stated that in evaluating a defendant’s challenge to the sufficiency of the evidence “we can only consider the evidence regarding the actual charges the State chose to bring against him, and not the fact that he may be guilty of [an] uncharged offense . . .” that is not a lesser included crime. In addition, because aggravated criminal sexual abuse contains an element which is not part of criminal sexual assault, the court could not reduce the convictions.

Defendant’s seven convictions for criminal sexual assault were reversed.

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

[People v. Brown, 2013 IL App \(2d\) 110303 \(No. 2-11-0303, 2/11/13\)](#)

Defendant was charged with involuntary manslaughter and aggravated criminal sexual assault predicated on causing bodily harm while committing a sexual assault with knowledge that the decedent “could not give consent.” [720 ILCS 5/12-13\(a\)\(2\)](#). Defendant contended that the evidence was insufficient to convict because there was no evidence that the decedent was unable to give knowing consent or that he was aware she was unable to give knowing consent.

In the course of affirming the conviction, the court noted that [720 ILCS 5/12-13\(a\)\(2\)](#) is generally used in situations alleging that sexual assault victims were mentally disabled, asleep, unconscious, drugged, or intoxicated. The court found, however, that the State is not precluded from applying §12-13(a)(2) where, by inflicting a severe beating that resulted in the decedent’s death, defendant rendered the decedent unable to give knowing consent, and defendant was aware that she could not consent. “[J]ust as the incapacitating effects of drugs or alcohol can rob a victim of his or her ability to give knowing consent, so could the effect of [a] physical beating.”

The court also concluded that the evidence was sufficient to prove guilt, and affirmed the conviction for aggravated criminal sexual assault.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

[People v. Childs, 407 Ill.App.3d 1123, 948 N.E.2d 105 \(4th Dist. 2011\)](#)

Aggravated criminal sexual assault is committed when one commits criminal sexual assault and one of the statutorily-delineated aggravating circumstances exists during the commission of the offense, including that the accused caused bodily harm. [720 ILCS 5/12-14\(a\)\(2\)](#). Because the statutory offense of aggravated criminal sexual assault does not prescribe a mental state, the mental state of intent, knowledge, or recklessness is implied. If during the course of the sexual assault, the defendant caused bodily harm to the victim, the State need not prove that such harm was inflicted knowingly or intentionally to convict defendant of aggravated criminal sexual assault. An inadvertent or accidental infliction of simple bodily harm is sufficient.

The court correctly convicted defendant of attempt aggravated criminal sexual assault where the State proved that defendant intended to commit a sexual assault and inflicted bodily harm on the victim. Even if the State were required to prove that defendant intended

to inflict bodily harm, it satisfied this burden where defendant punched complainant repeatedly until she acquiesced to his sexual demands.

(Defendant was represented by Assistant Defender Larry Bapst, Springfield.)

[People v. Decaluwe, 405 Ill.App.3d 256, 938 N.E.2d 181 \(1st Dist. 2010\)](#)

An attempt to commit an offense requires completion of a substantial step toward the commission of the offense with the requisite intent. An attempt aggravated criminal sexual assault requires that defendant take a substantial step toward an act of sexual penetration.

The State failed to prove the offense of attempt aggravated criminal sexual assault where it proved only that the defendant admitted that he wanted the 14-year-old complainant to take naked photos of him and to have sex with him, but had only given the complainant a camera and asked him to take defendant's photo. While defendant's admissions proved that he possessed the requisite intent, he had taken no substantial step toward an act of penetration where he had not disrobed, asked the complainant to disrobe, or communicated to complainant that he wanted to have sex with him.

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

[People v. Feller, 2012 IL App \(3d\) 110164 \(No. 3-11-0164, 10/25/12\)](#)

Defendant was convicted of counts of criminal sexual assault and aggravated criminal sexual assault that required the State to prove that defendant held a position of trust, authority or supervision over the complainant. "Supervise" means "superintend" or "oversee." There is no requirement in the statute that the position of trust, authority or supervision be of any specific duration.

The State's evidence was sufficient to prove that element. The defendant sexually assaulted the complainant while they were swimming in a lake. The complainant: (1) was 14 years old and legally blind; (2) could not swim in a lake unassisted and would not swim with someone she did not trust; (3) was assisted by defendant while they both swam in the lake; and (4) would not have been able to swim without defendant's assistance. Defendant oversaw the complainant's progress as she swam from the shore into the lake. Common sense dictates that an individual who guides a blind person into an unknown body of water is in a position of trust with that person.

Lytton, J., dissented. The statutory reference to a position of trust, authority or supervision does not apply to actions based on the momentary assistance defendant offered the complainant in swimming with her to the shore. Complainant was not acquainted with defendant before that day and could not have held him in a position of trust.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

[People v. Giraud, 2011 IL App \(1st\) 091261 \(No. 1-09-1261, 8/30/11\)](#)

1. A person commits the offense of criminal sexual assault by committing an act of sexual penetration by use of force or threat of force. A person commits aggravated criminal sexual assault by committing criminal sexual assault where an aggravating factor is present during the assault.

Defendant was convicted of aggravated criminal sexual assault under [720 ILCS 5/12-14\(a\)\(3\)](#), which creates an aggravating factor where the defendant acts "in such a manner as to threaten or endanger the life of the victim or any other person." The court concluded that under Illinois law, a criminal sexual assault is elevated to aggravated criminal sexual assault only if the aggravating circumstance occurs "during . . . the commission of the" criminal sexual assault. Thus, the aggravating factor must occur contemporaneously with the criminal sexual

assault.

Defendant, who was HIV-positive, was convicted of aggravated criminal sexual assault for exposing his daughter to HIV by forcing her to engage in unprotected sex. The court concluded that merely exposing the victim of a criminal sexual assault to HIV, without more, does not constitute the §12-14(a)(3) aggravating factor, because there is no immediate risk to the victim's life during the commission of the criminal sexual assault. "In other words, while exposing someone to HIV can result in transmitting . . . a life-threatening disease to that person, it cannot threaten or endanger someone's life *during* the commission of the criminal sexual assault."

2. The court noted that defendant was also convicted of criminal transmission of HIV, which is a separate offense defined as committing criminal sexual assault while exposing the victim to HIV, without actually causing the victim to contract HIV. "The fact that the legislature criminalized the act of exposing one to HIV, combined with the fact that sentence for such crime is to run consecutive to sexual assault convictions, shows that the legislature intended HIV exposure its own separate crime, and not . . . an aggravating factor to elevate criminal sexual assault to aggravated criminal sexual assault."

3. In the course of its opinion, the court noted that had the daughter actually contracted HIV, defendant could have been charged with aggravated criminal sexual assault under §12-14(a)(2), which elevates criminal sexual assault to aggravated criminal sexual assault if the defendant causes bodily harm to the victim. The court also noted that other jurisdictions have considered an HIV-infected person's sexual organs and bodily fluids to be "deadly weapons," and have sustained convictions of aggravated criminal sexual assault based on displaying a deadly weapon during the course of a criminal sexual assault. Here, however, the State did not charge defendant under §12-14(a)(1), the equivalent provision under Illinois law.

Because the evidence was sufficient to prove that defendant committed criminal sexual assault, the conviction for aggravated criminal sexual assault was reduced to criminal sexual assault and the cause remanded for resentencing. The court also noted that because [730 ILCS 5/5-8-4\(a\)](#) requires that the sentence for criminal transmission of HIV run consecutively to the underlying criminal sexual assault conviction, the trial court improperly ordered defendant's sentences to be served concurrently.

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

[People v. Gomez, 2011 IL App \(1st\) 092185 \(No. 1-09-2185, 9/30/11\)](#)

Under the ongoing-criminal-assault rule, Illinois does not require proof of a living victim of a sexual assault where the assault and another offense are committed as a part of the same criminal episode, and the State proves the elements of both offenses.

The State proved that defendant forced his way into the victim's home, threatened her with a BB gun and a knife, pushed her down, stabbed her through the neck with the knife, and then sexually assaulted her. The State was not required to prove that she was still alive when the actual penetration occurred essentially simultaneously with the homicide and as part of the same criminal episode.

(Defendant was represented by Assistant Defender Geoffrey Burkhart, Chicago.)

[People v. Gutierrez, 402 Ill.App.3d 866, 932 N.E.2d 139 \(1st Dist. 2010\)](#)

Defendant was convicted of first degree murder and aggravated criminal sexual assault. He contended on appeal that the aggravated criminal sexual assault conviction must be reversed because the State failed to prove that the decedent was alive at the time of the assault.

1. Illinois follows the “ongoing criminal assault” rule, under which a conviction for sexual assault is proper so long as the forcible compulsion which lead to the sexual assault began before the victim’s death. Because it was clear that the decedent was alive when defendant instituted the force which resulted in both the sexual assault and the murder, the aggravated criminal assault conviction was proper even if the victim was killed before the sexual assault occurred.

2. In the alternative, the court held that the evidence was sufficient to prove beyond a reasonable doubt that the victim’s death occurred after the sexual assault was completed.

Defendant’s convictions and sentences were affirmed.

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

[People v. Lloyd, 2011 IL App \(4th\) 100094 \(No. 4-10-0094, 11/16/11\)](#)

Defendant was charged with seven counts of criminal sexual assault under [720 ILCS 5/12-13\(a\)\(2\)](#), which defines the offense as committing an act of “sexual penetration” where “the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.” The complaining witness was 13 the time of the alleged offenses. The State did not argue that the complainant was unable to understand the nature of the acts, but claimed that §12-13(a)(2) applied because under Illinois law, a 13-year-old is “unable to give knowing consent.” In most cases, the age to consent in Illinois is 17, although in a few instances it is 18.

1. The majority concluded that §12-13(a)(2) is broad enough to include acts committed against a person who is legally unable to consent because of her age. The court acknowledged that in other sections of the Criminal Code the legislature specifically criminalized sexual acts committed against persons who are under the age of consent. The court concluded, however, that the legislature did not intend to exclude such acts from prosecution under §12-13(a)(2).

The court also noted that unlike statutes outlawing sexual activity based on age, in a prosecution under §12-13(a)(2) the State must prove not only the complainant’s age but also that the defendant knew the complainant could not legally consent. “[B]ecause the State has to prove the accused knew the victim was unable to consent, it would be highly unlikely any sexual contact between two similarly aged teenagers under 17 or sex with a person almost 17 would be punishable under section 12-13(a)(2).”

The court found that the evidence showed that the defendant knew the complainant’s age and that she could not legally consent to sexual activity. Therefore, defendant was properly convicted under §12-13(a)(2).

2. In dissent, Justice Steigmann found that §12-13(a)(2) was intended, and has been traditionally interpreted, to apply in two instances: (1) where the victim is unable to understand the act, and (2) where due to her mental condition the victim is unable to give consent. Justice Steigmann rejected the argument that §12-13(a)(2) applies where the victim is unable to give consent merely because she is under the age of consent. Those crimes are prosecuted under other statutes which provide varying penalties; §12-13(a)(2) authorizes a non-probationable Class 1 felony conviction, while aggravated criminal sexual abuse based on the complainant’s age is a probationable Class 2 felony.

The dissent expressed concern that under the majority’s reasoning, a 17-year-old male who engages in sexual penetration with a girlfriend who is one month under the age of 17 can be convicted under §12-13(a)(2) of a non-probationable Class 1 felony. Justice Steigmann rejected the majority’s view that such prosecutions would be rare because the State would be required to prove that the defendant knew the victim was unable to consent; the construction of a criminal statute “should not be based upon the hope that no prosecutor will ever bring

ridiculous charges.”

The dissent concluded that the evidence clearly showed that the defendant committed an offense which the State did not charge - aggravated criminal sexual abuse. However, the record did not support criminal sexual assault, the offense which the State chose to prosecute.

Justice Steigmann added:

In my 22-years on this court, I have never written an opinion to reverse a criminal conviction based on the insufficiency of the State’s evidence. Nor have I written a dissent, as this one, arguing that the majority has erred by failing to reverse a defendant’s conviction on the grounds of insufficient evidence. This long-standing record is in no small measure due to my deference to the trier of fact and my unwillingness to second-guess it.

This case is different. Here, we need not reweigh the evidence because there is no evidence to weigh. Once the State’s claim is rejected – that based solely on [the complainant’s] age, she was unable to understand the nature of the act or unable to give knowing consent – this record is bereft of any evidence to sustain defendant’s convictions.

3. For purposes of the criminal sexual assault statute, [720 ILCS 5/12-12\(f\)](#) defines “sexual penetration” as involving two broad categories of conduct. The first category includes any contact “between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person.” Within this category, the term “object” does not include parts of the defendant’s body, including fingers. The second category includes any “intrusion of any part of the body of one person . . . into the sex organ or anus of another person.”

Defendant was convicted of criminal sexual assault for acts of “sexual penetration” involving his fingers and the complainant’s vagina. At the State’s request and without objection by the defense, the trial court gave the jury only the portion of IPI Crim. 4th, No. 11.65E concerning the first category - “contact” between the complainant’s sex organ by “an object, the sex organ, mouth or anus of” the defendant.

The court concluded that concerning three of the four convictions, failing to give the proper definition of “sexual penetration” did not constitute plain error. For each of the three convictions, the complainant’s testimony clearly demonstrated that defendant inserted his fingers into her vaginal opening. Because the uncontroverted evidence showed digital penetration, the result of the trial on those convictions would not have been different had the proper instruction been given.

Concerning the other conviction, however, the complainant’s testimony did not clearly show penetration by the defendant’s fingers. Based on the evidence, the jury could have found that no penetration occurred. Concerning this count, therefore, plain error occurred because the incorrect definitional instruction could have affected the outcome of the trial.

Defendant’s criminal sexual assault conviction for Count I was reversed, but the other three convictions were affirmed.

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

People v. Mims, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2460, 8/20/10)

At a trial for aggravated criminal sexual assault, trial counsel was not ineffective although he failed to request a jury instruction concerning a consent defense. In the course

of its opinion, the court rejected the argument that without an instruction on consent, the jury had no basis on which it could have acquitted.

Because aggravated criminal sexual assault is defined as an act of sexual penetration by use of force or threat of force, and a consensual act is not perpetrated by force, the jury could have acquitted had it believed that defendant's actions were consensual.

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](#)

Sexual penetration involving the sex organ of one person by the sex organ of another requires evidence of contact, however slight. Sexual penetration involving the sex organ of one person and any part of the body of another requires proof an intrusion, however slight. [720 ILCS 5/12-12\(f\)](#).

Instructing the jury that sexual penetration involving a body part requires only contact, not an intrusion, was error, but not plain error, given that the evidence was not closely balanced or the error so fundamental as to affect the fairness of the trial.

The dissent (Gordon, R., J.) would reverse defendant's aggravated criminal sexual assault conviction based on evidence that defendant forced complainant to insert her finger in her vagina. The statutory definition of penetration requires that the body part of one person intrude into the sex organ of another. Insertion of complainant's finger into her vagina did not meet that definition.

Alternatively, the dissent would find plain error based on the erroneous penetration instruction. Complainant, a non-native English speaker, testified that she put her finger in her own vagina. Defendant's statements to the police were only that he told her to touch herself or touch her clitoris. Therefore the evidence on this issue was closely balanced and the issue should be noticed as plain error.

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

People v. Mpulamasaka, 2016 IL App (2d) 130703 (No. 2-13-0703, 2/17/16)

1. To prove defendant guilty of aggravated criminal sexual assault as charged in this case, the State was required to prove that he committed an act of sexual penetration by the use of force and caused bodily harm. In addition, because defendant raised sufficient evidence of consent, the State had to prove beyond a reasonable doubt that the complainant did not consent.

"Consent" means a freely given agreement to the act of sexual conduct in question. Lack of verbal or physical resistance, or submission resulting from the use or threat of force by the accused, does not constitute consent. In addition, where the complainant initially consents to sexual activity but subsequently withdraws that consent, the withdrawal of consent is effective once it is communicated in some objective manner so that a reasonable person would have understood that consent had been withdrawn.

2. The evidence was insufficient to establish beyond a reasonable doubt that defendant acted without the complainant's consent. At trial, the State conceded that the complainant's testimony on cross-examination was consistent with consent. On cross-examination, the complainant stated that at her request she and defendant changed positions twice because she was uncomfortable, and that defendant ceased all sexual activity when she stated that the intercourse was causing her pain. In addition, the complainant did not say that she feared defendant, the sexual encounter took place in the backseat of a car in the parking lot of a restaurant that was open for business, after the incident the complainant drove off instead of seeking help from persons inside the restaurant, and the complainant reported the incident

only because she experienced pain and bleeding.

The complainant initially told medical personnel that the bleeding was spontaneous, and an expert testified that the complainant's injuries could have been caused by consensual sex. In addition, the complainant admitted that she and defendant kissed. Under these circumstances, the evidence was insufficient to show a lack of consent.

The court acknowledged that some of defendant's actions after the incident (i.e., laundering clothes, telling the complainant not to tell anyone, destroying carry-out containers from the restaurant outside which the incident occurred, and lying to police about not having been at the restaurant or meeting the complainant) could have indicated consciousness of guilt. Such evidence, however, is not a substitute for credible evidence of the elements of the offense. In addition, defendant's explanation that both he and the complainant were married and wanted to hide their actions was not unreasonable.

Defendant's conviction for aggravated criminal sexual assault was reversed.
(Defendant was represented by Assistant Defender Barb Paschen, Elgin.)

[People v. Ostrowski, 394 Ill.App.3d 82, 914 N.E.2d 558 \(2d Dist. 2009\)](#)

The offense of criminal sexual abuse occurs where a defendant commits an act of "sexual conduct" by use of force or threat of force. Aggravated criminal sexual abuse occurs where the victim of the "sexual conduct" is under the age of 18 and the accused is a family member.

"Sexual conduct" is defined as any "intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breasts of the victim or the accused, or any part of the body of a child under 13 years of age, . . . for the purpose of sexual gratification or arousal of the victim or the accused."

1. Factors used to determine whether conduct is "sexual" in nature include: (1) whether the conduct was intended to arouse or satisfy the sexual desires of the defendant or victim; (2) the relationship between the defendant and the victim; (3) whether anyone else was present; (4) the length and purpose of the contact; (5) whether there was a legitimate, non-sexual purpose for the contact; (6) when and where the contact occurred; and (7) the conduct of the defendant and the victim before and after the contact.

2. Here, the evidence was insufficient for a rational jury to conclude that kisses on the lips between a grandfather and his five-year-old granddaughter were for the purpose of sexual gratification or arousal. The court noted that the granddaughter and grandfather appeared to be engaging in horseplay at a public festival, and that neither appeared to be upset until police intervened. In addition, the recollections of the prosecution witnesses contained substantial contradictions concerning the types of kisses that were being exchanged and the positions of both the defendant and the granddaughter. "While defendant's public display of intoxication while supervising his granddaughter was inappropriate, his conduct was not proven beyond a reasonable doubt to constitute aggravated criminal sexual abuse."

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

[People v. Raymond, 404 Ill.App.3d 1028, 938 N.E.2d 131 \(1st Dist. 2010\)](#)

Relying on **[People v. Douglas, 381 Ill.App.3d 1067, 886 N.E.2d 1232 \(2d Dist. 2008\)](#)**, the court concluded that a mistake-of-age defense was not available to a defendant charged with predatory criminal sexual assault of a child. The State was required to prove a mental state for the element of penetration, but not for the circumstance of the age of the defendant and the victim.

(Defendant was represented by Assistant Defender Sean Southern, Chicago.)

[People v. Roldan, 2015 IL App \(1st\) 131962 \(No. 1-13-1962, 9/14/15\)](#)

Defendant was charged with criminal sexual assault based on the allegation that he knew the victim was “unable to understand the nature of the act or [was] unable to give knowing consent.” ([720 ILCS 5/11-1.20\(a\)\(2\)](#)). The trial court concluded that defendant knew or should have known that the victim was in a “blackout” state and was unable to give knowing consent.

The Appellate Court concluded that even viewing the evidence most favorably to the prosecution, the record was devoid of any credible evidence to support a finding that at the time of the encounter between defendant and the victim, defendant knew or should have known that the victim was unable to give knowing consent. There was evidence showing that the victim consumed a large quantity of alcohol on the night in question, and at one point was difficult to awaken and had to be led to a wheelchair because she had trouble walking. This evidence of unresponsiveness concerned a time period well after the victim’s encounter with defendant, however.

The evidence showed that at the time of the encounter between defendant and the victim, the latter stated several times that she wanted to have sex with defendant. Although defendant initially declined and said “she would regret it in the morning because she was drunk,” the couple eventually engaged in intercourse after the victim continued to say that she wanted to have sex with defendant. Defendant then returned to his home and the victim went back to the party where they had met. It was later in the evening when the victim was unresponsive and unable to walk.

In addition, the State did not introduce a toxicology report concerning the victim, and there was no evidence that the victim was in a “blackout” state at the time of her activities with defendant. Although the victim testified that she “blacked out” and could not remember the encounter with defendant, there was also evidence that she walked back to the party unassisted and did not appear to other partygoers to be impaired. The Appellate Court concluded that under these circumstances, there was a lack of evidence to indicate that defendant knew the victim was unable to consent to sexual activity with the defendant, even if she might have been unable to consent later in the evening.

The conviction for criminal sexual assault was reversed.

[People v. Toy, 407 Ill.App.3d 272, 945 N.E.2d 25 \(1st Dist. 2011\)](#)

Defendant was charged with aggravated criminal sexual assault in that he committed a criminal sexual assault while armed with a firearm. [720 ILCS 5/12-14\(a\)\(8\)](#). Unless specified otherwise, “firearm” has the meaning ascribed to it by the Firearm Owners Identification Act. [720 ILCS 5/2-7.5](#). The FOID Act defines a firearm as “any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas,” excluding certain pneumatic, spring, paint ball, or BB guns, any device used for signaling or safety and required or recommended by the United States Coast Guard or Interstate Commerce Commission, any device used for firing of industrial ammunition, and antique firearms that are primarily collector’s items and not likely to be used as a weapon. [430 ILCS 65/1.1](#).

The prosecution witnesses’ testimony that they observed defendant with a gun and that defendant pressed an object against the head of the complainant and threatened to kill her while sexually assaulting her was sufficient to prove that he was armed with a firearm.

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

[Top](#)

§46-2(b) Constitutionality

[People v. Terrell, 132 Ill.2d 178, 547 N.E.2d 145 \(1989\)](#) Defendant contended that the aggravated criminal sexual assault statute is unconstitutional because it requires a less culpable mental state than that required for the less serious offense of criminal sexual abuse. Aggravated criminal sexual assault punishes "sexual penetration," which does not require a specific mental state. However, the less serious offense of aggravated criminal sexual abuse punishes "sexual conduct," which does require that the touching be "intentional or knowing" and "for the purpose of sexual gratification or arousal."

Though the definition of "sexual penetration" does not expressly require a mental state, the legislature did not intend to define a strict liability offense. Intent or knowledge is required by implication, so aggravated criminal sexual assault does not punish innocent conduct or punish lesser conduct more severely. The legislature may rationally punish "sexual penetration" more severely than "sexual conduct."

Aggravated criminal sexual assault, as defined in ¶12-14(b)(1), does not violate due process because criminal sexual assault is not a lesser included offense of the ¶12-14(b)(1) aggravated offense. There is no principle that every aggravated offense must have a lesser included offense. Furthermore, ¶¶12-13(a) and 12-14(b) "simply reflect the legislature's decision to punish certain acts of sexual penetration more severely than others"; "this Court will not interfere with legislation defining the nature and extent of penalties that is reasonably designed to remedy evils which the legislature has determined to be a threat to the public."

[People v. Haywood, 118 Ill.2d 263, 515 N.E.2d 45 \(1987\)](#) Section 12-13 provides that criminal sexual assault occurs where defendant commits an act of "sexual penetration by the use of force or threat of force." The phrase "force or threat of force" is not unconstitutionally vague. The legislature intended to "retain the same meaning of 'force' that was given under the offenses of rape and deviate sexual assault" even though it failed to enact those definitions as part of the new statutory scheme.

Likewise, the meaning of "bodily harm," as defined in ¶12-12(b) and included as an element under ¶12-14(a)(2), is sufficiently definite to satisfy due process. For bodily harm to occur, "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent is required." [People v. Mays, 91 Ill.2d 251, 437 N.E.2d 633 \(1982\)](#); See also, [People v. Lauderdale, 228 Ill.App.3d 830, 593 N.E.2d 757 \(1st Dist. 1992\)](#) ("bodily harm" under the aggravated criminal sexual assault statute should be given the same meaning as "bodily harm" under the battery statute; the legislature intended that the term include injuries to a victim's sexual organs or reproductive capacity.)

[People v. Reed, 148 Ill.2d 1, 591 N.E.2d 455 \(1992\)](#) Ch. 38, ¶12-16(d), which enhances an act of sexual penetration with a person between 13 and 17 from a Class A misdemeanor to a Class 2 felony if defendant is more than five years older than the victim does not violate equal protection, as there is a rational basis for distinguishing between adults who engage in sexual activities with minors at least five years younger and persons who engage in the same activities but who are within five years of the victim's age. The purpose of ¶12-16(d) is to protect children from sexual exploitation by adults. The legislature could logically conclude that an adult who is at least five years older than the minor poses a greater risk of exploitation

than an offender who is closer in age to the victim; in the latter case, similar levels of maturity reduce the potential for overreaching or undue influence.

Further, section 12-16(d) does not violate due process as an arbitrary and unreasonable exercise of the State's police power. A statute satisfies due process when it is reasonably designed to remedy the evil identified by the legislature as a threat to public health, safety and general welfare. The legislature acted reasonably when it attempted to protect minors by simply prohibiting sexual activity with adults, regardless of whether the minor is the aggressor or initiates the activity.

[People v. Burpo, 164 Ill.2d 261, 647 N.E.2d 996 \(1995\)](#) The criminal sexual assault statutory scheme is not so vague as to deprive citizens of notice of the conduct that is prohibited.

Defendant, a gynecologist, was charged with violating [725 ILCS 5/12-13\(a\)\(2\)](#), which provides that criminal sexual assault occurs where an act of "sexual penetration" is committed with knowledge that the victim was unable to understand the nature of the act or give knowing consent. However, [720 ILCS 5/12-18](#) creates an exception to the offense for examinations by physicians, medical personnel, parents or caretakers, if conducted "for purposes of and in a manner consistent with reasonable medical standards."

To prove criminal sexual assault by a gynecologist, the State is required to show not only that defendant committed an act of sexual penetration (which necessarily occurs in every gynecological examination), but also that he or she intentionally, knowingly or recklessly transgressed "reasonable medical standards" without the patient's consent. When a gynecologist "intentionally exceeds the scope of reasonable medical standards," the patient's consent for the examination itself is vitiated.

Because the State must prove that the act of penetration was committed with intent, knowledge, or recklessness, a gynecologist could not be prosecuted for negligent conduct. Instead, a "physician's good faith will protect him from criminal sanctions." Also, the phrase "reasonable medical standards" is not unconstitutionally vague.

[People v. Hengl, 144 Ill.App.3d 405, 494 N.E.2d 937 \(3d Dist. 1986\)](#) Defendant contended that the criminal sexual assault (act of penetration by force) and aggravated criminal sexual assault (act of penetration by force and causing bodily harm) statutes are unconstitutional. Defendant argued that because causing bodily harm is inherent in an act of penetration by force, there is no distinction between the Class 1 offense of criminal sexual assault and the Class X offense of aggravated criminal sexual assault.

This contention was rejected; bodily harm is not inherent in sexual penetration by the use of force.

[People v. Downin, 357 Ill.App.3d 193, 828 N.E.2d 341 \(3d Dist. 2005\)](#) The aggravated criminal sexual abuse statute ([720 ILCS 5/12-16\(d\)](#)) does not violate equal protection although unmarried 16-year-olds are prohibited from engaging in sexual intercourse, even with parental consent, while 16-year-olds who receive parental consent to marry are permitted to engage in intercourse. The purpose of §12-16(d) is to protect persons under the age of 17 from sexual exploitation by adults, and unmarried and married 16-year-olds are not similarly situated for purposes of equal protection analysis.

[Top](#)

§46-2(c)

Lesser Included Offenses

[People v. Kolton, 219 Ill.2d 353, 848 N.E.2d 950 \(2006\)](#) Under Illinois law, whether a crime is a lesser included offense is determined under the “charging instrument” approach, which examines the charging instrument to determine whether the “broad foundation” of the lesser offense is alleged. Under the “charging instrument” approach, the absence of a statutory element of the lesser charge will not preclude a finding of a lesser included offense, if the missing element can reasonably be inferred.

Here, aggravated criminal sexual abuse was a lesser included offense of predatory criminal sexual assault of a child. The indictment alleged that defendant committed an act of sexual penetration, without any allegation of defendant’s state of mind or motivation. Aggravated criminal sexual abuse requires an act of “sexual conduct,” which includes the requirement that the act was committed for purposes of sexual gratification or arousal.

Despite the omission of an allegation that the act was performed for purposes of sexual gratification, it was reasonable to infer from the circumstances that defendant performed the act for such a purpose. The primary constitutional concern of the lesser included offense doctrine is to ensure that defendant has notice of the charge; a charge of predatory sexual assault of a child based on “sexual penetration” gives notice to defendant that criminal sexual abuse is a possible included charge.

[People v. Brials, 315 Ill.App.3d 162, 732 N.E.2d 1109 \(1st Dist. 2000\)](#) Convictions for aggravated criminal sexual assault, based on committing the offense of criminal sexual assault during the felony of unlawful restraint, were reduced to criminal sexual assault. Unlawful restraint is inherent in criminal sexual assault, and cannot also be used to aggravate the offense.

[People v. Creamer, 143 Ill.App.3d 94, 492 N.E.2d 923 \(4th Dist. 1986\)](#) Defendant was charged with aggravated criminal sexual *assault* and was convicted at a jury trial. The trial judge erred by refusing defendant’s requested instruction on aggravated criminal sexual abuse. The distinction between the “assault” and “abuse” offenses is that “assault” requires sexual penetration, whereas “abuse” requires only sexual conduct.

The victim’s testimony on cross-examination suggested the possibility that there was no penetration, thereby requiring the trial court to instruct the jury on the included offense of aggravated criminal sexual abuse.

[People v. Leonard, 171 Ill.App.3d 380, 526 N.E.2d 397 \(2d Dist. 1988\)](#) Battery is not a lesser included offense of aggravated criminal sexual assault under ¶12-14(a)(2).

Cumulative Digest Case Summaries §46-2(c)

[People v. Hurry, 2012 IL App \(3d\) 100150 \(No. 3-10-0150, modified 4/20/12\)](#)

Defendant was convicted of two counts of predatory criminal sexual assault based on the act of placing his penis in the mouth of the child. Because the child’s testimony was that defendant placed her hand on his penis, the court reduced the convictions from predatory criminal sexual assault to aggravated criminal sexual abuse. [720 ILCS 5/12-16.](#)

(Defendant was represented by Assistant Defender Glenn Sroka, Ottawa.)

[People v. Hurry, 2013 IL App \(3d\) 100150-B \(No. 3-10-0150, Mod. Op. 1/16/14\)](#)

Defendant was convicted of two counts of predatory criminal sexual assault based on the act of placing his penis in the mouth of the child. Because the child's testimony was that defendant placed her hand on his penis, the court reduced the convictions from predatory criminal sexual assault to aggravated criminal sexual abuse. [720 ILCS 5/12-16.](#)

(Defendant was represented by Assistant Deputy Defender Verlin Meinz, Ottawa.)

[Top](#)

§46-3

Decisions Under Prior Law

§46-3(a)

Rape and Deviate Sexual Assault

[Michael M. v. Superior Court, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 \(1981\)](#) The Court upheld a state statutory rape law which imposed criminal liability solely on men; gender-based classifications are not "inherently suspect," and the statute was held to be sufficiently related to legitimate State objectives.

[People v. Enoch, 122 Ill.2d 176, 522 N.E.2d 1124 \(1988\)](#) Requisite intent to commit rape may be inferred from the circumstances of the assault.

[People v. Pearson, 52 Ill.2d 260, 287 N.E.2d 715 \(1972\)](#) Since force is an element of rape, the condition of complainant's clothing after the incident is relevant.

[People v. Edmunds, 30 Ill.2d 538, 198 N.E.2d 313 \(1964\)](#) The State is not required to introduce medical testimony to support a rape conviction.

[People v. Crocker, 25 Ill.2d 52, 183 N.E.2d 161 \(1962\)](#) Evidence that complainant is pregnant is improper.

[People v. Robinson, 73 Ill.2d 192, 383 N.E.2d 164 \(1978\)](#) Where there was evidence that the victim was threatened and intimidated, the trial court did not err by giving a non-IPI instruction that "a rape victim need not resist or cry out when restrained by fear of violence or when such act would have been futile or endangered her life."

[People v. Medrano, 24 Ill.App.3d 429, 321 N.E.2d 97 \(2d Dist. 1974\)](#) Rape statute upheld over claim that it discriminates against males.

[People v. Brumfield, 72 Ill.App.3d 107, 390 N.E.2d 589 \(5th Dist. 1979\)](#) Since rape is a general intent crime, voluntary intoxication is not a defense. However, involuntary intoxication may be a defense; thus, the trial court erred by excluding evidence of involuntary intoxication.

[People v. Story, 114 Ill.App.3d 1029, 449 N.E.2d 935 \(1st Dist. 1983\)](#) Battery is not a lesser included offense of attempt rape or unlawful restraint; thus, defendant could not be properly

convicted of battery when he was only charged with attempt rape and unlawful restraint.

[People v. Blunt, 65 Ill.App.2d 268, 212 N.E.2d 719 \(4th Dist. 1965\)](#) Rape conviction reversed. Complainant was not so mentally deficient that she could not consent.

[People v. Washington, 121 Ill.App.2d 174, 257 N.E.2d 190 \(1st Dist. 1970\)](#) Mere presence at scene of rape, plus flight, was insufficient to prove defendant accountable in absence of evidence that he facilitated the commission of rape by others.

[People v. Pitts, 89 Ill.App.3d 145, 411 N.E.2d 586 \(3d Dist. 1980\)](#) The State failed to prove defendant guilty of attempt rape. The acts of defendant and his statements fail to support the conclusion that defendant had specific intent to have sexual intercourse with the complainant, as opposed to some other form of sexual activity.

[Top](#)

§46-3(b)

Indecent Liberties; Contributing to Sexual Delinquency

[People v. Bradford, 106 Ill.2d 492, 478 N.E.2d 1341 \(1985\)](#) Defendant was convicted of indecent liberties with a child (Ch. 38, ¶11-4), a Class 1 felony, and contended that he was entitled to the benefit of a statutory change which makes such conduct a Class A misdemeanor (Ch. 38, ¶12-15). Section 12-15 became effective on July 1, 1984; before that date, defendant's conviction and sentence had been affirmed. Defendant "was sentenced prior to the effective date of ¶12-15, and he is not eligible to elect to be sentenced under it."

[People v. Rogers, 415 Ill. 343, 114 N.E.2d 398 \(1953\)](#) In a rape without force case (indecent liberties with a child), it is essential for the State to prove the age of defendant as well as the age of the complainant.

[People v. Dalton, 91 Ill.2d 22, 434 N.E.2d 1127 \(1982\)](#) Evidence of defendant's statement as to his age (over 17 years) is sufficient to prove age beyond a reasonable doubt at trial for indecent liberties.

[People v. Schelsky, 134 Ill.App.3d 1044, 482 N.E.2d 807 \(5th Dist. 1985\)](#) Aggravated indecent liberties with a child conviction reduced to indecent liberties. The information was insufficient to charge the aggravated offense because it did not allege the infliction of great bodily harm.

[People v. Mahoney, 18 Ill.App.3d 518, 310 N.E.2d 36 \(4th Dist. 1974\)](#) Indecent liberties with child indictment held sufficient over defendant's claim that it failed to allege the name of the injured party. The indictment alleged acts against a one-year old child "whose name will be revealed at a trial of this cause."

[People v. Ball, 126 Ill.App.2d 9, 261 N.E.2d 417 \(1st Dist. 1970\)](#) An indecent liberties indictment was fatally defective where it alleged the required intent but not the acts allegedly committed. "A defendant cannot be lawfully convicted of a crime not charged in the indictment."

[People v. Brown, 132 Ill.App.2d 875, 271 N.E.2d 395 \(2d Dist. 1971\)](#) At a trial for indecent liberties with a child, the trial court erred by refusing defendant's instruction on the affirmative defense of prostitution; there was "some evidence" to support the defense.

[Top](#)

§46-4

Other Sex Related Offenses

[In re Ryan B., 212 Ill.2d 226, 817 N.E.2d 495 \(2004\)](#) Respondent was adjudicated delinquent based on the offense of sexual exploitation of a child. [720 ILCS 5/11-9.1\(a-5\)](#) provides that a person commits sexual exploitation of child if he "knowingly entices, coerces or persuades a child to remove the child's clothing for the purpose of sexual arousal or gratification of the person or the child or both."

The evidence showed that respondent, a 14-year-old, asked an 8-year-old girl to lift up her shirt so he could see her "boobs." The 8-year-old complied with the request.

The State failed to prove the offense beyond a reasonable doubt. The ordinary and popularly understood meaning of "entice" is "to draw on by arousing hope or desire." The common meaning of "coerce" is "to restrain, control or dominate, nullifying individual will or desire." "Persuade" is defined as "to induce by argument, entreaty, or expostulation into some mental position." Respondent did not "entice" or "persuade" the 8-year-old child to lift her shirt by asking her to do so; "coercing, persuading or enticing requires something more than making a single request."

Although the age difference was a fact for the trial court to consider and "certainly could be dispositive if the offender was an adult or a person in a position of authority over the victim," in this case the age difference did not establish coercion. In addition, had the legislature intended to criminalize conduct between two minors based solely on a difference in age, it would have enacted "a presumptive inference of culpability based upon age differences."

[Chicago v. Wilson, 75 Ill.2d 525, 389 N.E.2d 522 \(1978\)](#) City ordinance which prohibits a person from wearing clothing of the opposite sex is unconstitutional as applied to defendants whose cross-dressing was part of their therapy in preparation for sex reassignment operations. The ordinance was an unconstitutional infringement of defendants' "liberty interests."

[People v. Garrison, 82 Ill.2d 444, 412 N.E.2d 483 \(1980\)](#) Public indecency statute upheld. The statute is not unconstitutionally vague, and prosecution under the statute did not invade defendant's right to privacy. The statute does not violate equal protection; prosecution of some defendants under the obscenity statute and others under the public indecency statute does not unfairly burden the latter because the elements of the obscenity offense are more narrowly drawn and more difficult to prove.

Additionally, defendant could not properly claim that the statute was unconstitutional as overbroad. Generally, a defendant may not avoid prosecution on the ground that the prosecution of other individuals under the same statute might violate their constitutional rights. Although an exception to this rule exists where the existence of a statute might inhibit the exercise of expressive or associational rights protected by the First Amendment, the public indecency statute affects only privacy rights and not rights protected by the First Amendment.

[People v. Baus, 16 Ill.App.3d 136, 305 N.E.2d 592 \(1st Dist. 1973\)](#) Defendant was convicted of public indecency and claimed although he was in public park, he was not in a "public place" as required by statute since he "went into the bushes to conceal himself" while he and the codefendant performed an act of "oral sex."

A "public place" is a one in which there is a "high probability that the deviate conduct would be viewed by other members of the public." Here, defendant was in a park at 7:00 a.m. on a bright, sunshiny day, people were walking dogs and jogging, and he was seen by a policeman riding in an automobile on an access road. Conviction affirmed.

[People v. Cessna, 42 Ill.App.3d 746, 356 N.E.2d 621 \(5th Dist. 1976\)](#) Conviction for adultery reversed. There was insufficient evidence to prove that defendant's conduct was "open and notorious."

[People v. Thompson, 85 Ill.App.3d 964, 407 N.E.2d 761 \(1st Dist. 1980\)](#) Prostitution statute upheld over defense contentions that it violates due process (by defining an inherently inchoate offense as a specific substantive offense) and equal protection, infringes on the freedom of speech, and violates [art. 4, §8\(d\) of the Illinois Constitution](#) by containing more than one subject.

[People v. Matthews, 89 Ill.App.3d 749, 412 N.E.2d 31 \(3d Dist. 1980\)](#) Defendant was charged by indictment with pandering. She was acquitted of pandering but was found guilty of soliciting for a prostitute. The conviction was improper; soliciting is not a lesser included offense of pandering, since all elements of soliciting are not included within the elements of pandering.

[People v. Ford, 2 Ill.App.3d 780, 276 N.E.2d 820 \(5th Dist. 1971\)](#) Pandering indictment was fatally defective by failing to include the name of the female procured.

[People v. Holloway, 143 Ill.App.3d 735, 493 N.E.2d 89 \(1st Dist. 1986\)](#) Defendant was convicted of soliciting for a prostitute (Ch. 38, ¶11-15(a)) after he offered an undercover officer \$10 in exchange for sex. Section 11-15 does not apply to a patron's solicitation of a prostitute; the "clear import" of ¶ 11-15 limits the offense "to those persons who establish the contact between the prostitute and a prospective customer."

[People v. Jones, 245 Ill.App.3d 810, 615 N.E.2d 391 \(4th Dist. 1993\)](#) Ch. 38, ¶11-15.1 ([720 ILCS 5/11-15.1](#)), which creates the offense of soliciting for a juvenile prostitute, applies only to "middlemen" who solicit prospective customers for prostitutes.

Cumulative Digest Case Summaries §46-4

[People v. Giraud, 2011 IL App \(1st\) 091261 \(No. 1-09-1261, 8/30/11\)](#)

1. A person commits the offense of criminal sexual assault by committing an act of sexual penetration by use of force or threat of force. A person commits aggravated criminal sexual assault by committing criminal sexual assault where an aggravating factor is present during the assault.

Defendant was convicted of aggravated criminal sexual assault under [720 ILCS 5/12-](#)

[14\(a\)\(3\)](#), which creates an aggravating factor where the defendant acts “in such a manner as to threaten or endanger the life of the victim or any other person.” The court concluded that under Illinois law, a criminal sexual assault is elevated to aggravated criminal sexual assault only if the aggravating circumstance occurs “during . . . the commission of the” criminal sexual assault. Thus, the aggravating factor must occur contemporaneously with the criminal sexual assault.

Defendant, who was HIV-positive, was convicted of aggravated criminal sexual assault for exposing his daughter to HIV by forcing her to engage in unprotected sex. The court concluded that merely exposing the victim of a criminal sexual assault to HIV, without more, does not constitute the §12-14(a)(3) aggravating factor, because there is no immediate risk to the victim’s life during the commission of the criminal sexual assault. “In other words, while exposing someone to HIV can result in transmitting . . . a life-threatening disease to that person, it cannot threaten or endanger someone’s life *during* the commission of the criminal sexual assault.”

2. The court noted that defendant was also convicted of criminal transmission of HIV, which is a separate offense defined as committing criminal sexual assault while exposing the victim to HIV, without actually causing the victim to contract HIV. “The fact that the legislature criminalized the act of exposing one to HIV, combined with the fact that sentence for such crime is to run consecutive to sexual assault convictions, shows that the legislature intended HIV exposure its own separate crime, and not . . . an aggravating factor to elevate criminal sexual assault to aggravated criminal sexual assault.”

3. In the course of its opinion, the court noted that had the daughter actually contracted HIV, defendant could have been charged with aggravated criminal sexual assault under §12-14(a)(2), which elevates criminal sexual assault to aggravated criminal sexual assault if the defendant causes bodily harm to the victim. The court also noted that other jurisdictions have considered an HIV-infected person’s sexual organs and bodily fluids to be “deadly weapons,” and have sustained convictions of aggravated criminal sexual assault based on displaying a deadly weapon during the course of a criminal sexual assault. Here, however, the State did not charge defendant under §12-14(a)(1), the equivalent provision under Illinois law.

Because the evidence was sufficient to prove that defendant committed criminal sexual assault, the conviction for aggravated criminal sexual assault was reduced to criminal sexual assault and the cause remanded for resentencing. The court also noted that because [730 ILCS 5/5-8-4\(a\)](#) requires that the sentence for criminal transmission of HIV run consecutively to the underlying criminal sexual assault conviction, the trial court improperly ordered defendant’s sentences to be served concurrently.

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

[People v. Rexroad, 2013 IL App \(4th\) 110981 \(No. 4-11-0981, modified 6/28/13\)](#)

1. A person of the age of 17 and upwards commits the offense of indecent solicitation of a child if the person, with the intent that the offense of aggravated criminal sexual assault, criminal sexual assault, predatory criminal sexual assault of a child, or aggravated criminal sexual abuse be committed, knowingly solicits a child or one whom he believes to be a child to perform an act of sexual penetration or sexual conduct as defined in §12-12 of the Criminal Code. [720 ILCS 5/11-6\(a\)](#). Defendant was charged with indecent solicitation of a child when he sent suggestive text messages to a police officer who was pretending to be a teenaged girl.

The instructions provided to defendant’s jury defining the elements of indecent solicitation of a child were defective. They failed to require the jury to find that defendant knew or believed the child was under 17 years of age, and that defendant possessed the intent

to commit aggravated criminal sexual abuse. The court noted that these pattern instructions (Nos 9.01, 9.01A and 9.02) have since been modified to correctly state the law.

The Appellate Court affirmed despite the error because it had been forfeited below and did not amount to plain error where the evidence was not closely balanced and the error did not affect defendant's defense that he was not the person who sent the text messages.

2. The court rejected the argument that the State had failed to prove the *corpus delicti* of the offense of indecent solicitation of a child because the sexually-explicit messages were sent to a detective impersonating a 15-year-old girl and therefore there was no possibility of any injury to a minor. The fact that a minor was not actually victimized is irrelevant. The offense was complete when defendant knowingly solicited someone he believed to be a child to commit a variety of sexual acts, with the intent that the sexual acts be committed.

3. The court rejected defendant's argument, relying on [Ashcroft v. Free Speech Coalition, 535 U.S. 234 \(2002\)](#), that his text messages were constitutionally-protected speech because they only simulated a conversation between defendant and a minor, where defendant actually communicated with a police detective. In [Free Speech Coalition](#), the Supreme Court made clear that criminal penalties for unlawful solicitation of minors may be enforced. The government may suppress speech that advocates the incitement of imminent illegal action that is likely to produce that illegal action. Defendant was convicted of encouraging imminent illegal sex acts with a minor with the intent that those lawless acts occur.

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

[Top](#)

§46-5

Sexually Dangerous Persons Act

[Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 \(1997\)](#) Kansas's Sexually Violent Predator Act was unconstitutional. That act authorized procedures for civil commitment for persons who, due to a "mental abnormality" or "personality disorder," were deemed likely to engage in "predatory acts of sexual violence."

The respondent, a prison inmate with a long history of molesting children, had been scheduled to be released from prison shortly after the Act took effect. However, the Act was invoked to prevent his release.

The Act was intended to provide a means of civilly committing dangerous people who do not meet the test for civil commitment (i.e., persons with a mental disease or defect who are dangerous to themselves or others), but who because of their inability to control their acts, are at risk of committing sexual crimes. A "mental illness" is not an indispensable component of substantive due process; instead, both the act in question here and involuntary commitment statutes seek to protect society from persons who, because of circumstances beyond their control, present serious risks. The right to liberty is not absolute, and the need to protect society from "mentally abnormal" persons who are likely to commit violent sexual offenses is a sufficient public interest to outweigh a citizen's right to personal liberty.

Also, the commitment procedure was civil rather than criminal, and therefore did not constitute "punishment" for purposes of the double jeopardy or *ex post facto* clauses.

[People v. Allen, 107 Ill.2d 91, 481 N.E.2d 690 \(1985\)](#) (aff'd [Allen v. Illinois, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 \(1986\)](#)) Proceedings under the Sexually Dangerous Persons

Act are not "criminal" within the meaning of the self-incrimination clause. Thus, statements defendant made at a court-ordered psychiatric examination were admissible at Sexually Dangerous Person proceedings though no **Miranda** warnings had been given.

Defendant also contended that the Sexually Dangerous Persons Act requires proof of more than one act of sexual assault or sexual molestation. The State contended that the statute requires only a showing of "propensity" and does not require proof of any actual crime.

Both contentions were rejected. The language of the statute, which requires that "the State must prove at least one act of or attempt at sexual assault or sexual molestation," requires more than the proof of mere "propensity"; it also requires that the State prove that defendant "has 'demonstrated' this propensity. . . . [However it] would be illogical to construe the statute to require that a defendant cannot be treated until he has committed more than one assault."

[People v. Masterson, 207 Ill.2d 305, 798 N.E.2d 735 \(2003\)](#) In [Kansas v. Crane, 534 U.S. 407 \(2002\)](#), the U.S. Supreme Court held that the federal constitution permits the civil commitment of a person who has not been convicted of a criminal offense only if he or she has serious difficulty controlling behavior. The Illinois Sexually Dangerous Persons Act satisfies **Crane**, although it does not explicitly define "mental disorder" to include the fact that defendant lacks the ability to control his behavior, because it implies that the "mental disorder" afflicting the respondent must be related to a propensity to commit sex offenses and requires that such propensity has been demonstrated by the respondent's actions.

However, because the Sexually Dangerous Persons Act contains "certain significant ambiguities" caused by the failure to define "mental disorder" in the same manner as the Sexually Violent Persons Commitment Act, and because "it was merely a matter of legislative oversight" that the Sexually Dangerous Persons Act was not amended to conform to the Sexually Violent Persons Act, the term "mental disorder" in the Sexually Dangerous Persons Act should be construed "to mean a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in the commission of sex offenses and results in serious difficulty controlling sexual behavior."

The Sexually Dangerous Persons Act contains no explicit standard for determining the likelihood of future offenses by a respondent. To "ensure compliance with the Supreme Court's decision in [Crane](#) . . . and clarify the State criteria for civil commitment hitherto in use," the trier of fact must explicitly find that it is "substantially probable" that the respondent in a Sexually Dangerous Persons Act proceeding will engage in the commission of sex offenses in the future if not confined.

[People v. Pembrock, 62 Ill.2d 317, 342 N.E.2d 28 \(1976\)](#) The burden of proof for commitment under the Sexually Dangerous Persons Act is "beyond a reasonable doubt."

Although there are differences between commitment under the Sexually Dangerous Persons Act and the Mental Health Code, the Sexually Dangerous Persons Act does not violate equal protection; there is a reasonable and rational basis for the different procedures.

The term "sexually dangerous person" is sufficiently defined in the Act to provide meaningful standards to be applied by the judicial officer, and thus is not unconstitutionally vague.

[People v. Spurlock, 388 Ill.App.3d 365, 903 N.E.2d 874 \(5th Dist. 2009\)](#) As an issue of first impression, the Appellate Court held that the filing of a Sexually Dangerous Person petition tolls the speedy trial term for the underlying criminal proceeding. The court stressed

that the legislature intended that Sexually Dangerous Person proceedings be in lieu of the criminal prosecution, and that a stay of the criminal proceeding is necessary to give effect to that intent.

[People v. Jenneski, 36 Ill.2d 624, 225 N.E.2d 19 \(1967\)](#) Defendant is entitled to counsel under the Sexually Dangerous Persons Act.

[People v. Lawton, 212 Ill.2d 285, 818 N.E.2d 326 \(2004\)](#) A §2-1401 petition may be utilized to raise a claim of ineffective assistance of counsel in Sexually Dangerous Persons proceedings, at least where that claim could not have been raised on direct appeal because the same attorney represented the respondent both in the trial court and on appeal. Although §2-1401 does not specifically authorize such actions, fundamental fairness requires that persons who are deprived of their liberty through the Sexually Dangerous Persons Act, and who were represented by the same attorney in the trial and reviewing courts, be afforded a process by which to bring charges of ineffective assistance of counsel. However, the court concluded that defense counsel was not ineffective.

[People v. Studdard, 51 Ill.2d 190, 281 N.E.2d 678 \(1972\)](#) Though proceedings under the Act are civil in nature, due process must be afforded. There is statutory right to a jury trial upon demand.

[People v. Trainor, 196 Ill.2d 318, 752 N.E.2d 1055 \(2001\)](#) Where a respondent who has been adjudicated a sexually dangerous person files an application of recovery, the burden is on the State to prove beyond a reasonable doubt that the applicant is still sexually dangerous. When an application of recovery is filed, the trial court must hold a recovery proceeding at which defendant has the right to counsel and a jury hearing.

Because the State bore the burden of proof to show that defendant was still sexually dangerous, the trial court erred by granting the State's motion for summary judgment on an application for recovery. The summary judgment order was vacated and the cause remanded for a jury trial. See also, [People v. Kastman, 309 Ill.App.3d 516, 722 N.E.2d 1202 \(2d Dist. 2000\)](#) (where a respondent who had been adjudicated a sexually dangerous person and committed to the Department of Corrections filed an "application showing recovery" which included a demand for a jury trial, the trial court erred by conducting a bench hearing).

[People v. Olmstead, 32 Ill.2d 306, 205 N.E.2d 625 \(1965\)](#) The rights to counsel and to demand a jury trial under this Act apply to proceedings on an application for discharge.

[People v. Cooper, 132 Ill.2d 347, 547 N.E.2d 449 \(1989\)](#) "A sexually dangerous person who has been conditionally released retains his status as sexually dangerous until a trial court grants a petition for discharge."

[People v. Covey, 34 Ill.2d 195, 215 N.E.2d 220 \(1966\)](#) The testimony of one psychiatrist, where two have filed reports with the court, is sufficient to establish a *prima facie* case in the absence of contradictory reports.

Psychiatrist could testify that he would classify defendant as sexually dangerous; this was not improper as an opinion as to the ultimate fact in issue.

[People v. Burns, 209 Ill.2d 551, 809 N.E.2d 107 \(2004\)](#) A respondent who files an application

for recovery under the Sexually Dangerous Persons Act is not entitled to an independent psychiatric examination, unless he can show that the experts employed by the State will not give an honest and unprejudiced opinion.

The court held that [725 ILCS 205/9](#), which requires that a “socio-psychiatric report” be prepared upon the filing of an application for recovery, does not mandate that the psychologist who prepares the report be licensed by the State of Illinois.

[People v. Sly, 82 Ill.App.3d 742, 403 N.E.2d 72 \(2d Dist. 1980\)](#) Indefinite incarceration under the Sexually Dangerous Persons Act was not cruel and unusual punishment.

[People v. Patch, 9 Ill.App.3d 134, 293 N.E.2d 661 \(2d Dist. 1972\)](#) The State cannot obtain a conviction and then proceed against the accused as sexually dangerous for the same incident. The prosecution must choose to either prosecute criminally or seek commitment under the Act. But see, [People v. Cooper, 177 Ill.App.3d 942, 532 N.E.2d 1022 \(2d Dist. 1988\)](#) (questioning the viability of **Patch**).

[People v. Oetgen, 269 Ill.App.3d 1000, 647 N.E.2d 1083 \(3d Dist. 1995\)](#) The trial court is required to hold a hearing on the State's petition to revoke conditional release under the Sexually Dangerous Persons Act. Because the trial court granted summary judgment on the State's petition, the revocation order was reversed and the cause remanded for a hearing.

[People v. Beshears, 65 Ill.App.2d 446, 213 N.E.2d 55 \(5th Dist. 1965\)](#) A charge that cannot be prosecuted (because defendant was held in violation of the speedy trial statute) cannot serve as the basis for proceedings under the Sexually Dangerous Persons Act.

[People v. Becraft, 74 Ill.App.3d 407, 393 N.E.2d 110 \(4th Dist. 1979\)](#) The judgment finding defendant to be a sexually dangerous person was reversed and remanded.

The trial court failed to appoint two psychiatrists to determine whether defendant was sexually dangerous, as is required by the Act. Furthermore, there was no showing that psychiatrists who examined defendant before the petition was filed were "qualified psychiatrists" as defined in the Act; in any event, they examined only defendant's fitness to stand trial, and their reports only touched on the question of sexual dangerousness. Finally, the psychiatrist's reports were not admitted into evidence at the hearing, and the prosecutor misstated the findings of the reports.

[People v. McDonald, 186 Ill.App.3d 1096, 542 N.E.2d 1266 \(5th Dist. 1989\)](#) Defendant was found to be a Sexually Dangerous Person. At trial, the reports of a psychiatrist and a psychologist, who had been appointed by the trial judge, were introduced by stipulation.

The Act specifically requires that "two qualified *psychiatrists*" examine defendant. Since only one psychiatrist examined defendant in this case, the finding was reversed.

Defense counsel's stipulation to the report of the psychologist was not sufficient to permit a violation of the statute.

Also, the report of the psychiatrist did not support a finding that defendant was sexually dangerous. However, since this is a civil case, the provision against double jeopardy does not bar remand.

[Potts v. People, 80 Ill.App.2d 195, 224 N.E.2d 281 \(5th Dist. 1967\)](#) Finding of sexually dangerous reversed where no witness testified and only the joint report of the doctors and the

indictment were admitted. There was no showing that the doctors met the requirements of the Act.

[People v. Austin, 24 Ill.App.3d 233, 321 N.E.2d 106 \(2d Dist. 1974\)](#) Judgment finding defendant to be sexually dangerous reversed. It was error to allow a doctor to testify concerning his examination of defendant where he failed to file a written report with the court and deliver a copy to defendant, as is required by the Act.

[People v. Antoine, 286 Ill.App.3d 920, 676 N.E.2d 1374 \(4th Dist. 1997\)](#) The plain language of the Sexually Dangerous Persons Act does not suggest that the legislature intended to require dismissal of a petition because the two psychiatrists appointed under the Act disagree, and “we decline to read such a requirement into the Act.”

[People v. Richardson, 32 Ill.App.3d 621, 335 N.E.2d 619 \(2d Dist. 1975\)](#) In 1969, defendant was determined to be sexually dangerous. In 1973, he appealed following the denial of a petition for conditional discharge. On appeal, defendant could not challenge the sufficiency of the evidence at the 1969 proceeding.

However, the denial of the petition for discharge was reversed and remanded. The trial judge erred by requiring proof that defendant had been absolutely cured; under the Act, “[c]onditional release is mandatory when it appears that the defendant is no longer sexually dangerous . . . but it is impossible to determine with certainty that the defendant has fully recovered.”

[People v. Haywood, 96 Ill.App.2d 344, 239 N.E.2d 321 \(5th Dist. 1968\)](#) Where defendant's petition for recovery stated sufficient facts to require a hearing, it could not be denied merely because a recovery petition had been denied 18 months earlier.

[People v. Bailey, 265 Ill.App.3d 758, 639 N.E.2d 1313 \(3d Dist. 1994\)](#) In 1989, a petition was filed alleging that the respondent was a sexually dangerous person. In September and October 1989, two psychiatrists appointed by the court examined the respondent. However, trial was delayed for nearly three years, and did not occur until June 1992. Defense counsel obtained additional psychiatric examinations by two defense experts in January 1990 and March 1992, but successfully opposed the State's motions to have the court psychiatrists re-examine the respondent.

The respondent in a Sexually Dangerous Person proceeding is entitled to the assistance of counsel. Defense counsel was ineffective for opposing the State's attempts to have the respondent reexamined by the court's psychiatrists. Whether a respondent is sexually dangerous is to be determined as of the date the hearing is held, not the date on which the petition was filed.

[People v. Galba, 273 Ill.App.3d 95, 652 N.E.2d 400 \(3d Dist. 1995\)](#) Because the Sexually Dangerous Persons Act is a civil proceeding giving the State discretion to seek treatment rather than prosecution of an alleged sex offender, the trial court erred by simultaneously committing defendant as a sexually dangerous person and accepting his guilty pleas to the underlying charges.

[People v. Burk, 289 Ill.App.3d 270, 682 N.E.2d 352 \(3d Dist. 1997\)](#) Reversible error occurs where an application for recovery is heard in a bench proceeding despite the petitioner's

request for a jury trial. Although proceedings under the Sexually Dangerous Persons Act are civil in nature, the Act specifically affords the right to demand a jury trial. (See [725 ILCS 205/5](#).) Once a jury is requested, that request must be honored unless the right to a jury is knowingly waived.

The Court rejected the State's argument that defendant waived his jury demand by failing to reassert it at the recovery hearing. (Distinguishing [People v. Cash, 282 Ill.App.3d 638, 616 N.E.2d 1198 \(4th Dist. 1996\)](#).)

[People v. Akers, 301 Ill.App.3d 745, 704 N.E.2d 452 \(4th Dist. 1998\)](#) The respondent in a Sexually Dangerous Persons Act proceeding is not entitled to a fitness hearing even where there is a *bona fide* doubt of his fitness to stand trial. Sexually dangerous persons proceedings are civil in nature; the constitutional prohibition against being tried while unfit applies only to criminal prosecutions.

Cumulative Digest Case Summaries §46-5

[People v. Grant, 2016 IL 119162 \(No. 119162, 5/19/16\)](#)

The Supreme Court held that where a person committed to DOC as a sexually dangerous person files a recovery petition, the State does not have the right to hire an independent expert. Noting that the Sexually Dangerous Persons Act requires that DOC employees prepare a report to be submitted to the trial court, the court concluded that the legislature did not contemplate that the State would hire an additional expert.

The court found that it need not decide whether there could be circumstances under which the State could show sufficient bias on the part of a DOC evaluator to justify allowing it to hire an independent expert, but noted that even if such circumstances arose the trial court would appoint an independent expert rather than allow the State to handpick the expert it wanted.

[People v. Masterson, 2011 IL 110072 \(No. 110072, 9/22/11\)](#)

1. The Equal Protection Clause requires that the government treat similarly situated individuals in a similar fashion, unless it can demonstrate an appropriate reason to treat them differently. The level of scrutiny applied to an equal protection challenge is determined by the nature of the right affected. "Strict scrutiny" analysis is applied when the challenge involves a fundamental right or suspect classification based on race or national origin. In such cases, the classification satisfies the equal protection clause if it is narrowly tailored to serve a compelling State interest.

The "rational basis" test is applied where the classification does not involve a fundamental right or suspect classification. Under this standard, the statute survives the challenge if it bears a rational relationship to a legitimate government purpose.

Finally, "intermediate scrutiny" is applied to classifications based on gender, illegitimacy, and content-neutral incidental burdens to speech. The "intermediate scrutiny" standard requires a showing that the statute is substantially related to an important governmental interest.

As a threshold matter, equal protection analysis applies only where the individual raising the challenge can demonstrate that he is similarly situated to another group.

2. The Sexually Dangerous Persons Act provides that the trial court may appoint two psychiatrists to examine the defendant and render an opinion as to his dangerousness. The

Sexually Violent Persons Act provides that in addition to any expert testimony from the Department of Corrections evaluator or Illinois Department of Human Services psychiatrist, the respondent may retain experts or professional persons to perform an examination. If the respondent is indigent, the county must pay the cost of such experts.

The court concluded that it need not determine whether equal protection is violated by the disparate provisions concerning the right to obtain additional experts, because persons charged with being sexually dangerous are not similarly situated to persons committed under the Sexually Violent Persons Act. The Sexually Violent Persons Act applies to only a limited number of criminal offenses which are deemed sexually violent, and requires a conviction for specified violent sex offenses or a trial which ends in an insanity finding. By comparison, persons are eligible for sexually dangerous status if they are charged with any criminal offense. No conviction is required for sexually dangerous status; the proceeding provides an involuntary and indefinite commitment in lieu of criminal prosecution.

The court concluded that individuals subject to commitment as sexually violent persons are a distinct and more dangerous group because they have been convicted, or tried and declared insane, of the most serious and violent types of sex offenses. Although both Acts have the goal of protecting the public from mentally disordered individuals who pose a risk of sex crime recidivism, and both may subject individuals to indefinite commitment, the Acts address separate groups of individuals. Thus, persons charged under each act are not similarly situated for equal protection purposes.

Because the two affected classes are not similarly situated, the court declined to apply any equal protection analysis.

[Top](#)

§46-6

Sexually Violent Persons Act

[In re Samuelson, 189 Ill.2d 548, 727 N.E.2d 228 \(2000\)](#) Illinois's Sexually Violent Persons Commitment Act upheld against claims that it violated the double jeopardy and *ex post facto* clauses, the right to a jury trial (because a defendant is entitled to a jury only if the prosecution agrees), due process, and equal protection. The court stated, however, that in view of the "[l]imited argument presented to us, . . . we are reluctant to issue a blanket pronouncement that the post-commitment discharge procedures present no due process problems. We simply hold that the defendant . . . has failed to meet his burden of clearly establishing that those procedures are unconstitutional."

[In re Lieberman, 201 Ill.2d 300, 776 N.E.2d 218 \(2002\)](#) Although rape was not specifically listed as a "sexually violent offense" in the Sexually Violent Persons Commitment Act, a petition for involuntary commitment can be based on a rape conviction. The Act has since been amended to specifically include rape.

[In re Varner, 207 Ill.2d 425, 800 N.E.2d 794 \(2003\)](#) The federal constitution does not permit commitment of dangerous sexual offenders without a determination that the offender suffers from an inability to control his behavior. Such lack of control need not involve a "total or complete lack of control," however. Furthermore, the fact-finder is not necessarily required to make a specific determination that the respondent lacks the ability to control his behavior.

Instead, where the State statute authorizing commitment contains a specific requirement that the respondent suffers from a “mental disorder,” and “mental disorder” is defined to include a “volitional capacity that predisposes a person to engage in acts of sexual violence,” a jury finding that an individual is a “sexually violent person” represents an adequate finding of lack of control to satisfy due process.

[In re Commitment of Simons, 213 Ill.2d 523, 821 N.E.2d 1184 \(2004\)](#) The “actuarial risk assessment,” a process by which expert witnesses use various tests to predict the likelihood that a sex offender will re-offend, satisfies **Frye v. U.S.** and therefore is admissible in Illinois courts. See also, [People v. Hargett, 338 Ill.App.3d 669, 786 N.E.2d 557 \(3d Dist. 2003\)](#) (the M.N.S.O.S.T-R. and Static-99 tests, which psychiatrists and psychologists use to assess a sexual offender’s risk to re-offend, constitute scientific evidence which is subject to the **Frye** test).

[In re Detention of Powell, 217 Ill.2d 123, 839 N.E.2d 1008 \(2005\)](#) The Sexually Violent Persons Act provides a 120-day “window” for the State to file a SVP petition against a DOC inmate who is to be released on mandatory supervised release for a criminal offense. The “window” commences 90 days before the inmate starts MSR, and expires 30 days after MSR begins. Where defendant was scheduled to enter MSR on September 30, a petition filed five days earlier was timely although defendant refused to sign the statement of MSR conditions, did not sign until 120 days had passed, and therefore did not start MSR until after the 120-day window had closed.

The legislature did not intend that by refusing to sign a MSR statement, an inmate could obtain control over whether a SVP petition was timely. The 120-day window commences on the date the inmate is *expected* to begin MSR, not the date on which he physically does so.

[People v. Botruff, 212 Ill.2d 166, 817 N.E.2d 463 \(2004\)](#) Where a person committed as a sexually violent person is the subject of an annual reexamination, the trial court has discretion whether to grant a request for the appointment of an independent expert to conduct an examination. ([725 ILCS 207/55\(a\)](#)) The trial court abuses its discretion where it fails to provide an indigent defendant with the assistance of an expert whose testimony is “crucial” to a proper defense. [725 ILCS 207/65](#), which prohibits a detainee from attending a limited probable cause hearing held as part of the reexamination process, does not violate due process.

[In re Diestelhorst, 307 Ill.App.3d 123, 716 N.E.2d 823 \(5th Dist. 1999\)](#) Under [725 ILCS 207/5\(e\)](#), a “sexually violent offense” is:

- “(1) Any crime specified in Section 12-13, 12-14, 12-14.1 or 12-16 of the Criminal Code of 1961; or
- (2) First[-]degree murder, if it is determined by the agency with jurisdiction to have been sexually motivated; or
- (3) Any solicitation, conspiracy[,], or attempt to commit a crime under paragraph (e)(1) or (e)(2) of this Section.”

A defendant who is about to be released from prison on a sentence for child abduction is not eligible for commitment under the Sexually Violent Persons Commitment Act, because child abduction is not a “sexually violent offense” under the Act. The legislature intended to limit use of the commitment statute to persons who were about to complete prison terms for certain, particularly “egregious” criminal offenses. Thus, §5(e)(3) applies only to persons convicted of and sentenced for the solicitation, conspiracy, or attempt to commit one of the

crimes specifically listed in §5(e)(1) and (2).

People v. Rainey, 325 Ill.App.3d 573, 758 N.E.2d 492 (4th Dist. 2001) The right to counsel under the Sexually Violent Person's Commitment Act includes the right to effective assistance of counsel.

In re Tiney-Bey, 302 Ill.App.3d 396, 707 N.E.2d 751 (4th Dist. 1999) Because the Sexually Violent Persons Commitment Act is a civil commitment procedure, a respondent has no constitutional right to a jury trial. Similarly, there is no constitutional right to waive a jury trial and demand a bench hearing where the State exercises its statutory right to request a jury trial.

Also, a respondent's constitutional right to silence is violated by **725 ILCS 207/30(c)**, which provides for an evaluation by the Department of Human Services after the State establishes probable cause to believe that the respondent is sexually dangerous.

In re Kortte, 317 Ill.App.3d 111, 738 N.E.2d 983 (2d Dist. 2000) Under **725 ILCS 207/30(c)**, a respondent in a sexually violent person proceeding who fails to cooperate with an evaluating expert from the Department of Human Services "shall be prohibited from introducing testimony or evidence from any expert or professional person who is retained or court appointed to conduct an evaluation of the person." **Section 207/30(c)** violates due process where, despite the respondent's failure to cooperate, the State calls an evaluating expert who bases his or her evaluation on written records rather than on a personal evaluation. Section 30(c) was intended to assure a "level playing field" by precluding the defense from calling an examining witness where the respondent's failure to cooperate prevents the State from calling such an expert; where the State is able to introduce expert testimony despite the failure to cooperate, the respondent is entitled to elicit the same sort of testimony.

In re Commitment of Sandry, 367 Ill.App.3d 949, 857 N.E.2d 295 (2d Dist. 2006) Penile plethysmography has obtained sufficient acceptance in the relevant scientific field to satisfy **Frye**.

Under **725 ILCS 207/60(d)**, a person committed under the Sexually Violent Persons Commitment Act may petition the trial court for conditional release. To prevent conditional release, the State must prove by clear and convincing evidence that the petitioner has not made sufficient progress to justify conditional release.

The trial court's order concerning conditional release should be reversed only if it is contrary to the manifest weight of the evidence. In this case, the trial court's denial of conditional release was not contrary to the manifest weight of the evidence.

People v. Swanson, 335 Ill.App.3d 117, 780 N.E.2d 342 (2d Dist. 2002) The Sexually Violent Persons Commitment Act does not violate **Kansas v. Crane**, 534 U.S. 407 (2002), although it contains no express requirement that the State prove beyond a reasonable doubt that the respondent had serious difficulty controlling sexually violent behavior. Although the Act does not explicitly mandate a determination of the respondent's ability to control his behavior, the State is required to prove that the respondent suffers from a mental disorder that affects his ability to control his conduct. Thus, the trial court must find the existence of a mental disorder making it substantially probable that the offender will engage in further acts of sexual abuse. Because the Act narrows the class eligible for confinement to persons who are unable to control their dangerousness, it satisfies federal constitutional requirements.

In re Detention of Hardin, 238 Ill.2d 33, 932 N.E.2d 1016 (2010)

The quantum of evidence necessary to support a petition for commitment of a sexually violent person at a probable cause hearing is less than that necessary to convict. The State need only establish a plausible account on each of the required elements of the petition to assure the court that there is a substantial basis for the petition. While the court should not ignore blatant credibility problems, it should not choose between conflicting facts or inferences.

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

1. In order to render effective assistance of counsel, defense counsel must inform a defendant who pleads guilty to a sexually violent offense that he will be evaluated for possible commitment under the Sexually Violent Person's Commitment Act.

2. The court concluded, however, that defendant failed to establish that defense counsel was ineffective. First, the record did not show that defense counsel failed to advise defendant of the possibility that a sexually violent person's petition could be filed. Second, even if counsel's performance was deficient, defendant failed to prove that prejudice resulted where he claimed only that he would not have pleaded guilty had he known that the plea would not dispose of the entire proceeding.

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

People v. Masterson, 2011 IL 110072 (No. 110072, 9/22/11)

1. The Equal Protection Clause requires that the government treat similarly situated individuals in a similar fashion, unless it can demonstrate an appropriate reason to treat them differently. The level of scrutiny applied to an equal protection challenge is determined by the nature of the right affected. "Strict scrutiny" analysis is applied when the challenge involves a fundamental right or suspect classification based on race or national origin. In such cases, the classification satisfies the equal protection clause if it is narrowly tailored to serve a compelling State interest.

The "rational basis" test is applied where the classification does not involve a fundamental right or suspect classification. Under this standard, the statute survives the challenge if it bears a rational relationship to a legitimate government purpose.

Finally, "intermediate scrutiny" is applied to classifications based on gender, illegitimacy, and content-neutral incidental burdens to speech. The "intermediate scrutiny" standard requires a showing that the statute is substantially related to an important governmental interest.

As a threshold matter, equal protection analysis applies only where the individual raising the challenge can demonstrate that he is similarly situated to another group.

2. The Sexually Dangerous Persons Act provides that the trial court may appoint two psychiatrists to examine the defendant and render an opinion as to his dangerousness. The Sexually Violent Persons Act provides that in addition to any expert testimony from the Department of Corrections evaluator or Illinois Department of Human Services psychiatrist, the respondent may retain experts or professional persons to perform an examination. If the respondent is indigent, the county must pay the cost of such experts.

The court concluded that it need not determine whether equal protection is violated by the disparate provisions concerning the right to obtain additional experts, because persons

charged with being sexually dangerous are not similarly situated to persons committed under the Sexually Violent Persons Act. The Sexually Violent Persons Act applies to only a limited number of criminal offenses which are deemed sexually violent, and requires a conviction for specified violent sex offenses or a trial which ends in an insanity finding. By comparison, persons are eligible for sexually dangerous status if they are charged with any criminal offense. No conviction is required for sexually dangerous status; the proceeding provides an involuntary and indefinite commitment in lieu of criminal prosecution.

The court concluded that individuals subject to commitment as sexually violent persons are a distinct and more dangerous group because they have been convicted, or tried and declared insane, of the most serious and violent types of sex offenses. Although both Acts have the goal of protecting the public from mentally disordered individuals who pose a risk of sex crime recidivism, and both may subject individuals to indefinite commitment, the Acts address separate groups of individuals. Thus, persons charged under each act are not similarly situated for equal protection purposes.

Because the two affected classes are not similarly situated, the court declined to apply any equal protection analysis.

[People v. Peterson, 404 Ill.App.3d 145, 935 N.E.2d 1123 \(2d Dist. 2010\)](#)

At a fitness discharge hearing, the trial court erred by finding defendant “not not guilty,” and should have entered an acquittal. Defendant was charged with knowingly failing to register a change of address as required by the Sex Offender Registration Act. ([730 ILCS 150/3\(a\)](#)) However, the State presented no evidence supporting that charge, and at most proved that defendant was homeless for the entire period in question.

At the discharge hearing, the State argued two theories: that defendant gave a false address when he claimed to live at an address where the resident denied any knowledge of him, and that defendant failed to comply with the weekly reporting requirement imposed on homeless persons who are subject to the Registration Act. The court found that neither theory had been proven.

First, the fact that defendant was unknown to the resident at the address which defendant gave was insufficient to prove defendant provided a false address. Given defendant’s documented mental deficiencies and memory problems, it was as likely that defendant confused two apartments at that address as that he knowingly gave false information.

Second, the weekly reporting requirement applies only to persons who lack a “fixed address,” which is defined as an address at which the registrant stays five days a year. Because defendant could have stayed at the second apartment at least five days a year, the State failed to prove that he lacked a “fixed address” and was thus required to report weekly.

Nor did defendant’s statement to police that he was homeless establish either that he gave a false address or that he was subject to weekly reporting. To a layman, having a “fixed address” (*i.e.*, a location to stay five days a year) is not inconsistent with being “homeless.”

Because the State failed to prove that defendant knowingly provided false information or was required to report weekly, the evidence was insufficient to satisfy the reasonable doubt standard. The Appellate Court entered an acquittal in defendant’s behalf.

In the course of its holding, the court observed that the offense of providing false registration information requires a knowing mental state. The court rejected the argument that the legislature intended to create an absolute liability offense. (See [People v. Molnar, 222 Ill.2d 495, 857 N.E.2d 209 \(2006\)](#)).

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

[People v. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 \(1st Dist. 2010\)](#)

A prisoner confined in an Illinois Department of Corrections facility can be assessed court costs and fees for the filing of a frivolous post-conviction petition. [735 ILCS 5/22-105](#). A defendant confined to a Department of Human Services facility as a sexually violent person may not be assessed those costs and fees because he is not confined in the IDOC.

[Top](#)

§46-7

Sex Offender Registration Act

[Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 \(2003\)](#) The Alaska Sex Offender Registration Act does not violate the *ex post facto* clause even when applied to persons convicted before the Act's effective date, because the Act does not constitute "punishment."

The Alaska legislature clearly intended to establish a civil remedy when it enacted the Registration Act. In addition, the Act is not so "punitive" as to overcome that intent, although one purpose of the legislation is to protect the public and criminal penalties are imposed for failing to register.

[Connecticut Department of Public Safety v. Doe, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 844 \(2003\)](#) Connecticut's sex offender registration law, which requires sexual offenders who are released to the community to register with the Department of Public Safety and mandates that a sex offender registry be made available to the public on an Internet site, does not violate due process.

[People v. Malchow, 193 Ill.2d 413, 739 N.E.2d 433 \(2000\)](#) The Sex Offender Registration Act ([730 ILCS 150/1](#)) and Sex Offender and Child Murderer Community Notification Law ([730 ILCS 152/101](#)) do not violate: (1) the *ex post facto* clause; (2) the Eighth Amendment prohibition of cruel, unusual, and disproportionate punishment; (3) the Illinois constitutional requirement of proportionate sentencing; (4) the right to privacy under the United States and Illinois Constitutions; (5) double jeopardy; (6) due process; or (7) equal protection. In addition, [P.A. 89-8](#), which amended the Registration Act to expand the class of persons required to register, did not violate the single-subject rule. See also, [People v. Logan, 302 Ill.App.3d 319, 705 N.E.2d 152 \(2d Dist. 1998\)](#) (Sex Offender Registration Act and Sex Offender and Child Murderer Community Notification Law do not violate the *ex post facto* clause, due process, the terms of the plea agreement for the original offense, or the right to privacy, and are neither fundamentally unfair nor bills of attainder).

[People v. Cornelius, 213 Ill.2d 178, 821 N.E.2d 288 \(2004\)](#) In [People v. Malchow, 193 Ill.2d 413, 739 N.E.2d 433 \(2000\)](#), the Illinois Supreme Court held that the Sex Offender Registration Act and the Sex Offender and Child Murderer Community Notification Law do not violate either the Federal or State Constitutions. The holding of **Malchow** was not affected by the subsequent amendment of the Acts to require the Illinois State Police to maintain a web site with information about and photographs of sex offenders.

The Internet provision does not violate defendant's right to privacy under the Illinois Constitution, because a person who has been adjudicated a sex offender has no privacy interest in the records concerning his status. Sex offender registration information is a matter of public

record, and the Internet provision merely affords citizens an additional means of gaining access to such information.

People v. Adams, 144 Ill.2d 381, 581 N.E.2d 637 (1991) The Habitual Child Sex Offender Registration Act does not constitute cruel and unusual punishment under the Eighth Amendment, violate **Art. I, §11 of the Illinois Constitution** (requirement that penalties be determined according to the severity of the crime and with the purpose of rehabilitating the offender), or violate due process and equal protection.

People v. Molnar, 222 Ill.2d 495, 857 N.E.2d 209 (2006) 730 ILCS 150/7, which provides that “consistent with administrative rules” the Director of the State Police “shall” extend for 10 years the registration period of any sex offender who fails to comply with the requirements of the Sex Offender Registration Act, satisfies due process although defendant need not be informed that he has allegedly violated the Act, the basis of the purported violation, or that the registration period has in fact been extended. Under the statute, sex offenders must be informed of the statutory requirement that the registration period be extended for failure to comply with the registration requirements. Defendant stipulated that he had received such information.

The Act is not unconstitutional because it creates a Class 4 felony penalty for the failure to register, although the offense does not require a mental state. An absolute liability offense can carry a felony sentence if the statute defining the offense clearly indicates that the legislature intended to create an absolute liability offense. There was such a legislative intent where the statute imposes a Class 4 felony penalty for violating the Registration Act and a Class 3 penalty for “knowingly or willfully” giving false information. By including a mental state in one section but omitting it from another, the legislature demonstrated its intent that the latter offense carry absolute liability.

The provision authorizing the 10-year extension is not unconstitutionally vague because it provides no standards for determining when the extension will be imposed. The extension is mandatory whenever a sex offender fails to register, and therefore gives no discretion to the State Police. In addition, the statute clearly states the conduct which will trigger the 10-year-extension - failure to register.

In re J.W., 204 Ill.2d 50, 787 N.E.2d 747 (2003) The trial court did not err by imposing a condition of probation requiring a 12-year-old sex offender to register under the Sex Offender Registration Act. Under the version of the Act (**730 ILCS 150/1 et seq.**) in effect at the time of this case, a “juvenile sexual offender” was included within the definition of a “sex offender,” and was therefore required to register. (**Note: P.A. 92-828**, eff. August 22, 2002, amended the Act to explicitly subject juvenile sex offenders to the same registration requirements as adults). Where the conduct for which the minor was adjudicated delinquent made him a “sexual predator” under the Act, the registration requirement lasted for the minor’s natural life.

Substantive due process was not violated by requiring a 12-year-old to register as a sex offender for the rest of his life; the statute satisfied the rational basis test. There is a rational relationship between the registration of juvenile sex offenders and the protection of the public from such offenders. The duration of registration for life is reasonable in light of the strict limits placed upon access to that information.

Further, the requirement does not violate the Eighth Amendment bar on cruel and unusual punishment or the prohibition of double jeopardy. The registration requirement does

not constitute “punishment.”

[People v. Johnson, 225 Ill.2d 573, 870 N.E.2d 415 \(2007\)](#) Under the Sex Offender Registration Act as it existed at the time of defendant’s conviction, aggravated kidnapping of a minor by a non-parent was included within the definition of a “sex offense,” and thus triggered a requirement to register as a sex offender. While defendant’s case was on appeal, the Act was amended so that the aggravated kidnapping of a minor by a non-parent was a “sex offense” only if the offense was “sexually motivated.”

At the same time, a new “Violent Offender Against Youth” registry was created for the registration of violent, non-sexual offenders. A provision of the new act allowed the State’s Attorney to verify that past offenses were not sexually motivated; in such cases, the offender could be transferred from the sex offender registry to the violent offender registry.

Due process was not violated because under the pre-amended law, perpetrators of non-sexually motivated offenses were designated as “sexual offenders” and required to register.

The purpose of the Act is to facilitate ready access to information about sex offenders, and thereby permit law enforcement to protect the public. The legislature could rationally believe that there is a high risk of sexual assault where minors are kidnaped by persons other than their parents, and that imposing a registration requirement on persons convicted of such offenses would protect the public whether or not the particular conduct in question was sexually motivated.

[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.

[In re J.R., 341 Ill.App.3d 784, 793 N.E.2d 687 \(1st Dist. 2003\)](#) The Sex Offender and Child Murder Community Notification Law ([730 ILCS 152/101 et seq.](#)) does not violate substantive or procedural due process when applied to a juvenile sex offender, and the Sex Offender Registration Act ([730 ILCS 150/1 et seq.](#)) does not violate procedural due process when applied to a juvenile.

[People v. Woodard, 367 Ill.App.3d 304, 854 N.E.2d 674 \(1st Dist. 2006\) P.A. 94-945](#) (eff. June 27, 2006), which amended the definition of “sex offender” to provide that persons convicted of first degree murder of a person under the age of 18 were not subject to registration requirements unless the offense was sexually motivated, does not apply retroactively.

[People v. Henderson, 361 Ill.App.3d 1055, 838 N.E.2d 978 \(4th Dist. 2005\)](#) The Sex Offender Registration Act provides that a person convicted of certain offenses must register with the chief of police in the municipality in which he resides. A person who is unable to comply with the registration requirements “because he or she is confined, institutionalized, or imprisoned . . . shall register in person within 10 days of discharge, parole or release.” [730 ILCS 150/3\(c\)\(4\)](#).

Where defendant was released from prison on mandatory supervised release with instructions to proceed directly to his home, call his parole officer, and remain in the residence until the parole agent made an initial visit, he was “confined” until the parole agent visited and defendant was free to leave the residence. Thus, defendant had 10 days after the parole agent’s visit to complete sex offender registration. An arrest made 11 days after defendant’s release from the penitentiary, but only nine days after he was visited by the parole agent, was

premature and could not support a conviction for failing to register within 10 days of release.

[In re Phillip C.](#), 364 Ill.App.3d 822, 847 N.E.2d 801 (1st Dist. 2006) There is a rational connection between the registration requirement and the State's interests in protecting children from sex offenders and aiding law enforcement, without regard to whether the offense was motivated by a desire to commit a sex offense, because the legislature could rationally conclude that kidnappers of children pose such a threat of sexual assault that their inclusion in the sex offender registration requirement is warranted. The Sex Offender Registration Act does not violate procedural due process, because defendant has a meaningful opportunity at trial to challenge whether he committed the offense for which registration is required.

[People v. Leroy](#), 357 Ill.App.3d 530, 828 N.E.2d 769 (5th Dist. 2005) [720 ILCS 5/11-9.4\(b-5\)](#), which prohibits persons convicted of sex offenses against children from knowingly residing within 500 feet of a playground or facility providing programs or services exclusively directed towards persons under 18 years of age, but which excepts offenders who owned the property in question before the effective date of the statute, does not violate substantive due process, procedural due process, equal protection, the *ex post facto* clause, the right against self-incrimination, or the Eighth Amendment prohibition of cruel and unusual punishment. Also, §11-9.4(b-5) is not overly broad.

[People v. Traven C.](#), 384 Ill.App.3d 870, 894 N.E.2d 876 (1st Dist. 2008) Juvenile need not be afforded the right to a jury trial on an adjudication of delinquency even where it requires lifetime sex offender registration.

Cumulative Digest Case Summaries §46-7

[In re S.B.](#), 2012 IL 112204 (No. 112204, 10/4/12)

Noting that it has authority to read into statutes language which the legislature omitted by oversight, the court elected to allow unfit juveniles who are found “not not guilty” in a discharge hearing to seek termination of the sex offender registration requirement under the same conditions as minors adjudicated delinquent for sex offenses. The court also found that the legislature made a similar oversight with respect to the limitations that are contained in the Sex Offender Community Notification Law ([730 ILCS 152/121](#)) related to the dissemination of sex offender registration information with respect to adjudicated delinquents. It held that §121 of that Act should be read to include juveniles found “not not guilty” following a discharge hearing.

[People ex rel. Birkett v. Konetski et al.](#), 233 Ill.2d 185, 909 N.E.2d 783 (2009)

1. The court granted *mandamus* to compel the trial court to vacate an order exempting a juvenile delinquent from the requirement that he register as a sex offender. The court found that the legislature intended to impose a mandatory obligation to register on juvenile sex offenders, and to require trial courts to admonish juvenile sex offenders concerning the duty to register. (See also **COLLATERAL REMEDIES**, §9-3(a)).

2. The court rejected arguments that applying the Sex Offender Registration Act to juveniles violates procedural due process. The court noted that under recent amendments to the Act, a minor's registration information is circulated to only a limited group of people. In addition, a minor may seek termination of the registration requirement after five years.

The court also rejected arguments that the Act violates the prohibition against cruel and unusual punishment and the proportionate penalties clause. Finally, the court rejected the argument that the *ex post facto* clause is violated by the post-adjudication reclassification of a juvenile delinquent who has committed the offense of criminal sexual assault as a “sexual predator.”

[People v. Cardona, 2013 IL 114076 \(No. 114076, 3/21/13\)](#)

1. Procedural due process governs the constitutionality of procedures utilized to deny life, liberty, or property, and is generally satisfied where the citizen receives notice and an opportunity to be heard. Procedural due process is a fluid concept, however, and more or less procedural due process may be necessary depending upon the circumstances and the type of proceeding.

Substantive due process, by contrast, limits the State’s ability to act irrespective of the procedural protections provided. Although defendant raised a procedural due process challenge to the requirement that he register as a sex offender, the court concluded that his argument involved substantive due process – whether a defendant who is unfit to stand trial can constitutionally be certified as a sex offender after he is found “not not guilty” in a discharge hearing that is held because he is not expected to be restored to fitness within one year. Defendant contended that even if he were afforded the full panoply of procedural rights guaranteed in a criminal trial, his unfitness to stand trial means that he is incapable of participating in any meaningful way in any proceeding at which his life, liberty, or property is at stake.

The court concluded that in light of the defendant’s failure to present his argument except in procedural due process terms, it would limit its consideration to procedural due process and leave for another day resolution of any possible substantive due process claim under these circumstances.

2. Because due process is a flexible concept, the procedures required in a particular case depend on the nature of the case and the circumstances. Although the due process clause categorically bars the criminal prosecution of a defendant who is unfit to stand trial, under [People v. Waid, 221 Ill. 2d 464, 851 N.E.2d 1210 \(2006\)](#), the State may hold a discharge hearing of an unfit defendant even when an extended period of treatment or involuntary civil commitment may result. A discharge hearing is not a criminal prosecution, but an “innocence only” hearing that is civil in nature. The court concluded that defendant was afforded an appropriate level of due process at his discharge hearing, including notice, the right to be heard, the right to present evidence, the right to assistance by counsel and by an interpreter, and application of the reasonable doubt standard.

3. In the course of its opinion, the court rejected the argument that it is fundamentally unfair to require a person who has been found “not not guilty” to register as a sex offender despite the fact that he has not been convicted of committing a triggering offense. The court noted that the category “sex offender” is created by statute and applies to several situations, including where the defendant is found “not not guilty” of a triggering offense at a discharge hearing. Because the registration statute clearly covers defendant’s situation, no error occurred.

(Defendant was represented by Assistant Defender Kathleen Weck, 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 S.B., 408 Ill.App.3d 516, 945 N.E.2d 102 \(3d Dist. 2011\)](#)

The Sex Offender Registration Act provides that a person who is charged with a sex offense, found unlikely to be fit to stand trial within one year, and not "acquitted" at a discharge hearing is required to register as a sex offender. ([730 ILCS 150/2\(A\)\(1\)\(d\)](#)). [Section 150/2\(A\)\(5\)](#) provides that a juvenile is required to register as a sex offender only if he is adjudicated delinquent for an act which would constitute an act which would require an adult to register. The court concluded that the plain language of the statute showed that the legislature intended that only juveniles who are adjudicated delinquent are required to register.

Thus, a juvenile who is charged with a sex offense, found unlikely to be fit to stand trial within one year, and found "not not guilty" at a discharge hearing is not required to register. The court stated that an absurd result would occur if such juveniles were required to register, because under [730 ILCS 150/3-5](#) they would be unable to petition the circuit court to have the sex offender registration terminated, although juveniles adjudicated delinquent can do so.

(Defendant was represented by Assistant Deputy Defender Verlin Mainz, Ottawa.)

[People v. Avila-Briones, 2015 IL App \(1st\) 132221 \(No. 1-13-2221, 12/24/15\)](#)

The Appellate Court rejected the defendant's request that it revisit whether the statutory scheme created by the Sex Offender Registration Act ([730 ILCS 150/1 et seq.](#)), the Sex Offender Community Notification Act ([730 ILCS 152/101 et seq.](#)), and statutes restricting the residency, employment, and presence of sex offenders constitute cruel and unusual punishment under the Eighth Amendment or disproportionate punishment under the Illinois Constitution. The court concluded that even if recent amendments to the statutory scheme constituted "punishment," the restrictions were not disproportionate to legitimate penological goals. In addition, the court concluded that the statutory scheme did not violate substantive or procedural due process.

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

[People v. Black, 394 Ill.App.3d 935, 917 N.E.2d 114 \(1st Dist. 2009\)](#)

The Sexual Offender Registration Act and the Child Murderer and Violent Offender Against Youth Registration Act require that the trial court determine whether a specified offense was sexually motivated, in order to determine whether the defendant is subject to registration as a sex offender or as a violent offender against youth. Because the trial court failed to make such a ruling, the requirement of Sex Offender Registration was vacated. The cause was remanded for determination whether the offense of unlawful restraint, which defendant committed against an 11-year-old boy, was sexually motivated.

(Defendant was represented by Assistant Defender Steven Becker, Chicago.)

[People v. Black, 2012 IL App \(1st\) 101817 \(No. 1-10-1817, 5/17/12\)](#)

1. The Sex Offender Registration Act provides that a defendant commits a sex offense that subjects him to a registration requirement when he unlawfully restrains a victim under

18 years old, and the defendant is not a parent to the victim, if the offense is “sexually motivated.” [730 ILCS 150/2\(A\)\(1\)\(a\), \(B\)\(1.5\)](#). An offense is “sexually motivated” when “one or more of the facts of the underlying offense indicates conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature.” [20 ILCS 4026/10\(e\)](#).

The legislature included a sexual-motivation component to prevent individuals whose crimes have nothing to do with sex offenses from being required to register as sex offenders. If the court makes a finding that the offense was not sexually motivated, the defendant is subject to a registration requirement under the Child Murderer and Violent Offender Against Youth Registration Act. [730 ILCS 154/5\(a\)\(1\)\(A\), \(b\)\(1\)](#).

A court reviews a trial court’s findings that an offense was sexually motivated under the manifest-weight-of-the-evidence standard. A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based on the evidence.

2. The court’s finding that defendant’s unlawful restraint of an 11-year-old boy was sexually motivated was not against the manifest weight of the evidence. The court was only required to find that at least one of the facts supporting defendant’s unlawful restraint conviction indicated conduct that was of a sexual nature or showed an intent to engage in such behavior. There is no requirement of actual sexual contact or an overt sexual act.

Defendant, a grown man, used sports conversation and requests for help with his groceries as a pretext to lure the boy into his apartment. The boy had to engage in a physical struggle with defendant before he was able to flee. That luring and the discovery of defendant’s possession of an adult pornographic magazine shortly after the offense indicate that defendant’s activities with the boy consisted of conduct of a sexual nature. Luring-type behavior has proven to be a precursor to commission of sex offenses or intent to commit sex offenses against children. The magazine was illustrative of defendant’s state of mind – his preoccupation with sexual activity.

The Appellate Court observed that “there was no alternative motive clearly present from the record and, given the facts, it would have been difficult for the trial court to certify the opposite conclusion, that there was *no* indication that defendant was motivated to engage in conduct of a sexual nature.”

3. The court rejected the defense argument that the Act confines consideration of “sexual motivation” to the facts of the underlying offense. Motive is not an essential element of the offense of unlawful restraint. A court could consider “only the elements of the offense at trial absent motive.” The legislature did not intend that the “statute would then prohibit the State from presenting evidence at a posttrial and postsentencing proceeding that, while not necessary to prove defendant committed the crime, did tend to prove *why* he committed that crime.”

Therefore, while the trial court had found that defendant’s possession of a pornographic magazine was inadmissible at trial, it properly considered that evidence in determining that the offense was sexually motivated.

4. A court may also properly consider the defendant’s social and criminal history as set forth in the presentence investigation report if relevant. Analyzing the facts of the underlying offense necessarily requires consideration of a defendant’s background and the stimuli motivating the present conduct.

The trial court thus properly considered defendant’s self-report that he was the victim of sexual abuse when he was younger and that he was physically abused because his family believed that he was a homosexual. Although defendant’s mere arrests for prostitution and solicitation absent supporting evidence are not properly considered, defendant’s criminal

history was not a significant factor in the trial court's decision.

The Appellate Court affirmed the finding that defendant was required to register as a sex offender.

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

[People v. Brock, 2015 IL App \(1st\) 133404 \(No. 1-13-3403, 11/23/15\)](#)

1. A person who has been adjudicated sexually dangerous or violent must register as a sex offender with the police and additionally must (1) report in person to the police every 90 days thereafter and (2) report in person and register with the police within three days after he changes his address. [730 ILCS 150/6](#).

2. Defendant initially registered with the Chicago police as a sex offender on January 19, 2012 and provided an address on West 58th street in Chicago. Defendant appeared in person to renew his registration on April 18, 2012. But since he did not have proof of his current address, defendant could not complete the registration process.

The police conducted a sex offender registration check on June 12, 2012, and discovered that defendant no longer lived at the West 58th street address. The police eventually located defendant at a different address and arrested him. Defendant admitted that he had moved to the new address in April 2012. The trial court found defendant guilty of two counts of violating the registration act by (1) failing to report within 90 days of his initial registration and (2) failing to report and register within three days of changing his address.

3. The Appellate Court reversed defendant's conviction for failing to report within 90 days, but affirmed his conviction for failing to report and register within three days of changing his address. The court held that defendant satisfied the first part of the act by personally reporting to the police within 90 days. Since there is no registration requirement in this part of the act, defendant's failure to successfully re-register was irrelevant.

But the second part of the act does have a registration requirement, and thus defendant's failure to re-register meant that he did not properly report and register within three days of changing his address.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

[People v. Cardona, 2012 IL App \(2d\) 100542 \(No. 2-10-0542, 3/2/12\)](#)

1. A non-acquittal of the offense of unlawful restraint of a child entered at a discharge hearing of an unfit defendant pursuant to [725 ILCS 5/104-25](#) requires that the defendant register as a sex offender where the court makes a finding that the offense was sexually motivated. [730 ILCS 150/2\(B\)\(1.5\)](#). "Sexually motivated" means one or more of the facts of the underlying the offense indicates conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature." [20 ILCS 4026/10\(e\)](#). A finding that the offense was not sexually motivated requires that defendant register as a violent offender against youth. [730 ILCS 154/5\(b\)\(1\)](#); [730 ILCS 154/86](#). A court's determination of this factual finding should be reversed only if it is against the manifest weight of the evidence.

The court's finding that the offense was sexually motivated was not against the manifest weight of the evidence nor was it precluded by defendant's acquittal of the offense of indecent solicitation of a child. As charged, a conviction of indecent solicitation of a child required a finding beyond a reasonable doubt that with the intent that the offense of predatory criminal sexual assault be committed, defendant solicited the child to perform an act of sexual penetration. The State's inability to meet this high burden did not preclude the court from finding that the lower standard—that one or more of the facts underlying the unlawful restraint indicate conduct of a sexual nature or an intent to engage in behavior of a sexual

nature—had been satisfied.

The child’s statement to her father and a police officer that defendant told her that he wanted to have sex with her was sufficient to support this finding. The statements were admitted as substantive evidence and were made immediately after the offense. In contrast, the child’s testimony at the discharge hearing that she did not remember whether defendant mentioned sex took place two years after the offense.

2. Deprivation of a liberty interest without a meaningful opportunity to be heard violates due process. A defendant is not denied due process where a procedurally-safeguarded opportunity to contest the ruling resulting in the deprivation of liberty is afforded the defendant. Due process is a flexible concept and not all situations call for the same procedural safeguards.

Assuming that sex-offender registration implicates a liberty interest, defendant was afforded a procedurally-safeguarded opportunity at the discharge hearing to contest the ruling that required him to register as a sex offender. The question at a discharge hearing conducted pursuant to [725 ILCS 5/104-25](#) is whether to acquit the defendant, not whether to convict. Therefore defendant is not afforded all of the procedural protections of a criminal trial. Nonetheless the procedural protections afforded defendant were sufficient where he was provided notice and the opportunity to present objections at the discharge hearing, and had an appointed attorney who was able to cross-examine prosecution witnesses, the right against self-incrimination, and the standard of proof beyond a reasonable doubt.

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

[People v. Cowart, 2015 IL App \(1st\) 131073 \(No. 1-13-1073, 2/17/15\)](#)

Before accepting a guilty plea, the trial court must admonish the defendant about the direct consequences of his plea; the court does not need to admonish the defendant about collateral consequences. A direct consequence “has a definite, immediate and largely automatic effect” on defendant’s punishment. Illinois courts have held that mandatory sex offender registration is a collateral consequence, since it is neither a restraint on liberty nor a punishment.

Defendant argued that the reasoning of [Padilla v. Kentucky, 559 U.S. 356 \(2010\)](#) should be extended to require a trial court to admonish a defendant who is pleading guilty about mandatory sex offender registration. In [Padilla](#), the defendant argued that his trial counsel was ineffective for failing to inform him that his guilty plea made him eligible for deportation. The United States Supreme Court held that even though deportation is a civil consequence of a guilty plea, given its enmeshment with criminal law, it could not be “categorically removed” from defense counsel’s duty to provide proper advice to a client who is pleading guilty.

The Appellate Court rejected defendant’s argument. It held that unlike deportation, sex offender registration is not a punishment or restraint on liberty. Registration remains a collateral consequence and thus there was no need for admonitions about it. Additionally, **Padilla** involved an issue about ineffective assistance of counsel, not trial court admonitions. Since defendant raised no claim about ineffective counsel, **Padilla** does not change the outcome.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

[People v. Evans, 405 Ill.App.3d 1005, 939 N.E.2d 1014 \(2d Dist. 2010\)](#)

[730 ILCS 154/1 et seq.](#) requires that a person over the age of 17 who commits a “violent offense against youth” must register under the Child Murder and Violent Offender Against

Youth Registration Act. First degree murder is a “violent offense against youth” if the victim was under 18 and the defendant was at least 17.

A person who was over the age of 17 at the time of the offense, and who is convicted as an accomplice, is required to register under the Act even if the principal was under the age of 17 and therefore not required to register. First, the plain language of the statute contains no exception for persons convicted as accomplices. Second, although an accomplice may not be convicted if the State fails to prove that the principal committed an element of the charged offense, that rule does not apply to collateral ramifications of a criminal conviction. “For example, if an alien defendant is convicted of a crime on an accountability theory and thus is subject to deportation, he would not avoid deportation simply because the principal is a United States citizen and not subject to deportation.”

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

[People v. Fredericks, 2014 IL App \(1st\) 122122 \(No. 1-12-2122, 6/26/14\)](#)

In 2012, defendant entered a guilty plea to one count of possession of methamphetamine and was sentenced to two years probation. As a result of a 1999 conviction for attempted aggravated criminal sexual abuse, the plea required defendant to register as a sex offender for life.

The trial court did not advise defendant of the lifetime registration requirement before it accepted the guilty plea on the possession offense. Defendant had completed the 10-year registration period for the 1999 conviction before the possession offense occurred.

1. In order to satisfy the due process requirement that guilty pleas must be entered knowingly and voluntarily, the trial court must inform the defendant of the direct consequences of a guilty plea before the plea is accepted. Direct consequences are those which affect the sentence and other punishment which the court may impose. However, the trial court need not advise a guilty plea defendant of collateral consequences of the plea.

The court concluded that a requirement to register as a sex offender is merely a collateral consequence of the plea. Therefore, due process does not require that a guilty plea defendant be admonished that he will be required to register as a sex offender.

The court acknowledged that in [Padilla v. Kentucky, 559 U.S. 356 \(2010\)](#), the Supreme Court held that the Sixth Amendment right to the effective assistance of counsel requires defense counsel to advise a client of the immigration consequences of a guilty plea. The Illinois Supreme Court has extended **Padilla** to an attorney's failure to inform a client that a guilty plea can lead to involuntary commitment as a sexually violent person. [People v. Hughes, 2012 IL 112817](#).

Here, however, defendant contended not that his attorney rendered ineffective assistance, but that due process was violated by the trial court's failure to provide admonishments that he would be required to register as a sex offender for the rest of his life. Whether or not counsel had a duty to advise defendant of the registration requirement, the trial court had no such duty before it could accept a guilty plea.

2. [730 ILCS 150/5-7](#) requires that a defendant who is to be released on probation or conditional discharge and who is subject to a sex offender registration requirement must be advised of that requirement. In addition, [730 ILCS 150/5](#) requires that the trial court provide written notice of the registration requirement to an offender who is to be released on probation. Although defendant was sentenced to probation on his guilty plea, the statutory notice was not provided.

The Appellate Court concluded that the failure to comply with the notice requirements of the Registration Act did not provide a basis for defendant to withdraw the plea. The purpose

of §§5 & 5-7 is to prevent a defendant from inadvertently violating probation because he or she lacks knowledge of the registration requirement. The notification requirements are directory rather than mandatory, however, and do not prevent the trial court from accepting a guilty plea.

The trial court's order denying defendant's motion to withdraw his guilty plea was affirmed.

[People v. Kayer, 2013 IL App \(4th\) 120028 \(No. 4-12-0028, 5/6/13\)](#)

The Sex Offender Registration Act provides that if a sex offender "changes" his "place of employment," he shall report his "change in employment . . . within the time period specified in Section 3." [730 ILCS 150/6](#). Section 3 provides that the sex offender shall register in person within three days of "establishing . . . a place of employment." [730 ILCS 150/3\(b\)](#).

The Appellate Court concluded that the Act does not require a sex offender to report a loss of employment. This interpretation is supported by the legislature's use of the word "change," the plain and ordinary meaning of which is "to replace with another." It is impossible for a sex offender who loses his job to report a change of his "place of employment" within the time period of §3, as that period of time begins to run only after he has established his new place of employment. The Registration Act requires a sex offender who loses his fixed place of residence to report that loss, but contains no comparable language with respect to employment. Not requiring a report of loss of employment is consistent with the purpose of the Act, which is to enable law enforcement to keep track of sex offenders. Loss of employment does not require law enforcement to track an offender at a new location.

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

[People v. Manskey, 2016 IL App \(4th\) 140440 \(No. 4-14-0440, 6/14/16\)](#)

1. Under the Sex Offender Registration Act a defendant must provide the authorities with accurate information, including his current address. [730 ILCS 150/3\(a\)](#). To prove that a defendant violated the Act by failing to accurately provide his current address, the State must show that defendant knowingly or willfully gave the authorities false information about his current residential address. The Act defines place of residence as any place a defendant resides for three or more days during any year.

2. Defendant was convicted of providing a false address to the authorities when he registered as a sex offender. Defendant told the authorities that he lived at 1212 N. Western Avenue. When the police went to that address, the owner told them that defendant was a friend of his son's and did not live there. The owner signed a statement saying defendant never lived at 1212.

The owner testified that he didn't know if defendant lived at 1212, but he gave defendant permission to stay in the basement of 1212 "as often as he wished," although he never checked to see if defendant had accepted his offer since the basement was a separate unit with its own entrance. The owner's son and defendant testified that defendant lived in the basement of 1212 at the time he registered.

3. The court held that the State failed to prove that defendant provided a false address. Although the owner told the authorities and signed a statement saying that defendant never lived at 1212, that did not provide proof that 1212 was not defendant's place of residence as defined under the Act. The Act defines place of residence to mean residing somewhere for three or more days, a meaning that differs from what place of residence means in common parlance, *i.e.*, a place where one lives permanently. If defendant had stayed in the basement of 1212 for an aggregate period of three days, he would have been an occasional guest in

common parlance, but would not have lived at 1212, in the sense of staying there permanently. Defendant's conviction was reversed.
(Defendant was represented by Assistant Defender Amanda Kimmel, Springfield.)

[People v. Minnis, 2016 IL 119563 \(No. 119563, 10/20/16\)](#)

The First Amendment right to freedom of speech includes the right to remain anonymous while publishing and distributing written material. This right fully extends to Internet communications. Laws unrelated to the content of speech are subject to an intermediate level of scrutiny. To survive intermediate scrutiny the regulation must serve a substantial governmental interest unrelated to the suppression of speech and must be narrowly tailored so it does not burden more speech than necessary to further that interest.

The Sex Offender Registration Act requires sex offenders to disclose information regarding their Internet identities and websites. [730 ILCS 150/3\(a\)](#). This information is subject to public inspection under the Sex Offender Community Notification Law. [730 ILCS 152/101](#).

The court subjected the statute to intermediate scrutiny since it does not regulate the content of speech and found that it did not violate the First Amendment. The internet disclosure provision serves the substantial government interest of protecting the public from recidivist sex offenders. And the statute is narrowly tailored since a more narrowly drawn statute would not as effectively promote this governmental interest.

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

[People v. Olsson, 2011 IL App \(2d\) 091351 \(No. 2-09-1351, 9/22/11\)](#)

1. Sex offenders and sexual predators must register as provided by the Sexual Offender Registration Act. Included within the statutory definition of "sex offenders" are persons who are the subject of a "not not guilty" finding after a discharge hearing conducted subsequent to a finding of unfitness to stand trial. [725 ILCS 5/104-25](#); [730 ILCS 150/2\(A\)\(1\)\(d\)](#). "Sexual predators" include persons convicted of enumerated offenses, including predatory criminal sexual assault of a child and aggravated criminal sexual abuse. [730 ILCS 150/2\(E\)](#). "After conviction or adjudication," sexual predators are required to register for life, while sex offenders are required to register for a period of ten years. [730 ILCS 150/7](#). Under the Act, "convicted" and "adjudicated" have the same meaning. [730 ILCS 150/2\(A\)\(5\)](#).

2. A finding of "not not guilty" of the offenses of predatory criminal sexual assault of a child and aggravated criminal sexual abuse subjects the defendant to registration for ten years as a sex offender, not to lifetime registration as a sexual predator. The court rejected the State's argument that defendant qualified as a sexual predator, because under the Act, "convicted" and "adjudicated" have the same meaning, and in finding defendant "not not guilty," the court "adjudged" that defendant committed the charged offenses.

When an act defines its own terms, those terms must be construed according to the definitions given them in the act. The legislature included persons found "not not guilty" after a discharge hearing in the definition of sex offenders, but did not include such persons in the definition of sexual predators. The court refused to read into the Act what appeared to be a deliberate exclusion of unfit defendants from the category of sexual predators. The court construed §2(A)(5), which defined "adjudications" as the equivalent of "convictions," to only extend the registration requirement to juveniles found delinquent based on the commission of an enumerated offense.

3. This construction of the Act is consistent with due process. Criminal prosecution of a person unfit for trial is prohibited by the due process clause of the Fourteenth Amendment. Defendant was not adjudicated guilty at the discharge hearing. He has not yet had a definitive

resolution of the charges against him. Subjecting someone who has not gained resolution of the charges against him to lifetime registration as a sexual predator could have a chilling effect on that person's exercise of his right to a discharge hearing.

The court modified the trial court's order to subject defendant to registration for a period of ten years.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

[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. Robinson, 2013 IL App \(2d\) 120087 \(No. 2-12-0087, 8/5/13\)](#)

To prove a violation of the duty of a sex offender to report a change of address, the State must prove that defendant: (1) was previously convicted of an offense subjecting him to the Act; and (2) established a new fixed residence or temporary domicile which he knowingly failed to report in person to the law enforcement agency with whom he last registered. [730 ILCS 150/6](#).

A "fixed residence" is "any and all places that a sex offender resides for an aggregate period of time of 5 or more days in a calendar year." [730 ILCS 150/2\(I\)](#). A defendant may have multiple fixed residences. A "temporary domicile" is "any and all places where the sex offender resides for an aggregate period of time of 3 or more days during the calendar year." [730 ILCS 150/3](#).

Evidence that defendant was often absent from the residence at which he registered for more than five days failed to prove that defendant stayed at one specific address for the requisite period of time. Vague evidence that defendant was at his "girlfriend's house" two nights a month was also insufficient. Without evidence of the identity of this girlfriend, the court was unwilling to assume that the reference to "his girlfriend" referred to only one person or that defendant stayed with the same person each time.

Because defendant's absence from his registered address failed to prove that he had another fixed residence or temporary domicile, the court reversed defendant's conviction for failure to report a change of address.

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

[People v. Velez, 2012 IL App \(1st\) 101325 \(No. 1-10-1325, 3/22/12\)](#)

A defendant convicted of child abduction committed by luring or attempting to lure a child under the age of 16 into a motor vehicle without the consent of the parent for other than a lawful purpose is required to register as a sex offender if the trial court makes a finding that the offense was sexually motivated. [730 ILCS 150/2\(B\)\(1.9\)](#) "Sexually motivated" means one or more of the facts of the underlying offense indicated conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature." [20 ILCS 4026/10\(e\)](#).

The trial court did not err in finding that the child abduction was sexually motivated.

The child testified that defendant did a “double take” and looked at her as she walked down the street. He offered her a ride home twice, even though she did not verbally respond, put up her hood, and walked faster. Defendant was a complete stranger to the 14-year-old school girl, suggestively referred to her as “baby girl,” and doggedly pursued her in order to convince her to get in his van.

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

[People v. Wlecke, 2014 IL App \(1st\) 112467 \(No. 1-11-2467, 2/5/14\)](#)

Section 6 of the Sex Offender Registration Act requires a convicted sex offender to either register the address of his fixed residence (defined as any place an offender lives for five or more days during a calendar year), or if he does not have a fixed address, to report weekly. [730 ILCS 150/6](#). The Act also requires the offender to provide accurate information. [730 ILCS 150/3\(a\)](#). Defendant was convicted of failing to report weekly while lacking a fixed residence. The Appellate Court held that the State failed to prove defendant guilty beyond a reasonable doubt.

1. The absence of a fixed residence is an essential element of the offense of failing to report weekly. Here, the State failed to show that defendant did not have a fixed residence. Defendant provided the authorities with two addresses, a V.A. hospital and a residence. The State could have established its case by presenting records from the V.A. hospital or testimony from the residents of the other listed address. The State, however, failed to present any evidence that defendant did not reside at either location for five or more days, and thus failed to establish that defendant lacked a fixed residence.

2. The Court rejected the State’s claim that one of the addresses, a V.A. hospital providing inpatient treatment, could not be considered a fixed residence. The only requirement for being a fixed residence is that a person reside there for five or more days during a year, and there was no reason someone could not reside at an inpatient treatment facility for five or more days.

3. The State claimed that defendant’s statement that he was staying with friends showed that he lacked a fixed residence. The Court held that there was no inconsistency between staying with friends and having a fixed residence. Under the Act’s definition, a person could have a fixed residence by staying with friends for five or more days during the year. In this sense, a person could have a fixed residence and yet be homeless in the ordinary meaning of the word.

4. The State also failed to prove that defendant did not comply with the conditions of reporting weekly, beginning with his failure to register. The Act requires a person who lacks a fixed residence to register by notifying the authorities that he lacks a fixed address and identifying his last known address. Thereafter, he must report weekly. Although defendant was not registered, it was not due to any voluntary omission on his part. Instead, it was due to the officer’s improper refusal to complete the registration. Defendant made a good faith effort to comply with the Act by reporting to the authorities upon his release from prison and providing them with his two addresses. The officer did not believe that defendant had valid proof of a fixed residence, but also refused to register defendant as lacking a fixed residence. If the officer had registered defendant as lacking a fixed residence, defendant would have been properly registered and in compliance with the Act when he was arrested six days later.

5. The Court rejected the State’s argument that defendant failed to provide accurate information since he could not produce a valid driver’s license, State identification, or other government-issued document showing his residence. The Court held that the Act’s requirement for accurate information is not synonymous with or limited to the categories of

identification listed by the State. The Court also noted that the State's insistence on sex offenders presenting government-issued identification is inconsistent with the reality faced by offenders who have been recently released from prison and who must register within three days of their release.

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

[Top](#)