

YE OLDE
CASELAW UPDATE
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Being a compendium of opinions

As issued by the

Wise Honorable Justices

Of

The Illinois Appellate and

Supreme Courts

COMPILED AND COLLATED BY
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ACCOUNTABILITY

[People v. Cowart](#), 2015 IL App (1st) 113085 (February 9, 2015) Cook Co., 1st Div. (CUNNINGHAM) Reversed.

Defendant was convicted, after jury trial, of first-degree murder under theory of accountability; and after simultaneous bench trial outside presence of jury, was also convicted of being armed habitual criminal. State failed to prove beyond a reasonable doubt that there was a common criminal design between Defendant and the victim's killer, to establish Defendant's intent to promote or facilitate the crime. Thus, evidence was insufficient to convict Defendant of murder under accountability theory. Because Defendant's prior conviction for AUUW (aggravated unlawful use of a weapon) was based on statute found unconstitutional and void ab initio in *People v. Aguilar* case, it cannot stand as predicate offense for Defendant's armed habitual criminal conviction. (DELORT and CONNORS, concurring.)

[People v. Ulloa](#), 2015 IL App (1st) 131632 (June 30, 2015) Cook Co., 2d Div. (NEVILLE) Reversed and remanded.

Defendant was convicted, after jury trial, of conspiring to deliver cocaine. Court misstated applicable law by its use of accountability instruction and insertion of accountability language in issues instruction was plain error, requiring reversal, as evidence was closely balanced. On remand, court must instruct jurors that to find Defendant guilty as charged, they must find that he personally agreed to delivery of more than 900 grams of a substance containing cocaine. Court did not abuse its discretion in admitting testimony that Defendant bought a money counter and a heat sealer from a store in Cicero 11 months prior to encounter in issue. (PIERCE, specially concurring; LIU, concurring.)

[People v. Malcolm](#), 2015 IL App (1st) 133406 (August 10, 2015) Cook Co., 1st Div. (CUNNINGHAM) Affirmed.

Defendant was convicted, after bench trial, of first-degree murder and robbery; co-Defendant identified Defendant as person holding cell phone and recording assault of victim. Defendant was a friend of co-Defendant, and knew that another co-Defendant had recently been released from juvenile detention and made statements indicating that illegal acts that could cause great bodily harm were going to occur. Court properly considered this factor, and the factor that Defendant did not call police and fled scene, in convicting Defendant based on theory of accountability. Court within its discretion in sentencing Defendant to 22 years for first-degree murder and 8 years for robbery. (CONNORS and HARRIS, concurring.)

ADMONISHMENTS

[People v. Norton](#), 2015 IL App (2d) 130599 (February 19, 2015) Winnebago Co. (McLAREN) Appeal dismissed.

Defendant was convicted, after bench trial, of aggravated domestic battery. Court heard and denied his motion to reconsider sentence of imprisonment and restitution, and then heard and denied motion for new trial, after evidentiary hearing, ending on court's entry of denial. Trial court misadvised Defendant that the time in which he could appeal was tolled when actually it was not tolled. Although Defendant's loss of his right to appeal was rooted in incorrect advice from the trial court, the appellate court lacks authority to disregard its lack of jurisdiction.(JORGENSEN and SPENCE, concurring.)

[People v. Moore](#), 2015 IL App (5th) 130125 (April 28, 2015) Perry Co. (STEWART) Affirmed. At time sentence was imposed, after stipulated bench trial, court gave incorrect admonishment as to timing for and method of appealing; court should have admonished him under Rule 605(a). When Defendant filed petition for leave to file untimely posttrial motion and notice of appeal, court's jurisdiction had long since lapsed. As notice of appeal was untimely, admonition exception does not apply. Court thus properly dismissed Defendant's motion for leave to file untimely posttrial motion and notice of appeal. (SCHWARM and MOORE, concurring.)

[People v. Guzman](#), 2015 IL 118749 (November 19, 2015) Will Co. (KILBRIDE) Appellate court affirmed.

Illinois Supreme Court's 2009 decision in *People v. Delvillar* held that statutory admonishment on potential immigration consequences of entering a guilty plea is directory, not mandatory, and potential immigration consequences of plea are collateral, not direct. Thus, failure to admonish did not affect voluntariness of plea, and Defendants were required to show prejudice or denial of justice to withdraw their pleas on that basis. That decision stands, under principle of stare decisis, even after U.S. Supreme Court's 2010 decision in *Padilla v. Kentucky*. *Padilla* case required defendants to establish a reasonable probability that they would not have pled guilty if they had been properly admonished.(GARMAN, FREEMAN, THOMAS, KARMEIER, BURKE, and THEIS, concurring.)

BATTERY

[People v. Taylor](#), 2015 IL App (1st) 131290 (June 19, 2015) Cook Co., 5th Div. (GORDON) Reversed.

Defendant was convicted, after bench trial, of aggravated assault, after she yelled profanities at deputy sheriff who was ushering her out of courthouse, and issued a final verbal threat as she exited through airlock doors, venting her displeasure. In light of spatial differences, and other circumstances reflected in the record, evidence was insufficient to support the determination beyond a reasonable doubt that deputy was placed in objective and reasonable apprehension of receiving a battery. Mere words alone without a gesture objectively does not place a person in reasonable apprehension of receiving a battery. (PALMER and REYES, concurring.)

[People v. Messenger](#), 2015 Il App (3d) 130581 (September 1, 2015) Whiteside Co. (SCHMIDT) Affirmed.

Defendant was convicted of aggravated battery, for committing battery upon another inmate in a common area for inmates while both were incarcerated at County Jail. Defendant was properly convicted of aggravated battery on the theory that the area inside the County Jail was "public property" within the meaning of section 12-3.05(c) of the Criminal Code of 2012. Even though place where battery occurred was not open to the public, court properly took judicial notice that county jail was "public property" and obtained necessary information. (O'BRIEN, concurring; CARTER, specially concurring.)

BURGLARY

[People v. Murphy](#), 2015 IL App (4th) 130265 (March 18, 2015) Macon Co. (TURNER) Judgment vacated.

Defendant was convicted, after jury trial, of two counts of burglary. State failed to prove that Defendant entered pawn shop with intent to commit therein a theft of stolen property. Defendant pawned electronic game equipment and camera, later identified as items which had been stolen from homes, at a pawn shop. Defendant admitted buying merchandise "on the street", but denied going into a home and stealing items, and never admitted that he knew items had been stolen. State was required to prove Defendant knowingly obtained control over stolen property knowing property to have been stolen or under circumstances as would reasonably induce Defendant to believe it was stolen. (KNECHT, concurring; STEIGMANN, dissenting.)

[People v. Burton](#), 2015 IL App (1st) 131600 (August 5, 2015) Cook Co., 3d Div. (HYMAN) Affirmed.

Defendant was convicted, after jury trial, of burglary of car parked in a factory lot. Court properly allowed into evidence a photo of factory parking lot; even though photo showed a "no trespassing" sign, and State did not show that sign was present on date of crime, relevancy outweighed any prejudice. Photo was not improper other-crimes evidence, as no evidence

suggests that Defendant committed any crime other than burglary. Although court erred in failing to ask Defendant if he agreed with his counsel's request for a lesser-included jury instruction, it was not plain error, as evidence was not so closely balanced as to present doubt. Court within its discretion in sentencing Defendant to 9 years, which was within statutory range of 6 to 30 years. (LAVIN and MASON, concurring.)

[*People v. Bradford*](#), 2016 IL 118674 (March 24, 2016) McLean Co. (BURKE) Appellate court reversed; circuit court reversed.

Defendant, having entered store during store hours, shoplifted 5 items totaling less than \$300, and exited store during store hours, after which he was stopped by store security personnel. State failed to prove that Defendant remained within the store without authority as charged under the burglary statute. A person commits burglary by remaining in a public place only where he exceeds his physical authority to be on the premises as a member of the public to be in store. Interpreting conduct as sufficient for burglary is unworkable, has the potential to lead to absurdity, and is inconsistent with retail theft statute and with historical development of burglary statute. (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and THEIS, concurring.)

[*People v. Sanderson*](#), 2016 IL App (1st) 141381 (April 20, 2016) Cook Co., 3d Div. (MASON) Affirmed in part and reversed in part.

Attempted residential burglary is not a "forcible felony", as its elements do not include a specific intent to carry out a violent act. No evidence, under facts of this case, that Defendant contemplated the use of force. Thus, State did not prove beyond a reasonable doubt Defendant's willingness to use violence against another. As Defendant's conviction for attempted residential burglary could not serve as one of the predicate offenses for armed habitual criminal, his conviction for that offense is reversed. (FITZGERALD SMITH and PUCINSKI, concurring.)

COLD DEAD FINGERS

[*In re the Interest of Jordan G.*](#), 2015 IL 116834 (February 20, 2015) Cook Co. (THEIS) Remanded.

Respondent, age 16, was charged under Juvenile Court Act with three counts of Aggravated Unlawful Use of a Weapon (AUUW) statute and one count of unlawful possession of a firearm. Illinois Supreme Court's holding in Aguilar case, that age-based restrictions on right to keep and bear arms are historically rooted, applies equally to persons under age 21. Charges based on Class 4 form of Section 24-1.6(a)(1), (a)(3)(A) of AUUW statute are dismissed as facially unconstitutional per Aguilar decision. Sections 24-1.6(a)(1), (a)(3)(C) and (a)(3)(I) of AUUW statute are constitutional and severable from unconstitutional provision of statute.(GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and BURKE, concurring.)

[People v. Almond](#), 2015 IL 113817 (February 20, 2015) Cook Co. (KILBRIDE) Appellate court reversed in part and affirmed in part.

Defendant was arrested in a liquor store, found to have an uncased and loaded .38-caliber handgun in his waistband. Defendant's conviction and sentence for Unlawful Use of a Weapon (UW) by a felon, based on Defendant's possession of firearm ammunition, is reinstated. Defendant was properly convicted of armed habitual criminal based on his possession of a firearm and UW by a felon based on his possession of firearm ammunition. Underlying incident, where police officers arrived at liquor store in squad car, in plain clothes but with badges visible, and then Defendant entered store, was a consensual encounter, as it was not coercive or unusual. No Fourth Amendment violation when officer searched Defendant for weapon after Defendant told him that he was armed. That UW by a felon statute does not expressly distinguish between loaded and unloaded firearms does not render statute ambiguous. Statute authorizes separate convictions for simultaneous possession of a firearm and ammunition in a single loaded firearm. Separate convictions do not violate one-act, one-crime rule. (FREEMAN, THOMAS, KARMEIER, BURKE, and THEIS, concurring.)

[People v. Mosley](#), 2015 IL 115872 (February 20, 2015) Cook Co. (KARMEIER) Circuit court affirmed in part and reversed in part; remanded.

Under plain language of AUW statute, a person may only be sentenced under subsection (d)(2) if the factors constituting the AUW offenses identified in both subsections (a)(3)(A) and (a)(3)(C) are present., but because the former subsection has been found unconstitutional, the requirements for sentences cannot be met. Thus, subsection (2) of sentencing subsection (d) of AUW statute is invalid; but it is not such an interdependent and essential part of statute that its severance requires rest of statute to fail. Trial court properly vacated Defendant's Class 4 convictions of AUW, as offenses charged are based on Sections 24-1.6(a)(1), (a)(3)(A), and 24-1.6(a)(2), (a)(3)(A), which are unconstitutional. (GARMAN, FREEMAN, THOMAS, KILBRIDE, BURKE, and THEIS, concurring.)

[People v. Moreno](#), 2015 IL App (3d) 130119 (March 25, 2015) Will Co. (SCHMIDT) Reversed in part and remanded with directions.

Defendant was convicted, after bench trial, of reckless discharge of a firearm (for shooting his .22-caliber handgun into the ground at a New Year's Eve party) and unlawful possession of a controlled substance. Defendant did not fire gun into the air or near to any persons; other partygoers were behind him, and his conduct did not create substantial risk of endangering bodily safety of others. (LYTTON, concurring; WRIGHT, dissenting.)

[People v. Frederick](#), 2015 IL App (2d) 140540 (March 20, 2015) Stephenson Co. (SCHOSTOK) Reversed.

(Modified upon denial of rehearing 4/16/15.) Department of State Police issued Respondent a FOID card in 2011. Department revoked his FOID card in 2013, pursuant to 2013 Amendments FOID Act, based on Respondent's 1991 conviction of domestic battery. Court erred in granting

Respondent's petition for issuance of FOID card. Direct appeal to circuit court is permitted when denial or revocation of FOID card was based on enumerated offense such as domestic battery. 2013 Amendments to Act must be applied to Respondent's petition, as Amendments do not penalize a person's past conduct, but affect present and future eligibility to hold a FOID card. (ZENOFF and BURKE, concurring.)

[People v. Deleon](#), 2015 IL App (1st) 131308 (May 28, 2015) Cook Co., 4th Div. (ELLIS) Reversed.

Defendant was convicted, after bench trial, of unlawful sale or delivery of a firearm. State's evidence showed that Defendant acted as straw purchaser of handgun for his friend at store in Indiana and then gave gun to friend after return to Illinois. Defendant and his friend were not "buyer and seller" and did not reach an "agreement to purchase" a firearm under Section 24-3(A)(g) of Criminal Code. Providing service of acting as a straw purchaser for another person, where that service is the only purpose of the transaction between the two persons, and the price of the gun was not integral part of transaction, no violation of Section 24-3(A)(g). (HOWSE and COBBS, concurring.)

[People v. Smith](#), 2015 IL App (1st) 132176 (July 15, 2015) Cook Co., 3d Div. (MASON) Affirmed as modified.

(Court opinion corrected 7/17/15.) Defendant was convicted, after bench trial, of aggravated unlawful use of weapon (AUUW) and sentenced to one year probation. Greyhound bus driver saw butt of a handgun inside backpack which Defendant had left on back seat of bus; Defendant approached driver and told him the bag was his. When driver asked him what was in bag Defendant said, "nothing but a BB gun." Defendant's statement creates reasonable inference of "knowing possession", and that he intended to retain control and possession of bag and gun. State offered sufficient evidence to establish corpus delicti and guilt of AUUW beyond a reasonable doubt. Court erred in assessing \$100 street gang fine as there is no evidence in record identifying defendant as a member of a street gang when he committed AUUW offense. (LAVIN, concurring; HYMAN, dissenting.)

[People v. Shreffler](#), 2015 IL App (4th) 130718 (August 4, 2015) Piatt Co. (STEIGMANN) Reversed.

Defendant was convicted, after stipulated bench trial, of three counts of unlawful use of weapons. Stipulated evidence failed to prove Defendant guilty of the charged offenses. "Overall length" of shotguns should have been measured by length of a straight line between two farthest points on the gun. Flash suppressor at end of rifle's barrel should have been included in measurement of barrel's length, as flash suppressor is a functional component of gun through which bullet passes when gun is fired. (HARRIS and HOLDER WHITE, concurring.)

People v. Richardson, 2015 IL App (1st) 130203 (August 10, 2015) Cook Co., 1st Div. (CUNNINGHAM) Reversed.

Defendant was convicted, after bench trial, of unlawful use of a weapon by a felon (UUWF). Defendant's prior 2010 conviction for aggravated felony (AUUWF), which was premised on a statutory provision which created Class 4 version of AUUW charge which was later held unconstitutional in Illinois Supreme Court's 2013 Aguilar decision, cannot stand as a predicate offense to support Defendant's UUWF conviction. Thus, State could not prove beyond a reasonable doubt an element of UUWF offense (a valid prior felony), and Defendant's conviction is reversed. (DELORT and HARRIS, concurring.)

People v. Faulkner, 2015 IL App (1st) 132884 (August 31, 2015) Cook Co., 1st Div. (CUNNINGHAM) Affirmed in part and reversed in part; remanded.

Defendant was convicted, after bench trial, of being armed habitual criminal and unlawful use or possession of weapon by a felon (UUWF), and sentenced to 6 years. Evidence at trial was sufficient to establish that Defendant exercised immediate and exclusive control over attic where assault rifle and ammunition were found. Because Defendant's prior conviction for AUUW was based on statute found unconstitutional and void ab initio in Illinois Supreme Court's 2013 Aguilar decision, it cannot stand as predicate offense for Defendant's armed habitual criminal conviction, and thus State could not prove beyond a reasonable doubt an element of offense of armed habitual criminal. (CONNORS and HARRIS, concurring.)

People v. Larson, 2015 IL App (2d) 141154 (September 23, 2015) Kendall Co. (ZENOFF) Affirmed.

Defendant was convicted, after bench trial, of one count of possession of firearm without valid FOID card. Defendant's FOID card had been previously revoked pursuant to entry of plenary order of protection (OP). Although OP had expired at time firearm was discovered, Defendant's FOID card was still revoked. Section 14(c)(3) of FOID Card Act provides that a violation of Section 2(a) of FOID Card Act is a Class 3 felony if offender does not possess a currently valid FOID Card and is not otherwise eligible under this Act. Legislature concluded that possession of firearms after revocation of FOID card represents a greater public-safety threat than mere failure to apply for a card. (SCHOSTOK and SPENCE, concurring.)

People v. Clark, 2015 IL App (3d) 140036 (October 5, 2015) Peoria Co. (CARTER) Affirmed in part and vacated in part; remanded with directions to properly apply \$5 per day credit.

Defendant was convicted, after jury trial, of armed robbery, for holding up pizza delivery driver, pointing rifle at him. Evidence at trial, viewed in light most favorable to the State, was sufficient to prove beyond a reasonable doubt that Defendant carried a firearm. Evidence was not closely balanced as to that issue, as testimony of victim and his co-worker was unequivocal and sufficient to establish that Defendant was armed with firearm during robbery. The failure to give a jury instruction defining "firearm" was not plain error. Failure of defense counsel to tender a jury instruction did not prejudice Defendant. (O'BRIEN and SCHMIDT, concurring.)

People v. Winston, 2015 IL App (1st) 140234 (October 19, 2015) Cook Co., 1st Div. (LIU) Affirmed.

Defendant was convicted, after bench trial, of aggravated unlawful use of a weapon (AUUW). The Class 2 form of Section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute does not violate the second amendment and survives the Illinois Supreme Court's 2013 decision in Aguilar. As no sentence was imposed on Defendant's other AUUW convictions, those convictions are nonfinal, and appellate court declined jurisdiction over Defendant's challenges to those convictions. (CUNNINGHAM and CONNORS, concurring.)

People v. Johnson, 2015 IL App (1st) 133663 (October 27, 2015) Cook Co., 1st Div. (CONNORS) Affirmed.

Defendant was convicted, after bench trial, of offense of armed habitual criminal and sentenced to 7 ½ years. The offenses of armed habitual criminal and unlawful use or possession of a weapon by a felon (UUWF) do not have identical elements. As Defendant has been convicted of both a subsequent violation of UUWF statute and prior conviction for forcible felony, Defendant was appropriately charged and convicted of armed habitual criminal and thus his conviction did not violate proportionate penalties clause. Armed habitual criminal statute is not unconstitutional on its face. Amendments to FOID Card Act prohibit State Police from issuing Defendant a FOID card. (LIU and CUNNINGHAM, concurring.)

People v. Williams, 2015 IL 117470 (November 19, 2015) Cook Co. (FREEMAN) Circuit court reversed; remanded with directions.

Circuit court erred in declaring certain sections of the aggravated unlawful use of a weapon (AUUW) statute unconstitutional. The AUUW statute has an additional location element, that the person is knowingly carrying on his person or in any vehicle, outside the home, a firearm without having been issued a valid FOID Card. Thus, the offense of AUUW and a violation of the FOID Card Act are not identical. There can be no proportionate penalty violation, as the location element in AUUW, which is absent from the FOID Card Act, is an additional element that must be proved to establish a violation of AUUW. (GARMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

People v. Holmes, 2015 IL App (1st) 141256 (November 25, 2015) Cook Co., 5th Div. (PALMER) Affirmed.

Defendant was arrested when police officer observed a revolver in his waistband. Police then discovered that Defendant did not have a FOID card, and charged Defendant with 2 counts of aggravated unlawful use of a weapon (AUUW) for carrying a firearm without a valid FOID card. Court properly suppressed the evidence, as the facially invalid AUUW statute is void ab initio, so that the good-faith exception to the exclusionary rule is inapplicable. The void ab initio doctrine applied both to legislative acts that were found unconstitutional for violating substantive

constitutional guarantees as well as those adopted in violation of single subject clause. (REYES and LAMPKIN, concurring.)

People v. Schweih, 2015 IL 117789 (December 3, 2015) Kane Co. (THEIS) Circuit court reversed; remanded.

Section 24-1.6(a)(1), (a)(3)(C) of the Aggravated Unlawful Use of a Weapon (AUUW) statute does not violate the proportionate penalties clause of the Illinois Constitution, or the equal protection clauses of the U.S. and Illinois Constitutions. The location element in Section 24-1.6(a)(1) remains a viable element of the AUUW statute when combined with subsection (a)(3)(C). (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and BURKE, concurring.)

In re Nasie M., 2015 IL App (1st) 151678 (December 1, 2015) Cook Co., 2d Div. (HYMAN) Reversed.

State charged minor, then age 17, with reckless discharge of a firearm, 2 counts of aggravated unlawful use of a weapon, and unlawful possession of a firearm. Minor sustained gunshot wounds to his foot and was taken to a hospital. Police officer testified that minor told him he was holding a gun and shot himself while running away from 2 men he thought were going to rob him. Minor denies that he shot himself, and says that 1 or both men shot him. State failed to prove beyond a reasonable doubt that minor possessed a firearm, and thus could not prove he committed the 3 offenses charged. State offered no eyewitnesses to shooting or any evidence that minor was in possession of gun when he injured his foot. (NEVILLE and SIMON, concurring.)

People v. Burns, 2015 IL 117387 (December 17, 2015) Cook Co. (BURKE) Appellate court reversed.

Defendant was convicted, after jury trial, of aggravated unlawful use of a weapon (AUUW). The offense of AUUW, as set forth in section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute, is facially unconstitutional. As a result, the provision is not enforceable against anyone, including Defendant. (FREEMAN, KILBRIDE, KARMEIER, and THEIS, concurring; GARMAN and THOMAS, specially concurring.)

People v. Dixon, 2015 IL App (1st) 133303 (December 22, 2015) Cook Co., 2d Div. (NEVILLE)

People v. Harris, 2015 IL App (1st) 133892 (December 22, 2015) Cook Co., 2d Div.

(NEVILLE)

Reversed and remanded.

(Court opinion corrected 1/14/16.) Defendant was convicted, after bench trial, of armed robbery. State failed to present evidence that Defendant was armed with a gun that had weight or composition (metallic nature) of a dangerous weapon. Defendant's statement was un rebutted that he carried a BB gun during the robbery, and that the BB gun broke when it was dropped. Evidence presented by the State failed to prove, beyond a reasonable doubt, that Defendant was armed with a gun that was a dangerous weapon because it could be used as a bludgeon.

Remanded for entry of judgment of conviction for robbery and appropriate sentence. (PIERCE and HYMAN, concurring.)

People v. Tolbert, 2016 IL 117846 (January 22, 2016) Cook Co. (BURKE) Appellate court vacated; remanded.

The invitee requirement is an exemption to the offense of aggravated unlawful use of a weapon statute for possessing a handgun while under age 21 that the defendant must raise and prove. A defendant charged under that statute will avoid criminal liability if the firearm was carried while on the land or in the legal dwelling of another persona as an invitee with that person's permission. The invitee requirement is not an element of the offense. (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and THEIS, concurring.)

People v. McGee, 2016 IL App (1st) 141013 (February 16, 2016) Cook Co., 2d Div. (PIERCE) Affirmed in part and vacated in part; remanded.

Defendant was convicted, after jury trial, of armed habitual criminal (AHC) and unlawful use of a weapon by a felon (UUWF). A conviction under the portion of the aggravated unlawful use of a weapon (AUUW) statute found unconstitutional under *People v. Aguilar* and *People v. Burns* cannot stand where the Defendant's predicate felony as alleged in the charging document is based on a conviction for a UUW or AUUW offense that is facially unconstitutional under *Aguilar*. A prior felony conviction is not an element of offense of AUUW, but a factor to be used in enhancing the sentence, and the Defendant's predicate felony drug conviction was not a valid constitutional basis to criminalize Defendant's firearm possession. As State alleged 2 prior felony convictions, and one conviction is fatally defective, State failed to prove essential element of offense of AHC. As to other count charging Defendant with possession of firearm after having been previously convicted of felony offense, Defendant had a constitutionally valid qualifying felony conviction and thus State proved all elements of the merged conviction for UUWF.(SIMON and HYMAN, concurring.)

People v. Ligon, 2016 IL 118023 (February 19, 2016) Cook Co. (KARMEIER) Appellate court reversed; circuit court affirmed.

Defendant was convicted, after jury trial, of aggravated vehicular hijacking with a dangerous weapon, other than a firearm (AVH/DW), a Class X felony. Defendant, while armed with a BB gun, approached a woman as she was getting out of her pickup truck, and took vehicle from her. BB gun was a common-law dangerous weapon of the third type. Trial court properly denied Defendant's Section 2-1401 petition for relief from judgment alleging proportionate penalties violation. Defendant's mandatory life sentence imposed as an adjudged habitual criminal under Section 33B-1 of Criminal Code is affirmed. (GARMAN, FREEMAN, THOMAS, KILBRIDE, BURKE, and THEIS, concurring.)

[People v. Clark](#), 2016 IL 118845 (March 24, 2016) Cook Co. (KARMEIER) Appellate court affirmed.

(Court opinion corrected 4/8/16.) Defendant was charged with multiple offenses, including aggravated vehicular hijacking while armed with a firearm and armed robbery while armed with a firearm, for accosting a man who was parking his vehicle in his garage, taking it from him. Plain language of Sections 18-2(a)(1) and 18-4(a)(3) of Code of Criminal Procedure explicitly excludes possession or use of a firearm. Thus, a violation of Sections of Code for offenses committed with firearms and those Sections for offenses committed with weapons other than firearms are mutually exclusive. Although Defendant was acquitted of the charged firearm offenses, he stands convicted of and sentenced for uncharged offenses he did not commit. Improper convictions and sentences are corrected via remedial application of plain error. Convicting a defendant of an uncharged offense that is not a lesser-included offense of a charged offense violates a defendant's due process right to notice of the charges against him. Appellate court properly reduced degree of convictions to lesser-included offenses of vehicular hijacking and robbery and remanded for resentencing. (GARMAN, FREEMAN, THOMAS, KILBRIDE, BURKE, and THEIS, concurring.)

CONFESSION (suppressed)

[People v. Neese](#), 2015 IL App (2d) 140368 (April 21, 2015) Boone Co. (BIRKETT) Reversed and remanded.

Defendant was indicted on one count of felony theft, based on theft of coins from washing machine in apartment building. Court granted Defendant's motion to suppress statements he made to a police officer during phone conversation, finding that statements they were made during plea discussion. Rule 402(f) did not apply to phone conversation between officer and defendant. There was no evidence that Defendant subjectively expected that he was involved in any plea discussion, but only comments that Defendant intended to provide written statement in exchange for officer charging him with only a misdemeanor. Even if Defendant had subjective expectation of negotiating a plea, it would not have been objectively reasonable, as nothing would indicate to a reasonable person in Defendant's position that officer had authority to engage in a plea discussion, to offer plea deal, or enter into plea agreement. (HUTCHINSON and HUDSON, concurring.)

[People v. Marion](#), 2015 IL App (1st) 131011 (May 12, 2015) Cook Co., 2d Div. (NEVILLE) Reversed.

(Modified upon denial of rehearing 5/12/15.) State failed to offer any credible rebuttal to Defendant's credible testimony, and Defendant thus sufficiently proved that he produced guns in response to police officer's promise not to arrest him in exchange for getting guns off the street. Police have authority to agree not to arrest a suspect in exchange for cooperation with police

work, and officer's agreement with Defendant was thus enforceable.(SIMON and LIU, concurring.)

[*People v. Coleman*](#), 2015 IL App (4th) 140730 (July 20, 2015) Sangamon Co. (POPE) Affirmed. Initial determination of custody depends on objective circumstances of interrogation, not on subjective views harbored by officers or by person being questioned. A failure to admonish a defendant pursuant to Miranda warnings cannot be excused based on mere fact that Defendant incorrectly believed he was not in custody for Miranda purposes. Defendant was handcuffed and questioned about any independent crime, which objectively would have led a reasonable person to believe he was not free to leave or terminate encounter. Under totality of circumstances, defendant was entitled to be given Miranda warnings before being questioned because he was in custody for Miranda purposes.(HARRIS, concurring; STEIGMANN, dissenting.)

[*People v. Tyler*](#), 2015 IL App (1st) 123470 (September 11, 2015) Cook Co., 5th Div. (GORDON) Affirmed in part and reversed and remanded in part.

Defendant, age 17 and with no prior record at time of offense, was tried as an adult and convicted of first-degree murder after jury trial in 1995. Only evidence at trial implicating Defendant in the murder was testimony of witness who testified she saw Defendant run through an alley carrying a gun shortly after shooting, and Defendant's confession that he acted as a lookout for the shooter. Defendant testified at trial that a detective physically beat him into giving false confession. Reversed and remanded in part for 3rd-stage evidentiary hearing on Defendant's claim of coerced confession. Defendant is entitled to have evidence of systemic police misconduct considered by trial court at evidentiary hearing, as evidence was sufficient to relax requirements of res judicata and evidence made a substantial showing of a constitutional violation. Evidence of systemic police misconduct is new, material, noncumulative, and is so conclusive it could reasonably change the result on retrial, as evidence is sufficient to support Defendant's claim of actual innocence. (REYES and McBRIDE, concurring.)

[*People v. Weathers*](#), 2015 IL App (1st) 133264 (November 25, 2015) Cook Co., 4th Div. (McBRIDE) Reversed and remanded.

Defendant was convicted, after bench trial, of first degree murder in 2002 shooting death, and sentenced to 75 years. Court erred in denying his motion for leave to file successive postconviction petition, as his claims of a physically coerced confession have never been reviewed. Defendant attached portions of 2012 Illinois Torture Inquiry and Relief Commission (TIRC) report, which related to detectives that interrogated him, and contended that it was newly discovered evidence as it was not available at the time of his initial postconviction petition in 2009. Defendant established requisite cause, in that an objective factor impeded his ability to raise this claim earlier. Defendant satisfied prejudice prong as the use of a Defendant's physically coerced confession as substantive evidence of his guilt is never harmless error.(HOWSE and ELLIS, concurring.)

People v. Wright, 2016 IL App (5th) 120310 (January 15, 2016) Marion Co. (GOLDENHERSH) Reversed and remanded.

Defendant was convicted, after jury trial, of armed robbery and unlawful possession of a controlled substance. Court erred in denying Defendant's motion to suppress statements made after his arrest. Officer's language and actions were particularly evocative, and likely to elicit incriminating response from Defendant. Officer handcuffed Defendant, placed him in back of a patrol car, and engaged him in ongoing conversation, including asking him at least one question and discussing evidence against him, and officer drove Defendant to area where Defendant could see police questioning the mother of Defendant's 3 children. Officer subjected Defendant to functional equivalent of a police interrogation without providing Miranda warnings.(SCHWARM, concurring; WELCH, dissenting.)

People v. Gempel, 2016 IL App (3d) 140833 (January 26, 2016) Will Co. (HOLDRIDGE) Affirmed.

State charged Defendant by indictment with first degree murder and concealment of a homicidal death in death of his neighbor. Court properly granted Defendant's motion to suppress. State failed to meet its burden in proving that statements made by Defendant while in custody at police department were sufficiently attenuated from taint of illegal arrest. Defendant did not voluntarily waive Miranda when he asked to speak with detective at end of 37 hours in custody. Police illegally held Defendant without probable cause, repeatedly ignored his requests to speak with an attorney, and held him nearly 37 hours before he made his statements. (O'BRIEN and LYTTON, concurring.)

People v. Tayborn, 2016 IL App (3d) 130594 (March 7, 2016) Will Co. (CARTER) Reversed and remanded.

Defendant was convicted, after jury trial, of possession of cocaine. Defense counsel provided ineffective assistance of counsel by failing to file a motion to suppress Defendant's statement that he was transporting cocaine to Iowa, which Defendant made in response to police questioning without having received Miranda warnings. During vehicle search, driver of vehicle had already been arrested and placed in a squad car. Cocaine was found in vehicle during search. As trial judge found that Defendant was in custody at time cocaine was discovered, when officer questioned Defendant about the cocaine, the questioning was a custodial interrogation without Defendant having first been given Miranda warnings. Defendant's statement would have been inadmissible at trial, and outcome of trial would have been different had his admission been suppressed.(WRIGHT, concurring; SCHMIDT, dissenting.)

People v. Little, 2016 IL App (3d) 140124 (March 23, 2016) Peoria Co. (WRIGHT) Reversed and remanded.

(Court opinion corrected 4/21/16.) Defendant filed motion to suppress, asking that all statements relevant to murder prosecution be suppressed as Defendant was subjected to a custodial interrogation as part of a homicide prosecution and initial custodial interrogation was not

properly electronically recorded. Defendant was "accused" of murder when court was called upon to determine admissibility of recorded second segment of interview. Preponderance of evidence establishes recorded segment of interrogation followed unrecorded segment of custodial interrogation and thus is presumed inadmissible. Second portion of custodial interrogation was presumptively inadmissible as detectives did not record preceding segment of interrogation.(CARTER and HOLDRIDGE, concurring.)

CONFESSION (allowed)

People v. Bowen, 2015 IL App (1st) 132046 (July 31, 2015) Cook Co., 5th Div. (McBRIDE) Affirmed.

Defendant was charged with possession of contraband (per indictment, a dangerous weapon, a sharp metal object) in a penal institution, and was convicted, after bench trial, and sentenced to 6 years. A large 7" sharpened metal shank was found hidden in Defendant's cell. In sentencing, court was not considering merely that Defendant possessed contraband, was used descriptive language of type of weapon and location of its discovery, which are proper sentencing considerations. Evidence was sufficient to sustain conviction, given officer's positive and unambiguous testimony about nature of shank. Circumstances of Defendant's interrogation were not inherently coercive as in custodial interrogations, which would have required Miranda warnings. (PALMER and GORDON, concurring.)

People v. Little, 2016 IL App (3d) 130683 (February 10, 2016) McDonough Co. (CARTER) Affirmed.

Defendant was convicted, after stipulated bench trial, of felony driving while license suspended or revoked and sentenced to one year conditional discharge and 60 days in jail. Court properly denied Defendant's pretrial motion to quash his arrest and suppress evidence. Deputy had reasonable suspicion to make investigatory stop of Defendant's vehicle for possible criminal trespass to real property. Deputy was responding to a live complaint of a very recent criminal trespass to real property, alleging that someone was trespassing and running dogs on his property, and that complainant took deputy to exact location of trespass, where there was one vehicle, with dogs inside of dog box in the back of vehicle. Officer may make a lawful Terry stop without first determining whether circumstances he observed would satisfy each element of a certain offense.(O'BRIEN and WRIGHT, concurring.)

People v. Buschauer, 2016 IL App (1st) 142766 (February 16, 2016) Cook Co., 2d Div. (HYMAN) Reversed and remanded.

Defendant, 13 years after his wife's death, was arrested for his wife's murder. Defendant had called 911 and claimed that his wife drowned in the bathtub. Trial court erred in granting defense motions to suppress Defendant's statements and exclude evidence seized from his home, after he

consented to search. A reasonable person in Defendant's situation would have felt free to leave at any point during police questioning at police station that occurred 1 week after wife's death. Defendant was free to leave, was never formally arrested, and was given Miranda warnings as a precaution; he was allowed to go home, after agreeing to return in the morning.(PIERCE and NEVILLE, concurring.)

[People v. Tuson](#), 2016 IL App (3d) 130861 (February 22, 2016) Peoria Co. (LYTTON)
Affirmed.

Court properly denied Defendant's motion to suppress statements he made during a police interview. Defendant was the subject of a federal use immunity agreement when he participated in the crime that resulted in a murder. Terms of federal agreement stated that immunity would no longer apply if Defendant participated in any criminal activity of any kind without authorization. Any belief that Defendant had that he was immune from prosecution when he gave his statement to county police detective was not reasonable under circumstances. Subject matter of interview was not related to subject matter of federal use immunity agreement.(O'BRIEN and SCHMIDT, concurring.)

[People v. Pitts](#), 2016 IL App (1st) 132205 (March 24, 2016) Cook Co., 4th Div. (ELLIS)
Affirmed.

Defendant was convicted, after bench trial, of unlawful use or possessions of weapons by a felon and possessing a firearm with defaced identification marks.Evidence was sufficient to establish that an offense had been committed to corroborate Defendant's confession that the guns in his home belonged to him, including the fact that guns were seized from a bedroom in his home. Defendant argued that evidence should be suppressed because complaint supporting search warrant for his home was incomplete, in that second page of the complaint, which had been signed by judge issuing warrant, had gone missing. Court properly denied motion to suppress, after State presented unsigned copy of complaint at hearing.State was not required to restore the complaint under the Court Records Restoration Act, because it had what it purported to be a complete copy of complaint. State sufficiently authenticated that copy under rules of evidence.(McBRIDE and COBBS, concurring.)

CONFRONTATION

[People v. McCullough](#), 2015 IL App (2d) 121364 (February 11, 2015) De Kalb Co. (ZENOFF)
Affirmed in part and vacated in part.

Defendant was convicted, after bench trial in 2012, of of 1957 kidnapping and murder of seven-year-old girl, when Defendant was age 18. Harmless error in admitting deathbed statement of Defendant's mother that "John did it", as other evidence was sufficient to allow rational trier of fact to find that elements of offenses had been proved beyond a reasonable doubt..(SCHOSTOK and BURKE, concurring.)

[People v. Barner](#), 2015 IL 116949 (April 16, 2015) Cook Co. (THEIS) Appellate court affirmed. Defendant was convicted, after jury trial, of aggravated criminal sexual assault, having been arrested and charged more than three years after the crime. Reports of nontestifying witnesses as to DNA lab work, made before Defendant was charged for this offense, were not subject to confrontation requirement because, although they produced a "match", they were not made in connection with current prosecution but in connection with another unrelated homicide for which Defendant had been a suspect and for which he was never charged. Standard for determining whether a forensic report is testimonial is an objective one as to whether it was made for purpose of proving guilt at trial. (GARMAN, FREEMAN, THOMAS, KARMEIER, and BURKE, concurring; KILBRIDE, dissenting.)

[Ohio v. Clark](#), No. 13-1352 (June 18, 2015)

The Sixth Amendment's Confrontation Clause did not prohibit prosecutors from introducing statements made by a child abuse victim to his teachers, where neither the child, who was unavailable for cross-examination, nor his teachers had the primary purpose of creating an out-of-court substitute for trial testimony.

Cited By:

[People v. Burnett](#), 2015 IL App (1st) 133610 (Dec 18, 2015)

Affirmed.

Convicted after bench trial of violating order of protection. Victim's live testimony was that she didn't remember and would "just assume forget" defendant's threatening contacts. State read victim's earlier written statement into the record over objection. Admission of her out of court statement under the domestic violence exception to hearsay does not violate confrontation clause.

[People v. Campbell](#), 2015 IL App (1st) 131196 (July 27, 2015) Cook Co., 1st Div. (HARRIS)

Affirmed.

Defendant was convicted of first degree murder after jury trial and sentenced to natural life in prison. Admission of witness' entire grand jury testimony did not violate right to confrontation, or requirement of Section 115-10.1 of Code of Criminal Procedure that witness be subject to cross-examination as to her statement. Counsel for both parties had opportunity to question witness at trial about her prior inconsistent testimony, and witness willingly responded to questions at trial. Although defense counsel did not formally present alibi defense, he was allowed to present witnesses who testified that Defendant was at home when shooting occurred. Thus, no prejudice from defense counsel's failure to formally present alibi defense. (DELORT and CONNORS, concurring.)

[*People v. Williams*](#), 2015 IL App (1st) 131359 (September 25, 2015) Cook Co., 6th Div. (DELORT) Affirmed.

Postconviction petition alleging ineffective assistance of counsel, in sequel to case heard on direct appeal, and on the merits, by First District Appellate Court, Illinois Supreme Court, and U.S. Supreme Court, in which Defendant was convicted of aggravated kidnapping, aggravated robbery, and aggravated criminal sexual assault. Defendant contended on appeal that report from Cellmark that forensic scientist referenced in her testimony and used in her analysis was testimonial, and thus claimed that his right to confrontation was violated. Defendant argues that 3 documents should have been presented on his behalf in appeal: Rule 11.1.2 of FBI Standard, 2008 manual from ASCLD/LAB, and transcript from a prior, unrelated proceeding of Defendant's in which a former manager of research and lab director at Cellmark testified. Speculation as to whether Justice Clarence Thomas would have changed his deciding vote if these documents had been presented, as the substance of that argument was made by appellate counsel, and amici briefs made reference to the same documents and arguments. (ROCHFORD and HOFFMAN, concurring.)

[*People v. Weinke*](#), 2016 IL App (1st) 141196 (March 1, 2016) Cook Co., 2d Div. (HYMAN) Reversed and remanded.

Woman, age 77, was found at bottom of her basement stairs, and told police and paramedics that her son had pushed her over a first-floor railing, causing her to fall to the basement. Court granted State's immediate request to take evidence deposition of injured woman, although defense counsel had just entered case. Woman died 3 months later. Son's case went to bench trial 6 years later, during which evidence deposition was admitted into evidence. Allowing woman's evidence deposition to be taken on emergency basis was reversible error. Admitting evidence deposition at trial violated Defendant's constitutional rights to confront witnesses, as his counsel did not have adequate opportunity to cross-examine woman at deposition.(PIERCE and NEVILLE, concurring.)

CONTEMPT

[*People v. Geiger*](#), 2015 IL App (3d) 130457 (April 17, 2015) Kankakee Co. (WRIGHT) Affirmed.

Defendant was age 15 at time of fatal shootings of two men, and then provided statement to police about events that preceded the shootings; Defendant was not charged for any offense directly related to murders. State later prosecuted Defendant for his refusal to testify at retrial, 9 years later, of person charged with murders. Court initially sentenced Defendant to 20 years, but supreme court reversed and on remand trial court resentenced him to 10 years. Defendant originally refused to testify based on his fifth amendment right, but 5 years later Defendant explained he refused to testify because he could not remember the events of day of murders. Ten-year sentence was not grossly disproportionate to nature of contemptuous act when

considered in light of Defendant's previous criminal history. (O'BRIEN, concurring; LYTTON, dissenting.)

CONTROLLED SUBSTANCE

[People v. Chatha](#), 2015 IL App (4th)130652 (May 29, 2015) McLean Co. (STEIGMANN) Reversed.

Defendant was convicted, after bench trial, of possession of controlled substance with intent to deliver 50 grams or more of substance containing synthetic cannabis. Police confidential source purchased commercially packaged product from convenience store Defendant owned. Source asked Defendant for a product which Defendant replied he did not have, but offered a similar product, "Bulldog Potpourri", which was stored underneath counter and was not displayed. Defendant denied that he knew product contained controlled substance, and said that his supplier described it as natural incense. Extent of State's proof was that Defendant knowingly possessed something that could be ingested for its intoxicating effects. Defendant's actions did not show conscious or willful ignorance as to product's legality. Evidence was insufficient to establish beyond a reasonable doubt that Defendant knew product contained synthetic cannabis. (KNECHT and HOLDER WHITE, concurring.)

[People v. Maldonado](#), 2015 IL App (1st) 131874 (June 30, 2015) Cook Co., 2d Div. (PIERCE) Reversed.

Defendant was convicted, after bench trial, of three counts of unlawful use or possession of ammunition by a felon and possession of a controlled substance with intent to deliver heroin, and sentenced to 3 years intensive drug probation. State failed to prove beyond a reasonable doubt that Defendant had constructive possession of ammunition (found in kitchen of residence) and heroin (found inside a statue on nightstand). State failed to present direct evidence establishing Defendant's control over premises, and failed to present any evidence that Defendant had knowledge of contraband found in residence. Defendant was not present when search warrant was executed, and State presented no admissions by Defendant as to his residency. One receipt and two pieces of unopened mail with Defendant's name and address of location searched is insufficient evidence to establish proof of control. (NEVILLE and LIU, concurring.)

[People v. Bush](#), 2015 IL App (5th) 130224 (July 28, 2015) St. Clair Co. (GOLDENHERSH) Affirmed.

Defendant was convicted, after jury trial, of possession of methamphetamine precursor and manufacturing material. Under Methamphetamine Control and Community Protection Act, Defendant committed two distinct acts of possession, as he possessed two separate items: precursor (pseudoephedrine) and manufacturing materials (lithium batteries, "Heet" isopropyl alcohol, and cold packs). Defendant's convictions and concurrent sentences were properly imposed. (STEWART and MOORE, concurring.)

DEFENSES

[People v. Getter](#), 2015 IL App (1st) 121307 (January 6, 2015) Cook Co., 4th Div. (ELLIS) Reversed and remanded.

Defendant was charged with first-degree murder as to one victim, attempted murder and aggravated battery with a firearm as to another victim, and aggravated discharge of a firearm as to another victim. At trial, Defendant relied exclusively on self-defense theory. As to the first three charges, jury was instructed that State was required to prove beyond a reasonable doubt that Defendant was not justified in using force to defend himself; Defendant was acquitted on those charges. Jury was not so instructed as to fourth charge, and he was convicted of that charge. Plain error in failing to give self-defense instruction on aggravated discharge count, and defense counsel was ineffective for acquiescing in erroneous instructions. (FITZGERALD SMITH and EPSTEIN, concurring.)

[People v. Lewis](#), 2015 IL App (1st) 122411 (February 27, 2015) Cook Co., 5th Div. (REYES) Affirmed.

Defendant was convicted, after jury trial, of first degree murder, and sentenced to 60 years. Defendant did not raise issue of self-defense at trial and State was not obliged to disprove that affirmative defense. Trial court properly refused self-defense instructions based on insufficient evidence. Court did not err in allowing State to introduce evidence and present argument that Defendant was hiding from the police. A jury could validly infer from evidence that Defendant knew he was a suspect and that he consciously avoided the police. (PALMER and McBRIDE, concurring.)

[People v. Castellano](#), 2015 IL App (1st) 133874 (September 18, 2015) Cook Co., 5th Div. (GORDON) Affirmed.

Defendant, age 34 and mentally retarded, was convicted after bench trial of first-degree murder and 2 counts of aggravated battery, and sentenced to total of 32 years. On appeal, Defendant asks court to reduce his murder conviction to 2nd-degree murder, arguing that he proved by preponderance of evidence a mitigating factor, that he had actual, although unreasonable, belief in the need to act with deadly force to defend himself and another. A rational trier of fact could have reached the same conclusion, that Defendant failed to prove his claim of imperfect self-defense, and thus refused to reduce murder charge to second-degree murder. Defendant made conflicting statements, and trial court did not believe Defendant's testimony, and concluded that Defendant did not act out of any belief that self-defense was necessary. (REYES and McBRIDE, concurring.)

[*People v. Mpulamasaka*](#), 2016 IL App (2d) 130703 (January 6, 2016) Lake Co. (BIRKETT) Reversed.

(Court opinion corrected 2/17/16.) Defendant was convicted, after jury trial, of aggravated criminal sexual assault, and sentenced to 12 years. State failed to disprove defense of consent by the victim, who testified that she held hands with Defendant and guided his hand to her thigh. Evidence was sufficient to raise affirmative defense of consent. There was no evidence that victim was confused during cross-examination, or that she lacked capacity to understand defense counsel's questions or recall events. By telling jury that they should ignore victim's cross-examination testimony because it was not "her own words", the State undermined Defendant's right to fair trial. Prosecutor committed prosecutorial misconduct, which severely prejudiced Defendant's case, when he sat in witness stand while making closing and rebuttal argument about victim's courage in testifying, and then commented on Defendant's "credibility", although Defendant did not testify. (HUTCHINSON, concurring; BURKE, specially concurring.)

[*People v. Orasco*](#), 2016 IL App (3d) 120633 (April 14, 2016) Will Co. (SCHMIDT) Affirmed. (Court opinion corrected 4/18/16.) Defendant was convicted, after jury trial, of 3 first-degree murder counts, which merged together, and aggravated battery which merged with attempted first degree murder. Jury was instructed on accountability but not on affirmative defense of compulsion. No ineffective assistance of counsel from defense counsel never tendering an instruction on compulsion. Evidence at trial was insufficient to support jury instruction on compulsion; evidence did not establish that Defendant committed acts constituting any of his offenses under threat of great bodily harm or death; and any potential compulsion arose from fault of Defendant; Void sentence rule has been abolished, and thus, the State may not directly attack the trial court's sentencing order.(HOLDRIDGE and LYTTON concurring.),

DISCOVERY

[*People v. DiCosola*](#), 2015 IL App (2d) 140523 (January 9, 2015) Du Page Co. (SCHOSTOK) Affirmed.

Court properly entered summary judgment in favor of Attorney General's complaint against Defendant for his failure to comply with investigative subpoena issued by AG per Sections 3 and 4 of Consumer Fraud Act. Defendant, who is not licensed to practice law in any state, sold instructional DVDs, held seminars, and provided consultations on bankruptcy and foreclosure laws. Defendant was required to appear in response to subpoena, and could at that time invoke his fifth amendment right against self-incrimination. Given no evidence that AG is aiding or participating in any criminal prosecution of Defendant, fifth amendment does not provide any basis for noncompliance with subpoena. (JORGENSEN and BIRKETT, concurring.)

[People v. Olsen](#), 2015 IL App (2d) 140267 (June 5, 2015) DeKalb Co. (SCHOSTOK) Reversed and remanded.

Defendant was charged with two counts of DUI. Section 30 of State Police Act, which requires that police cars be equipped with video recording device to record traffic stops. Court abused its discretion in suppressing officer's testimony about field sobriety tests as a sanction for officer's failure to capture field sobriety tests on video. State did not commit a discovery violation, as State turned over the video, and as Section 30 of Act is directory, and does not provide remedy for noncompliance. (JORGENSEN and BIRKETT, concurring.)

[People v. Moises](#), 2015 ILApp(3d) 140577 (Will County)
Reversed & remanded

In DUI trial court granted defense motion for sanctions after dash video revealed officer elected to conduct FSTs outside the view of the lens. The video was tendered in discovery. There can be no discovery violation and hence no sanction when the requested item does not and never did exist. The holding in Kladis, is there for inapplicable. “[t]here is nothing in this record to support any inference or suggestion that the police or the prosecution intentionally or inadvertently destroyed any preexisting discoverable evidence.”

[People v. Forrest](#), 2015 IL App (4th) 130621 (October 6, 2015) McLean Co. (STEIGMANN)
Affirmed.

Defendant was convicted, after jury trial, of aggravated battery, criminal damage to property, and mob action. Court abused its discretion by imposing the most onerous sanction of excluding defense witness' testimony as sanction for Defendant failing to disclose witness until day of trial. Court is required to consider available alternative sanctions, materiality of evidence, prejudice, and bad faith, to exercise sound discretion. Imposition of sanctions was harmless error, and late disclosure was not ineffective assistance of counsel, as there was not a reasonable probability that Defendant would have been acquitted had witness' testimony been admitted. (KNECHT and APPLETON, concurring.)

[People v. Moravec](#), 2015 IL App (1st) 133869 (November 3, 2015) Cook Co., 2d Div. (SIMON)
Affirmed.

Defendant was charged with one count of aggravated DUI. Court properly granted Defendant's motion in limine and for sanctions to limit State's proof at trial (barring testimony of officers about facts and circumstances of stop, investigation, and arrest) because State failed to produce POD (police observational device) camera video of those events, despite Defendant's timely request for videos. Sanction imposed was within bounds of court's discretion for this discovery violation. (PIERCE and HYMAN, concurring.)

People v. Carballido, 2015 IL App (2d) 140760 (December 15, 2015) Lake Co. (JORGENSEN) Reversed and remanded.

Defendant was convicted, after jury trial, of first-degree murder, under accountability theory. Defendant, age 17 at time of offense, drove a car to and from scene where 21-year-old member of gang allegedly shot and killed 15-year-old whom shooter believed associated with a rival gang. Court erred in third-stage denial of Defendant's postconviction petition. It is beyond reasonable dispute that Defendant made substantial showing of a constitutional violation, as State failed to disclose field notes of an investigating officer. If defense had been given access to notes prior to trial, it could have impeached officer on central issue of Defendant's foreknowledge of gun used in the offense. Defendant's knowledge of the gun was critical to State's shared-intent theory of accountability.(McLAREN and BIRKETT, concurring.)

People v. Gray, 2016 IL App (2d) 140002 (March 2, 2016) DuPage Co. (McLAREN) Affirmed. (Court opinion corrected 3/2/16.) Court properly entered second-stage dismissal of Defendant's petition for relief under Post-Conviction Hearing Act from his conviction, based on negotiated guilty plea, of possession of cocaine with intent to deliver. State is not required to disclose potential impeachment evidence before a defendant pleads guilty. Alleged misdeeds of 3 police officers did not involve facts of Defendant's case or any conduct in which Defendant participated; thus, State's failure to disclose to Defendant that these officers had been charged with criminal misconduct,did not invalidate his guilty plea. (SCHOSTOK and ZENOFF, concurring.)

DOUBLE JEOPARDY

People v. Jackson, 2015 IL App (1st) 123695 (July 27, 2015) Cook Co., 1st Div. (HARRIS) Affirmed and remanded.

Defendant was found guilty but mentally ill, after bench trial, of first degree murder. Appellate court then reversed circuit court and remanded for new trial, holding that court adopted prosecutorial role when questioning defense expert and by relying on matters based on private knowledge of court outside the record. Retrial of Defendant for first degree murder does not offend prohibition against double jeopardy because judgment in initial trial was reversed due to trial errors, not evidentiary insufficiency. Collateral estoppel does not apply due to absence of different causes of action and a final adjudication on merits. (DELORT and CUNNINGHAM, concurring.)

People v. Espinoza, 2015 IL 118218 (December 3, 2015) Will Co. (THOMAS) Appellate court affirmed.

A charging instrument that identifies the victim of a nonsexual offense only as "a minor" is insufficient pursuant to Section 111-3 of Code of Criminal Procedure. Courts properly dismissed criminal complaints based on insufficiency of those charging instruments.Under Section 111-3,

State was required to identify the victims, and as State failed to amend charging instruments, and refused to identify victims by their names, initials, or any description of than "a minor", to strictly comply with Section 111-3 prior to trial, courts properly dismissed them. (GARMAN, FREEMAN, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

People v. Meuris, 2016 IL App (2d) 140194 (March 30, 2016) Boone Co. (BURKE) Reversed and remanded.

Defendant was convicted of failure to stop after an accident involving personal injury or death. Defendant, who was driving a semi, admitted that he fell asleep and traveled off roadway, but stated that he thought he hit a road sign or mile marker. Defendant had struck a person standing next to driver's side of pickup truck stopped on shoulder, who died from injuries. The charge required the State to prove that Defendant knew that he was in an accident with another person. No double jeopardy impediment to new trial, as Defendant does not argue that evidence was insufficient.(SCHOSTOK and HUDSON, concurring.)

DUE PROCESS

People v. Stapinski, 2015 IL 118278 (October 8, 2015) Will Co. (BURKE) Appellate court reversed; circuit court affirmed; remanded.

Defendant was indicted on a single count of unlawful possession of a controlled substance (ketamine) with intent to deliver. Defendant's substantive due process rights were violated when State breached cooperation agreement police sergeant entered into with Defendant. Court properly granted Defendant's motion to dismiss indictment. Cooperation agreements, where State agrees to limit a prosecution in some manner in consideration for Defendant's cooperation, are construed under contract principles, and construed strictly against the government. Whether cooperation agreement was "valid" in sense that it was approved by State's Attorney is irrelevant. Defendant relied upon cooperation agreement and incriminated himself in the process of fulfilling his obligations under the agreement. Thus, Defendant suffered prejudicial violation of due process rights when, more than a year after Defendant was detained and after he had fulfilled his obligations, by assisting in undercover efforts leading to arrests, he was charged with possession of ketamine. (FREEMAN, THOMAS, KILBRIDE, KARMEIER, and THEIS, concurring.)

DUI

[People v. Morales](#), 2015 IL App (1st) 131207 (January 6, 2015) Cook Co. (FITZGERALD SMITH) Reversed.

Court improperly rescinded DUI Defendant's statutory summary suspension of his driver's license. No due process violation where Defendant was provided notice and a hearing. Defendant was served with notice on date he was arrested for DUI, and had opportunity to present any objections at court hearing. That a letter "Notice of Summary Suspension" from Secretary of State arrived by mail when his suspension had already begun was irrelevant, as it was merely a confirmation that his license was suspended, and did not impact his procedural due process rights. (HOWSE and EPSTEIN, concurring.)

[People v. Bozarth](#), 2015 IL App (5th) 130147 (January 26, 2015) Wayne Co. (STEWART) Reversed.

Defendant was charged with two counts of DUI, and convicted of one count after bench trial. Court erred in denying Defendant's motion to quash arrest and suppress evidence. Defendant was seized within meaning of 4th Amendment, as officer testified he had his gun drawn when he exited his vehicle to make contact with Defendant, which is show of authority. Officer's testimony establishes that he did not have any suspicion of criminal activity when he first began following Defendant's vehicle, and that he followed vehicle onto private drive to see if anything "might happen". Officer could not articulate any facts to support reasonable suspicion that Defendant had committed, or was about to commit, a crime that would justify investigatory stop.(GOLDENHERSH, concurring; WELCH, dissenting.)

[People v. Taiwo](#), 2015 IL App (3d) 140105 (April 3, 2015) Will Co. (WRIGHT) Affirmed.

Defendant was convicted, after bench trial, of DUI, improper lane usage, and failure to notify authorities of an accident. Court properly allowed State's motion for directed finding pertaining to existence of probable cause and duration of traffic stop. Court properly allowed State's motion for directed finding pertaining to existence of probable cause and duration of this traffic stop. Thus, court properly denied motion to suppress, as court found that officer first observed a traffic violation before initiating the stop. In ruling on motion to quash arrest or suppress evidence, lawfulness of traffic stop,must be measured by trial judge, rather than dictated by officer's reasoning formulated under exigent circumstances. Circumstantial evidence supports finding that Defendant was in actual, physical control of vehicle before driver of another vehicle picked her up and offered her a ride home. Evidence was sufficient to establish Defendant's guilt of DUI beyond a reasonable doubt. (LYTTON and SCHMIDT, concurring.)

[People v. Lake](#), 2015 IL App (3d) 140031 (April 8, 2015) Will Co. (SCHMIDT) Affirmed in part and vacated in part.

Defendant pled guilty to aggravated DUI; he struck a horse which his girlfriend was riding, causing horse to buck and girlfriend died from her injuries; another woman riding horse was

seriously injured. Sentence of nine years was not disproportionate to nature of offense. Defendant had been driving about 46 mph on a dark road with no artificial lighting in early morning hours. Defendant had 2 prior DUI convictions. No evidence that court failed to consider mitigating factors. Presentence incarceration credit applies against eligible fines.(McDADE and WRIGHT, concurring.)

[People v. Scarbrough](#), 2015 IL App (3d) 130426 (May 13, 2015) Will Co. (McDADE) Affirmed. Defendant entered blind plea of guilty to driving while license revoked, and to obstructing identification. Court properly found that Defendant was not eligible for court supervision, as his revocation was related to a DUI charge. During plea agreement negotiations, it was established that Defendant had been convicted of driving while license revoked in connection with DUI charge, and thus Defendant was required to serve minimum 30 days in jail. Bond forfeiture for DUI is equivalent of conviction for DUI for purposes of Driver Licensing Law. (CARTER and WRIGHT, concurring.)

[People v. Moreno](#), 2015 IL App (2d) 130581 (June 17, 2015) DuPage Co. (HUTCHINSON) Affirmed.

Defendant was convicted of aggravated DUI resulting in a death, aggravated failure to report accident resulting in death, and disorderly conduct. As Defendant made no attempt to report accident, his argument that he was physically unable to go to a police station to make a report, because he was being detained by police, fails. Evidence showed that Defendant knew of accident yet made no attempt to report his involvement, even after being arrested for obstruction of justice and confronted with knowledge of victim's death. (ZENOFF and SPENCE, concurring.)

[People v. Gutierrez](#), 2015 IL App (3d) 140194 (July 20, 2015) Will Co. (HOLDRIDGE) Affirmed.

Defendant police officer was involved in traffic accident while off duty, and arrested for DUI; he took PBT (preliminary breath test) but refused any other testing. Defendant's drivers license was then summarily suspended. PBT results were not inadmissible under fifth amendment, as it protects against use of testimonial evidence, not physical evidence; and it prevents introduction of compelled testimony at criminal proceeds, rather than civil proceedings such as SSS proceedings. PBT statute does not require affirmative consent. Officer is not required to inform suspect of his right to refuse PBT testing. Court properly admitted PBT results, and thus court properly denied Defendant's petition to rescind SSS, as PBT showed 0.249 BAC. (CARTER and WRIGHT, concurring.)

[People v. Stutzman](#), 2015 IL App (4th) 130889 (August 4, 2015) Livingston Co. (STEIGMANN) Affirmed in part and vacated in part; remanded with directions.

Defendant entered guilty plea, pursuant to negotiated guilty plea agreement, to reckless homicide and aggravated DUI. Defendants' convictions violated the one-act, one-crime doctrine. Reckless

homicide conviction is vacated as it was based on same physical act as aggravated DUI conviction; at moment of his passenger's death (who fell from Jeep, which had no doors, as he attempted left turn), he drove while intoxicated.(HOLDER WHITE and APPLETON, concurring.)

[People v. Torruella](#), 2015 IL App (2d) 141001 (August 17, 2015) DuPage Co. (ZENOFF) Affirmed.

Defendant was convicted, after bench trial, of driving with BAC of 0.08 or more. Court properly admitted as a business record a report of accuracy checks performed on instrument used to administer breath test. State had filed motion in limine seeking admission of accuracy checks as business records, with attached verified certification signed by recordkeeper. That certification was dated two years after records were created did not render records inadmissible, as certification indicated that records were created at or near time of matters set forth in records, which were dated in months of and after Defendant's arrest. Officer's testimony that logbook and printouts of automated accuracy checks were retained in regular course of business was sufficient to lay foundation for admission of printouts. Court properly sustained State's objections to testimony of expert, who was qualified in areas of Intox EC/IR machines and standardized field sobriety tests (FSTs), about accuracy of Defendant's breath test result in light of his performance on FSTs. (SCHOSTOK and SPENCE, concurring.)

[People v. Smith](#), 2015 IL App (1st) 122306 (August 21, 2015) Cook Co., 6th Div. (ROCHFORD) Reversed.

(Modified upon denial of rehearing 11/13/15.) Jury convicted Defendant of driving with alcohol concentration of 0.08 or more. State failed to establish foundational requirement that his Breathalyzer test results were certified as accurate at least once within 62 days prior to his test. Although electronic certification contains raw data from accuracy tests conducted electronically by State Police, it provides no interpretation of that data, so it cannot be determined whether Breathalyzer test performed within accuracy tolerance and was certified as accurate for that time period. (HOFFMAN and HALL, concurring.)

[People v. Moises](#), 2015 IL App (3d) 140577 (August 24, 2015) Will Co. (SCHMIDT) Reversed and remanded.

Defendant was charged with misdemeanor DUI and several traffic offenses. State turned over squad car video recording of traffic stop, which did not capture Defendant's field sobriety tests because arresting officer directed Defendant to perform tests in area outside view of camera. Court granted Defendant's motion for sanctions, on grounds that officer's direction resulted in no video being created, and barred testimony about Defendant's field sobriety tests. As no discovery violation occurred, because State neither destroyed nor withheld squad car video from Defendant, court erred in granting motion for sanctions.(LYTTON, specially concurring; HOLDRIDGE, dissenting.)

[People v. Way](#), 2015 IL App (5th) 130096 (September 25, 2015) St. Clair Co. (MOORE)
Reversed and remanded.

Defendant was convicted, after stipulated bench trial, of aggravated DUI. Parties stipulated that accident resulted in great bodily harm to a passenger in her vehicle, and to driver of other vehicle with which she collided. Parties stipulated that Defendant had, in her system, THC metabolite, from use of cannabis, and that Defendant's vehicle crossed into other driver's lane. Court erred in denying Defendant the right to present a defense, as she was not allowed to contest the "proximate cause" element of her charge. Defendant should have been allowed to present physician's testimony that Defendant has low blood pressure, and that it is possible that loss of consciousness right before accident was caused by this condition, for court to decide whether Defendant's sudden illness was sole and proximate cause of accident.(STEWART and SCHWARM, concurring.)

[People v. Phillips](#), 2015 IL App (1st) 131147 (October 20, 2015) Cook Co., 2d Div. (HYMAN)
Affirmed.

Defendant was convicted of DUI. State presented sufficient evidence from a credible police officer that Defendant emitted a strong odor of alcohol, exhibited slightly slurred speech, had bloodshot eyes, and performed poorly on field-sobriety tests. Appellate court declines to reweigh evidence against Defendant; weaknesses in evidence noted by Defendant do not lead appellate court to conclude that evidence of guilt was so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of Defendant's guilt. (NEVILLE and SIMON, concurring.)

[People v. Blakey](#), 2015 IL App (3d) 130719 (November 25, 2015) Henry Co. (McDADE)
Affirmed.

Defendant, then age 19, was convicted of aggravated DUI and sentenced to 12 years. Three back-seat passengers died in crash. Admissions of his front-seat passenger's out-of-court statement (in the hospital, to the police) that he heard a back seat passenger yell to the driver that he shouldn't be doing that, in the moments before the crash, did not meet requirements for admissibility as substantive evidence, and was improperly admitted for purposes of impeachment. State's case was not affirmatively damaged by passenger's professed lack of memory as to that statement. Error was harmless, as Defendant admitted to police that he was "huffing" from a can of compressed air in the vehicle while driving. (LYTTON and O'BRIEN, concurring.)

[People v. Wuckert](#), 2015 IL App (2d) 150058 (December 10, 2015) Kane Co. (BURKE)
Reversed and remanded.

Defendant was charged with driving under the influence of intoxicating compounds (DUI). Court granted Defendant's motion to suppress evidence that was allegedly the product of an illegal arrest. Court then allowed results of urine test that hospital personnel administered to Defendant shortly after his arrest; court ultimately suppressed the test results. Although Defendant was arrested illegally, the test results were not tainted by the arrest, as they were the

product of actions by hospital employees not acting at instigation or prompting of the police. Fourth amendment does not apply to a search or seizure effected by a private individual not acting as agent of government or with participation or knowledge of any governmental official. Thus, court erred in suppressing results of urine test done by hospital personnel.(HUTCHINSON and ZENOFF, concurring.)

[People v. Harrison](#), 2016 IL App (5th) 150048 (February 18, 2016) St. Clair Co. (SCHWARM) Affirmed.

Defendant refused to submit to breath test after his DUI arrest, where he hit a motorcyclist who sustained massive leg injury resulting in partial amputation of leg. Defendant was taken to hospital where samples of his blood were drawn without warrant or consent. Test results shown BAC over twice the legal limit of 0.08. Court properly denied Defendant's motion to suppress test results, as good-faith exception to exclusionary rule was applicable. At time of Defendant's arrest, binding precedent of Illinois Supreme Court's 2005 Jones decision held that Section 11-501.2(c)(2) of Vehicle Code clearly allowed for warrantless, nonconsensual blood draws in all DUI cases. Section 11-5-1.2(c)(2) is constitutional as written, and Defendant's blood was drawn solely on basis of Jones court's interpretation of statute.(WELCH and GOLDENHERSH, concurring.)

EVIDENCE (corpus)

[People v. Lawson](#), 2015 IL App (2d) 140604 (March 3, 2015) Kane Co. (SCHOSTOK) Affirmed.

Defendant was convicted of two counts of forgery, for letter of diminished capacity purportedly written by treating psychologist. Letter was provided to financial adviser to facilitate transfer of assets from trust of Defendant's father to Defendant's mother. Defendant admitted to psychologist, who had refused to write such letter, that she had written the letter with his signature. Evidence was sufficient to show that a reasonable person might be deceived into accepting the document as genuine; letter was presented with the name of psychologist who had evaluated Defendant's father, and it was on letterhead from nursing home where he had stayed. Although document was rejected by financial adviser, it had the potential to have a legal effect. Intent to defraud can exist even though funds are sought on behalf of another person. (ZENOFF and BURKE, concurring.)

[People v. Gonzalez](#), 2015 IL App (1st) 132452 (June 30, 2015) Cook Co., 2d Div. (PIERCE) Reversed.

After joint bench trial with 3 co-defendants, Defendant was found guilty of reckless conduct, based on his act of holding a brick and glass bottle in his hand while yelling gang slogans to passing vehicles and pedestrians.State failed to prove Defendant guilty of reckless conduct

beyond a reasonable doubt. Police officer was the only witness who testified that he saw "the defendants" throwing bricks, but also unequivocally testified that he did not see any of "the defendants", including this Defendant, throwing bricks. Where multiple Defendants are tried simultaneously, State is not relieved of its burden to make record clearly establishing alleged conduct of each individual Defendant beyond a reasonable doubt. (SIMON and LIU, concurring.)

[People v. Rankin](#), 2015 IL App (1st) 133409 (July 16, 2015) Cook Co., 6th Div. (HOFFMAN) Reversed in part and vacated in part; remanded with instructions.

Defendant was convicted, after bench trial, of residential burglary and sentenced to 84 months imprisonment and then 3 years mandatory supervised release (MSR), with fines and costs of \$549 and \$450 fee for his court-appointed defense counsel. Evidence of record is so unsatisfactory that it creates reasonable doubt of Defendant's guilt. Remanded for court to conduct evidentiary hearing to consider Defendant's financial circumstance and ability to pay for costs of court-appointed counsel. (HALL and LAMPKIN, concurring.)

[People v. Shaw](#), 2015 IL App (1st) 123157 (September 17, 2015) Cook Co., 2d Div. (HYMAN) Reversed.

Court acquitted Defendant of armed robbery, noting that officers did not recover the weapon or the funds, but found Defendant guilty of lesser included offense of robbery. Evidence at trial was insufficient to convict Defendant, where numerous aspects of victim's testimony contained material inconsistencies, including accounts contrary to evidence from surveillance camera and testimony from police officers. Viewed in their entirety, impeachments of victim show that victim's account at trial repeatedly strayed from what he told police and from surveillance videos. (NEVILLE and SIMON, concurring.)

[People v. Klein](#), 2015 IL App (3d) 130052 (September 28, 2015) Will Co. (WRIGHT) Affirmed. (Modified upon denial of rehearing 9/28/15.) Defendant, an in-home day care provider, was convicted, after bench trial, of aggravated battery of a child, as 7-month-old infant in her care suffered brain injury. Treating physicians concluded that infant's injuries were non-accidental and resulted from significant amount of force. There were several injuries to multiple planes of infant's body that could not have been caused by infant himself. Evidence was sufficient to prove Defendant guilty beyond a reasonable doubt. Trial judge's finding of guilty, standing alone, does not support view that he bore any animosity, hostility, or distrust toward Defendant. Thus, court properly denied 2 motions for substitution for cause. (CARTER and LYTTON, concurring.)

[People v. Garcia](#), 2015 IL App (2d) 131234 (October 20, 2015) Kane Co. (JORGENSEN) Affirmed.

Defendant was convicted, after jury trial, of threatening a public official, and sentenced to 54 months in prison. Conviction based on evidence that Defendant made death threats against judge after she had found him in contempt of court. Although Defendant did not make threats in

Judge's presence, he made them in presence of police and sheriff's department personnel, and judge was made aware of threats, and was thus sufficient within meaning of Section 12-9 of Code. Jury could reasonably infer that it was a practical certainty that threats, made in presence of police and sheriff's department, would be brought to judge's attention, thus sufficient to meet requirement that Defendant acted knowingly. (McLAREN and HUDSON, concurring.)

[*People v. Ford*](#), 2015 IL App (3d) 130810 (October 28, 2015) Henry Co. (CARTER) Affirmed. Defendant, then age 19, was convicted of 2 counts of aggravated battery and 2 counts of battery, sentenced to 3 years on first aggravated battery charge but not sentenced on remaining charges. Victim, age 15, gave consent for Defendant to place him in a choke hold in exchange for cigarettes. While in choke hold, victim gave signal for Defendant to release him, but Defendant did not, and victim lost consciousness, had a seizure, and awoke with a nosebleed. Consent is not a valid defense to aggravated battery. Evidence was sufficient to reasonably conclude without need for expert medical testimony that Defendant's choke hold caused victim's nosebleed. Factfinder could reasonably infer that Defendant knowingly caused victim to lose consciousness, which is a form of bodily harm. (McDADE and LYTTON, concurring.)

[*People v. Abrams*](#), 2015 IL App (1st) 133746 (December 22, 2015) Cook Co., 2d Div. (HYMAN) Affirmed.

Defendant, then age 68, was convicted of theft of \$1.8 million from his employer/business partner's business properties, and sentenced to 12 years. Loan applications on partner's residence were irrelevant to proving theft of business income. Partner's residence was neither part of the business nor did it generate income. Jury heard testimony as to partner's income and properties, and Defendant cross-examined him based on his income tax returns and business documents. Any additional documents, even were they relevant, would have been cumulative. Court properly considered aggravating and mitigating factors, and sentence was within range for Class 1 felony. Court's isolated remark "ask your next question" was a direction to defense counsel to proceed and was not prejudicial. (NEVILLE and SIMON, concurring.)

[*People v. Netisingha*](#), 2015 IL App (1st) 133520 (December 29, 2015) Cook Co., 2d Div. (SIMON) Reversed.

Defendant was convicted, after bench trial, of theft and other financial crimes for allegedly buying merchandise he was led to believe was stolen and then selling it online. Property obtained by Defendant from undercover police investigator was not stolen, and thus a necessary element of the theft offense is absent. As convictions for theft are vacated, conviction for operating a continuing financial crime enterprise, which is based on existence of theft convictions, must also be vacated. Defendant's conviction for online sale of stolen property, because State did not prove that property was gained by unlawful means. (PIERCE and HYMAN, concurring.)

EVIDENCE (science)

[People v. Tademy](#), 2015 IL App (3d) 120741 (February 13, 2015) Will Co. (O'BRIEN) Affirmed in part and vacated in part.

Defendant was convicted, after jury trial, of attempted first degree murder, aggravated battery with a firearm, and aggravated battery of a child for shooting his 12-year-old son in the head. Jury heard two expert opinions reaching opposite conclusions, and lay testimony as to Defendant's actions, and was free to accept opinion of State's expert that Defendant appreciated criminality of his actions. Jury's finding that Defendant was sane was not against manifest weight of evidence. Jail psychiatrist's diagnosis of adjustment disorder with depressed mood was not offered for truth of matter asserted, but to show facts and conclusions underlying experts' opinions, and thus experts were properly allowed to testify as to that diagnosis. State's reference to diagnosis in argument was not plain error, as evidence was not closely balanced. Two aggravated battery convictions are vacated under one-act, one-crime doctrine. (HOLDRIDGE and WRIGHT, concurring.)

[People v. Jones](#), 2015 IL App (1st) 121016 (March 31, 2015) Cook Co., 3d Div. (PUCINSKI) Reversed and remanded.

Defendant was convicted, after jury trial, of first-degree murder based on circumstantial evidence and expert opinion testimony of firearm/toolmark examiner who identified bullet found by victim as being fired from Defendant's gun. Court erred in admitting testimony of firearm/toolmark examiner, as expert's testimony failed minimum foundational requirements for general expert testimony. Expert testified that he found "sufficient agreement" but did not testify to any facts that formed bases or reasons for this ultimate opinion that bullet matched Defendant's gun. Expert's opinion testimony substantially prejudiced Defendant, as it essentially placed murder weapon in Defendant's hands. (HYMAN, concurring; MASON, dissenting.)

[People v. Navarro](#), 2015 IL App (1st) 131550 (September 8, 2015) Cook Co., 2d Div. (HYMAN) Affirmed.

Court properly denied Defendant's pro se "motion for ballistic testing" under Section 116-3 of Code of Criminal Procedure. Integrated Ballistic Identification System (IBIS) testing of bullet shells would not materially advance Defendant's claim of actual innocence due to State's strong evidence, including 4 witnesses identifying Defendant as the shooter. Defendant cannot establish that IBIS search has scientific potential to produce new, noncumulative evidence materially relevant to actual innocence as required by Section 116-3 of Code. (PUCINSKI and LAVIN, concurring.)

[People v. Lerma](#), 2016 IL 118496 (January 22, 2016) Cook Co. (THOMAS) Appellate court affirmed.

Victim was shot to death while sitting on the unlit front steps of his home. Victim, immediately after being shot, told family members it was Defendant who shot him, and this eyewitness

identification was admitted into evidence under excited utterance exception to hearsay rule. The other eyewitness identification was by female companion who was sitting with victim on the steps when a man dressed all in black approached the house and began shooting at them; companion admitted that she had seen Defendant only once or twice before shooting, and did not know him. Qualified expert would present relevant and probative testimony directly addressing State's only evidence against Defendant. Court's reasons for denying expert's testimony were expressly contradicted by expert's report and inconsistent with actual facts. Under these specific facts, trial court abused its discretion when it denied Defendant's motion to allow expert testimony as to reliability of eyewitness identifications.(GARMAN, FREEMAN, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

[People v. Pike](#), 2016 IL App (1st) 122626 (January 27, 2016) Cook Co., 3d Div. (PUCINSKI) Affirmed.

(Court opinion corrected 1/29/16.) The admission of DNA expert testimony of a 50% probability of inclusion for a random person in the population as a possible contributor to a mixed DNA profile was error because it was irrelevant, as it did not tend to make the issue of Defendant's identification more likely than not. The admission of this evidence was not plain error, as error was not serious and evidence was not closely balanced as both victims identified Defendant. Court is not required to recite all counts against a defendant in admonishment of a waiver of the right to counsel pursuant to Rule 401(a). Admonishment substantially complies with Rule 401(a) where court states nature of charge and possible maximum punishment, even though it did not recite every count. (LAVIN, concurring; HYMAN, dissenting.)

EVIDENCE (technology)

[People v. Sanders](#), 2015 IL App (4th) 130881 (June 5, 2015) McLean Co. (KNECHT) Affirmed. Defendant was convicted, after jury trial, of two counts of criminal sexual assault, alleging that he knew the victim was unable to give consent due to intoxication. Defendant was a bartender who had been providing victim with free alcohol all night. As nothing in record indicates Defendant knew what victim was saying in her text messages to bouncer, content of messages was irrelevant, and court allowed bouncer to testify as to victim's cognitive abilities during messaging. Court properly denied Defendant's Batson challenge, and did not err by failing to sua sponte address factors other than deciding that no pattern of discrimination had been shown. Court properly prohibited defense counsel from introducing content of sexually suggestive text messages victim sent to bouncer on night of offense. (STEIGMANN and APPLETON, concurring.)

[People v. Macias](#), 2015 IL App (1st) 132039 (June 26, 2015) Cook Co., 5th Div. (McBRIDE) Affirmed.

Defendant was convicted, after jury trial, of first degree murder of one victim, and of attempted murder and aggravated battery of another victim, and sentenced to total 75 years. Court did not err in admitting MySpace photographs, as Defendant was not identified as a suspect based on MySpace photos, and presence of caption does not impact Defendant's case so as to cause prejudice to Defendant. Photos were relevant to show course of investigation, which led to co-Defendant, who later implicated Defendant. (PALMER and REYES, concurring.)

EVIDENCE (testimony)

[People v. Mister](#), 2015 IL App (4th) 130180 (January 23, 2015) Champaign Co. (KNECHT) Affirmed in part and vacated in part; remanded with directions.

Defendant was convicted, after jury trial, of armed robbery (while carrying a firearm) of University of Illinois student when he returned to campus after winning \$23,000 at casino in Peoria, and was sentenced to 30 years. A lay witness may testify as to identity of a person depicted in a surveillance video if there is some basis for concluding the witness is more likely to correctly identify the person from the videotape than is the jury. Rational trier of fact could have found victim viewed Defendant under circumstances permitting positive identification, although he did not identify him in courtroom. State presented sufficient evidence to allow jury to find Defendant was the person who committed armed robbery of victim. (POPE and TURNER, concurring.)

[People v. Betance-Lopez](#), 2015 IL App (2d) 130521 (January 28, 2015) Kane Co. (ZENOFF) Affirmed.

(Court opinion corrected 1/29/15.) Defendant was convicted, after bench trial, of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. Court properly relied on written transcript, in which English portion of interview of Defendant by police officer was transcribed verbatim, and Spanish portion of interview was translated into English, as substantive evidence, although audio recording of interview, including live translation by DCFS investigator, was played for court. It would have been impractical or even impossible for court to rely on Spanish portions of recording as substantive evidence. State proved Defendant's guilt beyond a reasonable doubt. (JORGENSEN and BIRKETT, concurring.)

[People v. Wright](#), 2015 IL App (1st) 123496 (May 21, 2015) Cook Co., 4th Div. (COBBS) Reversed and remanded with instructions.

Defendant was convicted, after jury trial, of four counts of armed robbery while armed with a firearm. At hearing on record outside presence of jury, with codefendant present, codefendant invoked his right not to testify under fifth amendment, and he was thus unavailable to testify for purposes of Rule 804(b)(3). However, Defendant failed to establish conditions for admissibility under Rule 804(b)(3) and thus court properly excluded codefendant's statement. Evidence was

sufficient to find Defendant guilty of armed robbery with a firearm beyond a reasonable doubt. Even though witnesses viewed only the handle of the gun, their testimonies as to their having viewed guns before, and ample opportunity to view weapon at close distance, was sufficient identification.(FITZGERALD SMITH and ELLIS, concurring.)

[People v. McLaurin](#), People v. McLaurin (May 4, 2015) Cook Co., 1st Div. (CUNNINGHAM) Affirmed.

Defendant was convicted, after second jury trial, of first-degree murder. Witness' prior inconsistent statements contained in his written statement and grand jury testimony were properly admitted as substantive evidence. Written statement, signed by witness, described events of shooting to which he was eyewitness. Statements that phrase "you stretched buddy" meant that Defendant killed the victim, in witness' prior written statement and grand jury testimony, met requirements of Rule 701, and thus were properly admitted. Other statements, which did not describe any misconduct or criminal acts committed by Defendant but only witness' observations that he had seen Defendant in possession of some guns at some unknown time, were not other-crimes evidence.(DELORT and HARRIS, concurring.)

[People v. Moore](#), 2015 IL App (1st) 141451 (November 24, 2015) Cook Co., 2d Div. (PIERCE) Affirmed in part and vacated in part.

(Court opinion corrected 12/3/15.) Defendant was convicted, after bench trial, of armed robbery with a handgun. Multiple suspects in same lineup does not render lineup impermissibly suggestive. Witness, who positively identified Defendant in lineup 8 days after robbery had ample opportunity to view Defendant, and paid much attention to details. Thus, witness' identification testimony was reliable. Court erred in imposing \$150 public defender fee without holding sufficient hearing to determine Defendant's financial circumstances and ability to pay.(NEVILLE and SIMON, concurring.)

[People v. Blakey](#), 2015 IL App (3d) 130719 (November 25, 2015) Henry Co. (McDADE) Affirmed.

Defendant, then age 19, was convicted of aggravated DUI and sentenced to 12 years. Three back-seat passengers died in crash. Admissions of his front-seat passenger's out-of-court statement (in the hospital, to the police) that he heard a back seat passenger yell to the driver that he shouldn't be doing that, in the moments before the crash, did not meet requirements for admissibility as substantive evidence, and was improperly admitted for purposes of impeachment. State's case was not affirmatively damaged by passenger's professed lack of memory as to that statement. Error was harmless, as Defendant admitted to police that he was "huffing" from a can of compressed air in the vehicle while driving. (LYTTON and O'BRIEN, concurring.)

People v. Cacini, 2015 IL App (1st) 130135 (December 11, 2015) Cook Co., 5th Div. (LAMPKIN) Reversed and remanded.

Defendant was convicted, after jury trial, of attempted first degree murder of police officer and aggravated battery of another police officer. Court's failure to instruct jury on State's burden to disprove Defendant's justification for his use of force in self-defense was plain error. Court did not abuse its discretion in concluding after in camera inspection that confidential records of complaints against the arresting police officers were not admissible at trial or subject to disclosure. Court used proper review procedure and did not err in its decision as to remoteness and irrelevancy of information in OPS (Office of Professional Standards) files. As to 9 files of both officers that were not too remote in time, allegations of misconduct were completely distinct from present case, and all claims were unfounded or not sustained by sufficient evidence.(REYES and PALMER, concurring.)

People v. Williams, 2016 IL 118375 (January 22, 2016) Tazewell Co. (FREEMAN) Appellate court affirmed.

Two different interpretations of Section 408(a) of Illinois Controlled Substances Act, advanced by State and by defense, are both reasonable. Thus, Section 408(a) of the Act is ambiguous, and it is appropriate to invoke the rule of lenity. Section 408(a) of the Act applies only to offenses committed in violation of the Act, and cannot apply to double Defendant's enhanced Class X potential maximum sentence of 30 years.(GARMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

People v. Thompson, 2016 IL 118667 (January 22, 2016) Hamilton Co. (BURKE) Appellate court reversed; circuit court affirmed.

(Correction 3/29/16 to opinion modified upon denial of rehearing 3/28/16.) Defendant was convicted of violating Methamphetamine Control and Community Protection Act, after jury trial at which court admitted lay opinion identification testimony of 4 witnesses, pursuant to Rule 701 of Illinois Rules of Evidence. Witnesses identified Defendant as the person depicted in surveillance video or still photos taken from crime scene, showing theft of anhydrous ammonia and tampering with equipment at ag supply facility. Opinion identification testimony is admissible under Rule 701 if the testimony is rationally based on perception of witness and testimony is helpful to clear understanding of witness's testimony or determination of a fact in issue. A showing of sustained contact, intimate familiarity, or special knowledge of the Defendant is not required. Lay identification testimony is admissible under these principles as long as its probative value outweighs any prejudice under Rule 403. (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and THEIS, concurring.)

People v. Grant, 2016 IL App (3d) 140211 (January 29, 2016) Peoria Co. (CARTER) Reversed and remanded.

Defendant was convicted, after jury trial, of aggravated criminal sexual assault. Court erred in denying Defendant's motion for forensic testing, as Defendant satisfied each element of Section

116-3 of Code of Criminal Procedure, for posconviction motion for forensic testing. Defendant put the question of identity squarely at issue at trial, as he disputed being the person who committed the crime, and stated at trial that it was victim's brother who committed the crime. (O'BRIEN and McDADE, concurring.)

[People v. Moore](#), 2016 IL App (1st) 133814 (February 18, 2016) Cook Co., 4th Div. (COBBS) Affirmed.

Defendant was convicted, after jury trial, of first degree murder and attempted first degree murder. Photo arrays are only potentially useful and not material and exculpatory, and thus Defendant was required to show that State acted in bad faith in failing to preserve photo arrays. As no evidence that State acted in bad faith, no due process violation. Court was within its discretion in not imposing sanctions for missing photo arrays, and was reasonable in admonishing jury that it was permitted to make a negative inference. Court properly allowed testimony of codefendant's confession, and State and court took significant precautions to not introduce substantive evidence from confession. (McBRIDE and HOWSE, concurring.)

[People v. Thompson](#), 2016 IL App (1st) 133648 (March 8, 2016) Cook Co., 2d Div. (HYMAN) Affirmed.

(Court opinion corrected 3/10/16.) Defendant and a codefendant were convicted, after separate jury trials, of first degree murder and attempted first degree murder, for shooting of 16-year-old and 15-year-old cousins in front of their home. Potential problems with identifications of 3 State witnesses were presented to jury. Prior consistent statement of victim's brother to his father identifying Defendant and codefendant as the shooters was properly admitted when testified to by that witness as a statement of identification. Police officer's testimony as to the statement should not have been admitted, but any error was harmless. State's remarks in opening statements and closing arguments were questionable but do not rise to level of clear and obvious error. (NEVILLE and SIMON, concurring.)

FINES, FEES & RESTITUTION

[People v. Bruun](#), 2015 IL App (2d) 130598 (February 27, 2015) Kane Co. (McLAREN) Affirmed.

Court entered order requiring Defendant, who had been convicted of theft and financial exploitation of an elderly or disabled person, to make monthly restitution payments over a five-year period. Defendant remained obligated to make full restitution. Court later reduced amount of monthly installment payments, but did not extend period during which payments were due. Order did not become unenforceable as to unpaid amounts that became due during the five-year period. (JORGENSEN and BIRKETT, concurring.)

[People v. McClinton](#), 2015 IL App (3d) 130109 (March 5, 2015) Whiteside Co. (LYTTON) Vacated in part and affirmed in part; remanded with directions.

Defendant was convicted, after jury trial, of delivery of less than one gram of cocaine, and he was sentenced to 7 years. Court erred in ordering reimbursement for public defender's service when Defendant was not given notice of hearing and was not allowed to present evidence as to his ability to pay. Court's actions in pronouncing amount to be paid to PD was "some sort of a hearing", but did not meet due process requirements. Case remanded for proper hearing on reimbursement. (O'BRIEN and SCHMIDT, concurring.)

[People v. Daniels](#), 2015 IL App (2d) 130517 (March 6, 2015) Lake Co. (HUDSON) Affirmed in part and vacated in part.

Defendant was convicted of burglary after jury trial. Preindictment delay was due to defense counsel's numerous requests for continuances; thus, no error in 79-day delay of indictment. Public defender fee vacated, as court failed to conduct hearing on Defendant's financial resources, to determine his ability to pay public defender fee. (McLAREN and SPENCE, concurring.)

[People v. Rankin](#), 2015 IL App (1st) 133409 (July 16, 2015) Cook Co., 6th Div. (HOFFMAN) Reversed in part and vacated in part; remanded with instructions.

Defendant was convicted, after bench trial, of residential burglary and sentenced to 84 months imprisonment and then 3 years mandatory supervised release (MSR), with fines and costs of \$549 and \$450 fee for his court-appointed defense counsel. Evidence of record is so unsatisfactory that it creates reasonable doubt of Defendant's guilt. Remanded for court to conduct evidentiary hearing to consider Defendant's financial circumstance and ability to pay for costs of court-appointed counsel. (HALL and LAMPKIN, concurring.)

[People v. Jones](#), 2015 IL App (3d) 130601 (August 6, 2015) Peoria Co. (McDADE) Vacated in part and remanded with directions.

Defendant pled guilty to theft in exchange for sentence of 12 months court supervision, and ordered Defendant to pay restitution and court costs. As court did not set fixed deadline for payment of any monetary obligations in any written order, clerk's imposition of collection fee is void. (CARTER, concurring; WRIGHT, specially concurring in part and dissenting in part.)

[People v. Scalise](#), 2015 IL App (3d) 130720 (September 1, 2015) Will Co. (O'BRIEN) Vacated in part and modified in part; remanded with directions.

Defendant pled guilty to 2 counts of predatory criminal sexual assault of a child in exchange for consecutive sentences of 12 years on each charge. Court erred in imposing a \$500 sex crimes assessment where cited statute did not authorize the assessment. The \$500 sex offender fine became effective after date of offenses, and thus cannot be imposed as this would violate prohibition against ex post facto laws. Sentence is void to extent it did not include required \$100 sexual assault fine. (LYTTON, concurring; WRIGHT, dissenting.)

People v. Goossens, 2015 IL 118347 (September 24, 2015) Rock Island Co. (KARMEIER) Appellate court affirmed; circuit court affirmed.

Police sergeant was convicted of intimidation, a Class 3 felony, after he threatened not to respond to 911 calls from a local auto racetrack as long as 2 former police officers were employed there. Defendant's sentence to 2 years probation included condition requiring that he become current on child support. Plain language of Unified Code of Corrections authorizes a trial court to impose any of the enumerated conditions under Section 5-6-3(b), regardless of whether condition relates to nature of Defendant's conviction. Thus, that Section provides express statutory authority to impose payment of child support as a condition of probation. (GARMAN, FREEMAN, THOMAS, KILBRIDE, BURKE, and THEIS, concurring.)

People v. Reed, 2016 IL App (1st) 140498 (January 27, 2016) Cook Co., 3d Div. (LAVIN) Affirmed.

(Court opinion corrected 2/25/16.) Court System fee of \$50 is actually a fine. State's Attorney's Records Automation Fee of \$2 is legally a fee. Public Defender Records Automation Fee is legally a fee. (MASON and FITZGERALD SMITH, concurring.)

People v. Ford, 2016 IL App (3d) 130650 (February 22, 2016) Peoria Co. (LYTTON) Affirmed in part and vacated in part; remanded with directions.

Defendant was convicted of reckless conduct for causing damage to a van owned by narcotics enforcement unit, when his vehicle collided with van in narrow driveway of apartment building where a confidential informant had arranged to buy drugs from Defendant. Evidence was sufficient to establish recklessness, as 2 officers testified that when Defendant saw van approaching his vehicle head on, he accelerated, causing collision. As Enforcement Unit suffered out-of-pocket expenses as a result of Defendant's conduct, it was entitled to restitution. Remanded for calculation of imposing proper fine, fee, assessment and court cost in written order with statutory authority for each. (CARTER and SCHMIDT, concurring.)

People v. Castillo, 2016 IL App (2d) 140529 (March 24, 2016) Lake Co. (McLAREN) Affirmed in part and vacated in part.

(Court opinion corrected 3/25/16.) Court erred in imposing public-defender fee of \$250 after assistant public defender withdrew, as the exchange between assistant PD and court did not satisfy hearing requirement of Section 113-3.1(a) of Code of Criminal Procedure. A hearing, for the purpose of that Section, requires an inquiry, however slight, into issue of Defendant's ability to pay the PD fee. (JORGENSEN and BIRKETT, concurring.)

FITNESS

[People v. Olsson](#), 2015 IL App (2d) 140955 (June 26, 2015) Lake Co. (ZENOFF) Affirmed. Defendant appeals from order following a hearing which he refused to attend conducted per Sections 104-25(g)(2) and (g)(2)(i) of Code of Criminal Procedure. Treatment plan reviews during Section 104-25(g)(2) period of treatment and hearings conducted pursuant to section (g)(2)(i) are not fitness hearings. Thus, Section 104-16(c) of Criminal Code does not apply to such proceedings. Although Defendant had a right to attend hearing, he rejected court's attempts to facilitate his attendance. (HUTCHINSON and SPENCE, concurring.)

[People v. Garcia](#), 2015 IL App (1st) 131180 (September 8, 2015) Cook Co., 2d Div. (HYMAN) Affirmed in part and dismissed in part.

(Modified upon denial of rehearing 2/2/16.) State, in 1998, charged Defendant with 2 counts of unlawful use of a weapon by a felon (UUWF) and 2 counts of simple unlawful use of a weapon (UUW). In 1999, while weapons charges still pending, State charged Defendant with first-degree murder, attempted first-degree murder, and aggravated battery after Defendant brought a gun to a fist fight. After a retrospective fitness hearing, court found that Defendant was fit in 2001 to be tried and sentenced for first-degree murder and to plead guilty to UUWF. Court's dismissal of Defendant's postconviction petition, after third-stage evidentiary hearing, was not manifestly erroneous. State offered credible evidence in form of defense counsels' testimony and a psychiatrist's report finding Defendant fit to stand trial in murder case and that he made his plea in felony weapons case knowingly and intelligently. (MASON and PUCINSKI, concurring.)

[People v. Olsson](#), 2016 IL App (2d) 150874 (March 14, 2016) Lake Co. (ZENOFF) Affirmed. Defendant was charged with sex offenses involving children and was later found unfit to stand trial. Court found Defendant "not not guilty" of several offenses, and ordered extended period of treatment. At expiration of extended treatment period, court remanded Defendant to Department of Human Services for further treatment per Section 104-25(g)(2) of Code of Criminal Procedure. Per Defendant's treating psychiatrist, Defendant refused to attend the hearing scheduled pursuant to Section 104-25(g)(2)(i) of the Code. Defendant cannot complain of lack of treatment when he refuses to cooperate with his treatment staff at mental health center. A defendant's right to be present at every hearing on issue of his fitness does not apply to treatment plan reviews during Section 1-4-25(g)(2) period of treatment or hearings conducted pursuant to Section 104-25(g)(2)(i) of the Code. (HUTCHINSON and SPENCE, concurring.)

GRAND JURY / CHARGING

[People v. Kliner](#), 2015 IL App (1st) 122285 (January 6, 2015) Cook Co., 4th Div. (FITZGERALD SMITH) Affirmed.

Defendant was convicted in 1996 of first degree murder and conspiracy to commit murder. Section 112-2 of Code of Criminal Procedure does not require affirmative showing of compliance that grand jury was impaneled and sworn. Record shows, on face of indictment, that a valid indictment was entered by a sworn grand jury. Thus, court properly denied Defendant's Section 2-1401(f) petition for relief from judgment, as Defendant's convictions are not void. (HOWSE and EPSTEIN, concurring.)

[People v. Booker](#), 2015 IL App (1st) 131872 (May 12, 2015) Cook Co., 2d Div. (LIU) Affirmed in part and reversed in part; remanded with directions.

Defendant was convicted, after bench trial, of home invasion while armed with a dangerous weapon, robbery, attempted robbery, and unlawful restraint. As information charging Defendant with home invasion "while armed with a firearm" did not state a "broad foundation" or "main outline" of home invasion while armed with a dangerous weapon other than a firearm, court erred in convicting Defendant of uncharged offense of home invasion with a dangerous weapon other than a firearm. Home invasion with a dangerous weapon is not a lesser-included offense of home invasion with a firearm. (SIMON and PIERCE, concurring.)

[People v. Wade](#), 2015 IL App (3d) 130780 (October 7, 2015) Kankakee Co. (SCHMIDT) Affirmed.

One Defendant was convicted, after jury trial, of attempted murder and unlawful possession of a weapon by a felon; another Defendant was convicted, by same jury, of attempted murder. Court did not err by instructing jury as to whether Defendants personally discharged a gun proximately causing great bodily harm, where Defendants' indictments did not include such allegations. Indictments sufficiently notified Defendants that State would seek 25-year enhancement. Language of indictments clearly alleged that Defendants personally discharged a weapon, and sufficiently notified Defendants jury would consider whether Defendants caused victim's injuries. State's failure to include all sentence-enhancing elements in indictment did not deny Defendants a fair trial nor undermine integrity of judicial process. (CARTER and HOLDRIDGE, concurring.)

[People v. Boston](#), 2016 IL 118661 (February 26, 2016) Cook Co. (THEIS) Appellate court affirmed.

Defendant was convicted of 1997 first-degree murder of his former girlfriend. Defendant was charged in 2005 with murder, after a bloody palm print discovered at crime scene was shown to match Defendant's palm print obtained by State through grand jury subpoena. Information provided by State to grand jury was sufficiently tied to Defendant to hold there was individualized suspicion to warrant grand jury subpoena. Defendant failed to show that he was

prejudiced in any way by grand jury process employed by State to obtain palm prints. Grand jury that indicted Defendant heard evidence from police that palm print discovered at crime scene matched Defendant's. Nothing in record indicates that when grand jury issued subpoena that it was asked to grant agency powers, or that it had granted ASA or police detectives agency powers. Court properly denied Defendant's motion to quash subpoena and suppress palm print evidence. (GARMAN, FREEMAN, THOMAS, KILBRIDE, and KARMEIER, concurring.)

HEARSAY

[People v. Schlott](#), 2015 IL App (3d) 130725 (April 15, 2015) Will Co. (WRIGHT) Reversed. Defendant was charged with attempted first degree murder and aggravated domestic battery. Court erred in granting Defendant's pretrial motion in limine to exclude portions of Defendant's responses to questions posed by 911 operator. Defendant's statements are admissions, are thus not hearsay, and do not implicate confrontation clause. Court erred in granting Defendant's request to exclude State's DNA evidence which State submitted for analysis by crime lab within weeks of scheduled jury trial, as State disclosed it to defense promptly upon receipt as ongoing discovery, and defense failed to allege or show unfair prejudice to the State. (O'BRIEN, concurring; McDADE, dissenting.)

[People v. Nixon](#), 2015 IL App (1st) 130132 (June 26, 2015) Cook Co., 5th Div. (GORDON) Affirmed. Defendant was convicted, after jury trial, of aggravated sexual assault and sentenced to 30 years. Court did not err in allowing State to introduce testimony about a computer printout showing that another man's DNA profile (who was previously selected by victim out of photo array as possibly her assailant) was entered into State's database three months after assault. State offered record not for mere purpose of showing that his profile was stored in database, but for fact that database was continually generating comparisons against stored profiles. State failed to establish adequate foundation for record for business record exception to hearsay to apply, but error is not reversible, as other properly admitted evidence against Defendant is overwhelming. (PALMER and McBRIDE, concurring.)

[People v. Quiroga](#), 2015 IL App (1st) 122585 (August 26, 2015) Cook Co., 3d Div. (HYMAN) Reversed.

Defendant was a volunteer at his children's elementary school, including as a member of Local School Council (LSC). School sent Defendant a letter, weeks after a LSC meeting when he argued with school principal about incident involving his daughter, notifying him that he had to seek permission before entering school property. On last day of school, Defendant stood on sidewalk and in street in front of school and solicited parents to sign petition to remove the school principal. Defendant was convicted, after bench trial, of criminal trespass to state-supported land. Statement of principal that some parents had complained that someone was

outside harassing them was hearsay which could not be used as evidence to prove Defendant interfered with parents' use or enjoyment of school. As State introduced no further evidence to prove this element of offense, State failed to establish Defendant's guilt beyond a reasonable doubt. (PUCINSKI and MASON, concurring.)

[People v. Brothers](#), 2015 IL App (4th) 130644 (September 18, 2015) McLean Co. (STEIGMANN) Affirmed in part and reversed in part; remanded (No. 4-13-0644); affirmed (No. 4-13-0650).

Defendant was convicted, after jury trial, of home invasion, aggravated criminal sexual assault, domestic battery, and aggravated unlawful restraint, from incident when Defendant entered trailer of his estranged lover and physically and sexually attacked her over several hours. Later that month, Defendant pled guilty to harassment by telephone, when Defendant persuaded assault victim not to cooperate with prosecution in those cases; and violation of bail bond. State presented inadmissible hearsay and opinion testimony, and that was the only evidence supporting one conviction for aggravated criminal sexual assault. Retrial for that charge does not violate double jeopardy; evidence presented at first trial would have been sufficient for rational trier of fact to find essential elements of crime proven beyond a reasonable doubt, and thus retrial is proper remedy. Affirming verdict on all other counts, as properly admitted evidence overwhelmingly proved Defendant guilty of remaining counts. (KNECHT and HARRIS, concurring.)

[People v. Burnett](#), 2015 IL App (1st) 133610 (December 18, 2015) Cook Co., 5th Div. (GORDON) Affirmed.

Defendant was convicted, after bench trial, of harassment in violation of order of protection obtained against him by his girlfriend, whose prior statement was admitted under statutory exception to hearsay that she was "unavailable for cross-examination" at trial. Defendant claimed violation of his 6th amendment right to confrontation. To be admitted, an out-of-court statement must satisfy a hearsay exception and a defendant's sixth amendment rights. Girlfriend persisted in her refusal to testify as to some questions, but did answer preliminary questions at trial and answered some questions about offense of conviction in her statement at trial. Thus, hearsay exception and sixth amendment were satisfied, and her statement was properly admitted. (REYES, concurring; McBRIDE, specially concurring.)

[People v. Abram](#), 2016 IL App (1st) 132785 (March 7, 2016) Cook Co., 1st Div. (LIU) Affirmed.

Defendant was convicted, after jury trial, of possession of a controlled substance with intent to deliver and court was sentenced to 7 years. As there is no recognized exception to rule against hearsay in Illinois for present sense impressions, the police call-out tape was not properly admitted on that basis. However, statements qualified as excited utterances, circumstances of as officers' pursuit of Defendant were sufficiently startling to produce unreflective statements. State provided substantial evidence that Defendant was in actual possession of cocaine retrieved by

officers along path of vehicle and admitted as evidence. Officers consistently testified that they saw objects being thrown from vehicle and that in certain instances they were able to keep those objects in view and retrieve them for testing and identification. (CONNORS and HARRIS, concurring.)

INEFFECTIVE ASSISTANCE (not)

[People v. Sharp](#), 2015 IL App (1st) 130438 (January 21, 2015) Cook Co., 3d Div. (HYMAN) Affirmed.

Defendant was charged with multiple offenses arising from shooting. Defendant was convicted of attempted first degree murder and aggravated battery with a firearm, and sentenced to total 55 years. No ineffective assistance of counsel; counsel's decision to not call two alibit witnesses was trial strategy, as those witnesses did not do well in Defendant's first trial (which ended in mistrial). No ineffective assistance of counsel in counsel's failure to object to court's polling of only 10 out of 12 jurors. Posttrial counsel's strategic decision to stand on posttrial motions and to offer no argument during sentencing was within range of professionally reasonable judgments. Firearm enhancement statute of 25-years-to-life is not unconstitutionally vague.(PUCINSKI and LAVIN, concurring.)

[People v. Shines](#), 2014 IL App (1st) 121070 (February 4, 2015) Cook Co., 3d Div. (HYMAN) Affirmed.

Defendant was convicted, after bench trial, of aggravated fleeing and eluding. Convictions do not violate the one-act, one-crime doctrine, because Defendant committed more than one act during the course of an offense. His two separate acts were his driving at a high rate of speed, and his contravention of traffic control devices. Trial court was without jurisdiction to consider Defendant's pro se letter, entitled "Motion of Appeal", alleging ineffective assistance of counsel, as it was filed after 30-day window following entry of final judgment.(PUCINSKI and MASON, concurring.)

[People v. Cotto](#), 2015 IL App (1st) 123489 (February 11, 2015) Cook Co., 3d Div. (LAVIN) Affirmed.

Defendant appealed second-stage dismissal of his postconviction petition, claiming that his privately retained postconviction counsel failed to provide him reasonable assistance with his petition because he failed to contest the State's assertion that the untimely filing of his petition was due to his culpable negligence. Although a pro se defendant had a right to reasonable assistance from appointed counsel, State is not required to provide reasonable assistance of counsel for any petitioner able to hire his own postconviction counsel, and thus Defendant failed to state a cognizable claim for relief. Here, private counsel's performance was not so deficient that he failed to provide reasonable level of assistance, and his argument appears to have been the best option available.(HYMAN, concurring; PUCINSKI, dissenting.)

[People v. Kirklin](#), 2015 IL App (1st) 131420 (March 6, 2015) Cook Co., 5th Div. (GORDON) Affirmed.

(Court opinion corrected 4/6/15.) Defendant was convicted, after bench trial, of aggravated battery. No ineffective assistance of counsel. Claim of ineffective assistance must be evaluated based on entire record. Defense counsel thoroughly exposed weaknesses and contradictions in State's case through cross-examination. Counsel's failure to introduce evidence of victim's recent cocaine use likely did not change outcome of trial. (McBRIDE and REYES, concurring.)

[People v. Brown](#), 2015 IL App (1st) 122940 (March 11, 2015) Cook Co., 3d Div. (HYMAN) Affirmed.

Court properly dismissed Defendant's second-stage postconviction petition, after his conviction for unlawful use of a weapon by a felon. Allegations in petition, with supporting documentation, fail to make substantial showing of any constitutional deprivation to warrant third-stage proceeding. No ineffective assistance of counsel claim, as Defendant cannot show prejudice from his claims that his counsel failed to relay State's plea offer, and that counsel failed to inform him of sentence he faced if convicted. Defendant cannot show reasonable probability that he would have accept plea offer and that if he had, court would have accepted it.(PUCINSKI and LAVIN, concurring.)

[People v. Brown](#), 2015 IL App (1st) 131552 (June 30, 2015) Cook Co., 3d Div. (HYMAN) Affirmed.

(Court opinion corrected 7/14/15.) Defendant was convicted, after jury trial, of felony murder based on fatal traffic accident occurring while he and co-offender fled from scene of residential burglary. Sufficient evidence to find Defendant guilty beyond a reasonable doubt. During course of commission of residential burglary, Defendant set in motion chain of events that led to fatal car accident while he tried to evade police capture. Defense counsel's decision not to provide definition of foreseeability to jury at its request was sound trial strategy in face of legally sufficient jury instruction and defense theory that jury rely on "common sense". Thus, no ineffective assistance of counsel.(PUCINSKI and LAVIN, concurring.)

[People v. Crutchfield](#), 2015 IL App (5th) 120371 (June 29, 2015) St. Clair Co.

(GOLDENHERSH) Affirmed in part and reversed and remanded in part with directions.

Defendant was convicted, after jury trial, of first-degree murder of his girlfriend's 6-year-old son, and sentenced to natural life in prison. Illinois Supreme Court invalidated provision mandating life imprisonment for adult murderers of children. Court made proper inquiry of Defendant personally in court, and court's determination that Defendant's claims of ineffective assistance of counsel lacked merit and pertained to trial strategy is not manifestly erroneous. Defendant failed to overcome presumption that counsel's action or inaction was the result of sound trial strategy. Counsel's decision to not impeach three instances of testimony of victim's mother was sound trial

strategy, especially as counsel thoroughly impeached her at trial by informing jury of her inconsistent statements and lack of credibility. (WELCH and STEWART, concurring.)

People v. Hughes, 2015 IL App (1st) 131188 (August 7, 2015) Cook Co., 5th Div. (GORDON) Affirmed.

Defendant was convicted, after jury trial, of first degree murder and attempted armed robbery and sentenced to 55 years. Court properly denied Defendant's pro se postconviction petition alleging ineffective assistance of trial counsel. The only supporting document is Defendant's own affidavit stating that ASA violated his Miranda rights, which is not enough to support gist of a meritorious constitutional claim that defense counsel was ineffective in not objecting to ASA's testimony as to interview with Defendant. Defendant failed to overcome presumption, created by his postconviction counsel's filing of 651(c) certificate, that Defendant received effective assistance of postconviction counsel.(McBRIDE and REYES, concurring.)

People v. Carranza-Lamas, 2015 IL App (2d) 140862 (August 13, 2015) McHenry Co. (SPENCE) Affirmed.

Defense counsel was not obligated to inform Defendant of the specific consequences that pleading guilty to a drug crime and receiving Second 410 first-offender probation would have on discretionary immigration relief. Thus, counsel's performance was not constitutionally deficient under U.S. Supreme Court's decision in Padilla v Kentucky. In contrast to the defendant in Padilla case, Defendant here was aware of possibility of deportation based on his illegal presence in U.S., and the law was not succinct and straightforward, so defense counsel met his obligations by advising Defendant that guilty plea would have some sort of immigration consequences and that he should speak to an immigration attorney.(BURKE, concurring; HUTCHINSON, specially concurring.)

People v. Winkfield, 2015 IL App (1st) 130205 (September 30, 2015) Cook Co., 2d Div. (HYMAN) Affirmed.

Defendant was convicted, after jury trial, of aggravated vehicular hijacking, armed robbery, and aggravated unlawful restraint. Defense counsel promised, in opening statement, to present alibi witnesses whose story would be completely at odds with State's case. Although defense counsel presented testimony highlighting inconsistencies and weaknesses in State's case, no evidence directly contradicted State's case. As evidence of Defendant's guilt was not overwhelming, had counsel properly supported defense theory with witness testimony, counsel's unfulfilled promise did prejudice Defendant. However, given overall nature and quality of evidence considered given counsel's otherwise effective representation, counsel did not render ineffective assistance. (PIERCE and SIMON, concurring.)

People v. Rogers, 2015 IL App (2d) 130412 (September 29, 2015) Lake Co. (HUTCHINSON)
Affirmed.

Defendant was convicted, after jury trial, of attempted first-degree murder, solicitation of murder, and home invasion. No ineffective assistance of counsel; defense counsel's decision whether and to what extent to challenge attacker as to proffer agreement and his statement was part of a reasonable trial strategy to exploit the inconsistencies in his statements, to challenge his credibility, and to emphasize his relationship with daughter of Defendant and victim, who was Defendant's former husband. Defense counsel's failure to object during State's closing argument did not deprive Defendant of a fair trial; prosecutor is allowed wide latitude in closing arguments. Once court granted Defendant's postconviction petition, it vacated Defendant's guilty plea and accompanying sentence, both parties were then returned to status quo as it existed prior to acceptance of plea, and thus court then correctly reinstated all charges and order trial on all charges. Neither side could then later claim benefit of prior agreement. (ZENOFF and SPENCE, concurring.)

People v. Wallace, 2015 IL App (3d) 130489 (October 16, 2015) Will Co. (SCHMIDT)
Affirmed.

Defendant was convicted, after jury trial, of first-degree murder and aggravated battery with a firearm. Court properly summarily dismissed Defendant's postconviction petition as frivolous and patently without merit. Efforts to quash Defendant's arrest would have been futile, as testimony of trial witnesses and police reports show that police had probable cause to arrest Defendant before transporting him to the station. Police detention of Defendant at scene of shooting for 45 minutes was reasonable, and his arrest was supported by probable cause. Thus, no ineffective assistance of counsel. (O'BRIEN and WRIGHT, concurring.)

People v. Peterson, 2015 IL App (3d) 130157 (November 12, 2015) Will Co. (CARTER)
Affirmed.

Defendant was convicted, after jury trial, of first degree murder of his 3rd ex-wife and sentenced to 38 years in prison. Evidence was sufficient to prove beyond a reasonable doubt that Defendant committed first-degree murder. Court did not err in finding that clergy privilege was inapplicable to pastor's testimony about what Defendant's 4th wife, who disappeared 3 years after 3rd ex-wife's death, had told him at her counseling session 2 months before her disappearance. Court properly found conversation was not confidential, as it was in public with at least one other person present. Court's prior ruling admitting certain statements of 2 victims under common law doctrine of FBWD (forfeiture by wrongdoing) stands as the law of the case. Use of statements was not so extremely unfair to Defendant that their admission violated Defendant's due process right to a fair trial. Court's ruling admitting testimony of a person who testified that Defendant had tried to hire him to kill 3rd ex-wife was within its discretion. Defense attorney did not have a per se conflict of interest in representing Defendant as a result of media rights contract which Defendant and defense attorney jointly co-signed and which began and ended before Defendant was indicted. Decision to call 4th ex-wife's divorce attorney was a matter of trial strategy as

Defendant was seeking to discredit impression of her that pastor's testimony had given to jury, and was largely cumulative to pastor's testimony.(O'BRIEN and SCHMIDT, concurring.)

People v. Shipp, 2015 IL App (2d) 131309 (December 1, 2015) Kane Co. (McLAREN)
Affirmed.

Defendant filed postconviction petition alleging ineffective assistance of trial counsel in that counsel failed to impeach detective with a prior inconsistent statement and failed to seek to admit as substantive evidence the police report containing prior inconsistent statement; and that appellate counsel was ineffective for failing to raise those issues on direct appeal. Trial counsel did impeach detective to the extent possible. Decisions whether to emphasize the difference between what detective said on direct and what he admitted on cross, and whether to offer police report as substantive evidence, were issues of trial strategy.(SCHOSTOK and BIRKETT, concurring.)

People v. Nelson, 2016 IL App (4th) 140168 (March 10, 2016) Sangamon Co. (KNECHT)
Affirmed in part and vacated in part; remanded with directions.

Defendant was convicted, after jury trial, of 3 counts of first degree murder. In physical altercation with another male, Defendant's uncle punched victim, causing victim to fall straight back, with his head striking the concrete. Defendant, then age 17, approached victim and tossed a cinder block onto victim's head. Postconviction counsel did not fail to provide reasonable representation by failing to conduct a search to find expert who would support Defendant's claims, to rebut testimony of State's expert physician who testified that cinder block, and not punch, caused victim's death. Section 5-130 of Juvenile Court Act, providing for automatic transfer to adult criminal court, does not violate 8th Amendment. (STEIGMANN and APPLETON, concurring.)

People v. Veach, 2016 IL App (4th) 130888 (March 11, 2016) Coles Co. (STEIGMANN)
Affirmed.

(Court opinion corrected 3/21/16.) Defendant was convicted, after 2013 jury trial, of 2 counts each of attempt (first degree murder) and aggravated battery. Court later imposed consecutive prison sentences of 16 years on attempt convictions. On direct appeal, Defendant argued that he was denied effective assistance of trial counsel when his counsel stipulated to admission, during trial, of video recordings containing prior consistent statements and bad character evidence. Record is inadequate for appellate court to resolve, as it contains no indication why defense counsel agreed to admission of recordings, and it would be improper for appellate court to speculate as to defense counsel's motivation. Defendant may raise his claim through Post-Conviction Hearing Act. (HOLDER WHITE, concurring; APPLETON, dissenting.)

[People v. Guja](#), 2016 IL App (1st) 140046 (March 18, 2016) Cook Co., 5th Div. (REYES)
Affirmed as modified.

Defendant was convicted, after bench trial, of domestic battery and unlawful restraint of his then-girlfriend, but was acquitted of several other offenses; and was sentenced to 2 concurrent 2-year terms in DOC. No ineffective assistance of counsel for failing to include affirmative defenses of necessity and self-defense in his answer to discovery. Defendant was not prejudiced at trial as a result of the claimed error, as record does not contain even "some evidence" which satisfies requirements of necessity and self-defense. Court did not abuse its discretion in denying Defendant's motion to amend answer as a sanction for discovery violation, as Defendant failed to show he was prejudiced.(GORDON and LAMPKIN, concurring.)

INEFFECTIVE ASSISTANCE (ineffective)

[People v. Coleman](#), 2015 IL App (4th) 131045 (January 6, 2015) Macon Co. (APPLETON)
Reversed and remanded with directions.

Defendant was sentenced to 25 years for unlawful delivery of 900 grams or more of substance containing cocaine, after previous conviction for unlawful delivery of controlled substance. Police officer testified that he commingled powder from 15 separate bags before sending the commingled powder submitted as Exhibit found in Defendant's possession. Ineffective assistance of counsel by defense counsel entering into stipulation that 926 grams of powder in Defendant's possession were "cocaine". Defendant counsel should have investigated whether substances in 15 bags were separately tested to determine whether each individual bag was substance containing cocaine, as case law requires. Conviction for lesser amount would have resulted in sentence of 6 to 30 years, and lower fines. (POPE and STEIGMANN, concurring.)

[People v. Simpson](#), 2015 IL 116512 (January 23, 2015) Cook Co. (THOMAS) Reversed.

Defendant was convicted, after jury trial, of first degree murder in beating death. Ineffective assistance of counsel in failing to object to videotaped statement, that Defendant told him that he beat victim, as substantive evidence that Defendant struck victim numerous times with a bat. As person giving statement had no personal knowledge of beating, out-of-court videotaped statement was not given imprimatur of admissibility required for prior inconsistent statements. Reasonable probability that outcome would have been different, but for defense counsel's ineffectiveness. Eyewitness, age 74, was not able to identify Defendant or codefendant at trial 4 1/2 years after incident.(GARMAN, FREEMAN, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

[People v. Deltoro](#), 2015 IL App (3d) 130381 (April 22, 2015) Will Co. (HOLDRIDGE)
Reversed and remanded.

Defendant, a legal permanent resident of U.S., entered negotiated guilty pleas to unlawful possession of controlled substance with intent to deliver. Defendant was to be released from

MSR to federal immigration authorities, as when pleading guilty to offense relating to a controlled substance, deportation is presumptively mandatory. Defendant presented gist of a constitutional claim for ineffective assistance of plea counsel. Existence of plausible trial defense is not required to show prejudice in cases involving counsel's failure to advise a defendant as to immigration consequences of his guilty plea. Defendant was arguably prejudiced by his plea counsel's deficient performance, as Defendant alleged that he would not have pled guilty if plea counsel had fully advised him of potential immigration consequences of his plea (McDADE and O'BRIEN, concurring.)

[People v. Romero](#), 2015 IL App (1st) 140205 (June 22, 2015) Cook Co., 1st Div. (HARRIS) Reversed and remanded.

Defendant was acquitted, after jury trial, of attempted first degree murder, but convicted of aggravated discharge of a firearm and aggravated battery with a firearm. Defendant presented arguable basis for claim of ineffective assistance of counsel, based on trial court's consideration of improper factor in aggravation. Appellate and trial counsel performance fell below objective standard of reasonableness, as court improperly considered level of intent and conduct for which Defendant was acquitted. Court's comments indicated that it believed that Defendant intended that the bullet would hit the officer, but jury's verdict negates that. (CUNNINGHAM, concurring; DELORT, dissenting.)

[People v. Lofton](#), 2015 IL App (2d) 130135 (July 24, 2015) Winnebago Co. (McLAREN) Reversed and remanded.

Defendant was convicted, after jury trial, of three counts of first-degree murder and one count of attempted armed robbery, and sentenced to natural life in prison to be served consecutively with 20 years for attempt, to be served consecutively to 75-year sentence for prior, unrelated murder. Ineffective assistance of counsel in defense counsel's failure to object to witness' written statement, as substantive evidence, that he heard Defendant say he shot victim, as witness did not perceive the events that were subject of statement; improperly admitted statement was bolstered by detective's repetitious testimony of it. Defense counsel erred in allowing other witness' double hearsay grand jury testimony to go to jury in written form. (HUTCHINSON, concurring; ZENOFF, dissenting.)

[People v. Valdez](#), 2015 IL App (3d) 120892 (May 19, 2015) Bureau Co. (McDADE) Vacated and remanded.

(Modified upon denial of rehearing 8/19/15.) Defendant was a noncitizen who pled guilty to burglary predicated on theft. Court erred in denying Defendant's motion to withdraw his guilty plea. Immigration consequences of plea were clear, and counsel failed to meet his duty to advise Defendant of those consequences. Defendant was prejudiced by counsel's deficiencies, and prejudice was not cured by court's admonishments under Section 113-8, as that section warns only that nebulous immigration consequences may occur, but in this case, deportation was presumptively mandatory. Defendant established reasonable probability that, had he knew that

deportation was "practically inevitable", he would have rejected guilty plea and proceeded to trial. (CARTER, concurring; HOLDRIDGE, specially concurring.)

[*People v. Ross*](#), 2015 IL App (3d) 130077 (September 18, 2015) Rock Island Co. (O'BRIEN) Reversed and remanded.

Defendant pled guilty to felony murder and sentenced to 60 years. Defendant was denied reasonable assistance of postconviction counsel, as counsel filed no affidavits or depositions and offered no oral testimony or other evidence to support Defendant's ineffective assistance of counsel claim based on his trial counsel's wrong advice about applicability to Defendant's sentencing of truth-in-sentencing amendments. Postconviction counsel failed to comply with Rule 651(c), in failing to make all necessary amendments to pro se petition.(HOLDRIDGE, concurring; SCHMIDT, concurring in part and dissenting in part.)

[*People v. Lopez*](#), 2015 IL App (1st) 142260 (September 30, 2015) Cook Co., 4th Div. (HOWSE) Reversed.

Defendant pled guilty to possession of a controlled substance, a Class 4 felony. Court treated Defendant's "Amended Motion to Withdraw Plea of Guilty", filed 8 months later, as a petition for postconviction relief and summarily dismissed it. Given facts alleged, had Defendant been properly advised of immigration consequences of his plea, Defendant's decision to reject the plea bargain would have been rational under the circumstances, including nature of offense and Defendant's lack of criminal history. Defendant's affidavit stated that defense counsel never advised him that pleading guilty would cause him to be immediately deported from U.S. and separated from his family. Defendant made a substantial showing of ineffective assistance of counsel. (McBRIDE and ELLIS, concurring.)

[*People v. Blanchard*](#), 2015 IL App (1st) 132281 (October 13, 2015) Cook Co., 2d Div. (PIERCE) Remanded; dismissal vacated.

Defendant was convicted of armed robbery, and alleged that his appointed postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) by failing to review trial exhibits that contained evidence crucial to his pro se claims. Remanded to trial court to allow postconviction counsel to comply with Rule 651(c) requirements as to exhibits, and to allow a supplemental certificate to be filed, if requested; and circuit court directed to then reconsider Defendant's petition or amended petition. (NEVILLE and SIMON, concurring.)

[*People v. Lamar*](#), 2015 IL App (1st) 130542 (November 19, 2015) Cook Co., 4th Div. (COBBS) Reversed and remanded.

Defendant's postconviction petition supports a substantial showing that he was denied effective assistance of counsel in alleging that trial counsel failed to file a notice of appeal. Defendant alleged that he never told counsel that he did not want to appeal, he thought one was pending, and he expected and wanted an appeal, and explicitly asked trial counsel to take steps to prepare an appeal. Allegations, if proven at evidentiary hearing, would demonstrate that trial counsel's

performance was deficient. Defendant's petition sets forth a substantial showing of a constitutional violation and thus Defendant is entitled to an evidentiary hearing. (McBRIDE and HOWSE, concurring.)

People v. Hughes, 2015 IL 117242 (December 17, 2015) Cook Co (GARMAN) Appellate court affirmed in part and reversed in part; circuit court affirmed; remanded.

Defendant was convicted, after bench trial, of first-degree murder in shooting death of 68-year-old victim during botched robbery attempt. Alleged co-conspirator was shot to death next day. Defendant's own taped interrogation was admitted against him at trial. At trial, defense counsel's arguments as to motion to suppress were broadly worded, but many arguments advanced on appeal had not been argued at trial. Drastic shift in factual theories deprived State of opportunity to present evidence as to them. (FREEMAN, KARMEIER, and THEIS, concurring; BURKE, THOMAS, and KILBRIDE, specially concurring.)

People v. Rodriguez, 2015 IL App (2d) 130994 (December 23, 2015) Ogle Co. (McLAREN) Vacated and remanded.

Defense counsel failed to substantially comply with Rule 651(c), and he failed to provide reasonable level of assistance at second stage postconviction proceedings. Defendant's fitness to stand trial was a constitutional issue that was strongly considered, should have been fully explored, and possibly should have been raised in amended postconviction petition. Defense counsel never fully explored issue, and never raised issue. Defendant's fitness at time of trial needed to be reviewed in order for defense counsel to properly prepare amended postconviction petition. (JORGENSEN and HUDSON, concurring.)

People v. Salem, 2016 IL 118693 (January 22, 2016) Will Co. (GARMAN) Appellate court vacated; appeal reinstated.

(Correcting court designation.) Defendant's two notices of appeal were not filed within 30 days of sentencing nor within 30 days of orders disposing of timely filed motions against judgment, and thus appeals were not timely, and appellate court did not have jurisdiction. However, given unique facts of case, Defendant was understandably confused about when to file appeals. Trial counsel and the court were confused as to time to file motion for new trial, and neither State nor court took issue with timeliness of Defendant's motions for new trial. As the right to appeal a criminal conviction is fundamental, Supreme Court, in exercise of its supervisory authority, ordered appeal reinstated. (FREEMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

People v. Tayborn, 2016 IL App (3d) 130594 (March 7, 2016) Will Co. (CARTER) Reversed and remanded.

Defendant was convicted, after jury trial, of possession of cocaine. Defense counsel provided ineffective assistance of counsel by failing to file a motion to suppress Defendant's statement that he was transporting cocaine to Iowa, which Defendant made in response to police questioning

without having received Miranda warnings. During vehicle search, driver of vehicle had already been arrested and placed in a squad car. Cocaine was found in vehicle during search. As trial judge found that Defendant was in custody at time cocaine was discovered, when officer questioned Defendant about the cocaine, the questioning was a custodial interrogation without Defendant having first been given Miranda warnings. Defendant's statement would have been inadmissible at trial, and outcome of trial would have been different had his admission been suppressed. (WRIGHT, concurring; SCHMIDT, dissenting.)

[People v. Jones](#), 2016 IL App (3d) 140094 (March 16, 2016) Rock Island Co. (O'BRIEN)
Reversed and remanded with directions.

After unsuccessful direct appeal, Defendant filed pro se postconviction petition. Court appointed counsel once petition advanced to second stage. Defendant's pro se allegations are sufficient to alert appointed counsel that Defendant's contention encompassed a claim that trial counsel provided ineffective assistance of counsel. Trial counsel argued extensively that omitted statements were necessary to Defendant's defense, but then failed to present them when afforded the opportunity. It was necessary for appointed counsel to either allege facts as to content of statements omitted from redacted videotape or attach evidentiary support to petition, either the entire videotaped statement or affidavit of Defendant as to substance of statements. Thus, record rebuts presumption that appointed counsel provided Defendant with reasonable assistance of postconviction counsel. (LYTTON, concurring; CARTER, dissenting.)

INEFFECTIVE ASSISTANCE (procedure & conflict of interest)

[People v. Lewis](#), 2015 IL App (1st) 122411 (February 27, 2015) Cook Co., 5th Div. (REYES)
Affirmed.

Defendant was convicted, after jury trial, of first degree murder, and sentenced to 60 years. Defendant did not raise issue of self-defense at trial and State was not obliged to disprove that affirmative defense. Trial court properly refused self-defense instructions based on insufficient evidence. Court did not err in allowing State to introduce evidence and present argument that Defendant was hiding from the police. A jury could validly infer from evidence that Defendant knew he was a suspect and that he consciously avoided the police. Court conducted a Krankel inquiry, permitting Defendant opportunity to present each point raised in his pro se motion claiming ineffective assistance of counsel, followed by brief discussion between court and defense counsel as to conduct, and concluding with court's observation of defense counsel's performance at trial. Court's finding of no ineffectiveness of counsel was not manifestly erroneous. (PALMER and McBRIDE, concurring.)

[People v. Flemming](#), 2015 IL App (1st) 111925-B (May 1, 2015) Cook Co., 5th Div. (PALMER)
Affirmed and remanded.

(Court opinion corrected 5/1/15.) Defendant was convicted, after bench trial, of second degree murder and aggravated battery, sentenced to 20 years. Under Illinois Supreme Court's 2014 decision in *People v. Jolly*, trial court committed reversible error by allowing State to rebut Defendant's pro se allegations at preliminary Krankel inquiry on Defendant's pro se ineffective assistance of counsel claim. (McBRIDE and REYES, concurring.)

[People v. Robinson](#), 2015 Il.App(1st) 130837 (June 26, 2015) Cook Co.,

Affirmed in part, Reversed in Part, Remanded with Instructions

Defendant was convicted of residential burglary and aggravated battery. Defendant alleged ineffective assistance and a Krankle hearing was held by the Court. After allowing the defendant to make all of his claims, the Court sought rebuttal first from defense counsel and then from the State. On appeal the State argued that by waiting until after the defendant was finished the proceeding remained non-adversarial. *Jolly* applies retroactively. Whether the State is permitted to rebut each claim as it is voiced or after the defendant concludes is immaterial to determining if the proceeding is adversarial. State is afforded "virtually no opportunity" to participate in Krankle hearing. (GORDON)

[People v. Washington](#), 2015 IL App (1st) 131023 (June 30, 2015) Cook Co., 2d Div. (PIERCE)
Remanded with directions.

Defendant was convicted, after bench trial, of possession of a controlled substance and sentenced to 18 months in prison. Court erred in informing Defendant that he was required to file a written motion, upon Defendant making oral pro se posttrial claim of ineffective assistance of trial counsel. Defendant then stated that he could not put his claim in writing and only "withdrew" his motion when court again stated that motion must be in writing. Court denied Defendant opportunity to tell court of his specific complaints as court cut him short by insisting that he must put motion in writing. Court erred in failing to conduct inquiry into basis of alleged claim. Remanded for limited purposes of allowing trial court to conduct required preliminary investigation. (NEVILLE and LIU, concurring.)

[People v. Poole](#), 2015 IL App (4th) 130847 (September 16, 2015) Sangamon Co. (POPE)
Reversed and remanded with directions.

Defendant was convicted, after jury trial, of aggravated battery and theft. Defense counsel operated under per se conflict of interest, as he contemporaneously represented Defendant and his girlfriend, who State called as a hostile witness. State used girlfriend's testimony to introduce her prior inconsistent statements, made during her police interviews, as substantive evidence. Thus, girlfriend's testimony was not beneficial only to Defendant. Defendant was not adequately informed of the significance of the conflict, and his waiver was not knowing and intelligent waiver of conflict. (STEGMANN and APPLETON, concurring.)

[*People v. Taylor*](#), 2015 IL App (4th) 140060 (December 15, 2015) Macon Co. (APPLETON) Affirmed.

Defendant was convicted, after jury trial, of aggravated domestic battery for beating his brother-in-law. Defendant forfeited review of errors he claimed had deprived him of a fair trial. Ineffective assistance of counsel claims should be raised in postconviction proceedings where a better record can be made. Court conducted adequate Krankel inquiry into his pro se posttrial allegations of ineffective assistance of counsel. Sentence of 15 years was not excessive; Defendant committed offense while on parole, and had several prior criminal convictions, and was to be sentenced as Class X offender based on prior record. (TURNER and STEIGMANN, concurring.)

[*People v. Shaw*](#), 2015 IL App (4th) 140106 (December 21, 2015) Champaign Co. (HARRIS) Affirmed.

Defendant was convicted, after jury trial, of attempt (criminal sexual assault), and sentenced to 30 years. Record contains no specific or express complaints by Defendant about his counsel's performance, and thus no Krankel inquiry was required. Court appropriately relied on stipulated evidence as to psychiatric expert's opinion testimony to find Defendant fit to stand trial. Record does not indicate that Defendant's mental health changed significantly from time of evaluation of his fitness for trial and time of his trial or sentencing. Thus, court was not required to sua sponte order a fitness hearing during trial and sentencing phases of underlying proceeding. (APPLETON, concurring; STEIGMANN, specially concurring.)

[*People v. Demus*](#), 2016 IL App (1st) 140420 (February 10, 2016) Cook Co., 3d Div. (MASON) Remanded with directions.

Defendant was sentenced to 2 years probation after pleading guilty to vehicular burglary. State then filed petition for violation of probation after Defendant was arrested for another vehicular burglary; defendant was then found in violation of probation and sentenced to 6 years. Court erred in focusing on underlying merit of Defendant's claim as to event query, rather than addressing merits of whether his trial counsel was ineffective for failing to obtain it. By proceeding directly to hearing on Defendant's substantive claim where he was forced to participate pro se, and where his counsel he claimed was ineffective participated in hearing, court deprived him of benefit of new counsel in exploring his claim of ineffective assistance of counsel. (FITZGERALD SMITH and PUCINSKI, concurring.)

[*People v. Jackson*](#), 2016 IL App (1st) 133741 (March 10, 2016) Cook Co., 4th Div. (ELLIS) Affirmed in part and vacated in part; remanded.

Defendant was convicted, after jury trial, of delivery of less than one gram of a controlled substance (heroin) within 1,000 feet of a school, and sentenced to 13 years. Court failed to properly conduct preliminary Krankel hearing, by moving directly to merits of Defendant's claim of ineffective assistance of counsel without first determining whether sufficient facts were alleged to show possible neglect and deciding whether to appoint conflict counsel. Court denied

Defendant his constitutional right to self-representation at posttrial proceedings that followed Krankel hearing; remanded for new proceedings oin motion for new trial and sentencing because Defendant invoked his right to represent himself. Given trial judge's prior rulings and comments to Defendant, remanded to a different trial judge for new preliminary Krankel hearing, for hearing on motion for new trial if necessary, and for sentencing if necessary. (McBRIDE and COBBS, concurring.)

[People v. Mourning](#), 2016 Il App (4th) 140270 (March 31, 2016) Macon Co. (STEIGMANN)
Remanded with directions.

(Court opinion corrected 4/7/16.) Defendant was convicted, after jury trial, of 2 counts of predatory criminal sexual assault of a child. Defendant then filed pro se posttrial motion claiming that his privately retained counsel had provided him ineffective assistance, and Defendant explicitly requested new counsel, and court was informed that Defendant lacked funds to hire private counsel and needs service of public defender. Court erred in failing to conduct adequate Krankel hearing, by failing to conduct any interchange with Defendant. In every case, court must conduct some type of inquiry into underlying factual basis, if any, of a Defendant's pro se posttrial claim of ineffective assistance of counsel. Krankel hearing is required even when a defendant is represented by private counsel. (TURNER and APPLETON, concurring.)

[People v. Willis](#), 2016 IL App (1st) 142346 (April 19, 2016) Cook Co., 2d Div. (HYMAN)
Affirmed in part and dismissed in part.

Defendant alleged that trial court failed to adequately inquire into his posttrial allegations of ineffective assistance of counsel in violation of Krankel and appellate court's mandate upon remand. Court fully considered Defendant's pro se claim of ineffective assistance by discussing the claim with him, and evaluating the claim based on its knowledge of defense counsel's performance and insufficiency of claim on its face. Cour did not err in denying Defendant's claim without appointing new counsel to investigate it, as court conducted adequate inquiry into Defendant's claim of error. Defense counsel's failure to request lesser included offense instructions of second degree murder and involuntary manslaughter was reasonable exercise of trial strategy. (PIERCE and NEVILLE, concurring.)

INTENT

[People v. Hatchett](#), 2015 IL App (1st) 130127 (December 28, 2015) Cook Co., 1st Div.
(CUNNINGHAM) Affirmed.

Defendant and a co-defendant were charged with first-degree murder, and initially were both represented by the same private attorney. Conflict as to dual representation was resolved by court at an early stage during pretrial proceedings, when court found that a conflict of interest existed and appointed separate counsel for co-defendant, allowing private attorney to solely represent Defendant. Court had no additional duty to admonish Defendant about conflict of

interest after dual representation was resolved and risk of conflict of interest was removed. Court properly dismissed postconviction petition at third stage, where Defendant failed to make substantial showing of denial of effective assistance of counsel due to conflict of interest, and failed to establish prejudice. (CONNORS and HARRIS, concurring.)

[People v. Jellis](#), 2016 IL App (3d) 130779 (January 26, 2016) Whiteside Co. (SCHMIDT)
Affirmed.

Defendant was convicted of home invasion and 6 counts of aggravated criminal sexual assault, and sentenced to 75 consecutive years imprisonment. Court properly found that State had made a 30-year plea offer, and that there was no evidence that counsel ever conveyed the offer to Defendant. Court properly concluded that Defendant failed to satisfy second prong of ineffective assistance of counsel Strickland test, as Defendant failed to show he would have accepted the 30-year plea offer absent counsel's deficient performance. Evidence established that Defendant either did or would have rejected a 30-year offer by making a counteroffer, and that State would have revoked any existing offer as prosecutor received DNA evidence. (HOLDRIDGE, specially concurring; McDADE, dissenting.)

INVOLUNTARY COMMITMENT / MEDICATION

[In re Deborah S.](#), 2015 IL App (1st) 123596 (January 16, 2015) Cook Co., 5th Div. (PALMER)
Reversed.

After hearing, court found that Respondent was subject to involuntary commitment. Collateral consequences exception to mootness doctrine is applicable to this case as Respondent's ability to seek employment similar to her past employment would be negatively impacted by involuntary admission order. State failed to establish by clear and convincing evidence that Respondent was unable to meet her basic physical needs so as to guard herself from serious harm. Thus, order of involuntary commitment was against manifest weight of evidence. (McBRIDE and GORDON, concurring.)

[In re Linda B.](#), 2015 IL App (1st) 132134 (February 18, 2015) Cook Co., 3d Div. (PUCINSKI)
Affirmed.

Section 3-611 of Mental Health Code requires that mental health facility director file petition for involuntary admission and two supporting certificates within 24 hours of after person's admission to the facility. Respondent was not admitted to facility in a legal sense pursuant to Article VI of Mental Health Code when she first entered medical floor of hospital because of tachycardia and severe anemia. Thus, 24-hour filing requirement of Section 3-611 was inapplicable at that point. Petition was timely as it was filed within 24 hours after it was presented to mental health facility director at hospital. (LAVIN and MASON, concurring.)

In re Maureen D., 2015 IL App (1st) 141517 (August 14, 2015) Cook Co., 6th Div. (ROCHFORD) Affirmed.

(Court opinion corrected 8/25/15.) Court authorized involuntary administration of psychotropic medications to Respondent. Psychiatrist, who filed petition for involuntary administration, testified to his compliance with Section 2-102(a-5) of Mental Health Code and to Respondent's lack of capacity to make a reasoned decision about her treatment. Psychiatrist gave undisputed testimony that he twice attempted to present Respondent with written information about her proposed psychotropic medications, but Respondent twice refused to accept the tenders and walked away. State met its burden of proof as to Respondent's lack of capacity, and court's Order was not against manifest weight of evidence. (HOFFMAN and LAMPKIN, concurring.)

In re Megan G., 2015 IL App (2d) 140148 (November 17, 2015) Lake Co. (McLAREN) Affirmed.

Petition asserted a claim under Section 3-600 of Mental Health Code, alleging that Respondent is subject to involuntary admission to a mental health facility and is in need of immediate hospitalization. As petition sets forth the required allegations, on its face, the petition alleges existence of a justiciable matter, and thus the court had subject matter jurisdiction. As court was procedurally limited from hearing matter while felony charges were pending, it properly dismissed petition for involuntarily admission. Respondent did not contest personal jurisdiction, and received proper notice, and her appointed counsel was present at the hearing on her motion to dismiss. Thus, the trial court had personal jurisdiction over Respondent. (SPENCE, concurring; JORGENSEN, specially concurring.)

People v. Bailey, 2016 IL App (3d) 150115 (February 10, 2016) Will Co. (O'BRIEN) Affirmed. Court's determination that Defendant was in need of mental health services on inpatient basis, after finding of not guilty by reason of insanity on charge of aggravated battery, was not manifestly erroneous. Psychiatrist did not base his opinion solely upon finding of mental illness, but on Defendant's lack of insight into his mental illness and his history of noncompliance with his medications, and also past arrest and police records which showed history of criminal behavior. (LYTTON and WRIGHT, concurring.)

In re Miroslava P., 2016 IL App (2d) 141022 (March 30, 2016) Kane Co. (JORGENSEN) Affirmed.

State petitioned for involuntary admission of and involuntary administration of psychotropic medication to Resondent, a Bulgarian citizen. Court was authorized to take a strict-compliance approach and vacate admission order in light of State's noncompliance with Section 3-609 of Mental Health Code. Respondent had repeatedly asked the State to notify the Bulgarian consulate, as required by Vienna Convention. State initially refused to do so, and did noify the consulate several weeks later, but it did not include the admission petition. Court may reasonably have found the State's noncompliance to be inexcusable, regardless of prejudice. (SCHOSTOK, concurring; SPENCE, dissenting.)

[*In re Sharon H.*](#), 2016 IL App (3d) 140980 (April 15, 2016) LaSalle Co. (McDADE) Affirmed in part and reversed in part; appeal dismissed in part.

Court granted petitions for involuntary admission and for involuntary administration of medication. Two of Respondent's 4 claims on review are moot and are not excused by any applicable exception to mootness doctrine, and are thus dismissed as moot. Respondent's remaining 2 claims satisfy public interest exception to mootness doctrine. State failed to provide Respondent with required notice, as State did not serve medication petition on her at least 3 days prior to hearing. Court violated Mental Health Code by failing to specify in medication order what testing it was requiring to be conducted on Respondent. Thus, court's decision ordering psychotropic medication to be involuntarily administered to Respondent is reversed. Court failed to show prejudice necessary to establish ineffective assistance of counsel at admission hearing.(LYTTON and WRIGHT, concurring.)

JUDICIAL NEUTRALITY

[*People v. Wiggins*](#), 2015 IL App (1st) 133033 (September 1, 2015) Cook Co., 2d Div. (NEVILLE) Reversed and remanded.

(Corrected; supplemental opinion upon denial of rehearing 11/3/15.) Defendant was convicted, after jury trial, of attempted murder. Judge improperly abandoned his role as neutral arbiter and his actions prejudiced the defense. Judge interposed objections on behalf of State, asked questions of victim designed to impeach victim's testimony, and made remarks indicating a preference for the State. Court abused its discretion when it permitted prosecution to read to jury the entirety of written statement of a witness, as witness signed statement after he had a motive to fabricate, as he had by then been identified as the shooter and was a prior consistent statement. (SIMON, concurring; LIU, dissenting.)

[*People v. Lopez*](#), 2015 IL App (4th) 150217 (December 4, 2015) Livingston Co. (STEIGMANN) Reversed and remanded.

Court erred in dismissing traffic charges "for failure to prosecute" when, after Court waited for 15 minutes, State failed to appear at pretrial conference. Absent statutory authorization, or in case where court has an inherent authority to dismiss indictment where there has been a clear denial of due process, a trial court has no power before trial to dismiss criminal charges on its own motion or on motion of the defendant.(HARRIS and POPE, concurring.)

People v. Jackson, 2015 IL App (3d) 140300 (December 9, 2015) Rock Island Co. (CARTER) Affirmed.

Defendant was convicted of aggravated battery for repeatedly punching 4-year-old boy in the stomach, causing bruising to an organ in his abdomen. Although court erred in granting State's noncompliant motion to substitute judge, which was untimely filed and did not allege judge was

prejudiced, error was harmless as Defendant made no showing of prejudice. Court properly found child victim competent to testify; child's testimony did not establish that he was disqualified to be a witness under Section 115-14(b) of Code of Criminal Procedure.(McDADE, concurring; HOLDRIDGE, specially concurring.)

[*People v. McGuire*](#), 2016 IL App (1st) 133410 (February 3, 2016) Cook Co., 3d Div. (MASON) Vacated and remanded.

After evidentiary hearing, court found that Defendant had violated terms of his probation on drug possession conviction and sentenced him to "sheriff's boot camp". One week later, court held "resentencing" hearing and sentenced him to 34 months plus 1 year mandatory supervised release (MSR). Record is lacking any explanation for resentencing hearing; neither State nor defense counsel informed court that Defendant had been sentenced to "boot camp" just one week prior.(FITZGERALD SMITH and LAVIN, concurring.)

JURY (deliberation / questions / structure)

[*People v. Downs*](#), 2015 IL 117934 (June 18, 2015) Kane Co. (FREEMAN) Appellate court reversed; circuit court affirmed; remanded.

Defendant was convicted, after jury trial, of first degree murder. Appellate court erred in vacating conviction and remanding for new trial, concluding that trial court erred in response to jury questions. Circuit court correctly answered, "We cannot give you a definition; it is your duty to define it" when jury, during deliberations, sent note to court asking for definition of reasonable doubt. Term needs no definition because words themselves sufficiently convey its meaning. Defendant failed to show that a clear or obvious error occurred in response to jury's question.(THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

[*People v. Peoples*](#), 2015 IL App (1st) 121717 (June 30, 2015) Cook Co., 4th Div. (ELLIS) Affirmed in part and reversed and remanded in part with directions.

Defendant was convicted, after jury trial, of first-degree murder and two counts of attempted first-degree murder and sentenced to 70 years in prison. Evidence was sufficient to prove Defendant guilty beyond a reasonable doubt. Jury reached its guilty verdict in 5 minutes when court incorrectly told jury it could convict based on accountability theory, after jury sent note that they didn't have enough evidence that Defendant was the shooter. As possibility of jury lenity or compromise, or that the jury's error favored State, cannot be ruled out, conviction is reversed and case remanded for new trial. Court expressly addressed all factors in aggravation and mitigation at sentencing, except that Defendant was age 24 at time of sentencing.(FITZGERALD SMITH and HOWSE, concurring.)

[People v. Mueller](#), 2015 IL App (5th) 130013 (July 17, 2015) Jackson Co. (MOORE) Reversed and remanded.

Defendant was convicted, after jury trial, of retail theft, and received extended-term four-year sentences. Testimony of retail store's loss prevention employee was weak, and police officer's testimony did not assist State. Court limited jury in manner it viewed store's video surveillance tape, and during deliberations jury sent specific note asking to see video and stating that it was too far away. Court refused jurors' requests to extend video to full screen and to play video again. Evidence was closely balanced, and judge's Rule 431(b) errors (in not asking jurors if they accepted that Defendant did not have to present any evidence or testify, and that if Defendant did not testify they could not hold it against him) prejudiced jury. (GOLDENHERSH and STEWART, concurring.)

[People v. Johnson](#), 2015 IL App (3d) 130610 (December 10, 2015) Tazewell Co. (LYTTON) Affirmed.

Defendant was convicted of aggravated battery of a peace officer and resisting a peace officer resulting in injury. Court properly allowed video of incident to be played in the courtroom during deliberations, as video equipment was not available in jury room; video had viewed video twice during trial, and no presumption that third viewing was prejudicial. Evidence was sufficient to support convictions. Defendant was not denied effective assistance of counsel; decision to not have Defendant testify was matter of trial strategy. (WRIGHT, concurring; McDADE, dissenting.)

JURY (instructions)

[People v. Gashi](#), 2015 IL App (3d) 130064 (April 7, 2015) Henry Co. (LYTTON) Reversed and remanded.

(Court opinion corrected 4/24/15.) Defendant was convicted, after jury trial, of aggravated criminal sexual abuse. Court committed reversible error by telling jurors, during voir dire and after jury chosen but before trial began, that they could decide for themselves what "reasonable doubt" means. These statements sent an unconstitutional message to jurors that they had discretion to determine what "reasonable doubt" means. Based on totality of circumstances, reasonable likelihood that jury understood court's statements to allow them to find Defendant guilty based on standard of proof less than beyond a reasonable doubt. (McDADE, specially concurring; SCHMIDT, concurring in part and dissenting in part.)

[People v. Walker](#), 2015 IL App (1st) 130500 (May 11, 2015) Cook Co., 1st Div. (CUNNINGHAM) Affirmed.

Defendant was convicted, after jury trial, of first degree murder and sentenced to 42 years. Whether Defendant was armed with a firearm was not submitted to jury as aggravating factor for

felony murder, and thus court erred in imposing 15-year firearm enhancement. Error was harmless, as evidence that Defendant was armed with a firearm at time he committed felony murder was uncontested and overwhelming. Court had statutory authority to impose firearm enhancement. (DELORT and HARRIS, concurring.)

[People v. Torres](#), 2015 IL App (1st) 120807 (May 27, 2015) Cook Co., 1st Div. (HYMAN) Affirmed.

Defendant was convicted, after jury trial, of aggravated battery as a lesser-included offense of attempted murder, four counts of aggravated criminal sexual assault, and one count of aggravated kidnapping; and found not guilty of attempted murder. Court properly allowed State to adduce evidence of two earlier attacks by Defendant against victim within two months of charges. State's supplemental motion to allow other-crimes evidence provided adequate summary of evidence as required by statute. No error in court instructing jury as to elements of offense of aggravated criminal sexual assault, State's burden of proof, and presumption of innocence. (PUCINSKI and MASON, concurring.)

[People v. Downs](#), 2015 IL 117934, (2nd Dist.) (June, 2015) SCT APPEAL Appellate Court Reversed.

Defendant was convicted of murder. After retiring to deliberate, jury asked trial court question regarding definition of "reasonable doubt;" and questioned if it was "80%, 70%, 60%?". Trial court responded by stating "We cannot give you a definition; it is your duty to define." Appellate Court, in reversing defendant's conviction, found that trial court's directive constituted plain error, because it: (1) posed risk that jury used standard less than reasonable doubt when convicting defendant of murder charge; (2) evidence in case was closely balanced; and (3) jury's question demonstrated that it already was contemplating standard less than reasonable doubt. It is better to refrain from attempting to define reasonable doubt as the trial court did here – even where the jury itself suggests a percentage-based analysis. (GARMAN, concurrence by THOMAS, KILBRIDE, KARMEIR, BURKE & THEIS)

[People v. Willett](#), 2015 IL App (4th) 130702 (August 4, 2015) Sangamon Co. (STEIGMANN) Reversed and remanded.

Defendant was convicted, after jury trial, of aggravated battery of a child; indictment alleged that he shook his 2-month-old daughter, causing brain injury. Court abused its discretion by refusing to instruct jury on lesser-included offense of reckless conduct. Court erred in allowing jury to render its decision based upon incorrect definition of "knowingly." (POPE and HOLDER WHITE, concurring.)

[People v. Smith](#), 2015 IL App (4th) 131020 (December 4, 2015) Champaign Co. (HOLDER WHITE) Affirmed as modified and remanded with directions.

(Court opinion corrected 1/4/16.) Jury convicted Defendant of aggravated battery to a person over age 60 and intimidation, and sentenced him 6 concurrent terms of 5 years and 6 years. IPI

Criminal Jury Instructions do not accurately convey present law as to charge of aggravated battery to a person over age 60, as instructions do not include element added to offense by amendment in 2006, that State must prove that Defendant knew the victim was at least 60. Evidence of injuries to victim's face and witness testimony as to injuries was sufficient to support battery conviction for Defendant, who was victim's caregiver. Court did not err in answering jury's request for definition of "reasonable doubt" with "the definition of reasonable doubt is for the jury to determine." (HARRIS and APPLETON, concurring.)

[People v. Mefford](#), 2015 IL App (4th) 130471 (December 3, 2015) Coles Co. (STEIGMANN) Affirmed.

Defendant was convicted, after jury trial, of first degree murder and robbery. State proved Defendant guilty beyond a reasonable doubt of first degree murder; autopsy showed that victim suffered at least 6 blunt force trauma blows to his face consistent with strikes from a fist. Jury could reasonably have concluded that sometime during his violent encounter with victim, who was frail and small, knew that blows he inflicted on victim created strong probability of death or great bodily harm; no specialized physiological knowledge was required to know that. Court's failure to instruct jury that IPI Criminal 7.15 also applied to involuntary manslaughter was not error. No error in admitting Defendant's statements, made in police interview, as to his criminal history, illicit drug use, and "going to jail all his life", as they were not used to argue propensity to commit crimes. (KNECHT and APPLETON, concurring.)

[People v. Cacini](#), 2015 IL App (1st) 130135 (December 11, 2015) Cook Co., 5th Div. (LAMPKIN) Reversed and remanded.

Defendant was convicted, after jury trial, of attempted first degree murder of police officer and aggravated battery of another police officer. Court's failure to instruct jury on State's burden to disprove Defendant's justification for his use of force in self-defense was plain error. Court did not abuse its discretion in concluding after in camera inspection that confidential records of complaints against the arresting police officers were not admissible at trial or subject to disclosure. Court used proper review procedure and did not err in its decision as to remoteness and irrelevancy of information in OPS (Office of Professional Standards) files. As to 9 files of both officers that were not too remote in time, allegations of misconduct were completely distinct from present case, and all claims were unfounded or not sustained by sufficient evidence. (REYES and PALMER, concurring.)

[People v. Jones](#), 2015 IL App (1st) 142597 (December 22, 2015) Cook Co., 2d Div. (HYMAN) Affirmed.

Defendant was convicted, after jury trial, of first-degree murder based on fatal traffic accident that occurred when he and co-defendant fled from residential burglary. DNA evidence, and other circumstantial evidence linking Defendant to car used in burglary, support verdict. Defendant was not entitled to additional language in jury instruction to state that Defendant could be found responsible only if death occurred before he reached a place of safety. Sentence

of 42 years not excessive, given nature of crime and Defendant's criminal history. Court considered mitigating factors of his parents' incarcerations and physical abuse he suffered when young. (PIERCE and NEVILLE, concurring.)

[People v. Sago](#), 2016 IL App (2d) 131345 (February 10, 2016) Winnebago Co. (JORGENSEN) Affirmed.

Defendant was convicted of first-degree murder (felony murder) for shooting death of his cousin, who entered pizza restaurant while Defendant and 2 others, all with their faces covered, attempted to commit armed robbery of restaurant. Off-duty police officer, who was not in uniform, did not identify himself as officer, and was in restaurant waiting for pizza, fired several shots. Court within its discretion in instructing jury that an officer could, as a matter of law, react with deadly force to prevent death or great bodily harm to himself or others. Defendant put at issue reasonableness of officer's actions, as he was trying to show that actions were so outrageous they were not reasonably foreseeable. (HUTCHINSON and HUDSON, concurring.)

JURY (voir dire)

[People v Jones](#), 2015 IL App (2d) 120717 (February 3, 2015) Winnebago Co. (SCHOSTOK) Affirmed in part and vacated in part.

Defendant was convicted, after jury trial, of 12 counts of first-degree murder, and attempted first-degree murder, 4 counts of home invasion, and residential burglary. Court properly determined that State did not commit a Batson violation in jury selection. Defense counsel objected to State's question of potential juror, who was black, about her "faith", and State exercised peremptory challenge as it believed that it could not question her further about subject (HUTCHINSON and BURKE, concurring.)

[People v. Payne](#), 2015 IL App (2d) 120856 (March 9, 2015) Winnebago Co. (HUDSON) Affirmed.

Defendant was convicted, after jury trial, of aggravated vehicular hijacking and aggravated battery. State's use of peremptory challenges did not evince a discriminatory purpose, as potential jurors who were stricken all made comments which indicated they might not be impartial. As hearing on posttrial motion occurred more than three months after jury selection, prosecutor's lack of recall as to specific reason for striking potential juror does not establish that her stated reason was pretextual. Court's finding that State established a valid and race-neutral reason to exclude potential juror is not clearly erroneous. (SCHOSTOK and ZENOFF, concurring.)

[People v. Seby](#), 2015 IL App (3d) 130214 (April 27, 2015) LaSalle Co. (SCHMIDT) Affirmed. (Court opinion corrected 5/18/15.) Defendant was convicted, after jury trial, of resisting a peace officer. Court's question to potential jurors whether they had any "problems" with the Zehr principles of law failed to sufficiently comply with Rule 431(b), and constituted clear error.

Evidence was not so closely balanced that court's error warrants reversal under plain-error doctrine. Prosecutor's statement, "There are no statements made by any defense witnesses to any law enforcement about what happened that day.", is within bounds of acceptable argument, and was not a comment on Defendant's postarrest silence. (HOLDRIDGE, specially concurring; O'BRIEN, dissenting.)

People v. Williams, 2015 IL App (1st) 131103 (November 24, 2015) Cook Co., 2d Div. (HYMAN) Affirmed.

Defendant was convicted, after jury trial, of first degree murder, attempted murder, and aggravated battery with a firearm. Defense counsel did not carry burden of establishing prima facie case of purposeful discrimination in jury selection as required by Batson. Defense counsel's cross-examination of key eyewitness to shooting was not unfairly limited because court reversed its ruling to allow questions about an earlier shooting on the same day and same location. State proved beyond a reasonable doubt by credible eyewitnesses that Defendant was one of the shooters. The few inconsistencies in eyewitnesses' accounts, individually and together, do not usurp jury's role in resolving questions of fact and credibility of witnesses. (PIERCE and NEVILLE, concurring.)

JURY (waiver)

People v. Hollahan, 2015 IL App (3d) 130525 (May 6, 2015) Kankakee Co. (SCHMIDT) Affirmed and remanded with directions.

(Modified upon denial of rehearing 7/16/15.) Defendant was convicted, after bench trial, of two counts of domestic battery against two different women. Defendant's jury waiver, entered before his guilty plea was withdrawn, was still in effect at time of his bench trial. No error when court failed to obtain additional jury waiver after withdrawing Defendant's guilty plea. (CARTER and O'BRIEN, concurring.)

People v. Campbell, 2015 IL App (3d) 130614 (August 6, 2015) Peoria Co. (O'BRIEN) Reversed and remanded.

Defendant was convicted of criminal sexual assault after stipulated bench trial and sentenced to 15 years. Defendant's guilty plea included jury waiver, and when his plea was withdrawn, his jury waiver was also withdrawn. A jury waiver is "expended" when the waiver was part of a plea that was subsequently withdrawn. Court's admonishments were insufficient as they did not inform Defendant that he had a right to a jury trial and that by agreeing to stipulated bench trial, he was waiving his right to jury trial, and he was not informed of his reinstated jury trial rights prior to stipulated bench trial as required. Given insufficient admonishments, Defendant's jury waiver was not understandingly and knowingly made. (McDADE and CARTER, concurring.)

[People v. Reed](#), 2016 IL App (1st) 140498 (January 27, 2016) Cook Co., 3d Div. (LAVIN)
Affirmed.

(Court opinion corrected 2/25/16.) Defendant was convicted, after bench trial, of possession of a controlled substance with intent to deliver and sentenced to 9 years. Considering Defendant's written jury waiver, his colloquy with trial court, and his demonstrated familiarity with justice system, court did not err in finding that Defendant knowingly waived his right to jury trial. Court System fee of \$50 is actually a fine. State's Attorney's Records Automation Fee of \$2 is legally a fee. Public Defender Records Automation Fee is legally a fee. (MASON and FITZGERALD SMITH, concurring.)

JUVENILE

[In re Shermaine S.](#), 2015 IL App (1st) 142421 (January 9, 2015) Cook Co., 3d Div. (HYMAN)
Affirmed.

Respondent minor, age 16 at time of offense, was convicted, after jury trial, of one count of robbery, and was sentenced as a habitual juvenile offender (based on two dispositions for burglary in two prior years) and sentenced to mandatory term of commitment to Department of Juvenile Justice until age 21. Based on Illinois Supreme Court precedent, mandatory sentencing provision of Juvenile Court Act does not violate eighth amendment or Illinois proportionate penalties clause. (PUCINSKI and LAVIN, concurring.)

[In re: Edgar C.](#), 2014 IL App (1st) 14-703 (December 31, 2014) Cook Co., 5th Div. (GORDON)
Affirmed as modified.

(Court opinion corrected 1/22/15.) Respondent, age 16 at time of offense, was found guilty of robbery, theft and battery and adjudicated delinquent and sentenced to five years' probation. Mandatory five-year probation requirement applies to Respondent's adjudication, as robbery offense is a forcible felony. Mandatory probation requirement is rationally related to goals of Juvenile Court Act as it protects the public while allowing for individualized sentence. Juvenile robber is not treated more harshly than adult robber, as juvenile probation is only one year longer than maximum probation for adult, and minor cannot be committed to Department of Juvenile Justice for longer term than adult could be incarcerated for same offense, and juvenile commitment is inherently less harsh than adult incarceration. (McBRIDE and REYES, concurring.)

[In re Henry B.](#), 2015 IL App (1st) 142416 (January 26, 2015) Cook Co., 5th Div. (McBRIDE)
Appeal dismissed.

Juvenile court judge continuing juvenile delinquency case for supervision contained no finding of guilty and no judgment order, and thus was not a final judgment. Order of supervision entered pursuant to Section 5-615 of Juvenile Court Act after a respondent minor's trial is not appealable.

Supreme Court Rule 604(b) applies only when sentence of supervision is entered under adult criminal code. (PALMER and GORDON, concurring.)

[In re S.M.](#), In re S.M. (February 4, 2015) Peoria Co. (WRIGHT) Reversed.

State charged Respondent minor with unlawful possession of a concealable handgun, under Section of Criminal Code which prohibits possession of concealable firearm or handgun for persons under age 18. State failed to present any evidence establishing "age" element of offense. Court erred in taking judicial notice of court record showing court's juvenile jurisdiction attached for matters involving minors under age 18. Court may take judicial notice of facts, sua sponte, only if judge makes clear before evidence is closed was facts and sources are included in sua sponte notice. Minor's unsworn statement of his age during arraignment cannot be used to meet State's burden of proof as to element of age. (LYTTON and O'BRIEN, concurring.)

[People v. Baker](#), 2014 IL App (5th) 110492 (February 6, 2015) Fayette Co. (CATES) Affirmed in part and vacated in part; remanded with instructions.

Defendant, age 15 at time of offense, was convicted, after jury trial, of two counts of first degree murder and three counts of home invasion, and sentenced to two mandatory terms of natural life for murders, and 30 years for each home invasion. Two murders and home invasion at neighboring house arose out of same incident, and thus home invasion was properly prosecuted under criminal law in circuit court, even though that charge had not been transferred from juvenile court. Defense counsel's decision to forgo instructing jury on insanity was a matter of trial strategy, thus no ineffective assistance of counsel. Court properly limited opinions of defense neuropharmacologist expert to adverse effects of Cymbalta (which Defendant had been prescribed) on adolescents in general, as he did not have qualifications required to offer expert opinion on issue of Defendant's sanity or mental illness. As no indication that court considered Defendant's youth and attendant characteristics, life sentences are vacated. (STEWART and MOORE, concurring.)

[In re: Austin S.](#), 2015 IL App (4th) 140802 (February 9, 2015) Adams Co. (STEIGMANN) Reversed.

County Juvenile Detention Center Treatment Program is "detention", within definition of detention in Section 5-105(5) of Juvenile Court Act. Thus, the Treatment Program's minimum 90-day length violates timing limitations of Section 5-710(1)(a)(v) of Juvenile Court Act. Sentencing Order, entered upon finding that Respondent minor violated terms of his probation, adding condition that minor successfully complete Treatment Program is void, as it violates 30-day limitation for detention under that Section of Act. (POPE and APPLETON, concurring.)

[In re Henry B.](#), 2015 IL App (1st) 142416 (January 26, 2015) Cook Co., 5th Div. (McBRIDE) Appeal dismissed.

(Court opinion corrected 3/16/15.) Juvenile court judge continuing juvenile delinquency case for supervision contained no finding of guilty and no judgment order, and thus was not a final

judgment. Order of supervision entered pursuant to Section 5-615 of Juvenile Court Act after a respondent minor's trial is not appealable. Supreme Court Rule 604(b) applies only when sentence of supervision is entered under adult criminal code. (PALMER and GORDON, concurring.)

[People v. Baker](#), 2014 IL App (5th) 110492 (February 6, 2015) Fayette Co. (CATES) Affirmed in part and vacated in part; remanded with instructions.

(Modified upon denial of rehearing 3/17/15.) Defendant, age 15 at time of offense, was convicted, after jury trial, of two counts of first degree murder and three counts of home invasion, and sentenced to two mandatory terms of natural life for murders, and 30 years for each home invasion. Two murders and home invasion at neighboring house arose out of same incident, and thus home invasion was properly prosecuted under criminal law in circuit court, even though that charge had not been transferred from juvenile court. Defense counsel's decision to forgo instructing jury on insanity was a matter of trial strategy, thus no ineffective assistance of counsel. Court properly limited opinions of defense neuropharmacologist expert to adverse effects of Cymbalta (which Defendant had been prescribed) on adolescents in general, as he did not have qualifications required to offer expert opinion on issue of Defendant's sanity or mental illness. As no indication that court considered Defendant's youth and attendant characteristics, life sentences are vacated. (STEWART and MOORE, concurring.)

[People v. Cavazos](#), 2015 IL App (2d) 120171 (March 31, 2015) Kane Co. (JORGENSEN) Affirmed.

Defendant, then age 17, and his brother, then age 16, were convicted, after simultaneous juries in adult court, of first degree murder, attempted first-degree murder, and related offenses, in shooting death of 15-year-old boy and shooting injury of boy's girlfriend. Jury found that Defendant personally discharged semi-automatic weapon used in crimes, and sentenced him to aggregate 75 years. Jury could have reasonably concluded Defendant's intent to kill both persons, as they were walking closely together. Section 5-120 of Juvenile Court Act, which designates where juveniles are to be tried, and is not subject to and does not violate eighth amendment or proportionate-penalties clause, as it is not a sentencing statute. (ZENOFF and BIRKETT, concurring.)

[People v. Reyes](#), 2015 IL App (2d) 120471 (May 6, 2015) Kendall Co. (SCHOSTOK) Affirmed.

Defendant, then 16, was convicted of first-degree murder for shooting death of one victim, and attempted murder of two victims; jury found that Defendant personally discharged firearm as to all three offenses. Defendant's aggregate term-of-years sentence of 97 consecutive years imprisonment, based on multiple counts and multiple victims, does not violate eighth amendment. Automatic transfer statute does not violate eighth amendment or due process. (BURKE and SPENCE, concurring.)

[People v. Gipson](#), 2015 IL App (1st) 122451 (May 27, 2015) Cook Co., 3d Div. (LAVIN) Reversed and remanded.

Defendant was tried and sentenced as an adult for shooting incident at age 15. After automatic transfer from juvenile court to adult court, court found him unfit to stand trial but later determined he had been restored to fitness. Court found Defendant guilty of attempted first-degree murder of two persons, aggravated battery with a firearm and aggravated discharge of a firearm. As applied to Defendant, cumulative sentence of 52 years does not constitute a natural life sentence without possibility of parole, and thus Illinois' transfer and sentencing scheme does not violate eighth amendment. Defendant's sentence is so wholly disproportionate that it shocks the moral sense of the community and, as applied, automatic transfer statute in conjunction with sentencing scheme violates proportionate penalties clause. Reversed and remanded for retroactive fitness hearing.(PUCINSKI and MASON, concurring.)

[In re Deshawn G.](#), 2015 IL App (1st) 143316 (September 9, 2015) Cook Co., 3d Div. (FITZGERALD SMITH) Affirmed in part and vacated in part.

After jury trial, Respondent was adjudicated to be a violent juvenile offender (VJO) and sentenced to Department of Juvenile Justice until age 21, pursuant to mandatory sentencing provision of Juvenile Court Act which applies upon a minor's second finding of delinquency for an offense that, in an adult case, would have been a Class 2 or greater felony involving use or threat of physical force or violence, or which involves a firearm. Under the one-act, one-crime rule, Respondent should be adjudicated delinquent under a single count of AUUW statute. Possessing a firearm while under age 21 is more serious offense, and thus adjudication under that count remains, and adjudication under count for no FOID card count is vacated. VJO mandatory sentencing provision does not violate 8th amendment of U.S. Constitution nor proportionate penalties clause of Illinois Constitution.(HOWSE and COBBS, concurring.)

[People v. Craighead](#), 2015 IL App (5th) 140468 (September 11, 2015) St. Clair Co. (GOLDENHERSH) Affirmed and remanded.

Defendant, age 16 at time of offense, was convicted of 1997 murders of two persons, after being tried as an adult. Court sentenced Defendant to natural life, pursuant to provision requiring mandatory natural life for any defendant, regardless of age at time of offense, found guilty of murdering more than one person. Lack of culpable negligence excused Defendant's 7-month delay in filing postconviction petition, and significant changes in state and federal law affected Defendant's initial petition, which remained pending in trial court for nearly 10 years. U.S. Supreme Court's 2012 decision in *Miller v. Alabama*, which holds that mandatory imposition of life sentence without parole on a person under age 18 at time of offense violates 8th amendment prohibition against cruel and unusual punishment, applies retroactively to cases on collateral review. (WELCH and CHAPMAN, concurring.)

People v. Pace, 2015 IL App (1st) 110415 (September 11, 2015) Cook Co., 6th Div. (DELORT) Affirmed in part and vacated in part; remanded with instructions.

(Modified upon denial of rehearing 10/16/15.) In 2007, Defendant, age 16 at time of offense, entered blind guilty plea to 1 count of first degree murder, 1 count of first degree murder with personal discharge of firearm that proximately caused death, and 2 counts of aggravated battery with a firearm. Defendant's case had been transferred to adult criminal court pursuant to automatic transfer provision of Juvenile Court Act. Court placed significant weight on improper aggravating factors in sentencing, including statements about judge's personal feelings about gang violence and statements that judge felt aligned with victims. Thus, remanded for resentencing before different judge. Judge did not abandon his role as neutral arbiter during hearing on Defendant's motion to vacate his guilty plea. Automatic transfer provision, and application of consecutive sentencing statute and firearm enhancement are not unconstitutional. Mittimus corrected from 2 to 1 count of murder, based on one-act, one-crime doctrine. (CUNNINGHAM and HARRIS, concurring.)

In re O.P., 2015 IL 118569 (September 24, 2015) Peoria Co. (KILBRIDE) Appellate court reversed.

Minor was found guilty of obstructing justice for knowingly furnishing false information to a police officer with intent to prevent his own apprehension. Obstruction of justice statute is violated when a person knowingly provides false information with intent to prevent his seizure or arrest on a criminal charge. Minor gave false information about his identity shortly after he was placed in backseat of squad car, being apprehended for vehicle burglary. At that time, officer did not know about separate, unrelated juvenile warrant, and had not apprehended minor on that warrant. Officer learned of warrant only after transporting minor to police station. Evidence was sufficient to establish that minor committed offense of obstructing justice by knowingly furnishing false information with intent to prevent his apprehension on juvenile warrant. (GARMAN, FREEMAN, THOMAS, KARMEIER, BURKE, and THEIS, concurring.)

People v. Fiveash, 2015 IL 117669 (September 24, 2015) Cook Co. (KILBRIDE) Appellate court affirmed; remanded.

Defendant, age 23, was charged with aggravated criminal sexual assault and criminal sexual assault of his 6-year-old cousin, who lived in same residence, when Defendant was 14 or 15 years old. Section 5-120 of Juvenile Court Act does not bar prosecution of Defendant in criminal court for offenses allegedly committed when he was 14 or 15 but not charged with until he was over 21 and no longer subject to the Act. Under Section 3-6 of Code of Criminal Procedure, Defendant can be charged with her assault until victim turns age 28. By retaining limited authority of juvenile court while expanding State's available time frame for initiating prosecution of specified sex offenses, legislature allowed for criminal prosecution of youthful offenders who subsequently age out of juvenile court system. (FREEMAN, THOMAS, KARMEIER, BURKE, and THEIS, concurring.)

[*In re M.A.*](#), 2015 IL 118049 (November 4, 2015) Cook Co. (THOMAS) Appellate court affirmed in part and reversed in part; circuit court affirmed.

Juvenile Respondent, then age 13, inflicted cuts on her 14-year-old brother with a kitchen knife during argument over a missing shower cap. Respondent was adjudicated delinquent, including for aggravated battery and aggravated domestic battery, and was ordered to register under the Murderer and Violent Offender Against Youth Registration Act. That Act does not violate substantive due process, procedural due process, or equal protection. (GARMAN and KARMEIER, concurring; BURKE, FREEMAN, KILBRIDE, and THEIS, concurring.)

[*In re Michael D.*](#), 2015 IL 119178 (December 17, 2015) Cook Co. (THOMAS) Appellate court affirmed.

In a juvenile delinquency case, no Illinois Supreme Court Rules allow a minor to appeal an order continuing the case under supervision, when the order is entered after a finding of guilty. Order continuing respondent's case under supervision, although entered after a finding of guilty, was not a final, appealable order, and thus appellate court was without jurisdiction to consider appeal. (GARMAN, KILBRIDE, KARMEIER, and THEIS, concurring; BURKE, dissenting.)

[*People v. House*](#), 2015 IL App (1st) 110580 (December 24, 2015) Cook Co., 4th Div. (McBRIDE) Affirmed in part and vacated in part; remanded.

Defendant was convicted, after jury trial, of 2 counts of first-degree murder and 2 counts of aggravated kidnapping, for his role as a lookout, on theory of accountability. Court properly dismissed Defendant's petition for postconviction relief at second stage. No newly discovered evidence which could not have been discovered with due diligence; and no showing of ineffective assistance of counsel. Mandatory natural life sentencing statute is unconstitutional as applied to Defendant. At time of offense in 1993, Defendant, at age 19 years and 2 months, was barely a legal adult and still a teenager. Young age, family background, and lack of violent criminal history are all relevant when considered along with his participation in shootings. (REYES, concurring; GORDON, concurring in part and dissenting in part.)

[*People v. Holman*](#), 2016 IL App (5th) 100587-B (March 3, 2016) Madison Co. (CHAPMAN) Affirmed.

Defendant was convicted of murder of 83-year-old woman in her rural farmhouse, committed when Defendant was age 17, and in 1981 was sentenced to natural life in prison. Evidence in presentenced investigation report (PSI) included evidence related to Defendant's youth and the mitigating features of youth, and his low IQ and susceptibility to influence by peers. Ample aggravating evidence was presented. Court declined to decide whether 8th amendment requires a categorical bar on sentences of life without parole for any juvenile defendant. A natural-life sentence might still be appropriate on remand so long as the court has discretion to consider other sentences. (SCHWARM and MOORE, concurring.)

[In re N.H.](#), 2016 IL App (1st) 152504 (March 18, 2016) Cook Co., 5th Div. (GORDON) Affirmed.

Respondent minor appeals adjudication of delinquency and dispositional order of probation. Court found Respondent guilty of robbery and aggravated battery of an 18-year-old student , whom he pushed and then grabbed wallet from her hand.Court sentenced him to 5 years of probation. Court was within its discretion in ordering Respondent to maintain a "C average" in school as a condition of his probation. Mandatory probation requirement is rationally related to twin goals of the Juvenile Court Act as it protects the public, while still allowing for an individualized sentence. Minor reported grades of A's and B's, has no mental or physical health issues, and has a supportive family. Requirement does not challenge the integrity of the judicial process. (REYES, concurring; LAMPKIN, specially concurring.)

[People v. Nieto](#), 2016 IL App (1st) 121604 (March 23, 2016) Cook Co., 3d Div. (LAVIN) Affirmed in part and vacated in part; remanded with directions.

(Court opinion corrected 4/5/16.) Defendant, then age 17, when a front-seat passenger with 3 other gang members, shot and killed 1 person, and injured another, when they allegedly used a sign disrespecting their gang. Jury convicted Defendant of first degree murder and aggravated battery with a firearm. Court sentenced Defendant to total 78 years. Per U.S. Supreme Court decision, state courts must give 2012 Miller v. Alabama U.S. Supreme Court decision, which bars life without parole for all but the rarest juvenile offender, effect in collateral proceedings as it is a substantive rule. Courts must consider a juvenile's special characteristics even when exercising discretion.Sentence is not likely to deter anyone, as deterrence is diminished in juvenile sentencing. Court failed to consider characteristics of Defendant's youth through lens of Miller decision. (MASON and PUCINSKI, concurring.)

JUVENILE (transfer \ ejj)

[In re C.C.](#), 2015 IL App (1st) 142306 (January 6, 2015) Cook Co., 4th Div. (ELLIS) Affirmed. Respondent, age 14 at time of shooting, was convicted of first-degree murder for shooting death of 17-year-old. Respondent was sentenced to imprisonment in Department of Juvenile Justice until age 21, with mandatory minimum 45-year adult criminal sentence. Under extended jurisdiction juvenile (EJJ) statute, adult sentence stayed, to be vacated upon completion of juvenile sentence if no new offenses and no violation of conditions of juvenile sentence. As stay on Respondent's adult sentence has not been revoked and it is currently in no jeopardy of being revoked, he lacks standing at this time to challenge severity of his adult sentence, as his asserted injury is too remote to confer standing.(HOWSE and EPSTEIN, concurring.)

[In re E.W.](#), 2015 IL App (5th) 140341 (February 23, 2015) St. Clair Co. (WELCH) Affirmed in part as modified; reversed in part and remanded.

Respondent minor, age 15 at time of offense, was adjudicated delinquent after entering fully negotiated guilty plea to criminal sexual assault, and was sentenced to five years probation. Respondent then entered open plea for adult portion of EJJ (extended jurisdiction juvenile) prosecution, and court entered 15-year conditional adult sentence, stayed pending successful completion of juvenile sentence. In adult portion of plea, conversation between court and counsel, not with Respondent, as to whether he had understood that he was waiving jury, and was not asked if he wished to persist in his plea. Respondent's postconviction petition set forth "gist" of a constitutional claim that his guilty plea was not knowing and voluntary. Respondent was given adequate notice that conditional adult sentence could be imposed if he violated condition of probation.(CHAPMAN and SCHWARM, concurring.)

[People v. Brown](#), 2015 IL App (1st) 130048 (April 20, 2015) Cook Co., 1st Div. (HARRIS) Affirmed as modified; mittimus corrected.

Defendant, age 16 at time of offense, was tried as an adult pursuant to mandatory transfer provision of Juvenile Court Act, and was convicted, after jury trial, of aggravated battery with a firearm and three counts of attempted first degree murder. Court merged convictions into one count for attempted first degree murder and sentenced him to 50 years imprisonment, consisting of 25-year term for attempted first degree murder and 25-year sentencing enhancement for personally discharging a firearm that proximately caused great bodily harm to another. State presented sufficient evidence to support sentencing enhancement imposed by showing that Defendant caused great bodily harm. Mandatory transfer provision of Juvenile Court Act is constitutional. Court abused its discretion when, in determining sentence, relied on speculative evidence, and where sentence failed to satisfy constitutional objective of restoring Defendant to useful citizenship. Sentence for attempted first degree murder is reduced to 6 years, with 25-year enhancement.(DELORT and CUNNINGHAM, concurring.)

[People v. Banks](#), 2015 IL App (1st) 130985 (June 30, 2015) Cook Co., 5th Div. (McBRIDE) Affirmed.

Defendant, after bench trial, was convicted of first degree murder and sentenced to 45 years in prison. Automatic application of mandatory minimum sentence of 45 years for a juvenile Defendant and statute providing for automatic transfer to adult court for a juvenile Defendant charged with first degree murder do not violate eighth amendment of U.S. Constitution or proportionate penalties clause of Illinois Constitution. Court had opportunity to consider factors in aggravation and mitigation, including age.(PALMER and REYES, concurring.)

[People v. Nelson](#), 2016 IL App (4th) 140168 (March 10, 2016) Sangamon Co. (KNECHT) Affirmed in part and vacated in part; remanded with directions.

Defendant was convicted, after jury trial, of 3 counts of first degree murder. In physical altercation with another male, Section 5-130 of Juvenile Court Act, providing for automatic

transfer to adult criminal court, does not violate 8th Amendment. (STEIGMANN and APPLETON, concurring.)

JUVENILE (abuse & neglect)

[In re A.T.](#), 2015 IL App (3d) 140372 (January 13, 2015) Tazewell Co. (McDADE) Affirmed. After finding of neglect and dispositional hearing, court found Respondent mother unfit to care for her minor child. Dispositional report support conclusion, as mother had made several threats to kill minor, is and exhibited actual conduct supporting finding of unfitness. (O'BRIEN and WRIGHT, concurring.)

[In re M.M.](#), 2015 IL App (3d) 130856 (January 23, 2015) Peoria Co. (HOLDRIDGE) Reversed and remanded.

(Modified upon denial of rehearing 9/2/15.) Court failed to comply with Juvenile Court Act's mandatory prerequisites for placing children with DCFS, which requires that a court may place a child outside parental home only if court makes factual determination that parent is either unfit, unable, or unwilling to care for the child, and puts in writing explicit factual basis supporting the determination. Thus, court committed reversible error in awarding custody of children to DCFS. Appellate court may not presume that trial court made such findings implicitly based on strength of evidence. (LYTTON and CARTER, concurring.)

[L.F. v. The Department of Children and Family Services](#), 2015 IL App (2d) 131037 (March 11, 2015) Lake Co. (BURKE) Reversed with directions.

DCFS failed to meet its burden of proof to show that a preponderance of evidence supported its indicated report of child neglect due to inadequate supervision. Director of DCFS erred in denying Plaintiff mother's request to expunge indicated finding. There was no evidence that Plaintiff's use of K3 (synthetic marijuana) rendered her unable to adequately supervise her 6-year-old son. DCFS failed to refute Plaintiff's testimony that she could still function after using K3, and failed to present evidence that her use of K3 produced substantial state of stupor, unconsciousness, or irrationality so that she was unable to adequately supervise her son. (HUTCHINSON and BIRKETT, concurring.)

[In re N.T.](#), 2015 IL App (1st) 142391 (April 10, 2015) Cook Co., 5th Div. (GORDON) Affirmed. Court's order terminating Respondent's parental rights to her four-year-old daughter, and finding that termination was in best interest of minor, was not against manifest weight of evidence.

Respondent was not denied a fair hearing because court properly informed maternal grandmother, with whom minor was placed, as to the law when cautioning her that adoption was favored over guardianship. Court was not acting as advocate by asking four questions of maternal grandmother during best interest hearing. Respondent was not entitled to hearing on her fitness to stand trial prior to termination proceedings. (McBRIDE and REYES, concurring.)

[In re M.S.](#), 2015 IL App (4th) 140857 (April 14, 2015) Vermilion Co. (HARRIS) Reversed. Minors were placed in relative foster care, and court held DCFS and its agent, LSSI, in contempt for not having immediately removed minors from foster home after grandfather had positive drug test. Court Record fails to reflect existence of a clear order upon which juvenile court could base its contempt finding against Respondents. Even assuming that court order existed requiring Respondents to remove minors from their foster placement, removal was completed prior to date court issued its rule to show cause and before it held Respondents in civil contempt, and thus there was not action for court to coerce at time contempt proceedings began. Court's order improperly punished Respondents for actions which they could not undo, and due process requirements for indirect criminal contempt were not met. (KNECHT and APPLETON, concurring.)

[In re Audrey B.](#), 2015 IL App (1st) 142909 (April 30, 2015) Cook Co., 4th Div. (HOWSE) Affirmed.

After dispositional hearing, court adjudged minor a ward of court, and placed minor in custody and guardianship of DCFS. Court did not use "constellation of injuries" theory when it based its decision on fact that minor's symmetrical bilateral forearm injuries were difficult to explain. Court based its decision on testimony and relative credibility of expert witnesses. Court's findings of physical abuse and medical neglect were not against manifest weight of evidence. (ELLIS and COBBS, concurring.)

[In re Marianna F.-M.](#), 2015 IL App (1st) 142897 (May 8, 2015) Cook Co., 5th Div. (McBRIDE) Reversed in part and vacated in part; remanded.

Court entered order, after adjudicatory hearing and same-day dispositional hearing, finding that father of minor, then age 6, was fit, willing, and able to parent minor, and returned minor home to him under order of protective supervision. Finding was against manifest weight of evidence, as court concluded that minor was abused due to excessive corporal punishment and substantial risk of physical injury caused by father, based on physician's opinion that her injuries were nonaccidental and her bruising was inconsistent with father's explanation for injuries. Father made insufficient progress in therapy to parent minor. (PALMER and GORDON, concurring.)

[In re S.W. and S.W.](#), 2015 IL App (3d) 140981 (May 26, 2015) Peoria Co. (SCHMIDT) Affirmed.

After court found Respondent mother's two minor children neglected, court within its discretion in denying Respondent mother's motions to continue, and in proceeding with fitness hearing after discharging her final appointed attorney who had stated he was ready to proceed to fitness hearing, and in conducting best interests hearing in Respondent's absence but with prior notice to her. Respondent fired all four of her court-appointed attorneys, each time expressing her dissatisfaction with their representation, and Respondent stated that she would find private counsel but failed to do so. (McDADE and LYTTON, concurring.)

In re S.B., 2015 IL App (4th) 150260 (August 24, 2015) Adams Co. (APPLETON) Reversed and remanded.

Court entered adjudicatory orders finding Respondent mother's 3 children to be neglected, and dispositional orders making children wards of the court. Mother was being transported to hearing from prison but transport vehicle arrived 50 minutes late due to heavy snowfall. Respondent mother's attorney was present, but mother was not present when case, set for 9 a.m., was called at 9:35 a.m. and proceeded over objection of mother's attorney. In these circumstances, court erred in denying continuance to await mother's arrival from prison. (HARRIS and HOLDER WHITE, concurring.)

In re M.H., 2015 IL App (4th) 150397 (September 28, 2015) Vermilion Co. (APPLETON) Affirmed.

Court terminated Respondent father's parental rights to his daughter. Court's factual findings, that Respondent was an unfit person and that terminating his parental rights were in the best interest of the minor, were not against manifest weight of evidence. Minor was born when Respondent was in jail, awaiting trial, and never has had any contact with her. Foster mother has established relationship with minor, and is knowledgeable about complicated medical problems of minor, who was born with cannabis and alcohol in her system. (TURNER and STEIGMANN, concurring.)

In re Davon H., 2015 IL App (1st) 150926 (October 30, 2015) Cook Co., 5th Div. (PALMER) Affirmed.

Following adjudication and disposition hearings, court terminated parental rights of Respondent mother to her 3 children, and found children abused and neglected, Respondent to be unfit, found Respondent should not be allowed visitation, and it was in best interests of children that a guardian with right to consent to their adoption be appointed. Children's father had previously admitted to hitting one child's twin brother, who died at 8 months old from cerebral edema due to skull fracture from multiple blunt force injuries, and was convicted of murder. Respondent allowed children to be beaten, failing to notice their injuries and pain, and continued to deny any responsibility for their injuries. Court's findings were not against manifest weight of evidence. Court was within its discretion in denying visitation and in admitting independent expert witness testimony. Requirement that State disclose basis for each opinion applied only to controlled experts. Expert's opinion that injuries of deceased child were fresh was not a new opinion, as in expert discovery responses expert's opinions included that child sustained acute blunt trauma, which means that injuries were recent. (LAMPKIN and GORDON, concurring.)

In re S.K.B., 2015 IL App (1st) 151249 (November 10, 2015) Cook Co., 2d Div. (SIMON) Affirmed.

Court found both natural parents to be unfit; and found that it was in best interests of child to terminate both parents' parental rights and to appoint a guardian with right to consent to adoption

of the minor. Court considered all factors required by Juvenile Court Act, with detailed explanations for findings. Judgment was not against manifest weight of evidence. Court properly weighed minor's attachment to his foster mother and that minor, although young indicated that he wants to be adopted by his foster mother. (PIERCE and NEVILLE, concurring.)

In re M.I., 2015 IL App (3d) 150403 (November 20, 2015) Peoria Co. (O'BRIEN) Reversed and remanded.

Court erred in finding Respondent father unfit to care for his daughter and that it was in best interest of minor that his parental rights be terminated. Court's findings on both grounds (failure to make reasonable progress toward return home, and failure to maintain reasonable degree of interest or concern for minor's welfare) were against manifest weight of evidence. Failing to complete a task beyond one's intellectual capacity is not the same as refusing to comply with court-ordered directives and willfully failing to make reasonable efforts or maintaining reasonable degree of interest in child. Court was required to consider father's conduct in light of circumstances facing him, and no modifications to services were made to allow father to be compliant with tasks given his intellectual deficits. Finding of unfitness does not necessarily mean that parental rights should be terminated. (McDADE, concurring; SCHMIDT, dissenting.)

In re Zion M., 2015 IL App (1st) 151119 (December 17, 2015) Cook Co., 4th Div. (HOWSE) Affirmed.

Petition alleging abuse and neglect filed 5 days after birth of Respondent mother's 5th child. One of her children had, 2 months prior, found a gun in the home, owned by mother's boyfriend, and shot and accidentally killed his sibling. There is nothing in the record to suggest that mother abused or neglected child. Evidence that mother has not done everything social services requires of her to regain custody of her other children is not determinative. Just as prior abuse or neglect of a sibling does not per se establish neglect of another sibling, "a prior finding of unfitness does not prove per se neglect." Court properly found that State had not proved abuse or neglect by a preponderance of the evidence under a theory of anticipatory neglect. (ELLIS and COBBS, concurring.)

In re Jordyn L., 2016 IL App (1st) 150956 (January 20, 2016) Cook Co., 3d Div. (FITZGERALD SMITH) Affirmed.

Evidence was sufficient to support court's finding that minor was neglected and abused, as child was neglected due to injurious environment and abused due to substantial risk of physical injury. Mother refused to entrust minor with services offered through UCAN and DCFS, and instead entrusted minor with her mother and grandmother, who had abused and neglected her and her siblings when she was a minor; and mother consistently failed to participate in services assigned to her. (MASON and LAVIN, concurring.)

In re Adam B., 2016 IL App (1st) 152037 (January 26, 2016) Cook Co., 2d Div. (SIMON) Affirmed.

Court's findings that Respondent mother's three minor children were abused and neglected were not against manifest weight of evidence. Court heard evidence including that mother delayed seeking medical treatment for one child's burn on his leg; and that mother was noncompliant with services; and that mother could not explain bruise on one child or the burn on the other child's leg. State was not required to show that each minor had already been harmed, to prove its allegations of abuse and neglect. (NEVILLE and HYMAN, concurring.)

In re D.M., 2016 IL App (1st) 152608 (March 10, 2016) Cook Co., 4th Div. (HOWSE) Affirmed.

Court properly adjudicated two minor siblings wards of the State; siblings' half-sister reported that their father had sexually abused her multiple times over several years, and father confessed to abusing half-sister while 2 siblings were in his custody and living in his home. Thus, evidence was sufficient to prove allegations of petitions by preponderance of evidence in video recorded statement to the police. As father does not argue that substance of his video recorded statement was inaccurate, his argument that statement was inadmissible hearsay and that no proper foundation was laid to admit video fails. (McBRIDE and COBBS, concurring.)

In re Harriett L.-B., 2016 IL App (1st) 152034 (March 9, 2016) Cook Co., 3d Div. (FITZGERALD SMITH) Affirmed.

Court properly entered adjudicatory order finding that infant was neglected due to injurious environment based on anticipatory neglect, and dispositional order finding that mother is unable and unwilling to parent infant at this time. Mother tested positive for marijuana at time of birth, had little prenatal care, and was often noncompliant with her medications. Whatever mother's medically related constitutional rights are (including to refuse medical treatment for her epilepsy and seizures, resulting in repeated grand mal seizures), they do not override infant's rights to a safe and nurturing environment. Court properly applied doctrine of anticipatory neglect, as basis for finding of neglect due to injurious environment, which is a method to protect children who are direct victims of neglect or abuse, and also to protect children with probability of being subject to neglect or abuse for a person who has neglected or abused another sibling child.(LAVIN and PUCINSKI, concurring.)

KIDNAPPING

[People v. Johnson](#), 2015 IL App (1st) 123249 (January 28, 2015) Cook Co., 3d Div. (MASON) Affirmed.

(Court opinion corrected 2/17/15.) Defendant was convicted of aggravated kidnapping and aggravated criminal sexual assault. Rational trier of fact could have found independent offense of kidnapping under asportation theory, and that offense was not merely incidental to offense of criminal sexual assault. Defendant assaulted victim but put his arm around her neck, choking her, and twice moved her to more secluded area, both which increased danger to victim. State's analogy to car accident with no visible signs of injury was in response to remarks made by defense counsel in closing argument; thus, no prejudice in defense counsel failing to object to analogy. Trial judge emphatically stating "sustained" in response to its own objection to defense counsel's argument for jury not to compromise was not material factor in conviction. (LAVIN and HYMAN, concurring.)

LESSER-INCLUDED

[People v. Sumler](#), 123381 (February 11, 2015) Cook Co., 4th Div. ((FITZGERALD SMITH)) Affirmed in part and vacated in part.

Defendant was convicted, after jury trial, of aggravated kidnapping, violation of order of protection, and domestic battery. Defendant's conviction for domestic battery should be vacated as a lesser-included offense of aggravated kidnapping. Court considered proper aggravating and mitigating factors prior to imposing a sentence. (HOWSE and COBBS, concurring.)

[People v. Hicks](#), 2015 IL App (1st) 120035 (March 5, 2015) Cook Co., 4th Div. (ELLIS) Affirmed.

Defendant was charged with armed robbery, and was convicted, after jury trial, of robbery of candy store. Evidence showed that Defendant grappled with cashier when he took money from cash register and thus used "force" sufficient to convict him of offense of robbery. Court did not err in sua sponte instructing jury as to lesser-included offense of robbery. No ineffective assistance of counsel in defense counsel's failure to define force, as no pattern jury instruction defines force, and outcome of trial would likely not have changed even if force was defined. (FITZGERALD SMITH and COBBS, concurring.)

[People v. Lee](#), 2015 IL App (1st) 132059 (September 24, 2015) Cook Co., 4th Div. (ELLIS) Reversed and remanded.

Defendant was convicted, after jury trial, of 4 counts of aggravated cruelty to a companion animal, after 4 horses were found in deplorable conditions in a barn. Evidence was sufficient to find Defendant guilty of aggravated cruelty beyond a reasonable doubt, with evidence of gross deprivation of food and water, humane treatment, and veterinary care. Court committed

reversible error by failing to instruct jury on lesser-included offense of violation of owner's duties statute. There was no evidence that Defendant was on the property during time at issue, and jury reasonably could have accepted Defendant's argument that he was an absentee, unknowing owner, and thus lacked requisite intent. (HOWSE and COBBS, concurring.)

[People v. Collins](#), 2015 IL App (1st) 131145 (September 16, 2015) Cook Co., 3d Div. (LAVIN) Affirmed in part and vacated in part.

(Court opinion corrected 10/8/15.) Defendant was convicted, after jury trial, of possession of controlled substance and possession of a controlled substance with intent to deliver, and was sentenced as a habitual criminal to natural life. Court properly denied Defendant's motion to quash arrest and suppress evidence, and Defendant cannot show that his sentence is unconstitutional. Conviction for possession of controlled substance is vacated as it is a lesser-included offense of possession with intent to deliver. Evidence at motion to suppress hearing did not show that any conduct of officer unreasonably prolonged encounter. Officer testified that he found Defendant's explanation of his route illogical, creating additional suspicion. It was reasonable for officer to ask whether Defendant had narcotics in car, upon learning that Defendant was on MSR for possession of cocaine conviction. (PUCHINSKI, concurring; HYMAN, dissenting in part.)

[People v. Johnson](#), 2015 IL App (1st) 141216 (December 23, 2015) Cook Co., 5th Div. (GORDON) Modified and remanded.

Defendant was convicted, after bench trial, of aggravated robbery as a lesser-included offense of armed robbery, and other offenses. Evidence adduced at trial does not support defendant's conviction for aggravated robbery beyond a reasonable doubt. State requested a lesser-included offense conviction of "robbery" only, never mentioning aggravated robbery. Convicting Defendant of the uncharged offense of aggravated robbery that is not a lesser-included offense of the charged offense of armed robbery violates defendant's "fundamental due process right" and affects fairness of Defendant's trial. Aggravated robbery is not a lesser-included offense of armed robbery. Thus, conviction reduced to simple robbery, and remanded for resentencing. (REYES and PALMER, concurring.)

[People v. Green](#), 2016 IL App (1st) 134011 (March 7, 2016) Cook Co., 1st Div. (HARRIS) Affirmed in part and reversed in part; remanded.

Defendant was convicted, after jury trial, of aggravated battery with a firearm and unlawful use of a weapon by a felon, after shooting, with a gun concealed in his front pants pocket, a man who refused to shake hands with him outside a bar. Court properly refused to instruct jury on lesser-included offense of reckless conduct, as evidence does not support that theory; Defendant shot at man twice through his pants pocket, and only afterward, during a struggle, was man shot when gun fired a third time. Remanded to correct fines, fees, and costs, and to correct mittimus to reflect a single conviction in accordance with court's merger order. (LIU and CUNNINGHAM, concurring.)

People v. Clark, 2016 IL 118845 (March 24, 2016) Cook Co. (KARMEIER) Appellate court affirmed.

(Court opinion corrected 4/8/16.) Defendant was charged with multiple offenses, including aggravated vehicular hijacking while armed with a firearm and armed robbery while armed with a firearm, for accosting a man who was parking his vehicle in his garage, taking it from him. Plain language of Sections 18-2(a)(1) and 18-4(a)(3) of Code of Criminal Procedure explicitly excludes possession or use of a firearm. Thus, a violation of Sections of Code for offenses committed with firearms and those Sections for offenses committed with weapons other than firearms are mutually exclusive. Although Defendant was acquitted of the charged firearm offenses, he stands convicted of and sentenced for uncharged offenses he did not commit. Improper convictions and sentences are corrected via remedial application of plain error. Convicting a defendant of an uncharged offense that is not a lesser-included offense of a charged offense violates a defendant's due process right to notice of the charges against him. Appellate court properly reduced degree of convictions to lesser-included offenses of vehicular hijacking and robbery and remanded for resentencing. (GARMAN, FREEMAN, THOMAS, KILBRIDE, BURKE, and THEIS, concurring.)

People v. Higgins, 2016 IL App (3d) 140112 (March 24, 2016) LaSalle Co. (SCHMIDT) Affirmed.

Defendant was convicted, after jury trial, of unlawful delivery of a controlled substance. Court was not required to admonish Defendant of the risks associated with admitting he delivered heroin as soon as that strategy became clear to the court. A trial court need only inquire into defense counsel's advice as to potential penalties associated with a lesser-included offense if defense counsel actually tenders the lesser-included offense instruction. Court should not interfere with what might be a defense strategy and need not give generalized admonishments to the defendant. Court was not required to ensure that Defendant agreed with decision not to object to State's tender of instruction. Defendant failed to show that 12-year sentence is manifestly disproportionate to nature or offense or that it is greatly at variance with spirit or purpose of law. (McDADE and WRIGHT, concurring.)

MURDER-

[People v. Balfour](#), 2015 IL App (1st) 122325 (March 18, 2015) Cook Co., 3d Div. (LAVIN) Affirmed.

(Modified upon denial of rehearing 5/6/15.) Defendant was convicted, after jury trial, of first-degree murder of three members of his wife's family, and related charges. State offered substantial evidence of Defendant's role in murders, and of his many prior threats. Absence of forensic evidence unequivocally tying Defendant to murders does not necessarily equate to reasonable doubt. (PUCINSKI and HYMAN, concurring.)

[People v. Pollard](#), 2015 IL App (3d) 130467 (June 2, 2015) Peoria Co. (CARTER) Affirmed. (Court opinion corrected 6/11/15.) Defendant was convicted, after bench trial, of first degree murder, involuntary manslaughter, and endangering the life or health of a child, relating to death of her two-month-old son, and sentenced to 29 years. Infant's death was due to malnutrition and dehydration due to neglect, with prematurity a contributing factor. Evidence was sufficient to establish that Defendant acted with "knowledge" that her acts created strong probability of death or great bodily harm to infant, as she failed to follow hospital's instructions on feeding, positioning, and monitoring infant. (SCHMIDT, concurring; McDADE, dissenting.)

[People v. Brown](#), 2015 IL App (1st) 134049 (June 22, 2015) Cook Co., 1st Div. (CUNNINGHAM) Affirmed in part and vacated in part; remanded.

Defendant was convicted of 7 counts of first degree murder, including 2 counts of knowing murder and 5 counts of felony murder. Innocent bystander was struck by bullet from nearby gunfight in 2007, and was rendered quadriplegic and was dependent on ventilator, and died in 2010. As victim had not yet died at time of trial, double jeopardy did not preclude 2013 murder prosecution after victim had died. State was estopped from prosecuting Defendant for intentional first degree murder after his 2009 acquittal for attempted murder. Collateral estoppel effect did not preclude charges of knowing or felony murder. Directed verdict in Defendant's favor on charges of aggravated battery with a firearm and aggravated discharge of a firearm indicates finding of insufficient evidence that Defendant knowingly fired in direction of victim or caused victim's injury. Thus, collateral estoppel precludes first degree murder conviction. (DELORT and CONNORS, concurring.)

[People v. Carlisle](#), 2015 IL App (1st) 131144 (June 30, 2015) Cook Co., 5th Div. (GORDON) Affirmed.

Defendant was convicted, after jury trial, of attempted first-degree murder, aggravated battery with a firearm, and aggravated discharge of a firearm after he used sawed-off shotgun to shoot one two police officers. No error in refusing to admit testimony of defense expert that shotgun was not dangerous, as guns are per se deadly weapons, and testimony was not relevant to proving first element of attempted murder, a "substantial step"; and was not relevant to whether Defendant intended to commit murder, as expert could not testify as to what Defendant knew

about shotgun's capabilities after the offense. As evidence of Defendant's guilt was overwhelming, Defendant could not show reasonable probability that outcome would have been different if defense counsel had introduced officers' previous statements into evidence. Thus, Defendant could not show ineffective assistance of counsel. (PALMER and REYES, concurring.)

People v. Lengyel, 2015 IL App (1st) 131022 (August 5, 2015) Cook Co., 3d Div. (HYMAN) Reversed and remanded.

Defendant, then age 22 who lived in a one-bedroom apartment with his father, then age 55, got into verbal altercation and then physical altercation with his father. Defendant punched his father with his fists; he died two days later after suffering a stroke. Proof failed to sufficiently establish beyond a reasonable doubt that Defendant knowingly or intentionally killed his father. Defendant acted recklessly, so his actions were involuntary manslaughter, not second-degree murder.(PUCINSKI and MASON, concurring.)

People v. Ivy, 2015 IL App (1st) 130045 (August 6, 2015) Cook Co., 4th Div. (ELLIS) Reversed in part and affirmed in part.

Shooting outside apartment building left one person dead and three injured. Defendant was one of at least three shooters present. After bench trial, Defendant was convicted of first-degree murder of one person and attempted murder of three persons, and sentenced to combined 120 years. No evidence at trial proved that one injured person was shot by someone acting in furtherance of common criminal design shared by Defendant and other shooters at scene. Thus, Defendant's conviction of attempted murder of that one person, based on accountability theory, is reversed. Although two witnesses, who had identified Defendant, to police and to grand jury, as the man who shot the one person who died, recanted at trial, trial court was better-positioned to assess credibility of those statements versus their prior statements. Defendant's murder conviction affirmed.(FITZGERALD SMITH and COBBS, concurring.)

People v. Glazier, 2015 IL App (5th) 120401 (August 20, 2015) Perry Co. (CATES) Affirmed and remanded.

Defendant, age 17 at time of offense, was convicted, after stipulated bench trial, of first-degree murder of 15-year-old victim and was sentenced to 60 years. Evidence was sufficient to establish Defendant's intent to kill. Although Defendant choked victim, and another person shot victim and then threw her body in river, Defendant's acts caused, or at least contributed to, victim's death. Juveniles have no constitutional or common law right to adjudication in juvenile court.(GOLDENHERSH and CHAPMAN, concurring.)

People v. Casciaro, 2015 IL App (2d) 131291 (September 9, 2015) McHenry Co. (ZENOFF) Reversed.

Defendant was convicted, after 2013 jury trial, of felony murder predicated on intimidation of 17-year-old who disappeared in 2002, having been last seen at grocery store co-owned by

Defendant's father where victim worked. Defendant was "unofficial manager" of stock boys there. State claimed that evidence proved that another stock boy committed intimidation as a principal, acting on behalf of Defendant. Jury trial in 2012 resulted in mistrial after jury failed to reach a verdict. No rational trier of fact could have found that State proved predicate forcible felony of intimidation beyond a reasonable doubt. Victim's body has never been recovered, and evidence against Defendant was so lacking and so improbable that it is unreasonable to sustain finding of guilt beyond a reasonable doubt. (HUTCHINSON and SPENCE, concurring.)

[People v. Harmon](#), 2015 IL App (1st) 122345 (December 30, 2015) Cook Co., 3d Div. (PUCINSKI) Affirmed.

(Court opinion corrected 1/25/16.) Defendant, age 18 at time of offense, was convicted, after bench trial, of first degree murder and sentenced to 65 years. Defendant shot victim in alleged self-defense or defense of others after the victim punched one of his friends while on a public way. State proved beyond a reasonable doubt that Defendant was not acting in self-defense or defense of others from death or great bodily harm. Defendant's use of deadly force was not justified to prevent commission of a forcible felony. Defendant failed to show mitigating factors for reduction of conviction. Court erred in not allowing any questioning of a prosecution witness as to potential bias from hope of deal with State for pending charges, but error was harmless as testimony of other witnesses corroborated his testimony. Court properly sustained objections to defense counsel's questions as to what Defendant thought would happen during incident, and Defendant otherwise testified extensively to his state of mind. Sentence not in error, as court considered all relevant mitigating and aggravating factors. (FITZGERALD SMITH, concurring; MASON, specially concurring.)

[People v. Lefler](#), 2016 IL App (3d) 140293 (January 21, 2016) Knox Co. (CARTER) Affirmed in part and vacated in part.

Defendant was convicted, after jury trial, of second degree murder, unlawful possession of a weapon by a felon, and attempted burglary. Conviction for attempted burglary was erroneous, as this was predicate offense for felony murder conviction and is thus a lesser included offense. Jury verdicts were not legally inconsistent and court did not err in finding no statutory mitigating factors applicable to Defendant. That jury found a mitigating factor to exist in present case would have no bearing on its finding that Defendant was also guilty of felony murder, as felony murder may not be mitigated to second degree murder. (HOLDRIDGE and McDADE, concurring.)

[People v. Nibbe](#), 2016 IL App (4th) 140363 (February 10, 2016) Ford Co. (TURNER) Reversed and remanded.

Defendant was convicted, after jury trial, of second degree murder and aggravated battery (public way), and not guilty of aggravated battery (great bodily harm). Defendant struck victim in the face with his fist, causing victim to fall and fracture his skull, which caused his death. Death is not ordinarily contemplated as a natural consequence of blows from bare fists. Victim

was not substantially smaller or weaker than Defendant, and victim died from his head striking the concrete, and not from blow to face. Conviction for second degree murder vacated, and remanded for sentencing for aggravated battery (public way). State presented evidence that negated Defendant's self-defense claim, sufficient for jury to find guilty beyond a reasonable doubt of aggravated battery. (HARRIS and HOLDER WHITE, concurring.)

OBSTRUCTION OF JUSTICE / RESIST

[People v Slaymaker](#), 2015 IL App (2d) 130528 (February 3, 2015) Winnebago Co. (SCHOSTOK) Reversed.

Defendant was convicted, after bench trial, of resisting a peace officer. Court erred in judgment of conviction, as officer was not engaged in an authorized act at the time, as officer was not authorized to pat Defendant down for weapons in the course of a community-caretaking encounter. Officer stopped Defendant as he walked down paved median while talking on cell phone on a hot summer evening, and told officer he was walking to McDonald's, and placed hands in his pockets. Officer was not authorized to prolong encounter to frisk Defendant for possible weapon. (HUTCHINSON and BURKE, concurring.)

[People v. Bernard](#), 2015 IL App (2d) 140451 (March 3, 2015) Kendall Co. (BIRKETT) Reversed and remanded.

Police officer took bottled of pills from Defendant, when responding to call for domestic disturbance. While in police car, Defendant removed handcuffs, grabbed bottle of pills which officer had taken, and swallowed them. Defendant was charged with obstruction of justice. Evidence supporting Defendant's charged offense was not the fruit of the purportedly unconstitutional police conduct, and thus exclusionary rule did not apply. (ZENOFF and JORGENSEN, concurring.)

[People v. Jones](#), 2015 IL App (2d) 130387 (March 17, 2015) Carroll Co. (McLAREN) Affirmed in part and reversed in part.

Defendant was convicted, after jury trial, of aggravated battery to a peace officer and obstructing a peace officer, and sentenced to five years. Officer was authorized to conduct initial investigation into report of domestic violence, but in doing so he found no evidence of domestic violence or of any other offense, and officer's authority to remain in Defendant's home ended at that point. Court was not required, sua sponte, to instruct jury on self-defense. Once officer attempted to arrest Defendant, Defendant was not entitled to resist. (HUDSON and BIRKETT, concurring.)

[People v. Wrencher](#), 2015 IL App (4th) 130522 (April 30, 2015) Champaign Co. (APPLETON) Affirmed.

Defendant was convicted, after jury trial, of two counts of aggravated battery and sentenced to total 14 years. Information alleged that Defendant dug his fingernails into officer's hand, and spat blood on officer's hand, during officer's investigation of domestic dispute. No ineffective assistance of counsel in failure to argue for jury instruction on resisting a peace officer as alternative to aggravated battery. Essential element of resisting a peace officer--knowing resistance or obstruction--cannot reasonably be inferred, and there was no evidence to support conviction of that offense and simultaneous acquittal of aggravated battery.(TURNER and HARRIS, concurring.)

[In re Q.P.](#), 2015 IL 118569 (September 24, 2015) Peoria Co. (KILBRIDE) Appellate court reversed.

Minor was found guilty of obstructing justice for knowingly furnishing false information to a police officer with intent to prevent his own apprehension. Obstruction of justice statute is violated when a person knowingly provides false information with intent to prevent his seizure or arrest on a criminal charge. Minor gave false information about his identity shortly after he was placed in backseat of squad car, being apprehended for vehicle burglary. At that time, officer did not know about separate, unrelated juvenile warrant, and had not apprehended minor on that warrant. Officer learned of warrent only after transporting minor to police station. Evidence was sufficient to establish that minor committed offense of obstructing justice by knowingly furnishing false information with intent to prevent his apprehension on juvenile warrant.(GARMAN, FREEMAN, THOMAS, KARMEIER, BURKE, and THEIS, concurring.)

[People v. Jenkins](#), 2016 IL App (1st) 133656 (February 16, 2016) Cook Co., 1st Div. (HARRIS) Reversed and remanded.

Defendant was convicted, after jury trial, of felony of resisting or obstructing a police officer. Failure to instruct jury on the proximate cause element of the offense (that his resisting or obstructing officer proximately caused injury to officer) was error. Evidence was closely balanced, as conflicting testimony at trial as to whether Defendant's kick to officer's face or hand resulted from his resisting arrest, and judgment depends solely on credibility of trial witnesses. Thus, plain error exception to waiver rule does not apply.(CUNNINGHAM and CONNORS, concurring.)

ONE ACT / ONE CRIME

[People v. McWilliams](#), 2015 IL App (1st) 130913 (January 21, 2015) Cook Co., 3d Div. (HYMAN) Affirmed in part and vacated in part.

Defendant was convicted, after bench trial, of two counts of armed robbery and two counts of aggravated unlawful restraint. Convictions for both offenses violate the one-act, one-crime

doctrine, where restraint was inherent in and concurrent with the armed robbery. Concurrent 12-year sentences for each armed robbery count are not excessive. No indication that court failed to consider mitigating factors, and sentence was well within statutory range.(PUCINSKI and LAVIN, concurring.)

[People v Jones](#), 2015 IL App (2d) 120717 (February 3, 2015) Winnebago Co. (SCHOSTOK)
Affirmed in part and vacated in part.

Defendant was convicted, after jury trial, of 12 counts of first-degree murder, and attempted first-degree murder, 4 counts of home invasion, and residential burglary. Court erred in convicting Defendant of 12 counts of murder, as two persons were murdered; and court erred in convicting on 4 counts of home invasion as convictions were based on Defendant's single entry into home of victims. As convictions of residential burglary and home invasion were based on same conduct, conviction for residential burglary is vacated. (HUTCHINSON and BURKE, concurring.)

[People v. Scott](#), 2015 IL App (1st) 133180 (December 1, 2015) Cook Co., 2d Div. (HYMAN)
Affirmed in part and vacated in part; remanded with directions.

(Court opinion corrected 12/8/15.) Defendant was convicted, after bench trial, of 2 counts of armed robbery, 2 counts of aggravated discharge of a firearm, and 1 count of aggravated battery with a firearm, and sentenced to aggregate term of 43 years. Defendant pointed a gun at pizza delivery driver, and told him not to move; and shot driver's teenage niece, hitting her in the thigh. Evidence does not support conviction for attempted armed robbery, as Defendant never demanded pizza or other property, and thus actions were not a substantial step toward armed robbery. Under one-act, one-crime doctrine, Defendant cannot be convicted of both armed robbery of niece and attempted armed robbery of driver where there was only one attempt to take pizza from niece. Under same rule, Defendant's single act of firing at niece cannot be basis for multiple convictions, and sentence should be imposed on more serious offense. Thus, convictions for aggravated battery with a firearm and aggravated discharge of a firearm are vacated. State's participation in preliminary Krankel inquiry created adversarial situation requiring reversal in claim of ineffective assistance of counsel.(PIERCE and NEVILLE, concurring.)

[People v. Sanderson](#), 2016 IL App (1st) 141381 (April 20, 2016) Cook Co., 3d Div. (MASON)
Affirmed in part and reversed in part.

As both of Defendant's convictions arising out of possession of weapons were based on single physical act of possessing a handgun, the conviction on the less serious charge (AUUW) is vacated under the one-act, one-crime rule. (FITZGERALD SMITH and PUCINSKI, concurring.)

OTHER CRIMES / BAD ACTS

[People v. Watkins](#), 2015 IL App (3d) 120882 (January 21, 2015) Peoria Co. (CARTER)

Affirmed in part and reversed in part; remanded.

Defendant was convicted, after jury trial, of unlawful possession of controlled substance with intent to deliver and sentenced to 8 years. Court erred in admitting photos of drug-related text-message conversations with the name "Charles" found on a cell phone in close proximity to drugs as evidence that Defendant had connection to cell phone and, circumstantially, to the drugs. Court did not abuse its discretion in admitting evidence of Defendant's prior conviction for possession of cannabis with intent to deliver as some evidence of Defendant's intent to deliver cocaine in this case. Requirement of general threshold similarity between facts of prior crime and current offense was satisfied. (HOLDRIDGE, concurring; WRIGHT, specially concurring.)

[People v. McGee](#), 2015 IL App (1st) 122000 (January 23, 2015) Cook Co., 6th Div.

(HOFFMAN) Reversed and remanded.

Defendant was convicted, after jury trial, of stalking a CTA employee and sentenced to 30 months in prison. Court erred in allowing evidence of Defendant's altercation with victim's husband, as it was not part of a continuing narrative of Defendant's alleged course of stalking conduct and was not relevant to prove his intent toward Vicki. Defendant allegedly stabbed victim's husband for a distinct reason and two hours after time charged offense was completed. Admission of this other-crimes evidence was so pervasive that it was not harmless error. (LAMPKIN and ROCHFORD, concurring.)

[People v. McCullough](#), 2015 IL App (2d) 121364 (February 11, 2015) De Kalb Co. (ZENOFF)

Affirmed in part and vacated in part.

Defendant was convicted, after bench trial in 2012, of of 1957 kidnapping and murder of seven-year-old girl, when Defendant was age 18. Exclusion of FBI reports did not violate Defendant's right to present a defense, as rule of evidence prohibiting their admission is not arbitrary, and reports do not tend to exonerate Defendant. Court properly excluded testimony of witness that facts of a 1951 Pennsylvania murder "closely matched" this case, as only speculation linked the two cases. (SCHOSTOK and BURKE, concurring.)

[People v. Fields](#), 2015 IL App (3d) 080829-C (March 5, 2015) Henry Co. (McDADE) Reversed and remanded.

Defendant was convicted of multiple sex assault offenses as to his minor stepdaughter. Subsequent reversal of Defendant's underlying prior conviction for aggravated criminal sexual abuse of his prior girlfriend's minor daughter which was admitted to show propensity requires reversal and a new trial. Resulting injustice in present case was not harmless. Reversal of underlying case was "new evidence" in that conviction was in good standing at time of present trial. (SCHMIDT, specially concurring; LYTTON, dissenting.)

[People v. Smith](#), 2015 IL App (4th) 130205 (March 26, 2015) McLean Co. (POPE) Affirmed. Defendant was convicted, after jury trial, of multiple sex offenses against two unrelated children. Court properly admitted evidence of Defendant's alleged (and uncharged) sexual abuse of his then stepdaughter and her cousin over 6-year period, ending 12 years prior to alleged abuse at issue in present case. Court properly balanced statutory factors and found similarities of prior incidents to charged incidents sufficient such that probative value of evidence was not substantially outweighed by its prejudicial effect. Court did not abuse its discretion in admitting allegations of prior abuse to show propensity per Seciton 115-7.3 of Code of Criminal Procedure. (HARRIS and STEIGMANN, concurring.)

[People v. Cavazos](#), 2015 IL App (2d) 120444 (March 31, 2015) Kane Co. (JORGENSEN) Affirmed.

Defendant, then age 16, and his brother, then age 17, were charged with first-degree murder in shooting death of 15-year-old, and sentenced to aggregate 60 years. Court within its discretion in admitting other-crimes evidence of Defendant, later that night, firing shots at rival gang member. Court within its discretion in admitting testimony of police officer who was expert in gangs that Defendant was a gang member. Gang membership was relevant, and at heart of charged crimes, to help explain environment that would lead to otherwise inexplicable act of shooting at two strangers. (ZENOFF and BIRKETT, concurring.)

[People v. Braddy](#), 2015 IL App (5th) 130354 (May 20, 2015) Marion Co. (CHAPMAN) Affirmed.

Defendant was charged with criminal sexual assault and aggravated criminal sexual abuse as to his minor daughter and his girlfriend's minor daughter. Court did not err in admitting testimony of Defendant's sister that, 20 years prior, Defendant had sexually abused her. Factual differences between abuse alleged by sister and charged crimes were not significant, and involved Defendant abusing children living in his household with whom he had familiar relationship. Court properly considered statutory factors in finding that sister's testimony was more probative than prejudicial. (CATES and GOLDENHERSH, concurring.)

[People v. Clark](#), 2015 IL App (1st) 131678 (June 25, 2015) Cook Co., 4th Div. (ELLIS) Affirmed.

Defendant was convicted of theft for stealing a bicycle. At trial, court improperly allowed evidence that four years prior Defendant had stolen another bicycle in same area, as it did not prove intent to commit theft or his identity in a permissible way, but relied on inference that he possessed propensity to commit theft. However, error was harmless as evidence was overwhelming against Defendant. Court erred in delivering incomplete version of IPI Criminal 3.14, but not plain error, as jury was told that it "may" consider evidence of prior conviction, and other instructions told jury it could give whatever weight it deemed appropriate. (FITZGERALD SMITH and COBBS, concurring.)

[*People v. Salem*](#), 2016 IL App (3d) 120390 (March 21, 2016) Will Co. (WRIGHT) Reversed and remanded.

Investigators discovered Defendant was in possession of multiple open Illinois vehicle titles pertaining to various stolen vehicles. Court erred in allowing State to present 11 federal convictions to jury to impeach Defendant's credibility, as they were beyond the strict 10-year requirement of Rule 609(b) of Illinois Rules of Evidence. Court erred in allowing State to impeach Defendant's credibility with proof of guilty for 2010 Cook County charge, because plea had not resulted in sentence and final judgment of conviction. Without convictions and guilty plea, State could not properly urge jury that Defendant's credibility was weakened by his prior convictions. Thus, admission of improper evidence was so egregious that it eroded integrity of judicial process. Court abused its discretion by allowing State to introduce unlimited other crimes evidence as proof of Defendant's "mental state". (O'BRIEN and LYTTON, concurring.)

[*People v. Gregory*](#), 2016 IL App (2d) 140294 (March 30, 2016) Kendall Co. (BIRKETT) Reversed and remanded.

Defendant was convicted, after jury trial, of 1 count of threatening a public official and 3 counts of cyberstalking. Court erred by allowing into evidence 10 letters, read in their entirety, containing references to other crimes and prior bad acts. Although portions of letters had some relevance to issue of identity, abuse of discretion in admitting other portions of letters which contained large amounts of other-crimes evidence. Great risk that jury would find Defendant guilty of charges in light of his propensity, or that it would find Defendant guilty of one of the uncharged acts, so the letters' prejudicial effect overwhelmed their probative value. (JORGENSEN and BURKE, concurring.)

PLEAS

[*People v. Smith*](#), 2015 IL 116572 (February 5, 2015) Will Co. (BURKE) Appellate court reversed; circuit court affirmed.

Illinois Supreme Court held, in 2012 *People v. White* decision, that when factual basis for plea agreement accepted by circuit court establishes that the defendant is subject to mandatory sentencing enhancement, court must impose it even if agreement included condition that State would not pursue enhancement. As that decision established a new rule within the meaning of U.S. Supreme Court's 2989 *Teague v. Lane* decision, which does not fall within either of the *Teague* exceptions, it does not apply retroactively to convictions which were final at time *People v. White* case was decided. (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and THEIS, concurring.)

[People v. Cowart](#), 2015 IL App (1st) 131073 (February 17, 2015) Cook Co.,1st Div. (HARRIS) Affirmed.

Court properly dismissed Defendant's pro se postconviction petition. Plea court was not required to admonish Defendant of requirement to register as a sex offender, and thus admonishment does not render his plea unknowing or involuntary. Requirement to register as a sex offender is definite and automatic, but does not affect Defendant's punishment. (DELORT and CUNNINGHAM, concurring.)

[People v. Palmer-Smith](#), 2015 IL App (4th) 130451 (March 26, 2015) Champaign Co. (POPE) Affirmed.

Defendant entered negotiated guilty plea to unlawful possession with intent to deliver a controlled substance, more than 900 grams of cocaine, a Class X felony; State recommended sentencing cap of 20 years, and court sentenced Defendant to 20 years. Court did not err in considering large quantity of drugs that Defendant possessed (3,000 grams of cocaine and large amount of cannabis). Court noted that potential maximum could have been 60 years but for plea agreement, and court discussed the need to deter large-scale drug dealers, which was appropriate factor for court to consider. (HARRIS and APPLETON, concurring.)

[People v. Grant](#), 2015 IL App (4th) 140682 (May 26, 2015) Vermilion Co. (POPE) Affirmed.

Defendant pled guilty, pursuant to negotiated plea agreement, to possession of cocaine, with agreed-upon sentence of 2 years with credit for 384 days served. Evidence shows Defendant knew he would not receive double sentencing credit by accepting offer, as DOC treats consecutive sentences as one sentence. Sentence credit was not an essential, bargained-for term of his plea agreement. Although court's admonishment could have been improved by explicitly stating Defendant would not receive "double credit", no due process violation as real justice has not been denied and Defendant has not shown prejudice. Thus, court properly dismissed Defendant's postconviction petition.(TURNER and APPLETON, concurring.)

[People v. McClendon](#), 2015 IL App (3d) 130401 (August 25, 2015) Knox Co. (WRIGHT) Reversed and remanded.

State and Defendant entered into fully-negotiated plea agreement, but a few days later Defendant filed timely motion to withdraw his guilty pleas. State did not object to Defendant's timely motions, but court acted unreasonably by refusing to allow Defendant's request to set aside plea agreement. Judicial discretion should not be exercised to override prosecutorial discretion in absence of compelling reasons. (McDADE and HOLDRIDGE, concurring.)

[People v. Liner](#), 2015 IL App (3d) 140167 (November 17, 2015) Peoria Co. (HOLDRIDGE) Affirmed.

Defendant appeals circuit court's sua sponte denial of his motion to withdraw guilty plea and vacate sentence. Defendant's motion was untimely filed and thus circuit court lacked jurisdiction to consider the motion. Defendant failed to meet requirements of amended Rule 12(b)(4) because

his verification did not contain complete address to which motion was to be delivered. Thus, his Section 1-1-9 verification was insufficient to establish that his motion was mailed to court on a timely date. Remand for further postplea proceedings is unwarranted.(CARTER and WRIGHT, concurring.)

[People v. Unzueta](#), 2015 IL App (1st) 131306 (November 25, 2015) Cook Co., 5th Div. (PALMER) Affirmed.

(Court opinion corrected 11/30/15.) Court properly dismissed Defendant's postconviction petition, as he failed to make a substantial showing of a claim of ineffective assistance of counsel based on counsel's failure to advise him of deportation consequences of his guilty plea. Any prejudice that Defendant may have suffered as a result of counsel's failure was cured by trial court's strict adherence with provisions of Section 113-8 of Code of Criminal Procedure, advising him that if he is not a U.S. citizen that conviction may have consequences of deportation. The fact that Defendant pled guilty while being informed by court of risk of deportation belied the Defendant's claim that his decision would have been different if he had been told that the risk was a certainty. (McBRIDE and GORDON, concurring.)

[People v. Maxey](#), 2015 IL App (1st) 140036 (December 31, 2015) Cook Co., 5th Div. (GORDON) Affirmed.

Defendant pled guilty to attempted aggravated robbery and was sentenced to 11 years. No good cause to overlook untimeliness of Defendant's motion to vacate bond, which was filed several years late. Record does not support Defendant's claim that he misunderstood his guilty plea. Illinois Supreme Court has abolished the "void sentence rule" that a sentence that does not conform to a statutory requirement is void. (REYES and PALMER, concurring.)

[People v. Haywood](#), 2016 IL App (1st) 133201 (March 14, 2016) Cook Co., 1st Div. (HARRIS) Affirmed.

(Court opinion corrected 4/8/16.) Court properly denied Defendant's motion to withdraw his guilty plea. In light of thorough discussions that took place at Rule 402 conference prior to court accepting Defendant's guilty plea, records show that Defendant made his plea knowingly and voluntarily. Court admonished Defendant on nature of charges against him, applicable sentences, his right to plead not guilty, and in pleading guilty his waiver of right to jury trial and to confront witnesses. Defendant had previously filed pro se motion for substitution of judge, but never ruled on motion. During 402 conference, court did not inform Defendant that substitution of judge issue would remain relevant only if he rejected the plea recommendation and elected to have trial. However, Defendant failed to show prejudice by inadequate admonishment.(CUNNINGHAM and CONNORS, concurring.)

[*People v. Kibbons*](#), 2016 IL App (3d) 150090 (April 5, 2016) Kankakee Co. (O'BRIEN) Appeal dismissed.

Defendant pled guilty to aggravated DUI, and State agreed to sentencing cap and dismissed charges based on plea, making it a negotiated plea. Thus, Defendant could not appeal from negotiated plea unless first filing motion to withdraw plea and vacate judgment. Defendant failed to file notice of appeal within 30 days of denial of that motion, and instead filed the correct motion: motion to withdraw plea. As notice of appeal was untimely, appellate court has no jurisdiction over appeal.(McDADE and SCHMIDT, concurring.)

PLEA (604d)

[*People v. Axelson*](#), 2015 IL App (2d) 140173 (January 9, 2015) Winnebago Co. (McLAREN) Vacated and remanded with directions.

Defendant entered open plea of guilty to burglary and unlawful possession of a stolen motor vehicle and was sentenced to concurrent 10-year prison terms. Subsequently, new defense counsel filed motion to withdraw guilty plea, but counsel's certificate did not strictly comply with Rule 604(d), as he did not mention contentions of error as to Defendant's sentences. Proceedings on remand must follow Rule 605(c), which applies here because at plea hearing prosecution did make concession in agreeing to forgo any recommendation of consecutive sentences.(BIRKETT and SPENCE, concurring.)

[*People v. Willis*](#), 2015 IL App (5th) 130147 (March 6, 2015) Marion Co. (GOLDENHERSH) Reversed and remanded with directions.

Court erred in denying Defendant's motion to withdraw his guilty plea, as his attorney filed a Supreme Court Rule 604(d) certificate that was defective on its face. Certificate incorrectly refers to Defendant with pronoun "her", and states that he made amendments to pleadings, yet he later admitted that he had not done so. Certificate does not specify that counsel examined report of proceedings of guilty plea.(STEWART and SCHWARM, concurring.)

[*People v. Mason*](#), 2015 IL App (4th) 130946 (August 4, 2015) Champaign Co. (TURNER) Reversed and remanded.

Pursuant to negotiated plea agreement, Defendant pled guilty to criminal sexual abuse. Court erred in denying Defendant's request to withdraw his guilty plea, as defense counsel's Rule 604(d) certificate is deficient, because it fails to show counsel consulted with Defendant about his contentions of error related to his guilty plea AND sentence. A Rule 604(d) certificate which uses the Rule's verbatim language with the "or" rather than "and" does not precisely comply with Rule 604(d). (POPE and KNECHT, concurring.)

[*People v. Evans*](#), People v. Evans (August 17, 2015) Will Co. (O'BRIEN) Vacated and remanded with instructions.

Defendant pled guilty to home invasion and was sentenced to 12 years. Court denied Defendant's motion for reconsideration of sentence, then appealed denial of motion three times, each time court remanding for compliance with Rule 604(d). Trial court's most recent denial of motion to reconsider sentence was void for lack of subject matter jurisdiction. Because trial court had not filed the mandate received from appellate court when trial court took action on motion, trial court had not yet been re-vested with jurisdiction over case.(HOLDRIDGE and WRIGHT, concurring.)

[*People v. Colin*](#), 2015 IL App (1st) 132264 (September 15, 2015) Cook Co., 2d Div. (PIERCE) Affirmed.

Defendant pled guilty to first degree murder and was sentenced to 53 years. Prosecutor and defense counsel both failed to comply with Rule 402, by failing to fully and completely inform court of terms of plea agreement. Omission was cured by hearing under Rule 604(d) to vacate or reopen plea proceeding, when court took testimony on issues that Defendant claimed affected his initial plea in hearing on motion to vacate, and court concluded that original plea was not involuntary or coerced. (NEVILLE and SIMON, concurring.)

[*People v. Martell*](#), 2015 IL App (2d) 141202 (September 23, 2015) Lake Co. (BIRKETT) Vacated and remanded.

(Modified upon denial of rehearing 10/23/15.) Defendant entered negotiated plea of guilty to unlawful restraint and was sentenced to agreed term of 12 months. Nine days later, Defendant moved to withdraw his plea, alleging he had not been given time to make a fully informed decision. Defense attorney's Rule 604(d) certificate was deficient, as certificate failed to state that attorney consulted with Defendant to ascertain Defendant's contentions of error in both the sentence and the entry of plea of guilty. Terms of Rule 604(d) apply even when parties have negotiated a specific sentence. (SCHOSTOK and McLAREN, concurring.)

[*People v. Luna*](#), 2015 IL App (2d) 140983 (October 23, 2015) McHenry Co. (SCHOSTOK) Affirmed.

Defendant pled guilty to one count of aggravated DUI, in exchange for State nol-prossing other charges; there was no agreement as to Defendant's sentence. Court sentenced Defendant to 8 years, and Defense counsel moved for reconsideration of sentence, which court denied. On appeal, court granted Defendant's motion for remand to afford counsel opportunity to file new motion in accordance with Rule 604(d). New Rule 604(d) certificate strictly complies with Rule 604(d). Certificate indicates that counsel consulted with Defendant to ascertain his contentions of error, and includes no language limiting the scope of the consultation to a particular category of error. Thus, natural import of certificate's unqualified language is that the consultation broadly encompassed both types of error that postplea proceedings were designed to redress: sentencing errors and errors affecting validity of Defendant's plea.(BURKE and SPENCE, concurring.)

[In re H.L.](#), 2015 IL 118529 (November 4, 2015) DeKalb Co. (GARMAN) Appellate court reversed; remanded.

Strict compliance of Rule 604(d) does not require counsel to file his or her certificate of compliance prior to or at hearing on Defendant's postplea motion. Strict compliance requires counsel to prepare a certificate that meets the content requirements of Rule 604(d) and to file the certificate with the trial court, prior to filing of any notice of appeal. (THOMAS, KARMEIER, and THEIS, concurring; FREEMAN, KILBRIDE, and BURKE, dissenting.)

[People v. Strickland](#), 2015 IL App (3d) 140204 (December 1, 2015) Will Co. (LYTTON) Affirmed in part and reversed in part; remanded.

Defendant was immediately sentenced to 6 years of imprisonment after his conviction for unlawful delivery of a controlled substance, but mittimus was stayed for 5 1/2 months while he was allowed on bond to receive treatment. Mittimus issued when Defendant failed to comply with terms of his bond. Court was enforcing its judgment, and retained jurisdiction to do so, when mittimus issued. Case remanded for further postplea proceedings, as defense counsel's Supreme Court Rule 604(d) certificate was inadequate as defense counsel failed to certify that he had consulted with Defendant about any possible contentions of error in his guilty plea and failed to certify that he had examined report of proceedings of plea.(O'BRIEN, concurring; WRIGHT< specially concurring.)

POST-CONVICTION PETITIONS

[People v. Kuehner](#), 2015 IL 117695 (May 21, 2015) Sangamon Co. (THOMAS) Appellate court reversed; circuit court reversed; remanded.

(Correcting court designation.) Circuit court erred in granting appointed postconviction counsel's motion to withdraw and dismissing Defendant's postconviction petition. Where a pro se postconviction petition advances to second stage on basis of affirmative judicial determination that petition is neither frivolous nor patently without merit, appointed counsel's motion to withdraw must contain at least some explanation as to why all claims set forth in petition are so lacking in legal and factual support as to compel withdrawal. (GARMAN, FREEMAN, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

[People v. Flowers](#), 2015 IL App (1st) 113259 (January 6, 2015) Cook Co. (FITZGERALD SMITH) Affirmed.

Defendant filed pro se postconviction petition, with affidavits from witnesses claiming that Defendant was innocent of first-degree murder of which he had been convicted. Defendant's culpable negligence in not timely filing petition is not excused by affiants' having moved multiple times over the years, as their affidavits indicate that Defendant could have located them much sooner. Court properly dismissed petition as untimely. (EPSTEIN and ELLIS, concurring.)

[People v. Haynes](#), 2015 IL App (3d) 130091 (January 13, 2015) Kankakee Co. (McDADE) Reversed and remanded.

Defendant filed pro se postconviction petition claiming that prosecution suborned perjury of a proffered 11-year-old witness, who was cousin of Assistant State's Attorney who was co-counsel during his criminal trial. Affidavit of witness offered by witness stated that shooting victim did have a gun, but that he was told to say that he did not have a gun. Affidavit, if true, renders witness' entire testimony reliable. A witness's testimony is entirely unreliable if he is under instructions from a prosecutor to lie or to omit certain facts while testifying. (HOLDRIDGE, concurring; LYTTON, specially concurring.)

[People v. Montes](#), 2014 IL App (2d) 140485 (February 6, 2015) Kane Co. (JORGENSEN) Affirmed.

Defendant was convicted, after jury trial in absentia, of attempted first-degree murder and aggravated discharge of a firearm. Court properly summary dismissed Defendant's postconviction petition. Claim of entrapment is forfeited as he did not raise it at trial, and also as that defense is unavailable to a defendant who denies committing the offense. Actual-innocence claim was meritless; basis for entrapment defense did not remain undiscovered until after trial. No ineffective assistance of counsel claim, as Defendant's presence at trial was required for counsel to decide whether to submit instruction on lesser charge.(McLAREN and BIRKETT, concurring.)

[People v. Johnson](#), 2015 IL App (2d) 140388 (March 24, 2015) Kane Co. (ZENOFF) Affirmed. (Court opinion corrected 4/15/15.) In postconviction proceedings, doctrine of res judicata bars relitigation of any issues which have previously been decided by a reviewing court. Failure to swear grand jury does not divest court of subject-matter jurisdiction to enter a criminal conviction. Court is not required to conduct preliminary hearing where a defendant is indicted after initially having been charged in some other manner.(SCHOSTOK and BURKE, concurring.)

[People v. Wingate](#), 2015 IL App (5th) 130189 (April 20, 2015) St. Clair Co. (MOORE) Affirmed.

Court properly dismissed Defendant's petition for postconviction relief at second stage of proceedings. Defendant was convicted of first-degree murder in shooting death of wife of long-time acquaintance in dispute over money Defendant owed him. Proffered impeachment testimony is not of such conclusive character that it would probably change result on retrial. Affidavit of alleged witness, claiming that Defendant acted in self-defense, does not meet criteria to be construed as "newly discovered" evidence, as Defendant did not meet his burden to show that there has been no lack of due diligence on his part. Even if proffered testimony could potentially reduce liability to second-degree murder, it would not support claim of actual innocence. (CATES and STEWART, concurring.)

[People v. Ross](#), 2015 IL App (1st) 120089 (May 8, 2015) Cook Co., 5th Div. (GORDON) Reversed and remanded with instructions.

Defendant was convicted, after bench trial, of being an armed habitual criminal and sentenced to 80 months imprisonment. Court erred when it summarily dismissed Defendant's pro se postconviction petition in the first stage because affidavit of Defendant's teenage son is newly discovered evidence, and Defendant's due process rights were not violated as Defendant's term of MSR was imposed by operation of law. (McBRIDE, concurring; PALMER, specially concurring.)

[People v. Allen](#), 2015 IL 113135 (May 21, 2015) Cook Co. (GARMAN) Circuit court reversed; appellate court reversed.

Defendant filed pro se postconviction petition, alleging actual innocence and raising related constitutional issues that State suborned perjury and coerced confessions, and attached unnotarized statement, styled as affidavit, wherein author took responsibility for victim's murder and stated that Defendant had no involvement in murder. Statement qualifies as other evidence for first-stage postconviction review. Circuit court's consideration that statement lacked "conclusive character" essentially weighed credibility of Defendant's petition and statement against Defendant's prior grand jury testimony, and testimony of detective and prosecutor. This analysis is more probing inquiry than is proper on first-stage review, where dismissal is proper only if petition has no arguable basis either in law or in fact. (FREEMAN, KILBRIDE, BURKE, and THEIS, concurring; THOMAS and KARMEIER, dissenting.)

[People v. Kuehner](#), 2015 IL 117695 (May 21, 2015) Sangamon Co. (THOMAS) Appellate court reversed; circuit court reversed; remanded.

Circuit court erred in granting appointed postconviction counsel's motion to withdraw and dismissing Defendant's postconviction petition. Where a pro se postconviction petition advances to second stage on basis of affirmative judicial determination that petition is neither frivolous nor patently without merit, appointed counsel's motion to withdraw must contain at least some explanation as to why all claims set forth in petition are so lacking in legal and factual support as to compel withdrawal. (GARMAN, FREEMAN, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

[People v. Shotts](#), 2015 IL App (4th) 130695 (June 2, 2015) Clark Co. (STEIGMANN) Affirmed. Defendant was convicted in 1991, after jury trial, of multiple counts of aggravated criminal sexual assault of two minors under ruse that he wanted them to babysit for his son, and sentenced to total 64 years. Consolidated appeal is Defendant's eleventh appeal from these convictions. Defendant failed to show that conflict of interest necessitated transfer of his case from OSAD's fourth district office. OSAD's motion to withdraw granted, as no meritorious grounds exist to challenge court's denial of defendant's motion to file successive postconviction petition. His claims raised in that petition had been raised or could have been raised in earlier proceedings. (POPE and APPLETON, concurring.)

[People v. Walker](#), 2015 IL App (1st) 130530 (June 17, 2015) Cook Co., 3d Div. (HYMAN)
Affirmed.

(Court opinion corrected 6/23/15.) Defendant was convicted, 30 years ago, of first-degree murder in shooting deaths of three people. Court properly summarily dismissed his third pro se postconviction petition, as petition presents neither newly discovered, noncumulative exculpatory evidence nor material evidence of a conclusive character that would likely change outcome on retrial. As issue of another shooter was litigated at trial, and as Defendant failed to present any newly discovered evidence, doctrine of res judicata bars issue. (LAVIN, concurring; PUCINSKI, dissenting.)

[People v. Kitchell](#), 2015 IL App (5th) 120548 (June 29, 2015) Lawrence Co. (GOLDENHERSH)
Reversed and remanded.

Court erred in dismissing postconviction petition alleging ineffective assistance of guilty plea counsel where plea counsel's advice was incorrect as to available sentencing credit. Defendant attached affidavit to his petition, averring that he would not have pleaded guilty but for erroneous advice of plea counsel that he was eligible for good-conduct credit for participation in certain Department programs. This averment is sufficient to entitle Defendant to evidentiary hearing. (CATES and CHAPMAN, concurring.)

[People v. Robinson](#), 2015 IL App (4th) 130815 (July 16, 2015) Douglas Co. (APPLETON)
Affirmed.

Defendant was convicted, on basis of stipulated evidence in bench trial, of unlawful trafficking in cannabis, and sentenced to 20 years. Court properly dismissed postconviction petition as untimely, as Defendant failed to establish that lateness was due to "culpable negligence" on his part, and claimed only that his appellate counsel failed to notify him of appellate court's decision on direct appeal. (KNECHT and HOLDER WHITE, concurring.)

[People v. Kines](#), 2015 IL App (2d) 140518 (July 24, 2015) DuPage Co. (HUTCHINSON)
Reversed and remanded with directions.

Defendant was convicted, after bench trial, of first-degree murder of 11-year-old girl, based on theory of accountability, and thus any DNA evidence linking two suspected perpetrators would tend to inculcate Defendant as well. There is no reason not to test key physical evidence that was admitted at Defendant's 1989 trial. Defendant met all requirements under Section 116-3 of Code of Criminal Procedure, and court erred in denying his petition for postconviction DNA testing. A defendant is excused from establishing a chain of custody for evidence that was admitted at his or her trial, as evidence would have remained within custody of circuit clerk. (BURKE and SPENCE, concurring.)

People v. Minniefield, 2015 IL App (1st) 141094 (August 14, 2015) Cook Co., 5th Div. (GORDON) Affirmed.

Court entered order striking Defendant's pro se document entitled "Motion to Vacate Conviction/Sentence as Void". On appeal, Defendant characterizes his Motion as a Section 2-1401 petition, and concedes that he chose incorrect vehicle to present his claims. Court did not err in not recharacterizing Defendant's Motion, which set forth only one claim, as a successive postconviction petition, in light of consequences to Defendant that such a recharacterization would have. (PALMER and REYES, concurring.)

People v. Crenshaw, 2015 IL App (4th) 131035 (September 9, 2015) Brown Co. (TURNER) Affirmed.

Defendant was convicted of criminal sexual assault and sentenced to 8 years. Court properly denied Defendant's pro se petition for leave to file successive postconviction petition. Postconviction counsel filed Rule 651(c) certificate specifically stating he satisfied the requirements. Defendant failed to provide any specific examples of bias on part of trial judge due to her presiding over criminal matter and Defendant's divorce. Nothing in record indicates trial judge relied on any information derived from divorce case to Defendant's detriment at his criminal trial. (POPE and STEIGMANN, concurring.)

People v. Cooper, 2015 IL App (1st) 132971 (October 14, 2015) Cook Co., 3d Div. (MASON) Affirmed.

Defendant was convicted, after jury trial, of attempted first degree murder, by personally discharging a firearm proximately causing great bodily harm, and sentenced to 31 years. No basis in record to conclude that court summarily and improperly dismissed pro se postconviction petition on ground of untimeliness, which is Defendant's only argument challenging dismissal of petition. (LAVIN and PUCINSKI, concurring.)

People v. Hotwagner, 2015 IL App (5th) 130525 (October 22, 2015) Lawrence Co. (SCHWARM) Affirmed.

Defendant appeared pro se at final pretrial conference and pled guilty to one count of aggravated criminal sexual assault in exchange for a 12-year sentence and State's dismissal of 2 other counts. At plea hearing, prosecutor advised court that he and Defendant had reached agreement after talking outside the courtroom; and that he had asked Defendant if he wanted a court-appointed attorney or if he wanted to speak with him, and Defendant said he wanted to speak with him. Defendant filed pro se postconviction petition, alleging that when he appeared for final pretrial conference he expected to be met by his former attorney, who had then recently withdrawn, but instead was met by State's Attorney, and he felt ambushed and threatened. Defendant cannot show reasonable probability that result of evidentiary hearing would have been different had witness, who stated in affidavit that he had witnessed hallway conversation. No ineffective assistance of counsel in handling postconviction petition. Trial court's denial of

postconviction petition hinged on court's finding that Defendant was not credible. (CATES and GOLDENHERSH, concurring.)

[*People v. Morgan*](#), 2015 IL App (1st) 131938 (October 21, 2015) Cook Co., 3d Div. (MASON) Affirmed.

Defendant was convicted of attempted murder and aggravated battery with a firearm, and filed pro se postconviction petition in which he alleged he had newly discovered evidence of his actual innocence; and alleged that trial counsel and appellate counsel were ineffective (including claim that appellate counsel was ineffective for failing to raise on appeal her own ineffectiveness at sentencing). Court did not commit manifest error in rejecting Defendant's actual innocence claim based on finding that Defendant's testimony was incredible and would not have changed result at trial. Court properly dismissed defendant's claims of ineffective assistance of counsel. Postconviction counsel satisfied requirements of Rule 651(c), in that Defendant agreed to be jointly represented by father and son attorney, and those attorneys took all actions necessary under the Rule. (PUCINSKI and HYMAN, concurring.)

[*People v. Diggins*](#), 2015 IL App (3d) 130315 (November 12, 2015) Peoria Co. (O'BRIEN) Affirmed.

Petitioner was convicted, after jury trial, of 2 counts of aggravated battery with a firearm and 1 count of armed robbery for his involvement in a robbery in 1995. Postconviction petitions claim that his trial counsel was ineffective during plea negotiations, but this issue was not raised in initial postconviction pleading. Petitioner could have raised the issue in his initial pro se postconviction petition, and he failed to demonstrate cause for not doing so. Thus, court properly denied leave to file successive postconviction petition. (CARTER and LYTTON, concurring.)

[*People v. Smith*](#), 2015 IL App (1st) 140494 (November 10, 2015) Cook Co., 3d Div. (MASON) Reversed and remanded.

Defendant was convicted of first degree murder for shooting death of gang member who was playing dice with other gang members. Court erred in second stage dismissal of his postconviction petition. Defendant made a substantial showing of actual innocence where eyewitness to shooting recanted his identification of Defendant. Witness' recantation was newly discovered evidence, as Defendant could not have discovered this recantation prior to trial. This witness was the only eyewitness to identify Defendant as shooter at trial; the other two eyewitnesses both recanted their prior identifications in their trial testimony, and State produced no physical evidence linking Defendant to the crime. (FITZGERALD SMITH and PUCINSKI, concurring.)

[*People v. Lamar*](#), 2015 IL App (1st) 130542 (November 19, 2015) Cook Co., 4th Div. (COBBS) Reversed and remanded.

Defendant's postconviction petition supports a substantial showing that he was denied effective assistance of counsel in alleging that trial counsel failed to file a notice of appeal. Defendant

alleged that he never told counsel that he did not want to appeal, he thought one was pending, and he expected and wanted an appeal, and explicitly asked trial counsel to take steps to prepare an appeal. Allegations, if proven at evidentiary hearing, would demonstrate that trial counsel's performance was deficient. Defendant's petition sets forth a substantial showing of a constitutional violation and thus Defendant is entitled to an evidentiary hearing. (McBRIDE and HOWSE, concurring.)

[People v. Weathers](#), 2015 IL App (1st) 133264 (November 25, 2015) Cook Co., 4th Div. (McBRIDE) Reversed and remanded.

Defendant was convicted, after bench trial, of first degree murder in 2002 shooting death, and sentenced to 75 years. Court erred in denying his motion for leave to file successive postconviction petition, as his claims of a physically coerced confession have never been reviewed. Defendant attached portions of 2012 Illinois Torture Inquiry and Relief Commission (TIRC) report, which related to detectives that interrogated him, and contended that it was newly discovered evidence as it was not available at the time of his initial postconviction petition in 2009. Defendant established requisite cause, in that an objective factor impeded his ability to raise this claim earlier. Defendant satisfied prejudice prong as the use of a Defendant's physically coerced confession as substantive evidence of his guilt is never harmless error. (HOWSE and ELLIS, concurring.)

[People v. Johnson](#), 2015 IL App (2d) 131029 (December 16, 2015) Winnebago Co. (SCHOSTOK) Affirmed.

Defendant was convicted, after jury trial, of first-degree murder. Court properly dismissed Defendant's pro se postconviction petition at second stage, as Defendant failed to make showing of culpable negligence to excuse his late filing of his petition. Defendant had 35 days after judgment on direct appeal to file petition for leave to appeal and 6 months from that point to file his postconviction petition. (JORGENSEN and SPENCE, concurring.)

[People v. Burns](#), 2015 IL App (1st) 121928 (December 21, 2015) Cook Co., 3d Div. (CUNNINGHAM) Vacated and remanded.

Under Illinois Supreme Court's 2015 ruling in *People v. Allen*, court improperly dismissed Defendant's postconviction petition at first stage. "Strategy argument" as to trial counsel's decision not to call a witness is inappropriate for the first stage of review of postconviction petition. Relevant test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced. Defendant presented an "arguable" claim that her trial counsel was ineffective in not calling co-defendant as a witness. (CONNORS and DELORT, concurring).

People v. Rodriguez, 2015 IL App (2d) 130994 (December 23, 2015) Ogle Co. (McLAREN) Vacated and remanded.

Defense counsel failed to substantially comply with Rule 651(c), and he failed to provide reasonable level of assistance at second stage postconviction proceedings. Defendant's fitness to stand trial was a constitutional issue that was strongly considered, should have been fully explored, and possibly should have been raised in amended postconviction petition. Defense counsel never fully explored issue, and never raised issue. Defendant's fitness at time of trial needed to be reviewed in order for defense counsel to properly prepare amended postconviction petition. (JORGENSEN and HUDSON, concurring.)

People v. Jackson, 2015 IL App (3d) 130575 (December 28, 2015) Peoria Co. (LYTTON) Reversed and remanded.

Defendant pled guilty to 2 counts of first-degree murder in exchange for a sentence of natural life in prison. Defendant's postconviction counsel improperly filed a motion to withdraw and dismiss Defendant's successive postconviction petition. State did not file motion to dismiss, and verbal statements, even in construed as an oral motion to dismiss, are insufficient, as an oral motion to dismiss is not authorized by Post-Conviction Hearing Act. Postconviction defense counsel should not seek dismissal of a Defendant's postconviction petition, but instead, if counsel believes that petition is frivolous and patently without merit, then counsel should file a motion to withdraw, not a motion to dismiss petition. (HOLDRIDGE, concurring; SCHMIDT, dissenting.)

People v. Sanders, 2016 IL 118123 (January 22, 2016) Cook Co. (GARMAN) Appellate court affirmed; circuit court affirmed.

Petitioner failed to carry his burden to make substantial showing of a claim of actual innocence. Thus, court properly dismissed his successive postconviction petition at second stage. Proposed testimony would merely add to evidence jury heard at Petitioner's trial, and is not so conclusive in character as would probably change result on retrial, either by itself or in conjunction with recantation of another witness. (FREEMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

People v. Christian, 2016 IL App (1st) 140030 (March 4, 2016) Cook Co., 5th Div. (GORDON) Affirmed.

In postconviction proceeding, Defendant filed petition before Torture Inquiry and Relief Commission, claiming that he had been tortured into confessing to the murder of his stepmother in 1989, a crime for which he was convicted. Commission determined that sufficient evidence existed to warrant judicial review pursuant to the Act. After evidentiary hearing, circuit court found there was no credible evidence that Defendant was entitled to any relief on his torture claim and thus denied Defendant petition. Findings of Commission are not entitled to any preclusive effect before the circuit court. Commission's decision is not the type of decision to which collateral estoppel applies. Required elements of collateral estoppel were not satisfied. Law of the case doctrine is inapplicable. (REYES and LAMPKIN, concurring.)

[People v. Hayes](#), 2016 IL App (3d) 130769 (March 7, 2016) Peoria Co. (HOLDRIDGE)

Affirmed in part and reversed in part; remanded.

Defendant was convicted of armed violence, unlawful possession with intent to deliver a controlled substance, and unlawful possession of a controlled substance, and pled guilty to aggravated unlawful use of a weapon. Defense counsel consulted with Defendant to ascertain his contentions of deprivations of constitutional rights, examined trial record, and made any amendments to defendant's pro se postconviction petition necessary for adequate representation of his contentions. Thus, counsel's performance was reasonable and his withdrawal was proper in light of his compliance with Rule 651(c) and the fact that he believed petition was frivolous. Defendant is not entitled to new appointed counsel on remand, as his original counsel performed reasonably.(O'BRIEN, concurring; SCHMIDT, concurring in part and dissenting in part.)

[People v. Smith](#), 2016 IL App (4th) 140085 (March 8, 2016) Sangamon Co. (APPLETON)

Reversed and remanded.

Court erred in, after granting appointed counsel's motion to withdraw, entering second-stage dismissal of Defendant's pro se petition for postconviction relief. Postconviction counsel never filed Rule 651(c) certificate, and record fails to show counsel's fulfillment of all his responsibilities under that Rule.(TURNER and STEIGMANN, concurring.)

[People v. Allen](#), 2016 IL App (1st) 142125 (March 25, 2016) Cook Co., 6th Div. (DELORT)

Affirmed.

Illinois Torture Inquiry and Relief Commission Act does not provide relief to a petitioner who alleges that his conviction resulted from evidence which was physically coerced at the hands of police officers other than former Chicago police commander Jon Burge or his subordinates. Explicit language of the Act limits its application only to petitioners who were victims of Burge or his subordinates.(ROCHFORD and HOFFMAN, concurring.)

[People v. Meeks](#), 2016 IL App (2d) 140509 (March 30, 2016) Kane Co. (SCHOSTOK) Reversed and remanded.

Summary dismissal of postconviction petition was error, as attorney representing Defendant in direct appeal failed to file an appellate brief, resulting in dismissal of appeal. If counsel believed he could not raise any issue of arguable merit on appeal, he was ethically obligated to seek leave to withdraw as appellate counsel, or raise some issue in a properly filed appellate brief.(McLAREN and ZENOFF, concurring.)

[People v. Clinton](#), 2016 IL App (3d) 130737 (March 29, 2016) Rock Island Co. (O'BRIEN)

Affirmed.

Defendant was convicted, after jury trial, of first degree murder. Court properly dismissed Defendant's amended postconviction petition, as it did not make a substantial showing of any constitutional violation. Defendant failed to allege that State knew that witnesses were testifying

falsely before grand jury, and that witnesses committed perjury. (SCHMIDT, concurring; McDADE, specially concurring.)

[*People v. Alfonso*](#), 2016 IL App (2d) 130568 (March 24, 2016) DuPage Co. (SPENCE) Reversed and remanded.

(Court opinion corrected 3/25/16.) Court struck Defendant's postconviction petitions on basis that they violated Defendant's promise, as part of his plea agreement, not to collaterally attack his convictions. Defendant's waiver of his right to file collateral petitions was knowing, voluntary, and intentional; at hearing before plea agreement was final, Defendant acknowledged that proposed agreement would prohibit him from raising any issue in postconviction litigation. No specific admonishments were required, and court's admonishments sufficiently informed Defendant that he was waiving his right to file any type of collateral petition. Postconviction Act requires court to determine whether a petition is frivolous or patently without merit within 90 days of its docketing. As this did not occur, petition is remanded for second-stage proceedings. Court erred in striking petition, as the ruling was premature. (HUTCHINSON and HUDSON, concurring.)

[*People v. Rademacher*](#), 2016 IL App (3d) 130881 (April 4, 2016) Iroquois Co. (SCHMIDT) Affirmed.

Defendant pled guilty to predatory criminal sexual assault of a child and criminal sexual assault, for sexual conduct with 2 boys, age 13 and under, at parsonage where Defendant lived when he was a church youth minister. In exchange for plea, State agreed to aggregate sentencing range of 12-35 years on mandatorily consecutive sentences. Court properly dismissed Defendant's pro se postconviction petition, as it is not of sufficient constitutional dimension. Court reasonably cited Defendant's pattern of behavior, in performing sexual acts on victims in parsonage before taking them to church the next morning, in aggravation does not offend state or federal constitution. Court's repeated references to religion and church were invited by Defendant, who called 6 clergy members to testify in mitigation. (HOLDRIDGE and WRIGHT, concurring.)

[*People v. Wideman*](#), 2016 IL App (1st) 123092 (March 31, 2016) Cook Co., 1st Div. (CUNNINGHAM) Affirmed.

Defendant was convicted, in 2004 jury trial, of first degree murder and armed robbery. Defendant did not set forth evidence of such conclusive character that it would probably change the result on retrial, as is required to allow leave to file a successive petition on basis of actual innocence. Defendant did not satisfy independent "cause and prejudice" test for leave to file successive petition under Section 122-1(f); also, motion is barred by res judicata. Court properly denied Defendant's motion seeking leave to file a successive postconviction petition, as he did not establish his right to obtain leave to file it.(CONNORS and HARRIS, concurring.)

[*People v. Russell*](#), 2016 IL App (3d) 140386 (April 20, 2016) Peoria Co. (O'BRIEN) Reversed and remanded.

Defendant filed postconviction petition after his conviction for first-degree murder was affirmed on direct appeal. Court erred in dismissing petition at second stage. Postconviction counsel's failure to make routine amendment to postconviction petition to allege ineffective assistance of counsel prevented circuit court from considering merits of Defendant's claim's. This failure contributed directly to dismissal of petition without evidentiary hearing, and rebutted presumption of reasonable assistance created by filing of certificate of compliance with Rule 651(c). (LYTTON and McDADE, concurring.)

PRIVILEGE

[*People v. Shepherd*](#), 2015 IL App (3d) 140192 (February 11, 2015) Will Co. (CARTER) Reversed and remanded.

Defendant was charged with solicitation of murder for hire. Court erred in granting Defendant's motion to suppress evidence that State had allegedly obtained by taking advantage of alleged ethical violations of attorney that Defendant had consulted with about case but had not retained. Although Defendant was a prospective client of attorney as defined in Rule 1.18(a) of Rules of Professional Conduct, Defendant failed to raise before trial court that he had formed attorney-client relationship with him, and thus cannot advance that argument as basis to affirm appeal. Defendant failed to show that attorney received from Defendant information that could be significantly harmful to Defendant in either of two cases. (LYTTON and O'BRIEN, concurring.)

[*People v. Ross*](#), 2015 IL App (3d) 130077 (September 18, 2015) Rock Island Co. (O'BRIEN) Reversed and remanded.

Defendant pled guilty to felony murder and sentenced to 60 years. Defendant was denied reasonable assistance of postconviction counsel, as counsel filed no affidavits or depositions and offered no oral testimony or other evidence to support Defendant's ineffective assistance of counsel claim based on his trial counsel's wrong advice about applicability to Defendant's sentencing of truth-in-sentencing amendments. Postconviction counsel failed to comply with Rule 651(c), in failing to make all necessary amendments to pro se petition.(HOLDRIDGE, concurring; SCHMIDT, concurring in part and dissenting in part.)

[*People v. Robinson*](#), 2015 IL App (4th) 130815 (October 2, 2015) Douglas Co. (APPLETON) Affirmed.

Defendant filed amended petition for postconviction relief, and court granted State's motion to dismiss on ground of untimeliness. Failure of Defendant's counsel on direct appeal to notify him of issuance on direct appeal does not show lack of culpable negligence on Defendant's part, as Defendant failed to make a fully reasoned explication of Section 122-1(c) of Post-Conviction Hearing Act. Defendant failed to explain to Appellate Court what triggers running of the period

of limitation, what the period of limitation, and how the issuance of decision on direct appeal relates to that trigger. Without such explanation, Appellate Court cannot address issue of culpable negligence. (KNECHT and HOLDER WHITE, concurring.)

[People v. Blanchard](#), 2015 IL App (1st) 132281 (October 13, 2015) Cook Co., 2d Div. (PIERCE) Remanded; dismissal vacated.

Defendant was convicted of armed robbery, and alleged that his appointed postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) by failing to review trial exhibits that contained evidence crucial to his pro se claims. Remanded to trial court to allow postconviction counsel to comply with Rule 651(c) requirements as to exhibits, and to allow a supplemental certificate to be filed, if requested; and circuit court directed to then reconsider Defendant's petition or amended petition. (NEVILLE and SIMON, concurring.)

[People v. Peterson](#), 2015 IL App (3d) 130157 (November 12, 2015) Will Co. (CARTER) Affirmed.

Defendant was convicted, after jury trial, of first degree murder of his 3rd ex-wife and sentenced to 38 years in prison. Evidence was sufficient to prove beyond a reasonable doubt that Defendant committed first-degree murder. Court did not err in finding that clergy privilege was inapplicable to pastor's testimony about what Defendant's 4th wife, who disappeared 3 years after 3rd ex-wife's death, had told him at her counseling session 2 months before her disappearance. Court properly found conversation was not confidential, as it was in public with at least one other person present. Court's prior ruling admitting certain statements of 2 victims under common law doctrine of FBWD (forfeiture by wrongdoing) stands as the law of the case. Use of statements was not so extremely unfair to Defendant that their admission violated Defendant's due process right to a fair trial. Court's ruling admitting testimony of a person who testified that Defendant had tried to hire him to kill 3rd ex-wife was within its discretion. Defense attorney did not have a per se conflict of interest in representing Defendant as a result of media rights contract which Defendant and defense attorney jointly co-signed and which began and ended before Defendant was indicted. Decision to call 4th ex-wife's divorce attorney was a matter of trial strategy as Defendant was seeking to discredit impression of her that pastor's testimony had given to jury, and was largely cumulative to pastor's testimony.(O'BRIEN and SCHMIDT, concurring.)

PROSECUTORIAL MISCONDUCT

[People v. Haynes](#), 2015 IL App (3d) 130091 (January 13, 2015) Kankakee Co. (McDADE) Reversed and remanded.

Defendant filed pro se postconviction petition claiming that prosecution suborned perjury of a proffered 11-year-old witness, who was cousin of Assistant State's Attorney who was co-counsel during his criminal trial. Affidavit of witness offered by witness stated that shooting victim did have a gun, but that he was told to say that he did not have a gun. Affidavit, if true, renders

witness' entire testimony reliable. A witness's testimony is entirely unreliable if he is under instructions from a prosecutor to lie or to omit certain facts while testifying. (HOLDRIDGE, concurring; LYTTON, specially concurring.)

[People v. Williams](#), 2015 IL App (1st) 122745 (March 31, 2015) Cook Co., 2d Div. (SIMON) Reversed and remanded.

(Modified upon denial of rehearing 5/5/15.) Prosecution made impermissible argument in criminal case for drive-by shooting in apparent gang dispute. Prosecutor improperly vouched, saying, "When a gang member comes before us and is charged with an offense, we don't just take everything he says for truth immediately, we check it out." This statement urged jury to believe his witness over Defendant because of government's verification of witness' version of event. Testimony thus became that of prosecutor rather than that of witness. Prosecutor impermissibly implied that he knew something that jury did not, but implication had no evidentiary basis.(PIERCE and LIU, concurring.)

[People v. Risper](#), 2015 IL App (1st) 130993 (June 4, 2015) Cook Co., 4th Div. (ELLIS) Affirmed.

Defendant was convicted, after jury trial, of attempted robbery. Three references made at trial (one in opening statement and two during police officer testimony) to a nontestifying witness's identification of Defendant as a culprit was error, but errors were harmless beyond a reasonable doubt. If a Defendant cannot establish that challenged testimony is hearsay, he cannot prevail on a claim under confrontation clause. In two instances where Defendant objected, court promptly ruled, sustaining objection to one officer's testimony and instructing jury to disregard it, and instructing jury to consider testimony only as to detective's course of conduct and not as to truth of statements made to him by nontestifying witnesses. Court twice instructed jury that opening statements are not evidence. State presented strong evidence of Defendant's guilt, and errors did not deny Defendant right to fair trial. (HOWSE and COBBS, concurring.)

[People v. Ringland](#), 2015 IL App (3d) 130523 (June 3, 2015) LaSalle Co. (SCHMIDT) Affirmed.

Defendants were each charged separately of felony drug offenses as a result of evidence obtained following traffic stops conducted by State's Attorney's special investigator in LaSalle County. State's Attorney's Felony Enforcement ("SAFE") unit's conduct falls well outside duties contemplated by Section 3-9005(b) of Counties Code, which grants State's Attorneys authority to appoint a special investigator. Failure to comply with fingerprint requirements of statute meant that this special investigator was not authorized to act as a peace officer on date of incidents. Thus, court properly granted motions to suppress. (LYTTON and O'BRIEN, concurring.)

[People v. Trotter](#), 2015 IL App (1st) 131096 (June 30, 2015) Cook Co., 4th Div. (COBBS) Affirmed.

Defendant was convicted, after jury trial, of murder and sentenced to natural life in prison. No misconduct during closing argument when prosecutor noted that victim had just moved to

Chicago to start a life with her fiance, as prosecutor was commenting on evidence properly presented at trial as to victim's background and relevant details of her life prior to her murder. Defendant definitively invoked his right of self-representation. A defendant has either the right to counsel or the right to represent himself, and is thus not entitled to hybrid representation whereby he would receive services of counsel and still be permitted to file pro se motions.(FITZGERALD SMITH and HOWSE, concurring.)

People v. Herndon, 2015 IL App (1st) 123375 (July 21, 2015) Cook Co., 2d Div. (PIERCE) Affirmed.

Defendant was convicted, after jury trial, of delivery of a controlled substance and sentenced to 10 years. Although Defendant was not specifically informed that he would be sentenced as a Class X offender if he was found guilty, Defendant was correctly admonished as to minimum and maximum extended term sentence he faced as a Class X offender. This admonishment was substantially compliant with Rule 401(a). Prosecutor's comments in closing argument about impact of Defendant's narcotics sales on families living nearby properly focused on negative effects of Defendant's conduct and not on crime in society at large. Prosecutor's minor mistatement in closing that witness testified that he tested three separate samples of controlled substance, when he actually testified that he had tested two samples, was not error. (SIMON and NEVILLE, concurring.)

People v. Thompson, 2015 IL App (1st) 122265 (August 5, 2015) Cook Co., 3d Div. (HYMAN) Affirmed.

Defendant was convicted, after jury trial, of burglary, and sentenced to 18 years. State's closing argument did not result in substantial prejudice or constitute a material factor in Defendant's conviction. No error in State's remarks in closing about the reasonable doubt standard, and arguments by defense counsel invited State's response. Although State's remarks in closing that Defendant was trying to "evade his responsibility" was improper, evidence was not close and no prejudice resulted from remarks. (LAVIN and MASON, concurring.)

People v. Burgess, 2015 IL App (1st) 130657 (August 14, 2015) Cook Co., 5th Div. (GORDON) Affirmed.

Defendant, then an HR Director, was convicted, after jury trial, of aggravated criminal sexual assault, criminal sexual assault, and unlawful restraint of a 15-year-old summer employee of his employer, and received concurrent sentences of 24, 15, and 3 years. As both sides presented testimony that witnesses for the other side were lying, and both sides argued in closing that their witnesses were more believable, comment made by State as to burden of proof, in rebuttal at closing, did not create substantial prejudice against Defendant. Court within its discretion in sentencing within statutory range, as court considered multiple factors and evidence showed that minor suffered psychological harm from assaults. (PALMER and REYES, concurring.)

[*People v. Kelley*](#), 2015 IL App (1st) 132782 (September 18, 2015) Cook Co., 5th Div. (GORDON) Affirmed.

Defendant was convicted, after jury trial, of first-degree murder and sentenced to 35 years. State's apparent purpose in questioning witnesses was to answer doubts raised by cross-examination in eliciting testimony from its experts that Defendant could have requested evidence to be tested. State's remarks in rebuttal closing were not error; State was reminding jury that case was not a referendum on propriety of victim's life but trial on question of who murdered the victim. State made a few solitary remarks about defense counsel's motives, and did not create theme of disparaging defense counsel. (REYES and PALMER, concurring.)

[*People v. Moody*](#), 2015 IL App (1st) 130071 (October 29, 2015) Cook Co., 1st Div. (COBBS) Affirmed in part and reversed in part; remanded with instructions.

Defendant was convicted of first degree murder and aggravated kidnapping pursuant to Section 10-2(a)(3) of Criminal Code, and sentenced to consecutive terms of 60 years and 25 years. Prosecutor did not commit reversible error in discussing reasonable doubt standard during closing arguments, or in statements as to presumption of innocence, as comments did not diminish burden of proof. Two isolated instances of prosecutor making improper comments did not constitute pervasive pattern of prosecutorial misconduct depriving Defendant of fair trial. (HOWSE and ELLIS, concurring.)

[*People v. McGee*](#), 2015 IL App (1st) 130367 (October 29, 2015) Cook Co., 4th Div. (COBBS) Affirmed in part and reversed in part; remanded with instruction.

Defendant was convicted of first degree murder and aggravated kidnapping and sentenced to consecutive terms of 60 years and 25 years in prison. Defendant was lawfully seized, and thus lineup identifications were properly admitted into evidence. Prosecutor sought to discuss reasonable doubt standard in terms which did not diminish its burden of proof, and thus statements in closing arguments were not reversible error. (HOWSE and ELLIS, concurring.)

[*People v. Vanderark*](#), 2015 IL App (2d) 130790 (December 23, 2015) DuPage Co. (SCHOSTOK) Affirmed.

Defendant was convicted of 3 counts of solicitation of murder for hire and sentenced to 40 years. Among his alleged intended victims were trial judge and ASA who prosecuted him for Aggravated DUI. Court within its discretion in denying Defendant's motion to appoint special prosecutor, as Defendant offered no reason other than that one alleged intended victim was an ASA. That ASA was not involved in, and her testimony was not needed for, prosecution of Defendant for these offenses.(JORGENSEN and SPENCE, concurring.)

[*People v. Ealy*](#), 2015 IL App (2d) 131106 (December 29, 2015) Lake Co. (BURKE) Affirmed. Defendant was convicted, after jury trial, of first-degree murder and sentenced to natural life. State may not introduce evidence that accused exercised his constitutional right to be free from unreasonable searches and seizures, by refusing DNA testing, because prejudicial effect

substantially outweighs probative value of allowing jury to infer the accused's consciousness of guilt from his exercise of his rights. However, in this case the error was harmless beyond a reasonable doubt. State introduced overwhelming circumstantial evidence of Defendant's guilt, such that prejudicial testimony that he refused DNA testing did not contribute to conviction, especially because Defendant's DNA was not found at crime scene.(HUTCHINSON and ZENOFF, concurring.)

[People v. Mpulamasaka](#), 2016 IL App (2d) 130703 (January 6, 2016) Lake Co. (BIRKETT) Reversed.

(Court opinion corrected 2/17/16.) Defendant was convicted, after jury trial, of aggravated criminal sexual assault, and sentenced to 12 years. State failed to disprove defense of consent by the victim, who testified that she held hands with Defendant and guided his hand to her thigh. Evidence was sufficient to raise affirmative defense of consent. There was no evidence that victim was confused during cross-examination, or that she lacked capacity to understand defense counsel's questions or recall events. By telling jury that they should ignore victim's cross-examination testimony because it was not "her own words", the State undermined Defendant's right to fair trial. Prosecutor committed prosecutorial misconduct, which severely prejudiced Defendant's case, when he sat in witness stand while making closing and rebuttal argument about victim's courage in testifying, and then commented on Defendant's "credibility", although Defendant did not testify. (HUTCHINSON, concurring; BURKE, specially concurring.)

[People v. Thompson](#), 2016 IL App (1st) 133648 (March 8, 2016) Cook Co., 2d Div. (HYMAN) Affirmed.

(Court opinion corrected 3/10/16.) Defendant and a codefendant were convicted, after separate jury trials, of first degree murder and attempted first degree murder, for shooting of 16-year-old and 15-year-old cousins in front of their home. Potential problems with identifications of 3 State witnesses were presented to jury. Prior consistent statement of victim's brother to his father identifying Defendant and codefendant as the shooters was properly admitted when testified to by that witness as a statement of identification. Police officer's testimony as to the statement should not have been admitted, but any error was harmless. State's remarks in opening statements and closing arguments were questionable but do not rise to level of clear and obvious error.(NEVILLE and SIMON, concurring.)

[People v. Effinger](#), 2016 IL App (3d) 140203 (March 28, 2016) Will Co. (LYTTON) Affirmed. Defendant was convicted of aggravated battery, for grabbing (and then releasing) the hand of a middle school student as she was walking to middle school on a public sidewalk. Although court erred in admitting evidence that assistant principal believed that Defendant was "grooming" victim, as such evidence was irrelevant to charged offense, any error was harmless. State impermissibly vouched for victim's credibility in arguing that victim was credible and that State believed she was credible. Evidence was not closely balanced, and jury was instructed that arguments were not evidence and that only they were the judges of believability of witnesses.

Thus, erroneous statements did not severely threaten to tip scales of justice against Defendant.(CARTER, concurring; McDADE, dissenting.)

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[People v. Argueta](#), 2015 IL App (1st) 123393 (July 8, 2015) Cook Co., 3d Div. (HYMAN)
Affirmed.

Defendant was convicted, after bench trial, of various criminal sexual assault offenses. After State had rested, court properly refused Defendant's request for interpreter for his own testimony at trial. Defendant, a Spanish speaker and El Salvador citizen who described himself as "bilingual", repeatedly declined interpreter during numerous interactions with court in year prior to trial. Defense counsel and Defendant both told court that he understood and spoke English and did not need an interpreter; record supports finding that Defendant was capable of testifying in English. (PUCINSKI and LAVIN, concurring.)

RIGHT TO COUNSEL

[People v Jones](#), 2015 IL App (2d) 120717 (February 3, 2015) Winnebago Co. (SCHOSTOK)
Affirmed in part and vacated in part.

Defendant was convicted, after jury trial, of 12 counts of first-degree murder, and attempted first-degree murder, 4 counts of home invasion, and residential burglary. Court did not improperly admonish Defendant that if he waived his right to counsel that he would not be able to have counsel reappointed in middle of trial, and court did not intimidate Defendant into foregoing his right to self-representation (HUTCHINSON and BURKE, concurring.)

[People v. Wright](#), 2015 IL App (1st) 123496 (May 21, 2015) Cook Co., 4th Div. (COBBS)
Reversed and remanded with instructions.

Defendant was convicted, after jury trial, of four counts of armed robbery while armed with a firearm. Court's pretrial admonishments failed to substantially comply with Rule 401(a) prior to accepting Defendant's waiver of counsel, as court never gave accurate statement of maximum punishment prior to waiver of counsel, and no evidence that Defendant was aware of penalty. (FITZGERALD SMITH and ELLIS, concurring.)

[People v. Lewis](#), 2015 IL App (1st) 130171 (May 12, 2015) Cook Co., 2d Div. (PIERCE)
Affirmed.

Defendant was convicted, after jury trial, of armed robbery and unlawful vehicular invasion. Jury instructions properly identified standard of reasonable doubt, and cured any possible error in court's comments prior to instructions.Extradition proceedings were procedural, aimed at transferring Defendant to Illinois pursuant to arrest warrant, and thus there was no judicial

involvement in adversary proceedings against him, and no sixth amendment right to counsel yet attached. Court properly denied defendant's motion to suppress identification, and no plain error. Defense counsel's analogy, in closing argument, comparing reasonable doubt standard to a football game fell below objective standard of reasonableness, but Defendant suffered no prejudice as jury instructions after closing arguments cured any potential confusion as to reasonable doubt.(SIMON and LIU, concurring.)

[People v. Brzowski](#), 2015 IL App (3d) 120376 (May 18, 2015) Will Co. (LYTTON) Reversed and remanded.

(Court opinion corrected 6/2/15.) Defendant was charged with two counts of unlawful violations of order of protection for sending mail to his two sons, and later charged with two more counts for sending mail to his ex-wife. Defendant was denied his right to counsel at both trials. Court excused Defendant's standby counsel prior to jury deliberations, a critical stage in trial, which was prejudicial and abuse of discretion. Court denied Defendant his right to have counsel appointed in telling Defendant that he could not proceed with his current assistant public defender (despite public defender's office having indicated that it had no objection to Defendant being represented by his same assistant public defender), but could only proceed pro se, hire a new attorney or convince his attorney to provide him pro bono representation. (McDADE and WRIGHT, concurring.)

[People v. Trotter](#), 2015 IL App (1st) 131096 (June 30, 2015) Cook Co., 4th Div. (COBBS) Affirmed.

Defendant was convicted, after jury trial, of murder and sentenced to natural life in prison. No misconduct during closing argument when prosecutor noted that victim had just moved to Chicago to start a life with her fiance, as prosecutor was commenting on evidence properly presented at trial as to victim's background and relevant details of her life prior to her murder. Defendant definitively invoked his right of self-representation. A defendant has either the right to counsel or the right to represent himself, and is thus not entitled to hybrid representation whereby he would receive services of counsel and still be permitted to file pro se motions.(FITZGERALD SMITH and HOWSE, concurring.)

[People v. Bartholomew](#), 2015 IL App (4th) 130575 (July 7, 2015) McLean Co. (HARRIS) Reversed and remanded.

Jury convicted Defendant of aggravated batter and battery. Court failed to substantially comply with Supreme Court Rule 401(a), prior to allowing him to proceed pro se. Court did not address any of the three elements required by Rule 401(a) prior to allowing him to proceed pro se during defense portion of trial. Thus, his waiver of counsel was ineffective, and conviction and sentence are reversed. (POPE and HOLDER WHITE, concurring.)

[People v. Mitchell](#), 2016 IL App (2d) 140057 (March 8, 2016) Kane Co. (BIRKETT) Vacated and remanded.

Court denied Defendant's motion to withdraw his negotiated guilty plea to possession of a controlled substance and resisting a peace officer. Counsel was initially appointed for Defendant, but Defendant later waived his right to counsel. Whether Defendant revoked his waiver of right to counsel, and thus whether trial judge was obligated to reappoint counsel, is not clear from the record. Judge did not suggest appointing a different attorney within the public defender's office, and focus of Defendant's dissatisfaction was with the assistant public defender appointed to him. (SCHOSTOK and ZENOFF, concurring.)

[People v. Adams](#), 2016 IL App (1st) 141135 (March 15, 2016) Cook Co., 2d Div. (HYMAN) Reversed and remanded with directions.

Court abused its discretion in denying request of Defendant, who had been indicted for delivery of a controlled substance 70 days prior, on day set for bench trial that case be continued so he could retain private counsel. Court erred in failing to inquire into Defendant's reasons for wanting new counsel or any efforts he made to find new counsel. Defendant had never previously requested continuance, and no evidence that request was a delay tactic.(NEVILLE and SIMON, concurring.)

SEARCH & SEIZURE (auto)

[People v. Simpson](#), 2015 IL App (1st) 130303 (March 11, 2015) Cook Co., 3d Div. (HYMAN) Affirmed.

Defendant and his codefendant were convicted after bench trial of four counts of home invasion with guns, while residents were in the house. Court properly denied pretrial motion to quash arrest and suppress evidence. Police stopped codefendants in early morning hours, immediately after receiving dispatch that suspects from a home invasion were fleeing in a car which matched their description, on the road and in the direction where they were travelling; no other vehicles were on the road. Reasonable suspicion for Terry stop can be derived, in part, when police observe persons similar to those believed fleeing from recent crime scene when found in general area where suspects would be expected. Patdown search was justified given that home invasion by two armed perpetrators is inherently dangerous crime. (LAVIN and MASON, concurring.)

[People v. Irby](#), 2015 IL App (3d) 130429 (May 11, 2015) Peoria Co. (SCHMIDT) Reversed.

Defendant was convicted, after stipulated bench trial, of aggravated unlawful use of a weapon, and sentenced to 6 years and 3 years MSR.Court properly denied Defendant's motion to suppress, as officer did not effectuate a seizure of Defendant until after he had reasonable, articulable suspicion of criminal activity. State had burden of proving that gun was uncased, as element of offense, but failed to do so. Court cannot infer that gun was uncased based on

Defendant's decision not to present evidence that gun was cased.(LYTTON and O'BRIEN, concurring.)

[People v. LeFlore](#), 2015 IL 116799 (May 21, 2015) Kane Co. (THOMAS) Appellate court affirmed in part and reversed in part; circuit court affirmed in part and reversed in part; remanded.

Defendant, who was convicted of aggravated robbery, robbery, and burglary, had filed pretrial motion to quash arrest and suppress evidence, arguing that police improperly used a GPS device without a warrant to track movements of a vehicle he used. Even where a fourth amendment violation has occurred, evidence that resulted will not be suppressed when good-faith exception to exclusionary rule applies. In this case, good-faith exception to exclusionary rule applies, and evidence obtained against Defendant should not be excluded. At time when detective placed GPS on vehicle in April 2009, U.S. Supreme Court's decisions were "binding appellate precedent" that detective could have reasonably relied upon. In the alternative, it would have been objectively reasonable for police to rely upon legal landscape and constitutional norm in existence at time of search that allowed warrantless attachment and use of GPS technology. (GARMAN, KILBRIDE, and KARMEIER, concurring; BURKE, FREEMAN, and THEIS, dissenting.)

[People v. Smith](#), 2015 IL App (1st) 131307 (May 29, 2015) Cook Co., 5th Div. (McBRIDE) Reversed.

Defendant was convicted, after jury trial, of aggravated unlawful use of a weapon (AUUW) and unlawful use of a weapon by a felon (UUWF), and sentenced to concurrent terms of nine years. Officer stopped Defendant for running stop sign, and while approaching his vehicle officer observed Defendant making a "furtive movement" toward rear of passenger seat. Officer then searched car and found handgun and live ammunition. Officer offered no specific facts to support his belief that he asked Defendant and passenger to step out of the vehicle because he feared for his safety. Based on Defendant's movement in the car, there was no reasonable basis for officer to engage in search of vehicle, and thus court erred in denying Defendant's motion to quash arrest and suppress evidence. (PALMER and REYES, concurring.)

[People v. Gaytan](#), 2015 IL 116223 (May 21, 2015) McLean Co. (BURKE) Appellate court reversed; circuit court affirmed.

(Correcting court designation.) An objectively reasonable, though mistaken, belief as to the meaning of a law may form basis for constitutionally valid vehicle stop under Illinois constitution. It was objectively reasonable for officers to believe that trailer hitch, on vehicle in which Defendant was a passenger, violated Section 3-413(b) of Vehicle Code. Thus, traffic stop was constitutionally valid under state and federal constitutions. Section 3-413(b) is ambiguous and, applying rule of lenity, it prohibits only materials which are attached to a license plate, and thus a trailer hitch does not violate that section. (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and THEIS, concurring.)

[People v. Pulling](#), 2015 IL App (3d) 140516 (June 17, 2015) Henry Co. (McDADE) Affirmed. Court properly found that traffic stop was unreasonably prolonged prior to canine alert, and thus properly granted motion to suppress crack cocaine located in vehicle trunk. Officer unlawfully prolonged duration of investigative stop when he interrupted his traffic citation preparation to conduct a free-air canine sniff based on unparticularized suspicion of criminal activity. Officer's deviation from purpose of stop to conduct drug investigation was not supported by independent reasonable suspicion and thus unlawfully prolonged duration of stop. (CARTER and O'BRIEN, concurring.)

[People v. Collins](#), 2015 IL App (1st) 131145 (September 16, 2015) Cook Co., 3d Div. (LAVIN) Affirmed in part and vacated in part.

Defendant was convicted, after jury trial, of possession of controlled substance and possession of a controlled substance with intent to deliver, and was sentenced as a habitual criminal to natural life. Court properly denied Defendant's motion to quash arrest and suppress evidence, and Defendant cannot show that his sentence is unconstitutional. Conviction for possession of controlled substance is vacated as it is a lesser-included offense of possession with intent to deliver. Evidence at motion to suppress hearing did not show that any conduct of officer unreasonably prolonged encounter. Officer testified that he found Defendant's explanation of his route illogical, creating additional suspicion. It was reasonable for officer to ask whether Defendant had narcotics in car, upon learning that Defendant was on MSR for possession of cocaine conviction. (PUCHINSKI, concurring; HYMAN, dissenting in part.)

[People v. Litwin](#), 2015 IL App (3d) 140429 (September 17, 2015) LaSalle Co. (McDADE) Reversed.

Defendant was convicted of unlawful cannabis trafficking and sentenced to 12 years. Court's conclusion that arresting officer was credible is not entitled to deference, as that conclusion was clearly against manifest weight of evidence. Officer was not credible as to whether he smelled cannabis emanating from Defendant's vehicle. Thus, officer was not justified in prolonging duration of traffic stop for improper lane usage. Thus, court erred in denying motion to quash arrest and suppress evidence. (O'BRIEN, concurring; CARTER, dissenting.)

[People v. Bravo](#), 2015 IL App (1st) 130145 (September 22, 2015) Cook Co., 2d Div. (NEVILLE) Affirmed.

DEA agents, without judicial authorization, installed a GPS tracking device on Defendant's car. Court properly granted motion to quash Defendant's arrest (a month later, for possession of marijuana with intent to deliver), and to suppress evidence. State failed to show that police acted in good faith when they installed GPS device on Defendant's car. Police failed to ask any attorney for advice on meaning of 7th Circuit's 2007 Garcia decision, and failed to show any grounds to suspect Defendant of criminal activity. (SIMON, concurring; LIU, specially concurring.)

People v. Reedy, 2015 IL App (3d) 130955 (August 26, 2015) Will Co. (SCHMIDT) Reversed and remanded.

(Court opinion corrected 9/30/15.) Police officers conducted traffic stop after twice observing passenger-side tires of Defendants' vehicle completely cross over solid white fog line on right side of road, first on entrance ramp and then while on interstate. Defendants were found in possession of at least 900 grams of heroin in duffel bag found on front passenger-seat floorboard, after dog sniff of exterior of vehicle. Court erred in granting dual motions to suppress heroin. Probable cause existed for stop, as Vehicle Code prohibits driving on shoulder. Traffic stop was not unduly delayed, as trained narcotics canine arrived less than 5 minutes after stop, and before purpose of stop was completed, and traffic stop last less than 10 minutes.(HOLDRIDGE, concurring; LYTTON, specially concurring.)

People v. Collins, 2015 IL App (1st) 131145 (September 16, 2015) Cook Co., 3d Div. (LAVIN) Affirmed in part and vacated in part.

(Court opinion corrected 10/8/15.) Defendant was convicted, after jury trial, of possession of controlled substance and possession of a controlled substance with intent to deliver, and was sentenced as a habitual criminal to natural life. Court properly denied Defendant's motion to quash arrest and suppress evidence, and Defendant cannot show that his sentence is unconstitutional. Evidence at motion to suppress hearing did not show that any conduct of officer unreasonably prolonged encounter. Officer testified that he found Defendant's explanation of his route illogical, creating additional suspicion. It was reasonable for officer to ask whether Defendant had narcotics in car, upon learning that Defendant was on MSR for possession of cocaine conviction. (PUCHINSKI, concurring; HYMAN, dissenting in part.)

People v. Jones, 2015 IL App (1st) 142997 (December 8, 2015) Cook Co., 2d Div. (HYMAN) Affirmed.

Police stopped Defendant for running red light, then officer returned to his police car and returned to squad car to check status of his drivers license and learned of active investigative alert for Defendant involving a homicide. Defendant was then placed in back seat of squad car, and another officer, looking through backseat window, saw brick of cocaine in back seat. That officer, without permission, then entered Defendant's car and retrieved cocaine. Search of Defendant's vehicle was not a valid search incident to arrest, as Defendant was not in custody, and thus officer had no grounds for securing Defendant's car. Discovery of cocaine stems directly from Defendant's improper detention and thus was properly suppressed. (PIERCE and NEVILLE, concurring.)

People v. Maberry, 2015 IL App (2d) 150341 (December 23, 2015) DeKalb Co. (BIRKETT) Reversed and remanded.

Defendant was charged with DUI, possession of drug paraphernalia, and following too closely. Court erred in granting Defendant's motion to suppress. Uncontested testimony that Defendant followed officer's squad car at an interval of a car-length or less for the distance of a football

field while travelling 30-35 mph. Officer Defendant's vehicle based on his observation and opinion that defendant was following him at an unsafe distance, and officer's observation justified an investigatory traffic stop. (McLAREN and HUDSON, concurring.)

[People v. Cummings](#), 2016 IL 115769 (January 22, 2016) Whiteside Co. (GARMAN) Appellate court reversed; circuit court reversed; remanded.

A driver's license request of a lawfully stopped driver is permissible irrespective of whether that request directly relates to the purpose for the stop. Interest in officer safety permits a driver's license request of a driver lawfully stopped, and such ordinary inquiries are part of the stop's mission and do not prolong the stop for fourth amendment purposes. (FREEMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

[People v. Zayed](#), 2016 IL App (3d) 140780 (February 24, 2016) Will Co. (McDADE) Affirmed. Defendant was charged with unlawful possession of a controlled substance, found after pat-down search and then strip search. Court properly granted Defendant's motion to suppress evidence. Officer had probable cause to conduct a search of Defendant, given that when he approached his car (stopped for failure to use turn signal), he immediately smelled very strong odor of burnt cannabis coming from vehicle. However, officer's strip search of Defendant was unreasonable. Officer's attempted steps to reduce intrusiveness of search were inadequate; search was conducted on a residential street on which numerous vehicles passed during stop and search, and streetlights provided some illumination of area.(O'BRIEN and HOLDRIDGE, concurring.)

[People v. Timmsen](#), 2016 IL 118181 (March 24, 2016) Hancock Co. (FREEMAN) Appellate court reversed; circuit court affirmed.

Defendant, who had just crossed into Illinois from Iowa at 1:15 a.m., made a U-turn 50 feet in front of a police roadblock, using a railroad crossing which was the only place to turn around before reaching the roadblock; roadblock, which was well-marked and which was not busy. Deputy, emerging from roadblock, stopped him and discovered his license was suspended. Under totality of circumstances, there was reasonable suspicion to conduct an investigatory stop of Defendant's vehicle. Thus, circuit court properly denied Defendant's motion to suppress evidence. Avoidance of roadblock is only one factor in determining existence of reasonable suspicion. (GARMAN, KILBRIDE, KARMEIER, and THEIS, concurring; THOMAS, specially concurring; BURKE, dissenting.)

SEARCH & SEIZURE (place)

[People v. Cannon](#), 2015 IL App (3d) 130672 (January 7, 2015) Will Co. (LYTTON) Reversed. Defendant, age 19 at time of charge, was convicted, after bench trial, of unlawful consumption of alcohol by a minor. Court properly granted Defendant's motion to suppress evidence. Police officer walked onto back deck of Defendant's mother's house, without a warrant. Entry onto back

deck was reasonable, to ask homeowner about noise complaint, and officer could hear noise coming from back deck. State failed to prove that Defendant was not directly supervised by his mother while he was drinking alcohol, and thus State failed to prove that Defendant did not fall within exemption of the Liquor Control Act for minors drinking under supervision of a parent within the privacy of a home. (O'BRIEN, concurring; SCHMIDT, concurring in part and dissenting in part.)

[People v. Burns](#), 2015 IL App (4th) 140006 (January 30, 2015) Champaign Co. (KNECHT) Affirmed.

Warrantless use of a drug detection dog to sniff Defendant's apartment door, within a locked 3-story, 12-unit apartment building, at 3:20 a.m. affected judge's decision to issue search warrant, and evidence obtained pursuant to search warrant is fruit of the poisonous tree and the exclusionary rule applies. Court properly granted Defendant's motion to suppress. Area where police stood, at entrance to Defendant's apartment with drug-detection dog, was a constitutionally protected area, where there was no implicit invitation for the police to be. (TURNER and APPLETON, concurring.)

[People v. Brown](#), 2015 IL App (1st) 140093 (March 31, 2015) Cook Co., 3d Div. (MASON) Affirmed.

Defendant was indicted on multiple counts related to possession of controlled substance and a weapon. Without a warrant, officers entered common area of Defendant's apartment building by walking through front entrance door which required key to open but which was not pulled all the way shut. Officers' canine gave positive alert at front and back doors of Defendant's apartment. Judge later approved search warrant based on canine sniff of apartment doors. Court properly granted Defendant's motion to quash search warrant and suppress evidence, as police officers' execution of search warrant was not protected under good-faith exception to exclusionary rule. At the time of search, law as to constitutionality of warrantless canine sniff within curtilage of home was not settled, and was later declared unconstitutional. (PUCINSKI and HYMAN, concurring.)

[People v. Pettis](#), 2015 IL App (4th) 140176 (May 14, 2015) Champaign Co. (HOLDER WHITE) Reversed and remanded.

Defendant was charged by information with armed habitual criminal, aggravated unlawful possession of a firearm by a felon, and reckless discharge of a firearm. Judge issuing search warrant had substantial basis to conclude probable cause existed. Officers responded to "shots fired" call in early morning, and suspect had fled scene, and officers had information on suspect, incident, and vehicle from an identified witness, and judge drew reasonable inference from affidavits that Defendant violated law and that evidence of crime committed could be found inside his residence. Good-faith exception arises only after court determines that search warrant was improperly issued for lack of probable cause. (HARRIS, concurring; APPLETON, dissenting.)

[People v. Valle](#), 2015 IL App (2d) 131319 (June 11, 2015) Kane Co. (JORGENSEN) Affirmed. Defendant was convicted, after bench trial, of unlawful possession of cocaine with intent to deliver. Court properly denied motion to quash arrest and suppress evidence seized from detached garage. Although warrant expressly authorized search of Defendant's residence, detached garage was within curtilage. Thus, detached garage was a proper object of the search. Had the issuing judge wished to exclude the garage, despite that case authority, he could have and would have done so expressly. (SCHOSTOK and BIRFKETT, concurring.)

[People v. Harris](#), 2015 IL App (1st) 132162 (June 17, 2015) Cook Co., 3d Div. (MASON) Reversed and remanded.

(Correcting case citation and link.) Defendant was convicted, after jury trial, of possession of cannabis and sentenced to 24 months probation. Court erred in denying motion to quash Defendant's arrest and suppress evidence. Officers improperly executed search by arresting Defendant before he opened a package containing narcotics that had been fitted by police with electronic monitoring and breakaway filament device. Officers knew that device had produced no information that package had been opened, and possessed no prior knowledge connecting Defendant to package or its contents. Officers were aware of ambiguity reflected on face of warrant, which broadly authorized search of "S. Harris or anyone taking possession of" the package. Without any further information, officers could not have reasonably believed that warrant authorized a search of anyone who picked up package without opening it, and good faith exception does not apply. (LAVIN and HYMAN, concurring.)

[People v. Moore](#), 2015 IL App (1st) 140051 (December 16, 2015) Cook Co., 3d Div. (PUCINSKI) Reversed.

Defendant was convicted, after bench trial, of unlawful possession of ammunition by a felon and one count of possession of a controlled substance (cocaine). State failed to establish that Defendant had exclusive and immediate control of area where contraband was recovered. Defendant was seen jumping out of window of house where contraband was recovered, but no proof that Defendant had immediate control over basement rafters in house, or of living room where bullets were found in desk drawer. Officer did not see Defendant handle contraband or discard anything while emerging through the window. Mail addressed to Defendant at that address, and men's clothing located in bedroom, were insufficient proof of immediate and exclusive control of those areas. (FITZGERALD SMITH and LAVIN, concurring.)

[People v. Burns](#), 2016 IL 118973 (March 24, 2016) Champaign Co. (KILBRIDE) Circuit court affirmed.

Warrantless use of a drug-detection dog at 3:20 a.m. at Defendant's apartment door, located within a locked apartment building, violated Defendant's rights under 4th Amendment. Good-faith exception to exclusionary rule does not apply, as at time of officers' conduct, binding 4th District precedent existed holding that common areas of locked apartment buildings are protected

by 4th Amendment. Third-floor landing, located directly outside of Defendant's apartment door and nature of its use is generally limited to Defendant, one neighbor, and their invitees; landing is of limited access and not observable by "people passing by." Thus, landing is curtilage. Absent the dog sniff, evidence relied on in complaint and affidavit for search warrant was insufficient to establish probable cause for search warrant of Defendant's home.(FREEMAN, BURKE, and THEIS, concurring; GARMAN, specially concurring; THOMAS and KARMEIER, dissenting.)

SEARCH & SEIZURE (person)

[People v. Almond](#), 2015 IL 113817 (February 20, 2015) Cook Co. (KILBRIDE) Appellate court reversed in part and affirmed in part.

Defendant was arrested in a liquor store, found to have an uncased and loaded .38-caliber handgun in his waistband. Underlying incident, where police officers arrived at liquor store in squad car, in plain clothes but with badges visible, and then Defendant entered store, was a consensual encounter, as it was not coercive or unusual. No Fourth Amendment violation when officer searched Defendant for weapon after Defendant told him that he was armed. (FREEMAN, THOMAS, KARMEIER, BURKE, and THEIS, concurring.)

[People v. Lake](#), 2015 IL App (4th) 130072 (March 16, 2015) Vermilion Co. (STEIGMANN) Affirmed.

Defendant, age 17 at time of offense, was convicted, after bench trial, with aggravated use of a weapon and defacing identification marks of a firearm. Defendant was not seized when officer approached him from behind, and tapped him on shoulder, while Defendant was walking back and forth and seemed to be acting as "lookout" in area near public housing project. Tapping was minimally intrusive way and socially accepted method to get his attention, and tap did not demonstrate authority sufficient to constitute an unreasonable seizure under fourth amendment. Defendant was not seized when officer blocked his path down the street and began asking him questions. Up to the point when Defendant willingly answered officer's questions, encounter was consensual. Possession of handguns by minors is conduct that falls outside scope of second amendment's protection. (HOLDER WHITE and APPLETON, concurring.)

[People v. Shipp](#), 2015 IL App (2d) 130587 (April 8, 2015) Stephenson Co. (BIRKETT) Reversed and remanded.

Defendant was convicted of offenses of possession of cannabis, possession with intent to deliver controlled substance, unlawful possession of firearm by a felon and unlawful use of weapons. Defendant stated sufficient claim that his counsel on direct appeal was ineffective for failing to challenge denial of his motion to suppress. Trial court erred in failing to address validity of police officer's stop and attempted frisk and found that Defendant was resisting or obstructing police officer. No indication that officers were attempting to arrest Defendant when they reached

out to pat him down for weapons, and nothing indicates that officers had valid reason to arrest him at that point. Stop was based on nothing other than Defendant's mere presence in the area, and by time of attempted frisk, 911 callers, who had reported a fight, had told police that Defendant was not involved in crime, but officers frisked Defendant, he fled, and officers obtained contraband only after they chased and tackled him. Discovery of contraband was so tainted by illegal stop that suppression was appropriate. (HUTCHINSON and HUDSON, concurring.)

[People v. Evans](#), 2015 IL App (1st) 130991 (June 8, 2015) Cook Co., 1st Div. (HARRIS)
Affirmed as modified.

Defendant was convicted, after bench trial, of possession of cannabis. State presented sufficient evidence to sustain conviction. Evidence showed that Defendant threw bag of cannabis into a room and shut the door before complying with officer's instructions to show his hands and to step toward him. Reasonable inference is that Defendant disposed of bag by throwing it. Where possession has been shown, inference of guilty knowledge can be drawn from surrounding facts and circumstances. (DELORT and CUNNINGHAM, concurring.)

[People v. Butler](#), 2015 IL App (1st) 131870 (December 24, 2015) Cook Co., 4th Div. (COBBS)
Reversed and remanded.

Defendant was convicted, after bench trial, of second-degree murder. Court erred in denying Defendant's motion to suppress text message obtained after warrantless search of his cell phone; officer stated that he took Defendant's cell phone to try to find way to contact his family members as he had sustained gunshot wounds, and saw a text message. Cell phones implicate privacy concerns far beyond those implicated in searches of objects such as purses or wallets. Given that Defendant's privacy interest in his cell phone was so substantial, officer's actions in searching phone to contact family members do not fall under the community caretaking exception, as officer had less intrusive means at his disposal for same task. No showing of exigent circumstances to justify search. (HOUSE and ELLIS, concurring.)

[People v. Smith](#), 2016 IL App (3d) 140648 (April 29, 2016) Rock Island Co. (SCHMIDT)
Reversed and remanded.

Defendants were each charged with one count of unlawful possession of a controlled substance and one count of unlawful possession of a hypodermic needle. Record lacks factors indicative of a seizure rather than a consensual encounter. Although officer testified that Defendants were not free to leave because he was conducting investigation, this was never conveyed to Defendants. Each of the requests of officers were requests rather than orders. Police encounter with one Defendant was consensual all the way through officer's search of him, and he was not seized, for 4th Amendment purposes, until officer placed him in handcuffs. At that point, having found heroin on his person, officer had probable cause to arrest him. When Defendant told officer that the other Defendant "must have put it there", given totality of circumstance, officer had

reasonable suspicion that other Defendant was involved in criminal activity. Thus court erred in granting Defendants' motions to suppress evidence. (CARTER and HOLDRIDGE, concurring.)

SEARCH & SEIZURE (warrant)

[*People v. Chambers*](#), 2016 IL 117911 (January 22, 2016) Cook Co. (GARMAN) Appellate court affirmed; circuit court reversed.

A Franks hearing is not foreclosed on the sole basis that a confidential informant whose statements formed the basis for a warrant application appears before the judge at the warrant hearing. Appellate review of a trial court's ruling on a motion for a Franks hearing is de novo. Defendant made a substantial preliminary showing that a false statement was intentionally, knowingly, or recklessly included in the warrant affidavit, and he is, thus, entitled to a Franks hearing to determine whether the warrant must be quashed and the evidence obtained thereby suppressed. (FREEMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

[*People v. Jarvis*](#), 2016 IL App (2d) 141231 (February 23, 2016) Kane Co. (ZENOFF) Reversed and remanded.

Court erred in granting motion to suppress evidence found during a strip search conducted pursuant to search warrant. Because search warrant authorized a search of Defendant's person for narcotics, the strip search was within scope of warrant and did not violate 4th Amendment or Illinois Constitution's search-and-seizure clause or private clause.(SCHOSTOK and BIRKETT, concurring.)

SENTENCE (VOID)

[*People v. Castleberry*](#), 2015 IL 116916 (November 19, 2015) Cook Co. (BURKE) Appellate court reversed; circuit court affirmed.

The "void sentence rule", which states that a sentence which does not conform to a statutory requirement is void, is no longer valid. Recent Illinois Supreme court decisions holding that voidness does not speak to mere error, but to lack of jurisdiction, have undermined the rationale behind the rule. Rule 604(a) does not permit State to appeal a sentencing order. Thus, State could not have cross-appealed in the appellate court on this issue, as a reviewing court acquires no greater jurisdiction on cross-appeal than it could on appeal. (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and THEIS, concurring.)

People v. Gray, 2015 IL App (1st) 112572-B (November 18, 2015) Cook Co., 3d Div. (LAVIN) Affirmed.

Defendant was convicted, after jury trial, via accountability theory of 1993 first degree murder and attempted armed robbery committed when Defendant was age 16. As Defendant had previously convicted of first degree murder, he was sentenced to mandatory term of life imprisonment on his murder conviction and 15 years imprisonment on his attempted armed robbery conviction. Defendant's sentence is not void, and Defendant failed to file his Section 2-1401 petition within 2 years, and it is thus untimely. Sentence was authorized by statute and was required at time of Defendant's sentencing. (FITZGERALD SMITH and PUCINSKI, concurring.)

People v. Smith, 2016 IL App (1st) 140887 (March 1, 2016) Cook Co., 2d Div. (PIERCE) Affirmed as modified.

Defendant's 60-year extended term sentence for aggravated criminal sexual assault and 40-year extended term sentences for home invasion and armed robbery are unauthorized by law, as trial court did not find the required factors listed in Section 5-5-3.2(b) of Unified Code of Corrections when it sentenced Defendant to extended term sentence. Illinois Supreme Court's 2015 decision in Castleberry, which abolished the void-sentence rule, did not announce a new rule, but reinstated the rule that a sentence that did not comply with statutory guidelines was only void if court lacked personal or subject matter jurisdiction. Thus, the Castleberry holding cannot be applied retroactively, and Defendant has the right to challenge his sentence for the first time on appeal. (NEVILLE and SIMON, concurring.)

People v. McDaniel, 2016 IL App (2d) 141061 (March 10, 2016) DuPage Co. (HUTCHINSON) Affirmed in part and vacated in part.

(Court opinion corrected 3/14/16.) Defendant was convicted of first-degree murder in shooting death of his wife. Court entered maximum available sentence of 60 years, with fines and fees. Defendant filed Section 2-1401 petition for relief from "void" judgment, arguing that because county clerk added mandatory \$25 fine to his original sentence, his entire sentence was void. Based on Supreme Court's 2015 opinion in *People v. Castleberry*, there is no true voidness as alleged in Defendant's petition, but only a voidable \$25 fine, which is no longer subject to collateral attack. So long as a Section 2-1401 petition challenges a judgment on voidness grounds, as did Defendant's petition, it is not subject to Section 2-1401's 2-year limitations period. (SCHOSTOK and SPENCE, concurring.)

SENTENCING (agg / mit)

[People v. Scott](#), 2015 IL App (1st) 131503 (June 30, 2015) Cook Co., 3d Div. (HYMAN)
Affirmed.

Defendant was convicted, after jury trial, of second degree murder and sentenced to 18 years. No substantial prejudice shown from prosecutor's rebuttal argument that Defendant fabricated his self-defense theory at trial three years after shooting, as remark was not a material factor in jury's verdict. No substantial prejudice resulted from defense counsel's failure to pursue motion in limine, as no reasonable probability that result of proceeding would have been different. Sentencing court did not abuse its discretion even though sentence was near upper range of permissible sentences. Court placed no emphasis on AUUW conviction itself, but relied on Defendant's pattern of behavior two months after release from parole, selling drugs, buying guns, and engaging in fatal street brawl. (PUCINSKI and MASON, concurring.)

[People v. Crabtree](#), 2015 IL App (5th) 130155 (July 30, 2015) Richland Co. (GOLDENHERSH)
Affirmed.

Defendant was convicted, after jury trial, of aggravated criminal sexual abuse, and sentenced to 180 days in county jail and 48 months probation. As conditions of probation, Defendant was ordered to refrain from communicating with or contacting via Internet any non-relative under age 18, to refrain from using social networking sites, and to not use any computer "scrub" software on a computer he uses. Even though computer was not used in underlying offense, conditions are reasonably related to goals of deterrence, protection of public, and rehabilitation. Conditions are limited and do not completely bar Defendant from computer use.(CATES and CHAPMAN, concurring.)

[People v. Minter](#), 2015 IL App (1st) 120958 (June 25, 2015) Cook Co., 4th Div. (ELLIS)
Affirmed and remanded.

(Modified upon denial of rehearing 9/3/15.) Defendant was convicted, after jury trial, of armed robbery and sentenced to 23 years. Defendant was not deprived of fair trial by virtue of jury seeing his tattoos. Court erred in improperly favoring State during its closing argument, and preventing Defendant from arguing that he could draw inference contrary to detective's testimony that he did look for a gun.State's evidence establishing Defendant's guilt was strong, and thus court's error during argument did not threaten to tip balance of evidence against Defendant. Court erred in considering Defendant's pending possession of contraband and aggravated battery charges as aggravating factors, as State presented no evidence as to those charges. Charges likely played more than a minimal role in sentencing; thus, remanded for resentencing.(FITZGERALD SMITH, concurring; COBBS, dissenting.)

[People v. Scott](#), 2015 IL App (1st) 131503 (June 30, 2015) Cook Co., 3d Div. (HYMAN)
Affirmed.

(Modified upon denial of rehearing 9/15/15.) Defendant was convicted, after jury trial, of second degree murder and sentenced to 18 years. No substantial prejudice shown from prosecutor's rebuttal argument that Defendant fabricated his self-defense theory at trial three years after shooting, as remark was not a material factor in jury's verdict. No substantial prejudice resulted from defense counsel's failure to pursue motion in limine, as no reasonable probability that result of proceeding would have been different. Sentencing court did not abuse its discretion even though sentence was near upper range of permissible sentences. Court placed no emphasis on AUUW conviction itself, but relied on Defendant's pattern of behavior two months after release from parole, selling drugs, buying guns, and engaging in fatal street brawl. (PUCINSKI and MASON, concurring.)

[People v. Sauseda](#), 2016 IL App (1st) 140134 (March 9, 2016) Cook Co., 3d Div. (MASON)
Affirmed.

Defendant, on a Saturday afternoon in summer, walked up to a car stopped at intersection and fired 4 shots into the vehicle, missing the driver but killing the passenger. Defendant was convicted, after jury trial, of murder and aggravated discharge of a firearm, and court sentenced him to 55 years for murder and consecutive sentence of 7 years for firearm conviction. In stating, at sentencing, that it was a senseless act with a gun on a street on a Saturday, court did not improperly impose sentence based primarily on the fact that Defendant shot someone with a gun. Court properly considered degree and gravity of conduct and nature and circumstances of offense, and record does not show that court improperly considered element of offenses as aggravating factor. Court weighed aggravating and mitigating factors and sentenced within permissible range.(FITZGERALD SMITH and PUCINSKI, concurring.)

SENTENCING (consecutive \ enhanced \ extended)

[People v. Lawson](#), 2015 IL App (1st) 120751 (March 6, 2015) Cook Co., 6th Div. (LAMPKIN)
Affirmed in part and vacated in part.

Defendant was convicted, after jury trial, of four counts of home invasion and aggravated kidnapping, and sentenced to natural life in prison. Three of Defendant's four convictions for home invasion are vacated, pursuant to one-act, one crime rule. Defendant's 2003 armed robbery sentence, which did not include firearm sentencing enhancement, is not void as he was properly sentenced without enhancement four years before legislature cured proportionate penalties clause violation. Defendant's first Class X felony conviction (armed robbery) occurred when he was 17, but his second Class X (armed robbery) conviction occurred five years later. Natural life sentence was properly imposed, and is not unconstitutional. Defendant's adjudication as armed habitual offender, of which he had fair and ample warning, punished him for new and separate

crime he committed as an adult after two prior Class X felonies. (HALL and ROCHFORD, concurring.)

[People v. Arbuckle](#), 2015 IL App (3d) 121014 (April 21, 2015) Bureau Co. (SCHMIDT) Affirmed.

At plea hearing, court informed Defendant that he was eligible for extended-term sentences on each count charged: aggravated domestic battery and aggravated battery. Court sentenced Defendant to consecutive terms of 5 1/2 years and 4 years, respectively, and stated that among aggravating factors was degree of harm inflicted on victims. Even if court mistakenly believed that Defendant was extended-term eligible, this did not affect sentencing decision, as sentence was well within nonextended range, and thus no clear or obvious error, or plain error, in sentencing. Court's assessment of degree of harm to victims was not abuse of discretion, as Defendant shattered his girlfriend's arm with golf club, resulting in severe and ongoing pain and complications; and Defendant stabbed her friend with broken golf club when she tried to help girlfriend. (WRIGHT, concurring; LYTTON, specially concurring.)

[People v. Ramirez](#), 2015 IL App (1st) 130022 (April 22, 2015) Cook Co., 3d Div. (MASON) Affirmed.

(Modified upon denial of rehearing 5/27/15.) Defendant was convicted, after jury trial, of four counts of attempted first degree murder and sentenced to four concurrent terms of 40 years in prison. Defendant forfeited plain-error review of his allegation that court improperly considered use of a firearm as a factor in aggravation when he had already received mandatory enhanced sentence as firearm was involved. Consideration of improper factor in sentencing does not always constitute structural error. Structural error cases are limited to systemic errors which erode integrity of judicial process. Consecutive sentences are not mandatory for all attempted murder cases involving great bodily harm. (PUCINSKI and HYMAN, concurring.)

[People v. Jones](#), 2015 IL App (3d) 130053 (May 15, 2015) Will Co. (McDADE) Affirmed.

(Court opinion corrected 5/19/15.) Defendant was convicted, after jury trial, of aggravated robbery, and was found extended-term eligible based, in part, on prior adjudication of juvenile delinquency referenced in presentence investigation report (PSI). Prior juvenile petition alleged three counts of residential burglary. Prior adjudication of delinquency is sufficiently analogous to prior conviction so as to fall under exception to Apprendi v. New Jersey rule that except for prior convictions, any fact that increases penalty for crime beyond statutory maximum must be submitted to jury. Thus, fact of prior adjudication may be determined by sentencing court through reference to PSI. (HOLDRIDGE and LYTTON, concurring.)

[People v. Reeves](#), 2015 IL App (4th) 130707 (June 2, 2015) Vermilion Co. (KNECHT) Affirmed.

Defendant appealed court's denial of his motion to amend written sentencing judgment for his consecutive sentences, seeking to apply double credit for simultaneous time served in presentence custody to his sentence for crime committed 10 years after Illinois Supreme Court's ruling in *People v. Latona* case. Defendant does not, and cannot, raise benefit-of-the-bargain argument where no evidence shows parties ever agreed to specific days of "double credit" for presentence time spent in custody. (HARRIS and STEIGMANN, concurring.)

[People v. Robinson](#), 2015 IL App (1st) 130837 (June 26, 2015) Cook Co., 5th Div. (GORDON) Affirmed in part and reversed in part; remanded with instructions.

Defendant was convicted, after bench trial, of residential burglary and aggravated battery of security guard and resident of apartment building who discovered Defendant attempting to remove his flat screen TV from his apartment. Physical altercation ensued in which Defendant bit off resident's lower lip which, after surgeries, resulted in speech impediment. Court within its discretion in sentencing in making reasonable inference as to long-lasting effects of attack. Defendant had 9 prior residential burglary convictions and was on Mandatory Supervised Release for 8 of those convictions at time of offense. Defendant did not have a substantial change in criminal objective, as his only real objective was to finish burglarizing and then escape, and any harm done to resident was a means to effectuate that objective. Thus, Defendant's effort to escape should not be basis for extended term upon lesser offense. Thus, mittimus is modified to reduce aggravated battery to 5 years, and to run concurrently with 30-year residential burglary sentence. (PALMER and REYES, concurring.)

[People v. Minter](#), 2015 IL App (1st) 120958 (June 25, 2015) Cook Co., 4th Div. (ELLIS) Affirmed and remanded.

Defendant was convicted, after jury trial, of armed robbery and 23 years. Defendant was not deprived of fair trial by virtue of jury seeing his tattoos. Court erred in improperly favoring State during its closing argument, and preventing Defendant from arguing that he could draw inference contrary to detective's testimony that he did look for a gun. State's evidence establishing Defendant's guilt was strong, and thus court's error during argument did not threaten to tip balance of evidence against Defendant. Court erred in considering Defendant's pending possession of contraband and aggravated battery charges as aggravating factors, as State presented no evidence as to those charges. Charges likely played more than a minimal role in sentencing; thus, remanded for resentencing. (FITZGERALD SMITH, concurring; COBBS, dissenting.)

[People v. Melvin](#), 2015 IL App (2d) 131005 (July 16, 2015) Kane Co. (McLAREN) Vacated and remanded.

Defendant entered negotiated guilty plea to attempted predatory criminal sexual assault of a child and sentenced to 60 years. Defendant's sentence is void as it is product of double enhancement.

Specific factor used to enhance penalty, and reused, was Defendant's prior Class X felony. That offense, along with his prior Class 2 felony, subjected him to enhanced penalty of Class X sentence and then also subjected him to further enhanced penalty of extended-term sentence. Thus, sentence to which parties agreed was not statutorily authorized and was thus void. (SCHOSTOK and BIRKETT, concurring.)

People v. Bailey, 2015 IL App (3d) 130287 (August 28, 2015) Tazewell Co. (LYTTON) Reversed and remanded.

Defendant pled guilty to aggravated domestic battery and sentenced to 12 years, and was deemed subject to extended-term sentencing based on prior California conviction. In determining whether a defendant is subject to extended-term sentencing based on prior conviction in another jurisdiction for the same or similar class felony, comparison should include sentencing range of prior conviction with sentencing range of an equivalent Illinois offense. (CARTER and WRIGHT, concurring.)

People v. Reese, 2015 IL App (1st) 120654 (September 24, 2015) Cook Co., 4th Div. (McBRIDE) Affirmed in part, reversed in part, and modified in part.

Defendant was convicted, after jury trial, of aggravated vehicular hijacking, vehicular invasion, attempted armed robbery, and escape, and sentenced to concurrent extended-term sentences of 50, 30, 30, and 14 years, to be served consecutively to natural life sentence he was serving on prior murder conviction. Court violated Defendant's right to due process by failing to undertake a Boose analysis and state reasons for shackling on the record before requiring him to remain shackled at trial, but error was limited and harmless. Where Defendant testified that he tried to escape out of necessity, to expose inhumane conditions in jail, State was entitled to present evidence of jury's finding in prior conviction to establish Defendant faced potential life sentence and sought to escape for that reason. Court substantially complied with Rule 401(a), so his waiver of counsel was valid. As convictions did not arise from unrelated courses of conduct, court could only impose extended term sentence on offenses within most serious class of felony. State failed to prove taking element of vehicular hijacking, as no evidence that he took possession or custody of bus he boarded upon escape from hospital prior to sentencing for murder conviction.(GORDON, concurring; PALMER, specially concurring.)

People v. Johnson, 2015 IL App (4th) 130968 (November 24, 2015) McLean Co. (POPE) Affirmed.

Defendant pled guilty to robbery and aggravated battery and sentenced to probation. Defendant was later convicted of theft and criminal trespass to residence after 2 separate jury trials. Court properly found his convictions for theft and criminal trespass were statutorily required to be consecutively served. Section 5-8-4(c)(1) of Unified Code of Corrections provides that a trial court may impose consecutive sentences where court is of opinion that consecutive sentences are required to protect the public from further criminal conduct by the Defendant. (HARRIS and STEIGMANN, concurring.)

People v. Larry, 2015 IL App (1st) 133664 (December 1, 2015) Cook Co., 2d Div. (HYMAN)
Conviction reversed; extended-term sentence affirmed.

Defendant was convicted of domestic battery and other charges, including residential burglary of his girlfriends's apartment which Defendant claims was his residence too. Evidence established that at the time of the alleged offense, Defendant resided in the apartment, and thus evidence did not establish he entered "the dwelling of another". Due to Defendant's history of domestic violence, court sentenced him to extended, 5-year term for domestic battery, a Class 4 felony. As residential burglary conviction is reversed, Defendant's challenge to sentence as in violation of extended-term sentencing statute no longer exists. (PIERCE and SIMON, concurring.)

People v. Decatur, 2015 IL App (1st) 130231 (December 2, 2015) Cook Co., 3d Div. (MASON)
Affirmed.

Defendant was convicted of 1 year of first-degree murder and 2 counts of attempted murder, and sentenced to total 105 years. Sentence was well within statutory guidelines and was not the product of any error by court. Although Defendant was age 19 at time of offense, and had minimal criminal record, court is not required by law to consider a defendant's age in sentencing.(LAVIN and PUCINSKI, concurring.)

People v. Wilson, 2015 IL App (4th) 130512 (December 3, 2015) McLean Co. (KNECHT)
Affirmed in part and reversed in part; remanded.

Defendant was convicted of 5 counts of predatory criminal sexual assault of a child and 5 counts of aggravated criminal sexual abuse, and sentenced to 5 terms of natural life. Some offenses occurred when Defendant was a minor; victims were Defendant's minor sisters and half-sisters. Court properly admitted testimony on other crimes, as they were proximate in time, within 2 years of charged offenses, similar physical acts, and probative value of other-crimes evidence outweighed its prejudicial effect. Court erred in sentencing Defendant to natural life on counts committed when Defendant was a minor, and on counts which each involved only one victim. Thus, those mandatory natural-life sentences violate 8th-Amendment prohibition against cruel and unusual punishment.(POPE and HOLDER WHITE, concurring.)

People v. Brown, 2015 IL App (1st) 140508 (December 23, 2015) Cook Co., 3d Div. (MASON)
Vacated and remanded.

Defendant, age 20 at time of offense, was convicted, after bench trial, of possession of heroin with intent to deliver and sentenced as Class X offender due to his prior felony convictions. Section 5-4.5-95(b) of Unified Code of Corrections is ambiguous as to whether eligibility for Class X sentencing depends on whether Defendant is age 21 as of date of commission, charge, or conviction. Thus, statute is interpreted under rule of lenity in favor of Defendant, who was charged with offense on day prior to his 21st birthday, and he is thus ineligible for Class X sentencing. (PUCINSKI, concurring; LAVIN, dissenting.)

People v. Smith, 2016 IL App (2d) 130997 (February 8, 2016) Winnebago Co. (SCHOSTOK) Affirmed in part and vacated in part; remanded.

Defendant was convicted, after jury trial, of armed robbery with a firearm and sentenced to 20 years with mandatory add-on of 15 years. Defendant's 2003 Aggravated Unlawful Use of a Weapon (AUUW) conviction was based on an unconstitutional statute, and thus court erred in relying on it in sentencing him, and error was not harmless. Resentencing is required also because appellate court reversed Defendant's 2013 Cook County conviction for AUUW by a felon. (JORGENSEN and BIRKETT, concurring.)

People v. Smith, 2016 IL App (1st) 140496 (February 24, 2016) Cook Co., 3d Div. (MASON) Affirmed as modified and vacated in part; remanded.

Defendant was convicted, after bench trial, of unlawful use of a weapon (UUW) by a felon and sentenced as a Class X offender to 9 years. Residual category of forcible felony statute refers to felonies not previously specified in preceding list of felonies contained within that section. As Defendant's prior conviction of aggravated battery to a peace officer was not based on great bodily harm or permanent disability or disfigurement, it was not within statutory definition of forcible felony, and court erred in using it to enhance Defendant's present aggravated battery conviction to a Class 2 offense. Illinois Supreme Court has, in 2015, abolished void-sentence rule. (FITZGERALD SMITH and LAVIN, concurring.)

People v. Smith, 2016 IL App (1st) 140887 (March 1, 2016) Cook Co., 2d Div. (PIERCE) Affirmed as modified.

Defendant's 60-year extended term sentence for aggravated criminal sexual assault and 40-year extended term sentences for home invasion and armed robbery are unauthorized by law, as trial court did not find the required factors listed in Section 5-5-3.2(b) of Unified Code of Corrections when it sentenced Defendant to extended term sentence. Illinois Supreme Court's 2015 decision in Castleberry, which abolished the void-sentence rule, did not announce a new rule, but reinstated the rule that a sentence that did not comply with statutory guidelines was only void if court lacked personal or subject matter jurisdiction. Thus, the Castleberry holding cannot be applied retroactively, and Defendant has the right to challenge his sentence for the first time on appeal. (NEVILLE and SIMON, concurring.)

People v. Fulton, 2016 IL App (1st) 141765 (March 31, 2016) Cook Co., 1st Div. (LIU) Affirmed.

Defendant was not subjected to improper double enhancement where his conviction for delivery of a controlled substance was only used once, as a predicate felony, to support his conviction as an armed habitual criminal. Defendant was originally charged as being an armed habitual criminal and the 2 predicate offenses (delivery of a controlled substance and UUWF) were used only once each as element of armed habitual criminal offense. No harsher sentence was imposed, and severity of offense was never elevated. The armed habitual criminal statute is not

unconstitutional where statute is rationally related to public interest.(CUNNINGHAM and CONNORS, concurring.)

[People v. Cole](#), 2016 IL App (1st) 141664 (March 30, 2016) Cook Co., 3d Div. (FITZGERALD SMITH) Affirmed.

Defendant was convicted, after jury trial, of 2 counts attempted first degree murder and 2 counts of aggravated battery with a firearm, and was sentenced to 2 terms of 20 years, on attempted murder convictions, to be served concurrently. On remand, court held new sentencing hearing, and resented defendant to 2 consecutive terms of 15 years. Court did not impose a harsher sentence on remand, as the term to which he was sentenced has decreased from 40 to 30 years, even though the time he will be incarcerated has increased. Sentence is not excessive; court reviewed Defendant's presentence investigation report, considered appropriate mitigating and aggravating factors, and sentenced Defendant to a term within permissible range. (MASON and LAVIN, concurring.)

SENTENCING (msr / credit)

[People v. Sumler](#), 2015 IL App (1st) 123381 (March 26, 2015) Cook Co. (FITZGERALD SMITH) Affirmed in part and vacated in part; remanded.

(Court opinion corrected 4/2/15.) Defendant was convicted, after jury trial, of aggravated kidnapping, violation of order of protection, and domestic battery as to the mother of his three children. Under truth-in-sentencing provisions, a person convicted of certain offenses, including aggravated kidnapping, would receive no more than 4.5 days of credit for each month of his sentence. Thus, Defendant must serve at least 85% of his sentence, and does not receive normal day-for-day good-conduct credit. As sentencing court and attorneys may have believed Defendant would be eligible for day-to-day credit, which may have influenced sentence, remanded for reconsideration of sentence. Conviction for domestic battery violated one-act, one-crime doctrine because it was a lesser included offense of aggravated kidnapping predicated on domestic battery.(HOWSE and COBBS, concurring.)

[People v. Saterfield](#), 2015 IL App (1st) 132355 (June 12, 2015) Cook Co., 5th Div. (McBRIDE) Affirmed.

(Court opinion corrected 6/22/15.) Court properly dismissed, sua sponte, Defendant's pro se petition for postjudgment relief, finding it frivolous and patently without merit. Petition alleged that truth-in-sentencing statute is unconstitutional. Statute was amended and constitutional infirmity was corrective, and thus act is no longer unconstitutional as applied to offenses committed after June 1998. Defendant's offenses were committed in August 1999. Time for State to respond to petition was not short-circuited. State received petition prior to date it was file-stamped, State had actual notice, and chose not to object to dismissal thus waiving any objection to improper service. (REYES, concurring; GORDON, dissenting.)

People v. Chacon, 2016 IL App (1st) 141221 (March 1, 2016) Cook Co., 2d Div. (PIERCE)
Vacated.

Defendant was convicted, after jury trial, of first degree murder, and later filed pro se motion to modify-correct a void sentence, arguing that DOC improperly added 3-year term of mandatory supervised release (MSR) not imposed by trial court. Section 22-105 of Code of Civil Procedure applies to Defendant's motion, as motion is an action against the State within meaning of Section 22-105. Motion had an arguable basis in law and was not frivolous. Trial court alone has power to assign term of MSR, and DOC may not alter trial court's pronouncement. Thus, court's order imposing fees and costs against Defendant is vacated. (NEVILLE and HYMAN, concurring.)

People v. Brown, 2016 IL App (2d) 140458 (March 8, 2016) Winnebago Co. (JORGENSEN)
Affirmed.

Defendant entered negotiated plea of guilty to second-degree murder and armed robbery, with agreement to sentence of consecutive terms of 20 years and 10 years; and court admonished him that he would have to serve 2 years and 3 years of MSR, but was unsure whether MSR terms could be served concurrently. Mittimus states that he would serve MSR terms consecutively, which is a statutory violation. A sentence is void only if the court that entered it lacked jurisdiction. As court had jurisdiction to impose Defendant's sentence, including unauthorized MSR term, is not void. Thus, as there is no arguably meritorious basis to challenge dismissal of Defendant's Section 2-1401 petition, court properly granted appellate counsel's motion to withdraw.(SCHOSTOK and HUTCHINSON, concurring.)

SENTENCING (proportionality)

People v. Davis, 2015 IL App (1st) 121867 (January 20, 2015) Cook Co.,1st Div. (DELORT)
Affirmed.

Separate juries returned verdicts convicting Defendant of two 1985 armed robberies. In doing so, juries rejected Defendant's version of events, set forth in his postconviction petitions, that weapon at issue was a toy gun. Eyewitness testimony that offender was armed with a gun, where witness could see the weapon, is sufficient to allow reasonable inference that weapon was a real gun. Defendant's Class X felony armed robbery convictions may not properly be compared to Class 2 felony offense of armed violence with a category II weapon. Thus, no disproportionality exists, as a conviction under either statute would be a Class X felony subjecting Defendant to mandatory natural life sentence as a habitual offender. Thus, Defendant's adjudication as a habitual criminal, convictions and natural life sentences do not violate proportionate penalties clause. (CUNNINGHAM and CONNORS, concurring.)

[People v. Taylor](#), 2015 IL 117267 (January 23, 2015) Macoupin Co. (GARMAN) Reversed and remanded.

Defendant was convicted of armed robbery and sentenced to 24 years. Enhanced sentenced for armed robbery with a firearm violated proportionate penalties clause, and thus Defendant's sentence is facially unconstitutional and void ab initio. Matter remanded to circuit court for resentencing in accordance with statute as it existed prior to adoption of sentencing enhancement. (FREEMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

[People v. Lampkins](#), 2015 IL App (1st) 123519 (January 28, 2015) Cook Co., 3d Div. (HYMAN) Reversed and remanded.

Defendant, age 17 at time of offense, was convicted of multiple offenses, including Aggravated Criminal Sexual Assault (ACSA) with a firearm. Defendant's 15-year firearm enhancement imposed in addition to his 12-year sentence on conviction for ACSA violated proportionate penalties clause of Illinois Constitution because it provided harsher sentence for ACSA than for armed violence predicated on criminal sexual assault. Offense occurred in 2006, which was prior to 2007 effective date of amendment which cured proportionate penalties violation. (PUCINSKI and MASON, concurring.)

[People v. Schweih](#)s, 2015 IL 117789 (December 3, 2015) Kane Co. (THEIS) Circuit court reversed; remanded.

Section 24-1.6(a)(1), (a)(3)(C) of the Aggravated Unlawful Use of a Weapon (AUUW) statute does not violate the proportionate penalties clause of the Illinois Constitution, or the equal protection clauses of the U.S. and Illinois Constitutions. The location element in Section 24-1.6(a)(1) remains a viable element of the AUUW statute when combined with subsection (a)(3)(C). (GARMAN, FREEMAN, THOMAS, KILBRIDE, KARMEIER, and BURKE, concurring.)

SEX CRIMES (registration)

[People v. Roe](#), 2015 IL App (5th) 130410 (January 6, 2015) Williamson Co. (WELCH) Affirmed.

Defendant was convicted, after stipulated bench trial, of failure to register as a sex offender. In reading language in count and statute together, reference in charging instrument to registering within three days of conviction is not a denial of due process. Any variance between charging instrument and proof does not require reversal of conviction, as it was not material, misleading, or likely to expose Defendant to possibly double jeopardy. Defendant was afforded sufficient notice of charge and was given meaningful opportunity to defend himself against the charge. (STEWART and SCHWARM, concurring.)

[In re Maurice D.](#), 2015 IL App (4th) 130323 (May 29, 2015) McLean Co. (HARRIS) Affirmed. After bench trial, court adjudicated Respondent minor, age 17 at time of offense, delinquent, finding evidence supported conviction for criminal sexual abuse beyond a reasonable doubt. Respondent must thus register as a sex offender. Evidence was conflicting as to whether victim, then age 15, voluntarily engaged in sexual act. Neither eighth amendment cruel and unusual punishment clause nor proportionate penalties clause apply to Respondent's juvenile adjudication. Juvenile Court Act does not provide juvenile with substantive rights, such as substantive due process. Criminal sexual abuse statute is rationally related to legislative purpose of protecting 13 to 16 year olds from premature sexual experiences. (POPE and KNECHT, concurring.)

[People v. Stavenger](#), 2015 IL App (2d) 140885 (July 9, 2015) DuPage Co. (SCHOSTOK) Affirmed.

Defendant pled guilty to possession of child pornography. Because registering as a sex offender is not part of Defendant's sentence, does not place any actual restraint on his liberty, and is merely a collateral consequence of his conviction, Defendant lacks standing to bring a postconviction petition under the Post-Conviction Hearing Act. (HUTCHINSON and BURKE, concurring.)

[People v. Brock](#), 2015 IL App (1st) 133404 (November 23, 2015) Cook Co., 1st Div. (CUNNINGHAM) Reversed in part, affirmed in part, vacated in part, and remanded for resentencing.

Defendant was convicted, after bench trial, of failure to report in person within 90 days of his last date of registry and failure to report his change of address within 3 days as a registered sex offender. Sex Offender Registration Act imposes a separate and additional duty on those sex offenders specifically adjudicated "dangerous" or violent", and legislature intended to distinguish a duty to report that does not simply duplicate the registration requirement. Registration requires the creation of a signed writing. Section 6 does not mention a registration requirement, and thus a defendant may satisfy his duty simply by reporting. Conviction for failure to report address change within 3 days is affirmed. Defendant's prior conviction for aggravated criminal sexual assault was improperly used as both an element of the offense and as a basis for imposing a mandatory Class X sentence, thus resulting in improper double enhancement. (LIU and HARRIS, concurring.)

[People v. Avila-Briones](#), 2015 IL App (1st) 132221 (December 24, 2015) Cook Co., 4th Div. (ELLIS) Affirmed.

Defendant, aggravated criminal sexual abuse for having sex with a 16-year-old girl when he was 23 years old, argues for unconstitutionality of Sex Offender Registration Act, Sex Offender Community Notification Law, and other related statutes. Statutory scheme does not violate the eighth amendment or proportionate penalties clause, and is not a grossly disproportionate sentence for Defendant's offense, and serves legitimate penological goals. Statutory Scheme does

not violate procedural or substantive due process, and is rationally related to goal of protecting public from possibility that sex offenders will commit new crimes. (HOWSE and COBBS, concurring.)

People v. Howard, 2016 IL App (3d) 130959 (January 13, 2016) Peoria Co. (WRIGHT)
Affirmed.

Police officer discovered Defendant, a registered sex offender, sitting in vehicle parked within 15 feet of school property while children were present and playing on school playground. Defendant was convicted of felony offense of being present in a school zone as a child sex offender. Statutory scheme clearly delineates a 500-foot zone surrounding school property, and prohibits certain conduct during specific time when children under age 18 are present. Sex offenders who, like Defendant, are not a parent of a child in the school, cannot be present in restricted school zone for any purpose, lawful or unlawful, when children are present. (CARTER, concurring; McDADE, dissenting.)

People v. Armstrong, 2016 IL App (2d) 140358 (March 22, 2016) DuPage Co. (BURKE)
Reversed and remanded.

(Court opinion corrected 3/31/16.) Defendant entered negotiated plea of guilty to one count of failing to register as a sex offender, and was sentenced to 3 years. On remand, Defendant filed pro se postjudgment motion, with court denied. Trial counsel rendered ineffective assistance of counsel. Counsel was aware that charge was predicated on conviction of unlawful restraint, which was not per se a sex offense, and victim's age was not put before the court during that case. It is reasonably probable that had Defendant realized that he could not be properly convicted of violating the Act, he would have forgone entering his plea and would have gone to trial. (SCHOSTOK and JORGENSEN, concurring.)

SHACKLING

People v. Reese, 2015 IL App (1st) 120654 (September 24, 2015) Cook Co., 4th Div.
(McBRIDE) Affirmed in part, reversed in part, and modified in part.

Defendant was convicted, after jury trial, of aggravated vehicular hijacking, vehicular invasion, attempted armed robbery, and escape, and sentenced to concurrent extended-term sentences of 50, 30, 30, and 14 years, to be served consecutively to natural life sentence he was serving on prior murder conviction. Court violated Defendant's right to due process by failing to undertake a Boose analysis and state reasons for shackling on the record before requiring him to remain shackled at trial, but error was limited and harmless. (GORDON, concurring; PALMER, specially concurring.)

SPEEDY TRIAL

[People v. Raymer](#), 2015 IL App (5th) 130255 (February 25, 2015) Saline Co. (CATES)

Affirmed.

Defendant was charged with 3 separate felonies (driving while license revoked, unlawful use of a credit card, and escape), and held in simultaneous custody on all 3 cases. State elected to prosecute driving-on-revoked charge first, but failed to bring any case to trial within 120 days from date Defendant was placed in custody. Thus, Defendant's statutory right to speedy trial was violated, and court properly dismissed charges with prejudice. Commencement of trial, or adjudication of guilt after waiver of trial, on at least one pending charge, and not mere election of which charge to be tried first, that provides additional time to try unelected charges.

(GOLDENHERSH and CHAPMAN, concurring.)

[People v. Moody](#), 2015 IL App (1st) 130071 (October 29, 2015) Cook Co., 1st Div. (COBBS)

Affirmed in part and reversed in part; remanded with instructions.

Defendant was convicted of first degree murder and aggravated kidnapping pursuant to Section 10-2(a)(3) of Criminal Code, and sentenced to consecutive terms of 60 years and 25 years. Court erred in denying Defendant's motion to dismiss murder charges for violation of Defendant's right to a speedy trial. Continuances obtained in connection trial of original charges cannot be attributed to Defendant as to new and additional charges when these new and additional charges were not before the court when continuances were obtained. (HOWSE and ELLIS, concurring.)

[People v. McGee](#), 2015 IL App (1st) 130367 (October 29, 2015) Cook Co., 4th Div. (COBBS)

Affirmed in part and reversed in part; remanded with instruction.

Defendant was convicted of first degree murder and aggravated kidnapping and sentenced to consecutive terms of 60 years and 25 years in prison. Defendant was lawfully seized, and thus lineup identifications were properly admitted into evidence. State violated Speedy Trial Act by charging Defendant with first-degree murder 18 months after Defendant was charged with attempted murder, aggravated battery, aggravated kidnapping, and unlawful restraint. Victim was kidnapped and beaten in Chicago but was found dead in Gary, Indiana. State had knowledge that at least part of the injuries that caused victim's death occurred in Illinois. At time of original indictment State had a conscious awareness of evidence that is sufficient to give State a reasonable chance to secure a conviction. (HOWSE and ELLIS, concurring.)

STATUTE OF LIMITATIONS

[People v. Chenoweth](#), 2015 IL 116898 (January 23, 2015) Adams Co. (FREEMAN) Appellate court reversed and remanded.

Defendant was convicted, after bench trial, of financial exploitation of an elderly person and sentenced to four years probation and ordered to pay restitution. Elderly victim did not "discover the offense", within meaning of Section 3-6(a)(2)'s extended limitations period, prior to prosecuting officer becoming aware of the offense, when it received police investigation file. This event activated Section 3-6(a)(2), and thus Defendant was indicted within that section's one-year extended limitations period. (GARMAN, THOMAS, KILBRIDE, KARMEIER, BURKE, and THEIS, concurring.)

[People v. McCullough](#), 2015 IL App (2d) 121364 (February 11, 2015) De Kalb Co. (ZENOFF) Affirmed in part and vacated in part.

Defendant was convicted, after bench trial in 2012, of 1957 kidnapping and murder of seven-year-old girl, when Defendant was age 18. Sentences for kidnaping and abduction vacated, as State did not adduce any proof that would toll 3-year limitations periods, and Defendant was sentenced to natural life for murder.(SCHOSTOK and BURKE, concurring.)

[People v. Lutter](#), 2015 IL App (2d) 140139 (May 18, 2015) Du Page Co. (ZENOFF) Reversed. (Court opinion corrected 5/29/15.) Defendant was convicted, after bench trial, of reckless driving. Information showed on its face that it was filed beyond statute of limitations.

Establishing that statutory exception tolled limitations period was element of State's case that it had to prove beyond a reasonable doubt at trial, but State failed to do so. Defendant was not required to file motion to dismiss, and he did not waive State's obligation to prove this element at trial by not filing motion to dismiss.(SPENCE, specially concurring; BURKE, dissenting.)

SVP/SDP

[In re Detention of Carpenter](#), 2015 IL App (1st) 133921 (August 4, 2015) Cook Co., 2d Div. (SIMON) Affirmed.

After bench trial, court entered judgment finding Defendant a sexually violent person subject to commitment under Sexually Violent Persons Commitment Act. The Act does not require appointment of evaluator on behalf of a person subject to a petition until after probable cause hearing and in preparation for trial. Court was within its discretion in granting State's motion to extend time to answer Defendant's requests to admit, as Assistant Attorney General took responsibility for inadvertence and error in not timely responding to motion, and no evidence of wrongdoing or prejudice shown.(PIERCE and LIU, concurring.)

People v. Kastman, 2015 IL App (2d) 141245 (September 30, 2015) Lake Co. (HUTCHINSON) Certified question answered; remanded.

Under 1999 *People v. McDougale* (Second District) case, the judicial review of the adequacy of a sexually dangerous person's treatment should occur in the court that committed the offender. (SCHOSTOK and BURKE, concurring.)

People v. Bailey, 2015 IL App (3d) 140497 (October 1, 2015) Iroquois Co. (McDADE) Vacated and remanded with instructions.

Defendant, having been found a sexually dangerous person in 2007, filed a pro se petition 5 years later alleging recovery. After bench trial, court found that Defendant remained an SDP. A trial court's failure to make a finding that there was a substantial probability Defendant would engage in commission of sex offenses in the future if not confined may not be harmless error. A finding of sexual dangerousness must be accompanied by a substantial probability finding. Error must not necessarily result in outright reversal of order, but may be remanded for rehearing. (WRIGHT, concurring; SCHMIDT, concurring in part and dissenting in part.)

In re Commitment of Kirst, 2015 IL App (2d) 140532 (September 30, 2015) Lee Co. (BIRKETT) Affirmed.

Overwhelming evidence established that Respondent was still a sexually violent person (SVP); thus, no probable cause existed to warrant an evidentiary hearing. Court did not err in finding that no probable cause existed to warrant evidentiary hearing on issue of whether is still an SVP. Court properly denied Respondent's motion for independent examiner as part of his periodic reexamination under SVP Act, as he failed to demonstrate that such an appointment was crucial to his defense. (HUTCHINSON and BURKE, concurring.)

In re Commitment of Simons, 2015 IL App (5th) 140566 (December 1, 2015) Madison Co. (WELCH) Affirmed.

Respondent, a sexually violent person committed to Department of Human Service, filed petition for discharge and motion to appoint an expert, when circuit court properly denied as untimely. Respondent has refused to participate in reviews and in sex offender treatment over the past year. Petitions for discharge may be filed only in limited period of time, which is after receiving notice of Respondent's right to petition at time of yearly reexamination, but before the probable cause hearing. Respondent's petition was untimely, as he filed it after the probable cause hearing. Respondent's request was not a valid postjudgment motion, as it was not directed at the previous judgment. (GOLDENHERSH and CHAPMAN, concurring.)

People v. Holmes, 2016 IL App (1st) 132357 (January 11, 2016) Cook Co., 1st Div. (CONNORS) Affirmed.

After bench trial, Defendant was found to be a sexually dangerous person and committed to custody of Department of Corrections. Defendant had been convicted of 3 sex offenses in 3 different states over 6 years. Court only limited how prior allegation was characterized and

avoided confusion about whether allegation was false, and court did not prohibit all cross-examination about substance of Defendant's question. State proved that Defendant had serious difficulty controlling his sexual behavior, and court made an explicit "substantial probability finding". Court made finding of sexual dangerousness based on requirements of the Sexually Dangerous Persons Act. Evidence was sufficient to find that Defendant had all 3 mental disorders raised by the experts. (LIU and HARRIS, concurring.)

TRAFFIC

[People v. McLeer](#), 2015 IL App (2d) 140526 (February 27, 2015) McHenry Co. (BURKE) Affirmed.

Defendant's driving privileges were summarily suspended after he refused to submit to blood alcohol testing. At hearing, court allowed State to amend arresting officer's "Sworn Report" to indicate date Defendant was given notice. Officer's failure to fill in blank line on Sworn Report asking for when Notice of Suspension/Revocation was given was not a fatal defect warranting rescission of statutory summary suspension. Sworn Report listed date Defendant refused testing, indicated that notice of suspension was served on Defendant immediately, and stated that it was signed on same date. From that information, Secretary of State had sufficient information to calculate and confirm suspension. (SCHOSTOK and ZENOFF, concurring.)

[People v. Williams](#), 2015 IL App (1st) 133582 (November 3, 2015) Cook Co., 2d Div. (HYMAN) Reversed.

Defendant was convicted, after bench trial, of aggravated fleeing or attempting to elude a peace officer. Officer was sitting in a marked police car wearing "civilian dress", and saw Defendant's vehicle not fully come to a stop at a stop sign; officer then activated emergency lights and siren, and pursued Defendant, who continued to pull away from squad car. Conviction for that offense requires State prove pursuing officer was wearing a police uniform. Because officer who stopped Defendant was out of uniform and in civilian clothes, State failed to satisfy an essential element of the offense: the uniform of the police officer. (NEVILLE and SIMON, concurring.)

[People v. Grandadam](#), 2015 IL App (3d) 150111 (December 2, 2015) LaSalle Co. (O'BRIEN) Affirmed in part and reversed in part.

Defendant was convicted, after bench trial, of driving while license revoked, operating an uninsured motor vehicle, no valid registration, and disobeying a traffic control device. Defendant had been riding a bicycle powered with a 3/4 hp motor; Defendant testified that one must pedal the bicycle up to 8-10 mph before activating the motor, and when pedaling in conjunction with the motor, it can travel 25-30 mph. State failed to prove beyond a reasonable doubt that the motorized bicycle was a motor vehicle under the Motor Vehicle Code; thus, first 3 convictions are reversed. Offense of disobeying a traffic control device applied to Defendant even if he was

not operating a "motor vehicle". Thus, that conviction is affirmed.(McDADE and WRIGHT, concurring.)

[People v. McGuire](#), 2015 IL App (2d) 1131266 (December 23, 2015) McHenry Co. (HUDSON) Affirmed.

Defendant was convicted, after jury trial, of aggravated operating a watercraft under the influence of alcohol in violation of section 5-16(A)(1) of the Boat Registration and Safety Act. Defendant argued that Boat Act was repealed by implication, because both that Act and the Motor Vehicle Code punish operation of watercraft under the influence, where a death occurs, as a Class 2 offense, but only the Vehicle Code requires proof that the offense proximately caused the death. The plain language of the statute makes clear that watercraft are not vehicles. Two statutes are not in conflict such that one statute cannot stand. (McLAREN and BIRKETT, concurring.)

[People v. Lee](#), 2016 IL App (2d) 150359 (January 28, 2016) Kane Co. (SCHOSTOK) Affirmed. Court properly denied Defendant's petition to rescind statutory summary suspension (SSS) of his driver's license, after he was charged with DUI. Court's finding that arrest took place in South Elgin was against manifest weight of evidence, as arresting police officer, who was on South Elgin City Police Department, testified that arrest was within Kane County's jurisdiction. If officer had probable cause to believe that Defendant was speeding within South Elgin, he was authorized to arrest Defendant outside of South Elgin. Officer used radar to monitor Defendant's speed while Defendant was driving within South Elgin, and thus he was performing official duty within his jurisdiction.(ZENOFF and BIRKETT, concurring.)

MISC

[People v. Williams](#), 2015 IL App (2d) 130585 (February 27, 2015) Winnebago Co. (SPENCE) Affirmed.

Defendant pled guilty to aggravated discharge of a firearm, and sentenced to 36-month term of probation. Court then held hearing on revocation of probation Court ejected three spectators from revocation hearing, after prosecutor complained that spectators had followed citizen witnesses from courthouse. Whether there is a constitutional right to a public hearing on probation revocation hearing is not sufficiently settled to permit review under plain-error rule. (ZENOFF and BURKE, concurring.)

[People v. Clendenny](#), 2016 IL App (4th) 150215 (January 26, 2016) Calhoun Co. (APPLETON) Affirmed.

Defendant pled guilty to reckless homicide, and was sentenced to 30 months' probation, including 18 months' periodic imprisonment as a condition of probation. As record does not indicate Defendant's employment was comparable to a county work-release program, his 18-month periodic imprisonment sentence is valid. Court's reference to the probation condition as

"work release" was not indicative of court's intent to impose a sentence that qualified as a program comparable to a county or state work-release program. Defendant's release was not limited strictly to employment, as he was ordered to participate in alcohol evaluation and treatment, and was allowed to attend birth of his child and remain with his wife during her hospitalization. (KNECHT and POPE, concurring.)

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PUTTING IT ALL TOGETHER

FROM YOUR FILE TO THE VERDICT: A CASE STUDY
BY DONALD J RAMSELL

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Dunlap County | Updated 8/10/2015 12:45 PM

New DUI charges filed in fatal Lisle crash



James D. Kislak

THE CASE: PEOPLE V. KISLA

- Defendant leaves Fourth Of July Fireworks Show
- Travelling On 4 Lane Public Highway as Crowd of 10,000 is Leaving
- Woman and Man Attempt to Cross
- Defendant in Inside Lane Strikes and Kills Woman with Front of Minivan

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THE CASE: PEOPLE V. KISLA

- Held at Scene About 1 Hour
- Admits Drinking a Few Beers
- Voluntarily Goes to Police Station
- Search of Vehicle Locates 3 Empty Beer Cans in Cooler
- Submits to FSTs and Fails
- Arrested for DUI after FSTs

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THE CASE: PEOPLE V. KISLA

- Refuses Breath Testing
- Is Told That Law Requires Testing If Death Involved
- Threatened with Catheterization
- Submits Under Protest 2 hours Post Arrest

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THE CASE: PEOPLE V. KISLA

- Blood and Urine Collected At Hospital
- Tested at State Crime Laboratory
- Whole Blood Result from GC 0.086 twice
- Urine Drug Result is Hydrocodone Less than 10 ug/L

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MOTION TO SUPPRESS VEHICLE SEARCH

- ▶ Motion to Suppress Search of Vehicle
- ▶ Search was Conducted as Per Standard Accident Reconstruction
- ▶ Arizona v. Gant 556 U.S. 332 (2009):
 - ▶ Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. Pp. 3-18.
 - ▶ Warrantless searches "are per se unreasonable," "subject only to a few specifically established and well-delineated exceptions."
 - ▶ The exception for a search incident to a lawful arrest applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence."
 - ▶ This Court applied that exception to the automobile context in Belton, the holding of which rested in large part on the assumption that articles inside a vehicle's passenger compartment are "generally ... within 'the area into which an arrestee might reach.'"

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MOTION TO SUPPRESS VEHICLE SEARCH

▶ RESULT:

Suppressed

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MOTION TO SUPPRESS INVOLUNTARY BLOOD AND DRUG DRAWS

- ▶ The defendant refused the breath test.
- ▶ The defendant refused to voluntarily consent to blood and urine testing
- ▶ The States Attorney was Contacted and the told cop to say that....
- ▶ The Defendant was (correctly) told that Illinois law requires that a driver submit to blood and urine testing when involved in fatality
- ▶ The Cop testified that he was concerned that defendant was on the way down at the time of arrest and that it would take 3 hours to get a warrant.

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MOTION TO SUPPRESS INVOLUNTARY BLOOD AND DRUG DRAWS

- ▶ *McNeely v. Missouri* 569 US ___ (2013) held that:
 - ▶ When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.
 - ▶ Circumstances may make obtaining a warrant impractical such that dissipation will support an exigency, but that is a reason to decide each case on its facts.
 - ▶ Blood testing is different in critical respects from other destruction-of-evidence cases; BAC evidence naturally dissipates in a gradual and relatively predictable manner.
 - ▶ Because an officer must typically obtain a trained medical professional's assistance before having a blood test conducted, some delay between the time of the arrest and time of the test is inevitable regardless of whether a warrant is obtained.

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MOTION TO SUPPRESS INVOLUNTARY BLOOD AND DRUG DRAWS

▶ RESULT

DENIED
 see *People v Gaede*
 386 Ill.Dec 488

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MOTION TO SUPPRESS TEST RESULTS FAILURE TO IDENTIFY UNCERTAINTY

- ▶ The result of the blood alcohol test was 0.086
- ▶ The result of the drug test was 'less than 10 ug/L'

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ISO 17025 The Science Standards for Crime Labs

INTERNATIONAL STANDARD ISO/IEC 17025

Second edition
2005-05-15

General requirements for the competence of testing and calibration laboratories

Exigences générales concernant la compétence des laboratoires d'étalonnages et d'essais

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ISO 17025 The Science Standards for Crime Labs

5.4.6.2 Testing laboratories shall have and shall apply procedures for estimating uncertainty of measurement. In certain cases the nature of the test method may preclude rigorous, metrologically and statistically valid, calculation of uncertainty of measurement. In these cases the laboratory shall at least attempt to identify all the components of uncertainty and make a reasonable estimation, and shall ensure that the form of reporting of the result does not give a wrong impression of the uncertainty. Reasonable estimation shall be based on knowledge of the performance of the method and on the measurement scope and shall make use of, for example, previous experience and validation data.

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ISO 17025 The Science Standards for Crime Labs

5.10.3 Test reports

5.10.3.1 In addition to the requirements listed in 5.10.2, test reports shall, where necessary for the interpretation of the test results, include the following:

- a) deviations from, additions to, or exclusions from the test method, and information on specific test conditions, such as environmental conditions;
- b) where relevant, a statement of compliance/non-compliance with requirements and/or specifications;
- c) where applicable, a statement on the estimated uncertainty of measurement, information an uncertainty is needed in test reports when it is relevant to the validity or application of the test results, when a customer's instruction so requires, or when the uncertainty affects compliance to a specification limit.

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ISO 17025 The Science Standards for Crime Labs

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**MOTION TO SUPPRESS TEST RESULTS
FAILURE TO IDENTIFY UNCERTAINTY**

1. Any and all data, documentation, records, logs or other materials that you have relied upon or will rely upon in formulating any opinion(s) related to the validity reliability and accuracy of the Blood and urine drug or alcohol analyses in this matter.
2. Any uncertainty values (pursuant to ISO 17025 and ASCLD) that relate to the blood and urine drug or alcohol analyses in this matter, as well as copies of all documents, data, and other information used to calculate the uncertainty value related to this matter.
3. If any of the above does not exist, then the subpoenaed individual is requested to provide a written statement as to:
 - a) whether the above ever existed;
 - b) the dates that compliance or preservation was attempted; and
 - c) the reasons said items no longer exist.

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FAILURE TO IDENTIFY UNCERTAINTY**

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MOTION TO SUPPRESS TEST RESULTS FAILURE TO IDENTIFY UNCERTAINTY

▶ RESULT

- ▶ Court Ordered State Lab to Calculate Uncertainty Margin

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MOTION TO B

Pat Quinn
Governor



ILLINOIS STATE POLICE
Division of Forensic Services

Stacy Olsen
Director

March 3, 2012

Honorable Judge George Bikalis
DuPage County Judicial Center
Room 4006
505 N. County Farm Road
Wheaton, Illinois 60187

Re: People of the State of Illinois v. James Kisla
Case Number: 11C91539
Laboratory Case Number: C11-29244

Dear Judge Bikalis:

Per your request, I have calculated the uncertainty estimation associated with the volatile analysis performed on the blood of James Kisla. The variation for case blood ethanol analysis can be determined by the observed variation seen in control samples. Because control samples are handled and analyzed under the same protocol as case samples, any variation seen in those results can reasonably be applied to case samples.

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Add or subtract this result from the measured result of 0.086 g/dL to get the expected range of results for this case.

$$0.086 \text{ g/dL} - 0.003 \text{ g/dL} = 0.083 \text{ g/dL}$$

$$0.086 \text{ g/dL} + 0.003 \text{ g/dL} = 0.089 \text{ g/dL}$$

Therefore, after applying the variation of 3.6% to this result, the expected concentration of ethanol in the blood of James Kisla would be from 0.083 to 0.089 g/dL.

MOTION SUPPRESS TESTING RESULTS

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff,)	
v.)	Case No. 11 CF 1530
JAMES KISLA,)	
Defendant.)	

MOTION TO SUPPRESS ALCOHOL AND DRUG TESTING RESULTS AND FOR ANY AND ALL OTHER SANCTIONS

NOW COMES the Defendant, James Kisla, by and through his attorneys Ramsell & Associates, LLC, who moves to suppress the alcohol and drug testing in this matter and in support thereof

Copyright 2015 Ramsell & Associates as follows:

MOTION SUPPRESS TESTING RESULTS

Jimmie L. Valentine, B.S., B.S., M.S., Ph.D.
Medical Pharmacology and Toxicology Consulting
UAMS Professor of Pediatrics, Pharmacology, and Myeloma Research (Retired)

Basically there are three elements espoused by GUM for estimation of uncertainty in an analytical measurement:⁷

1. Sampling
2. Calibration/Verification
3. Analysis

Any estimation of uncertainty according to GUM would therefore need to consider the contribution of each facet listed above. Obviously, each category might have sub-categories depending on the assay being evaluated for uncertainty.

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1. Analysis repeatability;
2. Temperature effect on analysis;
3. Humidity effect on analysis;
4. Barometric pressure effect on analysis;
5. Inter/intra analyst effect on analysis;
6. Inter/intra instrumental effect on analysis;
7. Matrix (blood, urine, aqueous, etc.) effect on analysis;
8. Sodium fluoride effect;
9. Potassium oxalate effect;
10. Other anticoagulant effect;
11. Pipettor/diluter syringe volume sampling and delivery;
12. Pipettor/diluter sampling and delivery volume for different types of matrix;
13. Intra/inter analyst effect on pipettor/diluter sampling and volume delivery;
14. Titration reproducibility;
15. Temperature effect on titration;
16. Humidity effects on titration;
17. Intra/inter analyst effects on titration;
18. Thermometer bias;
19. Hydrometer bias;
20. Water/matrix density;
21. Analytical balance bias;
22. Intra/inter analyst effect on weighing with analytical balance;
23. Pipette calibration bias;
24. Intra/inter analyst effect on pipetting volume;
25. Volumetric flask bias;
26. Intra/inter analyst effect on volumetric flask bias;
27. Intra/inter analyst effect in sampling (pipetting) a reproducible volume of blood, typically 100 µL (0.1 mL) into a headspace vial;
28. Intra/inter analyst effect on reproducibility adding 1.0 mL of aqueous internal standard;
29. Effect of using glass versus plastic headspace vials;
30. Effect of type liner used in headspace vials

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WITNESS INVESTIGATION

Me To jkosatka@villageoffisle.org Jul 3, 2011

Chief,

Steve and I, with our family, were in the car seat closest to the vehicle which hit the pedestrian this evening. We unfortunately witnessed this tragedy. If your department needs anything from us, please let us know.

Debbie Pawlowicz
 (630) 309-1466
 RE/MAX Action

Visit www.DebbiePawlowicz.com
 To search all MLS listings

Sent from my iPhone

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WITNESS INVESTIGATION

As we approached Robin Lane, I observed two pedestrians crossing the road. One person was tall and the other one short. This crossing occurred in an unmarked area of Yackley south of the Short Street crossing and north of Robin Lane. The two pedestrians dashed out into the street, much like a deer crossing a highway. The taller person looked north and beckoned the shorter individual to dash out into the street to beat the traffic. Together they ran right out into the middle of two lanes of on-coming traffic. I could see the break lights from the front car in the left hand lane. I screamed out to my wife to stop our car. As I screamed to her to stop, I could see the tall individual just slip by the front vehicle to our left. He proceeded to the far curb alone. Looking back alone, I saw him turn to return to the street in front of the stopped car.

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WITNESS INVESTIGATION

I do not believe the driver of the car could have avoided this accident or an equally bad accident, as the pedestrians ran out right in front of their moving car. The driver did not have time to stop in his lane. The driver could not turn left, as the second pedestrian was in this space, and would have been hit. They could not pull into our lane without hitting the first pedestrian head on and/or hitting our vehicle and possibly other pedestrians.

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ACCIDENT RECONSTRUCTION

Crash Data Services, LLC
A Traffic Accident Investigation Company

PO Box 7292
Algonquin, IL 60102
847-217-6644
www.crashdataservices.net

Mr. Donald J. Ramsell
128 South County Farm Road
3rd Floor
Wheaton, IL 60187

November 4th, 2014

RE: People v. James Kisa

Dear Mr. Ramsell,

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ACCIDENT RECONSTRUCTION

Crash Data Services, LLC
A Traffic Accident Investigation Company

PO Box 7292
Algonquin, IL 60102
847-217-6644
www.crashdataservices.net

Prior to addressing the timeliness of Mr. Kisa's response, the actual act of braking should be address. As detailed in **Factors that Influence Drivers' Response Choice Decisions in Video Recorded Crashes**, **SAE Technical Paper #2005-01-0426**, when faced with a path intrusion like the one in this report, over ninety four percent (94%) of drivers will apply their brakes, at some point, in an attempt to minimize or avoid the impending crash.

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ACCIDENT RECONSTRUCTION VIDEO



Crash Data Services, LLC
A Traffic Accident Investigation Company

847-217-6644
www.crashdataservices.net

Copyright

ACCIDENT RECONSTRUCTION

Crash Data Services, LLC
A Traffic Accident Investigation Company

PO Box 7292
Algonquin, IL 60102
847-217-6684
www.crashdataservices.net

By way of explanation, to date, I do not find any actions, or inactions, on the part of Mr. Kisla which contributed to the collision.

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ACCIDENT RECONSTRUCTION

Crash Data Services, LLC
A Traffic Accident Investigation Company

PO Box 7292
Algonquin, IL 60102
847-217-6684
www.crashdataservices.net

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By way of explanation, to date, I do not find any actions, or inactions, on the part of Mr. Kisla which contributed to the collision.

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POLICE OFFICER TESTIMONY

CROSS EXAMINATION
By: Mr. Ramsell

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POLICE OFFICER TESTIMONY

CROSS EXAMINATION
By: Mr. Ramsell

7 Q You were trained in accordance with the
8 National Highway Traffic Safety Administration?
9 A Yes.
10 Q You consider them to be authoritative and
11 reliable in this area of training?
12 A Yes.

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POLICE OFFICER TESTIMONY

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POLICE OFFICER TESTIMONY



DWI Detection
and
Standardized Field
Sobriety Testing

February 2008 Edition

William H. Miller

IATRA

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POLICE OFFICER TESTIMONY

20 Q And in that regard, you were also taught
21 that the walk and turn test is -- when properly
22 administered is 68 percent reliable, right?

23 A Correct.

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POLICE OFFICER TESTIMONY

20 Q And in that regard, you were also taught
 21 that the walk and turn test is -- when properly
 22 administered is 68 percent reliable, right?
 23 A Correct.

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POLICE OFFICER TESTIMONY

11 Q You were taught if any one of the
 12 standardized field sobriety test elements is
 13 changed, the validity is compromised, correct?
 14 A Correct.

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POLICE OFFICER TESTIMONY

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 12 standardized field sobriety test elements is
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Copyright 2015 Ramsell & Associates LLC

POLICE OFFICER TESTIMONY

7 Q And in order to validly administer the
 8 test, you were trained that a particular set of
 9 instructions must be given to the person that
 10 would, of course, include at least the eight
 11 clues you were going to use, right?
 12 A Correct.

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POLICE OFFICER TESTIMONY

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 8 test, you were trained that a particular set of
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POLICE OFFICER TESTIMONY

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 11 clues you were going to use, right?
 12 A Correct.

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7 Q Isn't it true that you were that for
 8 standardization in the performance of the test,
 9 you need to give the following instructions,
 10 number one, quote, place your foot left foot on
 11 the line and demonstrate it, correct?
 12 A I simply state, put your right foot in
 13 front of your left.
 14 Q I'm not asking what you said.
 15 I'm asking you were trained to tell
 16 the person, quote, place your left foot on the
 17 line?
 18 A I would assume if that's what the
 19 Paperwork says, yes.

Copyright 2015 Ramona's Association

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 17 line?
 18 A I would assume if that's what the
 19 Paperwork says, yes.

Copyright 2015 Ramona's Association

POLICE OFFICER TESTIMONY

20 Q Did you tell him that?
 21 A I told him to place his right foot
 22 in front of his left, heel to toe like I was --
 23 Q The answer would be no, you did not tell
 24 him that?

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1 A Yeah.
 2 I would say I was explaining to you my
 3 words.
 4 Q Sir, it's a yes or no question.
 5 Did you tell him, place your left foot
 6 on the line?
 7 A No.
 8 Q The next instruction would be, quote,
 9 place your right foot on the line ahead of the
 10 left foot with heel of right foot against toe of
 11 left foot.
 12 Did you say it exactly that way?
 13 A No.

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13 A No.
14 Q Next instruction you are supposed to
15 tell the person is, place your arms down at your
16 sides.
17 Did you tell him that?
18 A No.
19 Q The next instruction during that stage
20 is, maintain this position until I have completed
21 the instructions. Do not start to walk until
22 told to do so.
23 Did you tell him that?
24 A No.

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21 the instructions. Do not start to walk until

22 told to do so.

23 Did you tell him that?

24 A No.

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POLICE OFFICER TESTIMONY

5 Q Now, isn't it true, sir, if you don't

6 give him the proper instructions for the

7 instruction stage, that assigning him a clue for

8 starting before instructions or can't keep balance

9 while listening to instructions is a deviation from

10 your training?

11 A Correct.

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POLICE OFFICER TESTIMONY

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POLICE OFFICER TESTIMONY

12 Q You would agree with me the validity
 13 is then compromised because you deviated from the
 14 standardized instructions you should have given
 15 him.
 16 Isn't that true?
 17 A Correct.
 18 MR. RAMSELL: May I have a second, your Honor?
 19 THE COURT: Yes.

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POLICE OFFICER TESTIMONY

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THE LAB COUGHS IT UP

The following evidence was received by the Forensic Science Center at Chicago on July 12, 2011:

<u>EXHIBIT</u>	<u>DESCRIPTION</u>	<u>FINDINGS</u>
1A	Two tubes of blood	Ethanol 0.086 g/dL. Not analyzed for drugs.
1B	Two bottles of urine	Not analyzed for volatiles. Hydrocodone detected. Dihydrocodeine detected.

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ILLINOIS STATE POLICE
DIVISION OF FORENSIC SERVICES
FORENSIC SCIENCES COMMAND

QUALITY ISSUE REPORT FINAL REPORT

QI 11-046 7/12/11

Part I. Completed by Reporting Person:

Reported By: Tim Turekwal (TL) Susan Vondrak → July 13, 2011
 Laboratory/Program: Toxicology Section
 Agency Notified? N/A

Issue Identified by: (Check one)

Internal Proficiency Test	<input type="checkbox"/>	Case Reanalysis	<input type="checkbox"/>	Agency	<input type="checkbox"/>
Internal Observation	<input type="checkbox"/>	File Review	<input type="checkbox"/>	Other	<input type="checkbox"/>
Internal Audit	<input checked="" type="checkbox"/>	External Proficiency Test	<input type="checkbox"/>		

Description of Issue: (Brief description including effect of the quality issue and the actions already taken. Include attachments if necessary.)

On June 29 and 30, 2011, Tim TL Vondrak conducted a semi-annual review of the Toxicology

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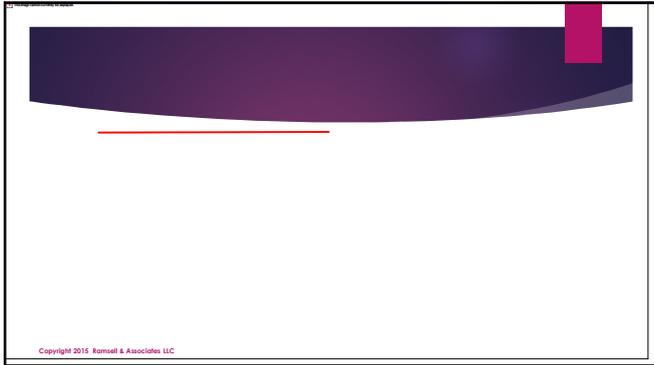
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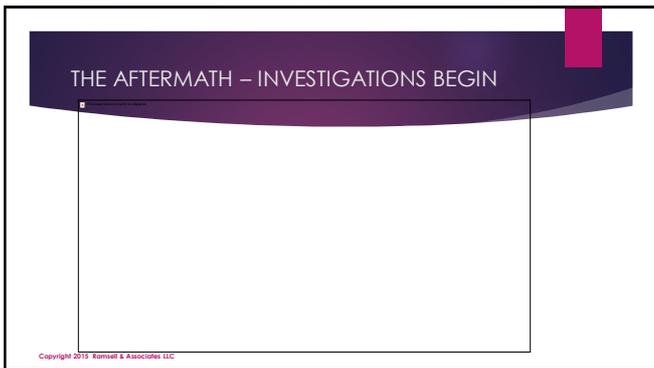
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THE AFTERMATH – INVESTIGATIONS BEGIN

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THANK YOU!

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- ▶ Wheaton IL 60187
- ▶ 630-665-8780
- ▶ Donald.ramsell@dialdui.com

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PROBLEM-SOLVING COURT STANDARDS



ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS

PSC Standards Development

- Illinois Supreme Court charge to the Special Supreme Court Advisory Committee for Mental Health and Justice Planning and the AOIC
- A working group comprised of JMHP Committee members and AOIC staff
- Extensive research, knowledge and experience of working group members

Resources

- Adult Drug Court Best Practice Standards; Volume I (2013) & II (2015) NADCP
- Defining Drug Courts: The Key Components
- The Essential Elements of a Mental Health Court, Council of State Governments Justice Center

PSC Standards are based on:

Evidence-based practices, now well established by a substantial body of research

Promising accepted practices that are correlated with positive, cost-effective outcomes and enhanced public safety

PSC Standards

- Ensure uniformity and accountability measures for all of the problem-solving courts throughout Illinois
- Create an oversight process to assure compliance with EBPs including program evaluation

PSC Standards

- Require Policy and Procedures
- Identify required team members, mandatory training and responsibility of each defined in MOU's
- Establish Eligibility/Exclusionary Criteria
- Screening Process using validated Risk/Need and Clinical Assessment tools

PSC Standards

- Voluntary Participation, Consent to Participate in open court
- Frequent judicial interaction, less formal court process
- Intense and coordinated treatment and case management
- Team Staffings and Status Hearings

PSC Standards

- Defined Phases with skill based requirements for advancement
- Regular drug and alcohol testing protocol
- Utilizing Sanctions, Incentives and Therapeutic Adjustments
- Protection of *DUE PROCESS* Rights

The Path to Certification

Path to Certification

- Submission of Application for Certification
- Notification of Receipt
- Initial Review

Path to Certification

- Site Visit
- Certification Application and Site Visit Review
- Determination of Certification

Path to Certification

- **THE SUPREME COURT WILL MAKE THE FINAL DETERMINATION ON CERTIFICATION OF ALL PSC**

Information

- Found at the Administrative Office of the Illinois Courts website

http://www.illinoiscourts.gov/Probation/Problem-Solving_Courts/Problem-Solving_Courts.asp



Problem-Solving Court Statutes and Legislative Updates Affecting Them

This project was supported by Grant #2012-DJ-BX-0203, awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, through the Illinois Criminal Justice Information Authority. Points of view or opinions contained within this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice, or the Illinois Criminal Justice Information Authority.

Problem-Solving Court Statutes

- Drug Court Treatment Act
730 ILCS 166
- Mental Health Court Treatment Act
730 ILCS 168
- Veterans and Servicemembers Court Treatment Act
730 ILCS 167

Attorneys in Problem-Solving Courts

- Non adversarial process with common goals

WHILE

- Prosecutor still keeps in mind public safety
- Defense attorney still ensure advocacy for client

Defense Counsel

- Competent Representation
 - Plea/Dismissal vs. Extended Treatment/Supervision
 - Short-Term Success vs. Client's Long-Term Interests
- Non Adversarial
 - But ensure advocacy for client
 - Due Process
 - Full hearings not required but right to be heard maintained
- Voluntary Participation/Withdrawal
 - Understands requirements of program
 - Understands consequences of withdrawal
- Client Fully Understand the Nature of PSC
 - Staffing – Client not present
 - What information attorney will and will not share

Recent Legislative Changes

- **Heroin Crisis Act HB1/Public Act 99-0480**
- Summary of Changes
 - Requires the drug court to submit a written order to referring court under the Cannabis Control Act, the Controlled Substance Act, First Offender Probation, The Methamphetamine Control Act, the Offender Initiative Program, and Second Chance Probation, whether a person suffers from a substance abuse problem and whether that makes him or substantially unlikely to successfully complete a sentence of probation. If so, the offender becomes ineligible for the listed types of probation but may be considered for drug court.



- **Heroin Crisis Act (cont.)**

- Amends the definition of “crime of violence” in the Drug Court Treatment Act
- Removes the prosecutor veto in the eligibility section of the Drug Court Treatment Act except under certain circumstances
- Removes the “one time” drug court eligibility requirement from the Drug Court Treatment Act
- Amends the definition of “crime of violence” in the Veterans and Servicemembers Court Treatment Act

Specific Change-Evaluation

- Cannabis Control Act 720 ILCS 550/10
- Controlled Substances Act 720 ILCS 570/102
- First Offender Probation 720 ILCS 570/410
- Methamphetamine Control and Community Act 720 ILCS 646/70
- Offender Initiative Program 730 ILCS 5/5-6-3.3
- Second Chance Probation 730 ILCS 5/5-6-3.4

Specific Change-Evaluation

Notwithstanding subsection (a), before a person is sentenced to probation under this Section, the court may refer the person to the drug court established in that judicial circuit pursuant to Section 15 of the Drug Court Treatment Act. The drug court team shall evaluate the person's likelihood of successfully completing a sentence of probation under this Section and shall report the results of its evaluation to the court. If the drug court team finds that the person suffers from a substance abuse problem that makes him or her substantially unlikely to successfully complete a sentence of probation under this Section, then the drug court shall set forth its findings in the form of a written order, and the person shall not be sentenced to probation under this Section, but may be considered for the drug court program.

Specific Change – Prosecutor Veto

- Has been eliminated

(730 ILCS 166/20)

Sec. 20. Eligibility.

(a) A defendant may be admitted into a drug court program only upon the agreement of ~~the prosecutor and~~ the defendant and with approval of the court.

Specific Change – Prosecutor Veto

- Except when

(c) Notwithstanding subsection (a), the defendant may be admitted into a drug court program only upon the agreement of the prosecutor if:

(1) the defendant is charged with a Class 2 or greater felony violation of:

(A) Section 401, 401.1, 405, or 405.2 of the Illinois Controlled Substances Act;

(B) Section 5, 5.1, or 5.2 of the Cannabis Control Act;

(C) Section 15, 20, 25, 30, 35, 40, 45, 50, 55, 56, or 65 of the Methamphetamine Control and Community Protection Act; or

(2) the defendant has previously, on 3 or more occasions, either completed a drug court program, been discharged from a drug court program, or been terminated from a drug court program.

Specific Change – Crime of Violence

- The definition of “crime of violence” has been limited in section
 - The Drug Court Act 730 ILCS 166/20(b)(4)
 - The Veterans and Service Members Court Treatment Act 730 ILCS 167/20(b)(3)

Specific Change – Crime of Violence

(4) The defendant has been convicted of a crime of violence within the past 10 years excluding incarceration time. As used in this Section, "crime of violence" means ~~including but not limited to:~~ first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, armed robbery, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability, stalking, aggravated stalking, or any offense involving the discharge of a firearm.

Specific Change – One Time

- Finally, in 730 ILCS 166/20, the restriction of only being allowed to participate in drug court once was removed.

Specific Change – One Time

~~(5) The defendant has previously completed or has been discharged from a drug court program.~~

Proposed Legislation

- Make similar changes to Mental Health Court and Veterans Court statutes:
 - Prosecutor Veto
 - Definition of “Crime of Violence”

Pending Legislation Affecting PSCs

- Veterans Court Statute

- SB3259

- Allows Veterans Court or be operated in one or more counties in a Circuit

- HB5003

- Requires each circuit to establish a Veterans Court

Other Pending Legislation Affecting PSCs

- **Services**

- HB2990

- Restores money to DHS to the Community Services Act and the Community Mental Health Act to pay for psychiatric care and other

- HB 5038

- Appropriation money to DHS for the Community Services Act and the Community Mental Health Act to pay for psychiatric care, assessment services and community hospital inpatient services

- HB4955

- Appropriate money to DHS to restore supported housing funding and other services

- HB5959/SB3368

- Provides that the SOS shall issue an identification card to all released from DOC

Other Pending Legislation Affecting PSCs

- **HB6037 - Sentencing**

730 ILCS 5/5-5-3.1 Sec. 5-5-3.1. Factors in Mitigation.

(a) The following grounds shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment:

(16) At the time of the offense, the defendant was suffering from a serious mental illness which, though insufficient to establish the defense of insanity, substantially affected his or her ability to understand the nature of his or her acts or to conform his or her conduct to the requirements of the law.

Other Pending Legislation Affecting PSCs

- **SB3164 – Sentencing**

730 ILCS 5/5-4-1 Sec. 5-4-1. Sentencing Hearing

(b-1) In imposing a sentence of imprisonment or periodic imprisonment for a Class 3 or Class 4 felony for which a sentence of probation or conditional discharge is an available sentence, if the defendant has no prior sentence of probation or conditional discharge and no prior conviction for a violent crime, the defendant shall not be sentenced to imprisonment before review and consideration of a presentence report and determination and explanation of why the particular evidence, information, factor in aggravation, factual finding, or other reasons support a sentencing determination that one or more of the factors under subsection (a) of Section 5-6-1 of this Code apply and that probation or conditional discharge is not an appropriate sentence.

Other Pending Legislation Affecting PSCs

- **HB5666 – Sentencing**
- A nonviolent Class 3 or 4 where the defendant has less than 4 months remaining on his or her sentence accounting for time serviced may not be confined in the penitentiary system of the DOC but may be assigned to electronic home detention, an adult transition center, or another facility or program within the DOC.

Resource

- **Illinois Sentencing Policy Advisory Council**
 - Fiscal Impact Analysis – Provides a Cost Benefit Analysis for some of the pending bills
 - Example – HB5666
 - Benefits from IDOC Housing Costs Avoided: \$5,464,162
 - Additional Costs for IDOC for Alternative Programs: \$7,686,554
 - Victimization Costs (Costs of Recidivism in Less Supervised Settings): \$200,427
 - **Net Benefit: -\$2,422,818**



Kelly Gallivan-Ilarraza

Problem Solving Court Coordinator

Administrative Office of the Illinois Courts

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Michelle Rock, JD, Director

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www.illinoiscenterofexcellence.org

LEGISLATION 2016 – OUTLINE SUMMARY #A
99th General Assembly

LIVE BILLS
CRIMINAL, TRAFFIC & JUVENILE

Steve Baker
stephen.baker@cookcountyil.gov
312-603-0720
Legislative Liaison
Law Office of the Cook County Public Defender

Last update: 5-3-16

*denotes an immediate effective date

- a. New Offenses
- b. Amendment to Existing Offenses
- c. Criminal Procedure
- d. Code of Corrections
- e. Crime Victims
- f. Domestic Violence
- g. Drugs
- h. Juvenile [delinquency & abuse]
- i. Animals
- j. Sex Offenders
- k. Vehicle Code
- l. Firearms
- m. Omnibus
- n. Public Health
- o. Miscellanea
- p. Reentry Issues

Full text and bill status can be found at <http://www.ilga.gov>

A. NEW OFFENSES

Status:

SB2778 Creates Extortion Offense

Pass Senate;

B. AMENDMENT TO EXISTING OFFENSES

SB2167	False Personation \$	Pass Senate
SB2294	Switchblade Knife Legal	Pass Senate
SB2907	Property Damage – Felony \$ Amount	Pass Senate
SB2947	EMS Definition	Pass Senate
SB3180	Exploit Elder \$ - Stat of Lim	Pass Senate

C. CRIMINAL PROCEDURE

SB392	Burge Torture Comm Expand	Pass Senate
SB2252	Bail – Mandate Accept Cash	Pass Senate
SB2343	Cell Site Simulator Device – Use	Pass Senate;
SB2370	Juv - Homicide Interrogat; Attorney	3d Senate; t/e
SB2521	DMH UST Reports – Each 60 days	Pass Senate
SB2875	Cell Location Authority via AV	Pass Senate
SB2876	Money Laundering – Joinder	Pass Senate
SB2880	Victim Testimony via AV: Dev Disabled	Pass Senate
SB2885	Conviction Reversal - \$ Refund	Pass Senate
SB3106	115-10 Hrng – Intellectual Disabled	Pass Senate
HB4683	Appeal – Defendant's Death	Pass House
HB5613	Task Force – Criminal Discovery	Pass House
HB6190	Accel Res Court – Extend	Pass House

D. CODE OF CORRECTIONS

SB2263	IDOC ID Card – Expiration	3d Senate?
*SB2282	MSR Condition – Associate w/	Pass Senate
SB2465	Repeal IDOC Cost Reimburse\$	Pass Senate
SB2870	Probation – EM, Drugs & Alcohol	Pass Senate
SB2872	Probation Officer Training	Pass Senate
SB3164	Judicial – Probationable Offense; SPAC	Pass Senate
SB3294	MGT Sentence Credit Expansion	Pass Senate
SB3312	Added Fine for State Police Fund	Pass Senate
HB4326	Hardin Cty Work Camp	Pass House;
HB5003	Veteran's Courts – Multi County	Pass House
HB5771	LWOP Minors – Sex Crimes Nix	Pass House
HB5915	SOS: MSR Temp State ID	Pass House
HB6037	Mitigation – Mental Illness	Pass House

E. CRIME VICTIMS

SB3096	Sex Crime; Protocol; Rape Kit Consent	Pass Senate
HB5472	Victim Comp Act; Victim = Witness	Pass House

F. DOMESTIC VIOLENCE

HB5538	DV – Police Training	Pass House
HB6109	OOP E-filing	Pass House

G. DRUGS

SB210	Bath Salts	Pass Senate;
SB211	OAF \$ - Copy Evidence	Pass Senate
SB212	Drug Forfeitures – Use	Pass Senate;
SB2228	Cannabis Penalty; DUI	Pass Senate;
SB2345	Cannabis Forfeitures – Use	Pass Senate;
SB2601	TASC Probation – Mot to Vacate	Pass Senate
SB2989	Liquor Transport – Comm Carrier	Pass Senate
SB3102	OAF \$ - Restitution	Pass Senate
HB4872	OAF \$ - Copy Evidence	Pass House
HB5593	Opioid Addiction Education	Pass House
HB5594	Drug Court – Opioid Treatment	Pass House

H. JUVENILE LAW (Abuse & Delinquency)

SB2371	DCFS – Fictive Kin	Pass Senate;
SB2512	Juv Ct – Info re Relatives	Pass Senate;
SB2524	DCFS Youth ID Card – No Fee	Pass Senate;
SB2777	DJJ Parole Condition & Revoke	Pass Senate
SB3090	No VOPs to DJJ	2d Senate?
SB3119	DJJ Personnel	Pass Senate
HB114	DJJ – Critical Incident Report	Pass House
HB4425	DCFS-Abse Rpt; in Military	Pass House
HB4447	Parentage Act	Pass House
HB5017	Expunge Non-Adjud; Misd's	Pass House
HB5551	DCFS – Fictive Kin	Pass House

HB5619	Detention Hrng w/in 24 Hours	Pass House
HB5656	DHFS – Grandparent Visitation	Pass House
*HB5665	DCFS – Foster Child – Activities	Pass House

I. ANIMALS

SB2421	Humane Animal Euthanasia	Pass Senate
SB3129	Police Dog Retirement	Pass Senate
*HB5010	Animal Abuse – Exposure	Pass House
HB5995	Police Animal Torture	Pass House
HB6031	Police Animal Retirement	Pass House

J. SEX OFFENDERS

SB2221	Assault – DNA Testing Protocol	Pass Senate;
SB3354	SORA Regis Site – Chicago	Pass Senate
HB5572	SORA Task Force	Pass House
HB6332	Sex Assault DNA Testing	Pass House

K. VEHICLE CODE

SB629	IVC Commercial Veh AV	Pass Senate
SB2261	Relocat Tow Comm; Solicit	Pass Senate
SB2265	Impound Fee \$ Limits	2d Senate?
SB2567	Vehicle Insurance – Verify	Pass Senate
SB2806	Rail Signal Crossing	Pass Senate
SB2808	Salvage Title	Pass Senate
SB2812	MV Theft Prevention Council	Pass Senate
SB2835	Highway – Public School Road	Pass Senate
SB2974	Cert of Title & Registrat Fee	Pass Senate
SB2980	DUI – Rx Drug	3d Senate; t/e
SB2992	Excess Truck Wt – Ag Exempt	Pass Senate
*SB3018	Truck Glider Titling	Pass Senate
SB3177	Avoid Disabled Vehicle	Pass Senate
*HB4334	Vehicle Registration Renewal	Pass House'
HB4369	Boat Racing Cer & Insure	Pass House
HB4387	Pilot License Registration	Pass House
HB4445	SOS Miscellany	Pass House

HB4615	Vehicle Pursuit – Police	Pass House
HB5402	License Plate Special Renewal	Pass House
HB5651	Veh Reg Expire Birthday	Pass House
HB5704	SOS – Seizure Notification	Pass House
HB5723	No Insur – Petty Offense	Pass House
HB5912	Bicycles – Right of Way	Pass House
HB6006	Disabled Vehicle – Move over	Pass House
HB6010	Police Citation Delivery	Pass House
HB6093	Auto Transporter – Length	Pass House
HB6131	Driver Ed – Stop Protocol	Pass House

L. FIREARMS

SB2213	FOID – Mental Dis Note to ISP	Pass Senate
SB3333	FOID Revoke – Order of Protect	3d Senate?
HB6303	Creates Firearm Trafficking	Pass House
HB6331	FOID Revoke – Order of Protection	Pass House

M. OMNIBUS

SB3292	Penalty Down – 1 gr CM; Probation	3d Senate; t/e
HB5540	First 2016 General Revisory	Pass House

N. PUBLIC HEALTH & MENTAL HEALTH

SB2224	Plastic Bag Recycling	3d Senate; t/e
SB2459	MHDDC – Video Hearing	Pass Senate
SB3011	Tobacco & E-Cig < 21	3d Senate; t/e
HB5603	Nursing Home – Electronic Monitor	Pass House
HB5635	MHDDC – Video Testimony	Pass House

O. MISCELLANY

SB2346	Police Training – Computer Use	Pass Senate;
SB2563	Juror – Veteran Opt Out	3d Senate; t/e
SB2767	Cnty Cd – Enforce Ordinance	Pass Senate
SB2833	Cnty Cd – Enforce Judgments	Pass Senate
SB2861	IL Code of Military Justice	Pass Senate
SB2922	Cnty Cd – Admin Adjudication	2d Senate?
SB3034	Donate Jury Fee – Pilot Pgrm	Pass Senate

SB3067	Task Force – Criminal Discovery	Pass Senate
SB3076	IEMA – Police Powers	3d Senate; t/e
SB3162	Civil Pro – E-File Fee	Pass Senate
SB3284	Cnty Cd – Admin Adj; IGA w/	2d Senate; t/e
HR1072	Celebrates Miranda v. Arizona	Adopted House
HB1437	Diversion Racial Impact Data	Pass House
*HB4552	Aging Abuse – Records Access	Pass House
*HB4603	Public Defender Report < 3 Mil	Pass House
HB4715	FOIA; \$ Prevailing Party	Pass House
HB4999	Work Privacy – Social Media	Pass House
HB5808	Drone Taskforce – IDOC	Pass House
HB5910	Fed Law Enforce Agency List	Pass House
*HB6167	Suffrage Rights at 17	Pass House
*HB6324	SPAC to Assist	Pass House
*HB6325	SPAC Members Judicial	Pass House

P. REENTRY ISSUES

SB42	Health Care Licensing	Pass Senate;
SB3005	Park Dist – Crim Backgrnd Check	Pass Senate
HB4391	Twp Office Eligible – No felony	Pass House
*HB4446	College Admission Inquiry (CHRI)	Pass House
*HB4515	Health Care Worker Registry – Waiver	Pass House;
HB4562	Human Rights Act – Real Estate	Pass House
HB5973	Occupational License – Conviction	Pass House
HB6328	Early Expungement & Sealing	Pass House

A SIMPLIFIED GUIDE TO CONSTITUTIONAL ANALYSIS AND CHALLENGE

Wayne Brucar – Supervising Assistant, DuPage Public Defender’s Office

As Don Quixote “impossibly” proposed to fight worldly injustice by making his utopian vision a reality, so can legal injustice be fought by constitutional challenge to the law under which it is wrought. While an extraordinarily difficult endeavor, a properly fashioned constitutional challenge can yield results not only for the case at issue but potentially thousands of others. When championing a criminal case in which defense seems hopeless, an examination and challenge of the law under which prosecution is advanced can often yield a far reaching result.

WHAT IS A CONSTITUTION?

The modern American constitution is based upon the concept of rule of law – that the law should govern a nation or state rather than the capricious will of individuals. As a participant in drafting the 1780 Massachusetts constitution, John Adams forwarded the concept of a government of laws, not men. As such, government should be based on clearly written laws promulgated by those to which they apply.

Popularized in the 19th century by British constitutional scholar A. V. Dicey, the rule of law holds that every citizen is subject to the law, including law makers themselves. It stands in contrast to any system of government where the rulers are held above the law. Government based upon the rule of law is a nomocracy. The framers of the original state and federal constitutions of the United States drafted their respective documents with this as their goal.

A written constitution is a system for implementing the rule of law - a schematic of rules about making rules to exercise power. It creates and governs the relationships between the judiciary, the legislature and the executive branches of government. Inspired by John Locke, the fundamental constitutional principle is that the individual can do anything but that which is forbidden by law, while the state may do nothing but that which is authorized by law. Locke expressed the “radical” view that government is morally obligated to serve people by protecting life, liberty, and property.

Chief Justice Warren Burger in *United States v. Nixon*, 418 U.S. 683 (1974) explained this process:

Our system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.'... (D)eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. 'Notwithstanding the deference each branch must accord the others, the 'judicial Power of the United States' vested in the federal courts by Art. III, s 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case.

Nixon ultimately held the President himself was subject to the subpoena power of Congress.

FEDERAL AND STATE CONSTITUTIONS

American constitutions codify the principles upon which the government they oversee are based and the procedure in which those governments make and enforce laws. They establish protections for violations of their mandate. Their theme is typically set out by their preamble:

The Preamble to the United States Constitution states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The Preamble to the Illinois Constitution states:

We, the People of the State of Illinois - grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors - in order to provide for the health, safety and welfare of the people; maintain a representative and orderly government; eliminate poverty and inequality; assure legal, social and economic justice; provide opportunity for the fullest development of the individual; insure domestic tranquility; provide for the common defense; and secure the blessings of freedom and liberty to ourselves and our posterity - do ordain and establish this Constitution for the State of Illinois.

THE BILL OF RIGHTS

The first 10 Amendments to the United States Constitution make up the Bill of Rights. This is the source of most criminal constitutional litigation. Written by James Madison, the Bill

of Rights lists specific prohibitions on governmental conduct. The Fourteenth Amendment makes the Bill of Rights provisions enforceable against state governments.

The most significant amendments for criminal constitutional litigation are as follows:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article One of the Illinois Constitution is the State version of the federal Bill of Rights. Due Process, Equal Protection, the Right against Self Incrimination, the Right to Representation, Freedom of Speech and Freedom of Religion are the most common arenas for the championing of individual rights.

LOCKSTEP

A person may have wider constitutional protections under the Illinois Constitution than the United States Constitution. The concept of lockstep refers to the requirement of the states to adhere to federal decisional law when it comes to constitutional interpretation. In Illinois, *People v. Caballes*, 221 Ill. 2d 282 (2006) explains the construction of the Illinois constitution in light of the federal constitution and has adopted what it refers to as the “limited lockstep” approach of interpretation:

This approach has been described as one under which a court will “ ‘assume the dominance of federal law and focus directly on the gap-filling potential’ ” of the state constitution...Under this approach, this court will “look first to the federal constitution, and only if federal law provides no relief turn to the state constitution to determine whether a specific criterion—for example, unique state history or state experience—justifies departure from federal precedent.” (We) shall refer to it, for lack of a better term, as our “limited lockstep approach”.

Caballes held a dog sniff of a vehicle during a routine traffic stop did not implicate the privacy clause of the Illinois constitution so federal constitutional precedent would apply.

STANDING

Before bringing a constitutional challenge, a party must be in a position to do so legally. The doctrine of standing is intended to insure that issues are raised and argued only by those parties with a real interest in the outcome of the controversy. *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago*, 189 Ill.2d 200 (2000). To have standing to challenge the constitutionality of a statute, the challenger must have suffered or be in immediate danger of suffering a direct injury as a result of enforcement of the challenged statute. *People v. Greco*, 204 Ill. 2d 400 (2003)

As a general rule, if there is no constitutional violation in the application of a statute to a litigant, they do not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. *Broadrick v. Oklahoma*, 413 U.S. 601. A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. *Gooding v. Wilson*, 405 U.S. 518 (1972).

In *Sierra Club v. Morton*, 405 U.S. 727 (1972) Justice Douglas filed a dissenting opinion to the refusal of the majority to confer standing to an environmental group looking to stop commercial development on a national forest:

The critical question of ‘standing’ would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium

should lead to the conferral of standing upon environmental objects to sue for their own preservation. See *Stone, Should Trees Have Standing?— Toward Legal Rights for Natural Objects*, 45 S.Cal.L.Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King v. Morton*.

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a ‘person’ for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life.

Under Douglas’ theory, a tree could have standing to contest its destruction.

CONSTITUTIONAL INTERPRETATION

There is significant controversy as to how the federal constitution should be interpreted and applied. A constitutional challenge to a law calls into question the authority the legislature has to promulgate it under the proper auspices of the constitution. The two most significant views on how to interpret the constitution when addressing this issue are pragmatism and formalism.

According to the pragmatist (also known as realist) view, the Constitution should be seen as evolving over time as a matter of social necessity. This view was articulated by Justice Holmes in *Missouri v. Holland* 252 U.S. 416 (1920):

(W)hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

From a more modern opinion, Judge Richard Posner commented:

A constitution that did not invalidate so offensive, oppressive, probably undemocratic, and sectarian law (as the Connecticut law banning contraceptives) would stand revealed as containing major gaps. Maybe that is the nature of our, or perhaps any, written

Constitution; but yet, perhaps the courts are authorized to plug at least the most glaring gaps. Does anyone really believe, in his heart of hearts, that the Constitution should be interpreted so literally as to authorize every conceivable law that would not violate a specific constitutional clause? This would mean that a state could require everyone to marry, or to have intercourse at least once a month, or it could take away every couple's second child and place it in a foster home.... We find it reassuring to think that the courts stand between us and legislative tyranny even if a particular form of tyranny was not foreseen and expressly forbidden by framers of the Constitution. (Sex and Reason. Harvard University Press 1992)

Formalism (also known as originalism), on the other hand, posits that the constitution should be interpreted strictly on the intention of the original framers. Justice Clarence Thomas has routinely repudiated the pragmatist doctrine:

Let me put it this way; there are really only two ways to interpret the Constitution – try to discern as best we can what the framers intended or make it up. No matter how ingenious, imaginative or artfully put, unless interpretive methodologies are tied to the original intent of the framers, they have no more basis in the Constitution than the latest football scores. To be sure, even the most conscientious effort to adhere to the original intent of the framers of our Constitution is flawed, as all methodologies and human institutions are; but at least originalism has the advantage of being legitimate and, I might add, impartial. (Speech to the Manhattan Institute October 2008)

Justice Antonin Scalia has expressed similar sentiments. He commented:

(There's) the argument of flexibility and it goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. But you would have to be an idiot to believe that; the Constitution is not a living organism; it is a legal document. It says something and doesn't say other things.... (Proponents of the living constitution want matters to be decided) not by the people, but by the justices of the Supreme Court. They are not looking for legal flexibility, they are looking for rigidity, whether it's the right to abortion or the right to homosexual activity, they want that right to be embedded from coast to coast and to be unchangeable. (Speech to the Federalist Society, February 2006)

These theories clash by operation of the common law, which is built out of precedents which evolve over time. Constitutions are documents setting out a schematic for their orderly enforcement - one that can protect fundamental principles in their application to the group over which they apply. The mechanics get a bit tricky. This is ultimately accomplished by the promulgation of laws by the legislature involved and the application of the appropriate constitution interpretation to those laws by the appropriate courts.

STATUTORY CONSTRUCTION

The rules of statutory construction provide that the starting point in reviewing the constitutionality of statutes is that statutes promulgated by the legislature body at issue are

presumed constitutional and all reasonable doubts must be resolved in favor of upholding their validity. The hearing court must construe acts of the legislature so as to affirm their constitutionality and validity if it can reasonably be done. *People v. Steffens* (1991), 208 Ill.App.3d 252. It is the party challenging the constitutionality of a statute that bears the burden of clearly establishing the constitutional violation. *People v. Bales*, 108 Ill.2d 182 (1985). The only exception is when a statute infringes on a First Amendment Right where the State has the burden of proving constitutionality beyond a reasonable doubt.

When construing a statute, the reviewing court's fundamental objective is to give effect to the legislature's intent. The best indication of legislative intent is the plain and ordinary meaning of the statutory language. However, a reviewing court may also consider the underlying purpose of the statute, the evil sought to be remedied, and the consequences of construing the statute in one manner versus another. It is always presumed that the legislature did not intend to cause absurd, inconvenient, or unjust results. Furthermore, statutes must be construed in the most beneficial way which their language will permit so as to prevent hardship, injustice, or prejudice to the public interest. *People v. Garcia*, 241 Ill.2d 416 (2011)

When the language of the statute is clear and unambiguous, it must be applied as written without resort to extrinsic aids or tools of interpretation. If the language of a statute is ambiguous, determination of legislative intent includes consideration of the purpose of the law, the evils it was intended to remedy, and relevant legislative history. Multiple statutes relating to the same subject are presumed to have been intended to be consistent and harmonious. A statute should be read as a whole and construed so as to give effect to every word, clause, and sentence; a statute must not be read so as to render any part superfluous or meaningless. However, the court is not bound by the literal language of a statute if that language produces absurd or unjust results not contemplated by the legislature. *People v. Hawkins*, 2011 IL 110792 (2011)

BASIC CONSTITUTIONAL CHALLENGE ISSUES

Facial and As Applied

There are two types of constitutional challenge to a law: a facial challenge alleging that on its face, the law is unconstitutional in "every" context and an as applied challenge alleging the law is unconstitutional as to the challenger alone.

In an as applied challenge, the party challenging the statute contends that the application of the statute in the particular context in which the challenger has acted, or in which he proposes to act, would be unconstitutional. An as applied challenge requires a party to show that the statute violates the constitution as it applies to them. *People v. Garvin*, 219 Ill.2d 104 (2006). If a statute is unconstitutional as applied, the State may continue to enforce the statute in circumstances where it is not unconstitutional. *People v. Brady*, 369 Ill. App. 3d 836 (2nd Dist. 2007)

In a facial challenge, the party challenging the statute contends that there is no set of circumstances exist under which it would be validly applied. *People v. Blair*, 2013 IL 114122

(2013) When a statute is held facially unconstitutional, i.e., unconstitutional in all its applications, it is said to be void ab initio. Such a challenge to a statute will be significantly more difficult than challenging a specific application.

In *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015) Justice Sotomayor, speaking for the majority stated facial challenges under the Fourth Amendment are not categorically barred or especially disfavored:

Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a “law is unconstitutional in all of its applications.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). But when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct. For instance, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court struck down a provision of Pennsylvania's abortion law that required a woman to notify her husband before obtaining an abortion. Those defending the statute argued that facial relief was inappropriate because most women voluntarily notify their husbands about a planned abortion and for them the law would not impose an undue burden. The Court rejected this argument, explaining: The “[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.... The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.” *Id.*, at 894, 112 S.Ct. 2791.

Similarly, when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant. If exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional “applications” that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.

Patel clarifies that a law must not be shown to be unconstitutional in “every” context but only where it impacts conduct.

Due Process and Equal Protection

Due process and equal protection are two distinct types of challenges. Each concept requires a different inquiry which emphasizes different factors. The concept of due process emphasizes the fairness of the relationship between the state and the individual, without regard to similarly situated individuals. On the other hand, equal protection places emphasis on the state's disparate treatment of groups of individuals similarly situated. *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. Marshall L. Rev. 95, James W. Hilliard (1996)

Strict Scrutiny and Rational Basis

The first step in challenging statutes under either due process or equal protection requires the same analysis for the standard of review to be applied. It is the nature of the right affected that dictates the level of scrutiny employed in determining whether the statute meets constitutional requirements. *People v. Kimbrough*, 163 Ill.2d 231 (1994).

If the challenged statute implicates a fundamental right or discriminates based on a suspect classification of race or national origin, the court subjects the statute to strict scrutiny analysis and will uphold the statute only if it is narrowly tailored to serve a compelling State interest. If the statute does not affect a fundamental constitutional right or involve a suspect classification, the rational basis test applies, requiring the statute bear a rational relationship to the purpose the legislature intended to achieve by enacting it. *People v. Shephard*, 152 Ill.2d 489 (1992).

A third tier of constitutional scrutiny lies between rational basis and strict scrutiny analyses. Intermediate scrutiny has been applied to review classifications based on gender, illegitimacy, and those classifications that cause certain content-neutral, incidental burdens to speech. To withstand intermediate scrutiny, the legislative enactment must be substantially related to an important governmental interest. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296 (2008).

Due Process - Procedural and Substantive

Under substantive due process, a statute is unconstitutional if it impermissibly restricts a person's life, liberty or property interest. Substantive due process limits the state's ability to act, irrespective of the procedural protections provided. *People v. Cardona*, 2013 IL 114076. Under the banner of its police power, the legislature has wide discretion to fashion penalties for criminal offenses, but this discretion is limited by the constitutional guarantee of substantive due process, which provides that a person may not be deprived of liberty without due process of law. *People v. Madrigal*, 241 Ill. 2d 463 (2011)

Procedural due process asserts that the deprivation at issue is constitutionally invalid because the process leading up to it was deficient. Whereas substantive due process limits the state's ability to act, irrespective of the procedural protections provided, procedural due process governs the procedures employed to deny a person's life, liberty or property interest. A procedural due process claim asserts that the deprivation at issue is constitutionally invalid because the process leading up to it was deficient. *In re Marriage of Miller*, 227 Ill.2d 185 (2007)

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas for the majority clearly illustrated the nature of a substantive constitutional right:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale,

seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Equal Protection

Equal protection requires that similarly situated individuals will be treated in a similar manner. *People v. Reed*, 148 Ill.2d 1 (1992). The equal protection clauses of the United States and Illinois Constitutions do not deny the State the power to draw lines that treat different classes of people differently, but prohibits the State from according unequal treatment to persons placed by a statute into different classes for reasons wholly unrelated to the purpose of the legislation. *People v. Shephard*, 152 Ill.2d 489 (1992).

To state a cause of action for a violation of equal protection, a challenger must allege that there are other people similarly situated to him, that these people are treated differently than him, and that there is no rational basis for this differentiation. *Safanda v. Zoning Board of Appeals*, 203 Ill.App.3d 687 (2nd Dist. 1990). A hearing court uses the same analysis in assessing equal protection claims under both the state and federal constitutions. *People v. Guyton*, 2014 IL App (1st) 110450

In *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954) Chief Justice Warren for the majority held that segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment.

To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

COMMON CONSTITUTIONAL CHALLENGES

Vagueness

Legislation may run afoul of the due process clause if it fails to give adequate guidance to those who would be law abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused. *Musser v. Utah*, 333 U.S. 95 (1948). Vague laws offend several important values.

First, because of the assumption that man is free to steer between lawful and unlawful conduct, laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 (1982).

Overbreadth

The overbreadth doctrine is primarily concerned with facial challenges to laws under the First Amendment. A governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *Zwickler v. Koota*, 389 U.S. 241 (1967) A statute is overly broad if it may reasonably be interpreted to prohibit conduct which is constitutionally protected. *People v. Klick*, 66 Ill.2d 269 (1977).

Overbreadth is a judicially created doctrine which recognizes an exception to the established principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court. The reason for this special rule in First Amendment cases recognizes an overbroad statute might serve to chill protected speech. A person contemplating protected activity might be deterred by the fear of prosecution. The doctrine reflects the conclusion that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Proportional Penalties/Cruel and Unusual Punishment

The United States Constitution and the Illinois Constitution have separate approaches for challenging unconstitutional punishments.

Amendment VIII of the United States Constitution states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. *Estelle v. Gamble*, 429 U.S. 97 (1976)

The cruel and unusual punishments clause prohibits the imposition of inherently barbaric punishments under all circumstances. Under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense. *Weems v. United States*, 217 U.S. 349 (1910).

Cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty, a concept now irrelevant in Illinois. The sentencing classification considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.

In *Solem v. Helm*, 463 U.S. 277 (1983) the United States Supreme Court found a sentence of life imprisonment without possibility of parole imposed upon the defendant who was convicted of uttering no account check for \$100 and who had three prior convictions for third-degree burglary, one prior conviction for obtaining money under false pretenses, one prior conviction for grand larceny, and one prior conviction for third-offense driving while intoxicated, was significantly disproportionate to his crime, and was prohibited by Eighth Amendment, because uttering no account check was a nonviolent crime, defendant's prior felonies were relatively minor, the sentence was the most severe that state could impose on any criminal and only one other state authorized life sentence without parole in circumstances of defendant's case; possibility of commutation under state law did not save defendant's otherwise unconstitutional sentence:

Helm's present sentence is life imprisonment without possibility of parole.²⁴ Barring executive clemency, see *infra*, at 3015-3016, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁵ a fact on which the Court relied heavily. See 445 U.S., at 280-281, 100 S.Ct., at 1142-1143. Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. See n. 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

Harmelin v. Michigan, 501 U.S. 957 (1991) explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. In the rare case in which this threshold comparison leads to an inference of gross disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual. *Graham v. Florida*, 560 U.S. 48 (2010).

Article I, Section 11, of the Illinois Constitution states;

Limitation of Penalties After Conviction

All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

Also known as the Proportional Penalties Clause, it provides that all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. A proportionality challenge contends that the penalty in question was not determined according to the seriousness of the offense. A defendant may challenge a penalty on the basis that it is harsher than the penalty for a different offense that contains identical elements. However, even if the elements are not identical, in Illinois a statute may also be challenged under the Eight Amendment cruel and unusual standard. *People v. Sharpe*, 216 Ill.2d 481 (2005)

CONCLUSION

While the championing of constitutional rights in the face of perceived injustice may seem quixotic, it should never be abandoned. In 1986, Justice White declared Georgia's sodomy statute did not violate the fundamental rights of homosexuals and that the Federal Constitution did not confer the fundamental right upon homosexuals to engage in sodomy. *Bowers v. Hardwick*, 478 U.S. 186 (1986). In 2003, Justice Kennedy overruled *Bowers* and held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional as applied to adult males who had engaged in the consensual act of sodomy in the privacy of their home. *Lawrence v. Texas*, 539 U.S. 558 (2003) In 2015, Justice Kennedy held that the right to marry is a fundamental right inherent in the liberty of the person and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)

It is often said in the defense of a criminal case, "If you don't have the facts, pound the law, if you don't have the law, pound the facts, and if you don't have either, pound the table!" A

better alternative to the defense of a case without facts or law is to pound the constitution. Analyze the statute your client is charged with, see if it's been challenged in a particular constitutional way consistent with your issue and if not attack it. A determination a statute is facially unconstitutional or unconstitutional as it is applied requires both legal and evaluative analysis but also a determination of how it affects human affairs. In doing so, fear not to go tilting at windmills!

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL
CIRCUIT, DU PAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
 Plaintiff,)
)
 v.)
)
)
)
 Defendant.)

No.

**MOTION TO DECLARE 720 ILCS 5/19-1(a) UNCONSTITUTIONAL AS APPLIED TO
DEFENDANT FOR VIOLATION OF DUE PROCESS BY VAGUENESS AND THE
PROPORTIONAL PENALTIES CLAUSE OF THE ILLINOIS CONSTITUTION AND
THE EIGHT AMENDMENT OF THE UNITED STATES CONSTITUTION**

Now comes the Defendant, _____, by his attorney, Assistant Public Defender
-----, and moves this Honorable Court to declare 720 ILCS 5/19-1(a)
unconstitutional as applied to Defendant and dismiss the burglary count pending against
Defendant in the above captioned matter as being in violation of the Due Process Clause of the
United States and Illinois Constitutions due to vagueness and the Proportional Penalties Clause
of the Illinois Constitution. In support thereof, Defendant states as follows:

INTRODUCTION

1. The starting point in reviewing the constitutionality of statutes is that the statutes are
presumed constitutional and all reasonable doubts must be resolved in favor of upholding their
validity. The court must construe acts of the legislature so as to affirm their constitutionality and
validity if it can reasonably be done. *People v. Steffens*, 208 Ill.App.3d 252 (1991). It is the
party challenging the constitutionality of a statute that bears the burden of clearly establishing the
constitutional violation. *People v. Bales*, 108 Ill.2d 182 (1985).

2. The due process clauses of the United States and Illinois Constitutions provide that no
person shall be deprived of “life, liberty, or property, without due process of law.” U.S. Const.
Amend. XIV, Ill. Const., Art. I, § 2.

3. Procedural due process claims concern the constitutionality of the specific procedures
employed to deny a person's life, liberty, or property interest. *People v. R.G.*, 131 Ill.2d 328
(1989); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Procedural due
process rules are meant to protect persons not from the deprivation, but from the mistaken or
unjustified deprivation of life, liberty, or property. *People v. Lang*, 113 Ill.2d 407 (1986);
Fuentes v. Shevin, 407 U.S. 67 (1972). Courts considering procedural due process questions

conduct a three-part analysis: the first asks the threshold question whether there exists a liberty or property interest which has been interfered with by the State; the second examines the risk of an erroneous deprivation of such an interest through the procedures already in place, while considering the value of additional safeguards; and the third addresses the effect the administrative and monetary burdens would have on the state's interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976)

4. If a statute is challenged constitutionally and implicates a *fundamental right* or discriminates based on a suspect classification of race or national origin, the court subjects the statute to “strict scrutiny” analysis and will uphold the statute only if it is narrowly tailored to serve a compelling State interest. If the statute does not affect a fundamental constitutional right or involve a suspect classification, the rational basis test applies, requiring the statute bear a rational relationship to the purpose the legislature intended to achieve by enacting it. *People v. Shephard*, 152 Ill.2d 489, (1992); *People v. Cornelius*, 213 Ill.2d 178 (2004)

5. In an “as-applied” challenge, the party challenging the statute contends that the application of the statute in the particular context in which the challenger has acted, or in which he proposes to act, would be unconstitutional. An “as-applied” challenge requires a party to show that the statute violates the constitution as the statute applies to him. *People v. Garvin*, 219 Ill.2d 104 (2006). If a statute is unconstitutional as applied, the State may continue to enforce the statute in circumstances where it is not unconstitutional. *People v. Brady*, 369 Ill. App. 3d 836 (2nd Dist. 2007)

STATEMENT OF FACTS

6. Defendant is charged with a two count indictment, to wit:

...**Retail Theft** in that said defendant knowingly took possession of certain merchandise offered for sale in a retail mercantile establishment, Burlington Coat Factory...with the intention of depriving the merchant, Burlington Coat Factory, permanently of the use or benefit of such merchandise, without paying the full retail value of such merchandise said defendant having previously been convicted of Retail Theft, in violation of 720 ILCS 5/16-25(a)(1) and 720 ILCS 5/16(f)(2) (see attached Exhibit A)

...**Burglary** in that said defendant knowingly and without authority entered the building of Burlington Coat Factory...with the intent to commit a theft in violation of 720 ILCS 5/19-1(a) (see attached Exhibit B)

7. 720 ILCS 5/16-25(a)(1) **Retail Theft** holds:

(a) A person commits retail theft when he or she knowingly:

- (1) Takes possession of, carries away, transfers or causes to be carried away or transferred any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of

the possession, use or benefit of such merchandise without paying the full retail value of such merchandise...

8. 720 ILCS 5/19-1 **Burglary** holds:

- (a) A person commits burglary when without authority he or she knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle, railroad car, or any part thereof, with intent to commit therein a felony or theft. This offense shall not include the offenses set out in Section 4-102 of the Illinois Vehicle Code.

9. In the store at issue, notice is posted that “shoplifters will be prosecuted”. (See Defendant’s Exhibit C attached hereto)

10. Because of prior convictions, the charged offense becomes a Class 4 felony with a potential extended term sentence of 1 – 6 years in the Illinois Department of Corrections. Defendant is then charged with Burglary and under Defendant’s prior history, he is subjected to Class X sentencing. By being charged with burglary, Defendant is mandatorily required to serve a sentence of 6 to 30 years in the Illinois Department of Corrections if he pleads or is found guilty.

11. Defendant contends that the burglary statute as applied to him violates his due process rights as being unconstitutionally vague in its application to him and in violation of proportional penalties and cruel and unusual punishment as applied to him.

VAGUENESS

12. Legislation may run afoul of the due process clause if it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused. *Musser v. Utah*, 333 U.S. 95 (1948).

13. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law *impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications* (emphasis added). *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 (1982).

14. Acts which are made criminal must be defined with appropriate definiteness. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The

vagueness may be from uncertainty in regard to persons within the scope of the act or in regard to the applicable tests to ascertain guilt. *Winters v. New York*, 333 U.S. 507 (1948)

15. Statutes which lack the requisite definiteness or specificity are commonly held void for vagueness. Such a statute may be pronounced wholly unconstitutional (unconstitutional “on its face”) *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) or, if the statute could be applied to both prohibitable and to protected conduct and its valuable effects outweigh its potential general harm, it could be held unconstitutional as applied. *Palmer v. City of Euclid*, 402 U.S. 544 (1971).

16. *People v. Bales*, 108 Ill. 2d 182 (1985) holds there are two requirements under the due process-vagueness standard when the first amendment is not involved. First, the statute must give a person of ordinary intelligence a reasonable opportunity to know what conduct is lawful and what conduct is unlawful. Thus, the statute must give fair warning as to what conduct is prohibited. Second, the statute must provide standards, so as to *avoid arbitrary and discriminatory enforcement and application by police officers, judges, and juries* (emphasis added). *Grayned v. City of Rockford*, 408 U.S. 104 (1972)

17. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 498 (1982).

18. On information and belief, DuPage County selectively enhances Retail Theft charges with a count of Burglary if the defendant in question has a “significant” criminal record.

19. In the instant case, Defendant is accused of committing a retail theft by entering a Burlington Coat Factory in Villa Park and removing a misdemeanor amount of clothing from the store without paying for said items, a classic instance of retail theft. Because of prior convictions, the charged offense becomes a Class 4 felony with a potential extended term sentence of 1 – 6 years in the Illinois Department of Corrections.

20. Under Defendant’s prior history, he is subjected to Class X sentencing. By being charged with burglary, Defendant is mandatorily required to serve a sentence of 6 to 30 years in the Illinois Department of Corrections if he pleads or is found guilty.

21. Charging Defendant with burglary for what is classically a retail theft is an arbitrary and discriminatory enforcement and application of the burglary statute.

22. *People v. Stepan*, 105 Ill. 2d 310 (1985) in construing the legislative intent of the Illinois burglary and theft statutes held:

The function of the courts in construing statutes is to ascertain and give effect to the intent of the legislature. (*People v. Rink* (1983), 97 Ill.2d 533, 539, 74 Ill.Dec. 34, 455 N.E.2d 64; *People v. Robinson* (1982), 89 Ill.2d 469, 475, 60 Ill.Dec. 632, 433 N.E.2d 674.) In ascertaining the intent of the legislature, it is proper for the court not only to

consider the language employed by the statute, but also to look to the “ ‘reason and necessity for the law, the evils to be remedied, and the objects and purposes to be obtained.’ ” (People v. Alejos (1983), 97 Ill.2d 502, 511, 74 Ill.Dec. 18, 455 N.E.2d 48; see also People v. Bratcher (1976), 63 Ill.2d 534, 543, 349 N.E.2d 31.) Moreover, in construing statutes, the courts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience or injustice. Illinois Crime Investigating Com. v. Buccieri (1967), 36 Ill.2d 556, 561, 224 N.E.2d 236.

23. *Steppan* went on to hold the purpose of the burglary statute is to protect the security and integrity of certain enclosures. On the other hand, the theft statute was enacted to cover an entire range of offenses against property. Thus, the Supreme Court presumed that the General Assembly considered different factors in enacting a penalty provision for theft than for burglary.

24. In reviewing the State practice of charging a burglary on top of a retail theft, *People v. McDaniel*, 2012 IL App 100575 (5th Dist.) held:

The State knows that [defendant] was truly ‘stealing’, rather than committing a burglary. The defense acknowledged at trial that shoplifting was what [defendant] was doing. * * * In reality, the approach taken by the State in this prosecution, and in this appeal, will serve to convert every retail theft into a burglary. Ordinary burglary is a Class 2 felony punishable by three to seven years in prison. 720 ILCS 5/19–1 (West 2012)[sic]; 730 ILCS 5/5–4.5–35(a) (West 2012) [sic]. Standard retail theft of the type occurring in this case (theft not from the person, under \$500) is a Class A misdemeanor punishable by up to 364 days in jail. 720 ILCS 5/16–1(b)(1) (West 2012)[sic]; 730 ILCS 5/5–4.5–55(a) (West 2012)[sic]. The difference in potential penalties is severe. Whether or not it is good public policy to convert potentially all retail theft prosecutions into more serious ones for burglary is a matter of speculation. Whether good or bad though, *that decision does not rest with the police, prosecutors, or even the courts of this state.* (emphasis added) The legislature defines what actions constitute a crime and how the crime should be punished. *People v. Lee*, 167 Ill.2d 140, 145 (1995). If the police and prosecutors of Illinois believe that harsher penalties should be available to punish retail theft, they should put the issue before the legislature and seek change in the laws through legislative amendment. This [c]ourt should not assist the prosecution in creating a de facto amendment to the criminal law by reading ‘remaining within’ so broadly that common shoplifting becomes burglary.”*

*It must be noted that *People v. Bradford*, 2014 IL App (4th) 130288 held contrary, that there is no infirmity in charging a burglary on top of a retail theft. It should be further noted that the Illinois Supreme Court allowed PLA from the appellate court in *Bradford* on March 25, 2015.

25. In charging Defendant with burglary, the State has clearly, under the circumstances of this case, engaged in arbitrary and discriminatory enforcement and application of the burglary statute. In presenting its case to the grand jury, the State engaged in the attached colloquy with its arresting officer. (see grand jury transcript attached here to as Exhibit D) As a result, the Grand Jury found a true bill against Defendant for “knowingly and without authority entered the

building of Burlington Coat Factory...with the intent to commit a theft”. Nowhere in the testimony was anything presented to indicate Defendant *knowingly and without authority* entered Burlington Coat Factory *with intent to commit a theft*. The grand jury was presented with the scenario of a retail theft and by the vagueness of the burglary statute in its application in this context was goaded into indicting on a burglary.

26. In *People v. Miller*, 238 Ill.2d 161 (2010), the Illinois Supreme Court determined that Retail Theft is not a lesser included offense of Burglary by using the “abstract elements” approach. In its analysis, the Court spoke of how to make a determination if two offenses are similar, or in this case, one is a lesser included of the other:

In the absence of statutory direction, we have identified three possible methods for determining whether a certain offense is a lesser-included offense of another: (1) the “abstract elements” approach; (2) the “charging instrument” approach; and (3) the “factual” or “evidence” adduced at trial approach. *Novak*, 163 Ill.2d at 106, 205 Ill.Dec. 471, 643 N.E.2d 762.

Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. *Novak*, 163 Ill.2d at 106, 205 Ill.Dec. 471, 643 N.E.2d 762; *Kolton*, 219 Ill.2d at 360, 302 Ill.Dec. 386, 848 N.E.2d 950. Although this approach is the most clearly stated and the easiest to apply (J. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 *Brook. L. Rev.* 191, 198 (Winter 1984)), it is the strictest approach in the sense that it is formulaic and rigid, and considers “solely theoretical or practical impossibility.” In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense. *Novak*, 163 Ill.2d at 106, 205 Ill.Dec. 471, 643 N.E.2d 762; *Kolton*, 219 Ill.2d at 360, 302 Ill.Dec. 386, 848 N.E.2d 950.

Under the charging instrument approach, the court looks to the charging instrument to see whether the description of the greater offense contains a “broad foundation” or “main outline” of the lesser offense. *Kolton*, 219 Ill.2d at 361, 302 Ill.Dec. 386, 848 N.E.2d 950. The indictment need not explicitly *167 state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations. This is the intermediate approach. *Kolton*, 219 Ill.2d at 361, 302 Ill.Dec. 386, 848 N.E.2d 950.

Lastly, under the evidence or facts approach, the court looks to the facts adduced at trial to determine whether proof of the greater offense necessarily established the lesser offense. This is the broadest and most lenient approach of the three. *Kolton*, 219 Ill.2d at 360–61, 302 Ill.Dec. 386, 848 N.E.2d 950

Thus, under the “evidence or facts” approach, the State has accomplished the charging of two distinct offenses by the vagueness of an offer of identical facts to the charging body.

27. In a review of all defendant's charged with Retail Theft only and those charged with Retail Theft and Burglary, the years 1981 through 2007 show that approximately 0% – 3% of defendants charged with Retail Thief were charged with Burglary. From 2008 through 2015 to date (6/15) show that approximately 10% to 30% of defendants charged with Retail Theft were charged with burglary. There were no corresponding changes to the Retail Theft Statute or Burglary statute during a 20 year period surrounding this shift in charging. (See Exhibit E – the raw number of cases – specific case numbers are available).

28. By its actions, the State has engaged in arbitrary and discriminatory enforcement and application of the burglary statute in its decision to charge Defendant with burglary and its presentation of a constitutionally vague charge to the Grand Jury in the circumstances of this case.

PROPORTIONAL PENALTIES/CRUEL AND UNUSUAL PUNISHMENT

29. Article I, Section 11, of the Illinois Constitution states;

Limitation of Penalties after Conviction

All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

Also known as the Proportional Penalties Clause, it provides that all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. A proportionality challenge contends that the penalty in question was not determined according to the seriousness of the offense. A defendant may challenge a penalty on the basis that it is harsher than the penalty for a different offense that contains identical elements or that a particular offense violates the cruel or degrading standard. *People v. McCarty*, 223 Ill. 2d 109 (2006)

30. Under the State's police power, the legislature has wide discretion to prescribe penalties for defined offenses. However, the legislature's exercise of the police power is constitutional only where the statute in question bears a reasonable relationship to the public interest to be protected, and the means adopted must be a reasonable method of accomplishing the desired objective. *People v. Wick*, 107 Ill.2d 62 (1985). Otherwise stated, "the classification of a crime and the penalty provided [must] be reasonably designed to remedy the evils which the legislature has determined to be a threat to public health, safety and general welfare." *People v. Toliver* 251 Ill.App.3d 1092 (2d Dist. 1993), *People v. Bowen*, 241 Ill.App.3d 608 (4th Dist. 1993). The determination of reasonableness is a matter for the courts. *People v. Morris*, 136 Ill.2d 157 (1990), and the due process test "focuses on the purposes and objectives of the enactment in question" *People v. Johns*, 153 Ill.2d 436 (1992).

31. As previously indicated, *People v. Steppan*, 105 Ill. 2d 310 (1985) held the purpose of the burglary statute is to protect the security and integrity of certain enclosures. On the other hand, the theft statute was enacted to cover an entire range of offenses against property. Thus,

the Supreme Court presumed that the General Assembly considered different factors in enacting a penalty provision for theft than for burglary.

32. As is illustrated by the Grand Jury transcript in this case, the burglary as indicted has the same elements as the retail theft. In fact, there is nothing to distinguish the premise of the retail theft from the premise of the burglary as applied to Defendant.

33. Because a greater penalty can be imposed for burglary than theft under the circumstances of this case, section 19-1(a) is constitutionally infirm. Article I, section 2, of the Illinois Constitution provides: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." Ill. Const. 1970, art. I, sec. 2. The due process guarantee of section 2 requires that penalty provisions be reasonably designed to remedy the particular evil which the legislature has selected for treatment under the statute in question.

34. The Eighth Amendment to the United States Constitution states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.' *Estelle v. Gamble*, 429 U.S. 97 (1976) The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

35. The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. Under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense. *Weems v. United States*, 217 U.S. 349 (1910).

36. The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty. In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check. *Solem v. Helm*, 463 U.S. 277 (1983).

37. *Harmelin v. Michigan*, 501 U.S. 957 (1991) explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. In the rare case in which this threshold comparison leads to an inference of gross

disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual. *Graham v. Florida*, 560 U.S. 48 (2010), as modified (July 6, 2010)

38. *Solem v. Helm*, 463 U.S. 277 (1983) presents a situation closely related to the case at bar.

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N.W.2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft. It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am.Soc.Rev., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender. And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor. All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, *supra*, and the minimum amount covered by the grand larceny statute was fairly small, see n. 3, *supra*.

Helm's present sentence is life imprisonment without possibility of parole. Barring executive clemency, see *infra*, at 3015-3016, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily. See 445 U.S., at 280-281, 100 S.Ct., at 1142-1143. Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. See n. 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

39. Defendant is in a similar position to Victor Hugo's Jean Valjean. In this case, for what the legislature determined to be a misdemeanor theft, Defendant is facing Class X sentencing. Thus, under the facts of this case, where the *statutory* enhancement of misdemeanor retail theft to a felony expands what would normally be a maximum sentence of 364 days to a "double enhanced" maximum of six years with probation still a possibility, the *State's* enhancement of a misdemeanor retail theft to a burglary in these circumstances expands Defendant's sentence to a minimum of 6 years to a maximum of 30 years with no possibility of parole. Surely, the Illinois Legislature did not intend such discretionary enhancement which is clearly disproportional to the offense.

CONCLUSION

WHEREFORE, Defendant moves this Honorable Court to declare 720 ILCS 5/19-1(a) unconstitutional as applied to Defendant and dismiss the burglary count pending against Defendant in the above captioned matter as being in violation of the Due Process Clause of the United States and Illinois Constitutions due to vagueness and the Eight Amendment to the United States Constitution and the Proportional Penalties Clause of the Illinois Constitution.

Respectfully submitted,

**TILTING AT WINDMILLS: FUNDAMENTALS
OF A CONSTITUTIONAL CHALLENGE TO A
CRIMINAL STATUTE**





**WHAT IS UNCONSTITUTIONAL?
I know it when I see it.
Jacobellis v. Ohio, 378 U.S. 184**



INTERPRETATION VERSUS CHALLENGE

- King v. Burwell,
135 S. Ct. 2480 (U.S. 2015)
- Obergefell v. Hodges
135 S. Ct. 2584 (U.S. 2015)

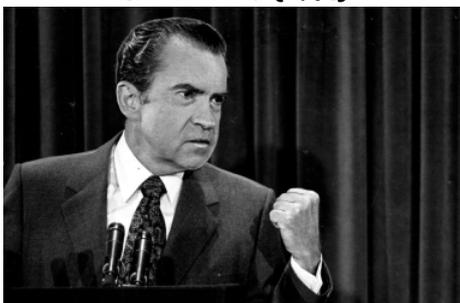
- People v. Bradford
2016 IL 118674 (Ill. 2016)

THE CONSTITUTION



A GOVERNMENT OF LAWS, NOT MEN

United States v. Nixon
418 U.S. 683 (1974)



THE AMENDMENTS



US CONSTITUTION BILL OF RIGHTS HIT LIST

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VIII

Excessive Bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ILLINOIS CONSTITUTION BILL OF RIGHTS HIT LIST

SECTION 2 Due Process and Equal Protection

SECTION 4 Freedom of Speech

SECTION 6 Searches, Seizures, Privacy and Interceptions

SECTION 7 Indictment and Preliminary Hearing

SECTION 8 Rights after Indictment

SECTION 9 Bail and Habeas Corpus

SECTION 10 Self-Incrimination and Double Jeopardy

SECTION 11 Limitation of Penalties After Conviction

SECTION 12 Right to Remedy And Justice

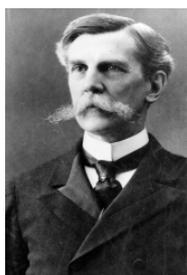
SECTION 13 Trial by Jury

LOCKSTEP

People v. Caballes
221 Ill. 2d 282 (2006)



INTERPRETATION - PRAGMATISM VERSUS FORMALISM



JUSTICE OLIVER WENDELL HOLMES

Missouri v. Holland
252 U.S. 416 (1920)

JUSTICE ANTONIN NINO SCALIA

Speech to Federalist Society
February 2006

STANDING

Chicago Teachers Union v. Board of Education
198 Ill. 2d. 200 (2000)



STATUTORY CONSTRUCTION

People v. Steffans
208 Ill. App. 3d (1991)



AS APPLIED CHALLENGE

People v. Garvin
219 Ill. 2d 104 (2006)



FACIAL CHALLENGE

People v. Blair
2013 IL 114122



IRRELEVANCE IS IRRELEVANT

City of Los Angeles v Patel
135 S. Ct. 2443 (2015)



NATURE OF VIOLATION

DUE PROCESS

EQUAL PROTECTION



LEVEL OF SCRUTINY

People v. Shephard
152 Ill. 2d 489 (1992)

Strict Scrutiny

Rational Basis



DUE PROCESS

Griswold v. Connecticut
381 U.S. 479 (1965)



EQUAL PROTECTION

Brown v. Board of Education
347 U.S. 483 (1954)



OUR HERO



PROSECUTORIAL DISCRETION

People ex rel. Carey v. Cousins
77 Ill. 2d 531 (1979)

PHOTO: THESTREETPHOTOGRAPHY.COM



STATUTORY COMPARISONS

Retail theft - knowingly took possession of certain merchandise offered for sale in a retail mercantile establishment

Less than \$300	Class A	3-6	probationable
Less than \$300, prior conviction	Class 4	1-3	probationable
Over \$300	Class 3	2-5	probationable
Over \$300, emergency exit	Class 2	3-7	probationable
Less than \$300 enhanced/extended	Class 4	1-6	probationable

Theft - knowingly obtains or exerts unauthorized control over property of the owner and intends to deprive the owner permanently of the use or benefit of the property

Less than \$500	Class A	3-6	probationable
Less than \$500, prior conviction	Class 4	1-3	probationable
\$500-\$10,000	Class 3	2-5	probationable
\$10,000-\$100,000	Class 2	3-7	probationable
\$100,000-\$500,000	Class 1	4-15	probationable
\$500,000-\$1,000,000	Class 1	4-15	non-probationable
*More than \$1,000,000	Class X	6-30	non-probationable

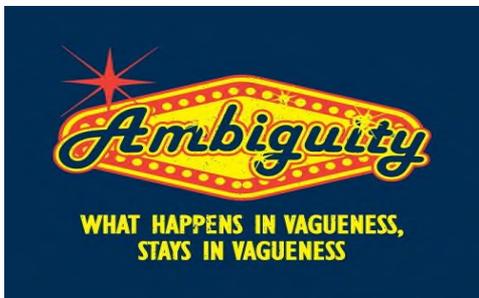
Burglary - without authority he or she knowingly enters or without authority remains within a building, house trailer, watercraft, aircraft, motor vehicle, railroad car, or any part thereof, with intent to commit therein a felony or theft.

1 st	Class 2	3-7	probationable
2 nd	Class 2	3-14	non-probationable
3 rd	Class X	6-30	non-probationable

***INELIGIBLE FOR TASC**

VAGUENESS

**Musser v. Utah
333 U.S. 95 (1948)**



INVITEE

One who has come upon the land at the express or implied invitation of a possessor for the purpose of transacting business.



NOTICE

**Grayned v. City of Rockford
408 U.S. 104**



Article I, Section 11, of the Illinois Constitution states;

Limitation of Penalties after Conviction

All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

The Eighth Amendment to the United States Constitution states:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

People v. McDaniel, 2012 IL App (5th) 100575

The State knows that defendant was truly 'stealing', rather than committing a burglary. In reality, the approach taken by the State in this prosecution, and in this appeal, will serve to convert every retail theft into a burglary. The difference in potential penalties is severe. Whether or not it is good public policy to convert potentially all retail theft prosecutions into more serious ones for burglary is a matter of speculation. Whether good or bad though, that decision does not rest with the police, prosecutors, or even the courts of this state. The legislature defines what actions constitute a crime and how the crime should be punished. If the police and prosecutors of Illinois believe that harsher penalties should be available to punish retail theft, they should put the issue before the legislature and seek change in the laws through legislative amendment. This court should not assist the prosecution in creating a de facto amendment to the criminal law by reading 'remaining within' so broadly that common shoplifting becomes burglary.

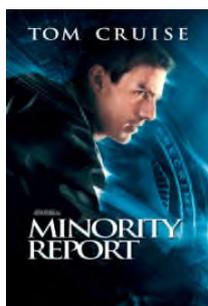
People v. Bradford, 2014 IL App 130288 (4th Dist.)

A defendant's remaining within a building open to the public is "without authority" if it is accompanied by an intent to steal. The authority to remain in a public building, or any part of the building, extends only to persons who remain in the building for a purpose consistent with the reason the building is open. A defendant's entry is "without authority" if it is accompanied by a contemporaneous intent to steal, so too must a defendant's remaining be "without authority" if it also is accompanied by an intent to steal

People v. Bradford, 2016 IL 118674 (Ill. 2016)

In determining legislative intent, we may consider the consequences of construing the statute one way or another, and we presume that the legislature did not intend to create absurd, inconvenient, or unjust results. The State's application of burglary to retail thefts is unworkable, has the potential to lead to absurdity, and is inconsistent with both the retail theft statute and the historical development of the burglary statute. The appellate court's vague conclusion that "a defendant who develops an intent to steal after his entry into a public building may be found guilty of burglary by unlawfully remaining" encompasses nearly all cases of retail theft, effectively negating the retail theft statute. This statute was enacted in 1975 for the purpose of combating the growing problem of retail theft in Illinois. 720 ILCS 5/16-25 (West 2012); 79th Ill. Gen. Assem., House Proceedings, June 11, 1975, at 113 (statements of Representative Sangmeister). The law takes into account various factors, including the value of the property taken, a defendant's prior record, and how the property was acquired. Based on these factors, shoplifting can be charged in a range from a Class A misdemeanor to a Class 2 felony. Standard retail theft of the type occurring in this case is a Class A misdemeanor punishable by up to 364 days in jail. The burglary statute, on the other hand, does not consider any of these proportionality factors and classifies ordinary burglary as a Class 2 felony, punishable by three to seven years in prison.

**WHO ARE THE BRAIN
POLICE?**





Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses

Richard M. Thompson II
Legislative Attorney

April 3, 2013

Congressional Research Service

7-5700

www.crs.gov

R42701

Summary

The prospect of drone use inside the United States raises far-reaching issues concerning the extent of government surveillance authority, the value of privacy in the digital age, and the role of Congress in reconciling these issues.

Drones, or unmanned aerial vehicles (UAVs), are aircraft that can fly without an onboard human operator. An unmanned aircraft system (UAS) is the entire system, including the aircraft, digital network, and personnel on the ground. Drones can fly either by remote control or on a predetermined flight path; can be as small as an insect and as large as a traditional jet; can be produced more cheaply than traditional aircraft; and can keep operators out of harm's way. These unmanned aircraft are most commonly known for their operations overseas in tracking down and killing suspected members of Al Qaeda and related organizations. In addition to these missions abroad, drones are being considered for use in domestic surveillance operations to protect the homeland, assist in crime fighting, disaster relief, immigration control, and environmental monitoring.

Although relatively few drones are currently flown over U.S. soil, the Federal Aviation Administration (FAA) predicts that 30,000 drones will fill the nation's skies in less than 20 years. Congress has played a large role in this expansion. In February 2012, Congress enacted the FAA Modernization and Reform Act (P.L. 112-95), which calls for the FAA to accelerate the integration of unmanned aircraft into the national airspace system by 2015. However, some Members of Congress and the public fear there are insufficient safeguards in place to ensure that drones are not used to spy on American citizens and unduly infringe upon their fundamental privacy. These observers caution that the FAA is primarily charged with ensuring air traffic safety, and is not adequately prepared to handle the issues of privacy and civil liberties raised by drone use.

This report assesses the use of drones under the Fourth Amendment right to be free from unreasonable searches and seizures. The touchstone of the Fourth Amendment is reasonableness. A reviewing court's determination of the reasonableness of a drone search would likely be informed by location of the search, the sophistication of the technology used, and society's conception of privacy in an age of rapid technological advancement. While individuals can expect substantial protections against warrantless government intrusions into their homes, the Fourth Amendment offers less robust restrictions upon government surveillance occurring in public places including areas immediately outside the home, such as in driveways or backyards. Concomitantly, as technology advances, the contours of what is reasonable under the Fourth Amendment may adjust as people's expectations of privacy evolve.

In the 113th Congress, several measures have been introduced that would restrict the use of drones at home. Several of the bills would require law enforcement to obtain a warrant before using drones for domestic surveillance, subject to several exceptions. Others would establish a regime under which the drone user must file a data collection statement stating when, where, how the drone will be used and how the user will minimize the collection of information protected by the legislation.

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Introduction

The prospect of drone use in domestic surveillance operations has engendered considerable debate among Americans of various political ideologies.¹ Opponents of drone surveillance have complained that the use of unmanned aircraft on American soil infringes upon fundamental privacy interests and the ability to freely associate with others.² Some are specifically concerned about the possibility of turning military technology inward to surveil American citizens.³ Proponents have responded by emphasizing their potential benefits, which may include protecting public safety, patrolling our nation's borders, and investigating and enforcing environmental and criminal law violations.⁴

The tension between security and privacy interests is not new, but has been heightened by the explosion of surveillance technology in recent decades.

The tension between security and privacy interests is not new, but has been heightened by the explosion of surveillance technology in recent decades. Police officers who were once relegated to naked eye observations may soon have, or in some cases already possess, the capability to see through walls or track an individual's movements from the sky.⁵ One might question, then: What is the proper balance between the necessity of the government to keep people safe and the privacy needs of individuals? As some polls suggest, while the public supports drone usage in certain circumstances, they are less enthusiastic about using them as part of routine law enforcement activity.⁶

¹ The term "domestic drone surveillance" as used in this report is designed to cover a wide range of government uses including, but not limited to, investigating and deterring criminal or regulatory violations; conducting health and safety inspections; performing search and rescue missions; patrolling the national borders; and conducting environmental investigations.

² Letter from Representatives Edward J. Markey and Joe Barton, Co-Chairmen of the Congressional Bi-Partisan Privacy Caucus, to Michael P. Huerta, Acting Administrator of the Federal Aviation Administration (April 19, 2012) ("[I]n addition to benefits, there is also the potential for drone technology to enable invasive and pervasive surveillance without adequate privacy protections."), available at <http://markey.house.gov/sites/markey.house.gov/files/documents/4-19-12.Letter%20FAA%20Drones%20.pdf>; AMERICAN CIVIL LIBERTIES UNION, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT 1 (2011), available at <https://www.aclu.org/files/assets/protectingprivacyfromaerialsurveillance.pdf>.

³ Mark Brunswick, *Spies in the sky signal new age of surveillance*, STARTRIBUNE (July 22, 2012, 6:26 a.m.), available at <http://www.startribune.com/local/163304886.html?refer=y>.

⁴ Some state and local officials have expressed interest in employment of drones for public safety and law enforcement purposes. See, e.g., Brianna Carter, *Gov. Bob McDonnell supports drones policing Virginia*, ABC NEWS (May 30, 2012), available at <http://www.wjla.com/articles/2012/05/gov-bob-mcdonnell-supports-drones-policing-virginia-76464.html>; *Unmanned Aircraft Systems Within the Homeland: Security Game Changer? Hearing Before the Subcomm. on Oversight, Investigations, and Management of the H. Comm. on Homeland Sec.*, 112th Cong. 3 (2012) (statement of William R. McDaniel, Chief Deputy, Montgomery County Sheriff's Office, Conroe, TX) ("UAV systems for public safety agencies are extremely viable, effective, and economical means to enhance the public safety response to critical incidents.").

⁵ The Supreme Court remarked in *Kyllo v. United States*, 533 U.S. 27, 37 (2001):

The ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development. The National Law Enforcement and Corrections Technology Center, a program within the United States Department of Justice, features on its Internet Website projects that include a 'Radar-Based Through-the-Wall Surveillance System,' 'Handheld Ultrasound Through the Wall Surveillance,' and a 'Radar Flashlight' that 'will enable law officers to detect individuals through interior building walls.'

⁶ *U.S. Supports Some Domestic Drone Use, But Public Registers Concern About Own Privacy* 1, Monmouth University Polling Institute (June 12, 2012), available at <http://www.monmouth.edu>.

The Fourth Amendment to the United States Constitution safeguards Americans' privacy and prevents excessive government intrusion by prohibiting "unreasonable searches and seizures."⁷ Courts have long grappled with how to apply the text of this 18th century provision to 20th century technologies. Although the Supreme Court has the final say in the interpretation of the Fourth Amendment and other constitutional safeguards,⁸ Congress and, in many cases, the President are free to institute more stringent restrictions upon government surveillance operations.⁹

This report first explores the potential uses of drones in the domestic sphere by federal, state, and local governments. It then surveys current Fourth Amendment jurisprudence, including cases surrounding privacy in the home, privacy in public spaces, location tracking, manned aerial surveillance, and those involving the national border. Next, it considers how existing jurisprudence may inform current and proposed drone uses. It then describes the various legislative measures introduced in the 113th Congress to address the legal and policy issues surrounding drones. Finally, it briefly identifies several alternative approaches that may constrain the potential scope of drone surveillance.

Background, Uses, and Drone Technology

Drones, also known as unmanned aerial vehicles (UAVs), are aircraft that do not carry a human operator and are capable of flight under remote control or autonomous programming.¹⁰ An unmanned aircraft system (UAS) is the entire system, including the aircraft, digital network, and personnel on the ground.¹¹ Drones can range from the size of an insect—sometimes called nano drones or micro UAVs—to the size of a traditional jet.¹²

Drones are perhaps most commonly recognized from their missions abroad, including to target and kill suspected members of Al Qaeda and related groups, but they might be used for a variety of other purposes, including for both commercial and law enforcement activities within the United States. In fact, the FAA predicted that 30,000 unmanned aircraft could be flying in U.S. skies in less than 20 years.¹³ One reason for this expansion has been a push by Congress for a

⁷ U.S. CONST. amend IV.

⁸ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”).

⁹ In reaction to the Supreme Court’s ruling in *United States v. Miller*, 425 U.S. 435 (1976), that the privacy of an individual’s bank records were generally not protected by the Fourth Amendment, Congress enacted the Right to Financial Privacy Act, P.L. 95-630, 92 Stat. 3697 (codified at 12 U.S.C. §3401-3422), creating a statutory protection for such records.

¹⁰ DEP’T OF DEFENSE, *DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 331 (2012). Unless expressly mentioned, the terms “unmanned aerial vehicle,” “UAV,” “unmanned aircraft system,” “UAS,” and “drone” are used interchangeably in this report.

¹¹ *Id.*

¹² See CRS Report R42136, *U.S. Unmanned Aerial Systems*, by Jeremiah Gertler, for a description of the various types of drones currently operated in the United States.

¹³ FEDERAL AVIATION ADMINISTRATION, *FAA AEROSPACE FORECAST: FISCAL YEARS 2010-2030*, at 48 (2010), available at http://www.faa.gov/data_research/aviation/aerospace_forecasts/2010-2030/media/2010%20Forecast%20Doc.pdf. The FAA has noted that “Federal agencies are planning to increase their use of UAS’s. State and local governments envision using UAS’s to aid in law enforcement and firefighting. Potential commercial uses are also possible, for example, in real estate photography or pipeline inspection. UAS’s could perform some manned aircraft missions with less noise and fewer emissions.” *Id.*

faster integration of UAVs into U.S. airspace.¹⁴ Most recently, as part of the FAA Modernization and Reform Act of 2012, Congress mandated that the Federal Aviation Administration (FAA) “develop a comprehensive plan to safely accelerate the integration of civil unmanned aircraft systems into the national airspace system.”¹⁵ This plan shall provide for integration of UAVs by September 2015.

Drones have been employed domestically by federal, state, and local governments in a range of circumstances. The Department of Homeland Security (DHS) uses them to police the nation’s borders to deter unlawful border crossings by unauthorized aliens, criminals, and terrorists, and to detect and interdict the smuggling of weapons, drugs, and other contraband into the country.¹⁶ Within DHS, Customs and Border Protection’s (CBP’s) Office of Air and Marine (OAM) has flown missions to support federal and state agencies such as the Federal Bureau of Investigation (FBI), the Department of Defense (DOD), Immigration and Customs Enforcement (ICE), the U.S. Secret Service, and the Texas Rangers.¹⁷ According to a recent disclosure by the FAA, several local police departments, state and private colleges, and small cities and towns have also received FAA Certificates of Authorization (COAs) to fly unmanned aircraft domestically.¹⁸ Recently, a police force in North Dakota conducted the nation’s first drone-assisted arrest.¹⁹ DHS, in conjunction with local law enforcement agencies, has been testing drone capabilities in a host of other situations including detecting radiation, monitoring a hostage situation, tracking a gun tossed by a fleeing suspect, firefighting, and finding missing persons.²⁰

Currently, drones can be outfitted with high-powered cameras,²¹ thermal imaging devices,²² license plate readers,²³ and laser radar (LADAR).²⁴ In the near future, law enforcement

¹⁴ See, e.g., Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, §5102, 118 Stat. 3638, 3732 (requesting that DHS test the feasibility of using unmanned aircraft to patrol the northern border of the United States).

¹⁵ FAA Modernization and Reform Act of 2012, P.L. 112-95, §332, 126 Stat. 11, 73.

¹⁶ See CRS Report RS21698, *Homeland Security: Unmanned Aerial Vehicles and Border Surveillance*, by Chad C. Haddal and Jeremiah Gertler.

¹⁷ The OAM mission is to “protect the American people and the Nation’s critical infrastructure through the coordinated use of integrated air and marine forces.” DEP’T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, CBP’S USE OF UNMANNED AIRCRAFT SYSTEMS IN THE NATION’S BORDER SECURITY 2 (2012). These forces are used to “detect, interdict, and prevent acts of terrorism and the unlawful movement of people, illegal drugs, and other contraband toward or across U.S. borders.” *Id.*

¹⁸ There are over 300 total, including those issued to the following entities: City of Herrington, KS; Cornell University; Department of Energy Idaho National Laboratory; Eastern Gateway College Community College—Steubenville, OH; Miami-Dade Police Department; Mississippi Department of Marine Resources; North Little Rock Police Department, AR; Ogden Police Department, UT; Ohio University; Seattle Police Department; Texas A&M—Texas Engineering Experiment Station; Texas Department of Public Safety; Texas State University; University of Connecticut; University of Florida; U.S. Department of Agriculture Agricultural Research Service; Utah State University; Virginia Tech. See Unmanned Aircraft Systems, Federal Aviation Administration, <http://www.faa.gov/about/initiatives/uas/>.

¹⁹ *New age of surveillance*, *supra* note 3.

²⁰ Brian Bennett, *Drones Tested as Tools for Police and Firefighters*, LOS ANGELES TIMES (August 5, 2012 5:00 A.M.), <http://www.latimes.com/news/nationworld/nation/la-na-drones-testing-20120805,0,6483617.story>.

²¹ The U.S. Army recently acquired a 1.8 gigapixel camera for use on its drones. This camera offers 900 times the pixels of a 2 megapixel camera found in some cell phones. It can track objects on the ground 65 miles away from an altitude of 20,000 feet. *US Army unveils 1.8 gigapixel camera helicopter drone*, BBC NEWS (December 29, 2011 6:11 p.m.), <http://www.bbc.com/news/technology-16358851>.

²² Infrared cameras, also known as thermal imaging, can see objects through walls based on the relative levels of heat produced by the objects. See Draganflyer X6, Thermal Infrared Camera, <http://www.draganfly.com/uav-helicopter/draganflyer-x6/features/flir-camera.php>.

²³ This sensor can recognize and permit drones to track vehicles based on license plate numbers. Customs and Border (continued...)

organizations might seek to outfit drones with facial recognition or soft biometric recognition, which can recognize and track individuals based on attributes such as height, age, gender, and skin color.²⁵ As explained below, the relative sophistication of drones contrasted with traditional surveillance technology may influence a court's decision whether domestic drone use is lawful under the Fourth Amendment.

Fourth Amendment "Search" Jurisprudence

The Fourth Amendment's story is one of continuity and change. Core values such as privacy and protection from excessive and arbitrary government intrusion are always within its sweep. A continuing question, though, is how the demands of its protection apply to an ever-changing society in which new and pervasive forms of technology are increasingly common. Although there are numerous rules and exceptions throughout the Supreme Court's Fourth Amendment jurisprudence, this section will explore those most pertinent to domestic drone use.

In short, the Fourth Amendment regulates when, where, and how the government may conduct searches and seizures. The Amendment provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"²⁶ The Fourth Amendment does not apply to all government acts, but only to those that constitute a search. So when does government monitoring constitute a Fourth Amendment "search" for which a warrant is generally required? Initially, courts' assessment focused on the specific area being investigated. Consider the 1928 case *Olmstead v. United States*.²⁷ There, the Supreme Court held that police wiretaps of the defendant's home telephone did not constitute a Fourth Amendment search because the police did not trespass onto Olmstead's property to intercept his conversation.²⁸ The Court's thinking at the time was that if the person's home, tangible property, or papers were not physically invaded, then no search in the constitutional sense occurred. Almost 40 years later, the Court shifted focus from property to privacy interests.²⁹ In *Katz v. United States*, decided in 1967, the Court held that an FBI agent's use of a bug to listen to the private conversations of Mr. Katz while in a telephone booth violated his Fourth Amendment rights.³⁰ Although he was in a public telephone booth and there was no physical invasion, the Court noted that what a person "seeks to preserve private, even in an area accessible to the public, may be constitutionally protected."³¹ One of the modern Fourth

(...continued)

Protection Today, Unmanned Aerial Vehicles Support Border Security (July 2004), http://www.cbp.gov/xp/CustomsToday/2004/Aug/other/aerial_vehicles.xml.

²⁴ This sensor produces three-dimensional images, and has the capability to see through trees and foliage. U.S. ARMY, UAS CENTER FOR EXCELLENCE, "EYES OF THE ARMY" US ARMY ROADMAP FOR UNMANNED AIRCRAFT SYSTEMS 2010-2035, at 83 (2010).

²⁵ See Clay Dillow, *Army Developing Drones that Can Recognize Your Face from a Distance*, POPSCI (September 28, 2011), 5:01 p.m., available at <http://www.popsci.com/technology/article/2011-09/army-wants-drones-can-recognize-your-face-and-read-your-mind>.

²⁶ U.S. CONST. amend IV.

²⁷ *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

²⁸ *Id.*

²⁹ *Katz v. United States*, 389 U.S. 347, 351 (1967).

³⁰ *Id.* at 359.

³¹ *Id.* at 351.

Amendment tests relied upon by courts in assessing whether government monitoring constitutes a “search” derives from Justice Harlan’s concurrence in *Katz*. It considers whether the person has a subjective expectation of privacy in the area to be searched and whether society is prepared to deem that expectation reasonable.³²

Although the Court said in *Katz* that the Fourth Amendment “protects people not places,”³³ Justice Harlan noted that determining what “protection it affords people ... requires reference to a ‘place.’”³⁴ And as Justice Scalia observed when writing for a majority of the Court in *United States v. Jones*, a Fourth Amendment search occurs, “at a minimum,” where “the Government obtains information by physically intruding on a constitutionally protected area.”³⁵ The majority in *Jones* indicated that the reasonable expectation of privacy test was never intended to replace the property-based approach used in earlier cases, but merely augment it.³⁶ So where do individuals enjoy the most Fourth Amendment protection? The least? Why does the location dictate the level of protection? And how does technology affect society’s expectation of privacy?

When analyzing domestic drone use under the Fourth Amendment, a reviewing court may be informed by cases surrounding privacy in the home, privacy in public spaces, location tracking, manned aerial surveillance, those involving the national border, and warrantless searches under the special needs doctrine.

³² *Id.* at 361 (Harlan, J., concurring).

³³ *Id.* at 351.

³⁴ *Id.* at 361 (Harlan, J., concurring); *see also* *Oliver v. United States*, 466 U.S. 170 (1984).

We have frequently acknowledged that privacy interests are not coterminous with property rights. E. g., *United States v. Salvucci*, 448 U.S. 83, 91 (1980). However, because “property rights reflect society’s explicit recognition of a person’s authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual’s expectations of privacy are reasonable.” *Rakas v. Illinois*, 439 U.S. 128, 153 (1978) (Powell, J., concurring). Indeed, the Court has suggested that, insofar as “[one] of the main rights attaching to property is the right to exclude others, ... one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.” *Id.*, at 144, n. 12.

Oliver, 466 U.S. at 189-90.

³⁵ *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012).

³⁶ *Id.*

Privacy in the Home

The home has always held a central place in American life, and remains the area accorded the greatest Fourth Amendment protection.³⁷ The Fourth Amendment protects this zone of privacy by ensuring that “the right of the people to be secure in their ... houses ... against unreasonable search and seizure, shall not be violated[.]”³⁸ In most instances, the Supreme Court has rigorously adhered to this safeguard.³⁹ For instance, although police officers may make a warrantless arrest of an individual for a felony offense committed in public,⁴⁰ they may not step inside his home without a warrant, barring any recognized exception.⁴¹

“The right of the people to be secure in their ... houses ... against unreasonable search and seizure, shall not be violated[.]” U.S. CONST. amend IV.

In addition to a physical entry and search of the home, police are likewise prohibited from using certain technology to pierce this zone of privacy. In *Kyllo v. United States*, government agents used a thermal-imaging device to determine heat patterns inside the home of Danny Kyllo.⁴² The Court began with the presumption that a warrantless search of a home is unreasonable.⁴³ Ultimately, the Court protected this “realm of guaranteed privacy” by holding that obtaining information about the inside of a home that could not otherwise be obtained except by entering the home, through the use of technology not in “general public use,” is a “search” covered by the Fourth Amendment.⁴⁴

The home, however, does not provide an absolute shield against government surveillance. As Justice Harlan emphasized in *Katz*, “[A] man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the plain view of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited.” Indeed, in certain instances, police may use their natural senses to conduct warrantless searches of the inside of a home.⁴⁵ To fall under this exception—known as the “plain view” doctrine—the police must be in a lawful vantage point when they conduct the surveillance, and the incriminating nature of the evidence must be readily apparent.⁴⁶

³⁷ DANIEL SOLOVE, UNDERSTANDING PRIVACY 59 (2008).

³⁸ U.S. CONST. amend IV.

³⁹ *Silverman v. United States*, 365 U.S. 505, 512 (1961) (“At the very core stands the right of a man to retreat into his own home and be free from unreasonable government intrusion.”).

⁴⁰ *United States v. Watson*, 423 U.S. 411 (1976).

⁴¹ *Payton v. New York*, 445 U.S. 573, 603 (1980). This protection not only covers traditional houses, but apartments, *Clinton v. Virginia*, 377 U.S. 158 (1963), and motel rooms, *Stoner v. California*, 376 U.S. 483 (1964).

⁴² *Kyllo v. United States*, 533 U.S. 27, 29-30 (2001).

⁴³ *Id.* at 31.

⁴⁴ *Id.* at 34.

⁴⁵ In one case, police observation of marijuana plants through a crack in the house’s siding did not constitute an unlawful search. *United States v. Hammett*, 236 F.3d 1054, 1061 (9th Cir. 2001). In another, the court held that the police officer’s observation of contraband through the front dining room window was not unlawful. *United States v. Taylor*, 90 F.3d 903, 909 (4th Cir. 1996).

⁴⁶ *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

Curtilage and Open Fields

Once an individual moves from the confines of the home, he is entitled to different Fourth Amendment considerations. Depending on a host of varying factors, areas outside of the home may be considered “curtilage” or “open fields.”⁴⁷ The curtilage is the area immediately surrounding the home—an area the Court has granted similar protections as the inside of the home.⁴⁸ To determine if an area is curtilage, a court will look at how close the area is to the home; whether the area is within a fence surrounding the home; how the area is used; and whether the area is protected from observation by passersby.⁴⁹ Although an area may be deemed curtilage—as with the home—it is not veiled with unconditional constitutional protection. As the Court noted in one aerial surveillance case:

The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible.⁵⁰

On the other hand, the area outside the curtilage is sometimes considered “open fields,” which “do not provide the setting for those intimate activities that the Amendment is intended to shelter from governmental interference or surveillance,”⁵¹ and thus are not given similar Fourth Amendment protections. Differentiating between the two is no easy task. In one case, for example, the Ninth Circuit Court of Appeals determined that the defendant’s driveway was not curtilage as he had taken no affirmative steps to block it from observation by passers-by.⁵² Furthermore, in the fly-over cases discussed *infra*, the Supreme Court has permitted similar searches in both open fields and the curtilage, to some extent eliminating any constitutional difference between the two.

Manned Aerial Surveillance

In a series of cases that provide the closest analogy to UAVs, the Supreme Court addressed the use of *manned* aircraft to conduct domestic surveillance over residential and industrial areas. In each, the Court held that the fly-over at issue was not a search prohibited by the Fourth Amendment, as the areas surveilled were open to public view.

⁴⁷ *United States v. Hester*, 365 U.S. 57 (1924) (distinguishing between the doctrines of curtilage and open fields).

⁴⁸ The Court has defined curtilage as “the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

⁴⁹ *United States v. Dunn*, 480 U.S. 294, 301 (1987).

⁵⁰ *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

⁵¹ *Dow Chemical Co. v. United States*, 476 U.S. 227, 234-35 (1986) (quoting *Oliver*, 466 U.S. at 179).

⁵² *Maisano v. Welcher*, 940 F.2d 499 (9th Cir. 1991).

In *California v. Ciraolo*, police received a tip that an individual was growing marijuana in his backyard next to his suburban home.⁵⁴ Because two fences blocked their view of the yard, officers flew a fixed-wing aircraft at an altitude of 1,000 feet over the property to conduct a visual inspection. From this vantage point, the officers readily identified with the naked eye marijuana plants growing in the defendant's yard. The Court held that the defendant's expectation of privacy in the area immediately surrounding his home was not reasonable, since "what a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection."⁵⁵ "Any member of the public flying in this airspace who glanced down could have seen everything these officers observed," the Court remarked.⁵⁶ Much weight was placed on the fact that the plane was at all times in navigable airspace as defined by federal statute.⁵⁷

"What a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection."⁵³

Similarly, in *Florida v. Riley*, local police received a tip that an individual was growing marijuana in a greenhouse located 10 to 20 feet away from his mobile home.⁵⁸ The officers could not see the contents of the greenhouse from the ground, so they flew a helicopter over the defendant's backyard at an altitude of 400 feet. While overhead, an officer saw marijuana plants through a crack in the greenhouse roof. Because the helicopter, like the plane in *Ciraolo*, was in navigable airspace—where any member of the public could have flown—the Court did not consider this a search for which a warrant was required.⁵⁹

In the final case of the series, *Dow Chemical v. United States*, the Court was asked whether a theory of "industrial curtilage" would prevent a government agency from conducting aerial surveillance over a 2,000-acre commercial plant.⁶⁰ There, after Dow Chemical Co. refused access to the Environmental Protection Agency (EPA), the EPA hired a commercial aerial photographer to take photos of the facility using a precision aerial mapping camera. Having ruled out the argument that the areas surrounding an industrial complex are entitled to the same protection as similar areas surrounding a home, the Court concluded that photographing the plant from navigable airspace was not a search.⁶¹

Government Tracking

Like the aerial surveillance cases, individuals have reduced—and in some contexts no—Fourth Amendment protection from government tracking of their travel in public places. This has permitted the government to conduct warrantless tracking of a vehicle's movements while traveling on public streets. However, once people enter a private residence, the tracking must

⁵³ *Ciraolo*, 476 U.S. at 213.

⁵⁴ *Id.* at 207.

⁵⁵ *Id.* at 213.

⁵⁶ *Id.* at 213-214. It should be noted that although the police did take photographs with a 35-millimeter camera, the warrant relied on naked-eye observations and not the photographs. Thus, the holding was based on the naked-eye observations, unaided by the camera.

⁵⁷ *Id.* at 213 (citing 49 U.S.C. §1304).

⁵⁸ *Florida v. Riley*, 488 U.S. 445, 448 (1989).

⁵⁹ *Id.*

⁶⁰ *Dow Chemical Co.*, 476 U.S. 227.

⁶¹ *Id.* at 239

cease. Also, using technology to perform pervasive tracking might not meet Fourth Amendment muster.

Consider, for example, these two government tracking cases, *United States v. Knotts* and *United States v. Karo*.⁶² In both cases, the government hid a location monitoring device in an item that was then given to the suspects. In *Knotts*, the police tracked the suspect's movements solely while traveling on public roadways.⁶³ The Court held that people have no reasonable expectation of privacy in their movements on public streets. As such, no Fourth Amendment search occurred, thus no warrant was required. By contrast, in *Karo*, the police tracked a beeper device on public streets *and* while the beeper was in a private residence—a “location not open to visual surveillance.”⁶⁴ “Indiscriminate monitoring of property that has been withdrawn from public view,” the Court declared, “would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.”⁶⁵ The Court held the search unlawful.

Although surveillance in public is generally not considered a search, pervasive tracking may cross the line. Take, for instance, the Supreme Court's recent decision in the GPS tracking case *United States v. Jones*.⁶⁶ In that case, the Court held that the attachment and monthlong tracking of a GPS device on an individual's vehicle constituted a trespass, and hence a Fourth Amendment search.⁶⁷ The Court grounded its decision in the property-based approach to assessing what constitutes a “search” under the Fourth Amendment, which had been more prevalent in the late 19th and early 20th century cases involving relatively unsophisticated technology.

The Court's focus on whether the attachment of a tracking device constitutes a trespass triggering Fourth Amendment protections is not necessarily applicable to drone surveillance. However, in two separate concurring opinions that together made up five members of the Court, an alternative framework was proposed that may have more far-reaching implications for the domestic use of UAVs.

Justice Alito, concurring in the Court's judgment, and joined by Justices Ginsburg, Breyer, and Kagan, would have held that “the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.” Justice Sotomayor, joining the controlling opinion in *Jones*, but also concurring separately, noted that although following people for a short period of time conveys little information about them, tracking an

Tracking an individual for an extended period “reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”⁶⁸

⁶² *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Karo*, 468 U.S. 705 (1984).

⁶³ *Knotts*, 460 U.S. at 279. The Court reiterated that its analysis was based on the fact that the beeper was tracked within the vicinity of a home, not actually in the home. *Id.*

⁶⁴ *Karo*, 468 U.S. at 714.

⁶⁵ *Id.* at 715.

⁶⁶ *United States v. Jones*, 132 S. Ct. 945 (2012).

⁶⁷ *Id.* at 949. See generally CRS Report R42511, *United States v. Jones: GPS Monitoring, Property, and Privacy*, by Richard M. Thompson II.

⁶⁸ *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

individual for an extended period “reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”⁶⁹ Thus, the length of time an individual is kept under surveillance and the breadth of data collected through such surveillance may inform a reviewing court whether a particular surveillance practice constitutes a Fourth Amendment search.⁷⁰

Border Searches

Even more so than surveillance of public places generally, law enforcement agencies are granted significant deference to conduct surveillance at or near American borders. The federal government has a significant interest in protecting American borders from crossings by persons attempting to enter unlawfully, drug trafficking, and, perhaps most importantly, the transit of weapons and persons seeking to do harm to American people and infrastructure.

Congress has granted federal law enforcement agencies significant search powers at the border. Section 287 of the Immigration and Nationality Act (INA), codified at 8 U.S.C. Section 1357, authorizes immigration officers to conduct warrantless searches of any vessel within a reasonable distance from the United States border and any vehicle within 25 miles from a border for the “purpose of patrolling the border to prevent the illegal entry of aliens into the United States.”⁷¹ Similarly, 19 U.S.C. Section 482 authorizes customs officers to search vehicles and persons on which or whom they have reasonable cause to believe are carrying goods unlawfully into the United States.⁷²

The Supreme Court has likewise acknowledged this federal interest in the borders, observing that “[t]he Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”⁷³ Again, the touchstone in every Fourth Amendment case is whether the search is *reasonable*.⁷⁴ The Court observed in *United States v. Montoya De Hernandez* that “the Fourth Amendment balance of reasonableness is qualitatively different at the international border.”⁷⁵ “Routine searches,” the Court continued, “are not subject to any requirement of reasonable suspicion, probable cause, or warrant.”⁷⁶ “Routine” searches have included pat downs for weapons or contraband,⁷⁷ the use of drug sniffing dogs,⁷⁸ and the

⁶⁹ *Id.*

⁷⁰ Although the two concurring opinions in *Jones* arguably do not constitute binding precedent, lower courts have combined them as a possible alternative holding. See *United States v. Hanna*, No. 11-20678-CR, 2012 WL 279435, at *3 (S.D. Fla. Jan. 3, 2012) (analyzing the issue of Fourth Amendment standing to contest GPS surveillance under both the trespass theory and *Katz*’s privacy test); *State v. Zahn*, No. 25584, 2012 WL 862707 (S.D. Mar. 14, 2012) (holding that both the trespass approach and the mosaic theory can apply to GPS tracking); *but see United States v. Bradshaw*, No. 1:11-CR-257, 2012 WL 774964 (N.D. Ohio Mar. 8, 2012) (noting that the *Jones* majority did not adopt the mosaic theory).

⁷¹ 8 U.S.C. 1357.

⁷² 19 U.S.C. §482. In the 112th Congress, the House of Representatives introduced H.R. 1505, which would enlarge CBP’s authority to secure U.S. borders on federal land. H.R. 1505; see also John S. Adams, *Border bill would expand Homeland Security powers*, USA TODAY (September 26, 2011).

⁷³ *United States v. Flores-Montano*, 541 U.S. 149, 152 (2004).

⁷⁴ *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973).

⁷⁵ *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985).

⁷⁶ *Id.*

⁷⁷ *United States v. Beras*, 183 F.3d 22, 24 (1st Cir. 1999) (ruling that pat down of defendant’s legs was routine search).

⁷⁸ *United States v. Kelly*, 302 F.3d 291, 294-95 (5th Cir. 2002).

inspection of luggage.⁷⁹ By contrast, “non-routine” searches are those that go beyond a limited intrusion, and require the government official to have (at a minimum) “reasonable suspicion” of wrongdoing.⁸⁰ Prolonged detentions,⁸¹ strip searches,⁸² and body cavity searches⁸³ have all been considered non-routine searches.

Unlike searches directly at the border, the Court has shown more reticence in granting law enforcement unfettered discretion to conduct searches near, but not directly at, the border. In *Almeida-Sanchez v. United States*, the defendant’s vehicle was stopped and searched by U.S. Border Patrol agents 25 miles north of the U.S.-Mexico border.⁸⁴ The agents had neither a warrant nor probable cause, nor even reasonable suspicion, to conduct the search. The government argued that the search was permissible under Section 287 of the Immigration and Nationality Act. A federal statute, the Court noted, cannot trump the Constitution. The Court refused to permit this suspicionless search, as it was conducted neither at the border nor at its “functional equivalent.”⁸⁵

Warrants, Suspicionless Searches, and Special Needs

The baseline rule in Fourth Amendment cases is that police must obtain a warrant to search an individual or their property in all but a few limited instances.⁸⁶ This rule ensures that an independent judicial officer, rather than a police officer in the field, is determining whether there is probable cause to conduct a search or seizure.⁸⁷ Over time, however, the Court has loosened this warrant requirement in instances where a strict showing of individualized suspicion of probable cause would hinder the government from addressing health and safety concerns.⁸⁸ In two lines of overlapping cases—administrative searches and “special needs” cases—the Court has balanced the individual’s privacy interest against the government’s interest to determine if a

⁷⁹ *United States v. Okafor*, 285 F.3d 842 (9th Cir. 2002).

⁸⁰ *Montoya De Hernandez*, 473 U.S. at 541.

⁸¹ *Id.*

⁸² *United States v. Asbury*, 586 F.2d 973, 975 (1978).

⁸³ *United States v. Ogberaha*, 771 F.2d 655, 657 (2d Cir. 1985).

⁸⁴ *Almeida-Sanchez v. United States*, 413 U.S. 266, 267-68 (1973).

⁸⁵ *Id.* at 272-73 (“For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents from border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico would clearly be the functional equivalent of a border search.”). Like *Almeida-Sanchez*, Border Patrol agents in *United States v. Brignoni-Ponce* stopped an individual’s vehicle as part of a roving patrol solely because the occupants appeared to be of Mexican descent, with no proof of illegal activity. *United States v. Brignoni-Ponce*, 422 U.S. 873, 874-75 (1975). Again, the Court struck down this practice of suspicionless stops, remarking that “[i]n the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well.” *Id.* at 882.

⁸⁶ *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (citation omitted).

⁸⁷ *Johnson v. United States*, 333 U.S. 10, 14 (1948) (“The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.”). Probable cause is found when, looking at the “totality-of-the-circumstances” there “is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

⁸⁸ Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 256 (2011).

warrant or any individualized suspicion is required.⁸⁹ These two theories permit law enforcement to conduct dragnet searches in certain instances.

Suspicionless general searches are ones “in which the government searches or seizes every person, place, or thing in a specific location or involved in a specific activity based only on a showing of a generalized government interest.”⁹⁰ Suspicionless searches have been conducted at the national border,⁹¹ private businesses,⁹² and police roadblocks.⁹³ In the roadblock cases, the Court has balanced the government’s interest against the individual’s privacy interest to determine whether police may stop and question drivers without a warrant or any suspicion of criminal wrongdoing. In *Michigan Dep’t of State Police v. Sitz*, the Court upheld the suspicionless stopping and examination of drivers for intoxication at sobriety checkpoints.⁹⁴ The Court reasoned that the high incidence of drunk driving balanced against the minimal intrusion on drivers permitted suspicionless checkpoints. In *City of Indianapolis v. Edmund*, however, law enforcement was not permitted to set up a drug interdiction checkpoint.⁹⁵ The Court held that searches such as this violated the Fourth Amendment when their “primary purpose” is “to uncover evidence of ordinary criminal wrongdoing.”⁹⁶ Justice O’Connor observed that if this type of roadblock were allowed “the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.”⁹⁷

Application of Fourth Amendment to Drone Surveillance

As evidenced by the foregoing, the constitutionality of domestic drone surveillance may depend upon the context in which such surveillance takes place. Whether a targeted individual is at home, in his backyard, in the public square, or near a national border will play a large role in determining whether he is entitled to privacy. Equally important is the sophistication of the technology used by law enforcement and the duration of the surveillance. Both of these factors will likely inform a reviewing court’s reasoning as to whether the government’s surveillance constitutes an unreasonable search in violation of the Fourth Amendment.

⁸⁹ Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989).

⁹⁰ Primus, *supra* note 88, at 263.

⁹¹ United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976).

⁹² United States v. Biswell, 406 U.S. 311, 317 (inspection of gun dealer’s storeroom) (“We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.”).

⁹³ Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 455 (1990).

⁹⁴ *Id.* at 455.

⁹⁵ City of Indianapolis v. Edmund, 531 U.S. 32 (2000).

⁹⁶ *Id.* at 42.

⁹⁷ *Id.*

Location of Search

Based on existing case law, it is reasonable to assume that surveillance of an individual while in his home—an area accorded the greatest Fourth Amendment protection—using technology not in general public use would be an unlawful search absent a search warrant. The Supreme Court in *Kyllo* was particularly concerned about law enforcement’s use of powerful equipment to peer inside an individual’s home. Currently, UAVs carry high-megapixel cameras and thermal imaging, and will soon have the capacity to see through walls and ceilings.⁹⁸ These technologies are not generally available to the public, and under current jurisprudence, their use by law enforcement would probably constitute a search covered by the Fourth Amendment. However, the use of low-powered cameras or other unsophisticated technology to view people and objects in plain view while in their home might not trigger Fourth Amendment protections. The rationale for this notion is that officers are not required to avert their eyes when they see illegal activity in plain view, especially when the subject of the search has taken no affirmative efforts to hide their activity from public view.

Moving beyond the home, it is unclear whether circumstances exist in which the area immediately surrounding the home—for instance, a backyard, a swimming pool, a deck, or a porch—would receive similar protections as the interior of the home if surveilled by drones or other aerial vehicles.⁹⁹ Although the Supreme Court has recited on many occasions that a person located in a home’s curtilage is accorded similar privacy protections as when inside the home, the aerial surveillance cases arguably constitute an exception to this general principle. In the two aerial cases, *Riley* and *Ciraolo*, the area surveilled was within close proximity of the home, yet the police surveillance at altitudes of 400 and 1,000 feet were not considered a search.

Based on the aerial surveillance cases, it may be reasonable to presume a warrant would *not* be required (nor, perhaps, any suspicion, for that matter) to conduct drone surveillance of most public places for a relatively short period of time. The Supreme Court remarked in *Ciraolo* that the “Fourth Amendment simply does not require the police traveling in the public airways at [1,000 feet] to obtain a warrant to observe what is visible to the naked eye.”¹⁰⁰ However, the rarity of drone flights may distinguish their use from surveillance by the piloted aircraft used in the three aerial cases decided by the Court. All three of these cases were premised on the fact that each aircraft was flying in navigable airspace, and that these flights were not “sufficiently rare” to provide a reasonable expectation of privacy in the area to be searched. To this point, Justice White remarked in *Riley* that “there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent’s claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude.”¹⁰¹ Presently, use of UAVs in U.S. airspace is considerably less common. The FAA has issued only approximately 300 licenses for drone use in U.S. airspace.¹⁰² The general public

⁹⁸ EYES OF THE ARMY, *supra* note 24.

⁹⁹ See generally, Paul McBride, *Beyond Orwell: The Application of Unmanned Aircraft Systems in Domestic Surveillance Operations*, 74 J. Air. L. & Com. 627, 655-56 (“This implies that although the curtilage does not benefit from the absolute protection afforded to the interior of the home, there is a close relationship between the two, and that technology directed at the home and its curtilage will be subjected to a more skeptical analysis than would be applied in a case involving open fields or industrial areas.”).

¹⁰⁰ *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

¹⁰¹ *Florida v. Riley*, 488 U.S. 445, 451-52 (1989).

¹⁰² Federal Aviation Administration, *supra* note 18.

would likely find it exceedingly unusual for a drone to fly over their homes taking surveillance photographs. This rarity might factor into a reviewing court's determination of whether individuals have a legitimate expectation of privacy from various forms of drone surveillance while in a public place.¹⁰³

The federal government's authority to use unmanned aircraft is undoubtedly at its maximum near U.S. borders. One of the federal government's only affirmative duties is to protect citizens from external harm.¹⁰⁴ This includes securing the borders. The Court has hesitated from interfering with the performance of this duty, and it would in all likelihood demonstrate the same deference when it comes to the use of UAVs. Moreover, the Supreme Court's rulings in border cases have all involved active searches—either a physical search of a vehicle or stopping and questioning a vehicle's passenger. Surveillance by UAVs, on the other hand, may be considered more passive and therefore may be even less likely to run afoul of Fourth Amendment requirements. Drone surveillance does not require any physical manipulation of a person or his things. UAVs also do not require the seizure of a person for any period of time (though drone surveillance may lead to law enforcement physically apprehending a person who is seen engaging in suspected illegal activity). However, the Court has shown some reticence about giving law enforcement carte blanche search power at the border. Roving vehicle patrols and indiscriminate searches in *Almeida-Sanchez v. United States* and *United States v. Brignoni-Ponce* were deemed unconstitutional.¹⁰⁵ It is unclear whether this reticence would extend to drone surveillance along the border if it were to become significantly widespread.

Technology Used

Like location, the technology used by UAVs may be a decisive factor considered by courts in determining whether individuals have a legitimate expectation of privacy in the object or area of the challenged drone search. Technological developments make it increasingly easy to share and acquire personal information about others, oftentimes without their direct knowledge or consent. As surveillance technology advances and becomes ever-present in Americans' lives, people's conception of privacy may tend to oscillate. Justice Scalia, writing for the majority in *Kyllo v. United States*, remarked on this trend:

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example, ... the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.¹⁰⁶

Justice Alito, joined by three other Justices in his *United States v. Jones* concurrence, likewise observed:

¹⁰³ *Ciraolo*, 476 U.S. at 212. However, in determining society's privacy expectations, a reviewing court might also take into consideration the proliferation of aerial mapping such as Google Maps and Google Earth conducted by private actors. See generally Google Maps, Street View, <http://www.google.com/streetview>.

¹⁰⁴ U.S. CONST. art. IV, §4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion[.]").

¹⁰⁵ *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

¹⁰⁶ *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001).

The *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations. But technology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.¹⁰⁷

The crucial question, then, is whether drones have the potential to be significantly more invasive than traditional surveillance technologies such as manned aircraft or low-powered cameras—technologies that have been upheld in previous cases. In this vein, some have asked whether using sophisticated digital platforms on a drone is any different from attaching the same instrument to a lamppost or traditional aircraft.¹⁰⁸ Take, for example, the tracking of license plates. Currently, many states and municipalities employ automatic license plate readers (ALPRs), which are usually mounted on police vehicles or stationary objects along the streets, to take a snapshot of a license plate as a car drives by, and store this information in a large database for possible later use by law enforcement.¹⁰⁹ It is alleged that these devices can be used to track a person's movements when police aggregate the data from a multitude of ALPR stations.¹¹⁰ A majority of the reviewing federal circuit courts have held that a person has no reasonable expectation of privacy in his license plate number.¹¹¹

However, it appears that no federal court has addressed the constitutionality of the use of ALPRs (whether attached to a drone, manned vehicle, or a stationary device), as opposed to plate numbers collected by a human observer. Nonetheless, the question remains whether attaching an ALPR—or any similar sophisticated technology—to a drone would alter the constitutionality of its use by law enforcement. Some say yes, arguing that the sophistication of drone technology in and of itself “present[s] a unique threat to privacy.”¹¹² Drones are smaller, can fly longer, and can be built more cheaply than traditional aircraft. For instance, defense firm Lockheed Martin's Stalker—a small, electrically powered drone—can be recharged from the ground using a laser.¹¹³ It now has a flight time of more than 48 hours. As this technology advances, it is reported that

¹⁰⁷ *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring).

¹⁰⁸ Stanford Law Review Symposium, *Drones—Privacy Paradox: Privacy and its Conflicting Values* (February 2, 2012), <http://cyberlaw.stanford.edu/multimedia/drones-privacy-paradox-privacy-and-its-conflicting-values-video>.

¹⁰⁹ *ACLU Seeks Details on Automatic License Plate Readers in Massive Nationwide Request*, AMERICAN CIVIL LIBERTIES UNION (July 31, 2012), <http://www.aclu.org/technology-and-liberty/aclu-seeks-details-automatic-license-plate-readers-massive-nationwide-reque-4>.

¹¹⁰ *Id.*

¹¹¹ *See, e.g., Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir. 1999) (“A motorist has no privacy interest in her license plate number. Like the area outside the cartilage [sic] of a dwelling, a car’s license plate number is constantly open to the plain view of passersby.”) (internal citation and quotation marks omitted); *United States v. Ellison*, 462 F.3d 557, 562 (6th Cir. 2006) (“No argument can be made that a motorist seeks to keep the information on his license plate private. The very purpose of a license plate number, like that of a Vehicle Identification Number, is to provide identifying information to law enforcement officials and others.”); *United States v. Castaneda*, 494 F.3d 1146, 1151 (9th Cir. 2007); *United States v. Walraven*, 892 F.2d 972, 974 (10th 1989).

¹¹² *Using Unmanned Aircraft Systems Within the Homeland: Security Game Changer? Hearing Before the Subcomm. on Oversight, Investigations, and Management of the H. Comm. on Homeland Sec.*, 112th Cong. 3 (2012) (statement of Amie Stepanovich, Counsel, Electronic Privacy Information Center).

¹¹³ Mark Brown, *Lockheed uses ground-based laser to recharge drone mid-flight*, WIRED (July 12, 2012), available at <http://www.wired.co.uk/news/archive/2012-07/12/lockheed-lasers>.

some drones could theoretically “stay in the air forever.”¹¹⁴ Unlike a stationary license plate tracker or video camera, drones can lock on a target’s every move for days, and possibly weeks and months. This ability to closely monitor an individual’s movements with pinpoint accuracy may raise more significant constitutional concerns than some other types of surveillance technology.

Furthermore, the technology and sophistication of drones may mark a considerable departure from the traditional technologies used in the three manned aerial surveillance cases decided by the Supreme Court. First, all three holdings in *Ciraolo*, *Riley*, and *Dow Chemical* were premised on naked-eye searches. Chief Justice Burger remarked in *Dow Chemical*: “It may well be, as the government concedes, that surveillance of private property using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.”¹¹⁵ As noted above, the sophistication of surveillance technology available to drones, such as facial recognition or laser radar which can “see” through walls, may lead some to question the relevance of prior Fourth Amendment jurisprudence concerning more rudimentary forms of surveillance technology.

The sophistication of drones also has the ability to break down any practical privacy safeguard. In the pre-computer age, the greatest privacy protections were neither constitutional nor statutory, but practical. Putting officers everywhere in the community cost too much for local police departments. This acted as a natural barrier to excessive police presence. Drones are not hindered by similar limitations. This is similar to the expansion of GPS technology observed by the five concurring Justices in *United States v. Jones*. There, Justice Sotomayor, writing for herself, noted that because GPS technology was cheaper and performed in a surreptitious manner, it “evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility.”¹¹⁶ Justice Alito sounded a similar note in *Jones*: “Traditional surveillance for any extended period of time was difficult and costly and therefore rarely undertaken. [GPS devices] make long-term monitoring relatively easy and cheap.”¹¹⁷ Instead of putting more officers in the field, a police force could put drones in the sky for potentially less expense. Already, drones with video capabilities can be purchased from private vendors for a few hundred dollars.¹¹⁸ This access to inexpensive technology may significantly reduce budgetary concerns that once checked the government from widespread surveillance.

This access to inexpensive technology may significantly reduce budgetary concerns that once checked the government from widespread surveillance.

The duration and pervasiveness of drone surveillance—two factors closely associated with the technology employed by law enforcement—may also influence a court’s Fourth Amendment analysis. Consider the Fifth Circuit Court of Appeals’ ruling in *United States v. Cuevas-Sanchez*.¹¹⁹ In that case, federal law enforcement agents suspected the defendant was using his home as a drop house for drug traffickers. After obtaining a court order, the agents installed a

¹¹⁴ *Id.* Lockheed has reportedly been working on extending flight times from days to months. *Id.*

¹¹⁵ *Dow Chemical*, 476 U.S. at 238.

¹¹⁶ *United States v. Jones*, 132 S. Ct. 945, 956 (Sotomayor, J., concurring) (internal quotation marks omitted).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., Apple Store, Parrot AR.Drone 2.0, <http://store.apple.com/us/product/H8859ZM/A/parrot-ar-drone-2-0>. This aircraft, is remote-controlled by an iPhone or iPad, and has a high-definition camera that can take both pictures and videos. *Id.*

¹¹⁹ *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987).

video camera on a utility pole overlooking the defendant's 10-foot high fence surrounding his back yard. The officers observed the removal of drugs from the gas tanks of several cars parked in the defendant's yard. Based on these observations, the defendant was arrested whereupon the police seized a large amount of marijuana. At trial, the defendant moved to suppress the evidence on the basis that the warrant was defective. However, the court first addressed whether the video surveillance was a search under the Fourth Amendment. In determining that the video surveillance was a search, the panel noted that this "was not a one-time overhead flight or a glance over the fence by a passer-by.... It does not follow that *Ciraolo* authorizes any type of surveillance whatever just because one type of minimally-intrusive aerial observation is possible."¹²⁰ Drones have the capability to stay in the air for long periods of time and can hover in one location. Similar to the mounted camera in *Cuevas-Sanchez*, this permits law enforcement to employ drones in prolonged surveillance operations. This capability may sway a court's determination of whether certain types of warrantless drone surveillance are compatible with the Fourth Amendment.

Warrant Requirement and Suspicionless Drone Searches

Applying the Fourth Amendment to drones requires application of the threshold question: was there a search? Again, this will depend on all the factors discussed above—the area of the search, the technology used, and whether society would respect the target's expectation of privacy in the place searched. If a reviewing court concludes that the drone surveillance was not a search, neither a warrant nor any degree of individualized suspicion would be required. If, however, the court concluded there was a search, then a court would ask whether a warrant is required, if one of the exceptions apply, and what level of suspicion, if any, is necessary to uphold the search.

Unless a meaningful distinction can be made between drone surveillance and more traditional forms of government tracking, existing jurisprudence suggests that a reviewing court would likely uphold drone surveillance conducted with no individualized suspicion when conducted for purposes other than strict law enforcement. The Supreme Court has hesitated from interfering in what they see as the executive's function in protecting the health and safety of the American population. As Chief Justice Rehnquist noted in the *Sitz*, the Court does not want

to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with serious public danger.... [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.¹²¹

The Court may defer to law enforcement officials in the drone context also. There are countless instances where the government may seek to utilize drones for health and safety purposes that go beyond mere law enforcement. These may include firefighting, search and rescue missions, traffic safety enforcement, or environmental protection. If, on other hand, surveillance is conducted primarily to enforce the law, a warrant may be required, unless one of the exceptions to the warrant requirement applies.

¹²⁰ *Id.* at 251.

¹²¹ *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453-54 (1990).

Legislative Proposals in the 113th Congress to Constrain Domestic Use of Drones

Although the Supreme Court is the final arbiter of the Constitution, Congress and the President can provide for greater regulation of drones than the Fourth Amendment requires. Congress has taken such steps over the years to address government surveillance of communications in transit (commonly known as wiretapping),¹²² communications in storage such as e-mails,¹²³ bank records,¹²⁴ and health records,¹²⁵ among a host of other private information. Several measures have been introduced in the 113th Congress that would restrict the domestic use of drones, and establish arguably greater constraints on their usage than the Fourth Amendment requires. Several bills were prompted by a general concern for potential privacy intrusions by federal and state law enforcement and executive agencies.¹²⁶

Preserving Freedom from Unwarranted Surveillance Act of 2013 (H.R. 972)

In the 113th Congress, Representative Austin Scott has introduced the Preserving Freedom from Unwarranted Surveillance Act of 2013 (H.R. 972).¹²⁷ This bill would require any entity acting under the authority of the federal government to obtain a warrant based upon probable cause before conducting drone surveillance to investigate violations of criminal law or regulations. There are, however, several exceptions to this warrant requirement: (1) to prevent or deter illegal entry of any persons or illegal substances into the United States; (2) when a law enforcement officer possesses reasonable suspicion that under particular circumstances “swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect, or destruction of evidence” is necessary; or (3) when the Secretary of Homeland Security determines credible intelligence indicates a high risk of a terrorist attack by a specific individual or organization. H.R. 972 would create a right to sue for any violation of its prohibitions.

Preserving American Privacy Act of 2013 (H.R. 637)

Representative Ted Poe introduced the Preserving American Privacy Act of 2013 (H.R. 637), which would restrict the domestic use of drones.¹²⁸ To begin, the bill regulates surveillance of “covered information,” which means “information that is reasonably likely to enable

¹²² Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 87 Stat. 197, 211 (codified at 18 U.S.C. §2510-2522).

¹²³ Electronic Communications Privacy Act of 1986, P.L. 99-508, 100 Stat. 1848 (codified at 18 U.S.C. §2701-2712).

¹²⁴ Right to Financial Privacy Act, P.L. 95-630, 92 Stat. 3697 (codified at 12 U.S.C. §3401-3422).

¹²⁵ Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, 110 Stat. 1936.

¹²⁶ Several bills introduced in the 113th Congress aim to restrict the government’s use of drones to lethally target U.S. citizens on U.S. soil. See, e.g., No Armed Drones Act of 2013, H.R. 1083, 113th Cong (1st Sess. 2013); S. 505, 113th Cong. (1st Sess. 2013). These bills, however, are beyond the scope of this report.

¹²⁷ H.R. 972, 113th Cong. (1st Sess. 2013). Senator Rand Paul filed similar legislation in the 112th Congress, but has not re-introduced it in the 113th Congress. See S. 3287, 112th Cong. (2d Sess. 2012). Unlike H.R. 972, S. 3287 included an express exclusionary rule for evidence obtained in violation of the act.

¹²⁸ H.R. 637, 113th Cong. (1st Sess. 2013).

identification of an individual” or “information about an individual’s property that is not in plain view.” H.R. 637 would create a general prohibition on the use of drones to collect covered information or disclose covered information so collected. It does, however, provide the following exceptions:

- *Warrant.* Law enforcement obtains a court-issued warrant and serves a copy of the warrant on the target of the search within 10 days of the surveillance. However, notice need not be provided if it would jeopardize an ongoing criminal or national security investigation.
- *General Order.* Law enforcement obtains a court-issued order based upon “specific and articulable facts showing a reasonable suspicion of criminal activity and a reasonable probability” that the operation “will provide evidence of such criminal activity.” The order may authorize surveillance in a stipulated public area for no more than 48 hours which may be renewed for a total of 30 days. Notice of the operation must be provided to the target no later than 10 days after the operation. Alternatively, notice may be provided not less than 48 hours before the operation in a major publication, on a government website, or with signs posted in the area of the operation.
- *Border searches.* Operation is within 25 miles of national border.
- *Consent.* The targeted individual has provided prior written consent.
- *Emergencies.* Emergency situation involves danger of death or serious physical injury, conspiratorial activities threatening the national security interest, or conspiratorial activities characteristic of organized crime, where a warrant cannot be obtained with due diligence. Law enforcement must then obtain a warrant within 48 hours of such operation.

Any evidence obtained in violation of this act is not admissible in any trial or adjudicative proceeding. Additionally, H.R. 637 requires any governmental entity applying for a certificate or license to operate a UAS to also file a data collection statement with the Attorney General. The statement must include the following:

- Purpose for which the UAS will be used
- Whether the UAS is capable of collecting covered information
- The length of time the information will be retained
- A point of contact for citizen feedback
- The particular unit of governmental entity responsible for safe and appropriate operation of the UAS
- The rank and title of the individual who may authorize the operation of the UAS
- The applicable data minimization policies barring the collection of covered information unrelated to the investigation of crime and requiring the destruction of covered information that is no longer relevant to the investigation of a crime
- Applicable audit and oversight procedures.

Under H.R. 637, the Attorney General may request that the Secretary of Transportation revoke the license or certificate of any entity that fails to file a data collection statement. Further, H.R. 637

contains a provision permitting administrative discipline against an officer who intentionally violates a provision of this act.

Drone Aircraft Privacy and Transparency Act of 2013 (H.R. 1262)

Representative Ed Markey introduced the Drone Aircraft Privacy and Transparency Act of 2013 (H.R. 1262).¹²⁹ This bill would amend the FAA Modernization and Reform Act of 2012 to create a comprehensive scheme to regulate government actors' use of drones, including data collection requirements and enforcement mechanisms.

First, this bill would require the Secretary of Transportation, with input from the Secretary of Commerce, the Chairman of the Federal Trade Commission, and the Chief Privacy Officer of the Department of Homeland Security, to study any potential threats to privacy protections posed by the introduction of drones in the national airspace. Next, the bill would prohibit the FAA from issuing a license to operate a drone unless the application for such use included a "data collection statement." This statement would require the following items:

- A list of individuals who would have the authority to operate the drone
- The location in which the drone will be used
- The maximum period it will be used
- Whether the drone would be collecting information about individuals

If the drone will be used to collect personal information, the statement must include the following:

- The circumstances in which such information will be used
- The kinds of information collected and the conclusions drawn from it
- The type of data minimization procedures to be employed
- Whether the information will be sold, and if so, under what circumstances
- How long the information would be stored
- Procedures for destroying irrelevant data.

The statement must also include information about the possible impact on privacy protections posed by the operation under that license and steps to be taken to mitigate this impact. Additionally, the statement must include the contact information of the drone operator; a process for determining what information has been collected about an individual; and a process for challenging the accuracy of such data. Finally, the FAA would be required to post the data collection statement on the Internet.

In addition to the data collection statement, any law enforcement agency which operates a drone must file with the FAA a "data minimization statement." This statement must include policies adopted by the agency that

¹²⁹ H.R. 1262, 113th Cong. (2d Sess. 2013).

- minimize the collection of information and data unrelated to the investigation of a crime under a warrant,
- require the destruction of data that is no longer relevant to the investigation of a crime,
- establish procedures for the method of such destruction, and
- establish oversight and audit procedures to ensure the agency operates a UAS in accordance with the data collection statement filed with the FAA.

H.R. 1262 includes several enforcement mechanisms. First, the FAA may revoke a license of a user that does not comply with these requirements. The Federal Trade Commission would have the primary authority to enforce the data collection requirements just stated. Additionally, the Attorney General of each state, or an official or agency of a state, is empowered to file a civil suit if there is reason to believe that the privacy interests of residents of that state have been threatened or adversely affected. H.R. 1262 would also create a private right of action for a person injured by a violation of this legislation.

Conclusion

The introduction of drones into American airspace raises many legal and policy questions. For instance, how far can the government go in its attempts to maintain security and ensure that laws are enforced? What level of privacy should Americans expect in an age where technology facilitating the acquisition of personal information expands at a phenomenal pace? Currently, there is a vast body of Fourth Amendment law that governs the circumstances in which law enforcement must obtain a warrant before conducting surveillance. However, the sheer sophistication of drone technology and the sensors they can carry may remove drones from this traditional Fourth Amendment framework. Beyond the courts and the Constitution, what role should Congress and the President play in regulating the introduction of drones inside the United States? As the integration of drones for domestic surveillance operations quickly accelerates, these questions and others will be posed to the American people and their political leaders.

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Drones and privacy

A looming threat

Mar 19th 2015, 22:32 BY K.K. | WASHINGTON, DC

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UNMANNED aircraft, otherwise known as drones, are becoming common. Many are familiar with America's use of armed drones in Pakistan, Yemen and elsewhere, but drones are increasingly being used by other parts of the government, as well as by companies and individuals. Drones can be far cheaper to operate than anything that requires an [on-board pilot](#), and they are handy for [making maps](#) and taking pictures and videos. The FBI uses a [small fleet of drones](#) for law-enforcement surveillance. Customs and Border Patrol uses them to monitor the American border with Mexico (though the programme was recently found to be [ineffective and expensive](#)). Commercial drones are now regularly used for [real-estate photography](#) and to [monitor oil and gas pipelines](#), among many other applications.

The proliferation of drones—which include both small fixed-wing aircraft and small rotorcraft with multiple propellers—raises some vexing public-policy questions. In an effort to safely [integrate drones of all sizes into American airspace](#), the Federal Aviation Administration (FAA) is now figuring out [how to regulate the small ones](#) (ie, less than 55 pounds). As drones acquire so-called "sense and avoid" technology to automatically avoid collisions, the FAA and the aviation industry more broadly must parse thorny questions about how to

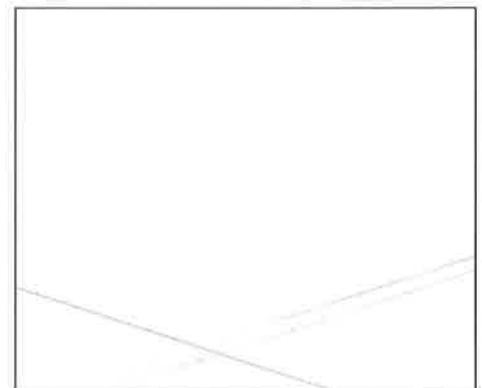
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either prevent accidents involving flying robots or assign liability in the inevitable event of one.

But questions of air safety are relatively straightforward compared to another broad set of concerns that drones raise: how do they impact privacy? At issue is the way some drones can loiter overhead for long stretches, engaging in what is called "persistent surveillance". As drones—and other airborne surveillance platforms, such as circling [manned aircraft](#) and [lighter-than-air craft](#)—become cheaper and more effective, persistent aerial surveillance could become the norm, and no privacy or transparency measures currently exist in the law. So figuring out how to protect privacy without pre-empting innovation is as tricky as it is necessary. On February 15th, the same day the FAA announced its new proposed rules for small drones, Barack Obama [published a memorandum](#) calling on government agencies to study the matter. The president also called on an agency in the Commerce Department to examine the privacy implications of drones used by individuals and corporations.

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The current state of the law—both legislation and court decisions—is poorly suited to deal with persistent surveillance. This is because privacy law is tailored to questions of whether one is in public—an open field—or in a space where one has a "reasonable expectation of privacy". The Supreme Court has, at times, expanded such spaces, for instance [finding in 1967](#) that the FBI cannot eavesdrop on conversations in telephone booths without a warrant. But in this era of "big data", the line between public and private can no longer be delimited by physical boundaries.

Complicating matters, there is no clear line between episodic surveillance—a snapshot—and persistent surveillance, even though the effects are profoundly different. As Justice [Sonia Sotomayor pointed out](#) in a 2012 case, incremental observations by the government may not violate a person's privacy, but the sum total do. It's the difference between a snapshot and an overhead video that shows the comings and goings of everybody in a city over the course of a week. In such a video, a so-called "pattern-of-life" emerges. Any still frame from the video might be a defensible incursion on privacy, yet the whole video is something more than the sum of these parts.

What are the dangers of such videos? Plenty of similar information is available from mobile-phone records, which track the physical position of their users. Indeed, many technologies, from mobile telephony to e-mail, have been widely adopted before their impacts on privacy

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could be parsed by either consumers or regulators. But therein lies the value of regulating drones. As Ryan Calo, a University of Washington law professor, optimistically suggests, drones may serve as a "privacy catalyst". Once regulators assess the ramifications of persistent aerial surveillance, he argues, they may then turn to the privacy implications of a whole host of other gadgets and innovations.

Discussions about privacy often involve the question of why it is something worth protecting. People tend to invoke Louis Brandeis and Samuel Warren's definition of privacy in 1890 as the "right to be let alone". But this view does not fully capture the purpose of privacy in modern society. A better explanation comes from Julie Cohen at the Georgetown Law School, who argues that "the liberal self and the liberal democratic society are symbiotic ideals." So persistent surveillance—whether through monitoring internet browsing habits or from a drone overhead—undermines the formation of liberal individuals in the way that an over-reliance on GPS undermines the formation of a sense of direction. This is because pervasive surveillance tends to shape the actions, thoughts and personalities of those being observed. Such changes happen gradually, even imperceptibly. But ultimately excessive surveillance encourages people to behave predictably. To oversimplify her argument, democracy needs privacy to breathe.

It is worth noting that not all persistent drones are a threat to privacy—NASA's Global Hawk Earth science missions, for instance, are exactly what they claim to be: new tools for studying hurricanes and other natural phenomena. But it is essential that these questions about drones and privacy are being asked now. This is because the "reasonable expectation of privacy" test depends on whether technologies are already widely adopted. If no restrictions are put in place and persistent drones become more common, then the legal system allows the *fait accompli* to stand.

It is unclear whether Mr Obama is serious about addressing the privacy concerns raised by drones. His February memorandum had large carve-outs for "law enforcement or national security" that could undermine his attempts to address "privacy, civil rights, and civil liberties concerns". However, if he is serious, restrictions on persistent surveillance would be a fine place to start.

Dig deeper:

[The stressful lives of drone pilots](#) (June 2014)

[Should drone pilots get medals?](#) (May 2014)



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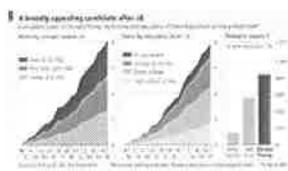
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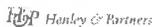
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SundayReview | EDITORIAL

Drone Regulations Should Focus on Safety and Privacy

By THE EDITORIAL BOARD JAN. 9, 2016

Though it would have been inconceivable just a few years ago, among the most popular gifts this past holiday season was the drone. Increasingly coveted by hobbyists and businesses, these devices flew (as it were) off the shelves and into living rooms by the hundreds of thousands.

But as drones have become smaller, cheaper and more numerous — some popular consumer models sell for less than \$1,000 — policy makers have had to address potential problems. These machines can obviously be put to good use — say, inspecting cellphone towers, shooting movies or compiling multidimensional real estate portfolios. They can also be used to snoop on people and harass them. And they can threaten other aircraft.

Some regulation of the private and commercial use of drones thus seems inevitable. The task for regulators is how to protect privacy and promote safety without infringing on the First Amendment rights of citizens and businesses that wish to use drones for legitimate purposes, like photography or news gathering (The Times has used drones to shoot videos and take photographs).

The Federal Aviation Administration has taken the lead in regulating drones. Last month, it started requiring users to register their unmanned aircraft. It has also proposed rules that would limit drone flights to daylight hours and require commercial users of small drones to keep their aircraft within their sight.

That's too restrictive, according to some businesses that make drones and companies that want to use them. But the agency's approach is measured and makes sense for a new technology, especially given reports of near collisions with helicopters and airplanes taking off or landing.

The F.A.A. is not equipped to regulate another big drone-related issue: privacy. There is no question that many Americans are concerned; 63 percent of people surveyed by the Pew Research Center and Smithsonian magazine in 2014 said allowing private and commercial drones into the American airspace could cause harm. Some worry that drones will be used to peer through windows and into normally protected spaces like backyards. These are not new concerns. In 1946, in a case involving airplane takeoffs and landings over a farm, the Supreme Court ruled that people should have control over "the immediate reaches of the enveloping atmosphere" above their properties.

Many privacy advocates are also worried that drones used by businesses will collect information like wireless signals emitted by cellphones that could be used to determine people's locations. One marketing company did just that in a test last year in Los Angeles.

President Obama has ordered the Commerce Department to work with industry and privacy groups to come up with a set of best practices for drone use that are expected to be voluntary. States and cities are more aggressive. Lawmakers in California, Texas, Los Angeles, Miami and elsewhere have passed laws that limit where drones can be flown and how they can be used. Texas, for example, forbids the use of drones to take photographs of people or real estate. Exceptions include crime investigations and the marketing of

properties by brokers.

The public's desire for clear rules is understandable. Still, policy makers should not make it so difficult to use drones that they end up limiting the First Amendment rights of filmmakers, activists and journalists. The Texas law, for example, does not include an exception for news gathering.

Drones provide one more reason for Congress to approve a broad consumer privacy bill giving Americans more control over what businesses collect about them and how they use it. Such legislation would apply to data collection by websites and by drones. Privacy legislation proposed by President Obama in 2012 has been thwarted by companies that collect and use private data.

Unmanned aircraft can be incredibly useful. But many Americans will be skeptical of them unless safeguards are put in place guaranteeing safety and protecting privacy.

Follow The New York Times Opinion section on Facebook and Twitter, and sign up for the Opinion Today newsletter.

A version of this editorial appears in print on January 10, 2016, on page SR10 of the New York edition with the headline: Ruling Drones, Before They Rule Us .

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Police Officer Body-Worn Cameras

ASSESSING THE EVIDENCE

by Michael D. White, PhD



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Letter from the Assistant Attorney General

Dear colleagues,

I am pleased to bring you this resource from the Office of Justice Programs (OJP) Diagnostic Center on body-worn video cameras. This review was produced for a Diagnostic Center client seeking to understand the costs and benefits to the law enforcement community to use body-worn camera technology, and we believe the information assembled by the Diagnostic Center can be of use to law enforcement departments throughout the country.

As you may know, OJP is committed to translating scientific evidence about what works in criminal justice and public safety to the field, ensuring it is both accessible and user friendly. OJP launched the Diagnostic Center in spring 2012 to facilitate this translation process of science into outcomes. The Diagnostic Center is a technical assistance resource for state, local, and tribal policymakers seeking to implement data-driven strategies to combat crime and improve public safety.

In pursuing that mission, the Diagnostic Center undertook this literature review of the current evidence on the challenges and benefits of body-worn video camera technology. I hope that this resource, which we are proud to be publishing jointly with our colleagues from the Office of Community Oriented Policing Services (COPS Office), helps inform your department's conversations about the use of body-worn video cameras in the field.

If you are interested in receiving services from the OJP Diagnostic Center, please visit www.OJPDiagnosticCenter.org or call 1-855-657-0411 to learn more about how the Diagnostic Center engages with client communities to improve public safety.

Sincerely,



Karol V. Mason
Assistant Attorney General
Office of Justice Programs

Executive Summary

In recent years, technological innovation has continually shaped law enforcement, from less-lethal devices (e.g., TASER) and forensic evidence to advanced crime analysis. The most recent technological innovation that may redefine policing is officer body-worn camera systems.

The technology has received considerable attention in the media and among policing officials. For example, in her August 2013 ruling that declared the New York Police Department's (NYPD) stop, question, and frisk program unconstitutional, Judge Shira Scheindlin included body-worn cameras as part of the judicial order.

On September 11, 2013, the Police Executive Research Forum (PERF) held a conference on the technology. Although advocates and critics have made numerous claims regarding body-worn cameras, there have been few balanced discussions of the benefits and problems associated with the technology and even fewer discussions of the empirical evidence supporting or refuting those claims.

This publication provides a review of the available evidence on officer body-worn cameras. The goal is to provide a comprehensive resource that will help law enforcement agencies to understand the factors they should consider to make informed decisions regarding the adoption of body-worn camera technology.

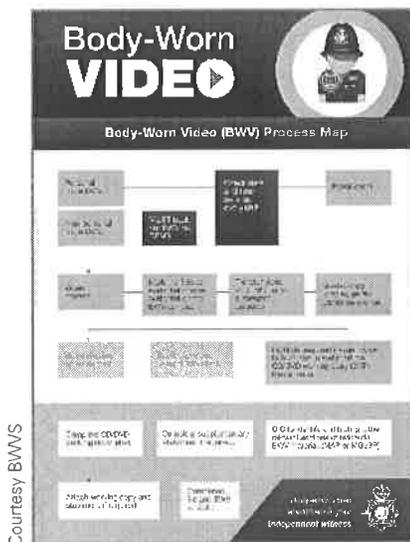
Resources and research

This publication reviews several available resources that offer a starting point for exploring the body-worn camera technology (see Appendix A for greater detail):

- The UK Home Office's Guidance for the Police Use of Body-Worn Video Devices (Goodall 2007)
- The National Institute of Justice's (NIJ) A Primer on Body-Worn Cameras for Law Enforcement (ManTech 2012)
- Body Worn Video Steering Group, www.bwvsg.com

This resource also provides an overview of empirical studies to date that have examined the implementation and impact of officer body-worn cameras. The overwhelming theme from this review is the lack of available research on the technology. This publication identifies five empirical studies:

1. Plymouth Head Camera Project (England)(Goodall 2007)
2. Renfrewshire/Aberdeen Studies (Scotland)(ODS Consulting 2011)



3. Rialto (California) Police Department (Farrar 2013)
4. Mesa (Arizona) Police Department (MPD 2013)
5. Phoenix (Arizona) Police Department (White 2013)

The five studies reviewed here, which vary widely in their methodological rigor, represent the entire body of evidence on body-worn cameras (see also Draisin 2011 for an internal review of the literature on in-car or body-worn cameras conducted for the Orlando Police Department).

Perceived benefits and concerns

The majority of this publication reviews the claims made by advocates and critics regarding body-worn camera technology and includes a discussion of the empirical evidence supporting each claim. Given the lack of research, there is little evidence to support or refute many of the claims, and there are outstanding questions regarding the impact and consequences of body-worn cameras. Nevertheless, the available studies have provided insight into several areas, suggesting that additional study of the technology is warranted. However, police departments should be cautious and deliberate in their exploration of the technology given the lack of research.

Perceived benefits (based on available research and conventional wisdom), along with a discussion of each claim, include the following:

- **Body-worn cameras increase transparency and citizen views of police legitimacy.** This claim has not been sufficiently tested. There have been virtually no studies of citizens' views of the technology.
- **Body-worn cameras have a civilizing effect, resulting in improved behavior among both police officers and citizens.** Several of the empirical studies have documented substantial decreases in citizen complaints (Rialto, Mesa, Plymouth, and Renfrewshire/Aberdeen studies) as well as in use of force by police (Rialto) and assaults on officers (Aberdeen). There is also anecdotal support for a civilizing effect reported elsewhere (Phoenix and in media reports cited in the references list).

However, the behavior dynamics that explain these complaints and use of force trends are by no means clear. The decline in complaints and use of force may be tied to improved citizen behavior, improved police officer behavior, or a combination of the two. It may also be due to changes in citizen complaint reporting patterns (rather than a civilizing effect), as there is evidence that citizens are less likely to file frivolous complaints against officers wearing cameras (Goodall 2007; Stross 2013). Available research cannot disentangle these effects; thus, more research is needed.

- **Body-worn cameras have evidentiary benefits that expedite resolution of citizen complaints or lawsuits and that improve evidence for arrest and prosecution.** The available research offers support for the evidentiary benefits of body-worn camera systems. Several of the empirical studies (Plymouth and Renfrewshire/Aberdeen studies) indicate that body-worn cameras assist in the resolution of citizen complaints against police officers. Findings also suggest that body-worn cameras may reduce the likelihood that citizens will file untruthful complaints (Plymouth and Renfrewshire/Aberdeen studies). While some research has looked into the technology's impact on resolution of citizen complaints (all five studies listed in "Resources and research"), no research has tested the technology's impact on lawsuits against police.

There is no evidence from the U.S. studies regarding the impact of body-worn cameras on arrest and prosecution practices. Evidence from the UK studies indicates that the technology reduces officers' paperwork, enhances their ability to determine whether a crime occurred, and increases the likelihood that cases will end in a guilty plea rather than criminal trial. However, more research is needed.

- **Body-worn cameras provide opportunities for police training.** This claim is mostly untested. There is anecdotal evidence from the UK Home Office guide (Goodall 2007) regarding the use of the technology in police training, and there is one report of a U.S. police department (Miami) doing so (Local 10 2013). More research is needed.

Perceived concerns and problems (based on available research and conventional wisdom), along with a discussion of each claim, include the following:

- **Body-worn cameras create citizen privacy concerns.** Although civil rights advocates have generally supported the use of body-worn cameras by police (Stanley 2013), the impact of the technology on citizen privacy is not fully understood. Federal and state laws regarding the expectation of privacy place some restrictions on using audio and video recording. Moreover, body-worn cameras capture in real time the traumatic experiences of citizens who are victims of crime, who are involved in medical emergencies and accidents, and who are being detained or arrested. Recording these events may exacerbate citizens' trauma. In their model policy template (see Appendix B), the Body Worn Video Steering Group cautions law enforcement agencies about the collateral intrusion of the technology, particularly with regard to religious sensitivities, intimate searches, witnesses and confidential informants, victims, and communications governed by legal privilege. More research is needed.
- **Body-worn cameras create concerns for police officer privacy.** Law enforcement circles have not universally accepted the technology. Police unions in several cities, most recently New York, have claimed that the cameras represent a change in working conditions that must be negotiated

during contract talks (Schoenmann 2012; Celona 2013). There are also concerns that officers may be subjected to unsolicited fishing expeditions by supervisors (White 2013). Experiences from Phoenix and Rialto suggest that including line-level staff in the implementation process from the start, particularly with regard to policy development governing camera use, can alleviate many of these concerns. Nevertheless, everything an officer records is discoverable, even if the officer records events unintentionally (e.g., forgets to stop recording). The implications of the technology for officer privacy are not fully understood, and more research is needed.

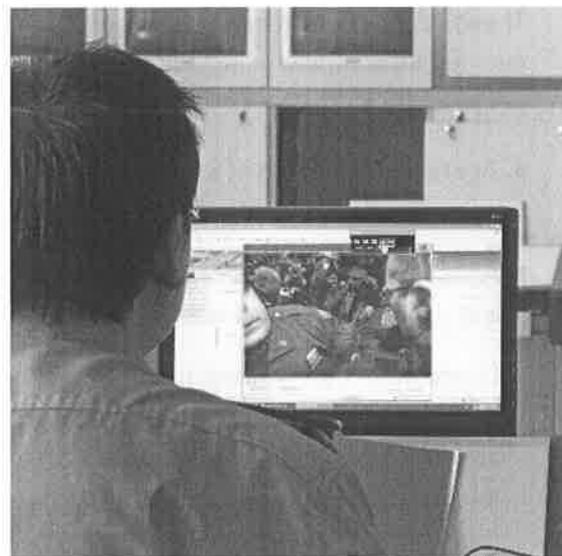
- **Body-worn cameras create concerns for officer health and safety.** The UK Home Office guide (Goodall 2007) details a wide range of potential health and safety concerns, from neck injury resulting from the weight of the camera to electrical shock. The vast majority of concerns are rated as low risk. The guide does cite a few concerns as medium risk, including the potential for head injury (i.e., the camera striking the officer's head during an assault), soreness and headaches from the headband (most UK agencies use a unit attached to a headband), and transferred bodily fluids or infectious agents from shared cameras. However, wearing the camera on part of the uniform (e.g., lapel or torso) instead of the head can mitigate nearly all of the stated risks. Nevertheless, there has been no research examining health and safety issues associated with body-worn cameras.
- **Body-worn cameras require investments in terms of training and policy development.** Available research clearly demonstrates the importance of training and policy governing the deployment of body-worn cameras. Officers who wear cameras need to be trained in their use, from recording and downloading video to proper equipment maintenance. Departments must develop clear administrative policies that provide guidance to officers on a wide range of issues, such as when to record and when not to, whether to announce that the encounter is being recorded, and when supervisors can review video. The policies should also address video download procedures, video redaction procedures, preparation of video for prosecution, and data storage and management.

The Body Worn Video Steering Group developed a comprehensive policy template (see Appendix B) that can be used by agencies as a framework for developing their own policies.

Moreover, the Mesa (Arizona) Police Department's evaluation, which focused on the cameras' impact on reducing civil liability, addressing departmental complaints, and enhancing criminal prosecution, clearly demonstrates that administrative policy influences camera usage (MPD 2013). During the one-year evaluation, Mesa employed two different policies governing use of the

camera: one that was restrictive (implemented the first six months) and one that gave officers much more discretion in determining when to record events (implemented the last six months). Camera use declined by 42 percent when the discretionary policy was in effect. The Mesa evaluation also demonstrated that officers who volunteer to wear the technology are more likely to record encounters than officers who are required to wear it.

- **Body-worn cameras require substantial commitment of finances, resources, and logistics.** Available research demonstrates that the resource and logistical issues surrounding adoption of body-worn cameras are considerable and, in many cases, difficult to anticipate. There are direct costs associated with purchasing the hardware (from \$800 to \$1,000 per camera) as well as replacement costs as components break down (MPD 2013). One of the primary resource issues revolves around data storage and management. Body-worn cameras produce an enormous amount of video data that must be properly and securely stored. There are also questions about how quickly specific video can be retrieved (White 2013). The major vendors offer cloud-based storage solutions at a cost, or agencies can choose to manage and store the video locally.



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Further, when body-worn camera video footage is used in court, there are potential expenses associated with reviewing and redacting footage. The more frequently that body-worn camera footage is introduced in court, the greater these expenses will be.

The evaluations in Mesa and Phoenix clearly indicate that adopting body-worn camera technology has a substantial impact, both positive and negative, on the agency that far exceeds the effect on officers who wear the technology. Adopting the technology requires creating an agency-wide process to manage the program that includes nearly every unit, from line supervisors and patrol officers to detectives, technology and data analysts, legal staff, internal affairs, and agency leaders. The technology also impacts other stakeholders outside the law enforcement agency, including the prosecutor's office, defense attorneys, and the courts.

Recommendations

Based on the review of available literature on body-worn camera technology, this publication offers several recommendations for next steps to improve the knowledge base on the technology. These recommendations center on continued exploration of body-worn cameras through deliberate and cautious deployment of the technology, coupled with a methodologically rigorous portfolio of research.

- Agencies interested in adopting body-worn camera technology should proceed cautiously and consider the issues described in the previous section to fully inform their decisions.
- Agencies should collaborate with researchers to design rigorous implementation and impact evaluations of the technology and with experimental research designs.
- Leadership organizations in law enforcement, such as the International Association of Chiefs of Police (IACP), the Police Foundation, and PERF, should consider developing guidelines for implementation and evaluation of body-worn camera technology. IACP and other organizations should collaborate with their UK partners who have been experimenting with this technology for nearly a decade.
- Independent research on body-worn camera technology is urgently needed. Most of the claims made by advocates and critics of the technology remain untested. Federal agencies that support research and development should consider providing funding streams for comprehensive research and evaluation of body-worn camera systems. Researchers should examine all aspects of the implementation and impact of the technology—from its perceived civilizing effect, evidentiary benefits, and impact on citizen perceptions of police legitimacy to its consequences for privacy rights, the law enforcement agency, and other outside stakeholders.
- Body-worn camera systems hold great promise as a training tool for law enforcement, both in the academy and as part of performance evaluation. Post-hoc review of officer (or cadet) behavior during recorded encounters can serve as a mechanism for positive feedback, can identify problems in officer behavior, can help identify best practices in handling critical incidents (e.g., de-escalation), and can eliminate traditional reliance on “final frame” review of officer decisions to use force (i.e., the “split second syndrome” [Fyfe 1986]).

Introduction

“When you put a camera on a police officer, they tend to behave a little better, follow the rules a little better. And if a citizen knows the officer is wearing a camera, chances are the citizen will behave a little better.”

– William A. Farrar, Chief of Police,
Rialto (California) Police Department
(Lovett 2013)

“It would be a nightmare. We can’t have your camera-man follow you around and film things without people questioning whether they deliberately chose an angle, whether they got the whole picture in.”

– Michael R. Bloomberg, Mayor,
New York City (Santora 2013)

Over the past several years, technological innovation has redefined numerous facets of policing, most notably as an extension of law enforcement’s authority to use force (e.g., TASER [see White and Ready 2010]), as a tool for criminal investigation (e.g., DNA testing [see Roman et al. 2008]), and as a mechanism for improving their efficiency and effectiveness (e.g., hot spot analysis and CompStat [see Braga and Weisburd 2010; Weisburd et al. 2003; Braga et al. 2012]).

Technology has also been increasingly used as a mechanism for surveillance and observation, both by citizens and the police. In the early 1990s, dashboard cameras emerged as a new method for capturing the real-time encounters between police and citizens.

Despite early resistance to the dashboard cameras by officers (see Pilant 1995), research demonstrated that the cameras led to increased officer safety and accountability and reduced agency liability. As a result, the technology has been widely embraced by law enforcement (see IACP 2003).

Closed circuit surveillance systems (CCTV) have also become increasingly popular among city leaders and law enforcement as both a method of surveillance (crime prevention) and as a tool for post-hoc criminal investigation (e.g., Boston Marathon bombing)(see Ratcliffe 2011; Welsh and Farrington 2009). And of course the proliferation of smartphones has also exponentially increased the ability to record events as they transpire, especially police-citizen encounters (see Erpenbach 2008; Harris 2010). As a result, video and audio recording has become a ubiquitous part of life in the 21st century.¹

The latest technological development for law enforcement in the area of surveillance involves officer body-worn cameras. There are a number of body-worn camera manufacturers, including Panasonic, VIEVU, TASER International, WatchGuard, and Wolfcom Enterprises.²

The technology includes several components that vary across manufacturers. For example, TASER International's AXON system includes a small camera worn by the officer (on a shirt lapel, hat, or sunglasses) that captures what the officer sees; a device (e.g., smartphone) that records and stores the video (similar to a DVR); and a battery pack that lasts typically from 12–14 hours and that includes the on/off switch for recording. The AXON system comes with a cloud-based data storage service (www.evidence.com) whereby the officer places the recording device in a docking station at the end of the shift, and the storage service securely uploads and stores all video evidence.³ The VIEVU system is a self-contained, pager-sized device that officers wear on their torso, and device includes a docking station for video download and cloud-based data storage.

Police officer body-worn camera technology received significant media attention in 2013. In August 2013, Judge Shira Scheindlin of the Federal District Court in Manhattan ruled that the New York Police Department's (NYPD) stop, question, and frisk (SQF) program is unconstitutional, and as part of the ruling, the judge ordered officers in the highest volume SQF precincts to wear cameras in an effort to prevent racial profiling (Santora 2013).⁴

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1. For example, the American Civil Liberties Union's smartphone app, called "Police Tape," records encounters with police (see ACLU-NJ n.d.). Consequently, many police leaders instruct their officers to always assume that their actions are being recorded.
 2. Though there are a number of competitor manufacturers, this publication refers primarily to the products developed by VIEVU and TASER International. There are two reasons for this. First, nearly all of the empirical studies reviewed for this publication were based on either the VIEVU or TASER International camera systems. Second, the author conducted an extensive literature review for this publication, and the manufacturers most commonly cited in the identified literature and media sources were, by far, VIEVU and TASER International. VIEVU claims that more than 3,000 police agencies are currently using their product (VIEVU LLC 2014). TASER offers the AXON FLEX and the AXON Body camera systems.
 3. Both VIEVU and TASER have protections in place to insure that video cannot be tampered with or destroyed.
 4. The New York case has continued to evolve. In October 2013, a federal court of appeals issued a stay on the lower court ruling and removed Judge Scheindlin from the case (questioning her objectivity). In November, Bill de Blasio was elected mayor of New York, and he replaced former Police Commissioner Raymond Kelly with Bill Bratton. At the time of this writing, the court of appeals had not scheduled a hearing to review evidence on the case. The implications of these developments for the adoption of body-worn cameras in the NYPD remain unknown.

On September 11, 2013, PERF held a one-day conference on law enforcement's use of the technology. Moreover, there have been dozens of media reports describing police use of the technology.

Unfortunately, there have been few balanced discussions of the merits and drawbacks of police officer body-worn cameras and even fewer empirical studies of the technology in the field. The perceived yet widely touted benefits of the camera technology range from improved citizen and police behavior (e.g., civilizing effect) to reduced use of force, citizen complaints, and lawsuits. The perceived benefits are grounded in a body of literature establishing that human beings change their behavior when they are observed and are more likely to "experience public awareness, become more prone to socially-acceptable behavior and sense a heightened need to cooperate with the rules," (Farrar 2013, 2).⁵ There have been fewer discussions of the technology's drawbacks, but criticism often centers on citizen privacy concerns, officer apprehension regarding unsolicited supervisor review of video, union concerns about changes to officer working conditions, and cost and resource concerns.

The goal of this publication is to provide law enforcement agencies, researchers, and other interested parties with a comprehensive, objective resource that describes the key issues to consider with the technology, that outlines the perceived advantages and limitations of the technology, and that assesses the body of empirical evidence supporting or refuting those claims.

The publication is divided into several major sections. The first section includes a discussion of the methodology employed for this review, as well as brief descriptions of available reports and resources that are useful for understanding body-worn camera technology. This section also provides an overview of the empirical studies that have tested officer body-worn cameras, as well as a summary of the perceived benefits and concerns with the technology. The empirical evaluations, which vary in methodological rigor and independence (e.g., internal agency reviews), serve as the foundation for the current knowledge base on body-worn camera technology.

The next two sections examine the benefits and drawbacks identified by advocates and critics of the technology and include descriptions of available empirical evidence to support or refute those claims. The last section summarizes the evidence on the technology's impact and outlines a series of recommendations for next steps to assess and understand the future of body-worn cameras in law enforcement.

Overall, this review provides a comprehensive discussion of the issues and evidence surrounding officer body-worn cameras. The review also provides a framework that will allow law enforcement agencies to consider the full range of issues regarding adoption of the technology.

5. Farrar (2013) provides a brief review of this literature (for original sources, see Gervais and Norenzayan 2012; Sproull et al. 1996; Milinski et al. 2002; Bateson et al. 2006). Deterrence theory may also be relevant (see Nagin 2013): e.g., risk of apprehension increases with the presence of a body-worn camera.

Resources and Research

A brief note on methodology

To identify the relevant literature on police officer body-worn cameras, the author conducted Internet searches using Google, the National Criminal Justice Reference Service (NCJRS), and the primary scholarly criminal justice and criminology electronic databases, which include the Academic Search Premier (EBSCOhost), HeinOnline, LexisNexis Academic, and Criminal Justice Abstracts. The author also reviewed works cited in identified documents and vetted the list of identified documents with several police scholars. In addition, the author reviewed the websites of the two popular manufacturers of body-worn cameras: i.e., TASER International for the AXON system at www.taser.com and VIEVU at www.viewu.com.

This review also uncovered dozens of newsprint and television news stories on body-worn cameras. This publication reviews many but not all of these news reports. Rather, it summarizes the key themes based on results from a handful of empirical studies and uses the media reports as supplemental documentation.

The following resources describe the technology and offer guidance on its adoption and deployment by police (see Appendix A for greater detail):

- The UK Home Office's *Guidance for the Police Use of Body-Worn Video Devices* (Goodall 2007)
- Body Worn Video Steering Group, www.bwvsg.com

- National Institute of Justice's (NIJ) *A Primer on Body-Worn Cameras for Law Enforcement* (ManTech 2012)
- System Assessment and Validation for Emergency Responders' (SAVER) *Wearable Camera Systems Focus Group Report* (SAVER 2011)
- SAVER's *Camera Systems, Wearable* (SAVER 2012)

These resources represent a starting point for law enforcement agencies considering adoption of body-worn camera technology. The UK Home Office guide, the Body Worn Video Steering Group website, and the National Institute of Justice guide are especially useful.

A handful of reports identified for this review describe evaluations of officer body-worn camera programs (see Table 1). These evaluations represent the only empirical tests to date of the implementation and impact of the technology, and they serve as the foundation of this publication.

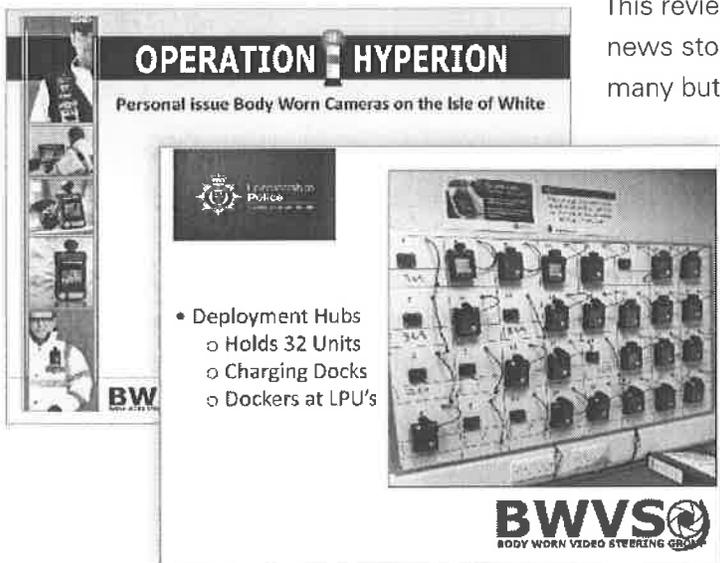


Table 1. Empirical studies of officer body-worn cameras as of September 2013

Country	Study	Citation	Independent evaluation	Comparative design
England	Plymouth Head Camera Project	Goodall 2007	Yes: Process Evolution, Ltd.	No
Scotland	Renfrewshire/Aberdeen Studies	(ODS Consulting 2011)	Yes: ODS Consulting	No
United States	Rialto (CA) Police Department	(Farrar 2013)	No	Yes
United States	Mesa (AZ) Police Department	(MPD 2013)	No*	Yes
United States	Phoenix (AZ) Police Department	(White 2013)	Yes: Arizona State University	Yes

* Arizona State University has conducted survey research of Mesa police officers and collected field contact reports for 400 police-citizen encounters; however, the Mesa Police Department directed the outcome evaluation.

Most of the evaluations described here have significant methodological limitations, either because the study does not employ a comparative design (i.e., no comparison group), or the study was carried out internally by the law enforcement agency deploying the technology (raising questions of independence). Also, several of the studies rely heavily on officer surveys that ask about perceptions and attitudes rather than measuring behavior.⁶ The absence of rigorous, independent studies using experimental methods has limited understanding of the impact and consequences of body-worn cameras.

Studies in the United Kingdom

British police agencies were among the first to experiment with and test officer body-worn camera technology. Harris (2010, 6) notes that “the initial pilot studies, small in size, transpired in Plymouth, England, in 2005 and 2006.” Based on positive results from the early pilot studies, the Plymouth Basic Command Unit initiated the “Plymouth Head Camera Project” in October 2006.

As part of the project, which lasted 17 months, the agency purchased 50 camera systems and trained 300 officers to use the technology (Goodall 2007). The camera systems were available for trained officers to sign out voluntarily. Officers recorded 3,054 incidents during the study. Although the Plymouth Head Camera Project study did not use a comparative research design, the goals of the project were as follows (Goodall 2007):

- To provide police officers with optical evidence that would reduce bureaucracy, improve sanction detections, and streamline the criminal justice process

6. See Draisin 2011 for literature review on in-car and body-worn cameras conducted for the Orlando Police Department. Also, the National Institute of Justice recently made an award to the CNA Corporation to evaluate the impact of body-worn cameras in the Las Vegas Metropolitan Police Department. The study is set to begin in early-2014.

- To reduce challenges to police officer evidence in court
- To increase early guilty pleas, reducing wasted police officer and court time
- To reduce the number of malicious complaints made against police officers
- To reduce the incidence of violent crime

Several police agencies in Scotland have also evaluated body-worn camera technology. In July 2011, ODS Consulting published evaluations of the technology in Renfrewshire and Aberdeen (Strathclyde and Grampian Police, respectively).⁷ In Renfrewshire, the Strathclyde police deployed 38 body-worn camera systems for eight months. In Aberdeen, the Grampian police deployed 18 camera systems for three months. Neither study employed a comparative research design. The evaluations focused on the technology's impact on citizen attitudes, criminal justice processing (guilty pleas), citizen complaints, and assaults on officers. In each department, the camera systems recorded approximately 2,500 events.

Studies in the United States

There have been three studies of the technology in the United States. The first study is an evaluation of the Rialto (California) Police Department body-worn camera project, led by Chief of Police William Farrar (Farrar 2013). The Rialto study began in February 2012 and continued through July 2013. The study involved a randomized controlled trial in which half of the department's 54 patrol officers were randomly assigned to wear the TASER AXON body-camera system (*ibid.*). The work shift was the study's unit of analysis.

"There are 19 shifts during any given week and 54 frontline officers conducted patrols in six teams: two teams work day shifts, three teams work nights, and two teams are cover shifts" (Farrar 2014). Shifts were randomly allocated to treatment and control conditions on a weekly basis. In total, the study assigned 988 shifts into 489 treatment and 499 control conditions over a 12-month period (Farrar, 5–6).

The Rialto experiment tested the impact of the cameras on citizen complaints and police use of force incidents, comparing officers who wear the cameras to officers who do not.⁸

For the second evaluation, the Mesa (Arizona) Police Department outfitted 50 officers with TASER AXON FLEX body-worn cameras on October 1, 2012, and the year-long study was completed in September 2013. The evaluation "focused on the system's impact on reducing civil liability, addressing departmental complaints and enhancing criminal prosecution" (MPD 2013, 1). The evaluation

7. The Strathclyde and Grampian police agencies applied for and received evaluation support from the Scottish Government's Community Safety Unit. The Community Safety Unit appointed ODS Consulting to conduct the evaluation.

8. The Rialto project served as the foundation for Farrar's master's thesis at the University of Cambridge. In 2013, Farrar received the award for Excellence in Evidence-Based Policing, from the Society of Evidence-Based Policing, for this study of body-worn cameras.

also examined officer perceptions of the technology at multiple points in time throughout the study period. The 50 AXON users are compared to a group of demographically similar officers who are not equipped with cameras.

The third evaluation, conducted by the Phoenix (Arizona) Police Department and Arizona State University, is part of the Bureau of Justice Assistance's Smart Policing Initiative (SPI). The Phoenix study, which involves 56 officers wearing the VIEVU camera system, is testing whether the cameras deter unprofessional behavior from officers, lower citizen complaints, reduce citizen resistance, and disprove allegations against officers. The Phoenix SPI team is also assessing whether the cameras enhance response to domestic violence cases (e.g., increased charging, prosecution, and conviction rates).

Moreover, the third study includes both an extensive process evaluation, which captures implementation of the body-worn camera system, and an assessment of officer perceptions of the technology throughout the project period. The study has a comparative research design, focusing on differences in outcomes between two squads in the Maryvale precinct: the 56 officers wearing body cameras and 50 comparison officers. The officers began wearing the cameras during their shifts in April 2013 (shift periods covered 24 hours a day, seven days a week), and they will continue to do so for one year.

Perceived benefits and concerns

Table 2 provides a summary of the perceived merits and drawbacks of the technology. Such perceived benefits include enhanced transparency and legitimacy, improved behavior (citizen and officer), quicker resolution of complaints/lawsuits, improved evidence for arrest and prosecution and training opportunities. Critics of the technology have raised concerns about privacy (citizen and officer), officer health and safety, training and policy requirements and logistical/resource requirements. The next two sections describe each of the perceived benefits and concerns, as well as the available empirical evidence supporting or refuting each claim.

Table 2. Perceived benefits and concerns with officer body-worn cameras

Benefits	Concerns
<ul style="list-style-type: none"> ■ Increased transparency and legitimacy ■ Improved police officer behavior ■ Improved citizen behavior ■ Expedited resolution of complaints and lawsuits ■ Improved evidence for arrest and prosecution ■ Opportunities for police training 	<ul style="list-style-type: none"> ■ Citizens' privacy ■ Officers' privacy ■ Officers' health and safety ■ Training and policy requirements ■ Logistical and resource requirements, including data storage and retrieval

The Perceived Benefits of Officer Body-Worn Cameras

Increased transparency and police legitimacy

Transparency, or willingness by a police department to open itself up to outside scrutiny, is an important perceived benefit of officer body-worn cameras. Transparency can demonstrate to the community that officers aim to act in a fair and just manner (e.g., procedural justice) when interacting with citizens, which can increase perceptions of police legitimacy (Tyler 1990). A recent article in *Police Magazine* stated that “officer-worn cameras represent the pinnacle of transparency in law enforcement,” and according to the American Civil Liberties Union, “transparency leads to public trust and trust benefits the community” (Clark 2013).

In her recent ruling against the NYPD’s stop, question, and frisk program, Judge Scheindlin wrote that cameras

will provide a contemporaneous, objective record of stop-and-frisks allowing for the review of officer conduct [that] may either confirm or refute the belief of some minorities that they have been stopped simply as a result of their race.... Thus, the recordings should also alleviate some of the mistrust that has developed between the police and the black and Hispanic communities, based on the belief that stops and frisks are overwhelmingly and unjustifiably directed at members of these communities. (*Floyd v. City of New York* 2013, 26–27)



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Unfortunately, the assertion that body-worn cameras enhance the transparency of a police department has not been sufficiently tested. To date, there has been little research examining the views and perceptions of citizens regarding police officer body-worn cameras, with the exception of a few studies overseas. The Renfrewshire/Aberdeen studies queried citizens through an online survey in Renfrewshire (n=97) and as part of a citizens panel in Aberdeen (n=701). Citizen support for the technology was high in both cities, at 64 to 76 percent (ODS Consulting 2011).

Also, the Plymouth Head Camera Project in England included brief surveys of 36 crime victims, and the responding officer was wearing a camera. Of the 36 victims, 26 (72 percent) reported that the body-worn camera was beneficial during the encounter with police, and 29 victims (81percent)

The Perceived Benefits of Officer Body-Worn Cameras

reported that they felt safer as a result of the cameras (Goodall 2007, 68). However, these results are far from definitive. Citizen support for use of body-worn cameras remains unclear, as does the impact of the technology on citizens' trust in the police (e.g., increased transparency and legitimacy).

Improved police officer behavior

Advocates of body-worn cameras have argued the technology will change police officer behavior during encounters with citizens. In the NYPD ruling, the judge noted:

If, in fact, the police do, on occasion, use offensive language—including racial slurs—or act with more force than necessary, the use of body-worn cameras will inevitably reduce such behavior. (*Floyd v. City of New York* 2013, 26–27)

Harris (2010) suggests the technology could increase officer compliance with the Fourth Amendment provisions governing search and seizure.⁹ Several of the empirical evaluations sought to test the potential for improving police officer behavior.

The Rialto evaluation reported that, following implementation of the body-worn camera program, citizen complaints against police declined by 88 percent—from 24 in 2011, a year before the study, to just three complaints during the camera project study period (Farrar 2013). Moreover, use of force by police officers dropped by 60 percent, from 61 to 25 instances, following the start of the body-worn camera study (*ibid.*).

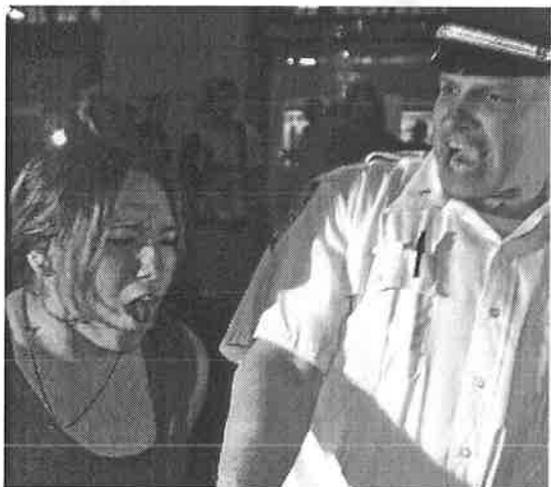
Farrar (2013) reported two findings that seek to tie the use of force reduction to the body-worn cameras:

1. First, "shifts without cameras experienced twice as many incidents of use of force as shifts with cameras" (8).
2. Second, a qualitative review of all use of force incidents determined that officers without cameras were more likely to use force without having been physically threatened. This occurred in five of the 17 use of force incidents involving officers without cameras.

All use of force incidents involving camera-wearing officers began with a suspect physically threatening the officer.

Questions remain regarding the behavior dynamics that led to the decline in use of force and citizen complaints. For example, are the declines a result of changes in officer behavior (e.g., officers less

9. Harris (2010) notes that approximately 30 percent of police searches are unconstitutional, and the vast majority of those illegal searches produce no evidence. As a result, citizens who experience those violations have no recourse through the exclusionary rule because there is no evidence to exclude.



likely to use force or behave improperly), citizen behavior (e.g., citizens act less aggressively), or some combination of the two? The drop in complaints may also be due to changes in citizen reporting patterns, as evidence suggests that body-worn cameras may reduce the filing of frivolous complaints by citizens.

The Mesa Police Department also assessed the impact of body-worn cameras on officer attitudes and officer behavior. With regard to attitudes, researchers at Arizona State University surveyed officers at multiple points in time regarding the body-worn camera project. To date, the results from only the first survey, as the project began, are available. Officers generally had positive views about the potential impact of the body-worn cameras: i.e., 77 percent believed the cameras would cause officers to behave more professionally (MPD 2013).¹⁰

The Phoenix evaluation addresses similar questions about attitudes and behavior and also includes officer surveys at multiple points in time. Preliminary results indicate that, prior to the start of the project, officers' attitudes were either ambivalent or negative. However, after wearing the camera for three months, some officers' attitudes improved significantly (White 2013).

The Mesa study also examined officer behavior measured through citizen complaints. The first part of the analysis compared the 50 officers who wore AXON cameras to 50 non-camera wearing officers. During the first eight months of the evaluation, the AXON users were the subject of eight complaints; during that same time, the control officers were the subject of 23 complaints.

The second part of the analysis examined the complaint trends of AXON users before and after they started wearing the cameras. In the year before the camera project started, officers were the subject of 30 complaints; at the officers' current pace, they were estimated to generate 12 complaints during the camera project study. If this trend holds, implementing the body-worn camera system will be associated with significant declines in complaints against officers, including:

- 60 percent decline among AXON users (year before compared to study period);
- 65 percent fewer complaints about AXON users compared to non-camera officers.

As with the Rialto study, the behavior dynamics that caused the decline in complaints remain unknown (e.g., civilizing effect on citizens, officers, or both or a change in complaint reporting).¹¹

10. However, officers were not entirely supportive of the body-worn camera project. Only 23 percent of the officers stated that the department should adopt a body-worn camera system, and less than half believed that their fellow officers would welcome the presence of a camera at a scene (MPD 2013).

11. Alternatively, critics have suggested that the body-worn cameras will have a "chilling effect" on police officers, meaning they will become less proactive and as a result, will become less effective in dealing with crime. There is currently no available evidence to support this claim. Farrar, chief of the Rialto Police Department, did address this concern in a recent interview. He stated, "The thinking was that some officers wearing cameras might try to hide and not really do their job. We found the opposite. We actually had 3,000 more officer-citizen contacts during the year (of the experiment)" (Dillon 2013).

The Perceived Benefits of Officer Body-Worn Cameras

The UK studies also sought to test the impact of the technology on officer behavior. For example, the Plymouth Head Camera Project reported a 14.3 percent reduction in citizen complaints during the first six months of the project as compared to the same six-month period from the prior year. During the project, there were no complaints filed against officers wearing head cameras (Goodall 2007). In the Renfrewshire/Aberdeen studies, officers wearing body cameras recorded more than 5,000 citizen encounters, and only five citizens filed complaints as a result of those incidents. There was no comparison to officers who did not wear cameras.¹²

Improved citizen behavior

Proponents of body-worn cameras have also argued that the technology will improve citizen behavior during encounters with police, suggesting that they will be more respectful and compliant. Unfortunately, there is currently very little evidence to support this assertion outside of anecdotal reports in the media (Lovett 2013) and preliminary results from a few evaluations (Goodall 2007).

The UK Home Office guide (ibid.) states that citizen behavior improves as a result of officer body-worn cameras, though the evidence used to support this statement is not clear:



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Officers using [body-worn cameras] at anti-social behavior hotspots noted that persons present significantly reduce the level of their behavior when officers with head cameras attend, more so than just with the presence of a police officer or PCSO. The equipment can have a greater impact than street CCTV or vehicle-borne cameras as they can be deployed at any position within the incident; those present quickly learn that the recordings include sound, and [body-worn cameras] are more obvious than other CCTV systems that can blend into the background after a short time. (Goodall 2007, 8).

The Renfrewshire/Aberdeen studies examined assaults on officers to ascertain whether officer body-worn cameras change citizen behavior. During the 5,000 recorded encounters in both sites, officers were assaulted on four occasions (ODS Consulting 2011). In the Aberdeen study, there were 62 assaults on officers: 61 against officers not wearing cameras and one against a camera-wearing officer. The researchers concluded that “if police officers wearing [body-worn cameras] had been assaulted in proportion to the overall number of assaults in Aberdeen, it might have been expected that 18 assaults would have taken place” rather than one (ODS Consulting 2011, 12).¹³

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12. It is unknown whether any of the agencies described here changed their citizen complaint intake and screening process, which could also explain changes in citizen complaint patterns.
13. The researchers’ logic is based on the premise that if 30 percent of officers on patrol are wearing cameras, those officers should experience about 30 percent of assaults against police (30 percent of 61 assaults is 18 assaults). This, of course, does not allow for any differences among officers wearing cameras and those not wearing cameras in terms of the number of encounters, types of encounters, patrol assignments, or time on patrol.

The U.S. empirical evaluations of body-worn cameras provide some insight into the potential for improved citizen behavior. First, the Mesa evaluation asked officers their perceptions of the impact of the cameras on citizen behavior. However, officers were skeptical: only 45 percent of surveyed officers stated that cameras would cause citizens to act more respectfully (MPD 2013). Second, anecdotal evidence from the Phoenix evaluation suggests the technology appears to have a “civilizing effect” on citizens once they realize that a camera is recording their behavior (White 2013).

Last, the Rialto experiment documented a substantial drop in officer use of force. It is possible that this finding may be explained in part by changes in citizen behavior. To be more specific, citizens may have altered their behavior during encounters with officers who are wearing cameras, such as being more respectful and compliant, which led to fewer incidents in which officers needed to use force. Farrar (2013) acknowledges this possibility but notes that his study is unable to offer definitive evidence on citizen behavior:

Members of the public with whom the officers communicated were also aware of being videotaped and therefore were likely to be cognizant that they ought to act cooperatively. However, we did not collect any evidence from these individuals to be able to ascertain this question. (ibid., 10)

Additional research on the dynamics of encounters between citizens and police who wear cameras is required to better understand the nature of the behavior changes that are occurring.¹⁴

Expedited resolution of citizen complaints/lawsuits

Advocates of body-worn cameras have also argued that the technology will facilitate quick resolution of complaints and lawsuits against police officers. While there is no empirical evidence regarding the impact of body-worn cameras on lawsuits against police, there is evidence of a positive impact on citizen complaint resolution. Police departments devote considerable resources to the investigation of citizen complaints (Walker and Katz 2013). However, complaints against police are often adjudicated as “not sustained” because typically no witnesses are present and the complaint involves the officer’s word against the citizen’s. Video evidence changes this dynamic. The researchers of the Renfrewshire/Aberdeen studies concluded:

What is clear is that the process of considering any complaint was made much easier by using the evidence from [body-worn] cameras. This will have provided some reassurance to the officer involved; reduced the time taken to resolve the complaint; and reduced police time in resolving complaints. (ODS Consulting 2011, 12)

14. The Plymouth Head Camera Project sought to reduce crime by 10 percent in the areas where the body-worn cameras were deployed. The simple pre-/post-comparison of crime (year before project compared to year of implementation) indicated little change at 1.2 percent. The Renfrewshire/Aberdeen studies of body-worn cameras documented a significant drop in crime in Aberdeen following deployment of the technology, but limitations in the research design prevent any definitive conclusions about the connection between the cameras and the crime trends (ODS Consulting 2011).

The Perceived Benefits of Officer Body-Worn Cameras

Harris (2010) notes that the video evidence can provide citizens with additional information that helps them understand the police officer's behavior:

If citizens can see that they were, perhaps, mistaken, or that they did not understand the situation from the officer's point of view, or that they did not have all the facts, they may come away with a better grasp of the situation and feeling that they need not continue with the complaint process. (ibid., 7)

Citizens may be less likely to file "frivolous" or untruthful complaints against officers wearing cameras because citizens know that the video evidence can instantly refute their claims. Rialto Chief of Police Farrar has noted in interviews that the ability to access video has led to quick resolution of potential complaints (Stross 2013). The UK Home Office guide draws similar conclusions, noting that "in a number of cases the complainants have reconsidered their complaint after this [video] review, thus reducing investigation time for unwarranted complaints" (Goodall 2007, 7).¹⁵

Even if we assume that in most cases the recording supports the officer's version of events and not the citizen's, the opposite will surely be true some of the time. In such a case, the officer's conduct can be examined and he or she held accountable for mistakes made or violations committed (Harris 2010, 10).

Evidence for arrest and prosecution

Advocates of body-worn cameras state that the video evidence will facilitate the arrest and prosecution of offenders, as it offers a real-time, permanent record of the events that transpired.

Though U.S. studies have not sufficiently examined this claim, results from several UK studies lend support. The Plymouth Head Camera Project reported that the technology increased officers' ability to document that a violent crime had occurred, and the incidents recorded by body cameras were more likely to be resolved through guilty pleas rather than criminal trials (Goodall 2007).

The UK Home Office guide also noted that quicker resolution of cases led to a 22.4 percent reduction in officer time devoted to paperwork and file preparation and an increase of 9.2 percent in officer time spent on patrol, which amounts to an extra 50 minutes per nine-hour shift. The Renfrewshire/Aberdeen studies also documented quicker resolution of criminal cases through guilty pleas. In Renfrewshire, body-worn camera cases were 70 to 80 percent less likely to go to trial, compared to other court cases. In Aberdeen, none of the body-worn camera cases resulted in a criminal trial (ODS Consulting 2011). The UK Home Office guide comments on this benefit for domestic violence cases:

15. For additional discussion, see also Stecklein 2012.

The evidence gathered using [body-worn cameras] at the scene of a domestic abuse incident has assisted greatly in supporting reluctant witnesses through the court process. In providing an exact record of the demeanor and language of the accused, the disturbance throughout the scene and the emotional effect on the victim, the use of [body-worn cameras] can significantly strengthen the prosecution case. (Goodall 2007, 8)

Results from the Mesa officer survey support the UK Home Office, showing that 80 percent of officers believe that the cameras will improve evidence quality and 76 percent believe that video evidence will facilitate prosecution of domestic violence cases (MPD 2013).

Opportunities for police training

Advocates of body-worn cameras have also suggested the technology can serve as an important training tool (Harris 2010). Post-hoc review of officer behavior could be especially useful when critical incidents, such as use of force, are recorded. The UK Home Office guide identifies professional development as one of the most important benefits of the technology:

[A body-worn camera] has been used by Professional Development Units as a training aid for student officers. The ability to review their performance in detail after an incident is a powerful tool for officers to highlight effective and ineffective actions. When reviewing their evidence, experienced officers who have used the equipment have also been able to assess their behavior and can professionalize their performance accordingly. (Goodall 2007, 8)

There is evidence of at least one police department in the U.S. employing the technology as a training tool. As part of its exploration of the technology, the Miami Police Department has been using body-worn cameras in the training academy since 2012. Miami Police Major Ian Moffitt stated that “we can record a situation, a scenario in training, and then go back and look at it and show the student, the recruit, the officer what they did good, what they did bad, and [what they can] improve on” (Local 10 2013).



Body-worn cameras could also be very useful during investigations of critical incidents, such as use of force. Fyfe (1986) argued that departmental review of officer decision-making during critical incidents traditionally focuses only on the circumstances immediately preceding the use of force or

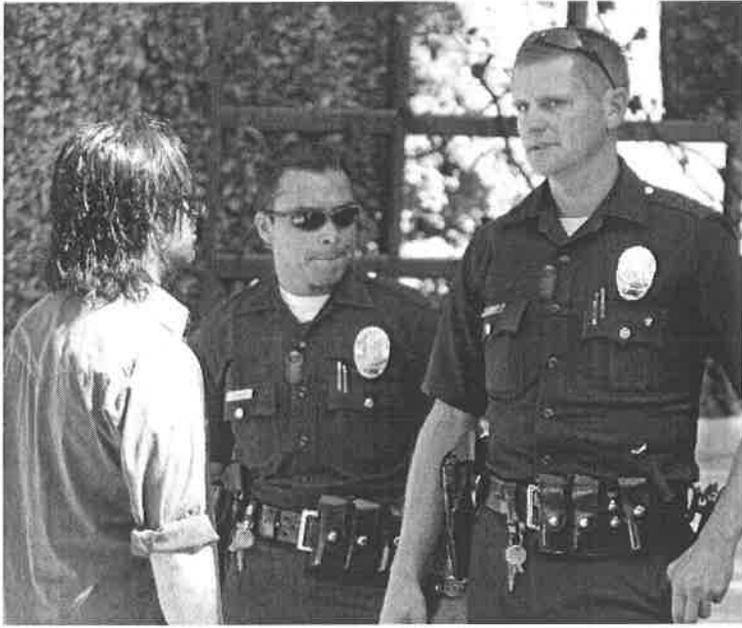
The Perceived Benefits of Officer Body-Worn Cameras

what he calls the “split-second syndrome.” However, reliance on the split-second syndrome inhibits “the development of greater police diagnostic expertise” by ignoring the decisions that an officer made prior to the use of force (ibid.). But body-worn cameras can address this problem:

Instead of asking whether an officer ultimately had to shoot or fight his way out of perilous circumstances, we are better advised to ask whether it was not possible for him to have approached the situation in a way that reduced the risk of bloodshed and increased the chances of a successful and nonviolent conclusion. (Fyfe 1986, 224)

The limited available evidence shows that body-worn camera technology could hold great promise both as a training tool for police and as a mechanism for more thorough and fair reviews of officer behavior during critical incidents. Future research should explore these areas.

Concerns and Considerations Regarding Body-Worn Cameras



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Concerns for citizens' privacy

Critics of body-worn cameras have cited numerous concerns over citizen privacy. First, the National Institute of Justice (NIJ) guide (ManTech 2012, 7) notes that "federal law blocks the warrantless capturing of photo or video images of people where they have an expectation of privacy, and most states have similar laws."

Moreover, a number of states require two-party consent before lawful recording of private conversations. The NIJ guide (ManTech 2012, 7) states that "When using [body-worn cameras], considerations on whether or not audio recording is allowed during video recording will require specific research prior to purchases or even

piloting devices" (see also Draisin 2011). For example, in September 2011, the Seattle Police Department determined that use of body-worn cameras would violate Washington state law:

State law bars audio recording of private conversations without the consent of all directly involved. Unauthorized recording exposes police to potential civil suits. State law does allow an exception for dashboard-mounted cameras in police cars but not body cameras on police officers.... The city law department has informed the police department that "it would be unwise to implement a body camera program without first obtaining a legislative exception to the Washington Privacy Act." (Rosenberg 2011)

In addition, police scholar Sam Walker noted in a recent interview that "the camera will capture everything in its view and that will include people who are not suspects in the stop" (Hinds 2013).

Skeptics have also suggested that citizens, including witnesses and confidential informants, may be less willing to provide information to police, knowing that the encounter is recorded and can be viewed by others later (Harris 2010). A sergeant with the Albuquerque Police Department observed that "officers a lot of times are seeing people on the worst day of their lives, and we're capturing that on video that's now a public record" (Hinds 2013).

Body-worn cameras capture in real time the potentially traumatic experiences of citizens who are victims of a crime, those who are involved in medical emergencies and accidents, or those who are being detained or arrested. As such, citizens' emotional trauma could be exacerbated when they

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realize that the experience has been caught on video. Moreover, the potential for body-worn cameras to be coupled with other technologies, such as facial recognition software, may present additional concerns for citizen privacy.

These concerns highlight the importance of developing detailed policies governing when the body-worn cameras should be turned on and off. For example, the model policy template developed by the Body Worn Video Steering Group provides specific guidance on how to minimize the “collateral intrusion” of the technology, specifically with regard to private dwellings, religious sensitivities, intimate searches, vulnerable witnesses and victims,¹⁶ and communications governed by legal privilege (see Appendix B).

Detailed policies and careful officer training can assuage some citizens’ objections to body-worn cameras. Nevertheless, there are many unanswered questions regarding citizens’ privacy concerns, and additional research is needed.

Concerns for officers’ privacy

Some resistance to body-worn cameras has come from officers themselves. These concerns have echoed the response to dashboard cameras in the mid-1990s (Pilant 1995). Officers expressed concerns over the potential for supervisors to go on unsolicited “fishing expeditions” in an effort to find behavior that will get an officer into trouble (White 2013).

The response from the NYPD following the judicial order to deploy body-worn cameras has been almost universally negative. Former Police Commissioner Raymond Kelly stated that “the body camera issue opens up certainly more questions than it answers” (Lovett 2013).

In May 2012, the Las Vegas Metropolitan Police Department announced that it planned to pilot test body-worn cameras. The Las Vegas Police Protective Association, a police union, responded by threatening to file suit against the department because the cameras represented a “clear change in working conditions” that would have to be negotiated through the union contract (Schoenmann 2012). The NYPD union has made similar claims (Celona 2013).

The experiences of several other police departments shed light on how leaders can respond to officers’ concerns. In Phoenix, police leadership engaged officers from the beginning of the project. Leadership attended every briefing to explain the goals and objectives of the project and to answer officer questions. Line officers were invited to participate in the “scope of work” group that developed the request for proposals from vendors, and they participated in pilot and durability testing

16. The policy template developed by the Body Worn video Steering Group does not provide a definition of “vulnerable witnesses and victims.” Presumably, this category of citizens would include confidential informants, witnesses whose safety may be in jeopardy as a result of the information they provide, and victims of certain types of crime such as domestic violence and sexual assault.

(White 2013). The leadership also engaged the officer union in developing policies and procedures governing camera use. Commander Michael Kurtenbach of the Phoenix Police Department stated that it is “just as important to be transparent with officers as it is with the community” (White 2013).

Similarly, Rialto’s police union participated in developing their department’s administrative policy (Dillon 2013), and the Mesa Police Department created a stakeholder workgroup to manage the implementation of the body-worn camera project. The workgroup included officials from the department’s records unit, evidence section, information technology unit, policy management unit, training unit, and internal affairs as well as the Mesa City Prosecutor’s Office. “The objectives of the workgroup were to minimize the impact on officers and to integrate the on-officer body camera system into existing processes” (MPD 2013, 1).

Although the experiences from Mesa and Phoenix provide important insight, more research is needed to understand police officers’ concerns with the technology.

Concerns for officers’ health and safety

Critics of body-worn cameras have raised questions about the impact of the technology on officer health and safety. For example, Pat Lynch, head of the NYPD’s Patrolmen’s Benevolent Association (PBA), recently questioned numerous aspects of body-worn cameras, including their effect on officer health and safety:

There is simply no need to equip patrol officers with body cams.... Our members are already weighed down with equipment like escape hoods, Mace, flashlights, memo books, ASPs, radio, handcuffs and the like. Additional equipment becomes an encumbrance and a safety issue for those carrying it. (Celona 2013)

The UK Home Office guide (Goodall 2007) provides a comprehensive list of potential hazards to officers who wear cameras and rates the risk level for each hazard.¹⁷ The guide deems many of the hazards low-risk, such as being targeted for assault because of the camera, neck injury from the weight of the camera, and electrical shock. However, the guide does rate several hazards as medium-risk, such as assailants strangulating officers with the camera strap or wire; assailants hitting officers with the camera and causing head injury; cameras transferring infectious agents or bodily fluids when officers share units; and headbands causing soreness, discomfort, and headache (Goodall 2007, 29). The guide also offers measures to reduce the risks. For example, wearing the camera on other parts of the uniform (e.g., a lapel or torso) can mitigate many of the cited health concerns.

Nevertheless, there is little empirical evidence on the potential health and safety risks associated with the technology.

17. The UK Home Office guide (Goodall 2007) deals solely with head-mounted cameras.

Concerns and Considerations Regarding Body-Worn Cameras

Investments in training and policy

There is consensus from numerous sources regarding the critical importance of developing policies and procedures regarding camera use and training officers in how to use the camera. Many of the camera systems are simple and intuitive in terms of use, but training and policy requirements vary depending on the system.

The NIJ guide (ManTech 2012) states that officer training should emphasize that the technology's primary purpose is for evidence collection, officer safety, and improved public relations, but monitoring officer performance is also a benefit of the system. Police officer reluctance to accept the technology can be minimized by their active involvement in policy development. The NIJ guide highlights the importance of department policy:

If cameras are to be used, policies and procedures will have to be put in place, or expanded on, to address several legal issues. These issues extend beyond the more obvious privacy and civil liberties protections toward which agencies must be sensitive. For example, a policy would have to address when a camera should be used and when it should be turned on or not turned on to ensure fair treatment of all citizens. Parameters would need to be set for voluntary, compulsory and prohibited use of the camera. Camera video may also be considered a public record item and a procedure would need to be created for public assessment and information requests. This policy should be in place before any testing or deployment. (ManTech 2012, 8)

There is a wide range of important issues that should be governed by administrative policy. The Body Worn Video Steering Group's policy template (see Appendix B) outlines many of the key policy areas, such as the following:

- Selection of technology vendor
- Elements of officer training
- Data storage and management
- Video download procedures
- Redaction of video
- Preparation of video for prosecution
- Maintenance and upkeep of the equipment

The policy template also addresses the following questions:

- Will officers volunteer to wear cameras, or will it be required?
- When should officers turn on the camera; when should they turn it off?
- How should officers divide responsibilities if multiple cameras are on scene?
- Whether or not (and how) officers should announce that an encounter is being recorded?
- What should officers record and not record during an encounter?
- When can supervisors review video?

Departments that have adopted body-worn cameras have varied widely on many of these issues. For example, many departments have set limits on how long video will be archived, but the Oakland (California) Police Department is currently storing video indefinitely (Lovett 2013). In terms of camera activation, the Rialto Police Department requires officers to turn on the camera whenever they leave the patrol car to speak with a civilian (Stross 2013).

The Mesa Police Department employed two different policies during their evaluation period. For the first six months, the policy stated, "When practical, officers will make every effort to activate the on-officer body camera when responding to a call or have any contact with the public" (MPD 2013, 2). During the second six months, the policy was less restrictive, asking officers to "exercise discretion and activate the on-officer body camera when they deem it appropriate" (ibid.). The two different administrative policies resulted in the following:

- During the first six months of the Mesa project (with the restrictive policy), the 50 camera-wearing officers averaged 2,327 video files per month (ibid.).
- During the second six-month period (with the less restrictive policy), the same 50 officers averaged 1,353 video files per month (ibid.).

These results represent a 42 percent decline in camera system activations and clearly demonstrate that department policy affects how often officers use the technology.



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Concerns and Considerations Regarding Body-Worn Cameras

Furthermore, the Mesa project included officers who volunteered to wear the camera as well as officers who were assigned to wear it. Results showed that volunteers were more likely to activate the system: each volunteer averaged 71 video files per month, compared to just 28 video files for assigned officers (ibid.).

The Mesa results suggest that officers' use of the technology may decline with less restrictive policies about activation. Discretionary activation may raise concerns among the public and advocacy about the potential for police to record encounters only when it suits them (and failing to record when it may not serve the interests of the officer). As a result, police leaders should consider the activation policy question from an accountability and transparency perspective.

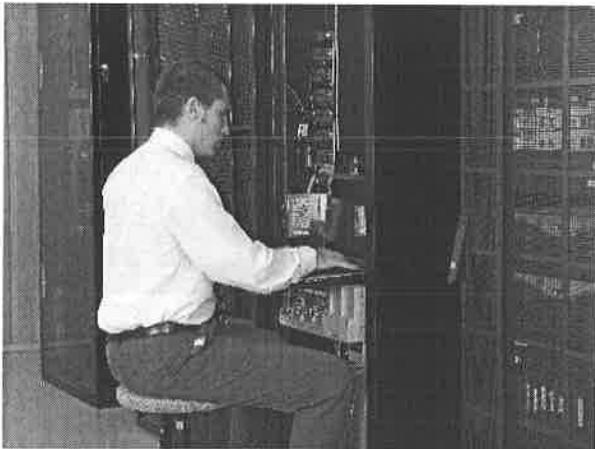
Substantial financial, resource, and logistical commitment

The resource and logistical issues surrounding adoption of body-worn camera technology are considerable and, in many cases, difficult to anticipate. There are direct costs associated with the technology, most notably the costs of each camera (from \$800 to \$1,000 for the TASER AXON and VIEVU models).¹⁸ There may also be replacement costs for hardware such as batteries and cameras. One

of the most important logistical issues involves how the agency will manage the vast amounts of video data that are generated. The NIJ guide states:

This leads to one of the more important items for an agency to consider before purchasing [body-worn camera] units: data storage, management and retention. Not only must the data be protected and backed up regularly, but it must be accessible to all parties involved. Some data needs to be retained forever; other data can be deleted quickly. Crime recordings must be managed by law and through

policies. Even video of standard officer interaction may be retained for a default period of time to cover potential performance complaints. Policies should control the period of time this data is maintained. As recordings become more or less important to [the] agency, adjustments need to be made. The length of storage time can cost numerous man-hours in addition to the actual cost of the storage device. (ManTech 2012, 9)



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18. Departments have dealt with the financial costs of body-worn camera technology in several ways, including state and federal grants, confiscated drug money, and asset forfeiture funds.

The major manufacturers of body-worn cameras offer cloud-based data storage solutions at an annual subscription cost, though a department can also choose to manage the video internally. The Phoenix Police Department has chosen to maintain the video internally while both Rialto and Mesa have employed Evidence.com, which

eliminates the need for on-site storage space by storing the files off-site and allowing agencies to share the files via secure access to the server. Prosecutors can simply log into a remote portal and get the videos they need for their cases. Additionally, the system tracks every activity associated with every file and stores it in an audit log. (Clark 2013)

Regardless of the approach taken, the cost of data storage and management can be significant. The Mesa (2013, 10) report states that “the initial purchase of fifty AXON FLEX cameras, including applicable sales tax was \$67,526.68. The current proposal includes a second year pricing option for video storage with Evidence.com for \$93,579.22 and a third year option for \$17,799.22.”

The Phoenix Police Department has had to devote considerable staff and resources to manage the video data internally, to conduct video redaction for publicly requested files, and to coordinate with the city and county prosecutor offices (White 2013).

The Mesa report (2013) describes the integration issues between Evidence.com and the department’s internal data system (CAD/RMS) that had to be overcome to facilitate evidence discovery and public records requests. The initial procedure required officers to manually record the department report number associated with each video file. However, officers initially failed to record this number in 60 percent of video files, which significantly increased the workload associated with locating files (MPD 2013). Department officials worked with Evidence.com to create a system that would auto-populate the department number, thereby reducing the workload of the officers and the records unit staff. The Mesa report also describes in detail the process and resources required for redacting video footage:

All public records requests involving on-officer video are forwarded to the officer who produced the video.... When an officer receives the public records video request, the officer is required to review the video in its entirety. The review consists of identifying images and information that should not be released, including NCIC/ACJIS information, personal biographical information, juvenile faces, undercover officers, informants, nudity and other sensitive information as determined by the staff attorney. Any items that need to be redacted are identified by the officer by providing a description and time stamp of the selected images. The request is then forwarded to the MPD Video Services Unit (VSU) for action. (MPD 2013, 10)

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This redaction process requires substantial time commitment from the officers, as well as record management and video technician staff. During the Mesa project period, the department received three to four video records requests each month (MPD 2013). If no redaction is necessary, the resource burden is limited to the officer who must review the video (and those who manage the process to release the video). In three cases, redaction was necessary, and each case required about 10 hours to complete the video editing (ibid.).

The experiences in both Mesa and Phoenix highlight the considerable resources required to manage a body-worn camera project. Commander Michael Kurtenbach of the Phoenix Police Department noted that the project has a “profound” impact on the police department and other outside agencies (White 2013). The Mesa report concluded:

Program management of 50 on-officer body camera systems requires a considerable amount of operational commitment.... These duties will exponentially increase with any expansion of the on-officer body camera program.... Properly managed, the program is an asset to the organization; however, it can also expose the department to increased liability without effective oversight. (MPD 2013, 5–6)

Conclusion and Recommendations

This publication seeks to provide a comprehensive, objective review of the available evidence on police officer body-worn cameras. The overall goal is to provide a document that describes the primary issues departments should consider when weighing adoption of the technology and that assesses the empirical support for claims made about the technology.

The handful of resources reviewed for this publication represents a good starting point for exploring body-worn cameras. The UK Home Office guide (Goodall 2007), the Body Worn Video Steering Group website (www.bwvsg.com), and the NIJ guide (ManTech 2012) are particularly useful (see Appendix A).

There is little evidence regarding most of the perceived benefits and drawbacks of the technology. For example, little is known about citizen attitudes toward body-worn cameras, most notably whether the technology increases trust, legitimacy, and transparency of the police. The potential for the technology to serve as a training tool for police is also largely unexplored. Moreover, the privacy implications of body-worn cameras, for both citizens and police officers, are not clearly understood and may vary considerably as a result of differences in state law.

Simply put, there is not enough evidence to offer a definitive recommendation regarding the adoption of body-worn cameras by police. Departments considering body-worn cameras should proceed cautiously, consider the issues outlined in this review, and recognize that most of the claims made about the technology are untested.

That said, the evaluations described in this review do offer insights in several key areas, including a potential civilizing effect; evidentiary benefits; and the logistical, resource, and stakeholder commitment required to successfully manage a body-worn camera program. These insights provide an early glimpse into the potential impact and consequences of body-worn cameras.

Civilizing effect

Most of the empirical studies document a reduction in citizen complaints against the police and, in some cases, similar reductions in use of force and assaults on officers.

- The evaluations in Mesa and Rialto documented substantial drops in citizen complaints following deployment of the technology. The UK studies documented a similar effect.
- The Rialto study also documented a substantial drop in use of force incidents, and review of video indicated that officers wearing cameras appeared to be more restrained in their use of force.
- The Aberdeen study documented substantially fewer assaults on camera-wearing officers compared to other officers.

Conclusions and Recommendations

These findings, which are supported by anecdotal evidence from Phoenix, suggest that the cameras may have a civilizing effect. However, the dynamics of police-citizen encounters are complex, and there are numerous potential explanations for the decline in citizen complaints and use of force. One explanation is that body-worn cameras dissuade citizens from filing complaints, especially frivolous complaints (see “Evidentiary benefits” below). Under this explanation, the reductions are not caused by a civilizing effect; rather, they are driven by changes in citizen complaint reporting patterns.

An alternative explanation is that the reduction in complaints, and use of force, is a consequence of improved behavior (i.e., the civilizing effect) – whether it is citizen behavior, officer behavior, or both.

The majority of studies are unable to disentangle these potential effects. Additional independent research, with rigorous methodologies, is required to substantiate these preliminary findings and to identify the underlying dynamics of behavior that are driving the noted reductions.

Evidentiary benefits

The available research offers credible support for the evidentiary benefits of body-worn camera technology:

- Evidence from several studies (Goodall 2007; ODS Consulting 2011) indicates that body-worn cameras assist in the investigation and resolution of citizen complaints and that the technology may reduce the likelihood that citizens will file frivolous or untruthful complaints.
- Results from the UK studies suggest that video evidence from body-worn cameras reduces officer time devoted to paperwork, enhances officers’ ability to determine whether a crime occurred, and increases the likelihood that cases will end in guilty plea rather than criminal trial.

Body-worn cameras create a real-time, permanent record of what transpires during a police-citizen encounter. This video is useful for police, citizens, and prosecutors. Additional research should continue to explore this benefit and quantify the impact in a more formal cost-benefit analysis that assesses both financial and resource savings as well as costs.

Impact on law enforcement agencies and other stakeholders

Results strongly suggest that adopting body-worn camera technology requires a substantial commitment by the law enforcement agency, a commitment that far exceeds the initial outlay of funds to purchase the cameras. Several agencies have described the considerable groundwork that they must complete before camera deployment, such as selecting a vendor; overcoming officer (and union) objections; and developing training and a policy that covers a wide range of critically important issues, from when to turn the cameras on and off to supervisor review and video redaction.

One of the most pressing resource decisions involves storing and managing the video data. Departments that choose to maintain the data locally as opposed to using a storage service must overcome numerous challenges to manage effectively the vast amount of video that officers record and to respond to requests from the public, prosecutors, etc., for that data.

Commander Kurtenbach of the Phoenix Police Department notes that agencies must fully articulate the goals they seek to accomplish with body-worn cameras and that they should be deliberate in their decision-making process because the technology affects all aspects of the law enforcement agency as well as other stakeholder agencies (White 2013).

Recommendations

The following recommendations, which are based on the literature reviewed for this publication, are to help improve and expand the knowledge base on body-worn camera technology:

1. Any agency interested in adopting body-worn camera technology should proceed cautiously and consider the issues described in this review to fully inform their decisions. Other available resources include the UK Home Office guide (Goodall 2007), the published evaluations in the United States (Mesa and Rialto) and abroad (Plymouth and Renfrewshire/Aberdeen evaluations), and the forthcoming proceedings of the September 2013 PERF conference.
2. Independent research on body-worn camera technology is urgently needed. Most of the claims made by advocates and critics of the technology remain untested. Federal agencies that support research and development should consider providing funding streams for comprehensive research and evaluation of body-worn camera systems. Law enforcement agencies that adopt the technology should partner with researchers to evaluate the implementation and impact of body-worn camera systems.
3. Professional organizations in law enforcement, such as the IACP, the Police Foundation, and PERF, should consider developing guidelines for implementation and evaluation of body-worn camera technology. U.S. professional organizations should collaborate with their UK partners who have been experimenting with the technology for nearly a decade.
4. Law enforcement agencies that are planning to adopt officer body-worn cameras should employ rigorous evaluations of the implementation and impact of such systems. The evidence base for this technology is scant, and agencies can increase this knowledge by partnering with independent evaluators to empirically study the impact of the cameras.
5. Research on implementation and impact of body-worn cameras should include citizen surveys that capture perceptions of the technology, particularly with regard to trust, satisfaction, transparency, and legitimacy.
6. Body-worn camera systems hold great promise as a training tool for law enforcement, both in the academy and as part of performance evaluation. Post-hoc review of officer (or cadet) behavior during recorded encounters can serve as a mechanism for positive feedback, can identify problems in officer behavior, can help identify best practices in handling critical incidents (e.g., de-escalation); and can eliminate traditional reliance on “final frame” review of officer decisions to use force (i.e., the “split second syndrome” [Fyfe 1986]).

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Useful Guides to Body-Worn Camera Technology

This publication has identified several documents and reports that describe body-worn camera technology and offer guidance on its adoption and deployment by police (see “A brief note on methodology” on page 15). Law enforcement agencies in the United Kingdom have been experimenting with this technology for nearly a decade, and there are a number of valuable resources based on their work.

For example, the UK Home Office published *Guidance for the Police Use of Body-Worn Video Devices* (Goodall 2007). This comprehensive document provides recommendations for policy and practice across a wide range of operational issues, as well as discussions of legal requirements, implementation issues, and health and safety concerns. The document’s executive summary provides definitive statements on the benefits of police body-worn camera systems:

- **Evidential quality:** The cameras provide accurate, real-time evidence of what occurred.
- **Time saving:** The cameras create less written record keeping and enable quicker resolution of cases (guilty pleas).
- **Public order policing:** When citizens see officers wearing cameras, they are less likely to engage in anti-social behavior, and when they do, the cameras help to resolve cases faster.
- **Critical incidents:** The cameras provide a detailed record of police use of force.
- **Domestic abuse:** The cameras aide in prosecution of domestic violence by assisting reluctant witnesses.
- **Professional development:** The cameras provide an excellent tool to review cadet performance at the academy as well as post-hoc review of critical incidents. (Goodall 2007, 7–8)

Police in the United Kingdom have also created the Body Worn Video Steering Group (BWVSG). According to its website (www.bwvsg.com), the mission of the BWVSG is

to bring together organizations experienced in deploying and using Body Worn Video technology so that a code of best practice can be developed and shared with others; to provide a central library of information, a forum for debate, a group of experienced people willing to help others; to promote the use of Body Worn Video; and to design the future of Body Worn Video.

Appendix A: Useful Guides to Body-Worn Camera Technology

The BWVSG holds quarterly meetings (the first was in January 2013) to share information, discuss new and emerging practices, and learn from subject matter experts. The BWVSG website also makes available a range of resources, most notably a comprehensive administrative policy template (see Appendix B) that departments can use as a starting point for developing their own policies.

The U.S. Department of Justice has also developed resources to guide police departments in their consideration of body-worn camera technology. In September 2012, the National Institute of Justice published *A Primer on Body-Worn Cameras for Law Enforcement* (ManTech 2012), which covers a range of important topics, including the reasons why body-worn cameras are useful for law enforcement and the implementation issues that come with the technology (e.g., policies, training, and data storage). The document also includes a “camera market survey” that compares the products of seven leading camera manufacturers along a range of operational and technical specifications as well as cost (see also TechBeat 2010; 2012).

Last, the U.S. Department of Homeland Security (DHS) has examined body-worn camera technology through its System Assessment and Validation for Emergency Responders (SAVER). The goal of the SAVER program is to provide local, state, tribal, and federal authorities with information to assist with purchasing emergency responder equipment, from physical security and decontamination equipment to information technology. SAVER has produced two documents on body-worn cameras, a *Wearable Camera Systems Focus Group Report* with recommendations for product selection and a detailed assessment report, *Camera Systems, Wearable*, that includes a comparative evaluation of different systems.¹⁹

19. At the time this publication was completed, the SAVER resources were in the process of being transferred to <https://www.llis.dhs.gov/>. Note that many of the documents available through SAVER are restricted access.

APPENDIX B

Body-Worn Camera Policy Template

The follow text is reprinted with permission from the Body-Worn Video Steering Group. A Word document version can be downloaded from its website by clicking the "Police BWV Policy Document" hyperlink at www.bwvsg.com/resources/procedures-and-guidelines/.

Title: Body Worn Video

Policy

1 Introduction

- 1.1 This policy is required to ensure police officers using Body Worn Video (BWV) equipment as part of their operational duties are aware of their responsibilities in relation to its use to secure 'best evidence' and to safeguard the integrity of the digital images captured should they need to be produced for evidential purposes.

2 Application

- 2.1 This policy is effective immediately and applies to all police officers and police staff who use BWV or come into contact with the material recorded by BWV.

3 Purpose

- 3.1 The purpose of this policy is to ensure BWV is used correctly so that the Force gains maximum benefit from the operational use of BWV, and that all staff coming into contact with either the equipment or the images are able to comply with legislation and Force requirements.

4 Scope

- 4.1 This policy covers all aspects of the use of BWV equipment by members of staff and the subsequent management of any images obtained.

5 Policy Statement

- 5.1 *X Police* is committed to making the best use of its resources to capture best evidence by taking full advantage of new technology and the use of Body Worn Video in all appropriate circumstances.

6 Benefits

- 6.1 This policy will facilitate the use of BWV to:
 - Enhance opportunities for evidence capture;
 - Increase early guilty pleas, reducing officer case preparation and court time;

Appendix B: Body-Worn Camera Policy Template

- Assist police officers and PCSOs to control anti-social behavior;
- Reduce protracted complaint investigations by providing impartial, accurate evidence;
- Give greater insight into service delivery and identifying good practice.

7 Responsibilities

7.1 This policy will be monitored and reviewed by *X Department*.

The practical implementation of this policy at local level will be monitored by the Divisional Operations Chief Inspectors, District Single Point of Contacts (SPOCS) and supervisors of the BWV users.

Procedure (All procedures are ****RESTRICTED****)

1 Introduction

- 1.1 The use of BWV devices must complement the use of other video and digital evidence gathering devices within the Force. These procedures should be considered a minimum standard for the use of BWV devices.
- 1.2 These procedures have been designed with regard to the current legislation and guidance for the use of overt video recording of police evidence.
- 1.3 All images recorded are the property of the Force and must be retained in accordance with force procedures and the Association of Chief Police Officers (ACPO) Practice Advice on Police Use of Digital Images. They are recorded and retained for policing purposes and must not be shown or given to unauthorized persons other than in accordance with specified exemptions.

2 Objectives

- 2.1 BWV is an overt method by which officers can obtain and secure evidence at the scene of incidents and crimes. These procedures are intended to enable officers to comply with legislation and guidance to create evidence for use in court proceedings.
- 2.2 When used effectively BWV can promote public reassurance, capture best evidence, modify behavior, prevent harm and deter people from committing crime and anti-social behavior. Recordings will provide independent evidence that will improve the quality of prosecution cases and may reduce the reliance on victim evidence particularly those who may be vulnerable or reluctant to attend court.
- 2.3 Using recordings can also affect the professionalism of the service and in the professional development of officers. Officers, trainers and supervisors can use the equipment to review and improve how incidents are dealt with.
- 2.4 The use of BWV relates to crime reduction and investigation strategies and should NOT be confused with the deployment of Public Order trained Evidence Gatherers, which is the subject of other policies.

2.5 Professional Standards Department and line management will not routinely search the back office system for misdemeanors or offences committed by users, but if a complaint is received interrogation of the system can be an appropriate line of enquiry.

3 Equipment

3.1 The BWV equipment is generally a body-mounted camera with built in microphone. The camera stores digital files that, once recorded, cannot be deleted or amended by the operator. Each file carries a unique identifier and is time and date stamped throughout.

3.2 To support the camera systems, stand-alone computers and appropriate software have been purchased for the downloading and storage of digital video files. These provide a full audit trail ensuring evidential continuity is maintained.

4 Upkeep of Equipment

4.1 It will be the responsibility of X supported by Single Points of Contact (SPOC) to keep records of the serial numbers and location of the cameras on their division.

4.2 Any malfunction of the equipment must be reported immediately to the SPOC for that division.

4.3 The divisions will be responsible for the upkeep of the cameras, including the cost of any repairs or damage to equipment.

4.4 Any new equipment must be purchased via the divisional SPOC.

4.5 It will be the responsibility of Divisional Support Services Managers to ensure that there are sufficient DVDs available for use. If staff notices that resources are running low, they should notify the Divisional Support Services Manager accordingly.

5 Training

5.1 All uniform frontline Officers and PCSOs will be trained and have access to BWV.

5.2 Training in the use of the BWV device will be available via an eLearning package on NCALT. Additional guidance on the X software has also been produced by L&D and is available via the Neighborhood Policing Branch intranet site (part of the Communications Department).

5.3 In order to use BWV equipment officers should receive training in all necessary technical aspects of the specific equipment being used and its use. A training package for the equipment will include:

- Legal implications
- Practical use issues
- Evidential continuity
- Health and safety

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- Diversity issues
 - Professional standards
- 5.4 The eLearning may be completed individually or as a team led by a supervisor. Once a supervisor is satisfied that a member of staff has completed the eLearning, details of authorized users will be supplied to the SPOC who will issue the necessary log on details.
- 6 Equipment Issue
- 6.1 When not in use all equipment must be securely stored in a suitable location within the police station.
- 6.2 Only officers and PCSOs who have received the appropriate training will be able to “self issue” the equipment. Priority will be given to Neighborhood Response Team (NRT) officers, with any remaining cameras available for issue to Local Support Team (LST) or Neighborhood Policing Team (NPT) staff.
- 6.3 Cameras will be signed out by the user using their network login and BWV password on *X software*.
- 6.4 The user must ensure it is working correctly prior to leaving the station, check that the battery is fully charged and the date and time stamp is accurate.
- 7 Recording an Incident
- 7.1 The following is guidance on the use of BWV when recording incidents.
- a. Decide
 - Guiding principles are:
 - NRT officers will wear BWV when on operational response duty.
 - The camera should be switched on when footage might support ‘professional observation’ or would corroborate what would be written in a pocket book.
 - The decision to record or not to record any incident remains with the user.
 - The user should be mindful that failing to record incidents that are of evidential value may require explanation in court.
 - b. Start recording early
 - It is evidentially important to record as much of an incident as possible; therefore recording should begin at the earliest opportunity from the start of an incident.
 - c. Recordings to be Incident specific
 - Recording must be incident specific. Users should not indiscriminately record entire duties or patrols and must only use recording to capture video and audio at incidents that would normally be the subject of PNB entries or as ‘professional observation’, whether or

not these are ultimately required for use in evidence. There are a few instances where recording should not be undertaken and further guidance on when not to record is included later in this section.

d. Talk

At the commencement of any recording the user should, where practicable, make a verbal announcement to indicate why the recording has been activated. If possible this should include:

- Date, time and location
- Confirmation, where practicable, to those present that the incident is now being recorded using both video and audio

e. Inform

If the recording has commenced prior to arrival at the scene of an incident the user should, as soon as is practicable, announce to those persons present at the incident that recording is taking place and that actions and sounds are being recorded. Specific words for this announcement have not been prescribed in this guidance, but users should use straightforward speech that can be easily understood by those present, such as, "I am wearing and using body worn video."

f. Collateral intrusion

In so far as is practicable, users should restrict recording to areas and persons necessary in order to obtain evidence and intelligence relevant to the incident and should attempt to minimize collateral intrusion to those not involved.

g. Private dwellings

In private dwellings, users may find that one party objects to the recording taking place; for example, where domestic abuse is apparent. In such circumstances, users should continue to record and explain the reasons for recording continuously. These include:

- That an incident has occurred requiring police to attend
- That the officer's presence might be required to prevent a Breach of the Peace or injury to any person
- The requirement to secure best evidence of any offences that have occurred, whether this is in writing or on video and the video evidence will be more accurate and of higher quality and therefore in the interests of all parties
- Continuing to record would safeguard both parties with true and accurate recording of any significant statement made by either party
- An incident having previously taken place may reoccur in the immediate future
- Continuing to record will safeguard the officer against any potential allegations from either party

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h. Sensitivities connected with faith.

The filming in domestic circumstances could be an issue with some faiths. An example may be a situation in which the female may not have a face covering within the home. Officers should be aware of this fact and be sensitive to the wishes of those involved in these cases.

i. Do not interrupt filming.

Unless specific circumstances dictate otherwise (see below) recording must continue uninterrupted from commencement of recording until the conclusion of the incident or resumption of general patrolling.

j. Concluding filming.

It is considered advisable that the officer continues to record for a short period after the incident to demonstrate clearly to any subsequent viewer that the incident has concluded and the user has resumed other duties or activities.

Recording may also be concluded when the officer attends another area such as a custody center where other recording devices are able to take over the recording.

Prior to concluding recording the user should make a verbal announcement to indicate the reason for ending the recording this should state:

- Date, time and location
- Reason for concluding recording

k. Don't delete!

Once a recording has been completed this becomes police information and must be retained and handled in accordance with the Code of Practice on the Management of Police Information. **Therefore, any recorded image must not be deleted by the recording user and must be retained as required by the procedures.** Any breach of the procedures may render the user liable to disciplinary action or adverse comment in criminal proceedings.

7.2 Stop & Search

All 'stop and search' encounters should be recorded unless the search is an 'intimate search' or 'strip search' or if the search requires removal of more than outer clothing.

A video recording does not replace the need for a 'record of search' to be completed by the officer.

There is currently no specific power within PACE to take a photographic or video image of a person during a stop search, although such action is not explicitly prohibited.

8 Selective Capture and Bookmarking

- 8.1 Selective capture does not involve deletion of any images, merely the user making a choice of when to record and when not to record. It also describes the process of temporarily stopping and restarting recording in order to 'bookmark' the recorded footage.

There are no circumstances in which the deletion by the user of any images already recorded can be justified and any such action may result in legal or disciplinary proceedings.

8.2 Selective Capture

In general, the BWV user should record entire encounters from beginning to end without the recording being interrupted. However, the nature of some incidents may make it necessary for the user to consider the rationale for continuing to record throughout entire incidents.

For example, the recording may be stopped in cases of a sensitive nature or if the incident has concluded prior to the arrival of the user. In all cases, the user should exercise their professional judgment in deciding whether to record all or part of an incident.

In cases where the user does interrupt or cease recording at an ongoing incident, they should record their decision in a PNB or similar log including the grounds for making such a decision.

8.3 Bookmarking

In recording an incident, it is likely that BWV users will encounter victims, offenders and witnesses as well as recording the visual evidence at the scene itself. Bookmarking is a means by which users may separate encounters with each of these types of person or occurrence in order to allow for easier disclosure later. For example if a police officer has recorded an encounter with a witness including disclosure of their name and address, this section should not be shown to the suspect or their legal representative.

It is recognized that bookmarking is not always practicable due to the nature of incidents and therefore this should only be attempted if the situation is calm and the operator is easily able to undertake this procedure.

Prior to any temporary suspension for the purpose of bookmarking the user should make a verbal announcement for the recording to clearly state the reason for suspending recording. The user should also announce that they have recommenced recording at the same incident as before.

The bookmarking process will be demonstrated on the final whole recording by a missing section of a few seconds. In creating the master disk exhibit for court the user must include all bookmarked sections for the incident as one complete master recording of the incident.

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9 Witness First Accounts

- 9.1 If the BWV user is approached by victims or witnesses who are giving their first account of the crime the user may record the encounter using BWV but this should be considered against the needs of the individual with due sensitivity to the nature of the offence being reported. Any initial disclosure from victims and witnesses recorded by BWV should be treated as an evidential recording and submitted to the investigating officer. This is important to ensure compliance with statutory identification procedures under PACE Code D.
- 9.2 Such recordings do not replace the need for formal written statements from victims or witnesses but they can be used as supporting evidence for the statements and can also be considered as hearsay evidence and used in accordance with the provisions of the Criminal Justice Act 2003.
- 9.3 If this recording amounts to the victim's first notes or initial description of suspects they may refer to the relevant section of the video when making their written statement. Care must be taken to ensure that only the witnesses account is reviewed by the witness and they must not be allowed access to other sections of the recording. The extent of any review by the witness to assist with making their statement must also be recorded in their statement.
- 9.4 Care should be taken to ensure that should a victim or witness provide a 'first description' of the offender on video, that this fact should be recorded and submitted to the investigating officer. This is important to ensure compliance with statutory identification procedures under PACE Code D.
- 9.5 In the case of victims of serious sexual offences the user must consider the guidance in ACPO (2009) Guidance on Investigating and Prosecuting Rape. The victim's explicit permission for video recording of the initial disclosure should be sought and if the victim is in any way unsure of the need for the recording to be made or is uncomfortable with the thought of being recorded then the user should not record using video.
- 9.6 If the victim does not consent to being video recorded the user may consider the option to divert the camera away from the victim, or obscuring the lens and then record the encounter using the audio only facility. Again in these circumstances the explicit consent of the victim must be obtained prior to audio only recording.
- 9.7 Initial accounts from the victim should be limited to asking about:
 - Need for medical assistance
 - Nature of the incident (to ascertain if a Sexual Offences Liaison Officer is required)
 - Identity of the suspect (if known)
 - Location of the suspect (if known)
 - First description of the suspect (for circulation if appropriate)
 - Time of the offence in order to prioritize action

- Location of the crime scene(s)
- Identification of forensic opportunities, including information for forensic medical examinations
- Activities since the offence took place (to establish forensic evidence opportunities)
- Identity of any other person(s) informed of the incident by the victim (to ascertain early complaint)
- Identity or existence of any witness(es) to the offence or to events immediately prior to or after the offence

10 Recording of Interviews

- 10.1 BWV should not be used to record interviews of suspects under caution that occur at a police station. It may be used to record interviews that take place other than at a police station. However, recording of interviews under such circumstances does not negate the need for them to be recorded contemporaneously. There is no provision within the Police and Criminal Evidence Act 1984 for this.
- 10.2 BWV can and should be used to capture hearsay evidence. An example of this is a situation in which a store detective gives his account of a suspected shoplifter's actions to an investigating officer, in the presence and hearing of the suspect.

11 Scene Review

- 11.1 An additional use of BWV is to record the location of objects and evidence at the scene of a crime or incident. This can be particularly beneficial in allowing the Senior Investigating Officer an opportunity to review scenes of serious crime or in effectively recording the positions of vehicles and debris at the scene of a serious road traffic collision.
- 11.2 If reviewing a scene this should be treated as an evidential recording and where possible the officer should provide a running commentary of factual information to assist later viewers.

12 Limitations on Use

- 12.1 BWV is an overt recording medium and can be used across a wide range of policing operations. There are a few examples of situations where the use of BWV is not appropriate. In all cases users and supervisors must use their professional judgment with regard to recording.
- 12.2 The following examples of where the use of BWV is not appropriate are for guidance only and this list is not exhaustive.
- *Intimate searches* – BWV must not be used under any circumstances for video or photographic recording to be made of intimate searches.
 - *Legal privilege* – users must be careful to respect legal privilege and must not record material that is or is likely to be subject of such protections.

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- *Private dwellings* – whilst use of video at the scene of domestic violence incidents is covered in other sections, users must consider the right to private and family life, in accordance with Article 8 of the Human Rights Act, and must not record beyond what is necessary for the evidential requirements of the case.
- *Vulnerable Witness interview (VWI)* - the use of BWV is not a replacement for VWI and vulnerable victims must be dealt with in accordance with force policy 1130/2012 - Investigative Interviewing Policy.
- *Explosive devices* - like many electrical items, BWV cameras could cause electrostatic interference, which may trigger explosive devices. Therefore, BWV equipment **MUST NOT** be used in an area where it is believed that explosive devices may be present.

13 Audit Trail

13.1 An audit trail is covered by use of the *X software*.

14 Production of Exhibits

14.1 All footage recorded to the BWV unit will be downloaded at the end of the officer's tour of duty. Officers should return the units to their home station.

14.2 Evidential footage downloaded will be saved on the relevant stand-alone BWV coputer as per the approved procedure. It will be identified by exhibit number, incident type, name(s) of any accused person(s) and the Storm reference, if appropriate.

14.3 Evidential footage will be considered any data that is:

- Evidence of an offence
- Supporting evidence for any process (e.g., charge, Fixed Penalty Notice, Penalty Notice for Disorder)
- Footage that is required for a relevant and proportionate policing purpose - i.e. footage taken of an overcrowded town center taxi-rank to highlight the need for an extended facility to Local Authority partners
- Footage that is revealable under The Criminal Procedure and Investigations Act of 1997

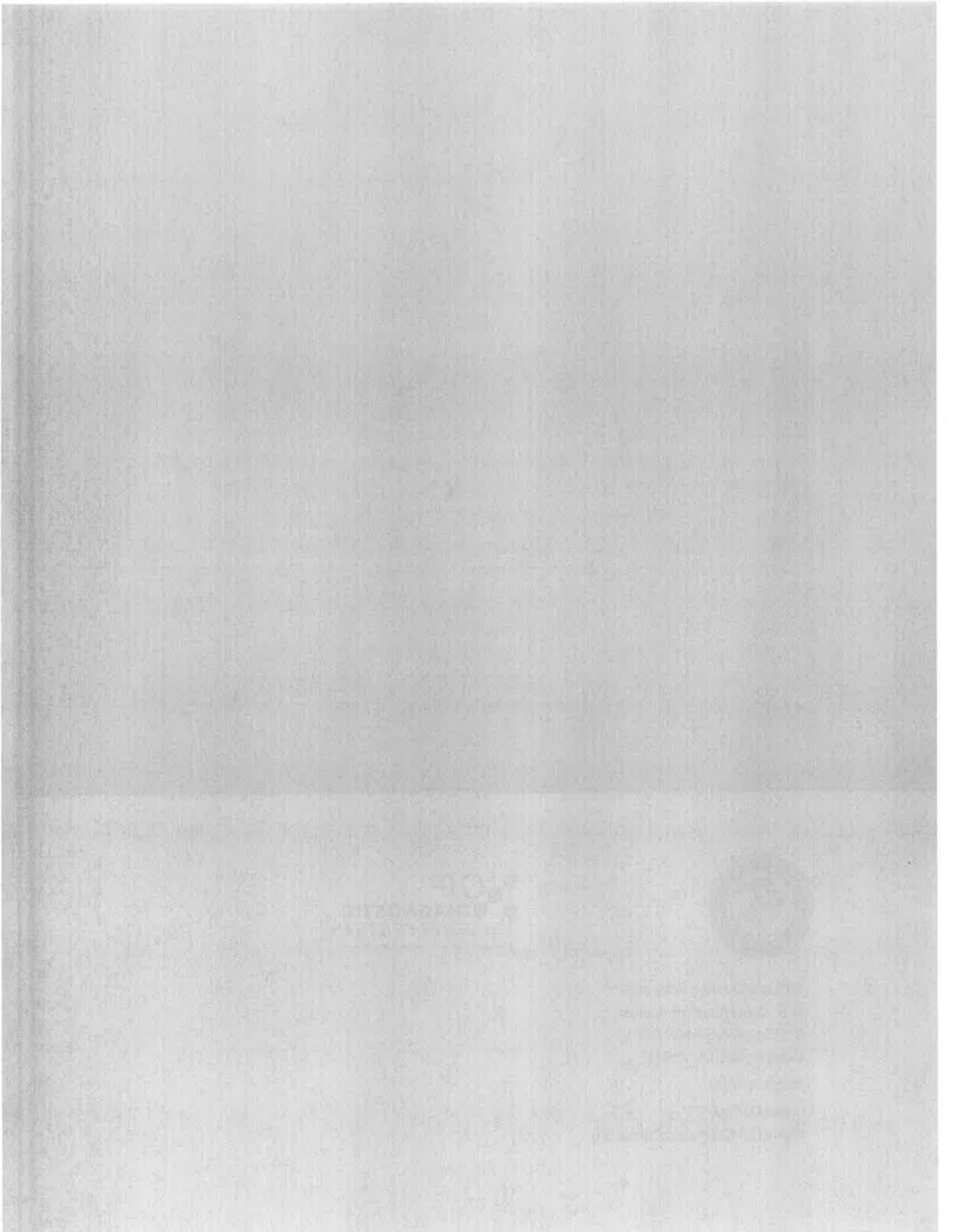
14.4 Data will not be downloaded to any device other than the dedicated stand-alone BWV computer provided.

14.5 *X software* will be used to book out BWV units.

- 14.6 Data downloaded as **non-evidential** will be stored on DEMS for 31 days. During that time it is searchable and can be retrieved and marked as evidential. After this period it will be automatically deleted.
- 14.7 As soon as reasonably practical, the user will make two DVD copies. The first will be a master copy, which will be sealed, labeled, and entered into the G83. The second will be a 'working copy' for investigation and file preparation purposes. DVDs should be retained in line with force policy 610/2012 - Audio and Video Unit Procedures Policy.
- 14.8 If the 'working' copy contains any sensitive information, i.e. witness details, and has not been sanitized, clearly mark it '**Do not disclose.**'
- 14.9 BWV is supporting evidence and officers will be required to provide written statements, which must include the audit trail for the capture of the footage and the subsequent production of the master disc/DVD. This can be complied with through *X software*. A separate statement evidencing arrests or evidence not captured on BWV should be supplied to the investigation.
- 14.10 For details of what to include in a statement refer to the File Preparation Guidance on the Force intranet.
- 14.11 In order that the recorded evidence can be presented in court the master copy must be preserved as an exhibit. It is recommended for reasons of security that this takes place as soon as practicable after the footage is recorded and that users do not start duty with a recording device that contains evidence of cases from a previous duty or day.
- 14.12 Where more than one BWV device is present at the scene of an incident or the area of the incident is also covered by a CCTV system the officer in the case (OIC) must ensure that all available footage of the incident is secured as exhibits in consideration of any defense arguments that may be presented.

About the Author

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Body-worn cameras represent the latest technological innovation for law enforcement. The perceived benefits of these cameras are far-ranging and touch on core elements of the police mission, including enhanced police legitimacy, reduced use of force, and fewer citizen complaints. Criticism of the technology centers on equally important issues, such as violations of citizen and officer privacy, and on enormous investments in terms of cost and resources. Unfortunately, there have been few balanced discussions of body-worn cameras and even fewer empirical studies of the technology in the field. As such, *Police Officer Body-Worn Cameras: Assessing the Evidence* provides a thorough review of the merits and drawbacks regarding the technology and assesses the available empirical evidence on each of those claims. Overall, this publication articulates the key questions surrounding the technology and provides a framework for informed decision-making regarding adoption and empirical evaluation of body-worn cameras.



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Police Body-Mounted Cameras: With Right Policies in Place, a Win For All

Version 2.0

By Jay Stanley, ACLU Senior Policy Analyst

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Introduction to Version 2.0¹

Since we published the first version of this policy white paper in October 2013, interest in police body cameras has exploded. The August 2014 shooting of Michael Brown in Ferguson, Missouri and the subsequent protests focused new public attention on the problem of police violence—and on the possibility that body cameras might be part of the solution. The following December, a grand jury's decision not to indict an officer in the videotaped chokehold death of Eric Garner in New York City further intensified discussion of the technology.

With so much attention being paid to body cameras, we have received a lot of thoughtful feedback on our policy recommendations. Overall, considering how early in the discussion we issued our paper, we believe our recommendations have held up remarkably well. But in this revision of the paper we have seen fit to refine our recommendations in some areas, such as when police should record. And of course, the intersection of technology and human behavior being highly complex and unpredictable, we will continue to watch how the technology plays out in the real world, and will most likely continue to update this paper.

"On-officer recording systems" (also called "body cams" or "cop cams") are small, pager-sized cameras that clip on to an officer's uniform or are worn as a headset, and record audio and video of the officer's interactions with the public. Recent surveys suggest that about 25% of the nation's 17,000 police agencies were using them, with fully 80% of agencies evaluating the technology.

¹ I would like to thank Doug Klunder of the ACLU of Washington, who did much of the thinking behind the analysis set forth in the original draft of this paper; Scott Greenwood of Ohio; and my colleagues at the national office, for their valuable feedback and advice.

Much interest in the technology stems from a growing recognition that the United States has a real problem with police violence. In 2011, police killed six people in Australia, two in England, six in Germany and, according to an FBI count, 404 in the United States. And that FBI number counted only “justifiable homicides,” and was comprised of *voluntarily submitted* data from just 750 of 17,000 law enforcement agencies. Attempts by journalists to compile more complete data by collating local news reports have resulted in estimates as high as 1,000 police killings per year in the United States. Fully a quarter of the deaths involved a white officer killing a black person.

The ACLU’s Interest

Although we at the ACLU generally take a dim view of the proliferation of surveillance cameras in American life, police on-body cameras are different because of their potential to serve as a check against the abuse of power by police officers. Historically, there was no documentary evidence of most encounters between police officers and the public, and due to the volatile nature of those encounters, this often resulted in radically divergent accounts of incidents. Cameras have the potential to be a win-win, helping protect the public against police misconduct, and at the same time helping protect police against false accusations of abuse.

We’re against pervasive government surveillance, but when cameras primarily serve the function of allowing public monitoring of the government instead of the other way around, we generally support their use. While we have opposed government video surveillance of public places, for example, we have supported the installation of video cameras on police car dashboards, in prisons, and during interrogations.

At the same time, body cameras have more of a potential to invade privacy than those deployments. Police officers enter people’s homes and encounter bystanders, suspects, and victims in a wide variety of sometimes stressful and extreme situations.

For the ACLU, the challenge of on-officer cameras is the tension between their potential to invade privacy and their strong benefit in promoting police accountability. Overall, we think they can be a win-win—but *only* if they are deployed within a framework of strong policies to ensure they protect the public without becoming yet another system for routine surveillance *of* the public, and maintain public confidence in the integrity of those privacy protections. Without such a framework, their accountability benefits would not exceed their privacy risks.

On-officer cameras are a significant technology that implicates important, if sometimes conflicting, values. We will have to watch carefully to see how they are deployed and what their effects are over time, but in this paper we outline our current thinking about and recommendations for the technology. These recommendations are subject to change.

Control over recordings

Perhaps most importantly, policies and technology must be designed to ensure that police cannot “edit on the fly” — i.e., choose which encounters to record with limitless discretion. If police are free to turn the cameras on and off as they please, the cameras’

role in providing a check and balance against police power will shrink and they will no longer become a net benefit.

The primary question is how that should be implemented.

Purely from an accountability perspective, the ideal policy for body-worn cameras would be for continuous recording throughout a police officer's shift, eliminating any possibility that an officer could evade the recording of abuses committed on duty.

The problem is that continuous recording raises many thorny privacy issues, for the public as well as for officers. For example, as the Police Executive Research Forum (PERF) pointed out in their September 2014 [report](#) on body cameras, crime victims (especially victims of rape, abuse, and other sensitive crimes), as well as witnesses who are concerned about retaliation if seen cooperating with police, may have very good reasons for not wanting police to record their interactions. We agree, and support body camera policies designed to offer special privacy protections for these individuals.

Continuous recording would also mean a lot of mass surveillance of citizens' ordinary activities. That would be less problematic in a typical automobile-centered town where officers rarely leave their cars except to engage in enforcement and investigation, but in a place like New York City it would mean unleashing 30,000 camera-equipped officers on the public streets, where an officer on a busy sidewalk might encounter thousands of people an hour. That's a lot of surveillance. That would be true of many denser urban neighborhoods—and of course, the most heavily policed neighborhoods, poor and minority areas, would be the most surveilled in this way.

Continuous recording would also impinge on police officers when they are sitting in a station house or patrol car shooting the breeze — getting to know each other as humans, discussing precinct politics, etc. We have some [sympathy](#) for police on this; continuous recording might feel as stressful and oppressive in those situations as it would for any employee subject to constant recording by their supervisor. True, police officers with their extraordinary powers are not regular employees, and in theory officers' privacy, like citizens', could be protected by appropriate policies (as outlined below) that ensure that 99% of video would be deleted in relatively short order without ever being reviewed. But on a psychological level, such assurances are rarely enough. There is also the danger that the technology would be misused by police supervisors against whistleblowers or union activists — for example, by scrutinizing video records to find minor violations to use against an officer.

On the other hand, if the cameras do not record continuously, that would place them under officer control, which allows them to be manipulated by some officers, undermining their core purpose of detecting police misconduct. Indeed, this is precisely what we are seeing happening in many cases.

The balance that needs to be struck is to ensure that officers can't manipulate the video record, while also placing reasonable limits on recording in order to protect privacy.

One possibility is that some form of effective automated trigger could be developed that would allow for minimization of recording while capturing any fraught encounters — based, for example, on detection of raised voices, types of movement, etc. With dashcams, the devices are often configured to record whenever a car's siren or lights are activated, which provides a rough and somewhat (though not entirely) non-discretionary measure of when a police officer is engaged in an encounter that is likely to be a problem. That policy is not applicable to body cams, however, since there is no equivalent to flashing lights. And it's not clear that any artificial intelligence system in the foreseeable future will be smart enough to reliably detect encounters that should be recorded. In any case, it is not an option with today's technology.

Another possibility is that police discretion be minimized by requiring the recording of all encounters with the public. That would allow police to have the cameras off when talking amongst themselves, sitting in a squad care, etc., but through that bright-line rule still allow officers no discretion, and thus no opportunity to circumvent the oversight provided by cameras.

An all-public-encounters policy is what we called for in the first version of this white paper, but (as we first explained [here](#)), we have refined that position. The problem is that such a policy does not address the issues mentioned above with witnesses and victims, and greatly intensifies the privacy issues surrounding the cameras, especially in those states where open-records laws do not protect the privacy of routine video footage.

If a police department is to place its cameras under officer control, then it becomes vitally important that it put in place tightly effective means of limiting officers' ability to choose which encounters to record. Policies should require that an officer activate his or her camera *when responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a police officer and a member of the public*. That would include stops, frisks, searches, arrests, consensual interviews and searches, enforcement actions of all kinds. This should cover any encounter that becomes in any way hostile or confrontational.

If officers are to have control over recording, it is important not only that clear policies be set, but also that they have some teeth. In too many places ([Albuquerque](#), [Denver](#), and [other cities](#)) officer compliance with body camera recording and video-handling rules has been terrible. Indeed, researchers report that compliance rates with body camera policies are as low as 30%.

When a police officer assigned to wear a body camera fails to record or otherwise interferes with camera video, three responses should result:

1. Direct disciplinary action against the individual officer.
2. The adoption of rebuttable evidentiary presumptions in favor of criminal defendants who claim exculpatory evidence was not captured or was destroyed.
3. The adoption of rebuttable evidentiary presumptions on behalf of civil plaintiffs suing the government, police department and/or officers for damages based on

police misconduct. The presumptions should be rebuttable by other, contrary evidence or by proof of exigent circumstances that made compliance impossible.

Evidentiary presumptions against a defendant-officer in a criminal proceeding should not be sought, as they are insufficient for meeting the burden of proof in a criminal case and might lead to false convictions.

Limiting the threat to privacy from cop cams

The great promise of police body cameras is their oversight potential. But equally important are the privacy interests and fair trial rights of individuals who are recorded. Ideally there would be a way to minimize data collection to only what was reasonably needed, but there's currently no technological way to do so.

Police body cameras mean that many instances of entirely innocent behavior (on the part of both officers and the public) will be recorded. Perhaps most troubling is that some recordings will be made inside people's homes, whenever police enter — including in instances of consensual entry (e.g., responding to a burglary call, voluntarily participating in an investigation) and such things as domestic violence calls. In the case of dashcams, we have also seen video of particular incidents released for no important public reason, and instead serving only to embarrass individuals. Examples have included DUI stops of celebrities and ordinary individuals whose troubled and/or intoxicated behavior has been widely circulated and now immortalized online. The potential for such merely embarrassing and titillating releases of video is significantly increased by body cams.

Therefore it is vital that any deployment of these cameras be accompanied by good privacy policies so that the benefits of the technology are not outweighed by invasions of privacy. The core elements of such a policy follow.

Notice to citizens

Most privacy protections will have to come from restrictions on subsequent retention and use of the recordings. There are, however, a few things that can be done at the point of recording.

1. Body cameras should generally be limited to uniformed police officers and marked vehicles, so people know what to expect. Exceptions should be made for non-uniformed officers involved in SWAT raids or in other planned enforcement actions or uses of force.
2. Officers should be required, wherever practicable, to notify people that they are being recorded (similar to existing law for dashcams in some states such as Washington). One possibility departments might consider is for officers to wear an easily visible pin or sticker saying "lapel camera in operation" or words to that effect. Cameras might also have blinking red lights when they record, as is standard on most other cameras.

3. It is especially important that the cameras not be used to surreptitiously gather intelligence information based on First Amendment protected speech, associations, or religion. (If the preceding policies are adopted, this highly problematic use would not be possible.)

Recording in the home

Because of the uniquely intrusive nature of police recordings made inside private homes, officers should be required to provide clear notice of a camera when entering a home, except in circumstances such as an emergency or a raid. And departments should adopt a policy under which officers ask residents whether they wish for a camera to be turned off before they enter a home in non-exigent circumstances. (Citizen requests for cameras to be turned off must themselves be recorded to document such requests.) Cameras should never be turned off in SWAT raids and similar police actions.

Retention

Data should be retained no longer than necessary for the purpose for which it was collected. For the vast majority of police encounters with the public, there is no reason to preserve video evidence, and those recordings therefore should be deleted relatively quickly.

- Retention periods should be measured in weeks not years, and video should be deleted after that period unless a recording has been flagged. Once a recording has been flagged, it would then switch to a longer retention schedule (such as the three-year period currently in effect in Washington State).
- These policies should be posted online on the department's website, so that people who have encounters with police know how long they have to file a complaint or request access to footage.
- Flagging should occur automatically for any incident:
 - involving a use of force;
 - that leads to detention or arrest; or
 - where either a formal or informal complaint has been registered.
- Any subject of a recording should be able to flag a recording, even if not filing a complaint or opening an investigation.
- The police department (including internal investigations and supervisors) and third parties should also be able to flag an incident if they have some basis to believe police misconduct has occurred or have reasonable suspicion that the video contains evidence of a crime. We do not want the police or gadflies to be able to routinely flag all recordings in order to circumvent the retention limit.

- If any useful evidence is obtained during an authorized use of a recording (see below), the recording would then be retained in the same manner as any other evidence gathered during an investigation.
- Back-end systems to manage video data must be configured to retain the data, delete it after the retention period expires, prevent deletion by individual officers, and provide an unimpeachable audit trail to protect chain of custody, just as with any evidence.

Use of Recordings

The ACLU supports the use of cop cams for the purpose of police accountability and oversight. It's vital that this technology not become a backdoor for any kind of systematic surveillance or tracking of the public. Since the records will be made, police departments need to be subject to strong rules around how they are used. The use of recordings should be allowed only in internal and external investigations of misconduct, and where the police have reasonable suspicion that a recording contains evidence of a crime. Otherwise, there is no reason that stored footage should even be reviewed by a human being before its retention period ends and it is permanently deleted. Nor should such footage be subject to face recognition searches or other analytics.

Subject Access

People recorded by cop cams should have access to, and the right to make copies of, those recordings, for however long the government maintains copies of them. That should also apply to disclosure to a third party if the subject consents, or to criminal defense lawyers seeking relevant evidence.

Public Disclosure

When should the public have access to cop cam videos held by the authorities? Public disclosure of government records can be a tricky issue pitting two important values against each other: the need for government oversight and openness, and privacy. Those values must be carefully balanced by policymakers. One way to do that is to attempt to minimize invasiveness when possible:

- Public disclosure of any recording should be allowed with the consent of the subjects, as discussed above.
- Redaction of video records should be used when feasible — blurring or blacking out of portions of video and/or distortion of audio to obscure the identity of subjects. If recordings are redacted, they should be discloseable.
- Unredacted, unflagged recordings should not be publicly disclosed without consent of the subject. These are recordings where there is no indication of police misconduct or evidence of a crime, so the public oversight value is low. States

may need to examine how such a policy interacts with their state open records laws.

- Flagged recordings are those for which there is the highest likelihood of misconduct, and thus the ones where public oversight is most needed. Redaction of disclosed recordings is preferred, but when that is not feasible, unredacted flagged recordings should be publicly discloseable, because in such cases the need for oversight generally outweighs the privacy interests at stake.

Good technological controls

It is important that close attention be paid to the systems that handle the video data generated by these cameras.

- Systems should be architected to ensure that segments of video cannot be destroyed. A recent case in Maryland illustrates the problem: surveillance video of an incident in which officers were accused of beating a student disappeared (the incident was also filmed by a bystander). An officer or department that has engaged in abuse or other wrongdoing will have a strong incentive to destroy evidence of that wrongdoing, so technology systems should be designed to prevent any tampering with such video.
- In addition, all access to video records should be automatically recorded with immutable audit logs.
- Systems should ensure that data retention and destruction schedules are properly maintained.
- It is also important for systems be architected to ensure that video is only accessed when permitted according to the policies we've described above, and that rogue copies cannot be made. Officers should not be able to, for example, pass around video of a drunk city council member, or video generated by an officer responding to a call in a topless bar, or video of a citizen providing information on a local street gang.
- If video is held by a cloud service or other third party, it should be encrypted end-to-end so that the service provider cannot access the video.

It is vital that public confidence in the integrity of body camera privacy protections be maintained. We don't want crime victims to be afraid to call for help because of fears that video of their officer interactions will become public or reach the wrong party. Confidence can only be created if good policies are put in place and backed up by good technology.

As the devices are adopted by police forces around the nation, studies should be done to measure their impact. Only very limited studies have been done so far. Are domestic

violence victims hesitating to call the police for help by the prospect of having a camera-wearing police officer in their home, or are they otherwise affected? Are privacy abuses of the technology happening, and if so what kind and how often?

Although fitting police forces with cameras will generate an enormous amount of video footage and raises many tricky issues, if the recording, retention, access, use, and technology policies that we outline above are followed, very little of that footage will ever be viewed or retained, and at the same time those cameras will provide an important protection against police abuse. We will be monitoring the impact of cameras closely, and if good policies and practices do not become standard, or the technology has negative side effects we have failed to anticipate, we will have to reevaluate our position on police body cameras.

Use of body cameras in different contexts

Body cameras are not justified for use by government officials who do not have the authority to conduct searches and make arrests, such as parking enforcement officers, building inspectors, teachers, or other non-law enforcement personnel. Police officers have the authority, in specific circumstances, to shoot to kill, to use brutal force, and to arrest people—and all too often, abuse those powers. The strong oversight function that body cameras promise to play with regards to police officers makes that deployment of the technology a unique one. For other officials, the use of body cameras does not strike the right balance between the oversight function of these cameras and their potential intrusiveness.

Legal Issues Surrounding the Use of Body Cameras

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Legal Issues Surrounding the Use of Body Cameras

I. INTRODUCTION

This outline of legal issues is intended to identify the essential legal issues relevant to and affecting the implementation of body cameras. It is not intended to be an exhaustive statement of the law; rather, it is intended to encourage caution with respect to the interaction of statutes, constitutional provisions and legal decisions interpreting the obligations of a police agency in regard to the issues raised by the use of body cameras.

II. COMPLIANCE WITH THE WASHINGTON PRIVACY ACT IN THE USE OF BODY CAMERAS TO RECORD COMMUNICATIONS

Washington's privacy act, chapter 9.73 RCW, places great value on the privacy of communications. *State v. Christensen*, 153 Wash.2d 186, 199–200, 102 P.3d 789 (2004). The act “tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant.” *Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 457, 139 P.3d 1078, 1082 (2006)

A. APPLICABILITY OF THE WASHINGTON PRIVACY ACT

Do the requirements of the Washington Privacy Act apply in all police contacts in which body cameras are used?

No. The requirements of the Washington Privacy Act only apply to “private conversations.” *City of Auburn v. Kelly*, 127 Wash. App. 54, 61, 111 P.3d 1213, 1217 (2005) *rev'd sub nom. Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 139 P.3d 1078 (2006).

Are conversations with police officers really private conversations?

That depends. Many cases have made their way to the Washington Supreme Court and the Washington Court of Appeals with specific facts that have resulted in rulings that conversations with police officers were not private. *See, e.g., Clark*, 129 Wash.2d at 226, 916 P.2d 384 (no reasonable expectation of privacy in a conversation with an undercover police officer when it “takes place at a meeting where one who attended could reveal what transpired to others.”); *State v. Bonilla*, 23 Wash.App. 869, 873, 598 P.2d 783 (1979) (“It would strain reason for Bonilla to claim he expected his conversations with the police dispatcher to remain purely between the two of them.”); *State v. Flora*, 68 Wash.App. 802, 808, 845 P.2d 1355 (1992) (“Because the exchange [between a police officer and an arrestee during an arrest] was not private, its recording [by the arrestee] could not violate RCW 9.73.030 which applies to private conversations only.”); *see also Alford v. Haner*, 333 F.3d 972, 978

(9th Cir.2003), *rev'd on other grounds, Devenpeck v. Alford*, 543 U.S. 146, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) (noting that *State v. Flora* established that a traffic stop was not a private encounter for purposes of the privacy act); *Johnson v. Hawe*, 388 F.3d 676, 682–83 (9th Cir.2004) (holding that an individual who videotaped a police officer during an arrest did not violate RCW 9.73.030 because the officer had no reasonable expectation of privacy in his communications with others over his police radio). *Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 460, 139 P.3d 1078, 1084 (2006)

What determines whether the conversation is private, invoking the Privacy Act and the advisement obligations under RCW 9.73?

Whether a conversation is private – intended only for the persons directly involved in the conversation regarding something confidential or private – is a question of fact. *State v. Clark*, 129 Wash.2d 211, 225, 916 P.2d 384 (1996). In determining whether a conversation is private, the courts look to the subjective intentions of the parties to the conversation as well as a number of factors bearing on the reasonable expectations and intent of the parties.

Among those factors are (1) the duration and subject matter of the conversation (whether it was essentially a brief business conversation with a uniformed police officer), (2) the location of the conversation (whether it occurred in public or along a busy road), whether it occurred in the presence of a third party (such as a passenger), and (3) role of the non-consenting party and his or her relationship to the consenting party (i.e. it is not persuasive that the non-consenting parties to these conversations, the drivers, would expect the officers to keep their conversations secret, when the drivers would reasonably expect that the officers would file reports and potentially would testify at hearings about the incidents.) *Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 459, 139 P.3d 1078, 1083 (2006)

What about DUI Stops? Are they private?

No. The courts have held that the Washington Privacy Act does not apply to conversations between a police officer and a driver stopped *on a public road* for suspicion of DUI. *City of Auburn v. Kelly*, 127 Wash. App. 54, 61, 111 P.3d 1213, 1217 (2005) *rev'd sub nom. Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 139 P.3d 1078 (2006).

What about conversations at traffic stops in general? Are they considered private for purposes of the privacy act?

No. The Washington Supreme Court has ruled that traffic stop conversations are not private conversations, and therefore the Washington Privacy Act does not apply. *Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 460, 139 P.3d 1078, 1084 (2006).

(Note, however: Lewis v. State, Dept. of Licensing addresses dashboard cameras and is governed by RCW 9.73.090(1)(c), which only pertains to dashboard cameras and not to body cameras. RCW 9.73.090(1)(c) creates a separate set of requirements for recording traffic stop conversations that police officers must follow, *regardless of whether the conversations are private*. This ruling has not thus far been extended by the courts to body cameras, as they are not subject to RCW 9.73.090(1)(c).)

Does an officer need to evaluate every conversation to determine whether it is private?

No. As long as the requirements of the Washington Privacy Act are met with regard to the advisement, each conversation can be treated as if it were private.

Is the same advisement given for every conversation?

No. The advisement is different when recording in custody conversations versus out of custody conversations.

**B. ADVISEMENT WHEN RECORDING PERSONS NOT IN CUSTODY
RCW 9.73.030**

When a defendant is not in custody at the time of the statement, the police are required to comply with the terms of RCW 9.73.030 rather than 9.73.090. State v. Rupe, 101 Wash. 2d 664, 681, 683 P.2d 571, 583 (1984)

RCW 9.73.030 makes it unlawful for any individual to record any private conversation without first obtaining the consent of all the persons engaged in the conversation. For there to be consent, the recording party is required to announce to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded. That announcement also must be recorded. State v. Rupe, 101 Wash. 2d 664, 681, 683 P.2d 571, 583 (1984).

What advisement must an officer give to a person not in custody?

- a. Officer Must Announce that the Conversation Is About To Be Recorded.
- b. Announcement May Be In "Any Reasonably Effective Manner."
- c. The tape must also contain the announcement that the conversation is being recorded.

What if the person says s/he doesn't want to be recorded?

The police officer still has the authority to record the communication. The law says that "*consent shall be considered obtained* whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded." RCW 9.73.030(3) Thus, it doesn't matter if a person objects to the recording.

Could the video tape be lost as evidence in a criminal case if officers fail to follow the requirements under RCW 9.73.030?

Yes, the courts have stated that in no uncertain terms. Keep in mind also that, even if your recorded conversation is with a potential witness to the crime, the defendant has standing to object to unlawfully recorded conversation even though s/he was not a participant in the unlawfully intercepted or recorded conversation. *State v. Williams*, 94 Wash.2d 531, 534, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980). *State v. Johnson*, 40 Wash. App. 371, 375, 699 P.2d 221, 224-25 (1985).

What if the announcement is inadvertently left off of the tape?

The tape might still be allowed if the court can find that the consent requirement was fulfilled. RCW 9.73.030(3) provides consent may be found in the announcement in *any reasonably effective manner* that the statement is being recorded. The court will look to the circumstances surrounding the taping to determine whether the defendant knew the statements were being recorded. *State v. Johnson*, 40 Wash. App. 371, 376-77, 699 P.2d 221, 225-26 (1985)

C. ADVISEMENT FOR CUSTODIAL INTERROGATIONS RCW 9.73.090

RCW 9.73.090 governs the recording of custodial interrogations." *State v. Mazzante*, 86 Wash.App. 425, 427, 936 P.2d 1206 (1997). RCW 9.73.090 is specifically aimed at the specialized activity of police taking recorded statements from arrested persons, as distinguished from the general public. *State v. Cunningham*, 93 Wash. 2d 823, 829, 613 P.2d 1139, 1143 (1980)

What advisement must an officer give to a person prior to a custodial interrogation?

- a. The arrested person shall be informed that such recording is being made;
- b. The statement so informing him shall be included in the recording;

- c. The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
- d. At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

RCW 9.73.090(1)(b); State v. Demery, 100 Wash. App. 416, 419-20, 997 P.2d 432, 434 (2000) rev'd, 144 Wash. 2d 753, 30 P.3d 1278 (2001)

Must this advisement be given once a driver is arrested and subjected to custodial interrogation following a traffic stop?

Yes. Whether or not the communications occurring during the traffic stop were treated as private conversation, the fact of an arrest changes the rules with respect to the advisement that must be given if the communication continues to be recorded. This is true for all arrests stemming from routine traffic stops or other investigatory detentions.

What happens if these steps are not strictly followed?

Recordings of custodial interrogations that fail to comply strictly with statutory requirements are inadmissible. State v. Mazzante (1997) 86 Wash.App. 425, 936 P.2d 1206.

What if you have a signed waiver of Constitutional Rights and the recording makes reference to the written waiver? Is that enough?

No. In order to render recording of custodial interrogation admissible, recorded statement must contain full statement of defendant's *Miranda* rights; mere reference to prior written waiver is insufficient. State v. Mazzante (1997) 86 Wash.App. 425, 936 P.2d 1206.

What if the arrested person says s/he doesn't want to be recorded?

A criminally accused person can always exercise the right to remain silent and not give a statement. If a statement is given, however, strict adherence to the statutory rules for advising a person in custody will establish a record that defendant's consent was given only after being informed that the statement would be recorded, that consent and the resultant statement were given only after being fully informed of constitutional rights, including exact information imparted, and that the statement was not obtained by means of oppressively long interrogation or interrogation that occurred at unreasonable times or in unreasonable sequences. State v. Cunningham (1980) 93 Wash.2d 823, 613 P.2d 1139, on remand 27 Wash.App. 834, 620 P.2d 535, review denied.

What if there are technical errors, such as noting an incorrect start or end time?

When the only procedural defect in a taped interview is the absence of a correct start time, the court may admit the tape under Privacy Act unless there is an allegation of police misconduct that makes the existence of the time announcement a matter of critical importance. West's RCWA 9.73.090(1)(b)(ii). *State v. Demery*, 100 Wash. App. 416, 997 P.2d 432 (2000) *rev'd*, 144 Wash. 2d 753, 30 P.3d 1278 (2001)

What if the end time is not noted on the recording at all?

If no misconduct or unauthorized editing is alleged, the court may allow the officer to testify as to contents of videotape recording, notwithstanding inadmissibility of recording itself because of failure to specify ending time, since there is substantial compliance with recording requirements of this section. *State v. Gelvin* (1986) 43 Wash.App. 691, 719 P.2d 580, review denied.

III. PRIVACY ISSUES BEYOND THE RECORDED CONVERSATION

Are there privacy concerns beyond the communication that could be raised with the implementation of body cameras?

This is a largely unexplored area. The Washington Supreme Court has said that there is no reasonable expectation of privacy in routine traffic stops, *Lewis v. State*, 157 Wn.2d 446 (2006) but body-cameras raise the potential for more privacy issues than dash-cams because of the potential for recording inside private residences or other places where individuals may have an expectation of privacy. In addition to "private affairs", Const. art. 1, § 7 explicitly protects the "home". *State v. Young*, 123 Wash. 2d 173, 184, 867 P.2d 593, 599 (1994).

What type of information would violate a person's right to privacy?

RCW 42.56.050 provides that a person's right of privacy is violated only if disclosure of information about the person would be highly offensive to a reasonable person, and is not of legitimate concern to the public. There is no guide to what information may fall into this category; what is determined to be highly offensive to a reasonable person may ultimately be a question for the fact finder.

What other situations might raise privacy concerns?

Allegations of governmental trespass and illegal searches could arise from recordings made on private property. Under the Fourth Amendment, a search

occurs if the government intrudes upon a subjective and reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351-52, 88 S.Ct. 507, 511-12, 19 L.Ed.2d 576 (1967). The Washington constitution focuses on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Myrick*, 102 Wash.2d at 511, 688 P.2d 151.

What types of individuals might assert a violation of privacy?

The Public Records Act allows a "person in interest" to seek legal relief enjoining the release of a video. RCW 42.56.010(2) defines a "person in interest" as the person who is the subject of a record. It need not be a suspect or the subject of an investigation. In some police investigations, there may be "persons in interest" or property owned by an individual appearing in the footage of a body cam video. These persons may challenge a video's release by asserting an expectation of privacy.

Why would the issue of privacy be raised if the recording was properly done?

Even where an officer properly records a conversation with one individual under RCW 9.73, a second individual could conceivably assert an expectation of privacy applicable as to the location related to the conversation with the first individual. This is a developing area of law with potential to change as challenges are raised.

Where there is a reasonable expectation of privacy, isn't there a possible unconstitutional search and/or seizure issue?

The potential for search and seizure issues presents the area of greatest concern with respect to the implementation of body cameras. Apart from searches pursuant to a warrant, police officers enter private residences on a regular basis in response to calls for service. They take reports, speak to witnesses, render aid and investigate crime. Video images captured from inside private homes, even if taken in the course of a matter unrelated to a crime, could reveal evidence of a crime. It is impossible to anticipate what challenges may be raised to the introduction of video recordings in a criminal or civil trial once body cameras enter private residences.

Are there Washington court rulings that indicate what constitutes a search via the use of body camera?

No; the law is unclear in this area with respect to body cameras. Questions remain regarding the application of the Fourth Amendment and the Washington Constitution's Article I section 7 to various scenarios in which body cameras affixed to police officer uniforms record information from

inside private homes.¹ The courts have not yet ruled on challenges to body cameras and whether there might be situations that require a search warrant prior to entry on account of the presence of a body camera.

Are there evidentiary issues of concern?

Yes. Among other concerns, it is debatable whether an object revealed in the footage taken by a body camera not otherwise spotted by an officer is evidence discovered in “plain view” and whether it would be admissible in a criminal proceeding. Similarly, it is unknown whether digitally enhancing a recording of items captured on video from inside a residence is considered to be a search requiring a warrant. The United States Supreme Court has consistently ruled that, where the government obtains information by physically intruding on constitutionally protected areas, a “search” within original meaning of Fourth Amendment has occurred. U.S.C.A. Const.Amend. 4. United States v. Jones, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). This is an evolving area of law and this discussion should not be construed as providing dispositive guidance on the matter.

IV. REVIEW AND HANDLING OF VIDEO: SPECIAL ISSUES

A. VIDEOTAPE AS EVIDENCE

Are there integrity concerns that may warrant an extra layer of caution with respect to videotape evidence?

Yes. A video generated from a body camera is not merely a report; it is evidence, the integrity of which must be preserved so that it is not subject to criticism that it has been changed or altered in any manner. There will be an expectation that the videotape be handled carefully and placed on property since it may consist of evidence that exonerates the innocent or exposes malfeasance.

Is the Videotape Evidence such that it would require special handling?

A video tape is a potential exhibit at trial, and therefore potential evidence in a criminal or civil case. To avoid challenges to the authenticity of the videotape and baseless allegations that the recording has been changed or altered, there should be a set of departmental guidelines governing how the original videotape is handled and what steps must be taken to preserve the chain of custody.

¹ The Fourth Amendment provides in relevant part that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” United States v. Jones, 132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012)

Will the department need to consider in its implementation plan the foundational requirements for admissibility of the videotapes?

Yes, SPD will need technicians who understand and can explain the operational aspects of the video cameras. In a court proceeding, the proponent of videotape evidence may be required, in foundational questions, to show the process by which the videotape was taken, i.e. the installation and operation of the camera, testing and removal of the film. The proponent of the video will need to be prepared to establish the integrity of the tape and its chain of custody.

B. VIDEOTAPE FOR ADMINISTRATIVE PURPOSES

Is a protocol needed to set forth how the videotape is handled for purposes of investigations and administrative reviews?

A video captured from a body camera recording may be the subject of an internal review by the shift supervisor and by other supervisors in an officer's chain of command, such as in an incident involving the use of force. Just like an incident report or a use of force report, a video will be the subject of scrutiny in some cases where adherence to department policy is in question or where the level of force must be reviewed. The department will need to determine whether a copy of the video accompanies a use of force report for the chain of command review.

The same video recording could be the subject of an internal affairs investigation in response to a specific complaint or subject to a criminal investigation pursuant to the SIRRT protocol. A protocol is needed to determine how video evidence flows through the department and how internal reviews occur using such video evidence. For purposes of maintaining integrity, it must be decided as a matter of policy whether the original remains on property and whether copies are made before the various reviews can occur.

What happens to the video if it is determined that it contains evidence of a policy violation?

A decision will need to be made whether a video containing evidence of misconduct or a policy violation is Brady/Giglio material, whether it should become part of the internal affairs file, whether the video, like other internal affairs investigations, is posted for public inspection and the manner in which such video gets turned over to the county prosecutor if determined to contain

exculpatory evidence. There may be contractual issues at play in these matters, and the rights of individual officers will need to be considered.

Are videotapes discoverable in civil and criminal cases?

It can be anticipated that, just as police reports are discoverable in civil and criminal cases, that video evidence depicting an incident will be subject to the discovery rules in civil and criminal cases where the incident is relevant and material to the case or where it serves as proper impeachment material.

Will videotapes be available for parallel investigations?

In critical incidents, the SIRRT team must determine whether body camera videos must remain with criminal investigators or whether the IA investigators can also access a copy of the video immediately. It should also be decided how the existence of a video will be incorporated into the SIRRT protocol.

V. RETENTION OF BODY CAMERA VIDEOS

How long must a body camera video be retained by the Spokane Police Department?

Body camera videos must be retained for the same length of time as any other record related to a particular investigation. Recordings of incidents that are not expected to result in litigation or criminal prosecution may be destroyed after 90 days.

The retention of body cam videos will be based on the retention schedule of the Spokane Police Department. Law enforcement agencies follow Washington Law Enforcement Records Retention Schedule Version 6.0 (July 2010), which divides "Recordings from Mobile Units" into two categories, "Incident Identified" and "Incident Not Identified." The retention schedule doesn't contain a specific provision for body-cam videos, but one can anticipate that they will be similar.

"Incident Identified" are "recordings created by mobile units which have captured a unique or unusual action from which litigation or criminal prosecution is expected or likely to result." The retention period for a particular recording is the same as any other record related to a particular investigation.

"Incident Not Identified" are "Recordings created by mobile units that *have not* captured a unique or unusual incident or action from which litigation or criminal prosecution is expected or likely to result." These recordings may be destroyed after 90 days. Note that a video is properly retained when it is

copied and retained in a file for the retention period appropriate to that file. (RCW 40.14.060).

VI. RELEASE OF BODY CAMERA VIDEOS UNDER THE PUBLIC RECORDS ACT

Are the videos from body cameras subject to disclosure?

Yes. RCW 42.56.010 defines "public record" as *any writing containing information relating to the conduct of government* or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Writing" includes every means of recording any form of communication or representation including video recordings.

Do body camera videos need to be redacted?

Yes. Under RCW 42.56, the same rules would apply to the video footage that apply to any other public record; therefore, some information contained within a video generated by a body camera could be subject to one or more statutory exemptions.

Redaction would need to occur for information exempt under RCW 42.56 including, but not limited to the following:

- **Personal Identifiers:** RCW 42.56.230 would exempt anything generated on video footage from a body camera that would disclose personal information, including but not limited to, addresses, telephone numbers and social security numbers.
- **Crime victim or witness information:** RCW 42.56.240 exempts information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property or, if at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure.
- **Child Victims of Sexual Assault** RCW 42.56.240 also exempts information revealing the identity of child victims of sexual assault who are under age eighteen. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.

- **Information essential to effective law enforcement** RCW 42.56.240 exempts information “the nondisclosure of which is essential to effective law enforcement.” *Cowles Pub. Co. v. State Patrol*, 109 Wash.2d 712 (1988).

Are there implementation issues associated with the redaction of body camera videos?

Yes. Processing and altering video to remove portions of exempt information is labor-intensive and costly because it requires trained staff with technical expertise to take on the additional workload of reviewing videos prior to release and redacting any portions that are exempt from disclosure for privacy or other reasons. This will not be possible without additional staffing.

How quickly must a body camera video be turned over pursuant to a request under the Public Records Act?

Five days unless more time is needed or an exemption exists. RCW 42.56.520 requires the SPD to provide a response to the request within five business days and to either (1) provide the video, (2) provide an internet address and link on the agency's web site to the video, if it posted, (3) provide a copy of the video or (4) allow the requester to view the video using an agency computer. If the video cannot be provided within five days, SPD within five business days must provide a reasonable estimate of time required to respond to the request. If there is a statutory basis for the denial of the video, SPD must indicate the basis for such denial.

What if the body camera video is part of an investigation?

If the body camera video is part of an investigative file subject to an ongoing criminal or administrative investigation, it is exempt from disclosure. RCW 42.56.240. The “investigative records” exception to the public disclosure act categorically exempts from disclosure all police investigative records in an unsolved, open investigation. *Newman v. King County*, 133 Wash.2d 565, 947 P.2d 712 (1997).

At what point can the video be released?

Once the investigation is complete, the body camera video may be released.

Can body camera videos be released at Police Chief's discretion?

Yes. Discretionary disclosures of body camera videos, unlike the disclosure of video footage from dash cameras, are not prohibited by state law. The Chief of Police, in consultation with the prosecuting authority, may elect to disclose

video footage (i.e. to the media) after giving consideration to preserving the integrity of any ongoing criminal investigation.

VII. USE OF BODY CAMERAS AS TOOL TO MONITOR CONSTITUTIONAL POLICING

Can police leadership utilize body cameras to better monitor an officer's use of force?

Yes. Body cameras can be used as an effective tool to ensure that individual officers are following their training, using appropriate amount of force and otherwise following department policy. While this is important in overall police accountability, it can also serve to dispel the notion that an officer committed an act of misconduct or used excessive force.

Use of Force

Currently, all incidents meeting a threshold set of criteria which involve an officer's use of force are subject to a use of force review. In many cases, the department could more effectively and objectively determine the reasonableness of the force used by reviewing a video recording of the incident.²

Because the "reasonableness" inquiry in an excessive force case is an objective one, the question for command staff is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Additionally, the body cameras will be an additional tool to be used to gauge the effectiveness of training on the application of force by officers within the department and to monitor specific use of force incidents for violations of law and policy.

Does the department have any other purpose in monitoring incidents involving the use of force?

Yes. All policies and practices within the department come under scrutiny when Use of Force incidents are called into question. In terms of assigning

² The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry v. Ohio, supra*, 392 U.S., at 20-22, 88 S.Ct., at 1879-1881. As in other Fourth Amendment contexts, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott v. United States*, 436 U.S. 128, 137-139, 98 S.Ct. 1717, 1723-1724, 56 L.Ed.2d 168 (1978). See *Scott v. United States, supra*, 436 U.S., at 138, 98 S.Ct., at 1723, citing *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (U.S.N.C. 1989)

liability, potential plaintiffs will inquire into whether there is a causal connection between department policies and an alleged constitutional deprivation. The police department must continually monitor the legality and effectiveness of its policies both written as well as in practice. The purpose of self-monitoring is to ensure compliance with constitutional policing and minimize harm to the public. It is also done with the purpose of limiting liability to the department and ensuring that training of all officers is accurate and effective. This level of review and internal scrutiny will be critical to limiting liability and reducing sec. 1983 claims against the department and against the City.

Municipalities are “persons” subject to damages under §1983, but “a municipality cannot be held liable *solely* because it employs a tortfeasor-or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.” *Monell v. Department of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).³

In order to establish a § 1983 claim against a municipality, a plaintiff must:

- (1) identify a specific policy or custom;
- (2) demonstrate that the policy was sanctioned by the official or officials responsible for making policy in that area of the city's business;
- (3) demonstrate a constitutional deprivation; and
- (4) establish a causal connection between the custom or policy and the constitutional deprivation.

Pembaur v. Cincinnati, 475 U.S. 469, 481-84, 106 S.Ct. 1292, 1299-301, 89 L.Ed.2d 452 (1986); *Oklahoma City v. Tuttle*, 471 U.S. 808, 822-24, 105 S.Ct. 2427, 2435-37, 85 L.Ed.2d 791 (1985) (plurality); *Tuttle*, 471 U.S. at 828-30, 105 S.Ct. at 2438-40 (Brennan, J., concurring). Lack of proof on any of the above elements would require dismissal of the action. *Phennah v. Whalen*, *supra*. *Baldwin v. City of Seattle*, 55 Wash. App. 241, 248, 776 P.2d 1377, 1381 (1989)

³ 42 U.S.C. § 1983, provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.... *Baldwin v. City of Seattle*, 55 Wash. App. 241, 247-48, 776 P.2d 1377, 1380 (1989)

VIII. LABOR CONSIDERATIONS

Does the use of body cameras require negotiation?

Yes, but as to impact only. Management is not required to seek the permission of a union before instituting a camera system; this is a management right. What requires negotiation is *the impact* of body cameras on working conditions.

Trends show that body and dashboard camera systems are heavily favored by many police unions. They have great potential to protect officers because they can provide an objective view of the reasonableness of an officer's interactions with members of the public and use of force activity. That said, body cameras will require changes to department policy and will require training on new procedures. Compliance with departmental policy is directly related to police discipline, so there may be an impact to some officers. It is important for police management to sit down and discuss these impacts with the union so that both sides are able to move toward successful implementation and gain a full understanding of the body camera program.

IX. COMMUNITY CONCERNS

Should the community be involved in a discussion about the implementation of body cameras?

Involving the community in a discussion about body cameras is a decision for police leadership, but it may be helpful in both educating the public on implementation issues as well as eliciting the citizen's perspective. With regard to the subject of body cameras, there has already been a strong showing of public support for the concept. What the public may not be aware of is peripheral issues concerning privacy and disclosure.

Some citizen advocates have expressed concerns about body-cameras. While body cameras are often discussed as a means to monitor police behavior, the subjects captured on video will, for the most part, be civilians. In many cases, civilians will be engaged in situations or behavior they would not wish to have recorded, and potentially, released and distributed under public disclosure laws. A public discussion about the issues and challenges surrounding body camera implementation may be useful.

X. BUDGET CONSIDERATIONS.

Is there a fiscal impact to the implementation of body cameras beyond the purchase of the cameras?

Yes. There are substantial back-end costs related to body-camera systems which, if unanticipated, could be overlooked by the authorizing and funding authority and which could expose the police department to significant civil liability.

Why is this any more expensive than implementing dashboard cameras?

There are many more officers than vehicles, so the cost of a body-cam system is higher than for dash cams. Before implementing a body camera program the agency should consider and budget for the cost of cameras, as well as the equipment.

Are there other costs to consider?

Yes. There are significant workload increases that will occur as the result of body camera implementation. These work load increases will require more civilian personnel to store, catalog and manage large amounts of video data, and to retrieve and process individual segments of video on request. The department will need to hire more people.

Are there operational impacts as the result of these additional costs?

The department will have to decide if the tasks of storage and retention will be the responsibility of the Records Division or another division. The department will have to consider the fact that, either way, more staff and more resources will be needed to do this job. Currently, the Police Records Division serves the function of fulfilling requests made under the Public records Act, but logistically the unit cannot handle this additional workload with its current staffing. The department should consider exploring technological options to assist in performing these tasks.

Additionally, processing video is labor-intensive and costly because it requires staff to review videos prior to release and to redact any portions that are exempt from disclosure for privacy or other reasons. Processing a single video can take hours. The department will need to allow ample time for training in this regard.

Does the presence of exempt material on a video provide us a legal reason to deny disclosure?

No. An agency can't simply deny access to an entire video if it contains exempt information; it must redact the exempt portions and produce the non-exempt portions.

What if the public records request requires us to turn over every video in our possession?

We would have to comply. An agency can't deny an "overbroad" request. By law we cannot inquire into why so many videos are requested. A requester can ask for thousands of videos or even every video in SPD's possession and we would have to make these available for inspection or copying.

XI. CONCLUSION

The legal issues set out in this discussion should be approached with caution as they are subject to continued interpretation by Washington and federal courts. The costs of camera implementation, including the cost to retain, store, redact and disseminate the videos, should be discussed with city budget leaders and policymakers toward an understanding of the comprehensive costs.

(50 ILCS 706/Art. 10 heading)
ARTICLE 10.

(Source: P.A. 99-352, eff. 1-1-16.)

(50 ILCS 706/10-1)

Sec. 10-1. Short title. This Act may be cited as the Law Enforcement Officer-Worn Body Camera Act. References in this Article to "this Act" mean this Article.

(Source: P.A. 99-352, eff. 1-1-16.)

(50 ILCS 706/10-5)

Sec. 10-5. Purpose. The General Assembly recognizes that trust and mutual respect between law enforcement agencies and the communities they protect and serve are essential to effective policing and the integrity of our criminal justice system. The General Assembly recognizes that officer-worn body cameras have developed as a technology that has been used and experimented with by police departments. Officer-worn body cameras will provide state-of-the-art evidence collection and additional opportunities for training and instruction. Further, officer-worn body cameras may provide impartial evidence and documentation to settle disputes and allegations of officer misconduct. Ultimately, the uses of officer-worn body cameras will help collect evidence while improving transparency and accountability, and strengthening public trust. The General Assembly creates these standardized protocols and procedures for the use of officer-worn body cameras to ensure that this technology is used in furtherance of these goals while protecting individual privacy and providing consistency in its use across this State.

(Source: P.A. 99-352, eff. 1-1-16.)

(50 ILCS 706/10-10)

Sec. 10-10. Definitions. As used in this Act:

"Badge" means an officer's department issued identification number associated with his or her position as a police officer with that department.

"Board" means the Illinois Law Enforcement Training Standards Board created by the Illinois Police Training Act.

"Business offense" means a petty offense for which the fine is in excess of \$1,000.

"Community caretaking function" means a task undertaken by a law enforcement officer in which the officer is performing an articulable act unrelated to the investigation of a crime. "Community caretaking function" includes, but is not limited to, participating in town halls or other community outreach, helping a child find his or her parents, providing death notifications, and performing in-home or hospital well-being checks on the sick, elderly, or

persons presumed missing.

"Fund" means the Law Enforcement Camera Grant Fund.

"In uniform" means a law enforcement officer who is wearing any officially authorized uniform designated by a law enforcement agency, or a law enforcement officer who is visibly wearing articles of clothing, a badge, tactical gear, gun belt, a patch, or other insignia that he or she is a law enforcement officer acting in the course of his or her duties.

"Law enforcement officer" or "officer" means any person employed by a State, county, municipality, special district, college, unit of government, or any other entity authorized by law to employ peace officers or exercise police authority and who is primarily responsible for the prevention or detection of crime and the enforcement of the laws of this State.

"Law enforcement agency" means all State agencies with law enforcement officers, county sheriff's offices, municipal, special district, college, or unit of local government police departments.

"Law enforcement-related encounters or activities" include, but are not limited to, traffic stops, pedestrian stops, arrests, searches, interrogations, investigations, pursuits, crowd control, traffic control, non-community caretaking interactions with an individual while on patrol, or any other instance in which the officer is enforcing the laws of the municipality, county, or State. "Law enforcement-related encounter or activities" does not include when the officer is completing paperwork alone or only in the presence of another law enforcement officer.

"Minor traffic offense" means a petty offense, business offense, or Class C misdemeanor under the Illinois Vehicle Code or a similar provision of a municipal or local ordinance.

"Officer-worn body camera" means an electronic camera system for creating, generating, sending, receiving, storing, displaying, and processing audiovisual recordings that may be worn about the person of a law enforcement officer.

"Peace officer" has the meaning provided in Section 2-13 of the Criminal Code of 2012.

"Petty offense" means any offense for which a sentence of imprisonment is not an authorized disposition.

"Recording" means the process of capturing data or information stored on a recording medium as required under this Act.

"Recording medium" means any recording medium authorized by the Board for the retention and playback of recorded audio and video including, but not limited to, VHS, DVD, hard drive, cloud storage, solid state, digital, flash memory technology, or any other electronic medium.

(Source: P.A. 99-352, eff. 1-1-16.)

(50 ILCS 706/10-15)

Sec. 10-15. Applicability. Any law enforcement agency which employs the use of officer-worn body cameras is subject to the provisions of this Act,

whether or not the agency receives or has received monies from the Law Enforcement Camera Grant Fund.
(Source: P.A. 99-352, eff. 1-1-16.)

(50 ILCS 706/10-20)

Sec. 10-20. Requirements.

(a) The Board shall develop basic guidelines for the use of officer-worn body cameras by law enforcement agencies. The guidelines developed by the Board shall be the basis for the written policy which must be adopted by each law enforcement agency which employs the use of officer-worn body cameras. The written policy adopted by the law enforcement agency must include, at a minimum, all of the following:

(1) Cameras must be equipped with pre-event recording, capable of recording at least the 30 seconds prior to camera activation, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015.

(2) Cameras must be capable of recording for a period of 10 hours or more, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015.

(3) Cameras must be turned on at all times when the officer is in uniform and is responding to calls for service or engaged in any law enforcement-related encounter or activity, that occurs while the officer is on-duty.

(A) If exigent circumstances exist which prevent the camera from being turned on, the camera must be turned on as soon as practicable.

(B) Officer-worn body cameras may be turned off when the officer is inside of a patrol car which is equipped with a functioning in-car camera; however, the officer must turn on the camera upon exiting the patrol vehicle for law enforcement-related encounters.

(4) Cameras must be turned off when:

(A) the victim of a crime requests that the camera be turned off, and unless impractical or impossible, that request is made on the recording;

(B) a witness of a crime or a community member who wishes to report a crime requests that the camera be turned off, and unless impractical or impossible that request is made on the recording;
or

(C) the officer is interacting with a confidential informant used by the law enforcement agency.

However, an officer may continue to record or resume recording a victim or a witness, if exigent circumstances exist, or if the officer has reasonable articulable suspicion that a victim or witness, or confidential informant has committed or is in the process of committing a crime. Under these circumstances, and unless impractical or impossible,

the officer must indicate on the recording the reason for continuing to record despite the request of the victim or witness.

(4.5) Cameras may be turned off when the officer is engaged in community caretaking functions. However, the camera must be turned on when the officer has reason to believe that the person on whose behalf the officer is performing a community caretaking function has committed or is in the process of committing a crime. If exigent circumstances exist which prevent the camera from being turned on, the camera must be turned on as soon as practicable.

(5) The officer must provide notice of recording to any person if the person has a reasonable expectation of privacy and proof of notice must be evident in the recording. If exigent circumstances exist which prevent the officer from providing notice, notice must be provided as soon as practicable.

(6) For the purposes of redaction, labeling, or duplicating recordings, access to camera recordings shall be restricted to only those personnel responsible for those purposes. The recording officer and his or her supervisor may access and review recordings prior to completing incident reports or other documentation, provided that the officer or his or her supervisor discloses that fact in the report or documentation.

(7) Recordings made on officer-worn cameras must be retained by the law enforcement agency or by the camera vendor used by the agency, on a recording medium for a period of 90 days.

(A) Under no circumstances shall any recording made with an officer-worn body camera be altered, erased, or destroyed prior to the expiration of the 90-day storage period.

(B) Following the 90-day storage period, any and all recordings made with an officer-worn body camera must be destroyed, unless any encounter captured on the recording has been flagged. An encounter is deemed to be flagged when:

- (i) a formal or informal complaint has been filed;
- (ii) the officer discharged his or her firearm or used force during the encounter;
- (iii) death or great bodily harm occurred to any person in the recording;
- (iv) the encounter resulted in a detention or an arrest, excluding traffic stops which resulted in only a minor traffic offense or business offense;
- (v) the officer is the subject of an internal investigation or otherwise being investigated for possible misconduct;
- (vi) the supervisor of the officer, prosecutor, defendant, or court determines that the encounter has evidentiary value in a criminal prosecution; or
- (vii) the recording officer requests that the

video be flagged for official purposes related to his or her official duties.

(C) Under no circumstances shall any recording made with an officer-worn body camera relating to a flagged encounter be altered or destroyed prior to 2 years after the recording was flagged. If the flagged recording was used in a criminal, civil, or administrative proceeding, the recording shall not be destroyed except upon a final disposition and order from the court.

(8) Following the 90-day storage period, recordings may be retained if a supervisor at the law enforcement agency designates the recording for training purposes. If the recording is designated for training purposes, the recordings may be viewed by officers, in the presence of a supervisor or training instructor, for the purposes of instruction, training, or ensuring compliance with agency policies.

(9) Recordings shall not be used to discipline law enforcement officers unless:

(A) a formal or informal complaint of misconduct has been made;

(B) a use of force incident has occurred;

(C) the encounter on the recording could result in a formal investigation under the Uniform Peace Officers' Disciplinary Act; or

(D) as corroboration of other evidence of misconduct.

Nothing in this paragraph (9) shall be construed to limit or prohibit a law enforcement officer from being subject to an action that does not amount to discipline.

(10) The law enforcement agency shall ensure proper care and maintenance of officer-worn body cameras. Upon becoming aware, officers must as soon as practical document and notify the appropriate supervisor of any technical difficulties, failures, or problems with the officer-worn body camera or associated equipment. Upon receiving notice, the appropriate supervisor shall make every reasonable effort to correct and repair any of the officer-worn body camera equipment.

(11) No officer may hinder or prohibit any person, not a law enforcement officer, from recording a law enforcement officer in the performance of his or her duties in a public place or when the officer has no reasonable expectation of privacy. The law enforcement agency's written policy shall indicate the potential criminal penalties, as well as any departmental discipline, which may result from unlawful confiscation or destruction of the recording medium of a person who is not a law enforcement officer. However, an officer may take reasonable action to maintain safety and control, secure crime scenes and accident sites, protect the integrity and confidentiality of investigations, and protect the public safety and order.

(b) Recordings made with the use of an officer-worn body camera are not subject to disclosure under the Freedom of Information Act, except that:

(1) if the subject of the encounter has a reasonable expectation of privacy, at the time of the recording, any recording which is flagged, due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm, shall be disclosed in accordance with the Freedom of Information Act if:

(A) the subject of the encounter captured on the recording is a victim or witness; and

(B) the law enforcement agency obtains written permission of the subject or the subject's legal representative;

(2) except as provided in paragraph (1) of this subsection (b), any recording which is flagged due to the filing of a complaint, discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm shall be disclosed in accordance with the Freedom of Information Act; and

(3) upon request, the law enforcement agency shall disclose, in accordance with the Freedom of Information Act, the recording to the subject of the encounter captured on the recording or to the subject's attorney, or the officer or his or her legal representative.

For the purposes of paragraph (1) of this subsection (b), the subject of the encounter does not have a reasonable expectation of privacy if the subject was arrested as a result of the encounter. For purposes of subparagraph (A) of paragraph (1) of this subsection (b), "witness" does not include a person who is a victim or who was arrested as a result of the encounter.

Only recordings or portions of recordings responsive to the request shall be available for inspection or reproduction. Any recording disclosed under the Freedom of Information Act shall be redacted to remove identification of any person that appears on the recording and is not the officer, a subject of the encounter, or directly involved in the encounter. Nothing in this subsection (b) shall require the disclosure of any recording or portion of any recording which would be exempt from disclosure under the Freedom of Information Act.

(c) Nothing in this Section shall limit access to a camera recording for the purposes of complying with Supreme Court rules or the rules of evidence. (Source: P.A. 99-352, eff. 1-1-16.)

(50 ILCS 706/10-25)

Sec. 10-25. Reporting.

(a) Each law enforcement agency which employs the use of officer-worn body cameras must provide an annual report to the Board, on or before May 1 of the year. The report shall include:

(1) a brief overview of the makeup of the agency, including the number of officers utilizing officer-worn body cameras;

(2) the number of officer-worn body cameras utilized

by the law enforcement agency;

(3) any technical issues with the equipment and how those issues were remedied;

(4) a brief description of the review process used by supervisors within the law enforcement agency;

(5) for each recording used in prosecutions of conservation, criminal, or traffic offenses or municipal ordinance violations:

(A) the time, date, location, and precinct of the incident;

(B) the offense charged and the date charges were filed; and

(6) any other information relevant to the administration of the program.

(b) On or before July 30 of each year, the Board must analyze the law enforcement agency reports and provide an annual report to the General Assembly and the Governor.

(Source: P.A. 99-352, eff. 1-1-16.)

(50 ILCS 706/10-30)

Sec. 10-30. Evidence. The recordings may be used as evidence in any administrative, judicial, legislative, or disciplinary proceeding. If a court or other finder of fact finds by a preponderance of the evidence that a recording was intentionally not captured, destroyed, altered, or intermittently captured in violation of this Act, then the court or other finder of fact shall consider or be instructed to consider that violation in weighing the evidence, unless the State provides a reasonable justification.

(Source: P.A. 99-352, eff. 1-1-16.)

(50 ILCS 706/10-35)

Sec. 10-35. Authorized eavesdropping. Nothing in this Act shall be construed to limit or prohibit law enforcement officers from recording in accordance with Article 14 of the Criminal Code of 2012 or Article 108A or Article 108B of the Code of Criminal Procedure of 1963.

(Source: P.A. 99-352, eff. 1-1-16.)



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LawPulse

Pacesetting police body camera law takes effect January 1

By Matthew Hector

The sweeping legislation also expands police officer training beyond the academy, bans chokeholds, and clarifies that citizens may film police officers, among other changes.

What some have called the nation's most comprehensive police body camera law will take effect at the turn of the year.

The bill, Public Act 99-0352, also takes several steps to improve police-citizen relationships by providing a uniform model for the use of police body cameras, expanding police officer training beyond the academy, banning chokeholds, clarifying that citizens may film police officers, and creating a database of officers who have been dismissed for misconduct or while under investigation. Most of the bill's provisions are effective January 1.

'Everybody behaves better when the camera is present'

The process of drafting and negotiating the bill is one of the most compelling things about it, according to Sean Smoot, director and chief counsel for the Police Benevolent & Protective Association of Illinois and the Police Benevolent Labor Committee. The bipartisan, bicameral legislation was part of a "consensus process" involving diverse parties such as the ACLU, the NAACP, law enforcement groups, community groups, and the bill's primary sponsors, Representative Elgie Sims and Senator Kwame Raoul.

While the law does create comprehensive guidelines for the use of police body cameras, "it is more than that," says



Raoul. For example, it requires that law enforcement officers receive ongoing professional training beyond the police academy. Raoul says that people being fearful of interacting with law enforcement is "unnecessary." This, among other factors, was the impetus for requiring that law enforcement officers receive cultural competency training.

Smoot agrees that in-service training for officers is important. As a member of the President's Task Force on Policing in the 21st Century, he reviewed evidence provided by hundreds of witnesses and thousands of pages of written testimony. "We spend very little money training police officers compared to other professions," he says.

As a result, the law puts in place annual and longer-term training requirements to "make sure that officers are adequately prepared to do their important job." Khadine Bennett, a staff attorney and legislative counsel for the ACLU, applauds the requirement, noting that "many people don't realize that law enforcement officers don't get training after the academy."

For Bennett, one of the most compelling aspects of the new law is the collection of data related to *Terry* stops (i.e., stop and frisk interactions between police and citizens). The data will allow lawmakers, civil rights groups, and others to learn what groups are stopped and frisked the most.

One of the most important elements is that officers are required to give an individual subjected to a *Terry* stop a receipt, she says. The receipts give individuals an "opportunity to prove that a stop and frisk happened." Senator Raoul feels that the receipts and data collection are important to help determine if stop and frisk encounters are being applied unevenly. Bennett says that the data collection provision will also help improve transparency and interactions between law enforcement and the community.

Bennett is also hopeful that the expanded use of body cameras may improve the behavior of both law enforcement officers and citizens. Smoot agrees with Bennett. "What the data tells us so far is that everybody behaves better when a camera is present. The camera's presence has a de-escalation effect." He cites to research from Mesa, Ariz., and London which demonstrates that the use of body cameras reduces officer use of force 30-70 percent, officer complaints by 70-90 percent, and injuries by 50 percent.

Balancing openness with privacy

Bennett says that while body cameras "are not a magic bullet," they are a "good step." She stresses that the increased use of cameras should not come at the expense of privacy. The law provides for times where officers are not required to or may not use cameras. "It's about striking the right balance between capturing interactions with civilians while not overly surveilling the community, which was why we didn't require recording when officers were walking their beat or providing community care-taking functions."

The law's Freedom of Information Act (FOIA) provisions help to further balance this privacy interest. Under them, only certain types of recordings are available for disclosure pursuant to a FOIA request. Those recordings, defined as "flagged," are ones in which an officer discharges a firearm or someone is seriously hurt or killed, among other situations.

Reducing the number of recordings that can be disclosed helps reduce burdens on law enforcement, state's attorneys, and county clerks, says Smoot. He also notes that "citizen-police encounters can often happen at a low point in a person's life; once something gets on YouTube it's there forever."

Bennett agrees, noting that even when a recording is flagged, it may not be disclosable if a person on the recording has a reasonable expectation of privacy. She echoes Smoot, saying that "we don't want people to be able to submit FOIA requests for video of friends who got drunk and were arrested at Wrigley Field." Both Bennett and Smoot believe that the law does a good job of balancing access to information and individual privacy.

The new law also clarifies the right of citizens to record the police. After Illinois revised its eavesdropping law, social

media sites were replete with posts claiming that it was illegal to record the police. The new law makes it clear that "recording police is okay and that law enforcement officers cannot stop people from recording," says Senator Raoul.

This right is not unlimited, notes Smoot. "The last thing we need is a large number of people charging into a crime scene or an arrest." As a result, the statute allows officers to take reasonable actions to control a crime scene.

By making it clear that citizens have the right to film police officers doing their job, the law "puts power in the hands of people who feel powerless," says Bennett. She believes that recording police officers does not have a chilling effect on police doing their jobs. "People recording from a safe distance will not impact their ability to do their jobs; law enforcement officers are trained to be in public."



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Substantive and Procedural Differences Between Immigration and Criminal Law

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I. Chapter Overview [§ 2.1]

This book explains immigration law, in particular crimmigration, to Wisconsin criminal defense lawyers. *See supra* § 1.6. Before delving into the U.S. Supreme Court’s opinion in *Padilla v. Kentucky*, 559 U.S. 356 (2010), the chapter first discusses the differences between these two fields of law (immigration law and criminal law) and addresses the common misconceptions. Although the *Padilla* decision outlines in great length the interrelationship between criminal convictions and immigration consequences, the majority opinion did not discuss the counterintuitive nature of this body of law. A defense attorney must first understand and avoid the common pitfalls in advising noncitizen defendants about potential immigration consequences.¹

¹ Unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2013–14 Wisconsin Statutes, as affected by acts through 2015 Wisconsin Act 62; all references to the United States Code (U.S.C.) are current through Public Law No. 114-61 (excluding Public Law Nos. 114-52, 114-54,

In general, a criminal defense attorney's job is to minimize liability, whether by getting the case dismissed, securing an acquittal, or negotiating a sentence that does not involve actual jail time. In some cases, a defense attorney might avoid a conviction by entering into a deferred prosecution agreement (DPA). Basic tenets of criminal defense law are that misdemeanors are better than felonies and stayed or withheld sentences are generally better than actual incarceration.

For noncitizens, the landscape is far more complicated because often what is at stake is beyond the issue of mere jail time or probation. While deportation is considered a "civil penalty," it can mean separation from U.S. citizen spouses and children and banishment to a country where the person has not resided for years.

Certain misdemeanors carry significant immigration consequences regardless of the sentence or jail time. DPAs might be considered "convictions" under immigration law regardless if the case is dismissed under Wisconsin law, and stayed sentences might inadvertently result in deportation for even longtime lawful permanent residents (LPRs or permanent residents). In some cases, a felony might not result in any immigration consequence. These aspects of immigration law run counter to basic precepts of criminal defense law.

Sections 2.2–.14, *infra*, expose the common mistakes and misconceptions regarding immigration consequences of criminal convictions. Defense attorneys should be attuned to the fact that any noncitizen can be severely affected by pleading to an inadmissible or deportable offense regardless of his or her immigration status. An undocumented person could be foreclosed from pursuing permanent residence forever by pleading to certain offenses.

Sections 2.15–.26, *infra*, explain the procedural differences between criminal and immigration law. Because deportation is considered civil law, the constitutional rights afforded to criminal defendants do not attach to individuals placed into immigration court. The purpose of this discussion highlights why defense attorneys should strive to avoid future immigration consequences for their noncitizen clients. Removal proceedings are procedurally different from criminal proceedings, with noncitizens lacking most of the constitutional safeguards.

114-60) (Oct. 7, 2015); and all references to the Code of Federal Regulations (C.F.R.) are current through 80 Fed. Reg. 64,298 (Oct. 22, 2015).

II. Common Misconceptions of Crimmigration [§ 2.2]

A. In General [§ 2.3]

Criminal defense practice is not easy. Many criminal defense lawyers have substantial case dockets. Because of the counterintuitive nature of immigration law, defense counsel should be aware of the common misunderstandings to avoid unwittingly negotiating a plea that will carry far-reaching immigration consequences to their noncitizen clients.

B. "It is Easy to Identify Whether a Defendant Is a Noncitizen." [§ 2.4]

In the course of pursuing postconviction relief, the author has had several circuit court judges admit they assumed a defendant was a U.S. citizen based on the defendant's appearance or ability to speak English. Defense attorneys should not assume a client is a noncitizen based purely on ethnicity, race, or the person's ability to speak or understand English. Noncitizens who have lived in the United States since a young age, and therefore have graduated from Wisconsin high schools, will often lack any discernible foreign accent. Conversely, it is not uncommon for a U.S. citizen who has been naturalized to have an accent or feel less comfortable communicating in English.

Defense attorneys should not make any assumptions without asking a few basic questions. The best practice is to use the client questionnaire in appendix A, *infra*, to determine alienage. The easiest and most comfortable way to find out whether a client is a noncitizen is to first ask where the person was born. If born inside the United States or in a U.S. territory, then the client is a U.S. citizen by virtue of the 14th Amendment to the U.S. Constitution unless a parent was a foreign diplomat at the time of birth. See *United States v. Wong Kim Ark*, 169 U.S. 649, 664 (1898).

If a defendant is born outside the United States, a defense attorney will need to ask additional questions to confirm whether the client is a noncitizen. In certain cases, a person with a U.S. citizen parent might have acquired citizenship at birth or derived citizenship before reaching the age of 18. Because the law on acquired and derivative citizenship is complex, defense counsel will likely need to have the client consult with an immigration lawyer in these cases.

► **Caution.** A defense attorney should not assume U.S. citizenship either. The author was hired to investigate postconviction options for a man who wrongly assumed he was already a U.S. citizen. Despite being adopted by his U.S. citizen stepfather, the law at the time of the adoption required a few additional steps to secure U.S. citizenship that were never taken. As an unfortunate consequence, this client was removed to a country where he does not speak the language because he was convicted of a deportable offense in Wisconsin.

C. "It Does Not Matter If Undocumented Defendants Are Convicted of a Crime Because They Are Here Illegally Anyway." [§ 2.5]

A common assumption is that a person with no legal immigration status will be deported regardless of family ties or length of residency. On the one hand, that is a fair assumption. A person who entered the United States illegally is subject to removal proceedings for being inadmissible pursuant to 8 U.S.C. § 1182(a)(6)(A)(i).

On the other hand, removal proceedings are a bifurcated process. The first phase is to establish the person is removable as charged. The second phase is to determine whether that individual has any viable relief to remain in the United States. An undocumented person has several avenues to obtain lawful immigration status in the United States. It can be based on a family member, such as a U.S. citizen spouse, an application for cancellation of removal in immigration court, a U visa application, temporary protected status, or even asylum.

There are criminal bars to undocumented immigrants adjusting to lawful status or obtaining relief in immigration court. The most frequent bar involves inadmissibility. Therefore, a guilty plea to an inadmissible offense will result in serious immigration consequences to an undocumented immigrant who would otherwise be eligible for permanent residence or other relief in removal proceedings.

An inadmissible conviction will remain a problem forever. There is no statute of limitation in immigration law. Time will not cure the immigration consequence. However, if a waiver of inadmissibility is available, a period of at least 15 years from the date of the offense could be one basis for approval of the waiver. 8 U.S.C. § 1182(h)(1)(A). In

many cases, if an undocumented immigrant pleads to an inadmissible offense, the immigration consequence will likely manifest itself at the time the individual later pursues legal immigration status.

➤ *Example.* John Doe is undocumented. On the advice of his defense attorney, he pleads guilty to simple possession of cocaine. Seven years later, he meets and falls in love with Jane, a U.S. citizen. Jane wants to petition John for permanent residence, but they learn from an immigration lawyer that possession of cocaine is an inadmissible offense with no waiver available for it regardless of the hardship Jane would face without John in the country. He is permanently ineligible to apply for permanent residence through marriage to Jane because of his plea to possession of cocaine seven years ago. *See generally infra* ch. 13.

D. "Permanent Residents Cannot Be Deported. Only Undocumented Immigrants Can Be Deported."

[§ 2.6]

Permanent residents are often shocked to learn that a conviction has put them in danger of being deported from the United States. This common error transcends race, ethnicity, educational background, and class. Permanent residents from all parts of the world have often expressed surprise after being arrested and detained by Immigration and Customs Enforcement (ICE) and placed into removal proceedings.

The shock is often compounded by the passage of time between the date of the conviction and the date ICE initiates removal proceedings. The author has had clients placed into removal proceedings for deportable or inadmissible convictions from the 1970s and 1980s.

It is not uncommon for at least 10 years to pass before ICE places a permanent resident into removal proceedings based on a deportable or inadmissible conviction. This is not by design. In many cases, ICE learns about a deportable conviction when a permanent resident renews his or her green card. Permanent resident cards expire every 10 years, and the process of renewing it requires fingerprinting. Once a rap sheet is produced, ICE will then learn of a conviction that could be 9 or 10 years old.

**E. "Once They Get Green Cards, Permanent Residents Can Travel Freely Outside the United States with No Problems Getting Admitted Back into the Country."
[§ 2.7]**

As a general rule, permanent residents can freely travel outside the United States and return with no problem. They are not requesting a new admission into the United States but are returning home to their family and job in the United States. However, a permanent resident who has committed an inadmissible offense before departing the United States will be treated as an "arriving alien," as though that person is seeking admission to the United States for the first time. *See* 8 U.S.C. § 1101(a)(13)(C)(v). The law is counterintuitive. It applies to every permanent resident regardless of length of residence. A permanent resident who has family, property, and a job in the United States may nonetheless be denied admission into the United States if previously convicted of an inadmissible offense before departing and re-entering.

The U.S. Supreme Court ruled that this provision of immigration law does not apply retroactively to inadmissible offenses that occurred before the provision's effective date under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. Law No. 104-208, div. C, § 309, 110 Stat. 3009, 3009-625. *Vartelas v. Holder*, 132 S. Ct. 1479 (2012). Therefore, a permanent resident who was convicted of an inadmissible offense before April 1, 1997, cannot be found inadmissible upon returning from a trip abroad. For later convictions, a permanent resident risks being found inadmissible, and thus being placed into removal proceedings, by traveling abroad. In certain cases, a permanent resident's conviction will not separately trigger deportability, and thus even a brief trip abroad can inadvertently result in removal proceedings.

► *Example.* John Doe became a permanent resident in 1992. In 2013, he was charged and convicted of simple possession of marijuana of 15 grams of marijuana. He is properly advised by his defense counsel that it is not a deportable offense because the amount is less than 30 grams. However, the defense attorney neglected to tell John that it is an inadmissible offense if he leaves the United States. John pleads guilty, and in 2014, travels to Europe for a two-week vacation. While going through customs, he is detained and placed into removal proceedings because simple possession of marijuana is clearly an inadmissible offense. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II).

F. "A Noncitizen Cannot Be Deported for a Misdemeanor." [§ 2.8]

The distinction between a misdemeanor and a felony is a cornerstone of criminal defense law and practice. Indeed, a felony carries significantly more consequences in Wisconsin than a misdemeanor. A felony not only involves potentially more incarceration time in a prison instead of a county jail, but it could result in a ban on firearm possession and loss of voting rights. A felony conviction can also prevent a person from obtaining certain jobs and occupations. Given the serious nature of felonies, a criminal defense attorney will often seek to negotiate an amendment to either a single misdemeanor or multiple misdemeanors.

While the distinction between a felony and a misdemeanor is not completely meaningless under immigration law, a misdemeanor conviction can cause far-reaching immigration consequences. In the author's experience, criminal defense attorneys have frequently assumed that a misdemeanor will not trigger immigration consequences. Judges are not immune to this common misconception. Several judges have confided to the author that they did not give the mandatory immigration warning under Wis. Stat. § 971.08(1)(c) in misdemeanor cases under the mistaken assumption that such offenses could not be an immigration problem.

The Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in sections of 8 U.S.C. ch. 12), contains multiple provisions under which a misdemeanor conviction will result in either inadmissibility or deportability, including the following:

1. Most controlled substance violations in Wisconsin are inadmissible offenses, including misdemeanors such as possession of cocaine or marijuana. The text of the current codification of the INA provision on inadmissible offenses does not distinguish between a felony and misdemeanor. Rather a "violation of ... any law or regulation" relating to a controlled substance is an inadmissible offense. 8 U.S.C. § 1182(a)(2)(A)(i)(II).
2. Like the provision for inadmissibility, the deportability counterpart for controlled substance convictions employs the

same language of a violation of “any law or regulation.” 8 U.S.C. § 1227(a)(2)(B)(i).

3. A conviction that qualifies as a crime involving moral turpitude (CIMT) could be an inadmissible offense even if it is a misdemeanor. This is especially made clear with the petty-offense exception, which states a single CIMT conviction will not trigger inadmissibility if the sentence does not exceed six months. 8 U.S.C. § 1182(a)(2)(A)(ii)(II).
4. The definition of an *aggravated felony* under immigration law may encompass what state statutes would classify as a misdemeanor offense. For example, an offense involving “sexual abuse of a minor” is an aggravated felony regardless of whether it is a misdemeanor or felony under state law. *See In re Small*, 23 I. & N. Dec. 448 (BIA 2002). Thus, a misdemeanor offense of exposing genitals in violation of Wis. Stat. § 948.10(1) would be an aggravated felony under immigration law. *See In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (BIA 1999).
5. A crime of domestic violence or child abuse, abandonment, or neglect is a deportable offense even if a misdemeanor. The plain text of the statute does not limit deportability in this category to felony convictions only. 8 U.S.C. § 1227(a)(2)(E)(i).
6. Certain firearms convictions will also subject a noncitizen to deportation regardless of the potential length of sentence. The statute is clear that it applies to a “violation of any law” instead of only felonies. 8 U.S.C. § 1227(a)(2)(C).

G. “A Felony Is Always an Immigration Problem.”

[§ 2.9]

Conversely, criminal defense lawyers have also mistakenly concluded that a felony will result in deportation. Although most felonies in Wisconsin carry an immigration consequence, a felony conviction might not necessarily trigger an immigration consequence depending on the nature of the offense or the defendant’s criminal and immigration history.

As discussed in further detail in section 5.32, *infra*, a CIMT requires some level of scienter, whether it is an intentional, knowing, or reckless offense. Therefore, negligent offenses cannot qualify as a CIMT even if they are felonies. For example, homicide by negligent operation of a vehicle is not a CIMT despite being a serious felony that carries a maximum sentence of 10 years.

Certain felonies that do qualify as a CIMT might not necessarily result in an immigration consequence for certain noncitizens. The dispositive issues are the length of admission in the United States and prior criminal record. A single felony conviction that is a CIMT is not a deportable offense if it is committed beyond five years after the noncitizen having been admitted to the United States.

► *Example.* Jane Doe was admitted to the United States as a permanent resident in 2000. In 2007, she is charged and later convicted of forgery in violation of Wis. Stat. § 943.38 and given a sentence of probation only. Although forgery is definitely a felony CIMT, Jane is not deportable because the offense was not committed within five years after her admission in 2000. Jane will not suffer any immigration consequence unless she travels outside the United States or is convicted of a second CIMT.

Even if a felony is a deportable or inadmissible offense, relief may be available for permanent residents. As discussed in section 5.68, *infra*, a permanent resident may be eligible for cancellation of removal, which is essentially being granted a “second chance” if convicted of certain deportable offenses.

H. “A Dismissal After Completion of a DPA Will Avoid Future Immigration Consequences.” [§ 2.10]

DPAs frequently involve a plea of guilty or no contest followed by the defendant being required to fulfill certain conditions such as treatment and counseling. Once the defendant fulfills the agreement, the case is later dismissed. A defendant will enter into such an agreement to avoid a conviction by successfully completing all the required conditions.

It is completely understandable why a prosecutor would want a guilty plea as part of the DPA. If the defendant breaches the agreement, the district attorney does not want to expend any additional resources in securing a conviction. A judgment of conviction can simply be entered by informing the court that the defendant has violated one of the conditions in the DPA.

However, for noncitizen defendants, a plea of guilty or no contest as part of a DPA will not ameliorate the immigration consequences even if the case is ultimately dismissed. Immigration law contains its own definition of conviction. 8 U.S.C. § 1101(a)(48)(A); *see infra* app. D, at 16. When adjudication of guilt has been withheld, all that is required for a “conviction” is (1) a plea of guilt or no contest; and (2) the judge ordering some form of punishment, penalty, or restraint on the person’s liberty, such as probation, anger management, counseling, or other rehabilitative measures.

Because this clause is so broad, courts have repeatedly found DPAs to be “convictions” for immigration purposes when it involves a plea of guilty or no contest and some restraint on liberty. *See, e.g., Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1207–09 (10th Cir. 2007) (nolo plea and deferred sentence under Wyoming statute is a conviction under immigration law); *Gonzalez v. O’Connell*, 355 F.3d 1010, 1018 & n.6 (7th Cir. 2004) (noting that a guilty plea coupled by probation in a deferred adjudication qualifies as a “conviction” under immigration law); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001) (when Arizona statute provides that a judgment of guilt will be set aside upon fulfillment of probation or sentence, it remains a conviction for immigration purposes); *Moosa v. INS*, 171 F.3d 994, 1006–10 (5th Cir. 1999) (a plea under Texas deferred adjudication statute is a conviction).

In contrast, a deferred adjudication that does not involve a plea of guilty or no contest, or any formal admission of facts warranting a finding of guilt, will not be considered a conviction. In *Crespo v. Holder*, 631 F.3d 130, 134 (4th Cir. 2011), the noncitizen defendant pleaded not guilty to possession of marijuana offense, but the judge “found facts justifying a finding of guilt and deferred adjudication” over the prosecutor’s objection. The Fourth Circuit ruled that because the defendant did not plead guilty or admit to facts sufficient to warrant a finding of guilt, he did not have a conviction for immigration purposes. *Id.* at 134–35. The Fourth Circuit noted the plain language of 8 U.S.C. § 1101(a)(48)(A) “makes clear that Congress intended a judge’s finding

of guilt to be a far different scenario than a judge finding facts sufficient to find guilt.” *Id.* at 135.

➤ **Caution.** DPAs are especially prevalent in Wisconsin drug courts. Defense attorneys should carefully screen their clients who enter into a drug court program involving a plea of guilty or no contest to a controlled substance. The author has had several clients who successfully completed the drug court program and had the charges later dismissed, only to be later placed into removal proceedings because of having been “convicted” of a controlled substance violation under immigration law.

A DPA that does not involve a plea of guilty or no contest, and does not require the defendant to admit facts sufficient to warrant a finding of guilt, will not be a conviction under immigration law. Appendix E, *infra*, is a sample DPA that noncitizens can enter without triggering a conviction under 8 U.S.C. § 1101(a)(48)(A). Instead of a guilty plea or admission to facts, the defendant agrees to waive certain rights and defenses instead, such as a right to a jury trial, confronting witnesses, and challenging evidence. If the noncitizen defendant violates the DPA, the prosecutor will be able to secure a conviction with these rights and defenses being waived.

DPAs are a useful tool in the criminal justice system. They provide an incentive for the defendant to fulfill certain conditions and demonstrate rehabilitation in order to avoid a conviction. If the agreement is violated, it will provide a prosecutor with a conviction without the expense of a jury trial. Noncitizens should be able to benefit from DPAs too by crafting an agreement like the one in appendix E, *infra*, instead of the noncitizen inadvertently triggering a conviction under immigration law.

I. "Expunction Will Avoid Immigration Consequences of a Conviction." [§ 2.11]

In certain cases, a defendant can later request an expunction to erase the criminal conviction from public record. *See* Wis. Stat. § 973.015. However, an expunction is not recognized as a valid vacatur under immigration law. *In In re Roldan-Santoye*, 22 I. & N. Dec. 512 (BIA 1999), the Board of Immigration Appeals (Board or BIA) expressly held that an expunction based on rehabilitative grounds does not eliminate the immigration consequence of the underlying conviction.

J. "A Stayed Sentence Will Avoid Future Immigration Consequences." [§ 2.12]

As with the term *conviction*, immigration law also contains its own definition of a *sentence*. The definition includes "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." 8 U.S.C. § 1101(a)(48)(B); *see infra* app. D, at 17.

Certain immigration consequences are triggered by the length of sentence regardless if there is no actual incarceration. For example, a misdemeanor CIMT can constitute an inadmissible offense if the sentence exceeds six months "regardless of the extent to which the sentence was ultimately executed." 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

Likewise, numerous offenses, such as a crime of violence, theft, burglary, forgery, bribery, or perjury, will only qualify as an aggravated felony if the sentence is one year or longer. 8 U.S.C. § 1101(a)(43)(F), (G), (R), (S); *see infra* app. D, at 9–11. The aggravated felony designation is particularly harsh, especially for permanent residents. It forecloses discretionary relief. In contrast, a mere sentence reduction of one day to 364 days will avoid these types of offenses from becoming aggravated-felony convictions.

For most defendants, a stayed sentence is ordinarily preferable to straight jail time. Once the conditions of probation are met, the defendant is assured of avoiding incarceration. However, for the

noncitizen defendant, a stayed sentence that triggers removal is not a good resolution to the case.

➤ *Example.* Jane Doe is charged with misdemeanor theft. She is a permanent resident who must travel frequently outside the United States. The prosecution offers her probation with a stayed sentence of seven months. That resolution would result in Jane's inadmissibility when she leaves the United States because theft is a CIMT and the sentence exceeds six months. A better deal would be a stayed sentence of six months or less, or jail time of six months or less with Huber privileges.

➤ *Example.* John Doe is a permanent resident. He pleads guilty to one count of forgery. The prosecutor wants the sentence withheld and probation, with 12 months of jail time as a condition of probation. That would be considered an aggravated felony under immigration law because of the sentence of exactly 12 months of jail. *See* 8 U.S.C. § 1101(a)(43)(R). John's defense attorney should negotiate jail time of 364 days or less to avoid the aggravated-felony designation.

K. "If a Noncitizen Can Avoid Actual Jail Time, the Immigration Consequences to a Plea Can Likewise Be Avoided." [§ 2.13]

While certain inadmissible or deportable offenses require a certain length of sentence, most offenses carry an immigration consequence regardless of the sentence or actual jail time served. Indeed, drug offenses, certain CIMTs, family and domestic-violence related offenses, and firearms offenses will be deportable offenses even if the only penalty is a fine.

➤ *Example.* John Doe is a permanent resident. He enters a municipal court while possessing a firearm and is later convicted of that offense under Wis. Stat. § 941.235(1). At sentencing, his defense attorney explains that John simply did not understand that he was forbidden to carry his weapon inside the court building, and that there was no ill intent behind his mistake. The judge agrees and only orders a fine. Nevertheless, John is deportable because he was convicted of a firearms offense.

Conversely, an offense that simply does not carry a direct immigration consequence cannot be transformed into an inadmissible or deportable offense because of the length of a jail sentence. Simple operating while intoxicated (OWI) and negligence offenses are neither inadmissible nor deportable offenses regardless of the sentence or actual jail time served.

L. "A Civil-Ordinance Violation Can Never Cause an Immigration Problem." [§ 2.14]

Under Wisconsin law, a "crime is conduct which is prohibited by state law and punishable only by fine or imprisonment or both." Wis. Stat. § 939.12. In contrast, "[c]onduct punishable by a forfeiture is not a crime." *Id.* In both municipal court as well as with county ordinances, certain offenses are considered "quasi-criminal" because the elements of the offense are taken from the Wisconsin Criminal Code. For example, a first OWI offense under Wisconsin law is a civil-ordinance violation, not a criminal offense. However, a second OWI offense is a misdemeanor under Wisconsin law.

The distinction between a civil-ordinance violation and a criminal conviction is important under immigration law. A Wisconsin civil-ordinance violation is not even a "conviction" under immigration law because it does not contain the same constitutional and procedural safeguards reserved for criminal defendants. *See In re Eslamizar*, 23 I. & N. Dec. 684 (BIA 2004) (holding that Oregon ordinance violation for theft was not a "conviction" under immigration law). For that reason, a Wisconsin civil-ordinance violation cannot be a deportable offense because only criminal convictions can trigger deportability under 8 U.S.C. § 1227(a)(2)(A), (B), (C), (D), (E); *see infra* app. D, at 5-8.

Nonetheless, because certain civil-ordinance violations are patterned after the elements in criminal statutes, a plea to certain offenses could result in a finding of inadmissibility. While deportability requires a criminal conviction, inadmissibility might not necessarily require a conviction. It can be triggered if a noncitizen "admits committing acts which constitute the essential elements of" an inadmissible offense. 8 U.S.C. § 1182(a)(2)(A)(i). Furthermore, while the inadmissibility provision for CIMTs employs the term "crime," *see* 8 U.S.C. § 1182(a)(2)(A)(i)(I), the inadmissibility statute relating to controlled substances uses the broader term of "a violation," *see* 8 U.S.C.

§ 1182(a)(2)(A)(i)(II). Arguably, the distinction between “crime” and “violation” could support a finding that inadmissibility is triggered for ordinance violations that relate to a controlled substance under the federal schedules.

► *Comment.* It is an open question as to whether pleading guilty to a civil-ordinance violation can render a noncitizen inadmissible. However, defense counsel should be aware of this possibility and pursue a safer alternative with municipal and county ordinances.

► *Example.* John Doe is eligible to file for permanent residence through his U.S. citizen wife. He is charged in municipal court for possession of marijuana for his own use. If charged criminally, the citation would definitely be an inadmissible offense under immigration law. However, an amendment to a disorderly conduct citation would avoid that potential issue of inadmissibility because disorderly conduct is generally not even a CIMT.

III. Consequences of Deportation Proceedings Being a “Civil Action” [§ 2.15]

A. In General [§ 2.16]

Criminal defendants are protected by a number of constitutional safeguards under the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution. These rights attach at the time of an arrest or stop and continue throughout the criminal proceeding.

These rights generally do not apply to noncitizens in removal proceedings. The reason is the long-held position that deportation is only a “civil penalty,” and therefore these constitutional rights are inapplicable to the process. As explained by the U.S. Supreme Court, “[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry.” *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). For that reason, a “noncitizen in removal proceedings is not at all similarly situated to a defendant in a federal criminal prosecution.” *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013). This distinction between civil and criminal is not new. The U.S. Supreme Court stated more than 100 years ago that an “order of deportation is not a punishment for crime.” *Fong Yue Ting*

v. United States, 149 U.S. 698, 730 (1893), *overruled on other grounds* by *Yamataya v. Fisher*, 189 U.S. 86 (1903).

Despite the fact that deportation is considered a “civil penalty” only, the effect of deportation can often be far more devastating than jail time after a criminal conviction. The U.S. Supreme Court also observed that deportation involves “loss of both property and life, or of all that makes life worth living.” *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). A person who has lived in the United States since almost birth can still be removed to a country based on a criminal conviction. Banishment is a far more serious penalty than mere jail time.

Nonetheless, the civil action designation carries significant consequences for noncitizens placed into immigration court. Criminal defense attorneys should recognize that many constitutional rights for their clients stop the moment a noncitizen defendant is arrested by ICE and placed into removal proceedings.

B. *Miranda* Rights [§ 2.17]

Pursuant to the U.S. Supreme Court’s landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), individuals arrested by the police and placed into custody for further interrogation have a constitutional right to be advised of their right to remain silent, warned that anything they say may be used against them in court, advised of their right to an attorney being present during questioning, and, if indigent, the right to appointed counsel at no cost.

Immigrants do not have the same *Miranda* rights when arrested by ICE. While there is a regulatory requirement that ICE advise individuals as to why they are being arrested and to inform them “that any statement made may be used against him or her in a subsequent proceeding,” 8 C.F.R. § 287.3(c), there is no effective enforcement mechanism of this regulation. As discussed in section 2.18, *infra*, suppression of evidence for constitutional violations is limited in removal proceedings. There is no remedy by suppression of evidence if an ICE officer neglects to satisfy this regulation unless an immigration judge is convinced it rises to the level of an “egregious violation” of the Fourth Amendment.

More importantly, this regulatory requirement was rendered meaningless by a decision from the Board, which held the warning

against self-incrimination must only be given after formal removal proceedings have been initiated. *In re E-R-M-F- & A-S-M-*, 25 I. & N. Dec. 580, 588 (BIA 2011). As a matter of simple logical progression, formal removal proceedings are initiated only after ICE has interviewed the respondent. For that reason, the Board's decision gutted the regulatory *Miranda* right by permitting an ICE officer to give the warning against self-incrimination *after* the interview is completed.

C. Suppression of Evidence [§ 2.18]

Under a basic tenet of constitutional law, evidence obtained in violation of the U.S. Constitution may be suppressed in criminal proceedings. This rule extends to all evidence derived from the constitutional violation.

In contrast, suppression motions in immigration court are only granted in limited circumstances. The U.S. Supreme Court held that the exclusionary rule under the Fourth Amendment is generally inapplicable in deportation proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Only "egregious violations" of the Fourth Amendment that "transgress notions of fundamental fairness" can be a basis to suppress evidence in immigration court. *Id.* at 1050-51; *see also In re Cervantes-Torres*, 21 I & N Dec. 351, 353 (BIA 1996).

Several courts have taken the position that a stop based solely on race or ethnicity is an "egregious violation" that warrants suppression of evidence in removal proceedings. *See, e.g., Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1164 (9th Cir. 2005) (a stop based solely on "Hispanic appearance" can be grounds to suppress evidence in removal proceedings); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (arresting a person and conducting warrantless search based solely on Nigerian-sounding name is an egregious violation and grounds for suppression). In contrast, lack of probable cause to arrest, without aggravating circumstances such as an arrest based on solely race, is not sufficiently egregious to warrant suppression of evidence in removal proceedings. *Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010).

D. Right to Appointed Counsel [§ 2.19]

A criminal defendant who is indigent has a right to an appointed counsel at the government's expense. *Gideon v. Wainwright*, 372 U.S. 335 (1963). As the U.S. Supreme Court remarked in *Gideon*, appointed counsel is a constitutional right because "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

In contrast, a respondent in removal proceedings only has "the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." 8 U.S.C. § 1229a(b)(4)(A) (emphasis added). The circuit courts of appeals, including the Seventh Circuit, have repeatedly held that an indigent person in removal proceedings has no right to appointed counsel. *See, e.g., Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Stroe v. INS*, 256 F.3d 498, 500-01 (7th Cir. 2001); *Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001); *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999).

The fact that certain immigrants must represent themselves in immigration court is troubling for several reasons. First, the INA is a highly complex body of law. As one court succinctly put it, immigration law is a "maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike." *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003).

Given the complexity of immigration law, a respondent stands a far greater chance of avoiding deportation with representation. As the Ninth Circuit stated years ago,

The importance of counsel for the alien in deportation cases has long been recognized. Over fifty years ago it was observed that in "many cases" a lawyer acting for an alien would prevent a deportation "which would have been an injustice but which the alien herself would have been powerless to stop." Since 1931 the law on deportation has not become simpler. With only a small degree of hyperbole, the immigration laws have been termed "second only to the Internal Revenue Code in complexity." A lawyer is often the only person who could thread the labyrinth.

Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987) (citations omitted).

A pro se litigant in immigration court is far less likely to win his or her case, with one study finding that, in analyzing the outcome of removal proceedings, “the single most important non-merit factor that mattered was representation.” Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 544 & n.18 (2009).

Second, the stakes could be higher in removal proceedings than in criminal proceedings. In misdemeanor cases, the issue is often avoiding a short jail sentence. Even in some felony cases, the issue might be more about the length of probation than serving a long prison sentence.

A person facing removal could be permanently separated from family and lose the person’s livelihood in the United States. In some cases, removal proceedings are a life-or-death matter for noncitizens fearing persecution in their home country. As one immigration judge remarked during testimony before Congress, the immigration courts are often “[l]ike doing death-penalty cases in a traffic-court setting.” Eli Saslow, *In a Crowded Immigration Court, Seven Minutes to Decide a Family’s Future*, Wash. Post (Feb. 2, 2014), http://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html.

E. Bail and Release from Custody [§ 2.20]

The right to bail for criminal defendants is enshrined in the U.S. and Wisconsin Constitutions. A prosecutor bears the burden of proving why bond should be denied or why a particularly high bond is warranted by establishing the defendant is a flight risk or a danger to the community. The right to bail extends to criminal defendants who lack immigration status. In an en banc decision, the Ninth Circuit struck down an Arizona law that barred undocumented immigrants from bail or pretrial release who were arrested for a felony even if the person did not pose a flight risk or danger to the community. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc).

Unless detention is prolonged and indefinite, a noncitizen placed into removal proceedings has no constitutional right to be released on bond. See generally *Demore v. Kim*, 538 U.S. 510 (2003) (upholding

mandatory immigration detention); *see also* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (arriving aliens has constitutional right to release).

A noncitizen has a statutory right to request release under 8 U.S.C. § 1226(a)(2). The rules are significantly different for immigrant detainees. It is the respondent, not the government, who bears the burden that bond should be given because the individual is not a flight risk or a danger to the community. *See* 8 C.F.R. § 236.1(c)(8). The Board has emphasized that an immigration judge cannot release a respondent on bond who has not met the threshold burden of demonstrating that he does not pose a danger to the community. *In re Urena*, 25 I. & N. Dec. 140 (BIA 2009).

Immigration judges are given wide discretion to deny a bond. In fact, an immigration judge can deny bond simply because the respondent was arrested and charged with an offense. *In re Guerra*, 24 I. & N. Dec. 37 (BIA 2006). The presumption of innocence does not apply to bond decisions in immigration court. If a criminal complaint is sufficiently detailed, an immigration judge has the power under *Guerra* to deny bond basely solely on the pending criminal charge.

Finally, and most importantly, certain convictions will result in mandatory immigration detention under 8 U.S.C. § 1226(c). If a noncitizen is subject to mandatory detention under this provision, an immigration judge has no jurisdiction to release him or her even if the noncitizen is not a flight risk or does not pose any danger to the community. Mandatory detention covers a wide swath of criminal convictions. It is not confined to dangerous or violent offenses. For example, most simple possession drug offenses will result in mandatory detention.

► *Example.* John Doe has a permanent resident since age 2. When he is 20 years old, John is convicted of simple possession of cocaine. He rehabilitates and has no other issues with the law. Seven years after his conviction, ICE arrests and detains him for having been convicted of a deportable offense. Despite his length of residence and rehabilitation, John will not be eligible for a bond in removal proceedings and will remain in detention until his case is resolved.

F. Retroactivity [§ 2.21]

The Ex Post Facto Clause of the U.S. Constitution expressly prohibits the U.S. government from enforcing criminal statutes retroactively. *See* U.S. Const. art. 1, § 9, cl. 3; U.S. Const. art. 1, § 10, cl. 1. A person cannot be charged with an offense that was not a crime at the time of incident.

The Ex Post Facto Clause does not apply to immigration law. The U.S. Supreme Court ruled many years ago that “whatever might have been said at an earlier date for applying the ex post facto Clause, it has been the unbroken rule of this Court that it has no application to deportation.” *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The inapplicability of the Ex Post Facto Clause has had major implications for noncitizens. In the 1990s, Congress passed a number of bills that significantly broadened the types of offenses that will trigger deportability. These provisions expressly apply to convictions entered *before* the effective date of the legislation.

The retroactive application of new classes of deportable offenses is illustrated in the Seventh Circuit’s decision in *Alvear-Velez v. Mukasey*, 540 F.3d 672 (7th Cir. 2008). In that case, the respondent pleaded to a sexual assault offense in 1993. The following year he was placed into removal proceedings and charged with being convicted of a CIMT with an actual sentence of one year or more. However, the immigration judge terminated proceedings because the sentence was less than a year, and therefore the respondent was not deportable under the applicable law at the time. *Id.* at 675.

In 1999, ICE placed the respondent into removal proceedings a second time for the same conviction from 1993. The government argued that the respondent was deportable for having been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(A) as an offense involving “sexual abuse of a minor.” *Id.* at 675–76.

The issue in *Alvear-Velez* was whether the doctrine of res judicata barred ICE from seeking the respondent’s removal a second time based on the same 1993 conviction. The Seventh Circuit found that res judicata did not apply because in 1996 “Congress amended the statutory definition of aggravated felony ... to include sexual abuse of a minor, and it specifically applied that new definition retroactively ‘regardless’ of

how long ago the 'conviction was entered.'" *Id.* at 679. Accordingly, "Congress provided the immigration authorities with a new ground upon which to institute removal proceedings—a ground that had not been available when the immigration authorities had first sought to deport Mr. Alvear-Velez." *Id.*

G. Statute of Limitation [§ 2.22]

As a general rule, Wisconsin law contains an express statute of limitation for prosecuting criminal offenses, with a six-year deadline for most felonies and a three-year deadline for misdemeanors. Wis. Stat. § 939.74(1). The purpose of the statute of limitation is to protect defendants from unfair prosecutions when either the evidence has gone stale or the person has been rehabilitated since the alleged offense.

In contrast, the passage of time does not protect a noncitizen from deportation. There is no statute of limitation under immigration law. An inadmissible or deportable offense generally remains a problem forever. For example, the author knows of removal proceedings being initiated for alleged convictions occurring in the 1970s and 1980s.

The lack of a statute of limitation applies to all noncitizens regardless of immigration status. An undocumented immigrant who pleads guilty to an inadmissible offense might be permanently unable to adjust to lawful status if in the future he or she marries a U.S. citizen. Noncitizens must be advised that time will not cure the problem of pleading to an inadmissible or deportable offense.

H. Right to Discovery [§ 2.23]

Wisconsin law requires prosecutors to provide the evidence in support of the criminal charges as well as list of witnesses and their addresses. Wis. Stat. § 971.23. A prosecutor's failure to comply with a discovery request is grounds for dismissal, and possibly even sanctions. *Id.*

Removal proceedings do not have a formal discovery process. While a respondent has a "reasonable opportunity to examine the evidence against the alien," that statutory right does not extend to the alien registration file, which contains all the evidence in support of the government's assertion that the respondent is removable as charged. 8

U.S.C. § 1229a(4)(A). Rather, a person placed into removal proceedings must submit a request under the Freedom of Information Act (FOIA) to obtain the file. However, the response to the FOIA request not only takes several months, but it often involves a heavily redacted file. For a client who is detained, a FOIA request is not an adequate substitution for discovery.

The Ninth Circuit Court of Appeals held that when a noncitizen contests removal, ICE must provide a copy of the alien registration file to comport with due process. *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010). To date, the Ninth Circuit's holding in *Dent* has not been adopted by other jurisdictions or courts, including the Board.

I. Right to Confront Witnesses [§ 2.24]

A criminal defendant has a constitutional right under the Confrontation Clause of the Sixth Amendment to cross-examine the state's witnesses, including the alleged victim and the police officers involved in the arrest. *See* U.S. Const. amend. VI.

In the vast majority of cases, ICE does not need to present witnesses to prove its case, but it may rely solely on a document called a "Record of Deportable/Inadmissible Alien," which is created on a Form I-213. The Seventh Circuit has followed the general rule that a "Form I-213 is treated as inherently trustworthy and admissible even without the testimony of the officer who prepared it." *Pouhova v. Holder*, 726 F.3d 1007, 1013 (7th Cir. 2013). The Seventh Circuit has ruled that unless a respondent can articulate a basis to challenge the contents of the Form I-213, it is not a due-process violation if an immigration judge does not allow the cross-examination of the ICE agent who drafted the document. *Antia-Perea v. Holder*, 768 F.3d 647 (7th Cir. 2014).

J. Burden of Proof: The Problem with Remaining Silent [§ 2.25]

The state must prove guilt of a criminal defendant beyond a reasonable doubt, the highest evidentiary standard in the law. Wis. Stat. § 903.03(2). Under the Fifth Amendment right against self-incrimination, a prosecutor cannot compel a defendant to testify in order to meet this high burden of proof. Immigration law does not require

proof of removability beyond a reasonable doubt. When the respondent is lawfully admitted, as opposed to being undocumented, ICE must prove deportability by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A).

For undocumented immigrants placed into removal proceedings, ICE has the threshold burden of proving alienage by clear and convincing evidence. 8 C.F.R. § 1240.8(c). If alienage is established, “unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.” *Id.*; see also 8 U.S.C. § 1361.

An undocumented person who is found removable can still pursue relief to remain in the United States or to adjust to lawful permanent residence. However, the respondent will bear the burden of proof on not only eligibility, but also that the court should grant the application as a matter of discretion. 8 U.S.C. § 1229a(c)(4). For that reason, a person pursuing relief in immigration court must testify in support of his or her own case and will be cross-examined by ICE’s attorney.

When either being confronted with evidence of alienage or pursuing relief in immigration court, a respondent cannot stand mute without possibly being found removable or ineligible for relief. The Board observed that “an adverse inference may indeed be drawn from a respondent’s silence in deportation proceedings.” *In re Guevara*, 20 I. & N. Dec. 238, 241 (BIA 1991). For a noncitizen with a criminal record, this often means that the respondent must openly discuss the reason for the arrest or conviction, the actual criminal conduct committed, and the steps the noncitizen has taken to show genuine rehabilitation.

K. No Plea Agreements [§ 2.26]

Most criminal cases are resolved with a plea agreement. As observed by the U.S. Supreme Court, approximately 97% of federal convictions and 94% of state convictions result from guilty pleas. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012). Because of limited resources and the desire to avoid lengthy prison sentences, the plea-negotiation process is an essential feature of criminal defense practice.

There are no genuine plea negotiations in removal proceedings. It is a zero-sum proceeding. If ICE wins, the respondent is removed from the United States. If the respondent wins, he or she is able to remain here. There is no middle ground, such as immigration probation, or being deported for five years only to be able to automatically return after that time period.

The lack of plea negotiations only underscores what is at stake for noncitizens who are placed into removal proceedings. A noncitizen is best served by trying to avoid removal proceedings altogether by avoiding an inadmissible or deportable conviction.

IV. Conclusion [§ 2.27]

Despite the close connection between criminal law and immigration law, the two fields are drastically different from both substantively and procedurally. While the distinction between a misdemeanor and felony is not completely meaningless in the immigration context, the distinction is blurred. A misdemeanor might carry a severe immigration consequence regardless of the sentence. In contrast, a felony might not produce an immigration consequence at all.

Most constitutional rights protecting criminal defendants are absent in removal proceedings. There is no *Miranda* right or right to appointed counsel. Evidence generally cannot be suppressed unless the constitutional violation is especially egregious. For the most part, immigration laws retroactively apply to old criminal convictions with no statute of limitation.

Noncitizens placed into removal proceedings face an uphill battle. This is why defense attorneys should pursue a plea-negotiation strategy that avoids or minimizes future immigration consequences.

Plea Negotiations

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I. Chapter Overview [§ 16.1]

Defense attorneys armed with the knowledge that they represent a noncitizen facing a charge that carries a serious immigration consequence should go beyond their advisory duty under *Padilla v. Kentucky*, 559 U.S. 356 (2010), and seek a solution for the client. Plea negotiations for noncitizens are qualitatively different than plea bargaining for U.S. citizens. Liability is not limited to jail time, lengthy probation, or a felony record. Defense attorneys must find the right disposition to try to avoid future immigration consequences. In many cases, that would involve seeking an amendment to the original information.¹

The first section of this chapter addresses a defense attorney’s ethical duty to plea bargain effectively. While *Padilla* does not mandate that a defense attorney negotiate a plea to avoid a noncitizen client’s deportation, the U.S. Supreme Court strongly suggests that counsel should pursue an immigration-safe plea agreement. Furthermore, in two later cases, the U.S. Supreme Court has held that plea negotiations fall squarely under the ambit of the Sixth Amendment.

The next section of this chapter provides a general framework for negotiating pleas for noncitizens. The first step is to figure out whether a safe immigration plea is even realistic. Defense attorneys should also get

¹ Unless otherwise stated, all references in this chapter to the Wisconsin Statutes are to the 2013–14 Wisconsin Statutes, as affected by acts through 2015 Wisconsin Act 62; and all references to the United States Code (U.S.C.) are current through Public Law No. 114-61 (excluding Public Law Nos. 114-52, 114-54, 114-60) (Oct. 7, 2015).

a feel for the prosecutor. In certain cases, a client's immigration status could possibly make negotiations more difficult depending on the district attorney and nature of the charge. If a prosecutor is amenable to taking into consideration a defendant's immigration status, defense counsel should consider summarizing the equities and why an immigration-friendly plea could also satisfy the State's interests of minimizing recidivism and seeking restorative justice for the victim.

The final section of this chapter focuses on specific recommendations during the plea negotiations. Negligent offenses as well as most offenses lacking a *mens rea* can serve as amendments to charges that will result in deportation or inadmissibility. In some cases, defense attorneys will need to pursue a sentencing strategy to avoid certain immigration consequences. Finally, there will be some cases in which the best a defense attorney can achieve is to minimize—but not entirely eliminate—future immigration consequences.

II. Counsel's Duty to Plea Bargain Effectively [§ 16.2]

A. Dicta in *Padilla* [§ 16.3]

Padilla v. Kentucky, 559 U.S. 356 (2010) holds that defense attorneys have a Sixth Amendment duty to advise noncitizen clients of the potential immigration consequences of a charge or plea. Does *Padilla* also separately mandate that defense attorneys pursue a plea-negotiation strategy that takes into account these potential immigration consequences? The answer is no, but with a major caveat. *Padilla* represents the bare minimum of what a defense attorney must do in cases involving a noncitizen client. If, for example, a defense attorney appropriately warns a noncitizen client on the immigration consequences of a particular plea, then the duty under *Padilla* has been satisfied.

However, the ethical issues become murkier when a noncitizen client has expressed a desire to avoid inadmissibility or deportability after defense counsel has discussed the potential immigration consequences under *Padilla*. If the prosecutor offers a plea deal that carries an immigration consequence, a defense attorney would need to consult with a noncitizen client and to likely propose a counteroffer that takes into account the client's immigration status.

Furthermore, there is a strong argument that *Padilla* implicitly requires a defense attorney to discuss what the client would want to do to avoid a possible immigration consequence. It may make little sense that a defense attorney must only warn about an immigration consequence without also pursuing a plea-agreement strategy to avoid deportation. In other words, why would a defense attorney not take the next step and try to find a plea resolution to avoid or minimize the immigration consequence?

Indeed, the U.S. Supreme Court in *Padilla* strongly encouraged defense attorneys to take that additional step when representing noncitizen clients. The Court stated in dicta that defense attorneys should find creative solutions during plea bargaining to avoid deportation:

Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense *may be able to plea bargain creatively with the prosecutor* in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

Padilla, 559 U.S. at 373 (emphasis added). The Court explained that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process” because “the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.” *Id.* Although *Padilla* does not mandate an immigration-centered plea strategy, the Court has strongly recommended that path when representing noncitizen clients. In some cases, a defense attorney may be ethically bound to seek a certain plea deal if a noncitizen client has expressed a strong desire to avoid deportation or inadmissibility. SCR 20:1.1 (Competence); SCR 20:1.3 (Diligence).

B. Post-*Padilla* Cases [§ 16.4]

After *Padilla v. Kentucky*, 559 U.S. 356 (2010) was decided, the U.S. Supreme Court issued two decisions that further clarified counsel’s Sixth Amendment duty during the plea-bargaining process. In 2012, the Court simultaneously decided *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and

Missouri v. Frye, 132 S. Ct. 1399 (2012), involving ineffective assistance of counsel during the plea-bargaining process. *Lafler* addressed whether a defense attorney is ineffective for rejecting a plea offer and the defendant then receives a harsher sentence after losing at trial. In contrast, the issue in *Frye* involved a defense attorney who failed to inform a defendant of a plea offer.

The Court in *Frye* emphasized the importance of effective plea bargaining in light of the statistics showing 97% of federal convictions and 94% of state convictions result from guilty pleas instead of trials. *Frye*, 132 S. Ct. at 1407. Given these high percentages, the Court in *Frye* concluded that the

reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.

Id. The Court in *Lafler* likewise held that “[d]uring plea negotiations defendants are ‘entitled to the effective assistance of counsel.’” *Lafler*, 132 S. Ct. at 1384.

As in *Padilla*, the Court in *Frye* recognized the value of plea bargaining to both sides of the aisle and found that “[i]n order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations” and “[a]nything less ... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” *Frye*, 132 S. Ct. at 1407–08.

Frye and *Lafler* must be read closely with *Padilla*. All three cases share a common concern about information that is not being adequately conveyed to clients during plea negotiations. All three cases accentuate the importance of the plea-negotiation stage of the criminal process, especially because the great majority of cases are resolved through guilty pleas. A defense attorney who knows of a client’s immigration status and desire to avoid deportation runs the risk of being found ineffective if there is no effort to pursue a plea to avoid serious immigration consequences.

III. General Framework When Plea Bargaining for Noncitizens [§ 16.5]

A. In General [§ 16.6]

Because an amendment may be necessary to avoid deportation or inadmissibility, plea negotiations for an immigrant could be more difficult than for a similarly situated U.S. citizen. As discussed in chapter 15, *supra*, defense attorneys should have a conversation with the client as to what is achievable. Serious charges may not leave defense counsel with much wiggle room during the plea-bargaining stage.

If plea negotiations could avoid or minimize future immigration consequences, a defense attorney should prepare a game plan to persuade a district attorney that the client should not be removed from the United States because of a conviction.

B. Setting a Realistic Goal [§ 16.7]

Noncitizen clients who want to avoid deportation or inadmissibility may need to be told that is an unrealistic goal in light of the nature of the charges or the evidence. Prosecutors are unlikely to agree to an amendment involving serious offenses especially if the evidence in support of guilt is strong. For example, a noncitizen defendant charged with a substantial amount of drugs with intent to distribute is unlikely to receive an amendment to simple possession. And in most cases, simple possession is going to be separately a deportable or inadmissible offense anyway. Defense attorneys should have this conversation with noncitizen defendants after reviewing the State's evidence and assessing the strength of the prosecutor's case.

In certain cases, a noncitizen's only option might be to limit, but not entirely eliminate, a future immigration consequence. For example, a permanent resident might have to accept a plea to an inadmissible offense to avoid a deportable conviction. A permanent resident can simply avoid inadmissibility by not traveling outside the United States. In contrast, a deportable conviction would result in removal proceedings for a permanent resident.

This is precisely why a defense attorney should ascertain the client's immigration status and history at the earliest stages of representation: so there can be an informed discussion about the parameters during the plea-bargaining process.

C. Research the Prosecutor [§ 16.8]

A corollary to setting a realistic goal is whether the prosecutor assigned to the case will be willing to take the client's immigration status into account during plea negotiations. Prosecutors could be sympathetic, indifferent, or even hostile towards a noncitizen defendant seeking an immigration-friendly plea. A defense attorney should research on listservs and within the local criminal defense bar regarding how the assigned prosecutor generally handles plea proposals involving noncitizens. What does the prosecutor want to see? What particular arguments are *not* effective? A defense attorney can best serve the client if knowledgeable about the prosecutor's treatment of plea proposals involving noncitizens.

In some cases, a defense attorney would be better off not disclosing a client's immigration status or history, such as if the prosecutor has a reputation for viewing immigrant defendants unfavorably or of being prone to contacting Immigration and Customs Enforcement (ICE). This especially applies to undocumented immigrants, who may be fearful that any information given to the prosecutor during plea negotiations will be handed over to ICE.

D. Persuading the Prosecutor [§ 16.9]

1. Cite Immigration Law [§ 16.10]

Defense counsel should not assume that a district attorney will automatically agree that a charge or plea carries a significant immigration consequence. As discussed in chapter 2, *supra*, it is a common misconception that a misdemeanor cannot result in deportation or inadmissibility. A prosecutor may similarly be skeptical without supporting legal material outlining the immigration consequence of a pending charge.

Appendix F, *infra*, is a redacted sample letter that the author used in one case to persuade the prosecutor of the immigration consequences of a sentence of a year or longer on a burglary and theft conviction. In that case, the defendant was not going to be able to avoid removal proceedings, but a sentence structured to avoid a one-year sentence on any of the counts preserved the client's ability to pursue discretionary relief in immigration court. It will often be key to accurately and succinctly explain the immigration consequence to the prosecutor as well as to the judge.

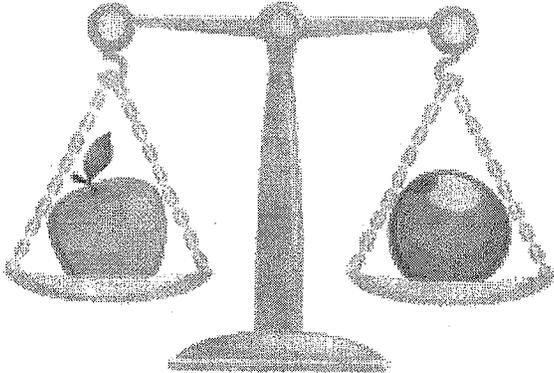
2. Address "Why Should I Treat a Noncitizen Differently?" [§ 16.11]

Defense attorneys should anticipate initial resistance, with a prosecutor asking: "Why should I treat your noncitizen differently than a U.S. citizen?" A district attorney may question why he or she would agree to a deal for a noncitizen that would not be offered to a U.S. citizen. At first blush, the comparison is unfair. A U.S. citizen does not face permanent separation from family members and exile by pleading guilty to a misdemeanor. In contrast, a noncitizen may lose everything regardless if there is no jail time as part of the sentence.

On the other hand, defense attorneys should be sensitive to a prosecutor's concern about giving preferential treatment to certain classes of individuals. Furthermore, equality under the law is an important value in the U.S. judicial system. If a prosecutor raises this issue, a defense attorney should consider structuring a deal that will try to resolve any concern about fairness and consistency of plea deals between noncitizen and U.S. citizen defendants.

The graphic below illustrates the best approach to addressing this issue with a prosecutor. On the one hand, the comparison between noncitizen and U.S. citizens is like comparing apples and oranges. While U.S. citizen defendants have an obvious need and desire to avoid or minimize criminal liability, the potential consequences beyond the sentence are simply not comparable. A U.S. citizen charged with a misdemeanor drug offense does not face the prospect of being sent to another country far away from family and friends. It is important to remind prosecutors about the stakes for a noncitizen faced with an offense that would be of far less concern to a U.S. citizen.

Nonetheless, this graphic also has the apple and orange as being of equal weight on the scale. A prosecutor will be more willing to agree to a deal if he or she feels that it is fair and balanced compared to a similarly situated U.S. citizen. There are several ways to achieve balance. For example, a defense attorney can recommend a higher fine than usually paid by U.S. citizens. In certain instances, defense attorneys can propose more jail time in exchange for an amendment that will avoid inadmissibility or deportability. In other cases, additional misdemeanors can be included in the plea deal as long as they are not inadmissible or deportable offenses.



3. Ask What the Victim Would Want? [§ 16.12]

Before agreeing to a deal, a prosecutor will need to reach out to the victim and discuss the proposal. *See* Wis. Stat. § 971.095. It is therefore worth arguing why an immigration-safe plea would be a resolution that would achieve some level of justice for the victim. In domestic violence and child-abuse cases, a defense attorney may point out that the victim may want the spouse or parent to be able to remain in the United States rather than being deported. In other words, a victim of domestic violence may be more interested in restorative justice by having the defendant becoming a better spouse or parent through probation and counseling.

If a noncitizen family member is deported, then it could make the life of the victim even harder, either financially or emotionally. A victim of domestic violence may want to repair the marriage and have the defendant spouse be a part of the family. A spouse who is deported will not be able to contribute financially or help to raise the children. Indeed,

the victim in *State v. Ortiz-Mondragon*, 2015 WI 73, ¶ 17, 364 Wis. 2d 1, 866 N.W.2d 717, stated that she wanted the felony domestic violence charge reduced to a misdemeanor because she has children with him and they “were trying to keep them here in the states, but if he ends up with a felony charge, that’s not going to happen.” This is not to say that the prosecutor could or should have considered the immigration impact of the felony charge, but it is unfortunate that the victim’s desire appears to have only been communicated *after* the defendant pleaded guilty to the offense.

In non-family cases, a victim may want a noncitizen to remain in the United States to pay off the restitution. It is unlikely that a noncitizen who is deported will continue to pay restitution from the home country.

4. Outline the Equities [§ 16.13]

During plea negotiations, defense attorneys should not shy away from explaining what is at stake for the noncitizen defendant. In cases involving longtime residents or individuals with family in the United States, everything dear to that client may be on the line. Defense counsel should consider outlining the following equities when proposing an immigration-safe plea:

1. The length of time the noncitizen has lived in the United States;
2. The family members living with the noncitizen, especially U.S. citizen children;
3. The noncitizen’s work history, including how much the client is currently making versus what the client could expect to earn in his or her home country;
4. The amount of money the noncitizen client has invested in Social Security, which would be lost if removed because of a deportable offense;
5. The relief that would be available in removal proceedings that the client would be barred from pursuing if convicted of the charge;
6. Conditions in the home country, including whether the noncitizen has a fear of persecution; and

7. Any special factors in the client's case that would make the prosecutor empathetic.

The sample letter in appendix F, *infra*, outlined the equities and what was precisely at stake for the lawful permanent resident (LPR or permanent resident) client in that case.

E. Assuaging Concerns About Rehabilitation and Recidivism [§ 16.14]

Once defense attorneys begin to routinely raise a noncitizen client's immigration status during plea negotiations, they will find certain advantages to convincing a prosecutor to accept a deal. Prosecutors are more likely to accept deals if they feel reasonably comfortable that the defendant will not get arrested and convicted again in the future.

Generally speaking, a noncitizen who has become aware that a conviction can result in devastating immigration consequences is less likely to commit future crimes. Fear of deportation is a powerful incentive for immigrants to avoid future problems with the law. A prosecutor may be more likely to agree to a deal with knowledge that the client is petrified of deportation because of a criminal conviction.

Fear of deportation would likewise be a powerful incentive to faithfully complete probation. As discussed in sections 16.15–.28, *infra*, certain offenses might only carry an immigration consequence depending on the length of the sentence. A defense attorney can use the prospect of a one-year sentence on these offenses to persuade a district attorney to accept probation instead of a lengthy jail term. A noncitizen would have a vested interest in completing probation to avoid an aggravated-felony conviction that would be triggered by a sentence of one year or longer after revocation.

Finally, a prosecutor may be satisfied knowing that a noncitizen defendant's plea leaves no room for future misconduct. For example, a noncitizen on temporary protected status (TPS) who pleads to a single misdemeanor will have TPS revoked if convicted of a subsequent misdemeanor conviction. Similarly, a permanent resident convicted of a single crime involving moral turpitude (CIMT) will be deportable if convicted of another CIMT regardless if it is a misdemeanor or felony.

A prosecutor who knows a noncitizen defendant will be on “thin ice” in the future may be more amenable to agreeing to an immigration-safe plea. The fear of deportation is a powerful deterrent. Defense attorneys should employ that deterrent for the noncitizen client’s own benefit during plea negotiations.

IV. Specific Recommendations [§ 16.15]

➤ *Note.* Unfortunately, this chapter cannot provide a plea-negotiation strategy for every possible scenario. However, certain recommendations should apply to every case.

A. Is There a Possible Negligent Offense that Fits Under the Allegations in the Criminal Complaint? [§ 16.16]

Unless the crime involves a firearm, negligent offenses are often the best substitute for noncitizen clients because they are neither CIMTs nor crimes of violence. Standing alone, negligent offenses cannot be inadmissible or deportable offenses—with the only possible exception being a negligent crime involving a firearm. Even in cases involving a firearm, a negligent offense might not carry an immigration consequence if the categorical approach as set forth in *Descamps v. United States*, 133 S. Ct. 2276 (2013), prevents an examination of the underlying factual record. In addition, it does not matter whether a negligent offense is a felony or misdemeanor. Even a single felony negligent offense cannot trigger inadmissibility or deportability.

For that reason, defense attorneys should see whether one of these negligent offenses could apply to a noncitizen’s case:

1. Reckless driving (with negligence *mens rea*), Wis. Stat. § 346.62(2), (3), (4);
2. Negligent homicide, Wis. Stat. §§ 940.08, 940.10;
3. Negligent injury, Wis. Stat. § 940.24;
4. Negligent operation of a vehicle, Wis. Stat. § 941.01;

5. Negligent handling of burning material, Wis. Stat. § 941.10; and
6. Endangering safety by negligent use of dangerous weapon, Wis. Stat. § 941.20(1)(a).

B. No Mens Rea/General Intent Offenses [§ 16.17]

In addition to negligent offenses, an offense that either does not contain a *mens rea* or that is considered a general intent (as opposed to specific intent) offense may also be a safe plea for noncitizens. The following offenses should be considered during the plea-bargaining process:

1. Disorderly conduct, Wis. Stat. § 947.01;
2. Simple operating while intoxicated involving alcohol, Wis. Stat. § 346.63(1)(a);
3. Carrying a concealed weapon (CCW) (with a caveat that a firearm CCW charge could be considered a deportable offense by ICE), Wis. Stat. § 941.23;
4. Entry onto or into a locked building or dwelling, Wis. Stat. § 943.15; and
5. Lewd and lascivious behavior, Wis. Stat. § 944.20(1)(a).

C. Sentencing Considerations [§ 16.18]

1. In General [§ 16.19]

In certain cases, an immigration consequence might be avoided by the length of the sentence. In most cases, a noncitizen will be inadmissible or deportable regardless of the sentence imposed. It is important for a defense attorney to distinguish between these two classes of immigration consequences when trying to navigate a solution for the client.

2. Inadmissibility Regardless of Sentence [§ 16.20]

A noncitizen will be found inadmissible if convicted of an offense relating to a controlled substance in the federal Controlled Substances Act, 21 U.S.C. §§ 801–971, or a felony CIMT regardless of the actual sentence imposed. 8 U.S.C. § 1182(a)(2)(A)(i).

3. Inadmissibility Triggered by Length of Sentence [§ 16.21]

A single misdemeanor CIMT will not result in inadmissibility unless the sentence exceeds six months. 8 U.S.C. § 1182(a)(2)(A)(ii)(II). However, “sentence” includes a stayed sentence. *Id.* Actual jail time is not needed. A stayed sentence that exceeds six months will transform a single misdemeanor into an inadmissible CIMT offense even if no actual jail time is served.

In cases involving a single misdemeanor that would be otherwise considered a CIMT, a defense attorney should negotiate a sentence that will not trigger inadmissibility.

► *Example.* John Doe has been charged with misdemeanor theft. The State is offering probation with a stayed sentence of the maximum nine months. Because that would render John inadmissible, the defense attorney should counter with either a withheld sentence or a stayed sentence of six months or less.

4. Deportability Regardless of Sentence [§ 16.22]

In the following scenarios, nearly all grounds of deportation will be triggered even if the noncitizen client does not receive a stayed sentence or any actual time:

1. Felony CIMT committed within five years of admission;
2. Multiple CIMT convictions;
3. Certain aggravated-felony convictions, such as sexual abuse of a minor;

4. Controlled substance convictions;
5. Firearms convictions; and
6. Crimes of domestic violence, child-abuse offenses, and violations of protection orders.

5. Deportability Triggered by Length of Sentence [§ 16.23]

In limited cases, only the length of the sentence will trigger deportability. A number of offenses will only be considered an aggravated felony if the sentence is at least one year or longer: (1) burglary, (2) theft, (3) receipt of stolen property, (4) a crime of violence, (5) forgery, (6) perjury, and (7) certain bribery offenses. 8 U.S.C. § 1101(a)(43)(F), (G), (R), (S). These offenses could separately trigger deportation because most also qualify as a CIMT, but they cannot be an aggravated felony unless accompanied by a sentence of one year or longer.

► **Caution.** A sentence includes a stayed sentence. No actual jail time is needed to trigger an aggravated-felony conviction with these offenses if there is a stayed sentence of one year or longer. With these offenses, a sentence of 364 days or less will avoid the aggravated-felony designation.

D. Limiting the Factual Basis [§ 16.24]

If a prosecutor is amenable to an amendment, defense attorneys should consider carving out a specific factual basis. Judges will always ask whether the criminal complaint should serve as a basis for the conviction. Reliance on the criminal complaint could be especially dangerous for noncitizens who expect to apply for an immigration benefit in the future and will need to explain the factual basis behind their conviction. A criminal complaint often contains unflattering allegations regarding the defendant.

As discussed in chapter 5, *supra*, the adoption of *Descamps v. United States*, 133 S. Ct. 2276 (2013) in the immigration context should

foreclose an examination of the record for offenses that are not divisible. Nonetheless, the application of *Descamps* is still in its infancy, and it will likely involve litigation in removal proceedings. This is especially important to cases involving potential CIMT offenses or cases involving alleged victims who are minors. To avoid potential litigation and to ensure the safest possible plea, an amendment should be accompanied with a short and succinct statement involving the most possible innocuous facts under the circumstances.

► *Example.* Jane Doe has been charged with disorderly conduct with the domestic abuse modifier. The criminal complaint alleges that during an argument with her husband that she slapped him and hit him with a lamp. The categorical approach should prevent an examination of the record because disorderly conduct is not a divisible statute as defined under *Descamps*. However, to avoid any possible argument that Jane is deportable for a crime of domestic violence, a plea to disorderly conduct should be limited to the “unreasonably loud” prong under Wis. Stat. § 947.01 instead of admitting to slapping her husband and throwing a lamp at him.

E. Minimizing the Damage [§ 16.25]

1. In General [§ 16.26]

In certain cases, inadmissibility or deportability cannot be avoided. However, a defense attorney might still be able to preserve relief from removal, and thus at least a chance of remaining in the United States, through the plea-negotiation process.

2. LPRs and Cancellation of Removal [§ 16.27]

LPRs convicted of inadmissible or deportable offenses might nonetheless avoid removal if they are granted cancellation of removal. While an aggravated-felony conviction serves as a statutory bar to cancellation of removal, all other deportable offenses may be “waived” under this form of relief. 8 U.S.C. § 1229b(a)(3). In certain cases, the best a defense attorney can do is to avoid an aggravated-felony conviction with the knowledge that a permanent resident client’s plea will trigger a separate deportable offense. Again, the sample letter in appendix F, *infra*, illustrates this very issue.

➤ *Example 1.* John Doe has been charged with intentional child abuse in violation of Wis. Stat. § 948.03(2). Because of the severity of the abuse, the State wants a sentence of at least one year. Child abuse is clearly a deportable offense under 8 U.S.C. § 1227(a)(2)(E)(i), and therefore deportation is unavoidable regardless of the sentence. However, it might also be an aggravated felony if the sentence is one year or longer. ICE is likely going to find that intentional child abuse is a crime of violence and therefore a possible aggravated felony under 8 U.S.C. § 1101(a)(43)(F). Assuming John is otherwise eligible for cancellation of removal, a sentence of less than one year would at least preserve that form of relief in removal proceedings.

➤ *Example 2.* Jane Doe has been charged with possession of cocaine with intent to distribute based on the amount of cocaine. The State is only willing to amend the charge to simple possession of cocaine. Although simple possession of cocaine is a deportable offense, it is not an aggravated felony like possession with intent. Assuming Jane is otherwise eligible for cancellation of removal, a plea to simple possession of cocaine would at least provide her with a defense in removal proceedings.

3. Non-LPRs Who Might Be Eligible for Adjustment of Status [§ 16.28]

A nonpermanent resident who is able to apply for permanent residence through either a family member or employer might still be able to retain this form of relief if an inadmissible offense is avoided entirely or eligibility for a waiver of inadmissibility is preserved.

➤ *Example 1.* Jane Doe is married to a U.S. citizen and is eligible to apply for permanent residence. She has been charged with two counts of retail theft and possession of cocaine. The State is only willing to dismiss the cocaine charge in exchange for a plea two counts of retail theft. Jane will be inadmissible for a conviction to two misdemeanor CIMTs but will be eligible for a waiver of inadmissibility under 8 U.S.C. § 1182(h). In contrast, there is no waiver of inadmissibility for a conviction to possession of cocaine.

► *Example 2.* John Doe has been charged with felony child neglect in violation of Wis. Stat. § 948.21(1)(b). While child neglect is a deportable offense regardless if it is a felony or misdemeanor, an amendment under Wis. Stat. § 948.21(1)(a) would avoid issues of inadmissibility if the sentence does not exceed six months. If child neglect is construed as a CIMT, a misdemeanor amendment coupled with a sentence of six months or less will fall under the petty-offense exception in 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

V. Conclusion [§ 16.29]

Plea negotiations are qualitatively different for noncitizens. It is not simply an issue of jail time because many offenses will carry an immigration consequence regardless of time served. Instead, defense attorneys must convince a prosecutor to swap a deportable or inadmissible offense with an offense that will either avoid or minimize future immigration consequences. In certain cases, an aggravated felony can only be avoided if the sentence is 364 days or less.

Defense attorneys should not necessarily view a client's immigration status as a weakness. If a prosecutor is amenable to taking deportation consequences into consideration, a client's immigration status could serve as a basis to persuade the prosecutor to accept a plea deal to avoid these devastating consequences.

Appendix B

Checklist of Most Common Inadmissible Offenses Under 8 U.S.C. § 1182(a)(2)(A)

1. **Crime involving moral turpitude (CIMT):** Yes No Maybe
(see *supra* §§ 1.16, 5.30–.33)

2. **Controlled substance violation:** Yes No Maybe
(see *supra* §§ 5.34–.39, ch. 13)

3. **Has the client been charged with any of the following:**
 - Illicit trafficking of a controlled substance?: Yes No Maybe
(see *supra* ch. 13)

 - Prostitution-related offense?: Yes No Maybe
(see *supra* §§ 5.43, 14.24–.47)

 - Human trafficking?: Yes No Maybe

 - Money laundering?: Yes No Maybe
(see *supra* § 5.29, ch. 10)

4. **Two or more convictions with aggregate sentence of five years:**
(see *supra* § 5.42)

 Yes No Maybe

Appendix C

Checklist of Deportable Wisconsin State Offenses Only

1. **Felony crime involving moral turpitude (CIMT) committed within five years after admission to United States**
(see *supra* § 5.46) Yes No Maybe
2. **Multiple CIMTs**
(see *supra* § 5.47) Yes No Maybe
Note: Review criminal record to determine answer.
3. **Aggravated felony**
(see *supra* §§ 5.50–.60, *infra* app. D, at 9–11) Yes No Maybe
Note: Review all 27 definitions of aggravated felony under 8 U.S.C. § 1101(a)(43) to determine answer.
4. **Controlled substance**
(see *supra* § 5.48, ch. 13) Yes No Maybe
5. **Firearms**
(see *supra* § 5.49, ch. 9) Yes No Maybe
6. **Domestic violence**
(see *supra* § 5.63, ch. 8) Yes No Maybe
7. **Stalking**
(see *supra* §§ 5.62, 8.105–.113) Yes No Maybe
8. **Child abuse, neglect, or abandonment**
(see *supra* § 5.61, ch. 12) Yes No Maybe
9. **Violation of domestic abuse order**
(see *supra* § 5.64, ch. 8) Yes No Maybe

Padilla & Beyond: Plea Negotiation Strategies For Noncitizens

**Illinois Public Defender Association
2016 Spring Conference
Davorin J. Odrdic
Odrdic Law Group, LLC**

Padilla v. Kentucky, 559 U.S. 356 (2010)

- **Holding:** Defense counsel must advise noncitizen clients on whether a charge or plea carries a risk of deportation.
- (1) This is the bare minimum required under the 6th Amendment;
- (2) SCOTUS expressly encouraged creative plea bargaining for noncitizens

Key Immigration Concepts

- **Inadmissibility:** A criminal conviction that can result in denial of admission to the U.S., whether at the border, as part of an application for lawful permanent residence, or in removal proceedings
- **Deportability:** A criminal conviction **AFTER ADMISSION** that can result in the noncitizen being removed from the U.S.

Step 1: Acknowledging that plea bargaining for noncitizens is different.

- (1) "A noncitizen cannot be deported for a misdemeanor."
 - **FALSE!** Misdemeanor CIMTs, drugs, firearm offenses, child victim offenses, and domestic violence offenses can all result in deportation.
- (2) "A noncitizen cannot be deported if jail time is avoided."
 - **NOPE!** Most inadmissible and deportable offenses do not require a sentence or actual jail time.
- (3) "Stayed sentences are totally cool, right?"
 - **WATCH OUT!** Certain grounds of deportation are triggered by the length of sentence regardless if served or stayed.
- (4) "A felony will always result in deportation."
 - **NOT SO!** Certain felonies do not carry an immigration consequence.

Felony Example

- Noncitizen client is charged with obstruction of justice in violation of 720 ICLS 5/31-4(a) after giving a police officer a false name. While in the process being handcuffed, the client gets into a scuffle with the officer is separately charged with aggravated battery on a peace officer under 720 ILCS 5/12-3.05(d)(4).
- **WHICH OFFENSE IS NOT A CRIME INVOLVING MORAL TURPITUDE?**

Felony Example Continued

- *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005) (obstruction of justice under Illinois law is a CIMT for giving a false name to a police officer).
- *Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008) (aggravated battery on a peace officer under Illinois law is not a CIMT because the offense does not require an actual physical injury on the officer).

Misdemeanor Example

- A misdemeanor that is considered an aggravated felony.
WAIT, WHAT???
- *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir. 2001) (misdemeanor sexual abuse under 720 ILCS 5/12-15(c) [now 720 ILCS 5/11-1.50(c) is an aggravated felony under immigration law).

Step 2: Understanding your client's immigration status and history

- **Immigration Status** might be dispositive on potential immigration consequence
- **Time of admission into the U.S.** might be dispositive on potential immigration consequence
- **What are the stakes for your noncitizen client?**
 - Length of time in the U.S.
 - Family ties
 - Fear of returning to the home country

Step 3: Understanding your client's conviction record

- Prior conviction(s) might be dispositive on immigration consequences of pending charge or parameters of plea bargaining

Managing Client's Expectations

- What does the noncitizen want to achieve?
- Not all immigration consequences can be avoided through plea negotiations

Negotiating with the prosecutor

- **(1) Do intel on your prosecutor**
 - Is this prosecutor willing to consider deportation consequences during plea bargaining?
 - Would your client's immigration status actually make plea negotiating more difficult?
- **(2) Outline the equities and what is at stake for noncitizen client**
- **(3) Propose an immigration-safe amendment**

Tips & Strategies for Negotiating

- **What does the alleged victim want?**
- **Why your noncitizen client will not be a recidivist.**
 - Fear of deportation is a powerful incentive to avoid future trouble with the law.
 - Certain deals could trigger removal if the client does not comply with probation or is convicted of a future offense.

“Why would I give your client a deal that I would not give to a U.S. citizen?”



Making apples and oranges equal

- Emphasize that comparing a noncitizen to a US citizen is like comparing apples and oranges
- But pursue a plea agreement that will make things as equal as possible
 - More fines
 - More misdemeanors
 - Longer probation
 - Jail time?

Finding safe-haven offenses

- Negligent offenses (unless involving a firearm)
- Most regulatory offenses
- Offenses with no *mens rea*
- No immigration consequence due to client's length of admission
 - Example: Single felony crime involving moral turpitude committed after five years of admission is not a deportable offense.

Legal Updates: Categorical Approach Strengthened

- Examining the elements of the offense only and determining the minimum conduct necessary for a conviction
- The underlying factual basis cannot be examined

Categorical Approach & Sexual Abuse of a Minor

- Generic Illinois sex-related offenses that do not include as an element sexual involvement with a minor should no longer be considered sexual abuse of a minor
 - *Gettem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005) (Indecent solicitation under 720 ILCS 5/11-14.1 is an aggravated felony because factual basis involved offering cigarettes to a minor for sex).

Categorical Approach & Controlled Substance Violations

- Illinois Schedule I controlled substance is broader than the federal schedule
 - **Salvia** is not on the federal schedule
- Possession of Drug Paraphernalia
 - *Gutnik v. Gonzales*, 469 F.3d 683 (7th Cir. 2006) (Illinois offense for possession of drug paraphernalia is a deportable offense)
 - *But see Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (Kansas possession of drug paraphernalia not a deportable offense because Kansas schedule broader than federal schedule)
- Schedule I Illinois Offenses
 - Modified Categorical Approach May Apply (i.e. examining record for particular controlled substance)
