CH. 29
INDICTMENTS, INFORMATIONS, COMPLAINTS
§29-1
Manner of Charging – Discretion in Bringing Charges

United States Supreme Court

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

Illinois Supreme Court

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

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

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

People v. Redmond, 67 Ill.2d 242, 367 N.E.2d 703 (1977) All prosecutions of felonies shall

be by information or indictment. Prosecution may be by information only where a preliminary hearing has been held or waived by the accused. Moreover, a defendant may be prosecuted by information for all offenses arising from the same transaction, though a preliminary hearing was held on only one or some of the offenses.

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

People v. Gordon, 64 Ill.2d 166, 355 N.E.2d 3 (1976) Defendant claimed that he could not be prosecuted for theft or conspiracy to commit theft for acts that arose from his services as a real estate broker, because the same conduct is proscribed by the Real Estate Brokers Act. The Court stated that the proof required for conviction of theft is far different than under the Broker's Act, and the legislature did not intend "to give real estate brokers a special status to prohibit their prosecution for theft if there is a mishandling of clients' funds."

Illinois Appellate Court

People v. Chambliss, 2024 IL App (5th) 220492 At defendant's first appearance on felony battery charges, a fitness evaluation was ordered due to a pending fitness issue in an unrelated misdemeanor case, as well as ongoing concerns over his behavior in court, at the jail, and with counsel. Defendant was ultimately found fit and allowed to proceed *pro se*. He was convicted of two counts of battery at a jury trial six weeks later.

On appeal, defendant challenged the fact that he was never afforded a preliminary hearing or indicted by a grand jury, and thus there was no probable cause determination before trial. He had not raised this issue below, and thus it was forfeited. Defendant argued that it should be reviewed as a matter of plain error.

It is "without question" that a felony defendant in Illinois must be indicted or receive a preliminary hearing within 30 days of being taken into custody. See Ill. Const. 1970, art. I, sec. 7; 725 ILCS 5/109-3(a); 725 ILCS 5/109-3.1(b). Here, where neither was done, the court found plain error. Second-prong plain error has often been equated to "structural" error, applicable only to a limited class of cases. Specifically, under federal law, structural error has been found in cases involving a complete denial of counsel, trial before a biased judge, racial discrimination in grand jury selection, denial of self-representation, denial of a public trial, and defective reasonable doubt instructions. The appellate court noted, however, that error can be classified as "structural" as a matter of state law, even where the error is not considered structural under federal law. The State's failure to establish probable cause before placing defendant on trial deprived him of a basic constitutional protection and resulted in an unfair process for determining guilt. Accordingly, it is "structural" and constitutes second-prong plain error.

As to remedy, the court rejected the notion of holding an after-the-fact probable cause hearing, stating that it would be "ludicrous" where defendant's rights had already been violated. Instead, defendant's convictions were reversed outright.

People v. Page, 2022 IL App (4th) 210374 Defendant pled guilty to DUI, but because the State omitted one of defendant's prior DUI convictions from the charging instrument, the

court informed defendant that he was eligible for probation before accepting the plea. After defense counsel asked the court to double-check defendant's eligibility for probation, the State recognized its error, the trial court vacated the plea, and defendant was recharged with a non-probationable DUI and pled guilty again. After sentencing, defendant moved to withdraw the second plea, arguing that it violated double jeopardy. The trial court denied the motion to withdraw.

The second plea did not violate double jeopardy. While jeopardy did attach at the time the first plea was accepted, jeopardy was not terminated improperly, and therefore continued, at the time of the second plea. A trial court may vacate a plea *sua sponte* upon realizing that a defendant was misinformed as to his rights. Here, it was clear that defendant received inaccurate admonishments as to the sentencing range. Defense counsel did not object when the trial court realized its error and vacated the plea. Because the trial court did not abuse its discretion, jeopardy did not terminate improperly.

The appellate court also rejected defendant's claim that the upgraded charge was the result of vindictive prosecution. Although a presumption of vindictiveness may arise if the new charges follow a defendant's successful challenge to the original conviction, here, there was no presumption of vindictiveness because the trial court vacated the original plea *sua sponte*. Also, the State's discovery of the additional prior conviction constituted an independent reason to upgrade the charge.

People v. Jophlin, 2018 IL App (4th) 150802 Where the State files a more serious charge against defendant after reversal of a conviction, there is a presumption of vindictiveness. No such presumption exists, however, where the State files an additional, more serious charge prior to trial. In that case, to establish vindictiveness, defendant must show both a retaliatory motive on the part of the prosecution and that absent such motive, defendant would not have been prosecuted on the more serious charge.

The Appellate Court declined to find vindictive prosecution where the State filed a Class 2 aggravated DUI charge on the morning of trial, replacing the originally-filed Class 4 aggravated DUI charge. The record established that defendant knew the State intended to file the Class 2 charge before he declined to plead guilty to the lower class offense. Citing **United States v. Goodwin**, 457 U.S. 368 (1982), the Appellate Court upheld the filing of the more serious charge, noting that the State had not attempted to use the greater charge to influence defendant to waive a trial and plead guilty to the lesser.

People v. Brown, 2017 IL App (1st) 160025 The State charged defendant with aggravated battery to a police officer. After a bench trial, he was acquitted of aggravated battery but convicted of the lesser-included offense of resisting a police officer. When new evidence came to light, the trial court granted defendant a new trial. The State did not amend the charging document to reflect that defendant had been acquitted of aggravated battery and was being retried only on the resisting offense. At the second trial, a jury convicted defendant of resisting a police officer.

The Appellate Court agreed that resisting a police officer was a lesser-included offense of aggravated battery under the facts of this case. But it questioned the propriety of not recharging defendant after he had been acquitted of the charged offense since defendant never received formal notice of what the State would attempt to prove at the second trial. In essence, defendant was forced to defend himself against a charge that was not even pending against him.

Because the court found another error that required a new trial it did not need to decide whether the failure to recharge defendant would have been grounds for reversal, but

the court stated "it sure seems that way." And in any event, the interests of justice would clearly have been better served by recharging defendant.

People v. Stapinski, 2015 IL 118278 After he was arrested for unlawful possession of ketamine with intent to deliver, defendant entered an agreement with police to assist in apprehending the persons to whom he was supposed to deliver the ketamine. Approximately a year after defendant provided such assistance, and the intended recipients had been prosecuted, defendant was charged with unlawful possession of ketamine with intent to deliver.

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

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

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

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

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

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

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

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

The trial court's dismissal order was affirmed.

People v. Goad, 2013 IL App (4th) 120604 The inherent authority to ensure a fair trial

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

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

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

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

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

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

People v. Velez, 2012 IL App (1st) 110801 No prosecution can be pursued by information "unless a preliminary hearing has been held or waived in accordance with Section 109-3 and at that hearing probable cause to believe the defendant committed an offense was found, and the provisions of Section 109-3.1 of this Code have been complied with." 725 ILCS /111-2(a).

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

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

Because the dismissed counts rose from the same conduct as the counts on which

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

People v. Herman, 2012 IL App (3d) 110420 "The State's Attorney of the county in which [a violation of the Illinois Vehicle Code] occurs shall prosecute all violations except when a violation occurs within the corporate limits of a municipality, the municipal attorney may prosecute if written permission to do so is obtained from the State's Attorney." 625 ILCS 5/16-102(c).

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

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

The Appellate Court reversed defendant's conviction.

People v. Lee, 2011 IL App (2d) 100205 A prosecutor violates due process by exacting a price for a defendant's exercise of an established right, or by punishing a defendant for doing what the law plainly entitles him to do. Therefore, if a prosecutor responds to a defendant's successful exercise of his right to appeal by bringing a more serious charge against him, he acts unconstitutionally. A finding of prosecutorial vindictiveness is remedied through dismissal of the criminal charges brought against a defendant.

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

A presumption of vindictiveness will rarely be applied to a prosecutor's pretrial decisions. Prosecutors' charging decisions are presumptively lawful. Based on the broad discretion given prosecutors, and the wide range of factors that may properly be considered in making pretrial prosecutorial decisions, a prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.

Defendant was charged in separate cases with aggravated criminal sexual assault and unlawful restraint of his wife on November 9, 2005, and the residential arson of her home on

November 22, 2005. After defendant was convicted and sentenced on the first case, the State dismissed the residential arson charge. After defendant's convictions were reversed on appeal, the State reindicted defendant for residential arson. The circuit court dismissed the arson charge after finding that the State did not meet its burden of establishing that it was not being vindictive.

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

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

People v. Rendak, 2011 IL App (1st) 082093 A prosecution is vindictive and violates due process if it is undertaken to punish a defendant because he has done "what the law plainly allows him to do." **United States v. Goodwin**, 457 U.S. 368 (1982). Presumptions of vindictiveness exist only in a narrow set of circumstances, such as where a prosecutor brings additional charges and more serious charges after a defendant has successfully overturned a conviction, effectively subjecting the defendant to greater sanctions for pursuing a statutory or constitutional right. Generally, no such presumption exists in a pretrial setting where a prosecutor has broad discretion in charging a defendant. In the absence of a presumption, defendant must show actual prosecutorial vindictiveness, which requires: (1) objective evidence that the prosecutor had some animus or retaliatory motive; and (2) objective evidence that tends to show the prosecution would not have occurred absent the motive.

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

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

People v. Peterson, 397 Ill.App.3d 1048, 923 N.E.2d 890 (3d Dist. 2010) The prosecutor's charging decision is presumed to be lawful and motivated by proper considerations. A prosecutor has broad discretion whether to file charges and which charges to file. A claim of vindictive prosecution does not constitute an affirmative defense to a crime, and does not mandate pretrial discovery concerning the charging decision. (See **APPEAL**, §2-6(a) &

DISCOVERY, §15-1).

People v. Determan, 397 Ill.App.3d 929, 925 N.E.2d 227 (5th Dist. 2009) 750 ILCS 16/10, which provides that a criminal prosecution for wilfully failing to provide for the support of a spouse or a child "may be instituted and prosecuted . . . only upon the filing of a verified complaint by the person or persons receiving child or spousal support," requires that a verified complaint be filed with the circuit court before criminal proceedings are instituted. The court rejected the State's argument that §16/10 is satisfied by filing a verified complaint with the State's Attorney's office.

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

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

People v. Fields, 322 Ill.App.3d 1029, 751 N.E.2d 97 (5th Dist. 2001) . Selective prosecution and vindictive prosecution involve separate but related theories. "Selective prosecution" requires a showing that: (1) the defendant was singled out for prosecution while similarly situated violators were not prosecuted, and (2) the decision to prosecute was based on an arbitrary classification such as race, religion or the exercise of constitutional rights. "Vindictive prosecution" requires a showing that the prosecution was pursued in retaliation for the defendant's exercise of a protected statutory or constitutional right. In determining whether a prosecution was retaliatory, the court will consider whether the prosecutor "harbored genuine animus" toward the defendant and whether defendant would otherwise have been prosecuted. Although charges were not brought for five months after the offense and were filed only after defendant filed a separate class action suit against DOC, defendant failed to raise a reasonable doubt that the State acted improperly. **U.S. v. Monsoon**, 77 F.3d 1031 (7th Cir. 1996) holds that an improper motive by an agency which refers the defendant for criminal charges can be imputed to the prosecutor only if the agency "in some way prevailed upon the prosecutor to make the decision to prosecute." Here, there was no showing that DOC decided to prosecute defendant and then persuaded the State's Attorney to file charges.

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

establish that the aggravated battery charge was filed out of vindictiveness.

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

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

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

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

the police station and subjected to an inventory search that disclosed cannabis. Defendant was convicted of a cannabis offense.

The Appellate Court found that defendant's right to equal protection had been violated:

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

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

People v. Brooks, 75 Ill.App.3d 109, 394 N.E.2d 10 (5th Dist. 1979) Defendant waived error for being prosecuted for a felony by way of a complaint when he failed to file a timely pretrial motion to dismiss. See also, **People v. Kleiss**, 90 Ill.App.3d 53, 412 N.E.2d 39 (3d Dist. 1980).

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

People v. Montgomery, 21 Ill.App.3d 230, 315 N.E.2d 92 (1st Dist. 1974) Defendant argued unsuccessfully that the State's Attorney had no authority to prosecute a municipal offense. Since there was no objection by defendant at trial, and because the State's Attorney's jurisdiction is countywide, the State's Attorney was properly permitted to prosecute a city charge along with State offenses, "at least where they both occurred at the same point in time."

§29-2
Grand Jury Proceedings
United States Supreme Court
Campbell v. Louisiana, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d 551 (1998) A white defendant has standing to object where black persons are discriminated against in the selection of grand jurors. The court extended to grand jury proceedings precedent that a

criminal defendant has standing to assert the equal protection rights of citizens excluded from petit juries based on their race, even where the defendant is not a member of the same race.

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

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

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

Illinois Supreme Court

People v. Basile, 2024 IL 129026 The supreme court reinstated a grand jury indictment that had been dismissed on the basis of deceptive evidence. The State sought an indictment for criminal sexual assault by presenting a detective's testimony before the grand jury. The detective testified that a woman told him that after a night of drinking alcohol, defendant took her home and had sexual intercourse with her while she was unable to give consent and in and out of consciousness. After this testimony, a grand juror asked the detective if, given the complainant's extreme intoxication, there was any corroborating evidence that "this person did this to her." The detective responded, "He told me he did." The juror stated that was "all I need to know," and the grand jury issued the indictment.

Defendant moved to dismiss the indictment, arguing that in defendant's recorded interview with the detective, he did not admit to sexual assault, only consensual sex. The circuit court agreed this rendered the detective's answer misleading and dismissed the indictment. The appellate court affirmed, holding the detective's answer left the grand jury with a false impression that the defendant had admitted to having intercourse without consent, and while a defendant may not generally attack an indictment, due process is violated if the prosecutor deliberately misleads the grand jury. This error was prejudicial because the State presented a single witness, who provided a secondhand account from a complainant who was admittedly inebriated and unable to recall much of the encounter.

A 4-3 supreme court majority reversed. The grand jury is historically independent, so when courts are asked to dismiss an indictment based on the denial of due process, they must proceed with restraint and find a denial of due process only if certain. Dismissal is appropriate only if the due process violation is "unequivocally clear" and leads to "actual and substantial" prejudice.

The majority held that the record did not show an unequivocally clear violation of due process. The juror's question as to whether there was additional evidence "that this person did this to her" was ambiguous. Depending on which word the juror emphasized, the question may have been about the identify of the perpetrator, the act of intercourse, or the act of intercourse without consent. In two of these interpretations, the detective's affirmative

answer would not be misleading – defendant admitted he had intercourse with the victim. Defendant could not clearly establish that the juror meant to ask only about non-consensual intercourse.

Regardless, defendant could not show prejudice. The grand jury had sufficient evidence to return a true bill of indictment based solely on the detective's testimony prior to the grand juror's question. Nothing in the record suggests that this lone juror's questions were indicative of any uncertainty of any of the other grand jurors with respect to the State's legally sufficient probable cause evidence.

The dissent would have upheld the lower courts because it was clear the juror was asking about non-consensual sex. The notion that the juror's question could be interpreted three different ways is unrealistic, given that the question was qualified with a comment about the complainant's inebriation. The juror obviously wanted to know if the events occurred as described by the complainant. The detective's answer was that yes, the defendant confirmed the events occurred as described. This was unequivocally misleading. Regarding prejudice, the dissent pointed out that the juror who asked the question, upon hearing the detective's affirmative answer, stated, "That's all I needed to know." To the dissent, this was "unequivocally clear" evidence that the misleading answer affected the indictment. The majority placed undue emphasis on the fact that only one juror asked a question, because this question and answer was dispositive.

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

People v. DiVincenzo, 183 Ill.2d 239, 700 N.E.2d 981 (1998) Grand jury proceedings may be challenged only in limited circumstances; generally, a defendant may not challenge "the validity of an indictment [or] the sufficiency of the evidence considered by the grand jury if some evidence was presented." A defendant may seek dismissal of an indictment procured by prosecutorial misconduct, however, where the misconduct is reflected by the grand jury transcripts and need not be shown through extrinsic evidence. Dismissal may be appropriate where the prosecutor deliberately or intentionally misled the grand jury, knowingly used perjured testimony, or presented deceptive or inaccurate evidence. Dismissal is also appropriate where the prosecutor applied undue pressure or coercion to induce an indictment. Although the prosecutor asked the grand jury to reconsider its earlier vote when he learned that the jurors were confused about the applicable law, a "no probable cause" determination does not preclude subsequent consideration of the same question., In addition, the prosecutor's explanation of the applicable law was accurate, and before returning the indictment the grand jurors questioned the prosecutor's "statements and suggestions." The record did not show that the grand jury's will was overborne by the prosecutor's statements; to the contrary, "[t]he transcript shows an independent grand jury that . . . exercised its own independent will."

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

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

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

Ill.App.3d 632, 451 N.E.2d 1364 (5th Dist. 1983) (an indictment will not be dismissed on the ground that witnesses were present in the grand jury room while other witnesses were testifying).

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

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

People v. J.H., 136 Ill.2d 1, 554 N.E.2d 961 (1990) A murder indictment was dismissed on the ground of prosecutorial misconduct before the grand jury. The Court held that the prosecutor's conduct neither prejudiced defendant's right to a fair trial nor undermined the integrity of the judicial process. The exclusionary rule does not bar presentation of illegally obtained evidence to a grand jury. In addition, a person called to testify before a grand jury is not entitled to be warned that he is a target of the investigation. Finally, dismissal was inappropriate because defendant would have been indicted even without the prosecutor's alleged misconduct or the defendant's own testimony. See also, **People v. Morgan**, 169 Ill.App.3d 368, 523 N.E.2d 560 (4th Dist. 1988); **People v. Seehausen**, 193 Ill.App.3d 754, 550 N.E.2d 702 (2d Dist. 1990).

People v. Creque, 72 Ill.2d 515, 382 N.E.2d 793 (1978) The Court made the following holdings regarding grand jury proceedings: (1) The prosecution may obtain an indictment on wholly hearsay evidence, and is not required to show a "compelling justification" for using hearsay. (2) The prosecutor is not required to inform the grand jury that evidence is hearsay; here, there was no attempt to mislead the grand jury and the hearsay testimony could not have been mistaken for an eyewitness account. (3) The prosecutor is not required to advise the grand jury that it has the power to subpoena the alleged victim. (4) The prosecutor is not required to inform the grand jury of a prior finding of no probable cause on the same charges. (5) The prosecutor is not required to instruct the grand jury as to the differences between offenses (e.g., aggravated battery and attempt murder). (6) The defendant may not challenge an indictment on the ground it is not supported by adequate evidence. (7) A defendant does not have the right to have counsel present or to conduct cross-examination during grand jury proceedings. (Note: 725 ILCS 5/112-4 now requires that the prosecutor inform the grand jury of its right to subpoena persons and documents, and that the grand jury be informed of prior findings of no probable cause.)

Illinois Appellate Court

People v. Barker, 2021 IL App (1st) 192588 The prosecutor did not act as an "unsworn witness" when he asked leading questions of a police officer who testified before the grand jury. Leading questions are permissible during grand jury proceedings, and a minor discrepancy in the evidence presented through those leading questions was insufficient to warrant dismissal of the indictment.

People v. Alexander, 2021 IL App (2d) 180193 The court affirmed child pornography convictions over defendant's contention of an improper search.

A police officer, designated as an investigator for a grand jury, learned that a particular IP address had been linked to child pornography. He served Comcast with a subpoena, returnable to him and not the grand jury, requesting the name and address associated with that IP address. Once he obtained the information, he sought and received a search warrant for defendant's residence, and recovered a hard drive containing child pornography.

While the Appellate Court disapproved of the officer's "unauthorized and freewheeling abuse of the grand jury's subpoena power," it found no constitutional violation. Subpoenaing an ISP for user information connected with a given IP address is not a search within the fourth amendment, because the third-party doctrine defeats a claim that the owner of the IP address has a constitutionally protected expectation of privacy in that information. Defendant's claim that the subpoena constituted a search under **Carpenter v. United States**, 138 S. Ct. 2206 (2018), lacked merit. While **Carpenter** created an exception to the third-party doctrine, the exception was narrowly tailored to the type of intrusive, persistent location tracking involved in that case. An IP address user's information does not create the same privacy concerns. Furthermore, the officer's decision to go around the grand jury and serve the subpoena himself was not grounds for reversal, because defendant could not show prejudice in light of the inevitable discovery doctrine.

People v. Rebollar-Vergara, 2019 IL App (2d) 140871 At defendant's murder trial, evidence showed that on the night of the offense defendant and Garcia left a party and went to a convenience store. Defendant was a former Latin King. He believed Garcia was a Latin King, but he did not know him very well. They encountered the victim, a suspected rival, argued with him, and followed him out of the store. Defendant intended to fight him, and did not know Garcia was armed. Suddenly, Garcia shot and killed the victim.

Defendant alleged that the trial court erred in denying his motion to dismiss the indictment because it was predicated on perjured testimony. At the grand jury, pursuant to leading questions, an officer testified that both defendant and Garcia confessed to the crime, and that defendant flashed gang signs. The evidence later showed that only Garcia confessed to shooting the victim, and surveillance video did not show defendant flashing gang signs. The Appellate Court held that this testimony was "not necessarily false" because defendant did admit he was present and involved in the "trash talk" with the victim, and the officer later clarified that "one" defendant flashed gang signs. Moreover, this testimony was not prejudicial in light of the evidence that defendant intended to fight the victim prior to the shooting.

The dissent, noting that the use of the word "confession" implies defendant acknowledged he was guilty of murder, would have found a due process violation. The fact that the majority would affirm simply because other evidence supported the indictment renders the entire grand jury process superfluous – under this rationale, as long as defendant is ultimately convicted, the State has *carte blanche* to use false information to obtain the indictment.

People v. Wright, 2017 IL 119561 A defendant may challenge an indictment if the State deliberately or intentionally misleads the grand jury, uses perjured or false testimony, or presents other deceptive or inaccurate evidence. To warrant dismissal of the indictment, a defendant must show that the State's improper actions prevented the grand jury from returning a meaningful indictment.

A detective testified before the grand jury that defendant and codefendant committed a robbery with a handgun. He also testified that codefendant was able to dispose of the weapon, which was never recovered. The trial evidence showed that a week after the robbery, the police recovered a BB gun in the street where one of the defendants had been fleeing after the robbery. The BB gun had no fingerprints.

Defendant argued that the detective presented deceptive evidence to the grand jury by failing to disclose the recovery of the BB gun, and that without this deception the grand jury may not have indicted defendant. The court held that the State did not prevent the grand jury from returning a meaningful indictment. There was no evidence that the BB gun was used in the commission of the offense and thus the detective's testimony was not false.

Defendant's conviction was affirmed.

People v. Boston, 2016 IL 118661 A grand jury investigation is designed to both exonerate individuals suspected of criminal activity and to establish probable cause necessary to arrest suspected felons. The grand jury has the power to investigate crimes and may issue subpoenas regardless of whether a specific charge is pending. Matters occurring before a grand jury may be disclosed to the prosecution and other government personnel for use in the enforcement of criminal law. 725 ILCS 5/112-6.

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

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

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

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

The court also found that the procedures used in this case were "sloppy" and should not be repeated. The subpoena was prepared at the direction of the prosecutor rather than the grand jury. The evidence was made returnable to the prosecutor rather than the grand

jury. And the evidence was delivered to the crime lab rather than the grand jury. But since the grand jury could have disclosed the evidence to the prosecution, defendant failed to show that he was prejudiced by these procedures.

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

In re Angel P., 2014 IL App (1st) 121749 The trial court has inherent authority to dismiss criminal charges where there has been a clear denial of due process which prejudices the defense. To justify dismissal of an indictment, the denial of due process must be unequivocally clear. In addition, the prejudice must be actual and substantial.

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

In his testimony before the grand jury, a Chicago police officer misrepresented the age of the 16-year-old respondent as 17. The grand jury returned an indictment, but the charges were dismissed and replaced with juvenile charges after the minor presented the trial court with a certified copy of his birth certificate. The minor argued that the criminal charges should have been dismissed with prejudice because the indictment was obtained through perjured testimony.

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

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

Defendant's delinquency adjudication and disposition were affirmed.

People v. Reimer, 2012 IL App (1st) 101253 In proceedings before the grand jury, the State's Attorney acts as an advisor in terms of the applicable law and the proposed charges. Challenges to grand jury proceedings are limited; a defendant may not challenge either the validity of an indictment returned by a legally constituted grand jury or the sufficiency of the evidence considered by the grand jury (so long as some evidence was presented). However, a defendant may challenge an indictment which resulted from prosecutorial misconduct which violated due process.

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

uses known perjury or false testimony, or presents deceptive or inaccurate evidence. An indictment may also be dismissed where the prosecutor applied undue pressure or coercion so that the indictment is, in effect, the action of a prosecutor rather than the grand jury.

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

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

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

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

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

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

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

People v. Sampson, 406 Ill.App.3d 1054, 943 N.E.2d 783 (3d Dist. 2011) An indictment can be dismissed for prosecutorial misconduct if the misconduct rises to the level of a deprivation of due process or miscarriage of justice. The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence. An indictment may also be dismissed where the prosecutor applies undue pressure or coercion so that the indictment is, in effect, that of the prosecutor rather than the grand jury. To warrant

dismissal of an indictment, defendant must show that prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it.

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

People v. Bauer, 402 Ill.App.3d 1149, 931 N.E.2d 1283 (5th Dist. 2010) A grand jury has the power to issue subpoenas to obtain documents relevant to its inquiry when an individual is under investigation for a crime. Subpoenas need not be supported by probable cause. Subpoenas are returnable to the grand jury, but the grand jury may disclose the subpoenaed documents to the State's Attorney for the purpose of the State's Attorney furthering his responsibility to enforce the law. A State's Attorney can abuse the grand jury's subpoena power if the subpoenas are not prepared at the direction of the grand jury and returnable to it, but to the State's Attorney. Any error in the abuse of that power can be harmless if the State's Attorney would have received the documents from the grand jury had the proper procedure been followed.

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

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

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

People v. Oliver, 368 Ill.App.3d 690, 859 N.E.2d 38 (2d Dist. 2006) Even the unintentional presentation of deceptive evidence to the grand jury may violate due process. However, to justify dismissal of the indictment, the denial of due process must be unequivocally clear and result in actual and substantial prejudice. Due process was violated where, in his testimony before two grand juries, a police officer who had not been at the surveillance scene implied that he had observed the defendant engaged in drug transactions. In fact, the officer was

basing his testimony on a police report by an officer who specifically stated that he was unable to tell whether any controlled substances were exchanged. The court concluded that the misrepresentation was prejudicial - had the observations been accurately reported, there would not have been sufficient probable cause for an indictment on charges of possession with intent to deliver.

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

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

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

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

§29-3
Dismissal of Charges

Illinois Supreme Court
People v. Basile, 2024 IL 129026 The supreme court reinstated a grand jury indictment that had been dismissed on the basis of deceptive evidence. The State sought an indictment for criminal sexual assault by presenting a detective's testimony before the grand jury. The detective testified that a woman told him that after a night of drinking alcohol, defendant

took her home and had sexual intercourse with her while she was unable to give consent and in and out of consciousness. After this testimony, a grand juror asked the detective if, given the complainant's extreme intoxication, there was any corroborating evidence that "this person did this to her." The detective responded, "He told me he did." The juror stated that was "all I need to know," and the grand jury issued the indictment.

Defendant moved to dismiss the indictment, arguing that in defendant's recorded interview with the detective, he did not admit to sexual assault, only consensual sex. The circuit court agreed this rendered the detective's answer misleading and dismissed the indictment. The appellate court affirmed, holding the detective's answer left the grand jury with a false impression that the defendant had admitted to having intercourse without consent, and while a defendant may not generally attack an indictment, due process is violated if the prosecutor deliberately misleads the grand jury. This error was prejudicial because the State presented a single witness, who provided a secondhand account from a complainant who was admittedly inebriated and unable to recall much of the encounter.

A 4-3 supreme court majority reversed. The grand jury is historically independent, so when courts are asked to dismiss an indictment based on the denial of due process, they must proceed with restraint and find a denial of due process only if certain. Dismissal is appropriate only if the due process violation is "unequivocally clear" and leads to "actual and substantial" prejudice.

The majority held that the record did not show an unequivocally clear violation of due process. The juror's question as to whether there was additional evidence "that this person did this to her" was ambiguous. Depending on which word the juror emphasized, the question may have been about the identify of the perpetrator, the act of intercourse, or the act of intercourse without consent. In two of these interpretations, the detective's affirmative answer would not be misleading – defendant admitted he had intercourse with the victim. Defendant could not clearly establish that the juror meant to ask only about non-consensual intercourse.

Regardless, defendant could not show prejudice. The grand jury had sufficient evidence to return a true bill of indictment based solely on the detective's testimony prior to the grand juror's question. Nothing in the record suggests that this lone juror's questions were indicative of any uncertainty of any of the other grand jurors with respect to the State's legally sufficient probable cause evidence.

The dissent would have upheld the lower courts because it was clear the juror was asking about non-consensual sex. The notion that the juror's question could be interpreted three different ways is unrealistic, given that the question was qualified with a comment about the complainant's inebriation. The juror obviously wanted to know if the events occurred as described by the complainant. The detective's answer was that yes, the defendant confirmed the events occurred as described. This was unequivocally misleading. Regarding prejudice, the dissent pointed out that the juror who asked the question, upon hearing the detective's affirmative answer, stated, "That's all I needed to know." To the dissent, this was "unequivocally clear" evidence that the misleading answer affected the indictment. The majority placed undue emphasis on the fact that only one juror asked a question, because this question and answer was dispositive.

People v. Shinaul, 2017 IL 120162 As part of a negotiated guilty plea agreement, defendant pled guilty to one count of aggravated unlawful use of weapons and in exchange the State nol-prossed the eight remaining counts. Years later defendant filed a 2-1401 petition for relief from judgment (735 ILCS 5/2-1401) seeking to vacate his conviction since it was void under **Aguilar**, 2013 IL 112116. The State conceded that **Aguilar** voided defendant's conviction

and filed a motion to reinstate some of the charges it had nol-prossed. The circuit court vacated defendant's conviction and allowed him to withdraw his guilty plea, but denied the State's motion to reinstate the charges.

The Supreme Court, with one justice dissenting, held that the statute of limitations barred the State from reinstating the nol-prossed charges. When a circuit court vacates a judgment and allows a defendant to withdraw his guilty plea, the case returns to its status before the judgment was made. And generally the State may in this situation ask the court to reinstate nol-prossed charges. But here the statute of limitations constituted an absolute bar against reinstating the charges since the three-year limitations period had already run. 720 ILCS 5/3-5.

Although a statute of limitations period may be tolled, the court found no authority for the State's argument that it is tolled when a defendant successfully vacates his conviction after the period of limitations has expired on charges that were dismissed as part of a plea agreement. The court specifically rejected the State's argument that the "prosecution" against defendant was still pending and had not expired because defendant's case never had a final disposition on appeal. The court refused to read into the statute "exceptions, limitations, or conditions" that were not plainly spelled out.

The State was barred from reinstating the nol-prossed charges.

People v. Stapinski, 2015 IL 118278 After he was arrested for unlawful possession of ketamine with intent to deliver, defendant entered an agreement with police to assist in apprehending the persons to whom he was supposed to deliver the ketamine. Approximately a year after defendant provided such assistance, and the intended recipients had been prosecuted, defendant was charged with unlawful possession of ketamine with intent to deliver.

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

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

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

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

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

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

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

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

The trial court's dismissal order was affirmed.

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

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

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

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

Illinois Appellate Court

People v. Banks, 2020 IL App (2d) 180509 Defendant moved to dismiss his indictment for possession of a controlled substance, arguing that the State had violated a cooperation agreement. The State objected, arguing that while defendant worked with the police, he didn't do enough to warrant dismissal of the charges. At a hearing on the motion, the evidence established that the police told defendant he could "work off" the charges by helping them arrest two or three heroin dealers and recover amounts equal or greater than the amount involved in his own case. Accordingly, defendant tried to set up one deal that resulted in no arrests, then engaged in a second deal that did result in an arrest and a conviction, and recovery of a similar amount of heroin as in defendant's case. When police approached defendant for additional work, defendant declined, stating that his contacts all suspected him of being a "snitch." A week later, he was arrested and charged for the original crime, without notice. The trial judge denied the motion to dismiss, finding that there was no explicit agreement to drop the charges, and that defendant did not provide sufficient assistance to the police.

The Appellate Court reversed, holding that the trial court's findings were against the manifest weight of the evidence and that under **People v. Stapinski**, 2015 IL 118278, the State violated due process by breaking off the cooperation agreement. Cooperation agreements need not be in writing, and when they include ambiguous language, they should be construed against the government, "especially when those words are relied upon to persuade a defendant to act in exchange for dismissal of pending charges." Here, the police offered to let defendant "work off" the charges and specifically mentioned helping in cases with equal or greater amounts of heroin than in his own case. Defendant's cooperation resulted in an arrest and recovery of the requisite amount of heroin. While he did not further assist the police, they gave him only one week before arresting him without notice. This constituted a breach of the agreement on the part of the police, and accordingly the charges should have been dismissed.

People v. Van Syckle, 2019 IL App (1st) 181410 The trial court granted defendant's motion to dismiss various child pornography charges, finding the photograph of a 14-year-old girl changing in a locker room did not meet the definition of "lewd."

The Appellate Court first held that the trial court had the power to entertain the motion to dismiss on these grounds. Where child pornography charges have been filed against a defendant, the trial court does have the authority to consider whether a reasonable trier of fact could find that the material charged in the indictment constituted a "lewd exhibition." **People v. Lamborn**, 185 Ill. 2d 585 (1999).

Nevertheless, the trial court erred in dismissing the charges. The trial court offered no reasoned analysis as to why it found the image could not be deemed "lewd" by a reasonable trier of fact. The court made no reference to the factors articulated in **Lamborn** and cited no analogous caselaw, instead offering its own unsupported opinion. The Appellate Court, noting in particular the voyeuristic and therefore sexualized nature of the photograph, found it could reasonably be considered lewd. The court remanded for trial before a different trial judge to "remove any suggestion of unfairness."

People v. Atchison, 2019 IL App (3d) 180183 A court may only dismiss charges prior to trial for the reasons set forth in 725 ILCS 5/114-1 or "where there has been a clear denial of due process which prejudiced defendant. Where the court granted defendant's motion to suppress evidence, finding that he was arrested without probable cause, the court erred in subsequently dismissing the charges prior to trial.

The suppression order was not a final order terminating the prosecution and was not tantamount to an acquittal, as would support a dismissal under Section 114-1(a)(2) and, by incorporation, 720 ILCS 5/3-4(a)(2) (barring prosecution where former prosecution was terminated by pretrial order under certain circumstances). And, the court's prior finding that defendant was arrested without probable cause did not necessitate dismissal where the State had other evidence available to support a conviction. A legal arrest is not a prerequisite to prosecution.

Likewise, defendant did not suffer a prejudicial denial of due process by the State's further prosecution of him after the court found no probable cause for arrest. The Illinois Constitution only requires probable cause to bring a felony charge, and the DUI charge here was a misdemeanor.

Finally, while State falsely stated in its certificate of impairment that it would be "unable" to prosecute defendant without the suppressed evidence, that false statement did not result in a prejudicial denial of due process to defendant. The State was entitled to appeal the suppression order even without the false statement, and defendant had prevailed on appeal from the suppression order.

People v. Burchell, 2018 IL App (5th) 170079 The trial court properly dismissed the State's information charging a violation of 730 ILCS 150/3(a), SORA's temporary absence notification requirement. The information alleged that defendant failed to notify law enforcement despite being absent from his residence for more than three days within a three-month time span. The Appellate Court disagreed with defendant's argument that section 3(a) cannot be violated because it lacks a time frame for notification, and held that the legislature intended to require notification on or before the third day of absence. But the court agreed that the provision requires three consecutive, rather than aggregate, days of absence. Because the statute does not specify the type of conduct prohibited (three consecutive days of absence from one's residence), the charging instrument must specifically allege the facts of the offense. Here, the information did not specify which days defendant was absent, and therefore did not adequately apprise defendant of the nature of the offense.

People v. Daniels, 2017 IL App (1st) 142130-B The State charged defendant with multiple counts of aggravated unlawful use of a weapon (AUUW) and unlawful use of a weapon by a felon. As part of negotiated guilty plea, the State *nolled* all the charges except one count of AUUW and defendant pled guilty to that count. After serving his sentence, defendant filed a 2-1401 petition challenging his conviction because it was based on a statute held facially unconstitutional in **Aguilar**, 2013 IL 112116. The trial court denied the petition.

On appeal, the State conceded that defendant's conviction should be vacated but asked the Appellate Court to remand the case to the trial court to reinstate six of the *nolled* charges. In it's initial opinion issued in June, 2016, the Appellate Court vacated defendant's conviction but denied the State's request to reinstate the charges, holding that it did not have jurisdiction to consider the State's request since the issue had not been raised in the trial court.

The Illinois Supreme Court issued a supervisory order directing the Appellate Court to reconsider its decision in light of **Shinaul**, 2017 IL 120162. **Shinaul** held that an Appellate

Court has jurisdiction to consider whether the trial court had improperly denied the State's motion to reinstate *nolled* charges. In **Shinaul**, the State's motion was presented to the trial court after the trial court granted defendant's 2-1401 petition to vacate his convictions. The Supreme Court held that the trial court's order denying the State's motion was a final judgment subject to review on appeal.

The Appellate Court held that **Shinaul** did not change its decision. Unlike in **Shinaul**, here the State never asked the trial court to reinstate the charges nor did it file new charges to initiate a separate proceeding. Since that issue was never raised in the trial court, the trial court's final judgment was limited to defendant's request to vacate his convictions. The request to reinstate the other counts was not part of the final judgement and thus the Appellate Court did not have jurisdiction to review that issue.

People v. Wells, 2017 IL App (1st) 152758 A *nolle prosequi* is the formal entry by the State showing an unwillingness to prosecute a charge and leaving the matter in the same condition as it was before the prosecution began. Generally, a prosecution must be commenced within three years after the commission of a felony offense. 720 ILCS 5/3-5(b). This period does not include any period when a prosecution is pending against a defendant for the same conduct. 720 ILCS 5/3-7(c).

Defendant entered a negotiated guilty plea to one charge and in exchange the State nol-prossed the remaining charges. Several years later, defendant successfully withdrew his guilty plea and in response the State moved to reinstate the nol-prossed charges.

The Appellate Court held that based on the Illinois Supreme Court's decision in **Shinaul**, 2017 IL 120162, the State could not reinstate the nol-prossed charges since they were barred by the statute of limitations. **Shinaul** held that the statute of limitations is not tolled where the State nol-prosses charges as part of a guilty plea.

Here, the State sought to reinstate charges that were originally nol-prossed as part of the guilty plea. But by the time defendant withdrew his plea the three-year limitations period on those charges had expired. The State was thus barred from reinstating the charges.

People v. Lopez, 2015 IL App (4th) 150217 Absent statutory authorization or a clear denial of due process which prejudices the defendant, a trial court has no authority to dismiss criminal charges before trial either on the court's own motion or on the motion of the defense. Statutory authority to dismiss a charge before trial exists only for the grounds set forth in 725 ILCS 5/114-1.

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

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

People v. Hughes, 2012 IL 112817 Jurisdiction stems from the Illinois Constitution, which assigns original jurisdiction to the circuit court in all "justiciable matters" except where the Supreme Court has original and exclusive jurisdiction. The court rejected the argument that the circuit court lacked jurisdiction to accept a guilty plea on a count on which a *nolle prosequi* order had been entered on the State's motion and which had not been refiled or reinstated.

To *nolle prosequi* a charge means simply that the State indicates an unwillingness to prosecute. Once the charge is *nol prossed*, the proceedings are terminated with respect to

that particular charge, but the defendant is not acquitted. If a *nolle prosequi* is entered before jeopardy attaches, the State may reprosecute the defendant subject to other relevant statutory or constitutional defenses and so long as there is no harassment, bad faith, or fundamental unfairness.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§29-4
Sufficiency of Charge
§29-4(a)
Generally
Illinois Supreme Court

People v. Libricz, 2022 IL 127757 Defendant was convicted of various sex offenses against his minor daughter. On appeal, he argued that Counts VI and VIII of the indictment, each charging predatory criminal sexual assault of a child, were fatally defective because they alleged criminal conduct occurring between March 1995 and March 1997, but the statute creating the offense did not take effect until May 29, 1996. Prior to trial, defendant had sought a bill of particulars, arguing that he was unable to prepare his defense, in part due to changes in the law during the times specified in the indictment. The State objected, and the court denied that motion.

Where a charging instrument is challenged for the first time on appeal, it will be found sufficient if it apprised the accused of the offense charged with enough specificity to prepare a defense and to allow pleading a resulting conviction as a bar to future prosecution. The Court found that both of those standards had been satisfied.

The charges notified defendant of the alleged acts of sexual penetration, identified the time frame in which those acts were alleged to have occurred, and specified the ages of defendant and his daughter at the time the offenses were committed. While part of the time period charged was prior to the effective date of the offense of predatory criminal sexual assault, the same conduct was criminalized as aggravated criminal sexual assault during the earlier time period. So, while the predatory counts were defective, the indictment put defendant on notice that his conduct was criminal and allowed him to prepare a defense. And, that defense was that the acts did not occur, not that they did not occur during a specific time period.

The Court rejected the argument that defective charges are *per se* prejudicial when they allege conduct that occurs prior to the effective date of a statute. Defendant had ample opportunity to raise the issue of the statute's effective date prior to trial. The fact that he sought a bill of particulars was evidence that counsel knew of the changes in the law and could have challenged the indictment at that time. Because he did not, it was proper to hold defendant to the standard for challenges raised for the first time on appeal.

People v. Easley, 2014 IL 115581 725 ILCS 5/111-3(c) provides that when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction in order to give notice to the defense. However, the prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense, and may not be disclosed to the jury during trial unless otherwise permitted by the issues. An "enhanced" sentence is a sentence which is increased by a prior conviction from one class of offense to a higher classification. (725 ILCS 5/111-3(c)).

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

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

People v. Zimmerman, 239 Ill.2d 491, 942 N.E.2d 1228 (2010) 720 ILCS 5/24-1.6(a)(3)(D) creates the offense of aggravated unlawful use of a weapon for possession of a weapon by a person who has been adjudicated delinquent for an act which would have been a felony if

committed by an adult. The court concluded that the plain language of §24-1.6 establishes that the prior juvenile adjudication is an element of aggravated unlawful use of a weapon, and not merely a factor enhancing the sentence for misdemeanor unlawful use of a weapon.

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

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

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

People v. White, 221 Ill.2d 1, 849 N.E.2d 406 (2006) Defendant was indicted for a drug offense. On the day the jury trial was to begin, the prosecutor filed an information containing a second count alleging the same offense, but adding an allegation that the offense occurred on property owned by a housing authority. Defense counsel objected because the new count contained an additional element and was a more serious offense. The court concluded that the prosecutor improperly attempted to amend the indictment by filing the information. Where the initial charge is by indictment, no preliminary hearing is required. Because the allegations have not been subjected to a preliminary hearing, an indictment can not be broadened unless amended by the grand jury. Because the prosecutor added a new count charging a more serious offense, and defendant was not afforded a preliminary hearing, error occurred. The court concluded, however, that defense counsel at trial had objected to the information on the ground that it was a new charge, but did not raise any argument regarding the defendant's right to a preliminary hearing. Because counsel did not assert the issue that was subsequently raised on appeal, the court applied the standard for criminal charges which are challenged for the first time on appeal. Thus, the information was sufficient if it apprised the defendant of the charge with sufficient specificity to allow him to prepare a defense and plead a resulting conviction as a bar to future prosecution arising from the same conduct. Because defense counsel admitted that defendant was on housing authority property at the time of his arrest there was no prejudice from the filing of the information or the failure to hold a preliminary hearing.

People v. Woodrum, 223 Ill.2d 286, 860 N.E.2d 259 (2006) Where an indictment fails to specify the details of the charged offense sufficiently to enable the defendant to prepare a

defense, the State may be required to furnish a bill of particulars to give notice of the charge and the specific transactions at issue. Defendant was charged with child abduction, and moved for a bill of particulars concerning the nature of the "unlawful purpose" with which he allegedly acted. Here, the State had informed the defendant of the evidence it intended to introduce, and that evidence made clear the State's contention that defendant acted with intent to commit a sex offense. Because defendant was aware of the charges and the underlying transactions, and knew that the State would rely on his own statements to identify the allegedly unlawful purpose, he was able to prepare a defense.

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

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

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

People v. Cuadrado, 214 Ill.2d 79, 824 N.E.2d 214 (2005) The standard for resolving a challenge to the sufficiency of an indictment depends on the stage at which the challenge is raised. (1)Where the challenge is raised in a pretrial motion to dismiss, the defendant is not required to show prejudice resulting from the inadequacy of the charge. Thus, the defendant

is entitled to relief if the charge does not sufficiently allege an offense.(2) Where the challenge is brought after trial has started, however, the charge is sufficient if it apprised the defendant of the precise offense with enough specificity to allow him to prepare a defense and to permit a conviction to be raised as a bar for future prosecutions for the same conduct. Here, the court rejected the argument that in a charge for solicitation of murder for hire substituting the term "procured" for the term "solicited" constituted a meaningless change. However, defendant was not prejudiced by the mid-trial substitution where, before she brought a mid-trial challenge to the sufficiency of the indictment, defendant moved for a directed verdict due to the State's failure to prove that she had "procured" a murder. Because defendant was clearly aware that the State was required to prove procurement, she was not prejudiced by the change.

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

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

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

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

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

People v. Pujoue, 61 Ill.2d 335, 335 N.E.2d 437 (1975) Citation of the statutory provision alone is not sufficient to charge an offense; an indictment must set forth both the statutory

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

People v. Sirinsky, 47 Ill.2d 183, 265 N.E.2d 505 (1970) Defects in the caption of a charging document will not invalidate it. A complaint brought in name of a city rather than the State was not fatally defective. See also, **People v. Bates**, 9 Ill.App.3d 882, 293 N.E.2d 358 (1st Dist. 1973) (A typographical error does not void an indictment if in the context of the entire record, it is clear there was no prejudice to the defense.)

Illinois Appellate Court

People v. Kyles, 2020 IL App (2d) 180087 Section 5-130(1)(a) of the Juvenile Court Act excludes from juvenile court jurisdiction any minor who was at least 15 years old and charged with aggravated battery with a firearm where the minor personally discharged the firearm. The indictment here was directed against both defendant and another individual and alleged that "said defendants" discharged a firearm. And, another charge in the indictment was directed solely against defendant and alleged the he shot the victim. Taken as a whole, the indictment satisfied the personal discharge requirement for automatic transfer, and defendant was properly prosecuted in criminal court.

People v. Casas, 2018 IL App (2d) 150456-B Violation of bail bond is a continuing offense, but only so long as a defendant is obligated to appear in court. In previous Supreme Court proceedings in this matter, the Court held that defendant's obligation to appear pursuant to his bond terminated when he was tried *in absentia* and sentenced for the underlying offense. The Supreme Court then remanded to the Appellate Court for consideration of whether the State adequately pled an exception to the statute of limitations.

The Appellate Court agreed that the State had pled the exception from 720 ILCS 5/3-7(a), which tolls the statute of limitations when a defendant is "not usually and publicly resident" in Illinois. The State did not cite the statute or use the statutory language, but did allege that defendant had "used [a] false identity to evade prosecution." As a matter of law, a defendant is not "usually and publicly resident" when he is living in Illinois under a false identity. While quoting and citing the statutory exception to the limitations period is the better practice, the circumstances alleged were sufficient to put defendant on notice of the basis on which the State sought tolling.

People v. Mitchell, 2018 IL App (1st) 153355 Defendant was convicted of felony murder predicated on aggravated kidnaping, where the kidnaping occurred in Illinois and the death occurred in Indiana. He challenged the Illinois' court's jurisdiction. The Appellate Court affirmed. Pursuant to Section 1-5 of the Criminal Code, Illinois has jurisdiction over crimes committed wholly or in part within the state. Crimes are committed partly in the state if any element occurs within the state. Here, the predicate felony of a felony murder charge is an element of the offense, and the evidence sufficiently established that the kidnaping occurred in Illinois, bestowing jurisdiction on Illinois courts.

People v. Espinoza, 2015 IL 118218 The Supreme Court reiterated precedent that the charging instrument must identify the victim of the offense. Where a charging instrument is challenged before trial, strict compliance with pleading requirements is necessary. In addition, where the charge is challenged before trial the defendant is not required to show prejudice in order to obtain dismissal of the charge.

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

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

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

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

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

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

People v. Espinoza, 2014 IL App (3d) 120766 Under section 111-3 of the Code of Criminal Procedure, a defendant has a fundamental right to be informed of the nature of any criminal accusations against him. 725 ILCS 5/111-3. If a charging instrument is challenged before trial it must strictly comply with the pleading requirements of section 111-3, and if it does not, the proper remedy is dismissal.

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

Here, the State refused to identify the juvenile victims by initials in the charging instruments. The trial court dismissed the charging instruments and the State appealed,

arguing that defendants could not show that they were prejudiced since the victims could be identified in a bill of particulars or in discovery.

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

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

The court affirmed the dismissal of the charging instruments.

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

People v. Whalum, 2014 IL App (1st) 110959-B Section 111-3(c) of the Code of Criminal Procedure requires the prosecution to specifically state in the charging instrument its intention to seek an enhanced sentence based on a prior conviction. 725 ILCS 5/111-3(c). In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice to defendant under section 111-3(c) only applies when the prior conviction used to enhance the sentence is not an element of the offense.

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

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

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

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

seek an enhanced sentence. Since it failed to do so, defendant's case was remanded for re-sentencing as a Class 3 felon.

People v. Wooden, 2014 IL App (1st) 130907 Under 725 ILCS 5/111-3(c) when the State seeks to impose an enhanced sentence due to a prior conviction, the charge must state the intent to seek the enhanced sentence and set forth the prior conviction to give the defense notice. In **People v. Easley**, 2014 IL 115581, the Illinois Supreme Court held that notice under §111-3(c) is required only if the prior sentence that would enhance the sentence is not an element of the charged offense.

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

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

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

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

People v. Nowells, 2013 IL App (1st) 113209 725 ILCS 5/111-3(c) provides that where the State seeks an enhanced sentence based on a prior conviction, the charge must give notice of the intent to seek an enhanced sentence and allege the prior conviction. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial."

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

People v. Pryor, 2013 IL App (1st) 121792 Under 725 ILCS 5/111-3(c), when the State seeks an enhanced sentence based on a defendant's prior conviction it must specifically state its

intention to do so in the charging instrument, and it must state the prior conviction that is the basis of the enhancement. Subsection (c) defines an enhanced sentence as a sentence which is increased by a prior conviction from one class of offense to a higher class.

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

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

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

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

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

People v. Barwan, Sandkam, & Klicko, 2011 IL App (2d) 100689 A motion to dismiss a charge for failing to allege an offense challenges the sufficiency of the allegations of the complaint, and does not concern the evidence which might be introduced to support those allegations. A charging instrument is sufficient to state an offense where it is in writing, sets forth the nature and elements of the offense, and alleges the provision violated, the name of the accused, and the date and county of commission. Where the State seeks an enhanced sentence due to a prior conviction, the charge must state the prior conviction and the intent to seek the enhancement, although neither are elements of the offense. (725 ILCS 5/111-3).

Aggravated DUI charges which alleged that the defendants had committed DUI three times, and were therefore subject to Class 2 felony sentences under 625 ILCS 5/11-501(d)(2)(B), were sufficient to allege offenses although the second violation in each case involved pending charges that had not yet been resolved. Because the third-time offender provision is a sentencing enhancement, whether the evidence supports the enhancement is

determined at sentencing rather than before trial. Thus, it was premature for the trial court to consider the status of the predicate offenses when ruling on pretrial motions to dismiss.

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

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

People v. Rich, 2011 IL App (2d) 101237 Under 720 ILCS 5/6-1, a criminal conviction cannot be entered for an offense which occurred when the defendant was under the age of 13. Thus, the trial court properly dismissed an indictment which alleged that defendant committed aggravated criminal sexual assault when he was 12 years old.

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

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

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

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

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

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

§29-4(b)
In Charging Offense (Also See Substantive Offense)
United States Supreme Court
U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) The omission of an element of a crime from an indictment does not deprive a court of jurisdiction to hear the case.

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

Illinois Supreme Court
People v. Kidd, 2022 IL 127904 Defendant was charged with two counts of predatory criminal sexual assault of a child. Both counts alleged that defendant committed an act of "sexual contact" by touching his penis to a child's mouth. The statute provides, in relevant part, that a person commits predatory criminal sexual assault where that person "commits an act of contact, however slight, * * * for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-1.40(a)(1).

Prior to trial, defendant objected to the charging instrument because it did not allege the contact was for sexual gratification or arousal. The State maintained that the indictment was correct, and the trial court agreed, denying the motion to dismiss. Immediately before trial, the State moved to amend the indictment by adding the additional "gratification or arousal" language, while the defense again moved to dismiss. The trial court denied both motions, finding that the indictment's allegation of "sexual contact" adequately apprised defendant of the elements of the offense, including the element of "sexual gratification or arousal."

The jury, which received an instruction accurately defining "sexual contact" as involving sexual gratification or arousal, found defendant guilty. The appellate court affirmed, finding the indictment's use of the phrase "sexual contact" adequately informed defendant that the contact was done for sexual gratification or arousal.

A 6-1 majority of the supreme court agreed with the defendant that the indictment should have been dismissed. Section 111-3(a) of the Code of Criminal Procedure requires the State to set forth the "the nature and elements of the offense charged." When a defendant contests the sufficiency of a charge prior to trial, the indictment must strictly comply with section 111-3.

Convictions for predatory criminal sexual assault of a child can be established in two ways: (1) sexual penetration, which does not require proof of the purpose of the act; or (2) sexual contact, which requires proof that the contact was "for the purpose of sexual gratification or arousal of the victim or the accused." Here, the indictment alleged sexual contact, but did not allege the purpose of the contact. By alleging contact without adding the element of purpose, the indictment did not charge a violation of the statute. This hindered the defense by omitting an element of the offense, and creating confusion as to whether the State had charged a penetration case or a contact case. The State caused further confusion by stating that it had charged penetration, before moving to amend the indictment to add the "gratification or arousal" language needed for a contact case. The trial court added to this

confusion by denying the motion to amend, then providing the "gratification or arousal" language in the jury instructions.

Because defendant filed a pretrial motion challenging the sufficiency of the allegations in the indictment, he did not need to show prejudice.

The dissenting justice would have found the indictment strictly complied with section 111-3, because by alleging contact between defendant's penis and the victim's mouth, an act which meets the statutory definition of sexual penetration, the indictment did in fact allege an offense based on sexual penetration, even if it did not use the word penetration.

People v. Carey, 2018 IL 121371 The indictment sufficiently specified the predicate offense for defendant's felony murder conviction.

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

Although defendant had a constitutional right, codified by Section 111-3(a) of the Code of Criminal Procedure, to sufficient notice of the charges against him, strict compliance with the charging requirements is not necessary if defendant challenges the indictment for the first time on appeal. Rather, a defendant who does not challenge the indictment below must show on appeal that the deficient charge prejudiced his ability to prepare a defense. To determine prejudice, the court must look to the indictment as a whole. Here, while Count 1, the felony murder count, did not specify which armed robbery defendant was alleged to have attempted, Counts 2 through 4 - attempt armed robbery with a firearm, and two counts of unlawful use of a weapon by a felon - made clear that the felony murder charge was predicated on the act of armed robbery with a firearm, as did several comments made by the prosecution before trial. The State's decision to *nolle* Counts 2, 3, and 4 before trial did not negate the notice these charges provided to the defendant. Furthermore, the record established that the defense had actual notice, as it sought to disprove the existence of a firearm during cross-examination and closing argument

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

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

People v. DiLorenzo, 169 Ill.2d 318, 662 N.E.2d 412 (1996) The Court noted a split between the appellate districts concerning whether an aggravated criminal sexual abuse charge that is challenged at trial must explicitly allege that defendant's acts were for purposes of "sexual gratification." Because defendant did not challenge the indictments in the trial court and the charges were sufficient when challenged for the first time on appeal, the Court held that the issue was not presented in this case. See also, **People v. Allensworth**, 235 Ill.App.3d 185, 600 N.E.2d 1197 (3d Dist. 1992) (indictment for aggravated criminal sexual abuse is sufficient where it alleges that defendant committed "sexual conduct," without specifying that the conduct was for the purpose of sexual gratification or arousal; furthermore, where there was evidence that defendant was at least 26 years older than the victim, the indictment was not insufficient because it failed to allege that the accused was more than five years older than the victim).

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

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

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

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

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

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

flawed. The Court rejected the State's argument that the three ways of committing the offense were so intimately related that defendant had sufficient notice of the charge).

Illinois Appellate Court

People v. Klimek, 2023 IL App (2d) 220372 The trial court did not err in denying defendant's motion to dismiss a charge of official misconduct for failing to report a battery where the charge did not identify the victim of the battery. Where a challenge to the sufficiency of a charging instrument is raised prior to trial, the charge must strictly comply with the requirements of 725 ILCS 5/111-3(a).

Section 111-3(a) requires that a charge set forth the name of the offense, the statutory provision violated, the nature and elements of the offense, the date and county where the offense occurred, and the name of the accused. Defendant argued that the failure to include the underlying battery victim's name amounted to a failure to set forth the nature and elements of the offense of official misconduct. The appellate court concluded that the charge was sufficient where the official misconduct count in question was included among a group of charges all predicated on conduct occurring on the same date and, taken together, those charges "collectively notified" defendant of the identity of the victim of the underlying battery. Further, the court held that a charge of official misconduct need not allege with specificity the underlying act supporting the charge. Thus, the official misconduct charge here strictly complied with the requirements of section 111-3(a).

The court also rejected defendant's challenge to two of his official misconduct convictions which were predicated on violations of the Illinois Administrative Code. Under 720 ILCS 5/33-3(a)(1) and (2), official misconduct is committed when a public employee in his official capacity (1) intentionally or recklessly fails to perform any mandatory duty required by law or (2) knowingly performs an act which he knows is forbidden by law. Defendant was a juvenile justice specialist (JJS) at the Illinois Youth Center (IYC) at St. Charles. The charges in question alleged that defendant (1) allowed more than two offenders access to the shower at the same time and (2) failed to report a threat of safety to a youth under his supervision. These actions violated internal directives of the IYC. Defendant argued that, because the internal directives are not "laws," they could not form the basis for official misconduct convictions. The court held, however, that because the Administrative Code requires that JJSs comply with departmental rules and procedures such as the internal directives here, and because the charges alleged that defendant violated the Administrative Code, the convictions were proper. The provisions of the Administrative Code are "laws" such that they fall within the language of the offense of official misconduct.

People v. Parlier, 2023 IL App (4th) 220091 The State charged defendant with several counts of child pornography. The language in the indictment closely followed the language of section 11-20.1(a)(1)(ii) by alleging that he "filmed, videotaped[,] or otherwise depicted or portrayed by means of any similar visual medium or reproduction or depicted by computer a minor child." Defendant, citing **People v. Heard**, 47 Ill. 2d 501 (1970), argued that the disjunction of the allegations in each of the 10 counts (the uses of "or") "prevented [him] from being fully apprised of the nature of the charges and violated [his] due process rights."

The appellate court disagreed. Although **Heard** noted that the use of statutory, disjunctive language may result in an insufficient indictment, it did so in the context of a gambling statute whose language referred to several acts that were very different from each other. Regardless, **Heard** has been superseded **by People v. Pujoue**, 61 Ill. 2d 335 (1975), which held, "When attacked for the first time on appeal[,] a complaint is sufficient if it apprised the accused of the precise offense charged with sufficient specificity to prepare his

defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct." Here, defendant could not show prejudice because it was clear what the State alleged, given that the videos in question were provided during discovery and the defendant specifically stated that he had no questions about these counts prior to trial.

People v. Cox, 2022 IL App (5th) 200398 The State charged defendant with driving while license revoked. The State charged the Class 4 version of the offense under 625 ILCS 5/6-303(d), which applies when a defendant has a prior conviction for driving while license revoked. The indictment did not provide a date or case number for the prior conviction. Instead, it alleged that defendant committed the offense of driving while license revoked "for a second or subsequent time." Defendant objected to the indictment before trial, arguing that it did not comply with 725 ILCS 5/111-3(c), which requires the indictment to specify the prior offenses being used to elevate the charge. The trial court provided defendant with a copy of his driving abstract, but overruled the objection.

Section 111-3(c) states that "[w]hen the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant." The appellate court concluded that the indictment was specific enough to "state" the prior conviction under section 111-3(c), because it alleged "[d]efendant committed the violation of Driving While License Revoked or a similar provision for the second or subsequent time." This language informed defendant that a prior conviction for driving while license revoked would be used as an enhancement, and this provided adequate notice to strictly comply with section 111-3(c).

People v. Okoro, 2022 IL App (1st) 201254 A grand jury indicted defendant for home invasion, alleging *inter alia* that he entered the complainant's dwelling without authority. The evidence at trial showed that defendant entered the apartment with the complainant, A.B.. A.B. alleged that he tried to sexually assault her, causing her to flee the apartment and hide in a stairwell. She returned to her apartment after she believed defendant left, but defendant was still in the apartment and attacked her again.

At the instruction conference, the State asked for two versions of IPI 11.53, one using the "entered without authority" language and the other using the "remained in the dwelling place" language. The defense objection was overruled, and defendant was convicted. He did not raise the issue in his post-trial motion.

On appeal, defendant, citing the lack of the "remained" language in the indictment, alleged a violation of his right to a grand jury under the Fifth Amendment, and a fatal variance. The court rejected his Fifth Amendment claim, because the grand jury clause applies only to federal trials.

The Appellate Court next found that defendant had not forfeited his fatal variance claim. A challenge to the sufficiency of the charging instrument may be raised for the first time on appeal, because due process concerns are implicated.

When the indictment or information is challenged for the first time on appeal, review is limited to determining whether the indictment apprised defendant of the precise offense charged with sufficient specificity to prepare his defense, and allowed defendant to plead a resulting conviction as a bar to future prosecution arising out of the same conduct.

Here, an Appellate Court majority found no fatal variance. While the indictment did not contain the "remains in the dwelling place" language, it did cite to the home invasion statute which does contain said language. An indictment that cites a statute should be read together with the statute. This citation would give defendant sufficient notice that any and

all provisions of the home invasion statute were alleged. Nor could any variance prejudice his preparation of a defense, because defendant learned of A.B.'s version of events in discovery. The probable cause statement included A.B.'s allegation that defendant remained in her apartment after she returned from the stairwell and attacked her again.

People v. Panozzo, 2022 IL App (3d) 190499 Defendant was charged with violation of a no stalking order. The order prohibited defendant from making contact with Robert Mysliwiec, Sr., his wife, and his son, Robert Mysliwiec, Jr. ("Robby"). The information alleged that on July 23, 2014, defendant "made contact with Robert Mysliwiec," an act that was prohibited by the order.

Before trial, the State moved to introduce evidence of defendant's "course of conduct" concerning contact with the Mysliwiecs, alleging defendant put up yard decorations taunting the Mysliwiecs and threatened Robert in April of 2014. Defendant objected, noting the information alleged a specific incident, and it wasn't even clear which Robert defendant allegedly contacted. The State responded that the information referred to both Robert and Robby. The court granted the State's motion.

Robert testified that he lived next door to his son Robby, and that defendant lived two houses down. In April 2014, defendant yelled at him in an alley behind their homes. In May, defendant put up various yard signs and installations which Robert believed were aimed at his family. Robby testified that defendant "berated" him in July 2014 after Robby commented on the yard signs.

The court agreed to provide the jury with three verdict forms – one for the statement to Robert Sr., one for the statements to Robby, and one for the yard signs. The jury found defendant guilty of all three.

The Appellate Court reversed, agreeing with defendant that the information was deficient. Because the case involved two Robert Mysliwiecs, the State's failure to specify which was the victim resulted in a fatal variance. Furthermore, the addition of the "course of conduct" evidence, involving yard signs and contact with Robert, Sr., rendered the information duplicitous. A charging instrument is void for duplicity where two or more distinct offenses are charged in a single count. Although this information was not duplicitous on its face, it became duplicitous once the trial court allowed the State to proceed under multiple theories.

These errors were clearly prejudicial where defendant was taken by surprise when the State included the "course of conduct" evidence, and again when the court agreed to give the jury three verdict forms. Defendant repeatedly attempted to raise a first amendment defense which the court denied as untimely, despite the fact that defendant did not know about the yard sign charges until the start of trial.

Additionally, because the allegations regarding yard signs and Robert, Sr., were not legitimate charges, their introduction violated the rule against other-crimes evidence. The incidents served no legitimate purpose other than to portray defendant as a bad person.

Finally, the Appellate Court granted defendant's request for an outright reversal of his conviction rather than a new trial. Defendant had served his entire sentence at the time of the decision, so the Appellate Court had discretion to reverse the conviction outright under **People v. Campbell**, 224 Ill. 2d 80 (2006).

People v. Hall, 2021 IL App (1st) 190959 Police officers responding to a kidnaping dispatch pulled over a car driven by defendant. A woman rode in the passenger seat. Defendant pulled into a gas station, exited the car, and entered the gas station. Detective Gibson followed defendant inside, where he told defendant he was investigating a kidnaping and asked

defendant for identification. Defendant told him he had the wrong person, then, seeing Officer Zurowski talking to the female in the passenger seat, ran back towards the car. He yelled at Zurowski to leave the woman alone before he was pushed back and detained.

The State charged defendant with obstruction of justice pursuant to 720 ILCS 5/31-1, alleging he obstructed Detective Gibson by disobeying a request for identification or to identify himself, during the course of a criminal investigation.

The trial court found defendant guilty. In denying a motion for new trial, the court explained that it believed the "gravaman" of the obstruction occurred when defendant ran towards Zurowski and attempted to interfere with the conversation with the passenger.

On appeal, defendant alleged: (1) insufficient evidence; and (2) a fatal variance between the complaint alleging obstruction of Gibson and the evidence showing obstruction of Zurowski. The State conceded the fatal variance. The Appellate Court, however, found no fatal variance. When, as here, the sufficiency of the charging instrument is attacked for the first time on appeal, defendant must show the variance to be material and of such character as to mislead the defense or expose defendant to double jeopardy. The Appellate Court found no distinction between the complaint and the evidence. The complaint alleged that defendant ignored the requests of Gibson, and the evidence supported those allegations. Although the trial court mentioned the "gravaman" of the obstruction occurred with regard to Zurowski, it would not interpret this comment to mean the court did not find obstruction of Gibson.

The Appellate Court did find the evidence insufficient. Finding the facts were not in dispute, it applied a *de novo* standard of review. While it noted that defendant ignored several orders by the officers, ultimately having to be pushed away and detained, the complaint strictly confined itself to defendant's act of ignoring the request to identify himself. The Appellate Court held that this act, in and of itself, did not constitute obstruction of justice. Precedent such as **People v. Fernandez**, 2011 IL App (2d) 100473 and **People v. Raby**, 40 Ill. 2d 392, 399 (1968), dictates that initial refusals to identify oneself, and arguing with officers, are not considered criminal acts. Nor did the refusal here materially hamper the investigation, where officers were able to immediately learn from the passenger that she was not in fact the victim of a kidnapping.

People v. Burchell, 2018 IL App (5th) 170079 The trial court properly dismissed the State's information charging a violation of 730 ILCS 150/3(a), SORA's temporary absence notification requirement. The information alleged that defendant failed to notify law enforcement despite being absent from his residence for more than three days within a three-month time span. The Appellate Court disagreed with defendant's argument that section 3(a) cannot be violated because it lacks a time frame for notification, and held that the legislature intended to require notification on or before the third day of absence. But the court agreed that the provision requires three consecutive, rather than aggregate, days of absence. Because the statute does not specify the type of conduct prohibited (three consecutive days of absence from one's residence), the charging instrument must specifically allege the facts of the offense. Here, the information did not specify which days defendant was absent, and therefore did not adequately apprise defendant of the nature of the offense.

People v. Fiumetto, 2018 IL App (2d) 170230 When determining whether a requirement of a criminal statute is a description of the offense which must be included in the charging instrument, or merely an exception, courts look to whether the language describes the crime or whether it describes persons. If the language designates certain persons not covered by the statute, it is an exception. Here, Section 1(a) of the Syringes Act begins with the phrase "[e]xcept as provided in subsection (b)." 720 ILCS 635/1(a) (2016). In turn, section 1(b) states

that any person who is at least 18 years old may possess up to 20 syringes if she has purchased them from a pharmacy. Because this language describes persons, it qualifies as an exception rather than a description of the offense, and need not be alleged in the charging instrument.

An ordinary spoon (as opposed to a miniature cocaine spoon under 720 ILCS 600/2(d)(5)(D)(2016)), does not qualify as "drug paraphernalia," even when found near a syringe, because section 4(b) of the Paraphernalia Act exempts any item used to ingest "any other lawful substance." 720 ILCS 600/4(b) (2016).

People v. Albarran, 2018 IL App (1st) 151508 An indictment charging various sex offenses against a child victim over a period of five years was not unconstitutionally overbroad, and the trial court did not abuse its discretion in denying defendant's motion for a bill of particulars. A motion for bill of particulars is a request for more specific information to supplement a sufficient indictment, not a challenge to the sufficiency of the indictment itself. Because defendant did not move to dismiss the indictment he did not actually challenge the sufficiency of the indictment in the trial court. Regardless, the indictment contained all of the required elements and was sufficient to permit him to prepare a defense. The specific date of the offense is not an essential element in child sex offenses cases, so its absence did not render the indictment insufficient.

People v. Swift, 2016 IL App (3d) 140604 The State charged defendant with aggravated driving under the influence. 625 ILCS 5/11-501(a)(6), (d)(1)(C). One of the elements of aggravated DUI is that defendant's driving was a proximate cause of the victim's injuries. The indictment failed to include this element. After the first witness testified at trial, defendant moved to dismiss the indictment on the grounds that it was defective for failing to include an essential element of the charged offense. The trial court denied defendant's motion and directed the State to amend the indictment to include the missing element.

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

People v. Carey, 2016 IL App (1st) 131944 The due process right to be adequately informed of the charged offense applies to the predicate felony in a felony murder charge. When the charging instrument is attacked for the first time on appeal, the court must determine whether the charge was specific enough to allow defendant to prepare his defense and to bar future prosecution arising out of the same conduct. Additionally, when the challenge is made for the first time on appeal the defendant must show that he was prejudiced in the preparation of his defense.

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

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

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

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

People v. Moman, 2014 IL App (1st) 130088 A defendant has a due process right to notice of the State's charges, and may not be convicted of an offense the State has not charged. But, a defendant may be convicted of an uncharged offense if it is a lesser-included offense of the charged offense.

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

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

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

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

People v. Nowells, 2013 IL App (1st) 113209 725 ILCS 5/111-3(c) provides that where the State seeks an enhanced sentence based on a prior conviction, the charge must give notice of the intent to seek an enhanced sentence and allege the prior conviction. "However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial."

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

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

People v. Barwan, Sandkam, & Klicko, 2011 IL App (2d) 100689 A motion to dismiss a charge for failing to allege an offense challenges the sufficiency of the allegations of the complaint, and does not concern the evidence which might be introduced to support those allegations. A charging instrument is sufficient to state an offense where it is in writing, sets forth the nature and elements of the offense, and alleges the provision violated, the name of the accused, and the date and county of commission. Where the State seeks an enhanced sentence due to a prior conviction, the charge must state the prior conviction and the intent to seek the enhancement, although neither are elements of the offense. (725 ILCS 5/111-3).

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

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

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

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

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

to charge a crime where it alleged that the defendant flashed a laser pointer at the person of the complainant.

People v. Swanson, 308 Ill.App.3d 708, 721 N.E.2d 630 (2d Dist. 1999) Defendant was charged with disorderly conduct for "knowingly transmitt[ing] . . . a report that the offense of domestic battery had been committed, knowing that at the time of such transmission, . . . there was no reasonable ground for believing that such offense had been committed." The Court held that the charge failed to allege an offense. Where a charging instrument is challenged in the trial court, it must strictly comply with the pleading requirements of 725 ILCS 5/111-3(a), including setting forth the nature and elements of the offense. The failure to allege an offense is a fundamental defect that renders the charge void and which cannot be cured by amendment. The use of statutory language in the charging instrument may be sufficient to charge an offense where such language specifically apprises the accused of the alleged offense. Because the disorderly conduct statute uses only general language in describing the offense, however, the State must plead additional facts to describe the particular conduct involved. Where the offense that was allegedly the subject of the false report can be committed in at least two ways and may be either a misdemeanor or a felony, and defendant made at least two statements which could have been the basis for the charge, the failure to specifically identify the alleged false statement rendered the information insufficient to apprise defendant of her precise criminal conduct.

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

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

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

People v. Morrissette, 225 Ill.App.3d 1044, 589 N.E.2d 144 (4th Dist. 1992) The trial court properly dismissed an indictment for unlawful possession of contraband in a penal institution The indictment alleged defendant brought a hacksaw blade into a Correctional Center. The statute defines "contraband" as certain controlled substances, hypodermic needles, specified

weapons, and "any dangerous weapon or instrument of like character." Because a hacksaw blade is not specifically listed, it can be contraband only if it is a "dangerous weapon or instrument of like character." A hacksaw blade is not a dangerous weapon per se, and the State failed to allege that it had been used as a dangerous weapon. Thus, because the indictment omitted an essential element of the offense, it failed to state an offense.

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

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

People v. Walton, 2013 IL App (3d) 110630 A defendant has a fundamental right to be informed of the nature and cause of criminal accusations made against her. As part of that right, the Code of Criminal Procedure provides that the charging instrument must set forth the nature and elements of the offense charged. 725 ILCS 5/111-3(a)(3). When challenged for the first time on appeal, the charging instrument will be found sufficient if it: (1) apprised the accused of the precise offense with sufficient specificity to prepare her defense; and (2) would allow her to plead a resulting conviction as a bar to future prosecutions arising from the same conduct.

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

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

§29-5
Amendment of
United States Supreme Court
Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) After an indictment has been returned, its charges may not be broadened through amendment except by the grand jury itself.

Illinois Supreme Court

People v. Staake, 2017 IL 121755 Where new and additional charges arise from the same facts as the original charges and the State had knowledge of such facts at the time of the commencement of the prosecution, the speedy trial term on the new charges is the same as on the original charges. Continuances obtained in connection with the original charges cannot be attributed to the defendant with respect to the new and additional charges, because those charges were not before the court when the continuances were obtained.

The purposes of the rule that continuances on the original charge cannot be attributed to defendant on the new charge is to ensure adequate notice of the subsequent charges and to prevent trial by ambush.

The court concluded that where defendant was charged with second degree murder, a subsequent charge of first degree murder was not a new and additional charge for purposes of the speedy trial statute. Second degree murder is not a lessor included offense of first degree murder, but rather a lessor mitigated offense. Because the State is required to prove the elements of first degree murder before the trier of fact can consider whether there is a mitigating factor which will reduce the charge to second degree murder, first degree and second degree murder have the same elements. However, second degree has an additional mitigating factor.

Because the State must prove first degree murder to obtain a conviction for second degree murder, a defendant charged with second degree murder is on notice that the State intends to prove the elements of first degree murder. Because the first degree murder charge added to the prosecution relates back to the original second degree murder charge, it is not a new offense. Therefore, delays attributable to defendant on the initial charge are also attributable to him on the subsequent charge.

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

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

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

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

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

Illinois Appellate Court

People v. Bonnette, 2025 IL App (4th) 240827 The trial court did not abuse its discretion when it granted the State leave to amend the indictment to correct the file name associated with the child pornography charge defendant was facing. The original indictment was not fatally defective for stating an incorrect file name. The indictment included the name of the offense, the statutory provision involved, the nature and elements, the date and county, and the name of the accused, thus satisfying 725 ILCS 5/111-3(a). In a child pornography prosecution, the State is not required to specifically define the details of the image(s) it intends to introduce at trial, thus the name of the file was not required to be stated in the indictment. Similarly, while the erroneously identified file allegedly was possessed outside of the statute of limitations, the content was identical to that corresponding to the correctly-named file, and the record demonstrated that defendant knew before trial exactly which file the State was charging him with possessing and on what date. And, finally, correction of the file name was a formal amendment, akin to the sort of misnomer correctable under 725 ILCS 5/111-5. It did not change the substance of the charge and did not prejudice the defense.

People v. Bonnette, 2025 IL App (4th) 240827 Defendant was proved guilty beyond a reasonable doubt of child pornography. The evidence showed that the offending image was on defendant's cell phone, and circumstantial evidence supported an inference of knowing and voluntary possession where there was a digital trial indicating the image was once contained within the phone's photo application and "common life experience" teaches that images end up in a phone's photo application via user input and not as a hidden function of routine web browsing. There was no evidence that anyone else had access to defendant's phone, and no basis to suspect defendant was the victim of hacking or malware. The phone's digital records indicated that, on the date in question, someone actually clicked on the photo to enlarge it from the photo gallery to a full-screen view. And, there was further evidence that the charged image was also viewed on defendant's tablet, indicating defendant did not merely encounter the image inadvertently. Further, the evidence showed defendant possessed other uncharged images of child pornography, making it much more likely that he voluntarily possessed and viewed the image in question. Finally, defendant used software to erase files from his digital devices around the time he was being investigated, indicating a pattern of downloading child pornography and then deleting it to avoid detection. The totality of the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt.

People v. Swift, 2016 IL App (3d) 140604 The State charged defendant with aggravated driving under the influence. 625 ILCS 5/11-501(a)(6), (d)(1)(C). One of the elements of aggravated DUI is that defendant's driving was a proximate cause of the victim's injuries. The indictment failed to include this element. After the first witness testified at trial, defendant moved to dismiss the indictment on the grounds that it was defective for failing to include an essential element of the charged offense. The trial court denied defendant's motion and directed the State to amend the indictment to include the missing element.

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

People v. Jones, 2012 IL App (2d) 110346 Once the grand jury has returned an indictment, it may not be broadened through amendment except by the grand jury itself. This rule ensures that individuals' rights are not at the mercy or control of the prosecutor. An exception to this rule exists allowing correction of formal defects if no surprise or prejudice results to the defendant. The lack of surprise by an amendment supports a finding that the amendment is merely technical.

A list of formal defects that may be corrected by amendment is contained in 725 ILCS 5/111-5, but the list is not exclusive. An amendment is substantive and therefore improper if it: (1) materially alters the charge, and (2) it cannot be determined whether the grand jury intended the alteration.

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

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

People v. Shipp, 2011 IL App (2d) 100197 A charge must set forth the nature and elements of the offense, as well as cite the statutory provision alleged to have been violated. 725 ILCS 5/111-3(a). It may be amended at any time to correct a formal defect, including a miswriting. 725 ILCS 5/111-5. Amendment is permissible if the change is not material or does not alter the nature and elements of the offense. Formal amendment is warranted especially where there is no resulting surprise or prejudice to the defendant or where the record shows that the defendant was otherwise aware of the actual charge. Generally, an error in the citation of the statute giving rise to a charge is a mere technical defect subject to amendment.

The State charged defendant with a violation of 720 ILCS 570/407(b)(2) in that he possessed with intent to deliver in violation of 720 ILCS 570/401(c) more than 1 gram but less than 15 grams of a substance containing cocaine. At arraignment, the court brought to

the prosecutor's attention that §407(b)(2) applies to an amount less than one gram, but the prosecutor declined to correct the inconsistency. Almost two years later, over defense objection, the court permitted the State to amend the charge to a violation of §407(b)(1), conforming the code section to the language of the body of the charge.

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

People v. Adams, 404 Ill.App.3d 405, 935 N.E.2d 693 (1st Dist. 2010) An indictment may be amended any time to correct formal defects, including miswritings. 725 ILCS 5/111-5(a). An amendment to an indictment to include an essential element must originate with the grand jury.

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

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

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

quantity of controlled substance "defines both the crime and the punishment." and is an essential element of the offense and not merely a "formal defect." The Court ordered the trial judge to enter judgment and sentence on the original charge.

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

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

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

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

§29-6
Statute of Limitations
Illinois Supreme Court
People v. Casas, 2017 IL 120797 Violation of bail bond under 720 ILCS 5/3-5(b) is a continuing offense for purposes of the statute of limitations. But it continues only until a final judgment in the case. Therefore, defendant, who was indicted for violating his bond in 1998, and tried and sentenced *in absentia* shortly thereafter, could not be prosecuted for violating bond after he was finally taken into custody in 2014, as the three-year limitations period had expired.

The continuing offense exception to the statute of limitations states, "When an offense is based on a series of acts performed at different times, the period of limitation prescribed by this Article starts at the time when the last such act is committed." 720 ILCS 5/3-8. The plain language of the violation of bail bond statute makes clear that the offense is committed on the thirtieth day after forfeiture of bond, but does not plainly state whether it is a continuing offense. Turning to the "nature of the offense," the court compared it to other

crimes whose statutes do not state whether they are continuing offenses, including escape. In **United States v. Bailey**, 444 U.S. 394 (1980), the United States Supreme Court characterized escape as a continuing offense due to the continued threat posed by the escapee, a position adopted by Illinois in **People v. Miller**, 157 IL App. 3d 43 (1st Dist. 1987). Even though those who violate bond have yet to be convicted and pose less of a threat than escapees, the Illinois Supreme Court found sufficient similarities between the offenses such that both must be considered continuing offenses.

The Supreme Court rejected defendant's reliance on **People v Grogan**, 197 Ill. App. 3d 18 (1st Dist. 1990), which held that defendants who violate bail bond do not pose the same continuing threat as escapees and therefore held that violation of bail bond is not continuing. Because bond imposes conditions and duties upon the defendant to return to court until the final order in the case, a violation occurs each time defendant fails to appear, and therefore **Grogan** must be overruled. The Supreme Court further rejected defendant's argument that the legislature signaled its intent by acquiescing in the years following **Grogan**, during which it did not amend the statute to clarify that violation of bail bond is a continuing offense. Legislative intent to treat the offense similar to escape is evident from other sections of the Code of Criminal Procedure, including in multiple provisions treating the two offenses identically for purposes of providing for trials *in absentia*.

People v. Shinaul, 2017 IL 120162 As part of a negotiated guilty plea agreement, defendant pled guilty to one count of aggravated unlawful use of weapons and in exchange the State nol-prossed the eight remaining counts. Years later defendant filed a 2-1401 petition for relief from judgment (735 ILCS 5/2-1401) seeking to vacate his conviction since it was void under **Aguilar**, 2013 IL 112116. The State conceded that **Aguilar** voided defendant's conviction and filed a motion to reinstate some of the charges it had nol-prossed. The circuit court vacated defendant's conviction and allowed him to withdraw his guilty plea, but denied the State's motion to reinstate the charges.

The Supreme Court, with one justice dissenting, held that the statute of limitations barred the State from reinstating the nol-prossed charges. When a circuit court vacates a judgment and allows a defendant to withdraw his guilty plea, the case returns to its status before the judgment was made. And generally the State may in this situation ask the court to reinstate nol-prossed charges. But here the statute of limitations constituted an absolute bar against reinstating the charges since the three-year limitations period had already run. 720 ILCS 5/3-5.

Although a statute of limitations period may be tolled, the court found no authority for the State's argument that it is tolled when a defendant successfully vacates his conviction after the period of limitations has expired on charges that were dismissed as part of a plea agreement. The court specifically rejected the State's argument that the "prosecution" against defendant was still pending and had not expired because defendant's case never had a final disposition on appeal. The court refused to read into the statute "exceptions, limitations, or conditions" that were not plainly spelled out.

The State was barred from reinstating the nol-prossed charges.

People v. Chenoweth, 2015 IL 116898 Under section 3-5(b) of the Criminal Code, a felony prosecution must be commenced within three years after the offense was committed. 720 ILCS 5/3-5(b). Section 3-6, however, extends the statute of limitations in certain situations. For theft involving breach of a fiduciary obligation, section 3-6(a) allows a prosecution to begin "within one year after the discovery of the offense by the aggrieved person." In the

absence of such discovery, the prosecution must begin "within one year after the proper prosecuting office becomes aware of the offense."

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

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

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

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

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

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

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

Illinois Appellate Court

People v. Hartfield, 2022 IL App (1st) 200719 Trial counsel was ineffective for failing to raise a statute-of-limitations challenge to the indictment.

In December of 2017, defendant was charged with several counts of predatory criminal sexual assault as well as aggravated and simple criminal sexual assault. The count charging aggravated criminal sexual assault alleged that defendant committed bodily harm by impregnating the complainant. The charge alleged that the offense occurred between 2007 and 2016.

Ordinarily, the State must commence a prosecution for aggravated criminal sexual assault "within 3 years after the commission of the offense." 720 ILCS 5/3-5(b). Section 36 of the Code, however, provides that the State may commence prosecution for aggravated criminal sexual assault within 10 years of the commission of the offense "if the victim reported the offense to law enforcement authorities within 3 years after the commission of the offense."

Where, as here, the State proceeds on a theory that the accused had engaged in a continuous course of aggravated criminal sexual assault, the offense is not complete "until the last act was accomplished." The State argued that, where the assaults occurred between 2007 and 2016, it had within 3 years of 2016 in order to indict defendant, and reporting within 3 years of 2016 would trigger a 10-year extension.

The Appellate Court disagreed. By asserting that defendant committed bodily harm, "to wit: pregnancy," the State fixed the charge to a specific date. Acts occurring after the pregnancy – which ended with the birth of the child in October 2012 – were not covered by the indictment. Because the victim did not report the offense to law enforcement until 2017, nearly five years after the last act of the offense as charged, the State was not entitled to the 10-year extension of the statute of limitations.

An objection to the indictment would have resulted in dismissal of the charge (the Appellate Court found it "highly unlikely" the State could have amended the charge given that nearly all of the evidence presented at trial concerned acts that occurred before the pregnancy) and prevented the eventual conviction and 20-year sentence. Therefore, counsel's performance was both unreasonable and prejudicial. The court vacated the conviction and remanded for sentencing on one count of criminal sexual assault which, as charged, formed a lesser-included offense of the aggravated criminal sexual assault count at issue.

People v. Puruncajas, 2022 IL App (1st) 192515 In 2019, defendant was convicted of two counts of aggravated criminal sexual abuse for conduct occurring between August 1998 and August 2003. Both counts alleged that the relevant statute of limitations was extended pursuant to 720 ILCS 5/3-6(j). On appeal, defendant argued that the statute of limitations had run, and that his convictions should therefore be vacated.

The statute of limitations changed three times during the period from August 1998 to August 2003. The applicable statute of limitations in effect in August 1998, was "three years after the commission of the offense or one year after the victim turns 18, whichever is greater." Here, the victim was seven or eight years old in August 1998, so the applicable statute of limitations would not have expired until August 2009, one year after the victim turned 18.

Effective January 1, 2000, the statute of limitations for aggravated criminal sexual abuse was extended to allow prosecution to be commenced "within 10 years of the victim attaining the age of 18 years, if the victim reported the offense to law enforcement authorities before he or she attained the age of 21 years." This meant that the limitations period could not expire any earlier than August 2011, when the victim turned 21.

And, the limitations period was again extended in August 2002, to eliminate the requirement that the offense be reported prior to the victim's turning 21, and instead simply

providing that prosecution may be commenced "within 10 years after the child victim attains 18 years of age." Thus, the limitations period did not expire until August 2018.

Here the charges were brought in 2015. The limitations period was extended during the years prior to defendant's prosecution, and it is well established that the legislature cannot enact a statute that "reinstates" a prosecution after the passage of time has barred it. Here, however, defendant had never acquired a right to acquittal through the running of the statute of limitations at any time prior to the effective dates of the relevant statutory amendments. Thus, the extended limitations period applied to defendant's prosecution, and his convictions were affirmed.

People v. Casas, 2018 IL App (2d) 150456-B Violation of bail bond is a continuing offense, but only so long as a defendant is obligated to appear in court. In previous Supreme Court proceedings in this matter, the Court held that defendant's obligation to appear pursuant to his bond terminated when he was tried *in absentia* and sentenced for the underlying offense. The Supreme Court then remanded to the Appellate Court for consideration of whether the State adequately pled an exception to the statute of limitations.

The Appellate Court agreed that the State had pled the exception from 720 ILCS 5/3-7(a), which tolls the statute of limitations when a defendant is "not usually and publicly resident" in Illinois. The State did not cite the statute or use the statutory language, but did allege that defendant had "used [a] false identity to evade prosecution." As a matter of law, a defendant is not "usually and publicly resident" when he is living in Illinois under a false identity. While quoting and citing the statutory exception to the limitations period is the better practice, the circumstances alleged were sufficient to put defendant on notice of the basis on which the State sought tolling.

People v. Wells, 2017 IL App (1st) 152758 A *nolle prosequi* is the formal entry by the State showing an unwillingness to prosecute a charge and leaving the matter in the same condition as it was before the prosecution began. Generally, a prosecution must be commenced within three years after the commission of a felony offense. 720 ILCS 5/3-5(b). This period does not include any period when a prosecution is pending against a defendant for the same conduct. 720 ILCS 5/3-7(c).

Defendant entered a negotiated guilty plea to one charge and in exchange the State nol-prossed the remaining charges. Several years later, defendant successfully withdrew his guilty plea and in response the State moved to reinstate the nol-prossed charges.

The Appellate Court held that based on the Illinois Supreme Court's decision in **Shinaul**, 2017 IL 120162, the State could not reinstate the nol-prossed charges since they were barred by the statute of limitations. **Shinaul** held that the statute of limitations is not tolled where the State nol-prosses charges as part of a guilty plea.

Here, the State sought to reinstate charges that were originally nol-prossed as part of the guilty plea. But by the time defendant withdrew his plea the three-year limitations period on those charges had expired. The State was thus barred from reinstating the charges.

People v. Lutter, 2015 IL App (2d) 140139 The statute of limitations for a misdemeanor is generally six months. When the charge shows on its face that the offense was not committed within the applicable limitations period, an element of the State's case is to allege and prove the existence of some fact which invokes an exception to the statute of limitations. See **People v. Morris**, 135 Ill. 2d 540, 554 N.E.2d 150 (1990).

The court concluded that where the information "vaguely alleged facts" that might arguably toll the statute of limitations, but the State offered no evidence of those facts during

trial, defendant's motion for acquittal should have been granted. Under **Morris**, the State had the burden to both allege and prove facts which would extend the statute of limitations.

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

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

People v. Leavitt, 2014 IL App (1st) 121323 Under Illinois law, the statute of limitations is tolled when an indictment is returned or an information is filed. The Appellate Court concluded that where an indictment was returned within the three-year-statute of limitations, but was sealed because there was an ongoing investigation into police misconduct, no statute of limitations violation occurred when the indictment was unsealed after the statute of limitations had expired.

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

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

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

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

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

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

People v. Chenoweth, 2013 IL App (4th) 120334 Generally, a three-year statute of limitations applies to the offense of unlawful financial exploitation of an elderly person. (725/ILCS 5/3-5(b)) However, 720 ILCS 5/3-6 creates an extended statute of limitations for

the prosecution of theft involving a breach of a fiduciary obligation. Under §3-6, such prosecutions may be commenced within one year after the "the discovery of the offense by an aggrieved person, . . . or in the absence of such discovery, within one year after the proper prosecuting authority becomes aware of the offense," provided that the statute of limitations is not extended by more than three years.

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

The court rejected the argument that the one-year extension did not begin to run until the victim knew that defendant had illegally misappropriated a specific sum of money in breach of her fiduciary duties. The extended statute of limitations commences upon "the discovery of the offense by an aggrieved person," and does not require that the aggrieved person have knowledge that each element of an offense has occurred. Because the victim discovered when she spoke to the officer that defendant had written unauthorized checks on the victim's account, she discovered at that time that defendant had misappropriated her money. Therefore, the extended statute of limitations began to run on that date.

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

People v. Macon, 396 Ill.App.3d 451, 920 N.E.2d 1224 (1st Dist. 2009) Illinois law requires that unless the statute of limitations is extended, a prosecution for a felony offense must commence within three years of the commission of the offense. The purpose of the statute of limitations is to minimize the danger of punishment for conduct which occurred in the distant past, to encourage the State to be diligent in its investigation, and to provide the trier of fact with fresh evidence that is not distorted by the passage of time.

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

The statute of limitations can be extended in some situations, and certain periods can be excluded from the statute of limitations. Such exceptions are not self-executing, and must be alleged on the face of the indictment along with the specific facts and exception that would suspend the statute. Where the offense in question was committed on May 20, 2002, the statute of limitations expired on May 20, 2005. Thus, an indictment filed April 20, 2006 was defective on its face. The court noted, however, that the prosecution could refile the indictment with facts giving rise to an extension of the limitation period.

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

People v. Mann, 341 Ill.App.3d 832, 794 N.E.2d 425 (2d Dist. 2003) Under 720 ILCS 5/3-7(c), the statute of limitations for an offense is tolled during any period in which "[a] prosecution is pending against the defendant for the same conduct, even if the indictment or information which commences the prosecution is quashed or the proceedings set aside, or . .

. reversed on appeal." The court concluded that a misdemeanor action instituted by a complaint tolls the statute of limitations, even though §3-7 refers only to prosecutions commenced by indictment or information. Here, a misdemeanor prosecution for driving while license revoked was based on the "same conduct" as a felony prosecution for aggravated driving while license revoked, although the felony charge involved two additional elements. The misdemeanor complaint stated defendant drove a motor vehicle on a specific date while his license was revoked, and the same act of driving was alleged in the felony charge for aggravated driving while license revoked.

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

People v. Martin, 266 Ill.App.3d 369, 640 N.E.2d 638 (4th Dist. 1994) Defendant was charged with three counts of reckless homicide. After the charges had been pending for approximately 20 months, the trial court denied continuance motions by both parties and set the case for trial. The State then dismissed the charges, but on the same day recharged the same counts plus two counts of misdemeanor DUI and one count of leaving the scene of an accident. Defendant was convicted of all six counts. On appeal, defendant contended that the new charges were improper because the 18-month statute of limitations for misdemeanors had expired when the new information was filed. However, Illinois law provides that the statute of limitations period does not include any period of time in which "a prosecution is pending against the defendant for the same conduct, even if the indictment or information which commences the prosecution is quashed or the proceedings thereon are set aside, or reversed on appeal." Because the new charges were based on the same "conduct" as the reckless homicide counts, the period during which the original counts had been pending was excluded from the statute of limitations period.
Updated: July 28, 2025