ILLINOIS JUDICIAL BENCHBOOK ON CRIMINAL LAW AND PROCEDURE 2022

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Law and authorities good through December 31, 2021

Supreme Court of Illinois
and the
Administrative Office of the Illinois Courts

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The Benchbook should be used only as a practical legal reference guide. In ***People ex rel. Glasgow v. Carlson***, 2016 IL 120544, the Supreme Court of Illinois commented on the trial court's reliance on benchbook excerpts, stating, "[w]e caution our circuit courts, however, that a benchbook is to be used only as a practical legal reference guide. Thus, a benchbook should not be viewed or treated as authoritative precedent" and cited language found in the front matter of each benchbook "explaining a '[b]enchbook has no precedential value, is not intended to be cited by courts or litigants as authority in pleadings, rulings or otherwise, and is not a substitute for reading the statutes and cases cited herein.'" ***Id.*** at par. 29.

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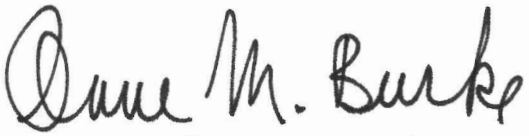
FOREWORD

On behalf of the Illinois Supreme Court, I am pleased to present this Benchbook. This volume is one of a series of judicial benchbooks offered in various topical areas and designed to serve as a key resource to assist Illinois judges in the performance of their judicial duties.

Benchbooks are published annually to provide the most current substantive legal information, complemented by practice aids, sample orders, and checklists. We are confident that you will find them to be informative and useful.

Benchbooks are produced through the collaborative efforts of the Judicial Education Division of the Administrative Office of the Illinois Courts, the Benchbook Editorial Board of the Illinois Judicial College Committee on Judicial Education, and individual benchbook teams of law school professors, judicial editors and judicial peer reviewers. The Court is grateful to everyone who has contributed their time and talent to the production of this publication.

Sincerely,



Anne M. Burke, Chief Justice
Illinois Supreme Court

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Those who serve and have served on the Criminal Law Benchbook Writing and Editorial Team include: Past Chairman Hon. Stuart Palmer, Past Chairman Hon. Mark H. Clarke, Past Chairman Hon. Scott A. Shore, Past Chairwoman Hon. Robbin J. Stuckert, Current Chairman Hon. David A. Brown, Topic Editors and Peer Reviewers including Hon. Sophia Atcherson, Hon. Tom Callum, Hon. Jerry E. Crisel, Hon. Kathryn E. Creswell, Hon. Lawrence E. Flood, Hon. Robert L. Freitag, Hon. Margaret Frossard, Hon. Timothy J. Joyce, Hon. Diana L. Kenworthy, Hon. James A. Knecht, Hon. Bertina E. Lampkin, Hon. Timothy J. McCann, Hon. Brett N. Olmstead, Hon. Domenica A. Osterberger, Hon. Dennis J. Porter, Hon. Michael P. Toomin, Hon. Scott H. Walden, Hon. Lisa Holder White, and Hon. William A. Yoder, and additional contributions of Hon. John Coady, Hon. Larry Fox, Hon. John K. Greanias, Hon. Colleen McSweeny Moore, Hon. John T. Phillips, Hon. Patrick Quinn, and Hon. Christopher C. Starck, with the faculty assistance of Prof. Martha Pagliari, Prof. James Carey, Prof. Ralph Ruebner, Asst. Prof. Colin Miller and the Research Fellows from The John Marshall Law School, including Ali Abid, Katarina Durcova and Peter Follenweider, and Hon. David Erickson, of the Chicago-Kent College of Law. Hon. David Erickson would like to give grateful acknowledgement to those who provide valuable synopses of cases, edits, texts and on-line resources utilized in preparation of these materials, including Ana Montelongo, Research Assistant from the Chicago-Kent College of Law.

We wish to thank all who have contributed to the success of this publication and we particularly acknowledge the hard work and dedication of staff of the Judicial Education Division, Administrative Office of the Illinois Courts for assistance in managing the project.

It is our hope that our colleagues will find this Benchbook to be a valuable tool in their work on the bench. The book is regarded as a work in progress and will be updated continually over time. We welcome your feedback on how we can improve the Benchbook with a view to ensuring that it effectively performs its important task in the administration of justice for which it is designed. Please share your suggestions with the Administrative Office of the Illinois Courts, Judicial Education Division at JudicialEducation@IllinoisCourts.gov.

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USING THE BENCHBOOK

A. SCOPE AND PURPOSE OF THE BENCHBOOK

The purpose of this Benchbook is to provide judges at all levels of experience a practical legal reference guide for use in the courtroom, providing concise, well-organized outlines of statutory law and case law.

Case law and authorities cited in this Benchbook are current through December 31, 2021 with later materials included. Reference is also recommended to the Illinois Judicial Education Conference Criminal Law Updates and Hot Topics, providing a review of recent cases, rules and statutes, organized in the same manner as the Criminal Law Benchbook and therefore readily cross-referenced. All of these resources are available by contacting the Administrative Office of the Illinois Courts, Judicial Education Division at JudicialEducation@IllinoisCourts.gov.

B. ORGANIZATION OF THE BENCHBOOK

Major sections covered in this book include:

- Special Prosecutors
- Complex Litigation
- Pre-Charging Issues
- Pre-Indictment
- Post-Indictment
- Jury Selection
- Trial Procedure
- Defenses in Criminal Cases
- Jury Instructions
- Jury Deliberations
- Post-Trial Proceedings
- Sentencing Procedure
- Sentencing Alternatives
- Assessment, Fees and Fines
- Motions to Reconsider Sentencing
- Appeal
- Collateral Remedies
- Extradition
- Sexually Dangerous Persons
- Sexually Violent Persons
- Drug Asset Forfeiture Procedure Act

The appendix contains a selection of practice aids and sample form orders. This supplemental information comes from judges who share their perspectives, insightful guidance, and suggestions in the form of procedural checklists and other reference tools. An index is also provided at the end of this Benchbook for your convenience.

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1.1 Search and Seizure—Bench Issues

A. Search Warrants

1. Standard for Issuance

Search warrants authorize searches of places and seizure of things. A warrant need not name a specific person and may be directed at the property of a non-culpable third party. ***Zurcher v. Stanford Daily***, 436 U.S. 547, 554 (1978).

725 ILCS 5/108-4 governs issuance of search warrants. *See also* U.S. Const. amend. IV and Il. Const. art. I, §6. ***Illinois v. Gates***, 462 U.S. 213, 214 (1983), defines probable cause as a "fair probability that contraband or evidence of a crime will be found in a particular place," and Illinois concurs. ***People v. Tisler***, 103 Ill.2d 226, 238 (1984).

"Probable cause" exists if there is a reasonable or "fair probability that contraband or evidence of a crime will be found in a particular place" given a common-sense assessment of the totality of the circumstances. ***Gates***, 462 U.S. at 238. Hearsay may be the basis of probable cause, and if there is an anonymous tip, the tip must standards of reliability under the ***Gates*** approach. ***People v. Tisler***, 103 Ill.2d 226, 237 (1984).

The complaint, affidavit of probable cause, and warrant should stand independently. If there are gaps in the warrant, reference to supporting documents can sometimes be used, but such references cannot be used a substitute for the absence of any description of a person or place to be searched. ***See People v. Mabry***, 304 Ill.App.3d 61, 67 (2nd Dist. 1999). A warrant must describe the location and evidence sought with sufficient particularity. ***See*** **People *v. McCarty***, 223 Ill.2d 109, 149-51 (2006).

> **Note:** GPS monitoring of a private vehicle requires a search warrant. ***United States v. Jones*****,** 565 U.S. 400, 404 (2012); ***see also*** **720 ILCS 5/21-2.5 (electronic tracking devices prohibited)**; ***People v. LeFlore***, 2015 IL 116799, ¶ 71 (GPS case in which good faith exception to exclusionary rule applied).

Note: Generally, a search for cell phone data requires a warrant. ***Riley v. California***, 573 U.S. 373, 403 (2014).

2. Anticipatory Search Warrants

In an anticipatory warrant, probable cause is conditional—the evidence is expected to be at future location upon a triggering event. Such warrants are constitutional. ***United States v. Grubbs***, 547 U.S. 90, 96 (2006). *See e.g.* ***People v. Bui***, 381 Ill.App.3d 397, 412 (1st Dist. 2008); ***People v. Harris***, 2015 IL App (1st) 132162, ¶ 31.

3. Execution of Search Warrants—Knock and Announce

An unannounced entry into a home might be unreasonable under the Fourth Amendment. ***Wilson v. Arkansas***, 514 U.S. 927, 934 (1995). Hence, the "knock and announce" rule generally applies when executing search warrants. ***See Hudson v. Michigan***, 547 U.S. 586, 589 (2006). But the state may establish the reasonableness of an unannounced entry. ***Wilson***, 514 U.S. at 936.

Notably, the exclusionary rule does not apply to knock and announce violations. ***Hudson***, 547 U.S. at 599.

Note: Illinois has codified the manner of the execution of search warrants via **725 ILCS 5/108-8(b)**, which provides that all "necessary and reasonable force may be used to effect an entry…to execute a search warrant," and that a court *may* pre-authorize a "no knock" warrant upon the showing of certain exigent circumstances.

Note: A *warrantless* search of premises may not be premised on a police-created exigency through an actual or threatened Fourth Amendment violation, but a warrantless entry is otherwise allowed to prevent the destruction of evidence. ***Kentucky v. King***, 563 U.S. 452, 469 (2011).

4. Search of Persons Present

Individualized suspicion is required for a pat-down search of a person for weapons in a public place where a warrant is

being executed. ***Ybarra v. Illinois***, 444 U.S. 85, 94 (1979). And probable cause is required to otherwise detain and search a person in a public place. ***Ybarra***, 444 U.S. at 95.

Police may detain an occupant of a premises that is being searched—the "authority to detain incident to a search is categorical." ***Muehler v. Mena***, 544 U.S. 93, 99 (2005). Further, detaining an occupant outside of the premises while police are seeking approval of a search warrant may be reasonable. ***Illinois v. McArthur***, 531 U.S. 326, 331 (2001) (two-hour detention upheld). Last, police may use reasonable force to detain an occupant. ***Mena***, 544 U.S. at 98 (use of handcuffs upheld).

> **Note: 725 ILCS 5/108-9** codifies the circumstances of detention and provides that a person may be detained during the execution of a search warrant to protect the police or the destruction of evidence. But there must be a sufficient connection between the detainee and the location or person subject to the warrant. ***People v. Gutierrez***, 109 Ill.2d 59, 62 (1985). Further, non-resident occupants of a home may not be searched pursuant to this statute absent such a connection or probable cause. ***People v. Coats***, 269 Ill.App.3d 1008 (3rd Dist. 1995) (declining to find which standard applies).

5. Inventory and Return

725 ILCS 5/108-10 requires that a return and inventory of items seized via warrant must be given to the court without unnecessary delay. But a violation of this standard does not invalidate an otherwise lawful search. ***People v. York***, 29 Ill.2d 68 (1963). ***See also*** **725 ILCS 5/108-2, 108-11,** and **108-12** (concerning disposition of seized property.)

6. Execution of Search Warrants

725 ILCS 5/108-6 requires that a search warrant be executed within 96 hours of issuance.

If an error in the warrant's description of location is discovered during the search, the validity of the search will be based on the reasonableness of the officers' conduct. ***Maryland v. Garrison***, 480 U.S. 79, 87 (1987). ***See also People v. Luckett***, 273 Ill.App.3d 1023, 1033 (1st Dist. 1995) (upholding search immediately after mistaken entry to adjoining apartment).

7. Out-of-State Internet and Telecommunications

Illinois search warrants must be honored by out-of-state "wire or electronic communication" providers, which applies to internet and telecommunications providers. ***See* 18 U.S.C. § 2701 *et seq***.

B. Eavesdrop Warrants

1. Grounds

Katz v. United States, 389 U.S. 347, 358 (1967), holds that that electronic eavesdropping is a search and seizure subject to Fourth Amendment principles.

725 ILCS 5/108a-1 *et seq*. governs one-party consent eavesdropping, which turns on reasonable cause, a term synonymous with probable cause. ***Cf*. *People v. Damian***, 374 Ill.App.3d 941, 945 (5th Dist. 2007).

725 ILCS 5/108b-1 *et seq*. governs non-consensual eavesdropping, for which an application must be made to the chief judge of the circuit.

720 ILCS 5/14-3 lists exemptions from the eavesdropping statute, including, *inter alia*, recordings during a traffic stop or via tasers.

Eavesdropping is permitted in investigations of child sex crimes, child prostitution, or human trafficking. ***See* 720 ILCS 5/14-3(g); (g-6)**.

720 ILCS 5/14-3(o) allows eavesdropping during hostage or barricade situations.

2. After-Fact Approval of Emergency Eavesdrop

***See* 725 ILCS 5/108A** and **725 ILCS 5/108B**.

Note: Fifty minutes was a sufficiently short period of time to justify eavesdropping without an order. ***People v. Schnurr***, 206 Ill.App.3d 522, 532 (2nd Dist. 1990).

See Appendix for Suggested "Judicial Overhear (Eavesdropping) Checklist" on page A – 3.

3. Federal Standards Control

In a joint federal and state investigation, electronic surveillance obtained under federal law is admissible even if it violates Illinois law, absent a showing of collusion. ***People v. Coleman***, 227 Ill.2d 426, 439 (2008).

4. Overhear Return

Recordings must be immediately returned to the court to preserve their integrity, but the court need not immediately review same. ***See 725* ILCS 5/108A-7(b); *People v. Cunningham***, 2012 IL App (3d) 100013, ¶ 26.

5. Warrantless Overhear Upon State's Attorney's Authorization

Upon reasonable cause, the state's attorney may authorize an eavesdrop warrant in connection with undercover investigations of drug transactions or for controlled buys for a 24-hour period. **720 ILCS 5/14-3(q)**.

C. Investigatory Subpoena

The state's attorney may issue a subpoena duces tecum regarding suspected criminal activity even in the absence of an existing criminal charge. ***People v. Nohren,*** 283 Ill.App.3d 753, 758 (4th Dist. 1996).

D. Arrest Warrants

1. When Arrest Warrant May Issue

725 ILCS 5/107-9 provides that an arrest warrant may issue upon the filing of a complaint. **725 ILCS 5/111-2** provides that an arrest warrant shall issue upon the filing of an information or indictment.

2. Contents of Arrest Warrant

725 ILCS 5/107-9(d) lists the required contents of an arrest warrant (*e.g.*, name, sex, birth date of person to be arrested, nature of the offense, etc.).

Regarding defective warrants, **725 ILCS 5/107-10** provides that an arrest warrant "shall not be quashed or abated, nor shall any person in custody for an offense be discharged from such custody because of technical irregularities not affecting the substantial rights of the accused."

1.2 Initiation of Prosecution

A. Misdemeanors

Misdemeanors may be charged by complaint, information, or indictment. **725 ILCS 5/111-2(b)**. A complaint shall be sworn to and signed by the complainant, but if a peace officer is a complainant, his signature is sufficient. **725 ILCS 5/111-3(b)**. Uniform traffic tickets and uniform conservation tickets are deemed complaints to which a defendant may plead, unless he demands that a verified complaint be filed. **725 ILCS 5/111-3(b)**.

Preliminary hearings are not required for misdemeanors. ***People v. Majors***, 405 Ill.App.3d 879, 881 (3rd Dist. 2010).

B. Felonies

1. Information

Felonies must be charged via information or indictment. **725 ILCS 5/111-2(a)**.

An information is a verified statement charging the offense and signed by a State's Attorney. **725 ILCS 5/102-12**. If a felony is charged by information, a preliminary hearing must be held or waived. **725 ILCS 5/111-2(a)**.

725 ILCS 5/111-3 sets forth the requirements for the form of a charge.

After preliminary hearing or waiver of same, a prosecutor may pursue all offenses arising from the same transaction or conduct of a defendant, even though the information filed at the preliminary hearing charges only one or some of the offenses arising from that transaction or conduct. **725 ILCS 5/111-2(f)**; ***see People v. Velez***, 2012 IL App (1st) 110801, ¶ 12.

A defendant has the right to counsel at a preliminary hearing ***Moore v. Illinois***, 434 U.S. 220, 228 (1977).

Hearsay evidence is admissible at the preliminary hearing. ***See People v. Waid***, 221 Ill.2d 464, 479 (2006).

3. Indictments

(a) Generally

The Grand Jury consists of 16 citizens, a quorum is 12, and at least nine must find probable cause to issue an indictment. **725 ILCS 5/112-1**; **725 ILCS 5/112-4(d).**

A checklist is provided at page A-5 of the Appendix hereto, for judges' use when installing a new Grand Jury. Note that practices differ from jurisdiction to jurisdiction. In lieu of providing a suggested "script" we refer the reader to the Administrative Office Handbook for Grand Jurors at www.illinoiscourts.gov/circuitcourt/jury/grandjuror.asp.

An indictment is a written statement charging an offense that is presented by the grand jury to a court. It must be signed by the foreman of the grand jury. **725 ILCS 5/102-11; 725 ILCS 5/111-3(b)**.

(b) Sufficiency

The requirement that the charges recite the nature and elements of the offense is generally satisfied by use of the language of the statute defining the offense. ***People v. Nibbio***, 180 Ill. App. 3d 513 (5th Dist. 1989). *See also* ***People v. Ikpoh***, 242 Ill. App. 3d 365, 380 (2d Dist. 1993).

Charging documents alleging child endangerment and domestic battery were properly dismissed due to the State's failure to include any identifying information or to amend when directed to do so, to identify the alleged minor victims. It is not sufficient that evidence or other discovery indicates the identity of the alleged victim. ***People v. Espinoza***, 2015 IL 118218.

(c) Amendment

Indictments, information, or complaints shall not be dismissed because of formal defects, including, *inter alia*, misjoinder of parties or of offenses, but may be amended on motion by the state or the defendant. **725 ILCS 5/111-5**.

An amendment to an indictment "is substantive" and thus prohibited "if it alters an essential element of the offense." ***People v. Kelly***, 299 Ill.App.3d 222, 227 (3rd Dist. 1998).

(d) ***Apprendi v. New Jersey***, 530 U.S. 466 (2000)

As a result of ***Apprendi***, **725 ILCS 5/111-3(c-5)** states:

> "[I]f an alleged fact (other than the fact of prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument

or otherwise provided to the defendant through a written notification before trial, submitted to the trier of fact as an aggravating factor, and proved beyond a reasonable doubt."

3. Juveniles

(a) Excluded jurisdiction from Juvenile Court Act

A minor who was at least 16 years of age at the time of the offense and who is charged with (i) first degree murder, (ii) aggravated criminal sexual assault, and (iii) aggravated battery with a firearm where the minor personally discharged the firearm shall be prosecuted under the criminal laws and not in juvenile court. **705 ILCS 405/5-130(1)(a)**.

People ex rel. Alvarez v. Howard, 2016 IL 120729, retroactively applied a statutory amendment raising the age of transferred minor from 15 to 16.

The automatic transfer statute is not unconstitutional. ***People v. Patterson***, 2014 IL 115102, ¶ 127.

(b) Presumptive and Discretionary Transfer from Juvenile Court to Adult Court

The prosecution of a minor 15 years or older may be presumptively transferred to adult court on motion of the state's attorney when certain conditions regarding a forcible felony are met. The judge shall enter an order permitting transfer unless the judge makes a finding based on clear and convincing evidence that the prosecution of the minor should not be in adult court based on certain statutory criteria. ***See*** **705 ILCS 405/5-805(2)**.

The prosecution of a minor 13 years or older may be transferred to discretionarily transferred to adult court on motion of the state's attorney showing that

it is not in the best interest of the public to proceed against the minor in juvenile court. The court must consider certain statutory criteria. **705 ILCS 405/5-805(3)(b)**.

(c) Prosecution of a Minor after Attainment of Majority Age

The state may charge and prosecute a defendant over 21 years of age in adult court in a discretionary transfer case for crimes committed when the defendant was 14 or 15. ***People v. Fiveash***, 2015 IL 11766, ¶ 48.

C. Filing Deadline Calculation

1. Statute of Limitations

Absent certain exceptions, the statute of limitations is three years for felonies and 18 months for misdemeanors. There is no statute of limitations for certain specific offenses, including murder. **720 ILCS 5/3-5**.

The statute of limitations may be extended for a variety of prosecutions listed in **720 ILCS 5/3-6**.

2. Time Computation

The relevant time period is computed under the Statute on Statutes by excluding the first day of the term and including the last. ***See* 5 ILCS 70/1.11**.

D. Diversion Programs

The state may elect upon filing, or at a later stage of the proceedings, to offer or agree to programs intended to avoid or divert the normal process of prosecution.

Among such options are:

1. Mental Health Court per **730 ILCS 168/1 *et seq.***

2. Drug Court per **730 ILCS 166/1 *et seq.***

3. Veterans Court per **730 ILCS 167/1 *et seq.***

4. Civil Commitment of Sexually Dangerous Persons (diversion in lieu of prosecution) per **725 ILCS 205/0.01 *et seq.***

5. Diversion to counseling for teens charged with "sexting" (essentially deferred prosecution to avoid criminal record). **705 ILCS 405/3-1**.

PART I – PRE-TRIAL

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1.3 Post-Arrest Procedure

A. ***Gerstein / McLaughlin*** Hearing

1. Probable Cause to Detain

The Fourth Amendment to the U.S. Constitution requires a prompt judicial determination of probable cause as a prerequisite to pre-trial restraint, when the arrest is not pursuant to a warrant. ***Gerstein v. Pugh***, 420 U.S. 103 (1975). Prompt does not mean as soon as the administrative steps incident to arrest are completed. ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991). A state could combine probable cause determinations with arraignment, even if such combination resulted in a delay. A delay of 48 hours "will as a general matter comply with the promptness requirement of ***Gerstein***." ***County of Riverside v. McLaughlin***, 500 U.S. 44, 56 (1991).

A ***Gerstein*** hearing is not a critical stage of the proceedings, so it may be *ex parte* and hearsay is permitted. The accused has no right to counsel or cross examination at such stage. ***Gerstein v. Pugh***, 420 U.S. 103 (1975).

But note, a ***Gerstein*** hearing marks the start of the prosecution for the purposes of the accused's Sixth Amendment right to counsel. ***Rothgery v. Gillespie County***, 554 U.S. 191 (2008).

725 ILCS 5/109-1 codifies ***Gerstein***.

2. First Appearance – Illinois Requirements

725 ILCS 5/109-1(b) requires an arrestee be taken before a judge and when an arrestee appears before the court, the judge must:

1. inform the arrestee of the charge against him or her;

2. advise the arrestee of his or her right to counsel;

3. schedule a preliminary hearing;

4. admit the arrestee to bail;

5. ask whether the arrestee has any children under eighteen years old living with the arrestee **725 ILCS 5/109-1.1**.

6. In addition to the requirements in **725 ILCS 5/109(b)**, the court should consider determining the need for a foreign language interpreter for the defendant to avoid unnecessary delays at future appearances. Pursuant to the Illinois Supreme Court Language Access Policy, the court should provide an interpreter for any "Limited English Proficient Person who is involved in legal proceedings as a party or witness." In addition, the Criminal Proceedings Interpreter Act requires that "[w]henever any person accused of a felony or misdemeanor is to be tried in any court …, the court on its own motion or that of defense or prosecution determine whether the accused is capable of understanding the English language and is capable of expressing himself in English …" **725 ILCS 140/1**.

    (a) Determining need for foreign language interpreter: the Court should ask open-ended questions in an attempt to determine if the LEP has a limited ability to speak English. If the Court conducts such an examination, the Court shall state its conclusion as to whether an interpreter is required in open court. The fact that an individual knows some English does not mean that person should not be afforded an interpreter. Examples of the open-ended questions that the Court should ask are contained in the Bench Card found in the Appendix.

B. Setting of Bail

See Appendix for "Checklist and Procedures for Setting Bail" on page A-6.

1. Misdemeanors—Per Statute and Rule

(a) Statutes

725 ILCS 195/1 (Quasi Criminal and Misdemeanor Bail Act) permits law enforcement officers to release on bail persons charged with specified conservation cases, traffic cases, quasi criminal offenses and misdemeanors, where there is in force a rule or order of the Supreme Court establishing a uniform schedule prescribing the amounts of bail. **725 ILCS 5/110-15** authorizes the Supreme Court to prescribe "a uniform schedule of amounts of bail" in such cases.

(b) Illinois Supreme Court Rules

Ill. S. Ct. R. 553 expands the locations at which bail or license may be posted, including credit card or online payment if permitted by local rules, or bail may be posted by mail (if outside of Cook County).

Ill. Sup. Ct. R. 528 sets bail as follows:

i. For offenses other than traffic or conservation offenses punishable by fine only which does not exceed $1,000, bail is $120.

ii. For offenses other than traffic or conservation offenses punishable by fine only which is in excess of $1,000, bail is $1,500.

iii. For other offenses, except domestic violence, including violation of any local government ordinance punishable by fine or imprisonment in a penal institution other than the penitentiary, or both, bail is $1,500 except class C misdemeanors for which bail is $120.

2. Felony—Factors for Consideration

There is a long list of factors set out in **725 ILCS 5/110-5**. ***People v. Ealy***, 49 Ill. App. 3d 922 (1st Dist. 1977), and ***People v. Saunders***, 122 Ill. App. 3d 922 (2d Dist. 1984), summarize the factors as follows: (1) the existence of doubt about defendant's guilt; (2) the likelihood that the defendant will appear in court; (3) the defendant's character; (4) the nature of the offense; (5) the defendant's post-conviction conduct; (6) the financial ability of the defendant to pay; (7) consent of defendant to periodic drug testing; and (8) whether defendant is a gang member or the charged offense is related to gang activity.

3. Bail Reform Act

- The **Bail Reform Act, S.B. 2034** (Eff. Jan. 1, 2018) amended the **Code of Criminal Procedure of 1963**.

- The **Bail Reform Act Trailer Bill, S.B. 2579** (Eff. Jan. 1, 2019) amended certain provisions of the original bill.

- The Bail Reform Act creates two categories of offenses.

    - Pursuant to **725 ILCS 5/102-7.1** a Category A offense is defined as First Degree Murder, a Class X felony, Class 1 felony, Class 2 felony and a long list of other specific felonies set out therein.

- Pursuant to **725 5/102-7.2** a Category B offense is defined as a business offense, petty offense, Class C misdemeanor, Class 3 felony or Class 4 felony, unless otherwise specified in Category A.

- Pursuant to **725 ILCS 5/109-1(A-5)** a person charged with an offense shall be allowed counsel at the hearing at which bail is determined under the Code. If the defendant desires counsel for his or her initial appearance but is unable to obtain counsel, the court shall appoint a public defender or licensed attorney at law of this State to represent him or her for purposes of that hearing.

- Pursuant to **725 ILCS 5/110-5(A-5)** there shall be a presumption that any conditions of release imposed shall be non-monetary in nature and the court shall impose the least restrictive conditions or combination of conditions necessary to reasonably assure the appearance of the defendant for further court proceedings and protect the integrity of the judicial proceedings from a specific threat to a witness or participant. The court shall consider the defendant's socioeconomic circumstance when setting conditions of release or imposing monetary bail.

- Pursuant to **725 ILCS 5/110-6** a person in custody solely for a Category B offense due to an inability to post monetary bail shall be brought before the court at the next available court date or 7 calendar days from the date bail was set, whichever is earlier, for a rehearing on the amount or conditions of bail or release pending further court proceedings. The court may reconsider conditions of release for any other person whose inability to post monetary bail is the sole reason for continued incarceration, including a person in custody for a Category A offense or a Category A offense and a Category B offense. The court may deny the rehearing permitted under this subsection (a-5) if the person has failed to appear as

required before the court and is incarcerated based on a warrant for failure to appear on the same original criminal offense.

- Pursuant to **725 ILCS 5/110-6.4** the Supreme Court may establish a risk-assessment tool to be used in proceedings to assist the court in establishing bail for a defendant by assessing the defendant's likelihood of appearing at future court proceedings or determining if the defendant poses a real and present threat to the physical safety of any person or persons.

- Pursuant to **725 ILCS 5/110-14(c)** a person with bail set on a Category B offense shall have $30 deducted from his or her 10% cash bond amount every day the person is incarcerated. The sheriff shall calculate and apply this $30 per day reduction and send notice to the circuit clerk if a defendant's 10% cash bond amount is reduced to $0, at which point the defendant shall be released upon his or her own recognizance.

- Pursuant to **725 ILCS 5/110-14(d)** the court may deny the incarceration credit in subsection (c) of this Section if the person has failed to appear as required before the court and is incarcerated based on a warrant for failure to appear on the same original criminal offense.

4. "No Bail" Warrants

Bail may be denied, under **725 ILCS 5/110-4**, when the proof is evident or the presumption great that life imprisonment may be imposed. Bail may also be denied, after a hearing in which the court determines that release would pose a threat to the safety of the victim or other person, where imprisonment without conditional and revocable release may be imposed, or stalking or aggravated stalking cases (and denial of bail is necessary to prevent fulfillment of the threat upon which the charge is based) or unlawful use of weapons (**720 ILCS 5/24-1(a)(4)**) when the offense is school-related.

The burden is also on the State in cases of stalking, or those when the accused's release is alleged to pose a threat. **725 ILCS 5/110-4**.

In ***People v. Simmons****,* 2019 IL App (1st) 191253, there was a pre-trial appeal of no bail order in an armed robbery case. The Court affirmed no bail order but gives a laundry list of factors to be applied, and discusses all alternatives available to trial judges, and when they may be applied.

5. Special Conditions of Bond

725 ILCS 5/110-10 prescribes numerous possible conditions of bond, ranging from general conditions to those appropriate to specific offenses. General conditions include: (1) appear to answer the charge, (2) not leave the state or commit a crime, (3) surrender, in the case of certain offenses, firearms, and (4) submit to a psychological evaluation. (Where such evaluation is ordered, the accused may be ordered to refrain from entering on a school property or school conveyance.)

Additional conditions are appropriate if the court finds they are reasonably necessary to ensure the defendant's appearance in court, protect the public from the defendant, or prevent the defendant's unlawful interference with the orderly administration of justice. These conditions include: (1) refrain from approaching certain persons or certain classes of persons; (2) refrain from engaging in certain activities or indulging in intoxicating liquors or in certain drugs; (3) work or pursue course of study or vocational training; or (4) be placed under direct supervision of the Pre-Trial Services Agency in a pre-trial bond home supervision capacity, with or without electronic monitoring.

725 ILCS 5/110-10(b)(14.1), **(14.2)**, **(14.3)** and **(14.4)** permit the court to set fees for persons under pre-trial supervision to include fees that may be charged in drug-related cases, DUI cases, and domestic violence cases for DNA testing, GPS electronic monitoring,

assessments and evaluations.

As a condition of bond on murder and other listed violent crimes, the court is to provide for surrender of the accused's passport or to include other travel restrictions. **725 ILCS 5/109-1**.

C. Failure to Appear

1. Failure-To-Appear Fee

725 ILCS 5/110-7(i) imposes a mandatory $75 fee against a person arrested for failure to appear when previously court-ordered to so appear, if defendant has posted bond to effect his release following such arrest. The fee applies in Criminal Code of 1961, Illinois Vehicle Code, the Wildlife Code, the Fish and Aquatic Life Code offenses, and comparable municipal code violations. When collected, $70 is to be remitted to the arresting agency which had affected arrest on the "fail-to-appear" warrant, and $5 is retained by the Circuit Court Clerk Operation and Administrative Fund (**705 ILCS 105/27.3d**).

2. Payment as Condition of Release

Section **5/110-7(i)** provides that the fee is to be assessed as a condition of release, "unless otherwise ordered."

1.4 First Appearance

A. Counsel

1. Appointment of Counsel

Note: According to **Section 113-3** of the Code of Criminal Procedure, in order to properly invoke the statutory right to counsel, "there [must] be a showing that defendant desired and requested counsel."

See **725 ILCS 5/113-3(a)** ("every person charged with an offense shall be allowed counsel before pleading to

the charge"); "Illinois provides a right to appointed counsel in criminal cases, which is broader than the constitutional right." ***People v. Campbell***, 224 Ill. 2d 80 (2007); **725 ILCS 5/103-4** (right to consult with an attorney). Once a complaint and arrest warrant are issued, a defendant's Sixth Amendment right to counsel attaches. Therefore, before the defendant is brought before the court, the right to counsel has already attached. ***People v. Dove***, 147 Ill. App. 3d 659 (4th Dist. 1986).

(a) Fine-Only Cases

The only Illinois exception to the right to counsel is when the offense is defined as "fine only." **725 ILCS 5/113–3(b)**. Any oral or written statement of intention by the State to "waive jail time" has no effect on the defendant's right to counsel, where the charges against the defendant may result in jail or imprisonment. Moreover, a waiver of jail time on the initial disposition would not necessarily carry over to resentencing on violation of probation, conditional discharge or supervision. In this regard, Illinois law (allowing counsel in every case that is not "fine only") is more inclusive than the Sixth Amendment which applies only where jail is actually imposed. **725 ILCS 5/113-3(b)**; ***People v. Campbell***, 224 Ill. 2d 80, 85 (2007).

(b) Jailable Offenses

In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. **725 ILCS 5/113-3(b)**.

An indigent defendant shall have counsel appointed for him or her if the defendant so

desires, and if the charges against the defendant could result in more than a fine only. ***People v. Morgese***, 94 Ill. App. 3d 638 (2d Dist. 1981). In ***Morgese***, the court found defendant entitled to counsel where defendant received probation. ***People v. Morgese***, 94 Ill. App. 3d 638 (2d Dist. 1981). *See also* ***People v. MacArthur***, 313 Ill. App. 3d 864, 869 (2d Dist. 2000).

Illinois has provided a right to counsel that is broader than the Sixth Amendment right to counsel; therefore, all defendants are to be advised of their right to counsel and the right to have counsel appointed if indigent if the charges against the defendant may result in imprisonment. ***People v. Campbell***, 224 Ill. 2d 80, 82, 87 (2007). Further, the failure to properly admonish a defendant regarding potential imprisonment is plain error. ***People v. Vernon***, 396 Ill. App. 3d 145, 150 (2d Dist. 2009).

The United States Supreme Court established that if the punishment was a suspended sentence which may result in imprisonment, then the right to counsel attaches. ***Alabama v. Shelton***, 535 U.S. 654 (2002).

(c) Pre-Assessment of Public Defender Fee

725 ILCS 5/113-3.1 provides that where the court appoints counsel to represent the defendant, the court may order the defendant to pay the court clerk a reasonable sum to reimburse the county or the state for such representation, not to exceed $500.00 for a defendant charged with a misdemeanor, $5,000.00 for a defendant charged with a felony, and $2,500.00 for a defendant who is appealing a conviction of any class offense.

The court may order that payments be made on a monthly basis during the term of representation. **725 ILCS 5/113-3.1(c)**. (However, the sum deposited as bond money shall not be used to satisfy this type of order of reimbursement. **725 ILCS 5/113-3.1(c)**).

This statute requires the court to conduct a hearing into defendant's financial circumstances and find an ability to pay before it may require defendant to pay reimbursement for appointed counsel; at the hearing, the focus must be on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided. ***People v. Love***, 177 Ill. 2d 550 (1997). *But see* ***People v. Bates***, 365 Ill. App. 3d 724 (4th Dist. 2006) (finding that the Court's holding in ***Love*** applies only to defendants who appear at sentencing hearing). ***People v. MacTaggart***, 2019 IL App (3d) 160583 (finding ability to hire counsel based on family/friends' generosity v. indigency based on "complete" picture of defendant's finances).

Where assessment of a public defender fee is a negotiated term of defendant's fully negotiated plea, the court is under no obligation to conduct a hearing pursuant to **725 ILCS 113-3.1** to determine defendant's ability to pay. ***People v. Evans***, 391 Ill. App. 3d 470 (4th Dist. 2009).

(d) Counsel of Choice

A defendant's right to select his counsel is a fundamental right, denial of which constitutes structural error. In ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 144 (2006), the district court erroneously deprived the defendant of his right to be represented by the counsel of his

choice. The Government argued that this deprivation did not violate the Sixth Amendment unless the defendant demonstrated that counsel who represented him in substitution of the counsel he wanted was ineffective under the ***Strickland*** standard. ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 144 (2006). The U.S. Supreme Court held a Sixth Amendment violation is complete when the court denies a defendant's right to select counsel of his or her choice, without a showing that subsequent counsel is ineffective. ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 147–48 (2006). Moreover, this error is a structural error that is not subject to harmless error analysis. ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 150 (2006).

In ***People v. Tucker***, 382 Ill. App. 3d 916 (2008), on the date scheduled for defendant's jury trial, trial court's denial of defendant's request for new counsel violated his right to counsel of choice, and the denial of defendant's request for new counsel was reversible error.

2. Communications without Presence of Counsel

A defendant who was automatically assigned counsel, but without affirmatively invoking his Fifth Amendment right to counsel, may waive ***Miranda*** rights to be interrogated while in custody. In ***Montejo v. Louisiana***, 556 U.S. 778 (2009), the U.S. Supreme Court overruled ***Michigan v. Jackson***, 475 U.S. 625 (1986), which prohibited police from interrogating a criminal defendant without counsel present at any point after the accused requested counsel at arraignment or a similar proceeding. In ***Montejo***, the defendant waived his ***Miranda*** rights and confessed to committing a murder. ***Montejo v. Louisiana***, 556 U.S. 778, 781 (2009). At the preliminary hearing, the defendant did not affirmatively request counsel but

stood silent for the entire proceeding. ***Montejo v. Louisiana***, 556 U.S. 778, 781 (2009). Nonetheless, the court appointed a public defender to represent the defendant, and after the hearing and without appointed counsel's knowledge or advice, detectives asked the defendant to take them to locate the murder weapon. ***Montejo v. Louisiana***, 556 U.S. 778, 781–82 (2009). The defendant again waived ***Miranda*** rights, and while traveling with the detectives, the defendant wrote an inculpatory letter apologizing to the victim's widow. ***Montejo v. Louisiana***, 556 U.S. 778, 782 (2009). The Louisiana Supreme Court held that the letter should not be suppressed under the ***Jackson*** rule because the defendant did not actually request or assert his Sixth Amendment right to counsel at his preliminary hearing. ***Montejo v. Louisiana***, 556 U.S. 778, 782 (2009).

Defendant did not specifically invoke his Fifth Amendment right to remain silent by merely remaining silent for almost three hours of the interrogation. ***Berghuis v. Thompkins***, 560 U.S. 370 (2010).

3. Appointment of Counsel in Civil Contempt Cases

While the Sixth Amendment grants indigent defendants the right to state-appointed counsel in criminal cases, the Fourteenth Amendment allows a State to provide fewer procedural protections in civil cases. ***In re Marriage of Betts***, 200 Ill. App. 3d 26 (4th Dist. 1990) (holding no right to counsel for indigents in civil contempt proceedings even if civil proceedings may result in imprisonment); *but see* ***Sanders v. Shephard***, 185 Ill. App. 3d 719 (1st Dist. 1989) (holding that indigents in indirect civil contempt proceedings are entitled to appointed counsel).

4. *Pro Se* / Self-Representation

(a) Constitutional Right

A defendant has a Sixth Amendment right to proceed *pro se*. ***Faretta v. California***, 422 U.S. 806 (1975). A defendant's constitutional right to self-representation is as basic and fundamental as his right to be represented by counsel. ***People v. Silagy***, 101 Ill. 2d 147, 179 (1984).

(b) Legal Standard for Waiver of Counsel

It is the obligation of the court to protect defendant's right to represent himself if the choice to do so has been made clearly and unequivocally after being properly admonished per **Rule 401(a)** regardless of how unwise or unskilled the decision may be, because the trial court did not find the Defendant had a mental disability that incapacitated him from understanding the court's admonitions. ***People v. Fisher***, 407 Ill. App. 3d 585 (4th Dist. 2011).

The court's inquiry should not place undue weight on defendant's lack of sufficient legal knowledge and expertise, but must instead determine whether defendant has the ability to make a knowing and intelligent waiver of his right to counsel. ***People v. Woodson****,* 2011 IL App. (4th) 100223.

Whether a defendant has made an intelligent waiver of the right to counsel depends, in each case, "upon the particular facts and circumstances of that case, including the background, experience, and conduct of the accused." ***People v. Baez***, 241 Ill. 2d 44, 116 (2011).

Defendant's poor performance at trial does not alone disqualify his right to self-representation. ***People v. Tatum***, 389 Ill. App. 3d 656 (2009).

A trial judge must protect an insistent defendant's right to represent himself, but may require representation by counsel if defendant is found unfit or suffering from a severe mental illness. ***United States v. Berry***, 565 F.3d 385 (7th Cir. 2009).

The trial judge must satisfy himself that the defendant's waiver of counsel is voluntarily, knowingly, and understandingly made and specifically, that defendant has the ability to understand the proceedings, that he knows the significance and consequences of his decision, and that his waiver was not coerced. ***People v. Simpson***, 172 Ill. 2d 117 (1996).

A defendant who has been found fit to stand trial does not have an automatic right to self-representation. ***Indiana v. Edwards***, 554 U.S. 164 (2008). The test, separate and beyond the test for fitness to stand trial, is whether he is mentally competent to proceed *pro se*. ***People v. Allen***, 401 Ill. App. 3d 840 (1st Dist. 2010); *see also* ***People v. Fisher***, 407 Ill. App. 3d 585 (4th Dist. 2011) (trial court could not deny defendant's clear and unequivocal request to represent himself on the ground that defendant is ignorant of the technical rules of law unless it found that defendant had a mental disability that incapacitated him from understanding the court's admonitions).

(c) Procedure for Waiver of Right to Counsel

Ill. S. Ct. Rule 401(a) provides that the court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the

defendant personally in open court, informing him of and determining that he understands: (1) the nature of the charge; (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and (3) that he has a right to counsel and, if indigent, to have counsel appointed for him by the court. *See also* ***People v. Campbell***, 224 Ill. 2d 80, 84–85 (2006); ***People v. Ware***, 407 Ill. App. 3d 315 (1st Dist. 2011). Strict compliance with these guidelines is not necessary. ***People v. Toy***, 407 Ill. App. 3d 272 (1st Dist. 2011) (trial court substantially complied with the admonishment requirements although it did not orally admonish defendant about potential sentences, where the court provided defendant with a list documenting charges and possible penalties). *But see* ***People v. Gamble***, 2013 IL App (3d) 120519-U, ¶ 4 (trial court failed to give defendant the applicable sentencing range before allowing defendant to represent himself *pro se)*. The court in ***Gamble*** held the second prong of plain error applied and vacated defendant's convictions and remanded for a new trial, finding that the right to counsel is a fundamental constitutional right of great significance and the burden is slight for a judge to consult the language of **Rule 401(a)** and to comply with those requirements before allowing a defendant to waive his right to counsel. ***People v. Gamble***, 2013 IL App (3d) 120519-U.

A *pro se* defendant waives his right to counsel, and must, therefore, be admonished of his rights. Once a defendant has waived his right to counsel, he cannot later claim that his own ineffectiveness denied him his right to counsel.

Faretta v. California, 422 U.S. 806 (1975). Courts look to the overall context of the proceedings to determine whether defendant waived his right to counsel "competently and intelligently." *See* ***People v. Coleman***, 168 Ill. 2d 509 (1995); ***People v. Belk***, 403 Ill. App. 3d 1056, 1060–61 (4th Dist. 2010) (defendant was found to have waived counsel where he repeatedly declined offers for appointed counsel, and had three months during which to obtain new counsel prior to trial); ***People v. Polk***, 407 Ill. App. 3d 80 (1st Dist. 2010) (defendant who initially made a gesture that could be interpreted as not understanding his rights was found to have waived his right to counsel where defendant ultimately indicated that he understood his rights and consequently began responding to officer's questions).

Defendant's conviction for aggravated battery of a police officer was affirmed, despite his allegation that he was denied his right to represent himself, where the record did not show that defendant ever made an articulate and unmistakable demand to proceed *pro se.* ***People v. Pena***, 2014 IL App (1st) 120586.

(d) The Continuing Waiver Rule

Under the "continuing waiver" rule, a valid waiver of counsel continues through later stages of the proceedings unless "(1) the defendant later requests counsel, or (2) other circumstances suggest that the waiver is limited to a particular stage of the proceedings." ***People v. Cleveland***, 393 Ill. App. 3d 700, 705 (1st Dist. 2009) (trial court did not substantially comply with the admonishment requirements by re-admonishing on only one of the three requirements after defendant received counsel and consequently waived counsel at a separate

stage of the proceedings).

(e) Materials Provided to *Pro Se* Defendant

A *pro se* defendant must be provided with adequate law libraries or assistance from persons trained in the law, but this right is not limitless. ***People v. Banks***, 161 Ill. 2d 119 (1994) (quoting ***Bounds v. Smith***, 430 U.S. 817 (1977)).

The constitutional requirement to provide access to legal resources may be met either by providing actual library access, or by offering "adequate assistance from persons trained in the law." ***People v. Page***, 152 Ill. App. 3d 957, 959 (4th Dist. 1987) (quoting ***Bounds v. Smith***, 430 U.S. 817, 828 (1977)). In ***People v. Page***, all four defendants were in segregation in DOC. All four were represented by counsel, and, all four "had indirect access to the law library through inmate law clerks." The court found, on those facts, "no special arrangements or court intervention was necessary to let them prepare to defend themselves." ***People v. Page***, 152 Ill. App. 3d 957, 959 (4th Dist. 1987).

5. Stand-by Counsel

A trial court may appoint "stand-by" counsel, which is counsel whose role is to assist a *pro se* defendant if and when the defendant requests help, and to be available to represent the defendant if termination of self-representation is necessary. ***Faretta v. California***, 422 U.S. 806, 834 n.46 (1975). The United States Supreme Court in ***McKaskle v. Wiggins***, 465 U.S. 168, 178–79 (1984), prescribed a way of analyzing whether stand-by counsel undermined the *pro se* defendant's self-representation, including whether the representation "destroy[ed] the jury's perception that the defendant is representing himself."

Factors which should be considered in deciding whether to appoint stand-by counsel include: (1) the nature and gravity of the charges; (2) the expected factual and legal complexity of the proceedings; and (3) the abilities and experience of the defendant. ***People v. Gibson***, 136 Ill. 2d 362, 380 (1990). *See also* ***People v. Chapman***, 194 Ill. 2d 186, 224 (2000). This power is discretionary; the court can, therefore, refuse to appoint stand-by counsel when the accused requests such help. ***People v. Shelton***, 401 Ill. App. 3d 564, 574 (1st Dist. 2010). On the issue of standby counsel, the court in ***People v. Phillips***, 392 Ill. App. 3d 243 (1st Dist. 2009), held that the defendant who made a knowing and intentional waiver of his right to counsel several times after being properly admonished that he may be denied standby counsel if the trial court exercises discretion, giving due consideration to the three factors.

A *pro se* defendant is not automatically entitled to stand-by counsel: the court may not however, have a blanket policy to deny stand-by counsel to all *pro se* defendants regardless of the circumstances. Defendant was not denied law library access while in custody, in that opportunities were routinely given to him to allow more library time. ***People v. Ellison***, 2013 IL App (1st) 101261.

6. Removal of Counsel

The primary goal of the Sixth Amendment right to counsel is "to guarantee an effective advocate for each criminal defendant." ***Wheat v. United States***, 486 U.S. 153, 159 (1988). Thus, a court may remove counsel if the chosen counsel is inadequately representing the defendant. ***People v. Baez***, 241 Ill. 2d 44 (2011). In ***Baez***, the court did not violate defendant's right to counsel where it properly removed private counsel after considering the serious nature of the case and learning that counsel would be out of the country for an unspecified period of time during trial, and after

finding counsel unreliable. ***People v. Baez***, 241 Ill. 2d 44 (2011). Absent contempt or other specified cause, however, a judge does not have the authority to reject or remove an assistant public defender from representation of a defendant. ***Burnette v. Terrell***, 232 Ill. 2d 522, 538–39 (2009).

7. Minors

   Minor under 17 cannot waive the right to counsel except in fine-only cases and certain traffic charges. **725 ILCS 5/115-1.5**.

8. Written Consent for 711 Interns

   Defendant is not automatically denied effective assistance of counsel merely due to his representation in part by a law intern, even if the defendant did not provide written approval as required by **Rule 711**. However, lack of consent may be considered in determining the adequacy of representation. ***In re Denzel W.***, 237 Ill. 2d 285 (2010).

9. Conflicts of Interest

   Counsel representing both defendant and alleged victim has a *per se* conflict of interest, unless knowingly waived by the defendant. ***People v. Hernandez***, 231 Ill. 2d 134 (2008). In ***People v. Santiago***, 236 Ill. 2d 417 (2010), the Illinois Supreme Court addressed the boundaries of the "no contact" rule set forth in **Rule 4.2** of the **Ill. Rules of Professional Conduct**, which prohibits a lawyer from communicating in the course of representing his client with a party that the lawyer knows is represented by counsel in the matter. The Illinois Supreme Court in ***People v. Taylor***, 237 Ill. 2d 356 (2010), held that joint representation of co-defendants did not violate the defendants' constitutional right to conflict-free representation under the Sixth Amendment. The Court acknowledged that joint representation does not present a *per se* conflict of interest; however, a

defendant may prove that an actual conflict of interest adversely affected his attorney's performance. ***People v. Taylor***, 237 Ill. 2d 356, 375–76 (2010). The Court held that the defendant merely demonstrated that the defense counsel's strategy may have helped one criminal defendant, but not that it actually prejudiced the other defendant. ***People v. Taylor***, 237 Ill. 2d 356, 375–76 (2010). Further, defense counsel's choice not to call certain witnesses was not attributable to a conflict of interest because counsel showed that he believed the witnesses were weak and would offer inconsistent testimony. ***People v. Taylor***, 237 Ill. 2d 356, 375–76 (2010). In ***People v. Perkins***, 408 Ill. App. 3d 752 (1st Dist. 2011), the court held that an attorney arguing his own ineffectiveness does not constitute a *per se* conflict of interest. Counsel must be removed for a *per se* conflict of interest, such as representing a victim or state's witness. ***People v. Fields***, 2012 IL 112438; ***People v. Nevarez***, 2012 IL App (1st) 093414.

In ***People v. Nelson***, 2017 IL 120198, the Illinois Supreme Court held that a common defense for two clients does not necessarily demonstrate the absence of a conflict between their interests, for purposes of an ineffective assistance of counsel claim.

B. Self-Represented Litigants (*Pro Se*) / Access to Justice - Suggested Practices

Supreme Court Rule 63(a)(4) (Canon 3 of the Code of Judicial Conduct) has been amended to clarify judges' adjudicative responsibilities and states that "[A] judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of self-represented litigants to be fairly heard."

Suggested Best Practices from the Illinois Supreme Court Access to Justice Commission, in the context of a criminal prosecution, would recommend judges in cases where the defendant has elected to represent himself or herself:

- to use plain language whenever possible and minimize the use of complex legal terms.

- to take necessary steps to provide a qualified interpreter in accordance with court system policies before proceeding to hearings where defendant is not fully conversant in English or is hearing impaired.

- to remind the defendant that the judge will apply the law without regard to defendant's status as a self-represented litigant, and that court proceedings will be conducted in accordance with applicable evidentiary and court rules.

- to remind the defendant, as often as may be appropriate, of the benefits of retained or appointed counsel, as well as what it means to represent oneself in a criminal prosecution.

- to provide explanations of substantive and procedural matters at the beginning of court proceedings, and as often as may be appropriate during court proceedings.

- to maintain decorum in the courtroom, cognizant of the effect it will have on everyone present, including the defendant. For example, consider calling a recess to allow an agitated defendant time to calm down, as opposed to immediately imposing a sanction for potentially disruptive behavior.

- to use discretion in providing the unrepresented party the opportunity to present his or her case in a meaningful way, while adhering to the rules of evidence.

1.5 Preliminary Hearing / Indictment

A preliminary hearing under **725 ILCS 5/109-3** is a critical stage of the proceedings at which the accused has the right to counsel. ***People v. Kidd***, 129 Ill. 2d 432, 448–49 (1989); ***People v. Makiel***, 265 Ill. App. 3d 54,

66 (1st Dist. 1994). *See also* ***People v. Hood***, 59 Ill. 2d 315, 322 (1974).

725 ILCS 5/109-3.1 provides that every person in custody charged with a felony shall receive either a preliminary examination or indictment within 30 days from the date he was taken into custody. If the accused is on bail, the period is 60 days. These timing provisions do not apply (1) when delay is occasioned by the defendant, (2) when defendant has been indicted for the offense on which he was originally taken into custody or on an offense arising from the same transaction or conduct that was the basis for the initial charges, (3) when a competency examination is ordered, (4) when a competency hearing is held, (5) when an adjudication of incompetency has been made, or (6) when the case has been continued under **725 ILCS 5/114-4** after a determination that the defendant is physically incompetent to stand trial. Delay occasioned by the defendant temporarily suspends the period within which the examination must be held.

Hearsay evidence is generally admissible at preliminary hearings. *See* ***In re W.J.***, 284 Ill. App. 3d 203, 208 (1st Dist. 1996).

The State need not establish probable cause at a preliminary hearing to support a misdemeanor offense, but must do so for a felony charge. ***People v. Majors***, 405 Ill. App. 3d 879 (3d Dist. 2010) (trial court cannot dismiss a misdemeanor telephone harassment charge for lack of showing of probable cause at the preliminary hearing).

1. Conduct of the Grand Jury

Illinois Rule of Evidence 606(b) states that "[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to

assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify (1) whether any extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form."

2. Grand Jury's Subpoena Power

The grand jury has the power to issue subpoenas. ***People v. Wilson***, 164 Ill. 2d 436 (1994). The grand jury may disclose subpoenaed documents to the State's Attorney. ***People v. Wilson***, 164 Ill. 2d 436, 458 (1994). In ***People v. Bauer***, 402 Ill. App. 3d 1149 (5th Dist. 2010), the court held that defendant's medical records regarding defendant's blood alcohol content were obtainable by the grand jury under a subpoena returnable to the grand jury, pre-indictment, for that purpose. Further, the court held that the State's Attorney and law enforcement agencies are not prohibited from receiving such records because they are not "covered entities" prevented from use of such records under HIPAA. ***People v. Bauer***, 402 Ill. App. 3d 1149, 1158 (5th Dist. 2010).

Regarding impaneling of a grand jury, the judge is to indoctrinate the new panel. The content of such indoctrination is dictated by statute, **725 ILCS 5/112-1** ***et seq.*** The script for doing so can be gleaned from the Handbook for Illinois Grand Jurors located at http://www.state.il.us/court/CircuitCourt/Jury/GrandJuror.asp. Specific procedures including length of jury service are different from county to county. The historic duty of grand jurors to inspect the county jail was deleted from the County Jail Act. **730 ILCS 125/22**, **23** (repealed 2008).

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1.6 Arraignment

See Appendix for suggested "Arraignment Script" on page A-15.

A. Procedure on Arraignment

725 ILCS 5/113-1 sets forth the required procedure for arraignment.

B. Applicable Speedy Trial Rules

See below in this book, Section 1.8.A.5. "Speedy Trial."

C. Trial *in Absentia*—Admonishments

725 ILCS 5/113-4(e) mandates that the court advise a defendant who pleads not guilty at arraignment that, if he at any time escapes from custody or is released on bond and fails to appear in court when required, the failure to appear will result in the waiver his right to confront the witnesses against him and trial could proceed in his absence.

> **Note**: A trial *in absentia* cannot be held absent such admonishment. ***People v. Garner***, 147 Ill.2d 467, 482 (1992). Notice on a bond slip, rather than the court's admonishment, is insufficient to support waiver. *Garner*, 147 Ill.2d at 479. But substantial compliance with the language of the statue is sufficient. ***People v. Liss***, 2012 IL App (2d) 101191, ¶ 17. A post-arraignment admonishment may cure the failure to comply with the statute. ***See Garner***, 147 Ill.2d at 482.

1.7 Discovery

A. Defendant's Right to Discovery

Upon written request of the defendant the state is required to provide to the accused: (1) names and addresses of witnesses whom the state intends to call, along with their statements; (2) statements by the accused or a co-defendant, and witnesses to those statements; (3) grand jury transcripts of testimony of the accused and of witnesses the state intends

to call; (4) expert reports and their qualifications; (5) physical objects which the state intends to use or that were obtained from or belonged to the accused; (6) prior convictions of state's witnesses for impeachment purposes; (7) information on electronic surveillance; (8) evidence favorable to the accused; and (9) any other relevant material reasonably requested by the defendant. **Supreme Court Rule 412**.

To meet these obligations the state may perform in any way "mutually agreeable to itself and defense counsel" or by (1) notifying the defense that the material sought may be "inspected, obtained, tested, copied, or photographed" during specified reasonable times and (2) by making the material available. ***Id.***

Supreme Court Rule 411 provides that the discovery rules apply to felonies and juvenile delinquency cases that would be felonies if committed by an adult.

1. Destruction or Spoliation of Evidence

The state's destruction of evidence does not deprive defendant of due process if the destruction was not in bad faith and the evidence was non-exculpatory. ***People v. Voltaire***, 406 Ill.App.3d 179, 184 (2nd Dist. 2010) (finding that ***Illinois v. Fisher***, 540 U.S. 544 (2004), overruled due process holding of ***People v. Newberry***, 166 Ill.2d 310 (1995)). The state is under no general constitutional obligation to preserve all material that might be of conceivable evidentiary significance in a particular case. ***Arizona v. Youngblood***, 488 U.S. 51, 57 (1988).

Under **Supreme Court Rule 415(g)**, the court still has the discretion to impose a discovery sanction in the event of the destruction of evidence even in the absence of a due process violation. ***See Voltaire***, 406 Ill.App.3d at 184; ***People v. Sutherland***, 223 Ill.2d 187, 242 (2006).

2. Discovery as to Vindictive Prosecution Claim

The claim of selective or vindictive prosecution is not an affirmative defense and the court may deny discretionary discovery on the issue when defendant fails to show a colorable basis for the claim. ***People v. Peterson***, 397 Ill.App.3d 1048, 1056 (3rd Dist. 2010).

3. Pre-Trial DNA Discovery

A defendant may seek pretrial DNA database searches via the Illinois State Police pursuant to **725 ILCS 5/116-5** when DNA evidence may be material to the defense investigation or relevant at trial, including its use to cross-examine the state's DNA expert. ***See People v. Wright***, 2012 IL App (1st) 073106, ¶ 101.

For a discussion regarding the statistical methodology used to determine paternity in the context of a criminal trial, see **People v. Gonis**, 2018 IL App (3d) 160166.

B. State's Duty to Disclose Relevant Material and Information in Felony Cases

Supreme Court Rule 412(f) requires the state "ensure that a flow of information is maintained between" its office and investigators so that the state has relevant discovery material within its possession and control. **Rule 412(j)** excludes discovery as to work product, informants, and national security issues. But memoranda reporting or summarizing oral statements may be discoverable on defense motion and after *in camera* review. ***See*** **Rule 412(a)(i)**. The issue for *in camera* review what material is "properly producible." ***People v. Szabo***, 94 Ill.2d 327, 345 (1983).

725 ILCS 5/114-13, regarding criminal discovery, requires investigative agencies to adopt policies to ensure compliance the discovery rules.

C. Inspection of Person

1. Defendant

Supreme Court Rule 413(a) provides that the court may order defendant to:

(i) appear in a line-up;

(ii) speak for identification by witnesses to an offense;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of a scene;

(v) try on articles of clothing;

(vi) permit the taking of specimens of material under his fingernails;

(vii) permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof;

(viii) provide a sample of his handwriting; and

(ix) submit to a reasonable physical or medical inspection of his body.

Rule 413(b) sets forth the notice and procedural requirements for the above inspections/actions.

2. Witness

A court cannot order the physical examination of a complaining witness in a sex offense case. ***People v. Lopez***, 207 Ill.2d 449, 459 (2003).

D. Compelling Compliance

1. **Supreme Court Rule 415 (Regulation of Discovery)**

Rule 415 authorizes the court to permit additional discovery, grant continuances, and sanction the parties for discovery

violations. The Court may also sanction counsel for willful violations of the rules.

> **Note**: The exclusion of a defense witness does not necessarily deprive defendant of his Sixth Amendment right to present a defense. ***Taylor v. Illinois***, 484 U.S. 400, 418 (1988).

Rule 415(c) requires counsel to retain exclusive custody of discovery, but counsel may share discovery with defendant upon motion to and order of the court.

Rule 415(d) allows for the party providing the discovery to seek a protective order to limit or defer the dissemination of same.

2. ***Brady***

Independent of discovery rules, due process requires the state to disclose any evidence that is material to the guilt, innocence, or sentence of defendant, regardless whether requested. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Material evidence includes impeachment material. ***United States v. Bagley***, 473 U.S. 667, 677 (1985). ***Brady*** applies to all potentially exculpatory evidence, even if known solely to the police and not the prosecutor—the prosecutor has a duty to learn of same. ***Youngblood v. West Virginia***, 547 U.S. 867, 869 (2006).

> **Note**: Evidence corroborating defendant's alibi can be ***Brady*** material. ***See Wearry v. Cain***, 577 U.S. 385, 391 (2016).

Evidence is material if there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different. In other words, reversal is necessary where the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." ***Youngblood***, 547 U.S. at 868. A ***Brady*** violation is never subject to harmless error analysis.

Note: ***Brady*** does not apply to post-conviction proceedings. ***District Attorney's Office for Third Judicial Dist. v. Osborne***, 557 U.S. 52, 68 (2009).

3. **Bill of Particulars**

If the charging instrument fails to specify the particulars of an offense sufficiently to enable the preparation of a defense, defendant may move for an order requiring the state to provide a bill of particulars. ***See*** **725 ILCS 5/114-2** (specifying as pre-trial motion)**; 725 ILCS 5/111-6** (defining when bill of particulars should be ordered).

A bill of particulars is not available as a discovery tool or a means to secure evidentiary details**.** ***See People v. Richards***, 120 Ill.App.2d 313, 348 (2nd Dist. 1970). Defendant must explain in what manner he is unable to prepare his defense, and the issuance of a bill is within the court's discretion. ***People v. Lego***, 116 Ill.2d 323, 337 (1987).

While section 111-6 confines the state to proof of the particulars of the bill, there is no limit as to the evidence of such matters. ***People v. Kliner***, 185 Ill.2d 81, 137 (1998). A variance between the bill and the evidence is fatal only if defendant has been misled or prejudiced in the preparation of his defense. ***Kliner***, 185 Ill.2d at 137.

E. Subpoena Duces Tecum

1. Generally

A defendant is entitled under the sixth amendment right to compulsory process to issue a subpoena *duces tecum* independent of discovery rules, and even before a preliminary hearing. ***People ex rel. Fisher v. Carey***, 77 Ill.2d 259, 268 (1979). Moreover, a defendant need not exhaust discovery options before pursuing a subpoena *duces tecum*. ***People v. Shukovsky***, 128 Ill.2d 210, 222 (1988).

A subpoena *duces tecum* should be allowed and upheld if: (1) the material sought is relevant and usable as evidence; (2) the material cannot be obtained any other way; (3) counsel cannot prepare for trial without the material; and (4) the subpoena is issued in good faith and the request is not a

fishing expedition. ***See United States v. Nixon***, 418 U.S. 683, 699 (1974).

Supreme Court Rule 412(g) provides that the court may issue subpoenas at the request of defendant to obtain information in the possession or control of governmental personnel other than the state if the material or information would be discoverable if it were in the state's possession or control.

725 ILCS 5/115-17 codifies the procedures for the issuance of subpoenas in criminal cases. Either party may seek a subpoena.

2. Motions to Quash

Procedural Defect: The use of a subpoena is a judicial process. It must be returnable to the court with notice for a date certain, and not directly to a party, so that challenges may be presented to the issuance of the subpoena. The court is then able to determine whether the materials are relevant, material, or privileged, and whether the subpoena is unreasonable or oppressive. ***Carey***, 77 Ill.2d at 265. A court may quash a subpoena that was not properly issued. ***See People v. Smith***, 259 Ill.App.3d 492, 502 (4th Dist. 1994).

Third-Party Recipient Challenge: To be sure, a subpoena for records is effectively a constructive search and is subject to the fourth amendment constraint of reasonableness, but not probable cause. Thus, a third-party recipient of a subpoena may challenge a subpoena that is unreasonable—in other words, that is overbroad or for which compliance is overly burdensome. ***See Donovan v. Lone Steer, Inc.***, 464 U.S. 408, 414-15 (1984).

Defendant Challenge to Third-Party Subpoena: However, generally a defendant has no reasonable expectation of privacy and thus no fourth amendment interest in the business records of a third party. ***See United States v. Miller***, 425 U.S. 435, 442 (1976). But there is an exception. ***Carpenter v. United States***, 138 S. Ct. 2206, 2223 (2018), held that a defendant *can* have a legitimate privacy interest

in records held by a third party to which fourth amendment rights apply. Information in a wireless carrier database of physical location carries such a legitimate interest, the request for such material is a search, and a warrant premised on probable cause, rather than a subpoena *duces tecum*, is required to obtain the material. ***Carpenter***, 138 S. Ct. at 442

Defendant Fifth Amendment Challenge: A defendant may assert that his own subpoena compliance is an *act* that would violate his fifth amendment right against self-incrimination, thought the privilege does not apply to the actual content of documents. ***United States v. Doe***, 465 U.S. 605, 617 (1984); ***Fisher v. United States***, 425 U.S. 391, 409 (1976) (documents with incriminating writing, whether of defendant or someone else, are not testimonial communication).

3. *In-Camera* Review

If a party claims that a document ordered to be produced is not relevant the court should inspect the document *in camera* and delete unrelated matters or, if nothing in the document is relevant, exclude the entire document. ***People v. Hartgraves***, 31 Ill.2d 375, 377 (1964). ***See also*** **Supreme Court Rule 415(f)** ("upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made *in camera*").

4. Privilege as to Medical and Mental Health Records

Non-party records*:* The physician-patient privilege codified in **735 ILCS 5/8-802** generally bars the disclosure of medical information of non-party patients. ***Parkson v. Central DuPage Hosp.***, 105 Ill.App.3d 850, 854 (1st Dist. 1982). There are some statutory exceptions, such as the directly relevant records of a homicide victim.

Non-party medical records may also be privileged under the state Mental Health and Developmental Disabilities Confidentiality Act—**740 ILCS 110/10** governs disclosure in legal proceedings, and contains some provisions for

limited disclosure in certain cases, such as the directly relevant records of a homicide victim.

The federal Health Insurance Portability and Accountability Act of 1996, or HIPAA, also protects patient privacy. There are some exceptions allowing, but not requiring, disclosure. *See e.g*. **45 C.F.R. §§ 164.512 (e)** (in judicial proceeding in response to an order, subpoena or other lawful process if certain assurances regarding notice to the individual or a protective order are provided).

Defendant's records*:** All three medical privilege statutes listed above have exceptions for certain criminal prosecutions. For example, BAC results are not privileged under **735 ILCS 5/8-802** in DUI cases. And, among other exceptions, mental health records may be disclosed when the recipient introduces his health condition as an element of his defense in the case, and in limited instances in fitness hearings. ***See* 740 ILCS 110/10**. An *in camera* review may be requested prior to any such disclosure. ***Id.

F. Misdemeanor Discovery

The state is required in misdemeanor cases to supply the defendant with a list of witnesses, any confession by the defendant, and evidence negating the defendant's guilt. ***People v. Schmidt***, 56 Ill.2d 572 (1974). The court does not otherwise have authority to order discovery in a non-felony case. ***People v. Williams***, 87 Ill.2d 161, 164 (1981).

The list of witnesses is also required if a motion is made for same pursuant to statute, **725 ILCS 5/114-9**, as is the production of defendant's written confession and a list of witnesses to same, and a list of witnesses to an oral confession. **725 ILCS 5/114-10**

G. Appointment/Payment of Defense Expert Witnesses & Investigators

An indigent defendant is entitled to the appointment of an expert when the expertise sought is crucial to the defense, not whether it is merely helpful. ***People v. Keene***, 169 Ill.2d

1, 8 (1995).

A defendant may be deemed indigent even when his attorney is funded by a third-party with financial resources. ***People v. Djurdjulov***, 2017 IL App (1st) 142258, ¶ 50.

An investigator may be appointed if the investigator is "necessary to prove a crucial issue" and where "the lack of funds" for the investigation will "substantially prejudice the defendant." ***People v. Rhode***, 219 Ill.App.3d 1079, 1082 (2nd Dist. 1991). There is no statutory provision for the payment of fees, however. ***See People v. Wilson***, 117 Ill.App.3d 744, 752 (1983).

H. Evidence Deposition/Right of Confrontation

An evidence deposition admitted at a criminal trial under **Supreme Court Rule 414** does not violate the right of confrontation if defendant had the opportunity for cross-examination at the deposition. ***People v. Hood***, 2016 IL 118581, ¶ 29.

Rule 414(e) requires a written waiver from defendant and his counsel if he waives his right to confrontation at the deposition. The failure to obtain the written waiver is not constitutional error if defendant had actual notice of the deposition and chose not to attend. ***Hood*** at ¶ 34.

1.8 Pre-Trial Motions

A. To Dismiss Charge

725 ILCS 5/114-1 identifies 11 grounds upon which defendant may seek dismissal of a charge.

1. Double Jeopardy

(a) Generally

The double jeopardy clause of the fifth amendment precludes both a prosecution for the same offense after an acquittal or conviction and multiple

punishments for the same offense. ***People v. Henry***, 204 Ill.2d 267, 282 (2003).

Jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the first witness is sworn. ***Martinez v. Illinois***, 572 U.S. 833, 839 (2014) (jury); ***Crist v. Bretz***, 437 U.S. 28, 37 n.15 (1978) (bench).

A ruling on the insufficiency of the facts of the charge constitutes an acquittal, even if the judge labels it as a dismissal rather than acquittal. ***Martinez***, 572 U.S. at 841-842.

The grant of a motion for a directed verdict is an acquittal, even if mistaken—in Illinois, the court cannot reconsider its ruling later in the trial. ***Henry***, 204 Ill.2d at 288; ***see Evans v. Michigan***, 568 U.S. 313, 319 (2013) (mistaken midtrial acquittal results in double jeopardy); ***Smith v. Massachusetts***, 543 U.S. 462, 479 (2005) (state law may allow for reconsideration of midtrial ruling before double jeopardy applies).

Improper termination of a trial once jeopardy has attached also precludes retrial. Double jeopardy is *not* implicated if a mistrial was declared due to a manifest necessity. ***Illinois v. Somerville***, 410 U.S. 458, 464 (1973).

A court may properly declare a mistrial when an impartial verdict cannot be reached or if there has been an obvious procedural error in the trial that would necessitate reversal on appeal were defendant convicted. ***Somerville***, 410 U.S. at 464; ***See also Blueford v. Arkansas***, 566 U.S. 599, 609 (2012) (a hung jury is the classic case of manifest necessity for a mistrial).

A mistrial declared on defendant's motion or with his consent precludes a double jeopardy claim unless the mistrial was premised on bad-faith state or judicial

misconduct intended to provoke a mistrial. ***United States v. Dinitz***, 424 U.S. 600, 611 (1976). Likewise, the grant of defendant's motion for a new trial cannot result in double jeopardy. ***People v. Cordero***, 2012 IL App (2nd) 101113, ¶ 2.

Last, double jeopardy does not preclude retrial upon reversal on appeal if the evidence, even improperly admitted evidence, was sufficient to sustain the verdict. ***See People v. King***, 2020 IL 123926, ¶ 52.

> **Note**: Illinois does not allow the state to appeal if a judge sets aside a verdict and enters an acquittal. Double jeopardy does not apply to that scenario. ***Smith***, 543 U.S. at 467.

Illinois has codified double jeopardy principles. ***See*** **720 ILCS 5/3-4.**

(b) **Collateral Estoppel**

Collateral estoppel means "when an issue of ultimate fact has once been determined by a valid and final judgment that issue cannot again be litigated between the same parties in any future lawsuit." ***Ashe v. Swenson***, 397 U.S. 436, 443 (1970). Collateral estoppel is "embodied" in the guarantee against double jeopardy. ***Ashe***, 397 U.S. at 445.

Thus, double jeopardy precludes prosecution for a second offense that turns on the presentation of a fact resolved in the first case.

720 ILCS 5/3-4(b) codifies this principle. It outlines when prosecution is barred if defendant was previously prosecuted for a *different offense* based on the *same* facts. ***See*** **720 ILCS 5/3-4(b).** A second prosecution is barred if the first case resulted in: (1) a conviction or acquittal and the subsequent prosecution is for an offense of which the defendant could have been convicted or should have been charged under **720 ILCS 5/3-3**, or which involves

the same conduct unless each prosecution requires proof of a fact not required by the other; (2) *a final adjudication that required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution*; or (3) improper termination, where the subsequent prosecution is for an offense of which the defendant could have been convicted initially. ***Id***. (emphasis added).

> **Note**: Inconsistent verdicts do not preclude retrial on collateral estoppel grounds. ***See People v. Jones***, 207 Ill.2d 122, 141 (2003).

(c) Same Offense

The provisions of **720 ILCS 5/3-4(b)** noted above also apply to bar prosecution for the *same offense* based on *new facts*.

Also, **720 ILCS 5/3-4(a)(3)** provides that "a conviction of an included offense, other than through a plea of guilty, is an acquittal of the offense charged."

Whether the second offense is the same as in the first prosecution turns on whether each contains an element that the other does not. ***See Blockburger v. United States***, 284 U.S. 299 (1932); ***People v. Gray***, 214 Ill.2d 1, 7 (2005) (applying Blockburger and allowing prosecution of different offenses in different counties based on the same conduct).

Also, ***Harris v. Oklahoma***, 433 U.S. 682 (1977), held that an acquittal of a greater offense precludes prosecution for a lesser included offense.

(d) **Sham Trial**

If a court convenes a trial for the purpose of terminating it without prejudice, it is a sham trial to which double jeopardy does not apply. ***People v. Deems***, 81 Ill.2d 384, 389 (1980).

(e) **Double Jeopardy and Forfeiture**

A civil *in* rem forfeiture proceeding is not punishment and does not trigger double jeopardy. ***United States v. Ursery***, 518 U.S. 267, 292 (1996); ***In re P.S.***, 175 Ill.2d 79, 89 (1997).

Note: Proceedings under the Illinois Cannabis and Controlled Substances Tax Act are the functional equivalent of a prosecution and double jeopardy applies to same. ***Wilson v. Department of Revenue***, 169 Ill.2d 306, 317 (1996). But jeopardy does not attach until a tax hearing begins and evidence is presented. ***People v. Medina***, 287 Ill.App.3d 690, 699 (2nd Dist. 1997).

2. Deficiencies in the Charge

Dismissal may be sought if the charge does not state an offense, if the indictment is based on the testimony of an incompetent witness, or if defendant is misnamed in the charge resulting in substantial injustice to him. **725 ILCS 5/114-1**.

The charging instrument must include sufficient particularity so that defendant can prepare a defense. ***People v. Klepper***, 234 Ill. 2d 337, 351 (2009). Further, a motion to dismiss challenges the sufficiency of the complaint, not the sufficiency of the evidence. ***People v. Barwan***, 2011 IL App (2d) 100689, ¶ 9.

Note: ***People v. Nolan***, 2019 IL App (2d) 180354, ¶ 19, held that it was error to dismiss an indictment when the claim of false or misleading evidence was based on defendant's uncorroborated testimony.

3. Statute of Limitations

A charge may be dismissed upon a statute of limitations violation. The general limitations period is set forth **720 ILCS 5/3-5**, and **720 ILCS 5/3-6** governs extended

limitations periods.

For most felonies, the period is three years, and for misdemeanors, it is 18 months. **720 ILCS 5/3-5**.

There is no limitations period for certain enumerated crimes such as first-degree murder. ***See* §3-5(a)**.

720 ILCS 5/3-6 provides for extended limitation periods for certain offenses in certain circumstances, including some sex offenses.

The state must assert the extended limitations period in the charging instrument. Because the existence of the extension is a question of law, the state need not prove it to a jury, but may be required to prove same at a hearing on a motion to dismiss. ***People v. Gray***, 396 Ill.App.3d 216, 224 (4th Dist. 2009). However, a jury can decide a disputed factual issue supporting the limitations period. ***Gray***, 396 Ill.App.3d at 226. Last, if the state fails to allege the extension in the charging instrument, the remedy is not dismissal but amendment of the charge. ***Id.***, at 224.

> **Note:** ***People v. Leavitt***, 2014 IL App (1st) 121323 ¶ 48, held that, for limitations purposes, the prosecution started upon the date of indictment, even though the indictment was sealed.

4. Violation of Rules Governing Grand Jury

Dismissal may be based on an improperly selected grand jury or grand jury misconduct that "results in substantial injustice to the defendant," **725 ILCS 5/114-1(a)(4) & (5)**.

> **Note**: A conviction "may not stand despite racial discrimination in the selection of the grand jury." ***Vasquez v. Hillery***, 474 U.S. 254, 261 (1986).

> **Note**: ***People v. J.H.***, 136 Ill.2d 1, 17 (1990), reversed the dismissal of an indictment premised on alleged prosecutorial misconduct, since there was sufficient evidence connecting defendant to the

offense.

Note: ***People v. DiVincenzo***, 183 Ill.2d 239, 257 (1998), held that the violation of grand jury secrecy by a juror and the state did not warrant dismissal.

Note: ***People v. Reimer***, 2012 IL App (1st) 101253, ¶ 33, affirmed the dismissal of an indictment where the state, even if inadvertently, misled the grand jury as to an element of the charge.

5. Speedy Trial

(a) **Generally**

Dismissal may be premised on a speedy trial violation.

The state and federal constitutions guarantee defendant a speedy trial. As a constitutional matter, there is no defined speedy trial period. A speedy trial violation is determined by considering the length of delay, reasons for delay, prejudice to defendant and defendant's assertion of the right. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972).

Illinois also has a statutory speedy trial period. ***See* 725 ILCS 5/103-5**. Generally, trial must be had within 120 days if defendant is in custody, or within 160 days if he is not in custody. Both time periods are tolled by "delay occasioned by the defendant."

Note: Defendant is charged with delay occasioned by counsel, including a public defender. But a systemic breakdown of the public defender system may result in fault charged to the state. ***See Vermont v. Brillon***, 556 U.S 81, 93 (2009).

For the 120-day period, delay is presumptively "agreed to by defendant" absent a "written demand for trial or an oral demand for trial on the record."

See* §103-5(a)**. This provision does not apply to the 160-day period. ***Village of Mundelein v. Bogachev, 2011 IL App (2d) 100346, ¶ 26.

Both time periods are tolled by fitness proceedings and interlocutory appeals. ***See* §103-5(a) & (b).**

The 120-day period "must be one continuous period of incarceration." Separate periods of incarceration for the same offense cannot be combined. ***See* §103-5(a)**.

A written demand is not required for the 120-day period to apply but is required to trigger the 160-day period. ***See* §103-5(b).** The state must have actual notice of the demand. ***People v. Bonds***, 401 Ill.App.3d 668, 672 (2nd Dist. 2010).

When computing the 160-day period, a defendant who made a written speedy trial demand while in custody and is subsequently released is entitled to credit for time following said demand. ***See* §103-5(b)**.

If a defendant fails to appear "for any court date set by the court" the 160-day period is waived. ***Id***. A late appearance is a failure to appear. And, this provision prescribes waiver, not tolling. ***People v. Galloway***, 2014 IL App (1st) 123004, ¶ 31.

The state may seek an extension of up to 60 days if, with the exercise of due diligence, it has not yet obtained material evidence for the case. An extension of up to 120 days may be sought when it is DNA evidence. ***See* § 103-5(c).** Further, if defendant causes delay within 21 days of the end of the speedy trial period, the state may seek up to a 21-day extension. ***See* § 103-5(f).**

(b) **Simultaneous Custody**

If a defendant is in simultaneous custody on multiple charges or demands a speedy trial on multiple charges, he must be tried on at least one charge in accordance with the speedy trial period. The state has an additional 160 days to try defendant on all the remaining charges. ***See* § 103-5(e)**.

(c) **Effect of State's Re-Filing on Speedy Trial**

If the state dismisses charges *to avoid the speedy trial term* and refiles same—or upgrades same—the initial speedy trial demand applies, and the period is not tolled. ***People v. Van Schoyck***, 232 Ill.2d 330, 340 (2009). In the absence of such evasion, the speedy trial period is *tolled* between dismissal and refiling. ***See People v. Weddell*,** 405 Ill.App.3d 424, 437 (2nd Dist. 2010).

(d) **Compulsory Joinder and Speedy Trial**

When the state adds charges, the speedy trial period applicable to the original charges applies if the additional and original charges are subject to compulsory joinder. Thus, the start of the speedy trial period for the new charges is that applicable to the original charges. Importantly, delays or continuances on the original charges *are not attributable* to the new charges. ***People v. Woodrum***, 223 Ill.2d 286, 299 (2006); ***People v. Hunter***, 2013 IL 114100 ¶ 27.

(e) **Illinois Intrastate Detainers Act**

The Illinois Intrastate Detainers Act, **730 ILCS 5/3-8-10**, prescribes the speedy trial period for defendants in DOC custody. An inmate who makes a written demand under that statute, which has specific notice provisions, must be tried within the 160-day period of §103-5(b). ***People v. Wooddell***, 219 Ill.2d 166, 172 (2006). A demand made under

the detainer act remains effective even after release from DOC custody. ***Wooddell***, 219 Ill.2d at 178.

(f) **Interstate Agreement on Detainers**

An out-of-state inmate may demand trial on pending charges in Illinois under **730 ILCS 5/3-8-9**, the Interstate Agreement on Detainers. There are numerous procedural steps that apply, which include an inmate notifying his current warden of the demand in order to obtain a certificate regarding his current incarceration. If a defendant makes a proper demand under Article III, he must be tried within 180 days. ***See People v. Payne***, 2015 IL App (2d) 120856.

6. Improper Venue (Place of Alleged Occurrence)

Defendant may move to dismiss the charge because the county is an improper place of trial. The venue statute generally provides that charges shall be tried in the county where the offense was committed. **720 ILCS 5/1-6**.

If defendant makes a *prima facie* showing that the current venue is improper, the state must prove by a preponderance of the evidence that the county is the proper place of trial. **725 ILCS 5/114-1(d-5)**. If the court finds venue is improper, it may dismiss the charge or transfer the case. Dismissal does not prevent the filing of a new charge. **720 ILCS 5/114-1 (f) & (e)**.

Venue objections are waived unless made before trial. **725 ILCS 5/1-6(a)**.

7. Statute Unconstitutional

Statutes are presumptively constitutional, and the challenging party bears the burden of proof to show otherwise. ***People v. Ashley***, 2020 IL 123989, ¶ 35. The court "has a duty to construe [a] statute in a manner that upholds its validity and constitutionality if reasonably possible." ***Id***.

Supreme Court Rule 18 sets forth express requirements to be followed when a court finds a statute to be unconstitutional. **Supreme Court Rule 19** sets forth certain notice requirements to be given to the state or the Attorney General. ***See People v. Croom***, 2012 IL App (4th) 100932, ¶ 12 (notice to state's attorney as party sufficient).

Rule 18 provides that a court *shall not* find a statute unconstitutional *unless* it makes the finding in a written order or transcribed statement that clearly identifies the portions that are unconstitutional and sets forth the specific grounds for the decision, including the relevant constitutional provision, whether the decision is as applied or a facial finding, or both, that the statute cannot reasonably be construed in any manner that would preserve its validity, that the finding is necessary to the judgment; and that the notice required in **Rule 19** has been proper.

8. Vindictive Prosecution

Vindictive prosecution violates due process. ***United States v. Goodwin***, 457 U.S. 368, 372, 373 (1982). Dismissal is warranted upon a showing of vindictive prosecution.

Defendant must show, through objective evidence, that: (1) the prosecutor acted with genuine animus or retaliatory motive toward the defendant; and (2) defendant would not have been prosecuted but for that animus or motive. ***People v. Hall***, 311 Ill.App.3d 905, 912 (4th Dist. 2000).

If defendant is unable to prove an improper motive with direct evidence, he might be able to establish a presumption of vindictiveness. For example, filing a more serious charge after the defendant withdrew his guilty plea gave rise to a presumption of vindictiveness. ***See People v. Brexton***, 405 Ill.App.3d 989, 996 (2nd Dist. 2010). But refiling a dismissed unrelated charge after reversal did not. ***See People v. Kun Lee***, 2011 IL App (2d) 100205, ¶ 31. In a presumptive case, the burden shifts to the prosecution to present objective evidence justifying its conduct. ***Goodwin***, 457 U.S. at 374.

B. Motion to Continue

A motion to continue made more than 30 days after arraignment must be in writing and supported by affidavit. **725 ILCS 5/114-4**. The statute sets forth specific grounds for continuance, includes a catch-all provision invoking the "interests of justice," and allows the court to order a continuance on its own motion. **§114-4(b), (c) & (d)**.

Whether a continuance should be granted to prepare a case or for the substitution of counsel depends on the facts and is within the court's discretion. *See* ***People v. Sullivan***, 234 Ill. App.3d 328, 332 (2nd Dist. 1992) (court erred in denying continuance for defendant to hire new counsel).

If the ground for continuance is the unavailability of a material witness, the motion should be denied if the opposing party will stipulate to that witness' testimony. ***See*** **§114-4(b) & (c)**

> **Note**: The movant must show that that diligent efforts were made to find the unavailable material witness. ***See People v. Clamuextle***, 255 Ill.App.3d 504, 510 (2nd Dist. 1994).

While defendant has the right to hire counsel of his choice, a motion to continue to secure new counsel at the last minute is disfavored and may not be used to thwart the administration of justice. ***People v. Friedman***, 79 Ill.2d 341, 349 (1980).

C. Motion to Change Venue Due to Potential Jury Bias

A defendant may move for a change of venue if he cannot receive a fair trial in the charging county. The statute sets forth a procedure for a hearing on the issue. ***See*** **725 ILCS 5/114-6**. The decision is within the court's discretion. ***People v. Farris***, 82 Ill.App.3d 147, 152 (4th Dist. 1980).

> **Note**: Rather than moving the place of trial, the court may select the jury in a separate county but

conduct the trial in the original county. ***See People v. Gacy***, 103 Ill.2d 1, 42 (1984).

Note: Delaying the trial until publicity has died down may resolve the claim of prejudice. *See* ***Skilling v. United States***, 561 U.S. 358, 384–85 (2010).

Note: News exposure does not demonstrate prejudice—a juror need not be totally ignorant of the case. ***See People v. Sutherland***, 155 Ill.2d 1, 16 (1992).

D. For Substitution of Judge

1. For Cause

Either party may move for a substitution of judge for cause at any time. The motion must be supported by affidavit. ***See*** **725 ILCS 5/114-5(d)**.

The motion must contain sufficient allegations that, if taken as true, would justify the grant of the motion. ***People v. Klein***, 2015 IL App (3d) 130052, ¶ 85. The target judge may deny a motion on its face if it fails to meet this threshold standard. ***In re Estate of Wilson***, 238 Ill.2d 519, 558 (2010); ***Klein***, at ¶ 89.

Bias or prejudice must stem from an extrajudicial source. A court's prior rulings "almost never" are cause for bias. ***Wilson***, 238 Ill.2d at 554; *see also* ***People v. Andricopulos***, 162 Ill.App.3d 899, 910 (1st Dist. 1987) (presiding over codefendant's case does not result in bias).

Note: The motion for substitution for cause must be made at the "earliest practical moment after any potential prejudice is discovered"—in some instances, it may be deemed untimely, to prevent forum shopping after the judge has made a substantive ruling. ***See People v. Taylor***, 101 Ill.2d 508, 518 (1984). If the basis of cause occurred after the ruling, the motion is not per se untimely. *See* ***People v. Jones***, 197 Ill.2d 346, 357 (2001) (including on remand after appeal).

Note: ***People v. Thomas***, 199 Ill.App.3d 79, 91 (2nd Dist. 1990), held that the judge's former position as supervisor in the prosecutor's office was insufficient standing alone to establish cause).

The statute requires that a different judge hear the motion for substitution for cause. The target judge need not testify but may submit an affidavit. ***See* 725 ILCS 5/114-5(d)**. The burden of proof is a preponderance of the evidence. ***People v. Mercado***, 244 Ill.App.3d 1040, 1046 (1st Dist. 1993).

Note: Any proceeding after a motion for substitution is improperly denied is voidable. ***People v. Tate***, 2016 IL App (1st) 140598, ¶¶ 20, 31.

Note: ***People v. Gold-Smith***, 2019 IL App (3d) 160665, ¶ 29, noted that the right to substitution belongs to the defendant, not counsel.

2. Automatic Substitution

Both parties have one automatic right to substitution if the motion is filed within 10 days of the case being placed on the judge's call and the judge has not yet made a substantive ruling. The motion must allege that the judge is prejudiced against the moving party. ***See* 725 ILCS 5/114-5**.

A defendant who is charged with a Class X felony or with an offense carrying life imprisonment, may name two judges in his automatic substitution motion.

Note: The 10 days is calculated using the "charged with knowledge" test—a motion is timely if filed within 10 days of when defendant could be charged with knowledge of the assignment. This is a fact-specific analysis**.** ***See People v. Evans***, 209 Ill.2d 194, 216 (2004).

Note: A ruling on a motion to quash arrest or suppress evidence is substantive. *See* ***People v. Taylor***, 101 Ill.2d 508, 518 (1984).

Note: Absent a new indictment, a motion for

automatic substitution of the original trial judge may not be made on remand, as it is a continuation of the same case. ***People v. Emerson***, 122 Ill.2d 411, 424 (1987).

In a case with co-defendants, the first motion must be made within 10 days of assignment. That movant may name two judges if allowed by statute. Any subsequent defendant is limited to naming one judge, and the number of substitutions cannot exceed the number of defendants. ***See* 725 ILCS 5/114-5(b)**; ***People v. Ash***, 131 Ill.App.3d 644, 647 (5th Dist. 1985).

3. **Self-Recusal**

A judge should recuse himself where his impartiality may reasonably be questioned, including where he has personal extrajudicial knowledge of the facts. ***People v. Cunningham***, 2012 IL App (3d) 100013, ¶ 15. Recusal is within the discretion of the judge—it is not the same as a substitution. ***See In re Marriage of O'Brien***, 2011 IL 109039, ¶ 45. And absent remittal under Supreme Court Rule, a judge may not hear the matter further outside of ministerial actions. ***See Brzowski v. Brzowski***, 2014 IL App. (3d) 130404, ¶ 19.

E. Joinder and Severance

1. Charges

(a) Compulsory Joinder

When multiple charges are based on the same act, are known to the state at the time of prosecution, and are within the jurisdiction of a single court, they must be prosecuted in a single action. **720 ILCS 5/3-3(b)**.

The court may, in the interest of justice, order that charges otherwise subject to compulsory joinder be tried separately. **§ 3-3(c)**.

Joinder is required where defendant is engaged in "only one continuous and uninterrupted act." ***People v. Hunter***, 2013 IL 114100, ¶ 18. The phrase is not subject to a "hypertechnical interpretation." ***Hunter***, at ¶ 18. It is not subject to an elements-based analysis. ***Id***. at ¶ 22.

(b) **Joinder**

The state *may* charge two or more offenses in the same indictment, information or complaint as separate counts, if the charges are based on the *same act* or on *two or more acts* that are part of the "*same comprehensive transaction*. **725 ILCS 5/111-4(a)** (emphasis added).

(c) **Severance**

To determine if charges are part of the same comprehensive transaction, the court should consider their proximity in time and place, the identity of evidence needed to link the offenses, any common method in commission of the offenses, and similarity of evidence required to establish the offenses. ***People v. Gapski***, 283 Ill.App.3d 937, 942 (2nd Dist. 1996). The court may also consider whether defendant is in a similar position of authority to each victim, whether the victims are similar, and whether severance will promote judicial efficiency. ***People v. Patterson***, 245 Ill.App.3d 586, 588 (5th Dist. 1993).

2. Defendants

(a) **Joinder**

Two or more defendants *may* be charged in the same indictment, information, or complaint if it is alleged that they "*participated in the same act or in the same comprehensive transaction out of which*" the charges arose. **725 ILCS 5/111-4(b)**. The meaning of "same comprehensive transaction" is discussed above.

If two defendants charged separately "could have been joined in a single charge" the court may order that they be tried together. **725 ILCS 5/114-7**.

There is no general right to be tried separately from a codefendant. ***People v. Daugherty***, 102 Ill.2d 533, 540–41 (1984).

(b) **Severance**

A severance may be allowed if a joint trial would prejudice a defendant or the State. **725 ILCS 5/114-8**.

A motion for severance must include specific allegations of prejudice—mere apprehensions of prejudice are not enough. ***Daugherty***, 102 Ill.2d at 541. It should be raised before trial—a mid-trial motion is appropriate only if the grounds for same became apparent during trial. ***People v. Lumpkin***, 105 Ill.App.3d 157, 165 (5th Dist. 1982

(c) **Severance Due to Statement of Codefendant**

If a codefendant's confession is testimonial hearsay, is sought to be admitted, inculpates defendant, and the codefendant does not testify at the joint trial, defendant is entitled to a severance in a jury trial on confrontation clause grounds, since he cannot cross-examine his codefendant. ***See Bruton v. United States***, 391 U.S. 123, 137 (1968); ***Crawford v. Washington***, 541 U.S. 36, 57 (2004).
Bruton does not apply to bench trials. ***People v. Silas***, 185 Ill.App.3d 920, 927 (1st Dist. 1985).

There is no *Bruton* problem, however, if the codefendant is subject to cross-examination about the statement, even if he entirely denies its truth. ***Nelson v. O'Neil***, 402 U.S. 622, 627 (1971); ***People v. King***, 252 Ill.App.3d 334, 341, (1st Dist. 1993).

Bruton applies even when the codefendants make "interlocking" confessions. ***See Cruz v. New York***, 481 U.S. 186, 193 (1987).

(d) **Severance Due to Antagonistic Defense**

Severance should be granted when the codefendants' defenses are so antagonistic that a joint trial would not be fair—such as when each defendant blames the other. ***People v. Byron***, 116 Ill.2d 81, 92 (1987).

Actual hostility is required. Inconsistencies in defense theories are usually not enough to establish actual hostility, but actual hostility can occur even in the absence of the parties directly blaming each other. ***People v. Rodriguez***, 289 Ill.App.3d 223, 235-36 (2nd Dist. 1997). Not all defenses are inherently antagonistic. ***See People v. Mercado***, 397 Ill.App.3d 622, 630 (1st Dist. 2009).

(e) **Mega-Trials**

The risk of prejudice in a joint trial is heightened when defendants in a complex case have markedly different degrees of culpability. ***Zafiro v. United States***, 506 U.S. 534, 539 (1993).

(f) **Alternatives to Severance of Defendants**

For a discussion of simultaneous trials, *see infra,* Section 2.2.F. "Simultaneous Trials".

(g) **Redacting Statements**

Crawford precludes the admission of testimonial hearsay absent cross-examination. But a court can determine "at what point" a statement becomes testimonial and can redact the testimonial portion. ***See Davis v. Washington***, 547 U.S. 813, 821, 828 (2006).

Note: Consideration of *Crawford* suggests that a non-testimonial coconspirator statement that is admissible under a hearsay exception may be admitted at a joint trial. ***See People v. Edwards***, 128 Ill.App.3d 993, 1004 (1st Dist. 1984); ***Crawford***, 541 U.S. at 56 (noting statements in furtherance of a conspiracy are not testimonial).

F. Pre-Trial *Pro Se* Motions

A defendant is not entitled to represent himself and have an attorney. There is no constitutional right to hybrid representation in which defendant has counsel and can file *pro se* motions other than a claim of the ineffective assistance of counsel. ***People v. Serio***, 357 Ill.App.3d 806, 815 (2nd Dist. 2005).

G. State's Pre-Trial Motion to Amend Charge

The state may not amend an indictment prior to trial except to correct a formal defect. ***People v. Kincaid***, 87 Ill.2d 107, 124 (1981); ***see also* 725 ILCS 5/111-5** (allowing for formal amendment of charging instrument).

But a felony information can be amended before trial to correct substantive defects. ***Kincaid***, 87 Ill. 2d at 125. A new preliminary hearing might be needed if a new element was not tested for probable cause. ***People v. Smith***, 2012 IL App (4th) 100901, ¶ 133.

If the amendment does not create a new and additional charge, there is no speedy trial issue. But if the amendment does and compulsory joinder would apply to the old and new charges, there could be a speedy trial issue. ***See People v. Wells***, 2012 IL App (1st) 083660, ¶¶ 24-30; ***People v. Woodrum***, 223 Ill.2d 286, 298 (2006).

1.9 Motions to Quash a Search Warrant and Suppress Evidence; Quash Arrest and Suppress Evidence

See Appendix for "Checklist for Motions to Suppress and Motions to Quash" on page A-22.

A. Motion to Suppress Evidence Illegally Seized

The fourth amendment protects against unreasonable searches and seizures. A search occurs upon the infringement of an expectation of privacy that society is prepared to consider reasonable. A seizure occurs when there is meaningful interference with a person's possessory interest in property. ***United States v. Jacobsen***, 466 U.S. 109, 113 (1984).

The exclusionary rule generally applies to evidence obtained from unlawful searches or seizures as a court-created means to deter unlawful police conduct, not to vindicate the rights of a defendant. ***See United States v. Calandra***, 414 U.S. 338, 347 (1974).

Defendant may move to suppress evidence illegally seized under **725 ILCS 5/114-12**. The motion must be in writing and state facts showing the search and seizure were unlawful. Defendant has the burden of proof. **§ 114-12(b)**. The motion must be made before trial "unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion." **§ 114-12(c)**.

725 ILCS 5/108-3 codifies the grounds for the issuance of a search warrant.

Standing: To seek suppression on fourth amendment grounds, defendant must show that he had a reasonable expectation of privacy in the place or item searched—standing is not premised on being the mere target of the investigation. ***Rakas v. Illinois***, 439 U.S. 128, 140 (1978).

The criteria for standing are subjective—a person need not be an owner or lessor to have a reasonable expectation of

privacy. ***See Minnesota v. Olson***, 495 U.S. 91, 97 (1990) (overnight visitor)

> **Examples**: ***Rawlings v. Kentucky***, 448 U.S. 98, 105 (1980) (no reasonable expectation of privacy in third party's purse in which defendant placed drugs); ***United States v. Payner***, 447 U.S. 727, 731 (1980) (none in bank documents held in third party briefcase); ***People v. Johnson***, 237 Ill.2d 81, 90 (2010) (none of passenger in searched vehicle); ***People v. Tyus***, 2011 IL App (4th) 100168, ¶ 59 (none in undelivered but not yet untimely package).

There is no expectation of privacy in information knowingly exposed to the public, including a state agent. ***People v. Meyer***, 402 Ill.App.3d 1089, 1093 (4th Dist. 2010).

> **Note**: A defendant has a diminished expectation of privacy in a copy of a hard drive acquired by police via a search warrant *before* defendant's acquittal, but that was searched *after* the trial if the probable cause for the search warrant extended beyond the charge for which he was acquitted. ***People v. McCavitt***, 2021 IL 125550, ¶ 117.

1. **Grounds: No Probable Cause:** Generally, suppression is the remedy for a warrant lacking probable cause, absent the application of the good faith exception. ***Mapp v. Ohio***, 367 U.S. 643 (1961); (1987).

> **Note:** The good faith exception in Illinois discussed *infra*, is not identical to the federal rule. ***See People v. Krueger***, 175 Ill.2d 60 (1996) (good faith exception of ***Illinois v. Krull***, 480 U.S. 340 (1987) does not apply when a statute is subsequently found unconstitutional).
>
> **Note**: The use of a drug-sniffing dog in the physical intrusion of the curtilage of a home is a search, the illegal results of which cannot support a search warrant. ***Florida v.***

Jardines, 569 U.S. 1, 11 (2013).

Note: The fact that a drug dealer drove defendant's car to a drug deal does not create probable cause that defendant has drugs in his home. ***People v. Manzo***, 2018 IL 122761, ¶ 41.

2. **Grounds: Lack of Particularity:** A search warrant must describe with particularity the place to be searched and the item to be seized—a detailed description in the complaint alone is insufficient. ***See Groh v. Ramirez***, 540 U.S. 551, 557 (2004); **725 ILCS 5/108-3(a)**. A description is sufficient if the executing officer, with reasonable effort, can identify the place to be searched and the officer will not seize the wrong property. ***See People v. McCarty***, 223 Ill.2d 109, 149, 152 (2006).

   Note: If the search warrant contains erroneous information regarding the place to be searched, but the error is not known to the officers, the validity of the search will be based on the objective reasonableness of the officers' failure to recognize the error. ***Maryland v. Garrison***, 480 U.S. 79, 88 (1987). But the search must stop once the error is discovered. ***Garrison***, 480 U.S. at 87.

3. **Execution (Detention of Persons)**

   See above in this book, Section 1.1.A. "Search Warrants."

4. **Non-Governmental Actor**:

   The fourth amendment applies to government action, not private conduct unaffiliated with the government. ***Jacobsen***, 466 U.S. at 113. The state can view information obtained by a private search. ***Id***. at 120. The fourth amendment is implicated, and a warrant is required, only when the state uses "information with respect to which the expectation of privacy has not already been frustrated." ***Id***. at 117; ***see People v. Clendenin***, 238 Ill.2d 302, 331 (2010) (police may

examine video file seized by neighbor);

Note: ***See People v. Sykes*****,** 2017 IL App (1st) 150023, ¶ 28 (even though police restrained defendant to aid in performance of a medical test ordered by hospital, no fourth amendment violation occurred); ***People v. Brooks***, 2017 IL 121413, ¶ 30 (fact that police took defendant to hospital after motorcycle accident over his objection did not convert private hospital blood draw to police action).

5. Good Faith Exception to Exclusionary Rule

Pursuant to **725 ILCS 5/114-12,** evidence is generally not to be suppressed because of the conduct of a police officer if: (1) the officer's conduct was taken in a reasonable and objective good faith belief that the conduct was proper; and (2) the evidence is otherwise admissible.

"Good faith" is defined as reasonable reliance on: (1) a lawfully obtained arrest or search warrant; or (2) a law, later deemed invalid, that supports a warrantless search incident to arrest. **§ 5/114-12(b)(2)**.

However, ***People v. Krueger***, 175 Ill.2d 60, 70, 76 (1996), found that article I, § 6 of the Illinois Constitution, mandates that the exclusionary rule *does not apply* when an officer has relied on a procedural statute later deemed unconstitutional—there, a statute authorizing a no-knock search warrant. Illinois thus provides greater protection on this score, as the federal constitution does permit a good faith exception for reliance on a procedural statute later declared unconstitutional. ***Illinois v. Krull***, 480 U.S. 340 (1987) (invalidated statute authorized warrantless administrative searches).

Illinois still follows the good-faith exception set forth in ***United States v. Leon*** 468 U.S. 897 (1984). ***Krueger***, 175 Ill.2d at 76. ***Leon*** recognized a good-faith exception to the exclusionary rule when an officer acts in objectively reasonable reliance on a search warrant that was later invalidated. 468 U.S. at 916.

> **Note**: ***Arizona v. Evans***, 514 U.S. 1 (1995), held that the good faith exception applies to a search pursuant to an arrest warrant not recorded as quashed due to clerical error. And ***Herring v. United States***, 555 U.S. 135, 147 (2009), applied the exception to a search pursuant to an arrest warrant not recorded as recalled due to police error, though the court noted that police negligence could rise to the level of misconduct.

(a) ***Franks v. Delaware***

Generally, the "four corners" rule allows a challenge only to the facial sufficiency of a search warrant.

But ***Franks v. Delaware***, 438 U.S. 154 (1978), held that defendant may challenge a search warrant on the grounds that the affiant lied or acted in reckless disregard of the truth. There is a multi-step process for defendant to obtain a hearing on his claim.

In a ***Franks*** motion, defendant must first: (1) allege deliberate falsehood or reckless disregard for the truth; (2) specifically note the portion of the affidavit claimed to be false and state why; and (3) support the motion with affidavits or otherwise reliable statements or explain the absence of same. 438 U.S. at 171. Allegations of innocent mistake or negligence do not suffice. ***Id***. Only the affiant's claims are challengeable—not those of an informant. ***Id***. However, the affiant's reasonable reliance on the informant may be challenged. ***See People v.***

Lucente, 116 Ill.2d 133, 150 (1987).

If the above standards are met, the court must set aside the challenged evidence and determine whether, in its absence, there is sufficient evidence of probable cause. If there is, no hearing is needed. If there is not, defendant is entitled to a hearing. ***Franks***, 438 U.S. at 171. Defendant must then prove his claim of perjury by a preponderance of the evidence. ***Id***. at 156.

Note: The affiant's reliance on the informant's credibility can supported by independent corroboration of same, such as when the informant testified in support of issuance of the search warrant and the court had the opportunity to determine the informant's credibility. But the presence of the informant before the issuing judge does not categorically preclude a *Franks* hearing. ***People v. Chambers***, 2016 IL 117911, ¶ 63.

B. Motions to Suppress Evidence

1. Probable Cause for Arrest

Probable cause exists when "the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." ***People v. Hopkins***, 235 Ill.2d 453, 472 (2009).

While "quashing" an arrest is not an articulated remedy set forth in Illinois statutes, a finding that an arrest was without probable cause may support suppression of evidence under **725 ILCS 5/114-12** and use of the exclusionary rule if that remedy is sought in the motion. "Quashing" arrest, however, does not preclude prosecution or allow for dismissal of the charge. ***See People v. Motzko***, 2019 IL App (3d) 180184, ¶¶ 19-22.

2. Arrest in Defendant's Home

Absent exigent circumstances, the fourth amendment

precludes entry into a defendant's home to make a probable-caused-based warrantless arrest. ***Payton v. New York***, 445 U.S. 573, 590 (1980).

> **Note**: An overnight guest may have a reasonable expectation of privacy in the premises such that ***Payton*** applies. ***Minnesota v. Olson***, 495 U.S. 91, 100 (1990).
>
> **Note**: ***Dorman v. United States***, identifies some of the factors in determining whether exigent circumstances exist. 435 F.2d 385, 392 (D.C. Cir. 1970).
>
> **Note**: "Hot pursuit" is an exigent circumstance allowing for an in-home warrantless felony arrest. ***United States v Santana***, 427 U.S. 38, 42 (1976). It is not necessarily an exigent circumstance for an in-home warrantless misdemeanor arrest—misdemeanors require a case-by-case analysis. ***Lange v. California***, 141 S. Ct. 2011, 2020 (2021).

But an in-home warrantless arrest supported by probable cause does not render defendant immune from prosecution. ***New York v. Harris***, 495 U.S. 14, 18 (1990). And while the exclusionary rule applies to a ***Payton*** violation insofar as suppression of evidence found in the home, it does not bar a statement later elicited outside of the home. ***Harris***, 495 U.S. at 17.

3. Arrest Outside Defendant's Home

No arrest warrant is required for a probable-cause-based arrest in a *public place*. ***United States v. Watson***, 423 U.S. 411, 423 (1976). This rule applies to all arrests, not just felonies. ***Atwater v. City of Lago Vista***, 532 U.S. 318, 354 (2001) (offense punishable by fine only). Last, "[i]t is the rare case where 'staleness' will be relevant to the legality of a warrantless arrest. [fn omitted] When there is a reasonable belief that someone has committed a crime, time by itself does not make the existence of that fact any less probable." ***United States v. Haldorson***, 941 F.3d 284, 292 (7th Cir.

2019).

> **Note**: Consent or a search warrant by the resident is required to enter and effectuate an arrest warrant for defendant in a *third-party residence*—absent same, the third-party resident's fourth amendment protections are violated. ***Steagald v. United States***, 451 U.S. 204, 220 (1981).

4. Seizure Before Formal Arrest and *Terry* Stops

Arrest—The arrest of defendant may occur even before formally declared. The issue is whether and when a reasonable person would have believed that he was not free to leave, depending on the facts of the case. ***See Kaupp v. Texas***, 538 U.S. 626, 630 (2003) (seizure deemed an arrest). Probable cause must exist at that point. ***See United States v. Hastamorir***, 881 F.2d 1551, 1556 (11th Cir. 1989).

Investigatory Seizure/*Terry*—But defendant may be detained and seized on less than probable cause under ***Terry v. Ohio***, 392 U.S. 1, 24, (1968), which allows for a brief investigatory seizure and search based on reasonable articulable suspicion. ***See Rodriguez v. United States***, 575 U.S. 348, 354 (2015).

An investigative stop is by definition not an arrest, though a reasonable person there also would not believe himself free to leave. Traffic stops are often based on less than probable cause and are often thus ***Terry*** stops. ***See Brendlin v. California***, 551 U.S. 249, 255 (2007) (traffic stop effectuates a seizure of both driver and passenger).

Whether a seizure occurred is premised on a multi-factor analysis. ***See People v. Cosby***, 231 Ill.2d 262, 277 (2008).

> **Note**: A ***Terry*** stop may be premised on an informant's tip if there are sufficient indicia of reliability to support same. ***Alabama v. White***, 496 U.S. 325, 332 (1990) (sufficient reliability); ***Florida v. J.L.***, 529 U.S. 266, 274 (2000) (insufficient reliability); ***see also People v. Hansen***, 2012 IL App

(4th) 110603, ¶ 41 (information pursuant to 911 call supported ***Terry*** stop).

Note: Unprovoked flight from police in an area of heavy drug trafficking can support a ***Terry*** stop. ***Illinois v. Wardlow***, 528 U.S. 119, 125 (2000).

Notably, a ***Terry*** seizure may become unlawful if it is prolonged beyond the time reasonably required to complete its purpose. ***See Rodriguez v. United States***, 575 U.S. 348, 354 (2015). The focus is on the time reasonably necessary to complete the tasks related to the scope of the stop. During the stop, police may conduct tasks unrelated to the scope of the stop (for which additional reasonable suspicion or probable cause does not exist) so long as the unrelated tasks to do not prolong the duration of the seizure. ***Rodriguez***, 575 U.S. at 355.

Note: Police may order a driver and passenger out of the car during a traffic stop for safety reasons. ***Arizona v. Johnson***, 555 U.S. 323, 331 (2009). However, during a ***Terry*** stop, whether a traffic stop or otherwise, police may additionally conduct a pat down only if there is reasonable suspicion that the subject is armed and dangerous ***Johnson***, 555 U.S. at 331.

Obviously, if additional reasonable suspicion or probable cause develops during the ***Terry*** stop, further seizure from that point on is justified on such grounds. ***See e.g. Johnson***, 75 U.S. at 334, n.2 (Arizona could make such a finding on remand).

Note: If police ask for and obtain consent to search from a driver after concluding a lawful traffic stop, the consenting driver is not necessarily unconstitutionally seized during the search. ***People v. Oliver***, 236 Ill.2d 448, 457–58 (2010).

5. Search Incident to Arrest

Safety and concern for the destruction of evidence underpin searches incident to arrest. Defendant may be searched

incident to custodial arrest—no additional warrant is needed. ***United States v. Robinson***, 414 U.S. 218, 235 (1973). This is true even if state law provides for a summons instead of arrest—the constitutionality of a search incident to arrest turns on whether the arrest is constitutionally valid, not whether the arrest is in compliance with state law. ***Virginia v. Moore***, 553 U.S. 164, 177 (2008); ***see also People v. Fitzpatrick***, 2013 IL 113449, ¶ 21 (arrest for petty offense and search incident to arrest upheld).

> **Note**: A strip search violative of **725 ILCS 5/103-1** may nonetheless not violate the fourth amendment if reasonable. ***People v. Carter***, 2011 IL App. (3d) 090238, ¶ 19.

A visual strip search of a defendant being placed in the general jail population is permissible. ***Florence v. County of Burlington, N.J.***, 566 U.S. 318, 338 (2012).

Search of person: The lawful search of a person incident to arrest categorically includes areas within the immediate control of the arrestee—no additional justification is required. ***Robinson***, 414 U.S. at 235; ***Chimel v. California***, 395 U.S. 752, 763 (1969); ***see also People v. Cregan***, 2014 IL 113600, ¶ 50 (upholding search of laundry bag, suitcase, and container in suitcase in immediate control of arrestee).

Search of car: Police may search a car incident to the arrest of the driver in two instances: (1) when the arrestee is unsecured and can reach the passenger compartment at the time of the search; and (2) when it is reasonable to believe that evidence relevant to the crime of arrest might be in the car. ***Arizona v. Gant***, 556 U.S. 332, 351 (2009).

Two other recognized exceptions to the warrant requirement for the search of a car during an arrest are: (1) when it is reasonable to believe that someone, whether or not the arrestee, is dangerous and might access the car to gain immediate control of a weapon; and (2) when there is probable cause that the car contains evidence of any crime, in which case police may search the area of the car in which evidence might be found. ***Gant***, 556 U.S. at 346-7.

6. Protective Sweeps

A protective sweep is a limited search of a specific area of a premises incident to an arrest conducted for safety purposes. ***Maryland v. Buie***, 494 U.S. 325, 327 (1990). The fourth amendment permits a protective sweep when there is a reasonable, articulable suspicion "that the area to be swept harbors an individual posing a danger to those on the arrest scene" and it should last "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." ***Buie***, 494 U.S. at 336-37.

7. Cell Phones

Absent exigent circumstances, a warrant is necessary to search a cell phone seized during an arrest. ***Riley v. California***, 573 U.S. 373, 403 (2014).

> ***The appellate court is split on whether the fifth amendment precludes police from compelling defendant to reveal his phone passcode. ***People v. Spicer***, 2019 IL App (3d) 170814, ¶ 23, held it does, and that the "foregone conclusion" doctrine generally does not apply. But ***People v. Sneed***, 2021 IL App (4th) 210180, ¶94, held otherwise. The Illinois Supreme Court accepted the petition for leave to appeal in ***Sneed*** on March 30, 2022***

8. Hot Pursuit Resulting in Warrantless Search

The exigent circumstances doctrine allows police to enter a home without a warrant while in hot pursuit of a fleeing felon. ***Warden v. Hayden***, 387 U.S. 294, 299 (1967). The pursuit need not be lengthy. ***United States v. Santana***, 427 U.S. 38, 43 (1976) (defendant ran into her house upon arrival of police). However, the hot pursuit rule does not categorically allow a warrantless entry into the home of a misdemeanant, though such entry might be valid depending on the facts. ***Lange v. California***, 141 S. Ct. 2011, 2024 (2021).

9. Warrantless Search of Car

Under the automobile exception, police may search an area of a car without a warrant, including closed containers, if there is probable cause to believe there is contraband in that area. ***United States v. Ross***, 456 U.S. 798, 825 (1982) (search of two containers in trunk). The probable cause may be to search the entire vehicle or to search only a container within the vehicle. ***California v. Acevedo***, 500 U.S. 565 (1982). This rule applies to passengers' belongings. ***Wyoming v. Houghton***, 526 U.S. 295, 307 (1999).

10. Emergency Circumstances

The need for emergency aid is an exigent circumstance. Police may enter a home without a warrant if there is an objectively reasonable basis to believe someone in the house needs immediate aid, whether that be medical assistance or protection from danger. ***Michigan v. Fisher***, 558 U.S. 45, 47 (2009). But warrantless entry to a home may not be premised on the "community caretaking function" of police, nor does ***Cady v. Dombrowski***, 413 U.S. 433 (1973), stand for a "community caretaking" exception to the warrant requirement. ***Caniglia v. Strom***, 141 S. Ct. 1596, 1598 (2021).

> **Note**: There is no "murder scene" exception for a warrantless search. ***Mincey v. Arizona***, 437 U.S. 385, 396 (1978).

11. Other Exigent Circumstances

Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), sets forth certain factors to consider in determining whether there are exigent circumstances. They are: (1) the relative peacefulness of the entry, (2) the time of day or night when the entry was made, (3) the seriousness of the crime, (4) the probability that the suspect is armed, (5) the danger of flight, (6) the delay which would be occasioned by the application for a warrant, (7) the probability beyond the minimum requirement of probable cause, that the suspect is guilty, and

(8) the probability that the suspect is within the house which is to be entered.

> **Note**: Police may make a warrantless entry to a home to prevent the destruction of evidence so long as the police have not impermissibly created the exigency. ***Kentucky v. King***, 563 U.S. 452, 469 (2011).

12. Consent Search

A search may be premised on voluntary consent. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 248 (1973). The state must show that the consent was not the result of duress or coercion. ***Schneckloth***, 412 U.S. at 248. While the subject's knowledge of his right to refuse is a factor to consider in determining whether consent was voluntary, such knowledge is not a prerequisite to voluntary consent. ***Id***. Nor do police need to expressly advise a detainee that that he is free to go before seeking consent. ***Ohio v. Robinette***, 519 U.S. 33, 40 (1996).

Further, police may ask for consent to search in the absence of suspicion of criminal activity—asking a question is not a seizure and, so long as a reasonable person would feel free to disregard the police and leave, it is a consensual encounter. ***Florida v. Bostick***, 501 U.S. 429, 434 (1991).

Consent is not valid, however, where it is mere "acquiescence to a claim of lawful authority." ***Bumper v. North Carolina***, 391 U.S. 543, 549 (1968).

The scope of a consent search is what is "objectively reasonable." ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991) (general consent to narcotics search included containers in car).

13. Third Party Consent Search

Police may rely on consent to search of a third party whom police reasonably believe at the time of the search has common authority over a premises, even if the belief is in error. ***Illinois v. Rodriguez***, 497 U.S. 177, 188 (1990).

But, police may not rely on third-party consent if the co-occupant is also physically present at the entrance and objects. ***Georgia v. Randolph***, 547 U.S. 103, 123 (2006).

Third-party consent is valid if the co-occupant is absent, regardless whether the absence is due to lawful detention or arrest or some other unrelated reason. ***Fernandez v. California***, 571 U.S. 292, 303 (2014). Moreover, third-party consent in the co-occupant's absence overrides any objection by the co-occupant preceding his departure. ***Fernandez***, 571 U.S. at 303.

14. Inventory Search

Inventory searches are an exception to the warrant requirement. ***Colorado v. Bertine***, 479 U.S. 367, 371 (1987). "Reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment." ***Bertine***, 479 U.S. at 374. There must be a policy as to how the search is carried out. ***Florida v. Wells***, 495 U.S. 1, 5 (1990). The policy need not be written. ***People v. Gipson***, 203 Ill.2d 298, 306 (2003).

In a vehicle inventory search, the impoundment/tow must be lawful, the purpose of the search must be to protect police and property, and the search must be in good faith, performed in accordance with procedure, and not be pretextual. ***People v. Hundley***, 156 Ill.2d 135, 138 (1993).

> **Note**: ***People v. Wells***, 403 Ill.App.3d 849, 862 (1st Dist. 2010), held that an inventory search conducted after a tow for a parking violation is unreasonable—but that court seemed to wrongly conclude that probable cause is a requirement for an inventory search. ***Compare People v. Nash***, 409 Ill.App.3d 342, 358 (2nd Dist. 2011) (upholding inventory search after mandatory tow following traffic violation).

15. Seizure of Items in Plain View

"The plain view doctrine authorizes seizure of illegal or

evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." ***Illinois v. Andreas***, 463 U.S. 765, 771 (1983). This is because, once police lawfully observe an item, any privacy interest therein is lost. ***Andreas***, 463 U.S. at 771.

The observation need not be inadvertent. ***Horton v. California***, 496 U.S. 128, 139 (1990).

Police may not move items in plain view to establish probable cause. ***Arizona v. Hicks***, 480 U.S. 321, 326 (1987) (moved stereo to see serial number).

16. Seizure of items pursuant to Plain Touch

Items detected by "plain touch" during a protective pat-down to be contraband may be seized. **Minnesota v. Dickerson**, 508 U.S. 366, 375 (1993). But police may not manipulate items to determine if they are or contain contraband. ***Dickerson***, 508 U.S. at 379; ***People v. Mitchell***, 165 Ill.2d 211, 223 (1995) (upholding seizure on plain touch doctrine); ***see also Bond v. United States***, 529 U.S. 334, 338 (2000) (improper to manipulate luggage to detect item).

17. Curtilage

Curtilage, the area immediately surrounding and associated with the home, is part of the home for fourth amendment purposes. ***Collins v. Virginia***¸138 S. Ct. 1663, 1670 (2018). Curtilage includes, *inter alia*, a front porch, side garden, an area outside a front window, and a driveway enclosure, as each is an area to which "the activity of home life extends." ***Collins***, 138 U.S. at 1671.

Florida v. Jardines, 569 U.S. 1, 11 (2013), held that a front porch was curtilage, and the physical intrusion by police to conduct a dog sniff there was a search. ***See Bovat v. Vermont***, 141 S. Ct. 22 (Gorsuch, J. dissenting from denial of cert, analyzing ***Jardines***).

Illinois applied ***Jardines*** to an apartment threshold—***People***

v. Bonilla, 2018 IL 122484, ¶ 27—but not an alcove outside a motel room. ***People v. Lindsey***, 2020 IL 124289, ¶ 42

> **Note**: ***United States v. Dunn***, 480 U.S. 294, 301 (1987), held that a farm out-building was not curtilage. ***See also People v. Nielson***, 187 Ill.2d 271, 283 (1999) (burn pile not curtilage).

18. Use of Enhanced Surveillance Methods

California v. Ciraolo, 476 U.S. 207, 214 (1987), held that the use of a low-flying airplane to observe marijuana plants in defendant's back yard, even though it was curtilage, did not violate the Fourth Amendment—defendant did not have a reasonable expectation of privacy since he grew plants that could be seen from public airspace.

But the use of a thermal imaging device to gather information about the interior of a home that could not otherwise have been obtained without entering the house is a search that is presumptively unreasonable without a warrant. ***Kyllo v. United States***, 533 U.S. 27, 40 (2001).

19. Open Field

The search of an open field requires neither a warrant nor probable cause, as there is no reasonable expectation of privacy in an open field. ***Oliver v. United States***, 466 U.S. 170, 181 (1984); ***see People v. Pitman***, 211 Ill.2d 502, 515 (2004) (open fields doctrine does not apply when police could only observe marijuana by stepping inside a barn).

> **Note**: ***Dow Chemical Co. v. United States***, 476 U.S. 277, 239 (1986), drawing an analogy to the open fields doctrine, upheld aerial surveillance of an industrial complex.

20. Abandoned Property

Police may conduct a warrantless search of garbage left for collection outside the curtilage of a home, as there is no reasonable expectation of privacy in abandoned trash.

California v. Greenwood, 486 U.S. 35, 40 (1988). ***People v. Stage***, 337 Ill.App.3d 242, 245 (3rd Dist. 2003), declined to find greater protection for same in the state constitution.

21. Administrative Search

The "special needs" doctrine allows for a search in the form of alcohol or drug testing of employees in the absence of a warrant when such tests are reasonably conducted pursuant to government regulations geared toward safety. The court must balance the intrusion of privacy against the "special needs" of the particular program. ***See Skinner v. Railway Labor Executives' Association***, 489 U.S. 602, 634 (1989); ***Ferguson v. City of Charleston***, 532 U.S. 67, 78 (2001).

The special needs doctrine does not justify non-consensual drug tests on patients for the purpose of turning the results over to law enforcement, even if an underlying goal was health-related. ***Ferguson***, 532 U.S. at 82.

Schools—Student-athlete drug testing is permissible under the special needs doctrine. ***Vernonia School District 47J v. Acton***, 515 U.S. 646, 665 (1995). So is drug-testing of students in competitive extra-curricular activities. ***Board of Education v. Earls***, 536 U.S. 822, 838 (2002).

> **Note**: Searches of public-school students are subject to a standard of reasonableness that does not require probable cause. Instead, officials must have reasonable grounds to suspect that the search will reveal evidence of a violation of the law or school rule, and the search must not be excessively intrusive. ***New Jersey v. T.L.O.***, 469 U.S. 325, 341 (1985). ***Safford Unified School District v. Redding***, 557 U.S. 364, 374 (2009), found, under the facts of the case, a strip-search to be unreasonable and excessively intrusive.

Probation—The special needs doctrine justifies a state regulatory search of a probationer's home premised on reasonable grounds rather than probable cause. ***See Griffin v. Wisconsin***, 483 U.S. 868, 879 (1987).

But the special needs doctrine does not apply when the search of a probationer's home is not conducted for regulatory probation purposes. ***United States v. Knights***, 534 U.S. 112, (2001); ***People v. Lampitok***, 207 Ill.2d 231, 248 (2003). Instead, such a warrantless search is subject to ordinary fourth amendment scrutiny, for which the existence of a condition of probation requiring submission to a search is a relevant factor since a probationer has a diminished expectation of privacy. Such searches may be premised on reasonable suspicion of criminal activity. ***Knights***, 534 U.S. at 118-121.

> **Note**: ***People v. Absher***, 242 Ill.2d 77, 90 (2011), held that defendant's express agreement as part of a negotiated plea to a prospective consent to search as a detailed condition of his probation was a valid waiver of his fourth amendment rights, an issue left open in ***Knights***.

Parole—A parolee has less of an expectation of privacy than a probationer. A warrantless search of a parolee's home premised on a parole condition is permissible. ***Samson v. California***, 547 U.S. 843, 857 (2006); ***People v. Wilson***, 228 Ill.2d 35, 52 (2008).

Roadblocks—Roadblocks conducted for general crime control purposes are not justified by the special needs doctrine. ***Indianapolis v. Edmond***, 531 U.S. 32, 41 (2000).

A brief seizure at a highway sobriety checkpoint is allowed without a warrant, ***Michigan Dept. of State Police v. Sitz***, 496 U.S. 444, 455 (1990), as is a brief seizure, including a diversion for questioning, at a border-patrol checkpoint for the purpose of locating illegal aliens. ***United States v. Martinez-Fuerte***, 428 U.S. 543, 563 (1976).

A brief seizure at a highway checkpoint is also permissible when police seek information about a recent hit-and-run. ***Illinois v. Lidster***, 540 U.S. 419, 423 (2004).

22. Stop and Frisk

Investigatory stops under ***Terry v. Ohio***, 392 U.S. 1 (1968),

are discussed earlier on page 89. **725 ILCS 5/107-14** codifies ***Terry***.

> **Note**: ***Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County***, 542 U.S. 177, 187, 191 (2004), held that a state statute requiring a person to answer a police request for his name during a ***Terry*** stop did not violate the fourth or fifth amendment.

23. Traffic Stops

As noted earlier, most traffic stops are ***Terry*** stops premised on reasonable articulable suspicion, though some are based on probable cause. Stops may be pretextual. The officer's subjective intent in making the stop is irrelevant. ***Whren v. United States***, 517 U.S. 806, 814 (1996). And a stop may be objectively justified if the officer reasonably misunderstands the law. ***People v. Gaytan***, 2015 IL 116223, ¶ 46; ***Hein v. North Carolina***, 574 U.S. 54, 61 (2014).

Dog Sniffs— ***Illinois v. Caballes***, 543 U.S. 405, 410 (2005), held that a suspicionless drug dog sniff of a vehicle during a lawful traffic stop is not impermissible under the fourth amendment, as it does not intrude on legitimate privacy expectations.

Florida v. Harris, 568 U.S. 237, 246 (2013), held that evidence of a drug dog's satisfactory performance in a training program can provide a basis to rely on his alert, so long as defendant has an opportunity to challenge the evidence of reliability. ***See also People v. Litwhiler***, 2014 IL App (3d) 120431, ¶ 41 (relying on ***Harris***).

People v. Bartelt, 241 Ill.2d 217, 231 (2011), held that police may order a driver to assist a drug sniffing dog during a vehicle stop by rolling up windows and turning blower on high.

> **Note**: Due to the legalization of small amounts of marijuana, absent additional factors, the odor of burnt cannabis alone may not support probable cause to search a vehicle. ***See People v. Stribling***, 2022 IL

App (3d) 210098, ¶ 28.

Collective Knowledge—the collective knowledge of the officers may be the basis of probable cause, regardless whether the arresting officer, acting at another's direction, had first-hand information. ***United States v. Williams***, 627 F.3d 247, 252 (7th Cir. 2010); ***People v. Fonner***, 385 Ill.App.3d 531, 541 (4th Dist. 2008).

Outside of Jurisdiction—An arrest or ***Terry*** stop is permissible outside of an officer's jurisdiction under **725 ILCS 5/107-4** if, *inter alia*, the criminal activity occurred in the officer's primary jurisdiction, if the on-duty officer becomes personally aware of the crime, or if the officer is requested to provide assistance. ***See People v. Contreras***, 2011 IL App (2d) 100930, ¶ 32 (personally aware means first-hand knowledge). The Illinois Municipal Code provides that adjoining municipalities in a county form a police district in which police may operate. ***See* 65 ILCS 5/7-4-8**.

An extraterritorial arrest by an officer not authorized by statute to act may be upheld as a citizen's arrest if the crime was committed in the officer's presence. ***See People v. O'Connor***, 167 Ill.App.3d 42, 46 (1st Dist. 1988). But, unlike an arrest under section 107-3, an officer may not use the powers of his office during a citizen's arrest. ***People v. Olson***, 361 Ill.App.3d 62, 68 (1st Dist. 2005).

24. State v. Federal Constitution—Lockstep

With some exceptions, Illinois interprets its constitutional provisions in the same manner as their federal counterparts.

One area of difference is the good faith exception for reliance on a procedural statute later declared unconstitutional. ***People v. Krueger***, 175 Ill.2d 60, 70, 76 (1996), found that article I, §6 of the Illinois Constitution, mandates that the exclusionary rule *does not apply*. It *does apply* under federal constitutional analysis. ***See Illinois v. Krull***, 480 U.S. 340 (1987).

People v. McCauley, 163 Ill.2d 414, 440 (1994), presents

another, in that Illinois requires that, for a knowing waiver of the right to counsel in custodial interrogation, police must inform defendant if his attorney is physically present to see him.

1.10 Motions to Suppress Confession

A. Fifth Amendment

Miranda v. Arizona, 384 U.S. 436, 498 (1966), held that that a defendant subject to custodial interrogation be admonished of four rights: the right to remain silent, that anything said can be used against defendant in a court of law, that defendant has the right to an attorney, and that, if defendant cannot afford an attorney, one will be appointed for him before questioning. ***Miranda***, 384 U.S. at 479. These admonishments are prophylactic in nature, designed to protect a defendant's fifth amendment rights. ***Vega v. Tekoh***, 142 S. Ct. 2095, 2106 (2022).

A violation of ***Miranda***'s rules is not the equivalent of a fifth amendment violation. ***Vega***, 142 S. Ct. at 2105.

A fifth and fourteenth amendment violation occurs when a statement is involuntary, in that it was not the product of a rational intellect and a free will, and due process precludes the use of it at trial. ***Mincey v. Arizona***, 437 U.S. 385, 398 (1978).

Congress cannot legislatively change ***Miranda*** requirements. ***Dickerson v. United States***, 530 U.S. 428, 444 (2000). ***Miranda*** warnings are intended to combat the inherently coercive nature of custodial interrogation. ***Dickerson***, 530 U.S. at 435.

A person who is not in custody may affirmatively invoke the fifth amendment to prevent police questioning. Silence alone during a voluntary interview generally does not imply that the witness asserts the privilege against self-incrimination. ***Salinas v. Texas***, 570 U.S. 178, 184 (2013) (plurality).

1. Custody

Custodial interrogation is "questioning initiated by law

enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ***Miranda***, 384 U.S. at 487.

There are two discrete components to determining whether defendant is in custody for ***Miranda*** purposes: (1) what were the circumstances surrounding the interrogation; and (2) given those, would a reasonable person have felt he "was not at liberty to terminate the interrogation and leave." ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995).

The age and experience of defendant are relevant factors to consider, but defendant's subjective mindset is not. ***J.D.B. v. North Carolina***, 564 U.S. 261, 271 (2011) (suspect was 13 years old). Likewise, the subjective and undisclosed views of the questioning officer are irrelevant. ***J.D.B***., 564 U.S. at 271.

> **Note**: ***People v. Braggs***, 209 Ill.2d 492, 507 (2003), held that "intelligence and mental makeup" may be considered in the reasonable person standard.

The location of the interview is not dispositive. Police station interviews are not *per se* custodial. ***Oregon v. Mathiason***, 429 U.S. 492, 495 (1977). Interviews while a defendant is in prison serving a sentence are not *per se* custodial. ***See Maryland v. Shatzer***, 559 U.S. 98, 114 (2010). This is true even if defendant is taken out of general population and questioned about a non-prison related issue. ***Howes v. Field***, 565 U.S. 499, 508 (2012). And in-home questioning can be custodial. ***Orozco v. Texas***, 394 U.S. 324, 326 (1969).

The ***Miranda*** requirement does not turn on the severity of the offense, but roadside questioning during a routine traffic stop or questioning during a ***Terry*** stop is not *per se* custodial interrogation under ***Miranda***. ***Berkemer v. McCarty***, 468 U.S. 420, 434, 441 (1984) (traffic); ***Shatzer***, 559 U.S. at 113 (***Terry***).

Note: An interview by parole agents about a new crime can be deemed custodial interrogation. ***See People v. Coleman***, 2015 IL App. (4th) 140730, ¶ 49.

2. Interrogation

Miranda warnings must be given prior to custodial interrogation but are not required immediately upon arrest. ***Rhode Island v. Innis***, 446 U.S. 291, 300 (1980). ***Innis*** found that defendant's unsolicited response to a conversation between the officers was not the result of interrogation. 446 U.S. at 302. Interrogation includes not just questioning, but also words or actions on the part of police that police should know are reasonably likely to elicit an incriminating response. ***Id.*** at 301. Volunteered statements are not affected by ***Miranda***. ***Innis***, 446 U.S. at 300.

Note: Statements made during field sobriety or breathalyzer tests are generally not the result of police interrogation for ***Miranda*** purposes, because such inquiries are limited and necessarily attendant to legitimate police procedure. ***Pennsylvania v. Muniz***, 496 U.S. 582, 605 (1990).

Note: ***Arizona v. Mauro***, 481 U.S. 520 (1987), found no custodial interrogation when police allowed defendant's wife to speak to him in the presence of officer who tape- recorded conversation.

Custodial interrogation does not occur when defendant speaks freely to an undercover agent, since the coercive atmosphere of police interrogation is not present. ***Illinois v. Perkins***, 496 U.S. 292, 296 (1990). This is true even if the location of the undercover interview is a police station. ***People v. Hunt***, 2012 IL 111089, ¶¶ 35, 41.

3. Warnings

The four warnings of ***Miranda***—the right to silence, counsel and appointed counsel for the interview, and the consequences of speaking—need not be given in any particular order or verbatim. ***Duckworth v. Eagan***, 492 U.S.

195, 202 (1989).

Police need not state all the subject matters of the interrogation. ***Colorado v. Spring***, 479 U.S. 564, 577 (1987).

The Illinois constitution requires that police inform defendant that his attorney is physically present to see him. ***People v. McCauley***, 163 Ill.2d 414, 440 (1994). The federal constitution does not require telling defendant of an attorney's attempts to reach him. ***Moran v. Burbine***, 475 U.S. 412, 423 (1986).

> **Note***:* ***McCauley*** does not apply in the absence of custodial interrogation. ***Hunt***, 2012 111089 at ¶ 41 (statement to undercover informant).

4. Waiver

A ***Miranda*** waiver must be knowing and voluntary, though an explicit statement of waiver is not necessary. ***North Carolina v. Butler***, 441 U.S. 369, 376 (1979).

Waiver may be implied even if defendant is silent on the issue if he understands his rights and his conduct indicates waiver. ***Butler***, 441 U.S. at 373. So, if warnings were given, defendant understood, and defendant did not invoke his rights, his "uncoerced statement establishes an implied waiver." ***Berghuis v. Thompkins***, 560 U.S. 370, 384 (2010).

> **Note**: It follows that, because waiver may be implied, police need not obtain an express waiver before questioning so long as defendant was properly warned. ***Id***. at 388.

Waiver is gauged as an intentional relinquishment of a known right. ***Berghuis***, 441 U.S. at 385. Sufficiency is determined on the totality of the circumstances, including age and mental capacity. ***People v. Brown***, 2012 IL App (1st) 091940, ¶ 38; ***People v. Braggs***, 209 Ill.2d 492, 515 (2003) (considering limited mental capacity).

5. Assertion of Rights

Police may not question a defendant or must cease questioning him if he invokes his right to remain silent. And police may not question or must cease questioning a defendant who invokes his right to counsel until one is provided. ***Davis v. United States***, 512 U.S. 452, 461 (1994); ***Miranda***, 384 U.S. at 474.

Both the assertion of the right to remain silent and the right to counsel must be unambiguous. ***Berghuis***, 560 U.S. at 381.

A defendant's mere silence, even if for hours, after being given ***Miranda*** warnings is not an assertion of his right to remain silent. ***Id.*** at 381.

As for the right to counsel, a statement such as "Maybe I should talk to a lawyer," followed by a denial that defendant was asking for one, is not a clear request. ***Davis***, 512 U.S. at 462; ***see also In re Christopher K***., 217 Ill.2d 348, 383 (2005) ("Do I need a lawyer" not an invocation of counsel). The inquiry is objective. ***Id***. at 459.

The fifth amendment right to counsel is not offense-specific, cannot be anticipatorily invoked, and is not triggered by the invocation of the sixth amendment right to counsel on another case. ***McNeil v. Wisconsin***, 501 U.S. 171, 177 (1991); ***People v. Villalobos***, 193 Ill.2d 229, 242 (2000).

6. Interrogation After Invocation of Rights

Right to remain silent—If defendant invokes his right to remain silent, police may reapproach defendant for a new interview only if police "scrupulously honored" defendant's initial "right to cut off questioning." ***Michigan v. Mosely***, 423 U.S. 96, 104 (1975).

In ***Mosely***, reapproach was deemed appropriate after the passage of a significant period of time, fresh ***Miranda*** warnings, and the fact that the questioning was about a different subject. 423 U.S. at 106.

Questioning may also resume if defendant reinitiates same, though new waiver must also be shown. ***Cf. Oregon v. Bradshaw***, 462 U.S. 1039, 1045 (1983).

Right to counsel—If a defendant in continuous custody has requested an attorney, police may not reapproach him in the absence of a lawyer. Any statement obtained in violation of this rule, regardless whether waiver is obtained, is presumptively involuntary. ***Edwards v. Arizona***, 451 U.S. 477, 484 (1981).

Edwards created an additional prophylactic rule to ***Miranda***. ***Shatzer***, 559 U.S. at 104.

> **Note**: The ***Edwards*** rule applies even when defendant consulted with counsel after the first interview but counsel is not present at the reapproach. ***Minnick v. Mississippi***, 498 U.S. 146, 153 (1990).
>
> **Note**: ***Miranda*** is not offense specific, and ***Edwards*** precludes police from questioning defendant about any offense once he invokes his rights. ***McNeil v. Wisconsin***, 501 U.S. 171, 177 (1991).

A defendant in continuous custody, may, however, reinitiate the conversation, rendering the ***Edwards*** presumption inapplicable, though new express or implied waiver must still be shown. ***Bradshaw***, 462 U.S. at 1046; ***Edwards***, 451 U.S. at 485.

Importantly, continuous custody for ***Edwards*** purposes presumptively ends 14 days after a defendant is released from custody, even if it is release to a prison population to serve a sentence. ***Shatzer***, 559 U.S. at 110, 113.

7. *Miranda* Exceptions

Public Safety—Warnings are not required during custodial interrogation when police are acting to protect public safety. ***New York v. Quarles***, 467 U.S. 649, 651, 657 (1984). The question of public safety turns on the exigency present in

each circumstance, and police can judge whether a question is necessary for safety purposes versus whether it is designed solely to elicit testimonial evidence. ***Quarles***, 467 U.S. at 659.

Booking Questions—Though routine booking questions are custodial interrogation, questions that are needed to obtain "biographical data necessary to complete booking or pretrial services" are exempt from ***Miranda*** and warnings are not required. ***Muniz***, 496 U.S. at 601 (Brennan, J.); ***Maryland v. King***, 569 U.S. 435, 456 (2013) (citing rationale).

8. Use of Statement Obtained via *Miranda* Violation

Miranda precludes the state's direct use of a statement obtained in violation of its rules.

9. Impeachment

Silence following a ***Miranda*** warning cannot be used to impeach. ***Doyle v. Ohio***, 426 U.S. 610, 618 (1976).

But an otherwise voluntary statement may be used to impeach defendant's testimony. ***Harris v. New York***, 401 U.S. 222, 226 (1971); ***Oregon v. Hass***, 420 U.S. 714, 723 (1975).

Defendant's improperly obtained statement may not, however, be introduced substantively to impeach a defense witness. ***James v. Illinois***, 493 U.S. 307, 320 (1990).

10. Fruit of the poisonous tree

While evidence derived from involuntary statements obtained in violation of the fifth amendment is subject to the fruit of the poisonous tree doctrine, the doctrine does not apply to evidence derived from statements obtained in violation of ***Miranda***. ***United States v. Patane***, 542 U.S. 630, 644 (2004).

11. Second Statement after *Miranda* Violation

Even if police obtain a statement in violation of ***Miranda***, a

second statement obtained after warnings and waiver may be admissible. ***Oregon v. Elstad,*** 470 U.S. 298, (1985); ***Bobby v. Dixon***, 565 U.S. 23, 32 (2011).

But police may not use a deliberate strategy to obtain a statement without ***Miranda*** warnings, give such warnings, obtain a waiver, and use the second statement against defendant. These circumstances drain the warnings of their efficacy. ***Missouri v. Seibert***, 542 U.S. 600 (2004) (plurality) (opinion of Kennedy, J.).

Depending on the jurisdiction, application of Justice Kennedy's ***Seibert*** opinion has turned on intent of the police or effect on the defendant. ***People v. Lopez***, 229 Ill.2d 322, 366 (2008), looked at both—first determining that the strategy was deliberate and then assessing its effect on the waiver.

12. Voluntariness

The admission of an involuntary statement at trial violates the fifth and fourteenth amendments. ***Colorado v. Connelly***, 479 U.S. 157, 163 (1986). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" ***Connelly***, 479 U.S. at 167 (finding defendant's mental state, alone, did not support finding of involuntariness. Police use of deception during the interview is relevant to the inquiry but does not support a *per se* finding of involuntariness. ***People v. Martin***, 102 Ill.2d 412, (1984). The court must look to the totality of the circumstances. ***Arizona v. Fulminante***, 499 U.S. 279, 286 (1991).

> **Note**: Even if defendant's motion to suppress on voluntariness grounds is denied, he may still introduce evidence at trial of the circumstances of giving the statement and argue against its credibility. ***Crane v. Kentucky***, 476 U.S. 683, 691 (1986).

An involuntary statement may not be used for any purpose at trial. ***Mincey v. Arizona,*** 437 U.S. 385, 402 (1978). The fruit of the poisonous tree doctrine applies. ***Nix v. Williams***, 467 U.S. 431, 442 (1984).

13. Hearing and Burden of Proof

725 ILCS 5/114-11 sets forth the hearing process on a motion to suppress statements. The motion must be in writing and, generally, heard before trial**.** It is heard by the court, not a jury.

At a hearing challenging voluntariness, the state has the initial burden to show a prima facie case of voluntariness; once shown, the burden shifts to the defense to produce some evidence that the confession was involuntary, and if shown, the burden reverts to the state to prove voluntariness by a preponderance of the evidence. ***People v. Richardson***, 234 Ill.2d 233, 254 (2009); ***Lego v. Twomey***, 404 U.S. 477, 489 (1972) (state's burden of proof).

The state must prove a *Miranda* waiver by a preponderance of the evidence. ***Connelly***, 479 U.S. at 168.

Also, if defendant was injured while in police custody, the state must prove "by clear and convincing evidence that the injuries were not inflicted as a means of producing the confession." ***People v. Wilson***, 116 Ill.2d 29, 40 (1987).

B. Sixth Amendment

The Sixth Amendment right to counsel applies to all critical stages of the proceedings, which includes obtaining statements of defendant. ***Massiah v. United States***, 377 U.S. 201, 206 (1964).

The ***Massiah*** right to counsel applies once adversary judicial proceedings are initiated. ***Brewer v. Williams***, 430 U.S. 387, 398 (1977). ***Brewer*** found that commencement occurred upon appearance in court on a warrant in the county of arrest, and his subsequent incarceration on the warrant. 430 U.S. at 399.

For sixth amendment purposes, judicial proceedings can start even in the absence of the prosecutor. ***See Rothgery v. Gillespie County, Texas***, 554 U.S. 191, 199 (2008).

> **Note**: ***People v. Lewis***, 2015 IL App (1st) 130171, ¶ 37, held that judicial proceedings did not commence when defendant had a court hearing in another state

regarding extradition to Illinois, reasoning ***Rothgery*** turned on when defendant was before a judicial officer and told of the formal accusation against him.

Note: There is no sixth amendment right to counsel in prison administrative proceedings before adversary judicial proceedings are started. ***United States v. Gouveia***, 467 U.S. 180, 192 (1984).

1. "Deliberate Elicitation"

While ***Miranda*** turns on custodial interrogation, ***Fellers v. United States***, 540 U.S. 519, 524 (2004), held that that for sixth amendment purposes, the right to counsel applies whenever police deliberately elicit information from defendant. Indeed, ***Brewer*** held that the officer's "Christian Burial Speech" directed at defendant was deliberate elicitation. 430 U.S. at 400.

The sixth amendment is not violated when defendant makes uncounseled statements that are not deliberately elicited. ***Maine v. Moulton***, 474 U.S. 159, 176 (1985) (state may use statements obtained by luck or happenstance).

It is violated when the state uses an undercover informant to obtain uncounseled statements. ***Moulton***, 474 U.S. at 176.

2. Offense Specific

The sixth amendment right to counsel is offense specific. So, police may question about other charges, or use an informant to obtain statements regarding other charges, but any statements obtained that are related to the charged offense are inadmissible. ***Moulton***, 474 U.S. at 180.

The police may obtain statements about any uncharged offense that fails the ***Blockburger*** elements test, even if factually related to the charged offense. ***Texas v. Cobb***, 532 U.S. 162, 173 (2001).

3. Waiver

Patterson v. Illinois, 487 U.S. 285, 297 (1988), held that ***Miranda*** warnings were sufficient to support a waiver of the accused's Sixth Amendment right to counsel.

"[T]he decision to waive need not itself be counseled." ***Montejo v. Louisiana***, 556 U.S. 778, (2009). And police may approach a defendant and obtain a waiver of the sixth amendment right to counsel even if counsel was appointed at a prior judicial proceeding. ***Montejo***, 556 U.S. at 792.

> **Note**: the ***Edwards*** prohibition on reapproach during continuous custody still applies if defendant had asserted the fifth amendment right to counsel under ***Miranda***. ***Montejo***, 556 U.S. at 797.

4. Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine applies to a ***Massiah*** violation unless inevitable discovery is shown. ***Nix v. Williams***, 467 U.S. 431, 448 (1984).

5. Impeachment

Michigan v. Harvey, 494 U.S. 344, 353 (1990), permits use of otherwise voluntary statements obtained through a ***Massiah*** violation for impeachment purposes. ***See also Kansas v. Ventris***, 556 U.S. 586, 594 (2009) (unlawful statement to informant used for impeachment).

C. Fourth Amendment

Defendant's statement following an unlawful arrest is inadmissible unless the state shows that the statement was sufficiently an act of the defendant's free will so as to "purge" the taint. ***Knaupp v. Texas***, 538 U.S. 626, 632 (2003). Relevant factors are observance of ***Miranda***, the temporal proximity of the arrest and confession, the presence of intervening circumstances, and the purpose and flagrancy of the police misconduct. ***Knaupp***, 538 U.S. at 633.

However, ***Miranda*** warnings alone do not *per se* purge the taint. ***Id***.

> **Note**: Three exceptions to the exclusionary rule related to the discovery of evidence are: (1) independent source; (2) inevitable discovery; and (3) attenuation. **Utah v. Strieff**, 579 U.S. 232, 238 (2016). These exceptions do not turn on defendant's "free will." ***Strieff***, 579 U.S. at 238.

1. Unlawful Delay

An unreasonable delay in conducting a ***Gerstein*** /***McLaughlin*** hearing does not necessarily require suppression of statements made during the delay—the issue is voluntariness. ***People v. Willis***, 215 Ill.2d 517, 528 (2005).

2. Recording of Interrogation Required in Certain Cases

725 ILCS 5/103-2.1 mandates that, in certain offenses, including, *inter alia*, murder, aggravated kidnapping, and aggravated criminal sexual assault, that custodial statements of defendant must be recorded. Generally, any unrecorded statements are inadmissible unless certain statutory exceptions are met. ***See People v. Clayton***, 2014 IL App (1st) 130743.

1.11 Motion to Suppress Identification of Defendant

See Appendix for "Checklist for Motions to Suppress and Motions to Quash" on page A-22.

A. Line-up Procedures

Line-up procedures are governed by **725 ILCS 5/107A-2**. The statute prescribes the process and discovery. It also provides that the failure to comply with its provisions is relevant to a motion to suppress and that a jury may be

instructed to consider whether police complied with the statute.

Show-ups—A "show-up" occurs when police temporarily detain a suspect to have the victim identify him. ***People v. Lippert***, 89 Ill.2d 171 (1982). Showing a victim one photograph is akin to an in-person show-up. ***See Manson v. Brathwaite***, 432 U.S. 98, 111 (1977).

The show-up may be suppressed if it was unnecessarily suggestive and conducive to irreparable misidentification. ***Neil v. Biggers***, 409 U.S. 188, 196 (1972). "Reliability is the linchpin" for the admissibility of the confrontation. ***Manson***, 432 U.S. at 113. Factors to consider "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation," to be weighed against "the corrupting effective of the suggestive identification itself." ***Id***. at 114.

> **Note**: ***People v. McKinley***, 69 Ill.2d 145, 152 (1977), viewed the fact that defendant was handcuffed to the arresting officer to be but one factor for consideration.

B. Eyewitness Identification

Due process does not require a pre-trial judicial inquiry into the reliability of an eyewitness when identification was not procured under unnecessarily suggestive circumstances engineered by law enforcement. ***Perry v. New Hampshire***, 565 U.S. 228, 248 (2012).

> **Note:** ***People v. Lerma***, 2016 IL 118496, ¶ 25, held the trial judge abused his discretion in excluding defendant's expert witness on eyewitness testimony because the judge did not give proper consideration to the potential evidence.

Note: ***People v. Thompson***, 2016 IL 118667, ¶ 50, held that a witness may identify defendant in a photo or video if the standards of Rule of Evidence 701 are met.

Photo Line-up—The photos in a line-up need not depict physically identical people. The difference in appearances goes to the weight, not the admissibility, of the identification. ***People v. Allen***, 376 Ill.App.3d 511, 521 (2007).

Right to Counsel—The sixth amendment right to counsel applies to a post-indictment line-up. ***United States v. Wade***, 388 U.S. 218, 237 (1967).

The right to counsel's presence does not apply to displays of photographs to witnesses. ***United States v. Ash***, 413 U.S. 300, 321 (1973).

In-Court Identification—If a pre-trial identification has been found improper, a subsequent in-court identification is admissible if there is an independent basis for the identification. ***People v. White***, 2011 IL 109689, ¶ 142. Factors to consider include the witness' prior opportunity to see the crime, any discrepancies between the pre-trial description of defendant and defendant's actual description, any identification of another person, a pre-line-up identification of defendant by the witness, any failure to identify defendant on a past occasion, and the lapse in time. ***Wade***, 388 U.S. at 241.

Burden of Proof—It is defendant's burden to show that the pre-trial identification was impermissibly suggestive. Following an improper pre-trial identification, the state must show that the in-court identification was independent by clear and convincing evidence. ***People v. Brooks***, 187 Ill.2d 91, 126 (1999).

1.12 Right of Defendant to Be Present; Disruptive Defendants

Defendant has a constitutional right to be present at any stage of the criminal proceeding that is critical to its outcome. ***People v. Stroud***, 208 Ill.2d 398, 404 (2004). To show a constitutional violation, there must be evidence that defendant's due process rights were violated by his absence from the courtroom. ***Stroud***, 208 Ill.2d at 406.

> **Note**: Absent waiver, defendant has the right to be present at *in camera* exercise of challenges during jury selection. ***People v. Oliver***, 2012 IL App (1st) 102531, ¶ 22.
>
> Note: Defendant has the right not to appear before a jury in a jail uniform. *Estelle v. Williams*, 425 U.S. 501, 512 (1976).

A. Removal from the Courtroom

A disruptive defendant may be removed from the courtroom on the ground that his behavior forfeits his right to be present. ***Illinois v. Allen***, 397 U.S. 337, 346 (1970).

B. Shackling

Supreme Court Rule 430 governs the use of restraints at trial. It does not preclude use of restraints in non-trial settings. It requires a hearing regarding the need for restraints and sets forth certain factors and findings for the court to determine. The rule is in line with the requirements of ***People v. Boose***, 66 Ill.2d 261, 266 (1977); ***People v. Allen***, 222 Ill.2d 340 (2006) (addressing stun belts).

> **Note**: Where the court does not know that a defendant has been physically restrained, the court should direct that the shackles be removed at once. ***In re Jonathon C.B.***, 2011 IL 107750.

C. Contempt

Direct or indirect criminal contempt is one option for addressing disruptive behavior. ***Illinois v. Allen***, 397 U.S.

337, 344 (1970). Civil contempt might be useful to force compliance with a court order. *See* ***People ex rel. Chicago Bar Ass'n v. Barasch***, 21 Ill.2d 407 (1961) (explaining the distinction between civil and criminal contempt).

Judge Shonkwiler's book on contempt, available from the AOIC, delves into these issues in depth and explains the procedures attendant to all forms of contempt.

D. Security Officers in Courtroom

Security officers may be used in the courtroom without prejudicing defendant. ***Holbrook v. Flynn***, 475 U.S. 560, 569 (1986); ***People v. Peeples***, 205 Ill.2d 202, 48 (2002); ***People v. Moore***, 402 Ill.App.3d 143, 147–48 (2nd Dist. 2010) (two uniformed police officers positioned directly behind defendant during jury trial was not abnormal or inherently prejudicial).

1.13 Conduct of Hearings by Closed Circuit Television

725 ILCS 5/106(D-1) governs defendant's appearance by closed circuit television and video conference. ***People v. Lindsey***, 201 Ill.2d 45, 55 (2002), held that defendant's appearance on video for arraignment and jury waiver did not violate the constitution. But ***People v. Stroud***, 208 Ill.2d 398, 414 (2004), found that a guilty plea by video is proper only where defendant waives his right to be present physically.

Note: Defense counsel's appearance by speaker phone at time defendant entered plea of no contest did not automatically constitute ineffective assistance of counsel. ***Wright v. Van Patten***, 552 U.S. 120, 126 (2008).

1.14 Fitness Determination, Burdens and Procedures

See Appendix for "Fitness One-Page Summary" on page A-24, "Fitness Flow Chart" on page A-25, "Fitness Overview Parts 1 through 4" on page A-26, "Fitness Form Orders" on page A-30 and "Judges' Guide to Mental Illnesses in the Courtroom" on page A-31.

A. Fitness Defined

A defendant is unfit if, because of a mental or physical condition, he or she is unable to understand the nature and purpose of proceedings against him or her or is unable to assist in the defense. A defendant is presumed to be fit to stand trial, to plead, and to be sentenced. **725 ILCS 5/104-10**.

Note: Fitness and sanity are discrete issues. ***People v. Murphy***, 72 Ill.2d 421, 433 (1978).

B. Raising the Issue of Fitness

The defense, state, or court may raise the issue of fitness at any time. If a *bona fide* doubt as to fitness is raised, the court shall order a determination of the issue before proceeding further. **725 ILCS 5/104-11(a)**.

Speedy trial is tolled by a fitness exam ordered under **725 ILCS 5/104-13**, by a fitness hearing, and by a finding of unfitness. **725 ILCS 5/103-5(a) & (b)**.

Defendant may also petition the court to appoint an expert to assist in determining "if a bona fide doubt" "may be raised." **725 ILCS 5/104-11(b)**. An order under this section shall not prevent any further proceedings in the case. ***Id***. If the expert's report does not support a finding of *bona fide* doubt, no further action is necessary. ***People v. Hanson***, 212 Ill.2d 212, 225 (2004).

People v. Eddmonds, 143 Ill.2d 501, 518 (1991), identified several factors in assessing *bona fide* doubt, including irrational behavior, demeanor, and prior medical opinion on competence to stand trial.

Once a *bona fide* doubt is found, defendant must have a fitness hearing. ***People v. Johnson***, 206 Ill. 2d 348, 362 (2002).

C. Psychotropic Medication

Receipt of psychotropic drugs does not presumptively render defendant unfit. **725 ILCS 5/104-21(a);** ***People v. Mitchell***, 189 Ill. 2d 312, 330 (2000).

Note: If medication is prescribed to maintain fitness, the court must address fitness if it learns defendant is off the medication. ***See People v. Moore***, 408 Ill.App.3d 706, 713 (1st Dist. 2011); **725 ILCS 5/104-17** (providing for expedited review).

D. Amnesia

People v. Stahl, 2014 IL 115804, ¶ 39, held that amnesia about the crime does not *per se* render a defendant unfit to stand trial.

E. Fitness Examination

The court must admonish defendant prior to the exam about the limitations in the use of any statements he makes and the consequences of non-cooperation. **725 ILCS 5/104-14**.

When the issue of fitness is mental capacity, the court may order one or more licensed examiners but may not order an examiner employed by DHS. **725 ILCS 5/104-13(a)**.

When the issue of fitness is physical condition, the court may appoint one or more experts. **725 ILCS 5/104-13(b)**.
725 ILCS 5/104-15 governs the expert's report. Among other requirements, it provides that forensic interviews of a person retained by the state or defense must be videotaped unless doing so is impractical.

If defendant is not in custody, the examiner shall designate the place of the exam. If defendant is in custody, the court shall do so. No exam may be at a DHS facility. If a non-custodial defendant fails to keep appointments without reasonable cause, or if the examiner indicates that a defendant requires hospitalization or extended observation, the court may order

defendant admitted to an appropriate facility for not more than seven days for an in-patient examination. **725 ILCS 5/104-13(c)**.

Defendant may seek an order for an independent exam in addition to the court-designated exam. **725 ILCS 5/104-13(e)**.

See Appendix for "Fitness Hearing—Sample Jury Instructions" on page A-34.

F. Fitness Hearing

Either party may demand a jury or the court may *sua sponte* order one. But if the issue is raised after trial starts, or if the hearing is a redetermination, the hearing is bench. **725 ILCS 5/104-12**. Defendant's statutory right to demand a jury is personal. ***People v. McCoy***, 2014 IL App (2d) 130632, ¶ 28.

Because due process precludes the trial of an unfit defendant, defense counsel may take a position on fitness contrary to that of defendant and need not argue that defendant is fit if the evidence clearly shows otherwise. ***People v. Holt***, 2014 IL 116989, ¶ 56; ***McCoy***, at ¶ 27.

The state bears the burden of providing fitness by a preponderance of the evidence. The court may call its own witnesses and conduct its own inquiry. **725 ILCS 5/104-11(c)**.

> **Note**: ***Holmes v. King***, 709 F.2d 965, 968 (1983), held that the defendant may be called as a witness at the fitness hearing but that any statements could not be used at the criminal trial.

725 ILCS 5/104-16 sets forth a non-exhaustive list of matters that are admissible at the hearing, including defendant's ability to understand and cooperate and his social behavior and abilities.

The parties may stipulate to evidence, but not the final determination of fitness. The record must show that the

court made an independent inquiry. ***People v. Cook***, 2014 IL App (2d) 130545, ¶ 20.

At the conclusion of the hearing, there are four available verdicts: (1) fit to stand trial; (2) unfit with a substantial probability that fitness could be obtained in a year; (3) unfit with no substantial probability that fitness could be obtained in a year; or (4) unfit but unable to determine whether fitness can be obtained in a year. **725 ILCS 5/104-16(d)**.

G. Finding of Unfitness

If defendant was found unfit with a substantial probability of attaining fitness within one year, the court shall order the defendant to undergo treatment for the purpose of rendering him or her fit. **725 ILCS 5/104-16(d)**.

Treatment may be inpatient or outpatient, and, if defendant is not in custody, must be the least restrictive form of treatment that is appropriate. **725 ILCS 5/104-17**.

The period of treatment for restoration cannot exceed one year, or, if the offense is a class B or C misdemeanor, the maximum possible term of imprisonment. If defendant remains unfit, the state must move for a discharge hearing under **725 ILCS 5/104-25**, dismiss the charges, or petition to civilly commit defendant. **725 ILCS 5/104-23(b)**.

H. Motion Practice After Unfitness

"Following a finding of unfitness, the court may hear and rule on any pretrial motion or motions if the defendant's presence is not essential to a fair determination of the issues. A motion may be reheard upon a showing that evidence is available which was not available, due to the defendant's unfitness, when the motion was first decided." **725 ILCS 5/104-11(d)**.

I. Discharge Hearing

A discharge hearing is a bench proceeding at which the state presents its evidence of the underlying crime. **725 ILCS 5/104-25**.

Note: A motion to suppress may be heard before the discharge hearing under section 104-11(d). ***See People v. Braggs***, 302 Ill.App.3d 602, 606 (1998).

The court may acquit defendant. The state may then seek civil commitment.

The court may find defendant not guilty by reason of insanity, after which the statutory procedures for same apply.

Last, a guilty finding is not an option. Instead, if the court finds that defendant is "not not guilty," he may be remanded for further treatment for fitness restoration. If fitness is restored, defendant may be criminally tried.

Note: Some sex offender registration requirements apply even after a "not not guilty" finding at a discharge hearing. *See* ***People v. Cardona***, 2013 IL 114076, ¶ 25.

J. Treatment Plan and Obligation to Notify of Restoration of Fitness

725 ILCS 5/104-17 sets forth timelines for placement of defendant with treatment providers and for reporting and notification of defendant's progress in the treatment plan following a finding of unfitness.

725 ILCS 5/104-20 requires a court to reexamine the issue of defendant's fitness not more than ninety days after the initial order.

725 ILCS 5/104-21 permits forced use of psychotropic medication.

K. Appeal

An order finding the defendant unfit is a final order for purposes of appeal by the state or defendant. **725 ILCS 5/104-16(e)**.

1.15 Waiver of Rights by Defendant

Waiver of Counsel—Supreme Court Rule 401(a) requires that the waiver of counsel must be in open court, and the court must

admonish defendant and determine that he understands the nature of the charges, the minimum and maximum sentences including enhanced sentencing, that he has the right to counsel, and that, if he is indigent, he has right to appointed counsel. Substantial compliance is required. ***People v. Haynes***, 174 Ill.2d 204, 236 (1996).

Supreme Court Rule 401(b) requires that the Rule 401 must be transcribed. A bystander's report is insufficient. ***People v. Montgomery***, 298 Ill.App.3d 1096, 1100 (2nd Dist. 1998).

Jury Waiver—Waiver must be in open court. **725 ILCS 5/103-6.** And it must be in writing. **725 ILCS 5/115-1**. Waiver must be knowing, intelligent, and understanding. ***People v. St. Pierre***, 146 Ill. 2d 494, 511 (1992).

Defendant may waive jury up until the first juror is sworn. ***People v. Jordan***, 2019 IL App (1st) 161848. But the court may deny a mid-trial jury waiver. ***People v. Rand***, 291 Ill. App. 3d 431, 437 (1st Dist. 1997).

The court has the discretion to allow a jury waiver to be withdrawn. ***People v. Catalano***, 29 Ill.2d 197, 202 (1963).

The jury waiver applies to "one trial"—it does not carry over on remand or to a new trial. ***People v. Bracey***, 213 Ill.2d 265, 271 (2004).

Right of Confrontation at Evidence Deposition—Defendant and counsel have a right to be present at an evidence deposition, though each may waive the right in writing. **Supreme Court Rule 414(e)**.

Right to Appeal—***People v. McCaslin***, 2014 IL App (2d) 130571, held that defendant voluntarily and intelligently waived his right to appeal pursuant to his plea agreement to enter the drug court program.

1.16 402 Conferences/Admonitions and Procedures

See **Ill. S. Ct. R. 402** (Plea of Guilty or Stipulations Sufficient to Convict).

See Appendix for "**Rule 402(d)** Admonishment to Defendant Prior to Plea Discussions" on page A-41.

Supreme Court Rule 402(d) permits the court to participate in, but not initiate, plea discussions, with consent of the defendant. The judge may then indicate to the parties whether he will not concur, or whether he will concur, or will conditionally concur provided the evidence is consistent with such representations made. The court must admonish defendant in accordance with provisions in the rule.

The rule provides that, if the judge withdraws his concurrence, he must allow defendant either to affirm or withdraw his guilty plea and if withdrawn, the judge shall recuse himself. ***See People v. Collier***, 376 Ill.App.3d 1107, 1112 (2007). The recusal rule does not apply if the withdrawal of concurrence is due to a plea agreement being no longer effective due to a mistake of fact. ***People v. Wade***, 116 Ill.2d 1, 8 (1987).

If no conference under **Rule 402** is held, the judge must inform defendant in open court at the time the plea agreement is stated that the court is not bound by the plea agreement and that, if defendant persists in his plea, the disposition may be different from that contemplated by the plea agreement. No recusal is required. ***People v. Baldridge***, 19 Ill. 2d 616, 622 (1960).

1.17 Stipulated Bench Trials

Rule 402 admonishments must be given when a stipulated bench trial is equivalent to a plea. This occurs in two instances: (1) defendant stipulates to all evidence presented but does not preserve a defense; and (2) regardless whether a defense is preserved, defendant stipulates that the evidence is sufficient to convict. ***People v. Weaver***, 2103 IL App (3d) 130054, ¶ 18.

As for appellate admonishments, ***Weaver*** held that compliance with

Rule 604(d) was a precedent to appeal because it was a bench trial. ***Id***.

1.18 Guilty Pleas

See Appendix for "Checklist for Fully Negotiated Plea" on page A-44.

Defendant does not have an absolute right to have a guilty plea accepted by the court—the court has the discretion to reject a plea. ***People v. Henderson***, 211 Ill.2d 90, 102 (2004).

Indeed, a court may terminate a plea on its own motion if it has good reason to doubt the truth of the plea. ***People v. Gaines***, 2020 IL 125165, ¶ 50.

In the absence of a set deadline to present a negotiated plea, the court may not summarily refuse to consider a tardy presentation of a plea

agreement. ***People v. Allen***, 351 Ill. App. 3d 599, 607 (4th Dist. 2004).

> **Note: 720 ILCS 5/12-3.2** requires that upon conviction of domestic battery or aggravated domestic battery, defendant must be admonished about consequences on federal firearm laws.
>
> **Note**: Defense counsel should advise defendant of the guilty but mentally ill plea option and consequences, but the failure to do so does not *per se* result in prejudice. ***People v. Manning***, 227 Ill.2d 403, 418 (2008).
>
> **Note**: Defense counsel must advise defendant about applicable provisions of the Sexually Violent Persons Commitment Act. ***People v. Hughes***, 2012 IL 112817, ¶ 60**.**

Supreme Court Rule 402 sets out the minimum requirements for a guilty plea.

The court must determine if the plea is knowing and voluntary.

The court must personally address defendant in open court, inform him of and determine that he understands the nature of the charge,

the minimum and maximum penalties including enhancements and possible consecutive sentencing, his right to plead not guilty or to plead guilty, that if he pleads guilty there will not be a trial of any kind, and that he is waiving the right to a jury trial and to confront witnesses against him.

The court must obtain a factual basis for the plea.

The court must confirm the terms of any agreement and determine whether any force, threats or promises other than the agreement were used to obtain the plea.

> **Note**: If restitution is part of the plea or required, the court must admonish as to same. *See* ***People v. Wigod***, 406 Ill.App.3d 66, 75 (1st Dist. 2010).
>
> **Note**: The rule provides that plea discussions are inadmissible at trial. There is a two-part test to determine if plea discussions occurred. First, whether defendant exhibited a subjective expectation to negotiate a plea, and second, whether this expectation was reasonable. ***People v. Rivera***, 2013 IL 112467, ¶ 18.

A. Appellate Rights

The appellate rights to be given defendant depend on whether the plea was negotiated or blind. **Supreme Court Rule 605** defines negotiated pleas and sets forth the applicable appellate rights for each type of plea.

Depending on the type of plea, defendant must file a motion within 30 days of the plea to preserve his right to appeal.

Notably, negotiated pleas include sentencing concessions such as an agreement to a sentencing cap. And in a negotiated plea, defendant may not move to reconsider his sentence. He may only move to withdraw his plea within 30 days. ***See People v. Linder***, 186 Ill.2d 67, 74 (1999).

In a blind plea, which includes a plea in which charges may have been dismissed but no sentencing concessions were made, defendant may move to withdraw his plea or reconsider his sentence, or both, within 30 days. ***See People v. Lumzy***, 191

Ill.2d 182, 187 (2000).

Substantial compliance is required for **Rule 605**. ***People v. Dominguez***, 2012 IL 111336, ¶ 22.

Supreme Court Rule 604(d) requires defense counsel to certify in writing before a hearing on a motion to withdraw a plea or reconsider sentence he has ascertained defendant's contentions of error in the sentence or the entry of the plea of guilty means counsel must certify he has "consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings."

Strict compliance with **Rule 604(d)** is required, regardless of whether defendant is only challenging his sentence. ***People v. Gorss***, 2022 IL 126464, ¶ 26.

B. *Alford* Pleas

A judge may accept a guilty plea in which defendant maintains his innocence so long as the record establishes a strong factual basis from which a jury could find the defendant guilty of the offense. ***North Carolina v. Alford***, 400 U.S. 25 (1970); ***People v. Barker***, 83 Ill.2d 319, 332 (1980).

Mandatory Supervised Release; Truth in Sentencing

730 ILCS 5/5-4-1(c-2) requires that the judge inform a defendant sentenced to a term of years in prison of the approximate period of time the defendant will serve in custody according to the then current statutory rules and regulations for early release. This statement is intended solely to inform the public, has no legal effect on the defendant's actual release, and may not be relied on by the defendant on appeal.

As for MSR, the court must admonish defendant of the applicable period in a practical and realistic way, though there is no precise formula as to how to give the admonishment. ***See***

People v. Boykins, 2017 IL 121365, ¶ 16. It need not be expressly linked to the pronouncement of sentence. ***Boykins***, at ¶ 21.

Immigration Admonishment

See Appendix for Suggested "Deportation Admonition" on page A-45.

725 ILCS 5/113-8 requires that the court admonish all defendants of the possible immigration consequences of a guilty plea as follows:

> "If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States."

Defendant may move to withdraw his guilty plea within 2 years of same if he is not admonished pursuant to statute and he shows that his conviction might have deportation consequences. ***Id***.

> **Note**: Defense counsel must advise defendant of the risk of deportation of a guilty plea. ***Padilla v. Kentucky***, 559 U.S. 356, 372 (2010). And incorrect or incomplete advice may result in a basis to vacate the plea or conviction. ***See People v. Hoare***, 2018 IL App (2d) 160727, ¶ 20.

C. *Pro Se* Motion to Withdraw Guilty Plea

If a *pro se* defendant moves to withdraw his plea, Rule 604 entitles him to counsel and the appointment of counsel if indigent.

Withdrawal of a plea is within the court's discretion. ***People v. Davis***, 145 Ill.2d 240, 244 (1991). It should be allowed if the plea was entered upon a misapprehension of the facts or law, if it was entered because of misrepresentations by defense

counsel or the state, if defendant has a defense worthy of consideration, or where the ends of justice require the withdrawal of the plea. ***Davis***, 145 Ill.2d at 244.

Defendant's subjective impressions alone are not sufficient grounds to withdraw a plea. ***Id***.

Only after inquiring whether the defendant desires counsel, and if need be, allowing the defendant to obtain counsel to assist in preparing a proper motion, may the court proceed further. ***People v. Griffin***, 305 Ill. App. 3d 326 (2d Dist. 1999).

> **Note**: A pro se motion to correct the mittimus does not toll the 30-day period to file a motion to withdraw a plea. ***People v. Thomas***, 402 Ill.App.3d 1129, 1133 (5th Dist. 2010). And only motion to withdraw a plea or reconsider sentence tolls the 30-day time period for appeal. ***Thomas***, 402 Ill.App.3d at 1131.

D. Miscellaneous Issues

> **Note**: A guilty plea is a judicial admission of every fact alleged in the indictment. ***People v. Feldman***, 409 Ill.App.3d 1124, 1128 (5th Dist. 2011).

But defendant may pursue an actual innocence claim in a guilty plea case. ***People v. Reed***, 2020 IL 124940, ¶ 57 (post-conviction).

A court need not admonish about possible post-DOC commitment as an SVP, ***People v. Hughes***, 2012 IL 112817, nor lifetime sex offender registration. ***People v. Presley***, 2012 IL App (2d) 100617, as each is a collateral consequence of a plea.

Pursuant to **725 ILCS 5/113-4(c)**, the court must admonish a defendant who pleads guilty at arraignment of certain enumerated collateral consequences such as the effect of the plea on housing and driving privileges. ***People v. Burge***, 2021 IL 125642, ¶ 43 confirmed that this provision does not apply to non-arraignment guilty pleas.

PART II – TRIAL PROCEDURE

Tab 4

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2.1 Jury Selection

See Appendix "Jury Trial Issues from Selection to Discharge" starting on page A-50.

Before jury selection, the judge should advise the parties of: (1) jury selection procedure; (2) any time limits on opening or closing statements; (3) method of making and responding to objections; (4) marking, use, and admission of exhibits; (5) movement in the courtroom; (6) any policy on recross or surrebuttal; and (7) submission of jury instructions.

The judge may also admonish defendant of fundamental rights or decisions to be made by defendant alone, such as whether to testify. The judge should inform defendant that he or she will be given time to confer with counsel on these issues.

A. Jury *Venire*

1. Jury Pool

Petit jurors are randomly drawn from a combined list of voter registrations, driver's licenses, Illinois Identification Cards, Illinois Disabled Person Identification Cards, and unemployment insurance claimants. *See* **705 ILCS 305/1**, **305/(20)(b)**, and **310/2a**.

If the *venire* is exhausted, the trial court may direct that the sheriff or (if a party objects to the sheriff) a special bailiff summon bystanders to serve. **705 ILCS 305/13**. The sheriff has discretion in the method used to do so, subject to the direction of the trial court. ***People v. White***, 353 Ill.App.3d 905, 912 (4th Dist. 2004).

2. Jury List

Supreme Court Rule 434(b) and **725 ILCS 5/115-4(c)** each provide that, upon request, the parties shall be furnished with a list of prospective jurors with their addresses, if known. The statute is permissive, not mandatory, ***People v. Partee***,

157 Ill.App.3d 231, 259–60 (1st Dist. 1987), but denying this information, at least as to juror names, requires certain findings, *see infra*, Section 2.1.B.1. "Juror Secrecy/ Anonymous Juries."

3. Juror Contact During Trial

   Communication with a juror with the intent to influence is a Class 4 felony. **720 ILCS 5/32-4**.

4. Post-trial Juror Contact

   Jurors should be instructed after verdict that they may, but are not required to, speak with the attorneys after they are released. A convicted self-represented defendant, though, must obtain leave of court before contacting any juror, **705 ILCS 320/5**, following the specific procedure at **705 ILCS 320/10**.

5. Juror's Right to Serve

   An individual juror does not have a personal right to serve on a particular jury but does have an equal protection right not to be excluded from same on account of race. ***Powers v. Ohio***, 499 U.S. 400, 409 (1991). It is the prospective juror's right that is violated if such occurs. ***Georgia v. McCollum***, 505 U.S. 42, 48 (1992). A defendant, and the State, have third-party standing to raise a racial discrimination claim under ***Batson v. Kentucky***, 476 U.S. 79 (1986).

   See discussion of ***Batson*** at Section 2.1.E., *infra*. Challenge to Venire

6. Challenge to the *Venire*

   (a) Pleading: Motion to Discharge Jury Panel

   A party may object to the way a jury panel has been selected or drawn by moving to discharge the panel via written motion supported by affidavit. The motion must be made before *voir dire* but, for good cause shown, the court may entertain a motion filed

after *voir dire* has begun but before a jury has been sworn. **725 ILCS 5/114-3(a)**.

A defendant who raises an unfair cross-section of the community claim need not be a member of the allegedly excluded group and need not plead or prove malice or intent to discriminate. ***People v. Flores***, 193 Ill.App.3d 501, 506-07 (2nd Dist. 1990).

(b) Hearing

If the motion states facts showing improper selection or drawing, a hearing must be held. **725 ILCS 5/114-3(c)**.

(c) Burden

The movant has the burden of proof. **725 ILCS 5/114-3(c)**.

To establish a *prima facie* case that the jury pool was not drawn from a fair cross-section of the community, the movant must show:

(i) the group alleged to be excluded is a distinctive group in the community;

(ii) representation of the group in venire from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(iii) The under-representation is due to systemic exclusion of the group in the jury selection process. ***People v. Hobley***, 159 Ill.2d 272, 304–05 (1994); *See also* ***Duren v. Missouri***, 439 U.S. 357 (1979).

See also ***People v. Peeples***, 155 Ill.2d 422, 453 (1993) (drawing jurors from a sub-region of county did not impermissibly underrepresent minority members in the venire when the population percentage difference was 2.46% (10.14% vs. 12.6%)).

See also ***People v. Hollins***, 366 Ill.App.3d 533, 538-39 (3rd Dist. 2006) (numerical calculations unnecessary when jury coordinator intentionally removed *venire* persons because of their race).

(iv) Ruling

If the court finds that the jury panel was improperly selected or drawn, the court shall discharge the panel and order that a new one be drawn in the manner provided by law. **725 ILCS 5/114-3(d)**.

7. Juror Qualifications

Jurors must be:

(a) inhabitants of the county;

(b) at least 18 years old;

(c) free from all legal exception, of fair character, of approved integrity, of sound judgment, well informed, and able to understand the English language, whether in spoken or written form or interpreted into sign language;

(d) citizens of the United States of America. **705 ILCS 305/2(a)**.

8. Juror Disqualification

A juror shall be discharged for cause if he or she:

(a) lacks the qualifications in **705 ILCS 305/2**, noted above; or

(b) served as a juror in a trial in the same county within one year prior to the time of being offered as a juror (unless the juror waives such exemption); or

(c) is a party to a suit pending for trial in that court. **705 ILCS 305/14**.

NOTE: If a juror is disqualified due to a total and permanent disability, he or she shall be permanently excluded from jury service. *See* **705 ILCS 305/10.4** and **705 ILCS 310/10.5**.

9. Physical and Language Disabilities and Accommodation—Access to Justice

   A juror is qualified to serve if he can understand the English language "interpreted into sign language." **705 ILCS 305/2(a)(3)**.

   As to a challenge for cause, "[i]f a prospective juror has a physical impairment, the court shall consider such prospective juror's ability to perceive and appreciate the evidence." **725 ILCS 5/115-4(d)**.

   705 ILCS 315/1(a) provides that: "if any juror is deaf or hard of hearing, the juror may be accompanied by and may communicate with a court appointed interpreter throughout any period during which the jury is sequestered or engaged in its deliberations;" however, if the jury foreman reasonably believes the interpreter is doing more than interpreting, the foreman may request that the interpreter be replaced.

   IPI-Criminal 1.06 provides that the court may, in the event of deliberation with a hearing-impaired juror, instruct the jury that an interpreter present during deliberations is there solely to aid in communication and may not offer opinions or recollections concerning testimony, evidence, or trial proceedings.

10. Pre-Screening Prospective Jurors

    A court may issue specially created jury questionnaires prior to *voir dire* in conjunction with questioning prospective jurors. *See*, *e.g.*, ***People v. Sheley***, 2014 IL App (3d) 120012, ¶ 25.

11. Jury Consultants and Internet Searches of Prospective Jurors

The attorneys or their consultants may conduct an internet search of jurors during *voir dire*. The court may require the parties to disclose information discovered regarding potential jurors or direct that any party with information that could potentially bar a juror disclose such information.

Some courts allow the parties to run a juror background check. If so, juror criminal background information should be disclosed and placed on the record outside the presence of the jury.

B. *Voir Dire*

Prior to commencing jury selection, the judge must read to the jury venire IPI 1.01B, Implicit Bias. This instruction is also to be read to the jury prior to opening statements.

(Practice note: This instruction (1.01B) has been incorporated into IPI 1.01, so may not need to be read to the jury for a third time by the Judge during the instructions phase, however, it should go back to the jury in the written instruction packet.)

The court may consider giving the potential jurors some information about the case so that the jurors can give more informed responses to the *voir dire* questions. If so, the court should conduct a conference with the attorneys as to that information and how it will be provided.

In a publicized case, the court may consider asking the potential jurors at the outset whether they have heard about the case. Follow up questions of venire members who have been exposed to the publicity may be done individually. *See*, *e.g.*, American Bar Association (ABA) Fair Trial and Free Press, Part I Conduct of Attorneys in Criminal Trials, Standard 8-3.5 Selecting the Jury.

Notably, though, "In the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no

opinion,) shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein, in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement." **705 ILCS 305/14**.

1. Juror Secrecy / Anonymous Juries

As noted above, the court may, upon request and in its discretion, provide the parties with a list of prospective jurors and their addresses. **725 ILCS § 5/115-4(c)**; **Supreme Court Rule 434(b)**.

Referring to jurors only by numbers "can be problematic" because it "may undermine the presumption of innocence by intimating that the defendant is a dangerous person" but informing jurors that they are referred to by number in every trial in the county and providing the parties forms listing jurors' names and towns of residence negates that intimation. ***People v. Collins***, 351 Ill.App.3d 175, 183 (2nd Dist. 2004).

The level of anonymity can vary from complete anonymity, where the juror's identities are never revealed, to partial anonymity, where the jurors' names are known to the parties but are made available to the public only after the trial. *See e.g.*, ***United States v. White***, 698 F.3d 1005, 1018 (7th Cir. 2012); ***United States v. Black***, 483 F.Supp.2d 618, 624 (N.D. Ill. 2007).

(a) Juror Safety Concerns

Anonymous juries are permissible when the jurors' safety would be jeopardized by public disclosure, or the defendant has attempted to bribe or intimidate witnesses or jurors. ***United States v. Blagojevich***, 612 F.3d 558, 561 (7th Cir. 2010); *see also* **705 ILCS 315/2**. When weighing the need for an anonymous jury, the court must balance the competing interests of the defendant in preserving the presumption of innocence, of conducting a useful *voir dire,* of the

jurors' interest in their own security and of the public's interest in having a jury assess defendant's guilt or innocence impartially. ***United States v. White***, 698 F.3d 1005, 1016 (7th Cir. 2012); ***United States v. Mansoori***, 304 F.3d 635, 650 (7th Cir. 2002).

(b) Deferred Disclosure of Jurors' Identities

The First Amendment guarantees the press and the public the right to attend *voir dire* proceedings. ***Press-Enterprise Co. v. Superior Court of California, Riverside County***, 464 U.S. 501, 508 (1984).

The courts in ***Blagojevich***, 612 F.3d at 561, and ***United States v. Wecht,*** 537 F.3d 222, 239 (3rd Cir. 2008), held that there is a presumption of openness for access to juror names during trial, but it can be overcome. "The right question is not *whether* names may be kept secret, or disclosure deferred, but *what justifies* such a decision." ***Blagojevich***, 612 F.3d at 561. Deferred release of names requires less justification than nondisclosure. ***Id.*** at 564. *See also* ***United States v. Harris***, 763 F.3d 881, 886 (7th Cir. 2014) (distinguishing between anonymous and confidential juries).

2. Punitive Treatment of Juror Claiming Bias

Courts must avoid pressuring or punishing a prospective juror who claims bias or inability to serve, as such practice discourages openness for the rest of the venire. ***People v. Trzeciak***, 2014 IL App (1st) 100259-B, ¶ 85.

3. Requirement of Record

Jury selection must be court reported. **Supreme Court Rule 608(a)(7)**.

4. Sequestered *Voir Dire*

   The decision to separate jurors and conduct individual *voir dire* to prevent prejudice and eliminate the possibility of taint is discretionary and rests upon factors including security concerns and the physical constraints of the courthouse. ***People v. Williams***, 147 Ill.2d 173, 214–215 (1991).

5. Court's Initial *Voir Dire*

See Appendix for "Jury Trial Issues from Selection to Discharge" starting on page A-50.

Supreme Court Rule 431(a) provides that the court shall conduct the *voir dire* examination by asking potential jurors appropriate questions to determine their qualifications to serve as jurors during the trial and may in its discretion ask additional questions submitted by the parties if appropriate.

Rule 431(b), which codifies *voir dire* requirements set forth in ***People v. Zehr***, 103 Ill.2d 472 (1984), mandates that "the court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles:

(a) the defendant is presumed innocent of the charge(s) against him or her;

(b) before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt;

(c) the defendant is not required to offer any evidence on his or her own behalf; and

(d) if a defendant does not testify it cannot be held against him or her; *however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects*."

The court must ask whether the juror both understands and accepts each principle. ***People v. Belknap***, 2014 IL 117094, ¶ 45. Failure to ask the ***Zehr*** questions is error, though not automatically plain error, ***Id.*** at ¶ 62, but every year this easily avoided mistake fills the case reporters and should be avoided.

6. *Voir Dire* by Counsel

Rule 431(a) provides that counsel shall be allowed to make direct inquiry "as the court deems proper for a reasonable period of time depending on the length of the examination by the court, the complexity of the case, and the nature of the charges." The rule precludes questions that directly or indirectly concern matters of law or instructions.

Rule 431(a) imposes an obligation on the court to consider the above factors to determine what questioning will be allowed, and the court should exercise its discretion in favor of attorney questioning. The court might determine that no such questioning is necessary, ***People v. Garstecki***, 234 Ill.2d 430, 443–45 (2009), but the court cannot summarily dispense with attorney *voir dire* without considering the Rule's factors. ***People v. Gonzalez***, 2011 IL App (2d) 100380, ¶ 24.

> **Practice Note**: The court may require counsel to put proposed questions in writing for the court's review.
>
> The court may disallow questions that are improper or redundant, ***People v. Kraus***, 318 Ill.App.3d 774, 783 (1st Dist. 2000); or over-broad, non-specific, or inappropriately worded, *e.g.* questions regarding jurors' feelings about various principles of law that suggest to the jury their theory of the case, ***People v. Karim***, 367 Ill.App.3d 67, 91–93 (1st Dist. 2006). A party may be prohibited from asking identification questions designed to suggest that defendant was mis-identified. ***People v. Bowel***, 111 Ill.2d 58, 64–65 (1986).

The state may not use *voir dire* to improperly indoctrinate the jury regarding the defense of consent under the facts of the case. ***People v. Boston***, 383 Ill.App.3d 352, 356 (4th Dist. 2008). *See also* ***People v. Rinehart****,* 2012 IL 111719, ¶ 21 (distinguishing generic questions on preconceptions of sexual assault cases from those in ***Boston*** as fact-driven).

Police: The court should ask if jurors would be more likely to believe the testimony of a police officer just because the person is a police officer, but failing to do so is not reversible error unless prejudice results. ***People v. Taylor***, 235 Ill.App.3d 763, 764 (3rd Dist. 1992).

Crime victim*:* The court may ask whether the juror or his family or friend has been the victim of a crime, even other than that charged, but must permit individual responses. ***People v. Oliver***, 265 Ill.App.3d 543, 549-50 (1st Dist. 1994).

Racial prejudice: Generally, questioning as to racial viewpoints is required only where special circumstances give rise to a constitutionally significant likelihood that racial prejudice would possibly infect the proceedings. ***People v. Peeples***, 155 Ill.2d 422, 459 (1993). The sole fact that defendant and victim are of different races is not such a circumstance. ***Peeples***, 155 Ill.2d at 460 (*citing* ***Turner v. Murray***, 476 U.S. 28, 33 (1986)).

Gang issues*:* The court must allow inquiry into gang bias if testimony of gang membership and gang-related activity is to be an integral part of defendant's trial. ***People v. Strain***, 194 Ill. 2d 467, 477 (2000). But the judge is not required to ask *sua sponte*. ***People v. Macias***, 371 Ill.App.3d 632, 639-640 (1st Dist. 2007).

Insanity defense: Jurors may be examined as to their attitudes toward the defense of insanity. ***People v. Scott***, 148 Ill.2d 479, 513 (1992).

Self-defense: The court may refuse to ask jurors if they would be able to follow the law of self-defense. ***People v. Kendricks***, 121 Ill.App.3d 442, 449 (1st Dist. 1984).

Indoctrination of defense: The purpose of *voir* dire is not to indoctrinate the jurors on defendant's theory of the case. ***People v. Bowell***, 111 Ill.2d 58, 65 (1986). In general, a proposed *voir dire* question concerning an affirmative defense should be excluded ***People v. Reeves***, 385 Ill.App.3d 716, 730 (1st Dist. 2008), but insanity is different due to its controversial nature.

Accountability: The court may, in its discretion, give a brief and fair summary of accountability principles and ask jurors if they could apply same to the evidence. ***People v. Mapp***, 283 Ill.App.3d 979, 989 (1st Dist. 1996).

C. Challenging Jurors for Cause: **Supreme Court Rule 434(c) and 725 ILCS 5/115-4(d)**

1. Grounds, Generally

The court may *sua sponte* excuse a juror for cause but is not required to do so. ***People v. Metcalfe***, 202 Ill. 2d 544, 557 (2002).

However, a court's failure to remove a juror for cause is grounds for reversal only if the defense exhausted all of its preemptory challenges and an objectionable juror sat on the jury. ***People v. Pendleton***, 279 Ill.App.3d 669, 674–75 (1st Dist. 1996).

2. Specific Grounds

The statutory grounds for cause are listed above in section A8.

Media exposure is not an automatic ground for exclusion, as noted above in section B. Instead, the relevant inquiry is whether the defendant can receive a fair and impartial trial. ***People v. Lucas***, 132 Ill.2d 399, 422 (1989).

Practice Note: I.P.I.-Criminal 1.01A, a required instruction, admonishes jurors not to conduct independent research or review media reports regarding the case.

(a) Potential bias issues

The fact that a juror was a victim of sexual assault or knows a victim of same is not necessarily cause to excuse the juror. ***People v. Bowman***, 325 Ill.App.3d 411, 423 (1st Dist. 2001).

The fact that a juror is a police officer is not automatic grounds for cause, though the officer's knowledge of the case, witnesses and parties may require removal. ***People v. Stremmel***, 258 Ill.App.3d 93, 113 (2nd Dist. 1994).

The fact that a juror was the prosecutor's law school classmate and remote acquaintance is not automatic grounds for cause. ***People v. Kuntu***, 196 Ill.2d 105, 126 (2001).

A juror who recognized a witness and said he would find it difficult to be fair and impartial was properly removed for cause mid-trial. ***People v. Sanders***, 342 Ill.App.3d 374, 379 (5th Dist. 2003).

(b) Religious Beliefs

A juror who stated his religious beliefs would interfere with his ability to follow the law was properly excluded for cause. ***People v. Rissley***, 165 Ill.2d 364, 402 (1995).

(c) Juror Lying

If a judge finds that a juror lied during *voir dire,* he may be excused for cause—rehabilitation or explanation is not required. ***People v. Adkins***, 239 Ill.2d 1, 20 (2010); ***People v. Williams***, 164 Ill.2d 1, 20 (1994).

D. Peremptory Challenges

1. Number

Supreme Court Rule 434(d) and (e) set the number of peremptory challenges, which is less than that provided by statute under **725 ILCS 5/115-4(e)**. The Rule prevails on separation of powers grounds. ***People v. Colclasure***, 200 Ill.App.3d 1038, 1043 (5th Dist. 1990).

Thus, the following peremptory challenges apply:

(a) <u>One Defendant</u>

Felony – 7 Challenges

Other Cases – 5 Challenges

(b) <u>More Than One Defendant in Single Trial</u>

Felony – 5 Challenges (Each Defendant)

Other Cases – 3 Challenges (Each Defendant)

The State shall have the same number as all defendants combined.

Each party shall have one challenge per alternate.

2. Method of Selection

Rule 434(a) provides that "the parties shall pass upon and accept jurors in panels of four, commencing with the State" unless the court otherwise directs. Submission of the panel moves back and forth between the state and defense until both sides have accepted all four jurors. Alternate jurors "shall be passed upon separately."

Courts vary in practice on whether the selection process takes place in the presence of the jurors.

Practice Note: ***People v. McCormick***, 328 Ill.App.3d 378, 383 (2nd Dist. 2002), affirmed the use of an alternative "strike method," whereby the parties simultaneously exercised their challenges against the entire venire, and the subsequent jury was then chosen randomly. Although the

court rejected defendant's claim that his number of peremptory challenges was reduced, it cautioned: "[t]rial courts utilizing such a system must ensure that the process does not impair the defendant's peremptory right." ***Id.***

3. Backstriking

Backstriking occurs during an individual panel selection when a party exercises a peremptory challenge as to a juror who was previously approved and tendered to the other side but is part of the returned/modified panel to be addressed.

Backstriking is not barred by Rule 434 and may be allowed or prohibited in the court's discretion. The theory is that the final panel has not yet been selected and sworn, thus permitting a peremptory challenge to be made regardless of whether the juror was previously approved. ***People v. Moss***, 108 Ill.2d 270, 275 (1985).

4. Mid-trial challenges

Once a juror has been sworn, no peremptory challenge is allowed, though the juror may still be dismissed for cause. ***People v. Peeples***, 205 Ill.2d 480, 520 (2002).

E. ***Batson*** Challenges

Under ***Batson v. Kentucky***, 476 U.S. 79 (1986), the exercise of a peremptory challenge in a racially discriminatory manner violates the juror's right to equal protection. *See* ***Georgia v. McCollum***, 505 U.S. 42, 48 (1992). Both the state and defense may raise a ***Batson*** issue. ***McCollum***, 505 U.S. at 56. ***Batson*** also applies to gender discrimination claims. ***J.E.B. v. Alabama ex rel. T.B.***, 511 U.S. 127 (1995); ***People v. Blackwell***, 164 Ill.2d 67 (1995). A defendant need not be a member of the protected class to raise a ***Batson*** challenge. ***Powers v. Ohio***, 499 U.S. 400, 415 (1991).

A ***Batson*** challenge is assessed in a three-step process. The court should be careful not to conflate the steps and immediately require the challenged party to explain the use of the challenge---the party's rationale is only given at the second step. Following the process ensures that a party is

not erroneously deprived of the use of a peremptory strike. ***People v. Rivera***, 221 Ill.2d 481, 506 (2006), *aff'd*, ***Rivera v. Illinois***, 556 U.S. 148, 162 (2009).

First, the challenger must establish a *prima facie* case of racial or gender discrimination in striking a juror. The court should consider more than simply the number of jurors excluded. ***People v. Young***, 128 Ill.2d 1, 19 (1989). The court must instead determine whether "all the relevant circumstances raised an inference of intentional discrimination." ***People v. Hudson***, 195 Ill.2d 117, 128 (2001). Circumstances include any pattern of strikes or any disproportionate use of strikes against persons in the protected class, the challenged party's questions and statements during *voir dire* and when making challenges, the level of representation of the protected class in the venire as compared to the jury, whether the only common characteristic between the struck jurors was membership in the protected class, and whether the potential witnesses are members of the protected class. ***Hudson***, 195 Ill.2d at 128.

Second, once a *prima facie* case has been established, the burden shifts to the challenged party to offer a race or gender-neutral explanation for the challenge at issue. The reason need not rise to the level of cause, but it may not be pretextual. ***Id***. at 127. It need not be "a reason that makes sense," but it must be a reason that does not deny equal protection. ***Id***. Moreover, the reasons must be clear and reasonably specific, and related to the case being tried. ***People v. Blackwell***, 171 Ill.2d 338, 349 (1996). Simply saying "personality reasons" or "criminal contacts" with no specific context is insufficient. ***People v. Bradshaw***, 2020 IL App (3d) 180027, ¶¶ 39-40. The challenged party/counsel need not testify under oath and is not subject to cross-examination on the issue. ***Blackwell***, 171 Ill.2d at 349.

Third, once the explanation has been proffered by the challenged party, the court must determine whether the challenger has shown purposeful discrimination. ***Id***.

Practice Note: The court has no duty to raise a ***Batson*** issue *sua sponte*, but may do so if a *prima facie* case of

discrimination is "abundantly clear." ***Rivera***, 221 Ill.2d at 504.

F. Number of Jurors

By statute, a jury consists of 12 people. **725 ILCS 5/115-4(b)**. But a defendant can waive his right to a jury of 12, and the court has the discretion to allow a smaller jury. ***People ex rel. Birkett v. Dockery***, 235 Ill.2d 73, 81 (2009) (grant of request for a jury of six upheld); ***People v. Barrier***, 359 Ill.App.3d 639, 644 (3rd Dist. 2005) (defendant validly waived 12-person jury mid-trial and proceeded with a jury of 11 by agreeing to go to trial with no alternates and remaining silent when juror became ill and was excused).

Rule 434 does not specify the number of alternates to be selected, but **725 ILCS 5/115-4(g)** provides for two. In lengthy cases, some courts select more than two alternate jurors.

G. Pre-Instruction of Empaneled Jury

See Appendix for "Jury Trial Issues from Selection to Discharge" starting on page A-50.

1. Rules of Conduct and Introduction to Trial Procedure

The Jury must be sworn in. Failure to swear in the jury constitutes plain error. "[U]pholding a conviction before an unsworn jury would undermine the integrity of the criminal justice system." ***People v. Moon***, 2022 IL 125959 (2022).

Supreme Court Rule 451(e) provides that, after the jury is selected and before opening statements, the court may orally instruct the jury on cautionary or preliminary matters (such as burden of proof, believability of witnesses, and receipt of evidence for a limited purpose), and substantive law applicable to the case (such as the elements of the offense, and, when requested by the defendant, the elements of an affirmative defense).

IPI-Criminal 1.01A must be read to the jury before trial and included in the instruction packet at the conclusion of the trial. It admonishes jurors not to investigate matters or consider information obtained outside court proceedings, not to utilize Internet or other resources, and not to communicate with others. *See also* **Supreme Court Rule 436(b)** (requiring similar admonishments).

See Appendix Checklist Page A-52 and Suggested Scripts pages A-66–70 for practice tips as to other areas that may be addressed.

2. Note Taking

By statute, jurors are entitled to take notes. Writing material must be provided and the notes must be kept confidential during trial. Notes must be destroyed after the trial has ended. **725 ILCS 5/115-4(n)**.

The judge is to instruct the jury as to note taking at commencement, and in writing at conclusion, of the case. *See* **IPI-Criminal 1.05**.

H. Mid-trial Admonitions and Sequestration

Supreme Court Rule 436(a) grants the court discretion to sequester the jury.

Rule 436(b) provides that, whether sequestered or not, the court is to instruct that jurors are "(1) not to converse with anyone else on any subject connected with the trial until they are discharged; (2) not to knowingly read or listen to outside comments or news accounts of the procedure until they are discharged; (3) not to discuss among themselves any subject connected with the trial, or form or express any opinion on the cause until it is submitted to them for deliberation; and (4) not to view the place where the offense was allegedly committed."

725 ILCS 5/115-4(m) provides that jurors shall be permitted to separate during any adjournment before final adjudication, unless the court finds a probability that prejudice will result from such separation.

I. Juror Misconduct

1. Standard Justifying Removal

(a) Outside Influence

Any juror exposure to prejudicial outside influences raises a presumption of prejudice and the burden shifts to the state to show that the contact was harmless. ***People v. Williams***, 209 Ill.2d 227, 241 (2004).

A defendant's personal attempt to influence a juror generally does not invoke a presumption of prejudice. ***People v. Ward***, 371 Ill.App.3d 382, 405 (1st Dist. 2007) (defendant looked at juror and mouthed "don't do it.")

(b) Discovery During Deliberation That Juror Lied in *Voir Dire*

Where the state investigated the veracity of the juror's pre-trial questionnaire only after it was evident during deliberation that the juror was a "hold out," dismissal of the juror was improper. ***People v. Gallano***, 354 Ill.App.3d 941, 954 (1st Dist. 2004).

(c) Sleeping or Inattentive Juror

A sleeping juror, or a juror with prolonged inattentiveness, should be removed if it is impossible for him to perform his duties so that defendant receives a fair trial. And, if a court affirmatively observes same, the court is obligated to inquire as to the issue. ***People v. Clayton***, 2019 IL App (3d) 170315, ¶ 20. A judge should also alert the parties to a perceived potential issue of inattentiveness. ***People v. Gonzalez***, 388 Ill App.3d 566, 577 (1st Dist. 2008).

(d) Late Juror

A judge may replace juror whose late arrival would inconvenience the proceedings and other jurors.

People v. Thomas, 71 Ill.App.3d 838, 841 (1st Dist. 1979).

2. Reasonable Inquiry; Mid-Trial *Voir Dire*

The entire jury need not always be questioned when an individual juror reports possible outside influence—such action might highlight unknown contact to the other jurors. ***People v. Ward***, 371 Ill.App.3d 382, 399–402 (1st Dist. 2007).

3. Replacement of Jurors

725 ILCS 5/115-4(g) and **Rule 434(e)** provide that a juror who dies or is discharged shall be replaced by an alternate juror in the order of selection.

While the statute and the rule only address pre-deliberation replacement, neither prohibit replacement of a juror during deliberation. ***People v. Roberts***, 214 Ill.2d 106, 121 (2005).

Replacement in such an instance is within the court's discretion. ***Roberts***, 214 Ill.2d at 121. The court must take precaution to avoid prejudice before allowing a replacement. For instance, the alternate should be questioned as to his or her continued impartiality and post-trial contact before being seated, the court may carefully determine if the original jurors formed an opinion before the replacement (without disclosure of specific views), the court should consider the length of the deliberation before replacement, and the jury should be instructed to begin to deliberate anew. ***Id***. at 124.

J. Extended Media Coverage and Additional Concerns on Internet Use

As noted earlier, **I.P.I-Criminal 1.01A** directs jurors not to discuss or research the case in any way. **Rule 436(b)** requires similar admonishments.

Also, the Illinois Supreme Court has allowed extended media coverage in some instances, and special admonishments and instructions must be given to the jury

when such coverage is allowed. *See* **M.R. 2634, §1.5(a)**, issued February 22, 2016.

Generally, the court may also consider the following:

- reminding jurors at *voir dire* to refrain from using social media while serving as a juror,

- explaining the reason behind the social media ban in plain terms to the jury,

- instructing jurors at multiple points throughout the trial about the prohibition on the use of social media and the internet to discuss or research the case,

- confiscating phones and other electronic devices from the jurors not only during deliberation but at the start of each day of trial,

- alerting the jury about the personal consequences of using social media or the internet to discuss or research the case, and

- requiring jurors to sign a written pledge agreeing to refrain from using social media while serving as a juror.

See Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations (Federal Judicial Center 2014).

See also
https://www.uscourts.gov/sites/default/files/proposed_model_jury_instructions.pdf (proposed instructions).

See Appendix for "Juror's Statement of Compliance" at page A-95; "Sample Jury Decorum Order" at page A-96; and "Checklist for Dealing with Jury Issues" at page A-98.

PART II – TRIAL PROCEDURE

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2.2 Trial Procedure

A. Opening Statements

1. General Rule

Opening statements in criminal jury trials are governed by **Supreme Court Rules 432 and 235**. Each party may make an opening statement when the jury is empaneled or, if requested and in the court's discretion, later in the trial. The court may not deny an opening statement in a jury trial. ***People v. DeRossett***, 237 Ill.App.3d 315, 333 (4th Dist. 1992).

The purpose of an opening statement is to advise the jury non-argumentatively of what each party expects the evidence will prove and may include discussion of reasonable inferences to be drawn from the evidence. ***People v. Sutton***, 353 Ill.App.3d 487 (1st Dist. 2004); ***People v. Cloutier***, 156 Ill.2d 483 (1993); ***People v. Kliner***, 185 Ill.2d 81 (1998).

NOTE: Defense counsel's request to reserve opening but failure to adequately present same may be ineffective assistance. *See* ***People v. Lee***, 185 Ill.App.3d 420, 443 (5th Dist. 1989).

2. Propriety of Opening Statement

Counsel may not argue in opening. ***People v. Lee***, 342 Ill.App.3d 37, 51 (1st Dist. 2003).

It is improper to comment on testimony that will not be produced at trial. But counsel may comment on anticipated circumstantial evidence and reasonable inferences to be drawn from same. ***People v. Warmack***, 83 Ill.2d 112, 125 (1980).

The failure to introduce evidence mentioned in opening is reversible where the remarks are attributable to deliberate misconduct and result in substantial prejudice to defendant. ***People v. Smith***, 141 Ill.2d 40, 63–64 (1990).

B. Order of Proof

1. Order of Producing Testimony

The state first presents its evidence in its case-in-chief. The defense may then present its evidence. The state may then present evidence in rebuttal.

2. Recalling Witnesses

Whether a witness may be recalled is in the court's discretion. ***People v. Lewis***, 223 Ill.2d 393, 405 (2006).

3. Rebuttal Testimony

Rebuttal evidence is for the purpose of explaining, contradicting, or disproving defendant's evidence. Rebuttal evidence may be proper even if it was available but unused in the state's case-in-chief. ***People v. Hood***, 213 Ill.2d 244, 259, 261 (2004).

Rebuttal evidence should not be permitted to impeach on a purely collateral issue. ***People v. McGhee***, 20 Ill.App. 3d 915, 922 (1st Dist. 1974).

4. Reopening Proofs

Reopening proofs is within the court's discretion, even after closing argument or motion for directed verdict. *See* ***People v. Biro***, 260 Ill.App.3d 1012, 1022 (1st Dist. 1994) (closing); ***People v. Berrier***, 362 Ill.App.3d 1153, 1166 (2nd Dist. 2006) (motion).

5. Re-cross-examination

Re-cross-examination is limited to response to testimony elicited on re-direct. ***People v. Williams***, 161 Ill.2d 1, 44 (1994).

C. Motion for Mistrial and Directed Verdict

1. Motion for Mistrial

(a) Double Jeopardy Considerations

(i) Mistrial over defendant's objection

The court may declare a mistrial over defendant's objection only where there is a "manifest necessity" to do so. Otherwise, double jeopardy bars retrial. ***United States v. Jorn***, 400 U.S. 470, 481 (1971).

(ii) Factors—Manifest Necessity

Declaring a mistrial is within the court's discretion based on the facts of the trial. ***People v. Edwards***, 388 Ill.App.3d 615, 623–24 (1st Dist. 2009).

People v. Street, 316 Ill.App.3d 205, 212 (4th Dist. 2000), sets forth some factors to consider in determining whether there is a manifest necessity:

(1) Whose actions–court or counsel–caused the issue and whether there were events over which the parties lacked control;

(2) whether the issue may have been intentionally caused by the state to strengthen its case;

(3) whether the issue could be 'cured' by means that would preserve the trial's fairness;

(4) whether the judge granted the mistrial solely to protect defendant from prejudice;

(5) whether the state's evidence before the mistrial suggested a weakness in its case;

(6) whether the jurors had heard enough of the case to formulate some tentative opinions;

(7) whether the case thus far has given the state a substantial preview of defense tactics and evidence; and

(8) whether the composition of the jury was unusual.

(9) (upon review) whether the judge considered an alternative to mistrial;

(10) (upon review) whether a subsequent conviction would be subject to reversal on appeal; whether the judge acted in the heat of the trial confrontation;

(11) (upon review) whether the judge's decision rested on assessment of trial factors such as demeanor or atmosphere not amenable to appellate review;

(iii) Defense Motion

Generally, so long as the state did not deliberately provoke the mistrial, a defense motion for a mistrial forfeits a double jeopardy claim. ***United States v. DiFrancesco***, 449 U.S. 117, 434 (1980); ***People v. Placek***, 184 Ill.2d 370, 377 (1998).

(iv) State Misconduct

If the state intentionally provoked the mistrial, retrial is barred even if the mistrial is

granted on defendant's motion. ***Oregon v. Kennedy***, 456 U.S. 667, 673 (1982). Illinois (and federal) law requires the intent to provoke the defendant to request a mistrial, and the intent to harass a defendant or deprive the defendant of a fair trial is not enough. ***People v. Nelson***, 193 Ill.2d 216, 221 (2000).

Re-trial based on judicial or state error is not barred in the absence of intent to provoke a mistrial. ***Placek***, 184 Ill.2d at 378.

(b) Grounds for Mistrial

(i) Examples of state misconduct <u>not</u> deemed to intentionally cause a mistrial:

Nelson, 193 Ill.2d at 220 (offered inadmissible evidence "even if done purposely" and discovery violation); ***People v. Tate***, 317 Ill.App. 3d 272, 279 (5th Dist. 2000) (reference to post-arrest silence in opening); ***Kennedy***, 456 U.S. at 669 (state asked witness if defendant was a crook); ***People v. Campos***, 349 Ill.App.3d 172, 177 (2nd Dist. 2004) (state inadvertently elicited from officer that defendant asked to speak to counsel); ***People v. Longoria***, 375 Ill.App.3d 346, 351 (2nd Dist. 2007) (state violated order barring use of "other crimes" evidence); ***People v. Griffith***, 404 Ill.App.3d 1072, 1074–75, 1088 (1st Dist. 2010) (state repeatedly referenced defendant's separate murder conviction and death sentence, belittled defense witnesses, and told jury that accepting defense argument would give defendant a "license to kill").

(ii) Example of state misconduct that was deemed to intend a mistrial:

People v. Pendleton, 75 Ill.App.3d 580, 597 (1st Dist. 1979) (when state's case was going badly in a bench trial, the prosecutor had a recess conference with the complaining witness, who then suddenly proclaimed confidence in identifying the defendants, and then tried to hide the conference when questioned by the court).

(iii) Examples of defense misconduct that constituted manifest necessity for mistrial:

People v. Burtron, 376 Ill.App. 3d 856, 864 (5th Dist. 2007) (defense flagrantly violated multiple court directives and offered that defendant would take polygraph to prove his innocence); ***People v. Edwards***, 388 Ill.App. 3d 615, 625 (1st Dist. 2009) (discovery violation involving letter defense expert may have relied on, where short continuance would not help the state and expert was so important to defense that excluding him likely would have meant conviction, so lesser sanctions would be ineffective).

(iv) Example of alleged defense misconduct that did not result in manifest necessity for mistrial:

People v. Dahlberg, 355 Ill.App.3d 308, 311 (2nd Dist. 2005) (cross of complaining witness as to prior claims of domestic abuse and orders of protection against others).

(v) Example of no basis for mistrial due to publicity:

People v. Kleiss, 88 Ill.App.3d 358, 362 (3rd Dist. 1980) (media exposure overcome by

jurors unequivocally saying they could ignore broadcast and by use of cautionary instructions).

(vi) Hung jury

Generally, a jury deadlock can create a manifestly necessity for mistrial. No fixed time is prescribed, and it is in the court's discretion. Further, a Prim instruction is not an absolute condition precedent to a mistrial. ***People v. Wolf***, 178 Ill.App.3d 1064, 1066 (3rd Dist. 1989).

(c) Consideration of Alternatives to Mistrial

The court must carefully consider alternatives and avoid a hasty decision. ***People v. Shoevlin***, 2019 IL App (3d) 170258, ¶ 28. These include providing curative instructions or admonitions, and striking testimony. ***People v. Robinson***, 121 Ill.App. 3d 1003, 1015 (1st Dist. 1984); ***People v. Finley***, 312 Ill.App.3d 892, 897 (4th Dist. 2000).

2. Motion for Directed Verdict

(a) General Rules

725 ILCS 5/115-4(k) provides that the court may, and on motion of the defendant shall, enter a directed verdict of acquittal when, at the close of the State's case or at the close of all of the evidence, the evidence is insufficient to support a finding or verdict of guilty.

Presentation of oral argument on the motion is in the discretion of the court. ***People v. Withers***, 87 Ill.2d 224, 230–31 (1981).

An unequivocal directed verdict is an acquittal and not subject to reconsideration. Re-prosecution is barred by double jeopardy. ***Smith v. Massachusetts***, 543 U.S. 462 (2005). ***People v. Henry***, 204 Ill.2d 267, 288 (2003).

(b) Standard

In a criminal case, the standard is the same for bench or jury trial: The court must consider the evidence in the light most favorable to the state and determine whether a reasonable trier of fact could fairly find defendant guilty beyond a reasonable doubt. ***People v. Connolly***, 322 Ill.App.3d 905, 915 (2nd Dist. 2001).

(c) Forfeiture on review

If defendant presents evidence after the denial of a directed verdict at the close of the state's evidence, defendant must renew the motion at the close of all evidence to preserve the denial of the mid-trial motion for review. ***People v. DeBartolo***, 242 Ill.App.3d 811, 816 (2nd Dist. 1993).

3. Mid-Trial Amendment of Charge

The state may only amend the charge mid-trial to change or correct a formal defect. *See, e.g.* ***People v. Kincaid***, 87 Ill.2d 107, 125 (1981). (For a discussion of "State's Pre-Trial Motions to Amend Charge," *see* Section 1.8.G.).

725 ILCS 5/111-5 provides that an "indictment, information or complaint . . . may be amended on motion by the State's Attorney or defendant ***at any time*** because of formal defects, including [but not limited to] any miswriting, misspelling or grammatical error, and misjoinder of the parties defendant, any misjoinder of the offense charged, the presence of any unnecessary allegation, the failure to negative any exception, any excuse or proviso contained in the statute defining the offense or the use of alternative or disjunctive allegations as to the acts, means, intents, or results charged."

Examples of formal defects:

- Change of alleged controlled substance to cocaine instead of heroin. ***People v. Flores***, 250 Ill.App.3d 399, 403 (1st Dist. 1993).

- Change in name of victim and manner of commission

of sexual conduct. ***People v. Ross***, 395 Ill.App.3d 660, 668 (1st Dist. 1999).

- Change to include land and abode in weapons charge. ***People v. Hester***, 271 Ill.App.3d 954 (4th Dist. 1995).

D. State's Burden of Proof

1. Generally

The state must prove each element of the charged offense beyond a reasonable doubt. ***People v. Maggette***, 195 Ill.2d 336 (2001).

Reasonable doubt is not defined for the trier of fact. *See* **Committee Comment** to **IPI Criminal, No. 2.05**; ***People v. Malmenato***, 14 Ill.2d 52, 61 (1958).

2. Proximate Causation Issues

Time Passing: In ***People v. Amigon***, 239 Ill.2d 71, 83 (2010), the state proved proximate cause in first degree murder where the victim's death from pneumonia stemmed from quadriplegia that resulted from gunshot wound inflicted by defendant five years earlier.

Agg DUI: In an aggravated DUI premised on a fatal accident and a BAC over .08, the state is not required to prove that the consumption of alcohol was a proximate cause of a fatal accident, only that defendant's driving was a proximate cause. ***People v. Merrick***, 2012 IL App (3d) 100551 ¶ 27; *see also* ***People v. Martin***, 2011 IL 109102 (agg DUI premised on meth in system did not require proof that impairment was a proximate cause).

3. Proof Based Solely On:

(a) Confession and *Corpus Delicti*

An uncorroborated confession cannot establish proof beyond a reasonable doubt. However, corroboration need not in itself prove the crime beyond a reasonable

doubt. ***People v. Willingham***, 89 Ill.2d 352, 359 (1982).

Proof of *corpus delicti,* or that the crime occurred, consists of two elements: (1) that a certain result occurred, (2) that the person charged is criminally responsible. ***People v. Sargent***, 239 Ill.2d 166, 184 (2010).

Corroboration of a confession must either substantiate (1) that a crime took place, or (2) that the detail given demonstrates that the confession was not simply a by-product of the defendant's imagination. ***Sargent***, 239 Ill.2d at 183.

Examples:

Confession of residential burglary within an apartment building requires greater corroboration than mere occurrence of a burglary in one of the units. ***People v. Stewart***, 377 Ill.App.3d 715, 721 (1st Dist. 2007).

Corroborating evidence was insufficient to sustain a conviction based on an accused's confession for failure to register as a sex offender. ***People v. Harris***, 333 Ill.App.3d 741 (1st Dist. 2002).

(b) Circumstantial Evidence

Circumstantial evidence alone can establish guilt beyond a reasonable doubt. ***People v. Sutherland***, 223 Ill. 2d 187, 242 (2006).

(c) Testimony of:

(i) A Single Witness

A positive identification by a single witness who had ample opportunity to observe is sufficient to support a conviction. ***People v. Piatkowski***, 225 Ill. 2d 551, 566 (2007).

IPI Crim. 4th 3.15, **Circumstances of Identification**, sets forth factors for the jury to consider on the issue. The court should determine, depending on the evidence, which factors in the instruction should be included. **NOTE**: the instruction no longer includes the disjunctive "or" in its language and should not include "or" or "and." ***Piatkowski***, 225 Ill. 2d at 562.

(ii) Accomplice

Although the testimony of an accomplice is to be viewed cautiously and with suspicion, it may sustain a conviction, even without corroboration. ***People v. Jimerson***, 127 Ill.2d 12, 44 (1989). **IPI Crim. 4th 3.17**, **Testimony of An Accomplice**, may be given but only if there is probable cause to believe the witness is an accomplice. *See* ***People v. Henderson***, 142 Ill.2d 258, 315 (1990) (witness not deemed accomplice); ***People v. Fane***, 2020 IL App (2d) 180151, ¶ 39 (same, but looks at whether witness's testimony is exculpatory).

NOTE: An accomplice's agreement with the State to testify consistently with prior statements is acceptable so long as it requires truthful testimony. *See* ***People v. Bannister***, 236 Ill.2d 1, 17 (2009).

(iii) Addict

An addict's testimony may be sufficient to sustain a conviction, if credible. ***People v. Norman***, 28 Ill. 2d 77 (1963). *See also* ***People v. West***, 156 Ill.App.3d 608, 612 (1987) (a witness may be cross-examined as to addiction).

The court is not required to instruct the jury on the unreliability of testimony of narcotic

addicts. ***People v. Armstrong***, 183 Ill.2d 130, 146 (1998).

4. Presumptions and Inferences

A presumption is a rule of law requiring a fact finder to take as established the existence of a fact. ***People v. Funches***, 212 Ill.2d 334, 341 (2004).

A mandatory presumption (requiring that if trier finds X, it must also find Y) cannot be used to prove an element of the crime. A mandatory irrebuttable presumption takes an issue from the trier of fact. A mandatory rebuttable presumption is used to shift, to the defendant, either the burden of proof or the burden of production. All mandatory presumptions are *per se* unconstitutional. ***People v. Watts***, 181 Ill.2d 133, 144–47 (1998).

A permissive presumption leaves to the discretion of the trier of fact as to whether it will be applied and is constitutional so long as there is a rational connection between the facts proved and facts to be presumed. ***Francis v. Franklin***, 471 U.S. 307 (1985); ***People v. Hester***, 131 Ill.2d 91, 100 (1989).

An inference is a factual conclusion that may be drawn considering other facts. The legislature has created a number of statutory inferences in criminal prosecutions. ***Funches***, 212 Ill.2d at 340, 342. A three-part test applies to determine if the inference may be used: (1) is there a rational connection between the basic fact and presumed fact; (2) does the presumed fact more like than not flow from the basic fact; and (3) there must be corroborating evidence of guilt. ***Id***. at 343; *see also* ***People v. Housby***, 84 Ill. 2d 415 (1981).

5. Venue

The state is <u>not</u> required to prove during trial that the alleged offense occurred in any particular county. **720 ILCS 5/1-6(a)**.

To contest venue, the defendant must raise the issue in a pre-trial motion to dismiss, **725 ILCS 5/114-1(a)(6), (a)(7)**.

The remedy is dismissal or transfer of the matter to another court. **725 ILCS 5/114-1(f).** Failure to raise the issue before trial results in waiver. **720 ILCS 5/1-6(a)**.

6. Date of Offense

A variance between the date alleged in the charge and the date proved at trial is not fatal so long as the charge sufficiently apprises defendant of the charge against him, and so long as the date is not essential to the limitations period. ***People v. Alexander***, 93 Ill.2d 73, 77 (1982); *see* **IPI Criminal**, **No. 3.01**.

7. Proof of Crime within Limitations Period

A charging instrument must show on its face that the charge is commenced within the statutory limitation period, so an exception to same is a material element of any charge and must be pleaded and proved. ***People v. Munoz***, 23 Ill.App.3d 306, 308 (2nd Dist. 1976). Factors that toll the statute must be pleaded and proved. ***People v. Strait***, 72 Ill.2d 503, 506 (1978). If the issue is not timely raised so that the State may cure by amendment, the issue is waived. ***People v. Wasson***, 211 Ill.App.3d 264, 273 (4th Dist. 1991).

The State must prove the period is tolled, but not necessarily to the jury. If raised pretrial, proving it "to the satisfaction of the trial court" is sufficient. ***People v. Gray***, 396 Ill.App.3d 216, 227 (4th Dist. 2009). If alleged in the charge or if a factual issue arises during trial, "it would be resolved by the jury". *Id*. at 226.

E. Witness Issues

1. Expert/Scientific Evidence

(a) Generally

Expert testimony should only be admitted when "the subject is both particularly within the witness's experience and qualifications and beyond that of the average juror's, and when it will aid the jury in reaching its conclusion." ***People v. Becker***, 239 Ill.2d 215, 235–36 (2010). **Rule 702 of the Illinois Rules**

of Evidence provides the standard for the admissibility of expert testimony.

(b) Scientific evidence–***Frye*** and **Rule 702**.

Illinois adheres to the standard in ***Frye v. United States***, 293 F. 1013 (D.C. 1923) to determine the admissibility of new or novel scientific evidence. The ***Frye*** standard is codified in **Rule 702.** Under ***Frye***, scientific evidence is admissible "only if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs." ***People v. McKown***, 226 Ill. 2d 245, 254 (2007). The general acceptance may be shown one of two ways: (1) following a hearing; or (2) taking judicial notice of unequivocal and undisputed prior judicial decisions or technical writings on the subject. ***McKown***, 226 Ill.2d at 254.

Evidence that meets the ***Frye*** test may still be inadmissible if the probative value is outweighed by the risk of unfair prejudice. ***People v. Floyd***, 2104 IL App (2d) 120507, ¶ 22.

Frye applies to the *methodology* underlying the opinion of an expert, not the conclusion or opinion itself. *See* ***People v. Cook***, 2014 IL App (1st) 113079, ¶ 48 (opinion on death by shaken baby syndrome allowed).

Unlike Illinois, federal courts and most state courts adhere to the admissibility standard in Rule 702 of the Federal Rules of Evidence, which ***Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579 (1993), held supersedes ***Frye***.

NOTE: LIDAR is admissible without a ***Frye*** hearing. ***People v. Mann***, 397 Ill.App.3d 767, 768 (2nd Dist. 2010).

Expert testimony on child sexual abuse accommodation syndrome is admissible under ***Frye***. ***People v. Atherton***, 406 Ill.App.3d 598, 613 (2nd Dist. 2010).

Evidence of HGN testing is admissible under ***Frye*** if administered correctly. ***People v. McKown (McKown II)***, 236 Ill.2d 278, 303 (2010).

Testimony regarding Y-STR DNA testing is admissible under ***Frye***. ***People v. Zapata***, 2014 IL App (2d) 120825.

Evidence of Gudjonsson Suggestibility Scale (GSS) is not admissible under ***Frye***. ***People v. Shanklin***, 2014 IL App (1st) 120084, ¶ 80

(c) Language expert/Transcript as substantive evidence

A transcript of a Spanish-language interrogation translated into English and verified by the witness to be an accurate translation is admissible and may be considered as substantive evidence. ***People v. Betance-Lopez***, 2015 IL App (2d) 130521, ¶¶ 30-33 (holding that the general rule that a recorded conversation is the substantive evidence and "the transcript is merely an aid for the trier of fact" does *not* apply to a transcript that translates another language into English).

(d) Basis for expert opinion

Rule 703 of the Illinois Rules of Evidence provides that "the facts or date in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Underlying facts and data relied upon by an expert may be admissible, not for the truth of the matter

asserted, but as the basis for explaining the opinion. ***People v. Williams***, 238 Ill.2d 215, 143 (2010), *affirmed on other grounds*, ***Williams v. Illinois***, 567 U.S. 50 (2012). Thus, the use of these facts arguably falls outside of the scope of the Confrontation Clause. *See* ***People v. Barner***, 2015 IL 116949, ¶ 50 (discussing plurality in ***Williams v. Illinois***).

(e) Witness Credibility

A witness is not allowed to comment directly on the credibility of another witness. ***Becker***, 239 Ill. 2d 215 at 235; *see also* ***People v. Munoz***, 398 Ill.App.3d 455, 487 (1st Dist. 2010) (officer should not have offered opinion on veracity of defendant's pre-trial statement).

NOTE: The court must consider defendant's request to present expert testimony on reliability of eyewitness testimony. ***People v. Starks***, 2014 IL App (1st) 121169, ¶ 72.

NOTE: ***Becker*** held that no expert was needed as to the alleged unreliability of minor victim's statements and testimony. 239 Ill.2d at 235.

NOTE: Refusing expert on reliability of eyewitness identification in case of one eyewitness and no physical evidence may be error. ***People v. Lerma***, 2016 IL 118496, ¶ 33; *but see* ***People v. Corral***, 2019 IL App (1st) 171501, ¶ 114 (expert testimony presented, but court properly excluded ultimate opinion on reliability).

2. Expert testimony on chemical testing–chain of custody

For foundation purposes, the state must show that "police took reasonable protective measures to ensure that the substance recovered from the defendant was the same substance tested by the forensic chemist." ***People v. Alsup***, 241 Ill.2d 266, 274 (2011). If the state presents this *prima*

facie showing, the burden shifts to defendant to produce evidence of actual tampering, alteration or substitution, which then would shift the burden again to the state to rebut defendant's claim. Id. A missing link in the chain is not necessarily fatal if there is testimony that sufficiently shows that the condition of the evidence when delivered matches the description when examined. *See* ***People v. Woods***, 214 Ill.2d 455, 468 (2005).

3. Compelling Attendance of Witnesses

Ill. Sup. Ct. Rule 237(a), regarding civil proceedings, requires a witness with actual knowledge of a subpoena to appear if his fee and mileage has been tendered, and prescribes the manner of proving service on a witness.

725 ILCS 5/115-17 requires the Clerk to issue subpoenas and provides sanctions for a witness's failure to appear, mandating that such witness "shall be proceeded against and punished for contempt of the court," regardless of whether such witness lives in a different county from that where the subpoena is returnable.

A court order requiring a witness to appear and comply may, depending on the circumstances, be enforced by direct or indirect civil or criminal contempt. *See* **725 ILCS 5/115-17** (subpoenaed witness shall be punished for contempt); ***People v. Perez-Gonzalez***, 2014 IL App (2d) 120946, ¶ 25; *see* Section 1.12(C)(4) above. Factors to consider in direct criminal contempt are: (1) the extent of the willful and deliberate defiance of the court's order, (2) the seriousness of the consequences of the contumacious behavior, (3) the necessity of effectively terminating the defendant's defiance as required by the public interest, and (4) the importance of deterring such acts in the future. ***People v. Geiger***, 2012 IL 113181, ¶ 28 (20-year sentence for failure to testify excessive).

Street Clothes for Witness: The court should exercise its discretion in ruling on timely defense request that witness testify in street clothes as opposed to jail uniform. ***People v. Bowman***, 2012 IL App (1st) 102010, ¶ 62.

4. Compelling Appearance of Judges, Lawyers, Reporters (the Special Witness Doctrine)

   "Special witnesses," including judges, prosecutors and, in some circumstances, criminal defense attorneys and reporters, are not subject to subpoena without a showing why the testimony sought is both relevant and necessary, and what efforts have been made to secure the same evidence through alternative means. ***People v. Paris***, 295 Ill.App.3d 372, 377-78 (4th Dist. 1998).

   Rule 605 of the Illinois Rules of Evidence provides that the judge presiding at trial may not be a witness.

5. Issuance and Service of Subpoena: **725 ILCS 5/115-17**

   Supreme Court Rule 412(g) further provides that, if the state is unsuccessful in providing state-controlled material in discovery to defendant, "the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel."

   A defendant has a constitutional right to compulsory process to obtain documentary evidence in a trial via the issuance of a subpoena *duces tecum*. ***People ex rel. Fisher v. Carey***, 77 Ill.2d 259, 265 (1979). A subpoena is a judicial process and must be returnable to the court. ***Carey***, 77 Ill.2d at 265.

6. Quashing Subpoena

   The court determines whether a subpoena is unreasonable or oppressive. ***People v. Hanson***, 238 Ill.2d 74, 121 (2010). A subpoena is reasonable where: (1) the document sought is relevant to the inquiry and (2) the specification of the document to be produced is adequate but not excessive for the purpose of the relevant inquiry. ***Oaklahoma Press Publishing Co. v. Walling***, 327 U.S. 186 (1946).

   Only a witness with standing, not defendant or the State, may challenge a subpoena on the ground of improper service. Standing exists when the person challenging the subpoena could be held in contempt for failure to comply. ***People v. DeLaire***, 240 Ill.App.3d 1012, 1028 (2nd Dist. 1993).

7. Exclusion of witnesses during trial

   The purpose of excluding a witness from the courtroom during trial is to prevent a witness from shaping his testimony to conform to that of those who have already testified. ***People v. Boles***, 52 Ill.App.3d 707, 709 (2nd Dist. 1977)

   If an exclusion order is violated, the court may preclude the witness from testifying. The court should consider whether the violation was inadvertent, unknown to, and unintended by the party offering the witness, whether the proposed testimony is material and necessary, and the possible prejudice resulting from the witness's presence during others' testimony. ***People v. Miller***, 254 Ill.App.3d 997, 1016 (1st Dist. 1993); ***Boles***, 52 Ill.App.3d at 710.

   As to a victim-witness, the court must balance the potential prejudice to defendant against the constitutional and statutory right of a victim-witness to be present. *See* **725 ILCS 120/4(a)(8)**.

   In cases with minor victims of criminal sexual abuse/assault, **725 ILCS 5/115-11** provides that, while the victim is testifying or while depictions of a minor engaged in a sex act are being shown, "the court may exclude from the proceedings . . . all persons, who, in the opinion of the court, do not have a direct interest in the case, except the media."

8. Qualification, Competency and Privilege of Witnesses

   (a) Witness Competency

   725 ILCS 5/115-14(a) provides that "[e]very person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter."

   There are two exceptions to the rule: if the witness is (1) "[i]ncapable of expressing himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him;" or (2) [i]ncapable of understanding the duty of a witness to tell the truth." **725 ILCS 5/115-14(b)**.

   A party may request, prior to testimony, that the court

determine if the witness is competent. The hearing is outside the presence of the jury and the burden of proof is on the moving party. **725 ILCS 5/115-14(c)**. Determination of competency is in the court's discretion. ***People v. Cookson***, 335 Ill.App.3d 786, 789 (4th Dist. 2002).

There is no separate rule for the competency of a child witness. *See* ***People v. Westpfahl***, 295 Ill.App. 3d 327, 330 (3rd Dist. 1998).

(b) Marital Privilege

725 ILCS 5/115-16 provides that, in criminal cases, husband and wife may testify for or against each other, but, "Neither, however, may testify as to *any communication or admission made by either of them to the other or as to any conversation between them during marriage*." ***Id.*** (emphasis added).

There are five statutory exceptions to the above prohibition: (1) "cases in which either is charged with an offense against the person or property of the other;" (2) "case[s] of spouse abandonment;" (3) "when the interests of their child or children or of any child or children in either spouse's care, custody, or control are directly involved;" (4) "when either is charged with, or under investigation for [criminal sexual abuse/assault of a minor] in either spouse's care, custody, or control at the time of the offense:" and (5) "or as to matters in which either has acted as agent of the other." ***Id***.

The child exception applies even when the child is deceased. ***People v. Eveans***, 277 Ill.App.3d 36, 45 (4th Dist. 1996).

The "agent" exception applies when one spouse is acting solely for the other's benefit and can render admissible statements heard by a spouse as the other's agent in a criminal enterprise. ***People v. Hommerson***, 399 Ill.App.3d 405, 413-14 (2nd Dist. 2010).

Further, non-confidential communications are not privileged. If the facts show that confidentiality between spouses was not intended, the statutory privilege does not apply. ***People v. Layne***, 286 Ill.App.3d 981, 990 (5th Dist. 1997). Generally, statements made in the presence of third persons are not privileged. ***Layne***, 286 Ill.App.3d at 990.

Threats are not considered confidential communication. *See* ***People v. Trzeciak***, 2013 IL 114491, ¶ 52.

(c) Witness-Held Privileges

Therapist privilege: **740 ILCS 110/1-110/17**. There are numerous exceptions, including one for homicide cases. **740 ILCS 110/10**.

Rape crisis counselor privilege, **735 ILCS 5/8-802.1**.

Domestic violence counselor or advocate privilege, **750 ILCS 60/227**. The privilege applies to all confidential communication, not just that related to domestic violence. ***People v. Sevedo,*** 2017 IL App (1st) 152541, ¶ 30.

News reporter privilege, **735 ILCS 5/8-901;** People ***v. Pawlaczyk***, 289 Ill.2d 177 (2000).

Interpreter privilege, **735 ILCS 5/8-911(c)**.

Social worker privilege, **225 ILCS 20/1 *et seq.***

Accountant privilege, **225 ILCS 450/27**; ***Brunton v. Kruger***, 2015 IL 117663, ¶ 34 (privilege held by accountant, not client).

Clergy privilege, **735 ILCS 5/8-803**.

Violent Crime Victim Assistance privilege, protecting against disclosure by any assistance agency volunteer, advocate or therapist, of information provided by victim of violent crime unless court determines *in camera* that information is relevant and admissible. **735 ILCS 5/8-802.2**.

Informant privilege, **735 ILCS 5/8-802.3**.

Clergy privilege, **735 ILCS 5/8-803**. Both defendant and the clergy hold the privilege. ***People v. Thomas***, 2014 IL App (2d) 121001, ¶ 94. The privilege extends only to admissions or confessions made in confidence and does not bar use of repetitive information learned independently outside of that context, even if the same information is separately also offered in confidence. ***People v. Campobello***, 348 Ill.App.3d 619, 636 (2nd Dist. 2004).

(d) Evidentiary privileges

Surveillance privilege. Pursuant to common law, the surveillance location is privileged. ***People v. Price***, 404 Ill.App.3d 324, 330–31 (1st Dist. 2010). The privilege protects sources from retaliation and encourages cooperation with law enforcement. ***Price***, 404 Ill.App.3d at 330.

The privilege is qualified and may not apply if the information is material to the issue of guilt. ***Id***. at 331; ***People v. Knight***, 323 Ill.App.3d 1117 (1st Dist. 2001). Admissibility is in the court's discretion. *See* ***People v. Britton***, 2012 IL App (1st) 102322, ¶ 27.

Medical and mental health records. The federal "HIPAA" law, the Illinois Confidentiality Act, **735 ILCS 5/8/802** and the Illinois Mental Health and Developmental Disabilities Confidentiality Act, **740 ILCS 110/1 *et seq***. confer this privilege. *See supra* Section 1.7.H. "Subpoena *Duces Tecum*."

(e) Defendant-Held Privileges

Attorney-client privilege. The attorney-client privilege extends to communications between defendant and a psychiatric expert. ***People v. Knuckles***, 165 Ill.2d 125, 139 (1995). The privileged is waived when the expert testifies, or the expert's notes are used by another testifying expert. ***Knuckles***, 165 Ill.2d at 139.

Physician-patient privilege, **735 ILCS 5/8-802**.

Clergy privilege, **735 ILCS 5/8-803**. See *supra* Subsection (c).

9. Fifth Amendment and Ill. Const. Art. I, Sec. 10

(a) Defendant's right not to testify

The state may not argue a negative inference from defendant's failure to testify. ***People v. Herrett***, 137 Ill.2d 195, 210–11 (1990); ***Griffin v. California***, 380 U.S. 609 (1965).

If defendant testifies, the state may question his credibility. ***Portuondo v. Agard***, 529 U.S. 61, 65 (2000).

If defendant argues in closing that he was not given the opportunity to explain at trial, the state may respond and tell the jury that defendant could have testified. ***United States v. Robinson***, 485 U.S. 25, 30–1 (1988).

Defendant can be compelled to testify as to non-criminal violations at a probation revocation hearing, as such proceedings are deemed "civil" in nature. ***People v. Lindsey***, 199 Ill.2d 460, 467 (2002).

Defendant who chooses to testify waives the allegedly improper comment on his right to remain silent. ***People v. Chromik***, 408 Ill.App.3d 1028, 1041 (3rd Dist. 2011).

A defendant may display a relevant physical characteristic, such as a tattoo, even if he does not testify. ***People v. Gonzalez***, 2018 IL App (1st) 152242, ¶ 85.

(b) Witness Assertion of Fifth Amendment

It is not automatically error for the state to call a witness it knows will invoke the Fifth Amendment.

People v. Crawford Distributing Co., Inc., 78 Ill.2d 70, 74–75 (1979). It is improper in two situations: "first, 'when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege,' and second, where 'a witness' refusal to answer adds critical weight to the prosecution's case in a form not subject to cross-examination.'" ***Id.*** (quoting ***Namet v. United States***, 373 U.S. 179, 186-87 (1963)).

The court is not obligated to admonish a witness of the Fifth Amendment privilege. If court does so admonish, the court must ensure not to threaten or badger the witness to remain silent. ***People v. Radovick***, 275 Ill.App.3d 809, 815 (1st Dist. 1995).

The court may bar the testimony of a witness who indicates beforehand that he will assert his privilege, as calling the witness serves only to mislead the jury. ***People v. Human***, 331 Ill.App.3d 809, 815 (1st Dist. 2002) (defense witness).

10. Immunity and Effect

(a) Transactional Immunity

The court, may, on the state's motion at trial or at grand jury, grant transactional immunity–the court "*may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce*." **725 ILCS 5/106-1**. The immunity "*shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence*." **725 ILCS 5/106-2.**

Transactional immunity does not apply to perjury committed while testifying. ***Id***.

Transactional immunity may be granted only on the state's motion, not by the court *sua sponte* nor on

defendant's motion. ***People v. Foster***, 119 Ill.2d 69, 90 (1987).

(b) Use Immunity

Use immunity bars prosecution in a criminal case "as to any information directly or indirectly derived from the production of evidence" under the immunity order. **725 ILCS 5/106-2.5**.

Any evidence "so compelled" under the immunity order, "and any information directly or indirectly derived from it, may not be used against the witness in a criminal case. . . An order of immunity…does not bar prosecution of the witness, except as specifically provided in this Section." **725 ILCS 5/106-2.5**.

There is an exception. The witness may be prosecuted for "perjury, false swearing, or an offense otherwise involving a failure to comply with the order." ***Id***.

There are two forms of use immunity.

First, the state may request immunity in any resulting criminal case for a street gang member who testifies in a civil proceeding brought via the Illinois Street Gang Terrorism Omnibus Prevention Act. The court "shall" grant immunity if the production of evidence is necessary to a fair determination of the civil case and the witness has refused to testify or is likely to so refuse on Fifth Amendment grounds. **725 ILCS 5/106-2.5(a)**.

Second, on motion of the state in any trial or Grand Jury, the court "shall" grant use immunity "if the witness has refused or is likely to refuse to produce the evidence on the basis of his or her privilege against self-incrimination." **725 ILCS 5/106-2.5(b)**.

Upon request of the witness, a copy of the evidence produced under the immunity order shall be furnished

to him or her. **725 ILCS 5/106-2.5(d)**.

The grant of use immunity is mandatory, not permissive. ***People v. Ousley***, 235 Ill.2d 299, 313 (2009).

Use immunity may not be revoked on state's perception that witness was not forthcoming as anticipated. ***People v. Adams***, 308 Ill.App.3d 995, 1005 (4th Dist. 1999).

F. Simultaneous Trials

1. Severance of co-defendants–two juries

725 ILCS 5/114-8 provides for severance of the trials of codefendants (and related prosecutions of single defendants), separate trials, or "other relief as justice may require," taking into consideration, in sex crime prosecutions of multiple defendants, the impact of multiple trials upon the alleged victim.

The court may seat simultaneous separate juries for each defendant, where admissions by each defendant are not admissible against the other thus avoiding error under ***Bruton v. United States*, 391 U.S. 123, 126 (1968)** (admission at joint trial of codefendant's confession inculpating defendant when codefendant does not testify violates confrontation clause and admonition to disregard is insufficient). It is in the court's discretion to determine whether co-defendants' defenses are so antagonistic that severance is mandatory or whether use of simultaneous juries adequately protects defendants' rights. ***People v. Ruiz***, 94 Ill.2d 245, 257–260 (1982).

The two jury procedure is acceptable "where a defendant is given every opportunity to present a complete defense before one jury, cannot point to any event which confused the jury or affected its ability to render a decision fairly, and the record shows the trial judge adequately prepared the jurors for the procedure." ***People v. Prince***, 362 Ill.App.3d 762, 774 (1st Dist. 2005).

2. Simultaneous Jury and Bench Trial

The court may simultaneously try one defendant before a jury and the other before the bench. ***People v. Pulaski***, 15 Ill.2d 291, 299 (1958); *see also* ***People v. George***, 263 Ill.App. 3d 968, 978 (1st Dist. 1993) (simultaneous trials did not overtax court's "ability to compartmentalize" the evidence").

G. Bifurcated Trials

Supreme Court Rule 451(g) gives the court discretion to conduct either a unitary or bifurcated trial on the separate issues of (a) guilt-innocence and (b) sentencing factors. Bifurcation may be ordered *sua sponte* or on motion of either party. Before bifurcation, the court must determine whether sentencing factor is irrelevant to the question of guilt, or if undue prejudice outweighs the sentencing factor's probative value. Both parts of a bifurcated jury trial shall be presented to the same jury. Defendant may also waive jury for the sentencing portion of a bifurcated trial.

Per the committee comments to **Rule 451**, unitary trials are the presumptive option.

There is a series of pattern jury instructions applicable to bifurcated trials. *See* **I.P.I**. **Criminal 28.00** *et seq.*

H. Trial in Absentia

1. Right of Defendant to Be Present

A defendant has an absolute right to be present at his trial, but his voluntary absence forfeits the right. Further, defendant is not entitled to a continuance on motion of his counsel without explanation for his absence. ***People v. Steenbergen***, 31 Ill.2d 615, 619 (1964).

2. Statutes

The court is required to admonish defendant that if he fails to appear he may be tried *in absentia* and will have waived

his right to confront the witnesses against him. **725 ILCS 5/113-4(c)**.

725 ILCS 5/115-4.1(a) provides that, if certain prerequisites are met, a defendant who fails to appear for trial may be tried *in absentia*.

> **NOTE**: The *in absentia* statute does not apply to in-custody defendants. ***People v. Eppinger***, 2013 IL 114121, ¶ 40.

First, defendant must have been notified of the trial date if he was not personally present in open court at the time the case was set for trial (the court may set a trial date in his absence if he fails to appear at the hearing setting the trial date). ***Id***.

Notice of the trial date set in defendant's absence must be sent to defendant by the clerk via certified mail at defendant's last known address on his bond slip. ***Id***. Certified mailing by the clerk is a mandatory prerequisite to trial *in absentia*. ***People v. Ramirez***, 214 Ill.3d 176, 184 (2005). Further, defendant must be told the time and date of the trial–designating the month is insufficient. ***Ramirez***, 214 Ill.2d at 181–182, *citing* ***People v. Watson***, 109 Ill.App.3d 880, 882 (4th Dist. 1982).

Second, the state must make the request and must affirmatively prove "through substantial evidence that the defendant is willfully avoiding trial." **725 ILCS 5/115-4.1(a)**.

To establish a *prima facie* case of willful absence, the state must show that defendant (1) was advised of the trial date; (2) was advised that failure to appear could result in trial *in absentia* (*see* **725 ILCS 5/113-4(c)**), and (3) did not appear for trial when the case was called. ***People v. Smith***, 188 Ill.2d 335, 343 (1999).

Section 115-4.1 further provides that, *inter alia*:

> –trial *in absentia* shall be by jury unless there is a prior jury waiver.

–Mid-trial 2-day rule: *in absentia* proceedings may commence mid-trial if defendant who was present when trial commenced willfully absents himself for two successive court days.

–defendant must be represented by retained or appointed counsel. This rule applies even if defendant previously waived counsel. ***People v. McCombs***, 372 Ill.App.3d 967, 972 (3rd Dist. 2007). It does not apply to in-custody defendants who have waived counsel. *See* ***Eppinger***, 2013 IL 114121 at ¶ 40.

–counsel may be paid from defendant's bond. *See* ***People v. Maya***, 105 Ill.2d 281, 287 (1985) (allowing award).

–Defendant must be granted a new trial or new sentencing hearing if the defendant thereafter can establish that his failure to appear in court was both without his fault and due to circumstances beyond his control. This motion can be filed more than 30 days after trial and requires an evidentiary hearing. ***People v. Johnson***, 2019 IL App (4th) 170622, ¶ 16.

NOTE: A conviction obtained *in absentia* in the absence of proper notice of the trial date renders the conviction voidable, not void. *See* ***People v. Sharifpour***, 402 Ill.App.3d 100, 121 (2nd Dist. 2010).

3. Trial issues *in absentia*

(a) Identity

In an *in absentia* trial, the rebuttable presumption of identity, based on name alone, is insufficient to prove identity without corroboration, such as identification of defendant at scene, at police station, or by witness connecting name to picture of defendant. ***People v. Williams***, 274 Ill.App.3d 793, 800 (4th Dist. 1995); People ***v. McDonald***, 227 Ill.App.3d 92, 99 (2nd

Dist. 1992) (redacted police photo used for corroboration).

(b) Arguments of Counsel

The state may comment that defendant's absence, like fleeing, shows consciousness of guilt. ***People v. Garza***, 180 Ill.App.3d 820, 826 (2d Dist. 1989); ***McDonald***, 227 Ill.App.3d 92 at 98.

(c) Jury Instructions

Defendant tried *in absentia* is not entitled to an instruction suggesting that his absence may not be considered. ***People v. DuPree***, 339 Ill.App. 3d 512, 520 (1st Dist. 2003).

I. Public Trial

1. Closure of Proceedings

The federal and state constitutions grant a defendant a right to a public trial.

The court is "obligated to take every reasonable measure to accommodate public attendance at criminal trials" ***Presley v. Georgia***, 558 U.S. 209, 215 (2010).

The right to a public trial extends to the jury selection except where a "judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire*." ***Presley***, 558 U.S. at 215. The court should articulate the basis for the closure order to allow for appellate review. ***Id***.

NOTE: Brief questioning of jurors outside of the presence of the venire does not violate the right to a public trial. *See* ***People v. Jones***, 2014 IL App (1st) 120927, ¶ 45.

The court must make findings that balance defendant's public trial right with an overriding interest likely to be prejudiced by public trial, consider alternatives to closure,

and narrowly tailor any exclusion order. ***People v. Radford***, 2020 IL 123975, ¶¶ 25-27.

> **NOTE**: **725 ILCS 5/115-11** provides, in prosecution for specified sex offenses against minors, that the court may, while the victim is testifying or while depictions of a minor engaged in a sex act are shown, exclude all persons who do not have a direct interest in the case, except the media. *See* ***People v. Schoonover***, 2021 IL 124832, ¶¶ 38, 47 (2021) (affirming exclusion where media were allowed to remain, trial court exercised its discretion in determining whether certain spectators had direct interest in case, and while defense counsel alerted trial court to family members of defendant present in courtroom, there was no showing that such persons were members of defendant's immediate family, or that any members of defendant's immediate family were excluded from courtroom); ***People v. Holveck***, 141 Ill.2d 84, 103 (1990) (affirming exclusion).
>
> **NOTE:** ***People v. Gore***, 2018 IL App (3d) 150627, ¶ 35 (*overruled on other grounds*, ***People v. Jackson***, 2020 IL 124112, ¶ 122), held that defendant's right to a public trial does not apply when the court answers "the jury's intradeliberational questions."

2. Removal of Disorderly Spectators

   The court may remove disruptive spectators, even when court observed disturbance but could not identify individuals causing it. ***People v. Cooper***, 365 Ill.App.3d 278, 282 (4th Dist. 2006).

3. Applicability to *In Camera* Proceedings

   The right to a public trial is not violated via *in camera* discussions. ***People ex rel. Woodward v. Oliver***, 25 Ill.App.3d 66, 73 (2nd Dist. 1975).

   Review of audio/video *in camera* during bench trial: This issue has generated a First District split, ***People v. Lucas***, 2019 IL App (1st) 160501, ¶¶ 4-7 (improper), ***People v.***

Rodriguez, 2022 IL App (1st) 200315, ¶¶ 108-09 (permitted), albeit with important factual differences, while other districts consistently have upheld the procedure, ***People v. Aquisto***, 2022 IL App (4th) 200081, ¶¶ 83-84, ***People v. Bartels***, 2022 IL App (3d) 190635, ¶¶ 24-25. Comparing the holdings, the best practice appears to be to do this only if (1) the recording is admitted into evidence first, (2) the record reflects that the defendant personally has had the opportunity to view the evidence, and (3) defense counsel agrees to the *in camera* review.

J. Media Issues

1. Planning for Media Interaction

In a criminal case, media and security issues are often intertwined. Both often require plans for crowd control, addressing issues such as appropriate control of access to the courthouse and courtroom; contingency plans for control of demonstrations in or around the courthouse; requiring identification of courthouse or courtroom visitors; screening procedures; securing other courthouse or courtroom entrances or exits against public access; procedures for emergency evacuation; control of parking in or around the courthouse; and appropriate arrangements for dissemination of information.

For a series of orders addressing management of the courtroom, *see* Appendix at pages A-96 through A-124: "Sample Jury Decorum Order;" "Sample Standing Order;" "Sample Courthouse Decorum/General Rules;" "Sample Courtroom Spectator Rules;" "Sample Media Rules; and Sample Media Acknowledgement."

2. Liaison Between the Court and the Media

"A judge should abstain from public comment about a pending or impending proceeding in any court." **Ill. S. Ct. R. 63(A)(7)**; *see also*, ABA Model Code of Judicial Conduct, **Rule 2.10** (2011).

Requests for interviews or comments should be forwarded to

the Court Administrator or other designated liaison. **Ill. MCCL 3d § 32.27**; *see also*, Illinois Manual for Complex Criminal Litigation: High Profile and Notorious Cases 2nd Ed. 2014 **(Ill. MCCL 2d), 2.5.1.1**.

"A judge . . . should require similar abstention on the part of court personnel subject to the judge's direction and control." **Ill. S. Ct. R. 63(A)(7)**.

The court liaison or other administrator should establish a system for disseminating information on scheduling and court procedures. Ideally, the information should be equally accessible to all media. If the court has a website, the information can be posted there. **Ill. MCCL 2d § 2.5.1.2**.

3. Seating in the Courtroom

   Seating may be allocated to the attorney(s), the family of the defendant, family of the victim, the media, and the general public. **Ill. MCCL 2d § 2.5.1.3**.

4. Location and Size of Courtroom

   The court may consider alternative accommodations, which may include a courtroom that is technologically equipped or installation of case-specific technology in the courtroom for the case on trial; media access to additional witness and attorney conference rooms; and more security. **Ill. MCCL 2d § 2.5.1.4**.

5. Copies of Exhibits, Transcripts, and Documents

   The court may consider using a live feed to an ancillary courtroom and making rulings, documents, and exhibits electronically available. **Ill. MCCL 2d § 2.5.1.5**.

6. Juries—Media Coverage Issues

   The court may consider enhanced protections for juror privacy such as special arrangements for the jurors to have secure and nonpublic access to the courthouse and courtroom. **Ill. MCCL 2d § 2.5.1.6**.

See Appendix at page A-96 for "Jury Decorum Order."

7. Delivery of Judge's Decision

   The court may also want to make the decision available to the public immediately through the court website, if it has one, or another official website. By making the decision accessible immediately, other professionals and the public can view the opinion and draw their own conclusions.

8. Extended Media Coverage

   The Illinois Supreme Court has a permanent extended media coverage program. Extended media coverage includes: the recording or broadcasting of proceedings by use of television, radio, photographic, and recording equipment. **Supreme Court Order M.R. 2634**. (February 22, 2016).

See Appendix at page A-125 for reference to the Illinois Supreme Court Policy concerning Extended Media Coverage and *see* Appendix at Page A-134 for a list of judicial circuits and their local rules.

(a) Rule 44 : A court may allow certain proceedings to be recorded or broadcast without authorization under M.R. 2634:

(i) Any proceeding conducted remotely pursuant to Rules 45 and 241 or other rules;

(ii) Ceremonial events like marriages, investitures, and problem-solving court graduations;

(iii) To permit parties and counsel to make a copy of a court order or other paperwork received in court;

(iv) To broadcast a proceeding to interested persons, such as crime victims or persons

with a statutory right to be present but who do not wish to attend in person.

(b) Factors to Consider in Deciding whether to Allow Extended Media Coverage

The court must first determine whether the proceeding is one that is excluded from extended media coverage, such as: juvenile dissolution, adoption, child custody, evidence suppression, and trade secrets cases. **M.R. 2634** at **ILSCP § 1.2(c)**.

Jury selection is excluded from extended media coverage. **M.R. 2634** at **ILSCP § 1.2(d)**.

Likewise, if a presumption of access to a particular type of court proceeding has not been established, that proceeding is excluded from extended media coverage. *See supra*, Section I *Public Trial*.

Requests for extended media coverage should be made at least fourteen days before the proceeding to be covered, *see* **MR 2634** at ILCSP **§ 1.3(b)** (procedure).

There are no specific factors for the court to consider. Instead, "[e]xtended media coverage shall not be distracting or interfere with the solemnity, decorum and dignity of the court making decisions that affect the life, liberty, or property of citizens." **MR 2634** at **ILSCP § 1.0**. Some arguably relevant factors to be considered may include:

1. whether there is a reasonable likelihood that expanded media coverage would interfere with the rights of the parties to a fair trial;

2. whether there is a reasonable likelihood that expanded media coverage would unduly detract from the solemnity, decorum, and dignity of the Court; and

3. whether expanded media coverage would create adverse effects that would be greater

than those caused by traditional media coverage.

If the judge allows extended media coverage, a written order should be entered specifying the scope of coverage allowed. *See*, *e.g.*, First Cir. Admin. Order **12-11-1 § 1.3(b)(1)**; **IL R 17 CIR Rule 2.12(B)(6)**.

(c) Technical Requirements

There are technical requirements for equipment, lighting, pooling, location of equipment, movement during the proceedings, and decorum; *see* **MR 2634** at **ILSCP § 1.4**.

A media coordinator is defined as a "member of the news media who has requested extended media coverage" or a "representative chosen by all of the media requesting extended coverage." **MR 2634** at **ILSCP § 1.1(f)**.

The media is encouraged to pool equipment and personnel. **MR 2634** at **ILSCP § 1.4(c)(1)**. The judge should require that the selected media entity be present each trial day and that the entity record the entire proceeding. This practice ensures that the entity is committed to fairly portraying the courtroom events and keeps the entity from abusing its discretion. The judge should also require the entity to notify the court immediately if there is any problem, mistake, or inadvertent photo. Judges may want to create a standing order so that the media entities know the ground rules ahead of time.

(d) Privacy Concerns of Witnesses and Parties

If extended media coverage is allowed, witnesses and parties have the right to object to extended media coverage of their testimony; **MR 2634** at **ILCSP § 1.3(c)**. The attorney who proposed the introduction of a witness' testimony must advise the witness of his or her right to object to the extended media coverage.

MR 2634 at **ILCSP § 1.3(c)**. The objection should be filed before the trial begins; however, the judge has the discretion to hear an untimely objection. **MR 2634** at **ILCSP § 1.3(c)**. The judge may require a hearing on the objection or may rule on the basis of the written objection. **MR 2634** at **ILCSP § 1.3(c)**. The judge may also allow the witness, parties, or media coordinator to present other evidence.

The judge has broad discretion in deciding whether to allow extended media coverage of a witness or party. **MR 2634** at **ILCSP § 1.2(b)**. However, victims of sexual assault are not subject to extended media coverage unless they consent. **MR 2634** at **ILCSP § 1.2(b)**. Likewise, an objection to media coverage by a victim in a forcible felony, police informant, undercover agent, and relocated witness is presumed valid. **MR 2634** at **ILCSP § 1.2(b)**.

(e) Privacy Concerns of Jurors

The jury and the venire may never be filmed or photographed. Extended media coverage is not permitted during jury selection. **MR 2634** at **ILCSP § 1.2(d)**. If extended media coverage of a trial is granted, the jury should be admonished at the start of the trial that the jury will not be photographed or filmed and that the presence of the media does not make the case more important than other cases. **MR 2634** at **ILCSP § 1.2(d)**; **MR 2634** at **ILCSP § 1.5(a)** (admonishment to be given). The jury should also be instructed at the end of the case not to draw any inferences from the presence of the media. **MR 2634** at **ILCSP § 1.5(b)** (instruction to be given). *See also supra*, Section 2.2.J.1.e "Juries—Media Coverage Issues."

(f) Decorum and Extended Media Coverage

Under the Policy, the court retains the authority to

i. control the conduct of any proceeding;

ii. maintain decorum and prevent distractions;

iii. guarantee the safety of the courtroom, including any party, witness, or juror; and

iv. ensure the fair and impartial administration of justice in the pending cause.

MR 2634 at **ILSCP § 1.0**. In addition to contempt and any other sanctions allowed by law, some circuits specifically state that the court may remove any person violating the Policy from the courtroom and revoke the privileges for extended media coverage and bar the publication of the coverage; *see*, *e.g.*, First Cir. Adm. Order **12-11-1 § 1.5**. Other limitations include barring the use of any photograph, audio, or video by the judge or attorneys in any campaign for office or advertising; *see*, *e.g.*, 6th Cir. Admin. Order **2013-5 § II (C)(1)-(2)**.

(g) Types of Media—Blogging, Social Media

Criminal trials raise safety concerns, which social media can exacerbate. For a sample order banning wireless communication devices, *see* Cook Cty. Cir. Ct. Gen. Admin. Ord. **No. 2013-01**,

The extended media policy does not directly address social media or blogging. The policy allows only the news media to exercise the rights of extended media coverage. **M.R. 2634** at **ILSCP § 1.2(j)**. "News Media" is defined as "established news gathering and reporting agencies." **M.R. 2634** at **ILSCP § 1.1(b)**. However, the Tenth Circuit gives the trial judge absolute discretion to allow or not allow live blogging in the courtroom by credentialed news media. **IL R 10 CIR Rule 16**; *see also*, **IL R 11 CIR RULE 307(A)(5)**.

K. Victims' Rights

1. Generally

Illinois Constitution, **Art. 1, § 8.1**, sets forth certain victim's rights such as the rights to privacy, protection from the accused, fairness, timely disposition of the case, notification of court proceedings and disposition including release of a defendant, to be present at all hearings (subject to rule on witnesses) and to permit the presence of an advocate, to be heard at sentencing, and to restitution.

Sub-part (d) provides that nothing in this Section or in any law enacted under this Section shall be construed as creating a basis for vacating a conviction or a ground for appellate relief in any criminal case.

725 ILCS 120/7 requires victims to make a timely report of the violent crime, to cooperate with law enforcement officers, to testify at trial, and to notify authorities of a change of address.

725 ILCS 120/4.5 requires that the state provide information about a secure waiting area during court proceedings. It also describes the role of victim advocate personnel. **725 ILCS 120/4.5(b)(3)**, **(b)(5)**, **(b)(9)**.

The state is further required to provide notice to alleged victims if a "cold case" is reopened, unless the state determines that disclosure would unreasonably interfere with such investigation. **725 ILCS 120/4.5**.

"The Circuit Clerk must post within three feet of every criminal courtroom door a notice to victims of their rights in the proceedings." **725 ILCS 120/4 (c)**.

2. Victim Impact Statements

The presentation of victim impact statements is governed by **725 ILCS 120/6**. The statute has been amended numerous times, including a complete revision in 2013.

It provides, *inter alia*, that a victim of a violent crime or a non-violent crime for which a conviction resulted from a plea

agreement dismissing a violent crime may present an oral or written statement at sentencing. The court may also allow "persons impacted by the crime" to make an oral or written statement. The person making the statement shall not be placed under oath or cross-examined. **725 ILCS 120/6(a)**. Additionally, a crime victim may prepare and present a written victim impact statement to the state that must be considered by the court at sentencing. **725 ILCS 120/6(b)**.

L. Closing Argument

1. Generally

The purpose of closing arguments is to provide the parties with a final opportunity before the jury to review the admitted evidence, to explain the relevant law, and to assert why the evidence and the law compel a favorable verdict. ***People v. Nicholas***, 218 Ill. 2d 104, 121 (2005).

Courts have discretion to allow prosecutors great latitude in making closing arguments, allowing comment on the evidence and all inferences reasonably yielded by the evidence, unless the argument serves no purpose but to inflame the jury. ***People v. Blue***, 189 Ill.2d 99, 127-28 (2000).

Counsel may discuss subjects of common experience or common sense. ***People v. Runge***, 234 Ill.2d 58, 146 (2009).

"An error in closing argument is not a typical trial error in that it does not involve the admission of inculpatory evidence or the rejection of exculpatory evidence but rather commentary on the evidence that has been presented. . . Because an error in closing argument is *sui generis*, we have created a unique two-step process for determining whether a trial court's decision to overrule a defendant's objection to a prosecutorial comment in closing argument is reversible error. A reviewing court must initially determine whether the comment was improper. If so, the court must then determine whether the improper comment was so prejudicial that real justice was denied or the verdict resulted from the error.

[citation omitted] A trial court's decision to overrule an objection to a comment in prosecutorial closing argument will not be overturned absent an abuse of discretion. [citation omitted] ***People v. Williams***, 2022 IL 126918 (2022).

The trial court may consider the cumulative effect of improper argument rather than assess the prejudicial effect of every isolated comment. ***People v. Beltran***, 2011 IL App (2d) 090856, ¶ 61.

If argument is prejudicial, it should be terminated by the judge *sua sponte* and the jury should be instructed to disregard it. ***People v. Lee***, 229 Ill.App.3d 254, 260 (1st Dist. 1992).

2. Argument Regarding Burden of Proof

While counsel may not define reasonable doubt or distort the state's burden, counsel may discuss same. ***People v. Speight***, 153 Ill. 2d 365, 374 (1992) (neither the court nor counsel should attempt to define).

(a) Not improper to argue:

Proof beyond a reasonable doubt is not beyond all doubt, ***People v. Ligon***, 365 Ill.App.3d 109, 125 (1st Dist. 2006), and is met every day in courts. ***People v. Bryant***, 94 Ill.2d 514, 523 (1983).

"[T]hat's not some mythical, unattainable standard that can't be met." ***People v. Carroll***, 278 Ill.App.464, 466–67 (4th Dist. 1996).

"The penitentiary is full of people like [the defendants] who have been proved guilty beyond a reasonable doubt." ***People v. Collins***, 106 Ill.2d 237, 277 (1985).

Argue in response to issue raised in defense closing. ***People v. Nowicki***, 385 Ill.App.3d 53, 91 (1st Dist. 2008) (discussing "invited response" doctrine).

(b) Is improper to:

Suggest the burden is *pro forma* or a minor detail. ***Ligon***, 365 Ill.App.3d at 125.

Suggest defendant has burden to present evidence of innocence. ***People v. Giangrande***, 101 Ill.App.3d 397, 401–02 (1st Dist. 1981).

Suggest that defendant's choice to go to trial is failing to "take responsibility" like his pleading co-defendant did. ***Williams*** at ¶ 44.

Comment on defendant's failure to present witnesses, with the exception of alibi witnesses interjected into case by defendant but not produced. ***People v. Fly***, 249 Ill.App.3d 730, 736 (4th Dist. 1993).

3. Argument Regarding Trial Defense or Strategy

(a) Not improper to argue:

Negative inference from defendant's having testified last after hearing other witnesses. ***Portuondo v. Agard***, 529 U.S. 61, 74 (2000).

Defendant has subpoena power just like the government, in response to defense argument that the state failed to call witnesses to corroborate victim testimony when the defendant had equal access to those witnesses.. ***People v. Williams*****,** 2022 IL 126918, ¶ 45 (2022)

Defendant's theory of the case is silly, wacky, or fantasy, and police officers are brave and honorable. ***People v. Zoph***, 381 Ill.App.3d 435, 456 (2nd Dist. 2008).

(b) Improper to argue:

Defense counsel "fabricated" a defense theory, attempted to free his client through trickery or deception, or suborned perjury (unless some evidence

in the record to support argument). ***People v. Kirchner***, 194 Ill.2d 502, 549–50 (2000); *compare* People v. Slabaugh, 323 Ill.App. 3d 723, 729-30 (2nd Dist. 2001) (finding insufficient supportive evidence when defendant testified that he and a friend who was a defense witness "may have" discussed what happened during the two years the case was pending maybe "a few times", "[w]ondering what it's going to be like", "[b]ut nothing relevant to the case now").

Defense was a "smokescreen" and "smoke and mirrors." ***People v. Kidd***, 147 Ill.2d 510, 541 (1992).

Jurors should not let defendant and his "high paid lawyer buy his way out of this." ***United States v. Farinella***, 558 F.3d 695, 700 (7th Cir. 2009).

Improper motive or any adverse inference from defendant's waiver of right to make an opening statement. ***People v. Fuerback***, 66 Ill.App. 2d 452, 456 (1st Dist. 1966).

The prosecution was at a disadvantage because accused waived opening. ***People v. Church***, 366 Ill.149 (1937).

Comment on questions defense counsel should have asked but did not. ***People v. Euell***, 2012 IL App (2d) 101130, ¶ 20.

4. Insult and Sarcasm

(a) Not improper to:

Refer to defendant as a "rapist," "child molester," "coward," and "the ultimate villain" where justified by reasonable inferences to be drawn from the evidence. ***People v. Jackson***, 2012 IL App (1st) 092833, ¶ 45 (citing ***People v. Nicholas***, 218 Ill.2d 104, 121 (2005)).

Depict particular defendant as evil. ***Zoph***, 381 Ill.App. 3d 435 at 458.

Refer to defendant as a "conman," "fraud," and "fake" as well as stating "[d]on't let [the defendant] deceive you. Find him guilty of theft by deception," in rebuttal. ***People v. Perry***, 224 Ill.2d 312, 350 (2007).

Include some degree of both sarcasm and invective to express points. ***People v. Banks***, 237 Ill.2d 154, 183 (2010).

(b) Improper to:

Liken defendant to an animal. ***People v. Johnson***, 208 Ill.2d 53, 80 (2004).

Characterize defendant as one who "lacks respect for authority," or is "hiding behind" constitutional rights. ***People v. Ray***, 126 Ill.App.3d 656, 662 (1st Dist. 1984).

Compare defendant to a Nazi. ***People v. Johnson***, 2013 IL App (1st) 122459, ¶ 166.

Call experts "cash for trash doctors." ***People v. Moss***, 205 Ill.2d 139, 170 (2002).

Argue "Why don't the State's attorneys just throw their law degrees in the toilet too?" ***People v. Hamilton***, 328 Ill.App.3d 195, 204 (1st Dist. 2002).

5. Vouching for Witness

Improper to:

Bolster officers' credibility by arguing that they would not lie because of their profession and that they would not put their careers on the line for the sake of a conviction. ***People v. Adams***, 2012 IL 111168, ¶ 20.

Personally vouch for the state's case. ***People v. Yates***, 98 Ill.2d 502, 536 (1983).

Invoke reputation of office to vouch for credibility of witness. ***People v. Lee***, 229 Ill.App.3d 254, 260 (1st Dist. 1992).

A witness is more believable because he is a police officer. ***People v. Montgomery***, 254 Ill.App.3d 782, 793–94 (1st Dist. 1993).

6. Empathy for Victims, Appeals to Sympathy or Passions of Jury

   (a) Not improper to argue:

   For fearless administration of justice or to comment unfavorably on the evils of crime ***People v. Hope***, 116 Ill.2d 265, 278 (1986).

   Child victim was forced by defendant to testify or that child would have felt as if the climb to the witness stand was akin to climbing Mt. Everest. ***People v. Jackson***, 2012 IL App (1st) 092833, ¶¶ 41, 44.

   (b) Improper to:

   Refer to young murder victim as "heavenly angel" and cry during closing. ***People v. Beltran***, 2011 IL App (2d) 090856, ¶¶ 65, 67.

   Create an "us v. them" mentality. ***People v. Wheeler***, 226 Ill.2d 92, 129 (2007).

   Request jurors to make a decision between "good" and "evil." ***People v. Jackson***, 2012 IL App (1st) 092833, ¶ 45.

   Extol the jury to "send a message" to the public beyond a general denunciation of society's ills. ***People v. Johnson***, 208 Ill.2d 53, 78–79 (2003).

   Argue for "justice for all." ***People v. Woods***, 2011 IL App (1st) 091959, ¶ 45.

   Challenge the jury to send a message of support in favor of law enforcement. ***People v. Johnson***, 208 Ill.2d 53, 80 (2004).

Dwell on the victim's family or relate punishment to impact on victim's family. ***Blue***, 189 Ill.2d at 139.

The state's intentional references to the victim's family are improper. ***Hope***, 116 Ill. 2d at 278; *but see* ***People v. Gutierrez***, 402 Ill.App.3d 866, 896 (1st Dist. 2010) (no impropriety in urging jury to think about what went through victim's family members' minds as compared to defendant's own actions because this was a reasonable inference in support of consciousness of guilt).

Argue that deceased left a family. ***People v. Hayes***, 139 Ill.2d 89 (1990), *overruled on other grounds*, ***People v. Tisdel***, 201 Ill.2d 210 (2002).

Comment on victim's rights to get married, have families, have children, and spend time with families. ***People v. Kokoraleis***, 132 Ill.2d 235, 285 (1989).

Use religious references. ***People v. Woolley***, 205 Ill.2d 296, 306 (2002).

Argue it is the jury's "duty" to find defendant guilty. ***People v. Sutton***, 353 Ill.App.3d 487, 501–02 (1st Dist. 2004).

7. Improper Argument of Evidence

(a) Improper to:

Misstate the evidence. ***People v. Linscott***, 142 Ill.2d 22, 27 (1991).

Argue defendant is a gang member when that is unsupported by the evidence. ***People v. Terry***, 312 Ill.App.3d 984, 993 (1st Dist. 2000).

Argue the effects of gangs on society. ***People v. Fluker***, 318 Ill.App.3d 193, 200 (1st Dist. 2000).

Argue a witness did not testify because defendant threatened them unless supported by the evidence. ***People v. Johnson***, 202 Ill.App. 3d 417, 424 **(**1st Dist. 1990).

Argue that, to acquit defendant, jury must believe all of state's witnesses lied. ***People v. Coleman***, 158 Ill.2d 319, 346.

Use personal anecdotes not based on the evidence. ***People v. Barraza***, 303 Ill.App.3d 794, 796–98 (2nd Dist. 1999).

Use a newly created demonstrative exhibit in closing of an altered mug shot depicting defendant in a half-ski mask. ***People v. Middleton*****,** 2018 IL App (1st) 152040, ¶ 36.

8. Comment on Defendant's Failure to Testify

(a) Improper to:

Argue there was no one that took the stand to give defendant's version of events. ***People v. Edgecombe***, 317 Ill.App.3d 615, 621 (1st Dist. 1981).

Argue "no one" said anything to contradict the state's evidence, ***People v. Chester***, 409 Ill.App.3d 442, 450 (4th Dist. 2011) though the state may say the evidence is "uncontradicted", ***People v. Edgecombe***, 317 Ill.App.3d 615, 621 (1st Dist. 2000).

9. Defense Closing

A defense closing argument is presumed to be within the bounds of trial strategy, even if unusually brief and devoid of argument addressing exculpatory factors. ***Yarborough v. Gentry***, 540 U.S. 1, 6 (2003). Even a decision by counsel to forego closing argument may be sustained as appropriate trial strategy. ***Bell v. Cone***, 535 U.S. 685, 701 (2002).

People v. Ramos, 2018 IL App (1st) 151888, ¶ 28, held the court abused its discretion in blanketly prohibiting counsel's

use of the trial transcript to assist in closing argument, though some restriction on the use of the transcript may have been appropriate.

M. Duty of Trial Judge/Jury to be Present and Attentive at Trial

A judge's physical absence from a portion of defendant's trial is *per se* reversible error, ***People v. Vargas***, 174 Ill.2d 355, 371 (1996), but falling asleep for a time is not, ***People v. Sheley***, 2017 IL App (3d) 140659, ¶ 17, and prejudice would have to be shown.

However, juror inattentiveness requires the court to reopen *voir dire* and investigate *sua sponte*. ***People v. Clayton***, 2019 IL App (3d) 170315, ¶ 20 (juror sleeping during trial).

PART II - TRIAL PROCEDURE

Tab 6

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2.3 Defenses

A. Burden of Proof; Entitlement to Instruction

A jury should be instructed on a defense if there is some evidence that supports the defense. ***People v. Everette***, 141 Ill.2d 147, 156 (1990); *see also* ***Matthews v. United States***, 485 U.S. 58, 63 (1988). This is true even if the evidence is slight or if the defense is inconsistent with either defendant's testimony or other defenses presented in the case. ***Everette***, 141 Ill.2d at 156. The court determines only whether the evidence exists–it is not the court's role to weigh the evidence. ***People v. Jones***, 175 Ill.2d 126, 132 (1997).

A statutory scheme that places the burden of proving an affirmative defense on defendant is not unconstitutional unless the affirmative defense is one that negates an element of the offense itself. ***Dixon v. United States***, 548 U.S. 1, 7 (2006).

1. Disclosure/Late-filed Affirmative Defense

Supreme Court Rule 413(d) requires defendant to disclose intended defenses, including the names and last known addresses of intended witnesses, their relevant written or recorded statements–including memoranda regarding oral statements–and any record of their prior criminal convictions, if known; as to an alibi, defendant must disclose specific information as to the place where he maintains he was at the time of the alleged offense.

The compulsory process clause is not an absolute bar to the exclusion of witnesses as a discovery sanction. ***Taylor v. Illinois***, 484 U.S. 400, 415 (1988). However, while the court may bar a defense witness, exclusion is a drastic measure and should be limited to flagrant discovery violations. ***People v. Tally***, 2014 IL App (5th) 120349, ¶ 28. "The factors that the trial court should consider when considering the exclusion of evidence as a discovery sanction are (1) the effectiveness of a less severe sanction, (2) the materiality of the witness's proposed testimony to the outcome of the case, (3) the prejudice to the other party caused by the testimony, and (4)

evidence of bad faith in the violation of discovery rules." ***Tally***, at ¶ 29.

2. Felony Murder / Self-Defense

Generally, self-defense is inapplicable to felony murder. However, a self-defense instruction should be given if the alleged provocation or the belief in the need for self-defense occurred before defendant formed the intent to commit the underlying felony. ***People v. Maclin***, 2014 IL App (1st) 110342, ¶ 38.

B. Exemptions vs. Affirmative Defenses

There is a distinction between a defense and an exemption. If a statutory provision is neither an element of the offense nor a designated affirmative defense, it is an exemption. ***People v. Foster***, 195 Ill.App.3d 926, 953 (5th Dist. 1990).

Affirmative Defense: The burden is on the state to prove the issue beyond a reasonable doubt. ***People v. Smith***, 71 Ill.2d 95, 106 (1978).

Exemption: The burden is on defendant to prove the exemption by a preponderance of the evidence. ***Id***. at 109.

1. Parental Supervision of Alcohol Consumption by Minor

235 ILCS 5/6-20(g) provides an exemption to the charge of underage consumption under parental supervision. It does not apply when actual supervision is lacking. ***People v. Finkenbinder***, 2011 IL App (2d) 100901, ¶ 14.

2. Prescription Drug Use

A valid prescription is a statutory exemption to the charge of unlawful use or consumption under the Controlled Substances Act, so the burden of proof is on defendant. ***People v. Kathan***, 2014 IL App (2d) 121335, ¶ 27.

The medical marijuana statute provides an exemption to prosecution for medical use of cannabis. **410 ILCS 130/25**.

3. Reasonable Belief of Age of Sex Offense Victim

720 ILCS 5/11-1.70(b) provides that it is a defense to **720 ILCS 5/11-1.50(b)** and **(c)** (criminal sexual abuse of minor under seventeen) and **720 ILCS 5/11-1.60(d)** (aggravated criminal sexual abuse of minor under seventeen) that defendant reasonably believed the minor to be 17 years of age or over.

To obtain an instruction on this affirmative defense, defendant may rely, *inter alia*, on the state's evidence, including the jury's ability to observe the victim's appearance and demeanor. ***People v. Jones***, 175 Ill.2d 126, 132–33 (1997).

4. Encased Firearm and FOID card

The fact of the weapon being "uncased" is a statutory element of certain versions of the offense Aggravated UUW (**720 ILCS 5/24-1.6(a)(1)(3)**) that the state must prove. ***People v. Holmes***, 241 Ill.2d 509, 518 (2011). The term "case" in the "unloaded and enclosed in a case" exception to the offense of Aggravated UUW (**720 ILCS 5/24-1.6(c)(iii)**) means "any portable or nonportable receptacle" and thus includes the center console of a car, ***People v. Diggins***, 235 Ill.2d 48, 57 (2009), and a backseat armrest with a cover and latch, ***Holmes***, 241 Ill.2d at 518. Similar exceptions are in the UUW statute. *See* **720 ILCS 5/24.1**. Whether the weapon is enclosed in the case is a question for the trier of fact. ***Diggins***, 235 Ill.2d at 58.

A non-resident with a permit to possess a firearm under law of his home state may invoke the exception to the FOID act when prosecuted for Aggravated UUW barring possession of a firearm without a FOID card. ***Holmes***, 241 Ill.2d at 521.

5. UUW / ***Aguilar***

A challenge to a conviction for the specific version of Aggravated UUW held facially unconstitutional by ***People v. Aguilar***, 2013 IL 112116, ¶ 22, may be raised at any time in a subsequent proceeding. ***In re N.G.***, 2018 IL 121939, ¶ 83.

See also ***People v. Gayfield***, 2014 IL App (4th) 120216-B, ¶ 28 (applying ***Aguilar*** to enhanced version of Aggravated UUW predicated on prior felony): ***People v. Mosley***, 2014 IL 115872, ¶ 26 (applying ***Aguilar*** to version of Aggravated UUW premised on uncased loaded firearm on a public way).

C. Specific Defenses

1. Compulsion: **720 ILCS 5/7-11(a); IPI Crim. 24-25.21**

"Compulsion is conduct performed under the threat of imminent infliction of death or great bodily harm, which the person reasonably believes will be inflicted if the conduct is not performed." ***People v. Pegram***, 124 Ill.2d 166, 172 (1988).

Compulsion can be raised as a defense to the predicate for felony murder. ***People v. Serrano***, 286 Ill.App.3d 485, 492 (1st Dist. 1997).

720 ILCS 5/7-11 applies the defense of compulsion where great bodily harm is threatened upon defendant's spouse or child(ren).

Threat must be imminent: ***People v. Goodman***, 347 Ill.App.3d 278, 291 (1st Dist. 2004), upheld the use of a modified IPI that added that "imminent" threat does not include threat of future harm, given the facts of the case. The added text read: "A threat of future death or great bodily harm is not sufficient to excuse criminal conduct."

2. Intoxicated or Drugged Condition

(a) Voluntary Intoxication: **720 ILCS 5/6-3; IPI (Crim) 24-25.02**

Voluntary intoxication is not a statutory defense and has not been since January 1, 2002, even if it "[i]s so extreme as to suspend the power of reason and render him incapable of forming a specific intent which is an element of the offense").

(b) The defense of voluntary intoxication is not constitutionally required. ***Montana v. Egelhoff***, 518 U.S. 37, 56 (1996). Involuntary Intoxication: **720 ILCS 5/6-3; IPI (Crim) 24-25.03**

"A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." **720 ILCS 5/6-3**.

An unexpected and unwarned adverse effect of a drug taken on doctor's orders may warrant an involuntary intoxication defense. ***People v. Hari***, 218 Ill.2d 275, 292 (2006).

Mixing prescription and illegal drugs does not give rise to an involuntary intoxication defense. ***People v. McMillen***, 2011 IL App (1st) 100366, ¶ 23.

3. Use of Justifiable Force

All forms of the justifiable use of force are affirmative defenses that the state must disprove. **720 ILCS 5/7-14**.

(a) Self-defense and defense of others: **720 ILCS 5/7-1; IPI (Crim) 24-25.06**.

A person may use force against another "when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." **720 ILCS 5/7-1(a)**. However, force that "is intended or likely to cause death or great bodily harm" may be used "only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." ***Id***.

NOTE: A self-defense instruction is available to a defendant who forcibly resists arrest after officers arguably applied

excessive force. ***People v. Sims***, 374 Ill.App.3d 427, 435 (3rd Dist. 2007).

NOTE: A self-defense instruction may be denied where defendant resists arrest and police subsequently exert force to effectuate the arrest. ***People v. Haynes***, 408 Ill.App.3d 684, 691 (1st Dist. 2011).

NOTE: A self-defense instruction may be available in a disorderly conduct case if there is proof of imminent harm. *See* ***People v. McLennon***, 2011 IL App (2d) 091299, ¶ 26.

NOTE: ***People v. Lewis***, 2015 IL App (1st) 122411, ¶¶ 64–66, held that defendant was not entitled to a self-defense instruction where the state's evidence did not raise the issue and his witnesses claimed he was not the person who shot the victim.

(b) Defense of Dwelling: **720 ILCS 5/7-2(a); IPI (Crim) 24-25.07**

A person may use "force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon his home." **720 ILCS 5/7-2(a)**. However, force that "is intended or likely to cause death or great bodily harm" may be used only if the "entry is made or attempted in a violent, riotous or tumultuous manner and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him or another then in the dwelling" or he "reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling." ***Id****; see* ***People v. Sawyer***, 115 Ill.2d 184, 196 (1986) (rejecting defense).

(c) Defense of Other Property: **720 ILCS 5/7-3(a); IPI (Crim) 24-25.08**

A person may use "force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or tortious or criminal interference with real property (other than dwelling) or personal property, lawfully in his possession" or in possession of an immediate household or family member or "a person whose property he has a legal duty to protect." **720 ILCS 5/7-3(a)**. However, force that "is intended or likely to cause death or great bodily harm" may be used "only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony." ***Id***.

This defense applies only if defendant is lawfully in possession of the property. ***People v. Robinson***, 68 Ill.App.3d 687, 692 (4th Dist. 1979) (unavailable where armed robber was retaking gambling losses).

(d) Initial Aggressor: **720 ILCS 5/7-4; IPI (Crim) 24-25.09**

Use of justifiable force for protection of one's self, another, home, or property is not available to an aggressor engaged in a forcible felony or who otherwise provokes the attack unless the force that results is great or the aggressor has in good faith announced his withdrawal from the aggression but continues to be attacked.

4. Consent in Sex Offenses: **720 ILCS 5/11-1.70**

Consent is an affirmative defense to criminal sexual assault or abuse (simple or aggravated) where force or threat of force is an element of the offense. **720 ILCS 5/11-1.70(a)**.

Consent is "a freely given agreement to the act of sexual penetration or sexual conduct in question." ***Id***. The lack "of verbal or physical resistance or submission by the victim

resulting from the use of force or threat of force by the accused" or the "manner of dress of the victim at the time of the offense" shall not constitute consent. ***Id***. Consent may be withdrawn during the course of sexual acts or conduct. **720 ILCS 5/11-1.70(c)**.

5. Defenses in Conspiracy Cases

720 ILCS 5/8-2 provides that it *is not* a defense to conspiracy that a co-conspirator was not prosecuted or was acquitted or lacked the capacity to commit such offense.

720 ILCS 5/8-3 provides a defense to a charge of solicitation or conspiracy that, if the criminal object were achieved, the accused would not be guilty of an offense.

6. Impossibility of Attempt

720 ILCS 5/8-4(b) provides that "it is not a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted."

7. Necessity: **720 ILCS 5/7-13; IPI (Crim) 24-25.22**

"Conduct that would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct." **720 ILCS 5/7-13**.

Necessity involves "the choice between two admitted evils *where other courses of action are unavailable* and the conduct chosen promotes some higher value than the value of literal compliance with the law." ***People v. Janik***, 127 Ill.2d 390, 399 (1989) (citations omitted) (emphasis added). The defense is not available when another alternative exists than the two evils that, if carried out, would cause less harm. ***People v. Kratovil***, 351 Ill.App.3d 1023, 1034 (2nd Dist. 2004).

NOTE: ***People v. Kucavik***, 367 Ill.App.3d 176, 180 (3rd Dist. 2006), held that the statutory text does not

support denying a necessity instruction because the court on its own determines that the defendant's action was not the "sole" reasonable alternative, and instead it is for the jury to determine (1) Whether defendant subjectively believed the chosen option was reasonable; and (2) Whether that chosen option was objectively reasonable.

Kucavik has been widely criticized and not followed by other Districts, but has not been overruled.

8. Accident or Misfortune

Accident or misfortune is not an affirmative defense. A claim of accident may support a challenge to the mental state of the crime. *See* ***People v. Everette***, 141 Ill.2d 147, 156 (1990). Further, even if defendant argues accident, the evidence might still support a self-defense instruction, despite the inconsistency in defense theory. ***Everette***, 141 Ill.2d at 157.

Accident is not a defense to felony murder. ***People v. Pugh***, 157 Ill.2d 1, 16 (1993).

9. Withdrawal

Where a substantial step has been taken and the offender's intent is clear, abandonment is no defense. ***People v. Grathler***, 368 Ill.App.3d 802, 813 (5th Dist. 2006).

10. Alibi

An alibi is evidence that defendant was at another specified place at the time of the crime, making it impossible for him to have committed it. An assertion that defendant was not at the scene and therefore must have been elsewhere is not an alibi. ***People v. Fritz***, 84 Ill.2d 72, 77–78 (1981).

Alibi is not an affirmative defense because, to prove its case, the state must prove that defendant was present to commit the crime. If defendant presents an alibi, the burden does not shift from the state to the defense; the jury should not be instructed in a way that suggests otherwise. ***People v.***

Pearson, 19 Ill.2d 609, 613 (1960). Indeed, the committee note to **I.P.I. Criminal 24-25.05** recommends that no alibi instruction be given.

Supreme Court Rule 413(d), discussed above, requires disclosure of an alibi. But a witness's unresponsive statement that "defendant told her he was going to work" does not invoke disclosure. See ***Fritz***, 84 Ill.2d at 79.

11. Entrapment: **720 ILCS 5/7-12; IPI (Crim) 24-25.04**

"A person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense." **720 ILCS 5/7-12**.

Once defendant has presented some evidence in support of entrapment defense, the state must prove defendant was not entrapped. ***People v. Dunn***, 251 Ill.App.3d 772, 776 (4th Dist. 1993).

The state need not prove that defendant originated a criminal purpose; proof of pre-disposition suffices, which may include acts before or after the crime itself. ***People v. Criss***, 307 Ill.App.3d 888, 897-98 (1st Dist. 1999).

Entrapment requires admitting "all the elements of the charged crime", so a defendant who asserts it cannot request an instruction on a lesser included offense either. ***People v. Henry***, 318 Ill.App.3d 83, 86 (2nd Dist. 2001).

12. Insanity or Mental Illness

(a) Insanity: **720 ILCS 5/6-2(a); IPI (Crim) 24-25.01**

720 ILCS 5/6-2(a) provides that a "person is not criminally responsible for conduct if at the time of such conduct, as a result of a mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct. Insanity is

not alternately defined as an inability to *control* conduct.

"The terms 'mental disease or mental defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." **720 ILCS 5/6-2(b)**.

The burden remains on the state to prove defendant guilty beyond a reasonable doubt; the burden of proof is on defendant to prove by clear and convincing evidence that he is not guilty by reason of insanity. **720 ILCS 5/6-2(e)**.

A jury must be expressly instructed that it is to first determine whether the state met its burden of proof before assessing defendant's claim of insanity. ***Id***.

(b) Defendant's Disclosure and Burden in Insanity

Insanity must be timely raised and disclosed to the state. **Supreme Court Rule 413(d)**.

Defendant may raise the defense even in the absence of an opinion from an expert witness. *See* ***People v. Dwight***, 368 Ill.App.3d 873, 880 (1st Dist. 2006).

A finding of Not Guilty by Reason of Insanity is equivalent to an acquittal and may not be appealed. ***People v. Harrison***, 226 Ill.2d 427, 439 (2007). However, a defendant may challenge issues that arise in the post-acquittal adjudication process. ***Harrison***, 226 Ill.2d at 441.

(c) Guilty But Mentally Ill: **720 ILCS 5/6-2(c); IPI (Crim) 24-25.01B**

If a defendant asserts an insanity defense but fails to meet his burden of proof, the court may find him to be "guilty but mentally ill" if the court finds that defendant has proved by a preponderance of the evidence that he was mentally ill at the time of the offense. **725 ILCS 5/115-3(c)**; **720 ILCS 5/6-2(c)**.

"Mental illness" or "mentally ill" is defined as "a substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior." **720 ILCS 5/6-2(d)**.

(d) Diminished Capacity Not a Defense

Diminished capacity is not an affirmative defense in Illinois and may not be raised in the "guise of a reasonable doubt argument." ***People v. Hulitt***, 361 Ill.App.3d 634, 641 (1st Dist. 2005).

An expert therefore may not offer an opinion supporting a diminished capacity defense. ***People v. Frazier,*** 2019 IL App (1st) 172250, ¶ 36 (opinion on PTSD barred); ***People v. Johnson,*** 2018 IL App (1st) 140725, ¶ 70 (opinion on seizures barred).

13. Infancy: **720 ILCS 5/6-1**

A defendant must be at least 13 at the time of the offense. **720 ILCS 5/6-1**. Infancy is an affirmative defense to be raised by defendant. ***People v. DeBartolo***, 24 Ill.App.3d 1000, 1008 (2nd Dist. 1975).

14. Ignorance or Mistake: **720 ILCS 5/4-8; IPI (Crim) 24-25.24**

"A person's ignorance or mistake as to a matter of either fact or law" is an affirmative defense *if it negatives the existence of the mental state* which the statute prescribes with respect to an element of the offense." **720 ILCS 5/4-8(a) (emphasis added).**

A reasonable belief that "conduct does not constitute an offense is a defense" if one of four listed circumstances applies, including, *inter alia*, reliance on a statute later found invalid. *See* **720 ILCS 5/4-8(b)**.

The defense does not apply if, despite ignorance or mistake, defendant "may be convicted of an included offense of which he would be guilty if the fact or law were as he believed it to be." **720 ILCS 5/4-8(c)**.

NOTE: Ignorance or mistake can only negate the *mental state*. A mistaken belief that *conduct* is not criminal is not a defense. ***People v. Sevilla***, 132 Ill.2d 113, 126-27 (1989). Indeed, the statute defining mental state, **720 ILCS 5/4-3(c)**, provides that knowledge that certain conduct constitutes an offense is not an element of the offense unless expressly defined as such.

15. Second Degree Murder: **720 ILCS 5/9-2**

Second degree murder is not a defense, nor an included offense, but is instead a lesser mitigated offense of first degree murder. ***People v. Jeffries***, 164 Ill.2d 104, 122 (1995).

In a prosecution for *first degree murder*, when evidence of either of two mitigating factors defined in **720 ILCS 5/9-2(a)** (the second degree murder statute) has been presented, *the burden of proof is on the defendant* to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. **720 ILCS 5/9-2(c)**.

The mitigating factors are:

(1) "at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed; or

(2) at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the

principles stated in Article 7 of this Code, but his or her belief is unreasonable." **720 ILCS 5/9-2(a)**.

"Serious provocation" is defined as "conduct sufficient to excite an intense passion in a reasonable person provided, however, that an action that does not otherwise constitute serious provocation cannot qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim's sexual orientation as defined in" **775 ILCS 5/1-103** (Human Rights Act). **720 ILCS 5/9-2(b)**.

The state may charge second degree murder without charging first degree murder. ***People v. Mohr***, 228 Ill.2d 53, 67 (2008). In so doing, the state essentially alleges that it can prove the elements of first degree murder but concedes that mitigating factors are present. Therefore, defendant bears no burden to prove any mitigating factors. ***Mohr***, 228 Ill.2d at 67.

NOTE: There is no offense of attempt second degree murder. ***People v. Lopez***, 166 Ill.2d 441, 448 (1995).

NOTE: If the evidence supports tendering a self-defense instruction and defendant requests a second-degree murder instruction, the court must give the instruction. ***People v. Brown***, 2014 IL App (4th) 120887, ¶ 25.

See Section 2.5.F. "Second Degree Murder."

D. Lesser Included Offenses: **720 ILCS 5/2-9**

A lesser-included offense is not technically a defense but "is established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged" or an offense that is "an attempt to commit the offense charged or an offense included therein." **720 ILCS 5/2-9**.

Whether an offense is "lesser-included" is determined by the "charging instrument" approach–whether the "factual description" of the offense "describes, in a broad way, the conduct necessary for the commission of the lesser offense

and any elements not explicitly set forth in the indictment can reasonably be inferred." ***People v. Kolton***, 219 Ill.2d 353, 367 (2006).

> **NOTE**: A lesser-included offense for application of the one-act, one-crime, principle of merger *after a finding of guilt on multiple offenses* is identified by the abstract elements approach. ***People v. Miller***, 238 Ill.2d 161, 173 (2010).

A defendant is entitled to a lesser-included offense instruction only if, based on the evidence, the trier of fact could rationally find the defendant guilty of the lesser and acquit him of the greater. ***People v. Medina***, 221 Ill.2d 394, 405 (2006).

> **NOTE**: A reviewing court considering reducing the degree of a charge under **Supreme Court Rule 615(b)(3)** is to use the charging instrument approach, even when no request for a conviction on a lesser uncharged offense was made in the trial court. ***People v. Kennebrew***, 2013 IL 113998, ¶ 53.

It is defendant's decision, not defense counsel's, as to whether to give a lesser-included offense instruction, but the trial court has discretion to give it *sua sponte* over defendant's (and the state's) objection after balancing defendant's interest in avoiding a compromise verdict with "society's interest in avoiding the unjustified exoneration of wrongdoers and in punishing a defendant only to the extent of his crime." ***People v. Garcia***, 188 Ill. 2d 265, 281 (1999).

2.4 Procedure When Defendant Is Found Not Guilty by Reason of Insanity: 730 ILCS 5/5-2-4

An NGRI finding is equivalent to an acquittal and may not be appealed, ***People v. Harrison***, 226 Ill.2d 427, 439 (2007), but defendant may appeal a post-acquittal order of commitment. ***People v. Beeler***, 2012 IL App (4th) 110217, ¶ 12

When a defendant is found NGRI, the court must order that defendant be evaluated by the Department of Human Services as to whether he needs mental health services. The

clerk must be ordered to send the relevant order and certain specified records to DHS within 5 days. The court must specify whether the evaluation shall be conducted on an out-patient or in-patient basis. **730 ILCS 5/5-2-4(a)**.

If the evaluation is to be conducted on an in-patient basis, the defendant shall be placed in a secure setting. ***Id***.

DHS must provide the court with an evaluation report within 30 days of the order. ***Id***.

A defendant subject to an in-patient evaluation shall be held in the county jail pending transfer to a DHS facility. Because of delays in the process of transferring defendants to DHS secure facilities within the time frame provided by the evaluation, the statute now provides a detailed process and timeline for the transfer of defendant between the sheriff and DHS. ***Id***.

Upon receiving the DHS report, the court must hold a hearing under the Mental Health and Developmental Disabilities Code to determine whether defendant is in need of services on an inpatient basis, an outpatient basis, or not in need of mental health services. The court must give the victim a right to make a Victim Impact Statement at the hearing. ***Id***.

Defendant shall be represented by counsel at all post-NGRI commitment proceedings. **730 ILCS 5/5-2-4(c)**.

> **NOTE**: The parties may stipulate to the only psychiatric report, provided that the court exercises its discretion to determine whether defendant is subject to commitment by clear and convincing evidence. ***People v. Johnson***, 2012 IL App (5th) 070573, ¶ 24.

If defendant is found to not need mental health services, he shall be discharged from custody. **730 ILCS 5/5-2-4(a)**.

If defendant is found to need out-patient services, he is to be placed on conditional release under such conditions that "will reasonably assure [his] satisfactory progress and participation in treatment or rehabilitation and the safety of

the defendant, the victim, the victim's family members, and others." ***Id***.

If defendant is committed to DHS for in-patient services, "the initial order for admission" "shall be for an indefinite period of time." **720 ILCS 5/5-2-4(b)**. That period cannot exceed the maximum time defendant could have served in custody for the most serious offense for which he was acquitted, "less credit for good behavior as provided in **Section 5-4-1 of the Unified Code of Corrections**." ***Id***.

> **NOTE**: The appellate court may be split as to whether defendant is automatically entitled to discretionary credit in the calculation as opposed to day for day credit. *Compare* ***People v. Kokkeneis***, 259 Ill.App.3d 404, 408–09 (1st Dist. 1994) (discretionary credit automatic); ***People v. Detert***, 343 Ill.App.3d 607, 612 (2nd Dist. 2003) (discretionary credit up to DHS).

The court must "determine the maximum period of commitment by an appropriate order." **730 ILCS 5/5-2-4(a)**; *see* ***People v. Thiem***, 82 Ill.App.3d 956, 962 (1st Dist. 1980).

After commitment, DHS must file a treatment plan with the court within 30 days and every 90 days thereafter. **730 ILCS 5/5-2-4(b)**.

Defendant has the right to periodically file for review of the commitment and to seek discharge or conditional discharge pursuant to **730 ILCS 5/5-2-4(e)**.

PART II – TRIAL PROCEDURE

Tab 7

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2.5 Jury Instructions

A. General Requirements for Jury Instructions

1. Adequacy of Instructions

A defendant's right to fair trial includes a right to clear jury instructions so that jurors may properly determine whether sufficient evidence has been introduced to prove defendant guilty beyond a reasonable doubt. ***People v. Comer***, 78 Ill.App.3d 914, 916 (3rd Dist. 1979).

2. Use of IPI / Exceptions

Supreme Court Rule 451(a) provides that whenever Illinois Pattern Jury Instructions, Criminal, contain an instruction applicable and appropriate, the IPI shall be used unless the court determines that it does not accurately state the law. *See* ***People v. Wilkerson***, 87 Ill.2d 151, 159 (1981) (discussing purpose of pattern instructions is clarity and to avoid confusion).

A non-IPI instruction should be simple, brief, impartial, and free from argument. ***People v. Roberts***, 351 Ill.App.3d 684 (4th Dist. 2004).

3. Counsel to Prepare Instructions

Supreme Court Rule 451(b) provides that at any time before or during the trial, the court may direct counsel to prepare designated instructions.

4. Sequence

The court should read the jury instructions in the sequence suggested by the committee comments to the IPI, although the failure to do so has been upheld so long as the content is accurate and not misleading. *See* ***People v. Anderson***, 2012 IL App (1st) 103288, ¶¶ 46, 47.

B. Jury Instruction Conference—Procedure

Rule 451(c) provides that **735 ILCS 5/2-1107** governs the tendering, settling and giving of instructions. The rule provides that the court shall instruct the jury after the

arguments are completed, or, in its discretion, at the close of all the evidence. The statute provides that instructions shall be given after arguments are completed.

Rule 451(d) provides that the court shall be provided an original and a copy of each instruction, and a copy shall be delivered to each opposing counsel. The court's copy of the instructions should be numbered and marked–IPI, IPI modified, non IPI–as provided in the Rule and indicate who tendered them. All objections made at the conference and the rulings thereon shall be shown in the report of proceedings.

735 ILCS 5/2-1107 provides that the court shall mark its copies as given or refused. The statute also provides that the originals given shall be marked as such in the margin–notably, inconsistency in such markings on the originals has been held to be prejudicial error. *See* ***People v. Marks***, 251 Ill. 475, 478 (1911).

The failure to mark the jury's original instructions as given is not reversible error where the record shows the instructions were actually given to the jury. ***People v. Lawson***, 328 Ill. 602, 606 (1928).

C. Special Issues

1. *Sua Sponte* Duty to Instruct

It is the parties' responsibility to submit instructions. Generally, with one exception noted below, the court is not obligated to *sua sponte* give instructions or modify those submitted by the parties. ***People v. Underwood***, 72 Ill.2d 124, 129 (1978).

The court does bear the burden of ensuring the jury is instructed on the elements of the crime, the presumption of innocence, and the burden of proof. ***People v. Parks***, 65 Ill.2d 132, 137 (1976).

But, failing to do so does not necessarily require reversal. ***People v. Casillas***, 195 Ill.2d 461, 478 (2000), held that failing to tender a written instruction on the burden of proof

and presumption of innocence, while error, did not require reversal where the court orally instructed the jury on the issue at beginning and end of the trial. *See also* ***Kentucky v. Whorton***, 441 U.S. 786, 490 (1979) (failure to give same written instruction not automatically reversible).***People v. Stromblad***, 74 Ill.2d 35, 41 (1978), held that the failure to properly instruct on an essential element requires reversal, regardless of the evidence, but the appellate court has noted that ***People v. Jones***, 81 Ill.2d 1, 10 (1979), is inconsistent with ***Stromblad*** in that it held that the error in failing to properly instruct on the intent to kill was harmless given the overwhelming evidence. *See* ***People v. Morrison***, 162 Ill.App.3d 299, 306 (2nd Dist. 1987).

Likewise, ***People v. Hopp***, 209 Ill.2d 1, 8 (2004), found that that "the erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial."

An error in the court's instructions is not necessarily prejudicial where the instructions were "at worst ambiguous" and counsel's arguments clarified the ambiguity. ***Middleton v. McNeil***, 541 U.S. 433, 438 (2004).

Lesser Included *sua sponte*: The court has no duty to give a lesser-included offense instruction *sua sponte*, ***People v. Carter***, 208 Ill.2d 309, 324 (2003), but has discretion to give it *sua sponte* even over defendant's (and the state's) objection after balancing defendant's interest in avoiding a compromise verdict with "society's interest in avoiding the unjustified exoneration of wrongdoers and in punishing a defendant only to the extent of his crime." ***People v. Garcia***, 188 Ill. 2d 265, 281 (1999).

2. Identification of Witness Credibility

IPI Criminal 3.15–Circumstances of Identification should be given when identification is an issue. The instructions list 5 factors to consider in weighing identification testimony. The factors are taken from identification principles set forth in ***Neil v. Biggers***, 409 U.S. 188, 199 (1972).

The committee comments say the court should give the numbered paragraphs supported by the evidence. ***People v. Rodriguez***, 387 Ill.App.3d 812, 824 (1st Dist. 2008), holds, however, that all five factors are generally required and whether to omit any of the five is in the court's discretion.

There is no "or" or "and" between the paragraphs in the instruction, and the court should not add them when more than one factor is listed. *See* ***People v. Herron***, 215 Ill.2d 167, 191 (2005).

3. Accountability

IPI Criminal 5.03–Accountability instructs that a person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of that or another offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of such offense.

The state may prove an aspect of the mental state of accountability–a defendant's intent to promote or facilitate an offense–one of two discrete ways: (1) by showing that defendant shared the criminal intent of the principal; or (2) that there was a common criminal design. ***People v. Fernandez***, 2014 IL 115527, ¶ 21. The "common design" rule applies when the resulting offense is different than the planned and intended offense but is committed in furtherance of the planned offense. ***Fernandez***, at ¶ 21; ***People v. Kessler***, 57 Ill.2d 493, 497 (1974). The court should identify which theory applies when ruling upon an accountability issue. *See* ***Fernandez***, at ¶ 21.

Mere presence: Mere presence at the scene of a crime, even with knowledge that the crime is being committed, or negative acquiescence to same, is not enough to support accountability. ***Fernandez***, at ¶ 20.

Aiding escape or flight: For the purpose of accountability, "the duration of the commission of the offense is defined by the elements of the offense," thus precluding an

accountability instruction based on action in aiding and or abetting escape or flight. ***People v. Dennis***, 181 Ill.2d 87, 101–03 (1998). However, if force is involved in the flight or escape, the force aspect might be viewed as a continuing element of the ongoing offense. ***Dennis***, 181 Ill.2d at 107. The commission of a robbery, for example, ends when both the force and the taking, the elements of the offense, have ceased. ***People v. Smith***, 2019 IL 123901, ¶ 29.

> **NOTE:** This accountability principle does not apply to the felony-murder escape rule, which provides that, if a killing occurs during escape, it is within the scope of felony-murder. ***Dennis***, 181 Ill.2d at 105; ***People v. Klebanowski***, 221 Ill.2d 538, 552 (2006).

"Should know" Instruction Not Allowed: When holding a parent accountable for another's murder of her child, it is error to instruct the jury via a non-IPI instruction that "a parent has a legal duty to aid a small child if the parent knows or should know about a danger to the child," as this instruction introduces the improper mental state of "should have known" to the jury. ***People v. Pollock***, 202 Ill.2d 189, 216 (2002).

4. Affirmative Defenses

A defendant is entitled to have the jury instructed on an affirmative defense if there is any evidence in the record to support the defense, even if such defense is inconsistent with the defendant's own version of the facts. ***People v. Everette***, 141 Ill.2d 147, 156 (1990).

> **NOTE**: A defendant may raise the defense of insanity even in the absence of an opinion from an expert witness. *See* ***People v. Dwight***, 368 Ill.App.3d 873, 880 (1st Dist. 2006).

5. ***Apprendi***

Apprendi v. New Jersey, 530 U.S. 466 (2000), requires that factual issues enhancing defendant's potential sentence (other than prior criminal record) must be submitted to the trier of fact.

Supreme Court Rule 451(g) gives the court discretion to conduct either a unitary or bifurcated trial on the separate issues of (a) guilt-innocence and (b) sentencing factors. Bifurcation may be ordered *sua sponte* or on motion of either party. Before bifurcation, the court must determine whether sentencing factor is irrelevant to the question of guilt, or if undue prejudice outweighs the sentencing factor's probative value. Both parts of a bifurcated jury trial shall be presented to the same jury. Defendant may also waive jury for the sentencing portion of a bifurcated trial.

Per the committee comments to **Rule 451**, unitary trials are the presumptive option.

There are a series of pattern jury instructions applicable to these enhancement issues. *See* **I.P.I**. **Criminal 28.00** *et seq.*

6. Special Interrogatories

Special interrogatories are not mentioned in the Code of Criminal procedure and are not favored in criminal cases. ***People v. Greer***, 336 Ill.App.3d 965, 979 (5th Dist. 2003).

> **NOTE**: A defendant cannot challenge a guilty verdict on the basis of an answer to a special interrogatory. ***People v. Reed***, 396 Ill.App.3d 636 (4th Dist. 2009) (interrogatory used for ***Apprendi*** compliance apparently before IPI applied).

7. Attempt

IPI Criminal No. 6.05 applies to attempt charges other than first degree murder. **No. 6.05X** applies to attempt first degree murder.

8. Proximate Cause

A defendant may be charged with murder under the "proximate cause" theory of felony murder. ***People v. Hudson***, 222 Ill.2d 392, 401 (2006). Proximate cause has two distinct requirements: fact and legal cause–legal cause is essentially a question of foreseeability. ***Hudson***, 222 Ill.2d at 401. The jury should be instructed on the issue.

Foreseeability need not be expressly mentioned in a proximate cause instruction so long as the instruction communicates the principle. ***Id***. The ***Hudson*** court provided an example of a proximate cause instruction "in an effort to aid the bench and bar in future cases"–the suggested language is set forth in the context of attempt armed robbery as the predicate felony. ***Id***. 408.

> **NOTE**: The use of an almost verbatim version of ***Hudson's*** suggested instruction language was upheld in ***People v. Nash***, 2012 IL App (1st) 093233 ¶ 30.

9. Identification of Attempt Murder Victims

Where there are two victims referenced in the charges, an attempt first degree murder instruction must specify the name of the particular alleged victim. ***People v. Anderson***, 2012 IL App (1st) 103288, ¶ 64.

10. Limited Purpose of Impeachment

IPI Criminal No. 3.13–Impeachment–Defendant–Offenses, which explains the limited purpose of evidence of prior conviction(s), should be given only at defendant's request. It should not be given over defense objection. ***People v. Fultz***, 2012 IL App (2d) 101101, ¶ 71.

11. Other Instructional Issues

115-10: The statute provides that, when evidence of out-of-court statements of a child sex abuse victim are admitted into evidence pursuant to **725 ILCS 5/115–10**, **IPI Criminal No. 11.66** must be given. The committee comments to the IPI take no position on whether it should orally be given at the

time of the admission of the evidence. The failure to provide the instruction did not rise to plain error in ***People v. Sargent***, 239 Ill.2d 166, 194 (2010).

Involuntary Manslaughter: Whether an involuntary manslaughter lesser-offense instruction is warranted depends on the facts of the case. Some factors to consider in a death from beating include disparity in size and strength between defendant and victim, brutality and duration of a beating, severity of injuries, and whether defendant used bare fists or a weapon. ***People v. Richardson***, 401 Ill. App. 3d 45, 50 (1st Dist. 2010).

IPI Criminal 3.17–Testimony of an Accomplice should be given any time that an accomplice testifies. The word "accomplice" is no longer in the language of the instruction. Defendant is entitled to this instruction if there is probable cause to believe the witness was guilty as an accessory as a principal or on a theory of accountability. This includes when: (1) the witness rather than defendant could have been responsible for the crime; or (2) if the witness admits his presence at the scene and could have been charged but denies involvement. *See* ***People v. Montgomery***, 254 Ill.App.3d 782, 790 (1st Dist. 1993). Counsel can be found ineffective for the failure to tender this instruction in certain cases. ***People v. Wheeler***, 401 Ill.App.3d 304, 314 (3rd Dist. 2010).

Jury question: ***People v. Coots***, 2012 IL App (2d) 100592, ¶ 46, found counsel to be ineffective for failing to request that the trial judge respond to the jury's request for a definition of delivery (of drugs), and for failing to tender an instruction that would limit the definition of delivery *vis a vis* potential joint possession.

Extended Media: With an approved request for extended media coverage the court is required to admonish the jury at the commencement of any criminal or civil trial regarding media coverage. *See* Appendix at pages A–116 through A–139 for materials regarding extended media coverage.

D. Forms of Verdict

725 ILCS 5/115-4(j) provides, in part, that the jury shall return a *general verdict as to each offense* charged, unless the affirmative defense of insanity has been raised, in which case the jury is to receive both a general verdict form and a special verdict form of not guilty by reason of insanity, as to each offense charged. The court is then to separately instruct the jury that such special verdict requires a unanimous finding by the jury that the defendant committed the acts charged but at the time of the commission of those acts the defendant was insane.

When an offense is charged based on multiple theories, the court has the discretion to tender *separate verdict forms for each version of the offense*. However, if specific findings by the jury with regard to the offenses charged could result in different sentencing consequences favorable to defendant, the court *must* tender specific verdict forms on defendant's request. ***People v. Smith***, 233 Ill.2d 1, 23 (2009); ***People v. Davis***, 233 Ill.2d 244, 273 (2009).

When a general verdict of guilty is returned, there is a presumption that defendant committed the most serious of the crimes alleged. ***Davis***, 233 Ill.2d at 264.

A defendant may challenge a conviction based on a general verdict if the jury was instructed on alternative theories of guilt and may have relied on an invalid theory. ***Stromberg v. California***, 283 U.S. 359 (1931). However, instructing a jury on multiple theories of guilt, one of which is invalid, is subject to harmless error review which requires the court to ask whether the flaw in the instructions had "substantial and injurious effect or influence in determining the jury's verdict." ***Hedgpeth v. Pulido***, 555 U.S. 57 (2008); ***Davis,*** 233 Ill.2d at 273 (error deemed harmless).

E. Lesser-Included Offenses

1. Definition

By statute, an included offense is defined as an offense that "is established by proof of the same or less than all of the

facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged" or an offense that is "an attempt to commit the offense charged or an offense included therein." **720 ILCS 5/2-9**.

There is a two-step process for determining whether to instruct on a lesser-included offense.

First, whether an offense is lesser-included is determined by the "charging instrument" approach–whether the "factual description" of the offense "describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." ***People v. Kolton***, 219 Ill.2d 353, 367 (2006). A lesser-included offense is *not* one that is based on the same disputed facts–though the identifying approach is broad, there must be a disputed element between the lesser-included offense and the greater charge. ***People v. Meor***, 233 Ill.2d 465, 472 (2009).

> **NOTE**: A lesser-included offense for application of the one-act, one-crime, principle of merger *after a finding of guilt on multiple offenses* is identified by the abstract elements approach. ***People v. Miller***, 238 Ill.2d 161, 173 (2010).

Second, the instruction on an identified lesser-included offense should be given only if the evidence rationally supports a conviction on the lesser offense and an acquittal on the greater. ***Kolton***, 219 Ill.2d at 360-61, 371. The standard is whether there is *some evidence* that would support the lesser verdict. The court is not to weigh credibility. ***People v. McDonald***, 2016 IL 118882, ¶ 25 (2016).

> **NOTE**: The court should be cautious about providing *two* lesser-included offense instructions. The jury should be instructed so as to avoid legally inconsistent guilty verdicts.

Avoiding inconsistent verdicts: In ***People v. Washington***, 2019 IL App (1st) 161742 (2019), the charged offenses were

attempt first degree murder and aggravated battery with a firearm, based on the same act. The jury was provided lesser-included instructions on reckless conduct *on each charged offense*. The jury convicted on the lesser on only the attempt murder. Because the jury's resulting guilty verdicts of reckless conduct (rather than attempt murder) and aggravated battery with a firearm were premised on *legally inconsistent findings as to mental state on the same act*, it was error to accept both verdicts. ***Washington***, at ¶ 34. Given these facts, the jury should have received 4 verdict forms to prevent this problem. ***Id***. at ¶ 33.

2. *Sua Sponte* or at State's Request

   The court may give a lesser included offense instruction, *sua sponte* or at the state's request, over defendant's objection after balancing interests of society in achieving justice against interest of defendant in averting a compromise verdict. ***People v. Garcia***, 188 Ill.2d 265, 284 (1999).

   The court may also give the instruction *sua sponte* over the state's objection. ***People v. Knaff***, 196 Ill.2d 460 (2001).

3. Defendant's Personal Assent

   The decision whether to tender a lesser-included offense instruction belongs to defendant personally. ***People v. Brocksmith***, 162 Ill.2d 224, 229 (1994). If the defendant requests the instruction and it is supported by some evidence, the court must give it. ***People v. Hill***, 2020 IL App (1st) 162119, ¶ 27.

   The court need not expressly ascertain from defendant personally the choice *not* to pursue lesser included offense instruction. ***People v. Medina***, 221 Ill.2d 394, 410 (2006).

   But, when a lesser-included instruction *is* sought, the court should inquire of defense counsel, in defendant's presence, whether counsel has advised defendant of the potential penalties associated with the lesser offense–criminal liability that he might otherwise avoid–and then ask defendant if he agrees

with the use of the instruction. ***Medina***, 221 Ill.2d at 409.

F. Second Degree Murder and Involuntary Manslaughter

Second degree murder is not a lesser-included offense of first degree murder. Rather, it is more accurately described as a *lesser mitigated* offense of first degree murder. ***People v. Jeffries***, 164 Ill.2d 104, 122 (1995). Unlike a lesser-included offense, the request for a second-degree murder instruction does not expose defendant to "potential criminal liability he might otherwise avoid." ***People v. Wilmington***, 2013 IL 112938, ¶ 48.

The court is not bound by the same legal principles on the tendering of lesser-included offenses when there is an issue of a second degree murder instruction. ***Wilmington***, at ¶ 44. Thus, the court need not inquire whether defendant personally consents to a second degree murder instruction. ***Wilmington***, at ¶ 52.

Second degree murder can be based on intentional or knowing murder but not felony murder. However, where there are varying theories of murder and the evidence so supports, instructions on both felony murder and second degree murder based on intentional or knowing murder are proper. ***People v. Luckett***, 339 Ill.App.3d 93, 112 (1st Dist. 2003).

When the evidence supports the giving of an instruction on self-defense in a prosecution for first degree murder, an instruction on second degree murder must be given as a mandatory counterpart if defendant requests it. ***People v. Washington***, 2012 IL 110283, ¶ 56.

The state may charge only second degree murder, as it may concede that the mitigating factor is present. In that case, the jury should not be instructed on the mitigating factor of provocation, as there is no need

to do so. ***People v. Mohr***, 228 Ill.2d 53, 67 (2008). Introducing this non-issue wrongly shifts the focus of the jury from the contested elements of the offense. ***Mohr***, 228 Ill.2d at 68.

When instructing on involuntary manslaughter, **IPI Criminal No. 7.07–Definition of Involuntary Manslaughter** requires that the jury be instructed on the definition of recklessness found in **IPI Criminal No. 5.01**. ***People v. Cook***, 2014 IL App (1st) 113079, ¶ 29. ***People v. Hayes***, 409 Ill.App.3d 612, 623 (1st Dist. 2011), held that no involuntary manslaughter instruction was required where defendant's actions showed not recklessness but calculation and thoughtful execution of the crime and consequent cover up. A defendant's testimony alone that he did not intend to shoot anyone is an insufficient basis for an instruction on involuntary manslaughter, but some additional evidence will support same. *See* ***People v. Beasley***, 2014 IL App (4th) 120774, ¶¶ 19, 25.

(*See also* Section 2.3.C.15. "Second Degree Murder").

G. Solicitation and Conspiracy

Consistent with **720 ILCS 5/2-20**, **IPI Criminal No. 9.01A** defines solicitation as meaning to command, authorize, urge, incite, request, or advise.

IPI Criminal No. 6.03 defines conspiracy (other than certain drug conspiracies) as both (1) Agreeing with another to the commission of an offense with intent that it be committed, combined with (2) An act in furtherance of the agreement by any party to the agreement. An agreement may be implied from the conduct of the parties although they acted separately or by different means and did not come together or enter into an express agreement. To constitute the offense of conspiracy it is not necessary that the conspirators succeed in committing the offense.

The committee comments provide that the jury must also be given an instruction defining the offense that is the alleged subject of the conspiracy, although omission might not rise to the level of plain error. *See* ***People v. Hopp***, 209 Ill.2d 1, 13–14 (2004).

In a case of criminal drug conspiracy, instructions **IPI Criminal Nos. 17.31** and **17.32** apply.

The committee comments to **IPI Criminal No. 6.03–Definition of Conspiracy–Other Than Certain Drug Conspiracies** provide that the affirmative defense that the objective of the solicitation or conspiracy, if achieved, would not be a crime, as set forth in **720 ILCS 5/8-3**, "raises a legal issue for the court."

720 ILCS 5/8-2(a) adopts the bilateral theory of conspiracy requiring actual agreement between at least two persons to commit the offense to support a conviction. ***People v. Foster***, 99 Ill.2d 48, 55 (1983). Defendant's agreement with a government agent does not constitute such a bilateral agreement. ***People v. Hensley***, 354 Ill.App.3d 224, 231 (4th Dist. 2004).

For the relationships among inchoate offenses, *see* ***People v. Stroner***, 96 Ill.2d 204 (1983) (solicitation to commit murder is not a lesser included offense of conspiracy to commit murder and conspiracy to commit murder is not a lesser included offense of attempted murder on theory of accountability).

H. Mental State and Intent

In an attempt first degree murder case, the jury instructions must make clear that proof of nothing less than intent to kill is required to convict. ***People v. Harris***, 72 Ill.2d 16, 27 (1978).

Home Invasion: Entering a home with criminal intent which, if known to the occupant, would've resulted in entry being barred, is "without authority" for the offense of home invasion, ***People v. Murray***,

364 Ill.App.3d 999, 1005-06 (4th Dist. 2004), as is entry prohibited by a court order known to defendant, even if the occupant permitted entry, ***People v. Witherspoon***, 2019 IL 123092, ¶¶ 26, 33.

PART II - TRIAL PROCEDURE

Tab 8

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2.6 Jury Deliberations

A. Materials to Be Provided to Jury

1. Instructions

The court should provide the written instructions immediately to the jury for its deliberation. The failure to do so can result in reversible error, even if the instructions are eventually delivered. *See* ***People v. Williams***, 181 Ill.2d 297, 319 (1998) (no reversible error; oral instructions were correct but written contained an error; delay of 35 minutes to tender corrected written instructions); ***People v. Cadwallader***, 181 Ill.App.3d 488, 503 (4th Dist. 1989) (error in that oral instructions were initially inaccurate, tendering of corrected written instructions was delayed and after deliberation began).

2. Exhibits

It is within the court's discretion to determine what exhibits will be permitted in the jury room. ***People v. Carrero***, 345 Ill.App.3d 1, 14 (1st Dist. 2003). This includes tangible objects. ***People v. Watson***, 107 Ill.App.3d 681, 696 (3rd Dist. 1982). **735 ILCS 5/2-1107(d)** provides that papers read or received in evidence may be taken to the jury room for use in deliberation.

Not Impeachment Exhibits: It can be error to send documents admitted for impeachment to the jury. *See* ***People v. Carr***, 53 Ill.App.3d 492, 500 (2nd Dist. 1997) (jury could have misused as substantive evidence).

No Dictionary: The court should not provide a dictionary to the jury. *See* ***People v. Jedlicka***, 84 Ill.App.3d 483, 492 (2nd Dist. 1980) (while error, not reversible under facts).

B. Discharge and Replacement by Alternates

725 ILCS 5/115-4(g) and **Rule 434(e)** provide that a juror who dies or is discharged shall be replaced by an alternate juror in the order of selection.

While the statute and rule only address pre-deliberation replacement, neither prohibits replacement of a juror during deliberation. ***People v. Roberts***, 214 Ill.2d 106, 121 (2005). Replacement in such an instance is within the court's discretion. ***Id.*** at 121. The court must take precaution to avoid prejudice before allowing a replacement. For instance, the alternate should be questioned as to his or her continued impartiality and post-trial contact before being seated, the court may carefully determine if the original jurors formed an opinion before the replacement (without disclosure of specific views), the court should consider the length of the deliberation before replacement, and the jury should be instructed to begin to deliberate anew. ***Id.*** at 124.

C. Conduct of Jury During Deliberations

1. False Information Provided During *Voir Dire*

Where the state investigated the veracity of the juror's pre-trial questionnaire only after it was evident during deliberation that the juror was a "hold out," dismissal of the juror was improper. ***People v. Gallano***, 354 Ill.App.3d 941, 954 (1st Dist. 2004).

2. Inability to Understand the English Language

People v. Hayes, 319 Ill.App.3d 810, 814 (1st Dist. 2001), upheld replacing a juror after the court learned that the juror did not understand or follow the evidence due to a language barrier. The court instructed the jury to deliberate anew. ***Id.*** at 817.

3. Improper Contact

Improper communication about the case between jurors and third parties is presumptively prejudicial. ***People v. Hobley***,

182 Ill.2d 404, 462 (1998). If a party shows that prejudicial outside information reached the jury, the burden shifts to the state to show that the exposure was harmless. ***People v. Caguana***, 2020 IL App (1st) 180006, ¶ 34.

If outside influence reached some jurors but not others, replacement rather than declaring a mistrial still may pose problems. ***Roberts***, 214 Ill.2d at 125 (replacement improper where original jury had taken two votes in the absence of the alternate juror); ***People v. Smith***, 341 Ill.App.3d 729, 741 (1st Dist. 2003) (replacement improper where one of the discharged jurors told the other jurors during deliberation about her acquaintance with defendant).

4. Unauthorized Scene Visit

People v. Spice, 54 Ill.App.3d 539, 543 (4th Dist. 1977), reversed a conviction because a juror had visited the crime scene and described his investigation to the other jurors, undermining the defendant's rights to a fair trial and of confrontation.

5. Jury Research or Experimentation

Because the trier of fact cannot consider evidence not presented at trial, it cannot conduct experiments or private investigations that have the effect of creating such evidence. ***People v. Gilbert***, 68 Ill.2d 252, 259 (1977). However, not every exhibit-handling or craft-making is an improper experiment. ***Id.*** at 260 (not improper for judge in bench trial to hold admitted gun in a cocked and uncocked position to see if defendant's testimony about his handling of it was credible); ***People v. Kurena***, 87 Ill.App.3d 771, 775-76 (1st Dist. 1980) (not improper for jury to make cardboard knife modeled on admitted exhibit to assess whether victim's wounds could have resulted as described and whether it could be concealed and seen from a distance); ***People v. Szmanski***, 226 Ill.App.3d 115, 121 (2nd Dist. 1992) (map drawn by foreman from personal knowledge of area deemed an extension of her "mental processes" and not extraneous).

6. Illness or Emergency

It is within the court's discretion to excuse a juror during deliberation due to illness or emergency and substitute an alternate juror. ***People v. Durgan***, 346 Ill.App.3d 1121, 1137 (4th Dist. 2003) (heart attack).

Or, defendant could agree to proceed with less than 12 jurors, ***People ex rel. Birkett v. Dockery***, 235 Ill.2d 73, 78 (2009), which can be inferred from silence, ***People v. Barrier***, 359 Ill.App.3d 639, 644 (3rd Dist. 2005) (defendant validly waived 12-person jury mid-trial and proceeded with a jury of 11 by agreeing to begin trial with no alternates and remaining silent when juror became ill and was excused).

However, declaring a mistrial over defendant's objection requires finding manifest necessity or double jeopardy applies. ***People v. Largent***, 337 Ill.App.3d 835, 843 (4th Dist. 2003) (error to declare mistrial when juror's mother-in-law broke her leg–juror's presence might have comforted mother-in-law, but was not "highly necessary").

7. Conflict Among Jurors

There is a difference between a juror who refuses to deliberate and a holdout juror. *See e.g.* ***United States v. Symington***, 195 F.3d 1080, 1086 (9th Cir. 1999) (discussing issue). A holdout juror cannot be dismissed for cause–the available options are to order further deliberation or a mistrial. ***People v. Nelson***, 235 Ill.2d 386, 446 (2009).

D. Communicating with a Deliberating Jury

1. Duty to Respond to Jury Question

Generally, the court has a duty to respond to a jury question on a relevant point of law about which there is confusion. ***People v. Childs***, 159 Ill.2d 217, 229 (1994). The court has a duty to seek clarification if the jury's question is unclear. ***Childs***, 159 Ill.2d at 22. The court should respond with "specificity and accuracy." ***Id***.

The court may decline to respond if "the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or if the giving of an answer would cause the court to express an opinion which would likely direct a verdict". ***Id.*** at 228.

Thus, the court may in some circumstances appropriately respond that the jury should continue to deliberate and read its instructions, ***People v. Hernandez***, 229 Ill. App. 3d 546, 552 (3rd Dist. 1992), but must be careful not to use coercive language, ***People v. Wilcox***, 407 Ill.App.3d 151, 164 (1st Dist. 2010) (improper to say "Please continue to deliberate and obtain a verdict").

Examples of Response Required: ***Childs***, 159 Ill.2d at 230–34 (question about the legally available verdicts);

Examples of Response Improper: ***People v. Milsap***, 189 Ill.2d 155, 161 (2000), (introduced new theory of accountability); ***People v. Edwards***, 2020 IL App (1st) 170843, ¶ 24 (introduced new theory of constructive possession).

Reasonable Doubt: If asked to define reasonable doubt, the court may respond that "We cannot give you a definition it is your duty to define." ***People v. Downs,*** 2015 IL 117934, ¶¶ 7, 32.

> **Non-questions Requiring No Answer:** ***People v. Kliner***, 185 Ill.2d 81, 165 (1999) (statement "we are done for today" and complaints about hotel accommodations); ***People v. Cowan***, 105 Ill.2d 324, 329 (1985) (deadlock notes); ***People v. Harris***, 294 Ill.App.3d 561, 567, 569 (1st Dist. 1998) (report of their "extremely thorough, soul searching and emotional" deliberations).

Substitute Judge: When a substitute judge is called upon to preside over a deliberating jury, it is "incumbent upon the predecessor judge to advise his successor colleague as to the salient facts and contested prior rulings which may again

become issues to be considered and for the successor judge to make rulings secure in the knowledge that he has the authority to do so." ***People v. Hill***, 315 Ill.App.3d 1005, 1011 (1st Dist. 2000).

2. *Ex Parte* Communications

   A communication between a judge and a deliberating jury not held in open court and in the defendant's presence violates defendant's constitutional right to be present at all proceedings. ***People v. Kliner***, 185 Ill. 2d 81, 162 (1999). On review, the state must prove that preserved error was harmless beyond a reasonable doubt. ***Id***.

   Defendant can waive his right to be present during responses to questions during deliberations. The waiver may be done through defense counsel so long as defendant voluntarily, knowingly, and intelligently waives his right. ***People v. Phillips***, 383 Ill.App.3d 521, 550 (1st Dist. 2008).

3. Jury's Request to Read or Rehear Testimony

   It is in the court's discretion in whether to provide the jury, at its request, with a transcript of trial testimony. ***People v. Williams***, 173 Ill.2d 48, 88 (1996).

   The court should recognize that it has the discretion to provide a transcript and, if it denies same, make a record of the basis of its decision. *See* ***People v. Queen***, 56 Ill.2d 560 (1974) (court said it had no discretion); ***People v. Frisby***, 160 Ill.App.3d 19, 43 (1st Dist. 1987) (court noted potential delay and lack of immediate availability; proper exercise of discretion).

   Discretion extends to which portions of the transcript should be given. ***People v. Reynolds***, 57 Ill. App.3d 593, 598 (1st Dist. 1978) (cross not included); ***People v. Creque***, 214 Ill. App. 3d 587, 597 (1st Dist. 1991) (direct of only one of three witnesses).

4. Jury Request to View Video Evidence

The jury may be brought to the courtroom to replay a video or audio recording, even after deliberations have begun and with non-jurors in the courtroom, so long as no deliberations take place and no non-jurors communicate with jurors during the replay. ***People v. Hollahan***, 2020 IL 125091, ¶ 27 (resolving Appellate Court split). The court should: (1) Ensure the court, the parties, and counsel are present; (2) Admonish all non-jurors in the courtroom "not to comment on the evidence, communicate with the jury, or try in any manner to influence the jury"; and (3) Instruct the jurors that they are not to discuss the evidence while in the courtroom and that, "after the replay, the jury will return to the jury room and should then continue its deliberations, which may include, if it wishes, [discussing] the replay." ***People v. Lewis***, 2019 IL App (4th) 150637-B, ¶ 99.

E. Deadlocked Jury / Use of ***Prim*** Instruction

1. Deadlocked Jury

IPI Criminal No 26.07 "Deadlocked Jury Supplemental Instruction," which is consistent with the holding of ***People v. Prim***, 53 Ill.2d 62, 76 (1972), provides:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of

your fellow jurors or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

The committee comments take no position on whether or under what circumstances the instruction should be given, citing ***People v. Cowan***, 105 Ill.2d 324 (1985), as an example of the court's application of ***Prim***.

A ***Prim*** instruction is not required before declaring a mistrial, ***People v. Kimble***, 2019 IL 122830, ¶ 45, nor is it the only language that can be used, ***People v. Foreman***, 361 Ill.App.3d 136, 141, 152 (1st Dist. 2005) (upholding admonishment after being told of a deadlock due to a perceived conflict in a juror's religious beliefs and guilty verdict that "it was not being asked to judge the defendant but to rule on the facts of the case"); ***People v. Boyd***, 366 Ill.App.3d 84, 99 (1st Dist. 2006) (upholding admonishment to review the instructions and continue to deliberate).

The court should avoid coercive language suggesting to the jury that it must reach a verdict. *See* ***People v. Ferro***, 195 Ill.App.3d 282, 292–3 (2nd Dist. 1990).

Giving the ***Prim*** instruction to a deadlocked jury is within the court's discretion. The court need not accept a jury's declaration that it is deadlocked or to respond to notes to that effect. ***Cowan***, 105 Ill.2d at 328–9. Also, if the court perceives that the jury is having difficulty reaching a verdict, the court is not required to wait to give the ***Prim*** instruction until the foreperson says that no verdict can be reached. ***People v. Preston***, 76 Ill.2d 274, 283–4 (1979).

Do Not Ask the Number Split: The court may not inquire how a deadlocked jury is divided numerically, and instruction to continue to deliberate in that instance might be coercive. ***People v. Santiago***, 108 Ill.App.3d 787, 807 (1st Dist. 1982). However, if a court receives an unsolicited statement regarding the numerical division of jurors, it may

instruct them to continue to deliberate. ***People v. Watkins***, 293 Ill.App.3d 496, 507 (1st Dist. 1997).

F. Separation of Jury During Deliberations; Sequestration

It is in the court's discretion to sequester— "keep the jury together in the charge of an officer of the court" —during trial or deliberations or to allow jurors to separate and return at a later date or time. Regardless of which procedure is used, the jury must be admonished pursuant to Rule. *See* **Illinois Supreme Court Rule 436**.

The jury may be sequestered to continue deliberations even after 10 of 12 jurors say it cannot reach a verdict. ***People v. Green***, 91 Ill. App. 3d 1085, 1090 (1st Dist. 1980). The court should be careful and neutral in its direction to the jury regarding overnight accommodation. A perceived "threat" of overnight sequestration may be challenged as coercive. See ***Ferro***, 195 Ill.App.3d at 286 (coercion); ***People v. Branch***, 123 Ill.App.3d 245, 252 (1st Dist. 1984) (coercion); ***People v. Fields***, 285 Ill.App.3d 1020, 1030 (1st Dist. 1997) (no coercion); ***People v. McCoy***, 405 Ill. App. 3d 269, 277 (1st Dist. 2010) (no coercion).

> **NOTE:** The manner of asking the jury if a verdict could be reached in 45 minutes was not coercive in ***People v. Sanders***, 37 Ill.App.3d 236, 242 (1st Dist. 1976), nor was telling the jury that "a verdict must be reached by 11 p.m., or everybody is going home" in ***People v. Gregorich***, 71 Ill.App.3d 251, 255 (5th Dist. 1979).

G. Verdicts

1. General Procedure for Receiving Verdicts

The manner in which the court receives and announces the jury's verdict is within the court's discretion.

The verdict(s) may be announced by the court, the clerk or jury foreperson but should always be tendered to the court for its review before announcement to insure that one verdict form as to each charge has been signed by all jurors. Issues

needing clarification or further deliberation such as unsigned verdict forms, additional writing on verdict forms or crossed out signatures on other verdict forms should be addressed with the foreperson of the jury at this time.

2. Inconsistent Verdicts

Inconsistent Acquittals Stand: A jury may render both logically and legally inconsistent verdicts of *guilty and not guilty*, as an inconsistent guilty verdict may be a product of lenity. ***People v. Jones***, 207 Ill.2d 122, 133 (2003); *see also* **People *v. McCoy***, 207 Ill.2d 352, 357 (2003) (applying ***Jones*** to bench verdicts).

Inconsistent Guilty Verdicts Return to Jury: If the jury returns inconsistent guilty verdicts (as by convicting of 2 offenses with different mental states), the court must "refuse the verdicts and send the jury back to deliberate because the judge would not know which of the two verdicts to enter." ***Jones*** at 135.

3. General and Specific Verdict Forms

Generally, if there are multiple theories and counts of murder and one general verdict form is submitted, defendant is presumed to be convicted of the most serious offense. ***People v. Davis***, 231 Ill.2d 349, 358 (2008).

However, where specific findings by the jury on the offenses charged could result in different sentencing consequences favorable to defendant, the court must provide specific verdict forms upon defendant's request. ***People v. Smith***, 233 Ill.2d 1, 23 (2009). The remedy for the failure to do so is to presume that the general verdict is a finding of guilty on the least culpable offense. ***Smith***, 233 Ill.2d at 28.

4. Polling of Jury

Defendant's right to poll the jury is absolute. ***People v. McGhee***, 2012 IL App (1st) 093404, ¶ 15. The purpose of polling is "ensure that the verdict is in fact unanimous" before it is pronounced and recorded in open court. ***Id.***

The court should inquire whether counsel requests polling or at least give both sides a reasonable opportunity to ask to poll the jury. It can be error to: (1) Fail to give defendant a reasonable time to make the request, (2) Ignore a juror's ambiguous response, or (3) Fail to poll the jury after a timely request. ***Id***. at ¶ 16. An ambiguous response requires giving the juror an opportunity to repudiate the verdict. ***People v. Preston***, 76 Ill.2d 274, 286 (1979) (court properly inquired when juror said "compromise").

Jurors must be polled individually, asking of each, "Was this then and is this now your verdict?" If one or more jurors repudiate the verdict, the court must either: (1) Direct the jury to deliberate further; or (2) Discharge the jury. ***People v. Kellogg***, 77 Ill.2d 524, 528-29 (1979).

H. Discharge of Jury

1. Collection / Destruction of Notes

725 ILCS 5/115-4(n) provides:

The jurors are entitled to take notes during trial, and the sheriff of the county in which the jury is sitting shall provide them with writing materials. Such notes shall remain confidential and shall be destroyed by the sheriff after the verdict has been returned or a mistrial declared.

2. Media, Disclosure Instructions

The court should have a policy as to media access and any potential for cameras or media coverage of persons including jurors exiting courtroom, and protection of jurors from media, with further admonition that jurors will have the right to speak to others, or to choose not to speak regarding the case following discharge.

3. Providing Appropriate Security

The court may determine that jurors be excused before others are permitted to leave courtroom, or that the jurors may remain sequestered for safe departure after trial. In some cases, a secured escort from the building may be appropriate.

PART III – POST-TRIAL PROCEEDINGS

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3.1 Motions for New Trial

A. Timeliness

1. Thirty Day Mandatory Filing Deadline

   A written motion must be filed within thirty days following the verdict or finding of guilty. **725 ILCS 5/116-1**. The filing deadline is mandatory. ***People v. Segoviano***, 189 Ill. 2d 228, 243 (2000).

2. Trial Court Discretion

   The trial judge is not bound by the filing deadline and has the discretion to hear any motion for a new trial that is filed before sentencing, even if it is untimely. ***People v. Harper***, 347 Ill. App. 3d 499, 502 (5th Dist. 2004).

3. ***Krankel*** exception
   A *pro se* post-trial motion alleging the ineffective assistance of counsel that is filed at any time ***before*** a notice of appeal is filed, regardless of whether there is a counseled post-trial motion pending, is timely and triggers the requirement to conduct a preliminary ***Krankel*** inquiry on counsel's performance. *See* Section 3.3 on ***Krankel*** procedure.

   The trial court has no authority to hear such motions that are filed ***after*** the notice of appeal has been filed. ***People v. Darr***, 2018 IL App (3d) 150562, ¶ 93. And the filing of such a motion after the notice of appeal does not render the notice of appeal ineffective. ***People v. Bell***, 2018 IL App (4th) 151016, ¶ 32.

   NOTE: Even if the trial court provides improper appeal admonitions, it loses jurisdiction to hear untimely post-trial motions. ***People v. Moore***, 2015 IL App (5th) 130125, ¶ 30.

B. Continuance of Filing Deadline

   The trial court should grant a defense motion to extend the 30-day deadline that requests a reasonable time to prepare

and file a motion for new trial. ***People v. Gambino***, 12 Ill. 2d 29, 39 (1957).

C. Forfeiture of Appellate Issues

The failure to file a timely motion for new trial in writing forfeits all issues on review save constitutional claims properly raised at trial, the sufficiency of evidence, and plain error. ***People v. Enoch***, 122 Ill. 2d 176, 190 (1988).

D. Grounds for Granting a New Trial

1. Newly Discovered Evidence

Motions for a new trial based on newly discovered evidence are not looked upon favorably and should be subject to the closest scrutiny. ***People v. Williams***, 295 Ill. App. 3d 456, 462 (1st Dist. 1998). Newly discovered evidence warrants a new trial when the following four requirements are met:

(a) **Timing of Discovery**: it has been discovered since trial;

(b) **No Lack of Diligence**: it is of such character that it could not have been discovered prior to trial by the exercise of due diligence;

(c) **Non-cumulative**: it is material and not merely cumulative; and

(d) **Conclusive Character**: it is of such a conclusive character that it will probably change the result on retrial. ***People v. Williams***, 295 Ill. App. 3d 456 (1st Dist. 1998); ***People v. Gonzalez***, 407 Ill. App. 3d 1026, 1036–37 (2d Dist. 2011) (codefendant's affidavit that defendant did not participate in victim's murder was not of such conclusive character that it would probably change the result on retrial where trial court found codefendant's testimony entirely incredible).

It is defendant's burden to rebut the presumption that the original verdict is correct and to demonstrate no lack of diligence. ***People v. Cunningham***, 267 Ill. App. 3d 1009, 1017 (1st Dist. 1994).

Recantation testimony is ordinarily not a sufficient basis for a new trial. ***People v. Woodrome***, 237 Ill. App. 3d 220, 234 (5th Dist. 1992).

2. Impeachment of Verdicts / Juror Misconduct

(a) Impeachment of Verdict ordinarily not permitted

A jury verdict may not be impeached by the affidavit of the jurors describing the process by which the verdict was reached. ***People v. Simms***, 192 Ill. 2d 348, 369 (2000). Evidence of motive, method, or process of jury deliberations is inadmissible to impeach a verdict. ***People v. Davis***, 233 Ill. 2d 244, 266 (2009).

(b) Racial Stereotype or Animus Exception

In ***Peña-Rodriguez v. Colorado***, 580 U.S. ___, 137 S.Ct. 855, 869 (2017), the United States Supreme Court held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury guarantee."

(c) Juror Misconduct

A juror should be able to testify "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." However, not every instance in which "extraneous or

unauthorized information reaches the jury results in error so prejudicial as to require reversal." ***People v. Holmes***, 69 Ill. 2d 507, 516–519 (1978). *See* ***People v. Hobley***, 182 Ill. 2d 404, 459–461 (1998) (restaurant patrons made statements to jurors implying the jury should convict, so defendant was entitled to a hearing on his post-conviction petition alleging prejudicial influence). *See also* ***People v. Williams***, 209 Ill. 2d 227, 241 (2004) (prejudice, requiring a hearing on outside influence, was not established by affidavit from juror that another juror had said she spoke about the case with her husband).

NOTE: **Illinois Rule of Evidence 606(b)** precludes inquiry into the deliberative process of a juror but permits inquiry as to extraneous prejudicial information, outside influence, or mistake made in executing the verdict form. Any questions of intra-jury influence or misconduct are at the discretion of the trial judge. ***People v. Runge***, 234 Ill. 2d 68, 104 (2009).

3. Ineffective Assistance of Counsel—*see* Section 3.3 below.

4. Conflict of Interest of Defense Counsel

It is not a per se conflict of interest for trial counsel to argue his own ineffectiveness in a post-trial motion. However, if counsel "fails to adequately assert an ineffective assistance of counsel claim on the defendant's behalf and the record indicates his failure to do so was influenced by counsel's reluctance to argue his own ineffectiveness, the defendant has been denied his constitutional right to conflict-free counsel." ***People v. Garcia*****,** 2018 IL App (5th) 150363 ¶ 48.

3.2 Motion in Arrest of Judgment

A motion in arrest of judgment challenges whether the charging instrument properly charged an offense or whether the trial court lacked jurisdiction. It must be filed within thirty days of the guilty verdict. The statute provides that the motion shall be denied if the defendant was sufficiently

apprised of the offense with enough specificity to allow him to prepare a defense and allow pleading a resulting conviction as a bar to future prosecution for the same conduct. **725 ILCS 5/116-2**. *See* ***People v. Herman***, 347 Ill. App. 3d 525, 532 (1st Dist. 2004).

3.3 *Pro se* Post-Trial Motion Claiming Ineffective Assistance of Trial Counsel—*Krankel* Hearings

The trial court is not required to automatically appoint new counsel when a defendant brings a *pro se* post-trial motion alleging the ineffective assistance of counsel. Instead, the court should examine the factual basis of the claim to determine whether the appointment of counsel is necessary. ***People v. Krankel***, 102 Ill. 2d 181 (1984). If the claim lacks merit or pertains to trial strategy, new counsel is not required, and the motion should be denied. If the motion shows possible neglect, new counsel should be appointed to argue the claim of ineffectiveness.

People v. Bates*,* 2019 IL 124143, ¶ 32–33, post-trial comments by defendant's counsel (and not defendant) that counsel might have handled one aspect of evidence differently had he known more about the issue, not sufficient to trigger ***Krankel*** inquiry. The court went on to say that such ought not to be undertaken, as it might reveal or breach attorney-client privilege.

People v. Custer*,* 2019 IL 123339, ¶ 42, a ***Krankel*** hearing is not required when a defendant makes a complaint about counsel's performance in a post-conviction proceeding.

People v. Reed*,* 2018 IL App (1st) 160609, ¶ 51–52, if new counsel is appointed after a ***Krankel*** hearing, the new counsel's subsequent post-trial motion must address defendant's initial claim of ineffective assistance of original counsel.

People v. Horman*,* 2018 IL App (3d) 160423, ¶ 30–31, when defendant sends the trial court letters complaining of trial counsel's performance, simply referencing the letters

and nature of claim is not sufficient to resolve ***Krankel***–type claim of ineffectiveness.

A. Scope of Inquiry

1. Timing: *See* Section 3.1(A)(3)—prior to filing of notice of appeal.

2. Form and Sufficiency of Motion: The motion can be oral or written. No specific wording is required, but the complaint must be clear. The failure to mention counsel can render a complaint deficient. ***People v. Schnoor***, 2019 IL App (4th) 170571, ¶ 69, post-trial *pro se* motion which does not complain about counsel does not trigger ***Krankel***.

   People v. Thomas, 2017 IL App (4th) 150815, ¶ 31 ("defendant must at least mention his attorney"); *see also* ***People v. Taylor***, 237 Ill. 2d 68, 77 (2010) (implied dissatisfaction with counsel insufficient to raise claim). An express reference to ineffective assistance of counsel will suffice. ***People v. Ayres***, 2017 IL 120071, ¶ 21; *see also* ***People v. Washington***, 2015 IL App (1st) 131023, ¶ 13 (reference during allocution sufficient).

3. ***Krankel*** Hearing: Once the issue of ineffective assistance of counsel is deemed raised, the Court's preliminary inquiry into the claim should be conducted as follows:

   (a) Court inquiry: The judge may inquire of both defendant and defense counsel regarding the underlying facts at issue. ***People v. Jolly***, 2014 IL 117142, ¶ 30. Further, inquiry is non-adversarial, the state should neither question defendant or defense counsel nor argue against the allegations. ***Jolly***, at ¶ 40.

   (b) A trial court may consider both the facts and legal merits of a defendant's *pro se* post-trial allegations of ineffective assistance of counsel at the preliminary inquiry stage. ***People v. Roddis***, 202 IL 124352.

(c) Determination: If the judge finds that there is some factual basis for the claim, new counsel should be appointed to represent the defendant regarding the claim. If no factual basis is found, it is not necessary to appoint counsel, and the claim should be denied. *See* ***People v. Reveles-Cordova,*** 2019 IL App (3d) 160418, 421–422, (remanded for the trial judge to address the defendant's subsequent claims of ineffective assistance of counsel).

NOTE: In light of ***Roddis***, the judge may now consider both the factual and legal merits of defendant's claim.

(d) Forfeiture: It is incumbent on the defendant to bring the allegations of ineffective assistance of counsel to the court's attention to avoid forfeiture. However, the message can be delivered in a variety of ways. ***People v. Downing***, 2019 IL App (1st) 170329, ¶ 40, trial judges should conduct a preliminary ***Krankel*** hearing whenever a defendant's post-trial allegation of ineffective assistance of counsel is brought to the trial court's attention in open court. In this case, the defendant raised claims of ineffective assistance of counsel in his presentence investigation which the State brought to the court's attention at the sentencing hearing.

A defendant's omission of a claim in a post-trial ***Krankel*** hearing does not constitute a positive rebuttal of a claim in a postconviction proceeding. ***People v. McGee***, 2021 IL App (2d) 190040.

(e) Trial counsel's admission: In the absence of a *pro se* complaint, defense counsel's admission of ineffective assistance does not trigger the duty to conduct a ***Krankel*** inquiry. ***People v. McGath***, 2017 IL App (4th) 150608 ¶ 51. ***People v. Bates***, 2018 IL App (4th) 160255, ¶ 102.

(f) ***Krankel's*** application to private counsel: ***People v. Pecoraro***, 144 Ill. 2d 1, 15 (1991), seemingly held that ***Krankel*** is inapplicable to complaints against private counsel. However, the appellate court has declined to apply a blanket prohibition on private counsel ***Krankel*** claims. ***People v. Mourning***, 2016 IL App (4th) 140270, ¶ 20 (claim should be addressed under ***Krankel*** if defendant desires new counsel and cannot afford same); ***People v. Willis***, 2013 IL App (1st) 110233.

B. Pre-Trial Complaints of Ineffective Assistance

Absent a claim of actual conflict of interest or other such allegation amounting to a complete deprivation of counsel, which do not require a showing of possible prejudice, the trial court is not obligated to address a *pro se* allegation of ineffective assistance of counsel prior to trial. ***People v. Jocko***, 239 Ill. 2d 87 (2010). However, at the conclusion of trial, the court should, pursuant to ***Krankel***, address any remaining pre-trial ineffectiveness claims that required a showing of prejudice. ***People v. Washington***, 2012 IL App (2d) 101287, ¶ 22.

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3.4 Pre-Sentence Investigation Reports

A. Requirement of PSI in Felony Cases

A written pre-sentence report is statutorily mandated for felony sentencing. The report can be waived in all cases but sex offenses. Waiver is allowed if both sides agree to a specific sentence and the court makes a finding of defendant's criminal or delinquent history, including prior sentences of probation, periodic imprisonment, conditional discharge, or imprisonment. **730 ILCS 5/5-3-1**; ***People v. Bryant***, 2016 IL App (5th) 140334, ¶ 49. Absent an agreed sentence, the parties have no authority to waive the PSI. ***People v. Jennings,*** 364 Ill.App.3d 473, 484 (1st Dist. 2005). However, in ***People v. Sophanavong***, 2020 IL 124337, the court's failure to strictly comply with the requirements of **730 ILCS 5/5-3-1** did not require a remand for a new sentencing hearing. The defendant waived the issue by pleading guilty and forfeited the claim by failing to raise it in a post-plea motion within 30 days of the imposition of sentence as required by **Ill. Sup. Ct. R 604(d)**.

The statute provides that the PSI "shall be in writing and shall be filed by the clerk in the respective cases." **730 ILCS 110/12(3)**.

The victim or certain other family or household members of the victim may submit information to the preparer of the presentence report about the effect the offense has had on the victim and the person. **725 ILCS 120/4.5**.

B. Requirement of Sex Offender Evaluation

The PSI must include a sex offender evaluation when probation is a possible sentence both in felony sex offenses and in any felony that is "sexually motivated," as defined in the Sex Offender Management Board Act. The PSI "shall not" include a sex offender evaluation in cases involving a mandatory prison sentence. **730 ILCS 5/5-3-2(b-5)**.

NOTE: The statute does not grant a trial judge discretion to order an evaluation in non-probationable cases and any resulting potential error is an open issue. Indeed, in ***People v. Hillier***, 237 Ill. 2d 539, 547 (2010), the Court held that defendant forfeited the argument that the use of a sex offender evaluation in his non-probationable case resulted in a Fifth Amendment violation.

C. Requirement of DUI Evaluation

A substance abuse/risk evaluation, performed by a DHS-approved provider, is required in a DUI sentencing. **625 ILCS 5/11-501.01(a)**, **730 ILCS 5/5-4-1(a)**, **77 Ill. Adm. Code 2060.503**, as amended at **25 Ill. Reg. 11063**.

The statutory requirement is permissive, not mandatory. Sentencing without an evaluation may be acceptable in limited circumstances, *e.g.*, where defendant exerts a logical and bona fide claim against self-incrimination, or where defendant refuses to submit to evaluation in an attempt to thwart discovery or sentencing. ***People v. Baker***, 123 Ill. 2d 233, 244 (1988). ***Baker*** suggests that, in such an instance, the trial judge may impose sentence but stay implementation or allow defendant to obtain an evaluation and move to reconsider within thirty days, thus providing defendant a final chance to complete the process.

3.5 Sentencing Hearing—730 ILCS 5/5-4-1

A. Aggravation Evidence

730 ILCS 5/5-5-3.2 lists specific aggravating factors that "shall be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence."

The court may also consider non-statutory aggravating factors. ***People v. Shatner***, 174 Ill. 2d 133, 160 (1996) (history of drug abuse); ***U.S. v. Grayson***, 438 U.S. 41 (1978), *superseded by statute as stated in* ***Barber v. Thomas***, 560 U.S. 474 (2010) (perjury, lack of remorse, continued protestations of innocence may be considered). *See also* **720**

ILCS 570/407, **408**, **411** (for special aggravating/extending factors in certain drug cases).

With regard to non-statutory factors, the trial court is free to determine the positive or negative implication of same. For instance, the trial court may consider the defendant's dismal childhood past, mental illness and unrelenting addictions as aggravation, rather than mitigation, in that it shows "that he cannot conform his behavior to societal norms." ***People v. Brunner***, 2012 IL App (4th) 100708, ¶ 66; *see also* ***People v. Munson***, 171 Ill. 2d 158, 198 (1996) (that defendant did not know what evidence the judge would consider aggravating is not a due process violation).

However, when sentencing individuals under the age of 18, the court must consider the ***Miller*** factors listed in **730 ILCS 5/5-4.5-105** only as mitigation. Factors such as the defendant's family and home environment cannot be considered as aggravating factors. ***People v. Royer***, 2020 IL App (3d) 170794.

The trial court is not permitted to consider the particular beneficent traits of the victim, such as status as a war veteran, asset to the community, or valued family member when imposing a sentence. ***People v. Mauricio***, 2014 IL App (2d) 121340 ¶ 19.

The trial court should not consider victim impact statements referencing any incident other than that for which the defendant is being sentenced. Facts of prior crimes may be considered, just not the impact of those crimes on the victims. ***People v. Raney***, 2014 IL App (4th) 130551, ¶¶ 43–45.

The trial court should not consider bare arrests or pending criminal charges against a defendant in aggravation at sentencing. ***People v. Minter***, 2015 IL App (1st) 120958 ¶ 148. Presumably, the court could consider relevant and accurate (*i.e.*, reliable) evidence of the defendant's other criminal activity if presented by the state at the sentencing hearing.

Factors inherent in the crime charged may not be relied upon in aggravation. ***People v. Martin***, 119 Ill. 2d 453, 459 (1988) (error to consider as aggravating factor that defendant caused serious harm to victim of voluntary manslaughter). When age is a necessary element, it is precluded as an aggravating factor. ***People v. White***, 114 Ill. 2d 61, 66 (1986). *See also* ***People v. Pearson***, 324 Ill. App. 3d 622, 628 (4th Dist. 2001) (age not an element of armed robbery - and therefore could be used as an aggravating factor at sentencing).

Defendant has the right to refuse to participate in the presentence investigation, and his refusal may not be considered an aggravating factor. ***People v. Maggio***, 2017 IL App (4th) 150287 ¶ 49.

A trial court may not penalize a defendant for exercising his right to stand trial. However, it must be "clearly evident" in the record that the harsher sentence resulted from the defendant's choice to go to trial. The mere fact that a defendant is given a greater sentence than that offered prior to trial does not support an inference that the harsher sentence was a punishment for demanding trial. ***People v. Jones-Beard,*** 2019 IL App (1st) 162005 ¶ 26 (15-year sentence for aggravated vehicular hijacking and armed robbery was not an impermissible "trial tax" after a 7-year plea offer).

B. Mitigation Evidence

730 ILCS 5/5-5-3.1 lists specific mitigating factors that "shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment." When imprisonment is imposed, the factors shall be considered in mitigation of the term.

730 ILCS 5/5-4.5-105 codifies the factors that should be taken into consideration under ***Miller*** when sentencing an individual under the age of 18 at the time of the offense. The factors may only be used in mitigation, not aggravation. See ***People v. Royer***, 2020 IL App (3d) 170794.

People v. Heider, 231 Ill. 2d 1, 20 (2008), held that the trial court improperly considered the defendant's "mental retardation as an aggravating factor" in sentencing. The Court noted that the legislature listed "mental retardation" as a mitigating, not aggravating, factor in the statutes. However, while a court cannot impose a longer sentence due to a defendant's mental limitations, it may consider future dangerousness that results from same, such as lack of impulse control. ***Heider***, 231 Ill. 2d at 22–23. *See also* ***People v. Coty***, 2020 IL 123972.

730 ILCS 5/5-4-1(c-1.5) notes that the court, in imposing a sentence for an offense that requires a mandatory minimum sentence of imprisonment, may instead sentence the defendant to probation, conditional discharge, or a lesser term of imprisonment it deems appropriate if: (1) the offense involved the use or possession of drugs, retail theft, or driving on a revoked license due to unpaid financial obligations; (2) the court finds that the defendant does not pose a risk to public safety; and (3) the interest of justice requires imposing a term of probation, conditional discharge, or a lesser term of imprisonment. The court must state on the record its reasons for imposing the lesser sentence.

> **NOTE:** An attempt murder defendant shall be sentenced as a Class 1, rather than a Class X, felon if he proves by a preponderance of evidence at sentencing that he acted under a sudden and intense passion resulting from serious provocation by the victim or another and, had the victim died, his death would have been negligently or accidentally caused. **720 ILCS 5/8-4(c)(1)(E).** "Serious provocation," as defined in the second degree murder statute, **720 ILCS 5/9-2(b)**, is "conduct sufficient to excite an intense passion in a reasonable person provided, however, that an action that does not otherwise constitute serious provocation cannot qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim's sexual orientation as defined in Section 1-103 of the **Illinois**

Human Rights Act [775 ILCS 5/1-103]."

C. Allocution

The court must afford defendant the opportunity to make a statement in his own behalf. **730 ILCS 5/5-4-1(a)(6)**.

The defendant may not be required to speak, nor may the court draw an adverse inference from the defendant's silence. ***Mitchell v. United States***, 526 U.S. 314, 324 (1999). However, the court may question the defendant. ***People v. Iseminger***, 202 Ill. App. 3d 581, 599 (4th Dist. 1990). Though error, a trial judge's failure to invite allocution may be harmless. ***People v. BoClair***, 225 Ill. App. 3d 331, 336 (1st Dist. 1992).

D. Victim Impact Statement

1. Who May Present a Statement

A victim has the right to address the court at a sentencing hearing in a case of violent crime as defined by **725 ILCS 120/3(c)**. The right applies to cases disposed of by plea agreement in which the defendant was charged with a violent crime but pleads guilty to a non-violent crime. The court must consider the statement at sentencing. **725 ILCS 120/6(a)**.

The court has the discretion to allow the presentation of a statement by a person other than the victim who has been impacted by a violent crime. If allowed, the court must consider the statement at sentencing. **725 ILCS 120/6(a).** *See also* ***People v. Hestand***, 362 Ill. App. 3d 272, 281 (2005) (Trial court did not abuse its discretion when it allowed two victim impact statements, one from the victim and one from the victim's mother, to be admitted at sentencing). *Contrast with* ***People v. Larson***, 2022 IL App (3d) 190482 in which the trial court erred in allowing 16 victim impact statements at sentencing.

A victim has the right to present a statement at a hearing to determine whether the defendant needs mental health services. The court may also allow a non-victim who was

impacted by the crime to present a statement. The court may consider the statement only as it relates to specific findings noted in the statute. **725 ILCS 120/6(a-5)**.

In cases of vehicular crimes that resulted in great bodily harm or death, the victim, the victim's representative, or the representative of the deceased is entitled to notice of the sentencing hearing. The statute provides that if one or more representatives of the injured or deceased person is present at sentencing, the court has the discretion to permit one or more of the representatives to present a statement. The Court must consider the statements at sentencing. **725 ILCS 120/6(a-1)**.

The above rights apply to delinquency proceedings. **725 ILCS 120/6(c)**.

2. No Written Requirement

The court must allow the victim to present an oral or written statement. If the victim is present at the hearing and asks to present an oral statement, the court must allow him to do so. An oral statement may consist of the victim or his representative reading a written statement.

A non-victim statement may be oral or written.

A written impact statement may be prepared by the victim and submitted to the Office of the State's Attorney at any time. The Court must consider that written statement during its consideration of aggravation and mitigation in plea proceedings under **Supreme Court Rule 402**. **725 ILCS 120/6(b)**.

3. Appellate Relief Precluded

The Illinois Constitution and the statute prohibit a defendant from seeking appellate relief on the ground that a crime victim was allowed to exercise their right to present a statement. **Ill. Const. 1970, art. I, § 8.1(d)**; **725 ILCS 120/9**.

E. Sentencing Hearing in Sex Offenses

The sentencing hearing in sex offenses or sexually motivated offenses must be set at the time of the guilty verdict or finding of guilt and conducted within 65 days of same. **730 ILCS 5/5-4-3.1**. A continuance may be granted upon the filing of a written motion. The victim must be notified of the request for a continuance and allowed to address the court on the impact of a continuance on the victim's well-being.

F. Collateral Requirements at Sentencing

1. FOID

If a defendant is found guilty but mentally ill, the judge must direct the circuit clerk to "immediately" notify the FOID Department of the Illinois State Police. **430 ILCS 65/8.1(b)**. It is arguable that notification is required at the time of the verdict, rather than sentencing, though a conviction does not exist until sentence is imposed.

> **NOTE:** The notification requirement applies to other instances in which someone is adjudicated as a mentally disabled person, which is defined by statute. *See* **430 ILCS 65/8.1(b)**, **65/1.1** (*inter alia*, not guilty by reason of insanity, unfit to stand trial, SVP or SDP).

2. Offender Registration

The requirement to register as a sex offender under **730 ILCS 150/1** ***et. seq*** is statutory and is not an obligation imposed by the trial court. ***People v. Bingham***, 2018 IL 122008, ¶ 18.

Pursuant to the Murder and Violent Offender Against Youth Registration Act, the trial judge must inform defendants who are released on probation or discharged upon payment of a fine for offenses defined in the statute of certain specific registration obligations, under this act or the Sex Offender Registration Act, and certain specific consequences. **730 ILCS 154/20**. Further, under **730 ILCS 154/86**, the trial

judge appears to have an obligation at sentencing to determine if the crime was sexually motivated so that it can be determined under which act the defendant must register.

3. DNA

A convicted felon and certain other qualifying offenders must submit a DNA sample to the state database. **730 ILCS 5/5-4-3**. While the statute, found in the sentencing code, refers to the issuance of a court order for DNA sampling, it does not expressly state that such order must be imposed at sentencing.

See Appendix for "Suggested Script for Sentencing Hearing" on page A-142.

3.6 Sentencing Considerations

A. One Act, One Crime Doctrine

1. General Rule

A defendant found guilty of multiple offenses carved from the same physical act or found guilty of both a lesser and greater offense, as tested by the "abstract elements" approach, may be sentenced only on the greater charge. ***People v. King***, 66 Ill. 2d 551 (1977).

The one-act one-crime rule applies in cases brought under the Juvenile Act of 1987, **705 ILCS 405/5-101 *et seq.***; ***In re Samantha V.***, 234 Ill. 2d 359, 373 (2004).

2. Same Physical Act; Series of Acts

If a defendant commits a series of similar acts that may constitute a crime, such as a series of punches, the state may charge separate offenses and seek multiple convictions on the same—*i.e.* multiple battery charges. However, if the state in its charging instrument treats multiple acts as a single course of conduct, and thus fails to put the defendant on notice that it is seeking multiple convictions, it may not ask the court to justify separate convictions premised on each

individual act. ***People v. Crespo***, 203 Ill. 2d 335, 345. (2001).

3. Identifying a Lesser-Included Offense

When the same physical act is not utilized to justify multiple convictions, the one act, one crime doctrine applies only when one of the charges is a lesser-included offense of the other.

The Illinois Supreme Court has settled on the "abstract elements" approach to determine whether there is a lesser-included offense for this purpose. ***People v. Miller***, 238 Ill. 2d 161, 173 (2010). The Court expressly disavowed the "charging instrument" approach and the "factual" or trial "evidence" approach to the analysis.

Under the "abstract elements" approach, the court must compare the statutory elements of the two offenses. If all of the elements of the first offense are present in the elements of the second offense, the first offense is a lesser-included of the second.

> **NOTE**: The Court noted that the "charging instrument" approach remains applicable to identifying whether a jury should be instructed on a non-charged lesser-included offense at trial. *See* Section 2.5.
>
> Example: Home invasion and residential burglary convictions did not violate the one-act, one-crime rule because they were not carved from the same physical act and shared only the act of entry; home invasion required the additional act of causing injury. ***People v. Price***, 2011 IL App (4th) 100311, ¶ 30.

4. Determining Which Charge to Impose Sentence Upon

When multiple charges are based on the same physical act, sentencing should be imposed on the most serious offense. The court, rather than the state, determines which of two charges is more serious for the purpose of the one-act one-crime rule. ***People v. Artis***, 232 Ill. 2d 156, 176–77 (2009).

In determining same, the court must examine the legislative intent as expressed in the plain language of the statutes, the classification of each, the minimum and maximum sentence or extended sentence of each, whether either is probationable, the applicable MSR period of each, and required mental state required of each. ***People v. Johnson***, 237 Ill. 2d 81, 97–100 (2010).

In ***Johnson***, the Court vacated a conviction for unlawful possession of a weapon by a felon finding that the legislature intended it to be a less serious offense than aggravated unlawful use of a weapon because it carries a lower felony classification, is probationable, and is subject to a shorter period of mandatory supervised release. This was found to be the case despite the fact that UUW carried a greater potential maximum sentence of ten years, rather than seven years for aggravated UUW. ***Johnson***, 237 Ill. 2d at 97–100.

Where the charges have the same classification, the court may determine the more serious offense by considering which requires proof of a greater or higher mental state, but the court may not consider the effect of aggravating circumstances assignable to each charge. ***Artis***, 232 Ill. 2d at 171.

Further, if the charges carry the same penalty, the offense that requires a greater level of proof is the more serious offense. ***People v. Bailey***, 409 Ill. App. 3d 574, 597 (1st Dist. 2011).

5. Examples of Cases Wherein Doctrine Applies

In ***People v. Lee***, 213 Ill. 2d 218, 229 (2004), the Court compared classification and sentencing parameters and found second-degree murder to be a less serious offense than aggravated battery with a firearm. Interestingly, the Court declined to find second-degree murder to be the more serious offense in that case simply because the trial judge imposed a greater sentence on that charge. ***Lee***, 213 Ill. 2d at 229.

In the absence of a statutory provision to the contrary, simultaneous possession of two handguns and their

ammunition could not support multiple convictions. ***People v. Carter***, 213 Ill. 2d 295 (2004).

> **NOTE**: the UUW statute was later amended to add "The possession of each firearm or firearm ammunition in violation of this section constitutes a single and separate violation". **720 ILCS 5/24-1.1(e)**. Contrast with the Armed Habitual Criminal Act, **720 ILCS 5/24-1.7(a)**.

The continuous possession of a weapon throughout the series of three armed robberies supports only one conviction for UUW by a felon. ***People v. McFadden***, 2014 IL App (1st) 102939 ¶ 29, *reversed in part on other grounds*, 2016 IL 117424.

A defendant could be convicted of only one of four counts of failing to report an accident that resulted in one death and three injuries, because all counts arose from a single physical act. ***People v. Patrick***, 406 Ill. App. 3d 548, 560 (2010), *affirmed on other grounds*, 2011 IL 111666.

Where defendant was found guilty of multiple counts of a single aggravated discharge of a firearm in the direction of a vehicle occupied by two police officers, only one conviction stood. ***People v. Hardin***, 2012 IL App (1st) 100682 ¶ 37.

Comparison to the underlying felony is inappropriate in felony murder cases. To be a lesser-included, the offense must have an equal or lesser intent. Since felony murder does not require intent, an intentional offense such as battery cannot be a lesser offense. ***In re Dionte J.***, 2013 IL App (1st) 110700 ¶ 67.

Robbery conviction vacated where it was the same robbery used as the predicate offense for aggravated criminal sexual assault. ***People v. Gillespie***, 2014 IL App (4th) 121146, ¶ 23–25.

Aggravated battery with a firearm is a lesser-included offense of attempt first degree murder and therefore subject

to the one-act-one-crime doctrine. ***People v. Temple***, 2014 IL App (1st) 111653 ¶ 93.

6. Statutory Provisions

The Unlawful Use of Weapon by a Felon statute authorizes separate convictions for possession of a firearm and possession of the ammunition inside the firearm. **720 ILCS 5/24-1.1(e)** (possession of each firearm or ammunition "constitutes a single and separate violation"); ***People v. Almond***, 2015 IL 113817, ¶ 36.

The armed habitual criminal statute, **720 ILCS 5/24-1.7(a)**, does not permit multiple convictions for the simultaneous possession of multiple firearms. ***People v. Davis***, 408 Ill. App. 3d 747, 752 (1st Dist. 2011).

Though possession of multiple firearms without a FOID card supports only one conviction, separate convictions for possession of a firearm(s) and ammunition without a card are allowed under the FOID Act. **430 ILCS 65/2(a); *People v. Sotelo***, 2012 IL App (2d) 101046, ¶ 10.

Despite the common physical act of driving, the Vehicle Code provides that the penalty for DWLR is in addition to the penalty for aggravated DUI, so a conviction for both may stand. ***People v. Nunez***, 236 Ill.2d 488, 496 (2010). Further, DWLR is not a lesser included offense of Agg. DUI because license revocation enhances the DUI sentence from a misdemeanor to a felony but is not an element of the DUI. ***Nunez***, 236 Ill. 2d at 496.

The child pornography statute, **720 ILCS 5/11-20.1(a-5)**, provides that possession of each individual film, videotape, photograph, or other similar visual reproduction or depiction by computer of child pornography constitutes a single and separate violation.

B. ***Apprendi*** Compliance

1. General Rule

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

2. Statutory Provisions

Illinois enacted **725 ILCS 5/111-3(c-5)** and **(d)** in response to ***Apprendi***. Consistent with ***Apprendi***, the statute requires proof beyond a reasonable doubt to the trier of fact of a sentencing enhancement. It also has a notice requirement. In sum, it sets forth:

> if an alleged fact (other than the fact of a prior conviction) is not an element of the offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum, the alleged fact must be: (1) included in the charging instrument or otherwise provided to the defendant in writing before trial; (2) submitted to the trier of fact as an aggravating factor; and (3) proved beyond a reasonable doubt.

3. **Supreme Court Rule 451(g)**

The Rule provides that the trial judge has the discretion to conduct either a single or a bifurcated trial on the charge and the sentencing enhancement. A bifurcated trial may be ordered only on motion of a party, and only after a pre-trial hearing where the court determines that proof of the sentencing enhancement factor is not relevant to the question of guilt, or that undue prejudice outweighs the factor's probative value. If the defendant waives jury for the guilt phase, a bench trial shall also be held on the second phase. If the guilt phase was before a jury, the enhancement phase must be held before the same jury, unless the defendant tenders a jury waiver for that portion of the proceeding.

4. Examples of applicability of ***Apprendi***

   Determination that murder was brutal and heinous, in order to impose extended-term sentence, must be made by the finder of fact and proved beyond a reasonable doubt. ***People v. Swift***, 202 Ill.2d 378, 392 (2002).

   The facts triggering the 15-20-25 to Life sentencing add-ons for firearm use or possession during certain offenses must be alleged in the charging document and proven beyond a reasonable doubt. ***People v. Daniel***, 2014 IL App (1st) 121171, ¶ 67–70; **730 ILCS 5/5-8-1(a)(1)(d).**

5. Examples of non-applicability of ***Apprendi***

   The ***Apprendi*** rule does not address any notice requirements of the charging instrument—unlike **725 ILCS 5/111-3(c-5)**—or speak to indictment-related issues. ***People v. Robinson***, 232 Ill. 2d 98, 111 (2008).

   > **NOTE:** As relates to the notice requirement of **section 111-3(c-5)**, the charge of first degree murder provides sufficient notice of any non-charged lesser-included offense. ***Robinson***, 232 Ill. 2d at 113 (no statutory violation in murder indictment when conviction was entered on non-charged lesser-included involuntary manslaughter, which was enhanced to a class 2 felony because the victim was a family member).

   Whether probation would deprecate the seriousness of the offense and be inconsistent with the ends of justice is a sentencing issue, but it is not a factual determination subject to ***Apprendi***. ***People v. Crawford***, 2011 IL App (2d) 100533, ¶ 20.

   The fact of a prior juvenile adjudication need not be alleged in the charging instrument or submitted to the jury in order for it to be used to increase the penalty of a crime. ***People v. Jones***, 2015 IL App (3d) 130053, ¶ 38.

Factors that justify imposition of consecutive sentences are not subject to ***Apprendi***. ***Oregon v. Ice***, 555 U.S. 160, 164 (2009).

C. Double Enhancement Prohibited

See Appendix for "Guidelines for Charge and Sentencing Enhancements" on page A-144.

General Rule: It is improper for the court to consider a fact that is implicit in the offense as an aggravating factor at sentencing, because it is presumed that the legislature considered the factors inherent in an offense in determining the range of penalties. *See* ***People v. Rissley***, 165 Ill. 2d 364, 391 (1995).

Therefore, the rule against double enhancement prohibits a single factor from being used twice for the same offense, *e.g.,* to both establish an element and to support a harsher sentence than would otherwise be imposed, or to twice elevate the severity of the offense.

It is not double enhancement for a court to consider the quantity of drugs in excess of the minimum for that sentencing range as an aggravating factor. ***People v. Palmer-Smith***, 2015 IL App (4th) 130451, ¶ 29; ***People v. Garcia***, 2018 IL App (4th) 170339, ¶ 41.

Exception: If provided by statute, a single aggravating factor may both upgrade the charge and enhance the penalty. ***People v. Phelps***, 211 Ill. 2d 1, 16 (2004) (statutes expressly authorized double enhancement—factor of severe bodily harm properly used to enhance sentence and to support consecutive sentencing).

D. Statutory Enhancement Issues

Prior Juvenile Adjudication: A prior juvenile adjudication is not the equivalent of a prior conviction for purposes of a

sentencing enhancement of misdemeanor to a felony. ***People v. Taylor***, 221 Ill. 2d 157, 182 (2006); ***In re Antoine B.***, 2014 IL App (3d) 110467-B, ¶ 8–9.

DWLR: A felony driving while license revoked based on a subsequent offense cannot serve as a predicate felony for the offense of armed violence because the armed violence statute requires that the predicate felony be proved at trial beyond a reasonable doubt, but the felony classification for DWLR is premised only on the proof of a prior offense at sentencing. ***People v. Lucas***, 231 Ill. 2d 169, 178 (2008).

Attempt First Degree Murder**:** The 15-20-25/life firearm sentencing add-ons, found in **720 ILCS 5/8-4(c)(1)(B)**, **(C)**, and **(D)**, apply to all attempt first degree murder cases, even those in which the sentencing range is enhanced by other factors under **720 ILCS 5/8-4(c)(1)(A)**. ***People v. Smith***, 2012 IL App (1st) 102354, ¶ 114–116.

> **NOTE:** If sentencing an individual under the age of 18 at the time of the commission of the offense, the court may, in its discretion, decline to impose the firearm enhancements. **730 ILCS 5/5-4.5-105(b)**.

E. Enhancement of a Separate Offense

A factor inherent in one charge may be used to enhance the sentence on a different offense, and its use as such is not double enhancement. ***Phelps***, 211 Ill.2d at 17 (same infliction of great bodily harm properly used to enhance kidnapping to aggravated kidnapping and to elevate battery to heinous battery). As noted above, the factor was also properly utilized to require the imposition of consecutive sentences. ***Phelps***, 211 Ill.2d at 16.

Moreover, when one offense is used to enhance a companion charge, the unenhanced companion charge may simultaneously be used to enhance the first offense. ***People v. Siguenza-Brito***, 235 Ill. 2d 213, 233 (2009) (criminal sexual assault was used to enhance the kidnapping conviction, and the kidnapping conviction was used to enhance the criminal sexual assault conviction).

F. Use of an Uncounseled Misdemeanor Conviction

An uncounseled misdemeanor conviction is constitutional if no jail term is imposedand a valid uncounseled misdemeanor conviction can be used for sentence enhancement. ***People ex rel. Glasgow v. Kinney***, 2012 IL 113197, ¶ 14; ***Nichols v. United States***, 511 U.S. 738, 746 (1994).

G. Proof of Prior Convictions for Class X Sentencing

The trial court may rely upon priors noted in a PSI to impose a Class X enhanced sentence. ***People v. White***, 407 Ill. App. 3d 224, 237 (2011); **730 ILCS 5/5-4.5-95(b)**.

H. MSR Issues

A second offense cannot enhance an MSR term under **730 ILCS 5/5-8-1(d)(5)**, if both the first offense and second offense arose from a single incident. ***People v. Anderson***, 402 Ill. App. 3d 186, 188–90 (3d Dist. 2010).

When mandated in certain sex offenses, the enhanced MSR term of three years to life is to be imposed as an indeterminate term by the trial judge, as length of the term will be determined by DOC. ***People v. Rinehart***, 2012 IL 111719, ¶ 29; **730 ILCS 5/5-8-1(d)(4)**.

I. Proportionality

The state constitution has a proportionate penalties clause that provides "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." **Ill. Const. 1970, art. I, § 11**.

The United States Supreme Court has held that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." ***Solem v. Helm***, 463 U.S. 277, 290 (1983). However, the analysis used in ***Solem*** was called into question in ***Harmelin v. Michigan***, 501 U.S. 957 (1991). In ***Lockyer v. Andrade***, 538 U.S. 63, 72 (2003), the Court further explained that, while there is a gross

disproportionality principle stemming from the Eighth Amendment that is applicable to sentences of a term of years, the "precise contours" of it remain unclear. But a constitutional violation will occur only in an "extraordinary case." ***Lockyer***, 538 U.S. at 77.

It is not clear whether the state and constitutional provisions are co-extensive. The Illinois clause may provide more protection. *See* ***People v. Horta***, 2016 IL App (2d) 140714, ¶ 62.

The state proportionate penalties clause applies to provisions imposing a penalty or punishment. Thus, the automatic transfer of a juvenile to adult court for certain charges per **705 ILCS 405/5–130(1)(a)** does not directly impose a penalty and therefore does not violate the rule. ***People v. Willis***, 2013 IL App (1st) 110233, ¶¶ 50, 52.

The Illinois Supreme Court has settled on two alternate tests to assess proportionate penalties clause claims. One, a violation occurs when a sentence is cruel, degrading or so wholly disproportionate to the offense committed as to shock the moral sense of the community. Or, two, a violation occurs when the penalty is harsher than the penalty for another offense with identical elements—the "identical elements" test. ***People v. Sharpe***, 216 Ill. 2d 481, 521 (2005).

When a violation occurs under the "identical elements" test, the greater sentencing statute is constitutionally void and the case must be remanded for resentencing. ***People v. Clemons***, 2012 IL 107821 ¶ 60.

J. Disparity

There should not be arbitrary or unreasonable disparity in sentences of similarly situated codefendants. However, in cases of disparity, a sentence may be warranted by differences in the nature and extent of each defendant's participation in the offense. ***People v. Caballero***, 179 Ill. 2d 205, 216 (1997). *See* ***Williams v. Illinois***, 399 U.S. 235, 243 (1970) (no requirement of identical sentences for two individuals convicted of the same offense).

NOTE: The state may strategically enter into a plea agreement with a codefendant that provides for a lighter sentence in exchange for his testimony. ***People v. Hauschild***, 226 Ill. 2d 63, 90–91 (2007).

K. Presumption of Probation

Pursuant to statute, the court shall impose a sentence of probation or conditional discharge unless it is expressly prohibited or if the court determines:

1. that "imprisonment or periodic imprisonment is necessary for the protection of the public;" or

2. that "probation or conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice;" or

3. that "a combination of imprisonment with concurrent or consecutive probation when an offender has been admitted into a drug court program under Section 20 of the Drug Court Treatment Act is necessary for the protection of the public and for the rehabilitation of the offender." **730 ILCS 5/5-6-1(a)**.

Exception: The presumption of probation does not apply to misdemeanor or felony vehicle code offenses or reckless homicide cases if defendant within the past twelve months has pleaded guilty to or been convicted of a misdemeanor or felony vehicle code offense or reckless homicide. **730 ILCS 5/5-6-1(b-1)**.

AGG DUI Exception: An aggravated DUI premised on death is a class 2 felony, and prison is the mandatory sentence unless the court determines that "extraordinary circumstances exist and require probation." **625 ILCS 5/11-501(d)(2)(G)**.

L. Sentencing Election

If the sentencing law changes between the time of the offense and the time of sentencing, a defendant is entitled to elect which sentencing scheme should be used. ***People v.***

Hollins, 51 Ill. 2d 68, 71 (1972). The right to elect does not apply if the substance of the offense has also changed. ***People v. Gancarz***, 228 Ill. 2d 312, 319 (2008).

PART III – POST-TRIAL PROCEEDINGS

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3.7 Sentences of Imprisonment

A. Basic Sentencing Range

1. Felony Sentencing

Generally, a sentence of imprisonment will have several components: The term of imprisonment as applicable to the offense(s) of which defendant is convicted, the mandatory supervised release period applicable to same, calculation of credit for time served, and application of the appropriate percentage to be served pursuant to "Truth In Sentencing" (*see* charts in Appendix on pages A-156 through A-160).

The terms of incarceration, and MSR applicable to each level of offense are governed by **730 ILCS 5/5-4.5-20 *et seq***., subject to the possibility of an extended term sentence pursuant to **730 ILCS 5/5-8-2**, and imposition of fines per **730 ILCS 5/5-4.5-50(b)**. (*See* charts in Appendix.)

The trial judge shall set forth the reasons for imposing a felony sentence, which may include any statutory or non-statutory mitigating or aggravating factors or lack thereof "consistent with the purposes and principles of sentencing set out in this Code." **730 ILCS 5/5-4.5-50(c)**.

> **NOTE**: There is no statutory authority, case law, or court rule that allows a court to stay the imposition of a prison sentence for 30 months. ***People v. Sweeney***, 2012 IL App (3d) 100781, ¶ 21 (court found this portion of order void, though void sentence rule has now been abolished).

2. General Recidivism Provisions

(a) Habitual Criminal, **730 ILCS 5/5-4.5-95(a)**: A habitual criminal is subject to a mandatory life sentence. This is a sentencing issue, not an independently charged offense.

A habitual criminal is a defendant who commits a Class X felony, criminal sexual assault, or first

degree murder after having been twice convicted of a Class X felony, criminal sexual assault, aggravated kidnapping, first degree murder, or the equivalent thereto, in state or federal court. The current offense must have been committed after the 2 prior convictions, and there are certain timing requirements that must be met regarding all 3 offenses. **730 ILCS 5/5-4.5-95(a)(1)**.

> **NOTE**: All variations of aggravated kidnapping have been class X felonies since June 1, 1997.
>
> **NOTE**: A 1986 armed robbery conviction is a proper predicate for a habitual criminal determination as an equivalent to the current version, even though it is not a verbatim copy of same. ***People v. Debardelaben***, 105 N.E. 3d 943, 947 (1st Dist. 2018).

The habitual criminal determination is made at sentencing and is not to be alleged in the charging instrument or proved at trial. After a plea or finding of guilty, the state must file a verified written statement of the prior triggering offenses in order to initiate the proceeding. **730 ILCS 5/5-4.5-95(a)(6)**.

The statutory timing requirements are: (A) the current offense was committed after July 3, 1980; (B) the current offense was committed within twenty years of the first conviction, not including time spent in custody; (C) the current offense was committed after conviction on the second offense; (D) the second offense was committed after conviction on the first offense; and (E) the first offense was committed when the person was 21 years of age or older . **730 ILCS 5/5-4.5-95(a)(4)**.

Defendant has a right to a hearing, and the court must make a written finding. The burden of proof is on the state by a preponderance of the evidence. ***People v. Brown***, 229 Ill. 2d 374, 389 (2008).

"A duly authenticated copy of the record of any alleged former conviction . . . shall be *prima facie* evidence of that former conviction; and a duly authenticated copy of the record of the defendant's final release or discharge from probation granted, or from sentence and parole supervision (if any) imposed pursuant to that former conviction, shall be *prima facie* evidence of that release or discharge." **730 ILCS 5/5-4.5-95(a)(7)**. The "time and sequence requirements" must also be proved by a preponderance of the evidence. ***Brown***, 229 Ill. 2d at 388.

(b) Armed Habitual Criminal Offense, **720 ILCS 5/24-1.7**: This is an independently charged offense that is a Class X felony.

Defendant commits the offense "if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of two or more times of any combination of the following offenses: (1) a forcible felony as defined in **Section 2-8** of this Code; (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child as described in **Section 12-4.3** or **subdivision (b)(1)** of **Section 12-3.05**; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm as described in **subdivision (e)(1)**, **(e)(2)**, **(e)(3)**, or **(e)(4)** of **Section 12-3.05**; or (3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher. **720 ILCS 5/24-1.7**.

There is no *ex post facto* violation where the charge is predicated on prior offenses that occurred before 2005, when the offense of armed habitual criminal was created. ***People v. Bailey***, 396 Ill. App. 3d 459, 463 (1st Dist. 2009).

(c) Mandatory Class X Sentencing, **730 ILCS 5/5-4.5-95(b)**: This is a sentencing issue.

A defendant who: (1) is over the age of twenty-one; (2) is convicted of a Class 1 or Class 2 **forcible** felony; and (3) has previously been twice convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 forcible felony was committed) classified in Illinois as a Class 2 or greater Class forcible felony and those charges are separately brought and tried and arise out of different series of acts shall be sentenced as a Class X offender. **730 ILCS 5/5-4.5-95(b)**. There are timing and sequence requirements.

The first forcible felony must have been committed after February 1, 1978. The second forcible felony must have been committed after conviction on the first. The third forcible felony must have been committed after conviction on the second. The first offense must have been committed when the defendant was 21 years of age or older. ***Id***.

The period of MSR is three years, as required in Class X sentencing. ***People v. Holman***, 402 Ill. App. 3d 645, 653 (2nd Dist. 2010).

NOTE: The prior offenses used to enhance the punishment to a Class X sentencing range may also be considered as part of defendant's criminal history and thus as an aggravating factor when determining an appropriate sentence within the applicable range. ***People v. Thomas***, 171 Ill.2d 207, 229 (1996).

See Appendix for "Penalties for Crimes in Illinois" on page A-152.

3. Mandatory Supervised Release

The term of mandatory supervised release depends on the charge and is set by statute. **730 ILCS 5/5-8-1(d)**.

With the exception of the specific offenses listed below, most of the MSR terms have changed. For first degree murder and Class X felonies with an 85% sentence, MSR is 3 years. All other Class X felonies have an 18 month MSR. Class 1 and 2 felonies require a 1 year MSR, unless the sentence is to be served at 85% which requires a 2 year MSR. Class 3 and 4 felonies now have discretionary MSR unless the sentence is to be served at 85% which requires a 1 year MSR.

The following MSR periods apply to specific offenses: (1) three years to life for predatory criminal sexual assault of a child, criminal sexual assault and aggravated criminal sexual assault, aggravated child pornography, or manufacture or dissemination of child pornography; (2) four years with at least the first two in electronic monitoring or home detention for a second or subsequent aggravated criminal sexual abuse or felony criminal sexual abuse of a minor; and (3) four years for felony domestic battery or aggravated domestic battery, stalking or aggravated stalking, and a felony violation of an order of protection. **730 ILCS 5/5-8-1(d)(4), (5),** and **(6)**.

The "three years to life" MSR period is an indeterminate term imposed by the court. ***People v. Rinehart***, 2012 IL 111719, ¶ 30.

4. Misdemeanor Sentencing

Statutory penalties for misdemeanor, petty and business offenses are found at **730 ILCS 5/5-4.5-55 *et seq.***

All county jail good behavior credit is governed by the County Jail Good Behavior Allowance Act, **730 ILCS 130/3**. Day-for-day credit does not apply to crimes of civil contempt, infliction of physical harm, or criminal sexual abuse; cases wherein such credit could reduce the sentence below a statutory mandatory minimum sentence; sentences to a county impact incarceration program; or periodic

imprisonment pursuant to felony probation or conditional discharge. **730 ILCS 130/3**.

There are now two versions of this statute. The current statute is effect until January 1, 2023. A revised version of the statute will go into effect on January 1, 2023.

Judges should also familiarize themselves with the updated rules and regulations regarding sentencing credit in 730 ILCS 5/3-6-3.

5. For-Profit Jail Prohibited

730 ILCS 140/3 prohibits local and state authorities from contracting with private operators of correctional facilities.

6. Contempt Sentencing

There are no sentencing parameters for criminal contempt. Such sentences are reviewed for abuse of discretion. ***People v. Geiger***, 2012 IL 113181, ¶ 27.

The court may consider, *inter alia*, the following factors: (1) the extent of the willful and deliberate defiance of the court's order; (2) the seriousness of the consequences of the contumacious behavior; (3) the necessity of effectively terminating the defendant's defiance as required by the public interest; and (4) the importance of deterring such acts in the future. ***Geiger***, at ¶ 28.

B. 15-20-25 to Life Firearm Enhancements

An additional term of years must be added to the sentence for certain offenses that were committed with a firearm. **730 ILCS 5/5-8-1**.

Specifically, if defendant: (1) was armed with a firearm, 15 years shall be added; (2) personally discharged the firearm, 20 years shall be added; and (3) personally discharged a firearm that proximately caused great bodily harm, permanent disfigurement, or death to another person, 25 years to life imprisonment shall be added.

The enhancements apply to: First degree murder (**730 ILCS 5/5-8-1(a)(1)(d)**); Attempt first degree murder (**720 ILCS 5/8-4(c)(1)**); Intentional homicide of an unborn child (**720 ILCS 5/9-1.2(d)**); Aggravated battery of a child (**720 ILCS 5/12-3.05(b)(1)**, **(h)**); Aggravated kidnapping (**720 ILCS 5/10-2(b)**); Home invasion (**720 ILCS 5/19-6(c)**); Aggravated criminal sexual assault (**720 ILCS 5/11-1.30(d)**); Predatory criminal sexual assault of a child **(720 ILCS 5/11-1.40(b)**); Armed robbery (**720 ILCS 5/18-2(b)**); Aggravated vehicular hijacking (**720 ILCS 5/18-4(b)**).

NOTE: Separate convictions of aggravated criminal sexual assault, based on separate acts of sexual penetration while armed with a firearm, require separate 15-year enhancements. ***People ex rel. Alvarez v. Gaughan***, 2016 IL 120110, ¶ 34.

NOTE: By statute, the enhancements are discretionary, rather than mandatory, in sentencing of persons under the age of 18 at the time of the offense. ***People v. Reyes***, 2016 IL 119271, ¶ 11; **730 ILCS 5/5-4.5-105**.

NOTE: The 15-year enhancement, which is not predicated on personal discharge of a firearm, applies to defendants convicted under an accountability theory. Such a defendant is accountable for all acts done in furtherance of a crime, including being armed. ***People v. White***, 2011 IL 109616, ¶ 19.

People v. Phagan*,* 2019 IL App (1st) 153031, ¶ 107; ***People v. Holley****,* 2019 IL App (1st) 161326, ¶ 32. The 15-20-25 year firearm enhancements do not apply to attempt first degree murder of a peace officer or corrections officer as that charge already has a sentencing enhancement. But see ***People v. Jackson****,* 2018 IL App (1st) 150487, ¶ 50 (firearm enhancements "may be applied to a sentence for attempt murder of a peace officer").

1. Constitutional Issues

The 15/20/25-life enhancements were enacted in 2000. In a series of subsequent cases, the Illinois Supreme Court found the enhancements to a number of the offenses unconstitutional in that the amended offenses violated the proportionate penalties clause of the Illinois Constitution when compared to other similar criminal offenses. However, in ***People v. Sharpe***, 216 Ill. 2d 481 (2005), the Court overruled these decisions and changed the method by which it analyzes proportionate penalties challenges.

Now, a penalty violates the proportionate penalties clause only if it is so cruel or degrading that it "shocks the moral sense of the community" or if, when the offense is compared to another offense with "identical elements," the penalty is greater. ***Sharpe***, 216 Ill. 2d at 521-22. ***Sharpe*** rejected a challenge to the enhancements applied to first degree murder. ***Id***. at 527.

After ***Sharpe***, the Court used the "identical elements" approach to invalidate the enhancement-amended armed robbery statute, finding the penalty to be disproportionate when compared to the identical offense of armed violence predicated on robbery with a firearm. ***People v. Hauschild***, 226 Ill. 2d 63, 86 (2007).

In response to ***Hauschild***, the legislature amended the armed violence statute effective October 23, 2007, by excluding its application to certain offenses, including "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." **720 ILCS 5/33A-2**. This amendment rendered many "identical offense" proportionate penalties challenges invalid and revived the validity of the enhancements to certain offenses. *See* ***People v. Cherry***, 2016 IL 118728, ¶ 20, ***People v. Blair***, 2013 IL 114122, ¶ 27.

> **NOTE**: ***Hauschild*** still applies to cases that predate the October 2007 amendment to the armed violence

statute. ***People v. Clemons***, 2012 IL 107821, ¶ 19. Generally, after the amendment, the 15/20/25-life enhancements are constitutional, including armed robbery while armed with a firearm. ***Blair***, 2013 IL 114122 at ¶ 35.

A conviction for armed violence requires proof that the defendant is "armed with a dangerous weapon while committing a predicate felony. A person is "armed with a dangerous weapon" when he "carries on or about his or her person or is otherwise armed with" a firearm or other qualifying weapon. **720 ILCS 5/33A-1(c)(1)-(2)**. A defendant is "otherwise armed" only if he has "immediate access to or timely control over" the gun. ***People v. Calloway,*** 2019 IL App (1st) 160983, ¶ 37; *citing* ***People v. Condon***, 148 Ill. 2d 96, 110 (1992). Having a gun 15 feet away when officers enter to execute a search warrant in defendant's home is insufficient. ***Calloway***, 2019 IL App (1st) 160983.

2. Procedural Issues

Apprendi v. New Jersey, 530 U.S. 466 (2000) and **725 ILCS 5/111-3(c-5)** require that the allegation as to the basis of the enhancement—being armed with or personally discharging a firearm—be given to defendant in writing or included in the charging instrument and proved beyond reasonable doubt at trial. There may be charging documents that contain multiple counts with and without the add-on penalties.

Supreme Court Rule 451(g) provides that, when the state gives notice of a sentence enhancement under section **111-3(c-5)**, "the court may, in its discretion, conduct a unitary trial" on the issues of guilt and existence of the enhancement, or the court may bifurcate same upon motion of a party. In order to bifurcate the trial, the court must "hold a pretrial hearing to determine if proof of the sentencing enhancement factor is not relevant to the question of guilt or if undue prejudice outweighs the factor's probative value." The trial on the sentencing issue shall be determined by the same jury.

The committee comments to the rule state that unitary trials are the presumptive option.

3. Jury Instructions

I.P.I. Criminal 28.01, **28.02**, **28.03**, **28.04**, **28.05**, **and 28.06** set forth the jury instructions and verdict forms on the enhancement factor in a unitary trial. The committee comments provide instruction as to the sequence in which they are to be given with the other jury instructions.

I.P.I. Criminal 28A.01 through 28A.03 set forth the jury instructions and verdict forms for the enhancement portion of a bifurcated trial. The committee comments provide instruction as to what other applicable I.P.I. should be given.

C. Extended Term

1. Eligibility for Extended Term

Pursuant to **730 ILCS 5/5-8-2**, a judge may issue a sentence greater than the maximum authorized sentence for the class of the most serious offense of which defendant was convicted if the factors in aggravation in **730 ILCS 5/5-5-3.2(b), (c) & (e)** or **730 ILCS 5/5-8-1(a)(1)(b)** are found to exist and if the pre-trial and trial proceedings were conducted in compliance with **725 ILCS 5/111-3(c-5)**.

Section 111-3(c-5) mandates ***Apprendi*** compliance.

Subsection (b) of section 5-5-3.2 sets forth factors for the imposition of an extended term for all felonies. Subsections (c) and (e) set forth extended term factors for certain specific offenses. Please note the current statute is effective until January 1, 2023 at which time an amended version of **730 ILCS 5/5-5-3.2** will take effect. **Section 5-8-1(a)(1)(b)** sets forth factors for the discretionary imposition of natural life imprisonment for first degree murder.

> **NOTE**: An extended term may be imposed for more than one offense as long as each is in the class of the most serious offense. ***People v. Jordan***, 103 Ill. 2d 192, 207 (1984).

NOTE: If defendant is sentenced to natural life, he may be sentenced to an extended term for the next most serious offense, as a natural life is not for a term of years and cannot be extended. ***People v. Terry***, 183 Ill. 2d 298, 305 (1998).

NOTE: Extended term sentences may be imposed on offenses that are charged in separate cases involving unrelated courses of conduct that were consolidated for plea and sentencing proceedings. ***People v. Coleman***, 166 Ill. 2d 247, 256 (1995).

NOTE: If defendant is not eligible for an extended term on the greater of two charges, the court may not sentence him to an extended term on the lesser, even if the statutory factors for extended term may be present. ***People v. Poole***, 2012 IL App (4th) 101017, ¶ 13.

2. Extended Term Factors under **730 ILCS 5/5-5-3.2(b)**

Please note that this statute is amended effective January 1, 2023, so be sure to refer to the most recent version before sentencing.

The following factors may be a basis to impose an extended term on any felony:

(a) Defendant is convicted after having been previously convicted of a similar or greater class felony within ten years, excluding time spent in custody and such charges are separately brought and tried and arise out of different series of acts.

Prior offense: Double enhancement is prohibited in this instance. That is, the same prior conviction cannot be used both to enhance the current offense from a misdemeanor to a felony and then to support an extended term. ***People v. Hicks***, 164 Ill. 2d 218, 226 (1995).

A current felony offense that is enhanced from a misdemeanor due to a prior conviction may be subject to an extended term based on a different prior conviction, as that is not double enhancement. ***Hicks***, 164 Ill. 2d at 228.

Generally, a prior juvenile adjudication may not support an extended term. ***People v. Rankin***, 297 Ill. App. 3d 818, 824 (4th Dist. 1998). There is one statutory exception. A prior juvenile adjudication may support an extended term only if defendant was at least 17 years old at the time of the current offense, the current offense occurred within 10 years of the prior adjudication, excluding time in custody, and the prior adjudication would have been a Class X or Class 1 felony. **730 ILCS 5/5-5-3.2(b)(7)**; ***People v Jones***, 2016 IL 119391, ¶ 33.

> **NOTE**: If a defendant is convicted of a Class 1 or Class 2 felony but sentenced as a class X offender under **730 ILCS 5/5-4.5-95(b),** he is not eligible for a Class X extended term because, while he is subject to Class X sentencing, he is not convicted of a Class X crime. ***People v. Olivo***, 183 Ill. 2d 339, 341 (1998).

Ten Year Limitation: The ten-year period is calculated from the date of conviction, which in a case involving a probation violation is the date of the new sentence. ***People v. Lemons***, 191 Ill. 2d 155, 159 (2000).

The term "excluding time spent in custody" includes all time in custody in the time frame, regardless of whether the custody is a result of the prior conviction used for enhancement. ***People v. Robinson***, 89 Ill. 2d 469, 476 (1982).

Though not provided in the statute, the ten years is tolled when defendant wrongfully delays his

criminal proceedings by violating bond and becoming a fugitive from justice. ***People v. Garcia***, 241 Ill. 2d 416, 427 (2011).

(b) The court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty.

The terms "brutal," "heinous," and "indicative of wanton cruelty" are given their ordinary and popular meaning. ***People v. Nitz***, 219 Ill. 2d 400, 418 (2006).

Heinous behavior must be "hatefully or shockingly evil; grossly bad; enormously and flagrantly criminal." ***Nitz***, 219 Ill.2d at 418. Brutal behavior is "behavior that is grossly ruthless, devoid of mercy or compassion; cruel and cold-blooded." ***Id***. Brutal or heinous behavior generally involves prolonged pain, torture, or premeditation but does not necessarily require same. ***Id***.

As for wanton cruelty, it "requires 'proof that the defendant consciously sought to inflict pain and suffering on the victim of the offense.'" ***Id***. Behavior might be brutal or heinous but not indicative of wanton cruelty. Wanton cruelty cannot be perpetrated on a corpse. ***People v. Nielson***, 187 Ill. 2d 271, 299 (1999).

> **NOTE**: This factor may not be used to impose an extended term in a heinous battery case, as such action would constitute impermissible double enhancement. ***People v. Jackson***, 299 Ill. App. 3d 104, 114 (1st Dist.1998).

(c) The victim is under twelve years of age, sixty years of age or older, or physically handicapped.

(d) The offense involved the following misconduct as part of a ceremony, rite, initiation, observance, performance, practice or activity of any actual or ostensible religious, fraternal, or social group:

(i) the brutalizing or torturing of humans or animals;

(ii) the theft of human corpses;

(iii) the kidnapping of humans;

(iv) the desecration of any cemetery, religious, fraternal, business, governmental, educational, or other building or property;

(v) ritualized abuse of a child.

(e) In a case other than conspiracy, when the court finds that the felony was committed under an agreement with two or more other persons to commit that offense and the defendant, with respect to the other individuals, occupied a position of organizer, supervisor, financier, or any other position of management or leadership, and the court further finds that the felony committed was related to or in furtherance of the criminal activities of an organized gang or was motivated by the defendant's leadership in an organized gang.

(f) Defendant used a firearm with a laser sight attached to it, as defined by **720 ILCS 5/26-7**.

(g) A prior juvenile adjudication may support an extended term only if defendant was at least 17 years old at the time of the current offense, the current offense occurred within 10 years of the prior adjudication, excluding time in custody, and the prior adjudication would have been a Class X or Class 1 felony.

The prior adjudication is considered akin to a prior conviction for ***Apprendi*** purposes. ***People v Jones***, 2016 IL 119391, ¶ 33.

People v. Johnson, 2013 IL App (1st) 120413, ¶ 21, held that the limitation of "same or similar class felony or greater class felony" must be read into this section to preclude the absurd result of using a prior

juvenile adjudication equivalent to a Class 1 felony to impose an extended term sentence on a Class X felony when a prior adult conviction for a Class 1 felony would not support an extended term on a Class X felony.

(h) Defendant used, possessed, exercised control over, or otherwise directed an animal to assault a law enforcement officer engaged in the execution of his or her official duties or in furtherance of the criminal activities of an organized gang in which the defendant is engaged.

(i) Defendant knowingly video or audio recorded the offense with the intent to disseminate the recording.

3. Extended Term Factors under **730 ILCS 5/5-5-3.2(c)**

This statute is being amended effective January 1, 2023 so be sure to refer to the most recent version before sentencing.

The following factors may be a basis to impose an extended term for certain specified offenses:

(a) For first degree murder, if defendant was previously convicted in Illinois of any offense listed under **730 ILCS 5/5-5-3(c)(2)**, when that conviction has occurred within ten years after the previous conviction, excluding time spent in custody, and the charges are separately brought and tried and arise out of different series of acts**.**

(b) For first degree murder, if defendant was previously convicted of domestic battery or aggravated domestic battery committed on the same victim or if defendant was previously convicted of a violation of an order of protection in which the same victim was the protected person.

(c) For voluntary manslaughter, second degree murder, involuntary manslaughter, or reckless homicide in

which the defendant has been convicted of causing the death of more than one individual.

(d) For aggravated criminal sexual assault or criminal sexual assault, when there is a finding that aggravated criminal sexual assault or criminal sexual assault was also committed on the same victim by one or more other individuals, and the defendant voluntarily participated in the crime with the knowledge of the participation of the others in the crime, and the commission of the crime was part of a single course of conduct during which there was no substantial change in the nature of the criminal objective.

(e) For aggravated criminal sexual assault or predatory criminal sexual assault of a child if the victim was under 18 years of age at the time of the commission of the offense**.**

> **NOTE**: Predatory criminal sexual assault of a child is based upon the victim being under the age of 13, so there is a potential double enhancement issue. Also, section (a)(1) carries a specified sentence of 6 to 60 years.

(f) For an unlawful use of weapons when there is a finding that the defendant is a member of an organized gang**.**

(g) For unlawful use of weapons for possessing a weapon that is not readily distinguishable as one of the weapons enumerated in the unlawful use of weapons statute.

(h) For manufacture of a controlled substance or methamphetamine or the illegal possession of explosives and an emergency response officer in the performance of his or her duties is killed or injured at the scene of the offense while responding to the emergency caused by the commission of the offense.

The statute broadly defines "emergency" and "emergency response officer."

(i) For mob action, or solicitation or conspiracy to commit same, where the criminal object is mob action and an electronic communication is used in the commission of the offense.

4. Extended Term Factors Under **730 ILCS 5/5-5-3.2(e)**

For criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, criminal sexual abuse, and aggravated criminal sexual abuse, when the victim of the offense is under 18 years of age at the time of the commission of the offense and, during the commission of the offense, the victim was under the influence of alcohol, regardless of whether or not the alcohol was supplied by the offender; and the offender, at the time of the commission of the offense, knew or should have known that the victim had consumed alcohol.

5. Discretionary Natural Life Factors under **730 ILCS 5/5-8-1(a)(1)(b)**

Natural life for first degree murder may be imposed if the trier of fact finds beyond a reasonable doubt that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or, except as set forth in **730 ILCS 5/5-8-1(a)(1)(c)**, that any of the aggravating factors listed in **720 ILCS 5/9-1(b)** or **(b)(5)** are present.

D. Concurrent and Consecutive Sentencing

See Appendix for "Guidelines for Consecutive and Concurrent Sentencing" on page A-154.

Sentences are concurrent unless the court finds otherwise. Consecutive sentencing is either mandatory or discretionary. **730 ILCS 5/5-8-4(a)**.

Please note this statute is amended effective July 1, 2023. Please consult the latest version before sentencing.

Apprendi requirements do not apply to consecutive or concurrent sentencing proceedings. ***Oregon v. Ice***, 555 U.S. 160, 168 (2009).

If defendant is serving a misdemeanor sentence and is convicted of a felony and sentenced to IDOC, the misdemeanor sentence "shall be merged in and run concurrently with the felony sentence." **730 ILCS 5/5-8-4(b)**. If defendant is not serving a misdemeanor sentence, no merger is required, and consecutive sentencing rules apply. ***People v. Betts***, 246 Ill. App. 3d 84, 86 (4th Dist. 1993).

The statute regarding concurrent and consecutive terms of imprisonment, **730 ILCS 5/5-8-4**, has been significantly revised several times and caution should be given to case law on the subject. In 2003, via **Public Act 93-160**, the legislature removed conditional language regarding the applicability of consecutive sentences to the commission of offenses during a single course of conduct. And in 2009, via **Public Act 95-1052**, the statute was completely rewritten along with the imposition of significant modifications to the sentencing code. The statute has again been revised via **Public Act 102-787** effective July 1, 2023.

1. Permissive Consecutive Sentences—**730 ILCS 5/5-8-4(c)**

   Please refer to the statute for the most current version.

   When the court (i) imposes multiple sentences of imprisonment at the same time, or (ii) imposes a sentence of imprisonment on a defendant who is already subject to a sentence of imprisonment imposed by any court, the court may impose consecutive sentences in the following circumstances:

   (a) Required to Protect the Public

   If having regard to the nature and circumstances of the offense and the history and character of the defendant, it is the opinion of the court that

consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record. **730 ILCS 5/5-8-4(c)(1)**.

(b) Impersonating a Peace Officer

If one of the offenses for which a defendant was convicted was a violation of **720 ILCS 5/17-2(b)(5)** or **(b)(6)** and the offense was committed in attempting or committing a forcible felony. **730 ILCS 5/5-8-4(c)(2)**.

2. Mandatory Consecutive Sentences—**730 ILCS 5/5-8-4(d)**

Again, please refer to the statute for the most current version.

The court must impose consecutive sentences in each of the following circumstances:

(a) One of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury. **730 ILCS 5/5-8-4(d)(1)**.

There is a split in the appellate court as to whether "severe bodily injury" requires proof of something more than the "great bodily harm" applicable to an aggravated battery offense. ***People v. Williams***, 335 Ill. App. 3d 596, 600 (1st Dist. 2002), and ***People v. Alvarez***, 2016 IL App (2d) 140364, ¶ 23, hold that it does. But ***People v. Witherspoon***, 379 Ill. App. 3d 298, 308 (4th Dist. 2008), found the distinction to be one of semantics.

The determination of severe bodily injury depends on the facts of each case. ***People v. Holley***, 2019 IL App (1st) 161326, ¶ 38; *see* ***People v. Deleon***, 227 Ill. 2d 322, 335 (2008) ("through and through gunshot wound to the chest" deemed severe bodily injury).

The severe bodily injury must occur during the triggering offense, not another offense. It need not be

an inherent factor in the triggering offense; severe bodily injury as a result of the offense is sufficient. ***People v. Whitney***, 188 Ill. 2d 91, 99 (1999). As for timing, ***People v. Sample***, 326 Ill. App. 3d 914, 928 (1st Dist. 2001), reasoned that the injury must occur "essentially simultaneously" with the triggering offense.

It is not an impermissible double enhancement if the severe bodily harm is an element of the triggering offense. ***People v. Phelps***, 211 Ill. 2d 1, 14–15 (2004).

> **NOTE**: This provision is mandatory even when the severe bodily injury was in an offense for which defendant is currently serving a sentence. ***People v. Martin***, 2012 IL App (1st) 093506, ¶ 67–69.

(b) The defendant was convicted of criminal sexual assault, aggravated criminal sexual assault, or predatory criminal sexual assault of a child. **730 ILCS 5/5-8-4(d)(2)**.

> **NOTE**: Mandatory consecutive sentences for multiple charges of aggravated criminal sexual assault do not violate the proportionate penalties clause of the Illinois Constitution. ***People v. Hawkins***, 409 Ill. App. 3d 564, 572–574 (1st Dist. 2011).

(c) The defendant was convicted of offenses relating to child pornography and aggravated child pornography, and the child depicted is under the age of thirteen. **730 ILCS 5/5-8-4(d)(2.5)**.

(d) The defendant was convicted of armed violence based upon the predicate offense of any of the following: solicitation of murder, solicitation of murder for hire, heinous battery, aggravated battery of a senior citizen, criminal sexual assault, manufacture, delivery or possession with intent to manufacture or deliver more than 5000 grams of a

substance containing cannabis, cannabis trafficking, manufacture, delivery or possession with intent to manufacture or deliver a class X amount of any controlled substance, controlled substance trafficking involving a Class X felony amount of controlled substance under **720 ILCS 570/401,** a violation of the Methamphetamine Control and Community Protection Act, calculated criminal drug conspiracy, or street gang criminal drug conspiracy. **730 ILCS 5/5-8-4(d)(3)**.

(e) The defendant was convicted of the offense of leaving the scene of a motor vehicle accident involving death or personal injuries, and either: (A) aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof; (B) reckless homicide; or (C) both an offense described in item (A) and an offense described in item (B). **730 ILCS 5/5-8-4(d)(4)**.

(f) The defendant was convicted of concealment of homicidal death or dismembering a human body. **730 ILCS 5/5-8-4(d)(5)**.

(g) The defendant was convicted of the use of a stolen firearm in the commission of an offense. **730 ILCS 5/5-8-4(d)(5.5)**.

(h) If the defendant was in IDOC custody at the time of the offense, the sentence shall be served consecutive to the sentence under which the defendant is held by IDOC. **730 ILCS 5/5-8-4(d)(6)**.

(i) A sentence for escape or attempted escape shall be served consecutive to the terms under which the offender is held by IDOC. **730 ILCS 5/5-8-4(d)(7)**.

(j) If a person charged with a felony commits a separate felony while on pretrial release or in pretrial detention in a county jail facility or county detention facility, then the sentences imposed upon conviction of these felonies shall be served consecutively

regardless of the order in which the judgments of conviction are entered. **730 ILCS 5/5-8-4(d)(8)**.

(k) If a person commits a battery against a county correctional officer or sheriff's employee while serving a sentence or in pretrial detention in a county jail facility, then the sentence imposed upon conviction of the battery shall be served consecutively with the sentence imposed upon conviction of the earlier misdemeanor or felony, regardless of the order in which the judgments of conviction are entered. **730 ILCS 5/5-8-4(d)(8.5)**.

(l) If a person admitted to bail following conviction of a felony commits a separate felony while free on bond or if a person detained in a county jail facility or county detention facility following conviction of a felony commits a separate felony while in detention, then any sentence following conviction of the separate felony shall be consecutive to that of the original sentence for which the defendant was on bond or detained. **730 ILCS 5/5-8-4(d)(9)**.

(m) If a person is found to be in possession of an item of contraband, as defined in **720 ILCS 5/31A-0.1**, while serving a sentence in a county jail or while in pre-trial detention in a county jail, the sentence imposed upon conviction for the offense of possessing contraband in a penal institution shall be served consecutively to the sentence imposed for the offense in which the person is serving sentence in the county jail or serving pretrial detention, regardless of the order in which the judgments of conviction are entered. **730 ILCS 5/5-8-4(d)(10)**.

(n) If a person is sentenced for a violation of bail bond, any sentence imposed for that violation shall be served consecutive to the sentence imposed for the charge for which bail had been granted and with respect to which the defendant has been convicted. **730 ILCS 5/5-8-4(d)(11)**.

NOTE: A defendant sentenced to natural life as a Habitual Criminal is not subject to consecutive sentencing. ***People v. Petrenko***, 237 Ill.2d 490, 504 (2010). However, a natural life sentence imposed under the other provisions of the sentencing code may be subject to a consecutive sentencing order. ***Petrenko***, 237 Ill.2d at 506. Natural life sentences may run concurrently. *See* ***People v. Hernandez***, 382 Ill.App.3d 726, 730 (2008).

3. Aggregate Maximum and Minimum Consecutive Sentence Limitations under **730 ILCS 5/5-8-4(f)**

Though the passage of time will eventually render this provision obsolete, for sentences imposed under law before February 1, 1978, the aggregate minimum may not exceed the highest minimum term for the two most serious felonies involved, and the aggregate maximum may not exceed the highest maximum term for same.

For sentences imposed under law after February 1, 1978, the aggregate maximum **may not exceed the sum of the highest maximum term for the two most serious felonies involved**. However, the aggregate maximum limitation applies only to offenses that were committed as a part of a **single course of conduct during which there was no substantial change in the nature of the criminal objective**. There is no such limitation in the absence of this type of single course of conduct. Before 2003, the actual imposition of a consecutive sentence also used to depend on a determination of a single course of conduct. It no longer does.

The test for determining whether the type of single course of conduct exists is in the statute itself: whether "there was no substantial change in the nature of the criminal objective." *See* ***People v. Bell***, 196 Ill. 2d 343, 351 (2001) (noting same).

A misdemeanant may not be consecutively sentenced to more than the maximum for one Class A misdemeanor.

The specific statutory language is:

For sentences imposed under law in effect prior to February 1, 1978, the aggregate maximum of consecutive sentences shall not exceed the maximum term authorized under [the Code of Corrections] for the 2 most serious felonies involved. The aggregate minimum period of consecutive sentences shall not exceed the highest minimum term authorized under [the Code of Corrections] for the 2 most serious felonies involved. When sentenced only for misdemeanors, a defendant shall not be consecutively sentenced to more than the maximum for one Class A misdemeanor. **730 ILCS 5/5-8-4(f)(1)**.

For sentences imposed under the law in effect on or after February 1, 1978, the aggregate of consecutive sentences for offenses that were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective shall not exceed the sum of the maximum terms authorized under Article 4.5 of Chapter V for the two most serious felonies involved, but no such limitation shall apply for offenses that were not committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective. When sentenced only for misdemeanors, a defendant shall not be consecutively sentenced to more than the maximum for one Class A misdemeanor. **730 ILCS 5/5-8-4(f)(2)**.

> **NOTE**: When a Class 1 or 2 felony is subject to Class X sentencing, the Class 1 or 2 felony sentence, not Class X, must be used to calculate the maximum aggregate term. ***People v. Pullen***, 192 Ill. 2d 36, 43 (2000).
>
> **NOTE**: When a 15/20/25-Life enhancement applies, the sentence may be greater than the aggregate maximum term because the enhancement is added to the sentence that would otherwise be imposed. ***People v. Johnson***, 368 Ill. App. 3d 1146, 1170 (4th Dist. 2006).

4. Calculating Consecutive and Concurrent Sentences

   Consecutive sentences for triggering offenses must "be served prior to, and independent of, any sentences imposed for non-triggering offenses. Sentences for multiple non-triggering offenses may be served concurrently to one another after any consecutive sentences for triggering offenses have been discharged." ***People v. Curry***, 178 Ill. 2d 509, 539 (1997).

   Consecutive sentences are treated as a single term for MSR purposes. The MSR period is the one that corresponds to the most serious offense. **730 ILCS 5/5-8-4(g)(2)**; ***People v. Jackson***, 231 Ill. 2d 223, 227 (2008).

5. Consecutive Sentence of Probation

   A period of probation may be imposed consecutively to a period of imprisonment if the sentences are properly imposed on discrete offenses. ***People v. Wendt***, 163 Ill. 2d 346, 354 (1994); ***People v. Williams***, 179 Ill. 2d 331, 335 (1997) (a sentence of probation and prison cannot be imposed on one offense).

6. Vacatur and Resentencing of Consecutive or Concurrent Sentences

   The court may vacate a permissive consecutive sentencing order pursuant to a motion to reconsider. But, because the sentence for each offense is discrete, the court is prohibited from then increasing the now-concurrent sentences beyond the original term. ***People v. Carney***, 196 Ill. 2d 518, 530 (2001).

   Conversely, when upon remand consecutive sentences are to be imposed instead of concurrent sentences, the aggregate term may be increased so long as the sentences for individual offenses are not. ***People v. Sanders***, 356 Ill. App. 3d 998, 1005 (1st Dist. 2005).

7. Previous Unexpired Federal or Other-State Sentences

   "A defendant who has a previous and unexpired sentence of imprisonment [from another jurisdiction] and who, after

sentence for a crime in Illinois, must return to serve the unexpired prior sentence may have his or her sentence by the Illinois court ordered to be concurrent with the prior other-state or federal sentence. The court may order that any time served on the unexpired portion of the other-state or federal sentence, prior to his or her return to Illinois, shall be credited on his or her Illinois sentence." **730 ILCS 5/5-4.5-50(e)**.

8. Previous Unexpired Illinois Sentence

"A defendant who has a previous and unexpired sentence of imprisonment imposed by an Illinois circuit court for a crime in this State and who is subsequently sentenced to a term of imprisonment by another [jurisdiction] and who has served a term of imprisonment of [another jurisdiction], and must return to serve the unexpired prior sentence imposed by the Illinois circuit court, may apply to the Illinois circuit court that imposed sentence to have his or her sentence reduced." **730 ILCS 5/5-4.5-50(f)**. The motion to reduce must be filed within 30 days of completion of the other sentence. ***Id***.

E. Natural Life Sentences

1. Discretionary for Murder—**730 ILCS 5/5-8-1(a)(1)(b)**

Natural life may be imposed for first degree murder upon a finding that it was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, or upon a finding that an aggravating factor in **720 ILCS 5/9-1(b) or (b-5)** is present.

2. Mandatory for Murder—**730 ILCS 5/5-8-1(a)(1)(c)**

Natural life is mandatory for first degree murder if defendant was 18 at the time of the offense and: (a) defendant had been previously convicted of murder under any state or federal law; (b) is found guilty of murdering more than one victim; or (c) is found guilty of murdering a victim who falls into a certain specified class under certain specified circumstances, as set forth in the statute (*i.e.* peace officer, fireman, emergency worker, IDOC employee).

NOTE: The statute providing for a mandatory life sentence for murder has been frequently amended, with the most recent significant change enacted in 2016.

NOTE: A mandatory life sentence without parole violates the Eighth Amendment prohibition against cruel and unusual punishment when imposed on a person under 18 years of age at the time of the offense. ***Miller v. Alabama***, 567 U.S. 460, 479 (2012). In ***Montgomery v. Louisiana***, 136 S. Ct. 718 729 (2016), the court held that ***Miller*** announced a new substantive rule that, under the Constitution, is retroactive. Thus, previously entered mandatory life sentences for juvenile offenders are subject to collateral attack, usually through post-conviction proceedings.

A mandatory sentencing scheme which results in a juvenile being sentenced to the functional equivalent of a life sentence without the possibility of parole (i.e. *de facto* life) also violates the Eighth Amendment. ***People v. Reyes***, 2016 IL 119271. Courts may consider the opportunity for good-conduct credit when determining what constitutes a *de facto* life sentence. ***People v. Dorsey***, 2021 IL 123010.

The mitigating factors outlined in ***Miller*** have been codified in **730 ILCS 5/5-4.5-105**. In addition, **730 ILCS 5/5-4.5-115** discusses parole eligibility for persons under the age of 21 at the time of the commission of an offense.

In ***People v. Holman***, 2017 IL 120655, the Court applied ***Miller*** retroactively to discretionary life sentences. However, that holding is now questionable in light of ***Jones v. Mississippi***, 593 U.S. __, 141 S. Ct. 1307 (2021), ¶ 48.

After ***Miller***, defendants older than 18 began challenging their life sentences using similar reasoning. Those over the age of 18 do not have a facial challenge on the basis of the Eighth Amendment prohibition against life sentences for youthful offenders. ***People v. Harris***, **2018 IL 121932**. However, they may be able to raise an as-applied challenge to their sentences based on the proportionate penalties clause after an evidentiary hearing or factual findings regarding the defendant's individual circumstances. ***People v. House***, 2021 IL 125124.

3. Habitual Criminal

A person found to be a Habitual Criminal is subject to a mandatory natural life sentence. **730 ILCS 5/5-4.5-95(a)(5)**.

4. Mandatory Credit

Credit for time spent in presentence custody against a natural life sentence is mandatory. ***People v. Purcell***, 2013 IL App (2d) 110810, ¶ 18.

F. Sentencing Upon a Finding of Guilty but Mentally Ill

"The court may impose any sentence upon the defendant which could be imposed pursuant to law upon a defendant who had been convicted of the same offense without finding of mental illness." **730 ILCS 5/5-2-6(a)**. IDOC is required to provide care as it determines necessary upon imprisonment. **730 ILCS 5/5-2-6(b)**. If defendant is placed on probation or sentenced to a term of periodic imprisonment or conditional discharge, he "shall be required to submit to a course of mental treatment prescribed by the sentencing court." **730 ILCS 5/5-2-6(e)(1)**.

G. Sentencing Credits

1. Calculating Terms of Imprisonment

Credit must be given for time spent in custody as a result of the offense for which the sentence was imposed at the rate specified in **730 ILCS 5/3-6-3**. **730 ILCS 5/5-4.5-100(b)**.

Except as expressly prohibited in subsection (e), credit must be given for "time spent in home detention on the same sentencing terms as incarceration as provided in [**730 ILCS 5/5-8A-3**, the Electronic Monitoring and Home Detention Law]" and credit may be given for days "spent confined for psychiatric or substance abuse treatment prior to judgment, if the court finds that the detention or confinement was custodial." **730 ILCS 5/5-4.5-100(b)**.

If defendant is arrested on one charge and then prosecuted on another charge for conduct that occurred before the arrest, he is entitled to credit on for any time spent in custody on that first charge that is not credited against another sentence. **730 ILCS 5/5-4.5-100(c)**.

Defendant is entitled to credit for "successfully completing county programming while in custody" (which in some cases includes home detention), prior to the sentence. **730 ILCS 5/5-4.5-100(c-5)**. Credit is calculated at the rate specified in **730 ILCS 5/3-6-3** which mandates that county programming credit be awarded at the time of sentencing. *See* ***People v. Montalvo***, 2016 IL App (2d) 140905, ¶ 23 (applying criteria).

No credit is allowed for home confinement as a condition of appeal bond. ***People v. Smith***, 2014 IL App (3d) 130548, ¶¶ 35, 43.

> **NOTE**: The statutory scheme for crediting has been amended a number of times and care should be given to reviewing case law on the issue. *See e.g.* ***Smith***, 2014 IL App (3d) 130548, ¶ 10 (noting changes).

If a defendant commits an offense while on MSR or probation, no credit is allowed on the new charge for time served as a result of an MSR or probation revocation unless the parties agree to same. **730 ILCS 5/5-4.5-100(e)**.

A defendant in custody or committed to treatment as a result of fitness proceedings is entitled to credit for such time against his sentence. **725 ILCS 5/104-24**.

NOTE: Under the then-applicable statute, a defendant who participated in the Sheriff's Day Reporting Center Program was entitled to credit as time spent in "custody" because of the specifics of the program. ***People v. Beachem***, 229 Ill.2d 237, 253 (2008).

NOTE: The date of the *mittimus* is the first day of a sentence and is not part of presentence credit. ***People v. Williams***, 239 Ill. 2d 503, 510 (2011).

NOTE: Resisting or obstructing a peace officer carries a mandatory sentence of 48 consecutive hours of imprisonment or 100 hours of community service. **720 ILCS 5/31-1(a-5)**. Presentence credit may apply to the 48 hours even if the time was not consecutive. ***People v. Smith***, 2013 IL App (3d) 110477, ¶ 27.

2. Good Conduct Credit and Good Behavior Allowance**—730 ILCS 5/3-6-3**

3. **Please note there have recently been significant changes to this statute. Refer to the most recent version of the statute before awarding sentencing credit.**

   IDOC is charged with calculating and awarding good behavior and good conduct credit for prison sentences.

   Generally, for an offense committed before June 19, 1998, a defendant is entitled to day for day credit. IDOC may also award up to 180 days of earned sentence credit for good conduct.

   Day for day credit and good conduct credit is limited for certain offenses committed after June 19, 1998. (*See* Subsection 3, "Truth-In-Sentencing," below).

   The County Jail Good Behavior Allowance Act, **730 ILCS 130/1 *et seq*.**, governs credit on jail sentences. Generally, day for day credit is allowed except when: (1) defendant inflicted physical harm; (2) credit would reduce sentence below mandatory minimums; (3) defendant was sentenced to an impact incarceration program; (4) defendant was convicted

of certain sexual assault or abuse crimes; (5) defendant was convicted of a felony and receives periodic imprisonment as a condition of sentence; and (6) where person is sanctioned for civil contempt. **730 ILCS 130/3**. Please note that this statute is revised effective January 1, 2023.

Only a fractional day over 12 hours is credited as a day for purposes of the good behavior allowance. ***Id***.

> **NOTE**: A defendant who receives a mandatory 180-day sentence on a felony driving while license suspended charge is ineligible for day for day credit under the County Jail Good Behavior Allowance Act. ***People ex rel. Birkett v. Jorgensen***, 216 Ill. 2d 358, 365 (2005).

4. Pronouncement of Truth in Sentencing

See Appendix for "Truth in Sentencing Offenses" on page A-156.

730 ILCS 5/5-4-1(c-2) requires the sentencing judge to make a statement to inform the public of the actual amount of time the defendant is likely to serve as a result of the sentence. The statute requires several separate statements depending on the offense and when it was committed.

H. Juvenile Sentencing

730 ILCS 5/5-4.5-105(a) requires the trial court to consider 9 additional mitigating factors whenever sentencing a defendant who is "under age 18 at the time of the offense"

(a) "the person's age, impetuosity, and level of maturity at the time of the offense, including the ability to consider risks and consequences of behavior, and the presence of cognitive or developmental disability, or both, if any;"

(b) "whether the person was subjected to outside pressure, including peer pressure, familial pressure, or negative influences;"

(c) "the person's family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma;"

(d) "the person's potential for rehabilitation or evidence of rehabilitation, or both;"

(e) "the circumstances of the offense;"

(f) "the person's degree of participation and specific role in the offense, including the level of planning by the defendant before the offense;

(g) "whether the person was able to meaningfully participate in his or her defense;"

(h) "the person's prior juvenile or criminal history; and"

(i) "any other information the court finds relevant and reliable, including an expression of remorse, if appropriate. However, if the person, on advice of counsel chooses not to make a statement, the court shall not consider a lack of an expression of remorse as an aggravating factor."

1. Limitation on Juvenile Sentencing

A defendant under the age of 18 at the time of the offense cannot be sentenced to death. ***Roper v. Simmons***, 543 U.S. 551 (2005). The Eighth Amendment prohibits capital punishment for juvenile offenders. *Id.* "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." ***Roper***, 543 U.S. at 574.

A mandatory life sentence without parole violates the Eighth Amendment prohibition against cruel and unusual punishment when imposed on a person under 18 years of age at the time of the offense. ***Miller v. Alabama***, 567 U.S. 460, 479 (2012), A mandatory sentencing scheme which results

in a juvenile being sentenced to the functional equivalent of a life sentence without the possibility of parole (*de facto* life) also violates the Eighth Amendment. ***People v. Reyes***, 2016 IL 119271.

Mandatory life for juveniles was repealed in 2016. Under **730 ILCS 5/5-8-1(1)(c)**, mandatory life now only applies to offenders age 18 and over. However, an aggravating factor based upon status of the victim still applies to juveniles, but instead of mandatory life, the mandatory minimum sentence is 40 years. Per **730 ILCS 5/5-4.5-105(c)**, if the victim is a peace officer, firefighter, corrections employee, EMT, or community policing volunteer, "the court shall impose a sentence of not less than 40 years of imprisonment."

In ***Graham v. Florida***, 560 U.S. 48 (2010), the court held that imposing a sentence of life without the possibility of parole for a juvenile convicted of a non-homicide offense is unconstitutional. Most new juvenile sentences for non-homicide offenses in Illinois will comply with ***Graham*** because of **730 ILCS 5/5-4.5-115**, enacted in 2019. Now, nearly every offender under the age of 21 at the time of the offense will be eligible for parole after serving 10-20 years, regardless of the length of their sentence. There is an exception for predatory criminal sexual assault of a child, which is not eligible for parole under the statute. Most juvenile homicide offenders sentenced to a term-of-years will be eligible for parole after 20 years except for those sentenced to 40+ years pursuant to **730 ILCS 5/5-4.5-105(c)** based on status of victim. Eligibility for parole complies with ***Miller***, regardless of the length of sentence or finding of incorrigibility.

Relying on **730 ILCS 5/5-4.5-105**, which set forth new rules regarding sentencing offenders under the age of 18 at the time of the offense and which is discussed below, ***Buffer*** concluded that a juvenile sentence in excess of 40 years is a *de facto* life sentence. ***Buffer***, 2019 IL 122327, ¶ 40. "In determining when a juvenile defendant's prison term is long enough to be considered *de facto* life without parole, we choose to draw a line at 40 years." ***Id.***

Conversely, "a prison sentence of 40 years or less imposed on a juvenile offender does not constitute a *de facto* life sentence in violation of the eighth amendment." ***Buffer***, at ¶ 41. Such a sentence allows a meaningful opportunity for release based on maturity and rehabilitation. ***Id***.

In determining whether a sentence is a *de facto* life sentence, the new parole statute and day-for-day good conduct credit statutes may be considered. A defendant is not entitled to eventual release, but only to a meaningful opportunity to obtain release based on his maturity and rehabilitation. ***People v. Beck***, 2021 IL App (5th) 200252. See also, ***People v. Dorsey***, 2021 IL 123010.

In ***People v. Harris***, 2018 IL 121932, an 18-year-old defendant raised a ***Miller*** challenge to his sentence. The court declined to extend ***Miller*** protections to young adults. However, the defendant may have an "as applied" constitutional challenge if he can show that the sentence is unconstitutional based on his specific facts and circumstances. ***Harris***, 2018 IL 121932, ¶ 52–54.

In ***People v. Coty***, 2020 IL 123972, the court held that a 50-year sentence for an intellectually disabled defendant convicted for the second time of a sexual offense did not violate the proportionate penalties clause as applied to him. While ***Atkins v. Virginia,* 536 U.S. 204 (2002)**, held that the death penalty cannot be imposed on the intellectually disabled, many of the factors listed in ***Atkins*** which mitigate the culpability of the intellectually disabled are also factors which may increase the future dangerousness of such a defendant and make him less likely to be rehabilitated. The court distinguished ***Miller*** which focused on the "transient nature of youth, characteristics not shared by adults who are intellectually disabled." ***Coty***, 2020 IL 123972, ¶ 39.

Required registration of a juvenile as a sex offender does not violate the Eighth Amendment, or the state proportionate penalties clause. ***People ex rel. Birkett v. Konetski***, 233 Ill.2d 185, 208 (2009).

2. Statutory Requirements for Juvenile Sentencing in Adult Court

In 2016, **730 ILCS 5/5-4.5-105** went into effect requiring that that the court consider additional mitigating factors when sentencing a defendant who was under the age of 18 at the time of the offense. The court also has the option to decline to impose the 15/20/25-life firearm sentencing enhancements. **730 ILCS 5/5-4.5-105(b)**. Further, if the defendant is convicted of first degree murder and would otherwise be subject to mandatory life, the court shall impose a sentence of not less than 40 years imprisonment and may decline to impose a firearm enhancement to that sentence. **730 ILCS 5/5-4.5-105(c)**.

3. Juvenile Sentenced as Adult

No transfer hearing is required before sentencing a juvenile as an adult after a plea to attempt first degree murder filed pursuant to a negotiated agreement to dismiss a first degree murder charge. The attempt arose from the same incident as the original charge. ***People v. King***, 241 Ill. 2d 374, 386 (2011).

In ***People v. Fort***, 2017 IL 118966, the minor was charged with first degree murder and tried in adult court pursuant to an automatic transfer. He was convicted of the uncharged offense of second degree murder and sentenced as an adult. The Court differentiated ***King*** and held that the adult sentencing in this case was in error because the second degree murder was not charged and did not arise out of the same incident as the first degree murder. ***Fort***, 2017 IL 118966, ¶ 38.

In ***People v. Rodriguez***, 2018 IL App (1st) 160030, the defendant was 15 at the time of the offense and tried as an adult for first degree murder. After a finding of guilt, he was given the mandatory minimum sentence of 45 years (due to the 25 year enhancement for personally discharging a firearm). He had previously been sentenced on an unrelated case to 20 years for attempt first degree murder. The two sentences were to run consecutively, making the total time

the defendant would spend in custody 65 years, which the defendant claimed was a *de facto* life sentence. The case was remanded for resentencing under **730 ILCS 5/5-4.5-105** in which the sentencing judge would have the discretion to not impose the firearm enhancements.

4. Void Sentences

The "void sentence" rule, which states that a criminal sentence that does not conform to statutory requirements is inherently void, is abolished. ***People v. Castleberry***, 2015 IL 116916, ¶ 19.

3.8 Periodic Imprisonment

A. Statutory Authority

"A sentence of periodic imprisonment is a sentence of imprisonment during which the committed person may be released for periods of time during the day or night or for periods of days, or both, or if convicted of a felony other than first degree murder, a Class X or Class 1 felony, committed to any county, municipal, or regional correctional or detention institution or facility in this State for such periods of time as the court may direct." **730 ILCS 5/5-7-1(a)**. The statute sets forth the following limits on the term of periodic imprisonment:

(a) Class 1 Felony: A definite term of from 3 to 4 years;

(b) Class 2 Felony: A definite term of from 18 to 30 months;

(c) Other Offenses: Lesser of up to 18 months or the longest sentence of imprisonment that could be imposed. **730 ILCS 5/5-7-1(d)**.

B. Limited Availability

1. "[N]o person shall be sentenced to a term of periodic imprisonment longer than one year if he is committed to a county correctional institution or facility and in conjunction

with that sentence participates in a county work release program comparable to the work and day release program provided for in **Article 13** of the Unified Code of Corrections in State Facilities." **730 ILCS 5/5-7-1(d)**.

2. Periodic Imprisonment cannot be imposed when a sentence of imprisonment in excess of 90 days is also imposed. **730 ILCS 5/5-7-1(c)**.

3. The non-probationable offenses listed in **730 ILCS 5/5-5-3(c)(2)** are also excluded from periodic imprisonment.

C. Inapplicability of Day-for-Day Credit

Day-for-day credit for time served in pre-trial custody does not apply to a term of periodic imprisonment under the Code of Corrections or the County Jail Good Behavior Allowance Act. ***People v. Lindsey***, 199 Ill. 2d 460, 479 (2002).

3.9 Impact Incarceration

A. State Boot Camp

1. Placement

The court may approve in the sentencing order defendant's placement in the impact incarceration program (boot camp), conditional upon acceptance by IDOC. Defendant must be no less than 17 years of age and not more than 35 and must have a sentence of 8 years or less. Additional eligibility criteria are that the defendant be physically and mentally capable of participation, must not previously have participated in the program, must not have previously served more than one sentence of imprisonment for a felony in an adult correctional facility, and must not have been convicted, at the time of admission sought or previously, of a Class X felony, first or second degree murder, armed violence, aggravated kidnapping, criminal sexual assault, aggravated criminal sexual abuse or subsequent conviction for criminal

sexual abuse, forcible detention, or arson. **730 ILCS 5/5-8-1.1(a), (b)**.

Defendant must be referred into the program by the sentencing judge at the time of sentencing and must sign a consent to participate.

NOTE: The statute does not violate the separation of powers clause of the Illinois Constitution. ***People v. Manoharan***, 394 Ill. App. 3d 762, 772 (4th Dist. 2009).

NOTE: The failure of counsel to properly advise defendant of his statutory eligibility may render defendant's plea to be involuntary or may be the basis for a claim of ineffective assistance of counsel. ***People v. Clark***, 386 Ill. App. 3d 673, 678 (3rd Dist. 2008).

2. Definition.

"Boot Camp" includes "among other matters, community service activities, cognitive behavior programming, life skills, reentry planning, education and counseling, including drug counseling where appropriate." **730 ILCS 5/5-8-1.1(c)**.

B. Cook County Boot Camp

1. **730 ILCS 5/5-8-1.2** authorizes the Cook County Board of Commissioners to allow the Sheriff of Cook County to operate a county impact incarceration program.

2. The differences between the Cook County and state boot camps are as follows:

(a) in addition to the eligibility requirements applicable to the impact incarceration program, the participant must have been found in violation of probation for a Class 2, 3, or 4 felony that is not a forcible felony (defined by **720 ILCS 5/2-8**) or not a violent crime (defined by **725 ILCS 120/3(c)**); or the participant must have been convicted of a Class 2, 3, or 4 felony that is not a forcible felony or a violent crime after

having previously served a sentence of probation for any felony offense **730 ILCS 5/5-8-1.2(c)(4)**;

(b) there is no requirement that a participant be sentenced to 8 years or less (in the county program, after approval by the sheriff, participants are sentenced directly into the program, without time period designations, for 120 to 180 days);

(c) the sheriff of the county recommends and approves the participant for placement in the program **730 ILCS 5/5-8-1.2(c)(7)**; and

(d) participation in the program is followed by a mandatory term of monitored release, supervised by the sheriff, for at least eight months to no more than twelve months **730 ILCS 5/5-8-1.2(f)**.

C. Other County Boot Camp Programs

55 ILCS 5/3-6038 authorizes the sheriff in counties with a population under 3,000,000 inhabitants, with approval of the county board, to operate a county impact incarceration program. The statute requires that the participant meet the same eligibility requirements as those in the state program.

D. Status on Completion

If a defendant completes the state program successfully (the program lasts for a period of 120 to 180 days), the sentence is reduced to time served. **730 ILCS 5/5-8-1.1(a)**. The defendant shall also serve a period of mandatory supervised release as set forth in **730 ILCS 5/5-8-1**.

If a defendant successfully completes Cook County boot camp (which includes a period of at least 8 months and no more than twelve months monitored release), the sheriff shall certify the person's successful completion of the program to the State's Attorney and to the court. **730 ILCS 5/5-8-1.2(g)**. The court may also sentence the defendant to a period of probation, to begin after the successful completion of the program. **730 ILCS 5/5-8-1.2(f)** and **(g)**.

E. Unsatisfactory Discharge

1. If the defendant does not successfully complete the state boot camp "his term of imprisonment shall be as set for by the court in its sentencing order." **730 ILCS 5/5-8-1.1(a)**.

2. If the defendant fails to successfully complete the county boot camp, the court may impose any sentence available except for probation or conditional discharge. **730 ILCS 5/5-6-4(e)**. A violation of county boot camp sentence is handled in the same way as a violation of probation or conditional discharge. **730 ILCS 5/5-6-4(e)**.

3.10 Electronic Monitoring and Home Detention

A. Statutory Authority

Home confinement may be a condition of probation or conditional discharge. **730 ILCS 5/5-6-3(b)(10)**.

"Home detention" is defined as "the confinement of a person convicted or charged with an offense to his or her place of residence under the terms and conditions established by the supervising authority." **730 ILCS 5/5-8A-2(C)**. "Electronic monitoring" is defined as "the monitoring of an inmate, person, or offender with an electronic device both within and outside of their home under the terms and conditions established by the supervising authority." **730 ILCS 5/5-8A-2(A-20)**.

"Imprisonment" includes electronic monitoring or home detention served by an offender after (i) the offender has been committed to the custody of the sheriff to serve the sentence and (ii) the sheriff has placed the offender in an electronic monitoring or home detention program in accordance with Article 8A of Chapter V of this Code." **730 ILCS 5/5-1-10**.

When a defendant is sentenced to a minimum term of imprisonment, **730 ILCS 5/5-8A-8** authorizes the sheriff to place a defendant "in an electronic monitoring or home detention program" for service of that minimum term of

imprisonment unless the defendant is convicted of an excluded offense or the sentencing order specifies otherwise.

NOTE: Electronic home monitoring is not a form of imprisonment for the purpose of the mandatory jail term associated with **625 ILCS 5/6-303**. ***People v. Horsman*****,** 406 Ill. App. 3d 984, 991 (2nd Dist. 2011).

B. Application

1. The conditions of electronic monitoring and home detention include that:

   (a) defendant remain within the designated area for the hours designated;

   (b) designated persons be admitted into the place of detention to verify compliance with the conditions of detention;

   (c) designated persons be admitted into the place of education or work to verify compliance with the conditions of detention;

   (d) defendant shall participate in electronic monitoring as designated by the supervising authority at any time to verify compliance with conditions of detention; and

   (e) defendant shall maintain a working phone or monitoring device. **730 ILCS 5/5-8A-4(A)**, **(B)**, **(C)**, **(D)** and **(E)**.

2. When home confinement is a condition of probation or conditional discharge, certain similar conditions apply, including use of an electronic monitoring device. **730 ILCS 5/5-6-3(b)(10)**.

3. Electronic monitoring and home detention may be given in connection with pre-trial or pre-adjudication detention; probation; conditional discharge; periodic imprisonment; parole, aftercare release, or mandatory supervised release;

work release; furlough; or post-trial incarceration. **730 ILCS 5/5-8A-3(f)**.

4. Certain offenses are excluded from electronic monitoring and home detention: "first degree murder, escape, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated battery with a firearm, bringing or possessing a firearm, ammunition or explosive in a penal institution, any 'Super-X' drug offense or calculated criminal drug conspiracy or street gang criminal drug conspiracy, or any predecessor or successor offenses with the same or substantially the same elements or any inchoate offenses relating to the foregoing offenses." **730 ILCS 5/5-8A-2(B)**.

5. A defendant charged with or convicted of an excluded offense may not be placed in an electronic home detention program except for bond preceding trial or appeal or while on parole, aftercare release, or mandatory supervised release. **730 ILCS 5/5-8A-3(a)**.

6. A defendant serving a sentence on a Class 1 offense may be placed in an electronic monitoring or home detention program "for a period not to exceed the last 90 days of incarceration." **730 ILCS 5/5-8A-3(b)**.

7. A defendant sentenced on a Class X offense on or after August 11, 1993, may be placed in a program "for a period not to exceed the last 90 days of incarceration" so long as the program is not prohibited in the sentencing order. **730 ILCS 5/5-8A-3(c)**.

8. A defendant serving a sentence on a Class 2, 3, or 4 offense may be placed in a program "pursuant to Department administrative directives." **730 ILCS 5/5-8A-3(e)**.

9. Notwithstanding the statutory exclusions, a defendant convicted of an excluded offense "may be placed in an electronic home detention program for a period not to exceed the last twelve months of incarceration" if: (1) he is 55 years of age or older, (2) he is serving a determinate sentence, (3) he has served at least 25% of his sentenced prison term, and

(4) his placement in an electronic home detention program is approved by the Prisoner Review Board. This exception does not apply to certain enumerated sex offenses. **730 ILCS 5/5-8A-3(d)**.

C. Escape or Failure to Comply

A violation of the electronic monitoring or home detention program is a Class 3 felony for a person charged with or convicted of a felony, and a Class B misdemeanor for a person charged with or convicted of a misdemeanor. A person who violates while armed with a dangerous weapon commits a Class 1 felony. **730 ILCS 5/5-8A-4.1(a)**, **(b)**, and **(c)**. The statute requires that the person remain in violation for at least 48 hours in order to be charged.

3.11 Substance Use Disorder Treatment for Criminal Justice Clients (commonly called TASC probation)

A. Statutory Authority

Pursuant to **20 ILCS 301/40-5 *et seq.***, certain eligible persons with a substance use disorder may elect treatment under the supervision of a program licensed by DHS. TASC is one such program. The treatment may be ordered as a condition of probation, with certain special requirements. **20 ILCS 301/40-10(a)**.

Completion of probation allows the judgment to be vacated under certain circumstances. **20 ILCS 301/40-10(e)**. The probation period may not exceed the maximum which could be imposed or five years, whichever is less. **20 ILCS 301/40-10(a)(1)**.

B. Eligibility

1. General Requirements

(a) The following offenses are ineligible for TASC probation: certain crimes of violence; certain non-probationable drug crimes (or where defendant has previously been convicted of a non-probationable

felony); two or more convictions of crimes of violence; other felony charges are pending; the person is on probation or parole and the probation or parole authority does not consent; the person had previously been admitted under TASC on two prior occasions within any consecutive two-year period; the person has been convicted of residential burglary and has a record of one or more felony convictions: DUI, reckless homicide, driving a vehicle under the influence (also reckless homicide of an unborn child). **20 ILCS 301/40-5(1) *et seq.***

(b) TASC is available to both those who plead guilty or are found guilty at trial. ***People v. House***, 232 Ill. App. 3d 309, 316 (2nd Dist. 1992).

(c) TASC may be denied if the court finds that there is no significant relationship between the addiction and the crime committed, that imprisonment is necessary to protect the public; or if defendant is not likely to be rehabilitated through treatment. The program must approve defendant's participation. **20 ILCS 301/40-10(c)**.

(d) Where all eligibility criteria is met, the statute mandates TASC probation unless the court expressly finds that the sentence is inappropriate under **section 40-10(c)**. ***People v. Demsco***, 2013 IL App (3d) 120391 ¶ 10.

2. Duty to Admonish Defendant

If the court has reason to believe that defendant suffers from alcohol or drug addiction, and if the court finds he is eligible for TASC, the court ***shall*** advise defendant that he may be sentenced to probation if he elects and is accepted for treatment. The court must also admonish defendant, *inter alia*, of the length of the potential probation and that failure to adhere to the program requirements is a breach of probation. **20 ILCS 301/40-10(a)**.

C. Status on Completion

Upon successful completion the court shall discharge defendant from probation. If defendant has not previously been convicted of a felony offense and has not previously been granted a vacatur of judgment under Article 40, the court shall vacate the judgment and dismiss the criminal proceedings unless "having considered the nature and circumstances of the offense and the history character, and condition of the individual, the court finds that the motion should not be granted." **20 ILCS 301/40-10(e)**; ***People v. McGregor***, 405 Ill. App. 3d 776, 779 (2nd Dist. 2010) (noting court's discretion to deny vacatur).

The motion to vacate the judgment of conviction must be filed between the date of the entry of judgment and not more than 60 days after the discharge of probation, unless good cause is shown. **20 ILCS 301/40-10(e)**.

3.12 Probation, Conditional Discharge and Supervision

A. Statutory Authority

1. Probation and Conditional Discharge

Both probation and conditional discharge are defined as "a sentence or disposition of conditional and revocable release." Probation occurs "under the supervision of a probation officer," while conditional discharge occurs "without probationary supervision." **730 ILCS 5/5-1-4** (conditional discharge); **730 ILCS 5/5-1-18** (probation).

2. Supervision

Supervision allows the deferral of a judgment of guilty in non-felony cases (with exceptions) for no longer than two years, the successful completion of which results in the dismissal of the charge and discharge of the defendant "without adjudication of guilt" and without a conviction. **730 ILCS 5/5-6-1(c); 5/5-6-3.1**.

3. Preferred Sentence

Probation or conditional discharge is the preferred sentence unless, having regard to the nature and circumstance of the offense, and to the history, character and condition of the offender, the court determines:

(a) that "imprisonment or periodic imprisonment is necessary for the protection of the public," or

(b) that [it] would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice, or

(c) that "a combination of imprisonment with concurrent or consecutive probation when an offender has been admitted into a drug court program is necessary for the protection of the public and the rehabilitation of the offender." **730 ILCS 5/5-6-1(a)(3)**.

NOTE: The court may sentence a defendant to a term of probation that commences during the MSR term for the other sentence. The sentences are deemed concurrent. ***People v. Horrell***, 235 Ill. 2d 235, 243 (2009). And, as of January 1, 2005, **730 ILCS 5/5-6-2(f)** authorizes a term of probation that is concurrent or consecutive to a term of imprisonment so long as the maximum term imposed does not exceed the maximum term provided under Article 4.5 or Article 8 of the code.

NOTE: **730 ILCS 5/5-4-1(c-4)** requires the court to inquire into defendant's military or veteran status and, if defendant has been professionally diagnosed as having a mental illness, the court may order the officer preparing a presentence report to consult with VA or other agency regarding available treatment options, for consideration at sentencing.

4. Length of Probation or Conditional Discharge

Terms of probation are set forth in the provisions of **730 ILCS 5/5-4.5-30** ***et seq.*** governing each individual classification of crime:

(a) Class 1 or Class 2 Felony—Not more than four years under **730 ILCS 5/5-4.5-30, 35**;

(b) Class 3 or Class 4 Felony—Not more than thirty months under **730 ILCS 5/5-4.5-40, 45**;

(c) Misdemeanor—Not more than two years under **730 ILCS 5/5-4.5-55, 60, 65**;

(d) Petty Offense—Not more than six months under **730 ILCS 5/5-4.5-75**.

B. Non-Probationable Offenses

Under **730 ILCS 5/5-5-3(c)(2)** probation and conditional discharge shall not be imposed for certain enumerated offenses.

The list is extensive. It is: first degree murder; attempt first degree murder; any Class X felony; controlled substance trafficking; a violation of **720 ILCS 570/407**; certain fentanyl or heroin manufacture and delivery charges; certain Class 1 or Class 2 felonies if defendant has an equal or greater prior conviction within 10 years; mandatory imprisonment firearm cases under **720 ILCS 5/24-1**, **24-1.1**, or **24-1.6**; residential burglary; criminal sexual assault; aggravated battery of a senior citizen; a forcible felony related to activity of an organized gang; vehicular hijacking; certain subsequent hate crimes; a subsequent conviction for institutional vandalism with damage in excess of $300; a Class 3 felony FOID violation under **430 ILCS 65/2(a)(1)** and **430 ILCS 65/14(c)**; compelling organization membership of persons; certain child pornography offenses; certain arson offenses; gunrunning; certain suspended or revoked licenses offenses; unlawful purchase of a firearm; disarming a peace officer; unlawful possession of a loaded firearm by a street gang member; a Class 1 felony committed

while defendant is on felony probation or conditional discharge; theft of property valued between $500,000 and $1,000,000; laundering of criminally derived property with a value exceeding $500,000; selling certain counterfeit items; certain aggravated assaults with a firearm; and certain firearm trafficking offenses. **730 ILCS 5/5-5-3(c)(2)**.

NOTE: **730 ILCS 5/5-6-3(a)(3)** requires a court to prohibit the defendant from possessing a firearm or other dangerous weapon as a condition of probation or conditional discharge for a felony or misdemeanor with intentional or knowing infliction of bodily harm or threat of bodily harm. For other offenses, this requirement is discretionary.

NOTE: The Veterans Court Act does not prohibit participation by a defendant charged with a non-probationable offense. ***People v. McKinney***, 2012 IL App (1st) 103364, ¶ 24.

C. Trial with Special Provisions and Assistance

When a trial occurs with special provisions and assistance under **725 ILCS 5/104-22**, section **725 ILCS 5/104-26** regarding disposition of defendants suffering disabilities permits the court to impose probation even when defendant is otherwise ineligible. ***People v. Watters***, 231 Ill.App.3d 370, 389 (5th Dist. 1992).

D. Offenses for Which a Person is Not Eligible for Supervision

1. Under **730 ILCS 5/5-6-1(c)**, a defendant who is charged with a felony or any of the following Class A misdemeanor offenses is not eligible for supervision:

   (a) sexual exploitation of a child **720 ILCS 5/11-9.1**;

   (b) domestic battery **720 ILCS 5/12-3.2**;

   (c) criminal sexual abuse **720 ILCS 5/11-1.50**;

   (d) dog fighting **720 ILCS 5/26-5**;

(e) criminal damage to property when done recklessly or knowingly by means of fire or explosive **720 ILCS 5/21-1(a)(2)**, **(3)**;

(f) unlawful use of certain weapons **720 ILCS 5/24-1(a)(1)**, **(2)**, **(3)**, **(4)**, **(5)**, **(8)**, **(10)**, **(11)**;

(g) retail theft when defendant convicted or placed on supervision for retail theft within last five years; *see* **730 ILCS 5/5-6-1(e)** for the specific provision;

(h) resisting or obstructing a peace officer or correctional institution employee **720 ILCS 5/31-1**;

(i) escape or failure to report for periodic imprisonment **720 ILCS 5/31-6**;

(j) aiding escape **720 ILCS 5/31-7**;

(k) Class A misdemeanor violation of **Section 3.01, 3.03-1** or **4.01** of the Humane Care for Animals Act.

2. Supervision is prohibited for speeding 26 miles per hour or more over the speed limit on any highway. **730 ILCS 5/5-6-1(p)** and **(q)**.

3. Supervision is prohibited for a second or subsequent violation of **Section 6-303** committed while defendant's driving privilege was revoked for involuntary manslaughter or reckless homicide **730 ILCS 5/5-6-1(c-5)**.

4. Under **730 ILCS 5/5-6-1(d)**, a defendant is not eligible for supervision if he has been charged with driving while under the influence of alcohol or drugs (**625 ILCS 5/11-501** or a similar local ordinance) and the defendant has previously been:

(a) convicted of driving under the influence of drugs or alcohol **625 ILCS 5/11-501** or a similar local ordinance; or

(b) assigned supervision for driving under the influence of alcohol or drugs **625 ILCS 5/11-501** or a similar local ordinance; or

(c) in connection with a plea agreement, has pleaded guilty or stipulated to the facts supporting a charge or a finding of guilty for violating **625 ILCS 5/11-501** or a similar local ordinance.

5. Under **730 ILCS 5/5-6-1(f)**, a defendant is not eligible for supervision if he has been charged with violating the provisions of the Illinois Vehicle Code or a similar local ordinance relating to:

   (a) vehicle weight restrictions **625 ILCS 5/15-111**;

   (b) submission of vehicles to weighing and removal of excess weight **625 ILCS 5/15-112**;

   (c) permits for excess vehicle size and weight **625 ILCS 5/15-301**;

   (d) driver's license classifications **625 ILCS 5/6-104(b)**;

   (e) speed limits in school zones **625 ILCS 5/11-605**;

   (f) passing school buses **625 ILCS 5/11-1414**;

   (g) pedestrians' right-of-way at crosswalks and school zones. **625 ILCS 5/11-1002.5**.

6. Under **730 ILCS 5/5-6-1(g)**, a defendant is not eligible for supervision if he has been charged with violating **Section 3-707** (operation of uninsured motor vehicle), **3-708** (operation of motor vehicle when registration suspended for noninsurance), **3-710** (display of false insurance card), or **5-401.3** (scrap processors required to keep records) of the Illinois Vehicle Code or a similar provision of a local ordinance, if the defendant has within the last 5 years been:

   (a) convicted for a violation of **Section 3-707**, **3-708**, **3-710**, or **5-401.3** of the Illinois Vehicle Code or a similar provision of a local ordinance; or

   (b) assigned supervision for a violation of **Section 3-707**, **3-708**, **3-710**, or **5-401.3** of the Illinois Vehicle Code or a similar provision of a local ordinance.

7. Under **730 ILCS 5/5-6-1(h)**, a defendant is not eligible for supervision if he is under 21 years of age and is charged with a serious traffic offense as defined in **625 ILCS 5/1-187.001**, unless he pays fines, penalties, and costs provided by law and successfully completes an approved traffic safety program, but in any event he is ineligible for supervision if he had previously received supervision for such an offense.

8. Under **730 ILCS 5/5-6-1(i)**, a defendant is not eligible for supervision if he is charged with operating an uninsured vehicle if he previously received supervision for the same or a similar offense.

9. Under **730 ILCS 5/5-6-1(j)**, a defendant is not eligible for supervision on a 6-303 charge if his revocation or suspension was for DUI, or refusal to submit to testing for DUI, or reckless homicide, if he was convicted of or received supervision for DWLS within the last ten years.

10. Under **730 ILCS 5/5-6-1(k)**, a defendant is not eligible for supervision if he is charged with violating any provision of the Illinois Vehicle Code or a similar provision of a local ordinance that governs the movement of vehicles if, within the twelve months preceding his arrest, he was given supervision on two occasions for violation for similar provisions.

11. Under **730 ILCS 5/5-6-1(o)**, a defendant is not eligible for supervision if charged with a violation of **Section 6-303** of the Vehicle Code when the suspension is for a statutory summary suspension and defendant was a first offender and (1) failed to obtain a monitoring device driving permit, or (2) had obtained a monitoring device driving permit but was driving a vehicle not equipped with a breath alcohol ignition interlock device.

12. Under **730 ILCS 5/5-6-1(r)**, a defendant is not eligible for supervision if charged with violating any provision of the Vehicle Code if the violation was the proximate cause of the death of another and the defendant's driving abstract contains any prior conviction or supervision for any

violation of the Vehicle Code other than an equipment violation.

13. Under **730 ILCS 5/5-6-1(s)**, a defendant is not eligible for supervision if charged with violating subsection (i) of **Section 70** of the Firearm Concealed Carry Act.

14. Charges resulting in dispositions of supervision may be treated as prior committed offenses for purposes of imposing subsequent penalties. ***People v. Sheehan***, 168 Ill. 2d 298, 306 (1995), and as evidence in aggravation when imposing punishment for a later conviction. ***People v. Johnson***, 128 Ill. 2d 253, 285 (1989).

E. Conditions

1. Mandatory Conditions

(a) Intermediate sanctions for violation of probation (adopted by the chief judge of each circuit), are mandated by **730 ILCS 5/5-6-1(a)**; *see also* **730 ILCS 5/5-6-4(i)**.

(b) **730 ILCS 5/5-6-3(a)** lists additional mandatory conditions of probation and conditional discharge: (1) not commit a crime; (2) report as required; (3) not possess a firearm or other dangerous weapon *where the offense is a felony, or if a misdemeanor, the offense involved the intentional or knowing infliction of bodily harm or threat of bodily harm*; (4) not leave the state without approval; (5) permit probation officer visits; (6) 30–120 hours of community service where the offense related to gang-related criminal activities; (7) educational or vocational training (if person at least seventeen years old and sentenced in county of over 3,000,000 inhabitants); (8) drug abuse treatment under certain circumstances; (8.5) sex offender treatment for those convicted of a felony sex offense; (8.6) refrain from residing with another convicted sex offender if convicted of sex offense; (8.7) refrain from communicating over the Internet with a minor if convicted of child sex offense; (8.8)

abstain from using Internet without probation officer's permission and submit to monitoring and searching of offender's computer if convicted of certain sex offenses; (8.9) refrain from accessing social networking websites if convicted of sex offense; (9) surrendering firearms owner's identification card; (10) unless offender is parent or guardian of child under 18 with no other minors present, not participate in holiday event involving children under 18 if convicted of sex offense; (11) not use any computer scrub software if convicted of sex offense; (12) not purchase, possess or have under control any product containing pseudoephedrine or ammonium nitrate if convicted of methamphetamine offense; (13) if convicted of certain hate crimes, complete a minimum of 200 hours community service and enroll in certain educational programs.

(c) **730 ILCS 5/5-6-3.1** sets forth the incidents and conditions of supervision. They are similar, but not identical, to those of probation or conditional discharge.

A jail sentence is not expressly listed and thus is not an authorized condition of supervision. ***People v. Roper***, 116 Ill. App. 3d 821, 825 (1st Dist. 1983); ***People v. Majer***, 131 Ill. App. 3d 80, 86 (2nd Dist. 1985).

(d) A person sentenced to probation for a hate crime must perform a designated period of community service and, if offender caused property damage to religious objects or decorations, attend an educational program discouraging hate crimes. **720 ILCS 5/12-7.1(b-10)**.

2. Discretionary Conditions

(a) **730 ILCS 5/5-6-3(b)** lists discretionary conditions for probation and conditional discharge, including, *e.g.*, serve a term of periodic imprisonment, pay a fine and costs.

(b) Probation conditions should be consistent with the overall rehabilitative intent of the statutory scheme. ***People v. Meyer***, 176 Ill.2d 372, 383 (1997) (requiring defendant to erect a sign "WARNING! A convicted felon lives here. Enter at your own risk." was an improper condition of probation).

(c) Requiring a defendant to bring his child support payments current was proper condition of probation, as the statute provides that the court may require defendant to support his dependents. ***People v. Goossens***, 2014 IL App (3d) 120680, ¶ 9.

> **NOTE**: A court's oral pronouncement overrides any conflict with a written order. Thus, an oral pronouncement of a two year probation term overrides a written order of four years. ***People v. Roberson***, 401 Ill. App. 3d 758, 774 (4th Dist. 2010).

3. Where a defendant is on probation, he has a "significantly diminished" expectation of privacy. ***United States v. Knights***, 534 U.S. 112, 119–20 (2001). Further, defendant's agreement via his guilty plea to submit to searches of his person, residence, papers, automobiles, and/or effects any time the Probation Officer makes such a request is a proper and enforceable condition of probation. ***People v. Absher***, 242 Ill. 2d 77, 91 (2011).

F. Conditional Jail Term

1. Length

Imprisonment imposed as a condition of probation may not exceed 6 months, unless for a fourth or subsequent violation of **625 ILCS 5/6-303**. **730 ILCS 5/5-6-3(e)**. It may be required to be served at the end of the probation period. ***People v. Tipton***, 88 Ill.2d 256, 265 (1981).

2. Impact Incarceration Program

730 ILCS 5/5-6-3(e) excludes from the six-month limit any period of confinement given to a participant in the county impact incarceration program.

G. Status on Completion

Upon expiration or termination of the period of probation or of conditional discharge, the court shall enter an order discharging the offender. **730 ILCS 5/5-6-2(d)**.

730 ILCS 5/5-5.5-10 and **5/5-5.5-25** allow a court to issue a "certificate of relief," and/or a "certificate of good conduct" to eligible offenders (excluding those who committed specified crimes). The certificates assist offenders in obtaining professional licenses or employment and relieve employers from liability for employing such individuals absent willful and wanton conduct. The court may grant the certificate if the eligible offender has shown by clear and convincing evidence that he or she is fully rehabilitated, (*see* Tab 15, Section 3.31).

A defendant who is acquitted or discharged without conviction or supervision may be entitled to have his file sealed. **20 ILCS 2630/5.2** governs the sealing of records of misdemeanor or felony cases.

H. Expungeable Probation

The following provisions allow that successful completion of the probation results in no conviction: **720 ILCS 550/10** (Cannabis Control Act); **720 ILCS 570/410** (Controlled Substances Act); **720 ILCS 646/70** (Methamphetamine Control and Community Protection Act). *See also* the Drug Court Treatment Act **730 ILCS 166/1 *et seq***. and the Drug School Act, **55 ILCS 130/1 *et seq.***

Alternative "second chance probation" is available in the court's discretion for consenting, qualified, non-violent offenders, and defers proceedings for not less than two years.

730 ILCS 5/5-6-3.4. Second chance probation requires the state's consent.

I. Violations of Probation

The State need not prove that a defendant's violation of probation was willful except in the case of financial non-compliance. ***People v. Konwent***, 405 Ill. App. 3d 794, 800 (2nd Dist. 2010).

> **NOTE**: In ***People v. Prusak***, 200 Ill. App. 3d 146, 150 (2nd Dist. 1990), defendant attended and participated in the required course of sex offender counseling, but denied act of criminal sexual abuse. The court found that his failure to accept responsibility was caused by mental disabilities, and he did not violate his probation, as he participated in the ordered treatment, even though he was not "cured." *But see* ***People v. McGuire***, 216 Ill. App. 3d 705, 709 (2nd Dist. 1991) (limiting ***Prusak*** to its facts); ***In re Terry H.***, 2011 IL App (2d) 090909, ¶ 18 (same).

A probation officer is statutorily authorized to file a petition for violation of probation under **730 ILCS 5/5-6-4**, provided that the probation officer does not advocate for a particular result. ***People v. Hammond***, 2011 IL 110044, ¶ 47.

The state may not prosecute a violation of probation where defendant agreed to intermediate sanctions in lieu of a petition to revoke probation and successfully complied with the sanctions pursuant to **730 ILCS 5/5-6-4(i)**. ***Hammond***, 2011 IL 110044, at ¶ 80.

1. Notice Hearing

(a) Notice of the petition for violation shall be by court order to the probation department clerk or sheriff, by summons or by warrant. Personal service or the issuance of a warrant, summons or notice, tolls the period of probation. **730 ILCS 5/5-6-4(a)**.

(b) Effective January 1, 2023, the probationer is entitled to pretrial release unless the alleged violation is itself an offense, in which case pretrial release is governed by the Code of Criminal Procedure of 1963. The State has the burden of going forward with the evidence and proving the violation by preponderance of the evidence. The evidence shall be presented in open court with the right of confrontation, cross examination, and representation by counsel. **730 ILCS 5/5-6-4(b)**, **(c)**. It is unresolved whether there is a right to an open/public hearing. ***People v. Williams***, 2015 IL App (2d) 130585, ¶ 11.

(c) Since a revocation hearing is civil, the State can call the probationer as a witness to testify to facts which would prove he violated probation (so long as he would not incriminate himself in any other proceedings). ***People v. Lindsey***, 199 Ill. 2d 460, 475 (2002).

2. Admissions, Admonitions

Supreme Court Rule 402A prescribes a series of admonitions which the court must give defendant before accepting an admission to a violation. The court must also determine that the admission is voluntary and that there is a factual basis for same. *See also* **Rules 402(d)**, **(e)**, **(f)**, which **Rule 402A(d)** makes applicable to proceedings in a revocation petition.

3. Dispositions

If the court finds the defendant has violated probation, it may continue him on the existing sentence with or without modifying or enlarging the conditions or it may impose any other sentence available at the time of the initial sentencing. **730 ILCS 5/5-6-4(e)**.

J. Sex Offender Registration

Sex offender registration requirement that sex offenders register for a total of ten years pursuant to **730 ILCS 150/7**,

is not an improper retroactive enlargement of time. ***Lesher v. Trent***, 407 Ill. App. 3d 1170, 1175 (5th Dist. 2011).

Requiring a juvenile to register pursuant to the Sex Offender Registration Act does not violate the Eight Amendment's prohibition against cruel and unusual punishment. ***People v. Konetski***, 233 Ill. 2d 185, 206–07 (2009).

The Sex Offender Registration Act requires that a sex offender who has never been required to register has a duty to register if the person has been convicted of any felony after July 1, 2011. **730 ILCS 150/3**. Any person who was previously required to register for a period of ten years and who completed that registration period has to register if he has been convicted of any felony after July 1, 2011, and the offense for which the ten-year registration was served currently requires a registration period of more than ten years. No registrant whose registration has been terminated shall be required to register for offense that was the subject of a successful petition for termination. **730 ILCS 150/3**. **730 ILCS 150/5-7** states the requirements for notification and release or discharge of a sex offender for an offense committed after July 1, 2011.

730 ILCS 5/5-4-3 requires any sex offender seeking transfer to or residency in Illinois to provide a specimen of blood, saliva or tissue within 45 days after moving. If judge finds probable cause to believe an arrestee has committed first degree murder, home invasion, predatory criminal sexual assault of a child, aggravated criminal sexual assault, or criminal sexual assault, the arrestee shall be required to provide a DNA sample within fourteen days after an indictment or hearing. There is an exception for a registered sex offender who has previously given a DNA sample.

> **NOTE**: An unfit defendant is entitled to acquittal at discharge hearing where State did not meet its burden to prove that defendant, who had documented cognitive limitations and was subject to sex offender registration requirements, knowingly or willingly failed to report his change of address. ***People v. Peterson***, 404 Ill. App. 3d 145, 153 (2nd Dist. 2010).

NOTE: In ***People v. Pearse***, 2017 IL 121072 ¶ 45, the Court held that the defendant had not violated part of the Sex Offender Registration Act when, after a short hospital stay during which he registered both his home and hospital address as place of residence or temporary domicile, he returned to his home without "re-registering" his home address, as there was no statutory duty to "re-register" a defendant's home address after discharge from hospital.

PART III - POST-TRIAL PROCEEDINGS

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3.13 Fines, Fees and Assessments

See Appendix for "Guide to Fines, Fees and Costs in Criminal Cases" on page A-161.

A. Determination of Fee vs. Fine

1. The statutory label of a charge as a fee versus a fine is not determinative of its legal import. ***People v. Jones***, 223 Ill. 2d 569, 599–600 (2006).

2. A fee is a charge for the purpose of recouping the state's expenses of prosecution. ***People v. Graves***, 235 Ill. 2d 244, 250 (2009).

3. A fine is a punitive measure imposed as part of a sentence. ***Graves***, 235 Ill. 2d at 250.

4. Because fees are compensatory, rather than punitive, they are not subject to *ex post facto* laws. Fines, on the other hand, are so subject. ***People v. Dalton***, 406 Ill. App. 3d 158, 163–64 (2d Dist. 2010).

5. Some charges may be a fee or a fine, depending upon the facts of the case. For instance, in ***People v. Rogers***, 2014 IL App (4th) 121088, ¶ 38, the probation assessment charge was deemed a fee because probation services were utilized, but the court noted that, in a non-probation cause, it could constitute a fine.

B. Only the Court May Impose Fees and Fines

The imposition of a fine is a judicial act. The circuit clerk has no authority to levy fines, and a recording of fines by the clerk outside of the court's judgment is invalid and unenforceable. ***People v. Vara***, 2018 IL 121823, ¶¶ 22, 23.

However, while invalid, the clerk's improper recording of a fine *is not reviewable on direct appeal* because it is the result of a ministerial function rather than part of the final

judgment. Instead, it may be challenged via a *mandamus* action. ***Vara***, at ¶ 31.

> **NOTE**: ***Vara*** expressly overruled a line of cases in which the improper imposition of a fine was considered void because of the lack of statutory authority, noting that the void sentence rule was abolished in ***People v. Castleberry***, 2015 IL 116916. ***Vara***, at ¶ 25.
>
> **NOTE AS TO FEES**: The ***Vara*** majority also rejected an argument of the dissent that compared fines to fees, and that posited that the fees recorded by the clerk outside of the court's judgment are rendered part of the judgment via **705 ILCS 105/16(5)**, which mandates that the clerk keep a fee book and states that fees are part of the judgment. ***Vara***, at ¶¶ 26–28. The majority noted that fees and fines are distinct. The majority further reasoned that, in any event, fees imposed by the clerk, rather than the court, are not made part of the judgment pursuant to the statute. ***Id***. at ¶ 27.

Vara thus also precludes the imposition of fees by the circuit clerk.

C. Constitutional Limit on Fines

Due process does not require that fines be related to the underlying offense. Rather, a fine comports with due process so long as the amount is not grossly disproportionate to the offense. ***Graves***, 235 Ill. 2d at 255.

D. Credit Against Fines

1. A defendant is entitled to credit of $30/day against fines imposed at sentencing for each day that he is incarcerated prior to trial on a bailable offense. **725 ILCS 5/110-14(a) PLEASE NOTE THAT THIS STATUTE IS REPEALED EFFECTIVE JANUARY 1, 2023**. The credit does not apply in sexual assault cases as defined in **730 ILCS 5/5-9-1.7**. **The credit shall not exceed the amount of**

the fines. Also, certain fines may be statutorily exempted from the credit.

2. The per day credit applies regardless whether defendant also receives credit for pre-trial custody against the term of his sentence. ***People v. Hare***, 119 Ill. 2d 441, 448 (1988).

3. The per day credit applies even if defendant fails to raise the issue before the trial court. ***People v. Williams***, 409 Ill. App. 3d 408, 419 (3rd Dist. 2011).

4. The per day credit may be applied only once. If defendant is convicted of multiple offenses, the credit may not be applied to each discrete fine. ***People v. Wacker***, 257 Ill. App. 3d 728, 735 (2nd Dist. 1994).

5. The per day credit also applies to time in custody incident to a petition to revoke probation if probation is revoked and defendant resentenced. ***People v. Watson***, 318 Ill. App. 3d 140, 144 (4th Dist. 2000). It does not apply to time served incident to a probation sentence. ***Watson***, 318 Ill. App. 3d at 143.

E. Court Must Consider Ability to Pay

Except for fines for overweight trucks, the court must consider the "financial resources and future ability of the offender to pay the fine" and "whether the fine will prevent the offender from making court ordered restitution or reparation to the victim of the offense." **730 ILCS 5/5-9-1(d)(1)** and **(d)(2)**. Consideration is mandatory and the record must reflect same. ***People v. Maldonado***, 109 Ill. 2d 319, 324 (1985).

The ability to pay is not relevant to the imposition of street value fines. ***People v. Carrasquilla***, 167 Ill.App. 3d 1069, 1075 (1st Dist. 1988).

3.14 Discretionary Fines

A. Statutory Authority

1. **Effective July 1, 2019, the Criminal and Traffic Assessments Act (P.A. 100-987) revised multiple**

statutory fine provisions under 705 ILCS 135/15-5, *et seq.* Therefore, it is advisable to review statutory sections that a judge may have cited to in the past. **PLEASE NOTE THAT THIS STATUTE WILL BE REPEALED JANUARY 1, 2024.**

2. The sentencing classification provisions of **730 ILCS 5/5-4.5-5**. ***et seq.***, set forth the maximum fines applicable to misdemeanors and felonies.

3. A fine cannot be the sole disposition for a felony; it may be imposed only in conjunction with another disposition. **730 ILCS 5/5-4.5-15(b)**.

4. A fine may be imposed in addition to a sentence of conditional discharge, probation, periodic imprisonment, or imprisonment. **730 ILCS 5/5-4.5-50(b)**, **55(e)**, **60(e)**, **65(e), 75(a), 80(a)**.

B. Amount—General Discretionary Fines

1. Felony – Greater of up to $25,000 or amount specified in statute ($50,000 or amount specified for a corporation). **730 ILCS 5/5-4.5-50(b)**.

2. Class A Misdemeanor – Greater of up to $2,500 or amount specified in statute. **730 ILCS 5/5-4.5-55(e)**.

3. Class B and Class C Misdemeanor – Greater of up to $1,500 or amount specified in statute. **730 ILCS 5/5-4.5-60(e)** and **730 ILCS 5/5-4.5-65(e)**.

4. Petty Offense – Lesser of up to $1,000 or amount specified in statute. **730 ILCS 5/5-4.5-75(a)**.

5. Business Offense – Amount specified in statute. **730 ILCS 5/5-4.5-80(a)**.

C. Amount—Certain Discretionary Fines

1. A defendant convicted of felony theft or deceptive practices may be fined up to the greater of $25,000 or twice the value of the subject property. **730 ILCS 5/5-9-1.3(a)**.

2. A defendant convicted of felony theft or other crimes against a unit of local government or a school district may be fined up to the greater of $25,000 or ***treble*** the value of the subject property. **730 ILCS 5/5-9-1.3(b)**.

3. As a condition of supervision, conditional discharge, or probation, a defendant may be ordered to reimburse an anti-crime program or to contribute a reasonable sum of money, not to exceed the maximum amount of the fine authorized for the offense, to a local anti-crime program or to a fund of the Department of Natural Resources that is set up to fund investigations. **730 ILCS 5/5-6-3(b)(12), (13)**; **730 ILCS 5/5-6-3.1(c)(12), (13)**. The fine does not apply to prison terms. ***People v. Atherton***, 406 Ill. App. 3d 598, 621 (2nd Dist. 2010).

3.15 Mandatory Fines, Fees and Costs

NOTE: Again, effective July 1, 2019, the Criminal and Traffic Assessments Act (P.A. 100-987) revised multiple statutory fine provisions. Among other changes, there is now a set lump-sum mandatory assessment for various categories of charges. The act then sets forth the manner in which the assessment is disbursed.

The Act also includes a procedure by which certain costs may be waived or reduced upon application by a defendant as an indigent person. **725 ILCS 5/124A-20**.

It is advisable to review statutory fine sections that a judge may have cited to in the past.

Even with the new act, Illinois statutes still provide for innumerable mandatory fines that are required to be imposed by court order. The charges vary depending upon the type and nature of the offense. Some of the mandatory fines apply to all cases in a category, while others require action by the local county board before they become applicable.

Therefore, it may be necessary to review specific county ordinances to determine whether certain fines apply.

The following section is an overview of certain mandatory fines and procedures.

A. Criminal and Traffic Assessments and Procedure

1. Minimum Fines

"The minimum fine for a conviction or supervision" on a "minor traffic offense is $25," and "the minimum fine for a conviction, supervision disposition, or violation based upon a plea of guilty or finding of guilt for any other offense is $75." **705 ILCS 135/5-5**. The court may reduce or waive the fine if it finds that it would impose an undue burden on the victim (but not the defendant). **THIS STATUTE WILL BE REPEALED JANUARY 1, 2024.**

In felony and misdemeanor cases, as well as petty and business offenses, "[u]nless otherwise specified by law, the minimum fine is $75," which may be reduced or waived. **730 ILCS 5/5-4.5-50(b)**, **55(e)**, **60(e)**, **65(e)**, **75(a)**, **80(a)**.

All persons in court who plead or are found guilty of a traffic offense must pay an unspecified non-waivable fine. **625 ILCS 5/16-104e**.

B. Mandatory Assessment—Schedule

PLEASE NOTE THAT SUBSECTIONS 1-17 IN MANDATORY ASSESSMENTS WILL NO LONGER BE CORRECT AS OF JANUARY 1, 2024 WHEN 705 ILCS 135-5 et seq. WILL BE REPEALED.

"In each case, the court shall order an assessment, as set forth in this Act, for a defendant to pay in addition to any fine, restitution, or forfeiture ordered by the court. . ." **705 ILCS 135/5-10**. The court may order one payment or installment payments. **705 ILCS 135/5-10(c)**. The court may extend the term of probation, conditional discharge, or supervision until the assessment is paid in full. **705 ILCS 135/5-10(c-3)**. The court may suspend the collection of the assessment if defendant enters an approved substance abuse treatment program. The assessment may be reduced upon completion of same. **705 ILCS 135/5-10(c-5)**.

1. Substitution of Community Service

   Except for "any ordered conditional assessment," a defendant who has been placed on probation, conditional discharge, or supervision may petition the court to convert an assessment into court-approved community service. The period of public service necessary to satisfy the assessment shall be set by the court, but in no event shall the hourly rate of the public or community service performed by the defendant be equivalent to less than the minimum wage of this State.. The service shall be a condition of the sentence and in addition to public service ordered as part of the sentence. **705 ILCS 135/5-20**. **REPEALED EFFECTIVE JANUARY 1, 2024.**

2. Service Provider Costs

   Unless otherwise specified, a "defendant shall pay service provider costs to the entity that provided the service." **705 ILCS 135/5-15**. Such costs include items such as probation fees, traffic school fees, or drug/alcohol test fees. The costs are not waivable, are not subject to substitution for public service, and the per day credit does not apply. **REPEALED EFFECTIVE JANUARY, 1 2024.**

3. Waiver or Reduction of Assessments

   A defendant may apply for a waiver of assessments imposed under the assessment schedule set forth in Article 15 of the Criminal and Traffic Assessment Act, **705 ILCS 135/15-5**,***et seq.*** **(REPEALED EFFECTIVE JANUARY 1, 2024)**, at any time up to 30 days after sentencing. **725 ILCS 5/124A-20(b)**. The waiver does not apply to "violation of the Illinois Vehicle Code assessments." **725 ILCS 5/124A-20(a)**. The court "shall grant" a "full assessment waiver" to a defendant who meets the definition of an indigent person under the statute. **725 ILCS 5/124A-20(b)(1)**. The court "shall grant" "partial assessment" relief of a 75%, 50%, or 25% reduction in assessments to a defendant who meets certain criteria under the statute. **725 ILCS 5/124A-20(b)(2)**. The application process shall be established by Supreme Court Rule, and the statute sets forth factors by which the court

must review the contents of the application. **725 ILCS 5/124A-20(c)**.

4. Felony Assessment

   "Unless assessments are imposed by the court under another schedule of this Act, for a felony offense, the Clerk of the Circuit Court shall collect $549…" **705 ILCS 135/15-5**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

5. Felony DUI Assessment

   The assessment is $1,709. **705 ILCS 135/15-10**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

6. Felony Drug Assessment

   All felony drug cases shall be assessed $2,215. **705 ILCS 135/115-15**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

7. Felony Sex Offense Assessment

   All felony sex offenses shall be assessed $1,314. **705 ILCS 135/15-20**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

8. Misdemeanor Assessment

   "Unless assessments are imposed under another schedule of this Act," all misdemeanor cases shall be assessed $439. **705 ILCS 135/15-25**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

9. Misdemeanor DUI Assessment

   The assessment is $1,381. **705 ILCS 135/15-30**. **REPEALED EFECTIVE JANUARY 1, 2024.**

10. Misdemeanor Drug Assessment

    All misdemeanor drug cases shall be assessed $905. **705 ILCS 135/15-35**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

11. Misdemeanor Sex Offense Assessment

    All misdemeanor sex offenses shall be assessed $1,184. **705 ILCS 135/15-40**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

12. Major Traffic Offense Assessment

    A major traffic offense is any offense under the Vehicle Code or ordinance other than a petty or business offense. **705 ILCS 135/1-5**. The assessment is $325. **705 ILCS 135/15-45**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

13. Minor Traffic Offense Assessment

    A Minor traffic offense is a petty and business offense under the Vehicle Code or ordinance. **705 ILCS 135/1-5**. The assessment is $226. **705 ILCS 135/15-50**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

14. Overweight Truck Assessment

    The assessment is $260. **705 ILCS 135/15-52**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

15. Conservation Assessment

    The assessment is $195. **705 ILCS 135/15-55**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

16. Supreme Court Rule 529 dispositions

    The assessment is $164. **705 ILCS 135/15-60**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

17. Non-traffic Offenses

    All non-traffic petty or business offenses or ordinance violations shall be assessed $100. **705 ILCS 135/15-65**. **REPEALED EFFECTIVE JANUARY 1, 2024**.

18. Failure to Appear Fee

    A mandatory fee of $75 shall be assessed “by the court” against defendants arrested on failure to appear warrants.

725 ILCS 5/110-7(i). Imposition of the fee "shall be a condition of release unless otherwise ordered," is in addition to bail, and may not be used for fines and costs for the offense. ***Id***. **725 ILCS 5/110-7 IS REPEALED EFFECTIVE JANUARY 1, 2023**.

19. Electronic Monitoring Device

    The court shall impose a reasonable fee for each day of use of the device when a condition of probation or conditional discharge. The fee shall be established by the county board. The judge may assess no fee or a lower fee if there is an inability to pay. **730 ILCS 5/5-6-3(b)(10)(iv)(v)**.

20. Drug Testing or Electronic Monitoring Probation/ Conditional Discharge

    Defendant shall be ordered "to pay all costs incidental" to the testing and "all costs incidental" to monitoring in accordance with the ability to pay. The fee shall be set by the county board. This is a distinct provision from the above paragraph. **730 ILCS 5/5-6-3(g)**.

21. Drug Paraphernalia

    Anyone found guilty of possession of drug paraphernalia subject to minimum fine of $750. **720 ILCS 600/3.5(a)**.

22. Methamphetamine charge proximate cause of emergency response

    A mandatory fine of $2,500.00 for a first offense or $5,000.00 for a subsequent offense. **720 ILCS 646/90(c)**.

23. Criminal Damage to Property Over $10,000.00

    Mandatory fine equal to the value of damage to the property. **720 ILCS 5/21-1(d)(2)**, **720 ILCS 5/21-1.01(c)**.

24. Battery to Sports Official

Mandatory minimum fine of $1,000 for a first offense and $2,000 for a subsequent offense. **730 ILCS 5/5-5-3(c)(11)**.

25. Criminal Defacement of Property

In a class 3 or 4 felony violation, a mandatory minimum fine of $500. **720 ILCS 5/21-1.3(2)(B)**.

C. Conditional Assessments

The Court must impose conditional assessments "for each sentenced violation" in a case in "which a conditional assessment is applicable" in addition to the assessments set forth in the schedules noted above. **705 ILCS 135/15-70**. They are listed in section 15-70 as follows:

THIS STATUTE IS EFFECTIVE UNTIL JANUARY 1, 2024.

i. Arson (including residential and aggravated)—$500.

ii. Child pornography—$500 per arresting agency.

iii. Drug cases; analysis/crime lab—$100.

iv. DNA analysis—$250 "on each conviction in which it was used".

v. DUI analysis—$150 on "each sentenced violation in which it was used".

vi. Drug cases other than methamphetamine—no less than "full street value" The court must hear and consider evidence; the prosecutor's suggestion is inadequate. *See* ***People v. Lewis***, 234 Ill. 2d 32, 46 (2009). The appellate court is divided as to whether a defendant's failure to object to the suggested street value can be considered acquiescence

to the amount. *Compare* ***People v. Blankenship***, 406 Ill. App. 3d 578, 598 (2nd Dist. 2010) (silence was tacit stipulation when judge asked for input); ***People v. Nelson***, 2013 IL App (3d) 110581, ¶ 15 (silence not the equal of clear stipulation).

vii. Methamphetamine cases—no less than "full street value." Again, the court must hear and consider evidence. ***Lewis***, 234 Ill. 2d at 46.

viii. Order of Protection conviction—$200 for each conviction (for county treasurer).

ix. Order of Protection violation—$25 for each violation (for state treasurer).

x. Prosecution by State's Attorney of certain offenses—$4 for petty and business offenses, $2 for conservation and traffic offenses.

xi. Speeding in a construction zone—$250.

xii. Illinois Vehicle Code or ordinance supervision disposition—50 cents "unless waived by the court".

xiii. Cases in which the victim and offender are family or household members—$200 for "each sentence violation".

xiv. DUIs that proximately caused an emergency response—up to a maximum of $1000.

xv. Controlled Substance violations that proximately caused a drug-related emergency response—$1000.

xvi. Reckless driving (and aggravated) that "triggered an emergency response"—up to a maximum of $1000.

xvii. Human trafficking offenses—$50 (to county treasurer) and $300 (to state treasurer).

xviii. UUW/Felon, Agg Discharge of a Firearm, Reckless Discharge of a Firearm—$100 for each conviction.

NOTE: In Kane and Will Counties, an assessment shall be imposed for all offenses of up to $30 as set by the county board, except for local or county ordinance traffic and conservation offenses if fines are paid without a court appearance. **705 135/15-70 (6.5)**.

NOTE: 705 ILCS 135/15-70 IS EFFECTIVE UNTIL JANUARY 1, 2024.

3.16 Court-Appointed Counsel Fee Assessments

A. Court-Appointed Counsel Fees

The court may order a defendant to reimburse the county or the state for court appointed counsel. **725 ILCS 5/113-3.1**.

B. Hearing on Ability to Pay Required

The court must provide the defendant with both: (1) notice that it is considering imposing the fee; and (2) a hearing that focused on defendant's financial circumstances and his ability to pay. The hearing may be held on the motion of the court or the state at any time after counsel is appointed, but no later than 90 days after final order of disposition. ***People v. Love***, 177 Ill. 2d 550, 563 (1997). The hearing must be meaningful. An inquiry as to whether, *inter alia*, defendant had any physical reason that would prevent him from working, is insufficient. ***People v. Somers***, 2013 IL 114054, ¶ 15.

C. Determination of Value of Services

1. "In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under **Section 113-3** of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." **725 ILCS 5/113-3.1(a)**.

The court should consider the time spent while the court is in session, other time spent in representing the defendant, and expenses reasonably incurred as well as defendant's affidavit, financial circumstances, and statutory limitations. ***People v. Cozad***, 158 Ill. App. 3d 664, 671 (4th Dist. 1987). The amount of reimbursement need not equal the amount of all reasonable fees. *See* ***People v. Spotts***, 305 Ill. App. 3d 702, 705 (2nd Dist. 1999).

2. The maximum fee that may be ordered is $500 for a misdemeanor, $5000 for a felony, and $2500 for an appeal of any offense. **725 ILCS 5/113-3.1(b)**.

3.17 Reserved

3.18 Restitution

A. Mandatory Restitution

1. Where a defendant is convicted of an offense in the Criminal Code or a DUI that causes personal injury or real or personal property damage. **730 ILCS 5/5-5-6**.

2. In cases of human trafficking, involuntary servitude, and related offenses, there is mandatory restitution of the greater of the gross income to the defendant of the victim's labor or services, or the value of same as provided under minimum wage and overtime laws. **720 ILCS 5/10-9(g)**.

3. To a cemetery authority or property owner. **765 ILCS 835/1(b)**, **(b-5)**.

4. For criminal defacement of property, reimbursement of actual costs of repair. **720 ILCS 5/21-1.3(b)(2)**.

5. To domestic violence shelter or family member who sheltered victim from defendant convicted of or given supervision for domestic violence. **730 ILCS 5/5-5-6(b)**.

6. Expenses incurred for an act of terrorism. **720 ILCS 5/29D-40**.

7. The court may order the money to be paid through a local victim restitution fund, provided that the purpose of such

fund is indeed to funnel restitution to the victim. ***People v. Dickey***, 2011 IL App (3d) 100397, ¶ 28.

B. Manner of Imposition

1. A court may not impose restitution as part of a sentence following a plea of guilty unless it admonished defendant of the possibility of same. ***People v. Snyder***, 2011 IL 111382, ¶ 20. The remedy for the failure to so admonish is to consider a motion to withdraw the plea. The remedy is not a vacatur of the restitution order. ***Snyder***, at ¶ 31.

2. Restitution may be imposed without regard to ability to pay. *See* ***People v. Culbreath***, 343 Ill. App. 3d 998, 1009 (4th Dist. 2003).

3. The ability to pay is relevant only to determining the method and time of payment, or modification or revocation. **730 ILCS 5/5-5-6(f), (i).** ***People v. Higgins***, 2014 IL App (2d) 120888, ¶ 10.

4. By statute, defendant's bond may be applied to restitution only after satisfaction of fines and costs. ***Higgins*****,** at ¶ 13; **730 ILCS 5/5-5-6(e)**.

5. The sentencing order must be based on evidence or PSI information as to the victim's actual expenses or losses. The court must consider defendant's ability to pay when determining if restitution shall be made as a single payment or in installments. ***People v. Dickey***, 2011 IL App. (3d) 100397, ¶¶ 26, 27.

6. If payment is to be made over a period greater than six months, monthly payments must be ordered, though the judge may waive monthly payments upon a finding of good cause. ***Dickey***, at ¶ 27.

7. The payment period shall not exceed 5 years, except in cases of financial exploitation of the elderly or disabled. **730 ILCS 5/5-5-6(f)**. The Court may extend the 5-year period if it deems it necessary and in the best interest of the victim. ***Id***. "Complete restitution shall be paid in as short a time period as possible." ***Id***.

8. The statute expressly authorizes the imposition of restitution in addition to a jail or prison sentence. Imprisonment is not a mitigating factor that precludes the imposition of restitution.

9. At sentencing, the court must consider whether the damaged property may be restored in kind, whether defendant has the skills to achieve same, and whether cash restitution is appropriate. **730 ILCS 5/5-5-6(a)**.

10. Where the trial judge expressly reduced defendant's theft conviction to a misdemeanor because the state had not proved the property had a value in excess of $500, the judge was precluded from ordering restitution in excess of $500. ***People v. Adame***, 2018 IL App (2d) 150769, ¶ 17.

11. In a case of criminal fraud, business defendant was entitled to credit against restitution for the value of legitimate services provided. ***People v. Universal Public Transportation, Inc.***, 2012 IL App (1st) 073303-B, ¶ 58.

12. For cash restitution, the court shall assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the named victim and *any other victims* whose losses were proximately caused by the defendant. **730 ILCS 5/5-5-6(b)**. The term "victim" is defined in the Rights of Crime Victims and Witnesses Act. **725 ILCS 120/3(a)**; **730 ILCS 5/3-1-2(n)**. A grandfather who has custody of the named victim has been construed as a victim for the purpose of restitution. ***People v. Graham***, 406 Ill. App. 3d 1183, 1193 (5th Dist. 2011).

C. Discretionary Restitution

1. The court may require a defendant to pay the cost of counseling for a child witness of domestic battery. **730 ILCS 5/5-5-6(b)**.

2. In cases where restitution is not required by statute, the court may order restitution resulting from non-DUI cases or offenses not in the criminal code if the court makes a finding at sentencing that restitution is appropriate. **730 ILCS 5/5-5-6**.

3. Restitution may be ordered based on a charge that was dismissed pursuant to a plea agreement. **730 ILCS 5/5-5-6(d)**. In the absence of a negotiated plea, restitution for a dismissed charge is improper. ***People v. McClard***, 359 Ill. App. 3d 914, 917 (3rd Dist. 2005).

4. Restitution may be ordered even if defendant is acquitted of one of multiple charges, if the injury nonetheless was proximately caused by the criminal conduct that was the basis of the ultimate conviction. ***People v. Clausell***, 385 Ill. App. 3d 1079, 1082 (4th Dist. 2008) (restitution for injuries suffered by victim based on robbery was proper even though defendant was acquitted of aggravated battery).

5. In certain sex offenses and certain cases of bodily harm, the court may expressly order restitution for the financial obligations of the victim, including the victim's medical, physical, rehabilitative, or psychological treatment. The court may enter the order as to "any person who is convicted of" "or who was charged with any of those offenses and which charge was reduced to another charge as a result of a plea agreement" under **subsection (d)** of this Section." **730 ILCS 5/5-5-6(g)**.

6. The court may order restitution for long-term physical care of the victim. **730 ILCS 5/5-5-6(f-1)**.

PART III – POST-TRIAL PROCEEDINGS

Tab 13

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3.19 Motions to Reconsider Sentence

A. Motion to Reduce Sentence After Trial

Defendant may file a motion to reduce sentence within 30 days of the imposition of same. **730 ILCS 5/5-4.5-50(d)**. Defendant must exercise due diligence to obtain a ruling on the motion, and the court must decide the motion within a reasonable time period. ***Id***.

Also, even in the absence of a motion, the court may reduce a sentence within 30 days of the imposition of same. **730 ILCS 5/5-4.5-50(d)**.

The statute expressly provides that, if a timely motion is filed, the judgment is not final until the court rules on the motion. ***Id***.

Because the statute provides that a challenge to a sentence "shall be made by written motion" timely filed in the trial court, ***People v. Reed***, 177 Ill. 2d 389, 393 (1997), held that such a motion is required to preserve issues for review. Forfeited claims may be reviewed for plain error. ***People v. Thomas***, 178 Ill. 2d 215, 251 (1997).

The State may file a motion to reconsider sentence under the motion to reduce provision of section 4.5–50(d). ***People v. Amans***, 2018 IL App (2d) 170405, ¶ 57.

B. Motion to Reconsider Sentence After Plea of Guilty

A defendant who enters into a negotiated plea that includes sentencing concessions by the State may not seek reconsideration of his sentence. The remedy instead is to timely seek to withdraw the guilty plea in order to return the parties to the *status quo*. ***People v. Johnson***, 2019 IL 122956, ¶¶ 42, 47 (such defendant barred from moving to reconsider sentence); **Supreme Court Rule 604(d)**. A negotiated plea for this purpose is one in which the State recommends "a specific sentence or a specific range of sentence," or in which the State has made "concessions relating to the sentence to be imposed." It is not a plea in

which the State makes only charging concessions. **Supreme Court Rule 604(d)**; ***People v. Lumzy***, 191 Ill. 2d 182, 187 (2000).

If the motion to withdraw the negotiated plea is denied, defendant may appeal from only the denial of the motion—he may not challenge the propriety of the sentence on appeal. *See* ***Johnson***, at ¶ 57. He may, however, challenge the constitutionality of the sentencing statute. ***Johnson***, at ¶ 54.

In a non-negotiated plea—as defined above—defendant may move to reconsider his sentence without moving to withdraw his plea. *See* ***Lumzy***, at 187.

In order to appeal from the sentence in a non-negotiated plea, defendant must file a motion to reconsider sentence within 30 days of the imposition of same. The motion may be filed alone or in addition to a motion to withdraw the guilty plea. Any issue not raised in the motion is "deemed waived" on appeal. **Supreme Court Rule 604(d)**.

If indigent, defendant is entitled to the appointment of counsel for the purpose of a motion to reconsider sentence and/or a motion to withdraw a guilty plea. Also, the court "shall order" a free plea transcript for an indigent defendant. **Supreme Court Rule 604(d)**.

C. Supreme Court Rule 604(d) Certificate

In order for defendant's sentencing and/or plea appeal to be heard, counsel must file a certificate in the trial court stating that counsel "has consulted with the defendant either by phone, mail, electronic means or in person to ascertain defendant's contentions of error in the sentence and the entry of the plea of guilty, has examined the trial court file and both the report of proceedings of the plea of guilty and the report of proceedings in the sentencing hearing, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." **Supreme Court Rule 604(d)** (as amended eff. July 1, 2017). The Supreme Court has provided a form certificate of compliance in the appendix to the Rules.

The certificate must be filed prior to or simultaneously with the hearing of the motion(s). ***People v. Shirley***, 181 Ill. 2d 359, 371 (1998).

Notably, the Supreme Court has clearly held that defense counsel must certify that he has reviewed the file and transcript(s) and that he has consulted with defendant as to **both** sentencing and guilty plea issues, even if defendant's initial complaint pertains to only one of these points. ***People v. Tousignant***, 2014 IL 115329, ¶ 20.

Strict compliance with the rule is required. In the absence of a certificate in precise conformance with the rule, the appellate court must remand the matter to the trial court for the filing of a proper certificate, an opportunity to file an amended motion(s), and a new hearing on the existing or amended motion(s). ***People v. Lindsay***, 239 Ill. 2d 522, 531 (2011). The new hearing is required. ***People v. Fricks***, 2017 IL App (2nd) 160493, ¶ 6.

NOTE: ***People v. Wigod***, 406 Ill. App. 3d 66, 78 (1st Dist. 2010), held that defendant's absence from the court proceeding on his post-trial motion precluded the court from determining, as required by **Rule 604(d)**, whether defendant was indigent or desired counsel.

D. Hearing on the Motion to Reduce or Reconsider

The purpose of a motion to reconsider is not to permit a new sentencing hearing but to allow the court to reconsider the appropriateness of its sentencing decision. ***People v. Vernon***, 285 Ill. App.3d 302, 304 (2nd Dist. 1996). Defendant's post-sentencing good conduct is therefore irrelevant. ***Vernon***, 285 Ill. App. 3d at 304.

It is within the court's discretion whether to allow oral argument on a motion to reconsider. ***People v. Burnett***, 237 Ill. 2d 381, 388 (2010).

A motion to reconsider the court's denial of a post-plea motion is not an improper successive post-judgment motion. ***People v. Feldman***, 409 Ill. App. 3d 1124, 1127 (5th Dist. 2011).

A motion to correct the mittimus is not the equivalent of a motion to reconsider sentence or withdraw a guilty plea and therefore does not toll the 30-day period to file a notice of appeal. ***People v. Thomas***, 402 Ill. App. 3d 1129, 1132 (5th Dist. 2010); *see also* **Supreme Court Rule 472** (providing for motions to correct certain sentencing errors).

E. No Increase in Sentence Allowed on Motion to Reduce

The court is statutorily precluded from increasing a sentence following a hearing on a motion to reduce. **730 ILCS 5/5-4.5-50(d)**.

The statutory prohibition applies only when a valid sentence has been entered. ***People ex rel. Alvarez v. Gaughan***, 2016 IL 120110, ¶ 19. In so holding, the Court concluded "[i]t seems to us unreasonable to suggest that the legislature intended **sections 5-4.5-50(d)** and **5-5-4(a)** to function as a bar against correction of sentences that do not comply with statutory mandates prescribed by the legislature elsewhere in the Code of Corrections." ***Alvarez***, at ¶ 19.

The prohibition applies even if the judge misunderstood the law or otherwise erred when imposing same. ***People v. McBride***, 395 Ill. App. 3d 204, 209 (5th Dist. 2009) (defendant entitled to vacatur of extended-term portion of sentence due to faulty admonishments and court could not thereafter also reverse its order granting discretionary sentencing credit for time served on probation).

A sentence that includes a mandatory "add-on" provision is considered a single sentence, not two individual terms, for the purpose of this rule. In ***People v. Barnes***, 364 Ill. App. 3d 888, 898 (1st Dist. 2006), defendant was initially sentenced to 10 years for attempted murder to which a 15-year enhancement applied, resulting in a total term of 25 years. But the 15-year enhancement had been deemed unconstitutional and the judge reduced the sentence to 17 years. ***Barnes*** found that there was only one initial 25-year sentence. Further, the court found that the original 25-year sentence was invalid and not subject to the statutory prohibition on increasing a sentence.

Consecutive sentences, however, may not be treated as a single sentence. Therefore, an increase in an individual term is prohibited when the imposition of consecutive sentences is vacated, even if the aggregate term remains the same. ***People v. Kilpatrick,*** 167 Ill. 2d 439, 447 (1995).

An order changing the service of sentences from concurrent to mandatory consecutive, thus increasing the aggregate term, does not violate the statute because the order for concurrent service was never valid. *See* ***People v. Garcia***, 179 Ill. 2d 55, 73 (1997), *citing* ***People v. Arna***, 168 Ill. 2d 107, 113 (1995) (order imposing concurrent terms void and increase in aggregate term does not violate rule).

> **NOTE:** ***Garcia*** and ***Arna*** were premised on the conclusion that the concurrent sentencing orders were void. But the void sentence rule was abolished by ***People v. Castleberry*****,** 2015 IL 116916 ¶ 17. Nonetheless, ***Alvarez*** which was the State's subsequent petition for mandamus relief in the ***Castleberry*** case, expressly clarified that an invalid sentence—one not in conformance with sentencing statutes—is not subject to the statutory prohibition on increased sentences. ***Alvarez***, 2016 IL 120110 at ¶ 19.

> **NOTE:** Increase in Sentence upon Retrial or Trial after Vacatur of Guilty Plea.

Due process may also prohibit an increase in a sentence imposed after a second trial, since a defendant might be penalized for exercising his right to challenge his conviction. ***People v. Jones***, 168 Ill. 2d 367, 372 (1995), *citing* ***North Carolina v. Pearce***, 395 U.S. 711, 725 (1969) (due process precludes an increased sentence when the increase is motivated by vindictiveness on the part of the sentencing judge); ***People v. Moore***, 177 Ill. 2d 421, 432 (1997) (citing ***Pearce***). In some circumstances, therefore, a judge who imposes an increased sentence upon retrial must rebut the presumption of vindictiveness by stating objective reasons for the increase, on the record, as to "identifiable conduct" of defendant after the original sentencing hearing or newly

discovered information that predated the first hearing. ***Pearce***, 395 U.S. at 725–26; ***Texas v. McCullough***, 475 U.S. 134, 142 (1986). There are exceptions to the ***Pearce*** rule. ***McCullough***, 475 U.S. at 139 (noting same when possibility of vindictiveness is speculative).

Importantly, Illinois law expressly provides that the court may consider only post-sentencing aggravating conduct in resentencing: "Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied unless the more severe sentence **is based upon conduct on the part of the defendant occurring after the original sentencing.**" **730 ILCS 5/5-5-4(a)** (emphasis added)**.**

No presumption of vindictiveness arises when a defendant whose guilty plea was vacated receives a greater sentence following trial. ***Alabama v. Smith***, 490 U.S. 794, 801 (1989).

F. **Supreme Court Rule 472—Correction of Error**

Under **Rule 472**, effective March 1, 2019, a court retains jurisdiction to correct certain sentencing errors at any time after judgment, including during the pendency of an appeal. The correction may be made on the court's motion or on motion of either party.

The errors subject to the rule are: (1) errors in the imposition/calculation of fines, fees, assessments, or costs; (2) errors in the application of the per diem credit against fines; (3) errors in the calculation of presentence custody credit; and (4) clerical errors in the sentencing order or record resulting in a discrepancy between the record and the actual judgment of the court.

Any correction made pursuant to **Rule 472** after the time for direct appeal has expired is final and appealable after 30 days. An underlying direct appeal shall not be stayed because of a **Rule 472** motion, but if both appeals are pending at the same time, they shall be consolidated.

A defendant must first seek relief under this section before appealing any error covered by the rule. Failure to include an issue in a **Rule 472** motion forfeits the issue.

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3.20 Appeal by Defendant

A. When Defendant May Appeal

Pursuant to **Supreme Court Rule 604(b)**, a defendant who has been placed under supervision or sentenced to probation, conditional discharge or periodic imprisonment may appeal and seek review of "the conditions of supervision or of the finding of guilt or the conditions of the sentence, or both" Defendant may also appeal from an order modifying the conditions or revoking such an order or sentence. (Notably, the Illinois Constitution provides appellate jurisdiction to review final judgments, while adult supervision orders are appealable **only by the above court rule**. *See* ***In re Michael D.***, 2015 IL 119178, ¶¶ 10, 16)

Pursuant to **Supreme Court Rule 604(c)**, a defendant may appeal a bail order if he follows certain procedures in the trial and appellate court.

Pursuant to **Supreme Court Rule 604(e)**, a defendant or the State may appeal from an order finding defendant unfit to stand trial or be sentenced.

Pursuant to **Supreme Court Rule 604(f)**, a defendant may appeal from the denial of a motion to dismiss on the ground of former jeopardy.

Pursuant to **Supreme Court Rule 604(g)**, a defendant may petition for leave to appeal to the appellate court from an order disqualifying his counsel based on a conflict of interest.

Pursuant to **Supreme Court Rule 472**, effective March 1, 2019, a court retains jurisdiction to correct certain sentencing errors at any time after judgment, including during the pendency of an appeal. Any correction made pursuant to **Rule 472** after the time for direct appeal has expired is final and appealable after 30 days. An underlying

direct appeal shall not be stayed because of a **Rule 472** motion, but if both appeals are pending at the same time, they shall be consolidated.

B. Admonishment of Defendant of Appellate Rights

1. On Judgment and Sentence After a Plea of Not Guilty

(a) Upon sentencing a defendant after trial or revocation hearing of a sentence imposed after trial, or upon modifying the conditions of such a sentence, the court must, at the time of sentencing or modification, advise defendant of: (1) the right to appeal; (2) the right to request the clerk to prepare and file a notice of appeal; and (3) the right, if indigent, to be furnished with a free transcript of the trial or hearing proceedings. **Supreme Court Rule 605(a)(1)**.

(b) The court must also advise defendant that he has the right to the appointment of counsel on appeal if:

(1) defendant is convicted of a felony or class A misdemeanor; or

(2) defendant is convicted of a lesser offense and is:

(i) sentenced to imprisonment or periodic imprisonment; (ii) sentenced to probation or conditional discharge conditioned on periodic imprisonment; or (iii) sentenced to probation or conditional discharge that has been revoked or modified resulting in the imposition of imprisonment or periodic imprisonment. **Supreme Court Rule 605(a)(2)**.

(c) The court must also advise defendant that:

(1) "the right to appeal the judgment of conviction, excluding the sentence imposed or modified, will be preserved only if a notice of appeal is filed within 30 days of the date on which sentence is imposed;"

(2) if defendant seeks to challenge the correctness of any aspect of the sentence or sentencing hearing,

prior to taking an appeal the defendant "must file within 30 days of the date on which sentence is imposed a written motion asking to have the trial court reconsider the sentence imposed, or consider any challenges to the sentencing hearing, setting forth in the motion all issues or claims of error regarding the sentence imposed or the sentencing hearing;"

(3) any issue or claim of error not in the written motion "shall be deemed waived;" and

(4) in order to preserve the right to appeal following a motion challenging the sentence or sentencing hearing, defendant must file a notice of appeal in the trial court within 30 days of the entry of the order disposing of the motion. **Supreme Court Rule 605(a)(3)**.

2. On a Non-Negotiated Plea of Guilty

In all *non-negotiated pleas*, the court must advise defendant at the time of sentencing that:

(a) defendant has the right to appeal;

(b) prior to taking an appeal, defendant must first file in the trial court, within 30 days of the date on which the sentence is imposed, a written motion asking that "the trial court reconsider the sentence or to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;"

(c) "if the motion is allowed, the sentence will be modified or the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;"

(d) upon the State's request, "any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;"

(e) if "defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant's plea of guilty and sentence will be provided without cost to the defendant and counsel will be appointed to assist the defendant with the preparation of the motions;" and

(f) "in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to reconsider the sentence or to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." **Supreme Court Rule 605(b)**.

3. On a Negotiated Plea of Guilty

A negotiated plea is one in which the State recommends a specific sentence or range of sentence or in which the State has "made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." **Supreme Court Rule 605(c)**.

In all negotiated pleas, the court must advise defendant at the time of sentencing that:

(a) defendant has the right to appeal;

(b) prior to taking an appeal, defendant must first "file in the trial court, within 30 days of the date on which the sentence is imposed, a written motion asking to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;"

(c) "if the motion is allowed, the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;"

(d) upon the State's request, "any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;"

(e) if "defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant's plea of guilty and sentence will be provided without cost to the defendant and counsel will be appointed to assist the defendant with the preparation of the motions;" and

(f) "in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." **Supreme Court Rule 605(c)**.

C. Appointment of Appellate Counsel

Supreme Court Rule 607(a) provides that the court is required to determine whether defendant is represented by counsel on appeal when a notice of appeal has been filed in four types of cases: (a) a finding of guilt on a felony; (b) a finding of guilt on a class A misdemeanor; (c) a finding of guilt on a lesser offense than a class A misdemeanor if a term of imprisonment is imposed; or (d) a state appeal. If a defendant is not so represented, is indigent, and desires counsel, the court "shall appoint counsel on appeal."

D. Report of Proceedings for Indigent Defendant

Supreme Court Rule 607(b) provides that, upon a finding that the defendant is indigent, the court reporting personnel shall transcribe, certify, and file the report of proceedings as directed by the appellate court docketing order. On direct appeal, the clerk "shall transmit one printed copy of the filed report of proceedings to the defendant." This includes the transcript of a juvenile proceeding "that was dismissed so that the case could proceed." In "subsequent collateral appeals," a transcript "shall be provided to the defendant only upon written request from defendant's appointed counsel to the clerk of the circuit court specifying the date" of the transcript requested.

Supreme Court Rule 607(c) provides that, if the defendant is appointed counsel, "the clerk of the reviewing court shall docket the appeal and accept documents for filing without the payment of fees."

Supreme Court Rule 651 governs appeals in post-conviction proceedings. It provides that, if petitioner is indigent, the appellate procedures set forth in **Rule 607** apply. It also provides that a written request may be made for transcripts not previously provided to petitioner or counsel. **Supreme Court Rule 651(c)**.

The right to a transcript is not a basic constitutional right. ***People v. Grundset***, 63 Ill. App. 3d 787, 789 (2nd Dist. 1978). However, the State must provide a record of sufficient completeness to permit consideration of defendant's claims. The State "must provide a full verbatim record where that is necessary to assure the indigent" defendant has as effective an appeal as a non-indigent defendant. ***Mayer v. City of Chicago***, 404 U.S. 189, 194–95 (1971). If the grounds for appeal show a colorable need for a complete transcript, the burden is on the State to show that a portion or an alternative will suffice. ***Mayer***, 404 U.S. at 195; *see also* ***People v. Majka***, 365 Ill. App. 3d 362, 368 (2nd Dist. 2006) (assumes burden on State to show adequacy of bystander's report).

Supreme Court Rule 323(c) provides for the filing of a bystander's report when a transcript is not available. **Rule 323(d)** allows for the filing of an agreed statement of facts. **Rule 323(c) and (d)** apply to criminal appeals via **Supreme Court Rule 612(b)(3)**.

The record on appeal shall be prepared in accordance with **Supreme Court Rule 608**.

E. Stay of Order and Imposition of Bail on Direct Appeal

Supreme Court Rule 609(a) provides that, if an appeal is taken from a judgment imposing a sentence of imprisonment or probation or conditional discharge conditioned on imprisonment, defendant may be admitted to bail, and the

sentence or condition of imprisonment may be stayed, with or without bond, pending appeal. The trial court or reviewing court may enter such order. Upon a motion showing good cause, the reviewing court or a judge thereof may revoke the order of the trial court or order that the amount of bail be increased or decreased.

Supreme Court Rule 609(b) provides that, in other cases, the trial or reviewing court may stay a judgment or order with or without bond. Upon a motion showing good cause, the reviewing court or a judge thereof may revoke the order of the trial court or order that the amount of bail be increased or decreased.

See Appendix for "Appeal Rights Following Contested Trial and Petition to Revoke Probation **Supreme Court Rule 605 (a)** on page A-164.

3.21 Appeal by State

A. When State May Appeal

Supreme Court Rule 604(a)(1) provides that the State may appeal:

(a) From an order or judgment the substantial effect of which results in dismissing a charge for any of the grounds enumerated in [**725 ILCS 5/114-1**];

(b) An order or judgment arresting judgment because of a defective indictment, information or complaint;

(c) An order quashing an arrest or search warrant; or

(d) An order suppressing evidence.

B. Order Dismissing Charge

The substantive effect of the order, and not the title or language used by the court, governs whether it is a dismissal that is appealable under **Rule 604(a)(1)**. *See* ***People v. Seaberry***, 86 Ill. App. 3d 369, 371 (5th Dist. 1980)

(purported acquittal deemed appealable dismissal order); ***People v. Scholin***, 62 Ill. 2d 372, 373 (1975) (dismissal not appealable order when court's holding defendant to bail did not evince intent to dismiss and not final); ***People v. Deems***, 81 Ill. 2d 384, 391 (1980) (order of acquittal entered after state refused to participate in sham trial deemed appealable dismissal).

The State's right to appeal applies even if the dismissal is not based on any ground set forth in **725 ILCS 5/114-1**. ***People v. Grimm***, 74 Ill. App. 3d 514, 516 (3rd Dist. 1979).

C. Order Suppressing Evidence

1. Pre-Trial Ruling

The State may seek an interlocutory appeal of a pre-trial order suppressing evidence "whenever the prosecutor certifies to the trial court that the suppression substantially impairs the State's ability to prosecute the case." ***People v. Young***, 82 Ill. 2d 234, 247 (1980). The State must file a certificate of impairment in all appealed suppression orders, though the certificate is not a jurisdictional requirement and may be filed as a supplement to the record on appeal. ***People v. Carlton***, 98 Ill. 2d 187, 193 (1983); *but see* ***People v. Stevenson***, 2014 IL App (4th) 130313, ¶ 24 (court accepted State's oral representations of impairment though no written certificate filed).

Time limit: As a general rule, to appeal under **Rule 604(a)(1)**, the State must file a motion to reconsider or a notice of appeal within 30 days of the suppression order. ***People v. Holmes***, 235 Ill. 2d 59, 61 (2009), *citing* ***People v. Taylor***, 50 Ill. 2d 136 (1971). The motion to reconsider tolls the time to appeal. ***People v. Marker***, 233 Ill. 2d 158, 173 (2009). An exception to the time limit applies when there is a material change in facts that could not have been previously presented with the exercise of due diligence. ***Holmes***, 235 Ill. 2d at 62.

An order limiting the manner in which evidence may be presented is not an appealable order of suppression. *See* ***In***

re K.E.F., 235 Ill. 2d 530, 538 (2009). It is the effect of the order, not the label, that controls whether it is appealable. ***People v. Keith***, 148 Ill. 2d 32, 39 (1992).

2. Mid-Trial Ruling

Pursuant to **725 ILCS 5/114-12(c)**, a motion to suppress evidence illegally seized must be made before trial "unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion." If the court finds a mid-trial motion to suppress to be timely and valid, the State may seek an interlocutory appeal from the suppression order providing certain procedures are followed, including prosecuting the appeal to completion. *See* **§ 114-12(c)**; ***People v. Flatt***, 82 Ill. 2d 250, 263 (1980).

If a trial judge enters a mid-trial suppression order on a ground not authorized by **section 114-12(c)**, the State may likewise appeal, but review is limited to the court's authority to enter such an order. ***Flatt***, 82 Ill. 2d 250 at 266.

D. Presumptive Release of Defendant During State Appeal

Pursuant to **Supreme Court Rule 604(a)(3)**, a defendant "shall not be held in jail or to bail" pending a state appeal "unless there are compelling reasons for his or her continued detention or being held to bail."

The rule favors release. ***People v. Baltimore***, 381 Ill. App. 3d 115, 125 (2nd Dist. 2008). It contemplates consideration of the strength of the evidence that would sustain the charge. ***People v. Wells***, 279 Ill. App. 3d 564, 567 (5th Dist. 1996). "The suppressed evidence is not to be considered." ***Wells***, 279 Ill. App. 3d at 570.

3.22 Jurisdiction of Trial Court

A. Termination Upon Filing of Notice of Appeal

An appeal is perfected by the filing of the notice of appeal with the clerk of the trial court. **Supreme Court Rule 606(a)**.

If a timely post-trial or post-sentencing motion is filed in the trial court, any notice of appeal that was filed before the entry of an order disposing all of the pending post-judgment motions "shall have no effect and shall be stricken by the trial court." **Supreme Court Rule 606(b)**. The trial court must forward a copy of the order striking the notice of appeal to the reviewing court within 5 days. **Rule 606(b)**.

A new notice of appeal must be filed within 30 days following the entry of the order disposing of all timely post-judgment motions. ***Id***.

> **NOTE:** A *pro se* motion alleging ineffectiveness, thus requiring a *Krankel* inquiry, did not trigger a **Rule 606(b)** dismissal of a notice of appeal, and the appellate court was not deprived of jurisdiction. ***People v. Bell,*** 2018 IL App (4th) 151016, ¶ 32.

Pursuant to **Supreme Court Rule 472**, effective March 1, 2019, a court retains jurisdiction to correct certain sentencing errors at any time after judgment, including during the pendency of an appeal.

A defendant may simultaneously pursue a direct appeal and post-conviction relief. ***People v. Harris,*** 224 Ill. 2d 115, 129 (2007).

B. Revestment of Jurisdiction

Under the revestment doctrine, litigants "may revest a court which has general jurisdiction over the matter with both personal and subject matter jurisdiction over the particular cause after the 30-day period following final judgment during which post-judgment motions must ordinarily be filed." ***People v. Kaeding***, 98 Ill. 2d 237, 240–41 (1983). For the rule to apply, (1) both parties must actively participate in the proceeding; (2) both parties must fail to object to the untimeliness of the late filing; and (3) both parties must assert positions that are inconsistent with the merits of the prior judgment and support setting aside at least part of that judgment. ***People v. Bailey***, 2014 IL 115459, ¶ 25.

C. Motions for *Nunc Pro Tunc* Relief

The purpose of a *nunc pro tunc* order is to make the present record correspond with what the court actually decided in the past. Such orders may be used to correct clerical errors but may not be used to challenge a court's previous decision. ***People v. White***, 357 Ill. App. 3d 1070, 1072 (3rd Dist. 2005).

D. Reversal and Remandment

The mandate of a reviewing court gives the trial court jurisdiction to do only that which the mandate requires. ***People v. Lowther***, 85 Ill. App. 3d 735, 739 (2nd Dist. 1980). Precise and unambiguous directions in a mandate must be obeyed. ***People v. Pugh***, 325 Ill. App. 3d 336, 342 (1st Dist. 2001).

PART III – POST-TRIAL PROCEEDINGS

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3.23 Post-Conviction Proceedings

A. Statutory Authority

1. Purpose

The Post-Conviction Hearing Act, **725 ILCS 5/122-1, *et seq***, allows a defendant to collaterally attack a judgment by asserting that a substantial denial of federal or state constitutional rights occurred in his conviction. ***People v. Simms***, 192 Ill. 2d 348, 359 (2000).

Though the death penalty is no longer available in Illinois, the Act still contains language providing that a defendant subject to a death sentence may raise a claim of actual innocence.

The Illinois Supreme Court has expressly held that the due process clause of the Illinois Constitution affords any post-conviction petitioner the right to assert a freestanding claim of actual innocence based on newly discovered evidence. ***People v. Ortiz***, 235 Ill. 2d 319, 331 (2009). Evidence of same must be newly discovered, material and not merely cumulative, and must be of such conclusive character that it would probably change the result on retrial. ***Ortiz***, 235 Ill. 2d at 333.

2. No Re-Litigation

A petition is not a means to re-litigate guilt or innocence. ***People v. Vail***, 46 Ill. 2d 589, 591 (1970).

3. Filed by Person "Imprisoned in the Penitentiary."

The petition may be filed by any person "imprisoned in the penitentiary." **725 ILCS 5/122-1(a)**. This phrase has been interpreted to include a defendant:

(a) on MSR or parole, ***People v. Correa***, 108 Ill. 2d 541, 547 (1985);

(b) on appeal bond, ***People v. Martin-Trigona***, 111 Ill. 2d 295, 300 (1986);

(c) on probation, ***People v. Montes***, 90 Ill. App. 3d 355, 357 (1st Dist. 1980); and

(d) serving consecutive sentences, ***People v. Pack***, 224 Ill. 2d 144, 152 (2007).

It does not apply to a defendant:

(a) who has completed his sentence, ***People v. Carrera***, 239 Ill. 2d 241, 253 (2010);

(b) who has completed his sentence and is subject to deportation, ***Carrera***, 239 Ill. 2d at 255–56;

(c) who is serving a sentence that was enhanced by the existence of the challenged conviction but the sentence on the challenged conviction is complete, ***People v. Dent***, 408 Ill. App. 3d 650, 654 (1st Dist. 2011);

(d) who is confined as a sexually violent person, ***People v. Steward***, 406 Ill. App. 3d 82, 92 (1st Dist. 2010); and

(e) who has completed his sentence but must still register as a sex offender. ***People v. Stavenger***, 2015 IL App (2d) 140885, ¶ 14.

A defendant convicted of a misdemeanor may file a post-conviction petition even though he is not subject to a prison term; such a petition is subject to a restricted court-created limitation period and review process. ***People v. Warr***, 54 Ill. 2d 487, 493 (1973). Post-conviction relief is not available to a misdemeanant serving a sentence of supervision. ***People v. Larimer***, 409 Ill. App .3d 827, 829 (1st Dist. 2011).

4. Petition

The petition must specify in the heading or the body that it is filed under the Act. If it does not, the court "need not evaluate the petition to determine whether it could otherwise have stated some grounds for relief under this Article." **725 ILCS 5/122-1(d)**. The inclusion of the phrase "post-

conviction petition," even without further statutory citation, is a sufficient reference. ***People v. McDonald***, 373 Ill. App. 3d 876, 880 (1st Dist. 2007).

5. Contents of the Petition

The petition must "clearly set forth the respects in which petitioner's constitutional rights were violated," and have attached affidavits or documents supporting the allegations, or state why same are not attached. **725 ILCS 5/122-2**. The failure to meet either requirement justifies summary dismissal. ***People v. Collins***, 202 Ill. 2d 59, 66 (2002).

The sworn verification required under **section 122-1** is not a substitute for a supporting evidentiary affidavit or document or explanation of the absence of same. ***Collins,*** 202 Ill. 2d at 67. Further, the lack of a sworn verification does not render a petition deficient at first stage review. ***People v. Hommerson***, 2014 IL 115638, ¶ 11.

The "failure to notarize a statement styled as an evidentiary affidavit" does not make a petition frivolous or patently without merit and may not be the sole basis for summary dismissal. ***People v. Allen***, 2015 IL 113135, ¶ 34.

> **NOTE**: The allegation of ineffective assistance of counsel in rendering advice at plea, absent an allegation of the advice given or not given, did not clearly set forth the claim. ***People v. Carr***, 407 Ill. App. 3d 513, 516 (2nd Dist. 2011)
>
> **NOTE**: The allegation that an affidavit in support was unavailable because the only source for same was defense counsel is a sufficient excuse for its absence. ***People v. Hall***, 217 Ill. 2d 324, 334 (2005).

B. Procedural Scheme—Three Stage Analysis

See Appendix page A-165 for "Post-Conviction Process – Summary Dismissal" Flowchart.

1. First Stage

Within 90 days of the filing and docketing of the petition, the court must examine same to determine whether it should be dismissed or docketed for further proceedings. **725 ILCS 5/122-2.1**. Dismissal is required at this first stage if the court determines the petition to be "frivolous or patently without merit." **725 ILCS 5/122-2.1**.

There is no statutory or constitutional right to appointed counsel at this stage. ***People v. Ligon***, 239 Ill. 2d 94, 118 (2010); **725 ILCS 5/122-4**. ***People v. Lesley***, 2018 IL 122100, held that defendant's continued refusal to work with his court-appointed attorneys and failure to hire private counsel constituted a knowing and intelligent election to proceed *pro se*. ***People v. Johnson***, 2018 IL 122227, while the court is not obligated to appoint counsel at the first stage of a PC, if counsel is privately retained, counsel must provide reasonable assistance.

(a) Time period: If an order ruling on the petition is not entered of record within 90 days, it must be docketed for second stage proceedings. ***People v. Perez***, 2014 IL 115927, ¶ 91.

The 90-day period begins to run when the clerk receives the petition, thus entering it in the official record. ***People v. Brooks***, 221 Ill. 2d 381, 391 (2006).

If a petition not initially labeled as a post-conviction petition is recharacterized as same, the 90-day period does not start until defendant has been admonished of the consequences of recharacterization. ***People v. Swamynathan***, 236 Ill. 2d 103, 113 (2010).

A motion for substitution of judge does not toll the 90-day period. ***Gibson v. People***, 377 Ill. App. 3d 748, 751 (2nd Dist. 2007).

(b) Written order: The statute requires that the court shall enter the dismissal via written order "specifying the findings of fact and conclusions of law it made in reaching its decision." **725 ILCS 5/122-2.1(a)(2)**. The Illinois Supreme Court has stated that the court must issue a written order. *See* ***Perez***, 2014 IL 115927, ¶ 23 (*dicta* stating oral announcement of decision would not have been in compliance with statute). But the Court has also held that the requirement of a written explanation is directory, not mandatory. ***People v. Porter***, 122 Ill. 2d 64, 82 (1988). Any conflict between ***Perez*** and ***Porter*** on this point is currently unresolved.

The written order must be "entered of record." The order is deemed entered when file-stamped by the clerk, not when signed by the judge. ***Perez***, 2014 IL 115927, ¶ 29.

(c) Standard of Review: The court must review the petition without oral or written input from the State. The Act does not authorize the State to file a motion to dismiss at the first stage, ***People v. Gaultney***, 174 Ill. 2d 410, 419 (1996).

Neither "frivolous" nor "patently without merit" is defined in the Act. The current standard to assess same is whether the petition has an "arguable basis either in law or in fact, *i.e.*, whether it [is] based on an indisputably meritless legal theory or a fanciful factual allegation." ***People v. Hodges***, 234 Ill. 2d 1, 17 (2009).

The standard is not whether the petition presents "the gist of a constitutional claim," as past case law has stated. ***Hodges***, 234 Ill. 2d at 10. Instead, the term "gist" is a reference to whether pleading requirements are met, even if a "petition lacks formal legal arguments or citations to legal authority." ***Id***. at 9.

"An example of an indisputably meritless legal theory" is one that is "completely contradicted by the record." ***Id.*** at 16. "Fanciful factual allegations include those which are fantastic or delusional" ***Id.*** at 17.

Both counseled and *pro se* petitions are subject to the same standard at first stage review. ***People v. Tate***, 2012 IL 112214, ¶ 12.

(d) *Res judicata*, forfeiture, and waiver: Post-conviction is not a substitute for appeal. Issues raised and decided on direct appeal are barred by *res judicata*. Issues that could have been raised on direct appeal, but were not, are forfeited. ***People v. Holman***, 2017 IL 120655, ¶ 25.

Res judicata or forfeiture may be a basis for a first stage dismissal. ***People v. Blair***, 215 Ill. 2d 427, 451 (2005).

Fundamental fairness may justify the review of otherwise barred claims. Or, such claims may be raised in the context of a claim of the ineffective assistance of appellate counsel. Last, barred claims may be raised if there are pertinent facts that were not present in the record on direct appeal. ***Blair***, 215 Ill.2d at 451. (Note: it is arguable that, in the last instance, the basis for *res judicata* or forfeiture might not be present).

Any claim not raised in the original or amended petition is waived. **725 ILCS 5/122-3**.

(e) Partial dismissal barred at first stage: Partial summary dismissal is not allowed. Where a petition contains multiple claims, if at least one claim meets the threshold standard of not frivolous or patently without merit, all claims survive to second stage proceedings. ***People v. Rivera***, 198 Ill. 2d 364, 370 (2001).

NOTE: Summary dismissal of a petition based upon a codefendant's assertion of sole responsibility for murder was appropriate where the affidavit was deemed to not be newly discovered evidence. The court described the affidavit as "a meaningless assemblage of words" and "a benign gesture" that revealed "no facts upon which a meaningful prosecution" of the codefendant could be brought. ***People v. Jones***, 399 Ill. App. 3d 341, 366 (1st Dist. 2010), *compare* ***People v. Parker***, 2012 IL App (1st) 101809, ¶ 85 (statement of codefendant deemed newly discovered evidence).

(f) Dismissal as untimely precluded at first stage: The Act contains a limitation period, discussed *infra*, that is akin to an affirmative defense and may be raised by the state only at second stage proceedings. The court may not dismiss a petition as untimely at first stage review. ***People v. Boclair***, 202 Ill. 2d 89, 99 (2002).

(g) Fees for frivolous filing: The dismissal of a petition as "frivolous or patently without merit" renders a defendant in DOC subject to the imposition of fees and costs applicable to a frivolous prisoner lawsuit under **735 ILCS 5/22-105**. ***People v. Alcozer***, 241 Ill. 2d 248, 265 (2011); *see also* **725 ILCS 5/122-4** (providing that prisoner who files a frivolous petition may not proceed as a pauper and shall be liable for filing fees and actual court costs).

(h) Post-conviction may run concurrently with direct appeal: Defendant may pursue post-conviction relief while a direct appeal is pending, and the court may not hold the petition in abeyance of first stage review pending direct appeal. ***People v. Harris***, 224 Ill. 2d 115, 130 (2007).

(i) Amendment allowed by discretion at first stage: The court has discretion to allow defendant to amend a petition during the first stage review. ***Harris***, 224 Ill. 2d at 131, 143; **725 ILCS 5/122-5** (allowing for same). However, if an amended petition is filed during the first stage, the 90-day review period begins anew from the date of the new filing. ***Harris***, 224 Ill. 2d at 129; ***People v. Watson***, 187 Ill. 2d 448, 451 (1999).

(j) Right to appeal: Pursuant to **Supreme Court Rule 651(b)**, the clerk is required to provide defendant written notice of the issuance of an adverse decision, such as a first stage dismissal. The notice must be consistent with language set forth in the Rule, which provides, *inter alia,* that an indigent defendant has the right to free transcripts of the record of the post-conviction proceeding and the appointment of counsel on appeal.

2. Second Stage

Within 30 days of the order allowing for second stage proceedings, the state must file either an answer or a motion to dismiss. The time period may be extended by the court. If a motion to dismiss is denied, the state must file an answer within 20 days thereafter. **725 ILCS 5/122-5**.

An indigent defendant has the right to request appointed counsel at this stage. The court may also waive fees and order free transcripts. **725 ILCS 5/122-4**.

It is not a *per se* conflict for trial counsel to represent defendant on post-conviction petition. ***People v. Kirkpatrick***, 2012 IL App (2d) 100898, ¶ 17. But it is a conflict where defendant challenges trial counsel's performance as incompetent. ***People v. Yaworski***, 2014 IL App (2d) 130327, ¶ 10.

(a) Counsel's obligations under **Rule 651(c)**: At second stage, counsel has an obligation to consult with

defendant, ascertain his legal contentions, examine the record, and to amend the *pro se* petition as necessary for an adequate presentation of defendant's claims. Counsel must file a certificate asserting he has completed same. **Supreme Court Rule 651(c)**. This rule does not apply to private counsel who filed an initial post-conviction petition. ***People v. Johnson***, 314 Ill. App. 3d 444, 454 (1st Dist. 2000), *citing* ***People v. Richmond***, 188 Ill. 2d 376, 382 (1999). It does apply to private counsel at second stage if the initial petition was a *pro se* filing. ***Richmond***, 188 Ill. 2d at 381.

Counsel need only review as much of the transcripts as needed to adequately present defendant's claims. ***People v. Davis***, 156 Ill. 2d 149, 164 (1993). And counsel has no obligation to investigate or raise any additional claims beyond those in the *pro se* petition. ***Davis***, 156 Ill. 2d at 164.

Counsel must shape the claims in the *pro* se petition into appropriate legal form; this obligation includes attaching available affidavits or documents in support of the petition or explaining the absence of same. ***People v. Turner***, 187 Ill. 2d 406, 412–13 (1999). But counsel is not required to amend the petition if, after the required consultation and review, counsel determines that it adequately presents defendant's claims. ***Turner***, 187 Ill. 2d at 412.

Counsel's duty is limited to claims raised in the initial petition. Counsel is not obligated to adopt or amend *pro se* pleadings filed by defendant after counsel was appointed. ***People v. Bell***, 2014 IL App (3d) 120367, ¶ 17. And the court has no obligation to entertain same. ***Bell***, at ¶ 15.

Counsel is obliged to amend an untimely petition to assert any available fact that would show delay was

not due to defendant's culpable negligence. ***People v. Perkins***, 229 Ill. 2d 34, 49 (2007).

Counsel may not simply orally argue modification of issues; counsel must amend the petition itself. ***People v. Schlosser***, 2012 IL App (1st) 092523, ¶ 32.

> **NOTE**: In ***People v. Dixon***, 2018 IL App (3d) 150630, ¶ 23, the court held that counsel's amended petition failed to adequately present defendant's claims because it contained conclusory allegations and, rather than presenting clear affidavits or evidence in support of the amended petition, counsel merely incorporated a 70-page "memorandum," including handwritten statements, police reports and other documents, that was submitted by defendant in support of his *pro se* petition.

(b) No reversion to first stage: The filing of an amended petition during the second stage does not trigger another first-stage review. ***People. v. Volkmar***, 363 Ill. App. 3d 668, 672 (5th Dist. 2006).

(c) Counsel may move to withdraw rather than file an amended petition: If counsel determines that defendant's claims are frivolous or spurious and that he cannot ethically advance same, counsel may, after filing a **Rule 651(c)** certificate, move to withdraw from the case on that ground rather than amend the petition. ***People v. Greer***, 212 Ill. 2d 192, 212 (2004). Moreover, if the petition advanced to the second stage upon a judicial finding that it presents a potentially legitimate claim(s), rather than advancement due to a blown deadline, counsel must explain in the motion to withdraw why each of defendant's claims is in fact frivolous or patently without merit. ***People v. Kuehner***, 2015 IL 117695, ¶ 21.

Counsel may not move to dismiss in conjunction with a motion to withdraw. ***People v. Jackson***, 2015 IL App (3d) 130575, ¶ 18.

Absent "unusual circumstances," the court is not obligated to appoint a second attorney if it allows counsel to withdraw under ***Greer***. ***People v. Thomas***, 2013 IL App (2d) 120646, ¶ 7.

If the court permits withdrawal, it should proceed to dispose of the matter after the state files an answer or a motion to dismiss. ***Thomas***, at ¶ 8; ***Jackson***, at ¶ 23.

> **NOTE**: Counsel may not take affirmative action that damages defendant's claims, such as withdrawing an affidavit because counsel questions the veracity of same and tacitly agreeing to the state's motion to dismiss. In such an instance, counsel should either stand on the petition or move to withdraw. ***People v. Perry***, 2017 IL App (1st) 150587, ¶ 39.

(d) Defendant's claim of unreasonable assistance of post-conviction counsel: While there is no constitutional right to counsel on post-conviction, under the statute a defendant is entitled to a reasonable level of assistance from counsel. However, ***Krankel*** is not to be applied when a defendant makes a complaint regarding counsel's performance in a post-conviction proceeding. ***People v. Custer***, 2019 IL 12339 ¶ 42.

(e) Standard of review on a motion to dismiss: Defendant "bears the burden of making a substantial showing of a constitutional violation." ***People v. Domagala***, 2013 IL 113688, ¶ 35.

Well-pleaded facts in the petition not positively rebutted by the record are taken as true. ***Domagala***, at ¶ 35. No fact-finding or credibility determination is made at this stage. ***Id***.

The court may not consider matters outside the record of petitioner's case, such as transcripts or proceedings of another defendant's case. ***People v. Sanders***, 2016 IL 118123, ¶ 43.

(f) Partial dismissal allowed at second stage: The court may dismiss discrete claims and advance others that meet the standard for a third stage hearing. ***People v. Perry***, 2017 IL App (1st) 150587, ¶ 22; ***People v. Lara***, 317 Ill. App. 3d 905, 908 (3rd Dist. 2000).

(g) If the State files only an answer, the matter must be set for third stage hearing: The court is required to advance the matter to a third-stage evidentiary hearing if the State opts only to answer rather than move to dismiss the petition. ***People v. Thompson***, 2016 IL App (3d) 140586, ¶ 20. The State's pleading, though, may contain an answer to certain claims and a request to dismiss others, and in such an instance partial dismissal is still allowed. ***People v. Miller***, 2017 IL App (3d) 140977, ¶ 35.

3. Third Stage—Evidentiary Hearing

Defendant must make a substantial showing of a violation of a constitutional right. ***People v. Coleman***, 206 Ill. 2d 261, 277 (2002). Defendant's burden is by a preponderance of the evidence. ***People v. Rovito***, 327 Ill. App. 3d 164, 167 (1st Dist. 2001). The Court has wide discretion to limit the type of evidence presented. ***Coleman***, 206 Ill. 2d at 278.

While both defendant and the State may present testimony at the hearing, neither is obligated to do so. Notably, even in the absence of the presentation of additional evidence, the court's determination of whether relief is warranted is still a third stage hearing. ***People v. Andrews***, 403 Ill. App. 3d 654, 659–60 (4th Dist. 2010).

In its discretion, the court may order discovery on post-conviction for good cause shown. The court should consider the scope of the request, the length of time between the conviction and post-conviction proceeding, the burden of discovery on the state and witnesses, and the availability of the evidence through other sources. ***People v. Johnson***, 205 Ill. 2d 381, 408 (2002).

C. Grounds for Relief Routinely Cited

1. Free-standing claim of actual innocence

(a) A free-standing claim of actual innocence is one in which the actual innocence claim is not raised as a component of another alleged constitutional deprivation.

A defendant asserting same must show he is "free of liability not only for the crime of conviction, but also of any related offenses." ***People v. Barnslater***, 373 Ill. App. 3d 512, 521 (1st Dist. 2007). However, total vindication or exoneration is not required, ***People v. Robninson,*** 2020 IL 123849 ¶ 55. If the claim is raised in a successive petition, defendant must still seek permission to file same. ***People v. Anderson***, 401 Ill. App. 3d 134, 141 (1st Dist. 2010).

(b) A defendant who pleaded guilty may be able to assert a freestanding claim of actual innocence in the absence of a claim of a coerced plea. A defendant is able to assert the right to not be deprived of life and liberty where there is compelling evidence of innocence. The defendant must provide new, material, non-cumulative evidence that clearly and convincingly demonstrates that a trial would result in acquittal. ***People v. Reed***, 2020 IL 124940.

2. Ineffective Assistance of Counsel

(a) Legal Standard

There is a two-prong test to establish ineffective assistance of counsel. Defendant must show both that counsel's representation fell below an objective standard of reasonableness and that the deficient performance prejudiced defendant in that there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. ***People v. Cherry***, 2016 IL 118728, ¶ 24, *citing* ***Strickland v. Washington***, 466 U.S. 668 (1984).

The court need not address both prongs of ***Strickland*** if it finds that defendant failed to establish the existence of one. ***People v. Torres***, 228 Ill. 2d 382, 395 (2008).

As an exception to the ***Strickland*** test, ineffectiveness of counsel is presumed in 3 situations: (1) where defendant is "denied counsel at a critical stage," (2) where counsel "entirely fails to subject the [State's] case to meaningful adversarial testing," and (3) where counsel represented defendant "in circumstances under which no lawyer could prove effective assistance." ***Cherry***, 2016 IL 118728, ¶ 25, *citing* ***United States v. Cronic***, 466 U.S. 648, 659 (1984).

(b) Examples of allegations of ineffective assistance

Sentencing: The failure to investigate and introduce mitigating evidence at sentencing may render counsel ineffective. ***Porter v. McCollum***, 558 U.S. 30, 39 (2009). But the failure of a mitigation strategy does not necessarily render counsel ineffective. *See* ***Wong v. Belmontes***, 558 U.S. 15, 28 (2009).

Counsel was not ineffective in recommending withdrawal of an insanity defense where counsel reasonably believed it would fail given that the jury

had just rejected testimony about defendant's mental condition. ***Knowles v. Mirzayance***, 556 U.S. 111, 125 (2009).

Plea negotiations: Counsel may be deemed ineffective in failed plea negotiations. As to the prejudice prong of the analysis, defendant must show a reasonable probability that he would have accepted the plea offer that would have had a more favorable outcome without the state withdrawing same or the court rejecting the negotiation. ***People v. Hale***, 2013 IL 113140, ¶ 19, *citing* ***Lafler v. Cooper***, 566 U.S. 156 (2012) and ***Missouri v. Frye***, 566 U.S. 134 (2012).

Counsel's error in advising defendant about rejected plea offer that was premised on an erroneous assessment of available good time credit was not ineffective assistance because there was no basis to believe the State would have stood by offer once error was known. ***People v. Powers***, 2011 IL App (2d) 090292. ¶ 7.

Counsel's rejection of the State's plea offer, rather than tender to the State of defendant's proposed counteroffer, was not objectively unreasonable conduct because the counteroffer was legally a rejection of State's offer. ***People v. Robinson***, 2012 IL App (4th) 101048, ¶ 39.

Where defendant did plead guilty, the claim that he might not have done so is insufficient to establish prejudice. ***People v. Giampaolo***, 385 Ill. App. 3d 999, 1003 (2008).

Deportation advice: If the law is "not succinct and straightforward" as to whether defendant will be subject to deportation as a result of his plea, counsel need only advise defendant that the charges "may carry a risk of adverse immigration consequences." ***Padilla v. Kentucky***, 559 U.S. 356, 369 (2010). When the consequence of deportation is "truly

clear," counsel must advise defendant of same. ***Padilla***, 559 U.S. at 369.

Counsel's advice that the plea "could" result in adverse immigration consequences was objectively unreasonable when law providing for deportation was clear. ***People v. Hoare***, 2018 IL App (2d) 160727, ¶ 22.

Failure to file notice of appeal: If defendant argues counsel was ineffective for failing to file a notice of appeal, he is entitled to a third-stage evidentiary hearing if he shows a reasonable probability that, but for counsel's deficient conduct, he would have appealed. ***People v. Lamar***, 2015 IL App (1st) 130542, ¶ 21.

3. Mandatory Supervised Release

Due process requires that defendant be admonished during a plea that a specific term of MSR will be added to a prison sentence. ***People v. Whitfield***, 217 Ill. 2d 177, 195 (2005). As a remedy for a violation of this principle, ***Whitfield*** ordered that defendant's fully-negotiated sentence be reduced by the applicable number of years of the MSR term because that was the bargain negotiated. 217 Ill. 2d at 205. ***Whitfield*** resulted in a flurry of post-conviction litigation.

Whitfield only applies prospectively to cases not finalized prior to its December 20, 2005 decision. ***People v. Morris***, 236 Ill. 2d 345, 366 (2010).

People v. Boykins, 2017 IL 121365, held that the court's MSR admonishment of defendant or pronouncement of sentence does not require use of particular language. Due process is satisfied so long as the admonishment conveys to an ordinary person in defendant's shoes that the penalty for the offense requires a term of imprisonment followed by a specified term of MSR. ***Boykins***, at ¶¶ 16, 18.

The MSR term is included in a sentence as a matter of statutory law and cannot be withheld from a sentence or bargained away. Further, the failure to include the term in a

written sentencing order, as directed by statute, does not invalidate the MSR term or the sentence. ***Round v. Lamb***, 2017 IL 122271, ¶ 16. Last, the court's failure to mention MSR at sentencing does not invalidate the sentence based on the law in effect at the time of defendant's sentencing. ***People v. McChriston***, 2014 IL 115310, ¶ 17.

4. Perjury

The State's knowing use of false testimony or failure to correct same violates due process. ***People v. Brown***, 169 Ill. 2d 94, 103 (1995). The State is attributed the knowledge of its representatives or agents, even if the trial prosecutor is unaware of the falsehood. ***People v. Olinger***, 176 Ill. 2d 326, 348 (1997). In some cases, the State's failure to adequately investigate is sufficient to establish a due process violation. Defendant must allege the knowing use of false testimony or at least a lack of diligence to raise the constitutional issue. ***Brown***, 169 Ill. 2d at 103, 106.

5. Vienna Convention

"The Vienna Convention does not generally provide rights enforceable by an individual defendant." ***People v. Najera***, 371 Ill. App. 3d 1114, 1147 (2nd Dist. 2007).

6. ***Brady*** Violation/Duty to Disclose

The State violates due process if it withholds evidence that is favorable to the defense and material to defendant's guilt or sentence. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Evidence is material if there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different. Reasonable probability is gauged by whether the likelihood of a different result is great enough to undermine confidence in the trial's outcome. ***Kyles v. Whitley***, 514 U.S. 419, 434 (1995). ***Brady*** material can include impeachment evidence. ***Smith v. Cain***, 565 U.S. 73, 76 (2012).

D. Limitation Period

There is no limitation period applicable to a petition that asserts a freestanding claim of actual innocence. **725 ILCS 5/122-1(c)**.

The statute still contains a limitation period applicable to cases in which defendant has a death sentence.

For all other cases, the limitation period is dependent on whether and how far a direct appeal has been taken.

No direct appeal: If defendant "does not file a direct appeal," the petition "shall be filed no later than 3 years from the date of conviction," unless defendant "alleges facts showing that the delay was not due to his or her culpable negligence." **725 ILCS 5/122-1(c)**.

The filing of a late notice of appeal and the subsequent dismissal of the appeal before a substantive resolution still constitutes filing a direct appeal such that this 3-year period does not apply. ***People v. Byrd***, 2018 IL App (4th) 160526, ¶ 53.

Direct appeal, petition for writ of *certiorari* filed: No petition "shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petition alleges facts showing that the delay was not due to his or her culpable negligence." **725 ILCS 5/122-1(c)**.

Direct appeal, no petition for writ of *certiorari* filed: "If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." **725 ILCS 5/122-1(c)**.

The filing of a petition for certiorari in the United States Supreme Court is conditioned on seeking discretionary review to the state court of last resort—in Illinois, this means filing a petition for leave to appeal. A petition for *certiorari* is due within 90 days after either the judgment of the state

court of last resort or the entry of an order denying discretionary review. ***People v. Johnson***, 2017 IL 120310, ¶ 20.

Direct appeal, no petition for leave to appeal filed: The limitation statute is silent on what period, if any, applies if there is no petition for leave to appeal filed on direct review. Nonetheless, the Illinois Supreme Court has found that there is a limitation period, interpreting the statute to provide "that a postconviction petition must be filed within six months of the date for filing a petition for *certiorari* or a petition for leave to appeal." ***Johnson***, 2017 IL 120310, ¶ 24.

A petitioner has 35 days from the entry of judgment to file a PLA, unless rehearing is sought, in which case the 35 days runs from date of the order on rehearing. In cases in which a motion to publish a **Rule 23** order is filed, the 35 days runs from the date of denial of the motion or filing of the opinion. **Illinois Supreme Court Rule 315**.

Lack of culpable negligence: The limitation period may be excused if defendant alleges in the petition and shows that the delay in filing was not due to his culpable negligence. Culpable negligence contemplates something greater than ordinary negligence and is akin to recklessness. ***People v. Boclair***, 202 Ill. 2d 89, 108.

Failure to comply with the limitation period is an affirmative defense rather than a jurisdictional prerequisite, so a petition may not be dismissed as untimely at first stage proceedings. The issue may be raised in a motion to dismiss or waived or forfeited by the State at second stage proceedings. ***Id***. at 102.

If the court concludes that the allegation of a lack of culpable negligence is sufficient and that dismissal is not warranted, evidence on the issue may be heard at third stage proceedings. ***People v. Marino***, 397 Ill. App. 3d 1030, 1036 (2nd Dist. 2010).

> **NOTE**: Delay occasioned by reliance on the advice of an inmate paralegal does not establish a lack of

culpable negligence. Likewise, ignorance of the law is not an excuse. ***Johnson***, 2017 IL 120310, ¶ 27.

Reinstatement after voluntary withdrawal of petition allowed: The court has the discretion to allow defendant to withdraw the petition at any time prior to judgment. **725 ILCS 5/122-5**. Though the statute does not contain a limitation period for refiling, the Illinois Supreme Court has held that **735 ILCS 5/13-217** allows defendant to refile a timely petition within one year or the remaining limitation period, whichever is greater. ***People v. Simms***, 2018 IL 122378, ¶ 46.

E. Successive Petitions

1. Only one post-conviction petition may be filed without leave of court. **725 ILCS 5/122-1(f)**. As set forth *infra*, there are two bases upon which a successive petition may be filed: upon a showing of cause and prejudice, or upon a showing of actual innocence.

   The statute does not expressly require a motion for leave. Defendant must "by whatever means" "prompt" the court to consider whether leave should be granted and obtain ruling on same. ***People v. Tidwell***, 236 Ill. 2d 150, 157 (2010).

   However, while the court is not required to address the issue of leave to file without some sort of request, the court has the authority to grant leave *sua sponte*. ***Tidwell***, 236 Ill. 2d at 158.

   A successive petition is not deemed filed until leave is granted. ***Id.*** There is no 90-day review period applicable to a request for leave to file a successive petition. ***People v. LaPointe***, 227 Ill. 2d 39, 44 (2007).

   The state may not participate in the hearing on a request for leave to file a successive petition. ***People v. Bailey***, 2017 IL 121450, ¶ 24.

   NOTE: A petition filed after a new sentencing hearing is not successive, as it challenges a new

judgment. ***People v. Inman***, 407 Ill. App. 3d 1156, 1162 (5th Dist. 2011).

2. Cause and prejudice: Leave to file a successive petition may be granted if defendant demonstrates cause for his failure to raise the claim in the initial petition and prejudice that has resulted from that failure. **725 ILCS 5/122-1(f)**.

   (a) Cause is shown "by identifying an objective factor that impeded [defendant's] ability to raise a specific claim" during the first proceeding. **725 ILCS 5/122-1(f)**.

   (b) Prejudice is shown "by demonstrating that the claim not raised" in the first proceeding "so infected the trial that the resulting conviction or sentence violated due process." **725 ILCS 5/122-1(f)**.

   There is no provision in the statute as to how cause and prejudice must be shown. ***People v. Evans***, 2013 IL 113471, ¶ 18.

   The Illinois Supreme Court has held that no evidentiary hearing is required and that the "cause and prejudice determination" must "be made on the pleadings prior to the first stage of postconviction proceedings." ***People v. Smith***, 2014 IL 115946, ¶ 33. The request for leave to file must adequately allege facts demonstrating cause and prejudice. ***Smith***, at ¶ 34.

   "Leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." ***Smith***, at ¶ 35.

   Cause and prejudice must be shown as to each discrete claim asserted by defendant. ***Id***.

   NOTE: Ignorance of the law is not cause. ***People v. Evans***, 2013 IL 113471, ¶ 13. The existence of

unfavorable precedent is also not cause. Defendant must raise an available issue, even if the law is against him, to preserve it for review. ***People v. Guerrero***, 2012 IL 112020, ¶ 20; *but see* ***People v. Craighead***, 2015 IL App (5th) 140468, ¶ 17 ("new substantive rule proclaimed" in ***Miller v. Alabama***, 567 U.S. 460 (2012), "establishes cause because it was not available earlier to counsel.").

3. Actual Innocence: In addition to cause and prejudice, actual innocence excuses the bar on successive petitions. This is the fundamental miscarriage of justice exception. It has not been codified. ***People v. Edwards***, 2012 IL 111711, ¶ 23.

   Leave of court to file is still required. ***Edwards***, at ¶ 24. Leave "should be denied only where it is clear, from a review of the successive petition and the documentation provided by petition, that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. . . Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'" ***Id***.

   The evidence in support of the claim must be newly discovered and not merely cumulative, and it must be of such conclusive character that it would probably change the result on retrial. ***Id***. at ¶ 32.

4. Three-stage process begins upon filing: The three-stage post-conviction evaluation process begins upon filing. ***People v. Bailey***, 2017 IL 121450, ¶ 26.

   If the petition reaches the second stage, the state may challenge the cause and prejudice asserted in support of the request for leave to file the successive petition. ***Bailey***, at ¶ 26. The sufficiency of a showing of actual innocence may also be subject to a second state motion to dismiss. *See* ***People v. Sanders***, 2016 IL 118123, ¶ 55.

3.24 Petition for Relief from Judgment

A. Nature of the Remedy

The relief from judgment provision of the code of civil procedure, **735 ILCS 5/2-1401**, also applies to criminal cases. ***People v. Sanchez***, 131 Ill. 2d 417, 420 (1989).

A **2-1401** petition is used to bring facts to the court's attention that, if known at the time, would have precluded entry of judgment. ***People v. Haynes***, 192 Ill. 2d 437, 461 (2000). It is not a substitute for direct appeal. ***Haynes***, 192 Ill. 2d at 461. It is an avenue to address errors of fact, not of law. ***People v. Pinkonsly***, 207 Ill. 2d 555, 566 (2003). However, some types of as-applied constitutional claims may be raised in a 2-1401 petition. ***People v. Harris***, 2018 IL 121932 ¶ 48.

The statute also expressly provides for relief in a forcible felony if: (1) defendant's participation in the offense was related to him or her previously having been a victim of domestic violence as perpetrated by an intimate partner; (2) no evidence of domestic violence against defendant was presented at the sentencing hearing; (3) defendant was unaware of the mitigating nature of domestic violence at the time of sentencing and could not have learned of its significance sooner through diligence; and (4) the new evidence of domestic violence is of such a conclusive character that it would likely change the sentence imposed. **735 ILCS 5/2-1401(b-5)**.

A movant may also present a meritorious claim under **735 ILCS 5/2-1401(b-10)** if the allegations in the petition establish each of the following by a preponderance of the evidence: (A) she was convicted of a forcible felony; (B) her participation in the offense was a direct result of her suffering from post-partum depression or post-partum psychosis; (C) no evidence of post-partum depression or post-partum psychosis was presented by a qualified medical person at trial or sentencing, or both; (D) she was unaware of the mitigating nature of the evidence or, if aware, was at the time unable to present this defense due to suffering from

post-partum depression or post-partum psychosis, or, at the time of trial or sentencing, neither was a recognized mental illness and as such, she was unable to receive proper treatment; and (E) evidence of post-partum depression or post-partum psychosis as suffered by the person is material and noncumulative to other evidence offered at the time of the trial or sentencing, and it is of such a conclusive character that it would likely change the sentence imposed by the original court.

The filing of a **2-1401** petition does not affect or suspend the challenged judgment. **735 ILCS 5/2-1401(d)**.

Relief may be pursued during direct appeal. ***People v. Gray***, 247 Ill. App. 3d 133, 142 (1st Dist. 1993).

B. Filing Procedure

1. Filing: "The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof." **735 ILCS 5/2-1401(b)**.

2. Substitution of judge: Though the petition constitutes a new action in the trial court, it is not for the purpose of a motion for substitution of judge as a matter of right. ***Niemerg v. Bonelli***, 344 Ill. App. 3d 459, 465 (5th Dist. 2003).

3. Service: The service requirements of **Supreme Court Rules 105 & 106** apply to **section 2-1401** petitions. One method of service is certified or registered mail. ***People v. Carter***, 2015 IL 117709, ¶ 14; **735 ILCS 5/2-1401(b)** (all parties "shall be notified as provided by rule").

   The filed return receipt is proof of service. The absence of the receipt in the file is not proof of deficient service. ***Carter***, at ¶ 23. The court lacks jurisdiction over the state/respondent absent service or waiver of service. ***People v. Matthews***, 2016 IL 118114, ¶ 23. But only the party to whom service is owed can object to improper service. ***Matthews***, at ¶ 23.

4. Limitation period: The limitation period is "no later than 2 years after the entry of the order or judgment." **735 ILCS 5/2-1401(c)**. The time period is tolled in two instances:

where "the person seeking relief is under legal disability or duress" or where "the ground for relief is fraudulently concealed." ***Id***.

There is one exception to the limitation period---a void judgment may be challenged at any time. ***People v. Thompson***, 2015 IL 118151, ¶ 29. There are only two valid voidness challenges. One, a judgment is void if entered by a court that lacked personal or subject matter jurisdiction. ***Thompson***, at ¶ 31. Notably, subject matter jurisdiction "emanates solely from" the Illinois Constitution. ***McCormick v. Robertson***, 2015 IL 118230, ¶ 27. Two, a judgment is void if based on a statute that is facially unconstitutional and thus *void ab initio*. ***Thompson***, at ¶ 32. This exception does not apply to an as-applied constitutional challenge. ***Id***.

The "void sentence rule," a third formerly-recognized voidness challenge, is no longer valid. The rule has been abolished. ***Id***. at ¶ 33; ***People v. Castleberry***, 2015 IL 116916, ¶ 19.

C. Procedure in the Trial Court

1. Rules of civil procedure apply: Petitions "are to be litigated in accordance with the usual rules of civil procedure." ***People v. Vincent***, 226 Ill. 2d 1, 11 (2007).

2. No right to counsel: There is no constitutional or statutory right to counsel on a **section 2-1401** petition. ***People v. Walker***, 2018 IL App (3d) 150527, ¶¶ 24, 26.

   If the court does appoint counsel, it is an open question as to whether counsel's performance is judged by a standard of due diligence versus the reasonable assistance standard applicable in post-conviction proceedings. ***Walker***, at ¶ 29. Regardless which standard applies, counsel at a minimum must perform the tasks assigned by the court, such as in ***Walker*** addressing the limitation period and amending the claims. ***Id***. at 36.

3. State's time to respond: Pursuant to **Supreme Court Rule 105(a)**, the state, as the responding party, has 30 days to

answer or otherwise appear on the petition. ***Carter***, 2015 IL 117709 at ¶ 14.

4. Defendant's right to reply to motion to dismiss: If the state moves to dismiss the petition, defendant must be given notice and a meaningful opportunity to respond. ***People v. Bradley***, 2017 IL App (4th) 150527, ¶ 19. The appellate court is divided on whether the failure to do so can be found harmless. *Compare* ***Bradley***, at ¶ 21 (never), ***People v. Stoecker***, 2019 IL App (3d) 160781 ¶ 13 (any error harmless).

   No summary dismissal, but court's *sua sponte* dismissal authorized: A **2-1401** petition is not the same as a post-conviction petition, and "summary dismissal" of the petition is not an available procedure. ***Vincent***, 226 Ill.2d at 11.

   If the state fails to file an answer or appearance within 30 days, however, the court must accept well-pleaded allegations in the petition as true, and the court may *sua sponte* dismiss the petition on the merits without notice to defendant if defendant cannot possibly win relief. ***Id***. at 13.

   Conversely, the court may not *sua sponte* rule on the merits of a petition within the State's 30-day response period. ***People v. Laugharn***, 233 Ill. 2d 318, 323 (2009). But if the court does so rule, defendant cannot complain of issuance of the order on the basis of service or personal jurisdiction on the state. ***Matthews***, 2016 IL 118114 at ¶ 23.

   The court may not *sua sponte* dismiss a petition as untimely. Timeliness is an affirmative defense that may be raised or forfeited by the state. ***People v. Malloy***, 374 Ill. App. 3d 820, 824 (3rd Dist. 2007).

D. Contents of Petition

   "The petition must be supported by affidavit or other appropriate showing as to matters not of record." **735 ILCS 5/2-1401(b)**.

   Defendant must specifically allege facts in support of three points: (1) the existence of a meritorious defense or claim;

(2) due diligence in presenting the claim to the court; and (3) due diligence in filing the petition. ***Vincent***, 226 Ill. 2d at 7-8; ***People v. Lee***, 2012 IL App (4th) 110403, ¶ 15.

Relief is limited to matters that were discovered after the trial. ***People v. Burrows***, 172 Ill. 2d 169, 187 (1996).

Res judicata precludes claims that were ruled on in direct appeal or other collateral proceedings. Forfeiture precludes claims that could have been raised. ***Burrows***, 172 Ill. 2d at 187.

A petition may not "be based on evidence that did not exist at the time of judgment." ***People ex rel. Devine v. Stralka***, 226 Ill. 2d 445, 457 (2007). And the evidence cited must have not been available at trial with the exercise of due diligence. ***People v. Waters***, 328 Ill. App. 3d 117, 127 (1st Dist. 2002).

Burden of proof: Defendant must prove the allegations by a preponderance of the evidence. ***Vincent***, 226 Ill. 2d at 7–8.

A perjury claim, however, must be proved by clear and convincing evidence. ***People v. Sanchez***, 115 Ill. 2d 238, 286 (1986).

E. Specific Issues Raised

Ineffective assistance of counsel: A **section 2-1401** petition is not an appropriate forum to claim the ineffectiveness of counsel, as the claim does not challenge the factual basis of the judgment. ***Pinkonsly***, 207 Ill. 2d at 567.

One exception to this prohibition exists: a defendant committed under the Sexually Dangerous Persons Act may challenge counsel's ineffectiveness, as a **section 2-1401** petition is the only available format for such a defendant to do so. ***People v. Lawton***, 212 Ill. 2d 285, 297 (2004).

1. Perjury: Perjury may be raised in a **section 2-1401** petition. ***Burrows***, 172 Ill. 2d at 180. Defendant must show, by clear and convincing evidence, that the challenged testimony was not merely false, but willfully and purposely given, that it was material to the issue tried and not merely cumulative,

and that it probably controlled the outcome. ***Sanchez***, 115 Ill. 2d at 286. The perjury claim need not be brought as a due process issue in a **section 2-1401** petition, so the defendant is not obligated to show that the state's use of the alleged perjury was knowing. ***People v. Brown***, 169 Ill. 2d 94, 107–08 (1995).

3.25 *Habeas Corpus*

A. Nature of Remedy

735 ILCS 5/10-101 *et seq*. allows a defendant to file a petition for *habeas corpus* on the ground that he is unlawfully imprisoned or otherwise restrained of his liberty and therefore is entitled to immediate release.

The statute has been interpreted as providing that "a prisoner may apply for an order requiring the person detaining him to produce the body of the prisoner to test the legality of the detention and, 'if it proved to be unlawful,' 'to obtain relief from such imprisonment.'" ***Hennings v. Chandler***, 229 Ill. 2d 18, 25 (2008), *quoting* **735 ILCS 5/10-106**.

This state statutory remedy is wholly distinct from federal *habeas corpus* proceedings, which are more akin to post-conviction proceedings in that constitutional violations may be raised therein, and which are not necessarily comparable to other state *habeas corpus* statutes.

In Illinois, there are essentially only two bases for *habeas* relief. A defendant is entitled to immediate release if he was convicted by a court that lacked jurisdiction, or if a post-judgment event has resulted in his right to release. ***People v. Gosier***, 205 Ill. 2d 198, 205 (2001). It is not a proceeding in which to raise other errors, even those involving constitutional rights. ***Gosier***, 205 Ill. 2d at 205. Last, while the statute sets forth seven grounds for relief, all fall within the above two general categories. ***Hennings***, 229 Ill. 2d at 30.

B. Petition

A petition may be filed in the trial court. Petitions may be filed in the Supreme Court only by leave. **735 ILCS 5/10-123**; **Illinois Supreme Court Rule 381(a)**.

The proper respondent in a *habeas* proceeding is the person in whose custody petitioner is held. *See* **735 ILCS 5/10-107**; ***Hennings***, 229 Ill. 2d at 27. This is usually the warden of the jail or prison in which petitioner is housed. Once the warden has been served, however, the transfer of petitioner by DOC to another prison does not operate to deprive the court of jurisdiction. ***Watkins v. Page***, 322 Ill. App. 3d 360, 363 (3rd Dist. 2001).

C. Procedure

The statute sets forth the procedure by which *habeas* petitions are addressed in the trial court. ***Hennings***, 229 Ill. 2d at 32.

An order of *habeas corpus*—Latin for "that you have the body"—is not the final order in the proceeding nor is it an order for release. Rather, it is an order to bring petitioner to court so that the legality of his detention can be determined. ***Hennings***, 229 Ill. 2d at 25.

If the complaint fails to sufficiently set forth a basis for relief, that is, to "establish a question as to the legality of the plaintiff's detention or imprisonment," the court should simply deny the request to enter an order of *habeas corpus*. ***Id***. at 26.

In practice, the respondent typically moves to dismiss the *habeas* petition by calling into question the sufficiency of the petition. But, because the statute requires the court to examine the petition to determine its sufficiency, the court may also *sua sponte* deny a petition for *habeas corpus*. ***Id***. at 32; **735 ILCS 5/10-106**.

There is no statutory or constitutional right to counsel. ***Alexander v. Pearson***, 354 Ill. App. 3d 643, 645 (1st Dist. 2004).

D. Grounds for Relief

Habeas relief is available only to a petitioner entitled to immediate release---it is not available to correct the prospective release date of a sentence that petitioner is currently serving. ***Watkins***, 322 Ill. App. 3d at 364.

The "void sentence" rule has been abolished. ***People v. Castleberry***, 2015 IL 116916, ¶ 19. Therefore, a void sentence challenge may no longer be a basis for a *habeas corpus* proceeding, though *habeas* is an available remedy for void judgments. *Cf.* ***Beacham v. Walker***, 231 Ill. 2d 51, 58 (2008) (discussing availability of *habeas* in a then-recognized void sentence challenge).

"*Habeas corpus* is not available to review errors which only render a judgment voidable and are of a nonjurisdictional nature." ***Beacham***, 231 Ill. 2d at 58.

Habeas corpus is an appropriate remedy for a petitioner held in custody by DHS after the expiration of commitment order. ***People v. Lindem***, 155 Ill. App. 3d 721, 722 (1st Dist. 1987).

It may be utilized to challenge the revocation of good-time credit that results in the continued incarceration of a petitioner who would otherwise be entitled to release. ***Adcock v. Snyder***, 345 Ill. App. 3d 1095, 1099 (4th Dist. 2004).

It is not available to challenge the revocation of MSR. ***Barney v. Prisoner Review Board***, 184 Ill. 2d 428, 431 (1998).

3.26 *Mandamus*

A. Nature of Remedy

Mandamus is an extreme remedy used to compel a public official to perform a nondiscretionary, ministerial duty. ***People ex rel. Madigan v. Snyder***, 208 Ill. 2d 457, 465 (2004); **735 ILCS 5/14-101**. A writ "will be awarded only if there is a clear right to relief, a clear duty of the public official to act, and a clear authority in the public official to comply with the writ." ***Madigan***, 208 Ill. 2d at 465.

B. Procedure

A petition may be filed in the trial court. Petitions may be filed in the Supreme Court only by leave. **735 ILCS 5/14-102**; **Illinois Supreme Court Rule 381(a)**.

There is no statutory or constitutional right to counsel. The court may appoint counsel in its discretion. ***Tedder v. Fairman***, 92 Ill. 2d 216, 226 (1982).

The appellate court is divided as to whether a trial judge may *sua sponte* dismiss a mandamus petition. *Compare* ***Carroll v. Akpore***, 2014 IL App (3d) 130731, ¶ 3; ***Mason v. Snyder***, 332 Ill. App. 3d 834, 840 (4th Dist. 2002).

C. Grounds

Mandamus is not a writ of prohibition and provides only affirmative relief. ***Chicago Bar Association v. Illinois State Board of Elections***, 161 Ill. 2d 502, 507 (1994).

Only matters of law are addressed in a mandamus action. ***People ex rel. Carey v. Bentivenga***, 83 Ill. 2d 537, 544 (1981).

"An order of mandamus may not be used to direct or alter the manner in which discretion is to be exercised," but "it may be used to compel a public official to in fact exercise the discretion that he possesses." ***Howell v. Snyder***, 326 Ill. App. 3d 450, 453 (4th Dist. 2001).

Mandamus is not a vehicle to regulate discovery. ***Marshall v. Elward***, 78 Ill. 2d 366, 375 (1980).

Mandamus is proper to direct the trial court to vacate an order entered without subject matter jurisdiction. ***People ex rel. Alvarez v. Skryd***, 241 Ill. 2d 34, 44 (2011).

Mandamus is proper to compel a trial court to comply with a sentencing statute. ***People ex rel. Alvarez v. Gaughan***, 2016 IL 120110, ¶ 34.

3.27 Petitions for Certificates of Innocence

By statute, an innocent person who has been wrongly convicted and imprisoned may obtain petition for a certificate of innocence. The petition must be filed in the circuit court in which the conviction took place. **735 ILCS 5/2-702(b)**. The remedy is also available to a person sentenced to probation who has never been imprisoned. ***People v. Glenn***, 2018 IL App (1st) 161331, ¶ 24.

The remedy is not available to the estate of a person wrongly convicted. ***Rudy v. People***, 2013 IL App (1st) 113449, ¶ 13.

If the court finds that the person is entitled to the certificate of innocence, it shall enter same and a copy of the certificate of innocence must be transmitted to the clerk of the Court of Claims. **735 ILCS 5/2-702(h)**. And an expungement order must be entered. ***Id***.

1. Limitation period: The petition must be filed within 2 years of the dismissal of the charge or acquittal. **735 ILCS 5/2-702(i)**.

2. Service: The state's attorney of the county of conviction and the Attorney General must be served. Each has a right to intervene. **735 ILCS 5/2-702(e)**.

3. Requirements of petition: The person must attach documentation to the petition demonstrating:

   (1) he or she has been convicted of one or more felonies by the State of Illinois and subsequently sentenced to a term of imprisonment, and has served all of any part of the sentence; and;

   (2) his or her judgment of conviction was reversed or vacated, and the indictment or information dismissed or, if a new trial was ordered, either he or she was found not guilty at the new trial or he or she was not retired and the indictment or information dismissed; or the statute, or application thereof, on which the indictment or information was based violated the Constitution of the United States or the State of Illinois; and

(3) his or her claim is not time-barred. **735 ILCS 5/2-702(c)**.

Also, the petition "shall state facts in sufficient detail to permit the court to find that the petitioner is likely to succeed at trial in proving that the petitioner is innocent of the offenses charged" or that "his or her acts or omissions charged" "did not constitute a felony or misdemeanor" and that "the petitioner did not by his or her own conduct voluntarily cause or bring about his or her conviction." **735 ILCS 5/2-702(d)**. The petition must be verified.

4. Burden of proof: The burden of proof is by a preponderance of the evidence. **735 ILCS 5/2-702(g)**.

5. Hearing: The court may take judicial notice of the evidence in the underlying criminal proceeding if the person was represented by counsel or waived same. **735 ILCS 5/2-702(f)**.

A finding of not guilty is not the equivalent of a finding of actual innocence. ***People v Fields***, 2011 IL App (1st) 100169, ¶ 19.

> **NOTE**: In ***People v. McClinton***, 2018 IL App (3d) 160648, ¶ 21, petitioner was entitled to a certificate because the statute under which she was convicted was deemed *void ab initio* and she demonstrated all other statutory requirements.

3.28 Forensic Testing

A. Motion for Fingerprint or Forensic Testing

1. Statute: **725 ILCS 5/116-3** provides for fingerprint, ballistic, and forensic DNA testing "not available at the trial or guilty plea regarding actual innocence." Testing is available "on evidence that was secured in relation to the trial or guilty plea" and either:

(1) "was not subject to the testing which is now requested at the time of trial; or

(2) although previously subjected to testing, can be subjected to additional testing utilizing a method that was not

scientifically available at time of trial that provides a reasonable likelihood of more probative results." **725 ILCS 5/116-3(a)**.

There is no limitation period in the statute. *See* ***People v. Henderson***, 343 Ill. App. 3d 1108, 1115 (1st Dist. 2003). And there is no limit on the number of motions that may be filed. ***People v. Bailey***, 386 Ill. App. 3d 68, 72 (1st Dist. 2008).

There is no statutory or constitutional right to counsel on a **section 116–3** motion. ***People v. Patterson***, 2012 IL App (4th) 090656, ¶¶ 15, 16.

> **NOTE**: In ***People v. Stoecker***, 2014 IL 115756, ¶ 35, the Court found that Y-STR DNA testing, though unavailable at trial, was not warranted under the statute because it would not produce a more probative result than the PCR DNA test that was presented at trial.

2. Motion requirements: Defendant must present a *prima facie* case that:

(1) "identity was the issue at trial or the guilty plea which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." **725 ILCS 5/116-3(b)**.

> **NOTE**: Identity need not have been the sole issue at trial in order to trigger the statute. ***People v. Urioste***, 316 Ill. App. 3d 307, 316 (5th Dist. 2000). But a defendant who raised a defense of self-defense, compulsion, entrapment, or necessity, or who claimed insanity at trial conceded the issue of identity so that the statute does not apply. ***Urioste***, 316 Ill. App. 3d at 316.
>
> **NOTE**: An allegation that evidence was available at the time of trial is insufficient; defendant must make

some allegation of the chain of custody to present day. ***People v. Jones***, 334 Ill. App. 3d at 61, 64 (1st Dist. 2002). Conclusory allegations on chain of custody are insufficient. ***People v. Moore***, 377 Ill. App. 3d 294, 299 (1st Dist. 2007). Limited discovery may be appropriate to aid a defendant on the issue of chain of custody. ***People v. Travis***, 329 Ill. App. 3d 280, 285 (4th Dist. 2002).

3. Standard for order for testing: Testing shall be allowed if "the testing requested employs a scientific method generally accepted within the relevant scientific community" and the trial court determines that "the result of the testing has the scientific potential to produce new, noncumulative evidence" that is either:

   (1) "materially relevant" to the claim of actual innocence "even though the results may not completely exonerate the defendant;" or

   (2) "would raise a reasonable probability" that defendant would have been acquitted had the evidence been available at trial, "even though the results may not completely exonerate the defendant." **725 ILCS 5/116-3(c)**.

   The testing must be done "under reasonable conditions to protect the State's interest in the integrity of the evidence and the testing process." ***Id***.

   Evidence is materially relevant to a claim of actual innocence if it "tends to significantly advance that claim." ***People v. Savory***, 197 Ill. 2d 203, 213 (2001). The court must examine the trial evidence and the evidence that defendant seeks to test. ***Savory***, 197 Ill. 2d at 214. The court, may, in its discretion, order an evidentiary hearing on the issue. ***People v. Barrow***, 2011 IL App (3d) 100086, ¶ 23.

   The court may *sua sponte* dismiss a motion if defendant is not entitled to relief as a matter of law. ***People v. O'Connell***, 227 Ill. 2d 31, 38 (2007) (dismissal

warranted; statute at time did not provide for relief in guilty plea cases).

4. Unknown Fingerprint: If evidence reveals an unknown fingerprint from the crime scene that does not match victim or defendant, the court must order the State to submit the fingerprint to the Illinois State Police for entry into AIFIS. **725 ILCS 5/116-3(d)**.

B. Motion for DNA Database Search

Under **725 ILCS 5/116-5**, defendant may request that the court order the Illinois State Police to conduct a DNA database search.

The database analysis may include DNA comparisons between:

(1) the genetic profile from forensic evidence secured in relation to the trial against the genetic profile of the defendant, or
(2) the genetic profile of items of forensic evidence secured in relation to the trial against the genetic profile of other forensic evidence secured in relation to trial, or
(3) the genetic profiles referred to in (1) and (2) against other genetic profiles as listed in the statute.
725 ILCS 5/116-5(a).

If requested, a "defense representative" must be allowed to "view any genetic marker grouping analysis" conducted by the State Police. **725 ILCS 5/116-5(c)**.

NOTE: ***People v. Jessica M.*** **(*In re Jessica M.*)**, 399 Ill. App. 3d 730, 743 (1st Dist. 2010), contains a detailed discussion of genetic marker grouping analysis and rejects the argument that collection of DNA for same violates the state constitutional right to privacy.

3.29 Re-Characterization of Pleading as Post-Conviction Petition

As noted in the post-conviction section, a defendant is required to specify in the heading or the body of the petition that it is filed under the Post-Conviction Hearing Act. If it does not, the court "need not evaluate the petition to determine whether it could otherwise have stated some grounds for relief under this Article." **725 ILCS 5/122-1(d)**.

However, if a *pro* se pleading, *whether unidentified or labeled as a different form of relief*, alleges a deprivation of constitutional rights cognizable under the Post-Conviction Hearing Act, the court in its discretion may re-characterize it and treat it as a post-conviction petition. ***People v. Shellstrom***, 216 Ill. 2d 45, 51 (2005).

Required admonishment before recharacterization: If the court intends to recharacterize a pleading as a post-conviction petition, it must first: (1) advise defendant of its intent; (2) warn defendant that the recharacterized pleading will render any subsequent post-conviction petition subject to restrictions on successive post-conviction proceedings; and (3) provide defendant with an opportunity to withdraw the petition rather than have it recharacterized, or to amend the pleading to include all claims appropriate thereto. ***Shellstrom***, 216 Ill. 2d at 57.

Exception to admonishment rule: The admonishment as to recharacterization is "unnecessary" if the "*pro se* petition is not summarily dismissed but is instead advanced for further review, and counsel is appointed." ***People v. Stoffel***, 239 Ill. 2d 314, 328 (2010).

> **NOTE**: The appellate court is divided as to whether the failure to provide ***Shellstrom*** admonishments mandates reversal. ***People v. Higginbotham***, 368 Ill. App. 3d 1137, 1141 (3rd Dist. 2006), holds it does not—the court instead opined that the recharacterized pleading "cannot be considered to have become a postconviction petition for purposes of applying restrictions" on successive petitions.

People v. Caliendo, 391 Ill. App. 3d 847, 853 (2nd Dist. 2009), disagreed, reasoning that ***Shellstrom*** contained no such directive limiting the use of the recharacterized pleading. *See also* ***People v. Hood***, 395 Ill. App. 3d 584, 588 (4th Dist. 2009) (same); ***People v. Escobedo***, 377 Ill. App. 3d 82, 88 (1st Dist. 2007) (***Shellstrom*** error not harmless).

Ninety-day review period: The 90-day first stage review period begins to run when the court gives all required ***Shellstrom*** admonishments. ***People v. Swamynathan***, 236 Ill. 2d 103, 114 (2010). There is no time limit for the court to give ***Shellstrom*** admonishments. ***Swamynathan***, 236 Ill. 2d at 116.

3.30 Sanctions

A. Assessment of Fees and Costs—Upon Prisoners Filing Frivolous Lawsuits

Under **735 ILCS 5/22-105(a)**, if a prisoner confined in the Illinois Department of Corrections "files a pleading, motion, or other filing which purports to be a legal document in a case seeking post-conviction relief," **section 116-3** testing, *habeas corpus* relief, a claim under the Court of Claims Act, a second or subsequent **section 2-1401** petition, or in other actions against the State, the Illinois Department of Corrections, or the Prisoner Review Board, or any of their officers or employees and the Court makes a specific finding that the filing is frivolous, the prisoner is responsible for the full payment of filing fees and actual court costs.

A frivolous pleading is defined as one that meets any or all of the following criteria:

(a) it lacks an arguable basis either in law or in fact;

(b) it is being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(c) the claims, defenses, and other legal contentions therein are not warranted by existing law or by a nonfrivolous argument for the extension,

modification, or reversal of existing law or the establishment of new law;

(d) the allegations and other factual contentions do not have evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; or

(e) the denials of factual contentions are not warranted on the evidence, or if specifically so identified, are not reasonably based on a lack of information or belief. **735 ILCS 5/22-105**.

NOTE: The fee applies to unsuccessful motions to file a successive post-conviction petition. ***People v. Conick***, 232 Ill. 2d 132, 139 (2008).

NOTE: A petition dismissed as frivolous or patently without merit under the Post-Conviction Hearing Act is frivolous for purposes of this statute. ***People v. Alcozer***, 241 Ill. 2d 248, 258 (2011). Further, a frivolous petition includes one that was dismissed on grounds of forfeiture or *res judicata*. ***Alcozer***, 241 Ill. 2d at 258.

NOTE: The statute does not apply to persons committed to the Department of Human Service for treatment as a sexually violent person. ***People v. Steward***, 406 Ill. App. 3d 82, 96 (1st Dist. 2010).

B. Revocation of Good Time

The Department of Corrections is statutorily required to conduct a hearing on revocation of good time credit when a court finds a prisoner lawsuit to be frivolous. **730 ILCS 5/3-6-3(d)**. The court does not order or participate in same.

3.31 Discretionary Relief from Effects of Conviction

A. Forms and Filing

All applications, certificates, and orders of revocation relating to certificates of relief from disabilities and certificates of good conduct shall be upon forms prescribed by the Chief Justice of the Supreme Court. All such forms are distributed by the Director of the Division of Probation Services. **730 ILCS 5/5-5.5-40(a)**.

Any court or board issuing or revoking a certificate of relief from disabilities or certificate of good conduct shall immediately file a copy of the certificate or the order of revocation with the Director of State Police. **730 ILCS 5/5-5.5-40(b)**.

B. Certificate of Relief from Disabilities

A court may issue a certificate of relief from disabilities to an eligible offender for a conviction that occurred in that court if the court imposed the sentence. **730 ILCS 5/5-5.5-15(a)**.

The certificate may be issued at the time sentence is pronounced, or any time thereafter. **730 ILCS5/5-5.5-15(a)**. If the certificate is not issued at the time of sentencing, it shall only be issued upon verified application to the court. **730 ILCS 5/5-5.5-15(c)**.

Investigations and Report: The court may request the probation or court services department to conduct an investigation of the applicant, and the probation officer shall prepare and submit a written report to the court. **730 ILCS 5/5-5.5-15(c)**. The report shall be confidential. **730 ILCS 5/5-5.5-15(e)**. The court, in its discretion, may hold a conference in open court or in chambers to offer an applicant an opportunity to controvert or to comment on any portions of the report, may conduct a summary hearing, and may take testimony under oath. **730 ILCS 5/5-5.5(e)**.

Burden of Proof: The court must be satisfied, by clear and convincing evidence, that the statutory requirements are present. **730 ILCS 5/5-5.5-15(b)**.

C. Certificate of Good Conduct

A court may issue a certificate of good conduct to any eligible offender previously convicted of a crime, and, if satisfied that the statutory requirements are present, shall make a specific finding of rehabilitation with the force and effect of a final judgment on the merits. **730 ILCS 5/5-5.5-30(a)**.

A certificate of good conduct relieves an eligible offender of employment, occupational licensing, or housing bars, as specified in the discretion of the Court, and as limited in **730 ILCS 5/5-5.5-25**.

1. Hearing: A rehabilitation review must be held by the Court in a manner designated by the chief judge of that circuit and in accordance with **730 ILCS 5/5-5.5-30**. An eligible offender as defined by **730 ILCS 5/5-5.5-5** must demonstrate by clear and convincing evidence that he or she has been a law abiding citizen and is fully rehabilitated. **730 ILCS 5/5-5.5-25(a-6)**.

2. Revocation or expansion of relief: If the court has issued a certificate of good conduct, the court may at any time issue a new certificate enlarging the relief previously granted. The court may, upon notice to a certificate holder, revoke a certificate of good conduct upon a violation of parole or mandatory supervised release, or a subsequent conviction. **730 ILCS 5/5-5.5-30(d), (e) & (f)**.

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4.1 Extradition

See Appendix for "Extradition Overview" on page A-168.
See Appendix for "Waiver of Extradition and Consent to Return" on page A-169.

A. What is Extradition?

Extradition is the process by which any person (the fugitive) found in this state (the asylum state) who, in another state (the demanding state), is charged with or has committed treason, a felony, or another crime, and has fled from justice, may be arrested and delivered to the demanding state. The extradition procedure is set forth in the Uniform Criminal Extradition Act, **725 ILCS 225/1** ***et seq***. The return of a fugitive from one state to another is also a federal matter, governed by the U.S. Constitution. See, ***People ex rel. Guidotti v. Bell***, 372 Ill. 572 (1939). As such, the Illinois Act is supplemental to and in conformance with the extradition clause found in **Article IV, § 2, cl. 2** of the United States Constitution and is consistent with Federal extradition legislation found in **18 U.S.C. § 3182**, *et seq*. ***People ex rel. Hernandez v. Elrod***, 86 Ill.2d 453, 456 (1981). Extradition is to be summary in nature and a ministerial proceeding, and not an independent inquiry into the merits of any charges. ***Michigan v. Doran***, 439 U.S. 282, 288, 99 S.Ct. 530, 535, 58 L.Ed. 526, 527 (1978)

The Act provides it is the duty of the Governor to facilitate the extradition process. **725 ILCS 225/2**. The constitutional duty imposed by the extradition clause on the asylum state is mandatory. ***New Mexico, ex rel. Ortiz v. Reed***, 524 U.S. 151, 154 (1998).

Essentially, upon the receipt of a proper request from the demanding state, the Illinois Governor is to issue a warrant of arrest for the fugitive. **725 ILCS 225/7**. The Governor's warrant authorizes the arrest of the fugitive and the delivery of the fugitive to an agent of the demanding state. **725 ILCS 225/8**.

As outlined below, certain procedures must be followed in the issuance and execution of a Governor's warrant, and a fugitive may raise only limited objections. The Governor's warrant may be issued either before or after the fugitive is arrested and is in the custody of Illinois authorities.

B. Under What Circumstances Is a Fugitive Subject to Arrest Before the Issuance of a Governor's Warrant?

The Act provides that the fugitive may be arrested by a peace officer or private person provided certain prerequisites are met. *See* **725 ILCS 225/13 & 14**. Further, an Illinois officer has the authority to arrest if he has reasonable grounds to believe that a foreign warrant has been issued for defendant. **725 ILCS 5/107-2(1)(b)**. There are a few possible scenarios for the arrest of a fugitive found in Illinois:

(1) The peace officer in Illinois could execute the warrant from the demanding state.

There is some question as to whether an Illinois peace officer can execute the warrant of a foreign state. The Illinois Supreme Court has held that, though common law renders a warrant invalid beyond the borders of the issuing state, **725 ILCS 5/107-2(1)(b)** (cited above) authorizes an Illinois officer to arrest a defendant on a foreign state's warrant. ***People v. Wolgemuth***, 69 Ill.2d 154, 160 (1977). In ***Wolgemuth***, the Court found that the statutory authority to arrest on the basis of an Iowa warrant defeated defendant's claim that Illinois police violated the Fourth Amendment in "executing" an entry to his home to arrest him. ***Wolgemuth***, 69 Ill.2d at 161.

Wolgemuth did not address an extradition issue, nor has an Illinois court applied ***Wolgemuth*** to same. As such, ***Wolgemuth*** did not expressly find that the police "executed" the Iowa warrant, nor did ***Wolgemuth*** give any guidance as to whether Illinois has the authority to process a bail bond on a foreign warrant, or how to do so.

Therefore, it can be argued that, even given ***Wolgemuth***, "executing" a foreign warrant and processing a bail bond is

wholly inconsistent with the purpose and procedures of the Uniform Criminal Extradition Act, which are discussed below.

(2) The peace officer could arrest the fugitive on a warrant issued by an Illinois court relating to a charge filed in Illinois that the person is a fugitive from justice (based upon information the prosecuting authority received from the demanding state). 725 ILCS 225/13. ***People v. Williams***, 68 Ill.App.3d 351 (2nd Dist. 1979).

(3) The peace officer could arrest the fugitive based upon probable cause the person is a fugitive from justice and the probable cause is based upon the officer's knowledge of a warrant from the demanding state. **725 ILCS 225/14**. See also, **725 ILCS 5/107(2)(1)(b)**.

The demanding state's warrant is relevant as a ground for probable cause that defendant is a fugitive from justice such that a fugitive warrant or a Governor's warrant should then be issued in Illinois, thus initiating the extradition process. *See* ***People v. Meschino***, 315 Ill.App.3d 488, 490 (3rd Dist. 2000); **725 ILCS 225/3** (a copy of demanding state's warrant, if issued, to accompany the state's demand for extradition); ***State v. Carter*** 2010 WI 77, ¶ 61 (Wisconsin warrant "provided reasonable information" for Illinois to arrest defendant as a fugitive from justice). See also, ***Wolgemuth***, discussed above.

(4) The peace officer could arrest the person based upon probable cause to arrest for a crime committed here in Illinois (or stop a person based upon reasonable suspicion) and subsequently discover the person is a fugitive from justice based upon a warrant from the demanding state. In this instance, the prosecuting authority would need to file a charge as set forth in subparagraph (2) above.

Finally, the provision for waiver of extradition does recognize that, even in the absence of a waiver, a fugitive may return to the demanding state "voluntarily and without formality." **725 ILCS 225/26**. But an arrest on a warrant surely invokes formality.

NOTE: the above statutes together provide that, in a case that has been charged in the foreign state which the potential sentence in the charging state is less than a year, a fugitive warrant from an Illinois court must be obtained before an arrest as a fugitive in Illinois].

C. Commitment in Jail or Setting of Bail Upon Arrest of Fugitive Before Issuance of Governor's Warrant

At defendant's first court appearance on a fugitive warrant, "[i]f from examination before the judge it appears" that the fugitive is the person charged with committing the underlying crime, the judge must: (a) commit the fugitive to the county jail for a time not to exceed 30 days, so as to enable either the arrest of the fugitive under a Governor's warrant or the legal discharge of the fugitive; or (b) admit the fugitive to bail under section 225/16. **725 ILCS 225/15**.

A judge may admit a fugitive "to bail by bond, with sufficient sureties, and in such sum as he deems proper," so long as the fugitive is not charged with an offense punishable by death or life imprisonment in the charging state. **725 ILCS 225/16**. A condition of bond must be that the fugitive appear before the court on a specific date for the purpose of surrendering to a Governor's warrant. ***Id***. If the fugitive fails to appear on the return date, his bond shall be

forfeited, and the court shall "order his immediate arrest without a warrant if he be within this State." **725 ILCS 225/18**.

Expiration of time period—discharge or extension: If the arrest under the Governor's warrant has not occurred within the 30-day commitment period or by the return date on the bond, the judge may discharge the fugitive. Alternatively, the judge may extend the commitment for a period not to exceed 60 days or admit the fugitive to bail for an additional period not to exceed 60 days. **725 ILCS 225/17**.

D. Issuance of Governor's Warrant

1. The demanding state must first provide a written demand for extradition to the Illinois Governor. The demand must contain the following:

> (a) an allegation that the fugitive was in the demanding state at the time of the offense and that he thereafter fled the state, unless the fugitive was in Illinois or a third state when he committed acts resulting in a crime in the demanding state; and
>
> (b) a copy of:
>
> > (i) the indictment, the information supported by affidavit, or an affidavit made before a magistrate in the demanding state, along with a copy of any warrant issued on any of these; or
> >
> > (ii) the judgment of conviction or sentence and a statement that the fugitive has escaped from confinement or broken the terms of his bail, probation, or parole.

Further, the indictment, information, or affidavit before the magistrate "must substantially charge the person demanded with having committed a crime" and the copy of same or of the judgment of conviction or sentence "must be authenticated by the Executive Authority (i.e., the Governor

or any person performing the functions of governor in another state) making the demand. **725 ILCS 225/3**.

The demanding state may also seek extradition of any person present in Illinois who is charged in the demanding state with a crime premised on acts committed in Illinois or a third state. The demand shall be made in the same form as provided in **section 225/3**, outlined above. **725 ILCS 225/6**.

The fugitive's purpose or motive for leaving the demanding state is irrelevant. ***Ely v. Sheahan,*** 361 Ill.App.3d 605, 614 (1st Dist. 2005). This includes leaving the demanding state under compulsion. **725 ILCS 225/5**.

2. Upon receipt of the written extradition demand, the Illinois Governor may require the Attorney General or a state prosecutor to investigate the circumstances of the demand and whether the fugitive should be surrendered. **725 ILCS 225/4**.

   The Illinois Governor determines whether the defendant is substantially charged with a crime in the demanding state and whether he is a fugitive. It is up to the Illinois Governor to determine whether the presented evidence demonstrates same. ***People ex rel. McGee v. Fischer***, 401 Ill. 95, 98-99 (1948).

   If the Illinois Governor determines "that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance." **725 ILCS 225/7**.

E. Bail Not Available After Issuance of Governor's Warrant

If the fugitive is on bail pending the issuance of the Governor's warrant, he must surrender when it is issued. A fugitive has no right to bail where a governor's warrant has been issued and he is held solely for the purpose of

extradition. ***Beauchamp v. Elrod***, 137 Ill.App.3d 208, 215 (1st Dist. 1985).

F. Procedure Upon Arrest on Governor's Warrant

The fugitive arrested on the Governor's warrant may not be turned over to the agent of the demanding state until the fugitive has first been taken, "forthwith," to an Illinois judge in the county of arrest. The judge must inform the fugitive of the "demand made for his surrender and of the crime with which he is charged." **725 ILCS 225/10**. The judge must inform the fugitive that he has a right to obtain a lawyer within a reasonable time and opportunity, which is at least 24 hours. ***Id***.

> **NOTE**: The Illinois Supreme Court has held that the issuance of a fugitive warrant and the initiation of the extradition process do not trigger the Sixth Amendment right to counsel because the extradition process, which is a summary procedure, does not result in solidified adversarial proceedings between the parties. ***People v. Young***, 153 Ill.2d 383, 403–05 (1992). This rationale was called into question by ***People v. White***, 395 Ill.App.3d 797, 820 (1st Dist. 2009), which noted that ***Rothgery v. Gillespie County, Texas***, 554 U.S. 191 (2008), held that that the Sixth Amendment right to counsel attaches at the first court appearance regardless whether the prosecutor was aware of the appearance. But the ***White*** analysis was rejected as premature by the Illinois Supreme Court, which declined to address the constitutional issue or adopt the lower court's rationale. ***People v. White***, 2011 IL 109689, ¶ 154.

G. Challenge to The Governor's Warrant by *Habeas Corpus* Petition

The fugitive may contest the legality of his arrest on the Governor's warrant by filing a petition for *habeas corpus* relief. **725 ILCS 225/10**. If the fugitive states that he intends to challenge the arrest, the court "shall fix a reasonable time" to allow the filing of the petition. ***Id***. The fugitive must give

notice of the filing and of the time and date of the hearing to the prosecutors in both the arresting county and the custodial county, and to the agent of the demanding state. ***Id***.

The scope of inquiry at the *habeas corpus* hearing is limited. The Governor's warrant certifying the existence of extradition requirements as set forth in the statute is *prima facie* proof that the warrant is legal and justified and that the detention of the fugitive on the warrant is legal. ***People ex rel. Hernandez v Elrod***, 86 Ill.2d 453, 457 (1981). The relevant issues at the hearing are: (1) "whether the extradition documents on their face are regular in form;" (2) whether the fugitive "has been charged with a crime in the demanding state;" (3) whether the fugitive is the person named in the extradition demand; and (4) whether the petitioner is in fact a fugitive. ***California v. Superior Court***, 482 U.S. 400, 408, 107 S.Ct. 2433, 2434, 96 L.Ed.2 332, 341 (1987); ***Beauchamp***, 137 Ill.App.3d at 210. The merits of the underlying charge may not be addressed. ***Id***. **725 ILCS 225/20** (guilt or innocence of accused not to be considered by the Governor nor at any hearing unless related to identifying accused as the person charged). The petitioner (i.e., fugitive) has the burden of proving beyond all reasonable doubt that he/she wasn't present in the demanding state when the offense was committed. ***People ex rel. O'Mara v. Ogilvie***, 35 IL.2d 287, 289, (1966). If the demanding state raises any issues of fact contradictory to the claims of the fugitive, then the fugitive has failed to carry his/her burden, and the court is not to weigh the evidence. ***People ex rel. Webb v. Babb***, 5 Ill.2d 35, 41 (1954).

If the Governor's warrant is deficient, the respondent (i.e., the demanding state) may introduce into evidence at the hearing the underlying request for extradition to cure the defect. ***Cohen v. Sheahan***, 298 Ill.App.3d 961, 966 (1st Dist. 1998). Fugitive's *habeas* petition should not be dismissed where the documents fail to demonstrate the fugitive has been charged with a crime in the demanding state. ***Id***. At 967.

A discharge upon a *habeas corpus* petition does not preclude a subsequent extradition proceeding "on additional evidence

or on new process." ***People ex rel. Shockley v. Hardiman***, 152 Ill.App.3d 38, 42 (1st Dist. 1987).

While extradition proceedings are summary in nature, Illinois recognizes one exception to the rule. "Extradition has been denied on constitutional grounds where extraordinary circumstances exist and fundamental fairness" mandates a finding that the "demanding state forfeited its right to extradite." ***Beauchamp***, 137 Ill.App.3d at 211. An "inordinate delay in the demanding state seeking extradition that is not attributed to the accused" is one such instance. ***Id***.

Either party may appeal from the decision on the *habeas corpus* petition, as it is a civil proceeding. **725 ILCS 225/10**.

H. Waiver of Extradition

A fugitive may waive extradition proceedings—that is, the issuance and service of a Governor's warrant. **725 ILCS 225/26**.

The waiver must be in writing and executed before the court. The writing must state that the fugitive consents to return to the demanding state. Before the execution of the waiver, the court must inform the fugitive "of his rights to the issuance and service of a warrant of extradition, and to obtain a relief by *habeas corpus*" pursuant to statute. **725 ILCS 225/26**.

The written waiver must be forwarded to the Illinois Governor "forthwith." The court must direct the Illinois custodial officer to deliver the fugitive to an agent of the demanding state, along with a copy of the waiver. ***Id***.

The waiver process is not exclusive, and it does not limit the right of the fugitive to return to the demanding state on a voluntary basis "without formality," nor does it limit the powers, rights or duties of the asylum or demanding states. ***Id***.

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4.2 Sexually Dangerous Persons

See Appendix for "Sexually Dangerous Persons Act (Overview)" on page A-170 and "Sexually Dangerous Persons Act Jury Instructions" on page A-172.

A. Overview

The Sexually Dangerous Persons Act (**725 ILCS 205/0.01 *et seq***.) provides a diversion from criminal proceedings to instead commit an offender to DOC for treatment. It defines a "sexually dangerous person" as one charged with a criminal offense who is suffering from a mental disorder lasting more than one year, coupled with demonstrated criminal propensities to commit sex offenses. **725 ILCS 205/1.01**. The SDPA provides for petition by the state prior to trial, appointment of two psychiatrists, right to jury trial, burden of proof beyond reasonable doubt, commitment to DOC as guardian, and non-prosecution of the criminal charge. It also provides for the filing of a recovery petition seeking release or conditional release from DOC.

B. Elements and Prerequisites to Filing

A defendant must first be charged with a criminal offense before such petition may be filed against him. ***People v. Harris***, 77 Ill.App.2d 300, 302 (4th Dist. 1966). The underlying charge need not be a sex offense, ***People v. Lovett***, 234 Ill.App.3d 645, 646 (3rd Dist. 1992), and need not be a felony offense. ***People v. Harter***, 86 Ill.App.2d 461, 467 (2nd Dist. 1967). The statutory prerequisite is only that there be "a pending criminal charge." **725 ILCS 205/3**.

The state may not first obtain a conviction for a criminal offense and then proceed to commit the accused for the same incident. ***People v. Patch***, 9 Ill.App.3d 134, 138 (2nd Dist. 1992). The state may, however, initially proceed upon both the underlying criminal charge and the SDP petition simultaneously, even with the intent to use same as leverage

to affect a negotiated plea. ***People v. Bailey***, 405 Ill.App.3d 154, 173 (3rd Dist. 2010); see also, ***People v. White***, 2017 IL App (1st) 130882, ¶ 58, 59. Defendant's speedy trial rights are suspended as to the underlying charge pending determination of the SDP petition. ***People v. Spurlock***, 388 Ill.App.3d 365, 376 (5th Dist. 2009).

Defendant must suffer from a mental disorder, and the disorder must have existed for not less than one year immediately prior to the filing of the petition and must be coupled with criminal propensities to commit sex offenses, with demonstrated propensities toward acts of sexual assault or molestation of children. **725 ILCS 205/1.01**.

A mental disorder is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." **725 ILCS 205/4.03**. *See*, *e.g.*, ***People v. Bailey***, 405 Ill.App.3d 154, 171 (3rd Dist. 2010) (sufficient evidence of volitional impairment that caused defendant serious difficulty in controlling his sexual urges and behavior).

C. Procedure and Burden of Proof

A petition may be brought by the State's Attorney or by the Attorney General. **725 ILCS 205/3**.

Upon filing, the court shall appoint two qualified evaluators to personally examine the respondent to determine if defendant is an SDP and to report their findings to the court with a copy to defendant. **725 ILCS 205/4**. The cost of the evaluators is to be paid from the general fund of the county when the county has a population of less than 500,000. **725 ILCS 205/4.02**.

A qualified evaluator includes any physician, psychologist or licensed professional who specializes in the evaluation of sex offenders. **725 ILCS 205/4.01**.

"Criminal propensities" is defined as a showing that it is substantially probable defendant will engage in the

commission of sex offenses in the future if not confined. **725 ILCS 205/4.05**.

Although the proceedings are civil in nature, the state's burden of proof is beyond a reasonable doubt. **725 ILCS 205/3.01**.

Though an SDP proceeding is a hybrid of a civil proceeding in which certain rights of a criminal defendant are afforded, summary judgment is not available. ***People v. Trainor***, 196 Ill.2d 318, 342 (2001).

Suggested jury instructions are provided in the appendix hereto, referencing both Civil IPI and Criminal IPI as appropriate.

Due process requires that an SDP commitment must be premised on an explicit finding of future dangerousness. Therefore, there must be a finding that it is "substantially probable" the respondent will engage in the commission of sex offenses in the future if not confined. ***People v. Masterson***, 207 Ill.2d 305, 330 (2003); ***Kansas v. Crane***, 534 U.S. 407 (2002). This requirement is now codified at **725 ILCS 205/4.05**.

D. Rights of Respondent

Defendant is entitled to a jury trial, representation by counsel, and the appointment of counsel if indigent. **725 ILCS 205/5**.

Defendant has a constitutional due process right to a speedy trial, but the speedy trial statute does not apply. ***People v. Holmes***, 2016 IL App (1st) 132357, ¶ 66.

Defendant does not have the right to demand appointment of independent psychiatric expert at the state's expense and there is no equal protection violation regarding same *vis a vis* the Sexually Violent Persons Act. ***People v. Masterson***, 2011 IL 110072, ¶ 43. Defendant may still petition the court for the appointment of an independent expert on the ground

that the current evaluators are biased. ***People v. Craig***, 403 Ill.App.3d 762 (5th Dist. 2010). See also, ***People v. Abel***, 2022 IL App (5th) 210155.

E. Evidentiary Issues

Defendant has a constitutional right to confront witnesses at trial. ***People v. Hunter***, 2013 IL App (4th) 120299, ¶ 30. An expert, however, may rely on out of court statements for the purpose of explaining the basis of his opinion; this use of out of court statements does not violate the Confrontation Clause because the statements are not offered for the truth of the matter asserted. ***Hunter***, at ¶ 37 (discussing ***Crawford v. Washington***, 541 U.S. 36 (2004) and its progeny); *see also* **Illinois Rule of Evidence 703** (Bases of Opinion Testimony by Experts).

The state may introduce respondent's prior conviction(s) for sex offenses to establish the propensity to commit sex offenses. ***People v. Lawton***, 212 Ill.2d 285 (2004). The state may do so by introducing certified copies of prior conviction(s) or asking the court to take judicial notice of prior conviction(s). ***Id***. One (1) conviction, even if it is in the distant past, can be sufficient to satisfy the state's burden of proof. ***Id***.; see also, ***Hunter***, at ¶ 46. Presumably, counsel for respondent could also offer to stipulate to the prior conviction(s). Counsel's decision as to whether to object to a request for judicial notice of a prior conviction appears to be one of trial strategy which would not constitute ineffective assistance of counsel. *See*, ***Lawton***.

In ***People v. Baldwin***, 2020 IL App (1st) 160496, the State's proof of propensity was defendant's prior convictions for aggravated criminal sexual abuse. After the sexually dangerous person trial was completed, defendant's prior criminal convictions were reversed on appeal in the criminal case. Defendant then appealed the sexually dangerous person verdict, and the appellate court reversed and remanded the sexually dangerous person case for a new trial. The appellate court did so even though the defendant has been subsequently convicted again on the sexual abuse charges after remand in the criminal case.

F. Order of Commitment

The court must appoint the Director of DOC as guardian of the person upon finding defendant to be SDP. **725 ILCS 205/8**. The Director "shall keep safely the person so committed until the person has recovered and is released" as provided in the Act. ***Id***. The Director shall provide treatment and care "designed to effect recovery." ***Id***. This includes potentially placing defendant in the care and treatment of another state department or agency. ***Id***.

The court must also direct the clerk to notify ISP, FOID Department, of the SDP finding. **430 ILCS 65/1.1(c)**.

Note that there is no statutory provision for periodic reports or subsequent court review following commitment.

G. Petition for Conditional Release

The Director may petition the court to conditionally release defendant if the Director finds that defendant "appears to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered." **725 ILCS 205/10**.

The court may order release with conditions that in its opinion "will adequately protect the public." ***Id***. Upon a violation of a condition, the court shall revoke the release and recommit defendant. ***Id***.

H. Petition for Discharge Upon Recovery

Defendant may petition the court for discharge on the ground that he has recovered. **725 ILCS 205/9(a)**.

Upon the filing of the petition, the Clerk must notify the Director of DOC. The Director must then order and send the court a socio-psychiatric report concerning defendant. ***Id***.

The court must set a date for hearing on the petition. The court may consider the report and any other relevant information submitted on behalf of defendant. ***Id***.

The original prosecuting agency shall represent the state. Either party may elect a jury trial. **725 ILCS 205/9(b)**. The

state has the burden of proving by clear and convincing evidence that defendant is still a sexually dangerous person. ***Id***.

Defendant is not entitled to the appointment of an independent expert at the state's expense on a recovery petition. ***People v. Burns***, 209 Ill.2d 551, 567 (2004). ***People v. Abel***, 2022 IL App (5th) 210155.

It is proper for the court to instruct the jury to presume that defendant has recovered, and to then determine whether the state had met its burden to overcome the presumption by clear and convincing evidence on all four elements:

(1) that defendant suffers from a mental disorder;

(2) that the mental disorder has existed for more than one year;

(3) that the mental disorder is accompanied by criminal propensities to commit future sex offenses; and

(4) that defendant has demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children (*i.e.*, under the age of eighteen). ***People v. Hancock***, 2014 IL App (4th) 131069, ¶ 127.

If defendant refuses to cooperate with the state's examiner, defendant may not present testimony based on his own expert's examination of his person. Defendant's expert may, however, opine based upon a review of the records, all of which shall be admissible at such hearing or trial. **725 ILCS 205/9(c)**.

If the petition is denied or withdrawn, defendant may not file another such petition within two (2) years, unless there is a statement from the treatment provider citing exceptional progress and if there are facts to find the condition of the person has so changed that a hearing is warranted. **725 ILCS 205/9(d)**.

Prior to the 2013 amendments to the Act, the courts had authority to order DOC, as defendant's guardian, to pay his attorney fees. ***People v. Carter***, 392 Ill.App.3d 520, 525 (2nd Dist. 2009). ***People v. Wilcoxen***, 358 Ill.App.3d 1076, 1079 (3rd Dist. 2005). In 2013, Section 5 of the Act was amended to specify the cost of respondent's counsel in the original proceedings were to be paid by the county in which the proceeding is brought. The court in ***People v. Sharp***, 2021 IL App (5th) 190190, concluded the amendment of Section 5 also require the county to be responsible for the cost of counsel during discharge hearings under Section 9(a).

In addition, ***People v. Kastman***, 2021 IL App (2d) 210158 (2021), P.L.A. granted 11/24/21, found the court may order DOC to pay respondent's "essential expenses" such as providing housing assistance after the defendant has been released from secure detention but prior to full recovery and discharge.

If defendant "is found to be no longer dangerous," the court shall order defendant discharged. **725 ILCS 205/9(e)**. "Upon an order of discharge every outstanding information and indictment, the basis of which was the reason for the present detention, shall be quashed." ***Id***.

If, however, the court finds that defendant "appears to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that [defendant] has fully recovered," the court may order release with conditions that in its opinion "will adequately protect the public." ***Id***. Upon a violation of a condition, the court shall revoke the release and recommit defendant. ***Id***.

Following the 2013 amendments to the Act which include the element of "substantial probability to reoffend" in the statutory definition of an SVP, it is no longer reversible error if the trial court fails to make an express finding as to such. ***In re the Commitment of Snapp***, 2021 IL 126176, (overruling ***People v. Masterson***, 207 Ill. 2d 305 (2003)).

I. Violation of Conditional Release

The state's burden is to prove the violation by a preponderance of the evidence. ***In re Detention of Kish***, 395 Ill.App.3d 546, 554 (3rd Dist. 2009).

J. Effect of Reversal of SDP Commitment

If an SDP commitment is reversed on appeal, the state may reinstate the charge(s) previously dismissed pursuant to that commitment. ***People v. Hughes***, 2012 IL 112817, ¶¶ 6, 69.

K. Collateral Review

An SDP may petition for relief from judgment under **735 ILCS 5/2-1401**, the details of which are discussed in Tab 15. An SDP, unlike other **section 2-1401** petitioners, may raise the issue of ineffective assistance of counsel. ***People v. Lawton***, 212 Ill.2d 285, 297 (2004).

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4.3 Sexually Violent Persons

See Appendix for "Sexually Violent Persons Commitment Act (Overview)" on page A-176 and "Sexually Violent Persons Commitment Act Jury Instructions" on page A-181.

A. Overview

The Sexually Violent Persons Commitment Act (**725 ILCS 207/1 *et seq***) provides for commitment of a convicted offender to DHS for treatment at the conclusion of the offender's prison term. It defines a "sexually violent person" as a person who: (1) has been convicted or adjudicated delinquent of a sexually violent offense (or found not guilty by reason of insanity); and (2) is dangerous because of a mental disorder that makes it substantially probable that the person will engage in future acts of sexual violence. **725 ILCS 207/5(f)**.

The Act provides, *inter alia*, for:

(1) petition by the state prior to defendant's discharge from prison (or within thirty days thereafter) in **725 ILCS 207/15**;

(2) initial determination of probable cause for detention in **725 ILCS 207/30**;

(3) a jury demand by either party in **725 ILCS 207/35(c)**;

(4) proof beyond reasonable doubt in **725 ILCS 207/35(d)**; and

(5) commitment to the Department of Human Services **725 ILCS 207/35(f) & 40**.

It also provides procedures for discharge or conditional release. **725 ILCS 207/60 & 65**.

The Act comports with due process in that it contains definitions "that supply the constitutionally required elements for civil commitment." ***In re Detention of Varner***,

207 Ill.2d 425, 432–3 (2003). Moreover, analyzing ***Kansas v. Crane***, 534 U.S. 407 (2002), ***Varner*** expressly found that the Constitution does not require a finding by the trier of fact that the respondent lacks volitional control due to his mental disorder. ***Varner***, 207 Ill.2d at 432.

> **NOTE**: Appointed counsel and expert witness fees may be reimbursable by the State to the county, subject to availability of State funding.

B. Elements and Prerequisites to Filing

Respondent must have been convicted, adjudicated delinquent, or found not guilty by reason of insanity of a sexually violent offense. **725 ILCS 207/5(f)**. A sexually violent offense is defined under the Act as: criminal sexual assault; aggravated criminal sexual assault; predatory criminal sexual assault of a child; aggravated criminal sexual abuse; rape (formerly); deviate sexual assault (formerly); indecent liberties with a child (formerly); aggravated indecent liberties with a child (formerly); first degree murder "if it is determined by the agency with jurisdiction to have been sexually motivated;" or "any solicitation, conspiracy, or attempt to commit" any of the above specified crimes. **725 ILCS 207/5(e)**.

Respondent must be alleged to be dangerous due to a mental disorder that "makes it substantially probable he "will engage in acts of sexual violence." **725 ILCS 207/15**. Mental disorder is defined under the Act as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." **725 ILCS 207/5(b)**; ***In re Detention of Varner***, 207 Ill.2d 425, 433 (2003). As used in the Act, the term "condition" is not limited to a single, stand-alone disorder. Rather, it includes combinations of psychological conditions. ***In re Detention of White***, 2016 IL App (1st) 151187, ¶ 46.

The diagnosis of a "novel condition" is subject to a ***Frye*** hearing to determine if it is a generally accepted mental disorder. ***In re Detention of New***, 2014 IL 116306, ¶ 32. In

New, the Illinois Supreme Court remanded for a ***Frye*** hearing on a diagnosis of hebephilia, or "paraphilia, NOS, sexually attracted to adolescent males." ***New***, 2014 IL 116306, ¶ 53.

C. Filing, Probable Cause Hearing and Burden of Proof at Trial

1. Filing

The commitment petition may be filed by the State's Attorney, the Attorney General, or jointly by both. **725 ILCS 207/15(a)**.

Time to file—*90 days before release to 30 days after*. The petition may be filed no earlier than 90 days before respondent's release or discharge to parole or MSR. **725 ILCS 207/15(b-5) & (b-6)**. The petition may be filed no later than 30 days following discharge to parole or MSR. **725 ILCS 207/15(a)(1)**. See, ***In re Detention of Powell***, 217 Ill.2d 123 (discussion of 90 day period where state's petition was filed within 90 days of when respondent's MSR could have started, but respondent refused to take MSR thereby causing the state's petition to be more than 90 days before when the MSR actually started).

A petition is timely filed upon the respondent's release on a sentence for a non-triggering offense if the sentence ran concurrently or consecutively to a triggering offense. **725 ILCS 207/15(b-7)**.

The filing of the petition tolls the term of MSR until a dismissal of the petition, a finding that respondent is not sexually violent, or when respondent is discharged. **725 ILCS 207/15(e)**.

The petition may be filed in the county where respondent was originally convicted, or where the respondent is in custody. **725 ILCS 207/15(d)**.

The petition must state, with particularity, essential facts to establish probable cause to believe respondent is a sexually violent person. **725 ILCS 207/15(c)**.

The state has the right to have the respondent evaluated by experts of its choice. The agency housing respondent must permit the expert reasonable access to respondent, respondent's records, past and present treatment providers, and other staff members relevant to the examination. **725 ILCS 207/15(f)**.

2. Initial Assessments

(a) Detention of respondent pending trial

The court must review the newly-filed petition to determine whether to detain respondent until commitment or discharge. Respondent "shall be detained only if there is cause to believe" respondent is eligible for commitment under **725 ILCS 207/35(f)** (i.e., the respondent meets the criterial for a "sexually violent person"). The detention remains in effect until discharge after trial or discharge after commitment. **725 ILCS 207/30(a)**.

(b) Appointment of counsel

If respondent "claims or appears to be indigent," he is entitled to the appointment of counsel before a probable cause hearing. **725 ILCS 207/30(e)**.

(c) Probable cause hearing

The court must hold a hearing to determine whether there is probable cause to believe that respondent is a sexually violent person. **725 ILCS 207/30(b)**. If respondent is in custody, the hearing must be held within 72 hours of filing (excluding holidays and weekends). A continuance of no more than 7 days may be ordered upon motion of respondent. If respondent is not in custody, the hearing shall be held "within a reasonable time." **725 ILCS 207/30(b)**.

This time limit is directory, rather than mandatory, and a lack of compliance does not require a dismissal of the SVP petition, particularly where further delay is occasioned, or acquiesced in, by respondent. ***In re***

Commitment of Trulock, 2012 IL App (3d) 110550, ¶ 40.

At the probable cause hearing the state must establish a "plausible account" of each element of the case. ***In re Detention of Hardin***, 238 Ill.2d 33, 48 (2010). The court "need not ignore blatant credibility problems," but the hearing is not the "proper forum to choose between conflicting facts or inferences." ***Hardin***, 238 Ill.2d 33 at 48.

Respondent may issue a subpoena *duces tecum* to obtain records before the hearing and may issue a subpoena for testimony at the hearing. Depending on the facts, the subpoena(s) may be subject to a motion to quash. ***In re Commitment of Clark***, 2014 IL App (1st) 133040. ¶¶ 17, 23.

Respondent has no right to the appointment of an evaluator before the probable cause hearing. ***In re Detention of Carpenter***, 2015 IL App (1st) 133921, ¶ 23.

(d) Probable Cause Finding

Upon a finding of probable cause, the court must order that respondent remain in or be taken into custody and that he be transferred to an appropriate facility for an evaluation. If no probable cause is found, the court must dismiss the petition. **725 ILCS 207/30(c)**. The state may appeal the finding of no probable cause. ***Hardin***, 238 Ill. 2d 33 at 41.

D. Trial

1. Evaluation and Trial Evidence

If respondent fails or refuses to cooperate with the evaluator pending trial, respondent is limited at trial to the presentation of expert testimony that is based solely upon review of the records, and not upon a personal examination. **725 ILCS 207/30(c)**.

All evaluations conducted under the Act and all DOC treatment records are admissible. **725 ILCS 207/30(c)**.

2. Procedure and burden of proof

(a) Jury Trial

Respondent, his counsel, or the state may demand a jury trial. The demand must be made within 10 days of the probable cause finding. The demand may thereafter be withdrawn. In the absence of a timely demand, the trial shall be by the court. **725 ILCS 207/35(c)**.

Respondent who did not timely demand a jury has no statutory right to a late demand after the state withdraws its jury request. ***People v. Miller***, 2014 IL App (1st) 122186, ¶ 19. However, Supreme Court Rule 183 may allow for a late demand upon a showing of good cause. ***Miller***, at ¶ 22.

(b) Speedy Trial

Trial must start no later than 120 days "after the date of the probable cause hearing." Delay agreed to or "occasioned" by respondent tolls the time period. Delay is "considered to be agreed to" unless respondent objects to the delay "by making a written demand for trial or an oral demand for trial on the record." **725 ILCS 207/35(a)**.

Confusingly, the statute provides that, "if the delay occurs **within 21 days after the end of the period within which a person much be tried**," the court may grant the state a continuance "for not more than an additional 21 days beyond the period prescribed." **725 ILCS 207/35(a)**. This provision would make more sense if the delay occurs within 21 days BEFORE the end of the time period.

The statute also provides that continuances may be granted "subject to" the speedy trial statute, **735 ILCS 5/103-5**.

NOTE: no reported decisions relating to the speedy trial provision could be found. However, two (2) unreported Rule 23 orders discuss the incorporation of the speedy trial provision: ***In re Commitment of Ricky A.W.***, 2011 WL 10158132 (unreported 3rd Dist. 2011); ***In re Detention of Powell***, 2016 IL App (1st) 130795-U].

(c) Fitness to stand trial

There is no statutory or due process right to a fitness evaluation in an SVP proceeding, nor does the court have the inherent authority to order same. ***In re Commitment of Weekly***, 2011 IL App (1st) 102276, ¶ 75.

Even in the absence of a fitness evaluation, the court had discretion to deem respondent's absence from all court proceedings as a waiver of the right to be present, under the circumstances. ***In re Commitment of Edwards***, 2021 IL App (1st) 200192, ¶¶ 41-32 (noting adults are presumed legally competent to direct their legal affairs even if they are mentally ill).

(d) Evidence

Evidence of respondent's crimes and any sentence imposed is admissible. **725 ILCS 207/35(b)**. Respondent's criminal history may also be relied upon by an expert witness in rendering an opinion. ***In re Commitment of Hooker***, 2012 IL App (2d) 101007, ¶ 61. However, the fact finder may consider the underlying facts and data relied upon by the expert when evaluating the credibility of the expert, but is not to accept as true those facts and data. ***In re Commitment of Mantanez***, 2020 IL App (1st) 182239.

The diagnosis of a "novel condition" is subject to a ***Frye*** hearing to determine if it is a generally accepted mental disorder. ***In re Detention of New***, 2014 IL 116306, ¶ 32. In ***New,*** the Illinois Supreme Court

remanded for a ***Frye*** hearing on a diagnosis of hebephilia, or "paraphilia, NOS, sexually attracted to adolescent males." ***New***, 2014 IL 116306, ¶ 53. Hebephilia has now been found to generally accepted in the relevant scientific community. ***In re Commitment of Bauer,*** 2020 IL App (2d) 180905. See also, ***In re Commitment of Adams***, 2021 IL App (1st) 182049 discussing paraphilia NOS and OSPD nonconsent.

Actuarial risk assessment data is admissible as a basis for an expert opinion on the issue of the risk of recidivism. ***In re Commitment of Simons***, 213 Ill.2d 523, 543 (2004).

The State is not obligated to prove with specificity whether the mental disorder was congenital or was acquired. ***In re Commitment of Moody***, 2020 IL App (1st) 190565.

Lay witness testimony as to respondent's current behavior and good character is irrelevant and inadmissible. ***In re Detention of Melcher***, 2013 IL App (1st) 123085, ¶ 45.

A respondent has the right to the appointment of a consultant pursuant to **Supreme Court Rule 201(b)(3)**, and the consultant's identity, opinions and work product are not discoverable absent exceptional circumstances. ***People v. Coyne***, 2014 IL App (1st) 123105, ¶ 22.

Respondent may stipulate that he is a sexually violent person, provided that he is properly admonished. ***In re Commitment of Walker***, 2014 IL App (2d) 130372, ¶ 38. The admonitions need not be the same as in a criminal plea. ***Walker***, at ¶¶ 41, 48.

Apprendi does not apply to an SVP trial. ***Walker***, at ¶ 19.

(e) Burden of proof

The state must prove its case beyond a reasonable doubt. **725 ILCS 207/35(d)(1)**. The state need not prove every allegation of its complaint but must prove respondent is an SVP under the statutory definition. ***In re Commitment of Butler***, 2013 IL App (1st) 113606, ¶ 50.

(f) Jury Instructions

For a recommended set of jury instructions, referencing both Civil IPI and Criminal IPI as appropriate, *see* Appendix.

"Substantially probable" may be defined by jury instruction as "much more likely than not." ***In re Commitment of Curtner***, 2012 IL App (4th) 110820, ¶ 37. For a discussion of the use of special interrogatories, *see* ***In re Commitment of Haugen***, 2017 IL App (1st) 160649.

(g) Argument

Prosecutorial misconduct, such as extreme sarcasm and mockery during opening and closing arguments, may deprive respondent of due process. ***In re Commitment of Gavin***, 2014 IL App (1st) 122918, ¶ 81. *Cf.* ***In re Commitment of Tenorio***, 2020 IL App (1st) 182608 (finding comments by prosecutor did not rise to level of plain error).

E. Discharge or Commitment

If respondent is not found to be a sexually violent person by proof beyond a reasonable doubt, the petition must be dismissed and respondent released, unless he is "under some other lawful restriction." **725 ILCS 207/35(f)**.

If respondent is found to be a sexually violent person, the court must enter judgment and commit respondent as provided in **725 ILCS 207/40**. The court must also order DNA testing. **725 ILCS 207/45**.

The court must also direct the clerk to notify the Illinois State Police, FOID Department that respondent has been deemed an SVP. **430 ILCS 65/1.1(c) & 8.1**.

F. Dispositional Hearing on Commitment

Following a judgment of SVP, the court must hold a hearing "as soon as practicable" to determine whether to order that respondent shall be subject to care in confinement or conditional release. The Court may proceed to the hearing immediately after trial if it has sufficient information with which to proceed, or it may adjourn the matter and order additional investigation. **725 ILCS 207/40(b)(1) & (2)**. ***In re Commitment of Williams***, 2020IL App (3d) 180588 (finding no abuse of discretion to immediately proceed to dispositional hearing). The hearing is mandatory. ***In re Commitment of Fields***, 2014 IL 115542, ¶ 49.

It is within the court's discretion to grant a request to continue the dispositional hearing. Further, the statute does not place a burden of proof on the state at the hearing. ***Miller***, 2014 IL App (1st) 122186 at ¶¶ 28, 34. However, the appellate court has assumed, for the sake of argument, that due process requires the application of a reasonable doubt standard to the hearing and has found that a trial judge applied same. ***In re Commitment of Walker***, 2014 IL App (2d) 130372, ¶ 24.

1. Confinement or Conditional Release

The Act does not require the court to select the least restrictive alternative of confinement or conditional release. ***Walker***, 2014 IL App (2d) 130372 at ¶ 27. Rather, once the commitment order is entered, the statute requires DHS to provide care in the "least restrictive manner" consistent with the order. ***In re Detention of Lenczycki***, 405 Ill.App.3d 1041, 1051 (2nd Dist. 2010); **725 ILCS 207/40(b)(2)**.

If the court orders conditional release, DHS must prepare and present a treatment plan to the court for approval within 60 days of the order, unless further time is jointly requested by respondent and DHS. **725 ILCS 207/40(b)(3)**.

The court must impose the 28 specific conditions listed in **725 ILCS 207/40(b)(5)** and may order other discretionary conditions. ***In re Detention of Hayes***, 321 Ill.App.3d 178, 195 (2001). Respondent must be given a certificate setting forth the conditions of release.

The court must notify the municipal police department and sheriff of the jurisdiction where respondent will be residing. **725 ILCS 207/40(b)(4)**.

The court may require respondent to pay the cost of mandatory drug/alcohol testing or electronic monitoring, if ordered. **725 ILCS 207/40(b)(6)**.

> **NOTE**: The statute precludes "the person being supervised on conditional release" from residing "at the same street address as another sex offender being supervised on conditional release under this Act, mandatory supervised release, parole, probation, or any other manner of supervision." **725 ILCS 207/40(b)(4)**.

2. Appeal

A finding of SVP is interlocutory to the subsequent commitment order and may be appealed. **725 ILCS 207/35(g)**.

The state may appeal the commitment order, though it is an open question as to what renders the order final—the order itself or the order approving the plan submitted by DHS. ***In re Commitment of Hernandez***, 239 Ill. 2d 195, 202 (2010).

G. Periodic Reexamination

1. Required Periodic Reports

DHS must submit a written report to the court on respondent's mental condition "at least once every 12 months" after the initial commitment order. **725 ILCS 207/55(a)**. The report is for the purpose of determining whether the respondent has made sufficient progress in treatment to be conditionally released and whether respondent's condition has so changed since "the most recent periodic reexamination" that he is no longer an SVP. At the time of reexamination, respondent has the right to retain an expert or, if indigent, to request that one be appointed. **725 ILCS 207/55(a)**. But the court's appointment of an independent evaluator is discretionary. ***People v. Botruff***, 212 Ill.2d 166, 178 (2004). All examiners must file a report within 30 days of the examination. **725 ILCS 207/55(b)**.

A change in the DSM manual's criteria for diagnosis of paraphilia did not warrant a full evidentiary hearing to determine whether respondent remained a sexually violent person. ***In re Detention of Hayes***, 2015 IL App (1st) 142424.

While the SVPCA requires an annual reexamination report of a person confined as a sexually violent person, it does not mandate discharge if the State fails to do so or files the report late. ***In re Detention of King***, 2016 IL App (1st) 150041.

2. Discretionary report

The court that committed respondent may order an examination at any time during period of commitment. The 30-day filing period after evaluation applies. **725 ILCS 205/55(c)**.

H. Petition for Conditional Release

1. Filing of petition

Respondent may file a petition for conditional release, but not within twelve months of a prior adjudication of such issue. **725 ILCS 207/60(a)**.

Also, the facility director where respondent is being treated may file a petition at any time. **725 ILCS 207/60(a)**.

Finally, if the DHS evaluator recommends conditional release, then "the director or designee" must file, within 30 days of his receipt of the evaluation, a notice with the court of his "intention whether or not to petition for conditional release on the committed person's behalf." **725 ILCS 207/60(a)**.

2. Obligation of court upon filing by SRL

The court must serve a copy of any timely non-counseled petition on the state and appoint counsel to an indigent respondent. **725 ILCS 207/60(b)**.

3. Examination of respondent

The court, on its own motion or upon motion of respondent, may, within 20 days of the receipt of the petition, appoint an examiner to assess defendant. The examiner must file a written report within 30 days of the examination. **725 ILCS 207/60(c)**.

The state has the right to have respondent evaluated by an expert of its choice. **725 ILCS 207/60(c)**.

4. Probable cause hearing

The court shall set a probable cause hearing "as soon as practicable" after the examination report(s) has been filed. The hearing "shall consist of a review of the examining evaluators' reports and arguments on behalf of the parties." **725 ILCS 207/60(c)**.

"If the court finds probable cause to believe" that respondent "has made sufficient progress in treatment to the point where he or she is no longer substantially probable to engage in acts of sexual violence if on conditional release, the court shall set a hearing on the issue." **725 ILCS 207/60(c)**.

The existence of conflicting reports does not mandate a probable cause finding. ***See In re Detention of Cain***, 402 Ill.App.3d 390, 397 (5th Dist. 2010). *C.f.*, ***In re Detention of Kelley***, 2019 IL App (1st) 162184.

5. Hearing on the petition for release

   The court must conduct a bench trial on the merits of the petition "as soon as practical after the reports of all examiners are filed with the court." **725 ILCS 207/60(d)**.

   The state bears the burden to prove by clear and convincing evidence that respondent "has not made sufficient progress in treatment to the point where he or she is no longer substantially probable to engage in acts of sexual violence if on conditional release." **725 ILCS 207/60(d)**.

6. Requirements to order granting conditional release

   If the court finds respondent to be appropriate for conditional release, DHS must prepare and file a treatment plan within 60 days of the court's finding. DHS and respondent may agree to request an extension of the deadline. **725 ILCS 207/60(f)**.

   The court must find as follows before entering "an order directing conditional release to a less restrictive environment:"

   (1) respondent will be treated by a DHS-approved provider;

   (2) the provider has presented a treatment plan, has agreed to assume responsibility for the treatment, will regularly issue a progress report to DHS, and will immediately report violations to DHS;

(3) housing exists that is sufficiently secure to protect the community, and the housing provider has agreed in writing to accept respondent, provide such security, and to immediately report violations to DHS;

(4) respondent has agreed to comply; and

(5) respondent has agreed to behavioral monitoring requirements imposed by the court or DHS.

725 ILCS 207/60(e).

I. Petition for Discharge

1. Petition with DHS approval

If the DHS Secretary determines at any time that respondent is no longer an SVP, the Secretary "shall authorize" respondent to file a petition for discharge. **725 ILCS 207/65(a)(1)**.

If a DHS evaluator recommends that respondent is no longer a SVP, "the Secretary or designee" must file, within 30 days of his receipt of the evaluation, a notice with the court of his "determination whether or not to authorize" respondent to petition for discharge. **725 ILCS 207/65(a)(1)**.

Upon receipt of a DHS approved petition for discharge, the court must set a hearing "as soon as practical." **725 ILCS 207/65(a)(1)**.

2. Petition without DHS approval

Respondent may petition for discharge without DHS approval.

In fact, when respondent is periodically examined under **725 ILCS 207/55**, the Secretary must provide respondent with written notice that he may petition for discharge over the Secretary's objection, and with form for a written waiver of rights.

If respondent does not affirmatively waive his right to petition the court for discharge, the court must "set a probable cause hearing to determine whether facts exist to believe that since the most recent periodic reexamination," respondent is no longer an SVP. The hearing must be held as soon as practicable after the filing of the reexamination report under section 55. **725 ILCS 207/65(b)(1)**. The court must determine at the hearing whether there is a plausible account that respondent is no longer an SVP. ***In re Commitment of Vance***, 2017 IL App (3d) 160683, ¶ 18.

If defendant does not waive, but also does not file a petition for discharge, "the probable cause hearing consists only of a review of the reexamination reports and arguments on behalf of the parties." **725 ILCS 207/65(b)(1)**.

If defendant files a petition for discharge, the court may deny it without a hearing if the court has previously denied a non-DHS approved petition for discharge unless the new petition "contains facts upon which a court could reasonably find" that respondent has "so changed that a hearing [is] warranted." **725 ILCS 207/65(b)(1)**.

If defendant files a petition for discharge and the court finds probable cause to believe that respondent is no longer an SVP, a trial must be set.

3. Trial

Either party may demand a jury. The verdict must be unanimous. Respondent has a right to be present and is entitled to all rights set forth in section 25 of the Act. **725 ILCS 207/65(a)(2) & (b)(2)**.

The state may have respondent assessed by the evaluator of its choice. **725 ILCS 207/65(a)(2) & (b)(2)**.

The state has the burden of proving by clear and convincing evidence that respondent is still a sexually violent person. **725 ILCS 207/65(b)(2)**.

If the state meets its burden, the court may modify the commitment order pursuant to a hearing under section 40 of the Act. **725 ILCS 207/65(b)(3)**.

J. Violation of Conditional Release

If DHS determines at any time during conditional release that respondent has violated same, or that the safety of others requires the release to be revoked, it may ask the state to seek an *ex parte* order directing the arrest of the respondent and transport the county jail. **725 ILCS 207/40(b)(4)**.

A petition to revoke may be filed by the state independently or at the request of DHS. Upon the filing of same, the court may order that respondent appear in court or order that a warrant issue. Respondent may be taken into custody and transported to jail, a hospital or a treatment facility. **725 ILCS 207/40(b)(4)**.

DHS must submit a statement showing probable cause for detention, and the state must file a petition to revoke the within 48 hours of respondent's detention. **725 ILCS 207/40(b)(4)**.

A hearing must be held within 30 days unless the deadline is waived by respondent. **725 ILCS 207/40(b)(4)**.

The state must prove by clear and convincing evidence that a rule or condition of release has been violated or that the safety of others requires that the release be revoked. If the release is revoked, respondent is to be placed in an appropriate facility until he is discharged or released again. **725 ILCS 207/40(b)(4)**.

The court may consider psychiatric reports at the hearing. ***In re Commitment of Rendon***, 2014 IL App (1st) 123090, ¶ 39.

4.4 Drug Asset Forfeiture Procedure Act

A. Statutory Authority

1. The Drug Asset Forfeiture Procedure Act, **725 ILCS 150/1 *et seq***. provides procedures for both non-judicial and judicial forfeiture of property claimed by the state to be proceeds of

or used in criminal violations of the Illinois Controlled Substances Act, the Cannabis Control Act, or the Methamphetamine Control and Community Protection Act. **725 ILCS 150/2**, **3**.

2. The purpose of the Act is to establish uniform procedures for the seizure and forfeiture of drug-related assets, ***People v. $280,020.00 U.S. Currency***, 372 Ill.App.3d 785, 791 (1st Dist. 2007), and to deter criminal behavior, ***In re P.S.***, 175 Ill.2d 79, 89.

3. Because the Act is based in part on federal forfeiture statutes, the Act is to be construed in light of federal law, except where the Act directly differs from same. **725 ILCS 150/2**; ***$280,020.00 U.S. Currency***, 372 Ill.App.3d at 792.

B. Items Subject to Forfeiture

Basically, anything used to manufacture, distribute, possess, or transport illegal substances under the Act may be subject to forfeiture, including anything of value exchanged for illegal substances (i.e., the proceeds from the sale or exchange). **725 ILCS 150/505**. ***People v. $35,315 U.S. Currency***, 2016 IL App (4th) 150685 (proceeds from winning lottery ticket purchased with money traceable to sale of drugs was subject to forfeiture).

C. Notice

1. A complaint for forfeiture or notice of pending forfeiture must be served on the owner or interest holder as provided in the Act.

(a) If the owner's or interest holder's **name and current address are known**, then service must be made by personal service or by mailing a copy of the notice by certified mail, return receipt requested, and first class mail to that address. **725 ILCS 150/4(1)(A)**.

If service by mail is not accomplished within a certain time period, the statute provides for

additional periods for mail service, then personal service, and, eventually, for service by posting. **725 ILCS 150/4(1)(A)**.

The statute also identifies what service address shall be used and imposes certain change of address obligations on the parties. **725 ILCS 150/4(1)(A)**.

If the property seized is a conveyance, then notice shall be sent to the address reflected in the office of the agency or official in which title or interest to the conveyance is required by law to be recorded. **725 ILCS 150/4(1)(A)**.

(b) If the owner's or interest holder's **address is not known and is not on record**, then notice shall be by publication for 3 successive weeks in a newspaper of general circulation in the county in which the seizure occurred. **725 ILCS 150/4(2)**.

2. Notice of mail service to a person in Illinois is effective upon receipt of the return receipt or the date of a communication from the person documenting actual notice. **725 ILCS 150/4(1)(B)(ii)**.

3. Notice of mail service under the Act to a business or a person whose address is not in the state is effective upon the date of compliance with the mailing procedure, regardless whether there is a signed return receipt. **725 ILCS 150/4(4)**, **(5)**, **(6)**.

4. Notice to a person whom the state should reasonably know is incarcerated in Illinois must include mailing by certified mail, return receipt requested, and first class mail to the person at the detention facility. **725 ILCS 150/4(7)**.

5. Failure to Give Notice. Failure to give proper notice to a claimant does not deprive the trial court of jurisdiction. As such, an order entered without proper notice is voidable, but not void. ***People ex rel. Alvarez v. $59914 U.S. Currency***, 2022 IL 126927. As a result, a motion to vacate under **Section 2-1401** must be timely.

D. Claimants

In a judicial *in rem* forfeiture, an owner or interest holder may file an answer asserting a claim against the property. A person not named in the proceeding who claims an interest may petition to intervene. **725 ILCS 150/9(C)**.

A person has standing as a "claimant" by asserting a possessory interest in the item and providing some explanation (such as holding the item for a friend). ***People v. $280,020.00 U.S. Currency***, 2013 IL App (1st) 111820 at ¶ 19. Illinois has construed standing in forfeiture proceedings more broadly than the federal court have, and the courts are instructed to construe legally cognizable interests broadly**.** ***Id***. As such, a claimant does not need to prove ownership to have standing. ***Id***.

> **NOTE**: However, ownership is required for the innocent-owner defense – discussed below.

> **NOTE**: An individual who mistakenly received a package in the mail containing $16,500 and turned it over to the police was entitled to notice of the non-judicial forfeiture and may raise a claim. ***Kelly v. $16,500***, 2014 IL App (5th) 130075, ¶ 27.

E. Procedure Upon Seizure

1. Notice. Whenever property is seized, notice must be given to "all known interest holders" that forfeiture may be instituted. **725 ILCS 150/3.1(e)**. Pursuant to statute, the notice is to be sent to the person's last known address. However, if the state knows, or reasonably should know, the person is incarcerated at the time of notice, due process may require notice to where the person is incarcerated. ***Rodriguez v. Brady***, 2017 IL App (3d) 160439, ¶¶ 25–31.

2. Preliminary Review.

   (a) Within 14 days of seizure, the court must determine whether there is probable cause that the property may be subject to forfeiture. **725 ILCS 150/3.5(a)**.

   (b) The rules of evidence do not apply to the probable cause hearing. Further, as evidence of probable cause for forfeiture, the court may accept a finding of probable cause at the preliminary hearing or the return of an indictment in an underlying criminal case related to the property seized. **725 ILCS 150/3.5(b)–(d)**.

   (c) State has burden of demonstrating "probable cause" to believe the property may be subject to forfeiture (i.e., may have been used in the commission of a violation of the act). State must allege and show reasonable grounds to believe there is a nexus between the property seized and the alleged illegal drug activity, "which may be supported by less than prima facie proof, but must be supported by more than mere suspicion." ***People v. Ramsey***, 2019 IL App (3d) 180084, ¶ 13. State need only show a "probability or substantial chance of the nexus." ***Id***. See, ***People v. $3,230 U.S. Currency, 2021 IL App (3d) 200434-U*** (discussing "close proximity" and probable cause).

   (d) Upon finding probable cause, the court shall order the property held until the conclusion of the forfeiture proceeding. **725 ILCS 150/3.5(e)**.

   NOTE: The failure of the state to comply with statutory deadlines vitiates the forfeiture. ***People v. Four Thousand Eight Hundred Fifty ($4,850) United States Currency***, 2011 IL App (4th) 100528, ¶ 35.

3. After Probable Cause Determination.

   If the property is a conveyance, the registered owner or other claimant may, within 28 days of the probable cause finding, file a motion alleging that the denial of the use of the conveyance during the pendency of the forfeiture proceeding creates a substantial hardship not due to his negligence. **725 ILCS 150/3.5(e)**.

   If there is a substantial hardship, the court must find whether it outweighs the state's interest in safeguarding the conveyance. The court may then enter an order requiring the state to return the conveyance until the conclusion of the forfeiture proceedings or as otherwise ordered. The court may place conditions on the use of the conveyance. **725 ILCS 150/3.5(e)**.

   The court may also set an amount for a cash security which must be posted with the Circuit Clerk before the conveyance is released. **725 ILCS 150/3.5(e)**.

4. Inventory. As soon as practicable, but no later than 28 days after the seizure, the law enforcement agency seizing the property must notify the State's Attorney of the seizure and the facts and circumstances giving rise to the seizure, and must provide the State's Attorney with an inventory of the property and its estimated value. **725 ILCS 150/5**. If the property is a vehicle, the law enforcement agency must immediately notify the Secretary of State that forfeiture proceedings are pending for same. **725 ILCS 150/5**.

5. Non-Judicial Forfeiture Procedures.

   The States Attorney's office can pursue non-judicial forfeiture of non-real property that is less than $150,000 in value. **725 ILCS 150/6**. To do so, the SA must, within 28 days after being notify by the law enforcement agency of the seizure, give notice to the owner of the property and all known interest holders.

If no person claiming an interest in the property files a claim within 45 days of the notice by the SA, the SA shall:

a. declare the property forfeited;
b. notify the owner and all known interest holders;
c. notify the Illinois Department of State Police; and
d. the State Police shall dispose of the property in accordance with law.

If a person claiming an interest in the property pending forfeiture files a verified claim with the State's Attorney asserting that interest within the 45 days, the state must initiate a judicial *in rem* forfeiture within 28 days. **725 ILCS 150(C)(2)**.

6. Judicial *in rem* Forfeiture Procedures.

Required if:

a. Real property;
b. Non-real property value exceeds $150,000; or
c. Person claiming an interest in property files a timely (i.e., within 45 days of notice) verified claim with the States Attorney's office.

Verified Complaint:

In order to initiate a judicial forfeiture, the States Attorney shall:

a. File a verified complaint for forfeiture as soon as practicable, but no later than 28 days after receiving notice from the seizing law enforcement agency or the verified claim;
b. Complaint shall contain:
    - Description of the property seized;
    - Date and place of seizure;
    - Name and address of seizing law enforcement agency;
    - Specific statutory and factual grounds for seizure
    - Be accompanied by a statutory notice.
c. Complaint must be served on:

- Person from whom property was seized; and
- All persons known or reasonably believed to claim an interest in the property.

Motion to Dismiss: The claimant may file a Section 2-619 motion to dismiss pursuant to the Code of Civil Procedure to challenge the legal sufficiency of the complaint. *See*, ***People v. $940 U.S. Currency***, 2019 IL App (3d) 180102.

Answer: ONLY the owner or interest holder in the property may file an answer asserting a claim against the property (referred to as "claimant") and must be verified. A person not named in the complaint claiming an interest in the property may petition to intervene. **725 ILCS 150/9(D)**.

The answer MUST be:

a. Signed by the claimant and verified;
b. Properly captioned;
c. Address at which the claimant will receive mail;
d. Nature and extent of interest in the seized property;
e. Information regarding how and when the interest in the property was acquired;
f. Names and addresses of anybody else who has a claim or interest in the property;
g. Any defenses to forfeiture; and
h. Relief sought.

Trial/Hearing: Shall be held within 60 days of the answer, unless continued for good cause. **725 ILCS 150/9(F)**.

Personal Property: In order to overcome a claimant's answer, the state must prove at least one (1) of the following:

(1) claimant is legally accountable for conduct giving rise to forfeiture;

(2) the claimant knew or reasonably should have known of the conduct giving rise to the forfeiture (or that the conduct was likely to occur);
(3) the claimant held the property for the benefit of a person whose conduct gives rise to the forfeiture;
(4) the claimant acquired the interest in the property through a person whose conduct gives rise to the forfeiture, and the claimant is an innocent purchaser (bona fide purchaser without knowledge);
(5) the claimant isn't the true owner of the property.

725 ILCS 150/9(G).

Real Property: In order to overcome a claimant's answer, the state must prove at least one (1) of the following:

(1) claimant is legally accountable for the conduct giving rise to the forfeiture;
(2) the claimant solicited, conspired or attempted to commit the conduct giving rise to the forfeiture;
(3) the claimant acquire or may acquire substantial proceeds from the conduct giving rise to the forfeiture;
(4) the claimant is not the true owner of the property;

725 ILCS 150/9(G).

Currency: If the state proves by a preponderance of the evidence the currency is subject to forfeiture, claimant then has the burden of production of evidence to show the currency is not related to the conduct giving rise to the forfeiture. If claimant

produces such evidence, the ultimate burden of proof rests with the state. **725 ILCS 150/9(G-5)**.

Evidence**:** Civil rules of evidence apply to proceedings, EXCEPT the court MUST receive and consider all relevant hearsay evidence that relates to evidentiary foundation, chain of custody, business records, recordings, laboratory analysis, laboratory reports, and the use of technology in the investigation. **725 ILCS 150/9(B)**.

F. Innocent Owner Claim

"After a complaint has been filed and all claimants have appeared and answered, a claimant may file a motion" for an "innocent owner hearing prior to trial." **725 ILCS 150/9.1**. The motion must be supported by affidavit and assert the following, along with sufficient facts to support the assertion:

1. claimant is the true owner of the conveyance;

2. claimant is not legally accountable for the conduct resulting in the pending forfeiture nor did claimant acquiesce in same;

3. claimant did not solicit, conspire, or attempt to commit the conduct resulting in the pending forfeiture;

4. claimant did not know or have reason to know the conduct resulting in the pending forfeiture was likely to occur; and

5. claimant did not hold the property for the benefit of or as nominee for the person whose conduct gave rise to the pending forfeiture, "or if the owner or interest holder acquired the interest through any such person, the owner or interest holder did not acquire it as a bona fide purchaser for value, or acquired the interest without knowledge of the seizure of the property for forfeiture." **725 ILCS 150/9.1(a)**.

A hearing may be held only after limited discovery has been taken as to the issues of ownership, control, knowledge, or related issues. **725 ILCS 150/9.1(b)**.

The hearing shall be held after discovery is complete. At the hearing, the "court shall only hear evidence related to the issue of innocent ownership." **725 ILCS 150/9.1(c)**.

The claimant has the burden of proof by a preponderance of the evidence regarding **ALL** the statutory assertions listed above. **725 ILCS 5/150/9.1(d)**. *See*, ***People v. Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Illinois***, 217 Ill.2d 481, 500 (2005).

G. Burden of Proof

Generally, in a judicial forfeiture proceeding, the State must show in its case in chief by a **preponderance of the evidence** that the property is subject to forfeiture and that one of certain listed criteria has been met. **725 ILCS 150/9(G)**. There is a separate list of criteria for the categories of personal and real property. **725 ILCS 150/9(G)**.

In cases of currency or its equivalent, if the state meets its burden by a preponderance of the evidence, the **claimant has the burden of production** to show that the property "is not related to the alleged factual basis of the forfeiture. After the production of evidence, **the [s]tate shall maintain the burden of proof to overcome this assertion**." **725 ILCS 150/9(G-5)**.

In cases in which the defendant in the related criminal proceeding has been found not guilty, or in which the state receives an adverse finding at a preliminary hearing and fails to secure an indictment, the state's burden of proof "**shall be by clear and convincing evidence**." **725 ILCS 150/9(G-10)**.

The laws of evidence relating to civil actions is applicable, but the Act expressly provides that the court must consider all relevant hearsay that relates to evidentiary foundation, chain of custody, business records, recordings, lab analysis, lab reports, and technology use. **725 ILCS 150/9(B)**.

If the forfeited real property is held in joint tenancy or by tenancy in common with another claimant, the court must determine the amount of each owner's interest in accordance with principles of property law. **725 ILCS 150/9(N)**.

H. Proportionality

"Property forfeited under this Act shall be subject to an 8th Amendment to the United States Constitution disproportionate penalties analysis and the property forfeiture may be denied in whole or in part if the court finds that the forfeiture would constitute an excessive fine in violation of the 8th Amendment to the United States Constitution, as interpreted by case law." **725 ILCS 150/9.5**.

In ***Timbs v. Indiana***, ___U.S. ___, 139 S.Ct. 682, 689 (2019), the Supreme Court found that the Eighth Amendment excessive fines clause is applicable to the states through the due process clause of the Fourteenth Amendment. And the Court affirmed its precedent holding that civil *in rem* forfeiture is a fine for the purpose of the Eighth Amendment when it is partially punitive in nature. ***Timbs***, 139 S.Ct. at 690.

A forfeiture violates the excessive fine clause of the eight amendment if it is grossly disproportionate to the gravity of the offense. *See*, ***People v. One 2000 GMC***, 357 Ill.App.3d 873. The court is directed to consider the following factors:

(a) The inherent gravity of the offense compared with the harshness of the penalty;

(b) Whether the property was an integral part of the commission of the crime; and

(c) Whether the criminal activity involving the property was extensive in terms of time

and/or spatial use. ***Id.* at 875-76**. The three (3) factors are not exclusive. ***Id***. at 876.

I. Presumptions

There are statutory presumptions that property seized was furnished or intended to be furnished in exchange for a substance in violation of the Controlled Substances, Cannabis Control or Methamphetamine Control and Community Protection Acts, or is the proceeds of such an exchange, and therefore forfeitable under the Act. **725 ILCS 150/7**. These presumptions are:

1. All moneys, coin, or currency found in close proximity to forfeitable substances, forfeitable drug manufacturing or distributing paraphernalia, or forfeitable records of the importation, manufacture or distribution of substances. This presumption is rebuttable by a preponderance of the evidence. **725 ILCS 150/7(1)**.

2. All property acquired or caused to be acquired by a person between the dates of occurrence of two or more acts in felony violation of the Controlled Substances, Cannabis Control, or Methamphetamine Control and Community Protection Acts, or an act committed in another state, territory or country which would be punishable as a felony under those Acts committed by the person within 5 years of each other, or all property acquired by such person within a reasonable amount of time after the commission of such acts if:

   (i) at least one of the acts was committed after the effective date of the Act (September 10, 1990); and

   (ii) at least one of the acts is or was punishable as a Class X, Class 1 or Class 2 felony; and

   (iii) there was no likely source for such property other than a violation of the above Acts. **725 ILCS 150/7(2)**.

J. Exemptions from Forfeiture

1. No vessel or watercraft, vehicle, or aircraft used by any person as a common carrier in the transaction of business as a common carrier may be forfeited" unless the state proves by a preponderance of the evidence that the owner of a railway car or engine, or the operator or owner of a vessel, watercraft, vehicle or aircraft "was at the time of the alleged illegal act a consenting party or privy to that knowledge." **725 ILCS 150/8**.

2. Under a prior version of the statute, the homestead exemption was deemed to apply to forfeiture proceedings even though it was not listed in the exemption section because the homestead exemption was of a different nature than the exemptions addressed, all of which dealt with innocent owners of property otherwise subject to forfeiture. ***People v. One Residence Located at 1403 East Parham Street***, 251 Ill.App.3d 198, 203 (5th Dist. 1993), *but see* ***People v. $8,450 U.S. Currency***, 276 Ill.App.3d 952, 956 (2nd Dist. 1995) (disagreeing with ***Parham***).

3. The exclusionary rule applies to proceedings under the Act, so a proper claimant may file a motion to suppress evidence alleged to have been illegally seized. ***People v. $280,020 in U.S. Currency***, 2013 IL App (1st) 111820, ¶ 23.

K. Limitations

1. A forfeiture proceeding must be filed within 5 years after the last conduct giving rise to the forfeiture became known or should have become known, or 5 years after the forfeitable property is discovered, whichever is later. **725 ILCS 150/9(L)**. Any time during which either the property or the claimant is out of the state or in confinement or during which criminal proceedings relating to the same conduct are in progress shall be excluded from the limitations period. **725 ILCS 150/9(L)**.

2. If property subject to forfeiture is seized for evidence, the limitation period is stayed until the property is no longer necessary for evidence. **725 ILCS 150/10**.

L. Double Jeopardy

Forfeiture is not "punishment" for double jeopardy purposes and therefore does not preclude subsequent prosecution for a related criminal offense. ***In re P.S.***, 175 Ill. 2d 79, 91 (1997).

APPENDIX

Table of Contents

THE PROCEDURES SUGGESTED IN THIS APPENDIX ARE EXAMPLES ONLY. IT IS RECOMMENDED THAT EACH INDIVIDUAL JUDGE TAILOR "SCRIPTS" OR CHECKLISTS WHICH, IN HIS OR HER ESTIMATION, COMPLIES WITH LOCAL CUSTOM AS WELL AS THE REQUIREMENTS OF ILLINOIS SUPREME COURT RULES, STATUTORY ENACTMENTS AND CASE LAW.

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APPENDIX - *Preface*

CLEAR COMMISSION – DOCUMENTS OVERVIEW

The Criminal Law and Procedure Benchbook writing team has included several documents regarding the CLEAR Commission and the Legislation rewriting the Criminal Code in the Appendix section of the Sixth Edition Criminal Law and Procedure Benchbook, specifically under 'Preface.' The materials that follow on the next several pages include an overview of the legislation, a summary of the Public Acts affected by the legislation and the tables of derivation and disposition provided to this workgroup by the CLEAR Commission.

Specifically, we would like to thank, Peter G. Baroni, Director of the CLEAR Initiative, for his materials providing an overview of the Legislation and summary of the Public Acts, and we would like to thank Mark R. Warnsing, Deputy Director of the Legislative Reference Bureau, for the derivation and disposition tables. We appreciate the assistance and support of the CLEAR Commission, so that these materials can be provided to the users of this publication.

Overview: CLEAR Commission and Legislation Rewriting the Criminal Code

The statutory revisions (some prefer to refer to them as "reform") began with the creation of the CLEAR Commission, a non-governmental entity whose members are a broad cross-section of those involved in criminal justice—including judges, legislative leaders, an assortment of prosecutors (including state's attorneys and the attorney general) and defense attorneys (including a public defender and the State Appellate Defender), a law professor, and representatives from the governor's office. The goal of CLEAR (an acronym for Criminal Law Edit, Alignment and Reform), was to simplify and clarify the substantive law contained in the Criminal Code of 1961 and the Unified Code of Corrections. Its working premise was that nothing would be recommended to the General Assembly unless there was consensus among its diverse members. This conservative approach ensured that nothing radical or controversial—nothing favoring either the prosecution or the defense side—would emerge. Consistent with CLEAR's goal to eschew either prosecutors' or defense attorneys' "dream legislation," which was sure to draw opposition from the other side and thus jeopardize legislative acceptance, very few substantive changes were approved. Indeed, the few substantively new statutory provisions are merely codifications of common law principles that are well established through already binding decisions of the supreme and appellate courts.

The result is that, in the revisions that were approved, the legislative intent of the General Assembly, contained in its statutory pronouncements, has been respected and maintained. CLEAR's primary accomplishment is simplification and clarification. Through consolidation of numerous related statutes and Acts, duplicative language has been eliminated. Statutes have been placed in logical places and in proper sequence. Definitions have been added where absent, and

archaic words have been deleted or replaced. Adding state-of-mind requirements for each offense eliminates uncertainty on that important issue. Provisions that have been declared unconstitutional have been deleted.

The Illinois General Assembly has now completed its adoption of the CLEAR Commission's recommendations. The legislative adoption process, took seven years and ended in 2012 with the renaming of the Code – henceforth, it will bear the title of the "Criminal Code of 2012." Virtually all of the reforms recommended by the CLEAR Commission have been adopted, resulting in a more cohesive, understandable and just set of criminal laws, which should assist judges, attorneys, and the citizens of Illinois to understand the laws that govern conduct within the State. The Criminal Code's size has been substantially reduced, making a difficult-to-fathom statutory scheme simpler to comprehend, thus aiding compliance and application.

APPENDIX - *Preface*

CLEAR COMMISSION – SUMMARY OF PUBLIC ACTS

CLEAR Commission-Sponsored Legislation:

The CLEAR Commission criminal law rewrite project resulted in 12 bills, particularly affecting Article 11 (Sex Offenses), Article 12 (Bodily Harm), Article 16 (Theft), Article 17 (Deception & Fraud), a new Article 12C (Harms to Children), and Articles 18 through the end of the Code, moved in criminal law provisions into that Code, likewise moved out provisions that fit better elsewhere, and eliminated unnecessary and redundant language throughout the Code.

1. PA 95-688—Armed Violence Rewrite eff. 10-23-07

Revised the armed violence statute per in ***People v. Hauschild***, 226 Ill.2d 63 (June 7, 2007), holding that, with the adoption of the "15, 20, 25-Life" sentencing enhancements for committing certain crimes with a firearm eff. Jan. 1, 2000, and since the offense of armed robbery with a firearm had the identical elements of the offense of armed violence predicated on robbery with a firearm, the legislature had violated the proportionate penalties clause of the Illinois Constitution when it assigned the offenses different sentences. Future challenges were prevented by excluding specific offenses from the list of predicate felonies in the armed violence statute, including second degree murder, involuntary manslaughter and reckless homicide. This Act is a codification of prior decisions that armed violence cannot be predicated on offenses which are not premeditated. *See* ***People v. Alejos***, 97 Ill.2d 502 (1983); ***People v. Fernetti***, 104 Ill. 2d 19 (1984).

2. PA 95-1052—Code of Corrections Rewrite eff. July 1, 2009

Although the changes present no substantive alterations, there is considerable consolidation and realignment to clarify the classification of offenses, basic and extended-sentence terms, availability and terms of probation, conditional discharge, and periodic imprisonment, fines, extended-term sentencing, and concurrent and consecutive sentences.

3. PA 96-711—Ill. Sentencing Policy Advisory Council (SPAC) eff. August 25, 2009.

Creates, under the jurisdiction of the Governor, the Illinois Sentencing Policy Advisory Council (SPAC) to address systemic information relating to why people are sentenced to the penitentiary and what evidence-based practices can serve to reduce the prison population, and to establish a method for collecting and analyzing criminal sentencing information possessed by various entities across the justice system.

4. PA 96-710—General Provisions Rewrite eff. January 1, 2010

Addresses and assigns the mental states of "knowingly" to "intentionally" when an offense requires knowing conduct, common criminal design, and accountability, compulsion, conspiracy, solicitation to commit other offenses as well as their penalties also increasing the penalty for solicitation of a person under the age of seventeen to commit murder for hire to a Super Class X felony.

5. PA 96-712—Forfeiture Statutes Rewrite eff. January 1, 2010.

Consolidates and simplifies forfeiture provisions and procedures in Illinois criminal law.

6. Public Act 96-1301—Felony Theft Thresholds Reform eff. January 1, 2011.

Increased the thresholds for a felony theft charge from $300 to $500 for first offenders. It also increased the thresholds for a felony retail theft from $150 to $300 for first offenders.

7. PA 96-1551—Sex Offenses, Bodily Harm, Deception-Fraud Rewrite eff. July 1, 2011

Reorganizes and eliminates redundancies, inconsistencies, and confusing language, added mental states and definitions for sex offenses and the new offense of promoting prostitution, added language to the patronizing a prostitute offense (adult and juvenile) for touching and fondling of sex organs (in addition to penetration) to cover the same type of conduct covered by the offense of prostitution, and consolidated previously separate sections reducing redundancy in the Code. For consistency, the Act adds victims to some aggravated battery categories and adds assistant attorney general and appellate prosecutor to the definition of "public official" for the purpose of threatening a public official offense, consolidates false impersonation statutes, and modernizes theft charges.

8. PA 97-160—Child Abduction Reform eff**.** January 1, 2012.

Added several definitions critical to the application of the statute, and removed an unconstitutional mandatory presumption.

9. PA 97-597—Theft Rewrite eff. January 1, 2012.

Consolidated all theft crimes in Illinois into Article 16 eliminating the specialized Articles 16A through 16K as well as separate miscellaneous acts at the end of the chapter.

10. PA 97-1109—Harms to Children Reform eff. January 1, 2013.

Reorganizes and consolidates offenses related to harms to children, makes substantive changes, inserts mental states to a number of offenses that lack a mental state to provide consistency with other offenses, or reflect the legislature's intent that the offense provide for strict liability.

11. PA 97-995—Child Pornography Sentencing Reform eff. January 1, 2013.

Provides for an enhanced penalty for possession of pornography depicting younger children, curing prior issues of unconstitutionality or disproportionality.

12. Public Act 97-1108—Miscellaneous eff**.** January 1, 2013.

Reorganizes and consolidates various criminal offenses, definitions, and penalties. It also relocates several non-criminal acts found in the Criminal Code to various other sections of the compiled statutes, resolves legal inconsistencies, constitutional issues, and laws that already are criminalized in other statutes, and changes the name of the Code from "The Criminal Code of 1961" to "The Criminal Code of 2012". The Act inserts mental states in the remaining offenses that lacked a mental state. Those offenses now have the *actus reas* mental state of "knowingly."

CRIMINAL CODE REWRITE CONVERSION TABLES
PUBLIC ACTS 96-1551 & 97-597

TABLE USER NOTES

These are the statute conversion tables for the Criminal Code Rewrite in **Public Act 96-1551** (effective July 1, 2011) and **Public Act 97-597** (effective January 1, 2012). Here are some general notes for users:

1. TABLE 1 lists the **OLD** section number prior to the Criminal Code Rewrite Public Act with the corresponding **NEW** section number for the same provision in the Criminal Code Rewrite Public Act.

2. TABLE 2 is the reverse of TABLE 1 listing the **NEW** section number from the Criminal Code Rewrite Public Act with the corresponding **OLD** section number for the same provision prior to the Criminal Code Rewrite Public Act.

3. Some of the Public Act changes are set out in the Tables by reference to paragraph or subsection.

4. The Criminal Code Rewrite reorganized some provisions within a Section, so if an old provision does not appear in the same location in a Section without a change for that noted in these tables, then the provision should still be found somewhere within the Section.

5. The Criminal Code Rewrite has added a new General Definition section at the beginning of Articles 11, 12, 16, & 17, so if a definition is not within a Section refer to the new general definition section. In some Sections, a definition is moved to another location within the Section for organizational reasons. **Note**: Article 15 definitions are still applicable to Articles 16 & 17.

6. The Criminal Code Rewrite has eliminated most provisions within offenses relating to aiding & abetting, solicitation, conspiracy, and accountability, since this conduct falls under the general provisions in the Criminal Code on aiding & abetting, solicitation, conspiracy, and accountability.

****

TABLE 1

(COVERTS OLD SECTIONS to NEW SECTIONS)

720 ILCS Section # prior to Rewrite - 720 ILCS Section # after Rewrite

OLD		NEW
11-7	-	11-35
11-8	-	11-40
11-9	-	11-30
11-9.4 (a)	-	11-9.3 (a-10)
11-9.4 (b)	-	11-9.3 (b-2)
11-9.4 (b-5)	-	11-9.3 (b-10)
11-9.4 (b-6)	-	11-9.3 (b-15)
11-9.4 (b-7)	-	11-9.3 (b-20)
11-9.4 (c)	-	11-9.3 (c)
11-9.4 (c-5)	-	11-9.3 (c-5)
11-9.4 (c-6)	-	11-9.3 (c-6)
11-9.4 (c-7)	-	11-9.3 (c-7)
11-9.4 (c-8)	-	11-9.3 (c-8)
11-9.4 (d)	-	11-9.3 (d)
11-9.4 (d-5)	-	11-9.3 (e)
11-12	-	11-45 (a) & (b)
11-13	-	11-45 (a-5) & (b)
11-14 prior conviction notice	-	725 ILCS 5/111-3 (c)
11-14.2	-	11-14 (c)
11-15	-	11-14.3 (a) (1) with “advances prostitution” definition in 11-0.1
11-15 (b) prior conviction disclosure	-	725 ILCS 5/111-3 (c)
11-15.1	-	11-14.4 (a) (1) with “advances prostitution” definition in 11-0.1
11-15.1 (c) prior conviction disclosure	-	725 ILCS 5/111-3 (c)
11-16	-	11-14.3 (a)(2)(A) & (a)(2)(B) with “profits from prostitution” definition in 11-0.1

11-17	-	11-14.3 (a) (1) with “advances prostitution” definition in 11-0.1
11-17.1	-	11-14.4 (a) (1) with “advances prostitution” definition in 11-0.1
11-17 (b) prior conviction disclosure	-	725 ILCS 5/111-3 (c)
11-18 (b) prior conviction disclosure	-	725 ILCS 5/111-3 (c)
11-19	-	11-14.3 (a)(2)(C) with “profits from prostitution” definition in 11-0.1
11-19 (b) prior conviction disclosure	-	725 ILCS 5/111-3 (c)
11-19.1	-	11-14.4 (a) (2) & (a) (3) with “profits from prostitution definition in 11-0.1
11-19.2	-	11-14.4 (a) (4) with “profits from prostitution” in 11-0.1
11-19.3	-	36.5-5
11-20.3	-	11-20.1B
12-2 (a) (1)	-	12-2 (c) (1)
12-2 (a) (2)	-	12-2 (c) (1) & (c) (4)
12-2 (a) (3)	-	12-2 (b) (2)
12-2 (a) (4)	-	12-2 (b) (3) with 12-0.1 definition
12-2 (a) (5)	-	now covered by 12-2 (b) (7)
12-2 (a) (6)	-	12-2 (b) (4), and if firearm used (c) (6)
12-2 (a) (7)	-	12-2 (b) (4), and if firearm used (c) (6)
12-2 (a) (8)	-	12-2 (b) (8) with 12-0.1 definition
12-2 (a) (9)	-	12-2 (a)
12-2 (a) (9.5)	-	12-2 (a)
12-2 (a) (10)	-	12-2 (b) (7)
12-2 (a) (11)	-	12-2 (b) (1)
12-2 (a) (12)	-	12-2 (b) (1)
12-2 (a) (13)	-	12-2 (c) (2)
12-2 (a) (13.5)	-	12-2 (c) (3)
12-2 (a) (14)	-	12-2 (b) (5)
12-2 (a) (14.5)	-	12-2 (b) (5)
12-2 (a) (15)	-	12-2 (b) (6)
12-2 (a) (16)	-	now covered by 12-2 (b) (7), and if firearm used (c) (6)
12-2 (a) (17)	-	12-2 (b) (9) with 12-0.1 definition
12-2 (a) (18)	-	12-2 (b) (4), and if firearm used (c) (6)

12-2 (a) (19)	-	12-2 (b) (4) with 12-0.1 definition
12-2 (a-5)	-	12-2 (c) (5)
12-2 (a-10)	-	12-2 (c) (7) & (c) (8) (enhanced sentence)
12-2.5	-	12-5.02
12-2.6	-	12-5.3
12-4 (a)	-	12-3.05 (a) (1)
12-4 (b) (1)	-	12-3.05 (f) (1)
12-4 (b) (2)	-	12-3.05 (f) (2)
12-4 (b) (3)	-	12-3.05 (d) (3)
12-4 (b) (6)	-	12-3.05 (d) (4)
12-4 (b) (7)	-	12-3.05 (d) (5) with 12-0.1 definition
12-4 (b) (8)	-	12-3.05 (c)
12-4 (b) (8.5)	-	12-3.05 (c) with 12-0.1 definition
12-4 (b) (9)	-	12-3.05 (d) (7) with 12-0.1 definition
12-4 (b) (10)	-	12-3.05 (d) (1)
12-4 (b) (11)	-	12-3.5 (d) (2)
12-4 (b) (12)	-	12-3.05 (d) (5)
12-4 (b) (14)	-	12-3.05 (d) (2)
12-4 (b) (15)	-	12-3.05 (d) (9) with subsection (i) definition
12-4 (b) (16)	-	12-3.05 (c) with subsection (i) definition
12-4 (b) (18)	-	12-3.05 (d) (6)
12-4 (b) (19)	-	12-3.05 (d) (5)
12-4 (b) (20)	-	12-3.05 (d) (4)
12-4 (b) (21)	-	12-3.05 (d) (8)
12-4 (b) (22)	-	12-3.05 (d) (5) with 12-0.1 definition
12-4 (c)	-	12-3.05 (g) (2)
12-4 (d)	-	12-3.05 (g) (2)
12-4 (d-3)	-	12-3.05 (f) (3)
12-4 (d-5)	-	12-3.05 (g) (3)
12-4 (d-6)	-	12-3.05 (a) (5) w/subsection (i) definition
12-4 (e) (2)	-	12-3.05 (d) (4)
12-4 (e) (3)	-	12-3.05 (a) (3)
12-4.1	-	12-3.05 (a) (2)
12-4.2 (a) (1)	-	12-3.05 (e) (1)
12-4.2 (a) (2)	-	12-3.05 (e) (2)
12-4.2 (a) (3)	-	12-3.05 (e) (3) with 12-0.1 definition
12-4.2 (a) (4)	-	12-3.05 (e) (4)
12-4.2 (a) (5)	-	12-3.05 (e) (2)
12-4.2-5 (a) (1)	-	12-3.05 (e) (5) w/subsection (i) definition
12-4.2-5 (a) (2)	-	12-3.05 (e) (6) w/12-0.1 & subsection (i) def
12-4.2-5 (a) (3)	-	12-3.05 (e) (7) w/12-0.1 & subsection (i) def

12-4.2-5 (a) (4)	-	12-3.05 (e) (6)
12-4.3	-	12-3.05 (b)
12-4.4	-	12-3.1 (a-5)
12-4.6	-	12-3.05 (a) (4)
12-4.7	-	12-3.05 (g) (1)
12-4.8	-	now covered by 510 ILCS 50/21
12-5.15	-	12-5.1a
12-6.1	-	12-6.5
12-6.3	-	12-3.5
12-12	-	11-0.1
12-13	-	11-1.20
12-13 (b) (5)	-	725 ILCS 5/111-3 (c)
12-14	-	11-1.30
12-14.1	-	11-1.40
12-15	-	11-1.50
12-16	-	11-1.60
12-16.2	-	12-5.01
12-17	-	11-1.70
12-18	-	11-1.10
12-18.1	-	11-1.80
12-19	-	12-4.4a (a), (c), (d), & (e)
12-21	-	12-4.4a (b), (c), (d), & (e)
12-30	-	12-3.4
12-31	-	12-34.5
16-1 (b)(2) (prior conviction notice)	-	covered by 725 ILCS 5/111-3 (c)
16-1.1	-	16-1 (d)
16-1.2	-	16-1 (e)
16-1.3	-	17-56

16-3.1	-	26-1.1
16-4	-	16-1 (f)
16-5 (c) (prior conviction notice)	-	covered by 725 ILCS 5/111-3 (c)
16-8 (a)	-	16-7 (b)
16-8 (c)	-	16-7 (h) (2nd sentence)
16-8 (c-5)	-	16-7 (e)
16-8 (e)	-	16-7 (i)
16-14 (a) (for telecommunications and wireless)	-	covered by 16-18
16-14 (c) (rebuttable presumption)	-	unconstitutional presumption deleted
16-15	-	16-6 (b), (g), & 16-0.1 definition
16-16	-	24-3.8
16-16.1	-	24-3.9
16-19	-	16-18 (b)
16-20 (a), (b), & (c)	-	16-18 (c)(2)(A) & (c)(2)(B)
16-20 (d) & (e)	-	16-18 (d)
16-20 (f)	-	16-18 (e)
16-20 (g) & (h)	-	covered by Code of Corrections
16-20 (i)	-	16-18 (f)
16-20 (j)	-	16-18 (g)
16-21	-	16-18 (h)
16-22	-	17-11.5
16A-3 (a)	-	16-25 (a)(1)
16A-3 (b)	-	16-25 (a)(2)
16A-3 (c)	-	16-25 (a)(3)
16A-3 (d)	-	16-25 (a)(4)
16A-3 (e)	-	16-25 (a)(5)
16A-3 (f)	-	16-25 (a)(6)
16A-3 (g)	-	16-25 (a)(7) & (f)
16A-3 (h)	-	16-25 (a)(8)
16A-3.5	-	16-25 (b) & (f)
16A-4	-	16-25 (c)
16A-5	-	16-26 (a)
16A-6	-	16-26 (b)
16A-7	-	16-27
16A-10	-	16-25 (f)

16A-10 (2) (prior conviction notice)	-	covered by 725 ILCS 5/111-3 (c)
16A-11	-	16-25 (d)
16B-2 (a), (b), & (c)	-	covered by 16-3 (a)
16B-2 (d)	-	16-3 (c)
16B-2.1	-	covered by 21-1 & 21-1.3
16B-5 (a)	-	included in 16-3 (d)
16B-5 (b)	-	covered by 16-3 (d)
16B-5 (c)	-	included in 16-3 (d)
16C-1	-	17-30 (f)
16C-2	-	17-30 (a), (d) (1), & (e)
16D-2	-	17-55 & 17-0.5
16D-3	-	17-51
16D-4	-	17-52
16D-5	-	17-50 (a) & (b)
16D-5.5	-	17-52.5, with definitions in 17-0.5 & 17-55
16D-6	-	17-50 (c)
16D-7	-	17-54
16E-3	-	16-28 (a) & (b)
16E-4	-	16-28 (c)
16F-3	-	covered by 16-18 (b)(1) & (c)(2)
16F-4 (a)(1)	-	included in 16-18 (b)(2) & (b)(3)
16F-4 (a)(2)	-	included in 16-18 (b)(4) & (b)(5)
16F-4 (b)	-	(c)(2), (c)(2)(A)(v), & (c)(2)(C)
16F-5	-	covered by 16-18 (c)(3)
16F-6	-	covered by 16-18 (h)
16G-13	-	16-32
16G-14	-	16-31
16G-15 (a)	-	16-30 (a)
16G-15 (b)	-	16-30 (c)
16G-15 (c)	-	16-30 (d)
16G-15 (d)(1)(A)	-	16-30 (e)(1)(A)(i)
16G-15 (d)(1)(A) (prior conviction notice)	-	covered by 725 ILCS 5/111-3 (c)
16G-15 (d)(1)(B)	-	16-30 (e)(1)(A)(ii)
16G-15 (d)(1)(C)	-	16-30 (e)(1)(A)(iii)
16G-15 (d)(1)(D)	-	16-30 (e)(1)(A)(iv)
16G-15 (d)(1)(E)	-	16-30 (e)(1)(A)(v)
16G-15 (d)(2)	-	16-30 (e)(1)(B)
16G-15 (d)(3)	-	16-30 (e)(1)(C)
16G-15 (d)(4)	-	16-30 (e)(1)(D)
16G-15 (d)(5)	-	16-30 (e)(1)(E)

16G-15 (d)(6)	-	16-30 (e)(1)(F)
16G-20 (a)	-	16-30 (b)
16G-20 (b)	-	16-30 (c)
16G-20 (c)	-	16-30 (d)
16G-20 (d)	-	16-30 (b)
16G-20 (e)	-	16-30 (e)(2)
16G-21	-	16-33
16G-25	-	16-34
16G-30	-	16-35
16G-35	-	16-36
16G-40	-	16-37
16H-10	-	17-10.6 (k) & 17-0.5
16H-15	-	17-10.6 (a)
16H-20	-	17-10.6 (b)
16H-25	-	17-10.6 (c)
16H-30	-	17-10.6 (d)
16H-35	-	17-10.6 (e)
16H-40	-	17-10.6 (f)
16H-45	-	17-10.6 (g)
16H-50	-	17-10.6 (h)
16H-55	-	17-10.6 (i)
16H-60	-	17-10.6 (j)
16H-65	-	17-10.6 (l)
16J-10	-	16-40 (a)
16J-15	-	16-40 (b)
16J-20	-	16-40 (c)
16J-25	-	16-40 (d)
16K-15	-	covered by 16-25 (a)(1)
16K-25	-	16-27
16K-30 (a)	-	16-25 (f)(1)
16K-30 (b)	-	16-25 (f)(2)
16K-30 (b) (prior conviction notice)	-	covered by 725 ILCS 5/111-3 (c)
16K-30 (c)	-	16-25 (f)(3)
17-1 (C) (4)	-	17-32 (a) & (c) (1)
17-1a	-	17-1 (E)
17-2 (a-6)	-	17-2 (e)
17-2.5 (a)	-	now covered by forgery, see 17-3 (d) (3)
17-2.5 (b)	-	17-8.3 (b) & (c)

17-4	-	now covered by forgery, see 17-3 (c)
17-7	-	17-60
17-8	-	17-10.5 (a) (2) & (d) (5)
17-10	-	17-9
17-11.1	-	now in 17-11
17-12	-	17-2 (c)
17-14	-	17-27 (b)
17-15	-	17-13 (b) & (d)
17-16	-	17-58
17-18	-	17-17 (b) & (c)
17-19	-	17-2 (a) (8)
17-22	-	17-8.3 (a) & (c)
17-23 (a)	-	now covered by forgery, see 17-3 (c)
17-23 (b) (1 or more false UPC label)	-	now covered by forgery, see 17-3 (c) & (d)
17-23 (b) (possess device to make UPC)	-	17-62
17-25	-	16-6 (c) & (d)
17-28	-	17-57
17-29	-	17-10.2
17A-1	-	17-6.5 (a)
17A-2	-	17-6.5 (d)
17A-3 (a) & (b)	-	17-6.5 (b)
17A-3 (c)	-	17-6.5 (c)
17A-3.1	-	17-6.5 (e)
17B-5	-	17-6.3 (b)
17B-10	-	17-6.3 (c)
17B-15	-	17-6.3 (d)
17B-20	-	17-6.3 (e)
17B-25	-	17-6.3 (f)
17B-30	-	17-6.3 (g)

32-5	-	17-2 (b) (1), (2), (2.3), & (2.7)
32-5.1	-	17-2 (b) (3)
32-5.1-1	-	17-2 (b) (4)
32-5.2	-	17-2 (b) (5) & (b) (6)
32-5.2-5	-	17-2 (d)
32-5.3	-	17-2 (b) (7)
32-5.4	-	17-2 (b) (8)
32-5.4-1	-	17-2 (b) (9)
32-5.5	-	17-2 (b) (10)
32-5.6	-	17-2 (b) (11)
32-5.7	-	17-2 (b) (12)
33C-1	-	17-10.3 (a)
33C-2	-	17-10.3 (b)
33C-3	-	17-10.3 (c)
33C-4	-	17-10.3 (d)
33C-5	-	17-10.3 (e)
39-1	-	17-59 (a) & (b)
39-2	-	17-59 (c)
39-3	-	17-59 (d)
45-1	-	12-3.6 (a)
45-2	-	12-3.6 (b), (c), & (d)
46-1 (a)	-	17-10.5 (a) (1)
46-1 (b)	-	17-10.5 (d) (1)-(4) & (8)
46-1 (c) (govt. entity)	-	17-8.5 (g)
46-1 (c) (private entity)	-	17-10.5 (f)
46-1.1	-	17-8.5 (a) & (e) (1)-(4)
46-2 (govt. entity)	-	17-8.5 (b) & (e) (5)
46-2 (private entity)	-	17-10.5 (b) (1) & (d) (6)
46-3 (govt. entity)	-	17-8.5 (c), (e) (7), & 8-2
46-3 (private entity)	-	17-10.5 (c), (d) (9), & 8-2
46-4 (govt. entity)	-	17-8.5 (d), (e) (6), & 8-2
46-4 (private entity)	-	17-10.5 (b) (2), (d) (7), (d) (9), & 8-2
46-5 (a) (govt. entity)	-	17-8.5 (f)
46-5 (a) (private entity)	-	17-10.5 (e) (1)
46-5 (b) (private entity)	-	17-10.5 (e) (2)
46-5 (c) (govt. entity)	-	17-8.5 (g)
46-5 (c) (private)	-	17-10.5 (f)
46-6 (govt. entity)	-	17-8.5 (h)
46-6 (private entity)	-	17-10.5 (g)
150/5.1	-	11-9.1A

235/1	-	covered by 16-5 (a)(1) with definition in 16-0.1
240/1	-	17-13 (a) & (d)
245/1	-	17-30 (b) & (d) (2)
250/2.01 to 2.16	-	17-0.5
250/3	-	17-31
250/4	-	17-32 (b) & (c) (2)
250/5	-	17-33
250/6	-	17-34
250/7	-	17-35
250/8	-	17-36
250/9	-	17-37
250/10	-	17-46
250/11	-	17-47
250/12	-	17-38
250/13	-	17-39
250/14	-	17-40
250/15	-	17-41 (a) (i) & (b)
250/16	-	17-41 (a) (ii) & (b)
250/17	-	17-42
250/17.01	-	17-43
250/17.02	-	17-44
250/17.03	-	17-45
250/19	-	17-48
250/20	-	17-49
250/24	-	17-49.5
290/1	-	17-3.5 (a)
290/2	-	17-3.5 (b)
290/3	-	17-3.5 (c)
295/1a	-	17-5.7 (a)
295/1b	-	17-5.7 (b)
295/1c	-	17-5.7 (c)
295/1d	-	17-5.7 (d)
305/1	-	17-5.7 (e)
305/2	-	17-5.7 (e)
325/5	-	17-10.7 (a) & (b)
325/10	-	17-10.7 (c)
335/1	-	17-30 (c) & (d) (3)

360/1	-	16-18 (a)(1) through (5) & (c)(1)
365/1 (a) & (b) (except credit card #)	-	16-18 (a)(6) (A) & (B)
365/1 (a) & (b) (credit card #)	-	covered by 17-37, 17-38, 17-39 & 17-40
365/1 (c)	-	16-18 (a)(6)(C)
365/1 (d)	-	covered by 16-18 (a)(6)(E) or 16-3 (a)
365/1 (e)	-	16-18 (a)(6)(D)
365/1 (f)	-	covered by 16-18 (b)(5)(A)
365/1 (g)	-	16-18 (a)(6)(E)
370/1	-	covered by 16-5 (a)(1) with definition in 16-0.1
370/2	-	unconstitutional prima facie provision deleted
390/1	-	17-61 (a)
390/2	-	17-61 (b)

END OF TABLE 1

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TABLE 2

(COVERTS NEW SECTIONS to OLD SECTIONS)

720 ILCS Section # in Rewrite	-	720 ILCS Section # prior to Rewrite
NEW		**OLD**
11-0.1	-	various definitions such as 12-12
11-1.10	-	12-18
11-1.20	-	12-13
11-1.30	-	12-14
11-1.40	-	12-14.1
11-1.50	-	12-15
11-1.60	-	12-16
11-1.70	-	12-17
11-1.80	-	12-18.1
11-9.1A	-	150/5.1
11-9.3 (a-10)	-	11-9.4 (a)
11-9.3 (b-2)	-	11-9.4 (b)
11-9.3 (b-10)	-	11-9.4 (b-5)
11-9.3 (b-15)	-	11-9.4 (b-6)
11-9.3 (b-20)	-	11-9.4 (b-7)
11-9.3 (c)	-	11-9.4 (c)
11-9.3 (c-5)	-	11-9.4 (c-5)
11-9.3 (c-6)	-	11-9.4 (c-6)
11-9.3 (c-7)	-	11-9.4 (c-7)
11-9.3 (c-8)	-	11-9.4 (c-8)
11-9.3 (d)	-	11-9.4 (d)
11-9.3 (e)	-	11-9.4 (d-5)
11-14 (c)	-	11-14.2
11-14.3 (a) (1) with “advances prostitution” definition in 11-0.1	-	11-15 & 11-17
11-14.3 (a)(2)(A) with “profits from prostitution” definition in 11-0.1	-	11-16
11-14.3 (a)(2)(B) with “profits from prostitution” definition in 11-0.1	-	11-16
11-14.3 (a)(2)(C) with “profits from prostitution” definition in 11-0.1	-	11-19

11-14.4 (a) (1) with "advances prostitution" definition in 11-0.1	-	11-15.1 & 11-17.1
11-14.4 (a) (2) with "profits from prostitution definition in 11-0.1	-	11-19.1
11-14.4 (a) (3) with "profits from prostitution definition in 11-0.1	-	11-19.1
11-14.4 (a) (4) with "profits from prostitution" in 11-0.1	-	11-19.2
11-20.1B	-	11-20.3
11-30	-	11-9
11-35	-	11-7
11-40	-	11-8
11-45 (a) & (b)	-	11-12
11-45 (a-5) & (b)	-	11-13
12-0.1	-	various definitions
12-2 (a)	-	12-2 (a) (9) & (a) (9.5)
12-2 (b) (1)	-	12-2 (a) (11) & (a) (12)
12-2 (b) (2)	-	12-2 (a) (3)
12-2 (b) (3) with 12-0.1 definition	-	12-2 (a) (4)
12-2 (b) (4) with 12-0.1 definition	-	12-2 (a) (6), (a) (7), (a) (18) & (a) (19)
12-2 (b) (5)	-	12-2 (a) (14) & (a) (14.5)
12-2 (b) (6)	-	12-2 (a) (15)
12-2 (b) (7)	-	12-2 (a) (5), (a) (10), & (a) (16)
12-2 (b) (8) with 12-0.1 definition	-	12-2 (a) (8)
12-2 (b) (9) with 12-0.1 definition	-	12-2 (a) (17)
12-2 (c) (1)	-	12-2 (a) (1) & (a) (2) (similar to gun)
12-2 (c) (2)	-	12-2 (a) (13)
12-2 (c) (3)	-	12-2 (a) (13.5)
12-2 (c) (4)	-	12-2 (a) (2)
12-2 (c) (5)	-	12-2 (a-5)
12-2 (c) (6)	-	12-2 (a) (6), (a) (7), (a) (16), & (a) (18) when a firearm is used other than by discharge
12-2 (c) (7)	-	12-2 (a-10)
12-2 (c) (8)	-	12-2 (a-10) with sentence enhancement

12-3.05 (a) (1)	-	12-4 (a)
12-3.05 (a) (2)	-	12-4.1
12-3.05 (a) (3)	-	12-4 (e) (3)
12-3.05 (a) (4)	-	12-4.6
12-3.05 (a) (5) w/subsection (i) definition	-	12-4 (d-6)
12-3.05 (b)	-	12-4.3
12-3.05 (c) with 12-0.1 & subsection (i) def.	-	12-4 (b) (8), (b) (8.5), & (b) (16)
12-3.05 (d) (1)	-	12-4 (b) (10)
12-3.05 (d) (2)	-	12-4 (b) (11) & (b) (14)
12-3.05 (d) (3)	-	12-4 (b) (3)
12-3.05 (d) (4)	-	12-4 (b) (6), (b) (20), & (e) (2)
12-3.05 (d) (5) with 12-0.1 definitions	-	12-4 (b) (7), (b) (12), (b) (19), & (b) (22)
12-3.05 (d) (6)	-	12-4 (b) (18)
12-3.05 (d) (7) with 12-0.1 definition	-	12-4 (b) (9)
12-3.05 (d) (8)	-	12-4 (b) (21)
12-3.05 (d) (9) w/subsection (i) definition	-	12-4 (b) (15)
12-3.05 (e) (1)	-	12-4.2 (a) (1)
12-3.05 (e) (2)	-	12-4.2 (a) (2) & (a) (5)
12-3.05 (e) (3) with 12-0.1 definitions	-	12-4.2 (a) (3)
12-3.05 (e) (4)	-	12-4.2 (a) (4)
12-3.05 (e)(5) w/subsection (i) definition	-	12-4.2-5 (a) (1)
12-3.05 (e) (6) w/12-0.1 & (i) definition	-	12-4.2-5 (a) (2) & (a) (4)
12-3.05 (e) (7) w/12-0.1 & (i) definition	-	12-4.2-5 (a) (3)
12-3.05 (e) (8)	-	new to match 12-4.2 (a) (4)
12-3.05 (f) (1)	-	12-4 (b) (1)
12-3.05 (f) (2)	-	12-4 (b) (2)
12-3.05 (f) (3)	-	12-4 (d-3)
12-3.05 (g) (1)	-	12-4.7
12-3.05 (g) (2)	-	12-4 (c) & (d)
12-3.05 (g) (3)	-	12-4 (d-5)
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12-3.4	-	12-30
12-3.5	-	12-6.3
12-3.6 (a)	-	45-1
12-3.6 (b)	-	45-2
12-3.6 (c)	-	45-2
12-3.6 (d)	-	45-2
12-4.4a	-	12-19 & 12-21
12-5.01	-	12-16.2

12-5.02	-	12-2.5
12-5.1a	-	12-5.15
12-5.3	-	12-2.6
12-6.5	-	12-6.1
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16-0.1	-	general definitions such as 16-18
16-1 (d)	-	16-1.1
16-1 (e)	-	16-1.2
16-1 (f)	-	16-4
16-3 (c)	-	16B-2 (d)
16-5 (a)(1) with definition in 16-0.1	-	235/1 & 370/1
16-6 (b), (g), & 16-0.1 definition	-	16-15
16-6 (c) & (d)	-	17-25
16-7 (b)	-	16-8 (a)
16-7 (e)	-	16-8 (c-5)
16-7 (h) (2^{nd} sentence)	-	16-8 (c)
16-7 (i)	-	16-8 (e)
16-18 (a) (1) through (5) & (c)(1)	-	360/1
16-18 (a)(6) (A) & (B)	-	365/1 (a) & (b) (except credit card #) See 365/1 (a) & (b) (credit card #)
16-18 (a)(6)(C)	-	365/1 (c)
16-18 (a)(6)(D)	-	365/1 (e)
16-18 (a)(6)(E)	-	365/1 (g)
16-18 (b)	-	16-19
16-18 (b)(1)	-	16-19 (1) & 16F-3 (a)
16-18 (b)(5)(A)	-	16-19 (5)(A) & 365/1 (f)
16-18 (c)(2)	-	16-20(a) –(c), 16F-3 (b), & 16F-4 (b)
16-18)d)	-	16-20 (d) & (e)
16-18 (e)	-	16-20 (f)
16-18 (f)	-	16-20 (i)
16-18 (g)	-	16-20 (j)
16-18 (h)	-	16-21 & 16F-6
16-25 (a)(1)	-	16A-3 (a)
16-25 (a)(2)	-	16A-3 (b)
16-25 (a)(3)	-	16A-3 (c)
16-25 (a)(4)	-	16A-3 (d)

16-25 (a)(5)	-	16A-3 (e)
16-25 (a)(6)	-	16A-3 (f)
16-25 (a)(7)& (f)	-	16A-3 (g)
16-25 (a)(8)	-	16A-3 (h)
16-25 (b) & (f)	-	16A-3.5
16-25 (c)	-	16A-4
16-25 (d)	-	16A-11
16-25 (f)	-	16A-10 & 16K-30
16-26 (a)	-	16A-5
16-26 (b)	-	16A-6
16-27	-	16A-7 & 16K-25
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16-28 (c)	-	16E-4
16-30 (a)	-	16G-15 (a)
16-30 (b)	-	16G-20 (a) & (d)
16-30 (c)	-	16G-15 (b) & 16G-20 (b)
16-30 (d)	-	16G-15 (c) & 16G-20(c)
16-30 (e)(1)(A)(i)	-	16G-15 (d)(1)(A)
16-30 (e)(1)(A)(ii)	-	16G-15 (d)(1)(B)
16-30 (e)(1)(A)(iii)	-	16G-15 (d)(1)(C)
16-30 (e)(1)(A)(iv)	-	16G-15 (d)(1)(D)
16-30 (e)(1)(A)(v)	-	16G-15 (d)(1)(E)
16-30 (e)(1)(B)	-	16G-15 (d)(2)
16-30 (e)(1)(C)	-	16G-15 (d)(3)
16-30 (e)(1)(D)	-	16G-15 (d)(4)
16-30 (e)(1)(E)	-	16G-15 (d)(5)
16-30 (e)(1)(F)	-	16G-15 (d)(6)
16-30 (e)(2)	-	16G-20 (e)
16-31	-	16G-14
16-32	-	16G-13
16-33	-	16G-21
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16-40	-	16J-10, 16J-15, 16J-20, & 16J-25
17-0.5	-	various definitions such as 250/2.01 to 2.16
17-1 (E)	-	17-1a
17-2 (a) (8)	-	17-19
17-2 (b) (1)	-	32-5 (a)
17-2 (b) (2)	-	32-5 (b)
17-2 (b) (2.3)	-	32-5 (b)
17-2 (b) (2.7)	-	32-5 (c)
17-2 (b) (3)	-	32-5.1
17-2 (b) (4)	-	32-5.1-1
17-2 (b) (5)	-	32-5.2
17-2 (b) (6)	-	32-5.2
17-2 (b) (7)	-	32-5.3
17-2 (b) (8)	-	32-5.4
17-2 (b) (9)	-	32-5.4-1
17-2 (b) (10)	-	32-5.5
17-2 (b) (11)	-	32-5.6
17-2 (b) (12)	-	32-5.7
17-2 (c)	-	17-12
17-2 (d)	-	32-5.2-5
17-2 (e)	-	17-2 (a-6)
17-3 (c)	-	now covers 17-4, 17-23 (a), (b) (UPC label)
17-3 (d)	-	now covers 17-23 (b) (device to make UPC)
17-3 (d) (3)	-	also now covers 17-2.5 (a)
17-3.5 (a)	-	290/1
17-3.5 (b)	-	290/2
17-3.5 (c)	-	290/3
17-5.7 (a)	-	295/1a
17-5.7 (b)	-	295/1b
17-5.7 (c)	-	295/1c
17-5.7 (d)	-	295/1d
17-5.7 (e)	-	305/1 & 305/2
17-6.3 (b)	-	17B-5
17-6.3 (c)	-	17B-10
17-6.3 (d)	-	17B-15
17-6.3 (e)	-	17B-20
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17-6.5 (a)	-	17A-1
17-6.5 (b)	-	17A-3 (a) & (b)
17-6.5 (c)	-	17A-3 (c)
17-6.5 (d)	-	17A-2
17-6.5 (e)	-	17A-3.1
17-8.3 (a) & (c)	-	17-22
17-8.3 (b) & (c)	-	17-2.5 (b)
17-8.5 (a)	-	46-1.1 (a)
17-8.5 (b)	-	46-2 (a) (govt. entity)
17-8.5 (c) & 8-2	-	46-3 (a) & (b) (govt. entity)
17-8.5 (d) & 8-2	-	46-4 (a) to (c) (govt. entity)
17-8.5 (e) (1)	-	46-1.1 (b) (1)
17-8.5 (e) (2)	-	46-1.1 (b) (2)
17-8.5 (e) (3)	-	46-1.1 (b) (3)
17-8.5 (e) (4)	-	46-1.1 (b) (4)
17-8.5 (e) (5)	-	46-2 (b) (govt. entity)
17-8.5 (e) (6) & 8-2	-	46-4 (d) (govt. entity)
17-8.5 (e) (7) & 8-2	-	46-3 (c) (govt. entity)
17-8.5 (f)	-	46-5 (a) (govt. entity)
17-8.5 (g)	-	46-1 (c) & 46-5 (c) (govt. entity)
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17-10.3 (b)	-	33C-2
17-10.3 (c)	-	33C-3
17-10.3 (d)	-	33C-4
17-10.3 (e)	-	33C-5
17-10.5 (a) (1)	-	46-1 (a)
17-10.5 (a) (2)	-	17-8 (a)
17-10.5 (b) (1)	-	46-2 (a) (private entity)
17-10.5 (b) (2) & 8-2	-	46-4 (a) & (b) (private entity)
17-10.5 (c) & 8-2	-	46-3 (a) & (b) (private entity)
17-10.5 (d) (1)	-	46-1 (b) (1)
17-10.5 (d) (2)	-	46-1 (b) (2)
17-10.5 (d) (3)	-	46-1 (b) (3)
17-10.5 (d) (4)	-	46-1 (b) (4)
17-10.5 (d) (5)	-	17-8 (b)
17-10.5 (d) (6)	-	46-2 (b) (private entity)

17-10.5 (d) (7), & 8-2	-	46-4 (d) (private entity)
17-10.5 (d) (8)	-	46-1 (b) (5)
17-10.5 (d) (9) & 8-2	-	46-3 (c) & 46-4 (c) (private entity)
17-10.5 (e) (1)	-	46-5 (a) (private entity)
17-10.5 (e) (2)	-	46-5 (b) (private entity)
17-10.5 (f)	-	46-1 (c) & 46-5 (c) (private entity)
17-10.5 (g)	-	46-6 (private entity)
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17-10.6 (b)	-	16H-20
17-10.6 (c)	-	16H-25
17-10.6 (d)	-	16H-30
17-10.6 (e)	-	16H-35
17-10.6 (f)	-	16H-40
17-10.6 (g)	-	16H-45
17-10.6 (h)	-	16H-50
17-10.6 (i)	-	16H-55
17-10.6 (j)	-	16H-60
17-10.6 (k) & 17-0.5	-	16H-10
17-10.6 (l)	-	16H-65
17-10.7 (a) & (b)	-	325/5
17-10.7 (c)	-	325/10
17-11	-	now includes 17-11.1
17-11.5	-	16-22
17-13 (a)	-	240/1
17-13 (b)	-	17-15
17-13 (d)	-	17-15 & 240/1
17-17 (b)	-	17-18
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17-30 (d) (2)	-	245/1
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17-31	-	250/3

17-32 (a)	-	17-1 (C) (4)
17-32 (b)	-	250/4
17-32 (c) (1)	-	17-1 (C) (4)
17-32 (c) (2)	-	250/4
17-33	-	250/5
17-34	-	250/6
17-35	-	250/7
17-36	-	250/8
17-37	-	250/9
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17-39	-	250/13
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17-41 (a) (i)	-	250/15
17-41 (a) (ii)	-	250/16
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17-42	-	250/17
17-43	-	250/17.01
17-44	-	250/17.02
17-45	-	250/17.03
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17-50 (a)	-	16D-5
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17-52.5 & definitions in 17-0.5 & 17-55	-	16D-5.5
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17-56	-	16-1.3
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17-59 (a)	-	39-1
17-59 (b)	-	39-1
17-59 (c)	-	39-2
17-59 (d)	-	39-3
17-60	-	17-7

17-61 (a)	-	390/1
17-61 (b)	-	390/2
17-62	-	17-23 (b) (possess device to make UPC)
24-3.8	-	16-16
24-3.9	-	16-16.1
26-1.1	-	16-3.1
36.5-5	-	11-19.3
510 ILCS 50/21	-	12-4.8
725 ILCS 5/111-3 (c)	-	now covers prior conviction notice for 11-14 (b) 11-15 (b) 11-15.1 (c) 11-17 (b) 11-18 (b) 11-19 (b) 12-13 (b)(5) 16-1 (b)(2) 16-5 (c) 16A-10 (2) 16G-15 (d)(1)(A) 16K-30 (b)

END OF TABLE 2

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APPENDIX

PART ONE: PRE-TRIAL

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THE PROCEDURES SUGGESTED IN THIS APPENDIX ARE EXAMPLES ONLY. IT IS RECOMMENDED THAT EACH INDIVIDUAL JUDGE TAILOR "SCRIPTS" OR CHECK-LISTS WHICH, IN HIS OR HER ESTIMATION, COMPLIES WITH LOCAL CUSTOM AS WELL AS THE REQUIREMENTS OF ILLINOIS SUPREME COURT RULES, STATUTORY ENACTMENTS, AND CASE LAW.

JUDICIAL OVERHEAR (EAVESDROPPING) CHECKLIST

1. Are you authorized to authorize an overhear? Must be a circuit judge or have the power assigned to you by your Chief Judge.

2. Is it a felony? The crime being investigated must be a felony.

3. The State's Attorney or a designated assistant must authorize the application.

4. The application must be in writing and under oath.

5. One party to the conversation must consent to the recording – get the consent in writing. (**Note**: it's OK for the consenting party to use an alias, if the judge is so informed.)

6. **725 ILCS 5/108A-3** identifies what must be included in the application:

    a. ID the law enforcement officer making the application and the State's Attorney authorizing it.

    b. Statement of facts relied upon by the applicant. (Usually references an affidavit of the consenting party.)

    c. Details as to the felony that has been, is being, or is about to be committed.

    d. Description of the type of communication sought to be monitored: in person, telephone, etc.

    e. ID the consenting party.

    f. ID, **if known**, of the person whose conversations are to be overheard.

    g. Specific period of time in which conversation may be overheard. (Specific dates **and** times. 30-day maximum.)

    h. Statement as to whether there have been previous eavesdropping application involving the same persons and what action the previous judge took.

7. The judge may request additional testimony, witnesses or evidence in support of the application.

8. Necessary grounds for approval pursuant to **725 ILCS 5/108A-4**:

   a. One party to the conversation has or will consent.

   b. There is reasonable cause to believe that a person is committing, has committed, or is about to commit a felony.

   c. There is reasonable cause for believing that particular conversations concerning that felony will be obtained.

9. "Reasonable cause" = "Probable cause."

10. Consider the "totality of the circumstances" to determine reasonable cause.

11. The non-consenting person does not have to be the target of the investigation.

12. The non-consenting party does not necessarily have to be identified.

13. Insist on "immediate" return of the recording. (16-day delay a "technical violation" not requiring suppression where defendant did not allege tapes were altered. ***People v. Nieves***, 92 Ill. 2d 452 (1982). However, if the defendant challenges the integrity of the tapes and presents some evidence to support his challenge, the burden shifts to the State, and the State must show that the tapes have not been altered.)

14. Listen to the recordings.

15. Have the Clerk seal the recordings, the application and the orders.

16. Have the Clerk send notice to the persons named in the authorizing order **and** other persons whose conversations were recorded:

   a. No later than 90 days after **denial** of an authorization request.

   b. No later than 90 days after termination of the period authorized in the order.

   c. Notice may be postponed upon "showing of good cause."

17. Here's a handy case addressing several overhear issues: ***People v. Calgaro***, 348 Ill. App. 3d 297 (2d Dist. 2004).

Empanelling the Grand Jury

[725 ILCS 5/112-1 *et seq.*]

Suggested Checklist

[Procedures differ from Circuit to Circuit]

1. Before opening court:

    a. ascertain whether roll has been taken and whether those unable to serve have been excused or deferred, and confirm that all are citizens, residents, and under no disability or religious inability to serve;

    b. have a list of jurors present in random order,

    c. confirm whether jurors have been shown information or a video describing grand jury service, and

    d. determine in advance the method you will employ to select 16 grand jurors and (suggested) alternates and (suggested) a responsible person to serve as foreperson and alternate foreperson.

    e. determine in advance the intended duration of grand jury service in your county – cannot be greater than 16 months. (You will later advise the grand jury of this expectation.)

    f. advise court personnel how court is to be opened (formal, informal, or none).]

2. Intro Judge and expected procedure for empaneling of grand jury, purpose of grand jury and distinctions from petit jury such as: Judge does not preside, grand jury meets early in investigation and decides probable cause, closed proceeding, 16 rather than 12 members, 12 for quorum, at least 9 YES votes to indict.

3. Explain need for Grand Jury confidentiality / secrecy: to protect the innocent, to not interfere with investigation, search warrants or arrest, and to permit frank deliberation, and to avoid jeopardizing fair trial. Explain exception allowing grand juror to consult with own attorney, if in the context of a confidential, attorney-client relationship. Violations punishable as contempt.

4. Explain Grand Jury Procedure: State's Attorney prosecutes, witnesses called and sworn by Foreperson, court reporter present to transcribe hearing (but not deliberations) later to be disclosed to both parties, witnesses to be advised of their rights.

5. Explain Witness rights to be represented and accompanied by an attorney, and if under suspicion and indigent, the right to free counsel and to remain silent.

6. Explain Grand Jury rights: to subpoena and question witnesses including the accused; to obtain and examine relevant documents and evidence; to ask that investigators be hired for specific purposes if need is shown by Foreperson and 8 other grand jurors.

7. Explain Grand Jury duty: to diligently inquire into all offenses coming to your knowledge, whether from the Court, the State's Attorney, grand jury's own members, or from other sources, and to hear all evidence presented, as they will be advised by the State's Attorney before each case is presented.

8. Explain Deliberation: private with no others present, to decide whether probable cause is shown and to issue a "true bill," or a "no true bill," or to continue case for further grand jury investigation.

9. Term: Length not greater than 18 months. State local practice as to term length and anticipated frequency of service based on past practice.

10. Thank jurors with comment on importance of service.

11. Empanel the Grand Jury and Alternates (recommended), Foreperson and Deputy Foreperson (recommended); have Circuit Clerk administer the oath or affirmation of office to grand jurors, alternates, and bailiffs.

12. Adjourn and discharge grand jury to begin their first session, and to consider any matters to be presented by the State.

CHECKLIST AND PROCEDURES FOR SETTING BAIL

I. Procedure at a bond hearing (725 ILCS 5/109(b)) the Judge shall:

A. Inform defendant of charge and provide copy of the charge;

B. Advise defendant of right to attorney including right to defender

C. Schedule preliminary hearing if applicable; and

D. Set bond pursuant to statute

II. Facts to be considered when setting bail (725 ILCS 5/110-5(a))

(Offered as evidence or by way of proffer by State or Defendant)

A. Monetary bail or conditions of release should be set which will reasonably assure the appearance of defendant or the safety of any other person or the community;

B. The Court shall, on the basis of available information, take into account the following:

1. Nature and circumstances of offenses charged;
2. Whether the evidence shows use of violence or threatened use of violence;
3. Whether the offense involved the corruption of public officials;
4. Whether there was physical harm or threatened physical harm to any public official, public employee, judge, prosecutor, juror or witness, senior citizen, child, or handicapped person;
5. Whether defendant used a weapon during the offense;
6. Whether offense was related to or in furtherance of the criminal activities of an organized gang or in allegiance to an organized gang;
7. Condition of the victim;
8. Impact upon the victim;
9. Victim's concern regarding contact with defendant if admitted to bail;
10. Whether offense was based on racial, religious, sexual orientation, or ethnic hatred;
11. Likelihood of conviction;
12. Sentence applicable upon conviction and motivation or ability to flee;
13. Likelihood of filing a greater charge;
14. Weight of the evidence;
15. Family ties;
16. Employment;
17. Financial resources;
18. Character and mental condition of defendant;
19. Past conduct;
20. Prior use of alias names or date of birth;
21. Length of residence in community;
22. Consent of periodic drug testing by defendant;

23. Whether defendant is an illegal alien;
24. Whether a foreign national defendant is lawfully admitted in the USA;
25. Whether government of the foreign national has an extradition treaty whereby he will be extradited for a crime committed in the USA;
26. Whether defendant is subject to deportation;
27. Amount of unrecovered proceeds lost as a result of alleged offense;
28. Source of bail;
29. Whether the evidence shows that the defendant is engaged in significant possession, manufacture, or delivery of a controlled substance or cannabis, individually or with others;
30. Whether the defendant is on bond or pre-trial release pending trial, probation, periodic imprisonment or conditional discharge, parole or MSR;
31. Record of convictions (any misdemeanors within 10 years or felonies within 20 years of current charge);
32. Juvenile Record;
33. Record of other court appearances or failure to appear at court appearance;
34. Flight to avoid arrest or prosecution;
35. Escapes or attempted escapes to avoid arrest;
36. Refusal to identify himself;
37. Refusal to be fingerprinted.

III. The amount of bails shall: (725 ILCS 5/110-5(b))

A. Be sufficient to assure compliance with conditions of bond;

B. Include defendant's current address;

C. Not be oppressive;

D. Be considerate of financial ability of defendant;

E. Take into consideration the street value of drugs for a violation of Cannabis Control Act or Controlled Substance Act. (street value must be based upon written report.);

F. Not exceed double the maximum penalty for a crime punishable by fine only;

G. Further consider, when a person is charged with a violation of an Order of Protection:

1. whether incident involved harassment or abuse;
2. any history of domestic violence or other criminal acts;
3. history as to mental health of person;
4. history of violating court orders;
5. whether person has been or is potentially a threat to any other person;
6. whether person has access to deadly weapons or history of using deadly weapons

7. whether person has history of abusing alcohol or any controlled substance;
8. severity of the alleged incident including duration and whether incident involved physical injury, sexual assault, strangulation, abuse during alleged victim's pregnancy, abuse of pets, or forcible entry to gain access;
9. whether separation of the person from alleged victim or termination of relationship between person and the alleged victim has recently occurred or is pending;
10. whether person has exhibited obsessive or controlling behavior toward victim including stalking, surveillance, of victim or victim's family;
11. whether person has expressed suicidal or homicidal ideations;
12. any information contained in the complaint, police reports, affidavits or other documents

The court may order the Respondent to undergo a risk assessment.

IV. Failure to Appear

If a defendant fails to appear within 30 days after a bond forfeiture he may be charged with a violation of bail bond. Under **720 ILCS 5/32-10(d)** any sentence imposed shall be served consecutive to the sentence for which bail has been granted.

V. Conditions of Bond (725 ILCS 5/110-10)

A. Mandatory

1. Appear in court
2. Submit to orders and process of court
3. Not depart the state
4. Not violate any criminal statute of any jurisdiction
5. Surrender firearms when charged with certain offenses
6. Submit to a psychological evaluation when person has been charged with Unlawful Use of Weapons (720 ILCS 5/24-l(a)(4) while in school, or in a vehicle transporting students or within 1,000 feet of a school.

B. Permissive (With finding that such conditions are reasonably necessary to assure defendant's appearance in court, protect public or prevent unlawful interference with the orderly administration of justice)

1. Report to persons or agencies;
2. Refrain from possessing weapons;
3. Refrain from approaching or communicating with certain people;

4. Refrain from going to certain areas;
5. Refrain from indulging in alcohol or drug; (SCRAM monitoring) *See also* **725 ILCS 5/110-6.5; Drug Testing Program)**;
6. Undergo treatment for drug addiction or alcoholism;
7. Undergo medical or psychiatric treatment;
8. Work or go to school;
9. Reside at a certain facility;
10. Support defendant;
11. (for minor) attend school and pay for room and board;
12. Observe court curfew;
13. Remain in custody of a person or organization agreement to a supervised release;
14. Be under supervision of Pretrial services Agency, Probation Department or Court Services Department in a pretrial bond home supervision capacity, including GPS, in some instances a home monitoring fee will be assessed;
15. Comply with terms and conditions of an order of protection;
16. Comply with conditions of drug testing program;
17. Such reasonable conditions as the Court may impose;
18. Other reasonable conditions of a court.

VI. Trial in *Absentia* (725 ILCS 5/115-4.1)

A. Admonishment of Defendant

1. Defendant must be **orally** admonished that a failure to appear may result in a trial in his absence and could constitute a waiver of the right to confront witnesses against him. **725 ILCS 5/113-4(e)**.
2. The admonishment should be given at the ime of the arraignment. *See* ***People v. Phillips***, 242 Ill. 2d. 189 (2011).

B. Court can commence trial in absence of defendant if:

1. Defendant has been arrested;
2. Defendant has had initial court appearance;
3. State requests a trial;
4. State requests a trial State proves through substantial evidence that defendant is willfully avoiding trial, and
5. Defendant was notified of trial date in open court or by the clerk by certified mail to his last known address if defendant was not in court when case was set for trial.

C. Trial must be by a jury trial unless defendant had previously waived jury.

D. Defendant must be represented by Counsel (retained or appointed)

E. If defendant was present when trial began, the trial can continue without the defendant after defendant willfully absents himself.

F. Defendant who is convicted and/or sentenced must be granted a new trial and/or sentencing hearing if he establishes his absence was not his fault and due to circumstances beyond his control. (Must have hearing with notice to State.)

VII. Grant, reduction, increase or denial of bail. (**725 ILCS 110-6**). This section allows the court to revisit the issue of bail on its own motion as well as the motion of the state or the defendant.

VIII. Drug Testing Program. (**725 ILCS 110-6.5**) provides that "The court, in the case of a defendant charged with **a felony** offense **or any offense involving the possession of delivery of cannabis or control substance, shall:**

A. Not consider a ROR or bail of a defendant unless drug testing is a condition of release.

B. Require that drug testing **SHALL** be conducted by pre-trial services.

IX. No Bail Warrant

When a defendant released on bail or recognizance on a felony fails to appear as required, the court shall issue a "no Bail" warrant. The defendant who is arrested on such a "no-bail" warrant within 30 days of the issuance of such warrant shall not be bailable unless the defendant shows by a preponderance of the evidence that his failure to appear was unintentional.

If a defendant is charged with a violation of bail bond, any sentence imposed for such violation shall be served consecutive to the sentence for which bail has been granted. (7**20 ILCS 5/32-10(d)**).

CHECKLIST:
APPOINTMENT OF SPECIAL PROSECUTOR

GROUNDS FOR APPOINTMENT OF A SPECIAL PROSECUTOR:

Has a petition invoking the court's jurisdiction under section 5/3-9008 to appoint a special prosecutor been filed with the court?

Does the petitioner plead specific facts showing that the State's Attorney would not zealously represent the People in the specific case before the court because the State's Attorney is either sick, absent, unable to attend, or has a conflict of interest in the prosecution?

If the petition alleges that the prosecutor is "interested" under section 3–9008, does the petition allege that:

(1) the attorney is interested as a private individual in the litigation,
(2) the attorney or his office is an actual party to the litigation, or
(3) the attorney's continued participation would create the appearance of impropriety in the prosecution of a defendant?

If the petition alleges that the state's attorney is ***interested as a private individual***, does the alleged conflict involve only the state's attorney's personal work-based acquaintance with the victim or a witness?

If so, the ***alleged interest is personal*** and the defendant must prove either:

(1) that the relationship involves significant emotional ties; or
(2) that defendant suffered actual and substantial prejudice.

Has the petitioner pled and proved specific facts that demonstrate the personal interest rather than mere speculation?

If the petitioner alleges that the state's attorney is an ***actual party to the litigation***, is the prosecutor is the complainant and key witness?

If the assistant state's attorney is a witness, but not the complainant, the court has discretion to refuse to appoint a special prosecutor.

If the petition alleges that the state's attorney participation would ***create the appearance of impropriety;***

Does the defense counsel have a previous or contemporaneous relationship with the victim, the prosecution, or an entity assisting in or benefiting from the prosecution?

*If so, a **per se conflict of interest** may exist and the defendant is relieved of his burden of showing that he suffered actual prejudice.*

However, where a per se conflict of interest exists, the burden shifts to the State's Attorney to show why a special state's attorney should not be appointed.

Even in the absence of demonstrated prejudice to the defendant, should a special prosecutor be appointed to remove an appearance that the defendant is being unfairly prosecuted?

Even if there is a concern about the appropriateness of the State's Attorney's office prosecuting a case against a particular defendant, has the trial judge considered:

(1) the burden that would be placed on the prosecutor's office if the entire prosecutor's office had to be disqualified;

(2) how remote the connection is between the State's Attorney's office and the alleged conflict of interest; and

(3) to what extent the public is aware of the alleged conflict of interest?

ORDER APPOINTING A SPECIAL PROSECUTOR:

Is the order appointing a special prosecutor entered in the record by the trial court?

Does the order appointing a special prosecutor set out a specific factual finding that the state's attorney was sick, absent, unable to attend or had a conflict of interest in the prosecution?

Does the order limit the appointment to a specific matter?

Does the order specify an event for terminating the appointment?

Does the order specify the attorney appointed?

Does the order reflect that the court first determined whether a public prosecutor was available to serve as a special prosecutor at no cost to the county?

If available, the public prosecutor should be appointed special prosecutor.

If a private attorney is appointed, does the record reflect that the court contacted public agencies throughout the state, including but not limited to the

Office of Attorney General, Office of the State's Attorney Appellate Prosecutor, and local State's Attorney's Office and that none was available, before appointing a private attorney as the special prosecutor.

If a private attorney is appointed, has the county been given an opportunity to participate in all agreements on the rate of compensation? Does the record reflect this?

EXPANSION OF ORDER OF APPOINTMENT:

If the order granting authority of the special prosecutor may be expanded, has the county been given notice?

Has the county been given the opportunity to provide the court with information on the financial impact of the expansion on the county?

If so, has this information been made part of the record?

If the county does not provide the information, has the fact that the county was given the opportunity to provide information on the financial impact been noted in the record?

ORDER OF COMPENSATION OF PRIVATE ATTORNEY'S FEES & EXPENSES:

Does the order restate that the county had been given an opportunity to participate or, in fact, participated in the agreement on the rate of compensation?

Has the attorney seeking compensation submitted a detailed bill describing:

____ all activities performed in relation to the case,
____ the time spent on each activity,
____ fees for each, and
____ expenses, including supporting invoices and bills?

Before the petition for fees has been heard by the court, has the attorney's detailed bill been submitted to the county?

Does the county have any objections to the bill?

Has the judge reviewed the bill to determine that the all fees reflect time spent on the matter assigned under the order appointing the special prosecutor?

Arraignment Script

The purpose of this hearing is to advise you of the charges against you, to provide you with a copy of the charging document, and to advise you of your rights and obligations in these proceedings. You are not to respond to the charges at this time and you are advised not to respond because any statement you make as to the charges may be used against you in further proceedings.

(If counsel is present with defendant, counsel has the option of waiving reading and explanation of the charges.)

You are charged with the offense of _____. (Read each count unless reading is waived by counsel, then read possible penalties as follows, unless explanation of penalties has been waived by counsel.)

I am providing you (and your attorney) with a copy of the charges against you at this time.

You have the right and obligation to be present for all further proceedings scheduled in your case. (If in custody: If you post bond and you are released on this case, it is your obligation to be here for all future court dates.) Failure to be present could be deemed a waiver or giving up of your right to be present for trial, resulting in trial and even sentencing occurring in your absence.

You have the right to be represented by counsel and if indigent or unable to afford an attorney, a public defender will be appointed to represent you. (If not represented, inquire further as to intention to hire or request counsel, inquire as to indigency, ask state if prosecution requests further proof or affidavit of indigency or would stipulate thereto, and appoint counsel if appropriate).

(If bail has not been set in felony case:) You have a right to have bail set in your case, and I will review the file, affidavits or evidence to be presented today to determine if there is probable cause for your arrest and if so, I will set bail and any special conditions that might apply.

If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from the admission to the United States, or denial of naturalization under the laws of the United States.

CHECKLIST:
JOINDER AND SEVERANCE

CHECKLIST FOR JOINDER:

When multiple charges against a defendant are brought based on the same act, compulsory joinder may apply, **720 ILCS § 5/3-3(b), (c)**. When multiple charges are brought against a defendant or codefendants based on the same acts or same comprehensive transaction, permissive joinder may apply, **725 ILCS § 5/111-4(a), (b)**.

COMPULSORY JOINDER

Joinder is required when:

___ Multiple charges are known to the prosecutor when the prosecution begins;

___ The charges are within the jurisdiction of a single court; and

___ The charges are based on the "same act":

___ Where several persons are affected by one act, and

___ Where several different statutes are violated by one act.

PERMISSIVE JOINDER

Permissive joinder is allowed by charging separate criminal acts in the same charging instrument when the offenses charged are:

___ Part of the same acts, or

___ Part of the same "comprehensive transaction."

MOTION TO SEVER JOINDER OF OFFENSES

When considering a motion to sever charges, the court should look to several factors to determine if the acts charged are part of the "same comprehensive transaction," including, but not limited to:

___ The proximity of the offense in time and place,

___ The identity of evidence needed to link the offenses,

___ Any common method in commission of the offenses, and

___ Similarity of evidence required to establish the offenses.

Other factors may include:

___ Whether the defendant is in a similar position of authority to each victim,

___ Whether the victims are similar, and

___ Whether severance will promote judicial efficiency

MOTION TO SEVER JOINDER OF MULTIPLE DEFENDANTS

The motion for severance:

___ Must make specific allegations of how the defendant will be prejudiced by a joint trial;

___ Must also be specific concerning defenses and the nature of the codefendants' defense strategies, and must be explicit as to the conflicts posed;

___ Should be raised before trial but may be raised during trial if the grounds for the motion become apparent during trial; and

___ Should be presented to the trial court in the form of a written motion with explicit allegations.

In ruling on a motion for severance, the trial judge must make a prediction about the likelihood of prejudice at trial, taking into account:

___ arguments of counsel,

___ its own knowledge and experience gained from handling the proceedings to that date,

___ the court file, and

___ other papers appropriately presented.

If a severance is granted, the prosecution may elect:

___ which severed charge defendant would be tried on first, or

___ which severed defendant would be tried first, (preference must be given to a defendant who is in custody).

INTERFERENCE WITH THE RIGHT OF CONFRONTATION

The classic situation that implicates the Sixth Amendment right to confrontation and cross-examination is when, in a jury trial, a codefendant makes a confession that is inculpatory to the defendant making the motion to sever, in this situation the court should determine:

____ Whether the statement of a nontestifying codefendant will be admitted; and

___ If so, does that statement expressly implicate the defendant in the crime?

If yes, the admission of the statement may violate the defendant's constitutional right to confront the witnesses against him.

If the statement is only incriminating when linked with other evidence introduced at trial, it does not rise to the level of a Bruton violation.

Likewise, the court may determine whether the complained of statement is a confession or admission.

INTERLOCKING CONFESSIONS

___ Does a codefendant's statement interlock with the defendant's statement, which he denies the truth of at trial?

If so, the admission of the codefendant's corroborating statement is so devastating to the defendant's defense as to deny him a fair trial.

___ Are the discrepancies insignificant?

If so, the codefendant's confession may be admitted, otherwise it may not.

OPPORTUNITY TO CROSS-EXAMINE

___ If the codefendant testifies at trial and is subject to full and effective cross-examination, the confrontation clause is not violated by the admission of a codefendant's statement.

___ Likewise, where a codefendant takes the stand in his own defense and denies making an alleged out-of-court statement implicating the defendant, neither the Sixth nor Fourteenth Amendments are violated.

ANTAGONISTIC DEFENDANTS

Joinder is inappropriate when "codefendants' defenses are so antagonistic that a joint trial would not be a fair one. In this situation, the trial court should determine whether the joint trial will be "more of a contest between the defendants than between the People and the defendants" by determining:

___ Whether a codefendant will take the stand to point a finger at the defendant as the real perpetrator of the offense;

___ Whether the motion states how the defendant would be prejudiced by a joint trial, rather than alleging mere apprehensions of prejudice; and

___ Whether the prejudice alleged is actual hostility, which occurs when there is "true conflict, such that each defendant professes his own innocence and condemns the other", is required.

MEGA-TRIALS

If a joint trial includes more than ten defendants, the trial court, in reaching its determination whether, on balance, justice would be better served by one aggregate trial of all indicted defendants or by two or more trials of groups of defendants may consider the following benchmarks:

Whether the government's case will last longer than four months based on:

___ the number of defendants,
___ the time and territorial scope of the crimes charged,
___ the number of witnesses likely to be called, and
___ the number and size of exhibits likely to be introduced, including wiretaps.

If the prosecution's case will exceed four months, the trial court may consider requiring:

___ prosecutor's brief supporting a joint trial of all defendants, and
___ a response from the defendants seeking severance.

In reaching its decision to sever or not, the trial court should:

___ weigh the interests of the prosecution, the defendants, the jurors, the court, and the public;

___ examine the feasibility of conducting separate trials for any defendant or group of defendants where a separate trial would be relatively brief; and

___ consider the advantages of severance: jury duty would be shorter; smaller groups of defense counsel in each trial would reduce trial disputes, the trial judge would have a more manageable task, and the jurors' ability to focus on individual defendants would be enhanced;

___ whether the separate trials can be assigned for simultaneous trial before other judges; and

____ if separate brief trials may be feasible for one or more defendants, the judge may explore with the prosecutor whether to limit the charges to those that can be proven expeditiously and that carry adequate maximum penalties.

ALTERNATIVES TO SEVERANCE OF DEFENDANTS:

REDACTING STATEMENTS

If no other hearsay exception applies, admission of a codefendant's statement at joint trials may be redacted:

___ only with proper limiting instructions, and

___ a general limiting instruction that a statement made by one defendant may not be considered against any other defendant, and

___ a contemporaneous instruction to disregard the codefendant's statement when considering the defendant's guilt.

___ only if the statements are cleansed of *all references* to a nondeclaring defendant;

___ elimination of direct and indirect identification of nondeclaring defendant;

___ elimination of statements that could be damaging to co-defendants once their identity have otherwise been discovered;

___ the statement cannot be changed or rendered misleading; and

___ the statement cannot implicate the defendant even when his name is deleted.

SIMULTANEOUS JURY TRIALS:

The trial court can help avoid confusion and prejudice by:

___ selecting each jury from a separate venire;

___ making each jury aware of the presence of the other jury;

___ preparing the jurors by explaining to both juries that their focus is on the particular defendant before them;

___ explaining that the fate of the codefendant in the other trial must not affect their consideration of their respective defendant;

___ conducting cross-examination of the State's witnesses, as well as opening and closing statements, separately;

___ insuring that both juries hear only the evidence which was admissible against both defendants:

___ insuring that a jury is retired when certain inculpatory evidence irrelevant to their case is introduced.

If, however, either defendant takes the stand, both juries may be present.

___ separating the two juries for deliberations.

SIMULTANEOUS BENCH AND JURY TRIALS

In this type of proceeding the defendants try their cases simultaneously in the same courtroom before a jury and a trial judge. The trial judge should:

___ recite for the record the findings and reasoning in each of the cases,

___ insure that the jury hears only the evidence which was admissible against both defendants,

___ insure that the jury is retired when inculpatory evidence irrelevant to their case is introduced, and

___ although not required, make its decision regarding the defendant before it immediately after the close of his case, rather than wait until after the jury renders a verdict on the codefendant.

SIMULTANEOUS BENCH TRIALS

In this type of proceeding, the defendants try their cases simultaneously in the same courtroom before the same judge. The trial judge:

___ cannot consider one codefendant's statement against the other,

___ needs to be constantly aware of the differences in the cases,

___ should recite for the record the findings and reasoning in each of the cases, and

___ although not required, make its decision regarding each defendant immediately after the close of the respective cases.

Checklist for Motions to Suppress and Motions to Quash

___ All motions to suppress and/or to quash must be in writing.

___ First examine the face of the motion. If it is not clear whether the motion is filed pursuant to **725 ILCS 5/114-11**, **725 ILCS 5/114-12**, or general principals of constitutional law, inquire of counsel, on the record, to make such a determination, allowing leave to amend, if necessary. Such a determination is necessary if the Court is to follow the proper procedure in resolving the motion.

For a Motion to Suppress Confession filed pursuant to 725 ILCS 5/114-11, (which provides that, prior to trial of any criminal case a defendant may move to suppress as evidence any confession given by him on the ground that it was not voluntary):

___ The motion shall be made only before a court with jurisdiction to try the offense.

___ The motion must be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion.

___ The motion must state facts showing wherein the confession is involuntary, and, if the Court determines the motion fails to do so, the Court may grant leave to amend.

___ If the motion states facts, which, if true, show that the confession was not voluntarily made, the court must conduct a hearing into the merits of the motion.

___ At the hearing, the burden of going forward with the evidence and the burden of proving that a confession was voluntary shall be on the State.

___ Any objection to a failure by the State to call all material witnesses on the issue of whether the confession was voluntary must be made in the trial court.

___ The court, not the jury, must resolve the issue of admissibility of the confession, but the circumstances surrounding the making of the confession may be submitted to the jury as bearing on the credibility or the weight to be given to the confession.

___ See Part I, Tab 3, 1.10, Motions to Suppress Confessions

For a Motion to Quash a Search Warrant and Suppress Evidence; Quash Arrest and Suppress Evidence, pursuant to 725 ILCS 5/114-12, **(**which provides that a defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained):

___ The motion must be made before trial unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion.

___ Grounds for the motion may include that the search and seizure without a warrant was illegal.

___ Grounds for the motion may include that the search and seizure with a warrant was illegal:

- ___ Because the warrant was insufficient on its face, or
- ___ Because the evidence seized was not that described in the warrant, or
- ___ Because there was not probable cause for the issuance of the warrant, or
- ___ Because the warrant was illegally executed.

___ The motion must state facts showing wherein the search and seizure were unlawful.

___ The Court must receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure was illegal shall be on the defendant.

___ *See* Part I, Tab 3, 1.9, Motions to Quash a Search Warrant and Suppress Evidence: Quash Arrest and Suppress Evidence.

For a Motion to Suppress Identification of Defendant, pursuant to general principals of constitutional law:

___ Grounds for the motion may include that a "Show up" or "Street" identification or "Photo Line-Up" by the victim was "unnecessarily suggestive and conducive to reparable misidentification", and in violation of the Due Process Clause of the Fourteenth Amendment.

- ___ At hearing, the Court must make a preliminary determination of suggestiveness, applying a "totality of the circumstances" analysis.
- ___ A finding that such an identification is unreliable supports exclusion of both testimony about the out-of-court identification and an in-court identification.
- ___ A finding that such an identification is reliable removes reason to consider independently the in-court identification.

___ Grounds for the motion may include that failing to provide counsel during a post-indictment police lineup violated an accused's right to counsel under the Sixth Amendment.

___ The motion must state facts showing the identification denied defendant of his constitutional rights.

___ *See* Part I, Tab 3, 1.11, Motion to Suppress Identification of Defendant.

Fitness One-Page Summary

For the Judge of the Circuit Court of Illinois

725 ILCS 5/104-10 *et seq.*

I. Fitness as an issue: The defense, state, or court (*sua sponte* duty) may raise the issue of fitness at any time. §104-11(a). If *bona fide* doubt raised, order a fitness exam and report. §104-13. Defense may request exam to see **if** a *bona fide* doubt exist. Standard is court's discretion. §104-11(b). If an exam is ordered, give the defendant the §104-14 admonition. If *bona fide* doubt already raised or raised from report, fitness hearing **must** be held. Do so within 45 days of receipt of fitness report (due in 30 days). §104-16(a). At fitness hearing, preponderance burden on State. §104-11(c). No right to jury if after trial has begun or after conviction.§104-12. Possible findings:

A. Fit to stand trial or to plead [or to be sentenced]. §104-16(d). Proceed with criminal case.

B. Unfit with a substantial probability, if provided with a course of treatment, of attaining fitness within 1 year. Order treatment. §104-16(d). Max length is for 1 year. Set first **"90-day hearing**." §104-20

C. Unfit but unable to determine if there is a substantial probability, if provided with a course of treatment, of attaining fitness within 1 year. Order treatment. §104-16(d). Set case to make that determination for a date "asap" after §104-17(e) report to be filed, which is due in 30 days. §104-16(d). Then proceed with II.B or III below.

II. Initial Period of Treatment: 90-Day Hearings every 90 days. §104-20. Δ's presence waivable per §104-16(c) with certificate. No stipulation "Δ is fit/unfit." Accept stipulation report is admissible. 103 Ill 2d 111. Possible findings at 90-day hearings:

A. Fit. §104-20(a)(1). Includes "trial with special provisions and assistance" for disabled §104-22. Proceed with the case.

B. Still unfit but making progress under treatment toward attainment of fitness within one year from the date of the original finding of unfitness. §104-20(a)(2). Continue or modify original treatment order. §104-20(c). Set next "90-day hearing." At end of 1 year, proceed with fitness not expected within 1-year procedures (III below).

C. Still unfit and not making progress toward attaining fitness with no substantial probability that fitness will be attained within 1 year of original finding of unfitness, or simply at the end of the 1-year and still unfit. Proceed with III below.

III. Extended Period of Treatment: If unfit and will not attain or has not attained fitness within 1 yr, Δ may ask for discharge hearing. §104-23(a). State to pick discharge hearing, dismissal with prejudice, or have DHS attempt civil commitment. §104-23(b).

A. **If discharge hearing**, aka "innocent only hearing" or "not 'not-guilty' hearing." §104-23(a) or (b)(1). Findings:

1. Not proven beyond a reasonable doubt. Acquitted. State may file civil commitment. §104-25(b).
2. Not guilty by reason of insanity. Acquitted. Proceed per 730 ILCS 5/5-2-4 for NGRI. §104-25(c).
3. Not acquitted; sometimes called "not 'not guilty.'" May remand for treatment extended 5 yrs for murder, 2 yrs for Class X or 1, 15 mo for Class 2, 3, and 4. §104-25(d). Continue to hold **90-Day Hearings**, with possible findings:
   1. Fit. Proceed with trial.
   2. Remains unfit. Continue or modify original treatment order. §104-20(c). Set next "90-day hearing." At the end of the extended period of treatment, go to IV below.

B. **If remand to DHS for civil commitment hearing per MHDDC**: Civil courts hold hearing. If committed, dismiss charges with leave to reinstate. DHS to notify if defendant to be released. §104-23(b)(3). State to then decide if reinstating.

IV. The "g(2)" Period of Treatment: At end of extended period of treatment hold hrg§104-25(g). Issues of fitness and treatment.

A. If fit, proceed to trial. §104-25(g)(1). Includes a "trial with special provisions and assistance" for disabled§104-22.

B. If not fit, determine if subject to involuntary admission per §104-25(g)(2)(ii) or constitutes a serious threat to public safety. §104-25(g)(2). Burden: clear & convincing. If not, release Δ. §104-25(g)(3). See IV.G for options. No outpatient treatment.

C. If commitment ordered, hold periodic g(2) hearings for issues of fitness and treatment. §104-25(g)(2).

1. Hold every 180 days, unless request for every 90 days. §104-25(g)(2). State has burden of going forward with evidence and burdens of proof. §104-25(g)(2)(i). Consider the treatment plan report and any other evidence. Waiver of defendant's presence with the filing of a physician's certificate. §104-16(c).
2. Fitness burden is by a preponderance of the evidence. If defendant has become fit, proceed to trial.
3. Treatment burden is by clear and convincing evidence. Possible findings:
   a. Subject to involuntary admission. §104-25(g)(2)(i)(A). Set the next review hearing.
   b. In need of mental health services in the form of inpatient care. §104-25(g)(2)(i)(B). This finding is also a basis for recommitment. Set next review hearing. 730 ILCS 5/5-2-4(b).
   c. In need of mental health services but not subject to involuntary admission or inpatient care. §104-25(g)(2)(i)(C). Also called "outpatient" services. Set next hearing. Reports and hearings continue. §104-25(g)(2).
   d. The defendant is no longer in need of mental health services. Go to IV.G below.

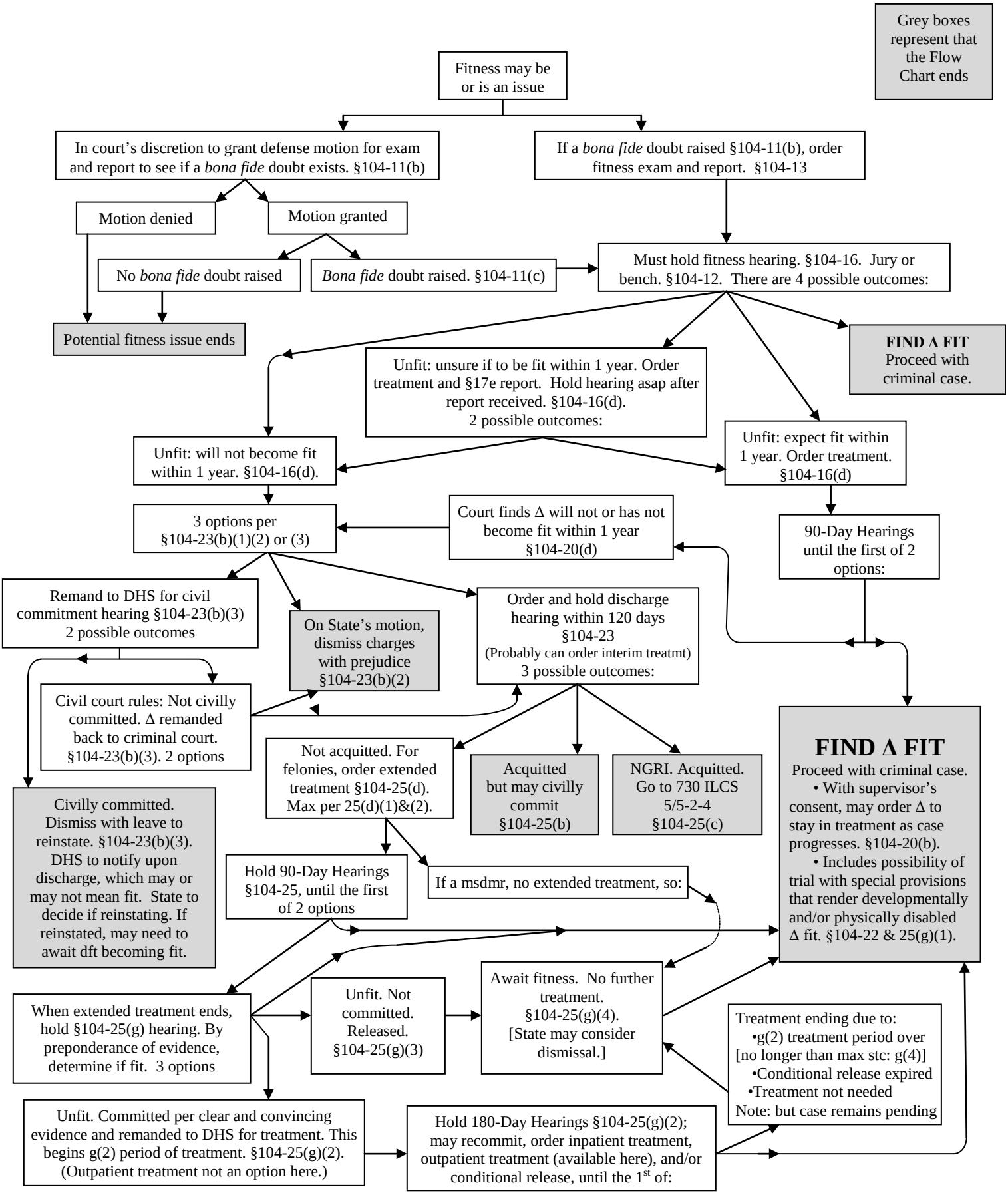
D. Reports will come in every 90 days. On "off" 90 day dates, review report. Make sure 180 day hrg date is already set.

E. The maximum treatment period, including g(2) treatment, may not exceed the maximum sentence the defendant would have been subject if convicted. §104-25(g)(4). Do not reduce by "good time" credit. 142 Ill. App. 3d 858.

F. This court must approve conditional release from DHS. §104-25(g)(2). Conditions that assure progress in treatment and safety of defendant and others. Maximum period of 5 years, with additional 5 year extensions. 730 ILCS 5/5-2-4(a)(1)(D). Reports and hearings continue. §104-25(g)(2). Don't exceed max sentence if were convicted. 725 ILCS 5/104-25(g)(4).

G. If g(2) treatment is denied or ends, due process clause prohibits State from proceeding until fitness is restored. 420 US 162. Statute gives little guidance. Await fitness. Require Δ to inform clerk of address change. Or State could *nolle* w/o prej.

Fitness Flow Chart in the Illinois Criminal Courts



Judge John Coady (retired) *single page Flow Chart* *Updated 12-2011*

Fitness Overview Part 1 of 4: The Period Leading up to the Fitness Determination
For the Judge of the Circuit Court of Illinois
725 ILCS 5/104-10 *et seq*.

1. **Fitness defined**: Unfit if, because of mental or physical condition, unable to understand the nature or purpose of proceedings against him/her or to assist in the defense. Δ is presumed to be fit. §104-10.

2. **The defense, state, or court may raise the issue of fitness at any time.** If *bona fide* doubt raised, Court shall order a determination of the issue before proceeding further, §104-11(a), except for bail motions, §104-13(d). Speedy trial tolled. §103-5(a). If *bona fide* doubt, cannot proceed *pro se*. 121 Ill. App. 3d 548, 551. Active standby counsel may be acceptable until Δ actually found unfit, 235 Ill App 3d 185, 190-191, but probably should avoid standby

3. **If *bona fide* doubt raised, order a fitness exam and report.** If mental condition, appoint physician, clinical psychologist, or psychiatrist. §104-13(a). If physical condition, appoint physician(s). §104-13(b). Report is due within 30 days. §104-15(a). Set status to see if report was filed and to set fitness hearing, or just immediately set fitness hearing. The fitness hearing is to be within 45 days of receipt of report. §104-16(a). Indigent Δ may get independent exam. §104-13(e). You must hold a fitness hearing regardless of the results of the exam. Reports are to be maintained separately by the clerk. Counsel and the court may examine them. §104-19.

4. **Exam to see <u>if</u> a *bona fide* doubt exist:** If Δ makes motion for fitness exam to see if a *bona fide* doubt exists, standard is court's discretion. §104-11(b). If you grant the motion, order a fitness exam and report, but specify no *bona fide* doubt has yet been raised. 347 Ill. App. 3d 278. It's same report as when *bona fide* doubt is actually raised. Case may proceed until, and if, *bona fide* doubt raised [§104-11(b)], but speedy trial is tolled. 128 Ill. App. 3d 548. If report comes back unfit, hold fitness hearing. If says "fit," hearing probably unnecessary.

5. **You must advise the defendant as follows if an exam is ordered:**
   "Statements made by you and information gathered in the course of any examination or treatment ordered under Illinois fitness laws shall not be admissible against you unless you raise the defenses of insanity or drugged or intoxicated condition.
   If you refuse to cooperate with the exam, you can still raise these defenses. But you cannot offer expert evidence or testimony to support those defenses if it's based on an expert's examination of you.
   With the exception of what I have already said, no statement made by you in the examination or in ordered treatment which relates to the crime charged or to other criminal acts shall be disclosed by persons conducting the examination or the treatment, except to other members of the examining and treating team, without your informed written consent, and only if you are competent at the time of giving the consent.
   You may refuse to cooperate with the examination, but that refusal may be admissible on the issue of your mental or physical condition." §104-14.

6. **If *bona fide* doubt was raised, within 45 days of receipt of fitness report, hold fitness hearing**. §104-16(a). Burden on state. Preponderance of the evidence standard. §104-11(c). Court may call its own witnesses and conduct its own inquiry. §104-11(c). Statutory right to jury, but no right if after trial has begun or after conviction. §104-12. Δ has the right to be present at every hearing on fitness; waived only with physician certificate. §104-16(c). Fitness presumption does not apply. 185 Ill. App. 3d 1079.
   Matters admissible include, but not limited to: (1) Δ's knowledge and understanding of the charge, the proceedings, the consequences of a plea, judgment or sentence, and the functions of the participants in the trial process. (2) Δ's ability to observe, recollect and relate occurrences, especially those concerning the incidents alleged, and to communicate with counsel. (3) Δ's social behavior and abilities; orientation as to time and place; recognition of person, places and things; and performance of motor processes. §104-16(b).
   Never accept a "Defendant is fit/unfit" stipulation. Instead, accept a stipulation as to what an expert would testify i.e., author of report is an expert and would testify in accordance with the report. 103 Ill. 2d 111.

7. **Jury (or you, if bench) is to make one of these four findings at the conclusion of the fitness hearing:**
   a. Fit to stand trial or to plead. §104-16(d). [Proceed with case.]
   b. Unfit with a substantial probability, if provided with a course of treatment, of attaining fitness within 1 year. §104-16(d). [Go to *Fitness Overview II: The Initial Period of Treatment*.]
   c. Unfit but unable to determine if there is a substantial probability, if provided with a course of treatment, of attaining fitness within 1 year. §104-16(d). [Go to *Fitness Overview II: The Initial Period of Treatment*.]
   d. Unfit with no substantial probability, if provided with a course of treatment, of attaining fitness within 1 year. §104-16(d). [Go to *Fitness Overview III: The Extended Period of Treatment*.]

Fitness Overview Part 2 of 4: The Initial Period of Treatment

For the Judge of the Circuit Court of Illinois

725 ILCS 5/104-10 *et seq*.

1. **Use this page if**, at the fitness hearing, the finding is either: *finding of unfit with a substantial probability, if provided with a course of treatment, of attaining fitness within 1 year* per §104-16(d) or *finding of unfit but unable to determine if there is a substantial probability, if provided with a course of treatment, of attaining fitness within 1 year* per §104-16(d). Also use for the subsequent "90-Day Hearings." §104-20.

2. **At the conclusion of the fitness hearing/trial, order treatment for the purpose of rendering Δ fit.** §104-16(d).If eligible to be or released on bail, select the least physically restrictive form of treatment. §104-17(a).
   If a mental condition, may place with DHS or other MH facility. May order in or out patient treatment. If DHS, place in secure setting unless you determine compelling reasons not necessary. If in jail, remain until placed for treatment. Sheriff to transport. §104-17(b). If on bond and going to DHS, discretion to order jail or to report as DHS directs. If a physical condition, may place under the supervision of DHS or other appropriate public or private facility or treatment program. May order inpatient or outpatient treatment. §104-17(c).
   If finding was *expected to attain fitness within one year*, set case within 90 days for "90-day hearing." §104-20.
   If the finding was *unable to determine...if...attaining fitness within 1 year*, set case to make that determination for a date "asap" after the §104-17(e) 30-day report to be filed, which is due in 30 days. §104-16(d).

3. **Reports:** The treatment supervisor is to file a 30-day report within 30 days, and if believes a probability of fit within 1 year, then also treatment plan filed. §104-17(e). Thereafter, the supervisor to file progress reports 7 days prior to hearings, or when believes Δ is fit, or when supervisor believes Δ will not be fit within l yr of original finding of unfitness. §104-18(a). See reports upon receipt to see if 14-day acceleration of hearing is triggered by opinion of fitness or will not be fit in 1 year. §104-20(a) & 18(a). Clerk to maintain the reports separately. §104-19.

4. **If the finding was *unable to determine...if...attaining fitness within 1 year*, the next hearing is to make that determination.** Held asap after 30-day report is filed. §104-16(d). Make one of these findings:
   a. Unfit with a substantial probability, if provided with a course of treatment, of attaining fitness within 1 year. §104-16(d). [Set 90-Day hearing 90 days from finding of unfitness. Go to *90-Day Hearing* section, par 5.]
   b. Unfit with no substantial probability, if provided with a course of treatment, of attaining fitness within 1 year. §104-16(d). [*Go to Fitness Overview III: The Extended Period of Treatment*.]
   c. Restored to fitness. Resume with the original criminal case.

5. **If the finding was *unfit with a substantial probability…of attaining fitness within 1 year*, the next hearing (after trial) is the first 90-Day Hearing.** §104-20(a). "90-Day Hearings" are held every 90 days from an order to undergo or continue treatment. Do for up to one year. To reexamine the issue of Δ's fitness. Accelerate within 14 days of progress report saying Δ is fit or will not attain fitness within 1 year of original finding of unfitness.
   Hearing is by the court without a jury. In practice, usually short. Consider written report. At the first 90-Day hearing, you will have both a 30-Day Report and a Progress Report. Both sides may present additional evidence.

   At a 90-Day Hearing, make one of these findings:
   a. Fit to stand trial or plead. §104-20(a)(1). Proceed with the criminal case. May order continued care or treatment pending conclusion of case, if supervisor agrees. §104-20(b).
      i. A subcategory is to consider a "trial with special provisions and assistance" for the disabled if it will render Δ fit. §104-22. Has special sentencing provisions. §104-26.
   b. Still unfit but making progress under treatment toward attainment of fitness within one year from the date of the original finding of unfitness. §104-20(a)(2). Continue or modify original treatment order. §104-20(c). Set next "90-day hearing." But if at the end of 1 year, go to par "d."
   c. Still unfit and not making progress toward attaining fitness with no substantial probability that fitness will be attained within 1 year of original finding of unfitness. Go to *Fitness Overview III: The Extended Period of Treatment*. May order continued care and treatment. §104-20(d).
   d. Still unfit at the end of 1 year from original finding of unfitness. Go to *Fitness Overview III: Not Expected To Attain Fitness Within 1 Year*. §104-23(b).

6. **Waiver of hearings:** If the defense wishes to waive hearings [§104-16(d), 20(a)], consider instead an abbreviated hearing with Δ's presence waived per §104-16(c) and a stipulation that testimony would have been as is stated in report. This helps to avoid forgotten cases and forgotten Δs.
   Never accept a "Defendant is fit/unfit" stipulation. Instead, accept a stipulation as to what an expert would testify, i.e., author of report is an expert and would testify in accordance with the report. 103 Ill. 2d 111.

7. **Proceed on some matters:** May rule on matters not requiring Δ's presence §104-11(d). (When Δ is eligible for a discharge hearing, some matters, as motions to suppress, must be heard. 302 Ill. App. 3d 602, 606.)

Fitness Overview 3 of 4: The Extended Period of Treatment

For the Judge of the Circuit Court of Illinois

725 ILCS 5/104-10 *et seq*.

1. **Use this page if** the jury or you have found that Δ is *unfit with no substantial probability, if provided with a course of treatment, of attaining fitness within 1 year* or, if at the end of 1 year, Δ is still unfit and no special provisions or assistance can compensate for any disabilities and render Δ fit. §104-23(b).

2. **The first step:** Δ may request a discharge hearing. To be held within 120 days unless delay occasioned by Δ. §104-23(a). The State must request the court for one of these three options §104-23(b):
   a. Set the matter for a discharge hearing, unless one was already held §104-23(b)(1) or equivalent, or
   b. Release Δ and dismiss charges with prejudice §104-23(b)(2) or,
   c. Remand Δ to DHS for a civil commitment hearing per MHDDC, 405 ILCS 5/1-100 *et seq*. §104-23(b)(3). DHS has 7 days to file paperwork. The civil court conducts this hearing, with a clear and convincing standard. If no commitment, Δ to return and options are dismiss or discharge hearing.

   If the civil court civilly commits defendant:

   i. Dismiss criminal case with leave to reinstate. §104-23(b)(3). Court, State and Δ's attorney will be notified by DHS if Δ to be released. State may reinstate upon release, but release does not necessarily mean fit. With criminal case dismissed, you will receive no more reports.
   ii. **Rare**: reopen case file, without reinstating the charge, upon Δ's filing of petition for *Lang* due process rights to subsequent fitness hearings and discharge hearing(s). 113 Ill 2d 407.
   If a subsequent fitness hearing is held (very rare for civilly committed Δ):
   - If Δ remains unfit, remand Δ back to DHS. Reclose file. Criminal charge remains dismissed with leave to reinstate.
   - If Δ found fit, State to decide if reinstating case. If so, proceed to trial. Regardless, remand Δ to DHS where Δ has been civilly committed.

   If a subsequent discharge hearing is held upon discovery of new evidence:
   - If Δ acquitted at a discharge hearing, dismiss. §104-25(d). Remand Δ back to DHS where Δ has been civilly committed.
   - If Δ found NGRI, proceed per 730 ILCS 5/5-2-4. §104-25(c).
   - If Δ found not "not-guilty," remand to DHS. Reclose file. Criminal charge remains dismissed with leave to reinstate. Remand Δ back to DHS.

3. **If the State opts for discharge hearing**: Also called "innocent only hearing" or "not not-guilty hearing." Prior to trial, defense entitled to hearings on suppressions motions. 302 Ill.App.3d 602, 606. No jury for discharge hearing. Either side may introduce evidence. Hearsay or affidavit evidence on secondary matters. §104-25(a). Δ should be present but this right is not absolute. 312 Ill. App. 3d 232. One of these 3 findings:
   a. Charge has not been proven beyond a reasonable doubt. Enter judgment of acquittal. State has the right to file civil commitment. §104-25(b).
   b. Not guilty by reason of insanity. Enter judgment of acquittal. Proceed per 730 ILCS 5/5-2-4 *Proceedings After Acquittal by Reason of Insanity* with evaluation by DHS and hearing. §104-25(c).
   c. Not acquitted; sometimes called "not not-guilty." **This authorizes the extended period of treatment.** May remand for further treatment. May extend the one year treatment period for 5 years for murder, 2 years for Class X or 1, and 15 months for Class 2, 3, and 4. §104-25(d). If at the original fitness hearing, finding was *unfit with no substantial probability, if provided with a course of treatment, of attaining fitness within 1 year*, this will be the first treatment order.

   Warning: While remand to DHS for extended treatment is appropriate at this point, do not remand to DHS for an attempt at a civil commitment per §104-23(b)(3). If civil court declines to commit, criminal case must be dismissed. 206 Ill App 3d 361. So just remand Δ for extended treatment.

4. **The procedure during the extended period of treatment** is substantially the same as the initial period of treatment. 90-Day Hearings are held every 90 days. §104-20. Progress reports will be filed at least 7 days prior to hearings. §104-18. Δ's presence may be waived with the physician's certificate. §104-16(c). Hearing is to reexamine issue of fitness. Possible findings:
   a. Restored to fitness. Set case for trial. §104-20(b). May keep Δ in MH facility during trial with supervisor's agreement. §104-20(b).
   b. Remains unfit. Continue or modify original treatment order. §104-20(c). Set next "90-day hearing."
   c. Remains unfit at the end of the extended period of treatment. §104-20(g)(2). Immediately go to *Fitness Overview IV: The "g(2) Period of Treatment* for next step.

Fitness Overview Part 4 of 4: The "g(2)" Period of Treatment

For the Judge of the Circuit Court of Illinois

725 ILCS 5/104-10 *et seq*.

[*Warning: case law is limited and statutory law is complex for this period*]

1. **Use this page if the period of extended treatment has expired.** Hold a hearing that considers fitness and then commitment to DHS. §104-25(g). Hold upon expiration of extended treatment period.

   a. Fitness: Upon finding that Δ is fit or can be rendered fit consistent with special provisions and assistance (§104-22), trial may proceed. §104-25(g)(1). Burden on State by preponderance of evidence.

   b. Commitment: If Δ remains unfit, determine whether Δ is subject to involuntary admission under the MHDDC (405 ILCS 5/1-100 et seq. but using NGRI statute definition 730 ILCS 5/5-2-4 which may mean "In need of mental health services on an inpatient basis") or constitutes a serious threat to public safety. §104-25(g)(2). If not, release Δ. §104-25(g)(3). Standard for commitment is clear and convincing evidence. §104-25(g)(2)(i). See paragraph 7 re denial of g(2) treatment. No option of outpatient treatment at this point.

   If commitment ordered, remand to DHS for treatment in "same manner as a civilly committed patient." You retain jurisdiction to approve conditional release or discharge. Order placement in a secure setting unless you determine there are compelling reasons it is not necessary. §104-25(g)(2).

2. **Reports:** Every 90 days, the facility director is to file a treatment plan report, which includes an opinion whether Δ is fit and whether Δ is subject to involuntary admission, in need of MH service on an inpatient bases, or in need of MH services on an outpatient basis. §104-25(g)(2).
   If you are having periodic g(2) review hearings every 180 days instead of 90 days, as allowed by statute, review the report on the "off" 90 days to see that it "complies" with this statute and to see if the hearing should be accelerated because report says Δ has attained fitness. §104-25(g)(2)(i), §104-20(a). Make certain there is a setting for the next periodic g(2) hearing.

3. **Periodic g(2) hearings during the g(2) period of treatment**, for issues of fitness and treatment.
   a. Hearings must be held every 180 days, and may be every 90 days upon request. §104-25(g)(2). Hold within 14 days of any report saying Δ is fit. §104-20(a). State has burden of going forward with evidence and burdens of proof. §104-25(g)(2)(i). Consider the treatment plan report and any other evidence.
   b. Δ's presence may be waived with the filing of a physician's certificate. §104-16(c).
   c. Δ is to be represented by private or appointed counsel. §104-25(g)(2)(i).
   d. Fitness burden is by a preponderance of the evidence. If Δ has become fit, proceed to trial.
   e. Treatment burden is by clear and convincing evidence. Possible findings:
      i. Subject to involuntary admission. §104-25(g)(2)(i)(A). Set the next review hearing.
      ii. In need of mental health services in the form of inpatient care. §104-25(g)(2)(i)(B). This finding is also a basis for recommitment. Set next hearing. 730 ILCS 5/5-2-4(b).
      iii. In need of mental health services but not subject to involuntary admission or inpatient care. §104-25(g)(2)(i)(C). Also called "outpatient" services. This finding is not a basis for recommitment. Set next hearing. Even though Δ is out of DHS, reports and hearings continue. §104-25(g)(2).
      iv. The Δ is no longer in need of mental health services. Go to par. 7 re "treatment ends."
   f. Court to "enter its findings and an appropriate order." §104-25(g)(2)(i).
   g. The maximum treatment period, including g(2) treatment, may not exceed max sentence Δ would have been subject if convicted. §104-25(g)(4). Do not reduce by "good time" credit. 142 Ill. App. 3d 858.

4. **Conditional release:** This court must approve conditional release from DHS. §104-25(g)(2). Conditional release means the release from the custody of DHS under such conditions as the Court may impose which reasonably assures Δ's satisfactory progress in treatment or habilitation and the safety of Δ and others. 730 ILCS 5/5-2-4(a)(1)(D). Reports continue per 730 ILCS 5/5-2-4(a-1)(D). Hearings are not required per §104-25(g)(2)(i). Recommendation:hold status hearings for conditional release compliance check and to see status of Δ's unfitness.
   a. Terms and conditions may include outpatient care, alcoholic and drug rehabilitation programs, community adjustment programs, individual, group, family, and chemotherapy, periodic checks with the legal authorities and/or DHS. 730 ILCS 5/5-2-4(a)(1)(D).
   b. Conditional release shall be for a period of 5 years. If a forcible felony, Δ, treatment provider, or State may petition for extensions in increments of 5 years. 730 ILCS 5/5-2-4(a)(1)(D).
      The length of any conditional release is limited by the provision that limits all treatment to a period not to exceed the maximum sentence to which Δ would have been subject had he or she been convicted in a criminal proceeding. 725 ILCS 5/104-25(g)(4).
   c. If violation, revocation & recommitment necessary by clear and convincing evidence.199 Ill. 2d 108

5. **If court denies g(2) treatment or if g(2) treatment ends,** the due process clause of US Const prohibits State from proceeding until fitness is restored. 420 US 162. Statute gives little guidance. Await fitness. Require Δ to keep clerk informed of current address. Or State may *nolle*, with right to refile within limitations of law.

Fitness Form Orders

Fitness Form Orders available as printable documents on the Judicial Links website.

List of Orders

The Period Leading up to the Fitness Determination

1. *Order for Fitness Evaluation*: Includes evaluation upon a *bona fide* doubt and evaluation to see if a *bona fide* doubt exists

Upon the Finding that the Defendant is Unfit:

2. *Finding of Unfitness with Fitness Expected within 1 Year and Order for Treatment (With provisions if trier of fact is unable to determine if fitness is expected within 1 year)*: Includes physical and mental unfitness
3. *Order Upon Initial Finding of Unfitness and with Fitness Not Expected Within 1 Year*: Note: This finding immediately moves the case to The Extended Period of Treatment

The Initial Period of Treatment:

4. *Ninety-Day Hearing Order During the Initial Period of Treatment:* Includes continued treatment, moving to The Extended Period of Treatment, and restoration to fitness

The Extended Period of Treatment:

5. *Order at Conclusion of Discharge hearing with Provisions for Acquittal or Extended Treatment*: Includes findings of "Not Guilty," "Not Guilty by Reason of Insanity," and "Not 'Not Guilty.'"
6. *Ninety-Day Hearing Order During the Extended Period of Treatment*: Includes continued treatment and restoration to fitness provisions
7. *Order at the Expiration of the Extended Period of Treatment*: Includes continued treatment including commitment to DHS awaiting fitness and restoration to fitness provisions

The g(2) Period of Treatment :

See #7 above: *Order at the Expiration of the Extended Period of Treatment* which includes provisions moving matter into The g(2) Period of Treatment

8. *Periodic Review Hearing Order During the "(g)(2)" Period of Treatment*: Includes continued treatment, end of treatment with defendant remaining unfit, and restoration to fitness
9. *Order Upon "In Camera" Review of Progress Report During the "(g)(2)" Period of Treatment*: Note: upon receipt of a Progress Report when the next periodic review hearing is not scheduled for another 90 days
10. *Order at the End of the "(g)(2)" Period of Treatment*: Includes end of treatment with defendant remaining unfit and restoration to fitness

Restoration Order:

11. *Restoration Order Language*: a list of the above orders that contain that language
12. *Restoration Order*
13. *Order of Restoration (In the form as requested by some DHS facilities):* For some Chicago area DHS facilities as they have requested

Judges' Guide to Mental Illnesses in the Courtroom

OBSERVATIONS THAT INDICATE A DEFENDANT MAY HAVE A MENTAL ILLNESS

When Mental Illness Seems to be a Factor, Consider:

Prevalence:

- **Serious Mental Illness:** 17% of adults booked into jails (31% of women; 15% of men)
- **Substance Use Disorder:** 65% of adults in U.S. corrections systems
- **Co-Occurring Mental Illness/Substance Use Disorder:** 72% of adults with serious mental illnesses in jail also had co-occurring substance use disorders

Contextualizing Observations: *While these categories of observation are provided to alert judges that an individual may have a mental illness that requires different judicial action and/or attention by a mental health professional, they are not definitive signs of mental illness. Certain contextual elements are important to remember:*

- Appearing in court is an anxiety-provoking experience for most people.
- Individuals may not be prepared to navigate a system as complex and demanding as the criminal justice system.
- Individuals may bring to court skills that have allowed them to survive in their communities but are poor fits for interacting with the court (e.g., toughness, argumentativeness, silence).

Categories of Observation: *Do you see something in one of the following areas that does not make sense in the court context?*	**Courtroom Observations:** *Examples of how behaviors in the observational areas can indicate that the individual may have a mental illness:*
Appearance: Age, hygiene, attire, ticks/twitches	• Looks older/younger than the listed date of birth • Wears inappropriate attire (e.g., multiple layers of clothing in the summertime) • Trembles or shakes, is unable to sit or stand still
Cognition: Understanding/appreciation of situation, memory, concentration	• Does not understand where s/he is • Seems confused or disoriented • Has gaps in memory of events • Answers questions inappropriately
Attitude: Cooperativeness, appropriate participation in court hearing	• Stays distant from attorney or bench • Acts belligerent or disrespectful • Is not attentive to court proceedings
Affect/Mood: Eye contact, outbursts of emotion/indifference	• Does not make eye contact with judge or court staff • Appears sad/depressed, or too high-spirited • Switches emotions abruptly • Seems indifferent to severity of proceedings
Speech: Pace, continuity, vocabulary *(Note: Can this be explained by discomfort with English language?)*	• Speaks too quickly or too slowly • Misses words • Uses vocabulary inconsistent with level of education • Stutters or has long pauses in speech
Thought Patterns and Logic: Rationality, tempo, grasp of reality	• Seems to respond to voices/visions • Expresses racing thoughts that may not be connected to each other • Expresses bizarre or unusual ideas

JUDICIAL INTERACTIONS

Before Interacting with a Defendant, Consider:

- **How the courtroom environment is affecting the defendant:**
  - Are there noises or distractions in the courtroom that are negatively affecting the defendant?
  - Is there a family member or defense attorney who can help calm the person?
- **Safety** for yourself, the court staff, and the individual.
- **What is being asked and said in open court** and how this may affect future proceedings.

While Interacting with a Defendant, Consider:

Courtroom Situations: *Examples of commonly-observed scenarios*	**Immediate Reponses:** *Recommendations for immediate situation management*

When a mental illness is affecting a defendant's courtroom participation	• Speak slowly and clearly
	• Avoid jargon
	• Explain what's happening
	• Write instructions down if dates/address are involved
	• Treat individual with the respect you would give other adults
	• If appropriate, use principles of Motivational Interviewing:*
	  • Express empathy
	  • Point out discrepancies between goals and current behavior
	  • Roll with resistance
	  • Support self-efficacy

Loss of Reality:** *When the defendant appears confused or disoriented*	• Ground defendant in the here and now**
Loss of Hope: *When the defendant appears sad, desperate*	• As appropriate, instill hope in positive end result • To extent possible, establish a personal connection
Loss of Control: *When the defendant appears angry, irritable*	• Listen, defuse, deflect • Ask defendant about why s/he is upset • Avoid threats and confrontation
Loss of Perspective: *When defendant appears anxious, panicky*	• Seek to understand • Reassure and calm defendant • Deflect concerns

When Taking Action, Consider:

- **Having defendant approach the bench:** Would this de-escalate the situation or create a safety risk?
- **Re-calling the case later in the session/calendar:** Could this help the defendant calm down?
- **Determining whether to proceed:** Is a fitness or competency evaluation appropriate?
- **Setting conditions of release:**
  - Does defendant have capacity to understand conditions?
  - Does defendant have ability to adhere to conditions?
  - What effect will these conditions have on regularity of treatment?
  - What effect will time in jail have on mental health, access to medication, benefits maintenance, etc.?
  - How will conditions/time in jail affect the defendant's access to a primary caregiver?
- **Requesting mental health information:** What exactly do you need to make the decision facing you?
- **Making a referral (to mental health services provider or other services):**
  - What are the goals of the referral?
  - How might the defendant's cultural background and linguistic needs impact access to services?
  - What are the expectations for reporting back to the court?

* Motivational Interviewing is a counseling approach initially developed by William R. Miller and Stephen Rollnick.

**The Loss of Reality, Hope, Control, and Perspective and the immediate responses are based on the LOSS Model developed by Paul Lilley.

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SUGGESTED SCRIPT FOR ADMONITION REGARDING FITNESS EVALUATION per 725 ILCS 5/104-14

A fitness examination is hereby ordered [upon this Court's finding of] or [without any finding by this Court that there is] bona fide doubt as to defendant's fitness to stand trial. Pursuant to statute, the following admonition is given to the defendant with regard to examination and any treatment ordered.

Defendant: Statements made by you during the examination will not be admissible against you at trial unless you raise certain defenses, in which case your statements may be admissible only as to any such defense you may raise, limited to insanity or drugged or intoxicated condition. Statements made during the course of examination relating to the crime charged or to other criminal acts will not be disclosed without your consent. Failure or refusal to cooperate with the examination process may be admissible at trial on the issue of your mental or physical condition and would prevent you from offering expert evidence or testimony based on your own expert's examination of you, on any such defense you may have.

Fitness Hearing – Sample Jury Instructions

1. Even though the case law states with certainty that a fitness hearing is a civil proceeding and not criminal one (***People v. Rosochacki***, 41 Ill.2d 483, 489-490 (1969); ***People v. Williams***, 205 Ill. App. 3d 715, 721 (1990)), the practice in the state is commonly to draw upon the Criminal Illinois Jury Pattern Instructions. These sample jury instructions are consistent with that practice.

2. Simplifying verdicts for a Jury: In some courts in Illinois, the practice at jury trials is for the prosecution and defense to ask the court to approve an agreement that the jury is given only two possible verdict forms (fit and unfit), with the defendant waiving the right to have the jury decide if there is a substantial probability of attaining fitness within 1 year if provided with a course of treatment. If the jury finds the defendant unfit, the agreement provides that the judge will make the determination whether there is a substantial possibility of attaining fitness within one year if the defendant is provided with a course of treatment. The sample instructions cover both ways of proceeding.

3. Where possible, in those instances where the sample jury instructions contain modifications of existing Illinois Pattern Jury Instructions, deleted material is kept in the text and denoted by "strikethrough."

4. These sample jury instructions are basic ones that are more commonly used. Other jury instructions may be appropriate depending on the individual facts of a case and the law applicable to a particular case.

1.01 modified

The Functions Of The Court And The Jury

Members of the jury, the evidence and arguments in this case have been completed, and I now will instruct you as to the law.

The law that applies to this case is stated in these instructions, and it is your duty to follow all of them. You must not single out certain instructions and disregard others. When I use the word "he" in these instructions, I mean a male or a female.

It is your duty to determine the facts and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case.

Neither sympathy nor prejudice should influence you. You should not be influenced by any person's race, color, religion, or national ancestry.

From time to time it has been the duty of the court to rule on the admissibility of evidence. You should not concern yourselves with the reasons for these rulings. You should disregard questions and exhibits which were withdrawn or to which objections were sustained.

Any evidence that was received for a limited purpose should not be considered by you for any other purpose.

You should disregard testimony and exhibits which the court has refused or stricken.

The evidence which you should consider consists only of the testimony of the witnesses and the exhibits which the court has received. [You should consider all the evidence without regard to which party produced it.]

You should consider all the evidence in the light of your own observations and experience in life.

Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be.

Faithful performance by you of your duties as jurors is vital to the administration of justice.

Note: Some courts add this line in the 9th paragraph from Civil Illinois Pattern Jury Instructions – Civil 1.01: You should consider all the evidence without regard to which party produced it.

1.02

Jury Is Sole Judge Of The Believability Of Witnesses

Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any

interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.

[You should judge the testimony of the defendants in the same manner as you judge the testimony of any other witness.]

1.03

Arguments Of Counsel

Opening statements are made by the attorneys to acquaint you with the facts they expect to prove. Closing arguments are made by the attorneys to discuss the facts and circumstances in the case and should be confined to the evidence and to reasonable inferences to be drawn from the evidence. Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded.

1.05

Jury Notetaking

Those of you who took notes during trial may use your notes to refresh your memory during jury deliberations.

Each juror should rely on his or her recollection of the evidence. Just because a juror has taken notes does not necessarily mean that his or her recollection of the evidence is any better or more accurate than the recollection of a juror who did not take notes.

When you are discharged from further service in this case, your notes will be collected by the deputy and destroyed. Throughout that process, your notes will remain confidential and no one will be allowed to see them.

2.01 modified (or modified to such an extent that it is non-IPI)

The Charge Against The Defendant

Note: Practice varies in the state as to whether this instruction is given in any form.

If it is given:

- The defendant is charged with the offense[s] of ____. This proceeding is not the criminal trial on any charge. Instead, it is a trial for you to determine if the defendant is fit to stand trial.

  May add:
  You should not concern yourself with whether the defendant is guilty or not guilty of any pending charge.

Other alternatives (not necessarily recommended):

- The defendant is charged with the offense of ____. The defendant has asserted that he is unfit to stand trial.

- The defendant is charged with the offense of ____. The defendant has asserted that he is fit to stand trial.

- The defendant is charged with the offense of ____. The state has asserted that the defendant is unfit to stand trial.

- The defendant is charged with the offense of ____. The state has asserted that the defendant is fit to stand trial.

2.03 modified (or modified to such an extent that it is non-IPI)
Presumption Of Innocence--Reasonable Doubt--Burden Of Proof Generally

The State has the burden of proving the fitness of the defendant by a preponderance of the evidence, and this burden remains on the State throughout the case.

Note: Presumption of fitness extinguishes upon a finding of a *bona fide* doubt as to fitness. ***People v. Baldwin***, 185 Ill. App. 3d 1079, 1086 (1989). Make no reference to any presumption.

2.04
Failure Of Defendant To Testify

The fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict.

Alternative:

You are not to draw any inference from the fact that the defendant did not testify.

Notes (the following are not necessarily consistent with one another):

The Committee notes for IPI 2.04 say "This instruction should be given *only* at the defendant's request and, then, it *must* be given."

A fitness trial is a civil proceeding. ***People v. Rosochacki***, 41 Ill. 2d 483, 489-490 (1969); ***People v. Williams***, 205 Ill. App. 3d 715, 721 (1990).

There is no right to remain silent at a fitness trial. ***Holmes v. King***, 709 F. 2d 965, 968 (5th Cir. La.) *cert. denied*, 464 U.S. 984 (1983).

In an involuntary commitment trial, under the Illinois Mental Health Act a respondent may refuse to attend and "no inference may be drawn" from the respondent's non-attendance**.** ***In re Frances K.***, 322 Ill. App. 3d 203, 208 (2001) citing 405 ILCS 5/3-806(c) (West 1998).

In a criminal fitness proceeding, the defendant's presence may be waived with a physician's certificate. **725 ILCS 5/104-16(c)**.

Non-IPI
Definition of Fitness
725 ILCS 5/104-10

A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense.

Non-IPI
Issues in Fitness (jury to decide all issues)
725 ILCS 5/204-10, 5/104-16(d)

To prove that the defendant is fit to stand trial, the State must prove the following propositions:

First Proposition: That the defendant is able to understand the nature and purpose of the proceedings against him, and

Second Proposition: That the defendant is able to assist in his defense.

If you find from your consideration of all the evidence that each one of these propositions has been proved by a preponderance of the evidence, you should find the defendant fit to stand trial.

If you find from your consideration of all the evidence that any one of these propositions has been not proved by a preponderance of the evidence, you should find the defendant unfit to stand trial. You should then continue on with your deliberations and decide whether, if provided with a course of treatment, the defendant will attain fitness within one year. That issue can be answered in one of the following three ways:

(1) There is a substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year; or
(2) There is not a substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year; or
(3) You are unable to determine whether there is a substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year.

Non-IPI
Issues in Fitness (jury to decide fitness but if unfit then not probability of treatment length)
725 ILCS 5/204-10, 5/104-16(d)

To prove that the defendant is fit to stand trial, the State must prove the following propositions:

First Proposition: That the defendant is able to understand the nature and purpose of the proceedings against him, and

Second Proposition: That the defendant is able to assist in his defense.

If you find from your consideration of all the evidence that each one of these propositions has been proved by a preponderance of the evidence, you should find the defendant fit to stand trial.

If you find from your consideration of all the evidence that any one of these propositions has been not proved by a preponderance of the evidence, you should find the defendant unfit to stand trial.

Note: Give where the State and the defense have agreed that upon a finding that the defendant is unfit to stand trial, the defendant waives the jury deciding if there is a substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year, and, further, that the judge will make that decision.

4.18 modified

Definition Of Preponderance Of The Evidence

The phrase "preponderance of the evidence" means whether, considering all the evidence in the case, the proposition on which the ~~defendant~~ State has the burden of proof is more probably true than not true.

26.01 modified

Concluding Instruction (jury to decide all issues)

When you retire to the jury room you first will elect one of your members as your foreperson. He or she will preside during your deliberations on your verdict.

Your agreement on a verdict must be unanimous. Your verdict must be in writing and signed by all of you, including your foreperson.

You will be provided with four forms of verdict that state as follows:

We, the jury, find the defendant ____ fit to stand trial.

We, the jury, find the defendant ____ unfit to stand trial and that there is a substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year.

We, the jury, find the defendant ____ unfit to stand trial and that there is not a substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year.

We, the jury, find the defendant ____ unfit to stand trial, and we are unable to determine if there is a substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year.

From these four verdict forms, you should select the one verdict form that reflects your verdict and sign it as I have stated. Do not write on the other verdict forms. Sign only one verdict form.

26.01 modified

Concluding Instruction (jury to decide fitness but if unfit then not probability of treatment length)

When you retire to the jury room you first will elect one of your members as your foreperson. He or she will preside during your deliberations on your verdict.

Your agreement on a verdict must be unanimous. Your verdict must be in writing and signed by all of you, including your foreperson.

You will be provided with two forms of verdict that state as follows:

We, the jury, find the defendant ____ fit to stand trial.

We, the jury, find the defendant ____ unfit to stand trial.

From these two verdict forms, you should select the one verdict form that reflects your verdict and sign it as I have stated. Do not write on the other verdict form. Sign only one verdict form.

Note: Give where the State and the defense have agreed that upon a finding that the defendant is unfit to stand trial, the defendant waives the jury deciding if there is a substantial probability that the defendant, if provided with a course of treatment, will attain fitness within one year, and, further, that the judge will make that decision.

RULE 402(d)
ADMONISHMENT TO DEFENDANT
PRIOR TO PLEA DISCUSSIONS

Rule 402(d) requires that prior to participating in the plea discussions, the trial judge shall admonish the defendant and inquire as to the defendant's understanding in the following manner (provided here in script format by the editor, including the Rule's proposed text with minor "best practice" edits):

> Your attorney and the prosecutor have requested that I participate in a conference to determine whether or not the charge(s) which is/are pending against you can be resolved by a plea of guilty. If I do participate in such discussions, during the course of the conference the prosecutor will be present and advise me of the facts of the case as contained in the police reports or conversations with witnesses. Your attorney will also be present and will advise me of any information the defense may have concerning the circumstances which led to your arrest in this case. Without the conference, I would not learn about this information unless the case proceeded to trial. I will also learn whether you have a prior criminal history, driving record, any alcohol or drug problem, your work history, family situation, and other things which would bear on what, if any punishment should be imposed upon you as a result of a plea of guilty to the charge or charges against you. These are things that I would not learn about unless the case went to trial and you were found guilty, at a sentencing hearing. At the end of the conference, I may comment on the lawyers' suggestions for a plea, or I may make a recommendation as to what an appropriate sentence would be. You and the prosecutor are free to accept or reject my recommendation. However, if the defense or prosecution rejects my recommendation, or if you wish to proceed to trial on the charge or charges, I remain the judge assigned to the case for trial and you may not obtain another judge solely on the basis that I participated in the conference and have been made aware of the facts and circumstances surrounding the incident as well as your background. This means that you will be waiving your right to request a substitution of judge based upon my knowledge of the case. Knowing all of these things do you still wish for me to participate in this conference?

SUGGESTED NOTICE OF APPEAL RIGHTS FOLLOWING PLEA AND SENTENCING

Checklist For Appeal Rights (Ill. S. Ct. R. 605):

- Notice of right to appeal.
- Prerequisite written motion within 30 days if to withdraw plea or reconsider non-negotiated sentence.
- Notice of effect of vacature of plea or sentence.
- Right to post-plea and appellate counsel and transcript if indigent.
- Notice of waiver of any issue not raised in any post-trial motion that is filed.

Sample Script for Advisement of Appeal Rights:

To Defendant: You have the right to appeal even though you have entered a (negotiated) plea to the charges against you, but to do so there are requirements you must meet:

(If fully negotiated or sentencing cap) Prior to taking an appeal you must first file with the Circuit Clerk within 30 days of today, a written motion asking my permission to allow you to withdraw your plea and agreement, stating every reason you may have for doing so, as any reason not raised may be deemed waived, or given up, on appeal.

If I granted your motion, I would set your plea aside just as if you had never entered it. Your case would then be set for further proceedings, including trial and any charges dismissed as a part of the plea agreement would be reinstated.

If I denied your motion then within 30 days from that date of denial you must file, or ask the Circuit Clerk to file on your behalf, a notice of appeal in order to preserve your right to appeal.

If no post-trial motion is filed, you have 30 days from today's date within which to file such notice of appeal or to ask that the Circuit Clerk do so on your behalf, to preserve your right to appeal.

You have the right to have an attorney to assist you with any post-trial proceedings and appeal. If you cannot afford an attorney, one will be appointed for you at no cost, and under those circumstances you will also be entitled to a free copy of the transcript of the proceedings in your case.

(If open plea or plea with dismissal of other charges) Prior to taking an appeal, if seeking to withdraw your plea of guilty, you must first file with the Circuit Clerk within thirty days of today, a written motion asking my permission to allow you to withdraw your plea, stating every reason you may have for doing so, as any reason not raised may be deemed waived, or given up, on appeal. If seeking to appeal the sentence imposed, you must first file with the Circuit Clerk within thirty days of today, a written motion asking that I reconsider the sentence imposed, stating every reason or claim of error that you may have for doing so, as any matter not raised may be deemed waived, or given up, on appeal.

If any post-trial motion is filed and **granted**, the sentence may be modified or the charges against you may be reinstated along with any charges dismissed or not brought by the State as part of your plea and those matters would be set for further proceedings, trial or sentencing as the case may be.

If any post-trial motion is filed and **denied**, you will have 30 days from the date of such denial within which to file a notice of appeal or to ask the Circuit Clerk to do so on your behalf, to preserve those issues for further review. If no post-trial motion is filed, you have 30 days from today's date within which to file such notice of appeal or to ask that the Circuit Clerk do so on your behalf, to preserve your right to appeal.

You have the right to have an attorney to assist you with any post-trial proceedings and appeal. If you cannot afford an attorney, one will be appointed for you at no cost, and under those circumstances you will also be entitled to a free copy of the transcript of the proceedings in your case.

CHECKLIST FOR FULLY NEGOTIATED PLEA
(Ill. S. Ct. R. 402 & 604)

- Confirm proposed terms including MSR, applicable truth-in-sentencing percentage, fines, fees and assessments, restitution, extended term, mandatory consecutive, etc.
- Determine defendant's ability to understand and agree.
- Advise, and confirm defendant's knowledge and understanding, of charges to which he is pleading guilty.
- Obtain State's factual basis and have defendant confirm or acknowledge factual basis.
- Advise, and confirm defendant's knowledge and understanding, of minimum and maximum possible penalties including applicable extended term and MSR.
- Advise, and Confirm defendant's knowledge and understanding of, defendant's right to plead guilty or not guilty, and if pleading guilty, the trial rights waived by that plea, including the right to a bench trial, a jury trial and the right to confront and cross-examine witnesses against him.
- Confirm voluntariness of defendant's plea and agreement.
- Have State indicate prior juvenile/adult criminal history.
- Find plea knowingly and voluntarily given,
- Enter judgment, conviction and sentence including MSR.
- Include any required admonitions (e.g. deportation, weapons restrictions, truth-in-sentencing).

Suggested Script for Fully Negotiated Plea:

To State: What are the terms of the fully negotiated plea? Are there any special sentencing provisions, extended term, enhancements, mandatory consecutive provisions, statutory minimums or special truth-in-sentencing provisions that apply?

To Defendant: Is that your understanding of the plea agreement? Is this the way you want to proceed today?
Before I can accept your plea agreement, I want to make sure that you fully understand the charge(s) against you, the trial rights that you are waiving or giving up by pleading guilty, and the possible consequences of your plea. To begin I'll get some background information about you.
How old are you?
How many years' education have you had?
Are you under any disability, either medical, mental, physical or otherwise? (follow-up as needed)

Are you taking any kind of medication? Is there any that you are supposed to be taking? (follow-up as needed)
Are you under the influence of any substance at this time?
Have you had an ample opportunity to discuss these matters with your attorney?
You are charged as follows: [read charge(s)]
Do you understand the charge(s) against you?

To Defendant: The (or each) charge against you is a Class ( ) offense, carrying a possible sentence of (stating applicable term, extended term, MSR term, probation alternative term, fine, restitution as applicable) from chart below, indicating term, extended term, probation term and maximum fine, but note any special sentencing provisions that may apply in a particular case such as minimum terms, truth-in-sentencing percent good time credit, MSR of 4 years for certain domestic violence cases, or 3 to life for certain sex offenses, etc.). Do you understand these possible penalties? (and that, if placed on probation and you violate probation those same terms could then apply?)

In pleading guilty to ____ you will be sentenced to (state applicable term …and if DOC, to be followed by ____ years MSR) Do you understand that is the sentence that will be imposed?

Cl. X: 6-30-60+3 non-probationable + $25,000 fine // **Cl. 1:** 4-15-30+2 (or 48 mo. probation) + $25,000 fine // **Cl. 2:** 3-7-14+2 (or 48 mo. probation) + $25,000 fine // **Cl. 3**: 2-5-10 (or 30 mo. probation) + $25,000 fine // **Cl 4:** 1-3-6+1 (or 30 mo. probation) + $25,000 fine // **Cl. A** <1 yr. (or 24 mo. probation) + $2,500 fine // **Cl. B** <6 mo. (or 24 mo. probation) + $1,500 // **Cl. C:** <30 days (or 24 mo. probation) + $1,500 // **Petty:** $1,000 max fine.

(Ask Prosecutor if any other special sentencing provisions apply.)

Jail Credits or Prison Truth-In-Sentencing: Under truth-in-sentencing, your sentence is subject to day-for-day (or applicable percentage) credit, also applicable to credit you will be given for time served in custody on this charge prior to today. Whether you receive or keep those additional credits, or earn other credits for participation in DOC programs, is between you and DOC over which I do not have any control.

Deportation Admonition: If you are not a citizen of the United States, you are hereby advised that conviction may also carry the consequence of deportation, exclusion from admission to the US, or denial of naturalization under US laws.

Domestic Battery Admonition: An individual convicted of domestic battery may be subject to federal criminal penalties for possessing, transporting, shipping, or receiving any firearm or ammunition in violation of the Federal Gun Control Act of 1968, and will not be qualified to receive an FOID card from the State of Illinois.

You have the right to continue to plead not guilty or to plead guilty. You also have the right to a trial by a jury or by a judge without a jury, the right to confront and cross examine the state's witnesses against you, to subpoena and have testify anyone you wished on your behalf, to testify if you chose to waive or give up the right that you otherwise have to remain silent, and the State would have the burden of proving your guilty beyond a reasonable doubt. If you continue in your plea, you are giving up these rights. Do you understand these rights that you are waiving or giving up?

Has anyone threatened or forced you to get you to plead guilty? Has anyone promised you anything other than what I've heard today? Are you entering into this agreement of your own free will?

To State: What is the factual basis, please?

To State: Does the defendant have a prior criminal record?

To Both Counsel: Do you both waive pre-sentence report?

To Defendant: Is there anything you want to say before I accept your plea of guilty?

I'll accept your plea as knowingly, understandingly and voluntarily made, supported by a factual basis, and I'll enter judgment, conviction and sentence according to your agreement, all mandatory fines, fees costs and assessments also to apply. Your sentence includes (state primary terms including MSR and special terms, if applicable).

[end]

Streamlined Script for Misdemeanor / Traffic Pleas in High-Volume Courts
(Not "as prescribed" by Rule 402 – but offered to hit the basics)

You have (or your attorney has) indicated your willingness to plead guilty to the charge of _____, in exchange for the sentence of (or as just stated by the prosecutor). Is that correct? Do you understand that by doing so, you are giving up your right to (an attorney or to have an attorney appointed to represent you if you could not afford one), a trial by a jury, or by a

judge , and your right to confront and cross examine the state's witnesses, present witnesses and evidence on your own behalf, testify if you chose to do so, and the right to hold the state to its burden to prove your guilt beyond a reasonable doubt? Do you understand that by pleading guilty, you are giving up all those trial rights?

The possible penalties you face include the following, (and if you are being placed on probation, it is important to understand that you could face these same penalties again if you violate the terms of your probation): _____. Do you understand those possible sentences that could be imposed? Are you pleading guilty freely and voluntarily?

I'll accept your plea and you are sentenced accordingly. Even though you pled guilty, you have the right to appeal but would first have to file a motion to withdraw your plea within 30 days of today, and again you would have the right to an attorney or to have an attorney appointed if you could not afford one as well as free transcripts of the plea.

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- Script: Explanation of Closing Arguments
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THE PROCEDURES SUGGESTED IN THIS APPENDIX ARE EXAMPLES ONLY. IT IS RECOMMENDED THAT EACH INDIVIDUAL JUDGE TAILOR "SCRIPTS" OR CHECK-LISTS WHICH, IN HIS OR HER ESTIMATION, COMPLIES WITH LOCAL CUSTOM AS WELL AS THE REQUIREMENTS OF ILLINOIS SUPREME COURT RULES, STATUTORY ENACTMENTS, AND CASE LAW.

JURY

TRIAL ISSUES FROM SELECTION TO DISCHARGE

SUGGESTED EXAMPLE CHECKLISTS AND SCRIPTS FOR USE ON THE BENCH

APPENDIX PART TWO – TRIAL PROCEDURE

JURY TRIAL ISSUES FROM SELECTION TO DISCHARGE - APPENDIX

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CHECKLIST:

INITIAL PRE-TRIAL CONSIDERATIONS

While judges each tend to have their own procedure and style, the following checklist suggestions are made as to items that may be reviewed before trial begins:

1. FITNESS: Defendant's fitness for trial: meds, disabilities, whether under influence;

2. READINESS FOR TRIAL:
   - ✓ availability of witnesses;
   - ✓ confirm defendant's prior consultation with counsel;
   - ✓ review of witness lists;
   - ✓ confirm that all witnesses are under subpoena;
   - ✓ confirm whether there are offers or plea discussions pending [including details of any offer previously made and rejected so that defendant personally confirms understanding thereof]; Inquiry should establish whether defendant has made a knowing and voluntary decision to continue to plead not guilty, thereby rejecting any offer by the State that might tend to reduce his punishment from the maximum possible for the charges he will face at trial;
   - ✓ confirm State and defendant agree on and all minimum and maximum penalties including enhancements, consecutive, etc] if trial and conviction ensue;
   - ✓ confirm whether defendant would be subject to deportation upon a plea or verdict of guilty to any of the pending charges; Admonish pursuant to **725 ILCS 5/113-8**, if applicable;
   - ✓ confirm that discovery has been exchanged;
   - ✓ determine whether there are any pretrial motions still pending;
   - ✓ confirm with defendant that witness list is complete.

3. SELF REPRESENTATION: If defendant insists on self-representation, **S. Ct. Rule 401** admonitions must be given. These include, essentially:
   a. An explanation of the charge(s), minimum and maximum penalties including applicable possible extended, enhanced, habitual criminal, or potentially consecutive sentencing risks, MSR, length or non-applicability of probation, fines, assessments and restitution if applicable.
   b. Defendant's right to counsel and to have counsel appointed without cost if indigent.
   c. Absence of proof of a "severe mental illness" that would negate Defendant's competency to represent himself [***Indiana v. Edwards***, 554 U.S. 164 (2008)].
   d. Assurance of Defendant's understanding and voluntariness of waiver;
   e. And In the event stand-by counsel is requested, determine nature and scope of request, take NO blanket position as to appointment of stand-by counsel, and make record of use of discretion in ruling. If appointed, state the specific duties and limitations of appointed standby counsel.

4. APPEARANCE:
   If defendant is in custody, confirm defendant's right to be in "street clothing," the availability of same and defendant's right to appear not in custody;

5. SHACKLING:
   Determine need for restraints (***Boose*** hearing if applicable; **S. Ct. Rule 430** requires extensive record noting the list of considerations contained within the Rule);

6. CHARGES TO BE READ TO VENIRE:
   As to indictment to be read to jury venire, determine whether State is proceeding on all counts; identify portions of indictment that are sentencing considerations only (and therefore NOT read); A suggestion for heavily publicized cases where jurors are likely to have heard or read about case, is to request of counsel a stipulated statement of alleged facts, going well beyond the minimal facts in the indictment, to more meaningfully ask member of the venire if they have ever heard of the case and if so, whether they recall learning any facts beyond those mentioned.

7. POTENTIAL LESSER-INCLUDED CHARGES:
   Determine if "lesser-included" instructions are contemplated.

8. RIGHT TO TESTIFY:
   Determine whether defendant objects to Court's asking fourth ***Zehr*** / **S.Ct. Rule 431(b)** question during *voir dire;*

9. JURY SELECTION PROCEDURE:
   Explain Court rules for jury selection: backstriking, challenges for cause, method of Batson challenges, procedure for peremptories, number of alternates and availability of additional peremptories for alternates; Determine if special voir dire is requested as to matters pertinent to case; Determine whether defense counsel intends to present an opening statement or affirmative defenses, to tailor Court's opening remarks accordingly.

10. RULES OF CONDUCT:
    Explain rules for trial conduct: demeanor, defendant contact with spectators, cell phones, defendant's right (or not) to approach the bench with counsel, working hours, requirement to be present on time to avoid trial in absentia, need to remain present or immediately accessible during jury deliberation. [See "Conduct of Attorneys During Trial" for suggested rules of conduct.]

11. PUBLIC TRIAL:
    In high profile or heavily attended trials: Confirm rules of conduct for spectators, no signs, message shirts, victim pictures, contact with jurors, civility to others; and determine need for additional security.

12. PUBLIC COMMENT:

    Confirm expectation of counsel to abide by the Illinois Rules of Professional Conduct including but not limited to the obligation of Rule 3.6 and Rule 3.8 (f) (restricting but not prohibiting parties' right to public comment regarding trial proceedings). See page __ of this Appendix.

13. WITNESSES & EXHIBITS:
    Obtain witness lists and cross reference to avoid duplication. Determine if any discovery, evidentiary or witness problems, rule on any evidence deposition objections, assure that parties pre-mark exhibits.

14. RULE ON WITNESSES:
    Determine whether witnesses are to be excluded.
    Determine whether "Rule On Witnesses" abides during jury selection, opening statements, testimony of that witness or thereafter.

15. JURORS' MEDIA EXPOSURE:
    A suggestion for heavily publicized cases is to request of counsel a stipulated statement of alleged facts, going well beyond the minimal facts in the indictment, to more meaningfully ask member of the venire if they have ever heard of the case and if so, whether they recall learning any facts beyond those mentioned.

16. EVIDENCE ISSUES:
    Check with counsel to determine whether there are any "chain of evidence" stipulations or expected contests to assure "chain" witnesses are subpoenaed and available if needed.
    Detemine whether there are any ***Montgomery*** / **Rule of Evidence 609** impeachment issues (based on prior crimes of defendant or witnesses) anticipated.

17. BURDEN OF PROOF ISSUES:
    Determine whether there are any affirmative defenses intended, and if so,
    Tailor opening remarks to jury accordingly, not locking defendant into presenting same but leaving possibility open that if raised, state must disprove beyond a reasonable doubt.

18. INTRO TRIAL RULES: I
    Indicate court's rules for approaching witnesses on the stand, procedure for permitting or limiting re-cross examination (and re-re-direct, etc. *ad infinitem*); [Practice note: judge may advise parties in advance that if re-cross examination is to be requested, such request is to be made at sidebar for good cause shown];
    Indicate any rules for making "non-speaking" objections.

19. SIDEBARS:
    Review procedure for defendant's participation (or not) at sidebar conferences, e.g. that defendant has such right and will be deemed to waive if he does not approach with his counsel; use of court reporter for sidebars;
    Review duty of the attorney preserving a record of matters discussed at any sidebar, to request discussion on the record at next jury recess.

20. EXPERTS:
    State court's rule or preference regarding "tender of a witness as an expert" and whether it is necessary or proper to ask the court to "certify" a witness as an expert. (The practice varies, but there appears to be no legal reason for a judge to "certify" or pre-approve the testimony of a witness before knowing whether his or her answers will draw objection as to foundation or scope of expertise.)

21. USE OF AUDIO-VISUAL EQUIPMENT:
    Require counsel to obtain and test use of equipment for media presentation outside of presence of jury so that proceedings are not delayed due to "technical difficulty."

22. TRANSCRIPTS:
Review with court reporter and then with counsel the availability (or not) of real time transcription, connectivity to court reporter's real-time system, or daily copy of transcripts;
Advise parties to address requests of court reporter to the court, and not directly to court reporter, to avoid undue burden on reporting staff.

23. JURY INSTRUCTIONS:
Announce when jury instructions are to be tendered, pre-numbered, plus clean copy, and preference of court regarding or avoiding duplication between prosecution and defense sets.

24. COURT SCHEDULE:
Expected working hours; Any scheduling conflicts or concerns.

25. Other rules or expectations applicable:
_____
_____
_____

See Pre-Trial Scripts below:

ADDRESS TO COUNSEL REGARDING CONDUCT DURING JURY TRIAL (P. 66)

ADDRESS TO DEFENDANT REGARDING RIGHTS DURING JURY TRIAL (P. 68)

CHECKLIST:

SHACKLING OR RESTRAINT OF DEFENDANT

The following checklist is provided per **Ill. S. Ct R. 430**, codifying ***People v. Boose***, 66 Ill. 2d 261 (1977) and ***People v. Allen***, 222 Ill. 2d 340 (2006), before a defendant in custody may be shackled during a bench or jury trial:

1. Hearing to be held in which the defendant has a right to be heard;

2. Court is to balance interests;

3. Must find manifest need for protection or to prevent escape, based on evidence specifically found in the particular case;

4. At such hearing, the trial court shall consider and shall make specific findings as to:

(1) the seriousness of the present charge against the defendant;

(2) defendant's temperament and character known to the trial court either by observation or by the testimony of witnesses;

(3) defendant's age and physical attributes;

(4) defendant's past criminal record and, more particularly, whether such record contains crimes of violence;

(5) defendant's past escapes, attempted escapes, or evidence of any present plan to escape;

(6) evidence of any threats made by defendant to harm others, cause a disturbance, or to be self-destructive;

(7) evidence of any risk of mob violence or of attempted revenge by others;

(8) evidence of any possibility of any attempt to rescue the defendant by others;

(9) size and mood of the audience;

(10) physical security of the courtroom, including the number of entrances and exits, the number of guards necessary to provide security, and the adequacy and availability of alternative security arrangements. After allowing the defendant to be heard and after making specific findings, the trial judge shall balance these findings and impose the use of a restraint only where the need for restraint outweighs the defendant's right to be free from restraint.

CHECKLIST:

CONFIRMATION OF PROCEDURES WITH COURT PERSONNEL

While judges each tend to have their own procedure and style, the following suggestions are made as to items that may be addressed to courtroom personnel before the jury venire is brought into the courtroom for trial:

1. JUROR INFO: Obtain jury lists and questionnaire answers / cards / printout or whatever is made available to the court and parties (to be collected back following voir dire); determine number of jurors needed and order in which jurors /jury list / juror information is provided by clerk or jury commission.

2. JURY PRE-INTRODUCTION: Confirm whether jurors are shown video, or explained jury service (view what they view if you are not specifically aware).

3. JURY SWORN: Confirm whether venire members have been previously sworn as members of venire or will be sworn in by judge or clerk in courtroom.

4. MEDIA: Determine how media will be defined and where media (including video if allowed) will be situated to enable access without disruption of proceedings (or video/identification of potential or selected jurors).

5. DOCKETS POSTED: Have court personnel remove from view of venire any docket sheets or other information that might indicate case information such as level of offense.

6. JURY SEATING: Direct court personnel as to how or where to seat jurors upon arrival in courtroom. Keep jurors separate from parties and their families, witnesses, or possible protest influence.

7. COURT REPORTER PREP: Provide Court Reporter with jury lists, witness lists and other matters likely to be raised in process of *voir dire*.

8. CELL PHONES: Determine policy for jurors' possession of cell phones;

9. JUROR NOTES: Determine how bailiff or deputy provides note-taking material and how they secure juror notes during jury recesses;

10. OPENING COURT: Direct court personnel as to how (or whether) to formally open court.

11. COMMUNICATION WITH JURORS: Ensure bailiff's understanding of rule not to discuss or comment on witnesses, case, scheduling, or any other matters with jurors, how to request and receive notes from jurors, and to keep court advised of any concerns.

12. PUBLIC TRIAL: Ensure that members of public are not excluded during voir dire or trial; that witnesses are excluded if "rule on witnesses" are in place but are permitted to enter after close of all testimony; that courthouse doors remain accessible if trial remains in session after courthouse closing hours.

13. JAILED DEFENDANT: Ensure bailiff's understanding that jury is not to know defendant is in jail or discretely shackled, and determine procedures for moving defendant in and out of courtroom unseen by venire or selected jurors.

14. Other rules or expectations applicable.

RULES RESTRAINING PUBLIC COMMENT REGARDING TRIAL PROCEEDINGS

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its

security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know would pose a serious and imminent threat to the fairness of an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to pose a serious and imminent threat to the fairness of an adjudicative proceeding, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that would pose a serious and imminent threat to the fairness of a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public

response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See **Rule 3.8(f)** for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings. *Cf.* ***Devine v. Robinson***, 131 F. Supp. 2d 963 (N.D. Ill. 2001).

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The duty of a public prosecutor is to seek justice, not merely to convict. The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that pose a serious and imminent threat of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

[1A] The first sentence of **Rule 3.8** restates an established principle. In 1924, the Illinois Supreme Court reversed a conviction for murder, noting that:

> "The state's attorney in his official capacity is the representative of all the people, including the defendant, and it was as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen." ***People v. Cochran***, 313 Ill. 508, 526 (1924).

In 1935, the United States Supreme Court described the duty of a federal prosecutor in the following passage:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." ***Berger v. United States***, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321, 55 S. Ct. 629, 633 (1935).

The first sentence of **Rule 3.8** does not set an exact standard, but one good prosecutors will readily recognize and have always adhered to in the discharge of their duties. Specific standards, such as those in **Rules 3.3, 3.4, 3.5, 3.6**, the remaining paragraphs of **Rule 3.8**, and other applicable rules provide guidance for specific situations. **Rule 3.8** is intended to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably.

[2] In Illinois, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. **Paragraph (c)** does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in **paragraph (d)** recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] **Paragraph (e)** is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] **Paragraph (f)** supplements **Rule 3.6**, which prohibits extrajudicial statements that pose a serious and imminent threat of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with **Rule 3.6(b)** or **3.6(c)**. *Cf.* ***Devine v. Robinson***, 131 F. Supp. 2d 963 (N.D. Ill. 2001).

[6] Like other lawyers, prosecutors are subject to **Rules 5.1** and **5.3**, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. **Paragraph (f)** reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, **paragraph (f)** requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

CHECKLIST:

ADDRESS TO VENIRE BEFORE JURY SELECTION BEGINS

While judges each tend to have their own procedure and style, the following suggestions are made as to items that may be addressed to the jury venire, with counsel and defendant present, on the record, upon bringing the jury venire into the courtroom for trial:

1. WELCOME: introduce self, comment on appreciation of jurors and benefit of civic duty.

2. INTRO TO PROCESS: Explain process (court's comments, and court's questions, counsel's questions, jury selection, then trial begins) and explain that court's comments are not intended to indicate opinion as to the facts.

3. INTRO TO CASE: explain that indictment is not evidence of guilt, need to keep an open mind, eventually to decide the case only on the law and evidence and not on basis of prejudice, speculation, guess or conjecture; read indictment (omitting sentencing enhancements), introduce counsel and defendant. Estimate number of days of trial.

4. WITNESSES: Explain purpose of reading list of potential witnesses to determine any familiarity (not automatically disqualifying but will inquire further); read list; explain that some witness are officers or have titles or degrees but that no witness is to be pre-judged based upon such position or title, nor is their credibility to be pre-judged, but rather that their testimony, as well as the testimony of any other witness and the defendant if defendant chooses to testify, is to be given whatever weight the jury determines based upon the testimony given, in light of all evidence in the case. (One suggestion is to ask members of the venire in the jury box if they recognize any of the names as they are read, and do follow-up inquiry as necessary.)

5. JUROR RULES: Review rules regarding service as potential jurors, and as jurors if selected: open mind, decide case without sympathy, bias, prejudice, speculation or conjecture, not discussing with one another or others, no contact with parties, witnesses or counsel during recesses, no media contact, no blogging, texting or twittering, not to go outside the courtroom or Google for info regarding case, subject matter or participants; to set aside any experience as juror or from watching TV to decide case on own facts and law; to follow the law as given regardless of personal opinion.

6. VOIR DIRE: Explain need to be frank and open in answering questions; offer option of approaching bench if answer is embarrassing or may prejudice or influence other jurors. Explain duty to advise court of any matter that might raise a concern regarding fairness or qualification to serve, even if the right question is not asked.

7. ELIGIBILITY: Confirm eligibility of jurors to serve: US Citizen, over 18, resident of county, not a party to any cases pending in same court, not having been previously deemed "permanently disabled from jury service," and not having served on a jury within 1 year (unless juror waives disqualification and agrees to serve again). Eligibility may have been confirmed by Circuit Clerk or jury commission ahead of time, or may be confirmed by checking juror cards or answers to jury summons questionnaire, or by asking venire as a group if there are any that do not possess those qualifications.

8. PERSONAL NEEDS: Explain procedure for member of venire to access facilities if needed during selection process.

CHECKLIST:

QUESTIONING OF VENIRE MEMBERS FOR JURY SELECTION

While judges each tend to have their own procedure and style, the following suggestions are made as to items that might be covered in questioning members of the jury venire, with counsel and defendant present, on the record. The suggestions below are culled from scripts used by numerous judges. All of the topics suggested are not required in all cases. Individual judges will craft a script with which that judge is comfortable. Questioning must, however, cover those matters in **S.Ct. Rules 431** (***Zehr*** questions) and must address the requirements of **S.Ct. Rule 434** (jury selection).

1. JUROR BIO: General questions as to juror's identity. (If court and counsel have jury questionnaire answers in advance, avoid duplication, other than necessary follow-up, such as determining occupation from which juror lists "retired" or questions the juror failed to answer.)

2. CASE-SPECIFIC QUESTIONS: Have you heard of case? Know or know of any of the people at counsel table? Know or know of any of the witnesses previously listed? Have any concerns regarding your availability to serve? Have any concerns regarding your ability to be fair and impartial if selected to serve? Do you have any religious or philosophical impediment or inability to rendering a decision in a case such as this, or regarding this defendant?

3. ***ZEHR QUESTIONS*** / **S.Ct. Rule 431(b)**: Explain obligation of jurors to abide by these important rules of law and procedure applicable to all cases in which a defendant is charged with a criminal offense: That the Defendant is to be presumed innocent of the (each) charge against him; that a defendant cannot be found guilty as to the charge (each charge) unless the state has proven his guilt beyond a reasonable doubt as to that (or each) charge; that defendant is not required to offer any evidence on his own behalf, and is not required to testify, and that if the defendant elects not to testify, that fact alone cannot be held against him. THEN ask the ***Zehr*** questions, <u>allowing each juror the opportunity to individually answer</u>:

    a. Do you understand and accept that the defendant is presumed innocent of the charge(s) against him?
    b. Do you understand and accept that before a defendant can be convicted the State must prove the defendant's guilty beyond a reasonable doubt?
    c. Do you understand and accept that the defendant is not required to offer any evidence on his own behalf?
    d. Do you understand and accept that the defendant has the right to testify or to not testify and that a defendant's choice not to testify cannot be held against him?

4. FOLLOW LAW: Will you agree to abide by the Court's instructions regardless of any personal opinion you may have as to what the law is or should be?

5. FAIRNESS: Will you agree to be fair and impartial in rendering a verdict?

CHECKLIST:

ADDRESS TO SELECTED JURORS FOLLOWING JURY SELECTION

While judges each tend to have their own procedure and style, the following suggestions are made as to items that may be addressed to the selected jury and alternates, on the record, before trial begins:

1. WELCOME: Thank jurors for endurance;

2. TRIAL PROCESS: Explain trial procedure (opening statements, evidence, closing arguments, instructions, deliberation), potential for sidebar conferences to keep case moving or proceedings outside jury hearing to address legal issues, and process of lawyers making and judge ruling on objections to ensure fairness of proceeding;

3. JUROR RULES: Keeping open mind, no discussion or investigation or electronic investigation or communication with one another, parties or witnesses, or others about case, issues, parties or counsel;

4. NOTETAKING: Right to take notes, procedure (name on first sheet?), bailiff or deputy's responsibilities at recess and at end of case;

5. JURY NEEDS: Anticipated schedule, breaks, availability, right to bring coffee, soda, water, snacks, etc. and whether / what is allowed in courtroom.

6. JUROR COMFORT: In some jurisdictions, judge or court personnel advise jurors regarding parking, dress code or suggestions due to courthouse temperatures, procedure in event of personal emergency, obligation to bring concerns to attention of bailiff or deputy, procedure for "proof of service" and payment for jury duty.

CHECKLIST:

RECESS ADMONITIONS

While judges each tend to have their own procedure and style, the following suggestions are made as to items that may be addressed to the jury, on the record, before each recess during which the jurors will be leaving the courthouse or may have interaction with others:

1. NO DISCUSSION OF CASE: Not to discuss case, parties, lawyers, type of case, first impressions or any other information with one another or with anyone else and not to allow others to discuss same with you;

2. RELIANCE ON EVIDENCE: Not to go outside the courtroom for any information concerning the case, parties, lawyers, issues or terms used, or to visit any place described or do any independent examination, measurement or testing of facts, and therefore to rely only upon the evidence presented;

3. NO COMMUNICATION: Not to blog, twitter, text or communicate by any means to anyone, regarding anything having to do with the case, or the experiences of serving as a juror;

4. NO MEDIA: Not to have any contact with or exposure to media, whether in print or broadcast or on-line; to avoid reading or hearing news reports;

5. NO PARTY CONTACT: Not to have even minimal contact with lawyers, parties or witnesses;

6. BADGES: To wear juror badges when remaining in area of courthouse or nearby restaurants while serving;

7. DUTY TO REPORT: To immediately advise bailiff or deputy of any issue that may occur, without discussing such issues with fellow jurors.

8. RETURN: Time, where, whether they may bring drinks or snacks, number to call if any delay whatsoever.

EXAMPLE SCRIPT:

ADDRESS TO COUNSEL REGARDING CONDUCT DURING JURY TRIAL

[These instructions for attorney may be given orally, in writing, or may be placed in a written order of Court.]

Judge to Counsel (with defendant present):

In order to expedite the jury trial of this particular case and to avoid the possibility of prejudice or possible mistrials, the court requires that all counsel adhere to the following instructions in the trial of the case:

1. Counsel will not be permitted to address each other during the trial of the case in the presence of the jury.

2. Counsel will state all objections to the court and not to opposing counsel.

3. There will be no arguments on objections in the presence of the jury. You may state a one or two word basis of your objection. If you wish to argue your point after making your objection or after being overruled on a point you will ask the court to exclude the jury or for a sidebar before proceeding with your argument. However, argument will be permitted on objections at the discretion of the court. If I do not allow you to have a sidebar at that moment, I will take a sidebar before the witness is excused from the witness stand to allow you to make their your argument and/or make a record.

4. Neither counsel will be allowed to interrupt the other, except to state a valid objection, while counsel is addressing the court or the jury. If objections are made by way of interruption, it shall be short, concise, and not stated by way of argument.

5. If either counsel wishes to offer stipulations, they shall be made to the Court in the absence of the jury. After the offer is made, opposing counsel may either accept or reject them, or ask for a conference to state some conditions or additions. No offers to stipulate shall be made in the presence of the jury.

6. There will be no wisecracking or gratuitous comments made in the presence of the jury.

7. Attorneys will conduct their examinations of witnesses at a reasonable distance away from the witness chair so that all jurors and other counsel may hear the questions and answers.

8. Counsel will question prospective jurors only on matters, which would be the basis for challenge for cause and will not examine as to matters of law or discuss the facts they expect to prove.

9. In making opening statement, counsel will refrain from argument and will confine themselves to the outline of facts that they intend to prove and will stay within the issues framed.

10. Counsel will refrain from making derogatory remarks, inferences, or insinuations about each other or their handling of the case. This is a trial between the parties and not counsel.

11. When two or more attorneys are on the same side trying a case, the attorney conducting the examination of a particular witness shall continue until the witness is excused from the stand and all objections made or exceptions taken during the examination of such witness shall be made or announced by the attorney who is conducting the examination or cross-examination.

12. When you wish to approach the bench for any reason, you will ask leave of court to do so, and if leave is granted, counsel for each party shall approach the bench.

13. Counsel are expected to abide by the Illinois Rules of Professional Conduct including but not limited to the obligation of **Rule 3.6** and **Rule 3.8(f)** (restricting but not prohibiting parties' right to public comment regarding trial proceedings).

EXAMPLE SCRIPT

ADDRESS TO DEFENDANT REGARDING RIGHTS DURING JURY TRIAL

At final pre-trial or sometime before jury selection, the following admonition may be given:

Your case appears to be ready for trial, and it is very important that you understand your rights and responsibilities in this case.

This is your case, and your defense against the charges brought by the State. It is very important to you that you have good communications with your attorney about how to proceed at trial.

Some decisions, pertaining to what the U.S. Supreme Court calls your fundamental rights, are yours and yours alone. Your attorney can give advice on what decisions you should make as to these fundamental rights. But, in the end, it is up to you, and you have the final say.

For example, it is your decision whether to plead guilty or to plead not guilty; whether to have a jury trial or to waive a jury and have a bench trial; whether to testify or not to testify; whether to submit what is called a lesser included offense instruction, if the circumstances are appropriate, at the conference on jury instructions; and in the event you are convicted of one or more charges at the end of trial, whether to appeal.

I cannot and will not express any opinion on what decisions you should make with respect to these fundamental rights; however, from time to time, like now, a judge will speak to a defendant directly to be sure the record is clear that the defendant understands his rights and that the defendant is making decisions with respect to these rights in a knowing and voluntary manner. I urge you to speak to your attorney about these decisions.

Counsel, have any plea offers been made and are there any outstanding at this time? What is the nature of the State's offer? Was this communicated to the Defendant? Defendant, I am not advocating that you should or should not enter into a negotiated plea, but I do want to make sure that you had been told any offers that had been made. Did you receive and reject each of these offers? Do you understand the following possible minimum and maximum penalties you face if convicted: _____ (including any applicable enhancements, special terms, consecutive sentencing, habitual criminal terms, etc.).

Other decisions, such as decisions regarding tactics or strategy pertaining to your defense, belong to your attorney. For example, the attorney decides what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or to strike, what trial motions should be made, and what evidence should be presented.

Even though your attorney has the final say with respect to matters of tactics or strategy, I urge you to speak to your attorney about these decisions as well. You should tell your attorney if you know of any witnesses who you believe may have information helpful to your case. You should be candid with your attorney in your discussions about all the facts of the case, and the

tactics and strategy your attorney believes are appropriate or inappropriate. You should ask questions about things you do not understand. It is important to you that you have good communications with your attorney about your case and your defense against the charges brought by the State.

If you ask me to, I will adjourn this case for now and allow for you to make arrangements to speak to your attorney about everything that I have told you today. Do you wish to have time to speak to your attorney?

EXAMPLE SCRIPT:

ADDRESS TO ALL POTENTIAL JURORS SENT TO THE COURTROOM

OPENING REMARKS:

Judge:

Good morning/afternoon, ladies and gentlemen, my name is Judge _____ and you are in courtroom _____. You are here to sit as jurors in the case of the People of the State of Illinois vs. _____.

Before we begin I want you to think about all our great country has to offer us via our rights and privileges. We live in what I consider the finest nation on earth. There are all sorts of reasons for that, not the least of which are the rights we enjoy. A few include the right to freedom of speech, freedom of the press, and the right to a public and speedy trial.

But with our many rights and privileges comes the great responsibility to serve on a jury if called. It may be that there are some here today who would endeavor to avoid jury service in this case. First, that would be a mistake. More importantly, before you do, I insist that you first consider the men and women of this country, not only members of our armed forces, but the men and women from all backgrounds, all races, all creeds, who over the years have made great sacrifices, endured unspeakable pain, and many of whom have made the ultimate sacrifice so that you and I can enjoy the fruits of this wonderful land. They know, and we will, that the last pleasure in life is the sense of having discharged your responsibility. Let us proceed consistent with that in mind.

First, before we begin I will introduce the parties:

Mr./Ms. _____will you please stand? (Defendant stands)

If anyone knows Mr./Ms. _____, please raise your hand. The record should reflect that no one has raised his or her hand.

Mr./Ms. _____ is represented by two attorneys. Attorney _____ (Attorney _____ stands). If anyone knows or recognizes attorney _____, please raise your hand. The record should reflect that no one has raised his or her hand.

The People of the State of Illinois are represented by two Assistant State's Attorneys. ASA _____. (ASA _____ stands). If anyone knows ASA _____ please raise your hand. The record should reflect that no one has raised his or her hand.

I am now going to read to you slowly a list of witnesses who may be called to testify in this case. If you know any of the witnesses who may be called to testify in this case, or if you think you might know them, please raise your hand. I will call on you at that time to get your name and you may be asked more questions about that later. (Court reads the record of witnesses by class *i.e.*

police officers, attorneys, civilian witnesses, ASAs) If no one raised their hand, the judge makes a record that no one has raised their hand.

[Practice Note: In smaller counties where parties and counsel are more likely to be known, it is recommended that such questions be asked in smaller groups, such as 12 or 14 in jury box.

Some judges prefer to wait until the end of all introductory comments before asking the jurors if they have any familiarity with the case, parties, counsel, or listed witnesses.]

The defendant(s) is/are charged with the offenses(s) of _____ and _____.

More specifically, it is charged that: (read substance of the complaint without the statutory citations.) It is alleged that (this) (these) offense(s) occurred at the address of (_____). To this/these charges(s), the defendant(s) has/have pleaded not guilty the jury in this case will determine whether the Defendant is proven guilty of this/ each or any of these charges beyond a reasonable doubt.

(If more than one defendant named in charging document, instruct the jurors as follows): Ladies and gentlemen, you heard me mention several names when reading the charges to you. You are not to concern yourself as to why those defendants are not present in court and you are not to concern yourself with the outcome of their cases. You are here to consider the evidence against Mr./Ms. _____ only.

(If multiple juries or simultaneous jury/bench instruct the jurors further as follows): Also, you are not to concern yourself as to the reason why each defendant has a separate jury/trial and is being tried separately.

[Note that it is the practice in some jurisdictions to not advise the venire that other defendants were also charged, therefore omitting the names of defendants not on trial. The subject of other charged defendants would then only be raised if relevant during trial.]

At this time, I am going to touch upon some broad and fundamental principles of law that apply to all criminal cases. This will help you to understand and follow the evidence and law in this case. My remarks at this time are not to be considered by you as your final instructions by the Court. After you have heard all of the evidence in this case and the arguments of the lawyers based upon the evidence, I will at that time instruct you both orally and in writing as to the law that applies to this case. You will have with you, during your deliberations, those written instructions as to the law which I have determined to be applicable to this case. It is your absolute duty to accept the law as defined in these instructions and to follow it.

The document that I read from earlier is what is called an (indictment/information/complaint).

The (indictment/information/complaint) in this case is not to be considered as any evidence or presumption of guilt against the defendant. It is a mere formal charge necessary to place the defendant on trial. The defendant, under the law, is presumed to be innocent of the charges(s) in the (indictment/information/complaint) and this presumption remains with the defendant throughout the trial and is not overcome unless you are satisfied by the evidence in the case,

beyond a reasonable doubt as to the guilt of the defendant, and the burden of proving the guilt of the defendant beyond a reasonable doubt is on the State. The law does not require the defendant to prove his innocence.

You are to be the judges of the facts in this case, and in that connection, you are the judges of the credibility of the witnesses—that is to say, the question of whether or not the witness(es) is/are telling the truth—and the weight to be given to their testimony. It is part of my duty to tell you what the applicable law is to the case. It is also my duty to tell you what evidence you may hear and consider. After the jury has heard all the evidence in this case, and the arguments of counsel based thereon, and received the written instructions as to the law applicable to this case, it will be the duty of the jury to determine whether the defendant is guilty or not guilty.

If you become convinced, from all the evidence in the case, beyond a reasonable doubt, that the defendant is guilty as charged in the (indictment/information/complaint), it will be your duty to find the defendant guilty.

On the other hand, if you do not become convinced beyond a reasonable doubt that the defendant is guilty as charged in the (indictment/information/complaint), it will be your duty to find the defendant not guilty. Any verdict reached by the jury must be unanimous, that is to say, all twelve jurors must agree.

(If trial will be televised:) Pursuant to court orders already entered by me, much of the case will be televised. I wish to advise all of you of several points in connection with this issue. First, jury selection will not be televised in any manner, today or hereafter. Further, no jurors, either individually or as a group, purposely or inadvertently, will be broadcast during the trial. After trial and after discharge from jury service, any person may appear on television or in any media, if they so desire, or you may choose not to talk to or be filmed by the press, and that is your right.

You should ignore the presence of any cameras. If you find at any time that you are distracted or unable to concentrate because of the cameras, it is your duty to notify me immediately.

(Also instruct at end of case):

Jury post-trial instruction.

In this case, the news media was permitted to film and photograph the proceedings pursuant to the Illinois Supreme Court Policy for Extended Media Coverage in the Circuit Courts of Illinois. In your deliberation, you should not draw any inferences or conclusions from the fact that cameras were present at this particular trial. Nor should you concern yourself with why certain witnesses were filmed and photographed and others were not. Whether a particular witness was filmed or photographed is not any indication as to the value of, or weight to be given to, that witness's testimony.

Now, in order to determine your qualifications to sit as jurors in this particular case, counsel and I will question you concerning your names, addresses, occupations, experience, and other related matters.

[In jurisdictions in which the judge and counsel receive jurors' biographical information (jury cards, questionnaire answers or the like, it is helpful to add: We have much of this information on your (jury cards, questionnaire answers or the like) and therefore we will not have to repeat those questions, but if any one's information has changes since completing your questionnaire, please make me aware of that even if I do not specifically ask that of you.]

You should not consider this an attempt to pry into your personal life. It is merely a way for both sides to select a fair and impartial jury. If any answer you are about to offer would be personally embarrassing to you, or might prejudice or influence other potential jurors, please ask to approach the bench and you may answer here with us more quietly.

To those of you here as potential jurors, and to those who will be accepted as the jurors in this case, I caution you during the course of this trial not to discuss this case with anyone – not even your own families or friends, and also not even amongst yourselves, until the end of the trial when you have retired to the jury room to deliberate you verdict(s). If anyone has spoken to you, or should speak to you about this case, or tries to influence you in any manner before its final disposition, directly or indirectly, it is your legal duty to report this to me immediately.

You should not allow sympathy, bias, or prejudice to influence you verdict; you should decide the case fairly, on the law and the evidence.

At this time you will **stand and be sworn** by the clerk to answer questions truly and properly put to you by the Court and counsel. **NOTE:** Ask Clerk to swear in jurors. Seat potential jurors to be questioned in jury box.

[In some jurisdictions the venire is sworn by the jury commissioner before assignment to a court and the first set of 12-16 jurors are pre-seated in the jury box.]

EXAMPLE SCRIPT:

QUESTIONS TO THE FIRST GROUP OF (12-28) JURORS

[NOTE: Before beginning this questioning, inform the prospective jurors of the anticipated length of the trial and that no one will be excused EXCEPT for good cause shown, for example, plane tickets to leave town. However, per recent case law, exercise caution not to dissuade potential jurors from providing truthful, good faith concerns they may have regarding their ability to serve and to be fair and impartial.]

I am now going to ask you questions as a whole to those of you sitting in the jury box. If your answer to any of these questions is YES, please raise your hand. If your answer is no, please shake your head so that I can see that your answer is no. (If the answer is no, make a record that all other jurors have indicated no.

1. Have you, a close friend, or a family member ever been charged with a similar offense? If so, please raise your hand. The record should reflect that all other jurors have indicated no.

2. Have you heard or read anything about this case? If so, please raise your hand. The record should reflect that all other jurors have indicated no. If yes, ask the following: If selected as a juror in this case, can you disregard anything you have heard or read about this case, and instead, decide this case only on the evidence you hear in this courtroom?

3. Do you have any friends or relatives who are State's Attorneys, defense attorneys, judges, members of a police force, or involved in law enforcement? If so, please raise your hand. The record should reflect that all other jurors have indicated no.

4. Other than when you've been called down to this building or another courthouse or jury duty, have you ever been in a courtroom of any type, at any time, for any reason? If so, please raise your hand. The record should reflect that all other jurors have indicated no.

5. Have you ever been in a jail or prison setting at any time for any reason? If so, please raise your hand. The record should reflect that all other jurors have indicated no.

6. Have you ever been charged with or accused of any offense whatsoever, other than a traffic offense? That means even if the case was dismissed or it was a mistake or you never stood trial. I still need to know about it. If so, please raise your hand. The record should reflect that all other jurors have indicated no.

7. Have you ever served as a grand juror or trial juror before today? If so, please raise your hand. The record should reflect that all other jurors have indicated no.

8. If the answer to Question #7 is yes, ascertain when, before what court, i.e. civil or criminal, and whether the jury reached a verdict and whether such service occurred within one year prior.

   If the previous service was in a civil case, ask: The rules of evidence, relating to the burden of proof, are different in criminal cases than they are in civil cases. Will you listen to the instructions carefully and apply the law as I state it to be, and disregard what the other judge said to you?

9. Have you, or anyone in your family, or a close friend ever been the victim of a crime? If so, please raise your hand. The record should reflect that all other jurors indicated no.

10. Do you have any bias or prejudice against a person simply because he/she may be charged with a crime? If so, please raise your hand. The record should reflect that all other jurors indicated no.

11. In terms of the length of the trial, does anyone have any conflicting plans that could not be rearranged and would prevent you from serving on this jury? If so, please raise your hand. The record should reflect that all other jurors indicated no.

[Some of these questions may not be necessarily if repeating information the court might already have before it on jury cards or jury summons questionnaire answers.]

[EXAMPLE] SUGGESTED QUESTIONS FOR JURY SELECTION WHEN APPROPRIATE IN CASES WITH UNIQUE ISSUES

1. In this case, the defense of **insanity** may be raised. The defendant has indicated that he may raise the defense that he was legally insane during the commission of the **crimes** attributed to him. (I will give you the law on this defense if it is raised). The law provides that a defendant is not criminally responsible for his conduct if, as a result of a mental disease or mental defect he lacks substantial capacity to appreciate the criminality of his conduct. In this case,

   Do you understand and accept this principle, and Will you follow the law as I give it to you? Would you have any difficulty in following this aspect of law in an appropriate case?

   Do you have any opinions regarding the insanity defense that would prevent you from being a fair and impartial juror? If so, please raise your hand.

   [If yes:] Do you believe you can put aside any opinion you have regarding the insanity defense and consider this evidence if the defense is raised?

   Have you, or any family member or close friend had any professional dealing with any mental health workers?

   Have you read any books, magazines or newspaper articles dealing with the insanity defense?

[Optional to ask:] Can you tell us what you recall of your readings? As a result of your readings did you form any opinions concerning the insanity defense? (Do you have any opinions or beliefs regarding psychiatry or psychology that would affect your ability to consider the defense of legal insanity?)

If, at the conclusion of the case, the evidence established that the defendant was legally insane during the commission of the crime and the jury so decided, would you sign a verdict of not guilty by reason of insanity?

2. Evidence of **alibi** will be presented. Will you consider alibi evidence along with other evidence in deciding your verdict? If your answer is no, please raise your hand.

3. **Psychiatrists** may testify—Do you hold any opinions regarding psychiatrists that would prevent you from being fair and impartial? If so, please raise your hand. Can you put aside any opinions you have regarding psychiatrists and decide the case based on the evidence and the law as I give it to you?

4. The defendant(s) in this case are (Hispanic) (African-American) (etc.) Do you have any feelings for or against defendant or defendant's race or nationality that would cause you to favor or disfavor the defendant even before hearing any evidence, or do you hold any prejudice for or against the defendant(s) simply because of his/her race? If so, please raise your hand.

5. Do you understand and accept that the **ethnic** background of the defendant(s) or anyone else is not an issue in this case?

6. **Police officers** (law enforcement officers) are going to testify. Do you understand and accept that you are not to pre-judge the credibility to be assigned to the testimony of a police officer simply because he/she is a police officer? You are to judge his/her testimony in the same manner as you judge the testimony of any other witness. Do you understand that? Do you think you can do that? If you cannot do that, please raise your hand.

7. There will be evidence presented in this case regarding **gang involvement or activity**. Do you understand and accept that you must not base your verdict in this case upon any pre-judgment you may have because a person or witness is associated with a gang, that you are to put aside any such feelings and decide this case based on the evidence presented? Do you believe you can put aside any opinion you have regarding gangs and decide this case fairly based on the evidence, the law, and the use of your common sense? You many have opinions regarding gangs. You are entitled to have opinions. What I ask fair jurors to do however, is to put aside those

opinions and decide the case fairly, based on the evidence and the law. Do you think you can do that? If you cannot do that please raise your hand.

(If you learned the defendant is a member of a gang, would this make him less believable?)

(If you learned the defendant is and was a member of a gang, would it make it more likely than not that he's guilty of a gang shooting?)

8. One concept of law you will be asked to consider is the concept of **legal responsibility** for the acts of another. In Illinois, under certain circumstances, persons who join together in the planning or commission of an offense may be responsible for the acts or conduct of those who participate in the offense. The law provides that:

> A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of the offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of the offense.
>
> The word conduct includes any criminal act done in furtherance of the planned and intended act.

Do you understand and accept this concept? If your answer is no, please raise your hand.

Will you agree to apply this principle of law if the court so instructs you? If you cannot do this, please raise your hand.

(Will you consider the law of legal responsibility in considering the guilt or innocence of the defendant? If you cannot do this please raise your hand.)

9. The incidence of the use and distribution of **drugs** is a factor that has touched many people in society. Do you believe you can put aside any opinions you hold regarding drugs and give the defendant(s) and the State a fair trial? If your answer is no, please raise your hand.

10. **Self-Defense Cases** (Case law holds that inquiry should not be made; if the parties concur in this request, the following questions are discretionary)

    In Illinois, under certain circumstances, a person may invoke or use deadly force to prevent imminent death or great bodily harm to himself. This is called the law of self-defense.

Do you understand and accept that the defendant has the right to raise the affirmative defense of self-defense, and if raised, that the State has the burden to disprove that defense beyond a reasonable doubt? Do any of you have any belief or pre-disposed opinion to the contrary?

Would your beliefs prevent you from considering evidence of self-defense if it was presented at trial?

If, at the conclusion of the case, you believed that the evidence established that the defendant had used deadly force to prevent imminent death or great bodily harm to himself, would you sign a verdict of not guilty and conversely, if you found that the State has proven its case and disproven that defense beyond a reasonable doubt, would you sign a verdict of guilty?

If Defendant is Self-Represented

11. The defendant has chosen to represent himself/herself. The defendant has a constitutional right to have an attorney represent him/her, however, he/she also has the right to represent himself/herself and has elected to do so.

You should not hold this against either the defendant or the State, nor should you consider this choice in any way in arriving at your verdict. Do you understand that? If you cannot do this, please raise your hand.

If Defendant is shackled

12. The defendant is shackled due to the circumstances of his confinement, not because he is guilty of any offense. Regardless of our courthouse security procedures, the defendant is presumed innocent and whether he is in custody, or shackled, is not to enter into your determination of his guilt or innocence. Do you understand and accept this principal and will you agree to extend to the defendant the presumption of innocence to which he is entitled by law? If you cannot do this, please raise your hand.

[EXAMPLES] SPECIAL AREAS OF INTEREST

Highly Publicized Cases (Inquiry should be made outside the presence of other prospective jurors to avoid contaminating the array)

Have you heard or read anything about this case. If so:

Was what you heard about this case something you read in the newspaper or heard on radio or television?

How often did this happen?

What was it that you read or heard?

As best as you may recall, how long has it been since you last heard or read anything about this case?

Have you participated in or overheard any discussions or conversations of other people concerning the facts of this case?

Did you form any opinions then about the case or whether the defendant is guilty?

Do you have any opinion now as to his guilt?

Is there anything that you may have heard or read about this case which would affect your ability to be a fair and impartial juror?

If selected as a juror, will you disregard what you may have heard or read, and decide this case only on the evidence which will be presented here in open court and the law I will give you?

EXAMPLE SCRIPT:

QUESTIONS TO JURORS IN JURY BOX

I am now going to ask you questions as a whole to those of you sitting in the jury box. If your answer to any of these questions is **NO**, please raise your hand. If your answer is yes, please nod your head so that I can see that your answer is yes. (If the answer is yes, make a record that all other jurors have indicated yes).

1. Do you understand and accept that you may not use sympathy, bias, or prejudice, in reaching your decision? If your answer is no, please raise your hand. The record should reflect that all other jurors indicated yes.

2. Will you wait until you hear all the evidence, the arguments of the lawyers, and my instructions on the law, before making up your mind? If your answer is no, please raise your hand. The record should reflect that all other jurors indicated yes.

3. Will you follow the law as I give it to you, even if you might personally disagree with it? If your answer is no, please raise your hand. The record should reflect that all other jurors indicated yes.

4. Will you consider the evidence in light of your own observations and experiences in life? This means you will use your common sense? If your answer is no, please raise your hand. The record should reflect that all other jurors indicated yes.

[ZEHR QUESTIONS - **Supreme Court Rule 431(b)**: Note that judges are required to provide an opportunity for each juror to individually respond to specific questions concerning these principled. Some judges or jurisdictions direct the following questions to a group of potential jurors but ask each juror to individually respond.

As we have discussed, a defendant is presumed innocent of the charge(s) against him; before a defendant may be convicted of any crime the State must prove the defendant guilty beyond a reasonable doubt. The defendant is not required to offer any evidence on his or her own behalf.

The defendant has a right to testify or not, and if defendant elects not to testify cannot be held against him. As I ask the following questions, please raise any question or concern that you have as to each principle addressed. Don't stand on formality or wait to be asked, if you have any question or concern as to each of these principles.

5. ***Zehr*** Questions:

    a. Do you understand and accept that the defendant is presumed to be innocent of the charge(s) against him (or her)? Is there anyone in the group / panel who does not understand this proposition, or who does not accept it? If so, please raise your hand The record will reflect that no hands were raised. (Or ask each juror in jury box, identified by seat number, to individually respond by stating: "Beginning with juror one?"(etc.)

    b. Do you understand and accept that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt? Is there anyone in the group / panel who does not understand this proposition, or who does not accept it? If so, please raise your hand The record will reflect that no hands were raised. (Or ask each juror in jury box, identified by seat number, to individually respond by stating: "Beginning with juror one?"(etc.)

    c. Do you understand and accept that the defendant is not required to offer any evidence on his or her own behalf? Is there anyone in the group / panel who does not understand this proposition, or who does not accept it? If so, please raise your hand The record will reflect that no hands were raised. (Or ask each juror in jury box, identified by seat number, to individually respond by stating: "Beginning with juror one?"(etc.)

    d. (UNLESS DEFENDANT HAS OBJECTED TO USE OF FOURTH QUESTION:) Do you understand and accept that the defendant's choice not to testify cannot be held against the defendant? Is there anyone in the group / panel who does not understand this proposition, or who does not accept it? If so, please raise your hand The record will reflect that no hands were raised. (Or ask each juror in jury box, identified by seat number, to individually respond by stating: "Beginning with juror one?"(etc.)

6. I am now going to ask these two questions of each juror individually because for religious or other reasons some people will not sign a verdict form, so again, I will ask you these questions individually:

ASK EACH JUROR INDIVIDUALLY

    a. If, after you hear everything—the evidence, the arguments, and my instructions on the law—you believe the State has proved its case beyond a reasonable doubt, will you sign a guilty verdict?

    b. On the other hand, after you hear everything, you do not believe the State has proved its case beyond a reasonable doubt, will you sign a not guilty verdict?

EXAMPLE SUGGESTIONS:

QUESTIONING EACH JUROR INDIVIDUALLY

NOTE: Question each of the jurors individually about the information on their questionnaires or on the back of their juror card or ask jurors to tell you about themselves. Make sure their answers are consistent with the information on the back of their juror card.

If a prospective juror is a named party in a case pending in your County that is grounds for disqualification, so make sure you check the back of the summons or questionnaire answers where this information is located.

[In some jurisdictions, the questionnaire answers are provided to the court and parties, allowing the trial judge to accept jurors' answers without need of the judge or attorneys repeating the same questions, other than to ask follow-up (such as asking a juror who lists occupation as "retired," to state the occupation from which he or she retired

EXAMPLE SUGGESTIONS:

COUNSEL ASKING QUESTIONS OF JURY

NOTE: When the above items have been disposed of, you may ask questions counsel have furnished previously to the court to be asked by the court. These questions should be in writing, or if counsel requests, the court shall permit counsel to ask questions; however, instruct counsel as follows:

Counsel does have a right to question jurors – However, the trial court may limit such questioning. In the event counsel chooses to ask questions, he/she shall not repeat the questions asked by the court (or jury questionnaire) unless:

a. A juror's answer was uncertain or suggested the desirability for follow-up, or

b. Counsel has cause for believing the juror has not answered truthfully or fully. Counsel shall be admonished to refrain from any attempt to "educate", "instruct", or "question" jurors as to matters of law. That is the function of the court exclusively.

Supreme Court Rule 431(a) permits further inquiry deemed appropriate by the trial judge, as the court deems proper for a reasonable period of time depending on the length of examination by the court, complexity and nature of the charges, but not concerning matters of law or instructions. Accordingly, it is appropriate to ask counsel to approach the bench to determine the nature of intended examination of jurors to ensure the appropriateness of same before they proceed.

NOTE: When the questioning is completed, a record must be made of the process of challenges for cause and peremptory challenges, outside the hearing of the venire. One suggestion is to have court and counsel and the defendant go into chambers, on the record, with the court reporter. The challenges for cause are taken up first, mentioning all cause challenges agreed upon first, for example a challenge for cause as to a juror who said he or she would not sign a verdict or has

personal concerns like a sick parent or child and could not concentrate on the case. The judge would then take the disputed challenges for cause. When they are completed the judge would then tender the first four (4) jurors to the State and go back and forth between the two sides until the judge has the first panel of four (4). The judge would select the second and third panel of four (4) and each alternate using the same procedure. If a judge does not allow back striking, it should be explained to counsel ahead of time that once a person has been tendered, they may not thereafter be removed.

EXAMPLE SCRIPT:

JUDGES OPENING REMARKS TO JURY—CRIMINAL

(Given to those 12 actually selected as jurors plus alternate jurors.)

Pre-instructions required per IPI-Criminal 1.01A:

Members of the jury, the trial is about to commence, and I now will instruct you as to the law regarding some of your duties during trial and deliberations.

You should not do any independent investigation or research on any subject or person relating to the case. What you may have seen or heard outside the courtroom is not evidence. This includes any press, radio, or television programs and it also includes any information available on the Internet. Such programs, reports, and information are not evidence and your verdict must not be influenced in any way by such material.

For example, you must not use the Internet or any other sources to search for any information about the case, or the law which applies to the case.

During the course of the trial, do not communicate with, provide information personally, in writing, or electronically to anyone about this case—not even your own families and friends, courtroom personnel, and also not even among yourselves until instructed otherwise.

Lawyers, parties, and witnesses are not permitted to speak with you about any subject, even if unrelated to this case, until after the case is over and you are discharged from your duties as jurors.

These are not your final and complete instructions – those will come after you have heard all the evidence and the final arguments of the lawyers.

When the time for giving instructions comes, I will read them to you and you will get them in writing, along with your verdicts for your consideration.

You must follow the law as I give it to you. You may not use your own ideas of what the law should be.

As I mentioned at the outset of jury selection, the defendant(s) in this case, _____ is (are) charged with the offense(s) of _____.

More specifically, it is charged that the defendant(s) _____.

On or about (read date and substance of charge)_____.

The charge in this case is contained in a document called the (indictment/information/complaint).

You must remember that an (indictment). (complaint), (information) is not to be considered as any evidence against the defendant nor does the law allow you to infer any presumption of guilt against the defendant simply because (he/she has been indicted) (he/she is named in an information).

In other words:

The (indictment), (information), (complaint), is merely the formal way in which a defendant is placed on trial.

Under the law, a defendant is presumed to be innocent of the charge(s) against him/her. This presumption remains with him/her throughout every stage of the trial and during your deliberations on the verdict and is not overcome, unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant(s) is/are guilty.

The State has the burden of proving the guilt of the defendant(s) beyond a reasonable doubt, and this burden remains on the State throughout the case.

The defendant(s) is (are) not required to prove his/her innocence, nor is (are) he/she (they) required to present any evidence on his/her behalf. He/she may rely on the presumption of innocence.

You are the judges of the facts in this case. That is you and you alone will determine which witnesses to believe and how much weight to give their testimony. Part of my job is to tell you what evidence you may hear and consider.

After you have heard all the evidence, and the arguments, of the lawyers based upon that evidence and received my instructions on the law, you will retire to the jury room to determine your verdict (or verdicts).

If you become convinced, beyond a reasonable doubt, from all the evidence in the case, that the defendant is guilty as charged in the (indictment) (information), it will be your duty to find him/her guilty.

On the other hand, if, after hearing all the evidence, you are not convinced beyond a reasonable doubt of the defendant’s guilt, it will be your duty to find him/her not guilty.

Whatever verdict you reach, it will be your own and you don’t have to explain it or justify it to anyone at any time.

It is essential that you not arrive at any decisions or conclusions of any kind until you have heard all the evidence, the arguments of the lawyers, and the law that applies to this case.

***(If more than one defendant)**

*You will note that there are _____ defendants in this case.

*Please remember throughout this trial that each defendant is entitled to have his/her case decided on the evidence and the law which is applicable to him/her. That is, you must give separate consideration to each defendant.

*Any evidence which is limited to one defendant should not be considered by you as to any other defendant.

During the trial you will hear the lawyers make objections. Don't hold it against either side when you hear objections. The lawyers are not trying to keep anything from you. They are doing their job and their duty. Objections help me, and serve an important purpose – to make sure you get only proper evidence on the issues in this case. The number of objections made, or which side has more objections sustained or overruled, must have no effect at all on your consideration of the evidence. If there is an objection and I say "overruled" you can consider the question and you can consider the answer. If there is an objection and I say "sustained" you are to disregard the question and the answer. Additionally, the personalities of the lawyers are not an issue in this case, and should have no effect on your verdict.

There will be times when I will discuss matters with the parties at the bench, if we can resolve scheduling matters or other issues without interrupting the flow of proceedings. Or I may excuse you from the courtroom, or we'll excuse ourselves and go off to the side, or in chambers to discuss a point of law. You should not let that annoy you. The law requires that these discussions be held out of your hearing and sometimes outside of your presence – this practice assures you hear only proper evidence. This is what we call a sidebar.

There may be recesses, or delays, although we'll try to keep those at a minimum. (At times we might begin a few minutes later than we hoped). The reason for this is that I have other cases on my call – having nothing to do with this case or this defendant. If there is a delay, we are using the time for a good purpose – so please don't feel your time is wasted if you have to wait.

You have the right to take notes during trial. Note pads have been provided for your convenience. Please place you name or other ID on the cover of the note pad. No one else will be allowed to look at your notes at any time.

You do not have to take notes. That is entirely up to you. I have no preference one way or the other. If you do take notes, do not let that stop you from hearing all the evidence.

You may use your notes to refresh your memory at the appropriate time, but you should also use your own memory of the evidence. If your notes conflict with your memory, or if someone else's notes conflict with your memory, you are free to use your own memory of the evidence. Just because a juror has taken notes does not mean that his or her memory of the evidence is any better than the memory of a juror who has not taken notes.

Your notes will not leave the courtroom. The deputy sheriff will collect them when you leave for lunch and at the close of the court day. At the end of the trial, when you are discharged from further service in this case, the notes will be collected by the deputy sheriff and then destroyed. No one will be allowed to look at the notes before they are destroyed.

As I have said, you are not to have any contact with any of the attorneys in the case or with any of the parties or witnesses. That includes any kind of exchange of words. I have asked the attorneys not to communicate with you, so if you see them around the building and if they don't talk to you, please don't think they are being rude or unfriendly. They are merely following my instructions.

You are also not to visit the place where the offense was allegedly committed.

If you do have to explain to friends, family or co-workers your absence from your usual routine, my advice is that you ONLY mention that you are serving as a juror, and that you say up frongt that you cannot say who or what is involved or even the type of case that it is. The reason I make this suggestion is that, in conversation, if you say anything more, it is natural for the other person to tell you everything they know about that person, case, subject matter, and every opinion they have about it. By stating your limits up front, you will cut off comments it will be improper for you to hear, and conversation in which it will be improper for you to participate.

When deciding this case, you must not allow sympathy, bias or prejudice to influence your verdict. Our system of law is based on the principle that a jury will decide the case on the law and on the evidence. That is the oath you will make as jurors, and I know you will be faithful to it.

(Have clerk swear in all 12 jurors and alternates for the case at this time if you have not done so already. In different jurisdictions, jurors might be sworn in upon selection of each panel, or all together after the judge's opening remarks.)

[EXAMPLE] ADDRESSING JURY PERSONALS

I want to cover some matters that will assist you in serving on our jury this week.

Our court schedule will generally be from 9 to 5, with a lunch break from about noon to 1pm, a short recess mid-morning and a couple short breaks during the afternoon. We may alter that schedule somewhat if we are in the middle of a witness' testimony, but that gives you an general idea of our intentions. If anyone needs a break for personal reasons at a time that we do not seem to be taking one, please catch my attention or the bailiff or deputy and we will accommodate your needs. If you are on a medication schedule, or must eat or snack at certain times due to a medical condition, please be responsible to that schedule and if you need our accommodation please let us know.

Coffee will be available for you in the jury deliberation room; if you prefer decaf or soda, or if you wish to bring in snacks for yourself or others, please feel free to do so.

When you return after a noon or evening recess, please come directly to our courtroom number ___ and wait outside the door until you are directed in by the deputy or bailiff, as we may be handling matters pertaining to this case.

You will want to dress appropriately, casual but not distracting to the parties; our courtroom temperature beyond our control so you may want to layer up.

Parking is available in the …….. at a cost of ……and if it is full, you might try. ……

Proof of jury service and your payment for jury service will be mailed to your listed address. If you have moved, please let the Circuit Clerk / Jury Commission know where to send your newfound fortune.

You may advise your family that in the event of a family emergency, you may be contacted through our court administrator at ……. As you are not permitted to have your cell phones with you (or on) while court is in session.

If you have any problems, or if you encounter any concerns during your jury service, you should not hesitate to bring them to the attention of the deputy sheriff / bailiff who will let me know if it is a matter that needs to be brought to our attention as well.

[EXAMPLE] ADMONITION TO JURY BEFORE RECESS

NOTE TO JUDGE: Should be given any time jurors leave the courtroom

Until this case is submitted to you for your deliberations, you must not discuss this case with anyone or remain within hearing of anyone discussing it; nor read any newspaper article, listen to any radio broadcast, nor view any television program which discusses the case. Only after this case has been submitted to you, ~~you must~~ may you discuss this case among yourselves, and then only in the jury room when all members of the jury are present. You are to keep an open mind and you must not decide any issue in this case until the case is submitted to you for deliberation under the instructions of the court. You are not to visit the place where the offense was allegedly committed or obtain any information regarding this case, the people involved, or the issues or evidence in this case, by any means or from any source whatsoever. It is my suggestion that, when telling friends, coworkers and family members why you aren't attending to your usual routine, that you carefully tell them only that you are serving as a juror and cannot say anything more about the type or facts of case, or the lawyers, witnesses or parties involved ---as it is the natural tendency of others to tell you everything they know about whatever you mention. That way, they know the rules up front.

[EXAMPLE] INSTRUCTION TO JURY ON ORDER OF PROOF

Members of the Jury:

This case will proceed in the following order:

1. The State's Attorney may make an opening statement outlining his/her case.

2. Then the defendant(s) may also make an opening statement outlining his/her case.

3. Neither party is required to make an opening statement.

4. The opening statements are not evidence but are merely an aid to assist you in understanding the significance of evidence when it is introduced. It is a statement by the lawyer indicating what he or she expects the evidence to show.

5. After the opening statements, if any are made, the State will introduce evidence.

6. At the conclusion of the State's evidence, the defendant(s) may introduce evidence.

7. Rebuttal evidence may be introduced.

8. At the conclusion of all the evidence, the attorneys may make their closing arguments to you.

9. After the closing arguments, you will be given further instructions, and you will deliberate and arrive at your verdict.

10. The law applicable to this case will be contained in the instructions I give you during the course of the trial and at the conclusion of the trial, and it is your duty to follow all such instructions.

[EXAMPLE] INSTRUCTIONS TO JURY ON OPENING STATEMENTS OF ATTORNEYS

At this time the lawyers for each (side) (party) have the opportunity of making opening statements, if they wish.

An opening statement is not evidence and should not be considered by you as evidence. It is a statement by a lawyer as to what he or she expects the evidence will show. Any statement made by an attorney that is not later supported by the evidence should be disregarded.

EXAMPLE SCRIPT:

INSTRUCTIONS TO JURY ON CLOSING ARGUMENTS OF ATTORNEYS

You have heard all the evidence in this case. But the trial has not ended. At this time, the lawyers have the opportunity of making final arguments. First, the State will argue, then the defense will argue, then the State will have a chance to respond to the defense argument. The State has the opportunity to give the first argument and the last not because of favoritism but because they have the burden of proof which, as I have previously stated, is the burden to prove defendant's guilty beyond a reasonable doubt.

I have asked the attorneys approximately how much time they will need for arguments, so that I can tell you what to anticipate. They each say they will take approximately _____ and the State would split its time between its initial and rebuttal arguments. I won't hold them to the minute but as a courtesy I will let each know if they seem to be going well over their estimate. We will try to (take a break at some midpoint) (go straight through and then break after their arguments) but if someone needs a break when we don't seem to soon be taking one, let us know and we will take a break for all jurors and parties at that time.

What the lawyers say during the arguments is not evidence and should not be considered by you as evidence. If a lawyer makes a statement that is not based on the evidence or reasonable inferences to be drawn from the evidence, you should disregard the statement. You are to rely upon your own recollection of the evidence.

After you have heard the arguments, I'll instruct you on the law. And then you will retire to the jury room to consider your verdict(s).

[EXAMPLES] HANDLING OBJECTIONS DURING CLOSING ARGUMENT:

IF POSSIBLE MISSTATEMENT

Any statement made by a lawyer that is not based on the evidence should be disregarded by you. You should use your own recollection of the evidence. Again, I remind you that what the lawyers say during arguments is not evidence.

IF LAWYER MISSTATES LAW

Counsel may argue. But arguments of lawyers are not to be taken as statements of law. Instructions on the law will come from me after the final arguments are completed.

IF A PERSONAL ATTACK

Counsel should refrain from engaging in personal attacks on other counsel. Ladies and gentlemen, I have instructed you on the purpose of closing arguments. Again, I remind you that your decision in this case must be based on the evidence and on the law.

IF A PERSONAL OPINION

Counsel should refrain from stating personal opinions or beliefs. Ladies and gentlemen, the personal opinions or beliefs of the lawyers are not proper and should not be considered by you in any way.

IF LAWYER PLACES JURORS IN CASE

Counsel should not ask jurors to place themselves in the positions of (witness) (parties) (lawyers).

EXAMPLE SCRIPT:

GIVING CASE TO JURY AFTER INSTRUCTING JURY

1. Members of the jury, you are in the care of Mr./Ms. _____, who is/are the Sheriff(s) / Bailiff(s) of this Court. They have been instructed by this Court not to permit any person to speak or to otherwise communicate with you on any subject connected with the trial, except with the permission of the Court. I am directing the Sheriff not to communicate with you on any subject connected with the trial and I direct you not to ask (him/her) any questions pertaining thereto. When you have reached your verdict, notify the Sheriff who will then inform the Court.

2. [Have clerk swear in Deputy Sheriff or bailiff(s) (Request the Sheriff or Bailiff(s) to raise his/her/their right hand.]

   Mr./Ms. _____(Sheriff/Bailiff) you are hereby sworn to carry out the directions of this Court, to keep this jury together and not to permit any person to speak to them or speak to them yourselves or otherwise communicate with them on any subject connected with the trial except with permission of the Court. And when they have reached their verdicts, return them into open court. You do?

3. Give Sheriff /Bailiff instructions, verdict forms and exhibits.

4. Direct Sheriff / Bailiff to conduct jury to jury room.

5. Note time jury retires.

6. Thank and excuse alternate jurors if not needed. (In some jurisdictions, excusing of alternates is deferred. Alternates are given recess admonitions, allowed to depart, and are advised to remain "on call" in case they may be called back into service during deliberations, and are not considered "discharged" until advised that a verdict has been reached. If so advised, the alternate(s) may be further instructed that when and if the jury reaches a verdict and they are released from further service, prior no-contact admonitions will no longer apply.)

DEADLOCKED JURY INSTRUCTION

(*PRIM* INSTRUCTION)

[If the jury has spent an inordinate amount of time reaching a verdict and it is indicated that they are hopelessly deadlocked, the Jury should be called from the jury room with counsel and defendant present, the judge should allow input of counsel as to whether to give the "***Prim***" instruction, a record should be made as to the length of deliberation, length and complexity of trial, hour of the day, and any other factors relevant, and whether the judge, in the court's discretion, deems giving the instruction to be appropriate, and if so, jurors are to be given the following instruction orally and in writing.]

Members of the Jury:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberation, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

[NOTE TO JUDGE: In dealing with what appears to be a deadlocked jury, the trial judge should avoid instructions which imply that a majority view is the correct one. Further, the judge is not to inquire or encourage disclosure of the jury vote, or which side presently has more juror votes.]

EXAMPLE SCRIPT:

VERDICT PROCEDURE

(Delivery of the Verdict –Scenario)

JUDGE: In the matter of the People v. _____, the record will show that the defendant and both counsel are present. All 12 jurors are present in the jury box. Mr./Ms. (Foreman), has the jury arrived at a verdict?

FOREMAN: (Responds)

JUDGE: Please hand all the verdict forms to the Sheriff/Bailiff. I will check over the forms to make certain that only one verdict form was signed (on each charge) and that there are no other markings, I will read (or have the Clerk read) the verdicts, and then the lawyers will have the option to ask the Clerk to ask of each of you whether this was and is your verdict, called "polling the jury." (The Sheriff/Bailiff hands the verdict forms to the judge who reviews

them to see if they are complete, and in turn, hands them to the clerk).

JUDGE: Read, or (To the clerk): Please read the verdict(s).

JUDGE: Counsel, do you wish to have the jury polled?

STATE'S ATTORNEY or DEFENSE COUNSEL:

(Respond) If yes

JUDGE: Ladies and gentlemen of the jury, one or both counsel have requested that the Court confirm that this is indeed the verdict of each of you. This is called polling the jury. The Clerk will ask each of you if this was and is your verdict, referring to you each by seat number rather than by name.

(The clerk polls the jury) Was this then, and is this now your verdict?

EXPRESSION OF THANKS TO THE JURY

The Court wishes to express appreciation for your services as jurors in this case. There is no higher duty of American citizenship other than military service than that of jury service.

When independence was won for this country, trial by jury became one of the institutions, which Americans would preserve at all costs. And today it stands as the keystone of our system of justice; the connecting link between the courts and the people. It is one of the blessings of a free society.

There is no more sacred public trust than to be chosen as a juror to try a cause—to sit in judgment on the acts and motives of one's fellow man.

The law, which is the courts' duty to declare, is found with comparative ease. But the facts of the case of which you as jurors are the exclusive judges, are nowhere written, are usually in dispute, and are found only after the jurors have determined the truth from evidence before them. We appreciate your service here.

No case is easily decided, and considering that some 95% of all civil and criminal cases are settled before they reach a jury, juries such as yours are called upon to serve on only those that were impossible to otherwise resolve.

I make these remarks upon discharging you from further service in this case, not only in appreciation of your service here, but also to give due recognition to the exalted character of jury service in every case.

You were told throughout your jury service that you were not to discuss the case with anyone. That no longer applies, but you have the right to not discuss your jury service or the case with anyone, if you so choose, or to choose not to discuss the case if that is your preference.

You will recall that at this time the bailiffs / deputies will take possession of any notes you have taken during the case, and your notes will be destroyed without the bailiffs/deputies or anyone else seeing your notes at any time.

Thank you and best wishes.

JUROR'S STATEMENT OF COMPLIANCE

I agree that during the duration of the trial in _____,
I will not conduct any independent research into any of the issues or parties involved in this trial. I will not communicate with any one about the issues or parties in this trial, and I will not permit any one to communicate with me. I further agree that I will report any violations of the court's instructions immediately.

_____
JUROR No. _____

Jury Committee, American College of Trial Lawyers, *Jury Instructions Cautioning Against Use of the Internet and Social Networking* 1, 6 (Sept. 2010).

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. WILLIAM BALFOUR, Defendant.	)	Jury Decorum Order 09 CR 00762 Hon. Charles P. Burns Judge Presiding

ORDER

In order to maintain public trust and confidence in the judicial system, protect privacy rights of jurors in these proceedings, maintain security and the dignity of the court, and maintain orderly conduct of the proceedings, the Court makes the following orders:

Except as expressly authorized by this Court:

1. No person shall attempt to influence any unexcused prospective juror who has been summoned on this case.
2. No unexcused prospective juror, or any seated juror or alternate once selected, shall communicate with any person on this case concerning any subject matter related to this trial by any means. This includes by cell phone, through email, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

3. No unexcused prospective juror participating in the jury selection process on this case or any seated juror or alternate once selected, shall give an interview to any journalist.
4. No person identifiable as an excused prospective juror shall be photographed, filmed, or interviewed while in the Cook County Criminal Courts Building, its courtrooms or jury assembly area.
5. In order to expeditiously complete the jury selection process, a maximum number of jurors will be seated in the courtroom during the selection process. This necessarily limits the number of seats afforded the public and media. Representatives of the media may be selected by the media to attend the jury selection process. Seats should be equitably divided among print, broadcast, radio and wire services. These shall constitute the public seats as well.
6. No sketch artist shall draw any facial features, jewelry, clothing, or other distinguishing features of any juror summoned for jury duty or selected for jury duty before, during, or following the conclusion of trial.
7. Names of prospective jurors shall be deemed confidential. No person shall publicly identify any unexcused juror, seated juror, or alternate juror once selected, by name in connection with this case.

Anyone in violation of this court order may be subject to contempt of court.

ENTERED:_____
Hon. Charles P. Burns
Circuit Court of Cook County
Criminal Division

DATED: _____

CHECKLISTS FOR DEALING WITH JURY ISSUES

PRETRIAL JURY CONSIDERATIONS

PREPARATION FOR *VOIR DIRE*

The trial judge may consider setting the case for a final pretrial conference before the trial date:

___ consider requiring the parties to file any motions, including motions *in limine*, in advance of the pretrial;

___ set the conference reasonably close to the trial date and should require trial counsel to attend.

Inform the parties that at the final pretrial conference, the court will

___ rule on previously filed motions *in limine;*

___ review parties submission of a joint statement of the case to be read to the jury;

___ review proposed questions for *voir dire*; and

___ review trial procedures.

ESTIMATING AND NUMBER OF PROSPECTIVE JURORS NEEDED

The court together with counsel on the record should discuss and determine:

___ Whether to require a jury of 12 members in state criminal trials,

___ Whether more than two alternate jurors are needed, and

___ Whether to call a larger than normal pool of prospective jurors if publicity or the length of the trial may eliminate a number of prospective jurors from qualifying.

PREPARATION AND USE OF PRESCREENING QUESTIONNAIRES

Either by questionnaire or questioning in open court, the trial court after allowing counsel to submit questions, may consider eliminating from the jury pool:

___ Persons who will obviously have to be excused for disqualification, hardship, or inability to serve in a long trial;

___ Persons who will be statutorily eliminated;

- Consider requiring the States' Attorney to search potential jurors for record of arrest, conviction, or prosecution for violation of state or federal law and disclose the information to the defense before *voir dire.*

The court together with counsel should prepare the questionnaire; some preliminary considerations include:

____ using only numbers for identification of jurors,

____ including instructions reminding the potential jurors that they are sworn to give truthful answers,

____ advising the jurors of the expected length of the trial,

____ giving jurors a description of the case, and

- consider requiring the States' Attorney to search potential jurors for record of arrest, conviction, or prosecution for violation of state or federal law and disclose the information to the defense before *voir dire.*

The questions may include inquires about:

___ juror's identifying information such as

____ age,

____ marital status,

____ number and ages of children,

____ employment,

____ level of education;

____ questions about exposure to publicity,

____ questions about familiarity with the defendant, witnesses, or attorneys.

The questionnaire can also include questions that elicit information to determine whether the juror may be statutorily disqualified:

____ persons who will be statutorily eliminated because they are not:

____ an inhabitant of the county, 705 ILCS 305/2;

____ at least 18 years old, 705 ILCS 305/2;

____ a United States citizen. 705 ILCS 305/2;

____ able to understand English, in spoken or written form or through an interpreter, 705 ILCS 305/2;

____ free from all legal exceptions, 705 ILCS 305/2;

____ of fair character, 705 ILCS 305/2;

____ of approved integrity, 705 ILCS 305/2;

____ of sound judgment, 705 ILCS 305/2;

____ well informed, 705 ILCS 305/2;

____ from the regular panel, unless selected from the body of the county as provided by 705 ILCS 305/13;

____ persons who will be statutorily eliminated because they

____ served as a juror on a trial in the county within one year, unless person waives this exemption, 705 ILCS 305/14;

____ are a party to a suit pending for trial in that court, 705 ILCS 305/14;

____ sought the position of juror within the past 60 days, 705 ILCS 305/13; and

____ an attorney or party sought them to serve on a jury in the past 60 days, 705 ILCS 305/13.

_ consider requiring the States' Attorney to search potential jurors for record of arrest, conviction, or prosecution for violation of state or federal law and disclose the information to the defense before *voir dire.*

The trial court should also determine:

____ Whether to disclose the jurors' responses to the questionnaires;

____ Or, if the jury is anonymous or the disclosure of their identities will be deferred, whether to delay release of the questionnaires until after the verdict;

____ Or, if the questionnaire responses will be released, consider allowing the jurors to object to the disclosure of information that would cause unjustified public embarrassment or harassment.

ANONYMOUS JURIES

If, after balancing the media's desire for access to the jurors with the juror's concerns for privacy or security, the court determines that jurors need some level of anonymity, the court should determine the level of anonymity:

_ complete anonymity, where the juror's identities are never revealed, or

_ partial anonymity, where the jurors' names are known to the parties but are made available to the public only after the trial.

To preserve anonymity, court may consider:

_____ assigning each juror a number and using that number for all references to that juror during trial

_____ keeping all lists that cross-reference the juror number with the juror's identity to a minimum and should be located at all times by the judge

_____ issuing an order of confidentiality for those who have access to the juror identification information

JUROR SAFETY CONCERNS

When weighing the need for an anonymous jury, the trial court must balance the competing interests of the defendant in preserving the presumption of innocence and in conducting a useful voir dire against the jurors' interest in their own security and the public's interest in having a jury assess the defendant's guilt or innocence impartially.

Factors bearing on the propriety of an anonymous jury include:

___ the defendant's involvement in organized crime;

___ his participation in a group with the capacity to harm jurors;

___ whether he previously has attempted to interfere with the judicial process;

___ the severity of the punishment that the defendant would face if convicted; and

___ whether publicity regarding the case presents the prospect that the jurors' names could become public and expose them to intimidation or harassment.

To avoid prejudice to the defendant when empanelling an anonymous jury, the trial court should:

___ allow an extremely thorough *voir dire,* and

___ inform the jurors that their names are withheld to prevent out-of-court contact, not out of concern for juror safety,

The jurors' names may not be released even after the verdict when their safety is at issue.

DEFERRED DISCLOSURE OF JURORS' IDENTITIES

___ If the court routinely operates under the policy of deferring disclosure of the jurors' names and addresses, except to the parties of a particular litigation, until after the verdict is rendered, the trial court should inform the jury of this practice in all trials.

- If the court does not routinely defer disclosure of jurors' identities, then before doing so in a particular case, the trial court, on the record, should consider alternatives, which may include instructing jurors:
  - ___ not to answer calls,
  - ___ not to listen to voice mails or open e-mails and letters from numbers and addresses they do not recognize,
  - ___ requiring jurors to surrender cell phones and computers,
  - ___ screening all electronic communication, and
  - ___ sequestration.

___ The trial court should be aware that this area of law is evolving and should check the law in their circuit when proceeding.

___ Last, the trial court may consider a notification period in which the jury has a period of time after the verdict to prepare for the media inquiries.

VOIR DIRE

QUESTIONING OF JURORS BY COURT AND COUNSEL

The trial court has the primary responsibility of conducting voir dire, and the manner

and scope of the voir dire is within the trial court's discretion. The court may:

___ consider requiring counsel to submit their proposed *voir dire* questions before calling the prospective venire;

___ allow counsel to directly question the venire; in making this determination, the trial court must consider, on the record:

- ___ the length of examination by the court;
- ___ the complexity of the case; and
- ___ the nature of the charges; and
- ___ determine, based on those factors, whatever direct questioning by the attorneys would be appropriate.

___ ask the potential jurors at the outset whether they have heard about the case and, if so, what their reaction is.

Disqualified jurors can then be eliminated.

Follow up questions of venire members who have been exposed to the publicity may be done individually in chambers.

The trial court must ask each potential juror, individually or in a group, whether that juror understands and accepts:

- ___ that the defendant is presumed innocent;
- ___ that the State must prove the defendant guilty beyond a reasonable doubt;
- ___ that the defendant is not required to offer any evidence; and,
- ___ unless the defendant objects, that the defendant's decision not to testify cannot be held against him or her.

____ After the judge has completed his or her questions, the prosecutor has an opportunity to question the panel. Once he or she is finished with the panel, the defense attorney has a chance to question the panel.

- ___ The court may impose reasonable time limits on questioning by the attorneys.
- ___ During attorney questioning of the venire, the trial court should:

___ disallow questions that directly or indirectly concern matters of law or instructions,

- disallow questions that serve to indoctrinate jurors to the State's or defendant's theory of the case; and

___ disallow questions that duplicate the questions asked by the court.

SOCIAL MEDIA JURY ISSUES

Courts may consider adopting written protocols adapted to local conditions for use by judges and bailiffs in handling juries. Tab 5 § N. Security; see also, Appendix Orders at pages A--- *Standing Orders and Decorum Orders*; including a *Sample Jury Decorum Order*, and *Sample Courthouse General Rules*.

___ If the case has extensive media coverage or if an anonymous jury is used, the court may consider an access to the courthouse for the jurors other than that used by the media and the public.

If so, this access should be coordinated with the court personnel and sheriff's office.

___ Jurors should be admonished about their duty

___ not to converse with anyone else on any subject connected with the trial until they are discharged;

___ not to knowingly read or listen to outside comments or news accounts of the procedure until they are discharged;

___ not to discuss among themselves any subject connected with the trial, or form or express any opinion on the cause until it is submitted to them for deliberation;

___ not to view the place where the offense was allegedly committed, and

___ not to do any independent investigation including the internet on the case, not to communicate, including on social network sites, any information about the case. *See*, I.P.I. 1.01A.

___ In addition to giving the cautionary instruction, other techniques the trial court

may consider using to help the jury to comply with their duties include;

___ Reminding jurors at *voir dire* to refrain from using social media while serving as a juror,

___ Explaining the reason behind the social media ban in plain terms to the jury,

___ Instructing jurors at multiple points throughout the trial about the prohibition on the use of social media and the internet to discuss or research the case,

___ Confiscating phones and other electronic devices from the jurors at the start of each day of trial,

___ Confiscating phones and other electronic devices from the jurors during deliberations,

___ Alerting the jury about the personal consequences of using social media or the internet to discuss or research the case, and

___ Requiring jurors to sign a written pledge agreeing to refrain from using social media while serving as a juror, *see* APPENDIX 6.A.2.

___ The public and the media should be admonished that they are not to have any contact with the jury either in the courthouse or outside it during the trial or to identify any juror

VERDICT CONSIDERATIONS

___ In a high profile or notorious criminal case, the court should consider the optimum timing for the return of the verdict.

___ If the defendant requests a jury poll, the court should consider how best to conduct the poll to obtain the juror's answers while protecting their privacy.

Polling on non-verdict issues such as the prejudicial effect of a newspaper article is within the trial court's discretion.

JURY ISSUES POST-TRIAL

___ The court may consider routinely instructing jurors that they may refuse interviews and seek the aid of the court if interviewers persist.

___ The trial court may also instruct the jurors not to discuss the specific votes and opinions of non-interviewed jurors.

The court cannot issue a sweeping restraint forbidding all contact between the press and former jurors without a compelling reason.

____ In a highly publicized case the court may consider giving the jury some information to help them deal with the media, which may include:

____ information on communicating with responsible media so that they understand the jurors' wishes;

____ ground rules which allow a civilized process for those jurors who are willing to speak;

- using helpful equipment, such as a “No Trespassing” sign to put on their property;

____ what the police should be asked to do and how they should be asked, or

____ how to monitor or close a phone line;

____ who to call for various security problems and given a contact in the Sheriff's Office

____ post-verdict debriefing of criminal trial juries, either by informal conferences with the trial judge or by formal professional sessions.

CHECKLIST: JUDICIAL MANAGEMENT
STANDING ORDERS AND DECORUM ORDERS

Effective judicial management of the criminal case may include a standing order on courtroom decorum; the trial judge may consider a standing order containing the following procedures:

1. A routine time for the attorneys to meet before the court call begins;

2. Rules for spectator seating on a first come, first served basis or other basis;

3. Prohibition of recording devices, including cell phones and computers in the courtroom; and

4. Prohibition of disruptive behavior in the courtroom, including nonverbal disruptions such as waving, standing, hand raising; and

5. Prohibition of other conduct of solidarity or protest or prejudicial or inflammatory logos in the courtroom or the courthouse.

In a complex criminal case the trial judge may also consider including discussion of the following at the initial conference or subsequent conferences:

1. Issuing a "Decorum Order" prohibiting the attorneys, parties, court personnel, and witnesses from disclosing information other than that which is routinely made public;

2. If the potential jury may be unfairly influenced by pretrial publicity, the judge may consider taking steps to preserve the defendant's right to a fair trial such as consensual delay of the trial date, change of venue, change of venire, specialized *voir dire* procedures, sequestration of jurors, sealing documents, limits on media presence, and controls on attorney contact with the press, *see, supra*, § 1.8 C *Motions to Change Venue Due to Potential Jury Bias*, Tab 5, § I. *Public Trial*, § J. *Media Issues*, and § N. *Security*;

3. Whether special facilities may be necessary due to the number of defendants charged or the celebrity of the defendant or victim;

4. If multiple defendants have been charged but will be tried in different counties, states, or federal courts, how will the litigation be coordinated;

5. When multiple defendants have been charged, may consider using dual juries or simultaneous juries, *see, supra*, Tab 5 § 2.2 F. *Simultaneous Trials*;

6. Discussion of special security measures that may need to be taken such as use of security officers in the court room or restraining the defendant, *see, supra*, Tab 5, § N. *Security*;

7. Need for the appointment of a special prosecutor, *see, supra*, Tab 2 § 1.4 C. *Special Prosecutors*; and

8. Joinder of defendants, *see, supra*, Tab 3, § 1.8 E. *Join or Sever Counts/Defendants*.

If the criminal case is high profile or notorious, the trial judge may consider issuing decorum orders addressing the heightened security concerns that type of trial brings. The chief or presiding judge and the sheriff's office may be involved in the initial considerations and should be apprised of any special security measures. The discussion may include the following:

1. Additional security screening before entry to the courtroom, which allows the Sheriff or his designee the discretion to bar any person based on the results of the screening;

2. Prohibition of bags, packages, large coats, purses, briefcases, or any type of container in the courtroom;

3. Procedures for issuing media credentials to allow access to the courtroom.

The trial judge, along with the chief or presiding judge and sheriff, may also consider formalizing procedures so that media disruption during the trial is limited, including:

1. How to disseminate credentials to the media, who will be responsible for credentialing the media, how to require the media to display the official court media credentials at all times in the courthouse;

2. Designating areas for the media to view the trial in the courtroom and providing an overflow room for media, including procedures to allow media who do not have a seat in the courtroom an opportunity view the trial in the courtroom by lottery or other method, and barring the media from unauthorized areas;

3. Designating areas for still and video photographers;

4. Designating areas outside the courtroom for press interviews and press conferences; and

5. Planning for the additional parking needs of media satellite trucks, microvans, and other equipment vehicles, including provisions for the additional wiring and cables.

The trial court may also consider a decorum order that addresses juror privacy and safety concerns, including:

1. Prohibiting the media and the public from any identification of jurors by name, identifying characteristic in a sketch or other means;

2. Prohibiting any contact with jurors by the media or the public;

3. Reminding the jury of their obligation not to discuss the case with anyone until the conclusion of the trial, including the media, and that this obligation includes any social media or networking websites; and

4. Ordering that the names of the jurors are confidential and cannot be disclosed by any person.

For samples of these types of orders, *see*, Appendix for:
Sample Standing Order
Sample Courthouse Decorum/General Rules Order
Sample Courtroom (Spectator) Decorum Order
Sample Jury Decorum Order
Sample Media Trial Rules and Information
Sample Media Acknowledgement Form

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CRIMINAL DIVISION

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)

STANDING ORDER

In the exercise of its inherent power to provide for the orderly disposition of all pretrial and trial proceedings, the Court sua sponte ORDERS as follows:

1. The court call will begin each business day at 10:00 a.m.
2. The Assistant State's Attorneys and Assistant Public Defenders assigned to this courtroom will be in court at 9:30 a.m. to meet with defense counsel/defendants before the court call begins.
3. Except for those seats otherwise designated and/or reserved by the Court, seating in the gallery of the courtroom will be assigned to the general public on a first come, first served basis. Attorneys, defendants, witnesses and others having direct business with the Court shall receive preference with respect to seating. The general public will not be allowed to stand or sit/kneel on the floor in the gallery during court proceedings.
4. The use of cameras or audio/video recording devices of any kind (including cellular telephones) is strictly prohibited in the courtroom and hallways outside of the courtroom. The use of such equipment is not allowed above the first floor.
5. All persons in the courtroom must remain silent during all proceedings. There will be no talking, noise making, standing, kneeling, waving, hand raising or other conduct of solidarity, camaraderie, protest, approval or disapproval in the courtroom or in the hallway outside of the courtroom.

6. There will be no reading of newspapers, magazines, books, or other materials in the courtroom.

7. Cellular telephones and computers cannot be used by the general public in the courtroom.

8. The atmosphere in the courtroom must be quiet, calm, and deliberative.

9. There are no warnings. This Order is not exhaustive of all conduct not allowed in the courtroom. Anyone who is unclear as to whether their conduct would be a violation of this Order should exercise all caution and leave the courtroom.

10. Any violation of this Order or other Rules of Court and any conduct the Court finds disruptive or interruptive of the proceedings may result in:

    a. An order of temporary or permanent exclusion of the offender from the courtroom and security areas.

    b. Contempt of Court sanctions which carry with them confinement in the Cook County Department of Corrections for up to six (6) months and/or a fine not to exceed five hundred dollars ($500.00) for each offense.

    c. Such other sanctions as deemed necessary by the Court to ensure the due and proper administration of justice.

11. Notice of this Order shall be given by its posting on the Circuit Court website (www.cookcountycourt.org) and/or first posting in the courtroom gallery. The lack of actual notice of this Order shall not be an excuse.

ENTERED:

Judge Thaddeus L. Wilson
Circuit Court of Cook County
Criminal Division

_____

Judge Judge No.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. WIILLIAM BALFOUR, Defendant.	)	Courthouse Decorum Order 09 CR 00762 Hon. Charles P. Burns Judge Presiding

ORDER

In the interest of justice, for the safety of individuals attending the proceedings of the aforementioned case, and to preserve the dignity of the court and the integrity of the proceedings, the Court orders the following:

I. GENERAL RULES

1. All members of the media, including reporters, photographers, videographers, and audio technicians shall be permitted only in designated media areas for this case.
2. All members of the media shall be prohibited from entering all unauthorized areas as well as all other areas within and around the Cook County Circuit Courthouse and the Cook County Department of Corrections as designated by the Sheriff.
3. All media satellite trucks, microwave vans, and other equipment vehicles shall park only in those areas designated by the Sheriff.
4. All still and video photographers shall only be permitted in the designated media area inside the Cook County Criminal Courthouse first floor lobby, adjacent to the Information Desk.
5. All interviews and/or press conferences shall be conducted in designated areas only.

6. Loitering in the area outside of the courtroom shall not be permitted by the media or members of the general public.
7. Members of the media shall not impede the flow of normal court traffic throughout the building for the duration of the trial.
8. All wiring and cabling shall be arranged in a manner that does not prohibit the movement of pedestrian traffic, court personnel with file carts, and individuals in wheelchairs from moving about the courthouse.
9. All members of the media shall display official court or media credentials at all times.
10. Members of the public and the media who do not have a seat in the gallery of the courtroom may read the transcript of the proceedings in the overflow observation room. The room is located on the fourth floor of the Administration Building.

II. COURTROOM RULES

1. All persons who enter the courtroom, including members of the media, shall be subject to security screening. The Cook County Sheriff, or his designee, has discretion as to whether a person may be admitted in the courtroom depending on the results of the screening. Court approved security and court personnel shall be exempted from this rule.
2. All members of the media shall display official court or media credentials at all times.
3. All members of the public and media must be seated before the court is in session and must remain seated in the courtroom until the next recess is called. If a seated person chooses to leave the courtroom, they will not be readmitted until the next court recess.
4. Seats in the gallery of the courtroom reserved for media shall only be assigned to court-approved media agencies.

5. Seating reserved for members of the media may be rescinded, restricted, or otherwise modified as ordered by the Court.
6. No members of the media or public shall be permitted beyond the railing separating the court gallery from the litigation area.
7. Members of the media covering this trial may bring one phone into the courtroom; however, it must be set to silent mode and placed out of sight at all times. Limited and discrete emails will be permitted subject to the Court's discretion. No other devices capable of taking pictures or capturing sound may be operated inside the courtroom. Such devices include, but are not limited to, cellular phones, cameras, tape recorders, video recorders, camcorders, laptop or other computers, personal digital assistants, satellite phones, any other manual or electronic device capable of recording video, audio, or still images, or any device capable of transmitting any visual or audio representation or actual image or sound. Any person who operates a non-approved device will have the device confiscated by court security and may be held in contempt of court.
8. No bags, packages, briefcases, large coats, purses, pocketbooks, boxes, or any other container shall be brought into the courtroom.
9. All members of the media, including sketch artists, are prohibited from drawing any facial features, jewelry, clothing, or other distinguishing features of jurors before, during, and following the conclusion of the trial.
10. No media interviews shall be conducted in the courtroom at any time.

III. JUROR CONTACT

1. No member of the media or public shall attempt to communicate with a member of the jury panel, juror, or alternate, respecting the case prior to return of a final judgment in the trial on the merits, and any attempt by anyone without permission by the Court to communicate with or influence a member of the jury once selected as a juror or alternate in the proceedings, until the return of a final judgment in the trial on the merits, may be punished as a criminal cause of action and as criminal contempt of court and such other actions as deemed by the Court to be necessary for due and proper administration of justice.
2. No member of the media or public may release or publicize the names of prospective jurors or seated jurors unless ordered by the Court.

IV. SANCTIONS

There are no warnings. Any violation of the foregoing or other court orders or plans, and any conduct the Court finds disruptive or interruptive of the proceedings may result in:

1. An order of temporary or permanent exclusion of the offender from the courtroom and security areas.
2. An order of temporary or permanent exclusion of the media organization represented by the offender from the courtroom or security areas.
3. Contempt of Court sanctions.
4. Such other sanctions as deemed necessary by the Court to ensure the due and proper administration of justice.

ENTERED:_____
Hon. Charles P. Burns
Circuit Court of Cook County
Criminal Division

DATED:_____

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	Courtroom Decorum Order 09 CR 00762
WILLIAM BALFOUR	)	Hon. Charles P. Burns Judge Presiding
Defendant.	)	

ORDER

In the interest of justice, for the safety of individuals attending the proceedings of the aforementioned case, and to preserve the dignity of the court and the integrity of the proceedings, the Court orders the following:

1. No cameras, tape recorders, video recorders, camcorders, laptop or other computers, cellular phones, personal digital assistants, satellite phones or any other manual or electronic device capable of recording video, audio, or still images, or any device capable of recording video, audio, or still images, nor any device capable of transmitting any visual or audio representation or actual image or sound shall be permitted in the courtroom.
2. No members of the media or public shall be permitted to draw or sketch any facial features, jewelry, clothing, or other distinguishing features of jurors before, during, and following the conclusion of the trial unless ordered by the Court.
3. No bags, packages, briefcases, large coats, purses, pocketbooks, boxes or any other container shall be brought into the trial courtroom.

4. No prejudicial or inflammatory logos, insignia or paraphernalia of any kind shall be worn on any person or clothing while in the courthouse or courtroom.
5. Anyone failing to occupy his or her seat in the courtroom by at least fifteen minutes before court is scheduled may forfeit the seat for the duration of the day's proceedings.
6. No members of the media or public shall be permitted beyond the railing separating the court gallery from the litigation area.
7. All members of the media shall display official court or media credentials at all times while in the courtroom.
8. No media or public observers shall be permitted to enter the courtroom while court is in session. Entry shall be only before court convenes and during announced breaks in the proceedings.
9. No interviews shall be held in the trial court at any time.
10. No disruptions, interferences, outbursts, public demonstration, loud or intrusive noises or distractions shall be permitted in the trial courtroom at any time. Anyone who does not comply with this condition will be immediately removed from the courtroom and may forfeit access for the duration of the case.
11. Anyone who does not comply with all conditions of this order may forfeit access to the courtroom for the duration of the case.

Violation of this order may result in the violator being held in contempt of court and/or being subject to monetary sanctions pursuant to Illinois civil and criminal law.

ENTERED:_____

Hon. Charles P. Burns
Circuit Court of Cook County
Criminal Division

DATED: _____

COOK COUNTY SHERIFF'S OFFICE
Thomas J. Dart, Sheriff

TO: All Media Outlets
FROM: The Cook County Sheriff's Press Office, Chicago, IL
DATE: March 13, 2012
RE: Press Credentials For ***People vs. William Balfour*** Criminal Trial – April, 2012

The Cook County Sheriff's Press Office is responsible for the issuance of special media credentials for the upcoming People VS William Balfour Criminal Trial scheduled to begin in April, 2012, and held at the Cook County Criminal Courthouse, at 26th Street and California Avenue in Chicago, IL.
Please Note: Pursuant to Illinois Law, video cameras and other recording devices are not allowed in Cook County courtrooms at this time.

THE CASE

The offender, William Balfour, 30, is charged in the deaths of Darnell Donerson, 57, Jason Hudson, 29 and Julian King, 7, the mother, brother and nephew of Jennifer Hudson.

William Balfour faces the following charges:
3 Counts First Degree Murder
Home Invasion
Aggravated Kidnapping
Residential Burglary
Possession of a Stolen Motor Vehicle

THE PRESS

The press shall be defined as reporters, photographers, producers, cameramen, technicians and sketch artists assigned to cover this event by legitimate news gathering organizations. Legitimate news gathering organizations shall be defined as local, national and international television news and radio stations; local, national and international daily, weekly and monthly written publications; as well as dot.com electronic entities possessing a legitimate business license.

PRESS LOCATIONS

The media will be allowed in three specific areas of the courthouse property for the duration of the trial: the Main Lobby First Floor Video and Still Photographer Area (FFPA); the Overflow Courtroom Area and the Trial Courtroom.

The surrounding courthouse grounds will be open to the public and the media, except where prohibited by the Cook County Sheriff. Normal, daily court proceedings, other than the ***People vs. William Balfour Trial***, will continue as scheduled.

A restricted parking area, for transmission trucks only, has also been reserved near the courthouse.

a) FIRST FLOOR PHOTOGRAPHY AREA (FFPA)

This area is located adjacent to the Information Desk in the Main Lobby of the Courthouse, just past the security checkpoint. It will be cordoned off and have a sign designation.

b) OVERFLOW COURTROOM

An Overflow Courtroom is being established for use by credentialed media covering this Trial. This Overflow Courtroom will be located within the Cook County Courthouse Complex and feature real-time streaming transcription of the Trial from the Trial Courtroom on a projection screen. Reporters who are unable to be seated in the Trial Courtroom on any given day due to seating limitations may utilize this space to follow the proceedings. To enter the Overflow Courtroom, all media must present the Special-Issue Trial Credential. For media with the "Permanent Local Media" designation, a photo credential from your News Organization must be presented for entrance to the Overflow Courtroom.

c) TRIAL COURTROOM

The Trial Courtroom for ***People vs W. Balfou***r will be Courtroom 500 in the main Courthouse building.

PRESS CREDENTIALS

All Chicago-area media covering ***People vs William Balfou***r must possess a valid photo identification card from the news organization which they are representing for access to all designated press locations in and around the 26th Street and California Avenue Criminal Courthouse.

All local and national sketch artists, as well as all out-of-town media, including reporters, producers, cameramen, photographers and any other related media, must have the Special-Issue Trial Credential.

All media – local, national and international – who wish to be seated in the courtroom, must have the Special-Issue Trial Credential. Special-Issue Trial Credentials will be issued in three categories: Permanent Local Media, Daily Media Lottery and First Floor Photography Area (FFPA).

Permanent local media have already been designated. If your agency has not received such a designation, you will be issued a credential in the Daily Media Lottery or First Floor Photography Area (FFPA) only.

The "Daily Media Lottery" credential will permit the holder to enter their name, for the duration of the trial, in the Daily Media Lottery for a daily seat in the Trial Courtroom. Please be advised, there is a limited amount of allocated press seats in the Trial Courtroom. Not all media may be able to be accommodated each day.

The First Floor Photography Area (FFPA) credential will allow the holder access to the designated First Floor Photography Area.

Please designate the credential category on your application form.

CREDENTIAL APPLICATION PROCEDURE

To complete the Special-Issue Trial Credential Application, each applicant must send the following from your official company email address:

- Special-Issue Trial Credential Application (may be downloaded from this site and submitted electronically)
- A current, face forward, original passport-sized photo (2inch x 2 inch) in jpeg format only. Please ensure each jpeg photo has the proper name of the applicant.
- Supervisor contact information at the bottom of the Credential Application must be completed in full otherwise the application will not be processed.

Emails from private email addresses will not be accepted and incomplete and/or incorrect submissions will not be processed.

SATELLITE TRUCK STAGING / SPECIAL-ISSUE MEDIA PARKING PASS

A restricted parking area has been designated near the courthouse for media satellite trucks, microwave vans and other equipment vehicles. Non-transmission media vehicle parking will not be permitted in the designated parking area.

Parking in the restricted area will only be allowed with a Special-Issue Media Parking Pass that must stay with the vehicle at all times.

Please Note: For media not included in the "Permanent Local Media" category, the following must be submitted for your vehicle to be considered for parking in the restricted parking area:

- The dimension of the entire vehicle including: length, width and height (with mast raised).
- A full description of the vehicle including make, model, color and a description of the logo, if the vehicle contains one.

News organizations with satellite or transmission mast vehicles can receive one (1) Special-Issue Parking Pass for parking in a restricted area near the Courthouse for the duration of the Trial. This pass will also include your organization's logo.

To receive a Parking Pass, please submit a request in writing from your Editor / News Director requesting such. The letter should be on your company letterhead and include information outlined in the above two points as well as a day and evening contact phone number for that Editor/News Director. Attached to this request letter should be your official media company logo in jpeg format.

Requests on company letterhead should be emailed from official company email addresses Email requests for a Parking Pass without the media organization's letterhead and company logo attached in jpeg format will not be considered.

Those news agencies that apply for the Special-Issue Parking Pass by the below listed deadline date will be eligible for the random drawing to determine permanent parking order in the restricted parking area for the duration of the Trial. Additional information regarding the date and time of the drawing will be forthcoming.

MEDIA CREDENTIAL AND PARKING PASS APPLICATION PERIOD

Members of the media may apply for the Special-Issue Trial Credential and Special-Issue Media Parking Pass beginning Wednesday, March 14, 2012, through Friday, March 23, 2012 at 5 p.m. CST.

OUT -OF-TOWN REPORTER CREDENTIAL PICK UP

All out-of-town reporters may pick up their Special-Issue Trial Credentials on the following dates:

Thursday, April 19: 10 a.m.-1 p.m.
Friday, April 20: 10 a.m. – Noon

At the time of pickup, all media will be required to:

1) Present a valid photo ID (Driver's License/State ID) or a valid Passport.
2) Present a valid media work ID that includes both the name of the media member, the name of the media organization and an up-to-date photo.
3) Submit the Acknowledgment Form attesting to reading and agreeing to the terms of all Cook County Judicial Decorum Orders related to ***People vs. W. Balfour.***

There will be no media credential pickup on the first day of the Trial, April 23, 2012.

LATE APPLICATIONS

Special-Issue Trial Credential and Special-Issue Media Parking Pass applications submitted after the March 23, 2012 deadline must be completed and submitted in person at the Sheriff's Daley Center Office, 50 West Washington, Room 704, Chicago, IL. Late applications must include the reporter's photo, and company logo – if requesting a Special-Issue Trial Parking Pass – in jpeg format on a disk submitted with the application. All applications will be handled on a first-come, first-served basis and are not guaranteed to be completed on the same day as submitted or by the start of Trial, Monday, April 23, 2012.

SHERIFF'S PRESS OFFICE & TRIAL MEDIA COORDINATOR

The Sheriff's Press Office in located in downtown Chicago and may be reached by dialing 312.603.4242.

The Sheriff's Trial Media Coordinator is Penny Mateck. She can be reached via office phone at 708.865.4917 or by email at Penny.Mateck@cookcountyil.gov.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
	)	Acknowledgment Form
v.	)	09 CR 00762
	)	
WILLIAM BALFOUR,	)	Hon. Charles P. Burns
	)	Judge Presiding
Defendant.	)	
	)	

ACKNOWLEDGMENT FORM

I,_____, acknowledge and certify that (1) I have personally or electronically received the Courthouse, Courtroom, and Jury Decorum Order; and (2) I have read and understood said order; and (3) I will comply with said order. I further understand that violation of any provision of the decorum order may result in being held in contempt of court and/or being subject to monetary sanctions pursuant to Illinois civil and criminal law.

REPORTER'S NAME: _____

NAME OF PUBLICATION: _____

DATE: _____

IN THE

SUPREME COURT OF ILLINOIS

In re: Extended Media Coverage In the Circuit Courts of Illinois on an Experimental Basis	)))))	M.R. 2634

ORDER

Effective immediately and until further order, pursuant to the Court's general administrative and supervisory authority over all courts, it is ordered that the attached "Policy for Extended Media Coverage in the Circuit Courts of Illinois" adopted January 24, 2012, is hereby amended to include a new paragraph 1.5 governing jury admonishment and instruction {"amended Policy").

It is further ordered that the amended Policy shall apply retroactively to all orders entered prior to this date approving pilot projects for extended media coverage on an experimental basis and shall apply to all future orders entered on or after this date approving pilot projects for extended media coverage on an experimental basis.

Order entered by the Court.

FILED

JAN 24 2013

SUPREME COURT
CLERK

POLICY FOR EXTENDED MEDIA COVERAGE IN THE CIRCUIT COURTS OF ILLINOIS

1.1 Media Access

Upon application and approval by the Supreme Court of Illinois, a judicial circuit of the circuit courts of Illinois may allow extended media coverage of public judicial proceedings on an experimental basis in accordance with the provisions of this policy. The coverage shall be subject, at all times, to the authority of the judge presiding at the proceeding. Extended media coverage shall not be distracting or interfere with the solemnity, decorum and dignity of the court making decisions that affect the life, liberty or property of citizens. Nothing in this policy shall limit or restrict the power, authority or responsibility otherwise vested in the chief judge of the circuit; and the judge presiding to: a) control the conduct of any proceeding; b) maintain decorum and prevent distractions; c) guarantee the safety of the courtroom, including any party, witness, or juror and d) ensure the fair and impartial administration of justice in the pending cause.

1.2 Definitions

(a) "Extended media coverage" means any media recording or broadcasting of proceedings by the use of television, radio, photographic, or recording equipment for the purpose of gathering and disseminating news to the public.

(b) "News Media", in general, means established news gathering and reporting agencies and their representatives whose function is to inform the public.

(c) "Judge" means the circuit or associate judge presiding in a trial court proceeding.

(d) "Chief Judge" means the chief judge of the circuit.

(e) "Judicial proceedings" or "proceedings" includes all public trials, hearings or other proceedings of a trial court when extended media coverage is requested, except those specifically excluded by these provisions.

(f) "Media coordinator" means a member of the news media who has requested extended coverage or, in the case of more than one media person requesting extended coverage, a representative chosen by all of the media requesting extended coverage and approved by the judge. The media coordinator shall work with the chief judge and the judge, or with their designee, in a court proceeding with extended coverage.

1.2 General

Broadcasting, televising, recording and photographing may be permitted in the courtroom during sessions of the court, under the following conditions:

(a) Permission first shall have been granted by the judge, who may prescribe such conditions of coverage as provided for in this policy. The chief judge shall have discretion to deny all extended media coverage.

{b) In prosecutions for sexual abuse, or when sexual abuse is an essential element, there shall be no extended media coverage of the testimony of a victim unless the testifying victim consents. Further, an objection to coverage by a testifying victim in any other forcible felony prosecution, and by police informants, undercover agent(s), and relocated witnesses shall be presumed valid. The judge shall exercise broad discretion in deciding whether there is cause for prohibition. This list is not exclusive. The judge may find cause in comparable situations.

(c) Extended media coverage is prohibited in any court proceeding required under Illinois law to be held in private. No coverage shall be permitted in any juvenile, dissolution, adoption, child custody, evidence suppression or trade secret cases.

(d) Extended media coverage of jury selection is prohibited. Extended media coverage of the jury and individual jurors is prohibited.

(e) There shall be no audio pickup or broadcast or recording of a conference in a court proceeding or in a court facility between attorneys and their clients, between co-counsel, between attorneys and opposing counsel, or attorneys and the judge.

(f) Audio or visual equipment authorized by these provisions shall not be operated during a recess in the court proceeding.

(g) The quantity and types of equipment permitted in the courtroom shall be subject to the discretion of the judge within the guidelines set out in this policy.

(h) Upon application of the media, the judge may permit the use of equipment or techniques at variance with the provisions in this policy, provided the variance request is included in the advance notice of coverage provided for in subsection 1.3(b). Objections, if any, shall be made as provided in subsection 1.3(c). Ruling upon a variance application shall be at the sole discretion of the judge. Variances may be allowed by the judge without advance application or notice if all couns1al and parties consent to it.

(i) The judge may refuse, limit, amend or terminate photographic or electronic media coverage at any time during the proceedings in the event the judge finds that provisions established under this policy, or additional rules imposed by the judge, have been violated, or that substantial rights of individual participants or rights to a fair trial will be prejudiced by the manner of coverage if it is allowed to continue; or if it is necessary to guarantee the safety of the courtroom, including any party, witness, juror or attendee of the proceeding.

0) The rights of extended media coverage may be exercised only by the news media.

(k) A decision by a judge to deny, limit or terminate extended media coverage is not appealable.

(l) A judge may authorize extended media coverage of ceremonial proceedings at variance with provisions in this policy as the judge sees fit.

1.3 **Procedural**

(a) Media Coordinator. The judge, or the court's designee, and all interested members of the media shall work, whenever possible, with and through an appropriate media coordinator on all arrangements for extended media coverage. In the event a media coordinator is not available for a particular proceeding, the judge may deny extended media coverage or may appoint an individual from among local working representatives of the media to serve as the coordinator for the media in the proceeding.

(b) Advance Notice of Coverage.

1. All requests for extended media coverage shall be made through the media coordinator. The media coordinator shall inform the judge at least 14 days in advance of the time the proceeding is scheduled to begin, but these times may be extended or reduced by court order. When the proceeding is not scheduled at least 14 days in advance, however, the media coordinator shall give notice of the request as soon as practicable after the proceeding is scheduled. Upon receipt of notice, the judge shall inform the chief judge.

2. Notice of the request shall be in writing, filed in the office of the clerk of the circuit clerk. A copy of the notice shall be provided by the media coordinator to all counsel of record, parties appearing without counsel, the appropriate court administrator and the judge expected to preside. The notice shall contain:

A. The title and docket number of the case, and the date and time, if available, of the proceeding;

8. The type of extended media coverage requested with a description (e.g. the number of television cameras, still photographers).

C. A statement that appropriate notice is being provided to all counsel of record, parties appearing without counsel, the trial court administrator and the judge, along with the names of each.

D. The name, address and telephone number of the media coordinator making the request, and the media coordinator's employer .

3. Failure to provide notice to all counsel of record and to parties appearing without counsel may result in denial of the request for extended media coverage.

(c) Objections.

A party objecting to expanded media coverage shall file a written objection, stating the reasons, at least three (3) days before commencement of the proceeding. All witnesses shall be advised by counsel proposing to introduce their testimony of their right to object to extended media coverage, and all objections by witnesses shall be filed prior to the commencement of the proceeding. Witnesses shall be entitled to the assistance of the clerk of the circuit court in providing copies of this objection to all counsel of record, parties appearing without counsel, the media coordinator and the judge. All objections shall be heard and determined by the judge prior to the commencement of the proceedings. The judge may rule on the basis of the written objection alone. In addition, the objecting party or witness, and all other parties, may be afforded an opportunity to present additional evidence by affidavit or by other means as the judge directs. The judge may permit presentation of evidence by the media coordinator in the same manner. Time for filing of objections may be extended or reduced at the discretion of the judge, who also, in appropriate circumstances, may extend the right of objection to persons not specifically provided for in this policy.

1.4 Technical

(a) Equipment specifications. Equipment to be used in courtrooms during judicial proceedings must be unobtrusive and must not produce distracting sound. In addition, equipment must satisfy the following criteria, where applicable:

1. Still cameras. Still cameras and lenses must be unobtrusive without distracting light or sound.

2. Television cameras and related equipment. Television cameras, together with any related equipment to be located in the courtroom, must be unobtrusive in both size and appearance, without distracting sound or light.

3. Audio equipment. Microphones, wmng and audio recording equipment shall be unobtrusive and shall be of adequate technical quality to prevent interference with the covered judicial proceedings. Any changes in existing audio systems must be approved by the presiding judge. No modifications of existing systems shall be made at public expense. Microphones for use of counsel and judges shall be equipped with power switches to facilitate compliance with subsections 1.2(e) and (f) of this policy.

4. . No light or signal visible or audible to participants in the proceeding shall be used on any equipment during extended coverage to indicate whether it is operating.

5. Advance approval. It shall be the duty of media personnel to demonstrate to the judge reasonably in advance of the proceeding that the equipment sought to be used meets the criteria set forth in this section. Failure to obtain advance judicial approval for equipment may preclude its use in the proceeding. All media equipment and personnel shall be in place at least fifteen minutes prior to the scheduled time of commencement of the proceeding.

(b) Lighting. Other than light sources already existing in the courtroom, no flashbulbs or other artificial light device of any kind shall be employed in the courtroom. With the approval of the judge, however, modifications may be made in light sources existing in the courtroom (e.g., higher wattage light bulbs), provided modifications are installed and maintained without public expense.

(c) Pooling and Equipment. The following limitations on the number of photographic and broadcast media personnel in the courtroom and the amount of equipment shall apply:

1. Pooling. The media are encouraged to pool equipment and personnel. Where the limitations on equipment and personnel under these provisions make it necessary, the media shall be required to pool equipment and personnel. Pooling arrangements shall be the sole responsibility of the media coordinator. No judicial officer or court personnel shall mediate disputes. Priority consideration shall be extended to one of the two television cameras to televise an entire proceeding from beginning to end. In the absence of agreement or in the event of unresolved disputes relating to pooling arrangements, the kind of extended coverage sought shall be prohibited and excluded from the proceeding.

2. Still photography. Not more than two still photographers, each using not more than two camera bodies and two lenses, shall be permitted in the courtroom during a judicial proceeding at any one time.

3. Television. Not more than two television cameras, each operated by not more than one camera person, shall be permitted in the courtroom during a proceeding. Other than the television cameras, recording and broadcast equipment shall be located outside of the courtroom.

4. Audio. Only one audio system for broadcast shall be permitted in a proceeding. Where possible, audio for all media shall be from any existing audio system present in the courtroom. If no technically suitable audio system exists, microphones, wiring, and recording equipment shall be furnished and temporarily installed by the news media without public expense, shall not interfere with the sound quality of any existing courtroom audio system, shall be operated by one person and shall be located in places designated in advance by the judge or designee. Where possible, electronic audio recording equipment and any operating personnel shall be located out of the courtroom.

5. Sufficient video and audio tape capacities should be provided to obviate the need to make changes except during court recess.

6. No equipment or clothing of any extended coverage personnel shall bear any insignia or identification of the individual medium or network involved in extended coverage.

(d) Location of equipment and personnel. Equipment and operating personnel shall be located in, and coverage of the proceedings shall take place from, an area or areas within the courtroom designated by the judge. The area or areas designated shall provide reasonable access to the proceeding to be covered. No equipment or personnel involved in extended media coverage shall impede

pedestrian traffic movement into, or from, the courthouse, including but not limited to courthouse corridors and courtroom entrances and exits.

(e) Movement during the proceedings. Television cameras and audio equipment may be installed in or removed from the courtroom only when the court is not in session. Equipment shall not be stored in the courthouse. In addition, such equipment shall at all times be operated from a fixed position. Still photographers and broadcast media personnel shall not move about the courtroom while proceedings are in session, nor shall they engage in any movement attracting undue attention. Still photographers shall not assume body positions inappropriate for the courtroom.

(f) Decorum. All news media representatives shall be properly attired and shall maintain proper courtroom decorum at all times when covering a judicial proceeding. The judge has discretion to determine proper attire and courtroom decorum.

1.5 Jury Admonishment and Instruction

1. Jury Admonishment. The judge shall give the following admonishment to the jury at the commencement of any criminal or civil trial with an approved request for extended media coverage:

> In this case, I have approved a request to allow the news media to film and photograph the proceedings. This is permitted by the Illinois Supreme Court and is subject to numerous restrictions contained in the Policy for Extended Media Coverage in the Circuit Courts of Illinois.
>
> The policy in place regarding cameras in the courtroom is very strict and the court closely monitors every policy provision. In general, the policy permits the news media to film and photograph the courtroom setting, the participants in the trial, and any persons who might be in the audience. The policy does not permit the news media to film or photograph any of you as jurors or the jury panel as a whole in the courtroom and outside the courtroom.
>
> The presence of cameras does not make this case more important than any other. All trials are equally important to the court and the involved parties. You should not draw any inferences or conclusions from the fact that cameras are present at this particular trial.
>
> The news media is generally able to choose which portion or portion(s) of the trial they wish to attend. Therefore, their attendance may be periodic

from day-to-day. Also, for legal reasons, the news media may not be permitted to film and photograph certain witnesses. You are not to concern yourself with why certain witnesses are filmed and photographed and others are not.

Whether a particular witness is filmed or photographed is not any indication as to the value of, or weight to be given to. that witness's testimony.

You should ignore the presence of any cameras. If you find at any time that you are distracted or unable to concentrate because of the cameras. please notify me immediately.

2. Jury Instruction. The judge shall give the following instruction to the jury when news media was present at any portion of a criminal or civil trial:

In this case. the news media was permitted to film and photograph the proceedings pursuant to the Illinois Supreme Court Policy for Extended Media Coverage in the Circuit Courts of Illinois.

In your deliberation, you should not draw any inferences or conclusions from the fact that cameras were present at this particular trial. Nor should you concern yourself with why certain witnesses were filmed and photographed and others were not. Whether a particular witness was filmed or photographed is not any indication as to the value of. or weight to be given to. that witness's testimony.

Approved: January 24, 2012.
Amended: January 24, 2013.

EXTENDED MEDIA COVERAGE
LOCAL RULES

As of September 12, 2014, the following Circuits and Counties have been approved to extend expanded media coverage on an experimental basis: ***Circuit 1***, Alexander, Jackson, Johnson, Massac, Pope, Pulaski, Saline, Union, and Williamson Counties; ***Circuit 3***, Madison County; ***Circuit 6***, Champaign, DeWitt, Douglas, Macon, Moultrie, and Piatt Counties; ***Circuit 9***, Knox County; ***Circuit 10***, Marshall, Peoria, Putnam, Stark, and Tazewell Counties; ***Circuit 11***, McLean County; ***Circuit 14***, Rock Island, Henry, Mercer, and Whiteside Counties; ***Circuit 15***, Carroll, Jo Daviess, Lee, Ogle, and Stephenson Counties; ***Circuit 16***, Kane County; ***Circuit 17***, Boone and Winnebago Counties; ***Circuit 18***, DuPage County; ***Circuit 19***, Lake County; ***Circuit 21***, Kankakee County; and ***Circuit 23***, Kendall and DeKalb Counties.

1ST JUDICIAL CIRCUIT Alexander, Jackson, Johnson, Massac, Pope, Pulaski, Saline, Union, and Williamson Counties

AUTHORITY: *In the Matter of Extended Media Coverage in the First Judicial Circuit of the State of Illinois*, Administrative Order 12-11-1 filed Oct. 31, 2012;

available at: http://fjc-il.org (First Circuit Website)

click on "Administrative Orders" in the column on the right-hand side of the page; scroll down to 2012 and click on "31-Oct-2012 12-1-1 An order, and attachment establishing Extended Media Coverage in the First District on an Experimental Basis"

6TH JUDICIAL CIRCUIT Madison County

AUTHORITY: *Extended Media Coverage*, Sixth Judicial Circuit Court Order, Administrative Order 2013-5, filed Oct. 5, 2013;

available at: http://www.co.champaign.il.us/circt/6thJCO.htm (Sixth Circuit Website)

on the left-hand side, under "Circuit Court's Menu", click on "Admin Orders & Courtroom Protocols", then click on "2013 Circuit Court Orders – Extended Media Coverage" Also available at:

www.co.champaign.il.us/circt/6th%20Judicial%20Orders/2013_5_Media_coverage.pdf

9TH JUDICIAL CIRCUIT Knox County

AUTHORITY: 9th Judicial Circuit (Knox County) Local Court Rules and Forms;

Form Media Coordinator's Notice of Request(s) For Extended Media Coverage of Trial or Proceeding

Form Objection of Party to Extended Media Coverage of Testimony

Form Objection of Witness to Extended Media Coverage of Testimony

Suggested forms are available at: www.9thjudicial.org;

click on bar across the bottom of the page that reads: "FORMS LEGAL -- RESOURCES –PHONE NUMBERS AND ADDRESSES"; then click on "Local Circuit Court Rules and Forms," then click on "Local Court Rules," and finally click on "Circuit Rules/Word Document," which takes you to a document containing the rules. The forms are at pages 137-139.

10TH JUDICIAL CIRCUIT Marshall, Peoria, Putnam, Stark, and Tazewell Counties

AUTHORITY: *Extended Media Coverage*, 10th Cir. R. 15; *Live Blogging in the Courtroom*, 10th Cir. R. 16.

Rule 15 contains the following Attachments:

Attachment B	Request for Media Credentials
Attachment C	Request for Media Access to Court Proceedings
Attachment D	Objection to Extended Media Coverage

Available at: www.peoriacounty.org/courts;

In the middle of the page, under the heading "Local Rules" click on ""Extended Media Coverage" for Rule 15 or click on "Live Blogging in the Courtroom" for Rule 16;

Available at: www.tazewell.com

Along the top of the page, scroll over the tab called "Offices and Departments" and then scroll over "Departments A-C" and click on "Courts." In the middle of the page, you will see a list of the orders and forms, click on the order or form that you want.

11TH JUDICIAL CIRCUIT McLean County

AUTHORITY: *Courtroom Management and Decorum*, Rule 307(B) (1) (allows extended media coverage in McLean County); Rule 307 (B) (2) (prohibits extended media coverage in all other counties in 11th

Circuit); Rule 307(A)(5) (allows live reporting while court is in session, blogging)

Available at: http://www.mcleancountyil.gov

Scroll over heading across the top of the page titled "Departments" then scroll over the drop down list titled "Departments A-F" then scroll over the drop down list to "Circuit Court" and then on the drop down list click on "Circuit Court Rules, 11th Judicial Circuit").

15TH JUDICIAL CIRCUIT Carroll, Jo Daviess, Lee, Ogle, and Stephenson Counties

AUTHORITY: Media Related Forms

Media Coordinator Request for Extended Coverage
Objection of Witness to Coverage
Objection of Party to Coverage
Courtroom Guidelines

Available at: www.15thjudicialcircuit.com

On the left-hand side of the page, under Main Menu, click on Resources, the drop down menu list the Media Related Forms.

16TH JUDICIAL CIRCUIT Kane County

AUTHORITY: *Extended Media Coverage*, 16th Jud. Cir. L.R. Art. 1.14A,
Available at:

www.illinois16thjudicialcircuit.org/localCourtRules/section01_14a.pdf

16th Circuit also has a Media Packet that contains:

Guidance for Camera Operators
Request for Extended Media Coverage
Notice of Filing of Request for Extended Media Coverage
Objection to Extended Media Coverage
Notice of Filing of Objection to Extended Media Coverage
Order on Request for Extended Media Coverage

Available at: www.illinois16thjudicialcircuit.org

Scroll over "General Information" when the drop down menu appears, click on "Local Court Rules & General Orders," then under

Administration of the court, click on Section 1.14A Extended Media Coverage for the Rule or underneath that click on "Media Packet"

17TH JUDICIAL CIRCUIT Boone and Winnebago Counties

AUTHORITY: Extended Media Coverage, 17th Jud. Cir. L.R. 2.12,

Available at: www.illinois17th.com

Scroll over the tab "Rules and Orders" and scroll to the drop down tab "Local Rules," and click on "Judicial Administration," then click on "Rule 2.12 Extended Media coverage."

The 17th Judicial Circuit has developed the following forms:

Appendix LL-1	Request for Extended Media Coverage
Appendix LL-2	Objection of Party to Extended Media Coverage of Testimony
Appendix LL-3	Objection of Witness to Extended Media Coverage of Testimony
Appendix LL-4	Order on Request for Extended Media Coverage

Suggested forms are available at:

www.illinois17th.com: Scroll over the tab "Rules and Orders" and scroll to the drop down tab "Appendices/Forms," and scroll through the list to locate the form.

18TH JUDICIAL CIRCUIT DuPage County

AUTHORITY: Extended Media Coverage, 18th Jud. Cir. L.R. Art. 38,

Available at: www.dupageco.org/Courts/LocalCourtRules/38686/

The Rule references the following:

Appendix 1	Request for Extended Media Coverage
Appendix 2	Objection of Party to Extended Media Coverage of Testimony

Appendix 3 Objection of Witness to Extended Media Coverage of Testimony

Appendix 4 Order on Request for Extended Media Coverage

Appendices are available at: www.dupageco.org

Scroll over "Courts" at the top of the page, the drop down menu should appear, under "Legal Resources" click on "Local Court Rules," then on the left-hand side of the page, under "Local Court Rules," click on "Appendices"

19TH JUDICIAL CIRCUIT Lake County

AUTHORITY: *Extended Media Coverage*, 19th Jud. Cir. L.R. 21.06

The 19th Judicial Circuit has developed the following forms:

Appendix A Request for Extended Media Coverage
Appendix B Order on Request for Extended Media Coverage
Appendix C Notice of Filing of Request for Extended Media Coverage
Appendix D Objection of Party to Extend Media Coverage of Testimony
Appendix E Notice of Filing of Request for Extended Media Coverage
Appendix F Objection of Witness to Extend Media Coverage of Testimony

Rule and forms are available at:

http://19thcircuitcourt.state.il.us/ under the tab "Resources" click on "Court Forms" and scroll down the list.

EXCLUDING THE MEDIA AND THE PUBLIC FROM COURT PROCEEDINGS

The right to access criminal proceedings and court records is not absolute. The trial court may close a proceeding if the right to access does not apply to a particular proceeding or, even if it does, the presumption of access is rebutted.

CLOSING PROCEEDINGS OTHER THAN THE TRIAL

First, the trial court must determine,

> Whether the presumption of public access applied to this particular type of court proceeding; and
>
> Whether the proceedings have a purpose and function that would be furthered by disclosure.
>
> *If the proceeding is not the actual trial but rather is held to determine admissibility of sealed documents, the proceeding can be closed without hearing.*

CLOSING PRETRIAL OR TRIAL PROCEEDINGS

The right to a public trial applies to all components of the trial, including *voir dire* examination, suppression hearings, and preliminary hearings.

> [Note: ***voir dire* examination** and **evidence suppression hearings** are specifically **excluded** from **extended media coverage**, see **ILCS Policy 1.2(d)**.]

When assessing the propriety of closing criminal proceedings to the public and the media, the Court should require:

___ Notice of the motion to all interested parties, including the media and public notice; and

___ Written motion.

At the *hearing* on the motion for any closure, either partial or complete, the moving party has the burden of establishing that:

___ An overriding interest is likely to be prejudiced. Such interests include:

- ___ Defendant's right to a fair trial,
- ___ Prevention of contamination of the jury,
- ___ Court's interest in maintaining proper decorum in the courtroom;

___ Alternatives to closure order cannot protect that interest; and

___ Closure will be effective in protecting against the perceived prejudice.

The *trial court's order:*

___ The order must indicate that the trial court considered alternatives to closure to protect the overriding interest that the movant advanced, such alternatives may include:

___ Delay or continuance of the trial,

___ Severance of defendants,

___ Change of venue,

___ Change of venire,

___ Specialized *voir dire* procedures,

___ Sequestration of jurors,

___ Sealing documents,

___ Limits on media presence, and

___ Control of attorneys' contact with the press.

___ If the trial court orders closure, the order makes findings that:

___ Without closure an overriding interest is likely to be prejudiced;

___ The court considered reasonable alternatives to closure; and

___ Closure will be effective in protecting the overriding interest.

___ The order must be no broader than necessary to protect the asserted interest.

___ The trial court should determine whether or not to seal the order.

APPENDIX

PART THREE: POST-TRIAL PROCEEDINGS

Suggested Script for Sentencing Hearing .....A – 142

Guidelines for Charge and Sentencing Enhancements .....A – 144

Penalties for Crimes in Illinois ("Illinois Sentencing Chart").....A – 152

Guidelines for Consecutive and Concurrent Sentencing .....A – 154

Truth in Sentencing Offenses.....A – 156

Guide to Fines, Fees and Costs in Criminal Cases .....A – 161

Appeal Rights Following Contested Trial and Petition to Revoke Probation – **Supreme Court Rule 605(a)** .....A – 164

Post-Conviction Process Summary Dismissal .....A – 165

Suggested **651(c)** Certificate of Counsel .....A – 166

THE PROCEDURES SUGGESTED IN THIS APPENDIX ARE EXAMPLES ONLY. IT IS RECOMMENDED THAT EACH INDIVIDUAL JUDGE TAILOR "SCRIPTS" OR CHECK-LISTS WHICH, IN HIS OR HER ESTIMATION, COMPLIES WITH LOCAL CUSTOM AS WELL AS THE REQUIREMENTS OF ILLINOIS SUPREME COURT RULES, STATUTORY ENACTMENTS, AND CASE LAW.

Suggested Script for Sentencing Hearing

Is the State prepared to proceed?

Is the Defense prepared to proceed?

Are you under any mental or physical disability, on any medication, or under the influence of any drugs or alcohol affecting your ability to understand these proceedings? Are you prescribed to any medications which you are <u>not</u> taking?

Have you had an ample opportunity to prepare for sentencing, and to discuss with your attorney any offers made, and the possible penalties you face? Are you satisfied with the services your attorney has performed thus far on your behalf?

Have the parties timely received the Pre-Sentencing Investigation Report (and addenda?)?

Are there any additions or corrections offered by the State? Defense?

State - Aggravation / Defense - Mitigation / State - Argument regarding sentencing alternatives?

Defense - Argument regarding sentencing alternatives?

Defendant - Right of allocution?

State - Victim Impact Statement(s) if appropriate to case?

Having now considered the factual basis (or trial evidence), the pre-sentencing investigation report (and addenda?), the history, character and attitude of the defendant, the evidence and arguments (and statement of allocution) presented, having considered the statutory matters in aggravation and mitigation, and having due regard for the circumstances of the offense, I find as follows: In aggravation . . . in mitigation . . . (best to specify factors of both, relevant to case).

IF DOC: And finding that a sentence of probation or conditional discharge would deprecate the seriousness of the crime(s) committed and would be inconsistent with the ends of justice, and having due consideration of the fact that the cost of confinement is now over $22,600 per year.

I hereby sentence the defendant to serve .....(concurrent, consecutive, extended, and+)

(Include special findings if sentencing to consecutive terms per statute.)

[IF JAIL OR DOC] Certain credits will apply against your sentence, including credit for any time served, which is allowed day for day credit if being calculated as a deduction from the total sentence imposed, or credit for time actually served if deducted from your net sentence after calculation of good time credits you will receive.

[IF DOC] Under the truth-in-sentencing you are qualified, but not guaranteed, to receive a 50% (or 15%) (or no) credit against your total sentence, a half-day credit for every day you participate in educational or vocational programs if available to you, and other credits under DOC's separate jurisdiction.

All mandatory costs, fines and assessments are imposed. Any obligations deemed fines are subject to a credit of $5 per day serve by defendant in custody.

GUIDELINES FOR CHARGE AND SENTENCING ENHANCEMENTS

This is a summary of common charges and sentencing enhancements to assist the court for purposes of arraignment and sentencing, but it is not inclusive of all statutory enhancements.

HABITUAL CRIMINAL – 730 ILCS 5/5-4.5-95: Natural Life Sentence: a person who has twice committed and been convicted in U.S. courts of 1st degree murder, a Class X felony, aggravated kidnapping, or criminal sexual assault; and after spending less than 20 years out of custody following conviction of the first such crime, again commits and is convicted of any of those crimes other than aggravated kidnapping.

CLASS X FELONY– 730 ILCS 5/5-45.95(b): A person who, twice after January 1978 committed and was convicted of Class 2 or more serious felonies, and while over age 21 commits another such felony.

NON PROBATIONAL OFFENSES– 730 ILCS 5/5-5-3(c)(2)

(A) First Degree Murder

(B) Attempt First Degree Murder

(C) Class X Felony

(D) Controlled Substance Trafficking; Unlawful Delivery Controlled Substance near: School, Public Housing, Park, Truck Stop

Unlawful Delivery Controlled Substance Fentanyl or Cocaine (5-15 grams)

(D-5) Unlawful Delivery Controlled Substance; Heroin (3-15 grams)

(E) Cannabis Trafficking (2,500 grams) or Cannabis Conspiracy

(F) Class 2 or greater if previous conviction in last 10 years is Class 2 or greater+

(F-5) Some UUW (School, etc.: silencer, machine gun, etc.) UUW/Possession by felons or persons in IDOC, Aggravated UUW by felon

(G) Residential Burglary+

(H) Criminal Sexual Assault

(I) Aggravated Battery to Senior Citizen

(J) Organized Gang related Forcible Felony

(K) Vehicular Hijacking

(L) 2nd or more Hate Crime (based on a felony aggravated assault or felony mob action)

(M) 2nd or more Institutional Vandalism if damage exceeds $300

(N) Class 3 Felony FOID violation of paragraph (a)(1)

(O) Compelling Organized Membership of Persons

(P) Child Pornography **720 ILCS 5/11-20.1 (subsections (a): (1)(2)(3)(4)(5)(7)**

(Q) Arson (with intent to defraud insurer) Residential Arson, Place of Worship Arson

(R) Unlawful Sale of Firearms

(S) Blank

(T) 2nd or more violation of Methamphetamine Control Act

(U) 2nd or more DWLR based on Involuntary Manslaughter or Reckless Homicide

(V) Aggravated Child Pornography subsections (c) (4)

(W) Unlawful Purchase of Firearm

(X) Disarming Peace/Corrections Officer: subsection (a) taking NOT attempt taking

(Y) Unlawful Possession of Firearm by street gang member when firearm loaded

(Z) Class 1 felony; while on felony probation or conditional discharge

(AA) Theft ($500,000 - $1,000,000)

(BB) Laundering of criminally derived property exceeding $500,000

(CC) Selling or attempting sale of $2,000 + or $500,000 + of counterfeit items

(DD) Aggravated Assault subsection (c) (6) if gun pointed towards victim

+ Except as otherwise provided in Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act, **20 ILCS 301/40-10(a)**

1ST DEGREE MURDER – 720 ILCS 5/9-1(b-5)

Natural Life under certain circumstances: See **Appendix A-78.**

INTENTIONAL HOMICIDE OF A UNBORN CHILD - 720 ILCS 5/9-1.2: Class X felony

15-year add on if commits the offense while armed with a firearm;

20-year add on if personally discharges a firearm;

25-year add on if personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person.

INVOLUNTARY MANSLAUGHTER AND RECKLESS HOMICIDE – 720 ILCS 5/9-3

(e-3): Class 2 felony: 6-28 years: offense committed upon a public thoroughfare where children pass to and from school, school guard performing duties; deaths of 2 or more persons.

(e-8): Class 2 felony: 6-28 years: deaths of two or more persons: and driving in construction zone: or operating a vehicle while failing or refusing to comply with police officer or traffic control aide.

(e-13) Class 2 felony: 6-28 years: violation of Section 11-907 of Illinois Vehicle Code (operation of vehicles and streetcars on approach of authorized emergency vehicles); death of 2 or more persons as part of single course of conduct.

AGGRAVATED KIDNAPPING – 720 ILCS 5/10-2 – Class X

(a)(6): 15-year add on if commits the offense while armed with a firearm;

(a)(7): 20-year add on if personally discharges a firearm;

(a)(8): 25-year add on if personally discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person.

Natural Life if convicted of a 2nd or subsequent offense (after conviction on the 1st offense).

CRIMINAL SEXUAL ASSAULT- 720 ILCS 5/11-1.20(b)(1)(A)

Class X felony 30-60 years: 2nd or subsequent conviction of criminal sexual assault or exploitation of a child or substantially equivalent offense of same in another state.

Natural Life: 2nd or subsequent conviction for aggravated criminal sexual assault or predatory criminal sexual assault of a child or substantially equivalent offense of same in another state.

AGGRAVATED CRIMINAL SEXUAL ASSAULT 720 ILCS 5/11-1.30 – Class X

(a)(1): 15- year add on if person displays, threatens to use, or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim to believe that the object is a dangerous weapon**;**

(a)(9): 20-year add on if personally discharges a firearm;

(a)(10): 25- to natural life if personally discharges a firearm which proximately causes great bodily harm, permanent disability, permanent disfigurement, or death.

(d)(2): Natural Life – 2nd or subsequent conviction for aggravated criminal sexual assault or predatory criminal sexual assault of a child or substantially equivalent offense of same in another state.

PREDATORY CRIMINAL SEXUAL ASSAULT OF A CHILD – 720 ILCS 5/11-1.40 – Class X

(a)(2)(A): 15-year add on if armed with a firearm;

(a)(2)(B): 20- year add on if personally discharges a firearm;

(a)(2)(C): 50-years to **natural life** if causes great bodily harm that results in permanent disability; or is life threatening.

(a)(2)(D): 50– 60 years; delivers any controlled substance to victim without victim's consent or by threat or deception for other than medical purposes.

Natural Life – against 2 or more persons.

Natural Life – 2nd or subsequent offense of predatory criminal sexual assault of a child, or criminal sexual assault or aggravated criminal sexual assault or substantially equivalent offense of same in another state.

AGGRAVATED BATTERY – 720 ILCS 5/12-3.05 Class X

(e)(1) discharges firearm and causes injury.

(a)(2): 6-45 years; causes severe and permanent disability, great bodily harm or disfigurement by means of caustic or flammable substance, poisonous gas, deadly biological or chemical contaminant or agent, radioactive substance, or a bomb or explosive compound.

(e)(5): 12-45 years: discharges machine gun or firearm equipped with a silencer and causes any injury.

(e)(2), (e)(3), or (e)(4): 15-60 years: discharges firearm and causes injury to the following:

Peace officer, community policing volunteer, person summoned by a police officer, fireman, private security officer, correctional institution employee, emergency management worker, emergency medical technician employed by a municipality or other governmental unit:

Performing his or her official duties; battered to prevent performance of official duties; or in retaliation for performing his/ her official duties. OR

Teacher, student or school employee upon school grounds or grounds adjacent to a school or in any part of a building used for school purposes.

(e)(8): 20 – 60 years: discharges a machine gun or a firearm equipped with a silencer and causes any injury to teacher, student, school employee and on school grounds or grounds adjacent to school or in part of a building used for school purposes.

(b)(1): great bodily harm or permanent disability or disfigurement to child under 13 or any severely or profoundly intellectually disabled person.

15- year add on if armed with firearm;

20- year add on if personally discharged firearm;

25- years to natural life personally discharged firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement or death.

DOMESTIC BATTERY-720 ILCS 5/12.3.2(c): Class 4 felony

10 days or 300 hours of community service: committed in the presence of child.

AGGRAVATED DOMESTIC BATTERY – 720 ILCS 5/12-3.3: Class 2 felony

60 days, mandatory consecutive.

ARMED ROBBERY – 720 ILCS 5/18-2: Class X felony

(a)(2): 15- year add on if armed with firearm;

(a)(3): 20- year add on if personally discharged firearm;

(a)(4): 25- year to natural life if personally discharges a firearm which proximately causes great bodily harm, permanent disability, permanent disfigurement, or death.

AGGRAVATED VEHICULAR HIJACKING – ILCS 5/18-4: Class X felony

(a)(3): not less than **7 years** when carries on or about person, or is otherwise armed with a dangerous weapon, other than a firearm.

(a)(4): 15- year add on if armed with firearm;

(a)(5): 20- year add on if personally discharged firearm;

(a)(6): 25- year to **natural life** if personally discharges a firearm which proximately causes great bodily harm, permanent disability, permanent disfigurement, or death.

HOME INVASION – 720 ILCS 5/19-6: Class X felony

(a)(3): 15- year add on if armed with a firearm uses force or threatens the imminent use of force upon any person(s) within the dwelling place whether or not injury occurs.

(a)(4): 20- year add on if uses force or threatens the imminent use of force whether or not injury occurs and personally discharges firearm;

(a)(5): 25 -year to natural life – personally discharged firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death to another person within the dwelling place.

AGGRAVATED DISCHARGE OF A FIREARM – 720 ILCS 24-1.2: Class X felony

(a)(3), (a)(4), (a)(5),(a)(6), (a)(7), (a)(8), or (a)(9):

10 – 45 years: if discharges a firearm in the direction of:

a peace officer, a community policing volunteer, a correctional institution employee, fireman, or vehicle occupied by the above named persons; while performing his/ her official duties; or

emergency medical technician – ambulance, emergency medical technician – intermediate, emergency medical technician – paramedic, ambulance driver, or other medical assistance or first aid personnel, or vehicle occupied by the above named persons; while performing his/her official duties; or

teacher, or other person employed in any school and upon school grounds or adjacent to a school, or any part of building used for school purposes; or

emergency management worker engaged in official duties, or vehicle occupied by said worker, to prevent worker from performing official duties or in retaliation for performing official duties.

ARMED VIOLENCE – 720 ILCS 5/33A-3: Class X felony

33(A)(2)(a): possession; minimum term **15 years;** category I weapon;

possession; minimum term **10 years;** category II weapon;

possession; with a firearm; 3 or more listed prior offenses; **25 - 50 years**

33(A)(2)(b): personal discharge; minimum term **20 years:** category I or II weapon;

personal discharge with a firearm; 3 or more listed prior offenses; **25 – 50**

33(A)(2)(c): personal discharge proximately causes great bodily harm, permanent disability or permanent disfigurement or death; **25-40 years:** category I or II weapon;

33(A)(2)(a-c): sentence must be consecutive to predicate offense if listed in 5/33A-3(d).

MANUFACTURE OR DELIVERY CONTROLLED SUBSTANCE: 720 ILCS 570/401: Class X felony

Heroin, morphine, cocaine, LSD, fentanyl, or analog, and other controlled substances listed herein, under section 570/204:

9-40 years: 100-400 grams; or 200-600 pills;

12-50: 400-900 grams; or 600-1500 pills

15-60: 900+; or 1500 + pills

Mandatory Drug Assessment $3,000; fine not to exceed $500,000 or street value whichever >.

POSSESSION OF CONTROLLED SUBSTANCE: 720 ILCS 570/402: Class 1 felony

Any controlled substance, counterfeit substance or analog.

6-30 years: 100-400 grams; or 200-600 pills; if sentenced to prison.

8-40 years: 400-900 grams; or 600-1500 pills; if sentenced to prison.

10-50 years: 900+ grams; or 1500 + if sentenced to prison.

Mandatory Drug Assessment $2,000; fine not to exceed $200,000 or street value whichever >.

METHAMPHETAMINE MANUFACTURING 702 ILCS 646/15: Class X felony

(a)(2)(C): 9-40 years: 100-400 grams; fine not to exceed $200,000 or street value whichever >.

(a)(2)(D) 12-50 years: 400-900 grams; fine not to exceed $300,000 or street value whichever >.

(a)(2)(E): 15-60 years: 900+; fine not to exceed $400,000 or street value whichever >.

(b)(2)(A) 6-30 years: less than 15 grams + aggravating factor; fine not to exceed $100,000 or street value whichever >.

(b)(2)(B) 9-40 years; 15-100 grams + aggravating factor; fine not to exceed $200,000 or street value whichever >.

(b)(2)(C) 12-50 years: 100-400 grams + aggravating factor; fine not to exceed $300,000 or street value whichever >.

(b)(2)(D) 15-60 years; 400 or more grams + aggravating factor; fine not to exceed $400,000 or street value whichever >.

METHAMPHETAMINE DELIVER OR POSSESSION WITH INTENT TO DELIVER - 720 ILCE 646/55: Class X felony

(a)(2)(D); 9-40 years; 100-400 grams; fine not to exceed $200,000 or street value whichever >.

(a)(2)(E): 12-50 years; 400-900 grams; fine not to exceed $300,000 or street value whichever >.

(a)(2)(F): 15-60 years; 900 + grams; fine not to exceed $400,000 or street value whichever >.

(b)(2)(C): 8-40 years: 15-100 grams with aggravating factor; fine not to exceed $200,000 or street value whichever >.

(b)(2)(D): 10-50 years: 100 or more grams with aggravating factor; fine not to exceed $300,000 or street value whichever >.

METHAMPHETAMINE POSSESSION 720 ILCS 646/60

(b)(5): 8-40 years: 400-900 grams; fine not to exceed $200,000 or street value whichever >.

(b)(6): 10-50 years: 900+ grams; fine not to exceed $300,000 or street value whichever >.

PENALTIES FOR CRIMES IN ILLINOIS

Category of crime	Usual prison or jail term	Possible extended term[1]	Probation term instead[2]	Mandatory supervised release time[3]	Maximum fine[4]
MURDER					
First-degree	Life, no parole[5]	—	Not allowed	3 years	
	20-60 years[6]	60-100 years	Not allowed	3 years	$25,000*
Second-degree	4-20 years	15-30 years	4 years	2 years	
HABITUAL CRIMINAL[7]	Life, no parole	—	Not allowed	—	—
FELONY					
Class X	6-30 years	30-60 years	Not allowed	3 years	$25,000*
1	4-15 years	15-30 years[8]	Up to 4 years[9]	2 years	(or more if
2	3-7 years	7-14 years[8]	Up to 4 years[9]	2 years	specified;
3	2-5 years	5-10 years	Up to 2½ years	1 year	$50,000 if a
4	1-3 years	3-6 years	Up to 2½ years	1 year	corporation)
MISDEMEANOR					
Class A	Under 1 year	—	Up to 2 years	—	$2,500*
B	Up to 6 months	—	Up to 2 years	—	1,500*
C	Up to 30 days	—	Up to 2 years	—	1,500*
PETTY OFFENSE	—	—	Up to 6 months	—	Amount specified, limited to $1,000*
BUSINESS OFFENSE	—	—	—	—	Amount specified

* Most fines are subject to mandatory surcharges of at least one-fourth the amount fined. Note 4 on the reverse side gives details.

Note: This summary of Illinois' complex sentencing provisions lists the normal penalties for each class of crime. Laws defining some crimes set higher penalties than the normal penalties for their classes. Numbered notes are on the reverse side.

1. EXTENDED TERM. The court may impose an extended term in lieu of the usual term on a person convicted of any of a number of crimes (or of crimes committed in types of circumstances) listed in 730 ILCS 5/5-5-3.2(a) to (e). An extended term can also be imposed if an aggravating factor described in Note 5 below was present.

2. PROBATION. Except for the most serious crimes, an offender can be sentenced to a term of probation in lieu of prison. The "Probation term instead" column lists maximum probation terms by class of crime. A probationer may not have a weapon or leave the state without permission, and must pay a $50 fee and any fees for court-ordered treatment, in addition to other conditions imposed by law or the court. See note 9 below on nonprobationable felonies.

3. MANDATORY SUPERVISED RELEASE (MSR). This is a period of parole that automatically follows a prison term for a felony. Persons convicted of some of the more serious sex crimes (mostly involving children or child pornography) must serve from 3 years to as long as natural life of MSR. A person convicted of felony or aggravated domestic battery, stalking or aggravated stalking, or a felony violation of an order of protection must serve 4 years of MSR; a person convicted of a repeat offense of aggravated or felony criminal sexual abuse of a victim under 18 must serve 4 years of MSR, with at least the first 2 under electronic home detention. The Prisoner Review Board can release from MSR a person it considers likely to avoid additional crimes.

4. FINES. When a fine is imposed, other than for a nonmoving traffic offense or a pedestrian offense, there is added to it a penalty of $10 per $40 or fraction of $40. Thus the fines listed must be increased by one-fourth to approximate maximum base fines. Separate surcharges of $100 for a felony, $75 for a misdemeanor other than a conservation offense, and $50 for many Vehicle Code offenses also apply. Other surcharges on fines for specific kinds of crimes are listed principally in 730 ILCS 5/5-9-1.1 to 5/5-9-1.18.

5. LIFE IN PRISON. .A first-degree murderer *may* be sentenced to life in prison without possibility of parole if the killing was done with "...wanton cruelty." A person who was at least 18 when committing first-degree murder may be so sentenced if the defendant killed: (1) any of the following kinds of persons who were performing their duties, or to prevent or retaliate for such performance: a peace officer; participant in a criminal investigation, prosecution, or trial; prison or jail employee; firefighter; emergency medical worker employed by government; or community policing volunteer; (2) a prisoner or other person authorized to be in a prison or jail; (3) two or more persons, at the same or different times, if done with separate intent or in separate acts; (4) as a result of a hijacking; (5) for hire, or by hiring another; (6) intentionally, acting either alone or with another, in the course of another "inherently violent" felony; (7) a person under age 12, or at least 60, with ". . . wanton cruelty;" (8) intentionally as part of a drug crime, or by causing another person to kill as part of such a crime; (9) while in prison and in the course of committing or conspiring to commit another felony; (10) in a "cold, calculated, and premeditated manner" as part of a scheme to take a human life illegally; (11) as a leader of a criminal drug conspiracy who caused the victim to be killed; (12) intentionally in a way that involved torture; (13) in a drive-by shooting; (14) a disabled person; (15) a person who had an order of protection against the murderer; (16) a teacher or other school employee, in or near a school; or (17) as part of a terrorist act. The court *must* sentence to life in prison without parole any first-degree murderer who killed (a) after being earlier convicted of first-degree murder anywhere in the U.S.; (b) a person under age 12 if the murderer was at least 17, or during an aggravated criminal sexual assault, criminal sexual assault, or aggravated kidnapping before the murderer turned 17; (c) a peace officer, firefighter, emergency medical or emergency management worker, or correctional employee performing duties or to prevent or retaliate for such performance.

6. The range of possible prison sentences for first-degree murder is 20 to 60 years unless a fact justifying life in prison is present. But if the murderer carried a firearm, the term is automatically increased by 15 years; if the murderer fired it, by 20 years; or if the firing caused great bodily harm, permanent disability or disfigurement, or death, by 25 years to life.

7. HABITUAL CRIMINALITY. This is not an offense, but an adjudication of a person who has twice committed and been convicted in U.S. courts of first-degree murder, a Class X felony, aggravated kidnapping, or criminal sexual assault; and after spending less than 20 years out of custody following conviction of the first such crime, again commits and is convicted of any of those crimes other than aggravated kidnapping.

8. A person who, twice after January 1978, committed and was convicted of Class 2 or more serious felonies, and while over age 21 commits another such felony, is to be sentenced as a Class X felon.

9. Probation is not ordinarily allowed for a Class 2 or more serious felony committed within 10 years after conviction of another Class 2 or more serious felony. Probation is also prohibited for numerous other kinds of crimes or situations listed in 730 ILCS 5/5-5-3(c)(2).

Sources: This chart is based principally on the following sections of Illinois law in effect as of early 2013: 720 ILCS 5/9-1 and 5/9-2; 725 ILCS 240/10; 730 ILCS 5/3-3-3, 5/3-3-8, 5/5-4.5-10 to 5/5-4.5-80 and 5/5-4.5-95, 5/5-5-3, 5/5-5-3.2, 5/5-6-1 ff., 5/5-8-1 ff., and 5/5-9-1 ff.; and 20 ILCS 301/40-5 ff.

GUIDELINES FOR CONSECUTIVE AND CONCURRENT SENTENCING

I. PERMISSIVE CONSECUTIVE TERMS: 730 ILCS 5/5-8-4(c): The court may impose consecutive sentences in any of the following circumstances:

(c)(1): If having regard to the nature and circumstances of the offense and the history and character of defendant, the court finds that consecutive sentences are required to protect the public from further criminal conduct.

(c)(2): one of the convictions was for aggravated false personation of peace officer AND the offense was committed in attempting or committing a forcible felony.

II. MANDATORY CONSECUTIVE SENTENCING: 730 ILCS 5/5-8-4(d)

(d)(1): one of the convictions was for 1st degree murder, *or* Class X or Class 1 felony *AND* the defendant inflicted severe bodily injury;

(d)(2): one of the convictions was for criminal sexual assault, aggravated criminal sexual assault, or predatory criminal sexual assault of a child;

(d)(3): defendant convicted of **armed violence** based upon one of the following predicate offenses:

(i) solicitation of murder;

(ii) solicitation of murder for hire;

(iii) heinous battery;

(iv) aggravated battery of senior citizen;

(v) criminal sexual assault;

(vi) manufacture, delivery, or possession with intent to deliver or manufacture > 5,000 grams of cannabis;

(vii) cannabis trafficking;

(viii) manufacture, deliver, or possession with intent to deliver or manufacture a Class X amount of controlled, counterfeit or analog substance;

(ix) controlled substance trafficking involving Class X amount of controlled, counterfeit or analog substance;

(x) calculated criminal drug conspiracy;

(xi) street gang criminal drug conspiracy.

(d)(4): defendant convicted of the offense of leaving the scene of a motor vehicle accident involving death or personal injuries (Section 11-401 of vehicle code) AND EITHER:

(A) aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound(s), or any combination;

(B) reckless homicide;

(C) both and offense describe in item (A) and (B).

(d)(5): defendant convicted of concealment of homicidal death or dismembering a human body, or

(d)(5.5): defendant convicted of use of stolen firearm in commission of an offense.

(d)(6): defendant in custody of Dept. of Corrections at time offense committed (includes placement on EHM);

(d)(7): defendant in custody of Dept. of Corrections and sentence for escape or attempted escape.

(d)(8): defendant charged with felony and commits separate felony while on pretrial release or in pretrial detention in county jail or detention facility.

(d)(8.5): defendant convicted of committing battery against county correctional officer or sheriff's employee while serving sentence or in pretrial detention in county jail facility.

(d)(9): defendant either on bond or in county jail or detention facility after conviction of a felony and commits a separate felony.

(d)(10): defendant possesses items of contraband while serving sentence in county jail or while in pre-trial detention in county jail; or

(d)(11): defendant sentenced for violation of bail bond, consecutive to any sentence for the charge for which the bail had been granted.

TRUTH IN SENTENCING OFFENSES

100% AUTOMATICALLY

First Degree Murder – eff.6-19-98
Terrorism – committed on or after 12-5-02

85% AUTOMATICALLY

Attempt First Degree Murder – eff. 6-19-98
Solicitation of Murder – eff. 6-19-98
Solicitation of Murder for Hire – eff. 6-19-98
Intentional Homicide of an Unborn Child – eff. 6-19-98
Aggravated Criminal Sexual Assault – eff. 6-19-98
Criminal Sexual Assault – eff. 6-19-98
Aggravated Kidnapping – eff. 6-19-98
Aggravated Battery with a Firearm – eff. 6-19-98
Heinous Battery – eff. 6-19-98
Aggravated Battery of a Senior Citizen – eff. 6-19-98
Aggravated Battery of a Child – eff. 6-19-98
Predatory Criminal Sexual Assault of a Child – eff. 6-19-98
Aggravated Battery with a Machine Gun or Firearm equipped with any device or attachment designed or used for silencing the report – eff. 7-15-99
Aggravated Discharge with a Machine Gun or Firearm equipped with any device or attachment designed or used for silencing the report – eff. 7-15-99
Aggravated Arson – eff. 7-27-01
Aggravated DUI, Death of Another, Class 2 or higher – eff. 7-18-03
Aggravated Discharge of a Firearm – eff. 6-23-05 – Does not require finding of great bodily harm
Armed Habitual Criminal – eff. 8-2-05
Luring A Minor-Second or Subsequent Offense - eff. 6-1-08
Aggravated Domestic Battery - eff. 7-23-10
Aggravated DUI, Great Bodily Harm or Permanent Disability or Disfigurement to Another - eff. 1-1-11

85% – IF THE COURT FINDS AND ENTERS A FINDING THAT CONDUCT LED TO A CONVICTION AND OFFENSE RESULTED IN GREAT BODILY HARM TO A VICTIM

Home Invasion
Armed Robbery
Aggravated Vehicular Hijacking
Aggravated Discharge of a Firearm (Prior to 6-23-05 must indicate great bodily harm)
Armed Violence with a Category I or II Weapon

85% – ONLY IN CASES WHEN THE OFFENDER WAS UNDER INFLUENCE OF ALCOHOL OR OTHER DRUGS

Reckless Homicide – eff. 1-1-99

75% Time to Serve of Sentence Imposed If Offense is committed on or after 8/13/07
730 ILCS 5/3-6-3(v), Public Act 095-0134

Years	Breakdown
1	9 mo.
2	1 yr, 6 mo.
3	2 yrs, 3 mo.
4	3 yrs.
5	3 yrs,9 mo.
6	4 yrs, 6 mo.
7	5 yrs, 3 mo.
8	6 yrs.
9	6 yrs, 9mo.
10	7 yrs, 6 mo.
11	8 yrs, 3 mo.
12	9 yrs.
13	9 yrs, 9 mo.
14	10 yrs, 6 mo.
15	11 yrs, 3 mo.
16	12 yrs.
17	12 yrs, 9 mo.
18	13 yrs, 6 mo.
19	14 yrs, 3 mo.
20	15 yrs.
21	15 yrs, 9 mo.
22	16 yrs. 6 mo.
23	17 yrs. 3 mo.
24	18 yrs.
25	18 yrs, 9 mo.

Years	Breakdown
26	19 yrs, 6mo.
27	20 yrs, 3 mo.
28	21 yrs.
29	21 yrs, 9 mo.
30	22 yrs, 6 mo.
31	23 yrs, 3 mo.
32	24 yrs.
33	24 yrs, 9 mo.
34	25 yrs, 6 mo.
35	26 yrs, 3 mo.
36	27 yrs.
37	27 yrs, 9 mo.
38	28 yrs, 6 mo.
39	29 yrs. 3 mo.
40	30 yrs
41	30 yrs. 9 mo.
42	31 yrs, 6 mo.
43	32 yrs, 3 mo.
44	33 yrs.
45	33 yrs, 9 mo.
46	34 yrs, 6 mo.
47	35 yrs. 3 mo.
48	36 yrs.
49	36 yrs, 9 mo.
50	37 yrs. 6 mo.

1. Gunrunning
2. Narcotics Racketeering
3. Controlled Substance Trafficking
4. Methamphetamine Trafficking
5. Drug Induced Homicide
6. Aggravated Methamphetamine-related Child Endangerment
7. Money Laundering (Pursuant to clause (C) (4) or (5) of Section 29B-1 of the Criminal Code of 1961

Not eligible for MGT/SMGT or GCC for Education, Vocational, Industrial or Substance Abuse Program. Parole violators will be calculated at 75%.

Note: <u>See Class X Felony Convictions on back.</u>

75% Time to Serve of Sentence Imposed If Offense is committed on or after 8/13/07
730 ILCS 5/3-6-3(v), Public Act 095-0134

Years	Breakdown
51	38 yrs, 3 mo.
52	39 yrs.
53	39 yrs, 9 mo.
54	40 yrs, 6 mo.
55	41 yrs, 3 mo.
56	42 yrs.
57	42 yrs, 9 mo.
58	43 yrs, 6 mo.
59	44 yrs. 3 mo.
60	45 yrs.
61	45 yrs. 9 mo.
62	46 yrs, 6 mo.
63	47 yrs, 3 mo.
64	48 yrs.
65	48 yrs, 9 mo.
66	49 yrs, 6 mo.
67	50 yrs, 3 mo.
68	51 yrs.
69	51 yrs, 9 mo.
70	52 yrs, 6 mo.
71	53 yrs, 3 mo.
72	54 yrs.
73	54 yrs, 9 mo.
74	55 yrs, 6 mo.
75	56 yrs. 3 mo.

Years	Breakdown
76	57 yrs.
77	57 yrs, 9 mo.
78	58 yrs, 6 mo.
79	59 yrs, 3 mo.
80	60 yrs.
81	60 yrs, 9 mo.
82	61 yrs, 6 mo.
83	62 yrs, 3 mo.
84	63 yrs.
85	63 yrs, 9 mo.
86	64 yrs, 6 mo.
87	65 yrs, 3 mo.
88	66 yrs.
89	66 yrs. 9 mo.
90	67 yrs, 6 mo.
91	68 yrs, 3 mo.
92	69 yrs.
93	69 yrs, 9 mo.
94	70 yrs, 6 mo.
95	71 yrs. 3 mo.
96	72 yrs.
97	72 yrs, 9 mo.
98	73 yrs, 6 mo.
99	74 yrs, 3 mo
100	75 yrs.

Class X felony convictions for the following are 75% Time to Serve if committed on or after 8/13/2007 and the substance containing the controlled substance or methamphetamine is 100 grams or more.
Public Act 095-0134 – 730 ILCS 5/3-6-3(v)

1. Delivery of a Controlled Substance
2. Possession of a Controlled Substance with Intent to Manufacture or Deliver
3. Calculated Criminal Drug Conspiracy
4. Criminal Drug Conspiracy
5. Street Gang Criminal Drug Conspiracy
6. Delivery of Methamphetamine
7. Participation in Methamphetamine Manufacturing
8. Aggravated Participation in Methamphetamine Manufacturing
9. Possession With Intent to Deliver Methamphetamine
10. Aggravated Delivery of Methamphetamine
11. Aggravated Possession With Intent to Deliver Methamphetamine
12. Methamphetamine Conspiracy

CALCULATIONS AT 85% SENTENCING

YEARS	BREAKDOWN
1	306 days
2	1 yr, 8 mo, 12 days
3	2 yrs, 6 mo, 18 days
4	3 yrs, 4 mo, 24 days
5	4 yrs, 3 mo
6	5 yrs, 1 mo, 6 days
7	5 yrs, 11 mo, 12 days
8	6 yrs, 9 mo, 18 days
9	7 yrs, 7 mo, 24 days
10	8 yrs, 6 mo
11	9 yrs, 4 mo, 6 days
12	10 yrs, 2 mo, 12 days
13	11 yrs, 18 days
14	11 yrs, 10 mo, 24 days
15	12 yrs, 9 mo
16	13 yrs, 7 mo, 6 days
17	14 yrs, 5 mo, 12 days
18	15 yrs, 3 mo, 18 days
19	16 yrs, 1 mo, 24 days
20	17 yrs
21	17 yrs, 10 mo, 6 days
22	18 yrs, 8 mo, 12 days
23	19 yrs, 6 mo, 18 days
24	20 yrs, 4 mo, 24 days
25	21 yrs, 3 mo

YEARS	BREAKDOWN
26	22 yrs, 1 mo, 6 days
27	22 yrs, 11 mo, 12 days
28	23 yrs, 9 mo, 18 days
29	24 yrs, 7 mo, 24 days
30	25 yrs, 6 mo
31	26 yrs, 4 mo 6 days
32	27 yrs, 2 mo, 12 days
33	28 yrs, 18 days
34	28 yrs, 10 mo, 24 days
35	29 yrs, 9 mo
36	30 yrs, 7 mo, 6 days
37	31 yrs, 5 mo, 12 days
38	32 yrs, 3 mo, 18 days
39	33 yrs, 1 mo, 24 days
40	34 yrs
41	34 yrs, 10 mo, 6 days
42	35 yrs, 8 mo, 12 days
43	36 yrs, 6 mo, 18 days
44	37 yrs, 4 mo, 24 days
45	38 yrs, 3 mo
46	39 yrs, 1 mo, 6 days
47	39 yrs, 11 mo, 12 days
48	40 yrs, 9 mo, 18 days
49	41 yrs, 7 mo, 24 days
50	42 yrs. 6 mo

CALCULATIONS AT 85% SENTENCING

YEARS	BREAKDOWN
51	43 yrs, 4 mo, 6 days
52	44 yrs, 2 mo, 12 days
53	45 yrs, 18 days
54	45 yrs, 10 mo, 24 days
55	46 yrs, 9 mo
56	47 yrs, 7 mo, 6 days
57	48 yrs, 5 mo, 12 days
58	49 yrs, 3 mo, 18 days
59	50 yrs, 1 mo, 24 days
60	51 yrs
61	51 yrs, 10 mo, 6 days
62	52 yrs, 8 mo, 12 days
63	53 yrs, 6 mo, 18 days
64	54 yrs, 4 mo, 24 days
65	55 yrs, 3 mo
66	56 yrs, 1 mo, 6 days
67	56 yrs, 11 mo, 12 days
68	57 yrs, 9 mo, 18 days
69	58 yrs, 7 mo, 24 days
70	59 yrs, 6 mo
71	60 yrs, 4 mo, 6 days
72	61 yrs, 2 mo, 12 days
73	62 yrs, 18 days
74	62 yrs, 10 mo, 24 days
75	63 yrs, 9 mo

YEARS	BREAKDOWN
76	64 yrs, 7 mo, 6 days
77	65 yrs, 5 mo, 12 days
78	66 yrs, 3 mo, 18 days
79	67 yrs, 1 mo, 24 days
80	68 yrs
81	68 yrs, 10 mo, 6 days
82	69 yrs, 8 mo, 12 days
83	70 yrs, 6 mo, 18 days
84	71 yrs, 4 mo, 24 days
85	72 yrs, 3 mo
86	73 yrs, 1 mo, 6 days
87	73 yrs, 11 mo, 12 days
88	74 yrs, 9 mo, 18 days
89	75 yrs, 7 mo, 24 days
90	76 yrs, 6 mo
91	77 yrs, 4 mo, 6 days
92	78 yrs, 2 mo, 12 days
93	79 yrs, 18 days
94	79 yrs, 10 mo, 24 days
95	80 yrs, 9 mo
96	81 yrs, 7 mo, 6 days
97	82 yrs, 5 mo, 12 days
98	83 yrs, 3 mo, 18 days
99	84 yrs, 1 mo, 24 days
100	85 yrs

GUIDE TO FINES, FEES AND COSTS IN CRIMINAL CASES

(* = pre-trial detention credit applies)

NOTE TO USER: This guide is intended as an aid in identifying and ordering fines in criminal cases. It is not a comprehensive listing of all fines. There are many specific offense and enhanced fines, particularly in traffic offenses, which are not included in this guide. The user is cautioned to review statutes that may affect a specific case and the fines that may be due. This form can be modified into a standard order if edited to match you particular county's standard and approved fines.

MANDATORY COSTS/ASSESSMENTS

ALL CRIMINAL CASES

Court costs (Clerk to compute)		$_____
DNA Analysis fee (all felonies, if no prior DNA test)	730 ILCS 5/5-4-3(j)	$ $250

DRUG OFFENSES

Drug Lab Analysis fee (if lab analysis conducted)	730 ILCS 5/5-9-1.4(b)	$ $100

DUI OFFENSES

DUI Lab Analysis fee (if lab analysis conducted)	730 ILCS 5/5-9-1.9(b)	$ $150

MANDATORY FINES

ALL CRIMINAL CASES

Statutory Surcharge (Clerk to compute)	730 ILCS 5/5-9-1(c)	$ 10 each $40 of fine
Felony VCVA penalty (offense on or after 7/16/12)	725 ILCS 240/10(b)(1)	$ $100
Misdemeanor VCVA penalty (on or after 7/16/12)	725 ILCS 240/10(b)(3)	$ $75
VCVA (offense on or before 7/15/12)	725 ILCS 240/10(b)	$ 4 each $40 of fine
Juvenile Records Expungement Fine (conviction req'd)	730 ILCS 5/5-9-1.17(a) (eff.1/1/10)	$ 30*
Medical Costs Fund	730 ILCS 125/17 (eff. 8/14/96)	$ 10

IF APPROVED BY COUNTY BOARD ACTION

Court System fee (traffic other than DUI)	55 ILCS 5/5-1101(a)	$ 5
Court System fee (DUI)	55 ILCS 5/5-1101(a)	$ Up to 30
Guilty/Supervision fee (felony)	55 ILCS 5/5-1101(c)(1)	$ 50*
Guilty/Supervision fee (Class A misdemeanor)	55 ILCS 5/5-1101(c)(2)	$ 25*
Guilty/Supervision fee (Class B or C misd.)	55 ILCS 5/5-1101(c)(3)	$ 15*
Guilty/Supervision fee (petty or business)	55 ILCS 5/5-1101(c)(4)	$ 10*
Subsequent DUI offense fee	55 ILCS 5/5-1101(d)	$ 100*
Drug/Mental Health/Veteran's Court fee (eff. 1/1/05)	55 ILCS 5/5-1101(d-5)	$ 10*
Teen/Peer/Youth Court fee (eff. 1/1/05)	55 ILCS 5/5-1101(e)	$ Up to 5*
Drug Court fee (eff. 6/30/06)	55 ILCS 5/5-1101(f)	$ Up to 5*
Child Advocacy Center fee (eff. 1/1/08)	55 ILCS 5/5-1101(f-5)	$ 5-30*
CASA fee (eff. 8/13/13)	55 ILCS 5/5-1101(f-10)	$ 10-30*
Court Services (security) fee	55 ILCS 5/5-1103	$ Up to 25
State Police Operations Assistance fee (eff. 7/13/10)	705 ILCS 105/27.3a(1.5)	$ 1-15*
Conservation Police Op. Assistance fee (eff. 7/1/12)	705 ILCS 105/27.3a(1.6)	$ 1-15*

DRUG OFFENSES

Drug Street Value fine	730 ILCS 5/5-9-1.1(a)	$ *
Methamphetamine Street Value fine	730 ILCS 5/5-9-1.1-5(a)	$ *
Drug Treatment Assessment fee (Cont. Sub)		
Class X	720 ILCS 570/411.2(a)(1)	$ 3000*
Class 1	720 ILCS 570/411.2(a)(2)	$ 2000*
Class 2	720 ILCS 570/411.2(a)(3)	$ 1000*
Class 3 or 4	720 ILCS 570/411.2(a)(4)	$ 500*

Class A	720 ILCS 570/411.2(a)(5)	$ 300*
Class B or C	720 ILCS 570/411.2(a)(6)	$ 200*
Drug Treatment Assessment fee (Cannabis)		
Class X	720 ILCS 550/10.3(a)(1)	$ 3000*
Class 1	720 ILCS 550/10.3(a)(2)	$ 2000*
Class 2	720 ILCS 550/10.3(a)(3)	$ 1000*
Class 3 or 4	720 ILCS 550/10.3(a)(4)	$ 500*
Class A	720 ILCS 550/10.3(a)(5)	$ 300*
Class B or C	720 ILCS 550/10.3(a)(6)	$ 200*
Drug Trauma Fund fine	730 ILCS 5/5-9-1.1 (b)	$ 100*
Drug Spinal Cord Injury fee	730 ILCS 5/5-9-1.1(c)	$ 5
TF/MEG Assessment	730 ILCS 5/5-9-1.1(e) (eff.1/1/10)	$ 25*
Rx Drug Disposal Fund Assessment	730 ILCS 5/5-9-1.1(f) (eff.1/1/12)	$ 20*
Methamphetamine Law Enforcement fine	730 ILCS 5/5-9-1.1-5(b)	$ 100*
TF/MEG Methamphetamine Assessment	730 ILCS 5/5-9-1.1-5(c) (eff.1/1/10)	$ 25*
Methamphetamine Rx Drug Disposal Fund	730 ILCS 5/5-9-1.1-5(d) (eff. 1/1/12)	$ 20*
Drug Paraphernalia fine	720 ILCS 600/3.5(a)	$ 750 - 2500*

DOMESTIC VIOLENCE OFFENSES

Domestic Violence fine	730 ILCS 5/5-9-1.5	$ 200*
Domestic Battery fine	730 ILCS 5/5-9-1.6	$ 10
VOP fine (Family/Household Member)	730 ILCS 5/5-9-1.11(a)	$ 20
VOP fine (Surveillance Fund)	730 ILCS 5/5-9-1.16(a)	$ 200

SEX OFFENSES

Sexual Assault fine	730 ILCS 5/5-9-1.7(b)(1)	$ 200
Sex Offender fine	730 ILCS 5/5-9-1.15(a)	$ 500
Child Pornography fine	730 ILCS 5/5-9-1.14(a)	$ 500

WEAPONS OFFENSES (24-1.1; 24-1.2; 24-1.5)

UUW Trauma Fund fine	730 ILCS 5/5-9-1.10	$ 100

ARSON OFFENSES

Arson fine	730 ILCS 5/5-9-1.12(a)	$ 500

GANG MEMBER

Streetgang Member Fine	730 ILCS 5/5-9-1.19 (eff.7/13/10)	$ 100*

PAROLEE

Parole Violator Fine	730 ILCS 5/5-9-1.20 (eff. 8/5/11)	$ 25*

DUI OFFENSES

DUI Equipment Fund fine (first offense)	625 ILCS 5/11-501.01(f)	$ 750*
DUI Equipment Fund fine (subsequent offense)	625 ILCS 5/11-501.01(f)	$ 1000*
DUI Trauma Fund fine	730 ILCS 5/5-9-1(c-5)	$ 100
DUI Spinal Cord Injury fee	730 ILCS 5/5-9-1(c-7)	$ 5
Driver's Education Fund fee (conviction req'd)	625 ILCS 5/16-104a(a)	$ 4 each $40 of fine
Serious Traffic Violation fee	625 ILCS 5/104d	$ 35*
(Note: fee set to expire 10/13/14)		
Roadside Memorial Fund Fee (eff. 8/25/09)	730 ILCS 5/5-9-1.18	$ 50*

TRAFFIC OFFENSES

Statutory surcharge	730 ILCS 5/5-9-1(c)	$ 10 each $40 of fine
Traffic VCVA penalty (on or after 7/16/12) (excluding speeding, parking and non-moving violations)	725 ILCS 240/10(b)(2)	$ $50
VCVA penalty (offense on or before 7/15/12) (excluding speeding, parking and non-moving violations)	725 ILCS 240/10(b)	$ 4 each $40 of fine
Driver's Education Fund fee (conviction req'd)	625 ILCS 5/16-104a(a)	$ 4 each $40 of fine
Court Supervision fee (Supervision disposition only)	625 ILCS 5/16-104c(a) and (b)	$ 35*
Serious Traffic Violation fee (Note: fee set to expire 10/13/14)	625 ILCS 5/104d	$ 35*

DISCRETIONARY FINES

ALL OFFENSES

Fine	730 ILCS 5/5-9-1(a)	$Amount authorized for offense*

THEFT/DECEPTIVE PRACTICE OFFENSES

Felony Theft – Deceptive Practices	730 ILCS 5/5-9-1.3(a) (eff. 7/1/11)	$greater of 25K or 2X value property*
Felony Theft – Local Govt./School District	730 ILCS 5/5-9-1.3(b) (eff. 7/1/11)	$greater of 25K or 3X value property*

RECKLESS DRIVING or MISDEMEANOR SPEEDING (excess 26mph over limit) OFFENSES

First offense (conviction req'd)	625 ILCS 5/16-104a(b)	$ up to 100
Subsequent offense (conviction req'd)	625 ILCS 5/16-104a(b)	$ up to 500

PROBATION CASES

Anti-Crime Program contribution	730 ILCS 5/5-6-3(13)	$Reasonable sum less than maximum fine*

SUPERVISION CASES

Anti-Crime Program contribution	730 ILCS 5/5-6-3.1(c)(13)	$Reasonable sum less than maximum fine*

DISCRETIONARY COSTS/ASSESSMENTS

Public Defender reimbursement (misdemeanor)	725 ILCS 5/113-3.1(a)	$ max 500
Public Defender reimbursement (felony)	725 ILCS 5/113-3.1(a)	$ max 5000
HIV Test (sex offense)	730 ILCS 5/5-5-3(g)	$ Test costs
HIV Test (hypodermic syringe offense)	730 ILCS 5/5-5-3(h)	$ Test costs

Appeal Rights Following Contested Trial and Petition to Revoke Probation
Supreme Court Rule 605 (a)

(a) On Judgment and Sentence After Plea of Not Guilty.

(1) In all cases in which the defendant is found guilty and sentenced to imprisonment, probation or conditional discharge, periodic imprisonment, or to pay a fine, or in which a sentence of probation or conditional discharge has been revoked or the conditions attached to such a sentence have been modified, excluding cases in which the judgment and sentence are entered on a plea of guilty, the trial court shall, at the time of imposing sentence or modifying the conditions of the sentence, advise the defendant of the right to appeal, of the right to request the clerk to prepare and file a notice of appeal, and of the right, if indigent, to be furnished, without cost to the defendant, with a transcript of the proceedings at the trial or hearing.

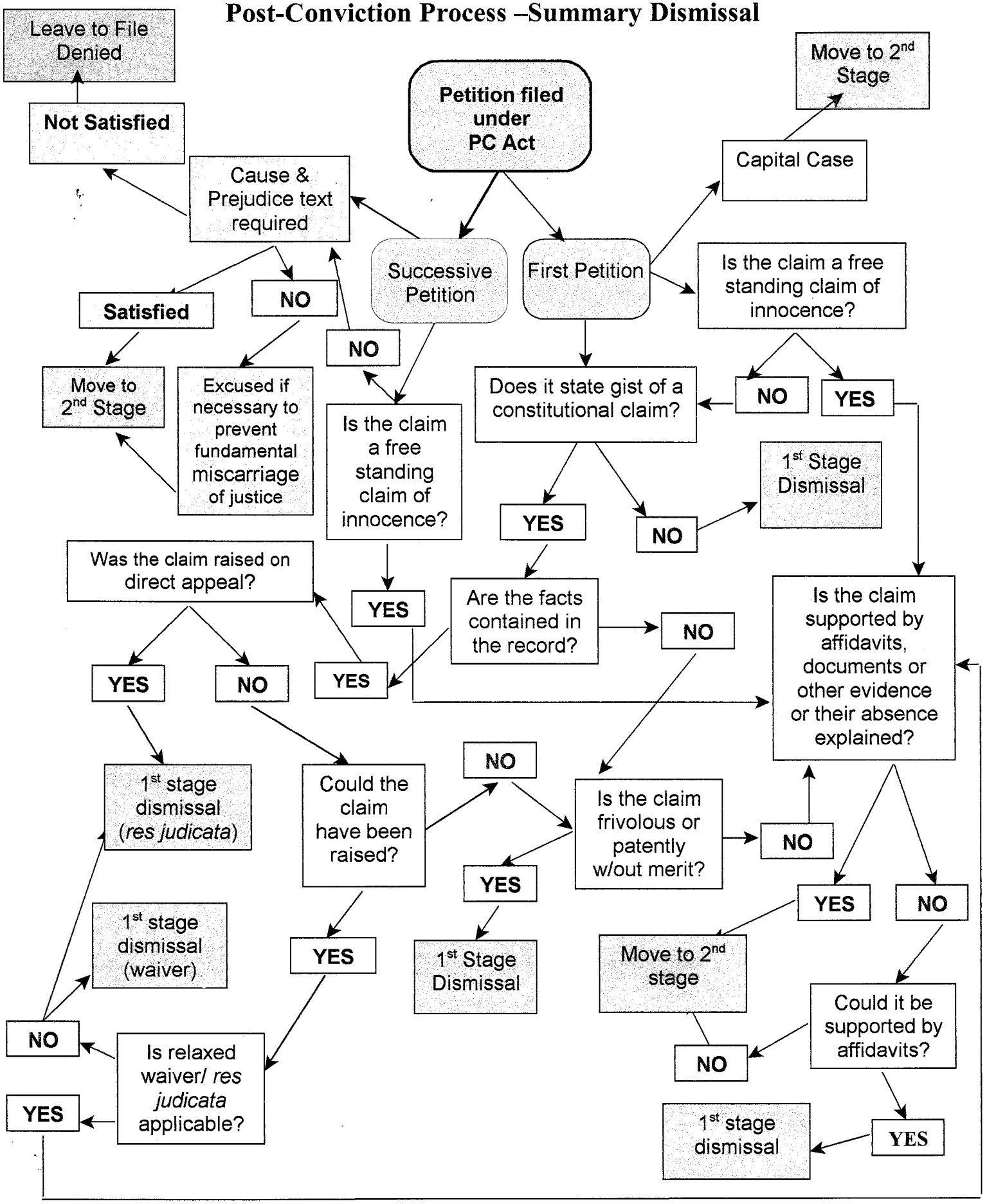
(2) In addition to the foregoing rights in cases in which the defendant has been convicted of a felony or a Class A misdemeanor or convicted of a lesser offense and sentenced to imprisonment, periodic imprisonment, or to probation or conditional discharge conditioned upon periodic imprisonment, or in which a sentence of probation or conditional discharge has been revoked or the conditions attached to such a sentence have been modified and a sentence or condition of imprisonment or periodic imprisonment imposed, the trial court shall advise the defendant of the right to have counsel appointed on appeal.

(3) At the time of imposing sentence or modifying the conditions of the sentence, the trial court shall also advise the defendant as follows:

> A. that the right to appeal the judgment of conviction, excluding the sentence imposed or modified, will be preserved only if a notice of appeal is filed in the trial court within thirty (30) days from the date on which sentence is imposed;
>
> B. that prior to taking an appeal, if the defendant seeks to challenge the correctness of the sentence, or any aspect of the sentencing hearing, the defendant must file in the trial court within 30 days of the date on which sentence is imposed a written motion asking to have the trial court reconsider the sentence imposed, or consider any challenges to the sentencing hearing, setting forth in the motion all issues or claims of error regarding the sentence imposed or the sentencing hearing;
>
> C. that any issue or claim of error regarding the sentence imposed or any aspect of the sentencing hearing not raised in the written motion shall be deemed waived; and
>
> D. that in order to preserve the right to appeal following the disposition of the motion to reconsider sentence, or any challenges regarding the sentencing hearing, the defendant must file a notice of appeal in the trial court within 30 days from the entry of the order disposing of the defendant's motion to reconsider sentence or order disposing of any challenges to the sentencing hearing.

Do you understand your appeal rights?

Post-Conviction Process –Summary Dismissal



RULE 651 APPEALS IN POST-CONVICTION PROCEEDINGS

SUGGESTED 651C CERTIFICATE OF COUNSEL

1. I am the attorney for the petitioner.
2. I have consulted with the petitioner by phone, mail, electronic means, or in person (circle all that apply) to ascertain his or her contentions of deprivation of constitutional rights.
3. I have examined the record of the proceedings at the trial (or guilty plea).
4. I have made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.

   Or

   No amendments to the petition filed *pro se* are necessary for an adequate presentation of petitioner's contentions.

   (Cross out or strike through the inapplicable fourth paragraph).

_____

Attorney's signature

APPENDIX

PART FOUR: MISCELLANEOUS REMEDIES

Extradition Overview ..... A – 168

Waiver of Extradition and Consent to Return ..... A – 169

Sexually Dangerous Persons Act (Overview) ..... A – 170

Sexually Dangerous Persons Act – Jury Instructions ..... A – 172

Sexually Violent Persons Commitment Act (Overview) ..... A – 176

Sexually Violent Persons Commitment Act – Jury Instructions ..... A – 181

Checklist for Drug Forfeitures ..... A – 184

THE PROCEDURES SUGGESTED IN THIS APPENDIX ARE EXAMPLES ONLY. IT IS RECOMMENDED THAT EACH INDIVIDUAL JUDGE TAILOR "SCRIPTS" OR CHECK-LISTS WHICH, IN HIS OR HER ESTIMATION, COMPLIES WITH LOCAL CUSTOM AS WELL AS THE REQUIREMENTS OF ILLINOIS SUPREME COURT RULES, STATUTORY ENACTMENTS, AND CASE LAW.

Extradition Overview

Extradition (725 ILCS 225 *et seq.*)

Admonitions (Section 225/10)

1. Advise defendant of the demand for him/her
2. The crime with which he/she is charged
3. The right to demand and procure legal counsel, within a reasonable time, not less than 24 hours.

Bail (Section 225/16)

- If it appears that the person held is the person charged and is a fugitive from justice, must commit to county jail for a time not exceeding 30 days and specified in warrant, unless person is given bail.

Conditions of Bond (Section 225/16)

- Judge may set bond unless charge is shown to be an offense punishable by death or by life imprisonment in the state in which it was committed.

Extension of Time of Commitment

- If accused not arrested under Governor Warrant by expiration of time specified in warrant or bond:

    - Defendant may be discharged: or
    - Defendant may be recommitted for period not to exceed 60 days; or
    - Defendant may take bail for a period not to exceed 60 days after date of new bond.

Waiver (Section 225/26)

- Can waive but judge to inform defendant of right to issuance and service of warrant and to obtain a writ of *habeas corpus*.

Issues:

1. Resolution of whether document is in required form
2. Whether defendant is person named in complaint
3. Whether defendant is a fugitive from justice
4. Whether defendant is substantially charged with crime

WAIVER OF EXTRADITION AND CONSENT TO RETURN

The court has informed me in open court that a demand has been made for me to be returned to another state to face charges that are pending against me in that state:

Demanding State: _____
Pending Charges: _____
Named Defendant: _____

The court has informed me in open court that I have the right to legal counsel, and that if I cannot afford to hire legal counsel, I can request and receive appointed legal counsel free of charge to assist me in this matter.

The court has informed me in open court that I have a right to an extradition process, including the issuance and service of a warrant of extradition (Governor's Warrant), and that I have the right to challenge the legality of my arrest and to contest the extradition proceedings by filing a petition for habeas corpus relief pursuant to 725 ILCS 225/10.

The court has informed me in open court that I have the right to waive any challenge to my arrest and extradition proceedings, and that I may consent to return to the demanding state to face the charges against me.

I hereby exercise my right to waive any challenge to my arrest and extradition proceedings, and I hereby consent to return to the demanding state to face the charges against me. I understand that by exercising my right to waive extradition, I am giving up the other rights listed above. No promises have been made to me and no threats have been made against me to get me to voluntarily return to the demanding state.

Signature:_____

The individual named above has signed this document in open court, in my presence, and has stated to me that said decision to sign has been made freely and voluntarily, without promise, compulsion, threat, force or duress. I have explained to the individual named above all rights in regard to formal extradition, including all the rights listed above

Dated this ___ day of _____, 20__.

_____
Judge of the Circuit Court

SEXUALLY DANGEROUS PERSONS ACT (OVERVIEW)
(725 ILCS 205/0.01 *et seq.*)

Sexually Dangerous Persons Act (725 ILSC 205/2, 205/3)

Pleading (725 ILCS 205/2, 205/3)
State's Attorney or Illinois Attorney General may petition to have a defendant charged with a sex crime committed to the Department of Corrections for treatment, in lieu of prosecution.

Venue is proper where the underlying crime occurred. The Petition is filed in the same proceeding pending in criminal court against the respondent for the underlying offense(s).

Rights Accorded to Respondent (725 ILCS 205/5)
Though the proceedings are characterized as "civil" in nature, rights and protections attending such proceedings are those generally applied in criminal proceedings. Respondent has the right to counsel and to have counsel appointed if indigent, and the right to request trial by jury (bench trial ensues if jury is not affirmatively requested).

Burden (725 ILCS 205/0.01)
The State has the burden to prove the elements of its case beyond a reasonable doubt.

The elements of the State's case are that the respondent suffers from a mental disorder that has existed for not less than one year immediately prior to the filing of the State's petition for commitment, and that the respondent has criminal propensities to commit sex offenses and has demonstrated those propensities through at least one act or attempt of sexual assault or sexual molestation of children.

The Courts have added a further requirement that the State must prove that respondent "has serious difficulty controlling his or her harmful sexual behavior such that it is highly likely that the person will not control his or her sexually violent behavior and will reoffend," ***Kansas v. Crane***, 534 U.S. 407 (2002); ***People v. Masterson***, 207 Ill. 2d 305 (2003); ***In re detention of Varner***, 207 Ill. 2d 425 (2003), and that it is "substantially probable" that the respondent will engage in the commission of sex offenses in the future if not confined. ***People v. Masterson***, 207 Ill. 2d 305 (2003).

Psychiatric Examination (725 ILCS 205/4)
The Court is to appoint two qualified psychiatrists (reputable, licensed MD, 5+ years specialization in mental disorders) to personally examine respondent and to render an opinion as to whether he or she is an SDP.

Trial (725 ILCS 205/5)
Respondent has the right to request trial by a jury. The Code of Civil Procedure generally applies. As in civil cases, if a jury is not requested, the matter will proceed to bench trial. The State may introduce evidence of all past crimes committed by the respondent. The right against self-incrimination does not apply as it is by nature a civil proceeding, and statements made to psychiatrists are admissible.

Verdict and Disposition (725 ILCS 205/8)
If the respondent is not found to be an SDP, the State may proceed with the pending criminal prosecution without violating double jeopardy as the respondent was not in criminal jeopardy in the SDP proceedings. ***Kansas v. Hendricks***, 521 U.S. 346 (1997).

If the respondent is found to be an SDP, he or she is committed to the custody of the Director of the Department of Corrections as his or her guardian, for care and treatment.

Petitions for Discharge or Conditional Release (725 ILCS 205/9)
The respondent or DOC may petition for discharge or conditional release. DOC must present a report for consideration by the court. The State still carries the burden of proving, by clear and convincing evidence, that the respondent has not recovered and is still sexually dangerous. ***People v. Trainer***, 196 Ill. 2d 318 (2001). Upon final discharge, all underlying criminal charges shall be quashed.

Sexually Dangerous Persons Act
Jury Instructions

Initial Commitment Instruction No. ___

The respondent is alleged to be a sexually dangerous person. The respondent has denied the allegation.

I.P.I. No. 2.01 Modified

Initial Commitment Instruction No. ___

The petition in this case is the formal method of alleging the respondent to be a sexually dangerous person. It is not any evidence against the respondent and does not create any inference that he is a sexually dangerous person.

IPI No. 2.02 Modified

Initial Commitment Instruction No. ___

The respondent is presumed not to be a sexually dangerous person. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the respondent is a sexually dangerous person.

The State has the burden of proving that the respondent is a sexually dangerous person beyond a reasonable doubt; and this burden remains on the State throughout the case. The respondent is not required to prove he is not a sexually dangerous person.

IPI No. 2.03 Modified

Initial Commitment Instruction No. ___

In order for you to find the respondent to be a sexually dangerous person, the State must prove the following propositions beyond a reasonable doubt:

First, that the respondent suffers from a mental disorder; and

Second, that the mental disorder has existed for a period of not less than one year prior to _____(the date of the predicate offense); and

Third, that the mental disorder is coupled with criminal propensities to the commission of sex offenses; and

Fourth, that the respondent has demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children; and

Fifth, that respondent's mental disorder causes him or her to have serious difficulty in controlling his or her behavior and makes it substantially probable that he or she will engage in the commission of sexual offenses in the future if not confined.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, you should find the respondent to be a sexually dangerous person.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the respondent not to be a sexually dangerous person.

725 ILCS 205/1.01 Modified per
People v Masterson, 207 Ill. 2d 305 (2003);
People v. Bailey, 405 Ill. App. 3d 154 (2010).

Recovery/Discharge Instruction No. ___

In order for you to find the respondent to be a sexually dangerous person, the State must prove the following propositions by clear and convincing evidence:

First, that the respondent suffers from a mental disorder; and

Second, that the mental disorder has existed for a period of not less than one year prior to _____(the date of the predicate offense); and

Third, that the mental disorder is coupled with criminal propensities to the commission of sex offenses; and

Fourth, that the respondent has demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children; and

Fifth, that respondent's mental disorder causes him or her to have serious difficulty in controlling his or her behavior and makes it substantially probable that he or she will engage in the commission of sexual offenses in the future if not confined.

If you find from your consideration of all the evidence that each of these propositions has been proved by clear and convincing evidence, you should find the respondent to be a sexually dangerous person.

If you find from your consideration of all the evidence that any one of these propositions has not been proved by clear and convincing evidence, you should find the respondent not to be a sexually dangerous person.

725 ILCS 205/1.01, 205//9(b); Modified per
People v Masterson, 207 Ill. 2d 305 (2003);
People v. Bailey, 405 Ill. App. 3d 154 (2010).

Initial Commitment Instruction No. ___
Recovery/Discharge Instruction No. ___

You have before you evidence that the respondent made statements relating to the conduct alleged in the petition. It is for you to determine what weight should be given to the statements. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made.

IPI No. 3.06 - 3.07

.

Initial Commitment Instruction No. ___
Recovery/Discharge Instruction No. ___

Sexually dangerous persons are defined as all persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year immediately prior to [the date of the predicate offense],coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children, and where the mental disorder causes him or her to have serious difficulty in controlling his or her behavior and makes it substantially probable that he or she will engage in future acts of sexual assault or of sexual molestation of children.

725 ILCS 205/1.01 Modified per
People v Masterson, 207 Ill. 2d 305 (2003);
People v. Bailey, 405 Ill. App. 3d 154 (2010).

Recovery/Discharge Instruction No. ___

The Applicant was previously adjudicated as a sexually dangerous person. The Applicant has filed an Application Showing Recovery, alleging he is no longer a sexually dangerous person. The State has objected to the Application Showing Recovery and alleges Applicant is still a sexually dangerous person.

The Application Showing Recovery is the formal method of alleging that the Applicant has recovered from the condition of being a sexually dangerous person. It is not any evidence for or against the Applicant and does not create any inference of recovery or non-recovery from the condition.

IPI Criminal No. 2.01 Modified
People v. Trainor, 196 Ill. 2d 318, 752 N.E.2d 1055 (2001)

Recovery/Discharge Instruction No. ___

The Applicant is presumed to have recovered and is no longer a sexually dangerous person. This presumption remains with the Applicant throughout every stage of the case and during your deliberations on the verdict, and is not overcome unless from all the evidence in this case you are convinced by clear and convincing evidence that the Applicant is still a sexually dangerous person.

The State has the burden of proving that the Applicant is still a sexually dangerous person by clear and convincing evidence, and this burden remains on the State throughout the case. The Applicant is not required to prove that he has recovered.

IPI Criminal No. 2.03 Modified per
725 ILCS 205//9(b);
People v Masterson, 207 Ill. 2d 305 (2003);
People v. Bailey, 405 Ill. App. 3d 154 (2010).

SEXUALLY VIOLENT PERSONS COMMITMENT ACT (OVERVIEW)

I. POSSIBLE PROCEEDING IDENTIFIED (RELEASE DATE NOTICE---**725 ILCS 207/10**)

Agency with custody must give notice to the Attorney General and State's Attorney in position to file a petition ASAP beginning 3 months prior to the anticipated release date. Must provide identifying information, offense history, evaluation of mental condition and reasons person subject to commitment as SVP.

II. FILING THE PETITION (**725 ILCS 207/15**)

A. May be filed by:
1. Attorney General at the request of the agency with jurisdiction over the person – after consulting with and advising the State's Attorney.
2. Attorney General on own motion – after consulting with and advising the State's Attorney.
3. State's Attorney if the Attorney General does not file.
4. The Attorney General and the State's Attorney may file jointly.
5. Petition shall be filed before the date of release or within 30 days of entry into parole or mandatory supervised release.

B. May be filed in:
1. County where person is incarcerated or committed.
2. County where person was convicted or adjudicated or found not guilty by reason of insanity.

C. Must be filed:
1. No more than 90 days before discharge from Department of Corrections or entry into mandatory supervised release.
2. No more than 30 days after entry into parole or mandatory supervised release.
3. No more than 90 days before discharge or release from a juvenile correctional facility.

III. PETITION CONTENTS (**725 ILCS 207/15**)
Must allege that the person:

A. Has been convicted, found delinquent, or not guilty by reason of insanity of one of the following:

1.	720 ILCS 5/12-13	Aggravated Criminal Sexual Assault
2.	720 ILCS 5/12-14	Criminal Sexual Assault
3.	720 ILCS 5/12-14.1	Predatory Criminal Sexual Assault of a Child
4.	720 ILCS 5/12-16	Aggravated Criminal Sexual Abuse
5.	720 ILCS 5/19-1	First Degree Murder (if sexually motivated).

The following crimes were added as triggering offenses effective 7-1-11 by **Pub. Act 96-1551**:
720 ILCS 5/11-1.20: criminal sexual assault
720 ILCS 5/11-1.30: aggravated criminal sexual assault
720 ILCS 5/11-1.40: predatory criminal sexual assault of a child
720 ILCS 5/11-1.60: aggravated criminal sexual abuse

B. Is within 90 days of release for a sexually violent offense or for a sentence that is being served concurrent or consecutive with a sexually violent offense.
C. Has a mental disorder.
D. Is dangerous to others, as the mental disorder creates a substantial probability that he or she will engage in acts of sexual violence.
E. Petition shall state with particularity the essential facts to establish probable cause to believe the person is sexually violent as defined in **725 ILCS 207/5 (f)**.
F. The State has the right to have the respondent evaluated by the State's expert(s) with access to treatment records, treaters and staff. **Pub. Act 96-1128** eff. 1-1-11.

IV. DETENTION (**725 ILCS 207/30(a)**)

Judge reviews petition. If judge finds "cause" to believe person is eligible for commitment, court enters order of detention. Detention in a facility approved by DHS.

V. RIGHTS OF RESPONDENT (**725 ILCS 207/25**)

A. To be present.
B. To be represented by counsel and if indigent, to appointed counsel.
C. To remain silent.
D. To cross-examine witnesses.
E. To a court reporter.
F. To a jury trial.
G. To the appointment of a qualified expert for an evaluation, however if the person refuses to speak to, communicate with, or otherwise fails to cooperate, the person shall be prohibited from introducing testimony or evidence from any expert based upon examination of the person (only the results of a review of records may be used by any respondent expert under these circumstances).
H. To a speedy trial within 120 days after the probable cause hearing.

VI. PROBABLE CAUSE HEARING (**725 ILCS 207/30**)

A. Held within 72 hours of filing if in custody (excludes Saturday, Sunday & holidays), or the court may grant a continuance for no more than 7 days upon motion of the respondent, with good cause shown.
B. If the person has been released, is on parole, is on mandatory supervised release or otherwise not in custody, within "reasonable" period of time.
C. If indigent court appoints counsel prior to hearing.
D. All relevant hearsay evidence shall be admitted and considered at the hearing.
E. IDOC treatment records shall be admissible at the hearing.
F. Upon finding of probable cause, judge orders person transferred to facility for evaluation as to whether he or she is a sexually violent person.
G. Upon finding of no probable cause, judge dismisses petition.

VII. TRIAL (**725 ILCS 207/35**)

A. Must be within 120 days of probable cause finding. Delay is agreed unless he or she objects to delay in written or oral demand on record.
B. Request for jury trial must be made within 10 days after probable cause hearing (State may request jury trial.) If no request, trial is by the court.
C. Rules of evidence in criminal proceedings apply.
D. Code of Civil Procedure applies.

E. Burden is on the state to prove petition Beyond Reasonable Doubt.
F. Evidence that person was convicted of sexually violent offense, alone, is not sufficient to establish that he or she has a mental disorder.
G. If court or unanimous jury finds person is a sexually violent person, court enters judgment.
H. Court then commits person pursuant to 725 ILCS 207/40.
I. If court or unanimous jury does not find person is a sexually violent person beyond a reasonable doubt, petition dismissed and person ordered released (unless under other lawful restriction).

VIII. COMMITMENT (**725 ILCS 207/40**)

A. Court orders person committed to custody of Department of Human Services (DHS) for control, care and treatment until such time as the person is no longer a sexually violent person.
B. Order for commitment shall specify either institutional care in a secure facility or conditional release.
C. Court must consider factors in determining whether to choose secure facility or conditional release:
1. Nature and circumstances of person's conduct.
2. Mental history and present mental condition.
3. Arrangements available to ensure the person has access to and will participate in treatment.
D. DHS must arrange for control, care and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the court's order.
E. If Conditional Release ordered:
1. DHS must prepare plan specifying the treatment the person will receive in the community.
2. Before placing the person on conditional release, the court must notify the police department and sheriff.
F. Revocation of Conditional Release:
1. DHS takes person into custody. (may be based on emergency ex-parte order)
2. DHS files probable cause statement with court and petition to revoke conditional release within 48 hours of detention.
3. Court shall hear petition to revoke within 30 days, unless waived by person. Burden on state by clear and convincing evidence that CD violated or safety of others requires revocation.
4. If burden met Court may revoke conditional release and commit person to DHS.

IX. SECURE FACILITY (**725 ILCS 207/50**)

A. If committed to a secure facility, person placed at facility provided by DOC.
B. DHS is to operate the facility provided by DOC.

X. DNA (**725 ILCS 207/45**)

A. If found to be a SVP, court shall require person to provide specimen for DNA analysis in accordance with Section 5-4-3 of the Unified Code of Corrections (**730 ILCS 5/5-4-3**)

B. The results of the DNA analysis may be used only as authorized by Section 5-4-3 of the Unified Code of Corrections.

C. The rules adopted by the Illinois Department of State Police under Section 5-4-3 of the Unified Code of Corrections are the procedures that must be followed for DNA specimens.

XI. RE-EXAMINATION (**725 ILCS 207/55**)

A. DHS must re-examine person within 6 months and at least every 12 months thereafter.

B. Examinations are to determine whether the person has made sufficient progress to be conditionally released or discharged.

C. Indigent person has right to qualified expert.

D. Court may order examination any time during period of commitment.

E. Petitions for discharge after re-examination must follow the procedure outlined in **725 ILCS 207/65**.

XII. PETITION FOR CONDITIONAL RELEASE (**725 ILCS 207/60**)

A. After 6 months from initial commitment, or after 6 months of most recent release petition denial, or after 6 months of the most recent CD revocation, person may petition for conditional release.

B. Court may appoint qualified examiner within 20 days (**P.A. 96-1128 eff. 1-1-11**).

C. Expert must submit report to court within 30 days after appointment.

D. Probable cause hearing set as soon as practical. If Court determines at hearing that there is probable cause to believe that it is not substantially probable that person will engage in acts of sexual violence if on release or conditional release Court must set a hearing on the issue.

E. Court must then hear petition within 30 days (no jury).

F. State's burden is clear and convincing evidence that the person has not made sufficient progress to be conditionally released.

G. To find person appropriate for conditional release Court must make the five findings required in **725 ILCS 207/60(e)**.

XIII. DISCHARGE HEARING (**725 ILCS 207/65**)

A. Request of the Secretary of DHS

1. Secretary of DHS may authorize the person to petition the court for discharge.
2. State's burden is clear and convincing evidence that the person is still a SVP.
3. The committed person or the state may elect to have the hearing before a jury.
4. A hearing is required as soon as practical (**P.A. 96-1128 eff. 1-1-11**).

B. Request of Sexually Violent Person

1. If not approved by DHS Secretary, court must hold probable cause hearing if request made by the person.
2. If person does not file a petition for discharge, yet fails to waive the right to petition for discharge under this Section, then the probable cause hearing consists only of a review of the re-examination reports and arguments on behalf of the parties.
3. The probable cause hearing must be held within 45 days of the filing of re-examination report under **725 ILCS 207/55**.
4. If probable cause exists to warrant a hearing on whether person is still a SVP court must hold discharge hearing. State's burden is clear and convincing evidence that the person is still a SVP.

5. Committed person or state may elect to have the hearing before a jury.
6. A jury verdict must be unanimous.

XIV. PAYMENT FOR SERVICES (**725 ILCS 207/90**)

A. A person may be liable for services funded by the Department of Human Services.
B. Person's estate liable as well.
C. Proceeds of private or public insurance are part of person's ability to pay.

SEXUALLY VIOLENT PERSONS COMMITMENT ACT
JURY INSTRUCTIONS

As respondents are entitled to all criminal law protections, the instructions suggested herein are premised upon IPI-Criminal pattern instructions unless otherwise noted. The packet of preliminary and cautionary instructions, not included herein, would be commensurate with those utilized in criminal trials; below are suggestions for use of instructions tailored for use in SVP cases.

Members of the jury, the evidence and arguments in this case have been completed, and I now will instruct you as to the law.

The law that applies to this case is stated in these instructions, and it is your duty to follow them. You must not single out certain instructions and disregard others. When I use the word "he" in these instructions, I mean a male or female.

It is you duty to determine the facts and to determine them only from the evidence in this case. You are to apply the law to the facts and in this way decide the case.

Neither sympathy nor prejudice should influence you.

From time to time it has been the duty of the court to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You should disregard questions and exhibits which were withdrawn or to which objections were sustained.

Any evidence that was received for a limited purpose should not be considered by you for any other purpose.

You should disregard testimony and exhibits which the court has refused or stricken.

The evidence you should consider consists only of the testimony of the witnesses and the exhibits which the court received.

You should consider all the evidence in the light of your own observations and experiences in life.

Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be.

Faithful performance by you of your duties as jurors is vital to the administration of justice.

The term "sexually violent person" means a person who has been convicted of a sexually violent offense and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.

Non-IPI Instruction: 725 ILCS 207/5(f)

The term "sexually violent offense" means the offense(s) of (aggravated criminal sexual assault), (criminal sexual assault), (aggravated criminal sexual abuse), (predatory criminal sexual assault of a child), (first degree murder, if sexually motivated).

Non-IPI Instruction: 725 ILCS 207/5(e)

The term "mental disorder" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.

Non-IPI Instruction: 725 ILCS 207/5(b)

The respondent is presumed not to be a sexually violent person. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that the respondent is a sexually violent person.

The State has the burden of proving that the respondent is a sexually violent person, and this burden remains on the State throughout the case. The respondent is not required to prove that he is not a sexually violent person.

IPI Criminal Instruction No. 2.03 Modified: 725 ILCS 207/35(d)(l)

To sustain the petition alleging the respondent to be a sexually violent person, the State must prove the following propositions:

First Proposition: That the respondent has been previously convicted of a sexually violent offense; and

Second Proposition: That the respondent suffers from a mental disorder; and

Third Proposition: That the respondent is dangerous because said mental disorder makes it substantially probable that he will engage in acts of sexual violence.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, you should find that the respondent is a sexually violent person.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find that respondent is not a sexually violent person.

IPI Civil Instruction No. 21.02 Modified 725 ILCS 207/5(f) and 35(d)(l)

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdict are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. The verdict should be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

If you find for the People of the State of Illinois and against the respondent, you should use the verdict which says:

> We, the jury, find that the respondent,_____, is a sexually violent person.

If you find for the respondent and against the People of the State of Illinois, you should use the form of verdict which says:

> We, the jury, find that the respondent,_____, is not a sexually violent person.

IPI Civil Instruction No. 45.02

Checklist for Drug Forfeitures

What is subject to forfeiture:

1. All substances in violation of the law the Controlled Substances Act (CSA), Cannabis Control Act (CCA), Methamphetamine Control and Community Protection Act (MCCPA) and the Illinois Food, Drug and Cosmetic Act (IFDCA).[1]
2. Anything used or to be used in furtherance of a criminal act in violation of the CSA, CCA, MCCPA, or IFDCA.

Has initial notice been provided and service perfected:

1. Notice shall be given to all known interest holders. Failure to provide timely notice invalidates the forfeiture.[2]

Preliminary Determination:

1. Within 14 days of seizure State shall seek a probable cause/ preliminary determination from the court.[3]
2. Rules of evidence do not apply and court may review simultaneously with a related criminal offense.[4]
3. If probable cause found, the items shall be held for forfeiture procedure.[5]

Judicial in rem Proceeding:

1. If the property is non-real and exceeds $150,000 in value or is real property **or**
2. If a claimant has filed a claim and cost bond under subsection. 150/6(c) the case is diverted from a non-judicial forfeiture to an in rem proceeding.

Before the hearing:

1. Within 45 days of receiving cost bond from claimant or notice from law enforcement, SAO must file a verified complaint for forfeiture.[6]
2. Answer to the complaint must be signed by the interest holder within 45 days and meet requirements of 150/9(D)(1)(i)-(viii).
3. Hearing must be held within 60 days after filing of the answer unless continued for good cause.[7] **OR**
4. If the property is evidence, the time period shall not begin until the property is no longer necessary for evidence.[8]

At the hearing:

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[1] 720 ILCS 570/505; 720 ILCS 550/12; 720 ILCS 646/85; 410 ILCS 620/3.23.
[2] *People v. Four Thousand Eight Hundred Fifty($4850) United States Currency*, 2011 IL App (4th) 100528.
[3] 725 ILCS 150/3.5(a).
[4] 720 ILCS 150/3.5(b), (c) & (d).
[5] 720 ILCS 150/3.5(e).
[6] 725 ILCS 150/9(A).
[7] 725 ILCS 150/9(F).
[8] 725 ILCS 150/10.

1. State must prove nexus between item and criminal conduct by a probable cause standard. During the **probable cause portion** of the in rem proceeding the court must receive and consider all relevant hearsay evidence. The law of evidence relating to civil actions shall apply to all other portion of the proceeding.[9]
2. If probable cause is shown, the claimant must rebut the presumption by a preponderance of the evidence.
3. **Presumptions** – The court can presume the item was used in violation of the CSA, CCA, MCCPA, IFDCA if any of the following are true:
   A. Money found near forfeitable substances;[10]
   B. All property acquired between the dates of occurrence of two or more acts in violation of the CSA, CCA, MCCPA, or IFDCA **and** at least one of the acts is a Class X, 1, or 2 felony **and** there is no likely source for the property other than a violation of the Acts.[11]
   C. Conviction bars defendant from denying allegations of the offense.[12]
4. **Exemptions** – Property is exempt from forfeiture if interest holder proves by a preponderance that:
   A. He is not legally accountable for the conduct giving rise to the forfeiture, did not acquiesce in it, and did not know and could not have reasonably known of the conduct;[13]
   B. He did not acquire substantial proceeds from the conduct giving rise to the forfeiture;[14]
   C. He did not hold property jointly or in common and does not hold the property for the benefit of the wrongdoer;[15]
   D. Attorney's fees are protected so long as they were received at a time when he did not know they were subject to forfeiture.[16]

Resolution –

1. If the State does not show probable cause the court shall order the property returned.
2. If the State does show probable cause but the claimant proves by a preponderance that interest is exempt under §8 the court shall order property returned.[17]
3. The parties may reach settlement in an amount and upon such terms as they feel appropriate.[18]

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[9] 720 ILCS 150/9(B).
[10] 725 ILCS 150/7(1).
[11] 725 ILCS 150/7(2).
[12] 720 ILCS 150/9(I)&(J).
[13] 725 ILCS 150/8(A)(i).
[14] 725 ILCS 150/8(B).
[15] 725 ILCS 150/8(C)&(D).
[16] 720 ILCS 150/12.
[17] 720 ILCS 150/9(G)&(H).
[18] 720 ILCS 150/11.

NOTABLE RECENT DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

FOURTH AMENDMENT

Carpenter v. United States, 2018 U.S. LEXIS 3844 (2018)

Defendant was convicted in connection with several robberies. Law enforcement used cell-site records from his cell phone provider to place him in the vicinity of the crimes, which defendant argued should not be presented to the jury because the government did not get a warrant for the records.

HELD: the government's acquisition of defendant's cell-site records from his cell phone provider was a Fourth Amendment search, not supported by probable cause. Police will generally need a warrant for such data.

Collins v. Virginia, 201 L. Ed. 2d 9 (2018)

Defendant's motorcycle was parked in his driveway, covered by a tarp. Police officers observed this, and lifted the tarp to investigate whether it was the stolen vehicle that they had been looking for in connection with several crimes. The trial court held that the search was based on probable cause and justified under the exigent circumstances automobile exception to the Fourth Amendment.

HELD: the automobile exception to the Fourth Amendment does not allow a police officer to conduct a search in a home's curtilage without a warrant, as the curtilage is afforded the same protections as the home itself.

Byrd v. United States, 138 S. Ct. 1518 (2018)

Defendant was pulled over in a rental car for which he was not listed as an authorized driver, and officers allege that he consented to a search of the car that uncovered heroin. At trial, defendant moved to suppress the evidence, challenging the initial stop and subsequent search.

HELD: a driver of a rental car who has the renter's permission to drive but is not listed on the rental agreement still has a reasonable expectation of privacy against government searches of the vehicle. Such a lawful possessor has complete dominion and control over this property and can rightfully exclude others from it.

District of Columbia v. Wesby, 138 S. Ct. 577 (2018)

Defendants were at a party hosted by a woman who claimed that she had permission from the owner of the house to host a party, as per her lease. When officers responded to a noise complaint at the house, a party goer called the woman for officers to confirm the permission but when officers called the owner of the house, the owner said that the lease had not been executed and this woman thus had no permission to throw the party. The partygoers were then arrested, and subsequently sued for false arrest.

HELD: The officers had probable cause to arrest the partygoers based on the totality of the circumstances, which reasonably led the officers to believe that there was a substantial chance of criminal activity at the time (i.e., they mistakenly but reasonably believed that they had probable cause to make the arrests at the time, so their actions were not unlawful.)

County of Los Angeles v. Mendez, 137 S. Ct. 1539 (2017)

Officers responded to an informant tip that a wanted parolee had been seen at a residence that defendants lived in the backyard of. They searched three storage sheds in the backyard without a warrant and then opened the door of a 4th shed surrounded by personal belongings. The officer opening the door saw the silhouette of someone holding a rifle through a curtain, yelled "gun," and both offices began shooting; at trial, there was conflicting testimony about whether the person was merely moving or pointed the gun.

HELD: The U.S. Court of Appeals for the Ninth Circuit's provocation rule has no basis in the Fourth Amendment, and the low court erroneously conflated multiple claims; the rule asks whether, once an officer's use of force has been determined to be reasonable under the Fourth Amendment, there was a different Fourth Amendment violation that made the otherwise reasonable use of force unreasonable. Because this rule uses one constitutional violation to manufacture an excessive use of force claim that has already been rejected under established Fourth Amendment precedent, it is an improper rule that lacks a constitutional basis.

Manuel v. City of Joliet, 137 S. Ct. 911 (2017)

Police relied on false positive tests of pills found on defendant during a search through grand jury proceedings, and defendant brought a suit for malicious prosecution against city officials after the ASA dismissed the charges. Defendant's malicious prosecution claim was dismissed under *Newsome v. McCabe* (held: federal claims of malicious prosecution stem from the right to due process and are thus not a Fourth Amendment issue).

HELD: An individual's Fourth Amendment right to be free from unreasonable searches and seizures continues throughout the legal process of a criminal case; a claim challenging pretrial detention falls within the scope of the Fourth Amendment regardless of whether the legal process has begun. Even if the legal process has begun, the prosecution itself may be unsupported by probable cause, thus giving rise to a Fourth Amendment claim.

White v. Pauly, 137 S. Ct. 548 (2017)

After pulling over an alleged drunk driver, police drove to the address registered to the license plate following a nonviolent encounter with the driver. One officer remained behind in case the driver returned, while the other two approached the residence without flashing lights, observing the aforementioned vehicle and two men inside the residence, and radioing for the third officer. After a verbal confrontation, the brothers heard "we're coming in" but did not hear the officers identify themselves. Identifying themselves as being armed, one of the brothers shot out the door as the third officer was arriving. This officer took cover and fired his weapon, killing the other brother.

HELD: An officer's failure to shout a warning before firing in an ongoing confrontation does not constitute a violation of a clearly established Fourth Amendment right to be free from the excessive use of force. For the purpose of qualified immunity, the right at issue must be particular to the facts of the case, and here there was no clearly established right requiring an officer to shout a warning before firing when joining an ongoing confrontation and could reasonably assume that proper procedures, such as police identification, were followed.

FIFTH AMENDMENT

Currier v. Virginia, 2018 U.S. LEXIS 3841 (2018)

Defendant was indicted for multiple crimes and agreed to severance into two trials, because evidence of prior convictions could prejudice the jury as to one of the charges. Defendant was acquitted in the first trial, and then found guilty in the second trial over his objection that the second trial would violate his Double Jeopardy rights under the Fifth Amendment.

HELD: because the defendant consented to a severance of multiple charges against him, his second trial resulting in a conviction, following his first trial resulting in an acquittal, did not violate the Double Jeopardy Clause.

United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018)

Defendants in several cases objected to a policy of the U.S. District Court for the Southern District of California that required them to appear for pretrial non-jury proceedings in full physical restraints. The Ninth Circuit withheld a writ of mandamus because the policy was no longer in effect, despite the applicable "capable of repetition yet evading review" mootness exception.

HELD: the appeals challenging the use of full restraints during non-jury pre-trial proceedings became moot when defendants' underlying criminal cases came to an end before the Ninth Circuit could render its decision.

Session v. Dimaya, 138 S. Ct. 1204 (2018)

Defendant was a lawful permanent resident convicted of an aggravated felony, which under the Immigration and Nationality Act makes a non-citizen subject to deportation. An aggravated felony includes a "crime of violence," which is any offense that involves the use or substantial risk of physical force against a person or property. The Court of Appeals for the Ninth Circuit found that the provision denied fair notice to defendants and did not make clear when a risk of violence would be considered substantial.

HELD: The "crime of violence" provision of the Immigration and Nationality Act is unconstitutionally vague, risking unpredictable and arbitrary interpretation, in violation of the Fifth Amendment's Due Process Clause

Sessions v. Morales-Santana, 198 L. Ed. 2d 150 (2017)

Defendant's father did not meet the requirements to transfer derivative citizenship to him upon birth and in 2000 defendant was placed in removal proceedings (from Puerto Rico) because of various felony convictions. His application to have the removal withheld was denied, and defendant filed a motion to reopen arguing that the denial of derivative citizenship violated the Equal Protection Clause of the Fifth Amendment because he met the less stringent requirements for citizenship through unwed mothers under the Immigration and Nationality Act.

HELD: The statutory distinction between the physical presence requirements for transferral of derivative citizenship for unwed mothers and unwed citizen fathers of foreign-born children violated the Equal Protection Clause of the Fifth Amendment. Laws granting or denying benefits on the basis of the gender of the qualifying parent were subject to heightened review. To be valid, such legislation must serve an important government objective and the means of

accomplishing it must be substantially related to that objective. It is up to Congress, rather than the courts, to create a uniform solution.

Beckles v United States, 137 S. Ct. 886 (2017)

Defendant was convicted after a sawed-off shotgun was located in his residence, and had a history of felony convictions for drug possession and sales. The district court determined that he was subject to sentencing enhancement under the Sentencing Guidelines of the Armed Career Criminal Act (ACCA), and eligible for a sentence ranging from 360 months to life (he got 360 months). He appealed claiming that his prior convictions did not qualify as violent felonies and that his conviction for possession of a sawed-off shotgun was not a crime of violence subject to sentencing enhancement. The U.S. Court of Appeals for the Eleventh Circuit affirmed, and SCOTUS vacated and remanded in consideration of *Johnson v. United States*, which held the residual clause of the ACCA unconstitutional.

HELD: The Court's holding in *Johnson v. U.S.* does not apply retroactively to the Sentencing Guidelines. The Sentencing Guidelines were not unconstitutionally vague like the ACCA residual clause because the Guidelines are primarily advisory, and do not necessarily constrain judicial discretion.

Bravo-Fernandez v. United States, 137 S. Ct. 352 (2016)

Defendants were convicted of violating a federal bribery statute, and acquitted them of conspiring to violate the statute and violating the Travel Act (which prohibits interstate commerce for a criminal purpose). Their convictions were vacated by the U.S. Court of Appeals for the First Circuit because the jury was improperly instructed. On remand, the order acquitting defendants was vacated upon government clarification that the appellate decision did not require the district court to enter an order of acquittal, and then vacated the bribery convictions, after which the defendants moved to reinstate the initial acquittal order.

HELD: The issue-preclusion component of the Double Jeopardy Clause does not bar the Government from retrying defendants after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal, and the convictions are later vacated for legal error unrelated to the inconsistency. It is unclear what a jury would have concluded without the legal error, and so the Government is not precluded from a new trial on the jury convictions.

SIXTH AMENDMENT

McCoy v. Louisiana, 138 S. Ct. 1500 (2018)

Defendant was charged with capital murder and refused to take a guilty plea, expressly telling his attorney that he wanted to maintain his innocence. This attorney went against his client's wishes, conceding his client's guilt throughout the trial in an attempt to get the crime reduced to second degree murder. A jury found the defendant guilty of first degree murder and sentenced him to death.

HELD: While an attorney can make strategic decisions about how to achieve a client's objectives, a defendant has the right to make decisions about what his actual objectives at trial are. Going against a client's express wish to profess innocence thus violated his right to autonomy under the Sixth Amendment,

Wilson v. Sellers, 138 S. Ct. 1188 (2018)

Defendant was convicted of murder and given the death penalty; he then sought habeas relief in Georgia Superior Court claiming ineffective assistance of counsel during sentencing. The Georgia Supreme Court summarily denied his application for certificate of probable cause to appeal, and he brought the same habeas claim in federal court. The District Court deferred to the state court's conclusion, and the Eleventh Circuit affirmed, holding that federal courts don't need to "look through" a summary decision on the merits to review the reasoning of a lower court.

HELD: A federal habeas court reviewing an unexplained state court decision on the merits should "look through" that decision to the most recent state court decision that provides a rationale and presume that the unexplained decision adopted the same reasoning. The state may rebut by showing that the unexplained decision most likely relied on different grounds than the reasoning below.

Lee v. United States, 137 S. Ct. 1958 (2017)

Defendant was a Korean immigrant who was charged with possession of ecstasy with intent to distribute, and pled guilty upon assurance from his attorney that a guilty plea would have no immigration consequences. However, his plea constituted a conviction of an aggravated felony, a deportable offense under the Immigration and Nationality Act.

HELD: Under *Strickland*, when a defendant claims that his plea was caused by ineffective assistance of counsel, the defendant can demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, he would have gone to trial rather than accepting a plea. The relevant question was not whether the defendant would have been acquitted at trial, but whether, had the defendant been properly advised, he would have chosen to exercise his right to a trial.

Weaver v. Massachusetts, 137 S. Ct. 1899 (2017)

Defendant was convicted of first degree murder, and his family and other members of the public were closed from court during voir dire because of overcrowding. Defendant filed a motion for a new trial, claiming ineffective assistance of counsel because his counsel did not object to the closure of the courtroom in violation of his Sixth Amendment right to a public trial. The motion was denied and his conviction alter affirmed.

HELD: In the context of the violation of a right to a public trial during voir dire, when the error is neither preserved nor raised on direct review but is first raised via an ineffective assistance of counsel claim, the defendant must demonstrate actual prejudice to secure a new trial. The defendant did not show a reasonable probability of a different outcome but for counsel's failure to object or that counsel's shortcomings led to a fundamentally unfair trial, so is not entitled to a new trial.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017)

After defendant was convicted of unlawful sexual conduct and harassment in state court, two jurors informed his counsel that another juror had made racially biased statements about defendant and the alibi witness during deliberations (who were both Hispanic). The trial court authorized counsel to obtain affidavits from these jurors. The trial court denied defendant's motion for a new trial, and the Colorado Court of Appeals affirmed. The Supreme Court of Colorado held the affidavits to be inadmissible under Colorado Rule of Evidence 606(b), which prohibits juror testimony on any matter occurring during deliberations, and further held that the

rule did not violate defendant's Sixth Amendment right to an impartial jury because he waived that right by not adequately questioning jurors about racial bias during voir dire.

HELD: Rule 606(b) of Colorado's Rules of Evidence may not bar evidence of racial bias which is proffered to prove a violation of a Sixth Amendment right to an impartial jury. If a juror makes a clear statement that he or she convicted a criminal defendant relying on racial stereotypes or animus, the trial court is permitted to consider evidence of the juror's statements. In certain rare cases, the Rule 606(b) no-impeachment rule shall be set aside to protect the Sixth Amendment, an exception that demands that a juror exhibit over racial animus that calls into question his or her ability to make a fair and impartial judgment about the defendant.

Buck v. Davis, 137 S. Ct. 759 (2017)

Defendant was convicted of capital murder for the deaths of his ex-girlfriend and her friend. During sentencing phase, the defense presented the expert testimony of a clinical psychologist who testified that he considered demographic factors, such as race, in his analysis, specifying that minorities are overrepresented in the criminal justice system. On cross-examination, the prosecution clarified that the expert's opinion was that being black increased the likelihood of the defendant's future dangerousness. Defendant raised an ineffective assistance of counsel claim because his counsel knowingly called this expert; the district court dismissed, finding that defendant failed to show that the outcome of his trial was prejudiced, and the Fifth Circuit similarly held that he did not show sufficient extraordinary circumstances to justify relief.

HELD: The U.S. Court of Appeals for the Fifth Circuit applied the wrong standard of review when it denied the defendant's Certificate of Appealability (COA); the proper standard of review in COA analysis was whether the defendant's claim was reasonably debatable. An appellate court should not consider the actual merits of an appeal unless it first determined that the claim was reasonable debateable. The defendant successfully demonstrated ineffective assistance of counsel because his attorney introduced evidence that he was likely a future danger because of his race, and it was reasonably probable that absent this testimony he may not have received the death penalty. Finally, the district court's denial of defendant's motion for habeas relief was an abuse of discretion as there was a reasonably probability that he was sentenced to death in part based on his race.

EIGHTH AMENDMENT

Moore v. Texas, 137 S. Ct. 1039 (2017)

Defendant was convicted of capital murder and after a federal court granted habeas corpus relief, he was again sentenced to death (which was affirmed on appeal). Defendant then sought state habeas relief, arguing that, pursuant to the precedent set in *Atkins v. Virginia*, he should be exempt from execution due to his intellectual disability. Relief was granted, but the Court of Criminal Appeals of Texas reversed, holding that defendant failed to establish his disability by a preponderance of the evidence based on Texas law using a 1992 definition of intellectual disability.

HELD: The use of an outdated medical definition of intellectual disability violates the Eighth Amendment's prohibition against cruel and unusual punishment and Supreme Court precedent. State standards for determining when a defendant is exempt from the death penalty because of mental disability cannot ignore current medical standards and definitions of mental disability.

Bosse v. Oklahoma, 137 S. Ct. 1 (2016)

Defendant Bosse was convicted of three counts of first degree murder and given the death penalty after three of the victims' family members recommended that sentence to a jury. The Oklahoma Court of Criminal Appeals affirmed, holding that *Payne v. Tennessee* implicitly overruled *Booth v. Maryland* (Eighth Amendment prohibits testimony by the victim's family members regarding their opinions about the defendant, the crime, or the sentence) relating to characterizations of the defendant and opinions about the sentence.

HELD: in *Payne*, the Court specifically stated that its opinion did not affect the *Booth* prohibition against victim impact testimony relating to the crime, the defendant, and the sentence. Only SCOTUS can overrule its own precedent, so the Oklahoma Court of Criminal Appeals erred in holding otherwise.