CH. 45
SEX OFFENSES

§45-1
Generally

§45-1(a)
Right to Confrontation

Note: See also §56-6(b)(2) Witnesses – Examination of Witness – Cross-Examination – Right to Face-to-Face Confrontation.

United States Supreme Court

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

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

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

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

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

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

Illinois Supreme Court

People v. Fitzpatrick, 158 Ill.2d 360, 633 N.E.2d 685 (1994) 725 ILCS 106B-1, which provided that in prosecutions for certain sexual offenses, victims under 18 may testify by closed circuit television if testifying in open court would either result in such serious emotional distress that the child cannot communicate or cause severe emotional distress which is likely to have "severe adverse effects," violated the Illinois Constitution's right to confrontation because it does not provide "face-to-face" confrontation. (**Note**: In the 1994 general election, Illinois voters amended the Illinois Constitution to eliminate the requirement of face-to-face confrontation. The General Assembly subsequently reenacted 725 ILCS 5/106B-1 (now 106B-5) to allow use of televised testimony under specified circumstances.)

Illinois Appellate Court

People v. Redmon, 2022 IL App (3d) 190167 One of defendant's convictions of predatory criminal sexual assault of a child was reversed outright based on speedy trial and compulsory joinder principles. While certain pretrial delays were attributable to defendant on the original charges, those delays did not toll the speedy trial term as to the subsequently-added PCSA charge. The subsequent PCSA charge was based upon the same act as was charged in one of the original counts and thus was subject to compulsory joinder. Because compulsory joinder applied, it could not be assumed that the delays agreed to by defendant before the charge was filed would have been agreed to by defendant had the additional charge been pending at the time of those delays.

Defendant's conviction for permitting the sexual abuse of a child also was reversed outright where the State failed to comply with the charging requirements of the statute. 720 ILCS 5/11-9.1A(f) provides that "[a] person may not be charged with the offense of permitting sexual abuse of a child...until the person who committed the offense is charged with" one of the enumerated sexual offenses. The plain language of the statute requires that the individual who allegedly committed the sexual abuse must be charged in order for the defendant to be charged with permitting the abuse. And, here, the State did not charge the person who committed the alleged abuse at issue.

Finally, defendant's remaining conviction of predatory criminal sexual assault of a child was reversed and remanded for a new trial. The Appellate Court agreed with defendant that she was deprived of a fair trial by the inclusion of the aforementioned charges, both of which should have been dismissed prior to trial. Certain evidence, including 115-10 statements, would not have been admissible had those charges been dismissed. Without that evidence, the State's case on the remaining charge would have been significantly weakened. Accordingly, due process and fundamental fairness required reversal and remand for a new trial.

People v. Bedoya, 2021 IL App (2d) 191127 Under 725 ILCS 5/115-7.3, evidence of other sexual offenses need not be identical to the charged offense in order to be admissible at trial. Here, for instance, while there were differences as to where the incidents occurred and whether anyone else was present, they were sufficiently similar where the incidents all involved boys close in age and consisted of the same type of acts, specifically defendant touching the boys' penises. This was enough to render the other offenses admissible to establish defendant's propensity to commit sex offenses under Section 115-7.3. And, the trial court properly weighed the potential prejudice against the probative value of the evidence when it admitted testimony from only two of the ten other-crimes witnesses whose testimony the State sought to introduce.

People v. Nevilles, 2021 IL App (1st) 191388 The failure to object to the joinder of sexual assault and sexual abuse charges involving two separate victims was not ineffective assistance of counsel. Section 111-4(a) of the Code of Criminal Procedure provides that charges may be joined where they are part of the same comprehensive transaction. Factors to be considered in determining whether multiple offenses are part of the same comprehensive transaction include: (1) the proximity in time and location; (2) the identity of evidence needed to establish a link between the offenses; (3) whether the offenses shared a common method; and (4) whether the same or similar evidence would prove the elements of the offenses.

Here, the charged sexual offenses occurred primarily in 2004, and most took place in defendant's home and in a hotel room during a trip to California. Both victims were teenage girls who were members of a music group managed by defendant. They rehearsed at defendant's home, and both girls described private rehearsal sessions in defendant's garage during which the offenses occurred. Similarly, both traveled with defendant to California to promote their music group, and defendant told them they would have to perform sex acts with him to further their careers in the music industry. Defendant used his position as the group's manager as part of his common plan to engage in sexual activity with the victims. And, each girl's testimony would have been admissible at a trial on charges involving the other under 725 ILCS 5/115-7.3, regardless of whether the charges were joined for trial. Accordingly, there was no error in joining the charges, and counsel did not perform deficiently where any objection to the joinder would have been futile.

People v. Martinez, 2021 IL App (1st) 172097 Defendant claimed that the trial court violated his right to confrontation by failing to follow the procedure outlined in 725 ILCS 5/106B-5. He further claimed a violation of his right to a public trial by improperly excluding spectators under 725 ILCS 5/115-11, and by reviewing video evidence outside the presence of the parties.

Before defendant's bench trial, the parties had agreed to have the child witness testify in the courtroom while defendant watched in a separate room over closed-circuit television. Section 106B-5, however, allows for the *witness* to testify from a separate room, not defendant. The Appellate Court found the error forfeited (though not affirmatively waived, as he was not advised of his rights) and did not rise to the level of plain error. No prejudice ensued from the set-up, where defendant could see the witness and communicate with his attorney via intercom to assist in cross-examination.

Defendant also alleged that the trial court erred when it ordered some spectators from "the mom's family" out of the courtroom pursuant to Section 115-11. Under this statute, parties without a "direct interest in the case" may be removed during a child's testimony. Defendant forfeited the error by not objecting at the time, but the decision was not plain error. While the trial court did not make a specific finding that the removed spectators were non-interested parties, and a better practice would be for the court to detail its decision on the record, nothing here suggested that the removed parties were directly interested in the case, *i.e.*, a part of the immediate family of the defendant or complainant.

Finally, defendant forfeited any complaint about the court's decision to view the video evidence outside the presence of the parties, and the decision did not rise to plain error. A trial court may review evidence on its own, as long as the foundation for the evidence is laid in open court and the parties have an opportunity to view it as well. No violation of the right to be present occurred where the court ensured defendant could view the evidence with his attorney, and did not demonstrate the violation an underlying right as a result of his absence

from the judge's viewing. Moreover, the right to confrontation was not violated where the subjects in the video testified and were subject to cross-examination.

People v. Rajner, 2021 IL App (4th) 180505 The trial court did not err in allowing a child witness to testify outside the courtroom through closed-circuit television. Under 725 ILCS 5/106B-5, testimony through closed-circuit television is available in certain sex cases involving child witnesses if the State can establish testifying in the courtroom would cause severe emotional distress. The State met this burden by eliciting testimony from the witness's therapist, who opined that testifying in the same room as the defendant would be so overwhelming for the witness that she would be unable to communicate and would suffer from flashbacks and other symptoms of post-traumatic stress disorder. While defendant argued that this opinion was mere speculation, the therapist had first-hand interactions with the child during which she personally observed her anxiety and reticence.

A concurring justice urged the Supreme Court to take the case to clarify whether section 106B-5 remains constitutional in light of **Crawford v. Washington**.

People v. Legoo, 2019 IL App (3d) 160667 The plain language of the statute prohibiting a child sex offender's presence in a public park (720 ILCS 5/11-9.4-1(b)) does not contain an exemption for parents or guardians, and the Court declined to read such an exemption into the statute. While such an exemption is included in a similar statute (720 ILCS 5/11-9.3(a-10)), the statutes are not so similar as to require the same exemption in both. For instance, Section 11-9.3 includes as an additional element that the prohibited individual approach, contact, or communicate with a child, while section 11-9.4-1 prohibits the individual's mere presence. And, Section 11-9.3 punishes a violation as a Class 4 felony, while a violation of 11-9.4-1 is a Class A misdemeanor.

People v. Pepitone, 2019 IL App (2d) 151161Application of the statute prohibiting child sex offenders from being present in a public park was not an *ex post facto* violation as applied to defendant. Although the conviction that triggered defendant's status as a child sex offender occurred prior to enactment of the public park ban in 2011, it was not defendant's status that triggered the statute's application. Instead, it was defendant's conduct of being present in the park in 2015 that subjected him to the statute's reach. While defendant's status as a child sex offender is an element of the offense, the public park ban is not additional punishment for defendant's prior conduct.

In re T.Z., 2017 IL App (4th) 170545 T.Z. was charged with aggravated criminal sexual assault and criminal sexual assault against another minor, T.W. At T.Z.'s adjudicatory hearing, T.W. gave audible answers to preliminary questions on direct examination but then whispered his answers to the trial judge when asked about the specific conduct alleged as the basis for the charges against T.Z. The judge then repeated those answers aloud. T.Z.'s counsel unsuccessfully attempted to request a sidebar during this procedure, but did not state the reason for the sidebar and did not object to the "whisper" testimony. T.Z. was adjudicated delinquent based upon the court's finding that T.W. was credible.

On appeal, T.Z. alleged that the whispered answers violated his right to confrontation. The Appellate Court first found that trial counsel's failure to specifically object to the manner of testimony meant that the confrontation issue had been forfeited. The Appellate Court refused to speculate that the requested sidebar was for the purpose of objecting to the whisper procedure. Thus, the issue was analyzed for plain error.

While the confrontation clause reflects a preference for face-to-face confrontation, exceptions may exist. In **Michigan v Craig**, 497 U.S. 836 (1990), the United States Supreme Court approved of a state statutory procedure permitting a child witness to testify via close circuit television because the procedure: (1) preserved the ability of the parties and the court to observe the witness while testifying, (2) furthered the State's interest in the well-being of the child, and (3) was used only after a case-specific showing of necessity. In **People v Lofton**, 194 Ill. 2d 40 (2000), on the other hand, the defendant's confrontation right was violated by the trial court's *ad hoc* procedure of allowing the child witness to testify from behind a barrier of podiums preventing the defendant from viewing the child witness while testifying.

The *ad hoc* whisper method used here violated T.Z.'s confrontation right and amounted to clear and obvious error. While T.Z. was able to see T.W., the whispered testimony precluded T.Z. and his attorney from listening to T.W.'s specific answers and manner of testimony. Spoken language contains more communicative information than the mere words that are uttered. Listening to a witness's manner of testimony is as vital as observing the witness's demeanor.

The evidence was closely balanced where T.Z. and T.W. provided opposing versions of events and there was no extrinsic corroboration of either. The outcome of the case turned on credibility, and the error here directly impacted T.Z.'s ability to contest T.W.'s credibility. The error was particularly prejudicial here because the trial judge made clear that he relied on T.W.'s whispered testimony in finding T.W. credible. Also, the judge was not sworn, as an interpreter would be, and a trial judge "cannot serve as a witness as well as a fact finder." The delinquency adjudication was reversed and the matter remanded for a new adjudicatory hearing before a different judge.

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

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

§45-1(b)
Rape Shield Statute

United States Supreme Court

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

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

Other Federal Courts

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

Illinois Supreme Court

People v. Patterson, 2014 IL 115102 The Illinois rape shield statute precludes evidence of a complainant's sexual history except under two narrow exceptions for: (1) evidence of past sexual conduct between the complainant and the defendant; and (2) evidence that is constitutionally required to be admitted. 725 ILCS 5/115-7.

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

Defendant attempted to introduce evidence that sperm (which did not belong to defendant) was found in complainant's vagina to show that she had engaged in sexual intercourse with someone other than defendant in the days prior to the assault. Defendant argued that although such evidence would normally be barred by the rape shield statute, he had a constitutional right to introduce such evidence to refute the inference that complainant had recent sexual intercourse with defendant by presenting evidence that she had intercourse with someone else within 72 hours, which was about the amount of time, defense counsel asserted, that sperm lasts in the vagina.

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

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

The court rejected defendant's reliance on medical sources cited in the State's appellate brief indicating cervical inflammation can last three days. It was trial counsel's burden to provide a sufficiently detailed offer of proof at trial, not months or years later on

appeal. When evaluating an evidentiary ruling for abuse of discretion, the reviewing court must evaluate that discretion in light of evidence actually before the trial judge. Since defendant did not provide a sufficient offer of proof, his claim was not subject to appellate review.

People v. Santos, 211 Ill.2d 395, 813 N.E.2d 159 (2004) The Rape Shield Statute bars evidence of the alleged victim's prior sexual activity or reputation, except where: (1) evidence of past sexual activity with the accused is offered as evidence of consent, or (2) admission of such evidence is constitutionally required. Where defendant was charged with criminal sexual abuse involving an act of sexual penetration with a person who was between the ages of 13 and 17 and at least five years younger than defendant, the Rape Shield Statute did not permit the defense to introduce: (1) the complainant's statement to medical personnel that she had not had sexual intercourse with anyone other than defendant within 72 hours prior to the incident, or (2) her subsequent admission, upon learning that DNA analysis showed that semen recovered from her person had not come from defendant, that she had sexual intercourse with another man on the date of the alleged offense.

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

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

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

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

Finally:

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

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

Illinois Appellate Court

People v. Carter, 2022 IL App (1st) 210261 A defendant cannot avoid application of the rape shield statute by claiming that the evidence of sexual history impeaches a complainant's prior denials. Here, complainant told defendant she was not sexually active. He sought to impeach her with inconsistent statements to the police indicating she was sexually active, and her medical records showing treatment for a sexually transmitted disease. As evidence of complainant's sexual history, these were not admissible under the rape shield statute. Furthermore, there was no constitutional right to present this evidence, as it was collateral (the complainant never testified on the stand that she was not sexually active) and substantially more prejudicial than probative.

Additionally, the State did not violate the rape shield statute when it elicited complainant's testimony that defendant asked her if she was sexually active and she responded "no." This statement was not admitted for the truth of the matter asserted, and the State did not confirm with complainant whether the statement was truthful. Thus, the statement did not constitute actual evidence of the complainant's sexual history.

People v. Kruel, 2022 IL App (1st) 200721 Before his trial for sexual assault and battery, defendant filed a motion *in limine* to admit evidence that two unidentified DNA samples were discovered in the complainant's rape kit. The State objected, citing the rape shield rule, 725 ILCS 5/115-7(a). Section 115-7(a) bars evidence of a victim's prior sexual activity in sexual assault cases except under certain limited circumstances. The trial court initially granted the motion in part, ruling that evidence of the DNA was admissible substantively, but not admissible to impeach the complainant's prior statement that she did not have sexual relations within 72 hours of the rape kit. However, after opening statements, the court revised its ruling and barred all evidence of the unidentified DNA profiles.

Defendant was acquitted of sexual assault and convicted of aggravated battery. On appeal, he challenged the trial court's decision to bar the evidence of other DNA profiles, but the Appellate Court affirmed. The rape shield statute provides only two exceptions to the bar on evidence of sexual history in sex offense cases: (1) when consent is an issue and defendant seeks to introduce prior sexual activity between himself and the victim; or (2) when the evidence is constitutionally required to be admitted.

Defendant here alleged that the ruling violated his sixth amendment right to present evidence in his defense. Courts have held that this right takes precedence over the rape shield statute when evidence of sexual history is directly relevant to the case, *e.g.* to show the victim's bias, prejudice, or motive; to negate the establishment of an element of the crime charged; or to explain physical evidence, such as semen or pregnancy. But in this case, the evidence had no direct relevance. The defense theory at trial was that defendant did not commit the act. Evidence that the complainant had recent intercourse did not bear on that theory. Nor was it directly relevant to the complainant's allegation that intercourse did occur despite the lack of defendant's DNA, as the timing of the rape kit – 24 hours after the assault – and her testimony that defendant did not ejaculate, offered alternative explanations.

Finally, the evidence was not admissible under the doctrine of curative admissibility. The doctrine allows the introduction of otherwise inadmissible evidence in order to rebut evidence presented by the opposing party that would cause undue prejudice. Here, although the State argued that the rape kit produced no DNA results, this misleading assertion did not cause defendant undue prejudice. The jury's belief that no DNA evidence was found was helpful to defendant's case, and it would not have necessarily become more helpful had the jury known about the other profiles. Thus, while the State erred in arguing that "no DNA"

was found, any such error was harmless and did not elicit a need for the doctrine of curative admissibility.

People v. Okoro, 2022 IL App (1st) 201254 After informing police that defendant attempted to sexually assault her, the complainant volunteered that she had been the victim of rape in the past. The defense sought to use this statement as part of the defense. The trial court denied the request, citing the Illinois rape shield statute.

The Appellate Court first held that defendant did not forfeit the claim by failing to raise the issue in a post-trial motion. The issue was raised in a pre-trial motion and is of constitutional dimension. It could be raised again in a post-conviction petition. Under these circumstances, courts will find the claim was not forfeited.

The Illinois rape shield statute bars evidence of the complainant's prior sexual activity or reputation, subject to two exceptions: (1) evidence of past sexual activities with the accused, offered as evidence of consent; and (2) where the admission of such evidence is constitutionally required. Defendant alleged that his constitutional right to cross-examination required use of the complainant's statement about a prior sexual assault. The right to cross-examine a witness is not defeated by the statute where the evidence of past sexual conduct is relevant and tends to establish bias, motive, or prejudice.

Here, defendant could not show the relevance of a prior sexual assault. While the defense theorized that a prior rape might have made the complainant hyper-sensitive to being alone with men, this claim was pure conjecture. The defense made no offer of proof in support of this claim, and therefore could not show that the rape shield law must yield in favor of the right to cross-examination.

People v. Cerda, 2014 IL App (1st) 120484 In sex offense prosecutions, the Rape Shield Statute bars the admission of evidence about the prior sexual activity or reputation of the victim. There are two exceptions to this bar: (1) when consent is an issue and defendant seeks to introduce prior sexual activity between himself and the victim; or (2) when such evidence is constitutionally required to be admitted. 725 ILCS 5/115-7(a). If one of the exceptions applies, the court must still determine whether the evidence is relevant and the probative value outweighs the danger of unfair prejudice. 725 ILCS 5/115-7(b).

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

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

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

Here, defense counsel made an offer of proof by reading from a police report stating that the victim "told her mom days before about having had sex for the first time with a boy her own age." The court held that this offer of proof provided no evidence that the victim's mother was angry about the consensual sexual experience and defendant only argued "weakly" that the mother "could have been" angry. As a result, the offer of proof did not support defendant's proposed argument that the victim's accusations were motivated by a desire to deflect her mother's anger about the sexual encounter. The trial court thus did not abuse its discretion in excluding the evidence.

People v. Patterson, 2012 IL App (1st) 101573 The Illinois Rape Shield law (725 ILCS 5/115-7(a)) bars evidence of the prior sexual history of an alleged sexual assault victim unless: (1) the evidence concerns the alleged victim's prior consensual conduct with the defendant and is offered to show consent, or (2) the constitution requires that the evidence be admitted. Due process requires that evidence of the victim's sexual history be admitted where such evidence is relevant to a critical aspect of the defense. Thus, evidence of the alleged victim's sexual history is admissible to explain physical evidence such as semen, pregnancy, or physical indications of intercourse.

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

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

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

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

People v. Maxwell, 2011 IL App (4th) 100434 Prior sexual activity of an alleged victim of a sex offense is admissible if constitutionally required. 725 ILCS 5/115-7(a). Both the due-process clause of the Fourteenth Amendment and the confrontation clauses of the state and federal constitutions guarantee the defendant a meaningful opportunity to present a complete defense. Fairness, however, does not require admission of evidence that is only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues.

Prior sexual activity by the alleged victim is admissible to explain the alleged victim's

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

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

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

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

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

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

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

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

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

whether the proffered evidence is relevant and admissible.

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

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

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

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

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

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

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

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

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

accuse defendant of rape.

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

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

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

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

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

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

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

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

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

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

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

People v. Ellison, 123 Ill.App.3d 615, 463 N.E.2d 175 (2d Dist. 1984) The trial judge

properly excluded, under the rape shield statute, defense evidence concerning the complainant's reputation for chastity.

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

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

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

§45-1(c)
Miscellaneous

United States Supreme Court

Packingham v. North Carolina, 582 U. S. ___, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017) The North Carolina legislature enacted legislation creating a felony where a registered sex offender accesses a commercial social networking website which is known by the offender to permit minor children to become members or to create or maintain personal web pages. The U.S. Supreme Court found a First Amendment violation because the statute was not drawn narrowly enough to avoid burdening substantially more speech than necessary to further the government's legitimate interests.

A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and after reflection speak and listen again. In the modern world, cyberspace and social media constitute an important place for communication and the exchange of views. Because this is the first case to address the relationship between the First Amendment and the modern Internet, the court "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium."

The court noted that inventions "heralded as advances in human progress" can be exploited by the criminal mind. However, the mere fact that an invention might be exploited for criminal purposes does not insulate it from First Amendment protection.

A statute which is content-neutral is subject to intermediate scrutiny. To survive such scrutiny, the law must be narrowly tailored to serve a significant governmental interest. In other words, the law may not substantially burden more speech than is necessary to further the government's legitimate interest.

The court concluded that the North Carolina statute failed this test. First, the statute enacts a "prohibition unprecedented in the scope of First Amendment speech it burdens." By prohibiting sex offenders from using websites to which children might also have access, the

statute bars the use of what may be principal sources for current events, checking ads for employment, speaking and listening on public issues, and "exploring the vast realms of human thought and knowledge." To completely foreclose access to social media prevents engagement in the legitimate exercise of First Amendment rights. The court also noted that even convicted criminals might receive legitimate benefits from social media, particularly if they seek to reform and pursue lawful and rewarding lives.

The court made two assumptions in resolving the case. First, the court presumed that because of the broad wording of the North Carolina statute, it might bar access not only to commonplace social media such as Facebook and Twitter, but also to websites such as Amazon.com, Washingtonpost.com, and Webmd.com.

Second, the court stated that its opinion should not be interpreted as barring a state from enacting more specific laws protecting children from convicted sex offenders. Thus, it can be assumed that the First Amendment permits the enactment of specific, narrowly tailored laws prohibiting a sex offender from engaging in conduct such as contacting a minor or using a website to gather information about a minor.

In a concurring opinion, Justices Alito, Roberts, and Thomas agreed that the law was too broad to satisfy the First Amendment. However, the concurring Justices declined to join in the majority's *dicta* equating the Internet with public street and parks.

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

Illinois Supreme Court

People v. Legoo, 2020 IL 124965 Defendant was convicted of being a child sex offender in a park under 720 ILCS 5/11-9.4-1(b). Evidence at trial established that defendant had gone to the park to retrieve his minor son who was there watching a baseball game. Defendant argued that a statutory exception contained in a nearby section of the Criminal Code, Section 11-9.3(a-10) should be read into Section 11-9.4-1(b). The Supreme Court disagreed.

Section 11-9.3(a-10) permits a child sex offender to be present in a public park and communicate with a minor if the offender's own minor child is also present in the park. Section 11-9.4-1(b), on the other hand, acts as a complete prohibition on a child sex offender's presence in a public park.

The Court first looked to its recent decision in **People v. Pepitone**, 2018 IL 122034, where it held that section 11-9.4-1(b) "completely bars sex offenders who have targeted children from public parks" and acts as a "flat ban." This indicates the legislature did not intend any exception to apply.

The Court went on to discuss differences between the two statutory provisions. Both apply to child sex offenders, but 11-9.4-1 excepts "Romeo and Juliet" offenders. Also, they prohibit different conduct, with 11-9.4-1(b) prohibiting entry or presence in a public park, while 11-9.3(a-10) prohibits approaching, contacting, or communicating with a minor in a public park unless the offender's minor child is also present. Finally, different penalties apply, with 11-9.4-1(b) being a misdemeanor for a first offense, while 11-9.3(a-10) is a Class 4 felony because of the greater threat to public safety from an offender actually approaching a minor in a park. The Court reasoned that because of the harsher punishment, the legislature may have concluded it was reasonable to allow an accused offender to provide an innocent explanation for his or her conduct under 11-9.3.

Ultimately, because the plain language of 11-9.4-1(b) did not include a parental exception, the Court declined to find that the legislature intended such an exception to apply.

Further, the Court held that Section 11-9.4-1(b) is not an unconstitutional infringement on defendant's interest in the care, custody, and control of his child. There is no fundamental right for any person to be present in a public park and no authority for the notion that a parent is entitled to take his child to a public park as part of his liberty interest in raising and caring for his child. Without such an interest, there was no constitutional infringement imposed by the statute.

The two dissenting justices reasoned that the legislature could not reasonably have intended to both prevent all child sex offenders (except Romeo and Juliet offenders) from public parks while simultaneously allowing an exclusion from the prohibition against talking to other children in a public park for those child sex offenders who are present in a public park with their own children. The dissent would have incorporated the parental exception.

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

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

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

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

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

People v. Wheeler, 151 Ill.2d 298, 602 N.E.2d 826 (1992) Before his trial for aggravated criminal sexual assault, defendant moved to have a defense expert examine the complainant or, in the alternative, to bar the State from presenting evidence concerning the rape trauma syndrome. The trial court denied the motion because Ch. 38, ¶115-7.1 prevents a trial judge

from ordering the victim in a sex offense to undergo a psychological examination, and because Ch. 38, ¶115-7.2 provides that expert testimony on post-traumatic stress syndrome shall be admitted. At trial, the State expert testified that based solely on a personal interview, she concluded that the complainant suffered from rape trauma syndrome.

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

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

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

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

Illinois Appellate Court

People v. Watts, 2022 IL App (4th) 210590 The trial court did not err in admitting evidence of defendant's prior sexual assaults of three other women pursuant to 725 ILCS 5/115-7.3. All three incidents shared facts in common with the charged offense. Specifically, defendant invited the women, who he knew, to hang out with him. Each rode in a vehicle with defendant, and all of the prior incidents involved the consumption of alcohol. Defendant assaulted each of the women at a time when they were unable to legally consent. While the charged incident did not involve alcohol, but rather a victim who could not consent because of her age, the differences were not enough to render the prior assault evidence more prejudicial than probative. And, while a significant amount of propensity evidence was admitted at defendant's trial, it did not amount to an improper "mini-trial" on the subject. The evidence was relatively straightforward, and was not "prosecutorial overkill" as in **People v. Cardamone**, 381 Ill. App. 3d 462 (2008).

Additionally, where the victim here claimed that defendant threatened self-harm in order to convince her to leave her home and meet him on the date in question, the court did not err in admitting evidence that defendant had made a similar threat to another individual

on a prior occasion. That evidence showed defendant's use of such threats to manipulate others in order to get his way. Thus, his prior statements of self-harm were relevant, and it was not an abuse of discretion to admit them into evidence at trial.

Finally, the trial court did not err in allowing the State to introduce evidence of memes found on defendant's phone. The State asserted that the memes showed defendant's belief that it was appropriate to sexually assault incapacitated women. For authentication purposes, the court treated the memes like any other form of documentary evidence. A proper foundation for documentary evidence will be found where the proponent presents a rational basis from which a fact finder can conclude that the document belonged to or was authored by the party alleged. Here, there was no dispute that the phone belonged to defendant, and there was evidence that the memes were contained in text messages defendant exchanged with another person. Thus, there was evidence that the memes belonged to him, even if defendant did not author them. This was enough to render the memes admissible, and it was for the trier of fact to determine what weight to give them.

People v. Jones, 2018 IL App (1st) 151307 An Eighth Amendment and proportionate penalties challenge to the predatory-sexual-assault statutory scheme was rejected. While the 17-year-old defendant's conduct would have been a Class A misdemeanor rather than a Class X felony had it been committed either two months earlier (before he turned 17) or two months later (after the victim turned 13), the legislature must draw the line somewhere and there will always be individuals close to the line. Defendant's reliance on **People v. Miller**, 202 Ill. 2d 328 (2002), and **People v. Gipson**, 2015 IL App (1st) 122451, was rejected because those defendants were each only 15 years old, they had received mandatory sentences of life or near life, and there were mental health issues at play in **Gipson**, as well. Defendant's 10-year sentence was close to the 6-year minimum and was not an abuse of discretion.

People v. Atherton, 406 Ill.App.3d 598, 940 N.E.2d 775 (2d Dist. 2010) In prosecutions for illegal sexual acts, testimony by experts relating to any recognized and accepted form of post-traumatic sex syndrome is admissible. 725 ILCS 5/115-7.2. This section is broad enough to include child-sexual-abuse-accommodation-syndrome testimony under the general label of post-traumatic stress syndrome, even though it is not recognized by the Diagnostic and Statistical Manual of Mental Health III (DMS-III).

People v. Johnson, 406 Ill.App.3d 805, 941 N.E.2d 242 (1st Dist. 2010) Generally, evidence of other crimes is inadmissible if offered merely to prove a defendant's propensity to commit crime. Under 725 ILCS 5/115-7.3(c), however, certain uncharged sex-related offenses may be admitted to show the criminal propensity of a defendant who is charged with a sex offense. Before admitting evidence under §7.3, the trial court must determine whether the probative value of the evidence is substantially outweighed by any undue prejudice in light of the proximity in time of the charged and uncharged offenses, the degree of factual similarity, and any other relevant facts.

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

For two reasons, the trial court erred at a trial for aggravated criminal sexual assault when it admitted evidence that 18 months after the charged offense, defendant and another

man sexually assaulted a different complainant. First, the trial court considered only whether the other crimes evidence was probative, and did not weigh the probative value against any undue prejudice. Second, there were substantial dissimilarities between the offenses. In the charged offense, the complainant was accosted by a single man as she walked past an alley. In the uncharged offense, the complainant was forced into a car and assaulted by two men who blew cocaine in her face and gave her alcohol. In addition, the type of penetration differed between the cases.

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

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

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

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

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

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

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

§45-2
Criminal Sexual Assault and Abuse Offenses

§45-2(a)
Generally

Illinois Supreme Court

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

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

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

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

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

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

defendant of the elements of the offense, including the element of "sexual gratification or arousal."

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

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

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

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

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

People v. Lloyd, 2013 IL 113510 Defendant was charged with criminal sexual assaul tin that he knew that the victim was unable to understand the nature of or give knowing consent to the act. Thus, the State was required to prove that defendant committed an act of sexual penetration with knowledge that the complainant was unable to either understand the nature of the act or give knowing consent. The State's theory was that defendant knew the victim was under the age of legal consent, and therefore incapable of understanding the act or giving knowing consent.

The victim's age, standing alone, did not show that she could not understand the nature of the act or give knowing consent. To establish criminal sexual assault under 720 ILCS 5/12-13(a)(2), the State is required to show that the defendant's knew of some fact other than age which prevented her from understanding the nature of the act or knowingly consenting. The proper inquiry in a prosecution under §12-13(a)(2) concerns the defendant's knowledge that a specific victim is incapable of appreciating or consenting to the act, and must be resolved on the particular facts of the case.

The record was completely devoid of any evidence to support a finding that defendant knew the victim was unable to understand the nature of the acts or give knowing consent. Although the State presented evidence from which a rational trier of fact could have concluded that defendant committed aggravated criminal sexual abuse, it chose not to charge

that offense. In evaluating a defendant's challenge to the sufficiency of the evidence "we can only consider the evidence regarding the actual charges the State chose to bring against him, and not the fact that he may be guilty of [an] uncharged offense . . ." that is not a lesser included crime.

People v. Giraud, 2012 IL 113116 Defendant was convicted of aggravated criminal sexual assault under 720 ILCS 5/12-14(a)(3), which defines the offense as committing criminal sexual assault where "during . . . the commission of the offense" the defendant "acted in such a manner as to threaten or endanger the life of the victim." Defendant was found guilty of having unprotected forcible intercourse while knowing that he was HIV positive. The Appellate Court reduced the conviction to criminal sexual assault, finding that exposing a sexual assault victim to the possibility of contracting the HIV virus in the future is not threatening or endangering his or her life "during . . . the commission of the offense."

The Supreme Court affirmed. The legislature intended for the aggravating to apply only if the threat or endangerment occurred *during* the offense. The court noted that nine of the 10 aggravating factors in §12-14(a) apply only during the commission of the crime, and that when the legislature intended to extend the time in which an aggravating factor could occur, it did so explicitly for the remaining factor (§12-14(a)(7)).

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

Mere exposure to the possibility of contracting the HIV virus at some later date does not constitute aggravated criminal sexual assault. The cause was remanded for sentencing for criminal sexual assault.

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

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

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

Illinois Appellate Court

People v. Streater, 2023 IL App (1st) 220640 The appellate court rejected defendant's request to reduce his aggravated criminal sexual assault conviction to simple criminal sexual assault, based on a failure to prove the aggravating factor beyond a reasonable doubt.

The evidence showed defendant carried a baseball bat when forcing the complainant into his car. Once inside the car, defendant drove 10 minutes to an alley and sexually assaulted the complainant. Although he did not touch the baseball bat after he entered the

car, the appellate court affirmed his conviction for aggravated criminal sexual assault. The State proved he "displayed, threatened to use, or used" a weapon "during the commission of the offense." Though he did not actually touch the bat during the sexual act, the offense of criminal sexual assault encompasses more than just sexual penetration; it also includes the use or threat of force. Here, a rational trier of fact could find that the crime of sexual assault began when the defendant used the bat to compel the complainant to get into his car before driving her to the alley where the sexual penetration occurred.

People v. Currie, 2023 IL App (2d) 220114 The State failed to prove one count of predatory criminal sexual assault based on contact between defendant's penis and the complainant's vagina. The complainant had told a doctor that defendant "put his private part in her private part," but the doctor admitted she did not ask the complainant to define "private part." The complainant testified that by "private" she meant "her bottom" or the place where she "peed" and "pooped." The complainant also testified that nobody had touched her where she "peed," though in an earlier statement she stated that defendant did touch her where she "peed." Taking all of the statements together, it could not be said that the complainant ever specifically stated that defendant used his penis to touch her vagina.

There was sufficient evidence to support defendant's other conviction for predatory criminal sexual assault, which had alleged contact between defendant's penis and the complainant's buttocks. Defendant argued that, while the complainant did mention contact between defendant's "pee-pee area" and her buttocks, the complainant also testified that defendant wore his clothing at the time. Unlike aggravated criminal sexual abuse, which criminalizes touching "through clothing," predatory criminal sexual assault omits this phrase and therefore requires skin-to-skin contact. But, the appellate court found the evidence sufficient because, despite repeated statements by the complainant indicating defendant wore clothing during the touching, she did make one final statement indicating defendant removed both of their underwear. The jury could have credited this final statement, especially because an expert testified that children's initial outcries may not include the full story due to family pressure or guilt, not because they're being untruthful.

However, a new trial was required because the State did not disclose this expert to the defense, and defense counsel was ineffective for failing to object to the expert based on this discovery violation. Counsel explained she did not object due to her "surprise," which is not a reasonable strategy. The failure prejudiced defendant, because the evidence was close, and the expert's testimony that child victims change their stories was "incredibly significant." The complainant not only changed the details of the touching, she disavowed her accusations after her initial outcry. Thus, the expert's opinion that a child victim may still be truthful even if her story changes was prejudicial. If counsel objected, she may have obtained a continuance in order to better prepare her cross and closing, or found her own expert. The defendant's remaining conviction was vacated and the case remanded for a new trial.

People v. Breshears, 2023 IL App (4th) 220947 Defendant was convicted of two counts of criminal sexual assault under 720 ILCS 5/11-1.20(a)(4) which provides that a person is guilty of the offense if he commits an act of sexual penetration and is 17 years of age or older and holds a "position of trust, authority, or supervision" in relation to a complainant who is between 13 and 18 years old. The charges in question alleged that defendant held a position of authority in relation to the complainant. On appeal, defendant challenged the proof on that element.

"Authority" is not defined in the statute, but has been given its common dictionary meaning: "the power to command, enforce laws, exact obedience, determine, or judge." Here,

the evidence was that defendant owned and operated a martial arts dojo, and the complainant was a student there. Defendant instructed the martial arts classes, which included determining which activities students would participate in during classes. Additionally, students in defendant's classes bowed to him at the start of class, which the jury reasonably could interpret as a sign of respect toward defendant's authority.

Defendant testified that the complainant was not amenable to his authority, however, because she was disruptive during class and his efforts to address her unruly behaviors were ineffective. But, the statute does not require that the complainant submit to the defendant's authority, only that defendant hold a position of authority with respect to the complainant. Accordingly, the court rejected defendant's argument.

Likewise, while defendant discontinued classes for a period of time during the COVID-19 pandemic, his position of authority with regard to the complainant did not change. Their sexual relationship began while defendant was her instructor. And, while COVID-19 temporarily halted formal instruction, defendant continued to allow the complainant access to the dojo and their sexual relationship continued as well.

Taking the evidence in the light most favorable to the prosecution, it was sufficient to prove beyond a reasonable doubt that defendant held a position of authority with respect to the complainant. Defendant did not dispute that he committed acts of sexual penetration with the complainant or that he was an adult and she was 17 at the time. Thus, his convictions were affirmed.

People v. Melvin, 2023 IL App (4th) 220385 Defendant challenged one of his convictions of predatory criminal sexual assault of a child on the basis that the State failed to prove sexual penetration as charged. The count in question alleged that defendant had committed an act of sexual penetration by placing his finger inside K.A.'s vagina. Defendant argued that K.A.'s testimony and out-of-court statements were not specific enough to prove an intrusion by his finger into K.A.'s vagina. The appellate court disagreed. K.A. testified at trial that defendant touched her vagina with his mouth and hands. In her child advocacy center interview, which was admitted as substantive evidence at trial, K.A. said that defendant touched her private parts with his finger and wiggled his finger "down there," which made her body feel "horrible." And, when he was interviewed by a detective, and before being confronted with the specific conduct alleged, defendant volunteered that he had never put his penis, fingers, or tongue in K.A. Taking all of this evidence in the light most favorable to the prosecution, the court found that defendant had been proved guilty beyond a reasonable doubt of the specific allegations in question.

People v. Hunter, 2023 IL App (4th) 210595 Under 725 ILCS 5/115-7.3, the State may generally introduce evidence of other sex crimes for propensity purposes in a sex crime prosecution. In this case, defendant was charged with aggravated criminal sexual abuse for rubbing the buttocks and breasts of a 10 year-old girl. The State introduced evidence that, on previous occasions with two other similarly aged girls, defendant rubbed their backs, necks, thighs, stomachs, and hair. One of the girls told her grandmother that she laid on top of defendant.

Defendant argued on appeal that these incidents were not admissible under section 115-7.3 because the acts were not for sexual gratification or arousal and therefore not prior acts of aggravated criminal sexual abuse. He also alleged that the statement about laying on defendant was inadmissible hearsay, as it came in through the girls' grandmother.

The appellate court disagreed. Defendant was supervising these children while their parents were at church choir practice, and he moved the two girls to a different room before

touching them extensively. Under these circumstances, it could be reasonably inferred that defendant's actions were for the purpose of sexual gratification or arousal, and therefore the acts met the requirements of section 115-7.3. Also, the statement to the grandmother was admissible as an excited utterance under Illinois Rule of Evidence 803(2). The statement was made by a 9 year-old shortly after being touched repeatedly by a 46 year-old man, and therefore was "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Finally, the trial court erred when it failed provide pattern instruction 11.66, which is required whenever prior statements are admitted pursuant to 725 ILCS 5/115-10 ("instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, *** the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.") IPI 11.66 implements this provision. However, given the overwhelming evidence, and the inclusion of IPI 1.02, the general instruction on witness credibility, this error was not reviewable as plain error.

People v. Rowlands, 2022 IL App (5th) 200221 Defendant was proved guilty beyond a reasonable doubt of predatory criminal sexual assault of a child. At trial, the complaining witness, B.H., testified that defendant was her friend's step-father and that the incident occurred during a sleepover at her friend's house. B.H. said defendant had touched her chest and stomach and "in [her] pants." When the prosecutor asked B.H., who was 12 at the time of the incident, to elaborate, she did not respond. Subsequently, B.H.'s child advocacy center interview was admitted into evidence. During that interview, B.H. said, among other things, that defendant had put his hand insider her pants and had "tried to go into [her] underwear," and that "he didn't really touch [her] private that much, but he did a little bit." B.H. also told the interviewer that defendant had "played around with" her "private" through her clothes and had touched her pubic hair. The appellate court concluded that from this evidence, a rational jury could have found beyond a reasonable doubt that defendant's hand made contact with, and even slightly penetrated, B.H.'s vagina, even if his hand did not go all of the way into her underwear.

Further, the jury was not required to view B.H.'s statements with skepticism simply because the CAC interview did not occur until a couple of weeks after the incident. The recording of that interview showed that B.H. gave a detailed, consistent account of the incident, and two weeks is not such a long period of time as to render her statements inherently suspect or unreliable.

People v. Winters, 2022 IL App (1st) 200859 The State proved criminal sexual assault under 720 ILCS 5/11-1.20(a)(2), by establishing that when defendant, a masseuse, inserted his finger into his client's vagina, she was "unable to understand the nature of the act or was unable to give knowing consent."

On appeal, defendant alleged that section 11-1.20(a)(2) does not apply to this situation, because the client was not "unable" to give consent or understand the act. The appellate court disagreed. Although this offense more typically involves an unconscious or intoxicated complainant, it has also been applied in cases involving doctors who commit an assault during an authorized medical examination. The appellate court found those cases analogous. Here, after the alleged act, complainant testified she "was trying to convince [herself] that it didn't happen," and when

defendant did it again, she "reacted," "jumped in place," and said that she "wasn't okay with it." Thus, the facts showed that the complainant was surprised by the unexpected assault, such that a rational fact-finder could have found she was "unable to give knowing consent."

People v. Lamonica, 2021 IL App (2d) 200136 Defendant was found guilty of aggravated criminal sexual assault under section 11-1.30(a)(2). To prove defendant guilty under this subsection, the State was required to prove that defendant committed an act of sexual penetration against the victim by the use of force and caused bodily harm. The Appellate Court found the evidence of "force" insufficient and reversed the conviction.

The complainant L.L. testified that defendant took her to a restaurant where she drank several glasses of wine, to the point of severe intoxication. She admitted that she invited defendant back to her apartment, with the assumption that they would engage in sexual intercourse. When they arrived at the apartment, L.L. took her dogs outside and fell down. The next thing she remembered was laying in her bed naked with defendant on top of her, digitally penetrating her. She told defendant to stop because it hurt, and after she agreed to oral copulation, they engaged in vaginal sex. The sex was so painful that L.L. began bawling, and told him it was painful, although she did not tell him to stop because she thought it would be futile. L.L. moved away, and told defendant to stop because he was hurting her. They argued, and she saw a vein pop in his neck, suggesting he was very angry and making her believe he would force himself on her or worse. At that point L.L. laid down and he again penetrated her vaginally. L.L. told him it hurt and told him to stop, eventually shoving him off and ending the encounter.

The Appellate Court rejected the argument that defendant used force during the digital penetration, or during either act of vaginal intercourse. First, defendant's act of forcing his fingers into L.L.'s vagina did not amount to the force necessary to prove criminal sexual assault. Force does not include the force inherent to the act of physical penetration; instead, there must be some kind of physical compulsion, or threat thereof, that causes the victim to submit to the penetration against their will. Regarding the first act of vaginal penetration, L.L. never testified that this act began due to force or the threat of force, only that it was painful and that she eventually moved away rather than telling him to stop. With regard to the second act of vaginal penetration, defendant did not threaten L.L., and her subjective interpretation of defendant's neck vein as a threat was insufficient to qualify as an actual threat. Under the definition provided in section 11-0.1, an actual threat must be followed by a reasonable belief that the accused will act upon the threat. Here, there was no evidence that defendant threatened L.L. or that any perceived threat was reasonable.

The State argued that L.L. withdrew her consent when she told defendant, "stop, it hurts," near the end of the encounter. But the Appellate Court found that defendant did not prevent her from disengaging. When a defendant raises the affirmative defense of consent in an aggravated criminal sexual assault trial, the State has a burden of proof beyond a reasonable doubt on the issue of consent as well as on the issue of force. A person can passively force someone to continue with an act of sexual penetration by using one's bodily inertia to prevent the victim from disengaging, but here, defendant's bodily inertia did not prevent L.L. from disengaging. Rather, L.L. was able to push defendant off her, ending the penetration.

Despite reversing defendant's conviction for insufficient evidence, the court went on to hold that the trial court erred in admitting other-crimes evidence. At trial, three witnesses testified about a prior sexual assault. The State used this testimony to prove propensity

under section 115-7.3 and as evidence of intent and lack of mistake. In that assault, E.S. alleged that defendant took her to a restaurant where she drank too much wine and ended up with defendant in her apartment. She further alleged that defendant forced himself on her in the morning. The court found E.S.'s unproven allegation was factually dissimilar to the charged conduct; other than defendant inviting E.S. and L.L. to wine bars, the two incidents bear little resemblance to one another in any significant way. Thus, the probative value was low and no reasonable person could conclude that the probative value outweighed the prejudicial effect.

People v. Miki, 2020 IL App (2d) 190862 To prove aggravated criminal sexual abuse under section 11-1.60(f) of the Criminal Code of 2012, the State must prove, among other things, that the defendant held "a position of trust, authority, or supervision in relation to the victim."

Here, defendant argued that the sexual relationship he had with the 17-year-old complainant did not occur while he held such a position. He admitted to being her soccer coach and employer in the past, but argued these relationships had ended prior to the start of the sexual relationship. However, the complainant testified that she continued to look up to defendant. She trusted him and relied on him for advice, as evidenced by the fact that he continued to offer her soccer training tips. Finally, the complainant's family trusted defendant to coach and hire their daughter, and to let her go to his house and ride in a car with him. This trust did not evaporate simply because he was no longer formally a coach or employer.

People v. Blom, 2019 IL App (5th) 180260 Defendant, a massage therapist, committed an act of sexual penetration without consent, but argued that the State failed to prove the "use or threat of force" element of criminal sexual assault. The victim testified that during her massage, the defendant inserted his fingers into her vagina, and, frozen with fear, she did not move or object. The Appellate Court affirmed, holding that "a woman locked in a dark room, alone, naked, with a man, where she thought no one could hear her yell, while he digitally penetrated her without her consent, constituted a threat of force beyond a reasonable doubt."

The Appellate Court also rejected defendant's argument that the State committed plain error in closing argument when it told the jury that "an act of sexual penetration is in its nature an act of force." The Appellate Court did find the State misstated the law, but found no plain error where the State elsewhere provided the correct definition, the jury was instructed as to the correct definition and also instructed that the arguments were not evidence, and in context the comments did not undermine the defendant's right to a fair trial.

People v. Guerrero, 2018 IL App (2d) 160920 Defendant's post-conviction petition made a substantial showing of appellate counsel's ineffectiveness. To prove predatory criminal sexual assault alleging digital penetration of the vagina, the State must establish intrusion beyond a reasonable doubt. Here, the complainant's testimony on whether defendant's finger intruded her vagina was ambiguous, and in response to a direct question she denied any intrusion, so appellate counsel was ineffective for not challenging the sufficiency of the evidence on direct appeal.

The remedy for a petition that has made a substantial showing of appellate counsel's ineffectiveness for failure to raise a reasonable doubt issue is to grant the same relief that would have been granted on direct appeal. Here, had this issue been raised on direct appeal, the Appellate Court would have reduced the conviction to the lesser-included offense of

aggravated criminal sexual abuse, using its authority under Rule 615(b)(3). Although the dissent would require the State to request a reduction, which it had not done here (instead arguing that the only proper relief would be an evidentiary hearing), the majority believed that judicial economy justified the *sua sponte* reduction to obtain the correct legal result. But as the dissent noted, the "correct legal result" would have been an acquittal, because the State did not provide lesser-included offense instructions.

People v. Mpulamasaka, 2016 IL App (2d) 130703 To prove defendant guilty of aggravated criminal sexual assault as charged in this case, the State was required to prove that he committed an act of sexual penetration by the use of force and caused bodily harm. In addition, because defendant raised sufficient evidence of consent, the State had to prove beyond a reasonable doubt that the complainant did not consent.

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

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

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

People v. Roldan, 2015 IL App (1st) 131962 Defendant was charged with criminal sexual assault based on the allegation that he knew the victim was "unable to understand the nature of the act or [was] unable to give knowing consent." (720 ILCS 5/11-1.20(a)(2)). The trial court concluded that defendant knew or should have known that the victim was in a "blackout" state and was unable to give knowing consent.

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

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

Although the victim testified that she "blacked out" and could not remember the encounter with defendant, there was also evidence that she walked back to the party unassisted and did not appear to other partygoers to be impaired. The Appellate Court concluded that under these circumstances, there was a lack of evidence to indicate that defendant knew the victim was unable to consent to sexual activity with the defendant, even if she might have been unable to consent later in the evening.

People v. Brown, 2013 IL App (2d) 110303 Defendant was charged with involuntary manslaughter and aggravated criminal sexual assault predicated on causing bodily harm while committing a sexual assault with knowledge that the decedent "could not give consent." 720 ILCS 5/12-13(a)(2). Defendant contended that the evidence was insufficient to convict because there was no evidence that the decedent was unable to give knowing consent or that he was aware she was unable to give knowing consent.

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

People v. Feller, 2012 IL App (3d) 110164 Defendant was convicted of counts of criminal sexual assault and aggravated criminal sexual assault that required the State to prove that defendant held a position of trust, authority or supervision over the complainant. "Supervise" means "superintend" or "oversee." There is no requirement in the statute that the position of trust, authority or supervision be of any specific duration.

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

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

People v. Giraud, 2011 IL App (1st) 091261 Defendant was convicted of aggravated criminal sexual assault under 720 ILCS 5/12-14(a)(3), which includes an aggravating factor

where the defendant acts "in such a manner as to threaten or endanger the life of the victim or any other person." The court concluded that under Illinois law, a criminal sexual assault is elevated to aggravated criminal sexual assault only if the aggravating circumstance occurs "during . . . the commission of the" criminal sexual assault. Thus, the aggravating factor must occur contemporaneously with the criminal sexual assault.

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

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

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

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

People v. Gomez, 2011 IL App (1st) 092185 Under the ongoing-criminal-assault rule, Illinois does not require proof of a living victim of a sexual assault where the assault and another offense are committed as a part of the same criminal episode, and the State proves the elements of both offenses.

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

People v. Childs, 407 Ill.App.3d 1123, 948 N.E.2d 105 (4th Dist. 2011) Aggravated criminal sexual assault is committed when one commits criminal sexual assault and one of the statutorily-delineated aggravating circumstances exists during the commission of the offense, including that the accused caused bodily harm. 720 ILCS 5/12-14(a)(2). Because the

statutory offense of aggravated criminal sexual assault does not prescribe a mental state, the mental state of intent, knowledge, or recklessness is implied. If during the course of the sexual assault, the defendant caused bodily harm to the victim, the State need not prove that such harm was inflicted knowingly or intentionally to convict defendant of aggravated criminal sexual assault. An inadvertent or accidental infliction of simple bodily harm is sufficient.

The court correctly convicted defendant of attempt aggravated criminal sexual assault where the State proved that defendant intended to commit a sexual assault and inflicted bodily harm on the victim. Even if the State were required to prove that defendant intended to inflict bodily harm, it satisfied this burden where defendant punched complainant repeatedly until she acquiesced to his sexual demands.

People v. Toy, 407 Ill.App.3d 272, 945 N.E.2d 25 (1st Dist. 2011) Defendant was charged with aggravated criminal sexual assault in that he committed a criminal sexual assault while armed with a firearm. 720 ILCS 5/12-14(a)(8). Unless specified otherwise, "firearm" has the meaning ascribed to it by the Firearm Owners Identification Act. 720 ILCS 5/2-7.5. The FOID Act defines a firearm as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas," excluding certain pneumatic, spring, paint ball, or BB guns, any device used for signaling or safety and required or recommended by the United States Coast Guard or Interstate Commerce Commission, any device used for firing of industrial ammunition, and antique firearms that are primarily collector's items and not likely to be used as a weapon. 430 ILCS 65/1.1.

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

People v. Decaluwe, 405 Ill.App.3d 256, 938 N.E.2d 181 (1st Dist. 2010) An attempt to commit an offense requires completion of a substantial step toward the commission of the offense with the requisite intent. An attempt aggravated criminal sexual assault requires that defendant take a substantial step toward an act of sexual penetration.

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

People v. Gutierrez, 402 Ill.App.3d 866, 932 N.E.2d 139 (1st Dist. 2010) Defendant was convicted of first degree murder and aggravated criminal sexual assault. He contended on appeal that the aggravated criminal sexual assault conviction must be reversed because the State failed to prove that the decedent was alive at the time of the assault.

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

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

People v. Mims, 403 Ill.App.3d 884, 934 N.E.2d 666 (1st Dist. 2010) At a trial for aggravated criminal sexual assault, trial counsel was not ineffective although he failed to request a jury instruction concerning a consent defense. In the course of its opinion, the court rejected the argument that without an instruction on consent, the jury had no basis on which it could have acquitted.

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

People v. Raymond, 404 Ill.App.3d 1028, 938 N.E.2d 131 (1st Dist. 2010) Relying on **People v. Douglas**, 381 Ill.App.3d 1067, 886 N.E.2d 1232 (2d Dist. 2008), the court concluded that a mistake-of-age defense was not available to a defendant charged with predatory criminal sexual assault of a child. The State was required to prove a mental state for the element of penetration, but not for the circumstance of the age of the defendant and the victim.

People v. McNeal, 405 Ill.App.3d 647, 955 N.E.2d 32 (1st Dist. 2010) Sexual penetration involving the sex organ of one person by the sex organ of another requires evidence of contact, however slight. Sexual penetration involving the sex organ of one person and any part of the body of another requires proof an intrusion, however slight. 720 ILCS 5/12-12(f).

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

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

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

People v. Ostrowski, 394 Ill.App.3d 82, 914 N.E.2d 558 (2d Dist. 2009) The offense of criminal sexual abuse occurs where a defendant commits an act of "sexual conduct" by use of force or threat of force. Aggravated criminal sexual abuse occurs where the victim of the "sexual conduct" is under the age of 18 and the accused is a family member.

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

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

sexual purpose for the contact; (6) when and where the contact occurred; and (7) the conduct of the defendant and the victim before and after the contact.

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

People v. Gonzalez, 385 Ill.App.3d 15, 895 N.E.2d 982 (1st Dist. 2008) Under 720 ILCS 5/12-16(d), a reasonable belief that the victim was 17 years old or older is an affirmative defense to aggravated criminal sexual abuse. Once the "reasonable belief" affirmative defense is raised, the State has the burden of proving defendant guilty beyond a reasonable doubt concerning the defense, as well as on all other elements of the offense.

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

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

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

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

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

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

People v. Reynolds, 294 Ill.App.3d 58, 689 N.E.2d 335 (1st Dist. 1997) 720 ILCS 5/12-13(a)(4), which provides that criminal sexual assault occurs where a person over the age of 17 commits an act of sexual penetration with a minor to whom he occupies a "position of

trust, authority or supervision," did not apply merely because defendant was a public official (i.e., a U.S. Congressman). However, there was "ample evidence" that defendant had the required relationship to the minor where he was her "mentor," provided her with money, paid her tuition to enroll in private school, and was the person called by the school when the complainant had problems.

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

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

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

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

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

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

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

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

People v. Vasquez, 233 Ill.App.3d 517, 599 N.E.2d 523 (2d Dist. 1992) Defendant's convictions for criminal sexual assault were reversed on the basis that no rational trier of fact could have found beyond a reasonable doubt that force was used to accomplish the acts of oral intercourse.

P.L., a 13-year-old boy, testified that on two separate occasions defendant "forced"

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

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

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

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

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

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

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

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

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

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

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

> "As long as the crime charged allegedly occurred within the applicable statute of limitations period, the State should be required to do no more than provide the defendant with the best information it has regarding when the offense took place."

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

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

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

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

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

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

People v. Barfield, 187 Ill.App.3d 257, 543 N.E.2d 157 (1st Dist. 1989) Under ¶12-14(b)(1),

aggravated criminal sexual assault requires an act of sexual penetration by a person over 17 years of age with a victim under 13 years of age. It is no defense that the victim consented or that defendant thought the victim was older than 13.

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

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

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

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

People v. Jackson, 178 Ill.App.3d 785, 533 N.E.2d 996 (1st Dist. 1989) Defendant's convictions for aggravated criminal sexual assault, aggravated kidnapping and unlawful restraint were reversed; the evidence of guilt was insufficient and "complainant's version of the morning's events reeks more of fantasy than fact."

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

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

The guilty verdict was not against the manifest weight of the evidence because the jury could have properly found that at least one incident occurred after July 1, 1984. However, the trial judge's refusal of an instruction which would have included as an essential element of the offense that the act of sexual penetration occurred on or after July 1, 1984, was error because without it, "it is impossible to know whether the jury instead convicted defendant for an act performed as alleged in the [information], during the period which predated the statute under which he was charged." Reversed and remanded for a new trial.
People v. Denbo, 372 Ill.App.3d 994, 868 N.E.2d 347 (4th Dist. 2007) Under 720 ILCS 5/12-17(c), initial consent to sexual penetration or conduct does not constitute consent to such conduct occurring after consent is withdrawn.

Withdrawal of consent becomes effective only when communicated to defendant "in some objective manner," so that a reasonable person "in defendant's circumstances" would

have understood that consent had been withdrawn. Here, a reasonable person in defendant's circumstances would not have understood a single push on the shoulders as withdrawal of consent:

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

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

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

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

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

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

People v. Boyer, 138 Ill.App.3d 16, 485 N.E.2d 460 (3d Dist. 1985) To prove bodily harm for aggravated criminal sexual assault, "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent" is required. Here, though the complainant answered affirmatively when asked whether she had experienced

any pain and testified that defendant slapped her face, "there is no evidence in the record which indicates the presence of the requirements necessary to prove bodily harm, i.e., lacerations, bruises or abrasions." Conviction reduced to criminal sexual assault.

Other State Courts

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

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

§45-2(b)
Constitutionality

Illinois Supreme Court

People v. Johanson, 2024 IL 129425 Defendant was convicted of predatory criminal sexual assault of a child based on an allegation of contact between defendant's penis and the minor's hand. At issue before the Supreme Court was whether section (a)(1) of the predatory criminal sexual assault statute and section (c)(1) of the aggravated criminal sexual abuse statute have identical elements but are subject to different penalties such that a proportionate penalties clause violation must be found.

Under 720 ILCS 5/11-1.40(a)(1), a person commits predatory criminal sexual assault of a child if that person is at least 17 years old and "commits an act of contact, however slight, between the sex organ or anus of one person and the part of the body of another for the purpose of sexual gratification or arousal of the victim or the accused, or an act of sexual penetration" and the victim is less than 13 years old. Predatory criminal sexual assault of a child under section (a)(1) is a Class X felony.

Under 720 ILCS 5/11-1.60(c)(1)(i), a person commits aggravated criminal sexual abuse if that person is at least 17 years old and commits an act of sexual conduct with a victim who less than 13 years old. "Sexual conduct" is defined as:

> any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.

720 ILCS 5/11-0.1. Aggravated criminal sexual abuse under section (c)(1) is a Class 2 felony.

Pursuant to the proportionate penalties clause of the Illinois constitution (Ill. Const., art. I, §11), where different offenses contain identical elements but different penalties, the penalties are unconstitutionally disproportionate. Determining whether different offenses have identical elements is an objective test and is not concerned with the offenses as applied to an individual defendant.

Employing that objective test here, the Court found a clear difference between the statutory elements. Specifically, predatory criminal sexual assault of a child requires contact with the sex organ or anus of either the defendant or victim, while aggravated criminal sexual abuse may be committed by "any touching or fondling," including over the clothing and including any part of the body of a victim under 13, for purposes of sexual gratification or arousal. Because the legislature could have reasonably believed that sex organ/anus contact required a more severe penalty than any touching or fondling, the more severe penalty for predatory criminal sexual assault was not constitutionally disproportionate.

The Court rejected defendant's argument that there was a proportionate penalties violation here because his alleged conduct satisfied the elements of both offenses. Citing **People v. Williams**, 2015 IL 117470, the Court reaffirmed that an as-applied challenge cannot be brought under the identical elements test because that test simply compares the statutory elements of two offenses and does not consider the specific acts at issue. That is, while defendant's conduct may have satisfied both statutes, the statutory elements of "contact" for predatory criminal sexual assault and "sexual conduct" for aggravated criminal sexual abuse, are not themselves identical.

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

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

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

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

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

protect children from sexual exploitation by adults. The legislature could logically conclude that an adult who is at least five years older than the minor poses a greater risk of exploitation than an offender who is closer in age to the victim; in the latter case, similar levels of maturity reduce the potential for overreaching or undue influence.

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

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

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

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

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

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

Illinois Appellate Court

In re M.G., 2024 IL App (1st) 232106 Respondent, a 15 year-old uncle to the 10-year-old complainant, was charged with aggravated criminal sexual abuse and adjudicated delinquent. An element of the charge was that respondent was a "family member" of the complainant as defined in 720 ILCS 5/11-0.1. See 720 ILCS 5/11-1.60(b) ("A person commits aggravated criminal sexual abuse if that person commits an act of sexual conduct with a victim who is under 18 years of age and the person is a family member,).

Defendant argued that because section 11-0.1 includes uncles but not brothers or cousins, the definition of "family member" violates the equal protection clause. Section 11-0.1 of the Code states "unless the context clearly requires otherwise," the term family member "means a parent, grandparent, child, aunt, uncle, great-aunt, or great-uncle, whether by whole blood, half-blood, or adoption, and includes a step-grandparent, step-parent, or step-child," and "also means, if the victim is a child under 18 years of age, an accused who has resided in the household with the child continuously for at least 6 months." 720 ILCS 5/11-0.1 (West 2018).

Because the "family member" definition can apply to a "child" who is a member of the household with the child for 6 months, the statute does not necessarily exclude brothers or cousins. Thus, respondent's constitutional claim "fails before it even begins."

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

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

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

§45-2(c)
Lesser Included Offenses

Illinois Supreme Court

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

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

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

Illinois Appellate Court

People v. Johnson, 2023 IL App (4th) 220201 Where the parties agreed that the State failed to prove predatory criminal sexual assault beyond a reasonable doubt, the appellate court reduced the conviction to aggravated criminal sexual abuse over defendant's objection.

One element of predatory criminal sexual assault is contact between the sex organ of one person and a body part of another. The complainant's allegation that defendant touched her sex organ over clothing did not meet the statutory definition of "contact." This type of touching instead constituted aggravated criminal sexual abuse.

A reduction to a lesser offense was appropriate where the trial court found the allegation credible despite complainant's failure to report the incident during her initial interview with the child advocate. The trial court found the explanations credible, and no motive to lie was offered by the defense.

Finally, the appellate court rejected defendant's argument that a reduction was unnecessary or inappropriate because defendant would still serve 10 years on a remaining count and was of old age and infirm. Even if defendant was unlikely to survive his sentence, punishment for the offense serves other purposes, such as retribution, deterrence, and incapacitation.

People v. Smith, 2019 IL App (1st) 161246 Defendant was accused of aggravated criminal sexual assault/dangerous weapon based on his use of a knife. The State alleged he held the knife in the doorway of the complainant's bedroom, threatened her, put the knife down, then forcibly penetrated her. The Appellate Court "categorically" rejected defendant's claim that because he used the knife only to open the door and did not hold a knife during the sexual penetration, his conviction should be reduced from aggravated criminal sexual assault to criminal sexual assault:

> The "offense" of criminal sexual assault does not begin and end at the fixed point in time of the sexual penetration. It begins when the offender first uses force or the threat of force along the way toward ultimately accomplishing sexual penetration. So when the aggravated criminal sexual assault statute provides for the aggravation of the crime based on the "display, threat[] to use, or use" of a dangerous weapon "during the commission of the offense," the phrase "during the commission of the offense" must include the period of time in which the offender used or threatened force."

Here, the complainant saw the knife when defendant threatened to hurt her prior to the assault. This testimony established the "use of a dangerous weapon" element of the offense.

People v. Hurry, 2013 IL App (3d) 100150-B Defendant was convicted of two counts of predatory criminal sexual assault based on the act of placing his penis in the mouth of the child. Because the child's testimony was that defendant placed her hand on his penis, the court reduced the convictions from predatory criminal sexual assault to aggravated criminal sexual abuse. 720 ILCS 5/12-16.

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

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

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

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

§45-3
Decisions Under Prior Law

§45-3(a)
Rape and Deviate Sexual Assault

United States Supreme Court

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

Illinois Supreme Court

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

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

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

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

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

Illinois Appellate Court

People v. Story, 114 Ill.App.3d 1029, 449 N.E.2d 935 (1st Dist. 1983) Battery is not a lesser included offense of attempt rape or unlawful restraint; thus, defendant could not be properly convicted of battery when he was only charged with attempt rape and unlawful restraint.

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

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

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

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

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

§45-3(b)
Indecent Liberties; Contributing to Sexual Delinquency

Illinois Supreme Court

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

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

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

Illinois Appellate Court

People v. White, 2021 IL App (4th) 200354 A person commits sexual exploitation of a child under 720 ILCS 5/11-9.1(a)(2) by exposing a sex organ or breast, for purposes of sexual arousal, while knowingly "in the presence or virtual presence" of a child. Here, a high school track coach sent suggestive photos, showing portions of her breasts, to a 16-year-old student over Snapchat. Although the majority questioned whether exposure of breasts, without revealing the nipple, would satisfy the statute (the special concurrence believed it would), the majority resolved the case on other grounds; namely, whether an exposure made via texted photos is done in the "virtual presence" of the child.

Pursuant to the statutory definition, "virtual presence" means that software, such as webcam video software, creates an "environment" in which the child is virtually in the defendant's presence. 720 ILCS 5/11-9.1(b). The still images that defendant texted to the student did not create an "environment" of virtual presence. They were merely the digital equivalents of Polaroids and not calculated to create the illusion of physical presence, as would be the case in an exposure made over live webcam or Zoom. Accordingly, the conviction was reversed.

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

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

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

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

§45-4
Other Sex Related Offenses

Illinois Supreme Court

People v. Devine, 2023 IL 128438 The supreme court affirmed the appellate court's decision to reduce defendant's conviction from nonconsensual dissemination of private sexual images to disorderly conduct.

The complainant brought her cell phone to a store for repair. She handed the phone to defendant, a store employee. As he reviewed the phone, he found five photos of the complainant's genital area, which he texted to himself. The complainant discovered the text and notified the police. The complainant stated she knew they were her photos because she

recognized her private area, and because her fingers were in the photos and she recognized her nail polish. Defendant was convicted of non-consensual dissemination of private sexual images.

The statute at issue states:

"A person commits non-consensual dissemination of private sexual images when he or she:

(1) intentionally disseminates an image of another person:

(A) who is at least 18 years of age; and

(B) who is identifiable from the image itself or information displayed in connection with the image; and

(C) who is engaged in a sexual act or whose intimate parts are exposed, in whole or in part; and

(2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and

(3) knows or should have known that the person in the image has not consented to the dissemination." 720 ILCS 5/11-23.5(b) (West 2018).

The appellate court held that the State failed to establish the elements of: (1) dissemination; and (2) that the complainant was identifiable from the image. The State challenged both holdings in the supreme court. The supreme court reviewed the issues *de novo*, finding they raised questions of pure statutory construction.

The supreme court held defendant disseminated the images by texting them to himself. The court had previously held in **People v. Austin**, 2019 IL 123910, that "disseminate," not defined in the statute, is to be given its plain and ordinary meaning. The **Austin** court held that the word therefore meant to "broadcast" or "spread." **Austin** did not limit the definition to sharing with multiple people. Here, defendant entered the complainant's camera roll without her consent and texted her private sexual images to a member of the public whom she did not wish to have them. "That the member of the public was himself does not mean that he did not disseminate the images." If "disseminate" means to "spread," "defendant unquestionably did this when he sent images from the victim's phone to his own." While the defense conceded that defendant's act would have constituted dissemination had he sent the photos to a third party rather than to himself, the court saw no difference between these situations.

But a 5-2 majority of the supreme court agreed with the appellate court that the complainant was not identifiable from the images. The dictionary definition of "identifiable" is "capable of being identified." Here, the photos were closeup images of female genitalia. While the complainant testified she could identify herself, the purpose of the statute is to protect people from being identified by *other* people. Thus, the complainant's ability to identify herself was irrelevant. As the trial court found, the images "could be any female." This finding should have resulted in acquittal of the greater offense.

Two dissenting justices were persuaded by the fact that the complainant's nail polish was a distinctive part of the image, allowing her to identify herself and therefore rendering the images "identifiable." The dissent also pointed out that the texts came with a phone number, which it would have found met the statutory definition of "information displayed in connection with the image." But the majority disagreed, because the presence of images on a phone does not necessarily mean they belonged to the owner.

People v. McKown, 2022 IL 127683 Defendant was charged with various sex offenses based on allegations that he sexually abused his grandson. Also included was a charge of child pornography which was based on his possession of self-made "collages" that combined images

of actual children cut from parenting magazines with images of adult male genitalia from adult magazines. More specifically, defendant cut slits in the mouths of the images of children and inserted the cutout images of male penises into those slits.

720 ILCS 5/11-20.1(a)(6) prohibits, among other things, possession of a "photograph or other similar visual reproduction...of any child...where such child is...actually or by simulation engaged in...sexual conduct involving...the mouth...of the child...and the sex organs of another person." The Court concluded that defendant's collages were covered by the child pornography statute because they involved images of children who were by simulation engaged in such sexual conduct.

The Court also held that defendant's conviction was not a violation of the first amendment where the collages were made with images of actual children. **New York v. Ferber**, 458 U.S. 747 (1982), held that states have great leeway in regulating pornographic depictions of children. But, **Ashcroft v. Free Speech Coalition**, 535 U.S. 234 (2002), clarified that states may not prohibit child pornography that does not depict an actual child. Here, while the materials in question did not reflect a live performance by children engaged in sexual conduct, they did involve real children whose images defendant morphed to depict sexual conduct. While defendant's collages were not as sophisticated as images which have been virtually altered to depict sexual conduct by children which never actually occurred, the Court found that both sorts of materials implicate the interests of real children. Such materials are not protected by the first amendment, and defendant's conviction was affirmed.

Finally, the Court rejected defendant's argument that the statute was unconstitutionally overbroad where it was evident that no child was sexually abused to create the images. Defendant's collages, made with images of real children, were not protected speech.

People v. Austin, 2019 IL 123910 Nonconsensual dissemination of private sexual images statute [720 ILCS 5/11-23.5(b)] was upheld against constitutional challenges. The statute criminalizes the intentional dissemination of an image of another who is at least 18 years old, identifiable from the image or accompanying information, engaged in a sexual act or whose intimate parts are exposed, if the disseminator obtained the image under circumstances in which a reasonable person would know or understand that it was to remain private, and knew or should have known that the person in the image had not consented to its distribution.

The Supreme Court upheld the statute against a first amendment challenge. Sexual images do not fall within an established categorical exception to first amendment protection, and the court declined to recognize a new category of speech – that which invades privacy – as falling outside of first amendment protection. Thus, Section 11-23.5(b) implicates freedom of speech and first amendment scrutiny was warranted.

Intermediate scrutiny applies because the statute is a content-neutral restriction that regulates only private matters. While the statute restricts a specific category of speech (sexual images), it is content neutral because it is concerned not with the content of the image, but with whether the disseminator obtained it under circumstances which would lead a reasonable person to conclude that it was intended to remain private and that the person in the image had not consented to its dissemination. And, because the statute involves private images rather than public speech, first amendment protections are less rigorous.

The statute withstands intermediate scrutiny because it protects individual privacy rights and is designed to prevent significant harm to victims. And, the restriction is narrowly tailored to serve the interest in protecting privacy without burdening substantially more speech than necessary. The statute is targeted at private sexual images, and requires that

the disseminator act intentionally and have reasonable awareness that the image was intended to remain private. For these same reasons, the statute is not facially overbroad.

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

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

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

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

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

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

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

Illinois Appellate Court

People v. Daigle, 2024 IL App (4th) 230015 The evidence was sufficient to prove beyond a reasonable doubt that defendant knowingly disseminated child pornography. Pursuant to 720 ILCS 5/11-20.1(f)(1), "disseminate" is defined as to sell, distribute, exchange, or transfer possession or to make a depiction by computer available for distribution or downloading

through various means. Defendant was found in possession of three videos of child pornography on his computer hard drive, as well as a software program (FrostWire) capable of using a computer network to share files. When questioned by the police, defendant admitted that he knew that videos he downloaded contained child pornography and that he knew FrostWire was a program used for sharing such videos. Accordingly, the State proved both the criminal acts and the necessary mental state.

People v. Moeller, 2024 IL App (2d) 230043 Defendant, a school superintendent, solicited a graphic image from one of his principals, and she obliged. Their relationship ultimately became contentious, and defendant sent the image to the school board. The State charged him with nonconsensual dissemination of private sexual images in violation of 720 ILCS 5/11-23.5. The State alleged that the image fell under the statutory definition of "sexual activity" because it showed "bondage" under section 11-23.5(a)(4). Defendant was found guilty and sentenced to conditional discharge.

Defendant argued on appeal that the State failed to prove that the image showed sexual activity, because it did not depict bondage. The image showed the subject in her underwear with her arms extended outward and her wrists hanging from straps attached to a curtain rod. But defendant established on cross-examination of the complainant that she could remove her hands if she wanted to, and that the photo was merely intended to "depict a bondage scenario." Defendant argued that this simulated or staged depiction necessarily fails to meet the statutory definition of sexual activity.

The appellate court disagreed. In **People v. Austin**, the supreme court used Black's Law Dictionary to define "bondage," including the relevant definition for purposes of section 11-23.5: "[t]he state or practice of being tied up for sexual pleasure." 2019 IL 123910. Notably, section 11-23.5(a) uses the phrase "any bondage." "Any" is not a vague term, it is all-encompassing. After consulting a variety of sources, including "the Urban Dictionary," the appellate court held that the image in this case depicts bondage. The subject's hands are in loops hanging from a curtain rod, and she appears restrained, regardless of the degree of escapability of such restraint. Notably, defendant sent a sexual image of himself in response, calling it a "quid pro quo" and rendering his argument that the complainant's image is not sexual "disingenuous."

Nor is the term "bondage" unconstitutionally vague. As noted, defendant's response text showed that he understood the image to be sexual in nature, thus undermining his assertion that the statute was too vague for him to understand whether this image fell into the category of prohibited images. Additionally, all of the witnesses who testified to viewing the image described it as "sexual" or "bondage."

People v. Melvin, 2023 IL App (4th) 220405 Presence – either actual or virtual – is a necessary element in proving a charge of sexual exploitation of a child pursuant to 720 ILCS 5/11-9.1(a). That is, an individual must do the prohibited acts in the presence of a child in order to be found guilty of sexual exploitation of a child. "Virtual presence" is defined as an "environment that is created with software and presented to the user and or receiver via the Internet, in such a way that the user appears in front of the receiver on the computer monitor or screen or hand-held portable electronic device, usually through a web camming program. 'Virtual presence' includes primarily experiencing through sight or sound, or both, a video image that can be explored interactively at a personal computer or hand-held communication device or both."

Defendant argued that the State's factual basis for his guilty plea to sexual exploitation of a child was deficient in that it failed to establish his "virtual presence."

Specifically, defendant argued that his sending of digital photographs of his exposed penis to a Facebook account which he believed to belong to a 16-year-old girl was insufficient to establish his "virtual presence" as a matter of law. Defendant relied on **People v. White**, 2021 IL App (4th) 200354, where the Court found Snapchat photographs, with no conversation between the sender and the recipient, were insufficient to establish that the sender had exposed herself in the virtual presence of the recipient.

The court distinguished **White** both procedurally and factually. First, **White** involved a trial, while the instant matter involved a guilty plea. Thus, the court here did not have a fully developed record. A factual basis is not a substitute for proof beyond a reasonable doubt, but rather is for the purpose of ensuring a defendant does not plead guilty to a crime he did not commit. Here, the State's factual basis, coupled with defendant's admission to committing the offense, was adequate. As to the facts, the court noted that defendant here sent the explicit images in the context of an ongoing lewd conversation between himself and the recipient, rather than sending photographs only as in **White**. This was sufficient to satisfy the "virtual presence" element, at least on the limited record available in this guilty plea case.

The court also rejected defendant's argument that his convictions for both sexual exploitation and distribution of harmful materials were improper on one-act, one-crime grounds. While both involved the physical act of sending pictures of his exposed penis, sexual exploitation contains the additional act of presence. Further, while defendant made no argument that one offense was a lesser-included of the other, the court engaged in a brief lesser-included-offense analysis and concluded that under the abstract elements approach, the Class A misdemeanor sexual-exploitation offense's inclusion of the virtual-presence element rendered it not a lesser-included offense of Class 4 distribution of harmful materials which contains no presence requirement.

People v. Rubio, 2023 IL App (1st) 211078 Convictions of both possession of child pornography and creation of child pornography do not violate the one-act, one-crime doctrine. Defendant recorded three separate videos of himself pulling down the pants of a five-year-old girl while she was asleep and touching her buttocks. The videos were all recorded within a matter of a few minutes, and defendant stopped recording when he was caught in the act by the child's mother. The possession of child pornography and creation of child pornography counts were both based on the first of the three videos.

The appellate court looked to the factors identified in **People v. Baity**, 125 Ill. App. 3d 50 (1984) to determine whether defendant's conduct consisted of a single act or multiple acts, specifically: (1) whether there was an intervening event, (2) how much time elapsed between successive parts of defendant's conduct, (3) whether the identity of the victim was the same, (4) how similar the defendant's conduct was, (5) whether the location of the conduct remained the same, and (6) the intent of the State, as evidenced by the charging instrument. Here, the victim and location were the same throughout the incident, and defendant's conduct was similar, weighing in favor of finding a single act. The State's intent was inconclusive where the indictment did not distinguish between different acts.

But, while very little time elapsed, there were intervening events where defendant stopped recording the first video and then recorded two additional videos, retaining possession of the first video while he continued to record. While defendant's possession of the first video was attendant to its creation at the moment he stopped recording, his retention of that video while he went on to record two more was sufficient to render his possession of it a separate act from its creation.

Further, possession of child pornography is not a lesser included offense of creation of child pornography under the abstract elements test. Each requires an element that the other

does not. Creation requires the use of visual media to depict the pornography, while possession does not. And, possession, of course, requires possession, but the creation offense does include possession as an element.

At the outset, the State argued that the one-act, one-crime issue was forfeited because defendant raised it at sentencing but did not raise it in a written post-sentencing motion. The appellate court found the issue adequately preserved where defendant orally moved to reduce his sentence, and the State did not object to that procedure.

People v. Devine, 2022 IL App (2d) 210162 Defendant appealed from a conviction of nonconsensual dissemination of sexual images under 720 ILCS 5/11-23.5(b), arguing that the State failed to prove beyond a reasonable doubt that he "disseminated" the sexual images and that the person in the images was "identifiable." The Appellate Court agreed.

Defendant was working at a cell phone store when the complainant came into the store to transfer her cellular service. Defendant asked to see her phone to check some settings, and when defendant returned the phone to the complainant, she could see that a text message had been sent from her phone to a number she did not recognize. Attached to that text message were images that the complainant had taken of her vagina a few days earlier. She subsequently determined that defendant had sent the images to his own cell phone number, and she reported the incident to the police.

Section 11-23.5(b) provides a person commits nonconsensual dissemination of sexual images when he or she (1) intentionally disseminates an image of another person who is at least 18 years of age, is identifiable from the image itself or information displayed in connection with the image, and is engaged in a sexual act or whose intimate parts are exposed; (2) obtains the image under circumstances in which a reasonable person would know or understand that the image was to remain private; and (3) knows or should have known that the person in the image has not consented to the dissemination.

The Appellate Court first determined that to "disseminate" meant to "foster general knowledge of" the images or to make them "more widely known," consistent with the decision in **People v. Austin**, 2019 IL 123910. The court also looked to the Civil Remedies Act definition of "dissemination," which clarifies that it requires either publication of the images or distribution to another person. Defendant did not disseminate the images when he sent them to himself but did not expose the images to anyone else.

The Appellate Court also found that the complainant was not "identifiable" within the meaning of the statute. As the trial court noted, the images could have been any female with red fingernail polish, which was the only distinguishing characteristic noted. While the images were on the complainant's cell phone, and the complainant was wearing red fingernail polish when she handed the phone to defendant, "the images themselves were anonymous." The fact that the images were sent from the complainant's cell phone or that metadata associated with the images could connect them to her phone was insufficient for the same reason; the images themselves did not contain sufficient information to identify the person depicted.

After concluding that the evidence was insufficient to prove defendant guilty beyond a reasonable doubt of nonconsensual dissemination of sexual images, the Appellate Court went on to enter a conviction of disorderly conduct. The Court cited its authority under Illinois Supreme Court Rule 615(b)(3) to "reduce the degree of the offense of which the appellant was convicted." While disorderly conduct was not charged, the court concluded that the indictment gave defendant sufficient notice of that offense. Disorderly conduct is committed when a person knowingly does any act in such an unreasonable manner as to alarm or disturb another and to provoke a breach of the peace. The evidence here was

sufficient to establish disorderly conduct beyond a reasonable doubt. Indeed, the parties conceded as much during oral argument.

People v. Torres, 2021 IL App (2d) 200420 Defendant was proved guilty beyond a reasonable doubt of solicitation of a sexual act. Defendant responded via text to an online ad offering "companionship." While defendant did not specifically state in his text messages that he wanted "sex," it could be inferred from defendant's request to "feed" the undercover officer's "kitty" twice for $100. Further, defendant repeatedly asked if he was texting with a police officer, which served as an indication that he was planning to commit an illegal act. The "legal disclaimer" in the online ad – which provided that fees were for companionship only and that any actions would be a matter of mutual consent – did not control. The ad was placed in the escort category of the website, contained sexually suggestive pictures, requested cash payment, and stated that the advertiser was a "cute, fun girl" who would "make all your dreams come true." On these facts, the Appellate Court found the evidence overwhelming.

People v. McKown, 2021 IL App (4th) 190660 Defendant's conviction of child pornography was affirmed where it was based on his possession of self-made "collages" that combined images of actual children cut from parenting magazines with images of adult male genitalia from adult magazines. More specifically, defendant cut slits in the mouths of the images of children and inserted the cutout images of male penises into those slits.

720 ILCS 5/11-20.1(a)(6) prohibits possession of "any film, videotape, photograph or other similar visual reproduction...of any child...engaged in..." sexual activity as expressly detailed in the statute. The Appellate Court concluded that defendant's collages were covered by the child pornography statute because they involved images of real children that were altered to make it appear as though the children were engaged in sexual activity. Defendant's conviction was not a violation of the first amendment where the collages were made with images of actual children.

People v. Barker, 2021 IL App (1st) 192588 The grooming statute, 720 ILCS 5/11-25, does not violate free speech rights under the First Amendment. There are categories of speech which are "of such slight social value" that they are unprotected. The grooming statute involves two of those categories, specifically incitement and speech integral to criminal conduct. The grooming statute criminalizes speech intended to solicit a child to engage in unlawful sexual conduct, thus it is rationally related to the government interest in preventing the sexual abuse of children and is facially constitutional.

The grooming statute was not unconstitutional as applied here, either. Defendant, a school employee, knowingly exchanged sexually explicit text messages with a minor student and in those messages expressed a desire to engage in sexual intercourse with the minor. This was not innocent behavior and is precisely the type of conduct the grooming statute was meant to criminalize.

People v. Hubbell, 2021 IL App (2d) 190442 Defendant's conviction of grooming was upheld where evidence showed that defendant sent a Snapchat photo of his bare buttocks to a 16-year-old girl with the message, "now it's your turn, LOL." Defendant also sent the girl a message that he wanted to "get with" her and asked her to keep his messages secret. When confronted by the police, defendant admitted that he knew his actions were wrong.

As relevant here, the grooming statute provides that the offense is committed by using an on-line service "to...attempt to seduce, solicit, lure, or entice, a child,...to distribute photographs depicting the sex organs of the child, or to otherwise engage in any unlawful

sexual conduct with a child." Defendant argued that buttocks are not sex organs and accordingly he could not be deemed to have attempted to entice the minor to send him a photograph of her sex organs by sending a message with a picture of his bare buttocks. The court declined to construe the statute so narrowly. Instead, the court held that given the totality of the evidence a rational trier of fact could find that defendant's conduct here was an attempt to have the minor send him a photograph of her sex organs even if it was not a direct solicitation for such a photograph.

People v. Rollins, 2021 IL App (2d) 181040 Statute criminalizing child photography by a sex offender, 720 ILCS 5/11-24, does not violate the first amendment. As charged here, the statute provides that it is unlawful for a child sex offender to photograph a child without the consent of the child's parent.

The court first found that the statute is content-neutral, resulting in the application of intermediate scrutiny. While the statute makes reference to the photographic content – children – it is limited to those photographs taken by sex offenders without parental consent. Thus, it is a restriction on the manner of photographing the child; it is not a ban on all pictures of children.

Applying intermediate scrutiny, the court first found that the government has a substantial interest in protecting children from sex offenders. The statute is substantially related to that interest where it is limited to photographs in which a child is the focus of the image, not every photograph that might incidentally include a child in the background. Further, it applies only to child sex offenders and provides an exception for parental consent. And, the court noted, the statute does not even require that the child sex offender disclose his or her status in obtaining such consent. Accordingly, the statute is not facially overbroad.

People v. Johnson, 2021 IL App (5th) 190515 Under the statute defining the offense of distributing harmful material to a minor [720 ILCS 5/11-21], subsection (g) is a separate offense from that defined in subsection (b)(1)(A) and not merely a sentencing enhancement. Here, defendant was charged with violating (b)(1)(A) which provides that it is unlawful for an individual to distribute harmful material to a minor knowing that the minor was under 18 or failing to exercise reasonable care in ascertaining the person's age. That offense is a Class A misdemeanor under subsection (e), or a Class 4 felony if it is a second offense. Subsection (g) provides that it is unlawful for a person over the age of 18 to knowingly distribute harmful material to a person believed to be a minor, with no requirement that the recipient actually be a minor. Subsection (g) is a Class A misdemeanor, enhanced to a Class 4 felony if the defendant used a computer web camera or cell phone to "manufacture" the harmful material.

Defendant was proved guilty beyond a reasonable doubt under Section (b)(1)(A) where the evidence established that he was over the age of 18 when he texted a photograph of his nude, erect penis to an individual he knew to be 16 years old. The Appellate Court reduced the class of the offense from a Class 4 felony to a Class A misdemeanor, however, because the trial court had incorrectly construed section (g) as a sentence enhancement and had erroneously elevated the class of the conviction based on defendant's use of a cell phone. The matter was remanded for resentencing.

People v. Barger, 2020 IL App (3d) 160316 For purposes of the child pornography statute, whether an image involves a lewd exhibition of a child's genitals is evaluated by considering whether: (1) the child's genitals are the focal point of the image; (2) the image is sexually suggestive; (3) the child is depicted in an unnatural pose or attire inappropriate for

the child's age; (4) the child is nude or partially clothed; (5) the image suggests sexual coyness or a willingness to engage in sexual activity; and (6) the image is intended to elicit a sexual response. Not all factors need be present, and no single factor is determinative. Images are assessed on a case-by-case basis, taking into account the age of the minor and overall content.

Here, the majority found that the photograph in question did not constitute child pornography. The photograph depicted a naked girl, eight-to-ten years old, on a beach during the daytime. The photograph showed the front of the child, from the knees up, seated on a ball swing with her legs spread slightly apart, showing her vaginal area, and she appeared to be squinting or smiling. The majority noted that while the child was naked, her genitals were not the focus of the photograph. The daytime beach setting was not sexually suggestive and the child's pose was not unnatural and did not suggest sexual willingness. The majority concluded that although the photograph was taken from a lower angle, it was not voyeuristic or taken in such a way as to intend to elicit a sexual response. Accordingly, the majority reversed defendant's conviction for possession of child pornography.

The dissenting justice would have concluded that "the depiction of a nude prepubescent female straddling a tether ball on a beach" was a lewd exhibition of a child and would have upheld defendant's conviction.

People v. Baldwin, 2020 IL App (1st) 160496 To prove an individual has a demonstrated propensity toward acts of sexual assault or molestation – an element of establishing that the individual is a sexually dangerous person – the State must prove at least one act or attempt of sexual assault or molestation. Here, the State admitted a certified copy of defendant's prior conviction of aggravated criminal sexual assault to meet that element. Defendant objected on the basis that the prior conviction was on appeal at the time of the SDP proceedings, and the trial court overruled the objection. Subsequently, while the SDP appeal was pending, the prior conviction was reversed and remanded for a new trial. Accordingly, the SDP finding was vacated and the matter was remanded for a new trial on the State's SDP petition. In reaching this conclusion, the Appellate Court cautioned that the more prudent course in the original trial court proceedings would have been to either sustain the objection to using the conviction that was on appeal or to stay the SDP proceedings until that appeal had been resolved.

People v. Pepitone, 2020 IL App (3d) 140627-B Section 11-9.4-1(b), which prohibits child sex offenders from being present in a public park, does not violate the *ex post facto* clause. While the statute was enacted after defendant committed the offense which resulted in his classification as a child sex offender, his conviction of a violation 11-9.4-1(b) was premised on conduct committed after the statute was enacted. Accordingly, there was no *ex post facto* violation.

People v. Assmar, 2020 IL App (2d) 180253 Public indecency is a Class 4 felony when committed "by a person 18 years of age or older who is on or within 500 feet of elementary or secondary school grounds when children are present on the grounds." 720 ILCS 5/11-30(c). The Appellate Court rejected defendant's argument that "school grounds" include only the outdoor property of school. Evidence that the children were inside the school building at the time of the offense satisfied that element of section 11-30(c).

People v. Conroy, 2019 IL App (2d) 180693 Section 11-14(a), which criminalizes prostitution, is not unconstitutional. The commercial sale of sex does not carry the same privacy interests as private sexual activity between two consenting adults.

People v. Ziemba, 2018 IL App (2d) 170048 Adhering to its recent opinion in **People v. Gaciarz**, 2017 IL App (2d) 161102, the Appellate Court held that a conviction for involuntary sexual servitude of a minor under 720 ILCS 5/10-9(c)(2) does not require that an actual minor be involved. Defendant's conviction of involuntary sexual servitude of a minor, under facts similar to those in **Gaciarz**, was affirmed.

Additionally, defendant's testimony that he intended to engage in sexual activity with an adult, rather than a minor, was belied by the text messages he exchanged with an undercover officer leading to the encounter. On that basis, defendant's solicitation conviction was affirmed.

Finally, the Appellate Court held that a transcript of the text messages was properly admitted. Text messages are documentary evidence, and proper foundation requires only that they be identified and authenticated. The Appellate Court rejected the assertion that text messages are computer-generated records because text messages necessarily require human input; they are not automatically generated records of the internal operations of a computer itself.

Here, the undercover officer testified that the transcript was an accurate record of the entire exchange of messages between himself and defendant. The same set of text messages was found on defendant's phone after he was arrested. And, defendant's actions of going to a specific hotel room and tendering a prearranged amount of money were consistent with his having received the instructions provided in the text exchange. The Appellate Court concluded that a proper foundation was laid for admission of the text messages.

People v. Gaciarz, 2017 IL App (2d) 161102 Defendant responded via text message to an online prostitution advertisement he found on backpage.com. Unbeknownst to defendant, the ad had been placed by an undercover police officer. In the text exchange, the officer posed as the "mother" of two "daughters" available for sex for money. Defendant asked for a picture, and received the response, "I don't send pics, too risky cause of mygirls age." Defendant said he was interested in one hour, and the "mother" asked, "which girl u want, i got a 14 yo blnd and 15 yo brunette." Defendant responded, "brunette" and that he wanted "kisses and bj." The "mother" told defendant he would have to wear a condom and directed him to a specific hotel and room.

Defendant argued that he was not proved guilty beyond a reasonable doubt of involuntary sexual servitude of a minor, traveling to meet a minor, and grooming because the undercover sting operation did not involve an actual minor, person pretending to be a minor, or even a photograph of a minor. While evidence that defendant conversed with a person posing as a minor is relevant, the lack of existence of a purported minor does not preclude the State from proving an essential element of the charged offenses. The sufficiency of the evidence turns on whether defendant intended to commit a specific offense and whether he did anything that constituted a substantial step toward that offense. Here, defendant's text messages were compelling evidence of his culpable mental state, and his arrival at the meeting place with money and condoms constituted a substantial step.

People v. Rexroad, 2013 IL App (4th) 110981 A person of the age of 17 and upwards commits the offense of indecent solicitation of a child if the person, with the intent that the offense of aggravated criminal sexual assault, criminal sexual assault, predatory criminal sexual assault of a child, or aggravated criminal sexual abuse be committed, knowingly solicits a child or one whom he believes to be a child to perform an act of sexual penetration or sexual conduct as defined in §12-12 of the Criminal Code. 720 ILCS 5/11-6(a). Defendant

was charged with indecent solicitation of a child when he sent suggestive text messages to a police officer who was pretending to be a teenaged girl.

The instructions provided to defendant's jury defining the elements of indecent solicitation of a child were defective. They failed to require the jury to find that defendant knew or believed the child was under 17 years of age, and that defendant possessed the intent to commit aggravated criminal sexual abuse. The court noted that these pattern instructions (Nos 9.01, 9.01A and 9.02) have since been modified to correctly state the law.

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

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

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

People v. Giraud, 2011 IL App (1st) 091261 Defendant was convicted of aggravated criminal sexual assault under 720 ILCS 5/12-14(a)(3), which creates an aggravating factor where the defendant acts "in such a manner as to threaten or endanger the life of the victim or any other person." Under Illinois law, a criminal sexual assault is elevated to aggravated criminal sexual assault only if the aggravating circumstance occurs "during . . . the commission of the" criminal sexual assault. Thus, the aggravating factor must occur contemporaneously with the criminal sexual assault.

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

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

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

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

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

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

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

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

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

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

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

§45-5
Sexually Dangerous Persons Act

United States Supreme Court

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

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

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

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

Illinois Supreme Court

People v. Kastman, 2022 IL 127681 In 1994, defendant was committed to the guardianship and custody of IDOC as a sexually dangerous person. In 2016, he was conditionally released with the Director of IDOC remaining as his guardian. Conditions of his release included drug and alcohol testing, GPS monitoring, that he actively seek employment, and that he "become self-supporting" and pay all monthly living expenses.

In 2020, defendant filed a motion seeking financial assistance from the Director because he had become disabled and unable to work. The Director objected on the basis that the conditional release order provided that defendant pay his own living expenses. The Director also argued that he had no obligation to pay for defendant's housing and treatment since defendant was no longer in custody. The circuit court granted defendant's motion for financial assistance on the basis that the Department was required to provide for defendant's "care and treatment" during conditional release, not just when he was in custody.

The Supreme Court affirmed. The Court looked to the plain language of the Sexually Dangerous Persons Act, 725 ILCS 205/0.01, *et seq.*, in reaching its decision. While the Act does not expressly mandate the Director to contribute financially to the care and treatment of sexually dangerous persons on conditional release, it does afford the circuit court the authority and discretion to order that the Director provide such assistance. Under 725 ILCS 205/8, the Director is required to "keep safely" and "provide care and treatment" for individuals committed to his guardianship as sexually dangerous persons. Those duties continue until such time as the individual is discharged from sexually dangerous person status; they are not dependent on whether the individual is housed in the custody of an institutional facility or on conditional release.

People v. Grant, 2016 IL 119162 The Supreme Court held that where a person committed to DOC as a sexually dangerous person files a recovery petition, the State does not have the right to hire an independent expert. Noting that the Sexually Dangerous Persons Act requires that DOC employees prepare a report to be submitted to the trial court, the court

concluded that the legislature did not contemplate that the State would hire an additional expert.

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

People v. Masterson, 2011 IL 110072 The Equal Protection Clause requires that the government treat similarly situated individuals in a similar fashion, unless it can demonstrate an appropriate reason to treat them differently. The level of scrutiny applied to an equal protection challenge is determined by the nature of the right affected. As a threshold matter, equal protection analysis applies only where the individual raising the challenge can demonstrate that he is similarly situated to another group.

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

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

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

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

People v. Burns, 209 Ill.2d 551, 809 N.E.2d 107 (2004) A respondent who files an application for recovery under the Sexually Dangerous Persons Act is not entitled to an independent psychiatric examination, unless he can show that the experts employed by the State will not give an honest and unprejudiced opinion.

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

People v. Lawton, 212 Ill.2d 285, 818 N.E.2d 326 (2004) A §2-1401 petition may be utilized to raise a claim of ineffective assistance of counsel in Sexually Dangerous Persons

proceedings, at least where that claim could not have been raised on direct appeal because the same attorney represented the respondent both in the trial court and on appeal. Although §2-1401 does not specifically authorize such actions, fundamental fairness requires that persons who are deprived of their liberty through the Sexually Dangerous Persons Act, and who were represented by the same attorney in the trial and reviewing courts, be afforded a process by which to bring charges of ineffective assistance of counsel. However, the court concluded that defense counsel was not ineffective.

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

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

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

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

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

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

People v. Allen, 107 Ill.2d 91, 481 N.E.2d 690 (1985) (aff'd **Allen v. Illinois**, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986)) Proceedings under the Sexually Dangerous Persons Act are not "criminal" within the meaning of the self-incrimination clause. Thus, statements defendant made at a court-ordered psychiatric examination were admissible at Sexually Dangerous Person proceedings though no **Miranda** warnings had been given.

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

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

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

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

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

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

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

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

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

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

Illinois Appellate Court

People v. Brown, 2024 IL App (3d) 230675 Defendant argued that the court erred in finding him a sexually dangerous person. To establish that defendant is an SDP, the State must prove beyond a reasonable doubt that defendant: (1) suffered from a mental disorder for at least one year prior to the filing of the petition; (2) had a criminal propensity to commit sexual offenses; and (3) had demonstrated propensities toward sexual assault or acts of molestation of children. 725 ILCS 205/1.01 (West 2022).

Defendant contested the third element. To satisfy this element, the State introduced evidence that defendant hugged and grabbed the buttocks of two girls aged 15 and 16, and

asked them to look at his pants while he had an erection. Defendant argued that this was neither sexual assault nor molestation of a child. He argued that under the Criminal Code, a child is someone under the age of 13. The appellate court agreed defendant did not commit sexual assault, but it held that he did demonstrate propensities toward molestation of children. Sexual molestation is the touching of any body part of someone for the purpose of sexual gratification or arousal. For purposes of this statute, precedent establishes that a child is any person under the age of 18. Therefore, the State provided sufficient evidence for the court to find defendant was an SDP.

People v. Coop, 2023 IL App (3d) 210579 Indigent respondents under the Sexually Dangerous Persons Act are entitled to be represented by state-funded counsel at all proceedings under the Act. At issue here was whether the cost of respondent's representation at his conditional release proceedings should be paid by the county or the Illinois Department of Corrections, respondent's guardian under the Act.

Under Section 5 of the Act, as amended in 2013, the cost of representation is to be paid by the county in which the proceeding is brought. 725 ILCS 205/5. And, under **People v. Kastman**, 2022 IL 127681, IDOC, as guardian, is responsible for a respondent's expenses while on conditional discharge. The circuit court, relying on **Kastman**, ordered that IDOC pay respondent's attorney's fees.

The appellate court reversed. Section 5 is unambiguous in requiring that the cost of representation in any proceedings under the Act be paid by the county, and **Kastman** does not apply to this particular expense. The court reversed the order directing IDOC to pay counsel's fees and remanded for further proceedings.

People v. Abel, 2022 IL App (5th) 210155 Respondent, who had been committed under the Sexually Dangerous Persons Act, was not denied due process when the court denied his motion to appoint an independent evaluator to assess his recovery. The Illinois Supreme Court has repeatedly held that absent a showing that the State's evaluator is biased or prejudiced, due process does not entitle a respondent to an independent evaluator for recovery proceedings under the Act. See, *e.g.*, **People v. Burns**, 209 Ill. 2d 551 (2004); **People v. Grant**, 2016 IL 119162. The fact that the evaluator is employed by the State, alone, is not enough to demonstrate bias or prejudice.

Further, an amendment to the statute did not undermine the due process analysis from prior case law. The previous version of the statute [725 ILCS 205/9] provided that the recovery evaluation be completed by "a social worker and psychologist under the supervision of a licensed psychiatrist assigned to the institution" where the respondent is confined, and the current version provides that the evaluation be completed by "an evaluator licensed under the Sex Offender Evaluation and Treatment Provider Act." This change provided an additional safeguard by requiring the evaluation be conducted by a licensed and qualified evaluator. Due process protections were not decreased by involving fewer individuals in the evaluation process or by eliminating the requirement that the evaluator be assigned to the facility where respondent is housed. And, a respondent retains the ability to seek appointment of an independent evaluator if he can establish that the State's evaluator is biased or prejudiced.

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

of the criminal prosecution, and that a stay of the criminal proceeding is necessary to give effect to that intent.

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

People v. Burk, 289 Ill.App.3d 270, 682 N.E.2d 352 (3d Dist. 1997) Reversible error occurs where an application for recovery is heard in a bench proceeding despite the petitioner's request for a jury trial. Although proceedings under the Sexually Dangerous Persons Act are civil in nature, the Act specifically affords the right to demand a jury trial. (See 725 ILCS 205/5.) Once a jury is requested, that request must be honored unless the right to a jury is knowingly waived.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Potts v. People, 80 Ill.App.2d 195, 224 N.E.2d 281 (5th Dist. 1967) Finding of sexually dangerous reversed where no witness testified and only the joint report of the doctors and the indictment were admitted. There was no showing that the doctors met the requirements of the Act.

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

§45-6
Sexually Violent Persons Act

Illinois Supreme Court

People v. Hughes, 2012 IL 112817 In order to render effective assistance of counsel, defense counsel must inform a defendant who pleads guilty to a sexually violent offense that he will be evaluated for possible commitment under the Sexually Violent Person's Commitment Act.

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

People v. Masterson, 2011 IL 110072 The Equal Protection Clause requires that the government treat similarly situated individuals in a similar fashion, unless it can demonstrate an appropriate reason to treat them differently. The level of scrutiny applied to an equal protection challenge is determined by the nature of the right affected. As a threshold matter, equal protection analysis applies only where the individual raising the challenge can demonstrate that he is similarly situated to another group.

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

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

The court concluded that individuals subject to commitment as sexually violent persons are a distinct and more dangerous group because they have been convicted, or tried and declared insane, of the most serious and violent types of sex offenses. Although both Acts

have the goal of protecting the public from mentally disordered individuals who pose a risk of sex crime recidivism, and both may subject individuals to indefinite commitment, the Acts address separate groups of individuals. Thus, persons charged under each act are not similarly situated for equal protection purposes.

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

In re Detention of Hardin, 238 Ill.2d 33, 932 N.E.2d 1016 (2010) The quantum of evidence necessary to support a petition for commitment of a sexually violent person at a probable cause hearing is less than that necessary to convict. The State need only establish a plausible account on each of the required elements of the petition to assure the court that there is a substantial basis for the petition. While the court should not ignore blatant credibility problems, it should not choose between conflicting facts or inferences.

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

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

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

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

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

that the respondent suffers from a "mental disorder," and "mental disorder" is defined to include a "volitional capacity that predisposes a person to engage in acts of sexual violence," a jury finding that an individual is a "sexually violent person" represents an adequate finding of lack of control to satisfy due process.

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

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

Illinois Appellate Court

People v. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 (1st Dist. 2010) A prisoner confined in an Illinois Department of Corrections facility can be assessed court costs and fees for the filing of a frivolous post-conviction petition. 735 ILCS 5/22-105. A defendant confined to a Department of Human Services facility as a sexually violent person may not be assessed those costs and fees because he is not confined in the IDOC.

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

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

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

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

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

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

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

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

A defendant who is about to be released from prison on a sentence for child abduction is not eligible for commitment under the Sexually Violent Persons Commitment Act, because child abduction is not a "sexually violent offense" under the Act. The legislature intended to limit use of the commitment statute to persons who were about to complete prison terms for certain, particularly "egregious" criminal offenses. Thus, §5(e)(3) applies only to persons convicted of and sentenced for the solicitation, conspiracy, or attempt to commit one of the crimes specifically listed in §5(e)(1) and (2).

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

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

§45-7
Sex Offender Registration Act

§45-7(a)
Generally

United States Supreme Court

Packingham v. North Carolina, 582 U. S. ___, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017)

The North Carolina legislature enacted legislation creating a felony where a registered sex offender accesses a commercial social networking website which is known by the offender to permit minor children to become members or to create or maintain personal web pages. The U.S. Supreme Court found a First Amendment violation because the statute was not drawn narrowly enough to avoid burdening substantially more speech than necessary to further the government's legitimate interests.

A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and after reflection speak and listen again. In the modern world, cyberspace and social media constitute an important place for communication and the exchange of views. Because this is the first case to address the relationship between the First Amendment and the modern Internet, the court "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium."

Inventions "heralded as advances in human progress" can be exploited by the criminal mind. However, the mere fact that an invention might be exploited for criminal purposes does not insulate it from First Amendment protection.

A statute which is content-neutral is subject to intermediate scrutiny. To survive such scrutiny, the law must be narrowly tailored to serve a significant governmental interest. In other words, the law may not substantially burden more speech than is necessary to further the government's legitimate interest.

The North Carolina statute failed this test. First, the statute enacts a "prohibition unprecedented in the scope of First Amendment speech it burdens." By prohibiting sex offenders from using websites to which children might also have access, the statute bars the use of what may be principal sources for current events, checking ads for employment, speaking and listening on public issues, and "exploring the vast realms of human thought and knowledge." To completely foreclose access to social media prevents engagement in the legitimate exercise of First Amendment rights. The court also noted that even convicted criminals might receive legitimate benefits from social media, particularly if they seek to reform and pursue lawful and rewarding lives.

The court made two assumptions in resolving the case. First, the court presumed that because of the broad wording of the North Carolina statute, it might bar access not only to commonplace social media such as Facebook and Twitter, but also to websites such as Amazon.com, Washingtonpost.com, and Webmd.com.

Second, the court stated that its opinion should not be interpreted as barring a state from enacting more specific laws protecting children from convicted sex offenders. Thus, it can be assumed that the First Amendment permits the enactment of specific, narrowly tailored laws prohibiting a sex offender from engaging in conduct such as contacting a minor or using a website to gather information about a minor.

In a concurring opinion, Justices Alito, Roberts, and Thomas agreed that the law was too broad to satisfy the First Amendment. However, the concurring Justices declined to join

in the majority's *dicta* equating the Internet with public street and parks.

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

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

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

Illinois Supreme Court

Kopf v. Kelly, 2024 IL 127464 The instant case arose out of a civil suit filed by an individual who had been convicted of aggravated criminal sexual abuse involving a 15-year-old victim in 2013 and who was subject to various restrictions as a result of that conviction, including that he not live within 500 feet of a day care home ("residency restriction"). The circuit court granted injunctive relief, prohibiting authorities from refusing to register the plaintiff at his address or taking any steps to prosecute him or force him to vacate his residence based on the residency restriction. The court's decision was based on its conclusion that the definition of "day care home" was not rationally related to the State's interest in protecting children from sex offenders because its application led to absurd results, particularly in that it would allow the plaintiff to reside near a single-family home with several children living there or near a home where only one child received day care services, but was violated by residing within 500 feet of a home where three or more children from at least two different households received day care services. The court found that the residency restriction was facially unconstitutional in violation of substantive due process and equal protection guarantees. Defendants – the Director of the Illinois State Police, the Attorney General, and the Kane County State's Attorney – appealed.

Substantive due process bars governmental action that infringes upon a protected interest when such action is itself arbitrary. To determine whether a statute violates due process, a court must first determine the nature of the right purportedly infringed upon in order to determine the level of scrutiny to apply in reviewing the statute.

The residency restriction at issue here affects child sex offenders' freedom to live in a particular location in relation to a day care home. The right to live where one pleases is not a fundamental right, and thus rational basis review was appropriate. Under that standard, the court found that the statute did not violate due process. The legislature has a legitimate interest in protecting children from neighboring sex offenders, and the residency restriction bears a reasonable relationship to furthering that interest by reducing the amount of incidental contact a sex offender may have with nearby children. A statutory scheme need not cover every possible evil to satisfy rational basis review. Thus, the residency restriction does not violate substantive due process.

The equal protection clause guarantees that similarly situated individuals be treated in a similar manner unless the government can demonstrate a legitimate reason to treat

them differently. The legislature is not forbidden from drawing distinctions between different categories of people, but it may not do so based on criterial wholly unrelated to the legislation's purpose. As with substantive due process, the equal protection analysis is governed by the nature of the right affected. And, here, the residency restriction did not violate equal protection where it satisfied the rational basis test. And, while some sex offenders are allowed to remain in their homes if they were purchased prior to the effective date of the residency restriction, sex offenders who purchase a house after the statute's effective date are not similarly situated to those prior purchasers because the prior purchasers acted in reliance on then-existing law. Thus, plaintiff's equal protection clause failed, as well.

The court went on to consider and rejected the plaintiff's cross-appeal claims under substantive due process, procedural due process, and *ex post facto* principles. With regard to substantive due process, additional restrictions on sex offenders' presence in certain locations, and the registration and notification laws, satisfy rational basis review where they provide additional methods of protecting children and aid law enforcement in monitoring the movements of sex offenders. As to procedural due process, the court concluded that the sex offender restrictions need not include an individualized risk assessment to be constitutional. Application of the restrictions is predicated entirely on the individual's triggering conviction, and they are rationally related to protecting the public. Finally, the restrictions do not violate *ex post facto* principles where they do not impose retroactive punishment on convicted sex offenders but rather constitute a regulatory scheme designed to further public safety.

People v. Bingham, 2018 IL 122008 The reviewing courts cannot reach an attack on SORA on direct appeal from a criminal conviction, when the trial court did not impose SORA and the underlying conviction was not directly related to the obligation or the failure to register. Here, while appealing a theft offense that retroactively triggered registration as a sex offender due to a prior sex offense, defendant raised an as-applied constitutional attack on the registration requirements. The registration requirement was not imposed by the trial court, but rather by statute. Accordingly, it was not a part of the judgment below and the reviewing court was not authorized to review it under Rule 615(b). Defendants must bring their claims either on direct appeal after conviction for violating the regulation, or by filing a civil suit seeking a declaration of unconstitutionality and relief from the classification as well as the burdens of sex offender registration.

People v. Minnis, 2016 IL 119563 The First Amendment right to freedom of speech includes the right to remain anonymous while publishing and distributing written material. This right fully extends to Internet communications. Laws unrelated to the content of speech are subject to an intermediate level of scrutiny. To survive intermediate scrutiny the regulation must serve a substantial governmental interest unrelated to the suppression of speech and must be narrowly tailored so it does not burden more speech than necessary to further that interest.

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

The court subjected the statute to intermediate scrutiny since it does not regulate the content of speech and found that it did not violate the First Amendment. The internet disclosure provision serves the substantial government interest of protecting the public from

recidivist sex offenders. And the statute is narrowly tailored since a more narrowly drawn statute would not as effectively promote this governmental interest.

People v. Cardona, 2013 IL 114076 Procedural due process governs the constitutionality of procedures utilized to deny life, liberty, or property, and is generally satisfied where the citizen receives notice and an opportunity to be heard. Procedural due process is a fluid concept, however, and more or less procedural due process may be necessary depending upon the circumstances and the type of proceeding.

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

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

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

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

In re S.B., 2012 IL 112204 Noting that it has authority to read into statutes language which the legislature omitted by oversight, the court elected to allow unfit juveniles who are found "not not guilty" in a discharge hearing to seek termination of the sex offender registration requirement under the same conditions as minors adjudicated delinquent for sex offenses. The court also found that the legislature made a similar oversight with respect to the limitations that are contained in the Sex Offender Community Notification Law (730 ILCS 152/121) related to the dissemination of sex offender registration information with respect to adjudicated delinquents. It held that §121 of that Act should be read to include juveniles found "not not guilty" following a discharge hearing.

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

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

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

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

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

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

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

People v. Cornelius, 213 Ill.2d 178, 821 N.E.2d 288 (2004) In **People v. Malchow**, 193 Ill.2d 413, 739 N.E.2d 433 (2000), the Illinois Supreme Court held that the Sex Offender Registration Act and the Sex Offender and Child Murderer Community Notification Law do not violate either the Federal or State Constitutions. The holding of **Malchow** was not

affected by the subsequent amendment of the Acts to require the Illinois State Police to maintain a web site with information about and photographs of sex offenders.

The Internet provision does not violate defendant's right to privacy under the Illinois Constitution, because a person who has been adjudicated a sex offender has no privacy interest in the records concerning his status. Sex offender registration information is a matter of public record, and the Internet provision merely affords citizens an additional means of gaining access to such information.

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

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

Illinois Appellate Court

People v. Carter, 2024 IL App (2d) 230234 Defendant was convicted of both home invasion predicated on criminal sexual assault, as well as the underlying criminal sexual assault. On appeal, the court vacated the underlying criminal sexual assault conviction, and defendant argued that the court should likewise vacate the order that he register as a sex offender. Under 730 ILCS 150/2(A)(1)(a), a "sex offender" is a person who has been convicted of a sex offense. And, under Section 2(B)(1), criminal sexual assault is defined as a sex offense, but home invasion is not. Nevertheless, the court noted that it was impossible for defendant to have committed home invasion predicated on criminal sexual assault without having committed the underlying sexual assault. Accordingly, he is a sex offender subject to registration under the Act.

People v. Vesey, 2020 IL App (3d) 180075 Under **People v. Bingham**, 2018 IL 122008, Appellate Court lacked jurisdiction to consider defendant's as-applied challenge to SORA on direct appeal from his conviction and sentence for aggravated criminal sexual abuse. The fact that the probation order contained language specifically requiring defendant to register as a sex offender was surplus; registration is required by statute regardless of whether the court specifically orders it. The language in the probation order simply put defendant on notice of the registration requirement but did not create an order that defendant could use to challenge SORA's constitutionality.

People v. Kochevar, 2020 IL App (3d) 140660-B The Appellate Court lacked jurisdiction to consider defendant's as-applied challenge to SORA on direct appeal because it was not part of the judgment below, as established by **People v. Bingham**, 2018 IL 122008.

The dissenting justice would have found **Bingham** distinguishable, would have reached the merits of defendant's SORA challenge, and would have found that Illinois' statutory sex offender scheme constitutes punishment and is unconstitutional as applied to defendant, in violation of both the Eighth Amendment and Illinois' proportionate penalties clause.

People v. Tetter, 2019 IL App (3d) 150243-B The defendant's as-applied attack on SORA could not be reviewed on direct appeal, as it was not part of the judgment below, as established by **People v. Bingham**, 2018 IL 122008.

People v. Wells, 2019 IL App (1st) 163247 The Appellate Court lacked jurisdiction to consider defendant's constitutional challenge to the Sex Offender Registration Act. Although defendant's registration requirement was a consequence of his conviction in the instant case, distinguishing his situation from that in **People v. Bingham**, 2018 IL 122008, it was still a collateral consequence that was not part of the trial court's judgment. Defendant must either obtain reversal of his conviction or pursue a civil suit to be relieved of his registration obligations.

People v. Lee, 2018 IL App (1st) 152522 The Appellate Court has jurisdiction to review a due process challenge to SORA on appeal from a conviction for violating SORA. Defendant has standing to challenge the entirety of SORA despite only violating one provision, the registration requirement.

Addressing defendant's facial due process challenge to SORA, the Appellate Court first found that SORA does not affect a fundamental right, and therefore rational basis review applies. Because SORA serves a legitimate state purpose rationally related to its goals, SORA does not violate substantive due process. Nor does it violate procedural due process, because defendants have a procedurally safeguarded opportunity to contest the underlying conviction giving rise to SORA.

People v. Kindelspire, 2018 IL App (3d) 150803 Defendant was charged with two counts of failure to comply with his duty to report as a sex offender under Section 6 [730 ILCS 150/6] of the Sex Offender Registration Act (SORA). One count alleged that he failed to notify the Morris police within three days of leaving his established residence there ("the Morris charge"), and the other that he failed to notify the Mazon police within three days of establishing residence there ("the Mazon charge"). At trial, there was conflicting evidence of whether he had relocated to Mazon during the time period in question. The court found reasonable doubt on the Mazon charge, but convicted on the Morris charge.

Section 6 can be violated in two ways: (1) by failing to report within three days of "ceasing to have a fixed residence," and (2) by failing to register a change of address. The Appellate Court held that both charges here were based on the failure to register a change of address and, because the State did not prove defendant had established residence in Mazon, the Morris charge had to be reversed outright.

The State argued on appeal that the Morris charge could be upheld because it had proved defendant ceased having a fixed residence during the time alleged. The Appellate Court concluded this was an improper change in theory on appeal where all of the evidence and argument below focused on the theory that defendant had moved from Morris to Mazon,

not that defendant lacked a fixed residence. The Court said the State's change in theory was "disingenuous" and raise[d] due process concerns."

People v. Cetwinski, 2018 IL App (3d) 160174 In its current state, the Sex Offender Registration Act constitutes punishment. Here, however, that punishment was not constitutionally disproportionate to the nature of the offense or defendant's potential for rehabilitation. Defendant was a 41-year-old high school coach, convicted of a single sex act with a 15-year-old student. Defendant used his position as a coach to develop a relationship with the student. While defendant had no criminal history and his sex offender evaluation indicated a low risk to reoffend, his offense (criminal sexual assault) was a Class 1 felony, and the sex offender report cautioned that the results were of questionable validity because defendant's answers suggested he was being misleading and painting himself in an unrealistically positive light.

People v. Jones, 2018 IL App (1st) 151307 The Appellate Court also found the Illinois Sex Offender Registration Act and the Illinois Sex Offender Community Notification Law (SORNA) were not unconstitutional as applied to defendant under the Eighth Amendment or the proportionate penalties clause. Following Supreme Court precedent holding that SORNA is not punitive, the Appellate Court rejected the Third District's recent decision in **People v. Tetter**, 2018 IL App (3d) 150243, which held to the contrary. The Court was also critical of **Tetter**'s ultimate outcome because it completely relieved that defendant of any and all restrictions under SORNA rather than continuing to apply the portions of SORNA that previously had been upheld by the Supreme Court.

People v. Owens, 2018 IL App (4th) 170506 The Sex Offender Registration Act (SORA) does not violate double jeopardy principles because a violation of SORA requires a separate criminal act from the underlying offense which subjected the individual to the registration requirements. Likewise, collateral estoppel principles do not apply where a prosecution for a SORA violation does not require relitigating the underlying sex offense. Finally, SORA's requirements that a person "shall" register and that a person who violates the registration requirements "is guilty of" a felony are not improper mandatory presumptions and do not violate due process.

While defendant's due process challenge was not included in his interlocutory notice of appeal, the Appellate Court addressed it under both its (1) supplemental jurisdiction, relying on **People v. Hobbs**, 301 Ill. App. 3d 581 (1998), and (2) original jurisdiction – allowing the court to exercise jurisdiction when necessary to "a complete determination of any case on review" – pursuant to Illinois Supreme Court Rule 604(f).

People v. Rodriguez, 2018 IL App (1st) 151938 Defendant, who was found not not guilty of aggravated criminal sexual assault at a discharge hearing and was subsequently ordered to comply with the terms of the Sex Offender Registration Act (SORA), challenged the SORA statutory scheme as unconstitutional, both facially and as applied. As a preliminary matter, the Appellate Court concluded that defendant's prior appeal which resulted in his being ordered to comply with SORA did not bar his constitutional challenge under the "law of the case" doctrine because the prior appeal did not address the question of constitutionality. Likewise, the Appellate Court found defendant had standing to challenge SORA's restrictions and requirements, but did not have standing to challenge the failure-to-register provision (section 10 of SORA) because he was not charged with violating it.

In analyzing whether SORA violates the due process right of an unfit defendant to be free from punishment, the Appellate Court first considers whether SORA constitutes punishment; if it does, the strict-scrutiny test applies, if not, rational basis applies. The Appellate Court concluded that SORA does not constitute punishment under the factors identified in **Kennedy v. Mendoza-Martinez**, 372 U.S. 144 (1963). Even though SORA has become more onerous over the years, it remains non-punitive where registration is not an affirmative restraint on movement, a registrant does not have to seek permission to move about and cannot have registration revoked like parole, registration is primarily concerned with public safety, and registration is not a disproportionate consequence even though it is not tied to an individual's actual risk to reoffend. Because SORA is non-punitive, rational basis review applied to the facial challenge. While SORA may be over-inclusive in some ways and under-inclusive in others, it is rationally related to the legitimate state interest in protecting the public from sex offenders.

The Appellate Court also rejected the "as applied" challenge, concluding that while defendant was unfit for trial, the record showed he had enough cognitive functioning to comply with registration requirements where he held a job, was able to care for himself and his day-to-day responsibilities, and had taken steps to conceal his criminal actions when he committed the underlying offense.

People v. Kochevar, 2018 IL App (3d) 140660 The requirements to register as a sex offender under SORA, be subject to community notification requirements under SOCNL, and comply with various other sex offender statutes were found unconstitutional as applied to this defendant. When he was 18 years old, defendant had sexual intercourse with his then 15-year-old girlfriend. This constituted criminal sexual abuse, a crime solely because of their respective ages.

The Appellate Court acknowledged Supreme Court precedent holding that Illinois's sex offender statutes are not punitive [**People v. Malchow**, 193 Ill. 2d 413 (2000)] but declined to follow it. Instead, the Court followed the more recent decision in **People v. Tetter**, 2018 IL App (3d) 150243, and urged the Supreme Court to reconsider the non-punitive finding and reach a different result because the statutes in question "appear to have evolved and become penal."

As applied to this defendant, the punitive sex offender restrictions are both "excessive and disproportionate." The offense was a Class A misdemeanor, and defendant was sentenced to probation. Nothing in the record indicated that he targeted children or underage girls, and thus the sex offender restrictions were unnecessary to prevent him from abusing children in the future. Further, compliance with the statutes would actually interfere with restoring defendant to useful citizenship by "tether[ing] him to [a] youthful mistake by a plethora of restrictions." The Appellate Court vacated the requirement that defendant comply with SORA, SOCNL, and various other statutes.

People v. Begay, 2018 IL App (1st) 150446 Where defendant had completed his probation sentence, he lacked standing under the Post-Conviction Hearing Act to file a petition even though he was subject to the requirements of the Sex Offender Registration Act. SORA is not punishment and therefore does not constitute "imprisonment" sufficient to bring defendant within the reach of the Act.

In re A.C., 2016 IL App (1st) 153047 The combination of the Sex Offender Registration Act (730 ILCS 150/1) and the Sex Offender Community Notification Law (730 ILCS 152/101) (SORA) as applied to juveniles does not violate due process or the eighth

amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between SORA's restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction and there is no need for further hearings. And SORA does not violate the eighth amendment/proportionate penalties clause since it does not involve punishment.

People v. Pollard, 2016 IL App (5th) 130514 The Sex Offender Registration Act (730 ILCS 150/1) and its attendant statutory restrictions (SORA) do not violate due process or the Eighth Amendment/proportionate penalties clauses of the federal and Illinois constitutions. SORA does not violate substantive due process since it does not affect fundamental rights and there is a rational relationship between the SORA restrictions and the State's legitimate interests. SORA does not violate procedural due process since SORA only applies after a criminal conviction which provides all the procedural protections required by due process. And SORA does not violate the Eighth Amendment/Proportionate Penalties Clause since it does not involve punishment.

People v. Avila-Briones, 2015 IL App (1st) 132221 The Appellate Court rejected the defendant's request that it revisit whether the statutory scheme created by the Sex Offender Registration Act (730 ILCS 150/1 *et seq.*), the Sex Offender Community Notification Act (730 ILCS 152/101 *et seq.*), and statutes restricting the residency, employment, and presence of sex offenders constitute cruel and unusual punishment under the Eighth Amendment or disproportionate punishment under the Illinois Constitution. The court concluded that even if recent amendments to the statutory scheme constituted "punishment," the restrictions were not disproportionate to legitimate penological goals. In addition, the court concluded that the statutory scheme did not violate substantive or procedural due process.

People v. Cowart, 2015 IL App (1st) 131073 Before accepting a guilty plea, the trial court must admonish the defendant about the direct consequences of his plea; the court does not need to admonish the defendant about collateral consequences. A direct consequence "has a definite, immediate and largely automatic effect" on defendant's punishment. Illinois courts have held that mandatory sex offender registration is a collateral consequence, since it is neither a restraint on liberty nor a punishment.

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

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

People v. Fredericks, 2014 IL App (1st) 122122 In 2012, defendant entered a guilty plea to one count of possession of methamphetamine and was sentenced to two years probation. As a result of a 1999 conviction for attempted aggravated criminal sexual abuse, the plea required defendant to register as a sex offender for life.

The trial court did not advise defendant of the lifetime registration requirement before it accepted the guilty plea on the possession offense. Defendant had completed the 10-year registration period for the 1999 conviction before the possession offense occurred. The court concluded that a requirement to register as a sex offender is merely a collateral consequence of the plea. Therefore, due process does not require that a guilty plea defendant be admonished that he will be required to register as a sex offender.

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

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

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

The failure to comply with the notice requirements of the Registration Act did not provide a basis for defendant to withdraw the plea. The purpose of §§5 & 5-7 is to prevent a defendant from inadvertently violating probation because he or she lacks knowledge of the registration requirement. The notification requirements are directory rather than mandatory, however, and do not prevent the trial court from accepting a guilty plea.

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

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

In re J.R., 341 Ill.App.3d 784, 793 N.E.2d 687 (1st Dist. 2003) The Sex Offender and Child Murder Community Notification Law (730 ILCS 152/101 *et seq.*) does not violate substantive

or procedural due process when applied to a juvenile sex offender, and the Sex Offender Registration Act (730 ILCS 150/1 *et seq*.) does not violate procedural due process when applied to a juvenile.

§45-7(b)
Duty to Register or Report

Illinois Supreme Court

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

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

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

In re S.B., 2012 IL 112204 Noting that it has authority to read into statutes language which the legislature omitted by oversight, the court elected to allow unfit juveniles who are found "not not guilty" in a discharge hearing to seek termination of the sex offender registration requirement under the same conditions as minors adjudicated delinquent for sex offenses. The court also found that the legislature made a similar oversight with respect to the limitations that are contained in the Sex Offender Community Notification Law (730 ILCS 152/121) related to the dissemination of sex offender registration information with respect to adjudicated delinquents. It held that §121 of that Act should be read to include juveniles found "not not guilty" following a discharge hearing.

People ex rel. Birkett v. Konetski et al., 233 Ill.2d 185, 909 N.E.2d 783 (2009) The court granted *mandamus* to compel the trial court to vacate an order exempting a juvenile delinquent from the requirement that he register as a sex offender. The court found that the legislature intended to impose a mandatory obligation to register on juvenile sex offenders, and to require trial courts to admonish juvenile sex offenders concerning the duty to register.

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

The court also rejected arguments that the Act violates the prohibition against cruel and unusual punishment and the proportionate penalties clause. Finally, the court rejected the argument that the *ex post facto* clause is violated by the post-adjudication reclassification

of a juvenile delinquent who has committed the offense of criminal sexual assault as a "sexual predator."

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

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

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

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

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

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

Illinois Appellate Court

People v. Profit, 2021 IL App (1st) 170744 Defendant was found guilty of attempt robbery and unlawful restraint. The sentencing court merged the unlawful restraint conviction into the attempt robbery conviction pursuant to the one-act/one-crime rule, and imposed a four-year sentence for attempt robbery. On appeal, defendant challenged his duty to register under the "violent offender against youth" statute, 730 ILCS 154/5(a).

The Appellate Court found no duty to register. Under the plain language of the statute, registration is required if one is "convicted" of unlawful restraint, but not attempt robbery. According to the definition provided by the Code of Corrections, a "conviction" includes the sentence imposed following the guilty verdict. 730 ILCS 5/5-1-5. Therefore, a guilty finding for unlawful restraint, without a sentence, did not constitute a conviction.

People v. Rodriguez, 2019 IL App (1st) 151938-B Defendant was found not not guilty due to unfitness, and the trial court imposed SORA. On appeal, defendant claimed that applying SORA to a defendant found not not guilty was unconstitutional.

Unlike **People v. Bingham**, 2018 IL 122008, the Appellate Court here had jurisdiction over the claim because the trial court's judgment specifically ordered compliance with SORA. However, the court rejected the argument on the merits, finding SORA does not infringe on an unfit defendant's fundamental right not to be punished, because SORA does not constitute punishment. The law also passes the rational basis test as applied to defendant, because the record established that he is capable of compliance with the registration requirements despite his unfitness.

People v. Najar, 2018 IL App (2d) 160919 Defendant was subject to 90-day registration requirement, and during previous registration was provided written notice of the date on which he must next appear and register. Defendant's failure to register on time was not excused by his testimony that he thought his registration date was a month later than it was. Defendant was not entitled to a mistake-of-fact instruction. "Forgetting" the correct registration date was not a mistake of fact sufficient to undermine the knowledge element of the offense of failure to register.

People v. Jones, 2017 IL App (1st) 143718 Defendant was convicted of attempt rape in 1979 and subjected to a 10-year sex offender registration period. On appeal, the State brought out several prison terms which defendant served after 1979, and argued that because defendant's registration period was tolled he was still under a duty to register in 2012. Under 730 ILCS 150/7, a sex offender's length of registration is tolled by confinement.

The Appellate Court acknowledged that had the evidence of the prison terms been presented at trial, the State might have proven that defendant was under a duty to register in 2012. However, a "challenge to the sufficiency of the evidence is not a question of what the State could have proved at trial; it is a question of what the State actually proved at trial." Because no rational trier of fact could have concluded from the evidence presented at trial that in 2012 defendant was under a duty to register as a sex offender, the evidence was insufficient to satisfy the reasonable doubt standard. Defendant's conviction for failing to register as a sex offender was reversed.

People v. Kayer, 2013 IL App (4th) 120028 The Sex Offender Registration Act provides that if a sex offender "changes" his "place of employment," he shall report his "change in employment . . . within the time period specified in Section 3." 730 ILCS 150/6. Section 3 provides that the sex offender shall register in person within three days of "establishing . . . a place of employment." 730 ILCS 150/3(b).

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

People v. Velez, 2012 IL App (1st) 101325 A defendant convicted of child abduction committed by luring or attempting to lure a child under the age of 16 into a motor vehicle without the consent of the parent for other than a lawful purpose is required to register as a sex offender if the trial court makes a finding that the offense was sexually motivated. 730 ILCS 150/2(B)(1.9) "'Sexually motivated'" means one or more of the facts of the underlying offense indicated conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature." 20 ILCS 4026/10(e).

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

People v. Black, 2012 IL App (1st) 101817 The Sex Offender Registration Act provides that a defendant commits a sex offense that subjects him to a registration requirement when he unlawfully restrains a victim under 18 years old, and the defendant is not a parent to the victim, if the offense is "sexually motivated." 730 ILCS 150/2(A)(1)(a), (B)(1.5). An offense is "sexually motivated" when "one or more of the facts of the underlying offense indicates conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature." 20 ILCS 4026/10(e).

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

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

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

Defendant, a grown man, used sports conversation and requests for help with his groceries as a pretext to lure the boy into his apartment. The boy had to engage in a physical struggle with defendant before he was able to flee. That luring and the discovery of

defendant's possession of an adult pornographic magazine shortly after the offense indicate that defendant's activities with the boy consisted of conduct of a sexual nature. Luring-type behavior has proven to be a precursor to commission of sex offenses or intent to commit sex offenses against children. The magazine was illustrative of defendant's state of mind – his preoccupation with sexual activity.

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

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

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

People v. Cardona, 2012 IL App (2d) 100542 A non-acquittal of the offense of unlawful restraint of a child entered at a discharge hearing of an unfit defendant pursuant to 725 ILCS 5/104-25 requires that the defendant register as a sex offender where the court makes a finding that the offense was sexually motivated. 730 ILCS 150/2(B)(1.5). "'Sexually motivated' means one or more of the facts of the underlying the offense indicates conduct that is of a sexual nature or that shows an intent to engage in behavior of a sexual nature." 20 ILCS 4026/10(e). A finding that the offense was not sexually motivated requires that defendant register as a violent offender against youth. 730 ILCS 154/5(b)(1); 730 ILCS 154/86. A court's determination of this factual finding should be reversed only if it is against the manifest weight of the evidence.

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

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

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

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

People v. Olsson, 2011 IL App (2d) 091351 Sex offenders and sexual predators must register as provided by the Sexual Offender Registration Act. Included within the statutory definition of "sex offenders" are persons who are the subject of a "not not guilty" finding after a discharge hearing conducted subsequent to a finding of unfitness to stand trial. 725 ILCS 5/104-25; 730 ILCS 150/2(A)(1)(d). "Sexual predators" include persons convicted of enumerated offenses, including predatory criminal sexual assault of a child and aggravated criminal sexual abuse. 730 ILCS 150/2(E). "After conviction or adjudication," sexual predators are required to register for life, while sex offenders are required to register for a period of ten years. 730 ILCS 150/7. Under the Act, "convicted" and "adjudicated" have the same meaning. 730 ILCS 150/2(A)(5).

A finding of "not not guilty" of the offenses of predatory criminal sexual assault of a child and aggravated criminal sexual abuse subjects the defendant to registration for ten years as a sex offender, not to lifetime registration as a sexual predator.

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

This construction of the Act is consistent with due process. Criminal prosecution of a person unfit for trial is prohibited by the due process clause of the Fourteenth Amendment. Defendant was not adjudicated guilty at the discharge hearing. He has not yet had a definitive resolution of the charges against him. Subjecting someone who has not gained resolution of the charges against him to lifetime registration as a sexual predator could have a chilling effect on that person's exercise of his right to a discharge hearing.

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

People v. Evans, 405 Ill.App.3d 1005, 939 N.E.2d 1014 (2d Dist. 2010) 730 ILCS 154/1 *et seq*. requires that a person over the age of 17 who commits a "violent offense against youth" must register under the Child Murder and Violent Offender Against Youth Registration Act. First degree murder is a "violent offense against youth" if the victim was under 18 and the defendant was at least 17.

A person who was over the age of 17 at the time of the offense, and who is convicted as an accomplice, is required to register under the Act even if the principal was under the age of 17 and therefore not required to register. First, the plain language of the statute contains no exception for persons convicted as accomplices. Second, although an accomplice

may not be convicted if the State fails to prove that the principal committed an element of the charged offense, that rule does not apply to collateral ramifications of a criminal conviction. "For example, if an alien defendant is convicted of a crime on an accountability theory and thus is subject to deportation, he would not avoid deportation simply because the principal is a United States citizen and not subject to deportation."

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

§45-7(c)
Failure to Register or Report

Illinois Supreme Court

People v. Pearse, 2017 IL 121072 Section 3(a) of the Sex Offender Registration Act requires a sex offender to register where he resides or is temporarily domiciled for three or more days during any calendar year. 730 ILCS 150/3(a). Section 3(b) states that a sex offender shall register within three days of establishing a residence or temporary domicile, "regardless of any initial, prior, or other registration." 730 ILCS 150/3(b). Section 2(I) of the Act defines "fixed residence" as any place where a sex offender resides for five or more days in a calendar year. 730 ILCS 150/2(I).

Defendant, a convicted sex offender, lived in an apartment in Belvidere, Illinois, and properly registered it as his residence. At some point he was admitted to a hospital in Belvidere after a suicide threat. He was later transferred to a hospital in Forest Park, Illinois. At that hospital, a Forest Park police officer filled out and defendant signed a registration form listing the hospital as defendant's resident address and defendants' apartment in Belvidere as his "secondary address," even though all the parties agreed that the second term has no meaning in the Act. After defendant was released from the hospital he returned to his apartment in Belvidere, but he did not re-register it as his residence.

The State charged and convicted defendant with failing to register his address. In response to a bill of particulars, the prosecution stated that its theory of the case was that defendant never registered a change of address when he returned to Belvidere after leaving the hospital in Forest Park.

The Supreme Court reversed defendant's conviction. The court held that the Act did not require re-registration under the facts of this case. The Act adopts a very broad definition of "fixed residence" and "place of residence or temporary domicile," defining those terms respectively as places where a sex offender resides for five or more days or three or more days. Defendant was thus required to register his presence at the Forest Park hospital as a place of residence or temporary domicile. Defendant did this by signing the form filled out by the Forest Park officer. But there was no statutory requirement that defendant had to re-register his address in Belvidere after he left the hospital. The term "re-register" does not appear anyway in the statute.

The language in subsection (b) requiring a sex offender to register when he establishes a residence "regardless of any initial, prior, or other registration," means nothing more than that a defendant must register additional residences. It does not require re-registration of already existing residences.

In reaching its decision, the court recounted at length the difficulty the trial court, prosecutor and defense counsel had figuring out what the statute required for compliance. The Supreme Court then stated that "persons subject to the Act's provisions must also have fair notice of what is required. It appears to us that defendant attempted to comply. Even after all the evidence had been presented in this case, the parties and the trial court struggled to figure out what compliance entailed. It should not be thus."

Illinois Appellate Court

People v. Sweigart, 2021 IL App (2d) 180543 Defendant was not proved guilty beyond a reasonable doubt of failing to register as a violent offender against youth. The charge alleged that defendant failed to register as a homeless person on or before May 31, 2017. The State presented evidence that defendant had registered with the Aurora Police Department during 2017, alternating between registering as homeless and with a fixed residence. He last registered as homeless on May 24, 2017, a warrant for his arrest was issued in July 2017, and he was arrested for failure to register September 19, 2017, at a hotel in Aurora where defendant had frequently reported staying for stretches of time when he registered previously (*i.e.*, a fixed residence).

The Appellate Court concluded that the State failed to prove that defendant was required to register in Aurora after May 24, 2017. The court looked to cases interpreting the corresponding provision of the Sex Offender Registration Act for guidance. An element of failure-to-register as charged here was that defendant was in Aurora at the time in question and that he lacked a fixed residence. The State offered no evidence as to where defendant was on or after June 1, 2017, through the date of his arrest, and he was arrested at a location that he had twice provided as a fixed residence during the months prior to his arrest.

People v. Woods, 2020 IL App (1st) 173022 Defendant was charged with violating section 6 of SORA, which provides that a person who lacks a fixed residence must report weekly, in person, to the appropriate law enforcement agency where the person is located. A fixed residence is defined as any and all places that the offender resides for an aggregate period of five or more days in a calendar year. Defendant had consistently been registering as "homeless" leading up to the time period in question.

To sustain a conviction for failing to report on a weekly basis, the State must prove both that defendant lacked a fixed residence and did not report weekly. And, section 6 is "jurisdiction specific," so the State was also required to prove that defendant was residing in Chicago at the time in question. Here, the evidence that defendant resided in Chicago was weak, but the court found it unnecessary to resolve that question because the State's proof failed to establish that defendant lacked a fixed residence during the period charged. While defendant had been reporting as homeless leading up to that period, there was no proof that he continued to be homeless. "[N]ot everyone who is homeless remains forever homeless." Defendant provided an address to police at the time of his arrest, and the State did not show that it was not a fixed residence or that defendant did not actually live there. Defendant's conviction was reversed outright.

People v. James, 2019 IL App (1st) 170594 Defendant was convicted of violating SORA in May of 2016 by failing to register within three days of establishing his residence. The Appellate Court reversed, holding that the State failed to establish defendant's obligation to register under SORA in May of 2016, and failed to prove he established a new residence.

Defendant was convicted of attempt aggravated criminal sexual assault in 1996, and sentenced to 10 years in prison, followed by 10 years of SORA registration. To establish that defendant was required to register as of May 2016, the State would have to establish the date of his release from prison, which it failed to do. In finding the State did not prove defendant's registration window, the Appellate Court refused to take judicial notice of DOC records that showed defendant should have been a lifetime registrant based on subsequent convictions. "The issue here is not what the State could have proved at trial but what the State actually did prove at trial."

The State also failed to prove that defendant established a new residence in Chicago. An investigator testified that when he asked where defendant lived, defendant offered a Chicago address and told the investigator he moved back to Chicago from Wisconsin one month prior. But this failed to prove that defendant spent an aggregate of three days at the address given and thereby established a residence or temporary domicile under SORA.

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

People v. Scott, 2017 IL App (4th) 150529 Where an individual has acquiesced to weekly reporting requirements under the Sex Offender Registration Act (SORA), his lack of a fixed residence is not an element of the offense of failing to register. Here, defendant had been registering weekly, was listed as "homeless" on the registration form, and signed the form advising him of the need to report again in one week. The court concluded that this constituted acquiescence to the weekly reporting requirement and therefore declined to address whether registration as "homeless" means that a person lacks a fixed residence.

People v. Gomez, 2017 IL App (1st) 142950 Defendant was charged in Cook County with failure to register as a sex offender under 730 ILCS 150/3(a)(1). Section 150/3(a)(1) requires registration in a municipality in which the sex offender "resides or is temporarily domiciled for a period of time of three or more days." The Act defines "place of residence or temporary domicile . . . as any and all places where the sex offender resides for an aggregate period of time of three or more days during any calendar year."

A Chicago police officer testified that he checked defendant's registration status after he was arrested on an unrelated matter, and did not find evidence of registration in any jurisdiction. The officer also testified that defendant was required to register within three days of his release from prison approximately a year before his arrest on the unrelated matter. The officer stated that defendant said he had tried to register in Chicago but was told that his address was too close to a school.

To prove a violation of §3(a)(1), the State was required to prove that defendant resided or was temporarily domiciled at a specific location within Chicago and that he failed to

register at that address. There was no evidence that defendant had resided in Chicago for at least three days without registering with the Chicago police. At most, the State proved that defendant was in Chicago when he was arrested. Without evidence that defendant had resided in Chicago on that day and on at least two other days that calendar year, the State failed to show any obligation to register in Chicago.

The court rejected the State's argument that there was a reasonable inference that defendant had resided in Chicago for at least three days where he did not register within three days of his release from prison, unsuccessfully tried to register in Chicago, and did not appear to have registered in any other jurisdiction. The court noted that defendant was not charged with failing to register within three days of his release from prison, but with failing to register in Chicago. The record contained no evidence that defendant was required to register in Chicago, as it failed to show that defendant was residing or domiciled in Chicago for three days.

The court also rejected the State's argument that because there was no record that defendant had registered in any jurisdiction "and he had to live *somewhere*," the State was not required to prove that defendant was residing or domiciled in any particular place. Not only did the State forfeit the argument by failing to raise it below, but under §150/3(a)(1) the duty to register is triggered by the offender's residence or domicile in a specific location. Accepting the State's argument would mean that the defendant could be prosecuted in jurisdictions to which he had no connection, merely because the police did not find a registration anywhere else.

The conviction was reversed.

People v. Manskey, 2016 IL App (4th) 140440 Under the Sex Offender Registration Act a defendant must provide the authorities with accurate information, including his current address. 730 ILCS 150/3(a). To prove that a defendant violated the Act by failing to accurately provide his current address, the State must show that defendant knowingly or willfully gave the authorities false information about his current residential address. The Act defines place of residence as any place a defendant resides for three or more days during any year.

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

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

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

People v. Brock, 2015 IL App (1st) 133404 A person who has been adjudicated sexually dangerous or violent must register as a sex offender with the police and additionally must (1) report in person to the police every 90 days thereafter and (2) report in person and register with the police within three days after he changes his address. 730 ILCS 150/6.

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

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

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

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

People v. Wlecke, 2014 IL App (1st) 112467 Section 6 of the Sex Offender Registration Act requires a convicted sex offender to either register the address of his fixed residence (defined as any place an offender lives for five or more days during a calendar year), or if he does not have a fixed address, to report weekly. 730 ILCS 150/6. The Act also requires the offender to provide accurate information. 730 ILCS 150/3(a). Defendant was convicted of failing to report weekly while lacking a fixed residence. The Appellate Court held that the State failed to prove defendant guilty beyond a reasonable doubt.

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

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

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

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

The Court rejected the State's argument that defendant failed to provide accurate information since he could not produce a valid driver's license, State identification, or other government-issued document showing his residence. The Court held that the Act's requirement for accurate information is not synonymous with or limited to the categories of identification listed by the State. The Court also noted that the State's insistence on sex offenders presenting government-issued identification is inconsistent with the reality faced by offenders who have been recently released from prison and who must register within three days of their release.

People v. Robinson, 2013 IL App (2d) 120087 To prove a violation of the duty of a sex offender to report a change of address, the State must prove that defendant: (1) was previously convicted of an offense subjecting him to the Act; and (2) established a new fixed residence or temporary domicile which he knowingly failed to report in person to the law enforcement agency with whom he last registered. 730 ILCS 150/6.

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

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

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

People v. Peterson, 404 Ill.App.3d 145, 935 N.E.2d 1123 (2d Dist. 2010) At a fitness discharge hearing, the trial court erred by finding defendant "not not guilty," and should have entered an acquittal. Defendant was charged with knowingly failing to register a change of address as required by the Sex Offender Registration Act. (730 ILCS 150/3(a)) However, the State presented no evidence supporting that charge, and at most proved that defendant was homeless for the entire period in question.

At the discharge hearing, the State argued two theories: that defendant gave a false address when he claimed to live at an address where the resident denied any knowledge of him, and that defendant failed to comply with the weekly reporting requirement imposed on

homeless persons who are subject to the Registration Act. The court found that neither theory had been proven.

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

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

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

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

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

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

Where defendant was released from prison on mandatory supervised release with instructions to proceed directly to his home, call his parole officer, and remain in the residence until the parole agent made an initial visit, he was "confined" until the parole agent visited and defendant was free to leave the residence. Thus, defendant had 10 days after the parole agent's visit to complete sex offender registration. An arrest made 11 days after defendant's release from the penitentiary, but only nine days after he was visited by the parole agent, was premature and could not support a conviction for failing to register within 10 days of release.

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

§45-7(d)
Status-Based and Location-Based Offenses

Illinois Supreme Court

People v. Leib, 2022 IL 126645 Defendant was convicted of a being child sex offender in a school zone. The statute criminalized being on "real property comprising any school . . . when persons under the age of 18 are present . . . on the grounds. . . ." 720 ILCS 5/11-9.3(a).

Defendant appealed, arguing that his presence at a carnival held in a parking lot across the street from a parish church and school did not violate the statute. The supreme court disagreed. Although defendant argued that the parking lot did not "comprise" the school because it was separated from the school by a public street and was therefore not contiguous, the supreme court held that the statute did not require the property to be contiguous. Moreover, the statute barred presence on "real property comprising any school" when children are present "on the grounds." The court concluded that the legislature therefore intended to bar sex offenders from all school grounds. Because the parish owned both the school and parking lot, the entire area comprised the school grounds.

Defendant also argued that the State failed to prove he knew he was on real property comprising a school. He pointed to the testimony of his brother, who invited defendant to the carnival and who, like two other witnesses, believed that it was on church property only. He also argued that, from the carnival, one would not necessarily be able to see the school, which was across the street and behind a gymnasium. The supreme court, over a dissent, rejected the claim, finding sufficient circumstantial evidence that defendant was aware he was on school grounds. Maps of the carnival showed that rides and vendors were located not just in the parking lot, but across the street in the alley behind the school. The school was open for people to walk through. The reverend testified that residents of the neighborhood generally viewed the parish church and school as synonymous, and the lot was closer to the school than it was the church. When an officer told defendant he shouldn't be there and asked him to leave, defendant agreed.

The two dissenting justices would have found the State failed to prove knowledge, which, it pointed out, "is not the same as 'should have known.'" Here, the State introduced no evidence to establish defendant's knowledge of the facts making his conduct illegal, including the fact that the festival extended to the school and that the school was open. There were no visible signs indicating he was in a school parking lot. Rather, the only sign advertised a church function—bingo and raffles on Thursday evenings. The flyer advertised the "Queen of Martyrs Fest" and did not mention the school at all. Nor was there any evidence that defendant was familiar with the property or had ever set foot on the property before that night. Finally, the fact that defendant attended the festival, then left when an officer asked, shows the opposite of consciousness of guilt.

People v. Pepitone, 2018 IL 122034 Defendant alleged that section 11-9.4-1(b) of the Criminal Code, which bans child sex offenders from parks, violates substantive due process. He argued that the statute lacks a *mens rea*, penalizes wholly innocent conduct, and, because it considers neither the presence of children nor the individual's potential for recidivism, is not narrowly tailored.

The Illinois Supreme Court upheld the statute. Because the ability to enter a park is not a fundamental right, the court applied the rational basis test, asking whether the statute bears a reasonable relationship to a legitimate state interest. The court held that the legislature could rationally conclude that child sex offenders pose a danger in public parks given the presence of children and sex offenders' high rates of recidivism. Although defendant pointed to numerous studies suggesting low recidivism rates among sex offenders, the court found that such data is better analyzed by the legislature, not the court. As for defendant's "overbreadth" argument, the court acknowledged that it has previously struck down statutes that penalize wholly innocent conduct, but it found those cases inapposite because here the conviction depends on the status of the defendant - a convicted sex offender. Finally, the court held that the rational basis test does not require narrow tailoring, only rationality.

People v. Howard, 2017 IL 120443 720 ILCS 5/11-9.3(b) provides that it is unlawful for a child sex offender to "knowingly loiter within 500 feet of a school building or real property comprising any school while persons under the age of 18 are present." As it applies here, the term "loiter" is defined as "[s]tanding, sitting idly, whether or not the person is in a vehicle, or remaining in or around school or public park property." 720 ILCS 5/11-9.3(d)(11).

Defendant, a convicted sex offender, was convicted of violating §9-3(b) for sitting in a car that was parked within 500 feet of an elementary school while children were present. Defendant stated that he took a friend to the school so she could drop off lunches to her grandchildren, who were students. He then parked on a street in front of the school waiting for his friend to return. Defendant challenged §9.3(b) on the ground that the definition of "loiter" was unconstitutionally vague. Defendant also contended that he was not "sitting idly" where he was waiting for his passenger to return and that the terms "standing" and "remaining" apply only to persons on foot and not to persons who are sitting in a vehicle.

The statutory definition of "loitering" is not unconstitutionally vague. First, the terms "standing" and "remaining" apply to persons who are sitting in a vehicle as well as to those who are on foot. Second, passing through a school zone, or even dropping off a passenger and then leaving, is clearly not "remaining." By contrast, it is obvious that dropping off a passenger at a school and then parking within 500 feet does constitute "remaining." Here, defendant "loitered" by parking his car near the school and "remaining" in the school zone while waiting for his friend to return and while children under the age of 18 were present.

The court rejected defendant's argument that to satisfy constitutional concerns, a crime defined as remaining must include an improper purpose or require that the defendant committed an overt act. The court noted that the statute applies only to convicted sex offenders and prohibits remaining in a specific place, regardless of the reason. Under these circumstances, neither an improper purpose nor overt act is constitutionally required.

Illinois Appellate Court

People v. Lowe, 2022 IL App (2d) 190981 Defendant's conviction for being a child sex offender present in a school zone was upheld against his challenge to the sufficiency of the evidence. The charge alleged that defendant was knowing and unlawfully present on high school property while persons under 18 were present. The evidence at defendant's bench trial was that defendant was in a vehicle in the parking lot in front of the high school's field house when children were arriving for a cheerleading competition. Defendant was with one of the cheerleading coaches and her daughter and exited the vehicle to help them unload when a police officer recognized defendant as a registered sex offender. There was testimony that the parking lot was "attached" to the high school and that there is a sign with the high school's name on it at the entry to the school driveway which leads to the parking lot. In finding defendant guilty, the trial court concluded that the parking lot was part of the school grounds and thus defendant was present on real property comprising a school.

The Appellate Court agreed with the State that the field house parking lot was on "real property comprising a school" under the plain language of the statute. School is defined as a "public, private, or parochial elementary or secondary school, community college, college, or university and includes the grounds of a school." The Appellate Court found it significant that both colleges and universities were included in the definition because those sorts of institutions typically have multiple buildings. Thus, the legislature did not contemplate that a school would necessarily be contained within a single building. So, while the field house may not have been attached to the school building, it was part of the school within the

meaning of the statute, and the adjacent parking lot was necessarily part of the school grounds even if that parking lot was not adjacent to the school building itself.

People v. Haberkorn, 2018 IL App (3d) 160599 The Appellate Court reversed defendant's conviction of unlawful presence at a facility providing services exclusively directed toward children by a child sex offender [720 ILCS 5/11-9.3(c)]. That statute prohibits a child sex offender from being present at any "facility providing programs or services exclusively directed toward persons under the age of 18."

Defendant was not present at a facility providing services "exclusively" directed toward children when he boarded a bus to accompany his cousin and her three children on a field trip offered as part of an Easter Seals parenting program. The parenting program was directed toward adults and families, and did not provide services exclusively for children.

The Appellate Court noted that the legislature likely did not intent or anticipate that prosecutors would use this statute to "bird-dog" individuals like defendant, specifically a teenager convicted of a sex offense based on "consensual" sexual conduct with another teenager close in age. The Appellate Court suggested SORA be amended to either eliminate SORA restrictions for misdemeanors or make SORA discretionary.

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

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