Chapter 17

Motions To Dismiss the Charging Paper

§ 17.01 TYPES OF CHALLENGES TO THE CHARGING PAPER; THE STAGES AT WHICH THESE CHALLENGES CAN AND SHOULD BE RAISED

There are numerous grounds for challenging the sufficiency of a charging paper or some of its counts by a motion to dismiss the Petition or those counts. They include:

1. Failure of the Petition to allege facts constituting an offense. (See § 17.03 *infra*.)

2. Lack of personal or subject-matter jurisdiction. *Compare McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), *with Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022); *and see, e.g.*, *In re Hijazi*, 589 F.3d 401 (7th Cir. 2009); *United States v. Davila-Mendoza*, 972 F.3d 1264 (11th Cir. 2020); *United States v. Wahchumwah*, 472 Fed. Appx. 623 (9th Cir. 2012)*; Sheridan v. Superior Court in and for Pinal County*, 91 Ariz. 211, 370 P.2d 949 (1962); *A Juvenile v. Commonwealth*, 380 Mass. 552, 556-63, 405 N.E.2d 143, 146-50 (1980); *People v. Cousar*, 191 A.D.3d 694, 137 N.Y.S.3d 736 (N.Y. App. Div., 2d Dep't 2021). Although most other grounds for dismissal of a prosecution must be raised within specified time limits,, lack of jurisdiction can be called to the court's attention at any time (*see, e.g.*, *State v. Kavajecz*, 139 Idaho 482, 80 P.3d 1083 (2003); *Harrell v. State*, 721 So.2d 1185 (Fla. App. 1998)).

3. Lack of jurisdiction to bring the case in the juvenile court, in that the respondent is too old to be prosecuted as a juvenile or too young to be prosecuted at all. (See § 17.04 *infra*.)

4. Failure to allege facts establishing venue. (See § 17.05 *infra*.)

5. Technical defects. (See § 17.06 *infra*.)

6. Expiration of the statute of limitations for the offense. (See § 17.07 *infra*.)

7. Double jeopardy. (See § 17.08 *infra*.)

8. Misjoinder of counts or of respondents. (See Chapter 18.)

9. Substantive unconstitutionality of the criminal statute on which the charge is based. *See*, *e.g.*, *United States v. Stevens*, 559 U.S. 460 (2010); *Ramirez v. Commonwealth*, 479 Mass. 331, 94 N.E.3d 809 (2018); *cf. State v. Spell*, 2021-00876 (La. 5/13/22), 339 So.3d 1125 (La. 2022). Counsel should be alert

particularly to the possibility of challenging obscure criminal statutes on grounds of vagueness (*see*, *e.g.*, *United States v. Davis*, 139 S. Ct. 2319 (2019); *Henry v. Spearman*, 899 F.3d 703 (9th Cir. 2018)), or overbreadth (*see*, *e.g.*, *Seals v. McBee*, 898 F.3d 587 (5th Cir. 2018)). *See generally Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019) (en banc); Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 (No. 4) CRIM. L. BULLETIN 207 (1967).

10. Selective prosecution or selective enforcement based on invidious discrimination. Litigation of selective prosecution claims – including issues of discovery necessary to prove such claims – is governed by a body of caselaw rooted in *United States v. Armstrong*, 517 U.S. 456 (1996). *Armstrong* declares in dictum that "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification'" (*id*. at 464). *See also Whren v. United States*, 517 U.S. 806, 813 (1996) (dictum) ("the Constitution prohibits selective enforcement of the law based on considerations such as race"); *Murguia v. Municipal Court*, 15 Cal. 3d 286, 300, 540 P.2d 44, 53, 124 Cal. Rptr. 204, 213 (1975) ("a criminal defendant may object, in the course of a criminal proceeding to the maintenance of the prosecution on the ground of deliberate invidious discrimination in the enforcement of the law") (discovery standard relaxed by the California Racial Justice Act as construed in *Young v. Superior Court of Solano County*, 79 Cal. App. 5th 138, 294 Cal. Rptr. 3d 513 (2022)). However, a "'presumption of regularity supports' . . . prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties'" (*United States v. Armstrong*, 517 U.S. at 464). "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" *Id*. at 465. This standard makes selective prosecution claims difficult to prove, but "not . . . impossible" (*id*. at 466). *Armstrong* also sets a demanding standard for defense discovery of prosecutorial records in support of a selective prosecution claim: it endorses a rule "'requir[ing] some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent"; and it holds that "'some evidence tending to show the existence' of the discriminatory effect element" must include "some evidence that similarly situated defendants of other races could have been prosecuted, but were not" (*id*. at 468-469). *Cf. State v. Ballard*, 190 N.J. 270, 920 A.2d 80 (2005), approved in *State v. Lee*, 190 N.J. 270, 920 A.2d 80 (2007). Some lower courts apply the same exacting requirements to claims of selective enforcement – that is, discrimination on the part of the police and other law-enforcement agencies, as distinguished from prosecutors – while others have adopted more defendant-friendly rules for cases in which *Armstrong*'s concern against exercising too much "judicial power over [prosecutorial judgment –] a 'special province' of the

Executive" – is inapplicable. See the discussions of the standards for discovery and proof of selective enforcement claims in, *e.g.*, *United States v. Davis*, 793 F.3d 712 (7th Cir. 2015) (en banc); *United States v. Washington*, 869 F.3d 193 (3d Cir. 2017); *United States v. Sellers*, 906 F.3d 848 (9th Cir. 2018); *United States v. Jackson*, 2018 WL 6602226 (D. N.M. December 17, 2018); *United States v. Lopez*, 415 F. Supp. 3d 422 (S.D. N.Y. 2019).

11. Prosecution instituted for the purpose of punishing the respondent's exercise of constitutional rights. *See Holt v. Virginia*, 381 U.S. 131 (1965); *cf. Wright v. Georgia*, 373 U.S. 284 (1963); *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968); *and compare Lozman v. City of Riviera Beach, Florida*, 138 S. Ct. 1945 (2018), *with Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). Targeting political activists or religious groups for surveillance or detention may also raise First Amendment issues. *See, e.g., Fazaga v. Federal Bureau of Investigation*, 916 F.3d 1202, 1244-45 (9th Cir. 2019); *Black Lives Matter v. Town of Clarkstown*, 354 F. Supp. 3d 313 (S.D.N.Y. 2018). The *Nieves* case represents the Supreme Court's current last word on the complex subject of retaliatory arrests. *Cf. Cole v. Encapera*, 758 Fed. Appx. 252 (3d Cir. 2018); *Campbell v. Mack*, 777 Fed. Appx. 122 (6th Cir. 2019).

(13) Violations of due process during the pretrial stages of the case (*compare Hayes v. Faulkner County*, 388 F.3d 669 (8th Cir. 2004), *with United States v. Jones*, 2023 WL 4006861 (8th Cir. 2023); *and see United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986); *United States v. Bogart*, 783 F.2d 1428, 1433 (9th Cir. 1986) (dictum) ("[w]e now reaffirm once again that a defendant may raise a due process-based outrageous government conduct defense to a criminal indictment"); *People v. Newberry*, 265 Ill. App. 3d 688, 638 N.E.2d 1196, 203 Ill. Dec. 70 (1994)), or flagrant governmental misconduct warranting a severe sanction (*compare United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), *with United States v. Walters*, 910 F.3d 11 (2d Cir. 2018)).

In most jurisdictions, statutes or court rules require that motions challenging the sufficiency of the charging paper be made in writing, within a specified period of time (usually 15 or 30 days after arraignment). See § 7.05 *supra.* If the challenge is to the jurisdiction of the court, that challenge may be made at any time.

Even when local procedures require that motions be in writing, a challenge to the sufficiency of the charging paper can be made orally at a detention hearing to prevent detention on an invalid Petition. See § 4.23 *supra.*

§ 17.02 TERMINOLOGY

Under the specialized vocabulary employed in juvenile courts in most jurisdictions, juveniles cannot be "charged" with "crimes" but can merely be "alleged" to have "committed

acts, which if committed by an adult, would constitute crimes" and which render the child "delinquent." Because this terminology is extremely unwieldy, the present chapter will use the words "charges" and "crimes" in discussing the pleading requirements governing Petitions and the sufficiency of their allegations. When practicing in jurisdictions that adhere rigidly to juvenile court parlance, counsel should, of course, substitute the appropriate juvenile court terms.

§ 17.03 FAILURE OF THE CHARGING PAPER TO ALLEGE FACTS CONSTITUTING A CRIME

A Petition (or counts thereof) can be fatally defective by reason of several types of insufficiency of allegations. These insufficiencies are often confusingly grouped under the single rubric "failure to charge a public offense."

§ 17.03(a) Failure To Charge Acts That Are Criminal in Nature

The allegations may state fully and clearly what specific acts the respondent is charged with doing, but these acts may be no crime (or, as juvenile parlance would have it, may not be acts "which, if committed by an adult, would constitute a crime"). *See*, *e.g.*, *United States v. McKee*, 68 F.4th 1100, 1102 n.2 (8th Cir. 2023) (affirming the dismissal of an indictment charging acts that lay beyond the "'scope, reach, or coverage' of a federal criminal statute"); *United States v. Guertin*, 67 F.4th 445 (D.C. Cir. 2023) (affirming the dismissal of an indictment charging wire fraud because that offense requires devising a scheme to obtain money or property fraudulently, and in the case at bar the fraud charged against the defendant, a federal employee, was aimed solely at getting his security clearance renewed); *Burns v. State*, 2023 WL 3606074, at *3 (Fla. App. 2023) (issuing a writ of prohibition to require the dismissal of an aggravated assault charge against a homeowner who chambered a round in a handgun during an altercation with a tree-cutting crew in his yard; "Florida provides a statutory right to openly carry a weapon or firearm while on one's home property or place of business. Even when one is not at his or her home property or place of business, it is not unlawful in Florida to 'briefly and openly display' a lawfully carried firearm 'to the ordinary sight of another person,' so long as the firearm is not being 'intentionally displayed in an angry or threatening manner' . . . ."); *Payne v. State*, 282 So.3d 432, 437 (Miss. App. 2019) ("Here, the indictment charged Payne with 'knowingly, willfully, unlawfully and feloniously possess[ing] 0.1 grams or more but less than 2.0 grams of ETHYLONE, a SCHEDULE I Controlled Substance . . . .' . . . But 'ethylone' is not listed in Schedule I of the Controlled Substances Act . . . . [I]t is insufficient for an indictment merely to allege an unlisted pseudonym for a controlled substance actually listed on the schedule then leave it to the jury to connect the dots."); *State v. Metzinger*, 456 S.W.3d 84 (Mo. App. 2015); *State v. Cooper*, 396 S.W.3d 603 (Tex. App. 2012); *State v. Isaacs*, 794 N.E.2d 1120, 1123 (Ind. App. 2003)*; State v. Miller*, 159 N.C. App. 608, 583 S.E.2d 620 (2003), *aff'd per curiam*, 358 N.C. 133, 591 S.E.2d 520 (2004) (mem.); *State v. Harrison*, 805 S.W.2d 241 (Mo. App. 1991). For example, a respondent may be charged under a statute penalizing one who "resists an officer in the execution of his [or her] duty," and the Petition may allege that the respondent did "run away and refuse to stop when called upon to stop by" the officer. A motion to dismiss here tests the

prosecution's legal theory. Specifically, it raises the issue of law whether one who runs away from a police officer thereby "resists" the officer within the meaning of the statute.

Ordinarily, the sole focus of this species of motion to dismiss is the text of the charging paper: Do the actions and circumstances which the charging paper sets forth constitute a crime or do they not? However, if there is no dispute between the parties that the factual scenario on which the charge is based includes additional circumstances relevant to the criminality of the actions charged, those circumstances can be considered by the court in ruling on the motion. *See*, *e.g.*, *United States v. Halseth*, 342 U.S. 277 (1952); *State v. Hankins*, 155 So.3d 1043, 1045-46 (Ala. Crim. App. 2011); *State v. Pagano*, 104 Md. App. 113, 122, 655 A.2d 55, 59-60 (1995), *aff'd*, 341 Md. 129, 669 A.2d 1339 (1996); *State v. Fernow*, 328 S.W.3d 429, 431 (Mo. App. 2010) (the indictment alleged that the defendant "while being held in custody after arrest for burglary, a felony, knowingly escaped from custody" but the facts underlying this allegation, as represented by the parties to the court on the motion to dismiss, were that the defendant "was not in custody after arrest for burglary. At the time . . . [he] absconded, he was being held in custody pursuant to a capias warrant issued for his failure to appear at his probation revocation hearing, where burglary was the underlying offense."). Prosecutors will ordinarily take the position that consideration of any factual information outside the four corners of the charging paper is improper on a motion to dismiss. But where there is no genuine factual debate about what happened when and where, and under what circumstances – so that the only real contest between the prosecution and defense is whether a set of agreed-upon events comes within the terms of a criminal statute – defense counsel can sometimes persuade the prosecutor to stipulate to the specifics of those events as the basis for a ruling on the motion, in order to save the state the cost and trouble of a trial.

Counsel should always check the caselaw to determine whether the courts have previously dealt with the kinds of acts with which the respondent is charged or equivalent acts. Frequently, prosecutors will charge respondents with acts that have previously been deemed insufficient to constitute a crime because the prosecutor is not aware of the prior decision or because the prior decision, while persuasive, is not controlling.

If there is no prior caselaw on the issue, then counsel's motion should be devoted primarily to a construction of the statute. In addition to parsing the statutory language, counsel should examine the statute's overall structure, context, relationship to other criminal provisions, and any relevant legislative history of the applicable statute for indications that the legislature (1) considered various factual situations to which the statute was intended to apply and did not mean it to reach facts like those in the respondent's case or (2) enacted the statute to achieve certain goals of policy that do not call for an application of the statute to acts such as those committed by the respondent. *See*, *e.g.*, *Dubin v. United States*, 143 S. Ct. 1557 (2023); *State v. Lopez*, 907 N.W.2d 112 (Iowa 2018).

A motion to dismiss is also appropriate when a charging paper purports to charge a particular offense but the facts which it alleges constitute only a lesser offense. *See*, *e.g.*, *Corona*

v. Superior Court for the City and County of San Francisco, 65 Cal. App. 5th 950, 280 Cal. Rptr. 3d 285 (2021). In this situation, local practice may call for outright dismissal of the charging paper, allowing the prosecution to file a new paper charging the lesser offense, or it may allow the prosecution to amend the charging paper (formally or constructively) so that the case proceeds to trial on the lesser charge only.

§ 17.03(b) Failure To Allege Facts That Make Out Every Element of the Charged Offense

A charging paper may quite simply have something missing. The conduct with which it charges the respondent is perfectly consistent with criminality, but some ingredient of the crime is omitted. Thus, for example: "To constitute an offense under Section 12438, General Code, a breaking and entering or an attempt to break and enter in the night season an uninhabited dwelling or other described building must be 'maliciously and forcibly' done, and an indictment purportedly drawn under such section, which charges merely that the accused in the night season 'did unlawfully attempt to break and enter' a building containing a food store, states no offense, is fatally defective and cannot be remedied by the court." *State v. Cimpritz,* 158 Ohio St. 490, at 490, 110 N.E.2d 416, 417 (1953); *accord*, *Holcomb v. State*, 573 S.W.2d 814, 815 (Tex. Crim. App. 1978) (reversing a conviction and ordering the indictment dismissed because it "omits the necessary culpable mental state"); *People v. Kidd*, 2022 IL 127904, 2022 WL 17245556 (Ill. 2022) (same); *State v. Singleton*, 285 N.C. App. 630, 634, 878 S.E.2d 653, 656 (2022) (reversing a conviction under a statute providing that a person commits second-degree forceable rape when he "engages in vaginal intercourse with another person" who is "physically helpless" and he "knows or should reasonably know that the other person [is] physically helpless": "The indictment here uses the phrase 'engaged in vaginal intercourse' where the statute requires the phrase 'carnally know and abuse.' While the phrase used in the indictment is a sufficient substitute for 'carnally know,' it is not a sufficient substitute for the word 'abuse'. The verb 'abuse' (or some equivalent) is required as a means of describing the essential element that was omitted from the indictment here, that Defendant 'knew or reasonably should have known' that Jane was physically helpless. The inclusion of 'abuse' is necessary to describe that Defendant knew and took advantage of Jane's physical inability to resist his advances."). *See*, *e.g.*, *State ex rel. Day v. Silver*, 210 W. Va. 175, 180, 556 S.E.2d 820, 825 (2001) ("We . . . hold that in order for an indictment for larceny to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable articles. Likewise, in order for an indictment for destruction of property to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable articles."); *State v. Shaw*, 150 Hawai'i 56, 497 P.3d 71 (2021) ("The State alleged only that Shaw 'did knowingly access a computer . . . with the intent to commit the offense of theft in the third degree, [and] thereby committed the offense' of Computer Fraud 3. (Emphasis added.) Because the indictment did not allege Shaw knowingly accessed a computer, computer

system, or computer network with the intent to commit the offense of theft in the fourth degree, and since none of the individual transactions were greater than $250.00, the State was required to include in the indictment language that Shaw possessed the intent to commit theft in the third degree through a continuing course of conduct over the four-month period. The State failed to do so." *Id*. at 63-64, 497 P.3d at 78-79. "The . . . [Intermediate Court of Appeals] was incorrect when it held that the charge was sufficient merely because the charge 'tracked' the language of the statutory offense and the predicate theft offense, and all the statutory elements were included in the indictment. This court has stated that a charge can be insufficient even when the charge tracks the language of the statute if it fails to sufficiently describe the crime . . . ." *Id*. at 64, 497 P.3d at 79.); *State v. Moavenzadeh*, 135 Wash. 2d 359, 362, 956 P.2d 1097, 1098 (1999) ("this court has held that an information is constitutionally adequate only if it includes all of the essential elements of the crime, both statutory and nonstatutory"); *State v. Rankin*, 257 N.C. App. 354, 809 S.E.2d 358 (2018); *United States v. Qazi*, 975 F.3d 989 (9th Cir. 2020); *Woods v. State*, 361 Ga. App. 844, 850-52, 864 S.E.2d 194, 201-02 (2021).

Local practice varies enormously with regard to the significance that an omission must have in order to be fatal. Most jurisdictions require allegations of: (1) the name of the respondent, (2) a description or characterization of the respondent's conduct that asserts (in factual or conclusory terms) every legal element of the offense charged (including acts done, any circumstances surrounding them that are necessary to make them unlawful, and the requisite mental state or *mens rea*), (3) the place of the crime (disclosing venue in the court, see § 17.05 *infra*), and (4) the approximate date of the crime (within the statute of limitations, see § 17.07 *infra*). Beyond these rudiments, the States differ (and often differ from offense to offense) regarding what must be charged. Some jurisdictions require the name of the victim and great particularization of the means or instrumentalities of the offense. Others disregard these matters. Some disregard even the rudiments just described. Conspicuous among the latter are States that provide statutory "short forms," declaring that a charging paper shall be sufficient for the crime of *x* if it alleges: "On [date], respondent A committed the crime of *x* against complainant B within the jurisdiction of this Court." Local practice must be consulted in the matter.

§ 17.03(c) Lack of Specificity

A charging paper may be wholly unspecific and conclusory. It may duplicate the language of the criminal statute (A "did commit a lewd act") without giving the slightest idea what the respondent *did.* Again, the States vary considerably in the factual specificity required. Many permit allegations in conclusory statutory language under all but the vaguest statutes. *Cf. Michigan v. Doran,* 439 U.S. 282, 290 (1978) (dictum). However, there are limits. A formulation of the rule found in the caselaw of numerous jurisdictions is that: "It is generally sufficient that [a charging paper] . . . set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'. . . 'Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of

the specific offence, coming under the general description, with which he is charged.' . . ." *Hamling v. United States,* 418 U.S. 87, 117-18 (1974); *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 108-10 (2007); *United States v. Bailey,* 444 U.S. 394, 414 (1980); *Russell v. United States*, 369 U.S. 749, 765-69 (1962); *People v. Burchell*, 2018 IL App (5th) 170079, 100 N.E.3d 660, 671, 421 Ill. Dec. 643, 654 (2018) (affirming the dismissal of an information that charged the defendant with failing to report his absence for 3 or more days from his address of registration as a sex offender, the court construes the statute as applying only to absences or 3 or more consecutive days and finds that the information failed to specify that the three days were consecutive as distinguished from aggregate: therefore, "we do not believe that the instrument's less-specific allegation that the defendant was temporarily absent for '3 or more days' during . . . [a 3-month] time period contained sufficient particularity to allow the defendant to prepare a defense"); *United States v. Hillie*, 227 F. Supp. 3d 57, 70-71 (D. D.C. 2017) ("It is important to note that, '[i]n order to meet the requirements of the Sixth Amendment, an indictment must contain every element of the offense charged *and* must fairly apprise the accused *of the conduct allegedly constituting the offense* so as to enable him to prepare a defense against those allegations.' . . . Courts have found that it is especially important to include such facts and circumstances in cases where, by solely tracking the statutory language, the indictment's terms create ambiguity regarding the defendant's conduct. . . . ¶ The indictment at issue in this case is, for the most part, a verbatim recitation of the broad and varied statutory elements of the offenses that are charged against Hillie in the various counts. Among other things, Hillie argues that the 'limited facts contained' in the indictment render this charging document constitutionally deficient, because the indictment does not 'sufficiently apprise him of what he must be prepared to meet at trial' or 'enable him to identify the conduct on which the government intends to base its case.' . . . The government responds that 'the charging language is sufficient[ ] because it tracks the language of the statute and provides the defendant with notice of what he has been charged with.' . . . ¶ [T]his Court agrees with Hillie that the federal child-pornography charges . . . do not contain any facts that describe the conduct of Hillie's that the government believes constitutes criminal behavior, and thus, these counts of the indictment fail to provide adequate notice of the factual bases for the myriad, manifestly indistinguishable charges that the government has brought. Nor do the indictment's vague child-pornography allegations provide adequate protection for Hillie's grand jury and double jeopardy rights. As a result, this Court concludes that the federal child pornography counts in the instant indictment . . . are constitutionally deficient and must be dismissed."); *State v. Israel*, 78 Hawai'i 66, 67-68, 890 P.2d 303, 304-05 (1995) (affirming the dismissal of a count of a complaint which "charged Israel with knowingly possessing or intentionally using or threatening to use a firearm while engaged in the commission of a felony . . . [but which failed] to specify which felony Israel was allegedly committed at the time he possessed, used, or threatened to use a firearm": the Hawai'i Supreme Court relies on Article I, § 14 of the state constitution, providing that in all criminal prosecutions "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation").

Conclusory pleading has several recognized vices. First, it impairs the respondent's rights to be "'fairly inform[ed] . . . of the charge against which he must defend'" (*United States v. Resendiz-Ponce*, 549 U.S. at 108, quoting *Hamling v. United States*, 418 U.S. at 117; and see

§ 9.09(b)(2) *supra*). Second, it frustrates the respondent's interest in having '"the record . . . sho[w] with accuracy to what extent he may plead a former acquittal or conviction [that is, double jeopardy, see § 17.08 *infra*]'" in the event of a subsequent prosecution (*Sanabria v. United States,* 437 U.S. 54, 66 (1978)). Third, it deprives the respondent of any opportunity to test the prosecution's legal theory without contesting its facts – an opportunity traditionally provided by the motion to dismiss and by its progenitor, the common-law demurrer (*see*, *e.g., Russell v. United States,* 369 U.S. at 768-69 ("It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set out 'the specific offence, coming under the general description,' with which the defendant is charged. This purpose . . . is 'to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.'"); Robert L. Weinberg, *Iqbal for the Accused?*, 34-JUL THE CHAMPION 28 (2010); and see § 17.03(a) *supra*). Although some judges seem to think that a vague charging paper can be cured by a bill of particulars (see § 9.07(a) *supra*), the bill actually remedies only the first two of these three vices. It does not touch the third because of the general rule that a demurrer or motion to dismiss will not lie to a bill of particulars. Therefore, attacks upon even venerable forms of conclusory charging papers can be forcefully argued on the ground that these preclude the court from performing its important function of testing the legal sufficiency of the prosecutor's case.

If the factual allegations in the charging paper are not sufficiently specific to enable counsel to investigate and prepare a defense efficiently, counsel should move for a bill of particulars. *See United States v. Montague*, 67 F.4th 520, 531-32 (2d Cir. 2023) ("[If the] allegations [in a charging paper] are . . . subject to the criticism that a defendant might need more notice of the charges . . . [, the] proper way to address such concerns is through a bill of particulars. 'An indictment that fulfills the [pleading] requirements . . . but is nonetheless insufficient to permit the preparation of an adequate defense may be supplemented with a bill of particulars.'").

§ 17.04 JURISDICTIONAL DEFECTS: MAXIMUM AGE AND MINIMUM AGE REQUIREMENTS FOR JUVENILE COURT PROSECUTIONS

§ 17.04(a) Maximum Age

In every State the juvenile code defines the jurisdiction of the juvenile court by establishing a maximum age that marks the limit of eligibility for prosecution as a delinquent. The vast majority of States define 18 as the maximum age, although some jurisdictions have opted for 17 or 16. Many States provide that children within a certain age range (for example, ages 16 to 18) who commit certain crimes are eligible for prosecution in either the juvenile or adult court, thereby giving the two sets of courts concurrent jurisdiction over these children. See Chapter 13.

A key issue is whether juvenile court jurisdiction hinges on the respondent's age at the time of the filing of the Petition or at the time of the crime. Most States treat the respondent's age

at the time of the crime as decisive, permitting juvenile court prosecution of a child who is older than the statutory maximum as long as s/he was under the maximum at the time of the crime. *See, e.g.,* CAL. WELF. & INST. CODE §§ 602, 604(a) (2023); COLO. REV. STAT. ANN. § 19-2.5-103 (2023); N.Y. FAM. CT. ACT § 302.1(2) (2023). A few States turn eligibility for juvenile court prosecution on the child's age at the time the proceedings commence, *see, e.g.,* OR. REV. STAT. § 419C.005(1) (2023); *State v. Salavea*, 151 Wash. 2d 133, 141-42, 86 P.3d 125, 129 (2004) (under applicable statute, juvenile court jurisdiction turns on the "age of the defendant at the time of the proceedings, regardless of age at commission of the crime"), and another handful of States extend jurisdiction to children on the basis of their age at the time of the commission of the crime, provided that the child does not exceed another designated maximum age by the time the proceedings commence. *See, e.g.,* N.H. REV. STAT. ANN. § 169-B:4(I) (2023) (under 18 at the time of the crime, and under 19 at the time the petition is filed); PA. CONS. STAT. ANN. tit. 42, § 6302 (2023) (under 18 at the time of the crime and under 21 at the time the petition is filed); TEX. FAM. CODE ANN. § 51.02(2)(B) (2023) (under 17 at the time of the crime and under 18 at the time the petition is filed). In States that determine juvenile court jurisdiction by reference to the child's age at the time the proceedings commence, the courts have ruled that the juvenile court retains jurisdiction (or that the adult court lacks jurisdiction) when the prosecutor's or police officers' delay in commencing proceedings was motivated by the purpose of preventing the child from being eligible for juvenile court treatment. *See Miller v. Quatsoe,* 348 F. Supp. 764 (E.D. Wis. 1972), discussed in § 13.04 *supra; State v. Scurlock,* 286 Or. 277, 593 P.2d 1159 (1979); *State v. Hodges*, 28 Wash. App. 902, 904-05, 626 P.2d 1025, 1026 (1981); *State v. Becker,* 74 Wis. 2d 675, 247 N.W.2d 495 (1976). *See also Ulla U. v. Commonwealth*, 485 Mass. 219, 224-25, 149 N.E.3d 713, 719-20 (2020) ("we have recognized that the transfer hearing procedure . . . could, in theory, be misused to proceed in an adult court against a person who committed an offense as a juvenile. Under this scenario, the Commonwealth intentionally could delay proceeding against a juvenile until after his or her nineteenth birthday, at which point the juvenile would have '"aged out" of the Juvenile Court's jurisdiction.' . . . Such inexcusable or bad faith delay would deprive a juvenile of certain advantages of the juvenile justice system. . . . . . In the event that such delay occurs, . . . we have provided a potential remedy for an aggrieved juvenile. Because inexcusable or bad faith delay could implicate due process concerns, . . . the 'acknowledged remedy for delay' is dismissal of the charging instrument"). *Cf. Noah v. Commonwealth*, 489 Mass. 498, 498-99, 502, 184 N.E.3d 784, 785, 788 (2022) (the trial court abused its discretion by granting "a continuance sought by the Commonwealth for the express purpose of delaying resolution of the case past the juvenile's eighteenth birthday" so that the juvenile would be subject to a potential sentence of twelve months in custody (which can be imposed on "a juvenile whose case is disposed of after his or her eighteenth birthday") rather than a potential sentence of "twenty days": "Where a request for a continuance has nothing to do with the orderly disposition of the case, but rather is directed at the timing of the juvenile's impending eighteenth birthday, and at extending the time of commitment beyond that ordinarily authorized by statute, the ample discretion allowed Juvenile Court judges is tightly constrained. A continuance may only be allowed in such circumstances if it is necessary to ensure the rehabilitation of the juvenile and express findings are made to that effect.").

Counsel must weigh considerations carefully and must consult with the client before challenging the jurisdiction of the juvenile court on the ground that the respondent is above the maximum age for juvenile court prosecution. By definition, if s/he is above this age, s/he is subject to prosecution as an adult. Accordingly, the net result of counsel's successful litigation of the motion to dismiss on jurisdictional grounds will usually be the dismissal of the juvenile court Petition and the subsequent filing of a charging paper in adult criminal court. (While some offenses may be too minor for the adult court prosecutor to bother with, and some cases may fall between the cracks, counsel cannot accurately predict either of these contingencies.) Section 13.02 *supra* describes the factors that counsel should consider and about which counsel should advise the client in deciding whether to opt for prosecution in juvenile court or adult court.

§ 17.04(b) Minimum Age and the Infancy Defense

In a handful of States the statute defining the jurisdiction of the juvenile court establishes a minimum age, below which children are not subject to juvenile court prosecution and thus cannot be prosecuted in any court. *See* MASS. GEN. LAWS ANN. ch. 119, § 52 (2023) (age 12); MISS. CODE ANN. § 43-21-105(i) (2023) (age 10); N.Y. FAM. CT. ACT § 301.2(1) (2023) (age 12 generally but down to age 7 for statutorily-enumerated crimes); TEX. FAM. CODE ANN. § 51.02(2)(A) (2023) (age 10); VT. STAT. ANN. tit. 33, § 5102(2)(C) (2023) (age 10). *See also In the Matter of the Welfare of S.A.C.*, 529 N.W.2d 517, 519 (Minn. App. 1995) (although the Juvenile Court Act's delinquency provisions do not establish a minimum age, the court concludes that the CHIPS ("child in need of protection or services") statute, which excludes children below the age of 10 from CHIPS jurisdiction, evidences a legislative "intent to take these children out of the delinquency definition" as well).

In some other States, in which the juvenile court statute is silent on the issue of minimum age, the courts recognize the common-law doctrine of infancy as applying to delinquency prosecutions. At common law, children under the age of seven were irrebuttably presumed to be incapable of forming criminal intent and therefore could not be culpable of an offense; children between the ages of seven and fourteen were subject to a rebuttable presumption of incapacity, which precluded prosecution unless the state proved that the child knew the wrongfulness of his or her act. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 23-24 (1769). *See also* Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687, 707-14 (2006). Some state courts have construed their juvenile court statutes in accordance with this common-law doctrine to deem children below a certain age exempt from prosecution as juveniles and to establish a rebuttable presumption that minors above that age and within a specified age range are incapable of committing a crime. *See, e.g., In re William A.*, 313 Md. 690, 693, 698-99, 548 A.2d 130, 131, 134 (1988) (the "common law defense of infancy" – "'under which an individual below the age of seven years cannot be found guilty of committing a crime'" and under which "'there is a rebuttable presumption'" that children "'between the ages of seven and fourteen . . . [are] incapable of committing a crime'" – "applies in juvenile delinquency adjudicatory hearings" because "[t]he defense is a firmly established principle of our common law; the General Assembly is undoubtedly cognizant of it,

but the Legislature has never repealed it, nor modified it, nor stated that it is inapplicable to juvenile delinquency proceedings," and "[r]epeals by implication are, of course, disfavored"); *State v. Q.D.,* 102 Wash. 2d 19, 22-24, 685 P.2d 557, 559-60 (1984) (construing the juvenile court statute in light of the common-law doctrine and the adult Penal Code to bar prosecution of children below the age of eight and to establish a rebuttable presumption that children between 8 and 12 years of age are incapable of committing a crime); *State v. K.R.L.*, 67 Wash. App. 721, 724, 726, 840 P.2d 210, 212-13 (1992) (8-year-old was exempt from prosecution as a delinquent because the state failed to satisfy its "significant burden" of presenting "'clear and convincing'" evidence to rebut the presumption of incapacity to commit a crime). Other courts have relied upon the common-law doctrine in construing their statutes to bar prosecution of young children who lack the capacity to appreciate the wrongfulness of their actions or to form the mental element of the offense charged. *See, e.g., In re Gladys R.,* 1 Cal. 3d 855, 862-67, 464 P.2d 127, 132-36, 83 Cal. Rptr. 671, 676-80 (1970) (construing the juvenile statute to prohibit prosecution of children below the age of 14 who are unable to understand the wrongfulness of their conduct); *State in the Interest of C.P.,* 212 N.J. Super. 222, 229, 514 A.2d 850, 854 (1986) (construing the juvenile code to prohibit prosecution of children who are incapable of forming the *mens rea* of the offense charged or who are incapable of understanding the significance of the trial or aiding in their own defense); *In the Matter of Robert M.,* 110 Misc. 2d 113, 116, 441 N.Y.S.2d 860, 863 (N.Y. Fam. Ct. 1981) (construing the juvenile statute in light of the common-law and the social scientific literature to prohibit prosecution of children whose "immaturity . . . negatives the requisite specific intent" to constitute the offense charged). However, some courts wholly reject the infancy doctrine as a defense in juvenile court, reasoning that the doctrine was intended solely as a safeguard against exposure of children to the harshness of the criminal system and therefore is inapplicable to delinquency proceedings because these supposedly focus on rehabilitation rather than punishment. *See, e.g.*, *In re Tyvonne*, 211 Conn. 151, 161, 558 A.2d 661, 666 (1989); *State v. D.H.,* 340 So.2d 1163 (Fla. 1976); *In the Interest of G.T.*, 409 Pa. Super. 15, 25, 597 A.2d 638, 643 (1991); *In re Michael,* 423 A.2d 1180 (R.I. 1981).

As explained in § 17.04(a) *supra,* most jurisdictions look to the age of the child at the time of the crime for jurisdictional purposes, but some jurisdictions look to the age of the child at the time of the filing of the Petition. Counsel can argue persuasively that, at least with respect to minimum age requirements, the only permissible consideration is age at the time of the crime, and that children who were ineligible for prosecution at the time of the crime cannot be prosecuted later. This follows from the nature of the common-law infancy doctrine: Its presumption of incapacity to form the requisite mental state for criminality was concerned with whether or not the child's age – and mental state as shaped by chronological age – at the time of the crime rendered him or her culpable for his or her actions.

In States that have a statutory or common-law minimum age requirement, counsel for an under-age respondent can raise the jurisdictional issue either by a pretrial motion to dismiss or at trial. If the statute or caselaw establish an absolute bar to prosecution of the child, there is no risk involved in raising the issue by pretrial motion, and that procedure is in the child's interest because it terminates the case quickly. But if the applicable statutory or common-law standard

permits the prosecutor to prove eligibility for prosecution by showing that the respondent is capable of forming a particular mental state (the *mens rea* of the crime, an appreciation of the wrongfulness of the act, an understanding of the proceedings, an ability to assist in his or her own defense), counsel is well advised to raise the jurisdictional defense for the first time at trial, so that a prosecutor who has not spotted the issue will fail to gather the psychiatric and other evidence s/he needs to satisfy the prosecution's burden.

§ 17.05 DISMISSAL OF THE CHARGING PAPER FOR FAILURE TO ESTABLISH VENUE

A charging paper is generally held fatally defective if it does not allege facts establishing venue in the court where it is filed. Allegations in terms of "*X* street" or "*Y* township" are ordinarily sufficient; the court will judicially notice that *X* street or *Y* township is within the geographical jurisdiction of the court, if it is.

Criminal venue (and its analogue in juvenile delinquency cases) is governed by statute within constitutional limitations. *See*, *e.g.*, *United States v. Lozoya*, 982 F.3d 648 (9th Cir. 2020) (en banc); *United States v. Petlechkov*, 922 F.3d 762 (6th Cir. 2019). The prevalent state constitutional provision guaranteeing trial by a jury of the vicinage may or may not comport a venue restriction (*see* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 4 CRIMINAL PROCEDURE §§ 16.1-16.2 (4th ed. & Supp.); Lisa E. Alexander, *Vicinage, Venue, and Community Cross-Section: Obstacles to a State Defendant's Right to Trial by a Representative Jury*, 19 HASTINGS CONST. L. Q. 261 (1991); Drew Kershen, *Vicinage*, 29 OKLA. L. REV. 801 (1976); 30 OKLA. L. REV. 1 (1977)); and even those forms of state jury-trial guarantees that omit explicit reference to "vicinage" may be read as restricting the place of trial or the area from which the trial jury pool can be drawn (*see Alvarado v. State*, 486 P.2d 891 (Alaska 1971)). The Sixth Amendment to the federal Constitution requires trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." *See United States v. Johnson*, 323 U.S. 273, 275 (1944); *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245-46 (1964); *cf*. U.S. CONST. art. III § 2, cl. 3. The incorporation of the Sixth Amendment into the Fourteenth by *Duncan v. Louisiana*, 391 U.S. 145 (1968) may, therefore, entail some measure of federal constitutional restraint upon state legislative power to manipulate criminal venue. *See Williams v. Florida*, 399 U.S. 78, 92-97 (1970); *Mareska v. State*, 534 N.E.2d 246 (Ind. App. 1989); *but see Price v. Superior Court*, 25 Cal. 4th 104, 625 P.3d 618, 108 Cal. Rptr. 2d 409 (2001); *State v. Bowman*, 588 A.2d 728 (Me. 1991).

The general constitutional and statutory rule is that offenses are triable only in the county (or circuit or other judicial unit) comprising the place where the offense was committed. *See*, *e.g.*, *United States v. Cores*, 356 U.S. 405, 407 (1958); *United States v. Medina-Ramos*, 834 F.2d 874 (10th Cir. 1987); *United States v. Moran-Garcia*, 966 F.3d 966 (9th Cir. 2020); *Thompson v. Brown,* 288 Ga. 855, 708 S.E.2d 270 (2011); *Tanner v. Commonwealth*, 72 Va. App. 86, 841 S.E.2d 377 (2020). The "crime-committed" formula depends principally on the statutory

elements of the offense: If a defendant or juvenile respondent mails a false application to a state agency in another county, for example, venue may turn on whether the statue punishes "making" a false statement or "filing" one. *See*, *e.g.*, *United States v. Powers*, 40 F.4th 129, 134-35 (4th Cir. 2022) ("[F]or some offenses, determining where the crime was committed for venue purposes can be complicated. Mail and wire fraud are 'continuing offense[s],' which may be prosecuted anywhere the offense 'was begun, continued, or completed,' including 'any district from, through, or into which' the mail or wire communication moved. . . . Mail and wire fraud are defined by two essential elements: '(1) the existence of a scheme to defraud and (2) the use of the mails or wire communication in furtherance of the scheme.' . . . But only the second element constitutes the 'essential *conduct* element' for purposes of determining venue. . . . In other words, venue will not lie everywhere the fraudster schemed, but venue is proper in any district associated with misuse of the mail or wires in furtherance of the scheme or 'any acts that cause such misuse.'"); *United States v. Seward*, 967 F.3d 57 (1st Cir. 2020); *United States v. Smith*, 22 F.4th 1236, 1242 (11th Cir. 2022), *subsequent history in Smith v. United States*, 143 S. Ct. 1594 (2023) (the determination whether venue is proper involves a "two-step . . . inquiry. . . . First, we identify the essential conduct elements of the . . . [charge]. Then, we 'discern the location of the commission' of the essential conduct elements, which are the only relevant elements for venue, and determine whether the location of their commission is the same as the location of the trial."). Crimes, the operative elements of which occur in more than one county, are generally triable in either. *United States v. Rodriguez-Moreno*, 536 U.S. 275 (1999); *People v. Posey*, 32 Cal. 4th 193, 82 P.3d 755, 8 Cal. Rptr. 3d 551 (2004); *Wakefield v. State*, 2023 WL 2489444 (Miss. App. 2023); *compare Martinez-Guzman v. Second Judicial District Court in and for County of Washoe*, 137 Nev. 599, 603, 496 P.3d 572, 676 (2021) (Nevada Revised Statutes 171.030 "governs venue over criminal offenses committed in more than one county: ¶ ['] When a public offense is committed in part in one county and in part in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the venue is in either county.['] ¶ . . . The district court's finding of proper venue under this statute depended in part on its finding that intent alone or a preparatory act alone could meet the requirements of that language. We hold that this conclusion was incorrect."), *and United States v. Bowens*, 224 F.3d 302, 308 (4th Cir. 2000) ("Bowens . . . appeals his two convictions for harboring or concealing a fugitive from arrest, arguing that venue for those offenses was not proper in the Eastern District of Virginia. There was no evidence that Bowens engaged in any act in the Eastern District of Virginia to harbor or conceal Beckford or Laidlaw. Nonetheless, the government makes two alternative arguments to support its venue selection: first, that venue was proper in the Eastern District of Virginia because an element of the offense (issuance of the warrant) occurred there; second, that venue was proper because Bowens' offense interfered with the administration of justice in the Eastern District of Virginia. Because both of these arguments fail, we vacate Bowens' harboring convictions."). "[I]n conspiracy cases, 'venue is proper in any district where the agreement was formed or an overt act occurred.'" *United States v. Romans*, 823 F.3d 299, 309-10 (5th Cir. 2016). *Accord*, *United States v. Geibel*, 369 F.3d 682, 696 (2d Cir. 2004) ("'In a conspiracy prosecution, venue is proper in any district in which an overt act in furtherance of the conspiracy was committed by any of the coconspirators. The defendant need not have been present in the district, as long as an overt act in furtherance of the conspiracy

occurred there.'"); *State v. Dent*, 123 Wash. 2d 467, 481, 869 P.2d 392, 400 (1994); *Henry v. Commonwealth*, 2 Va. App. 194, 342 S.E.2d 655 (1986); *compare Jones v. State*, 135 Ga. App. 893, 899-900, 219 S.E.2d 585, 590-91 (1975) ("Venue in a conspiracy prosecution is properly laid either in the jurisdiction where the conspiracy was formed or in any jurisdiction wherein a conspirator committed an overt act in furtherance of the conspiracy. . . . Sub judice, there was no evidence presented as to the place of the formation of the conspiracy. In addition, appellants' alleged participation in the conspiracy consisted of acts committed exclusively in Candler County. Thus, proof of venue rested solely upon the overt acts of co-conspirators Pinkham and Von Bargeron. It was incumbent upon the State to prove, in this respect, that the overt acts were committed in furtherance of the conspiracy and that they took place in Bulloch County. ¶ Did the trial court's failure to instruct the jury on the issue of venue constitute reversible error? We are compelled to answer this question affirmatively. . . . Appellants, by denying participation in the conspiracy and by denying any agreement or concerted action with Pinkham or Von Bargeron, necessarily raised an issue of fact as to venue which properly should have been presented to the jury. . . . Also for the jury's determination was the question of whether the alleged overt acts were proved to have been committed in furtherance of the conspiracy. . . . The trial court's failure to properly charge the applicable law relating to venue removed the above issues from the jury's determination."); *United States v. Williams*, 274 F.3d 1079, 1085 (6th Cir. 2001) ("None of the overt acts in consummation of the conspiracy occurred in Michigan and the conspiracy had no effect in Michigan. Moreover, it was never intended to have any effect there. Carboni, acting [as an informer] for the government, knew when he was making his drug deals with Williams that the drugs would never reach Michigan and that the drugs would be seized and the defendant arrested in Texas. The government's argument notwithstanding, there is no evidence that the *conspirators* fixed the price of the marijuana based upon their determination that the drug could be re-sold for a higher price in Michigan. The conspiracy between Williams and Del Bosque was simply one to sell the marijuana in Texas to a buyer in Texas, who professed that it was *his* purpose (although it was not) to resell the drugs in Michigan. That agreement did not provide the conspirators, Williams and Del Bosque, 'substantial contacts' to Michigan. We do not believe that a government informant may arbitrarily determine venue merely by stating, falsely, where he intends to take the drugs for resale."). (At the trial stage, the rule requiring proof of an overt act in the county or district of prosecution may become quite significant. When forum-shopping, prosecutors frequently pick a jurisdiction having only very attenuated contacts with a conspiracy and allege only one or two overt acts within it. If they fail to prove these specific overt acts at trial, an acquittal is compelled, even though the conspiracy is otherwise abundantly proved. *E.g.*, *Green v. United States*, 309 F.2d 852, 856-57 (5th Cir. 1962).)

In some courts, a respondent who fails to make a pretrial motion to dismiss the charging paper for lack of venue forfeits the right to argue lack of venue as the basis for an acquittal at trial. *E.g.*, *Harper v. United States*, 383 F.2d 795 (5th Cir. 1967); *and see United States v. Carreon-Palacio*, 267 F.3d 381, 392-393 (5th Cir. 2001) ("A defendant indicted by an instrument which lacks sufficient allegations to establish venue waives any future challenge by failing to object before trial. In situations where adequate allegations are made but the impropriety of venue only becomes apparent at the close of the government's case, a defendant

may address the error by objecting at that time, and thus preserve the issue for appellate review."). In other courts, such a pretrial motion is not required. *See*, *e.g.*, *State v. Hampton*, 2012-Ohio-5688, 134 Ohio St. 3d 447, 452, 983 N.E.2d 324, 329 (2012) ("Nothing in the Constitution, statutes, or rules requires a defendant to raise the issue of venue before trial. The state has the obligation to ensure the proper venue within the indictment, for the indictment puts the defendant on notice and the state to its proof."); *United States v. Ghanem*, 993 F.3d 1113 (9th Cir. 2021). Counsel considering a pretrial motion should check the jurisdiction's law on this question. It is important because, where respondents are permitted to delay raising the issue until trial, it is often strategically wise to do so. The relief available on a pretrial motion will be nothing more than a dismissal that leaves the prosecution free to re-charge the respondent in a court of proper venue; also, the prosecution can appeal a ruling in the respondent's favor on a pretrial motion; whereas, if the respondent raises the issue for the first time at trial and obtains an acquittal on that ground, the acquittal will, in most jurisdictions, be unappealable and constitute a bar to re-prosecution. *See*, *e.g.*, *State v. Hampton*, *supra*; and see § 7.03(b) *supra*; *but see Derry v. Commonwealth*, 274 S.W.3d 439 (Ky. 2008).

Venue is typically an intricate technical subject, and counsel does well to research the local law and practice thoroughly in any case in which the offense charged has elements based on events or circumstances outside the county or district in which the charging paper is filed.

§ 17.06 TECHNICAL DEFECTS IN THE CHARGING PAPER

Charging papers may be assailed by motion on a host of technical grounds, some relating to the nature of the charging language ("duplicity," "multiplicity," vagueness, noncompliance with prescribed statutory forms), others relating to strictly formal matters (failure of the Petition to carry the signature of the prosecutor as required by law, failure of the Petition to list the names of the witnesses it intends to present at trial (see § 9.07(b) *supra*), untimeliness of a motion by the prosecutor to amend the Petition, and so forth. *See, e.g.*, *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013). Some of these defects are remediable and will be ordered remedied without the dismissal, re-drawing, and re-filing of the Petition. Others are fatal. *See*, *e.g.*, *People v. Edmondson*, 191 A.D.3d 1015, 1018, 142 N.Y.S.3d 198, 202 (N.Y. App. Div., 2d Dep't 2021) (an indictment that charged assault in the first degree and robbery in the first degree was multiplicitous, charging two counts that are "essentially identical" and thereby "'creat[ing] the risk that a defendant will be punished for, or stigmatized with a conviction of, more crimes than he actually committed'"; although the defect was "unpreserved for appellate review" and although "dismissal of the multiplicitous count will not affect the duration of the defendant's sentence of imprisonment," the court "review[s] this contention in the exercise of our interest of justice jurisdiction" and "dismiss[es] the count charging assault in the first degree in consideration of the stigma attached to the redundant convictions"); *People v. Alonzo*, 16 N.Y.3d 267, 268, 945 N.E.2d 495, at 495, 920 N.Y.S.2d 302, at 302 (2011) ("where the evidence before a grand jury shows a single, uninterrupted attack in which the attacker gropes several parts of a victim's body, the attacker may be charged with only one count of sexual abuse"); *State v. Brown*, 217 Ariz. 617, 177 P.3d 878 (Ariz. App, 2008) **(**under a statute prohibiting the sale, transfer or

offer to sell or transfer a narcotic drug, separate charges of selling and of transferring the drug, based on a single transaction, were multiplicitous); *compare United States v. Smith*, 54 F.4th 755 (4th Cir. 2022) (two counts of an indictment alleging that the defendant lied twice to an F.B.I. agent during a single interview were multiplicitous, and one count should have been dismissed), *with United States v. Maldonado-Passage*, 56 F.4th 830 (10th Cir. 2022) (alternative ground) (two counts of an indictment charging that the defendant hired two unrelated hitmen to kill the same victim were not multiplicitous), *and United States v. Haas*, 37 F.4th 1256 (7th Cir. 2022) (holding that an indictment containing three counts alleging three threats against an F.B.I. agent made in texts sent over the course of two days is not multiplicitous). Local practice must be consulted.

§ 17.07 STATUTE OF LIMITATIONS

Statutes of limitations of prosecutions prescribe the permissible period of time within which a charging paper may be filed after an event, asserting liability based on that event.

In many jurisdictions a charging paper is subject to a motion to dismiss if it either (a) does not allege the date of the offense charged with reasonable specificity ("on or about" will do) or (b) alleges a date that is beyond the period of limitations. *See*, *e.g., United States v. Yashar*, 166 F.3d 873 (7th Cir. 1999). Such a motion may, and usually must, be made before trial, within the deadline for pretrial motions (see § 7.05 *supra*). In other jurisdictions the respondent must go to trial and raise the defense of the statute of limitations by a demurrer to the evidence or a motion for acquittal at the close of the prosecution's case.

To find the statute of limitations that applies to a delinquency offense, counsel must check both the criminal statute establishing the period of limitations for the particular offense and the juvenile code, which may set an earlier period of limitation based upon the child's attainment of the age of majority. *See, e.g.,* N.Y. FAM. CT. ACT § 302.2 (2023) ("juvenile delinquency proceeding must be commenced within the period of limitation prescribed in . . . the criminal procedure law or, unless the alleged act is a designated felony . . ., commenced before the respondent's eighteenth birthday, whichever occurs earlier"); *In re Luis R.*, 2013 IL App. 2d 120393, 992 N.E.2d 591, 592, 372 Ill. Dec. 749, 750 (2013) (juvenile court lacked jurisdiction even though the respondent "was under the age of 17 when he allegedly committed the offenses" because "he was over the age of 21 when the petition was filed").

§ 17.08 DOUBLE JEOPARDY

§ 17.08(a) Introduction: The General Rules

Guarantees against being "twice put in jeopardy" may be found in the Fifth Amendment to the federal Constitution and in most state constitutions. In *Benton v. Maryland,* 395 U.S. 784 (1969), the Supreme Court incorporated the Fifth Amendment guarantee into the Due Process Clause of the Fourteenth Amendment and thereby made it binding in state criminal prosecutions.

The Court thereafter declared its *Benton* decision fully retroactive (*Ashe v. Swenson*, 397 U.S. 436, 437 n.1 (1970); *and see Robinson v. Neil*, 409 U.S. 505 (1973)), but it has reserved the question whether "each of the several aspects of the [federal] constitutional guarantee against double jeopardy" developed by its Fifth Amendment cases is applicable in state prosecutions (*Waller v. Florida*, 397 U.S. 387, 390-91 (1970); *cf. Illinois v. Somerville*, 410 U.S. 458, 468 (1973)). Subsequent cases strongly imply an affirmative answer to this question (*see Greene v. Massey*, 437 U.S. 19, 24 (1978); *Crist v. Bretz*, 437 U.S. 28, 32 (1978); *Hudson v. Louisiana*, 450 U.S. 40, 42 n.3 (1981); *and see McDonald v. City of Chicago*, 561 U.S. 742, 764-65 & nn.12-14 (2010) (listing the Fifth Amendment's Double Jeopardy Clause among the rights that have been incorporated and are fully applicable to the States); *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) ("Incorporated Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' . . . Thus, if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires.")), but these decisions are not categorical on the point (*see Crist v. Bretz*, 437 U.S. at 37-38; *Whalen v. United States*, 445 U.S. 684, 689-90 n.4 (1980)). The argument for full-scale incorporation is supported by numerous decisions involving other incorporated Bill of Rights guarantees, which consistently rely on doctrines and precedents announced in federal prosecutions as establishing the rules to be applied in state cases as well. *See*, *e.g.*, *Ker v. California*, 374 U.S. 23, 30-34, 46 (1963) (Fourth Amendment guarantee against unreasonable search and seizure); *Malloy v. Hogan*, 378 U.S. 1, 9-11 (1964) (Fifth Amendment privilege against self-incrimination); *Lakeside v. Oregon*, 435 U.S. 333, 336 (1978) (same); *New Jersey v. Portash*, 440 U.S. 450, 456-57 (1979) (same); *Washington v. Texas*, 388 U.S. 14, 22 (1967) (Sixth Amendment right to compulsory process); *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970) (Sixth Amendment right to jury trial); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (same); *Ring v. Arizona*, 536 U.S. 584 (2002) (same); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confrontation); *Crawford v. Washington*, 536 U.S. 584 (2004) (same); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (Sixth Amendment right to counsel); *Scott v. Illinois*, 440 U.S. 367 (1979) (same); *Graham v. Florida*, 560 U.S. 48 (2010) (Eighth Amendment prohibition of Cruel and Unusual Punishment); *cf. Ludwig v. Massachusetts*, 427 U.S. 618, 624-30 (1976). "The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. at 10-11.

In *Breed v. Jones,* 421 U.S. 519 (1975), the Court ruled that double jeopardy guarantees are fully applicable to juvenile delinquency proceedings. *See also, e.g.*, *In re A.G.*, 148 Ohio St. 3d 118, 121, 69 N.E.3d 646, 650 (2016) ("the federal and Ohio Constitutions protect juveniles subject to delinquency proceedings from double jeopardy in the same fashion as they do adults").

Federal and state constitutional double jeopardy guarantees establish the general rule that a respondent may not be reprosecuted for the "same offense" if the first trial ended in acquittal or conviction, or if the first trial passed the stage at which jeopardy "attaches" and then ended in a mistrial declared without some "manifest necessity" or the respondent's assent. Each element of this general rule, however, has been qualified by complex definitions and exceptions. Section

17.08(b) *infra* defines the concepts of "attachment of jeopardy" and "same offense." Sections 17.08(c), (d), and (e) examine, respectively, the double jeopardy doctrines governing reprosecution when there has been an acquittal, conviction, or mistrial.

Sections 17.08(f), (g), and (h) then discuss other double jeopardy doctrines. Section 17.08(f) describes the collateral estoppel doctrine that applies to retrials. Section 17.08(g) explains the "dual sovereignty" exception to double jeopardy guarantees. Section 17.08(h) examines the double jeopardy implications of a juvenile court scheme in which evidence is heard first by a referee and the referee's findings are thereafter reviewed by a juvenile court judge.

§ 17.08(b) Definitions

§ 17.08(b)(1) "Attachment of Jeopardy"

Double jeopardy protections come into play only after a first trial has passed the stage at which jeopardy "attaches." In a bench trial jeopardy attaches when the first witness is sworn and the presentation of evidence commences. *Crist v. Bretz,* 437 U.S. 28, 37 n.15 (1978); *Serfass v. United States,* 420 U.S. 377, 388 (1975). In a jury trial jeopardy attaches when the jury is sworn. *Crist v. Bretz*, 437 U.S. at 35-38; *Martinez v. Illinois*, 572 U.S. 833, 839-40 (2014) (per curiam).

§ 17.08(b)(2) "Same Offense"

The guarantee against double jeopardy forbids a respondent's "be[ing] subject for the *same offence* to be[ing] twice put in jeopardy of life or limb." U.S. CONST, amend. V (emphasis added). Thus a threshold issue in double jeopardy analysis is whether the offense for which the respondent is being prosecuted is the "same offense" for which s/he was previously tried. This issue is obviously clear-cut when the second charge leveled against the respondent is a violation of the same criminal code provision that bottomed the first. Another easy call is that all lesser-included-offenses are treated as "the same" as the greater offense which subsumes all of their elements. "Historically, courts have treated greater and lesser-included offenses as the same offense for double jeopardy purposes, so a conviction on one normally precludes a later trial on the other." *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018) (dictum). *See*, *e.g.*, *Price v. Georgia,* 398 U.S. 323 (1970); *De Mino v.New York,* 404 U.S. 1035 (1972) (per curiam); *Harris v. Oklahoma,* 433 U.S. 682 (1977) (per curiam); *United States v. Gries*, 877 F.3d 255 (7th Cir. 2017); *State v. Putfark*, 651 S.W.3d 869 (Mo. App. 2022).. More difficult issues emerge, however, when the respondent's conduct violates two separate statutory provisions, and s/he is prosecuted first for one statutory violation and then the other.

> "Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature . . . intended that each violation be a separate offense. If [the legislature] . . . intended that there be only one offense – that is, a [respondent] . . . could be convicted under either statutory provision for a single act, but not under both – there would be no statutory authorization for a

subsequent prosecution after conviction [or acquittal] of one of the two provisions, and that would end the double jeopardy analysis." *Garrett v. United States,* 471 U.S. 773, 778 (1985).

Techniques for divining legislative intent in the common situation in which it is unclear differ considerably among the jurisdictions. In construing federal legislation, the Supreme Court has employed the so-called *Blockburger* test, deriving from *Blockburger v. United States,* 284 U.S. 299 (1932), which "emphasizes the elements of the two crimes . . . [and asks whether] 'each requires proof of a fact that the other does not"' (*Brown v. Ohio,* 432 U.S. 161, 166 (1977)). *See, e.g.*, *Rutledge v. United States*, 517 U.S. 292, 297 (1996); *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Ball v. United States,* 470 U.S. 856, 861 (1985); *United States v. Reyes-Correa*, 971 F.3d 6 (1st Cir. 2020); *United States v. Gries*, 877 F.3d 255, 259 (7th Cir. 2017) ("Under the familiar *Blockburger* test, if 'the same act or transaction constitutes a violation of two distinct statutory provisions,' the double-jeopardy inquiry asks 'whether each provision requires proof of a fact which the other does not.'. . . A lesser-included offense nests within the greater offense and therefore flunks the *Blockburger* test."); *United States v. Morrissey*, 895 F.3d 541 (8th Cir. 2018). The Court has cautioned that the *"Blockburger* rule[,] . . . [although] a useful canon of statutory construction," is not "a conclusive determinant of legislative intent" and "the *Blockburger* presumption must . . . yield to a plainly expressed contrary view on the part of [the legislature]." *Garrett v. United States,* 471 U.S. at 779. *See also Missouri v. Hunter,* 459 U.S. 359, 368 (1983); *Wood v. Milyard*, 721 F.3d 1190, 1195 (10th Cir. 2013). But, at least in the context of successive prosecutions – as distinguished from multiple charges joined for simultaneous adjudication in a single trial – it is arguable that the *Blockburger* test should prevail and preclude subjecting a respondent to two trials for offenses having identical elements unless the legislature intended specifically to authorize not merely cumulative punishments but multiple trials. And it would be a rare statute that could reasonably be found to manifest the latter intent. *See Ex Parte Chaddock*, 369 S.W.3d 880, 883, 886 (Tex. Crim. App. 2012) (even if "the Legislature manifested its intention that an accused be *punished* for both offenses," the Double Jeopardy Clause nonetheless bars "*successive prosecutions*" for both offenses; "Multiple punishments that result from a single prosecution do not subject a defendant to the evils attendant upon successive prosecutions, namely the 'embarrassment, expense and ordeal' of repetitive trials, 'compelling [the accused] to live in a continuing state of anxiety and insecurity,' and creating 'a risk of conviction through sheer governmental perseverance.'" (footnotes omitted)).

In interpreting their state constitutions and statutes, some state courts employ the *Blockburger* test. *See*, *e.g.*, *State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012); *Gianiny v. State*, 320 Md. 337, 577 A.2d 795 (Md. App. 1990); *May v. State*, 267 So.3d 803, 807-08 (Miss. App. 2018) ("May has two convictions under one statute . . . arising out of the same occurrence: his attack on Jalanivich. The State broke the assault down into two phases, the beating and the strangling, charging each under the same statute. But May's striking and strangling of Jalanivich was during the same assault. 'Whether a transaction results in the commission of one or more offenses is determined by whether separate and distinct acts made punishable by law have been committed.' . . . ¶ . . . May committed one attack to harm Jalanivich. His actions were not each a

discrete and separate act but a part of May's single attack on Jalanivich, i.e., one aggravated assault. Even though the statute for aggravated assault has two methods of proof for the one occurrence, May was not charged under a separate statute with differing elements of proof. Therefore, the same-elements test is inapplicable. Because statutes are to be strictly construed against the State, the two methods of proof are to be construed as describing one aggravated assault in this case. ¶ Thus, the right to protection from double jeopardy precludes the second conviction . . . ."). Other courts use the "same transaction" or compulsory-joinder approach articulated by Justice Brennan, concurring, in *Ashe v. Swenson,* 397 U.S. 436, 450-60 (1970); *see*, *e.g.*, *State v. Boyd*, 271 Or. 558, 533 P.2d 795 (1975), and the authorities collected in *Brooks v. Oklahoma,* 456 U.S. 999, 1000 (1982) (opinion of Justice Brennan, dissenting from denial of *certiorari*). Still other courts use an idiosyncratic local test. *See*, *e.g.*, *Wadle v. State*, 151 N.E.3d 227, 235 (Ind. 2020) ("[W]hen a defendant's single act or transaction implicates **multiple** criminal statutes (rather than a single statute) , . . [the court should conduct a two-part inquiry: First, a court must determine, under our included-offense statutes, whether one charged offense encompasses another charged offense. Second, a court must look at the underlying facts – as alleged in the information and as adduced at trial – to determine whether the charged offenses are the 'same.' If the facts show two separate and distinct crimes, there's no violation of substantive double jeopardy, even if one offense is, by definition, 'included' in the other. But if the facts show only a single continuous crime, and one statutory offense is included in the other, then the presumption is that the legislation intends for alternative (rather than cumulative) sanctions. The State can rebut this presumption only by showing that the statute – either in express terms or by unmistakable implication – clearly permits multiple punishment.").

§ 17.08(c) Reprosecution After An Acquittal

Double jeopardy guarantees clearly and unequivocally bar reprosecution for the same offense after an individual has been acquitted. *United States v. Martin Linen Supply Co.,* 430 U.S. 564 (1977); *see, e.g., Ball v. United States,* 163 U.S. 662, 671 (1896); *United States v. Scott,* 437 U.S. 82, 91 (1978); *Bullington v. Missouri,* 451 U.S. 430, 437-38, 445 (1981), and cases cited; *Yeager v. United States*, 557 U.S. 110, 117-20, 122-23 (2009); *McDaniels v. Warden Cambridge Springs SCI*, 700 Fed. Appx. 119, 121 (3d Cir. 2017); *and see State v. Allen*, 192 Wash. 2d 526, 431 P.3d 117 (2018) (applying the rule to a sentencing enhancement factor that is viewed as an element of a greater offense). *Cf. Blueford v. Arkansas*, 566 U.S. 599, 605-08 (2012); *Bravo-Fernandez v. United States*, 580 U.S. 5, 9 (2016); *Commonwealth v. Landis*, 2018 PA Super 351, 201 A.3d 768 (Pa. Super. 2018) (the defendant was tried before a jury on charges of first degree murder, third degree murder, voluntary manslaughter, and involuntary manslaughter; the jury found him guilty of first degree murder but acquitted him of the other charges, including third degree murder; after the first degree conviction was vacated on ineffective-assistance grounds in postconviction proceedings, the prosecution petitioned the trial court to reinstate the third degree murder charge, arguing that third degree murder is a lesser included offense of the first degree murder count on which the defendant had been convicted; the Superior Court affirms denial of the petition on the ground that double jeopardy prohibits reprosecution after an acquittal even when the acquittal is logically inconsistent with conviction

on a greater charge). "A trial court's actions constitute 'an acquittal on the merits when "the ruling of the judge . . . represents a resolution [in defendant's favor] . . . of some or all of the factual elements of the offenses charged."' . . . In determining whether a trial court's ruling represents a resolution in the defendant's favor of some or all of the factual elements of the offense charged, we consider both the form and the substance of the trial court's ruling. . . . A finding of insufficient evidence to convict amounts to an acquittal on the merits because such a finding involves a factual determination about the defendant's guilt or innocence." *State v. Sahr*, 812 N.W.2d 83, 90 (Minn. 2012) (reviewing relevant decisions of the U.S. Supreme Court and applying them to bar reprosecution after a trial judge has dismissed a charging paper on the basis of the prosecution's "concession that it lacked sufficient evidence to prove an essential element" of the offense initially charged (*id*.) and has denied the prosecution leave to amend that charge by adding a count alleging a lesser-included crime (*id*. at 87)); *Walker v. Commonwealth*, 288 S.W. 3d 729 (Ky. 2009) (at the close of the prosecution case, the defendant moved for a directed verdict on a charge of tampering with evidence; the prosecutor replied that the charge was based on the defendant's having thrown guns away; the judge granted the motion, commenting that he did not recall any evidence to that effect; then, at the close of all evidence, the prosecutor moved for reconsideration of the directed verdict, arguing that the tampering indictment was open-ended and that evidence had been presented that the defendant had disposed of ski masks and clothing bearing on the crime; the judge reinstated the tampering charge and the defendant was convicted on it; the Kentucky Supreme Court holds that the mid-trial directed verdict was an acquittal and that reinstatement of the charge constituted double jeopardy in violation of the Fifth Amendment). *See also, e.g.*, *Deedy v. Suzuki*, 788 Fed. Appx. 549 (9th Cir. 2019) (in the defendant's first jury trial on a charge of second-degree (intentional) murder, both the defense and the prosecution objected to the submission of reckless manslaughter as a lesser included offense and the trial judge agreed, stating in a conference on instructions that "I don't think there's any evidence to support manslaughter"; the jury deadlocked and a mistrial was declared; the Ninth Circuit holds that reprosecution for reckless manslaughter is barred by double jeopardy because the instructional ruling amounted to an acquittal); *Martinez v. Illinois*, 572 U.S. 833, 834, 842 (2014) (per curiam) (the trial judge's grant of defense counsel's motion for "a directed not-guilty verdict" when the state "declined to present any evidence" and instead moved for a continuance after the jury had been empaneled and sworn, "was an acquittal because the court 'acted on its view that the prosecution had failed to prove its case.' . . . And because Martinez was acquitted, the State cannot retry him."). *And see Evans v. Michigan*, 568 U.S. 313, 315-16, 318 (2013) (the trial judge's midtrial entry of a "directed verdict of acquittal" in a jury trial, based upon the judge's "view that the State had not provided sufficient evidence of a particular element of the offense" which "turn[ed] out" not to be "a required element at all," constituted "an acquittal for double jeopardy purposes" and barred a retrial notwithstanding the judge's error: "[A]n acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, . . .; a mistaken understanding of what evidence would suffice to sustain a conviction, . . .; or a 'misconstruction of the statute' defining the requirements to convict, ... In all these circumstances, 'the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character.' . . . [O]ur cases have defined an acquittal to

encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense."); *State v. Karpov*, 195 Wash. 2d 288, 293, 458 P.3d 1182, 1184-85 (2020) ("A dismissal by a trial judge is a judicial acquittal when it adjudicates the ultimate question of factual guilt or innocence. . . . Thus, when the trial court 'act[s] on its view that the prosecution ha[s] failed to prove its case' and dismisses the case in the defendant's favor, the trial court judicially acquits the defendant. . . . A judicial acquittal triggers the protections of the double jeopardy clauses even when the judge bases the acquittal on an erroneous understanding of the elements of the crime.").

When a jury convicts a defendant only of a lesser-included offense and is silent regarding the offense charged, the verdict constitutes an acquittal of the greater charge and bars reprosecution on it. *Green v. United States*, 355 U.S. 184 (1957); *Price v. Georgia*, 398 U.S. 323 (1970). If the jury returns a verdict stating explicitly that the jurors are unable to agree regarding the offense charged but convicting the defendant of a lesser-included or alternative offense, there is disagreement as to whether reprosecution on the greater charge is permissible. *Compare State v. Martin*, 247 Ariz. 101, 446 P.3d 806 (2019), *and Terry v. Potter*, 111 F.3d 454 (6th Cir. 1997), *with United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997), *and Cleary v. State*, 23 N.E.3d 664 (Ind. 2015). *And see United States v. Candelario-Santana*, 977 F.3d 146, 155, 156 (1st Cir. 2020) (alternative ground) ("We do not disagree with the district court's conclusion that, if the jury truly was 'clear and deliberate in expressing its deadlock' with respect to the death penalty, double jeopardy would not bar the government from seeking the death penalty upon retrial. We are not convinced, however, that the record so clearly supports the government's position that the jury was hopelessly deadlocked on the question of death. [It could be that, "by instructing the jury repeatedly as to the consequences of deadlock (namely, that it would result in an imposition of a life sentence), the district court reduced the jury's choice to a binary one – i.e., to either death or life in prison – and that any decision by the jury other than a unanimous verdict for death acquitted Candelario of the death penalty."] We therefore cannot say that the district court properly concluded that the original penalty-phase jury was deadlocked. . . . Consequently, the government is now barred from seeking the death penalty a second time.").

Unlike jury trials, in which a verdict of "not guilty" obviously is an "acquittal" for purposes of double jeopardy, *Fong Foo v. United States,* 369 U.S. 141 (1962) (per curiam), there may be questions whether a dismissal in a bench trial constituted an acquittal so as to bar reprosecution. *See, e.g.*, *Smalis v. Pennsylvania*, 476 U.S. 140 (1986). The rule (which also applies to ambiguous rulings terminating a jury trial) is that "'the trial judge's characterization of his own action cannot control the classification of the action.'" *United States v. Scott,* 437 U.S. at 96 (quoting *United States v. Jorn,* 400 U.S. 470, 478 n.7 (1971) (plurality opinion)). Instead, the test is whether "'the ruling of the judge, whatever its label, actually represents a resolution [in the [respondent's] . . . favor], correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Scott,* 437 U.S. at 97. *See, e.g., Sanabria v. United States,* 437 U.S. 54 (1978); *Martinez v. Illinois*, 572 U.S. at 842. *See also In the Interest of M.H.P.*, 830 N.W.2d 216, 218-20 (N.D. 2013) (juvenile court judge's dismissal of a delinquency petition at disposition on the ground that M.H.P. was "not in need of treatment or rehabilitation" despite a finding at

trial that he committed the charged act, functioned as an acquittal for double jeopardy purposes and "bars the State from appealing" because Nebraska's statutory definition of delinquency requires both a finding at trial that the child committed the charged act and a finding that the child is "in need of treatment or rehabilitation").

Although double jeopardy issues ordinarily arise when the government seeks to prosecute an individual after a first trial has concluded (either in a verdict or a mistrial), double jeopardy protections also may come into play if a trial judge grants a midtrial judgment of acquittal on one or more counts of the charging paper and is inclined to reconsider that ruling after the defense case has already commenced and the defense has begun presenting evidence. If the judge's ruling qualifies as a "judgment of acquittal" for double jeopardy purposes (under the test described in the preceding paragraph) and if state law does not expressly authorize judicial reconsideration of such a ruling (and – arguably – if, in addition, the judge does not reserve the right to reconsider or indicate that the ruling is not final), double jeopardy protections bar the trial judge from reconsidering the ruling. *Smith v. Massachusetts*, 543 U.S. 462, 473-74 (2005). *Compare Price v. Vincent*, 538 U.S. 634 (2003); *Schiro v. Farley*, 510 U.S. 222 (1994).

When a jury convicts a respondent but the trial judge enters a judgment in the respondent's favor N.O.V. (see § 37.02 *infra*), that judgment does not constitute an acquittal for purposes of the rules summarized in this section even if the judge labels it an "acquittal": the prosecution may appeal it (*see United States v. Wilson*, 420 U.S. 332 (1975), and *e.g.*, *United States v. Filer*, 56 F.4th 421 (7th Cir. 2022); *United States v. Jabar*, 19 F.4th 66 (2d Cir. 2021); *United States v. Rafiekian*, 991 F.3d 529 (4th Cir. 2021)) notwithstanding the rule barring prosecutorial appeal of an acquittal in a bench trial (*see United States v. Martin Linen Supply Co., supra)*.

§ 17.08(d) Reprosecution After Conviction in the First Trial

Once convicted, a respondent may not be reprosecuted for the same offense. *E.g., Brown v. Ohio,* 432 U.S. 161 (1977); *Harris v. Oklahoma,* 433 U.S. 682 (1977) (per curiam). This rule is said not to preclude a second prosecution in certain "special circumstances." *Ricketts v. Adamson,* 483 U.S. 1, 8 (1987). Three such circumstances recognized by the caselaw are: (i) when "the State is unable to proceed on the [second] . . . charge at the outset because the . . . facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence," *Brown v. Ohio,* 432 U.S. at 169 n.7 (dictum); *see Garrett v. United States,* 471 U.S. at 789-92; (ii) when the prosecution makes multiple charges in the alternative at the outset and the respondent elects to obtain a disposition of some of them prior to the others, *Jeffers v. United States,* 432 U.S. 137, 151-54 (1977); *Ohio v. Johnson,* 467 U.S. 493 (1984); and (iii) when the conviction on the earlier charges was the result of a plea agreement that the respondent later violates, *Ricketts v. Adamson*, 483 U.S. at 8-12.

Double jeopardy guarantees also do not bar reprosecution of a previously convicted respondent if the respondent succeeded in getting the first conviction set aside by a posttrial

motion, an appeal, or postconviction proceedings. *See, e.g., Smith v. United States*, 143 S. Ct. 1594 (2023); *Bravo-Fernandez v. United States*, 580 U.S. 5 (2016); *United States v. Tateo,* 377 U.S. 463, 465-68 (1964); *United States v. Serrano,* 856 F.3d 210 (2d Cir. 2017). However, retrial will be barred even after a conviction has been set aside if the basis for that action was a finding by either the trial court or an appellate court that the evidence was insufficient to support the conviction. *Hudson v. Louisiana,* 450 U.S. 40 (1981); *Burks v. United States,* 437 U.S. 1 (1978); *Monge v. California*, 524 U.S. 721, 729 (1998) (dictum). *But see Tibbs v. Florida,* 457 U.S. 31 (1982) (reprosecution permissible when the basis for reversal was not insufficiency of the evidence, but rather that the appellate court, sitting as a "thirteenth juror" found the conviction to be "against the weight of the evidence").

§ 17.08(e) Reprosecution After the First Trial Ends in a Mistrial

Double jeopardy guarantees will not bar reprosecution if the first trial ended in a mistrial, at the request of, or with the acquiescence of, the respondent, *United States v. Dinitz,* 424 U.S. 600 (1976), except when the respondent's request for the mistrial was occasioned by prosecutorial misconduct "intended to 'goad' the [respondent] into moving for a mistrial" (*Oregon v. Kennedy,* 456 U.S. 667, 676 (1982) (dictum); *compare United States v. Foster*, 945 F.3d 470 (6th Cir. 2019), *with State v. Parker*, 391 S.C. 606, 707 S.E.2d 799 (2011)).

A mistrial declared without the respondent's assent will bar reprosecution, *see, e.g., Downum v. United States,* 372 U.S. 734 (1963); *United States v. Jorn,* 400 U.S. 470 (1971); *State v. Stephenson*, 307 Or. App. 189, 476 P.3d 527 (2020); *State v. Fennell*, 431 Md. 500, 66 A.3d 630 (2013); *Commonwealth v. Balog*, 395 Pa. Super. 158, 576 A.2d 1092 (1990), except when the mistrial was declared under circumstances of "manifest necessity." *See, e.g., Illinois v. Somerville,* 410 U.S. 458 (1973); *Arizona v. Washington,* 434 U.S. 497 (1978); *Renico v. Lett*, 559 U.S. 766, 773-75 (2010); *Blueford v. Arkansas*, 566 U.S. at 609-10. Under ordinary circumstances, a hung jury constitutes "manifest necessity" for this purpose. *Richardson v. United States*, 468 U.S. 317 (1984). But if the prosecution voluntarily dismisses the charges following a hung-jury mistrial, double jeopardy does bar reprosecution, even though the prosecutor's stated reason for the dismissal is the jury's failure to agree. *State v. Courtney*, 372 N.C. 458, 831 S.E.2d 260 (2019). *Compare Seay v. Cannon*, 927 F.3d 776, 779 (4th Cir. 2019) ("[W]e conclude that the government failed to satisfy its high burden of showing manifest necessity for a mistrial. The record shows that the government allowed the jury to be empaneled knowing that the crucial witness might not appear to testify. Additionally, the state trial court failed to consider possible alternatives to granting the government's mistrial motion."); *Gouveia v. Espinda*, 926 F.3d 1102, 1113 (9th Cir. 2019) (the grant of a mistrial on the prosecutor's motion when members of the jury, after having deliberated and reached a verdict but before announcing it, expressed fear for their safety because of a "scary looking man" on the prosecution's side of the courtroom was not justified by "manifest necessity" and therefore barred retrial: "'A trial court should consider and correctly evaluate the alternatives to a mistrial" and, "once the court considers the alternatives, it should adopt one if less drastic and less harmful to the defendant's rights than a mistrial.'"); *Mansfield v. State*, 422 Md. 269, 290-93, 29 A.3d

569, 581-83 (2011) (judge's declaration of a mistrial at the close of evidence in a bench trial – based on her knowledge of the defendant's having been twice previously convicted of similar crimes, once in a jury trial over which the judge herself presided – was not justified by a "manifest necessity," and retrial therefore was barred by double jeopardy, because the judge possessed this knowledge before jeopardy attached and, "rather than proceeding to try the petitioner, knowing what she did of his criminal history, the trial judge should have recused herself"); *In the Matter of McNair v. McNamara*, 206 A.D.3d 1689, 1691, 169 N.Y.S.3d 774, 777 (N.Y. App. Div., 4th Dept. 2022) ("there was no manifest necessity for the mistrial, and the court therefore abused its discretion in granting it sua sponte" based on the judge's inability to come to court due to apparent COVID symptoms until testing negative or recovering: "The record establishes that the court did not consider the alternatives to a mistrial, such as a continuance . . . or substitution of another judge"); *In re Morris v. Livote*, 105 A.D.3d 43, 47, 962 N.Y.S.2d 59, 62 (N.Y. App. Div., 1st Dept. 2013) (double jeopardy barred a retrial after the first trial ended with the judge's granting the prosecution's motion for a mistrial based on "defense counsel's improper questioning" of a prosecution witness: "Although defense counsel's disregard of the court's instructions was blameworthy and understandably angered the court, the [defense] cross-examination did not rise to the level of the gross misconduct displayed in cases in which retrial was permitted."); *Commonwealth v. Goods*, 2021 PA Super 206, 265 A.3d 662, 673 (Pa. Super. 2021) (defense counsel's asking two improper questions of a prosecution witness did not constitute "manifest necessity"; therefore, the trial court's granting of the prosecution's motion for a mistrial triggered a double-jeopardy bar to the defendant's retrial).

§ 17.08(f) Collateral Estoppel

The Supreme Court has held that the federal Fifth Amendment embodies a "rule of collateral estoppel" (often called "issue preclusion") in criminal cases, *Yeager v. United States*, 557 U.S. 110, 119-20 & n.4 (2009); *Ashe v. Swenson,* 397 U.S. 436, 444 (1970), so that, following acquittal at a first trial, a criminal defendant or juvenile respondent may not be retried for any offense – whether or not it is the "same offense" within the definition of § 17.08(b)(2) *supra* – if conviction of the offense requires proof of facts that are inconsistent with the facts established in the accused's favor by his or her prior acquittal. *E.g., Yeager v. United States*, 557 U.S. at 119-20; *Simpson v. Florida,* 403 U.S. 384 (1971) (per curiam); *Harris v. Washington,* 404 U.S. 55 (1971) (per curiam); *Turner v. Arkansas,* 407 U.S. 366 (1972) (per curiam); *Wilkinson v. Gingrich*, 806 F.3d 511, 516-20 (9th Cir. 2015). "For . . . [the] doctrine [of collateral estoppel] to apply . . . , an issue of ultimate fact decided in . . . [the defendant's] favor through his acquittal must be fatal to the subsequent prosecution." *United States v. Inman*, 39 F.4th 357, 359 (6th Cir. 2022). *See*, *e.g., Ferrell v. State*, 318 Md. 235, 567 A.2d 937 (1990) ("[U]nder both the Fifth Amendment [to the federal Constitution] and Maryland common law, it is established that the doctrine of collateral estoppel is embodied in the double jeopardy prohibition. *Id*. at 241, 567 A.2d at 940. "[T]he critical questions in applying collateral estoppel are not whether the victim is the same or whether each offense is the same. The important questions are whether the offense for which the defendant was earlier acquitted, and the offense for which he is being retried, each involved a common issue of ultimate fact, and whether that issue was resolved in the defendant's

favor at the earlier trial. *Id*. at 243, 567 A.2d at 941. "[I]n determining whether the State at a subsequent trial is attempting to relitigate an issue which was resolved in the defendant's favor at an earlier trial, a court must realistically look at the record of the earlier trial, including the pleadings, the evidence, the prosecution's theory, the disputed issues, and the jury instructions. A court should not, as did the trial court in the instant case, ignore the evidence and disputed issues at the earlier trial and speculate that the jury's acquittal might have been based on a theory having nothing to do with the evidence and issues presented to the jury. ¶ Moreover, in reviewing the earlier trial to determine the jury's basis for the acquittal, a court 'should not strain to dream up hypertechnical and unrealistic grounds on which the previous verdict might conceivably have rested.'" *Id*. at 245, 567 A.2d at 942.); *People v. Terrance*, 2019 WL 1049701 (Mich. App. 2019) ("Defendant was tried before a jury on charges of first-degree premeditated murder and first-degree felony murder. The predicate felony for the felony-murder charge was torture, though it was not charged as a separate individual crime. The jury was instructed on second-degree murder as a lesser included offense for both charges. After two days of deliberation, the jury acquitted defendant of first-degree murder and the lesser offense of second-degree murder. The jury was unable, however, to reach a verdict on the felony-murder charge. ¶ . . . The prosecutor then charged defendant with torture, and defendant . . . moved to dismiss, arguing that the charge constituted (1) a violation of double jeopardy . . . . *Id*. at *1-*2. "The Double Jeopardy Clause includes the concept of issue preclusion, also known as collateral estoppel." *Id*. at *2. "[T]he jury [in the first trial] was asked to find that defendant murdered Tillman . . . as the final act of an assault in which he also inflicted a severe beating and that the extensive beating and suffocation constituted the crime of torture. The prosecution emphasized that point during closing argument, referring to the beating and killing as a single attack . . . Throughout the trial, the prosecution's evidence and argument were directed toward a finding that defendant was the victim's sole assailant, that the assault was a continuous or near-continuous event, beginning with a beating and culminating in defendant suffocating the victim. The defense asserted that defendant was not the party responsible for either the beating or the murder. The question, therefore, as presented by both sides, was whether defendant was the victim's assailant . . . ; neither side suggested that defendant committed only the murder or only the beating. Accordingly, we conclude that the prosecution's claim that defendant tortured the victim on that day is barred under the doctrine of issue preclusion by the jury's verdict acquitting defendant of murder." *Id*.); *Ex Parte Watkins*, 73 S.W.3d 264, 265 (Tex. Crim. App. 2002) ("[T]he doctrine of collateral estoppel applies in a subsequent prosecution of . . . [a defendant] for attempted capital murder or attempted murder of his wife's lover, when a prior jury found that appellant killed his wife 'in sudden passion' during the same transaction. . . . [T]hough . . . [collateral estoppel] does not preclude the State from prosecuting the charged offenses . . . [, the State is precluded from re-litigating the issue of sudden passion in the second trial."); *Ex parte Taylor*, 101 S.W.3d 434, 443 (Tex. Crim. App. 2002) (en banc) (two passengers were killed when a car driven by the defendant collided with an oncoming vehicle; the prosecution first charged the defendant with intoxication manslaughter based on alcohol inebriation, and a jury acquitted him of that charge; the prosecution then charged him with intoxication manslaughter of the other passenger based on inebriation either by marijuana alone or by marijuana and alcohol; a divided Texas Court of Criminal Appeals examines the evidentiary record of the first trial and finds that "[t]he *source* of . . . [the

defendant's] intoxication was not a disputed issue in the first trial. It was only the more general issue of intoxication was he or wasn't he that was disputed, and upon this issue, the . . . [defendant] prevailed"; it accordingly holds that collateral estoppel bars the second prosecution); *Commonwealth v. States*, 595 Pa. 453, 938 A.2d 1016 (2007) (a defendant's bench trial on charges of causing an accident involving death while not properly licensed was conducted simultaneously with a jury trial on charges of homicide by vehicle, homicide by vehicle while driving under the influence of alcohol, and DWI; the trial judge acquitted the defendant of the license-violation charges, expressly finding that the prosecution had failed to prove that the defendant was the driver of the vehicle; the jury hung on all other charges; a divided Pennsylvania Supreme Court holds that collateral estoppel based upon the judge's finding bars the prosecution from retrying the defendant on any of the charges on which the jury deadlocked; *compare Commonwealth v. Jordan*, 256 A.3d 1094, 1096 (Pa. 2021) ("a defendant who elects to proceed with a simultaneous jury and bench trial during aa defendant who elects to proceed with a simultaneous jury and bench trial during a single prosecution is subjected to only one trial and therefore double jeopardy and collateral estoppel do not apply to preclude the guilty verdict rendered by the judge."). *Compare Schiro v. Farley*, 510 U.S. 222, 232-36 (1994), *and Dowling v. United States*, 493 US 342, 350-52 (1990). Conviction of a lesser included offense or degree of the offense almost certainly constitutes an implicit acquittal of the greater offense or degree for this purpose (*Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018) (dictum)), just as it does for the purpose of the rule barring reprosecution for the "same offense" following an acquittal, *Price v. Georgia,* 398 U.S. 323 (1970); *De Mino v. New York,* 404 U.S. 1035 (1972) (per curiam). *Compare Yeager v. United States*, 557 U.S. at 121-23 (when a jury acquits a defendant on some counts of a multi-count indictment and hangs on others that require a finding of the same "critical issue of ultimate fact" as "an essential element," the prosecution is barred from retrying the defendant on the counts on which the jury hung; "collateral estoppel" or "issue-preclusion analysis" cannot ascribe significance to a jury's inability to reach a verdict on the latter counts "[b]ecause a jury speaks only through its verdict" and thus "there is no way to decipher what a hung count represents"; "To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide.") *and Roesser v. State*, 294 Ga. 295, 295, 298, 300, 751 S.E.2d 297, 297, 299, 301 (2013) (applying *Yeager v. United States* to hold that collateral estoppel barred retrial of the defendant for voluntary manslaughter, following a trial in which the jury acquitted the defendant of "malice murder, felony murder, and aggravated assault but was unable to reach a verdict on the lesser included offense of voluntary manslaughter"; "the jury in acquitting Roesser of [the higher counts] . . . necessarily determined that Roesser acted in self-defense and . . . this issue of ultimate fact constitutes a critical element of voluntary manslaughter"), *and In re Moi*, 184 Wash. 2d 575, 577, 580, 360 P.3d 811, 812, 813 (2015) (the doctrine of collateral estoppel barred retrial of the defendant for murder after the jury in the first trial "was unable to reach a verdict on the murder charge" and "[b]ased on the same evidence, Moi was acquitted [in a concurrent bench trial] of unlawful possession of the gun" that was used to commit the murder, and "the State's theory of the case [in the murder retrial] was that he shot the victim with . . . [the] gun he was [previously] acquitted of possessing"), *with Bravo-Fernandez v. United States*, 580 U.S. 5, 8-9 (2016) (if "a jury returns inconsistent verdicts, convicting on one count and acquitting on another count, where both counts turn on the very

same issue of ultimate fact," then the doctrine of "issue preclusion does not apply" because of the rule of *United States v. Powell*, 469 U.S. 57 (1984), and this rule bars issue preclusion even if "the guilty verdicts were vacated on appeal because of error in the judge's instructions unrelated to the verdicts' inconsistency"; unlike the scenario in *Yeager v. United States*, *supra* – where "issue preclusion attend[s] a jury's acquittal verdict if the same jury in the same proceeding fails to reach a verdict on a different count turning on the same critical issue," because "'there is no way to decipher what a hung count represents'" and "a jury's failure to decide 'has no place in the issue-preclusion analysis'" – "actual inconsistency in a jury's verdicts is a reality," which ordinarily bars issue preclusion under *Powell*, and "vacatur of a conviction for unrelated legal error does not reconcile the jury's inconsistent returns"), *and Bobby v. Bies*, 556 U.S. 825, 835 (2009) (collateral estoppel does not apply to "a subsidiary finding that, standing alone, is not outcome determinative" but does apply to "a determination necessary to the bottom-line judgment").

In *Currier v. Virginia*, 138 S. Ct. 2144 (2018), a fractured Supreme Court revisited *Ashe*. Five Justices subscribed to an opinion which said that the *Ashe "*test is a demanding one. *Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial. . . . A second trial 'is not precluded simply because it is unlikely – or even very unlikely – that the original jury acquitted without finding the fact in question.' . . . To say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, we must be able to say that 'it would have been *irrational* for the jury' in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second." (*Currier*, 138 S. Ct. at 2150). Technically, this is dictum because Currier's double-jeopardy claim was rejected on the ground that by joining the prosecution in a request for severance of two charges, he had waived any double-jeopardy claim he might have had against a second prosecution following acquittal in the first. ("[C]onsenting to two trials when one would have avoided a double jeopardy problem precludes any constitutional violation associated with holding a second trial." *Id*. at 2151.) But it is dictum in command mode. A four-Justice plurality then proceeded to write an extended critique of the principle of issue preclusion in criminal cases, suggesting that *Ashe* would be in trouble if the plurality could gain a fifth vote. Justice Kennedy, the potential fifth vote, abstained from joining this critique; and four dissenting Justices disagreed with both the critique and the majority's holding that Currier had waived his double-jeopardy rights. Counsel will need to be on the *qui vive* for ensuing chapters in the *Ashe* saga.

But whether or not *Ashe* survives as federal constitutional law, a jurisdiction's statutory or common-law doctrines of collateral estoppel will continue in many circumstances to protect defendants from relitigation of issues previously resolved in their favor. *See*, *e.g.*, *United States v. Arterbury*, 961 F.3d 1095 (10th Cir. 2020); *Crosby-Garbotz v. Fell, Judge Pro Tempore of the Superior Court in and for the County of Pima*, 246 Ariz. 54, 434 P.3d 143 (2019) (holding that "issue preclusion may apply in a criminal proceeding when an issue of fact was previously adjudicated in a dependency proceeding and the other elements of preclusion are met"); *Mason v. State,* 361 Ark. 357, 206 S.W.3d 869 (2005); *Commonwealth v. Williams*, 431 Mass. 71, 725

N.E.2d 217 (2000); *State v. Butler*, 505 N.W.2d 806 (Iowa 1993); *People v. Acevedo,* 69 N.Y.2d 478, 508 N.E.2d 665, 515 N.Y.S.2d 753 (1987); *Harris v. State*, 193 Ga. 109, 17 S.E.2d 573 (1941). Similarly, state-law doctrines of *res judicata* (*see*, *e.g.*, *Webster v. State*, 376 P.3d 488 (Wyo. 2016); *Highsmith v. Commonwealth*, 25 Va. App. 434, 489 S.E.2d 239 (1997); *State v. Stahley*, 12 Or. App. 579, 507 P.2d 1159 (1973)) and of finality of judgments or law of the case (*see*, *e.g.*, *State v. Jackson*, 306 So.3d 936 (Fla. 2020); *Okafor v. State*, 306 So.3d 930 (Fla. 2020)) will remain available to bar successive prosecutions in some situations, regardless of the ultimate fate of *Ashe*.

For an argument that principles of collateral estoppel together with other components of double-jeopardy theory outlaw the prosecutorial practice of pursuing convictions of two or more individuals in separate trials on the theory that each alone is the perpetrator of a crime which was committed by a single person, *see* Vedan Anthony-North, Note, *Doubling Down: Inconsistent Prosecutions, Capital Punishment, and Double Jeopardy*, 97 N.Y.U. L. REV. 235 (2022).

A prosecutor's attempt to invoke collateral estoppel against the accused is a quite different matter and should always be objected to. *See United States v. Pelullo,* 14 F.3d 881 (3d Cir. 1994); *United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998); *Allen v. State*, 423 Md. 208, 31 A.3d 476 (2011); *People v. Morrison*, 156 A.D.3d 126, 130, 66 N.Y.S.3d 682, 685-86 (N.Y. App. Div., 3d Dep't 2017) (rejecting the prosecution's argument that it could invoke collateral estoppel to instruct a Grand Jury that an element of the crime had already been determined by a jury in the defendant's prior trial on a related charge for the same crime; "Applying collateral estoppel in the strategic, prosecutorial manner attempted here – in an effort to dispense with proof of the elements of a class A–1 felony that carries a potential life sentence . . . – undermines, if not violates, fundamental principles of due process and the presumption of innocence, among others . . . . These countervailing constitutional protections '"outweigh the otherwise sound reasons for preventing repetitive litigation"' in this manner . . . . ¶ While the People argue that their offensive use of collateral estoppel is fair play, in that had defendant been acquitted of attempted murder, he would defensively rely on collateral estoppel principles to argue against a subsequent murder trial, this analysis overlooks the obvious and critical difference between an accused's defensive use of this doctrine and a prosecutor's strategic use of it against an accused. An accused's defensive invocation of this doctrine implicates and protects constitutional rights – to a jury trial, to present a defense, to due process and to not be placed twice in jeopardy, among others – whereas the People's affirmative use is for matters of expediency and economy and lacks a constitutional imperative . . . ."); *see also id*. at 130 n.*, 66 N.Y.S.3d at 686 n.1 (citing decisions by "other states' high courts" that support the "conclusion that the People's use of collateral estoppel is rarely, if ever, permitted").

§ 17.08(g) Reprosecution by a Different Sovereign

The double jeopardy clause does not bar successive prosecutions by different sovereigns. So, for example, a respondent convicted of bank robbery in a state court may subsequently be prosecuted for federal bank robbery of the same bank. *See, e.g., Abbate v. United States,* 359

U.S. 187 (1959); *United States v. Wheeler,* 435 U.S. 313 (1978); *Gamble v. United States*, 139 S. Ct. 1960 (2019); *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 66-69 (2016) (dictum). Similarly, when two different States are in a position to prosecute a respondent for the same or closely related conduct, the separate prosecutions do not violate the Fifth Amendment. *Heath v. Alabama,* 474 U.S. 82 (1985). (Another route to the same result in the case of successive prosecutions by the federal government and a Native American tribe was plowed in *Denezpi v. United States*, 142 S. Ct. 1838 (2022) ("Because the sovereign source of a law is an inherent and distinctive feature of the law itself, an offense defined by one sovereign is necessarily a different offense from that of another sovereign. . . . That means that the two offenses can be separately prosecuted without offending the Double Jeopardy Clause –even if they have identical elements and could not be separately prosecuted if enacted by a single sovereign.").) The "two sovereignties" principle does not, however, permit successive prosecutions by a state and its political subdivisions (for example, municipalities); these are barred by double jeopardy whenever successive prosecutions by the same prosecuting agency would be. *Waller v. Florida,* 397 U.S. 387 (1970); *United States* v. *Wheeler,* 435 U.S. at 318-22 (dictum); *Puerto Rico v. Sanchez Valle*, 579 U.S. at 71.

As a matter of executive policy, the federal Government seldom prosecutes persons previously convicted or acquitted of state crimes based on the same conduct. *See Thompson v. United States*, 444 U.S. 248 (1980) (per curiam): "The Department of Justice has a firmly established policy, known as the 'Petite' policy, under which United States Attorneys are forbidden to prosecute any person for allegedly criminal behavior if the alleged criminality was an ingredient of a previous state prosecution against that person. An exception is made only if the federal prosecution is specifically authorized in advance by the Department itself, upon a finding that the prosecution will serve 'compelling interests of federal law enforcement.'" *Id*. at 248.

§ 17.08(h) Double Jeopardy Doctrines Governing a Juvenile Court Judge's Review of the Findings of a Referee or Hearing Officer

In some States delinquency Petitions are tried first to a hearing officer (sometimes called a "referee" or "master"), who makes factual and legal findings and submits recommendations to the juvenile court judge. The judge then either ratifies or rejects the findings and recommendations of the hearing officer.

In *Swisher v. Brady,* 438 U.S. 204 (1978), the Court considered the double jeopardy implications of a trial judge's overturning of a master's order of dismissal. Under the Maryland statutory scheme at issue in *Swisher,* the juvenile court judge could not hear evidence but could only review the master's findings on the basis of the evidence presented to the master. The Court in *Swisher* sustained the statutory scheme on the narrow ground that the scheme did not subject juveniles to more than one trial or evidentiary hearing. The Court emphasized that the judge's review was merely a continuation of the original hearing and not a *de novo* hearing.

The *Swisher* decision leaves open the question whether a *de novo* hearing would

constitute double jeopardy. The lower courts have split on this issue, with some courts holding that a *de novo* hearing would constitute double jeopardy, *see, e.g., Jesse W. v. Superior Court of San Mateo County,* 26 Cal. 3d 41, 603 P.2d 1296, 160 Cal. Rptr. 700 (1979); *R.G.S. v. District Court,* 636 P.2d 340 (Okla. Crim. App. 1981); *State v. Mershon*, 43 Wash. App. 132, 715 P.2d 1156 (1986), and other courts reaching the opposite conclusion, *see, e.g., In the Interest of Stephens,* 501 Pa. 411, 461 A.2d 1223 (1983), *appeal dism'd,* 466 U.S. 954 (1984) (holding that jeopardy does not attach at a master's hearing, because the master's findings are merely advisory).

17.08(i) *Challenges to the Indictment or Information on the Ground of Unconstitutionality of the Statute on which the Charges Are Based*

A pretrial motion to dismiss a charging paper can be based on the claim that the statute grounding the charges is unconstitutional on its face or – in some jurisdictions – that the statute is unconstitutional as applied to the facts alleged. *See*, *e.g.*, WEST'S ANN. IND. CODE § 35-34-1-6(a)(3); *United States v. L. Cohen Grocery Co*, 255 U.S. 81 (1921) (facial challenge); *United States v. Rahimi*, 59 F.4th 163 (5th Cir. 2023) (facial challenge); *People v. Counterman*, 497 P.3d 1039 (Colo. App. 2021) (deciding the merits of a claim raised by a pretrial motion to dismiss a charge of stalking (serious emotional distress) on the ground that it violates the First Amendment but upholding the statute), *rev'd sub. nom. Counterman v. Colorado*, 2023 WL 4187751 (U.S. 2023) (holding the statute unconstitutional for lack of a *mens rea* element); *State v. Small*, 162 Ohio App. 3d 375, 833 N.E.2d 774 (2005) (as-applied challenge); *People v. Redwood*, 335 Ill. App. 3d 189, 780 N.E.2d 760, 269 Ill. Dec. 288 (2002) (overbreadth-as-applied-challenge: "The offense of disorderly conduct is broadly defined. . . . ¶ Freedom of speech is a fundamental right protected from invasion by the state by the fourteenth amendment. . . . A statute that punishes spoken words alone . . . cannot withstand constitutional attack unless it cannot be applied to speech protected by the first and fourteenth amendments, even if the speech punished is vulgar or offensive. . . . Thus, . . . [the disorderly-conduct statute] may only be applied in this case if the words used are 'fighting words.' . . . ¶ A trial court may dismiss a charge in a criminal case on the grounds that the charge does not state an offense. . . . ." *Id*. at 192, 780 N.E.2d at 762-63, 269 Ill. Dec. at 290-91. "Confining our analysis to the charging instruments, as we must on review of a judgment dismissing for failure to state a crime, we find the comment by defendant did not rise to the level of "fighting words," because the comment did not contain an explicit or implied threat. Because the only conduct alleged to have violated the statute was the use of these words, and because the "fighting words" requirement has not been met, the information charging defendant with disorderly conduct fails to state an offense." *Id*. at 194-95, 195-96, 780 N.E.2d at 765, 269 Ill. Dec. at 293.); *and see State v. Kay Distributing Co., Inc*, 110 Wis. 2d 29, 32, 327 N.W.2d 188, 191 (Wis. App. 1982) (reviewing and reversing on the merits the dismissal of two counts of a complaint on the ground of statutory vagueness: "The state initially argues that the trial court prematurely considered the question of whether . . .[the challenged statute] is unconstitutionally vague because there is no factual record on which to base a determination whether Kay had notice that its conduct was within the statute's prohibitions. We disagree. A statute challenged on vagueness grounds for lack of notice must be examined in light of the

conduct with which the defendant is charged."); *State v. Moeller*, 105 Or. App. 434, 806 P.2d 130 (1991) (superseded by statute amending the substantive provision involved) (affirming a trial court order sustaining a demurrer to an indictment which, in addition to charging that the defendants engaged in drug offenses, alleged that the offenses occurred "as a part of a drug cultivation, manufacture or delivery scheme or network" – language copying a guidelines rule providing for sentencing enhancement: the Court of Appeals finds the guidelines language void for vagueness and holds that a demurrer is an appropriate procedure for challenging the constitutionality of an enhancement allegation in an indictment); *cf. State v. Metzinger*, 456 S.W.3d 84 (Mo. App. 2015) (upholding dismissal of a prosecution for online terroristic threats on the ground that the defendant's tweets – whose contents were not specified in the information but were specified in the prosecution's answer to the motion to dismiss – were not true threats punishable consistently with the First Amendment); *People v. Sovey*, 77 Misc. 3d 518, 179 N.Y.S.3d 867 (N.Y. Sup. Ct., N.Y. Cty. 2022) (entertaining the defendant's motion to dismiss an indictment on the ground of unconstitutionality of the underlying statute, the court orders a suppression hearing to determine whether there was probable cause for the defendant's arrest; at this hearing, the defendant will have the burden of establishing the factual circumstances that render the statute unconstitutional as applied, thereby laying the foundation for dismissal).

In federal practice, claims of facial unconstitutionality are appropriately addressed on a motion to dismiss but claims of unconstitutionality as applied are not. *United States v. Petrillo*, 332 U.S. 1 (1937); *but cf. United States v. Pearl*, 324 F.3d 310 (10th Cir. 2003) (a motion to dismiss an indictment on grounds of unconstitutional overbreadth of the statutory language sufficed to preserve for appeal the defendant's contention that he could not be convicted under jury instructions that permitted a conviction to be based on the overbroad terminology).

As a matter of strategy, the question whether to challenge the constitutionality of the proscriptive statute before trial turns largely on the question whether and at what later stages the jurisdiction permits the same challenge to be raised. If failure to raise it before trial forfeits the claim, the answer is obvious. If the respondent has no plausible defense at trial other than the claim that the statute is unconstitutional, and if the jurisdiction allows a respondent to move to dismiss the charges for unconstitutionality, plead guilty conditionally, and obtain appellate review of the denial of the motion (*compare United States v. Rahimi*, *supra*, *and State v. White*, 545 N.W.2d 552, 554 (Iowa 1996), allowing such a procedure where the statute is challenged on its face, *with United States v. Turner*, 842 F.3d 602 (8th Cir. 2016), *and United States v. Pope*, 613 F.3d 1255 (10th Cir. 2010), disallowing the procedure in the case of an as-applied challenge), this procedure will ordinarily offer the quickest and least costly way to get a final ruling resolving the case. If a midtrial motion in a jury trial is available (*see*, *e.g.*, *State v. Woodard*, 2017 WL 2590216 (Tenn. Crim. App. 2017) (rejecting "the State's claim that the defendant has waived plenary review of her constitutional challenges by failing to challenge the constitutionality of the statute prior to her trial" (*id.* at *6), the court holds that "[b]y its plain language, [Tennessee Criminal] Rule 12 permits claims of a lack of jurisdiction to be raised at any time. . . . A claim that the proscriptive statute is facially unconstitutional amounts to a claim that the trial court lacks jurisdiction to impose a conviction under the statute. . . . Consequently, a

facial constitutional challenge to the *proscriptive* statute is not subject to the waiver provision of Rule 12." *Id*. at *10.); *Smith v. State*, 194 N.E.3d 118 (Ind. App. 2022) (in reviewing a trial court's order denying a pretrial motion to dismiss an information, the court of appeals declines to reach a potential challenge to the proscriptive statute as applied: although § 35-34-1-6(a)(3) of the Indiana Code, *supra*, permits "a motion to dismiss . . . [to] be made or renewed at any time before or during trial" (*id*. at 125), a pretrial motion "is an inappropriate forum for adjudicating factual questions" (*id*. at 130), and a motion challenging the constitutionality of a statute as applied to the defendant's conduct should be made during trial)), such a motion offers the distinct advantage of disabling the prosecution from appealing a ruling in respondent's favor, both as a matter of state law in most jurisdictions (*see*, *e.g.*, *State v. Wright*, 91 Mont. 427, 8 P.2d 646 (1932)) and because a prosecution appeal from such a ruling would be barred by double-jeopardy doctrine (*see United States v. Sisson*, 399 U.S. 267 (1970); *cf. Sanabria v. United States*, 437 U.S. 54 (1978)). If the only available alternative to a pretrial motion is a postconviction motion in bar – or in arrest of judgment or for dismissal after verdict – (see § 37.02 *infra*), the pretrial motion will usually be preferable, because the prosecution can obtain appellate review of a ruling granting the motion at either stage. *See*, *e.g.*, *United States v. Vuitch*, 402 U.S. 62 (1971) (pretrial motion); *State v. Arrington*, 74 S.3d 482 (Ala. Crim. App. 2011) (motion for judgment of acquittal NOV).