2006-2010 Cumulative Case Law Update

Contains All 2006-2010 "Update" Cases In This One Volume

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Editor's Note

Dear Readers:

This volume contains all prior cases from my *Case Law Updates* published in 2006, 2007, 2008, 2009 and 2010 with some minor exceptions.

I did not make any attempt to learn the subsequent history of all the cases, and I do not know if all of them remain good law. I am certain that some of the cases are no longer good law. **Therefore, you should Shepardize each case before citing it.**

My purpose in preparing this edition was to collect and index by subject matter all "successful" 2006-2010 cases in one place to make it easier and quicker to find relevant cases.

I hope you will find this volume useful.

Sincerely,

Greg Mermelstein
Division Director

Abandonment (Rule 24.035 & 29.15)

Moore v. State, No. SC90918 (Mo. banc 12/7/10):

Holding: Even though direct appeal appellate counsel failed to tell Movant when the mandate issued on his direct appeal (which caused his pro se 29.15 motion to be filed late), this did not constitute abandonment or excuse the untimely filing because (1) appellate counsel had no duty to represent Movant in postconviction proceedings; (2) there was nothing in the record that indicated that appellate counsel had agreed to inform Movant when the mandate issued; and (3) the appellate court timely sent Movant a copy of his mandate pursuant to Rule 30.24(b). Despite *Webb ex rel. J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) regarding jurisdiction, the motion court was correct in dismissing the untimely motion because the court had no "authority" to hear the case.

Gehrke v. State, No. SC89527 (Mo. banc 3/31/09):

Even though postconviction counsel failed to file a notice of appeal for Movant, this did not constitute abandonment.

Facts: Movant filed a timely Rule 24.035 case in 1999. In 2001, the motion court denied relief. Postconviction counsel failed to properly file a notice of appeal. In 2006, Movant moved to reopen his case on grounds of abandonment so that he could appeal.

Holding: Failing to properly file a notice of appeal is not "abandonment" under the abandonment doctrine. A Movant who fails to file a notice of appeal within the original time limit may do so within one year of a judgment becoming final under Rule 30.03. After that, however, the Movant cannot appeal. A Movant may still be able to proceed in habeas corpus, however, if he can show actual innocence or a jurisdictional defect.

Crenshaw v. State, No. SC88584 (Mo. banc 7/31/08):

Where postconviction counsel failed to file timely notice of appeal, this was an abandonment and the motion court could re-enter Findings to allow for filing of a timely notice of appeal.

Facts: In 2003, the motion court denied Movant's Rule 29.15 motion. However, postconviction counsel failed to file a notice of appeal. In 2005, Movant sought to reopen his postconviction on grounds of abandonment. The motion court found he was abandoned, and re-entered its original Findings, which allowed Movant to file a timely notice of appeal.

Holding: The motion court has authority to reopen a postconviction proceeding where counsel abandoned Movant. If abandonment is found, the remedy is to put Movant back in the position he would have been in had counsel not abandoned him. The motion court did this by finding that Movant was abandoned and re-entering its original Findings, thus allowing a notice of appeal to be timely filed. The State claims that failure to timely file a notice of appeal is not abandonment. However, in order to preserve that issue, the State needed to file a notice of appeal and cross-appeal, which the State did not do, so that issue is not before the court.

Editor's Note by Greg Mermelstein: This case may have been effectively overruled by *Gehrke v. State*, No. SC89527 (Mo. banc 3/31/09).

McFadden v. State, No. SC88895 (Mo. banc 6/30/08):
Where Movant gave his pro se Rule 29.15 motion to an attorney to file, and the attorney filed it one day late, the attorney "abandoned" Movant, and Movant's motion should be reopened and deemed timely.
Facts: Movant gave his pro se Rule 29.15 Motion to an attorney, who was going to represent Movant in the case, and who instructed him to give his motion to her for filing. The attorney, however, failed to file the motion timely. The motion court dismissed the case for untimely filing.
Holding: Movant had an attorney-client relationship with attorney in this case, even though attorney had not been formally appointed by a court. Attorney undertook to represent Movant in the case, provided legal advice, and told him to give his pro se 29.15 motion to her for filing. Movant timely prepared and gave his motion to his attorney at her express direction. Attorney's actions did not occur due to lack of understanding of Rule 29.15, an ineffective attempt at filing, or an "honest mistake," none of which will justify failure to meet the time requirements. Attorney undertook to represent Movant and simply abandoned the representation. This opinion is limited to where counsel overtly acted and such actions prevented Movant's timely filing.

Morgan v. State, No. ED92778 (Mo. App. E.D. 9/15/09):
Where PCR counsel filed an unsigned, unverified Rule 29.15 amended motion on behalf of Movant in 1993, this constituted abandonment, but Movant was not prejudiced because motion court decided case on the merits.
Facts: In 1993, PCR counsel filed an unverified, untimely Rule 29.15 amended motion on Movant's behalf. At that time, Rule 29.15 required that the amended motion be verified. In 2006, Movant filed a motion to reopen PCR on grounds of abandonment.
Holding: Counsel's failure to file a timely, verified amended motion constituted abandonment. The question is what remedy should be afforded. Normally, where there has been abandonment, the court remands for appointment of new counsel and a new amended motion, or remands to treat the amended motion as timely filed. Here, although Movant claims the amended motion is deficient as to content, Movant does not raise any new issues, and the motion court in 1993 addressed all issues raised on the merits. Therefore, remand is not required because Movant was not prejudiced.

State ex rel. Thomas v. Neill, No. ED91569 (Mo. App., E.D. 8/19/08):
Where postconviction counsel failed to file an amended motion, mandamus issues to require motion court to hold an abandonment hearing.
Facts: Movant filed a 29.15 motion and counsel was appointed, but did not enter an appearance for 13 months. Five months passed, and no amended motion was filed. Movant sought a writ of mandamus to require the motion court to hold an abandonment hearing.
Holding: Abandonment occurs when counsel takes no action on Movant's behalf. The record reflects no action by counsel. Writ issues to require motion court to conduct abandonment hearing and appoint new counsel with time to file an amended motion, if abandonment is found.

Stewart v. State, No. ED90296 (Mo. App., E.D. 7/8/08):
Even though Clerk's Office received Movant's pro se postconviction motion on time, where it was file-stamped late, and postconviction counsel moved to file a late amended motion causing the motion court to dismiss the case in 2002, there was no jurisdiction to reopen the case in 2006 since this was not an "abandonment" by counsel.
Facts: Movant's direct appeal mandate issued on July 5, 2001. He timely filed a pro se postconviction motion on October 3, 2001, but it was file-stamped October 4, 2001, which was one day late. Despite Movant's insistence that he filed his motion on time and postal records showing this, postconviction counsel in 2001 failed to investigate this, and filed a motion to file an untimely amended motion. This caused the motion court to dismiss the case as untimely in 2002. No appeal was filed. In 2006, new postconviction counsel sought to reinstate the case, and the motion court did reinstate the case. After denying relief on the merits, Movant appealed, but the State moved to dismiss the appeal for lack of jurisdiction.
Holding: Under Rule 75.01, a motion court retains jurisdiction for 30 days after entry of judgment. A dismissal is a judgment that starts the clock running. A motion court has no jurisdiction to reopen after 30 days. Although Movant claims he was "abandoned" by the original postconviction counsel, abandonment occurs when counsel fails to amend a pro se motion "without explanation" or takes "no action" on Movant's behalf. Here, original counsel took action and moved to file an untimely amended motion. Thus, there was no abandonment. This is really a claim of ineffective postconviction counsel, which is unreviewable. Court had no jurisdiction to reopen case in 2006. Appeal dismissed.

Clark v. State, No. ED90209 (Mo. App., E.D. 5/27/08):
(1) Even though Clark filed a cert. petition with the U.S. Supreme Court after his direct appeal, the time for filing his Rule 29.15 motion was 90 days after the direct appeal mandate by the Missouri appellate court, and not 90 days after the denial of the cert. petition by the U.S. Supreme Court. (2) Even though Clark relied on his direct appeal attorney's advice as to when to file his 29.15 motion, the attorney's incorrect advice did not constitute excusable neglect or abandonment.
Facts: Clark's convictions were affirmed by the Missouri Supreme Court on direct appeal. Clark's direct appeal attorney then filed a cert. petition with the U.S. Supreme Court and told Clark he would have 90 days after the cert. petition was denied to file a Rule 29.15 motion. Clark relied on this advice, and filed his 29.15 motion within 90 days of the denial of cert. However, this was more than 90 days after the Missouri Supreme Court had issued its mandate. The motion court dismissed the 29.15 motion as untimely.
Holding: (1) Clark contends that Rule 29.15 is silent or ambiguous as to the time limit for filing a 29.15 motion when a cert. petition has been filed, and that his conviction was not "final" until the cert. petition was denied, so that his filing within 90 days of that denial was "timely." However, Rule 29.15(b) states that a 29.15 motion must be filed within 90 days of the Missouri appellate court's mandate. The Rule is not ambiguous. The appellate court's mandate triggers the 90-day limitation regardless of whether a petition for certiorari is filed with the U.S. Supreme Court. (2) Although Clark made an "honest" mistake in following his counsel's advice as to when to file his 29.15 motion, Rule 29.15 simply contains no authority for granting time extensions due to good cause or excusable neglect. Nor was this abandonment by counsel, or a conflict of interest by

counsel. While the stringent requirements of Rule 29.15 may seem unfair where a movant relies on advice of counsel, the late filing deprived the motion court of jurisdiction and left no alternative but to dismiss.

Brooks v. State, No. SD29628 (Mo. App. S.D. 2/23/10):
Even though counsel drafted an amended motion and proceeded at an evidentiary hearing as though it had been filed, where no motion was ever actually filed, this may constitute an "abandonment" and case is remanded for an abandonment hearing.
Facts: Movant filed a pro se 24.035 motion. Counsel filed an extension of time to file an amended motion, but no amended motion was ever filed with the court. Counsel conducted a 24.035 evidentiary on issues not raised in the pro se motion, and the motion court issued Findings on these claims. Subsequently, a different, appellate counsel discovered an amended motion in motion counsel's file, which had apparently been drafted but never filed with the court.
Holding: Rule 24.035(e) requires that motion counsel file an amended motion or a statement in lieu of amended motion. Neither were filed here. Although motion counsel apparently intended to file an amended motion and proceeded as if one had been filed, the docket sheets do not reflect the filing of an amended motion. There is nothing here indicating that Movant personally was at fault for the failure to file an amended motion. Case remanded for a hearing on whether counsel abandoned Movant by failing to file an amended motion.

Carrol v. State, No. SD29310 (Mo. App. S.D. 5/20/09):
Where postconviction counsel filed the Amended Motion late and stated that the late filing was not Movant's fault, the motion court clearly erred in not conducting an abandonment hearing and in ruling only on the pro se motion.
Facts: Movant timely filed a pro se Rule 24.035 motion, but postconviction counsel ultimately filed her Amended Motion late. Counsel filed with her Amended Motion a statement that the late filing was due to counsel miscalculating the due date, and was not the fault of Movant. The motion court ultimately issued Findings denying relief on the pro se motion only.
Holding: Where the record reflects that counsel has determined there is a need to file an Amended Motion but fails to timely file it, this is an abandonment. Here, the record is unclear if the motion court found an abandonment or not. It is undisputed that counsel filed an untimely Amended Motion, but nothing in the record shows that the motion court ever ruled on the issue of abandonment. The order denying relief on the pro se motion is reversed, and case remanded for abandonment hearing.

Tabor v. State, No. SD29132 (Mo. App. S.D. 3/16/09):
Even though Movant filed a pro se Statement in Lieu of Amended Motion, where the record showed no action by counsel, a hearing is required to determine if counsel abandoned Movant.
Facts: Movant filed a pro se Rule 29.15 motion. Counsel entered an appearance. Subsequently, however, Movant filed a pro se Statement in Lieu of Amended Motion. The document stated that counsel had reviewed the record and found no additional

grounds to raise, but counsel did not sign the document. No amended motion was ever filed. The motion court denied relief.
Holding: Rule 29.15(e) requires that counsel sign a Statement in Lieu of Amended Motion showing that counsel determined that there were no additional issues to raise. Here, 29.15(e) was violated because counsel did not file a statement in lieu, so the record does not show whether counsel performed the duties required by Rule 29.15. Here, a hearing is required to determine if counsel abandoned Movant by failing to file a counsel-drafted statement in lieu, or an amended motion.

State ex rel. Nixon v. Sheffield, No. 28941 (Mo. App., S.D. 9/30/08):
Even though Movant's retained postconviction counsel missed the deadline for filing a 29.15 motion because he misunderstood the time limits, Movant could not later proceed in a state habeas corpus action because his counsel's actions did not constitute cause and prejudice, manifest injustice, or abandonment.
Facts: Movant retained private counsel to represent him in a Rule 29.15 motion. Counsel misunderstood the time limits of Rule 29.15 and missed the deadline for filing a 29.15 motion. Another counsel then filed a state habeas corpus action, and the court granted habeas relief on the merits, finding trial counsel was ineffective. The State appealed.
Holding: A prisoner who does not raise claims in a PCR proceeding waives them and cannot assert them in a later habeas case unless the prisoner can show "cause and prejudice" or "manifest injustice." Cause means some factor external to the defense impeded the filing of a timely motion, and manifest injustice requires a showing of actual innocence. Here, the original PCR counsel merely misunderstood the time limits. This is not "cause." The original PCR counsel did not abandon Movant because abandonment does not apply to the filing of the original "pro se" motion. Furthermore, Movant did not show actual innocence. He merely showed that his trial counsel was ineffective, and that is not actual innocence because no "new" evidence of innocence was produced.

Smith v. State, No. 28283 (Mo. App., S.D. 12/13/07):
Even though postconviction counsel conducted an evidentiary hearing and submitted a deposition of Movant's testimony, where no amended postconviction motion was ever filed by counsel and no statement in lieu of amended motion was ever filed, there is a presumption of abandonment and case is remanded for abandonment hearing.
Holding: Rule 24.035(e) states that if counsel does not file an amended motion, counsel shall file a statement stating that the pro se motion asserts all claims. If counsel does not comply with this rule, abandonment is presumed. Counsel placed nothing in the record that an amended motion was not warranted. Movant claimed in the motion court in a pro se filing that counsel had not participated in his case. Even though there was an evidentiary hearing and counsel submitted a deposition of Movant, Movant is entitled to an abandonment hearing to determine if postconviction counsel abandoned Movant by not filing an amended motion.

Wise v. State, No. 27766 (Mo. App., S.D. 4/5/07):
(1) Where motion court dismissed Movant's 24.035 motion for failure to prosecute in 1999, but Movant did not file motion to reinstate until 2002, the motion court lacked jurisdiction to reinstate because jurisdiction expired 30 days after entry of judgment in 1999; and (2) Even though Movant may have filed a motion claiming abandonment by counsel, where that motion was denied in 2002, the motion court lost jurisdiction 30 days after this denial, and could not later reinstate the cause.
Facts: Motion court dismissed 24.035 motion for failure to prosecute in 1999. In 2002, Movant filed a motion to reinstate. The motion court denied the motion to reinstate. In 2003, Movant filed a motion for evidentiary hearing. The motion court granted this motion, and a hearing was held. After the motion court denied relief on the merits, Movant appealed.
Holding: Rule 75.01 states a trial court retains jurisdiction over a judgment for only 30 days. Rule 81.05 extends the jurisdiction to cover timely after-trial motions. When jurisdiction expires, however, the court can no longer act. The 1999 dismissal was a judgment. The motion court lost jurisdiction over it 30 days after entry, and thus, could not grant the 2002 reinstatement motion, unless the 2002 motion alleged abandonment by PCR counsel. Assuming that motion alleged abandonment, however, the motion court denied it in 2002, and therefore, lost jurisdiction 30 days after that. Movant did not appeal. Instead, Movant filed a motion for a hearing in 2003. The motion court was without jurisdiction to grant that because it was filed more than 30 days after the 2002 judgment. Since the motion court lacked jurisdiction to do anything after 2002, the Court of Appeals lacks jurisdiction, too. Appeal dismissed.

Rutherford v. State, No. 27183 (Mo. App., S.D. 6/5/06):
(1) Pro se "Amended Motion" filed after the time for filing an Amended Motion expired is untimely and does not invoke jurisdiction on claims contained therein; (2) even though Public Defender Office filed motion to "reappoint" counsel, which was sustained, the subsequent Amended Motion filed under the reappointment order was untimely because it was more than 90 days from the appointment date of original counsel; however, case is remanded to determine if the late filing of the Amended Motion is an "abandonment" not caused by Movant.
Facts: On May 5, 1998, a mandate issued on direct appeal. Movant timely filed a pro se Rule 29.15 motion on July 13, 1998, and the Public Defender was appointed on this date. The next activity is on September 28, 1998, when the Public Defender filed a motion to "reappoint" counsel, and requested a 30-day extension to file an Amended Motion. The motions were sustained on September 29. On December 31, 1998, the Public Defender filed an Amended Motion. On June 23, 2000, Movant filed a pro se Amended Motion. The motion court issued Findings on July 14, 2005, denying relief on the claims in the pro se Amended Motion.
Holding: (1) The motion court lacked jurisdiction to decide the pro se Amended Motion claims because the pro se Amended Motion was untimely. The initial pro se motion filed on July 13, 1998, was timely because filed within 90 days of the direct appeal mandate. The Public Defender was appointed on July 13, 1998. The initial 60-day time period for filing an Amended Motion expired on September 11, 1998. The pro se Amended Motion was not filed until June 2000, about 21 months later. The motion

court lacked jurisdiction to consider claims in this untimely Amended Motion. (2) Regarding the Amended Motion filed by counsel on December 31, 1998, it is also untimely. The last day for filing the Amended Motion was September 11, 1998. The Amended Motion filed on December 31, 1998, was 111 days too late. Nevertheless, the motion court can permit filing this motion if the failure to file a timely Amended resulted exclusively from counsel's action or inaction, and was not the fault of Movant. Therefore, the case is remanded for an abandonment hearing to determine why the Amended was untimely filed.

Gehlert v. State, No. WD69445 (Mo. App. W.D. 2/10/09):
Even though there were no guilty plea transcripts available, where postconviction counsel failed to file an amended motion, this was evidence that Movant may have been abandoned and motion court should have conducted an abandonment hearing.
Facts: In 2005, Movant filed a 24.035 motion, and postconviction counsel entered an appearance and requested transcripts of the guilty plea. Between 2005 and 2008, counsel told Movant that an amended motion had not been filed because no transcript was available. In 2008, the motion court ruled that Movant's pro se motion failed to raise cognizable issues and dismissed the case.
Holding: The motion court erred in not holding a hearing to determine if Movant was abandoned by counsel. Abandonment occurs where counsel takes no action on behalf of Movant such that Movant is deprived of meaningful postconviction review. Here, the record reflects that counsel ordered the transcript, but the record does not reflect that counsel did anything further. Even though there may not be a transcript available, that does not justify failing to perform the duties required under Rule 24.035 and failing to file an amended motion. A lost transcript is a fact of life with which parties must contend. Case remanded for an abandonment hearing.

Gehrke v. State, No. WD67823 (Mo. App., W.D. 5/30/08):
Movant was entitled to hearing on claim that postconviction counsel abandoned Movant by failing to file a notice of appeal from denial of postconviction relief.
Facts: Movant was denied Rule 24.035 relief in 2001. Postconviction counsel did not appeal. In 2006, Movant filed a motion to reopen the 24.035 proceedings on grounds of abandonment. Movant alleged that he wanted to appeal, and that postconviction counsel told him he would appeal, but did not. The motion court denied relief without a hearing.
Holding: Failure to file a timely appeal of a postconviction case constitutes abandonment. A motion to reopen states a claim of abandonment unless the delay in filing the appeal was due to Movant's negligence or intentional conduct. Here, Movant alleged that postconviction counsel failed to appeal, despite Movant's request and counsel's statements that counsel would appeal. A hearing is warranted.

Dudley v. State, No. WD68759 (Mo. App., W.D. 3/25/08):
Where in 1990 Rule 29.15 counsel filed an unverified amended motion and it was dismissed for that reason, there is jurisdiction now for circuit court to inquire whether this constituted "abandonment" by counsel.
Facts: In 1990, Rule 29.15 counsel filed an unverified amended motion, which was dismissed under the then-version of Rule 29.15 because it was unverified. From 2004 to

2007, Movant filed various motions in the circuit court seeking to reopen his PCR on grounds of abandonment. The circuit court ultimately ruled under Rule 75.01 that it did not have jurisdiction to consider the claim.

Holding: A valid claim of abandonment is an exception to Rule 75.01. Movant claims he was abandoned because the amended motion was a nullity. Prior cases have held that it constitutes abandonment where counsel totally defaults in carrying out the obligations of Rule 29.15, and where an amended motion is so patently defective that it amounts to a nullity. Since 1990, the law on verification of motions has changed. The circuit court had jurisdiction to hear Movant's abandonment case. The Court of Appeals expresses no opinion, however, on whether PCR counsel's actions constitute abandonment. Case remanded for further proceedings.

Mitchem v. State, No. WD67270 (Mo. App., W.D. 3/25/08):

(1) Where PCR counsel did not receive notice that motion court entered Findings until after time for appeal expired, the motion court can reissue new Findings on grounds of "abandonment" of PCR counsel for not filing a notice of appeal, and the Movant can appeal from the new Findings; and (2) even though PCR counsel did not call direct appeal counsel to testify to ineffective appellate counsel claim, issue was not abandoned where PCR counsel presented the direct appeal briefs, new trial motion, and trial transcript to show appellate counsel failed to raise issue.

Facts: In 2005 the Rule 29.15 court issued Findings of Fact, Conclusions of Law denying relief on the merits in Movant's case. However, PCR counsel did not receive notice of this, and accidently learned Findings had been issued in 2006, after the time for filing any notice of appeal had expired, including late notice of appeal under Rule 30.03. PCR counsel filed a motion with the motion court saying that the failure to appeal was solely due to PCR counsel's failure to monitor the case, was an "abandonment," and not due to fault of Movant. The motion court found PCR counsel had "abandoned" Movant, and re-issued new Findings. Movant appealed the merits, and the State claimed lack of jurisdiction on appeal.

Holding: (1) The motion court can reopen proceedings in a 29.15 case if the Movant was abandoned by PCR counsel. *Fenton v. State*, 200 S.W.3d 136 (Mo. App., W.D. 2006) held that PCR counsel abandoned a 27.26 Movant by failing to file a notice of appeal. The failure to appeal under 29.15 is also an abandonment, where the failure to appeal was due to PCR's counsel's actions, and not due to delay resulting from Movant's negligence or intentional conduct. Thus, there is jurisdiction to appeal. (2) The State claims that Movant abandoned his ineffective direct appeal appellate counsel claim by not calling appellate counsel to testify. However, the claim is not abandoned because Movant presented as evidence the direct appeal briefs, the new trial motion and the trial transcript to show appellate counsel failed to raise the claim.

Editor's Note by Greg Mermelstein: At the time of this opinion, 3/25/08, the Missouri Supreme Court is currently considering in *Crenshaw v. State* whether PCR counsel's failure to file a notice of appeal constitutes "abandonment." I would watch for the Supreme Court's holding in *Crenshaw* before relying on this case. Also, other cases have held that failure to call direct appeal counsel to testify waives an ineffective assistance of appellate counsel claim. *See Cole v. State*, 223 S.W.3d 927, 931-32 (Mo. App., S.D. 2007). Therefore, I continue to recommend that PCR attorneys call direct

appeal counsel to testify at evidentiary hearings in 29.15 cases, so that you do not risk having the issue deemed waived.

Additional Editor's Note by Greg Mermelstein: *Crenshaw* was later decided by the Supreme Court, but then may have been effectively overruled by *Gehrke v. State*, No. SC89527 (Mo. banc 3/31/09).

Fenton v. State, No. WD65502 (Mo. App., W.D. 6/27/06):
Failure to file Notice of Appeal in postconviction case may constitute abandonment.
Facts: Movant had a 27.26 case in 1983, and was denied relief in the motion court. Movant claimed he wanted to appeal, but his postconviction counsel never filed an appeal. Movant tried to appeal out of time, but was denied. In 2005, Movant filed a motion in the motion court claiming he was abandoned.
Holding: Failure to file an appeal, when requested, can constitute abandonment under the postconviction rules. Case is remanded to motion court for findings on whether Movant wanted to appeal in 1983 and was abandoned by counsel's failure to do so.

Middleton v. State, No. WD65540 (Mo. App., W.D. 6/27/06):
Movant has not shown abandonment where PCR counsel had Movant sign a blank verification page (affidavit) that was later attached to the Amended 29.15 Motion.
Facts: In 1991, at a time when Rule 29.15 required that Amended Motions be verified by the Movant, PCR counsel had Movant sign a blank verification page (affidavit) that was later attached to the Amended Motion when it was filed. The verification page said that Movant knew the contents of the Amended Motion and waived claims not raised. In fact, Movant had not seen the Amended Motion before it was filed. In 2003, Movant filed a motion to reopen his 29.15 case, claiming abandonment by PCR counsel because Movant had not seen the Amended Motion before it was filed, and PCR counsel failed to raise viable claims. The circuit court found Movant had been abandoned and granted a new PCR proceeding, and ultimately vacated the conviction. The State appealed, claiming the circuit court lacked jurisdiction because there was no abandonment.
Holding: Review of whether the circuit court had jurisdiction is *de novo*. In 1991, Movant signed a verification page (affidavit) saying he had read the motion and waived all grounds not raised. Now, he is claiming that he did not see the Amended Motion, and that PCR counsel did not raise viable claims. In *State v. White*, 873 S.W.2d 590 (Mo. banc 1994), the Missouri Supreme Court held that signing a verification before the Amended Motion is completed does not constitute abandonment. Movant cannot complain of improper verification where his own conduct caused the improper verification. Therefore, Movant was not abandoned, and the circuit court had no jurisdiction to grant Movant relief. Judgment reversed and Movant's abandonment case dismissed.

Elam v. State, No. WD65877 (Mo. App., W.D. 6/20/06):
(1) Appellate court lacks jurisdiction to hear an appeal from a docket entry that is not signed by the judge because such does not comply with Rule 74.01(a); (2) Movant cannot bring a motion under Rule 29.07(d) to withdraw his guilty plea because Movant's claims should have been raised in a Rule 24.035 case; (3) Movant cannot claim abandonment by

postconviction counsel because Movant never had a timely filed pro se Rule 24.035 motion.
Facts: After Movant's probation was revoked, Movant filed an untimely Rule 24.035 motion. Movant then filed a Rule 29.07(d) motion claiming his guilty plea was not voluntary because he had a mental disease. The circuit court overruled the 29.07(d) motion with a typed docket entry which was "signed" with the judge's typewritten initials. The circuit court did not enter a signed ruling denominated a "judgment."
Holding: The Court of Appeals lacks jurisdiction for two reasons. First, a docket entry accompanied by a judge's typewritten initials does not satisfy the signature requirement of Rule 74.01(a). Second, the Court of Appeals and the circuit court both lack jurisdiction to hear the 29.07(d) claims because such claims should have been raised in a timely filed Rule 24.035 motion. Further, Movant cannot claim abandonment by postconviction counsel because Movant never had a timely filed pro se Rule 24.035 action.

"Ake" Issues

State v. Davis, No. SC89699 (Mo. banc 6/29/10):
Holding: (1) *Ake* applies to more types of experts than just psychiatric experts; (2) to obtain funding under *Ake*, defendant must show a reasonable probability that an expert would assist the defense and that denial of the expert would result in a fundamentally unfair trial, and defendant may make this showing *ex parte*.

Schafer v. State, No. WD68721 (Mo. App., W.D. 5/6/08):
Even though Movant pleaded guilty to forgery, where he alleged that his guilty plea was involuntary because his counsel was ineffective in failing to seek funding to obtain a handwriting analysis to show that Movant had not committed the offense, this stated a viable claim for relief and an evidentiary hearing should have been granted.
Facts: Movant pleaded guilty to forgery, Sec. 570.090. At the plea, the State said its evidence would show that victim's house was burglarized, checks were taken, and then eight days later, Movant passed one of victim's checks at a store. Movant filed a 24.035 motion, claiming his private counsel had failed to seek funding under *Ake v. Oklahoma*, 470 U.S. 68 (1985) to obtain a handwriting analysis, which would have shown that Movant did not write the check. The motion court denied the claim without a hearing, finding that the record refuted Movant's claim that his plea was coerced.
Holding: A guilty plea renders a claim of ineffective assistance of counsel irrelevant except to the extent that it affects the voluntariness and understanding of the plea. The allegation that Movant was coerced into pleading guilty is not waived because he entered a guilty plea. Guilty pleas can be rendered involuntary by counsel's failure to prepare. Here, Movant has alleged that his counsel failed to investigate a handwriting expert due to lack of funds; that his counsel failed to seek funding under *Ake*; that an expert would have found that Movant did not write the check; and that Movant would not have pleaded guilty and would have insisted on proceeding to trial, but for counsel's inaction. This states a valid claim for relief. Furthermore, this is not refuted by Movant's guilty plea, because the factual basis for the plea is questionable, in that the State had to show that

Movant was aware the checks were forged when he attempted to cash them, but the State's stated evidence only questionably shows this. Movant did not admit knowing this as part of his plea, but merely agreed with the State's statement of the evidence. Case remanded for evidentiary hearing.

Williams v. State, No. WD67306 (Mo. App., W.D. 3/4/08):
(1) Retained trial counsel ineffective in failing to properly prove Defendant's indigency so that Defendant could receive mental exam under "Ake;" (2) Indigent Defendant with retained counsel is entitled to mental examiner who will assist the defense under "Ake," and this assistance is outside Chapter 552. Thus, a Chapter 552 evaluation does not satisfy "Ake."
Facts: Defendant retained private counsel but had no funds to pay for a mental exam. Private counsel filed various motions seeking a mental health expert to assist the defense under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Trial counsel had Defendant testify he was indigent. The trial court denied an expert for the defense, and on direct appeal, the Court of Appeals held trial counsel had not properly proven that Defendant was indigent. Defendant/Movant filed a Rule 29.15 motion claiming counsel was ineffective in not properly proving his indigence.
Holding: (1) Counsel was ineffective in not properly proving Defendant's indigence. The testimony that Defendant was indigent was not sufficient. *State v. Huchting*, 927 S.W.2d 411, 419 (Mo. App., E.D. 1996) had held that counsel must file an affidavit of indigency under Sec. 600.086.3 to prove indigence. If counsel had used the correct method, Defendant would have been found indigent, and would have been provided with an expert to assist the defense. (2) Even though the trial court ordered that Defendant have an evaluation under Chapter 552, that did not satisfy *Ake*. *Ake* requires that Defendant have access to a competent mental health expert who will evaluate Defendant and assist in preparation of a defense. Secs. 552.020 and 552.030 do not provide the type of assistance envisioned by *Ake*. Under 552, the role of the expert is to evaluate Defendant and provide a report to the court and parties. Chapter 552 does not provide an expert to assist in preparation of a defense. *Ake* does not require that Defendant receive funds for an expert or be able to pick the expert, however. The court may appoint an expert of its choosing to provide the defense under *Ake*.

Holland v. Horn, 2008 WL 607486 (3rd Cir. 2008):
Holding: Direct appeal counsel ineffective for failing to appeal "Ake" issue that Defendant was entitled to psychiatrist to assist defense.

Hodge v. Coleman, 2008 WL 199833 (Ky. 1/25/08):
Holding: Indigent postconviction movant was entitled to State funds to reimburse travel expenses for 23 out-of-county witnesses.

State v. Brown, 2006 WL 1412890 (N.M. 2006):
Holding: An indigent Defendant represented by pro bono counsel was entitled to public funding for experts in same fashion as defendants who were represented by Public Defender.

Appellate Procedure

In re: Smith v. Pace, No. SC90425 (Mo. banc 5/11/10):
In order to hold a lawyer in indirect criminal contempt for making "degrading or embarrassing" statements about a judge, the State must prove that the lawyer's statements were false, that the lawyer knew his statements were false or acted with reckless disregard of the truth, and that there was an actual, imminent impediment or threat to the administration of justice.
Facts: Lawyer filed a pleading in which Lawyer claimed that Judge and Prosecutor were improperly using a grand jury "to threaten, instill fear and imprison innocent persons to cover up … their own apparent misconduct" and to "intimidate and silence any opposition to their personal control." Lawyer was convicted in a jury trial of indirect criminal contempt and sentenced to 120 days in jail. Lawyer sought a writ of habeas corpus as a means of appeal.
Holding: The First Amendment protects truthful statements made in judicial proceedings; thus, the State must prove that Lawyer's statements were false and that Lawyer acted with reckless disregard for the truth or falsity. However, the jury instruction in this case directed the jury to find Lawyer guilty if Lawyer's pleading "degraded" the Judge or "impeded and embarrassed the administration of justice." The instruction did not contain a mental state requirement. The instruction did not require the jury to find that Lawyer knew his statements were false or that Lawyer showed reckless disregard for the truth. Hence, the instructions were erroneous. Furthermore, degrading or embarrassing words alone are not enough to support a finding of criminal contempt. The First Amendment requires that the words actually interfere with or pose an imminent threat of interfering with the administration of justice. Here, the State stipulated that Lawyer's actions did not actually interfere with the grand jury or cause Judge to do anything differently. Thus, there was no actual interference or imminent threat. Lawyer ordered discharged.

State v. Terry, No. SC90332 (Mo. banc 2/10/10):
Where in statutory rape case pregnant Victim testified she had not had sex with anyone but Defendant yet while appeal was pending a DNA test showed that Defendant was not father of baby, the appellate court remands for filing of a new trial motion based on this newly discovered evidence showing perjury.
Facts: Defendant was charged with statutory rape. At trial, Victim was pregnant. Victim testified she had sex with Defendant only. Defendant denied having sex with Victim. During the pendency of the appeal, a DNA test was conducted on the baby born after trial. The DNA test showed Defendant was not the father. Defendant filed a motion to remand to the circuit court based on newly discovered evidence.
Holding: Relief can be granted based on newly discovered evidence to prevent miscarriages of justice. To obtain relief, a defendant must show (1) the facts of the newly discovered evidence came to his attention after trial, (2) the lack of prior knowledge is not due to lack of diligence on his part, (3) the evidence is so material as to likely produce a different result at trial, and (4) the evidence is not cumulative or merely impeaching. Here, all elements are satisfied. The DNA test does not exonerate Defendant, but it is not "merely impeaching" either. Rather, it conclusively shows that

Victim perjured herself. The jury was unable to weigh the Victim's credibility with this evidence because it wasn't available until after the baby was born after trial. Courts can grant new trials on the basis of perjury. Case remanded to circuit court for filing of new trial motion based on the newly discovered DNA evidence.

Atkins v. Director of Revenue, No. SC90181 (Mo. banc 2/23/10):
Holding: (1) Even though Driver injured three people in only a single incident stemming from drunk driving, where Driver pleaded guilty to three separate counts of second degree vehicular assault from this incident, Driver was "convicted more than twice for offenses related to" DWI under Sec. 302.060(9) allowing his license to be suspended for 10 years; (2) There is only one Court of Appeals in Missouri, although it is organized into three districts; there is no provision in the Mo. Const. requiring a circuit court to follow a decision from a particular district of the Court of Appeals.

State v. Craig, No. SC89867 (Mo. banc 6/30/09):
(1) In DWI proceeding, parties can bifurcate Defendant's guilty plea to DWI from the issue of what level of DWI the offense is, and Defendant may the appeal the trial court's finding regarding the level of offense; (2) State in DWI prosecution is not required to show that prior DWI convictions complied with Rules 24.02 (state prosecutions) and 37.58 (municipal violations); (3) where prior DWI judgment form did not state whether Defendant was found guilty or not guilty, the judgment form was facially invalid and could not be used to enhance current DWI offense.
Facts: Defendant entered a plea to DWI, but expressly contested whether he was an "aggravated offender." The trial court found him to be an "aggravated offender," and Defendant appealed.
Holding: (1) The State claims Defendant has no right to appeal the "aggravated offender" finding, and can only challenge this in a Rule 24.035 action. However, Defendant did not plead guilty. He admitted to facts establishing certain elements of the offense, but specifically requested a hearing to contest facts establishing him as an aggravated offender. Under Sec. 577.023, Defendant permissibly bifurcated the proceedings and litigated whether he was subject to enhancement. This procedure did not waive his right to appeal under Sec. 547.070. (2) To enhance the offense, the State was not required to prove that prior convictions for DWI complied with Rule 24.02 (state prosecutions) or Rule 37.58 (municipal prosecutions) so long as the judgment and sentence document is facially valid; to hold otherwise would allow constant collateral attack on presumptively valid judgments. (3) Here, one of the priors used to enhance is not facially valid. The judgment and sentence form submitted by the prosecution is blank in the space whether Defendant was found guilty or not guilty. Sec. 577.023 requires a plea of guilty or a finding of guilty followed by an SIS. Thus, this prior cannot be counted. Case remanded to sentence Defendant as "persistent offender" only.

Gehrke v. State, No. SC89527 (Mo. banc 3/31/09):
Even though postconviction counsel failed to file a notice of appeal for Movant, this did not constitute abandonment.

Facts: Movant filed a timely Rule 24.035 case in 1999. In 2001, the motion court denied relief. Postconviction counsel failed to properly file a notice of appeal. In 2006, Movant moved to reopen his case on grounds of abandonment so that he could appeal.
Holding: Failing to properly file a notice of appeal is not "abandonment" under the abandonment doctrine. A Movant who fails to file a notice of appeal within the original time limit may do so within one year of a judgment becoming final under Rule 30.03. After that, however, the Movant cannot appeal. A Movant may still be able to proceed in habeas corpus, however, if he can show actual innocence or a jurisdictional defect.

State ex rel. Poucher v. Vincent, No. SC88721 (Mo. banc 7/29/08):
Where the trial court stated that Defendant receive concurrent sentences, the court could not later impose consecutive sentences nunc pro tunc, even though the court had lacked authority to impose concurrent sentences under the facts.
Facts: In 2003, Poucher was sentenced to consecutive sentences, given a suspended execution of sentence, and placed on probation. On November 3, 2005, the trial court revoked probation and ordered the sentence executed, but stated orally and in its written judgment that the sentences run "concurrently." On December 12, 2005, 39 days after final judgment, the trial court entered a nunc pro tunc order running Poucher's sentences consecutively. Poucher sought a writ of mandamus to vacate the nunc pro tunc order.
Holding: A nunc pro tunc order is to correct clerical errors. It is designed to correct the recording of what was actually done, but which was not properly recorded. It cannot be used to change what was actually done. Thus, the trial court exceeded its authority in entering the nunc pro tunc after the final judgment. The trial court may have intended to impose consecutive sentences, but it actually stated the sentences were concurrent. A further issue, however, is that the trial court did not have authority to run the sentences concurrently, because they were originally consecutive. The State argues that if a nunc pro tunc cannot be used to correct the November 3 error, then there should be some alternative procedure for fixing it, but the State has not suggested what that procedure should be, and has not sought a writ itself. Therefore, that issue is not before the Court. Writ vacating nunc pro tunc order granted.

Brooks v. State, No. SC88353 (Mo. banc 1/15/08):
Even though postconviction court granted sentencing relief and re-sentencing had not yet occurred, the postconviction judgment was "final" for purposes of appeal.
Facts: 24.035 Movant was granted sentencing relief, but not relief from his conviction. Before he was resentenced, Movant appealed the denial of relief from conviction. The Court of Appeals had held there was no final judgment to appeal.
Holding: There must be a final judgment to appeal. However, when a motion court issues Findings of Fact and Conclusions of Law under Rule 24.035(j), that is a "final" judgment for purposes of appeal by either Movant or the State. The fact that resentencing has not occurred prior to appeal does make the motion court's judgment interlocutory. To the extent that *Barringer v. State*, 12 S.W.3d 765 (Mo. App. 2000), and *Williams v. State*, 954 S.W.2d 710 (Mo. App. 1997) are to the contrary, they are overruled.

State v. Bracken, No. ED94242 (Mo. App. E.D. 11/30/10):
Even though jury only convicted Defendant on some counts and hung on others, Court of Appeals had jurisdiction to hear appeal of the convicted counts before the remaining counts were re-tried (disagreeing with Southern District).
Facts: Defendant was convicted at a jury trial of two counts, and the jury hung on other counts. Defendant appealed his conviction on the two counts. The State alleged the appeal should be dismissed because the hung counts had not yet been retried.
Holding: The Southern District has held that lack of disposition as to all criminal counts bars appellate review. E.g., *State v. Storer*, 2010 WL 3872756 (Mo. App. S.D. 2010). However, the Eastern District has followed the rule that a judgment becomes final in a criminal case when the sentence is entered and imposed. We decline to follow the Southern District's reasoning. The instant case is ripe for appeal because a final judgment has been imposed on the counts of which Defendant was convicted. State's motion to dismiss is denied.

Cook v. State, No. ED93066 (Mo. App. E.D. 3/23/10):
Where during pendency of appeal of sex case, Defendant learned that Victim recanted her testimony and filed an affidavit and motion to remand on this ground, the appellate court grants the motion to remand for filing a new trial motion including the recantation as newly discovered evidence.
Facts: Defendant was convicted at a jury trial of various child sex offenses. During the pendency of his appeal, Defendant learned that that Victim had recanted her testimony. Victim's testimony was the only evidence to support the convictions. Defendant filed a motion to remand based on this newly discovered evidence.
Holding: Even though Defendant's motion is not within the time limits for filing a new trial motion under Rule 29.11(b), an appellate court has inherent power to prevent miscarriages of justice by remanding a case to consider newly discovered evidence presented for the first time on appeal. To get a remand, Defendant must show (1) that the newly discovered evidence came to Defendant's attention after trial; (2) that the lack of prior knowledge is not due to lack of diligence; (3) that the evidence is so material as to likely produce a different result; and (4) that the evidence is not cumulative or merely impeaching. Here, Defendant has met this test. Victim's recantation did not occur until 7 months after trial. Defendant could not have known Victim would recant. If the recantation is believed, it would produce a different result. Lastly, the recantation is not merely impeaching because, if believed, it directly refutes Victim's entire trial testimony and would show Defendant's conviction is based on false testimony. Defendant is entitled to a remand even though he made some incriminating remarks that were used against him at trial, such as "I didn't take a life; I might have destroyed a life."

Wilder v. State, No. ED93032 (Mo. App. E.D. 1/19/10):
Holding: A motion to withdraw a guilty plea at sentencing is an appealable order; therefore, where Defendant's motion to withdraw his plea at sentencing was denied, but he did not appeal, he could not contend in a Rule 24.035 motion that he should have been allowed to withdraw his plea.

State v. Jarvis, No. ED91711 (Mo. App. E.D. 6/16/09):
Holding: Remedy for improper revocation of probation is an extraordinary writ, not a direct appeal from sentencing.

State ex rel. Peete v. Moore, No. ED92522 (Mo. App. E.D. 4/7/09):
Where Attorney told Defendant he would file a direct appeal but failed to do so, Defendant was entitled to habeas corpus relief to allow filing of a direct appeal.
Facts: Defendant was convicted of various criminal offenses in 1997. Attorney told Defendant that Attorney would file a direct appeal, but never did. In 2008, Defendant filed a habeas corpus petition, but the motion court ruled that Defendant should have raised his claim in a Rule 29.15 motion and could not raise it in habeas.
Holding: A lawyer who fails to file a direct appeal denies effective assistance of counsel. While normally ineffectiveness claims must be raised in a 29.15 action, habeas corpus is available where the procedural default was caused by something external to the defense and prejudice resulted (i.e., "cause and prejudice"). The cause here is that Attorney abandoned Defendant by failing to file an appeal, despite telling Defendant he would appeal. The prejudice is Defendant was denied his right to appeal. Defendant is entitled to be resentenced, so that he can timely file a direct appeal.

State v. Bohlen, No. ED46436-01 (Mo. App. E.D. 3/24/09):
(1) Where Defendant was sentenced prior to January 1, 1996, a motion to recall the mandate is the proper procedure for raising ineffective assistance of appellate counsel; (2) where Defendant was convicted of two counts of robbery for forcibly stealing a wristwatch from the store manager and for forcibly stealing property of the store, conviction for both counts violated double jeopardy and counsel was ineffective in failing to appeal this; (3) even though Defendant did not object to convictions on double jeopardy grounds at trial, this could be raised on appeal because issue is jurisdictional.
Facts: In relevant part, Defendant was convicted for two counts of first degree robbery or forcibly stealing property of a jewelry store, and forcibly stealing a wristwatch owned by the store manager. Defendant filed a motion to recall mandate claiming appellate counsel was ineffective in failing to raise this as double jeopardy.
Holding: The State contends Defendant waived his double jeopardy claim by not raising it at trial. However, double jeopardy can be raised on appeal because the court was without power to proceed against a defendant twice for the same offense. The prohibition against double jeopardy is to ensure that the punishment remains within limits established by the legislature. The essence of robbery is forcibly taking property; the ownership of the property is immaterial. It has repeatedly been held that only one robbery occurs where a defendant robs a store employee of the employee's property and the employer's (store's) property. Appellate counsel was ineffective in failing to raise this meritorious issue.

State v. Goodloe, No. ED91807 (Mo. App. E.D. 3/24/09):
Holding: Where the trial court denied Defendant's motion to give him credit for time served on probation and parole, this was not an appealable order because there was no statutory authority to appeal it.

Smith v. State, No. ED90768 (Mo. App., E.D. 10/28/08):
Holding: Even though Sec. 512.180.2 required the Associate Circuit Court to make a record of this expungement proceeding, where neither party below requested a hearing be held on the record, the Court of Appeals will not grant relief merely for failure of the hearing to be on the record.

Bizzell v. State, No. ED90303 (Mo. App., E.D. 10/7/08):
Where one of Defendant's prior DWI convictions was a municipal court SIS which should not have been used to enhance his DWI to a felony, Defendant could raise this issue for the first time on direct appeal and case is remanded for resentencing and to permit State to produce other evidence of prior DWI convictions.
Facts: Defendant was convicted of Class D felony DWI. His offense was enhanced to a felony because the State alleged two prior DWI convictions, one of which was a municipal SIS. After Defendant's trial, *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), was decided, which held that prior municipal court SIS convictions cannot be used to enhance subsequent DWI's.
Holding: *Turner* held that prior municipal offenses resulting in an SIS cannot be used to enhance punishment under Sec. 577.023. Because *Turner* was decided before Defendant's direct appeal was complete, we are bound by its interpretation. Defendant's sentence is reversed and remanded with instructions to allow the State to present other evidence to prove Defendant's persistent DWI offender status.

Editor's note by Greg Mermelstein: But see ***State v. Severe***, No. WD69162 (Mo. App., W.D. 11/25/08), holding that on resentencing, the State cannot present additional evidence of prior convictions.

City of Sunset Hills v. Wymer, No. ED90028 (Mo. App., E.D. 9/9/08):
(*1) Even though Defendant charged with municipal offense waived jury trial in Associate Circuit Court, misdemeanor rules of criminal procedure applied; (2) Where trial court sentenced Defendant on same day it found her guilty, the sentencing was premature since the time for filing a new trial motion had not expired, and there was no jurisdiction on appeal.*
Facts: Defendant was charged with a municipal offense. She requested a jury trial, and the case was transferred to an Associate Circuit Judge. She then waived a jury trial. Defendant was found guilty at a bench trial, and sentenced on the same day.
Holding: The initial question is whether the Court of Appeals has jurisdiction. Rule 37.61(e) states in municipal cases where a jury trial is requested, the misdemeanor rules of criminal procedure apply. Rule 29.11(c), which applies to misdemeanors, states no judgment shall be rendered until the time for filing a new trial motion expires. The City contends the misdemeanor rules do not apply because Defendant ultimately had a bench trial. This is an issue of first impression. Rule 37.61(f) states that where a defendant waives jury trial, the case "may" be remanded to municipal court. The permissive language indicates that remand is not required, and a Circuit Court can still hear the case. Here, the Associate Circuit Judge retained jurisdiction and held a bench trial, so the misdemeanor rules apply. Under 29.11(c), the judge could not sentence Defendant until the time for filing a new trial motion expired. Premature sentencing renders the Court of

Appeals without jurisdiction, since there is not a valid final judgment. Appeal dismissed, and case remanded for filing of new trial motion and new sentencing.

Clark v. State, No. ED90209 (Mo. App., E.D. 5/27/08):
(1) Even though Clark filed a cert. petition with the U.S. Supreme Court after his direct appeal, the time for filing his Rule 29.15 motion was 90 days after the direct appeal mandate by the Missouri appellate court, and not 90 days after the denial of the cert. petition by the U.S. Supreme Court. (2) Even though Clark relied on his direct appeal attorney's advice as to when to file his 29.15 motion, the attorney's incorrect advice did not constitute excusable neglect or abandonment.
Facts: Clark's convictions were affirmed by the Missouri Supreme Court on direct appeal. Clark's direct appeal attorney then filed a cert. petition with the U.S. Supreme Court and told Clark he would have 90 days after the cert. petition was denied to file a Rule 29.15 motion. Clark relied on this advice, and filed his 29.15 motion within 90 days of the denial of cert. However, this was more than 90 days after the Missouri Supreme Court had issued its mandate. The motion court dismissed the 29.15 motion as untimely.
Holding: (1) Clark contends that Rule 29.15 is silent or ambiguous as to the time limit for filing a 29.15 motion when a cert. petition has been filed, and that his conviction was not "final" until the cert. petition was denied, so that his filing within 90 days of that denial was "timely." However, Rule 29.15(b) states that a 29.15 motion must be filed within 90 days of the Missouri appellate court's mandate. The Rule is not ambiguous. The appellate court's mandate triggers the 90-day limitation regardless of whether a petition for certiorari is filed with the U.S. Supreme Court. (2) Although Clark made an "honest" mistake in following his counsel's advice as to when to file his 29.15 motion, Rule 29.15 simply contains no authority for granting time extensions due to good cause or excusable neglect. Nor was this abandonment by counsel, or a conflict of interest by counsel. While the stringent requirements of Rule 29.15 may seem unfair where a movant relies on advice of counsel, the late filing deprived the motion court of jurisdiction and left no alternative but to dismiss.

Rupert v. State, No. ED89980 (Mo. App., E.D. 4/22/08):
(1) Defendant who pleads guilty can only challenge sufficiency of indictment or information by direct appeal, not 24.035; (2) where judge's written sentence was different than the oral pronouncement of sentence, the oral pronouncement controls; (3) judge is not required to give consecutive sentences for statutory rape.
Facts: Defendant pleaded guilty to four counts of second-degree statutory rape, Sec. 566.034. The judge sentenced him to "three years on each count." Later that day, the judge entered a written sentence saying the sentences were consecutive. When Defendant sought to fix this, the judge offered Defendant the opportunity to appear for resentencing, but Defendant refused. Defendant ultimately filed a 24.035 motion.
Holding: Regarding Defendant/Movant's claim that the information was insufficient, this is not cognizable in a 24.035 action. The remedy was to raise this on direct appeal. Regarding the sentence, Sec. 558.026.1 provides that sentences shall run concurrently unless the court specifies they run consecutively. Also, the general rule is that oral pronouncements of sentence control over later written judgments. The court believed it was required to give consecutive sentences under Sec. 558.026.1, which states that

certain sex offenses shall run consecutively, but statutory rape is not among the listed offenses mandating consecutive sentences. Once the court reduced its sentence to writing, it could not call Defendant back to court and resentence him. The oral sentence controls here, and Defendant's sentences are not consecutive. His sentences must run concurrently.

State v. Johnson, No. ED88355 (Mo. App., E.D. 11/6/07):
(1) Even though trial court sentenced Defendant below the statutory minimum, trial court could not resentence Defendant after the final judgment was entered and Notice of Appeal filed. However, appellate court can remand for proper resentencing. (2) Notice of Appeal filed more than 10 days after sentencing did not vest jurisdiction in appellate court.
Facts: In February 2006, trial court sentenced Defendant as a prior and persistent drug offender, Section 195.285, to eight years for possession of drugs. However, the actual statutory minimum is 10 years. Defendant filed a timely notice of appeal regarding this conviction. Then, in June 2006, trial court purported to fix its sentencing error by "resentencing" Defendant to 10 years. Defendant filed his notice of appeal from this 13 days after "resentencing."
Holding: The notice of appeal filed 13 days after the purported "resentencing" does not vest jurisdiction in the Court of Appeals because it was filed more than 10 days after sentencing. Rule 30.01(d). That appeal is dismissed. However, the earlier appeal is timely. There, however, the trial court lost jurisdiction of the case in February 2006 when final judgment was entered and notice of appeal filed. Thus, the judge could not "resentence" in June 2006. The sentence is erroneous, however, because it's below the statutory minimum. Sentence vacated in timely appeal and remanded for resentencing to not less than statutory minimum.

Elverum v. State, No. ED88496 (Mo. App., E.D. 9/18/07):
(1) Even though Movant absconded from probation, court exercises its discretion not to apply "escape rule" due to the "central issues" of this case; (2) plea court failed to ensure Movant understood the range of punishment by failing to advise him of maximum penalty and that his sentences could run consecutively; (3) Movant cannot raise a factual basis or sufficiency of information claim in Rule 24.035 appeal where those claims were not included in the Amended 24.035 Motion, but Movant could bring those via writ of habeas corpus; and (4) group guilty pleas with multiple defendants pleading guilty at once make confusing records and should be discontinued.
Facts: Movant pleaded guilty to four counts of first degree property damage, Section 569.100, and was placed on probation. After he absconded from probation, probation was later revoked and he was sentenced to four consecutive terms of four years, for 16 years. Also, on appeal, he claimed for the first time that he could not be charged or convicted of Class D felonies because the statute requires damage of more than $750 for a Class D felony, but Movant was only charged and the factual basis showed that the damage only "exceeded $500."
Holding: Rule 24.02(b) requires the court to inform defendants of the maximum possible penalty. Here, the court told Movant before his plea that "the range was up to four years" but never told him whether the range was four years on each count, or four

years total. Even though the State had recommended 10 years, this does not show that Movant knew he could receive up to 16 years. His attorney's statement at sentencing that Movant could receive 16 years does not cure the error either, because this took place at sentencing, two month after Movant pleaded guilty. Movant cannot raise for the first time on appeal claims that he could not be convicted for the Class D felony because the evidence did not show damage above $750. These claims were not included in the Amended 24.035 Motion. The claim about the information should have been raised on direct appeal; the factual basis claim in the 24.035 motion. However, Movant can raise these in a writ of habeas corpus.

State v. Green, No. ED897804 (Mo. App., E.D. 9/11/07):
Holding: Rule 29.12(b) allowing plain error to be corrected does not create an independent cause of action for issues that could have been raised in a Rule 24.035 motion. Thus, appellate court lacks jurisdiction to hear 29.12(b) appeal.

Buchanan v. State, No. ED89018 (Mo. App., E.D. 3/6/07):
Holding: Petitioner cannot appeal denial of writ of habeas corpus; remedy is to file a new writ in higher court.

Grass v. State, No. ED87708 (Mo. App., E.D. 2/27/07):
Holding: Where additional Findings by trial court were necessary, but trial judge who heard the evidence had died during the appeal, the case could not be remanded for additional Findings, and a new trial had to be granted.

Queen v. State, No. ED88014 (Mo. App., E.D. 2/20/07):
Holding: Postconviction Movant cannot appeal a "motion to reopen" a PCR case which motion to reopen was denied by docket entry, since there is no "final judgment" to appeal under Rule 74.01(a), which requires a "judgment" to be signed by the judge and be denominated a "judgment" or "decree."

State v. Simmons, No. ED88880 (Mo. App., E.D. 12/26/06):
Holding: Where Defendant, two years after conviction and sentence, filed motion in trial court under Rule 29.12(b) for plain error relief and trial court denied motion, this was not an appealable judgment because there is no independent basis for a motion under Rule 29.12(b) to enforce claims of plain error. Appeal dismissed.

Belger v. State, No. ED86533 (Mo. App., E.D. 10/03/06):
Holding: Where (1) Movant had had a Rule 29.15 case in 1996 and lost; (2) in 2005 Movant filed a "Motion To Reinstate Original Motion Under Rule 29.15" on grounds that the postconviction court had not decided all claims and that postconviction counsel had a conflict of interest; and (3) the motion court denied the new motion by docket entry, which Movant then appealed, the Court of Appeals dismisses for lack of jurisdiction because there is no final appealable "judgment" since docket entry was not signed by the judge or denominated a "judgment" under Rule 74.01(a).

State v. Decker, No. ED87245 (Mo. App., E.D. 6/30/06):

(1) Denial of motion for credit for time served on house arrest toward a prison sentence is not an appealable judgment; (2) trial court does not have authority to grant motion to file late notice of appeal because this relief must be requested from the Court of Appeals under Rule 30.03.

Facts: Defendant filed motion for credit for time served on house arrest to apply toward his prison sentence. The trial court denied the motion. Several months later, the trial court entered an order purporting to allow Defendant to file a late notice of appeal.

Holding: (1) A ruling denying a motion for jail time credit is not an appealable judgment. A prisoner seeking credit toward a sentence must request it from the Department of Corrections, and if the DOC does not act, the remedy is through a petition for declaratory judgment or extraordinary writ. (2) Furthermore, Defendant's notice of appeal is not timely. The trial court lacks authority to allow filing of a late notice of appeal because this must be requested from the Court of Appeals under Rule 30.03. Appeal dismissed.

State v. Childers, No. ED87323 (Mo. App., E.D. 5/16/06):

Where Appellant filed a Notice of Appeal (NOA) without paying a fee and without moving to proceed in forma pauperis at the time the NOA was filed, appeal must be dismissed for lack of jurisdiction.

Facts: On July 29, 2005, trial court entered judgment in criminal case. On August 8, 2005, Defendant filed an NOA. This was the 10th day after judgment. However, Defendant did not pay the docket fee or obtain a waiver thereof on that date. Instead, Defendant filed a motion to proceed in forma pauperis on September 29, 2005, which was granted on December 5, 2005.

Holding: Where an NOA is timely filed within 10 days after judgment pursuant to Rule 30.01(d), but without payment of the required docket fee or waiver thereof, the NOA is not timely filed, since without payment of the fee or order waiving the fee, there can be no valid filing of the NOA. Thus, the Appellate Court lacks jurisdiction. Defendant was granted leave to appeal as a poor person on December 5, 2005, seventeen weeks after the last day for timely filing an NOA. "Even if we considered [Defendant's] appeal as filed on September 29, 2005, the date he requested leave to appeal as a poor person, … that date is still well beyond the ten-day limit." Appeal dismissed for lack of jurisdiction.

State v. Storer, No. SD30391 (Mo. App. S.D. 10/5/10):

Where trial court granted defense motion to dismiss four counts, but two counts remained pending, the State could not appeal the dismissal of the four counts because Sec. 547.200 did not authorize such appeal and there was not a final judgment to appeal.

Facts: Defendant was originally charged with four counts. That case went to trial, but a mistrial was declared. Subsequently, the State nolle prossed those four counts, and without seeking leave of court, re-filed them along with two new counts. The defense moved to dismiss the original four counts alleging that re-prosecution would violate double jeopardy. The trial court dismissed the original four, and left the two new counts pending. The State appealed the dismissal of the four counts.

Holding: The appeal must be dismissed. Sec. 547.200 authorizes the State to appeal when a court quashes an arrest warrant; when a court finds an accused incompetent; and when a court suppresses evidence or a confession. The State claims the appeal here is a

quashing of an arrest warrant. However, this is not the case, since Defendant remains charged with two counts and continues to be incarcerated awaiting trial. Furthermore, since two counts remain pending, there is not a "final judgment" in this case, which is necessary for an appeal. Appeal dismissed.

In re Wolf v. Steele, No. SD29850 (Mo. App. S.D. 7/17/09):
Where trial counsel told Defendant she would file a notice of appeal after trial but failed to do so and two years elapsed before Defendant discovered this, Defendant does have a remedy in habeas corpus because he was denied effective assistance of appellate counsel on direct appeal.
Facts: In 2007, Defendant was tried and convicted. Counsel told Defendant she would file a notice of appeal and that the appeal would take two years. However, trial counsel never filed the notice of appeal. In January 2009, having heard nothing about his appeal, Defendant asked about it and learned it had not been filed. Defendant filed a habeas corpus action alleging ineffective trial counsel for failure to file notice of appeal.
Holding: The State claims Defendant is barred by *Gehrke v. State*, 280 S.W.3d 54 (Mo. banc 2009), which held that postconviction counsel's failure to file notice of appeal in postconviction case did not have a remedy after the one year for late notice of appeal under Rule 30.03 expired. However, *Gehrke* is distinguishable because there is no constitutional right to effective postconviction counsel. The instant case is a direct appeal where there is a constitutional right to effective direct appeal counsel. Counsel's failure to timely file notice of appeal was ineffective. Habeas granted, with remedy to remand for resentencing to same sentence so Defendant can file notice of appeal thereafter.

State v. Cain, No. SD29090 (Mo. App. S.D. 5/15/09):
(1) Even though the parties stipulated in trial court that Defendant's sentence would be reduced and the appeal waived, this did not waive Defendant's appeal because the trial court had no power to reduce Defendant's sentence long after sentencing; (2) where Defendant's prior DWI offense conduct occurred more than five years before the charged DWI offense, Defendant was not a "prior offender," Sec. 577.023.1(5) RSMo. Cum. Supp. 2005; and (3) Point Relied On must state that trial court erred in admitting evidence at trial, not just in denying motion to suppress.
Facts: In April 2007, Defendant was charged with DWI as a prior offender for having "been convicted on August 27, 2002" of DWI in Jefferson County. The conduct giving rise to the Jefferson County charge occurred in 2000. After Defendant was convicted in the new case, he filed an appeal. Meanwhile, six months after sentencing, the parties in the trial court stipulated that Defendant's sentence would be reduced to time served and "in exchange for this outcome, Defendant has agreed to waive" his appeal.
Holding: (1) The State argued that Defendant has waived this appeal because of the stipulation in the trial court. However, there was no authority for the trial court to reduce Defendant's sentence; therefore, Defendant's purported waiver of his right to appeal, based on the mutual false assumption by the parties as to the trial court's authority to reduce Defendant's sentence, was not and could not have been voluntarily made. Once sentencing occurs in a case, the trial court loses jurisdiction, and cannot reduce a sentence as was done here. The trial court could have granted Defendant parole under Sec. 559.100 RSMo. Cum. Supp. 2006, but that's not what the court purported to do here. (2)

Although the date of Defendant's prior DWI conviction was August 27, 2002, the conduct giving rise to that conviction occurred in 2000. Sec. 577.023.1(5) RSMo. Cum. Supp. 2005 provides that a prior offender is one whose "prior offense occurred within five years" of the newly charged offense. The 2000 DWI conduct is not within five years of April 6, 2007, the date of the new DWI offense. Therefore, Defendant cannot be sentenced as a "prior offender," and can only be sentenced for a Class B misdemeanor. (3) Defendant's Point Relied On on appeal raises an issue that the trial court erred in denying a motion to suppress. The Point Relied On does not claim error in admitting the evidence at trial. A trial court's ruling on a motion to suppress is interlocutory. A motion to suppress by itself preserves nothing for appeal, and a Point Relied On that refers only to such a ruling preserves nothing for appeal. However, the Court reviews the claim here because the motion was preserved at trial and in the new trial motion, so the State had notice Defendant was raising this issue.

Kreamalmyer v. Director of Revenue, No. SD29105 (Mo. App. S.D. 2/6/09):
Holding: Where an error with the sound recording of the trial failed to record certain testimony which the trial court relied upon in reaching its decision, so that a complete transcript for appeal could not be produced, the Appellant was entitled to a new trial.

State v. York, No. 28523 (Mo. App., S.D. 5/13/08):
(1) Where a prior judge had granted a motion to allow Defendant to withdraw his guilty plea, and then a subsequent judge granted the State's motion to reinstate the plea, the subsequent judge could not reinstate the plea because once it was withdrawn, it could not be reinstated by another judge. (2) The instant case is appealable by direct appeal, because this is not an appeal of a guilty plea, because no plea existed at the time of sentencing.
Facts: Defendant, with Public Defender counsel, entered an *Alford* plea to robbery. Sentencing was scheduled for later. Before sentencing, Defendant filed a motion to proceed *pro se*, and moved to withdraw his guilty plea. The plea judge granted Defendant's motion to withdraw his guilty plea, and sent the case to another judge for trial. In the new division, Defendant signed a waiver of counsel form, but said he was representing himself because of "systemic problems" in the Public Defender's Office, and that the Public Defender had not represented him at all. Defendant said he would not choose self-representation if he could have an attorney other than someone from the Public Defender. Although his concern focused on his particular Public Defender, Defendant did not believe the Public Defender System could adequately represent him or anyone else. The judge told the prosecutor that the judge did not think Defendant's waiver of counsel was going to stand up on appeal under these circumstances. The prosecutor then filed a motion to reinstate the guilty plea. The trial court granted this and sentenced Defendant. He appealed.
Holding: The State claims that this is a prohibited direct appeal of a guilty plea, and that the proper remedy is under Rule 24.035. The State mischaracterized this appeal. The issue is whether a guilty plea existed at the time the judge undertook to sentence Defendant. It is not an appeal of a guilty plea. When a guilty plea is withdrawn, a defendant is restored to the position he occupied before entering the plea. Here, the first

judge allowed Defendant to withdraw his plea. There was nothing that could be "reinstated" by the second judge. Judgment reversed and case remanded.

State v. Corley, No. 28249 (Mo. App., S.D. 5/7/08):
(1) Even though the State had dismissed a timely-filed charge of second degree assault and allowed another year to pass and then refiled a similar charge, the statute of limitation had not run because it was tolled by the original filing; (2) where the trial court's written judgment found Defendant guilty of a count different than the court's oral verdict, this is a clerical error and the case is remanded for correction of this error.
Facts: In 1998, Defendant was charged with second degree assault for causing an injury while driving a car in an intoxicated condition. The State dismissed this charge in 2003 without prejudice. In 2004, the State filed a new information charging Defendant with second degree assault for recklessly causing serious physical injury by driving the car at an excessive rate of speed. Defendant moved to dismiss on grounds that the statute of limitation has expired. After being found guilty, Defendant appealed.
Holding: (1) Several factors are used to determine if a previously charged offense can serve to toll the statute of limitations for a later charged offense: whether the later information essentially contains the same facts as the original charge; whether the later charge is charged under the same statute as the original charge; and whether the later charge is a different level of offense than the original charge. Here, while the later information charged somewhat different facts, both charges arose out of the same incident (auto crash), both were charged under the same statute, and under the same level of offense. Therefore, the original charge was the "same offense" as the later charge, and the statute of limitations was tolled by the original filing and did not expire. (2) The trial court's written judgment found Defendant guilty of a different count than the court's oral verdict. This is a clerical error in the judgment, and the case is remanded to correct this error under Rule 29.12.

State v. Constance, No. 28503 (Mo. App., S.D. 4/03/08):
Where indigent Defendant was appointed a Public Defender for appeal, but then "fired" that Public Defender, Defendant was not entitled to counsel of his choice on appeal or hybrid counsel.
Holding: An indigent defendant has a constitutional right to counsel in pursuing a direct appeal, and trial courts are required to appoint such counsel, Rule 31.02(c). Although there is no constitutional right to proceed pro se on appeal, courts may permit it. Defendants are not entitled to counsel of their choice, or to hybrid counsel or joint representation. Here, Defendant was appointed a Public Defender for appeal, but then fired her. Defendant cannot then complain that he was denied his right to counsel.

State v. Lawrence, No. 28199 (Mo. App., S.D. 4/3/08):
(1) Plain error resulted when trial court found Defendant guilty of offense at a purported "trial," when the only "evidence" presented was statements of a prosecutor and Defendant; (2) Plain error resulted when trial court convicted Defendant of an offense at a purported "trial" without obtaining a jury trial waiver from him.
Facts: Defendant was charged with Count I (assault) and Count II (unlawful use of a weapon). Defendant filed a motion to waive jury sentencing. Defendant then filed a

petition to plead guilty to *Count II*. A proceeding then occurred in which the trial court asked the Prosecutor what evidence would be presented in support of *both* Count I and Count II. The Prosecutor stated the evidence for both, and Defendant agreed with this. The court then found Defendant guilty of *both* Counts I and II. Defendant then appealed the "trial" on Count I, claiming there was insufficient evidence to convict.
Holding: This case presents glaring procedural irregularities which, although not briefed, present plain error. (1) While the proceeding below was satisfactory for a guilty plea, it does not constitute a trial on Count I. Statements of counsel are not evidence. The Prosecutor's statements of the facts did not constitute evidence for a trial. Also, the Defendant's statements at the hearing cannot be used to convict him under Rule 24.02(d)(5). Defendant was convicted on Count I without ever being tried or without any evidence. (2) While Defendant waived jury sentencing, he did not waive a jury trial. At the hearing, Defendant was only pleading guilty to Count II. Defendant did not waive his right to jury trial on Count I.

State v. Bescher, No. 28384 (Mo. App., S.D. 3/13/08):
Holding: (1) Where Defendant claimed State had failed to reveal examination results of a State's expert under Rule 25.03, but on appeal, the Defendant failed to include any motion in the legal file on appeal showing that a request for disclosure was made under Rule 25.03, the record on appeal was insufficient to review Defendant's claim; (2) prosecutor may not ask Defendant if the other trial witnesses were "lying," but error was harmless in this case.

State ex rel. Nixon v. Vacation Travel, No. 28262 (Mo. App., S.D. 12/19/07):
Holding: Where during pendency of the appeal, the parties filed a motion stating they had agreed to a settlement and the trial judge notified the appellate court that he would approve the settlement, the proper remedy was to remand the case with directions to vacate the prior judgment and enter the settlement.

State v. Bryant, No. 28673 (Mo. App., S.D. 10/31/07):
Once trial court enters final judgment and sentence, trial court cannot modify sentence under Rule 29.05.
Facts: After final judgment and sentence, Defendant filed a motion with the trial court under Rule 29.05 to reduce his sentence. The trial court denied it, and Defendant appealed.
Holding: Rule 29.05 states "the court shall have the power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive." A criminal judgment becomes final at the time sentence is pronounced. At that time, the trial court's jurisdiction is exhausted. Defendant's sentence was within the statutory range. The trial court had no power to modify the sentence after final judgment. Since appellate jurisdiction is derived from the trial court's jurisdiction, there is no jurisdiction to appeal. Appeal dismissed.

State v. Gonzalez, No. 27968 (Mo. App., S.D. 7/26/07):
(1) Appellate court does not consider evidence presented at a motion to suppress hearing, but not at trial, in determining sufficiency of evidence to convict; and (2) even

though 40 pounds of marijuana were found hidden in car Defendant was driving, evidence was insufficient to sustain conviction where there was no evidence Defendant knowingly possessed the marijuana.
Facts: Defendant and a passenger were stopped for a traffic stop. They had Arizona license plates, and no luggage. Defendant said they were going to meet friends in St. Louis. The passenger said they were going to call friends from a pay phone. Defendant consented to search the car. The backseat carpet and seat were loose. Police found under the seat marijuana. More marijuana was found concealed in speakers in the trunk and also in door panels. Defendant was convicted of possession with intent to distribute.
Holding: (1) The State contends that evidence admitted at the pretrial motion to suppress hearing can be used to support the conviction. This is not true. Although such evidence can be used regarding the motion to suppress, the only evidence that can be reviewed to support a conviction is that presented at trial, i.e., between opening statement and closing argument. (2) The evidence is insufficient to prove Defendant had knowledge of the marijuana. Defendant made no confession or statements. Even though the officer said the marijuana smelled like axle grease, there was no evidence Defendant knew this. Even though the carpet and seat were loose, there was no evidence Defendant knew that, since he was in the front seat. Defendant's and the passenger's statements about going to St. Louis and calling friends from a pay phone are not inconsistent, and don't show consciousness of guilt. The fact that there was no luggage in the car does not show inference of guilt, since the car could have been driven from many locations outside Missouri without needing luggage, even though it had Arizona plates. There was no evidence where the trip started.

Collins v. State, No. 28104 (Mo. App., S.D. 6/26/07):
Holding: Where in 29.15 appeal, appellate counsel failed to file with the Court of Appeals the testimony of trial counsel which was taken by deposition, Court of Appeals would not review ineffectiveness claims because complete record on appeal was not filed.

State v. Wheeler, No. 27823 (Mo. App., S.D. 4/20/07):
Holding: Where claim on appeal involved alleged error in the contents of the State's PowerPoint presentation at trial, Court of Appeals would not review the claim because Appellant failed to file the PowerPoint slides as an exhibit on appeal; burden was on appealing party to file complete record on appeal, which would include the PowerPoint.

Wise v. State, No. 27766 (Mo. App., S.D. 4/5/07):
(1) Where motion court dismissed Movant's 24.035 motion for failure to prosecute in 1999, but Movant did not file motion to reinstate until 2002, the motion court lacked jurisdiction to reinstate because jurisdiction expired 30 days after entry of judgment in 1999; and (2) Even though Movant may have filed a motion claiming abandonment by counsel, where that motion was denied in 2002, the motion court lost jurisdiction 30 days after this denial, and could not later reinstate the cause.
Facts: Motion court dismissed 24.035 motion for failure to prosecute in 1999. In 2002, Movant filed a motion to reinstate. The motion court denied the motion to reinstate. In 2003, Movant filed a motion for evidentiary hearing. The motion court granted this

motion, and a hearing was held. After the motion court denied relief on the merits, Movant appealed.

Holding: Rule 75.01 states a trial court retains jurisdiction over a judgment for only 30 days. Rule 81.05 extends the jurisdiction to cover timely after-trial motions. When jurisdiction expires, however, the court can no longer act. The 1999 dismissal was a judgment. The motion court lost jurisdiction over it 30 days after entry, and thus, could not grant the 2002 reinstatement motion, unless the 2002 motion alleged abandonment by PCR counsel. Assuming that motion alleged abandonment, however, the motion court denied it in 2002, and therefore, lost jurisdiction 30 days after that. Movant did not appeal. Instead, Movant filed a motion for a hearing in 2003. The motion court was without jurisdiction to grant that because it was filed more than 30 days after the 2002 judgment. Since the motion court lacked jurisdiction to do anything after 2002, the Court of Appeals lacks jurisdiction, too. Appeal dismissed.

State v. Whitwell, No. 28131 (Mo. App., S.D. 3/8/07):

State cannot appeal trial court's order granting Motion to Suppress Identification.

Facts: The trial court sustained Defendant's Motion to Suppress Identification following a robbery. The State appealed this order pre-trial.

Holding: This appeal must be dismissed because the State cannot appeal a pretrial sustaining of a motion in limine. Section 547.200.1(3) permits a State appeal of a motion to suppress evidence, but this statute is linked to Section 542.296 which involves illegal or warrantless searches and seizures. Section 547.200.1(3) was not intended to allow appeal of motions in limine. If that were the case, the State could appeal all motions in limine which excluded evidence.

Brooks v. State, No. 27682 (Mo. App., S.D. 1/31/07):

Where motion court in Rule 24.035 case vacated Movant's sentence and, before resentencing occurred, Movant filed Notice of Appeal to challenge the failure to set aside his plea, the Court of Appeals lacks jurisdiction to hear the appeal because there is no "final judgment" since Movant has not been resentenced.

Facts: Movant filed 24.035 motion to challenge his guilty plea and sentence. The motion court granted sentencing relief and ordered resentencing, but did not vacate his plea. Before resentencing occurred, Movant filed Notice of Appeal to challenge the failure to vacate the plea.

Holding: The Court of Appeals lacks jurisdiction because there is no "final judgment" since Movant has not been resentenced. Without resentencing, there is no "final judgment" to contest in a postconviction case. Once a final judgment is entered, Movant can attack his plea through a Rule 24.035 case. The motion court was entitled to rule on such a case before appeal to the appellate court.

Editor's Note by Greg Mermelstein: This case conflicts with the practice in capital cases followed by the Missouri Supreme Court. In capital cases where Movants have been granted new penalty phase trials, the Supreme Court hears appeals of the guilt phase *before* the new penalty phase trials occur, i.e., *before* resentencing. Judicial economy seems to be better served by the Supreme Court's approach, since in **Brooks**, the Movant is apparently going to have relitigate his guilty plea claims in a second PCR in the motion court, which the State could arguably claim is a prohibited "successive"

motion. I personally believe **Brooks** is wrongly decided and conflicts with the Supreme Court's approach. Until the Supreme Court "finally resolves" this issue some day, I would continue to file Notices of Appeal in these situations in the Eastern and Western Districts, and probably also in the Southern District, because of the "successive" motion issue.

Dismang v. State, No. 27680 (Mo. App., S.D. 11/29/06):
Holding: Where Movant/Appellant's brief did not discuss the motion court's Findings, the Court of Appeals will not review the claim of error because the Findings are presumptively correct, and Movant/Appellant has not argued why they are clearly erroneous.

Hollingshead v. State, No. WD71775 (Mo. App. W.D. 11/23/10):
Holding: Where motion court summarily denied Rule 24.035 claims without specific Findings, this was error since 24.035(j) requires sufficient Findings for meaningful appellate review. Footnote 3, however, states: "The dissenting opinion makes a persuasive argument concerning the application of Rule 78.07(c) to foreclose [Movant's] claim of error. The State did not argue that [Movant] failed to preserve his current claim by failing to file a Rule 78.07(c) motion. … [W]e believe the applicability of Rule 78.07(c) in postconviction proceedings is better resolved in a case in which the issue has been the subject of a full adversarial presentation."
Dissenting Opinion: The issue is not preserved for appeal because Movant failed to file a motion under Rule 78.07(c). 78.07(c) provides that in all cases, allegations of error relating to the form or language of the judgment, "including the failure to make statutorily required findings," must be brought to the motion court's attention in a motion to amend judgment in order to be preserved for appeal. This alleviates unnecessary appeals, reversals and remands. Findings are required under 547.360.10 and 24.035(j) and 29.15(j). 78.07(c) promotes the purpose of the postconviction rules by allowing an opportunity to expeditiously correct a judgment. Where a Movant fails to file a 78.07(c) motion, an appeal claiming the motion court failed to enter proper findings should be dismissed.

State v. Molsbee, No. WD70399 (Mo. App. W.D. 8/10/10):
Where (1) Defendant had pleaded guilty to sex offense in 1999, and (2) in 2008 moved within 1000 feet of a school, his guilty plea to violating Sec. 566.147 (2004) was set aside because the law could not be applied retrospectively to him, and he could raise this matter on direct appeal after a guilty plea because the law (caselaw) on this changed while his appeal was pending.
Facts: Defendant was convicted of a sex crime in 1999. In 2008, he moved within 1000 feet of a school, in violation of Sec. 566.147, which was enacted in 2004. In 2009, he pleaded guilty to this offense and was sentenced, but then filed a direct appeal.
Holding: While Defendant's direct appeal was pending, the Mo. Supreme Court ruled in *F.R. v. St. Charles County Sheriff's Dept*., 301 S.W.3d 56 (Mo. banc 2010), that Sec. 566.147 does not apply to persons convicted before the effective date of the statute in 2004 because that would be a retrospective law. The issue here is whether Defendant can raise this issue on direct appeal after a guilty plea. Usually, a guilty plea waives

defenses. A direct appeal of a guilty plea is limited to whether a trial court has subject matter jurisdiction (now construed as "authority") and whether the information was sufficient. Here, the issue is not precisely whether the court had authority to accept the plea, but that the statute was unconstitutional as applied to Defendant. However, prior cases have held that if there is a change in law after judgment but before the appellate court's decision is rendered, the appellant/defendant gets the benefit of the changed law. Here, the *F.R.* case was decided while Defendant's appeal was pending, and Defendant should get the benefit of *F.R.* The "change of law" principle is, in effect, an exception to the principle that a guilty plea waives defenses. Plea and conviction vacated.

In the Interest of T.S.G. v. Juvenile Officer, No. WD71641 (Mo. App. W.D. 9/28/10):
(1) Where Juvenile was charged with a sex offense but was adjudicated of a status offense of behavior injurious to her welfare, this violated due process because it was an offense not charged; and (2) even though Juvenile's supervision by Juvenile Court had expired, where her conviction involved sexual conduct that could have adverse consequences such as failure to register as a sex offender, an exception to mootness applies on appeal, because Juvenile could be subject to significant collateral consequences if not allowed to appeal.
Facts: Juvenile was charged under Sec. 211.031.1(3) for violating state law in that she allowed minors to touch her breasts. The trial court found that Juvenile Officer failed to prove this offense because there was no proof that this was done for sexual gratification, but the trial court "amended the petition to conform to the evidence" and found Juvenile committed a status offense under Sec. 211.031.1(2)(d) injurious to her welfare. Juvenile appealed. Meanwhile, the trial court discharged Juvenile from court supervision.
Holding: As an initial matter, the appellate court must determine if this appeal is moot because Juvenile has been discharged from supervision. One exception to mootness is where a party will be subjected to significant collateral consequences if their appeal is not allowed to proceed. Here, Juvenile's offense was sexual in nature, and she could be subjected to significant collateral consequences such as sex offender registration. Therefore, appellate court will decide appeal. On the merits, the petition charging Juvenile failed to allege the status offense and therefore, failed to provide notice of the charges against her, which violated due process and a fair trial. The status offense was not a lesser-included offense of the delinquency offense. This court has addressed prior attempts to circumvent the rights of juveniles for their supposed greater good. These cases revolve around the theme of charging juveniles with one offense, an inability to convict, and then convicting of another offense in order to get them into rehabilitation. These attempts have been rejected. Juvenile discharged.

State v. Connell, No. WD72643 (Mo. App. 12/14/10):
Even though State's appeal purported to be an appeal of a grant of a motion to suppress, where trial court had held a bench trial and only after the entire trial entered a "Judgment" purporting to grant the motion to suppress, this Judgment was in reality an acquittal, and State could not appeal.
Facts: Defendant was charged with drug possession. Prior to trial, the trial court overruled Defendant's motion to suppress. Defendant proceeded to a bench trial. At trial, the State introduced the drugs without any objection from the defense. After closing

arguments, the court entered an order that stated: "Judgment – Defendant's motion to suppress is sustained." The State appealed.
Holding: Defendant correctly claims that this is not an interlocutory appeal of a grant of a motion to suppress, but is an impermissible appeal of an acquittal. Sec. 547.200.1(3) allows the State to appeal a denial of a motion to suppress. However, the State cannot appeal if this would result in double jeopardy to a defendant, Sec. 547.200.2. Here, the trial court's order is nonsensical since the court admitted the evidence without objection at trial, but then purported to suppress the evidence after trial in a "Judgment." Suppression of evidence should be ruled upon before, not after, evidence has been admitted at trial. For double jeopardy purposes, the court looks to the entire proceedings. Here, the entire trial was concluded. The practical effect of the trial court's judgment is that after hearing all the evidence, the court concluded as a matter of law that the State could not meet its burden, and thus, Defendant was acquitted. Jeopardy has attached and the appellate court cannot review this appeal as "interlocutory." Appeal dismissed.

Stone v. Missouri Deparment of Corrections, No. WD71161 (Mo. App. W.D. 5/25/10):
Holding: Generally, when a circuit court denies a petition for mandamus, the remedy is to file another writ in a higher court, but when the circuit court denies a writ of mandamus following an answer or motion directed to the merits and in doing so determines a question of fact or law, then the court's ruling is final and appealable by way of direct appeal. Because the DOC's motion to dismiss attacked the merits of petitioner's petition and the circuit court denied the petition on the merits, the order is final and appealable by direct appeal.

Garcia v. State, No. WD69671 (Mo. App. W.D. 12/15/09):
(1) Court of Appeals would remand case upon Movant's request to be able to prove his 24.035 motion was timely filed; and (2) even though Clerk's Office did not open a file on Movant's pro se 24.035 motion, where Movant had a file-stamped copy of the motion showing it was timely filed, the motion was timely.
Facts: Movant was sentenced and delivered to the DOC on March 20, 2006. On April 17, 2006, Movant filed a pro se Rule 24.035 motion, but the Clerk's Office merely file stamped it and sent it back to Movant. In December 2007, Movant filed an Amened Motion, and the Clerk's Office opened a case at that time. In January 2008, the motion court dismissed the case as untimely. Movant appealed. During the appeal, Movant requested a remand to prove that his pro se motion was timely filed. A remand showed these facts.
Holding: Movant's motion was timely filed within 180 days of his delivery to the DOC on April 17. However, the Clerk's Office failed to open a case and returned Movant's motion to him. Movant's motion was "filed" on April 17, not the later date of the Amended Motion when the Clerk opened a file of the case. Therefore, his motion was timely.

Duley v. State, No. WD69962 (Mo. App. W.D. 11/24/09):
(1) Brady claim was cognizable in 29.15 action because there was no evidence Defendant/Movant knew of the claim on direct appeal, and even if Defendant/Movant did

know, the Brady evidence would not have been part of the record on appeal; (2) State committed Brady violation in failing to disclose police report of witness who told police Defendant/Movant did not do the charged murder, even though the witness' name appeared in other police reports that were disclosed; (3) Even though witness testified at 29.15 hearing he would have invoked 5th Amendment right not to testify had he been called at trial, Brady violation was still prejudicial because defense counsel could have used police report as prior inconsistent statement.

Facts: A shooting death occurred at a large public gathering of several hundred people. Defendant was convicted of murder. His defense at trial was that he was actually innocent. The State's evidence consisted largely of witnesses who originally said they saw Defendant do the shooting, but then later recanted. Defendant/Movant presented witnesses who testified he did not do the shooting. After direct appeal, Defendant/Movant filed a 29.15 motion alleging the State failed to disclose a police report of a witness who said Defendant/Movant was not the shooter, and identified another person as the shooter.

Holding: (1) The State claims that Brady claims are not cognizable in Rule 29.15 proceedings, but are trial error that can only be raised on direct appeal. There is no dispute that the report at issue was not disclosed before trial. However, the record does not reveal whether Defendant/Movant knew of the report during the pendency of his direct appeal and failed to raise it. This is irrelevant, however, because even if Defendant/Movant learned of the report during the pendency of his direct appeal, he could not have raised the issue on direct appeal because new evidence cannot be introduced. Therefore, the first opportunity to prove his Brady claim was in the 29.15 proceeding. Hence, even though Brady claims are "trial error," they are cognizable in 29.15 proceedings. (2) The State claims the nondisclosed report is not material because the witness' name appeared in other police reports. The police reports, however, merely identified the witness as one of 350-400 people at the public event. This large number of attendees made it virtually impossible for defense counsel to interview everyone who could have possibly witnessed the shooting. Without further details in the nondisclosed police report, counsel had no reason to believe the witness might have exculpatory information. (3) The State further claims there is no prejudice from the Brady violation because the witness at the 29.15 hearing testified he would have invoked his 5th Amendment right not to testify at trial. However, defense counsel could have used the police report as a prior inconsistent statement under Sec. 491.074, just as the State used prior inconsistent statements to make its case against Defendant/Movant here. New trial granted.

State v. Smothers, No. WD70361 (Mo. App. W.D. 11/17/09):

(1) Where Defendant, who was required to have urine testing as a bond condition, provided a urine sample that was not his to authorities, Defendant could be charged with forgery; (2) even though trial court's dismissal order was "without prejudice," it had the practical effect of terminating the litigation, so the State could appeal the dismissal; (3) the appeal of the trial court's dismissal of the charge did not violate double jeopardy because Defendant was never placed in jeopardy since the trial court had not begun to hear evidence on the question of guilt but merely decided a pretrial motion to dismiss charge.

Holding: To prove forgery under Sec. 570.090.1(4), the State must prove that Defendant with the purpose to defraud used an inauthentic item as genuine, possessed an inauthentic item as genuine, or transferred an inauthentic item with the knowledge it would be used as genuine. The State does not have to prove the Defendant made or altered anything himself. Forgery against the gov't need not deprive it of money or property. So long as the Defendant has the purpose to frustrate the administration of justice, the "purpose to defraud" element is met. The forgery statute does not cover only writings, but is broad enough to cover false urine samples. Dismissal of charge reversed.

Leimkuhler v. Gordon, No. WD70003 (Mo. App. W.D. 11/10/09):
Even though full order of protection had expired, the Court of Appeals could use the remedy of vacatur to order the judgment below vacated, rather than dismiss the appeal as moot.
Facts: Appellant appealed entry of a full order of protection against her. Appellant was a co-worker of another worker who sought an order of protection. The trial court entered the order for "abuse" and "stalking" at work. However, the full order of protection expired during the pendency of the appeal.
Holding: Under Sec. 455.020.1 protection orders can only be entered for "abuse" if the perpetrator is a family member or household member, which is not the case here. The only possible basis of the order here was "stalking," but regarding stalking the parties only saw each other two times at work in "non-eventful" events, once in passing in a hallway and once getting off an elevator. The Court of Appeals questions whether this constitutes "stalking." Nevertheless, the protection order has expired here, which would normally render the appeal moot and require dismissal of the appeal. However an appellate court can use the remedy of vacatur to grant relief when a judgment becomes moot through no fault of the appellant. Vacatur is appropriate where there are equitable considerations supporting the fairness of vacating the judgment. Here, court remands with order to vacate the judgment.

State v. Moad, No. WD70527 (Mo. App. W.D. 9/29/09):
Where trial court excluded evidence as a discovery sanction and not because the evidence was illegally obtained, the State could not appeal the trial court's ruling as an interlocutory appeal (but could seek a writ of prohibition).
Facts: Defendant was charged with vehicular manslaughter resulting from the death of a person in a car. Defendant claimed he was not the driver of the car, but was only a passenger. The car was owned by the victim's family. Before Defendant could conduct an independent examination of the car, the Highway Patrol released the car to the victim's family. The Patrol claimed this was done pursuant to a Patrol policy. Defendant sought discovery of the policy, and despite a court order to produce it, the State never produced it. The trial court then excluded all evidence from the car. The State appealed.
Holding: The question is whether the State has a right to appeal here. Sec. 574.200.1(3) permits an interlocutory appeal by the State where an order suppresses evidence. There is a difference between "suppression" and "exclusion," however. Suppression is a term used when the evidence is not objectionable as violating any rule of evidence, but the evidence has been illegally obtained. Suppression of evidence is linked to the reasons in Sec. 542.296. Here, there was never an argument that the evidence from the car was

illegally obtained. Hence, the order here is one of exclusion, not suppression. It is akin to a discovery violation sanction. This is not appealable by interlocutory appeal, but the State may challenge it via writ of prohibition. Appeal dismissed.

State v. Allen, No. WD70295 (Mo. App. W.D. 9/22/09):
Even though the State sought "clarification" of trial court's ruling on motion to suppress from the trial court, where State did not appeal the ruling within 5 days of the original suppression order, State's appeal was untimely under Sec. 547.200.4.
Facts: Defendant filed a motion to suppress statements, which the trial court sustained on September 8, 2008. The court entered a docket entry on September 8, saying "Deft's motion to suppress statements sustained." The State requested a "more specific ruling" on certain statements, and the court further explained its ruling in chambers on September 9. On November 3, the State asked for "further clarification" of the suppression order, and the court issued another order on November 4. On November 4, the State filed an appeal.
Holding: Sec. 547.200.4 only permits the State to appeal "within 5 days of the entry of the [suppression] order of the trial court." The State argues it is appealing the November 4 order, so its appeal is timely. However, the November 4 order was, in substance, the same as the court's prior rulings on September 8 and 9. The November 4 order, in substance, merely reaffirmed the in chambers conference on September 9. While an appeal within 5 days of September 9 would have been timely, the appeal on November 4 was outside the 5-day time limit for a State's appeal. Appeal dismissed.

State v. Henry, No. WD69978 (Mo. App. W.D. 6/16/09):
Holding: In reviewing whether affidavit to support search warrant was supported by probable cause, appellate court reviews whether the *issuing judge's* findings were clearly erroneous, not whether the trial court's ruling on the motion to suppress was.

State v. Severe, No. WD69162 (Mo. App., W.D. 11/25/08):
Where one of Defendant's prior DWI convictions was a municipal SIS, this conviction could not be used to enhance Defendant's subsequent DWI to a felony, and while the case is remanded for resentencing, the State cannot present additional evidence to show other DWI convictions.
Facts: Defendant was charged and convicted of being a "persistent" DWI offender under Sec. 577.023.1(4)(a) because she allegedly had two prior DWI offenses. One of the offenses, however, was a municipal SIS, which can no longer be used to enhance under *Turner v. State*, 245 S.W.2d 826 (Mo. banc 2008). On appeal, the State claimed that the appellate court should remand the case for resentencing, and allow the State to present additional evidence of other DWI convictions.
Holding: Sec. 577.023.8 specifies that in a jury trial the facts establishing persistent offender status "shall be pleaded, established and found *prior* to submission to the jury." Allowing the State to now present additional evidence of other convictions would violate the timing of the statute, that the factual finding be made before submission to the jury. The State is precluded from presenting additional evidence at resentencing of any other DWI convictions. The Court declines to follow *Bizzell v. State*, 2008 WL 4540395 (Mo.

App., E.D. Oct. 8, 2008), which allowed the State to present additional evidence of DWI convictions on resentencing.

State v. Craig, No. WD68750 (Mo. App., W.D. 10/28/08):
Even though Defendant claimed that his prior DWI convictions could not serve as enhancements for various reasons, where Defendant pleaded guilty, he could not take a direct appeal of the guilty plea for this reason, but could only challenge the evidentiary basis for his plea by postconviction motion.
Facts: Defendant was charged with DWI as an aggravated offender. He allegedly had three prior DWI convictions. Prior to pleading guilty, Defendant filed a motion challenging his prior convictions on grounds that they did not comply with various court rules and there was no record of one of the convictions. The plea court found Defendant to be an aggravated offender. He appealed.
Holding: The Court of Appeals must address its jurisdiction, and finds no jurisdiction to direct appeal here. The only issues cognizable on direct appeal from a guilty plea are subject matter jurisdiction and the sufficiency of the charging instruments. Defendant does not allege the court lacked subject matter jurisdiction. While he claims the court erred in refusing to dismiss the information, the challenge is grounded on the evidence the information was based on, rather than the sufficiency of the charging instrument itself. A complaint about the evidentiary basis for the trial court's finding is not subject to direct appeal, but may be raised in a postconviction motion. Appeal dismissed.

State v. Batiste, No. WD68396 (Mo. App., W.D. 7/15/08):
(1) Even though Point Relied on referred to multiple witnesses and exhibits, it was not in violation of Rule 84.04(d) as multifarious because all the evidence related to a single point of whether court erred in admitting prior bad act incident; and (2) trial court erred in child abuse case in admitting evidence that Defendant had previously abused child because this was inadmissible propensity evidence.
Facts: Defendant was charged with child abuse, Sec. 568.060(1), for beating child with a board. State introduced evidence that Defendant had previously beat child with a belt and extension cord.
Holding: Defendant had right to be prosecuted only for crime charged under Art. I, Secs. 17 and 18(a), Mo. Const. Defendant was not charged with the incident involving the belt and cord. State claims the prior incident showed motive. Motive is the cause or reason that moves the will and induces action, and an inducement which lead the mind to indulge in a criminal act. The evidence that Defendant previously hit child with a belt and cord did not explain why he later allegedly hit child with a board. This prior incident was prohibited propensity evidence.

Gehrke v. State, No. WD67823 (Mo. App., W.D. 5/30/08):
Movant was entitled to hearing on claim that postconviction counsel abandoned Movant by failing to file a notice of appeal from denial of postconviction relief.
Facts: Movant was denied Rule 24.035 relief in 2001. Postconviction counsel did not appeal. In 2006, Movant filed a motion to reopen the 24.035 proceedings on grounds of abandonment. Movant alleged that he wanted to appeal, and that postconviction counsel told him he would appeal, but did not. The motion court denied relief without a hearing.

Holding: Failure to file a timely appeal of a postconviction case constitutes abandonment. A motion to reopen states a claim of abandonment unless the delay in filing the appeal was due to Movant's negligence or intentional conduct. Here, Movant alleged that postconviction counsel failed to appeal, despite Movant's request and counsel's statements that counsel would appeal. A hearing is warranted.

State v. Cowan, No. WD67254 (Mo. App., W.D. 3/18/08):
(1) Prior and persistent offender statute increases the maximum sentence, but not the minimum sentence; and (2) the issue is preserved for appeal where Defendant raised the issue at sentencing, even though Defendant did not "object" to his sentence; he could not have raised it in his New Trial Motion because that was filed before sentencing.
Facts: Defendant was charged as a prior and persistent offender with the class B felony of first degree burglary. The trial court stated that the range of punishment was for a class A felony of 10 to 30 years or life. Defendant argued at sentencing after a trial that the minimum punishment was 5 years. Defendant did not include this claim in the New Trial Motion because that was filed before sentencing. Defendant was sentenced to 10 years.
Holding: (1) Section 558.016.7 states: "The total authorized maximum terms of imprisonment for a persistent or a dangerous offender are … for a class B felony, any sentence authorized for a class A felony." The statute extends the maximum sentence, but not the minimum sentence. Thus, the minimum remains 5 years. Remanded for resentencing.

City of Kansas City v. Dudley, No. WD67675 (Mo. App., W.D. 1/22/08):
Even though Defendant stipulated to the evidence in municipal court, this was a "trial" and, thus, Defendant was entitled to a trial de novo in circuit court under Sec. 479.200.
Facts: Defendant, charged with a municipal offense, pleaded not guilty but stipulated to the City's evidence in the case. This is known in municipal court as a "technical not guilty" plea. Defendant then sought a trial de novo in circuit court. The circuit court held it did not have jurisdiction because Defendant stipulated to the evidence and wasn't "tried."
Holding: Sec. 497.200 provides that a Defendant tried in municipal court has a right to a trial de novo in circuit court. A stipulation of fact dispenses with matters of proof not in dispute, but does not constitute a guilty plea. Defendant has not conceded his guilt and reserves the right to challenge sufficiency of the evidence to convict. The stipulated record met the requirements for a trial. There was jurisdiction under Sec. 479.200 for a trial de novo in circuit court.

State v. Norris, No. WD67406 (Mo. App., W.D. 8/14/07):
Appellate court lacks jurisdiction to hear appeal of grant of Rule 29.07 motion to withdraw a guilty plea where an SIS was imposed; remedy is by writ of mandamus.
Facts: Defendant pleaded guilty to speeding and was assessed a fine. Six weeks later, he filed a Rule 29.07 motion to withdraw his plea, because he did not know that points would be assessed against his license. The trial court granted the motion to withdraw, refunded the fine, and allowed a new plea with an SIS. The State then appealed the order setting aside the plea.

Holding: A trial court's ruling on a motion to withdraw a guilty plea under Rule 29.07 is not a final, appealable judgment if imposition of sentence has been suspended. The appropriate appellate remedy is by writ of mandamus.

In the Interest of R.R.M., No. WD67064 (Mo. App., W.D. 6/12/07):
(1) Even though alleged child-victim testified at trial, her hearsay statements made to police could not be admitted under Section 491.075 without the trial court determining that the statements had "sufficient indicia of reliability;" and (2) where through either human or mechanical error a transcript could not be produced of the child-victim's testimony or some of the police testimony, the Court of Appeals could not review Defendant's claim of insufficiency of evidence, and Defendant was entitled to a new trial due to lack of transcript.
Facts: Defendant-juvenile was charged with sexually molesting a six year old child. At trial, the child testified, and denied Defendant molested her. Subsequently, the State under Section 491.075 sought to introduce child's statements to police that Defendant molested her. Defendant objected on grounds of hearsay and no indicia of reliability. The trial court admitted the statements on the grounds that the child had testified. On appeal, a transcript could not be made of the child-victim's testimony or portions of the police testimony due to either human or mechanical error regarding the trial recording equipment.
Holding: Section 491.075 provides that in offenses under Chapter 566 for children under 14, their statements can be introduced as substantive evidence to prove the truth of the matter asserted if the court finds the statements provide "sufficient indicia of reliability" and "the child testifies at the proceedings." Under the statute, in addition to the child testifying, the court must find "indicia of reliability." Defendant objected to the reliability of the statements. However, the trial court did not rule on their reliability. This was error. Also, the case must be reversed for a new trial because there is not a sufficient transcript on appeal to review Defendant's claim of insufficiency of evidence. Defendant exercised due diligence in trying to obtain a transcript, and has been prejudiced by the lack of transcript, since the Court of Appeals cannot review his claim on appeal.

State v. Roark, No. WD67135 (Mo. App., W.D. 6/12/07):
(1) Even though officer received a call about a possible intoxicated driver, where officer saw the car and only saw it move slightly over the fog line of the road, there was no reasonable suspicion to stop the driver for DWI; and (2) even though defense counsel failed to object to officer's testimony at trial, where defense counsel had a pending "motion to reconsider denial of motion to suppress" at trial and requested a ruling at the close of the state's evidence, that preserved the claim for appeal.
Facts: Officer received a call about a "possible intoxicated driver." Officer found the car and it slightly moved across the fog line. The car then pulled into a motel. Officer went to the motel and asked driver to "come outside." Driver asked for an explanation, but officer said he would give one outside. Officer eventually arrested Defendant for DWI. Before trial, the trial court overruled a motion to suppress. At trial, defense counsel filed a "motion to reconsider denial of motion to suppress," which defense

counsel renewed at the close of all the state's evidence. Counsel did not object to officer's trial testimony.
Holding: (1) There was no reasonable suspicion to stop the car, and thus, no reasonable suspicion for the subsequent stop of Defendant at the motel. Officer testified Defendant's car did not "go off" on the shoulder; other drivers did not have to take evasive action; and there was no erratic or dangerous driving by Defendant. The anonymous information about a "possible intoxicated driver" provides no more information of substance than what officer observed. (2) While trial counsel's method of raising and preserving the suppression issue at trial is "certainly not the preferred method of preservation," it is preserved here where neither the State nor trial court claimed at trial that it had been waived. The better method would have been to object to the officer's testimony based on the motion to suppress.

State v. Hicks, No. WD66795 (Mo. App., W.D. 5/15/07):
(1) Where the State orally amended a felony complaint to charge a misdemeanor, but the record did not show that the oral amendment contained the information required by Rule 23.01, Defendant was not properly charged and Defendant's conviction must be vacated; and (2) proper procedure to litigate this issue was direct appeal, not Rule 24.035, 29.07(d) or habeas corpus.
Facts: Defendant was originally charged by felony complaint with the Class C felony of assault of a law enforcement officer. When Defendant appeared *pro se* for arraignment, the State orally amended the charge to a misdemeanor and Defendant pleaded guilty. Defendant then appealed, claiming he was not properly charged.
Holding: (1) Defendants cannot be convicted of an offense not charged in an information or indictment. A claim that an information or indictment is not sufficient can be raised for the first time on appeal. Rule 23.01 requires an information be in writing, signed by the prosecutor, and contain the defendant's name, the date and place of the offense charged, the statute violated, the penalty, and the degree of the offense charged. No charging instrument complying with Rule 23.01 was ever filed in this case. Although oral amendments of informations have sometimes been upheld, here the record is devoid of any indication whether the information charged the offense for which Defendant was convicted. Since double jeopardy would not prevent Defendant from being recharged under the facts here, conviction vacated and remanded for further proceedings. (2) Defendant correctly raised this issue on direct appeal. Rule 24.035 would not apply because Defendant was not convicted of a felony. Rule 29.07(d) would not apply because this only applies in extraordinary circumstances were defendants were misled into pleading guilty by fraud, mistake, misapprehension, coercion, fear or false hopes, and their pleas were not voluntary and intelligent. Habeas corpus would not apply because Defendant is not incarcerated.

State ex rel. Nixon v. Bowers, No. WD67347 (Mo. App., W.D. 5/9/07):
Holding: A party who did not receive notice of entry of a judgment may move to set aside the judgment within six months of its entry under Rule 74.03. The remedy is for the court to set aside the judgment under Rule 74.03, not to just "reenter" or "reissue" a new judgment. If circuit court fails to set aside judgment, party who did not receive notice may appeal denial of Rule 74.03 motion.

State v. Davis, No. WD65572 (Mo. App., W.D. 4/27/07):
(1) Trial court erred in assault case in admitting prior violent incident that occurred two days before charged assault; and (2) even though defense counsel only objected to the first witness who testified about the prior incident and not the second witness, the issue was preserved for appeal and was prejudicial because defense counsel's earlier objections had been overruled.
Facts: Defendant was convicted of first degree assault for acting in concert with a shooter. Defendant went to an apartment, and the shooter pulled out a gun, and Defendant said, "Just do it" and ran off. The shooter shot a man. Two days before this shooting, Defendant had been at the apartment to question another man about his involvement with Defendant's cousin. In this incident, Defendant had tried to run down the other man with his car. At trial, the State presented evidence of the prior incident.
Holding: The State argues the prior incident was part of the res gestae, and that it presented a complete and coherent picture of the charged crime to the jury. However, the incident two days before the charged assault (shooting) was not necessary to prove or understand the facts of the shooting. The two incidents were not the same. Defendant's prior interaction with another man at the apartment was not "so closely connected" with his actions on the night of the shooting to be "part of" the shooting incident. The State further argues Defendant was not prejudiced by admission of the testimony because another witness testified to the prior incident without objection. However, defense counsel had objected when the first witness testified about the prior incident, which objections were overruled. There was no reason for counsel to believe future objections to the same testimony would be sustained.

Editor's Note by Greg Mermelstein: Even though this panel concluded the issue was preserved for appeal, it would have been far safer for appellate purposes for defense counsel to have objected to the second witness also. Other appellate judges in Missouri would have likely held the issue was not preserved, or not prejudicial, because the second witness was not objected to. Attorneys should object to every witness who testifies about prior bad acts.

Whitehorn v. State, No. WD65343 (Mo. App., W.D. 3/27/07):
Holding: Where PCR Movant discharged his appointed counsel and requested that his Amended Motion be struck, the only motion before the motion court was the *pro se* motion, and since the motion court did not enter findings on all issues in the *pro se* motion, there is no final judgment for purposes of appeal. Appeal dismissed.

Scott v. State, 180 S.W.3d 519 (Mo. App., W.D. 2006):
Appellate Court lacks jurisdiction to consider appeal of a docket entry that is not in judge's handwriting, not initialed by judge, and not denominated a "judgment."
Facts: Movant filed a timely Rule 24.035 motion, but executed a waiver of that action, and the court dismissed it. The next day, Movant filed a serious of motions purporting to be an Amended Motion under Rule 24.035, a motion to vacate judgment under Rule 75.01, and a motion for relief from judgment under Rule 74.06. The motion court entered a typewritten docket entry overruling the motions. Movant appealed.
Holding: An Appellate Court must examine its jurisdiction *sua sponte*. Rule 74.01(a) provides that a judgment must be signed by a judge and denominated a "judgment" or

"decree" in order to be final. Here, the typewritten docket entry is not signed or initialed by the judge. Therefore, it is not a judgment from which to appeal the Rule 74 motion or the Rule 24.035 motion, and the Appellate Court lacks jurisdiction. Furthermore, the Appellate Court is without jurisdiction to hear an appeal of a Rule 75.01 motion to vacate or reopen the judgment.

Atterberry v. Missouri Board of Probation and Parole, No. WD65986 (6/13/2006):
Holding: Where circuit court dismissed writ of mandamus as moot, this was not a ruling on the merits so an appeal does not lie from that; remedy is file a new writ in Court of Appeals.

*** U.S. v. Marcus, ___ U.S. ___, 87 Crim. L. Rep. 269 (U.S. 5/24/10):**
Holding: The "plain error" standard for reviewing claims on appeal is whether the unobjected to error was clear or obvious; affected defendant's substantial rights; and seriously affected the fairness, integrity or public reputation of the judicial proceedings.

*** Mohawk Industries Inc. v. Carpenter, 86 Crim. L. Rep. 283, ___ U.S. ___ (U.S. 12/8/09):**
Holding: Even though a disclosure order is adverse to attorney-client privilege, it is not immediately appealable under the collateral-order doctrine, because the alleged harm can be remedied upon appeal from a verdict, in that an appellate court can order a new trial in which the protected material and its fruits are excluded.

*** Greenlaw v. U.S., ___ U.S. ___, 83 Crim. L. Rep. 456, 2008 WL 2484861 (6/23/08):**
Holding: U.S. Court of Appeals cannot sua sponte increase a Defendant's sentence to correct a mistake by the District Court; the Gov't has to either appeal or cross-appeal for a Court of Appeals to raise a mistakenly low sentence.

*** Bowles v. Russell, 81 Crim. L. Rep. 376, ___ U.S. ___ (6/14/07):**
Holding: Even though the federal habeas judge granted petitioner 17 days to file his notice of appeal, where Fed. R. App. P. 4(a)(6) only allowed a maximum of 14 days, petitioner's notice of appeal was untimely and appellate court had no jurisdiction. Supreme Court overrules "unique circumstances" doctrine that excused a party's untimely action when the party had relied on the lower court's findings.

U.S. v. Mouling, 2009 WL 564304 (D.C. Cir. 2009):
Holding: "Plain error" is error which would have been obvious to a reasonably competent judge.

U.S. v. Aguirre-Gonzalez, 86 Crim. L. Rep. 699 (1st Cir. 3/2/10):
Holding: Victim cannot appeal a Defendant's sentence.

U.S. v. Corey, 2009 WL 1693285 (1st Cir. 2009):
Holding: Where trial court ignored remand instructions to make credibility determinations regarding drug quantity, appellate court would not apply deferential review and would find Defendant's testimony credible.

Foxworth v. Maloney, 2008 WL 192288 (1st Cir. 2008):
Holding: Courts should address sufficiency of evidence issues before deciding other issues of trial error.

Ramchair v. Conway, 2010 WL 1253893 (2d Cir. 2010):
Holding: Appellate counsel ineffective in failing to raise issue on appeal because appellate counsel mistakenly thought it was not preserved; issue was that prosecutor had said trial counsel was at lineup (implying lineup was fair) and trial court failed to grant mistrial to allow defense counsel to testify why lineup was not fair.

Lebron v. Sanders, 2009 WL 161735 (2d Cir. 2009):
Holding: Pro se Defendant was entitled to printed copies of opinions cited in opposing counsel's brief where those were only available on fee-based electronic databases.

Nnebe v. U.S., 83 Crim. L. Rep. 467 (2d Cir. 6/12/08):
Holding: Defendant's claim that appellate counsel broke promise to file a cert. petition after direct appeal was properly brought as a motion to recall the mandate, not federal habeas corpus.

U.S. v. Goodson, 84 Crim. L. Rep. 112 (3d Cir. 10/16/08):
Holding: Even though Defendant did not challenge his appeal waiver in his opening brief, this did not waive a challenge to the waiver.

U.S. v. Lynn, 86 Crim. L. Re. 538 (4th Cir. 1/28/10):
Holding: Where Defendant had argued that guidelines called for different sentence than the one the court ultimately imposed, Defendant was not required to make a formal, post-sentencing objection to the sentence to preserve a challenge to the procedural reasonableness of the sentence.

U.S. v. Poindexter, 2007 WL 1845119 (4th Cir. 2007):
Holding: Counsel was ineffective in not filing notice of appeal at Defendant's request, even though he executed an appeal waiver as part of his plea.

U.S. v. Tapp, 2007 WL 1839277 (5th Cir. 2007):
Holding: Failure to file notice of appeal when requested to do so is per se ineffective, even when Defendant waived his right to direct appeal and collateral review.

Dorn v. Lafler, 2010 WL 1266813 (6th Cir. 2010):
Holding: Where prison officials received Defendant's appeal papers seven days before they were due but did not mail them until after deadline, this violated Defendant's constitutional right of access to the courts.

U.S. v. Anglin, 2010 WL 1330106 (6th Cir. 2010):
Holding: Court of Appeals' decision that a federal escape conviction was "crime of violence" was not the "law of the case" because intervening Supreme Court decision of *Chambers v. U.S.*

Harris v. Haeberlin, 83 Crim. L. Rep. 308 (6th Cir. 5/22/08):
Holding: Where a videotape surfaced after trial that showed prosecutor talking about peremptory challenges, this was new evidence regarding *Batson* and remand to the trial court for consideration should be required; State appellate court unreasonably applied federal law in not remanding to trial court.

Patterson v. Haskins, 80 Crim. L. Rep. 147 (6th Cir. 10/31/06):
Holding: Where appellant raises a constitutional claim which would require a new trial and a sufficiency of evidence claim which would preclude a retrial, the Court of Appeals must rule on the sufficiency claim, and cannot just grant a new trial on the constitutional claim and ignore the sufficiency claim.

In re Hajazi, 86 Crim. L. Rep. 350, 2009 WL 4723277 (7th Cir. 12/11/09):
Holding: (1) Alien Defendant who resides abroad has no obligation to appear in person before U.S. district judge in order to challenge the validity of federal indictment; (2) Appellate Court issues writ of mandamus to resolve issue since no "usual procedure" would work to resolve it since Defendant was under no obligation to appear.

U.S. v. Monroe, 85 Crim. L. Rep. 677 (7th Cir. 9/1/09):
Holding: Even though Defendant waived his right to appeal and collateral attack, this did not preclude him from seeking a sentence reduction under 18 USC 3582(c)(2) because a sentence reduction is different than appeal or collateral attack.

Howard v. Norris, 87 Crim. L. Rep. 812 (8th Cir. 8/12/10):
Holding: Gov't cannot take interlocutory appeal of district court's "stay and abey" order allowing petitioner to pursue unexhausted state claims.

U.S. v. Nguyen, 87 Crim. L. Rep. 43 (8th Cir. 4/2/10):
Holding: Even though plea agreement contained exception to appeal waiver for constitutional errors, Defendant cannot appeal a sentence imposed by judge who applied the "extraordinary circumstances" restriction on variances condemned in *Gall*, because the U.S. Supreme Court's repudiation of the extraordinary-circumstances standard was rooted in the remedial holding of *Booker*, not the constitutional holding of the case.

U.S. v. Lovelace, 85 Crim. L. Rep. 277 (8th Cir. 5/19/09):
Holding: Even though Defendant executed an appeal-waiver, he can still appeal Gov't breach of plea agreement, but review is for plain error only.

U.S. v. Vela, 88 Crim. L. Rep. 139, 2010 WL 4188983 (9th Cir. 10/26/10):
Holding: Even though Defendant was found NGRI, the appellate court had jurisdiction to hear an appeal from Defendant raising various issues, including refusal to dismiss indictment and prohibiting diminished capacity defense.

U.S. v. Krane, 88 Crim. L. Rep. 159 (9th Cir. 10/29/10):
Holding: Party could immediately appeal an order directed to its former attorney to disclose privileged materials, because directing a third-party to disclose information is

different than the immediate appeal procedure precluded by *Mohawk Indus. Inc. v. Carpenter*, ___ U.S. ___ (2009) under the collateral order doctrine.

Thompson v. Frank, 87 Crim. L. Rep. 12 (9th Cir. 3/30/10):
Holding: Gov't cannot immediately appeal district court order staying federal habeas proceeding while Petitioner exhausts claims in state court.

U.S. v. Rich, 87 Crim. L. Rep. 175 (9th Cir. 5/3/10):
Holding: Death of Defendant during direct appeal abates conviction and sentence of restitution.

U.S. v. Charles, 85 Crim. L. Rep. 713 (9th Cir. 2009):
Holding: Even though Defendant waived his right to appeal a sentence within the guideline range, where Defendant reserved the right to appeal trial court's "determination of criminal history category," this was ambiguous enough to allow appeal with respect to career-offender guidelines.

U.S. v. Castillo, 81 Crim. L. Rep. 546 (9th Cir. 7/25/07):
Holding: Even though Defendant executed a waiver of appeal when he pleaded guilty, where the prosecutor argues the merits on appeal, the Court of Appeals may consider the merits.

U.S. v. Hunter, 84 Crim. L. Rep. 290 (10th Cir. 12/2/08):
Holding: Victims under Crime Victims' Rights Act cannot take a direct appeal of a criminal defendant's conviction, because a non-party cannot appeal; victims can enforce victim rights only by writ of mandamus.

U.S. v. Lewis, 2007 WL 2033813 (11th Cir. 2007):
Holding: Even though Defendant failed to raise double jeopardy in the trial court, it could be reviewed under a plain error standard on appeal.

U.S. v. Morton, 87 Crim. L. Rev. 206 (C.A.A.F. 5/5/10):
Holding: Military courts should not affirm a guilty plea on basis of admissions to an offense that is "closely related" to the charged crime, but not a lesser-included offense, and to which Defendant did not plead guilty, because this violates due process and fair notice.

Duvall v. U.S., 85 Crim. L. Rep. 553 (D.C. 7/16/09):
Holding: Admission of lab report of drug analyst in violation of confrontation clause was not harmless error, even though the nature of the substance was not contested at trial.

Richardson v. U.S., 2007 WL 789591 (D. Mass. 2007):
Holding: Appellate counsel's failure to file supplemental brief on appeal regarding change in law following *Booker v. U.S.*, which would have aided Defendant, was ineffective.

Ramchair v. Conway, 2009 WL 3663920 (E.D. N.Y. 2009):
Holding: Remedy for ineffective appellate counsel was to order a new trial rather than a new appeal, where Defendant had already had three trials and another appeal would just delay the case further.

Rivera v. Goode, 2008 WL 8189908 (E.D. Pa. 2008):
Holding: Prejudice presumed where appellate attorney failed to perfect direct appeal; remedy is to reinstate appeal with new counsel.

Richardson v. U.S., 2009 WL 1260407 (N.D. W. Va. 2009):
Holding: Failure to file notice of appeal when client asks to appeal was per se ineffective assistance.

Thelman v. State, 84 Crim. L. Rep. 212 (Ark. 11/13/08):
Holding: Witness who was granted use immunity to force them to testify cannot immediately appeal that order, but must wait until there is a contempt order before appealing.

Onsae v. Hopi Tribe, 2008 WL 5549065 (Hopi CA 2008):
Holding: Notice of appeal was timely where it was filed before the filing deadline, even though the appeal fee was not submitted until later because Defendant was indigent.

People v. Bergerud, 2010 WL 59254 (Colo. 2010):
Holding: Where Defendant had unsuccessfully sought to waive appointed counsel at trial, remand was required to determine if appointed counsel had failed to investigate Defendant's possible defenses and also whether Defendant was deprived of his right to testify while represented by the appointed counsel.

State v. Fielding, 2010 WL 1629381 (Conn. 2010):
Holding: Even though there was a new statute prohibiting certain discovery procedures in child pornography cases, where trial court had ordered the discovery before the new law, the order was not a final appealable judgment.

Petion v. State, 88 Crim. L. Rep. 139 (Fla. 10/21/10):
Holding: Even though judges in bench trial are presumed not to have considered inadmissible evidence, this presumption is rebutted where judge made findings on the record that the evidence was admissible.

Whitehead v. State, 87 Crim. L. Rep. 373 (Ga. 6/1/10):
Holding: Georgia abandons rule that a litigant who unsuccessfully objected to evidence at a pretrial hearing has to object to the evidence at trial to preserve issue for appeal.

Creech v. State, 83 Crim. L. Rep. 358 (Ind. 5/21/08):
Holding: As part of a plea bargain, a Defendant can waive his right to a direct appeal, but court reaffirms prior cases forbidding provisions of a plea agreement that waive postconviction rights.

State v. Lyman, 86 Crim. L. Rep. 476 (Iowa 1/18/10):
Holding: Due process requires that appellate court review a trial court's competency finding under a de novo standard of review.

Kargus v. State, 81 Crim. L. Rep. 636, 2007 WL 2141445 (Kan. 7/27/07):
Holding: Appellate counsel is ineffective if he fails to file a petition for review to Kansas Supreme Court after affirmance of conviction by Kansas intermediate appellate court, where Defendant requests a petition be filed. A defendant need not show a different result would have been achieved but for counsel's performance.

Leonard v. Com., 2009 WL 160422 (Ky. 2009):
Holding: Even though a claim of error is raised on direct appeal, this does not bar raising a related claim of ineffective assistance of counsel in later postconviction action.

McDonough, 87 Crim. L. Rep. 784 (Mass. 8/11/10):
Holding: Even though trial court found Victim-Witness to be mentally incompetent to testify, Victim-Witness had no standing to appeal this ruling; appeal could only be pursued by a party to the criminal case (i.e., the prosecutor).

Commonwealth v. Goewey, 84 Crim. L. Rep. 117, 2008 WL 4571553 (Mass. 10/16/08):
Holding: Counsel was ineffective in failing to file a Respondent's brief in a State's appeal, and Defendant need not show prejudice.

State v. Al-Naseer, 87 Crim. L. Rep. 917 (Minn. 9/16/10):
Holding: Heightened scrutiny applies to examine sufficiency of evidence in circumstantial evidence cases, including when proof of an element of crime rests on circumstantial evidence.

State v. Tompkins, 80 Crim. L. Rep. 305 (Neb. 11/9/06):
Holding: Appellate court should not find "good faith" exception to exclusionary rule where State has not raised that issue.

State v. Lewis, 2008 WL 659709 (Nev. 2008):
Holding: Order allowing withdrawal of guilty plea is not a final judgment, and thus, not appealable.

State v. Richard, 88 Crim. L. Rep. 92 (N.H. 10/6/10):
Holding: Even though party may have "invited error" by their conduct at trial, the appellate court can still review "invited error" for plain error.

State v. Kousounadis, 86 Crim. L. Rep. 402 (N.H. 2009):
Holding: Under New Hampshire Constitution, a jury instruction which omits an element of the offense denies due process and is not subject to harmless error analysis; New Hampshire rejects *Neder v. U.S.*, 527 U.S. 1 (1999) to the contrary.

People v. Syville, 88 Crim. L. Rep. 120 (N.Y. 10/14/10):
Holding: Where Defendant missed the deadline for filing timely or normal late notice of appeal due to ineffective counsel, Defendant can remedy this by error coram nobis.

People v. Johnson, 87 Crim. L. Rep. 206 (N.Y. 5/4/10):
Holding: Where trial court did not honor certain aspects of a plea agreement, this caused an appeal wavier as part of the plea agreement to be invalidated.

People v. Price, 86 Crim. L. Rep. 625 (N.Y. 2/11/10):
Holding: Even though speedy trial law excludes delay caused by "exceptional circumstances," this provision does not allow the State to delay prosecution while it awaits the outcome of an appeal in an unrelated case that presents an issue relevant to the pending charges.

Simuel v. State, 2010 WL 4183927 (S.C. 2010):
Holding: Where counsel failed to make Defendant aware of right to appeal, Defendant was entitled to late appeal.

State v. Wilson, 87 Crim. L. Rep. 414 (S.C. 5/24/10):
Holding: State has no right to immediate appeal of an order disqualifying its counsel.

In re Bailey, 86 Crim. L. Rep. 379 (Vt. 12/24/09):
Holding: Where PCR statute made appointed counsel available on appeal only "where the attorney considers the contentions to be warranted by law or by nonfrivolous argument," then appointed counsel could withdraw without filing an *Anders* brief.

State v. Turner, 87 Crim. L. Rep. 834, 2010 WL 3259876 (Wash. 8/19/10):
Holding: Where Defendant is convicted at trial of both greater and lesser offense, it constitutes double jeopardy for trial court to conditionally vacate the conviction on the lesser while directing that the conviction remain valid in anticipation of the greater offense getting reversed on appeal.

State v. Rafay, 86 Crim. L. Rep. 351, 2009 WL 4681215 (Wash. 12/10/09):
Holding: Washington Constitution provides right to defendants to represent themselves on appeal, even though U.S. Constitution provides no such right.

State v. Webb, 86 Crim. L. Rep. 183 (Wash. 10/29/09):
Holding: Where a Defendant dies during the pendency of the appeal, Defendant's estate should be given an opportunity to decide whether to proceed with the appeal because the financial penalties of a criminal conviction may impact the heirs.

State v. Bahl, 84 Crim. L. Rep. 111, 2008 WL 4512855 (Wash. 10/9/08):
Holding: Probation condition prohibiting possession of "pornography" or "sexual stimulus for his deviancy" was unconstitutionally vague, and Defendant could raise this on direct appeal even before he would be released on probation (parole).

In re Kler, 2010 WL 3860629 (Cal. App. 2010):
Holding: Court rule requiring Court of Appeals to deny habeas petition that was not first presented to the trial court that rendered the underlying judgment was unconstitutional in light of Calif. constitutional provision granting original jurisdiction in writ proceedings to all Calif. courts.

People v. Puluc-Sique, 2010 WL 762190 (Cal. App. 2010):
Holding: Even though Defendant was deported, that did not warrant dismissal of his criminal appeal.

People v. Cervantes, 2007 WL 1429433 (Cal. App. 2007):
Holding: Where court reporter could not produce transcript of trial and appellate counsel was not the trial attorney, remand for further proceedings was required.

People v. Tillery, 2009 WL 3128744 (Colo. Ct. App. 2009):
Holding: Sentencing claim involving double jeopardy would be reviewed on appeal for plain error.

Staley v. State, 2009 WL 1153445 (Fla. Ct. App. 2009):
Holding: Where counsel fails to file timely notice of appeal, special master should be appointed to determine reason attorney failed to file an appeal.

People v. Bailey, 2008 WL 4754815 (Ill. App. 2008):
Holding: Even though Defendant had failed to appeal a prior loss of a motion for postconviction DNA testing, Defendant was not barred from pursuing another DNA motion because there is no limit in the statute on the number of requests for DNA testing that can be filed, and Defendant's second motion was not identical to his first.

People v. Billings, 85 Crim. L. Rep. 222 (Mich. Ct. App. 4/23/09):
Holding: Requiring indigent Defendant to waive appellate counsel as a condition of pleading guilty violates Equal Protection and Due Process.

State v. Riva, 2008 WL 4922538 (N.J. Sup. Ct. App. Div. 2008):
Holding: Even though Defendant died while his criminal appeal was pending, the Court of Appeals would still decide the case because various pension and death benefits to Defendant's family depended on whether Defendant had a criminal conviction or not.

Cox v. State, 2006 WL 38610170 (Okla. Crim. App. 2006):
Holding: Defendant can raise statute of limitations issue for first time on appeal because this is a jurisdictional defect.

Mason v. State, 88 Crim. L. Rep. 95 (Tex. Crim. App. 2010):
Holding: Where error occurs in grand jury proceeding, the focus on appeal should be on error's effect on the existence of probable cause to indict, not the effect on the ultimate verdict at trial.
Mayer v. State, 2010 WL 1050331 (Tex. Crim. App. 2010):

Holding: Defendant was not required to object at trial to paying for appointed attorney costs in order to challenge on appeal the evidence of his ability to pay.

McKinney v. State, 80 Crim. L. Rep. 226 (Tex. Crim. App. 11/15/06):
Holding: Defendant, who requested and received a lesser-included offense instruction and was convicted of the lesser, could challenge sufficiency of evidence to sustain conviction for lesser on appeal.

State v. Jeffrey A.W., 2010 WL 99099 (Wis. Ct. App. 2010):
Holding: Where alleged sex assault Victim claimed she got herpes from Defendant, but posttrial test showed Defendant did not have herpes, appellate court holds this newly discovered evidence requires new trial.

Armed Criminal Action

State v. Collins, 188 S.W.3d 69 (Mo. App., E.D. 2006):
(1) Evidence was insufficient to convict of ACA because evidence did not show Defendant used gun or deadly weapon to enter victim's residence; (2) where trial court orally said it was sentencing Defendant to "480 years," but written judgment said "510 years," and the actual total of the 20 counts was "540 years," the "480 years" statement was not controlling because it is surplusage, and the "510 years" is a clerical error which can be corrected by nunc pro tunc order.
Facts: Evidence showed that victim was awakened in her bed by Defendant, who had entered her residence. Defendant committed various sex offenses on victim, and used a gun to do this. He was convicted of 20 different counts from this incident. At sentencing, the trial court sentenced Defendant on 20 different counts and said the sentence totaled "480 years." However, the court later entered a written judgment saying the sentence totaled "510 years." When the counts are really added up, however, the actual total is "540 years." On appeal, Defendant contended evidence was insufficient to support his conviction for ACA arising out of his first degree burglary conviction.
Holding: (1) The crime of ACA is committed in a burglary if the weapon *is used to gain entry* for the purpose of committing the crime therein. Examples would include shooting the door open or demanding the victim open the door at gunpoint. Here, however, there was no evidence that Defendant used the gun *to gain entry*. Thus, evidence is insufficient to support conviction for ACA arising from the burglary conviction. (2) Generally, an oral pronouncement of sentence controls over the written sentence. However, the record here shows the trial court's oral sentences actually total "540 years." The statement that they total "480 years" was mere surplusage. Moreover, the written sentence was in error because the sentences do not total "510 years" either. This is a clerical error which can be corrected by nunc pro tunc to reflect correct sentence of "540 years."

State v. Baumann, No. 27713 (Mo. App., S.D. 3/28/07):
(1) Even though Defendant used a knife to puncture tires, where no one else was present, Defendant could not be convicted of ACA because the knife was not a dangerous

instrument capable of causing death or serious physical injury "under the circumstances in which it was used;" and (2) Defendant could not be convicted of violating an order of protection for entering the employment premises of victim because Section 455.085.8 states that a violation can only occur at a "dwelling unit," i.e., a residence.

Facts: Defendant was convicted of ACA for puncturing tires with a knife at a Post Office. No one else was present when Defendant did this. Defendant was also convicted of violating an order of protection by going to the Post Office, when an employee there had an order of protection against Defendant.

Holding: (1) The question is whether "under the circumstances in which [the knife was] used" it was "readily capable of causing death or other serious physical injury" such that it was a dangerous instrument for purposes of the ACA statutes, Section 556.061(9) and 571.015.1. The plain reading of Section 556.061(9) requires that the instrument "under the circumstances in which it is used" be readily capable of causing death or serious physical injury. Here, the knife cannot be considered a dangerous instrument because there was no one present at the time Defendant committed the acts of puncturing the tires. (2) Section 455.085.8 states that a person may violate a protective order by entering the victim's "dwelling unit." Here, Defendant went to a Post Office where the person who had the order of protection worked. This was not the victim's dwelling unit, i.e., residence. Even though Defendant's actions might have been in violation of the court's protective order, they are not elements constituting a criminal offense under Section 455.085.8.

<u>State v. Payne</u>, No. WD67999 (Mo. App., W.D. 4/29/08):

Even though victim suffered puncture wounds on his body, where there was no evidence of what type of weapon caused the wounds, the evidence was insufficient to convict of second degree assault and ACA for use of a "deadly weapon."

Facts: Defendant was involved in a fight with victim, and hit victim and caused "puncture wounds" to victim's body. The weapon was never identified or found. Defendant was convicted of second degree assault for attempting to cause physical injury by means of a "deadly weapon," and armed criminal action for use of a "deadly weapon." The deadly weapon was alleged to be a "dagger."

Holding: Second degree assault occurs when a person causes physical injury by means of a "deadly weapon or dangerous instrument." Sec. 565.060.1(2). Armed criminal action was charged in this case for use of a "deadly weapon." Sec. 571.015.1. Despite that the State could have charged use of a "dangerous instrument," the State chose "deadly weapon," and is held to this proof of the elements of the offense. "Deadly weapon" is defined, in relevant part, as a "dagger." Defendant's use of a weapon to stab victim did not mean that the unidentified weapon was a "dagger." Sec. 556.061(10). "Dagger" does not mean any sharp or pointed object, but is generally a short weapon used for stabbing. There was no evidence Defendant used a "dagger." He could have used a screwdriver, pen, scissors or other object. Conviction for second degree assault and ACA vacated, but conviction for less-included third degree assault is entered.

Talley v. Missouri Department of Corrections, No. WD65319 (Mo. App., W.D. 6/20/06):
The minimum prison term required to be served for armed criminal action is determined by Section 571.015 and not Section 558.019.
Facts: Petitioner was convicted of ACA. The DOC ruled that he had to serve 80% of his ACA sentence under Section 558.019 because he had three prior prison commitments.
Holding: Section 558.019.1 states that the general minimum prison terms "shall not affect" the specific minimum prison term for ACA as set out in Section 571.015 (which provides for a three-year term). The general minimum prison terms of Section 558.019 cannot be applied to a sentence for ACA, regardless of whether such application would result in an increase or decrease in the minimum time to be served. The Legislature intended to exclude ACA from the general minimum prison term provisions of Section 558.019 by setting forth minimum prison terms in Section 571.015 for ACA. Thus, Petitioner's minimum prison term is determined by Section 571.015.

State v. Hill, 181 S.W.3d 611 (Mo. App., W.D. 2006):
(1) Double jeopardy was violated where Defendant was convicted of four counts of ACA, which were charged in identical language in the indictment; (2) Defendant/Movant could raise claim of double jeopardy on appeal of denial of Rule 29.15 motion, even though Defendant/Movant had not pleaded this in the Amended Motion, because double jeopardy is jurisdictional.
Facts: Defendant/Movant shot at four police officers. The indictment which charged Defendant/Movant alleged four counts of ACA in identical language and referred to shooting "Officer White," rather than four different officers. Defendant/Movant was convicted of four counts of ACA. He later filed a Rule 29.15 motion. On appeal of the denial of the Rule 29.15 motion, he claimed his four convictions for ACA violated double jeopardy. This claim had not been pleaded in the Rule 29.15 motion.
Holding: The right to be free from double jeopardy is a constitutional right that goes to the power of the State to bring a defendant into court to answer a charge. As such, the right is jurisdictional. Here, the indictment charged Defendant/Movant using identical language referring to "Officer White," and not the four different officers. This violated double jeopardy for three of the four counts. Moreover, since the issue was jurisdictional, it could be raised for the first time on appeal of the Rule 29.15 case. Convictions vacated for three counts of ACA.

Attorney's Fees

*** Perdue v. Kenny, ___ U.S. ___, 87 Crim. L. Rep. 112 (U.S. 4/21/10):**
Holding: Award of attorney's fees under federal fee shifting statute, 42 USC 1988, in a civil rights lawsuit can include an enhancement for superior performance, but an enhancement should only be awarded in extraordinary circumstances.

Bail – Pretrial Release Issues

State v. Wurtzberger, No. ED89960 (Mo. App., E.D. 9/23/08):
(1) Even though Defendant was a prior and persistent offender, this did not increase the base level of the offense to a Class A felony; and (2) Even though Defendant did not obey bond conditions to not further break the law or consume alcohol or drugs, where Defendant always appeared in court, trial court abused discretion in ordering forfeiture of bond without proof Defendant violated bond conditions and this was not necessary to protect the community because the bond was forfeited after Defendant was sentenced.
Facts: Defendant was charged as a prior and persistent offender with attempt to manufacture methamphetamine, Sec. 191.211. The sentence and judgment classified this as a Class A felony. Also, Defendant's father had posted $100,000 bond. Various bond conditions required Defendant to obey the law and not consume alcohol or drugs. While on bond, Defendant committed new offenses and consumed alcohol or drugs. After Defendant was sentenced, the trial court ordered the $100,000 bond forfeited.
Holding: (1) A prior and persistent offender finding increases the range of punishment, but does not increase the classification of offense. Defendant's offense was a Class B felony. Case is remanded for correction of this clerical error in the sentence and judgment. (2) A court can set as bond conditions to obey the law and not abuse substances. However, the trial court abused its discretion in ordering forfeiture here. The trial court found that "justice requires forfeiture," but there is nothing in the record supporting this finding. Defendant was alleged to have violated the law and abused substances, but no evidence was presented to show this. Moreover, the purpose of the bond conditions is to protect the community. "[W]e fail to understand how the forfeiture of Defendant's bond after Defendant had been sentenced" to DOC protects the community.

*** O'Brien v. O'Laughlin, 2009 WL 2831420, ___ U.S. ___ (U.S. 2009):**
Holding: Justice Breyer acting as Circuit Justice rules where prisoner was granted federal habeas relief and the Gov't appeals, the petitioner can be released on bail pending the appeal of the habeas case.

Campbell v. Johnson, 2009 WL 3109910 (11th Cir. 2009):
Holding: Test for excessive bail is whether terms of release are designed to ensure a compelling interest of gov't.

U.S. v. Stephens, 2009 WL 3823964 (N.D. Iowa 2009):
Holding: Adam Walsh Act pretrial release condition which imposed mandatory electronic monitoring and curfew without opportunity to contest such restrictions violated due process.

U.S. v. Smedley, 2009 WL 1086972 (E.D. Mo. 2009):
Holding: Adam Walsh Act provision requiring pretrial mandatory home detention with electronic monitoring as condition for release of pornography Defendant violated due process.

U.S. v. Merritt, 2009 WL 764554 (D. Neb. 2009):
Holding: Adam Walsh Act bail conditions that required electronic monitoring and curfew, without any showing that child pornography Defendant was a danger, violated due process.

U.S. v. Mitchell, 86 Crim. L. Rep. 206 (W.D. Pa. 11/6/09):
Holding: Routine, warrantless taking of DNA samples from pretrial detainees violates 4th Amendment.

U.S. v. Torres, 2008 WL 2791883 (W.D. Tex. 2008):
Holding: Adam Walsh mandatory curfew and electronic monitoring provisions for pretrial release violate due process because no consideration is given to what is needed to ensure Defendant's presence for trial or safety of community.

State v. Blair, 2010 WL 2195729 (Fla. 2010):
Holding: Trial court could not deny bond to DWI Defendant even though he had failed to appear, where Defendant may not have had notice of the new court date.

State v. Wallace, 2009 WL 3682575 (La. 2009):
Holding: 48-hour time limit to determine probable cause for Defendant's arrest began at time of arrest, rather than at time the magistrate was presented with relevant documents, and magistrate's later finding of probable cause at the 72-hour hearing did not cure the failure to find probable cause within 48 hours; remedy was release of Defendant on own recognizance.

Com. v. Young, 85 Crim. L. Rep. 240 (Mass. 5/4/09):
Holding: Unlicensed possession of firearm does not pose "substantial risk of physical force" so as to deny bail.

Blair v. State, 2009 WL 2031305 (Fla. App. 2009):
Holding: Where trial court made no finding that Defendant's failure to appear was willful or that no release condition could protect the community, trial court could not hold Defendant before trial without bail.

State v. Cobler, 2009 WL 260618 (Idaho Ct. App. 2009):
Holding: Even though Defendant was charged with child sex crimes, a no contact order that prohibited Defendant from contact with his own children violated fundamental rights as parent.

Brady Issues

State v. Stewart, No. SC90503 (Mo. banc 5/25/10):
Where newly discovered evidence likely would have produced a different result at trial, trial court erred in not granting New Trial Motion on this basis.

Facts: Defendant was convicted at trial of first degree murder. Victim had said before he died that two people shot him, and one was "the Eby girl's boyfriend." Defendant was the son of Eby. Defendant's sister was married to Tim, and another sister was living with Leo. Defendant denied the crime to police and at trial. The State presented two "jail-house snitch" witnesses who claimed that Defendant, while in jail with them, had said he did the crime with Leo. At trial, the jury heard evidence that DNA test results did not find Defendant's DNA on a hat connected to the murder, but that DNA from Victim, Tim and an "unknown person" was on the hat. After trial, the defense filed a New Trial Motion alleging a new trial should be granted based on "newly discovered evidence." At the New Trial Motion hearing, the defense presented a police detective who testified that he had information that Tim had said he had "taken someone's life," and Tim's nephew testified that Tim had told him he was at Victim's house when Tim was killed. The trial court denied the New Trial Motion.
Holding: To obtain a new trial based on newly discovered evidence, Defendant must show: (1) the evidence came to his attention after trial; (2) the lack of knowledge before trial was not due to lack of diligence; (3) the evidence is so material that it is likely to produce a different result at trial; and (4) the evidence was not merely cumulative or impeaching. Here, the parties agree that conditions 1, 2 and 4 are satisfied. The State argues, however, that the evidence is not material and is hearsay. The evidence may be hearsay, but in considering a New Trial Motion on basis of newly discovered evidence, a court is not to conjecture about the evidence's future admissibility; the evidence may not be offered the same at trial. Prior cases have found that self-incriminatory statements made to close family members shortly after a crime, that are corroborated by DNA, carry substantial reliability. Here, the State's theory was that Defendant and Leo committed the crime. But no forensic evidence connected them to the crime scene. The newly discovered evidence of Tim's incriminating remarks, when considered with the DNA testing linking Tim's DNA to the crime scene, raises serious doubt as to Defendant's guilt. The jury could conclude that Tim and another person (not Defendant) killed Victim. Reversed and remanded for new trial.

State ex rel. Engel v. Dormire, No. SC90314 (Mo. banc 2/23/10):
(1) Even though Defendant/Petitioner had not raised his Brady claims in prior postconviction or habeas proceedings,where he subsequently learned of undisclosed, substantial Brady evidence, Defendant/Petitioner can proceed in state habeas corpus and a new trial is granted; (2) even though Missouri Prosecutor did not know that Illinois authorities who were investigating the Missouri crime had made deals with a key witness and paid the witness, the Missouri authorities are responsible for this undisclosed Brady evidence.
Facts: In 1990, Defendant/Petitioner, and some co-defendants, were convicted of a kidnapping that occurred in 1984. The crime involved events in both Missouri and Illinois, and was investigated by both Missouri and Illinois law enforcement authorities. The convictions ultimately obtained resulted largely from the testimony of a "snitch witness" (Snitch). Defendant unsuccessfully appealed, sought postconviction relief, and brought a prior habeas corpus case. Subsequently, Defendant learned through new information in a co-Defendant's case that Illinois authorities had paid Snitch's mother for Snitch to testify; that Snitch had made contradictory statements to law enforcement about

the kidnapping; and that law enforcement assisted in securing Snitch's release from prison. Defendant sought habeas relief for these *Brady* violations.
Holding: The claims here are different than Defendant's prior habeas claims because they rest on a collection of new evidence that was unknown and unavailable to Defendant previously, even though one of the claims appears similar to a previously-raised claim. The State claims that Defendant cannot show any *Brady* violation because the evidence of a "deal" with Snitch had not been documented at the time of trial. However, it is enough that the "deal" itself already existed, even if it had not yet been documented in letters. *Brady* applies to the prosecution and anyone else acting on the gov't's behalf. Here, even though Illinois law enforcement failed to disclose the information, the Illinois authorities were essentially acting as the Missouri prosecutor's agents, and were part of the Missouri case against Defendant. Even though Defendant offered other impeachment evidence against Snitch at trial, the reviewing court evaluates not only the way the Snitch was impeached, but also the way he was not impeached due to the undisclosed evidence. Additionally, the State argues that the other evidence at trial was sufficient to convict Defendant. However, that is not the correct test for determining *Brady* prejudice. Here, the undisclosed evidence could have led the jury to a different assessment of Snitch's credibility. New trial ordered.

Merriweather v. State, No. SC89846 (Mo. banc 9/1/09):
Where State failed to exercise due diligence to discover and disclose before trial that key witness had prior criminal convictions and pending charge, this violated Rule 25.03 and new trial was warranted under Rule 29.15.
Facts: Defendant was charged with a sex offense, in which the only witnesses were alleged Victim and Defendant. There was no physical evidence. Victim claimed she was sexually assaulted. Defendant claimed they consensually exchanged sex for drugs. Before trial, Defendant requested any prior criminal convictions of Victim under Rule 25.03. The State claimed there were none. After trial, Defendant filed a 29.15 motion alleging Victim had three prior Illinois convictions and a pending charge in St. Louis County at the time of trial.
Holding: This is not a *Brady* case because *Brady* does not impose an affirmative duty on prosecutors to discovery information they do not possess. However, Rule 25.03 does impose an affirmative duty to find even evidence in the possession of "other governmental personnel." Here, Defendant before trial made a request under 25.03 for discovery. The issue is whether the State exercised "due diligence" in seeking to discover and disclose that information. Here, the State's investigator did not remember if he ran the Victim's history through REJIS but he thought he did because they "run everybody." Further, the State had access to MULES and NCIC, but only claimed to run the check through REJIS. In the 29.15 case, the State found the convictions and pending charge. The State did not exercise due diligence before trial to find this. Further, the Victim's credibility was critical here, since Victim and Defendant were only witnesses, so Defendant was prejudiced. Further, even though the pending charge may not have been admissible at trial, Defendant was entitled to discovery of it to see if Victim was offered any deals for her testimony. New trial ordered.

Taylor v. State, No. SC88063 (Mo. banc 8/26/08):
(1) Brady violated where State failed to disclose impeachment evidence regarding State's jail-house snitch witness, including letters he wrote to the prosecutor, an interview by the State, and a post-trial letter from the prosecutor to another prosecutor seeking leniency; and (2) counsel ineffective in penalty phase in failing to present mental health records and testimony of family members regarding family and mental health history.
Facts: Defendant/Movant was charged with killing a fellow inmate of a prison. The defense was that Movant was not guilty by reason of mental disease. The State called a fellow inmate in rebuttal whose testimony indicated Movant was faking mental illness. During guilty phase deliberations, the jury asked to see mental health records of Movant, but they had not been admitted in evidence. Movant was convicted of first degree murder. In penalty phase, the defense presented a prison superintendent who testified that Movant would present minimal risk in prison in the future. Later, Movant filed a 29.15 motion alleging *Brady* violations and ineffective assistance of counsel.
Holding: (1) *Brady* requires the State to reveal impeachment material. Rule 25.03(A) requires the State, upon request, disclose written and recorded statements of witnesses it intends to call. Here, the State had received numerous letters from the jail-house snitch witness before trial, but destroyed many of them, rather than disclose them. The very fact of their destruction was favorable evidence that was required to be disclosed to the defense. Additionally, the prosecutor failed to reveal a memo of an interview of the jail-house snitch, because the prosecutor believed its disclosure might compromise a Highway Patrol investigation. However, the prosecutor did not seek in camera relief, and cannot make a purposeful decision to fail to disclose information. Finally, after trial, the prosecutor wrote a letter to another prosecutor seeking leniency for the jail-house snitch in another case. Even if there was no "deal" for the snitch's testimony, the fact that the prosecutor was considering writing such a letter at the time of trial, even if he did not make a final decision until hearing the testimony, was relevant impeachment evidence since the defense could have argued the snitch had incentive to testify favorably for the State. (2) Where the jury has convicted of first degree murder at a prison, it is not reasonable for defense counsel to only present mitigation that defendant is unlikely to commit other crimes in prison. Here, the jury asked to see mental health records. Although the records contained some harmful information, they also contained information that Movant had a long history of mental illness from age 7. Furthermore, family members were available to testify to his long mental health history and abusive background. It was unreasonable not to present this evidence.

Merriweather v. State, No. ED90312 (Mo. App., E.D. 10/21/08):
Even though witness' prior convictions were in Illinois, the State had an obligation to discover and disclose those convictions under Brady and Rule 25.03.
Facts: Defendant was convicted of rape. Before trial, Defendant requested all prior criminal records of witnesses, including those of alleged Victim. The State claimed it ran a criminal background check, which showed nothing. The trial involved conflicting testimony by Defendant and Victim as to whether there was a rape. After conviction and appeal, the defense learned that Victim had prior convictions for theft in Illinois.

Defendant won a new trial in a Rule 29.15 proceeding on grounds of *Brad*y and Rule 25.03. State appealed.

Holding: The State contends the motion court improperly imposed a duty on State to disclose records that were not in its possession. Rule 25.03 and *Brady* imposed on State an affirmative duty to learn of and reveal Victim-witness' prior criminal record for impeachment purposes. The State must exercise due diligence to obtain such records. The State contends the failure to disclose may have been an inadvertent computer or human error. This argument is without merit because the State is liable for both willful and inadvertent suppression or withholding of evidence.

State v. Freeman, No. 27750 (Mo. App., S.D. 1/26/07):

Where the prosecutor informed the trial court that Defendant's sentence for ACA had to run consecutively to the underlying felony sentence, and the trial court did not correct this misstatement and imposed consecutive sentences, plain error resulted because the trial court may not have exercised its discretion whether to run the sentences concurrently or consecutively.

Facts: Defendant was convicted of first degree assault and ACA, Section 571.015. At sentencing, the prosecutor told the trial court that Defendant's ACA sentence was required to be consecutive to his sentence for assault. *State v. Treadway*, 558 S.W.2d 646, 653 (Mo. banc 1977) had held that the ACA statute did not mandate consecutive sentences. The trial court did not correct the prosecutor's statement, and sentenced Defendant to consecutive sentences.

Holding: The court followed the prosecutor's recommendation without comment. Thus, it appears the trial court may have believed it was required to impose consecutive sentences. It is plain error for the trial court not to exercise its discretion in determining whether the sentences should be concurrent or consecutive. Remanded for resentencing at which court may exercise discretion to run the sentences concurrently or consecutively.

Duley v. State, No. WD69962 (Mo. App. W.D. 11/24/09):

(1) Brady claim was cognizable in 29.15 action because there was no evidence Defendant/Movant knew of the claim on direct appeal, and even if Defendant/Movant did know, the Brady evidence would not have been part of the record on appeal; (2) State committed Brady violation in failing to disclose police report of witness who told police Defendant/Movant did not do the charged murder, even though the witness' name appeared in other police reports that were disclosed; (3) Even though witness testified at 29.15 hearing he would have invoked 5th Amendment right not to testify had he been called at trial, Brady violation was still prejudicial because defense counsel could have used police report as prior inconsistent statement.

Facts: A shooting death occurred at a large public gathering of several hundred people. Defendant was convicted of murder. His defense at trial was that he was actually innocent. The State's evidence consisted largely of witnesses who originally said they saw Defendant do the shooting, but then later recanted. Defendant/Movant presented witnesses who testified he did not do the shooting. After direct appeal, Defendant/Movant filed a 29.15 motion alleging the State failed to disclose a police report of a witness who said Defendant/Movant was not the shooter, and identified another person as the shooter.

Holding: (1) The State claims that Brady claims are not cognizable in Rule 29.15 proceedings, but are trial error that can only be raised on direct appeal. There is no dispute that the report at issue was not disclosed before trial. However, the record does not reveal whether Defendant/Movant knew of the report during the pendency of his direct appeal and failed to raise it. This is irrelevant, however, because even if Defendant/Movant learned of the report during the pendency of his direct appeal, he could not have raised the issue on direct appeal because new evidence cannot be introduced. Therefore, the first opportunity to prove his Brady claim was in the 29.15 proceeding. Hence, even though Brady claims are "trial error," they are cognizable in 29.15 proceedings. (2) The State claims the nondisclosed report is not material because the witness' name appeared in other police reports. The police reports, however, merely identified the witness as one of 350-400 people at the public event. This large number of attendees made it virtually impossible for defense counsel to interview everyone who could have possibly witnessed the shooting. Without further details in the nondisclosed police report, counsel had no reason to believe the witness might have exculpatory information. (3) The State further claims there is no prejudice from the Brady violation because the witness at the 29.15 hearing testified he would have invoked his 5th Amendment right not to testify at trial. However, defense counsel could have used the police report as a prior inconsistent statement under Sec. 491.074, just as the State used prior inconsistent statements to make its case against Defendant/Movant here. New trial granted.

Buchili v. State, No. WD67269 (Mo. App., W.D. 11/13/07):
(1) New trial granted in Rule 29.15 proceeding where State violated "Brady" by failing to disclose a complete video which would have tended to refute the State's timeline of the crime, and show Defendant's innocence; (2) 29.15 motion need not plead "every fact" underlying a claim.
Facts: Defendant was convicted of murder. There was a portion of a video disclosed to the defense before trial which had a time-stamp on it. The State's theory was that the time-stamp was inaccurate, however. The defense theory was that the time on the tape was accurate and that this indicated Defendant could not have done the crime. After trial Defendant filed a 29.15 motion claiming the State failed to disclose the entire tape, and that the entire tape, combined with another witness, would have shown the time-stamp was accurate.
Holding: The State first claims that the "Brady" claim is not properly pleaded in the amended 29.15 motion. The motion , however, discussed the videotape and stated it would discredit the State's timeline. While Missouri is a fact-pleading state, a 29.15 motion does not need to allege "every fact" underlying a claim. Rather, the law is that a motion must make more than a general allegation of a "Brady" claim, and must allege facts supporting the claim. This motion did so. On the merits, the failure to provide the defense with the full version of the video prevented the defense from showing that the time-stamp on the video was accurate. This would have provided Defendant with plausible evidence to support his theory of innocence by showing he did not have enough time to commit the murder.

State v. Parker, No. WD52112, (Mo. App., W.D. 8/15/06):
Where after consolidated appeal Defendant filed motion to recall mandate based on Brady violation, and Court of Appeals recalled mandate and granted an opportunity to raise the issues, Court of Appeals remands to Circuit Court for Brady hearing.
Facts: Defendant had a "consolidated" direct and 29.15 appeal. After that, the defense discovered various alleged *Brady* violations, and moved to recall the mandate. The Court of Appeals recalled its mandate and granted an opportunity to raise the issue, and Defendant then filed a "new trial motion" in Circuit Court which contained various affidavits by witnesses and attorneys showing a *Brady* violation, and then filed this "new trial motion" as a supplemental legal file on appeal.
Holding: **"**The State complains that, after [Defendant] obtained an order from this court recalling its mandate and granting him an opportunity to raise issues of trial error, he submitted to the circuit court a new trial motion [with attached affidavits]. … He then included the motion [and affidavits in] … the supplemental legal file in this appeal. The State contends that this court cannot consider the documents because they were not properly before the circuit court. We concur that [Defendant's] motion for new trial was improper, but we understand the reason for [Defendant] returning to the circuit court to seek its acting on his motion for new trial: He feared that we would not have a proper record to conduct meaningful review. And, indeed, we do not have a proper record because a fact-finder has not determined" whether the elements of *Brady* have been violated. Defendant has made a facially valid *Brady* claim, however. Although there is at least one prior case that indicates that *Brady* violations should be raised in a habeas corpus motion, the Court of Appeals remands to the trial court to conduct a *Brady* hearing, and directs that if it finds a *Brady* violation, grant a new trial.

Editor's note by Greg Mermelstein: The dissenting opinion would grant a new trial now. The dissent says the affidavits establish a *Brady* violation. The dissent has an extensive review of *Brady* law. Also, the State claimed one of the affidavits shouldn't be believed because it contains "inconsistencies" between a cop's interview of a witness and the witness' affidavit. The dissent rejects this reasoning and finds the inconsistencies to be a normal part of an investigatory process by defense counsel, and says in footnote 10: "Such is the nature of investigation when it is conducted by parties with different roles. A skilled defense attorney re-interviewing [the witness] with the officer's report in hand will necessarily go further and deeper than the officer ever did."

*** Cone v. Bell, 85 Crim. L. Rep. 131, 2009 WL 1118709, ___ U.S. ___ (4/28/09):**
Holding: (1) Where state courts had refused or failed to consider the merits of petitioner's *Brady* claim, the claim was not procedurally barred in federal habeas; (2) where the prosecution failed to disclose police reports which would show Defendant was a "heavy drug user" and the defense was drug-induced psychosis, this may entitle death penalty petitioner to new penalty phase.

*** Van De Kamp v. Goldstein, 84 Crim. L. Rep. 445, ___ U.S. ___ (1/26/09):**
Holding: Supervisory prosecutors have absolute immunity from civil suit under Sec. 1983 on claims that they failed to properly train subordinates about *Brady* violations, or put information systems in place to manage disclosure of information.

*** Youngblood v. West Virginia, 2006 WL 1666862, ___ U.S. ___ (2006):**
Holding: *Brady* extends to evidence known only to police investigators and not prosecutors, and also extends to impeachment evidence; case remanded to determine if State's failure to reveal potentially exculpatory note in sex case showing that sex was consensual warrants new trial.

Tassin v. Cain, 2008 WL 384578 (5th Cir. 2/15/08):
Holding: State's failure to disclose witness' expectation of leniency violated *Giglio*, *Napue* and *Brady*. The witness and her attorney believed they had an informal expectation or deal, though not guaranteed, for 10 years if she testified for State, but the witness testified she might receive 99 years. The State allowed this to go uncorrected and argued in closing that witness could receive 99 years and there were no deals for the testimony.

Graves v. Dretke, 2006 WL 515485 (5th Cir. 2006):
Holding: *Brady* violated to fail to disclose witness' statement that he and his wife committed the charged murders, and state presented false, misleading testimony at trial that was inconsistent with these statements.

Moldowan v. City of Warren, 2009 WL 2176640 (6th Cir. 2009):
Holding: *Brady* imposes obligation on police to disclose exculpatory evidence.

Montgomery v. Bagley, 86 Crim. L. Rep. 12, 2009 WL 3075609 (6th Cir. 9/29/09):
Holding: Where Defendant was granted postconviction habeas relief because of State's failure to disclose under *Brady* a police report that witnesses had allegedly seen Victim alive days after State claimed she had been murdered, but then after court granted habeas relief these witnesses' recanted their statements as erroneous, the State was barred from presenting evidence of the recantations, because the State cannot wait until after Defendant wins habeas relief before making any attempt to investigate a habeas issue.

D'Ambrosio v. Bagley, 2008 WL 2276848 (6th Cir. 2008):
Holding: *Brady* violated where in murder prosecution State failed to reveal evidence that would have weakened the only eyewitness (including unrecorded conclusions of the detectives who concluded the murder did not happen where the body was found, a police report describing a tape in which a 3rd party implicated others, and a report stating victim was alive after alleged time of murder), and evidence that another person had motive to kill victim (including an anonymous call to police re: non-public facts, the fact the other person led police to Defendant, and had requested help with pending prosecutions).

U.S. v. White, 2007 WL 1662021 (6th Cir. 2007):
Holding: Trial judge abused discretion in not holding a hearing on Defendant's *Brady* claim raised as a part of new trial motion.

Bell v. Bell, 79 Crim. L. Rep. 745 (6th Cir. 8/25/06):
Holding: Prosecutor's failure to reveal that prosecution had a tacit, unspoken understanding with a jail-house informant witness that State would give witness

favorable treatment if he testified against Defendant violated *Brady*. This is true even though the prosecutor testified he had not promised the witness anything in exchange for his testimony. However, the prosecutor had written a letter to the parole board on behalf of the witness. The court held that if Defendant can show that witness approached the prosecutor and asked for a benefit, and if the prosecutor understood the witness' request for help and fulfilled it, this is a tacit agreement that must be disclosed.

Goudy v. Basinger, 2010 WL 1740777 (7th Cir. 2010):
Holding: State court misapplied law on *Brady* in holding that suppressed evidence had to establish innocence, rather than correct standard of a reasonable probability of a different outcome.

Williams v. Ryan, 2010 WL 4188304 (9th Cir. 2010):
Holding: Petitioner was entitled to an evidentiary hearing on *Brady* claim that prosecution failed to disclose certain jailhouse letters that refuted Gov't's theory of guilt, and indicated that another person did the crime; the veracity of the witnesses who wrote the letters could not be adjudicated without a hearing.

Jackson v. Brown, 2008 WL 185528 (9th Cir. 2008):
Holding: Failure to disclose prosecutor's promise to write a letter on behalf of jailhouse snitch witness to be able to serve his sentence nearer his family violated *Brady*, and failure to correct snitch's false testimony denying such a promise violated *Napue*.

U.S. v. Chapman, 2008 WL 1946744 (9th Cir. 2008):
Holding: Where prosecutor recklessly violated discovery obligations and made misrepresentations to court, dismissal of indictment was proper; prosecutor failed to keep a log indicating disclosed materials and falsely repeatedly told court he had complied with *Brady* and *Giglio*.

Barajas v. Wise, 81 Crim. L. Rep. 8 (9th Cir. 3/23/07), vacated 82 Crim. L. Rep. 114 (9th Cir. 10/22/07):
Holding: Habeas relief granted where gov't failed to reveal to Defendant the specific current and prior addresses of an informant-witness, so Defendant could prepare for trial.

Morris v. Ylst, 79 Crim. L. Rep. 169 (9th Cir. 5/9/06):
Holding: Prosecutor has duty to investigate allegation of perjury by a State's witness, but does not have to disclose a memo about a mere allegation of perjury by the witness; however, if the Prosecutor investigates and concludes that the witness did commit perjury, this would have to be disclosed under *Brady*.

Douglas v. Workman, 85 Crim. L. Rep. 39, 2009 WL 793136 (10th Cir. 3/26/09):
Holding: (1) *Brady* requires disclosure of "tacit agreements" with witnesses in addition to actual "deals"; *Brady* violated where, among other things, prosecutor wrote letters to parole authorities after witness testified and did other acts to help witness, even though claimed in letters there was "no deal"; (2) State's failure to disclose tacit agreements

justified allowing Defendant/Petitioner to file second habeas petition where these facts were not discovered earlier due to State's *Brady* violation.

U.S. v. Velarde, 81 Crim. L. Rep. 233 (10th Cir. 5/1/07):
Holding: Defendant in child sex abuse case is entitled to subpoena school officials to show victim made prior false claims of sex abuse against others, and to prove *Brady* violation for prosecution's failure to reveal this.

Trammell v. McKune, 81 Crim. L. Rep. 81 (10th Cir. 4/12/07):
Holding: Even though an eyewitness identified Defendant as the perpetrator of the crime, there was still a *Brady* violation when prosecutor failed to reveal evidence that suggested that a third-party committed the crime, because the evidence would have diminished the reliability of the eyewitness identification. Thus, there was a reasonable probability of a different outcome had the exculpatory evidence been disclosed.

Arnold v. Secretary, Dept. of Corrections, 86 Crim. L. Rep. 578 (11th Cir. 2/8/10):
Holding: Even though Prosecutor did not know that police investigator and a witness against Defendant had committed crimes until after trial was completed, this was exculpatory evidence which the prosecution had been required to disclose under *Brady*; the police misconduct is imputed to prosecution team as a whole.

Smith v. Sec. Dept. of Corrections, 2009 WL 1857302 (11th Cir. 2009):
Holding: Appellate court remands to conduct cumulative impact analysis of *Brady* evidence which had not been revealed.

U.S. v. Safavian, 2008 WL 5086944 (D.D.C. 2008):
Holding: Gov't was required to disclose FBI rough notes of interview of lobbyist as *Brady* material after a book was published containing statements about Defendant made by the lobbyist.

Boyd v. U.S., 80 Crim. L. Rep. 76 (D.C. 9/28/06):
Holding: Prosecutor and court were required to disclose to the defense identity of witnesses who would testify to differing versions of whether the crime was committed by four people or only three people, because this was material to the defense of casting doubt on the State's witnesses' account of the crime.

Blumberg v. Garcia, 2010 WL 530199 (C.D. Cal. 2010):
Holding: Habeas relief granted where police officer had given false testimony at trial regarding firearms and a false compartment being present in Defendant's car.

U.S. v. Fitzgerald, 2009 WL 500467 (S.D. Cal. 2009):
Holding: Dismissal of charges was warranted where Gov't failed to reveal exculpatory transcripts during original trial, and where Gov't's key witness had died since original trial so that Defendant could not confront witness again.

U.S. v. Shaver, 2009 WL 928298 (S.D. Cal. 2009):
Holding: New trial warranted where gov't failed to disclose to defense that a witness had said that "bricks" discussed in a phone call with Defendant were marijuana, not methamphetamine as charged, and that the drugs belonged to another person.

U.S. v. Shaver, 2008 WL 2745183 (S.D. Cal. 2008):
Holding: Where prosecutor failed to reveal in methamphetamine trial that tapes of Defendant were referring to marijuana and not methamphetamine, this was misconduct warranting new trial.

Robinson v. Cain, 2007 WL 2571640 (E.D. La. 2007):
Holding: *Brady* violated where police withheld report which contradicted key prosecution witness' eyewitness account, and provided a strong retaliatory motive on the part of someone other than Defendant.

U.S. v. Colomb, 2006 WL 2623894 (W.D.La. 2006):
Holding: Defendant entitled to new trial where gov't failed to disclose a letter by a gov't witness indicating that witness offered "to sell pictures of people going to trial."

U.S. v. Suarez, 88 Crim. L. Rep. 222 (D.N.J. 10/19/10):
Holding: Text messages between an FBI agent and a gov't witness were discoverable.

Hernandez v. City of El Paso, 2009 WL 2096272 (W.D. Tex. 2009):
Holding: Where the case against Defendant was based on eyewitness identification, *Brady* violation occurred when police failed to disclose another witness' statement that called into question the eyewitness testimony.

Johnson v. State, 2010 WL 121248 (Fla. 2010):
Holding: Where prosecutor knowingly presented false testimony by jailhouse snitch that snitch was not acting as a gov't agent, this violated Defendant's 6th Amendment right to counsel and *Giglio*.

State v. Cashen, 2010 WL 2629827 (Iowa 2010):
Holding: Defendant can obtain discovery of victim's mental health records where Defendant shows there is a reasonable basis to believe such records are likely to contain exculpatory evidence.

State v. Williams, 79 Crim. L. Rep. 176 (Md. 4/14/06):
Holding: Duty to disclose under *Brady* extends not only to evidence known by the actual Prosecutor in case, but also to other Prosecutors in the Prosecutor's Office.

Harness v. State, 87 Crim. L. Rep. 412 (Miss. 5/27/10):
Holding: Even though Prosecutor may not have intended to deprive Defendant of a DWI blood test evidence, where the State destroyed the blood sample without Defendant having an opportunity to test it, this denied Defendant right to due process and access to exculpatory evidence.

State v. Shepherd, 2009 WL 2367155 (N.H. 2009):
Holding: Where State's case turned on Victim's credibility, State committed *Brady* violation in not disclosing all portions of report of doctor who performed sex assault evaluation and evidence about Victim's mental health history; all this evidence could have been used to impeach Victim.

State v. Vasques, 80 Crim. L. Rep. 653 (Tenn. 3/9/07):
Holding: Where following conviction it was learned that undercover drug officer used cocaine at the time, some of which was seized as evidence, Defendants could obtain relief from conviction through coram nobis.

People v. Johnson, 2006 WL 2507142 (Cal. Ct. App. 2006):
Holding: *Brady* violated where prosecutor failed to reveal police reports impeaching prosecution's sole eyewitness to a shooting.

State v. Miller, 2009 WL 1842085 (Ga. Ct. App. 2009):
Holding: Where police sent notice as to how to retrieve Defendant's cell phone to an incorrect address, and destroyed Defendant's cell phone based on false statements in a police affidavit regarding unclaimed property, this showed bad faith and required dismissal of robbery charges since cell phone could have led to exculpatory evidence.

State v. Williams, 2008 WL 4390639 (N.J. Super. Ct. App. Div. 2008):
Holding: Where a superior in a prosecutor's office made racist remarks regarding Defendant, Defendant was entitled to discovery about the prosecutor's office to determine if there was systemic racial bias in the office, even though the superior was not going to be trial witness.

People v. Morrice, 2009 WL 1100001 (N.Y. App. Div. 2009):
Holding: Where prosecution witness testified she was not getting anything in return for her testimony but she had received immunity and prosecutor failed to correct this testimony, Defendant was denied a fair trial by prosecutor's misconduct.

State v. Johnson, 2007 WL 404020 (Or. Ct. App. 2007):
Holding: Trial court erred in denying Defendant's motion for a recess to review police officer's notes which were disclosed during trial; notes could have been used for impeachment and to show discovery violation.

Ex parte Masonheimer, 80 Crim. L. Rep. 669 (Tex. Crim. App. 3/21/07):
Holding: Where the prosecution in two prior trials had committed *Brady* violations in each trial which caused the defense to request a mistrial mid-trial, the State was barred by double jeopardy from seeking a third trial due to this prosecutorial misconduct.

Child Endangerment

State v. Power, No. ED91172 (Mo. App. E.D. 3/10/09):
(1) Even though Defendant was smoking marijuana in another person's trailer and the other person's children were in the trailer, Defendant could not be convicted of endangering the welfare of a child because he did not encourage, aid or cause a child to enter the trailer; and (2) even though Defendant was in the living room of a trailer where a "bong" was present, where there were "bongs" in other rooms of the trailer and Defendant did not own the trailer, the State failed to prove Defendant constructively possessed the "bong."
Facts: Defendant was visiting another person's trailer. When police entered the trailer, they saw the other person's baby in the living room, and smelled marijuana. Defendant was sitting on a couch in the living room. Police found a "bong" in the living room and other "bongs" in the bedroom. Police asked, "You guys just sitting here babysitting and smoking marijuana," and Defendant said "yes." Defendant was convicted of endangering the welfare of a child, and possession of drug paraphernalia.
Holding: (1) Section 568.050.1(4) states a person commits child endangerment if he encourages, aids of causes a child to enter a public nuisance. Section 195.130 defines public nuisance as any room or building which is used for illegal drugs. This case is a case of first impression. The State argues Defendant helped make the trailer a public nuisance by smoking marijuana in it. But the statute does not criminalizing making a building a public nuisance. The statute states a person must *encourage, aid or cause* a child *to enter* a public nuisance. The State failed to present evidence that Defendant brought the children into the trailer, or smoked marijuana in their presence. Since the other person was the children's father, it stands to reason that the other person had custody of them. The State merely showed that children were present in the trailer when police arrived. Conviction for endangering welfare of child reversed. (2) Other than Defendant's admission that he had been smoking marijuana, nothing connects Defendant to the "bong" in the living room. Other "bongs" were in a bedroom. The trailer did not belong to Defendant. While Defendant may have been aware of the "bong," the State failed to proved actual or constructive possession. Paraphernalia conviction reversed.

State v. Cole, No. 28175 (Mo. App., S.D. 2/5/08):
Trial court plainly erred in not giving lesser-included instruction on second degree child endangerment where jury could have found that Defendant-Mother did not "knowingly" act in a manner that created a substantial risk to the child.
Facts: Defendant-Mother lived with boyfriend. Young child was acting out, and boyfriend asked Mother to let boyfriend discipline child. Boyfriend then threw child across room and child died. Mother was convicted of first degree endangering welfare of a child and second degree murder. She claimed trial court erred in not giving a lesser-included offense instruction on second degree endangerment.
Holding: A person commits first degree endangerment if she "knowingly" acts in a manner that creates a substantial risk to the life, body or health of a child, Sec. 568.045.1(1). A person commits second degree endangerment if she "with criminal negligence" creates such a risk, Sec. 568.050.1(1). A person acts "knowingly" if she is aware that her conduct is practically certain to cause a result. A person acts with

"criminal negligence" when she fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and this is a gross deviation from the standard of care of a reasonable person, Sec. 562.016.5. Although there was evidence that boyfriend struck child in the past, there was other evidence that it was not Mother's practice to have boyfriend discipline child. The jury could have found that Mother was not aware that her conduct would be "practically certain" to create a substantial risk to the child, but that she failed to be aware of a substantial and unjustifiable risk. Thus, the lesser-included instruction should have been given. Since the murder conviction is dependent on the supporting felony, both convictions are reversed for new trial. This was reviewed as "plain error" on appeal because although defense counsel tendered a lesser-included instruction, it did not follow MAI-CR3d, and so review on appeal could only be for plain error.

State v. Smith, No. WD67404 (Mo. App., W.D. 12/26/07):
Even though child was in apartment where Defendant-mother and boyfriend were fighting and a pot was thrown in the fight, there was insufficient evidence to convict of endangering welfare of child because mother's conduct did not create a substantial, "practically certain" risk to the child.
Facts: Police were called to a domestic fight in progress at Defendant-mother's apartment. Mother was fighting with her boyfriend. Both mother and boyfriend were beaten up by each other, and there was blood on the wall and floor. Mother said she threw a pot in self-defense. The child said he heard his parents arguing, and saw his mother throw the pot.
Holding: To convict of second degree endangering welfare of a child, Section 568.050, the State had to prove that mother's conduct created a substantial risk and that she acted with criminal negligence. A substantial risk is an actual or "practically certain" risk. Here, there was no substantial risk to the child shown. The child was not involved in the fight or in close proximity to it, even though he was in the apartment. There is no evidence of where the child was standing when the pot was thrown. The child may have witnessed this from a safe distance.

State v. Wade, No. WD67363 (Mo. App., W.D. 9/11/07):
Section 568.045 does not authorize prosecution of pregnant mothers for child endangerment for ingesting drugs during pregnancy.
Facts: Defendant-mother delivered a baby who tested positive for marijuana and methamphetamine. The State charged mother with child endangerment. The trial court dismissed the charge.
Holding: Section 568.045 provides a person commits first-degree child endangerment by "knowingly act[ing] in a manner that creates a substantial risk to the life, body or health of a child less than 17 years old." The State argues that Section 1.205.1 which provides that life begins at conception allows prosecution. However, Section 1.205.4 states that "[n]othing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care." This provision precludes the prosecution of a mother who indirectly harms her fetus by ingesting illegal drugs.

State v. Geiser, 85 Crim. L. Rep. 88 (N.D. 4/2/09):
Holding: Child endangerment statute does not cover endangerment of a fetus.

State v. Gallegos, 82 Crim. L. Rep. 190 (Utah 10/26/07):
Holding: Law making it crime to cause a child "to be exposed to" controlled substances requires proof of a real, physical risk of harm to child.

State v. McAllister, 2007 WL 2026489 (N.J. Super Ct. 2007):
Holding: Where Defendant was the live-in boyfriend of victim's mother, Defendant could not be convicted of first degree endangering the welfare of a child for production of child pornography since he was not "legally charged" with victim's care or custody.

State v. Mondragon, 2008 WL 5070364 (N.M. Ct. App. 2008):
Holding: Even though Defendant beat mother and caused fetus' death, the fetus was not a child under the child-abuse statute and so Defendant could not be convicted of child abuse, even though fetus was born alive and then died.

Williams v. State, 2007 WL 2848986 (Tex. Crim. App. 2007):
Holding: Even though Defendant-mother left her children at a house without utilities and a lit candle under the supervision of another adult, where the house then burned and killed the children, the evidence was legally insufficient to show mother consciously disregarded a substantial or unjustifiable risk children would suffer serious bodily injury by leaving them at the house to support child endangerment conviction.

Child Support

State v. Latall, No. SC89322 (Mo. banc 12/16/08):
Even though Defendant left a $100,000 per year job for another job, eventually became unemployed, and eventually bought a money-losing bar, where he then became unable to pay his child support, he injected the issue of good cause for failure to pay into the case, and the evidence was insufficient to convict of criminal nonsupport.
Facts: Defendant originally had a $100,000 per year job. He quit that job and accepted another, similar job. However, he was laid off from the job when the company closed. He then sought other work, but could only find a $10 per hour job. He then took his remaining money and bought a money-losing bar to own and operate. The bar continued to lose money, and Defendant stopped paying his child support. He was convicted of criminal nonsupport.
Holding: Sec. 568.040.3 places the burden on Defendant to inject the issue of good cause into a criminal nonsupport case. Sec. 556.051 specifies the meaning of injecting the issue as follows: (1) The issue referred to is not submitted to the trier of fact unless supported by evidence; and (2) If the issue is submitted, any reasonable doubt on the issue requires a finding for the defendant on that issue. Sec. 556.051 imposes on the State the burden of proving, beyond a reasonable doubt, that Defendant did not have good cause in failing to pay. Defendant does not have to produce substantial evidence of good

cause, or prove good cause with substantial evidence. Defendant's burden is merely to produce evidence of good cause. Once that is done, then the State must prove Defendant did not have good cause. Here, Defendant showed he was heavily in debt and had no income, given the unprofitability of his bar business. He also tried to pursue other employment without success. Although the former wife testified she thought Defendant seemed to have a prosperous bar, her unsubstantiated speculations do not provide sufficient evidence to reasonably find Defendant guilty. The State failed to prove Defendant did not have good cause. Conviction reversed.

State v. Salazar, No. SC88438 (Mo. banc 10/30/07):

A default administrative order issued by the Division of Child Support Enforcement and docketed with the circuit court finding paternity is not "any child legitimated by legal process" so as to be able to sustain a conviction for failure to pay child support.

Facts: Defendant was charged with failure to pay child support. Defendant was married to Mother of child, but they were separated. Mother testified Defendant was not the child's biological father. The State claimed Defendant was required to pay child support by reason of a DCSE administrative default order which had been entered against Defendant and docketed with the circuit court.

Holding: The issue is whether a default administrative order issued by DCSE constitutes a "legal process" sufficient to support a criminal nonsupport conviction. The DCSE order finding Defendant financially responsible for child is based on Section 210.822.1 which provides that a man is presumed to be the father of a child born during wedlock. The DSCE order is enforceable in supplementary civil proceedings once it docketed per Section 454.490. But that does not mean that the order constitutes "legal process" for purpose of sustaining a criminal conviction. *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238 (Mo. banc 2006) holds that the State has the burden to prove a *judgment* was entered establishing a child was "legitimated by legal process." Although Section 454.490 gives a docketed administrative order the force of a circuit court order, the statute does not provide that the order becomes a "judgment" of the circuit court. Holding otherwise would impermissibly substitute an executive agency determination for the independent power of the courts to render final "judgments." Unlike *Sauer*, there is no final judgment and, thus, no "legal process" that judicially determined Defendant's parentage. In the absence of a judgment, Defendant can collaterally attack the administrative order, and the State did not prove beyond a reasonable doubt that the child was "legitimated by legal process."

State ex rel. Sanders v. Sauer, 183 S.W.3d 238 (Mo. banc 2006):

Defendant not entitled to DNA testing to establish paternity where Defendant previously had default judgment entered against him that child was his and child was, thus, "legitimated by legal process."

Facts: Defendant was charged with criminal nonsupport, Section 568.040. Previously, Defendant had a default judgment entered against him in a civil case in which it was held that he was the father. In the criminal case, Defendant sought DNA testing to determine if he was actually the biological father.

Holding: Regarding criminal nonsupport, Section 568.040(1) defines child, in relevant part, as any child "legitimated by legal process." Defendant argues that the State must

prove that he is the father beyond a reasonable doubt as an element of the offense. However, it is not that Defendant is the biological father that matters, but whether Defendant is the father of the child because the child was "legitimated by legal process." As such, the State need only prove beyond a reasonable doubt that a judgment was entered establishing the child as "legitimated by legal process." Whether Defendant is truly the biological father is irrelevant.
Editor's note by Greg Mermelstein: This case had three dissenting judges.

State v. Castilleja, No. ED87363 (Mo. App., E.D. 1/9/07):
Evidence was insufficient to convict of criminal non-support where the State failed to show that the Defendant or the child lived in the county where the prosecution occurred.
Facts: Defendant was convicted of criminal non-support, Section 568.040. Defendant contended the trial court should have sustained his motion for judgment of acquittal at the close of all evidence because the State had not shown that either he or the child lived in St. Louis County, where he was being prosecuted. An exhibit, which was not shown to the jury, and a defense offer of proof, which the jury did not hear either, showed Defendant did live in St. Louis County.
Holding: Venue must be proven in a criminal case. Section 568.040.6 states that a defendant may be prosecuted for criminal non-support in the county where the Defendant or child lived during the period of non-support. There was no evidence before the jury from which the jury could infer that either the child or Defendant lived in St. Louis County. The jury could not have relied on the exhibit or the offer of proof because the jury did not see or hear these. The evidence did show that Defendant owned property in St. Louis County, but it is not reasonable to assume that mere ownership of property shows Defendant lived there – especially in light of other testimony that this property was condemned and Defendant never moved into it.

State v. Ecford, No. ED86475 (Mo. App., E.D. 6/30/2006):
Editor's note by Greg Mermelstein: Defendant's conviction for criminal nonsupport and the denial of his motion for blood tests was affirmed under *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238 (Mo. banc 2006). However, there is an interesting concurring opinion which states the judge's belief that Article I, Section 11 of the Missouri Constitution that says that "no person shall be imprisoned for debt…" makes the criminal nonsupport statute unconstitutional. "Parse, ignore, and creatively define as we might, a duty to pay child support – as a duty to pay a mortgage – is a debt enforced by Court order. We do not have debtors' prison for failure to pay money obligation arising from duties. History should not be so easily forgotten." However, the judge believes that contempt may be available for failure to pay.

Calvin v. State, No. WD65265 (Mo. App., W.D. 8/1/06):
(1) In criminal non-support case, plea counsel was ineffective in failing to investigate Defendant/Movant's financial circumstances to determine if there was "good cause" for Defendant's failure to pay, but Defendant was not prejudiced because he cannot show he would not have pleaded guilty since his plea was based on a threat by the prosecutor to revoke probation in another case if Defendant did not plead; (2) there was an insufficient

factual basis to support Defendant's guilty plea to criminal non-support because plea record did not demonstrate that Defendant was without good cause in failing to pay.
Facts: Defendant/Movant was charged with criminal non-support, Section 568.040, for knowingly failing to pay child support without good cause for periods in 1997 and 1998. At the time of this new charge, Defendant was on probation for a criminal non-support conviction in 1996. For some of the periods in 1997 and 1998 for which Defendant was charged, he was in Department of Corrections' treatment programs or was incarcerated in another county's jail. The State threatened to revoke Defendant's probation if he did not plead guilty to the new charge. Defendant pleaded guilty. Defendant later filed a 24.035 motion claiming (1) that counsel was ineffective in failing to investigate and advise Defendant that he had a defense to the charges because he had "good cause" for failure to pay; and (2) that there was an insufficient factual basis for the plea.
Holding: A legal obligation to provide child support is not excused by changes in financial condition resulting from incarceration. However, despite that Defendant's voluntary behavior may cause incarceration, the court must still consider if the parent has present inability to pay the obligation. If financial impact of incarceration cannot be a factor to consider as part of a good cause defense, then a criminal non-support defendant could be charged with criminal non-support while already in prison for non-support and could then be subjected to more imprisonment, which could potentially go on for as long as the child support obligation existed, and parent would never be allowed to get a job and meet his obligation. Courts must distinguish those parents who are making an effort to pay their child support obligations, from those who would rather go to prison than pay them. Defendant was indigent during the periods in 1997 and 1998 when he was charged for failure to pay. He was often incarcerated in treatment programs or jail during those times, and when he was not in those programs, he made only $7.00 an hour; he had a lifelong problem with alcohol and drugs. Under these circumstances, Defendant's ability to pay child support during 1997 and 1998 was seriously in question, and should have been investigated by a reasonably competent attorney before a plea because Defendant had a viable good cause defense. Defendant's plea was not voluntary since he was not advised that he had a viable good cause defense. However, to set aside the plea on grounds of ineffective counsel, Defendant must also show that but for counsel's ineffectiveness, he would not have pleaded guilty and would have demanded a trial. Here, Defendant cannot show this because he pleaded guilty because the State threatened to revoke his 1996 probation if he did not plead guilty. Defendant has not raised a claim as to whether the threat to revoke probation was based on the new charges in 1997 and 1998 for which Defendant had a good cause defense; if so, "our analysis of prejudice would be different." This is point is denied. However, Defendant's plea is nevertheless vacated because there was an insufficient factual basis for the plea. At the plea, Defendant said he was not paying his child support in 1997 and 1998 because he had "setbacks" and "was trying to do the best I could." An element of criminal non-support is that the parent is without good cause in failing to provide support. There is nothing in the plea transcript to show Defendant was without good cause in failing to pay. There is no evidence that counsel or anyone else advised Defendant that if he was unable to pay for "good cause," i.e., because he was incarcerated, he could not be held criminally liable. In light of Defendant's responses at the plea, the plea court was obligated before

accepting the plea to explore further if Defendant had the ability to provide child support or purposely maintained his inability to provide it. Plea vacated.

U.S. v. Kerley, 84 Crim. L. Rep. 80 (2d Cir. 9/25/08):
Holding: Defendant who violates single child support order covering multiple children can be convicted of only one count of failure to pay child support.

People v. Monaco, 2006 WL 241119 (Mich. 2006):
Holding: Failure to pay child support is not a continuing offense, but is complete at time of the failure to pay. Prosecution for failure to pay child support more than 8 years after the failure to pay was barred by the 6-year statute of limitations.

State v. Stamm, 83 Crim. L. Rep. 356 (W.Va. 5/23/08):
Holding: State law that makes it a crime to fail to pay child support, but makes it an affirmative defense if Defendant can prove he is unable to pay, unconstitutionally shifts the burden of proof of an element of the offense to Defendant.

Civil Procedure

Dye v. Dept. of Mental Health, No. WD70567 (Mo. App. W.D. 4/20/10):
Holding: (1) Even though when Petitioner filed his petition he did so without paying the filing fee, this was not "jurisdictional" after *Webb ex rel. J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) and was corrected by later paying the fee, and the petition was deemed filed on the date it was received; (2) local court rules cannot impose more burdensome filing requirements on petitioners than required by State law; since State law did not require filing of an "information sheet" with a petition, this cannot be made a "jurisdictional" requirement by local court rule.

Closing Argument & Prosecutor's Remarks

State v. Banks, No. SC87921 (Mo. banc 2/27/07):
Prosecutor calling Defendant "the devil" and saying the crime was "Hell" was improper epithet, and Defendant was prejudiced because the evidence of guilt was not strong and the defense was based on challenging the credibility of the State's witnesses.
Facts: Defense counsel during closing argument argued that the crime occurred at a crack house, and the State's witnesses were drug users whose ability to accurately perceive events was questionable. In rebuttal, the State argued that police had to "catch the Devil, and there are no angels as witnesses. This is Hell. He is the Devil." Defense counsel objected.
Holding: A prosecutor has a duty to do justice, not simply be an advocate. The Missouri Supreme Court has repeatedly held that calling someone the Devil or Satan was improper name-calling and should not be tolerated in court. Defendant was prejudiced by the argument since the credibility of the State's witnesses was questionable, and the defense was based on attacking their credibility.

State v. Hoover, No. ED87068 (Mo. App., E.D. 3/20/07):
(1) Even though State claimed that police statements to Defendant that co-defendant had confessed were admissible as an "interrogation technique," the statements were inadmissible hearsay and violated Defendant's right to confront witnesses; and (2) where police got a co-defendant to secretly tape record some incriminating statements of another co-defendant after the crime occurred, the tape recording was not admissible against Defendant as statements of co-conspirators in furtherance of a conspiracy because the crime was over, and the co-defendant was acting as an agent of the police.
Facts: Defendant was the father-in-law of murder victim. There were two co-defendants. Police arrested Defendant and told him that one of the co-defendants had implicated him the crime. Defendant then made inculpatory statements. After the murder, the police got a co-defendant to secretly tape record another co-defendant about the murder. At trial, the State introduced testimony by police that they told Defendant that a co-defendant had implicated him. The State also introduced the tape recording. The co-defendants did not testify.
Holding: The State asserts that the police testimony that they told Defendant that a co-defendant had implicated him was offered as an "interrogation technique." However, if that were the case, then statements by co-defendants could always come in as "interrogation techniques" without any right of cross-examination. Where police are permitted to testify to background and context, courts do not permit the prosecutor to elicit details directly connecting Defendant to the crime. The tape recording should not have been admitted either because it violated Defendant's rights to confront witnesses under *Bruton* and *Crawford*. At the time the tape was made, the murder had happened and the co-defendant who made the tape was no longer acting in furtherance of a conspiracy. Rather, he was acting on behalf of police to get an incriminating statement from another co-defendant. The evidence of guilt was not overwhelming. Although Defendant made inculpatory statements, there was no audio or video or written statement made by Defendant, and the police took no notes during their interrogation of Defendant. There was no physical evidence linking Defendant to the crime. Thus, the erroneous admission of the co-defendant's statements was prejudicial.

State v. Taylor, No. ED87634 (Mo. App., E.D. 2/13/07):
It was plain error for State to argue for conviction in drug possession case based on drugs that were not actually or constructively possessed by Defendant, and to submit jury instruction allowing such conviction.
Facts: Defendant and his wife were arrested after a car stop. Police found a crack pipe with crack residue in it underneath a trash container; Defendant confessed that this was his. Police also found another crack pipe and crack in his wife's purse. Defendant was charged with possession of drugs. The State argued that he should be convicted because of the crack in his wife's purse in addition to the crack residue in his pipe, and submitted a jury instruction allowing conviction for this by referring only generally to possession of drugs without specifying which drugs.
Holding: There was no evidence establishing Defendant's actual or constructive possession of the crack in the purse. The State's argument and jury instruction allowing a conviction based on the crack in the purse constituted a manifest injustice.

Editor's Note by Greg Mermelstein: There is a concurring opinion in which the judge states his views that possession of only crack residue is an insufficient amount to sustain a conviction.

State v. Steger, No. ED86872 (Mo. App., E.D. 11/14/06):
Trial court plainly erred in allowing prosecutor to elicit from police witnesses that after Miranda warnings were given, Defendant had requested counsel.
Facts: Defendant was charged with first degree assault and other offenses arising out of a shooting incident. The evidence was conflicting at trial as to whether the victims or Defendant started the shooting. Defendant claimed the victims started it and Defendant acted in self-defense, and the victims claimed Defendant started it. The State either asked police officers, or the officers volunteered, that after *Miranda* warnings were given, Defendant asked to speak with a lawyer. Defense counsel did not object.
Holding: If a defendant exercises his right to remain silent or request an attorney, it is a violation of his constitutional rights to due process and against self-incrimination/right to silence to use that silence against him. Evidence in regard to the conclusion of an interrogation which reveals that the defendant was failing to answer a direct charge of guilt is improper. Here, the State repeatedly elicited testimony that Defendant had asked for counsel. Moreover, the evidence of guilt was not strong and the defense was not frivolous. Defendant had no prior convictions, but the victims (who testified against Defendant) all had multiple prior convictions, suggesting their credibility was questionable. The prosecutor's questions had a decisive effect on the jury by creating an inference of guilt.

State v. McGowan, 184 S.W.3d 607 (Mo. App., E.D. 2006):
Defendant entitled to new trial where Prosecutor asked non-testifying Defendant in front of jury, "[Defendant], did you want to take the stand?"
Facts: During the Prosecutor's direct examination of a witness at trial, Defendant blurted out, "He's lying." The Prosecutor then turned to Defendant and said, "[Defendant], did you want to take the stand?" Defense counsel objected and asked for mistrial. Defendant did not testify at trial.
Holding: Prosecutor's question improperly commented on Defendant's exercise of his right not to testify. Although the State claims Defendant opened the door to the comment by his outburst, the State had other means available to curtail further unsworn comments by Defendant, such as requesting the court to admonish the Defendant not to make comments. The State's question here was not a fair response. The State's question was a direct and unequivocal reference made to the jury intending to draw attention to Defendant's failure to testify. Trial court abused its discretion in not granting mistrial.

State v. Walters, No. WD66981 (Mo. App., W.D. 12/26/07):
Prosecutor cannot cross-examine Defendant about whether police officer was "lying" in his testimony.
Holding: A witness should not be asked to comment on the veracity of another witness. To ask whether another witness is lying is to invite an opinion as to someone else's state of mind that the witness is not qualified to give. Such questioning is argumentative, and an objection to it should be sustained.

State v. Brown, No. WD66219 (Mo. App., W.D. 6/26/07):
Prosecutor improperly vouched for her own credibility and implied special knowledge when she argued in closing that a prosecutor would not risk a law license or a career to coach a witness, as the defense had claimed.
Facts: In this murder case, a State witness testified that the prosecutor had not coached him on what to say about a knife. The defense then called a witness, Brown, who testified that she heard the prosecutor tell the State witness to say that a knife in question "never left the table" and that "you know, when they put that knife in [victim's] hands we are in trouble, we are done, we are through." In closing argument, the prosecutor argued, over objection, that "[t]he idea that an officer of the court, a prosecutor, would risk a law license, a career, a law degree, years of hard work, on one case is so offensive and completely ridiculous that we ask that you take [Brown's] testimony for what it is worth, which is nothing."
Holding: A prosecutor cannot argue facts outside the record because such assertions of personal knowledge are apt to carry weight amongst jurors when they should carry none. Here, prosecutor argued facts that were uniquely within her personal knowledge. Prosecutor was not called as a witness or subject to cross-examination. Her unsworn, untested testimony went to a critical issue – whether a key witness had been coached what to say regarding a knife. This improperly touted the prosecutor's credibility and implied special knowledge.

Amerson v. State, No. SD29983 (Mo. App. S.D. 10/15/10):
Holding: Prosecutor's comments that "a trial is a search for truth … not a search for reasonable doubt" border on the improper and "should not be repeated in other cases," but were harmless because they did not diminish the State's burden of proof or confuse the jury in this case.

U.S. v. Ayala-Garcia, 85 Crim. L. Rep. 591, 2009 WL 2196081 (1st Cir. 7/24/09):
Holding: Prosecutor's closing argument that each bullet in a gun in Defendant's drugs and gun case represented a "life saved by Defendant's arrest" was improper because implied Prosecutor had special knowledge that Defendant intended to kill others, and was inflammatory.

U.S. v. Azubike, 2007 WL 2745011 (1st Cir. 2007):
Holding: Defendant entitled to new trial where Prosecutor in closing misquoted words used by Defendant on key part of case, even though Prosecutor's misquote was not deliberate.

U.S. v. Carpenter, 81 Crim. L. Rep. 549 (1st Cir. 7/18/07):
Holding: In prosecution for securities fraud, prosecutor went too far in repeatedly using gambling terms and metaphors in closing argument.

U.S. v. Whitten, 2010 WL 2595315 (2d Cir. 2010):
Holding: Prosecutor violated Defendant's 6th Amendment right to trial and 5th Amendment due process rights by arguing that Defendant's demand for trial showed lack

of remorse and refusal to accept responsibility, and argued lack of remorse to support death penalty.

U.S. v. Wilson, 87 Crim. L. Rep. 681 (2d Cir. 6/30/10):
Holding: Prosecutor's remarks in capital penalty phase (1) that Defendant did "everything he could to escape responsibility for his crimes. He has a right to go to trial … but he can't have it both ways. He can't do that and then say I accept responsibility" violated his 6th Amendment right to jury trial and denigrated mitigating factors of remorse and acceptance of responsibility, and (2) that Defendant's remorse should be discounted because he declined to make it under oath and (3) lack of remorse showed future dangerousness were improper comments on invocation of 5th Amendment right not to testify.

U.S. v. Farmer, 86 Crim. L. Rep. 109 (2d Cir. 10/8/09):
Holding: Prosecutor's repeated use of Defendant's nickname, "Murder," in attempted murder prosecution violated due process; the nickname strongly suggested criminal disposition.

U.S. v. Garcia, 2008 WL 836696 (5th Cir. 2008):
Holding: Prosecutor improperly bolstered credibility of testifying law enforcement officers in closing argument; was plain error.

U.S. v. Mendoza, 2008 WL 788607 (5th Cir. 2008):
Holding: Prosecutor cannot argue the demeanor of a non-testifying Defendant, and thus, cannot argue Defendant was "calm" during trial.

Girts v. Yanai, 2007 WL 2481018 (6th Cir. 2007):
Holding: Prosecutor's remarks regarding Defendant's failure to testify violated 5th Amendment right to remain silent.

U.S. v. Clark, 83 Crim. L. Rep. 695 (7th Cir. 7/23/08):
Holding: Improper for Prosecutor to argue Defendant put on a "standard defense" defendants make in drug cases.

Sechrest v. Ignacio, 2008 WL 5101988 (9th Cir. 2008):
Holding: Prosecutor violated due process by arguing to jury that Defendant would be released if he did not receive the death penalty.

Hooks v. Workman, 87 Crim. L. Rep. 371 (10th Cir. 5/25/10):
Holding: (1) Prosecutor's remarks that jurors' work would be wasted if they didn't reach a unanimous verdict and that failing to reach a verdict would be "jury nullification" and outside the law misstated the law; (2) where jury told judge it was deadlocked 11 to l for death and judge instructed jurors to keep deliberating so that the "case may be completed" and suggested jurors could not go home until they reached a verdict, this improperly coerced a death verdict.

Najafi v. U.S., 2005 WL 3005743 (D.C. 2005):
Holding: Improper to argue Defendant was "running a business" of selling drugs in a distribution of drugs case.

Domingo-Gomez v. People, 78 Crim. L. Rep. 341 (Colo. 12/19/05):
Holding: Prosecutor cannot argue witnesses "lied" because this conveyed a personal opinion; also cannot argue Defendant and his friends "got together on a story" to fabricate a defense, or argue that the case had passed the Prosecutor's "screening" process.

State v. Angel T., 85 Crim. L. Rep. 544 (Conn. 6/30/09):
Holding: Due process prohibits Prosecutor from presenting evidence or argument that Defendant's prearrest retention of counsel indicates Defendant's guilt or impeaches his trial testimony that he was innocent.

Erskine v. State, 2010 WL 2541700 (Del. 2010):
Holding: Prosecutor's argument that defense expert was "bought and paid for" was improper.

Hayward v. State, 85 Crim. L. Rep. 712 (Fla. 8/27/09):
Holding: Where prosecutor's closing argument in death penalty case compared the Victim's sound life choices and accomplished to the Defendant's bad choices that caused him to be where he is now, this was improper victim impact argument because statute bars "characterizations and opinions about the crime, defendant and appropriate sentence as part of victim impact."

Smith v. State, 88 Crim. L. Rep. 193 (Ga. 11/8/10):
Holding: Where in Defendants' trial for murder of their children, prosecutor in closing argument staged a "birthday party" for their 8 year old victim-son by dimming the courtroom lights, bringing out a birthday cake, and singing Happy Birthday, this was highly improper and the trial judge could have stopped it; however, defense counsel was not ineffective in failing to object, because counsel believed that the argument would backfire on prosecutor.

State v. Mattson, 2010 WL 971791 (Haw. 2010):
Holding: Hawaii Confrontation Clause prohibits Prosecutor from making generic argument that Defendant tailored his testimony based on exercising his constitutional right to be present at trial.

State v. Rodrigues, 80 Crim. L. Rep. 272 (Haw. 11/29/06):
Holding: Where Defendant refused at the end of an interrogation to repeat a confession on audiotape, this was an invocation of his 5th Amendment right to silence, and prosecutor cannot present evidence that Defendant refused to make tape.

People v. Wheeler, 2007 WL 1774965 (Ill. 2007):
Holding: Prosecutor's closing argument advancing an "us vs. them" theme, saying the only thing standing between jurors and people like Defendant was a "thin blue line" of police like those who testified, and portraying himself as a lone avenging champion of the murder victim was inflammatory and prejudicial.

In re Foster, 78 Crim. L. Rep. 608 (Kan. 2/3/06):
Holding: Prosecutor denied Defendant fair SVP trial by saying in opening statement that a "multidisciplinary team," including a judge, had already examined Defendant's records and background and determined he was at risk of re-offending.

Lee v. State, 83 Crim. L. Rep. 466 (Md. 6/13/08):
Holding: Prosecutor's argument that a victim's exculpatory testimony was not credible because he was following "law of the streets," that jurors should protect the community and clean up the streets, and teach Defendant not to abide by "law of the streets" denied Defendant a fair trial.

Donaldson v. State, 88 Crim. L. Rep. 166 (Md. 10/26/10):
Holding: Even though defense counsel argued that police had essentially testified to trust them because they're cops, it was improper vouching for prosecutor to argue in rebuttal that the witnesses would not risk their jobs by testifying falsely.

Haley v. State, 81 Crim. L. Rep. 52 (Md. 3/21/07):
Holding: Prosecutor could not cross-examine Defendant at trial about when Defendant told his defense counsel his exculpatory version of events, because this violated attorney-client privilege.

Commonwealth v. Beaudry, 78 Crim. L. Rep. 345 (Mass. 12/20/05):
Holding: In child sex case, Prosecutor cannot argue that Defendant's alleged sexual abuse was the only source of the child's sexual knowledge, unless there is an adequate basis in the record to support that argument.

Brown v. State, 83 Crim. L. Rep. 649 (Miss. 6/26/08):
Holding: Prosecutor cannot make "send a message" arguments to jury because violates jury's oath to render verdict solely on the evidence; hence, it was improper to argue jury should convict to "rid crime from our streets" and because "we've got to do something about crime in this country."

State v. Hill, 85 Crim. L. Rep. 538 (N.J. 7/14/09):
Holding: Courts should not submit jury instruction telling jurors that where Defendant's witness was available and Defendant failed to call witness, then jury can draw an inference that witness' testimony would have been unfavorable to Defendant, and Prosecutor's argument to this effect is also suspect because it improperly relieves Prosecutor of burden to prove guilt and shifts burden of proof to Defendant to prove innocence.

State v. Gutierrez, 2007 WL 1987791 (N.M. 2007):
Holding: Prosecutor's reference in opening statement to Defendant's failure to take polygraph violated 5th Amendment right to silence.

State v. Lopez, 681 S.E.2d 271 (N.C. 2009):
Holding: Where prosecutor's closing argument stated a sentencing range Defendant would receive if jury convicted of a lesser offense that was inaccurate and misleadingly low, this was misleading and improperly stated the law.

Vasquez v. State, 87 Crim. L. Rep. 837 (S.C. 8/9/10):
Holding: Where Muslim Defendant was charged in capital case with murder and robbery, counsel was ineffective in failing to object to Prosecutor's argument that Defendant was a "domestic terrorist;" the remarks injected religious prejudice.

Rose v. State, 2007 WL 2162163 (Utah 2007):
Holding: Prosecutor's argument referring to defense counsel putting on "smoke screen and flat out deception" was prosecutorial misconduct.

State v. Frost, 2007 WL 1874772 (Wash. 2007):
Holding: Trial court's decision to limit defense counsel's closing argument violated 6th Amendment right to counsel and due process.

State v. Mills, 78 Crim. L. Rep. 268 (W.Va. 11/17/05):
Holding: Improper to argue jurors should not show mercy to Defendant because he was already receiving mercy since West Virginia didn't have a death penalty.

People v. Vance, 2010 WL 3770627 (Cal. App. 2010):
Holding: Prosecutor's remarks inviting jury to put itself in place of victim, walk in victim's shoes, and relive your feelings of what victim experienced, were improper.

People v. Katzenberger, 86 Crim. L. Rep. 213 (Cal. App. 11/2/09):
Holding: Where prosecutor used a PowerPoint in closing argument which was a jigsaw puzzle of the Statute of Liberty and prosecutor left out pieces and argued that all the pieces did not need to be put together to overcome reasonable doubt, this was improper because it left the impression with jurors that the reasonable doubt standard is satisfied with only a few pieces of evidence, and suggested improper quantification of reasonable doubt.

People v. Kiney, 81 Crim. L. Rep. 387 (Cal. Ct. App. 5/30/07):
Holding: A *pro se* Defendant's admissions made in closing argument at trial can be used against Defendant at a subsequent trial.

People v. Zurinaga, 56 Cal. Rptr. 3d 411 (Cal. App. 2007):
Holding: Prosecutor's analogy to Defendant's home invasion as like 9/11 was egregious misconduct, but harmless.

People v. Lopez, 2006 WL 950193 (Cal. App. 2006):
Holding: In prosecution of priest for sex crime, Prosecutor cannot argue that priests commit "horrendous crimes" and that it was not surprising that Catholic Church had rules about priests' conduct with minors.

People v. Munsey, 2009 WL 1476947 (Colo. App. 2009):
Holding: Where Defendant was charged with stealing from school district, argument that "as taxpayers" jurors were also victims of Defendant was improper.

People v. McNeely, 2009 WL 1476934 (Colo. App. 2009):
Holding: Prosecutor's closing argument that State witness was a "youth pastor" and "man of God" was improper because had no legitimate bearing on witness' credibility, even though witness had learned of events in witness' role as pastor.

State v. Walters, 2006 WL 1914097 (Colo. Ct. App. 2006):
Holding: In sex case, prosecutor's remarks, without evidentiary support, that Defendant lurked around elementary schools was plain error requiring reversal.

State v. Bradshaw, 81 Crim. L. Rep. 235 (N.J. Super. Ct. 5/1/07):
Holding: Prosecutor cannot argue that deaf people have "heightened sensory perception" because this is improper vouching for the credibility of deaf witness.

State v. Loyal, 2006 WL 1585619 (N.J. Super. Ct. App. 2006):
Holding: Defense counsel can argue the lack of fingerprint evidence on a gun, where State submitted gun for fingerprint testing and found none.

People v. Frederick, 2008 WL 2612144 (N.Y. App. Div. 2008):
Holding: Prosecutor improperly vouched for credibility of witnesses, and improperly elicited testimony that Defendant incarcerated since his arrest.

People v. Handwerker, 2006 WL 820390 (N.Y. App. 2006):
Holding: In DWI case, Prosecutor cannot ask Defendant on cross-examination, "You didn't say, 'I want to prove my innocence, give me [a breath] test?'" and cannot argue in closing, "Well, if he's innocent, then why doesn't he want to take the [breath] test to prove that?"

Crocker v. State, 2007 WL 2446886 (Tex. App. 2007):
Holding: Prosecutor's argument that jury only heard from State's witnesses was improper.

Confrontation & Hearsay

State v. Reed, No. SC88787 (Mo. banc 5/5/09):
Where State failed to ask Witness whether Witness made prior inconsistent statement, trial court abused discretion in admitting testimony of Officer about Witness' statement since this was hearsay.
Facts: Defendant was charged with attempted manufacture of methamphetamine. At trial, the State called Witness to testify about certain events, but did not ask Witness if Witness had told Officer that Defendant had been making meth. The State then called Officer to testify, over Defendant's hearsay objection, that Witness told Officer that Defendant had been making meth.
Holding: The State claims Officer's testimony was admissible as a prior inconsistent statement under Sec. 471.074. To admit a prior inconsistent statement, the necessary foundation is an inquiry whether the witness made the statement and whether the statement is true. If a witness claims not to remember, a proper foundation had been laid. Here, the State failed to ask Witness if he had previously stated that Defendant had been making meth. While a specific question is not required, the State failed to even ask a generally related question to lay a foundation. Thus, Officer's subsequent testimony that Witness made this statement was inadmissible hearsay.

In the Interest of N.D.C., No. SC88163 (Mo. banc 6/12/07):
Child's statement to mother that juvenile "put his thing in her butt" was not "testimonial," where mother had gone into bedroom shortly after act occurred and asked what was going on.
Facts: Mother went into bedroom and found juvenile with his pants down, and child victim with no underpants. Mother asked what was going on, and victim said juvenile "put his thing in her butt." Juvenile was charged with sodomy. Child victim refused to testify at trial. State then sought to admit juvenile's statements through the mother. Juvenile court excluded the statements under *Crawford*. State sought writ.
Holding: A writ of prohibition is the proper remedy where an issue would otherwise escape appellate review. Here, *Crawford* applied to juvenile proceedings. However, the statement here was not "testimonial" since it was made in the context of providing emergency assistance. Writ issues.

State v. March, No. SC87902 (Mo. banc 3/20/07):
Holding: *Lab report prepared for prosecution of case is "testimonial" and cannot be admitted without testimony of its preparer unless the witness is unavailable and there was a prior opportunity to cross-examine.*
Facts: In a drug case, the crime lab analyst who found a substance to be cocaine and who prepared a lab report stating this moved to another State before trial. At trial, the Prosecutor called the custodian of records of the crime lab to testify about the contents of the report.
Holding: The Prosecutor argues the report was admissible as a business record. However, falling within a hearsay exception does not resolve the Confrontation Clause issue. The lab report was "testimonial" under *Crawford*, 541 U.S. 36 (2004) and *Davis*, 126 S.Ct. 2266 (2006). The report was prepared at the request of law enforcement to

prosecute Defendant. It was offered to prove an element of the charge, i.e., that the substance was cocaine. When a lab report is created for the purpose of prosecuting a Defendant, it cannot be admitted without the testimony of the preparer unless the witness is unavailable and there was a prior opportunity to cross-examine. That was not the case here.

State v. Justus, No. SC87604 (Mo. banc 11/21/06):
Allowing two child abuse experts to testify to hearsay statements of child sex abuse victim violated Defendant's 6th Amendment right to confront and cross-examine witnesses, even though the testimony satisfied the requirements of Section 491.075.
Facts: Defendant was charged with first-degree child molestation of a three-year-old girl. The trial court granted the State's motion under Section 491.075 and ruled that the child was unavailable as a witness due to emotional distress, and that the State could present testimony from two child abuse experts who interviewed the child about the alleged abuse, and present a videotaped interview of the child by one of these experts. One of the experts was a child abuse investigator for the DFS, who interviewed the child about the alleged abuse. The other was a private social worker at a children's advocacy center who conducted a "forensic interview" or "official interview for law enforcement" and videotaped the interview.
Holding: The constitutionality of Section 491.075 is not at issue here, because this issue was not raised by the defense. The Supreme Court declines to address the constitutionality of Section 491.075 *sua sponte*. However, application of the statute is subject to the 6th Amendment's Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36 (2004), the U.S. Supreme Court held that where "testimonial" evidence is presented, the Defendant must be granted actual confrontation at trial unless the witness is unavailable and there was a prior opportunity for cross-examination. In *Davis v. Washington*, 126 S.Ct. 2266 (2006), the Supreme Court held that statements are nontestimonial when made in the course of police interrogation for meeting an emergency. But statements are testimonial when there is no ongoing emergency, and the police interrogation is to establish or prove past events relevant to later criminal prosecution. In Defendant's case, the two experts did not interview the child in response to an ongoing emergency. Rather, the interviews and videotape were done to establish or prove past sex events relevant to prosecuting Defendant. Thus, the statements are testimonial. Testimonial statements may still be admitted if (1) the witness is unavailable, and (2) there was a prior opportunity for cross-examination. Here, the child victim is unavailable due to emotional distress. However, the second condition is not met since Defendant never had the opportunity to previously cross-examine the victim. Reversed and remanded for new trial.

State v. Bynum, No. ED92157 (Mo. App. E.D. 11/24/09):
(1) Where trial court sentenced Defendant to life imprisonment for sexual misconduct involving a child, this was plain error because it exceeded the maximum statutorily authorized punishment; and (2) where trial court admitted 911 call reporting child sex abuse that happened years earlier, this violated Defendant's confrontation rights because caller did not testify at trial and call was "testimonial" (but harmless here).

Holding: (1) Defendant was convicted of two counts of sexual misconduct involving a child and sentenced to life and 15 years. However, Sec. 566.083 makes this offense only a Class D felony except for a second offense, which is a Class C felony. The authorized terms of imprisonment for a Class D and C felony are 4 and 7 years. Here, the trial court inexplicably sentenced Defendant to life and 15 years. A sentence in excess of the statutory authority is beyond the jurisdiction of the sentencing court, and constitutes plain error. As charged, Defendant can only be sentenced to 7 years. (2) The State introduced a 911 call in which Witness reported that Defendant had sexually abused victim several years earlier. Although Witness was available, State did not call Witness to testify. The admission of the 911 call violated Defendant's Confrontation Clause rights because Witness' statements were "testimonial" in that there was no ongoing emergency and the primary purpose was to prove past events relevant to later prosecution. However, because there was other evidence of guilt, the admission was harmless here.

State v. Smith, No. ED90253 (Mo. App., E.D. 9/30/08):
Victim's statements about prior acts of violence by Defendant were hearsay and not admissible as excited utterances or present sense impressions.
Facts: Defendant was charged with fatally stabbing Victim. Defendant testified Victim had threatened her with a gun. In rebuttal, State called a witness who testified that during previous telephone conversations with Victim, witness could hear Defendant screaming in background and Victim would say, "Here she comes with a knife," and then would laugh and say Defendant would only hurt herself.
Holding: Witness' testimony about Victim's statements was inadmissible hearsay. The statements were not excited utterances because Victim was not excited when telling her about Defendant, but rather was laughing about it. The statements were not admissible as present sense impressions because while made contemporaneously with the events described, Victim was unavailable for cross-examination and the State offered no testimonial or physical evidence to corroborate the statements. However, conviction is not reversed because no prejudice under facts of this case.

State v. Hill, No. ED89196 (Mo. App., E.D. 3/4/08):
Defendant's confrontation rights were violated when trial court allowed prosecutor to move podium in front of child victim witnesses so that Defendant could not see them.
Facts: Defendant was charged with child sex offenses. When the child victims were called to testify at trial, the prosecutor said the victims would be traumatized by seeing Defendant, and the trial court allowed the prosecutor to place a podium between Defendant and witnesses, so that Defendant could not see them.
Holding: The 6th Amendment and Article I, Sec. 18(a) Mo. Const., guarantee face-to-face confrontation. While Sec. 491.680 RSMo allows that child witnesses may testify by video and that Defendant can be excluded if the court finds that the children would be significantly traumatized, Missouri courts have generally held that the trauma must be established by expert testimony. Although this case does not arise under Sec. 491.680, the same case-specific finding of necessity should have been made before the podium was placed between Defendant and the witnesses. Defendant's confrontation rights were violated. However, the error was harmless because there was sufficient evidence to convict even without the children's testimony since Defendant gave a confession.

State v. Davidson, No. ED88555 (Mo. App., E.D. 10/23/07):
Admission of autopsy report without medical examiner who prepared it violated right to confrontation.
Facts: In murder trial, the State introduced an autopsy report which was prepared by a different medical examiner than the examiner who testified because the preparing examiner was out of town.
Holding: Before *Crawford v. Washington*, 541 U.S. 36 (2004), Missouri had held that reports prepared by an unavailable declarant were admissible under the business records exception to the hearsay rule. However, the business records exception does not overcome a Confrontation Clause right. The autopsy report was "testimonial" under *Crawford*. The report was prepared at the request of law enforcement in anticipation of a murder prosecution and was admitted to prove cause of death. The court cannot admit the report without the testimony of the examiner who prepared it unless he is unavailable and Defendant had a prior opportunity for cross-examination. That wasn't the case here. However, the error is harmless because Defendant conceded in opening statement that the victim died of gunshot wounds, and the only dispute was over who committed the murder.

State v. Hoover, No. ED87068 (Mo. App., E.D. 3/20/07):
(1) Even though State claimed that police statements to Defendant that co-defendant had confessed were admissible as an "interrogation technique," the statements were inadmissible hearsay and violated Defendant's right to confront witnesses; and (2) where police got a co-defendant to secretly tape record some incriminating statements of another co-defendant after the crime occurred, the tape recording was not admissible against Defendant as statements of co-conspirators in furtherance of a conspiracy because the crime was over, and the co-defendant was acting as an agent of the police.
Facts: Defendant was the father-in-law of murder victim. There were two co-defendants. Police arrested Defendant and told him that one of the co-defendants had implicated him the crime. Defendant then made inculpatory statements. After the murder, the police got a co-defendant to secretly tape record another co-defendant about the murder. At trial, the State introduced testimony by police that they told Defendant that a co-defendant had implicated him. The State also introduced the tape recording. The co-defendants did not testify.
Holding: The State asserts that the police testimony that they told Defendant that a co-defendant had implicated him was offered as an "interrogation technique." However, if that were the case, then statements by co-defendants could always come in as "interrogation techniques" without any right of cross-examination. Where police are permitted to testify to background and context, courts do not permit the prosecutor to elicit details directly connecting Defendant to the crime. The tape recording should not have been admitted either because it violated Defendant's rights to confront witnesses under *Bruton* and *Crawford*. At the time the tape was made, the murder had happened and the co-defendant who made the tape was no longer acting in furtherance of a conspiracy. Rather, he was acting on behalf of police to get an incriminating statement from another co-defendant. The evidence of guilt was not overwhelming. Although Defendant made inculpatory statements, there was no audio or video or written statement

made by Defendant, and the police took no notes during their interrogation of Defendant. There was no physical evidence linking Defendant to the crime. Thus, the erroneous admission of the co-defendant's statements was prejudicial.

State v. Courtney, No. 28669 (Mo. App., S.D. 7/28/08):
Where officer's testimony about a cell-phone call was based on phone records given to him by the Victim which were not admitted in evidence, officer's testimony was inadmissible hearsay.
Facts: Defendant was charged with rape. Victim and Defendant both acknowledged having sex at Victim's apartment; the issue was whether it was consensual. Victim claimed Defendant stole her cell phone and left her apartment at 6:30 a.m. At trial, Officer testified that Victim's cell phone records, which Victim had given him, showed a call to Defendant's relative at 8:47 a.m. (which would indicate Defendant had the phone). Defendant objected to the testimony as hearsay.
Holding: *State v. Dunn*, 7 S.W.3d 427 (Mo. App. 1999) had held that properly authenticated phone records are not hearsay. Here, however, the phone records were not offered into evidence. The Officer explicitly relied on the out-of-court statement of Victim that the phone records she gave him were hers. Further, implicit in Officer's testimony was the notion that the records contained other statements that showed they belonged to Victim. Officer's testimony depended upon the veracity of an out-of-court statement to prove that the papers he relied on were, in truth, the phone records of Victim. This was inadmissible hearsay.

State v. Robinson, 2006 WL 1229575 (Mo. App., S.D. 5/9/06):
Trial court erred in admitting hearsay testimony by police officer that third party said Defendant and co-defendant were talking about shooting the victim.
Facts: In murder case, Defendant's defense was that co-defendant shot victim, and Defendant had previously abandoned any attempt to shoot victim. State called police officer who, over hearsay objection, was allowed to testify that third party said "they overhead information where [Defendant and co-defendant] were talking about shooting [victim]."
Holding: Trial court erred in admitting this hearsay. This was offered for truth of matter because it went directly to the substance of the case, i.e., the Defendant's mental state in the crime. Defendant was prejudiced because his defense was that he had abandoned any intent to shoot anyone. There is a reasonable probability of a different verdict if the hearsay had not been admitted.

State v. Bell, No. WD68914 (Mo. App. W.D. 1/13/09):
Where pathologist testified to the opinions of a prior pathologist from the prior report, this violated Defendant's right to confrontation, but was harmless in this case.
Holding: An autopsy report, when prepared for purposes of criminal prosecution, is "testimonial." It cannot be admitted without testimony from the doctor who prepared the report unless Defendant had an opportunity to cross-examine the doctor. Here, the pathologist testified to a prior pathologist's conclusions from the prior report. This violated Defendant's confrontation rights, but was harmless under facts of case.

State v. Clevenger, No. WD68933 (Mo. App. W.D. 4/14/09):
Where in domestic assault trial the trial court allowed a Petition for Order of Protection which contained allegations of prior assaults to be published to the jury, this was hearsay and improper evidence of uncharged misconduct.
Facts: Defendant was charged with second-degree domestic assault and other related offenses. Victim had filed a Petition for Order of Protection on April 17. On April 26, a court entered a full order of protection. That night, Defendant assaulted victim. At trial, the State sought to admit the Petition for Protective Order for the "limited purpose" of showing victim had applied for an Order. The court admitted it for this "limited purpose," but did not publish it to the jury. During deliberations, the jury requested all exhibits, and the trial court allowed the jury to have the Petition for Protective Order over defense objections. The Petition contained allegations of other assaultive conduct prior to the charged crimes.
Holding: Evidence of uncharged crimes is generally inadmissible because it may encourage the jury to convict based on propensity to commit such crimes. The State argues the Petition was admissible as a certified record of a court proceeding under Sec. 490.130. The Petition, however, was admitted for a "limited purpose," and the trial court should have taken steps to ensure that "limited purpose" was carried out. The Petition established no facts relevant to the criminal charges against Defendant other than that the Petition was filed. The Petition contained hearsay about past assaults and uncharged misconduct. Defendant was prejudiced because the jury acquitted Defendant of related counts, but convicted him of domestic assault. Conviction reversed; new trial ordered.

State v. Coulter, No. WD67730 (Mo. App., W.D. 6/24/08):
Records of physical therapist were not "testimonial" under Crawford v. Washington,541 U.S. 36 (2006), because they were prepared for treatment purposes, not for prosecution purposes.
Facts: Defendant, convicted of worker's comp fraud, claimed that trial court erred in admitting records of her physical therapist (who had died before trial), since this violated her confrontation rights.
Holding: Statements are "testimonial" where the primary purpose of the statement is to prove past events relevant to later criminal prosecution. Hence, a crime lab report prepared for use in a criminal case is "testimonial," and cross-examination is required. Here, however, the purpose of the therapist's records was to document medical treatment, not to prepare for a criminal prosecution. Hence, the records were not testimonial, and were admissible without cross-examination of the therapist. Nevertheless, the Court does not actually decide the confrontation issue, because the records were not relied on by jury in this case.

State v. Bybee, No. WD67154 (Mo. App., W.D. 3/25/08):
Trial court abused discretion in admitting accident reconstruction report which contained hearsay statements that Defendant was driver of car, where Defendant had denied driving car.
Facts: Police arrived at the scene of a one-car accident and found Defendant in the passenger's seat of the car, no one in the driver's seat, and three other teenagers, one of whom was dead. Defendant denied driving the car, and another teenager claimed not to

know who was driving. Later, the other teen said Defendant was driving. Defendant was arrested and convicted of involuntary manslaughter. At trial, the trial court admitted a report by a police accident reconstruction expert, which report repeatedly said Defendant had been driving the car. Defendant objected to the report as hearsay.
Holding: Under Sec. 490.065.3, the facts on which the expert relies must be of a type reasonably relied upon by experts in the field in forming their opinions and must be otherwise reasonably reliable. It has been previously held that an accident reconstructionist should not be permitted to express an opinion based on hearsay statements of eyewitnesses, because such statements do not satisfy the reliability requirement. The reconstruction report's conclusion that Defendant was the driver was improper. Defendant denied he was the driver. Admitting the police reconstruction expert's opinion that Defendant was the driver improperly allowed the State to cloak this testimony with an undeserved authority that could unduly sway a jury.

In the Interest of R.R.M., No. WD67064 (Mo. App., W.D. 6/12/07):
(1) Even though alleged child-victim testified at trial, her hearsay statements made to police could not be admitted under Section 491.075 without the trial court determining that the statements had "sufficient indicia of reliability;" and (2) where through either human or mechanical error a transcript could not be produced of the child-victim's testimony or some of the police testimony, the Court of Appeals could not review Defendant's claim of insufficiency of evidence, and Defendant was entitled to a new trial due to lack of transcript.
Facts: Defendant-juvenile was charged with sexually molesting a six year old child. At trial, the child testified, and denied Defendant molested her. Subsequently, the State under Section 491.075 sought to introduce child's statements to police that Defendant molested her. Defendant objected on grounds of hearsay and no indicia of reliability. The trial court admitted the statements on the grounds that the child had testified. On appeal, a transcript could not be made of the child-victim's testimony or portions of the police testimony due to either human or mechanical error regarding the trial recording equipment.
Holding: Section 491.075 provides that in offenses under Chapter 566 for children under 14, their statements can be introduced as substantive evidence to prove the truth of the matter asserted if the court finds the statements provide "sufficient indicia of reliability" and "the child testifies at the proceedings." Under the statute, in addition to the child testifying, the court must find "indicia of reliability." Defendant objected to the reliability of the statements. However, the trial court did not rule on their reliability. This was error. Also, the case must be reversed for a new trial because there is not a sufficient transcript on appeal to review Defendant's claim of insufficiency of evidence. Defendant exercised due diligence in trying to obtain a transcript, and has been prejudiced by the lack of transcript, since the Court of Appeals cannot review his claim on appeal.

State v. Rios, No. WD65708 (Mo. App., W.D. 4/27/07):
Trial court erred in admitting two hearsay statements made by murder victim, because statements were not admissible under "state of mind" exception to hearsay rule.

Facts: Murder victim was having a gay relationship with police officer/Defendant. Police officer/Defendant had written a ticket to victim regarding a municipal violation. Before the murder, victim told a friend that "if he [officer/Defendant] doesn't get this ticket taken away … he [victim] had a little secret that he thought the Columbia Police Department might like to know," and also victim told the friend that he (victim) was going to ask officer if officer was married or not "because if he's married, I don't want to be involved in a relationship with a married man." Officer/Defendant was married. Victim was later found murdered. When police officer/Defendant was questioned by police about the murder, officer/Defendant first denied having a relationship with victim, but then admitted it and changed his story. He denied any involvement in the murder. The State argued officer/Defendant's motive in committing the murder was that victim was going to inform the Police Department about their affair, and wouldn't fix his ticket. Other evidence of guilt was not substantial.
Holding: The state of mind exception to the hearsay rule is generally limited to cases where hearsay declarations of mental condition are especially relevant, such as where the defendant has put the victim's mental state at issue by claiming accident, self-defense or suicide. Here, Defendant denied any involvement in the murder; Defendant did not claim accident, self-defense or suicide. Thus, victim's statements were not relevant to prove victim's death was intentional, rather than accidental. The state of mind exception also allows statements to be admitted "to show a future intent on the part of declarant to perform an act." However, the intent to do an act must be in the "immediate future." Victim's statements here do not indicate any intent to do these things in the "immediate future." Defendant was prejudiced by admission of these inadmissible hearsay statements because the State argued they were the motive for Defendant to kill victim.

State v. Davis, 217 S.W.3d 358 (Mo. App., W.D. 3/27/07):
Even though (1) officer arrived at crash scene and found a crashed car; (2) a woman told the officer that the crash happened shortly before and told the officer where the driver fled; and (3) the officer found the driver and he was intoxicated, the evidence was insufficient to sustain conviction for DWI because the only evidence of when the accident occurred was the hearsay statement of the woman to the officer, which could not be considered for its truth.
Facts: Officer arrived at scene where car had crashed. A woman told the officer that the car had crashed shortly before, and told the officer where the driver had fled. The officer went to another address and found the driver, who was intoxicated. Empty beer cans were found in the car. At trial, the woman did not testify. The defense objected to the officer's testimony about the woman's statements as hearsay, but the court admitted them to show officer's subsequent conduct.
Holding: The woman's statements were admitted at trial for a limited purpose, and not as substantive proof of the time of the accident. The court could not consider the woman's out-of-court statements about when the accident occurred for the truth. Thus, there was no substantive evidence to establish the time that Defendant was driving the vehicle or the time the accident occurred. Proof of intoxication at the time of arrest, when remote from operation of the vehicle, is insufficient to prove intoxication at the time the person was driving. The fact that Defendant had blood on him does not prove

intoxication while driving because there was no testimony if the blood was wet or dry; also, mere presence of beer cans does not prove intoxication while driving.

State v. Griffin, No. WD63968 (Mo. App., W.D. 8/22/06):
Where Defendant's counsel was able to cross-examine child sex abuse victim at pretrial video deposition, Defendant was not denied his constitutional right to confront and cross-examine victim at trial when State played video deposition at trial in lieu of victim's testimony, and when victim's hearsay statements made to social workers and doctors were admitted.
Facts: Before trial, the State filed a motion to permit child sex abuse victim to testify via video deposition under Section 491.680. The State also filed a motion to exclude Defendant personally from the deposition under Section 491.685. Both motions were sustained. At trial, the video was played in lieu of in-court testimony. The State also admitted hearsay statements the victim made to social workers and doctors about her alleged abuse. On appeal, Defendant claimed this violated his 6th Amendment right to confront and cross-examine witnesses.
Holding: The Court declines to decide whether the victim's hearsay statements are "testimonial" under *Crawford* because Defendant had an opportunity to cross-examine the victim in the video deposition, and this is dispositive of the appeal. The victim was cross-examined in the pretrial video deposition. Even though Defendant claims he was entitled to "face-to-face" confrontation, the U.S. Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990) held that the Confrontation Clause did not require the Defendant's personal presence during cross-examination of a child victim. *Crawford* did not overrule *Craig*.

*** Melendez-Diaz v. Massachusetts, 85 Crim. L. Rep. 455, ___ U.S. ___ (5/25/09):**
Holding: Forensic laboratory reports are "testimonial" under *Crawford*, and Confrontation Clause gives defendants right to cross-examine analyst who prepared report.

*** Giles v. California, ___ U.S. ___, 83 Crim. L. Rep. 512 (6/25/08):**
Holding: Forfeiture by wrongdoing exception to 6th Amendment confrontation right does not apply unless Defendant was acting with an intent to prevent the declarant from testifying when he engaged in the wrongful acts that rendered declarant unavailable.

*** Whorton v. Bockting, 80 Crim. L. Rep. 591, ___ U.S. ___ (2/28/07):**
Holding: *Crawford v. Washington*, 541 U.S. 36 (2004) does not apply retroactively to cases which were "final" when the decision was announced.

*** Davis v. Washington, 79 Crim. L. Rep. 333, ___ U.S. ___ (2006):**
Holding: Statements are *not* "testimonial" under *Crawford v. Washington* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Statements *are* "testimonial" when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Applying this test to two different factual scenarios, Supreme Court holds that (1) a 911 call was *not* testimonial because the primary purpose of the call was not to prove a past fact relevant to a future prosecution, but (2) that statements made by a woman domestic dispute victim at her home, after the emergency had ended, were "testimonial" because there was no ongoing emergency and the primary purpose of the police questioning, objectively viewed, was to investigate a possible crime.

Editor's Note by Greg Mermelstein: *Davis* was decided on 6/19/06. I have made no attempt to assess whether the below-listed cases decided before *Davis* remain good law under the test announced in *Davis*. *Davis* is a very important case regarding confrontation rights, and the definition of what is and is not "testimonial" under *Crawford*. I recommend that any pre-*Davis* cases be assessed as to their continuing viability in light of *Davis*.

U.S. v. Cabrera-Rivera, 2009 WL 3050892 (1st Cir. 2009):
Holding: Admission of non-testifying accomplice's confession through a police officer violated Confrontation Clause.

U.S. v. Maher, 2006 WL 1846572 (1st Cir. 2006):
Holding: Police officer's testimony that a drug informant had told him that Defendant was involved in drug activity was "testimonial" under *Crawford*.

Brinson v. Walker, 84 Crim. L. Rep. 231 (2d Cir. 11/13/08):
Holding: African-American Defendant can question white complainant about whether they are a racist, because this shows witness bias.

U.S. v. Mejia, 84 Crim. L. Rep. 79, 2008 WL 4459289 (2d Cir. 10/6/08):
Holding: Law enforcement officer's alleged "expert testimony" about gang was not true expert testimony, and also violated confrontation rights because officer just repeated what suspects had said in interrogations.

U.S. v. Figueroa, 84 Crim. L. Rep. 232 (2d Cir. 11/18/08):
Holding: Defendant can cross-examine witness about witness' swastika tattoos.

U.S. v. Riggi, 2008 WL 4071416 (2d Cir. 2008):
Holding: Admission of plea allocutions of non-testifying co-defendants at Defendant's trial violated Confrontation Clause.

U.S. v. Lloyd, 85 Crim. L. Rep. 324 (3d Cir. 5/27/09):
Holding: 5th Amendment due process right to confront adverse witnesses requires Gov't to show some good cause for a declarant's absence before presenting hearsay testimony in parole revocation proceeding.

Vazquez v. Wilson, 2008 WL 5264678 (3d Cir. 2008):
Holding: Even though court redacted Defendant's name from co-defendant's statement naming Defendant as the shooter, a *Bruton* error occurred where there were only three possible shooters such that jury could infer that the statement referred to Defendant.

U.S. v. Jackson, 88 Crim. L. Rep. 186 (5th Cir. 11/8/10):
Holding: Officer's general testimony about why drug dealers keep ledgers was not a sufficient foundation to authenticate ledgers allegedly used by Defendant, and the ledgers were not admissible under the business records exception to hearsay rule.

Jones v. Cain, 2010 WL 909084 (5th Cir. 2010):
Holding: Where absent witnesses statements were offered to prove the truth of matter asserted, this violated 6th Amendment confrontation right.

U.S. v. Martinez-Rios, 86 Crim. L. Rep. 555 (5th Cir. 1/28/10):
Holding: A certificate of nonexistence of a record is "testimonial" under *Crawford*.

U.S. v. Tirado-Tirado, 84 Crim. L. Rep. 677, 2009 WL 711921 (5th Cir. 3/19/09):
Holding: Where Gov't deported a Gov't witness, Gov't must make reasonable efforts to secure the witness for trial before they can be "unavailable" for Confrontation Clause purposes.

Burbank v. Cain, 2008 WL 2714628 (5th Cir. 2008):
Holding: Court erred in not permitting Defendant to cross-examine witness about the specifics of the agreement she had with State to receive lower sentence for testifying.

Fratta v. Quaterman, 2008 WL 2802051 (5th Cir. 2008):
Holding: Defendant denied confrontation rights when court admitted hearsay testimony by alleged co-conspirator's girlfriend as to statements co-conspirator made; statements were not in furtherance of conspiracy.

U.S. v. Rodriguez-Martinez, 2007 WL 519880 (5th Cir. 2007):
Holding: Confrontation violated where police officer testified that confidential informant, who was unavailable at trial, had identified Defendant as his drug source.

U.S. v. Jimenez, 2006 WL 2597892 (5th Cir. 2006):
Holding: Defendant's confrontation rights were violated where trial court prevented defense counsel from cross-examining undercover surveillance officer about exactly where the officer was located when he allegedly observed the crime.

U.S. v. Martinez, 86 Crim. L. Rep. 289 (6th Cir. 12/1/09):
Holding: A video of a doctor properly administering injections introduced in order to show proper standard of medical care was inadmissible hearsay.

Jensen v. Romanowski, 2009 WL 4639651 (6th Cir. 2009):
Holding: Where State used police officer to testify to details of prior assault by Defendant rather than prior victim, this violated Defendant's confrontation rights.

U.S. v. Hearn, 2007 WL 2593522 (6th Cir. 2007):
Holding: Admission of confidential informant's statements against Defendant without opportunity to cross-exam violated right to confrontation, even though gov't claimed

statement were admitted to show why police stopped Defendant; it was apparent gov't also used the statements to prove guilt.

Wall v. State, 78 Crim. L. Rep. 520 (6th Cir. 1/18/06):
Holding: Excited utterances made by crime victim to police officer while in hospital for injuries resulting from crime were "testimonial" under *Crawford v. Washington*.

Ray v. Boatwright, 2010 WL 183978 (7th Cir. 2010):
Holding: Even though the State claimed that non-testifying co-defendant's statements implicating Defendant in crime were introduced to show Defendant's "reaction" during his own police interrogation, this violated Defendant's confrontation rights.

U.S. v. Holmes, 2010 WL 3431830 (8th Cir. 2010):
Holding: Where Defendant was on trial for being felon in possession of firearm, admission of nontestifying confidential informant's statement from search warrant affidavit that he had seen Defendant with gun violated 6th Amendment confrontation rights.

U.S. Villa-Gonzalez, 88 Crim. L. Rep. 169 (8th Cir. 11/1/10):
Holding: Where (1) Officer, who went to a residence, ordered Defendant to talk to an immigration officer who, without *Miranda* warnings, learned that Defendant used false documents to enter the U.S., and then (2) Officer used that information to obtain a search warrant for Defendant's residence where they found drugs, the exclusionary rule applies to exclude the physical evidence because Defendant had been initially detained in violation of the 4th Amendment and unconstitutionally interrogated in violation of the 5th. The rule of *U.S. v. Pantane*, 542 U.S. 630 (2004), that physical evidence seized in violation of *Miranda* need not be suppressed, did not apply since Defendant's initial seizure violated 4th Amendment since without reasonable suspicion.

U.S. v. Bonds, 87 Crim. L. Rep. 464 (9th Cir. 6/11/10):
Holding: An athletic trainer of a pro-athlete is not athlete's "agent" for purposes of hearsay exception.

U.S. v. McFall, 2009 WL 579508 (9th Cir. 2009):
Holding: Where witness invoked 5th Amendment right against self-incrimination after having testified at grand jury, Defendant was entitled to introduce witness' grand jury testimony at trial under unavailable witness exception to hearsay rule.

U.S. v. Marguet-Pillado, 85 Crim. L. Rep. 84 (9th Cir. 3/27/09):
Holding: Statements made by a third person on an immigration application may be "testimonial" and not fall under the public-records exception to the Confrontation Clause.

U.S. v. Yida, 81 Crim. L. Rep. 628 (9th Cir. 8/16/07):
Holding: A gov't witness was not "unavailable" for hearsay rule purposes where the gov't deported the witness prior to trial, unless the gov't made good-faith efforts to stop the deportation prior to trial.

U.S. v. Perez, 83 Crim. L. Rep. 294 (9th Cir. 5/16/08):
Holding: Defendant on supervised release had due process right to cross-examine lab technician at revocation hearing because there was some evidence that the urine sample technician was testifying about had been contaminated.

U.S. v. Larson, 81 Crim. L. Rep. 602, 2007 WL 2192256 (9th Cir. 8/1/07):
Holding: Defendant was denied 6th Amendment right to confront witnesses when trial court precluded him from cross-examining a State witness about the mandatory minimum sentence he would have faced if he had not made a deal to testify against Defendant.

U.S. v. Kaufman, 84 Crim. L. Rep. 239 (10th Cir. 11/12/08):
Holding: Trial court's order that Defendant not make eye contact with witnesses violated Confrontation Clause.

Childers v. Floyd, 87 Crim. L. Rep 465 (11th Cir. 6/8/10):
Holding: 6th Amendment right of confrontation violated where trial court prohibited Defendant from questioning State's witness about possible revocation of plea agreement as reason why witness changed story; allowing Defendant to question about inconsistencies in witness' story was insufficient.

U.S. v. Schwartz, 83 Crim. L. Rep. 820, 2008 WL 4097317 (11th Cir. 9/5/08):
Holding: Where Defendant owned a closely-held corporation and an affidavit from a corporate officer co-defendant was admitted which identified the corporation as making incriminating transactions, this violated *Bruton* because jurors would identify the corporation with Defendant.

U.S. v. Yates, 78 Crim. L. Rep. 562 (11th Cir. 2/13/06):
Holding: Face-to-face confrontation right violated where prosecution presented an overseas witness via video-conferencing.

Duvall v. U.S., 85 Crim. L. Rep. 553, 2009 WL 2043963 (D.C. 7/16/09):
Holding: Admission of lab report of drug analyst in violation of confrontation clause was not harmless error, even though the nature of the substance was not contested at trial.

Thomas v. U.S., 80 Crim. L. Rep. 384 (D.C. 12/28/06):
Holding: Lab report identifying substance as drugs is "testimonial" and required testimony of the chemist to be admitted.

Ash v. Reilly, 2006 WL 1363625 (D.D.C. 2006):
Holding: Parolee was denied confrontation rights when hearsay evidence was introduced at his parole revocation hearing that he had committed an assault, where parolee had been acquitted of the assault in related criminal trial.

U.S. v. Mills, 79 Crim. L. Rep. 719 (C.D. Cal. 8/17/06):
Holding: Protections of Confrontation Clause under *Crawford* apply to capital penalty phase evidence.

Scott v. Roberts, 2009 WL 1158849 (M.D. Ga. 2009):
Holding: *Bruton* error occurred in admitting hearsay testimony of witness in violation of Defendant's confrontation rights.

U.S. v. Baines, 2007 WL 1334183 (D.N.M. 2007):
Holding: Co-conspirator statements, when "testimonial" in nature, cannot be admitted under the hearsay exception for co-conspirator statements because this would violate the confrontation clause under *Crawford*. Thus, statement of driver to border patrol officer about traveling companion in response to officer's questioning was not admissible.

U.S. v. Stein, 2008 WL 4810065 (S.D. N.Y. 2008):
Holding: Information derived from reports concerning tax benefits Defendant would receive if deductions were allowed was inadmissible hearsay, because the information required IRS analysis and judgment, and thus the information was adversarial.

People v. Cage, 2007 WL 1053284 (Cal. 2007):
Holding: Police officer's interview of assault victim at hospital waiting room was "testimonial," since interview occurred an hour after assault and officer's interview was not to facilitate emergency treatment.

Vasquez v. People, 82 Crim. L. Rep. 203 (Colo. 11/13/07):
Holding: Even though Defendant forfeited his 6th Amendment right to confrontation through forfeiture by wrongdoing doctrine, Defendant could still rely on state hearsay doctrine to exclude evidence.

People v. Moreno, 81 Crim. L. Rep. 378, 2007 WL 1662641 (Colo. 6/11/07):
Holding: Forfeiture by wrongdoing requires State prove that Defendant's actions which made witness unavailable were committed with the intent to keep the declarant off the witness stand. Thus, in child sex case, the mere fact that court found that the child was too traumatized by the sexual acts to testify did not mean that Defendant had forfeited his right to confrontation. Defendant must have taken actions intended to prevent the declarant from testifying.

State v. Smith, 84 Crim. L. Rep. 234 (Conn. 11/25/08):
Holding: Courts should not use an "all or nothing" approach to determining if an informant's recorded statements are admissible against Defendant, but should determine which portions of the recording are "testimonial" and which are not for Confrontation Clause purposes.

State v. Smith, 2008 WL 4910057 (Conn. 2008):
Holding: Tape recorded statements made by a jailhouse snitch to co-conspirator implicating Defendant in murder were testimonial under *Crawford.*

State v. Kirby, 80 Crim. L. Rep. 95 (Conn. 10/17/06):
Holding: Kidnapping victim's statement to police in a phone call immediately after her escape was "testimonial" and admission of hearsay evidence about the statement violated

Davis v. Washington. The primary purpose of the victim's statement was to report a past crime, not to resolve an emergency.

Jianniney v. State, 84 Crim. L. Rep. 292, 2008 WL 5076466 (Del. 12/2/08):
Holding: Where the State was allowed to cross-examine witness using Mapquest to show that the travel times the witnesses stated were wrong, the alleged travel times generated by Mapquest were inadmissible hearsay.

Coles v. State, 2008 WL 4194300 (Del. 2008):
Holding: Even though witness was unavailable at trial, a videotape of witness interview.

Wilson v. State, 83 Crim. L. Rep. 388 (Del. 6/10/08):
Holding: Defendant has right under 6th Amendment confrontation clause to cross-examine a snitch witness about sentence he avoided by cooperating with State, even when doing so would indicate to jury the sentence Defendant faces if convicted. was not admissible under hearsay rule.

Czech v. State, 83 Crim. L. Rep. 8 (Del. 3/17/08):
Holding: Court may allow a child witness-victim to have a "support person" with them during court testimony if there is a "substantial need" for it, but safeguards must include (1) allowing defense to suggest alternative; (2) cautioning the support person not to prompt the child to give testimony or approve or disapprove of testimony; (3) instructing jurors that the presence of the support person should not affect their credibility determination; and (4) the support person cannot be from the Prosecutor's Office.

State v. Blevin, 83 Crim. L. Rep. 198 (Fla. 5/1/08):
Holding: A breath-test affidavit regarding operator's procedures and observations in administering an alcohol breath test was "testimonial" under *Crawford*.

State v. Lopez, 82 Crim. L. Rep. 419 (Fla. 1/10/08):
Holding: Even though there was a pretrial discovery deposition of a witness who later was unavailable for trial, the examination at the discovery deposition did not satisfy Defendant's right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). The court held that a defense attorney cannot be expected to thoroughly examine a witness at a deposition when the attorney is learning things there for the first time.

State v. Machado, 2006 WL 164774 (Haw. 2006):
Holding: Hearsay statements made by complaining witness to an officer were not excited utterances, and were inadmissible.

State v. Mattson, 2010 WL 971791 (Haw. 2010):
Holding: Hawaii Confrontation Clause prohibits Prosecutor from making generic argument that Defendant tailored his testimony based on exercising his constitutional right to be present at trial.

State v. Shackelford, 2010 WL 173825 (Idaho 2010):
Holding: Even though defense presented a theory that dead victim's (ex-wife's) death was a suicide, victim's out-of-court statements that she feared Defendant would harm her were not relevant or admissible under state-of-mind exception to hearsay rule.

People v. Stechly (Ill. 4/19/07) and State v. Romero, (N.M. 3/15/07), 81 Crim. L. Rep. 199:
Holding: The "forfeiture by wrongdoing" exception to confrontation clause requires proof that Defendant's acts were intended to keep the unavailable witness off the witness stand.

Tyler v. State, 85 Crim. L. Rep. 83, 2009 WL 885879 (Ind. 3/31/09):
Holding: Indiana statute providing a hearsay exception in child sex cases does not permit the State to present both the child-declarant as a witness and the same matters through other witnesses, even though the statute's language appears to authorize this.

State v. Laturner, 86 Crim. L. Rep. 100, 2009 WL 3233750 (Kan. 10/9/09):
Holding: Where a statute required Defendant to justify why he needed to cross-examine authors of forensic reports before he could do so, this violated Defendant's right to confrontation.

State v. Henderson, 81 Crim. L. Rep. 457 (Kan. 6/22/07):
Holding: Forfeiture by wrongdoing not apply to Defendant charged with sex abuse of a child. The child was found "unavailable" to testify due to her inability to understand the duty to tell the truth due to her young age. Defendant had not threatened the child or orchestrated her unavailability.

State v. Davis, 80 Crim. L. Rep. 329 (Kan. 12/13/06):
Holding: Even though declarant's statement to his lover that Defendant telephoned him was not "testimonial" for *Crawford* purposes, the hearsay statement still had to satisfy *Robert's* reliability test to be admissible under the 6th Amendment.

Colvard v. Com., 2010 WL 997405 (Ky. 2010):
Holding: Even though during medical exam the child-victim said a family member was the perpetrator of sexual abuse, this identification was not admissible under hearsay exception for medical diagnosis or treatment, because the identity of the perpetrator is not relevant to medical diagnosis or treatment.

Rankins v. Commonwealth, 82 Crim. L. Rep. (Ky. 11/1/07):
Holding: Woman's statement to police officer after beating by boyfriend and calling 911 was "testimonial."

Parker v. State, 85 Crim. L. Rep. 221, 2009 WL 1177093 (Md. 5/4/09):
Holding: Even though State claimed it was introducing testimony about a non-testifying informant's tip only to show why officer responded to a scene, where the tip was that a

person matching Defendant's description was selling heroin, this was inadmissible hearsay because it clearly identified Defendant.

Taylor v. State, 2009 WL 17941 (Md. 2009):
Holding: Court violated Defendant's confrontation rights by limiting his impeachment of a non-testifying hearsay declarant's version of a sexual assault, by prohibiting Defendant from cross-examining State's witnesses about whether the declarant-victim had lied about sexual matters on previous occasions.

Rollins v. State, 79 Crim. L. Rep. 194 (Md. 5/5/06):
Holding: Medical examiner's opinions in autopsy report are "testimonial" under *Crawford v. Washington*.

Stoddard v. State, 78 Crim. L. Rep. 311 (Md. 12/08/05):
Holding: A child's out-of-court statement, "Is the Defendant going to get me?," was inadmissible hearsay when used to show that the child saw the Defendant attack another child; State cannot use such a hearsay statement to prove an "implied fact."

Bernadyn v. State, 2005 WL 3309787 (Md. 2005):
Holding: Medical bill at crime scene, addressed to Defendant, was inadmissible hearsay when introduced into evidence to prove Defendant lived at that address.

Com. v. Loadholt, 2010 WL 1209995 (Mass. 2010):
Holding: Ballistics report stating that gun was test-fired without malfunction was testimonial.

Com. v. Bicigalupo, 86 Crim. L. Rep. 380 (Mass. 12/14/09):
Holding: Even though court substituted Defendant's name with word "friend" in confession of non-testifying co-Defendant, this denied Defendant his confrontation rights under 6th Amendment.

Commonwealth v. Garcia, 2006 WL 3422699 (Mass. 2006):
Holding: Wife-victim's statements about husband at domestic assault scene after assault was over were "testimonial" and not made to enable police to meet an on-going emergency.

People v. Bryant, 2009 WL 1677569 (Mich. 2009):
Holding: Even though police found dying victim shot on sidewalk and asked what happened and victim said Defendant shot him, these statements were "testimonial" because police did not have as their primary purpose enabling police to meet "ongoing emergency."

State v. Swaney, 87 Crim. L. Rep. 860 (Minn. 8/26/10):
Holding: Police officer's testimony about questions he asked an unavailable witness violated Defendant's 6th Amendment confrontation rights because the questions implied how the witness had answered.

State v. Rodriguez, 83 Crim. L. Rep. 780 (Minn. 8/21/08):
Holding: 6th Amendment right to confront witnesses applies to jury trial to determine facts used to enhance sentence.

State v. Wright, 2007 WL 177690 (Minn. 2007):
Holding: Statements made by alleged victims to police during a field investigation were "testimonial."

State v. Caulfield, 80 Crim. L. Rep. 95 (Minn. 10/5/06):
Holding: Lab report identifying a substance seized from Defendant as drugs was "testimonial" under *Crawford v. Washington*, and admission of the report without testimony by the analyst violated right to confrontation.

State v. Sanchez, 82 Crim. L. Rep. 490 (Mont. 1/31/08):
Holding: Murder victim's written "to whom it may concern" letter that she might be killed by Defendant was "testimonial," but where Defendant admitted to killing victim, letter was admissible because witness was made unavailable by Defendant and there was forfeiture by wrongdoing.

State v. Parker, 2006 WL 2884957 (Mt. 2006):
Holding: Where bailiff gave to jurors a videotape with an interview of a witness who did not testify at trial, this violated Defendant's right to confrontation.

State v. Morrow, 2007 WL 1454285 (Neb. 2007):
Holding: Passenger's out of court statement to police officer that drugs were not hers was hearsay against Defendant, and thus, Defendant was allowed to impeach passenger's statement to officer by introducing passenger's inconsistent statement to another witness that the drugs were hers, pursuant to the rule providing that the declarant of a hearsay statement can be impeached with their prior or subsequent inconsistent statements.

City of Las Vegas v. Walsh, 78 Crim. L. Rep. 345 (Nev. 12/15/05):
Holding: Nurse's affidavit concerning circumstances of a DWI Defendant's blood draw is "testimonial" under *Crawford v. Washington*.

Flores v. State, 78 Crim. L. Rep. 141 (Nev. 10/20/05):
Holding: Child's out-of-court statements are "testimonial" under *Crawford v. Washington* if a reasonable person in child's position would have contemplated that the statements would be available for use at later trial.

State v. Connor, 82 Crim. L. Rep. 348 (N.H. 12/14/07):
Holding: Evidence of a fingerprint match must be supported by both the evidence technician who made the comparison, and the technician who performed the verification phase of ACE-V comparison, i.e., both persons must testify and one cannot testify to the other's findings because is hearsay.

State in Interest of J.A., 83 Crim. L. Rep. 622 (N.J. 6/23/08):
Holding: Statements made by witnesses who saw a robbery committed minutes earlier were "testimonial," since they described past events and there was no imminent danger.

State v. Bullcoming, 2010 WL 936149 (N.M. 2010):
Holding: Lab report offered to prove BAC level violated Confrontation Clause.

People v. Mingo, 2009 WL 1585819 (N.Y. 2009):
Holding: Documents generated by prosecutor's office are not "reliable hearsay" in Sex Offender Registration Act risk assessment hearing.

People v. Pacer, 2006 WL 794667 (N.Y. 3/28/06):
Holding: Affidavit prepared by state official that certain procedures regarding driver's license revocations were followed in defendant's case was a "testimonial" statement subject to cross-examination under the 6th Amendment and *Crawford v. Washington*, 541 U.S. 36 (2004).

People v. Goldstein, 78 Crim. L. Rep. 365 (N.Y. 12/20/05):
Holding: Out-of-court statements made by Defendant's acquaintances to a State forensic psychiatrist were "testimonial" under *Crawford v. Washington*. Therefore, psychiatrist should not have been allowed to testify what acquaintances told her.

State v. Lewis, 81 Crim. L. Rep. 661 (N.C. 8/24/07):
Holding: Victim's statements to "first responders" were "testimonial."

State v. Blue, 79 Crim. L. Rep. 626 (N.D. 6/29/06):
Holding: Videotaped statements made by child sex abuse victim to forensic interviewer were "testimonial" under *Crawford v. Washington* and *Davis v. Washington*.

State v. Siler, 82 Crim. L. Rep. 162 (Ohio 10/25/07):
Holding: Whether a child's statements to police are "testimonial" turns on the officer's primary purpose in doing the questioning, not on the child's ability to comprehend; thus, a 3-year old's statements in response to police questioning hours after her mother's murder were "testimonial."

State v. Rodriguez-Castillo, 83 Crim. L. Rep. 627 (Or. 7/3/08):
Holding: A police detective who interviewed a child abuse victim (girl) through a Spanish interpreter could not testify to what girl told him since the offered hearsay exceptions for reporting abuse do not cover interpreter's translations.

State v. Birchfield, 81 Crim. L. Rep. 209 (Or. 4/19/07):
Holding: Oregon Constitution's confrontation clause prohibits requiring a Defendant to call as a witness a criminalist from a crime lab, where Defendant wants to challenge the admissibility of the lab report in the absence of the State calling the criminalist.

Commonwealth v. Markman, 2007 WL 528077 (Pa. 2007):
Holding: Defendant's confrontation rights were violated where State presented a redacted co-defendant's confession with the Defendant's name replaced as "the other person," despite that the jury was instructed not to consider the confession as evidence against Defendant. This was an obvious substitution that would not fool the jury.

State v. Tiernan, 82 Crim. L. Rep. 459 (R.I. 1/16/08):
Holding: Defendant should have been allowed to cross-examine assault victim extensively about injuries he received and about his plans to file a civil lawsuit, since these matters went to his credibility.

State v. Decoteau, 81 Crim. L. Rep. 711 (Vt. 8/31/07):
Holding: Due process violated where at probation revocation hearing State admitted an unfavorable report from Defendant's treatment program provider, and hearsay statements by program staffers without allowing Defendant right to confrontation.

Cypress v. Com., 2010 WL 3583988 (Va. 2010):
Holding: Procedure requiring a Defendant to call State's forensic examiner if Defendant wants to cross-examine them violated Defendant's confrontation rights.

Lawrence v. Com., 2010 WL 653455 (Va. 2010):
Holding: Even though SVP law allows expert to state basis for his opinions, this does not authorize expert to give details of hearsay allegations of sexual misconduct.

State v. Jorgensen, 83 Crim. L. Rep. 466 (Wis. 6/13/08):
Holding: Defendant charged with bail-jumping was denied his confrontation rights when prosecutors were allowed to introduce transcript of his other case into the bail-jumping trial.

Woyak v. State, 2010 WL 923167 (Wyo. 2010):
Holding: Child sex Defendant has absolute right under Wyoming Const. to be present at hearing to determine competency of child witness against Defendant.

State v. Parks, 2006 WL 2624080 (Ariz. Ct. App. 2006):
Holding: Where police interviewed Defendant's son at crime scene regarding the crime, son's statements were "testimonial" and could not be admitted without Defendant being able to cross-examine the son.

People v. Dungo, 2009 WL 259629 (Cal. App. 2009):
Holding: Even though Pathologist called to testify about an autopsy conducted by Original Pathologist was himself an expert and formed his own opinions based on Original Pathologist's report, where Original Pathologist was not called by Prosecutor because he had "baggage" and had been forced to resign "under a cloud," Defendant's confrontation rights were violated because he was precluded from cross-examining Original Pathologist about these matters and his incompetence.

People v. Cogswell, 2007 WL 3172935 (Cal. App. 2007):
Holding: Preliminary hearing testimony of rape victim was not admissible at trial where rape victim had left California for another State but prosecutor did not use uniform attendance of witnesses act to secure victim's attendance at trial; victim was not an "unavailable" witness.

People v. Valencia, 2006 WL 3775903 (Cal. App. 2006):
Holding: For hearsay statement to be admitted for its truth, the witness relating the statement not only has to have personal knowledge of who made the statement, but also personal knowledge the statement is true; thus, school employee could not testify about statement of sister of sex abuse victim, since employee didn't personally know if statement was true.

People v. Dodd, 2005 WL 3047425 (Cal. App. 2005):
Holding: Reference in parole report to a Defendant's molestation of girl was unreliable hearsay, and therefore, experts could not consider that incident in forming their opinions whether Defendant was a Mentally Disordered Offender.

People v. Trevizo, 2007 WL 4336300 (Colo. Ct. App. 2007):
Holding: Where there was no on-going emergency and Defendant-husband had left the assault scene, victim-wife's statements to police were "testimonial" and their admission violated Confrontation Clause.

People v. Sharp, 80 Crim. L. Rep. 384 (Colo. Ct. App. 12/14/06):
Holding: Statements made by abuse victim to forensic interviewer during videotaped interview are "testimonial."

Bowers v. State, 2009 WL 3837251 (Fla. Dist. Ct. 2009):
Holding: Hearsay statements of a fellow officer involved in incident were not admissible under "fellow officer rule."

Milton v. State, 2008 WL 514996 (Fla. Ct. App. 2008):
Holding: Defendant was denied right to confrontation where Prosecutor called co-defendant to stand and had co-defendant refuse to testify; Prosecutor improperly tried to create impression that co-defendant had incriminating evidence against Defendant by doing this.

Hernandez v. State, 2007 WL 188417 (Fla. Ct. App. 2007):
Holding: Statements made by parents and child to a nurse who conducted a sexual assault evaluation on child were "testimonial."

Shennett v. State, 80 Crim. L. Rep. 56 (Fla. Dist. Ct. App. 9/13/06):
Holding: Police officer's play-by-play taped account of crime which he made while observing a crime-in-progress was "testimonial" and could not be admitted without cross-examination of officer.

Sankar v. State, 2006 WL 1409203 (Fla. Dist. Ct. App. 2006):
Holding: Police officer's testimony that witness' statement was "consistent with what took place" during crime was hearsay, because officer was not present when crime occurred and was not personally familiar with what occurred.

People v. Clendenin, 2009 WL 2520531 (Ill. App. 2009):
Holding: Even though Defendant's counsel failed to object to a stipulation by the Prosecutor, the Confrontation Clause required that the court not accept the stipulation without Defendant being apprised of its specific content and accepting it.

State v. Miller, 2009 WL 1562966 (Kan. Ct. App. 2009):
Holding: Even though nurse was not working for law enforcement, where nurse conducted an examination following a sexual assault, statements made by child-victim were "testimonial," because an objective witness could reasonably expect that the statements could be used for prosecution of crime; statements not admissible under diagnosis and treatment exception.

State v. Laturner, 81 Crim. L. Rep. 592, 2007 WL 2141515 (Kan. Ct. App. 7/27/07):
Holding: Kansas statute that allows admission of a lab report without the testimony of the person who prepared it violates *Crawford v. Washington*, 541 U.S. 36 (2004).

State v. Henderson, 2006 WL 568338 (Kan. Ct. App. 2006):
Holding: Videotaped interview of child victim by detective and Dept. of Social Service worker was "testimonial" under *Crawford v. Washington*.

Coates v. State, 2007 WL 2459114 (Md. Ct. Spec. App. 2007):
Holding: Statements made by child victim to nurse practitioner were not admissible as made for purposes of diagnosis or treatment; asking about sex abuse and identity of perpetrator was not necessary for diagnosis or treatment.

People v. Walker, 728 N.W.2d 902 (Mich. App. 2006):
Holding: Domestic assault victim's recorded statement to her neighbor after she ran away from the assault and subsequent statements to police were "testimonial" for confrontation purposes, since they recounted past events, not an ongoing emergency.

State v. Johnson, 84 Crim. L. Rep. 162 (Minn. Ct. App. 10/14/08):
Holding: Autopsy reports are "testimonial" under *Crawford*.

State v. Krasky, 80 Crim. L. Rep. 116 (Minn. Ct. App. 2006):
Holding: Statements made by child victim to medical personnel are "testimonial" if taken as part of a police investigation for proving a past crime.

State v. Byrd, 81 Crim. L. Rep. 321 (N.J. Super. Ct. 5/22/07):
Holding: New Jersey rejects "forfeiture by wrongdoing" exception to confrontation clause because this exception is not contained in the New Jersey rules of evidence.

State v. Renshaw, 80 Crim. L. Rep. 525 (N.J. Ct. App. 2/9/07):
Holding: Nurse's certification attesting to fact that she used medically appropriate procedures in taking a blood sample from a DWI defendant was "testimonial."

State v. Berezansky, 2006 WL 1541267 (N.J.Super.Ct.App.Div. 2006):
Holding: Admission of lab certificate showing Defendant's BAC in DWI trial violated right to confrontation.

State v. Almanza, 2007 WL 1742200 (N.M. Ct. App. 2007):
Holding: Appearance of a state crime lab witness by telephone should not have been allowed.

State v. Rivera, 2007 WL 2411728 (N.M. Ct. App. 2007):
Holding: Officer's testimony at suppression hearing that a bus company employee told him that another employee found marijuana in a package addressed to Defendant was double hearsay and violated right to confront witnesses.

State v. Phillips, 2005 WL 3690731 (N.M. Ct. App. 2005):
Holding: Probationer's right to confront witnesses was violated when probation officer was allowed at revocation hearing to read documents prepared and given to her by other persons, who were not called as witnesses.

People v. Berry, 2008 WL 803939 (N.Y. App. Div. 2008):
Holding: Defendant's confrontation rights were violated by officer's testimony that another person was apprehended running from the crime scene, and that a personal phone and address book was taken from this person, a phone number copied, and then a "wanted" posting put out for Defendant, because this indicated to the jury that the apprehended person had accused Defendant of the crime.

People v. Wrotten, 2008 WL 5396862 (N.Y. App. Div. 2008):
Holding: Even though assault victim was in poor health and unable to travel to court, reversible error occurred in allowing victim to testify via 2-way television since this was not authorized by statute in non-sex cases.

People v. Garcia, 2008 WL 4427529 (N.Y. Sup. 2008):
Holding: Where officer's statement in a complaint alleging trespassing was hearsay, the charging document was defective and did not charge an offense.

State v. Hurt, 2010 WL 4608708 (N.C. Ct. App. 2010):
Holding: 6th Amendment right to confrontation applies at non-capital sentencing trials which require a finding by the jury.

Marshall v. State, 87 Crim. L. Rep. 372 (Okla. Crim. App. 5/13/10):
Holding: Where pathologist testifies from another pathologist's report, the testifying witness can only offer their own opinions and conclusions, not those of the colleague.

State v. Miller, 80 Crim. L. Rep. 124 (Or. Ct. App. 2006):
Holding: Police lab report of urine analysis is "testimonial."

Com. v. Abrue, 88 Crim. L. Rep. 168 (Pa. Super. Ct. 10/25/10):
Holding: Even though officer made statements to another officer (witness) right after a fight with a prisoner, the statements were testimonial and could not admitted through the witness as "excited utterances."

Commonwealth v. Kriner, 2007 WL 5749 (Pa. Super. 2007):
Holding: Child victim who died before trial was not an "unavailable" witness for purpose of statute allowing out-of-court statements of child sex victim to be admitted, because the statute required a determination of whether testifying would be emotionally harmful to the child, and death didn't satisfy this definition of unavailability.

Cuadros-Fernandez v. State, 2009 WL 2647890 (Tex. App. 2009):
Holding: An expert report and expert's notes on DNA findings from a crime scene were "testimonial" and inadmissible where Defendant did not have opportunity to cross-examine the preparer.

Wood v. State, 2009 WL 3230848 (Tex. App. 2009):
Holding: Where medical examiner witness testified to portions of another medical examiner's autopsy report on which he based his opinions, this violated Defendant's 6th Amendment confrontation rights.

Taylor v. State, 84 Crim. L. Rep. 185 (Tex. Crim. App. 10/29/08):
Holding: Where a sex abuse victim identifies the perpetrator in seeking treatment, that identification is not admissible under the hearsay exception for "medical diagnosis and treatment" if identifying the perpetrator was not important to the efficacy of the treatment; in order for "medical diagnosis or treatment" hearsay exception to apply, the proponent of the hearsay must show declarant knew truth-telling was important in making the statement.

McCarty v. State, 83 Crim. L. Rep. 523 (Tex. Crim. App. 6/25/08):
Holding: Under excited utterance exception to hearsay rule, the event about which the utterance is made need not be the same one that sparked the declarant's excited state; excited utterance about a prior event is admissible.

Davis v. State, 2008 WL 3918050 (Tex. App. 2008):
Holding: Even though Defendant murdered victim, Defendant did not forfeit right to confront victim, so evidence of victim's statements about a prior incident was inadmissible.

Fischer v. State, 2006 WL 30772047 (Tex. App. 2006):
Holding: Where police officer in a DWI arrest made a tape of his observations as he was arresting Defendant, this was hearsay and could not be admitted as a "present sense impression."

Rangel v. State, 2006 WL 2076552 (Tex. App. 2006):
Holding: Child's videotaped statements to DFS worker which were later admitted against Defendant in child sex prosecution were "testimonial" for confrontation clause purposes. The statements had been admitted in lieu of child's live testimony in court pursuant to a state statute that allowed such statements where child was unavailable. However, the Court of Appeals does not reverse the conviction because Defendant had an opportunity under the statute to cross-examine the victim by interrogatories, and did not avail himself of that opportunity.

State v. Hopkins, 2007 WL 657430 (Wash. Ct. App. 2007):
Holding: Even though the prosecution and defense agreed that child was incompetent to testify in child sex case due to her young age, trial court was still required to conduct a competency hearing and enter findings under the statute which allowed the child's statements to be admitted if the child was unavailable to testify due to incompetency.

State v. Perez, 2007 WL 334982 (Wash. Ct. App. 2007):
Holding: Child's statements to social worker about Defendant shooting a gun were not admissible under the "medical diagnosis or treatment" exception to hearsay rule; the social worker was acting solely in a capacity as an investigator.

State v. Vincent, 78 Crim. L. Rep. 548 (Wash. Ct. App. 1/23/06):
Holding: Confrontation rights violated under *Bruton* where non-testifying co-defendant's statement was admitted with references to Defendant as "the other guy."

State v. Hopkins, 2006 WL 2552814 (Wash. Ct. App. 2006):
Holding: Child victim's hearsay statements to nurse who examined child for sex abuse were "testimonial" since law enforcement had referred child to nurse for an exam and nurse forwarded her file to law enforcement.

State v. Doss, 81 Crim. L. Rep. 661 (Wis. Ct. App. 8/7/07):
Holding: Admission of certified bank records without person who prepared them violated *Crawford*.

Continuance

State v. Gray, No. 27700-27702 (Mo. App., S.D. 7/19/07):
Where State did not endorse a DNA expert until one week before trial, and court did not rule on the motion to endorse until day of trial, this was untimely and violated Defendant's right to defend, since Defendant did not have reasonable time to secure his own expert in response.
Facts: Defendant was charged with various child sex offenses. One week before trial, the State filed a motion to endorse a DNA expert who would testify about various DNA evidence linking Defendant to the charged crimes. Defendant objected because he had previously sought discovery of any experts. Defendant sought a continuance. The

prosecutor admitted he didn't know if he had earlier disclosed the DNA report at issue. On the day of trial, the trial court sustained the motion to endorse and allowed the expert to testify, and denied the motion for continuance.
Holding: The DNA expert's testimony was prejudicial because it linked Defendant to physical evidence in the charged crimes. Even though the State's late endorsement did not arise from "bad motives" on the part of the State, Defendant was nevertheless prejudiced because he did not have time in which he could reasonably be expected to secure services of an expert to verify or contradict the DNA testing and evidence the State presented at trial. This was fundamentally unfair and denied Defendant his right to defend.

Neal v. Director of Revenue, No. SD27758 (Mo. App. S.D. 5/26/10):
Holding: Where Director made a request for a continuance on or before the "return date," the Associate Circuit Judge was required to grant the continuance because Sec. 517.071.1 provides that a case "shall" be continued upon request of any party made on or before the return date of the summons; this was true even though Director's attorney did not appear personally to argue for a continuance, but merely filed a motion requesting one.

U.S. v. Williams, 2009 WL 2366121 (7th Cir. 2009):
Holding: Where Defendant was originally charged with a two-defendant robbery, and five days before trial the State endorsed a new witness who claimed it was a three-defendant robbery and he would testify against Defendant in exchange for immunity, this changed the nature of the case and the trial court erred in denying a defense motion for a continuance of trial.

U.S. v. Kloehn, 87 Crim. L. Rep. 865, 2010 WL 3385542 (9th Cir. 8/30/10):
Holding: Trial court abused discretion in failing to grant 2-day continuance during Defendant's multi-day testimony at trial so Defendant could visit dying son; Defendant was prejudiced because his demeanor would be affected by son's condition.

Singleton v. Com., 86 Crim. L. Rep. 242 (Va. 11/5/09):
Holding: A defense counsel who reached an agreement with a prosecutor to continue a case and then told client not to appear, without the judge's approval, should not be held in criminal contempt in this instance because proof was lacking that the counsel intended to obstruct justice, but in the future, attorneys should not presume that judges will grant continuances just because the parties agree to them.

State v. Johnson, 2007 WL 404020 (Or. Ct. App. 2007):
Holding: Trial court erred in denying Defendant's motion for a recess to review police officer's notes which were disclosed during trial; notes could have been used for impeachment and to show discovery violation.

Counsel – Right To – Conflict Of Interest

Missouri Public Defender Commission v. Pratte, 2009 WL 4638864 (Mo. banc 2009):
Holding: (1) Public Defender Commission regulation that declared indigent defendants ineligible for Public Defender representation if they had retained a private attorney at any time during the pendency of their case violates Section 600.086.1 and is invalid; (2) Public Defender Commission regulation that allowed Public Defender to decline representation in "categories" of cases such as probation violations when a Public Defender Office exceeds a maximum allowable caseload standard under the regulation violates Section 600.042.4 and is invalid; however, the regulation properly authorizes the Commission to make a Public Defender Office unavailable to accept "any" class (all classes) of cases when an Office exceeds the caseload standard in the absence of agreement with the court and prosecutors on ways to limit the Public Defender's caseload; and (3) Trial judge is not authorized to appoint a Public Defender to represent an indigent defendant in a "private counsel capacity" because Public Defenders are prohibited from private practice of law by Section 600.021.2.

In the Interest of D.J.M., No. SC89095 (Mo. banc 7/29/08):
Where Juvenile did not waive counsel, trial court was required to appoint counsel for indigent Juvenile in juvenile proceeding, and the parents' counsel did not satisfy the right to counsel, since the parents' counsel was not representing Juvenile.
Facts: Juvenile was charged with an offense that would be a misdemeanor if he were an adult. The parents hired an attorney to represent them in the proceedings. Juvenile, however, had no attorney representing him. Juvenile was ordered into supervision and treatment, and appealed.
Holding: Sec. 211.211 gives juveniles a statutory right to counsel in all delinquency proceedings. Sec. 211.211.3 requires that after a petition is filed, the trial court "shall appoint counsel for the child when necessary to assure a full and fair hearing." The child may waive counsel, but only with approval of the trial court and only when the record shows that the trial court obtained a knowing and intelligent waiver of counsel from the juvenile. Here, the trial court did not obtain a waiver of counsel. Although the parents were represented by counsel, that counsel was not representing Juvenile and might have had a conflict of interest if he had represented the Juvenile and the parents simultaneously. The trial court's failure to comply with Sec. 211.211 requires that the judgment be reversed.

State ex rel. Burns v. Richards, No. SC88709 (Mo. banc 4/1/08):
Where the Prosecutor had represented Defendant in a similar case when Prosecutor was a defense attorney, the Prosecutor was disqualified from prosecuting Defendant in the new case.
Facts: In 2006, Defendant was represented in a false drug prescription case by defense counsel W. in Nodaway County. W. later was elected Prosecutor in Holt County, and filed a controlled substances case involving prescription drugs against Defendant. Defendant sought a writ of prohibition to disqualify Prosecutor.

Holding: Defendant argues that W. has confidential information in Holt County as a result of his work as her defense attorney in Nodaway County. Rule 4-1.9 states that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially similar related matter in which that person's interests are materially adverse to the former client. The cases here are "substantially similar" because both involve prescription drug violations under Chapter 195. The Prosecutor must avoid even the appearance of impropriety. Prejudice is presumed because of the Prosecutor's prior involvement with Defendant and concern that Prosecutor has obtained confidential information that could be used to prosecutor her. Writ made absolute.

In the Interest of M.M., No. ED93857 (Mo. App. E.D. 8/31/10):
Where (1) Public Defender withdrew from Juvenile's case shortly before trial; (2) Juvenile authorities and court told Juvenile she would be held in detention if she requested continuance of trial; (3) court's remarks indicated Juvenile could "explain" herself if she pleaded guilty; and (4) court did not explain nature of charges, range of punishments or possible defenses, Juvenile's waiver of counsel was not voluntary or intelligent.
Facts: Juvenile was charged with tampering. Shortly before trial, Public Defender withdrew from Juvenile's case because Juvenile's parents were not indigent. Juvenile authorities told Mother that they would recommend Juvenile be held in detention if the trial was continued because family wanted more time to obtain counsel. On day of trial, Juvenile authorities and court again told Juvenile that she would be detained pending trial if the case was continued, unless they could arrange for electronic monitoring, which was uncertain. However, court said Juvenile had option of entering guilty plea. The court indicated Juvenile would have opportunity to "explain" herself. Juvenile then pleaded guilty, and in doing said, said she thought she had permission from a friend to drive the car, but later learned that the friend didn't have permission. After the plea, Juvenile filed a motion to vacate the plea on grounds that her waiver of counsel was not voluntary or intelligent.
Holding: The constitutional standard for waiver of counsel by juveniles is no less than for adults. The validity of a waiver depends on the totality of circumstances. Here, Juvenile had no prior history with a court. She thought she would be represented by the Public Defender, but the Public Defender withdrew shortly before trial. She was told she would be detained if she sought a continuance to obtain private counsel. At trial, Mother asked for more time to obtain counsel, but was told Juvenile would be detained. The court said that Juvenile could plead guilty and could "offer an explanation" of what happened, but would not be allowed to withdraw plea. Mother then said Juvenile would plead. This did not show that Juvenile's waiver was voluntary. Also, the court never discussed the nature of the charges, the range of punishment or possible defenses prior to waiver of counsel. This made the waiver not intelligent. Case reversed.

State ex rel. Horn v. Ray, No. ED94968 (Mo. App. E.D. 9/21/10):
Attorney cannot simultaneously represent criminal Defendant and Victim of his crime, and Defendant and Victim cannot waive this conflict.

Fact: Defendant (Husband) was charged with domestic assault against Wife (Victim). Defendant and Victim hired the same attorney to represent them, and waived any conflict of interest. Victim did not want to testify against Defendant. Prosecutor moved to disqualify Attorney from representing both. Trial court refused to disqualify. Prosecutor sought writ of prohibition.
Holding: Rule 4-1.7(a) forbids concurrent conflicts of interest. The interests of Defendant and Victim are necessarily adverse. Representation of one client may well compromise Attorney's duty of zealous advocacy to the other. This is not a conflict to which the clients can consent/waive, because the nature of the conflict here is such that Attorney cannot possibly fulfill duties to each client of undivided loyalty, advocacy and independent judgment. Each client would almost certainly reveal information advantageous to one and detrimental to the other that counsel would be ethically prohibited from using. Defendant's 6th Amendment right to counsel would be compromised, despite his waiver of conflict. The right to counsel of choice does not automatically override the public's interest of having confidence in the judicial system. The dual representation here "smells of collusion between counsel, the defendant, and the victim." A victim must be represented by counsel whose loyalty is undiluted by representation of the defendant charged with victim's assault. Writ granted disqualifying Attorney from representing either Defendant or Victim here.

State v. Constance, No. 28503 (Mo. App., S.D. 4/03/08):
Where indigent Defendant was appointed a Public Defender for appeal, but then "fired" that Public Defender, Defendant was not entitled to counsel of his choice on appeal or hybrid counsel.
Holding: An indigent defendant has a constitutional right to counsel in pursuing a direct appeal, and trial courts are required to appoint such counsel, Rule 31.02(c). Although there is no constitutional right to proceed pro se on appeal, courts may permit it. Defendants are not entitled to counsel of their choice, or to hybrid counsel or joint representation. Here, Defendant was appointed a Public Defender for appeal, but then fired her. Defendant cannot then complain that he was denied his right to counsel.

State v. Keeth, No. 27419 (Mo. App., S.D. 8/30/06):
Where Defendant who represented himself at trial was convicted of misdemeanor DWI and sentenced only to a $500 fine, the right to counsel never attached since he was not sentenced to a term of incarceration, so Defendant did not have to execute a written waiver of counsel or be warned of the dangers of representing himself.
Facts: Defendant was charged with misdemeanor DWI. He represented himself at trial. He was fined $500, and not sentenced to any jail time. On appeal, he claimed the trial court erred in failing to obtain a written waiver of counsel from him, and failing to warn him of the perils of self-representation.
Holding: The 6th Amendment right to counsel only exists when a Defendant is sentenced to a term of imprisonment. Defendant argues that the trial court was required to obtain a written waiver of counsel under Section 600.051.1 which provides that a Defendant may waive counsel if the waiver is signed before and witnessed by a judge. However, this argument fails because Section 600.051.1 was not intended to expand a Defendant's right to counsel, but rather to provide a procedure to assure that Defendant's waiver was

knowing and voluntary. If a Defendant is not sentenced to imprisonment, he never possessed the constitutional right to counsel, and therefore, never had anything to waive. For the same reason, the trial court did not err in failing to warn Defendant of the perils of self-representation. A court does not have an obligation to warn about a decision to waive a right Defendant does not possess.

Smiley v. State, No. 27302 (Mo. App., S.D. 7/28/06):
Postconviction relief granted, allowing a direct appeal, where Movant requested representation on appeal but trial court failed to appoint counsel to perfect the appeal.
Facts: After dissatisfaction with the Public Defender, Movant represented himself at trial. At sentencing, Movant said he wanted to appeal and requested an attorney to help him appeal. The court said it would appoint counsel, but apparently never did. Movant never filed an appeal, but did file a 29.15 motion claiming denial of counsel on appeal. The motion court denied relief, finding that Movant had not told the trial court he was having difficulties filing a Notice of Appeal.
Holding: The period between the verdict and the time for filing a Notice of Appeal is a critical stage at which Movant was entitled to counsel. Although Movant represented himself at trial, once he requested counsel for the appeal, he was entitled to counsel to perfect the appeal. Case remanded for resentencing, after which Movant may file direct appeal.

State ex rel. Family Support Division v. Lane, No. WD70715 (Mo. App. W.D. 6/8/10):
In order for a court to impose imprisonment for contempt for failure to pay child support, it must appoint private counsel for indigent defendants or they must waive counsel; Public Defender cannot be appointed.
Facts: A civil contempt proceeding was brought against Defendant for failure to pay child support. The trial court, without appointing counsel, ordered Defendant imprisoned.
Holding: The Due Process Clause of the 14th Amendment provides that there is a right to counsel in cases where a court may imprison the defendant, regardless of whether the proceeding is "criminal" or "civil." The court does not have statutory authority to appoint the Public Defender in civil contempt cases. *State ex rel. Sterling v. Long*, 719 S.W.2d 455 (Mo. banc 1986); *Albers v. Koffman*, 815 S.W.2d 484 (Mo. App. W.D. 1991). However, courts have inherent authority to appoint members of the private bar. Here, before the court could imprison indigent Defendant, court had to appoint private counsel or Defendant had to waive counsel.

State ex rel. Public Defender Commission v. Hamilton and Oxenhandler, Nos. WD70327 and WD70349 (Mo. App. W.D. 4/14/09):
(1) Even though the Public Defender promulgated a Code of State Regulation making it temporarily unavailable to represent Defendants in probation violation cases due to case overload at the Public Defender, the CSR was inconsistent with Section 600.042.4 which requires the Public Defender to represent defendants in such cases; (2) A Public Defender cannot be appointed to represent defendants in a private capacity because

Section 600.021.2 prohibits a Public Defender from practicing law except in an official capacity as a Public Defender.
Facts: The Public Defender Commission promulgated 18 CSR 10-4.010, which authorized the Public Defender to limit its availability to accept cases when a Public Defender Office exceeded certain caseload standards. Pursuant to the CSR, the Area 13 Public Defender Office notified Judges that it was not available for appointment to probation violation cases. However, Judges appointed the Public Defender to two probation violation cases. In one case, the Judge appointed the Public Defender Office. In the other, the Judge appointed the head of the Public Defender Office in his private capacity as a "member of the local bar." The Public Defender sought writs of prohibition to stop the appointment to both cases.
Holding: (1) The Public Defender argues that its CSR is valid because it has discretion to accept cases under Section 600.042.3 which provides that the Public Defender shall provide representation when "in the discretion of the director or the defenders, such provision of legal services is appropriate." However, this section also states that the director shall provide representation "as set forth in subsection 4." Section 600.042.4(3) provides that the Public Defender shall provide representation to a person "charged with violation of probation." *State ex rel. Public Defender Commission v. Bonaker,* 706 S.W.2d 449 (Mo. banc 1986) held that the Public Defender cannot promulgate a rule which declines to represent persons who are entitled to representation under Section 600.042. While the Public Defender attempts to distinguish *Bonaker* by arguing that its CSR makes the Public Defender only temporarily unavailable until caseloads decline, the Public Defender CSR still eliminates a class of cases, which the Public Defender cannot do under Section 600.042.4. Writ on this issue denied. (2) In the other case, Judge appointed the head of the Public Defender Office as a "member of the local bar." Section 600.021.2 prohibits Public Defenders from practicing law except in their official capacity as Public Defenders. Therefore, Judge could not appoint a Public Defender in a private capacity. Also, *State ex rel. Robinson v. Franklin*, 48 S.W.3d 64 (Mo. App. W.D. 2001), prohibits judges from appointing particular Public Defenders. Writ granted on this issue.

State v. Rawlins, No. WD67773 (Mo. App., W.D. 4/1/08):
Where there was no record showing Defendant was warned of the perils of self-representation before trial, her waiver of counsel was not knowing and voluntary.
Facts: Defendant refused to meet with her Public Defender in person, and only wanted to meet by phone. The Public Defender moved to withdraw because of Defendant's lack of cooperation. The trial court allowed the Public Defender to withdraw. Defendant appeared pro se at trial, and said she did not want to represent herself. The trial court held a pro se trial, at which Defendant was convicted.
Holding: There is no written waiver of counsel under Sec. 600.051 or any record of the hearing at which the trial court allowed the Public Defender to withdraw. A defendant must be given warnings of the perils of self-representation on the record before trial to ensure a knowing and voluntary waiver. The problem here is an inadequate record. To avoid such a result in the future, where no record is made, a court should have the waiver under Sec. 600.051 read to the Defendant and then have the Defendant sign the waiver.

*** Kansas v. Ventris, 85 Crim. L. Rep. 171, ___ U.S. ___ (4/29/09):**
Holding: Even though police planted a jail-house informant in Defendant's cell in order to elicit statements from Defendant in the absence of counsel, the statements taken in violation of the 6th Amendment right to counsel could be used to impeach Defendant's testimony at trial.

*** Montejo v. Louisiana, 85 Crim. L. Rep. 267, ___ U.S. ___ (5/26/09):**
Holding: Even though Defendant had been appointed counsel at his first court appearance, where police later approached Defendant and asked if he wanted to talk and Defendant gave an incriminating note (statements), the admission of the note at trial did not violate the 6th Amendment right to counsel; Defendants who have counsel can voluntarily waive that right by answering police-initiated questions, even after appointment of counsel; *Michigan v. Jackson*, 475 U.S. 625 (1986) is overruled.

*** Rothgery v. Gillespie County, ___ U.S. ___, 83 Crim. L. Rep. 457 (6/23/08):**
Holding: 6th Amendment right to counsel attached from time of arrestee's initial appearance before a magistrate, even if prosecutors are not involved at that stage and unaware of the accusations.

*** U.S. v. Gonzalez-Lopez, 79 Crim. L. Rep. 391, ___ U.S. ___ (2006):**
Holding: Denial of non-indigent Defendant's counsel of choice is structural error under 6th Amendment.

U.S. v. Nicholson, 2010 WL 2723144 (4th Cir. 2010):
Holding: Counsel had actual conflict of interest where he failed to move for a downward departure of Defendant's sentence on the basis of self-defense, where counsel was also representing the person who had threatened Defendant's life.

McElrath v. Simpson, 2010 WL 517412 (6th Cir. 2010):
Holding: Where counsel represented co-defendants and chose to forgo the best defense of blaming the crime on one of them, this was an actual conflict of interest.

U.S. v. Aguirre, 87 Crim. L. Rep. 315 (6th Cir. 5/17/10):
Holding: Truthful but incriminating information on Public Defender application cannot be used as evidence to prove the underlying charged crime because this would force Defendant to choose between his 5th Amendment right against self-incrimination and his 6th Amendment right to counsel.

Boykin v. Webb, 83 Crim. L. Rep. 808, 2008 WL 4067539 (6th Cir. 9/4/08):
Holding: Counsel's joint representation of two co-defendants in murder case was conflict of interest since best defense would have been to blame other co-defendant.

Benitez v. U.S., 2008 WL 942048 (6th Cir. 2008):
Holding: Where Defendant told court at sentencing he had "fired" his private counsel, court had duty to inquire about circumstances.

U.S. v. Ryals, 2008 WL 90083 (7th Cir. 2008):
Holding: Where attorney and client had genuine disagreement regarding course of representation, trial court abused discretion in not appointing new counsel for sentencing hearing.

U.S. v. Shaaban, 2008 WL 1823300 (7th Cir. 2008):
Holding: Appointed counsel allowed to withdraw where Defendant would not permit counsel to raise the non-frivolous issue in case.

U.S. v. Rivera-Corona, 87 Crim. L. Rep. 830 (9th Cir. 8/18/10):
Holding: Where Defendant represented by private counsel sought to discharge him after a guilty plea and get a "public defender" for his sentencing hearing, trial court erred in simply denying this request out of hand, rather than inquire into Defendant's financial eligibility; the Criminal Justice Act expressly provides for appointment of counsel at any stage of the proceedings if Defendant can no longer pay counsel, and requiring private counsel to work without compensation is likely prejudicial since counsel will seek to end the representation as expeditiously as possible. Sentence vacated.

Houston v. Schomig, 2008 WL 2797027 (9th Cir. 2008):
Holding: Defendant entitled to hearing on claim his Public Defender had a conflict of interest because another Public Defender from that office had represented the victim-witness in a prior matter.

Bradley v. Henry, 2007 WL 4410355 (9th Cir. 2007):
Holding: Court violated Defendant's due process rights by excluding her from her retained counsel's motion to withdraw hearing for failure to pay counsel, and that Defendant would be given appointed counsel; Defendant had to be given opportunity to contest her attorney's withdrawal.

U.S. v. Sandoval-Mendoza, 80 Crim. L. Rep. 343 (9th Cir. 12/27/06):
Holding: Overnight ban preventing defense counsel from discussing Defendant's upcoming testimony with Defendant violates 6th Amendment right to counsel.

U.S. v. Bergman, 87 Crim. L. Rep. 46 (10th Cir. 3/25/10):
Holding: Where unbeknownst to Defendant, his "counsel" fraudulently claimed to be a lawyer but was never a lawyer at all, Defendant was denied 6th Amendment right to counsel and prejudice is presumed.

U.S. v. Kaley, 2009 WL 2497599 (11th Cir. 2009):
Holding: Defendant was entitled to challenge the gov't's restraint on his assets which prevented him from hiring counsel of his choice.

U.S. v. Velez, 86 Crim. L. Rep. 154 (11th Cir. 10/26/09):
Holding: Sec. 1957(f)(1) of federal money laundering statute exempts from forfeiture funds used to pay legal fees, notwithstanding ruling in *Caplin & Drysdale v. U.S.*, 491 U.S. 617 (1989).

Martin v. U.S., 87 Crim. L. Rep. 52 (D.C. 4/1/10):
Holding: Even though Defendant failed to object to trial court precluding him from talking to counsel over weekend break from trial, this did not waive Defendant's 6th Amendment right to counsel and appellate court found trial court's action constituted plain error.

U.S. v. Nicholas, 85 Crim. L. Rep. 98 (C.D. Cal. 4/1/09):
Holding: Where law firm represented both corporation and its Executive, Executive's statement to law firm had to be suppressed in stock fraud scheme even though law firm told Executive it was representing corporation when it asked him about scheme; "an oral warning to a current client that no attorney-client relationship exists" is "nonsensical" and "unethical."

U.S. v. Ghailani, 2009 WL 3853799 (S.D. N.Y. 2009):
Holding: Where Secretary of Defense reassigned Defendant's military counsel to other duties, district court could review whether this violated Defendant's 5th and 6th Amendment rights to due process and counsel.

People v. Bergerud, 2010 WL 59254 (Colo. 2010):
Holding: Where Defendant had unsuccessfully sought to waive appointed counsel at trial, remand was required to determine if appointed counsel had failed to investigate Defendant's possible defenses and also whether Defendant was deprived of his right to testify while represented by the appointed counsel.

State v. Angel T., 85 Crim. L. Rep. 544 (Conn. 6/30/09):
Holding: Due process prohibits Prosecutor from presenting evidence or argument that Defendant's prearrest retention of counsel indicates Defendant's guilt or impeaches his trial testimony that he was innocent.

State v. Cooke, 85 Crim. L. Rep. 551 (Del. 7/21/09):
Holding: Where defense attorney over client's objection pursued defense of "guilty but mentally ill" when client wanted an actual innocence defense, this deprived client of right to make fundamental decision about his defense; no showing of prejudice is required under *Cronic*.

Darling v. State, 2010 WL 2606029 (Fla. 2010):
Holding: Capital Collateral Regional Counsel was permitted to file 1983 action challenging lethal injection even though statute prohibited CCRC from civil litigation, since such a 1983 complaint was similar to a habeas petition and quasi-criminal in nature.

Maas v. Olive, 2008 WL 4346431 (Fla. 2008):
Holding: Statute which limited amounts postconviction counsel could be paid violated right to counsel if there could be no exceptions to it.

Williams v. Moody, 2010 WL 2642762 (Ga. 2010):
Holding: Defendant's pro se claim that his counsel was ineffective while he was still being represented by the counsel did not create a conflict of interest and was of no legal effect.

Alford v. State, 87 Crim. L. Rep. 182 (Ga. 4/19/10):
Holding: *Alabama v. Shelton*, 535 U.S. 654, forbidding imposition of SIS when Defendant is not given appointed counsel or waives counsel, is retroactive to cases that where final when it was handed down.

Edwards v. Lewis, 82 Crim. L. Rep. 586 (Ga. 2/25/08):
Holding: Defendant was denied conflict-free counsel where Public Defender's Office made agreement with judges not to challenge courts' use of out-of-date census data in calling venirepersons in past cases, in exchange for courts using up-to-date data in new cases.

Garland v. State, 82 Crim. L. Rep. 581 (Ga. 2/25/08):
Holding: Where Defendant's claim on appeal is ineffective assistance of trial counsel, indigent Defendant must be appointed a different attorney than trial counsel for the appeal; 6th Amendment requires conflict-free appellate counsel.

State v. Mundon, 2009 WL 2791659 (Haw. 2009):
Holding: Hawaii Const. provides right for pro se Defendant to consult with stand-by counsel during a recess taken during his cross-examination.

State v. Severson, 85 Crim. L. Rep. 390 (Idaho 5/29/09):
Holding: A conflict of interest in a Public Defender Office that would prevent one lawyer from representing Defendant is not necessarily imputed to entire office, when screening measures may be taken.

People v. Hernandez, 84 Crim. L. Rep. 6 (Ill. 9/18/08):
Holding: Where counsel in an attempted murder case represented Defendant and previously represented potential victim of the murder, this was a conflict of interest for which prejudice was presumed.

State ex rel. Kirtz v. Delaware Circuit Court, 86 Crim. L. Rep. 263 (Ind. 11/3/09):
Holding: Where Defendant had testified in an unrelated matter against Prosecutor's brother-in-law, Prosecutor was required to be disqualified because this created an appearance of impropriety.

State v. Dudley, 85 Crim. L. Rep. 353 (Iowa 5/29/09):
Holding: Where statute required indigent Defendants to reimburse State for cost of their appointed counsel but provided no determination of ability to pay when Defendants were acquitted, the statute violated constitutional right to counsel and equal protection.

State v. Smith, 84 Crim. L. Rep. 563 (Iowa 2/13/09):
Holding: Even though law firm simultaneously represented Defendant and a prosecution witness, Defendant was denied counsel of his choice when judge disqualified defense counsel, where counsel had screened himself from representation of the witness, Defendant waived any conflict, and Defendant had a second nonconflicted defense counsel to deal with the witness.

Hannan v. State, 2007 WL 1518940 (Iowa 2007):
Holding: Defendant did not voluntarily waive counsel where court's explanations of trial procedures occurred after Defendant had essentially been forced to represent himself.

Brown v. Commonwealth, 2007 WL 1790633 (Ky. 2007):
Holding: Allowing defense counsel to leave the courtroom during Defendant's testimony after counsel told the judge that Defendant would perjure himself, denied Defendant his right to counsel.

Gonzales v. State, 85 Crim. L. Rep. 242 (Md. 5/7/09):
Holding: Where on day of trial Defendant's retained attorney did not appear but sent a partner and Defendant did not want to be represented by partner, court erred in making Defendant proceed pro se because he was denied counsel of his choice.

Duvall v. State, 81 Crim. L. Rep. 262 (Md. 5/15/07):
Holding: Public Defender attorney had conflict of interest in representing Defendant who was claiming that another client of the same Public Defender Office did the crime, even though the two defendants were not co-defendants in the same crime, and the other defendant was being represented by the other Public Defender attorney on an unrelated crime.

Com. v. Stote, 86 Crim. L. Rep. 761 (Mass. 3/5/10):
Holding: Even though defense counsel had a romantic relationship with Prosecutor appellate division attorney, this was not an actual conflict of interest and did not prejudice client, but defense counsel should have told client about the relationship under Rule 1.7, which requires lawyers tell clients about any intimate personal relationship that might impair their ability provide effective representation. "Even if an attorney reasonably believes that he or she can continue to represent the client vigorously, the attorney should err on the side of caution by disclosing the relevant facts, which need not include the name of the third person, and asking whether the client consents to the representation."

Commonwealth v. Perkins, 2008 WL 725137 (Mass. 2008):
Holding: Defense counsel's agreement with journalists to wear a microphone during trial was a conflict of interest, because counsel cannot serve journalistic interests and Defendant's interests simultaneously.

Commonwealth v. Murphy, 80 Crim. L. Rep. 653 (Mass. 3/6/07):
Holding: A jailhouse informant's agreement with gov't to obtain information from inmates does not have to specify a particular inmate in order to implicate the inmates' 6th Amendment right to counsel under *Massiah v. U.S.*, 377 U.S. 201 (1964).

Morris v. State, 85 Crim. L. Rep. 278 (Minn. 5/14/09):
Holding: State constitutional right to counsel extends to indigent persons in misdemeanor PCR's where that is their first appeal of right.

State v. Veale, 80 Crim. L. Rep. 478 (N.H. 1/19/07):
Holding: Appellate Public Defender Office should be viewed as "same office" as Trial Office for purposes of ineffective assistance claims and should be judged by same conflict rules as attorneys in private practice; hence, outside counsel may be required in some circumstances where Appellate Office raises ineffectiveness claims against Trial Office.

Hurrell-Harring v. State, 87 Crim. L. Rep. 171 (N.Y. 5/6/10):
Holding: Court of Appeals certifies class action status for lawsuit alleging inadequate representation by Public Defender; will examine issue systemically instead of on case-by-case basis.

State v. Williams, 80 Crim. L. Rep. 385 (N.C. 12/15/06):
Holding: Trial judge abused his discretion in only giving defense counsel five minutes to consider whether to present evidence in murder case after State had rested its case.

In re C.S., 82 Crim. L. Rep. 57 (Ohio 9/27/07):
Holding: Statutory right to counsel given to juveniles can only be waived after juvenile has been advised by a parent or guardian.

In re Richland County Magistrate's Court, 87 Crim. L. Rep. 890 (S.C. 9/7/10):
Holding: Even though a state statute allowed non-lawyers to represent businesses in court, a non-lawyer for a business could not serve as a Prosecutor in a case against a Defendant who wronged the business; prosecutors are expected to represent the public and be impartial in deciding whether to prosecute and whether to negotiate a plea bargain.

Frazier v. State, 86 Crim. L. Rep. 704 (Tenn. 2/18/10):
Holding: Where statute provided for right to PCR counsel, this implicitly includes right to conflict-free counsel and court has duty to inquire about conflicts of interest.

State v. McClellan, 2009 WL 2341654 (Utah 2009):
Holding: Prosecutor's office should have been disqualified after Defendant's defense counsel joined that office, though Chinese Wall approach would rebut need for disqualification.

State v. Ford, No. 20060720 (Utah 9/16/08):
Holding: 14th Amendment due process and equal protection guarantees require a state to pay indigent defendants' legal fees on PCR appeal. Court agrees with *Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985) and *Blankenship v. Johnson*, 118 F.3d 312 (5th Cir. 1997). In *Walker*, the court held that when the state threatens an indigent litigant with the loss of a fundamental liberty interest, the rights to counsel, due process and equal protection require the state to appoint counsel. The focus of the inquiry in these cases must be whether the proceeding may result in a deprivation of liberty.

State v. Ferguson, 80 Crim. L. Rep. 457 (Utah 1/9/07):
Holding: Uncounseled misdemeanor conviction cannot be used to enhance later offense to a felony.

In re Bailey, 86 Crim. L. Rep. 379 (Vt. 12/24/09):
Holding: Where PCR statute made appointed counsel available on appeal only "where the attorney considers the contentions to be warranted by law or by nonfrivolous argument," then appointed counsel could withdraw without filing an *Anders* brief.

State v. Frost, 2007 WL 1874772 (Wash. 2007):
Holding: Trial court's decision to limit defense counsel's closing argument violated 6th Amendment right to counsel and due process.

Harris v. State, 2007 WL 866214 (Ala. Crim. App. 2007):
Holding: Non-indigent defendant's discharge of counsel one week before trial was not an implied waiver of constitutional right to counsel.

Holden v. State, 2007 WL 4277418 (Alaska Ct. App. 2007):
Holding: Indigent Defendant had state constitutional right to counsel for limited purpose of litigating if their state PCR petition was legally timely or not.

State v. Allen, 84 Crim. L. Rep. 240 (Ariz. Ct. App. 11/18/08):
Holding: Counsel's stipulation at trial that Defendant possessed certain amount of marijuana was functional equivalent of a guilty plea which required trial court to obtain a waiver of trial rights from Defendant under *Boykin v. Alabama*.

People v. Jones, 87 Crim. L. Rep. 706 (Cal. App. 6/30/10):
Holding: Where Public Defender chose not to use an investigator in his office due to "prioritization" of caseload (and instead did the work himself inadequately), attorney was ineffective and courts should be attentive to resource problems in Public Defender Offices because this constitutes a conflict of interest. Public Defender Office had only 1 investigator for 12 attorneys causing "prioritization" of use of investigator. "It is often difficult for public or contract defender to forthrightly admit he or she provided a client with deficient legal assistance; nor is it easy for such an attorney to withdraw from representation when not provided adequate support services, an act that may well cost a principled public defender his or her job or continuing government contracts. … Therefore, the right of indigent defendants to receive the assistance of counsel that is

constitutionally required may well depend on the attentiveness of judicial officers to this issue." "The danger of such a conflict [in having to choose which clients to devote resources to] bears upon the integrity of the judicial system [and] cannot be brushed aside." "[I]nadequate financing of public defender services and resulting lack of investigative resources for indigent defendants has been studied for decades and is no secret."

In re: Edward S., 92 Cal. Rptr. 3d 725 (Cal. App. 2009):
Holding: (1) Individual Public Defender had duty to move to withdraw under ABA Opinion 06-441 where he had too large of caseload to be effective; (2) too large of caseload creates conflict of interest for Public Defender because forces choice between clients; (3) Public Defender was ineffective in sex case in failing to get polygraph exam for client, failing to get psychological exam to show client not fit profile of sex offender, and failing to investigate family witnesses who would have shown alleged victim was familiar with type of molestation of which she accused defendant.

People v. Townley Hernandez, 86 Crim. L. Rep. 209 (Cal. App. 2009):
Holding: Where gang-member/snitch witness' statements were placed under seal and a gag order placed upon them so that Defendant's attorney was not even permitted to discuss the statements with Defendant, this violated Defendant's right to counsel and was "structural error" requiring new trial.

People v. Bergerud, 84 Crim. L. Rep. 37 (Colo. Ct. App. 9/18/08):
Holding: Counsel cannot make decision to forgo innocence-based trial defense in favor of lesser-included defense, where client wants an innocence-based defense at trial; this is decision only client can make; thus, judge violated right to counsel by forcing client to proceed to trial with attorney who would not present innocence-defense, or proceeding pro se.

People v. White, 2009 WL 2413933 (Ill. App. 2009):
Holding: A total prohibition on defense counsel from observing an identification lineup of their client violates Sixth Amendment right to effective assistance of counsel.

People v. Bingham, 2006 WL 1008647 (Ill. App. Ct. 2006):
Holding: Denial of Defendant's 6th Amendment right to counsel of choice is structural error requiring reversal.

Joseph v. State, 2010 WL 338000 (Md. Ct. Spec. App. 2010):
Holding: Trial court erred in denying Defendant's request to discharge counsel without inquiring into reasons Defendant wanted to do this.

Duncan v. State, 2009 WL 1640975 (Mich. App. 2009):
Holding: The State and Governor were not immune under the governmental tort law from indigent defendants' (plaintiffs') declaratory and injunctive relief claim that the State is not providing constitutionally adequate indigent defense representation.

People v. McClam, 2009 WL 790410 (N.Y. App. Div. 2009):
Holding: Where Defendant pleaded guilty after his counsel said he wanted to hit Defendant, Defendant was the worst client he ever had and he didn't think he could represent Defendant in good faith, the trial court failed to make sufficient inquiry into Defendant's request for substitution of counsel.

State v. Alexander, 84 Crim. L. Rep. 147 (N.J. Super. Ct. App. Div. 10/10/08):
Holding: Where counsel after trial but before sentencing undertook representation of a co-defendant, Defendant in subsequent postconviction case need not show prejudice from this conflict of interest to win sentencing relief.

State v. A.O., 82 Crim. L. Rep. 283 (N.J. Super. Ct. App. 11/27/07):
Holding: Court cannot admit a polygraph result based on Defendant's stipulation with police to such admission before he was represented by counsel, because that would violate the 6th Amendment right to counsel.

Lay v. State, 82 Crim. L. Rep. 516 (Okla. Crim. App. 2/12/08):
Holding: Though not required by constitution, stand-by counsel should be appointed in all death penalty cases where defendants go pro se.

Mayer v. State, 2010 WL 1050331 (Tex. Crim. App. 2010):
Holding: Defendant was not required to object at trial to paying for appointed attorney costs in order to challenge on appeal the evidence of his ability to pay.

State v. Cabrera, 81 Crim. L. Rep. 387 (Utah Ct. App. 6/7/07):
Holding: Defendant has right to counsel at a restitution hearing where the imposition of restitution is part of probation and includes actual or suspended jail time.

State v. Peterson, 2008 WL 3852142 (Wis. Ct. App. 2008):
Holding: Even though Movant's retained postconviction counsel had an acrimonious relationship with a former law partner who was the subject of the postconviction case, this did not justify the trial court's disqualification postconviction counsel.

Death Penalty

State v. Deck, No. SC89830 (Mo. banc 1/26/10):
Holding: Four judges join two concurring opinions that the Missouri Supreme Court's proportionality review under Section 565.035.6 must compare both death-sentenced cases and life-sentenced cases, instead of just comparing death-sentenced cases as the Court has been doing since 1993.

State ex rel. Lyons v. Lombardi, No. SC88625 (Mo. banc 1/26/10):
Where Petitioner sentenced to death before Atkins v. Virginia showed that his IQ was 60 to 70; that he had deficits in communications and functional academics; and that these conditions manifested themselves and were documented before age 18, Petitioner met the

definition of "mental retardation" in Sec. 565.030.6 and his death sentence is vacated and life without parole imposed.
Facts: Petitioner was sentenced to death before *Atkins*, 536 U.S. 304 (2002), which held that it violates the 8th Amendment to execute mentally retarded persons. Petitioner filed a petition for writ of mandamus pursuant to *In re Competency of Parkus*, 219 S.W.3d 250 (Mo. banc 2007), to demonstrate he was mentally retarded.
Holding: Even though Petitioner's IQ scores ranged from 61 to 84, Petitioner's expert explained why his IQ actually fell within 61 to 70. There was evidence of deficits in communication and functional academics as shown by family member testimony about Petitioner being a loner and being withdrawn while growing up, and school records showing he repeated 10th grade three times, and scored in the lowest 2% on Iowa Basic Skills Tests. Although there were no records before age 18 of IQ tests or other records of adaptive behavior, documentation is a matter of proof, and the court was entitled to make reasonable inferences from the evidence presented. The purpose of documentation is to prevent the Petitioner from exaggerating or fabricating mental retardation. The records presented here were sufficient to conclude that Petitioner's condition was not a recent fabrication.

Gill v. State, No. SC89831 (Mo. banc 12/1/09):
Where the State presented good character evidence of Victim in penalty phase, counsel were ineffective in failing to discover and present computer hard drive evidence in possession of police which contained child pornography to rebut good character evidence.
Facts: Defendant was convicted of murder and sentenced to death. Before trial, the police seized Victim's computer hard drive and a police Officer wrote a report stating that the hard drive contained files with sexually explicit names. Defense counsel did not interview Officer or obtain the contents of the hard drive. At penalty phase, the State presented evidence of Victim's "good character." Jury sentenced Defendant to death. Co-Defendant's counsel obtained Victim's hard drive and in Co-Defendant's case, the State refrained from presenting "good character" evidence of Victim. Co-Defendant's jury sentenced him to life without parole.
Holding: Generally, neither the State nor defense can present "character evidence" of Victim in penalty phase. If the State attempts to introduce "good character" evidence in penalty phase, defense counsel has two options: (1) object to introduction of the evidence, and the trial court should sustain the objection or (2) present rebuttal evidence of character. Here, the defense counsel did neither. Despite having a police report stating that there were sexually explicit file names on Victim's computer, counsel neither interviewed Officer who wrote report or obtained Victim's computer hard drive. Had counsel obtained the hard drive, they could have presented evidence that Victim collected child pornography to rebut evidence of Victim's "good character" or persuaded the State not to present the "good character" evidence. In Co-Defendant's trial, that defense counsel obtained the computer evidence, and as a result, the State did not present "good character" evidence in penalty phase, and Co-Defendant received life without parole. This shows Defendant's counsel were ineffective and Defendant was prejudiced.

Taylor v. State, No. SC88063 (Mo. banc 8/26/08):
(1) Brady violated where State failed to disclose impeachment evidence regarding State's jail-house snitch witness, including letters he wrote to the prosecutor, an interview by the State, and a post-trial letter from the prosecutor to another prosecutor seeking leniency; and (2) counsel ineffective in penalty phase in failing to present mental health records and testimony of family members regarding family and mental health history.
Facts: Defendant/Movant was charged with killing a fellow inmate of a prison. The defense was that Movant was not guilty by reason of mental disease. The State called a fellow inmate in rebuttal whose testimony indicated Movant was faking mental illness. During guilty phase deliberations, the jury asked to see mental health records of Movant, but they had not been admitted in evidence. Movant was convicted of first degree murder. In penalty phase, the defense presented a prison superintendent who testified that Movant would present minimal risk in prison in the future. Later, Movant filed a 29.15 motion alleging *Brady* violations and ineffective assistance of counsel.
Holding: (1) *Brady* requires the State to reveal impeachment material. Rule 25.03(A) requires the State, upon request, disclose written and recorded statements of witnesses it intends to call. Here, the State had received numerous letters from the jail-house snitch witness before trial, but destroyed many of them, rather than disclose them. The very fact of their destruction was favorable evidence that was required to be disclosed to the defense. Additionally, the prosecutor failed to reveal a memo of an interview of the jail-house snitch, because the prosecutor believed its disclosure might compromise a Highway Patrol investigation. However, the prosecutor did not seek in camera relief, and cannot make a purposeful decision to fail to disclose information. Finally, after trial, the prosecutor wrote a letter to another prosecutor seeking leniency for the jail-house snitch in another case. Even if there was no "deal" for the snitch's testimony, the fact that the prosecutor was considering writing such a letter at the time of trial, even if he did not make a final decision until hearing the testimony, was relevant impeachment evidence since the defense could have argued the snitch had incentive to testify favorably for the State. (2) Where the jury has convicted of first degree murder at a prison, it is not reasonable for defense counsel to only present mitigation that defendant is unlikely to commit other crimes in prison. Here, the jury asked to see mental health records. Although the records contained some harmful information, they also contained information that Movant had a long history of mental illness from age 7. Furthermore, family members were available to testify to his long mental health history and abusive background. It was unreasonable not to present this evidence.

State v. Johnson, No. SC87825 (Mo. banc 1/15/08):
Placing the burden of proof on Defendant to prove he is not mentally retarded does not violate Ring v. Arizona, 536 U.S. 584 (2002).
Facts: MAI-CR3d 313.38 instructs jurors that if they unanimously find by a preponderance of evidence that Defendant is mentally retarded, they must return a verdict of LWOP. Defendant objected to this instruction under the 6th Amendment on grounds that the State has the burden of proving he is not mentally retarded.
Holding: Sec. 565.030.4(1) provides that LWOP shall be assessed if the jury finds by a preponderance of the evidence that Defendant is mentally retarded. Determining a

defendant is mentally retarded is not a finding of fact that increases the potential punishment; it is a finding that removes a defendant from the death penalty. *Ring*, requiring a jury to find statutory aggravating circumstances beyond a reasonable doubt, does not apply to mental retardation.

Editor's Note by Greg Mermelstein: There were 3 dissenting judges who would hold that, under *Ring*, the State has the burden to prove Defendant is not mentally retarded.

Glass v. State, No. SC87852 (Mo. banc 7/6/07):

Death penalty counsel ineffective in penalty phase in failing to call teachers and experts who would have testified to Defendant's impaired intellectual functioning , and in failing to call probation officers who would have rebutted aggravating evidence regarding a prior conviction.

Facts: In capital penalty phase, counsel called ten mitigation witnesses who were family members, friends and employers of Defendant. Counsel failed to investigate and/or call various teachers, experts and probation officers.

Holding: Dr. Scherr, M.D., treated Defendant-Glass for meningitis when he was 23 months old. Dr. Scherr would have provided mitigating evidence by testifying about the long-term effects of meningitis on mental functioning. Although Glass' aunt testified at trial about his meningitis, the aunt was not a doctor and "didn't know" if the meningitis had any effect on Glass. The failure to call a doctor who would have testified about impaired intellectual functioning is prejudicial. Counsel also failed to call various teachers who would have testified about Glass' impaired intellectual functioning. And counsel failed to investigate and/or call a neuropsychologist, learning disability expert and toxicologist. The teachers, neuropsychologist and learning disability expert would have testified about impaired intellectual functioning. This can have powerful, inherent mitigating value. The State claims that Glass' learning deficits did not cause him to commit the murder, but evidence of impaired intellectual functioning is mitigating even without a nexus to the crime. The toxicologist would have testified to the statutory mitigating circumstances that Glass' ability to appreciate his conduct or conform to the requirements of law was substantially impaired, and he acted under extreme mental or emotional disturbance. Lastly, the State presented as aggravating evidence Glass' prior stealing conviction. Counsel has a duty to neutralize aggravating evidence. This could have been done by calling probation officers to testify that Glass was good on probation, and would have supported counsel's theory that the murder was "out of character" for Glass.

State v. Black, No. SC87785 (Mo. banc 5/29/07):

Where death penalty Defendant repeatedly and unequivocally demanded to represent himself, trial court erred in denying his motions to proceed pro se on grounds that he would be better represented by counsel.

Facts: Defendant was charged with first degree murder. The State sought the death penalty. Defendant filed numerous motions before trial to represent himself. On the day of trial, Defendant renewed his request to represent himself. The trial court overruled the motions, finding that Defendant was not a licensed attorney and his Public Defenders

were "more capable than you" of providing representation. Defendant was convicted and sentenced to death. He appealed, claiming he was denied his right to represent himself.
Holding: Defendants have a 6th Amendment right to self-representation. The 6th Amendment contemplates counsel aiding a willing defendant – not counsel being thrust upon an unwilling defendant as an organ of the State. To be entitled to proceed pro se, a defendant must make an unequivocal and timely motion, and his waiver of counsel must be knowing and intelligent. To refuse to honor a request to go pro se merely because the trial court felt Defendant's attorneys could do a better job was structural error. Reversed and remanded for new trial.

State ex rel. Wolfrum and Beimdiek v. Wiesman, No. SC88294 (Mo. banc 5/22/07):
Even though Defendant demanded that he be brought to trial within 180 days under the UMDDL, where his Public Defender attorneys needed more time to prepare for trial, the trial court should have granted them a continuance beyond 180 days for good cause, over Defendant's objection.
Facts: On September 6, 2006, Defendant was charged with first degree murder. The State sought the death penalty. On September 25, 2006, Defendant filed a request for final disposition of indictments, information or complaints pursuant to the Uniform Mandatory Disposition of Detainers Law (UMDDL), Sections 217.450-217.520. Defendant requested counsel on December 21, 2006, and two Public Defenders were appointed. The Public Defenders requested additional time to prepare the case. However, Defendant objected to this and demanded to be tried within 180 days of September 25, 2006. The court set the trial within 180 days. Public Defenders sought a writ of prohibition.
Holding: Section 217.460 provides: "Within [180] days after the receipt of the request … by the court and prosecuting attorney *or within such additional necessary or reasonable time as the court may grant, for good cause shown in open court, the offender or his counsel being present*, the indictment, information or complaint shall be brought to trial." The plain language makes it clear that a court can grant a continuance "for good cause shown." The statute does not require the defendant to personally consent to the continuance, but does require either the defendant or his attorneys be present. Here, Defendant's attorneys were present, and requested the continuance. They demonstrated "good cause" for the continuance based on their caseload, the incomplete discovery in the case, and the need to retain expert witnesses. Not granting a continuance would expose counsel to claims of ineffective assistance of counsel. Having invoked the right to counsel, Defendant ceded to counsel the authority to seek reasonable continuances to prepare. Writ made absolute.

In the Matter of Competency of Parkus, No. SC88077 (Mo. banc 4/17/07):
Proper procedure to claim Defendant sentenced to death prior to August 28, 2001, is mentally retarded – and, thus, cannot be executed -- is to file writ of mandamus in Missouri Supreme Court.
Facts: Defendant/Movant was convicted and sentenced to death prior to August 28, 2001. Defendant claimed he could not be executed because he is mentally retarded.
Holding: Section 565.030 bars execution of mentally retarded persons for offenses occurring after August 28, 2001. In 2002, *Atkins v. Virginia*, 536 U.S. 304 (2002), held

that the 8th Amendment bars execution of mentally retarded persons. In *Johnson v. State*, 102 S.W.3d 535, 540 (Mo. banc 2003), the Missouri Supreme Court held that all mentally retarded persons should receive the benefit of *Atkins*. Heretofore, there has been no clear procedure for how defendants sentenced before August 28, 2001, may show they are mentally retarded. Henceforth, Defendants asserting a claim of mental retardation shall file a petition for writ of mandamus in the Missouri Supreme Court. Respondents shall be the director of the Department of Corrections and the Attorney General. Defendant shall state specific facts showing mental retardation as defined in Section 565.030.6. If factual issues are in dispute, a special master shall be appointed. If the Court determines defendant is mentally retarded, the Supreme Court will recall its mandate in the direct appeal and resentence defendant to life without parole. This procedure shall apply only to cases which arose before August 28, 2001. On the merits, here, Defendant showed he was mental retarded under the statute.

State v. McFadden, No. SC87753 (Mo. banc 3/20/07):
(1) Prosecutor violated Batson by striking African-American juror for having "crazy red hair"; and (2) death sentence must be vacated which was based, in part, on prior conviction where Defendant had received death, but which later was overturned.
Facts: Prosecutor struck African-American venireperson on grounds that she had "crazy red hair." Defense counsel argued that style was quite fashionable in the African-American community. Also, Defendant had previously been convicted of murder and sentenced to death in another case. In penalty phase, the State presented evidence of the prior conviction and sentence. That prior conviction was later reversed on appeal.
Holding: The State's justification for striking the juror is not legitimate. The State fails to articulate how the juror's red hair, even if it were unusual, was related to the case other than that the juror was "individualistic." Regarding the penalty phase, *Johnson v. Mississippi*, 486 U.S. 578 (1988) held that reversal of a prior conviction the jury had considered in imposing death undermines the validity of the death sentence. That's the case here. Even assuming the prior conviction evidence was admissible as a prior bad act, the Court will not assume that the jury's weighing process was not affected by its knowledge that Defendant previously received death.

Anderson v. State, No. SC87060 (Mo. banc 6/30/06):
In death penalty case, (1) counsel unreasonably failed to object that Section 552.020.14 prohibited State doctor who did competency evaluation from testifying in guilt phase to statements Defendant/Movant made to him as evidence of guilt, but Defendant/Movant was not prejudiced; and (2) counsel ineffective in failing to strike juror who said on voir dire that he would automatically favor death and would put the burden on the defense to convince him otherwise.
Facts: (1) At death penalty trial, the State called as a rebuttal witness a doctor who conducted a competency evaluation of Defendant/Movant. The doctor testified, without objection, that Defendant/Movant told him that he did not have any psychiatric symptoms or brain damage. (2) During voir dire, a juror said that he would have to be convinced that a convicted Defendant was not deserving of the death penalty, that he would automatically favor death, and that the defense would have to put on evidence to convince him otherwise. Defense counsel did not move to strike the juror, and the juror

served on the jury that sentenced Defendant/Movant to death. Movant filed a 29.15 motion.

Holding: (1) The doctor who testified in rebuttal did not evaluate Defendant/Movant for mental state at time of crime, but instead conducted a competency evaluation. Section 552.020.14 provides that: "No statement made by the accused in the course of any examination … and no information received by any examiner … in the course thereof … shall be admitted in evidence against the accused on the issue of guilt …." Here, the doctor testified that Movant said he did not have psychiatric symptoms and did not have brain damage. In closing argument, the State argued that Defendant/Movant told the doctor he didn't have the psychiatric symptoms that the defense experts claimed. Reasonable counsel should have objected to the doctor's testimony because it was prohibited by Section 552.020.14 and was used as evidence of guilt. However, Defendant/Movant was not prejudiced under the facts of this case because the doctor made clear he was not opining on Defendant/Movant's mental state at time of crime. (2) Failure to strike a juror who is predisposed toward death is ineffective. A competent defense counsel would not fail to strike such a juror. Here, the juror said that he would have to be convinced that a convicted Defendant was not deserving of the death penalty, that he would automatically favor death, and that the defense would have to put on evidence to convince him otherwise. Therefore, Defendant/Movant granted new penalty phase.

Goodwin v. State, 2006 WL 1147691 (Mo. banc 5/2/06):

Motion court did not clearly err in denying Movant's Rule 29.15 claim that he was mentally retarded because his evidence of retardation did not meet standard set forth in Section 565.030.6.

Facts: Movant was convicted and sentenced to death. He filed Rule 29.15 motion, alleging he was ineligible for execution because he was mentally retarded. Motion court denied claim.

Holding: Section 565.030.6 sets the standard for whether a person is ineligible for execution due to mental retardation. The statute requires proof of (1) "significant subaverage intellectual functioning," (2) "continual extensive related deficits and limitations in adaptive behaviors," and (3) the first two factors must be "manifested and documented before 18 years of age." The evidence presented by Movant in this case did not meet these three tests. IQ test scores before Movant was 18 years old did not put him in the mentally retarded range, only the "borderline range." The postconviction expert presented by Movant who testified that Movant was mentally retarded was not certified or licensed as a psychologist or psychiatrist. The expert failed to account for Movant's hearing problems. The expert failed to test for malingering.

Editor's Note by Greg Mermelstein: *Goodwin* is "must reading" if you are going to be claiming a client is mentally retarded in a capital case, whether at trial or in postconviction. The majority opinion gives an extensive list of reasons why retardation was *not* shown here. Attorneys will need to be aware of this list, and be prepared to refute it in future cases by showing different facts in those cases, and correcting the deficiencies in proof and expert testimony which the majority found in *Goodwin*.

State ex rel. Johns v. Kays, 181 S.W.3d 565 (Mo. banc 2006):
Where Petitioner was found mentally retarded in prior case and thus ineligible for death penalty, collateral estoppel bars death penalty in subsequent case.
Facts: Petitioner was sentenced to death in Pulaski County. In subsequent postconviction case, Petitioner was found to be mentally retarded and, thus, ineligible for death penalty and the Pulaski County sentence was vacated. The State did not appeal, and the Pulaski judgment is final. State then charged Petitioner with murder and sought death penalty in Camden County for another murder. Petitioner sought Writ of Prohibition to prohibit trial court from proceeding with death case.
Holding: In deciding whether collateral estoppel applies, four factors are considered: (1) is the issue in the present case identical to the issue decided in the prior adjudication; (2) was there a judgment on the merits in the prior adjudication; (3) is the party against whom collateral estoppel is asserted the same party or in privity with the party in the prior adjudication; (4) did the party against whom collateral estoppel is asserted have a full and fair opportunity to litigate the issue in the prior adjudication. All four factors exist in this case. A writ is appropriate where lower court lacks to power to act as contemplated. Here, lower court cannot allow State to seek death due to collateral estoppel. Writ of prohibition made absolute.

State ex rel. Thurman v. Pratte, No. ED95387 (Mo. App. E.D. 11/9/10):
Even though death-penalty Defendant submitted a report that he was mentally retarded (which could preclude imposition of the death penalty), where Defendant had not given notice of an intent to rely on a defense of mental disease or defect to the offense, the court could not order a mental evaluation of Defendant under Sec. 552.030.
Facts: Defendant, who was charged with the death penalty, provided an expert report to the State showing he was mentally retarded. Defendant had not filed a notice of intent to rely on mental disease or defect. The State then sought a mental evaluation of Defendant. The trial court ordered that Defendant undergo a mental evaluation under Sec. 552.030. Defendant sought a writ of prohibition.
Holding: The State can obtain a mental evaluation of a defendant only if defendant claims incompetency, or pleads not guilty by reason of mental disease or defect, or files notice of intent to rely on such defense. Secs. 552.020 and 552.030. Defendant has not done that here. Defendant has only claimed that he is mentally retarded. Sec. 565.030.4 provides that a mentally retarded defendant is not eligible for the death penalty, but this is distinct from a plea of not guilty by reason of mental disease under Sec. 552.030. 552.030 deals with criminal responsibility for the offense. Sec. 565.030.4 deals with punishment, not guilt. Therefore, 552.030 does not authorize the trial court to order a mental evaluation here. Writ of prohibition granted.

Editor's Note: The court indicates in a footnote that the State may be able to obtain a mental exam under Rule 25.06(B) for good cause.

*** Brewer v. Landrigan, 88 Crim. L. Rep. 167, ___ U.S. ___, 2010 WL 4203911 (U.S. 10/26/10):**
Holding: Lower court should not have issued stay of execution on grounds that State refused to disclose the manufacturer of lethal injection drug, because there was no evidence that the drug obtained from the source was unsafe.

*** Sears v. Upton, ___ U.S. ___, 2010 WL 2571856 (U.S. 2010):**
Holding: Even though death penalty counsel presented some mitigating evidence, state court applied wrong prejudice test in holding counsel was not ineffective in failing to investigate and present frontal lobe problems, deficits in mental cognition, verbal abuse by parents, and sexual abuse by cousin. **"**We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." Postconviction court should have considered whether Defendant was prejudiced in light of all of this newly uncovered evidence, instead of focusing on reasonableness of the mitigation that was presented.

*** Smith v. Spisak, 86 Crim. L. 447, ___ U.S. ___ (U.S. 1/12/10):**
Holding: (1) Jury instructions at death penalty phase did not violate *Mills v. Maryland*, 486 U.S. 367 in that they did not preclude jury from considering only those mitigating factors unanimously found by jury; (2) even though death penalty counsel's closing argument emphasized the gruesome nature of the crime, said Defendant may commit crimes in the future, and did not emphasize mitigating circumstances or ask for life, Defendant was not prejudiced because he had admitted three murders and two other shootings.

*** Wood v. Allen, 86 Crim. L. Rep. 472, ___ U.S. ___ (U.S. 1/20/10):**
Holding: Even though death penalty counsel failed to present mitigating evidence of mental deficiencies, the state courts did not make an unreasonable determination of facts in holding that counsel had made a reasonable strategic choice not to present this evidence in order to avoid other possible harmful evidence.

*** Porter v. McCollum, 86 Crim. L. Rep. 269, ___ U.S. ___, 130 S.Ct. 447 (U.S. 11/30/09):**
Holding: Even though death penalty Defendant was uncooperative and fatalistic, counsel was obligated to conduct "*some* sort of mitigation investigation," and counsel was ineffective in failing to investigate and present evidence of Defendant's service in battles in Korean War, even though Defendant was also AWOL at times; Defendant's struggles to regain normality after the war; Defendant's childhood history of abuse; and Defendant's brain abnormality, difficulty reading and writing, and limited schooling (emphasis in original).

*** Johnson v. Bredesen, 86 Crim. L. Rep. 315, ___ U.S. ___ (U.S. 12/2/09):**
Holding: Justices Stevens and Breyer write opinion regarding denial of cert. to express their views that a 29-year delay in executing a prisoner violates the 8th Amendment as "unacceptably cruel."

*** Thompson v. McNeil, 129 S.Ct. 1299 (2009):**
Holding: Justices Stevens and Breyer write opinion regarding denial of cert. to express their views that waiting 30 plus years to execute someone violates the 8th Amendment, especially where some of the delay was attributable to reversals caused by State errors.

*** In re Davis, 2009 WL 2486475, ___ U.S. ___ (U.S. 2009):**
Holding: U.S. Supreme Court in an original habeas case filed by death-sentenced Defendant remands to District Court for hearing and findings on whether Defendant is actually innocent.

*** Wong v. Belmontes, 86 Crim. L. Rep. 222, ___ U.S. ___ (U.S. 11/16/09):**
Holding: Even though counsel failed to present certain mitigating mental health evidence, where counsel presented nine mitigation witnesses to testify about Defendant's life history and counsel's presentation of character evidence of Defendant would have opened the door to the Gov't presenting an alleged prior murder of Defendant (which had been excluded), counsel was not ineffective.

*** Bobby v. Van Hook, 86 Crim. L. Rep. 76, ___ U.S. ___ (U.S. 11/9/09):**
Holding: Lower court should not have applied 2003 ABA death penalty standards to judge ineffective assistance of counsel claim that occurred before the guidelines, and additionally, *Strickland* held that the ABA standards are only guides to what reasonableness means, not the requirement or definition of reasonableness.

*** Bobby v. Bies, 85 Crim. L. Rep. 319, ___ U.S. ___ (6/1/09):**
Holding: Where before *Atkins* a state court had considered Defendant's mental retardation as a mitigating factor but imposed death anyway and the State had not contested mental retardation as a mitigating factor, the State can re-litigate the mental retardation issue in the context of whether it bars execution post-*Atkins*.

*** Cone v. Bell, 85 Crim. L. Rep. 131, 2009 WL 1118709, ___ U.S. ___ (4/28/09):**
Holding: (1) Where state courts had refused or failed to consider the merits of petitioner's *Brady* claim, the claim was not procedurally barred in federal habeas; (2) where the prosecution failed to disclose police reports which would show Defendant was a "heavy drug user" and the defense was drug-induced psychosis, this may entitle death penalty petitioner to new penalty phase.

*** Harbison v. Bell, 85 Crim. L. Rep. 36, 129 S.Ct. 1481, ___ U.S. ___ (4/1/09):**
Holding: Federal courts under 28 U.S.C. 3599(e) should pay federal habeas attorneys to represent death-sentenced persons in state clemency proceedings.

***Zamudio v. California, 84 Crim. L. Rep. 192, ___ U.S. ____ (11/10/08):**
Holding: Justices Stevens and Breyer write opinions from denial of certiorari urging Court to revisit admissibility of "victim-impact" evidence. They note that *Payne* said victim impact could be so prejudicial as to violate due process, but Court has never given guidance for when due process is violated. Stevens indicates that videos, photos and other evidence about the victim's life is not "victim-impact" because this does not show the impact of the crime on survivors, and what the victim did in life years before the murder is not relevant.

***Walker v. Georgia, 84 Crim. L. Rep. 124, ___ U.S. ___ (10/20/08):**
Holding: Justice Stevens writes opinion from denial of certiorari to state his views that Georgia Supreme Court's proportionality review violates 8th Amendment because it only compares in a perfunctory fashion sentences where death was imposed, and does not compare cases where life was found or cases where death was not even charged by prosecutor.

*** Kennedy v. Louisiana, ___ U.S. ___, 83 Crim. L. Rep. 511 (6/25/08):**
Holding: 8th Amendment prohibits death penalty for child rape; death penalty is disproportionate when victim's death did not result and was not intended.

*** Baze v. Rees, ___ U.S. ___, 83 Crim. L. Rep. 75 (4/16/08):**
Holding: In order to show that execution method violated 8th Amendment, Defendant must show the method of execution creates a substantial risk of severe pain; in order to require an alternative procedure, Defendant must show the alternative is feasible, readily implemented and significantly reduces a substantial risk of severe pain.

*** Panetti v. Quarterman, 2007 WL 1836653, ___ U.S. ___ (6/28/07):**
Holding: (1) Petitioner's *Ford*-based claim that he was incompetent to be executed was not barred by AEDPA's prohibition against second or successive petitions; and (2) incompetency standard that focused only on Petitioner's understanding that he was about to be executed for a crime was too narrow, where standard did not consider whether Petitioner's delusions prevented him from comprehending the meaning and purpose of his execution. Courts cannot find delusional beliefs irrelevant just because a Petitioner can link his crime and punishment.

*** Uttecht v. Brown, 81 Crim. L. Rep. 311, ___ U.S. ___ (6/4/07):**
Holding: State court did not unreasonably apply federal law when it held that death penalty venireperson was substantially impaired in his ability to consider death. Juror said he would have favor the death penalty only if Defendant would "reviolate if released," and characterized State's burden of proof as "beyond a shadow of a doubt."

*** Schriro v. Landrigan, 81 Crim. L. Rep. 223, ___ U.S. ___ (5/14/07):**
Holding: Habeas petitioner not entitled to evidentiary hearing on claim that death penalty counsel failed to investigate mitigating evidence. Before trial, petitioner had thwarted counsel's investigation of mitigation and said he did not want mitigation, and thus, petitioner waived mitigating evidence.

*** Abul-Kabir v. Quarterman and Brewer v. Quarterman, 81 Crim. L. Rep. 132, ___ U.S. ___ (4/25/07):**
Holding: Texas death penalty instructions unduly limited jury's consideration of mental impairment and bad childhood as mitigating evidence, and federal habeas relief could be granted on this basis.

*** Smith v. Texas, 81 Crim. L. Rep. 132, ___ U.S. ___ (4/25/07):**
Holding: Texas jury instruction failed to give effect to Defendant's mitigating evidence.

* **Brown v. Sanders, 78 Crim. L. Rep. 403, ___ U.S. ___ (1/11/06):**
Holding: Even though an aggravating circumstance on which jury relied may later be found invalid, the death sentence may still be constitutional if there are other valid aggravating circumstances. Court abandons distinction between "weighing" and "non-weighing" death penalty schemes.

* **Hill v. McDonough, 2006 WL 1584710, ___ U.S. ___ (2006):**
Holding: Petitioner may challenge lethal injection protocol under Section 1983, where grant of injunctive relief will not bar inmate's execution because other methods of execution, including a revised lethal injection protocol, will be available; however, habeas corpus is the remedy to challenge the fact of the death sentence itself.

* **Kansas v. Marsh, 79 Crim. L. Rep. 393, ___ U.S. ___ (2006):**
Holding: Death penalty statute and instructions which mandate death where aggravators and mitigators are equally balanced do not violate the 8th and 14th Amendments.

* **Oregon v. Guzek, 126 S.Ct. 1226 (2006):**
Holding: The 8th Amendment does not prohibit a State from limiting the innocence-related evidence Defendant may introduce in the penalty phase of a capital case to evidence introduced in the guilt-innocence portion of the trial. The 8th Amendment does not require that Defendants be allowed to introduce "residual doubt" evidence of Defendant's guilt in penalty phase.

* **Ayers v. Belmontes, 80 Crim. L. Rep. 167, ___ U.S. ___ (2006):**
Holding: Mitigation instruction to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" allows for consideration of all mitigating evidence.

* **Carey v. Musladin, 80 Crim. L. Rep. 271, ___ U.S. ___ (2006):**
Holding: Since there are not any U.S. Supreme Court decisions regarding private individuals' conduct impairing right to a fair trial, federal court cannot grant habeas relief under AEDPA on such a claim; thus, federal court cannot grant habeas relief on claim that murder victim's family wore buttons with victim's picture in courtroom at Petitioner's trial.

* **Schriro v. Smith, ___ U.S. ___, 126 S.Ct. 7 (2005):**
Holding: Court of Appeals exceeded its authority on habeas review in ordering State of Arizona to conduct jury trial to resolve Petitioner's mental retardation claim.

U.S. v. Whitten, 2010 WL 2595315 (2d Cir. 2010):
Holding: Prosecutor violated Defendant's 6th Amendment right to trial and 5th Amendment due process rights by arguing that Defendant's demand for trial showed lack of remorse and refusal to accept responsibility, and argued lack of remorse to support death penalty.

U.S. v. Wilson, 87 Crim. L. Rep. 681 (2d Cir. 6/30/10):
Holding: Prosecutor's remarks in capital penalty phase (1) that Defendant did "everything he could to escape responsibility for his crimes. He has a right to go to trial … but he can't have it both ways. He can't do that and then say I accept responsibility" violated his 6th Amendment right to jury trial and denigrated mitigating factors of remorse and acceptance of responsibility, and (2) that Defendant's remorse should be discounted because he declined to make it under oath and (3) lack of remorse showed future dangerousness were improper comments on invocation of 5th Amendment right not to testify.

Thomas v. Horn, 2009 WL 1874285 (3d Cir. 2009):
Holding: Death penalty counsel ineffective in failing to present mental health history to explain Defendant's horrific actions.

Outten v. Kearney, 2006 WL 2773076 (3d Cir. 2006):
Holding: Death penalty mitigation investigation was unreasonable where counsel merely sent letter to Defendant asking for names of potential witnesses, and had limited discussions with Defendant and his mother

Wiley v. Epps, 2010 WL 4227405 (5th Cir. 2010):
Holding: Defendant was mentally retarded where his scores were below 75 on WAIS-III and he had adaptive functioning problems.

U.S. v. Williams, 2010 WL 2523207 (5th Cir. 2010):
Holding: Under federal death penalty law, an "act of violence" necessary to impose death penalty requires some act of physical force; Defendant-truck driver did not engage in such an act when illegal aliens he was smuggling in his truck died from heat.

Paredes v. Quarterman, 2009 WL 1911037 (5th Cir. 2009):
Holding: Where law required proof of murder of more than one person, Defendant was entitled to certificate of appealability on whether jury instruction denied him unanimous verdict as to which two of three people he was responsible for killing.

Walker v. Epps, 84 Crim. L. Rep. 263 (5th Cir. 11/24/08):
Holding: Sec. 1983 statute of limitation for asserting that lethal injection violates 8th Amendment begins on date direct review was complete or when protocol was adopted, whichever is later.

Oliver v. Quarterman, 83 Crim. L. Rep. 755 (5th Cir. 2008):
Holding: Capital jury's use of Bible in assessing punishment improper, because referred to external source of law outside instructions, though harmless here.

Mitts v. Bagley, 87 Crim. L. Rep. 882 (6th Cir. 9/8/10):
Holding: An "acquittal first" instruction which blocked considering lesser offenses violated *Beck v. Alabama*.

Van Hook v. Anderson, 2009 WL 605332 (6th Cir. 2009):
Holding: Death penalty counsel ineffective in penalty phase for failing to investigate mitigation until a few days before penalty phase and failing to discover that parents beat Defendant, Defendant saw his father attempt to kill his mother, and Defendant's mother was committed to mental hospital.

Jells v. Mitchell, 2008 WL 3823058 (6th Cir. 2008):
Holding: Counsel ineffective in penalty phase failing to present learning disabilities leading to aggressive behavior.

Mason v. Mitchell, 2008 WL 4443299 (6th Cir. 2008):
Holding: Where records showed that Defendant's childhood was marked by violence and drugs, but counsel interviewed only a few family members and hired a mental health expert only to opine on future dangerousness, counsel was ineffective.

Johnson v. Bagley, 2008 WL 4527345 (6th Cir. 2008):
Holding: Where counsel failed to interview Defendant's mother and grandmother, counsel were ineffective in failing to uncover substance abuse and mental illness in family; further, the failure to investigate led to erroneous damaging testimony from the mitigation expert at trial.

Spisak v. Hudson, 82 Crim. L. Rep. 429 (6th Cir. 1/11/08):
Holding: Death penalty counsel ineffective in stressing heinousness of crimes, calling Defendant "demented," saying sympathy was not part of jury's decision, and that a vote for either life or death would be valid.

Morales v. Mitchell, 2007 WL 3225397 (6th Cir. 2007):
Holding: Counsel ineffective in penalty phase for failure to investigate alcohol and drug abuse, mental illness in the family, and abuse of Defendant by his brother; and failure to hire a mitigation specialist and investigator.

Davis v. Coyle, 80 Crim. L. Rep. 472 (6th Cir. 1/29/07):
Holding: Defendant in new penalty phase can present evidence that he was a model prisoner on death row, even though this evidence arose after his original sentencing.

Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007):
Holding: Statute of limitations for bringing Section 1983 action to challenge lethal injection method of execution begins running at conclusion of direct appeal of conviction.

Getsy v. Mitchell, 79 Crim. L. Rep. 675 (6th Cir. 8/2/06), overruled 495 F.3d 295 (6th Cir. 2007)(en banc):
Holding: Even though Defendant was a shooter in a murder-for-hire scheme, where two other gunmen received plea bargains and the person who hired the men was acquitted, Defendant's death sentence violated the 8th Amendment ban on imposing arbitrary sentences under *Furman*, and also violated the rule against inconsistent jury verdicts.

Defendant's sentence must be viewed in terms of his individual culpability and the sentences of co-defendants in the same case.

Editor's note by Greg Mermelstein: The above holding was apparently overruled, but I am leaving the case on this list because there may be useful information cited in the case.

Griffin v. Pierce, 2010 WL 3655899 (7th Cir. 2010):
Holding: Death-penalty counsel ineffective in failing to present Defendant's horrendous childhood, and state could did not properly view the evidence as inherently mitigating.

Allen v. Buss, 2009 WL 605886 (7th Cir. 2009):
Holding: Even though Defendant had presented mental retardation as a mitigating circumstance in penalty phase, this was different than litigating whether Defendant's mental retardation precluded execution under *Atkins,* and Defendant should be allowed to litigate this.

Bies v. Bagley, 82 Crim. L. Rep. 612 (7th Cir. 2/27/08):
Holding: Where Defendant had been found mentally retarded by a state court, the State was barred by double jeopardy and collateral estoppel from getting another chance to prove Defendant was not mentally retarded.

Stevens v. McBride, 2007 WL 1732539 (7th Cir. 2007):
Holding: Death penalty counsel ineffective in penalty phase in presenting a psychologist who they believed was a "quack" without advance knowledge of his testimony, because counsel missed investigation which would have shown Defendant had dissociative disorder and was acting under extreme emotional disturbance and could not appreciate his criminality.

Clemons v. Crawford, 2009 WL 2725849 (8th Cir. 2009):
Holding: Death penalty lethal injection protocol did not violate 8th Amendment.

Taylor v. Crawford, No. 06-3651 (8th Cir. 6/4/07):
Holding: Missouri's written lethal injection protocol does not violate the 8th Amendment.

U.S. v. Purkey, 428 F.3d 738 (8th Cir. 2005):
Holding: Indictment is not required to allege non-statutory aggravating factors or statement that probable cause existed to believe that aggravating factors sufficiently outweighed mitigating factors. Indictment need only allege one statutory aggravating factor.

Pinholster v. Ayers, 2009 WL 4641748 (9th Cir. 2009):
Holding: Death penalty counsel was ineffective in failing to investigate mitigation, including brain damage from head injury, substance abuse, and family history of criminal problems and mental illness.

Harrison v. Gillespie, 2010 WL 10972 (9th Cir. 2010), reh'g granted, 6/18/10:
Holding: Where in penalty phase of death penalty trial the jury deadlocked, there was no manifest necessity to declare a mistrial without first polling the jury to determine whether Defendant had been acquitted of the death penalty; hence, double jeopardy bars a penalty phase retrial seeking death.

Harrison v. Gillespie, 86 Crim. L. Rep. 434 (9th Cir. 1/5/10):
Holding: Where judge refused Defendant's request to poll a deadlocked death penalty-phase jury before declaring a mistrial, there was no manifest necessity for the mistrial and State is barred from re-seeking death penalty.

Robinson v. Schriro, 86 Crim. L. Rep. 704 (9th Cir. 2/22/10):
Holding: Where death penalty Defendant did not intend, was not present for, and could not reasonably anticipate Victim's murder, the 8th Amendment was violated to apply the "cruel, heinous and depraved" aggravator to Defendant.

Hamilton v. Ayers, 2009 WL 2973231 (9th Cir. 2009):
Holding: Where death penalty counsel failed to investigate and present mitigating evidence about abuse and hardships of Defendant's childhood and history of mental illness, counsel was ineffective.

Jones v. Ryan, 2009 WL 3152396 (9th Cir. 2009):
Holding: Even though death penalty counsel used a state expert who conducted a mental evaluation of Defendant, counsel was ineffective in not retaining a defense expert and relying solely on the state expert, and counsel failed to provide the expert with information about client's drug addiction to assist the expert.

Nash v. Ryan, 85 Crim. L. Rep. 706, 2009 WL 2902088 (9th Cir. 9/11/09):
Holding: Because federal habeas statute provides a right to counsel in capital habeas proceedings, this implies that petitioner must be competent to assist counsel, including on appeal of denial of federal habeas relief; where petitioner is incompetent, proceedings must be stayed.

Sechrest v. Ignacio, 2008 WL 5101988 (9th Cir. 2008):
Holding: Prosecutor violated due process by arguing to jury that Defendant would be released if he did not receive the death penalty.

Comer v. Schriro, 79 Crim. L. Rep. 775 (9th Cir. 9/13/06):
Holding: Even though death-sentenced petitioner was competent and wanted to withdraw his habeas appeal and be executed, the Court of Appeals refused to allow petitioner to waive the appeal because this would allow petitioner to choose his own sentence in violation of the 8th Amendment's ban on arbitrariness in imposing death.

Comer v. Schriro, 2006 WL 2613669 (9th Cir. 2006):
Holding: Due process violated where Defendant appeared in front of judge at sentencing in wheelchair, virtually naked, in shackles, with blood oozing from wounds.

Hooks v. Workman, 87 Crim. L. Rep. 371 (10th Cir. 5/25/10):
Holding: (1) Prosecutor's remarks that jurors' work would be wasted if they didn't reach a unanimous verdict and that failing to reach a verdict would be "jury nullification" and outside the law misstated the law; (2) where jury told judge it was deadlocked 11 to l for death and judge instructed jurors to keep deliberating so that the "case may be completed" and suggested jurors could not go home until they reached a verdict, this improperly coerced a death verdict.

Phillips v. Workman, 2010 WL 1882313 (10th Cir. 2010):
Holding: State court erred under *Beck v. Alabama* in deciding whether capital Defendant was entitled to lesser-included offense instruction on murder.

Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007):
Holding: Capital counsel ineffective in failing to develop evidence of borderline mental retardation, childhood poverty and abuse.

Anderson v. Sirmons, 2007 WL 521173 (10th Cir. 2007):
Holding: Counsel ineffective in failing to present at penalty phase evidence of borderline mental defect, frontal lobe damage, brain damage, that Defendant functioned in bottom 2% of population, and did not complete 8th grade.

Hill v. Schofield, 2010 WL 2427092 (11th Cir. 2010):
Holding: Georgia's rule that mental retardation had to be proven beyond a reasonable doubt violated 8th Amendment.

Ward v. Hall, 86 Crim. L. Rep. 402 (11th Cir. 1/4/10):
Holding: Even though bailiff, in response to a jury question, had given death-penalty jury accurate information that life without parole was not one of their sentencing options, this was error requiring vacating death sentence because it was role of judge, not bailiff, to answer jurors' question and only judge should have answered it.

McNair v. Allen, 82 Crim. L. Rep. 476 (11th Cir. 1/29/08):
Holding: Statute of limitations for filing lethal injection Sec. 1983 suit starts either on the date on which state review was complete or the date prisoner was subject to new execution protocol, whichever is later.

Williams v. Allen, 2008 WL 4224720 (11th Cir. 2008):
Holding: Counsel ineffective failing to investigate mitigation including that Defendant's father was alcoholic who abused mother; counsel sought mitigation only from mother, not other family members, resulting in an incomplete and misleading life history.

Jones v. Allen, 2007 WL 1225393 (11th Cir. 2007):
Holding: Even though Defendant had Section 1983 action pending regarding lethal injection, stay of execution denied because Defendant filed his claim four years after State adopted lethal injection, and could have brought the claim in his prior federal habeas.

Grayson v. Allen, 81 Crim. L. Rep. 321 (M.D. Ala. 5/21/07):
Holding: Death row inmate, who lost his federal habeas and civil rights suit, is barred by laches from filing a Section 1983 action to challenge method of execution.

Thomas v. Allen, 2009 WL 1353722 (N.D. Ala. 2009):
Holding: Defendant was mentally retarded where had a trend of IQ scores between 65 and 70.

Holladay v. Campbell, 2006 WL 3147404 (N.D.Ala. 2006):
Holding: Defendant was mentally retarded under Alabama law where he had IQ under 70, adaptive skills deficits, and significant sub-average intellectual functioning before 18 years old.

U.S. v. Littrell, 2007 WL 867105 (C.D. Cal. 2007):
Holding: Even though Defendant strangled a fellow-inmate, where this was done at the direction of a prison gang of which he was a member, and other gang members were not charged with death or avoided death, gov't's decision to seek death against Defendant was arbitrary and capricious.

Morales v. Tilton, 2006 WL 3699493 (N.D. Cal. 2006):
Holding: California's lethal injection protocol violates 8th Amendment because inadequate assurance inmates are anesthetized.

U.S. v. Sablan, 2006 WL 3230597 (D.Colo. 2006):
Holding: Determination of whether Defendant was mentally retarded so as to preclude death penalty was for court to make prior to trial, and not an issue for jury.

Corcoran v. Buss, 2007 WL 1068102 (N.D. Ind. 2007):
Holding: Prosecutor unconstitutionally penalized Defendant's right to a jury trial when he sought the death penalty after Defendant refused to consent to the prosecutor's offer to forgo the death penalty in exchange for waiver of a jury trial.

U.S. v. Davis, 2009 WL 1117401 (D. Md. 2009):
Holding: Death penalty Defendant was mentally retarded where Defendant had consistently low scores over 25 years, and his IQ scores were low when adjusted for "Flynn effect."

Wiley v. Epps, 2009 WL 3747196 (N.D. Miss. 2009):
Holding: Where Defendant had IQ below 75, and deficits in academics, communication and self-direction all manifested before age 18, he was mentally retarded.

U.S. v. Taveras, 2006 WL 659304 (E.D.N.Y. 2006):
Holding: Evidence that Defendant sexually or physically abused minor stepdaughter was not admissible in penalty phase because the probative value of this evidence was

outweighed by risk of unfair prejudice, confusion and misleading jury. The evidence was offered to support the non-statutory aggravator of "future dangerousness."

U.S. v. Lawrence, 2006 WL 3337472 (S.D. Ohio 2006):
Holding: New penalty phase ordered because of inconsistent verdicts, where jury heard same mitigating evidence for two murder counts, but reached different results on each count.

Harbison v. Little, 82 Crim. L. Rep. 56, 2007 WL 2821230 (M.D. Tenn. 9/19/07):
Holding: Tennessee's lethal injection procedure violates 8th Amendment.

McGowen v. Thaler, 2010 WL 1257808 (S.D. Tex. 2010):
Holding: Instruction that did not allow jury to adequately consider sentence less than death violated 8th Amendment.

Wood v. Quarterman, 2008 WL 3876581 (W.D. Tex. 2008):
Holding: Standard for incompetence to be executed was too narrow where it only accounted for Defendant's awareness of his situation, but not his delusional thought process.

Ex parte Jerry Jerome Smith, 88 Crim. L. Rep. 170 (Ala. 10/22/10):
Holding: In capital trial, even though Judge extensively voir dired jurors about whether they could be fair after they sat with victim's mother and mother told them that Defendant should die, this was not enough to overcome a presumption of prejudice from being exposed to mother's comments.

State v. Gunches, 2010 Wl 2383603 (Ariz. 2010):
Holding: Murder was not especially heinous or depraved to support death penalty where murder happened in a few rapid shots, and there was no evidence Defendant continued to inflict violence after victim died.

State v. Speer, 2009 WL 2193820 (Ariz. 2009):
Holding: Even though Defendant in murder-for-hire scheme knew that Victim's child lived in apartment where murder was to occur, this did not by itself prove the grave-risk-of-death aggravator because State did not show that Defendant knew or believed child would be in zone of danger at time of murder.

State v. Gomez, 2005 WL 3289329 (Ariz. 2005):
Holding: Shackling at death penalty sentencing proceeding was not justified.

People v. Gay, 2008 WL 731995 (Cal. 3/20/08):
Holding: Trial court in penalty phase erred in excluding Defendant's evidence of "lingering doubt" of guilt of crime.

In re Hardy, 2007 WL 2128322 (Cal. 2007):
Holding: In death penalty case, counsel was ineffective in failing to investigate and present in penalty phase that a third-party did the actual stabbing of the victim, not Defendant. Jury may have reached a different result in penalty phase had they heard Defendant's involvement was less than the actual killer's.

People v. Superior Court, 2007 WL 1080385 (Cal. 2007):
Holding: In determining if Defendant is mentally retarded, court is not required to give primary weight to Full Scale IQ score, but can also consider that Verbal IQ score was in mentally retarded range, and other totality of evidence.

People v. Montour, 81 Crim. L. Rep. 134 (Colo. 4/23/07):
Holding: Death penalty statute which required that there be no jury trial on sentencing if Defendant pleaded guilty to capital offense violated Defendant's 6th Amendment right to have jury find all facts rendering Defendant eligible for death under *Ring v. Arizona*, 536 U.S. 584 (2002).

Cooke v. State, 85 Crim. L. Rep. 551, 2009 WL 2181678 (Del. 7/21/09):
Holding: Where defense attorney over client's objection pursued defense of "guilty but mentally ill" when client wanted an actual innocence defense, this deprived client of right to make fundamental decision about his defense; no showing of prejudice is required under *Cronic*.

State v. Norman, 85 Crim. L. Rep. 411 (Del. 6/16/09):
Holding: Where the aggravating circumstance in a death case is based on unadjudicated crimes in another State, Defendant is entitled to show he was NGRI at time of the other crime based on the law of the other State.

In re: Petition of State for a Writ of Mandamus, 2007 WL 521914 (Del. 2/16/07):
Holding: In death penalty case, defense can present defense of actual innocence and guilty but mentally ill.

Darling v. State, 2010 WL 2606029 (Fla. 2010):
Holding: Capital Collateral Regional Counsel was permitted to file 1983 action challenging lethal injection even though statute prohibited CCRC from civil litigation, since such a 1983 complaint was similar to a habeas petition and quasi-criminal in nature.

Caraballo v. State, 2010 WL 2517974 (Fla. 2010):
Holding: Competency expert's testimony in penalty phase violated the confidentiality afforded to the substance of Defendant's competency evaluation, and was prejudicial becaue it focused on malingering and untruthfulness.

Hayward v. State, 85 Crim. L. Rep. 712 (Fla. 8/27/09):
Holding: Where prosecutor's closing argument in death penalty case compared the Victim's sound life choices and accomplishments to the Defendant's bad choices that caused him to be where he is now, this was improper victim impact argument because

statute bars "characterizations and opinions about the crime, defendant and appropriate sentence as part of victim impact."

Hurst v. State, 2009 WL 2959204 (Fla. 2009):
Holding: Death penalty counsel ineffective in failing to present mitigating mental health evidence in penalty phase; this was not inconsistent with Defendant's guilt phase defense of innocence.

Maas v. Olive, 2008 WL 4346431 (Fla. 2008):
Holding: Statute which limited amounts postconviction counsel could be paid violated right to counsel if there could be no exceptions to it.

Offord v. State, 81 Crim. L. Rep. 351 (Fla. 5/24/07):
Holding: Death sentence imposed on schizophrenic Defendant who committed murder while hearing auditory hallucinations was disproportionate under state proportionality review.

O'Kelley v. State, 84 Crim. L. Rep. 184 (Ga. 11/3/08):
Holding: Defense can make an opening statement in penalty phase, even if the State does not.

People v. Nelson, 86 Crim. L. Rep. 401, 2009 WL 4843879 (Ill. 12/17/09):
Holding: Where trial court erroneously dismissed a juror during death penalty deliberations, the proper remedy was to impose life without parole, not order a new penalty phase trial.

Brown v. Com., 87 Crim. L. Rep. 651 (Ky. 6/17/10):
Holding: Where penalty phase jury chooses a non-death sentence, that operates as an acquittal of the death penalty for double jeopardy purposes.

Bowling v. Kentucky Dept. of Corrections, 86 Crim. L. Rep. 259 (Ky. 11/25/09):
Holding: Lethal injection protocol must be promulgated using Administrative Procedure Act.

Evans v. State, 80 Crim. L. Rep. 328 (Md. 12/19/06):
Holding: Maryland's lethal injection protocol invalid because it wasn't adopted in accord with Maryland Administrative Procedure Act.

Fulgham v. State, 2010 WL 42412616 (Miss. 2010):
Holding: Court abused its discretion in capital penalty phase in excluding expert mitigation testimony of licensed social worker who had done social history of Defendant; she was the only witness who based her findings on interviews with multiple witnesses.

State v. Mata, 82 Crim. L. Rep. 487 (Neb. 2/8/08):
Holding: Execution by electrocution presents substantial risk of unnecessary suffering such that it is unconstitutional.

Hidalgo v. State, 83 Crim. L. Rep. 357 (Nev. 5/29/08):
Holding: Death penalty aggravating circumstance of a "prior violent felony" is not satisfied by a prior conviction for "solicitation to commit murder," because this did not involve use or threat of violence.

Redeker v. 8th Judicial Dist. Court of Nevada ex rel. County of Clark, 2006 WL 301161 (Nev. 2006):
Holding: For purposes of determining an aggravator that the Defendant has a record of prior conviction for a felony involving the use or threat of violence, the court may look at the prior felony's statutory definition, the plea agreement, the transcript of the plea, and any factual findings made at the plea, but cannot examine police reports or complaint applications. Here, the Defendant's prior conviction for second-degree arson was found not to involve use or threat of violence.

State v. Jimenez, 81 Crim. L. Rep. 412 (N.J. 6/18/07):
Holding: If even one juror finds that a death penalty defendant is mentally retarded, defendant cannot be sentenced to death.

State v. Sanchez, 84 Crim. L. Rep. 263 (N.M. 11/24/08):
Holding: New Mexico law does not automatically allow prior conviction to be introduced at penalty phase; court must balance probativeness against unfair prejudice.

State v. Defoe, 87 Crim. L. Rep. 148 (N.C. 4/15/10):
Holding: Trial courts have inherent authority to declare a case non-capital as a sanction for State's failure to comply with rule that it timely move for a pretrial conference to seek the death penalty; but sanction should only be imposed if Defendant shows prejudice.

State v. Locklear, 68 S.E.2d 293 (N.C. 2009):
Holding: Capital Defendant claiming mental retardation is entitled to instruction sufficient to inform jury that Defendant will not be released if they find him mentally retarded.

State v. Tenace, 2006 WL 1359670 (Ohio 2006):
Holding: Even though there was nothing mitigating about robbing and killing an elderly victim in victim's home, death sentence was disproportionate where Defendant had had abusive childhood and sexual abuse.

Vasquez v. State, 87 Crim. L. Rep. 837 (S.C. 8/9/10):
Holding: Where Muslim Defendant was charged in capital case with murder and robbery, counsel was ineffective in failing to object to Prosecutor's argument that Defendant was a "domestic terrorist;" the remarks injected religious prejudice.

Rosemond v. Catoe, 2009 WL 1851377 (S.C. 2009):
Holding: Death penalty counsel ineffective in failing to present schizophrenia mitigating evidence in mistaken belief he could not present it because court found Defendant competent.

State v. Burkhart, 80 Crim. L. Rep. 408 (S.C. 1/8/07):
Holding: State cannot present evidence of "comforts" available to prisoners serving life sentences (such as television, meals, canteen, recreation) because this allows death to be imposed based on arbitrary factors.

State v. Bixby, 2006 WL 4457206 (S.C. 2007):
Holding: Defendant charged with "accessory before the fact" of murder was not eligible for death penalty.

Piper v. Weber, 85 Crim. L. Rep. 640 (S.D. 7/29/09):
Holding: Death penalty Defendant's waiver of right to have jury impose sentence was not knowing and voluntary where court failed to make clear that single juror of 12 can save their life.

State v. Jordan, 88 Crim. L. Rep. 64, 2010 WL 3668513 (Tenn. 9/22/10):
Holding: Even though witness sequestration rule was violated at capital sentencing proceeding, trial judge should not automatically exclude witness but should consider impact of proffered testimony and other relevant factors.

State v. Riels, 2007 WL 624349 (Tenn. 3/1/07):
Holding: Defendant's testimony in capital penalty phase expressing remorse about the murders did not "open the door" to Prosecutor being able to cross-examine him about details of the murders since that violated right against self-incrimination.

State v. Ott, 2010 WL 11138 (Utah 2010):
Holding: Death penalty counsel was ineffective in failing to object to inadmissible victim-impact testimony that portrayed Defendant as a terrorist who was beyond rehabilitation.

Burns v. Com., 86 Crim. L. Rep. 516 (Va. 1/15/10):
Holding: Where Defendant brought an *Atkins* challenge to claim he was mentally retarded and also claimed he was not competent to proceed in postconviction, the postconviction proceedings should be stayed until Defendant is competent.

Atkins v. Commonwealth, 79 Crim. L. Rep. 290 (Va. 6/8/06):
Holding: When a case is remanded for a jury trial on whether Defendant is mentally retarded, the new jury should not be told that the Defendant had previously been sentenced to death.

Ben-Yisrayl v. State, 2009 WL 2003964 (Ind. Ct. App. 2009):
Holding: Court lacked statutory authority to impose death penalty and an alternative term of year sentence.

Lay v. State, 82 Crim. L. Rep. 516 (Okla. Crim. App. 2/12/08):
Holding: Though not required by constitution, stand-by counsel should be appointed in all death penalty cases where defendants go pro se.

Stouffer v. State, 2007 WL 549246 (Okla. Crim. App. 2/22/07):
Holding: Petitioner cannot represent himself in capital PCR.

Coddington v. State, 79 Crim. L. Rep. 749 (Okla. Crim. App. 8/16/06):
Holding: Due process and right to reliable sentencing were violated where trial court in penalty phase refused to allow Defendant to play a videotaped deposition of a witness who was unavailable for trial. This is true even though the trial court allowed a transcript of the video to be admitted, because a transcript is not equivalent to a video. The prosecutor had been present at the deposition.

Coble v. State, 2010 WL 3984713 (Tex. Crim. App. 2010):
Holding: Psychiatrist's testimony that Defendant would be dangerous in future was not reliable where expert could not site a book or article that discussed factors he was relying on, was unaware of any scientific studies about accuracy of long-term predictions about future dangerousness, or of any error rates in such predictions.

Ex parte Hood, 2010 WL 625052 (Tex. Crim. App. 2010):
Holding: Various decisions by U.S. Supreme Court on *Penry* claim amounted to new law which justified allowing Petitioner to bring successive habeas petition.

Leal v. State, 2009 WL 3837309 (Tex. Crim. App. 2009):
Holding: Even though DNA testing would only be exculpatory as to aggravating circumstances of capital murder and not the murder itself, this was a sufficient showing to obtain postconviction DNA testing.

Ex parte Gonzales, 80 Crim. L. Rep. 178 (Tex. Crim. App. 10/18/06):
Holding: Where attorney in capital case knew that Defendant's sibling and mother had been abused by Defendant's father, attorney was ineffective in failing to ask Defendant if he was abused by father since this would have uncovered sexual abuse and post-traumatic stress disorder.

Detainer Law & Speedy Trial

State ex rel. Garcia v. Goldman, No. SC00833 (Mo. banc 7/16/10):
Even though Defendant left Missouri, where he lived openly in Chicago without trying to conceal his identity, and Missouri police made no serious attempt to find him for 10 years, his indictment must be dismissed for violating right to speed trial.
Facts: Defendant was suspected of a shooting in Missouri that occurred in 1998. Police were unable to locate Defendant at that time. In 2002, Defendant was indicted for the shooting. Police still could not locate him, and stopped looking for many years. In 2009, police entered Defendant's Social Security number into a computer and discovered that he was living in Chicago, where he was using his actual name, date of birth, Social Security number and was employed and paying taxes. Missouri then sought to try him.

He moved to dismiss on grounds that his speedy trial rights were violated. The trial court would not dismiss, and he filed a writ.
Holding: Defendant's 6th Amendment right to a speedy trial began when he was indicted in 2002. In considering whether speedy trial rights were violated, a court must balance the length of delay, reason for delay, Defendant's assertion of his right, and prejudice to Defendant. Delay of more than 8 months is presumptively prejudicial. As for reason for delay, the State did not show diligence in locating Defendant after 2002; this counts against the State. There was no evidence Defendant left Missouri to flee from his indictment or knew of his indictment or was trying to conceal his whereabouts. Defendant asserted his right to speedy trial in a timely manner after he was arrested in 2009. The real issue here is whether Defendant was prejudiced. Here, he was prejudiced because some witnesses have disappeared and the crime scene building has been torn down. Writ of mandamus granted.

State ex rel. McKee v. Riley, No. SC88867 (Mo. banc 12/21/07):
Defendant represented by counsel may file pro se motion for speedy trial to invoke his constitutional speedy trial rights.
Facts: Defendant, who was being represented by a Public Defender, filed various *pro se* motions seeking to invoke his statutory and constitutional rights to a speedy trial. The trial court did not act on the motions, and Defendant filed a *pro se* writ of mandamus seeking to dismiss charges for violation of his speedy trial rights.
Holding: The statutory right to a speedy trial, Section 545.780, cannot be invoked by a Defendant *pro se*, when the Defendant is represented by counsel, because the statute requires an announcement of "ready for trial" by the attorney. However, the constitutional right to a speedy trial under the 6th and 14th Amendments can be invoked by a Defendant *pro se*. This is because an incarcerated Defendant's interests in a speedy trial may outweigh defense counsel's needs, such as press of other business. However, on the record in this case, it is impossible to know if Defendant's speedy trial rights were violated. Defendant has been detained 18 months for a relatively minor crime, but it is not clear from the record why the case has been delayed. Case remanded to trial court to hold hearing on speedy trial motion and determine how much delay is attributable to crowded court dockets, the prosecution, or defendant, and prejudice. If Defendant's speedy trial rights were violated, trial court must dismiss charges.

State ex rel. Wolfrum and Beimdiek v. Wiesman, No. SC88294 (Mo. banc 5/22/07):
Even though Defendant demanded that he be brought to trial within 180 days under the UMDDL, where his Public Defender attorneys needed more time to prepare for trial, the trial court should have granted them a continuance beyond 180 days for good cause, over Defendant's objection.
Facts: On September 6, 2006, Defendant was charged with first degree murder. The State sought the death penalty. On September 25, 2006, Defendant filed a request for final disposition of indictments, information or complaints pursuant to the Uniform Mandatory Disposition of Detainers Law (UMDDL), Sections 217.450-217.520. Defendant requested counsel on December 21, 2006, and two Public Defenders were appointed. The Public Defenders requested additional time to prepare the case. However, Defendant objected to this and demanded to be tried within 180 days of

September 25, 2006. The court set the trial within 180 days. Public Defenders sought a writ of prohibition.
Holding: Section 217.460 provides: "Within [180] days after the receipt of the request … by the court and prosecuting attorney *or within such additional necessary or reasonable time as the court may grant, for good cause shown in open court, the offender or his counsel being present*, the indictment, information or complaint shall be brought to trial." The plain language makes it clear that a court can grant a continuance "for good cause shown." The statute does not require the defendant to personally consent to the continuance, but does require either the defendant or his attorneys be present. Here, Defendant's attorneys were present, and requested the continuance. They demonstrated "good cause" for the continuance based on their caseload, the incomplete discovery in the case, and the need to retain expert witnesses. Not granting a continuance would expose counsel to claims of ineffective assistance of counsel. Having invoked the right to counsel, Defendant ceded to counsel the authority to seek reasonable continuances to prepare. Writ made absolute.

Oden v. State, No. ED93734 (Mo. App. E.D. 8/31/10):
Even though postconviction Movant claimed he was not tried within 180 days under UMDDL, after J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009), this issue is not "jurisdictional" but is only trial error, and this could only be raised on a direct appeal, not in a postcoviction case.
Facts: Movant filed a 29.15 motion claiming he had not been brought to trial within 180 days as required by UMDDL, and that the trial court had no jurisdiction to try him.
Holding: Sec. 217.460 states that if a Defendant is not brought to trial within 180 days, "no court of this state shall have jurisidiction" over the case. However, *J.C.W. ex rel. Webb v. Wyciskalla* changed the way "jurisdiction" is analyzed. Here, there was personal and subject matter jurisdiction. After *Wyciskalla*, Movant's argument that there was no jurisdiction to try the case is untenable. The issue here is now one of trial error. Trial error must be raised on direct appeal, and not in a postconviction case. Movant did not raise this issue in his direct appeal; it cannot be raised in a 29.15 motion.

Lane v. State, No. SD30116 (Mo. App. S.D. 5/21/10):
Where Movant alleged that his guilty plea was rendered involuntary because his plea counsel was ineffective in misadvising him about his right to have his case dismissed under UMDDL, this properly stated a claim of ineffective counsel and Movant was entitled to an evidentiary hearing.
Facts: In 2007, Movant was charged with the crime in this case. Meanwhile, he was incarcerated in the DOC on another case. While incarcerated, he filed a request for disposition of his new charge within 180 days under the Uniform Mandatory Disposition of Detainers Law, Sec. 217.450. More than 180 days later, Movant pleaded guilty. Subsequently, he filed a Rule 24.035 motion alleging his plea was involuntary because counsel had been ineffective in misadvising Movant about his UMDDL motion. The motion court denied the claim without a hearing.
Holding: The motion court relied on cases holding that defendants waive a claim under UMDDL by pleading guilty. However, Movant's claim here is ineffective assistance of counsel, which is a different issue. The cases relied on by the motion court did not

address ineffective assistance of counsel. Movant's claim is that his plea was rendered unknowing and involuntary because his counsel misinformed him of the effect of his guilty plea and his rights under UMDDL. Movant has alleged facts which would have shown he was entitled to have his case dismissed under UMDDL but for counsel's misadvice. On the other hand, it is possible Movant and counsel had some strategy reason for not pursuing the UMDDL claim. This is impossible to determine without a hearing. Movant has pleaded facts warranting an evidentiary hearing.

Schmidt v. State, No. SD29663 (Mo. App. S.D. 9/10/09):
A guilty plea waives claim regarding the 180-day time limit for bringing a person to trial under UMMDL, Sec. 217.460.
Facts: Movant filed a request under the Uniform Mandatory Disposition of Detainer Law (UMDDL), Sec. 217.460, for final disposition of a detainer lodged against him. Movant was not brought to trial within 180 days, and ultimately pleaded guilty. He then filed a 24.035 motion claiming the court lacked jurisdiction to convict and sentence him.
Holding: Sec. 217.460 states that if an information is not brought to trial within 180 days of a request for disposition of detainer, "no court shall have jurisdiction" of the case. However, in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), the Supreme Court held there were only two types of jurisdiction -- subject matter and personal; neither is involved in here. A number of cases before *J.C.W.* had held that noncompliance with Sec. 217.460 was "jurisdictional," but after *J.C.W.*, failure to comply with the statute is merely legal error, which can be waived if not asserted. A guilty plea waives all nonjurisdictional errors, including statutory guarantees. Thus, Movant waived his UMDDL claim when he pleaded guilty.

State v. Woods, No. 28697 (Mo. App., S.D. 4/24/08):
Even though the circuit court received a document indicating there was a detainer on Defendant, where the court did not receive a request for disposition of detainer, the 180-day time limit for disposition did not begin to run, even though the prosecutor had received a request for disposition.
Facts: On Dec. 29, 2005, Greene County charged Defendant with tampering, and issued a warrant for his arrest. Sometime in 2006, the prosecutor learned Defendant was incarcerated in Oklahoma and requested a detainer be put on him. On Dec. 14, 2006, the prosecutor received a pro se document from Defendant entitled "Request for Final Disposition," and requesting disposition of the charge within 180 days. The circuit court did not receive a copy of this document. Instead, the court received a document from the Oklahoma DOC entitled "Receipt for prisoner/documents/detainer" which indicated a detainer was placed on Defendant and the Oklahoma DOC would notify the court prior to Defendant's release. This document did not include any request for disposition of detainer. On March 6, 2007, both the prosecutor and court received IAD Forms requesting disposition of detainer. On August 7, 2007, Defendant moved to dismiss by claiming the 180-day time limit began on Dec. 14, 2006, and had expired. The trial court dismissed, and the State appealed.
Holding: The time did not begin to run on Dec. 14. Sec. 217.490.1 requires that a Defendant notify both the prosecutor and court that he is seeking final disposition of detainer. The 180-day time limit does not begin to run until both the prosecutor and court

get notice. The Dec. 14 request was only received by the prosecutor. Defendant did not comply with the essential requirements of the IAD.

Greene v. State, No. WD71153 (Mo. App. W.D. 12/28/10):
Holding: Entry of guilty plea waives any claim that trial court lacked "jurisdiction" to accept plea in violation of Uniform Mandatory Disposition of Detainers Law (UMDDL), since this issue is not "jurisdictional" but only trial error; cases to contrary are no longer valid in light of *Webb ex rel. J.C. W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009).

*** Bloate v. U.S., 86 Crim. L. Rep. 659, ___ U.S. ___ (U.S. 3/8/10):**
Holding: Delays to give defendants time to prepare pretrial motions are not automatically excludable from the federal Speedy Trial Act's 70-day time limit; only the time between a motion's filing and its resolution is automatically excludable.

*** Vermont v. Brillon, 84 Crim. L. Rep. 623, ___ U.S. ___ (3/9/09):**
Holding: Even though Defendant went through six Public Defenders, which caused his case to be delayed, delays caused by appointed counsel are generally attributable to the defense for speedy trial purposes; however, delay caused by a "systemic breakdown" in a Public Defender system can be charged to the State.

*** Zedner v. U.S., ___ U.S. ___, 126 S.Ct. 1976 (2006):**
Holding: Defendant may not waive federal Speedy Trial Act "for all time," and could challenge lack of speedy trial on appeal even though he signed waiver, since Act's purpose is to protect both Defendant's right to speedy trial, and public's interest in speedy trial.

U.S. v. Ray, 85 Crim. L. Rep. 671, 2616247 (2d Cir. 8/27/09):
Holding: 6th Amendment's speedy trial clause does not prohibit delays in sentencing, but 5th Amendment's due process clause does; Defendant who had 15-year delay between her conviction and sentencing should have her sentence vacated.

U.S. v. Battis, 86 Crim. L. Rep. 354, 2009 WL 4755684 (3d Cir. 12/14/09):
Holding: Where federal prosecutors allowed State court to try Defendant first, that time counted against the federal gov't for purposes of 6th Amendment speedy trial analysis regarding the federal trial; delay of 45 months in bringing defendant to federal trial was prejudicial.

U.S. v. Henry, 2008 WL 3843982 (4th Cir. 2008):
Holding: Even though trial was continued for 103 days because plea negotiations were unsuccessful, this period of time was not excludable under Speedy Trial Act.

U.S. v. Tinklenberg, 85 Crim. L. Rep. 672 (6th Cir. 9/3/09):
Holding: Period of time between the filing and disposition of a pretrial motion is excludable under the Speedy Trial Act only if it actually causes a delay in the start of trial. (Other circuits have ruled that a pretrial motion stops the clock regardless of whether it affects the start of trial.)

U.S. v. Mendoza, 82 Crim. L. Rep. 610 (9th Cir. 3/3/08):
Holding: Where gov't knew Defendant was overseas but never actively tried to apprehend him or inform him of the indictment, a 10-year delay between indictment and trial violated Defendant's 6th Amendment right to speedy trial.

U.S. v. Seltzer, 86 Crim. L. Rep. 616 (10th Cir. 2/17/10):
Holding: Even though Defendant was in custody elsewhere, where he demanded a speedy trial in another jurisdiction where he was also charged, the 6th Amendment speedy trial right requires prosecutor in the jurisdiction where Defendant wants to be tried to "affirmatively justify" delaying the trial.

U.S. v. Jones, 87 Crim. L. Rep. 121 (11th Cir. 4/2/10):
Holding: A pretrial motion that requests a hearing does not necessarily toll the Federal Speedy Trial Act clock for the entire time the judge is considering the motion where the judge disposes of the motion without a hearing.

U.S. v. Ingram, 2006 WL 1071632 (11th Cir. 2006):
Holding: 6th Amendment right to speedy trial violated by two-year delay between indictment and jury trial; there was also a pre-indictment delay of another 2-years where police failed to diligently execute the arrest warrant.

U.S. v. Ospina, 2007 WL 1286377 (S.D. Fla. 2007):
Holding: Eight-year delay between Defendant's indictment and arrest violated 6th Amendment right to speedy trial, where delay was caused by gov't's action in deporting Defendant. No particularized showing of prejudice was necessary.

U.S. v. Bundu, 2007 WL 925688 (D. Mass. 2007):
Holding: Defendant's rights under Speedy Trial Act violated where Defendant was charged with parental kidnapping and had been imprisoned for a month and home confined for a year, and Defendant and other parent had resolved their custody dispute and Defendant repeatedly requested speedy trial.

U.S. v. Richotte, 2009 WL 983189 (D.S.D. 2009):
Holding: Defendant did not waive anti-shuttling provisions of Interstate Agreement on Detainers where he was returned to State custody because he was ordered to do so.

U.S. v. Hernandez-Amparan, 2009 WL 523109 (W.D. Tex. 2009):
Holding: Gov't delay of three months between court order committing Defendant for evaluation and time Defendant was transported to hospital for evaluation was counted against Gov't under Speedy Trial Act and warranted dismissal.

Harris v. State, 83 Crim. L. Rep. 784 (Del. 8/28/08):
Holding: Delay of six years between conviction and sentencing violated 6th Amendment right to "speedy sentencing."

Dabney v. State, 83 Crim. L. Rep. 44 (Del. 3/10/08):
Holding: State's inability to get a DNA test done in a timely fashion, which resulted in Defendant spending one year in pretrial detention, violated Defendant's right to speedy trial.

State v. Gleaton, 88 Crim. L. Rep. 194 (Ga. 11/8/10):
Holding: Where the State delayed four years in bringing Defendant to trial and during this time the apartment complex where the charged murder occurred was torn down, Defendant was denied his right to a speedy trial and was prejudiced because counsel could no longer visit the crime scene to take forensic evidence or locate witnesses. The court rejected State's argument that the defense should have investigated before the complex was destroyed; rather, it appeared that the State had delayed the case because their witnesses had recanted.

State v. Wallace, 2009 WL 3682575 (La. 2009):
Holding: 48-hour time limit to determine probable cause for Defendant's arrest began at time of arrest, rather than at time the magistrate was presented with relevant documents, and magistrate's later finding of probable cause at the 72-hour hearing did not cure the failure to find probable cause within 48 hours; remedy was release of Defendant on own recognizance.

Commonwealth v. Rodgers, 2007 WL 765457 (Mass. 2007):
Holding: Where, after Defendant had filed a motion to dismiss counsel, Defendant's counsel consented to continuances, Defendant did not acquiesce in the resulting delay. Defendant's motion to dismiss counsel suspended counsel's authority to agree to continuances, even though the motion had not been ruled on.

People v. Price, 86 Crim. L. Rep. 625 (N.Y. 2/11/10):
Holding: Even though speedy trial law excludes delay caused by "exceptional circumstances," this provision does not allow the State to delay prosecution while it awaits the outcome of an appeal in an unrelated case that presents an issue relevant to the pending charges.

State v. Defoe, 87 Crim. L. Rep. 148 (N.C. 4/15/10):
Holding: Trial courts have inherent authority to declare a case non-capital as a sanction for State's failure to comply with rule that it timely move for a pretrial conference to seek the death penalty; but sanction should only be imposed if Defendant shows prejudice.

State v. Larson, 2009 WL 4686555 (S.D. 2009):
Holding: Even though statute required only that persons be brought before magistrate without unnecessary delay, court holds that probable cause hearing must take place within 48 hours of arrest, and an 18 day delay in bringing Defendant before magistrate was unreasonable and may require dismissal if Defendant was prejudiced such that he lost opportunity for fair trial.

State v. Brillon, 83 Crim. L. Rep. 8, 2008 WL 681425 (Vt. 3/14/08):
Holding: Delays attributable to Public Defender's inability to move case to trial are attributable to the State in deciding whether Defendant was denied constitutional right to speedy trial; the Public Defender "is a part of the criminal justice system and an arm of the State. When, as in this case, a defendant presses for, but is denied, a speedy trial because of the inaction of assigned counsel or a breakdown in the public defender system, the failure of the system to provide the defendant a constitutionally guaranteed speedy trial is attributable to the prosecution, and not defendant." Convictions vacated and charges dismissed.

People v. Mirenda, 2009 WL 1664836 (Cal. App. 2009):
Holding: Even though Defendant changed his name and State was unable to locate Defendant, delay of 25 years between issuance of complaint and arraignment violated due process and speedy trial rights, where State made no effort to prosecute during delay.

Smith v. Superior Court, 2009 WL 3261674 (Cal. App. 2009), state review granted (12/23/09):
Holding: Even though a jointly charged co-defendant requested a speedy trial delay, this did not apply to Defendant under the State's 10-day speedy trial grace period.

People v. Litmon, 2008 WL 1813122 (Cal. App. 2008):
Holding: Delay in trying Defendant on civil sex predator proceedings violated due process and speedy trial, where unavailability of witnesses was fault of State.

Monroe v. State, 2007 WL 253529 (Fla. Ct. App. 2007):
Holding: Waivers of the Interstate Agreement on Detainers must be made before the allotted 180 days has expired, and are not effective if made afterwards; thus, Defendant can challenge his waiver which was made after the 180 days.

People v. Herrin, 2008 WL 4426886 (Ill. Ct. App. 2008):
Holding: Where probation officer (rather than prosecutor) filed a petition to revoke probation, this did not toll the original term of probation because only the prosecutor has authority to file a petition to revoke.

Pelley v. State, 2008 WL 928339 (Ind. Ct. App. 2008):
Holding: Where the State had taken an interlocutory appeal of trial judge's granting a third-party counselor's motion to quash subpoena, this delay was attributable to the State for purposes of the speedy trial statute.

State v. Baptiste, 2008 WL 4489696 (La. Ct. App. 2008):
Holding: Even though Defendant had failed to appear for a pretrial conference, where he was later incarcerated in another county for a probation violation, the limitations period in the original county began to run on the date of incarceration for speedy trial purposes, even though the State did not immediately know Defendant was incarcerated in the other county.

State v. Griffin, 2009 WL 304455 (Minn. Ct. App. 2009):
Holding: Even though Defendant was not in custody, where she was required to be accessible by telephone for trial within two hours, an 8 month delay in bringing her to trial violated speedy trial rights.

People v. Price, 84 Crim. L. Rep. 612 (N.Y. App. Div. 2/10/09):
Holding: Where the State waited to try Defendant until an appeal in a similar but unrelated case was resolved, this time counted against the State because the State cannot wait to try Defendant to hope for more favorable case law.

People v. Persuad, 2008 WL 4239015 (N.Y. City Crim. Ct. 2008):
Holding: Two and half year delay between arraignment and trial for DWI offense violated 6th Amendment speedy trial rights warranting dismissal, since majority of delay was caused by the court; Defendant's license had been suspended during this entire time, even though he would have faced only 90 day suspension if convicted.

Com. v. Burkett, 2010 WL 3785248 (Pa. Super. 2010):
Holding: Defendant/Movant has due process right to have his postconviction motion decided speedily.

Discovery

State ex rel. Stinson v. House, No. SC90364 (Mo. banc 7/16/10):
Holding: Even though Plaintiffs were claiming that Defendant-parents had negligently entrusted their car to their Son who had a history of alcohol and drug addiction, Son's medical and psychological records about his addiction were protected by doctor-patient privilege under Sec. 491.060 and not discoverable. Son had not put his medical or psychological condition at issue, and even though the records may be "relevant" to Plaintiffs' claim, the very nature of a privilege is that otherwise relevant evidence is removed from being discoverable.

State ex rel. Proctor v. Messina, No. SC90610 (Mo. banc 8/31/10):
Holding: Under HIPAA, trial court cannot issue order to plaintiff's non-party treating doctors that they can engage in *ex parte* communications with defendant's counsel without express authorization by plaintiff; discovery must occur in accordance with Rules 56 to 61.

Merriweather v. State, No. SC89846 (Mo. banc 9/1/09):
Where State failed to exercise due diligence to discover and disclose before trial that key witness had prior criminal convictions and pending charge, this violated Rule 25.03 and new trial was warranted under Rule 29.15.
Facts: Defendant was charged with a sex offense, in which the only witnesses were alleged Victim and Defendant. There was no physical evidence. Victim claimed she was sexually assaulted. Defendant claimed they consensually exchanged sex for drugs. Before trial, Defendant requested any prior criminal convictions of Victim under Rule

25.03. The State claimed there were none. After trial, Defendant filed a 29.15 motion alleging Victim had three prior Illinois convictions and a pending charge in St. Louis County at the time of trial.

Holding: This is not a *Brady* case because *Brady* does not impose an affirmative duty on prosecutors to discovery information they do not possess. However, Rule 25.03 does impose an affirmative duty to find even evidence in the possession of "other governmental personnel." Here, Defendant before trial made a request under 25.03 for discovery. The issue is whether the State exercised "due diligence" in seeking to discover and disclose that information. Here, the State's investigator did not remember if he ran the Victim's history through REJIS but he thought he did because they "run everybody." Further, the State had access to MULES and NCIC, but only claimed to run the check through REJIS. In the 29.15 case, the State found the convictions and pending charge. The State did not exercise due diligence before trial to find this. Further, the Victim's credibility was critical here, since Victim and Defendant were only witnesses, so Defendant was prejudiced. Further, even though the pending charge may not have been admissible at trial, Defendant was entitled to discovery of it to see if Victim was offered any deals for her testimony. New trial ordered.

State ex rel. Rogers v. Cohen, No. SC88778 (Mo. banc 8/26/08):

Where grand jury subpoenaed an attorney's transcript of a witness interview, the subpoena was quashed because the interview was work product and there was no showing of substantial need or undue hardship.

Facts: Attorney represented a client who was being investigated for the disappearance of his child. In connection with this case, the attorney interviewed another child of client. A grand jury subpoenaed the transcript of that interview. Attorney sought writ to quash subpoena.

Holding: A transcript of a recorded interview of a person taken in anticipation of litigation is not discoverable by a grand jury subpoena absent substantial need and undue hardship. The transcript is protected by the work-product doctrine. The Criminal Rules of Procedure do not apply to grand jury proceedings, so Rules 25.01 through 25.16 do not apply. Also, the Civil Rules do not apply, since a grand jury proceeding may result in criminal charges, not a civil action. Here, the grand jury has not shown substantial need or undue hardship to justify obtaining the attorney's work-product (transcript), since the grand jury could subpoena the other child to testify. Writ of prohibition made absolute.

Editor's Note by Greg Mermelstein: Footnote 2 discusses different discovery outcomes under the criminal and civil rules. Rule 25 provides more limited protection for work product than the civil rules. Rule 25 only prohibits disclosure of legal research, records, reports or memos of counsel to the extent that they contain the "opinions, theories or conclusions of counsel" or their staff. Work-product in criminal cases is confined to "opinions, theories, conclusions and communications between defendant and his attorney."

State v. Walkup, No. SC87837 (Mo. banc 5/1/07):

(1) Defendant was not required to give notice that he intended to use "diminished capacity" defense under Section 552.015.2(8), because this is not a defense of mental disease or defect excluding responsibility (NGRI) under Section 552.030; and (2)

Defendant timely disclosed that he intended to call a psychologist where defense had orally told the State that they intended to use the psychologist, and gave the State a copy of the psychologist's report when the defense received it.

Facts: Defendant was charged and convicted of first degree murder. The trial court precluded Defendant from presenting a psychologist who would testify that Defendant had bipolar disorder which would impact his "decision-making." The State claimed that Defendant had not given notice of an intent to use a defense of mental disease or defect under Section 552.030. The trial court found that Defendant had not timely disclosed the psychologist.

Holding: (1) Section 552.015.2(8) allows Defendant to present evidence of mental disease or defect "[t]o prove that [he] did or did not have a state of mind which is an element of the offense[.]" This is known as "diminished capacity." Section 552.015.2(2) allows evidence of mental disease or defect "[t]o determine whether the defendant is criminally responsible as provided in Section 552.030." Section 552.030 requires the Defendant to plead "not guilty by reason of mental disease or defect excluding responsibility" (NGRI) or notify the State in writing of the intent to use this defense. Although NGRI and "diminished capacity" are often confused, they are separate doctrines. NGRI is an affirmative defense which requires the defendant to carry the burden of proving he has a mental disease or defect excluding responsibility. "Diminished capacity" is a negative or negating defense designed to show the defendant did not have the culpable mental state for the crime, but the defendant has no burden to present evidence or persuade. NGRI absolves a defendant of criminal responsibility. Diminished capacity does not absolve a defendant of criminal responsibility, but makes him responsible only for the crime whose elements the State can prove. A defendant is required to give advance notice under Section 552.030 of an affirmative defense of NGRI, but a defendant is not required to give notice of a defense of "diminished capacity." Here, Defendant sought to present his psychologist to negate the element of deliberation for first degree murder. This would not have absolved Defendant of responsibility, but would have made him guilty of second degree murder. This was a "diminished capacity" defense, for which Defendant was not required to give advance notice. (2) As a matter of discovery, Rule 25.05(A) requires the defendant – upon written request by the State -- to disclose expert reports, mental exam results, and "[i]f the defendant intends to rely on the defense of mental disease or defect excluding responsibility, disclosure of such intent shall be in the form of a written statement." The defense had orally told the State about the psychologist about four months before trial, and the defense gave the State a copy of the psychologist's report a week before trial, when the defense received it. While the timing and method of disclosure may not have been "ideal," the defense complied with its disclosure obligations.

State ex rel. Pooker v. Kramer, No. SC87878 (Mo. banc 3/20/07):

Holding: Discovery request to defense doctor which requested "all" documents related to fees for the past 5 years and "all" communications between law firms and doctor for past 5 years was overly broad and intrusive, and trial court abused discretion in refusing to quash subpoena without considering less-intrusive alternatives.

State ex rel. Sanders v. Crane, No. SD30877 (Mo. App. S.D. 11/9/10):
Defendant was entitled to obtain State's evidence for fingerprint testing.
Facts: Defendant was charged with drug possession. Officer claimed to have seen Defendant drop a bag with drugs in it. Defendant denied he dropped bag. Defendant sought to obtain the bag for a fingerprint test. Defendant claimed that if his prints were not on the bag or another's person's prints were on the bag, this would be exculpatory. The State opposed providing the bag, and the trial court agreed. Defendant sought a writ of mandamus.
Holding: Due process entitles Defendant to examine any exculpatory evidence held by the State. Whether the bag will prove exculpatory is unknown. However, denying him access to the bag will impede an appeal, because Defendant will be required to make an offer of proof at trial if the trial court does not allow Defendant to admit this evidence. Defendant cannot make an offer of proof without showing what the results are of the testing of the bag. Appellate review could not occur without an offer of proof. Defendant is entitled to discovery and examination of the bag.

State v. Hopper, No. SD29638 (Mo. App. S.D. 2/19/10):
(1) Even though Defendant failed to disclose his alibi defense until 10 days before trial, where Defendant had told police he wasn't present at crime scene, the sanction of excluding Defendant's alibi evidence was too drastic; (2) even though Defendant failed to appear before trial and escaped from jail before trial, the "escape rule" does not apply to the appeal because the alleged trial error occurred after Defendant was back in custody.
Facts: Defendant was charged with a rape at his girlfriend's house which allegedly occurred on July 5, 2004. The rape was not reported until 2005. When Defendant was arrested in 2005, he told police he had been at his father's house that day, not his girlfriend's. In 2006, the State filed a discovery request under Rule 25.05 asking for notice to rely on alibi. Defendant's counsel did not respond. Defendant then went through several different counsel, and the final counsel filed notice of alibi three years later and 10 days before trial. The State requested that the alibi evidence be excluded for a discovery violation, and the trial court excluded it.
Holding: Defendant should have provided notice of alibi three years earlier. However, the exclusion of alibi evidence as a sanction for a discovery violation is a drastic remedy, because it deprives a defendant of a defense. Here, there were less drastic alternatives available. Defense counsel informed the State of the alibi evidence 10 days before trial. At a minimum, the State could have requested a recess to interview the alibi witnesses. Defendant was prejudiced by exclusion of the alibi evidence because, if believed, Defendant was not at the scene of the crime and could not have committed the offense.

State v. Bescher, No. 28384 (Mo. App., S.D. 3/13/08):
Holding: (1) Where Defendant claimed State had failed to reveal examination results of a State's expert under Rule 25.03, but on appeal, the Defendant failed to include any motion in the legal file on appeal showing that a request for disclosure was made under Rule 25.03, the record on appeal was insufficient to review Defendant's claim; (2) prosecutor may not ask Defendant if the other trial witnesses were "lying," but error was harmless in this case.

State v. Rushing, No. SD27749 (Mo. App., S.D. 9/10/07):
Trial court erred in not allowing Defendant to re-depose child sex victim when she revealed new allegations of sexual abuse shortly before trial, which would be the subject of the trial.
Facts: Defendant was charged with sex with a minor victim. The victim had claimed the acts took place on March 16. Defendant deposed the victim before trial. At trial, Defendant presented various witnesses who indicated that sexual acts could not have taken place that day. The trial resulted in a hung jury. When the trial was rescheduled, the victim claimed for the first time that the acts took place on March 14. Defendant sought to conduct a second deposition of victim. The prosecutor moved to quash, and the trial court sustained the motion. At trial, victim testified the events took place on March 14. Defendant was convicted.
Holding: Protective orders are subject to the requirement that they only be granted for "good cause shown." Rule 56.01(c). The State had the burden to show good cause, and did not do so here. The State asserted there was no reason for the second deposition because victim had already been questioned by Defendant, but this ignores that Defendant never questioned her about the events of March 14, because she did not reveal these events until six days before the second trial. It was fundamentally unfair that Defendant was forced to present a defense without being able to marshal alibi evidence concerning the events of March 14, and effectively cross-examine the victim.

Editor's note by Greg Mermelstein: The opinion notes that during the appeal, appellate defense counsel presented a letter and statement from victim recanting her trial testimony, but then after oral argument, the prosecutor alleged victim had recanted her recantation.

State v. Gray, No. 27700-27702 (Mo. App., S.D. 7/19/07):
Where State did not endorse a DNA expert until one week before trial, and court did not rule on the motion to endorse until day of trial, this was untimely and violated Defendant's right to defend, since Defendant did not have reasonable time to secure his own expert in response.
Facts: Defendant was charged with various child sex offenses. One week before trial, the State filed a motion to endorse a DNA expert who would testify about various DNA evidence linking Defendant to the charged crimes. Defendant objected because he had previously sought discovery of any experts. Defendant sought a continuance. The prosecutor admitted he didn't know if he had earlier disclosed the DNA report at issue. On the day of trial, the trial court sustained the motion to endorse and allowed the expert to testify, and denied the motion for continuance.
Holding: The DNA expert's testimony was prejudicial because it linked Defendant to physical evidence in the charged crimes. Even though the State's late endorsement did not arise from "bad motives" on the part of the State, Defendant was nevertheless prejudiced because he did not have time in which he could reasonably be expected to secure services of an expert to verify or contradict the DNA testing and evidence the State presented at trial. This was fundamentally unfair and denied Defendant his right to defend.

State ex rel. Tuller v. Crawford, No. 28050 (Mo. App., S.D. 1/25/07):
The federal Adam Walsh Child Protection Act of 2006 which prohibits providing the defense with copies of child pornography, provided the material is made available to the defense by other means, does not apply in Missouri state court proceedings.
Facts: Defendant was charged with promoting child pornography, Section 573.025. Defendant filed a motion to have the State provide the defense with a true ENCASE copy of Defendant's hard drive, and other computer-related materials, so that the materials could be examined by Defendant's experts. The State claimed the defense was prohibited from receiving copies of such materials by the federal Adam Walsh Child Protection Act of 2006. The trial court applied the federal law, and ordered that the material not be copied and given to the defense, but that the defense could examine it at the State's facilities. Defendant filed for a writ of mandamus and/or prohibition to obtain copies of the materials.
Holding: Section 504 of the Adam Walsh Child Protection Act of 2006 provides that "[n]othwithstanding Rule 16 of [the federal rules of procedure], a court shall deny" a request to copy child pornography "so long as the Government makes the property or material reasonably available to the defendant." It does not appear that Congress intended to make Section 504 applicable to state court proceedings. Rather, Section 504 is a procedural provision applicable to prosecutions in federal court. This is supported by Section 504's reference to federal Rule 16, and the fact that the statute is contained in the portion of the U.S. Code dedicated to "Criminal Procedure." Federal court procedures do not apply in Missouri state court. The trial court abused its discretion in holding that Section 504 prohibited it from ordering copying of the materials. Writ of prohibition granted.

State v. Moad, No. WD70527 (Mo. App. W.D. 9/29/09):
Where trial court excluded evidence as a discovery sanction and not because the evidence was illegally obtained, the State could not appeal the trial court's ruling as an interlocutory appeal (but could seek a writ of prohibition).
Facts: Defendant was charged with vehicular manslaughter resulting from the death of a person in a car. Defendant claimed he was not the driver of the car, but was only a passenger. The car was owned by the victim's family. Before Defendant could conduct an independent examination of the car, the Highway Patrol released the car to the victim's family. The Patrol claimed this was done pursuant to a Patrol policy. Defendant sought discovery of the policy, and despite a court order to produce it, the State never produced it. The trial court then excluded all evidence from the car. The State appealed.
Holding: The question is whether the State has a right to appeal here. Sec. 574.200.1(3) permits an interlocutory appeal by the State where an order suppresses evidence. There is a difference between "suppression" and "exclusion," however. Suppression is a term used when the evidence is not objectionable as violating any rule of evidence, but the evidence has been illegally obtained. Suppression of evidence is linked to the reasons in Sec. 542.296. Here, there was never an argument that the evidence from the car was illegally obtained. Hence, the order here is one of exclusion, not suppression. It is akin to a discovery violation sanction. This is not appealable by interlocutory appeal, but the State may challenge it via writ of prohibition. Appeal dismissed.

*** Mohawk Industries Inc. v. Carpenter, 86 Crim. L. Rep. 283, ___ U.S. ___ (U.S. 12/8/09):**
Holding: Even though a disclosure order is adverse to attorney-client privilege, it is not immediately appealable under the collateral-order doctrine, because the alleged harm can be remedied upon appeal from a verdict, in that an appellate court can order a new trial in which the protected material and its fruits are excluded.

U.S. v. Thompson, 85 Crim. L. Rep. 132 (D.C. Cir. 4/17/09):
Holding: Where company disclosed confidential internal investigation information to Gov't to avoid being indicted, that information was discoverable by company employee who was indicted by Gov't.

McKithen v. Brown, 80 Crim. L. Rep. 652 (2d Cir. 3/13/07):
Holding: Prisoner seeking DNA testing to prove innocence may get the evidence via a Section 1983 action instead of habeas, since such action would not necessarily render the conviction invalid.

Grier v. Klem, 86 Crim. L. Rep. 480 (3d Cir. 12/16/09):
Holding: A Sec. 1983 action regarding wrongful denial of DNA testing does not violate *Heck v. Humphrey* (holding that collateral attacks on convictions must be pursued in habeas corpus), because the action does not necessarily collaterally attack the conviction.

U.S. v. Wecht, 83 Crim. L. Rep. 707, 2008 WL 2940375 (3d Cir. 8/1/08):
Holding: News media and Defendant have 1st Amendment right to names of jurors before they are impaneled.

Ferensic v. Birkett, 2007 WL 2471276 (6th Cir. 2007):
Holding: Exclusion of defense expert for violation of production order was too great a sanction, and violated due process.

U.S. v. Shrake, 82 Crim. L. Rep. 542, 2008 WL 313190 (7th Cir. 2/6/08):
Holding: The Adam Walsh Child Protection Act, 18 U.S.C. 3509(m), regarding non-copying of child pornography, is constitutional where defense expert is allowed to examine hard drive at gov't facility, but where the Prosecutor copied the hard drive for a private prosecution expert, then the defense must receive it also under *Wardius v. Oregon*, 412 U.S. 470 (1973).

Afremov v. Computer Forensic Services, 87 Crim. L. Rep. 752 (8th Cir. 7/29/10):
Holding: Trial judge had no "ancillary jurisdiction" in criminal case to order Defendant to pay the consulting fees of a forensic firm whose records he subpoenaed for case; even though forensic firm spent $600,000 to comply with the subpoena, it could have complied by simply giving Defendant access to the hardware containing the data, and the subpoena here really was, in effect, an alleged agreement to perform consulting services; the consulting firm's proper remedy was to bring a breach of contract claim.

U.S. v. Krane, 88 Crim. L. Rep. 159 (9th Cir. 10/29/10):
Holding: Party could immediately appeal an order directed to its former attorney to disclose privileged materials, because directing a third-party to disclose information is different than the immediate appeal procedure precluded by *Mohawk Indus. Inc. v. Carpenter*, ___ U.S. ___ (2009) under the collateral order doctrine.

U.S. v. Stever, 2010 WL 1757926 (9th Cir. 2010):
Holding: Defendant charged with growing marijuana was entitled to discovery of evidence about Mexican drug trafficking organizations because this was relevant to his defense; and court denied him 6th Amendment right to present defense when he sought to offer this as alternative explanation for the growing operation.

U.S. v. Stever, 87 Crim. L. Rep. 172 (9th Cir. 5/4/10):
Holding: Ct. denied 6th Amendment right to present defense by denying discovery of gov't information regarding marijuana-growing activities of Mexican drug traffickers.

U.S. v. Chapman, 2008 WL 1946744 (9th Cir. 2008):
Holding: Where prosecutor recklessly violated discovery obligations and made misrepresentations to court, dismissal of indictment was proper; prosecutor failed to keep a log indicating disclosed materials and falsely repeatedly told court he had complied with *Brady* and *Giglio*.

Barajas v. Wise, 81 Crim. L. Rep. 8 (9th Cir. 3/23/07) vacated 82 Crim. L. Rep. 114 (9th Cir. 10/22/07):
Holding: Habeas relief granted where gov't failed to reveal to Defendant the specific current and prior addresses of an informant-witness, so Defendant could prepare for trial.

U.S. v. Robinson, 86 Crim. L. Rep. 134 (10th Cir. 2009):
Holding: Where one witness working as a confidential informant was the sole eyewitness to an alleged gun sale by Defendant, Defendant was denied due process when trial court denied Defendant discovery of witness' mental health records, because records contained evidence that shortly before trial witness had been involuntarily committed to mental hospital, had used illegal drugs and prescription drugs -- all of which may have been used to impeach witness' ability to accurately observe and remember events.

U.S. v. Nacchio, 2008 WL 697382 (10th Cir. 2008):
Holding: Federal rule requiring Defendant provide a written summary of expert's opinions does not require extensive discussion of expert's methodology.

U.S. v. Velarde, 81 Crim. L. Rep. 233 (10th Cir. 5/1/07):
Holding: Defendant in child sex abuse case is entitled to subpoena school officials to show victim made prior false claims of sex abuse against others, and to prove *Brady* violation for prosecution's failure to reveal this.

Osborne v. District Attorney's Office for the Third Judicial District, 2006 WL 245467 (D. Alaska 2006):

Holding: Defendant had limited constitutional right to obtain evidence for postconviction DNA testing where new type of DNA testing was not available at time of trial.

U.S. v. O'Rourke, 80 Crim. L. Rep. 483 (D. Ariz. 1/17/07):
Holding: Due process requires that Section 504 of Adam Walsh Protection Act, which prohibits copying of child pornography, be interpreted to require that, in some circumstances, the defense still be provided with copies of computer disks where the gov't cannot provide "ample opportunity" for inspection under other circumstances.

U.S. v. Garcia, 2010 WL 3033797 (C.D. Cal. 2010):
Holding: Where Gov't disclosed evidence to Defendant only after discovery deadline passed, exclusion of such evidence was proper as sanction.

U.S. v. Nichols, 2008 WL 5546721 (C.D. Cal. 2008):
Holding: Co-defendant was entitled to discovery of email from other co-defendant to that co-defendant's wife, despite the marital privilege, because the email may be used for impeachment or as co-conspirator's admissions.

U.S. v. Ferguson, 2007 WL 196668 (D. Conn. 2007):
Holding: State was required to disclose police "rough notes" of interview of Defendant by police, under rule requiring disclosure of any written record containing substance of Defendant's oral statements.

U.S. v. Suarez, 88 Crim. L. Rep. 222 (D.N.J. 10/19/10):
Holding: Text messages between an FBI agent and a gov't witness were discoverable.

U.S. v. Graham, 2006 WL 3877345 (E.D. N.C. 2006):
Holding: Providing "bad acts" evidence to defense only three days before trial was not reasonable.

U.S. v. Flynn, 2010 WL 1782157 (D.S.D. 2010):
Holding: Federal statute governing discovery in child pornography prosecutions did not preempt state law of discovery on this matter in state court.

Verdin v. Superior Court, 83 Crim. L. Rep. 386 (Cal. 6/2/08):
Holding: Even though Defendant was claiming insanity, State constitutional and reciprocal discovery provisions do not give State right to have their own expert conduct a pretrial psychological exam.

State v. Fielding, 2010 WL 1629381 (Conn. 2010):
Holding: Even though there was a new statute prohibiting certain discovery procedures in child pornography cases, where trial court had ordered the discovery before the new law, the order was not a final appealable judgment.

Burns v. State, 85 Crim. L. Rep. 182 (Del. 4/20/09):
Holding: The framework for discovery of therapist records announced in *Penn. v. Ritchie*, 480 U.S. 39 (1987), applies to requests for private therapists' records, not just public therapist records.

Scipio v. State, 2006 WL 345025 (Fla. 2006):
Holding: State committed misconduct in failing to inform Defendant of a material change in testimony by medical examiner's investigator after his deposition. This resulted in the defense being surprised at trial and having a witness turn against the defense.

Britt v. State, No. S07A0912 (Ga. 11/21/07):
Holding: Even though defense counsel subpoenaed all payment records of the Public Defender in capital cases in support of a motion, the Public Defender does not have to disclose names and pay rates of all expert witnesses because this may expose the strategies of other attorneys in pending death penalty cases.

Vasquez v. State, 81 Crim. L. Rep. 425 (Ind. 6/22/07):
Holding: Trial court abused its discretion in preventing defense from calling a witness who was not disclosed until during trial, where English-speaking defense counsel only learned of the witness from his Spanish-speaking client on day trial began and counsel told the prosecutor at that time. There was no bad faith in the late disclosure, and Defendant's right to compulsory process was of paramount importance.

State v. Cashen, 2010 WL 2629827 (Iowa 2010):
Holding: Defendant can obtain discovery of victim's mental health records where Defendant shows there is a reasonable basis to believe such records are likely to contain exculpatory evidence.

O'Connell v. Cowan, 87 Crim. L. Rep. 320 (Ky. 5/20/10):
Holding: Even though Plaintiff sued police and City in civil rights action and not Prosecutor, the "opinion work product" of Prosecutor is discoverable in action for malicious prosecution.

Chestnut v. Commonwealth, 2008 WL 1848427 (Ky. 2008):
Holding: Discovery rule requiring disclosure of "any oral incriminating statement" of Defendant is not limited to written or recorded statements; State's failure to reveal oral statement before trial gutted Defendant's defense and denied fair trial.

Thompson v. State, 86 Crim. L. Rep. 254 (Md. 11/16/09):
Holding: Even though Defendant had given a confession, that did not preclude him from using the postconviction DNA statute where DNA evidence may have changed the jury's evaluation of his confession.

Horton v. State, 86 Crim. L. Rep. 481 (Md. 12/21/09):
Holding: Under DNA statute, State has obligation to make a comprehensive search for potentially exonerating evidence by checking all "likely places" where evidence may be, including prosecutors' offices, crime labs, hospitals, and judges' chambers.

Arey v. State, 81 Crim. L. Rep. 608, 2007 WL 2188704 (Md. 8/1/07):
Holding: Prisoner's motion for postconviction DNA testing cannot be dismissed on grounds that the evidence likely no longer exists until the custodian of evidence has searched for it anywhere it could reasonably be found or submits written evidence that the evidence has been destroyed. Here, Movant sought to challenge a conviction more than 30 years old.

Com. v. Washington W., 87 Crim. L. Rep. 687 (Mass. 6/25/10):
Holding: Juvenile was entitled to discovery from prosecutor of statistics regarding homosexual statutory rape prosecutions in order to be able to make a claim of selective prosecution; the fact that juvenile records are sealed would make it difficult for Juvenile to prove his claim without such discovery.

Com. v. Shaughessy, 86 Crim. L. Rep. 358 (Mass. 11/19/09):
Holding: Trial judge considering motion by defense for discovery of confidential informant has discretion to consider ex parte an affidavit from Defendant, which contained information the prosecution was not entitled to.

Com. v. Mattei, 86 Crim. L. Rep. 529 (Mass. 2/1/10):
Holding: State DNA expert should not be allowed to testify that DNA found at scene does not exclude Defendant without also testifying to the statistical significance of this finding.

Commonwealth v. Dias, 83 Crim. L. Rep. 290 (Mass. 5/21/08):
Holding: Defendant may be entitled to discovery of informant's identity even though informant may not testify at trial because may invoke right against self-incrimination.

Commonwealth v. Madigan, 81 Crim. L. Rep. 632 (Mass. 8/13/07):
Holding: Accused drug dealer's assertions in an affidavit that an acquaintance had persistently urged him to sell drugs to an undercover officer was a sufficient showing of entrapment to obtain discovery of any relationship the police had with the acquaintance.

Commonwealth v. Dwyer, 2006 WL 3803215 (Mass. 2006):
Holding: Pretrial inspection of potential exculpatory records of third party is to be done by defense counsel, not the judge.

State v. Dale Lee Underdahl, 2009 WL 1150093 (Minn. 2009):
Holding: DWI defendant entitled to disclosure of computer sources code for the breathalyzer.

Scarbo v. Eighth Judicial Dist. Ct. of State ex rel. County of Clark, 2009 WL 1181841 (Nev. 2009):
Holding: Defendant entitled to full and complete copy of competency report before competency hearing.

Grey v. State, 2008 WL 659714 (Nev. 2008):
Holding: Where Defendant was claiming involuntary intoxication, State was required to provide notice that it intended to call an expert witness in rebuttal to rebut Defendant's expert.

In re Search Warrant for Medical Records of C.T., 2010 WL 1791275 (N.H. 2010):
Holding: Under New Hampshire law, where a hospital receives a search warrant for privileged records, it must give them to court for in camera inspection and patient shall be given notice and opportunity to object to disclosure.

State v. Lee, 81 Crim. L. Rep. 142 (N.J. 4/19/07):
Holding: Defendant seeking discovery on claim that vehicle stop resulted from racial profiling was entitled to have trial court rule on that discovery request, before deciding whether the evidence found as a result of the stop was too attenuated from the stop to suppress it.

State v. Gillespie, 2008 WL 200292 (N.C. 2008):
Holding: Even though defendant's expert witness engaged in violations under the discovery statute, the trial court should not have punished defendant by not allowing him to present expert witnesses, since the court lacks authority to punish Defendant for behavior of non-parties.

State v. Worthen, 86 Crim. L. Rep. 329 (Utah 12/8/09):
Holding: Extreme hatred of Victim toward Defendant can qualify as an "emotional condition" of Victim so as to allow Defendant to obtain Victim's mental health records to prepare a defense of fabrication; Defendant was charged with sexually abusing Victim-step-daughter.

State v. Tiedemann, 81 Crim. L. Rep. 507 (Utah, 6/29/07):
Holding: Under Utah Constitution, Defendant is not required to show "bad faith" on part of gov't to establish due process violation for destruction of evidence. Utah Constitution gives greater protection

State v. Garcia-Salgado, 88 Crim. L. Rep. 96 (Wash. 10/7/10):
Holding: Even though court rule authorizes taking DNA samples, the 4th Amendment requires that this be done in accord with constitutional principles similar to obtaining a warrant, and so taking of DNA sample from rape Defendant-Suspect was improper where the information on which this was done was not supported by oath or affirmation.

State v. Boyd, 81 Crim. L. Rep. 260 (Wash. 5/17/07):
Holding: Defendant charged with computer child pornography crime was entitled to have copy of hard drive for independent forensic examination, and was not required to examine evidence only at a State facility, because such was required for defense counsel to be effective.

In re James H., 81 Crim. L. Rep. 695 (Cal. Ct. App. 8/31/07):
Holding: Juvenile court records of Defendant sealed under state law could not be used against Defendant to prove he was a sexually violent predator as an adult.

People v. Superior Court, 2006 WL 3386747 (Cal. App. 2006):
Holding: Prosecutor should be disqualified from prosecuting defendant where prosecution made significant efforts to prevent disclosure of victim's medical and psychological records, which appeared not designed adhere to statutory procedures, but to block defendant from records which were critical to his defense.

People v. Kladis, 2010 WL 2977604 (Ill. App. 2010):
Holding: Even though police had only inadvertently destroyed a video of Defendant's DWI arreast, where the State was required to preserve and produce the tape, the exclusion of the Officer's testimony about events shown on the tape was an appropriate sanction for the discovery violation.

Edwards v. State, 2010 WL 2749654 (Ind. Ct. App. 2010):
Holding: Testimony from two eyewitnesses that Defendant was not at the crime scene was not an "alibi defense," and therefore, was admissible even though Defendant did not comply with notice of alibi rule.

People v. Wright, 2010 WL 1194903 (Ill. App. 2010):
Holding: Where State's case was based on cold hit DNA match, court abused discretion in denying Defendant's pretrial motion for a search of DNA database.

In re Crisis Connection, Inc., 2010 WL 2783876 (Ind. Ct. App. 2010):
Holding: Even though counseling center provided counseling and advocacy to crime victims, Defendant could seek discovery of center's records if relevant to defense of his criminal case.

State v. Williams, 2008 WL 4390639 (N.J. Super. Ct. App. Div. 2008):
Holding: Where a superior in a prosecutor's office made racist remarks regarding Defendant, Defendant was entitled to discovery about the prosecutor's office to determine if there was systemic racial bias in the office, even though the superior was not going to be trial witness.

State v. Bradshaw, 2007 WL 957000 (N.J. Super. Ct. 2007):
Holding: Even though Defendant failed to give notice of alibi before trial, the application of the notice of alibi rule to Defendant's own testimony would violate 6th Amendment right to testify.

State v. Ortiz, 86 Crim. L. Rep. 12 (N.M. Ct. App. 9/1/09):
Holding: Where a police video of a car stop contained a six-minute gap, Defendant was entitled to discovery of Officer's personal cell phone records to determine if Office spoke to anyone on the phone during the six-minute gap.

People v. Marcus A., 2010 WL 2134114 (N.Y. Sup. 2010):
Holding: Prosecutor could not gain access to sealed court record to bring a new criminal action against Defendant where prosecutor had already filed the new criminal action; sealing statute only allows unsealing in the course of investigation.

People v. Smothers, 2008 WL 2483292 (N.Y. Sup. 2008):
Holding: State failed to provide notice that it intended to offer eyewitness identification testimony .

People v. Campanella, 2009 WL 6327458 (N.Y. Dist. Ct. 2009):
Holding: Defendant charged with DWI was entitled to discovery of police global position system (GPS) tracking records as they related to police cars involved in her case.

State v. Shannon, 2007 WL 966981 (N.C. Ct. App. 2007):
Holding: Prosecutor required to disclose any written or recorded interviews he had with witnesses.

State v. Rivas, 2007 WL 2019665 (Ohio Ct. App. 2007):
Holding: In prosecution for luring a minor, Defendant was entitled to some assurance that police transcripts of on-line chats were both complete and accurate.

Hamill v. Powers, 81 Crim. L. Rep. 532 (Okla. Crim. App. 6/28/07):
Holding: Trial court has inherent power to order mental evaluation of complaining witness where Defendant shows a compelling need. Here, State was contending that rape victim was mentally incompetent to consent, and Defendant had compelling need for his own examination of victim to show otherwise.

State v. Johnson, 2007 WL 404020 (Or. Ct. App. 2007):
Holding: Trial court erred in denying Defendant's motion for a recess to review police officer's notes which were disclosed during trial; notes could have been used for impeachment and to show discovery violation.

Leal v. State, 2009 WL 3837309 (Tex. Crim. App. 2009):
Holding: Even though DNA testing would only be exculpatory as to aggravating circumstances of capital murder and not the murder itself, this was a sufficient showing to obtain postconviction DNA testing.

State v. Norris, 2010 WL 2902587 (Wash. Ct. App. 2010):
Holding: The federal Adam Walsh Act, which prohibits providing child pornography to the defense, does apply to state-court prosecutions.

DNA Statute & DNA Procedural Issues

Belcher v. State, No. SC89589 (Mo. banc 12/22/09):
(1) Motion court was required to enter sufficient Findings under DNA statute to allow meaningful appellate review; and (2) Even though Movant did not verify his DNA petition, this could be corrected under Rules 67.01, 67.03 or 67.06.
Facts: Movant filed an unverified pro se petition for DNA testing under Sec. 547.035. The motion court dismissed the case by holding that the files "conclusively show Movant is not entitled to relief."
Holding: (1) Sec. 547.035.8 requires the motion court to issue Findings of Fact and Conclusions of Law sufficient to allow meaningful appellate review. The Findings here are not sufficient, so remand is required. (2) Movant's motion was not verified. However, this does not result in barring Movant's claims. Unlike Rules 24.035 and 29.15 with their time limitations, the DNA statute has no time limitations and contemplates that later motions will be permitted as DNA technology advances. Sec. 547.035.2(3)(a). Thus, if on remand the petition is dismissed for lack of verification, a corrected or amended petition may be filed under Rules 67.01, 67.03 or 67.06.

State v. Ruff, No. SC88936 (Mo. banc 6/24/08):
Even though defense counsel had said at trial that "this is not a case of mistaken identity," where the defense in rape case was that Defendant did not have sex with victim at all, and that victim was falsely accusing him to further a civil suit against a hotel, this was sufficient to require DNA testing under Sec. 547.035.2(4) because Defendant was alleging the crime was committed by a different person.
Facts: Defendant was convicted many years ago of rape in a hotel room. Defendant was an employee of the hotel. At the trial, defense counsel claimed the victim was saying Defendant committed the offense to further a civil suit she was bringing against the hotel. In 2005, Defendant sought DNA testing under Sec. 547.035.2(4) which allows DNA testing where "identity was an issue at trial." The trial court denied testing.
Holding: The State claims this is not a case of "mistaken identity," because defense counsel said this at trial. However, the DNA statute does not require "mistaken identity." "Identity at trial" is a broader concept. "Mistaken identity" occurs when the defendant alleges the crime was committed by another person. "Identity at issue" includes "mistaken identity," but also includes all cases in which the defendant claims he did not commit the acts alleged -- as opposed to cases where the defendant admits his actions but puts forth an affirmative defense. Here, Defendant claims he did not commit the acts alleged, and thus, he was entitled to DNA testing.

Belcher v. State, No. WD68990 (Mo. App., W.D. 6/30/08):
Holding: Where pro se Movant did not verify his motion for DNA testing under Section 547.035, the motion was fatally defective because Section 547.035 requires the motion "must allege facts under oath," and Movant's signature alone was insufficient to invoke the DNA statute procedures without being verified. Thus, court did not err in denying testing without issuing Finding of Fact and Conclusions of Law.

*** District Attorney's Office for 3rd Judicial District v. Osborne, 85 Crim. L. Rep. 407, ___ U.S. ___ (6/18/09):**
Holding: There is no federal due process right to post-conviction DNA testing.

U.S. v. Lara-Ramirez, 83 Crim. L. Rep. 12 (1st Cir. 3/11/08):
Holding: Where, over Defendant's objection, the judge declared a mistrial because a Bible was found in the jury room, there was no manifest necessity for a mistrial and double jeopardy attached.

U.S. v. Kerley, 84 Crim. L. Rep. 80 (2d Cir. 9/25/08):
Holding: Defendant who violates single child support order covering multiple children can be convicted of only one count of failure to pay child support.

McKithen v. Brown, 80 Crim. L. Rep. 652 (2d Cir. 3/13/07):
Holding: Prisoner seeking DNA testing to prove innocence may get the evidence via a Section 1983 action instead of habeas, since such action would not necessarily render the conviction invalid.

U.S. v. Miller, 83 Crim. L. Rep. 355, 2008 WL 2230032 (3d Cir. 6/2/08):
Holding: Convictions for both receiving and possession of child pornography regarding the same images violate double jeopardy.

In re DNA Ex Post Facto Issues, 2009 WL 783391 (4th Cir. 2009):
Holding: Statute requiring a $250 processing fee be paid by prisoners for DNA samples before they could be paroled or released was ex post facto.

U.S. v. Fasano, 85 Crim. L. Rep. 586 (5th Cir. 7/31/09):
Holding: Even though Defendant's guilt had been shown by eyewitness identification and fingerprints, Defendant could still meet the requirements for DNA testing under Innocence Protection Act, 18 USC 3600.

Durr v. Cordray, 87 Crim. L. Rep. 148 (6th Cir. 4/16/10):
Holding: Prisoner's 42 USC 1983 action seeking postconviction access to DNA testing is not barred by favorable-termination rule of *Heck v. Humphrey*.

Bies v. Bagley, 82 Crim. L. Rep. 612 (7th Cir. 2/27/08):
Holding: Where Defendant had been found mentally retarded by a state court, the State was barred by double jeopardy and collateral estoppel from getting another chance to prove Defendant was not mentally retarded.

Friedman v. Boucher, 85 Crim. L. Rep. 464 (9th Cir. 6/23/09):
Holding: 4th Amendment violated where officers forcibly took DNA sample from pretrial detainee without a warrant or any basis to suspect he had committed a particular crime under investigation.

U.S. v. Schales, 84 Crim. L. Rep. 144 (9th Cir. 10/20/08):
Holding: Convictions for "receiving" and "possessing" same child pornography violated double jeopardy.

Brown v. Farrell, 83 Crim. L. Rep. 235 (9th Cir. 5/5/08):
Holding: Where State DNA examiner overstated the probability of a match to Defendant, no weight should be given to the DNA evidence on habeas review and the State court unreasonably applied federal law regarding sufficiency of evidence.

U.S. v. Davenport, 83 Crim. L. Rep. 36 (9th Cir. 3/20/08):
Holding: Defendant's conviction for both receiving child pornography and possessing child pornography violated double jeopardy as multiple punishments for a single offense.

U.S. v. Zalapa, 2007 WL 4246053 (9th Cir. 2007):
Holding: Defendant did not waive right to challenge multiplicitous convictions by failing to object to the indictment before he pled guilty.

Osborne v. District Attorney's Office for the Third Judicial District, 2006 WL 245467 (D. Alaska 2006):
Holding: Defendant had limited constitutional right to obtain evidence for postconviction DNA testing where new type of DNA testing was not available at time of trial.

Wade v. Brady, 2009 WL 1220631 (D. Mass. 2009):
Holding: Defendant was entitled under Due Process to access biological evidence for proving federal habeas claim of actual innocence, even though Defendant had procedurally defaulted ineffective assistance of counsel claim.

McKithen v. Brown, 83 Crim. L. Rep. 669 (E.D.N.Y. 7/21/08):
Holding: Due process protects "meaningful access to existing executive mechanisms for clemency" and, thus, Defendant is entitled to DNA testing where necessary to seek clemency and doubt arises about Defendant's guilt.

Valentine v. State, 86 Crim. L. Rep. 13 (Alaska 8/28/09):
Holding: Defendant was denied due process in DWI case when he was precluded from presenting "delayed absorption" evidence as exculpatory evidence; Defendant's defense was that the DWI test indicated a BAC higher than existed when he was actually driving.

Echols v. State, 88 Crim. L. Rep. 188 (Ark. 11/4/10):
Holding: (1) Defendant was entitled to evidentiary hearing as to whether he should get a new trial under post-trial DNA statute where neither he nor co-defendants were the source of DNA evidence at the crime scene, even though other evidence indicated that Defendant still could have committed the offense; (2) court rejects State's argument that DNA results excluding a Defendant are "inconclusive" where they do not also identify the actual perpetrator.

Richardson v. Superior Court, 83 Crim. L. Rep. 311 (Cal. 5/22/08):
Holding: "Materiality" under the post-trial DNA-testing statute is not the same as for *Brady* purposes, but is a lesser standard; standard is whether petitioner can show DNA testing would be "relevant" to issue of identity, not "dispositive" of identity.

State v. Dupigney, 87 Crim. L. Rep. 14 (Conn. 3/9/10):
Holding: Post-trial DNA statute allowing DNA testing if petitioner shows a "reasonable probability" of different outcome at trial means "a probability sufficient to undermine confidence in the outcome" of trial.

Turner v. State, 82 Crim. L. Rep. 474 (Ga. 1/8/08):
Holding: Jury verdict acquitting Defendant of a shooting because shooting was justified necessarily precluded the jury from simultaneously convicting Defendant of felony-murder; was an inconsistent verdict.

Bedingfield v. Commonwealth, 2008 WL 3891450 (Ky. 2008):
Holding: Even though new DNA evidence does not fully exonerate Defendant, Defendant entitled to new trial.

Gregg v. State, 85 Crim. L. Rep. 575 (Md. 7/24/09):
Holding: Statute allowing DNA testing is retroactive because it involves procedural changes and has a remedial effect that does not impair vested rights.

Arey v. State, 81 Crim. L. Rep. 608, 2007 WL 2188704 (Md. 8/1/07):
Holding: Prisoner's motion for postconviction DNA testing cannot be dismissed on grounds that the evidence likely no longer exists until the custodian of evidence has searched for it anywhere it could reasonably be found or submits written evidence that the evidence has been destroyed. Here, Movant sought to challenge a conviction more than 30 years old.

Blake v. State and Thompson v. State, 80 Crim. L. Rep. 168 (Md. 10/24/06):
Holding: Petitioner seeking postconviction DNA testing has right to hearing on State's claim that evidence needed for testing can no longer be found, and State has burden of proof to show that evidence can no longer be found.

State v. Prade, 87 Crim. L. Rep. 324 (Ohio 5/4/10):
Holding: Even though statute does not allow a second DNA test where a prior "definitive" test was performed, a second DNA test can be performed if newer DNA testing methods can reveal new information that could not have been previously revealed; in such a case, the prior test was not "definitive."

State v. Sterling, 81 Crim. L. Rep. 234 (Ohio, 5/2/07):
Holding: Ohio DNA statute that allowed prosecutor to deny DNA testing without any right of appeal to a court unconstitutionally interferes with judicial authority and violates separation of powers.

State v. Solomon, 83 Crim. L. Rep. 12 (N.H. 3/20/08):
Holding: Double jeopardy attached when trial judge in middle of trial left for military duty in Iraq; Defendant was entitled to have trial concluded by a single particular judge, and the State did not take steps to protect that right, even though they knew the judge could be called away.

Commonwealth v. States, 82 Crim. L. Rep. 366 (Penn. 12/27/07):
Holding: Where after jury hung, trial judge declared a mistrial on some counts and acquitted Defendant on other counts, double jeopardy barred retrial because the mistried counts were factually dependent on the acquitted counts.

Commonwealth v. Laudadio, 2007 WL 4276412 (Penn. 2007):
Holding: Even though Defendant exposed himself to multiple persons in one incident, this was punishable as one offense, and not multiple offenses per victim.

State v. Hall, 82 Crim. L. Rep. 473 (Wash. 1/31/08):
Holding: After Defendants have been convicted and sentenced, Prosecutors cannot move to retry Defendants on grounds that Defendants' double jeopardy rights were violated based on a subsequent appellate decision; only Defendants can assert their own double jeopardy rights, if they choose to do so.

State v. Knight, 82 Crim. L. Rep. 458, 2008 WL 151623 (Wash. 1/17/08):
Holding: The remedy for double jeopardy violation after a guilty plea to multiple charges is to vacate the counts that constituted double jeopardy, not to vacate the entire guilty plea.

People v. Wright, 2010 WL 1194903 (Ill. App. 2010):
Holding: Where State's case was based on cold hit DNA match, court abused discretion in denying Defendant's pretrial motion for a search of DNA database.

In re C.T.L., 80 Crim. L. Rep. 6 (Minn. Ct. App. 10/10/06):
Holding: Police must obtain a search warrant to obtain DNA from a suspect who is charged but not yet convicted of a crime.

State v. Garris, 2008 WL 2726650 (N.C. Ct. App. 2008):
Holding: Even though Defendant possessed two firearms, he could only be convicted of one count of possession of firearm by felon.

State v. Gray, 2009 WL 2712215 (Wash. Ct. App. 2009):
Holding: Defendant showed a likelihood that DNA testing would demonstrate his probable innocence so as to be entitled to DNA testing under postconviction DNA statute.

State v. Goldsmith, 84 Crim. L. Rep. 211 (Wash. Ct. App. 11/4/08):
Holding: Where court dismissed charges because State's evidence did not prove the crimes actually charged, double jeopardy barred a second trial on charges the first trial actually supported.

Double Jeopardy

State v. Daws, No. SC90444 (Mo. banc 2010):
Even though Defendant had previously pleaded guilty to failure to yield to an emergency vehicle, it did not violate double jeopardy for the State to then charge her with resisting arrest, because these offenses do not have the same elements (overruling State v. Clark, 263 S.W.3d 666 (Mo. App. 2008)).
Facts: Defendant pleaded guilty to failure to yield to an emergency vehicle, Sec. 304.022. The State then charged her with resisting arrest, Sec. 575.150, arising out of the same incident. Defendant moved to dismiss on grounds of double jeopardy.
Holding: The proper test for assessing whether successive prosecutions violate double jeopardy is the *Blockburger* or "same-elements" test. The test is whether each offense contains an element not contained in the other; if not, double jeopardy bars successive prosecution. The focus is on the elements, not the underlying conduct. Failure to yield requires (1) approach of emergency vehicle, (2) audible siren or visible lights, and (3) driver fails to yield. Resisting arrest requires (1) officer making or attempting to make a lawful arrest, (2) defendant's knowledge, (3) defendant resists by fleeing, (4) defendant resisted to thwart the arrest or stop by using or threatening violence or physical force or fleeing, and (5) defendant fled in a manner that created a substantial risk of serious physical injury or death. A comparison of the elements demonstrates that failure to yield is not a lesser-included offense of resisting arrest. *State v. Clark*, 263 S.W.3d 666 (Mo. App. 2008) was incorrectly decided.

State ex. rel. Kemper v. Vincent, No. SC87246 (Mo. banc 5/16/06):
(1) polygraph results were admissible because the State introduced Defendant's confession which was made, in part, because police falsely told Defendant she had failed a polygraph; and (2) double jeopardy barred retrial of Defendant where trial court, sua sponte, declared mistrial due to admission of polygraph evidence and there was no manifest necessity for trial court to take such drastic action over Defendant's objection.
Facts: Police interrogated Defendant and gave her a polygraph. She denied the crime. Then police told her, falsely, that she had failed the polygraph, and she confessed. Trial court allowed Defendant to admit the polygraph at trial to show this, but then trial court changed its mind and, *sua sponte*, granted a mistrial, over Defendant's objection.
Holding: (1) Although inadmissible on the issue of Defendant's truthfulness, the polygraph evidence was admissible here under the "rule of completeness" which holds that a party may introduce evidence to give the jury a complete picture of the evidence introduced by the adversary. Here, Defendant's confession was induced, in part, by the police use of the polygraph and so Defendant could introduce the polygraph to show circumstances of why she confessed. (2) Double jeopardy bars retrial of Defendant because there was no manifest necessity for trial court to declare mistrial. After trial

court admitted polygraph evidence, trial court simply changed its mind and declared mistrial over Defendant's objection. Trial court could have given Defendant's proposed limiting instruction on use of polygraph evidence. Writ of prohibition made absolute.

State v. Dowell, No. ED92846 (Mo. App. E.D. 3/23/10):
Where Defendant had been acquitted of first degree murder and lesser-included offenses and State subsequently sought to try Defendant for an alleged violent rape arising out of the murder, the subsequent prosecution was barred by collateral estoppel.
Facts: Defendant was originally charged with first degree murder and rape with serious physical injury. Because the State was seeking the death penalty, the rape charge was severed as required by Sec. 565.004. The State's theory at trial was that Defendant killed Victim during a violent rape, and that the rape was the motive for the homicide. The Defendant's theory was that a third-party committed the acts. Defendant was acquitted at a jury trial. Subsequently, the State sought to try Defendant for the rape. The trial court granted a defense motion to dismiss on grounds of collateral estoppel. The State appealed.
Holding: Collateral estoppel applies when the issue determined in the prior case is the same issue as the pending case. Collateral estoppel is embodied in the 5th Amendment guarantee against double jeopardy. Defendant has the burden to show that the prior verdict necessarily decided the issues now in litigation. That burden is met here. The State's entire theory at the prior trial was that Defendant committed the homicide because of the violent rape. The State now argues that it is possible the jury found that Defendant committed the violent rape by beating Victim in the head with a blunt instrument but did not mean to kill her. This illogical argument flies in the face of the theory the State relied on at trial, i.e., that the reason he killed Victim was because of the rape. The MAI for aggravated rape requires serious physical injury that creates a substantial risk of death or causes serious impairment. There is no rational basis that a jury could conclude that Defendant committed the violence constituting the aggravated rape charge, after the jury in the murder trial found Defendant did not commit the violence that resulted in Victim's death. Dismissal affirmed.

State v. Garnett, No. ED92790 (Mo. App. E.D. 12/8/09):
Even though Defendant cut the throat, breast and leg of Victim, where these injuries happened in a single action, it constituted double jeopardy to convict Defendant of first degree assault and two counts of domestic assault second because these were a single act.
Facts: Defendant attacked Victim with a knife, cutting her throat, breast and leg. He was convicted of first degree assault and two counts of second degree domestic assault for this, as well as corresponding convictions for armed criminal action.
Holding: The Double Jeopardy Clause prevents the State from splitting a single crime into separate parts and pursuing several prosecutions. Sec. 556.041 provides that when the same conduct of a person may establish more than one offense, he may be prosecuted for each offense, but not if one offense is included in the other. Here, second degree domestic assault is specifically denominated by statute as a lesser degree of first degree assault, so it is a lesser offense. This does not end the inquiry, however, if there were three separate assaults. Treating this case as a "unit of prosecution" case, the evidence

indicated Victim's injuries came from one quick, continuing attack. The record does not contain any evidence that would support an inference that Defendant and Victim stopped struggling for any period of time that would have afforded Defendant an opportunity to reconsider his actions. This was one assault, not three as charged by the State. Defendant's convictions for second degree domestic assault, and corresponding ACA convictions are vacated.

State v. Bohlen, No. ED46436-01 (Mo. App. E.D. 3/24/09):
(1) Where Defendant was sentenced prior to January 1, 1996, a motion to recall the mandate is the proper procedure for raising ineffective assistance of appellate counsel; (2) where Defendant was convicted of two counts of robbery for forcibly stealing a wristwatch from the store manager and for forcibly stealing property of the store, conviction for both counts violated double jeopardy and counsel was ineffective in failing to appeal this; (3) even though Defendant did not object to convictions on double jeopardy grounds at trial, this could be raised on appeal because issue is jurisdictional.
Facts: In relevant part, Defendant was convicted for two counts of first degree robbery or forcibly stealing property of a jewelry store, and forcibly stealing a wristwatch owned by the store manager. Defendant filed a motion to recall mandate claiming appellate counsel was ineffective in failing to raise this as double jeopardy.
Holding: The State contends Defendant waived his double jeopardy claim by not raising it at trial. However, double jeopardy can be raised on appeal because the court was without power to proceed against a defendant twice for the same offense. The prohibition against double jeopardy is to ensure that the punishment remains within limits established by the legislature. The essence of robbery is forcibly taking property; the ownership of the property is immaterial. It has repeatedly been held that only one robbery occurs where a defendant robs a store employee of the employee's property and the employer's (store's) property. Appellate counsel was ineffective in failing to raise this meritorious issue.

Melton v. State, No. ED90289 (Mo. App., E.D. 8/26/08):
Evidentiary hearing was not required on Movant's double jeopardy claim, but motion court was required to issue Findings on the claim to allow meaningful appellate review.
Facts: Movant pleaded guilty to two drug counts for drugs possessed at the same time. He filed a Rule 24.035 motion claiming conviction on both counts constituted double jeopardy. He waived a hearing on the claim. The motion court denied the claim without Findings.
Holding: A double jeopardy claim can be considered in a 24.035 proceeding because it goes to the power of the State to charge Movant. Movant correctly withdrew his request for a hearing, because all a motion court can consider in deciding a double jeopardy claim is the State's information and the transcript of the guilty plea. The motion court's failure to issue Findings on the claim, however, was error under 24.035(j) because it does not allow for meaningful appellate review.

State v. Wrice, No. ED88727 (Mo. App., E.D. 10/16/07):
There was no manifest necessity for trial court to grant a mistrial merely because defense did not timely disclose an alibi witness, so double jeopardy barred a retrial.

Facts: Defendant's case was assigned to Public Defender counsel two days before trial. Defense counsel immediately sought to contact an alibi witness, and found and interviewed the witness the day the State rested its case. Counsel sought to call the witness. The State requested a mistrial, claiming that it needed to investigate the witness. The defense did not consent to the mistrial. After the mistrial was granted, the trial court precluded the State from retrying the case based on double jeopardy. The State appealed.
Holding: Double jeopardy attaches under the 5th Amendment once a jury is impaneled and sworn. Defendant has a right to have his case heard to completion by a particular tribunal. Here, double jeopardy precludes retrial because there was no "manifest necessity" to declare a mistrial. The proper relief would have been to postpone or continue the trial to allow the State to have an opportunity to investigate the witness. To the extent that *State v. Stevenson*, 589 S.W.2d 44 (Mo. App., E.D. 1979) holds otherwise, it should not be followed.

State v. Storer, No. SD30391 (Mo. App. S.D. 10/5/10):
Where trial court granted defense motion to dismiss four counts, but two counts remained pending, the State could not appeal the dismissal of the four counts because Sec. 547.200 did not authorize such appeal and there was not a final judgment to appeal.
Facts: Defendant was originally charged with four counts. That case went to trial, but a mistrial was declared. Subsequently, the State nolle prossed those four counts, and without seeking leave of court, re-filed them along with two new counts. The defense moved to dismiss the original four counts alleging that re-prosecution would violate double jeopardy. The trial court dismissed the original four, and left the two new counts pending. The State appealed the dismissal of the four counts.
Holding: The appeal must be dismissed. Sec. 547.200 authorizes the State to appeal when a court quashes an arrest warrant; when a court finds an accused incompetent; and when a court suppresses evidence or a confession. The State claims the appeal here is a quashing of an arrest warrant. However, this is not the case, since Defendant remains charged with two counts and continues to be incarcerated awaiting trial. Furthermore, since two counts remain pending, there is not a "final judgment" in this case, which is necessary for an appeal. Appeal dismissed.

State v. Cunningham, No. 27028 (Mo. App., S.D. 5/30/06):
Convictions for possession of controlled substance with intent to distribute, Section 195.211, and possession of a controlled substance, Section 195.202, violated double jeopardy.
Facts: Defendant was arrested with 15 wrapped rocks of crack cocaine in a large baggie. He was convicted of one count of possession of a controlled substance with intent to distribute, and one count of possession of a controlled substance. On appeal, Defendant claimed trial court plainly erred in convicting him of possession because his conviction for both offenses violated double jeopardy in that possession under Section 195.202 is a lesser included offense of possession with intent to distribute under Section 195.211.
Holding: It was impossible for Defendant to commit the crime of possession with intent to distribute without also committing the crime of possession. Double jeopardy protects against multiple punishments for the same offense. The State has switched its position on appeal and argues that the cocaine Defendant was convicted of being in possession of

was different than the cocaine he intended to distribute; the State cannot switch positions on appeal from below. Defendant did not possess cocaine at different times in distinct places. The State is trying to prosecute a single crime in separate parts. The double jeopardy clause forbids such a prosecution, absent a legislative intent to do so. There is nothing to suggest the Legislature intended for multiple punishments for a single act of possession of the same controlled substance. Defendant's conviction for possession under Section 195.202 is vacated.

State v. Connell, No. WD72643 (Mo. App. 12/14/10):
Even though State's appeal purported to be an appeal of a grant of a motion to suppress, where trial court had held a bench trial and only after the entire trial entered a "Judgment" purporting to grant the motion to suppress, this Judgment was in reality an acquittal, and State could not appeal.
Facts: Defendant was charged with drug possession. Prior to trial, the trial court overruled Defendant's motion to suppress. Defendant proceeded to a bench trial. At trial, the State introduced the drugs without any objection from the defense. After closing arguments, the court entered an order that stated: "Judgment – Defendant's motion to suppress is sustained." The State appealed.
Holding: Defendant correctly claims that this is not an interlocutory appeal of a grant of a motion to suppress, but is an impermissible appeal of an acquittal. Sec. 547.200.1(3) allows the State to appeal a denial of a motion to suppress. However, the State cannot appeal if this would result in double jeopardy to a defendant, Sec. 547.200.2. Here, the trial court's order is nonsensical since the court admitted the evidence without objection at trial, but then purported to suppress the evidence after trial in a "Judgment." Suppression of evidence should be ruled upon before, not after, evidence has been admitted at trial. For double jeopardy purposes, the court looks to the entire proceedings. Here, the entire trial was concluded. The practical effect of the trial court's judgment is that after hearing all the evidence, the court concluded as a matter of law that the State could not meet its burden, and thus, Defendant was acquitted. Jeopardy has attached and the appellate court cannot review this appeal as "interlocutory." Appeal dismissed.

State v. Smothers, No. WD70361 (Mo. App. W.D. 11/17/09):
(1) Where Defendant, who was required to have urine testing as a bond condition, provided a urine sample that was not his to authorities, Defendant could be charged with forgery; (2) even though trial court's dismissal order was "without prejudice," it had the practical effect of terminating the litigation, so the State could appeal the dismissal; (3) the appeal of the trial court's dismissal of the charge did not violate double jeopardy because Defendant was never placed in jeopardy since the trial court had not begun to hear evidence on the question of guilt but merely decided a pretrial motion to dismiss charge.
Holding: To prove forgery under Sec. 570.090.1(4), the State must prove that Defendant with the purpose to defraud used an inauthentic item as genuine, possessed an inauthentic item as genuine, or transferred an inauthentic item with the knowledge it would be used as genuine. The State does not have to prove the Defendant made or altered anything himself. Forgery against the gov't need not deprive it of money or property. So long as the Defendant has the purpose to frustrate the administration of justice, the "purpose to

defraud" element is met. The forgery statute does not cover only writings, but is broad enough to cover false urine samples. Dismissal of charge reversed.

State v. Baldwin, No. WD69250 (Mo. App. W.D. 7/21/09):
Where Defendant cut victim on abdomen and breast in one cut with no lapse in time between the injuries, it was double jeopardy to convict Defendant of two counts of second degree assault.
Facts: Defendant got into fight with victim, sought to cut off her clothes, and used a knife to cut her breast and abdomen in a single stroke with no lapse of time between injuries. He was convicted of two counts of second degree assault.
Holding: In assault cases, separate offenses can arise from a single set of facts each time the defendant forms an intent to attack the victim. Here, however, the attack was "one cut." The singular motion and proximity in time suggests Defendant did not form a separate intent for each cut. Thus, it violated double jeopardy to convict of two assaults, and this was plain error. Conviction for Count II vacated.

State v. Royal, No. WD69152 (Mo. App. W.D. 3/3/09):
Where Defendant was convicted of DWI and second-degree assault for injuries caused in a DWI crash, the DWI is a lesser-included offense of the assault, so the DWI conviction violated double jeopardy.
Facts: Defendant, while driving drunk, crashed into another car an injured two people. He was convicted of DWI, Sec. 577.010, and second degree assault, Sec. 565.060.1(4).
Holding: The trial court plainly erred in finding Defendant guilty of DWI and second-degree assault when the charges for the offense were based on the same incident because DWI is a lesser-included offense of second degree assault and this violated double jeopardy. Sec. 556.401(1) states that a defendant whose conduct may establish multiple offenses may not be convicted of more than one offense if one offense is included the other. DWI is a lesser-included offense because a person must drive while intoxicated to commit second-degree assault under Sec. 565.060.1(4). DWI conviction reversed.

State v. Kamaka, No. WD69664 (Mo. App. W.D. 2/24/09):
Where Defendant had pleaded guilty to possession of child pornography, the State could not subsequently charge Defendant with promotion of this same pornography because this violated double jeopardy and possession was a lesser-included offense of promotion.
Facts: During an internet investigation, authorities in Platte County on January 12 downloaded child pornography being offered over the internet by Defendant's computer. On February 16, authorities searched Defendant's home and seized the computer, which had this same pornography still on it. Thereafter, Defendant pleaded guilty in Clay County to possession of child pornography, Sec. 573.027 RSMo. 2000, for this incident. Subsequently, Platte County charged Defendant with promotion of child pornography, Sec. 573.025 RSMo. 2000, for this incident. The trial court dismissed the Platte County promotion charge on double jeopardy grounds. The State appealed.
Holding: Although the Clay and Platte charged involved two different dates, there is only one act of possession here. It is significant that both the possession and promotion charges arose from possession of the same movie file. Defendant continuously possessed the file from the date it was disseminated to the date his computer was seized. Thus, in

addition to the lack of a newly formed mens rea, no separate act was performed. Thus, his conduct constituted the "same conduct" for double jeopardy analysis. Further, under the facts here, the possession charge was a lesser-included offense of promotion. Defendant could not have disseminated the pornography without possessing it. Thus, subsequent prosecution for promotion violated double jeopardy.

State v. Clark, No. WD67827 (Mo. App., W.D. 7/15/08):
Where Defendant had previously been convicted in municipal court of failing to yield to an emergency vehicle, it constituted double jeopardy to then convict Defendant in State court of resisting arrest, since the former offense is a lesser-included offense of the latter.
Facts: Defendant was convicted in Peculiar, Mo., municipal court of failure to yield to an emergency vehicle. Later, the State charged Defendant with resisting arrest for this same incident. Defendant sought to dismiss the later charge on grounds of double jeopardy. After conviction, he appealed.
Holding: Because a municipality is a creature of the State, double jeopardy prohibits the State and municipality from prosecuting persons for the same offense. Resisting arrest, Sec. 575.150, has three elements: (1) Defendant, having knowledge that a law enforcement officer is making an arrest or stop of a person or vehicle, (2) resists arrest by fleeing, which is presumed if Defendant continues to operate a vehicle after seeing an officer's lights, and (3) Defendant did so with purpose of preventing an arrest. The municipal ordinance has two elements: (1) an emergency vehicle or police vehicle making use of proper signals approaches a vehicle, and (2) the person driving the vehicle fails to pull over. Although the statute and ordinance use different wording, their elements show that the ordinance is a lesser-included offense to resisting arrest. A lesser-included offense is an offense established by proof of the same or less than all the facts required to establish the greater. A person commits a lesser-included offense if committing the charged offense without committing the lesser is impossible. The ordinance is essentially the first two proof elements of the resisting arrest statute. The resisting arrest statute has just one added element: that Defendant intended to prevent the arrest or stop. Double jeopardy prohibits prosecution for a greater offense after convicting of a lesser-offense. State conviction reversed.

State v. Harris, No. WD67312 (Mo. App., W.D. 1/22/08):
Where Defendant stabbed victim three times in an assault that lasted about one minute, this was a single act of assault, and conviction for three counts of first degree assault violated double jeopardy.
Facts: Defendant went to victim's house and stabbed him three times, in the face, arm, and back. The assault was a continuous fight that lasted about one minute. Defendant was charged and convicted of three counts of first degree assault.
Holding: Double jeopardy prohibits multiple punishments for the same offense. Separate assault offenses can be charged from a single event each time Defendant forms a new intent to assault. However, the evidence here showed the assault was a single, continuous battle and lasted about one minute. This must be considered one assault, and not three separate assaults. Two of the assault convictions are vacated.

State v. Seuferling, No. WD67866 (Mo. App., W.D. 11/20/07):
(1) Even though the trial court denied the State an opportunity to appeal its motion to suppress ruling by suppressing the evidence and granting a judgment of acquittal at the same time, double jeopardy required the Court of Appeals to dismiss the appeal because Defendant could not be retried after a grant of a judgment of acquittal; and (2) Even though the trial court entered its judgment on a Sunday, where that was the last day of the judge's term of office, this was allowed by "exigent" circumstances.
Facts: Defendant was tried at a bench trial. Defendant had filed a motion to suppress evidence. The judge heard the evidence at trial and on the suppression motion and took all matters under advisement. On Sunday, December 31, 2006, the judge issued an order acquitting Defendant of all charges, and granting Defendant's motion to suppress. The judge's term of office expired that day.
Holding: The State claims the judge could not enter judgment on a Sunday, and also that it can appeal the motion to suppress ruling. The State also claims that the Clerk didn't enter the judgment until after the judge left office. However, the controlling date is the day the judge signed the order, not when the Clerk entered it. Section 476.250 allows a court to conduct business on Sunday "as exigencies may require." Since Sunday was the last day of the judge's term of office, and since another judge could not rule on the suppression motion or motion for acquittal, the judge could issue orders that day, since this was an exigent circumstance. Usually, the State has five days to appeal a grant of a suppression motion, Section 547.200. However, the cases are clear that when a court enters a final judgment of acquittal, the State is barred from appealing either the judgment itself or the actions leading to the judgment, no matter how erroneous the judge's actions may have been, because this would violate double jeopardy. Thus, even though the judge may have erred in entering the acquittal at the same time as a ruling on the motion to suppress, the State cannot appeal. Appeal dismissed.

State v. Hill, 181 S.W.3d 611 (Mo. App., W.D. 2006):
(1) Double jeopardy was violated where Defendant was convicted of four counts of ACA, which were charged in identical language in the indictment; (2) Defendant/Movant could raise claim of double jeopardy on appeal of denial of Rule 29.15 motion, even though Defendant/Movant had not pleaded this in the Amended Motion, because double jeopardy is jurisdictional.
Facts: Defendant/Movant shot at four police officers. The indictment which charged Defendant/Movant alleged four counts of ACA in identical language and referred to shooting "Officer White," rather than four different officers. Defendant/Movant was convicted of four counts of ACA. He later filed a Rule 29.15 motion. On appeal of the denial of the Rule 29.15 motion, he claimed his four convictions for ACA violated double jeopardy. This claim had not been pleaded in the Rule 29.15 motion.
Holding: The right to be free from double jeopardy is a constitutional right that goes to the power of the State to bring a defendant into court to answer a charge. As such, the right is jurisdictional. Here, the indictment charged Defendant/Movant using identical language referring to "Officer White," and not the four different officers. This violated double jeopardy for three of the four counts. Moreover, since the issue was jurisdictional, it could be raised for the first time on appeal of the Rule 29.15 case. Convictions vacated for three counts of ACA.

*** Renico v. Lett, ___ U.S. ___, 87 Crim. L. Rep. 139 (U.S. 5/3/10):**
Holding: Federal habeas Petitioner not entitled to relief on double jeopardy claim because State court did not unreasonably apply federal law in holding that there was a "manifest necessity" to declare mistrial when jury told judge in first trial that it could not reach a verdict after four hours of deliberation; "Whether or not [State court's] opinion … was correct, it was clearly not unreasonable."

*** Yeager v. U.S., 85 Crim. L. Rep. 409, ___ U.S. ___ (6/18/09):**
Holding: Where jury acquits Defendant on some counts and hangs on other counts, collateral estoppel under the 5th Amendment Double Jeopardy Clause may bar the State from retrial on the hung counts.

U.S. v. Coughlin, 2010 WL 2572946 (D.C. Cir. 2010):
Holding: Double jeopardy barred retrial on mail fraud counts on which jury hung, where jury had acquitted of other mail fraud counts.

U.S. v. Coughlin, 87 Crim. L. Rep. 709 (D.C. Cir. 6/29/10):
Holding: Where Defendant was acquitted on some mail fraud charges but jury hung on others, double jeopardy precluded retrial on the hung counts.
, this may violate double jeopardy and hearing on matter was required.

U.S. v. Basciano, 2010 WL 1047904 (2d Cir. 2010):
Holding: Where Defendant had been convicted of conspiratorial racketeering, it violated double jeopardy to then charge substantive racketeering.

U.S. v. Polouizzi, 85 Crim. L. Rep. 176, 2009 WL 1098796 (2d Cir. 4/24/09):
Holding: Unit of prosecution for possession of child pornography under 18 USC 2252(a)(4)(B) is the entire collection of pornography, not each individual image or video, but Defendant may be charged separately under 2252(a)(2) for each separate receipt of charged pornography.

Willette v. Fischer, 82 Crim. L. Rep. 212 (2nd Cir. 10/29/07):
Holding: Requirement of sex registration statute to notify authorities of change of address is not a "continuing violation," so Defendant's multiple convictions for failure to report a single move for "each day" he did not report his change of address violated double jeopardy.

U.S. v. Olmeda, 2006 WL 2474880 (2d Cir. 2006):
Holding: Where Defendant had been charged and convicted of possession of ammunition within District of North Carolina and "and elsewhere," Defendant could not subsequently be convicted of same offense in New York.

U.S. v. Rigas, 2010 WL 1880366 (3d Cir. 2010):
Holding: Where Defendants were convicted in New York of conspiracy for hiding certain assets from investors, and then charged in Pennsylvania with fraud and other offenses regarding those same assets

U.S. v. Rigas, 87 Crim. L. Rep. 271 (3d Cir. 5/12/10):
Holding: Double jeopardy prohibits separate punishments for violating the "offense" and "fraud" portions of the federal conspiracy statute, 18 USC 371.

U.S. v. Rigas, 86 Crim. L. Rep. 130 (3d Cir. 10/21/09):
Holding: Section 371 which makes it a crime to conspire to "commit offenses" against the U.S. or "defraud" the U.S. does not authorize separate punishments for the "commit offenses" act and the "defraud" act when the same agreement gives rise to both charges. (The 8th Circuit has held the opposite in *U.S. v. Ervasti*, 201 F.3d 1029 (8th Cir. 2000)).

U.S. v. Tann, 85 Crim. L. Rep. 657, 2009 WL 2581433 (3d Cir. 8/24/09):
Holding: Defendant cannot be subject to multiple convictions for a single act of possession of firearm and ammunition for it under felon-in-possession statute, 18 USC 922(g)(1).
U.S. v. Jackson, 2006 WL 861181 (3d Cir. 2006):
Holding: Convictions for intent to distribute cocaine within 1000 feet of school and lesser-included offense of possession with intent to distribute violated double jeopardy.

U.S. v. Miller, 2009 WL 3153862 (5th Cir. 2009):
Holding: Even though Defendant sought to run over two police officers, where this was a single event, Defendant could only be convicted of one assault, not two.
sser-included offense of possession with intent to distribute violated double jeopardy.

U.S. v. Ellis, 2010 WL 3605499 (7th Cir. 2010):
Holding: Where Defendant actually or constructively possessed the same gun continuously, double jeopardy barred him from being prosecuted as felon in possession in both Illinois and Indiana.

U.S. v. Bell, 86 Crim. L. Rep. 754 (7th Cir. 3/16/10):
Holding: Sentencing Guideline of enhancement for violating a court order cannot be applied to Defendant convicted of federal failure to pay child support because this would be impermissible double enhancement.

U.S. v. Peel, 86 Crim. L. Rep. 573 (7th Cir. 2/12/10):
Holding: Double jeopardy prohibited Defendant-debtor, who tried to blackmail creditor into dropping a claim, from being convicted for both bankruptcy fraud and obstruction of justice.

U.S. v. Richardson, 2006 WL 488414 (8th Cir. 2006):
Holding: Convictions for being felon in possession of firearm and drug user in possession of firearm violated double jeopardy.

Harrison v. Gillespie, 2010 WL 10972 (9th Cir. 2010), reh'g granted 6/18/10:
Holding: Where in penalty phase of death penalty trial the jury deadlocked, there was no manifest necessity to declare a mistrial without first polling the jury to determine whether

Defendant had been acquitted of the death penalty; hence, double jeopardy bars a penalty phase retrial seeking death.

Harrison v. Gillespie, 86 Crim. L. Rep. 434 (9th Cir. 1/5/10):
Holding: Where judge refused Defendant's request to poll a deadlocked death penalty-phase jury before declaring a mistrial, there was no manifest necessity for the mistrial and State is barred from re-seeking death penalty.

U.S. v. Hector, 85 Crim. L. Rep. 653, 2009 WL 2501935 (9th Cir. 2009):
Holding: Where two convictions for same offense violate Double Jeopardy, the court and not the prosecutor, chooses which conviction to vacate.

U.S. v. Castillo-Basa, 80 Crim. L. Rep. 626 (9th Cir. 2/26/07):
Holding: Defendant, who testified in earlier trial and was acquitted, cannot be prosecuted for perjury for having given false testimony because prosecution was barred based on collateral estoppel and double jeopardy.

U.S. v. Blanton, 80 Crim. L. Rep. 570 (9th Cir. 2/12/07):
Holding: 5th Amendment's double jeopardy clause bars the gov't from appealing a trial judge's finding that a prior juvenile adjudication was insufficient to prove a prior conviction for sentence enhancement purposes.

U.S. v. McIntosh, 85 Crim. L. Rep. 682, 2009 WL 2611294 (11th Cir. 8/27/09):
Holding: Prosecutor who noticed mistake in indictment following guilty plea should have moved to vacate the conviction before seeking corrected indictment; failure to do so means second conviction had to be dismissed due to Double Jeopardy.

U.S. v. Bonilla, 85 Crim. L. Rep. 656 (11th Cir. 8/18/09):
Holding: Double Jeopardy prohibits prosecution for both identity theft, 18 USC 1028(a)(7) and aggravated identity theft, 18 USC 1028A(a)(1).

U.S. v. Lewis, 2007 WL 2033813 (11th Cir. 2007):
Holding: Even though Defendant failed to raise double jeopardy in the trial court, it could be reviewed under a plain error standard on appeal.

U.S. v. Ohayon, 2007 WL 1079999 (11th Cir. 2007):
Holding: Acquittal on attempted drug offense required later dismissal of drug conspiracy charge on which jury was unable to reach verdict.

U.S. v. Bonds, 2008 WL 4998683 (N.D. Cal. 2008):
Holding: Even though Defendant made numerous false statements during grand jury testimony, charging Defendant with separate counts for each statement was multiplicitous.

U.S. v. Haas, 2008 WL 5070699 (N.D. Iowa 2008):
Holding: Remedy for multiplicitous convictions is to sentence Defendant on one count and dismiss other count.

Fudge v. U.S., 2009 WL 3242573 (W.D. Mich. 2009):
Holding: Possession with intent to distribute cocaine is lesser-included offense of possession with intent to distribute within 1000 feet of school, so double jeopardy precludes separate convictions for both offenses.

Ex parte Benford, 2006 WL 204983 (Ala. 2006):
Holding: Double jeopardy barred retrial after trial court declared mistrial because it failed to administer oath to petit jury; mistrial was not based on manifest necessity.

People v. Ceja, 2010 WL 1948281 (Cal. 2010):
Holding: When Defendant is convicted of stealing and receiving the same property, the theft conviction takes precedence.

People v. Ramirez, 2009 WL 466795 (Cal. 2009):
Holding: Offense of "grossly negligent discharge of firearm" is included in offense of "shooting in a dwelling," so cannot be convicted of both.

People v. Rodriguez, 2009 WL 2526446 (Cal. 2009):
Holding: Sentence could not be enhanced for both "firearm enhancement" and "gang firearm enhancement."

Rowe v. Superior Court, 2008 WL 5061135 (Conn. 2008):
Holding: Even though witness refused to answer numerous questions at trial, this was a single act of contempt, not multiple acts.

Williams v. State, 2010 WL 3835679 (Ga. 2010):
Holding: Where felony-murder conviction was vacated under modified merger rule, which precluded conviction for felony-murder when Defendant was also convicted of voluntary manslaughter, double jeopardy barred Defendant from being re-prosecuted for felony-murder.

State v. Thompson, 84 Crim. L. Rep. 311 (Kan. 12/5/08):
Holding: Where State charged Defendant with two separate counts for simultaneous possession pseudoephedrine and lithium as precursor elements of methamphetamine, this violated double jeopardy since this was one offense.

Brown v. Com., 87 Crim. L. Rep. 651 (Ky. 6/17/10):
Holding: Where penalty phase jury chooses a non-death sentence, that operates as an acquittal of the death penalty for double jeopardy purposes.

Cardine v. Com., 2009 WL 160357 (Ky. 2009):
Holding: State statute fixing time of jeopardy in jury trials as swearing of first witness violated Double Jeopardy Clause, which requires that jeopardy attach when the jury is impaneled and sworn.

Radford v. Lovelace, 2006 WL 1650562 (Ky. 2006):
Holding: Where trial court declared a mistrial when it learned that Defendant's sister-in-law had contacted State's witnesses before they were subpoenaed by the State, there was no manifest necessity for the mistrial, so double jeopardy barred retrial.

State v. Stevenson, 2009 WL 104846 (La. 2009):
Holding: Where State originally charged two offenses in an indictment but chose to proceed to trial on only one of them, it was double jeopardy to proceed with the second count later and trial court was without jurisdiction to accept a guilty plea to it.

Hubbard v. State, 80 Crim. L. Rep. 99 (Md. 10/17/06):
Holding: There was no manifest necessity for a trial court to declare a mistrial where the prosecutor chose to try two defendants jointly and, after trial began, realized that a State's witness was going to testify about information that had been suppressed in one of the defendant's cases. The remedy was to not allow the prosecutor to call the witness. Therefore, double jeopardy barred retrial.

Bennett v. State, 2009 WL 4279714 (Nev. 2009):
Holding: Drug trafficking was a lesser-included offense of allowing a child to be present during trafficking, so conviction for both violated double jeopardy.

State v. Farr, 2010 WL 4142731 (N.H. 2010):
Holding: Convictions for delivery and possession of same child pornography violated double jeopardy under New Hampshire Constitution.

State v. Quick, 85 Crim. L. Rep. 105 (N.M. 4/2/09):
Holding: Double jeopardy prohibits use of a single act of drug possession to be used to prosecute both drug possession and possession with intent to distribute.

State v. Gonzales, 82 Crim. L. Rep. 255 (N.M. 10/31/07):
Holding: Verdict finding Defendant guilty of first degree murder without specifying whether jurors relied on theory of deliberate murder or alternative theory of felony-murder subjected Defendant to double jeopardy where he was also found guilty of predicate felony, because predicate felony is subsumed within felony-murder.

State v. Lizzol, 81 Crim. L. Rep. 422, 2007 WL 1742190 (N.M. 5/18/07):
Holding: Double jeopardy barred State from appealing trial judge's ruling that it failed to lay a sufficient foundation to admit its breathalyzer results. Since trial court found evidence insufficient to convict without the results, that constitutes an acquittal and double jeopardy bars a retrial.

People v. Williams, 2010 WL 605257 (N.Y. 2010):
Holding: Where Defendants had been released from prison, they had a legitimate expectation in the finality of their originally-imposed sentences, even though the sentences were wrong, and resentencing them to any higher sentence would violate double jeopardy.

People v. Williams, 86 Crim. L. Rep. 663 (N.Y. 2/23/10):
Holding: Even though court erroneously omitted period of post-release supervision mandated by statute, where Defendant's had completed his incarceration sentence, double jeopardy would be violated for the court to impose the post-release supervision after the incarceration sentence had expired.

State v. Bradshaw, 2006 WL 3820468 (Utah 2006):
Holding: Multiple acts of falsely representing self as mortgage broker in order to get fees from victims constituted a single scheme of one offense, not multiple offenses for each victim.

State v. Tester, 84 Crim. L Rep. 564 (Vt. 1/30/09):
Holding: State cannot present testimony that Defendant's DNA matches DNA at the crime scene, unless they also present evidence of the frequency of a match by chance.

State v. Hazelton, 80 Crim. L. Rep. 281 (Vt. 11/22/06):
Holding: Charging both statutory rape and forcible rape is multiplicitous because statutory rape victim is legally incapable of consenting.

State v. Turner, 87 Crim. L. Rep. 834, 2010 WL 3259876 (Wash. 8/19/10):
Holding: Where Defendant is convicted at trial of both greater and lesser offense, it constitutes double jeopardy for trial court to conditionally vacate the conviction on the lesser while directing that the conviction remain valid in anticipation of the greater offense getting reversed on appeal.

State v. Sutherby, 85 Crim. L. Rep. 100, 2009 WL 943858 (Wash. 4/9/09):
Holding: (1) Counsel was ineffective in failing to move to sever child sex assault charge from charge of possession of child pornography; (2) "unit of prosecution" for possession of child pornography is one offense, regardless of how many illegal images Defendant possessed or how many children were depicted in the images.

State v. Varnell, 82 Crim. L. Rep. 231 (Wash. 11/8/07):
Holding: Soliciting one person in one conversation to kill four people constitutes only one unit of prosecution for solicitation to murder.

People v. Magallanes, 2009 WL 1124252 (Cal. App. 2009):
Holding: Defendant cannot be convicted of both theft and receipt of stolen property, when the property at issue is a car stolen in a carjacking.

People v. Tillery, 2009 WL 3128744 (Colo. Ct. App. 2009):
Holding: Sentencing claim involving double jeopardy would be reviewed on appeal for plain error.

People v. Bailey, 2008 WL 4754815 (Ill. App. 2008):
Holding: Even though Defendant had failed to appeal a prior loss of a motion for postconviction DNA testing, Defendant was not barred from pursuing another DNA motion because there is no limit in the statute on the number of requests for DNA testing that can be filed, and Defendant's second motion was not identical to his first.

Hoover v. State, 2009 WL 5173515 (Ind. Ct. App. 2009):
Holding: Where Defendant was convicted of robbery but acquitted of murder, in a trial in which the jury deadlocked on felony-murder, Defendant could not be retried on the felony-murder count.

Owens v. State, 2008 WL 5146876 (Ind. Ct. App. 2008):
Holding: Conviction for murder and robbery with serious bodily injury arising out of same incident violated double jeopardy.

Geiger v. State, 2007 WL 1490476 (Ind. Ct. App. 2007):
Holding: Even though Defendant who impersonated a public servant appeared before two victims, where this was during the same occurrence, Defendant could only be convicted of one count of impersonating a public servant.

Scuro v. State, 2006 WL 1716870 (Ind. Ct. App. 2006):
Holding: Defendant could not be convicted on more than one count of dissemination of harmful material (pornographic movie) to minors when Defendant showed the movie simultaneously to three boys, since statute did not provide for multiple convictions based on number of viewers.

Foley v. Commonwealth, 2007 WL 2558846 (Ky. Ct. App. 2007):
Holding: Fleeing police is a single continuous act even though the flight extended across several counties, so Defendant could not be convicted of the offense in multiple counties once he was convicted in one of them.

Gorman v. Rice, 2010 WL 3326860 (N.Y. Sup. 2010):
Holding: Where judge had already declared a mistrial, and then asked Defendant to choose between the mistrial or continuing the trial, Defendant's choice was only acquiescence and Defendant did not waive her double jeopardy rights.

People v. Maracle, 2009 WL 724222 (N.Y. App. Div. 2009):
Holding: Defendant was subjected to double jeopardy where he made a motion to withdraw a guilty plea and the judge granted the motion without authority to do so, and then Defendant entered a new guilty plea to the charge.

Hancock v. State, 2007 WL 707533 (Okla. Crim. App. 2007):
Holding: Where defendant obtained a weapon in one county and took it into another county, double jeopardy barred prosecution for possession of a weapon by a felon in both counties, since this was only one continuous violation.

Lewis v. State, 2006 WL 3516214 (Okla. Crim. App. 2006):
Holding: Defendant's possession of cocaine and heroin in a single jar constituted just one violation of drug-trafficking statute, and two convictions for trafficking in cocaine and heroin violated double jeopardy.

Ex parte Amador, 2010 WL 3984773 (Tex. Crim. App. 2010):
Holding: Double jeopardy barred subsequent prosecution for indecency with a child by exposure, after Defendant had already pleaded guilty to the lesser-included offense of indecent exposure.

State v. Stephens, 80 Crim. L. Rep. 151 (Tenn. Crim. App. 10/13/06):
Holding: Prosecutor's isolated reference to a search warrant which had been suppressed did not constitute manifest necessity for a mistrial, and therefore, double jeopardy barred retrial.

Ex parte Masonheimer, 80 Crim. L. Rep. 669 (Tex. Crim. App. 3/21/07):
Holding: Where the prosecution in two prior trials had committed *Brady* violations in each trial which caused the defense to request a mistrial mid-trial, the State was barred by double jeopardy from seeking a third trial due to this prosecutorial misconduct.

Villanueva v. State, 2007 WL 1828766 (Tex. Crim. App. 2007):
Holding: Punishing Defendant for injury to a child and his omission in failing to seek medical help for child violated double jeopardy's ban on multiple punishments because the failure to seek medical help did not cause any more injury than the injury offense itself.

State v. Durrett, 2009 WL 1508567 (Wash. Ct. App. 2009):
Holding: Where Defendant was convicted of two counts of failure to register as sex offender for failing to register each week, this was double jeopardy because failure to register is only one "unit of prosecution" that cannot be divided into separate time periods to support multiple charges.

State v. Kenyon, 2009 WL 1671921 (Wash. Ct. App. 2009):
Holding: Where Defendant threw a gun out of a car window and then later attempted to sell the same gun after retrieving it, these were "related offenses" that should have been charged in the same trial, even though they occurred months apart.

State v. Borsheim, 2007 WL 2410890 (Wash. Ct. App. 2007):
Holding: Defendant was subjected to multiple punishments for the same offense where he was charged with four sex offenses, but the jury instructions failed to distinguish between the separate offenses.

State v. Ustimenko, 2007 WL 334208 (Wash. Ct. App. 2007):
Holding: Hit and run statute authorized only one unit of prosecution against the Defendant even though defendant harmed multiple victims by failing to stop.

State v. Knight, 2006 WL 1984733 (Wash. Ct. App. 2006):
Holding: Conviction for conspiracy to commit first degree burglary and second degree robbery violated double jeopardy because these were a single criminal conspiracy.

People v. Newton, 2007 WL 2994330 (2007):
Holding: Even though Defendant injured several persons in a "hit and run" accident, the incident could only be charged as one "hit and run," not a separate crime for each person injured.

DWI

White v. Director of Revenue, No. SC90400 (Mo. banc 8/3/10):
(1) Sec. 302.535.1 places the burden of production and persuasion on Director, and even though Driver does not introduce contradictory evidence, trial court is not required to believe Director's evidence; (2) trial court need not enter written findings of fact unless a party requests them; (3) even though Driver stipulated to introduction of BAC test that showed Driver over legal limit and Officer testified Driver exhibits signs of intoxication, where Officer on cross-examination gave inconsistent testimony, trial court could disbelieve Officer's testimony.
Facts: Director suspended Driver's license for being arrested on probable cause to believe Driver was DWI. Driver sought a trial de novo under Sec. 302.535. On direct examination, Officer testified that he observed Driver turn into a parking lot without signaling; that when he stopped Driver, Officer noticed alcohol odor on Driver and beer cans; that Driver failed field sobriety tests; and that a BAC test showed alcohol above the legal limit. Driver stipulated to the results of the BAC test at the trial de novo, but contended there was no probable cause. On cross-examination of Officer, Officer testified there was nothing abnormal about Driver's driving; that he was driving the speed limit; that Driver did not stumble or lose stability; and that field sobriety tests may not have been performed in accord with proper procedures. The trial court reinstated Driver's license without written findings. Director appealed.
Holding: Director claims that there was substantial, uncontroverted evidence that supported Officer's probable cause determination and, thus, the trial court's judgment is against the weight of the evidence. Director claims that because the trial court did not issue written findings disbelieving Officer's testimony, the appellate court does not defer to the trial court's factual determinations. Sec. 302.535.1 expressly places the burden of proof on the State and expressly provides that the trial de novo be conducted in accord with the Rules of Civil Procedure. Burden of proof means burden of production and burden of persuasion. When the burden of proof is placed on a party, the trier of fact has the right to believe or disbelieve that party's uncontradicted evidence. Also, in the absence of a statute or other rule requiring written findings, under Civil Rule 73.01(c), written findings are required only if a party requests them, which the Director did not do

here. Rule 73.01(c) provides that when there are no written findings, the evidence "shall be considered as having been found in accordance with the result reached." Several prior cases relied on by the Director did not follow the statute on burden of proof or Rule 73.01(c); those cases placed a burden on Driver to produce evidence and to rebut the Director's "prima facie case." Such prior cases include *Berry v. Director of Revenue*, 885 S.W.2d 326 (Mo. banc 1994); *Reinert v. Director of Revenue*, 894 S.W.2d 162 (Mo. banc 1995); *Brown v. Director of Revenue*, 85 S.W.3d 1 (Mo. banc 2002); and *Verdoorn v. Director of Revenue*, 119 S.W.3d 543 (Mo. banc 2003). These cases and others fail to follow Sec. 302.535.1 to place the burden of proof, including the burden of production of evidence, on Director and to apply the Rules of Civil Procedure. To the extent that these cases or any other case applied a presumption of validity to the Director's evidence, to place a burden on Driver to produce evidence that controverts or contradicts Director's evidence for the trial court to disbelieve Director's evidence, or to require written findings absent a request by a party, these cases are overruled. Here, Driver contested Director's evidence through cross-examination of Officer. When evidence is contested by disputing a fact in any manner, the appellate court defers to the trial court's determination of credibility. Trial court's reinstatement of license affirmed.

State v. Severe, No. SC89948 (Mo. banc 1/12/10):
Where while case was pending on appeal the Supreme Court decided Turner (holding that prior SIS municipal convictions cannot be used to enhance a subsequent DWI offense), Defendant receives the benefit of Turner, and remand to allow the State to prove up additional prior convictions is prohibited because Sec. 558.021.2 requires State to prove up prior convictions prior to submission to jury.
Facts: Defendant was convicted at jury trial of Class D felony DWI. Prior to submission to jury, the State submitted two prior DWI convictions to enhance the offense to a felony. One of these convictions was a prior municipal SIS conviction. While the case was pending on direct appeal, the Supreme Court decided *State v. Turner*, 245 S.W.3d 826 (Mo. banc 2008), which held that prior municipal SIS convictions cannot be used to enhance a subsequent DWI offense under the then-existing DWI statute. The State argued that it had additional prior convictions that could be shown, and that a remand should occur to allow the State to prove up the prior convictions.
Holding: Defendant can raise the issue here as plain error because a sentence greater than the maximum authorized by law is plain error resulting in manifest injustice. Here, under the then-existing DWI statute, the State should not have been allowed to use a prior municipal SIS conviction to enhance the instant offense. While the State requests remand to prove up additional DWI convictions, this is prohibited because Sec. 558.021.2 states that in a jury trial, prior convictions must be pleaded and proven before submission to the jury. To the extent that *State v. Bizzell*, 265 S.W.3d 892 (Mo. App. 2008) is to the contrary, it is overruled.

Norris v. Director of Revenue, No. SC89994 (Mo. banc 2/9/10):
When a driver has requested an attorney, the 20-minute time period in Section 577.041.1 begins immediately after the officer has informed the driver of the implied consent law, irrespective of whether the driver requested an attorney before or after an officer informs the driver of the implied consent law.

Facts: Driver was arrested at about 3:00 a.m. after drugs were found in a car he was driving. After being read *Miranda* rights, Driver requested at attorney. At 4:13 a.m., Officer informed Driver of the implied consent law and said his refusal to take a blood test would result in revocation of his license. Driver did not renew his request for an attorney and refused the test. At 4:16 a.m., Officer recorded Driver's refusal. The trial court reinstated Driver's license, and Director appealed.
Holding: Director argues that Driver was not entitled to 20 minutes to contact an attorney because he did not renew his request for counsel after being advised of the implied consent law. Driver argues his post-*Miranda* request for an attorney triggered his right to 20 minutes to contact an attorney after Officer read the implied consent law. Sec. 577.041.1 provides that if a person requested to submit to any test requests to speak to an attorney, the person shall be granted 20 minutes to do so. The statute is violated if an officer fails to allow a driver, upon request, 20 minutes to attempt to contact an attorney after being read the implied consent law. The court of appeals are divided on the interpretation of the statute. The purpose of the statute is to give a driver a reasonable opportunity to contact an attorney so as to make an informed decision whether to submit to a chemical test. When a driver asks for an attorney after the *Miranda* warning but before being read the implied consent law, the driver has not been informed of the consequences of refusing to submit to a test. This makes it difficult to make an informed decision. Thus, when a person requests an attorney, the 20-minute time period begins immediately after the officer has informed the driver of the implied consent law, regardless of whether driver requested an attorney before or after an officer informs driver of the implied consent law. Here, Driver's request to speak to an attorney after the *Miranda* warning was given, but before being read the implied consent law, was sufficient to invoke the 20-minute rule. Driver was not given his 20 minutes after being read the law. License reinstated.

Atkins v. Director of Revenue, No. SC90181 (Mo. banc 2/23/10):
Holding: (1) Even though Driver injured three people in only a single incident stemming from drunk driving, where Driver pleaded guilty to three separate counts of second degree vehicular assault from this incident, Driver was "convicted more than twice for offenses related to" DWI under Sec. 302.060(9) allowing his license to be suspended for 10 years; (2) There is only one Court of Appeals in Missouri, although it is organized into three districts; there is no provision in the Mo. Const. requiring a circuit court to follow a decision from a particular district of the Court of Appeals.

State v. Craig, No. SC89867 (Mo. banc 6/30/09):
(1) In DWI proceeding, parties can bifurcate Defendant's guilty plea to DWI from the issue of what level of DWI the offense is, and Defendant may the appeal the trial court's finding regarding the level of offense; (2) State in DWI prosecution is not required to show that prior DWI convictions complied with Rules 24.02 (state prosecutions) and 37.58 (municipal violations); (3) where prior DWI judgment form did not state whether Defendant was found guilty or not guilty, the judgment form was facially invalid and could not be used to enhance current DWI offense.

Facts: Defendant entered a plea to DWI, but expressly contested whether he was an "aggravated offender." The trial court found him to be an "aggravated offender," and Defendant appealed.
Holding: (1) The State claims Defendant has no right to appeal the "aggravated offender" finding, and can only challenge this in a Rule 24.035 action. However, Defendant did not plead guilty. He admitted to facts establishing certain elements of the offense, but specifically requested a hearing to contest facts establishing him as an aggravated offender. Under Sec. 577.023, Defendant permissibly bifurcated the proceedings and litigated whether he was subject to enhancement. This procedure did not waive his right to appeal under Sec. 547.070. (2) To enhance the offense, the State was not required to prove that prior convictions for DWI complied with Rule 24.02 (state prosecutions) or Rule 37.58 (municipal prosecutions) so long as the judgment and sentence document is facially valid; to hold otherwise would allow constant collateral attack on presumptively valid judgments. (3) Here, one of the priors used to enhance is not facially valid. The judgment and sentence form submitted by the prosecution is blank in the space whether Defendant was found guilty or not guilty. Sec. 577.023 requires a plea of guilty or a finding of guilty followed by an SIS. Thus, this prior cannot be counted. Case remanded to sentence Defendant as "persistent offender" only.

Turner v. State, No. SC88651 (Mo. banc 3/4/08):
Prior municipal DWI offenses which resulted in an SIS cannot be used to enhance a later DWI offense.
Facts: Defendant was charged as a "persistent offender" under Sec. 577.023.1(2)(a) RSMo 2000 in that he had committed two prior "intoxication-related traffic offenses" within 10 years prior to the new charged offense. This enhanced the offense from a Class A misdemeanor to a Class D felony. However, one of the prior offenses was a municipal DWI offense for which Defendant received an SIS. Defendant pleaded guilty to the D felony, and then sought postconviction relief, claiming that the municipal SIS offense could not be used to enhance his offense to a felony.
Holding: Sec. 577.023.2(a) states that a "persistent offender" is one who "has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offenses." Section 577.023.14 states: "A conviction of a violation of a municipal or county ordinance in a county or municipal court for [DWI] or a conviction or a plea of guilty or a finding of guilty followed by a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof in state court shall be treated as a prior conviction." The list in Section 577.023.14 does not include a plea of guilty or a finding of guilty followed by a suspended imposition of sentence in *municipal* court, which is not a conviction. The necessary implication, then, is that a municipal plea of guilty followed by a suspended imposition of sentence cannot be used to enhance punishment. The rule of lenity applies, and the statue must be interpreted in favor of Defendant.

The following note was supplied by Kate Webber, who represented Turner in the postconviction proceeding: The conflicting subsection of 577.023 is still in effect. The amendment to the statute just renumbered it from subsection 14 to subsection 16. Subsection 16 separates out two types of priors that can be used to enhance a new DWI charge: "circuit court priors," and "municipal priors." The "municipal priors"

clause says only prior "convictions" count as priors, thus specifically excluding a municipal SIS, but the "circuit court" priors clause specifically spells out that State SIS's are treated as priors. The Court in *Turner* found, therefore, that subsection [now] 16 conflicts with [now] subsection 4(a), which defines a persistent DWI offender as a person who "has pleaded guilty or been found guilty" of two or more intoxication related-offenses, because 16 seems to exclude prior municipal SIS's from counting as priors, while 4(a) would include them. Therefore, the rule of lenity applies to exclude them.

State v. Shelton, No. ED94134 (Mo. App. E.D. 8/31/10):
Even though Defendant had a new misdemeanor DWI charge pending, where his only prior DWI conviction was more than 10 years old, he was entitled under the old DWI statute to expunge the prior conviction, but he would not have been able to do so under the new DWI law effective August 28, 2010.
Facts: In 1993, Defendant was convicted of his only prior DWI offense. In April 2009, he was charged with a new DWI offense. In August 2009, he moved to expunge the 1993 conviction because more than 10 years had passed since the conviction and he had not been convicted of other DWI offenses. The trial court denied the expungement on grounds that his pending administrative suspension stemming from the April 2009 incident was an "alcohol-related contact" which rendered Defendant ineligible for expungement under Sec. 577.054.
Holding: Here, at the time Defendant moved for expungement, the DOR hearing to revoke or suspend Defendant's driving privileges was still pending. Because any preliminary suspension of the license had been stayed, there was no "formal action" against the license. Further, Defendant had not been convicted of the second DWI at this time. Thus, Defendant had no alcohol-related contacts and was eligible for expungement under Sec. 577.054. However, the holding here is narrow, because the new DWI law effective August 28, 2010, would change the result here, since the new 577.054.1 specifies that pending enforcement actions will disallow expungement.

State v. Carson, No. ED91955 (Mo. App. E.D. 5/25/10):
A prior municipal conviction for driving with excessive blood alcohol content (BAC) cannot be used to enhance punishment for a subsequent DWI under 577.023.1(4)(a) RSMo. Supp. 2005.
Facts: Defendant was charged and convicted at trial of class-D felony DWI for conduct in 2005. To enhance the offense to a felony, the State showed that Defendant had pleaded guilty to BAC in municipal court in 1994 and pleaded guilty to BAC in circuit court in 1995.
Holding: At the time of sentencing in this case, Sec. 577.023.16 did not include a municipal BAC conviction among those that a court can use for enhancement purposes. Therefore, the municipal BAC cannot be counted. Without that offense, Defendant was not a "persistent" DWI offender. And, because his remaining BAC offense occurred more than five years before the instant offense, he was not a "prior" DWI offender either under Sec. 577.023.1(5) RSMo. Supp. 2005. The proper remedy here is to vacate the sentence for class-D felony DWI and remand for jury-recommended sentencing within the range of punishment for class-B misdemeanor DWI.

S.S. v. Mitchell, Director of Revenue, No. ED91194 (Mo. App. E.D. 7/7/09):
Holding: As a matter of first impression, where Driver is eligible for expungement of their 10-year-old DWI conviction under Section 577.054, then under the 2005 amendment to this statute, the Director of Revenue must also expunge the records of Driver's 30-day administrative alcohol license suspension arising out of this incident.

State v. Cook, No. ED91054 (Mo. App., E.D. 12/30/08):
Where shortly after a car accident police went to Defendant's home and entered it without a warrant after Defendant answered the door, smelled of alcohol, and asked to go get identification, the entry and arrest of Defendant was unlawful because without a warrant, but the subsequent toxicology results of Defendant need not be suppressed because those were taken outside of Defendant's home.
Facts: Police were called to an accident scene where a car was abandoned, and a man was seen leaving. Police discovered the car was registered to Defendant's wife, and went to Defendant's house. Defendant answered the door and smelled of alcohol. Police asked for identification. Defendant said he would get identification, and police followed Defendant into his house. There, police arrested Defendant. Later, he was taken to the police station where toxicology tests were given which showed he was intoxicated. He was convicted of DWI and related offenses. He moved to suppress the toxicology results on grounds that the entry into his house without a warrant and his arrest were illegal.
Holding: Although the State claims there were exigent circumstances to justify entry into Defendant's house without a warrant, there were not. Defendant remained in sight of the officers while going to get his identification, and was not attempting to flee. The warrantless entry into the house violated the 4th Amendment. Although probable cause existed to arrest Defendant for leaving the scene of an accident, while probable cause would allow Defendant to be arrested in a public place, it does not justify a warrantless entry into his house to arrest him. Thus, the arrest violated the 4th Amendment. Although Defendant argues that everything that came after that must be suppressed as a poisonous fruit, that is not correct. The toxicology tests were taken *outside* of Defendant's home. Therefore, they were admissible.

Bizzell v. State, No. ED90303 (Mo. App., E.D. 10/7/08):
Where one of Defendant's prior DWI convictions was a municipal court SIS which should not have been used to enhance his DWI to a felony, Defendant could raise this issue for the first time on direct appeal and case is remanded for resentencing and to permit State to produce other evidence of prior DWI convictions.
Facts: Defendant was convicted of Class D felony DWI. His offense was enhanced to a felony because the State alleged two prior DWI convictions, one of which was a municipal SIS. After Defendant's trial, *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), was decided, which held that prior municipal court SIS convictions cannot be used to enhance subsequent DWI's.
Holding: *Turner* held that prior municipal offenses resulting in an SIS cannot be used to enhance punishment under Sec. 577.023. Because *Turner* was decided before Defendant's direct appeal was complete, we are bound by its interpretation. Defendant's sentence is reversed and remanded with instructions to allow the State to present other evidence to prove Defendant's persistent DWI offender status.

Editor's note by Greg Mermelstein: But see ***State v. Severe***, No. WD69162 (Mo. App., W.D. 11/25/08), holding that on resentencing, the State cannot present additional evidence of prior convictions.

Paxton v. State, No. ED89595 (Mo. App., E.D. 6/17/08):
Holding: Under Sec. 577.041.1's plain language, it is a driver's request to speak to an attorney *after* having been asked to submit to a blood alcohol test that triggers the driver's allowance of 20 minutes to call an attorney. Eastern District "declines to follow" *Schlussler v. Fischer*, 196 S.W.3d 648 (Mo. App., W.D. 2006), which held that "whether the request to speak to an attorney comes *before or after* the Implied Consent Law is read, Sec. 577.041.1's 20 minute waiting period begins running immediately after the officer has informed the driver of the Implied Consent Law."

Holloway v. Director of Revenue, No. SD30248 (Mo. App. S.D. 10/21/10):
Holding: Even though Officer found Driver's car in the median of highway with engine running, Driver smelled of alcohol and failed HGN test, where Officer could not recall if he asked Driver if she had been drinking, Officer could not recall if he had received training on the HGN test after NHTSA standardized the test, and a second Officer's observations were all post-arrest, the trial court was free to disbelieve Officer and find that there was no probable cause to arrest for DWI. License reinstatement after refusal to submit to breath test affirmed.

Bieker v. Director of Revenue, No. SD30466 (Mo. App. S.D. 12/23/10):
Holding: (1) Even though Director claimed that court had reinstated Driver's license on grounds that there was no probable cause to arrest for DWI and improperly applied the exclusionary rule (which does not apply in revocation proceedings), the court did not do this because it found that Officer did not have reasonable cause to believe Driver was operating car in intoxicated condition; and (2) even though Officer testified Driver smelled of alcohol, had bloodshot and glassy eyes, slurred speech, and refused sobriety tests, trial court could disbelieve Officer's testimony and find that Director did not show Officer had reasonable grounds to believe Driver was intoxicated when they refused breath test, Sec. 577.041.4. Trial court's reinstatement of license affirmed.

Snider v. Director of Revenue, No. SD30072 (Mo. App. S.D. 7/8/10):
Holding: Even though (1) Officer told Driver she had 20 minutes to contact an attorney, and (2) Driver only called her parents, this did not prove that Driver abandoned her attempt to contact an attorney and Officer was required to give Driver full 20 minutes under Sec. 577.041.1 before deeming her to have refused a breath test. Trial court's order reinstating Driver's license is affirmed.

Wesley v. Director of Revenue, No. SD29533 (Mo. App. S.D. 5/5/10):
Holding: Even though Director presented police officer who testified to facts which could warrant a finding that Defendant was intoxicated, where Defendant through cross-examination of the officer and presentation of his own witness presented facts that would warrant a finding Defendant was not intoxicated, the trial court determines credibility of

witnesses and the court's judgment finding no probable cause to arrest for DWI is affirmed.

State v. Collins, No. SD29516 (Mo. App. S.D. 3/29/10):
(1) Where State admitted driving record of Defendant to prove up prior convictions for DWI enhancement purposes, this was insufficient to prove this because a driving record does not show whether Defendant was represented by counsel or waived counsel in his prior cases; but (2) where Defendant had a court-tried case (as opposed to a jury-tried case), the remedy is to vacate his enhanced conviction and sentence and remand the case to allow the State an opportunity to properly prove up the prior convictions.
Holding: Here, the driving record was not sufficient to prove the prior convictions to enhance Defendant's DWI to a Class B felony, because the driving record did not show whether Defendant was previously represented by counsel or waived counsel. This was plain error requiring vacating Defendant's sentence. The issue here is one of remedy. Defendant claims he can only be sentenced to DWI as an unenhanced Class B misdemeanor. Section 577.023.9 provides that in a court-tried case, the court may defer proof of prior convictions "to a later time, but prior to sentencing." By vacating Defendant's sentence on appeal, Defendant is again "prior to sentencing." Defendant should not be allowed to sandbag by not objecting to lack of proof of prior convictions below, and then use that to have his sentence vacated on appeal, leaving only a misdemeanor conviction. Because Defendant failed to object below and give the State an opportunity to correct the error, the remedy is to remand to allow the State to properly prove up the prior convictions. Defendant's case is different from *State v. Severe,* No. SC89948, 2010 WL 97997 (Mo. banc Jan. 12, 2010), because Severe was a jury trial situation and a different statute, Sec. 577.023.8 governs jury trial cases.

State v. Collins, No. SD29516 (Mo. App. S.D. 12/22/09):
(1) Where State submitted only a Dept. of Revenue Driver's Record showing Defendant had eight prior DWI's, this was not sufficient to prove that Defendant was a "chronic offender" because there was no evidence Defendant had been represented by counsel or waived counsel in writing in the prior cases and this was plain error; but (2) where this was a bench trial, the case is remanded to allow the State an opportunity to properly prove the prior convictions.
Facts: Defendant was charged with DWI as a "chronic offender." The State submitted a certified copy of Defendant's Dept. of Revenue Driver's Record showing he had eight prior DWI convictions. The trial court found Defendant to be a chronic offender and sentenced him accordingly after a bench trial.
Holding: Sec. 577.023.1(3) requires the State to prove that in prior DWI offenses, the defendant was represented by or waived counsel in writing. The Driver's Record was insufficient to prove this. Plain error occurs where it appears a defendant has been improperly sentenced as a repeat offender. Representation by counsel or waiver thereof cannot be presumed by a silent record. Hence, plain error occurred here. The next question is whether Defendant can only be sentenced for a misdemeanor or whether the State should receive a remand to properly prove Defendant's prior convictions. Sec. 577.023.9 provides that in a trial without a jury, the court may defer the proof of prior convictions to a later time, but prior to sentencing. By vacating Defendant's sentence on

appeal, he is again prior to sentencing, so the State can prove up Defendant's prior convictions on remand. The result would be different if Defendant had had a jury trial because in a jury trial the prior convictions shall be "found prior to submission to the jury" under Sec. 577.023.8. Case remanded for opportunity to prove up prior convictions and resentencing.

State v. Cain, No. SD29090 (Mo. App. S.D. 5/15/09):
(1) Even though the parties stipulated in trial court that Defendant's sentence would be reduced and the appeal waived, this did not waive Defendant's appeal because the trial court had no power to reduce Defendant's sentence long after sentencing; (2) where Defendant's prior DWI offense conduct occurred more than five years before the charged DWI offense, Defendant was not a "prior offender," Sec. 577.023.1(5) RSMo. Cum. Supp. 2005; and (3) Point Relied On must state that trial court erred in admitting evidence at trial, not just in denying motion to suppress.
Facts: In April 2007, Defendant was charged with DWI as a prior offender for having "been convicted on August 27, 2002" of DWI in Jefferson County. The conduct giving rise to the Jefferson County charge occurred in 2000. After Defendant was convicted in the new case, he filed an appeal. Meanwhile, six months after sentencing, the parties in the trial court stipulated that Defendant's sentence would be reduced to time served and "in exchange for this outcome, Defendant has agreed to waive" his appeal.
Holding: (1) The State argued that Defendant has waived this appeal because of the stipulation in the trial court. However, there was no authority for the trial court to reduce Defendant's sentence; therefore, Defendant's purported waiver of his right to appeal, based on the mutual false assumption by the parties as to the trial court's authority to reduce Defendant's sentence, was not and could not have been voluntarily made. Once sentencing occurs in a case, the trial court loses jurisdiction, and cannot reduce a sentence as was done here. The trial court could have granted Defendant parole under Sec. 559.100 RSMo. Cum. Supp. 2006, but that's not what the court purported to do here. (2) Although the date of Defendant's prior DWI conviction was August 27, 2002, the conduct giving rise to that conviction occurred in 2000. Sec. 577.023.1(5) RSMo. Cum. Supp. 2005 provides that a prior offender is one whose "prior offense occurred within five years" of the newly charged offense. The 2000 DWI conduct is not within five years of April 6, 2007, the date of the new DWI offense. Therefore, Defendant cannot be sentenced as a "prior offender," and can only be sentenced for a Class B misdemeanor. (3) Defendant's Point Relied On on appeal raises an issue that the trial court erred in denying a motion to suppress. The Point Relied On does not claim error in admitting the evidence at trial. A trial court's ruling on a motion to suppress is interlocutory. A motion to suppress by itself preserves nothing for appeal, and a Point Relied On that refers only to such a ruling preserves nothing for appeal. However, the Court reviews the claim here because the motion was preserved at trial and in the new trial motion, so the State had notice Defendant was raising this issue.

Hurt v. Director of Revenue, No. SD28988 (Mo. App. S.D. 5/7/09):
Where Driver had chewing tobacco in his mouth at time of breathalyzer test, the test results were rendered invalid under 19 CSR 25-30.060.

Facts: Driver claimed that breathalyzer results showing he was intoxicated here invalid because he had chewing tobacco in his mouth at time of testing.
Holding: 19 CSR 25-30.060 provides that an officer must observe a person for 15 minutes before a breathalyzer, and that no smoking or oral intake of any material is allowed during that time. Here, Driver had chewing tobacco in his mouth during this time. The CSR creates a presumption that oral intake of materials renders the test results invalid. Driver was under no obligation to adduce additional evidence to show invalid test results.

Williams v. Director of Revenue, No. SD28910 (Mo. App. S.D. 2/6/09):
The 20-minute period to speak to an attorney under Section 577.041.1 is invoked only when a Driver has requested to speak to an attorney after having been asked to submit to a chemical test; disagreeing with Schussler v. Fischer, 196 S.W.3d 648 (Mo. App. W.D. 2006).
Facts: Driver arrested for DWI was taken to police station at 1:30 a.m. Driver immediately said she wanted an attorney. Officer told her she had 20 minutes to contact one. Driver made one attempt to call an attorney, then stopped trying. Officer said she had 10 to 15 minutes left to call an attorney. Driver then said she "ain't going to talk" to an attorney. Then, at 1:45 a.m., Officer read the Implied Consent Form and asked Driver to submit to a breath test. Driver did not make any additional request for an attorney and refused the breath test. Driver's license was suspended.
Holding: Driver claims her license should not be suspended because Officer failed to allow her 20 minutes to contact an attorney after reading the Implied Consent Law to her. The Eastern and Western Districts have reached conflicting decisions on this. In *Schussler v. Fischer*, 196 S.W.3d 648 (Mo. App. W.D. 2006), the Western District held that "whether the request to speak to an attorney comes *before or after* the Implied Consent law is read, Section 577.04.1's twenty minute waiting period begins running immediately after the officer has informed the driver of the Implied Consent Law." In *Paxton v. Director of Revenue*, 258 S.W.3d 68 (Mo. App. E.D. 2008), the Eastern District held that Section 577.041.1 clearly states that the 20-minute period for contacting an attorney is only triggered if the driver asks to speak to an attorney *after* he or she has been asked to submit to a chemical test. The Southern District holds it will follow the Eastern District ruling. Section 577.041 provides that "[i]f a person *when requested to submit to any test* … requests to speak to an attorney, the person shall be granted 20 minutes" to do so. This Section is clear and unambiguous that the 20-minute period is only triggered when the request to speak to an attorney is made in connection with the request to submit to a chemical test. The 20-minute period of Section 577.041.1 is a statutory right, not a constitutional one, and is different than the *Miranda* warning. Here, Section 577.041.1 was satisfied because Driver did not request to speak to an attorney when requested to submit to a chemical test. License suspension affirmed.

Mitchell v. Director of Revenue, No. 28193 (Mo. App., S.D. 4/16/08):
Director cannot suspend driver's license of someone driving a non-licensed, "off-road" motorcycle in a field, even though the person is intoxicated.
Facts: Director suspended the driver's license of Petitioner, who was driving an unlicensed "off-road" motorcycle in a field while intoxicated.

Holding: Sec. 302.505.1 requires suspension of a license of someone "driving a motor vehicle" while intoxicated. Secs. 302.010(9) and (23) define motor vehicle as any self-propelled vehicle designed primarily for use or used on highways. The Yamaha bike at issue was an "off-road" bike that was not licensed and not designed for use on roadways. It was not being driven on a roadway, but in a field. It does not fit in the definitions in the statutes.

State v. Morgenroth, No. 27686 (Mo. App., S.D. 6/20/07):
Section 577.021 prohibits admission of portable breath test (PBT) to prove guilt.
Facts: In DWI trial, the State, over defendant's objection, had trooper testify that Defendant failed a portable breath test. In closing argument, the State noted that Defendant had failed this test.
Holding: Admission of a PBT is narrowly restricted by statute. Section 577.021 states that a "test administered pursuant to this section shall be admissible as evidence of probable cause to arrest and as exculpatory evidence, but shall not be admissible as evidence of blood alcohol content." Here, the jurors were told they could consider Defendant's failure on the PBT as proof he was intoxicated. This violated the statute.

State v. Chambers, No. 27329 (Mo. App., S.D. 10/19/06):
Even though Defendant was passed out and slumped over the steering wheel in a driveway (not his own) next to the road with the windshield wipers running and said "next question" when asked if he had been driving and had .208 BAC, where the engine was not running, the evidence was insufficient to convict of DWI, Section 577.010.
Facts: Defendant was found asleep, slumped over car's steering in a driveway (not his own) by the road. The engine was not running, but the windshield wipers were on even though it was not raining. The keys were in the ignition. Police asked Defendant if he had been driving and he said "next question." He had a .208 BAC.
Holding: In cases where the Defendant's engine is not running at the time in question, the State must present significant additional evidence of driving and the connection of driving in an intoxicated state to sustain a conviction. The State claims the additional evidence is dogs barking near the time the car was found in the driveway to show that the car just arrived there, and Defendant's answer "next question" when asked if he had been driving. However, the dogs' barking does not show sufficient proof of when the car arrived in the driveway, since the driveway owner admitted he couldn't tell how long Defendant had been parked there. Also, the "next question" answer occurred after *Miranda* warnings and was an exercise of the right to remain silent. Conviction reversed.

State v. Robertson, No. WD72529 (Mo. App. W.D. 12/14/10):
Trial court could find there was no probable cause to arrest where State did not show that pre-arrest portable breathalyzer machine had been properly calibrated.
Facts: Defendant was charged with DWI. Officer had stopped Defendant for speeding. Defendant had a strong odor of alcohol on her. Officer asked her to submit to a portable breathalyzer test (PBT). It showed a result of .08. Officer then asked Defendant to perform other field sobriety tests, such as walking and counting. These tests did not show evidence of intoxication. However, Officer observed that Defendant's eyes were bloodshot and glassy, and she was argumentative. Officer then had Defendant perform

second PBT, which showed a result above .08. Defendant filed motion to suppress. At the suppression hearing, Officer testified he did not know when PBT machine was calibrated. The trial court issued an order stating that because no record existed establishing that the PBT had been calibrated, no probable cause existed for the arrest. The State appealed.
Holding: The State contends that the PBT results were admissible as evidence of probable cause to arrest. Sec. 577.021.3 provides that a PBT test shall be admissible as evidence of probable cause to arrest and as exculpatory evidence, but shall not be admissible as evidence of blood alcohol content. Also, the PBT is not subject to the same Dept. of Health regulations that govern breath analysis tests admissible to prove that a defendant was intoxicated. Admissibility of the PBT is not the issue here, however, because the trial court admitted into it evidence at the suppression hearing. The State's real complaint is that the court did not accept and rely on the results of the PBT. It appears the court found the results of the PBT inconsistent with the other evidence in the case, and disbelieved the results due to lack of calibration of the PBT. Even the Officer conceded that without the results of the PBT, he did not have probable cause to arrest Defendant for DWI. The court was free to disbelieve the PBT results. Without the PBT results, the Officer did not have probable cause to arrest. Motion to suppress affirmed.

State v. Loyd, No. WD71692 (Mo. App. W.D. 12/21/10):
Officer had no probable cause to stop Defendant for DWI where (1) Defendant failed to use a turn signal to pull out of private property onto a street, since this is not a crime; (2) Defendant failed to turn into the nearest lane, since this is not a crime, and Officer did not even notice this until he reviewed the police car video later; and (3) Defendant's wheels touched the center line, since this minor deviation does not justify a stop.
Facts: Officer saw Defendant pull out of a private parking lot and turn onto a street, apparently without signaling. Also, Officer saw Defendant fail to turn into the nearest lane. Finally, Officer saw Defendant's wheel touch the center line. Officer stopped Defendant and determined he was intoxicated. Defendant was convicted of DWI. He appealed the denial of a motion to suppress.
Holding: Since Defendant failed to object to evidence at trial, he did not properly preserve his motion to suppress, so the claim can only be reviewed as plain error on appeal. Nevertheless, plain error occurred here since Officer lacked probable cause to stop Defendant. First, Officer did not actually see Defendant fail to signal but only thought this because Officer thought there wasn't enough time for the signal to turn off when Defendant completed his turn. Even so, however, failing to signal when pulling out of a private parking lot does not violate state statute, Sec. 304.019, or municipal ordinance, which make failing to signal an offense only if committed upon a public roadway or publicly maintained road. Thus, Defendant violated no law in failing to signal. Second, Officer claimed Defendant did not pull into the nearest lane. This, however, does not violate any law either, but it also can't supply probable cause here because Officer did not even notice this until he reviewed the police car video later. Probable cause must be based on facts observed before a stop, not later. Finally, Officer claimed Defendant's wheel touched the center line. However, a minor deviation from traffic like this does not provide probable cause to stop a driver. The video clearly establishes that there was no illegal or unusual driving in this case. Defendant's seizure

violated 4th Amendment, and motion to suppress should have been granted. Absent probable cause for the stop, all subsequent evidence should have been suppressed.

Folkedahl v. Director of Revenue, No. WD71046 (Mo. App. W.D. 4/13/10):
Even though Director conducted license revocation administrative hearing in the wrong county, where this had not been objected to by Driver, trial court in another county lacked jurisdiction to reinstate license under Sec. 302.311.
Facts: Driver was arrested for DWI in Platte County, but the arresting officer erroneously listed Clay County in the notice of suspension/revocation. Driver filed a request for an administrative hearing to review his suspension/revocation. Based on the reference to Clay County, Director held the hearing in Clay County without objection from Driver. The hearing officer suspended Driver's license. Subsequently, Driver sought review of Director's decision in Platte County under Sec. 302.311. The trial court reinstated the license.
Holding: Here, there are two statutes at issue regarding review of suspension: 302.311 and 302.535. Driver contends that a procedural defect occurred when Director failed to grant him a hearing in Platte County; that Director lost jurisdiction due to the defect; and, therefore, that the trial court does not have jurisdiction to conduct a trial de novo under Sec. 302.535. Driver relies on cases which have allowed an appeal to proceed under Sec. 302.311 when there was a procedural error by the Director which rendered judicial review under 302.535 unavailable. Here, however, Driver requested an administrative hearing, which gave Director jurisdiction to conduct the hearing. Once jurisdiction is validly acquired, Director retains jurisdiction until final judgment. While the Director erroneously set the hearing in Clay County, Driver has failed to establish that the error deprived Director of jurisdiction, and the trial court of subject matter jurisdiction, and rendered a trial de novo under Sec. 302.535 unavailable in the correct county, Platte. A trial court has authority over a trial de novo under Sec. 302.535 if the petition is filed in the correct circuit court and if a petition is timely filed. Sec. 302.311 did not provide a basis for the trial court to review the suspension, and the court's decision to reinstate license is null and void.

State ex rel. Koster v. Jackson, No. WD71165 (Mo. App. W.D. 1/26/10):
Even though Defendant did not file a 24.035 motion, where he had pleaded guilty before the Turner case and one of his prior convictions was a municipal SIS, the municipal SIS could not be used to enhance his sentence and habeas relief is granted.
Facts: In 2002, Defendant (Petitioner) pleaded guilty to DWI as a "persistent offender" and was sentenced to five-years SES. In 2005, his 5-year sentence was executed. In 2008, *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), held that municipal SIS convictions could not be used to enhance sentence. Defendant had a prior municipal SIS used to enhance his sentence. Without it, his sentence could not have exceeded one year. He sought habeas corpus relief. The circuit court granted it, and the State appealed by writ of certioriari.
Holding: The State argues that because Defendant did not file a Rule 24.035 motion he waived his right to seek postconviction relief under *Turner*. However, a habeas petitioner can overcome such a procedural default by showing (1) actual innocence, (2) a jurisdictional defect, or (3) the procedural default was caused by something external to

the defense and prejudice. A sentence in excess of that authorized by statute falls under the jurisdictional defect exception, even though it is now a matter of a court's "authority" rather than jurisdiction under *Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). Here, the sentencing court exceeded its authority in imposing a 5-year sentence because municipal SIS convictions cannot be used to enhance sentence under the then-DWI statute. Grant of habeas relief affirmed.

State v. J.D.L.C., No. WD70769 (Mo. App. W.D. 9/1/09):
Even though minor-Defendant had faint odor of alcohol on his breath, where (1) minor was in backseat of vehicle and only alcohol was in front seat of vehicle or truck bed, and (2) minor's eyes were not glassy or bloodshot and he was not belligerent, Officer did not have probable cause to arrest minor for minor-in-possession, and later breath-test results must be suppressed.
Facts: Officer stopped truck for speeding. A driver and 3 minors were in the truck. Beer cans were in the truck bed, and a bottle of rum was in the front seat. Minor-Defendant was in the back seat. Minor-Defendant had a "faint" or "mild" odor of alcohol, but his eyes were not bloodshot or glassy, and he was not belligerent. Officer arrested him for minor-in-possession. At station, minor was given breath test which showed .058% BAC. Minor sought to suppress the breath-test results.
Holding: Section 311.325 provides that a person under age 21 commits minor-in-possession if they are "visibly intoxicated as defined in Sec. 577.001." Officer testified at suppression hearing that he arrested Defendant for being visibly intoxicated. However, there was no probable cause to arrest. Minor did not own or drive the truck, and was sitting in the backseat where alcohol was not found. Also, he showed no visible signs of intoxication because his eyes were not glassy or bloodshot and he was not belligerent, even though he had a faint or mild odor of alcohol. Since the breath-test was closely tied to the illegal arrest, it cannot be purged of this taint; the breath-test likely would not have been obtained absent the illegal arrest. Breath-test is suppressed.

Ross v. Director of Revenue, No. WD69900 (6/9/09):
Where Officer arrested Driver without a warrant more than 90 minutes after suspected DWI, the arrest was not lawful because it exceeded the 90 minute rule in Section 577.039, and thus, Driver's subsequent refusal to take breath test could not support license revocation.
Facts: Officer received a report of a woman by a highway, and arrived at scene at 2:14 a.m. Officer found woman in front passenger seat of wrecked vehicle. There was a strong odor of alcohol. Woman was wearing only one shoe and another shoe was near the road. Woman said another friend was driving, but was unable to provide a name. Officer arrested woman for careless and imprudent driving and possession of drug paraphernalia. At police station, Officer arrested woman for DWI, read implied consent advisory at 3:54 a.m., and woman refused to take breath test. Director revoked her license.
Holding: Driver (woman) argues her warrantless arrest for DWI was invalid because it did not occur within 90 minutes of the violation as required by Sec. 577.039. Sec. 577.039 provides that an arrest without a warrant for DWI is lawful "when such arrest without a warrant is made within one and one-half hours after such claimed violation

occurred." Here, the arrest for DWI occurred more than 90 minutes after the violation occurred, and therefore was unlawful. The unlawful arrest cannot support license revocation. Even though Officer arrested Driver for careless driving and drug paraphernalia earlier, this cannot support revocation because the implied consent law, Sec. 577.020.1(1), provides that a consent to chemical test is deemed given only if a person is arrested for driving "in an intoxicated or drugged condition."

Mullen v. Director of Revenue, No. WD69874 (Mo. App. W.D. 6/9/09):
Even though Driver was lying by a wrecked vehicle in an intoxicated condition, where Officer arrested Driver without asking Driver or any witnesses if Driver had been driving the vehicle, the arrest was without probable cause, so license could not be suspended.
Facts: Officer, called to scene of accident, found Driver lying by a wrecked vehicle. Driver smelled of alcohol and said he had been drinking. Officer gave a preliminary breath test which showed Driver's BAC was above the legal limit. Officer arrested Driver. After the arrest, Officer learned from witnesses that Driver had been driving the vehicle.
Holding: The arrest was without probable cause because at the time Officer arrested Driver, Officer had not asked Driver or witnesses if Driver had been driving the car. All Officer knew was that an intoxicated man was lying by a vehicle. Director must show Driver was arrested upon probable cause to believe he was driving a vehicle with excessive BAC.

State v. Royal, No. WD69152 (Mo. App. W.D. 3/3/09):
Where Defendant was convicted of DWI and second-degree assault for injuries caused in a DWI crash, the DWI is a lesser-included offense of the assault, so the DWI conviction violated double jeopardy.
Facts: Defendant, while driving drunk, crashed into another car an injured two people. He was convicted of DWI, Sec. 577.010, and second degree assault, Sec. 565.060.1(4).
Holding: The trial court plainly erred in finding Defendant guilty of DWI and second-degree assault when the charges for the offense were based on the same incident because DWI is a lesser-included offense of second degree assault and this violated double jeopardy. Sec. 556.401(1) states that a defendant whose conduct may establish multiple offenses may not be convicted of more than one offense if one offense is included the other. DWI is a lesser-included offense because a person must drive while intoxicated to commit second-degree assault under Sec. 565.060.1(4). DWI conviction reversed.

Raisher v. Director of Revenue, No. WD69090 (Mo. App. W.D. 1/29/09):
Even though Trooper testified he believed the breath-test machine gave an invalid result, there was no evidence from the machine of an incorrect result and Trooper's testimony should have been disregarded under doctrine of destructive contradictions.
Facts: Trooper administered breathalyzer to Driver. On Driver's first blow into the machine, the machine registered a BAC of .078%, under the legal limit of intoxication. However, Trooper believed that Driver had not blown properly into the machine and had Driver blow again. On second blow, machine registered a BAC of .094%. Trooper testified the two different results were due to Driver's incorrect breathing. But Driver introduced evidence that the machine detects improper breathing and reports this as an

"error code," and the machine had not reported improper breathing on the first test. Trial court suspended Driver's license. Driver appealed.
Holding: Director contends it met its burden of proof to show by preponderance of evidence Driver was intoxicated above legal limit, because Trooper testified the second test result was more accurate than the first one due to improper breathing. The issue is whether the Trooper's testimony is sufficient to overcome the presumed validity of the first test result. A prior case has held that a court cannot find a breath test result unreliable absent evidence the machine malfunctioned. The machine should have detected improper breathing. The Director did not present scientific evidence to show the first test result was invalid. Trooper's testimony should have been disregarded under doctrine of destructive contradictions. At best, the evidence of intoxication is in equipoise, and therefore, Director did not meet its burden. License suspension reversed.

State v. Severe, No. WD69162 (Mo. App., W.D. 11/25/08):
Where one of Defendant's prior DWI convictions was a municipal SIS, this conviction could not be used to enhance Defendant's subsequent DWI to a felony, and while the case is remanded for resentencing, the State cannot present additional evidence to show other DWI convictions.
Facts: Defendant was charged and convicted of being a "persistent" DWI offender under Sec. 577.023.1(4)(a) because she allegedly had two prior DWI offenses. One of the offenses, however, was a municipal SIS, which can no longer be used to enhance under *Turner v. State*, 245 S.W.2d 826 (Mo. banc 2008). On appeal, the State claimed that the appellate court should remand the case for resentencing, and allow the State to present additional evidence of other DWI convictions.
Holding: Sec. 577.023.8 specifies that in a jury trial the facts establishing persistent offender status "shall be pleaded, established and found *prior* to submission to the jury." Allowing the State to now present additional evidence of other convictions would violate the timing of the statute, that the factual finding be made before submission to the jury. The State is precluded from presenting additional evidence at resentencing of any other DWI convictions. The Court declines to follow *Bizzell v. State*, 2008 WL 4540395 (Mo. App., E.D. Oct. 8, 2008), which allowed the State to present additional evidence of DWI convictions on resentencing.

State v. Wilson, No. WD69083 (Mo. App., W.D. 11/4/08):
Where the only evidence was that Defendant had been in an accident at some unknown time in the past and was later intoxicated at a hospital, the evidence was insufficient to convict of DWI.
Facts: Defendant was involved in a one-car accident. Police arrived after Defendant had been taken to a hospital. At trial, the State presented evidence that Defendant was intoxicated at the hospital. A passenger in the car testified Defendant had "drunk a little, not very much."
Holding: The evidence presented showed only that Defendant drove a car, was involved in an accident, and was intoxicated at a hospital some time on December 17. There was no testimony when the accident occurred, when the trooper arrived at the scene, when the trooper arrived at the hospital or when the blood test was given; these were fatal omissions in proof. Proof Defendant was intoxicated at time of arrest, when remote from

operation of the vehicle, is insufficient by itself to prove intoxication at time the person was driving.

State v. Craig, No. WD68750 (Mo. App., W.D. 10/28/08):
Even though Defendant claimed that his prior DWI convictions could not serve as enhancements for various reasons, where Defendant pleaded guilty, he could not take a direct appeal of the guilty plea for this reason, but could only challenge the evidentiary basis for his plea by postconviction motion.
Facts: Defendant was charged with DWI as an aggravated offender. He allegedly had three prior DWI convictions. Prior to pleading guilty, Defendant filed a motion challenging his prior convictions on grounds that they did not comply with various court rules and there was no record of one of the convictions. The plea court found Defendant to be an aggravated offender. He appealed.
Holding: The Court of Appeals must address its jurisdiction, and finds no jurisdiction to direct appeal here. The only issues cognizable on direct appeal from a guilty plea are subject matter jurisdiction and the sufficiency of the charging instruments. Defendant does not allege the court lacked subject matter jurisdiction. While he claims the court erred in refusing to dismiss the information, the challenge is grounded on the evidence the information was based on, rather than the sufficiency of the charging instrument itself. A complaint about the evidentiary basis for the trial court's finding is not subject to direct appeal, but may be raised in a postconviction motion. Appeal dismissed.

Hack v. Director of Revenue, No. WD68408 (Mo. App., W.D. 7/22/08):
Even though Driver was only pushing a motorcycle, where the engine was running, this was operating a motorcycle and Driver's license could be suspended for DWI.
Facts: Driver, who had a BAC of .16, was pushing a motorcycle with the engine on when the motorcycle jumped forward, dragged him, and ran into a fence. Driver claimed his license could not be suspended because he was not operating the motorcycle.
Holding: To suspend a license, the Director is requires to show (1) Driver was arrested upon probable cause that Driver committed an alcohol-related offense, and (2) Driver had been driving with a BAC above .08. The issue is whether pushing a motorcycle is operating it. Operate means to cause to function usually by direct personal effort. Driving means to guide a vehicle along or through. The bright line test is whether the motor is running. Here, Driver turned the key and the motor was running. He was pushing the motorcycle and the motor was engaged to assist. Thus, he was driving or operating the motorcycle, and his license can be suspended.

State v. Ollison, No. WD66722 (Mo. App., W.D. 9/11/07):
Evidence was insufficient to prove Defendant drove his truck while intoxicated where truck was wrecked by road and police found Defendant more than an hour later at a house in an intoxicated state.
Facts: Police found Defendant's truck overturned in a ditch at 1:33 a.m. They found Defendant at 2:40 a.m. at a house. He was intoxicated and had a BAC of .154%. At 3:09 a.m., he had a BAC of .168%. He said he had been at a bar around 7:00 p.m. and drank 5 beers. He said he had not consumed any alcohol since the accident.

Holding: The State's evidence showed only that the accident occurred between 7:00 p.m. and 1:20 a.m., when Defendant called some people to report he had an accident. Defendant's statements do not prove he was intoxicated while driving because there is no evidence as to when he operated the truck. If the accident occurred close to 1:20 a.m., and Defendant did most of his drinking less than 30 minutes before, he might not have been intoxicated while driving, but the alcohol effects would show up later. The fact that his BAC was rising at 3:09 a.m. suggests he consumed some of the alcohol late in the evening.

State v. Roark, No. WD67135 (Mo. App., W.D. 6/12/07):
(1) Even though officer received a call about a possible intoxicated driver, where officer saw the car and only saw it move slightly over the fog line of the road, there was no reasonable suspicion to stop the driver for DWI; and (2) even though defense counsel failed to object to officer's testimony at trial, where defense counsel had a pending "motion to reconsider denial of motion to suppress" at trial and requested a ruling at the close of the state's evidence, that preserved the claim for appeal.
Facts: Officer received a call about a "possible intoxicated driver." Officer found the car and it slightly moved across the fog line. The car then pulled into a motel. Officer went to the motel and asked driver to "come outside." Driver asked for an explanation, but officer said he would give one outside. Officer eventually arrested Defendant for DWI. Before trial, the trial court overruled a motion to suppress. At trial, defense counsel filed a "motion to reconsider denial of motion to suppress," which defense counsel renewed at the close of all the state's evidence. Counsel did not object to officer's trial testimony.
Holding: (1) There was no reasonable suspicion to stop the car, and thus, no reasonable suspicion for the subsequent stop of Defendant at the motel. Officer testified Defendant's car did not "go off" on the shoulder; other drivers did not have to take evasive action; and there was no erratic or dangerous driving by Defendant. The anonymous information about a "possible intoxicated driver" provides no more information of substance than what officer observed. (2) While trial counsel's method of raising and preserving the suppression issue at trial is "certainly not the preferred method of preservation," it is preserved here where neither the State nor trial court claimed at trial that it had been waived. The better method would have been to object to the officer's testimony based on the motion to suppress.

State v. Byron, No. WD66807 (Mo. App., W.D. 5/22/07):
Evidence insufficient to prove Defendant operated car while intoxicated so as to convict of DWI where Defendant left car at accident scene and was not found by police until more than one hour later, at which time he was intoxicated.
Facts: Defendant's car ran off the road near a construction site. Police found the car abandoned, but learned it was Defendant's car. More than one hour later, police went to Defendant's house and found him intoxicated. When asked about the accident, Defendant said he knew nothing about it, and said his father had had his car. The father denied having the car, but said he had picked up Defendant near the accident scene, and Defendant was sober at that time. Defendant's shoeprint was by the accident scene.

When police asked Defendant to take a breathalyzer, Defendant said, "You didn't see me driving. You didn't catch me driving."
Holding: The evidence does not prove Defendant operated the car while intoxicated. Defendant was not contacted by police for as much as an hour and 20 minutes after the accident. While Defendant's statements show he was afraid he would be accused of DWI, they did not demonstrate Defendant actually was intoxicated at the time of the accident.

State v. Davis, 217 S.W.3d 358 (Mo. App., W.D. 3/27/07):
Even though (1) officer arrived at crash scene and found a crashed car; (2) a woman told the officer that the crash happened shortly before and told the officer where the driver fled; and (3) the officer found the driver and he was intoxicated, the evidence was insufficient to sustain conviction for DWI because the only evidence of when the accident occurred was the hearsay statement of the woman to the officer, which could not be considered for its truth.
Facts: Officer arrived at scene where car had crashed. A woman told the officer that the car had crashed shortly before, and told the officer where the driver had fled. The officer went to another address and found the driver, who was intoxicated. Empty beer cans were found in the car. At trial, the woman did not testify. The defense objected to the officer's testimony about the woman's statements as hearsay, but the court admitted them to show officer's subsequent conduct.
Holding: The woman's statements were admitted at trial for a limited purpose, and not as substantive proof of the time of the accident. The court could not consider the woman's out-of-court statements about when the accident occurred for the truth. Thus, there was no substantive evidence to establish the time that Defendant was driving the vehicle or the time the accident occurred. Proof of intoxication at the time of arrest, when remote from operation of the vehicle, is insufficient to prove intoxication at the time the person was driving. The fact that Defendant had blood on him does not prove intoxication while driving because there was no testimony if the blood was wet or dry; also, mere presence of beer cans does not prove intoxication while driving.

Ex parte Holbert, 2008 WL 2699684 (Ala. 2008):
Holding: Under Alabama statute, municipal DWI convictions cannot be used to enhance later DWI's to felony.

State v. Zaragoza, 2009 WL 1521769 (Ariz. 2009):
Holding: In DWI case, jury instruction on whether Defendant was in actual physical control of the vehicle should instruct jury to consider totality of circumstances shown by the evidence and whether Defendant's current or imminent control of vehicle presented a real danger to himself or others; factors to consider include whether vehicle was running, position of driver in vehicle, whether headlights were on, where vehicle was stopped, time of day, whether heater or air was on, whether windows were up or down, whether driver had pulled over voluntarily.

People v. McKown, 82 Crim. L. Rep. 11 (Ill. 9/20/07):
Holding: The horizontal gaze nystagmus (HGN) test cannot be admitted without first passing the *Frye* test.

State v. Blackwell, 85 Crim. L. Rep. 240 (Md. 5/14/09):
Holding: Officer's testimony about horizontal gaze nystagmus test must meet the requirements for expert testimony, and cannot be lay testimony.

People v. Freezel, 2010 WL 2291834 (Mich. 2010):
Holding: Metabolite 11-carboxy-tetrahydrocannabinol, which was a natural byproduct created by bread down of THC after marijuana use, was not a schedule 1 controlled substance, so that Defendant did not operate a motor vehicle with the presence of a schedule 1 controlled substance.

State v. Wertheimer, 2010 WL 1609730 (Minn. 2010):
Holding: The time computation statute which excluded the first day of a period did not apply to whether Defendant's second DWI was within 10 years of the prior one; thus, Defendant's second DWI offense exactly 10 years to day from prior offense was not subject to enhancement.

State v. Dale Lee Underdahl, 2009 WL 1150093 (Minn. 2009):
Holding: DWI defendant entitled to disclosure of computer sources code for the breathalyzer.

State v. Wiltgen, 2007 WL 2389768 (Minn. 2007):
Holding: Use of prior license revocation to establish aggravating factor for later DWI charge violated due process.

Harness v. State, 87 Crim. L. Rep. 412 (Miss. 5/27/10):
Holding: Even though Prosecutor may not have intended to deprive Defendant of a DWI blood test evidence, where the State destroyed the blood sample without Defendant having an opportunity to test it, this denied Defendant right to due process and access to exculpatory evidence.

Hoagland v. State, 88 Crim. L. Rep. 94 (Nev. 10/7/10):
Holding: Defendant can present defense of necessity to DWI; however, where Defendant's own misconduct contributed to the "necessity" to drive, the defense is not available; thus, where Defendant was parked illegally and had to move his car while drunk, the defense was unavailable.

State v. Rincon, 80 Crim. L. Rep. 304 (Nev. 12/7/06):
Holding: Where there was no indication that Defendant was drunk driving other than that he was driving slower than speed limit, there was no reasonable suspicion to stop for drunk driving.

State v. Marquez, 87 Crim. L. Rep. 709 (N.J. 7/12/10):
Holding: New Jersey implied consent law requires that non-English speaking arrested drivers be given an translated version of the warnings.

State v. Simms, 2010 WL 2793792 (N.M. 2010):
Holding: DWI conviction requires proof that Defendant actually exercised control over vehicle as well as general intent to drive.

State v. Marquez, 2009 WL 5100854 (N.M. 2009):
Holding: Where Officer testified that Defendant's performance on a field sobriety test correlated with a 90% probability of having a blood alcohol level above the legal limit, this was inadmissible absent qualification of the Officer as an expert and a sufficient scientific foundation.

City of Las Cruces v. Rogers, 2009 WL 2868714 (N.M. 2009):
Holding: City lacked authority to enforce DWI ordinance on private property without consent of owner, but offense could be prosecuted under State DWI law.

People v. Litto, 81 Crim. L. Rep. 528 (N.Y. 6/27/07):
Holding: New York's driving under the influence of drugs statute did not prohibit driving while under the influence of "huffed" aerosol, because this wasn't listed in the list of prohibited substances under the statute. Nor could this fit under the general DWI statute, because that only applies to alcohol-related offense.

State v. Worwood, 81 Crim. L. Rep. 455 (Utah 6/22/07):
Holding: Where police officer (1) encountered driver-Defendant stopped on a dirt road; (2) suspected Defendant was drunk; but (3) rather than conduct sobriety tests there, transported Defendant more than a mile away to have another officer conduct tests, the investigative detention escalated into a de facto arrest, and there was no probable cause for the arrest, even though there was reasonable suspicion of drunk driving. Thus, results of the sobriety tests were suppressed.

State v. Harris, 2009 WL 2401758 (Vt. 2009):
Holding: Evidentiary hearing was required to determine whether Defendant-driver was legally required to use his turn signal when exiting from a "rotary" because this involved factual and legal issues, and if Defendant was not required to signal, then Officer lacked any grounds to stop Defendant.

State v. Bonvie, 81 Crim. L. Rep. 693 (Vt. 8/24/07):
Holding: Even though Defendant initially refused to do a breath test, where he quickly changed his mind within the time required by the implied-consent statute, State could not use Defendant's refusal against him as evidence of guilt.

City of Auburn v. Hedlund, 2009 WL 331666 (Wash. 2009):
Holding: Even though passenger rode with a DWI driver, where the passenger was injured in a crash, passenger could not be charged as an accomplice to DWI because passenger was the "victim" of the crime.

Ludvigsen v. City of Seattle, 82 Crim. L. Rep. 460 (Wash. 12/20/07):
Holding: Ex post facto would be violated if DWI defendants were convicted using a breath test device that did not meet legally mandated requirements at the time of their offenses, even though the City later changed the requirements to allow the device.

People v. Kladis, 2010 WL 2977604 (Ill. App. 2010):
Holding: Even though police had only inadvertently destroyed a video of Defendant's DWI arreast, where the State was required to preserve and produce the tape, the exclusion of the Officer's testimony about events shown on the tape was an appropriate sanction for the discovery violation.

Sapen v. State, 2007 WL 2068645 (Ind. Ct. App. 2007):
Holding: Where officer followed Defendant into his driveway but never ordered him to stop and allowed him to go in the garage to get his license, a warrantless entry into the garage was not justified by exigent circumstances even though alcohol would dissipate in the blood.

State v. Stegman, 2009 WL 722991 (Kan. Ct. App. 2009):
Holding: A medical assistant was not qualified to draw blood in DWI case because was not "certified medical technician" under statute.

State v. Shadden, 2009 WL 102960 (Kan. Ct. App. 2009):
Holding: Police officer should not have been allowed to testify that driver who failed a walk-and-turn sobriety test had a 68% likelihood of having a BAC of .10, because this improperly implied a level of scientific certainty to the field test.

State v. Shriner, 2007 WL 2832448 (Minn. Ct. App. 2007):
Holding: Suspected presence of alcohol in Defendant's blood is not a *per se* exigent circumstance to allow warrantless blood draw; moreover, statute allowing taking of blood sample without driver's consent upon probable cause is unconstitutional where a warrant can be obtained.

State v. Tom, 2010 WL 3169360 (N.M. Ct. App. 2010):
Holding: Where State did not establish foundation that breath-test machine was certified for accuracy, admission of breath-test results was not harmless, where other evidence of guilt was weak.

State v. Diaz, 2007 WL 656871 (N.M. Ct. App. 2007):
Holding: After it had already imposed its sentence, trial court could not later impose an enhanced sentence for DWI when the State discovered an additional conviction that had not been used to enhance sentence at the original sentencing hearing.

People v. Baker, 2008 WL 1901667 (N.Y. App. Div. 2008):
Holding: Where the State failed to elicit from the blood alcohol test examiner whether the machine was properly calibrated and working properly, the BAC results were not admissible.

State v. Grizovic, 2008 WL 2550750 (Ohio Ct. App. 2008):
Holding: Trooper cannot testify to statistical probability that a Defendant would have tested over the legal limit for DWI, based on results on field sobriety tests.

State v. Hoover, 2007 WL 3131871 (Ohio Ct. App. 2007):
Holding: Court could not enhance DUI sentence merely because Defendant exercised his right to revoke his implied consent to a breath test.

Hall v. State, 2009 WL 2949746 (Tex. Crim. App. 2009):
Holding: Where officer stopped Defendant for allegedly speeding using Light Detection and Ranging Device (LIDAR), but there was no showing that LIDAR was reliable, there was no probable cause to stop and Defendant's motion to suppress DWI results following stop was granted.

People v. Molina, 2009 WL 1911941 (N.Y. Sup. 2009):
Holding: Where in DWI cases police gave both a breath test and coordination test to defendants who spoke English, but only a breath test to defendants who spoke Spanish, this violated Spanish defendant's equal protection rights.

Escape Rule

Elverum v. State, No. ED88496 (Mo. App., E.D. 9/18/07):
(1) Even though Movant absconded from probation, court exercises its discretion not to apply "escape rule" due to the "central issues" of this case; (2) plea court failed to ensure Movant understood the range of punishment by failing to advise him of maximum penalty and that his sentences could run consecutively; (3) Movant cannot raise a factual basis or sufficiency of information claim in Rule 24.035 appeal where those claims were not included in the Amended 24.035 Motion, but Movant could bring those via writ of habeas corpus; and (4) group guilty pleas with multiple defendants pleading guilty at once make confusing records and should be discontinued.
Facts: Movant pleaded guilty to four counts of first degree property damage, Section 569.100, and was placed on probation. After he absconded from probation, probation was later revoked and he was sentenced to four consecutive terms of four years, for 16 years. Also, on appeal, he claimed for the first time that he could not be charged or convicted of Class D felonies because the statute requires damage of more than $750 for a Class D felony, but Movant was only charged and the factual basis showed that the damage only "exceeded $500."
Holding: Rule 24.02(b) requires the court to inform defendants of the maximum possible penalty. Here, the court told Movant before his plea that "the range was up to four years" but never told him whether the range was four years on each count, or four

years total. Even though the State had recommended 10 years, this does not show that Movant knew he could receive up to 16 years. His attorney's statement at sentencing that Movant could receive 16 years does not cure the error either, because this took place at sentencing, two month after Movant pleaded guilty. Movant cannot raise for the first time on appeal claims that he could not be convicted for the Class D felony because the evidence did not show damage above $750. These claims were not included in the Amended 24.035 Motion. The claim about the information should have been raised on direct appeal; the factual basis claim in the 24.035 motion. However, Movant can raise these in a writ of habeas corpus.

Allen v. State, No. 27699 (Mo. App., S.D. 4/5/07):
(1) Even though Defendant who had been sentenced to 120-day treatment program absconded, rather than report to the program, the trial court could not rescind the program and impose a prison sentence, since the trial court's jurisdiction expired upon imposing sentence, and it was part of the plea agreement that Defendant would be put in the treatment program; and (2) "escape rule" did not bar Defendant's Rule 24.035 claim that trial court lacked jurisdiction to impose prison sentence, since the imposition of sentence occurred after Defendant was recaptured, and "escape rule" only applies to pre-escape errors.
Facts: Defendant pleaded guilty per an agreement that he would be placed in a 120-day treatment program under Section 559.115 and released upon successful completion of the program. The judge imposed this as the sentence. Defendant remained free on bond, however, while waiting for a "bed date" to the program. When the "bed date" arrived, Defendant absconded, rather than report to the program. He was captured a year later. At that time, the judge rescinded the 120-day treatment program, and imposed a five-year prison sentence. Defendant filed a 24.035 motion claiming the judge lacked jurisdiction to impose this sentence.
Holding: (1) The sentencing court exceeded its jurisdiction when it rescinded the 120-day program and imposed a prison sentence more than one year after it entered its original judgment imposing the 120-day program. This program was part of Defendant's plea agreement and Defendant had been sentenced to it. A trial court exhausts jurisdiction once judgment and sentence occur in a criminal case, and can take no further action. When Defendant was captured, the court only had jurisdiction to enforce its earlier sentence and judgment. It could not rescind the 120-day treatment sentence. (2) The "escape rule" does not apply here because Defendant's claim relates to a post-capture error by the trial court. The "escape rule" does not apply to errors that occur after a defendant is returned to custody.

*** Beard v. Kindler, 86 Crim. L. Rep. 284, ___ U.S. ___ (U.S. 12/8/09):**
Holding: A discretionary state procedural rule can serve as an adequate ground to bar federal habeas relief; hence, where state denied relief based on the escape rule, this barred federal habeas relief.

Taveras v. Smith, 79 Crim. L. Rep. 785 (2d Cir. 9/11/06):
Holding: State court cannot dismiss a direct appeal under the escape rule without appointing counsel where the dismissal is discretionary rather than mandatory and involves some consideration of the merits.

Hanson v. Phillips, 2006 WL 824097 (2nd Cir. 2006):
Holding: Since habeas Petitioner was in custody and had been prosecuted for bail jumping, Court of Appeals would not apply escape rule to dismiss appeal, since State was not prejudiced by Defendant's flight.

City of Seattle v. Klein, 81 Crim. L. Rep. 707 (Wash. 9/13/07):
Holding: Escape rule violates state constitution's guarantee of "right to appeal in all cases."
Hawley v. State, 2007 WL 1610212 (Fla. Dist. Ct. App. 2007):
Holding: Even though Defendant escaped from a work camp, where he was caught shortly afterwards and his escape was necessitated by threats against his life, the "escape rule" should not be applied to bar his postconviction action.

Evidence

State v. Stewart, No. SC90503 (Mo. banc 5/25/10):
Where newly discovered evidence likely would have produced a different result at trial, trial court erred in not granting New Trial Motion on this basis.
Facts: Defendant was convicted at trial of first degree murder. Victim had said before he died that two people shot him, and one was "the Eby girl's boyfriend." Defendant was the son of Eby. Defendant's sister was married to Tim, and another sister was living with Leo. Defendant denied the crime to police and at trial. The State presented two "jail-house snitch" witnesses who claimed that Defendant, while in jail with them, had said he did the crime with Leo. At trial, the jury heard evidence that DNA test results did not find Defendant's DNA on a hat connected to the murder, but that DNA from Victim, Tim and an "unknown person" was on the hat. After trial, the defense filed a New Trial Motion alleging a new trial should be granted based on "newly discovered evidence." At the New Trial Motion hearing, the defense presented a police detective who testified that he had information that Tim had said he had "taken someone's life," and Tim's nephew testified that Tim had told him he was at Victim's house when Tim was killed. The trial court denied the New Trial Motion.
Holding: To obtain a new trial based on newly discovered evidence, Defendant must show: (1) the evidence came to his attention after trial; (2) the lack of knowledge before trial was not due to lack of diligence; (3) the evidence is so material that it is likely to produce a different result at trial; and (4) the evidence was not merely cumulative or impeaching. Here, the parties agree that conditions 1, 2 and 4 are satisfied. The State argues, however, that the evidence is not material and is hearsay. The evidence may be hearsay, but in considering a New Trial Motion on basis of newly discovered evidence, a court is not to conjecture about the evidence's future admissibility; the evidence may not be offered the same at trial. Prior cases have found that self-incriminatory statements

made to close family members shortly after a crime, that are corroborated by DNA, carry substantial reliability. Here, the State's theory was that Defendant and Leo committed the crime. But no forensic evidence connected them to the crime scene. The newly discovered evidence of Tim's incriminating remarks, when considered with the DNA testing linking Tim's DNA to the crime scene, raises serious doubt as to Defendant's guilt. The jury could conclude that Tim and another person (not Defendant) killed Victim. Reversed and remanded for new trial.

Mitchell v. Kardesch, No. SC90370 (Mo. banc 6/15/10):
Where Defendant gave false interrogatory answer in case, Plaintiff may impeach witness with the falsity and may introduce extrinsic evidence of this because it is highly relevant to credibility of the witness (overruling State v. Wolfe, 13 S.W.3d 248, 258 (Mo. banc 2000)).
Facts: Plaintiff sued Defendant-doctor for medical malpractice. Defendant gave a false interrogatory answer in discovery in the case about his medical license. The case turned on whether Plaintiff or Defendant's version of events was the credible version. The trial court prohibited Plaintiff from inquiring about the false answer or using the interrogatory as extrinsic evidence. After a jury verdict for Defendant, Plaintiff appealed.
Holding: Cross-examination has long been permitted to impeach a witness *on his character* for truth and veracity. By contrast, if a witness is called to impeach the character of a *different witness* in the case for truth and veracity, then the witness on the stand initially may be asked only about the other person's general reputation in the community for truth and veracity. *State v. Wolfe* put these rules "in confusion" when the Court did not permit defense counsel to question a witness about *her own* truth and veracity where she had given a prior false story. The effect of *Wolfe* and its progeny was to eliminate the traditional method of impeachment of a witness on the stand by asking him about specific instances of conduct that bore on his character for truth or veracity. To the extent that *Wolfe* and cases following it hold that a witness may not be impeached by asking him about specific instances of conduct relevant to his character for truth and veracity, it should no longer be followed. Applying these principles, here, the trial court erred in not allowing Plaintiff to ask Defendant about his false interrogatory answer and his deposition admissions and explanations because the subject of the false answer – that his medical license had been suspended – was not independently admissible. Cross-examination may be had on issues relevant to the witness' character for truth and veracity regardless of whether the subject of the falsehood is material. Furthermore, in considering whether to allow extrinsic evidence on a witness' character for truth and veracity, the better rule that should be followed is to recognize that the real issue to be decided by the trial court is whether the admission of the extrinsic evidence would be more probative or prejudicial. It will be the unusual case where that balancing weighs in favor of admission of extrinsic evidence, but where it does so, that evidence should be admitted. Here, the probative value of Defendant's false interrogatory answer is high. This reflects on Defendant's credibility as to whether his trial testimony is accurate. Thus, trial court abused its discretion in excluding this extrinsic evidence. Reversed and remanded for new trial.

State v. Brooks, No. SC90347 (Mo. banc 2/23/10):

Where Prosecutor made comments and presented evidence that Defendant had not given an explanation to police after being given his Miranda rights, this violated Defendant's rights under Doyle v.Ohio, 426 U.S. 610 (1976), even though Defendant made brief general denials of the crime.

Facts: Defendant was charged with second degree murder. After his arrest and being given his *Miranda* rights, Defendant was questioned by police and repeatedly refused to answer. However, he did say, "I don't have nothing to hide" and "I didn't do nothing at all." During opening statement at trial, the Prosecutor said that after police gave Defendant his *Miranda* rights, "all they did was ask him what happened …. He never would tell them." At trial, the Prosecutor asked a police officer if Defendant "ever [told] what happened," and the Officer testified that he did not. The Prosecutor made other similar remarks and presented other similar evidence, some of which was objected to and some not. At trial, Defendant testified the shooting was an accident.

Holding: *Doyle* held that a defendant's post-*Miranda* silence cannot be used to impeach the defendant because it is unfair to implicitly assure a person that his silence will not be used against him and then breach that promise by using the silence for impeachment. The State argues that because Defendant said he had "nothing to hide" and "didn't do nothing" that he waived his right to silence, but a general denial of culpability does not waive this right. Here, there were multiple *Doyle* violations, some preserved for appeal and some not. The Court can consider the unpreserved errors in addition to the preserved errors in determining whether the State can meet its burden on appeal to show that the *Doyle* violations were harmless. Here, even though the trial court gave some instruction to disregard some of the remarks, this curative effort had little effect in response to continued *Doyle* violations. Defendant's defense of accident was not frivolous and the evidence of guilt was not overwhelming. Reversed for new trial.

State v. Reed, No. SC88787 (Mo. banc 5/5/09):

Where State failed to ask Witness whether Witness made prior inconsistent statement, trial court abused discretion in admitting testimony of Officer about Witness' statement since this was hearsay.

Facts: Defendant was charged with attempted manufacture of methamphetamine. At trial, the State called Witness to testify about certain events, but did not ask Witness if Witness had told Officer that Defendant had been making meth. The State then called Officer to testify, over Defendant's hearsay objection, that Witness told Officer that Defendant had been making meth.

Holding: The State claims Officer's testimony was admissible as a prior inconsistent statement under Sec. 471.074. To admit a prior inconsistent statement, the necessary foundation is an inquiry whether the witness made the statement and whether the statement is true. If a witness claims not to remember, a proper foundation had been laid. Here, the State failed to ask Witness if he had previously stated that Defendant had been making meth. While a specific question is not required, the State failed to even ask a generally related question to lay a foundation. Thus, Officer's subsequent testimony that Witness made this statement was inadmissible hearsay.

State v. Couch, No. SC88922 (Mo. banc 6/24/08):

(1) Trial court did not abuse discretion in child sex case in excluding evidence that victim had previously made allegedly false allegation of sexual abuse, because she did not make the allegation to persons in authority and did not acknowledge the allegation was false, and did not err in excluding prior false allegation of physical abuse because this was remote in time and had a different motive than the current sexual allegation. (2) Procedurally, where trial court sustained a motion in limine to exclude this evidence before trial, court should not have precluded defense counsel from seeking to make an offer of proof at trial and introduce this evidence at trial.

Facts: Defendant, charged with child sex offenses, sought to introduce evidence that victim had previously falsely accused a brother of sexual abuse, and had previously falsely accused her prior stepfather of physical abuse. The brother testified in an offer of proof that victim had falsely accused him of sexual abuse, but she did not report this to authorities. Defendant also sought to introduce evidence that victim falsely reported to authorities that a prior stepfather physically abused her, and later told another person that her claims were false.

Holding: (1) In *State v. Wilson*, No. SC88899 (Mo. banc 6/24/08), the Court held that prior false allegations are admissible only if they have been made to law enforcement or other authorities, are false, and concern a matter that is the same or substantially similar to the current allegation. Regarding the prior sex abuse claim, victim did not report this to authorities. Further, although the brother denied the claim, this does not establish the allegations' falsity. The victim never said the sex claim was false, and the trial court could have disbelieved brother and determined the claim was not false, since the trial court determines credibility. The prior claim of physical abuse is a closer legal question. Victim made the claim five years ago to DFS authorities apparently with the motive to get out of a different home. Here, there is no claim that victim made the current sex abuse claim to get out of the home. Given that the prior physical abuse allegation is remote in time, concerns a different type of abuse, and was made for a different motive, the court did not abuse its discretion in excluding it. (2) The trial court followed the wrong procedure in dealing with this evidence, however. It sustained a motion in limine before trial to exclude it, and ordered defense counsel not to raise the issue again at trial. There is a very real purpose in requiring counsel to request permission at trial to offer the testimony that has been excluded in response to a pretrial motion in limine: when considered in context, the trial court may reconsider its ruling and admit the evidence; it cannot prejudge the matter. This does not mean it must permit counsel to offer the witnesses' testimony again as part of the offer of proof, but the court must permit counsel to ask the court at an appropriate point to reconsider its pretrial motion in limine. The court did not allow that here.

State v. Wilson, No. SC88899 (Mo. banc 6/24/08):

Even though victim had lied to her family about a car accident in the past, trial court did not err in excluding this evidence in child sex case, because victim did not lie to person in authority about the car accident, and the lie about the car accident was not similar to the sexual allegations.

Facts: Defendant, charged with various child sex offenses, sought to introduce evidence that victim had previously lied to her family about being involved in a car accident, unrelated to the sexual offenses. The trial court excluded this evidence.
Holding: The limited exception to the general rule of inadmissibility of evidence of specific acts of misconduct by the victim set out in *State v. Long*, 140 S.W.3d 27 (Mo. banc 2004), does not apply every time the credibility of the victim is central to the case and the victim previously lied. While the prior false allegation need not be identical to the present allegation of the witness sought to be impeached, the *Long* exception applies only when the impeaching incident involves a prior false allegation to persons in authority implicating a specific person and involving the same or substantially similar circumstances as the prior allegation. Here, victim's prior lie to her family that a vague "somebody else" caused the car accident fails to meet this test. The family were not persons in authority, and the car accident story is not similar to the present sexual allegations.

State v. Fassero, No. SC88894 (Mo. banc 6/30/08):
Trial court erred in admitting in penalty phase evidence that Defendant was previously indicted for sex offense, because an indictment is not evidence that the sex offense occurred.
Facts: Defendant was convicted of first degree child molestation. At the sentencing penalty phase, the State introduced an indictment from Illinois charging Defendant with another sex offense.
Holding: Sec. 557.036.3 allows the State to present evidence about the Defendant's "history and character." The State may present evidence of prior criminal conduct for which Defendant was never convicted, but the State must prove that evidence by a preponderance of evidence. The State could have presented evidence that Defendant committed the acts charged in the indictment, but the State did not do this. It just admitted the indictment. The indictment not relevant to prove that Defendant engaged in the conduct charged in the indictment. New penalty phase ordered.

State v. Voorhees, No. SC88553 (Mo. banc 2/19/08):
Prior sexual bad acts cannot be admitted as "signature modus operandi" to corroborate victim's testimony and prove Defendant committed charged crime, because this violates right to be tried only for charged offense under Article I, Sections 17 and 18(a) of the Mo. Constitution.
Facts: Defendant was charged with a child sex offense in which Defendant had urinated in victim's mouth. Defendant denied doing the charged crime. State presented evidence that Defendant had also urinated in mouth of another victim in the past. State presented this to corroborate victim's testimony.
Holding: Evidence of a "signature modus operandi" may be admitted to prove identity of the person who committed the crime, but cannot be admitted to prove propensity to commit the crime. The identity exception has no relevance to this case because identity of Defendant was not an issue in this case; rather, the evidence was admitted to corroborate the victim's testimony. Signature evidence used for corroboration is really prohibited propensity evidence. By admitting the prior act evidence, the court is reasoning that if Defendant committed a very similar crime once before, it is more likely

he committed the charged crime. This undermines the ban on propensity evidence. To the extent that *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993) and *State v. Gilyard*, 979 S.W.2d 138 (Mo. banc 1998) are inconsistent with this, they should not be followed.

State v. Ellison, No. SC88468 (Mo. banc 12/04/07):

Section 566.025 which allows evidence of other charged or uncharged sexual acts to be admitted against a defendant for purposes of showing propensity to commit the charged crime is unconstitutional, because violates the right to be tried only for the offense charged.

Facts: Defendant was charged with a child sex offense. The State admitted in its case-in-chief a certified copy of a prior conviction for another child sex offense. The jury was instructed per MAI-CR3d 310.12 which states that if they found the Defendant had pled guilty to a sex offense, they may consider that evidence on the issue of propensity to commit the crime charged.

Holding: Section 566.025 allows evidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under age 14 to be admitted for the purpose of showing propensity to commit the charged crime. However, Article I, Secs. 17 and 18(a) of the Mo. Constitution provide that a Defendant has a right to be tried only for the offense charged. While evidence of other crimes may be admitted if the evidence is logically and legally relevant to show (1) motive, (2) intent, (3) absence of mistake or accident, (4) common scheme or plan, or (5) identity, evidence of other crimes can never be admitted to show a defendant's propensity to commit the charged crime.

State v. Walkup, No. SC87837 (Mo. banc 5/1/07):

(1) Defendant was not required to give notice that he intended to use "diminished capacity" defense under Section 552.015.2(8), because this is not a defense of mental disease or defect excluding responsibility (NGRI) under Section 552.030; and (2) Defendant timely disclosed that he intended to call a psychologist where defense had orally told the State that they intended to use the psychologist, and gave the State a copy of the psychologist's report when the defense received it.

Facts: Defendant was charged and convicted of first degree murder. The trial court precluded Defendant from presenting a psychologist who would testify that Defendant had bipolar disorder which would impact his "decision-making." The State claimed that Defendant had not given notice of an intent to use a defense of mental disease or defect under Section 552.030. The trial court found that Defendant had not timely disclosed the psychologist.

Holding: (1) Section 552.015.2(8) allows Defendant to present evidence of mental disease or defect "[t]o prove that [he] did or did not have a state of mind which is an element of the offense[.]" This is known as "diminished capacity." Section 552.015.2(2) allows evidence of mental disease or defect "[t]o determine whether the defendant is criminally responsible as provided in Section 552.030." Section 552.030 requires the Defendant to plead "not guilty by reason of mental disease or defect excluding responsibility" (NGRI) or notify the State in writing of the intent to use this defense. Although NGRI and "diminished capacity" are often confused, they are separate doctrines. NGRI is an affirmative defense which requires the defendant to carry the

burden of proving he has a mental disease or defect excluding responsibility. "Diminished capacity" is a negative or negating defense designed to show the defendant did not have the culpable mental state for the crime, but the defendant has no burden to present evidence or persuade. NGRI absolves a defendant of criminal responsibility. Diminished capacity does not absolve a defendant of criminal responsibility, but makes him responsible only for the crime whose elements the State can prove. A defendant is required to give advance notice under Section 552.030 of an affirmative defense of NGRI, but a defendant is not required to give notice of a defense of "diminished capacity." Here, Defendant sought to present his psychologist to negate the element of deliberation for first degree murder. This would not have absolved Defendant of responsibility, but would have made him guilty of second degree murder. This was a "diminished capacity" defense, for which Defendant was not required to give advance notice. (2) As a matter of discovery, Rule 25.05(A) requires the defendant – upon written request by the State -- to disclose expert reports, mental exam results, and "[i]f the defendant intends to rely on the defense of mental disease or defect excluding responsibility, disclosure of such intent shall be in the form of a written statement." The defense had orally told the State about the psychologist about four months before trial, and the defense gave the State a copy of the psychologist's report a week before trial, when the defense received it. While the timing and method of disclosure may not have been "ideal," the defense complied with its disclosure obligations.

State v. Davis, No. SC87748 (Mo. banc 12/5/06):
Trial court erred in admitting evidence of uncharged prior robbery.
Facts: Defendants were charged with robbery and other offenses. The trial court allowed the State to introduce evidence of a prior robbery to show identity.
Holding: Evidence of uncharged misconduct can be used to establish motive, intent, absence of mistake or accident, common scheme or plan, or identity. Such evidence is legally relevant if its probative value outweighs its prejudicial effect. Here, the charged robbery was similar in some respects to the prior robbery, but there were also several differences between the two crimes. In order to meet the test for identity, the charged and uncharged crime must be nearly identical and their methodology so unusual and distinctive that they resemble the signature of the defendant's involvement in both. That is not the case here. Defendants were prejudiced by admission of the prior robbery evidence.

State v. Clark, No. SC87473 (Mo. banc 8/8/06):
In penalty phase of non-capital trial, State may introduce evidence of prior crimes of which Defendant had been acquitted.
Facts: Defendant had been acquitted of two prior murders. In the penalty phase of a subsequent non-capital trial, the State introduced evidence through witnesses that Defendant had committed these prior murders. Defendant claimed this evidence was inadmissible because he had been acquitted.
Holding: In *U.S. v. Watts*, 519 U.S. 148 (1997), the Court ruled that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. Section 557.036.3 RSMo allows the sentencing court to consider "the history and character of the

defendant." An acquittal does not prove the defendant is innocent; it merely proves the existence of reasonable doubt as to guilt, and failure to the government to prove an element of the offense beyond a reasonable doubt. *State v. Jaco*, 156 S.W.3d 775 (Mo. banc 2005) held that the punishment phase of trial is generally subject to a lower standard of proof. *Jaco* held that since the defendant's sentence was within the original unenhanced range of punishment, any facts that would have tended to assess punishment within that range were not required to be found beyond a reasonable doubt by a jury. Here, Defendant Clark did not receive enhanced sentences. Thus, any facts that would have tended to assess his punishment within the unenhanced range were not required to be found beyond a reasonable doubt by a jury. Since those facts were subject to a lower standard of proof than beyond a reasonable doubt, the State was not precluded from introducing evidence of Defendant's prior murders during penalty phase.

Editor's Note by Greg Mermelstein: Footnote 3 states that Clark did not request a jury instruction be given clarifying that the jury was to consider the prior crimes only for purposes of determining the history and character of Defendant, and did not request any other instructions concerning the prior crimes. Thus, "[t]he Court does not decide whether any such instruction is appropriate."

State ex. rel. Kemper v. Vincent, No. SC87246 (Mo. banc 5/16/06):
(1) polygraph results were admissible because the State introduced Defendant's confession which was made, in part, because police falsely told Defendant she had failed a polygraph; and (2) double jeopardy barred retrial of Defendant where trial court, sua sponte, declared mistrial due to admission of polygraph evidence and there was no manifest necessity for trial court to take such drastic action over Defendant's objection.
Facts: Police interrogated Defendant and gave her a polygraph. She denied the crime. Then police told her, falsely, that she had failed the polygraph, and she confessed. Trial court allowed Defendant to admit the polygraph at trial to show this, but then trial court changed its mind and, *sua sponte*, granted a mistrial, over Defendant's objection.
Holding: (1) Although inadmissible on the issue of Defendant's truthfulness, the polygraph evidence was admissible here under the "rule of completeness" which holds that a party may introduce evidence to give the jury a complete picture of the evidence introduced by the adversary. Here, Defendant's confession was induced, in part, by the police use of the polygraph and so Defendant could introduce the polygraph to show circumstances of why she confessed. (2) Double jeopardy bars retrial of Defendant because there was no manifest necessity for trial court to declare mistrial. After trial court admitted polygraph evidence, trial court simply changed its mind and declared mistrial over Defendant's objection. Trial court could have given Defendant's proposed limiting instruction on use of polygraph evidence. Writ of prohibition made absolute.

St. Louis County v. Skaer, No. ED94279 (Mo. App. E.D. 6/29/10):
Where Defendant was charged with not having a valid waste management plan, trial court could not take judicial notice that all households generate waste because that is not a fact of common knowledge and it also shifts the burden of proof to Defendant.
Facts: Defendant was charged with an ordinance violation for not having a waste management plan. Defendant claimed he did not produce any waste, and therefore, was not required to have a plan. The State asked the trial court to take judicial notice that all

households generate a "possibly small amount of non-recyclable waste." The court took judicial notice and found Defendant guilty.
Holding: Judicial notice may be taken of facts which are within the common knowledge of people of ordinary intelligence. Whether or not someone could recycle all their waste is not a matter of common knowledge and should not be accepted as such. To carry its burden, the State was required to put on evidence that Defendant in fact produced non-recyclable waste. Taking judicial notice of a necessary element of the offense for which there is no evidentiary support improperly shifts the burden to Defendant to prove his innocence. The burden is on the State to prove guilt. Conviction reversed.

State v. Hogan, No. ED91919 (Mo. App., E.D. 9/8/09):
(1) Even though Defendant who contracted with homeowner to make home repairs only completed part of the job, evidence was insufficient to convict of unlawful merchandising practices, Sec. 407.020, because deception cannot be inferred solely from the fact that the work was not completed; (2) where court "admitted" certain exhibits, the court should not have prohibited them from being seen by or going to the jury.
Facts: Defendant contracted with homeowner to make certain home repairs, and homeowner paid Defendant. Defendant started the job, but never finished it. Defendant was convicted of unlawful merchandising practices. Also, the State sought to show that Defendant was previously convicted of this offense. The trial court let the State argue this in opening and closing statements and "admitted" an exhibit showing prior convictions, but would not publish it to the jury.
Holding: (1) Historically, the State typically charged such offenses as larceny by trick or deceit, so the statutory definition of "deceit" is relevant. Sec. 570.010(7) states that "deception as to the actor's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise." Here, the State merely showed that Defendant started a repair job, but did not finish it. This was insufficient to prove guilt. (2) While the State attempted to show Defendant's intent through prior convictions, this attempt was ineffective because of the court's inexplicable rulings regarding exhibits. The court allowed the State to argue that Defendant had prior convictions, and the court admitted an exhibit purporting to be prior convictions but did not allow the jury to see it, and the jury was not told what the exhibit was. "We frankly do not understand the trial court's ruling. When a judge admits evidence, the fact-finder may by virtue of such admission, consider it." The State's argument was not evidence by itself. Court of Appeals does not decide whether prior conviction should have been considered in light of ruling on sufficiency and procedural posture of case. Defendant discharged.

State v. Thurman, No. ED90806 (Mo. App., E.D. 12/23/08):
Even though State may present the "history and character" of Defendant in penalty phase, State could not present mere fact that Defendant had previously been charged with a rape, or that Defendant allegedly sexually abused another child (but no prejudice in this case).
Facts: Defendant was convicted of sexual abuse of a stepdaughter. In penalty phase, the State presented a police officer and the child's mother, who testified that Defendant had previously been charged with a rape, but the charges were dropped, and the mother also testified that Defendant sexually abused another stepdaughter.

Holding: Sec. 557.036.3 allows the State to present evidence of the "history and character" of Defendant in penalty phase. Although the State may present evidence of criminal conduct for which Defendant was not convicted, the penalty phase jury may only consider such evidence if proven by a preponderance of evidence. *State v. Fassero*, 256 S.W.3d 109, 119 (Mo. banc 2008). The evidence that Defendant was charged with rape, which was later dropped, violated *Fassero*. Further, the mother's testimony about another stepdaughter was not "history and character" evidence authorized by Sec. 577.036.3 and *Fassero*.

State v. Frezzell, No. ED89630 (Mo. App., E.D. 4/29/08):
Even though Defendant was charged with throwing urine and feces at prison guards, trial court abused its discretion in admitting prior incidents of such throwing because this constituted inadmissible prior bad act evidence.
Facts: Defendant, a prison inmate, was convicted of endangering an employee of the DOC by throwing urine and feces at prison guards. At trial, the State presented twelve prior violation reports where Defendant had also thrown urine or feces. The State claimed it showed Defendant's modus operandi. The trial court stated it was admitting the prior violations as part of a common scheme or plan.
Holding: The prior violations do not constitute a common scheme or plan. They are only a series of similar but unrelated acts that merely show propensity to commit the crime. Evidence of other crimes not properly related to the charged crime violates a defendant's right to be tried only for the offense charged under Art. I, Secs. 17 and 18(a), Mo. Const. For the common scheme or plan exception to apply, it must be shown that the prior crimes had some relation to the general criminal enterprise. The prior conduct violations which went back several years were too remote to show any connection to each other. The modus operandi exception does not apply because that requires prior acts to be so unusual and distinctive to constitute a signature of Defendant, and that's not the case here. Nor was Defendant's identity at issue. Defendant was prejudiced because his defense was that he threw water and old food, not urine and feces.

State v. Couch, No. ED88900 (Mo. App., E.D. 9/11/07):
Even though victim's prior false claim was of physical abuse, trial court abused its discretion in not admitting it in sex abuse case to show victim's lack of credibility.
Facts: Defendant was charged with sexual abuse of his adoptive daughter. Defendant sought to call a witness who would testify that victim made false claims that another adoptive father physically abused her. The trial court excluded the evidence because it was not the "same sort of allegation" as the sex case.
Holding: The legal relevance of prior false allegations relates to the falsity of the prior allegation and the bearing this has on the witness' credibility, not on the subject matter of the prior false allegation. While dissimilarity is a factor to consider, there are also similarities, namely that the prior allegation was of abuse, albeit physical, and was directed at an adoptive father.

State v. Steger, No. ED86872 (Mo. App., E.D. 11/14/06):
Trial court plainly erred in allowing prosecutor to elicit from police witnesses that after Miranda warnings were given, Defendant had requested counsel.

Facts: Defendant was charged with first degree assault and other offenses arising out of a shooting incident. The evidence was conflicting at trial as to whether the victims or Defendant started the shooting. Defendant claimed the victims started it and Defendant acted in self-defense, and the victims claimed Defendant started it. The State either asked police officers, or the officers volunteered, that after *Miranda* warnings were given, Defendant asked to speak with a lawyer. Defense counsel did not object.
Holding: If a defendant exercises his right to remain silent or request an attorney, it is a violation of his constitutional rights to due process and against self-incrimination/right to silence to use that silence against him. Evidence in regard to the conclusion of an interrogation which reveals that the defendant was failing to answer a direct charge of guilt is improper. Here, the State repeatedly elicited testimony that Defendant had asked for counsel. Moreover, the evidence of guilt was not strong and the defense was not frivolous. Defendant had no prior convictions, but the victims (who testified against Defendant) all had multiple prior convictions, suggesting their credibility was questionable. The prosecutor's questions had a decisive effect on the jury by creating an inference of guilt.

State v. Holleran, No. ED86074 (Mo. App., E.D. 8/1/06):
In tampering case, evidence that Defendant previously stolen merchandise from Wal-Mart was not admissible to prove his identity, since the prior stealing had no logical relevance in proving identity.
Facts: Police officer stopped a stolen SUV. Besides the driver, two other people were passengers in the SUV. Driver fled from the SUV and ran away. At tampering trial, the police officer identified Defendant as the driver. Defendant's defense was that he was not the driver, and the officer misidentified him. Defendant did not testify. The State, over objection, was allowed to introduce evidence that Defendant was previously convicted of stealing merchandise from Wal-Mart in a separate incident in another county with the one of the people in the SUV.
Holding: Evidence of other crimes is admissible if it is "logically relevant," in that it has some legitimate tendency to establish directly the Defendant's guilt, and if the evidence is "legally relevant," in that its probative value outweighs its prejudicial effect. Evidence is logically relevant if it proves motive, intent, absence of mistake, common scheme or plan, or identity. The State claims the prior conviction proved identity. Identity can be shown through other crimes evidence if, for example, the other crimes qualify under the signature modus operandi exception by showing similarity and uniqueness to the charged crime. Stealing merchandise from Wal-Mart is not similar to the crime of stealing an SUV. The inference that Defendant was the person driving the SUV was not a reasonable inference that could be drawn from the fact that Defendant had previously stolen merchandise with one of the other people in the SUV. The evidence of Defendant's association with the person in the SUV is not inconsistent with the theory that Defendant was not the driver of the SUV. Defendant's prior stealing conviction has no "logical relevance" to his identity as driver of the SUV.

Bankhead v. State, 182 S.W.3d 253 (Mo. App., E.D. 2006):
Prosecutor's use of factually inconsistent theories to secure convictions of three different defendants for same robbery and murder violated due process.

Facts: State charged three defendants (Washington, Shadwick and Movant) with murder and robbery. The first to be convicted was Washington, who pleaded guilty. At the plea, Prosecutor said that Shadwick shot the victim along with Washington as an accomplice. Shadwick went to trial next. At trial, Prosecutor argued Shadwick shot the victim with Washington as the accomplice. Movant then went to trial. At Movant's trial, Prosecutor claimed Shadwick shot the victim with Movant as the accomplice. Movant was convicted. Movant filed Rule 29.15 postconviction motion, alleging that his conviction upon inconsistent theories violated due process.
Holding: Movant is granted 29.15 relief. The use of theories that are factually inconsistent to secure convictions against two or more defendants in prosecutions for the same offenses arising out of the same event violates due process. The Prosecutor selectively presented contradictory evidence and arguments in three different cases depending on which defendant was before the trial court. This rendered Movant's conviction fundamentally unfair.

State ex rel. Sanders v. Crane, No. SD30877 (Mo. App. S.D. 11/9/10):
Defendant was entitled to obtain State's evidence for fingerprint testing.
Facts: Defendant was charged with drug possession. Officer claimed to have seen Defendant drop a bag with drugs in it. Defendant denied he dropped bag. Defendant sought to obtain the bag for a fingerprint test. Defendant claimed that if his prints were not on the bag or another's person's prints were on the bag, this would be exculpatory. The State opposed providing the bag, and the trial court agreed. Defendant sought a writ of mandamus.
Holding: Due process entitles Defendant to examine any exculpatory evidence held by the State. Whether the bag will prove exculpatory is unknown. However, denying him access to the bag will impede an appeal, because Defendant will be required to make an offer of proof at trial if the trial court does not allow Defendant to admit this evidence. Defendant cannot make an offer of proof without showing what the results are of the testing of the bag. Appellate review could not occur without an offer of proof. Defendant is entitled to discovery and examination of the bag.

State v. Hopper, No. SD29638 (Mo. App. S.D. 2/19/10):
(1) Even though Defendant failed to disclose his alibi defense until 10 days before trial, where Defendant had told police he wasn't present at crime scene, the sanction of excluding Defendant's alibi evidence was too drastic; (2) even though Defendant failed to appear before trial and escaped from jail before trial, the "escape rule" does not apply to the appeal because the alleged trial error occurred after Defendant was back in custody.
Facts: Defendant was charged with a rape at his girlfriend's house which allegedly occurred on July 5, 2004. The rape was not reported until 2005. When Defendant was arrested in 2005, he told police he had been at his father's house that day, not his girlfriend's. In 2006, the State filed a discovery request under Rule 25.05 asking for notice to rely on alibi. Defendant's counsel did not respond. Defendant then went through several different counsel, and the final counsel filed notice of alibi three years later and 10 days before trial. The State requested that the alibi evidence be excluded for a discovery violation, and the trial court excluded it.

Holding: Defendant should have provided notice of alibi three years earlier. However, the exclusion of alibi evidence as a sanction for a discovery violation is a drastic remedy, because it deprives a defendant of a defense. Here, there were less drastic alternatives available. Defense counsel informed the State of the alibi evidence 10 days before trial. At a minimum, the State could have requested a recess to interview the alibi witnesses. Defendant was prejudiced by exclusion of the alibi evidence because, if believed, Defendant was not at the scene of the crime and could not have committed the offense.

State v. Helms, No. 28434 (Mo. App., S.D. 10/10/08):
Even though State charged Defendant as an accessory, State could not introduce evidence that co-defendant had been convicted, because this violated Defendant's right to a separate trial.
Facts: Defendant was charged as an accessory with rape. A co-defendant was also charged. During trial, the State was allowed to argue that the co-defendant had been convicted of the offense, and was allowed to introduce certified documents showing the co-defendant's conviction.
Holding: Defendant was entitled to a separate trial under Sec. 545.880. The State claims that because it charged Defendant as an accessory, it could show that the co-defendant had been convicted. However, Missouri has abolished the distinction between accessories and principles; thus, the prosecutor's intent to submit an accessory liability instruction did not make the co-defendant's conviction admissible. Defendant was liable as a principal, and was entitled to not have his guilt judged by the co-defendant's conviction.

State v. Lawrence, No. 28199 (Mo. App., S.D. 4/3/08):
(1) Plain error resulted when trial court found Defendant guilty of offense at a purported "trial," when the only "evidence" presented was statements of a prosecutor and Defendant; (2) Plain error resulted when trial court convicted Defendant of an offense at a purported "trial" without obtaining a jury trial waiver from him.
Facts: Defendant was charged with Count I (assault) and Count II (unlawful use of a weapon). Defendant filed a motion to waive jury sentencing. Defendant then filed a petition to plead guilty to *Count II*. A proceeding then occurred in which the trial court asked the Prosecutor what evidence would be presented in support of *both* Count I and Count II. The Prosecutor stated the evidence for both, and Defendant agreed with this. The court then found Defendant guilty of *both* Counts I and II. Defendant then appealed the "trial" on Count I, claiming there was insufficient evidence to convict.
Holding: This case presents glaring procedural irregularities which, although not briefed, present plain error. (1) While the proceeding below was satisfactory for a guilty plea, it does not constitute a trial on Count I. Statements of counsel are not evidence. The Prosecutor's statements of the facts did not constitute evidence for a trial. Also, the Defendant's statements at the hearing cannot be used to convict him under Rule 24.02(d)(5). Defendant was convicted on Count I without ever being tried or without any evidence. (2) While Defendant waived jury sentencing, he did not waive a jury trial. At the hearing, Defendant was only pleading guilty to Count II. Defendant did not waive his right to jury trial on Count I.

State v. Bescher, No. 28384 (Mo. App., S.D. 3/13/08):
Holding: (1) Where Defendant claimed State had failed to reveal examination results of a State's expert under Rule 25.03, but on appeal, the Defendant failed to include any motion in the legal file on appeal showing that a request for disclosure was made under Rule 25.03, the record on appeal was insufficient to review Defendant's claim; (2) prosecutor may not ask Defendant if the other trial witnesses were "lying," but error was harmless in this case.

State v. Foster, No. 28068 (Mo. App., S.D. 2/14/08):
It was error to admit in child sex case testimony of doctor who essentially testified that, although there was no physical evidence of abuse, child was telling the truth.
Facts: Defendant was convicted of child sex offenses. The doctor who conducted the SAFE exam testified that although there was no physical evidence of abuse, he "had a sense of whether a child is telling a lie or not" and that he believed child was sexually abused. The case was otherwise a "he said/she said case." The prosecutor had told jurors in opening that the doctor had found child "very credible."
Holding: Missouri strictly prohibits expert evidence on witness credibility. Such testimony usurps the province of the jury, and there is a danger that jurors will give too much weight to an expert's seemingly "scientific" opinion on the matter of credibility. The doctor's testimony on this matter was improperly admitted, and was prejudicial because there was no other evidence of guilt.

State v. Rushing, No. SD27749 (Mo. App., S.D. 9/10/07):
Trial court erred in not allowing Defendant to re-depose child sex victim when she revealed new allegations of sexual abuse shortly before trial, which would be the subject of the trial.
Facts: Defendant was charged with sex with a minor victim. The victim had claimed the acts took place on March 16. Defendant deposed the victim before trial. At trial, Defendant presented various witnesses who indicated that sexual acts could not have taken place that day. The trial resulted in a hung jury. When the trial was rescheduled, the victim claimed for the first time that the acts took place on March 14. Defendant sought to conduct a second deposition of victim. The prosecutor moved to quash, and the trial court sustained the motion. At trial, victim testified the events took place on March 14. Defendant was convicted.
Holding: Protective orders are subject to the requirement that they only be granted for "good cause shown." Rule 56.01(c). The State had the burden to show good cause, and did not do so here. The State asserted there was no reason for the second deposition because victim had already been questioned by Defendant, but this ignores that Defendant never questioned her about the events of March 14, because she did not reveal these events until six days before the second trial. It was fundamentally unfair that Defendant was forced to present a defense without being able to marshal alibi evidence concerning the events of March 14, and effectively cross-examine the victim.

Editor's note by Greg Mermelstein: The opinion notes that during the appeal, appellate defense counsel presented a letter and statement from victim recanting her trial testimony, but then after oral argument, the prosecutor alleged victim had recanted her recantation.

State v. White, No. 27756 (Mo. App., S.D. 8/20/07):
In child sex case, plain error for prosecutor to question witnesses about whether Defendant used methamphetamine or had methamphetamine conviction, where there was no evidence Defendant used methamphetamine in alleged crime.
Facts: Defendant was charged with statutory rape, Section 566.032, of a 13-year-old at a party. The victim did not report the alleged rape until 8 months after the party. Her testimony at trial was conflicting. The prosecutor asked various witnesses at trial if Defendant used methamphetamine at the party, and if they knew Defendant had a prior conviction for methamphetamine. Defendant did not testify, and none of the witnesses, including the victim, saw Defendant use methamphetamine.
Holding: The prosecutor's examination of witnesses denied Defendant his right to be tried only for the crime charged. The methamphetamine conviction had no legitimate tendency to establish Defendant's guilt of the charged crime. Defendant did not put his character in issue, and did not testify. Moreover, the prosecutor asked other improper questions at trial which implied that defense counsel had coached a witness by interviewing him, and which introduced inadmissible hearsay into the trial. Defendant was prejudiced by the prosecutor's improper examinations, because the evidence in the case was not overwhelming.

State v. Whitwell, No. 28131 (Mo. App., S.D. 3/8/07):
State cannot appeal trial court's order granting Motion to Suppress Identification.
Facts: The trial court sustained Defendant's Motion to Suppress Identification following a robbery. The State appealed this order pre-trial.
Holding: This appeal must be dismissed because the State cannot appeal a pretrial sustaining of a motion in limine. Section 547.200.1(3) permits a State appeal of a motion to suppress evidence, but this statute is linked to Section 542.296 which involves illegal or warrantless searches and seizures. Section 547.200.1(3) was not intended to allow appeal of motions in limine. If that were the case, the State could appeal all motions in limine which excluded evidence.

State v. Davies, No. WD70910 (Mo. App. W.D. 12/14/10):
(1) Where Defendant solicited sex over the internet with a police (college) intern who he thought was a child, this was not enticement of a child but was attempted enticement of a child; the intern was not a "peace officer"; (2) even though Defendant and his Wife had discussed the case after his arrest, Defendant's failure to deny the offense was not a "tacit admission" under tacit admission rule.
Facts: Police employed a college intern in a sting operation to catch persons who solicited sex from minors on the internet. Intern posed on the internet as a 13 and 14 year old girl. Defendant engaged in sexually explicit chat room conversations with intern, and then arranged to meet her for sex. Police arrested him when he went to the location for sex. At trial, Defendant's Wife testified for the State, and testified that although she and Defendant had discussed his arrest, Defendant never denied the offense. He was convicted of child enticement.
Holding: (1) Defendant correctly claims that the evidence was insufficient to convict of child enticement. As relevant here, the offense of enticement of a child, Sec. 566.151.1, requires the person with whom Defendant communicated to be less than 15 years old.

The State argues that because Sec. 566.151.2 states that it is not an affirmative defense for violation of this law for the person to be a "peace officer masquerading as a minor," that Defendant can be convicted of child enticement. However, Sec. 566.151.2 is not applicable here because the person was a college intern, not a peace officer as defined in Sec. 590.010(3). Moreover, Sec. 566.151.3 gives "attempted" enticement of a child the same range of punishment as "enticement of a child." Here, Defendant's acts constitute "attempted" enticement since the person was not actually less than 15. Defendant committed a "substantial step" toward child enticement, so he is guilty of the attempt. Since this is a lesser-included offense, appellate court enters conviction for attempted enticement. (2) Defendant's Wife testified for the State. The prosecutor asked Wife if any time after his arrest, Defendant had ever said he'd been wrongly accused or said he thought the person was over 18? Wife answered "no." The State claims this testimony was admissible under the tacit admission rule, because Defendant and Wife discussed the case after his arrest, but Defendant never denied the offense. The tacit admission rule provides that a failure to respond or acquiescence of an inculpatory statement may be used against a Defendant when (1) the statement was made in the accused's presence; (2) the statement was so "direct" as to naturally call for a reply; and (3) the statement was not made at a judicial proceeding or while accused was in custody or under arrest. The State concedes that Wife did not testify to any expressly inclupatory statements to which one would naturally reply, but argues that her general conversations with Defendant about the case should have prompted a denial. Expanding the rule to apply to "conversations" in which one would expect a defendant to deny responsibility expands the tacit admission rule too far. Any person charged with an offense who has consulted with an attorney will be told not to discuss the case, and thus, will remain silent about it. It was error to admit Wife's testimony on this matter, but error was harmless here since other evidence of guilt was overwhelming.

State v. D.W.N., No. WD69142 (Mo. App. W.D. 8/11/09):
Holding: (1) In child sex case, investigator who interviewed child victim should not have been allowed to testify that he found victim believable and did not find any signs victim was lying, because this was improper expert vouching for victim's credibility. However, this was not plain error where defense counsel failed to object, but defendant can file a 29.15 action to claim ineffective assistance of counsel. (2) Where jury instruction instructed jury to convict if they found Defendant touched "genitals *or* breast of victim," this instruction was erroneous because it submitted the offense in the disjunctive and allowed the jury to convict non-unanimously in that some jurors may believe he committed one act while others believe he committed the other. However, this was not plain error, because the evidence showed Defendant touched both in one event.

State v. Clevenger, No. WD68933 (Mo. App. W.D. 4/14/09):
Where in domestic assault trial the trial court allowed a Petition for Order of Protection which contained allegations of prior assaults to be published to the jury, this was hearsay and improper evidence of uncharged misconduct.
Facts: Defendant was charged with second-degree domestic assault and other related offenses. Victim had filed a Petition for Order of Protection on April 17. On April 26, a court entered a full order of protection. That night, Defendant assaulted victim. At trial,

the State sought to admit the Petition for Protective Order for the "limited purpose" of showing victim had applied for an Order. The court admitted it for this "limited purpose," but did not publish it to the jury. During deliberations, the jury requested all exhibits, and the trial court allowed the jury to have the Petition for Protective Order over defense objections. The Petition contained allegations of other assaultive conduct prior to the charged crimes.

Holding: Evidence of uncharged crimes is generally inadmissible because it may encourage the jury to convict based on propensity to commit such crimes. The State argues the Petition was admissible as a certified record of a court proceeding under Sec. 490.130. The Petition, however, was admitted for a "limited purpose," and the trial court should have taken steps to ensure that "limited purpose" was carried out. The Petition established no facts relevant to the criminal charges against Defendant other than that the Petition was filed. The Petition contained hearsay about past assaults and uncharged misconduct. Defendant was prejudiced because the jury acquitted Defendant of related counts, but convicted him of domestic assault. Conviction reversed; new trial ordered.

Raisher v. Director of Revenue, No. WD69090 (Mo. App. W.D. 1/29/09):

Even though Trooper testified he believed the breath-test machine gave an invalid result, there was no evidence from the machine of an incorrect result and Trooper's testimony should have been disregarded under doctrine of destructive contradictions.

Facts: Trooper administered breathalyzer to Driver. On Driver's first blow into the machine, the machine registered a BAC of .078%, under the legal limit of intoxication. However, Trooper believed that Driver had not blown properly into the machine and had Driver blow again. On second blow, machine registered a BAC of .094%. Trooper testified the two different results were due to Driver's incorrect breathing. But Driver introduced evidence that the machine detects improper breathing and reports this as an "error code," and the machine had not reported improper breathing on the first test. Trial court suspended Driver's license. Driver appealed.

Holding: Director contends it met its burden of proof to show by preponderance of evidence Driver was intoxicated above legal limit, because Trooper testified the second test result was more accurate than the first one due to improper breathing. The issue is whether the Trooper's testimony is sufficient to overcome the presumed validity of the first test result. A prior case has held that a court cannot find a breath test result unreliable absent evidence the machine malfunctioned. The machine should have detected improper breathing. The Director did not present scientific evidence to show the first test result was invalid. Trooper's testimony should have been disregarded under doctrine of destructive contradictions. At best, the evidence of intoxication is in equipoise, and therefore, Director did not meet its burden. License suspension reversed.

State v. Bell, No. WD68914 (Mo. App. W.D. 1/13/09):

Where pathologist testified to the opinions of a prior pathologist from the prior report, this violated Defendant's right to confrontation, but was harmless in this case.

Holding: An autopsy report, when prepared for purposes of criminal prosecution, is "testimonial." It cannot be admitted without testimony from the doctor who prepared the report unless Defendant had an opportunity to cross-examine the doctor. Here, the

pathologist testified to a prior pathologist's conclusions from the prior report. This violated Defendant's confrontation rights, but was harmless under facts of case.

State v. Allen, No. WD69012 (Mo. App., W.D. 12/2/08):
In robbery prosecution, State could not admit evidence that Defendant possessed drugs several days after the robbery, because this did not show Defendant's "motive" for robbery since there was no evidence linking the drugs to the robbery.
Facts: On December 24, a man robbed a store. Four days later, police searched Defendant's residence for an unrelated matter and found clothing implicating Defendant in the robbery. Defendant was arrested, and crack and a crack pipe were found on his person. At the robbery trial, the State was allowed to introduce the drug evidence to show Defendant's "motive" for the robbery.
Holding: While it is true that evidence of prior drug use may be admissible to explain a defendant's motive to steal to support a drug habit, the State is not entitled to automatically admit such evidence whenever a defendant is charged with stealing. Mere possession of drugs and paraphernalia, four days after a crime occurred, cannot by itself establish motive. No evidence was presented to link the drug evidence with the robbery. There was no testimony or evidence of any prior drug use or financial trouble by Defendant. The State failed to connect the drug evidence to the robbery.

In the Interest of K.B.C., No. WD 68750 (Mo. App., W.D. 11/4/08):
Where witnesses had no personal knowledge of Defendant breaking into a school as shown on a video and only identified Defendant from the surveillance video, the witnesses' testimony that Defendant broke into school violated the Best Evidence Rule.
Facts: Defendant (Juvenile) broke into a school. This was captured on a school surveillance digital video. However, the State made no effort to make a recording from the digital machine. Instead, school officials watched the video and identified Defendant. At trial, the State did not present the video, but instead had officials testify that they watched the video and from that, saw Defendant break into the school. Defendant objected to all testimony pertaining to the contents of the video as violating the Best Evidence Rule.
Holding: The Best Evidence Rule requires production of a recording where the proponent seeks to prove the contents of the recording itself. Where a witness' testimony is the evidence at issue, the key to whether the rule applies is whether the witness has personal knowledge of the matter that exists independent of the recording. If so, the evidence does not violate the rule. Here, the witnesses did not have personal knowledge independent of the video that Defendant broke into the school. Even though the video was in "digital" form, the video was not unavailable because the State could have made a recording of it, but made no attempt to do so.

State v. Moyers, No. WD68026 (Mo. App., W.D. 9/2/08):
Even though Defendant testified his bond was revoked because he was around young children, and this was only partially true because his bond was also revoked for a new offense, State could not cross-examine Defendant about the bond being revoked for the other offense because prior arrests are inadmissible for impeachment.

Facts: Defendant was charged with murdering a child. He was released on bond. However, his bond was later revoked because he was around young children, and also because he was charged with a new burglary. Defendant testified at trial his bond was revoked because he was around young children. On cross-examination, the State examined him about the burglary.
Holding: Generally, evidence of prior arrests is not admissible for impeachment. The State contends Defendant "opened the door" to the cross-examination by testifying falsely why his bond was revoked. However, Defendant's bond revocation was not relevant to the charged crime of murder. Defendant did not testify he had never been arrested or in trouble. Even if Defendant lied or only told a half-truth on direct examination, a voluntary reference to prior arrests does not justify violation of the rule that prior arrests without a conviction are inadmissible. However, Defendant was not prejudiced under facts of case.

State v. Batiste, No. WD68396 (Mo. App., W.D. 7/15/08):
(1) Even though Point Relied on referred to multiple witnesses and exhibits, it was not in violation of Rule 84.04(d) as multifarious because all the evidence related to a single point of whether court erred in admitting prior bad act incident; and (2) trial court erred in child abuse case in admitting evidence that Defendant had previously abused child because this was inadmissible propensity evidence.
Facts: Defendant was charged with child abuse, Sec. 568.060(1), for beating child with a board. State introduced evidence that Defendant had previously beat child with a belt and extension cord.
Holding: Defendant had right to be prosecuted only for crime charged under Art. I, Secs. 17 and 18(a), Mo. Const. Defendant was not charged with the incident involving the belt and cord. State claims the prior incident showed motive. Motive is the cause or reason that moves the will and induces action, and an inducement which lead the mind to indulge in a criminal act. The evidence that Defendant previously hit child with a belt and cord did not explain why he later allegedly hit child with a board. This prior incident was prohibited propensity evidence.

State v. J.L.S., No. WD67933 (Mo. App., W.D. 4/8/08):
Trial court should have admitted evidence that alleged child sex Victim and her Uncle made "unsubstantiated" reports concerning Defendant's pretrial release conditions, because these reports would have impeached Victim and shown bias and interest.
Facts: Teenage Victim lived with Uncle and Aunt. Defendant was Uncle's brother. In 2004, Victim, Uncle and Defendant went on a camping trip where Defendant allegedly sexually touched Victim. Victim did not report this until 2005. Defendant was charged with a sex offense. One of the conditions of his pretrial release was that he not go to the campgrounds where the sexual event allegedly occurred. After Defendant was charged and released on bond, Victim told police that Defendant was at the campgrounds, and Uncle later made a similar report. Police officers investigated these reports of being at the campground, but found them "unsubstantiated." Victim testified at trial. Uncle did not. The defense sought to call the officers who prepared the police reports that the claims of going to the campground while on pretrial release were "unsubstantiated." Defendant's defense was that Victim and her Uncle had a family feud against Defendant

over a business dispute, and this was why Victim made false claims of sexual abuse against him. The trial court excluded the police report evidence. Defendant appealed.
Holding: Interest and bias are never irrelevant. Bias may be shown through cross-examination or extrinsic evidence. Bias of an accusing witness is not "collateral." The danger that the trial will become bogged down in collateral issues and the jury be confused is outweighed by the Defendant's interest in showing bias. Defendants in sexual assault cases can introduce evidence that the Victim's story is a fabrication. The police reports about going to the campground, even though "unsubstantiated," would have bolstered Defendant's fabrication theory of showing the feud between the families. The question of whether the unsubstantiated reports showed bias was one for the jury. This is true even though the reports were made after Defendant was charged. The reports were close in time to the initial allegations and the trial itself and involved potentially false allegations against Defendant. Evidence of the reports and their potential falsity should have been admitted to show bias and fabrication. Also, even though Uncle did not testify, the evidence coincides with the defense theory of fabrication, because the defense theory was the Uncle was a key actor in producing the motive to lie.

State v. Walters, No. WD66981 (Mo. App., W.D. 12/26/07):
Prosecutor cannot cross-examine Defendant about whether police officer was "lying" in his testimony.
Holding: A witness should not be asked to comment on the veracity of another witness. To ask whether another witness is lying is to invite an opinion as to someone else's state of mind that the witness is not qualified to give. Such questioning is argumentative, and an objection to it should be sustained.

In the Interest of R.R.M., No. WD67064 (Mo. App., W.D. 6/12/07):
(1) Even though alleged child-victim testified at trial, her hearsay statements made to police could not be admitted under Section 491.075 without the trial court determining that the statements had "sufficient indicia of reliability;" and (2) where through either human or mechanical error a transcript could not be produced of the child-victim's testimony or some of the police testimony, the Court of Appeals could not review Defendant's claim of insufficiency of evidence, and Defendant was entitled to a new trial due to lack of transcript.
Facts: Defendant-juvenile was charged with sexually molesting a six year old child. At trial, the child testified, and denied Defendant molested her. Subsequently, the State under Section 491.075 sought to introduce child's statements to police that Defendant molested her. Defendant objected on grounds of hearsay and no indicia of reliability. The trial court admitted the statements on the grounds that the child had testified. On appeal, a transcript could not be made of the child-victim's testimony or portions of the police testimony due to either human or mechanical error regarding the trial recording equipment.
Holding: Section 491.075 provides that in offenses under Chapter 566 for children under 14, their statements can be introduced as substantive evidence to prove the truth of the matter asserted if the court finds the statements provide "sufficient indicia of reliability" and "the child testifies at the proceedings." Under the statute, in addition to the child testifying, the court must find "indicia of reliability." Defendant objected to the

reliability of the statements. However, the trial court did not rule on their reliability. This was error. Also, the case must be reversed for a new trial because there is not a sufficient transcript on appeal to review Defendant's claim of insufficiency of evidence. Defendant exercised due diligence in trying to obtain a transcript, and has been prejudiced by the lack of transcript, since the Court of Appeals cannot review his claim on appeal.

State v. Davis, No. WD65572 (Mo. App., W.D. 4/27/07):

(1) Trial court erred in assault case in admitting prior violent incident that occurred two days before charged assault; and (2) even though defense counsel only objected to the first witness who testified about the prior incident and not the second witness, the issue was preserved for appeal and was prejudicial because defense counsel's earlier objections had been overruled.

Facts: Defendant was convicted of first degree assault for acting in concert with a shooter. Defendant went to an apartment, and the shooter pulled out a gun, and Defendant said, "Just do it" and ran off. The shooter shot a man. Two days before this shooting, Defendant had been at the apartment to question another man about his involvement with Defendant's cousin. In this incident, Defendant had tried to run down the other man with his car. At trial, the State presented evidence of the prior incident.

Holding: The State argues the prior incident was part of the res gestae, and that it presented a complete and coherent picture of the charged crime to the jury. However, the incident two days before the charged assault (shooting) was not necessary to prove or understand the facts of the shooting. The two incidents were not the same. Defendant's prior interaction with another man at the apartment was not "so closely connected" with his actions on the night of the shooting to be "part of" the shooting incident. The State further argues Defendant was not prejudiced by admission of the testimony because another witness testified to the prior incident without objection. However, defense counsel had objected when the first witness testified about the prior incident, which objections were overruled. There was no reason for counsel to believe future objections to the same testimony would be sustained.

Editor's Note by Greg Mermelstein: Even though this panel concluded the issue was preserved for appeal, it would have been far safer for appellate purposes for defense counsel to have objected to the second witness also. Other appellate judges in Missouri would have likely held the issue was not preserved, or not prejudicial, because the second witness was not objected to. Attorneys should object to every witness who testifies about prior bad acts.

State v. Davis, 217 S.W.3d 358 (Mo. App., W.D. 3/27/07):

Even though (1) officer arrived at crash scene and found a crashed car; (2) a woman told the officer that the crash happened shortly before and told the officer where the driver fled; and (3) the officer found the driver and he was intoxicated, the evidence was insufficient to sustain conviction for DWI because the only evidence of when the accident occurred was the hearsay statement of the woman to the officer, which could not be considered for its truth.

Facts: Officer arrived at scene where car had crashed. A woman told the officer that the car had crashed shortly before, and told the officer where the driver had fled. The officer

went to another address and found the driver, who was intoxicated. Empty beer cans were found in the car. At trial, the woman did not testify. The defense objected to the officer's testimony about the woman's statements as hearsay, but the court admitted them to show officer's subsequent conduct.
Holding: The woman's statements were admitted at trial for a limited purpose, and not as substantive proof of the time of the accident. The court could not consider the woman's out-of-court statements about when the accident occurred for the truth. Thus, there was no substantive evidence to establish the time that Defendant was driving the vehicle or the time the accident occurred. Proof of intoxication at the time of arrest, when remote from operation of the vehicle, is insufficient to prove intoxication at the time the person was driving. The fact that Defendant had blood on him does not prove intoxication while driving because there was no testimony if the blood was wet or dry; also, mere presence of beer cans does not prove intoxication while driving.

*** Holmes v. South Carolina, 79 Crim. L. Rep. 111, ___ U.S. ___ (2006):**
Holding: A rule that, when the State has introduced strong evidence of guilt, the defense cannot introduce evidence that another person committed the crime, violates 6th Amendment right to present a complete defense and 14th Amendment right to due process.

*** Dixon v. U.S., 79 Crim. L. Rep. 394, ___ U.S. ___ (2006):**
Holding: Defendant has the burden of proof on a duress defense in a federal firearms violation case; this does not violate due process because the prosecution still has burden of proof on essential elements of offense.

U.S. v. Davis, 86 Crim. L. Rep. 700 (D.C. Cir. 2/26/10):
Holding: Court abused discretion in embezzlement trial by admitting evidence that Defendant offered to repay the organization in order to "make this go away," because this violated Fed. R. Evid. 408 in that this had been an offer of a settlement negotiation.

U.S. v. Melendez-Rivas, 2009 WL 1351125 (1st Cir. 2009):
Holding: Trial judge's questions to witness that elicited inadmissible evidence of other possible crimes required new trial.

U.S. v. Bryant, 85 Crim. L. Rep. 539 (1st Cir. 7/8/09):
Holding: Where Defendant disputes existence of prior convictions, State cannot prove up Defendant's prior convictions through nonjudicial criminal records such as NCIC records or State Police Information Records.

U.S. v. Luisi, 81 Crim. L. Rep. 51 (1st Cir. 4/10/07):
Holding: Defendant can present an entrapment defense where gov't informer requested a non-gov't third party pressure Defendant to commit the crime.

U.S. v. Ramirez, 2010 WL 2574123 (2d Cir. 2010):
Holding: Even though Defendant on trial for a drug conspiracy testified that he had never seen any drugs during the time of the charged conspiracy, he could not be

impeached with evidence that had drugs after the date the conspiracy ended, since this did not contradict Defendant's testimony.

U.S. v. Oluwanisola, 87 Crim. L. Rep. 317 (2d Cir. 5/21/10):
Holding: Statements made in course of plea negotiations are not admissible at trial, and defense counsel does not "open the door" to admission of such statements by arguing the lack of evidence to support conviction at trial.

U.S. v. Jackson (Williams), 86 Crim. L. Rep. 185 (2d Cir. 10/17/09):
Holding: Where Defendant was charged with felon in possession of gun based on officer's belief that he saw a butt of a handgun in Defendant's pants before Defendant fled, the State should not have been allowed to present evidence that police found a gun the next day at an apartment where Defendant had been.

U.S. v. Figueroa, 84 Crim. L. Rep. 232 (2d Cir. 11/18/08):
Holding: Defendant can cross-examine witness about witness' swastika tattoos.

Brinson v. Walker, 84 Crim. L. Rep. 231 (2d Cir. 11/13/08):
Holding: African-American Defendant can question white complainant about whether they are a racist, because this shows witness bias.

U.S. v. Mejia, 84 Crim. L. Rep. 79, 2008 WL 4459289 (2d Cir. 10/6/08):
Holding: Law enforcement officer's alleged "expert testimony" about gang was not true expert testimony, and also violated confrontation rights because officer just repeated what suspects had said in interrogations.

U.S. v. Massino, 2008 WL 4530517 (2d Cir. 2008):
Holding: Co-defendant member of organized crime family cannot testify that they have never known anyone in organized crime who was charged with a crime who was not guilty, because the unfair prejudice outweighed the probative value.

U.S. v. Kaplan, 2007 WL 1087270 (2d Cir. 2007):
Holding: In fraud prosecution, cooperating gov't witness cannot express his opinion that Defendant had knowledge of fraud.

U.S. v. Williams, 79 Crim. L. Rep. 722 (4th Cir. 8/21/06):
Holding: Defendant does not subject himself to cross-examination merely because he does a demonstration for the defense in court by trying on clothing which the perpetrator allegedly wore in the crime, but which Defendant contended did not fit him.

U.S. v. Gonzalez-Rodriguez, 87 Crim. L. Rep. 917 (5th Cir. 9/21/10):
Holding: DEA agent should not have been permitted to testify as to typical characteristics of drug couriers and then link those to Defendant.

U.S. v. Jackson, 88 Crim. L. Rep. 186 (5th Cir. 11/8/10):
Holding: Officer's general testimony about why drug dealers keep ledgers was not a sufficient foundation to authenticate ledgers allegedly used by Defendant, and the ledgers were not admissible under the business records exception to hearsay rule.

U.S. v. Hollis, 82 Crim. L. Rep. 180, 2007 WL 3151700 (5th Cir. 10/30/07):
Holding: Even though Defendant stipulated to existence of prior felony for underlying crime of felon in possession of firearm, Defendant could later challenge conviction from serving as basis for recidivist enhancement under Armed Career Criminal Act.

U.S. v. Ibarra, 2007 WL 2056337 (5th Cir. 2007):
Holding: DEA agent should not have been permitted to testify that in his experience no drug trafficking organization would entrust a large shipment of cocaine to someone who did not know he was transporting cocaine.

U.S. v. Jones, 2007 WL 1098433 (5th Cir. 2007):
Holding: Trial court erred in admitting Defendant's prior conviction for possession of firearm in later case charging actual possession of another gun.

U.S. v. Sumlin, 2007 WL 1723563 (5th Cir. 2007):
Holding: In possession of firearms by felon case, police officer's unsupported testimony that he thought Defendant was a drug transporter was improper other bad acts evidence.

U.S. v. Jenkins, 593 F.3d 480 (6th Cir. 2010):
Holding: Court erred in drug and gun trial in admitting evidence of Defendant's prior conviction for marijuana distribution because his was unduly prejudicial propensity evidence.

U.S. v. Corsmeier, 87 Crim. L. Rep. 917 (6th Cir. 8/16/10):
Holding: Even though Defendant in a mortgage fraud scheme received small amounts of cocaine for participating in it, the drug evidence was not admissible at trial to prove Defendant's motive in the scheme.

U.S. v. Aguirre, 87 Crim. L. Rep. 315 (6th Cir. 5/17/10):
Holding: Truthful but incriminating information on Public Defender application cannot be used as evidence to prove the underlying charged crime because this would force Defendant to choose between his 5th Amendment right against self-incrimination and his 6th Amendment right to counsel.

U.S. v. Martinez, 86 Crim. L. Rep. 289 (6th Cir. 12/1/09):
Holding: A video of a doctor properly administering injections introduced in order to show proper standard of medical care was inadmissible hearsay.

Gagne v. Booker, 86 Crim. L. Rep. 665 (6th Cir. 2/23/10):
Holding: Where in rape case Defendant and co-defendant sought to show that victim was engaging in voluntary group sex, but trial court excluded under rape-shield law evidence that victim engaged in group sex in other instances, this was an unreasonable application of U.S. Supreme Court precedent allowing Defendant to present a defense.

U.S. v. Bell, 82 Crim. L. Rep. 544, 2008 WL 382665 (6th Cir. 2/14/08):
Holding: Evidence that Defendant committed similar crimes before, in trial for distribution of drugs, should not have been admitted to show absence of mistake, because defense was not mistake, but that Defendant never possessed the drugs regarding the new charge, and the past crimes weren't the same modus operandi or same scheme.

U.S. v. Stout, 82 Crim. L. Rep. 403 (6th Cir. 12/20/07):
Holding: In possession of child pornography case, court should have excluded evidence that Defendant had secretly videotaped teenage neighbor in an unrelated case, because this was more prejudicial than probative.

U.S. v. Klebig, 2010 WL 1380122 (7th Cir. 2010):
Holding: Where Defendant was charged with possession of firearm at his house, evidence of a sign on his house "Nothing Here Worth Dying For" and evidence of his home surveillance system were not relevant despite State's claim that they showed his security conscious mind.

U.S. v. Gorman, 2010 WL 2925447 (7th Cir. 2010) and U.S. v. Green, 87 Crim. L. Rep. 811 (3d Cir. 8/9/10):
Holding: The "inextricable intertwinement" doctrine for determining admissibility of other bad act evidence is rejected.

U.S. v. Cooper, 86 Crim. L. Rep. 439 (7th Cir. 1/11/10):
Holding: Evidence that some of Defendant-drug dealer's customers died from bad heroin should have been excluded at the guilt phase of drug trial, because the unfair prejudice outweighed the probative value.

U.S. v. Rogers, 83 Crim. L. Rep. 806 (7th Cir. 9/4/08):
Holding: Date person is released from prison starts time running for federal rule 609, prohibiting impeachment with convictions more than 10 years old, even if person remains on parole.

U.S. v. Gladish, 83 Crim. L. Rep. 733 (7th Cir. 7/31/08):
Holding: (1) Even though Defendant exposed himself to alleged minor in internet chat and talked generally about traveling to set up a meeting for sex, evidence was insufficient to prove attempted enticement of a minor because there was no substantial step toward completion of the crime; Defendant's general remarks were "hot air"; and (2) trial court erred in barring defense psychologist from testifying in support of Defendant's "hot air"

theory; while expert cannot testify Defendant did not intend to have sex with minor, expert could testify it was unlikely, given Defendant's psychological profile, that he would act on his intent.

U.S. v. Thompson, 81 Crim. L. Rep. 12 (7th Cir. 3/21/07):
Holding: Trial court should not allow a video to be played silently and the jury be given a transcript of the audio portion, without also playing the audio of the video. A court may allow a transcript of an audio be given to the jury, but this is always an adjunct to hearing the actual audio, not a substitute for it.

U.S. v. Simpson, 80 Crim. L. Rep. 677 (7th Cir. 3/13/07):
Holding: Even though Defendant said he was selling crack at time of undercover operation, where Defendant did not specifically remember the particular crack deal with which he was charged, his statement was not admissible because it constituted propensity evidence, rather than admission of the charged crime.

U.S. v. Jung, 80 Crim. L. Rep. 458 (7th Cir. 1/18/07):
Holding: Defense counsel's out-of-court statements to a third-party which were intended to placate the victims but which also conveyed incriminating statements of Defendant could not be admitted against Defendant at trial.

U.S. v. Smith, 79 Crim. L. Rep. 664 (7th Cir. 7/21/06):
Holding: Trial court abused discretion in not allowing Defendant's attorney to cross-examine State's witness about what witness' lawyer told him about the sentence he'd receive if he testified against Defendant; also, Prosecutor should not have invoked witness' attorney-client privilege to prevent witness from answering since prosecutor wasn't representing witness.

U.S. v. Cunningham, 2006 WL 2473428 (7th Cir. 2006):
Holding: Reversible error for trial court to admit evidence from police and government attorneys about why they obtained a wiretap regarding Defendant in a drug conspiracy case, because such evidence allowed officers and attorneys to give their opinions that Defendant was involved in drug conspiracy and improperly vouched for the State's case; such evidence was irrelevant and prejudicial.

U.S. v. Smith, 85 Crim. L. Rep. 574 (8th Cir. 7/28/09):
Holding: A pharmacist can testify as an expert to the standard of care a medical doctor must follow to write a prescription for a controlled substance.

U.S. v. Al-Esawi, 85 Crim. L. Rep. 107 (8th Cir. 3/31/09):
Holding: Even though an exception to an immunity agreement allowed the Gov't to use evidence from Defendant's proffer session that contradicted Defendant's trial statements, this evidence could not be used preemptively in Gov't's case-in-chief.

U.S. v. Rojas, 2008 WL 819080 (8th Cir. 2008):
Holding: Defendant was entitled to evidentiary hearing on New Trial Motion claim that child sex victim had recanted testimony after trial.

U.S. v. Lopez, 79 Crim. L. Rep. 120 (8th Cir. en banc 4/17/06):
Holding: Court overrules prior cases that say prosecution need only prove "slight evidence" of conspiracy, and holds that prosecutor must prove Defendant's involvement in a conspiracy beyond a reasonable doubt, but the Defendant's role can be minor.

U.S. v. Pineda-Doval, 87 Crim. L. Rep. 834, 2010 WL 3122862 (9th Cir. 8/10/10):
Holding: Where Defendant was charged with deaths from a car crash involving illegal aliens he was smuggling, it violated his right to present a defense when trial court prevented him from presenting evidence of how police policies on use of "spike strips" to stop fleeing vehicles contributed to the crash.

U.S. v. Waters, 2010 WL 3565259 (9th Cir. 2010):
Holding: Where Defendant charged with arson allegedly committed his crime for political purposes, trial court erred in admitting a folder of anarchist political articles without reading every page to determine if the probative value outweighed the danger of unfair prejudice.

U.S. v. Stever, 2010 WL 1757926 (9th Cir. 2010):
Holding: Defendant charged with growing marijuana was entitled to discovery of evidence about Mexican drug trafficking organizations because this was relevant to his defense; and court denied him 6th Amendment right to present defense when he sought to offer this as alternative explanation for the growing operation.

U.S. v. McFall, 2009 WL 579508 (9th Cir. 2009):
Holding: Where witness invoked 5th Amendment right against self-incrimination after having testified at grand jury, Defendant was entitled to introduce witness' grand jury testimony at trial under unavailable witness exception to hearsay rule.

U.S. v. Osazuwa, 2009 WL 1232107 (9th Cir. 2009):
Holding: Trial court erred in admitting details of Defendant's prior convictions for bank fraud in prosecution for assault.

U.S. v. Caruto, 83 Crim. L. Rep. 280 (9th Cir. 5/12/08):
Holding: Where Defendant's invocation of *Miranda* rights resulted in omitted facts in a second statement, State could not cross-examine Defendant on the omitted facts at trial because this would violate right to post-*Miranda* silence.

U.S. v. Richard, 82 Crim. L. Rep. 107, 2007 WL 2964366 (9th Cir. 10/12/07):
Holding: When jurors request a read back of testimony, court should read back full testimony and emphasize jurors should take into account all the evidence; trial court abused discretion in reading back only a portion of the witness' testimony.

U.S. v. Larson, 81 Crim. L. Rep. 602, 2007 WL 2192256 (9th Cir. 8/1/07):
Holding: Defendant was denied 6th Amendment right to confront witnesses when trial court precluded him from cross-examining a State witness about the mandatory minimum sentence he would have faced if he had not made a deal to testify against Defendant.

U.S. v. Curtin, 81 Crim. L. Rep. 316 (9th Cir. 5/24/07):
Holding: In prosecution for luring child over internet, prosecution may present evidence that Defendant had child-sex fiction stories on his PDA to show motive, but court must weigh probative value vs. prejudicial effect of each story. E.g., a story about bestiality would not be relevant.

U.S. v. Sine, 81 Crim. L. Rep. 208 (9th Cir. 5/1/07):
Holding: Where a different judge had made critical remarks about a Defendant accused of fraud, those remarks should not have been used to cross-examine Defendant at his trial. The remarks were hearsay and more prejudicial than probative.

Cooper v. Brown, 2007 WL 4233685 (9th Cir. 2007):
Holding: EDTA (ethylene-diamine tetra-acedic acid) test regarding bloodstains has not gained general scientific acceptance to satisfy *Daubert*.

U.S. v. Curtin, 2006 WL 851755 (9th Cir. 2006):
Holding: Stories in Defendant's possession about sex with minors were inadmissible in prosecution for traveling across State lines to engage in sex with minors.

U.S. v. Yarbrough, 83 Crim. L. Rep. 389 (10th Cir. 6/3/08):
Holding: Where defense was that Defendant committed the charged acts of obstruction but did not have a prohibited intent in committing the acts, Defendant was permitted to introduce evidence of his good character to refute the required intent.

U.S. v. Harlow, 2006 WL 1086432 (10th Cir. 2006):
Holding: Prosecutor improperly vouched for witnesses when he introduced their plea agreement to provide "ongoing truthful testimony" and stating that a court would approve lower sentences for the witnesses only if the court found they had given truthful testimony.

Childers v. Floyd, 87 Crim. L. Rep 465 (11th Cir. 6/8/10):
Holding: 6th Amendment right of confrontation violated where trial court prohibited Defendant from questioning State's witness about possible revocation of plea agreement as reason why witness changed story; allowing Defendant to question about inconsistencies in witness' story was insufficient.

U.S. v. Phaknikone, 87 Crim. L. Rep. 322 (11th Cir. 5/10/10):
Holding: Photos and name from Defendant's MySpace page that depicted him as "gangster-like" constituted evidence of bad character that was not admissible at his robbery trial.

Andrews v. U.S., 2007 WL 1280242 (D.C. 2007):
Holding: Where State presented part of Defendant's statement to police that was inculpatory, it was error under the rule of completeness to exclude the portion of the statement that was exculpatory.

Florence v. U.S., 80 Crim. L. Rep. (D.C. 9/21/06):
Holding: Defendant-parent may present defense of "parental discipline" in assault on child case, even though parent was angry at time parent hit child.

Jackson v. Norris, 2010 WL 3447275 (E.D. Ark. 2010):
Holding: Child sex Defendant was denied his right to present a defense, despite rape shield law, where trial court prevented him from presenting evidence that teenage girl-victim only accused Defendant after victim's mother learned that she was having sex with a teen boyfriend; Defendant's defense was that girl-victim was fabricating her allegations in order to deflect her mother's emotions away from her boyfriend to Defendant.

U.S. v. Castro-Cabrera, 2008 WL 466015 (C.D. Cal. 2008):
Holding: Where admission of only portions of an immigration file would create different, ambiguous meanings for the statements in the file, the rule of completeness warranted admission of the whole file.

Hill v. Hartley, 2008 WL 5390038 (E.D. Cal. 2008):
Holding: Trial court violated due process where it refused to allow Defendant to admit at sentencing hearing medical records demonstrating that Defendant did not cause a victim in a prior conviction to break her leg, where the State was arguing Defendant had done so in his prior case.

U.S. v. Casteel, 2009 WL 2251478 (S.D. Iowa 2009):
Holding: A second photo lineup was rendered impermissibly suggestive when it used the same photos from a prior lineup that was held impermissibly suggestive.

Sanborn v. Parker, 2007 WL 495202 (W.D. Ky. 2/14/07):
Holding: State's mental health expert invaded attorney-client relationship where expert interviewed Defendant about his meeting with his attorney and the defense strategy.

Tassin v. Cain, 2007 WL 942355 (E.D. La. 2007):
Holding: Even though State's witness' testimony was technically accurate when witness testified she had not received a firm promise of leniency from prosecution, prosecutor violated Defendant's due process rights in failing to correct this testimony about an expectation of leniency, especially where prosecutor exploited this in closing by arguing that witness testified against Defendant without any inducements.

U.S. v. Raymond, 2010 WL 1254664 (D. Me. 2010):
Holding: Gov't expert's testimony about behavior of child molesters in grooming children and about certain characteristics of victims was not reliable.

U.S. v. Willock, 2010 WL 1233992 (D. Md. 2010):
Holding: Where firearm/toolmark expert had relied on work by another expert to some extent, expert should be precluded from testifying how certain he was of his findings.

U.S. v. Jackson, 81 Crim. L. Rep. 36 (D. Neb. 3/28/07):
Holding: Where the prosecution lost the actual email chat between Defendant and alleged victim, the prosecution could not use a "cut and paste" Word document of the same conversation, since the Word document did not reflect the entire conversation.

U.S. v. Carneglia, 2009 WL 464447 (E.D. N.Y. 2009):
Holding: Where Defendant was charged with RICO violation for conspiracy regarding murders, State cannot admit evidence that Defendant disposed of bodies with acid because unfair prejudice outweighed the probative value.

U.S. v. Khan, 2008 WL 5243893 (E.D. N.Y. 2008):
Holding: Where Defendant was charged with a drug conspiracy, the probative value of uncharged murders was outweighed by their prejudicial effect.

U.S. v. Polizzi, 2008 WL 877164 (E.D.N.Y. 2008):
Holding: Defendant had 6th Amendment right to have jury be informed of 5-year minimum sentence for conviction for receiving child pornography; jury has right to know sentence so as to be able to apply the law in light of severity of punishment.

U.S. v. Graves, 2006 WL 3734367 (E.D. Pa. 2006):
Holding: Defense can present expert on eyewitness identification to attack identification and photo array.

U.S. v. Reyes-Guerrero, 2009 WL 224053 (D.P.R. 2009):
Holding: Officer's testimony that Defendants owned $100,000 used in a drug transaction was improper lay opinion, since it was not based on Officer's personal knowledge.

U.S. v. Rodriguez, 2007 WL 3125197 (D.P.R. 2007):
Holding: Issue whether doctor had legitimate medical purpose to prescribe drug was a jury question, and not one for the judge to resolve.

U.S. v. Lopez, 2009 WL 837697 (S.D. Tex. 2009):
Holding: Where gov't elicited information from Defendant in a proffer agreement, and then corroborated that information through co-defendant and used it against Defendant, the use was not sufficiently independent of Defendant's proffer to be proper.

Valentine v. State, 86 Crim. L. Rep. 13 (Alaska 8/28/09):
Holding: Defendant was denied due process in DWI case when he was precluded from presenting "delayed absorption" evidence as exculpatory evidence; Defendant's defense was that the DWI test indicated a BAC higher than existed when he was actually driving.

Fletcher v. People, 81 Crim. L. Rep. 142 (Colo. 4/23/07):
Holding: Prosecution could not present evidence that rape complainant was a virgin to prove that sex was non-consensual, since such evidence was more prejudicial than probative.

State v. Hedge, 87 Crim. L. Rep. 753 (Conn. 8/3/10):
Holding: Where Defendant was charged with drugs hidden in a borrowed car, trial court denied his 6th Amendment right to present a defense by preventing him from presenting testimony of car's owner that she had lent the car to another man in the past and he had previously left drugs in it.

State v. Angel T., 2009 WL 1709636 (Conn. 2009):
Holding: Where Defendant had been advised by counsel not to assist police in investigating sex abuse, it was improper for Prosecutor to elicit evidence that Defendant refused to assist police investigating sex abuse of his niece.

State v. Angel T., 85 Crim. L. Rep. 544 (Conn. 6/30/09):
Holding: Due process prohibits Prosecutor from presenting evidence or argument that Defendant's prearrest retention of counsel indicates Defendant's guilt or impeaches his trial testimony that he was innocent.

State v. Smith, 80 Crim. L. Rep. 101 (Conn. 10/10/06):
Holding: Trial court erred rape case in holding that "rape shield law" barred admission of DNA evidence that the only semen recovered from rape victim did not match Defendant. The evidence was relevant to prove Defendant's misidentification defense.

Kelly v. State, 85 Crim. L. Rep. 681 (Del. 8/27/09):
Holding: Defendant-prison inmate charged with assaulting another inmate should have been allowed to present evidence that victim had prior conviction for rape in order to show Defendant's state-of-mind to prove he was acting in self-defense when victim tried to rape him.

Norman v. State, 84 Crim. L. Rep. 683, 2009 WL 539909 (Del. 3/4/09):
Holding: Police officer cannot testify as to type of drug unless officer is qualified as an "expert witness."

Jianniney v. State, 84 Crim. L. Rep. 292, 2008 WL 5076466 (Del. 12/2/08):
Holding: Where the State was allowed to cross-examine witness using Mapquest to show that the travel times the witnesses stated were wrong, the alleged travel times generated by Mapquest were inadmissible hearsay.

Coles v. State, 2008 WL 4194300 (Del. 2008):
Holding: Even though witness was unavailable at trial, a videotape of witness interview was not admissible under hearsay rule.

Tolson v. State, 79 Crim. L. Rep. 297 (Del. 5/18/06):
Holding: Laser-based range finder cannot be used to measure distance between where Defendant sold drugs and a church without laser-based range finder results passing test for admissibility of scientific evidence.

Petion v. State, 88 Crim. L. Rep. 139 (Fla. 10/21/10):
Holding: Even though judges in bench trial are presumed not to have considered inadmissible evidence, this presumption is rebutted where judge made findings on the record that the evidence was admissible.

Calabro v. State, 84 Crim. L. Rep. 89 (Fla. 9/18/08):
Holding: Even though Defendant said at his arraignment that he did not want a trial and was "guilty of this," those statements were made in connection with plea bargaining and cannot be admitted at trial.

Barnes v. State, 82 Crim. L. Rep. 282 (Fla. 11/29/07):
Holding: Even though Defendant's prior testimony was read to the jury as testimonial evidence and admitted as an exhibit, the transcript of that testimony should not be sent to jury.

Dunagan v. State, 83 Crim. L. Rep. 315 (Ga. 5/19/08):
Holding: Defendant-driver charged with reckless driving should have been able to present evidence that an intersection was inherently dangerous and of remedial measures taken by State to fix the intersection after the charged accident, because this was relevant to whether Defendant was criminally negligent in causing the accident.

Forde v. State, 2008 WL 518139 (Ga. 2008):
Holding: Where in child sex case, the conduct was alleged to have occurred over a period of time during which the offense was reclassified from a misdemeanor to a felony, conviction and sentence for a felony violated ex post facto, since jury could have convicted of conduct that occurred when offense was a misdemeanor.

Belmar v. State, 78 Crim. L. Rep. 149 (Ga. 10/24/05):
Holding: A photo of Defendant showing he had a tattoo reading "12 gauge" should not have been admitted in trial where Defendant was accused of murdering someone with a 12-gauge shotgun.

State v. Manewa, 2007 WL 2637073 (Haw. 2007):
Holding: Expert could not testify as to weight of drugs where expert had no personal knowledge that scale had been calibrated correctly.

State v. Assaye, 2009 WL 3112426 (Haw. 2009):
Holding: (1) Where Defendant was on trial for speeding, the speed reading given by a laser gun was inadmissible absent proof that the same laser gun was tested using the manufacturer's recommended procedures; and (2) Officer's testimony that he was qualified by "certification" training and experience to operate the laser gun was

insufficient to establish his qualifications absent evidence that his training met the requirements of the gun's manufacturer.

State v. Rodrigues, 80 Crim. L. Rep. 272 (Haw. 11/29/06):
Holding: Where Defendant refused at the end of an interrogation to repeat a confession on audiotape, this was an invocation of his 5th Amendment right to silence, and prosecutor cannot present evidence that Defendant refused to make tape.

Village of Kildeer v. Munyer, 2008 WL 2673293 (lll. 2008):
Holding: Trial court's sua sponte review, in assessing guilt, of evidence of other charges of Defendant for which he was not convicted was plain error.

People v. McKown, 82 Crim. L. Rep. 11 (Ill. 9/20/07):
Holding: The horizontal gaze nystagmus (HGN) test cannot be admitted without first passing the *Frye* test.

People v. Hari, 78 Crim. L. Rep. 526 (Ill. 1/20/06):
Holding: Intoxication resulting from unexpected and unwarned side-effect of drugs Zoloft and Tylenol was "involuntary intoxication" which Defendant should have been able to assert as defense and receive jury instruction on.

Gonzalez v. State, 87 Crim. L. Rep. 274 (Ind. 5/19/10):
Holding: Where Defendant wrote a letter to victim as part of plea negotiations to encourage victim not to object to a plea bargain, this was not admissible at trial under rule prohibiting admission of statements made in plea negotiations.

Lafayette v. State, 86 Crim. L. Rep. 381 (Ind. 12/8/09):
Holding: Even though rape Defendant challenged Victim's credibility on issue of consent, this did not open the door to the State presenting evidence of Defendant's prior sexual misconduct to prove his criminal intent.

Tyler v. State, 85 Crim. L. Rep. 83, 2009 WL 885879 (Ind. 3/31/09):
Holding: Indiana statute providing a hearsay exception in child sex cases does not permit the State to present both the child-declarant as a witness and the same matters through other witnesses, even though the statute's language appears to authorize this.

Willis v. State, 83 Crim. L. Rep. 464, 2008 WL 2346306 (Ind. 6/10/08):
Holding: Parent charged with assaulting child can show "parental discipline" defense if can show that use of force was reasonable under circumstances and reasonably necessary to control the child.

State v. Cox, 87 Crim. L. Rep. 176 (Iowa 4/30/10):
Holding: Evidentiary rule that allows propensity evidence of other sex crimes in sex offense cases violates due process.

State v. Reynolds, 85 Crim. L. Rep. 221 (Iowa 5/1/09):
Holding: Where Defendant was charged with assault, trial court erred in admitting prior bad acts that Defendant had previous incidents of cursing, spitting and assault.

State v. Reynolds, 83 Crim. L. Rep. 83 (Iowa 4/4/08):
Holding: Local bank employee could not lay foundation for admission of Federal Reserve report to bank as a business record, because employee had no knowledge as to how the document was prepared.

State v. Ventris, 82 Crim. L. Rep. 491, 2008 WL 268900 (Kan. 2/1/08):
Holding: Where a jailhouse snitch was working for police, statements Defendant made to the snitch could not be used against Defendant at trial, including to impeach Defendant.

Roach v. Com., 2010 WL 2016851 (Ky. 2010):
Holding: In adult exploitation case, whether victim was unable to manage her own affairs was a question for the jury.

Jenkins v. Com., 87 Crim. L. Rep. 149 (Ky. 4/22/10):
Holding: Expert testimony regarding suggestive interviewing techniques in child sex cases is generally admissible.

Weaver v. Com., 2009 WL 4251653 (Ky. 2009):
Holding: Defendant should have been allowed to present expert testimony that he was intoxicated as defense to first-degree burglary.

Vires v. Com., 2008 WL 4692362 (Ky. 2008):
Holding: Where nurse testified that child failed to disclose sex abuse for years because of PTSD, this testimony was improper vouching for victim's credibility.

Colyer v. Com., 2009 WL 736001 (Ky. 2009):
Holding: Where Defendant's identity was not in question, the admission of his gang tattoos was improper evidence of gang affiliation.

Burton v. Com., 86 Crim. L. Rep. 184 (Ky. 10/29/09):
Holding: Where Defendant was charged with vehicular homicide, evidence that Defendant had cocaine and marijuana metabolites in his urine was unfairly prejudicial in the absence of evidence showing that the concentrations in the urine would cause impairment.

Ragland v. Commonwealth, 79 Crim. L. Rep. 121 (Ky. 3/23/06):
Holding: Comparative bullet lead analysis does not pass *Daubert* test.

State v. Blank, 81 Crim. L. Rep. 142 (La. 4/11/07):
Holding: General rule barring admission of polygraph results did not prevent Defendant from introducing a videotape of polygraph to prove that his post-exam confession was involuntary.

Johnson v. State, 85 Crim. L. Rep. 106 (Md. 4/8/09):
Holding: Prosecutors could not engage in "anticipatory rehabilitation" of their witness in their case-in-chief by asking about U.S. currency having drug residue to rebut anticipated defense evidence about this; "anticipatory rehabilitation" is unduly prejudicial.

State v. Blackwell, 85 Crim. L. Rep. 240 (Md. 5/14/09):
Holding: Officer's testimony about horizontal gaze nystagmus test must meet the requirements for expert testimony, and cannot be lay testimony.

Washington v. State, 84 Crim. L. Rep. 331 (Md. 12/12/08):
Holding: Where the State spliced together video from several different video surveillance cameras into a montage to show different views, there needed to be a foundation laid for the authenticity and reliability of the montage video.

Blanks v. State, 84 Crim. L. Rep. 212 (Md. 11/12/08):
Holding: Where prosecutor cross-examined Defendant about timing and content of communications with defense counsel, this violated attorney-client privilege and reversal is required unless State shows this was harmless error.

Bellamy v. State, 82 Crim. L. Rep. 540, 941 A.2d 1107 (Md. 2/14/08):
Holding: Prosecutor's statements at a guilty plea that he believed truth of accused's statements may be admissible against State in a related prosecution of a different Defendant as an adoptive admission of a party opponent.

Myer v. State, 2008 WL 623323 (Md. 2008):
Holding: Trial court abused discretion in not allowing defense to recall child sex victim to testify where, after her in-court testimony, the State, over Defendant's objection, played a video of child that contained inconsistent statements; Defendant had a right to cross-examine about the inconsistencies and did not need to do so during the child's original examination because that would open the door to the video.

Hurst v. State, 81 Crim. L. Rep. 590, 2007 WL 2176362 (Md. 7/31/07):
Holding: Even though "propensity evidence" may sometimes be allowed in cases involving the same victim, State could not in rape prosecution prove lack of consent by presenting evidence that Defendant had previously had sex with a different woman against her will.

Haley v. State, 81 Crim. L. Rep. 52 (Md. 3/21/07):
Holding: Prosecutor could not cross-examine Defendant at trial about when Defendant told his defense counsel his exculpatory version of events, because this violated attorney-client privilege.

Clemons v. State, 79 Crim. L. Rep. 121 (Md. 4/19/06):
Holding: Comparative bullet lead analysis is not generally accepted in scientific community under *Frye*.

Com. v. Mattei, 86 Crim. L. Rep. 529 (Mass. 2/1/10):
Holding: State DNA expert should not be allowed to testify that DNA found at scene does not exclude Defendant without also testifying to the statistical significance of this finding.

Com. v. Silva-Santiago, 85 Crim. L. Rep. 275 (Mass. 5/15/09):
Holding: Mass. Supreme Court sets standards for police photographic arrays, including making eyewitness aware that alleged wrongdoer may not be in any of the photos, and that investigation will continue regardless of whether eyewitness makes a photo identification.

Commonwealth v. Stuckich, 2008 WL 131947 (Mass. 2008):
Holding: Even though officer called out-of-state Defendant and told him complaints had "issued" regarding a sexual offense against him and asked him to contact the Prosecutor, but officer did not tell Defendant to return to the state, report to police, appear in court, or restrict his travel, Defendant's failure to do any of these things did not show "consciousness of guilt."

Williams v. State, 83 Crim. L. Rep. 760 (Miss. 8/14/08):
Holding: Court should accept Defendant's stipulation to prior convictions to prevent jury from hearing about past crimes under *Old Chief v. U.S.*, 519 U.S. 172 (1997).

State v. Bussmann, 82 Crim. L. Rep. 190 (Minn. 11/1/07):
Holding: Admission of extensive evidence about religious doctrine and church practices at clergyman's trial for sexual abuse violated 1st Amendment establishment clause.

State v. Cannady, 80 Crim. L. Rep. 524 (Minn. 2/8/07):
Holding: Due process was violated by a child pornography statute that made it an affirmative defense to show that the people depicted were 18 years old or older because this placed the burden of proof on Defendant concerning age.

Dixon v. State, 81 Crim. L. Rep. 206 (Miss. 4/12/07):
Holding: Where crack was found on two Defendants who were together, the crack should not have been aggregated together for purposes of determining the amount that the Defendant intended to distribute.

City of Kalispell v. Miller, 87 Crim. L. Rep. 12, 2010 WL 1055251 (Mont. 3/24/10):
Holding: The prejudice from repeated references to Defendant's homosexuality during jury trial outweighed the references' relationship to the charge crime.

State v. Derbyshire, 2009 WL 250490 (Mont. 2009):
Holding: Court erred in admitting evidence Defendant was on probation at time of crime, since this was evidence of uncharged crimes.

State v. Morrow, 2007 WL 1454285 (Neb. 2007):
Holding: Passenger's out of court statement to police officer that drugs were not hers was hearsay against Defendant, and thus, Defendant was allowed to impeach passenger's statement to officer by introducing passenger's inconsistent statement to another witness that the drugs were hers, pursuant to the rule providing that the declarant of a hearsay statement can be impeached with their prior or subsequent inconsistent statements.

Hoagland v. State, 88 Crim. L. Rep. 94 (Nev. 10/7/10):
Holding: Defendant can present defense of necessity to DWI; however, where Defendant's own misconduct contributed to the "necessity" to drive, the defense is not available; thus, where Defendant was parked illegally and had to move his car while drunk, the defense was unavailable.

Ramet v. State, 2009 WL 1562978 (Nev. 2009):
Holding: State cannot present evidence that Defendant refused consent to search his residence, and argue this as evidence of guilt.

Abbott v. State, 79 Crim. L. Rep. 644 (Nev. 7/13/06):
Holding: (1) Defendant can obtain psychological exam of alleged child sex victim based on "compelling need" where there's a reasonable basis for believing the victim's mental or emotional state may have affected veracity; (2) Defendant may also introduce victim's prior false allegations.

Nolan v. State, 2006 WL 1029205 (Nev. 2006):
Holding: Admission of post-hypnotic testimony by sex assault victim was error where safeguards provided in statute on this matter were not followed.

State v. Costello, 85 Crim. L. Rep. 574 (N.H. 7/23/09):
Holding: Defendant's drug addiction cannot be used to show motive for stealing unless State first makes threshold showing that Defendant committed the crime and lacked the ability to finance his addiction.

State v. A.O., 84 Crim. L. Rep. 658 (N.J. 3/4/09):
Holding: (1) Even though Defendant signed a stipulation for police that his polygraph results would be admissible at trial, where Defendant did not have counsel when he signed this, results were not admissible; (2) Defendant may impeach victim-witness with false accusations made after accusing Defendant.

State v. Fortin, 81 Crim. L. Rep. 9 (N.J. 3/28/07):
Holding: Prosecution could not present "signature evidence" to prove that because Defendant committed a prior murder in a certain manner, Defendant is the perpetrator of

the instant offense (identity), absent expert testimony and a database of cases showing that the two cases were unique and identical.

State v. Moore, 79 Crim. L. Rep. 727 (N.J. 8/10/06):
Holding: Hypnosis-refreshed testimony is generally inadmissible because recent studies have called into question the reliability of such testimony.

State v. Delgado, 79 Crim. L. Rep. 686 (N.J. 7/31/06):
Holding: As a condition of admitting out-of-court identification of Defendant, the police must have made a written record of the circumstances of the identification.

State v. Castagna, 79 Crim. L. Rep. 664 (N.J. 7/17/06):
Holding: Where State's witness took polygraph under stipulation that it would be admissible if witness went to trial, defendants in other cases are permitted to cross-examine witness about the polygraph results.

State v. Marquez, 2009 WL 5100854 (N.M. 2009):
Holding: Where Officer testified that Defendant's performance on a field sobriety test correlated with a 90% probability of having a blood alcohol level above the legal limit, this was inadmissible absent qualification of the Officer as an expert and a sufficient scientific foundation.

State v. Martinez, 2008 WL 4892091 (N.M. 2008):
Holding: Where charged crime of solicitation to commit burglary encompassed Defendant's honesty, Defendant should have been allowed to call witnesses to testify he was honest and truthful person.

People v. Gillyard, 2009 WL 4016114 (N.Y. 2009):
Holding: Even though Defendant was charged with impersonating police officer, court should not have admitted evidence that Defendant possessed a handcuff key because prejudice outweighed probative value, where handcuffs were not actually used in the crime.

People v. Abney, 2009 WL 3425059 (N.Y. 2009):
Holding: Exclusion of expert testimony on unreliability of eyewitness identification was error.

People v. LeGrand, 81 Crim. L. Rep. 32 (N.Y. 3/27/07):
Holding: Defendant should be permitted to present expert on lack of reliability of eyewitness identification, where eyewitness identification is main evidence against Defendant.

State v. Southard, 2009 WL 3127745 (Or. 2009):
Holding: The probative value of medical doctor's diagnosis that child had been sexually abused was outweighed by danger of unfair prejudice and was inadmissible, where there was no physical evidence child had been sexually abused.

State v. Chatelain, 86 Crim. L. Rep. 137 (Or. 10/22/09):
Holding: Under the corpus delecti rule, an admission by Defendant that he entered a vacant house for the purpose of smoking marijuana had to be corroborated before it could support a conviction for burglary.

State v. Pona, 83 Crim. L. Rep. 389 (R.I. 6/12/08):
Holding: Trial court erred in allowing State to play a lengthy audio of a murdered witness/victim's prior testimony because the prejudice from the "voice from the grave" outweighed its probative value; the witness/victim had been murdered for giving the testimony.

State v. Jones, 85 Crim. L. Rep. 682 (S.C. 8/10/09):
Holding: "Barefoot insole impression" evidence which sought to establish a link between Defendant's foot and the insoles of frequently worn shoes is not sufficiently reliable to be admissible.

State v. White, 85 Crim. L. Rep. 220 (S.C. 4/27/09):
Holding: In order to admit testimony about a tracking dog, State must show that the dog handler is an expert; that the dog has been properly trained; that the dog has been shown to be reliable; that the dog was put on the suspect's trail within a reasonable time; and that the trail was not contaminated.

State v. Sweet, 2007 WL 1673817 (S.C. 2007):
Holding: Even though police witnessed Defendant go into a motel room by himself and heard only one voice on the tape of the transaction in the room, there was no chain of custody for the drugs purchased by a confidential informant in the room in the absence of testimony by the confidential informant who allegedly bought the drugs; confidential informant was not called to testify at trial.

State v. Douglas, 79 Crim. L. Rep. 627 (S.C. 6/19/06):
Holding: Evidence that Defendant charged with murdering her husband had inquired about buying a life insurance policy on husband was not admissible because was more prejudicial than probative.

State v. James, 87 Crim. L. Rep. 689 (Tenn. 6/24/10):
Holding: Even though Defendant had unbelievable explanation for his possession of recently stolen goods, the possession is not sufficient to support a conviction for burglary. At common law such a presumption arose.

State v. Scott, 2009 WL 152740 (Tenn. 2009):
Holding: Where Defendant sought to show he did not have requisite intent for crime because he was sleepwalking, Defendant was entitled to present expert on sleepwalking, even though expert's opinion was based on self-reporting of Defendant, since many diagnoses are based on self-reporting.

State v. Copeland, 81 Crim. L. Rep. 297 (Tenn. 5/23/07):
Holding: Defendant should be allowed to present expert testimony on the lack of reliability of eyewitness identification.

State v. Riels, 2007 WL 624349 (Tenn. 3/1/07):
Holding: Defendant's testimony in capital penalty phase expressing remorse about the murders did not "open the door" to Prosecutor being able to cross-examine him about details of the murders since that violated right against self-incrimination.

State v. Clopten, 86 Crim. L. Rep. 375, 2009 WL 4877404 (Utah 12/18/09):
Holding: Expert testimony about unreliability of eyewitness identification is admissible because this is not within the common knowledge of lay persons.

State v. Tiedemann, 81 Crim. L. Rep. 507 (Utah, 6/29/07):
Holding: Under Utah Constitution, Defendant is not required to show "bad faith" on part of gov't to establish due process violation for destruction of evidence. Utah Constitution gives greater protection than *Arizona v. Youngblood*, 488 U.S. 51 (1988).

State v. Rothlisberger, 79 Crim. L. Rep. 800 (Utah 9/8/06):
Holding: Where police officer testified that, in his experience as an officer, possession 32 grams of methamphetamine showed that it was possessed for distribution purposes and not for personal use, this was "expert" testimony which should not have been admitted without meeting the requirements for admission of expert testimony.

State v. Brillon, 87 Crim. L. Rep. 49 (Vt. 3/19/10):
Holding: Where Defendant was charged with domestic assault and the aggravating factor to elevate offense to a felony was violation of a protective order, trial court should have bifurcated the trial and sentencing phases because of undue prejudice in guilt phase from evidence about violating protective order.

State v. Tester, 84 Crim. L Rep. 564 (Vt. 1/30/09):
Holding: State cannot present testimony that Defendant's DNA matches DNA at the crime scene, unless they also present evidence of the frequency of a match by chance.

State v. Amidon, 2008 WL 3982509 (Vt. 2008):
Holding: Statements Defendant made in a PSI after a guilty plea were not admissible at a trial on the charges, even for impeachment, when the plea was later withdrawn.

State v. Ish, 88 Crim. L. Rep. 115, 2010 WL 3911355 (Wash. 10/7/10):
Holding: Prosecutor cannot introduce on direct examination testimony that cooperating witness's deal calls from him to testify "truthfully," though this can be introduced on re-direct if Defendant attacks witness' credibility; however, trial court must not allow prosecutors to imply that they are able to independently verify that witness is complying with agreement.

State v. Brockob, 80 Crim. L. Rep. 349 (Wash. 12/28/06):
Holding: Shoplifting 30 packages of cold pills did not independently prove that Defendant stole the pills to make methamphetamine, so his confession was not admissible under the corpus delecti rule which requires an extrajudicial confession have independent proof of the offense before it can be admitted

Billips v. Commonwealth, 82 Crim. L. Rep. 188 (Va. 11/02/07):
Holding: Same standard governing admissibility of scientific evidence at trial also governs at sentencing hearings.

State v. Whitt, 81 Crim. L. Rep. 139 (W.Va. 4/6/07):
Holding: Defendant can call a witness who will invoke their 5th Amendment right against self-incrimination in front of the jury, where there is strong exculpatory evidence Defendant did not commit the crime.

State ex rel. Thomas v. Duncan, 81 Crim. L. Rep. 662 (Ariz. Ct. App. 8/21/07):
Holding: Statute that prohibits a justification defense for conduct that results in death of an innocent third party does not prohibit introduction of such evidence for a different purpose, such as to negate mental state for offense charged.

Ferguson v. State, 2005 WL 419700 (Ark. Ct. App. 2005):
Holding: Trial court abused its discretion in prosecution for felon in possession of firearm case to refuse Defendant's offer to stipulate to prior conviction in favor of allowing State to present evidence of Defendant's prior conviction including nature thereof.

People v. Dungo, 2009 WL 259629 (Cal. App. 2009):
Holding: Even though Pathologist called to testify about an autopsy conducted by Original Pathologist was himself an expert and formed his own opinions based on Original Pathologist's report, where Original Pathologist was not called by Prosecutor because he had "baggage" and had been forced to resign "under a cloud," Defendant's confrontation rights were violated because he was precluded from cross-examining Original Pathologist about these matters and his incompetence.

People v. Waldie, 85 Crim. L. Rep. 223 (Cal. App. 4/10/09):
Holding: Admission of evidence of police officer's repeated unsuccessful attempts to telephone Defendant before his arrest violated Defendant's 5th Amendment right to refuse to talk to police.

In re James H., 81 Crim. L. Rep. 695 (Cal. Ct. App. 8/31/07):
Holding: Juvenile court records of Defendant sealed under state law could not be used against Defendant to prove he was a sexually violent predator as an adult.

In re Christopher B., 82 Crim. L. Rep. 257 (Cal. Ct. App. 11/20/07):
Holding: Calif. rule requiring corroboration of accomplice testimony also applies in juvenile proceedings.

People v. Garcia, 82 Crim. L. Rep. 88 (Colo. Ct. App., 10/4/07):
Holding: Evidence that Defendant and rape complainant had previously engaged in violent rape fantasies should not have been excluded under the rape shield law, because this evidence was relevant to Defendant's consent defense.

People v. Kiney, 81 Crim. L. Rep. 387 (Cal. Ct. App. 5/30/07):
Holding: A *pro se* Defendant's admissions made in closing argument at trial can be used against Defendant at a subsequent trial.

Winsor v. Commissioner of Motor Vehicles, 2007 WL 1628385 (Conn. App. Ct. 2007):
Holding: A police officer did not "witness" Defendant's refusal to take a breath test by watching it via closed-circuit TV; when a person is viewing something via TV, there is no guarantee that the image or sound accurately reflect what happened.

State v. Gregory, 2006 WL 870610 (Conn. App. Ct. 2006):
Holding: In sex case, Defendant should have been allowed to question victim about her prior sexual role-playing with Defendant, because could have shown that victim consented to sex act.

State v. Cooke, 2007 WL 313327 (Del. Super. Ct. 2007):
Holding: Right against self-incrimination was violated where State handwriting expert dictated to Defendant what to write as an exemplar and the expert dictated in such a way to see if Defendant made the same spelling errors as the writing at the crime scene.

Bunche v. State, 2009 WL 383590 (Fla. Ct. App. 2009):
Holding: Where State presented a second fingerprint examiner to testify that he came to the same opinion as the first fingerprint examiner, this was improper bolstering.

Loftin v. State, 2008 WL 4265191 (Fla. Dist. Ct. App. 2008):
Holding: Even though male Defendant was charged with sex with boys, evidence that Defendant was homosexual or bisexual was inadmissible, because State did not show any connection between sexual orientation and pedophilia.

Milton v. State, 2008 WL 514996 (Fla. Ct. App. 2008):
Holding: Defendant was denied right to confrontation where Prosecutor called co-defendant to stand and had co-defendant refuse to testify; Prosecutor improperly tried to create impression that co-defendant had incriminating evidence against Defendant by doing this.

State v. Gomez, 2006 WL 2739029 (Fla. Ct. App. 2006):
Holding: Assault victim's out-of-court and in-court identification of Defendant were rendered unduly suggestive where officer provided victim with Defendant's name, which victim then used to look up Defendant's picture on internet, and then victim subsequently identified Defendant in a police photo lineup, even though victim claimed she wasn't influenced by the internet photo.

Brinkley v. State, 2009 WL 5154254 (Ga. Ct. App. 2009):
Holding: Trial court should not have accepted secondary sources to prove Defendant's prior conviction status based solely on prosecutor's statement that he "was told" the original documents had been destroyed.

Smith v. State, 2007 WL 546330 (Ga. Ct. App. 2007):
Holding: Certificates showing that murder victim was a minister were irrelevant and inadmissible at trial.

State v. Ryan, 2006 WL 1843298 (Haw. Ct. App. 2006):
Holding: Where police officers were asked questions about whether the evidence caused them to believe the complaining witness' allegations, this was tantamount to an opinion that the complaining witness was telling the truth, and therefore, improperly invaded the province of the jury.

State v. Estes, 2009 WL 4263561 (Idaho Ct. App. 2009):
Holding: Even though Officer testified he was certified as an expert to determine speeds, Officer's visual estimation of Defendant's speed, standing alone, was insufficient to convict of speeding.

State v. Thomas, 2009 WL 928531 (Iowa Ct. App. 2009):
Holding: State cannot use Defendant's refusal to consent to search of her home as evidence of guilt.

Edwards v. State, 2010 WL 2749654 (Ind. Ct. App. 2010):
Holding: Testimony from two eyewitnesses that Defendant was not at the crime scene was not an "alibi defense," and therefore, was admissible even though Defendant did not comply with notice of alibi rule.

Hape v. State, 2009 WL 866857 (Ind. Ct. App. 2009):
Holding: Where party seeks to admit telephone text message, the message must be authenticated before admission.

McClain v. State, 2008 WL 5340218 (Ind. Ct. App. 2008):
Holding: In trial for failure to register as sex offender, the probative value of Defendant's sex offender registration form was outweighed by the danger of unfair prejudice where the form contained details of prior sex offense, and Defendant offered to stipulate to his sex offender status.

State v. Shadden, 2009 WL 102960 (Kan. Ct. App. 2009):
Holding: Police officer should not have been allowed to testify that driver who failed a walk-and-turn sobriety test had a 68% likelihood of having a BAC of .10, because this improperly implied a level of scientific certainty to the field test.

Bishop v. Com., 2010 WL 392219 (Ky. Ct. App. 2010):
Holding: Even though medical records were properly authenticated, they were inadmissible absent testimony by preparing doctor since they'd be confusing to jury without doctor's explanation.

Wilder v. State, 2010 WL 1077325 (Md. Ct. Spec. App. 2010):
Holding: Detective could not testify how cell phone records showed Defendant's location unless Detective was qualified as an expert witness in this field and State complied with discovery obligations for experts.

Brown v. State, 2008 WL 4427214 (Md. Ct. Spec. App. 2008):
Holding: Where the only evidence was bullets found at the scene, jury could not infer the bullets were fired from a handgun (which was prohibited) or rifle (which was not prohibited), when either weapon could have used such bullets.

State v. Sanford, 2008 WL 4776713 (Minn. Ct. App. 2008):
Holding: Where Defendant was charged with disorderly conduct and a drug possession, trial court abused discretion in not allowing Defendant to present evidence that she had post-traumatic stress disorder, since this PTSD would have provided an alternative explanation for her behavior than being under the influence of drugs and, therefore, likely to possess drugs.

State v. Lenin, 85 Crim. L. Rep. 97 (N.J. Sup. Ct. App. Div. 4/7/09):
Holding: Even though FBI analyst claimed to be expert in "behavioral assessment" regarding murder scene, analyst could not testify that murderer was motivated by anger due to number of wounds on body, because this testimony had not been shown to be scientifically reliable and was subject-matter that would already be familiar to laypersons.

State v. A.O., 82 Crim. L. Rep. 283 (N.J. Super. Ct. App. 11/27/07):
Holding: Court cannot admit a polygraph result based on Defendant's stipulation with police to such admission before he was represented by counsel, because that would violate the 6th Amendment right to counsel.

State v. Bradshaw, 2007 WL 957000 (N.J. Super. Ct. 2007):
Holding: Even though Defendant failed to give notice of alibi before trial, the application of the notice of alibi rule to Defendant's own testimony would violate 6th Amendment right to testify.

State v. Burr, 2007 WL 1319433 (N.J. Super. Ct. 2007):
Holding: Even though expert would not testify that Defendant's Asperger's Disorder negated his mental state for sexual abuse, the expert's testimony was admissible to explain why Defendant would put children on his lap to negate the inference that Defendant did so for sexual gratification.

State v. Miraballes, 2007 WL 1201592 (N.J. Super. Ct. 2007):
Holding: Even though prosecutor asked expert witness a question that was posed as a hypothetical, the question was improper where it was obvious that the question referred to the Defendant and asked the expert to comment on the credibility of the State's case.

State v. Tom, 2010 WL 3169360 (N.M. Ct. App. 2010):
Holding: Where State did not establish foundation that breath-test machine was certified for accuracy, admission of breath-test results was not harmless, where other evidence of guilt was weak.

State v. Payton, 165 P.3d 1161 (N.M. Ct. App. 2007):
Holding: Evidence that child sex victim had been previously sexually assaulted by someone else was admissible to show alternative source of child's sexual knowledge, and rebut assumption that child would not know about sex other than by Defendant's acts.

People v. Patterelli, 2009 WL 4346503 (N.Y. App. Div. 2009):
Holding: Where prosecutor asked officer three times about Defendant's invocation of right to silence, this violated right to silence.

People v. Baker, 2008 WL 1901667 (N.Y. App. Div. 2008):
Holding: Where the State failed to elicit from the blood alcohol test examiner whether the machine was properly calibrated and working properly, the BAC results were not admissible.

People v. Florestal, 2008 WL 2498101 (N.Y. App. Div. 2008):
Holding: Where statute required a showing of "depraved indifference," this was a mental state to be evaluated by Defendant's conduct, and not an objective standard; therefore, Defendant could present psychological testimony showing lack of mental state for crime.

People v. Frederick, 2008 WL 2612144 (N.Y. App. Div. 2008):
Holding: Prosecutor improperly vouched for credibility of witnesses, and improperly elicited testimony that Defendant incarcerated since his arrest.

People v. Banks, 2007 WL 1989843 (N.Y. County Ct. 2007):
Holding: Defense may present expert testimony that "weapons focus" made eyewitness identification unreliable.

People v. McNeil, 2007 WL 968134 (N.Y. App. Div. 2007):
Holding: Where informant had identified Defendant at an unduly suggestive pretrial showup, informant could not later identify Defendant in court because there was no independent basis for the in-court identification.

State v. Grizovic, 2008 WL 2550750 (Ohio Ct. App. 2008):
Holding: Trooper cannot testify to statistical probability that a Defendant would have tested over the legal limit for DWI, based on results on field sobriety tests.

Summers v. State, 2010 WL 718010 (Okla. Crim. App. 2010):
Holding: Defendant was denied right to present complete defense where in his murder trial the trial court excluded a witness' testimony that witness had ordered the killing and Defendant was not one of the people who participated.

Dunkle v. State, 79 Crim. L. Rep. 642 (Okla. Crim. App. 7/7/06):
Holding: Computer-generated animation of how murder occurred was not admissible because it wasn't based on the exact evidence in the case, since there were varying witness accounts which made the animation lack an adequate foundation.

State v. Ragland, 2006 WL 3788416 (Or. App. 2006):
Holding: Defendant's 5th Amendment rights to counsel and silence violated where Prosecutor's questions and statements implied guilt because Defendant failed to speak to police after she invoked her constitutional rights.

Commonwealth v. Kriner, 2007 WL 5749 (Pa. Super. 2007):
Holding: Child victim who died before trial was not an "unavailable" witness for purpose of statute allowing out-of-court statements of child sex victim to be admitted, because the statute required a determination of whether testifying would be emotionally harmful to the child, and death didn't satisfy this definition of unavailability.

State v. Covert, 2005 WL 3675954 (S.C. Ct. App. 2006):
Holding: Submission of actual text of drug traffic statute to jury in written form was erroneous.

Coble v. State, 2010 WL 3984713 (Tex. Crim. App. 2010):
Holding: Psychiatrist's testimony that Defendant would be dangerous in future was not reliable where expert could not site a book or article that discussed factors he was relying on, was unaware of any scientific studies about accuracy of long-term predictions about future dangerousness, or of any error rates in such predictions.

Jackson v. State, 2010 WL 3168307 (Tex. App. 2010):
Holding: Where trial court spent 40% of trial admitting evidence of an unrelated robbery that occurred after the charged offense, this was prejudicial.

Walter v. State, 84 Crim. L. Rep. 87, 2008 WL 4414536 (Tex. Crim. App. 10/1/08):
Holding: Statements directly against a speaker's penal interests, including "blame-sharing" statements, are admissible as statements against penal interest.

Fischer v. State, 82 Crim. L. Rep. 477, 2008 WL 141850 (Tex. Crim. App. 1/16/08):
Holding: Police officer's videotaped narrative of his arrest of Defendant is not admissible under "present sense impression" to hearsay rule, because on-the-scene observations by police are fraught with thoughts of future prosecution and evidence gathering; trial court should have excluded the audio portion of the video that contained the officer's narrative and opinions.

Lapointe v. State, 2007 WL 1217340 (Tex. Crim. App. 2007):
Holding: The "hearing" required under Texas rape shield law to determine if victim's past sexual history will be admitted must be an "adversarial hearing" at which the parties are present and attorneys are allowed to questions witnesses.

Fischer v. State, 2006 WL 30772047 (Tex. App. 2006):
Holding: Where police officer in a DWI arrest made a tape of his observations as he was arresting Defendant, this was hearsay and could not be admitted as a "present sense impression."

Miller v. State, 2009 WL 3857193 (Utah Ct. App. 2009):
Holding: Where Defendant who had been convicted of assault against a complete stranger filed an "innocence petition" which alleged he had suffered a stroke in another State before the assault and was physically disabled and testimony indicated Defendant would have had only 24 hours to fly from the State to Utah to commit the crime and then return, Defendant stated sufficient facts to require a hearing as to his factual innocence.

State v. Davis, 2007 WL 121447 (Utah Ct. App. 2007):
Holding: In unlawful possession of firearm case, police officer could not testify that since Defendant's fingerprints were on the gun, he "possessed" the gun, since this was a legal conclusion.

State v. Denton, 2009 WL 1313469 (Wis. Cit. App. 2009):
Holding: The probative value of police officer's computer-generated crime scene animation was outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury.

State v. Denton, 85 Crim. L. Rep. 358 (Wis. Ct. App. 5/13/09):
Holding: Where police officer did not personally witness events depicted in a computer animation and was not an expert on computer animation, the computer animation was not admissible through the officer.

Evidentiary Hearing (Rules 24.035 and 29.15)

Roberts v. State, No. SC89245 (Mo. banc 2/10/09):
Where Movant pleaded that State changed its plea offer to Movant during a group guilty plea, this pleaded facts not refuted by the record entitling Movant to an evidentiary hearing.
Facts: Movant pleaded guilty in a "group" guilty plea with other defendants. Later, Movant filed a 24.035 motion claiming the State changed the plea offer from what his attorney had told him. The attorney had said the State would not oppose drug treatment, but the State said the agreement was that it would not oppose it "if it was recommended" by probation authorities. The motion court found the claim refuted by the record because Movant indicated at the group guilty plea that he understood the plea and had no questions.

Holding: The group guilty plea increased the opportunity of mistakes and confusion. In the context of a group plea, minor alterations in a plea agreement might be missed or misunderstood by defendants. Movant had little room to assert any confusion because this was a group plea. Although group pleas are not automatically invalid, they are not preferred procedure and should be used sparingly. The record does not conclusively refute Movant's claim. Evidentiary hearing granted.

Dickerson v. State, No. SC89142 (Mo. banc 10/28/08):
(1) Even though the trial record did not show that Movant was shackled at trial, Movant was entitled to hearing on claim he was shackled since the silence in the record did not rebut Movant's claim; and (2) where motion court failed to issue Findings on all claims, case is remanded for Findings on omitted claims under 29.15(j).
Facts: Before trial, defense counsel filed a motion to prohibit shackling of Defendant-Movant at trial. However, the motion was never ruled on, and the trial transcript is silent as to whether Defendant-Movant was shackled. Movant claimed in a 29.15 motion that he had been shackled and counsel was ineffective for failing to object. The motion court denied a hearing, finding this was refuted by the record.
Holding: It is true the trial record contains no reference to use of shackles. For the record to "refute" Movant's claim, however, the record had to "rebut" the claim or "prove the claim to be false." The silence on shackling does not prove Movant was not shackled. The motion court also found that Movant did not plead that he told his counsel he was shackled. However, Movant does state that counsel's performance fell below the conduct of a reasonably competent attorney. Important here is that counsel filed a motion to prohibit shackling, but there is nothing showing the court ever ruled on it. Movant is entitled to a hearing on his claim.

Hickey v. State, No. ED93397 (Mo. App. E.D. 7/6/10):
Even though Defendant made a record that he waived his right to testify at trial, his waiver may have been unknowing if his counsel misrepresented to him that she would present his alibi through other witnesses, and an evidentiary hearing is required.
Facts: Defendant waived his right to testify at trial. He later filed a 29.15 motion which alleged that his counsel had misled him into believing that counsel would present his alibi through other witnesses. Defendant alleged he would have testified if he had known his testimony would be the only source of alibi. The motion court denied the claim without a hearing.
Holding: The record does not refute Defendant-Movant's allegation that counsel's misrepresentation caused his wavier of his right to testify to be unknowing. When the issue is the movant's waiver of his right to testify, the motion court's belief that Movant's testimony would not have been believed is irrelevant. Movant alleged that counsel led him to believe that his alibi would be presented through other witnesses, and he waived his right to testify in reliance on this. Movant alleged that had he known his testimony would be the only source of alibi evidence, he would have testified. An evidentiary hearing is required to determine the veracity of Movant's claim that counsel misled him into waiving his right to testify.

Legendre v. State, No. ED93866 (Mo. App. E.D. 8/24/10):
Movant was entitled to an evidentiary hearing on his claim that his plea counsel was ineffective because counsel misled him into believing that counsel had litigated a motion to suppress, but this was not true, because this claim was not refuted by the record.
Facts: Movant was charged with robbery. He ultimately pleaded guilty, and said at the plea that he was satisfied with counsel's services. Movant then filed a 24.035 motion. He alleged that plea counsel was ineffective for failing to file a motion to suppress, and that plea counsel had misled Movant into thinking that such a motion had been litigated. Movant alleged that he did not learn until he was delivered to the DOC that plea counsel never filed such a motion. The motion court denied this claim without a hearing.
Holding: A plea is not voluntary if it is the result of fraud or mistake. If Movant's claim is true that his counsel misled him into believing that a suppression motion had been litigated, then his plea was involuntary. Movant's claim is not refuted by the record. The motion court cannot determine the credibility of Movant's claim without having heard witnesses on it. Remanded for an evidentiary hearing.

Smith v. State, No. ED90883 (Mo. App., E.D. 12/23/08):
Even though Movant said at sentencing she was satisfied with her counsel, where the record did not show that Movant had been advised of her right to testify, the record did not refute Movant's 29.15 claim that her counsel had been ineffective in not advising her of her right to testify, and a hearing was required.
Facts: Movant was convicted of assault. At sentencing, she said she was satisfied with her trial counsel. Later, she filed a 29.15 motion alleging counsel was ineffective for not advising her of her right to testify at trial. The motion court found this was refuted by the record and denied a hearing.
Holding: A hearing is required where the record does not establish that the court specifically asked Movant at trial if she was aware of her right to testify and waived that right. The fact that Movant said she was satisfied with trial counsel at her sentencing does not refute her claim that she was not advised of her right to testify. Remanded for a hearing.

Melton v. State, No. ED90289 (Mo. App., E.D. 8/26/08):
Evidentiary hearing was not required on Movant's double jeopardy claim, but motion court was required to issue Findings on the claim to allow meaningful appellate review.
Facts: Movant pleaded guilty to two drug counts for drugs possessed at the same time. He filed a Rule 24.035 motion claiming conviction on both counts constituted double jeopardy. He waived a hearing on the claim. The motion court denied the claim without Findings.
Holding: A double jeopardy claim can be considered in a 24.035 proceeding because it goes to the power of the State to charge Movant. Movant correctly withdrew his request for a hearing, because all a motion court can consider in deciding a double jeopardy claim is the State's information and the transcript of the guilty plea. The motion court's failure to issue Findings on the claim, however, was error under 24.035(j) because it does not allow for meaningful appellate review.

Thomas v. State, No. ED89985 (Mo. App., E.D. 4/1/08):
(1) Movant was entitled to evidentiary hearing on Rule 24.035 claim that he had told his attorney he was mentally retarded, and that Movant was incompetent to plead guilty, and (2) Strickland "outcome test" regarding not having pleaded guilty is not appropriate to deciding prejudice; rather, test is whether there is a "reasonable probability" Movant lacked mental competence.
Facts: Rule 24.035 Movant claimed that he had told plea counsel he was mentally retarded, and claimed he was incompetent to plead. The motion court denied an evidentiary hearing on grounds that this was refuted by the record.
Holding: (1) The record does not refute that Movant was mentally retarded. The general questions posed to Movant at his guilty plea regarding his understanding of the charge, plea process and rights waiver were not sufficiently specific to refute this claim of mental retardation. (2) Because cases such as this do not lend themselves very well to the *Strickland* outcome test, whether Movant would still have pleaded guilty is irrelevant. Rather, Movant need only demonstrate a "reasonable probability" that he lacked competency "sufficient to undermine confidence in the outcome."

McClendon v. State, No. ED87802 (Mo. App., E.D.1/30/07):
Where 29.15 Movant alleged counsel misinformed him of maximum punishment he would receive if he went to trial and Movant had rejected favorable pretrial plea offer, Movant was entitled to evidentiary hearing on his claim, even though trial court was not required to have accepted Movant's guilty plea.
Facts: Before trial, Movant's counsel told Movant the maximum punishment he could receive if he went to trial was seven years. Movant then rejected a plea offer for seven years. On the day of trial, Movant learned the maximum punishment was really 10 years. Movant sought to plead "open" that day, but the trial court refused to accept the plea. Movant was found guilty at trial and sentenced to nine years. He filed 29.15 motion claiming counsel was ineffective in misinforming him of maximum punishment, and he would have accepted the seven year plea offer if had known the correct maximum punishment. The motion court denied a hearing on grounds that the court would not have been required to accept the plea.
Holding: During the time Movant's case was pending, the maximum punishment was reduced by statute, but counsel should have been aware that under section 1.160 in effect at that time it was unlikely that Defendant would receive the benefit of the more favorable sentencing statute. Thus, counsel should have known the maximum sentence remained 10 years. Movant alleged he would have accepted the seven-year offer if he had known the correct maximum punishment. This matter is not refuted by the record, and would entitle Movant to relief. Thus, Movant is entitled to an evidentiary hearing. The motion court applied the wrong analysis in holding Movant was not prejudiced because the trial court was not required to accept Movant's guilty plea.

Teer v. State, No. ED86500 (Mo. App., E.D. 8/22/06):
Movant entitled to hearing on claim that appellate counsel was ineffective in failing to file complete record on appeal.

Facts: Movant contended his appellate counsel was ineffective in failing to file a complete record on appeal to support the issues raised on direct appeal. The motion court denied the claim without a hearing.
Holding: Although there was a four day trial, the transcript filed by appellate counsel on appeal included only the testimony of one witness, and did not include any portions relevant to the issues raised on direct appeal. On direct appeal, the conviction was affirmed because of the failure to file a complete record necessary for review of the claims. Movant's claim that counsel was ineffective in not filing the complete record is not refuted by the record. Reversed and remanded for a hearing.

Whited v. State, No. ED86584 (Mo. App., E.D. 7/18/06):
Movant entitled to hearing on claim of failure to call witness who would rebut an element of the offense.
Facts: Movant was convicted at jury trial of second degree domestic assault, Section 565.073, for beating his girlfriend. Movant filed 29.15 motion alleging counsel was ineffective for failing to call a witness who would testify that girlfriend said she had planned incident because she was angry with Movant and that girlfriend said that she caused the injuries to herself. Motion court denied claim without a hearing.
Holding: To be entitled to hearing, Movant must plead that (1) counsel knew or should have known of witness; (2) the witness could have been located through reasonable investigation; (3) the witness would testify; and (4) the testimony would provide a viable defense. An element of the crime of second degree domestic assault is physical injury to another. Here, Movant alleges the witness would have testified at trial that girlfriend said that she, not Movant, caused girlfriend's injuries. There were no other witnesses to the assault besides Movant and girlfriend. Witness' testimony would establish that Movant did not cause the injuries and would negate an element of the offense. Therefore, Movant entitled to a hearing on this claim.

Reid v. State, No. ED86566 (Mo. App., E.D. 5/30/06):
Case remanded for evidentiary hearing on issue of whether defense counsel misadvised Movant on parole eligibility; motion court's reliance on affidavit to reject claim was improper.
Facts: 24.035 Movant alleged, in relevant part, that he pleaded guilty on misadvice of counsel that he'd be eligible for parole in 18 months. In fact, Movant was not eligible for parole until he had served 40% of his sentence (which was longer). Prosecutor filed an affidavit from defense counsel stating that although counsel incorrectly told Movant he would be eligible for parole in 18 months, counsel also told Movant he could not promise how much time Movant would serve, and the "only guaranteed 'out date' was the final day of the nine year sentence." Motion court denied the claim without an evidentiary hearing, relying, in part, on the affidavit.
Holding: Motion court clearly erred in denying claim without a hearing. First, it was improper in the absence of a stipulation by the parties to rely on the affidavit. Movant had no opportunity to rebut the affidavit, since a hearing was not granted. In deciding whether to have a hearing, motion court should have reviewed the record without reference to the affidavit. Movant's claim is not refuted by record. Although counsel generally has no duty to inform Movant about parole eligibility, where counsel

affirmatively misadvises Movant about that, this can affect the voluntariness of a guilty plea. Although Movant said at his plea that no promises were made to him about the sentence he would receive, this general inquiry by the trial court did not refute the claim that Movant had been given misadvice about parole eligibility. Movant received the sentence he plea bargained for, but his counsel misadvised him about parole eligibility. Movant's 24.035 motion alleged he would not have pleaded guilty and would have insisted on proceeding to trial if he knew the parole eligibility advice was wrong.

Griffin v. State, 185 S.W.3d 763 (Mo. App., E.D. 2006):
(1) Information charging Defendant/Movant with assault of law enforcement officer first degree was defective because did not contain essential element of "serious" physical injury; and (2) Defendant/Movant was entitled to evidentiary hearing in Rule 24.035 case that his plea counsel was ineffective in failing to advise Defendant/Movant that "serious" physical injury was required.
Facts: Movant pleaded guilty in an *Alford* plea to assault of a law enforcement officer first degree, Section 565.081. The information charging Movant did not allege "serious" physical injury, only "physical injury." Movant filed a Rule 24.035 motion alleging counsel was ineffective in failing to advise Movant of the difference between "serious" physical injury and "physical injury," and that Movant would not have pleaded guilty had he known the difference.
Holding: "Serious" physical injury is a necessary element of assault of a law enforcement officer first degree under the Missouri Approved Criminal Charges and Section 565.081. The information was defective in that it did not contain the element of "serious" physical injury. Moreover, this defect was not corrected by the prosecutor's recitation of facts at the guilty plea. The prosecutor only used the term "harm" to describe what Movant had done to the officer. The prosecutor never said Movant had committed "serious" physical injury. Movant could have reasonably believed that he could be convicted at a trial only on a finding of "physical injury," which was incorrect. Movant is entitled to an evidentiary hearing on whether counsel was ineffective in failing to advise Movant of the difference between "serious" physical injury and "physical injury."

Lane v. State, No. SD30116 (Mo. App. S.D. 5/21/10):
Where Movant alleged that his guilty plea was rendered involuntary because his plea counsel was ineffective in misadvising him about his right to have his case dismissed under UMDDL, this properly stated a claim of ineffective counsel and Movant was entitled to an evidentiary hearing.
Facts: In 2007, Movant was charged with the crime in this case. Meanwhile, he was incarcerated in the DOC on another case. While incarcerated, he filed a request for disposition of his new charge within 180 days under the Uniform Mandatory Disposition of Detainers Law, Sec. 217.450. More than 180 days later, Movant pleaded guilty. Subsequently, he filed a Rule 24.035 motion alleging his plea was involuntary because counsel had been ineffective in misadvising Movant about his UMDDL motion. The motion court denied the claim without a hearing.
Holding: The motion court relied on cases holding that defendants waive a claim under UMDDL by pleading guilty. However, Movant's claim here is ineffective assistance of

counsel, which is a different issue. The cases relied on by the motion court did not address ineffective assistance of counsel. Movant's claim is that his plea was rendered unknowing and involuntary because his counsel misinformed him of the effect of his guilty plea and his rights under UMDDL. Movant has alleged facts which would have shown he was entitled to have his case dismissed under UMDDL but for counsel's misadvice. On the other hand, it is possible Movant and counsel had some strategy reason for not pursuing the UMDDL claim. This is impossible to determine without a hearing. Movant has pleaded facts warranting an evidentiary hearing.

Ritter v. State, No. 27733 (Mo. App., S.D. 12/7/06):
Movant entitled to hearing on 29.15 claim that trial counsel was ineffective for failing to file timely Notice of Appeal.
Facts: Movant was convicted at a bench trial and given an SES and probation. No Notice of Appeal was filed. Later, the probation was revoked after Movant was arrested on new offenses. Movant then sought to file a late Notice of Appeal, which request was denied by the Court of Appeals. Movant then filed a 29.15 motion alleging trial counsel was ineffective in failing to file a timely Notice of Appeal. The motion court held this was a claim of ineffective appellate counsel and denied an evidentiary hearing.
Holding: The motion court applied the wrong analysis in holding this was a claim of ineffective appellate counsel; it is properly a claim of ineffective trial counsel. A trial counsel who ignores a specific request to appeal is ineffective, and a Movant in such a situation is entitled to a new appeal without proof of likely merit of the appeal. Here, the State initially asked the Court of Appeals to judicially notice its prior denial of the late Notice of Appeal. The Court of Appeals judicially notices that file and finds an affidavit in that file stating that Movant told his trial counsel to appeal. The State then wanted the Court of Appeals not to consider that because it is outside the record. However, the Court, having judicially noticed a file, will not turn a blind eye to what is in the file. Even though the affidavit is outside the record of the 29.15 case, the affidavit indicates Movant may be entitled to relief, and the Court of Appeals remands for an evidentiary hearing.

Taylor v. State, No. 27501 (Mo. App., S.D. 8/18/06):
Movant entitled to hearing on claim that counsel failed to call alibi witness in mistaken identification case
Facts: Movant was convicted of robbery in a trial in which he claimed mistaken identification as a defense. Movant filed a Rule 29.15 motion claiming that trial counsel failed to investigate and call Movant's mother to testify that Movant was at home at the time of the robbery. The motion court denied a hearing.
Holding: To be entitled to a hearing for failure to call an alibi witness, Movant must plead (1) that the witness could have been located through reasonable investigation; (2) that the witness would have testified if called; and (3) that the witness' testimony would have provided a viable defense. Movant's motion pleaded that Movant had told counsel that he was at home with his mother, and pleaded where the mother could have been located; that she would have testified; and that would have provided an alibi by testifying that Movant was not at the scene of the robbery. The motion court's finding that trial

counsel's failure to call the mother was trial strategy is not supported by the record. There is no way to determine the basis for not calling her absent an evidentiary hearing.

Fisher v. State, No. 27308 (Mo. App., S.D. 5/31/06):
Movant entitled to hearing on claim plea counsel was ineffective in failing to investigate claim that alleged assault victim recanted her testimony.
Facts: Movant pleaded guilty to assault in an *Alford* plea. State said at plea that, among other evidence, State would show that a police officer witnessed Movant assault the victim. Movant subsequently filed Rule 24.035 motion alleging that his plea counsel was ineffective in failing to investigate claim that the assault victim had recanted her testimony. The motion court denied the claim without an evidentiary hearing, holding that Movant was not prejudiced since a police officer would testify that Movant assaulted victim.
Holding: Movant is entitled to a hearing. His claim is not refuted by the record because at the plea, Movant said he did not remember committing the assault. The motion court clearly erred in finding that Movant was not prejudiced due to the police officer having witnessed the event. The question of whether Movant was prejudiced at a guilty plea is to be answered not by whether he would have prevailed at trial, but whether he would have chosen to enter his *Alford* plea and forgo his right to trial if he had known the victim had recanted. The motion court also found that there was no evidence the victim had actually recanted. However, Movant's motion pleaded that victim had recanted, and the purpose of hearing is to supply the actual evidence.

Gehrke v. State, No. WD67823 (Mo. App., W.D. 5/30/08):
Movant was entitled to hearing on claim that postconviction counsel abandoned Movant by failing to file a notice of appeal from denial of postconviction relief.
Facts: Movant was denied Rule 24.035 relief in 2001. Postconviction counsel did not appeal. In 2006, Movant filed a motion to reopen the 24.035 proceedings on grounds of abandonment. Movant alleged that he wanted to appeal, and that postconviction counsel told him he would appeal, but did not. The motion court denied relief without a hearing.
Holding: Failure to file a timely appeal of a postconviction case constitutes abandonment. A motion to reopen states a claim of abandonment unless the delay in filing the appeal was due to Movant's negligence or intentional conduct. Here, Movant alleged that postconviction counsel failed to appeal, despite Movant's request and counsel's statements that counsel would appeal. A hearing is warranted.

Gabaree v. State, No. WD69551 (Mo. App. W.D. 8/11/09):
Movant entitled to evidentiary hearing on claims that counsel was ineffective in failing to object to (1) doctor's testimony in child sex case that victim's statements were believable; (2) psychologist's statements that Defendant's psychological test scores indicated someone who would probably abuse children; and (3) failing to impeach victim with prior inconsistent statements denying the charged acts.
Facts: Movant was convicted at trial of various child sex offenses. At trial, a doctor who examined victim testified, without objection, that he found the victim's "very specific" disclosures to be "very credible disclosure." A psychologist for DFS who examined Movant testified, without objection, that psychological tests showed that

Movant "could" fulfill his sexual needs using children, and that persons with Movant's scores are "probably abusing" children and "there's an assumption … you're actually doing it" if you have beliefs like Movant's. Victim also gave testimony at trial that contradicted early testimony she had given, and counsel did not impeach her. Movant claimed counsel was ineffective in failing to do all of this; the motion court denied the claims without a hearing.
Holding: To be entitled to a hearing, Movant must allege facts not refuted by the record which show counsel failed to act as a reasonably competent counsel and he was prejudiced. The doctor's testimony improperly commented on victim's credibility and bolstered victim's testimony. The record does not show a reasonable trial strategy for failure to object. The psychologist's testimony amounted to improper propensity evidence; again, the record does not show a reasonable trial strategy for failure to object. Lastly, although failure to impeach will not constitute ineffective assistance unless the action would provide a viable defense, here victim gave testimony at trial that contradicted prior testimony and went to the center of the State's case to prove the child sex charges; her prior testimony would have been admissible as substantive evidence under Sec. 491.074 and would have provided a viable defense. Remanded for an evidentiary hearing.

Samuel v. State, No. WD69273 (Mo. App. W.D. 2/27/09):
Where Movant claimed that his plea counsel told him he would receive 5 years in prison but he received more, Movant was entitled to evidentiary hearing on this claim because the record does not show that Movant was ever asked at the plea if any promises were made to him.
Facts: Movant pleaded guilty in an open plea to a class B felony and received 12 years. He filed a 24.035 motion claiming counsel told him he would receive 5 years. Movant had previously rejected an 8-year plea offer. The motion court denied the claim without a hearing, finding that "at no time did or could counsel promise" 5 years.
Holding: Although the plea judge told Movant the range of punishment was 5 to 15 years, the plea record shows that the judge did not inquire whether any promises had been made of Movant to plead guilty. If Movant pleaded guilty under the belief that he would receive a 5 year sentence because counsel told him this, then counsel was ineffective. The record does not refute Movant's claim. He is entitled to a hearing.

Schafer v. State, No. WD68721 (Mo. App., W.D. 5/6/08):
Even though Movant pleaded guilty to forgery, where he alleged that his guilty plea was involuntary because his counsel was ineffective in failing to seek funding to obtain a handwriting analysis to show that Movant had not committed the offense, this stated a viable claim for relief and an evidentiary hearing should have been granted.
Facts: Movant pleaded guilty to forgery, Sec. 570.090. At the plea, the State said its evidence would show that victim's house was burglarized, checks were taken, and then eight days later, Movant passed one of victim's checks at a store. Movant filed a 24.035 motion, claiming his private counsel had failed to seek funding under *Ake v. Oklahoma*, 470 U.S. 68 (1985) to obtain a handwriting analysis, which would have shown that Movant did not write the check. The motion court denied the claim without a hearing, finding that the record refuted Movant's claim that his plea was coerced.

Holding: A guilty plea renders a claim of ineffective assistance of counsel irrelevant except to the extent that it affects the voluntariness and understanding of the plea. The allegation that Movant was coerced into pleading guilty is not waived because he entered a guilty plea. Guilty pleas can be rendered involuntary by counsel's failure to prepare. Here, Movant has alleged that his counsel failed to investigate a handwriting expert due to lack of funds; that his counsel failed to seek funding under *Ake*; that an expert would have found that Movant did not write the check; and that Movant would not have pleaded guilty and would have insisted on proceeding to trial, but for counsel's inaction. This states a valid claim for relief. Furthermore, this is not refuted by Movant's guilty plea, because the factual basis for the plea is questionable, in that the State had to show that Movant was aware the checks were forged when he attempted to cash them, but the State's stated evidence only questionably shows this. Movant did not admit knowing this as part of his plea, but merely agreed with the State's statement of the evidence. Case remanded for evidentiary hearing.

<u>McQuary v. State</u>, No. WD67201 (Mo. App., W.D. 12/26/07):
Movant can raise in 29.15 case that a juror intentionally failed to disclose relationship with State's witness, where there was no opportunity to litigate this previously.
Facts: On voir dire, a juror failed to answer a question about whether he knew a State's witness. Defendant-Movant was convicted. In his new trial motion, he alleged that the juror had a girlfriend who knew the State's witness. While the direct appeal was pending, Movant discovered additional evidence showing the juror personally knew the State's witness, and filed a motion with the Court of Appeals to remand the case for a hearing on that, but the Court of Appeals denied this. Movant filed a 29.15 motion in which he alleged the juror failed to disclose the relationship. The State claimed this issue was not cognizable in a 29.15 proceeding, and had been litigated on direct appeal.
Holding: The juror issue is cognizable because constitutional violations can be addressed under 29.15 if "exceptional circumstances" are shown justifying why the issue was not raised on direct appeal. Movant did not have an opportunity to litigate this claim prior to or on direct appeal. His new trial motion did not raise this claim, since Movant was not aware of it until after that time. Even though the Court of Appeals denied a remand to litigate the claim, that was not an adjudication on the merits. The Court of Appeals is limited to reviewing claims that are in the record, and denying a remand was not an adjudication on the merits here, or a full opportunity to litigate the claim. Movant's first opportunity to litigate it is in the 29.15. The motion court believed it did not have any authority to decide this claim. That is error, and case remanded for further proceedings.

<u>Coke v. State</u>, No. WD67580 (Mo. App., W.D. 7/31/07):
Even though Movant said at his guilty plea hearing that no promises had been made to him, his 24.035 claim that plea counsel had misadvised him about his eligibility for parole was not refuted by the record, because no inquiry about parole was made at the plea.
Facts: Movant pleaded guilty to drug offenses pursuant to a plea bargain. At the plea, Movant was asked if any promises were made to him other than the plea bargain. Movant said "no." Movant then filed a 24.035 motion claiming his plea counsel told him

he would be eligible for parole in 17 months, but that he was not so eligible. He claimed he would not have pleaded guilty had he not been misadvised. The motion court dismissed the claim without a hearing.
Holding: Counsel can be ineffective for affirmatively misadvising a Movant about parole eligibility. The record does not conclusively "refute" Movant's claim. Movant was not asked about parole during the plea hearing. A negative response to a routine inquiry whether any promises had been made is too general to encompass all possible statements by counsel. Movant is entitled to a hearing.

Members v. State, No. WD65390 (Mo. App., W.D. 7/18/06):
Movant entitled to hearing on claim that counsel was ineffective in failing to convey a plea offer to Movant, even though State now denies a plea offer was made, since Movant's claim is not refuted by the record.
Facts: Movant filed a 29.15 Motion alleging counsel was ineffective in failing to convey a plea offer to him made during trial, and that Movant was prejudiced because he would have accepted the offer. The State denies a plea offer was made. Motion court denied claim without a hearing.
Holding: To be entitled to hearing, Movant (1) must allege facts, not conclusions, which if true, would entitle Movant to relief; (2) the facts must not be refuted by the record; and (3) the Movant must be prejudiced. Movant alleged that during trial the State offered a plea deal which Movant's counsel failed to convey to him. Movant alleged he was prejudiced since he would have accepted the plea deal. The State now denies there was a deal offered. Failure of counsel to communicate a plea offer constitutes ineffective assistance. Movant's claim is not refuted by the transcript, since there's nothing in the transcript indicating a plea offer was not made. Movant is entitled to a hearing.

Owens v. U.S., 2007 WL 1083136 (1st Cir. 2007):
Holding: Habeas petitioner entitled to hearing on claim that trial counsel didn't inform him of his right to testify.

U.S. v. Cavitt, 2008 WL 4967066 (5th Cir. 2008):
Holding: Where movant alleged he would not have pleaded guilty if counsel had informed him of possibility of motion to suppress cocaine found in car, this was not refuted by the record and movant was entitled to evidentiary hearing.

U.S. v. Rojas, 2008 WL 819080 (8th Cir. 2008):
Holding: Defendant was entitled to evidentiary hearing on New Trial Motion claim that child sex victim had recanted testimony after trial.

U.S. v. McTiernan, 84 Crim. L. Rep. 166, 2008 WL 460387 (9th Cir. 10/21/08):
Holding: Where Defendant claimed his plea counsel failed to advise him on possibility of motion to suppress evidence, this allegation required an evidentiary hearing on motion to withdraw guilty plea.

Williams v. Ryan, 2010 WL 4188304 (9th Cir. 2010):
Holding: Petitioner was entitled to an evidentiary hearing on *Brady* claim that prosecution failed to disclose certain jailhouse letters that refuted Gov't's theory of guilt, and indicated that another person did the crime; the veracity of the witnesses who wrote the letters could not be adjudicated without a hearing.

Saunders v. Tennis, 2010 WL 2490748 (E.D. Pa. 2010):
Holding: Habeas petitioner was entitled to evidentiary hearing on his *Batson* claim where trial court had denied his *Batson* objection without requiring the prosecutor to offer any race-neutral reasons for his strikes.

Morgan v. State, 2008 WL 2678442 (Fla. 2008):
Holding: Counsel can be ineffective for advising Defendant to reject a favorable plea offer, and Defendant entitled to evidentiary hearing on this claim.

Com. v. King, 2010 WL 2652506 (Pa. 2010):
Holding: Where original PCR judge had scheduled a hearing, but then a second judge dismissed the case without a hearing, this was prohibited by the "coordinate jurisdiction rule" which prohibits one judge from overruling another judge.

Woodward v. State, 2008 WL 4566878 (Fla. Dist. Ct. App. 2008):
Holding: Where movant claimed counsel failed to present evidence that specific medication he was prescribed for heart condition interfered with his mental capacity during interrogation, movant was entitled to an evidentiary hearing on claim that counsel was ineffective in failing to present this as grounds for motion to suppress.

Garcia v. State, 2008 WL 4184645 (Tex. App. 2008):
Holding: To warrant evidentiary hearing on new trial motion for newly discovered evidence, Defendant need only show affidavits reflecting reasonable grounds for granting a new trial, and need not show the new evidence would probably bring about a different result in a new trial.

Experts

State ex rel. Pooker v. Kramer, No. SC87878 (Mo. banc 3/20/07):
Holding: Discovery request to defense doctor which requested "all" documents related to fees for the past 5 years and "all" communications between law firms and doctor for past 5 years was overly broad and intrusive, and trial court abused discretion in refusing to quash subpoena without considering less-intrusive alternatives.

State v. Kimes, No. 28138 (Mo. App., S.D. 8/15/07):
(1) Police officer's opinion testimony that Defendant was speeding 35 mph in a 20 mph zone is sufficient to convict of speeding; and (2) it was plain error to sentence Defendant to jail for speeding, since only a fine is authorized by Sections 304.140 and 560.016 for this offense.

Facts: Defendant was charged with the infraction of speeding, Section 304.130. The evidence at trial consisted of a police officer's opinion testimony that Defendant was driving about 35 mph in a 20 mph zone. There was no radar evidence. Defendant was convicted and given an SES of 10 days in jail.
Holding: (1) It is a matter of first impression in Missouri whether the uncorroborated testimony of police officer is sufficient substantial evidence to support a conviction where the variance between the estimated speed and speed limit is not slight. Here, there was a 75 percent variance between the officer's estimated speed and the speed limit. In cases with a smaller variance, the evidence has been found insufficient, because it is harder to estimate if a driver is speeding when the driver is going only a small amount over the speed limit. But because of this large variance, a reasonable fact-finder could conclude beyond a reasonable doubt that an experienced officer could determine that the driver was speeding. (2) The maximum sentence for the infraction of speeding is a $200 fine, Sections 304.140 and 560.016. It was plain error for the trial court to impose a 10-day jail sentence.

State v. Bybee, No. WD67154 (Mo. App., W.D. 3/25/08):
Trial court abused discretion in admitting accident reconstruction report which contained hearsay statements that Defendant was driver of car, where Defendant had denied driving car.
Facts: Police arrived at the scene of a one-car accident and found Defendant in the passenger's seat of the car, no one in the driver's seat, and three other teenagers, one of whom was dead. Defendant denied driving the car, and another teenager claimed not to know who was driving. Later, the other teen said Defendant was driving. Defendant was arrested and convicted of involuntary manslaughter. At trial, the trial court admitted a report by a police accident reconstruction expert, which report repeatedly said Defendant had been driving the car. Defendant objected to the report as hearsay.
Holding: Under Sec. 490.065.3, the facts on which the expert relies must be of a type reasonably relied upon by experts in the field in forming their opinions and must be otherwise reasonably reliable. It has been previously held that an accident reconstructionist should not be permitted to express an opinion based on hearsay statements of eyewitnesses, because such statements do not satisfy the reliability requirement. The reconstruction report's conclusion that Defendant was the driver was improper. Defendant denied he was the driver. Admitting the police reconstruction expert's opinion that Defendant was the driver improperly allowed the State to cloak this testimony with an undeserved authority that could unduly sway a jury.

U.S. v. Mejia, 84 Crim. L. Rep. 79, 2008 WL 4459289 (2d Cir. 10/6/08):
Holding: Law enforcement officer's alleged "expert testimony" about gang was not true expert testimony, and also violated confrontation rights because officer just repeated what suspects had said in interrogations.

U.S. v. Joseph, 83 Crim. L. Rep. 825 (2d Cir. 9/9/08):
Holding: (1) Jury instruction for enticement of minor on Internet that told jurors to convict if Defendant "made the possibility of sex with him more appealing" was erroneous because this is not a crime; (2) Defendant should be able to present expert

testimony about "role-playing" on Internet, where Defendant claimed his conversations with undercover officer were "role play."

U.S. v. Brownlee, 2006 WL 1984522 (3d Cir. 2006):
Holding: Expert testimony regarding the reliability and accuracy of eyewitness identification should be allowed because is helpful to trier of fact.

U.S. v. Gonzalez-Rodriguez, 87 Crim. L. Rep. 917 (5th Cir. 9/21/10):
Holding: DEA agent should not have been permitted to testify as to typical characteristics of drug couriers and then link those to Defendant.

U.S. v. Ibarra, 2007 WL 2056337 (5th Cir. 2007):
Holding: DEA agent should not have been permitted to testify that in his experience no drug trafficking organization would entrust a large shipment of cocaine to someone who did not know he was transporting cocaine.

Garner v. Mitchell, 2007 WL 2593514 (6th Cir. 2007):
Holding: Even though Defendant said he understood his *Miranda* rights, where a postconviction expert administered a Grisso test which showed Defendant did not understand his rights, Defendant's waiver was not knowing and intelligent.

U.S. v. Gladish, 83 Crim. L. Rep. 733 (7th Cir. 7/31/08):
Holding: (1) Even though Defendant exposed himself to alleged minor in internet chat and talked generally about traveling to set up a meeting for sex, evidence was insufficient to prove attempted enticement of a minor because there was no substantial step toward completion of the crime; Defendant's general remarks were "hot air"; and (2) trial court erred in barring defense psychologist from testifying in support of Defendant's "hot air" theory; while expert cannot testify Defendant did not intend to have sex with minor, expert could testify it was unlikely, given Defendant's psychological profile, that he would act on his intent.

U.S. v. Smith, 85 Crim. L. Rep. 574 (8th Cir. 7/28/09):
Holding: A pharmacist can testify as an expert to the standard of care a medical doctor must follow to write a prescription for a controlled substance.

U.S. v. Andrews, 2010 WL 1338138 (9th Cir. 2010):
Holding: Even though Defendant was convicted of assault, sentencing court should not have excluded at a restitution proceeding medical expert's testimony that Defendant's offense did not cause the victim's physical and mental condition.

U.S. v. Cohen, 82 Crim. L. Rep. 359 (9th Cir. 12/26/07):
Holding: Psychiatrist should have been allowed to testify that Defendant had narcissistic personality disorder that explained how he believed he did not have to pay taxes, to rebut the gov't's evidence of his intent to file false returns.

Cooper v. Brown, 2007 WL 4233685 (9th Cir. 2007):
Holding: EDTA (ethylene-diamine tetra-acedic acid) test regarding bloodstains has not gained general scientific acceptance to satisfy *Daubert*.

U.S. v. Nacchio, 2008 WL 697382 (10th Cir. 2008):
Holding: Federal rule requiring Defendant provide a written summary of expert's opinions does not require extensive discussion of expert's methodology.

Sanborn v. Parker, 2007 WL 495202 (W.D. Ky. 2/14/07):
Holding: State's mental health expert invaded attorney-client relationship where expert interviewed Defendant about his meeting with his attorney and the defense strategy.

U.S. v. Raymond, 2010 WL 1254664 (D. Me. 2010):
Holding: Gov't expert's testimony about behavior of child molesters in grooming children and about certain characteristics of victims was not reliable.

U.S. v. Willock, 2010 WL 1233992 (D. Md. 2010):
Holding: Where firearm/toolmark expert had relied on work by another expert to some extent, expert should be precluded from testifying how certain he was of his findings.

U.S. v. Monteiro, 2006 WL 27215 (D. Mass 2006):
Holding: Police officer's testimony that spent cartridge matched certain firearms was inadmissible because it did not comport with standards for documentation and peer review in the ballistics field.

U.S. v. Graves, 2006 WL 3734367 (E.D. Pa. 2006):
Holding: Defense can present expert on eyewitness identification to attack identification and photo array.

Valentine v. State, 86 Crim. L. Rep. 13 (Alaska 8/28/09):
Holding: Defendant was denied due process in DWI case when he was precluded from presenting "delayed absorption" evidence as exculpatory evidence; Defendant's defense was that the DWI test indicated a BAC higher than existed when he was actually driving.

Verdin v. Superior Court, 83 Crim. L. Rep. 386 (Cal. 6/2/08):
Holding: Even though Defendant was claiming insanity, State constitutional and reciprocal discovery provisions do not give State right to have their own expert conduct a pretrial psychological exam.

Norman v. State, 84 Crim. L. Rep. 683, 2009 WL 539909 (Del. 3/4/09):
Holding: Police officer cannot testify as to type of drug unless officer is qualified as an "expert witness."

Tolson v. State, 79 Crim. L. Rep. 297 (Del. 5/18/06):
Holding: Laser-based range finder cannot be used to measure distance between where Defendant sold drugs and a church without laser-based range finder results passing test for admissibility of scientific evidence.

Dunagan v. State, 83 Crim. L. Rep. 315 (Ga. 5/19/08):
Holding: Defendant-driver charged with reckless driving should have been able to present evidence that an intersection was inherently dangerous and of remedial measures taken by State to fix the intersection after the charged accident, because this was relevant to whether Defendant was criminally negligent in causing the accident.

State v. Assaye, 2009 WL 3112426 (Haw. 2009):
Holding: (1) Where Defendant was on trial for speeding, the speed reading given by a laser gun was inadmissible absent proof that the same laser gun was tested using the manufacturer's recommended procedures; and (2) Officer's testimony that he was qualified by "certification" training and experience to operate the laser gun was insufficient to establish his qualifications absent evidence that his training met the requirements of the gun's manufacturer.

People v. McKown, 82 Crim. L. Rep. 11 (Ill. 9/20/07):
Holding: The horizontal gaze nystagmus (HGN) test cannot be admitted without first passing the *Frye* test.

Jenkins v. Com., 87 Crim. L. Rep. 149 (Ky. 4/22/10):
Holding: Expert testimony regarding suggestive interviewing techniques in child sex cases is generally admissible.

Weaver v. Com., 2009 WL 4251653 (Ky. 2009):
Holding: Defendant should have been allowed to present expert testimony that he was intoxicated as defense to first-degree burglary.

Vires v. Com., 2008 WL 4692362 (Ky. 2008):
Holding: Where nurse testified that child failed to disclose sex abuse for years because of PTSD, this testimony was improper vouching for victim's credibility.

Ragland v. Commonwealth, 79 Crim. L. Rep. 121 (Ky. 3/23/06):
Holding: Comparative bullet lead analysis does not pass *Daubert* test.

State v. Blackwell, 85 Crim. L. Rep. 240 (Md. 5/14/09):
Holding: Officer's testimony about horizontal gaze nystagmus test must meet the requirements for expert testimony, and cannot be lay testimony.

Clemons v. State, 79 Crim. L. Rep. 121 (Md. 4/19/06):
Holding: Comparative bullet lead analysis is not generally accepted in scientific community under *Frye*.

Com. v. Mattei, 86 Crim. L. Rep. 529 (Mass. 2/1/10):
Holding: State DNA expert should not be allowed to testify that DNA found at scene does not exclude Defendant without also testifying to the statistical significance of this finding.

Fulgham v. State, 2010 WL 42412616 (Miss. 2010):
Holding: Court abused its discretion in capital penalty phase in excluding expert mitigation testimony of licensed social worker who had done social history of Defendant; she was the only witness who based her findings on interviews with multiple witnesses.

Grey v. State, 2008 WL 659714 (Nev. 2008):
Holding: Where Defendant was claiming involuntary intoxication, State was required to provide notice that it intended to call an expert witness in rebuttal to rebut Defendant's expert.

Abbott v. State, 79 Crim. L. Rep. 644 (Nev. 7/13/06):
Holding: (1) Defendant can obtain psychological exam of alleged child sex victim based on "compelling need" where there's a reasonable basis for believing the victim's mental or emotional state may have affected veracity; (2) Defendant may also introduce victim's prior false allegations.

State v. Marquez, 2009 WL 5100854 (N.M. 2009):
Holding: Where Officer testified that Defendant's performance on a field sobriety test correlated with a 90% probability of having a blood alcohol level above the legal limit, this was inadmissible absent qualification of the Officer as an expert and a sufficient scientific foundation.

State v. Reeds, 84 Crim. L. Rep. 526 (N.J. 1/22/09):
Holding: Where expert witness at drug trial testified Defendant constructively possessed drug found in car, this went to the ultimate issue in case and invaded province of jury.

State v. Connor, 82 Crim. L. Rep. 348 (N.H. 12/14/07):
Holding: Evidence of a fingerprint match must be supported by both the evidence technician who made the comparison, and the technician who performed the verification phase of ACE-V comparison, i.e., both persons must testify and one cannot testify to the other's findings because is hearsay.

State v. Downey, 84 Crim. L. Rep. 211 (N.M. 10/16/08):
Holding: Expert's opinion in DWI case about Defendant's BAC using "retrograde extrapolation" must be based on evidence actually presented in case.

People v. Abney, 2009 WL 3425059 (N.Y. 2009):
Holding: Exclusion of expert testimony on unreliability of eyewitness identification was error.

People v. LeGrand, 81 Crim. L. Rep. 32 (N.Y. 3/27/07):
Holding: Defendant should be permitted to present expert on lack of reliability of eyewitness identification, where eyewitness identification is main evidence against Defendant.

State v. Southard, 2009 WL 3127745 (Or. 2009):
Holding: The probative value of medical doctor's diagnosis that child had been sexually abused was outweighed by danger of unfair prejudice and was inadmissible, where there was no physical evidence child had been sexually abused.

State v. Jones, 85 Crim. L. Rep. 682 (S.C. 8/10/09):
Holding: "Barefoot insole impression" evidence which sought to establish a link between Defendant's foot and the insoles of frequently worn shoes is not sufficiently reliable to be admissible.

State v. White, 85 Crim. L. Rep. 220 (S.C. 4/27/09):
Holding: In order to admit testimony about a tracking dog, State must show that the dog handler is an expert; that the dog has been properly trained; that the dog has been shown to be reliable; that the dog was put on the suspect's trail within a reasonable time; and that the trail was not contaminated.

State v. Scott, 2009 WL 152740 (Tenn. 2009):
Holding: Where Defendant sought to show he did not have requisite intent for crime because he was sleepwalking, Defendant was entitled to present expert on sleepwalking, even though expert's opinion was based on self-reporting of Defendant, since many diagnoses are based on self-reporting.

State v. Copeland, 81 Crim. L. Rep. 297 (Tenn. 5/23/07):
Holding: Defendant should be allowed to present expert testimony on the lack of reliability of eyewitness identification.

State v. Clopten, 86 Crim. L. Rep. 375, 2009 WL 4877404 (Utah 12/18/09):
Holding: Expert testimony about unreliability of eyewitness identification is admissible because this is not within the common knowledge of lay persons.

State v. Rothlisberger, 79 Crim. L. Rep. 800 (Utah 9/8/06):
Holding: Where police officer testified that, in his experience as an officer, possession 32 grams of methamphetamine showed that it was possessed for distribution purposes and not for personal use, this was "expert" testimony which should not have been admitted without meeting the requirements for admission of expert testimony.

Lawrence v. Com., 2010 WL 653455 (Va. 2010):
Holding: Even though SVP law allows expert to state basis for his opinions, this does not authorize expert to give details of hearsay allegations of sexual misconduct.

Billips v. Commonwealth, 82 Crim. L. Rep. 188 (Va. 11/02/07):
Holding: Same standard governing admissibility of scientific evidence at trial also governs at sentencing hearings.

In re Loresch, 2010 WL 1078388 (Cal. App. 2010):
Holding: Gov. could not deny parole based on expert's stated hypothetical belief that if Defendant were to feel worthless in the future he could be violent.

People v. Dungo, 2009 WL 259629 (Cal. App. 2009):
Holding: Even though Pathologist called to testify about an autopsy conducted by Original Pathologist was himself an expert and formed his own opinions based on Original Pathologist's report, where Original Pathologist was not called by Prosecutor because he had "baggage" and had been forced to resign "under a cloud," Defendant's confrontation rights were violated because he was precluded from cross-examining Original Pathologist about these matters and his incompetence.

People v. Veren, 78 Crim. L. Rep. 321 (Colo. Ct. App. 12/01/05):
Holding: Police officer cannot testify about the significance of ingredients to make methamphetamine unless officer has been properly qualified as an expert. Officer – who was not qualified as an expert – should not have been permitted to testify that pseudoephedrine and other chemicals found in Defendant's vehicle are used to make methamphetamine.

State v. Cooke, 2007 WL 313327 (Del. Super. Ct. 2007):
Holding: Right against self-incrimination was violated where State handwriting expert dictated to Defendant what to write as an exemplar and the expert dictated in such a way to see if Defendant made the same spelling errors as the writing at the crime scene.

Bunche v. State, 2009 WL 383590 (Fla. Ct. App. 2009):
Holding: Where State presented a second fingerprint examiner to testify that he came to the same opinion as the first fingerprint examiner, this was improper bolstering.

Pickle v. State, 79 Crim. L. Rep. 646 (Ga. Ct. App. 7/14/06):
Holding: Defendant can introduce expert testimony to show she suffered from "battered person syndrome" and this caused her to lack the mental state for assault against her 9 year-old child, even though the child was not the aggressor in the assault and Defendant was not claiming self-defense.

State v. Estes, 2009 WL 4263561 (Idaho Ct. App. 2009):
Holding: Even though Officer testified he was certified as an expert to determine speeds, Officer's visual estimation of Defendant's speed, standing alone, was insufficient to convict of speeding.

State v. Shadden, 2009 WL 102960 (Kan. Ct. App. 2009):
Holding: Police officer should not have been allowed to testify that driver who failed a walk-and-turn sobriety test had a 68% likelihood of having a BAC of .10, because this improperly implied a level of scientific certainty to the field test.

Wilder v. State, 2010 WL 1077325 (Md. Ct. Spec. App. 2010):
Holding: Detective could not testify how cell phone records showed Defendant's location unless Detective was qualified as an expert witness in this field and State complied with discovery obligations for experts.

Brown v. State, 2008 WL 4427214 (Md. Ct. Spec. App. 2008):
Holding: Where the only evidence was bullets found at the scene, jury could not infer the bullets were fired from a handgun (which was prohibited) or rifle (which was not prohibited), when either weapon could have used such bullets.

State v. Lenin, 85 Crim. L. Rep. 97 (N.J. Sup. Ct. App. Div. 4/7/09):
Holding: Even though FBI analyst claimed to be expert in "behavioral assessment" regarding murder scene, analyst could not testify that murderer was motivated by anger due to number of wounds on body, because this testimony had not been shown to be scientifically reliable and was subject-matter that would already be familiar to laypersons.

State v. Miraballes, 2007 WL 1201592 (N.J. Super. Ct. 2007):
Holding: Even though prosecutor asked expert witness a question that was posed as a hypothetical, the question was improper where it was obvious that the question referred to the Defendant and asked the expert to comment on the credibility of the State's case.

State v. Burr, 2007 WL 1319433 (N.J. Super. Ct. 2007):
Holding: Even though expert would not testify that Defendant's Asperger's Disorder negated his mental state for sexual abuse, the expert's testimony was admissible to explain why Defendant would put children on his lap to negate the inference that Defendant did so for sexual gratification.

People v. Florestal, 2008 WL 2498101 (N.Y. App. Div. 2008):
Holding: Where statute required a showing of "depraved indifference," this was a mental state to be evaluated by Defendant's conduct, and not an objective standard; therefore, Defendant could present psychological testimony showing lack of mental state for crime.

People v. Banks, 2007 WL 1989843 (N.Y. County Ct. 2007):
Holding: Defense may present expert testimony that "weapons focus" made eyewitness identification unreliable.

People v. Kogut, 2005 WL 2402689 (N.Y. Sup. 2005): An expert social psychologist can testify about research showing psychological aspects of confessions, effect on voluntariness, and issue of false confessions.

State v. Grizovic, 2008 WL 2550750 (Ohio Ct. App. 2008):
Holding: Trooper cannot testify to statistical probability that a Defendant would have tested over the legal limit for DWI, based on results on field sobriety tests.

Coble v. State, 2010 WL 3984713 (Tex. Crim. App. 2010):
Holding: Psychiatrist's testimony that Defendant would be dangerous in future was not reliable where expert could not site a book or article that discussed factors he was relying on, was unaware of any scientific studies about accuracy of long-term predictions about future dangerousness, or of any error rates in such predictions.

State v. Denton, 85 Crim. L. Rep. 358 (Wis. Ct. App. 5/13/09):
Holding: Where police officer did not personally witness events depicted in a computer animation and was not an expert on computer animation, the computer animation was not admissible through the officer.

Extradition

Sacirbey v. Guccione, 2009 WL 4640628 (2d Cir. 2009):
Holding: Where Serbian court had been ousted of jurisdiction over a U.S. citizen's alleged crimes, this did not satisfy the requirements of producing a valid arrest warrant to extradite citizen to Serbia.

Factual Basis

Winfrey v. State, No. SC88825 (Mo. banc 1/15/08):
Even though Defendant engaged in fraudulent scheme to exchange casino chips for more than their value, this was not a violation of a prohibited act on a gambling boat, Sec. 313.380.4(9), because the money was not taken "in or from gambling games."
Facts: Defendant conspired with a casino cashier to exchange casino chips for more money than they were worth. Defendant pleaded guilty to attempt to commit a prohibited act on a gambling boat, Sec. 313.380.4(9). Subsequently, he filed a 24.035 motion claiming no factual basis for the plea.
Holding: Sec. 313.280.4(9) makes it a Class D felony to take money "in or from the gambling games" with an intent to defraud. Although Defendant engaged in a fraud, he did not take money "in or from" the actual gambling games. Hence, the plea court should not have accepted his plea to a crime he did not commit.

State ex rel. Verweire v. Moore, No. SC87445 (Mo. banc 12/19/06):
(1) Habeas corpus may be used to assert "actual innocence" claim following a guilty plea where there was no factual basis; (2) Petitioner was "actually innocent" of first degree assault, Section 565.050, because his briefly pointing a gun at victim and threatening him was not a substantial step toward causing serious bodily injury.
Facts: Petitioner was confronted by a guy at an arcade, and Petitioner pulled out a gun and said he would "blow [guy's] head off," but then Petitioner retreated. Petitioner pled

guilty to first degree assault, Section 565.050. There was no direct appeal or 24.035 case. Petitioner filed a habeas in circuit court and the Missouri Court of Appeals, and the Court of Appeals issued an opinion denying the writ. *Verweire v. Moore*, 168 S.W.3d 518 (Mo. App., S.D. 2005). Petitioner then filed a new habeas at the Supreme Court, raising the same issue.

Holding: Habeas relief is available, even after a guilty plea, where a petitioner can show that a manifest injustice has resulted probably resulted in the conviction of one who is actually innocent. The precise issue is whether Petitioner's conduct was a substantial step toward first-degree assault. A person commits first degree assault if he "attempts to cause serious bodily injury to another person." The evidence was insufficient to show this. Petitioner did not pull the trigger, and soon retreated from the altercation. He merely threatened harm. There was no showing of a conscious object to carry out the threat. Thus, Petitioner is actually innocent of first degree assault, and his plea was not knowing and voluntary. Conviction vacated, but case remanded to await proceedings regarding lesser included offenses.

Brand v. State, No. ED93504 (Mo. App. E.D. 6/15/10):

Even though Movant pleaded guilty to living within 1000 feet of a day-care, where his underlying sex conviction occurred in 1999 and the 1000-foot law was not enacted until 2004, Movant's conviction is vacated since application of the 2004 law to him would be retrospective.

Facts: Movant pleaded guilty to a sex offense in 1999. In 2004, Sec. 566.147 was enacted, which prohibits sex offenders from living within 1000 feet of a day-care. In 2007, Movant was charged with living within 1000 feet of a day-care and pleaded guilty. He later filed a 24.035 action.

Holding: *F.R. v. St. Charles County Sheriff's Dept.,* 301 S.W.3d 56 (Mo. banc 2010) held that Sec. 566.147 could not be applied to persons whose sex offenses occurred before the effective date of the statute in 2004 because that would violate the prohibition against retrospective laws. If this is the case, Movant's conviction must be vacated. State, however, claims that Movant's conviction may also be based on a post-2004 sex conviction. Court of Appeals remands to determine if that is the case.

Nelson v. State, No. ED88797 (Mo. App., E.D. 2/26/08):

Even though Defendant never had a driver's license, he could be convicted of driving while revoked, Sec. 302.321.1, because his driving "privilege" had been canceled.

Facts: Although Defendant had never actually had a driver's license, he had had DWI convictions and two 10-year denial of licenses. He then was arrested again for driving. Defendant pleaded guilty to driving while revoked. He then filed a 24.035 motion claiming there was no factual basis since he had never actually had a driver's license to revoke.

Holding: Sec. 302.321.1 provides that a person commits driving while revoked if he operates a motor vehicle "when his license or driving privilege has been canceled, suspended or revoked." "Privilege" can refer to the actual award of a privilege to drive, but also can refer to the potential unvested privilege to seek licensure. Defendant's "privilege" had been canceled, suspended or revoked, even though he never had a license. Thus, there was a factual basis for his plea. This was an issue of first impression.

Elverum v. State, No. ED88496 (Mo. App., E.D. 9/18/07):
(1) Even though Movant absconded from probation, court exercises its discretion not to apply "escape rule" due to the "central issues" of this case; (2) plea court failed to ensure Movant understood the range of punishment by failing to advise him of maximum penalty and that his sentences could run consecutively; (3) Movant cannot raise a factual basis or sufficiency of information claim in Rule 24.035 appeal where those claims were not included in the Amended 24.035 Motion, but Movant could bring those via writ of habeas corpus; and (4) group guilty pleas with multiple defendants pleading guilty at once make confusing records and should be discontinued.
Facts: Movant pleaded guilty to four counts of first degree property damage, Section 569.100, and was placed on probation. After he absconded from probation, probation was later revoked and he was sentenced to four consecutive terms of four years, for 16 years. Also, on appeal, he claimed for the first time that he could not be charged or convicted of Class D felonies because the statute requires damage of more than $750 for a Class D felony, but Movant was only charged and the factual basis showed that the damage only "exceeded $500."
Holding: Rule 24.02(b) requires the court to inform defendants of the maximum possible penalty. Here, the court told Movant before his plea that "the range was up to four years" but never told him whether the range was four years on each count, or four years total. Even though the State had recommended 10 years, this does not show that Movant knew he could receive up to 16 years. His attorney's statement at sentencing that Movant could receive 16 years does not cure the error either, because this took place at sentencing, two month after Movant pleaded guilty. Movant cannot raise for the first time on appeal claims that he could not be convicted for the Class D felony because the evidence did not show damage above $750. These claims were not included in the Amended 24.035 Motion. The claim about the information should have been raised on direct appeal; the factual basis claim in the 24.035 motion. However, Movant can raise these in a writ of habeas corpus.

Schafer v. State, No. WD68721 (Mo. App., W.D. 5/6/08):
Even though Movant pleaded guilty to forgery, where he alleged that his guilty plea was involuntary because his counsel was ineffective in failing to seek funding to obtain a handwriting analysis to show that Movant had not committed the offense, this stated a viable claim for relief and an evidentiary hearing should have been granted.
Facts: Movant pleaded guilty to forgery, Sec. 570.090. At the plea, the State said its evidence would show that victim's house was burglarized, checks were taken, and then eight days later, Movant passed one of victim's checks at a store. Movant filed a 24.035 motion, claiming his private counsel had failed to seek funding under *Ake v. Oklahoma*, 470 U.S. 68 (1985) to obtain a handwriting analysis, which would have shown that Movant did not write the check. The motion court denied the claim without a hearing, finding that the record refuted Movant's claim that his plea was coerced.
Holding: A guilty plea renders a claim of ineffective assistance of counsel irrelevant except to the extent that it affects the voluntariness and understanding of the plea. The allegation that Movant was coerced into pleading guilty is not waived because he entered a guilty plea. Guilty pleas can be rendered involuntary by counsel's failure to prepare.

Here, Movant has alleged that his counsel failed to investigate a handwriting expert due to lack of funds; that his counsel failed to seek funding under *Ake*; that an expert would have found that Movant did not write the check; and that Movant would not have pleaded guilty and would have insisted on proceeding to trial, but for counsel's inaction. This states a valid claim for relief. Furthermore, this is not refuted by Movant's guilty plea, because the factual basis for the plea is questionable, in that the State had to show that Movant was aware the checks were forged when he attempted to cash them, but the State's stated evidence only questionably shows this. Movant did not admit knowing this as part of his plea, but merely agreed with the State's statement of the evidence. Case remanded for evidentiary hearing.

Calvin v. State, No. WD65265 (Mo. App., W.D. 8/1/06):
(1) In criminal non-support case, plea counsel was ineffective in failing to investigate Defendant/Movant's financial circumstances to determine if there was "good cause" for Defendant's failure to pay, but Defendant was not prejudiced because he cannot show he would not have pleaded guilty since his plea was based on a threat by the prosecutor to revoke probation in another case if Defendant did not plead; (2) there was an insufficient factual basis to support Defendant's guilty plea to criminal non-support because plea record did not demonstrate that Defendant was without good cause in failing to pay.
Facts: Defendant/Movant was charged with criminal non-support, Section 568.040, for knowingly failing to pay child support without good cause for periods in 1997 and 1998. At the time of this new charge, Defendant was on probation for a criminal non-support conviction in 1996. For some of the periods in 1997 and 1998 for which Defendant was charged, he was in Department of Corrections' treatment programs or was incarcerated in another county's jail. The State threatened to revoke Defendant's probation if he did not plead guilty to the new charge. Defendant pleaded guilty. Defendant later filed a 24.035 motion claiming (1) that counsel was ineffective in failing to investigate and advise Defendant that he had a defense to the charges because he had "good cause" for failure to pay; and (2) that there was an insufficient factual basis for the plea.
Holding: A legal obligation to provide child support is not excused by changes in financial condition resulting from incarceration. However, despite that Defendant's voluntary behavior may cause incarceration, the court must still consider if the parent has present inability to pay the obligation. If financial impact of incarceration cannot be a factor to consider as part of a good cause defense, then a criminal non-support defendant could be charged with criminal non-support while already in prison for non-support and could then be subjected to more imprisonment, which could potentially go on for as long as the child support obligation existed, and parent would never be allowed to get a job and meet his obligation. Courts must distinguish those parents who are making an effort to pay their child support obligations, from those who would rather go to prison than pay them. Defendant was indigent during the periods in 1997 and 1998 when he was charged for failure to pay. He was often incarcerated in treatment programs or jail during those times, and when he was not in those programs, he made only $7.00 an hour; he had a lifelong problem with alcohol and drugs. Under these circumstances, Defendant's ability to pay child support during 1997 and 1998 was seriously in question, and should have been investigated by a reasonably competent attorney before a plea because Defendant had a viable good cause defense. Defendant's plea was not voluntary since he was not

advised that he had a viable good cause defense. However, to set aside the plea on grounds of ineffective counsel, Defendant must also show that but for counsel's ineffectiveness, he would not have pleaded guilty and would have demanded a trial. Here, Defendant cannot show this because he pleaded guilty because the State threatened to revoke his 1996 probation if he did not plead guilty. Defendant has not raised a claim as to whether the threat to revoke probation was based on the new charges in 1997 and 1998 for which Defendant had a good cause defense; if so, "our analysis of prejudice would be different." This is point is denied. However, Defendant's plea is nevertheless vacated because there was an insufficient factual basis for the plea. At the plea, Defendant said he was not paying his child support in 1997 and 1998 because he had "setbacks" and "was trying to do the best I could." An element of criminal non-support is that the parent is without good cause in failing to provide support. There is nothing in the plea transcript to show Defendant was without good cause in failing to pay. There is no evidence that counsel or anyone else advised Defendant that if he was unable to pay for "good cause," i.e., because he was incarcerated, he could not be held criminally liable. In light of Defendant's responses at the plea, the plea court was obligated before accepting the plea to explore further if Defendant had the ability to provide child support or purposely maintained his inability to provide it. Plea vacated.

Fainter v. State, 174 S.W.3d 718 (Mo. App., W.D. 2005):
A riding lawn mower is not a "motor vehicle" under Section 570.030.3(3)(a) to make stealing it a Class C felony.
Facts: Movant pleaded guilty to the Class C felony of stealing a riding lawn mower. He then filed a Rule 24.035 motion claiming there was no factual basis for the plea since a riding lawn mower is not a "motor vehicle" under Section 570.030.3(3)(a).
Holding: 570.030.3(3)(a) makes stealing a Class C felony if the property consists of a "motor vehicle." From a definitional point of view, a "motor vehicle" has as its primary function to transport persons and things. A lawn mower has as its primary function to cut grass. The rule of lenity mandates that ambiguity in a criminal statute be construed in favor of a defendant. Therefore, the term "motor vehicle" does not include a riding lawn mower.

U.S. v. Garcia, 86 Crim. L. Rep. 336 (2d Cir. 12/1/09):
Holding: Even though Defendant admitted in guilty plea that he knew that crime proceeds he was transporting were not going to be declared as income by their recipients, this was not enough to sustain conviction for conspiring to engage in concealment money laundering.

U.S. v. Trejo, 2010 WL 2560430 (5th Cir. 2010):
Holding: Factual basis for plea to conspiracy to commit "promotion" money laundering was insufficient to show "specific intent to promote" the underlying drug activity as required under the statute.

People v. Zabele, 2008 WL 2608113 (N.Y. App. Div. 2008):
Holding: Even though Defendant pleaded guilty to methamphetamine charge, plea vacated because Defendant said meth belonged to other people, and he denied knowing of its presence.

Findings of Fact, Conclusions of Law (Rules 24.035 and 29.15)

Belcher v. State, No. SC89589 (Mo. banc 12/22/09):
(1) Motion court was required to enter sufficient Findings under DNA statute to allow meaningful appellate review; and (2) Even though Movant did not verify his DNA petition, this could be corrected under Rules 67.01, 67.03 or 67.06.
Facts: Movant filed an unverified pro se petition for DNA testing under Sec. 547.035. The motion court dismissed the case by holding that the files "conclusively show Movant is not entitled to relief."
Holding: (1) Sec. 547.035.8 requires the motion court to issue Findings of Fact and Conclusions of Law sufficient to allow meaningful appellate review. The Findings here are not sufficient, so remand is required. (2) Movant's motion was not verified. However, this does not result in barring Movant's claims. Unlike Rules 24.035 and 29.15 with their time limitations, the DNA statute has no time limitations and contemplates that later motions will be permitted as DNA technology advances. Sec. 547.035.2(3)(a). Thus, if on remand the petition is dismissed for lack of verification, a corrected or amended petition may be filed under Rules 67.01, 67.03 or 67.06.

Dickerson v. State, No. SC89142 (Mo. banc 10/28/08):
(1) Even though the trial record did not show that Movant was shackled at trial, Movant was entitled to hearing on claim he was shackled since the silence in the record did not rebut Movant's claim; and (2) where motion court failed to issue Findings on all claims, case is remanded for Findings on omitted claims under 29.15(j).
Facts: Before trial, defense counsel filed a motion to prohibit shackling of Defendant-Movant at trial. However, the motion was never ruled on, and the trial transcript is silent as to whether Defendant-Movant was shackled. Movant claimed in a 29.15 motion that he had been shackled and counsel was ineffective for failing to object. The motion court denied a hearing, finding this was refuted by the record.
Holding: It is true the trial record contains no reference to use of shackles. For the record to "refute" Movant's claim, however, the record had to "rebut" the claim or "prove the claim to be false." The silence on shackling does not prove Movant was not shackled. The motion court also found that Movant did not plead that he told his counsel he was shackled. However, Movant does state that counsel's performance fell below the conduct of a reasonably competent attorney. Important here is that counsel filed a motion to prohibit shackling, but there is nothing showing the court ever ruled on it. Movant is entitled to a hearing on his claim.

Muhammad v. State, No. ED93882 (Mo. App. E.D. 9/21/10):
Holding: Where motion court failed to issue findings on one of Movant's claims in his amended motion, case must be remanded for findings because Rule 24.035(j) requires findings to be issued whether or not a hearing is held.

Howard v. State, No. ED93170 (Mo. App. E.D. 1/26/10):
Holding: Even though counsel filed a Statement in Lieu of Amended Motion, the motion court was required under Rule 29.15(j) to enter Findings on the pro se motion sufficient to allow meaningful appellate review.

Melton v. State, No. ED90289 (Mo. App., E.D. 8/26/08):
Evidentiary hearing was not required on Movant's double jeopardy claim, but motion court was required to issue Findings on the claim to allow meaningful appellate review.
Facts: Movant pleaded guilty to two drug counts for drugs possessed at the same time. He filed a Rule 24.035 motion claiming conviction on both counts constituted double jeopardy. He waived a hearing on the claim. The motion court denied the claim without Findings.
Holding: A double jeopardy claim can be considered in a 24.035 proceeding because it goes to the power of the State to charge Movant. Movant correctly withdrew his request for a hearing, because all a motion court can consider in deciding a double jeopardy claim is the State's information and the transcript of the guilty plea. The motion court's failure to issue Findings on the claim, however, was error under 24.035(j) because it does not allow for meaningful appellate review.

Griffith v. State, No. ED88930 (Mo. App., E.D. 9/25/07):
Holding: Where motion court failed to enter findings on an important issue in the 29.15 case, case is remanded for entry of findings, since these are required.

Grass v. State, No. ED87708 (Mo. App., E.D. 2/27/07):
Holding: Where additional Findings by trial court were necessary, but trial judge who heard the evidence had died during the appeal, the case could not be remanded for additional Findings, and a new trial had to be granted.

Mitchell v. State, No. ED86401 (Mo. App., E.D. 5/23/06):
Where motion court denied Rule 24.035 motion without issuing Findings, case remanded for entry of Findings to allow meaningful appellate review.
Facts: Movant filed timely Rule 24.035 motion. Motion court denied motion by entering order that said merely "State's request for dismissal of Movant's claim … is hereby granted."
Holding: Motion court is required to issue Findings of Fact and Conclusions of Law on all issues presented in the Rule 24.035 motion, whether or not an evidentiary hearing is held. The Findings must be specific enough to allow for meaningful appellate review. Case remanded for motion court to enter specific Findings.

Merrick v. State, No. SD30343 (Mo. App. S.D. 11/4/10):
Holding: Where motion court simply repeated Movant's claims and then wrote they were "without merit," such Findings were insufficient to allow meaningful appellate review; reversed and remanded to enter sufficient Findings under 29.15(j).

Bott v. State, No. SD29918 (Mo. App. S.D. 3/31/10):
Holding: (1) Motion court erred in dismissing Movant's Rule 24.035 motion on grounds that Movant had been released from DOC custody because 24.035 does not require that movants still be incarcerated at the time the motion court decides their case; (2) motion court was required to enter sufficient Findings to allow for meaningful appellate review.

Rebstock v. State, No. SD29856 (Mo. App. S.D. 2/26/10):
Holding: Where motion court failed to enter Findings on Movant's amended motion claim that trial court failed to advise Movant of correct range of punishment, the Findings were insufficient to allow meaningful appellate review; motion court was required to enter specific Findings under 24.035(j).

Burgdorf v. State, No. SD29777 (Mo. App. S.D. 11/30/09):
Holding: Even though Movant's counsel filed a statement in lieu of amended motion, motion court was still required by Rule 24.035(j) and (h) to enter Findings of Fact and Conclusions of Law on pro se claims, so as to allow meaningful appellate review. Summary denial of postconviction relief reversed, and remanded for Findings.

Robertson v. State, No. SD29166 (Mo. App. S.D. 7/8/09):
Holding: Where motion court disposed of Rule 24.035 case by docket entry, this was error because Rule 24.035(j) requires court to enter Findings sufficient to permit meaningful appellate review.

Stark v. State, No. SD29178 (Mo. App. S.D. 2/27/09):
Holding: Under Rule 24.035(j), motion court is required to issue Findings of Fact and Conclusions of Law on claims to permit meaningful appellate review.

Weekley v. State, No. 28743 (Mo. App., S.D. 9/22/08):
Holding: Where motion court only issued a docket entry denying Rule 29.15 relief, remand was required for entry of Findings of Fact and Conclusions of Law as required by 29.15(j) to allow for meaningful appellate review.

Editor's Note by Greg Mermelstein: There were two interesting footnotes. Note 4 states that counsel attached the movant's pro se motion to the amended motion. "This method does not address, however ... a potential conflict between the requirement of Rules 24.035(e) and 29.15(e) that require [PCR] counsel to present all of a client's pro se claims ... and the requirement that a member of the bar only present claims that are" not frivolous under Rule 4-3.1. Note 5 states that a different judge than the one who conducted the PCR hearing entered the order denying relief. While not deciding the matter, Southern District states that the "preferred practice" would be to have the same judge who conducted the hearing enter the Findings.

Johnson v. State, No. 27601 (Mo. App., S.D. 12/29/06):
(1) Where Movant filed a second pro se motion prior to the time for filing an Amended Motion, and counsel filed a statement in lieu of Amended, both the first and second pro se motions were effective to raise claims; (2) motion court erred in failing to enter Findings on claims in second pro se motion.
Facts: Movant filed a pro se motion. Counsel was appointed and granted time to file an Amended. Movant filed a second pro se motion listing claims he said he wanted in an Amended. Counsel then filed a statement in lieu of Amended Motion which stood on both pro se motions. Motion court issued Findings only on the claims in the first pro se motion.
Holding: Movant's second pro se motion was timely filed before the due date for an Amended. Given that counsel then filed a statement in lieu which said counsel was standing on both pro se motions, motion court erred in not issuing Findings on both pro se motions.

Bullock v. State, No. 27491 (Mo. App., S.D. 12/20/06):
Holding: Where motion court failed to enter specific Findings on whether counsel was ineffective in failing to seek mental exam and in failing to assert defense of entrapment, case is remanded for specific Findings on these issues, because Court of Appeals cannot engage in appellate review without specific Findings from motion court.

Watts v. State, No. 27605 (Mo. App., S.D. 11/28/06):
Case remanded for specific Findings, or an evidentiary hearing, on issue of whether guilty plea counsel affirmatively misled Movant into believing that "85% rule" would not apply to him.
Facts: Movant's Rule 24.035 motion alleged that he was affirmatively misled by his guilty plea counsel regarding application of the "85% rule" to him. Plea counsel informed Movant of a plea offer for first-degree robbery for 15 years subject to the "85% rule." Movant rejected that offer. A week later, plea counsel re-approached Movant and told him of the 15 year offer, but without mentioning the "85% rule." Movant pled guilty. When he learned he was subject to the "85% rule," he filed a Rule 24.035 motion to vacate his plea. The motion court denied an evidentiary hearing, holding that the "85% rule" was a "collateral consequence" of the plea.
Holding: While there is no relief available on a claim that counsel failed to advise as to collateral consequences of pleading guilty, a claim that plea counsel misadvised Movant regarding particular consequences upon which Movant relied in pleading guilty may constitute ineffective assistance of counsel. Mistaken beliefs about sentencing affect a Movant's ability to knowingly enter a guilty plea if the mistake is reasonable and based on positive representations upon which he is entitled to rely. The motion court erroneously focused on the narrow inquiry of "collateral consequences" without considering the full context in which counsel's misrepresentations occurred. The motion court made no Findings about the context of counsel's advice. Without specific Findings on this issue, the Court of Appeals cannot engage in meaningful appellate review. Case is remanded for specific Findings on the precise claim made by Movant, and if necessary, an evidentiary hearing.

Copeland v. State, No. 26908 (Mo. App., S.D. 4/28/06):
Case remanded due to insufficient Findings of Fact and Conclusions of Law to allow meaningful appellate review.
Facts: Motion court entered Findings holding that trial counsel's failure to introduce deposition "may have" allowed jury to conclude Movant was not guilty. State appealed.
Holding: Motion court's Findings do not allow meaningful appellate review because motion court did not apply *Strickland* standard, which required motion court to enter Findings on whether it would have been reasonable trial strategy not to introduce the deposition, and if not, whether there is a reasonable probability the result of trial would have been different. "May have" is not correct standard.

Schaal v. State, 179 S.W.3d 907 (Mo. App., S.D. 2005):
Motion court's Findings which merely referenced Movant's Amended 29.15 Motion and said "this court finds [the claims] meritorious" were insufficient for meaningful appellate review.
Facts: Motion court entered Findings which referenced the Amended 29.15 Motion and attached pro se motion and granted relief on grounds that the claims were "meritorious." State appealed.
Holding: The motion court is required to issue Findings on all issues to allow for meaningful appellate review. Meaningful appellate review is premised upon specific Findings to respond to Movant's claims. Remanded for entry of specific Findings.

Hollingshead v. State, No. WD71775 (Mo. App. W.D. 11/23/10):
Holding: Where motion court summarily denied Rule 24.035 claims without specific Findings, this was error since 24.035(j) requires sufficient Findings for meaningful appellate review. Footnote 3, however, states: "The dissenting opinion makes a persuasive argument concerning the application of Rule 78.07(c) to foreclose [Movant's] claim of error. The State did not argue that [Movant] failed to preserve his current claim by failing to file a Rule 78.07(c) motion. … [W]e believe the applicability of Rule 78.07(c) in postconviction proceedings is better resolved in a case in which the issue has been the subject of a full adversarial presentation."
Dissenting Opinion: The issue is not preserved for appeal because Movant failed to file a motion under Rule 78.07(c). 78.07(c) provides that in all cases, allegations of error relating to the form or language of the judgment, "including the failure to make statutorily required findings," must be brought to the motion court's attention in a motion to amend judgment in order to be preserved for appeal. This alleviates unnecessary appeals, reversals and remands. Findings are required under 547.360.10 and 24.035(j) and 29.15(j). 78.07(c) promotes the purpose of the postconviction rules by allowing an opportunity to expeditiously correct a judgment. Where a Movant fails to file a 78.07(c) motion, an appeal claiming the motion court failed to enter proper findings should be dismissed.

Bode v. State, No. WD70311 (Mo. App. W.D. 4/27/10):
Holding: Even though it is "unlikely" that the motion court would have granted relief, where (1) the motion court failed to issue Findings on one of Movant's pro se 29.15 claims which had been incorporated into his amended motion, and (2) Movant questioned

trial counsel at the evidentiary hearing about this claim, then the motion court was required to issue Finding on the claim to permit meaningful appellate review. Remanded for Findings on the claim.

Taylor v. State, No. WD68964 (Mo. App., W.D. 10/28/08):
Holding: Where 29.15 court entered Findings which merely found that counsel was "not ineffective" and contained no factual findings, the Findings were conclusory and not specific enough to allow meaningful appellate review under 29.15(j).

Grimes v. State, No. WD67870 (Mo. App., W.D. 1/29/08):
Even if claims are refuted by the record, trial court is required to issue Findings of Fact and Conclusions of Law under Rule 24.035(j), and cannot just summarily deny the claims.
Facts: 24.035 Movant filed an amended motion, after which the motion court summarily denied the claims without issuing Findings.
Holding: 24.035(j) requires a court to issue Findings of Fact and Conclusions of Law sufficient to allow meaningful appellate review. While the State claims Movant's claims are refuted by the record, this is not one of the recognized reasons for not issuing Findings.

Ivory v. State, No. WD65867 (Mo. App., W.D. 1/16/07):
Case remanded for entry of specific findings where court failed to enter findings to allow meaningful appellate review on claim that State promised to recommend 10 years in prison and breached that promise at plea.
Facts: Prosecutor agreed to recommend 10 years in prison without probation in exchange for a plea. Hoping to receive probation, Defendant/Movant rejected that offer. The State and defense then agreed that Movant would plead "open" but the State would still recommend 10 years without probation. Defendant pleaded guilty and the State said it would be recommending 10 years without probation. After a PSI was completed, however, the State said it was now "leaving it up" to the judge to decide sentence. The plea court sentenced Movant to 15 years. Movant filed a 24.035 motion alleging the State breached its promise to recommend 10 years and instead made no recommendation at sentencing, thus rendering the plea involuntary since Movant had relied on the State's promise. The motion court denied relief. The findings stated that "Initially the State indicated it would be recommending a 10 year sentence and be opposed to probation," and that "there was no plea bargain."
Holding: The findings are insufficient to allow meaningful appellate review. The court found that "initially" the State and Movant had agreed to a plea bargain, but the court did not address what happened after Movant rejected the initial offer. None of the findings specifically find whether the State had promised to recommend 10 years and breached that promise. While the court correctly found that there was no formal plea bargain, the court made no conclusion on Movant's claim that even though it was an open plea, the State promised to recommend 10 years and breached that promise by making no recommendation.

U.S. v. Oquendo-Rivera, 86 Crim. L. Rep. 298, 586 F.3d 63 (1st Cir. 11/5/09):
Holding: Even though trial judge chose to believe police officer's testimony instead of Defendant's testimony, it violated due process for judge to do this where officer's testimony contradicted other testimony and physical evidence. "Because the district judge chose to believe one and not the other of two witnesses before him, it might seem that choice of whom to credit resolves the matter. But the credibility of a story depends not only on the seeming sincerity of the witnesses and their demeanor in the courtroom but also on more objective criteria: for example, consistency (both internal to the testimony and with the physical evidence), probability, access of the witness to information, his bias or interest, and corroboration or unexplained contradiction of his testimony by undisputed testimony or empirical evidence."

Ling v. State, 88 Crim. L. Rep. 318 (Ga. 11/22/10):
Holding: Where Defendant raises a post-trial constitutional claim that she did not understand English well enough to stand trial without an interpreter, the court must explain on the record its ruling denying the motion where it finds that Defendant understood English.

Guilty Plea

Roberts v. State, No. SC89245 (Mo. banc 2/10/09):
Where Movant pleaded that State changed its plea offer to Movant during a group guilty plea, this pleaded facts not refuted by the record entitling Movant to an evidentiary hearing.
Facts: Movant pleaded guilty in a "group" guilty plea with other defendants. Later, Movant filed a 24.035 motion claiming the State changed the plea offer from what his attorney had told him. The attorney had said the State would not oppose drug treatment, but the State said the agreement was that it would not oppose it "if it was recommended" by probation authorities. The motion court found the claim refuted by the record because Movant indicated at the group guilty plea that he understood the plea and had no questions.
Holding: The group guilty plea increased the opportunity of mistakes and confusion. In the context of a group plea, minor alterations in a plea agreement might be missed or misunderstood by defendants. Movant had little room to assert any confusion because this was a group plea. Although group pleas are not automatically invalid, they are not preferred procedure and should be used sparingly. The record does not conclusively refute Movant's claim. Evidentiary hearing granted.

Chaney v. State, No. ED93798 (Mo. App. E.D. 11/2/10):
Where (1) plea court had already accepted Movant's guilty pleas and sentenced him before court and prosecutor brought up idea that Movant was waiving his postconviction rights as part of the plea, and (2) defense counsel said he had not advised Movant about this, the alleged waiver was invalid because it came after the pleas were entered and was without counsel.

Facts: Movant pleaded guilty to various offenses. After the court accepted the plea and sentenced Movant, the State listed several other offenses it said it was agreeing not to file, and said that Movnant was agreeing that if Movant filed a postconviction motion, then the State would file those charges. Defense counsel said he had not discussed this with Movant and it would be a conflict of interest for him to advise Movant on this matter. The court told defense counsel to discuss it with Movant but not advise him. The proceedings went off the record. Counsel said he advised Movant not to waive his rights, but Movant said he was pleading anyway without advice of counsel. Movant later filed a 24.035 motion, and the State moved to dismiss it on grounds that Movant waived his postconviction rights.
Holding: It bears emphasizing that the purported waiver, which the State claims was part of the plea agreement, did not occur until after the court had accepted Movant's pleas and sentenced him. Thus, it is clear that the waiver of postconviction rights was not part of the plea agreement. A defendant can waive his postconviction rights only if the record clearly demonstrates he was properly informed of his rights, and the waiver was made knowingly, voluntarily and intelligently. Implicit in this is that a waiver can only be valid if defendant is represented by counsel and fully informed of his rights. Here, Movant did not have the benefit of counsel when he purportedly waived his rights. Thus, his waiver was not knowing, voluntary or intelligent. Motion to dismiss denied.

Johnson v. State, No. ED93541 (Mo. App. E.D. 8/24/10):
Where the plea court told Movant he would receive credit for time spent on bond "by agreement of the State and defendant," but the DOC would not allow Movant to have such credit, Movant was denied effective assistance of counsel and his pleas were involuntary and unknowing because he pleaded guilty under the mistaken belief he would receive credit for time spent on bond.
Facts: Movant pleaded guilty to various offenses pursuant to a plea bargain. During sentencing, the court told Movant he would be granted credit for time spent on bond "by agreement of the State and defendant." The written plea agreement, however, contained no mention of any credit for time spent on bond. After Movant was delivered to the DOC, he learned that DOC could not grant this credit. He filed a 24.035 motion.
Holding: Movant claims he was denied effective assistance of counsel because his plea counsel gave positive, incorrect information, on which he relied, that Movant would be granted credit for time spent on bond if he pleaded guilty. Movant claims this misadvice rendered his plea involuntary and unknowing. Where a movant claims his counsel affirmatively misinformed him of the consequences of pleading guilty, the test is whether there is a reasonable basis in the record for such a mistaken belief. Here, because the plea court told Movant he would receive credit for time spent on bond, Movant's mistaken belief was reasonable. Because his bond credit agreement cannot be honored under the law, his pleas were rendered involuntary. Remanded to allow withdrawal of pleas.

Legendre v. State, No. ED93866 (Mo. App. E.D. 8/24/10):
Movant was entitled to an evidentiary hearing on his claim that his plea counsel was ineffective because counsel misled him into believing that counsel had litigated a motion to suppress, but this was not true, because this claim was not refuted by the record.

Facts: Movant was charged with robbery. He ultimately pleaded guilty, and said at the plea that he was satisfied with counsel's services. Movant then filed a 24.035 motion. He alleged that plea counsel was ineffective for failing to file a motion to suppress, and that plea counsel had misled Movant into thinking that such a motion had been litigated. Movant alleged that he did not learn until he was delivered to the DOC that plea counsel never filed such a motion. The motion court denied this claim without a hearing.
Holding: A plea is not voluntary if it is the result of fraud or mistake. If Movant's claim is true that his counsel misled him into believing that a suppression motion had been litigated, then his plea was involuntary. Movant's claim is not refuted by the record. The motion court cannot determine the credibility of Movant's claim without having heard witnesses on it. Remanded for an evidentiary hearing.

Brand v. State, No. ED93504 (Mo. App. E.D. 6/15/10):
Even though Movant pleaded guilty to living within 1000 feet of a day-care, where his underlying sex conviction occurred in 1999 and the 1000-foot law was not enacted until 2004, Movant's conviction is vacated since application of the 2004 law to him would be retrospective.
Facts: Movant pleaded guilty to a sex offense in 1999. In 2004, Sec. 566.147 was enacted, which prohibits sex offenders from living within 1000 feet of a day-care. In 2007, Movant was charged with living within 1000 feet of a day-care and pleaded guilty. He later filed a 24.035 action.
Holding: *F.R. v. St. Charles County Sheriff's Dept.,* 301 S.W.3d 56 (Mo. banc 2010) held that Sec. 566.147 could not be applied to persons whose sex offenses occurred before the effective date of the statute in 2004 because that would violate the prohibition against retrospective laws. If this is the case, Movant's conviction must be vacated. State, however, claims that Movant's conviction may also be based on a post-2004 sex conviction. Court of Appeals remands to determine if that is the case.

Wilder v. State, No. ED93032 (Mo. App. E.D. 1/19/10):
Holding: A motion to withdraw a guilty plea at sentencing is an appealable order; therefore, where Defendant's motion to withdraw his plea at sentencing was denied, but he did not appeal, he could not contend in a Rule 24.035 motion that he should have been allowed to withdraw his plea.

Melton v. State, No. ED90289 (Mo. App., E.D. 8/26/08):
Evidentiary hearing was not required on Movant's double jeopardy claim, but motion court was required to issue Findings on the claim to allow meaningful appellate review.
Facts: Movant pleaded guilty to two drug counts for drugs possessed at the same time. He filed a Rule 24.035 motion claiming conviction on both counts constituted double jeopardy. He waived a hearing on the claim. The motion court denied the claim without Findings.
Holding: A double jeopardy claim can be considered in a 24.035 proceeding because it goes to the power of the State to charge Movant. Movant correctly withdrew his request for a hearing, because all a motion court can consider in deciding a double jeopardy claim is the State's information and the transcript of the guilty plea. The motion court's failure

to issue Findings on the claim, however, was error under 24.035(j) because it does not allow for meaningful appellate review.

Elverum v. State, No. ED88496 (Mo. App., E.D. 9/18/07):
(1) Even though Movant absconded from probation, court exercises its discretion not to apply "escape rule" due to the "central issues" of this case; (2) plea court failed to ensure Movant understood the range of punishment by failing to advise him of maximum penalty and that his sentences could run consecutively; (3) Movant cannot raise a factual basis or sufficiency of information claim in Rule 24.035 appeal where those claims were not included in the Amended 24.035 Motion, but Movant could bring those via writ of habeas corpus; and (4) group guilty pleas with multiple defendants pleading guilty at once make confusing records and should be discontinued.
Facts: Movant pleaded guilty to four counts of first degree property damage, Section 569.100, and was placed on probation. After he absconded from probation, probation was later revoked and he was sentenced to four consecutive terms of four years, for 16 years. Also, on appeal, he claimed for the first time that he could not be charged or convicted of Class D felonies because the statute requires damage of more than $750 for a Class D felony, but Movant was only charged and the factual basis showed that the damage only "exceeded $500."
Holding: Rule 24.02(b) requires the court to inform defendants of the maximum possible penalty. Here, the court told Movant before his plea that "the range was up to four years" but never told him whether the range was four years on each count, or four years total. Even though the State had recommended 10 years, this does not show that Movant knew he could receive up to 16 years. His attorney's statement at sentencing that Movant could receive 16 years does not cure the error either, because this took place at sentencing, two month after Movant pleaded guilty. Movant cannot raise for the first time on appeal claims that he could not be convicted for the Class D felony because the evidence did not show damage above $750. These claims were not included in the Amended 24.035 Motion. The claim about the information should have been raised on direct appeal; the factual basis claim in the 24.035 motion. However, Movant can raise these in a writ of habeas corpus.

Eckhoff v. State, No. ED86571 (Mo. App., E.D. 9/12/06):
Where plea agreement provided that Defendant would be sentenced to seven years on two counts to be run concurrently or consecutively after a PSI, the plea agreement was breached when the trial court sentenced Defendant to 14 years on each count to run concurrently, without allowing Defendant an opportunity to withdraw his guilty plea.
Facts: At guilty plea, the prosecutor stated the plea agreement was that the State would recommend seven years on two counts of sodomy, and be free to argue whether the time should be concurrent or consecutive after a PSI was completed. After the PSI, a different prosecutor recognized that the minimum sentence for statutory sodomy of a child under 12 years old was 10 years, Section 566.062.2. Thus, at sentencing the prosecutor recommended 14 years on each count to be served concurrently. The court imposed this sentence, without giving Defendant an opportunity to withdraw his plea. Defendant filed a Rule 24.035 motion, seeking to vacate his pleas.

Holding: Although the cap at the plea hearing was 14 years, and Defendant received 14 years, the State breached its plea agreement and Defendant did not get the benefit of his bargain. At the time of the plea, there was a possibility Defendant would receive seven years, if the sentences were run concurrently. At sentencing, Defendant learned that was impossible under the statute. Therefore, Defendant did not receive the benefit of his bargain. Moreover, the trial court did not give Defendant an opportunity under Rule 24.02(d)4 to withdraw his plea after it deviated from the plea agreement. Defendant's convictions are vacated.

State v. Bryan, No. SD30363 (Mo. App. S.D. 12/14/10):

Where Movant's plea agreement called for him to be placed in sexual offender program with eligibility for probation after 120 days, but Movant was not placed in the program by the DOC, Movant should be permitted to withdraw his plea.

Facts: Movant pleaded guilty to sex offenses under plea agreement that Movant would be placed in sexual offender assessment program and be eligible for probation after 120 days. However, the DOC never placed Movant in the program. Nevertheless, the DOC sent the judge an unfavorable report, and the judge denied Movant release on probation. Movant filed a 24.035 motion.

Holding: Movant, through no fault of his own, did not receive the benefit of his plea bargain. This rendered his guilty plea involuntary, unknowing and unintelligent. When a plea rests upon a promise or agreement so that it can be said to be part of the inducement or consideration, the plea agreement must be fulfilled. Here, the agreement was not fulfilled because the DOC did not place Movant in the sexual offender program, but instead simply wrote an unfavorable letter to the judge. This caused Movant to lose the opportunity for probation after 120 days. He should be permitted to withdraw his plea.

Lane v. State, No. SD30116 (Mo. App. S.D. 5/21/10):

Where Movant alleged that his guilty plea was rendered involuntary because his plea counsel was ineffective in misadvising him about his right to have his case dismissed under UMDDL, this properly stated a claim of ineffective counsel and Movant was entitled to an evidentiary hearing.

Facts: In 2007, Movant was charged with the crime in this case. Meanwhile, he was incarcerated in the DOC on another case. While incarcerated, he filed a request for disposition of his new charge within 180 days under the Uniform Mandatory Disposition of Detainers Law, Sec. 217.450. More than 180 days later, Movant pleaded guilty. Subsequently, he filed a Rule 24.035 motion alleging his plea was involuntary because counsel had been ineffective in misadvising Movant about his UMDDL motion. The motion court denied the claim without a hearing.

Holding: The motion court relied on cases holding that defendants waive a claim under UMDDL by pleading guilty. However, Movant's claim here is ineffective assistance of counsel, which is a different issue. The cases relied on by the motion court did not address ineffective assistance of counsel. Movant's claim is that his plea was rendered unknowing and involuntary because his counsel misinformed him of the effect of his guilty plea and his rights under UMDDL. Movant has alleged facts which would have shown he was entitled to have his case dismissed under UMDDL but for counsel's misadvice. On the other hand, it is possible Movant and counsel had some strategy

reason for not pursuing the UMDDL claim. This is impossible to determine without a hearing. Movant has pleaded facts warranting an evidentiary hearing.

Schmidt v. State, No. SD29663 (Mo. App. S.D. 9/10/09):
A guilty plea waives claim regarding the 180-day time limit for bringing a person to trial under UMMDL, Sec. 217.460.
Facts: Movant filed a request under the Uniform Mandatory Disposition of Detainer Law (UMDDL), Sec. 217.460, for final disposition of a detainer lodged against him. Movant was not brought to trial within 180 days, and ultimately pleaded guilty. He then filed a 24.035 motion claiming the court lacked jurisdiction to convict and sentence him.
Holding: Sec. 217.460 states that if an information is not brought to trial within 180 days of a request for disposition of detainer, "no court shall have jurisdiction" of the case. However, in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), the Supreme Court held there were only two types of jurisdiction -- subject matter and personal; neither is involved in here. A number of cases before *J.C.W.* had held that noncompliance with Sec. 217.460 was "jurisdictional," but after *J.C.W.*, failure to comply with the statute is merely legal error, which can be waived if not asserted. A guilty plea waives all nonjurisdictional errors, including statutory guarantees. Thus, Movant waived his UMDDL claim when he pleaded guilty.

State ex rel. Moore v. Brown, No. SD29089 (Mo. App., S.D. 11/19/08):
Rule 29.07 does not provide authority to resentence a Defendant, but only to withdraw a guilty plea.
Facts: Defendant pleaded guilty, and received an SES sentence. Several months later, Defendant sought to change her sentence on grounds of manifest injustice under Rule 29.07(d). The trial court changed the sentence. The State sought a writ of mandamus to prevent this.
Holding: 29.07(d) authorizes a trial court to withdraw a guilty plea, but does not grant authority for a re-sentencing. Defendant did not seek to withdraw her guilty plea. Rule 29.13(a) allows courts after a judgment of conviction to set aside a judgment for lack of jurisdiction or because the information does not charge an offense, but this is only allowed for 30 days after judgment and those grounds were not alleged here. No statute or Rule authorizes the court to resentence Defendant several months after her sentencing. Writ granted.

State v. York, No. 28523 (Mo. App., S.D. 5/13/08):
(1) Where a prior judge had granted a motion to allow Defendant to withdraw his guilty plea, and then a subsequent judge granted the State's motion to reinstate the plea, the subsequent judge could not reinstate the plea because once it was withdrawn, it could not be reinstated by another judge. (2) The instant case is appealable by direct appeal, because this is not an appeal of a guilty plea, because no plea existed at the time of sentencing.
Facts: Defendant, with Public Defender counsel, entered an *Alford* plea to robbery. Sentencing was scheduled for later. Before sentencing, Defendant filed a motion to proceed *pro se*, and moved to withdraw his guilty plea. The plea judge granted Defendant's motion to withdraw his guilty plea, and sent the case to another judge for

trial. In the new division, Defendant signed a waiver of counsel form, but said he was representing himself because of "systemic problems" in the Public Defender's Office, and that the Public Defender had not represented him at all. Defendant said he would not choose self-representation if he could have an attorney other than someone from the Public Defender. Although his concern focused on his particular Public Defender, Defendant did not believe the Public Defender System could adequately represent him or anyone else. The judge told the prosecutor that the judge did not think Defendant's waiver of counsel was going to stand up on appeal under these circumstances. The prosecutor then filed a motion to reinstate the guilty plea. The trial court granted this and sentenced Defendant. He appealed.

Holding: The State claims that this is a prohibited direct appeal of a guilty plea, and that the proper remedy is under Rule 24.035. The State mischaracterized this appeal. The issue is whether a guilty plea existed at the time the judge undertook to sentence Defendant. It is not an appeal of a guilty plea. When a guilty plea is withdrawn, a defendant is restored to the position he occupied before entering the plea. Here, the first judge allowed Defendant to withdraw his plea. There was nothing that could be "reinstated" by the second judge. Judgment reversed and case remanded.

State v. Lawrence, No. 28199 (Mo. App., S.D. 4/3/08):

(1) Plain error resulted when trial court found Defendant guilty of offense at a purported "trial," when the only "evidence" presented was statements of a prosecutor and Defendant; (2) Plain error resulted when trial court convicted Defendant of an offense at a purported "trial" without obtaining a jury trial waiver from him.

Facts: Defendant was charged with Count I (assault) and Count II (unlawful use of a weapon). Defendant filed a motion to waive jury sentencing. Defendant then filed a petition to plead guilty to *Count II*. A proceeding then occurred in which the trial court asked the Prosecutor what evidence would be presented in support of *both* Count I and Count II. The Prosecutor stated the evidence for both, and Defendant agreed with this. The court then found Defendant guilty of *both* Counts I and II. Defendant then appealed the "trial" on Count I, claiming there was insufficient evidence to convict.

Holding: This case presents glaring procedural irregularities which, although not briefed, present plain error. (1) While the proceeding below was satisfactory for a guilty plea, it does not constitute a trial on Count I. Statements of counsel are not evidence. The Prosecutor's statements of the facts did not constitute evidence for a trial. Also, the Defendant's statements at the hearing cannot be used to convict him under Rule 24.02(d)(5). Defendant was convicted on Count I without ever being tried or without any evidence. (2) While Defendant waived jury sentencing, he did not waive a jury trial. At the hearing, Defendant was only pleading guilty to Count II. Defendant did not waive his right to jury trial on Count I.

Allen v. State, No. 27699 (Mo. App., S.D. 4/5/07):

(1) Even though Defendant who had been sentenced to 120-day treatment program absconded, rather than report to the program, the trial court could not rescind the program and impose a prison sentence, since the trial court's jurisdiction expired upon imposing sentence, and it was part of the plea agreement that Defendant would be put in the treatment program; and (2) "escape rule" did not bar Defendant's Rule 24.035 claim

that trial court lacked jurisdiction to impose prison sentence, since the imposition of sentence occurred after Defendant was recaptured, and "escape rule" only applies to pre-escape errors.

Facts: Defendant pleaded guilty per an agreement that he would be placed in a 120-day treatment program under Section 559.115 and released upon successful completion of the program. The judge imposed this as the sentence. Defendant remained free on bond, however, while waiting for a "bed date" to the program. When the "bed date" arrived, Defendant absconded, rather than report to the program. He was captured a year later. At that time, the judge rescinded the 120-day treatment program, and imposed a five-year prison sentence. Defendant filed a 24.035 motion claiming the judge lacked jurisdiction to impose this sentence.

Holding: (1) The sentencing court exceeded its jurisdiction when it rescinded the 120-day program and imposed a prison sentence more than one year after it entered its original judgment imposing the 120-day program. This program was part of Defendant's plea agreement and Defendant had been sentenced to it. A trial court exhausts jurisdiction once judgment and sentence occur in a criminal case, and can take no further action. When Defendant was captured, the court only had jurisdiction to enforce its earlier sentence and judgment. It could not rescind the 120-day treatment sentence. (2) The "escape rule" does not apply here because Defendant's claim relates to a post-capture error by the trial court. The "escape rule" does not apply to errors that occur after a defendant is returned to custody.

Greene v. State, No. WD71153 (Mo. App. W.D. 12/28/10):

Holding: Entry of guilty plea waives any claim that trial court lacked "jurisdiction" to accept plea in violation of Uniform Mandatory Disposition of Detainers Law (UMDDL), since this issue is not "jurisdictional" but only trial error; cases to contrary are no longer valid in light of *Webb ex rel. J.C. W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009).

State v. Molsbee, No. WD70399 (Mo. App. W.D. 8/10/10):

Where (1) Defendant had pleaded guilty to sex offense in 1999, and (2) in 2008 moved within 1000 feet of a school, his guilty plea to violating Sec. 566.147 (2004) was set aside because the law could not be applied retrospectively to him, and he could raise this matter on direct appeal after a guilty plea because the law (caselaw) on this changed while his appeal was pending.

Facts: Defendant was convicted of a sex crime in 1999. In 2008, he moved within 1000 feet of a school, in violation of Sec. 566.147, which was enacted in 2004. In 2009, he pleaded guilty to this offense and was sentenced, but then filed a direct appeal.

Holding: While Defendant's direct appeal was pending, the Mo. Supreme Court ruled in *F.R. v. St. Charles County Sheriff's Dept*., 301 S.W.3d 56 (Mo. banc 2010), that Sec. 566.147 does not apply to persons convicted before the effective date of the statute in 2004 because that would be a retrospective law. The issue here is whether Defendant can raise this issue on direct appeal after a guilty plea. Usually, a guilty plea waives defenses. A direct appeal of a guilty plea is limited to whether a trial court has subject matter jurisdiction (now construed as "authority") and whether the information was sufficient. Here, the issue is not precisely whether the court had authority to accept the plea, but that the statute was unconstitutional as applied to Defendant. However, prior

cases have held that if there is a change in law after judgment but before the appellate court's decision is rendered, the appellant/defendant gets the benefit of the changed law. Here, the *F.R.* case was decided while Defendant's appeal was pending, and Defendant should get the benefit of *F.R.* The "change of law" principle is, in effect, an exception to the principle that a guilty plea waives defenses. Plea and conviction vacated.

Cherco v. State, No. WD70071 (Mo. App. W.D. 2/9/10):
Holding: Rule 24.035 movants may claim that counsel was ineffective at sentencing without seeking vacation of the guilty plea; prejudice test for counsel's failure to call character witnesses is whether there is a reasonable probability the sentence would have been lower.

Frye v. State, No. WD70504 (Mo. App. W.D. 3/23/10):
(1) Where defense counsel failed to communicate a favorable plea offer to Defendant-Movant, this was ineffective assistance of counsel where Movant would have accepted the plea offer; (2) however, although appellate court vacates conviction and remands, appellate court has no authority to force State to re-offer the noncommunicated plea offer.
Facts: Movant was charged with felony driving while revoked. The State made a plea offer to defense counsel for misdemeanor driving while revoked. Defense counsel, however, failed to communicate the offer before the time expired, and Movant never knew about it until after his later guilty plea and sentencing. Movant ultimately pleaded guilty to felony driving while revoked in an open plea and received three years.
Holding: Failure to communicate a plea offer constitutes ineffective assistance of counsel, and violates Rule 4-1.4 that a lawyer promptly inform clients of plea offers. The motion court denied relief on grounds that counsel could not recall if he communicated the plea offer, and even if he failed to do so, Movant was at fault for not staying in touch with counsel. However, the record does not support this finding. Counsel testified he was not sure if he communicated the plea offer. Even though Movant did not come to court for some court appearances, this was after the plea offer had expired. Further, counsel made no attempt to mail Movant a letter about the plea offer, and never testified that he tried to telephone Movant about the offer. Under these circumstances, the record does not support that Movant was at fault or that counsel communicated the offer. The State contends that Movant cannot show prejudice because he cannot show that "but for" trial counsel's failure to communicate the offer, he would have "insisted on proceeding to trial." However, the "insisted on proceeding to trial" misreads the prejudice requirement in this situation. Here, had Defendant known of the plea offer, he would not have entered an open plea, but would have accepted the offer; this is the correct allegation of prejudice here. The last issue here is what remedy a court can impose. While the appropriate remedy might be to afford Movant the opportunity to plead to the misdemeanor charge -- and this remedy is used by Texas courts -- the Missouri appellate court is not empowered to order the State to reduce the charge against Movant. All the Missouri court can do is vacate the conviction and sentence and remand. Even though this may leave Movant with only the result of pleading again to the felony or going to trial on the felony, this is the only remedy the appellate court can impose. Conviction vacated and remanded.

Trammel v. State, No. WD69084 (Mo. App. W.D. 3/10/09):
Even though the plea court told Defendant (Movant) that if court accepts the plea Defendant cannot withdraw it and that the court doesn't have to follow the State's recommendation, the court failed to specifically tell Defendant that he would not be permitted to withdraw his plea if the court rejected the State's recommendation, so Defendant was entitled to 24.035 relief.
Facts: The State recommended a 3-year sentence to be served concurrently with a sentence Defendant was already serving. At the plea hearing, the court asked Defendant if he understood that if the court accepts the plea "you cannot come back later if you decide it was an unwise decision and withdraw your plea?" The court also said, "You understand that the Court doesn't have to go along with either the 3 years or the recommendation for a concurrent sentence?" Defendant said he understood. The court sentenced Defendant to three years, but consecutive to his current sentence. Defendant moved to vacate the plea under Rule 24.035.
Holding: In cases where there is a non-binding recommendation, the defendant leaves the decision of sentence to the judge, and the defendant does not retain the right to withdraw the plea. In such cases, the judge must advise the defendant that he will not be allowed to withdraw the plea if the court does not follow the recommended sentence. This procedure is set forth in Rules 24.02(d)1(B) and 24.02(d)2. Defendant (Movant) does *not* contest whether he understood that the court did not have to follow the State's recommendation. Instead, Defendant contests that he did not understand he would not be permitted to withdraw his plea if the judge rejected the State's recommendation. Here, the court told Defendant that his plea, once accepted, could not be withdrawn. However, the court did not specifically tell Defendant, before accepting the plea, whether he will or will not be able to withdraw his plea if the court exceeds the recommendation. The court never specifically advised Defendant his plea could not be withdrawn if the recommendation were not followed. Thus, Defendant's plea was not knowing and voluntary because he was not adequately advised.

Samuel v. State, No. WD69273 (Mo. App. W.D. 2/27/09):
Where Movant claimed that his plea counsel told him he would receive 5 years in prison but he received more, Movant was entitled to evidentiary hearing on this claim because the record does not show that Movant was ever asked at the plea if any promises were made to him.
Facts: Movant pleaded guilty in an open plea to a class B felony and received 12 years. He filed a 24.035 motion claiming counsel told him he would receive 5 years. Movant had previously rejected an 8-year plea offer. The motion court denied the claim without a hearing, finding that "at no time did or could counsel promise" 5 years.
Holding: Although the plea judge told Movant the range of punishment was 5 to 15 years, the plea record shows that the judge did not inquire whether any promises had been made of Movant to plead guilty. If Movant pleaded guilty under the belief that he would receive a 5 year sentence because counsel told him this, then counsel was ineffective. The record does not refute Movant's claim. He is entitled to a hearing.

State v. Ison, No. WD68739 (Mo. App., W.D. 11/18/08):
Even though Defendant's probation had expired, where he had received an SES sentence after a guilty plea, he could move to vacate the plea for manifest injustice under Rule 29.07(d).
Facts: Defendant pleaded guilty to a sex offense and received an SES. After his probation expired, the victim recanted her testimony and Defendant sought to withdraw his guilty plea because of this.
Holding: Rule 29.07(d) allows a withdrawal of guilty plea "to correct manifest injustice." Case law has held that Rule 29.07(d) cannot be used to raise grounds that could have been raised in a Rule 24.035 case. Even if a matter could not have been raised in 24.035 (because, for example, it was unknown), the relief may be habeas corpus. 29.07 is not available after discharge from probation where a defendant received an SIS because there is no final judgment (conviction). Here, however, because Defendant received an SES and was never committed to the DOC, 24.035 does not apply and 24.035's time limit does not apply to 29.07. Defendant can proceed under 29.07 to try to withdraw his plea for "manifest injustice."

State v. Craig, No. WD68750 (Mo. App., W.D. 10/28/08):
Even though Defendant claimed that his prior DWI convictions could not serve as enhancements for various reasons, where Defendant pleaded guilty, he could not take a direct appeal of the guilty plea for this reason, but could only challenge the evidentiary basis for his plea by postconviction motion.
Facts: Defendant was charged with DWI as an aggravated offender. He allegedly had three prior DWI convictions. Prior to pleading guilty, Defendant filed a motion challenging his prior convictions on grounds that they did not comply with various court rules and there was no record of one of the convictions. The plea court found Defendant to be an aggravated offender. He appealed.
Holding: The Court of Appeals must address its jurisdiction, and finds no jurisdiction to direct appeal here. The only issues cognizable on direct appeal from a guilty plea are subject matter jurisdiction and the sufficiency of the charging instruments. Defendant does not allege the court lacked subject matter jurisdiction. While he claims the court erred in refusing to dismiss the information, the challenge is grounded on the evidence the information was based on, rather than the sufficiency of the charging instrument itself. A complaint about the evidentiary basis for the trial court's finding is not subject to direct appeal, but may be raised in a postconviction motion. Appeal dismissed.

State ex rel. Bennett v. Ravens, No. WD69409 (Mo. App., W.D. 8/12/08):
Trial court cannot disqualify prosecutor on grounds that trial court does not agree with plea bargain, because this is not authorized under Sec. 56.110.
Facts: Two days before a trial was to begin, the prosecutor notified the trial court that he and Defendant had reached a plea bargain, and that the prosecutor was planning to refile the felony charge as a misdemeanor. The judge, sua sponte, then disqualified the prosecutor, and appointed a special prosecutor. The judge stated the prosecutor "wasn't doing a good job of representing the State." Defendant sought a writ of prohibition to prohibit the judge from disqualifying the prosecutor.

Holding: Sec. 56.110 allows a court to disqualify a prosecutor if the prosecutor is interested, has a conflict of interest, or is related to the Defendant. The judge here did not allege any of these reasons for disqualifying the prosecutor. Rule 24.02(d)(1) prohibits a judge from participating in plea discussions until an agreement is reached. Removing the prosecutor based on plea discussions constitutes inappropriate interference with plea discussions. Writ of prohibition issues.

State ex rel. Goldesberry v. Taylor, No. WD67650 (Mo. App., W.D. 10/02/07):
Even though crime victims did not get prior notice of Defendant's guilty plea and sentencing, trial court had no jurisdiction to later set aside the guilty plea and sentence at the Prosecutor's request to benefit victims.
Facts: Defendant injured victims in a traffic incident and was charged with traffic offenses. At his arraignment, the Prosecutor was out of the courtroom, and Defendant pleaded guilty and was fined $267. The next day, the Prosecutor learned Defendant had pleaded guilty and filed a Rule 29.07(d) motion to set aside the plea on grounds that the victims had not had an opportunity to be present at the plea. The trial court set aside the plea. Defendant filed a writ of prohibition.
Holding: Once judgment and sentence occur in a criminal case, the trial court loses jurisdiction. Rule 29.07(d) states a court may set aside a plea for "manifest injustice," but this Rule is generally to be invoked by a defendant, not the Prosecutor. The "victim's rights" statute, 595.209, and constitutional provision do not allow the setting aside of the plea, because Article I, Sec. 32.4 of the victim's rights constitutional provision states: "Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilt, or an acceptance of a plea of guilty." The trial court had no power to set aside the guilty plea. Writ made absolute.

Coke v. State, No. WD67580 (Mo. App., W.D. 7/31/07):
Even though Movant said at his guilty plea hearing that no promises had been made to him, his 24.035 claim that plea counsel had misadvised him about his eligibility for parole was not refuted by the record, because no inquiry about parole was made at the plea.
Facts: Movant pleaded guilty to drug offenses pursuant to a plea bargain. At the plea, Movant was asked if any promises were made to him other than the plea bargain. Movant said "no." Movant then filed a 24.035 motion claiming his plea counsel told him he would be eligible for parole in 17 months, but that he was not so eligible. He claimed he would not have pleaded guilty had he not been misadvised. The motion court dismissed the claim without a hearing.
Holding: Counsel can be ineffective for affirmatively misadvising a Movant about parole eligibility. The record does not conclusively "refute" Movant's claim. Movant was not asked about parole during the plea hearing. A negative response to a routine inquiry whether any promises had been made is too general to encompass all possible statements by counsel. Movant is entitled to a hearing.

*** Padilla v. Kentucky, 2010 WL 1222274, ___ U.S. ___ (U.S. 3/31/10):**
Holding: Guilty plea counsel was ineffective in failing to advise that Defendant was subject to deportation from conviction; counsel has duty to advise of immigration consequences of a guilty plea.

*** Puckett v. United States, 84 Crim. L. Rep. 4, ___ U.S. ___ (3/25/09):**
Holding: Even though the Gov't breached a plea agreement, where Defendant failed to raise the issue in the district court, the issue is not preserved for appeal and can only be reviewed as plain error on appeal under Federal Rule of Criminal Procedure 52(b).

U.S. v. Rivera-Maldonoda, 84 Crim. L. Rep. 684, 2009 WL 620250 (1st Cir. 3/12/09):
Holding: Where judge erroneously told Defendant pleading guilty that he would be subject to 3 years supervised release but law actually required lifetime of supervised release, this met standard for plain error in withdrawing plea.

U.S. v. Newbert, 82 Crim. L. Rep. 106 (1st Cir. 10/11/07):
Holding: Even though a plea agreement provided that if Defendant sought to withdraw his plea, then the gov't would be able to introduce statements made during plea negotiations and at the plea as evidence of guilt, there was no "breach" of the agreement when Defendant later sought to withdraw his plea due to new evidence of actual innocence, and the statements could not be used against him.

U.S. v. Griffin, 82 Crim. L. Rep. 342 (2d Cir. 12/21/07):
Holding: Gov't breached plea agreement not to oppose acceptance-of-responsibility sentence reduction where Prosecutor said he was "troubled" by Defendant's objections to statements in PSI, even though Prosecutor also said he was not abandoning promise not to oppose downward departure. Different judge must conduct resentencing.

McKeever v. Warden SCI-Grateford, 81 Crim. L. Rep. 266 (3d Cir. 5/10/07):
Holding: Where, after Petitioner pleaded guilty, there was a change in State law that rendered him actually innocent of some counts, the federal habeas court was not required to order the State courts to rescind the whole plea, but only to resentence Petitioner on the remaining counts.

U.S. v. Alston, 87 Crim. L. Rep. 682 (4th Cir. 7/2/10):
Holding: Recidivist enhancement cannot be based on prior *Alford* plea proffer.

U.S. v. Dawson, 2009 WL 4408192 (4th Cir. 2009):
Holding: Where plea agreement called for prosecutor to recommend a two-level sentence reduction of minor participation but prosecutor failed to do so, this was a breach of the plea agreement and plain error.

U.S. v. Roberts, 88 Crim. L. Rep. 122, 2010 WL 4053921 (5th Cir. 10/15/10):
Holding: Prosecutor breached plea agreement by arguing that Defendant be sentenced under "career offender" provisions of USSG as an "adjustment" under 1B1.1(f) because this raised Defendant's base offense level from the one in the plea agreement.

U.S. v. Self, 86 Crim. L. Rep. 550 (5th Cir. 2/3/10):
Holding: Even though judge warned Defendant that judge could reject plea bargain and impose a higher sentence, where judge later rejected parts of the plea bargain but not others, this was improper since the judge must either accept or reject the plea bargain in total, even if the Defendant declined an offer to withdraw his plea.

U.S. v. Cavitt, 2008 WL 4967066 (5th Cir. 2008):
Holding: Where movant alleged he would not have pleaded guilty if counsel had informed him of possibility of motion to suppress cocaine found in car, this was not refuted by the record and movant was entitled to evidentiary hearing.

U.S. v. Arami, 2008 WL 2791844 (5th Cir. 2008):
Holding: Defendant had absolute right to withdraw guilty plea before court accepted it.

U.S. v. Harris, 2006 WL 3849318 (6th Cir. 2006):
Holding: Gov't breached plea agreement by failing to debrief Defendant about information Defendant knew about counterfeit securities where this had been part of plea agreement.

U.S. v. Pineda-Buenaventura, 2010 WL 3565270 (7th Cir. 2010):
Holding: Guilty plea colloquy was inadequate where Defendant had limited English ability and limited education, and his counsel's attempt to clarify matters was not a substitute for Defendant actually understanding the charge to which he pleaded guilty.

U.S. v. Nguyen, 87 Crim. L. Rep. 43 (8th Cir. 4/2/10):
Holding: Even though plea agreement contained exception to appeal waiver for constitutional errors, Defendant cannot appeal a sentence imposed by judge who applied the "extraordinary circumstances" restriction on variances condemned in *Gall*, because the U.S. Supreme Court's repudiation of the extraordinary-circumstances standard was rooted in the remedial holding of *Booker*, not the constitutional holding of the case.

U.S. v. Ochoa-Gonzalez, 87 Crim. L. Rep. 75, 2010 WL 1076059 (8th Cir. 3/25/10):
Holding: Where Defendant, her counsel and the court accepted Defendant's guilty plea to aggravated identify theft under the belief that the stolen identity did not have to belong to a real person, but the Supreme Court later held otherwise in *Flores-Figueroa v. U.S.*, Defendant's guilty plea was not intelligently entered and was invalid.

U.S. v. Lovelace, 85 Crim. L. Rep. 277 (8th Cir. 5/19/09):
Holding: Even though Defendant executed an appeal-waiver, he can still appeal Gov't breach of plea agreement, but review is for plain error only.

U.S. v. Yah, 2007 WL 2593627 (8th Cir. 2007):
Holding: Gov't breached plea agreement by failing to recommend lower sentence; remedy was specific performance or allow Defendant to withdraw plea.

U.S. v. Roblero-Solis, 86 Crim. L. Rep. 287, 2009 WL 4282022 (9th Cir. 12/2/09):
Holding: Taking guilty pleas "en masse" violates Fed. Rule 11.

U.S. v. Macinas-Flores, 86 Crim. L. Rep. 295, 2009 WL 428018 (9th Cir. 12/2/09):
Holding: A district judge who rejected a guilty plea when Defendant said, "I'm not really guilty," was still required to state reasons for rejection of the plea in order to reject it.

U.S. v. McTiernan, 84 Crim. L. Rep. 166, 2008 WL 4630387 (9th Cir. 10/21/08):
Holding: Where Defendant claimed his plea counsel failed to advise him on possibility of motion to suppress evidence, this allegation required an evidentiary hearing on motion to withdraw guilty plea.

U.S. v. Transfiguracion, 2006 WL 861186 (9th Cir. 2006):
Holding: Where a plea agreement precluded the State from prosecuting Defendant on other charges, State could not later prosecute Defendant on the other charges, even though Defendant's guilty plea was later set aside due to a Court of Appeals' decision that brought about a change in law.

Williams v. Jones, 85 Crim. L. Rep. 533 (10th Cir. 7/8/09):
Holding: Where counsel's deficient advice caused Defendant to reject a 10-year plea offer and Defendant went to trial and received life without parole, counsel was ineffective, and case remanded for fashioning of appropriate remedy which may be new trial or specific performance of the plea agreement; counsel had believed Defendant was innocent and refused to present "perjured" admission of guilt at plea proceeding.

U.S. v. Villa-Vazquez, 83 Crim. L. Rep. 807 (10th Cir. 8/20/08):
Holding: Gov't is bound by plea agreement to make certain sentencing recommendations, even though agreement has not yet been accepted by court.

U.S. v. Cudjoe, 2008 WL 2893130 (10th Cir. 2008):
Holding: Where gov't promised not to oppose 30-year sentence, gov't breached plea bargain by arguing court should impose sentence that would protect public "in any and all future events."

U.S. v. VanDam, 81 Crim. L. Rep. 524, 2007 WL 1982155 (10th Cir. 7/10/07):
Holding: Even though the sentence Defendant received was that authorized by the sentencing guidelines, where the prosecutor breached the plea agreement by failing to recommend a lesser-sentence, Defendant was entitled to seek specific performance of the original deal and the appeal was not subject to harmless-error analysis because the sentence was authorized by the guidelines.

U.S. v. Cachucha, 81 Crim. L. Rep. 210 (10th Cir. 4/26/07):
Holding: Prosecutor breached plea agreement when he said at sentencing that the agreed-upon sentence was "way too low," even though prosecutor ultimately requested the agreed-upon sentence.

U.S. v. Cano-Varela, 2007 WL 2285861 (10th Cir. 2007):
Holding: Where counsel told judge that Defendant wanted new attorney because he did not like the plea bargain counsel worked out, judge violated rule against participating in plea negotiations by then telling Defendant that he'd get a harsher sentence if he did not plead.

U.S. v. Scott, 2006 WL 3093824 (10th Cir. 2006):
Holding: Where gov't made plea deal that it would not argue for sentencing factors not contained in the plea agreement, gov't breached the plea agreement when it argued for other sentence enhancements.

Dasher v. Witt, 85 Crim. L. Rep. 552 (11th Cir. 7/13/09):
Holding: Where (1) plea counsel advised Defendant he had a good chance of a 1-year sentence, even though court had said it was inclined to impose a somewhat higher sentence; (2) counsel advised Defendant to plead "open" without a plea bargain; (3) counsel was unaware of Defendant's prior criminal record which was later revealed in the presentence investigation report; and (4) Defendant was ultimately sentenced to 10 years, counsel was ineffective.

U.S. v. Morton, 87 Crim. L. Rev. 206 (C.A.A.F. 5/5/10):
Holding: Military courts should not affirm a guilty plea on basis of admissions to an offense that is "closely related" to the charged crime, but not a lesser-included offense, and to which Defendant did not plead guilty, because this violates due process and fair notice.

U.S. v. Alvarado, 2009 WL 1026035 (E.D. Cal. 2009):
Holding: Where before sentencing, there was a change in law that possibly lowered Defendant's sentence, he should be permitted to withdraw his negotiated guilty plea.

U.S. v. Dicus, 2008 WL 4402214 (N.D. Iowa 2008):
Holding: Where gov't breached plea agreement, the remedy was to resentence Defendant to low end of sentencing range in order to deter prosecutorial misconduct and encourage Defendants to raise misconduct claims.

U.S. v. Newbert, 2007 WL 656558 (D. Me. 2007):
Holding: Even though Defendant's plea agreement provided that if he moved to withdraw his plea then statements made in the plea proceeding could be used against him, Defendant did not breach this agreement where plausible evidence of actual innocence later emerged and Defendant moved to withdraw his plea. Someone else later admitted that the drugs that Defendant was convicted of possessing were the other person's, not Defendant's.

Sasonov v. U.S., 2008 WL 4148268 (D.N.J. 2008):
Holding: Where counsel affirmatively misrepresented immigration consequences of guilty plea, counsel was ineffective.

U.S. v. Taylor, 2009 WL 3754164 (D.N.M. 2009):
Holding: Even though plea agreement provided a sentence below the statutory mandatory minimum, where court had already accepted it, it would enforce the agreement and impose a sentence below the statutory minimum.

U.S. v. DeSimone, 2010 WL 3553866 (D.R.I. 2010):
Holding: Defendant was entitled to withdraw guilty plea where, during plea colloquy Defendant told his attorney that he disagreed with Gov't's recitation of facts, and attorney implied that Defendant should lie at the plea hearing.

Jefferson v. Berkebile, 2010 WL 391508 (S.D. W.Va. 2010):
Holding: Where Defendant's plea agreement called for concurrent state and federal sentences, but state authorities failed to run sentence concurrently, Defendant was entitled to vacate federal sentence.

State v. Johnson, 86 Crim. L. Rep. 666 (Ark. 2/18/10):
Holding: Where Defendant fulfilled a pre-indictment cooperation agreement, it was binding on prosecutors even though it had not yet been presented or accepted by a court.

Crumb v. People, 2010 WL 1644642 (Colo. 2010):
Holding: Where plea judge had given advice to Defendant "as a human being" and stated he would be unhappy if no deal were reached, this violated rule that judge not become involve in plea negotiations; Defendant allowed to withdraw plea.

State v. Rivers, 81 Crim. L. Rep. 689 (Conn. 9/4/07):
Holding: Even though plea agreement said Defendant's agreement would be void in the event he testified untruthfully against a co-defendant, where Defendant then refused to testify, his agreement was not void because the agreement only called for being truthful *if* he testified, and did not require him to testify.

Ross v. State, 87 Crim. L. Rep. 405 (Fla. 5/27/10):
Holding: Where police did a 2-step interrogation similar to *Missouri v. Seibert*, 542 U.S. 600 (2004), the post-warnings statements made after an unwarned interrogation may be excluded even when the interrogator's action was not a deliberate attempt to get Defendant to talk.

Calabro v. State, 84 Crim. L. Rep. 89 (Fla. 9/18/08):
Holding: Even though Defendant said at his arraignment that he did not want a trial and was "guilty of this," those statements were made in connection with plea bargaining and cannot be admitted at trial.

Hopper v. State, 2010 WL 3767296 (Ind. 2010):
Holding: Where Defendant wishes to plead guilty pro se, the court must warn Defendant that an attorney is better able to engage in plea negotiations and identify potential defenses.

Diaz v. State, 2010 WL 3791266 (Ind. 2010):
Holding: Where it was unclear whether language translation at guilty plea was accurate, court was required to commission its own translation of hearing to determine if Defendant's plea was knowing and voluntary.

Creech v. State, 83 Crim. L. Rep. 358 (Ind. 5/21/08):
Holding: As part of a plea bargain, a Defendant can waive his right to a direct appeal, but court reaffirms prior cases forbidding provisions of a plea agreement that waive postconviction rights.

State v. Bearse, 2008 WL 1758899 (Iowa 2008):
Holding: Where State had agreed to recommend against incarceration as part of a plea bargain, Prosecutor breached agreement by saying that although Prosecutor was "abiding by agreement," judge was "not bound by agreement" and pointing out that the PSI recommended incarceration.

State v. Gilley, 2010 WL 204099 (Kan. 2010):
Holding: Where Defendant was charged with three counts of forgery and pleaded guilty to one count, the two remaining charged counts could not be counted as "convictions" to enhance the count on which Defendant pleaded guilty.

State v. Aguilar, 87 Crim. L. Rep. 318 (Kan. 5/12/10):
Holding: Even though defense counsel's performance does not rise to level of ineffective assistance under 6th Amendment, court can still allow Defendant to withdraw a guilty plea before sentencing for deficient attorney performance or conflict of interest.

State v. Case, 85 Crim. L. Rep. 603 (Kan. 8/7/09):
Holding: A stipulation to facts during an *Alford* plea is not an admission of those facts for right-to-jury trial purposes under *Apprendi*, because an *Alford* plea does not involve admission of guilt.

Cuffley v. State, 88 Crim. L. Rep. 220 (Md. 10/28/10):
Holding: State cannot use evidence outside of the plea hearing record to prove the meaning of a plea agreement, where Defendant later challenges the agreement.

Solorzano v. State, 2007 WL 789201 (Md. 2007):
Holding: Defendant was entitled to specific performance of his plea agreement where trial court in accepting the plea made remarks indicating it would agree to the plea, but then later sentenced Defendant to more time. While relief from a breached plea agreement is either specific performance or withdrawal of the plea, here Defendant sought specific performance.

Rubio v. State, 84 Crim. L. Rep. 188 (Nev. 10/30/08):
Holding: Where counsel affirmatively misadvises client on immigration consequences of guilty plea, that is ineffective and renders plea involuntary.

State v. Lewis, 2008 WL 659709 (Nev. 2008):
Holding: Order allowing withdrawal of guilty plea is not a final judgment, and thus, not appealable

State v. Sharkey, 2007 WL 2011426 (N.H. 2007):
Holding: Counsel ineffective in failing to advise Defendant that his guilty plea would affect his driver's license in another state, even though this was a collateral consequence of the plea.

State v. Nunez-Valdez, 85 Crim. L. Rep. 641 (N.J. 7/30/09):
Holding: Affirmative misadvice regarding immigration consequences of guilty plea is ineffective.

State v. Harrison, 2009 WL 2341829 (Ohio 2009):
Holding: Even though trial court made an error in failing to impose mandatory post-release conditions on sex Defendant when he completed his original sentence, the court lacked authority to correct its mistake by forcing Defendant to choose between withdrawing his guilty plea or resentencing; withdrawal of plea was, therefore, invalid.

State v. Sarkozy, 82 Crim. L. Rep. 545, 2008 WL 417690 (Ohio 2/14/08):
Holding: Plea court's failure to inform Defendant at plea that his sentence will include mandatory post-release control is grounds for later collaterally attacking validity of plea.

Rolen v. State, 2009 WL 1851325 (S.C. 2009):
Holding: Where after plea but apparently before sentencing Defendant said he wanted to withdraw his plea, counsel was ineffective in not moving to withdraw the plea, because this denied trial court opportunity to exercise its discretion to allow withdrawal.

State v. Rondell, 88 Crim. L. Rep. 316 (S.D. 11/17/10):
Holding: Conditional guilty pleas where a Defendant pleads guilty to preserve for appeal a ruling on a pretrial motion are not recognized in South Dakota, so such a plea was void.

Piper v. Weber, 85 Crim. L. Rep. 640 (S.D. 7/29/09):
Holding: Death penalty Defendant's waiver of right to have jury impose sentence was not knowing and voluntary where court failed to make clear that single juror of 12 can save their life.

Ward v. State, 87 Crim. L. Rep. 754 (Tenn. 7/7/10):
Holding: Trial judge accepting a guilty plea must inform sex offender defendants of mandatory lifetime supervision requirement, but not mandatory sex offender registration requirement.

Grindstaff v. State, 2009 WL 349715 (Tenn. 2009):
Holding: Where defense counsel did not understand that Defendant's conviction would preclude him serving an "alternative sentence" and misadvised Defendant that an

"alternative sentence" was possible, counsel was ineffective and Defendant was prejudiced in entering his guilty plea because he could not make an intelligent decision to plead when faced with this misadvice.

State v. Lovell, 87 Crim. L. Rep. 748 (Utah 7/27/10):
Holding: Defendant's prior experience with criminal justice system cannot substitute for inadequate plea colloquy in current case, such as where judge failed to explain presumption of innocence.

State v. Loveless, 2010 WL 1727805 (Utah 2010):
Holding: Where State charged two crimes in the alternative in a single count, State could not prevent Defendant from entering plea to the lesser charge.

State v. Amidon, 2008 WL 3982509 (Vt. 2008):
Holding: Statements Defendant made in a PSI after a guilty plea were not admissible at a trial on the charges, even for impeachment, when the plea was later withdrawn.

Justus v. Commonwealth, 2007 WL 1651145 (Va. 2007):
Holding: Where after a guilty plea but before sentencing Defendant presented affidavits from witnesses based on right to access premises and self-defense which affidavits established absolute defenses to the burglary crimes as a matter of law, it was an abuse of discretion to deny Defendant's motion to withdraw guilty plea.

State v. Knight, 82 Crim. L. Rep. 458, 2008 WL 151623 (Wash. 1/17/08):
Holding: The remedy for double jeopardy violation after a guilty plea to multiple charges is to vacate the counts that constituted double jeopardy, not to vacate the entire guilty plea.

State v. Hoppe, 85 Crim. L. Rep. 356 (Wis. 5/29/09):
Holding: Even though plea court had Defendant sign a waiver of trial rights form and asked Defendant if he understood it, this was not a substitute for the judge doing a full in-court colloquy with Defendant to be certain he voluntarily was pleading guilty.

Holcomb v. State, 2007 WL 2325655 (Wyo. 2007):
Holding: Defendant was entitled to withdraw guilty plea where his plea agreement called for deferred prosecution, but parties made "mutual mistake" in agreeing to that, since, unknown to the parties, Defendant was not eligible for that program.

People v. Zaidi, 2007 WL 587737 (Cal. App. 2007):
Holding: Before accepting Defendant's guilty plea to sex offense, trial court was required to advise Defendant that he would be subject to lifetime registration as sex offender.

Alhusainy v. Superior Court, 2006 WL 2728821 (Cal. App. 2006):
Holding: Banishing Defendant from State as a condition of plea agreement was unconstitutional and invalidated plea.

People v. Billings, 85 Crim. L. Rep. 222 (Mich. Ct. App. 4/23/09):
Holding: Requiring indigent Defendant to waive appellate counsel as a condition of pleading guilty violates Equal Protection and Due Process.

People v. Maracle, 2009 WL 724222 (N.Y. App. Div. 2009):
Holding: Defendant was subjected to double jeopardy where he made a motion to withdraw a guilty plea and the judge granted the motion without authority to do so, and then Defendant entered a new guilty plea to the charge.

People v. McClam, 2009 WL 790410 (N.Y. App. Div. 2009):
Holding: Where Defendant pleaded guilty after his counsel said he wanted to hit Defendant, Defendant was the worst client he ever had and he didn't think he could represent Defendant in good faith, the trial court failed to make sufficient inquiry into Defendant's request for substitution of counsel.

People v. Boyd, 2008 WL 1746726 (N.Y. App. Div. 2008):
Holding: Due process violated where guilty plea judge did not inform Defendant of duration of post-release supervision or permissible statutory range for such supervision.

People v. Zabele, 2008 WL 2608113 (N.Y. App. Div. 2008):
Holding: Even though Defendant pleaded guilty to methamphetamine charge, plea vacated because Defendant said meth belonged to other people, and he denied knowing of its presence.

State v. Williams, 2010 WL 2802354 (Ohio Ct. App. 2010):
Holding: Defendant's guilty plea was not knowing or intelligent where he entered it under mistaken belief that appellate court would then review the trial court's ruling on the admissibility of his affirmative defense.

Parma v. Buckwald, 2009 WL 2462626 (Ohio Ct. App. 2009):
Holding: Where trial court failed to inform Defendant of legal consequences of his guilty pleas in violation of court rule, this required vacation of the plea without a need to show prejudice.

State v. Carreno-Maldonado, 80 Crim. L. Rep. 49 (Wash. Ct. App. 9/19/06):
Holding: Where plea agreement called for prosecutor to ask for sentence in low end of range, prosecutor breached agreement by making statement "on victim's behalf," even though prosecutor also asked for sentence in low end of range.

Immigration

*** Carachuri-Rosendo v. Holder, ___ U.S. ___, 87 Crim. L. Rep. 409 (U.S. 6/14/10):**
Holding: Even though Lawful Permanent Resident could have been charged under a recidivist statute for a second drug offense, where Lawful Permanent Resident was not in

fact charged with the recidivist offense but only simple possession, Lawful Permanent Resident could seek cancellation of deportation; to reach threshold level of "aggravated felony" under Immigration and Nationality Act that would require deportation, the second conviction must contain an element of recidivism.

U.S. v. Cerna, 2010 WL 1659264 (2d Cir. 2010):
Holding: In illegal reentry case regarding collateral attack on deportation order, court's finding that Defendant waived his right to administrative remedies following deportation order merely because of passage of time was erroneous.

Indictment and Information

State v. Seeler, No. SC90583 (Mo. banc 7/16/10):
Where (1) Defendant was charged with involuntary manslaughter for "leaving the highway right of way," and (2) after the close of the State's evidence, the State amended the charge to involuntary manslaughter for "drove in a lane closed to traffic," this prejudiced Defendant because his defense was based on showing he never left the highway's right of way.
Facts: Defendant, while drunk, drove his car into a highway worker and killed him. Defendant was charged with the B felony of involuntary manslaughter, Sec. 565.024.1(3)(a) for causing the death of a person "that results from the defendant's vehicle leaving a highway … or the highway's right of way." The simple version of involuntary manslaughter is a C felony contained in Sec. 565.024.1(2), which requires operating a vehicle with criminal negligence which results in the death of someone. Defendant's defense was that he never left the highway or right of way because the decedent was working on the highway. When Defendant moved for acquittal at the close of the State's evidence, the State replaced "leaving the highway's right of way" with "drove into a lane closed to traffic." Defendant claimed this prejudiced him because he was prepared to defend against a charge that he left the highway. The trial court allowed the amendment. Defendant was convicted of B felony involuntary manslaughter.
Holding: Rule 23.08 allows an information to be amended or substituted for an indictment if the Defendant's substantial rights are not prejudiced. The test for prejudice is whether the planned defense to the original charge would still be available after the amendment. Here, Defendant's defense was that he never left the highway's right of way. The amendment caused this defense to become unavailable. Reversed and remanded for new trial.

State v. Fernow, No. ED94384 (Mo. App. E.D. 11/9/10):
Even though Defendant escaped from his probation revocation hearing, he could not be charged with escape from custody because he was not being held after arrest for a crime, since probation violations are not criminal offenses.
Facts: Defendant, who was on probation, failed to appear at a probation revocation hearing. After he was arrested on a capias warrant, he ran out of the courtroom. The State charged him with escape from custody. He moved to dismiss. The trial court dismissed. The State appealed.

Holding: Sec. 577.200 provides that a person commits the crime of escape from custody if they escape "while being held in custody after an arrest for any crime." Defendant was not in custody after an arrest for a crime. He was in custody pursuant to a capias warrant for failure to appear at a probation revocation hearing. Violating conditions of probation is not a crime. Probation operates independently of a criminal sentence. Thus, the motion to dismiss was properly granted. Court notes, however, that under the new version of Section 544.665 RSMo. Cum. Sup. 2009, a person can be charged with failure to appear at a probation revocation hearing.

In the Interest of J.A.H., No. ED92114 (Mo. App. E.D. 9/15/09):
(1) Even though Juvenile who was 8 or 9 years old touched another child's penis with a sponge and put other child's penis in Juvenile's mouth, evidence was insufficient to convict of first degree statutory sodomy because there was no evidence this was done for purposes of arousing or gratifying the sexual desire of any person; (2) two different acts of sodomy cannot be charged in the same charge.
Facts: The State charged in a single count that in 2003 or 2004 Juvenile committed first degree statutory sodomy by touching the penis of his Cousin with a sponge and putting his penis in the mouth of Cousin. Cousin, however, testified at trial that these events occurred when Cousin was "5 or 6," which would put the events in 2000 or 2001, making Juvenile 8 or 9 years old at that time. Cousin testified that Juvenile and Cousin took a shower together and Juvenile touched his penis with a sponge and rubbed it, but stopped when Cousin asked him to. Also, Cousin testified that Juvenile and Cousin were playing "hospital" or "doctor" and Juvenile put his penis in Cousin's mouth. Juvenile told Cousin not to tell anyone. Juvenile denied the acts at trial. The trial court convicted Juvenile.
Holding: To convict of first degree statutory sodomy, Section 566.010(1) requires that the deviate sexual acts be "done for the purpose of arousing or gratifying the sexual desire of any person." Here, there was no evidence this, or any evidence that the trial court found this. The State argues that because Juvenile denied the offenses, intent was not an issue in the case, but the State always has the burden of proving every element of the offense beyond a reasonable doubt. Regarding the shower incident, the boys took a shower together because they were late for a family function. Even though Juvenile touched Cousin's penis with the sponge and rubbed it, the circumstances fail to give rise to an inference that Juvenile touched the penis for the purpose of sexual arousal or gratification. In the other incident, Juvenile and Cousin were playing "doctor" or "hospital." Court finds it significant that Juvenile was 8 or 9 when this happened, as this is relevant to intent. Even though Juvenile told Cousin not to tell anyone, this only shows Juvenile knew the act was wrong, not an intent to cause sexual arousal or gratification. There was no evidence of Juvenile's behavioral development or knowledge of sexual subject matter. Juvenile discharged. (2) Although Juvenile did not raise issue on appeal, it was error for State to charge the two separate acts of sodomy in a single charge.

State v. Pullum, No. ED91159 (Mo. App. E.D. 4/14/09):
Where Defendant was charged with second degree sodomy, the trial court plainly erred in submitting the case to the jury as statutory rape, and there was a fatal variance between the information and the conviction.

Facts: The substitute information stated in its caption, "CNT:4 Statutory Rape – 2nd Degree (Class C Felony) RSMo. 566.034." However, the text of the information stated Defendant "committed the class C felony of statutory sodomy in the second degree" under Section566.064. Both the State and defense argued the case at trial as a statutory rape case, and the case was submitted to the jury on this basis.
Holding: The trial court plainly erred in convicting Defendant of statutory rape because this offense was not charged in the substitute information, resulting in a fatal variance between the information and conviction. Due process requires a defendant not be convicted of an offense not charged unless it is a lesser-included offense. Second degree sodomy is not a lesser-included offense of statutory rape. Statutory rape requires penetration of the female sex organ by the male sex organ, Sec. 566.034, whereas statutory sodomy excludes such penetration. Secs. 566.010(1) and 566.064. Although the caption of the substitute information identifies the Count as charging statutory rape, the caption is not part of the charge. Conviction reversed.

Elverum v. State, No. ED88496 (Mo. App., E.D. 9/18/07):
(1) Even though Movant absconded from probation, court exercises its discretion not to apply "escape rule" due to the "central issues" of this case; (2) plea court failed to ensure Movant understood the range of punishment by failing to advise him of maximum penalty and that his sentences could run consecutively; (3) Movant cannot raise a factual basis or sufficiency of information claim in Rule 24.035 appeal where those claims were not included in the Amended 24.035 Motion, but Movant could bring those via writ of habeas corpus; and (4) group guilty pleas with multiple defendants pleading guilty at once make confusing records and should be discontinued.
Facts: Movant pleaded guilty to four counts of first degree property damage, Section 569.100, and was placed on probation. After he absconded from probation, probation was later revoked and he was sentenced to four consecutive terms of four years, for 16 years. Also, on appeal, he claimed for the first time that he could not be charged or convicted of Class D felonies because the statute requires damage of more than $750 for a Class D felony, but Movant was only charged and the factual basis showed that the damage only "exceeded $500."
Holding: Rule 24.02(b) requires the court to inform defendants of the maximum possible penalty. Here, the court told Movant before his plea that "the range was up to four years" but never told him whether the range was four years on each count, or four years total. Even though the State had recommended 10 years, this does not show that Movant knew he could receive up to 16 years. His attorney's statement at sentencing that Movant could receive 16 years does not cure the error either, because this took place at sentencing, two month after Movant pleaded guilty. Movant cannot raise for the first time on appeal claims that he could not be convicted for the Class D felony because the evidence did not show damage above $750. These claims were not included in the Amended 24.035 Motion. The claim about the information should have been raised on direct appeal; the factual basis claim in the 24.035 motion. However, Movant can raise these in a writ of habeas corpus.

Griffin v. State, 185 S.W.3d 763 (Mo. App., E.D. 2006):

(1) Information charging Defendant/Movant with assault of law enforcement officer first degree was defective because did not contain essential element of "serious" physical injury; and (2) Defendant/Movant was entitled to evidentiary hearing in Rule 24.035 case that his plea counsel was ineffective in failing to advise Defendant/Movant that "serious" physical injury was required.

Facts: Movant pleaded guilty in an *Alford* plea to assault of a law enforcement officer first degree, Section 565.081. The information charging Movant did not allege "serious" physical injury, only "physical injury." Movant filed a Rule 24.035 motion alleging counsel was ineffective in failing to advise Movant of the difference between "serious" physical injury and "physical injury," and that Movant would not have pleaded guilty had he known the difference.

Holding: "Serious" physical injury is a necessary element of assault of a law enforcement officer first degree under the Missouri Approved Criminal Charges and Section 565.081. The information was defective in that it did not contain the element of "serious" physical injury. Moreover, this defect was not corrected by the prosecutor's recitation of facts at the guilty plea. The prosecutor only used the term "harm" to describe what Movant had done to the officer. The prosecutor never said Movant had committed "serious" physical injury. Movant could have reasonably believed that he could be convicted at a trial only on a finding of "physical injury," which was incorrect. Movant is entitled to an evidentiary hearing on whether counsel was ineffective in failing to advise Movant of the difference between "serious" physical injury and "physical injury."

State v. Smith, No. SD30150 (Mo. App. S.D. 12/8/10):

Where information charged Defendant with attempted first degree statutory rape for sending text messages to a 14 year old to encourage sex with him, but the jury instruction instructed jurors that victim had to be "less than 14," this was a fatal variance.

Facts: Defendant was charged by information with attempted first degree statutory rape, Secs. 564.011 and 566.032, for sending text messages to a 14 year old to encourage her to have sex with him. The jury instruction submitted stated that a person commits first degree statutory rape "when he has sexual intercourse with a person who is less than 14 years old." Defendant was found guilty.

Holding: Under Secs. 566.032.1 and 564.011.1, attempted first degree statutory rape occurs when a person takes a substantial step towards having "sexual intercourse with another person who is less than 14 years old." Here, Defendant sent non-sexual messages to an actual person under 14, but sexual messages were sent only to an undercover cop, who posed as a 14 year old. Defendant could not be convicted for sending non-sexual messages to the actual person under 14. Defendant believed the sexual messages with the undercover cop were going to a person who was 14. Therefore, Defendant could not have committed attempted first degree statutory rape because he wasn't texting a person he believed to be less than 14 with sexual messages. There is a fatal variance here between the information and instruction. However, the remedy is to enter a conviction for the lesser offense of attempted statutory rape in the second degree (which requires victim be less than 17 and Defendant 21 or older) and remand for resentencing.

State v. Crump, No. 27901 (Mo. App., S.D. 5/30/07):
Where the information which charged the offense did not contain an affidavit of probable cause sufficiently setting forth probable cause as required by Rule 21.04, the Defendant's motion to dismiss should have been sustained.
Facts: Defendant owned an adult video store. Police bought adult movies from the store. Defendant was charged with promoting obscenity, Section 573.030. He filed a motion to dismiss, claiming the information was defective under Rule 21.04 in that the probable cause statement attached to it did not describe the content of the movies.
Holding: Rules 21.02 and 21.04 require an affidavit of probable cause be attached to an information, and the affidavit must "support a finding of probable cause to believe a crime was committed." Here, the affidavit did not contain any facts about the contents of the movies at issue, and thus, was insufficient to establish probable cause. Conviction reversed and remanded.

In the Interest of T.S.G. v. Juvenile Officer, No. WD71641 (Mo. App. W.D. 9/28/10):
(1) Where Juvenile was charged with a sex offense but was adjudicated of a status offense of behavior injurious to her welfare, this violated due process because it was an offense not charged; and (2) even though Juvenile's supervision by Juvenile Court had expired, where her conviction involved sexual conduct that could have adverse consequences such as failure to register as a sex offender, an exception to mootness applies on appeal, because Juvenile could be subject to significant collateral consequences if not allowed to appeal.
Facts: Juvenile was charged under Sec. 211.031.1(3) for violating state law in that she allowed minors to touch her breasts. The trial court found that Juvenile Officer failed to prove this offense because there was no proof that this was done for sexual gratification, but the trial court "amended the petition to conform to the evidence" and found Juvenile committed a status offense under Sec. 211.031.1(2)(d) injurious to her welfare. Juvenile appealed. Meanwhile, the trial court discharged Juvenile from court supervision.
Holding: As an initial matter, the appellate court must determine if this appeal is moot because Juvenile has been discharged from supervision. One exception to mootness is where a party will be subjected to significant collateral consequences if their appeal is not allowed to proceed. Here, Juvenile's offense was sexual in nature, and she could be subjected to significant collateral consequences such as sex offender registration. Therefore, appellate court will decide appeal. On the merits, the petition charging Juvenile failed to allege the status offense and therefore, failed to provide notice of the charges against her, which violated due process and a fair trial. The status offense was not a lesser-included offense of the delinquency offense. This court has addressed prior attempts to circumvent the rights of juveniles for their supposed greater good. These cases revolve around the theme of charging juveniles with one offense, an inability to convict, and then convicting of another offense in order to get them into rehabilitation. These attempts have been rejected. Juvenile discharged.

State v. Hicks, No. WD66795 (Mo. App., W.D. 5/15/07):
(1) Where the State orally amended a felony complaint to charge a misdemeanor, but the record did not show that the oral amendment contained the information required by Rule 23.01, Defendant was not properly charged and Defendant's conviction must be vacated;

and (2) proper procedure to litigate this issue was direct appeal, not Rule 24.035, 29.07(d) or habeas corpus.
Facts: Defendant was originally charged by felony complaint with the Class C felony of assault of a law enforcement officer. When Defendant appeared *pro se* for arraignment, the State orally amended the charge to a misdemeanor and Defendant pleaded guilty. Defendant then appealed, claiming he was not properly charged.
Holding: (1) Defendants cannot be convicted of an offense not charged in an information or indictment. A claim that an information or indictment is not sufficient can be raised for the first time on appeal. Rule 23.01 requires an information be in writing, signed by the prosecutor, and contain the defendant's name, the date and place of the offense charged, the statute violated, the penalty, and the degree of the offense charged. No charging instrument complying with Rule 23.01 was ever filed in this case. Although oral amendments of informations have sometimes been upheld, here the record is devoid of any indication whether the information charged the offense for which Defendant was convicted. Since double jeopardy would not prevent Defendant from being recharged under the facts here, conviction vacated and remanded for further proceedings. (2) Defendant correctly raised this issue on direct appeal. Rule 24.035 would not apply because Defendant was not convicted of a felony. Rule 29.07(d) would not apply because this only applies in extraordinary circumstances were defendants were misled into pleading guilty by fraud, mistake, misapprehension, coercion, fear or false hopes, and their pleas were not voluntary and intelligent. Habeas corpus would not apply because Defendant is not incarcerated.

*** U.S. v. Resendiz-Ponce, 80 Crim. L. Rep. 339, ___ U.S. ___ (2007):**
Holding: An indictment charging Defendant with an attempt crime need not allege a particular overt act constituting a substantial step toward the crime.

U.S. v. Kingrea, 2009 WL 1482062 (4th Cir. 2009):
Holding: Indictment charging conspiracy based on predicate offense of "animal fighting venture" was invalid under the 5th Amendment because it omitted an element of the predicate offense, i.e., exhibiting "an animal in" such a venture.

In re Hajazi, 86 Crim. L. Rep. 350, 2009 WL 4723277 (7th Cir. 12/11/09):
Holding: (1) Alien Defendant who resides abroad has no obligation to appear in person before U.S. district judge in order to challenge the validity of federal indictment; (2) Appellate Court issues writ of mandamus to resolve issue since no "usual procedure" would work to resolve it since Defendant was under no obligation to appear.

U.S. v. Graham, 85 Crim. L. Rep. 575 (8th Cir. 7/28/09):
Holding: An indictment charging violation of Indian Major Crimes Act, 18 USC 1153, is insufficient if it does not expressly allege Defendant's status as an Indian.

U.S. v. Arias-Ordonez, 2010 WL 761088 (9th Cir. 2010):
Holding: Valid reinstatements of an invalid removal order provide no independent basis for a charge of reentry after removal.

U.S. v. Lopez-Velasquez, 2009 WL 1758730 (9th Cir. 2009):
Holding: Where judge in prior proceeding failed to advise Defendant of his right to appeal a prior deportation, Defendant's waiver of his right to appeal was invalid and this warranted dismissal of a subsequent indictment for illegal reentry into U.S.

Gautt v. Lewis, 2007 WL 1515123 (9th Cir. 2007):
Holding: State's failure to inform Defendant pretrial that he was subject to enhanced sentencing violated 6th Amendment right to be informed of charges, where Defendant would have defended differently had he known of the more serious enhancement.

U.S. v. Young, 2010 WL 938784 (D. Me. 2010):
Holding: In considering motion to dismiss indictment, court can only consider allegations in indictment and not Gov't attached description of facts.

U.S. v. Bergrin, 2010 WL 1574196 (D.N.J. 2010):
Holding: Indictment alleging disconnected street crimes and white collar frauds at different times failed to allege "pattern of racketeering" to violate RICO.

State v. Trautloff, 2009 WL 3234119 (Kan. 2009):
Holding: Where State charged Defendant only with "displaying" child pornography, the State was required to stick with this theory in jury instructions and the instructions could not expand the scope of how Defendant committed the offense.

State v. Gutweiler, 83 Crim. L. Rep. 62 (La. 4/8/08):
Holding: Dismissal of indictment was required where prosecutor violated grand jury secrecy rules by releasing transcripts, but witnesses could still testify at new grand jury or trial.

People v. Lafler, 2009 WL 774346 (N.Y. 2009):
Holding: Where indictment charged Defendant in a single count over an 8-month period of abuse by many different pleaded methods (including hitting with a fist, "and/or" baseball bat, "and/or" frying pan, "and/or" hammer, and many others), the indictment was improperly duplicitous because it was impossible to determine from the alleged acts a particular act the jury could be unanimous on.

State v. Colon, 83 Crim. L. Rep. 55 (Ohio 4/9/08):
Holding: Under Ohio Constitution, omitting the required mens rea from an indictment is structural error that is not waived by failure to object at trial.

State v. Ferrante, 84 Crim. L. Rep. 169 (Tenn. 10/28/08):
Holding: Where complaint was void at its inception, it did not toll the statute of limitations even though Defendant had appeared in court on the complaint.

State v. Loveless, 2010 WL 1727805 (Utah 2010):
Holding: Where State charged two crimes in the alternative in a single count, State could not prevent Defendant from entering plea to the lesser charge.

People v. Determan, 2009 WL 3402467 (Ill. App. 2009):
Holding: Under Non-Support Act, charges were dismissed because a verified complaint alleging failure to pay child support had to be filed with trial court, not prosecutor's office.

State v. Gutweiler, 2006 WL 2785836 (La. Ct. App. 2006):
Holding: Indictment must be quashed where prosecutor violated grand jury secrecy by providing the State's arson expert and investigator with copies of parts of the grand jury testimony.

State v. Rodriguez, 2009 WL 2762257 (N.M. Ct. App. 2009):
Holding: Where Defendant was originally bound over on a misdemeanor that was then recharged by information as a felony, this violated due process by subjecting Defendant to criminal prosecution without probable cause since the offense had to be in the bind-over order.

People v. Colletti, 2010 WL 2106974 (N.Y. App. Div. 2010):
Holding: Where indictment specified a particular criminal enterprise, gov't had to prove that Defendant's actions fell within that enterprise.

People v. Archie, 2010 WL 2134107 (N.Y. Sup. 2010):
Holding: Indictment should be dismissed where prosecutor delayed in getting exculpatory witnesses for Defendant requested by grand jury, even though prosecutor technically complied with grand jury statute.

People v. Thompson, 2010 WL 1999523 (N.Y. City Crim. Ct. 2010):
Holding: Information charging harassment was insufficient where it failed to allege that Defendant made some communication with the victim, even though information alleged Defendant's repeated phone calls caused victim to become alarmed.

People v. Martinez, 905 N.Y.S.2d 847 (City Crim. Ct. 2010):
Holding: Disorderly conduct summons was insufficient where it only stated conclusory facts and did not allege any disturbance of the peace or intent to disturb peace.

People v. James, 2010 WL 1911349 (N.Y. City Crim. Ct. 2010):
Holding: Given a statute specifically addressing trespassing on public housing property, Defendant could only be charged under that statute and not under general trespassing statute.

People v. Farley, 2009 WL 1741841 (N.Y. County Ct. 2009):
Holding: Where prosecutor failed to ascertain the effect on grand jurors of another juror saying he had previously arrested Defendant and of a second juror who knew Defendant and his mother, the indictment had to be dismissed because the grand jurors may have been biased.

People v. Garcia, 2008 WL 4427529 (N.Y. Sup. 2008):
Holding: Where officer's statement in a complaint alleging trespassing was hearsay, the charging document was defective and did not charge an offense.

Ineffective Assistance Of Counsel

Vaca v. State, No. SC90554 (Mo. banc 6/15/10):
Holding: *Where (1) defense counsel retained a mental health expert for guilt phase but did not use expert in guilt phase and (2) guilt-phase jury inquired about Defendant's mental health, counsel was ineffective in failing to consider calling expert in separate penalty phase.*
Facts: Defendant was charged with various robberies. Prior to trial, defense counsel hired Psychologist to evaluate Defendant. Psychologist found that Defendant suffered from schizophrenia. The trial was a bifurcated trial under Sec. 577.036 RSMo. Supp. 2008. The guilt phase defense was ultimately actual innocence based on misidentification of Defendant. During guilt phase deliberations, the jury wrote notes asking about Defendant's mental health, but found Defendant guilty. At sentencing phase, counsel called Defendant's parents, but did not call Psychologist. After Defendant received a life sentence plus 102 years, Defendant (Movant) filed a 29.15 motion alleging counsel was ineffective at sentencing phase.
Holding: Counsel testified that this was his first bifurcated trial, and he did not consider whether to call Psychologist at sentencing. Counsel's failure to consider this was unreasonable when the jury had asked about Defendant's mental health. Reversed and remanded for new sentencing trial.

Gill v. State, No. SC89831 (Mo. banc 12/1/09):
Where the State presented good character evidence of Victim in penalty phase, counsel were ineffective in failing to discover and present computer hard drive evidence in possession of police which contained child pornography to rebut good character evidence.
Facts: Defendant was convicted of murder and sentenced to death. Before trial, the police seized Victim's computer hard drive and a police Officer wrote a report stating that the hard drive contained files with sexually explicit names. Defense counsel did not interview Officer or obtain the contents of the hard drive. At penalty phase, the State presented evidence of Victim's "good character." Jury sentenced Defendant to death. Co-Defendant's counsel obtained Victim's hard drive and in Co-Defendant's case, the State refrained from presenting "good character" evidence of Victim. Co-Defendant's jury sentenced him to life without parole.
Holding: Generally, neither the State nor defense can present "character evidence" of Victim in penalty phase. If the State attempts to introduce "good character" evidence in penalty phase, defense counsel has two options: (1) object to introduction of the evidence, and the trial court should sustain the objection or (2) present rebuttal evidence of character. Here, the defense counsel did neither. Despite having a police report stating that there were sexually explicit file names on Victim's computer, counsel neither interviewed Officer who wrote report or obtained Victim's computer hard drive. Had

counsel obtained the hard drive, they could have presented evidence that Victim collected child pornography to rebut evidence of Victim's "good character" or persuaded the State not to present the "good character" evidence. In Co-Defendant's trial, that defense counsel obtained the computer evidence, and as a result, the State did not present "good character" evidence in penalty phase, and Co-Defendant received life without parole. This shows Defendant's counsel were ineffective and Defendant was prejudiced.

Taylor v. State, No. SC88063 (Mo. banc 8/26/08):
(1) Brady violated where State failed to disclose impeachment evidence regarding State's jail-house snitch witness, including letters he wrote to the prosecutor, an interview by the State, and a post-trial letter from the prosecutor to another prosecutor seeking leniency; and (2) counsel ineffective in penalty phase in failing to present mental health records and testimony of family members regarding family and mental health history.
Facts: Defendant/Movant was charged with killing a fellow inmate of a prison. The defense was that Movant was not guilty by reason of mental disease. The State called a fellow inmate in rebuttal whose testimony indicated Movant was faking mental illness. During guilty phase deliberations, the jury asked to see mental health records of Movant, but they had not been admitted in evidence. Movant was convicted of first degree murder. In penalty phase, the defense presented a prison superintendent who testified that Movant would present minimal risk in prison in the future. Later, Movant filed a 29.15 motion alleging *Brady* violations and ineffective assistance of counsel.
Holding: (1) *Brady* requires the State to reveal impeachment material. Rule 25.03(A) requires the State, upon request, disclose written and recorded statements of witnesses it intends to call. Here, the State had received numerous letters from the jail-house snitch witness before trial, but destroyed many of them, rather than disclose them. The very fact of their destruction was favorable evidence that was required to be disclosed to the defense. Additionally, the prosecutor failed to reveal a memo of an interview of the jail-house snitch, because the prosecutor believed its disclosure might compromise a Highway Patrol investigation. However, the prosecutor did not seek in camera relief, and cannot make a purposeful decision to fail to disclose information. Finally, after trial, the prosecutor wrote a letter to another prosecutor seeking leniency for the jail-house snitch in another case. Even if there was no "deal" for the snitch's testimony, the fact that the prosecutor was considering writing such a letter at the time of trial, even if he did not make a final decision until hearing the testimony, was relevant impeachment evidence since the defense could have argued the snitch had incentive to testify favorably for the State. (2) Where the jury has convicted of first degree murder at a prison, it is not reasonable for defense counsel to only present mitigation that defendant is unlikely to commit other crimes in prison. Here, the jury asked to see mental health records. Although the records contained some harmful information, they also contained information that Movant had a long history of mental illness from age 7. Furthermore, family members were available to testify to his long mental health history and abusive background. It was unreasonable not to present this evidence.

Glass v. State, No. SC87852 (Mo. banc 7/6/07):
Death penalty counsel ineffective in penalty phase in failing to call teachers and experts who would have testified to Defendant's impaired intellectual functioning , and in failing to call probation officers who would have rebutted aggravating evidence regarding a prior conviction.
Facts: In capital penalty phase, counsel called ten mitigation witnesses who were family members, friends and employers of Defendant. Counsel failed to investigate and/or call various teachers, experts and probation officers.
Holding: Dr. Scherr, M.D., treated Defendant-Glass for meningitis when he was 23 months old. Dr. Scherr would have provided mitigating evidence by testifying about the long-term effects of meningitis on mental functioning. Although Glass' aunt testified at trial about his meningitis, the aunt was not a doctor and "didn't know" if the meningitis had any effect on Glass. The failure to call a doctor who would have testified about impaired intellectual functioning is prejudicial. Counsel also failed to call various teachers who would have testified about Glass' impaired intellectual functioning. And counsel failed to investigate and/or call a neuropsychologist, learning disability expert and toxicologist. The teachers, neuropsychologist and learning disability expert would have testified about impaired intellectual functioning. This can have powerful, inherent mitigating value. The State claims that Glass' learning deficits did not cause him to commit the murder, but evidence of impaired intellectual functioning is mitigating even without a nexus to the crime. The toxicologist would have testified to the statutory mitigating circumstances that Glass' ability to appreciate his conduct or conform to the requirements of law was substantially impaired, and he acted under extreme mental or emotional disturbance. Lastly, the State presented as aggravating evidence Glass' prior stealing conviction. Counsel has a duty to neutralize aggravating evidence. This could have been done by calling probation officers to testify that Glass was good on probation, and would have supported counsel's theory that the murder was "out of character" for Glass.

Anderson v. State, No. SC87060 (Mo. banc 6/30/06):
In death penalty case, (1) counsel unreasonably failed to object that Section 552.020.14 prohibited State doctor who did competency evaluation from testifying in guilt phase to statements Defendant//Movant made to him as evidence of guilt, but Defendant/Movant was not prejudiced; and (2) counsel ineffective in failing to strike juror who said on voir dire that he would automatically favor death and would put the burden on the defense to convince him otherwise.
Facts: (1) At death penalty trial, the State called as a rebuttal witness a doctor who conducted a competency evaluation of Defendant/Movant. The doctor testified, without objection, that Defendant/Movant told him that he did not have any psychiatric symptoms or brain damage. (2) During voir dire, a juror said that he would have to be convinced that a convicted Defendant was not deserving of the death penalty, that he would automatically favor death, and that the defense would have to put on evidence to convince him otherwise. Defense counsel did not move to strike the juror, and the juror served on the jury that sentenced Defendant/Movant to death. Movant filed a 29.15 motion.

Holding: (1) The doctor who testified in rebuttal did not evaluate Defendant/Movant for mental state at time of crime, but instead conducted a competency evaluation. Section 552.020.14 provides that: "No statement made by the accused in the course of any examination … and no information received by any examiner … in the course thereof … shall be admitted in evidence against the accused on the issue of guilt …." Here, the doctor testified that Movant said he did not have psychiatric symptoms and did not have brain damage. In closing argument, the State argued that Defendant/Movant told the doctor he didn't have the psychiatric symptoms that the defense experts claimed. Reasonable counsel should have objected to the doctor's testimony because it was prohibited by Section 552.020.14 and was used as evidence of guilt. However, Defendant/Movant was not prejudiced under the facts of this case because the doctor made clear he was not opining on Defendant/Movant's mental state at time of crime. (2) Failure to strike a juror who is predisposed toward death is ineffective. A competent defense counsel would not fail to strike such a juror. Here, the juror said that he would have to be convinced that a convicted Defendant was not deserving of the death penalty, that he would automatically favor death, and that the defense would have to put on evidence to convince him otherwise. Therefore, Defendant/Movant granted new penalty phase.

Dobbins v. State, 187 S.W.3d 865 (Mo. banc 2006):
Plea counsel ineffective for incorrectly advising Movant he would be eligible for early release under Section 558.046 upon completion of a detoxification and rehabilitation program.
Facts: Parties negotiated a plea involving a 10-year sentence. Movant rejected it and entered "open" plea of guilty based on counsel's advice that, whatever sentence he received, he would be eligible to petition for early release under Section 558.046 upon completion of a detoxification and rehabilitation program. Movant received an 18-year sentence, and later learned he was not eligible for early release because he was a "prior offender." Movant filed 24.035 action.
Holding: Counsel was ineffective in affirmatively advising Movant he could petition for early release. Section 558.046(3)(a) states that this statute does not apply to a person who is a "prior offender." Movant was prejudiced because he would not have rejected the 10-year plea offer if he had known he was not eligible for early release. "[T]he facts relating to [Movant's] understanding of the plea and his agreement no one promised him leniency for the plea are irrelevant. It was not the sentence to be imposed that concerned [Movant] – it was his eligibility for sentence reduction as to any sentence that was imposed."

Johnson v. State, No. ED93541 (Mo. App. E.D. 8/24/10):
Where the plea court told Movant he would receive credit for time spent on bond "by agreement of the State and defendant," but the DOC would not allow Movant to have such credit, Movant was denied effective assistance of counsel and his pleas were involuntary and unknowing because he pleaded guilty under the mistaken belief he would receive credit for time spent on bond.
Facts: Movant pleaded guilty to various offenses pursuant to a plea bargain. During sentencing, the court told Movant he would be granted credit for time spent on bond "by

agreement of the State and defendant." The written plea agreement, however, contained no mention of any credit for time spent on bond. After Movant was delivered to the DOC, he learned that DOC could not grant this credit. He filed a 24.035 motion.
Holding: Movant claims he was denied effective assistance of counsel because his plea counsel gave positive, incorrect information, on which he relied, that Movant would be granted credit for time spent on bond if he pleaded guilty. Movant claims this misadvice rendered his plea involuntary and unknowing. Where a movant claims his counsel affirmatively misinformed him of the consequences of pleading guilty, the test is whether there is a reasonable basis in the record for such a mistaken belief. Here, because the plea court told Movant he would receive credit for time spent on bond, Movant's mistaken belief was reasonable. Because his bond credit agreement cannot be honored under the law, his pleas were rendered involuntary. Remanded to allow withdrawal of pleas.

Legendre v. State, No. ED93866 (Mo. App. E.D. 8/24/10):
Movant was entitled to an evidentiary hearing on his claim that his plea counsel was ineffective because counsel misled him into believing that counsel had litigated a motion to suppress, but this was not true, because this claim was not refuted by the record.
Facts: Movant was charged with robbery. He ultimately pleaded guilty, and said at the plea that he was satisfied with counsel's services. Movant then filed a 24.035 motion. He alleged that plea counsel was ineffective for failing to file a motion to suppress, and that plea counsel had misled Movant into thinking that such a motion had been litigated. Movant alleged that he did not learn until he was delivered to the DOC that plea counsel never filed such a motion. The motion court denied this claim without a hearing.
Holding: A plea is not voluntary if it is the result of fraud or mistake. If Movant's claim is true that his counsel misled him into believing that a suppression motion had been litigated, then his plea was involuntary. Movant's claim is not refuted by the record. The motion court cannot determine the credibility of Movant's claim without having heard witnesses on it. Remanded for an evidentiary hearing.

Head v. State, No. ED93893 (Mo. App. E.D. 9/28/10):
Where Defendant-Movant was charged with a Class B felony but defense counsel told court at sentencing it was a Class A felony and court gave Defendant a higher sentence than recommended by State or defense, counsel was ineffective and sentence is vacated and remanded for resentencing.
Facts: Defendant was convicted of kidnapping at trial, which was a class B felony with a range of punishment of 5 to 15 years. At sentencing, defense counsel stated that Defendant had been convicted of a class A felony. The prosecutor attempted to correct that by saying "that's 5 to 15" but defense counsel said "It's charged as an A." Both the State and defense recommended a sentence of 10 years. The court imposed 12 years. The presumptive sentence for a B felony is 7 years. Defendant filed a 29.15 motion alleging his lawyer was ineffective in misinforming the court of the range of punishment.
Holding: The trial court sentenced Defendant-Movant on a materially false foundation created by defense counsel overstating the offense class. Even though Defendant's sentence remained within the B range, we cannot say that the judge still would have

imposed 12 years where the presumptive sentence was 7 and the maximum 15 rather than 30. Sentence vacated and remanded for resentencing.

White v. State, No. ED92081 (Mo. App. E.D. 8/11/09):
Where juror who served on jury of 12 said during voir dire that he could not be fair, defense counsel was ineffective in failing to strike juror.
Facts: During voir dire, juror said he could not be fair and didn't think he could follow the judge's instructions. Defense counsel failed to strike juror, who served on jury which convicted Defendant. Defense counsel in 29.15 case stated in an affidavit that the failure to move to strike juror was an oversight. However, motion court held that counsel's affidavit was not believable and that the evidence against Defendant was overwhelming.
Holding: Where trial counsel fails to strike a biased venireperson who serves as a juror, there is a presumption of prejudice. This presumption can be overcome if trial counsel states a reasonable trial strategy basis for not striking the juror, but here trial counsel did not do this. Furthermore, the prosecutor admitted that he, too, overlooked this juror. A reasonably competent counsel would have struck this juror.

State ex rel. Peete v. Moore, No. ED92522 (Mo. App., E.D. 4/7/09):
Where Attorney told Defendant he would file a direct appeal but failed to do so, Defendant was entitled to habeas corpus relief to allow filing of a direct appeal.
Facts: Defendant was convicted of various criminal offenses in 1997. Attorney told Defendant that Attorney would file a direct appeal, but never did. In 2008, Defendant filed a habeas corpus petition, but the motion court ruled that Defendant should have raised his claim in a Rule 29.15 motion and could not raise it in habeas.
Holding: A lawyer who fails to file a direct appeal denies effective assistance of counsel. While normally ineffectiveness claims must be raised in a 29.15 action, habeas corpus is available where the procedural default was caused by something external to the defense and prejudice resulted (i.e., "cause and prejudice"). The cause here is that Attorney abandoned Defendant by failing to file an appeal, despite telling Defendant he would appeal. The prejudice is Defendant was denied his right to appeal. Defendant is entitled to be resentenced, so that he can timely file a direct appeal.

State v. Bohlen, No. ED46436-01 (Mo. App. E.D. 3/24/09):
(1) Where Defendant was sentenced prior to January 1, 1996, a motion to recall the mandate is the proper procedure for raising ineffective assistance of appellate counsel; (2) where Defendant was convicted of two counts of robbery for forcibly stealing a wristwatch from the store manager and for forcibly stealing property of the store, conviction for both counts violated double jeopardy and counsel was ineffective in failing to appeal this; (3) even though Defendant did not object to convictions on double jeopardy grounds at trial, this could be raised on appeal because issue is jurisdictional.
Facts: In relevant part, Defendant was convicted for two counts of first degree robbery or forcibly stealing property of a jewelry store, and forcibly stealing a wristwatch owned by the store manager. Defendant filed a motion to recall mandate claiming appellate counsel was ineffective in failing to raise this as double jeopardy.
Holding: The State contends Defendant waived his double jeopardy claim by not raising it at trial. However, double jeopardy can be raised on appeal because the court was

without power to proceed against a defendant twice for the same offense. The prohibition against double jeopardy is to ensure that the punishment remains within limits established by the legislature. The essence of robbery is forcibly taking property; the ownership of the property is immaterial. It has repeatedly been held that only one robbery occurs where a defendant robs a store employee of the employee's property and the employer's (store's) property. Appellate counsel was ineffective in failing to raise this meritorious issue.

Lane v. State, No. SD30116 (Mo. App. S.D. 5/21/10):
Where Movant alleged that his guilty plea was rendered involuntary because his plea counsel was ineffective in misadvising him about his right to have his case dismissed under UMDDL, this properly stated a claim of ineffective counsel and Movant was entitled to an evidentiary hearing.
Facts: In 2007, Movant was charged with the crime in this case. Meanwhile, he was incarcerated in the DOC on another case. While incarcerated, he filed a request for disposition of his new charge within 180 days under the Uniform Mandatory Disposition of Detainers Law, Sec. 217.450. More than 180 days later, Movant pleaded guilty. Subsequently, he filed a Rule 24.035 motion alleging his plea was involuntary because counsel had been ineffective in misadvising Movant about his UMDDL motion. The motion court denied the claim without a hearing.
Holding: The motion court relied on cases holding that defendants waive a claim under UMDDL by pleading guilty. However, Movant's claim here is ineffective assistance of counsel, which is a different issue. The cases relied on by the motion court did not address ineffective assistance of counsel. Movant's claim is that his plea was rendered unknowing and involuntary because his counsel misinformed him of the effect of his guilty plea and his rights under UMDDL. Movant has alleged facts which would have shown he was entitled to have his case dismissed under UMDDL but for counsel's misadvice. On the other hand, it is possible Movant and counsel had some strategy reason for not pursuing the UMDDL claim. This is impossible to determine without a hearing. Movant has pleaded facts warranting an evidentiary hearing.

In re Wolf v. Steele, No. SD29850 (Mo. App. S.D. 7/17/09):
Where trial counsel told Defendant she would file a notice of appeal after trial but failed to do so and two years elapsed before Defendant discovered this, Defendant does have a remedy in habeas corpus because he was denied effective assistance of appellate counsel on direct appeal.
Facts: In 2007, Defendant was tried and convicted. Counsel told Defendant she would file a notice of appeal and that the appeal would take two years. However, trial counsel never filed the notice of appeal. In January 2009, having heard nothing about his appeal, Defendant asked about it and learned it had not been filed. Defendant filed a habeas corpus action alleging ineffective trial counsel for failure to file notice of appeal.
Holding: The State claims Defendant is barred by *Gehrke v. State*, 280 S.W.3d 54 (Mo. banc 2009), which held that postconviction counsel's failure to file notice of appeal in postconviction case did not have a remedy after the one year for late notice of appeal under Rule 30.03 expired. However, *Gehrke* is distinguishable because there is no constitutional right to effective postconviction counsel. The instant case is a direct appeal

where there is a constitutional right to effective direct appeal counsel. Counsel's failure to timely file notice of appeal was ineffective. Habeas granted, with remedy to remand for resentencing to same sentence so Defendant can file notice of appeal thereafter.

Bullock v. State, No. 28258 (Mo. App., S.D. 10/22/07):
Holding: When raising claim of ineffective appellate counsel, merely presenting as evidence counsel's brief on appeal and showing that an issue was not raised does not overcome a presumption that appellate counsel had a strategic reason for not raising the claim on direct appeal.

Editor's Note by Greg Mermelstein: In order to raise ineffective appellate counsel, PCR counsel need to be sure to call appellate counsel at a hearing and question counsel why they didn't raise issues.

Cole v. State, No. 27954 (Mo. App., S.D. 5/31/07):
Where 29.15 Movant alleged ineffective appellate counsel but failed to call appellate counsel to testify at the 29.15 hearing as to why appellate counsel failed to raise issue on appeal, Movant abandoned the claim.
Facts: 29.15 Movant alleged appellate counsel failed to raise issue on appeal. At the 29.15 hearing, Movant did not call appellate counsel to testify. Movant only introduced counsel's brief to show counsel had not raised the issue.
Holding: Movant bore the burden of proof to show appellate counsel was ineffective. Counsel was not obligated to raise every issue. Counsel was permitted to winnow out non-frivolous issues in favor of other arguments. All Movant showed at his hearing was that counsel failed to raise an issue on appeal. Counsel was not called to testify at the hearing, and Movant presented no other evidence that counsel's decision not to raise the issue was unreasonable. Therefore, Movant abandoned his claim. Movant's failure to present evidence at a hearing in support of the claim constituted abandonment.

Eskridge v. State, No. 27428 (Mo. App., S.D. 6/20/06):
Guilty plea counsel ineffective in failing to put on record that plea agreement called for sentences were to run concurrently, and in failing to object when court imposed consecutive sentences.
Facts: State and defense counsel agreed to a plea deal that Movant would receive concurrent sentences. Movant pleaded guilty and was sentenced at a later time because she failed to appear for sentencing. The court sentenced Movant to consecutive sentences. Movant filed a 24.035 motion claiming counsel was ineffective in failing to put on the record that the agreement was for concurrent sentences, and in failing to object to the consecutive sentences.
Holding: The 24.035 evidence in the form of counsel's memos and a letter from the prosecutor showed that the plea agreement called for concurrent sentences. Counsel was ineffective in failing to assure that the plea agreement was correctly related to the sentencing court, and in failing to object to the consecutive sentences. Movant's convictions and sentences vacated.

Cherco v. State, No. WD70071 (Mo. App. W.D. 2/9/10):
Holding: Rule 24.035 movants may claim that counsel was ineffective at sentencing without seeking vacation of the guilty plea; prejudice test for counsel's failure to call character witnesses is whether there is a reasonable probability the sentence would have been lower.

Frye v. State, No. WD70504 (Mo. App. W.D. 3/23/10):
(1) Where defense counsel failed to communicate a favorable plea offer to Defendant-Movant, this was ineffective assistance of counsel where Movant would have accepted the plea offer; (2) however, although appellate court vacates conviction and remands, appellate court has no authority to force State to re-offer the noncommunicated plea offer.
Facts: Movant was charged with felony driving while revoked. The State made a plea offer to defense counsel for misdemeanor driving while revoked. Defense counsel, however, failed to communicate the offer before the time expired, and Movant never knew about it until after his later guilty plea and sentencing. Movant ultimately pleaded guilty to felony driving while revoked in an open plea and received three years.
Holding: Failure to communicate a plea offer constitutes ineffective assistance of counsel, and violates Rule 4-1.4 that a lawyer promptly inform clients of plea offers. The motion court denied relief on grounds that counsel could not recall if he communicated the plea offer, and even if he failed to do so, Movant was at fault for not staying in touch with counsel. However, the record does not support this finding. Counsel testified he was not sure if he communicated the plea offer. Even though Movant did not come to court for some court appearances, this was after the plea offer had expired. Further, counsel made no attempt to mail Movant a letter about the plea offer, and never testified that he tried to telephone Movant about the offer. Under these circumstances, the record does not support that Movant was at fault or that counsel communicated the offer. The State contends that Movant cannot show prejudice because he cannot show that "but for" trial counsel's failure to communicate the offer, he would have "insisted on proceeding to trial." However, the "insisted on proceeding to trial" misreads the prejudice requirement in this situation. Here, had Defendant known of the plea offer, he would not have entered an open plea, but would have accepted the offer; this is the correct allegation of prejudice here. The last issue here is what remedy a court can impose. While the appropriate remedy might be to afford Movant the opportunity to plead to the misdemeanor charge -- and this remedy is used by Texas courts -- the Missouri appellate court is not empowered to order the State to reduce the charge against Movant. All the Missouri court can do is vacate the conviction and sentence and remand. Even though this may leave Movant with only the result of pleading again to the felony or going to trial on the felony, this is the only remedy the appellate court can impose. Conviction vacated and remanded.

Coleman v. State, No. WD68014 (Mo. App., W.D. 5/13/08):
Trial counsel was ineffective in failing to adduce evidence of Defendant's pre-existing injury which made it impossible for him to run, and which would have refuted State's inference that Defendant did not run from police because his foot was injured in the charged burglary.

Facts: A witness saw two men burglarizing a house, and called police. When police arrived, the men ran. Police arrested the men and Defendant, who was also walking in the neighborhood. The witness could not identify any of the men as the burglars, but said their clothing was similar. Defendant claimed he was visiting a woman in the subdivision and was walking to a bus stop. Defendant denied having anything to do with a burglary. A police officer testified at trial that Defendant "could not" run from police, and the jury was left to infer that Defendant "could not" run because he had injured his foot in kicking in the door to the burglary. Defendant claimed counsel was ineffective in failing to present evidence that Defendant had a pre-existing foot injury that made it impossible for him to run.
Holding: It was not reasonable for counsel to fail to present evidence of Defendant's pre-existing foot injury, because this left the false impression with jurors that Defendant did not run from police because he had injured his foot in kicking in the door. A reasonable counsel would have foreseen that the State would draw this inference, and prepared to rebut it. Defendant was prejudiced because the lack of such evidence may have caused the jury to reject Defendant's defense that he was not involved in the burglary and was walking to a bus stop.

Editor's Note by Greg Mermelstein: There was a second claim of ineffectiveness which the Court of Appeals rejected, but which may have been important to the outcome here. Defendant also claimed counsel was ineffective in not calling the co-defendants to testify that they did not know Defendant and he was not involved in the burglary. Counsel had not called the co-defendants because their attorneys had said they would invoke their 5th Amendment rights. However, in the PCR case, the co-defendants testified that they did not know Defendant; that he was not involved in the burglary; and that they would have testified to this at trial. The motion court found this testimony incredible, and the Court of Appeals found it was bound by this, but "note[d] that testimony from [codefendants] that they did not know [Defendant] would not have violated their rights against self-incrimination," thus suggesting that they could have been called to testify to this.

Schafer v. State, No. WD68721 (Mo. App., W.D. 5/6/08):
Even though Movant pleaded guilty to forgery, where he alleged that his guilty plea was involuntary because his counsel was ineffective in failing to seek funding to obtain a handwriting analysis to show that Movant had not committed the offense, this stated a viable claim for relief and an evidentiary hearing should have been granted.
Facts: Movant pleaded guilty to forgery, Sec. 570.090. At the plea, the State said its evidence would show that victim's house was burglarized, checks were taken, and then eight days later, Movant passed one of victim's checks at a store. Movant filed a 24.035 motion, claiming his private counsel had failed to seek funding under *Ake v. Oklahoma*, 470 U.S. 68 (1985) to obtain a handwriting analysis, which would have shown that Movant did not write the check. The motion court denied the claim without a hearing, finding that the record refuted Movant's claim that his plea was coerced.
Holding: A guilty plea renders a claim of ineffective assistance of counsel irrelevant except to the extent that it affects the voluntariness and understanding of the plea. The allegation that Movant was coerced into pleading guilty is not waived because he entered a guilty plea. Guilty pleas can be rendered involuntary by counsel's failure to prepare.

Here, Movant has alleged that his counsel failed to investigate a handwriting expert due to lack of funds; that his counsel failed to seek funding under *Ake*; that an expert would have found that Movant did not write the check; and that Movant would not have pleaded guilty and would have insisted on proceeding to trial, but for counsel's inaction. This states a valid claim for relief. Furthermore, this is not refuted by Movant's guilty plea, because the factual basis for the plea is questionable, in that the State had to show that Movant was aware the checks were forged when he attempted to cash them, but the State's stated evidence only questionably shows this. Movant did not admit knowing this as part of his plea, but merely agreed with the State's statement of the evidence. Case remanded for evidentiary hearing.

Williams v. State, No. WD67306 (Mo. App., W.D. 3/4/08):
(1) Retained trial counsel ineffective in failing to properly prove Defendant's indigency so that Defendant could receive mental exam under "Ake;" (2) Indigent Defendant with retained counsel is entitled to mental examiner who will assist the defense under "Ake," and this assistance is outside Chapter 552. Thus, a Chapter 552 evaluation does not satisfy "Ake."
Facts: Defendant retained private counsel but had no funds to pay for a mental exam. Private counsel filed various motions seeking a mental health expert to assist the defense under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Trial counsel had Defendant testify he was indigent. The trial court denied an expert for the defense, and on direct appeal, the Court of Appeals held trial counsel had not properly proven that Defendant was indigent. Defendant/Movant filed a Rule 29.15 motion claiming counsel was ineffective in not properly proving his indigence.
Holding: (1) Counsel was ineffective in not properly proving Defendant's indigence. The testimony that Defendant was indigent was not sufficient. *State v. Huchting*, 927 S.W.2d 411, 419 (Mo. App., E.D. 1996) had held that counsel must file an affidavit of indigency under Sec. 600.086.3 to prove indigence. If counsel had used the correct method, Defendant would have been found indigent, and would have been provided with an expert to assist the defense. (2) Even though the trial court ordered that Defendant have an evaluation under Chapter 552, that did not satisfy *Ake*. *Ake* requires that Defendant have access to a competent mental health expert who will evaluate Defendant and assist in preparation of a defense. Secs. 552.020 and 552.030 do not provide the type of assistance envisioned by *Ake*. Under 552, the role of the expert is to evaluate Defendant and provide a report to the court and parties. Chapter 552 does not provide an expert to assist in preparation of a defense. *Ake* does not require that Defendant receive funds for an expert or be able to pick the expert, however. The court may appoint an expert of its choosing to provide the defense under *Ake*.

Taylor v. State, No. WD66345 (Mo. App., W.D. 7/24/07):
Appellate counsel ineffective in failing to appeal motion to suppress.
Facts: Movant-Defendant was walking in middle of street. Police stopped him for jaywalking. An officer knew Defendant had possessed drugs before, and had searched Defendant before, but never found any weapons. Officer told Defendant he would frisk him. Defendant then said he had a crack pipe. Defendant was arrested for possession of the crack pipe. Crack was then found on Defendant in an "inventory search" at the police

station. Trial counsel filed a motion to suppress and preserved this at trial, on grounds that police lacked reasonable suspicion to frisk Defendant. The trial court overruled the motion to suppress, and Defendant was convicted. Appellate counsel did not appeal this issue in the direct appeal. Defendant later filed a 29.15 motion.
Holding: Because the stop for the traffic violation and the frisk were one and the same, the justification for the frisk must have been apparent to police before they frisked Defendant. The officers already had probable cause for the jaywalking citation. There was no need for further investigation of Defendant. There cannot be a reason to frisk an individual for weapons unless there is reasonable suspicion of a more serious violation, or concern about safety. There was no evidence Defendant was suspected of having weapons. A person's prior drug involvement is not by itself reasonable suspicion to search someone. Moreover, the officers here had searched Defendant before and never found weapons. Appellate counsel evidently believed the search was valid under *Terry*. A traffic stop is not investigative, however. It is a form of arrest based on probable cause that a traffic violation has been violated. Defendant had no defense other than the motion to suppress. Without it, he might as well have pleaded guilty. It was unreasonable for appellate counsel not to appeal this issue, since it would have been successful if raised on appeal.

State v. Stiers, No. WD65559 (Mo. App., W.D. 6/19/07):
Counsel ineffective in failing to request self-defense instruction.
Facts: Movant claimed that girlfriend broke into his house at night, and was going through his wallet and briefcase. Movant confronted girlfriend, and she pulled out a knife. Movant fought with girlfriend for several minutes to disarm her. Girlfriend claimed that she went to Movant's house and entered when nobody came to the door, and Movant began beating her, tied her up and sodomized her. The jury acquitted Movant of sodomy, but convicted of felonious restraint. Movant later filed Rule 29.15 motion alleging counsel was ineffective in not requesting a self-defense instruction. Counsel believed the instruction was not warranted because the State's evidence indicated that Movant restrained girlfriend for several hours.
Holding: This is not a case where counsel did not request an instruction as a matter of strategy; rather, counsel believed the instruction was not available as a matter of law. However, self-defense may be justification for use of physical force when a person reasonably believes such force is needed to defend himself from what that person believes to be the use or imminent use of unlawful force of another. This extends to use of physical restraint provided the actor takes all reasonable measures to end the restraint as soon as reasonable to do so. In determining whether to give an instruction, the evidence must be viewed in the light most favorable to defendant. Viewing the evidence favorably to Movant, the evidence shows he acted in self-defense. Movant had two available defenses: (1) convince the jury he did not use deadly force, or (2) convince the jury he used deadly force in self-defense. These defenses are not inconsistent. A self-defense instruction must be given where there is substantial evidence to support it, even if it conflicts with a defendant's testimony. Here, a competent attorney would have requested the instruction.

James v. State, No. WD66774 (Mo. App., W.D. 4/24/07):
Counsel ineffective in failing to strike venireperson who said she would draw adverse inference from Movant's failure to testify.
Facts: Venireperson said on voir dire "I would have a question in my mind" why Movant/Defendant did not testify at trial. Counsel did not move to strike venireperson, and she served on jury. Movant filed a 29.15 motion alleging counsel was ineffective for failing to strike this juror.
Holding: Trial counsel testified he could not remember why he did not strike juror. Counsel's inability to remember the reason for not striking juror does not support a finding that counsel's decision was a matter of trial strategy, and in fact, undermines that finding. A reasonably competent attorney would have struck juror for cause because juror would draw an adverse inference from Movant/Defendant's failure to testify.

Pettis v. State, No. WD65972 (Mo. App., W.D. 1/30/07):
Plea counsel was ineffective for not informing sentencing court that Defendant/Movant would become ineligible for parole if he was given a consecutive four-year sentence to a life sentence he was already serving, where the court had asked what impact its sentence would have on Movant.
Facts: Movant pleaded guilty to possession of a controlled substance in a correctional institution. Movant had been serving a life sentence for many years already, and had a parole (release) date soon. The plea agreement allowed the plea court to determine if Movant's new sentence would be concurrent or consecutive to the life sentence. The plea court asked defense counsel what impact a consecutive sentence would have on the scheduled parole (release) date. Defense counsel said it would "push back" that date, but "who knows" when DOC would release Defendant (Movant). In fact, unbeknownst to defense counsel, DOC has a regulation that any consecutive sentence to a parolable life sentence for crimes after 1994 shall make the offenders ineligible for parole ever. Thus, the impact of a consecutive sentence was to turn Defendant's (Movant's) sentence into a life without parole sentence. The plea court imposed a consecutive sentence of four years. Defendant/Movant filed a 24.035 motion claiming counsel was ineffective in misinforming the plea court about the impact of a consecutive sentence.
Holding: Defense counsel at the plea affirmatively misadvised the plea court as to the impact of a consecutive sentence on Movant. Rather than merely "push back" his parole (release) date, the impact was to make Movant ineligible for parole ever. The prejudice is obvious. The court sentenced Movant under the mistaken belief that its sentence would "push back" parole-eligibility, with no inkling that it would be entirely extinguished by a consecutive sentence. The court was obviously taking leniency into account, because the court sentenced Movant to a lower term of years than the prosecutor was requesting, but the impact was to turn Movant's sentence into life without parole. Sentence is vacated and remanded for resentencing.

Gant v. State, No. WD65810 (Mo. App., W.D. 1/23/07):
Defense counsel rendered ineffective assistance in eliciting on cross-examination at a suppression hearing evidence which helped State establish probable cause for arrest.
Facts: Staff at a motel reported to police that they found a gun and crack in a motel room. Police set up surveillance of the room. Police knew the room was registered to

someone other than Movant. Police observed Movant approach the room with a key, and tackled him and arrested him. Police searched him incident to arrest and found crack on his person. Movant filed a motion to suppress, claiming his arrest and search were without probable cause. At the suppression hearing, the State presented the foregoing evidence, but then defense counsel elicited harmful facts on cross-examination of witnesses, including that police had a prior description of Movant and information connecting him to other drug activity. The suppression motion was overruled and affirmed on direct appeal, relying on facts which defense counsel had brought out on cross-examination. Movant filed a 29.15 motion, claiming defense counsel was ineffective in bringing out facts on cross-examination which allowed the State to show probable cause.

Holding: Without defense counsel's cross-examination, there was a reasonable probability that evidence gained through Movant's arrest would have been suppressed. Counsel's elicitation of evidence that supported the State's case constitutes conduct falling below that of a reasonably competent attorney. "We are sufficiently convinced that [Movant] still suffered prejudice even though the State had additional opportunity to admit further evidence to show probable cause [if it had chosen to do this]. … The possibility that the State could have introduced additional evidence, had trial counsel not done so, is speculative. We have no evidence that the State as prepared to present additional evidence."

Calvin v. State, No. WD65265 (Mo. App., W.D. 8/1/06):

(1) In criminal non-support case, plea counsel was ineffective in failing to investigate Defendant/Movant's financial circumstances to determine if there was "good cause" for Defendant's failure to pay, but Defendant was not prejudiced because he cannot show he would not have pleaded guilty since his plea was based on a threat by the prosecutor to revoke probation in another case if Defendant did not plead; (2) there was an insufficient factual basis to support Defendant's guilty plea to criminal non-support because plea record did not demonstrate that Defendant was without good cause in failing to pay.

Facts: Defendant/Movant was charged with criminal non-support, Section 568.040, for knowingly failing to pay child support without good cause for periods in 1997 and 1998. At the time of this new charge, Defendant was on probation for a criminal non-support conviction in 1996. For some of the periods in 1997 and 1998 for which Defendant was charged, he was in Department of Corrections' treatment programs or was incarcerated in another county's jail. The State threatened to revoke Defendant's probation if he did not plead guilty to the new charge. Defendant pleaded guilty. Defendant later filed a 24.035 motion claiming (1) that counsel was ineffective in failing to investigate and advise Defendant that he had a defense to the charges because he had "good cause" for failure to pay; and (2) that there was an insufficient factual basis for the plea.

Holding: A legal obligation to provide child support is not excused by changes in financial condition resulting from incarceration. However, despite that Defendant's voluntary behavior may cause incarceration, the court must still consider if the parent has present inability to pay the obligation. If financial impact of incarceration cannot be a factor to consider as part of a good cause defense, then a criminal non-support defendant could be charged with criminal non-support while already in prison for non-support and could then be subjected to more imprisonment, which could potentially go on for as long

as the child support obligation existed, and parent would never be allowed to get a job and meet his obligation. Courts must distinguish those parents who are making an effort to pay their child support obligations, from those who would rather go to prison than pay them. Defendant was indigent during the periods in 1997 and 1998 when he was charged for failure to pay. He was often incarcerated in treatment programs or jail during those times, and when he was not in those programs, he made only $7.00 an hour; he had a lifelong problem with alcohol and drugs. Under these circumstances, Defendant's ability to pay child support during 1997 and 1998 was seriously in question, and should have been investigated by a reasonably competent attorney before a plea because Defendant had a viable good cause defense. Defendant's plea was not voluntary since he was not advised that he had a viable good cause defense. However, to set aside the plea on grounds of ineffective counsel, Defendant must also show that but for counsel's ineffectiveness, he would not have pleaded guilty and would have demanded a trial. Here, Defendant cannot show this because he pleaded guilty because the State threatened to revoke his 1996 probation if he did not plead guilty. Defendant has not raised a claim as to whether the threat to revoke probation was based on the new charges in 1997 and 1998 for which Defendant had a good cause defense; if so, "our analysis of prejudice would be different." This is point is denied. However, Defendant's plea is nevertheless vacated because there was an insufficient factual basis for the plea. At the plea, Defendant said he was not paying his child support in 1997 and 1998 because he had "setbacks" and "was trying to do the best I could." An element of criminal non-support is that the parent is without good cause in failing to provide support. There is nothing in the plea transcript to show Defendant was without good cause in failing to pay. There is no evidence that counsel or anyone else advised Defendant that if he was unable to pay for "good cause," i.e., because he was incarcerated, he could not be held criminally liable. In light of Defendant's responses at the plea, the plea court was obligated before accepting the plea to explore further if Defendant had the ability to provide child support or purposely maintained his inability to provide it. Plea vacated.

*** Sears v. Upton, ___ U.S. ___, 2010 WL 2571856 (U.S. 2010):**

Holding: Even though death penalty counsel presented some mitigating evidence, state court applied wrong prejudice test in holding counsel was not ineffective in failing to investigate and present frontal lobe problems, deficits in mental cognition, verbal abuse by parents, and sexual abuse by cousin. **"**We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." Postconviction court should have considered whether Defendant was prejudiced in light of all of this newly uncovered evidence, instead of focusing on reasonableness of the mitigation that was presented.

*** Porter v. McCollum, 86 Crim. L. Rep. 269, ___ U.S. ___ (U.S. 11/30/09):**

Holding: Even though death penalty Defendant was uncooperative and fatalistic, counsel was obligated to conduct "*some* sort of mitigation investigation," and counsel was ineffective in failing to investigate and present evidence of Defendant's service in battles in Korean War, even though Defendant was also AWOL at times; Defendant's struggles to regain normality after the war; Defendant's childhood history of abuse; and

Defendant's brain abnormality, difficulty reading and writing, and limited schooling (emphasis in original).

*** Smith v. Spisak, 86 Crim. L. 447, ___ U.S. ___ (U.S. 1/12/10):**
Holding: (1) Jury instructions at death penalty phase did not violate *Mills v. Maryland*, 486 U.S. 367 in that they did not preclude jury from considering only those mitigating factors unanimously found by jury; (2) even though death penalty counsel's closing argument emphasized the gruesome nature of the crime, said Defendant may commit crimes in the future, and did not emphasize mitigating circumstances or ask for life, Defendant was not prejudiced because he had admitted three murders and two other shootings.

*** Wood v. Allen, 86 Crim. L. Rep. 472, ___ U.S. ___ (U.S. 1/20/10):**
Holding: Even though death penalty counsel failed to present mitigating evidence of mental deficiencies, the state courts did not make an unreasonable determination of facts in holding that counsel had made a reasonable strategic choice not to present this evidence in order to avoid other possible harmful evidence.

*** Padilla v. Kentucky, 2010 WL 1222274, ___ U.S. ___ (U.S. 3/31/10):**
Holding: Guilty plea counsel was ineffective in failing to advise that Defendant was subject to deportation from conviction; counsel has duty to advise of immigration consequences of a guilty plea.

*** Wong v. Belmontes, 86 Crim. L. Rep. 222, ___ U.S. ___ (U.S. 11/16/09):**
Holding: Even though counsel failed to present certain mitigating mental health evidence, where counsel presented nine mitigation witnesses to testify about Defendant's life history and counsel's presentation of character evidence of Defendant would have opened the door to the Gov't presenting an alleged prior murder of Defendant (which had been excluded), counsel was not ineffective.

*** Bobby v. Van Hook, 86 Crim. L. Rep. 76, ___ U.S. ___ (U.S. 11/9/09):**
Holding: Lower court should not have applied 2003 ABA death penalty standards to judge ineffective assistance of counsel claim that occurred before the guidelines, and additionally, *Strickland* held that the ABA standards are only guides to what reasonableness means, not the requirement or definition of reasonableness.

*** Knowles v. Mizayance, 84 Crim. L. Rep. 675, ___ U.S. ___ (3/24/09):**
Holding: Counsel is not required to pursue a losing or frivolous defense; thus, where jury had rejected an NGRI claim in guilt phase, counsel was not ineffective in recommending the defense be withdrawn in penalty phase, since it had been rejected by the jury already and was almost certain to lose in penalty phase.

Wright v. Van Patten, 82 Crim. L. Rep. 364, 2008 WL 59980, ___ U.S. ___ (1/7/08):
Holding: State court did not unreasonably apply federal law when it held that counsel was not ineffective for appearing at a court proceeding by speakerphone; this was not a complete denial of counsel or absence of counsel under *Cronic*.

*** Schriro v. Landrigan, 81 Crim. L. Rep. 223, ___ U.S. ___ (5/14/07):**
Holding: Habeas petitioner not entitled to evidentiary hearing on claim that death penalty counsel failed to investigate mitigating evidence. Before trial, petitioner had thwarted counsel's investigation of mitigation and said he did not want mitigation, and thus, petitioner waived mitigating evidence.

U.S. v. Cerna, 87 Crim. L. Rep. 144 (2d Cir. 4/27/10):
Holding: The rule that bars illegal aliens charged with illegal re-entry from collaterally attacking the underlying deportation order unless they exhausted available administrative remedies does not apply if Defendant can show his attorney's ineffective assistance led to his failure to exhaust.

Ramchair v. Conway, 2010 WL 1253893 (2d Cir. 2010):
Holding: Appellate counsel ineffective in failing to raise issue on appeal because appellate counsel mistakenly thought it was not preserved; issue was that prosecutor had said trial counsel was at lineup (implying lineup was fair) and trial court failed to grant mistrial to allow defense counsel to testify why lineup was not fair.

U.S. v. Brown, 88 Crim. L. Rep. 116, 2010 WL 4069002 (2d Cir. 10/19/10):
Holding: Where after trial but before sentencing, Defendant filed a pro se motion stating that counsel was ineffective for not informing him of a plea offer that had been made, the trial court should have considered the claim at that point, instead of stating that the claim should be decided in habeas under 28 USC 2255.

Bell v. Miller, 2007 WL 2469423 (2d Cir. 2007):
Holding: Counsel ineffective in failing to retain a medical expert to testify that victim's identification of Defendant may have been unreliable where victim had been shot, lost a lot of blood, was heavily medicated and in semi-conscious state.

Gersten v. Senkowski, 2005 WL 2630022 (2nd Cir. 2005):
Holding: Counsel ineffective in failing to consult or call a child sex abuse expert and educate himself about scientific issues necessary to attack "child sexual abuse accommodation syndrome."

Hummel v. Rosemeyer, 2009 WL 1140267 (3d Cir. 2009):
Holding: Where (1) Defendant had suffered brain damage from a suicide attempt, (2) Defendant's parents told counsel that Defendant was incompetent, and (3) psych reports were ambiguous as to competence, counsel was ineffective in stipulating to Defendant's competency.

Thomas v. Horn, 2009 WL 1874285 (3d Cir. 2009):
Holding: Death penalty counsel ineffective in failing to present mental health history to explain Defendant's horrific actions.

Holland v. Horn, 2008 WL 607486 (3rd Cir. 2008):
Holding: Direct appeal counsel ineffective for failing to appeal "Ake" issue that Defendant was entitled to psychiatrist to assist defense.

U.S. v. Shedrick, 2007 WL 2051032 (3d Cir. 2007):
Holding: Counsel ineffective in failing to appeal Defendant's sentence under sentencing guidelines where Defendant expressly requested an appeal.

Outten v. Kearney, 2006 WL 2773076 (3d Cir. 2006):
Holding: Death penalty mitigation investigation was unreasonable where counsel merely sent letter to Defendant asking for names of potential witnesses, and had limited discussions with Defendant and his mother.

U.S. v. Luck, 2010 WL 2635812 (4th Cir. 2010):
Holding: Even though court gave a general witness credibility instruction, counsel was ineffective in failing to request a specific informant instruction where informant-witness was paid for their testimony.

Bostick v. Stevenson, 2009 WL 4877312 (4th Cir. 2009):
Holding: Trial counsel's failure to consult with Defendant about filing a notice of appeal was ineffective.

U.S. v. Poindexter, 2007 WL 1845119 (4th Cir. 2007):
Holding: Counsel was ineffective in not filing notice of appeal at Defendant's request, even though he executed an appeal waiver as part of his plea.

Richards v. Quaterman, 2009 WL 1111177 (5th Cir. 2009):
Holding: Counsel ineffective in failing to present exculpatory evidence in murder trial including (1) victim's statements before his death that another attack had taken place by others after Defendant's fight with him, and (2) that there were differences between the prosecution witnesses' version of events and victim's statements about the attack before his death.

U.S. v. Cavitt, 2008 WL 4967066 (5th Cir. 2008):
Holding: Where movant alleged he would not have pleaded guilty if counsel had informed him of possibility of motion to suppress cocaine found in car, this was not refuted by the record and movant was entitled to evidentiary hearing.

U.S. v. Tapp, 2007 WL 1839277 (5th Cir. 2007):
Holding: Failure to file notice of appeal when requested to do so is per se ineffective, even when Defendant waived his right to direct appeal and collateral review.

Hodgson v. Warren, 2010 WL 3766642 (6th Cir. 2010):
Holding: Counsel in attempted murder trial was ineffective in failing to seek an adjournment or continuance to find witness who failed to appear after being subpoenaed;

witness had non-cumulative evidence that refuted Gov't's theory that Defendant shot victim.

English v. Romanowski, 2010 WL 1488354 (6th Cir. 2010):
Holding: Where trial counsel told jury in opening statement that he would call Defendant's girlfriend but trial counsel had never investigated girlfriend and her story and ended up not calling her, counsel was ineffective because his unfulfilled promise created a negative inference for jury.

Bigelow v. Haviland, 2009 WL 2391853 (6th Cir. 2009):
Holding: Even though Defendant failed to tell counsel about additional alibi witnesses and counsel presented one alibi witness at trial, where counsel knew Defendant was mentally ill, counsel was ineffective in failing to investigate and present other witnesses who would testify Defendant was in another city at time of crime.

Van Hook v. Anderson, 2009 WL 605332 (6th Cir. 2009):
Holding: Death penalty counsel ineffective in penalty phase for failing to investigate mitigation until a few days before penalty phase and failing to discover that parents beat Defendant, Defendant saw his father attempt to kill his mother, and Defendant's mother was committed to mental hospital.

Boykin v. Webb, 83 Crim. L. Rep. 808, 2008 WL 4067539 (6th Cir. 9/4/08):
Holding: Counsel's joint representation of two co-defendants in murder case was conflict of interest since best defense would have been to blame other co-defendant.

Spisak v. Hudson, 82 Crim. L. Rep. 429 (6th Cir. 1/11/08):
Holding: Death penalty counsel ineffective in stressing heinousness of crimes, calling Defendant "demented," saying sympathy was not part of jury's decision, and that a vote for either life or death would be valid.

Jells v. Mitchell, 2008 WL 3823058 (6th Cir. 2008):
Holding: Counsel ineffective in penalty phase failing to present learning disabilities leading to aggressive behavior.

Mason v. Mitchell, 2008 WL 4443299 (6th Cir. 2008):
Holding: Where records showed that Defendant's childhood was marked by violence and drugs, but counsel interviewed only a few family members and hired a mental health expert only to opine on future dangerousness, counsel was ineffective.

Johnson v. Bagley, 2008 WL 4527345 (6th Cir. 2008):
Holding: Where counsel failed to interview Defendant's mother and grandmother, counsel were ineffective in failing to uncover substance abuse and mental illness in family; further, the failure to investigate led to erroneous damaging testimony from the mitigation expert at trial.

Richey v. Bradshaw, 2007 WL 2287741 (6th Cir. 2007):
Holding: Counsel ineffective in failing to obtain arson expert to rebut State's arson expert.

Garner v. Mitchell, 2007 WL 2593514 (6th Cir. 2007):
Holding: Even though Defendant said he understood his *Miranda* rights, where a postconviction expert administered a Grisso test which showed Defendant did not understand his rights, Defendant's waiver was not knowing and intelligent.

Morales v. Mitchell, 2007 WL 3225397 (6th Cir. 2007):
Holding: Counsel ineffective in penalty phase for failure to investigate alcohol and drug abuse, mental illness in the family, and abuse of Defendant by his brother; and failure to hire a mitigation specialist and investigator.

U.S. v. Nichols, 81 Crim. L. Rep. 654, 2007 WL 2326051 (6th Cir. 8/16/07):
Holding: After *Apprendi*, trial and appellate counsel were ineffective in failing to foresee that federal sentencing guidelines would be struck down and in failing to challenge them and preserve this for appeal, including by filing a cert. petition; court finds this to be a "rare case" where counsel were ineffective for failing to make an objection that would have been overruled under then-existing law, but counsel should have anticipated a change in law.

Ramonez v. Berghuis, 2007 WL 1730096 (6th Cir. 2007):
Holding: Counsel was ineffective in limiting his investigation of three witnesses who he knew could have provided helpful testimony.

Dando v. Yukins, 79 Crim. L. Rep. 746 (6th Cir. 8/30/06):
Holding: Where Defendant asked her lawyer to explore a duress defense because she claimed to have aided her boyfriend in robberies under duress, counsel was ineffective in failing to investigate the validity of such a defense by retaining an expert in battered woman syndrome before advising Defendant to plead guilty.

Osagiede v. U.S., 83 Crim. L. Rep. 795 (7th Cir. 9/9/08):
Holding: Counsel ineffective for not objecting to violation of right to consult with Embassy under Vienna Convention.

Van Patten v. Endicott, 81 Crim. L. Rep. 513 (7th Cir. 6/5/07):
Holding: Defense counsel's "appearance" at a guilty plea on a speaker phone was ineffective, and a *Cronic* violation for which prejudice is presumed.

Miller v. Martin, 81 Crim. L. Rep. 10 (7th Cir. 3/15/07):
Holding: Even though it was counsel's "strategy" to stand mute at sentencing so as not to emphasize that Defendant had failed to appear for trial, this was a total abandonment of advocacy at sentencing and warranted relief under *Cronic* for constructive denial of counsel. A "strategy" of standing mute "would make a mockery of the word."

Julian v. Bartley, 2007 WL 2121921 (7th Cir. 2007):
Holding: Defense counsel ineffective in telling Defendant the maximum sentence he could receive was 30 years, when it was really 60, and Defendant rejected a plea offer and proceeded to trial under the incorrect assumption he could receive only 30 years. He received 40 after trial.

Stevens v. McBride, 2007 WL 1732539 (7th Cir. 2007):
Holding: Death penalty counsel ineffective in penalty phase in presenting a psychologist who they believed was a "quack" without advance knowledge of his testimony, because counsel missed investigation which would have shown Defendant had dissociative disorder and was acting under extreme emotional disturbance and could not appreciate his criminality.

Armstrong v. Kemna, No. 06-1424 (8th Cir. 7/24/08):
Holding: Where (1) counsel mistakenly believed that other State did not participate in Uniform Attendance of Witnesses Act, Sec. 491.420, despite contacting authorities in other State and getting erroneous information or misunderstanding the information, and (2) counsel failed to subpoena out-of-state witnesses as a result, counsel was ineffective, even though counsel believed some of the witnesses might voluntarily appear, but they did not.

Watson v. U.S., 2007 WL 2049697 (8th Cir. 2007):
Holding: Even though Defendant's plea agreement limited his right to appeal, counsel was ineffective in failing to file an appeal where Defendant requested it.

Rossum v. Patrick, 2010 WL 3704188 (9th Cir. 2010):
Holding: Where counsel had evidence that autopsy specimens might be contaminated, counsel's concession that fentanyl caused husband's death was ineffective in Defendant-Wife's trial for murder by poisoning.

Pinholster v. Ayers, 2009 WL 4641748 (9th Cir. 2009):
Holding: Death penalty counsel was ineffective in failing to investigate mitigation, including brain damage from head injury, substance abuse, and family history of criminal problems and mental illness.

Hamilton v. Ayers, 2009 WL 2973231 (9th Cir. 2009):
Holding: Where death penalty counsel failed to investigate and present mitigating evidence about abuse and hardships of Defendant's childhood and history of mental illness, counsel was ineffective.

Jones v. Ryan, 2009 WL 3152396 (9th Cir. 2009):
Holding: Even though death penalty counsel used a state expert who conducted a mental evaluation of Defendant, counsel was ineffective in not retaining a defense expert and relying solely on the state expert, and counsel failed to provide the expert with information about client's drug addiction to assist the expert.

Moore v. Czerniak, 2009 WL 2231650 (9th Cir. 2009):
Holding: Failure to file meritorious motion to suppress on grounds that Defendant's confession was not voluntary was ineffective.

Hovey v. Ayers, 2006 WL 2325130 (9th Cir. 2006):
Holding: Where defense counsel prior to capital penalty phase failed to provide psychiatric expert with important documents about Defendant's past and failed to prepare expert, counsel was ineffective in penalty phase when prosecutor conducted devastating cross-examination of expert that left impression that Defendant had never been treated for mental illness before crime and may be fabricating mental illness because expert's testimony was based on incomplete factual information.

U.S. v. Washington, 88 Crim. L. Rep. 59 (10th Cir. 9/30/10):
Holding: Counsel was ineffective in failing to warn federal Defendant prior to his presentence investigation interview about the "relevant conduct" concept and that his admissions to the probation office would lead to an increased sentence under the "relevant conduct" guidelines.

U.S. v. Bergman, 87 Crim. L. Rep. 46 (10th Cir. 3/25/10):
Holding: Where unbeknownst to Defendant, his "counsel" fraudulently claimed to be a lawyer but was never a lawyer at all, Defendant was denied 6th Amendment right to counsel and prejudice is presumed.

Williams v. Jones, 85 Crim. L. Rep. 533 (10th Cir. 7/8/09):
Holding: Where counsel's deficient advice caused Defendant to reject a 10-year plea offer and Defendant went to trial and received life without parole, counsel was ineffective, and case remanded for fashioning of appropriate remedy which may be new trial or specific performance of the plea agreement; counsel had believed Defendant was innocent and refused to present "perjured" admission of guilt at plea proceeding.

Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007):
Holding: Capital counsel ineffective in failing to develop evidence of borderline mental retardation, childhood poverty and abuse.

Bauder v. Dept. of Corrections, 87 Crim. L. Rep. 879, 2010 WL 3527536 (11th Cir. 9/13/10):
Holding: Where guilty plea counsel erroneously advised Defendant that his plea to stalking could not be used as a basis to later commit him as a sexually violent predator, counsel was ineffective.

Dasher v. Witt, 85 Crim. L. Rep. 552 (11th Cir. 7/13/09):
Holding: Where (1) plea counsel advised Defendant he had a good chance of a 1-year sentence, even though court had said it was inclined to impose a somewhat higher sentence; (2) counsel advised Defendant to plead "open" without a plea bargain; (3) counsel was unaware of Defendant's prior criminal record which was later revealed in the

presentence investigation report; and (4) Defendant was ultimately sentenced to 10 years, counsel was ineffective.

Lawhorn v. Allen, 2008 WL 638596 (11th Cir. 2008):
Holding: Counsel's waiver of closing argument in capital case in mistaken belief that State could not then give rebuttal argument was ineffective, because this was based on misunderstanding of law; State still was able to do further argument.

Williams v. Allen, 2008 WL 4224720 (11th Cir. 2008):
Holding: Counsel ineffective failing to investigate mitigation including that Defendant's father was alcoholic who abused mother; counsel sought mitigation only from mother, not other family members, resulting in an incomplete and misleading life history.

Thompson v. U.S., 2007 WL 750333 (11th Cir. 2007):
Holding: Counsel ineffective in failing to adequately consult with Defendant about his right to appeal his sentence; counsel told Defendant he had a right to appeal, but that an appeal would not be worthwhile.

Cosio v. U.S, 81 Crim. L. Rep. 462 (D.C. 6/21/07):
Holding: Counsel ineffective in child sex case in failing to investigate co-workers of Defendant who would have testified that they had seen victim and Defendant interact, and victim didn't appear afraid of Defendant. Counsel had interviewed the co-workers, but unreasonably failed to ask them about what they observed between Defendant and victim.

Deere v. Cullen, 2010 WL 1946914 (C.D. Cal. 2010):
Holding: Counsel ineffective in failing to challenge competency where counsel failed to have an independent evaluation and stipulated to an evaluation by a doctor who counsel knew was inadequate.

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Abraham v. U.S., 2007 WL 781365 (S.D. Fla. 2007):
Holding: Counsel ineffective by not arguing that a prior felony was not a qualifying offense for three-strikes law purposes.

Richardson v. U.S., 2007 WL 789591 (D. Mass. 2007):
Holding: Appellate counsel's failure to file supplemental brief on appeal regarding change in law following *Booker v. U.S.*, which would have aided Defendant, was ineffective.

Dittrich v. Woods, 2009 WL 690315 (E.D. Mich. 2009):
Holding: Counsel ineffective in failing to object to inadmissible evidence of others crimes.

Daniel v. Palmer, 2010 WL 2607271 (E.D. Mich. 2010):
Holding: Counsel was ineffective in failing to investigate eyewitnesses who would have said the van at the crime scene was different than Defendant's van and also would have contradicted State's witness that only one person was at the crime scene.

Davis v. Booker, 2009 WL 185726 (E.D. Mich. 2009):
Holding: Where counsel relied on police to attempt to locate a witness, rather than an investigator, counsel was ineffective.

Robinson v. U.S., 2009 WL 2230745 (E.D. Mich. 2009):
Holding: Counsel was ineffective in failing to challenge the quantity of drugs attributable to Defendant where the quantity was element of how long a sentence Defendant would receive.

Avery v. Prelesnik, 2007 WL 3346520 (W.D. Mich. 2007):
Holding: Counsel ineffective in not investigating alibi witness; counsel should have asked for witness' phone number or address and contacted witness, and was unreasonable to rely on teenagers to get back in touch with him regarding the witness.

U.S. v. Baker, 2007 WL 1381773 (D. Neb. 2007):
Holding: Counsel's failure to file conditional motion for new trial to protect against reversal on appeal of State's appeal of the judgment of acquittal was ineffective.

Sasonov v. U.S., 2008 WL 4148268 (D.N.J. 2008):
Holding: Where counsel affirmatively misrepresented immigration consequences of guilty plea, counsel was ineffective.

Graham v. Portuondo, 2010 WL 3210691 (E.D. N.Y. 2010):
Holding: Counsel was ineffective in murder trial in not investigating whether Defendant had viable psychiatric defense; in addition, even assuming such evidence would not have been admissible at trial, it likely would have caused trial court to give a lesser sentence had psychiatric evidence been presented at sentencing.

Ramchair v. Conway, 2009 WL 3663920 (E.D. N.Y. 2009):
Holding: Remedy for ineffective appellate counsel was to order a new trial rather than a new appeal, where Defendant had already had three trials and another appeal would just delay the case further.

Espinal v. Benett, 2008 WL 5104237 (E.D.N.Y. 2008):
Holding: Where redacted police reports would have corroborated Defendant's alibi, counsel was ineffective in failing to investigate the reports.

Carrion v. Smith, 2008 WL 495312 (S.D.N.Y. 2008):
Holding: Counsel ineffective in failing to fully inform and vigorously advise Defendant to take plea offer of 10 years where Defendant was facing more than 100 years; Defendant did not take offer and was sentenced to 125 years; Defendant was prejudiced given the disparity between the offer and the actual sentence given a reasonable probability Defendant would have accepted offer if properly advised.

Wynters v. Poole, 2006 WL 3469471 (W.D.N.Y. 2006):
Holding: Counsel ineffective for failing to object to prosecutor's cross-examination of investigator who interrogated Defendant and who testified that Defendant stopped the interview when asked to take a polygraph, and that Defendant had invoked right to silence and to counsel.

Rivera v. Goode, 2008 WL 8189908 (E.D. Pa. 2008):
Holding: Prejudice presumed where appellate attorney failed to perfect direct appeal; remedy is to reinstate appeal with new counsel.

U.S. v. DeSimone, 2010 WL 3553866 (D.R.I. 2010):
Holding: Defendant was entitled to withdraw guilty plea where, during plea colloquy Defendant told his attorney that he disagreed with Gov't's recitation of facts, and attorney implied that Defendant should lie at the plea hearing.

House v. Bell, No. 3:96-CV-883 (E.D. Tenn. 12/20/07):
Holding: "[W]here the only evidence against petitioner was circumstantial and the theory of the defense was to shift suspicion from petitioner to the victim's husband, it was incumbent on counsel to discover and present all witnesses who could testify as to the husband's abuse of his wife and thus lend credence to the defense theory."

Sturgeon v. Quarterman, 2009 WL 1351045 (S.D. Tex. 2009):
Holding: Where petitioner submitted an affidavit by a witness who would have testified that petitioner was innocent of charged crime but that witness had invoked 5th Amendment right not to testify because prosecutor had threatened to charge witness with crime, this stated a claim of ineffective assistance of trial counsel and overcame procedural default based on manifest injustice.

Richards v. Quarterman, 2008 WL 3992302 (N.D. Tex. 2008):
Holding: Where Veterans Administration records would have supported Defendant's claim at trial that he had physical disabilities that made it impossible for eyewitness' testimony to be correct, and would have supported Defendant's self-defense argument, counsel was ineffective in failing to obtain records and use them at trial and sentencing.

Richardson v. U.S., 2009 WL 1260407 (N.D. W. Va. 2009):
Holding: Failure to file notice of appeal when client asks to appeal was per se ineffective assistance.

State v. Bennett, 2006 WL 3240527 (Ariz. 2006):
Holding: Appellate counsel may be ineffective for failing to raise sufficiency issue on appeal where there was some evidence Defendant had not caused victim's death, since medical evidence was equivocal as to whether Defendant's delay in seeking medical treatment for victim caused death.

Sparkman v. State, 2008 WL 733002 (Ark. 2008):
Holding: Where Defendant had requested counsel and one was appointed before a confession, counsel was ineffective failing to move to suppress video confession Defendant made in sex case without counsel being present.

In re Hardy, 2007 WL 2128322 (Cal. 2007):
Holding: In death penalty case, counsel was ineffective in failing to investigate and present in penalty phase that a third-party did the actual stabbing of the victim, not Defendant. Jury may have reached a different result in penalty phase had they heard Defendant's involvement was less than the actual killer's.

Silva v. People, 81 Crim. L. Rep. 210 (Colo. 4/23/07):
Holding: Since Colorado provides a limited statutory right to counsel in PCR proceedings, PCR counsel must meet the two-prong standard for effective assistance under *Strickland v. Washington*.

Michael T. v. Commissioner of Corrections, 2010 WL 2572890 (Conn. 2010):
Holding: Counsel's failure to call an expert to challenge sexual assault victim's testimony that she obtained a sexually transmitted disease from Defendant was ineffective.

Bryant v. Commissioner of Corrections, 2009 WL 484896 (Conn. 2009):
Holding: Counsel ineffective in failing to investigate and call four disinterested witnesses who would have impeached and contradicted State's two eyewitnesses who were of dubious credibility.

Williams v. Commissioner of Correction, 2007 WL 763893 (Conn. 2007):
Holding: Standards for evaluating a New Trial Motion and a claim of ineffective assistance are different; therefore, there is no collateral estoppel effect when a New Trial Motion is denied on grounds that counsel could have discovered newly-discovered evidence with reasonable diligence, but a claim of ineffective assistance is later raised for not adequately investigating the case.

Cooke v. State, 85 Crim. L. Rep. 551, 2009 WL 2181678 (Del. 7/21/09):
Holding: Where defense attorney over client's objection pursued defense of "guilty but mentally ill" when client wanted an actual innocence defense, this deprived client of right to make fundamental decision about his defense; no showing of prejudice is required under *Cronic*.

Hurst v. State, 2009 WL 2959204 (Fla. 2009):
Holding: Death penalty counsel ineffective in failing to present mitigating mental health evidence in penalty phase; this was not inconsistent with Defendant's guilt phase defense of innocence.

Morgan v. State, 2008 WL 2678442 (Fla. 2008):
Holding: Counsel can be ineffective for advising Defendant to reject a favorable plea offer, and Defendant entitled to evidentiary hearing on this claim.

Ey v. State, 82 Crim. L. Rep. 624 (Fla. 2/28/08):
Holding: Plea attorney's erroneous advice to Defendant that his guilty plea could not be used to enhance another pending offense was ineffective.

Brown v. Baskin, 2010 WL 889788 (Ga. 2010):
Holding: Trial counsel ineffective in failing to give trial court legal authority for being able to cross-examine witness about pending criminal charges and failing to preserve this for appeal, and appellate counsel ineffective in failing to raise trial counsel's ineffectiveness on this issue.

Bass v. State, 2009 WL 159428 (Ga. 2009):
Holding: Counsel ineffective in failing to object when sheriff who was main State witness at trial then became the bailiff at the trial.

Estrada v. State, 80 Crim. L. Rep. 308 (Idaho 11/24/06):
Holding: Where after conviction but before sentencing Defendant was required to participate in a "psychosexual evaluation" to determine future dangerousness, defense counsel was ineffective in failing to advise Defendant that he had a right to counsel and against self-incrimination in the evaluation.

People v. Hernandez, 84 Crim. L. Rep. 6 (Ill. 9/18/08):
Holding: Where counsel in an attempted murder case represented Defendant and previously represented potential victim of the murder, this was a conflict of interest for which prejudice was presumed.

State v. Aguilar, 87 Crim. L. Rep. 318 (Kan. 5/12/10):
Holding: Even though defense counsel's performance does not rise to level of ineffective assistance under 6th Amendment, court can still allow Defendant to withdraw a guilty plea before sentencing for deficient attorney performance or conflict of interest.

Kargus v. State, 81 Crim. L. Rep. 636, 2007 WL 2141445 (Kan. 7/27/07):
Holding: Appellate counsel is ineffective if he fails to file a petition for review to Kansas Supreme Court after affirmance of conviction by Kansas intermediate appellate court, where Defendant requests a petition be filed. A defendant need not show a different result would have been achieved but for counsel's performance.

Beldsoe v. State, 80 Crim. L. Rep. 502 (Kan. 2/20/07):
Holding: Even though counsel deliberately presented hearsay statements of a child which exculpated the Defendant in the murder, where this opened the door for the State to present hearsay statements of the child which were incriminating, counsel was ineffective.

Smith v. State, 79 Crim. L. Rep. 681 (Md. 8/3/06):
Holding: Where counsel was appointed to advise a witness about whether he should invoke his 5th Amendment rights and not testify at a trial, counsel was ineffective in informing the judge that the witness had no basis for invoking his 5th Amendment right against self-incrimination; witness ultimately refused to testify, and was held in contempt and sentenced to prison because of counsel's disclosure to court.

Poe v. Sex Offender Registry Bd., 2010 WL 1931098 (Mass. 2010):
Holding: Sex offender has right to effective assistance of counsel in hearing in front of Sex Offender Registration Board.

Com. v. Patton, 88 Crim. L. Rep. 60 (Mass. 9/28/10):
Holding: Even though there is no 6th Amendment right to counsel in probation revocation hearing, where State law and rule provided for counsel, probationers could challenge counsel's conduct at the hearing as being ineffective assistance of counsel.

Commonwealth v. Goewey, 84 Crim. L. Rep. 117, 2008 WL 4571553 (Mass. 10/16/08):
Holding: Counsel was ineffective in failing to file a Respondent's brief in a State's appeal, and Defendant need not show prejudice.

Yecovenko v. State, 82 Crim. L. Rep. 350 (Mont. 12/14/07):
Holding: Counsel was ineffective in failing to move to sever unrelated charges of possession of child pornography from charges of child sex.

Rubio v. State, 84 Crim. L. Rep. 188 (Nev. 10/30/08):
Holding: Where counsel affirmatively misadvises client on immigration consequences of guilty plea, that is ineffective and renders plea involuntary.

State v. Sharkey, 2007 WL 2011426 (N.H. 2007):
Holding: Counsel ineffective in failing to advise Defendant that his guilty plea would affect his driver's license in another state, even though this was a collateral consequence of the plea.

State v. Nunez-Valdez, 85 Crim. L. Rep. 641 (N.J. 7/30/09):
Holding: Affirmative misadvice regarding immigration consequences of guilty plea is ineffective.

State v. Cottle, 83 Crim. L. Rep. 196 (N.J. 5/6/08):
Holding: Defense counsel was per se ineffective, when he represented Defendant while counsel was under indictment in the same county.

State v. Loftin, 81 Crim. L. Rep. 419 (N.J. 6/5/07):
Holding: Trial counsel ineffective in failing to move during trial to remove a white juror who (it was learned during trial) had told a co-worker before trial that he wanted to buy a rope and hang the African-American Defendant, and in failing to move to voir dire the remaining jurors about exposure to this juror's views. Defendant was entitled to a new trial, even though the juror served only as an alternate at the trial, and did not deliberate.

State v. Young, 82 Crim. L. Rep. 249 (N.M. 11/27/07):
Holding: Compensation of contract counsel in death penalty case at initial flat-fee rate of $46,500 for first chair and $23,000 for second chair violated 6th Amendment right to effective counsel. Counsel's fees amounted to less than the $73 per hour the counsel needed to pay office overhead. "The inadequacy of compensation in this case makes it unlikely that any lawyer could provide effective assistance, and therefore ... ineffectiveness is properly presumed without inquiry into actual performance."

State v. Grogan, 2007 WL 2197628 (N.M. 2007):
Holding: Counsel ineffective in failing to review his own expert's opinion before permitting expert to write an inculpatory report which was disclosed to the State.

People v. Syville, 88 Crim. L. Rep. 120 (N.Y. 10/14/10):
Holding: Where Defendant missed the deadline for filing timely or normal late notice of appeal due to ineffective counsel, Defendant can remedy this by error coram nobis.

Boan v. State, 2010 WL 2730925 (S.C. 2010):
Holding: Counsel was ineffective in not moving to correct a written sentence that was longer than the orally imposed sentence; oral pronouncement of sentence controls over written sentence.

Vasquez v. State, 87 Crim. L. Rep. 837 (S.C. 8/9/10):
Holding: Where Muslim Defendant was charged in capital case with murder and robbery, counsel was ineffective in failing to object to Prosecutor's argument that Defendant was a "domestic terrorist;" the remarks injected religious prejudice.

Simuel v. State, 2010 WL 4183927 (S.C. 2010):
Holding: Where counsel failed to make Defendant aware of right to appeal, Defendant was entitled to late appeal.

Rolen v. State, 2009 WL 1851325 (S.C. 2009):
Holding: Where after plea but apparently before sentencing Defendant said he wanted to withdraw his plea, counsel was ineffective in not moving to withdraw the plea, because this denied trial court opportunity to exercise its discretion to allow withdrawal.

Rosemond v. Catoe, 2009 WL 1851377 (S.C. 2009):
Holding: Death penalty counsel ineffective in failing to present schizoprehnia mitigating evidence in mistaken belief he could not present it because court found Defendant competent.

Davie v. People, 84 Crim. L. Rep. 685 (S.C. 3/9/09):
Holding: Where counsel failed to communicate plea offer to Defendant and Defendant received a 12-year longer sentence as a result, counsel was ineffective and this was sufficient prejudice to give relief to Defendant.

Grindstaff v. State, 2009 WL 349715 (Tenn. 2009):
Holding: Where defense counsel did not understand that Defendant's conviction would preclude him serving an "alternative sentence" and misadvised Defendant that an "alternative sentence" was possible, counsel was ineffective and Defendant was prejudiced in entering his guilty plea because he could not make an intelligent decision to plead when faced with this misadvice.

State v. Ott, 2010 WL 11138 (Utah 2010):
Holding: Death penalty counsel was ineffective in failing to object to inadmissible victim-impact testimony that portrayed Defendant as a terrorist who was beyond rehabilitation.

Menzies v. Galetka, No. 20040289 (Utah 12/15/06):
Holding: Because state statute required appointment of counsel in state postconviction cases, statute created right to effective assistance of postconviction counsel which should be analyzed using *Strickland* standard.

West v. Director of D.O.C., 2007 WL 79058 (Va. 2007):
Holding: Where counsel was ineffective for failing to raise double jeopardy objection, remedy was to vacate one of the improper convictions and sentences, rather than apply concurrent sentencing doctrine and decline relief.

State v. Sutherby, 85 Crim. L. Rep. 100, 2009 WL 943858 (Wash. 4/9/09):
Holding: (1) Counsel was ineffective in failing to move to sever child sex assault charge from charge of possession of child pornography; (2) "unit of prosecution" for possession of child pornography is one offense, regardless of how many illegal images Defendant possessed or how many children were depicted in the images.

People v. Jones, 87 Crim. L. Rep. 706 (Cal. App. 6/30/10):
Holding: Where Public Defender chose not to use an investigator in his office due to "prioritization" of caseload (and instead did the work himself inadequately), attorney was ineffective and courts should be attentive to resource problems in Public Defender Offices because this constitutes a conflict of interest. Public Defender Office had only 1 investigator for 12 attorneys causing "prioritization" of use of investigator. "It is often difficult for public or contract defender to forthrightly admit he or she provided a client with deficient legal assistance; nor is it easy for such an attorney to withdraw from

representation when not provided adequate support services, an act that may well cost a principled public defender his or her job or continuing government contracts. … Therefore, the right of indigent defendants to receive the assistance of counsel that is constitutionally required may well depend on the attentiveness of judicial officers to this issue." "The danger of such a conflict [in having to choose which clients to devote resources to] bears upon the integrity of the judicial system [and] cannot be brushed aside." "[I]nadequate financing of public defender services and resulting lack of investigative resources for indigent defendants has been studied for decades and is no secret."

In re: Edward S., 92 Cal. Rptr. 3d 725 (Cal. App. 2009):
Holding: (1) Individual Public Defender had duty to move to withdraw under ABA Opinion 06-441 where he had too large of caseload to be effective; (2) too large of caseload creates conflict of interest for Public Defender because forces choice between clients; (3) Public Defender was ineffective in sex case in failing to get polygraph exam for client, failing to get psychological exam to show client not fit profile of sex offender, and failing to investigate family witnesses who would have shown alleged victim was familiar with type of molestation of which she accused defendant.

In re Prescott, 81 Crim. L. Rep. 53 (Cal. Ct. App. 4/3/07):
Holding: Even though attorney thought it would be frivolous to file a motion to withdraw a guilty plea when client requested that such a motion be filed, attorney should have only told the court in conclusory fashion that he had a good faith basis to refuse Defendant's request to file the motion, and should not have advocated against his client by informing the court of privileged communications and other reasons why the attorney thought the motion was groundless; prejudice is presumed when attorney advocates against client's interest.

People v. Bergerud, 84 Crim. L. Rep. 37 (Colo. Ct. App. 9/18/08):
Holding: Counsel cannot make decision to forgo innocence-based trial defense in favor of lesser-included defense, where client wants an innocence-based defense at trial; this is decision only client can make; thus, judge violated right to counsel by forcing client to proceed to trial with attorney who would not present innocence-defense, or proceeding pro se.

Staley v. State, 2009 WL 1153445 (Fla. Ct. App. 2009):
Holding: Where counsel fails to file timely notice of appeal, special master should be appointed to determine reason attorney failed to file an appeal.

Woodward v. State, 2008 WL 4566878 (Fla. Dist. Ct. App. 2008):
Holding: Where movant claimed counsel failed to present evidence that specific medication he was prescribed for heart condition interfered with his mental capacity during interrogation, movant was entitled to an evidentiary hearing on claim that counsel was ineffective in failing to present this as grounds for motion to suppress.

State v. Alexander, 84 Crim. L. Rep. 147 (N.J. Super. Ct. App. Div. 10/10/08):
Holding: Where counsel after trial but before sentencing undertook representation of a co-defendant, Defendant in subsequent postconviction case need not show prejudice from this conflict of interest to win sentencing relief.

State v. Rountree, 2006 WL 2689968 (N.J. Super. Ct. App. 2006):
Holding: Where Defendant has criminal charges pending in different venues, defense counsel may be ineffective for failure to seek a single plea agreement to cover all of them.

Pelzer v. State, 2008 WL 4963982 (S.C. Ct. App. 2008):
Holding: Counsel ineffective failing to advise Defendant of lesser-included offense defense prior to entry of guilty plea to greater offense.

Cooks v. State, 82 Crim. L. Rep. 248 (Tex. Crim. App. 11/21/07):
Holding: Defendant is entitled to effective assistance of counsel in preparing motion for new trial.

Ex parte Gonzales, 80 Crim. L. Rep. 178 (Tex. Crim. App. 10/18/06):
Holding: Where attorney in capital case knew that Defendant's sibling and mother had been abused by Defendant's father, attorney was ineffective in failing to ask Defendant if he was abused by father since this would have uncovered sexual abuse and post-traumatic stress disorder.

Elliott v. State, 2004 WL 5050888 (Tex. App. 2004):
Holding: Counsel was ineffective in introducing evidence of Defendant's prior convictions where those weren't otherwise admissible. (2004 is not a typo.)

Interrogation – Miranda – Self-Incrimination – Suppress Statements

State v. Brooks, No. SC90347 (Mo. banc 2/23/10):
Where Prosecutor made comments and presented evidence that Defendant had not given an explanation to police after being given his Miranda rights, this violated Defendant's rights under Doyle v.Ohio, 426 U.S. 610 (1976), even though Defendant made brief general denials of the crime.
Facts: Defendant was charged with second degree murder. After his arrest and being given his *Miranda* rights, Defendant was questioned by police and repeatedly refused to answer. However, he did say, "I don't have nothing to hide" and "I didn't do nothing at all." During opening statement at trial, the Prosecutor said that after police gave Defendant his *Miranda* rights, "all they did was ask him what happened …. He never would tell them." At trial, the Prosecutor asked a police officer if Defendant "ever [told] what happened," and the Officer testified that he did not. The Prosecutor made other similar remarks and presented other similar evidence, some of which was objected to and some not. At trial, Defendant testified the shooting was an accident.

Holding: *Doyle* held that a defendant's post-*Miranda* silence cannot be used to impeach the defendant because it is unfair to implicitly assure a person that his silence will not be used against him and then breach that promise by using the silence for impeachment. The State argues that because Defendant said he had "nothing to hide" and "didn't do nothing" that he waived his right to silence, but a general denial of culpability does not waive this right. Here, there were multiple *Doyle* violations, some preserved for appeal and some not. The Court can consider the unpreserved errors in addition to the preserved errors in determining whether the State can meet its burden on appeal to show that the *Doyle* violations were harmless. Here, even though the trial court gave some instruction to disregard some of the remarks, this curative effort had little effect in response to continued *Doyle* violations. Defendant's defense of accident was not frivolous and the evidence of guilt was not overwhelming. Reversed for new trial.

State v. Gaw, No. SC89820 (Mo. banc 5/26/09):
Missouri Supreme Court adopts Justice Kennedy's concurring opinion in Seibert, 542 U.S. 600 (2004) as Missouri standard, i.e., where police question Defendant before Miranda warnings and again afterwards, the later statements should only be suppressed where "the two-step interrogation technique was used in a calculated way to undermine Miranda warnings."
Facts: Officer found Defendant by a vehicle that was involved in an accident. Defendant smelled of marijuana and alcohol. Officer asked Defendant for his marijuana and Defendant it gave it to him. Officer then arrested Defendant. Defendant made incriminating statements in response to Officer's questions re: DWI. Officer then gave *Miranda* warnings, and Defendant made further statements. When charged with DWI, Defendant sought to suppress the statements under *Seibert*.
Holding: Here, Defendant's *Miranda* rights were violated by Officer's questions after he had been arrested for marijuana because this was custodial interrogation and Officer had not given *Miranda* warnings. The issue is whether the statements have to be suppressed. In *Seibert*, the interrogating officer admitted he made a "conscious decision" to withhold *Miranda* warnings to get the defendant to talk, and that he'd been taught to question first, then give *Miranda* warnings, then question again to get defendants to repeat the information. The U.S. Supreme Court held in *Seibert* that the statements had to be suppressed, but there was no majority opinion. Four justices proposed an "objective test" as to whether the *Miranda* warnings were "effective." Justice Kennedy, however, proposed a subjective test that relies on whether the officer was deliberately trying to skirt *Miranda*. Where there is no majority opinion, the holding of the Supreme Court is the opinion based on the "narrowest grounds," which is Kennedy's. Here, there is no evidence Officer deliberately tried to skirt *Miranda* in his pre-*Miranda* questioning, and Defendant's post-*Miranda* statements are voluntary. Therefore, Defendant's statements are admissible.

State v. Gaw, No. SD28715 (Mo. App., S.D. 11/7/08), transferred to Supreme Court 1/27/09:
Where officer found Defendant at an accident scene, handcuffed him for possessing marijuana, and questioned him about who was driving the vehicle, this was "custodial

interrogation" requiring Miranda warnings and statements made by Defendant were suppressed.
Facts: Defendant was found at a vehicle accident scene outside the vehicle. He was intoxicated and had marijuana. The police officer asked Defendant to give him the marijuana and placed Defendant in handcuffs. Officer then questioned Defendant as to who was driving the vehicle, and Defendant said he was. Later, after *Miranda* warnings were given, Defendant made other statements. He was charged with DWI, and moved to suppress all statements.
Holding: Defendant was under arrest at the time officer questioned him about who was driving the vehicle. This was "custodial interrogation" under *Miranda*, and the questioning without *Miranda* warnings requires that his statements be suppressed. Additionally, Defendant's post-*Miranda* statements in the patrol car and at the jail had to be suppressed because they were responses to a continuous line of inquiry, and the method used to interrogate Defendant rendered the untimely *Miranda* warning ineffective for purposes of conveying an understanding to Defendant whether he had a choice to continue to talk to officer.

Harris v. State, No. ED91935 (Mo. App. E.D. 3/2/10):
Where during police interrogation Defendant asked "Can you appoint an attorney for me?" and "So I can talk to an attorney any time now?," the interrogation should have ceased and Defendant's subsequent statements must be suppressed.
Facts: Defendant was arrested for assault. Police read her her *Miranda* rights. During this, police told her "you know that you can stop [talking] at any time if you want to," and Defendant said, "I'd rather appoint a lawyer" two times. Police then asked her more about wanting an attorney and whether she can afford one, and she said, "Can you appoint one for me?" and "So I can talk to an attorney any time now?" Police said "that's correct." Police then had her sign a waiver of *Miranda* rights, during which she asked, "But what if I want to talk to a lawyer? So you are saying that I can't talk to a lawyer because I don't have one?" Police said she could talk to a lawyer any time. Defendant eventually signed the wavier, and made incriminating statements. The trial court denied her motion to suppress statements.
Holding: Here, Defendant invoked her right to counsel, and police violated this right by not ceasing interrogation. When Defendant asked for an attorney, instead of ceasing interrogation, police continued to try to explain her rights to her, and ultimately got her to sign a waiver. The wavier does not vitiate the fact that her right to counsel was violated when police continued to question her after she clearly and unequivocally invoked her right to counsel. Her statements should have been suppressed.

State v. Dickson, No. ED90382 (Mo. App., E.D. 5/6/08):
Even though officer testified Defendant was free to leave, where Defendant was a passenger in a car, and the officer had handcuffed Defendant while officer searched the car, Defendant was in "custody" and his pre-Miranda statements regarding ownership of a coat in the car had to be suppressed.
Facts: Defendant was a passenger in a car that was stopped because there was a warrant for the arrest of the driver. The officer searched the car incident to the arrest. The officer testified he "probably" handcuffed Defendant for "safety" reasons during the search, but

that Defendant was not under arrest and was free to leave "if the search did not find anything." The officer found drugs in a coat and asked who the coat belonged to. Defendant said the coat was his. Defendant moved to suppress this pre-*Miranda* statement.
Holding: Defendant was "in custody" for purposes of *Miranda*. The officer had requested Defendant give up his identification for a records check. Defendant was handcuffed. "Despite Deputy Christy's testimony that he would advise individuals such as Defendant that they were being handcuffed only for safety reasons, we can think of few more persuasive examples of restricting an individual's freedom to depart than being handcuffed by a law enforcement officer." Moreover, the officer testified Defendant was free to leave only if the search did not find anything. Defendant was "in custody" and should not have been questioned without *Miranda* warnings. His pre-*Miranda* statements regarding ownership of the coat must be suppressed.

State v. Dykes, No. ED89881 (Mo. App., E.D. 11/13/07):
Where, after Defendant was indicted and represented by counsel, the prosecutor and police interviewed Defendant allegedly about "an unrelated matter," but then sought to use the statements Defendant made against him, the statements should be suppressed because State was circumventing the right to counsel.
Facts: Defendant had been indicted and was represented by counsel. The prosecutor went to the judge, without Defendant's counsel, and got an order to interview Defendant allegedly regarding other, unrelated cases the prosecutor was prosecuting. The prosecutor and police got Defendant to waive *Miranda* rights, then interviewed Defendant, without counsel, and then sought to use statements he made in the interview against him at trial. The State claimed Defendant gave information about other crimes "so unique" as to show he committed the charged crime as part of a common scheme.
Holding: The prosecutor certainly would have been aware that any statements made in the interview could likely be incriminating because the subject matter of the interview was similar to the pending case. The State had an affirmative obligation to respect Defendant's right to counsel. The 6th Amendment was violated because the State obtained statements by knowingly circumventing Defendant's right to counsel.

State v. Steger, No. ED86872 (Mo. App., E.D. 11/14/06):
Trial court plainly erred in allowing prosecutor to elicit from police witnesses that after Miranda warnings were given, Defendant had requested counsel.
Facts: Defendant was charged with first degree assault and other offenses arising out of a shooting incident. The evidence was conflicting at trial as to whether the victims or Defendant started the shooting. Defendant claimed the victims started it and Defendant acted in self-defense, and the victims claimed Defendant started it. The State either asked police officers, or the officers volunteered, that after *Miranda* warnings were given, Defendant asked to speak with a lawyer. Defense counsel did not object.
Holding: If a defendant exercises his right to remain silent or request an attorney, it is a violation of his constitutional rights to due process and against self-incrimination/right to silence to use that silence against him. Evidence in regard to the conclusion of an interrogation which reveals that the defendant was failing to answer a direct charge of guilt is improper. Here, the State repeatedly elicited testimony that Defendant had asked

for counsel. Moreover, the evidence of guilt was not strong and the defense was not frivolous. Defendant had no prior convictions, but the victims (who testified against Defendant) all had multiple prior convictions, suggesting their credibility was questionable. The prosecutor's questions had a decisive effect on the jury by creating an inference of guilt.

Hill v. Hon. Larry L. Kendrick, No. ED87812 (Mo. App., E.D. 5/30/06):
Trial court lacked jurisdiction in criminal case to compel witness/victim to testify absent a showing that her testimony could not incriminate her.
Facts: Hill's father was charged with sexually abusing Hill. When the State sought to depose Hill, Hill asserted her rights against self-incrimination under the 5th Amendment and Article I, Section 19, Mo. Const., and refused to testify. The State sought an order compelling her to testify. The trial court ordered Hill to testify, finding that the State's questions "will not incriminate her." Hill filed a writ of prohibition.
Holding: Prohibition is a discretionary writ that lies to prevent abuse of judicial discretion, avoid irreparable harm, or to prevent exercise of extra-judicial power. Once a witness claims the privilege against self-incrimination, a rebuttable presumption arises that the witness' answers might tend to incriminate her, a presumption that can be rebutted by a showing that her answers cannot possibly incriminate her. Hill offered several offenses for which her answers could possibly incriminate her -- making false declarations, false reports, hindering prosecution, and others. The statute of limitations have not expired on these offenses. In the absence of a grant of immunity, the trial court exceeded its jurisdiction by ordering Hill to testify. Writ made absolute.

State v. Allen, No. WD70295 (Mo. App. W.D. 9/22/09):
Even though the State sought "clarification" of trial court's ruling on motion to suppress from the trial court, where State did not appeal the ruling within 5 days of the original suppression order, State's appeal was untimely under Sec. 547.200.4.
Facts: Defendant filed a motion to suppress statements, which the trial court sustained on September 8, 2008. The court entered a docket entry on September 8, saying "Deft's motion to suppress statements sustained." The State requested a "more specific ruling" on certain statements, and the court further explained its ruling in chambers on September 9. On November 3, the State asked for "further clarification" of the suppression order, and the court issued another order on November 4. On November 4, the State filed an appeal.
Holding: Sec. 547.200.4 only permits the State to appeal "within 5 days of the entry of the [suppression] order of the trial court." The State argues it is appealing the November 4 order, so its appeal is timely. However, the November 4 order was, in substance, the same as the court's prior rulings on September 8 and 9. The November 4 order, in substance, merely reaffirmed the in chambers conference on September 9. While an appeal within 5 days of September 9 would have been timely, the appeal on November 4 was outside the 5-day time limit for a State's appeal. Appeal dismissed.

State v. Blair, No. WD69602 (Mo. App. W.D. 8/18/09):
(1) Constitution does not require police to electronically record Defendant's interrogation; (2) Even though HB62, Sec. 590.701 RSMo. (effective August 28, 2009),

requires the recording of all custodial interrogations of persons suspected of committing specific violent crimes, under the new law, the failure to record results in loss of funding to the police agency, not suppression of the statements.
Facts: Police did not electronically record Defendant's interrogation in murder case. Defendant claimed this was error on appeal.
Holding: It is a matter of first impression in Missouri whether the U.S. or Missouri Constitutions require electronic recording of interrogations. While some states have held that their constitutions require this, the majority rule is that this is not constitutionally required, and the U.S. Supreme Court has not required it. Defendant may be correct that electronic recording would be good public policy, but it is for the legislature to enact such a policy, not the courts. Missouri has enacted an electronic recording statute, Sec. 590.701, effective August 28, 2009, requiring electronic recording of interrogations of persons suspected of committing certain violent crimes. However, even if the statute applies to Defendant, it provides no relief because Section 590.701.6 states, "Nothing in this section shall be construed as a ground to exclude evidence." The statute only provides that failure to record interrogations results in loss of police funding. Thus, Defendant cannot use the statute to suppress his statements.

Coleman v. State, No. WD68014 (Mo. App., W.D. 5/13/08):
Trial counsel was ineffective in failing to adduce evidence of Defendant's pre-existing injury which made it impossible for him to run, and which would have refuted State's inference that Defendant did not run from police because his foot was injured in the charged burglary.
Facts: A witness saw two men burglarizing a house, and called police. When police arrived, the men ran. Police arrested the men and Defendant, who was also walking in the neighborhood. The witness could not identify any of the men as the burglars, but said their clothing was similar. Defendant claimed he was visiting a woman in the subdivision and was walking to a bus stop. Defendant denied having anything to do with a burglary. A police officer testified at trial that Defendant "could not" run from police, and the jury was left to infer that Defendant "could not" run because he had injured his foot in kicking in the door to the burglary. Defendant claimed counsel was ineffective in failing to present evidence that Defendant had a pre-existing foot injury that made it impossible for him to run.
Holding: It was not reasonable for counsel to fail to present evidence of Defendant's pre-existing foot injury, because this left the false impression with jurors that Defendant did not run from police because he had injured his foot in kicking in the door. A reasonable counsel would have foreseen that the State would draw this inference, and prepared to rebut it. Defendant was prejudiced because the lack of such evidence may have caused the jury to reject Defendant's defense that he was not involved in the burglary and was walking to a bus stop.

Editor's Note by Greg Mermelstein: There was a second claim of ineffectiveness which the Court of Appeals rejected, but which may have been important to the outcome here. Defendant also claimed counsel was ineffective in not calling the co-defendants to testify that they did not know Defendant and he was not involved in the burglary. Counsel had not called the co-defendants because their attorneys had said they would invoke their 5th Amendment rights. However, in the PCR case, the co-defendants

testified that they did not know Defendant; that he was not involved in the burglary; and that they would have testified to this at trial. The motion court found this testimony incredible, and the Court of Appeals found it was bound by this, but "note[d] that testimony from [codefendants] that they did not know [Defendant] would not have violated their rights against self-incrimination," thus suggesting that they could have been called to testify to this.

State v. Wadas, No. WD66587 (Mo. App., W.D. 6/5/07):
Trial court erred in admitting statements of deaf Defendant that were made through a non-certified, non-licensed interpreter, since Sections 476.753.2 and 476.750(5) require a certified or licensed interpreter.
Facts: Deaf Defendant was arrested for DWI. Police found a non-certified, non-licensed sign-language interpreter who interpreted Defendant's statements for police. Those statements were then admitted against Defendant at his DWI trial, including that he had refused to take breath test.
Holding: Section 476.753.2 provides that no statement made by a deaf person under arrest shall be admitted at trial before an interpreter is made available to the person. Section 476.750(5) provides that a qualified interpreter is one who is certified or licensed by Missouri. Here, the interpreter was not certified or licensed. Thus, Defendant's statements made through the interpreter were not admissible.

State v. Renfrow, No. WD66102 (Mo. App., W.D. 2/27/07):
Where city police officer observed Defendant's car swerve within the city limits, but did not activate sirens or stop Defendant until he was outside the city limits, the stop was illegal and evidence obtained in Defendant's subsequent arrest by the Highway Patrol for DWI must be suppressed as fruit of poisonous tree.
Facts: City police officer observed Defendant's car swerve inside city limits. City officer followed Defendant and saw car drive erratically outside city limits. City officer activated siren, and stopped Defendant on side of road outside city limit. (The city limit was the center line of the road). City officer called Highway Patrol officer who came and discovered Defendant was drunk, and arrested Defendant. Defendant moved to suppress all evidence seized and statements made as a result of the stop.
Holding: Municipal police officers have no official power to apprehend offenders beyond their municipal boundaries, absent a statute. Section 544.157.3 allows officers to stop offenders if the officers are in "fresh pursuit" initiated from within the jurisdiction. Here, city officer did not activate his sirens until he was outside the city limits. Thus, city officer was not in "fresh pursuit," and did not have authority to stop Defendant. The stop was illegal. The question then becomes whether the evidence from the stop must be suppressed as a fruit of the poisonous tree. *State v. Neher*, 726 S.W.2d 362 (Mo. App., W.D. 1987) held that such evidence should not be suppressed, but Court of Appeals overrules ***Neher***. Court holds that the Highway Patrol officer's arrest of Defendant was a mere extension of city officer's illegal stop and seizure, not based on independent information, and not attenuated from the illegal stop.

State v. Gabbert, No. WD66350 (Mo. App., W.D. 2/13/07):
Where Defendant was stopped and searched by police when he was in the backyard of a house he was visiting, Defendant had standing to challenge the seizure and search, and the evidence seized and statements taken from him must be suppressed because there was no reasonable suspicion to stop and seize Defendant.
Facts: Police were called to a house to conduct a "well-being" check after a mother called police to try to get her daughter to come home from the house, when the mother found drugs in the daughter's purse. The police found Defendant in the backyard of the house. They ordered him to take his hands out of his pockets. They asked to search him, and he consented. They found a knife in his sock, and he made incriminating remarks about the knife. He was charged with unlawful use of a weapon.
Holding: Defendant has standing to object to his seizure and search, even though Defendant did not own the house, because the 4th Amendment protects people not places. Defendant had a legitimate expectation of privacy in his person. The police characterized their stop of Defendant as a seizure and testified he was not free to leave. While a person can be detained if there is reasonable suspicion for doing so, here there was not. Defendant was not fleeing; there was no evidence he was using drugs, or that he posed a danger to police or anyone else. Therefore, the stop and seizure of Defendant was illegal. The fact that Defendant may have consented to the search after the stop does not purge the taint of the illegal seizure. The knife and statements must be suppressed.

Wadas v. Director of Revenue, No. WD65704 (Mo. App., W.D. 8/1/06):
Where the police questioned deaf Defendant through an unlicensed interpreter, Defendant's statements cannot be used as evidence against him because Section 476.753.2 requires a licensed interpreter before a deaf person's statements may be used against him.
Facts: Defendant was stopped by police officer who knew Defendant was deaf and mute. Defendant was suspected of DWI and taken for a breath test. The police found an interpreter who had attended the Missouri School for the Deaf, but who was not licensed by Missouri as an interpreter. When the interpreter first met Defendant, Defendant asked if she was licensed. Even though she wasn't licensed, Defendant then communicated through the interpreter, and his statements were admitted into evidence to revoke his driver's license.
Holding: Defendant contends on appeal that his statements made through an unlicensed interpreter cannot be used against him. Section 476.753.2 provides, in relevant part, that no statement obtained from a deaf person who is involuntarily detained or arrested can be admitted in any judicial or administrative proceeding unless an interpreter is provided. Section 476.750(5) provides that a "qualified interpreter" is a person who is certified and licensed by Missouri or deemed competent by the Missouri Commission for the Deaf. Defendant's statements at issue were made through an unlicensed and uncertified interpreter. Therefore, under these statutes, the statements should not have been admitted, and considered as evidence of refusal to take a breath test.

State v. Brooks, 185 S.W.3d 265 (Mo. App., W.D. 2006):
Defendant was not "in custody" when she called 911 and went with police to the police station and made statements; therefore, those statements should not be suppressed. But

Defendant was "in custody" at the station after the officer told her "I promise we'll leave after this," so Defendant's statements made after that point should be suppressed, including statements made after Miranda warnings after that point.
Facts: Defendant called 911 and reported that a baby was not breathing. Police questioned Defendant and took her to police station where they questioned her further. After Defendant made various statements, the nature of the police questioning changed. The police moved physically closer to Defendant and told her "I promise we'll leave after this." Defendant confessed. Police then gave Defendant *Miranda* warnings. She then was asked if she understood her rights, and was given a waiver to sign. She confessed again.
Holding: There is no duty to give *Miranda* warnings unless a Defendant is in "custody." A reasonable person would have believed Defendant was free to leave the interview until the officer said "I promise we'll leave after this." That, along with other facts, made the situation custodial because a reasonable person would not have thought they were free to leave after that point. The statements made before the interrogation turned "custodial" are not to be suppressed. But the confessions given after the interrogation turned "custodial" must be suppressed. This includes the post-*Miranda* confession because under *Missouri v. Seibert*, 542 U.S. 600 (2004), there was no break between the unwarned questioning and the post-*Miranda* questioning, the questioning was continuous, and a reasonable person would not have understood that they retained a real choice about continuing to talk at that point. Regarding the waiver Defendant signed, she was asked if she *understood* her rights, but was never asked if she was *willing to waive* her rights

*** Berghuis v. Thompkins, ___ U.S. ___, 87 Crim. L. Rep. 329 (U.S. 6/1/10):**
Holding: A defendant must unambiguously invoke his 5th Amendment right to remain silent to cut off interrogation, and can waive the right by saying nothing and then answering questions; thus, where police gave *Miranda* warnings but Defendant said nothing during more than two hours of questioning until he finally made incriminating remarks, Defendant waived his right to silence and his statements were admissible because Defendant understood his *Miranda* rights and his statements were uncoerced.

*** Maryland v. Shatzer, 86 Crim. L. Rep. 611, ___ U.S. ___ (U.S. 2/24/10):**
Holding: Even though Defendant has invoked his right to counsel under *Edwards v. Arizona*, police may reinitiate questioning 14 days after Defendant is released from custody. However, even after 14 days, defendants can claim that a *Miranda* waiver was, in fact, involuntary under *Johnson v. Zerbst*.

*** Florida v. Powell, 86 Crim. L. Rep. 571 (U.S. 2/23/10):**
Holding: *Miranda* warnings need not specifically state that person is entitled to an attorney during police questioning.

*** Corley v. U.S., 85 Crim. L. Rep. 35, 2009 WL 901513, ___ U.S. ___ (4/6/09):**
Holding: 18 U.S.C. 3501 (which sought to abrogate *Miranda*) does not abrogate the rule that bars admission of a Defendant's statements given during an unreasonable delay in bringing him before a judge.

*** Kansas v. Ventris, 85 Crim. L. Rep. 171, ___ U.S. ___ (4/29/09):**
Holding: Even though police planted a jail-house informant in Defendant's cell in order to elicit statements from Defendant in the absence of counsel, the statements taken in violation of the 6th Amendment right to counsel could be used to impeach Defendant's testimony at trial.

*** Montejo v. Louisiana, 85 Crim. L. Rep. 267, ___ U.S. ___ (5/26/09):**
Holding: Even though Defendant had been appointed counsel at his first court appearance, where police later approached Defendant and asked if he wanted to talk and Defendant gave an incriminating note (statements), the admission of the note at trial did not violate the 6th Amendment right to counsel; Defendants who have counsel can voluntarily waive that right by answering police-initiated questions, even after appointment of counsel; *Michigan v. Jackson*, 475 U.S. 625 (1986) is overruled.

U.S. v. Jackson, 84 Crim. L. Rep. 145 (1st Cir. 10/8/08):
Holding: Where police conducting a search told Defendant he should "come clean" and Defendant confessed, this constituted "interrogation" for which *Miranda* warnings were required.

U.S. v. Andujar-Basco, 81 Crim. L. Rep. 348 (1st Cir. 6/6/07):
Holding: Even though Defendant initially agreed to talk to police and began talking, where he then expressly invoked his right to remain silent, the prosecution cannot use that invocation of silence against Defendant at trial.

U.S. v. Plugh, 85 Crim. L. Rep. 583, 2009 WL 2341966 (2d Cir. 7/31/09):
Holding: Where Defendant expressed uncertainty whether he should talk to police or get an attorney, his refusal to sign a *Miranda* waiver form was an invocation of his Fifth Amendment rights and interrogation should have ceased.

U.S. v. Lafferty, 82 Crim. L. Rep. 85 (3d Cir. 9/28/07):
Holding: Where Defendant and her boyfriend were arrested and invoked their right to silence and to counsel, and then boyfriend said "they" were ready to talk and police interrogated both again, the interrogation of Defendant violated her invocation of her right to counsel.

U.S. v. Chavira, 2010 WL 2024765 (5th Cir. 2010):
Holding: Where border patrol confiscated Defendant's birth certificate and state identification, handcuffed her to a chair, detained her child, and made increasingly accusatory accusations, Defendant was "in custody" for *Miranda* purposes.

Fields v. Howes, 87 Crim. L. Rep. 888, 2010 WL 3271654 (6th Cir. 8/20/10):
Holding: A Prisoner-Defendant is "in custody" for *Miranda* purposes (thus requiring warnings) whenever he is isolated from the general prison population and questioned in a manner likely to lead to self-incrimination about conduct occurring outside of the prison.

Ayers v. Hudson, 88 Crim. L. Rep. 69, 2010 WL 3894463 (6th Cir. 10/5/10):
Holding: Police need not specifically tell a jailhouse informer to get a statement from Defendant in order to violate 6th Amendment right to counsel because such an express requirement would allow police to do "wink and nod" deals; thus, where informer had given police certain information but police told informer that certain details were missing, informer's subsequent obtaining of these details from Defendant violated Defendant's right to counsel.

U.S. v. Aguirre, 87 Crim. L. Rep. 315 (6th Cir. 5/17/10):
Holding: Truthful but incriminating information on Public Defender application cannot be used as evidence to prove the underlying charged crime because this would force Defendant to choose between his 5th Amendment right against self-incrimination and his 6th Amendment right to counsel.

Garner v. Mitchell, 2007 WL 2593514 (6th Cir. 2007):
Holding: Even though Defendant said he understood his *Miranda* rights, where a postconviction expert administered a Grisso test which showed Defendant did not understand his rights, Defendant's waiver was not knowing and intelligent.

U.S. v. Shaw, 80 Crim. L. Rep. 4 (6th Cir. 9/26/06):
Holding: Mother's hearsay statements to police that her three-year-old child said that Defendant had sexually abused him (the child) did not, standing alone, provide probable cause to arrest Defendant. Therefore, his post-arrest statements had to be suppressed, because Defendant was arrested in violation of the 4th Amendment. The court noted that the police had not interviewed the child.

U.S. v. Simpson, 80 Crim. L. Rep. 677 (7th Cir. 3/13/07):
Holding: Even though Defendant said he was selling crack at time of undercover operation, where Defendant did not specifically remember the particular crack deal with which he was charged, his statement was not admissible because it constituted propensity evidence, rather than admission of the charged crime.

U.S. v. Jumper, 2007 WL 2296524 (7th Cir. 2007):
Holding: Where officer told Defendant if there were some questions he did not want to answer he could bypass them, Defendant invoked his right to silence by saying "I don't want to answer that," and "I'm not even going to answer that" in response to certain questions.

U.S. v. Martinez, 79 Crim. L. Rep. 777 (8th Cir. 9/11/06):
Holding: Where police stopped , frisked and handcuffed Defendant who matched a general description of a bank robber, Defendant was "in custody" for *Miranda* purposes and *Miranda* warnings were required before police could question him about cash on his person.

U.S. v. Ollie, 79 Crim. L. Rep. 54 (8th Cir. 3/31/06):
Holding: (1) Defendant who followed parole officer's order to report to police station and speak to police was "in custody" for *Miranda* purposes because a reasonable person would not have felt free to leave without having their parole revoked; (2) where

Defendant had orally confessed, then was given *Miranda* warnings and made a written confession, the written confession had to be suppressed under *Missouri v. Seibert*.

Crowe v. County of San Diego, 2010 WL 2431842 (9th Cir. 2010):
Holding: Interrogation of juvenile defendant violated 14th Amendment due process where defendant was isolated for hours, subjected to hours of interrogation, threatened and lied to by police, and defendant was in shock for death of his sister.

Hurd v. Terhune, 2010 WL 3293355 (9th Cir. 2010):
Holding: After *Miranda* warnings, Defendant's refusal to reenact his version of how his wife was shot could not be used to show his guilt in murder trial.

Earp v. Cullen, 2010 WL 4069332 (9th Cir. 2010):
Holding: Trial court erred in allowing witness to anticipatorily invoke her 5th Amendment right not to incriminate herself, because it believed witness was going to testify untruthfully and subject herself to prosecution.

Crowe v. County of San Diego, 2010 WL 114956, 2010 WL 293758 (9th Cir. 2010):
Holding: Where police interrogated Juvenile-Defendants for hours and threatened and lied to them, this violated 14th Amendment due process.

Doody v. Schriro, 86 Crim. L. Rep. 667 (9th Cir. 2/25/10)(en banc):
Holding: Where police did not give accurate *Miranda* warnings and questioned sleep-deprived juvenile-Defendant for 13 hours, this violated Defendant's *Miranda* rights.

U.S. v. Liera, 86 Crim. L. Rep. 211 (9th Cir. 11/4/09):
Holding: Even though police recording equipment "malfunctioned" and they wanted to record a second statement of Defendant, this did not justify delaying bringing Defendant before judge for initial appearance, and Defendant's second taped statements had to be suppressed.

Doody v. Schriro, 84 Crim. L. Rep. 257 (9th Cir. 11/20/08):
Holding: Even though police read *Miranda* rights, where they called them a formality for the benefit of juvenile Defendant, and then interrogated Defendant for 12 hours, this was coercive interrogation that rendered confession involuntary.

U.S. v. Craighead, 83 Crim. L. Rep. 776, 2008 WL 3863709 (9th Cir. 8/21/08):
Holding: Even though police, who were executing a search for child pornography at Defendant's house, told Defendant he would not be arrested that day and he was free to leave, Defendant would not have felt free to leave his own house under the circumstances and statements made without *Miranda* warnings had to be suppressed.

U.S. v. Juvenile Male, 83 Crim. L. Rep. 462 (9th Cir. 6/12/08):
Holding: Even though police did not know Defendant was a juvenile, police still must comply with interrogation requirements of the Juvenile Justice and Delinquency Prevention Act, 18 U.S.C. 5033.

U.S. v. Caruto, 83 Crim. L. Rep. 280 (9th Cir. 5/12/08):
Holding: Where Defendant's invocation of *Miranda* rights resulted in omitted facts in a second statement, State could not cross-examine Defendant on the omitted facts at trial because this would violate right to post-*Miranda* silence.

Anderson v. Terhune, 2008 WL 399199 (9th Cir. 2008)(en banc):
Holding: Statement to police "I plead the Fifth" was an unequivocal invocation of the right to silence under *Miranda*, and officer's subsequent question, "Plead the Fifth, what's that?" was not a legitimately clarifying question; State court erroneously applied federal law in holding otherwise.

U.S. v. Rodriguez, 2008 WL 623982 (9th Cir. 2008):
Holding: Under "clarification rule," where in response to a *Miranda* warning Defendant said "I'm good for tonight," officer was required to clarify what the remarks meant before proceeding with general interrogation.

U.S. v. Hansan, 83 Crim. L. Rep. 290 (10th Cir. 5/20/08):
Holding: Court committed plain error by finding that Defendant on trial for perjury at a grand jury needed an interpreter at trial, but that he had not been entitled to one at the grand jury; Defendant argued that without an interpreter, he didn't understand the rights advisory.

U.S. v. Lopez, 78 Crim. L. Rep. 659 (10th Cir. 2/21/06):
Holding: Police officer's giving Defendant pieces of paper with numbers on them representing what sentences Defendant would receive if he did or did not cooperate was a promise of leniency which rendered Defendant's confession involuntary.

U.S. v. Lall, 2010 WL 2136630 (11th Cir. 2010):
Holding: Where police told Defendant that anything he said would not be used to prosecute him, this rendered confession involuntary and this applied regardless that Defendant was later prosecuted in federal court, rather than state court.

U.S. v. Lall, 87 Crim. L. Rep. 373 (11th Cir. 5/28/10):
Holding: Where local police officer told Defendant during questioning that his statements would not be used to prosecute him, this made statements involuntary under *Miranda* and precluded their use in federal court.

U.S. v. Street, 80 Crim. L. Rep. 346 (11th 12/20/06):
Holding: Even though Defendant was a police officer, where police gave Defendant only a partial *Miranda* warning which contained only two of the required *Miranda* rights, Defendant's statements had to be suppressed.

U.S. v. Slough, 2009 WL 5173785 (D.D.C. 2009):
Holding: Gov't cannot use compelled statements of gov't contractors to obtain indictment against contractors.

Edwards v. U.S., 81 Crim. L. Rep. 201 (D.C. 5/3/07):
Holding: Where the police initially interrogated Defendant without giving *Miranda* warnings in violation of *Missouri v. Seibert*, 542 U.S. 600 (2004), the pre- and post-*Miranda* statements of Defendant must be suppressed, even though the statements were intended to be "exculpatory" rather than confessions.

U.S. v. Salabye, 2009 WL 1028181 (D. Ariz. 2009):
Holding: Where five armed officers confronted Defendant at a search of his home, directed him outside and he was interrogated for two hours, this was custodial interrogation and *Miranda* warnings were required.

U.S. v. Nicholas, 85 Crim. L. Rep. 98 (C.D. Cal. 4/1/09):
Holding: Where law firm represented both corporation and its Executive, Executive's statement to law firm had to be suppressed in stock fraud scheme even though law firm told Executive it was representing corporation when it asked him about scheme; "an oral warning to a current client that no attorney-client relationship exists" is "nonsensical" and "unethical."

Holguin v. Harrison, 2005 WL 2257901 (N.D. Cal. 2005):
Holding: Defendant, a special education student, was "in custody" when he was taken involuntarily to principal's office because he was trespassing and left with a police officer, who never told him he could leave.

U.S. v. Jenkins, 2007 WL 1627104 (M.D. Fla. 2007):
Holding: Due process violated where State presented evidence that Defendant refused to give a written statement after *Miranda* warnings were given.

U.S. v. Harrold, 2009 WL 5174739 (N.D. Ga. 2009):
Holding: Even though Defendant went to police station voluntarily because her photo was broadcast on TV as a suspect in a robbery, where police took her wallet and identification and placed her in a locked room before police interviewed her, a reasonable person would not have felt free to leave so Defendant was "in custody" for *Miranda* purposes.

U.S. v. DeLaurentiis, 2009 WL 1833961 (D. Me. 2009):
Holding: Where police told Defendant she could have a lawyer and she asked to call her mother who could contact her uncle-lawyer and later asked other times for her uncle, this was an invocation of her right to counsel and questioning should have ceased.

U.S. v. Gonzalez, 2010 WL 2598031 (D. Mass. 2010):
Holding: Application of inevitable discovery rule to permit admission of Defendant's statements and evidence found in a search of Defendant's residence would abet police misconduct and weaken 5th Amendment protections where police violated Defendant's *Miranda* rights and testified falsely about punching Defendant in stomach.

U.S. v. Mittel-Carey, 80 Crim. L. Rep. 228 (D. Mass. 10/20/06):
Holding: Even though police had a search warrant to search Defendant's house for child pornography, where police in conducting the search surrounded Defendant and kept him under surveillance, Defendant was in custody and *Miranda* warnings were required; his statements must be suppressed in absence of *Miranda* warnings.

U.S. v. Novak, 80 Crim. L. Rep. 51 (D. Mass. 9/26/06):
Holding: 4th Amendment prohibits use of information obtained in monitored telephone call between inmate and attorney because there was a reasonable expectation of privacy in attorney-client communication, even though parties knew call could be monitored.

U.S. v. Griffin, 2006 WL 1359381 (D. Mass. 2006):
Holding: Even though Defendant had waived his *Miranda* rights and made a statement, Defendant did not consent to a warrantless search of his safe where armed officers ordered Defendant to show them where his safe was and open it.

U.S v. Ross, 2008 WL 5046915 (E.D. Mich. 2008):
Holding: Even though a prosecutor was not present, where Defendant and his attorney met with a secret service agent in a bank fraud case, the purpose of the meeting was plea negotiations and Defendant's statements could not be used against him at trial.

U.S. v. Morrison, 2007 WL 2852591 (E.D. N.Y. 2007):
Holding: Prosecutor cannot use incriminatory statements made in connection with Defendant's proffer agreement to prosecute Defendant.

U.S. v. Gilkeson, 2006 WL 1226530 (N.D. N.Y. 2006):
Holding: Where Defendant's repeated requests for counsel were ignored and Defendant was not given *Miranda* rights, his later consent to search his computer was invalid because was direct result of the *Miranda* violation.

U.S. v. Pagnotti, 2007 WL 2570257 (M.D. Pa. 2007):
Holding: Prosecutor's use of Defendant's immunized testimony to indict Defendant violated right against self-incrimination.

U.S. v. Lopez, 2009 WL 837697 (S.D. Tex. 2009):
Holding: Where gov't elicited information from Defendant in a proffer agreement, and then corroborated that information through co-defendant and used it against Defendant, the use was not sufficiently independent of Defendant's proffer to be proper.

U.S. v. Monreal, 2008 WL 220707 (E.D. Va. 2008):
Holding: Where (1) Defendant did not speak English; (2) the police translator was not sufficiently bilingual; and (3) Defendant's statement given to translator was not a fair representation of what Defendant said, the statement had to be suppressed.

U.S. v. Toledo, 2009 WL 1313337 (S.D. W.Va. 2009):
Holding: Even though (1) 10 days passed between time of Defendant's illegal arrest by ICE agents and his statement, and (2) *Miranda* warnings were given before the statement, the statement must be suppressed.

Munson v. State, 2005 WL 3081632 (Alaska 2005):
Holding: Defendant's statement during interrogation, "Well, I'm done talking then," invoked his right to silence.

Osborne v. State, 85 Crim. L. Rep. 525 (Ark. 6/25/09):
Holding: Where Defendant had invoked his right to counsel, he did not reinitiate interrogation when he asked police about his family and the power of prayer.

Wedgeworth v. State, 84 Crim. L. Rep. 88 (Ark. 10/2/08):
Holding: Where Defendant said he wanted his lawyer but could not recall lawyer's name, officer improperly re-initiated interrogation after waiting a few minutes and then asking if he had remembered the name and "What do you want to do?"

People v. Sandoval, 2009 WL 3260644 (Colo. 2009):
Holding: Where detective unequivocally told Defendant that if he did not go to police station for questioning "voluntarily" that he would be required to go against his will, Defendant was "in custody" for *Miranda* purposes.

People v. Redgebol, 83 Crim. L. Rep. 352 (Colo. 5/27/08):
Holding: Defendant who invoked *Miranda* rights did not open door to further police questioning by reinitiating a conversation 30 seconds later; 30 seconds is not long enough to show police ceased interrogation and Defendant voluntarily reinitiated it.

People v. Elmarr, 83 Crim. L. Rep. 202 (Colo. 4/21/08):
Holding: Even though Defendant was never restrained, where Defendant was asked by police if he would mind coming to police station to talk about wife's murder, this was custodial interrogation for *Miranda* purposes.

People v. Bradshaw, 81 Crim. L. Rep. 58 (Colo. 4/9/07):
Holding: Where Defendant arrested for sex assault said during police interrogation, "If she's [victim's] got some other different story [than me], I'm going to have to talk to an attorney about this," this was an invocation of his right to silence and police questioning had to cease.

People v. Barrow, 79 Crim. L. Rep. 627 (Colo. 6/26/06):
Holding: Even though juvenile's mother had signed a waiver giving police permission to interview juvenile in her absence, this did not satisfy the express-waiver provision of Colorado law which gives juveniles the right to have a parent present during custodial interrogation.

People v. Wood, 2006 WL 1460402 (Colo. 2006):
Holding: Police "relationship-building" and effort to get Defendant's "side of story" was likely to elicit an incriminating response from in-custody Defendant, so *Miranda* warnings required.

Ares v. State, 82 Crim. L. Rep. 133 (Del. 10/18/07):
Holding: Where Defendant charged with killing his wife had invoked his right to silence, police officer violated invocation of that right by asking Defendant "if he had any children" during "booking," which elicited incriminating responses.

Rigterink v. State, 84 Crim. L. Rep. 529 (Fla. 1/30/09):
Holding: Even though police interview began as a consensual interview, where police confronted Defendant with evidence that his fingerprint was found in blood at murder scene, this made the interview custodial interrogation for purposes of *Miranda*.

State v. Powell, 84 Crim. L. Rep. 29 (Fla. 9/29/08):
Holding: *Miranda* warnings that say Defendant can consult with attorney but don't say attorney can be present during questioning violate 5th Amendment.

Calabro v. State, 84 Crim. L. Rep. 89 (Fla. 9/18/08):
Holding: Even though Defendant said at his arraignment that he did not want a trial and was "guilty of this," those statements were made in connection with plea bargaining and cannot be admitted at trial.

State v. Folsom, 2009 WL 3517529 (Ga. 2009):
Holding: Where police waited at Defendant's house to question him and then followed him to the police station, kept Defendant in an interrogation room for six hours, and never told him he was free to leave, Defendant was "in custody" for *Miranda* purposes.

Reynolds v. State, 84 Crim. L. Rep. 685 (Ga. 2/23/09):
Holding: Under Georgia evidentiary rules, prosecutor cannot comment on Defendant's prearrest, pre-*Miranda* silence.

Vergara v. State, 2008 WL 479998 (Ga. 2008):
Holding: Even though Defendant asked to speak to investigator, Defendant did not waive previously-invoked *Miranda* rights where the investigator did not remind Defendant of his *Miranda* rights; before Defendant said anything, the investigator reprimanded Defendant for not being truthful originally, and most of Defendant's statements were in response to reinterrogation.

State v. Rodrigues, 80 Crim. L. Rep. 272 (Haw. 11/29/06):
Holding: Where Defendant refused at the end of an interrogation to repeat a confession on audiotape, this was an invocation of his 5th Amendment right to silence, and prosecutor cannot present evidence that Defendant refused to make tape.

Carr v. State, 88 Crim. L. Rep. 65 (Ind. 9/29/10):
Holding: Even though Defendant's request for attorney may have been somewhat equivocal in saying "I feel like I need an attorney," where police made remarks suggesting this wasn't necessary and continued the interrogation, police failed to scrupulously honor Defendant's right to counsel and violated *Miranda*.

State v. Ortiz, 85 Crim. L. Rep. 350 (Iowa 5/29/09):
Holding: (1) Where Spanish translation of *Miranda* warnings was defective or incomplete, the warnings were ineffective; and (2) where police took Defendant to a interview room using a key-card-controlled elevator, Defendant was in custody and would not have felt free to leave because he would have thought needed a key-card to leave the building.

State v. Harris, 2007 WL 2404724 (Iowa 2007):
Holding: Defendant did not validly waive right to counsel during interrogation where police asked Defendant whether he didn't "trust us enough to do this without a lawyer."

State v. Morton, 83 Crim. L. Rep. 644 (Kan. 7/3/08):
Holding: Where (1) Defendant had been under investigation by authorities and had retained a lawyer for this, but it appeared that that investigation had been closed, and (2) authorities then asked her to come to an interview and she asked if she needed a lawyer was told "it's not that kind of interview," the authorities misrepresented the purpose of the interview and her incriminating statements made in relation to the prior investigation had to be suppressed.

State v. Brown, 83 Crim. L Rep. 281 (Kan. 5/16/08):
Holding: Threat by gov't social service workers that Defendant could lose her parental rights for refusing to confess made Defendant's confession involuntary.

State v. Ventris, 82 Crim. L. Rep. 491, 2008 WL 268900 (Kan. 2/1/08):
Holding: Where a jailhouse snitch was working for police, statements Defendant made to the snitch could not be used against Defendant at trial, including to impeach Defendant.

Bailey v. Commonwealth, 2006 WL 1649322 (Ky. 2006):
Holding: Defendant's confession was not voluntary where he had an IQ of 50, police knew he was mentally deficient, and police interrogated him for seven hours.

State v. Luckett, 87 Crim. L. Rep. 150 (Md. 4/14/10):
Holding: Even though officer gave *Miranda* warnings correctly, where officer then gave "clarification" of the warnings by saying things such as lawyers are not needed for discussing things outside the case, this rendered the *Miranda* warnings ineffective.

Shatzer v. State, 83 Crim. L. Rep. 797 (Md. 8/26/08):
Holding: Even though two years had passed since time Defendant invoked *Miranda* rights, police could not reinitiate questioning of Defendant about reopened case.

Com. v. McNulty, 88 Crim. L. Rep. 216 (Mass. 11/18/10):
Holding: Mass. Constitution requires police to inform suspects that that an attorney wants to advise them and wants them to stop talking to police.

Commonwealth v. Murphy, 80 Crim. L. Rep. 653 (Mass. 3/6/07):
Holding: A jailhouse informant's agreement with gov't to obtain information from inmates does not have to specify a particular inmate in order to implicate the inmates' 6th Amendment right to counsel under *Massiah v. U.S.*, 377 U.S. 201 (1964).

State v. Chavarria-Cruz, 2010 WL 2609435 (Minn. 2010):
Holding: Defendant's statement made after he had invoked his right to counsel was not admissible.

State v. Clark, 82 Crim. L. Rep. 86 (Minn. 9/13/07):
Holding: Prosecutor did not comply with ethics rule regarding communication with represented persons when prosecutor merely notified defense counsel that police would be interviewing their clients; moreover, even if defendants consented to the police interviews and wanted to talk to police, the ethical rules were violated because a prosecutor cannot get police to interview represented persons without the consent of defense counsel; suppression of defendants' statements may be required.

Haynes v. State, 2006 WL 1550188 (Miss. 2006):
Holding: Where Defendant had invoked his right to counsel, but then asked to speak to police about logistical matters such as bond, scheduling and a preliminary hearing, Defendant did not "initiate" a conversation about the charged crime with police (but only logistical matters) and his statements about the crime must be suppressed.

State v. Munson, 2007 WL 2484084 (Mont. 2007):
Holding: Even though police interrogated Defendant in her house, she was "in custody" for *Miranda* purposes.

In re C.H., 85 Crim. L. Rep. 143, 2009 WL 961153 (Neb. 4/10/09):
Holding: Where officer interviewed juvenile in school principal's office without telling juvenile he was free to leave, this was "custodial interrogation" for *Miranda* purposes.

State v. Rogers, 84 Crim. L. Rep. 524 (Neb. 1/30/09):
Holding: Even though Defendant gave one word "yes/no" answers after she said "I'm not talking no more" to police interrogators, her statement was was an unequivocal invocation of her right to silence under *Miranda*.

In re William M., 84 Crim. L. Rep. 286 (Nev. 11/26/08):
Holding: Where (1) statute created presumption that juvenile cases would be certified to adult court unless juvenile could show the crime was caused by emotional problems, and (2) juveniles could not show this where they refused to admit guilt, the statute violated the privilege against self-incrimination.

State v. Miller, 2009 WL 2343123 (N.H. 2009):
Holding: Even though Defendant had been read his *Miranda* rights at the time of his arrest and a second questioning, where the arrest was from an illegal stop, Defendant's statements at the second questioning were not voluntary because there was no intervening event between the illegal arrest and the second questioning; Defendant was always in police presence; and the second questioning took place three hours after arrest.

State v. Burgess, 82 Crim. L. Rep. 606 (N.H. 2/26/08):
Holding: Under N.H. constitution, trial judge cannot increase a Defendant's sentence for remaining silent at sentencing as showing lack of remorse.

State v. Jennings, 81 Crim. L. Rep. 631 (N.H. 8/8/07):
Holding: Even though police told Defendant he was not under arrest and was free to leave, where they made Defendant ride to the stationhouse in a police car, took away his keys and cell phone, and questioned him at length in a small room, Defendant was "in custody" and his unwarned statements had to be suppressed.

In the Interest of P.M.P., 85 Crim. L. Rep. 604 (N.J. 7/29/09):
Holding: Once prosecutor files a juvenile complaint, law enforcement officers cannot question juvenile until he has been appointed counsel.

State v. O'Neill, 82 Crim. L. Rep. 339 (N.J. 12/20/07):
Holding: Where police use a "question first/warn later" interrogation technique, whether confession can be admitted under New Jersey constitution depends on whether this rendered the subsequent *Miranda* warnings ineffective (adopting *Missouri v. Seibert*, 542 U.S. 600 (2004) as state constitutional law).

People v. Havrish, 81 Crim. L. Rep. 27 (N.Y. 4/3/07):
Holding: Defendant's act of producing an unlicensed gun in response to a protective order to surrender all firearms was protected by Defendant's 5th Amendment right against compelled self-incrimination, where police had not known about the gun beforehand; producing the gun was testimonial and incriminating.

State v. Gay, 83 Crim. L. Rep. 294 (N.D. 5/15/08):
Holding: Even though officer was initially justified in handcuffing Defendant (passenger) to protect safety during a traffic stop, officer violated 4th Amendment by not removing the cuffs after a frisk, and statements made by Defendant had to be suppressed.

State v. Jackson, 86 Crim. L. Rep. 660 (Ohio 3/3/10):
Holding: Police officer's statements made during a compelled internal affairs investigation cannot be used to prosecute him.

State v. Vondehn, 2010 WL 2607155 (Or. 2010):
Holding: Under Oregon Constitution, where police violate *Miranda* rights, the derivative physical evidence they obtain from this must be suppressed.

State v. Vondehn, 87 Crim. L. Rep. 683 (Or. 7/1/10):
Holding: Oregon Constitution requires that physical evidence obtained as fruit of violation of *Miranda* be suppressed. (Rejecting *U.S. v. Patane*, 542 U.S. 630 (2004) which held that violation of *Miranda* does not require suppressing physical evidence if statements were voluntary.)

State v. Chatelain, 86 Crim. L. Rep. 137 (Or. 10/22/09):
Holding: Under the corpus delecti rule, an admission by Defendant that he entered a vacant house for the purpose of smoking marijuana had to be corroborated before it could support a conviction for burglary.

State v. Oliveira, 84 Crim. L. Rep. 382 (R.I. 12/19/08):
Holding: Even though Child Protection Worker's purpose was not prosecutorial, where Worker interviewed Defendant in jail about child molestation incident as part of an assessment of risk to child, this violated Defendant's 6th Amendment right to counsel.

State v. Navy, 86 Crim. L. Rep. 440 (S.C. 1/11/10):
Holding: Where (1) police told Defendant he was not under arrest; (2) then obtained a statement from him; (3) then confronted him with autopsy findings and obtained another statement; and (4) only then gave Miranda warnings and obtained another statement, the statements should be suppressed under *Missouri v. Seibert*, 542 U.S. 600 (2004).

State v. Holman, 2006 WL 2440942 (S.D. 2006):
Holding: Where Defendant was incarcerated and police officer left impression with Defendant that police officer could negotiate a deal for Defendant if Defendant provided information, Defendant's subsequent statements were not voluntary because product of promise of leniency and deception.

In re H.V., 83 Crim. L. Rep. 87 (Tex. 4/12/08):
Holding: Juvenile's statement following *Miranda* warning that he wanted his mother to ask for a lawyer was an unequivocal invocation of right to counsel and questioning had to cease.

State v. Muntean, 88 Crim. L. Rep. 187 (Vt. 11/5/10):
Holding: Even though Defendant came to police station voluntarily, he was "in custody" for *Miranda* purposes where he was put in a secure area of the station and confronted with evidence he had committed crimes.

State v. Amidon, 2008 WL 3982509 (Vt. 2008):
Holding: Statements Defendant made in a PSI after a guilty plea were not admissible at a trial on the charges, even for impeachment, when the plea was later withdrawn.

State v. Peterson, 81 Crim. L. Rep. 137 (Vt. 4/6/07):
Holding: Vermont Constitution requires suppression of physical evidence obtained as "fruit" of a violation of *Miranda.* Thus, Vermont gives greater protection than *U.S. v.*

Patane, 542 U.S. 630 (2004), which held that failure to give *Miranda* warnings does not require exclusion of reliable physical evidence obtained as result of Defendant's unwarned but voluntary statements.

State v. Everybodytalksabout, 81 Crim. L. Rep. 705 (Wash. 9/6/07):
Holding: Statements made during an unwarned, counsel-less presentence investigation interview cannot be used at later retrial against Defendant.

State v. Brockob, 80 Crim. L. Rep. 349 (Wash. 12/28/06):
Holding: Shoplifting 30 packages of cold pills did not independently prove that Defendant stole the pills to make methamphetamine, so his confession was not admissible under the corpus delecti rule which requires an extrajudicial confession have independent proof of the offense before it can be admitted.

Barnes v. State, 2008 WL 183212 (Wyo. 2008):
Holding: Defendant was "in custody" for *Miranda* purposes where he was forcibly taken to the ground and placed in handcuffs, even though encounter only lasted a few moments and only 1 officer was present.

People v. Bradford, 2008 WL 5392183 (Cal. Ct. App. 2008):
Holding: Where police omitted the portion of *Miranda* warning that Defendant's statements could and would be used against him in court, this required suppression of confession.

People v. Kiney, 81 Crim. L. Rep. 387 (Cal. Ct. App. 5/30/07):
Holding: A *pro se* Defendant's admissions made in closing argument at trial can be used against Defendant at a subsequent trial.

State v. Cooke, 2007 WL 313327 (Del. Super. Ct. 2007):
Holding: Right against self-incrimination was violated where State handwriting expert dictated to Defendant what to write as an exemplar and the expert dictated in such a way to see if Defendant made the same spelling errors as the writing at the crime scene.

Ramirez v. State, 2009 WL 2244208 (Fla. Ct. App. 2009):
Holding: Where (1) police officer offered "help" numerous times during an interrogation in Spanish, and (2) officer appeared to use his ability to speak Defendant's language as a means of establishing a bond with him, this rendered Defendant's statements involuntary.

Powell v. State, 82 Crim. L. Rep. 111, 2007 WL 2935003 (Fla. Ct. App. 10/10/07):
Holding: *Miranda* warnings which did not expressly inform Defendant of right to have attorney present during police interrogation were deficient.

Maxwell v. State, 2006 WL 26180 (Fla. Dist. Ct. App. 2006):
Holding: Officer's statement that Defendant had "right to an attorney" without more was insufficient *Miranda* warning.

State v. Weiss, 2006 WL 2265516 (Fla. Dist. Ct. App. 2006):
Holding: Where Defendant, who was in 12th grade, was approached by armed police and taken to police station and questioned about a "baby case," but was never told she could refuse to go to the station or leave, she was "in custody" and her subsequent confession without *Miranda* warnings violated *Miranda*.

Origi v. State, 2005 WL 2373829 (Fla. Dist. Ct. App. 2005):
Holding: Police officer's statement to Defendant arrested for drugs, "That's a lot of drugs you had," was functional equivalent of interrogation under *Miranda*.

State v. Mariano, 2007 WL 1575512 (Haw. Ct. App. 2007):
Holding: Where Defendant had been unlawfully arrested in his home, his subsequent statements to police at the police station must be suppressed as "fruit of poisonous tree," even though police had probable cause to arrest all along.

State v. Hanson, 2010 WL 4157277 (Idaho Ct. App. 2010):
Holding: Defendant may invoke 5th Amendment right against self-incrimination regarding participation in a presentence investigation report, but still may choose to participate in a psychological evaluation for sentencing. PSI and psychological exam cover different purposes and there is less danger Defendant may use his 5th Amendment right to manipulate system by choosing what to disclose.

Adams v. State, 2010 WL 2089329 (Md. Ct. Spec. App. 2010):
Holding: Where Defendant invoked right to counsel and then police went to jail to give him notice State would seek a life without parole sentence, this was functional equivalent of interrogation outside presence of counsel and violated 6th Amendment.

People v. McBride, 2006 WL 3742780 (Mich. App. 2006):
Holding: Even though deaf defendant signed a *Miranda* waiver, the waiver was not knowing and intelligent because the sign language interpreter did not use the American Sign Language translation of *Miranda*, and no one assessed defendant's level of education before signing the *Miranda* form.

State v. Borg, 2010 WL 771693 (Minn. Ct. App. 2010):
Holding: Defendant's pre-counseled, pre-arrest and pre-*Miranda* silence made in response to a letter and phone call from police was not admissible.

State v. Wilson, 2007 WL 2492351 (N.M. Ct. App. 2007):
Holding: Defendant was "in custody" for *Miranda* purposes where he was handcuffed and placed in a police car.

People v. Foster, 2010 WL 1731814 (N.Y. App. Div. 2010):
Holding: Where Defendant had invoked his right to counsel in police interrogation, he did not knowingly and voluntarily waive his right to counsel when he gave murder confession to confidential informant several days later.

People v. Patterelli, 2009 WL 4346503 (N.Y. App. Div. 2009):
Holding: Where prosecutor asked officer three times about Defendant's invocation of right to silence, this violated right to silence.

State v. Rollins, 2008 WL 706625 (N.C. Ct. App. 2008):
Holding: Statements Defendant made to wife while incarcerated were protected by marital privilege.

State v. Porter, 2008 WL 4183986 (Ohio Ct. App. 2008):
Holding: Where police conducted a strip search at the jail, they were required to give *Miranda* warnings before interrogating about possessing of drugs.

State v. Dahlen, 80 Crim. L. Rep. 281 (Or. Ct. App. 11/1/06):
Holding: Defendant who said, "When can I call my attorney?," invoked his right to counsel and police should have stopped interrogation.

Com. v. Fink, 2010 WL 522806 (Pa. Super. 2010):
Holding: A polygraph exam that required sex offenders to answer questions about their prior sexual history without regard to whether their conduct had resulted in criminal charges had the potential to be incriminating and failure to answer could not support parole revocation, since this would violate privilege against self-incrimination.

Wilson v. State, 86 Crim. L. Rep. 707 (Tex. Crim. App. 3/3/10):
Holding: Where police created a phony fingerprint report to induce Defendant to confess, this required suppression of the confession.

State v. Gobert, 84 Crim. L. Rep. 548 (Tex. Crim. App. 1/28/09):
Holding: Where (1) Defendant said "I don't want to give up any right though, if I don't got no lawyer," (2) police then asked, "You don't want to talk to us," and (3) Defendant then confessed, his confession had to be suppressed because Defendant had unequivocally invoked his 5th Amendment right to counsel.

Wilson v. State, 2008 WL 5264643 (Tex. App. 2008):
Holding: Where Officer violated a statute by fabricating a forensics report in order to show Defendant to get him to confess, the confession was inadmissible; officer had made up report purporting to show Defendant's fingerprints were found on evidence.

Martinez v. State, 84 Crim. L. Rep. 324 (Tex. Crim. App. 12/17/08):
Holding: Even though non-*Mirandized* questioning did not produce any incriminating statement, where it was used to get Defendant talking, and then *Miranda* warnings were given, the subsequent incriminating statements should be suppressed under *Missouri v. Seibert*.

State v. Denney, 86 Crim. L. Rep. 138 (Wash. Ct. App. 10/20/09):
Holding: Jailer's routine questioning at booking about Defendant's drug use violated Defendant's right to remain silent where she had previously invoked her right to remain silent.

Joinder/Severance

State v. McKinney, No. WD69494 (Mo. App. W.D. 10/27/09):
Joinder of murder charges with later attempted escape charge was improper.
Facts: Defendant was charged with first degree murder and attempted escape from jail in one indictment. Defendant had been arrested for two murders on October 21. On December 27, jailers found evidence in Defendant's jail cell that he was planning an escape. He claimed the charges were improperly joined and moved to sever.
Holding: The appellate court must first determine if joinder was proper, and if so, only then determine if the trial court abused its discretion in denying severance. Joinder addresses what crimes can be charged in a single proceeding, while severance assumes joinder is proper but gives the trial court discretion to determine if substantial prejudice would result from trying the cases together. Here, joinder was improper, so the severance issue is not reached. Rule 23.05 and Sec. 545.140.2 provide that offenses of the same or similar character based on two or more acts of the same transaction or that constitute a common scheme or plan can be charged in the same indictment. Here, the murder and attempted escape are not similar crimes. Nor are they close enough in time to be the same transaction. Nor are they part of a common scheme or plan because a scheme or plan requires a plan in advance of the first offense, and there is no evidence Defendant planned the escape before the murders. Nor are the matters joinable to show "consciousness of guilt." Where joinder is improper, prejudice is presumed, although Court of Appeals suggests Missouri Supreme Court should adopt harmless error analysis. New trials granted on all offenses.

U.S. v. Hawkins, 2009 WL 4906678 (4th Cir. 2009):
Holding: Defendant's carjacking charge should not have been joined with his felon-in-possession charge where much of the felon-in-possession evidence would not have been admissible in the carjacking case.

State v. Gupta, 2010 WL 2519651 (Conn. 2010):
Holding: Separate sex cases could not be joined together for trial where facts of one was far more egregious than others and joinder would allow jury to improperly consider propensity to commit crime.

Yecovenko v. State, 82 Crim. L. Rep. 350 (Mont. 12/14/07):
Holding: Counsel was ineffective in failing to move to sever unrelated charges of possession of child pornography from charges of child sex.

In re State, 2007 WL 101684 (N.H. 2007):
Holding: Multiple charges of theft by deception were improperly joined where there was no connection between the different victims.

People v. Earle, 2009 WL 709402 (Cal. App. 2009):
Holding: Defendant entitled to severance of charges of indecent exposure and assault with intent to rape.

Judges – Recusal – Improper Conduct – Effect on Counsel – Powers

State ex rel. Manion v. Elliott, No. SC90222 (Mo. banc 2/23/10):
(1) Change of judge in probation revocation proceeding is governed by civil rule 51.05; (2) where Defendant filed his motion for change of judge within 22 days of the application to revoke probation, the motion was timely under Rule 51.05 and judge was required to recuse.
Facts: Defendant pleaded guilty to offense in 2006. Over the next two years, several probation revocation hearings occurred, with Defendant being continued on probation each time. In March 2009, a new probation violation report was filed. On March 31, 2009, a warrant was served on Defendant. On April 6, 2009, the prosecutor filed a third application to revoke probation. On April 28, 2009, Defendant filed a motion for change of judge. Judge denied this, and Defendant sought writ of prohibition.
Holding: A probation revocation hearing is a civil proceeding. Therefore, Rule 51.05 applies, not criminal Rule 32.07, regarding change of judge. Rule 51.05(b) provides that an application for change of judge must be filed within 60 days from service of process or 30 days from designation of the trial judge, whichever is longer. The motion to revoke probation was filed on April 6, 2009. Defendant filed his application for change of judge on April 28, 2009, which was 22 days after the motion to revoke was filed and well within the 60 day limit, so his application was timely. Writ granted.

State ex rel. Eckelkamp v. Mason, No. ED94859 (Mo. App. E.D. 6/22/10):
Where (1) appellate court reversed and remanded for a new trial in St. Louis City, and (2) case was randomly reassigned to same judge who heard original trial, Relator was entitled to automatic change of judge under Rule 51.05 because a St. Louis City local rule makes a remand from an appellate court a "new case filing," so this restarted the right and time to file for automatic change of judge.
Facts: Previously, the Court of Appeals reversed and remanded this case for a new trial. On remand, the case was ultimately reassigned to the same judge who heard the original trial, but this was only because of a "random assignment." Relators sought to use Rule 51.05 to automatically disqualify the judge, which was denied. Relators filed for a writ of prohibition.
Holding: The issue is whether Relators' application for change of judge is timely. Rule 51.05(b) allows for automatic change of judge in a civil case within 60 days from service of process or 30 days from designation of the trial judge, whichever is longer. When a timely application is filed under 51.05, a judge must recuse. Because the St. Louis City

Circuit Court has adopted a central docketing system for assignment of cases, each remand from the Court of Appeals is treated as a "new filing" and assigned randomly to a judge under Local Rule 6.2.1. Thus, the assignment of the original judge was a new assignment under 51.05 and restarted the time for filing an application for change of judge. Because Relators filed their application within 30 days of the judge's designation, it was timely. Writ of prohibition granted.

Watson v. Tenent Healthsystem, No. ED91997 (Mo. App. E.D. 12/22/09):
Holding: Where judge in jury trial interrupted plaintiff's direct exam of plaintiff's expert because "a couple of jurors have some serious time issues," took over direct exam of expert to apparently speed the trial up, and prevented further questioning by plaintiff so that plaintiff was ultimately precluded from making a submissible case, this was improper because it violated judge's role as impartial, neutral arbiter.

Elnicki v. Caracci, No. ED89669 (Mo. App., E.D. 6/3/08):
Holding: In dissolution action, Father was entitled to hearing on change of judge motion where Father alleged that judge had shown "continuing hostility and prejudice" by, among other things, saying Father "dodged a bullet" by settling with Mother on a contempt motion. A reasonable person would perceive this comment as biased because the judge made the comment without having heard any evidence on the contempt motion. This was sufficient to question whether judge had information from an extrajudicial source.

Springer v. Springer, No. ED87995 (Mo. App., E.D. 6/5/07):
Holding: Where in bench tried divorce case, trial judge belittled wife's attorney by calling attorney's motions "ridiculous" and "absurd;" refused to allow attorney to make an offer of proof; and said "I assume you attended law school so you should understand what the problem is," trial judge showed bias, and judgment is reversed and remanded for hearing before a different judge. Rule 73.01 requires the judge receive an offer of proof.

Grass v. State, No. ED87708 (Mo. App., E.D. 2/27/07):
Holding: Where additional Findings by trial court were necessary, but trial judge who heard the evidence had died during the appeal, the case could not be remanded for additional Findings, and a new trial had to be granted.

State ex rel. Kemper v. Cundiff, No. ED88102 (Mo. App., E.D. 6/27/06):
Once judge sustained change-of- judge-motion under Rule 32.07, judge had no jurisdiction to later rescind the order changing judge.
Facts: Defendant filed timely application for change of judge under Rules 32.06 and 32.07, with proper notice to the prosecutor. Judge sustained motion. Shortly thereafter, judge issued a nunc pro tunc order rescinding the change on grounds that the prosecutor had a right to challenge the application, that the case was already set for preliminary hearing prior to filing the application, and that Defendant had to file an application 5 days before the preliminary hearing. Defendant sought writ of prohibition.
Holding: Prohibition lies and a judge is without jurisdiction when the judge receives a proper application under Rule 32.07 but fails to disqualify himself. The application must

be filed not later than 10 days after the initial plea is entered. If the designation of the trial judge occurs more than 10 days after the initial plea is entered, the application must be filed within 10 days of the designation of the trial judge or prior to the commencement of any proceeding on the record, whichever is earlier. Here, Defendant timely filed the application. At the time the application was filed, no trial judge had been designated, and the application was filed prior to the commencement of any proceeding on the record. Once the judge granted the application, he was without jurisdiction to rescind it. Moreover, the judge could not rescind it by nunc pro tunc because that is to correct a clerical error, not to change an action already taken. Writ made absolute.

Weekley v. State, No. 28743 (Mo. App., S.D. 9/22/08):
Holding: Where motion court only issued a docket entry denying Rule 29.15 relief, remand was required for entry of Findings of Fact and Conclusions of Law as required by 29.15(j) to allow for meaningful appellate review.

Editor's Note by Greg Mermelstein: There were two interesting footnotes. Note 4 states that counsel attached the movant's pro se motion to the amended motion. "This method does not address, however ... a potential conflict between the requirement of Rules 24.035(e) and 29.15(e) that require [PCR] counsel to present all of a client's pro se claims ... and the requirement that a member of the bar only present claims that are" not frivolous under Rule 4-3.1. Note 5 states that a different judge than the one who conducted the PCR hearing entered the order denying relief. While not deciding the matter, Southern District states that the "preferred practice" would be to have the same judge who conducted the hearing enter the Findings.

State ex rel. Bennett v. Ravens, No. WD69409 (Mo. App., W.D. 8/12/08):
Trial court cannot disqualify prosecutor on grounds that trial court does not agree with plea bargain, because this is not authorized under Sec. 56.110.
Facts: Two days before a trial was to begin, the prosecutor notified the trial court that he and Defendant had reached a plea bargain, and that the prosecutor was planning to refile the felony charge as a misdemeanor. The judge, sua sponte, then disqualified the prosecutor, and appointed a special prosecutor. The judge stated the prosecutor "wasn't doing a good job of representing the State." Defendant sought a writ of prohibition to prohibit the judge from disqualifying the prosecutor.
Holding: Sec. 56.110 allows a court to disqualify a prosecutor if the prosecutor is interested, has a conflict of interest, or is related to the Defendant. The judge here did not allege any of these reasons for disqualifying the prosecutor. Rule 24.02(d)(1) prohibits a judge from participating in plea discussions until an agreement is reached. Removing the prosecutor based on plea discussions constitutes inappropriate interference with plea discussions. Writ of prohibition issues.

In the Estate of Downs v. Bugg, No. WD70409 (Mo. App. W.D. 12/15/09):
Even though Defendant owed money to an estate and had the financial ability to pay it, trial court could not imprison Defendant for failure to pay because such a civil contempt order violated Article I, Sec. 11 of the Missouri Constitution prohibiting imprisonment for debts; the trial court's remedy to enforce payment is execution upon Defendant's property.

Holding: The trial court ordered Defendant be imprisoned for failure to pay money owed to an estate. Sec. 511.340 allows a court to hold a person in civil contempt only if that judgment requires performance of an action other than payment of money. A court cannot hold a person in contempt for failing to pay money because this would violate Art. I, Sec. 11 of the Missouri Const. that prohibits imprisoning a person "for debt, except for nonpayment of fines and penalties imposed by law." The trial court's statutory remedy to enforce a judgment ordering payment of a debt is by execution on specific property of Defendant.

State ex rel. Goldesberry v. Taylor, No. WD67650 (Mo. App., W.D. 10/02/07):
Even though crime victims did not get prior notice of Defendant's guilty plea and sentencing, trial court had no jurisdiction to later set aside the guilty plea and sentence at the Prosecutor's request to benefit victims.
Facts: Defendant injured victims in a traffic incident and was charged with traffic offenses. At his arraignment, the Prosecutor was out of the courtroom, and Defendant pleaded guilty and was fined $267. The next day, the Prosecutor learned Defendant had pleaded guilty and filed a Rule 29.07(d) motion to set aside the plea on grounds that the victims had not had an opportunity to be present at the plea. The trial court set aside the plea. Defendant filed a writ of prohibition.
Holding: Once judgment and sentence occur in a criminal case, the trial court loses jurisdiction. Rule 29.07(d) states a court may set aside a plea for "manifest injustice," but this Rule is generally to be invoked by a defendant, not the Prosecutor. The "victim's rights" statute, 595.209, and constitutional provision do not allow the setting aside of the plea, because Article I, Sec. 32.4 of the victim's rights constitutional provision states: "Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilt, or an acceptance of a plea of guilty." The trial court had no power to set aside the guilty plea. Writ made absolute.

U.S. v. Oquendo-Rivera, 86 Crim. L. Rep. 298, 586 F.3d 63 (1st Cir. 11/5/09):
Holding: Even though trial judge chose to believe police officer's testimony instead of Defendant's testimony, it violated due process for judge to do this where officer's testimony contradicted other testimony and physical evidence. "Because the district judge chose to believe one and not the other of two witnesses before him, it might seem that choice of whom to credit resolves the matter. But the credibility of a story depends not only on the seeming sincerity of the witnesses and their demeanor in the courtroom but also on more objective criteria: for example, consistency (both internal to the testimony and with the physical evidence), probability, access of the witness to information, his bias or interest, and corroboration or unexplained contradiction of his testimony by undisputed testimony or empirical evidence."

U.S. v. Melendez-Rivas, 2009 WL 1351125 (1st Cir. 2009):
Holding: Trial judge's questions to witness that elicited inadmissible evidence of other possible crimes required new trial.

U.S. v. Griffin, 82 Crim. L. Rep. 342 (2d Cir. 12/21/07):
Holding: Gov't breached plea agreement not to oppose acceptance-of-responsibility sentence reduction where Prosecutor said he was "troubled" by Defendant's objections to statements in PSI, even though Prosecutor also said he was not abandoning promise not to oppose downward departure. Different judge must conduct resentencing.

U.S. v. Kaba, 2007 WL 687002 (2d Cir. 2007):
Holding: Defendant was entitled to resentencing before a different judge, where original judge made remarks at sentencing suggesting he was giving a harsher sentence because of Defendant's non-U.S. nationality.

U.S. v. Washington, 84 Crim. L. Rep. 330 (3d Cir. 12/11/08):
Holding: Even though Defendant obtained his sentence through fraud on the court, the court had no authority to change the sentence once the jurisdictional time for sentence modification had expired.

Haynes v. Quarterman, 84 Crim. L. Rep. 662, 2009 WL 604127 (5th Cir. 3/10/09):
Holding: A different judge than that who heard jury selection cannot preside over a *Batson* challenge in which demeanor of venirepersons is only issue.

U.S. v. Moncier, 2009 WL 1941772 (6th Cir. 2009):
Holding: Where criminal contempt trial against Defendant was because of criticism of trial judge and allegations of bias, trial judge should be disqualified from hearing contempt case.

U.S. v. Christman, 2007 WL 4105053 (6th Cir. 2007):
Holding: Sentencing judge cannot rely on ex parte information from probation officers that contradicts the record evidence, because Defendant had right to notice of evidence against him.

U.S. v. Christman, 82 Crim. L. Rep. 253 (6th Cir. 11/20/07):
Holding: Judge's undisclosed, ex parte contacts with probation officer required remand for resentencing, because denied Defendant opportunity to comment on matters affecting sentencing.

U.S. v. Barnwell, 2007 WL 58164 (6th Cir. 2007):
Holding: Judge's ex parte communications during trial with prosecutor regarding a juror's leaking of deliberation information was improper.

Lyell v. Renico, 2006 WL 3455004 (6th Cir. 2006):
Holding: Judge violated Defendant's due process right to fair trial with unbiased judge where judge repeatedly interrupted defense counsel and called him an actor, child, silly and smart aleck.

F.T.C. v. Trudeau, 2010 WL 1994593 (7th Cir. 2010):
Holding: Even though Defendant radio DJ got his listeners to send emails to judge using the court's computers, Defendant was not "present" in court sufficient to allow judge to impose summary criminal contempt.

Federal Trade Commission v. Trudeau, 87 Crim. L. Rep. 412 (7th Cir. 5/20/10):
Holding: Fed. R. Crim. P. 42(b) does not authorize judge to summarily find a party in civil case guilty of direct criminal contempt for urging followers to take part in an email campaign directed at the judge.

Afremov v. Computer Forensic Services, 87 Crim. L. Rep. 752 (8th Cir. 7/29/10):
Holding: Trial judge had no "ancillary jurisdiction" in criminal case to order Defendant to pay the consulting fees of a forensic firm whose records he subpoenaed for case; even though forensic firm spent $600,000 to comply with the subpoena, it could have complied by simply giving Defendant access to the hardware containing the data, and the subpoena here really was, in effect, an alleged agreement to perform consulting services; the consulting firm's proper remedy was to bring a breach of contract claim.

U.S. v. Lovelace, 2009 WL 1375168 (8th Cir. 2009):
Holding: Where judge relied on a previously undisclosed irrelevant factor regarding his personal knowledge of Defendant's criminal history in sentencing Defendant, this affected the fairness and integrity of the proceedings, and required resentencing.

U.S. v. Harper, 80 Crim. L. Rep. 125 (8th Cir. 2006):
Holding: Judge may not tell trial venire that grand jury would not have indicted Defendant unless it found that there was probable cause that Defendant was involved in the crime.

Taylor v. Sisto, 87 Crim. L. Rep. 369 (9th Cir. 5/25/10):
Holding: Where judge told jury that they could use their "common sense" but had to leave outside the courtroom "all the decisions that you have made, all the opinions about how people act, how people behave, what kind of people behave in what way, what makes them do that" and that jurors "can't depend" on such "biases and prejudices," this violated Defendant's 6th Amendment right to an impartial jury that was representative of the community.

Smith v. Curry, 2009 WL 2857194 (9th Cir. 2009):
Holding: Judge improperly coerced verdict where the jury was deadlocked and the judge told jury to weigh evidence that supported Defendant's guilt.

U.S. v. Sine, 81 Crim. L. Rep. 208 (9th Cir. 5/1/07):
Holding: Where a different judge had made critical remarks about a Defendant accused of fraud, those remarks should not have been used to cross-examine Defendant at his trial. The remarks were hearsay and more prejudicial than probative.

U.S. v. Cano-Varela, 2007 WL 2285861 (10th Cir. 2007):
Holding: Where counsel told judge that Defendant wanted new attorney because he did not like the plea bargain counsel worked out, judge violated rule against participating in plea negotiations by then telling Defendant that he'd get a harsher sentence if he did not plead.

Ward v. Hall, 86 Crim. L. Rep. 402 (11th Cir. 1/4/10):
Holding: Even though bailiff, in response to a jury question, had given death-penalty jury accurate information that life without parole was not one of their sentencing options, this was error requiring vacating death sentence because it was role of judge, not bailiff, to answer jurors' question and only judge should have answered it.

In re M.C., 88 Crim. L. Rep. 225 (D.C. 11/18/10):
Holding: Where, during a bench trial, judge received emails from a fellow judge about a gov't witness, judicial ethics required that the judge disqualify herself from the rest of the bench trial.

Donaldson v. State, 2007 WL 1367553 (Ark. 2007):
Holding: Where jury verdict sentenced Defendant to "zero" years in prison and "zero" fine, the trial court had no authority to impose a prison sentence, since the statute did not set a lower limit for sentences the jury could impose, but only an "up to" maximum sentence.

People v. Sturm, 2006 WL 522308 (Cal. 2006):
Holding: Judge committed reversible error in belittling defense witnesses and disparaging defense counsel.

State v. Kamel, 2009 WL 1796086 (Conn. 2009):
Holding: Where judge learned that jury had potentially been exposed to prejudicial unadmitted evidence in jury room, but waited three months to inform the parties of this and offered no explanation for the delay, this violated Defendant's right to fair trial.

Petion v. State, 88 Crim. L. Rep. 139 (Fla. 10/21/10):
Holding: Even though judges in bench trial are presumed not to have considered inadmissible evidence, this presumption is rebutted where judge made findings on the record that the evidence was admissible.

Wickham v. State, 2008 WL 4346321 (Fla. 2008):
Holding: Where Defendant was alleging ineffective assistance of counsel, and while case was pending, trial counsel became a circuit judge in same circuit then appellate judge reviewing that circuit, and trial counsel's wife was also a judge in that circuit, Defendant's motion to disqualify entire circuit from hearing his case should have been sustained.

Burnette v. Terrell, 85 Crim. L. Rep. 10, 2009 WL 711334 (Ill. 3/19/09):
Holding: Trial judge has no authority to bar a Public Defender from his courtroom or remove a Public Defender from cases, since this infringes on the authority of the Public Defender Office.

State v. Patrick, 84 Crim. L. Rep. 527 (Ill. 1/23/09):
Holding: Where Defendant filed motion in limine to exclude his prior convictions from being used for impeachment, the trial court was required to rule on the motion in limine before Defendant testified.

Village of Kildeer v. Munyer, 2008 WL 2673293 (lll. 2008):
Holding: Trial court's sua sponte review, in assessing guilt, of evidence of other charges of Defendant for which he was not convicted was plain error.

State v. Fremont, 2008 WL 2098033 (Iowa 2008):
Holding: Where magistrate was simultaneously representing a party adverse to the target of a search, the magistrate was not a "neutral or detached" magistrate for issuing a search warrant against the target.

State v. Kemble, 2010 WL 3448838 (Kan. 2010):
Holding: The trial judge became an improper advocate when, in child sex trial, he implied that he didn't believe child's testimony that she "didn't remember" certain events, and suggested to the child that if she would just implicate the Defendant, she would be done testifying.

State v. Hayden, 2006 WL 657370 (Kan. 2006):
Holding: Judge's numerous interruptions during voir dire, opening statement, witness examination, other remarks showing impatience, and raising voice violated Defendant's right to fair trial.

State v. Smalls, 2010 WL 4075266 (La. 2010):
Holding: Allowing Commissioners to accept guilty pleas violated constitutional provision that judicial power be exercised only by elected judges.

Wright v. State, 86 Crim. L. Rep. 239 (Md. 11/16/09):
Holding: Where trial judge conducted voir dire by quickly asking 17 questions en masse to jurors and then asking them to come to the bench to answer individually, this violated Defendant's right to a fair and impartial jury under the 6th Amendment.

Com. v. Shaughessy, 86 Crim. L. Rep. 358 (Mass. 11/19/09):
Holding: Trial judge considering motion by defense for discovery of confidential informant has discretion to consider ex parte an affidavit from Defendant, which contained information the prosecution was not entitled to.

State v. Schlienz, 86 Crim. L. Rep. 245 (Minn. 11/5/09):
Holding: Where judge gave ex parte advice to prosecutor about how to prevent Defendant from being able to withdraw his guilty plea, this called judge's impartiality into question warranting judge's disqualification and was plain error.

Mendoza-Lobos v. State, 86 Crim. L. Rep. 297 (Nev. 10/29/09):
Holding: Even though a state statute can require judges to consider certain sentencing factors, it violated separation of powers for the statue to require judges to state "on the record" that they had considered each factor.

State v. Solomon, 83 Crim. L. Rep. 12 (N.H. 3/20/08):
Holding: Double jeopardy attached when trial judge in middle of trial left for military duty in Iraq; Defendant was entitled to have trial concluded by a single particular judge, and the State did not take steps to protect that right, even though they knew the judge could be called away.

State v. Burgess, 82 Crim. L. Rep. 606 (N.H. 2/26/08):
Holding: Under N.H. constitution, trial judge cannot increase a Defendant's sentence for remaining silent at sentencing as showing lack of remorse.

State v. Abram, 82 Crim. L. Rep. 421, 2008 WL 151127 (N.H. 1/15/08):
Holding: Where Defendant was sentenced on multiple counts to a term of years, and then succeeded on appeal in getting some counts vacated, and the trial judge subsequently imposed the same total sentence on the remaining counts, there was a presumption of improper judicial vindictiveness at resentencing.

State v. Taffaro, 2008 WL 2662594 (N.J. 2008):
Holding: Defendant denied fair trial where trial judge questioned him during his testimony in fashion that suggested to jury trial court doubted Defendant's version of events.

State v. Tilghman, 79 Crim. L. Rep. 177 (N.J. 4/25/06):
Holding: Judge's remarks during defense opening statement that "this isn't a filibuster" and to "give jurors a break" denied Defendant fair trial.

State v. Belanger, 85 Crim. L. Rep. 523 (N.M. 6/23/09):
Holding: Judge can grant immunity to defense witnesses even over prosecutor's objection.

State v. Jojola, 2006 WL 3206066 (N.M. 2006):
Holding: Defendant entitled to new trial where trial judge had ex parte communication with juror who told judge that another juror didn't believe State's expert and believed Defendant was innocent, and judge told juror to "just report you are hung" or "whatever you have to do."

State v. Gillespie, 2008 WL 200292 (N.C. 2008):
Holding: Even though Defendant's expert witness engaged in violations under the discovery statute, the trial court should not have punished Defendant by not allowing him to present expert witnesses, since the court lacks authority to punish Defendant for behavior of non-parties.

Commonwealth v. Holmes, 82 Crim. L. Rep. 114 (Pa. 10/16/07):
Holding: Even though a trial court's jurisdiction had expired under a statute, trial court still had inherent power to correct a sentence that was unauthorized by law.

State v. Gokey, 88 Crim. L. Rep. 121 (Vt. 10/8/10):
Holding: Where trial judge engage in ex parte contacts regarding Defendant's competency hearing, such as asking guards about Defendant and discussing Defendant's prescriptions with a pharmacist (then ruled that Defendant was malingering), this was improper and prejudice is presumed. New trial after conviction granted.

State v. Abrams, 2008 WL 732744 (Wash. 2008):
Holding: Perjury statute which required judge to determine materiality of statement violated 6th Amendment right to have jury find facts.

Morgan v. State, 2006 WL 2089370 (Alaska Ct. App. 2006):
Holding: Where (1) Defendant had had a trial where judge served as fact-finder; (2) subsequently, Court of Appeals reversed and remanded back to trial court to consider new evidence; (3) original trial judge had retired by time of remand and new evidence was heard by a different judge, due process required a completely new trial because Defendant had a due process right to have the same judge consider all the evidence in the case.

Nordstrom v. Leonardo, 2007 WL 1153756 (Ariz. Ct. App. 2007):
Holding: Where judge had been peremptorily removed from case, judge was not authorized to rule on later motion to remove the successor judge, even though the first judge was the Presiding Judge.

People v. Dahl, 80 Crim. L. Rep. 600 (Colo. Ct. App. 2/22/07):
Holding: Judge's threat to hold juror who showed up late for court in contempt along with judge's statement that he would try the case to conclusion regardless of the juror's personal problems coerced a verdict.

Nawaz v. State, 2010 WL 325915 (Fla. Dist. Ct. App. 2010):
Holding: Where sentencing judge made remarks that indicated he had considered Defendant's non-American national origin in imposing sentence, Defendant was entitled to re-sentencing before a different judge.

Scott v. State, 2008 WL 711879 (Miss. Ct. App. 2008):
Holding: Where defense counsel told judge that Defendant had confessed to him and was going to commit perjury, judge was required to recuse herself from hearing motion to suppress statements.

State v. V.D., 2008 WL 2811322 (N.J. Super. Ct. 2008):
Holding: Probation condition that required Defendant to report immigration status to ICE was invalid; trial court should not report defendants to ICE because impairs courts' ability to independently protect those who may seek court remedies.

State v. Figueroa, 2006 WL 1714084 (N.J. Super. Ct. App. 2006):
Holding: Where judge told jury that they would remain in courthouse through the weekend until a verdict was reached, this improperly coerced jury's subsequent verdict.

Ochoa v. Bass, 2008 WL 650662 (Okla. Crim. App. 2008):
Holding: State statute requiring judges at sentencing to inquire into immigration status of defendants was unconstitutional, since judges cannot conduct investigations that are not before the court.

State v. Barrie, 2009 WL 997156 (Or. Ct. App. 2009):
Holding: Where Defendant was charged with manslaughter and had rejected a plea offer for that offense, trial court erred in, sua sponte, entering conviction for lesser-included offense of negligent homicide where Defendant did not request the lesser and had no notice court might enter it.

Ex parte Sinegar, 88 Crim. L. Rep. 225 (Tex. Crim. App. 11/3/10):
Holding: Texas Rule allowing parties to disqualify judges applies in habeas proceedings.

Hernandez v. State, 2008 WL 2970873 (Tex. App. 2008):
Holding: Where judge had a policy of sentencing defendants to twice whatever previous sentence they had received, this showed bias and denied due process.

Whitehead v. State, 2008 WL 2512836 (Tex. Crim. App. 2008):
Holding: Where Defendant's letter to another person in his retaliation-charge (threats-charge) trial made threats to judge, judge was disqualified from hearing trial.

Abdygapparova v, State, 2007 WL 2116424 (Tex. App. 2007):
Holding: Trial judge's actions in writing *ex parte* notes to prosecutor during voir dire about potential jurors denied Defendant right to fair trial and impartial judge.

State v. Goodson, 771 N.W.2d 385 (Wis. Ct. App. 2009):
Holding: Trial judge's unequivocal promise to sentence Defendant to maximum time if he violated his supervised release constituted objective bias, indicating judge had made up his mind about release revocation and sentencing.

Jury Instructions

State v. Seeler, No. SC90583 (Mo. banc 7/16/10):
Where (1) Defendant was charged with involuntary manslaughter for "leaving the highway right of way," and (2) after the close of the State's evidence, the State amended the charge to involuntary manslaughter for "drove in a lane closed to traffic," this prejudiced Defendant because his defense was based on showing he never left the highway's right of way.
Facts: Defendant, while drunk, drove his car into a highway worker and killed him. Defendant was charged with the B felony of involuntary manslaughter, Sec. 565.024.1(3)(a) for causing the death of a person "that results from the defendant's vehicle leaving a highway … or the highway's right of way." The simple version of involuntary manslaughter is a C felony contained in Sec. 565.024.1(2), which requires operating a vehicle with criminal negligence which results in the death of someone. Defendant's defense was that he never left the highway or right of way because the decedent was working on the highway. When Defendant moved for acquittal at the close of the State's evidence, the State replaced "leaving the highway's right of way" with "drove into a lane closed to traffic." Defendant claimed this prejudiced him because he was prepared to defend against a charge that he left the highway. The trial court allowed the amendment. Defendant was convicted of B felony involuntary manslaughter.
Holding: Rule 23.08 allows an information to be amended or substituted for an indictment if the Defendant's substantial rights are not prejudiced. The test for prejudice is whether the planned defense to the original charge would still be available after the amendment. Here, Defendant's defense was that he never left the highway's right of way. The amendment caused this defense to become unavailable. Reversed and remanded for new trial.

State v. Williams, No. SC90501 (Mo. banc 5/25/10):
Even though Defendant denied committing the charged robbery, where he requested a lesser-included offense instruction for stealing and some version of the evidence supported it if jurors chose to believe some parts of the evidence and not other parts, trial court erred in not giving the lesser-included stealing instruction.
Facts: Defendant was charged with second degree robbery, along with a co-defendant, for forcibly stealing money from Victim. At trial, Defendant testified that he had been at Victim's apartment and saw co-defendant take marijuana from Victim, but did not see co-defendant forcibly take anything. Defendant testified that he personally did not take anything. Defendant requested a lesser-included offense instruction for stealing, which the trial court denied.
Holding: Defendant is entitled to an instruction on any theory the evidence establishes. Sec. 556.046.2 requires only that there be "a basis" for the jury to acquit of the higher offense for the court to submit a lesser-included. Here, the evidence provided a basis for the jury to acquit of second degree robbery and convict of stealing. The State argues a lesser-included was not required because Defendant denied committing the offense entirely. But that is not the law. Jurors could have believed Defendant was complicit in taking money from Victim, but disbelieved Victim's testimony that physical force was

used. Thus, Defendant was entitled to the instruction. Reversed and remanded for new trial.

State v. Avery, No. SC89390 (Mo. banc 1/13/09):
Even though Defendant did not assert an intoxication defense, the trial court did not err in giving MAI-CR3d 310.50 on voluntary intoxication not relieving a person of responsibility, because the instruction correctly stated the law; overruling State v. Bristow, 190 S.W.3d 479 (Mo. App. S.D. 2006).
Facts: Defendant was originally charged with second degree murder for shooting victim. The jury found Defendant guilty of voluntary manslaughter. Defendant's defense was self-defense. The State presented evidence that Defendant drank before the shooting, but Defendant did not try to defend the case on grounds of intoxication. The trial court gave MAI-CR3d 310.50 that voluntary intoxication does not relieve a person of responsibility.
Holding: Defendant argues that although there was evidence that Defendant drank, no witnesses claimed Defendant was intoxicated, had slurred speech, or coordination problems. Defendant claims MAI-CR3d 310.50 should not have been given because it lacked evidentiary support and would confuse jurors into thinking Defendant was trying to evade responsibility on grounds of intoxication. The instruction is an accurate statement of the law, however. Without being instructed as to the legal effect of Defendant's alcohol consumption, the jury might have been left to guess what its legal effect was. *State v. Bristow*, 190 S.W.3d 479 (Mo. App. S.D. 2006) held that proof of alcohol consumption alone was not sufficient to give the instruction. To the extent *Bristow* holds that, in addition to alcohol consumption, there must be direct evidence of impairment, the decision is overruled.

State v. Cooper, No. SC87787 (Mo. banc 2/27/07):
Where the jury instruction for first degree burglary omitted element of crime that Defendant entered "unlawfully" into house, plain error resulted, because whether Defendant had permission to enter the house was disputed at trial.
Facts: Defendant was charged with first degree burglary for entering a house to assault someone. The victim testified Defendant had forced his way into the house. Defendant testified the victim had voluntarily allowed Defendant to enter.
Holding: First degree burglary, Section 569.160, requires a person to knowingly enter "unlawfully" in a building for committing a crime. The MAI submitted at trial stated: "…the defendant knowingly entered" a building for the purpose of committing an assault. MAI-CR 323.25, however, states that the "defendant knowingly entered unlawfully." The failure to give the correct instruction was error. A verdict directing instruction that omits an essential element of the offense rises to plain error if the evidence establishing the omitted element was seriously disputed at trial. Here, whether Defendant entered "unlawfully" was seriously disputed at trial. The jury could have found that even if Defendant entered the house with the purpose of committing an assault, the entry was not unlawful because the victim voluntarily allowed Defendant to enter.

State v. Seay, No. ED89788 (Mo. App., E.D. 6/24/08):
Trial court plainly erred in failing to give justification instruction, MAI-CR3d 306.20, in case of assault on child, where evidence supported that Defendant was disciplining child when he slapped child.
Facts: While Defendant was babysitting child, he slapped child with an open hand on child's face, when child refused to eat. This caused bruising and swelling. Defendant testified he only tapped child, and that he did so to discipline her for not eating. Defendant was convicted of assault third, Section 565.070. On appeal, he claimed the court plainly erred in not giving a justification instruction.
Holding: MAI-CR3d 306.20 on justification of force by a person entrusted with care of a minor is required to be given whether requested or not, once the defendant injects the issue. Defendant testified he was only disciplining child for not eating. This was sufficient evidence to require giving the instruction. The State claims that the Notes on Use prohibit the instruction if there was excessive force or extreme pain. But viewing the evidence in the light most favorable to Defendant, his actions were not designed to be excessive force or cause extreme pain.

State v. Reed, No. ED89015 (Mo. App., E.D. 1/22/08):
Omission of "unlawfully" from verdict director for second degree burglary was prejudicial, where Defendant's lawful presence in residence was in dispute.
Facts: Defendant was convicted of second degree burglary for burglary of a residence. He contended at trial that he had had permission to be in the residence.
Holding: The instruction given at trial stated that "the defendant knowingly entered" the residence for the purpose of stealing. MAI-CR3d 323.54 required that the instruction state "the defendant knowingly entered *unlawfully* in" the residence. The omission of "unlawfully" was prejudicial and plain error, because Defendant contended at trial that he had permission to be in the residence.

State v. Taylor, No. ED87634 (Mo. App., E.D. 2/13/07):
It was plain error for State to argue for conviction in drug possession case based on drugs that were not actually or constructively possessed by Defendant, and to submit jury instruction allowing such conviction.
Facts: Defendant and his wife were arrested after a car stop. Police found a crack pipe with crack residue in it underneath a trash container; Defendant confessed that this was his. Police also found another crack pipe and crack in his wife's purse. Defendant was charged with possession of drugs. The State argued that he should be convicted because of the crack in his wife's purse in addition to the crack residue in his pipe, and submitted a jury instruction allowing conviction for this by referring only generally to possession of drugs without specifying which drugs.
Holding: There was no evidence establishing Defendant's actual or constructive possession of the crack in the purse. The State's argument and jury instruction allowing a conviction based on the crack in the purse constituted a manifest injustice.

Editor's note by Greg Mermelstein: There is a concurring opinion in which the judge states his views that possession of only crack residue is an insufficient amount to sustain a conviction.

State v. Smith, No. SD30150 (Mo. App. S.D. 12/8/10):
Where information charged Defendant with attempted first degree statutory rape for sending text messages to a 14 year old to encourage sex with him, but the jury instruction instructed jurors that victim had to be "less than 14," this was a fatal variance.
Facts: Defendant was charged by information with attempted first degree statutory rape, Secs. 564.011 and 566.032, for sending text messages to a 14 year old to encourage her to have sex with him. The jury instruction submitted stated that a person commits first degree statutory rape "when he has sexual intercourse with a person who is less than 14 years old." Defendant was found guilty.
Holding: Under Secs. 566.032.1 and 564.011.1, attempted first degree statutory rape occurs when a person takes a substantial step towards having "sexual intercourse with another person who is less than 14 years old." Here, Defendant sent non-sexual messages to an actual person under 14, but sexual messages were sent only to an undercover cop, who posed as a 14 year old. Defendant could not be convicted for sending non-sexual messages to the actual person under 14. Defendant believed the sexual messages with the undercover cop were going to a person who was 14. Therefore, Defendant could not have committed attempted first degree statutory rape because he wasn't texting a person he believed to be less than 14 with sexual messages. There is a fatal variance here between the information and instruction. However, the remedy is to enter a conviction for the lesser offense of attempted statutory rape in the second degree (which requires victim be less than 17 and Defendant 21 or older) and remand for resentencing.

State v. Neal, No. SD29529 (Mo. App. S.D. 2/10/10):
Where trial court gave voluntary manslaughter instruction even though there was no evidence of "sudden passion arising from adequate cause," the instruction was erroneous and prejudicial where Defendant was convicted of voluntary manslaughter as lesser-offense of second degree murder.
Facts: Defendant was charged with second degree murder. Defendant came home drunk, and during an argument with his wife, shot and killed her. Over Defendant's objection, the State submitted a voluntary manslaughter instruction as a lesser offense of second degree murder. The prosecutor stated, however, that there was no evidence that the shooting was a result of heat of passion. Defendant was convicted of voluntary manslaughter.
Holding: The second degree murder instruction (No. 5) and voluntary manslaughter instruction (No. 7) were both erroneous here. Instruction No. 5 omitted a paragraph that the jury had to find the Victim's death was "not the result of heat of passion because of adequate cause." However, because Defendant was not convicted of second degree murder, he cannot complain about that instruction. The real issue is the voluntary manslaughter instruction. Notes on Use 3 for MAI-CR3d 314.08 explains that to justify a submission for voluntary manslaughter, "evidence of sudden passion arising from adequate cause must have been introduced." Here, the State admitted there was no such evidence. Defendant was prejudiced because he was convicted of voluntary manslaughter when there was no evidence to support it. The question becomes what is the remedy? Defendant cannot be tried again for second degree murder because he was acquitted of that. Given that, it follows that Defendant cannot be retried for voluntary

manslaughter as a lesser-included offense of second degree murder. He may be able to be retried for involuntary manslaughter. Reversed and remanded for trial.

State v. Avery, No. 27290 (Mo. App., S.D. 5/1/08):
Even though Defendant drank 7 to 11 beers within 7 hours of the charged killing, where Defendant did not claim voluntary intoxication as a defense but instead claimed self-defense and defense of premises, there was insufficient evidence that Defendant was intoxicated and it was error to give the voluntary intoxication instruction, MAI-CR3d 310.50.
Facts: Defendant drank 7 to 11 beers within 7 hours of shooting a victim. Victim came to Defendant's house, and Defendant shot him. Victim died. The State charged Defendant with second degree murder. The State claimed Defendant shot victim in order to protect her relationship with another man. Defendant claimed she acted in self-defense and defense of premises. Various State's witnesses testified at trial that Defendant drank 7 to 11 beers before the shooting, but no one testified she was intoxicated or that her mind was impaired. The trial court, over Defendant's objection, submitted MAI-CR3d 310.50 on voluntary intoxication. Defendant was convicted of voluntary manslaughter.
Holding: MAI-CR3d 310.50 provides that "in determining the defendant's guilt or innocence, you are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for her conduct." The defense contended that although Defendant drank, there was no evidence of intoxication, so the instruction could not be submitted. The State is wrong in contending that "any" evidence of alcohol consumption is sufficient to show an "intoxicated condition." There must be evidence showing some level of impairment before MAI-CR3d 310.50 can be given. There must be evidence that alcohol impaired the defendant's condition of thought or action. Drinking beers within 7 hours of the shooting did not show intoxication. Giving the instruction was erroneous and prejudicial because it could have led jurors to reject the Defendant's claim she acted in self-defense and defense of premises, and could have confused jurors into thinking Defendant was admitting wrongdoing or attempting to escape liability based on voluntary intoxication.

State v. Cole, No. 28175 (Mo. App., S.D. 2/5/08):
Trial court plainly erred in not giving lesser-included instruction on second degree child endangerment where jury could have found that Defendant-Mother did not "knowingly" act in a manner that created a substantial risk to the child.
Facts: Defendant-Mother lived with boyfriend. Young child was acting out, and boyfriend asked Mother to let boyfriend discipline child. Boyfriend then threw child across room and child died. Mother was convicted of first degree endangering welfare of a child and second degree murder. She claimed trial court erred in not giving a lesser-included offense instruction on second degree endangerment.
Holding: A person commits first degree endangerment if she "knowingly" acts in a manner that creates a substantial risk to the life, body or health of a child, Sec. 568.045.1(1). A person commits second degree endangerment if she "with criminal negligence" creates such a risk, Sec. 568.050.1(1). A person acts "knowingly" if she is aware that her conduct is practically certain to cause a result. A person acts with "criminal negligence" when she fails to be aware of a substantial and unjustifiable risk

that circumstances exist or a result will follow, and this is a gross deviation from the standard of care of a reasonable person, Sec. 562.016.5. Although there was evidence that boyfriend struck child in the past, there was other evidence that it was not Mother's practice to have boyfriend discipline child. The jury could have found that Mother was not aware that her conduct would be "practically certain" to create a substantial risk to the child, but that she failed to be aware of a substantial and unjustifiable risk. Thus, the lesser-included instruction should have been given. Since the murder conviction is dependent on the supporting felony, both convictions are reversed for new trial. This was reviewed as "plain error" on appeal because although defense counsel tendered a lesser-included instruction, it did not follow MAI-CR3d, and so review on appeal could only be for plain error.

State v. Galbreath, No. 27902 (Mo. App., S.D. 1/30/08):
Jury instruction which instructed jurors to convict if Defendant "acted together with or aided" codefendant was erroneous, in that it should have been "aided or encouraged," but was not prejudicial under facts of this case.
Holding: The instructions were patterned after MAI-CR3d 304.04. Defendant asserts that codefendant committed all the conduct elements of the offense, and the sole basis for Defendant's liability was to be a lookout or driver of the getaway car. Subsection (a) of Note On Use 5 states that when the conduct elements – as opposed to the intent elements – of an offense were committed entirely by a person other than Defendant, "all of the elements of the offense, including the culpable mental state, should be ascribed to the other person … and not to the defendant." Subsection (a) further directs that "aided or encouraged" is to be selected to describe the defendant's conduct in aiding the other person. "Acted together with or aided" can be used only where at least one of the conduct elements is ascribed to Defendant.

State v. Langston, No. 27900 (Mo. App., S.D. 7/26/07):
Plain error for trial court to instruct jury to find Defendant guilty of Class C felony stealing if amount stolen was at least $500, where statute in effect at time of crime provided this was a felony only if amount was at least $750.
Facts: Defendant worked at a doctor's office, where she handled cash along with other employees. Defendant was charged with the Class C felony of stealing for having stolen more than $500 in cash between October 1999 and June 2000. Defendant admitted stealing about $400, but claimed other employees took the rest of the missing cash. The trial court instructed the jury to find Defendant guilty of the Class C felony if she stole at least $500. Defense counsel objected that the statute at the time of the crime required the amount be at least $750, but defense counsel failed to file a timely new trial motion preserving this issue.
Holding: Appellate review is for plain error, since there was not a timely new trial motion. At the time of the crime, Section 570.030.3(1) provided that stealing was a Class C felony only if the value stolen was at least $750. This was later amended to be $500, but this amendment did not become effective until August 28, 2002. A verdict directing instruction must contain each element of the charged offense and require the jury to find every element. Defendant's evidence was that she stole about $400. Manifest injustice occurred because the State was not required to prove every element of the offense.

State v. Coker, No. 27353 (Mo. App., S.D. 11/9/06):
Trial court erred in failing to submit lesser-included offense instruction of first degree child molestation, Section 566.067, in conjunction with State's submission of first degree sodomy, Section 566.062, because there was evidence to acquit of the greater offense and convict of the lesser.
Facts: Defendant was charged with first degree sodomy, Section 566.062, for allegedly inserting his finger in a child's anus. Defendant requested an instruction on the lesser-included offense of first degree child molestation, Section 566.067, on grounds that the evidence showed Defendant only touched the anus. The trial court denied the instruction. Defendant was convicted of sodomy, and appealed.
Holding: Under Section 566.010(1), sodomy requires penetration of the anus. Under Section 566.010(3), first degree child molestation requires only touching of the anus. The victim gave inconsistent statements and inconsistent testimony on direct and cross-examination, at various times indicating a finger was put inside his anus, and at other times indicating he was just touched. A jury may accept part of a witness' testimony and disbelieve other parts. Depending on what evidence the jury believed, the jury could have believed that Defendant touched the anus, but did not penetrate it. When reviewing whether a defendant is entitled to a lesser-included offense instruction, the evidence is viewed in the light most favorable to giving the instruction. Here, there was evidence to acquit Defendant of sodomy and convict of child molestation. Court erred in not giving the lesser-included instruction.

State v. Coyles, No. 27195 (Mo. App., S.D. 10/23/06):
(1) Trial court plainly erred in instructing the jury on statutory rape in first degree, Section 566.032.1, and child molestation, Section 566.067, because child molestation is not a lesser-included offense of statutory rape in first degree; (2) where trial court found Defendant to be a" prior offender," but written sentence and judgment did not reflect that, case is remanded with directions to correct this clerical error under Rule 29.12 to reflect that Defendant is a "prior offender."
Facts: Defendant was charged with statutory rape in the first degree, Section 566.032.1. The trial court, without objection, submitted a jury instruction on child molestation in the first degree as a lesser-included offense. Defendant was convicted of child molestation in the first degree, Section 566.067.
Holding: Due process requires a Defendant not be convicted of an offense not charged. Thus, a trial court may not instruct on an offense not specifically charged unless it is a lesser-included offense. All of the statutory elements of the proposed lesser included offense must be encompassed by the statutory elements of the greater offense. The crime of child molestation required proof of additional facts other than those required for the proof of the crime of statutory rape. The additional facts include the touching of various private parts of the body, as well as the requirement that the touching be for "the purpose of arousing or gratifying sexual desire of any person." Section 566.010(3). The touching for "the purpose of arousing or gratifying sexual desire of any person" is not an element of the crime of statutory rape. Section 566.032.1. Thus, child molestation cannot be considered a lesser-included offense of statutory rape, because statutory rape does not contain an express mental element. Conviction vacated.

State v. Bristow, No. 26825 (Mo. App., S.D. 3/31/06):
Trial court erred in giving MAI-CR3d 310.50 on voluntary intoxication over Defendant's objection where there was insufficient evidentiary support to give instruction.
Facts: Defendant was convicted of first degree assault for events arising out of a fight at a bar. At trial, Victim and Defendant gave conflicting versions of events as to what happened. Defendant's defense was self-defense. Defendant admitted to drinking eight beers over nine hours, but said he wasn't intoxicated. In closing argument, the Prosecutor said nobody involved in the fight was "particularly intoxicated." Prosecutor requested and received, over Defendant's objection, MAI-CR3d 310.50 which states that "an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct."
Holding: Trial court erred in giving this instruction and Defendant was prejudiced. Defendant did not try to defend the charges by claiming he was intoxicated, nor did he try to excuse his flight from the bar on grounds of intoxication, nor did he admit any wrongdoing. To the contrary, his defense was self-defense without every admitting wrongful conduct. The State claims that any evidence of alcohol consumption is sufficient to show "intoxicated condition." "We are persuaded Defendant is correct when he asserts that there must be evidence showing some level of impairment resulting from an intoxicated condition before MAI-CR3d 310.50 is proper." By giving the instruction, the jury was led to believe (1) wrongdoing, and (2) that Defendant was, in fact, intoxicated which would negatively affect his credibility, i.e., the key issue at trial. These two implications directly contradicted Defendant's claim of self-defense. Therefore, Defendant was prejudiced by the instruction.

State v. Whiteley, 184 S.W.3d 620 (Mo. App., S.D. 2006):
Trial court erred in failing to give instruction on assault third degree as lesser-included offense of attempted robbery in second degree. Since second degree murder conviction was predicated on the finding of guilt of attempted robbery, murder conviction must also be vacated.
Facts: Defendant told a witness that H owed Defendant money, and Defendant was going to get it. Defendant went to H's residence and began beating H up. H got a gun and shot it, which ended up killing a bystander. Defendant was convicted of second-degree murder (felony-murder) because victim died in the attempted perpetration of a felony, an attempted robbery in second degree. At trial, Defendant offered an instruction on assault third degree as a lesser-included offense of attempted robbery second degree, but the instruction was refused.
Holding: The elements of robbery in the second degree under Section 569.030 are (1) taking property that is owned by another, (2) for the purpose of withholding it permanently from its owner, and (3) using physical force to take the property. Section 565.070 defines assault third degree as knowingly causing physical contact with a person knowing the person will regard it as offensive. An offense is a lesser-included offense "[i]f the greater of the two offenses includes all the legal and factual elements of the lesser." The facts that support the instruction on attempted robbery second degree include that Defendant used physical force to take the property in that he hit H. The offense of third degree assault occurs when a person knowingly causes physical contact that is offensive. The offense of attempted second degree robbery, under the facts of this

case, includes all the legal and factual elements of assault third degree. Thus, assault third degree is a lesser-included offense. Moreover, the trial court was required to instruct on this because there was a basis for acquitting Defendant of the greater and convicting him of the lesser, since a witness testified Defendant was trying to collect on a debt owed. The jury could have concluded that although Defendant's attempt at "self-help" to collect was excessive, this did not constitute attempted robbery because Defendant was not taking property of another person. Since the murder conviction was predicated on Defendant's attempted robbery conviction, the murder conviction must also be vacated. All convictions vacated and case remanded for new trial.

State v. Neal, No. WD70607 (Mo. App. W.D. 11/2/10):
Where Defendant was charged and convicted of first degree robbery, trial court plainly erred in submitting jury instruction with missing elements of first degree robbery, but remedy was to enter conviction for second degree robbery and resentence.
Facts: Defendant was charged with first degree robbery for forcing a woman to go to a store, cash a check and give him money. He was also charged with forcible rape for raping the woman. Defendant claimed all his dealings with the woman were consensual. The State, without objection by Defendant, offered a verdict director for the robbery count which was actually the MAI for second degree robbery. The jury convicted Defendant of rape and first degree robbery. He appealed.
Holding: The verdict director for first degree robbery is MAI-CR 323.02, not MAI-CR 323.04, which was submitted. What distinguishes first and second degree robbery is the additional element that Defendant (1) causes serious physical injury, or (2) is armed with a deadly weapon, or (3) uses or threatens the immediate use of a dangerous instrument, or (4) displays or threatens the use of what appears to be a dangerous instrument. Here, the State alleges Defendant threatened the immediate use of a dangerous instrument, but the jury instruction did not require the jury to find this element. A verdict director which omits the elements of the crime is erroneous. The State claims that since Defendant claimed the sex with victim was consensual and no robbery occurred, Defendant is not challenging the element that a dangerous instrument was used in the offense. However, it would be ludicrous to require a defendant to specifically dispute every element of the crime when he claims he did not commit the crime. The State also claims that since the jury found forcible rape, the jury must have found force in the robbery. However, a finding of forcible rape does not, standing alone, require a finding of threatened force in a subsequent robbery. Here, there was a video showing Defendant and the woman at the store holding hands after the alleged rape. Jurors could have reasonably found that a weapon was used in the rape, but not in the robbery. The remedy here, however, is not a new trial. Rather, since the Defendant did not object to the instruction, and since Defendant committed all elements of second degree robbery as submitted, the remedy is to enter a conviction for the lesser-included offense of second degree robbery and order resentencing.

State v. Richards, No. WD70019 (Mo. App. W.D. 12/29/09):
Where attempted stealing instruction failed to include the legal definition of the word "deprive" in the verdict director for attempted stealing, this was reversible error because

this was an essential element to be found by the jury, and the contested issue in the case was whether Defendant intended to "permanently" take the property or not.
Facts: Defendant was charged with attempted stealing. He was caught walking Victim's motorcycle down Victim's driveway. Defendant's defense at trial was that he was moving the motorcycle across the street only as a "prank." The defense objected to the verdict director for attempted stealing on grounds that it failed to give a legal definition of "deprive" as meaning to "permanently" deprive an owner of property.
Holding: MAI-CR3d 304.06 is the verdict director for attempted stealing. As given by the trial court, the relevant paragraph said a person commits stealing if he appropriates property of another "with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." This tracks MAI-CR3d 333.00 and Sec. 570.030.1 on stealing. However, the instruction required inserting a definition of the crime "including all elements thereof." The question is whether the given instruction, without more, satisfied this obligation to include all elements. It did not because the legal definition of "deprive" in Sec. 570.010(8) means to permanently withhold property. Here, the central contested issue in the case was whether Defendant intended to permanently deprive the Victim of the motorcycle (which would be attempted stealing), or only temporarily do so as a "prank" (which would not be attempted stealing). This was the central issue for the jury to decide, so the given instruction's failure to legally define "deprive" was prejudicial error. Reversed and remanded for new trial.

State v. Hiltibidal, No. WD69620 (Mo. App. W.D. 8/18/09):
Even though self-defense instruction was not requested by Defendant, where evidence viewed in light most favorable to defense supported the instruction, court was required to give it.
Facts: Defendant was convicted of second degree domestic assault, Sec. 565.073. Victim testified that she and Defendant were arguing and Defendant beat her up, breaking her ribs. Defendant testified that he was trying to leave Victim's residence, but Victim took his car keys and then hit him over head with beer bottle, and Defendant fought Victim in "defensive mode." Defendant did not request a self-defense instruction, but raised this as plain error on appeal.
Holding: MAI-CR3d 306.00 contains instructions that are required to be given whether requested or not. A jury instruction on self-defense is required to be given when substantial evidence supports it. The elements of self-defense are that the Defendant (1) did not provoke the attack; (2) reasonably believed he was faced with necessity of defending himself from serious bodily harm; (3) used no more force than necessary; and (4) attempted to avoid the confrontation. Evidence is viewed in the light most favorable to the defendant in determining if self-defense instruction must be given. Here, while it may be "tempting" to disbelieve Defendant's version of events, it was for the jury to determine credibility. Trial court erred in failing to sua sponte give self-defense instruction.

State v. D.W.N., No. WD69142 (Mo. App. W.D. 8/11/09):
Holding: (1) In child sex case, investigator who interviewed child victim should not have been allowed to testify that he found victim believable and did not find any signs victim was lying, because this was improper expert vouching for victim's credibility.

However, this was not plain error where defense counsel failed to object, but defendant can file a 29.15 action to claim ineffective assistance of counsel. (2) Where jury instruction instructed jury to convict if they found Defendant touched "genitals *or* breast of victim," this instruction was erroneous because it submitted the offense in the disjunctive and allowed the jury to convict non-unanimously in that some jurors may believe he committed one act while others believe he committed the other. However, this was not plain error, because the evidence showed Defendant touched both in one event.

State v. Stiers, No. WD65559 (Mo. App., W.D. 6/19/07):
Counsel ineffective in failing to request self-defense instruction.
Facts: Movant claimed that girlfriend broke into his house at night, and was going through his wallet and briefcase. Movant confronted girlfriend, and she pulled out a knife. Movant fought with girlfriend for several minutes to disarm her. Girlfriend claimed that she went to Movant's house and entered when nobody came to the door, and Movant began beating her, tied her up and sodomized her. The jury acquitted Movant of sodomy, but convicted of felonious restraint. Movant later filed Rule 29.15 motion alleging counsel was ineffective in not requesting a self-defense instruction. Counsel believed the instruction was not warranted because the State's evidence indicated that Movant restrained girlfriend for several hours.
Holding: This is not a case where counsel did not request an instruction as a matter of strategy; rather, counsel believed the instruction was not available as a matter of law. However, self-defense may be justification for use of physical force when a person reasonably believes such force is needed to defend himself from what that person believes to be the use or imminent use of unlawful force of another. This extends to use of physical restraint provided the actor takes all reasonable measures to end the restraint as soon as reasonable to do so. In determining whether to give an instruction, the evidence must be viewed in the light most favorable to defendant. Viewing the evidence favorably to Movant, the evidence shows he acted in self-defense. Movant had two available defenses: (1) convince the jury he did not use deadly force, or (2) convince the jury he used deadly force in self-defense. These defenses are not inconsistent. A self-defense instruction must be given where there is substantial evidence to support it, even if it conflicts with a defendant's testimony. Here, a competent attorney would have requested the instruction.

State v. White, No. WD65067 (Mo. App., W.D. 4/10/07):
Plain error to fail to give an instruction on self-defense where instruction was supported by the evidence.
Facts: A man became angry and confronted Defendant. The man hit Defendant, and a fight broke out. During the fight, a gun fell out of Defendant's pants. The man and Defendant wrestled for control of the gun. Defendant grabbed the gun, and fired one shot, which killed the man. Defendant was charged with second-degree murder. The defense was accident. Defendant was convicted of second-degree murder.
Holding: Defendant argues the trial court erred in failing to give MAI-CR3d 306.06 and 306.08 on self-defense and defense of third persons, even though he did not request them at trial. Upon evidence of self-defense or defense of third persons, the State has the burden to prove beyond a reasonable doubt that defendant did not act in lawful self-

defense, and the jury must be so instructed, regardless of whether the instructions are requested. In general an accident defense and self-defense are inconsistent because accident involves unintentional conduct while self-defense involves intentional but justified killing. But self-defense is submissible if the inconsistent evidence is offered by the State or the defendant through a third party witness. A witness for the State testified Defendant fired the gun as a defensive measure against the man. This was sufficient to show self-defense, and the court plainly erred in failing to give a self-defense instruction.

State v. Herndon, No. WD66610 (Mo. App., W.D. 3/27/07):
Where the evidence and jury instruction was that Defendant placed his penis "on" child victim's vagina, this was not sufficient evidence to prove sodomy, Section 566.062, because there was no evidence that the penis penetrated the vagina.
Facts: The evidence and jury instruction showed that Defendant placed his penis "on" child victim's vagina. Defendant was convicted of sodomy, Section 566.062.
Holding: Sodomy requires deviate sexual intercourse defined as an "act involving the genitals of one person and the hand, mouth, tongue or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object…." Putting a penis on a vagina without penetrating the vagina did not meet the definition of deviate sexual intercourse. Thus, sodomy conviction cannot be sustained. However, appellate court enters conviction for first-degree child molestation, Section 566.067.1, because this is a lesser-included offense of sodomy, and the evidence was sufficient to sustain that offense.

State v. Smith, No. WD66048 (Mo. App., W.D. 3/6/07):
Even though co-defendant used a gun to rob a store, thus committing first-degree robbery, Defendant was entitled to lesser-included offense instruction on second-degree robbery because evidence would support that Defendant did not know gun would be used.
Facts: Defendant was charged with first-degree robbery as an accomplice. A co-defendant had gone into a store, displayed a gun, and robbed the clerk. Defendant had previously been to a Wal-Mart where co-defendant bought ammunition, but the evidence showed that Defendant did not witness co-defendant buy the ammunition. Defendant did not go into the store that was robbed, but knew it was going to be robbed. Defendant claimed he was entitled to a lesser-included instruction on second-degree robbery because the jury could have found that he acted with the purpose of promoting forcible stealing, but did not act with the purpose of using a deadly weapon to do this.
Holding: Western District holds that cases which held that accomplices must have the intent for the underlying offense should no longer be followed. E.g., *State v. Neal*, 14 S.W.3d 236 (Mo. App., W.D. 2000) and *England v. State*, 85 S.W.3d 103 (Mo. App., W.D. 2002). The only showing required as to culpable mental state of an accomplice is that in aiding the principal he acted with the purpose to promote the conduct of the principal that constituted the offense. Defendants can introduce evidence to show that they did not have the purpose of committing the particular degree of the underlying offense. Juries must consider defendants' guilt or innocence as to the degree of the offense independently from the co-defendant's offense. Viewed in the light most favorable to Defendant, the evidence would show that Defendant did not have the intent to aid co-defendant in taking the property with the use or threatened use of a deadly

weapon. Thus, Defendant was entitled to a lesser-included offense instruction on second-degree robbery.

*** Smith v. Spisak, 86 Crim. L. 447, ___ U.S. ___ (U.S. 1/12/10):**
Holding: (1) Jury instructions at death penalty phase did not violate *Mills v. Maryland*, 486 U.S. 367 in that they did not preclude jury from considering only those mitigating factors unanimously found by jury; (2) even though death penalty counsel's closing argument emphasized the gruesome nature of the crime, said Defendant may commit crimes in the future, and did not emphasize mitigating circumstances or ask for life, Defendant was not prejudiced because he had admitted three murders and two other shootings.

*** Waddington v. Sarausad, 84 Crim. L. Rep. 447, ___ U.S. ___ (1/21/09):**
Holding: State court's rejection of challenge to jury instruction on accomplice liability was not an "unreasonable application" of clearly established federal law; thus, habeas petitioner was not entitled to relief. The instruction imposed liability on accomplices who acted "with knowledge that their actions will promote or facilitate commission of the crime."

Hedgpeth v. Pulido, 84 Crim. L. Rep. 276, ___ U.S. ___ (12/2/08):
Holding: Even though a jury instruction may be erroneous and allow a guilty verdict based upon an invalid theory of guilt, this is not "structural error" requiring reversal in the absence of a showing of prejudice.

*** Ayers v. Belmontes, 80 Crim. L. Rep. 167, ___ U.S. ___ (2006):**
Holding: Mitigation instruction to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" allows for consideration of all mitigating evidence.

U.S. v. Jadlowe, 87 Crim. L. Rep. 813 (1st Cir. 8/4/10):
Holding: Jury instruction that jurors could discuss case throughout the trial was erroneous but not per se structural reversible error.

U.S. v. Boidi, 85 Crim. L. Rep. 393 (1st Cir. 6/3/09):
Holding: Conspiracy to possess illegal drugs can be a lesser included offense of a vertical conspiracy to possess with intent to distribute.

U.S. v. Leahy, 80 Crim. L. Rep. 480 (1st Cir. 1/19/07):
Holding: Defendant charged with felon in possession of firearm may assert affirmative defenses of self-defense, duress and necessity

U.S. v. Tureso, 85 Crim. L. Rep. 241 (2d Cir. 5/14/09):
Holding: Even though evidence indicated Defendant should have known he was impersonating an actual person, where jury instructions did not require this finding in aggravated identity theft case, 188 USC 1028A, the conviction was reversed.

U.S. v. Joseph, 83 Crim. L. Rep. 825 (2d Cir. 9/9/08):
Holding: (1) Jury instruction for enticement of minor on Internet that told jurors to convict if Defendant "made the possibility of sex with him more appealing" was erroneous because this is not a crime; (2) Defendant should be able to present expert testimony about "role-playing" on Internet, where Defendant claimed his conversations with undercover officer were "role play."

U.S. v. Brutus, 82 Crim. L. Rep. 60, 2007 WL 2828690 (2d Cir. 10/2/07):
Holding: An "interested witness" jury instruction that Defendant may have a motive to testify falsely undermines the presumption of innocence.

U.S. v. Gaines, 79 Crim. L. Rep. 660 (2d Cir. 7/20/06):
Holding: Jury instruction informing jurors that Defendant's interest in the case creates a motive to testify falsely violated presumption of innocence.

U.S. v. Lee, 85 Crim. L. Rep. 560 (3d Cir. 7/17/09):
Holding: Even though the judge gave jurors an instruction to disregard an incriminating document that should not have gone to the jury, the document was so prejudicial to the defense that new trial was required.

U.S. v. Luck, 2010 WL 2635812 (4th Cir. 2010):
Holding: Even though court gave a general witness credibility instruction, counsel was ineffective in failing to request a specific informant instruction where informant-witness was paid for their testimony.

Paredes v. Quarterman, 2009 WL 1911037 (5th Cir. 2009):
Holding: Where law required proof of murder of more than one person, Defendant was entitled to certificate of appealability on whether jury instruction denied him unanimous verdict as to which two of three people he was responsible for killing.

U.S. v. Long, 2009 WL 542844 (5th Cir. 2009):
Holding: Schizotypal personality disorder was "severe" mental illness sufficient to warrant insanity instruction.

Mitts v. Bagley, 87 Crim. L. Rep. 882, 2010 WL 3488996 (6th Cir. 9/8/10):
Holding: An "acquittal first" instruction which blocked considering lesser offenses violated *Beck v. Alabama*.

U.S. v. Castano, 2008 WL 4470849 (6th Cir. 2008):
Holding: Where Defendant was charged with carrying a firearm in relation to drug offense, jury instructions which omitted "in relation to" language and substituted "possession" for "carrying" was plain error.

U.S. v. Ciesiolka, 87 Crim. L. Rep. 791 (7th Cir. 7/26/10):
Holding: Where (1) undercover police were conducting an internet sex sting operation for child enticement; (2) undercover police sent Defendant a photo of a woman in her

20's but told Defendant she was 13; and (3) undercover police arranged a meeting with Defendant and "woman" but Defendant never showed up, trial court erred in giving an "ostrich" instruction explaining an accused's deliberate indifference to the truth because the instruction allowed a guilty verdict based on Defendant's suspicion of victim's true age; rather than being incriminating, Defendant was trying to ascertain "woman's" true age, which would have exonerated him.

U.S. v. Pereyra-Gabino, 85 Crim. L. Rep. 143 (8th Cir. 4/16/09):
Holding: Jury instructions which allowed jurors to "mix and match" aliens with elements of crime in trial for concealing illegal aliens were erroneous.

U.S. v. Moreland, 2010 WL 3607180 (9th Cir. 2010):
Holding: Where Defendant was charged with promotion money laundering, district court plainly erred in failing to instruct that proceeds was defined as profits.

Taylor v. Sisto, 87 Crim. L. Rep. 369 (9th Cir. 5/25/10):
Holding: Where judge told jury that they could use their "common sense" but had to leave outside the courtroom "all the decisions that you have made, all the opinions about how people act, how people behave, what kind of people behave in what way, what makes them do that" and that jurors "can't depend" on such "biases and prejudices," this violated Defendant's 6th Amendment right to an impartial jury that was representative of the community.

U.S. v. Moreland, 2010 WL 1741084 (9th Cir. 2010):
Holding: Court was required to instruct jury in pyramid scheme case that proceeds was defined as profits.

Taylor v. Sisto, 2010 WL 2039172 (9th Cir. 2010):
Holding: Instruction telling jurors to disregard life experience and put personal experiences in a "box" was error because jury is meant to be made up of human beings with life experience vital to the validity of their verdict.

U.S. v. Harrison, 2009 WL 2516327 (9th Cir. 2009):
Holding: Where crime of interfering with federal officer required proof of assault, jury instruction which defining force as physical intimidation was plain error.

Byrd v. Lewis, 2007 WL 4302983 (9th Cir. 2007):
Holding: Jury instruction which allowed conviction if Defendant's intent was "clearly established," rather than proven beyond reasonable doubt, violated due process by lowering burden of proof.

Medley v. Runnels, 2007 WL 3197087 (9th Cir. 2007):
Holding: Jury instruction that a "flare gun" was a firearm improperly relieved State of burden to prove the flare gun was to be used as a weapon.

Pulido v. Chrones, 2007 WL 1544505 (9th Cir. 2007):
Holding: Felony-murder instruction was invalid where it allowed jury to convict based on a finding that the felony happened after the murder, rather than contemporaneously with the murder.

U.S. v. Hernandez, 2007 WL 465714 (9th Cir. 2007):
Holding: Even though Defendant had $4,000 of methamphetamine, Defendant was entitled to lesser-included offense instruction on possession of drugs in drug trafficking case, because the drugs were not packaged for sale and Defendant did not have a lot of cash on him; the jury could find that the drugs were for personal use, not sale.

Richie v. Workman, 2010 WL 1115850 (10th Cir. 2010):
Holding: Even though murder victim's body was found in closet with limbs bound and rope around neck, where there was some entomological evidence and other evidence that Defendant left victim alive, Defendant was entitled to lesser-included second degree murder instruction in first degree murder trial.

Hooks v. Workman, 87 Crim. L. Rep. 371 (10th Cir. 5/25/10):
Holding: (1) Prosecutor's remarks that jurors' work would be wasted if they didn't reach a unanimous verdict and that failing to reach a verdict would be "jury nullification" and outside the law misstated the law; (2) where jury told judge it was deadlocked 11 to l for death and judge instructed jurors to keep deliberating so that the "case may be completed" and suggested jurors could not go home until they reached a verdict, this improperly coerced a death verdict.

Phillips v. Workman, 2010 WL 1882313 (10th Cir. 2010):
Holding: State court erred under *Beck v. Alabama* in deciding whether capital Defendant was entitled to lesser-included offense instruction on murder.

Wheeler v. U.S., 81 Crim. L. Rep. 658 (D.C. 8/16/07):
Holding: Jury instruction that jurors could not "as a matter of law" consider lack of fingerprint evidence as reasonable doubt invaded province of jury and violated 6th Amendment right to jury trial and 14th Amendment due process right to conviction based on proof beyond a reasonable doubt.

Preacher v. U.S., 2007 WL 2436762 (D.C. 2007):
Holding: Where jury's question about meaning of "assault" was central to Defendant's defense, trial court erred in not responding to the specific question.

U.S. v. Polizzi, 2008 WL 877164 (E.D.N.Y. 2008):
Holding: Defendant had 6th Amendment right to have jury be informed of 5-year minimum sentence for conviction for receiving child pornography; jury has right to know sentence so as to be able to apply the law in light of severity of punishment.

U.S. v. Rodriguez, 2007 WL 3125197 (D.P.R. 2007):
Holding: Issue whether doctor had legitimate medical purpose to prescribe drug was a jury question, and not one for the judge to resolve.

State v. Zaragoza, 2009 WL 1521769 (Ariz. 2009):
Holding: In DWI case, jury instruction on whether Defendant was in actual physical control of the vehicle should instruct jury to consider totality of circumstances shown by the evidence and whether Defendant's current or imminent control of vehicle presented a real danger to himself or others; factors to consider include whether vehicle was running, position of driver in vehicle, whether headlights were on, where vehicle was stopped, time of day, whether heater or air was on, whether windows were up or down, whether driver had pulled over voluntarily.

State v. Nathan J., 2009 WL 4042772 (Conn. 2009):
Holding: Where alleged child-abuse victim testified that bruise had occurred by accident when Defendant pulled his shirt and Defendant had been disciplining child for misbehaving, Defendant was entitled to instruction on defense of parental justification in child abuse case.

State v. Terwilliger, 2009 WL 4980462 (Conn. 2009):
Holding: Where court refused to instruct jury that State had burden to disprove Defendant's defense of premises theory in manslaughter trial, this violated due process.

State v. Cote, 83 Crim. L. Rep. 182 (Conn. 4/22/08):
Holding: State prosecutors could not use definitions from a federal environmental statute in a jury instruction for prosecution of State-law environmental crimes.

Johnson v. State, 88 Crim. L. Rep. 122 (Fla. 10/7/10):
Holding: Judge's preemptive instruction telling jurors that no testimony will be read back to them is reversible error.

State v. Hobbs, 88 Crim. L. Rep. 317 (Ga. 11/22/10):
Holding: Instruction stating that jurors "may" consider evidence of Defendant's good character was inadequate because it did not instruct jurors how such evidence was to be considered in their deliberations.

Chase v. State, 2009 WL 1649690 (Ga. 2009):
Holding: Where State's age of consent was 16 and victim was 16, it was a defense to crime of "sexual assault of a person enrolled in school" that victim consented to sex.

People v. Smith, 85 Crim. L. Rep. 84 (Ill. 4/2/09):
Holding: Where Defendants were charged with multiple counts of murder involving different mental states, court was required to grant Defendants' requests for separate verdict forms for each count.

People v. Hari, 78 Crim. L. Rep. 526 (Ill. 1/20/06):
Holding: Intoxication resulting from unexpected and unwarned side-effect of drugs Zoloft and Tylenol was "involuntary intoxication" which Defendant should have been able to assert as defense and receive jury instruction on.

McDowell v. State, 83 Crim. L. Rep. 288 (Ind. 5/15/08):
Holding: Jury instruction that jury could infer knowing or intentional killing was improper where it told jury it could infer Defendant's intent "from evidence that a mortal wound was inflicted upon an unarmed person with a deadly weapon in hands of the accused."

State v. Schuler, 2009 WL 2951478 (Iowa 2009):
Holding: Where jury instruction on willfully causing serious injury allowed jury to convict as principal without finding all elements of the offense, this was error; instruction did not make clear whether Defendant was being convicted as a principal or aider.

State v. Heemstra, 79 Crim. L. Rep. 744 (Iowa 8/26/06):
Holding: An assault that caused a death cannot serve as the basis for conviction of felony-murder; the assault merges into the homicide. Thus, jury instruction that allowed finding guilt for murder based on assault was erroneous.

State v. Salts, 2009 WL 276719 (Kan. 2009):
Holding: Where hammer instruction stated that "another trial would be a burden on both sides," this was error.

State v. Trautloff, 2009 WL 3234119 (Kan. 2009):
Holding: Where State charged Defendant only with "displaying" child pornography, the State was required to stick with this theory in jury instructions and the instructions could not expand the scope of how Defendant committed the offense.

Roach v. Com., 2010 WL 2016851 (Ky. 2010):
Holding: In adult exploitation case, whether victim was unable to manage her own affairs was a question for the jury.

Morrow v. Com., 85 Crim. L. Rep. 524 (Ky. 6/25/09):
Holding: Defendant can both deny commission of offense and assert an alternative defense of entrapment.

Harp v. Commonwealth, 84 Crim. L. Rep. 165 (Ky. 10/23/08):
Holding: Where the jury instructions failed to contain indentifying characteristics of individual multiple counts, this was reversible error that was not cured by the prosecutor's closing argument distinguishing the counts.

Cruz v. State, 2009 WL 151586 (Md. 2009):
Holding: Where case had been tried as an assault case, trial court abused discretion in giving the jury a supplemental instruction on attempted battery in response to a jury note during deliberations.

Com. v. Medeiros, 86 Crim. L. Rep. 626 (Mass. 2/11/10):
Holding: Where two defendants are jointly tried for rape as a "joint enterprise" and one is acquitted, a guilty verdict against the other defendant must be set aside as an inconsistent verdict.

Commonwealth v. Filopoulos, 2008 WL 1747103 (Mass. 2008):
Holding: Even though child enticement is a strict liability offense, trial court erred in failing to instruct jury that State was required to prove that Defendant intended his offense to be committed against an underage person.

State v. Cannady, 80 Crim. L. Rep. 524 (Minn. 2/8/07):
Holding: Due process was violated by a child pornography statute that made it an affirmative defense to show that the people depicted were 18 years old or older because this placed the burden of proof on Defendant concerning age.

State v. Hall, 80 Crim. L. Rep. 103 (Minn. 10/12/06):
Holding: Trial court erred in giving instruction on "transferred intent" in murder case where there was no evidence that the actual victim was an unintended or accidental victim; instruction was not harmless because it relieved the State of burden to prove premeditation regarding the actual victim.

Nay v. State, 82 Crim. L. Rep. 11, 2007 WL 2770211 (Nev. 9/20/07):
Holding: Conviction for felony-murder requires the intent to commit the felony to arise before or during the conduct resulting in death; it is not felony murder where Defendant killed victim in self-defense and then, after victim was dead, robbed him.

Rosas v. State, 80 Crim. L. Rep. 501 (Nev. 1/24/07):
Holding: Defendant entitled to lesser-included offense instruction which is supported by the evidence, even if the instruction is not consistent with the theory of defense or Defendant's testimony.

State v. Hill, 85 Crim. L. Rep. 538 (N.J. 7/14/09):
Holding: Courts should not submit jury instruction telling jurors that where Defendant's witness was available and Defendant failed to call witness, then jury can draw an inference that witness' testimony would have been unfavorable to Defendant, and Prosecutor's argument to this effect is also suspect because it improperly relieves Prosecutor of burden to prove guilt and shifts burden of proof to Defendant to prove innocence.

State v. Hill, 2009 WL 2045167 (N.J. 2009):
Holding: Instructions permitting jury to draw adverse inference from Defendant's failure to call an available witness should not be given, because such instructions relieve State of burden to prove each element beyond a reasonable doubt.

People v. Aleman, 2009 WL 1148635 (N.Y. 2009):
Holding: Trial judge gave coercive instruction to deadlocked jury where jury sent note saying they were inclined to acquit because Defendant had spent a lot of time in jail and deserved second chance, and judge gave remonstrations about "following the rules."

State v. Locklear, 68 S.E.2d 293 (N.C. 2009):
Holding: Capital Defendant claiming mental retardation is entitled to instruction sufficient to inform jury that Defendant will not be released if they find him mentally retarded.

State v. Nucklos, 84 Crim. L. Rep. 661 (Ohio 3/4/09):
Holding: Where doctor was accused of illegally dispensing drugs, State had burden to prove doctor did not act in accord with State drug dispensing laws, rather than it be an affirmative defense for doctor to show he had right to dispense drugs.

State v. Belcher, 86 Crim. L. Rep. 109, 2009 WL 3246813 (S.C. 10/12/09):
Holding: Juries in homicide cases should not be instructed that malice may be inferred from use of a deadly weapon where evidence has been presented that would reduce, mitigate or justify the homicide.

State v. Light, 2008 WL 2715948 (S.C. 2008):
Holding: Defendant entitled to self-defense instruction where he told police it was either "her [victim] or me" before he shot victim, because this showed he believed he was in imminent danger of losing his life.

State v. Harden, 85 Crim. L. Rep. 389 (W.Va. 6/4/09):
Holding: Under "castle doctrine," person has no duty to retreat before using lethal force in response to an attack by a cohabitant inside the residence.
People v. Babaali, 2009 WL 522897 (Cal. App. 2009):
Holding: "Sexual battery" is not a lesser-included offense of "sexual battery by fraudulent representation" because sexual battery requires touching "against the will" of victim, but "sexual battery by fraud" requires victim to be "unconscious" of the nature of the touching because Defendant has fraudulently represented a professional purpose for touching.

People v. Jackson, 2009 WL 3380646 (Cal. App. 2009):
Holding: Where statute made it illegal to make a threat, trial court erred in not sua sponte giving an instruction on the reasonableness of the threat to cause sustained fear in victim; otherwise, the statute may punish speech protected by the 1st Amendment.

People v. Williams, 2009 WL 2606239 (Cal. App. 2009):

Holding: Where Defendant charged as an accomplice in a robbery used as his defense that he thought he was helping the accomplice retake property the accomplice had a right to, Defendant was entitled to a jury instruction on claim-of-right because a good faith belief that the accomplice was entitled to the property negates Defendant's felonious intent.

People v. Arko, 2006 WL 2828868 (Colo. Ct. App. 2006):
Holding: Where counsel and Defendant disagree about whether a lesser-included offense instruction should be requested, court should follow wishes of Defendant.

People v. Whaley, 2006 WL 3314974 (Colo. Ct. App. 2006):
Holding: Trial court erred in not instructing on affirmative defense that Defendant had a valid prescription to possess drugs.

Brown v. State, 2009 WL 1424047 (Fla. Dist. Ct. App. 2009):
Holding: Jury instruction that testimony of alleged sexual battery victim need not be corroborated for a finding of guilty was misleading and improperly commented on the evidence.

Hill v. State, 2009 WL 3030966 (Ga. Ct. App. 2009):
Holding: Where murder Defendant's defense was that while he was acting in self-defense the victim lunged at him and Defendant accidently stabbed him with knife, Defendant was entitled to jury instruction on defense of accident.

People v. Rosenthal, 2008 WL 5454241 (Ill. App. 2008):
Holding: The offense of "aggravated battery with a firearm" in inherent in offense of murder, so cannot serve as predicate felony for felony-murder.

State v. Jones, 2009 WL 1025222 (Kan. Ct. App. 2009):
Holding: Where during deliberations jury asked if there were identifiable fingerprints on a gun, and judge gave an erroneous statement of facts that was different than the testimony at trial, Defendant was entitled to new trial.

State v. Smith, 2008 WL 680413 (Kan. Ct. App. 2008):
Holding: Defendant charged with "rape by intoxication" was entitled to jury instruction on defense of voluntary intoxication.

Goldsberry v. State, 84 Crim. L. Rep. 146 (Md. Ct. Spec. App. 10/6/08):
Holding: Where trial court told jury that "anything short of a unanimous verdict is not acceptable," this was reversible error which required new trial.

McMillan v. State, 2008 WL 4138464 (Md. Ct. Spec. App. 2008):
Holding: Duress can be a defense to felony-murder.

Pettigrew v. State, 927 A.2d 69 (Md. Ct. Spec. App. 2007):
Holding: "Transferred intent" is inapplicable to instances where the intended victim is injured, but not killed, and thus, jury instruction on transferred intent in regard to first-degree assault charge was error.

State v. Kousounadis, 86 Crim. L. Rep. 402 (N.H. 2009):
Holding: Under New Hampshire Constitution, a jury instruction which omits an element of the offense denies due process and is not subject to harmless error analysis; New Hampshire rejects *Neder v. U.S.*, 527 U.S. 1 (1999) to the contrary.

State v. Jackson, 2006 WL 2096074 (N.J. Super. Ct. App. Div. 2006):
Holding: Where robbery victim's identification of Defendant was questionable, failure to give specific jury instruction on identification was plain error.

People v. Colletti, 2010 WL 2106974 (N.Y. App. Div. 2010):
Holding: Where indictment specified a particular criminal enterprise, gov't had to prove that Defendant's actions fell within that enterprise.

People v. Rodriguez, 2010 WL 521106 (N.Y. App. Div. 2010):
Holding: Defendant was entitled to a jury instruction on justification in his manslaughter trial where his defense was that he saw a parked truck begin to roll down a hill and he got in truck and tried to stop it, but it crashed into other cars and pedestrians.

State v. Yarborough, 2009 WL 1980998 (N.C. Ct. App. 2009):
Holding: A defendant cannot kidnap a person for purpose of facilitating felony-murder; thus, where Defendant was indicted for kidnapping for purpose of committing murder State has to prove deliberate murder and a fatal variance existed between evidence and indictments.

State v. Brown, 87 Crim. L. Rep. 374 (Tenn. 5/27/10):
Holding: Trial judge in "shaken baby" murder case should have given lesser-included instructions on second degree murder and reckless homicide.

State v. Jeffs, 2010 WL 2899120 (Utah 2010):
Holding: In prosecution of Minister-Defendant as accomplice to sex with a minor, the minor's lack of consent to sex with her husband could not be established by evidence that Minister-Defendant had position of trust in relation to victim or that he enticed or coerced victim.

State v. Harvill, 87 Crim. L. Rep. 733 (Wash. 7/22/10):
Holding: Where Defendant claimed he sold drugs to an informer only because he feared that if he refused, informer would harm his family, Defendant was entitled to jury instruction on duress because this was an implicit threat.

People v. Hoye, 2010 WL 3687757 (Cal. App. 2010):
Holding: Where Defendant was charged with harassing visitors to an abortion clinic, and evidence of 12 different interactions with visitors was presented, the trial court was required to instruct jury that it had to be unanimous as to which incidents constituted the harassment in their verdict finding guilt on two counts.

Walker v. State, 2010 WL 4226549 (Fla. Ct. App. 2010):
Holding: Manslaughter jury instruction given in first degree murder trial was improper where it told jury that it had to find that Defendant intended to kill victim to find manslaughter.

State v. Berry, 2010 WL 4226707 (Or. Ct. App. 2010):
Holding: Where in child sex case the State presented conflicting evidence on victim's age such as a birth certificate showing actual age, an email in which victim told Defendant she was 17 and her webpage which said she was 15, Defendant was entitled to a jury instruction on lesser-offense based on victim being the oldest age.

Sanchez v. State, 2010 WL 3894640 (Tex. Crim. App. 2010):
Holding: Jury instruction authorizing conviction if manner of death was "unknown" was not supported by evidence where pathologist had testified the cause of death was strangulation or a stun gun or both; the manner of death was not "unknown" but "unknowable."

Chaney v. State, 2010 WL 2136534 (Tex. App. 2010):
Holding: Where jury instruction contained full statutory definitions of intentional and knowing, this was erroneous because it allowed jury to convict based on Defendant's conduct, not whether he had acted knowingly.

Bartlett v. State, 84 Crim. L. Rep. 289 (Tex. Crim. App. 11/26/08):
Holding: Where jury instruction instructed jurors on how to consider a refusal to take a breath test in a DWI case, the instruction was an impermissible comment on the evidence by singling out a particular piece of evidence, even though the instruction itself was a neutral explanation

McKinney v. State, 80 Crim. L. Rep. 226 (Tex. Crim. App. 11/15/06):
Holding: Defendant, who requested and received a lesser-included offense instruction and was convicted of the lesser, could challenge sufficiency of evidence to sustain conviction for lesser on appeal.

State v. Shumaker, 2007 WL 4532845 (Wash. Ct. App. 2007):
Holding: Where marijuana was found in a car passenger's backpack, a jury instruction allowing conviction for driver for constructive possession if driver had dominion or control over the premises was erroneous.

Jury Issues – Batson – Striking Of Jurors – Juror Misconduct

Fleshner v. Pepose Vision Institute, No. SC90032 (Mo. banc 2/9/10):
(1) Where after trial Defendant obtained an affidavit of a juror who claimed that during jury deliberations another juror made anti-Semitic comments directed at Defendant, the trial court abused its discretion in not holding a hearing on the matter; (2) where a party shows that jurors made remarks during deliberations showing bias on basis of race, gender, religion or national origin, a new trial must be granted because this denies the party 12 impartial, fair jurors.
Facts: Plaintiff-employee sued Defendant-employer for wrongful termination. Jury returned verdict for Plaintiff. After trial, Defendant filed a new trial motion alleging juror bias. Defendant included an affidavit from a juror who claimed that during deliberations, another juror had made anti-Semitic remarks about the owner of the Defendant business, who was also a witness in the case. The trial court denied a hearing on the motion on grounds that the verdict could not be impeached by showing what occurred in jury deliberations.
Holding: This Court has never considered whether a trial court may hear testimony about juror statements during deliberations evincing ethnic or religious bias or prejudice. Other States have held that courts may hear testimony that a verdict may have been the result of racial, national origin, religious or gender bias. When a juror makes remarks during deliberations showing ethnic or religious prejudice, the juror's mental processes have been exposed to other jurors. The juror has revealed that he is not fair and impartial. "Whether the statements may have had a prejudicial effect on other jurors is not necessary to determine. Such statements evincing ethnic or religious bias or prejudice deny the parties their constitutional rights to a trial by 12 fair and impartial jurors and equal protection of the law." Thus, if a party files a new trial motion alleging such statements during deliberations, the trial court should hold a hearing to determine whether such statements occurred. If yes, a new trial must be granted.

Johnson v. McCullough, No. SC90401 (Mo. banc 3/9/10):
(1) Where juror failed to answer on voir dire whether she had been a party to prior lawsuits, this was intentional nondisclosure requiring a new trial; (2) Until Supreme Court can promulgate a written rule, attorneys must check Casenet after jury selection but before trial commences to ensure the selected jurors do not have prior litigation histories in order to preserve this issue for future review.
Facts: Plaintiff sued Defendant for medical malpractice. During voir dire, Plaintiff asked venire persons, "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" Several persons answered, but Juror did not. Juror subsequently served on the actual jury, which ruled for Defendant. After trial, Plaintiff discovered via Casenet that Juror had been a defendant in debt collection and personal injury cases in the past two years. Plaintiff moved for a new trial on grounds of the Casenet entries. The trial court granted a new trial. Defendant appealed.
Holding: (1) Venierpersons have a duty to give full, fair and truthful answers to all questions. Here, the question was clear and unambiguous. Failure to answer is a nondisclosure. Bias and prejudice are presumed for "intentional" nondisclosure. Defendants argue that a Casenet entry is not sufficient to prove intentional nondisclosure,

and that Plaintiff was required to have deposed Juror, obtained an affidavit from Juror, or had her testify. Although this may have been the better practice, under the facts here where the question was clear and Juror's litigation history is of such significance as to make it unreasonable to forget to answer, the trial court did not abuse its discretion in finding that the nondisclosure was "intentional." (2) Parties, however, should not be allowed to wait until after a trial is finished before raising the issue here. Modern technology, specifically Casenet, allows parties to search for jurors' prior litigation histories after the jurors are selected for trial, but before the jurors are actually empanelled. "Until a Supreme Court rule can be promulgated to provide specific direction, to preserve the issue of a juror's nondisclosure, a party must use reasonable efforts to examine the litigation history on Casenet of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial. To facilitate this search, trial courts are directed to ensure the parties have an opportunity to make a timely search prior to the jury being empanelled and shall provide the means to do so, if counsel indicates that such measures are not reasonably otherwise available." "Searches of other computerized record systems, such as PACER, are not required."

Kesler-Ferguson v. Hy-Vee, Inc., No. SC89314 (Mo. banc 12/16/08):
Holding: Party's strike of venireperson violated *Batson* where Party claimed it was concerned about venireperson's acquaintance with another venireperson, but both venirepersons said their acquaintance would not affect them, Party asked no questions of them about the acquaintance, and Party had a "long delay" in articulating why it struck venireperson.

State v. McFadden, No. SC87753 (Mo. banc 3/20/07):
(1) Prosecutor violated Batson by striking African-American juror for having "crazy red hair"; and (2) death sentence must be vacated which was based, in part, on prior conviction where Defendant had received death, but which later was overturned.
Facts: Prosecutor struck African-American venireperson on grounds that she had "crazy red hair." Defense counsel argued that style was quite fashionable in the African-American community. Also, Defendant had previously been convicted of murder and sentenced to death in another case. In penalty phase, the State presented evidence of the prior conviction and sentence. That prior conviction was later reversed on appeal.
Holding: The State's justification for striking the juror is not legitimate. The State fails to articulate how the juror's red hair, even if it were unusual, was related to the case other than that the juror was "individualistic." Regarding the penalty phase, *Johnson v. Mississippi*, 486 U.S. 578 (1988) held that reversal of a prior conviction the jury had considered in imposing death undermines the validity of the death sentence. That's the case here. Even assuming the prior conviction evidence was admissible as a prior bad act, the Court will not assume that the jury's weighing process was not affected by its knowledge that Defendant previously received death.

State v. McFadden, No. SC86857 (Mo. banc 5/16/06):
Trial court clearly erred in overruling Defendant's Batson challenge because totality of evidence showed that prosecutor struck African-American jurors, but not similarly-situated white jurors.

Facts: Prosecutor used five of its nine peremptories to remove African-American venirepersons, leaving only one African-American on the jury. Defense counsel made a *Batson* challenge, which was overruled.
Holding: Totality of evidence shows that trial court clearly erred in overruling the *Batson* challenge because similarly-situated white venirepersons were not struck. The State struck one venireperson allegedly because her phone rang, and she'd have difficulty taking time off work, but this juror gave answers more favorable to the State than other white jurors who weren't struck, and other white jurors who weren't struck also had difficulties taking time off work. The State struck a second venireperson because of her employment as a teacher and she would "likely … be liberal," but employment alone is not a sufficient reason to strike a juror absent more specific explanation why the employment would make an employee unfavorable for the State. The State struck a third venireperson on grounds that she had an unrealistic view of scientific evidence and worked at a crime lab, but the State did not strike a white juror who also had been exposed to crime lab work. The State also struck venirepersons on grounds that they were familiar with the crime scene, but the State did not strike white jurors who were familiar with the scene. The State also struck venirepersons who read about the case, but the State did not strike white jurors who read about the case. The State struck a venireperson who allegedly was sleeping during voir dire. While sleeping can be a valid reason to strike a juror, the totality of evidence in this case indicates the strike was pretextual.

Preston v. State, No ED93727 (Mo. App. E.D. 8/31/10):
Where circuit allowed venirepersons to opt out of jury service by paying a $50 fee and performing community service, this substantially failed to comply with jury statute because all citizens have an obligation to serve unless excused, and excusal from service is by judicial determination only; this was fundamental, systemic error.
Facts: Lincoln County adopted a jury selection procedure that permitted venirepersons to opt out of jury service by paying $50 and performing six hours of community service. Movant/Defendant alleged in his 29.15 motion that this violated the jury selection statute.
Holding: Sec. 494.465 provides that a party has to raise a claim regarding improper jury selection procedures within 14 days after discovering them or reasonably could have discovered them. Here, Movant's claims are timely because neither his trial counsel nor appellate counsel knew of the opt-out policy. Sec. 494.400 provides that all qualified persons have an obligation to serve unless excused. Sec. 494.300 provides that a judge may excuse persons from service for certain enumerated reasons. There is nothing in the statute allowing venirepersons to exempt themselves from service by paying money or performing community service. Here, seven venirepersons in Movant's jury pool chose the opt-out procedure. Although the Lincoln County procedure does not directly impinge on the concept of randomness, it violates the statute's mandates that citizens have an obligation to serve and that only judges can excuse persons for enumerated reasons. This was a fundamental, systemic violation that requires a new trial.

State v. Bateman, No. ED89968 (Mo. App. E.D. 2/24/09):
Where the State struck an African-American venireperson who had asked about the range of punishment in a case, but did not strike a white venireperson who asked a similar question, the State's strike violated Batson.
Facts: Defendant was charged with first degree murder. During voir dire, African-American venireperson Thompson asked what was meant by degrees of murder and whether the different degrees carried different punishments. After an explanation by the State, Thompson was asked if he could follow the court's instructions and answered, "yes." White venireperson Brindell asked why would the jury eliminate some of the possible punishments from their deliberation. The State struck Thompson on grounds that his responses showed "initiative" and a "more lenient bend" on criminal matters. Defense counsel argued that not striking Brindell showed the strike of Thompson was pretextual.
Holding: Thompson's questions showed no more "initiative" than Brindell's questions. Nothing in Thompson's response demonstrated a disposition toward leniency. The same is true of Brindell. Striking Thompson but not striking a similarly-situation white juror showed the State's reasons for the strike were pretextual and violated *Batson*.

State v. Owens, No. WD68830 (Mo. App., W.D. 12/16/08):
Where jury acquitted Defendant of sodomy, the jury's verdict convicting him of attempted witness tampering on the basis of the sodomy was an inconsistent verdict, and Defendant's conviction was vacated.
Facts: Defendant was charged with sodomy and attempted witness tampering, Sec. 575.270.2. The alleged sodomy was of a child. The alleged witness tampering occurred because Defendant had called the child's mother and tried to get her to have the child drop charges. The child ultimately recanted her allegations, but claimed that Defendant and mother never asked her to. The jury acquitted Defendant of sodomy, but convicted him of attempted witness tampering.
Holding: Generally, a Defendant must object at trial to an inconsistent verdict before the jury is discharged, or else the claim is waived. This did not happen here, but appellate court finds plain error. Sec. 575.270.2 states that a person commits the crime of victim tampering if they attempt to dissuade "any person who has been a victim of any crime" from pursuing prosecution. One of the elements of the offense is that the person "has been a victim of [a] crime." Because Defendant was acquitted of sodomy, the child was not a victim of a crime, and the acquittal of sodomy was inconsistent with the conviction of attempted witness tampering. Where a finding of guilt on one count depends on the jury's verdict on another, acquittal of the predicate crime precludes conviction of the dependent offense. The fact that Defendant was charged with only "attempted" tampering does not change the outcome. The judge had a duty to refuse to accept the inconsistent verdicts. He should have sent the case back for further deliberations. Having not done so, the only remedy is to vacate the attempted tampering conviction.

Hudson v. State, No. WD67082 (Mo. App., W.D. 1/22/08):
Jury selection process was not random where venirepersons were seated oldest to youngest, and this claim is cognizable in a 29.15 case.

Facts: When venirepersons called for jury duty arrived at the courthouse, they were seated oldest to youngest due to a computer glitch. The practical effect was that after voir dire and strikes, the petit jury would be chosen from the oldest venirepersons. Defendant was convicted at trial. He later filed a Rule 29.15 motion claiming the jury selection process was not random.
Holding: This claim is cognizable under the facts here. The claim could not have been adequately raised on direct appeal because it was not preserved for appeal, since trial counsel had not preserved it. Appellate counsel chose to not raise it on direct appeal for this reason. Multiple sections of Chapter 494 RSMo. require that jury selection procedures be random. Seating venirepersons oldest to youngest is a substantial failure to comply with the statute, and a new trial is warranted even in the absence of showing actual prejudice.

James v. State, No. WD66774 (Mo. App., W.D. 4/24/07):
Counsel ineffective in failing to strike venireperson who said she would draw adverse inference from Movant's failure to testify.
Facts: Venireperson said on voir dire "I would have a question in my mind" why Movant/Defendant did not testify at trial. Counsel did not move to strike venireperson, and she served on jury. Movant filed a 29.15 motion alleging counsel was ineffective for failing to strike this juror.
Holding: Trial counsel testified he could not remember why he did not strike juror. Counsel's inability to remember the reason for not striking juror does not support a finding that counsel's decision was a matter of trial strategy, and in fact, undermines that finding. A reasonably competent attorney would have struck juror for cause because juror would draw an adverse inference from Movant/Defendant's failure to testify.
Failure to remember the reason for not striking juror does not support a finding that counsel's decision was a matter of trial strategy, and in fact, undermines that finding. A reasonably competent attorney would have struck juror for cause because juror would draw an adverse inference from Movant/Defendant's failure to testify.

State v. Livingston, No. WD64677 (Mo. App., W.D. 1/30/07):
Prosecutor's strike of African-American venireperson was pretextual where Prosecutor claimed venireperson was struck because she had been to a bowling alley where crime occurred on a Sunday night, but similarly situated white venirepersons who had been to the bowling alley on other nights were not struck, and having been to the bowling alley had little logical relevance since the crime happened in the parking lot.
Facts: The crime happened in the parking lot of a bowling alley on a Sunday night. An African-American venireperson had been to the bowling alley on a Sunday night. White venirepersons had been there on other nights. Prosecutor struck the African-American juror on grounds that she had been to the bowling alley on a Sunday night. The white venirepersons were not struck. The trial court found that the Prosecutor's reason for the strike was race neutral and did not violate *Batson*.
Holding: Although the State is technically correct that no other venirepersons had been to the bowling alley on a Sunday night, that distinction is pretextual. The African-American venireperson was not asked anything special about Sunday nights at the bowling alley. White persons who had been to the bowling alley on other nights were not

struck. The bowling alley's procedures on Sunday night were not instrumental to the commission of the crime. If familiarity with the scene was the State's real concern, the State would have struck everyone who had been to the bowling alley. The existence of similarly-situated white venirepersons who were not struck coupled with the low degree of logical relevance between the State's explanation and the crime shows the strike was pretextual. The race of the Defendant (African-American), and the race of the victim (white), in addition to the fact that the State attempted to strike all African-Americans and that a prior strike was found to be discriminatory all support the conclusion of purposeful discrimination.

State v. Grondman, No. WD64717 (Mo. App., W.D. 4/25/06):
Trial court abused discretion in failing to strike two venirepersons who would consider Defendant's failure to testify as evidence of guilt.
Facts: During voir dire, two venirepersons made comments indicating they would consider Defendant's failure to testify as evidence of guilt, even though they also said they would follow the instructions or law. Trial court denied motions to strike, and the venirepersons served on the jury. Defendant did not testify.
Holding: Venireperson Parks said she had "a problem" with Defendant not testifying. Even though Parks said in response to Prosecutor's questions that she would follow the law, defense counsel subsequently got Parks to say she would "lean" toward finding Defendant guilty in a close case if he did not testify. Trial court did not conduct further inquiry to clarify Parks' answers. Venireperson Rhodeghier said if "[Defendant] has something to say, [he] should say it." Rhodeghier said in a close case, he would consider Defendant's failure to testify along with other evidence. Trial court did not conduct further inquiry to clarify his answers. Trial court abused its discretion in failing to strike Parks and Rhodeghier.

*** Berghuis v. Smith, ___ U.S. ___, 86 Crim. L. Rep. 747, 2010 WL 1189555 (U.S. 3/30/10):**
Holding: Even though habeas Petitioner alleged that jury selection method "siphoned off" potential African-American jurors to misdemeanor courts and improperly excused them for lack of transportation or child-care, state court did not unreasonably apply federal law in denying a 6th Amendment fair cross-section claim; Petitioner failed to prove African-Americans were systematically excluded from jury pool, even though they were underrepresented on venire panels.

*** Renico v. Lett, ___ U.S. ___, 87 Crim. L. Rep. 139 (U.S. 5/3/10):**
Holding: Federal habeas Petitioner not entitled to relief on double jeopardy claim because State court did not unreasonably apply federal law in holding that there was a "manifest necessity" to declare mistrial when jury told judge in first trial that it could not reach a verdict after four hours of deliberation; "Whether or not [State court's] opinion … was correct, it was clearly not unreasonable."

*** U.S. v. O'Brien, ___ U.S. ___, 87 Crim. L. Rep. 267 (U.S. 5/24/10):**
Holding: 18 USC 924(c)(1), which prohibits using, carrying or possessing a firearm in connection with a violent crime, treats the type of firearm as an element of the offense that must be proved to the jury beyond a reasonable doubt.

*** Thaler v. Haynes, 86 Crim. L. Rep. 572 (U.S. 2/22/10):**
Holding: Existing U.S. Supreme Court jurisprudence on "demeanor-based" explanations for juror strikes under *Batson* does not constitute "clearly established federal law" to satisfy AEDPA, 28 USC Sec. 2254(d)(1), to allow the grant of habeas relief.

*** Rivera v. Illinois, 85 Crim. L. Rep. 3, ___ U.S. ___ (3/31/09):**
Holding: Even though Defendant was erroneously denied a peremptory challenge, where none of the jurors were challengeable for cause, Defendant was not denied his 6th Amendment right to an impartial jury, nor due process; the good-faith loss of a peremptory challenge is a matter of State law only.

*** Snyder v. Louisiana, ___ U.S. ___, 128 S.Ct. 1203 (2008):**
Holding: Even though minority venireperson was "nervous" and expressed concern about missing a class, where (1) nervousness cannot be read from a transcript; (2) other venirepersons expressed concerns about missing work or school, but were not struck; (3) the court clerk contacted venireperson's school and the school said missing was not a problem; and (4) the trial was brief, the prosecutor's strike of the venireperson violated *Batson*.

*** Gonzalez v. U.S., ___ U.S. ___, 83 Crim. L. Rep. 195 (5/12/08):**
Holding: Personal consent of Defendant is not required to have federal magistrate preside over jury selection; consent of counsel is sufficient.

*** Uttecht v. Brown, 81 Crim. L. Rep. 311, ___ U.S. ___ (6/4/07):**
Holding: State court did not unreasonably apply federal law when it held that death penalty venireperson was substantially impaired in his ability to consider death. Juror said he would have favor the death penalty only if Defendant would "reviolate if released," and characterized State's burden of proof as "beyond a shadow of a doubt."

U.S. v. Littlejohn, 81 Crim. L. Rep. 416, 2007 WL 1745310 (D.C. Cir. 6/19/07):
Holding: Defendant's 6th Amendment right to jury trial violated by judge requiring voir dire questions which told venirepersons that they need not answer if they, themselves, believed the possible source of bias would not affect their ability to be fair. E.g., venirepersons were asked if they were related to police, but were told not to answer if they could still be fair and impartial.

U.S. v. Villar, 2009 WL 3738787 (1st Cir. 2009):
Holding: Court could hear juror testimony as to whether jurors made anti-Hispanic remarks against Hispanic Defendant.

In re Grand Jury, 2009 WL 1286334 (1st Cir. 2009):
Holding: A non-target grand jury witness only needed to show a low standard of particularized need to gain access to a transcript of his prior grand jury testimony so that he could avoid inconsistencies in further testimony.

U.S. v. Villar, 86 Crim. L. Rep. 203 (1st Cir. 11/10/09):
Holding: Rule that parties cannot inquire into deliberations of jurors to impeach their verdict does not apply when claim is that jurors were racially biased in reaching a verdict.

U.S. v. Lara-Ramirez, 83 Crim. L. Rep. 12 (1st Cir. 3/11/08):
Holding: Where, over Defendant's objection, the judge declared a mistrial because a Bible was found in the jury room, there was no manifest necessity for a mistrial and double jeopardy attached.

U.S. v. Pfaff, 87 Crim. L. Rep. 838 (2d Cir. 8/27/10):
Holding: Imposition of a fine double the maximum statutory penalty in the absence of the judge's finding regarding the amount of loss, violated Defendant's 6th Amendment right to a jury-finding under *Apprendi*.

U.S. v. Lee, 85 Crim. L. Rep. 560 (3d Cir. 7/17/09):
Holding: Even though the judge gave jurors an instruction to disregard an incriminating document that should not have gone to the jury, the document was so prejudicial to the defense that new trial was required.

U.S. v. Wecht, 83 Crim. L. Rep. 823 (3d Cir. 9/5/08):
Holding: Even though trial judge originally consulted with parties about a jury note indicating deadlock, where jury returned to deliberations and again said they were deadlocked two days later, trial court erred in not again consulting the parties.

U.S. v. Wecht, 83 Crim. L. Rep. 707 (3d Cir. 8/1/08):
Holding: News media and Defendant have 1st Amendment right to names of jurors before they are impaneled.

Haynes v. Quarterman, 84 Crim. L. Rep. 662 (5th Cir. 3/10/09):
Holding: A different judge than that who heard jury selection cannot preside over a *Batson* challenge in which demeanor of venirepersons is only issue.

Smith v. Berghuis, 84 Crim. L. Rep. 82 (6th Cir. 9/24/08):
Holding: Where trial court summarily excused jurors who asserted hardships for transportation and child care, this violated 6th Amendment right to fair cross section of jurors.

Harris v. Haeberlin, 83 Crim. L. Rep. 308, 2008 WL 2129764 (6th Cir. 5/22/08):
Holding: Where a videotape surfaced after trial that showed prosecutor talking about peremptory challenges, this was new evidence regarding *Batson* and remand to the trial

court for consideration should be required; State appellate court unreasonably applied federal law in not remanding to trial court.

U.S. v. Odeneal, 2008 WL 465357 (6th Cir. 2008):
Holding: Prosecutor's strike was pretextual where Prosecutor struck African-American juror who was on prior jury that voted not guilty and juror was going through a divorce, but did not strike white juror who had been on same prior jury.

U.S. v. Torres-Ramos, 2008 WL 3078262 (6th Cir. 2008):
Holding: Court was required to compare excluded African-American to venirepersons who were not excluded in deciding *Batson* issue; *not* compare excluded African-American venireperson to whites who were excluded.

U.S. v. Barnwell, 2007 WL 58164 (6th Cir. 2007):
Holding: Judge's ex parte communications during trial with prosecutor regarding a juror's leaking of deliberation information was improper.

Franklin v. Anderson, 2006 WL 38271 (6th Cir. 2006):
Holding: Juror was biased in death penalty case, and should not have served, where she had to be corrected three times by judge during voir dire about presumption of innocence and burden of proof; this was true even though juror said she would listen to all the evidence.

U.S. v. Sykes, 87 Crim. L. Rep. 755 (7th Cir. 7/19/10):
Holding: Where court allows jurors to question witnesses, it must do so through written questions rather than jurors directly questioning witnesses.

U.S. v. Vasquez-Ruiz, 2007 WL 2695693 (7th Cir. 2007):
Holding: Defendant entitled to new trial where someone other than the juror had written "guilty" in a notebook used by the juror to take notes during trial.

Harrison v. Gillespie, 2010 WL 10972 (9th Cir. 2010), reh'g granted 6/18/10:
Holding: Where in penalty phase of death penalty trial the jury deadlocked, there was no manifest necessity to declare a mistrial without first polling the jury to determine whether Defendant had been acquitted of the death penalty; hence, double jeopardy bars a penalty phase retrial seeking death.

Ali v. Hickman, 2009 WL 1924792 (9th Cir. 2009):
Holding: Where Prosecutor struck juror on grounds of prior experience with criminal justice system, this was pretextual under *Batson* because there was no evidence juror's prior experience was negative and Prosecutor did not strike other jurors who had prior experience.

Paulino v. Harrison, 2008 WL 4070694 (9th Cir. 2008):
Holding: Prosecutor's assertion of "bad memory" for failure to articulate reasons for striking African-American jurors violated *Batson*.

U.S. v. Richard, 82 Crim. L. Rep. 107, 2007 WL 2964366 (9th Cir. 10/12/07):
Holding: When jurors request a read back of testimony, court should read back full testimony and emphasize jurors should take into account all the evidence; trial court abused discretion in reading back only a portion of the witness' testimony.

U.S. v. Rosenthal, 79 Crim. L. Rep. 149 (9th Cir. 4/26/06):
Holding: A lawyer's comment to a friend who was sitting as a juror that juror had to follow judge's instructions or risk getting in trouble was "extraneous information" that coerced the juror's verdict.

Kesser v. Cambra, 2006 WL 2589425 (9th Cir. 2006):
Holding: Prosecutor's strike of Native American from venire on basis that she was "self-important" regarding her work for the tribe violated *Batson* where other panel members who were not struck said they could not leave their work either, and the prosecutor's explanation for the strike relied on personal prejudices.

Ward v. Hall, 86 Crim. L. Rep. 402 (11th Cir. 1/4/10):
Holding: Even though bailiff, in response to a jury question, had given death-penalty jury accurate information that life without parole was not one of their sentencing options, this was error requiring vacating death sentence because it was role of judge, not bailiff, to answer jurors' question and only judge should have answered it.

McGahee v. Alabama Dept. of Corrections, 2009 WL 530771 (11th Cir. 2009):
Holding: State violated *Batson* by striking African-American jurors for low intelligence without any support in the record.

Hinton v. U.S., 2009 WL 2778259 (D.C. 2009):
Holding: Where judge replaced juror who had asked questions of witnesses during trial, this violated the rule providing that jurors are to be replaced with alternates only if jurors are unable or disqualified to perform their duties.

Preacher v. U.S., 2007 WL 2436762 (D.C. 2007):
Holding: Where jury's question about meaning of "assault" was central to Defendant's defense, trial court erred in not responding to the specific question.

Parks v. Warren, 2008 WL 3050051 (E.D. Mich. 2008):
Holding: Petitioner demonstrated cause to overcome procedural default on claim that computer glitch caused jury to not be fair cross-section, where Petitioner did not know of this problem at time of trial.

U.S. v. Polizzi, 2008 WL 877164 (E.D.N.Y. 2008):
Holding: Defendant had 6th Amendment right to have jury be informed of 5-year minimum sentence for conviction for receiving child pornography; jury has right to know sentence so as to be able to apply the law in light of severity of punishment.

U.S. v. Rodriguez, 2007 WL 3125197 (D.P.R. 2007):
Holding: Issue whether doctor had legitimate medical purpose to prescribe drug was a jury question, and not one for the judge to resolve.

Torres v. Uttecht, 2008 WL 189560 (W.D. Wash. 2008):
Holding: Non-English-speaking pro se Defendant's right to self-representation was violated where judge refused to allow a jury question during deliberations translated into Defendant's language, so Defendant could respond.

Ex parte Jerry Jerome Smith, 88 Crim. L. Rep. 170 (Ala. 10/22/10):
Holding: In capital trial, even though Judge extensively voir dired jurors about whether they could be fair after they sat with victim's mother and mother told them that Defendant should die, this was not enough to overcome a presumption of prejudice from being exposed to mother's comments.

Donaldson v. State, 2007 WL 1367553 (Ark. 2007):
Holding: Where jury verdict sentenced Defendant to "zero" years in prison and "zero" fine, the trial court had no authority to impose a prison sentence, since the statute did not set a lower limit for sentences the jury could impose, but only an "up to" maximum sentence.

State v. Kamel, 2009 WL 1796086 (Conn. 2009):
Holding: Where judge learned that jury had potentially been exposed to prejudicial unadmitted evidence in jury room, but waited three months to inform the parties of this and offered no explanation for the delay, this violated Defendant's right to fair trial.

Black v. State, 87 Crim. L. Rep. 734 (Del. 7/6/10):
Holding: Where, during trial, trial judge learned information that one juror had obtained outside information about case, judge was required to question jurors about it, and where judge failed to do this, Defendant is granted a new trial.

Barnes v. State, 82 Crim. L. Rep. 282 (Fla. 11/29/07):
Holding: Even though Defendant's prior testimony was read to the jury as testimonial evidence and admitted as an exhibit, the transcript of that testimony should not be sent to jury.

Humphreys v. State, 86 Crim. L. Rep. 760 (Ga. 3/15/10):
Holding: Even though statute says than any person "convicted of a felony" is not eligible for jury service, statute did not apply to juror serving a probated sentence under state's special scheme for first time felony offenders.

Turner v. State, 82 Crim. L. Rep. 474 (Ga. 1/8/08):
Holding: Jury verdict acquitting Defendant of a shooting because shooting was justified necessarily precluded the jury from simultaneously convicting Defendant of felony-murder; was an inconsistent verdict.

People v. Nelson, 86 Crim. L. Rep. 401, 2009 WL 4843879 (Ill. 12/17/09):
Holding: Where trial court erroneously dismissed a juror during death penalty deliberations, the proper remedy was to impose life without parole, not order a new penalty phase trial.

People v. Davis, 2008 WL 4943533 (Ill. 2008):
Holding: *Batson* hearing was inadequate where trial court did not make any findings regarding prosecutor's credibility or demeanor of jurors, and although found that prosecutor's reasons for strikes were "race neutral," did not make a finding whether Defendant had met burden of showing purposeful discrimination.

State v. Leaper, 87 Crim. L. Rep. 863 (Kan. 9/3/10):
Holding: Where juror reported that another juror had taken evidence out of the courtroom, the trial judge had a duty to inquire about this.

State v. Case, 85 Crim. L. Rep. 603 (Kan. 8/7/09):
Holding: A stipulation to facts during an *Alford* plea is not an admission of those facts for right-to-jury trial purposes under *Apprendi*, because an *Alford* plea does not involve admission of guilt.

In re L.M., 83 Crim. L. Rep. 617 (Kan. 6/20/08):
Holding: Juveniles prosecuted under Juvenile Code have 6th and 14th Amendment right to jury trial, because juvenile code over past 20 years has become punitive rather than "paternalistic" in nature, so bench trials no longer satisfy the constitution.

Paulley v. Com., 2010 WL 4146180 (Ky. 2010):
Holding: Where juror expressed uncertainty whether she could be impartial in light of her and son's experience with being crime victims, court erred in not striking juror for cause.

Roach v. Com., 2010 WL 2016851 (Ky. 2010):
Holding: In adult exploitation case, whether victim was unable to manage her own affairs was a question for the jury.

Shane v. Commonwealth, 82 Crim. L. Rep. 340 (Ky. 12/20/07):
Holding: Defendants who are forced to use peremptory strikes to remove venirepersons who the trial court erroneously refused to strike for cause are entitled to automatic reversal of convictions without showing of prejudice.

Moore v. State, 2010 WL 699238 (Md. 2010):
Holding: Court abused discretion in failing to ask venirepersons, upon defendant's request, if they would view defense witnesses with more skepticisim than witnesses called by State.

State v. Santiago, 2009 WL 4895493 (Md. 2009):
Holding: Where jury was not polled and verdict not hearkened, Defendant was entitled to new trial.

Moore v. State, 86 Crim. L. Rep. 703 (Md. 2/26/10):
Holding: Trial court, upon request, must ask venirepersons if they would be more likely to view defense witnesses with skepticism over prosecution witnesses.

Wright v. State, 86 Crim. L. Rep. 239 (Md. 11/16/09):
Holding: Where trial judge conducted voir dire by quickly asking 17 questions en masse to jurors and then asking them to come to the bench to answer individually, this violated Defendant's right to a fair and impartial jury under the 6th Amendment.

Harris v. State, 83 Crim. L. Rep. 806 (Md. 9/11/08):
Holding: Court's failure to swear in jury is structural error requiring new trial.

Owens v. State, 81 Crim. L. Rep. 383 (Md. 6/5/07):
Holding: Defendant has right to jury made up of only U.S. citizens, but the issue can be waived if Defendant does not ask questions on voir dire to address the issue.

Butler v. State, 79 Crim. L. Rep. 122 (Md. 4/13/06):
Holding: Trial judge coerced verdict where juror during deliberations sent note that he "didn't trust police" and judge answered that that might be a violation of the jurors' oath because should have been revealed on voir dire.

Commonwealth v. Benoit, 83 Crim. L. Rep. 751 (Mass. 8/18/08):
Holding: Even though strike under Batson may be "race-neutral," trial court must also consider and put on record both "adequacy" and "genuineness" of State's strike; even though court found State's explanation that it struck African-American venireperson because showed sympathy in prior case to be race-neutral, court erred in not considering whether State's strike was "adequate" and "genuine."

State v. Lessley, 86 Crim. L. Rep. 760 (Minn. 3/11/10):
Holding: Minn. Constitution does not require the State's consent to waive a jury in criminal case.

State v. Parker, 2006 WL 2884957 (Mt. 2006):
Holding: Where bailiff gave to jurors a videotape with an interview of a witness who did not testify at trial, this violated Defendant's right to confrontation.

State v. Payan, 85 Crim. L. Rep. 243 (Neb. 5/1/09):
Holding: Findings of fact necessary to support lifetime supervision under Neb. Sex Offender law require a jury finding under 6th Amendment and *Apprendi*.

State v. Lamy, 85 Crim. L. Rep. 103, 2009 WL 928763 (N.H. 4/8/09):
Holding: (1) Even though State had a records law defining a "live birth" differently than the common law "born alive" doctrine, where Defendant killed a fetus in a drunken driving incident, the common law "born alive" rule applied to determine if Defendant could be prosecuted; (2) where jurors made unauthorized visit to crime scene, prejudice was presumed.

State v. Reeds, 84 Crim. L. Rep. 526 (N.J. 1/22/09):
Holding: Where expert witness at drug trial testified Defendant constructively possessed drug found in car, this went to the ultimate issue in case and invaded province of jury.

State v. Ingram, 83 Crim. L. Rep. 697 (N.J. 7/21/08):
Holding: Trial court erred in instructing jurors that Defendant's absence from trial showed consciousness of guilt; Defendant had right to waive presence at trial, and his absence was not to avoid apprehension.

State v. Loftin, 81 Crim. L. Rep. 419 (N.J. 6/5/07):
Holding: Trial counsel ineffective in failing to move during trial to remove a white juror who (it was learned during trial) had told a co-worker before trial that he wanted to buy a rope and hang the African-American Defendant, and in failing to move to voir dire the remaining jurors about exposure to this juror's views. Defendant was entitled to a new trial, even though the juror served only as an alternate at the trial, and did not deliberate, because the juror's bias presumptively infected the rest of the jury.

State v. Juan, 87 Crim. L. Rep. 813 (N.M. 8/9/10):
Holding: Trial judge's failure to respond to jury question whether they could hang or had to deliberate indefinitely was reversible error.

Stephens Media v. 8th Judicial District Court, 86 Crim. L. Rep. 435 (Nev. 12/24/10):
Holding: Jury questionnaires are presumptively subject to public disclosure.

State v. Speer, 2010 WL 756988 (Ohio 2010):
Holding: Even though court provided hearing-impaired juror with a transcript of a police call made by Defendant, this did not enable the juror to discern the demeanor, speech patterns or excitement of Defendant; thus, Defendant was denied his right to a fair trial by 12 jurors.

Commonwealth v. Long, 2007 WL 15674157 (Pa. 2007):
Holding: 1st Amendment right of public access to trial gives a limited right to access jurors' names, though not addresses.

State v. Tody, 2009 WL 1151985 (Wis. 2009):
Holding: Having judge's mother on jury violated Defendant's right to impartial jury.

People v. Marks, 2007 WL 1881273 (Cal. App. 2007):
Holding: Defendant's due process rights violated where judge conducted some voir dire outside Defendant's presence.

Forster v. State, 2010 WL 2977500 (Alaska Ct. App. 2010):
Holding: Where trial court's sentence limited Defendant's eligibility for good-time credit and parole, this required a jury-finding under *Apprendi*, which requires any fact that increases penalty to be submitted to and found by a jury.

State v. Aguilar, 2010 WL 1720613 (Ariz. Ct. App. 2010):
Holding: Jurors' use of internet to define first degree murder, second degree murder and premeditation tainted murder conviction.

People v. Traugott, 2010 WL 1797247 (Cal. App. 2010):
Holding: Even though Defendant absented herself from trial, she did not forfeit right to a 12-person jury verdict and jury of 11 was not sufficient to convict (1 juror left before verdict).

People v. Rubio, 2006 WL 2130644 (Cal. App. 2006):
Holding: Defendant denied fair trial by hearing-impaired juror who committed misconduct in failing to notify trial court that juror couldn't hear portions of trial.

People v. Dahl, 80 Crim. L. Rep. 600 (Colo. Ct. App. 2/22/07):
Holding: Judge's threat to hold juror who showed up late for court in contempt along with judge's statement that he would try the case to conclusion regardless of the juror's personal problems coerced a verdict.

Barrow v. State, 2010 WL 445388 (Fla. Dist. Ct. App. 2010):
Holding: Where jury requested transcripts of testimony, trial judge abused discretion in not telling jurors they could request a read back of testimony and instead told them that no transcripts were available and they had to use their recollection, when statute allowed a read back.

Olibrices v. State, 2006 WL 1541278 (Fla. Dist. Ct. 2006):
Holding: *Batson*-type challenge may be made to State's strike of jurors because of their Pakistani or Muslim origin, because this is a cognizable ethnic group.

Rouse v. State, 2009 WL 485171 (Ga. Ct. App. 2009):
Holding: Trial court erred in not striking juror who said he would doubt Defendant's innocence if he did not testify.

State v. Hauser, 2006 WL 2140054 (Idaho Ct. App. 2006):
Holding: Court erred in failing to strike juror who said he would "give more weight" to sheriff officer's testimony than others, and that he would tend to believe the officer over Defendant.

State v. Johnson, 2008 WL 5411974 (Kan. Ct. App. 2008):
Holding: Where trial court failed to follow the statutory mandate to inquire into whether jury's verdict was actually their verdict, this was reversible error.

State v. Ingram, 2010 WL 3663820 (La. Ct. App. 2010):
Holding: Where Defendant was on trial for shooting his ex-wife when she invaded his home, a juror engaged in misconduct when, during trial, she became concerned that her own boyfriend was being unfaithful and made unauthorized entry into his residence to confront him with baseball bat, and discussed this with other jurors.

State v. Jones, 2009 WL 3446347 (La. Ct. App. 2009):
Holding: Where trial court received a letter from a juror accusing another juror of using racial epithets, trial court should have conducted a hearing to hear testimony from jurors.

State v. Banks, 928 A.2d 842 (N.J. Super. Ct. App. Div. 2007):
Holding: Where jury had previously told court it could not reach a unanimous verdict, and then a juror had to be removed, the court was required to declare a mistrial rather than substitute an alternate juror.

State v. Robinson, 2007 WL 471131 (N.J. Super. Ct. 2007):
Holding: Instead of substituting a juror who was discharged with an alternate juror, trial court should have granted Defendant's motion for mistrial where it was clear that the dismissed juror was the only hold-out juror, and it was clear that the other 11 jurors were not likely to have been able to follow instruction to begin deliberations anew with the alternate juror.

People v. Robar, 2010 WL 3463747 (N.Y. County Ct. 2010):
Holding: Where Defendant was on trial for recklessly shooting a hunter, Defendant's use of peremptory challenges to strike venirepersons who were licensed hunters violated *Batson* principles.

People v. Hayes, 2009 WL 1153505 (N.Y. App. Div. 2009):
Holding: Where venireperson said she didn't know if she could be impartial because she'd been a victim of a similar crime (identity theft), she should have been struck for cause.

People v. Estella, 2009 WL 445099 (N.Y. County Ct. 2009):
Holding: Defendant entitled to new trial where juror testified he "guessed" he had found Defendant guilty based on Defendant's race.

People v. Farley, 2009 WL 1741841 (N.Y. County Ct. 2009):
Holding: Where prosecutor failed to ascertain the effect on grand jurors of another juror saying he had previously arrested Defendant and of a second juror who knew Defendant and his mother, the indictment had to be dismissed because the grand jurors may have been biased.

People v. Revette, 2008 WL 450409 (N.Y. App. 2008):
Holding: Presence on grand jury which indicted Defendant of the wife of the deputy sheriff who investigated the crime warranted dismissal of the indictment.

People v. Luciano, 81 Crim. L. Rep. 593, 2007 WL 2199718 (N.Y. App. Div. 8/2/07):
Holding: Even though Defendant violated *Batson*, the remedy was not to order Defendant to forfeit his peremptory strikes he had used, but was to put the improperly struck venirepersons back on the jury and allow Defendant to exercise other peremptories. Defendant was entitled to a new trial because he was denied his peremptories allowed by State law.

People v. Garbutt, 2007 WL 2001768 (N.Y. App. Div. 2007):
Holding: Once jury deliberations begin, trial court cannot substitute an alternate juror without Defendant's written consent.

Golden v. State, 2006 WL 44346 (Okla. Crim. App. 2006):
Holding: Failure to give statutorily allowed number of peremptory challenges was structural error requiring new trial.

State v. Dalessio, 2009 WL 1458267 (Or. Ct. App. 2009):
Holding: Where one day into trial juror, a former police officer, said he was struggling with case and did not think he could sit on it, trial court abused discretion in not removing the juror on grounds of bias, even though juror said during voir dire he would be impartial.

Mason v. State, 88 Crim. L. Rep. 95 (Tex. Crim. App. 2010):
Holding: Where error occurs in grand jury proceeding, the focus on appeal should be on error's effect on the existence of probable cause to indict, not the effect on the ultimate verdict at trial.

City of Bothell v. Barnhart, 2010 WL 2560493 (Wash. Ct. App. 2010):
Holding: Impaneling of jurors who did not live in county where crime was committed violated Washington Constitution that jurors come from that county.

State v. York, 2009 WL 2751147 (Wash. Ct. App. 2009):
Holding: Where Defendant was charged with one count of child sex and the Victim testified that Defendant had sex with her on numerous different occasions, the court was required to give a unanimity instruction to ensure that the jury would unanimously convict for one specific act.

State v. Sadler, 84 Crim. L. Rep. 147 (Wash. Ct. App. 10/14/08):
Holding: Where trial court held its *Batson* hearing outside the courtroom, this violated Defendant's right to a public trial.

Malpractice

Kuehne v. Hogan, No. WD71130 (Mo. App. W.D. 6/8/10):
Even though Plaintiff (former postconviction movant) alleged that his Rule 29.15 postconviction counsel had committed malpractice in failing to call certain witnesses at his postconviction hearing, Plaintiff's case should be dismissed because he did not show "actual innocence."
Holding: Although no Missouri case addresses whether a plaintiff can maintain a malpractice claim against his postconviction attorney, there are several Missouri cases which address the elements a plaintiff must prove in a malpractice action against trial counsel. Plaintiff argues that he merely needs to show that, but for postconviction counsel's negligence, he would have won his Rule 29.15 case. However, Court of Appeals holds that Plaintiff must plead and prove "actual innocence" to be able to pursue a malpractice claim against postconviction counsel. Here, Plaintiff did not sufficiently allege facts to support that, but for his postconviction attorney's actions, he would have been acquitted at a new trial. The four witnesses whom postconviction counsel failed to call would have merely impeached trial witness' credibility, and therefore, could have, at best, caused trial counsel to be found ineffective and a new trial ordered. But this does not equate to acquittal at a new trial or "actual innocence."

Editor's Note by Greg Mermelstein: A concurring opinion argues that Public Defenders have official immunity.

Costa v. Allen, No. WD71055 (Mo. App. W.D. 6/8/10):
Holding: Even though Plaintiff (former postconviction movant) claimed his postconvicition counsel had breached his "fiduciary duty" and committed malpractice in the postconviction case, Plaintiff cannot collaterally attack his judgment of conviction via a malpractice action and must plead and prove "actual innocence" to be able to proceed in a malpractice case.

Mooney v. Frazier, 87 Crim. L. Rep. 48 (W.Va. 4/1/10):
Holding: Lawyers appointed to represent indigent defendants in federal court have immunity from malpractice claims as matter of public policy, even though neither state nor federal immunity statutes grant such private attorneys immunity.

Mental Disease or Defect – Competency – Chapter 552

State v. Walkup, No. SC87837 (Mo. banc 5/1/07):
(1) Defendant was not required to give notice that he intended to use "diminished capacity" defense under Section 552.015.2(8), because this is not a defense of mental disease or defect excluding responsibility (NGRI) under Section 552.030; and (2) Defendant timely disclosed that he intended to call a psychologist where defense had orally told the State that they intended to use the psychologist, and gave the State a copy of the psychologist's report when the defense received it.
Facts: Defendant was charged and convicted of first degree murder. The trial court precluded Defendant from presenting a psychologist who would testify that Defendant

had bipolar disorder which would impact his "decision-making." The State claimed that Defendant had not given notice of an intent to use a defense of mental disease or defect under Section 552.030. The trial court found that Defendant had not timely disclosed the psychologist.

Holding: (1) Section 552.015.2(8) allows Defendant to present evidence of mental disease or defect "[t]o prove that [he] did or did not have a state of mind which is an element of the offense[.]" This is known as "diminished capacity." Section 552.015.2(2) allows evidence of mental disease or defect "[t]o determine whether the defendant is criminally responsible as provided in Section 552.030." Section 552.030 requires the Defendant to plead "not guilty by reason of mental disease or defect excluding responsibility" (NGRI) or notify the State in writing of the intent to use this defense. Although NGRI and "diminished capacity" are often confused, they are separate doctrines. NGRI is an affirmative defense which requires the defendant to carry the burden of proving he has a mental disease or defect excluding responsibility. "Diminished capacity" is a negative or negating defense designed to show the defendant did not have the culpable mental state for the crime, but the defendant has no burden to present evidence or persuade. NGRI absolves a defendant of criminal responsibility. Diminished capacity does not absolve a defendant of criminal responsibility, but makes him responsible only for the crime whose elements the State can prove. A defendant is required to give advance notice under Section 552.030 of an affirmative defense of NGRI, but a defendant is not required to give notice of a defense of "diminished capacity." Here, Defendant sought to present his psychologist to negate the element of deliberation for first degree murder. This would not have absolved Defendant of responsibility, but would have made him guilty of second degree murder. This was a "diminished capacity" defense, for which Defendant was not required to give advance notice. (2) As a matter of discovery, Rule 25.05(A) requires the defendant – upon written request by the State -- to disclose expert reports, mental exam results, and "[i]f the defendant intends to rely on the defense of mental disease or defect excluding responsibility, disclosure of such intent shall be in the form of a written statement." The defense had orally told the State about the psychologist about four months before trial, and the defense gave the State a copy of the psychologist's report a week before trial, when the defense received it. While the timing and method of disclosure may not have been "ideal," the defense complied with its disclosure obligations.

<u>In the Matter of Competency of Parkus</u>, No. SC88077 (Mo. banc 4/17/07):

Proper procedure to claim Defendant sentenced to death prior to August 28, 2001, is mentally retarded – and, thus, cannot be executed -- is to file writ of mandamus in Missouri Supreme Court.

Facts: Defendant/Movant was convicted and sentenced to death prior to August 28, 2001. Defendant claimed he could not be executed because he is mentally retarded.

Holding: Section 565.030 bars execution of mentally retarded persons for offenses occurring after August 28, 2001. In 2002, *Atkins v. Virginia*, 536 U.S. 304 (2002), held that the 8th Amendment bars execution of mentally retarded persons. In *Johnson v. State*, 102 S.W.3d 535, 540 (Mo. banc 2003), the Missouri Supreme Court held that all mentally retarded persons should receive the benefit of *Atkins*. Heretofore, there has been no clear procedure for how defendants sentenced before August 28, 2001, may

show they are mentally retarded. Henceforth, Defendants asserting a claim of mental retardation shall file a petition for writ of mandamus in the Missouri Supreme Court. Respondents shall be the director of the Department of Corrections and the Attorney General. Defendant shall state specific facts showing mental retardation as defined in Section 565.030.6. If factual issues are in dispute, a special master shall be appointed. If the Court determines defendant is mentally retarded, the Supreme Court will recall its mandate in the direct appeal and resentence defendant to life without parole. This procedure shall apply only to cases which arose before August 28, 2001. On the merits, here, Defendant showed he was mental retarded under the statute.

Anderson v. State, No. SC87060 (Mo. banc 6/30/06):
In death penalty case, (1) counsel unreasonably failed to object that Section 552.020.14 prohibited State doctor who did competency evaluation from testifying in guilt phase to statements Defendant/Movant made to him as evidence of guilt, but Defendant/Movant was not prejudiced; and (2) counsel ineffective in failing to strike juror who said on voir dire that he would automatically favor death and would put the burden on the defense to convince him otherwise.
Facts: (1) At death penalty trial, the State called as a rebuttal witness a doctor who conducted a competency evaluation of Defendant/Movant. The doctor testified, without objection, that Defendant/Movant told him that he did not have any psychiatric symptoms or brain damage. (2) During voir dire, a juror said that he would have to be convinced that a convicted Defendant was not deserving of the death penalty, that he would automatically favor death, and that the defense would have to put on evidence to convince him otherwise. Defense counsel did not move to strike the juror, and the juror served on the jury that sentenced Defendant/Movant to death. Movant filed a 29.15 motion.
Holding: (1) The doctor who testified in rebuttal did not evaluate Defendant/Movant for mental state at time of crime, but instead conducted a competency evaluation. Section 552.020.14 provides that: "No statement made by the accused in the course of any examination … and no information received by any examiner … in the course thereof … shall be admitted in evidence against the accused on the issue of guilt …." Here, the doctor testified that Movant said he did not have psychiatric symptoms and did not have brain damage. In closing argument, the State argued that Defendant/Movant told the doctor he didn't have the psychiatric symptoms that the defense experts claimed. Reasonable counsel should have objected to the doctor's testimony because it was prohibited by Section 552.020.14 and was used as evidence of guilt. However, Defendant/Movant was not prejudiced under the facts of this case because the doctor made clear he was not opining on Defendant/Movant's mental state at time of crime. (2) Failure to strike a juror who is predisposed toward death is ineffective. A competent defense counsel would not fail to strike such a juror. Here, the juror said that he would have to be convinced that a convicted Defendant was not deserving of the death penalty, that he would automatically favor death, and that the defense would have to put on evidence to convince him otherwise. Therefore, Defendant/Movant granted new penalty phase.

State ex rel. Thurman v. Pratte, No. ED95387 (Mo. App. E.D. 11/9/10):
Even though death-penalty Defendant submitted a report that he was mentally retarded (which could preclude imposition of the death penalty), where Defendant had not given notice of an intent to rely on a defense of mental disease or defect to the offense, the court could not order a mental evaluation of Defendant under Sec. 552.030.
Facts: Defendant, who was charged with the death penalty, provided an expert report to the State showing he was mentally retarded. Defendant had not filed a notice of intent to rely on mental disease or defect. The State then sought a mental evaluation of Defendant. The trial court ordered that Defendant undergo a mental evaluation under Sec. 552.030. Defendant sought a writ of prohibition.
Holding: The State can obtain a mental evaluation of a defendant only if defendant claims incompetency, or pleads not guilty by reason of mental disease or defect, or files notice of intent to rely on such defense. Secs. 552.020 and 552.030. Defendant has not done that here. Defendant has only claimed that he is mentally retarded. Sec. 565.030.4 provides that a mentally retarded defendant is not eligible for the death penalty, but this is distinct from a plea of not guilty by reason of mental disease under Sec. 552.030. 552.030 deals with criminal responsibility for the offense. Sec. 565.030.4 deals with punishment, not guilt. Therefore, 552.030 does not authorize the trial court to order a mental evaluation here. Writ of prohibition granted.

Editor's Note: The court indicates in a footnote that the State may be able to obtain a mental exam under Rule 25.06(B) for good cause.

State v. McCurry-Bey, No. ED91275 (Mo. App. E.D. 12/1/09):
Even though defense counsel did not raise question about Defendant's competency to stand trial until sentencing and even though trial court believed Defendant was competent based on its observations of Defendant, where school records showed Defendant with very low IQ and two court-ordered psychologists found Defendant to be incompetent, there was no substantial evidence to sustain the trial court's finding that Defendant was competent; conviction vacated and Defendant remanded to DMH until restored to competency.
Facts: Defendant was convicted at a jury trial of various offenses. Defendant testified at trial. Before sentencing, defense counsel learned that Defendant had a very low IQ and was moderately mentally retarded. Defense counsel requested a competency evaluation. Two psychologists ultimately found that Defendant was incompetent due to low IQ and mental retardation. Defendant's school records consistently showed low IQ. The trial court, however, found Defendant to be competent based on its own observations of Defendant at trial, and believed that Defendant was showing "guile" in trying to avoid punishment for his convictions, and that Defendant's prior experience with criminal justice system showed he was competent.
Holding: The trial court's factual determination must be upheld unless there is no substantial evidence to support it. The uncontradicted evidence showed that Defendant's school records consistently showed a low IQ, and the two court-appointed examiners found Defendant to have low IQ, mental retardation, and be incompetent. Here, the court disregarded both the opinions of the DMH and State expert and also prior evidence of school history and IQ scores, all of which weighed against competency. The Defendant proved by a preponderance of evidence he did not have sufficient present ability to

consult with counsel with a reasonable degree of rational and factual understanding. Conviction vacated and Defendant sentenced to DMH until such time as he is restored to competency.

State v. McCurry-Bey, No. ED91275 (Mo. App. E.D. 3/17/09):
Where all psychologists testified that Defendant was incompetent and this was supported by school records and prior IQ tests, the trial court could not find Defendant competent based on its own observations of Defendant, but case transferred to Missouri Supreme Court.
Facts: Defendant stood trial for various offenses. At sentencing, defense counsel raised for the first time that Defendant was incompetent to stand trial. Defense counsel stated he had just learned that Defendant may be mentally retarded. The court ordered evaluations of Defendant. Two different evaluations concluded that Defendant was incompetent. The trial court, however, found Defendant competent based on its own observations of Defendant at trial, and that Defendant had been through the criminal process before and was showing "guile" in trying to avoid conviction here.
Holding: Competency can be raised at any time. On appeal, the trial court's findings must be upheld unless there is no substantial evidence to support them. Here, the trial court disregarded both DMH-appointed psychologists' opinions, and also Defendant's prior school history and IQ scores, all of which weighed against a finding of competency. Given the record, we find Defendant proved by a preponderance of evidence that he did not have a present ability to consult with counsel with a reasonable degree of rational and factual understanding of the proceedings against him. We would reverse. However, in light of the general interest and importance of the issue, we transfer this case to the Missouri Supreme Court.

Thomas v. State, No. ED89985 (Mo. App., E.D. 4/1/08):
(1) Movant was entitled to evidentiary hearing on Rule 24.035 claim that he had told his attorney he was mentally retarded, and that Movant was incompetent to plead guilty, and (2) Strickland "outcome test" regarding not having pleaded guilty is not appropriate to deciding prejudice; rather, test is whether there is a "reasonable probability" Movant lacked mental competence.
Facts: Rule 24.035 Movant claimed that he had told plea counsel he was mentally retarded, and claimed he was incompetent to plead. The motion court denied an evidentiary hearing on grounds that this was refuted by the record.
Holding: (1) The record does not refute that Movant was mentally retarded. The general questions posed to Movant at his guilty plea regarding his understanding of the charge, plea process and rights waiver were not sufficiently specific to refute this claim of mental retardation. (2) Because cases such as this do not lend themselves very well to the *Strickland* outcome test, whether Movant would still have pleaded guilty is irrelevant. Rather, Movant need only demonstrate a "reasonable probability" that he lacked competency "sufficient to undermine confidence in the outcome."

Williams v. State, No. WD67306 (Mo. App., W.D. 3/4/08):
(1) Retained trial counsel ineffective in failing to properly prove Defendant's indigency so that Defendant could receive mental exam under "Ake;" (2) Indigent Defendant with

retained counsel is entitled to mental examiner who will assist the defense under "Ake," and this assistance is outside Chapter 552. Thus, a Chapter 552 evaluation does not satisfy "Ake."

Facts: Defendant retained private counsel but had no funds to pay for a mental exam. Private counsel filed various motions seeking a mental health expert to assist the defense under *Ake v. Oklahoma*, 470 U.S. 68 (1985). Trial counsel had Defendant testify he was indigent. The trial court denied an expert for the defense, and on direct appeal, the Court of Appeals held trial counsel had not properly proven that Defendant was indigent. Defendant/Movant filed a Rule 29.15 motion claiming counsel was ineffective in not properly proving his indigence.

Holding: (1) Counsel was ineffective in not properly proving Defendant's indigence. The testimony that Defendant was indigent was not sufficient. *State v. Huchting*, 927 S.W.2d 411, 419 (Mo. App., E.D. 1996) had held that counsel must file an affidavit of indigency under Sec. 600.086.3 to prove indigence. If counsel had used the correct method, Defendant would have been found indigent, and would have been provided with an expert to assist the defense. (2) Even though the trial court ordered that Defendant have an evaluation under Chapter 552, that did not satisfy *Ake*. *Ake* requires that Defendant have access to a competent mental health expert who will evaluate Defendant and assist in preparation of a defense. Secs. 552.020 and 552.030 do not provide the type of assistance envisioned by *Ake*. Under 552, the role of the expert is to evaluate Defendant and provide a report to the court and parties. Chapter 552 does not provide an expert to assist in preparation of a defense. *Ake* does not require that Defendant receive funds for an expert or be able to pick the expert, however. The court may appoint an expert of its choosing to provide the defense under *Ake*.

State v. Lewis, 188 S.W.3d 483 (Mo. App, W.D. 2006):

Trial court erred in finding Defendant NGRI under Section 552.030 and committing him to DMH, because Defendant never asserted an NGRI defense, but rather introduced evidence of mental disease or defect for the sole purpose of negating his culpable mental state under Section 552.015.2(8).

Facts: Defendant, who was charged with assault first, filed a "Notice To Rely On Defense of Mental Disease or Defect Negating Culpable Mental State" pursuant to Section 552.015.2(8). At trial, the trial court found Defendant not guilty by reason of mental disease or defect under Section 552.030 and ordered Defendant committed to the Department of Mental Health.

Holding: The trial court was not authorized to consider the NGRI defense because Defendant never asserted NGRI as a defense as required by Section 552.030.2, either by entering a plea of NGRI or timely filing notice of intent to rely on such defense. NGRI under Section 552.030.1 is an affirmative defense that requires the Defendant to inject it into the case by either entering a plea of NGRI or filing a notice of intent to rely on the defense within 10 days of pleading not guilty. While Defendant introduced evidence of his mental disease, he did so for the sole purpose of negating his culpable mental state. Section 552.015.2(8) allows such evidence "[t]o prove that the defendant did or did not have the state of mind which is an element of the offense." This is a special negative defense in that while Defendant has the burden to inject the issue, the burden is on the State to prove the existence of the culpable mental state. In other words, Defendant has

the burden of injecting the issue, but then State then has the burden of disproving it. Because this was a bench trial, the judgment is reversed and the case is remanded for the trial court to consider whether the State met its burden of proof on culpable mental state, and to find Defendant guilty or not guilty.

*** Indiana v. Edwards, ___ U.S. ___, 83 Crim. L. Rep. 455 (6/19/08):**
Holding: Even though Defendant may be competent under *Dusky* to stand trial, the trial court can still require Defendant to be represented by counsel at trial where Defendant is so mentally ill so as not be able to adequately conduct a trial.

*** Clark v. Arizona, 2006 WL 1764372, ___ U.S. ___ (2006):**
Holding: Due process does not prohibit a State from limiting insanity defense to capacity to know if criminal act was "right or wrong." Furthermore, to carry out this limitation, State may limit presentation of mental health evidence on the issue of mens rea.

Michael v. Horn, 2006 WL 2381919 (3d Cir. 2006):
Holding: It was improper to carry presumption of competency from state proceeding into habeas proceeding where Defendant vacillated in habeas proceeding about wishing to dismiss appeals and an expert questioned Defendant's current competency.

U.S. v. White, 2010 WL 3672557 (4th Cir. 2010):
Holding: Gov't could not compel Defendant to be involuntarily medicated for competency where Defendant's crime was nonviolent, Defendant had served more time in pretrial detention that her likely sentence would be, the victims would not benefit from her prosecution and she was not a danger to herself or the public.

U.S. v. Long, 2009 WL 542844 (5th Cir. 2009):
Holding: Schizotypal personality disorder was "severe" mental illness sufficient to warrant insanity instruction.

Wilson v. Gaetz, 2010 WL 2403386 (7th Cir. 2010):
Holding: Counsel ineffective in presenting insanity defense at trial where counsel failed to have psychiatrist who conducted competency evaluation opine on whether Defendant was insane at time of crime, failed to hire a second psychiatrist to bolster first expert's opinion, and failed to interview family members who could have testified to Defendant's poor mental condition.

U.S. v. Gladish, 83 Crim. L. Rep. 733 (7th Cir. 7/31/08):
Holding: (1) Even though Defendant exposed himself to alleged minor in internet chat and talked generally about traveling to set up a meeting for sex, evidence was insufficient to prove attempted enticement of a minor because there was no substantial step toward completion of the crime; Defendant's general remarks were "hot air"; and (2) trial court erred in barring defense psychologist from testifying in support of Defendant's "hot air" theory; while expert cannot testify Defendant did not intend to have sex with minor,

expert could testify it was unlikely, given Defendant's psychological profile, that he would act on his intent.

U.S. v. Whittington, 86 Crim. L. Rep. 260 (8th Cir. 11/12/09):
Holding: Competency statute, 18 USC 4241, requires Defendant to carry burden of proof by preponderance of evidence.

U.S. v. Ruiz-Gaxiola, 2010 WL 3720211 (9th Cir. 2010):
Holding: Gov't could not involuntarily medicate Defendant where it was not shown that medication would be effective and where it was unclear that medication would restore Defendant's competency.

U.S. v. Vela, 88 Crim. L. Rep. 139, 2010 WL 4188983 (9th Cir. 10/26/10):
Holding: Even though Defendant was found NGRI, the appellate court had jurisdiction to hear an appeal from Defendant raising various issues, including refusal to dismiss indictment and prohibiting diminished capacity defense.

In re Gonzales, 2010 WL 4104722 (9th Cir. 2010):
Holding: Even though Petitioner's habeas claim raised only record claims that were legal in nature, he was entitled to a stay pending a competency determination.

Maxwell v. Rose, 2010 WL 1997700 (9th Cir. 2010):
Holding: There was a bona fide doubt as to Defendant's competency in state court, and after 12 years have passed, a retrospective competency hearing is not possible; thus, habeas writ is granted.

Nash v. Ryan, 85 Crim. L. Rep. 706, 2009 WL 2902088 (9th Cir. 9/11/09):
Holding: Because federal habeas statute provides a right to counsel in capital habeas proceedings, this implies that petitioner must be competent to assist counsel, including on appeal of denial of federal habeas relief; where petitioner is incompetent, proceedings must be stayed.

U.S. v. Cohen, 82 Crim. L. Rep. 359 (9th Cir. 12/26/07):
Holding: Psychiatrist should have been allowed to testify that Defendant had narcissistic personality disorder that explained how he believed he did not have to pay taxes, to rebut the gov't's evidence of his intent to file false returns.

U.S. v. Allen, 2006 WL 1530112 (10th Cir. 2006):
Holding: Defendant in felon-in-possession-of-firearm case could raise insanity defense, even though this was a general intent crime.

U.S. v. Crape, 87 Crim. L. Rep. 111 (11th Cir. 4/21/10):
Holding: Federal statute that governs release of insanity acquittees allows revocation of release only for failure to comply with medical or psychiatric treatment program; thus, acquittee cannot be revoked for sending threatening letters, even though this was the offense he was originally charged with.

U.S. v. Austin, 2009 WL 910187 (D.D.C. 2009):
Holding: Where (1) gov't expert did not review Defendant's full medical records; (2) Defendant's medical history indicated he would not be restored to competency; and (3) Defendant had committed the charged crime while involuntarily medicated, there was not a substantial likelihood that Defendant could be restored to competency so as to authorize antipsychotropic drugs.

U.S. v. Gonzalez-Aguilar, 2006 WL 2501438 (D. Ariz. 2006):
Holding: Bureau of Prisons must follow its own administrative regulations in seeking to involuntarily medicate Defendant to make him competent to stand trial.

Deere v. Cullen, 2010 WL 1946914 (C.D. Cal. 2010):
Holding: Counsel ineffective in failing to challenge competency where counsel failed to have an independent evaluation and stipulated to an evaluation by a doctor who counsel knew was inadequate.

U.S. v. Cruz-Martinez, 2006 WL 1876522 (S.D. Cal. 2006):
Holding: Gov't failed to prove that involuntary medication would be in Defendant's best interest where Gov't did not show Defendant had schizophrenia and the antipsychotic medications had severe side-effects.

Sanborn v. Parker, 2007 WL 495202 (W.D. Ky. 2/14/07):
Holding: State's mental health expert invaded attorney-client relationship where expert interviewed Defendant about his meeting with his attorney and the defense strategy.

U.S. v. Weinberg, 2010 WL 3749509 and 2010 WL 4026152 (W.D. N.Y. 2010):
Holding: Gov't could not involuntarily medicate Defendant where Defendant had been in pretrial custody for longer than his likely sentence would be, medication had risk of significant side effects, and it was unlikely that medication would render Defendant competent.

U.S. v. Rodman, 2006 WL 2390348 (D.S.C. 2006):
Holding: It was inappropriate to involuntarily medicate Defendant to restore competency where Defendant had already been confined for entire term he could be confined if convicted and sentenced.

U.S. v. Rix, 2008 WL 3305167 (S.D. Tex. 2008):
Holding: Forced medication for competency violated due process where not in medical interests of Defendant due to dangerous side effects from drugs.

Wood v. Quarterman, 2008 WL 3876581 (W.D. Tex. 2008):
Holding: Standard for incompetence to be executed was too narrow where it only accounted for Defendant's awareness of his situation, but not his delusional thought process.

Verdin v. Superior Court, 83 Crim. L. Rep. 386 (Cal. 6/2/08):
Holding: Even though Defendant was claiming insanity, State constitutional and reciprocal discovery provisions do not give State right to have their own expert conduct a pretrial psychological exam.

People v. Pokovich, 2006 WL 2506364 (Cal. 2006):
Holding: Where Defendant made statements to a mental health expert as part of a pretrial court-ordered competency evaluation, those statements could not later be used to impeach Defendant at trial for to do so would violate the Fifth Amendment.

State v. Juan L., 85 Crim. L. Rep. 329 (Conn. 5/19/09):
Holding: Where juvenile was found permanently incompetent to stand trial, the same statute for release or commitment that applied to adults in this situation also applied to juvenile.

State v. Norman, 85 Crim. L. Rep. 411 (Del. 6/16/09):
Holding: Where the aggravating circumstance in a death case is based on unadjudicated crimes in another State, Defendant is entitled to show he was NGRI at time of the other crime based on the law of the other State.

In re: Petition of State for a Writ of Mandamus, 2007 WL 521914 (Del. 2/16/07):
Holding: In death penalty case, defense can present defense of actual innocence and guilty but mentally ill.

State v. Davis, 84 Crim. L. Rep. 351, 2008 WL 5252307 (Ind. 12/18/08):
Holding: Where incompetent Defendant will never be able to stand trial, due process requires the State to dismiss the charges.

State v. Jordan, 2010 WL 743944 (Iowa 2010):
Holding: Where Defendant's appointed counsel withdrew and he was appointed new counsel, this was "good cause" for extending the deadline for filing a motion to rely on diminished capacity defense.

State v. Lyman, 86 Crim. L. Rep. 476 (Iowa 1/18/10):
Holding: Due process requires that appellate court review a trial court's competency finding under a de novo standard of review.

Bean v. Dept. of Health and Mental Hygiene, 84 Crim. L. Rep. 210 (Md. 11/5/08):
Holding: Where Defendant was civilly committed after being found NGRI, Defendant did not have to present expert testimony to later petition to be released.

State v. Chavez, 2007 WL 478840 (N.M. 2007):
Holding: Under New Mexico law, defendant initially bears burden to prove he is incompetent to stand trial, and upon redetermination of competence (after finding of

incompetency), burden shifts to state to prove by preponderance of evidence defendant is competent to stand trial.

State v. Trujillo, 2009 WL 1140484 (N.M. 2009):
Holding: Mentally retarded defendants cannot be criminally committed under statute for commitment of dangerous incompetent defendants.

Scarbo v. Eighth Judicial Dist. Ct. of State ex rel. County of Clark, 2009 WL 1181841 (Nev. 2009):
Holding: Defendant entitled to full and complete copy of competency report before competency hearing.

People v. Goldstein, 78 Crim. L. Rep. 365 (N.Y. 12/20/05):
Holding: Out-of-court statements made by Defendant's acquaintances to a State forensic psychiatrist were "testimonial" under *Crawford v. Washington*. Therefore, psychiatrist should not have been allowed to testify what acquaintances told her.

Ferguson v. State, 85 Crim. L. Rep. 332 (S.C. 5/26/09):
Holding: Movant's mental incompetence tolls the time for filing a state postconviction action.

Nowell v. Rees, 2008 WL 2930100 (Ariz. Ct. App. 2008):
Holding: Where there was no substantial probability Defendant could be restored to competency and given that neither party had argued for a guardian or commitment proceedings, court had to dismiss charges.

Blakely v. Superior Court, 2010 WL 987226 (Cal. App. 2010):
Holding: Where civil commitment evaluation and certification was not performed on parolee until after the deadline in the Mentally Disordered Offender Act, parolee could not be civilly committed.

Moore v. Superior Court of Los Angeles County, 85 Crim. L. Rep. 385 (Cal. Ct. App. 6/4/09):
Holding: Where Defendant is mentally incompetent, due process prohibits proceeding in sexually violent predator commitment proceeding because Defendant cannot participate in proceeding while incompetent.

People v. Ary, 2009 WL 1037729 (Cal. App. 2009):
Holding: When a retrospective competency evaluation is held after an appeal because the original trial court failed to have a competency hearing, the burden of proof is on the State to show Defendant was competent, and the statutory presumption of competency does not apply.

People v. Dodd, 2005 WL 3047425 (Cal. App. 2005):
Holding: Reference in parole report to a Defendant's molestation of girl was unreliable hearsay, and therefore, experts could not consider that incident in forming their opinions whether Defendant was a Mentally Disordered Offender.

State v. Mondragon, 85 Crim. L. Rep. 276 (Colo. Ct. App. 4/16/09):
Holding: Even though Defendant was capable of understanding the charges against him and assisting counsel, where his delusions caused him to believe police would likely harm his family if he testified, he was not competent to stand trial.

Dept. of Children and Family Services v. Amaya, 2009 WL 763584 (Fla. Dist. Ct. App. 2009):
Holding: Even though Defendant was found incompetent to stand trial, court could not place victim under custody of DFS.

Phelps v. State, 2009 WL 500653 (Ga. Ct. App. 2009):
Holding: Where defense counsel expressed doubts about Defendant's competency and Defendant's father testified Defendant had a mental illness, trial court should have conducted competency hearing.

State v. Jason, 2009 WL 4842396 (Iowa Ct. App. 2009):
Holding: Where Defendant had been allowed to represent himself at trial even though his mental capacity (as distinct from competency) was questionable, appellate court remands for a hearing under *Indiana v. Edwards*, which permits courts to limit self-representation where defendants lack mental capacity; Defendant should be granted new trial if, on remand, trial court determines that defendant lacked mental capacity to represent himself.

State v. Sanford, 2008 WL 4776713 (Minn. Ct. App. 2008):
Holding: Where Defendant was charged with disorderly conduct and a drug possession, trial court abused discretion in not allowing Defendant to present evidence that she had post-traumatic stress disorder, since this PTSD would have provided an alternative explanation for her behavior than being under the influence of drugs and, therefore, likely to possess drugs.

People v. Florestal, 2008 WL 2498101 (N.Y. App. Div. 2008):
Holding: Where statute required a showing of "depraved indifference," this was a mental state to be evaluated by Defendant's conduct, and not an objective standard; therefore, Defendant could present psychological testimony showing lack of mental state for crime.

State v. Williams, 2008 WL 5064866 (Ohio Ct. App. 2008):
Holding: Where statute allowed State to hold incompetent defendant up to time of expiration of applicable prison term without civil commitment proceedings, this violated due process because State cannot hold incompetent person indefinitely without civil commitment proceedings.

In re Personal Restraint of Jian Liu, 2009 WL 1543800 (Wash. Ct. App. 2009):
Holding: In extradition proceeding, Defendant was required to be proven competent to assist counsel before extradition proceeding could be held.

Presence at Trial

State v. Washington, No. WD68016 (Mo. App., W.D. 4/8/08):
Where trial court originally imposed a sentence exceeding that recommended by the jury and the Court of Appeals remanded for "resentencing," Defendant had a right to be present at resentencing under Sec. 546.550 and Rule 29.07(b)(2).
Facts: The trial court originally sentenced Defendant to a prison term above that recommended by the jury. The Court of Appeals remanded for "resentencing." The trial court then reduced Defendant's sentence to that recommended by the jury. However, Defendant was not present for this. Defendant appealed.
Holding: The State claims the trial court was merely correcting a sentence. But while the Court of Appeals could have ordered a mere "correction," it didn't. It ordered "resentencing." Sec. 546.550 and Rule 29.07(b)(2) require Defendant to be present for sentencing. Thus, it was plain error for trial court to resentence without Defendant being present. Even though there may be little chance trial court will further reduce the sentence, a further resentencing is ordered.

Terrell v. U.S., 85 Crim. L. Rep. 10, 2009 WL 775434 (6th Cir. 3/26/09):
Holding: Where statute provided that prisoner "shall be allowed to appear and testify," then Parole Commission could not conduct its hearing by videoconferencing without allowing prisoner to appear in person at hearing.

In re Hajazi, 86 Crim. L. Rep. 350 (7th Cir. 12/11/09):
Holding: Alien Defendant who resides abroad has no obligation to appear in person before U.S. district judge in order to challenge the validity of federal indictment.

U.S. v. Ward, 87 Crim. L. Rep. 52, 2010 WL 1171697 (8th Cir. 3/29/10):
Holding: Before court can exclude disruptive Defendant from trial, court must not rely only on counsel's representation as to whether Defendant is willing to behave but should question Defendant personally before restricting his 6th Amendment right to presence.

U.S. v. Ward, No. 09-1882 (8th Cir. 3/29/10):
Holding: (1) Where trial judge removed Defendant from his trial because he talked loudly to his attorney in a disruptive way, this violated Defendant's 5th and 6th Amendment rights to be present at trial, due process, and confrontation rights; (2) it was further erroneous for the court to make defense counsel the intermediary between Defendant and the court as to whether Defendant wanted to return to trial since there was some evidence that counsel didn't want Defendant to return; Defendant should waive his right to be present and right to testify personally, not through counsel in these situations.

Bradley v. Henry, 2007 WL 4410355 (9th Cir. 2007):
Holding: Court violated Defendant's due process rights by excluding her from her retained counsel's motion to withdraw hearing for failure to pay counsel, and that Defendant would be given appointed counsel; Defendant had to be given opportunity to contest her attorney's withdrawal.

U.S. v. Nicholas, 85 Crim. L. Rep. 98 (C.D. Cal. 4/1/09):
Holding: Where law firm represented both corporation and its Executive, Executive's statement to law firm had to be suppressed in stock fraud scheme even though law firm told Executive it was representing corporation when it asked him about scheme; "an oral warning to a current client that no attorney-client relationship exists" is "nonsensical" and "unethical."

State v. Mattson, 2010 WL 971791 (Haw. 2010):
Holding: Hawaii Confrontation Clause prohibits Prosecutor from making generic argument that Defendant tailored his testimony based on exercising his constitutional right to be present at trial.

State v. Wallace, 2009 WL 3682575 (La. 2009):
Holding: 48-hour time limit to determine probable cause for Defendant's arrest began at time of arrest, rather than at time the magistrate was presented with relevant documents, and magistrate's later finding of probable cause at the 72-hour hearing did not cure the failure to find probable cause within 48 hours; remedy was release of Defendant on own recognizance.

In re Grand Jury Investigation, 85 Crim. L. Rep. 45, 2009 WL 723846 (Mass. 3/23/09):
Holding: Even though lawyer had reported client's threats to judge and police to law enforcement under ethical rule, lawyer could not be compelled to testify about those threats before a grand jury in criminal prosecution over threats because would violate attorney-client privilege unless crime-fraud exception applies.

State v. Matt, 84 Crim. L. Rep. 378, 2008 WL 5403690 (Mont. 12/30/08):
Holding: Exclusion of Defendant personally from an in-chambers conference with counsel during trial violated Defendant's right to personally appear and defend at all critical stages under Montana Constitution.

State v. Delisanti, 87 Crim. L. Rep. 180 (N.J. 4/27/10):
Holding: Where Defendant was arrested for a probation violation during jury deliberations on another offense and removed from trial, this violated Defendant's right to be present at trial.

State v. Grenci, 84 Crim. L. Rep. 630 (N.J. 2/24/09):
Holding: Even though New Jersey has a rule that a Defendant waives presence at trial by absconding after receiving notice of a trial date, this waiver does not apply to new, additional charges on which Defendant has not yet been arraigned.

State v. Ingram, 83 Crim. L. Rep. 697 (N.J. 7/21/08):
Holding: Trial court erred in instructing jurors that Defendant's absence from trial showed consciousness of guilt; Defendant had right to waive presence at trial, and his absence was not to avoid apprehension.

State v. Luna, 82 Crim. L. Rep. 345 (N.J. 12/19/07):
Holding: Even though Defendant had not appeared on the first day of trial and impliedly waived his appearance for that day, where the court learned later during trial that Defendant was incarcerated elsewhere, the court should have determined if Defendant voluntarily waived his appearance for the rest of the trial.

Com. v. Williams, 88 Crim. L. Rep. 226 (Pa. 11/17/10):
Holding: Defendant has right to be present when deliberating jurors listen to an audiotape of the trial.

Woyak v. State, 2010 WL 923167 (Wyo. 2010):
Holding: Child sex Defendant has absolute right under Wyoming Const. to be present at hearing to determine competency of child witness against Defendant.

People v. Traugott, 2010 WL 1797247 (Cal. App. 2010):
Holding: Even though Defendant absented herself from trial, she did not forfeit right to a 12-person jury verdict and jury of 11 was not sufficient to convict (1 juror left before verdict.)

People v. Concepcion, 79 Crim. L. Rep. 706 (Cal. Ct. App. 7/26/06):
Holding: Beginning criminal trial without Defendant's presence after he escaped from custody violated his federal and state constitutional rights to be present at trial and amounted to "structural error."

State v. Ruperd, 2009 WL 279965 (Idaho Ct. App. 2009):
Holding: Even though Defendant failed to appear at motion to suppress hearing, this did not justify court holding that hearing was waived, because personal presence was not required at a motion to suppress hearing.

Privileges

State ex rel. Stinson v. House, No. SC90364 (Mo. banc 7/16/10):
Holding: Even though Plaintiff was claiming that Defendant-parents had negligently entrusted their car to their Son (also a Defendant) who had a history of alcohol and drug addiction, Son's medical and psychological records about his addiction were protected by doctor-patient privilege under Sec. 491.060 and not discoverable. Son had not put his medical or psychological condition at issue, and even though the records may be

"relevant" to Plaintiff's claim, the very nature of a privilege is that otherwise relevant evidence is removed from being discoverable.

State ex rel. Proctor v. Messina, No. SC90610 (Mo. banc 8/31/10):
Holding: Under HIPAA, trial court cannot issue order to plaintiff's non-party treating doctors that they can engage in *ex parte* communications with defendant's counsel without express authorization by plaintiff; discovery must occur in accordance with Rules 56 to 61.

State ex rel. Rogers v. Cohen, No. SC88778 (Mo. banc 8/26/08):
Where grand jury subpoenaed an attorney's transcript of a witness interview, the subpoena was quashed because the interview was work product and there was no showing of substantial need or undue hardship.
Facts: Attorney represented a client who was being investigated for the disappearance of his child. In connection with this case, the attorney interviewed another child of client. A grand jury subpoenaed the transcript of that interview. Attorney sought writ to quash subpoena.
Holding: A transcript of a recorded interview of a person taken in anticipation of litigation is not discoverable by a grand jury subpoena absent substantial need and undue hardship. The transcript is protected by the work-product doctrine. The Criminal Rules of Procedure do not apply to grand jury proceedings, so Rules 25.01 through 25.16 do not apply. Also, the Civil Rules do not apply, since a grand jury proceeding may result in criminal charges, not a civil action. Here, the grand jury has not shown substantial need or undue hardship to justify obtaining the attorney's work-product (transcript), since the grand jury could subpoena the other child to testify. Writ of prohibition made absolute.

Editor's Note by Greg Mermelstein: Footnote 2 discusses different discovery outcomes under the criminal and civil rules. Rule 25 provides more limited protection for work product than the civil rules. Rule 25 only prohibits disclosure of legal research, records, reports or memos of counsel to the extent that they contain the "opinions, theories or conclusions of counsel" or their staff. Work-product in criminal cases is confined to "opinions, theories, conclusions and communications between defendant and his attorney."

Coleman v. State, No. WD68014 (Mo. App., W.D. 5/13/08):
Trial counsel was ineffective in failing to adduce evidence of Defendant's pre-existing injury which made it impossible for him to run, and which would have refuted State's inference that Defendant did not run from police because his foot was injured in the charged burglary.
Facts: A witness saw two men burglarizing a house, and called police. When police arrived, the men ran. Police arrested the men and Defendant, who was also walking in the neighborhood. The witness could not identify any of the men as the burglars, but said their clothing was similar. Defendant claimed he was visiting a woman in the subdivision and was walking to a bus stop. Defendant denied having anything to do with a burglary. A police officer testified at trial that Defendant "could not" run from police, and the jury was left to infer that Defendant "could not" run because he had injured his foot in kicking in the door to the burglary. Defendant claimed counsel was ineffective in

failing to present evidence that Defendant had a pre-existing foot injury that made it impossible for him to run.
Holding: It was not reasonable for counsel to fail to present evidence of Defendant's pre-existing foot injury, because this left the false impression with jurors that Defendant did not run from police because he had injured his foot in kicking in the door. A reasonable counsel would have foreseen that the State would draw this inference, and prepared to rebut it. Defendant was prejudiced because the lack of such evidence may have caused the jury to reject Defendant's defense that he was not involved in the burglary and was walking to a bus stop.

Editor's Note by Greg Mermelstein: There was a second claim of ineffectiveness which the Court of Appeals rejected, but which may have been important to the outcome here. Defendant also claimed counsel was ineffective in not calling the co-defendants to testify that they did not know Defendant and he was not involved in the burglary. Counsel had not called the co-defendants because their attorneys had said they would invoke their 5th Amendment rights. However, in the PCR case, the co-defendants testified that they did not know Defendant; that he was not involved in the burglary; and that they would have testified to this at trial. The motion court found this testimony incredible, and the Court of Appeals found it was bound by this, but "note[d] that testimony from [codefendants] that they did not know [Defendant] would not have violated their rights against self-incrimination," thus suggesting that they could have been called to testify to this.

*** Mohawk Industries Inc. v. Carpenter, 86 Crim. L. Rep. 283, ___ U.S. ___ (U.S. 12/8/09):**
Holding: Even though a disclosure order is adverse to attorney-client privilege, it is not immediately appealable under the collateral-order doctrine, because the alleged harm can be remedied upon appeal from a verdict, in that an appellate court can order a new trial in which the protected material and its fruits are excluded.

Jenkins v. Bartlett, 81 Crim. L. Rep. 235 (7th Cir. 4/23/07):
Holding: Even though a police union representative was present at a conversation between attorney and his client-police officer, the conversation was protected by attorney-client privilege.

In re Grand Jury Proceedings, 81 Crim. L. Rep. 546 (8th Cir. 7/20/07):
Holding: Even though a client used attorney's services to commit fraud, that does not affect the attorney's own privilege for work product such as his notes and recollections, provided attorney did not know about the fraud.

U.S. v. Graf, 2010 WL 2671813 (9th Cir. 2010):
Holding: Even though Defendant was only a consultant for a corporation, where he was the functional equivalent of corporation's employee, the corporation's attorney-client privilege extended to him.

U.S. v. Krane, 88 Crim. L. Rep. 159 (9th Cir. 10/29/10):
Holding: Party could immediately appeal an order directed to its former attorney to disclose privileged materials, because directing a third-party to disclose information is different than the immediate appeal procedure precluded by *Mohawk Indus. Inc. v. Carpenter*, ___ U.S. ___ (2009) under the collateral order doctrine.

Earp v. Cullen, 2010 WL 4069332 (9th Cir. 2010):
Holding: Trial court erred in allowing witness to anticipatorily invoke her 5th Amendment right not to incriminate herself, because it believed witness was going to testify untruthfully and subject herself to prosecution.

U.S. v. Straub, 2008 WL 3547541 (9th Cir. 2008):
Holding: Where prosecutor granted immunity to a witness but refused to immunize another witness who would contradict prosecutor's witness, Defendant can show he was denied due process by showing prosecutor's grant of immunity distorted fact-finding process and can compel immunity.

U.S. v. Novak, 80 Crim. L. Rep. 51 (D. Mass. 9/26/06):
Holding: 4th Amendment prohibits use of information obtained in monitored telephone call between inmate and attorney because there was a reasonable expectation of privacy in attorney-client communication, even though parties knew call could be monitored.

U.S v. Ross, 2008 WL 5046915 (E.D. Mich. 2008):
Holding: Even though a prosecutor was not present, where Defendant and his attorney met with a secret service agent in a bank fraud case, the purpose of the meeting was plea negotiations and Defendant's statements could not be used against him a trial.

Thelman v. State, 84 Crim. L. Rep. 212 (Ark. 11/13/08):
Holding: Witness who was granted use immunity to force them to testify cannot immediately appeal that order, but must wait until there is a contempt order before appealing.

State v. Gonzalez, 2010 WL 2490940 (Kan. 2010):
Holding: Prosecutor could not compel Public Defender to testify about a client's intent to commit perjury or who that client was, even though Public Defender had revealed the nature of client's statements; this was protected by attorney-client privilege.

Winstead v. Com., 87 Crim. L. Rep. 151 (Ky. 4/22/10):
Holding: Even though Defendant-husband requested that his wife provide a bogus alibi to police, this was covered by the marital privilege.

O'Connell v. Cowan, 87 Crim. L. Rep. 320 (Ky. 5/20/10):
Holding: Even though Plaintiff sued police and City in civil rights action and not Prosecutor, the "opinion work product" of Prosecutor is discoverable in action for malicious prosecution.

Blanks v. State, 84 Crim. L. Rep. 212 (Md. 11/12/08):
Holding: Where prosecutor cross-examined Defendant about timing and content of communications with defense counsel, this violated attorney-client privilege and reversal is required unless State shows this was harmless error.

Haley v. State, 81 Crim. L. Rep. 52 (Md. 3/21/07):
Holding: Prosecutor could not cross-examine Defendant at trial about when Defendant told his defense counsel his exculpatory version of events, because this violated attorney-client privilege.

In re William M., 84 Crim. L. Rep. 286 (Nev. 11/26/08):
Holding: Where (1) statute created presumption that juvenile cases would be certified to adult court unless juvenile could show the crime was caused by emotional problems, and (2) juveniles could not show this where they refused to admit guilt, the statute violated the privilege against self-incrimination.

In re Search Warrant for Medical Records of C.T., 2010 WL 1791275 (N.H. 2010):
Holding: Under New Hampshire law, where a hospital receives a search warrant for privileged records, it must give them to court for in camera inspection and patient shall be given notice and opportunity to object to disclosure.

State v. J.G., 87 Crim. L. Rep. 69, 2010 WL 1328844 (N.J. 4/7/10):
Holding: Where Defendant went to Pastor to discuss allegations of sex abuse made by Defendant's wife, Defendant's statements to Pastor were protected by cleric-penitent privilege because an objectively reasonable person would have believed his statements made to cleric were confidential, even if there was no religious duty for Pastor to keep statements confidential.

State v. Belanger, 85 Crim. L. Rep. 523 (N.M. 6/23/09):
Holding: Judge can grant immunity to defense witnesses even over prosecutor's objection.

People v. Bergerud, 84 Crim. L. Rep. 37 (Colo. Ct. App. 9/18/08):
Holding: Counsel cannot make decision to forgo innocence-based trial defense in favor of lesser-included defense, where client wants an innocence-based defense at trial; this is decision only client can make; thus, judge violated right to counsel by forcing client to proceed to trial with attorney who would not present innocence-defense, or proceeding pro se.

Gonzalez v. State, 20009 WL 1765684 (Ind. Ct. App. 2009)
Holding: Where Defendant wrote a letter to a school which was the crime victim after judge indicated he wanted to consider the views of the school regarding a plea bargain, the statements in the letter (which asked school to accept the plea bargain, but were also incriminating) were privileged statements made in connection with plea negotiations and could not be used against Defendant.

People v. Brito, 2010 WL 46861 (N.Y. Sup. 2010):
Holding: Even though Defendant was charged with DWI, a prehospital care report prepared by an emergency tech before taking Defendant to hospital was protected by doctor-patient privilege and not admissible against Defendant at DWI trial.

State v. Rollins, 2008 WL 706625 (N.C. Ct. App. 2008):
Holding: Statements Defendant made to wife while incarcerated were protected by marital privilege.

Com. v. Valle-Velez, 87 Crim. L. Rep. 414 (Pa. Super. Ct. 5/27/10):
Holding: Even though couple had filed for divorce, Wife could still invoke her spousal privilege not to testify against Husband.

Com. v. Valle-Velez, 2010 WL 2117203 (Pa. Super. 2010):
Holding: Spousal privilege applies to Defendant's estranged wife, even though they are separated by not divorced.

Probable Cause To Arrest

State v. Robertson, No. WD72529 (Mo. App. W.D. 12/14/10):
Trial court could find there was no probable cause to arrest where State did not show that pre-arrest portable breathalyzer machine had been properly calibrated.
Facts: Defendant was charged with DWI. Officer had stopped Defendant for speeding. Defendant had a strong odor of alcohol on her. Officer asked her to submit to a portable breathalyzer test (PBT). It showed a result of .08. Officer then asked Defendant to perform other field sobriety tests, such as walking and counting. These tests did not show evidence of intoxication. However, Officer observed that Defendant's eyes were bloodshot and glassy, and she was argumentative. Officer then had Defendant perform second PBT, which showed a result above .08. Defendant filed motion to suppress. At the suppression hearing, Officer testified he did not know when PBT machine was calibrated. The trial court issued an order stating that because no record existed establishing that the PBT had been calibrated, no probable cause existed for the arrest. The State appealed.
Holding: The State contends that the PBT results were admissible as evidence of probable cause to arrest. Sec. 577.021.3 provides that a PBT test shall be admissible as evidence of probable cause to arrest and as exculpatory evidence, but shall not be admissible as evidence of blood alcohol content. Also, the PBT is not subject to the same Dept. of Health regulations that govern breath analysis tests admissible to prove that a defendant was intoxicated. Admissibility of the PBT is not the issue here, however, because the trial court admitted into it evidence at the suppression hearing. The State's real complaint is that the court did not accept and rely on the results of the PBT. It appears the court found the results of the PBT inconsistent with the other evidence in the case, and disbelieved the results due to lack of calibration of the PBT. Even the Officer conceded that without the results of the PBT, he did not have probable cause to arrest

Defendant for DWI. The court was free to disbelieve the PBT results. Without the PBT results, the Officer did not have probable cause to arrest. Motion to suppress affirmed.

State v. Loyd, No. WD71692 (Mo. App. W.D. 12/21/10):
Officer had no probable cause to stop Defendant for DWI where (1) Defendant failed to use a turn signal to pull out of private property onto a street, since this is not a crime; (2) Defendant failed to turn into the nearest lane, since this is not a crime, and Officer did not even notice this until he reviewed the police car video later; and (3) Defendant's wheels touched the center line, since this minor deviation does not justify a stop.
Facts: Officer saw Defendant pull out of a private parking lot and turn onto a street, apparently without signaling. Also, Officer saw Defendant fail to turn into the nearest lane. Finally, Officer saw Defendant's wheel touch the center line. Officer stopped Defendant and determined he was intoxicated. Defendant was convicted of DWI. He appealed the denial of a motion to suppress.
Holding: Since Defendant failed to object to evidence at trial, he did not properly preserve his motion to suppress, so the claim can only be reviewed as plain error on appeal. Nevertheless, plain error occurred here since Officer lacked probable cause to stop Defendant. First, Officer did not actually see Defendant fail to signal but only thought this because Officer thought there wasn't enough time for the signal to turn off when Defendant completed his turn. Even so, however, failing to signal when pulling out of a private parking lot does not violate state statute, Sec. 304.019, or municipal ordinance, which make failing to signal an offense only if committed upon a public roadway or publicly maintained road. Thus, Defendant violated no law in failing to signal. Second, Officer claimed Defendant did not pull into the nearest lane. This, however, does not violate any law either, but it also can't supply probable cause here because Officer did not even notice this until he reviewed the police car video later. Probable cause must be based on facts observed before a stop, not later. Finally, Officer claimed Defendant's wheel touched the center line. However, a minor deviation from traffic like this does not provide probable cause to stop a driver. The video clearly establishes that there was no illegal or unusual driving in this case. Defendant's seizure violated 4th Amendment, and motion to suppress should have been granted. Absent probable cause for the stop, all subsequent evidence should have been suppressed.

U.S. v. Shaw, 80 Crim. L. Rep. 4 (6th Cir. 9/26/06):
Holding: Mother's hearsay statements to police that her three-year-old child said that Defendant had sexually abused him (the child) did not, standing alone, provide probable cause to arrest Defendant. Therefore, his post-arrest statements had to be suppressed, because Defendant was arrested in violation of the 4th Amendment. The court noted that the police had not interviewed the child.

State v. Marx, 86 Crim. L. Rep. 17, 215 P.3d 601 (Kan. 9/18/09):
Holding: Even though vehicle crossed shoulder fog line one time and then momentarily crossed center line of two northbound lanes, this was not by itself sufficient to create reasonable suspicion of a violation of state law requiring driver to maintain in his lane; drug evidence found as result of stop is suppressed.

Com. v. Hernandez, 87 Crim. L. Rep. 108 (Mass. 4/16/10):
Holding: Where officer arrested Defendant without statutory authority, the evidence seized had to be suppressed as a matter of state law, even though evidence would be admissible under *Virginia v. Moore*, 553 U.S. 164 (2008).

State v. Harris, 2009 WL 2401758 (Vt. 2009):
Holding: Evidentiary hearing was required to determine whether Defendant-driver was legally required to use his turn signal when exiting from a "rotary" because this involved factual and legal issues, and if Defendant was not required to signal, then Officer lacked any grounds to stop Defendant.

State v. King, 86 Crim. L. Rep. 161, 2009 WL 3298059 (Wash. 10/15/09):
Holding: Even though officer observed Defendant speed up to 100 mph when passing a truck but then Defendant resumed lawful speed, and even though this would have justified an arrest at the time it happened, this did not justify officer arresting Defendant outside his territorial jurisdiction, because there was no immediate threat to life or property at that time.

State v. Regnier, 2009 WL 2032096 (Or. Ct. App. 2009):
Holding: Even though there may have been minors with alcohol at a gathering at a bonfire, police did not have reasonable suspicion to stop adults who were leaving the bonfire where officer made no observation connecting the adults to the minors-in-possession.

Hall v. State, 2009 WL 2949746 (Tex. Crim. App. 2009):
Holding: Where officer stopped Defendant for allegedly speeding using Light Detection and Ranging Device (LIDAR), but there was no showing that LIDAR was reliable, there was no probable cause to stop and Defendant's motion to suppress DWI results following stop was granted.

Prosecutorial Misconduct

State ex rel. Burns v. Richards, No. SC88709 (Mo. banc 4/1/08):
Where the Prosecutor had represented Defendant in a similar case when Prosecutor was a defense attorney, the Prosecutor was disqualified from prosecuting Defendant in the new case.
Facts: In 2006, Defendant was represented in a false drug prescription case by defense counsel W. in Nodaway County. W. later was elected Prosecutor in Holt County, and filed a controlled substances case involving prescription drugs against Defendant. Defendant sought a writ of prohibition to disqualify Prosecutor.
Holding: Defendant argues that W. has confidential information in Holt County as a result of his work as her defense attorney in Nodaway County. Rule 4-1.9 states that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially similar related matter in which that person's interests are materially adverse to the former client. The cases here are "substantially

similar" because both involve prescription drug violations under Chapter 195. The Prosecutor must avoid even the appearance of impropriety. Prejudice is presumed because of the Prosecutor's prior involvement with Defendant and concern that Prosecutor has obtained confidential information that could be used to prosecutor her. Writ made absolute.

State v. Steger, No. ED86872 (Mo. App., E.D. 11/14/06):
Trial court plainly erred in allowing prosecutor to elicit from police witnesses that after Miranda warnings were given, Defendant had requested counsel.
Facts: Defendant was charged with first degree assault and other offenses arising out of a shooting incident. The evidence was conflicting at trial as to whether the victims or Defendant started the shooting. Defendant claimed the victims started it and Defendant acted in self-defense, and the victims claimed Defendant started it. The State either asked police officers, or the officers volunteered, that after *Miranda* warnings were given, Defendant asked to speak with a lawyer. Defense counsel did not object.
Holding: If a defendant exercises his right to remain silent or request an attorney, it is a violation of his constitutional rights to due process and against self-incrimination/right to silence to use that silence against him. Evidence in regard to the conclusion of an interrogation which reveals that the defendant was failing to answer a direct charge of guilt is improper. Here, the State repeatedly elicited testimony that Defendant had asked for counsel. Moreover, the evidence of guilt was not strong and the defense was not frivolous. Defendant had no prior convictions, but the victims (who testified against Defendant) all had multiple prior convictions, suggesting their credibility was questionable. The prosecutor's questions had a decisive effect on the jury by creating an inference of guilt.

State v. Bescher, No. 28384 (Mo. App., S.D. 3/13/08):
Holding: (1) Where Defendant claimed State had failed to reveal examination results of a State's expert under Rule 25.03, but on appeal, the Defendant failed to include any motion in the legal file on appeal showing that a request for disclosure was made under Rule 25.03, the record on appeal was insufficient to review Defendant's claim; (2) prosecutor may not ask Defendant if the other trial witnesses were "lying," but error was harmless in this case.

State v. Potts, 181 S.W.3d 228 (Mo. App., S.D. 2005):
Presumption of prosecutorial vindictiveness arose where, after Defendant received mistrial during voir dire, Prosecutor charged Defendant with greater charge of possession with intent to distribute.
Facts: Defendant was originally charged with possession of drugs, Section 195.202. During voir dire, the prosecutor asked if anyone would give "more weight to [Defendant's] testimony than to other testimony?" Defendant objected and asked for mistrial, which was granted. Prosecutor then dismissed the charge and re-filed a greater charge of possession with intent to distribute, Section 195.211. Prosecutor said he was not being vindictive, and had considered doing this earlier. Defendant objected on due process grounds. Defendant was convicted of the greater charge and appealed.

Holding: Prosecution on greater grounds was vindictive. "[T]he prosecutor stated he was well aware that this higher charge was possible long before the first trial. This action in the context of this case, permits no logical, non-vindictive explanation for the prosecutor's decision to re-file this case with a more serious charge on the same day [Defendant] was granted a mistrial. We find nothing to suggest that the prosecutor's purpose was anything thing other than to deter the defendant from, or punish him for exercising his rights at trial." To punish a person because he has done what the law allows him to do is a due process violation.

State v. Walters, No. WD66981 (Mo. App., W.D. 12/26/07):
Prosecutor cannot cross-examine Defendant about whether police officer was "lying" in his testimony.
Holding: A witness should not be asked to comment on the veracity of another witness. To ask whether another witness is lying is to invite an opinion as to someone else's state of mind that the witness is not qualified to give. Such questioning is argumentative, and an objection to it should be sustained.

Miller v. Mitchell, 86 Crim. L. Rep. 758 (3d Cir. 3/17/10):
Holding: Where Prosecutor said that he would prosecute minor for "sexting" unless she attended probationary counseling, this violated parent's due process right to raise their child without undue state interference.

Tassin v. Cain, 2008 WL 384578 (5th Cir. 2/15/08):
Holding: State's failure to disclose witness' expectation of leniency violated *Giglio, Napue* and *Brady*. The witness and her attorney believed they had an informal expectation or deal, though not guaranteed, for 10 years if she testified for State, but the witness testified she might receive 99 years. The State allowed this to go uncorrected and argued in closing that witness could receive 99 years and there were no deals for the testimony.

Jackson v. Brown, 2008 WL 185528 (9th Cir. 2008):
Holding: Failure to disclose prosecutor's promise to write a letter on behalf of jailhouse snitch witness to be able to serve his sentence nearer his family violated *Brady*, and failure to correct snitch's false testimony denying such a promise violated *Napue*.

U.S. v. Straub, 2008 WL 3547541 (9th Cir. 2008):
Holding: Where prosecutor granted immunity to a witness but refused to immunize another witness who would contradict prosecutor's witness, Defendant can show he was denied due process by showing prosecutor's grant of immunity distorted fact-finding process and can compel immunity.

U.S. v. Brooks, 2007 WL 4198177 (9th Cir. 2007):
Holding: Prosecutor improperly vouched for witnesses by eliciting from cooperating witnesses that their plea agreements required them to tell the truth, and that false testimony would increase their sentences, and prosecutors and judges in other cases believed they testified truthfully.

U.S. v. Yida, 81 Crim. L. Rep. 628 (9th Cir. 8/16/07):
Holding: A gov't witness was not "unavailable" for hearsay rule purposes where the gov't deported the witness prior to trial, unless the gov't made good-faith efforts to stop the deportation prior to trial.

U.S. v. Jenkins, 2007 WL 203403 (9th Cir. 2007):
Holding: Where Defendant charged with marijuana-smuggling admitted during trial to also smuggling aliens, the Prosecutor's later decision to charge her with alien-smuggling showed prosecutorial vindictiveness where Defendant had testified she did not know marijuana was in her car because she had been paid to smuggle an alien. The Prosecutor had an "open and shut" case of alien-smuggling before Defendant testified, but did not press charges until her marijuana trial testimony.

Smith v. Baldwin, 80 Crim. L. Rep. 120 (9th Cir. 2006):
Holding: Where in a habeas case the prosecutor threatened to charge a witness with capital murder if the witness recanted his prior testimony and claimed he did the murder rather than Petitioner, this was prosecutorial misconduct, and the remedy was for the court to presume the recantation was "true" for habeas purposes, allowing Petitioner to use the "actual innocence gateway."

U.S. v. Cudjoe, 2008 WL 2893130 (10th Cir. 2008):
Holding: Where gov't promised not to oppose 30-year sentence, gov't breached plea bargain by arguing court should impose sentence that would protect public "in any and all future events."

U.S. v. Harlow, 2006 WL 1086432 (10th Cir. 2006):
Holding: Prosecutor improperly vouched for witnesses when he introduced their plea agreement to provide "ongoing truthful testimony" and stating that a court would approve lower sentences for the witnesses only if the court found they had given truthful testimony.

U.S. v. Scott, 2006 WL 3093824 (10th Cir. 2006):
Holding: Where gov't made plea deal that it would not argue for sentencing factors not contained in the plea agreement, gov't breached the plea agreement when it argued for other sentence enhancements.

U.S. v. Dorsey, 2008 WL 115428 (11th Cir. 2008):
Holding: Gov't violated due process by refusing to file substantial assistance reduction because Defendant wanted jury trial; gov't cannot punish Defendant for what law plainly allows Defendant to do.

Blumberg v. Garcia, 2010 WL 530199 (C.D. Cal. 2010):
Holding: Habeas relief granted where police officer had given false testimony at trial regarding firearms and a false compartment being present in Defendant's car.

U.S. v. Shaver, 2008 WL 2745183 (S.D. Cal. 2008):
Holding: Where prosecutor failed to reveal in methamphetamine trial that tapes of Defendant were referring to marijuana and not methamphetamine, this was misconduct warranting new trial.

Corcoran v. Buss, 2007 WL 1068102 (N.D. Ind. 2007):
Holding: Prosecutor unconstitutionally penalized Defendant's right to a jury trial when he sought the death penalty after Defendant refused to consent to the prosecutor's offer to forgo the death penalty in exchange for waiver of a jury trial.

U.S. v. Dicus, 2008 WL 4402214 (N.D. Iowa 2008):
Holding: Where gov't breached plea agreement, the remedy was to resentence Defendant to low end of sentencing range in order to deter prosecutorial misconduct and encourage Defendants to raise misconduct claims.

Tassin v. Cain, 2007 WL 942355 (E.D. La. 2007):
Holding: Even though State's witness' testimony was technically accurate when witness testified she had not received a firm promise of leniency from prosecution, prosecutor violated Defendant's due process rights in failing to correct this testimony about an expectation of leniency, especially where prosecutor exploited this in closing by arguing that witness testified against Defendant without any inducements.

Simpson v. Warren, 2009 WL 3199709 (E.D. Mich. 2009):
Holding: Where court told prosecutor to present a prior offense but without detail, prosecutor committed misconduct in presenting many facts of prior offense including that it involved placing a gun at victim's head and photographs of the offense.

Liggett v. People, 2006 WL 1313175 (Colo. 2006):
Holding: Prosecutor cannot ask Defendant if State's witnesses are "lying" or "mistaken," because is argumentative and invades province of jury.

Johnson v. State, 2010 WL 121248 (Fla. 2010):
Holding: Where prosecutor knowingly presented false testimony by jailhouse snitch that snitch was not acting as a gov't agent, this violated Defendant's 6th Amendment right to counsel and *Giglio*.

State v. Bearse, 2008 WL 1758899 (Iowa 2008):
Holding: Where State had agreed to recommend against incarceration as part of a plea bargain, Prosecutor breached agreement by saying that although Prosecutor was "abiding by agreement," judge was "not bound by agreement" and pointing out that the PSI recommended incarceration.

State v. Gutweiler, 83 Crim. L. Rep. 62 (La. 4/8/08):
Holding: Dismissal of indictment was required where prosecutor violated grand jury secrecy rules by releasing transcripts, but witnesses could still testify at new grand jury or trial.

Blanks v. State, 84 Crim. L. Rep. 212 (Md. 11/12/08):
Holding: Where prosecutor cross-examined Defendant about timing and content of communications with defense counsel, this violated attorney-client privilege and reversal is required unless State shows this was harmless error.

Bellamy v. State, 82 Crim. L. Rep. 540, 941 A.2d 1107 (Md. 2/14/08):
Holding: Prosecutor's statements at a guilty plea that he believed truth of accused's statements may be admissible against State in a related prosecution of a different Defendant as an adoptive admission of a party opponent.

State v. Clark, 82 Crim. L. Rep. 86 (Minn. 9/13/07):
Holding: Prosecutor did not comply with ethics rule regarding communication with represented persons when prosecutor merely notified defense counsel that police would be interviewing their clients; moreover, even if defendants consented to the police interviews and wanted to talk to police, the ethical rules were violated because a prosecutor cannot get police to interview represented persons without the consent of defense counsel; suppression of defendants' statements may be required.

Harness v. State, 87 Crim. L. Rep. 412 (Miss. 5/27/10):
Holding: Even though Prosecutor may not have intended to deprive Defendant of a DWI blood test evidence, where the State destroyed the blood sample without Defendant having an opportunity to test it, this denied Defendant right to due process and access to exculpatory evidence.

State v. Knowles, 87 Crim. L. Rep. 890 (Mont. 8/24/10):
Holding: Prosecutor's decision to increase charges against Defendant because he rejected a plea offer after a mistrial constituted a vindictive prosecution in violation of due process.

Sampson v. State, 2005 WL 3212462 (Nev. 2005):
Holding: Improper for Prosecutor to elicit police testimony that Defendant refused to consent to a warrantless search of his residence.

In re Richland County Magistrate's Court, 87 Crim. L. Rep. 890 (S.C. 9/7/10):
Holding: Even though a state statute allowed non-lawyers to represent businesses in court, a non-lawyer for a business could not serve as a Prosecutor in a case against a Defendant who wronged the business; prosecutors are expected to represent the public and be impartial in deciding whether to prosecute and whether to negotiate a plea bargain.

State v. Vasques, 80 Crim. L. Rep. 653 (Tenn. 3/9/07):
Holding: Where following conviction it was learned that undercover drug officer used cocaine at the time, some of which was seized as evidence, Defendants could obtain relief from conviction through coram nobis.

State v. Riels, 2007 WL 624349 (Tenn. 3/1/07):
Holding: Defendant's testimony in capital penalty phase expressing remorse about the murders did not "open the door" to Prosecutor being able to cross-examine him about details of the murders since that violated right against self-incrimination.

People v. Superior Court, 2006 WL 3386747 (Cal. App. 2006):
Holding: Prosecutor should be disqualified from prosecuting defendant where prosecution made significant efforts to prevent disclosure of victim's medical and psychological records, which appeared not designed adhere to statutory procedures, but to block defendant from records which were critical to his defense.

Milton v. State, 2008 WL 514996 (Fla. Ct. App. 2008):
Holding: Defendant was denied right to confrontation where Prosecutor called co-defendant to stand and had co-defendant refuse to testify; Prosecutor improperly tried to create impression that co-defendant had incriminating evidence against Defendant by doing this.
State v. Christiansen, 2006 WL 1506551 (Idaho Ct. App. 2006):
Holding: State cannot elicit testimony that Defendant refused to consent to warrantless search of premises in order to prove guilt.

State v. Burkland, 2009 WL 4040275 (Minn. Ct. App. 2009):
Holding: Where police officer investigating prostitution posed as a customer and initiated sexual contact with prostitute by fondling her which escalated into sexual conduct, the officer's initiation of sex was unnecessary to the investigation and constituted outrageous gov't conduct which violated Defendant's right to due process.

State v. Williams, 2008 WL 4390639 (N.J. Super. Ct. App. Div. 2008):
Holding: Where a superior in a prosecutor's office made racist remarks regarding Defendant, Defendant was entitled to discovery about the prosecutor's office to determine if there was systemic racial bias in the office, even though the superior was not going to be trial witness.

People v. Morrice, 2009 WL 1100001 (N.Y. App. Div. 2009):
Holding: Where prosecution witness testified she was not getting anything in return for her testimony but she had received immunity and prosecutor failed to correct this testimony, Defendant was denied a fair trial by prosecutor's misconduct.

Sedore v. Epstein, 84 Crim. L. Rep. 84, 2008 WL 4427959 (N.Y. App. Div. 9/30/08):
Holding: Prosecutor cannot delegate prosecution of crime to an attorney hired by victim.

People v. Frederick, 2008 WL 2612144 (N.Y. App. Div. 2008):
Holding: Prosecutor improperly vouched for credibility of witnesses, and improperly elicited testimony that Defendant incarcerated since his arrest.

People v. Handwerker, 2006 WL 820390 (N.Y. App. 2006):
Holding: In DWI case, Prosecutor cannot ask Defendant on cross-examination, "You didn't say, 'I want to prove my innocence, give me [a breath] test?'" and cannot argue in closing, "Well, if he's innocent, then why doesn't he want to take the [breath] test to prove that?"

State v. Ragland, 2006 WL 3788416 (Or. App. 2006):
Holding: Defendant's 5th Amendment rights to counsel and silence violated where Prosecutor's questions and statements implied guilt because Defendant failed to speak to police after she invoked her constitutional rights.

Wilson v. State, 86 Crim. L. Rep. 707 (Tex. Crim. App. 3/3/10):
Holding: Where police created a phony fingerprint report to induce Defendant to confess, this required suppression of the confession.

Ex parte Chabot, 86 Crim. L. Rep. 355 (Tex. Crim. App. 12/9/09):
Holding: Prosecutor's unwitting use of perjured testimony is judged by same legal standard as a prosecutor's knowing use of perjured testimony.

Ex parte Masonheimer, 80 Crim. L. Rep. 669 (Tex. Crim. App. 3/21/07):
Holding: Where the prosecution in two prior trials had committed *Brady* violations in each trial which caused the defense to request a mistrial mid-trial, the State was barred by double jeopardy from seeking a third trial due to this prosecutorial misconduct.

State v. Carreno-Maldonado, 80 Crim. L. Rep. 49 (Wash. Ct. App. 9/19/06):
Holding: Where plea agreement called for prosecutor to ask for sentence in low end of range, prosecutor breached agreement by making statement "on victim's behalf," even though prosecutor also asked for sentence in low end of range.

Public Trial

*** Presley v. Georgia, 86 Crim. L. Rep. 427, ___ U.S. ___ (U.S. 1/19/10):**
Holding: 6th Amendment public trial clause prohibits judges from closing jury selection to the public without considering all reasonable alternatives, including those not suggested by the parties.

Rodriguez v. Miller, 78 Crim. L. Rep. 633 (2nd Cir. 2/17/06), overruled 81 Crim. L. Rep. 657 (2nd Cir. 8/29/07):
Holding: Forcing Defendant's relatives to choose between being excluded from the courtroom or sitting behind a screen when an undercover officer testified violated Defendant's 6th Amendment right to a public trial.

Editor's Note by Greg Mermelstein: This holding may no longer be good law, but I am leaving this case on list for research purposes.

U.S. v. Thunder, 438 F.3d 866 (8th Cir. 2006):
Holding: Closure of courtroom during testimony of allegedly-abused children violated 6th Amendment right to a public trial, where there was no hearing on closure and no particularized findings of the need for it.

Owens v. State, 2007 WL 2955841 (D. Mass. 2007):
Holding: Closing courtroom during voir dire violated right to public trial.

Ex parte Easterwood, 81 Crim. L. Rep. 424 (Ala. 6/1/07):
Holding: Defendant's 6th Amendment right to public trial violated where trial court closed the courtroom to everyone except Defendant's mother when an adult sex abuse victim did not want to testify publicly.

Longus v. State, 88 Crim. L. Rep. 138 (Md. 10/26/10):
Holding: Where trial court excluded Defendant's family members and another person from the courtroom during a witness' testimony, this violated Defendant's right to a public trial, even though the persons excluded allegedly tried to intimidate the witness.

Com. v. Wolcott, 931 N.E.2d 1025 (Mass. 2010):
Holding: Trial court violated 6th Amendment right to public trial by closing courtroom during jury selection.

Com. v. Cohen, 2010 WL 22836 (Mass. 2010):
Holding: Partial closure of courtroom for "lack of space reasons" during jury selection violated 6th Amendment right to a public trial, where judge did not consider available alternatives to closure.

Stephens Media v. 8th Judicial District Court, 86 Crim. L. Rep. 435 (Nev. 12/24/10):
Holding: Jury questionnaires are presumptively subject to public disclosure.

State ex rel. Toledo Blade Co. v. Henry Cty. Ct. of Common Pleas, 2010 WL 1508279 (Ohio 2010):
Holding: Ct. violated 1st Amendment by prohibiting news media from reporting on criminal case until a jury in another related criminal case was empaneled.

Commonwealth v. Long, 2007 WL 15674157 (Pa. 2007):
Holding: 1st Amendment right of public access to trial gives a limited right to access jurors' names, though not addresses.

Washington v. Easterling, 79 Crim. L. Rep. 603 (Wash. 6/29/06):
Holding: Closure of courtroom during co-defendant's severance motion hearing violated Defendant's state constitutional right to public trial.

State v. Bowen, 2010 WL 3666766 (Wash. Ct. App. 2010):
Holding: Closure of courtroom during voir dire violated Defendant's right to public trial.

State v. Sadler, 84 Crim. L. Rep. 147 (Wash. Ct. App. 10/14/08):
Holding: Where trial court held its *Batson* hearing outside the courtroom, this violated Defendant's right to a public trial.

State v. Vanness, 2007 WL 1893071 (Wis. Ct. App. 2007):
Holding: Defendant's right to public trial was violated where courthouse doors were locked at closing time, but trial continued into the evening.

Rule 24.035/29.15 & Habeas Postconviction Procedural Issues

Moore v. State, No. SC90918 (Mo. banc 12/7/10):
Holding: Even though direct appeal appellate counsel failed to tell Movant when the mandate issued on his direct appeal (which caused his pro se 29.15 motion to be filed late), this did not constitute abandonment or excuse the untimely filing because (1) appellate counsel had no duty to represent Movant in postconviction proceedings; (2) there was nothing in the record that indicated that appellate counsel had agreed to inform Movant when the mandate issued; and (3) the appellate court timely sent Movant a copy of his mandate pursuant to Rule 30.24(b). Despite *Webb ex rel. J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) regarding jurisdiction, the motion court was correct in dismissing the untimely motion because the court had no "authority" to hear the case.

Hoskins v. State, No. SC90695 (Mo. banc 12/7/10):
Even though trial court may have been without authority to impose consecutive sentences following probation violation where the sentences had not previously been ordered to be consecutive, this matter could not be raised as "plain error" in a Rule 24.035 appeal because there is no plain error review in postconviction cases.
Facts: Following revocation of Defendant-Movant's probation, he filed a Rule 24.035 motion, which was amended by counsel. The amended motion did not raise the issue about Movant receiving consecutive sentences. On appeal, Movant claimed the motion court plainly erred in imposing consecutive sentences because they were not authorized since his sentences were not consecutive when first pronounced and suspended.
Holding: The appellate court cannot consider Movant's claim because there is no plain error review in postconviction cases, even for "jurisdictional" issues. Although Rule 84.13(c) allows for plain error review in civil cases, 84.13(c) conflicts with the wording of Rule 24.035 (and 29.15) that all issues be preserved in motions for relief or they are waived. Thus, 84.13(c) does not apply to postconviction cases. However, Movant may be able to raise his claim in habeas corpus.

In re: Smith v. Pace, No. SC90425 (Mo. banc 5/11/10):
In order to hold a lawyer in indirect criminal contempt for making "degrading or embarrassing" statements about a judge, the State must prove that the lawyer's statements were false, that the lawyer knew his statements were false or acted with reckless disregard of the truth, and that there was an actual, imminent impediment or threat to the administration of justice.

Facts: Lawyer filed a pleading in which Lawyer claimed that Judge and Prosecutor were improperly using a grand jury "to threaten, instill fear and imprison innocent persons to cover up … their own apparent misconduct" and to "intimidate and silence any opposition to their personal control." Lawyer was convicted in a jury trial of indirect criminal contempt and sentenced to 120 days in jail. Lawyer sought a writ of habeas corpus as a means of appeal.
Holding: The First Amendment protects truthful statements made in judicial proceedings; thus, the State must prove that Lawyer's statements were false and that Lawyer acted with reckless disregard for the truth or falsity. However, the jury instruction in this case directed the jury to find Lawyer guilty if Lawyer's pleading "degraded" the Judge or "impeded and embarrassed the administration of justice." The instruction did not contain a mental state requirement. The instruction did not require the jury to find that Lawyer knew his statements were false or that Lawyer showed reckless disregard for the truth. Hence, the instructions were erroneous. Furthermore, degrading or embarrassing words alone are not enough to support a finding of criminal contempt. The First Amendment requires that the words actually interfere with or pose an imminent threat of interfering with the administration of justice. Here, the State stipulated that Lawyer's actions did not actually interfere with the grand jury or cause Judge to do anything differently. Thus, there was no actual interference or imminent threat. Lawyer ordered discharged.

State ex rel. Zinna v. Steele, No. SC90000 (Mo. banc 1/12/10):
Even though trial court may have intended to impose consecutive sentences, where its oral pronouncement of sentence did not state this, sentence is concurrent by operation of law and Defendant can raise this in habeas corpus proceeding.
Facts: Defendant (Petitioner) entered into a plea agreement for a consecutive sentence to one Defendant was already serving. The plea and sentencing record indicated the court intended to impose a consecutive sentence, but when it actually pronounced sentence, the court said nothing about it being consecutive. The written judgment stated the sentence was consecutive. Several years later, Defendant filed a habeas corpus petition alleging he should be released because his sentence was actually concurrent.
Holding: Section 558.026.1 and Rule 29.09 provide that sentences run concurrently unless the court specifies that they run consecutively. Rule 29.09 provides that if a court fails to make a sentence consecutive when pronouncing sentence, then it is concurrent. Here, even though the court may have intended to make the sentence consecutive, it said nothing about this when orally pronouncing sentence. The oral pronouncement controls, and the sentence is concurrent. The State contends Defendant could only raise this issue in a 24.035 motion, and failed to do so. However, failure to file a 24.035 motion does not bar later habeas relief in cases of (1) actual innocence, (2) jurisdictional defect, or (3) a procedural defect external to the defense and prejudice. A court acts beyond its authority when it sentences someone in excess of that authorized by law. While under *Wyciskilla*, 275 S.W.3d 249 (Mo. banc 2009), the issue may no longer be "jurisdictional," it is an issue of excess authority, and hence habeas relief is available. Habeas relief granted.

State v. Terry, No. SC90332 (Mo. banc 2/10/10):
Where in statutory rape case pregnant Victim testified she had not had sex with anyone but Defendant yet while appeal was pending a DNA test showed that Defendant was not father of baby, the appellate court remands for filing of a new trial motion based on this newly discovered evidence showing perjury.
Facts: Defendant was charged with statutory rape. At trial, Victim was pregnant. Victim testified she had sex with Defendant only. Defendant denied having sex with Victim. During the pendency of the appeal, a DNA test was conducted on the baby born after trial. The DNA test showed Defendant was not the father. Defendant filed a motion to remand to the circuit court based on newly discovered evidence.
Holding: Relief can be granted based on newly discovered evidence to prevent miscarriages of justice. To obtain relief, a defendant must show (1) the facts of the newly discovered evidence came to his attention after trial, (2) the lack of prior knowledge is not due to lack of diligence on his part, (3) the evidence is so material as to likely produce a different result at trial, and (4) the evidence is not cumulative or merely impeaching. Here, all elements are satisfied. The DNA test does not exonerate Defendant, but it is not "merely impeaching" either. Rather, it conclusively shows that Victim perjured herself. The jury was unable to weigh the Victim's credibility with this evidence because it wasn't available until after the baby was born after trial. Courts can grant new trials on the basis of perjury. Case remanded to circuit court for filing of new trial motion based on the newly discovered DNA evidence.

State ex rel. Engel v. Dormire, No. SC90314 (Mo. banc 2/23/10):
(1) Even though Defendant/Petitioner had not raised his Brady claims in prior postconviction or habeas proceedings,where he subsequently learned of undisclosed, substantial Brady evidence, Defendant/Petitioner can proceed in state habeas corpus and a new trial is granted; (2) even though Missouri Prosecutor did not know that Illinois authorities who were investigating the Missouri crime had made deals with a key witness and paid the witness, the Missouri authorities are responsible for this undisclosed Brady evidence.
Facts: In 1990, Defendant/Petitioner, and some co-defendants, were convicted of a kidnapping that occurred in 1984. The crime involved events in both Missouri and Illinois, and was investigated by both Missouri and Illinois law enforcement authorities. The convictions ultimately obtained resulted largely from the testimony of a "snitch witness" (Snitch). Defendant unsuccessfully appealed, sought postconviction relief, and brought a prior habeas corpus case. Subsequently, Defendant learned through new information in a co-Defendant's case that Illinois authorities had paid Snitch's mother for Snitch to testify; that Snitch had made contradictory statements to law enforcement about the kidnapping; and that law enforcement assisted in securing Snitch's release from prison. Defendant sought habeas relief for these *Brady* violations.
Holding: The claims here are different than Defendant's prior habeas claims because they rest on a collection of new evidence that was unknown and unavailable to Defendant previously, even though one of the claims appears similar to a previously-raised claim. The State claims that Defendant cannot show any *Brady* violation because the evidence of a "deal" with Snitch had not been documented at the time of trial. However, it is enough that the "deal" itself already existed, even if it had not yet been documented in

letters. *Brady* applies to the prosecution and anyone else acting on the gov't's behalf. Here, even though Illinois law enforcement failed to disclose the information, the Illinois authorities were essentially acting as the Missouri prosecutor's agents, and were part of the Missouri case against Defendant. Even though Defendant offered other impeachment evidence against Snitch at trial, the reviewing court evaluates not only the way the Snitch was impeached, but also the way he was not impeached due to the undisclosed evidence. Additionally, the State argues that the other evidence at trial was sufficient to convict Defendant. However, that is not the correct test for determining *Brady* prejudice. Here, the undisclosed evidence could have led the jury to a different assessment of Snitch's credibility. New trial ordered.

State ex rel. Laughlin v. Bowersox, NO. SC90542 (Mo. banc 8/23/10):
(1) Where Defendant was charged with burglarly and property damage at a U.S. Post Office, Missouri state courts had no jurisdiction to try Defendant because the State had ceded jurisdiction over the property to the federal gov't and jurisdiction was exclusively federal; and (2) even though Defendant failed to raise this issue in his postconviction appeal, habeas relief can be granted because the issue is jurisdictional.
Facts: In 1993, Defendant was convicted of burglary and property damage for crimes occurring at U.S. Post Office in Neosho. He was convicted in state court and sentenced to a lengthy prison sentence. In the 1990's, Defendant raised in a 29.15 motion in circuit court that he could not be prosecuted in state court, but did not raise this claim on appeal of his postconviction motion. In 2010, he sought habeas corpus relief.
Holding: Under the U.S. Constitution, if a State cedes jurisdiction over federal property, the U.S. has exclusive jurisdiction to hear cases involving offenses committed on that property. When the U.S. acquired the land to build the Neosho Post Office, Missouri ceded jurisdiction over the land to the federal gov't. Art. I, Sec. 8, Clause 17, of the U.S. Const. deprives Missouri courts of the authority to enforce state laws on this federal property. Hence, the circuit court lacked jurisdiction to try Defendant. Even though Defendant could have raised this issue on appeal of his 29.15 motion, the issue is not waived because it is a true jurisdictional issue. Habeas relief is available where a petitioner can show a jurisdictional defect. Rule 29.15 provides the exclusive procedure for claims in the "sentencing court," but the Supreme Court is not the "sentencing court" and Rule 91 allows a judge to issue writs of habeas corpus to persons illegally constrained. Defendant ordered discharged.

Belcher v. State, No. SC89589 (Mo. banc 12/22/09):
(1) Motion court was required to enter sufficient Findings under DNA statute to allow meaningful appellate review; and (2) Even though Movant did not verify his DNA petition, this could be corrected under Rules 67.01, 67.03 or 67.06.
Facts: Movant filed an unverified pro se petition for DNA testing under Sec. 547.035. The motion court dismissed the case by holding that the files "conclusively show Movant is not entitled to relief."
Holding: (1) Sec. 547.035.8 requires the motion court to issue Findings of Fact and Conclusions of Law sufficient to allow meaningful appellate review. The Findings here are not sufficient, so remand is required. (2) Movant's motion was not verified. However, this does not result in barring Movant's claims. Unlike Rules 24.035 and 29.15

with their time limitations, the DNA statute has no time limitations and contemplates that later motions will be permitted as DNA technology advances. Sec. 547.035.2(3)(a). Thus, if on remand the petition is dismissed for lack of verification, a corrected or amended petition may be filed under Rules 67.01, 67.03 or 67.06.

State v. Craig, No. SC89867 (Mo. banc 6/30/09):

(1) In DWI proceeding, parties can bifurcate Defendant's guilty plea to DWI from the issue of what level of DWI the offense is, and Defendant may the appeal the trial court's finding regarding the level of offense; (2) State in DWI prosecution is not required to show that prior DWI convictions complied with Rules 24.02 (state prosecutions) and 37.58 (municipal violations); (3) where prior DWI judgment form did not state whether Defendant was found guilty or not guilty, the judgment form was facially invalid and could not be used to enhance current DWI offense.

Facts: Defendant entered a plea to DWI, but expressly contested whether he was an "aggravated offender." The trial court found him to be an "aggravated offender," and Defendant appealed.

Holding: (1) The State claims Defendant has no right to appeal the "aggravated offender" finding, and can only challenge this in a Rule 24.035 action. However, Defendant did not plead guilty. He admitted to facts establishing certain elements of the offense, but specifically requested a hearing to contest facts establishing him as an aggravated offender. Under Sec. 577.023, Defendant permissibly bifurcated the proceedings and litigated whether he was subject to enhancement. This procedure did not waive his right to appeal under Sec. 547.070. (2) To enhance the offense, the State was not required to prove that prior convictions for DWI complied with Rule 24.02 (state prosecutions) or Rule 37.58 (municipal prosecutions) so long as the judgment and sentence document is facially valid; to hold otherwise would allow constant collateral attack on presumptively valid judgments. (3) Here, one of the priors used to enhance is not facially valid. The judgment and sentence form submitted by the prosecution is blank in the space whether Defendant was found guilty or not guilty. Sec. 577.023 requires a plea of guilty or a finding of guilty followed by an SIS. Thus, this prior cannot be counted. Case remanded to sentence Defendant as "persistent offender" only.

Gehrke v. State, No. SC89527 (Mo. banc 3/31/09):

Even though postconviction counsel failed to file a notice of appeal for Movant, this did not constitute abandonment.

Facts: Movant filed a timely Rule 24.035 case in 1999. In 2001, the motion court denied relief. Postconviction counsel failed to properly file a notice of appeal. In 2006, Movant moved to reopen his case on grounds of abandonment so that he could appeal.

Holding: Failing to properly file a notice of appeal is not "abandonment" under the abandonment doctrine. A Movant who fails to file a notice of appeal within the original time limit may do so within one year of a judgment becoming final under Rule 30.03. After that, however, the Movant cannot appeal. A Movant may still be able to proceed in habeas corpus, however, if he can show actual innocence or a jurisdictional defect.

Crenshaw v. State, No. SC88584 (Mo. banc 7/31/08):
Where postconviction counsel failed to file timely notice of appeal, this was an abandonment and the motion court could re-enter Findings to allow for filing of a timely notice of appeal.
Facts: In 2003, the motion court denied Movant's Rule 29.15 motion. However, postconviction counsel failed to file a notice of appeal. In 2005, Movant sought to reopen his postconviction on grounds of abandonment. The motion court found he was abandoned, and re-entered its original Findings, which allowed Movant to file a timely notice of appeal.
Holding: The motion court has authority to reopen a postconviction proceeding where counsel abandoned Movant. If abandonment is found, the remedy is to put Movant back in the position he would have been in had counsel not abandoned him. The motion court did this by finding that Movant was abandoned and re-entering its original Findings, thus allowing a notice of appeal to be timely filed. The State claims that failure to timely file a notice of appeal is not abandonment. However, in order to preserve that issue, the State needed to file a notice of appeal and cross-appeal, which the State did not do, so that issue is not before the court.
Editor's Note by Greg Mermelstein: This case may have been effectively overruled by *Gehrke v. State*, No. SC89527 (Mo. banc 3/31/09).

McFadden v. State, No. SC88895 (Mo. banc 6/30/08):
Where Movant gave his pro se Rule 29.15 motion to an attorney to file, and the attorney filed it one day late, the attorney "abandoned" Movant, and Movant's motion should be reopened and deemed timely.
Facts: Movant gave his pro se Rule 29.15 Motion to an attorney, who was going to represent Movant in the case, and who instructed him to give his motion to her for filing. The attorney, however, failed to file the motion timely. The motion court dismissed the case for untimely filing.
Holding: Movant had an attorney-client relationship with attorney in this case, even though attorney had not been formally appointed by a court. Attorney undertook to represent Movant in the case, provided legal advice, and told him to give his pro se 29.15 motion to her for filing. Movant timely prepared and gave his motion to his attorney at her express direction. Attorney's actions did not occur due to lack of understanding of Rule 29.15, an ineffective attempt at filing, or an "honest mistake," none of which will justify failure to meet the time requirements. Attorney undertook to represent Movant and simply abandoned the representation. This opinion is limited to where counsel overtly acted and such actions prevented Movant's timely filing.

Brooks v. State, No. SC88353 (Mo. banc 1/15/08):
Even though postconviction court granted sentencing relief and re-sentencing had not yet occurred, the postconviction judgment was "final" for purposes of appeal.
Facts: 24.035 Movant was granted sentencing relief, but not relief from his conviction. Before he was resentenced, Movant appealed the denial of relief from conviction. The Court of Appeals had held there was no final judgment to appeal.
Holding: There must be a final judgment to appeal. However, when a motion court issues Findings of Fact and Conclusions of Law under Rule 24.035(j), that is a "final"

judgment for purposes of appeal by either Movant or the State. The fact that resentencing has not occurred prior to appeal does make the motion court's judgment interlocutory. To the extent that *Barringer v. State*, 12 S.W.3d 765 (Mo. App. 2000), and *Williams v. State*, 954 S.W.2d 710 (Mo. App. 1997) are to the contrary, they are overruled.

Glover v. State, No. SC88373 (Mo. banc 6/12/07):
Even though postconviction Movant failed to sign his pro se motion and this was not discovered until the appeal was pending, this defect was not jurisdictional and could be corrected on appeal by having Movant file a properly signed motion with the circuit court, with a certified copy then sent to the appellate court, notifying the appellate court that the motion has been signed.
Facts: Movant filed an unsigned pro se Rule 29.15 motion. This lack of signature was not discovered until the appeal, when the State raised it for the first time. Movant then filed an identical, signed pro se motion in the motion court, and filed a certified copy of the signed motion with the appellate court.
Holding: The purpose of the signature requirement is not to deprive Movants of a cause of action. For purposes of Rules 24.035 and 29.15, the signature requirement is not jurisdictional. The proper procedure to follow when a lack of signature is not discovered until the appeal is to file a signed motion in the motion court, and then file a certified copy of that motion with the court of appeals. To the extent that *Denny v. State*, 179 S.W.3d 381, 382 (Mo. App. 2005) requires a different procedure, it is overruled. To the extent *Tooley v. State*, 20 S.W.3d 519, 520 (Mo. banc 2000) and *Wallingford v. State*, 131 S.W.3d 781, 782 (Mo. banc 2004) are contrary to this *Glover* opinion on "jurisdiction," they are overruled.

State ex rel. Kauble v. Hartenbach, No. SC87864 (Mo. banc 3/13/07):
Petitioner who pleaded guilty under sexual misconduct of a child statute, Section 566.083.1(1) that was later declared unconstitutional, and who received SIS, may petition to remove his name from sexual offender registry by bringing action against the parties who maintain registry.
Facts: In 1999, Petitioner pleaded guilty to sexual misconduct of a child, Section 566.083.1(1) and received an SIS. Petitioner completed probation. Statute was declared unconstitutional in 2005. Petitioner sought to remove his name from sex offender registry.
Holding: Petitioner cannot pursue his remedy under Rule 24.04(b)(2), as he tried to do in circuit court, because that rule applies only "during the pendency of the proceeding." Assuming that the proceeding on an SIS is pending during the time of probation, it is clearly complete when the probation ends. Petitioner cannot use Rule 29.07(d) either because that rule only allows withdrawal of a guilty plea before sentence is imposed or when imposition is suspended, or where there has been a judgment of conviction and manifest injustice. A court loses authority to alter its judgment under this rule once a defendant is discharged from probation. Also, since he received an SIS, he did not have a judgment of conviction. If he had pled guilty and received an SES, he would have a judgment of conviction and be able to withdraw his plea for manifest injustice under the rule. However, Petitioner may petition to remove his name from sexual offender registry by bringing action against the parties who maintain registry.

State ex rel. Verweire v. Moore, No. SC87445 (Mo. banc 12/19/06):
(1) Habeas corpus may be used to assert "actual innocence" claim following a guilty plea where there was no factual basis; (2) Petitioner was "actually innocent" of first degree assault, Section 565.050, because his briefly pointing a gun at victim and threatening him was not a substantial step toward causing serious bodily injury.
Facts: Petitioner was confronted by a guy at an arcade, and Petitioner pulled out a gun and said he would "blow [guy's] head off," but then Petitioner retreated. Petitioner pled guilty to first degree assault, Section 565.050. There was no direct appeal or 24.035 case. Petitioner filed a habeas in circuit court and the Missouri Court of Appeals, and the Court of Appeals issued an opinion denying the writ. *Verweire v. Moore*, 168 S.W.3d 518 (Mo. App., S.D. 2005). Petitioner then filed a new habeas at the Supreme Court, raising the same issue as below.
Holding: Habeas relief is available, even after a guilty plea, where a petitioner can show that a manifest injustice has resulted probably resulted in the conviction of one who is actually innocent. The precise issue is whether Petitioner's conduct was a substantial step toward first-degree assault. A person commits first degree assault if he "attempts to cause serious bodily injury to another person." The evidence was insufficient to show this. Petitioner did not pull the trigger, and soon retreated from the altercation. He merely threatened harm. There was no showing of a conscious object to carry out the threat. Thus, Petitioner is actually innocent of first degree assault, and his plea was not knowing and voluntary. Conviction vacated, but case remanded to await proceedings regarding lesser included offenses.

Stevens v. State, No. SC87885 (Mo. banc 12/19/06):
(1) Where Movant after guilty plea and sentencing appealed a denial of a 29.07(d) motion, the time for filing a later 24.035 motion was 90 days from the date of the appellate court's mandate; and (2) claims raised in a 29.07(d) motion are subject to res judicata in a later 24.035 case.
Facts: Movant pleaded guilty to two offenses. Prior to sentencing, Movant filed a 29.07(d) motion to withdraw her guilty plea. The plea court overruled the motion and sentenced Movant. Movant then appealed to the Court of Appeals, arguing the denial of the 29.07(d) motion was improper. The appellate court affirmed. Movant filed a 24.035 motion 57 days after the appellate mandate. This was 532 days after Movant had been delivered to the DOC. The motion court found that the pro se 24.035 motion was untimely.
Holding: The direct appeal was not an appeal of a 29.07(d) motion by itself because that is not an appealable order. Rather, the direct appeal was an appeal of a final judgment of conviction and sentence. Rule 24.035(b) provides that if an appeal of a judgment is taken, the pro se motion is due within 90 days of the appellate mandate. Movant appealed a judgment. Therefore, her 24.035 motion was due 90 days after the mandate, and was timely filed. However, Movant cannot take two bites at the apple regarding her issues. If the grounds from an appeal of a denial of a Rule 29.07(d) motion are raised again in a 24.035 motion, they should be reviewed under principles of res judicata.

Chaney v. State, No. ED93798 (Mo. App. E.D. 11/2/10):
Where (1) plea court had already accepted Movant's guilty pleas and sentenced him before court and prosecutor brought up idea that Movant was waiving his postconviction rights as part of the plea, and (2) defense counsel said he had not advised Movant about this, the alleged waiver was invalid because it came after the pleas were entered and was without counsel.
Facts: Movant pleaded guilty to various offenses. After the court accepted the plea and sentenced Movant, the State listed several other offenses it said it was agreeing not to file, and said that Movnant was agreeing that if Movant filed a postconviction motion, then the State would file those charges. Defense counsel said he had not discussed this with Movant and it would be a conflict of interest for him to advise Movant on this matter. The court told defense counsel to discuss it with Movant but not advise him. The proceedings went off the record. Counsel said he advised Movant not to waive his rights, but Movant said he was pleading anyway without advice of counsel. Movant later filed a 24.035 motion, and the State moved to dismiss it on grounds that Movant waived his postconviction rights.
Holding: It bears emphasizing that the purported waiver, which the State claims was part of the plea agreement, did not occur until after the court had accepted Movant's pleas and sentenced him. Thus, it is clear that the waiver of postconviction rights was not part of the plea agreement. A defendant can waive his postconviction rights only if the record clearly demonstrates he was properly informed of his rights, and the waiver was made knowingly, voluntarily and intelligently. Implicit in this is that a waiver can only be valid if defendant is represented by counsel and fully informed of his rights. Here, Movant did not have the benefit of counsel when he purportedly waived his rights. Thus, his waiver was not knowing, voluntary or intelligent. Motion to dismiss denied.

Cook v. State, No. ED93066 (Mo. App. E.D. 3/23/10):
Where during pendency of appeal of sex case, Defendant learned that Victim recanted her testimony and filed an affidavit and motion to remand on this ground, the appellate court grants the motion to remand for filing a new trial motion including the recantation as newly discovered evidence.
Facts: Defendant was convicted at a jury trial of various child sex offenses. During the pendency of his appeal, Defendant learned that that Victim had recanted her testimony. Victim's testimony was the only evidence to support the convictions. Defendant filed a motion to remand based on this newly discovered evidence.
Holding: Even though Defendant's motion is not within the time limits for filing a new trial motion under Rule 29.11(b), an appellate court has inherent power to prevent miscarriages of justice by remanding a case to consider newly discovered evidence presented for the first time on appeal. To get a remand, Defendant must show (1) that the newly discovered evidence came to Defendant's attention after trial; (2) that the lack of prior knowledge is not due to lack of diligence; (3) that the evidence is so material as to likely produce a different result; and (4) that the evidence is not cumulative or merely impeaching. Here, Defendant has met this test. Victim's recantation did not occur until 7 months after trial. Defendant could not have known Victim would recant. If the recantation is believed, it would produce a different result. Lastly, the recantation is not merely impeaching because, if believed, it directly refutes Victim's entire trial testimony

and would show Defendant's conviction is based on false testimony. Defendant is entitled to a remand even though he made some incriminating remarks that were used against him at trial, such as "I didn't take a life; I might have destroyed a life."

Wilder v. State, No. ED93032 (Mo. App. E.D. 1/19/10):
Holding: A motion to withdraw a guilty plea at sentencing is an appealable order; therefore, where Defendant's motion to withdraw his plea at sentencing was denied, but he did not appeal, he could not contend in a Rule 24.035 motion that he should have been allowed to withdraw his plea.

Oden v. State, No. ED93734 (Mo. App. E.D. 8/31/10):
Even though postconviction Movant claimed he was not tried within 180 days under UMDDL, after J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009), this issue is not "jurisdictional" but is only trial error, and this could only be raised on a direct appeal, not in a postcoviction case.
Facts: Movant filed a 29.15 motion claiming he had not been brought to trial within 180 days as required by UMDDL, and that the trial court had no jurisdiction to try him.
Holding: Sec. 217.460 states that if a Defendant is not brought to trial within 180 days, "no court of this state shall have jurisidiction" over the case. However, *J.C.W. ex rel. Webb v. Wyciskalla* changed the way "jurisdiction" is analyzed. Here, there was personal and subject matter jurisdiction. After *Wyciskalla*, Movant's argument that there was no jurisdiction to try the case is untenable. The issue here is now one of trial error. Trial error must be raised on direct appeal, and not in a postconviction case. Movant did not raise this issue in his direct appeal; it cannot be raised in a 29.15 motion.

Swofford v. State, No. ED933661 (Mo. App. E.D. 9/7/10):
Even though State did not raise untimeliness of Movant's 29.15 motion in circuit court, Court of Appeals has duty to enforce time limits of Rule 29.15 regardless of whether they are "jurisdictional" or not.
Facts: Movant filed a pro se 29.15 motion that was two days late. The State did not raise the timeliness issue in circuit court. The motion court denied relief on the merits. Movant appealed.
Holding: Movant argues that the time limits of Rule 29.15 are no longer "jurisdictional" under *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). However, the Court of Appeals has a duty to enforce Supreme Court rules. The parties cannot exempt themselves from those rules. Thus, the Court of Appeals can dismiss a motion as untimely even though the State failed to raise this in the circuit court. Appeal dismissed.

Morgan v. State, No. ED92778 (Mo. App. E.D. 9/15/09):
Where PCR counsel filed an unsigned, unverified Rule 29.15 amended motion on behalf of Movant in 1993, this constituted abandonment, but Movant was not prejudiced because motion court decided case on the merits.
Facts: In 1993, PCR counsel filed an unverified, untimely Rule 29.15 amended motion on Movant's behalf. At that time, Rule 29.15 required that the amended motion be verified. In 2006, Movant filed a motion to reopen PCR on grounds of abandonment.

Holding: Counsel's failure to file a timely, verified amended motion constituted abandonment. The question is what remedy should be afforded. Normally, where there has been abandonment, the court remands for appointment of new counsel and a new amended motion, or remands to treat the amended motion as timely filed. Here, although Movant claims the amended motion is deficient as to content, Movant does not raise any new issues, and the motion court in 1993 addressed all issues raised on the merits. Therefore, remand is not required because Movant was not prejudiced.

State v. Jarvis, No. ED91711 (Mo. App. E.D. 6/16/09):
Holding: Remedy for improper revocation of probation is an extraordinary writ, not a direct appeal from sentencing.

Howard v. State, No. ED91724 (Mo. App. E.D. 4/28/09):
Where Movant gave his pro se Rule 29.15 motion to prison authorities to mail three-weeks before its due date but the Post Office returned the motion to the prison after its due date and it ended up being filed late, the motion should be deemed timely filed under these unique facts because they were beyond Movant's control.
Facts: Movant's pro se Rule 29.15 motion was due on February 13, 2007. On January 24, 2007, he gave his motion to prison authorities to mail. The prison stamped the motion "Received January 25, 2007." Movant addressed his envelope to the Civil Courts Building in St. Louis, but the address was incorrectly written as 714 Market St. However, the address of N. 10th Tucker had been crossed out on the envelope, but was still visible. The actual address is 10 N. Tucker. Prison mailroom procedures required the mailroom to tell a prisoner of incorrect postage before mailing an envelope. On March 8, 2007, the Post Office returned Movant's motion to the prison. The prison asked Movant for additional postage. The prison then remailed it to the same incorrect address. The motion was file-stamped March 14, 2007, which was 30 days late under Rule 29.15. The motion court dismissed it as untimely.
Holding: Under the unique facts of this case, the motion should have been deemed timely filed. Missouri courts have previously found in a few cases that an improper filing, caused by circumstances beyond control of the movant, justified a late receipt of the motion. This case presents a rare set of circumstances justifying late receipt. The motion could have been returned for incorrect postage or due to incorrect address. The standard procedure of the mailroom was to notify inmates of incorrect postage before an envelope was mailed. Here, the mailroom did not notify Movant of incorrect postage before mailing. Assuming the motion was returned for incorrect address (which the court does not believe because the Civil Courts Building is a prominent building in St. Louis at the corner of Market and Tucker, and the motion reached the courthouse on the second mailing), this was an honest, clerical mistake that should not be held against Movant under *Spells v. State*, 213 S.W.3d 700 (Mo. App. W.D. 2007). Dismissal reversed.

Snyder v. State, No. ED90899 (Mo. App. E.D. 4/21/09):
Holding: (1) A challenge to revocation of probation based on ineffective assistance of counsel is not cognizable in a Rule 24.035 action, but may be brought in habeas corpus; (2) where Movant had litigated the effectiveness of his attorney in a prior related 24.035

action, Movant was barred by collateral estoppel from re-litigating the issue, and the appellate court can invoke collateral estoppel *sua sponte*, even though not raised below.

State ex rel. Peete v. Moore, No. ED92522 (Mo. App., E.D. 4/7/09):
Where Attorney told Defendant he would file a direct appeal but failed to do so, Defendant was entitled to habeas corpus relief to allow filing of a direct appeal.
Facts: Defendant was convicted of various criminal offenses in 1997. Attorney told Defendant that Attorney would file a direct appeal, but never did. In 2008, Defendant filed a habeas corpus petition, but the motion court ruled that Defendant should have raised his claim in a Rule 29.15 motion and could not raise it in habeas.
Holding: A lawyer who fails to file a direct appeal denies effective assistance of counsel. While normally ineffectiveness claims must be raised in a 29.15 action, habeas corpus is available where the procedural default was caused by something external to the defense and prejudice resulted (i.e., "cause and prejudice"). The cause here is that Attorney abandoned Defendant by failing to file an appeal, despite telling Defendant he would appeal. The prejudice is Defendant was denied his right to appeal. Defendant is entitled to be resentenced, so that he can timely file a direct appeal.

State v. Bohlen, No. ED46436-01 (Mo. App. E.D. 3/24/09):
(1) Where Defendant was sentenced prior to January 1, 1996, a motion to recall the mandate is the proper procedure for raising ineffective assistance of appellate counsel; (2) where Defendant was convicted of two counts of robbery for forcibly stealing a wristwatch from the store manager and for forcibly stealing property of the store, conviction for both counts violated double jeopardy and counsel was ineffective in failing to appeal this; (3) even though Defendant did not object to convictions on double jeopardy grounds at trial, this could be raised on appeal because issue is jurisdictional.
Facts: In relevant part, Defendant was convicted for two counts of first degree robbery or forcibly stealing property of a jewelry store, and forcibly stealing a wristwatch owned by the store manager. Defendant filed a motion to recall mandate claiming appellate counsel was ineffective in failing to raise this as double jeopardy.
Holding: The State contends Defendant waived his double jeopardy claim by not raising it at trial. However, double jeopardy can be raised on appeal because the court was without power to proceed against a defendant twice for the same offense. The prohibition against double jeopardy is to ensure that the punishment remains within limits established by the legislature. The essence of robbery is forcibly taking property; the ownership of the property is immaterial. It has repeatedly been held that only one robbery occurs where a defendant robs a store employee of the employee's property and the employer's (store's) property. Appellate counsel was ineffective in failing to raise this meritorious issue.

Hutson v. State, No. ED88069 (Mo. App., E.D. 11/18/08):
Writs of error coram nobis have been abolished, despite Sec. 547.080.
Facts: Appellant, who had served his sentence, sought to vacate his conviction via writ of error coram nobis.
Holding: Appellant contends he can pursue a writ of error coram nobis because of Sec. 547.080. However, Rule 74.06(d) abolished such writs. Supreme Court Rules control

over contradictory statutes unless the Legislature specifically annuls or amends the Rules in a bill limited to that purpose. Even though Appellant has served his sentence, a writ of error coram nobis is no longer available after Rule 74.06(d).

Melton v. State, No. ED90289 (Mo. App., E.D. 8/26/08):
Evidentiary hearing was not required on Movant's double jeopardy claim, but motion court was required to issue Findings on the claim to allow meaningful appellate review.
Facts: Movant pleaded guilty to two drug counts for drugs possessed at the same time. He filed a Rule 24.035 motion claiming conviction on both counts constituted double jeopardy. He waived a hearing on the claim. The motion court denied the claim without Findings.
Holding: A double jeopardy claim can be considered in a 24.035 proceeding because it goes to the power of the State to charge Movant. Movant correctly withdrew his request for a hearing, because all a motion court can consider in deciding a double jeopardy claim is the State's information and the transcript of the guilty plea. The motion court's failure to issue Findings on the claim, however, was error under 24.035(j) because it does not allow for meaningful appellate review.

State ex rel. Thomas v. Neill, No. ED91569 (Mo. App., E.D. 8/19/08):
Where postconviction counsel failed to file an amended motion, mandamus issues to require motion court to hold an abandonment hearing.
Facts: Movant filed a 29.15 motion and counsel was appointed, but did not enter an appearance for 13 months. Five months passed, and no amended motion was filed. Movant sought a writ of mandamus to require the motion court to hold an abandonment hearing.
Holding: Abandonment occurs when counsel takes no action on Movant's behalf. The record reflects no action by counsel. Writ issues to require motion court to conduct abandonment hearing and appoint new counsel with time to file an amended motion, if abandonment is found.

Stewart v. State, No. ED90296 (Mo. App., E.D. 7/8/08):
Even though Clerk's Office received Movant's pro se postconviction motion on time, where it was file-stamped late, and postconviction counsel moved to file a late amended motion causing the motion court to dismiss the case in 2002, there was no jurisdiction to reopen the case in 2006 since this was not an "abandonment" by counsel.
Facts: Movant's direct appeal mandate issued on July 5, 2001. He timely filed a pro se postconviction motion on October 3, 2001, but it was file-stamped October 4, 2001, which was one day late. Despite Movant's insistence that he filed his motion on time and postal records showing this, postconviction counsel in 2001 failed to investigate this, and filed a motion to file an untimely amended motion. This caused the motion court to dismiss the case as untimely in 2002. No appeal was filed. In 2006, new postconviction counsel sought to reinstate the case, and the motion court did reinstate the case. After denying relief on the merits, Movant appealed, but the State moved to dismiss the appeal for lack of jurisdiction.
Holding: Under Rule 75.01, a motion court retains jurisdiction for 30 days after entry of judgment. A dismissal is a judgment that starts the clock running. A motion court has no

jurisdiction to reopen after 30 days. Although Movant claims he was "abandoned" by the original postconviction counsel, abandonment occurs when counsel fails to amend a pro se motion "without explanation" or takes "no action" on Movant's behalf. Here, original counsel took action and moved to file an untimely amended motion. Thus, there was no abandonment. This is really a claim of ineffective postconviction counsel, which is unreviewable. Court had no jurisdiction to reopen case in 2006. Appeal dismissed.

Clark v. State, No. ED90209 (Mo. App., E.D. 5/27/08):
(1) Even though Clark filed a cert. petition with the U.S. Supreme Court after his direct appeal, the time for filing his Rule 29.15 motion was 90 days after the direct appeal mandate by the Missouri appellate court, and not 90 days after the denial of the cert. petition by the U.S. Supreme Court. (2) Even though Clark relied on his direct appeal attorney's advice as to when to file his 29.15 motion, the attorney's incorrect advice did not constitute excusable neglect or abandonment.
Facts: Clark's convictions were affirmed by the Missouri Supreme Court on direct appeal. Clark's direct appeal attorney then filed a cert. petition with the U.S. Supreme Court and told Clark he would have 90 days after the cert. petition was denied to file a Rule 29.15 motion. Clark relied on this advice, and filed his 29.15 motion within 90 days of the denial of cert. However, this was more than 90 days after the Missouri Supreme Court had issued its mandate. The motion court dismissed the 29.15 motion as untimely.
Holding: (1) Clark contends that Rule 29.15 is silent or ambiguous as to the time limit for filing a 29.15 motion when a cert. petition has been filed, and that his conviction was not "final" until the cert. petition was denied, so that his filing within 90 days of that denial was "timely." However, Rule 29.15(b) states that a 29.15 motion must be filed within 90 days of the Missouri appellate court's mandate. The Rule is not ambiguous. The appellate court's mandate triggers the 90-day limitation regardless of whether a petition for certiorari is filed with the U.S. Supreme Court. (2) Although Clark made an "honest" mistake in following his counsel's advice as to when to file his 29.15 motion, Rule 29.15 simply contains no authority for granting time extensions due to good cause or excusable neglect. Nor was this abandonment by counsel, or a conflict of interest by counsel. While the stringent requirements of Rule 29.15 may seem unfair where a movant relies on advice of counsel, the late filing deprived the motion court of jurisdiction and left no alternative but to dismiss.

Rupert v. State, No. ED89980 (Mo. App., E.D. 4/22/08):
(1) Defendant who pleads guilty can only challenge sufficiency of indictment or information by direct appeal, not 24.035; (2) where judge's written sentence was different than the oral pronouncement of sentence, the oral pronouncement controls; (3) judge is not required to give consecutive sentences for statutory rape.
Facts: Defendant pleaded guilty to four counts of second-degree statutory rape, Sec. 566.034. The judge sentenced him to "three years on each count." Later that day, the judge entered a written sentence saying the sentences were consecutive. When Defendant sought to fix this, the judge offered Defendant the opportunity to appear for resentencing, but Defendant refused. Defendant ultimately filed a 24.035 motion.
Holding: Regarding Defendant/Movant's claim that the information was insufficient, this is not cognizable in a 24.035 action. The remedy was to raise this on direct appeal.

Regarding the sentence, Sec. 558.026.1 provides that sentences shall run concurrently unless the court specifies they run consecutively. Also, the general rule is that oral pronouncements of sentence control over later written judgments. The court believed it was required to give consecutive sentences under Sec. 558.026.1, which states that certain sex offenses shall run consecutively, but statutory rape is not among the listed offenses mandating consecutive sentences. Once the court reduced its sentence to writing, it could not call Defendant back to court and resentence him. The oral sentence controls here, and Defendant's sentences are not consecutive. His sentences must run concurrently.

Thomas v. State, No. ED89985 (Mo. App., E.D. 4/1/08):
(1) Movant was entitled to evidentiary hearing on Rule 24.035 claim that he had told his attorney he was mentally retarded, and that Movant was incompetent to plead guilty, and (2) Strickland "outcome test" regarding not having pleaded guilty is not appropriate to deciding prejudice; rather, test is whether there is a "reasonable probability" Movant lacked mental competence.
Facts: Rule 24.035 Movant claimed that he had told plea counsel he was mentally retarded, and claimed he was incompetent to plead. The motion court denied an evidentiary hearing on grounds that this was refuted by the record.
Holding: (1) The record does not refute that Movant was mentally retarded. The general questions posed to Movant at his guilty plea regarding his understanding of the charge, plea process and rights waiver were not sufficiently specific to refute this claim of mental retardation. (2) Because cases such as this do not lend themselves very well to the *Strickland* outcome test, whether Movant would still have pleaded guilty is irrelevant. Rather, Movant need only demonstrate a "reasonable probability" that he lacked competency "sufficient to undermine confidence in the outcome."

Elverum v. State, No. ED88496 (Mo. App., E.D. 9/18/07):
(1) Even though Movant absconded from probation, court exercises its discretion not to apply "escape rule" due to the "central issues" of this case; (2) plea court failed to ensure Movant understood the range of punishment by failing to advise him of maximum penalty and that his sentences could run consecutively; (3) Movant cannot raise a factual basis or sufficiency of information claim in Rule 24.035 appeal where those claims were not included in the Amended 24.035 Motion, but Movant could bring those via writ of habeas corpus; and (4) group guilty pleas with multiple defendants pleading guilty at once make confusing records and should be discontinued.
Facts: Movant pleaded guilty to four counts of first degree property damage, Section 569.100, and was placed on probation. After he absconded from probation, probation was later revoked and he was sentenced to four consecutive terms of four years, for 16 years. Also, on appeal, he claimed for the first time that he could not be charged or convicted of Class D felonies because the statute requires damage of more than $750 for a Class D felony, but Movant was only charged and the factual basis showed that the damage only "exceeded $500."
Holding: Rule 24.02(b) requires the court to inform defendants of the maximum possible penalty. Here, the court told Movant before his plea that "the range was up to four years" but never told him whether the range was four years on each count, or four

years total. Even though the State had recommended 10 years, this does not show that Movant knew he could receive up to 16 years. His attorney's statement at sentencing that Movant could receive 16 years does not cure the error either, because this took place at sentencing, two month after Movant pleaded guilty. Movant cannot raise for the first time on appeal claims that he could not be convicted for the Class D felony because the evidence did not show damage above $750. These claims were not included in the Amended 24.035 Motion. The claim about the information should have been raised on direct appeal; the factual basis claim in the 24.035 motion. However, Movant can raise these in a writ of habeas corpus.

State v. Green, No. ED897804 (Mo. App., E.D. 9/11/07):
Holding: Rule 29.12(b) allowing plain error to be corrected does not create an independent cause of action for issues that could have been raised in a Rule 24.035 motion. Thus, appellate court lacks jurisdiction to hear 29.12(b) appeal.

State v. LaJoy, No. ED88009 (Mo. App., E.D. 3/13/07):
Holding: Defendant may file "nunc pro tunc motion" under Rule 29.12(c) many years after his sentence to correct the written judgment and sentence, which had declared him to be a "persistent drug offender" under Section 195.295, but the trial court's finding and oral pronouncement was only as "persistent offender" under Section 558.016. Defendant was prejudiced because "persistent drug offender" is not eligible for parole, but "persistent offender" is eligible.

Buchanan v. State, No. ED89018 (Mo. App., E.D. 3/6/07):
Holding: Petitioner cannot appeal denial of writ of habeas corpus; remedy is to file a new writ in higher court.

Queen v. State, No. ED88014 (Mo. App., E.D. 2/20/07):
Holding: Postconviction Movant cannot appeal a "motion to reopen" a PCR case which motion to reopen was denied by docket entry, since there is no "final judgment" to appeal under Rule 74.01(a), which requires a "judgment" to be signed by the judge and be denominated a "judgment" or "decree."

Penn v. State, No. ED87648 (Mo. App., E.D. 12/26/06):
(1) Relevant date for counting time to file 29.15 motion is date of mandate, not date of appellate court opinion; (2) where Movant failed to sign 29.15 motion, motion court was required to bring this to Movant's attention under Rule 55.03(a) and give him opportunity to correct this deficiency before dismissing on such grounds.
Facts: Movant's conviction was affirmed on direct appeal. He filed a 29.15 motion 89 days after the appellate mandate. He signed the in forma pauperis affidavit on his Form 40, but did not sign the other portion of the motion. The motion court dismissed the 29.15 as untimely, and unsigned.
Holding: 29.15(b) provides that a 29.15 motion be filed within 90 days of an appellate mandate. The motion court erroneously believed the date of the appellate opinion was the same as the date of the mandate, but it was not here. Movant filed his motion within 90 days of the mandate. Rule 55.03(a) provides that an unsigned filing shall be stricken

unless the omission is promptly corrected after being called to the party's attention. Here, movant's motion was not signed, but the trial court erred in failing to call this to movant's attention and give him an opportunity to correct it.

Editor's Note by Greg Mermelstein: Footnote 1 says this case is different than appellate cases which have dismissed appeals for failure to sign a pro se motion, because court says "the appellate record in [those cases] reveals that appellate counsel knew of the lack of the movant's signature, but took no action during the appeal to remedy the deficiency." This would suggest that appellate counsel can take action, pre-opinion, to remedy a lack of signature on appeal, and counsel should do so.

State v. Simmons, No. ED88880 (Mo. App., E.D. 12/26/06):
Holding: Where Defendant, two years after conviction and sentence, filed motion in trial court under Rule 29.12(b) for plain error relief and trial court denied motion, this was not an appealable judgment because there is no independent basis for a motion under Rule 29.12(b) to enforce claims of plain error. Appeal dismissed.

Belger v. State, No. ED86533 (Mo. App., E.D. 10/03/06):
Holding: Where (1) Movant had had a Rule 29.15 case in 1996 and lost; (2) in 2005 Movant filed a "Motion To Reinstate Original Motion Under Rule 29.15" on grounds that the postconviction court had not decided all claims and that postconviction counsel had a conflict of interest; and (3) the motion court denied the new motion by docket entry, which Movant then appealed, the Court of Appeals dismisses for lack of jurisdiction because there is no final appealable "judgment" since docket entry was not signed by the judge or denominated a "judgment" under Rule 74.01(a).

Purham v. State, No. ED86733 (Mo. App., E.D. 8/29/06):
Holding: Where Movant failed to sign his pro se Rule 24.035 motion, both the Circuit Court and Appellate Court lack jurisdiction to hear it because an "unsigned, unverified motion for postconviction relief is a nullity and does not invoke the jurisdiction of the court."

Henderson v. State, No. ED86359 (Mo. App., E.D. 5/30/06):
Appellate court lacks jurisdiction to consider appeal from unsigned Rule 24.035 motion.
Facts: Movant filed *pro se* Rule 24.035 motion which was not signed by Movant. An Amended Motion was filed, hearing held, and Findings of Fact, Conclusions of Law issued. Movant appealed.
Holding: The Appellate Court does not have jurisdiction because Movant failed to sign his *pro se* motion. The signature requirement is mandatory. The motion court did not have jurisdiction either because the *pro se* motion was never signed. Appeal dismissed.
Editor's Note by Greg Mermelstein: All *pro se* "Form 40's" need to be checked by the PCR attorney to be certain they are signed by the client. If the Form 40 is not signed, have the client correct this defect immediately upon discovery pursuant to Rule 55.03(a). *See, e.g., Denny v. State*, 179 S.W.3d 381 (Mo. App., W.D. 2005)**(**holding that a Movant whose unsigned motion for postconviction failed to confer jurisdiction on the motion court is allowed the opportunity to correct the defect and sign motion in order to confer jurisdiction); *accord, Wallingford v. State*, 131 S.W.3d 781 (Mo. banc 2004).

Reid v. State, No. ED86566 (Mo. App., E.D. 5/30/06):
(1) Case remanded for evidentiary hearing on issue of whether defense counsel misadvised Movant on parole eligibility; (2) motion court's reliance on affidavit to reject claim was improper.
Facts: 24.035 Movant alleged, in relevant part, that he pleaded guilty on misadvice of counsel that he'd be eligible for parole in 18 months. In fact, Movant was not eligible for parole until he had served 40% of his sentence (which was longer). Prosecutor filed an affidavit from defense counsel stating that although counsel incorrectly told Movant he would be eligible for parole in 18 months, counsel also told Movant he could not promise how much time Movant would serve, and the "only guaranteed 'out date' was the final day of the nine year sentence." Motion court denied the claim without an evidentiary hearing, relying, in part, on the affidavit.
Holding: Motion court clearly erred in denying claim without a hearing. First, it was improper in the absence of a stipulation by the parties to rely on the affidavit. Movant had no opportunity to rebut the affidavit, since a hearing was not granted. In deciding whether to have a hearing, motion court should have reviewed the record without reference to the affidavit. Movant's claim is not refuted by record. Although counsel generally has no duty to inform Movant about parole eligibility, where counsel affirmatively misadvises Movant about that, this can affect the voluntariness of a guilty plea. Although Movant said at his plea that no promises were made to him about the sentence he would receive, this general inquiry by the trial court did not refute the claim that Movant had been given misadvice about parole eligibility. Movant received the sentence he plea bargained for, but his counsel misadvised him about parole eligibility. Movant's 24.035 motion alleged he would not have pleaded guilty and would have insisted on proceeding to trial if he knew the parole eligibility advice was wrong.

Sabatucci v. State, No. SD30380 (Mo. App. S.D. 11/19/10):
Holding: Where Movant timely filed his 24.035 motion in the wrong county, the motion court should have transferred it to the proper county under Sec. 476.410 instead of dismissing it.

Bott v. State, No. SD29918 (Mo. App. S.D. 3/31/10):
Holding: (1) Motion court erred in dismissing Movant's Rule 24.035 motion on grounds that Movant had been released from DOC custody because 24.035 does not require that movants still be incarcerated at the time the motion court decides their case; (2) motion court was required to enter sufficient Findings to allow for meaningful appellate review.

State ex rel. Whittenhall v. Conklin, No. SD29470 (Mo. App. S.D. 9/29/09):
(1) Where Probationer sought to raise a claim that trial court was without statutory authority to revoke probation, Probationer could raise this claim either in writ of prohibition, under Rule 24.035, or in habeas corpus; and (2) Even though Probationer had requested one continuance of his probation revocation hearing, where the court and State delayed having a hearing for three years after probation expired, court was without authority to revoke probation.

Facts: On September 18, 2000, Probationer was placed on probation for five years. On July 1, 2005, a probation violation report was filed, and the State filed a motion to revoke on July 21, 2005. The court tolled the probationary period. For the next three years, the probation revocation hearing was continued, one time at the request of Probationer. Additionally, the State filed various additional motions to revoke probation. In 2008, the court revoked probation and ordered sentence executed. Probationer brought a writ of prohibition.
Holding: (1) The State argues a writ of prohibition is not the correct remedy, and that Probationer must file a 24.035 motion. However, Rule 24.035 states that a person convicted of a felony who claims the court imposing sentence was without jurisdiction "may" file a 24.035 motion; the word "may" indicates 24.035 is an optional remedy, not an exclusive one. Probationers may challenge revocation of probation by writ of prohibition, by 24.035, or by habeas corpus. (2) Section 559.036.6 requires a trial court to make every reasonable effort to notify a Probationer of a probation violation and to conduct the hearing before expiration of the term of probation. Here, the only timely probation revocation motion filed was the one filed before September 18, 2005. The subsequent motions were all outside the period of probation and voidable. Even though Probationer asked for one continuance, he did not do so until 2006 and the hearing still was not held until 2008. The three-year delay in having a revocation hearing did not show that the trial court made every reasonable effort to hold a hearing within a reasonable time. Writ granted.

In re Wolf v. Steele, No. SD29850 (Mo. App. S.D. 7/17/09):
Where trial counsel told Defendant she would file a notice of appeal after trial but failed to do so and two years elapsed before Defendant discovered this, Defendant does have a remedy in habeas corpus because he was denied effective assistance of appellate counsel on direct appeal.
Facts: In 2007, Defendant was tried and convicted. Counsel told Defendant she would file a notice of appeal and that the appeal would take two years. However, trial counsel never filed the notice of appeal. In January 2009, having heard nothing about his appeal, Defendant asked about it and learned it had not been filed. Defendant filed a habeas corpus action alleging ineffective trial counsel for failure to file notice of appeal.
Holding: The State claims Defendant is barred by *Gehrke v. State*, 280 S.W.3d 54 (Mo. banc 2009), which held that postconviction counsel's failure to file notice of appeal in postconviction case did not have a remedy after the one year for late notice of appeal under Rule 30.03 expired. However, *Gehrke* is distinguishable because there is no constitutional right to effective postconviction counsel. The instant case is a direct appeal where there is a constitutional right to effective direct appeal counsel. Counsel's failure to timely file notice of appeal was ineffective. Habeas granted, with remedy to remand for resentencing to same sentence so Defendant can file notice of appeal thereafter.

Tabor v. State, No. SD29132 (Mo. App. S.D. 3/16/09):
Even though Movant filed a pro se Statement in Lieu of Amended Motion, where the record showed no action by counsel, a hearing is required to determine if counsel abandoned Movant.

Facts: Movant filed a pro se Rule 29.15 motion. Counsel entered an appearance. Subsequently, however, Movant filed a pro se Statement in Lieu of Amended Motion. The document stated that counsel had reviewed the record and found no additional grounds to raise, but counsel did not sign the document. No amended motion was ever filed. The motion court denied relief.
Holding: Rule 29.15(e) requires that counsel sign a Statement in Lieu of Amended Motion showing that counsel determined that there were no additional issues to raise. Here, 29.15(e) was violated because counsel did not file a statement in lieu, so the record does not show whether counsel performed the duties required by Rule 29.15. Here, a hearing is required to determine if counsel abandoned Movant by failing to file a counsel-drafted statement in lieu, or an amended motion.

State ex rel. Moore v. Brown, No. SD29089 (Mo. App., S.D. 11/19/08):
Rule 29.07 does not provide authority to resentence a Defendant, but only to withdraw a guilty plea.
Facts: Defendant pleaded guilty, and received an SES sentence. Several months later, Defendant sought to change her sentence on grounds of manifest injustice under Rule 29.07(d). The trial court changed the sentence. The State sought a writ of mandamus to prevent this.
Holding: 29.07(d) authorizes a trial court to withdraw a guilty plea, but does not grant authority for a re-sentencing. Defendant did not seek to withdraw her guilty plea. Rule 29.13(a) allows courts after a judgment of conviction to set aside a judgment for lack of jurisdiction or because the information does not charge an offense, but this is only allowed for 30 days after judgment and those grounds were not alleged here. No statute or Rule authorizes the court to resentence Defendant several months after her sentencing. Writ granted.

State ex rel. Nixon v. Sheffield, No. 28941 (Mo. App., S.D. 9/30/08):
Even though Movant's retained postconviction counsel missed the deadline for filing a 29.15 motion because he misunderstood the time limits, Movant could not later proceed in a state habeas corpus action because his counsel's actions did not constitute cause and prejudice, manifest injustice, or abandonment.
Facts: Movant retained private counsel to represent him in a Rule 29.15 motion. Counsel misunderstood the time limits of Rule 29.15 and missed the deadline for filing a 29.15 motion. Another counsel then filed a state habeas corpus action, and the court granted habeas relief on the merits, finding trial counsel was ineffective. The State appealed.
Holding: A prisoner who does not raise claims in a PCR proceeding waives them and cannot assert them in a later habeas case unless the prisoner can show "cause and prejudice" or "manifest injustice." Cause means some factor external to the defense impeded the filing of a timely motion, and manifest injustice requires a showing of actual innocence. Here, the original PCR counsel merely misunderstood the time limits. This is not "cause." The original PCR counsel did not abandon Movant because abandonment does not apply to the filing of the original "pro se" motion. Furthermore, Movant did not show actual innocence. He merely showed that his trial counsel was ineffective, and that is not actual innocence because no "new" evidence of innocence was produced.

Weekley v. State, No. 28743 (Mo. App., S.D. 9/22/08):
Holding: Where motion court only issued a docket entry denying Rule 29.15 relief, remand was required for entry of Findings of Fact and Conclusions of Law as required by 29.15(j) to allow for meaningful appellate review.

Editor's Note by Greg Mermelstein: There were two interesting footnotes. Note 4 states that counsel attached the movant's pro se motion to the amended motion. "This method does not address, however ... a potential conflict between the requirement of Rules 24.035(e) and 29.15(e) that require [PCR] counsel to present all of a client's pro se claims ... and the requirement that a member of the bar only present claims that are" not frivolous under Rule 4-3.1. Note 5 states that a different judge than the one who conducted the PCR hearing entered the order denying relief. While not deciding the matter, Southern District states that the "preferred practice" would be to have the same judge who conducted the hearing enter the Findings.

Volner v. State, No. 28433 (Mo. App., S.D. 5/29/08):
Holding: Even though counsel requested a 30 day extension of time under Rule 24.035 five days after the initial 60 days under the Rule had expired, where the motion court granted the extension and an amended motion was filed within the 30 day extended period, the motion court had the power to grant the extension under Rule 24.035(g) and the amended motion was timely.

Editor's Note by Greg Mermelstein: Prior cases have held that a request for extension of time under Rules 24.035 and 29.15 must be made and granted within the initial 60 days allowed under the Rules, and that courts lack power to grant requests made after the initial time period expires. *See, e.g., State v. Lawrence*, 791 S.W.2d 729, 731 n. 1 (Mo. App., E.D. 1990)(decided when the initial time period was 30 days). The holding in *Volner* may be an anomaly, because the Movant was trying to claim abandonment by postconviction counsel for filing an allegedly untimely amended motion. I recommend that attorneys continue to seek and obtain extensions of time within the initial 60 days of the Rules.

State v. York, No. 28523 (Mo. App., S.D. 5/13/08):
(1) Where a prior judge had granted a motion to allow Defendant to withdraw his guilty plea, and then a subsequent judge granted the State's motion to reinstate the plea, the subsequent judge could not reinstate the plea because once it was withdrawn, it could not be reinstated by another judge. (2) The instant case is appealable by direct appeal, because this is not an appeal of a guilty plea, because no plea existed at the time of sentencing.
Facts: Defendant, with Public Defender counsel, entered an *Alford* plea to robbery. Sentencing was scheduled for later. Before sentencing, Defendant filed a motion to proceed *pro se*, and moved to withdraw his guilty plea. The plea judge granted Defendant's motion to withdraw his guilty plea, and sent the case to another judge for trial. In the new division, Defendant signed a waiver of counsel form, but said he was representing himself because of "systemic problems" in the Public Defender's Office, and that the Public Defender had not represented him at all. Defendant said he would not choose self-representation if he could have an attorney other than someone from the

Public Defender. Although his concern focused on his particular Public Defender, Defendant did not believe the Public Defender System could adequately represent him or anyone else. The judge told the prosecutor that the judge did not think Defendant's waiver of counsel was going to stand up on appeal under these circumstances. The prosecutor then filed a motion to reinstate the guilty plea. The trial court granted this and sentenced Defendant. He appealed.

Holding: The State claims that this is a prohibited direct appeal of a guilty plea, and that the proper remedy is under Rule 24.035. The State mischaracterized this appeal. The issue is whether a guilty plea existed at the time the judge undertook to sentence Defendant. It is not an appeal of a guilty plea. When a guilty plea is withdrawn, a defendant is restored to the position he occupied before entering the plea. Here, the first judge allowed Defendant to withdraw his plea. There was nothing that could be "reinstated" by the second judge. Judgment reversed and case remanded.

Smith v. State, No. 28283 (Mo. App., S.D. 12/13/07):

Even though postconviction counsel conducted an evidentiary hearing and submitted a deposition of Movant's testimony, where no amended postconviction motion was ever filed by counsel and no statement in lieu of amended motion was ever filed, there is a presumption of abandonment and case is remanded for abandonment hearing.

Holding: Rule 24.035(e) states that if counsel does not file an amended motion, counsel shall file a statement stating that the *pro se* motion asserts all claims. If counsel does not comply with this rule, abandonment is presumed. Counsel placed nothing in the record that an amended motion was not warranted. Movant claimed in the motion court in a *pro se* filing that counsel had not participated in his case. Even though there was an evidentiary hearing and counsel submitted a deposition of Movant, Movant is entitled to an abandonment hearing to determine if postconviction counsel abandoned Movant by not filing an amended motion.

Bullock v. State, No. 28258 (Mo. App., S.D. 10/22/07):

Holding: When raising claim of ineffective appellate counsel, merely presenting as evidence counsel's brief on appeal and showing that an issue was not raised does not overcome a presumption that appellate counsel had a strategic reason for not raising the claim on direct appeal.

Editor's Note by Greg Mermelstein: In order to raise ineffective appellate counsel, PCR counsel need to be sure to call appellate counsel at a hearing and question counsel why they didn't raise issues.

Cole v. State, No. 27954 (Mo. App., S.D. 5/31/07):

Where 29.15 Movant alleged ineffective appellate counsel but failed to call appellate counsel to testify at the 29.15 hearing as to why appellate counsel failed to raise issue on appeal, Movant abandoned the claim.

Facts: 29.15 Movant alleged appellate counsel failed to raise issue on appeal. At the 29.15 hearing, Movant did not call appellate counsel to testify. Movant only introduced counsel's brief to show counsel had not raised the issue.

Holding: Movant bore the burden of proof to show appellate counsel was ineffective. Counsel was not obligated to raise every issue. Counsel was permitted to winnow out non-frivolous issues in favor of other arguments. All Movant showed at his hearing was that counsel failed to raise an issue on appeal. Counsel was not called to testify at the hearing, and Movant presented no other evidence that counsel's decision not to raise the issue was unreasonable. Therefore, Movant abandoned his claim. Movant's failure to present evidence at a hearing in support of the claim constituted abandonment.

Wise v. State, No. 27766 (Mo. App., S.D. 4/5/07):
(1) Where motion court dismissed Movant's 24.035 motion for failure to prosecute in 1999, but Movant did not file motion to reinstate until 2002, the motion court lacked jurisdiction to reinstate because jurisdiction expired 30 days after entry of judgment in 1999; and (2) Even though Movant may have filed a motion claiming abandonment by counsel, where that motion was denied in 2002, the motion court lost jurisdiction 30 days after this denial, and could not later reinstate the cause.
Facts: Motion court dismissed 24.035 motion for failure to prosecute in 1999. In 2002, Movant filed a motion to reinstate. The motion court denied the motion to reinstate. In 2003, Movant filed a motion for evidentiary hearing. The motion court granted this motion, and a hearing was held. After the motion court denied relief on the merits, Movant appealed.
Holding: Rule 75.01 states a trial court retains jurisdiction over a judgment for only 30 days. Rule 81.05 extends the jurisdiction to cover timely after-trial motions. When jurisdiction expires, however, the court can no longer act. The 1999 dismissal was a judgment. The motion court lost jurisdiction over it 30 days after entry, and thus, could not grant the 2002 reinstatement motion, unless the 2002 motion alleged abandonment by PCR counsel. Assuming that motion alleged abandonment, however, the motion court denied it in 2002, and therefore, lost jurisdiction 30 days after that. Movant did not appeal. Instead, Movant filed a motion for a hearing in 2003. The motion court was without jurisdiction to grant that because it was filed more than 30 days after the 2002 judgment. Since the motion court lacked jurisdiction to do anything after 2002, the Court of Appeals lacks jurisdiction, too. Appeal dismissed.

Brooks v. State, No. 27682 (Mo. App., S.D. 1/31/07):
Where motion court in Rule 24.035 case vacated Movant's sentence and, before resentencing occurred, Movant filed Notice of Appeal to challenge the failure to set aside his plea, the Court of Appeals lacks jurisdiction to hear the appeal because there is no "final judgment" since Movant has not been resentenced.
Facts: Movant filed 24.035 motion to challenge his guilty plea and sentence. The motion court granted sentencing relief and ordered resentencing, but did not vacate his plea. Before resentencing occurred, Movant filed Notice of Appeal to challenge the failure to vacate the plea.
Holding: The Court of Appeals lacks jurisdiction because there is no "final judgment" since Movant has not been resentenced. Without resentencing, there is no "final judgment" to contest in a postconviction case. Once a final judgment is entered, Movant can attack his plea through a Rule 24.035 case. The motion court was entitled to rule on such a case before appeal to the appellate court.

Editor's Note by Greg Mermelstein: This case conflicts with the practice in capital cases followed by the Missouri Supreme Court. In capital cases where Movants have been granted new penalty phase trials, the Supreme Court hears appeals of the guilt phase *before* the new penalty phase trials occur, i.e., *before* resentencing. Judicial economy seems to be better served by the Supreme Court's approach, since in **Brooks**, the Movant is apparently going to have relitigate his guilty plea claims in a second PCR in the motion court, which the State could arguably claim is a prohibited "successive" motion. I personally believe **Brooks** is wrongly decided and conflicts with the Supreme Court's approach. Until the Supreme Court "finally resolves" this issue some day, I would continue to file Notices of Appeal in these situations in the Eastern and Western Districts, and probably also in the Southern District, because of the "successive" motion issue.

Johnson v. State, No. 27601 (Mo. App., S.D. 12/29/06):
(1) Where Movant filed a second pro se motion prior to the time for filing an Amended Motion, and counsel filed a statement in lieu of Amended, both the first and second pro se motions were effective to raise claims; (2) motion court erred in failing to enter Findings on claims in second pro se motion.
Facts: Movant filed a pro se motion. Counsel was appointed and granted time to file an Amended. Movant filed a second pro se motion listing claims he said he wanted in an Amended. Counsel then filed a statement in lieu of Amended Motion which stood on both pro se motions. Motion court issued Findings only on the claims in the first pro se motion.
Holding: Movant's second pro se motion was timely filed before the due date for an Amended. Given that counsel then filed a statement in lieu which said counsel was standing on both pro se motions, motion court erred in not issuing Findings on both pro se motions.

Dismang v. State, No. 27680 (Mo. App., S.D. 11/29/06):
Holding: Where Movant/Appellant's brief did not discuss the motion court's Findings, the Court of Appeals will not review the claim of error because the Findings are presumptively correct, and Movant/Appellant has not argued why they are clearly erroneous.

Rutherford v. State, No. 27183 (Mo. App., S.D. 6/5/06):
(1) Pro se "Amended Motion" filed after the time for filing an Amended Motion expired is untimely and does not invoke jurisdiction on claims contained therein; (2) even though Public Defender Office filed motion to "reappoint" counsel, which was sustained, the subsequent Amended Motion filed under the reappointment order was untimely because it was more than 90 days from the appointment date of original counsel; however, case is remanded to determine if the late filing of the Amended Motion is an "abandonment" not caused by Movant.
Facts: On May 5, 1998, a mandate issued on direct appeal. Movant timely filed a pro se Rule 29.15 motion on July 13, 1998, and the Public Defender was appointed on this date. The next activity is on September 28, 1998, when the Public Defender filed a motion to "reappoint" counsel, and requested a 30-day extension to file an Amended Motion. The

motions were sustained on September 29. On December 31, 1998, the Public Defender filed an Amended Motion. On June 23, 2000, Movant filed a pro se Amended Motion. The motion court issued Findings on July 14, 2005, denying relief on the claims in the pro se Amended Motion.

Holding: (1) The motion court lacked jurisdiction to decide the pro se Amended Motion claims because the pro se Amended Motion was untimely. The initial pro se motion filed on July 13, 1998, was timely because filed within 90 days of the direct appeal mandate. The Public Defender was appointed on July 13, 1998. The initial 60-day time period for filing an Amended Motion expired on September 11, 1998. The pro se Amended Motion was not filed until June 2000, about 21 months later. The motion court lacked jurisdiction to consider claims in this untimely Amended Motion. (2) Regarding the Amended Motion filed by counsel on December 31, 1998, it is also untimely. The last day for filing the Amended Motion was September 11, 1998. The Amended Motion filed on December 31, 1998, was 111 days too late. Nevertheless, the motion court can permit filing this motion if the failure to file a timely Amended resulted exclusively from counsel's action or inaction, and was not the fault of Movant. Therefore, the case is remanded for an abandonment hearing to determine why the Amended was untimely filed.

Crowder v. State, No. 27227 (Mo. App., S.D. 5/17/06):

Case remanded to consider "Motion To Reconsider Judgment" which alleged Rule 29.15 motion was timely.

Facts: Movant filed *pro se* Rule 29.15 motion, which was file-stamped April 4, 2003, making it untimely under the Rule. Motion court entered order on August 1, 2005, dismissing motion as untimely filed. On August 11, 2005, Movant filed "Motion To Reconsider Judgment," which contained an affidavit and other documents showing that Movant had mailed his motion to the Clerk's Office on February 28, 2003 (which was timely), but the Clerk returned it for lack of a signature on March 31, 2003. Movant promptly signed the motion and sent it back to the Clerk on April 1, 2003. Movant's "Motion To Reconsider Judgment" cited *Wallingford v. State,* 131 S.W.3d 781 (Mo. banc 2004) for proposition that "jurisdiction is restored whenever an unsigned *pro se* motion (otherwise timely filed) is promptly signed after the omission is brought to the [Movant's] attention." The motion court did not rule on the "Motion To Reconsider." Movant filed Notice of Appeal on September 2, 2005.

Holding: The "Motion To Reconsider" included allegations that the trial court committed errors of law in dismissing the 29.15 motion. The "Motion To Reconsider" is therefore treated as a motion for new trial under Rule 81.05. Since it was not ruled by the trial court, the motion was deemed overruled upon expiration of 90 days following August 11, 2005, the date it was filed. Rule 78.06. Notice of Appeal was filed September 2, 2005. Although filed prematurely, it was considered filed immediately after the time the judgment became final for purposes of appeal. Under the facts of this case, the motion court abused its discretion by failing to decide the pending after-trial motion and permitting it to be denied by operation of law. Case is remanded for the purpose of affording Movant a hearing to determine if the motion court, under the facts of this case, has jurisdiction to determine Movant's Rule 29.15 motion on the merits.

Hollingshead v. State, No. WD71775 (Mo. App. W.D. 11/23/10):
Holding: Where motion court summarily denied Rule 24.035 claims without specific Findings, this was error since 24.035(j) requires sufficient Findings for meaningful appellate review. Footnote 3, however, states: "The dissenting opinion makes a persuasive argument concerning the application of Rule 78.07(c) to foreclose [Movant's] claim of error. The State did not argue that [Movant] failed to preserve his current claim by failing to file a Rule 78.07(c) motion. … [W]e believe the applicability of Rule 78.07(c) in postconviction proceedings is better resolved in a case in which the issue has been the subject of a full adversarial presentation."
Dissenting Opinion: The issue is not preserved for appeal because Movant failed to file a motion under Rule 78.07(c). 78.07(c) provides that in all cases, allegations of error relating to the form or language of the judgment, "including the failure to make statutorily required findings," must be brought to the motion court's attention in a motion to amend judgment in order to be preserved for appeal. This alleviates unnecessary appeals, reversals and remands. Findings are required under 547.360.10 and 24.035(j) and 29.15(j). 78.07(c) promotes the purpose of the postconviction rules by allowing an opportunity to expeditiously correct a judgment. Where a Movant fails to file a 78.07(c) motion, an appeal claiming the motion court failed to enter proper findings should be dismissed.

Stone v. Missouri Deparment of Corrections, No. WD71161 (Mo. App. W.D. 5/25/10):
Holding: Generally, when a circuit court denies a petition for mandamus, the remedy is to file another writ in a higher court, but when the circuit court denies a writ of mandamus following an answer or motion directed to the merits and in doing so determines a question of fact or law, then the court's ruling is final and appealable by way of direct appeal. Because the DOC's motion to dismiss attacked the merits of petitioner's petition and the circuit court denied the petition on the merits, the order is final and appealable by direct appeal.

State ex rel. Koster v. Jackson, No. WD71165 (Mo. App. W.D. 1/26/10):
Even though Defendant did not file a 24.035 motion, where he had pleaded guilty before the Turner case and one of his prior convictions was a municipal SIS, the municipal SIS could not be used to enhance his sentence and habeas relief is granted.
Facts: In 2002, Defendant (Petitioner) pleaded guilty to DWI as a "persistent offender" and was sentenced to five-years SES. In 2005, his 5-year sentence was executed. In 2008, *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), held that municipal SIS convictions could not be used to enhance sentence. Defendant had a prior municipal SIS used to enhance his sentence. Without it, his sentence could not have exceeded one year. He sought habeas corpus relief. The circuit court granted it, and the State appealed by writ of certioriari.
Holding: The State argues that because Defendant did not file a Rule 24.035 motion he waived his right to seek postconviction relief under *Turner*. However, a habeas petitioner can overcome such a procedural default by showing (1) actual innocence, (2) a jurisdictional defect, or (3) the procedural default was caused by something external to the defense and prejudice. A sentence in excess of that authorized by statute falls under

the jurisdictional defect exception, even though it is now a matter of a court's "authority" rather than jurisdiction under *Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). Here, the sentencing court exceeded its authority in imposing a 5-year sentence because municipal SIS convictions cannot be used to enhance sentence under the then-DWI statute. Grant of habeas relief affirmed.

Cherco v. State, No. WD70071 (Mo. App. W.D. 2/9/10):
Holding: Rule 24.035 movants may claim that counsel was ineffective at sentencing without seeking vacation of the guilty plea; prejudice test for counsel's failure to call character witnesses is whether there is a reasonable probability the sentence would have been lower.

State ex rel. Scroggins v. Kellogg, No. WD71763 (Mo. App. W.D. 3/9/10):
Once consecutive sentences are imposed, they are final and court has no authority under Rule 29.05 to change the sentences to order that they be concurrent.
Facts: In 2002, Defendant pleaded guilty and was given two consecutive sentences, with execution suspended. In 2004, Defendant's probation was revoked and the consecutive sentences executed. In 2009, Defendant asked the court under Rule 29.05 to run the sentences concurrently. The trial court granted this. The State sought a writ of mandamus to stop it.
Holding: A trial court lacks authority to amend a judgment once a sentence becomes final. This is true even in cases where the court suspended execution of sentence. Rule 29.05 applies only in trial cases, and allows a court to reduce a sentence recommended by a jury between the time of trial and sentencing. Once sentence is imposed, it becomes final and the court cannot alter it under 29.05. Writ granted.

Frye v. State, No. WD70504 (Mo. App. W.D. 3/23/10):
(1) Where defense counsel failed to communicate a favorable plea offer to Defendant-Movant, this was ineffective assistance of counsel where Movant would have accepted the plea offer; (2) however, although appellate court vacates conviction and remands, appellate court has no authority to force State to re-offer the noncommunicated plea offer.
Facts: Movant was charged with felony driving while revoked. The State made a plea offer to defense counsel for misdemeanor driving while revoked. Defense counsel, however, failed to communicate the offer before the time expired, and Movant never knew about it until after his later guilty plea and sentencing. Movant ultimately pleaded guilty to felony driving while revoked in an open plea and received three years.
Holding: Failure to communicate a plea offer constitutes ineffective assistance of counsel, and violates Rule 4-1.4 that a lawyer promptly inform clients of plea offers. The motion court denied relief on grounds that counsel could not recall if he communicated the plea offer, and even if he failed to do so, Movant was at fault for not staying in touch with counsel. However, the record does not support this finding. Counsel testified he was not sure if he communicated the plea offer. Even though Movant did not come to court for some court appearances, this was after the plea offer had expired. Further, counsel made no attempt to mail Movant a letter about the plea offer, and never testified that he tried to telephone Movant about the offer. Under these

circumstances, the record does not support that Movant was at fault or that counsel communicated the offer. The State contends that Movant cannot show prejudice because he cannot show that "but for" trial counsel's failure to communicate the offer, he would have "insisted on proceeding to trial." However, the "insisted on proceeding to trial" misreads the prejudice requirement in this situation. Here, had Defendant known of the plea offer, he would not have entered an open plea, but would have accepted the offer; this is the correct allegation of prejudice here. The last issue here is what remedy a court can impose. While the appropriate remedy might be to afford Movant the opportunity to plead to the misdemeanor charge -- and this remedy is used by Texas courts -- the Missouri appellate court is not empowered to order the State to reduce the charge against Movant. All the Missouri court can do is vacate the conviction and sentence and remand. Even though this may leave Movant with only the result of pleading again to the felony or going to trial on the felony, this is the only remedy the appellate court can impose. Conviction vacated and remanded.

Wills v. State, No. WD71271 (Mo. App. W.D. 7/20/10):
Holding: In order to preserve claim for appeal that motion court failed to issue findings on all claims, movant must file in motion court a post-Findings motion to amend the judgment under Rule 78.07(c) for lack of proper findings.

Starry v. State, No. WD71557 (Mo. App. W.D. 8/31/10):
Where more than six years had elapsed from time when Defendant/Movant was sentenced to time when court began probation revocation proceedings, the court was without power to revoke probation because probation could only extend up to six years.
Facts: On October 22, 2001, Movant pleaded guilty to a Class C felony and was placed on five years probation. On October 17, 2006, a probation violation hearing was held which in April 2007 led the court to extend the probation for one year. On November 6, 2007, the court issued a warrant for a new probation violation, and ultimately revoked probation. Movant filed a 24.035 motion alleging that her revocation was invalid because her probation had expired.
Holding: Sec. 559.016.3 provides that the total time on probation could not exceed five years plus one extension of one year, for a total of six years. Once a term of probation expires, the court has no authority over a defendant. Here, Movant's probation expired October 21, 2007, six years after her sentence was imposed. The State claims that because the court issued various warrants for Movant during the six years, that the term was somehow stayed. But there is no tolling of the time for probation here because the court never suspended the probation.

Garcia v. State, No. WD69671 (Mo. App. W.D. 12/15/09):
(1) Court of Appeals would remand case upon Movant's request to be able to prove his 24.035 motion was timely filed; and (2) even though Clerk's Office did not open a file on Movant's pro se 24.035 motion, where Movant had a file-stamped copy of the motion showing it was timely filed, the motion was timely.
Facts: Movant was sentenced and delivered to the DOC on March 20, 2006. On April 17, 2006, Movant filed a pro se Rule 24.035 motion, but the Clerk's Office merely file stamped it and sent it back to Movant. In December 2007, Movant filed an Amended

Motion, and the Clerk's Office opened a case at that time. In January 2008, the motion court dismissed the case as untimely. Movant appealed. During the appeal, Movant requested a remand to prove that his pro se motion was timely filed. A remand showed these facts.

Holding: Movant's motion was timely filed within 180 days of his delivery to the DOC on April 17. However, the Clerk's Office failed to open a case and returned Movant's motion to him. Movant's motion was "filed" on April 17, not the later date of the Amended Motion when the Clerk opened a file of the case. Therefore, his motion was timely.

State v. Vogt, No. WD70378 (Mo. App. W.D. 12/15/09):

Where Defendant failed to bring a timely 24.035 action, he could not raise his claim via a 29.07(d) motion to withdraw his guilty plea, and his only possible remedy is habeas corpus, even though his previous habeas corpus cases had been denied.

Facts: Defendant pleaded guilty to drug offense stemming from search of a car. After the time for filing a 24.035 motion had expired, Defendant's co-defendant was successful in getting the search of the car suppressed. Defendant then filed habeas corpus cases in the circuit and appellate courts alleging that the search of the car violated the 4th Amendment and that his counsel had been ineffective in failing to challenge the search. These habeas corpus petitions were denied. Defendant then filed a 29.07(d) motion to withdraw his guilty plea on these grounds.

Holding: In *Brown v. State*, 66 S.W.3d 721 (Mo. banc 2002), the Court held that 29.07 cannot be used as a means to evade the time limits for filing a 24.035 motion. *Brown* held that even where a defendant asserts he could not have brought the claim within the time limits set out in 24.035, the defendant must raise his claim in habeas corpus, not under 29.07(d). The relevant issue is whether his claim is within the scope of those enumerated in 24.035, and Defendant's claims are within that scope. Here, Defendant has the ability to seek relief by means of a habeas petition -- whether he can establish a claim that warrants habeas relief has no bearing on the issue of whether the *Brown* holding applies here.

White v. State, No. WD69901 (Mo. App. W.D. 4/21/09):

Holding: Where motion court dismissed Rule 29.15 motion for not being filed within 90 days of the "opinion date" on direct appeal, the court clearly erred because the relevant date under 29.15(b) is the later "mandate date."

Andrews v. State, No. WD69603 (Mo. App. W.D. 3/10/09):

(1) Whether a postconviction motion is timely-filed is an issue of "jurisdictional competence," not subject-matter jurisdiction, and therefore, is "just an issue of trial error"; and (2) Where Movant who was on probation claimed that execution of his 5-years sentence violated various probation statutes, this claim was cognizable in a Rule 24.035 proceeding because whether probationary period has ended is a cognizable issue in 24.035.

Facts: Movant pleaded guilty, received a 5-year SES, and was put on probation for three years. Toward the end of the three years, the trial court extended the probationary term for another two years. During this time, Movant also was sentenced to a DOC treatment

program under 559.115 and released. Later, Movant violated probation and the trial court ordered his 5-year sentence executed. He filed a 24.035 motion claiming his probation could not be revoked because the court had lacked authority to extend his probation.
Holding: (1) The State contends that Movant's 24.035 motion is untimely. Despite prior cases holding that timeliness is "jurisdictional," the case of *Webb ex rel. J.C.W. v. Wyciskalla*, 2009 WL 186140 (Mo. banc Jan. 27, 2009), shows the issue is really "jurisdictional competence," not subject-matter jurisdiction. Thus, timeliness "is not an issue of jurisdiction and is just an issue of trial error." Here, the record is not entirely clear when Movant was delivered to the DOC for his treatment program, but it appears from the anticipated "bed date" that Movant did file his motion within 180 days of his delivery, so it is timely. (2) The State claims Movant's claim is not cognizable because his claim deals with whether or not the circuit court could execute his sentence. Prior appellate decisions are unanimous that a claim alleging the trial court lacked authority to revoke probation and execute a sentence because the probationary period has ended are cognizable in a 24.035 motion. On the merits, however, the court had authority to extend and revoke here.

Gehlert v. State, No. WD69445 (Mo. App. W.D. 2/10/09):
Even though there were no guilty plea transcripts available, where postconviction counsel failed to file an amended motion, this was evidence that Movant may have been abandoned and motion court should have conducted an abandonment hearing.
Facts: In 2005, Movant filed a 24.035 motion, and postconviction counsel entered an appearance and requested transcripts of the guilty plea. Between 2005 and 2008, counsel told Movant that an amended motion had not been filed because no transcript was available. In 2008, the motion court ruled that Movant's pro se motion failed to raise cognizable issues and dismissed the case.
Holding: The motion court erred in not holding a hearing to determine if Movant was abandoned by counsel. Abandonment occurs where counsel takes no action on behalf of Movant such that Movant is deprived of meaningful postconviction review. Here, the record reflects that counsel ordered the transcript, but the record does not reflect that counsel did anything further. Even though there may not be a transcript available, that does not justify failing to perform the duties required under Rule 24.035 and failing to file an amended motion. A lost transcript is a fact of life with which parties must contend. Case remanded for an abandonment hearing.

State v. Ison, No. WD68739 (Mo. App., W.D. 11/18/08):
Even though Defendant's probation had expired, where he had received an SES sentence after a guilty plea, he could move to vacate the plea for manifest injustice under Rule 29.07(d).
Facts: Defendant pleaded guilty to a sex offense and received an SES. After his probation expired, the victim recanted her testimony and Defendant sought to withdraw his guilty plea because of this.
Holding: Rule 29.07(d) allows a withdrawal of guilty plea "to correct manifest injustice." Case law has held that Rule 29.07(d) cannot be used to raise grounds that could have been raised in a Rule 24.035 case. Even if a matter could not have been raised in 24.035 (because, for example, it was unknown), the relief may be habeas

corpus. 29.07 is not available after discharge from probation where a defendant received an SIS because there is no final judgment (conviction). Here, however, because Defendant received an SES and was never committed to the DOC, 24.035 does not apply and 24.035's time limit does not apply to 29.07. Defendant can proceed under 29.07 to try to withdraw his plea for "manifest injustice."

State v. Craig, No. WD68750 (Mo. App., W.D. 10/28/08):
Even though Defendant claimed that his prior DWI convictions could not serve as enhancements for various reasons, where Defendant pleaded guilty, he could not take a direct appeal of the guilty plea for this reason, but could only challenge the evidentiary basis for his plea by postconviction motion.
Facts: Defendant was charged with DWI as an aggravated offender. He allegedly had three prior DWI convictions. Prior to pleading guilty, Defendant filed a motion challenging his prior convictions on grounds that they did not comply with various court rules and there was no record of one of the convictions. The plea court found Defendant to be an aggravated offender. He appealed.
Holding: The Court of Appeals must address its jurisdiction, and finds no jurisdiction to direct appeal here. The only issues cognizable on direct appeal from a guilty plea are subject matter jurisdiction and the sufficiency of the charging instruments. Defendant does not allege the court lacked subject matter jurisdiction. While he claims the court erred in refusing to dismiss the information, the challenge is grounded on the evidence the information was based on, rather than the sufficiency of the charging instrument itself. A complaint about the evidentiary basis for the trial court's finding is not subject to direct appeal, but may be raised in a postconviction motion. Appeal dismissed.

Charron v. State, No. WD69016 (Mo. App., W.D. 6/17/08):
Holding: Even though Petitioner claimed his sentence violated a state statute, he could not challenge this in a declaratory judgment action under Sec. 527.010, but might be able to do so in state habeas if he could show cause and prejudice for failing to raise the claim in a 24.035 or 29.15 action. Petitioner could challenge eligibility for parole via a declaratory judgment action, but not attack the "validity" of his sentence.

Gehrke v. State, No. WD67823 (Mo. App., W.D. 5/30/08):
Movant was entitled to hearing on claim that postconviction counsel abandoned Movant by failing to file a notice of appeal from denial of postconviction relief.
Facts: Movant was denied Rule 24.035 relief in 2001. Postconviction counsel did not appeal. In 2006, Movant filed a motion to reopen the 24.035 proceedings on grounds of abandonment. Movant alleged that he wanted to appeal, and that postconviction counsel told him he would appeal, but did not. The motion court denied relief without a hearing.
Holding: Failure to file a timely appeal of a postconviction case constitutes abandonment. A motion to reopen states a claim of abandonment unless the delay in filing the appeal was due to Movant's negligence or intentional conduct. Here, Movant alleged that postconviction counsel failed to appeal, despite Movant's request and counsel's statements that counsel would appeal. A hearing is warranted.

Mitchem v. State, No. WD67270 (Mo. App., W.D. 3/25/08):
(1) Where PCR counsel did not receive notice that motion court entered Findings until after time for appeal expired, the motion court can reissue new Findings on grounds of "abandonment" of PCR counsel for not filing a notice of appeal, and the Movant can appeal from the new Findings; and (2) even though PCR counsel did not call direct appeal counsel to testify to ineffective appellate counsel claim, issue was not abandoned where PCR counsel presented the direct appeal briefs, new trial motion, and trial transcript to show appellate counsel failed to raise issue.
Facts: In 2005 the Rule 29.15 court issued Findings of Fact, Conclusions of Law denying relief on the merits in Movant's case. However, PCR counsel did not receive notice of this, and accidently learned Findings had been issued in 2006, after the time for filing any notice of appeal had expired, including late notice of appeal under Rule 30.03. PCR counsel filed a motion with the motion court saying that the failure to appeal was solely due to PCR counsel's failure to monitor the case, was an "abandonment," and not due to fault of Movant. The motion court found PCR counsel had "abandoned" Movant, and re-issued new Findings. Movant appealed the merits, and the State claimed lack of jurisdiction on appeal.
Holding: (1) The motion court can reopen proceedings in a 29.15 case if the Movant was abandoned by PCR counsel. *Fenton v. State*, 200 S.W.3d 136 (Mo. App., W.D. 2006) held that PCR counsel abandoned a 27.26 Movant by failing to file a notice of appeal. The failure to appeal under 29.15 is also an abandonment, where the failure to appeal was due to PCR's counsel's actions, and not due to delay resulting from Movant's negligence or intentional conduct. Thus, there is jurisdiction to appeal. (2) The State claims that Movant abandoned his ineffective direct appeal appellate counsel claim by not calling appellate counsel to testify. However, the claim is not abandoned because Movant presented as evidence the direct appeal briefs, the new trial motion and the trial transcript to show appellate counsel failed to raise the claim.

Editor's Note by Greg Mermelstein: At the time of this opinion, 3/25/08, the Missouri Supreme Court is currently considering in *Crenshaw v. State* whether PCR counsel's failure to file a notice of appeal constitutes "abandonment." I would watch for the Supreme Court's holding in *Crenshaw* before relying on this case. Also, other cases have held that failure to call direct appeal counsel to testify waives an ineffective assistance of appellate counsel claim. *See Cole v. State*, 223 S.W.3d 927, 931-32 (Mo. App., S.D. 2007). Therefore, I continue to recommend that PCR attorneys call direct appeal counsel to testify at evidentiary hearings in 29.15 cases, so that you do not risk having the issue deemed waived.

Additional Editor's Note by Greg Mermelstein: *Crenshaw* was later decided by the Supreme Court, but then may have been effectively overruled by *Gehrke v. State*, No. SC89527 (Mo. banc 3/31/09).

Hudson v. State, No. WD67082 (Mo. App., W.D. 1/22/08):
Jury selection process was not random where venirepersons were seated oldest to youngest, and this claim is cognizable in a 29.15 case.
Facts: When venirepersons called for jury duty arrived at the courthouse, they were seated oldest to youngest due to a computer glitch. The practical effect was that after voir dire and strikes, the petit jury would be chosen from the oldest venirepersons.

Defendant was convicted at trial. He later filed a Rule 29.15 motion claiming the jury selection process was not random.
Holding: This claim is cognizable under the facts here. The claim could not have been adequately raised on direct appeal because it was not preserved for appeal, since trial counsel had not preserved it. Appellate counsel chose to not raise it on direct appeal for this reason. Multiple sections of Chapter 494 RSMo. require that jury selection procedures be random. Seating venirepersons oldest to youngest is a substantial failure to comply with the statute, and a new trial is warranted even in the absence of showing actual prejudice.

McQuary v. State, No. WD67201 (Mo. App., W.D. 12/26/07):
Movant can raise in 29.15 case that a juror intentionally failed to disclose relationship with State's witness, where there was no opportunity to litigate this previously.
Facts: On voir dire, a juror failed to answer a question about whether he knew a State's witness. Defendant-Movant was convicted. In his new trial motion, he alleged that the juror had a girlfriend who knew the State's witness. While the direct appeal was pending, Movant discovered additional evidence showing the juror personally knew the State's witness, and filed a motion with the Court of Appeals to remand the case for a hearing on that, but the Court of Appeals denied this. Movant filed a 29.15 motion in which he alleged the juror failed to disclose the relationship. The State claimed this issue was not cognizable in a 29.15 proceeding, and had been litigated on direct appeal.
Holding: The juror issue is cognizable because constitutional violations can be addressed under 29.15 if "exceptional circumstances" are shown justifying why the issue was not raised on direct appeal. Movant did not have an opportunity to litigate this claim prior to or on direct appeal. His new trial motion did not raise this claim, since Movant was not aware of it until after that time. Even though the Court of Appeals denied a remand to litigate the claim, that was not an adjudication on the merits. The Court of Appeals is limited to reviewing claims that are in the record, and denying a remand was not an adjudication on the merits here, or a full opportunity to litigate the claim. Movant's first opportunity to litigate it is in the 29.15. The motion court believed it did not have any authority to decide this claim. That is error, and case remanded for further proceedings.

Buchili v. State, No. WD67269 (Mo. App., W.D. 11/13/07):
(1) New trial granted in Rule 29.15 proceeding where State violated "Brady" by failing to disclose a complete video which would have tended to refute the State's timeline of the crime, and show Defendant's innocence; (2) 29.15 motion need not plead "every fact" underlying a claim.
Facts: Defendant was convicted of murder. There was a portion of a video disclosed to the defense before trial which had a time-stamp on it. The State's theory was that the time-stamp was inaccurate, however. The defense theory was that the time on the tape was accurate and that this indicated Defendant could not have done the crime. After trial Defendant filed a 29.15 motion claiming the State failed to disclose the entire tape, and that the entire tape, combined with another witness, would have shown the time-stamp was accurate.

Holding: The State first claims that the "Brady" claim is not properly pleaded in the amended 29.15 motion. The motion , however, discussed the videotape and stated it would discredit the State's timeline. While Missouri is a fact-pleading state, a 29.15 motion does not need to allege "every fact" underlying a claim. Rather, the law is that a motion must make more than a general allegation of a "Brady" claim, and must allege facts supporting the claim. This motion did so. On the merits, the failure to provide the defense with the full version of the video prevented the defense from showing that the time-stamp on the video was accurate. This would have provided Defendant with plausible evidence to support his theory of innocence by showing he did not have enough time to commit the murder.

State ex rel. Goldesberry v. Taylor, No. WD67650 (Mo. App., W.D. 10/02/07):
Even though crime victims did not get prior notice of Defendant's guilty plea and sentencing, trial court had no jurisdiction to later set aside the guilty plea and sentence at the Prosecutor's request to benefit victims.
Facts: Defendant injured victims in a traffic incident and was charged with traffic offenses. At his arraignment, the Prosecutor was out of the courtroom, and Defendant pleaded guilty and was fined $267. The next day, the Prosecutor learned Defendant had pleaded guilty and filed a Rule 29.07(d) motion to set aside the plea on grounds that the victims had not had an opportunity to be present at the plea. The trial court set aside the plea. Defendant filed a writ of prohibition.
Holding: Once judgment and sentence occur in a criminal case, the trial court loses jurisdiction. Rule 29.07(d) states a court may set aside a plea for "manifest injustice," but this Rule is generally to be invoked by a defendant, not the Prosecutor. The "victim's rights" statute, 595.209, and constitutional provision do not allow the setting aside of the plea, because Article I, Sec. 32.4 of the victim's rights constitutional provision states: "Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilt, or an acceptance of a plea of guilty." The trial court had no power to set aside the guilty plea. Writ made absolute.

State v. Norris, No. WD67406 (Mo. App., W.D. 8/14/07):
Appellate court lacks jurisdiction to hear appeal of grant of Rule 29.07 motion to withdraw a guilty plea where an SIS was imposed; remedy is by writ of mandamus.
Facts: Defendant pleaded guilty to speeding and was assessed a fine. Six weeks later, he filed a Rule 29.07 motion to withdraw his plea, because he did not know that points would be assessed against his license. The trial court granted the motion to withdraw, refunded the fine, and allowed a new plea with an SIS. The State then appealed the order setting aside the plea.
Holding: A trial court's ruling on a motion to withdraw a guilty plea under Rule 29.07 is not a final, appealable judgment if imposition of sentence has been suspended. The appropriate appellate remedy is by writ of mandamus.

State v. Hicks, No. WD66795 (Mo. App., W.D. 5/15/07):
(1) Where the State orally amended a felony complaint to charge a misdemeanor, but the record did not show that the oral amendment contained the information required by Rule 23.01, Defendant was not properly charged and Defendant's conviction must be vacated;

and (2) proper procedure to litigate this issue was direct appeal, not Rule 24.035, 29.07(d) or habeas corpus.
Facts: Defendant was originally charged by felony complaint with the Class C felony of assault of a law enforcement officer. When Defendant appeared *pro se* for arraignment, the State orally amended the charge to a misdemeanor and Defendant pleaded guilty. Defendant then appealed, claiming he was not properly charged.
Holding: (1) Defendants cannot be convicted of an offense not charged in an information or indictment. A claim that an information or indictment is not sufficient can be raised for the first time on appeal. Rule 23.01 requires an information be in writing, signed by the prosecutor, and contain the defendant's name, the date and place of the offense charged, the statute violated, the penalty, and the degree of the offense charged. No charging instrument complying with Rule 23.01 was ever filed in this case. Although oral amendments of informations have sometimes been upheld, here the record is devoid of any indication whether the information charged the offense for which Defendant was convicted. Since double jeopardy would not prevent Defendant from being recharged under the facts here, conviction vacated and remanded for further proceedings. (2) Defendant correctly raised this issue on direct appeal. Rule 24.035 would not apply because Defendant was not convicted of a felony. Rule 29.07(d) would not apply because this only applies in extraordinary circumstances were defendants were misled into pleading guilty by fraud, mistake, misapprehension, coercion, fear or false hopes, and their pleas were not voluntary and intelligent. Habeas corpus would not apply because Defendant is not incarcerated.

State ex rel. Nixon v. Bowers, No. WD67347 (Mo. App., W.D. 5/9/07):
Holding: A party who did not receive notice of entry of a judgment may move to set aside the judgment within six months of its entry under Rule 74.03. The remedy is for the court to set aside the judgment under Rule 74.03, not to just "reenter" or "reissue" a new judgment. If circuit court fails to set aside judgment, party who did not receive notice may appeal denial of Rule 74.03 motion.

Whitehorn v. State, No. WD65343 (Mo. App., W.D. 3/27/07):
Holding: Where PCR Movant discharged his appointed counsel and requested that his Amended Motion be struck, the only motion before the motion court was the *pro se* motion, and since the motion court did not enter findings on all issues in the *pro se* motion, there is no final judgment for purposes of appeal. Appeal dismissed.

Spells v. State, No. WD66116 (Mo. App., W.D. 1/30/07):
Where the circuit clerk obtained a new P.O. Box address and Movant sent his pro se motion to the old address, motion would be deemed timely filed even though it was received at the new P.O. Box after the 90-day time limit.
Facts: Circuit Clerk's Office changed their P.O. Box address. Movant timely sent his pro se 29.15 motion to the old P.O. Box address, but it was returned to him. When he then immediately sent his motion to the new address, it was untimely by seven days. The motion court dismissed the motion as untimely.
Holding: Even though Movant's pro se motion was untimely under 29.15(b), under the unique facts of this case, court will deem it timely. Movant took all the steps he could to

send his motion in a timely fashion, but it wasn't filed timely because of the change in address. Movant made an honest, clerical mistake, and fairness dictates that his motion be deemed timely.

Bode v. State, No. WD65477 (Mo. App., W.D. 10/17/06):
To plead ineffective assistance for failure to file New Trial Motion, Movant must plead the specific issues that trial counsel would have asserted in New Trial Motion and reasonable probability that trial court would have sustained the New Trial Motion.
Facts: Movant filed postconviction motion alleging trial counsel was ineffective in failing to file a New Trial Motion on "any issue."
Holding: Movant only claims generally that a New Trial Motion should have been filed, without specifying the underlying trial errors on which a New Trial Motion should have been based. There is no way of ascertaining whether the motion, if made, would have been granted. Movant was required to plead and show specific trial errors, and that there was a reasonable probability the trial court would have sustained the New Trial Motion.

Elam v. State, No. WD65877 (Mo. App., W.D. 6/20/06):
(1) Appellate court lacks jurisdiction to hear an appeal from a docket entry that is not signed by the judge because such does not comply with Rule 74.01(a); (2) Movant cannot bring a motion under Rule 29.07(d) to withdraw his guilty plea because Movant's claims should have been raised in a Rule 24.035 case; (3) Movant cannot claim abandonment by postconviction counsel because Movant never had a timely filed pro se Rule 24.035 motion.
Facts: After Movant's probation was revoked, Movant filed an untimely Rule 24.035 motion. Movant then filed a Rule 29.07(d) motion claiming his guilty plea was not voluntary because he had a mental disease. The circuit court overruled the 29.07(d) motion with a typed docket entry which was "signed" with the judge's typewritten initials. The circuit court did not enter a signed ruling denominated a "judgment."
Holding: The Court of Appeals lacks jurisdiction for two reasons. First, a docket entry accompanied by a judge's typewritten initials does not satisfy the signature requirement of Rule 74.01(a). Second, the Court of Appeals and the circuit court both lack jurisdiction to hear the 29.07(d) claims because such claims should have been raised in a timely filed Rule 24.035 motion. Further, Movant cannot claim abandonment by postconviction counsel because Movant never had a timely filed pro se Rule 24.035 action.

Prewitt v. State, No. WD65320 (Mo. App., W.D. 5/23/06):
Movant cannot challenge denial of probation in Rule 24.035 action.
Facts: Trial court revoked Movant's probation, and retained jurisdiction under the 120-day callback provision of Section 559.115 RSMo. 2000. On June 5, 2003, the Board of Probation and Parole issued a report recommending Movant be released. On June 20, 2003, the sentencing court denied release. One week later, an amendment to Section 559.115 because effective under which the sentencing court would have been required to grant probation or grant a hearing to consider the propriety of probation. On September 3, 2003, Movant filed a Rule 24.035 motion, calming the sentencing court failed to apply

the amended provision of Section 559.115 RSMo. Cum. Supp. 2004, and grant him probation. The motion court denied relief.
Holding: Movant's claim is not cognizable under Rule 24.035. Movant does not seek to challenge the validity of his conviction, or to challenge the jurisdiction of the sentencing court to impose the sentence. Instead, Movant claims the sentencing court misapplied the law in denying him probation. Probation determinations are not subject to challenge in a Rule 24.035 motion or on direct appeal. The procedural means for contesting probation denial is through an appropriate writ.

State v. Hill, 181 S.W.3d 611 (Mo. App., W.D. 2006):
(1) Double jeopardy was violated where Defendant was convicted of four counts of ACA, which were charged in identical language in the indictment; (2) Defendant/Movant could raise claim of double jeopardy on appeal of denial of Rule 29.15 motion, even though Defendant/Movant had not pleaded this in the Amended Motion, because double jeopardy is jurisdictional.
Facts: Defendant/Movant shot at four police officers. The indictment which charged Defendant/Movant alleged four counts of ACA in identical language and referred to shooting "Officer White," rather than four different officers. Defendant/Movant was convicted of four counts of ACA. He later filed a Rule 29.15 motion. On appeal of the denial of the Rule 29.15 motion, he claimed his four convictions for ACA violated double jeopardy. This claim had not been pleaded in the Rule 29.15 motion.
Holding: The right to be free from double jeopardy is a constitutional right that goes to the power of the State to bring a defendant into court to answer a charge. As such, the right is jurisdictional. Here, the indictment charged Defendant/Movant using identical language referring to "Officer White," and not the four different officers. This violated double jeopardy for three of the four counts. Moreover, since the issue was jurisdictional, it could be raised for the first time on appeal of the Rule 29.15 case. Convictions vacated for three counts of ACA.

*** Wilson v. Corcoran, 88 Crim. L. Rep. 164, ___ U.S. ___ (U.S. 11/8/10):**
Holding: Federal habeas court cannot grant relief based on a claim that state law was violated; furthermore, even though habeas court amended its opinion to attempt to base its decision on federal law, the court failed to identify any federal constitutional right that was violated.

*** Jefferson v. Upton, ___ U.S. ___, 87 Crim. L. Rep. 300 (U.S. 5/24/10):**
Holding: In pre-AEDPA case, where state postconviction judge signed Findings written by Prosecutor denying relief, federal court should not presume the state findings to be correct without considering all eight exceptions to a presumption of correctness listed in 28 USC 2254(d)(1)-(8); specifically, court must consider whether the State factfinding procedure was full and fair in light of judge adopting State's Findings. Supreme Court notes that it has criticized practice of adopting Findings verbatim that were written by one of the parties.

*** Holland v. Florida, ___ U.S. ___, 87 Crim. L. Rep. 399 (U.S. 6/14/10):**
Holding: Where habeas counsel's gross negligence leads to the untimely filing of a federal habeas petition, AEDPA's one-year statute of limitations for filing may be equitably tolled to allow filing of the petition.

*** McDaniel v. Brown, 86 Crim. L. Rep. 391, ___ U.S. ___ (U.S. 1/11/10):**
Holding: Even though prosecution-DNA expert overstated the probability of a DNA match in Defendant's trial, federal habeas court should not have entirely excluded consideration of this evidence but should have applied the standard of *Jackson v. Virginia* for evaluating the sufficiency of the evidence.

*** Wellons v. Hall, 86 Crim. L. Rep. 458, ___ U.S. ___ (U.S. 1/19/10):**
Holding: Denial of habeas relief is vacated and remanded for consideration under *Cone v. Bell*'s holding that where a state court declines to review the merits of a claim on the false grounds that it has already done so, this does not bar federal habeas review. Here, Defendant learned after death penalty trial that jurors had had *ex parte* contact with the judge and had for unknown reasons given the judge a chocolate penis and female breast; Defendant tried to find out what occurred by raising the issue on direct appeal, but the State court held there was a nonexistent record; then Defendant sought to raise this in state postconviction but the State court ruled the matter had been decided on direct appeal; the lower federal courts then denied the claim by finding that it was procedurally barred.

*** Holland v. Florida, ___ U.S. ___, 2010 WL 2346549 (U.S. 2010):**
Holding: One year limitation period in AEDPA, 28 USC 2244(d) is subject to equitable tolling.

*** Magwood v. Patterson, ___ U.S. ___, 2010 WL 2518374 (U.S. 2010):**
Holding: A federal habeas action, challenging a death sentence Defendant had received after re-sentencing following an earlier successful federal habeas action, was not a second or successive habeas petition barred by 28 USC 2244(b), even though Defendant could have raised his claim in the first habeas action.

Ex parte Harrington, 2010 WL 2077159 (Tex. Crim. App. 2010):
Holding: Even though Defendant had completed his sentence, where he was suffering collateral consequences such as loss of job opportunities, right to possess firearm, and loss of right to run for public office, he could challenge his conviction in habeas corpus.

*** In re Davis, 2009 WL 2486475, ___ U.S. ___ (U.S. 2009):**
Holding: U.S. Supreme Court in an original habeas case filed by death-sentenced Defendant remands to District Court for hearing and findings on whether Defendant is actually innocent.

*** Beard v. Kindler, 86 Crim. L. Rep. 284, ___ U.S. ___ (U.S. 12/8/09):**
Holding: A discretionary state procedural rule can serve as an adequate ground to bar federal habeas relief; hence, where state denied relief based on the escape rule, this barred federal habeas relief.

*** U.S. v. Denedo, 85 Crim. L. Rep. 348, ___ U.S. ___ (6/8/09):**
Holding: Armed-forces Defendant who was convicted in court-martial may seek writ of error coram nobis to challenge an Article I military appellate court's earlier, final decision affirming their conviction.

*** Cone v. Bell, 85 Crim. L. Rep. 131, 2009 WL 1118709, ___ U.S. ___ (4/28/09):**
Holding: (1) Where state courts had refused or failed to consider the merits of petitioner's *Brady* claim, the claim was not procedurally barred in federal habeas; (2) where the prosecution failed to disclose police reports which would show Defendant was a "heavy drug user" and the defense was drug-induced psychosis, this may entitle death penalty petitioner to new penalty phase.

*** Jimenez v. Quarterman, 84 Crim. L. Rep. 403, 129 S. Ct. 681, ___ U.S. ___ (1/13/09):**
Holding: Where a state grants a defendant the right to file an "out of time" direct appeal, but before defendant has first sought federal habeas relief, his judgment is not yet "final" for purposes of Sec. 2244(d)(1)(A); under AEDPA, in such a case, the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" must reflect the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal. Thus, even though Defendant should have appealed in 1996, where Texas allowed him to appeal out-of-time in 2003, his federal habeas filed within one year of conclusion of his direct appeal proceeding was timely.

*** O'Brien v. O'Laughlin, 2009 WL 2831420, ___ U.S. ___ (U.S. 2009):**
Holding: Justice Breyer acting as Circuit Justice rules where prisoner was granted federal habeas relief and the Gov't appeals, the petitioner can be released on bail pending the appeal of the habeas case.

*** Munaf v. Geren, 2008 WL 2369260, ___ U.S. ___ (2008):**
Holding: Federal habeas jurisdiction extends to American citizens held overseas by U.S. forces subject to U.S. chain of command. However, habeas courts have no authority to stop transfer of citizens to Iraqi authorities for crimes committed in Iraq.

*** Boumediene v. Bush, ___ U.S. ___, 83 Crim. L. Rep. 375 (6/12/08):**
Holding: Federal habeas corpus protections extend to enemy combatants held at Guantanamo Bay, Cuba.

Danforth v. Minnesota, 82 Crim. L. Rep. 535, ___ U.S. ___ (2/20/08):
Holding: Even though the U.S. Supreme Court may deem a new constitutional rule to not be retroactive on federal habeas review, state courts are free to apply the rule

retroactively to grant postconviction relief; *Teague v. Lane*, 498 U.S. 288 (1989) was not based on federal constitutional authority over state courts.

Allen v. Siebert, ___ U.S. ___, 128 S.Ct. 2, 82 Crim. L. Rep. 155 (11/5/07):
Holding: An untimely postconviction relief petition will not toll the statute of limitations for filing a federal habeas, even though state law treated the state time limit as an affirmative defense rather than a jurisdictional matter.

*** Panetti v. Quarterman, 2007 WL 1836653, ___ U.S. ___ (6/28/07):**
Holding: (1) Petitioner's *Ford*-based claim that he was incompetent to be executed was not barred by AEDPA's prohibition against second or successive petitions; and (2) incompetency standard that focused only on Petitioner's understanding that he was about to be executed for a crime was too narrow, where standard did not consider whether Petitioner's delusions prevented him from comprehending the meaning and purpose of his execution. Courts cannot find delusional beliefs irrelevant just because a Petitioner can link his crime and punishment.

*** Bowles v. Russell, 81 Crim. L. Rep. 376, ___ U.S. ___, 127 S.Ct. 2360 (6/14/07):**
Holding: Even though the federal habeas judge granted petitioner 17 days to file his notice of appeal, where Fed. R. App. P. 4(a)(6) only allowed a maximum of 14 days, petitioner's notice of appeal was untimely and appellate court had no jurisdiction. Supreme Court overrules "unique circumstances" doctrine that excused a party's untimely action when the party had relied on the lower court's findings.

*** Fry v. Pliler, 81 Crim. L. Rep. 347, ____ U.S. ____ (6/11/07):**
Holding: In federal habeas review, federal courts must apply the deferential *Brecht* "substantial and injurious" effect standard of review, even when the state court did not apply the *Chapman* "harmless beyond a reasonable doubt" standard. Federal court cannot apply the *Chapman* standard in the first instance.

*** Lawrence v. Florida, 80 Crim. L. Rep. 515, ___ U.S. ___ (2007):**
Holding: The time for filing a federal habeas corpus action is not tolled during the time a cert. petition is pending in the U.S. Supreme Court following conclusion of all state court proceedings in PCR.

*** Carey v. Musladin, 80 Crim. L. Rep. 271, ___ U.S. ___ (2006):**
Holding: Since there are not any U.S. Supreme Court decisions regarding private individuals' conduct impairing right to a fair trial, federal court cannot grant habeas relief under AEDPA on such a claim; thus, federal court cannot grant habeas relief on claim that murder victim's family wore buttons with victim's picture in courtroom at Petitioner's trial.

*** House v. Bell, 2006 WL 1584475, ___ U.S. ___ (2006):**
Holding: Under *Schlup v. Delo*'s "actual innocence" exception, Petitioner allowed to proceed with untimely habeas claim regarding new DNA evidence, where the central

forensic proof in the case was called into doubt by the new DNA evidence, even though there was still other evidence supporting an inference of guilt.

Riva v. Ficco, 87 Crim. L. Rep. 835 (1st Cir. 8/5/10):
Holding: One-year limitations period for filing habeas may be equitably tolled due to petitioner's mental illness.

Restucci v. Bender, 2010 WL 936556 (1st Cir. 2010):
Holding: Habeas petition asserting wrongful denial of parole was not a second or successive petition.

Kholi v. Wall, 2009 WL 3019696 (1st Cir. 2009):
Holding: The filing of a state postconviction motion to reduce sentence tolls the federal habeas limitation period.

Foxworth v. Maloney, 2008 WL 192288 (1st Cir. 2008):
Holding: Courts should address sufficiency of evidence issues before deciding other issues of trial error.

U.S. v. Brown, 88 Crim. L. Rep. 116, 2010 WL 4069002 (2d Cir. 10/19/10):
Holding: Where after trial but before sentencing, Defendant filed a pro se motion stating that counsel was ineffective for not informing him of a plea offer that had been made, the trial court should have considered the claim at that point, instead of stating that the claim should be decided in habeas under 28 USC 2255.

Johnson v. U.S., 88 Crim. L. Rep. 121, 2010 WL 3928861 (2d Cir. 10/8/10):
Holding: U.S. Supreme Court's holding in *Magwood v. Patterson* (2010) regarding federal habeas cases after a resentencing applies to 28 USC 2255 motions, as well as 2254 motions.

Negron v. U.S., 2010 WL 3818099 (2d Cir. 2010):
Holding: A motion to reconsider the merits of a habeas petition is not a second or successive habeas petition requiring the permission of the court of appeals to file.

Urinyi v. U.S., 87 Crim. L. Rep. 467 (2d Cir. 6/14/10):
Holding: Where petitioner won reinstatement of a direct appeal in a prior habeas proceeding on grounds of ineffective assistance of counsel, his subsequent habeas proceeding was not a "second or successive" one under AEDPA.

Bolarinwa v. Williams, 86 Crim. L. Rep. 537 (2d Cir. 1/28/10):
Holding: Habeas petitioner's mental illness can provide basis for equitable tolling of federal habeas time statute of limitations.

Nnebe v. U.S., 83 Crim. L. Rep. 467 (2d Cir. 6/12/08):
Holding: Defendant's claim that appellate counsel broke promise to file a cert. petition after direct appeal was properly brought as a motion to recall the mandate, not federal habeas corpus.

McKithen v. Brown, 80 Crim. L. Rep. 652 (2d Cir. 3/13/07):
Holding: Prisoner seeking DNA testing to prove innocence may get the evidence via a Section 1983 action instead of habeas, since such action would not necessarily render the conviction invalid.

Grier v. Klem, 86 Crim. L. Rep. 480 (3d Cir. 12/16/09):
Holding: A Sec. 1983 action regarding wrongful denial of DNA testing does not violate *Heck v. Humphrey* (holding that collateral attacks on convictions must be pursued in habeas corpus), because the action does not necessarily collaterally attack the conviction.

Heleva v. Brooks, 85 Crim. L. Rep. 706 (3d Cir. 9/14/09):
Holding: "Stay and abey" is not just available to "mixed" petitions, but also to petitions that contain nothing but unexhausted claims.

Urcinoli v. Cathel, 84 Crim. L. Rep. 207 (3d Cir. 11/7/08):
Holding: Where petitioner's habeas had been dismissed as a "mixed petition," equitable tolling applied to one-year statute of limitations to his exhausted claims.

McKeever v. Warden SCI-Grateford, 81 Crim. L. Rep. 266 (3d Cir. 5/10/07):
Holding: Where, after Petitioner pleaded guilty, there was a change in State law that rendered him actually innocent of some counts, the federal habeas court was not required to order the State courts to rescind the whole plea, but only to resentence Petitioner on the remaining counts.

Jones v. Sussex I State Prison, 2010 WL 155251 (4th Cir. 2010):
Holding: Even though Petitioner's state court pleadings did not cite the 5th Amendment or any federal case, where Defendant had cited a state case that had dealt with federal double jeopardy law, Defendant had exhausted his federal double jeopardy claim for purposes of federal habeas exhaustion requirements.

Winston v. Kelly, 86 Crim. L. Rep. 532 (4th Cir. 1/27/10):
Holding: Where state court denied petitioner an evidentiary hearing on his claim, AEDPA does not require that federal court give deference to the state court's resolution of the claim when new evidence arises on the claim in federal court.

U.S. v. Poindexter, 2007 WL 1845119 (4th Cir. 2007):
Holding: Counsel was ineffective in not filing notice of appeal at Defendant's request, even though he executed an appeal waiver as part of his plea.

In re Williams, 79 Crim. L. Rep. 122 (4th Cir. 4/10/06):
Holding: Where a prior federal habeas court ordered Petitioner be allowed to file a State direct appeal due to ineffective counsel, Petitioner's subsequent federal habeas action challenging that result is not a "second or successive" petition under AEDPA.

Stone v. Thaler, 2010 WL 3034809 (5th Cir. 2010):
Holding: Federal habeas time limit was tolled during pendency of Texas petitioner's "time-credit disputeiresolution request."

Gonzalez v. Thaler, 88 Crim. L. Rep. 68, 2010 WL 3895059 (5th Cir. 10/6/10):
Holding: The time limit for filing a federal habeas under 28 USC 2244(d)(1)(A) begins at the expiration of the period for seeking direct review in the state courts. 5th Circuit rejects the "mandate-based rule" of the 8th Circuit in *Payne v. Kemna*, 441 F.34d 570 (8th Cir. 2006) and *Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008).

U.S. v. Cooley, 86 Crim. L. Rep. 361, 2009 WL 4542610 (5th Cir. 12/9/09):
Holding: Even though Defendant bargained for a plea in exchange for waiving right to appeal or collaterally attack sentence, this did not preclude Defendant from moving to modify sentence under 18 USC 3582(c)(2) to reflect subsequent revision in Sentencing Guildelines.

Stoot v. Cain, 2009 WL 1579213 (5th Cir. 2009):
Holding: Under Louisiana law, a pro se PCR motion is deemed filed on date prisoner mailed it, even if court never received it.

Windland v. Quarterman, 85 Crim. L. Rep. 658 (5th Cir. 8/10/09):
Holding: The period during which a petitioner's state postconviction case is "pending" for purposes of tolling the federal time limit includes both the day on which the state petition was filed and the day on which a decision was rendered.

Hardy v. Quarterman, 85 Crim. L. Rep. 641 (5th Cir. 8/3/09):
Holding: State court's failure to timely notify petitioner that state relief was denied can be basis of equitable tolling of time for filing federal habeas.

Hutson v. Quarterman, 82 Crim. L. Rep. 204 (5th Cir. 11/14/07):
Holding: Filing a motion in Texas under Texas postconviction DNA statute will toll the time for filing a federal habeas under 2244(d)(2)'s "application for state postconviction or other collateral review" provision.

U.S. v. Tapp, 2007 WL 1839277 (5th Cir. 2007):
Holding: Failure to file notice of appeal when requested to do so is per se ineffective, even when Defendant waived his right to direct appeal and collateral review.

Dorn v. Lafler, 2010 WL 1266813 (6th Cir. 2010):
Holding: Where prison officials received Defendant's appeal papers seven days before

they were due but did not mail them until after deadline, this violated Defendant's constitutional right of access to the courts.

Durr v. Cordray, 87 Crim. L. Rep. 148 (6th Cir. 4/16/10):
Holding: Prisoner's 42 USC 1983 action seeking postconviction access to DNA testing is not barred by favorable-termination rule of *Heck v. Humphrey*.

Montgomery v. Bagley, 86 Crim. L. Rep. 12 (6th Cir. 9/29/09):
Holding: Where Defendant was granted postconviction habeas relief because of State's failure to disclose under *Brady* a police report that witnesses had allegedly seen Victim alive days after State claimed she had been murdered, but then after court granted habeas relief these witnesses' recanted their statements as erroneous, the State was barred from presenting evidence of the recantations, because the State cannot wait until after Defendant wins habeas relief before making any attempt to investigate a habeas issue.

Sherwood v. Prelesnik, 85 Crim. L. Rep. 713 (6th Cir. 9/3/09):
Holding: A timely motion for rehearing following state supreme court's denial of postconviction relief tolls the time period for filing federal habeas.

Pudelski v. Wilson, 85 Crim. L. Rep. 658 (6th Cir. 8/14/09):
Holding: A motion for new trial filed before direct appeal as part of a state criminal proceeding is not barred from consideration in federal habeas.

Harris v. Haeberlin, 83 Crim. L. Rep. 308 (6th Cir. 5/22/08):
Holding: Where a videotape surfaced after trial that showed prosecutor talking about peremptory challenges, this was new evidence regarding *Batson* and remand to the trial court for consideration should be required; State appellate court unreasonably applied federal law in not remanding to trial court.

Ege v. Yukins, 81 Crim. L. Rep. 270 (6th Cir. 4/24/07):
Holding: Where, long after conviction became final, Petitioner learned that a prosecution expert at trial was a fraud, Petitioner could bring a federal habeas because under 28 U.S.C. 2244(d)(1)(D) the statute of limitations did not begin to run until "the date on which the factual predicate of the claim … could have been discovered through the exercise of due diligence," and Petitioner could not have discovered the claim earlier.

Simmons v. Kapture, 80 Crim. L. Rep. 480 (6th Cir. 1/26/07):
Holding: *Halbert v. Michigan*, 545 U.S. 605 (2005) providing counsel on direct appeal was not a "new" rule under *Teague*, and thus, applies retroactively to cases on collateral review.

Lang v. U.S., 2007 WL 162689 (6th Cir. 2007):
Holding: Where a habeas claim originates at re-sentencing and could not have been raised after the original sentencing, a second habeas petition to challenge the error at re-sentencing is not a prohibited "successive" petition.

Socha v. Pollard, 2010 WL 3447732 (7th Cir. 2010):
Holding: District court could grant motion to extend time for filing federal habeas where Defendant filed his motion one day before limitations period expired and motion asserted facts that would support equitable tolling.

Wells v. Ryker, 86 Crim. L. Rep. 481 (7th Cir. 1/6/10):
Holding: Habeas petitioner's motion to extend time to seek certificate of appealability is the functional equivalent of a notice of appeal.

U.S. v. Monroe, 85 Crim. L. Rep. 677 (7th Cir. 9/1/09):
Holding: Even though Defendant waived his right to appeal and collateral attack, this did not preclude him from seeking a sentence reduction under 18 USC 3582(c)(2) because a sentence reduction is different than appeal or collateral attack.

Howard v. Norris, 87 Crim. L. Rep. 812 (8th Cir. 8/12/10):
Holding: Gov't cannot take interlocutory appeal of district court's "stay and abey" order allowing petitioner to pursue unexhausted state claims.

White v. Dingle, 2010 WL 3190678 (8th Cir. 2010):
Holding: Where (1) Petitioner had filed a timely habeas then unsuccessfully appealed its dismissal because it included unexhausted state claims and (2) Court of Appeals had inadvertently failed to order District Court to consider exhausted claims on remand, which resulted in dismissal again, Petitioner was entitled to equitable tolling of AEDPA time limit.

Parmley v. Norris, 86 Crim. L. Rep. 335, 2009 WL 3806168 (8th Cir. 11/16/09):
Holding: The Arkansas Supreme Court is court of last resort for purposes of determining federal habeas statute of limitations.

Streu v. Dormire, No. 07-3430 (8th Cir. 2/26/09):
Holding: (1) A motion to reopen Missouri 29.15 postconviction proceedings on grounds of abandonment of postconviction counsel is an application for State postconviction or other collateral review within the meaning of the tolling provisions of Sec. 2244(d)(2), so AEDPA's statute of limitations is tolled during the time the motion to reopen is pending. However, (2) where the circuit court denied the motion to reopen, and Petitioner did not file a notice of appeal until 116 days later when he filed it by leave of court out-of-time, the motion to reopen was not "pending" during those 116 days, so those days count against the statute of limitations.

Riddle v. Kemna, No. 06-2542 (8th Cir. 4/8/08)(en banc):
Holding: *(1) Time for filing federal habeas petition where Petitioner appealed only to Mo. Court of Appeals and did not file for transfer begins on date mandate issues; Petitioner does not get benefit of time to file cert. since cert. could not have been filed; but (2) where Petitioner relied on advice by Public Defender as to when to file federal habeas and that advice was based on existing 8th Circuit precedent, Petitioner may be entitled to equitable tolling to deem his habeas timely.*

Facts: Riddle (Petitioner) appealed to the Mo. Court of Appeals for his direct appeal. The Mo. Court of Appeals issued its mandate on February 15, 2001. Riddle did not file an application for transfer to the Mo. Supreme Court and thus could not have filed a cert. petition with the U.S. Supreme Court. Riddle filed a 29.15 PCR on May 4, 2001. His PCR appeal mandate issued on April 21, 2004. Riddle filed his federal habeas on March 22, 2005. The district court held it was untimely because the due date was February 3, 2005.

Holding: (1) Riddle argues that the time for filing a federal habeas did not begin to run after his direct appeal until the 90 days for seeking cert. with the U.S. Supreme Court expired. However, this is wrong. The Missouri Supreme Court is Missouri's court of last resort, and Riddle did not seek transfer of his direct appeal to the Missouri Supreme Court. Therefore, Riddle could not have sought cert. from the U.S. Supreme Court, because a ruling by the Missouri Supreme Court is a prerequisite to filing for cert. The 8th Circuit had held in *Nichols v. Bowerox*, 172 F.3d 1068 (8th Cir. 1999)(en banc) that the time did not begin to run until after the time for cert. expired. *Nichols* relied on *Smith v. Bowersox*, 159 F.3d 345 (8th Cir. 1998), but Smith had his case heard by the Missouri Supreme Court, and Nichols (and Riddle) did not; this distinction is critical, but was overlooked by the 8th Circuit in *Nichols*. *Nichols v. Bowersox* is now overruled. Thus, Riddle's federal habeas time began to run at the "conclusion of direct review" which is when the Mo. Court of Appeals issued its direct appeal mandate. The time was then tolled when Riddle filed his PCR, and began running again when the PCR mandate issued from the Court of Appeals. "To recap, the district court properly began the statute of limitations in 28 U.S.C. 2244(d) the day after the direct-appeal mandate issued, tolled it while the state postconviction proceedings were pending, and did not allow the 90-day period for filing for certiorari. Riddle's petition was thus untimely." (2) But at the time Riddle filed his federal habeas, *Nichols v. Bowersox* was the controlling precedent, which would render the habeas timely. Riddle has shown that the Public Defender System routinely told petitioners that the time did not begin to run until 90 days for cert. expired after direct appeal. This advice was based on *Nichols*. Riddle may receive equitable tolling if he can show he did not file his habeas because he was lulled into inaction through relying on 8th Circuit precedent.

Editor's Note by Greg Mermelstein: The Attorney General argued that the time began to run at the conclusion of the time when a motion for rehearing could have been filed on direct appeal, i.e., 15 days after the direct appeal opinion. The 8th Circuit rejects this and holds it is the later mandate-date that controls. However, the 8th Circuit is relying on *Payne v. Kemna*, 441 F.3d 570 (8th Cir. 2006), and not directly on a U.S. Supreme Court case. I know the Attorney General continues to contest *Payne*, so the most conservative advice is to count from the date when a rehearing motion could have been filed, not from the mandate date (although you are following 8th Circuit law in doing that, so equitable tolling may apply if the caselaw later changes).

Pierson v. Dormire, No. 06-2545 (8th Cir. 4/4/07):

Even though Petitioner did not file an application to transfer to the Missouri Supreme Court after his opinion on direct appeal from the Missouri Court of Appeals, the statute of limitations for filing a federal habeas corpus action did not begin to run until 90 days after the date of the opinion on direct appeal.

Facts: On January 11, 2000, the Missouri Court of Appeals affirmed Petitioner's conviction, and a mandate issued on February 15, 2000. Petitioner did not file an application to transfer to the Missouri Supreme Court or a cert. petition to the U.S. Supreme Court. On April 13, 2000, Petitioner filed a PCR motion. That motion was denied by the circuit court, and the Court of Appeals affirmed and issued a mandate on October 23, 2002. Petitioner filed his federal habeas on October 21, 2003. The district court held it was untimely because the time between February 15, 2000, and April 13, 2000 had to be subtracted from the one-year (365 day) statute of limitations, since Petitioner did not file a transfer application or cert. petition.
Holding: Since Petitioner did not file a transfer application, arguably the U.S. Supreme Court could not have taken the case. Circuits are split on whether petitioners who fail to appeal to a discretionary state court of last resort are entitled to the 90-day period from the time of the direct appeal opinion to file for cert. The 8th Circuit holds that the federal statute of limitations does not begin to run until 90 days after the opinion on direct appeal, even though Petitioner did not seek transfer to the Mo. Supreme Court or file for cert. The time to file a petition for cert. runs from the date of the direct appeal opinion, not the date of the mandate. Here, the Court of Appeals issued its opinion on January 11, 2000. The state court judgment was "final" on April 10, 2000. It was tolled on April 13, 2000, when the timely PCR was filed. This caused Petitioner to lose 2 days. He had 363 days after the mandate on his PCR appeal to file, or until October 21, 2003. He filed on the 363rd day, so it is timely.

Editor's Note by Greg Mermelstein: The 8th Circuit will revisit this same issue in an en banc case (not this case) in the Fall. Therefore, to be safe, I would advise clients to subtract the time between their direct appeal opinion and the time they file their 29.15 case in calculating their 1-year habeas deadline.

In re Gonzales, 2010 WL 4104722 (9th Cir. 2010):
Holding: Even though Petitioner's habeas claim raised only record claims that were legal in nature, he was entitled to a stay pending a competency determination.

Thompson v. Frank, 87 Crim. L. Rep. 12 (9th Cir. 3/30/10):
Holding: Gov't cannot immediately appeal district court order staying federal habeas proceeding while Petitioner exhausts claims in state court.

Chioino v. Kernan, 86 Crim. L. Rep. 14 (9th Cir. 9/21/09):
Holding: When federal district court grants federal habeas sentencing relief for violation of *Cunningham v. Calif.*, the remedy is to send the case back to state court for sentencing rather than have the federal court impose sentence.

Nash v. Ryan, 85 Crim. L. Rep. 706, 2009 WL 2902088 (9th Cir. 9/11/09):
Holding: Because federal habeas statute provides a right to counsel in capital habeas proceedings, this implies that petitioner must be competent to assist counsel, including on appeal of denial of federal habeas relief; where petitioner is incompetent, proceedings must be stayed.

Crickon v. Thomas, 85 Crim. L. Rep. 662 (9th Cir. 8/25/09):
Holding: Federal prisoner who was rendered ineligible for early release because of a Bureau of Prisons regulation that was issued in violation of the Administrative Procedures Act can petition for federal habeas corpus relief.

Phelps v. Alameida, 85 Crim. L. Rep. 512 (9th Cir. 6/25/09):
Holding: Substantive change in law can be grounds for granting a 60(b) motion to overturn denial of habeas relief.

Whaley v. Balleque, 83 Crim. L. Rep. 14, 2008 WL 763774 (9th Cir. 3/24/08):
Holding: Where in state court, Prosecutor asserted that a claim for collateral relief was moot, but then in federal habeas asserted that the claim was not moot and was defaulted because Petitioner did not appeal claim, principle of judicial estoppel prevents Prosecutor from doing this. Judicial estoppel prevents Gov't from taking different legal positions in state and federal court in order to create a procedural default to a habeas claim.

Stanko v. Davis, 87 Crim. L. Rep. 809 (10th Cir. 8/10/10):
Holding: Prisoner does not need permission of court merely to file successive habeas petition, but petition may be dismissed on successiveness grounds.

Merryfield v. Jordan, 85 Crim. L. Rep. 139 (10th Cir. 10/19/09):
Holding: A person civilly committed as a sexual predator is not a "prisoner" for purposes of Prison Litigation Reform Act (PRLA).

Wilson v. Workman, 85 Crim. L. Rep. 676, 2009 WL 2623336 (10th Cir. 8/27/09):
Holding: Where state court did not consider certain non-record evidence in considering ineffective counsel claim, the federal habeas court was not required to give deference to the state court's findings; if the state court fails to consider evidence in rejecting a claim, then the state court has not adjudicated the merits of the claim.

Douglas v. Workman, 85 Crim. L. Rep. 39, 2009 WL 793136 (10th Cir. 3/26/09):
Holding: (1) *Brady* requires disclosure of "tacit agreements" with witnesses in addition to actual "deals"; *Brady* violated where, among other things, prosecutor wrote letters to parole authorities after witness testified and did other acts to help witness, even though claimed in letters there was "no deal"; (2) State's failure to disclose tacit agreements justified allowing Defendant/Petitioner to file second habeas petition where these facts were not discovered earlier due to State's *Brady* violation.

U.S. v. Gabaldon, 83 Crim. L. Rep. 150 (10th Cir. 4/16/08):
Holding: Where the prison confiscated all of Movant's legal materials just weeks before the deadline for filing a federal habeas, this was an extraordinary circumstance which warranted equitable tolling.

Hunter v. Ferrell, 86 Crim. L. Rep. 262 (11th Cir. 11/18/09):
Holding: Where a prisoner was mentally retarded, this may constitute an extraordinary circumstance for equitable tolling under of the habeas corpus statute of limitations if prisoner was unable to understand and comply with the statute due to retardation.

Mancill v. Hall, 84 Crim. L. Rep. 145 (11th Cir. 10/17/08):
Holding: Where state trial court reversed conviction and State took an appeal but Petitioner did not cross-appeal, the failure to cross-appeal did not fail to exhaust Petitioner's issues in later federal habeas proceeding.

Downs v. McNeil, 83 Crim. L. Rep. 153 (11th Cir. 3/24/08):
Holding: Where habeas petitioner's lawyers told him they'd file a federal habeas for him, but did not, this was an extraordinary circumstance which warranted equitable tolling.

Ferreira v. Sec'y Dept. of Corrections, 81 Crim. L. Rep. 623 (11th Cir. 8/7/07):
Holding: Where Defendant was resentenced in State court after winning a State postconviction case, that started the federal habeas statute of limitations running, not the earlier, original conviction and sentence date.

Mattern v. Sec'y for Dept. of Corrections, 2007 WL 2240283 (11th Cir. 2007):
Holding: Even though Petitioner challenging his sentence was released from prison during the pendency of his habeas case, the habeas action was not moot because there were further collateral consequences faced by Petitioner.

Eastridge v. U.S., 2009 WL 635462 (D.D.C. 2009):
Holding: Even though Defendants picked up a murderer in their car, where they had no knowledge of the murder and had not participated in it, but were nevertheless convicted of first degree murder, they had not engaged in any misconduct or neglect in causing their convictions and could proceed to obtain certificate of innocence under the Unjust Conviction Act.

Smith v. U.S., 86 Crim. L. Rep. 383 (D.C. 12/3/09):
Holding: A judicial rule establishing a 120-day statute of limitations for filing motions to reduce sentence is a "claim-processing" rule which is waived if prosecutors fail to object to late-filed petitions; Court overturns prior cases holding the late filing is a "jurisdictional" issue.

Prasoprat v. Benov, 2009 WL 1480864 (C.D. Cal. 2009):
Holding: Sec. of State's decision to extradite Defendant to Thailand on drug charges was judicially reviewable by writ of habeas corpus.

Scott v. U.S., 2010 WL 3659478 (S.D. Fla. 2010):
Holding: Even though Defendant did not file motion to vacate on time, where he should not have been sentenced as career offender, he was actually innocent of that and manifest injustice exception allowed claim to be heard.

Wade v. Brady, 2009 WL 1220631 (D. Mass. 2009):
Holding: Defendant was entitled under Due Process to access biological evidence for proving federal habeas claim of actual innocence, even though Defendant had procedurally defaulted ineffective assistance of counsel claim.

U.S. v. Goward, 2010 WL 2553587 (E.D. Mich. 2010):
Holding: One year limitations period for filing motion to vacate began on date Defendant voluntarily dismissed his direct appeal.

Parks v. Warren, 2008 WL 3050051 (E.D. Mich. 2008):
Holding: Petitioner demonstrated cause to overcome procedural default on claim that computer glitch caused jury to not be fair cross-section, where Petitioner did not know of this problem at time of trial.

Sumrell v. Mississippi, 2009 WL 973330 (N.D. Miss. 2009):
Holding: Where state trial court had imposed a habitual offender sentence on Defendant that lacked any evidentiary support, this showed "actual innocence" of the sentence imposed so as to allow federal habeas review despite procedural default.

Sturgeon v. Quarterman, 2009 WL 1351045 (S.D. Tex. 2009):
Holding: Where petitioner submitted an affidavit by a witness who would have testified that petitioner was innocent of charged crime but that witness had invoked 5th Amendment right not to testify because prosecutor had threatened to charge witness with crime, this stated a claim of ineffective assistance of trial counsel and overcame procedural default based on manifest injustice.

U.S. v. Venancio-Dominguez, 2009 WL 3234217 (E.D. Va. 2009):
Holding: U.S. Supreme Court decision in *Flores-Figuero v. U.S.*, interpreting the identify-theft statute to require Defendant knew the identification he possessed belonged to another person, is retroactive to final convictions, because it narrowed the scope of aggravated identify theft.

Ex parte Burgess, 83 Crim. L. Rep. 808 (Ala. 9/5/08):
Holding: Even though Defendant did not raise juror misconduct until postconviction proceeding, the failure to raise issue earlier did not procedurally default it.

Ex parte Ward, 81 Crim. L. Rep. 423 (Ala. 6/1/07):
Holding: Even though Movant filed his PCR three days late, he may be entitled to equitable tolling if it was the result of his attorneys' actions, and if Movant exercised reasonable diligence in presenting his claims.

Richardson v. Superior Court, 83 Crim. L. Rep. 311 (Cal. 5/22/08):
Holding: "Materiality" under the post-trial DNA-testing statute is not the same as for *Brady* purposes, but is a lesser standard; standard is whether petitioner can show DNA testing would be "relevant" to issue of identity, not "dispositive" of identity.

People v. Ledesma, 2006 WL 2371347 (Cal. 2006):
Holding: Even though Defendant lost (waived) his attorney-client privilege regarding a psychiatrist in a postconviction case in which Defendant challenged the effectiveness of his trial counsel, where Defendant won a new trial, the Defendant did not lose that privilege as to the psychiatrist at the retrial.

Silva v. People, 81 Crim. L. Rep. 210 (Colo. 4/23/07):
Holding: Since Colorado provides a limited statutory right to counsel in PCR proceedings, PCR counsel must meet the two-prong standard for effective assistance under *Strickland v. Washington*.

Williams v. Commissioner of Correction, 2007 WL 763893 (Conn. 2007):
Holding: Standards for evaluating a New Trial Motion and a claim of ineffective assistance are different; therefore, there is no collateral estoppel effect when a New Trial Motion is denied on grounds that counsel could have discovered newly-discovered evidence with reasonable diligence, but a claim of ineffective assistance is later raised for not adequately investigating the case.

Darling v. State, 2010 WL 2606029 (Fla. 2010):
Holding: Capital Collateral Regional Counsel was permitted to file 1983 action challenging lethal injection even though statute prohibited CCRC from civil litigation, since such a 1983 complaint was similar to a habeas petition and quasi-criminal in nature.

Maas v. Olive, 2008 WL 4346431 (Fla. 2008):
Holding: Statute which limited amounts postconviction counsel could be paid violated right to counsel if there could be no exceptions to it.

Alford v. State, 87 Crim. L. Rep. 182 (Ga. 4/19/10):
Holding: *Alabama v. Shelton*, 535 U.S. 654, forbidding imposition of SIS when Defendant is not given appointed counsel or waives counsel, is retroactive to cases that where final when it was handed down.

People v. Ross, 2008 WL 2278910 (Ill. 2008):
Holding: Where trial counsel is ineffective for failing to file notice of appeal, the trial (PCR motion) court may allow filing of late notice of appeal as a remedy.

Creech v. State, 83 Crim. L. Rep. 358 (Ind. 5/21/08):
Holding: As part of a plea bargain, a Defendant can waive his right to a direct appeal, but court reaffirms prior cases forbidding provisions of a plea agreement that waive postconviction rights.

Leonard v. Com., 2009 WL 160422 (Ky. 2009):
Holding: Even though a claim of error is raised on direct appeal, this does not bar raising a related claim of ineffective assistance of counsel in later postconviction action.

Hodge v. Coleman, 2008 WL 199833 (Ky. 1/25/08):
Holding: Indigent postconviction movant was entitled to State funds to reimburse travel expenses for 23 out-of-county witnesses.

Cuffley v. State, 88 Crim. L. Rep. 220 (Md. 10/28/10):
Holding: State cannot use evidence outside of the plea hearing record to prove the meaning of a plea agreement, where Defendant later challenges the agreement.

Arey v. State, 81 Crim. L. Rep. 608, 2007 WL 2188704 (Md. 8/1/07):
Holding: Prisoner's motion for postconviction DNA testing cannot be dismissed on grounds that the evidence likely no longer exists until the custodian of evidence has searched for it anywhere it could reasonably be found or submits written evidence that the evidence has been destroyed. Here, Movant sought to challenge a conviction more than 30 years old.

Com. v. Patton, 88 Crim. L. Rep. 60 (Mass. 9/28/10):
Holding: Even though there is no 6th Amendment right to counsel in probation revocation hearing, where State law and rule provided for counsel, probationers could challenge counsel's conduct at the hearing as being ineffective assistance of counsel.

Roby v. State, 2010 WL 3257983 (Minn. 2010):
Holding: Postconviction petition which alleged newly discovered evidence invoked exception to time limit for filing.

Morris v. State, 85 Crim. L. Rep. 278 (Minn. 5/14/09):
Holding: State constitutional right to counsel extends to indigent persons in misdemeanor PCR's where that is their first appeal of right.

Rowland v. State, 87 Crim. L. Rep. 792 (Miss. 7/29/10):
Holding: Time limit for seeking postconviction relief does not apply to errors that affect "fundamental" constitutional rights; thus, Defendant could assert a double jeopardy claim after time limit expired.

Lott v. State, 2006 WL 2781067 (Mt. 2006):
Holding: Statute which barred Defendants from bringing habeas cases where they had already exhausted a direct appeal was an unconstitutional suspension of habeas.

State v. Veale, 80 Crim. L. Rep. 478 (N.H. 1/19/07):
Holding: Appellate Public Defender Office should be viewed as "same office" as Trial Office for purposes of ineffective assistance claims and should be judged by same conflict rules as attorneys in private practice; hence, outside counsel may be required in some circumstances where Appellate Office raises ineffectiveness claims against Trial Office.

Montoya v. Ulibarri, 81 Crim. L. Rep. 606 (N.M. 7/17/07):
Holding: New Mexico Constitution allows a free-standing claim of actual innocence to be brought in state habeas, regardless of whether there was a constitutional violation at trial. Case is similar to *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 20003), where Missouri permitted habeas relief to a Movant who showed by clear and convincing evidence he was actually innocent.

Com. v. King, 2010 WL 2652506 (Pa. 2010):
Holding: Where original PCR judge had scheduled a hearing, but then a second judge dismissed the case without a hearing, this was prohibited by the "coordinate jurisdiction rule" which prohibits one judge from overruling another judge.

Hiott v. State, 2009 WL 649785 (S.C. 2009):
Holding: Sanctions should not apply in PCR proceedings for filing meritless motions because postconviction rules already contain provisions to prevent litigation abuse.

Ferguson v. State, 85 Crim. L. Rep. 332 (S.C. 5/26/09):
Holding: Movant's mental incompetence tolls the time for filing a state postconviction action.

Talley v. State, 80 Crim. L. Rep. 481 (S.C. 1/22/07):
Holding: *Alabama v. Shelton*, 535 U.S. 654 (2002), holding that right to counsel extends to those who receive suspended sentences that may result in incarceration, was a new "watershed" rule that applied retroactively.

Frazier v. State, 86 Crim. L. Rep. 704 (Tenn. 2/18/10):
Holding: Where statute provided for right to PCR counsel, this implicitly includes right to conflict-free counsel and court has duty to inquire about conflicts of interest.

Dellinger v. State, 2009 WL 161284 (Tenn. 2009):
Holding: Freestanding claim of actual innocence based on new scientific evidence can be raised in a postconviction action.

State v. Vasques, 80 Crim. L. Rep. 653 (Tenn. 3/9/07):
Holding: Where following conviction it was learned that undercover drug officer used cocaine at the time, some of which was seized as evidence, Defendants could obtain relief from conviction through coram nobis.

State v. Ford, No. 20060720 (Utah 9/16/08):
Holding: 14th Amendment due process and equal protection guarantees require a state to pay indigent defendants' legal fees on PCR appeal. Court agrees with *Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985) and *Blankenship v. Johnson*, 118 F.3d 312 (5th Cir. 1997). In *Walker*, the court held that when the state threatens an indigent litigant with the loss of a fundamental liberty interest, the rights to counsel, due process and equal protection require the state to appoint counsel. The focus of the inquiry in these cases must be whether the proceeding may result in a deprivation of liberty.

In re Bailey, 86 Crim. L. Rep. 379 (Vt. 12/24/09):
Holding: Where PCR statute made appointed counsel available on appeal only "where the attorney considers the contentions to be warranted by law or by nonfrivolous argument," then appointed counsel could withdraw without filing an *Anders* brief.

Burns v. Com., 86 Crim. L. Rep. 516 (Va. 1/15/10):
Holding: Where Defendant brought an *Atkins* challenge to claim he was mentally retarded and also claimed he was not competent to proceed in postconviction, the postconviction proceedings should be stayed until Defendant is competent.

Carroll v. Johnson, 2009 WL 3644345 (Va. 2009):
Holding: Even though petitioner's habeas petition would not result in his "immediate release" from prison, where it would reduce his sentence, trial court had jurisdiction to hear it.

West v. Director of D.O.C., 2007 WL 79058 (Va. 2007):
Holding: Where counsel was ineffective for failing to raise double jeopardy objection, remedy was to vacate one of the improper convictions and sentences, rather than apply concurrent sentencing doctrine and decline relief.

State v. Knight, 82 Crim. L. Rep. 458, 2008 WL 151623 (Wash. 1/17/08):
Holding: The remedy for double jeopardy violation after a guilty plea to multiple charges is to vacate the counts that constituted double jeopardy, not to vacate the entire guilty plea.

Holden v. State, 2007 WL 4277418 (Alaska Ct. App. 2007):
Holding: Indigent Defendant had state constitutional right to counsel for limited purpose of litigating if their state PCR petition was legally timely or not.

In re Kler, 2010 WL 3860629 (Cal. App. 2010):
Holding: Court rule requiring Court of Appeals to deny habeas petition that was not first presented to the trial court that rendered the underlying judgment was unconstitutional in light of Calif. constitutional provision granting original jurisdiction in writ proceedings to all Calif. courts.

Blacker v. State, 2010 WL 4103159 (Fla. Ct. App. 2010):
Holding: Claim that Defendant's "youthful offender status" was improperly revoked was cognizable in postconviction action.

Pettit v. State, 2008 WL 3165588 (Fla. Ct. App. 2008):
Holding: Even though Defendant had fully served his sentence, he could file a motion to correct his sentence claiming he was imprisoned too long, if doing so would show that sex offender commitment law would not apply to him if he had been sentenced properly in the first place, because would have been released before effective date of law.

King v. State, 2005 WL 2372723 (Fla. Dist. Ct. App. 2005):
Holding: Defendant can challenge designation as a sexual predator via State postconviction motion to correct, vacate or set aside sentence.

People v. Bailey, 2008 WL 4754815 (Ill. App. 2008):
Holding: Even though Defendant had failed to appeal a prior loss of a motion for postconviction DNA testing, Defendant was not barred from pursuing another DNA motion because there is no limit in the statute on the number of requests for DNA testing that can be filed, and Defendant's second motion was not identical to his first.

Jama v. State, 2008 WL 4300706 (Minn. Ct. App. 2008):
Holding: Even though there was a general rule that movants cannot raise postconviction claims that were known at time of direct appeal if they failed to raise them there, where direct appeal counsel was also trial counsel, movant would be allowed to raise claims of ineffective trial counsel in later postconviction action.

State v. Alexander, 84 Crim. L. Rep. 147 (N.J. Super. Ct. App. Div. 10/10/08):
Holding: Where counsel after trial but before sentencing undertook representation of a co-defendant, Defendant in subsequent postconviction case need not show prejudice from this conflict of interest to win sentencing relief.

People v. Wheeler-Whichard, 2009 WL 2475900 (N.Y. Sup. 2009):
Holding: "Actual innocence" claim may be brought under postconviction statute authorizing challenges to convictions based on violation of constitutional rights; Movant proved actual innocence by showing his counsel failed to present several alibi witnesses.

Stouffer v. State, 2007 WL 549246 (Okla. Crim. App. 2/22/07):
Holding: Petitioner cannot represent himself in capital PCR.

Com. v. Burkett, 2010 WL 3785248 (Pa. Super. 2010):
Holding: Defendant/Movant has due process right to have his postconviction motion decided speedily.

Com. v. Haun, 2009 WL 3930107 (Pa. Super. 2009):
Holding: Postconviction petitioner need not show actual innocence to be able to state a claim of ineffective assistance of counsel.

Miller v. State, 2009 WL 3857193 (Utah Ct. App. 2009):
Holding: Where Defendant who had been convicted of assault against a complete stranger filed an "innocence petition" which alleged he had suffered a stroke in another State before the assault and was physically disabled and testimony indicated Defendant would have had only 24 hours to fly from the State to Utah to commit the crime and then return, Defendant stated sufficient facts to require a hearing as to his factual innocence.

Ex parte Sinegar, 88 Crim. L. Rep. 225 (Tex. Crim. App. 11/3/10):
Holding: Texas Rule allowing parties to disqualify judges applies in habeas proceedings.

Ex parte Hood, 2010 WL 625052 (Tex. Crim. App. 2010):
Holding: Various decisions by U.S. Supreme Court on *Penry* claim amounted to new law which justified allowing Petitioner to bring successive habeas petition.

Leal v. State, 2009 WL 3837309 (Tex. Crim. App. 2009):
Holding: Even though DNA testing would only be exculpatory as to aggravating circumstances of capital murder and not the murder itself, this was a sufficient showing to obtain postconviction DNA testing.

State v. Jeffrey A.W., 2010 WL 99099 (Wis. Ct. App. 2010):
Holding: Where alleged sex assault Victim claimed she got herpes from Defendant, but posttrial test showed Defendant did not have herpes, appellate court holds this newly discovered evidence requires new trial.

Sanctions

In re: Smith v. Pace, No. SC90425 (Mo. banc 5/11/10):
In order to hold a lawyer in indirect criminal contempt for making "degrading or embarrassing" statements about a judge, the State must prove that the lawyer's statements were false, that the lawyer knew his statements were false or acted with reckless disregard of the truth, and that there was an actual, imminent impediment or threat to the administration of justice.
Facts: Lawyer filed a pleading in which Lawyer claimed that Judge and Prosecutor were improperly using a grand jury "to threaten, instill fear and imprison innocent persons to cover up … their own apparent misconduct" and to "intimidate and silence any opposition to their personal control." Lawyer was convicted in a jury trial of indirect criminal contempt and sentenced to 120 days in jail. Lawyer sought a writ of habeas corpus as a means of appeal.
Holding: The First Amendment protects truthful statements made in judicial proceedings; thus, the State must prove that Lawyer's statements were false and that Lawyer acted with reckless disregard for the truth or falsity. However, the jury instruction in this case directed the jury to find Lawyer guilty if Lawyer's pleading "degraded" the Judge or "impeded and embarrassed the administration of justice." The instruction did not contain a mental state requirement. The instruction did not require the jury to find that Lawyer knew his statements were false or that Lawyer showed reckless disregard for the truth. Hence, the instructions were erroneous. Furthermore, degrading or embarrassing words alone are not enough to support a finding of criminal contempt. The First Amendment requires that the words actually interfere with or pose an imminent threat of interfering with the administration of justice. Here, the State stipulated that Lawyer's actions did not actually interfere with the grand jury or cause Judge to do

anything differently. Thus, there was no actual interference or imminent threat. Lawyer ordered discharged.

Peachtree Apartments v. Pallo, No. ED93824 (Mo. App. E.D. 7/20/10):
Holding: Even though Party filed a frivolous motion, where Party withdrew the motion before opposing party sought sanctions under Rule 55.03 and the case was voluntarily dismissed, the court could not impose sanctions after withdrawal of the motion and dismissal of the case.

State ex rel. Family Support Division v. Lane, No. WD70715 (Mo. App. W.D. 6/8/10):
In order for a court to impose imprisonment for contempt for failure to pay child support, it must appoint private counsel for indigent defendants or they must waive counsel; Public Defender cannot be appointed.
Facts: A civil contempt proceeding was brought against Defendant for failure to pay child support. The trial court, without appointing counsel, ordered Defendant imprisoned.
Holding: The Due Process Clause of the 14th Amendment provides that there is a right to counsel in cases where a court may imprison the defendant, regardless of whether the proceeding is "criminal" or "civil." The court does not have statutory authority to appoint the Public Defender in civil contempt cases. *State ex rel. Sterling v. Long*, 719 S.W.2d 455 (Mo. banc 1986); *Albers v. Koffman*, 815 S.W.2d 484 (Mo. App. W.D. 1991). However, courts have inherent authority to appoint members of the private bar. Here, before the court could imprison indigent Defendant, court had to appoint private counsel or Defendant had to waive counsel.

In the Estate of Downs v. Bugg, No. WD70409 (Mo. App. W.D. 12/15/09):
Even though Defendant owed money to an estate and had the financial ability to pay it, trial court could not imprison Defendant for failure to pay because such a civil contempt order violated Article I, Sec. 11 of the Missouri Constitution prohibiting imprisonment for debts; the trial court's remedy to enforce payment is execution upon Defendant's property.
Holding: The trial court ordered Defendant be imprisoned for failure to pay money owed to an estate. Sec. 511.340 allows a court to hold a person in civil contempt only if that judgment requires performance of an action other than payment of money. A court cannot hold a person in contempt for failing to pay money because this would violate Art. I, Sec. 11 of the Missouri Const. that prohibits imprisoning a person "for debt, except for nonpayment of fines and penalties imposed by law." The trial court's statutory remedy to enforce a judgment ordering payment of a debt is by execution on specific property of Defendant.

State v. Moad, No. WD70527 (Mo. App. W.D. 9/29/09):
Where trial court excluded evidence as a discovery sanction and not because the evidence was illegally obtained, the State could not appeal the trial court's ruling as an interlocutory appeal (but could seek a writ of prohibition).

Facts: Defendant was charged with vehicular manslaughter resulting from the death of a person in a car. Defendant claimed he was not the driver of the car, but was only a passenger. The car was owned by the victim's family. Before Defendant could conduct an independent examination of the car, the Highway Patrol released the car to the victim's family. The Patrol claimed this was done pursuant to a Patrol policy. Defendant sought discovery of the policy, and despite a court order to produce it, the State never produced it. The trial court then excluded all evidence from the car. The State appealed.
Holding: The question is whether the State has a right to appeal here. Sec. 574.200.1(3) permits an interlocutory appeal by the State where an order suppresses evidence. There is a difference between "suppression" and "exclusion," however. Suppression is a term used when the evidence is not objectionable as violating any rule of evidence, but the evidence has been illegally obtained. Suppression of evidence is linked to the reasons in Sec. 542.296. Here, there was never an argument that the evidence from the car was illegally obtained. Hence, the order here is one of exclusion, not suppression. It is akin to a discovery violation sanction. This is not appealable by interlocutory appeal, but the State may challenge it via writ of prohibition. Appeal dismissed.

F.T.C. v. Trudeau, 2010 WL 1994593 (7th Cir. 2010):
Holding: Even though Defendant radio DJ got his listeners to send emails to judge using the court's computers, Defendant was not "present" in court sufficient to allow judge to impose summary criminal contempt.

Federal Trade Commission v. Trudeau, 87 Crim. L. Rep. 412 (7th Cir. 5/20/10):
Holding: Fed. R. Crim. P. 42(b) does not authorize judge to summarily find a party in civil case guilty of direct criminal contempt for urging followers to take part in an email campaign directed at the judge.

U.S. v. Cohn, 86 Crim. L. Rep. 9, 2009 WL 3110775 (11th Cir. 2009):
Holding: Even though lawyer had failed to inform court that his license had been suspended while he was representing a client in court, the court was not justified in treating a subsequent criminal contempt proceeding against lawyer as a "Class A felony" for sentencing purposes; instead, sentencing for criminal contempt must be on a context dependent, case-by-case basis and not classified as either a felony or misdemeanor.

U.S. v. Garcia, 2010 WL 3033797 (C.D. Cal. 2010):
Holding: Where Gov't disclosed evidence to Defendant only after discovery deadline passed, exclusion of such evidence was proper as sanction.

Brandt v. Ozmint, 2009 WL 2905590 (D.S.C. 2009):
Holding: Even though Defendant submitted a fraudulent letter to an expert and vouched for the letter, this was not direct contempt but was indirect contempt because not done in presence of judge and so the contempt required notice, right to counsel and opportunity to be heard.

State v. Sluyter, 2009 WL 792298 (Iowa 2009):
Holding: Even though Iowa law allowed criminal contempt to be used for refusal to pay court-imposed costs, criminal contempt could not be used against acquitted indigent Defendants to force them to pay for their appointed counsel.

State v. Defoe, 87 Crim. L. Rep. 148 (N.C. 4/15/10):
Holding: Trial courts have inherent authority to declare a case non-capital as a sanction for State's failure to comply with rule that it timely move for a pretrial conference to seek the death penalty; but sanction should only be imposed if Defendant shows prejudice.

Hiott v. State, 2009 WL 649785 (S.C. 2009):
Holding: Sanctions should not apply in PCR proceedings for filing meritless motions because postconviction rules already contain provisions to prevent litigation abuse.

Archuleta v. Galetka, 2008 WL 4821013 (Utah. 2008):
Holding: Even though counsel filed a second postconviction motion with 120 claims, many of which were previously presented, imposition of sanctions against counsel was not justified where counsel was not given an opportunity to correct the conduct.

Scialdone v. Com., 86 Crim. L. Rep. 701 (Va. 2/25/10):
Holding: Even though lawyer offered false exhibit at trial, court could not convict lawyer of contempt in summary proceeding because part of the alleged contempt occurred outside of court.

Singleton v. Com., 86 Crim. L. Rep. 242 (Va. 11/5/09):
Holding: A defense counsel who reached an agreement with a prosecutor to continue a case and then told client not to appear, without the judge's approval, should not be held in criminal contempt in this instance because proof was lacking that the counsel intended to obstruct justice, but in the future, attorneys should not presume that judges will grant continuances just because the parties agree to them.

Kaufmann v. Cruikshank, 86 Crim. L. Rep. 74 (Ariz. Ct. App. 9/17/09):
Holding: Even though defense attorney filed frivolous motion against Prosecutor, court was not authorized as a sanction to require defense attorney to pay "attorney's fee" to Prosecutor for Prosecutor's having to respond to the motion.

State v. Asuncion, 2009 WL 807559 (Haw. Ct. App. 2009):
Holding: Even though Defendant violated a condition of probation, criminal contempt was not available for that violation, only revocation of probation.

People v. Kladis, 2010 WL 2977604 (Ill. App. 2010):
Holding: Even though police had only inadvertently destroyed a video of Defendant's DWI arrest, where the State was required to preserve and produce the tape, the exclusion of the Officer's testimony about events shown on the tape was an appropriate sanction for the discovery violation.

Nicely v. Com., 2009 WL 1097905 (Ky. Ct. App. 2009):
Holding: Court cannot impose contempt citations for same conduct used to revoke probation.

Search and Seizure – Suppression of Physical Evidence

State v. Sund, No. SC87747 (Mo. banc 1/9/07):
Where (1) police officer detained motorists longer than necessary to complete the traffic stop; (2) police officer then told motorists they could consent to search of their trunk or wait for a police dog to arrive; and (3) motorists allowed search of trunk, the seizure violated the 4th Amendment and evidence found in the trunk must be suppressed as fruit of the poisonous tree.
Facts: Police officer stopped a driver (Defendant) and passenger when their car drove on the center line. Officer wanted to check if driver was intoxicated or falling asleep. After officer determined driver was not intoxicated or falling asleep, officer asked if he could search the car. The driver said, "sure," but then the passenger objected and driver objected. The driver refused to open the trunk. The officer said they had a choice of letting him search the trunk or waiting for a drug dog to arrive. They allowed search of trunk, in which drugs were found.
Holding: The officer unlawfully detained Defendant and passenger without reasonable suspicion beyond the time needed to complete the traffic stop, thus negating their consent to search. The officer completed the traffic stop when he determined the driver was not intoxicated or falling asleep and gave the driver back her license. Police are not allowed to involuntarily detain a driver without reasonable suspicion under the guise of simply engaging in a "voluntary" conversation. An encounter is consensual only if a reasonable person would feel free to disregard police and leave. A reasonable person in Defendant's position would not have felt free to leave where officer had said that Defendant could consent to a search of her trunk or wait for a drug dog. Their consent to open the trunk was negated by the unlawful continued detention of them under the 4th Amendment, and evidence in the trunk must be suppressed as the fruit of the poisonous tree.

State v. Dienstbach, No. ED93837 (Mo. App. E.D. 6/15/10):
Holding: Even though MSHP Trooper saw Defendant driving on the wrong side of a city street, Trooper had legal authority to stop Defendant because a city street is a "highway" under prior caselaw defining the term.

State v. Cook, No. ED91054 (Mo. App., E.D. 12/30/08):
Where shortly after a car accident police went to Defendant's home and entered it without a warrant after Defendant answered the door, smelled of alcohol, and asked to go get identification, the entry and arrest of Defendant was unlawful because without a warrant, but the subsequent toxicology results of Defendant need not be suppressed because those were taken outside of Defendant's home.
Facts: Police were called to an accident scene where a car was abandoned, and a man was seen leaving. Police discovered the car was registered to Defendant's wife, and went to Defendant's house. Defendant answered the door and smelled of alcohol. Police

asked for identification. Defendant said he would get identification, and police followed Defendant into his house. There, police arrested Defendant. Later, he was taken to the police station where toxicology tests were given which showed he was intoxicated. He was convicted of DWI and related offenses. He moved to suppress the toxicology results on grounds that the entry into his house without a warrant and his arrest were illegal.
Holding: Although the State claims there were exigent circumstances to justify entry into Defendant's house without a warrant, there were not. Defendant remained in sight of the officers while going to get his identification, and was not attempting to flee. The warrantless entry into the house violated the 4th Amendment. Although probable cause existed to arrest Defendant for leaving the scene of an accident, while probable cause would allow Defendant to be arrested in a public place, it does not justify a warrantless entry into his house to arrest him. Thus, the arrest violated the 4th Amendment. Although Defendant argues that everything that came after that must be suppressed as a poisonous fruit, that is not correct. The toxicology tests were taken *outside* of Defendant's home. Therefore, they were admissible.

State v. Ross, No. ED90375 (Mo. App., E.D. 6/3/08):
Where after traffic stop was complete and officer said Defendant-driver was free to leave, officer began asking Defendant about drugs which led to officer saying "wait right there" and getting a drug dog to search car, the seizure of Defendant after completion of the traffic stop violated the 4th Amendment and drugs found in car had to be suppressed.
Facts: Officer stopped Defendant-driver and a passenger for speeding. Defendant and passenger were driving a rental car in a different name, were "nervous," and told somewhat inconsistent stories of their trip. However, officer gave Defendant a warning ticket and said he was "free to go." Defendant then asked the officer if passenger could drive the car. Officer then started asking Defendant about drugs and drug trafficking. Defendant said he did not have anything illegal and officer could search car. However, after reading a consent form, Defendant withdrew his consent. Officer said "wait right there," and called a drug dog. Drugs were then found in the car. Defendant moved to suppress.
Holding: The State claims that Defendant's further conversation with officer was "consensual." However, a traffic stop may only last for the time necessary to conduct a reasonable investigation of the traffic violation. Officer had said Defendant was "free to go." Thus, the traffic stop was complete. Nervousness during a traffic stop coupled with inconsistent stories might support reasonable suspicion to search, but only if the search request occurs before completion of the traffic stop. That did not happen here. A reasonable person would not have felt free to leave, especially after the officer said "wait right there." An officer cannot involuntarily detain an individual for questioning under the guise of a "consensual" conversation. The State further argues Defendant lacks standing because he had a rental car, but the Court need not address that because Defendant's person was involuntarily detained, and the search of the car was the fruit of the illegal detention.

State v. Grayson, No. SD29592 (Mo. App. S.D. 5/11/10):
(1) Even though Officer received an anonymous tip that a "Mr. Reed" in a red Ford pickup was driving while intoxicated, Officer's stop of a red Mazda pickup which was not

violating any traffic laws was an unconstitutional stop; but (2) where Driver-Defendant had an outstanding warrant for his arrest, the taint from the unconstitutional seizure of Defendant was attenuated by the subsequent legal arrest, so evidence found in a search incident to arrest need not be suppressed.
Facts: Officer received an anonymous tip that a "Mr. Reed" was driving while intoxicated in a red Ford pickup. Officer, knowing that people sometimes misidentify vehicle models, saw a red Mazda pickup in the area and stopped it based on the tip. The pickup was not violating any traffic laws. Driver-Defendant was not Mr. Reed, but Officer recognized Defendant after stopping him, and knew he had had outstanding warrants. Officer ran a warrant check and arrested Defendant on an outstanding warrant. Officer searched truck incident to arrest and found drugs, which Defendant moved to suppress.
Holding: The initial stop the truck was unconstitutional. The stop was not based on reasonable suspicion because the anonymous tip was uncorroborated and Defendant did not commit any traffic violations. Nevertheless, the evidence need not be suppressed here because the illegality of the stop was attenuated by the outstanding warrant for Defendant and the lawful arrest based on it. Under *Hudson v. Michigan*, 547 U.S. 586 (2006), attenuation occurs if, granting the primary illegality, the evidence to which objection is made has come by exploitation of the illegality or instead by means sufficiently distinguishable to purge it of taint. Here, the drugs were not found because of the invalid stop, but instead because of a valid search incident to arrest based on an outstanding warrant. The existence of the warrant meant Defendant could be seized and arrested at any time. While *State v. Taber*, 73 S.W.3d 699 (Mo. App. W.D. 2002) reached a contrary result than that here, we believe *Taber* relied on an analysis rejected in *Hudson*.

State v. Gambow, No. SD30076 (Mo. App. S.D. 3/10/10):
Even though Defendant was passenger in car with marijuana smell and Officer found small container in Defendant's pocket during Terry pat-down, where Officer was not concerned about his safety, Officer could not open the small container.
Facts: Officer stopped car for speeding and smelled marijuana coming from car. Defendant was a passenger. Officer patted down Defendant under *Terry v. Ohio* for his safety and felt a small container. Officer did not think it was a weapon. Officer opened it and found drugs. Officer asked Defendant if he had anything else illegal, and Defendant pulled marijuana out of his shirt. Defendant moved to suppress all evidence.
Holding: The *Terry* pat-down for Officer's safety was justified, but once Officer determined that Defendant was not armed, the reason for the *Terry* pat-down ended. The search of the container without a warrant or consent was unreasonable. Further, Defendant's later admission and production of marijuana flowed from the unreasonable search of the container, so the marijuana is also suppressed. Even though police may have had probable cause to search the car, that alone does not justify a warrantless search of the car's occupants. Occupants of a car continue to have a heightened expectation of privacy. All drug evidence suppressed.

State v. Vogler, No. SD29492 (Mo. App. S.D. 11/3/09):
Where (1) Officer stopped Defendant's car for a signal violation; (2) told Defendant he was going to be given a warning; and (3) found Defendant had a valid license and no warrants, the traffic stop ended at that point, and Officer's further questioning of Defendant about searching for drugs was not a "consensual" encounter since Defendant would not have felt free to leave; drugs found in Defendant's wallet must be suppressed.
Facts: Officer stopped Defendant's car for not signaling while turning. Officer told Defendant he would be given a warning. Officer ran a license check on Defendant and found nothing improper. Officer gave Defendant back his license. Officer then asked Defendant if he had any drugs, and if Officer could search for drugs and weapons. Defendant agreed, and Officer ultimately found methamphetamine in Defendant's wallet. Seven minutes had elapsed between the time of stop and the search and arrest.
Holding: The warrantless search violated the 4th Amendment because the traffic stop was over when Officer gave Defendant his license back, and the subsequent encounter was not "consensual" since a reasonable person would not have felt free to leave. A stop can last only as long as necessary to reasonably investigate the traffic violation. Once the investigation of the stop is over, the Defendant must be permitted to proceed. Here, the stop ended when Officer gave Defendant back his license. However, Officer at that point continued to question Defendant about searching for drugs. The State argues Defendant's encounter with Officer was "consensual" at that point, but from stop to arrest, the seven minute encounter was one seamless event, and there was nothing to give a reasonable person a clear demarcation between the end of the traffic stop and the "consensual" encounter between the Officer and Defendant. Motion to suppress should have been granted.

State v. Cain, No. SD29090 (Mo. App. S.D. 5/15/09):
(1) Even though the parties stipulated in trial court that Defendant's sentence would be reduced and the appeal waived, this did not waive Defendant's appeal because the trial court had no power to reduce Defendant's sentence long after sentencing; (2) where Defendant's prior DWI offense conduct occurred more than five years before the charged DWI offense, Defendant was not a "prior offender," Sec. 577.023.1(5) RSMo. Cum. Supp. 2005; and (3) Point Relied On must state that trial court erred in admitting evidence at trial, not just in denying motion to suppress.
Facts: In April 2007, Defendant was charged with DWI as a prior offender for having "been convicted on August 27, 2002" of DWI in Jefferson County. The conduct giving rise to the Jefferson County charge occurred in 2000. After Defendant was convicted in the new case, he filed an appeal. Meanwhile, six months after sentencing, the parties in the trial court stipulated that Defendant's sentence would be reduced to time served and "in exchange for this outcome, Defendant has agreed to waive" his appeal.
Holding: (1) The State argued that Defendant has waived this appeal because of the stipulation in the trial court. However, there was no authority for the trial court to reduce Defendant's sentence; therefore, Defendant's purported waiver of his right to appeal, based on the mutual false assumption by the parties as to the trial court's authority to reduce Defendant's sentence, was not and could not have been voluntarily made. Once sentencing occurs in a case, the trial court loses jurisdiction, and cannot reduce a sentence as was done here. The trial court could have granted Defendant parole under Sec.

559.100 RSMo. Cum. Supp. 2006, but that's not what the court purported to do here. (2) Although the date of Defendant's prior DWI conviction was August 27, 2002, the conduct giving rise to that conviction occurred in 2000. Sec. 577.023.1(5) RSMo. Cum. Supp. 2005 provides that a prior offender is one whose "prior offense occurred within five years" of the newly charged offense. The 2000 DWI conduct is not within five years of April 6, 2007, the date of the new DWI offense. Therefore, Defendant cannot be sentenced as a "prior offender," and can only be sentenced for a Class B misdemeanor. (3) Defendant's Point Relied On on appeal raises an issue that the trial court erred in denying a motion to suppress. The Point Relied On does not claim error in admitting the evidence at trial. A trial court's ruling on a motion to suppress is interlocutory. A motion to suppress by itself preserves nothing for appeal, and a Point Relied On that refers only to such a ruling preserves nothing for appeal. However, the Court reviews the claim here because the motion was preserved at trial and in the new trial motion, so the State had notice Defendant was raising this issue.

State v. Dye, No. 28657 (Mo. App., S.D. 12/10/08):
Even though police had a report that a man was knocking on doors asking for a ride, where Defendant was seen in the area, there was no reasonable suspicion to stop Defendant or conduct a Terry search of him, because knocking on doors was not a crime, and there was no evidence Defendant was armed. Thus, drugs found on Defendant were suppressed.
Facts: At 10:48 p.m., police received a report of a man knocking on doors asking for a ride home and possibly "panhandling." At 11:00 p.m., Officer saw Defendant walking in the area, asked him to stop, and told him he was not free to go. Officer did a pat down of Defendant for Officer's safety and asked Defendant to empty his pockets. Defendant had drugs in his pockets. Defendant moved to suppress the drugs.
Holding: To justify a forcible stop, an officer must have reasonable suspicion that the person being stopped is engaged in criminal activity. Once a valid stop is made, an officer may pat a suspect's clothing only on reasonable suspicion the suspect is armed. Here, Officer just saw Defendant walking down a street. Even if Defendant was knocking on doors, it is not illegal to do so; nor is it against any law to "panhandle." There was no reasonable suspicion Defendant was committing a crime, so the stop was invalid. Further, there was no reasonable suspicion that Defendant was armed. Even though Defendant may have "consented" to the search, this alleged consent was only after an illegal stop, and there was no intervening circumstance. Evidence should have been suppressed.

State v. Kelley, No. 28248 (Mo. App., S.D. 6/26/07):
Officer not justified under "plain feel" doctrine in searching canister found in Defendant's pocket.
Facts: Defendant lived with his mother. A neighbor, who saw Defendant go into the mother's garage a lot, suspected drug activity and called the police. Officer went to house to investigate. At house, officer saw Defendant in an intoxicated condition and asked if he was "involved with meth." Defendant said no. Defendant had a knife and officer placed it aside, and conducted a *Terry* frisk of Defendant. Officer felt a canister in the pocket. Officer opened canister and found meth.

Holding: The State contends officer could open the canister under the "plain feel" doctrine. However, while officer was allowed to conduct a *Terry* frisk, he could not open the canister under the facts here. Officer was not making a search incident to an arrest for probable cause. He did not have a warrant. He said he knew the canister was a cylinder, but he did not know what it was when he felt it. He did not identify the canister as contraband. He did not testify he had knowledge that such canisters commonly contain contraband. He could not have reasonably believed the canister endangered his safety. No one observed Defendant doing anything consistent with having drugs, and Defendant was on private property.

State v. Hamilton, No. 28218 (Mo. App., S.D. 6/14/07):
Even though (1) officer claimed he stopped Defendant for following too closely and claimed he smelled marijuana after the stop, and (2) officer claimed he had a safety concern that caused him to search for weapons and he found a gun, where officer allowed Defendant to drive off without issuing a traffic ticket, the trial court's suppression of the gun, after Defendant was charged four months later, was affirmed because the trial court evidently disbelieved officer's testimony.
Facts: Officer claimed he stopped Defendant's car for following too closely. He claimed that after he pulled Defendant over, he smelled marijuana and he suspected Defendant was "intoxicated" on marijuana. Officer saw a crowbar, hammer and baseball bat in the car, and claimed he had a "safety concern" that caused him to search for weapons. He then found a gun. At the time he found the gun, it was not reported stolen. The officer issued Defendant a ticket for a marijuana pipe, but did not issue any other tickets and allowed Defendant to drive off. The officer's reports did not mention marijuana odor or intoxication. Four months later, the gun was reported stolen and Defendant was charged with a gun offense. The trial court suppressed the gun.
Holding: The officer described a minor traffic stop, that escalated into a DWI investigation for marijuana intoxication, that escalated into a weapons search. However, his five written reports never mentioned marijuana odor or intoxication. The officer did not ticket Defendant for DWI or following too closely. The trial court evidently disbelieved the officer's testimony about the traffic stop or the marijuana odor or both. Whether there was reasonable suspicion for the weapons search depends on the officer's credibility for the following too closely, smelling marijuana and appearing intoxicated. Since the trial court evidently found officer to be incredible, there was no reasonable suspicion or probable cause to search the car.

State v. Whitwell, No. 28131 (Mo. App., S.D. 3/8/07):
State cannot appeal trial court's order granting Motion to Suppress Identification.
Facts: The trial court sustained Defendant's Motion to Suppress Identification following a robbery. The State appealed this order pre-trial.
Holding: This appeal must be dismissed because the State cannot appeal a pretrial sustaining of a motion in limine. Section 547.200.1(3) permits a State appeal of a motion to suppress evidence, but this statute is linked to Section 542.296 which involves illegal or warrantless searches and seizures. Section 547.200.1(3) was not intended to allow appeal of motions in limine. If that were the case, the State could appeal all motions in limine which excluded evidence.

State v. Kingsley, No. WD71800 (Mo. App. W.D. 11/9/10):
Where Officer searched car "incident to arrest" in violation of Arizona v. Gant, 129 S.Ct. 1710 (2009), drugs found must be suppressed because Gant is retroactive (though Missouri Supreme Court is currently considering this issue).
Facts: Officer stopped car for speeding. Driver and Defendant-Passenger were in car. Officer then discovered Driver was driving while revoked and arrested him. Officer then searched car "incident to arrest" and found drugs. Defendant-Passenger's motion to suppress on basis of *Arizona v. Gant* was granted. The State appealed.
Holding: *Gant* holds that a search of car incident to arrest is valid only if arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Here, the search was pre-*Gant*, but other Missouri Court of Appeals cases have held that *Gant* is retroactive. Although the Missouri Supreme Court is currently deciding this retroactivity issue in another case, the Court of Appeals here follows current Missouri caselaw on retroactivity. The State also argues that Passenger lacked standing to challenge the search, but since the State did not object to lack of standing below, the State cannot raise this on appeal for the first time. Suppression affirmed.

State v. Stover, No. WD70594 (Mo. App. W.D. 12/14/10):
Even though Officer had reasonable suspicion to search car, where he then delayed in conducting a search by asking irrelevant questions, his lack of diligence unnecessarily prolonged the traffic stop, rendering the later search a violation of the 4th Amendment.
Facts: Officer stopped a car for following another vehicle too closely. Upon stopping car, officer learned car was rented, and driver from another state. Defendant driver said they had no luggage because they had been in Las Vegas for only one day and were returning home. The rental agreement showed the car was overdue by one day. A passenger in the car had a prior arrest for drugs. The officer continued to ask questions for more 20 minutes before he finally called a drug dog. The dog arrived 45 minutes after the stop, and found drugs. Defendant moved to suppress.
Holding: An officer can detain a driver for a reasonable period of time to deal with a traffic infraction. Once the investigation of the traffic stop is finished, the officer must permit the driver to leave unless the officer has objectively reasonable suspicion that the driver is involved in criminal activity. Here, Officer had reasonable suspicion to search early in the traffic stop since the driver's story about being in Las Vegas for only one day was very unusual, along with the lack of luggage and passenger with a drug arrest. However, a detention for investigation of drug possession must be reasonably efficient. If an officer does not act diligently to justify his suspicions as quickly as possible, the detention may become unreasonable. Here, there was an unnecessarily protracted detention of at least 15 minutes before Officer called for a drug dog. The Officer's unnecessary questioning was a "fishing expedition" conducted as though the travelers had all the time in the world. Altogether, the entire stop was about an hour. An hour would be too long to be seized if the travelers had been innocent persons subject to receiving a traffic warning. Motion to suppress should have been granted.

State v. Connell, No. WD72643 (Mo. App. 12/14/10):
Even though State's appeal purported to be an appeal of a grant of a motion to suppress, where trial court had held a bench trial and only after the entire trial entered a "Judgment" purporting to grant the motion to suppress, this Judgment was in reality an acquittal, and State could not appeal.
Facts: Defendant was charged with drug possession. Prior to trial, the trial court overruled Defendant's motion to suppress. Defendant proceeded to a bench trial. At trial, the State introduced the drugs without any objection from the defense. After closing arguments, the court entered an order that stated: "Judgment – Defendant's motion to suppress is sustained." The State appealed.
Holding: Defendant correctly claims that this is not an interlocutory appeal of a grant of a motion to suppress, but is an impermissible appeal of an acquittal. Sec. 547.200.1(3) allows the State to appeal a denial of a motion to suppress. However, the State cannot appeal if this would result in double jeopardy to a defendant, Sec. 547.200.2. Here, the trial court's order is nonsensical since the court admitted the evidence without objection at trial, but then purported to suppress the evidence after trial in a "Judgment." Suppression of evidence should be ruled upon before, not after, evidence has been admitted at trial. For double jeopardy purposes, the court looks to the entire proceedings. Here, the entire trial was concluded. The practical effect of the trial court's judgment is that after hearing all the evidence, the court concluded as a matter of law that the State could not meet its burden, and thus, Defendant was acquitted. Jeopardy has attached and the appellate court cannot review this appeal as "interlocutory." Appeal dismissed.

State v. Robertson, No. WD72529 (Mo. App. W.D. 12/14/10):
Trial court could find there was no probable cause to arrest where State did not show that pre-arrest portable breathalyzer machine had been properly calibrated.
Facts: Defendant was charged with DWI. Officer had stopped Defendant for speeding. Defendant had a strong odor of alcohol on her. Officer asked her to submit to a portable breathalyzer test (PBT). It showed a result of .08. Officer then asked Defendant to perform other field sobriety tests, such as walking and counting. These tests did not show evidence of intoxication. However, Officer observed that Defendant's eyes were bloodshot and glassy, and she was argumentative. Officer then had Defendant perform second PBT, which showed a result above .08. Defendant filed motion to suppress. At the suppression hearing, Officer testified he did not know when PBT machine was calibrated. The trial court issued an order stating that because no record existed establishing that the PBT had been calibrated, no probable cause existed for the arrest. The State appealed.
Holding: The State contends that the PBT results were admissible as evidence of probable cause to arrest. Sec. 577.021.3 provides that a PBT test shall be admissible as evidence of probable cause to arrest and as exculpatory evidence, but shall not be admissible as evidence of blood alcohol content. Also, the PBT is not subject to the same Dept. of Health regulations that govern breath analysis tests admissible to prove that a defendant was intoxicated. Admissibility of the PBT is not the issue here, however, because the trial court admitted into it evidence at the suppression hearing. The State's real complaint is that the court did not accept and rely on the results of the PBT. It appears the court found the results of the PBT inconsistent with the other evidence in the

case, and disbelieved the results due to lack of calibration of the PBT. Even the Officer conceded that without the results of the PBT, he did not have probable cause to arrest Defendant for DWI. The court was free to disbelieve the PBT results. Without the PBT results, the Officer did not have probable cause to arrest. Motion to suppress affirmed.

State v. Loyd, No. WD71692 (Mo. App. W.D. 12/21/10):
Officer had no probable cause to stop Defendant for DWI where (1) Defendant failed to use a turn signal to pull out of private property onto a street, since this is not a crime; (2) Defendant failed to turn into the nearest lane, since this is not a crime, and Officer did not even notice this until he reviewed the police car video later; and (3) Defendant's wheels touched the center line, since this minor deviation does not justify a stop.
Facts: Officer saw Defendant pull out of a private parking lot and turn onto a street, apparently without signaling. Also, Officer saw Defendant fail to turn into the nearest lane. Finally, Officer saw Defendant's wheel touch the center line. Officer stopped Defendant and determined he was intoxicated. Defendant was convicted of DWI. He appealed the denial of a motion to suppress.
Holding: Since Defendant failed to object to evidence at trial, he did not properly preserve his motion to suppress, so the claim can only be reviewed as plain error on appeal. Nevertheless, plain error occurred here since Officer lacked probable cause to stop Defendant. First, Officer did not actually see Defendant fail to signal but only thought this because Officer thought there wasn't enough time for the signal to turn off when Defendant completed his turn. Even so, however, failing to signal when pulling out of a private parking lot does not violate state statute, Sec. 304.019, or municipal ordinance, which make failing to signal an offense only if committed upon a public roadway or publicly maintained road. Thus, Defendant violated no law in failing to signal. Second, Officer claimed Defendant did not pull into the nearest lane. This, however, does not violate any law either, but it also can't supply probable cause here because Officer did not even notice this until he reviewed the police car video later. Probable cause must be based on facts observed before a stop, not later. Finally, Officer claimed Defendant's wheel touched the center line. However, a minor deviation from traffic like this does not provide probable cause to stop a driver. The video clearly establishes that there was no illegal or unusual driving in this case. Defendant's seizure violated 4th Amendment, and motion to suppress should have been granted. Absent probable cause for the stop, all subsequent evidence should have been suppressed.

State v. Johnson, No. WD70167 (Mo. App. W.D. 7/13/10):
(1) Where Officer arrested Defendant for driving without a license and Defendant was in the patrol car at the time of arrest, Officer's subsequent search of Defendant's vehicle was not a valid search incident to arrest under Arizona v. Gant; (3) Gant applies retroactively to Defendant because Defendant's case was pending on direct appeal when Gant was decided; and (3) "good faith" exception to 4th Amendment does not apply to save the search because "good faith" does not include reliance on 4th Amendment caselaw.
Facts: Officer stopped Defendant's vehicle for driving without a license plate. After the stop, Officer placed Defendant in patrol car and discovered he had an invalid license to

drive. Officer then searched Defendant's vehicle "incident to arrest" and discovered drugs. Defendant moved to suppress. After he was convicted at trial, he appealed.
Holding: Defendant correctly argues that under *Arizona v. Gant*, 129 S.Ct. 1710 (2009), Officer was not entitled to search his vehicle incident to arrest for driving without a license because Defendant was secured in the patrol car at the time of the search, and it was not reasonable for Officer to believe that the vehicle would contain evidence relevant to the offense of arrest – driving without a license. *Gant* held that it is lawful to search a vehicle incident to arrest only when the arrestee is within reaching distance of his vehicle, has not been secured by law enforcement, or when law enforcement has reason to believe that evidence of the offence for which arrestee has been arrested is likely to be in the vehicle; that is not the case here. Moreover, since Defendant's case was pending on direct appeal at the time *Gant* was decided, *Gant* applies retroactively to his case. The State argues that the "good faith" exception to the exclusionary rule applies because Officer relied on pre-*Gant* caselaw to conduct the search. However, good-faith reliance on caselaw is different than good-faith reliance on a warrant that is later declared invalid because caselaw is more subject to interpretation. Moreover, if reliance on caselaw constitutes "good faith," then the "good faith" exception would apply any time that the Supreme Court announces a new constitutional 4th Amendment rule. Finally, the State argues that inevitable discovery saves the search here because Defendant's vehicle would have been subject to an eventual inventory search. However, the State did not prove that Defendant would have been unable to make arrangements to have someone come and pick up the vehicle or that Officer had decided to impound the vehicle. Therefore, an inventory search was not inevitable. Drug conviction reversed.

State v. Kingsley, No. WD71799 (Mo. App. W.D. 8/24/10):
Where (1) Defendant was stopped for speeding, and (2) Officer learned Defendant had a revoked license, arrested him, and put him in patrol car, Officer's subsequent search of car "incident to arrest" was invalid under Arizona v. Gant, 129 S.Ct. 1710 (2009), and the "good faith" exception to the exclusionary rule does not apply; drugs found must be suppressed.
Facts: Officer stopped Defendant's car for speeding. Officer learned Defendant had a revoked license, arrested him and put him in patrol car. Officer then searched car "incident to arrest" and found drugs.
Holding: *Arizona v. Gant* held that police may search a vehicle incident to arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Here, the search violated *Gant*. The State claims the "good faith" exception to the exclusionary rule applies because Officer relied on *pre*-Gant caselaw to conduct the search. But the good-faith exception has never been applied to Officer's reliance on appellate caselaw. Applying the good-faith exception would be inconsistent with Supreme Court decisions concerning retroactive application of cases under the 4th Amendment. Evidence suppressed.

State v. Waldrup, No. WD70318 (Mo. App. W.D. 4/27/10):
Even though (1) Troopers stopped car at routine license checkpoint, and (2) Trooper saw Defendant-passenger appear to hide something, Troopers had reasonable suspicion to

conduct Terry pat-down of Defendant-passenger for weapons, but once no weapons were found, they could not detain Defendant-passenger to confirm identification; the further detention led to finding a warrant for his arrest, which led to finding drugs in his shoe.
Facts: Troopers were conducting a checkpoint for driver's licenses. As the car in which Defendant was a passenger approached the checkpoint, Troopers observed Defendant-passenger appear to hide something around his feet. Troopers suspected Defendant-passenger had a weapon. When the car was stopped, they had Defendant-passenger get out and patted him down for a weapon but found nothing. They then asked Defendant-passenger for identification, but he did not have any. He gave his name, birthdate and social security number. Troopers then ran a check on him and found a warrant for his arrest. They arrested him and searched him incident to arrest. They found drugs in his shoe. Defendant-passenger moved to suppress the drugs and statements he made.
Holding: The evidence must be suppressed because Troopers' actions went impermissibly beyond the scope of the stop because there was no objectively reasonable suspicion of criminal activity after the pat-down dispelled Troopers' suspicion that Defendant-passenger was armed. Defendant's actions gave reasonable suspicion to pat-down for weapons. However, when no weapons were found, the justification for detaining and searching Defendant ended. Further detention of him constituted an unlawful seizure absent new grounds for reasonable suspicion. Police can request identification and perform a computer check without reasonable suspicion so long as police do not convey the message that compliance is required. Otherwise, this is a seizure, thereby invoking constitutional protections. While it was permissible to ask for identification during the *Terry* search, the computer check was not done until *after* the suspicions for the *Terry* search ended. Defendant would not have felt free to leave while police were checking his identification on the computer. This further detention without reasonable suspicion while his identification was being checked was an unlawful seizure. Evidence suppressed.

State v. Kruse, No. WD70481 (Mo. App. W.D. 1/19/10):
Even though police had an arrest warrant for a possibly dangerous person, where they found the person's vehicle at a third party's residence, there were not exigent circumstances to go to the backyard of the property to search for the person and drugs found in a shed were suppressed.
Facts: Police received a tip that Beel was planning to do a meth cook, and they had an arrest warrant for Beel which had "caution indicators" indicating Beel was violent. Police then saw Beel's vehicle at a third party's (Defendant's) house. Police had no information connecting Beel to Defendant. Police knew that Defendant had previously violated the "nine-gram Sudafed law." Police decided not to apply for a search warrant. They went onto the property at about midnight, and approached a storage shed. Defendant, who was inside the shed, came out of the shed, and police then saw a methamphetamine lab in the shed. Defendant moved to suppress.
Holding: The State contends the search and seizure was valid because, first, the police were not actually conducting a search but were instead executing an arrest warrant; second, there were exigent circumstances; and third, that the methamphetamine lab was in plain view. The 4th Amendment acknowledges the sanctity of the home, and extends to curtilage such as sheds. This is not a case where the officers merely knocked on a

front door to ask if Beel was present. They went in the backyard where the shed was before trying the front door. Even though Beel's arrest warrant had "caution indicators" on it, the police did not fear present danger to anyone or destruction of evidence. They had time to seek a search warrant, but chose not to. Drug evidence suppressed.

State v. Moad, No. WD70527 (Mo. App. W.D. 9/29/09):
Where trial court excluded evidence as a discovery sanction and not because the evidence was illegally obtained, the State could not appeal the trial court's ruling as an interlocutory appeal (but could seek a writ of prohibition).
Facts: Defendant was charged with vehicular manslaughter resulting from the death of a person in a car. Defendant claimed he was not the driver of the car, but was only a passenger. The car was owned by the victim's family. Before Defendant could conduct an independent examination of the car, the Highway Patrol released the car to the victim's family. The Patrol claimed this was done pursuant to a Patrol policy. Defendant sought discovery of the policy, and despite a court order to produce it, the State never produced it. The trial court then excluded all evidence from the car. The State appealed.
Holding: The question is whether the State has a right to appeal here. Sec. 574.200.1(3) permits an interlocutory appeal by the State where an order suppresses evidence. There is a difference between "suppression" and "exclusion," however. Suppression is a term used when the evidence is not objectionable as violating any rule of evidence, but the evidence has been illegally obtained. Suppression of evidence is linked to the reasons in Sec. 542.296. Here, there was never an argument that the evidence from the car was illegally obtained. Hence, the order here is one of exclusion, not suppression. It is akin to a discovery violation sanction. This is not appealable by interlocutory appeal, but the State may challenge it via writ of prohibition. Appeal dismissed.

State v. Allen, No. WD70295 (Mo. App. W.D. 9/22/09):
Even though the State sought "clarification" of trial court's ruling on motion to suppress from the trial court, where State did not appeal the ruling within 5 days of the original suppression order, State's appeal was untimely under Sec. 547.200.4.
Facts: Defendant filed a motion to suppress statements, which the trial court sustained on September 8, 2008. The court entered a docket entry on September 8, saying "Deft's motion to suppress statements sustained." The State requested a "more specific ruling" on certain statements, and the court further explained its ruling in chambers on September 9. On November 3, the State asked for "further clarification" of the suppression order, and the court issued another order on November 4. On November 4, the State filed an appeal.
Holding: Sec. 547.200.4 only permits the State to appeal "within 5 days of the entry of the [suppression] order of the trial court." The State argues it is appealing the November 4 order, so its appeal is timely. However, the November 4 order was, in substance, the same as the court's prior rulings on September 8 and 9. The November 4 order, in substance, merely reaffirmed the in chambers conference on September 9. While an appeal within 5 days of September 9 would have been timely, the appeal on November 4 was outside the 5-day time limit for a State's appeal. Appeal dismissed.

State v. J.D.L.C., No. WD70769 (Mo. App. W.D. 9/1/09):
Even though minor-Defendant had faint odor of alcohol on his breath, where (1) minor was in backseat of vehicle and only alcohol was in front seat of vehicle or truck bed, and (2) minor's eyes were not glassy or bloodshot and he was not belligerent, Officer did not have probable cause to arrest minor for minor-in-possession, and later breath-test results must be suppressed.
Facts: Officer stopped truck for speeding. A driver and 3 minors were in the truck. Beer cans were in the truck bed, and a bottle of rum was in the front seat. Minor-Defendant was in the back seat. Minor-Defendant had a "faint" or "mild" odor of alcohol, but his eyes were not bloodshot or glassy, and he was not belligerent. Officer arrested him for minor-in-possession. At station, minor was given breath test which showed .058% BAC. Minor sought to suppress the breath-test results.
Holding: Section 311.325 provides that a person under age 21 commits minor-in-possession if they are "visibly intoxicated as defined in Sec. 577.001." Officer testified at suppression hearing that he arrested Defendant for being visibly intoxicated. However, there was no probable cause to arrest. Minor did not own or drive the truck, and was sitting in the backseat where alcohol was not found. Also, he showed no visible signs of intoxication because his eyes were not glassy or bloodshot and he was not belligerent, even though he had a faint or mild odor of alcohol. Since the breath-test was closely tied to the illegal arrest, it cannot be purged of this taint; the breath-test likely would not have been obtained absent the illegal arrest. Breath-test is suppressed.

State v. Henry, No. WD69978 (Mo. App. W.D. 6/16/09):
Holding: In reviewing whether affidavit to support search warrant was supported by probable cause, appellate court reviews whether the *issuing judge's* findings were clearly erroneous, not whether the trial court's ruling on the motion to suppress was.

In re: Search Warrant for 415 Locust St., Chillicothe, Mo., No. WD69242 (Mo. App., W.D. 11/12/08):
Holding: Even though (1) police seized Appellants' records and computers under a search warrant, and (2) Appellants were never charged with a crime, Appellants could not recover their property through a "Motion to Quash Warrant and Return Seized Property," but could only do this through a "Motion To Suppress" under Section 542.296, which includes the investigation of crime before the filing of any charges.

Taylor v. State, No. WD66345 (Mo. App., W.D. 7/24/07):
Appellate counsel ineffective in failing to appeal motion to suppress.
Facts: Movant-Defendant was walking in middle of street. Police stopped him for jaywalking. An officer knew Defendant had possessed drugs before, and had searched Defendant before, but never found any weapons. Officer told Defendant he would frisk him. Defendant then said he had a crack pipe. Defendant was arrested for possession of the crack pipe. Crack was then found on Defendant in an "inventory search" at the police station. Trial counsel filed a motion to suppress and preserved this at trial, on grounds that police lacked reasonable suspicion to frisk Defendant. The trial court overruled the motion to suppress, and Defendant was convicted. Appellate counsel did not appeal this issue in the direct appeal. Defendant later filed a 29.15 motion.

Holding: Because the stop for the traffic violation and the frisk were one and the same, the justification for the frisk must have been apparent to police before they frisked Defendant. The officers already had probable cause for the jaywalking citation. There was no need for further investigation of Defendant. There cannot be a reason to frisk an individual for weapons unless there is reasonable suspicion of a more serious violation, or concern about safety. There was no evidence Defendant was suspected of having weapons. A person's prior drug involvement is not by itself reasonable suspicion to search someone. Moreover, the officers here had searched Defendant before and never found weapons. Appellate counsel evidently believed the search was valid under *Terry*. A traffic stop is not investigative, however. It is a form of arrest based on probable cause that a traffic violation has been violated. Defendant had no defense other than the motion to suppress. Without it, he might as well have pleaded guilty. It was unreasonable for appellate counsel not to appeal this issue, since it would have been successful if raised on appeal.

State v. Roark, No. WD67135 (Mo. App., W.D. 6/12/07):
(1) Even though officer received a call about a possible intoxicated driver, where officer saw the car and only saw it move slightly over the fog line of the road, there was no reasonable suspicion to stop the driver for DWI; and (2) even though defense counsel failed to object to officer's testimony at trial, where defense counsel had a pending "motion to reconsider denial of motion to suppress" at trial and requested a ruling at the close of the state's evidence, that preserved the claim for appeal.
Facts: Officer received a call about a "possible intoxicated driver." Officer found the car and it slightly moved across the fog line. The car then pulled into a motel. Officer went to the motel and asked driver to "come outside." Driver asked for an explanation, but officer said he would give one outside. Officer eventually arrested Defendant for DWI. Before trial, the trial court overruled a motion to suppress. At trial, defense counsel filed a "motion to reconsider denial of motion to suppress," which defense counsel renewed at the close of all the state's evidence. Counsel did not object to officer's trial testimony.
Holding: (1) There was no reasonable suspicion to stop the car, and thus, no reasonable suspicion for the subsequent stop of Defendant at the motel. Officer testified Defendant's car did not "go off" on the shoulder; other drivers did not have to take evasive action; and there was no erratic or dangerous driving by Defendant. The anonymous information about a "possible intoxicated driver" provides no more information of substance than what officer observed. (2) While trial counsel's method of raising and preserving the suppression issue at trial is "certainly not the preferred method of preservation," it is preserved here where neither the State nor trial court claimed at trial that it had been waived. The better method would have been to object to the officer's testimony based on the motion to suppress.

State v. Gibbs, No. WD66334 (Mo. App., W.D. 4/3/07):
Where police did not knock and announce their presence before breaking in door to Defendant's motel room, the evidence found on Defendant's person should have been suppressed because there were no exigent circumstances to justify failure to knock and announce.

Facts: Defendant robbed a bank. Subsequently, police learned Defendant was staying at a motel. Without knocking and announcing, police broke in Defendant's motel room door and arrested Defendant. Money, a knife and a crack pipe were found on Defendant's person.
Holding: A no-knock search is justified under the 4th Amendment only if there are exigent circumstances, such as a threat of physical violence or a reasonable fear that evidence would be destroyed. The fact that the alleged crime was a robbery is not, by itself, sufficient to do a no-knock entry. Here, there were no exigent circumstances. Therefore, the items on Defendant's person should have been suppressed. However, the arrest itself was supported by probable cause and was not illegal. The "fruit of the poisonous tree" doctrine does not bar Defendant's subsequent statements to police. There is overwhelming evidence of guilt. Thus, conviction affirmed.

State v. Dixon, No. WD66641 (Mo. App., W.D. 3/20/07):
Where officer pulled up behind Defendant's broken truck and took Defendant's license to run a records check, Defendant was "seized" for 4th Amendment purposes because he would not have felt free to leave, and evidence found in Defendant's wallet had to be suppressed because there was no reasonable suspicion that Defendant was engaged in wrongdoing.
Facts: MSHP officer pulled behind Defendant's broken truck on the road shoulder. Officer asked for Defendant's license and told Defendant to stay in the truck. Officer ran a records check and was told everything was okay. Officer gave Defendant back his license, but then heard on the radio that there was a warrant for Defendant. A person then arrived to help Defendant with his broken truck. The officer went back to the truck and told Defendant that he would be arrested for the warrant. Defendant then tried to give his wallet to the other person, but the officer took it and found cocaine in the wallet.
Holding: The officer had "seized" Defendant when he initially took Defendant's license and told him to stay in the truck. Defendant would have reasonably believed that he was not free to decline the request or terminate the encounter. The 4th Amendment requires that all warrantless "seizures" of a person be founded upon at least reasonable suspicion that the person is engaged in wrongdoing. Here, there was no reasonable suspicion before the seizure to believe Defendant was engaged in wrongdoing. Defendant was "seized" before the officer learned about the outstanding warrant. Because the seizure was invalid, the evidence found as a result of the seizure must be suppressed.

State v. Renfrow, No. WD66102 (Mo. App., W.D. 2/27/07):
Where city police officer observed Defendant's car swerve within the city limits, but did not activate sirens or stop Defendant until he was outside the city limits, the stop was illegal and evidence obtained in Defendant's subsequent arrest by the Highway Patrol for DWI must be suppressed as fruit of poisonous tree.
Facts: City police officer observed Defendant's car swerve inside city limits. City officer followed Defendant and saw car drive erratically outside city limits. City officer activated siren, and stopped Defendant on side of road outside city limit. (The city limit was the center line of the road). City officer called Highway Patrol officer who came and discovered Defendant was drunk, and arrested Defendant. Defendant moved to suppress all evidence seized and statements made as a result of the stop.

Holding: Municipal police officers have no official power to apprehend offenders beyond their municipal boundaries, absent a statute. Section 544.157.1 allows officers to stop offenders if the officers are in "fresh pursuit" initiated from within the jurisdiction. Here, city officer did not activate his sirens until he was outside the city limits. Thus, city officer was not in "fresh pursuit," and did not have authority to stop Defendant. The stop was illegal. The question then becomes whether the evidence from the stop must be suppressed as a fruit of the poisonous tree. *State v. Neher*, 726 S.W.2d 362 (Mo. App., W.D. 1987) held that such evidence should not be suppressed, but Court of Appeals overrules *Neher*. Court holds that the Highway Patrol officer's arrest of Defendant was a mere extension of city officer's illegal stop and seizure, not based on independent information, and not attenuated from the illegal stop.

State v. Gabbert, No. WD66350 (Mo. App., W.D. 2/13/07):
Where Defendant was stopped and searched by police when he was in the backyard of a house he was visiting, Defendant had standing to challenge the seizure and search, and the evidence seized and statements taken from him must be suppressed because there was no reasonable suspicion to stop and seize Defendant.
Facts: Police were called to a house to conduct a "well-being" check after a mother called police to try to get her daughter to come home from the house, when the mother found drugs in the daughter's purse. The police found Defendant in the backyard of the house. They ordered him to take his hands out of his pockets. They asked to search him, and he consented. They found a knife in his sock, and he made incriminating remarks about the knife. He was charged with unlawful use of a weapon.
Holding: Defendant has standing to object to his seizure and search, even though Defendant did not own the house, because the 4th Amendment protects people not places. Defendant had a legitimate expectation of privacy in his person. The police characterized their stop of Defendant as a seizure and testified he was not free to leave. While a person can be detained if there is reasonable suspicion for doing so, here there was not. Defendant was not fleeing; there was no evidence he was using drugs, or that he posed a danger to police or anyone else. Therefore, the stop and seizure of Defendant was illegal. The fact that Defendant may have consented to the search after the stop does not purge the taint of the illegal seizure. The knife and statements must be suppressed.

*** City of Ontario, Cal. v. Quon, ___ U.S. ___, 2010 WL 2400087 (U.S. 2010):**
Holding: City's reading text messages on Officer's city-owned pager was not an unreasonable search.

*** Michigan v. Fisher, 86 Crim. L. Rep. 318, ___ U.S. ___ , 2009 WL 454492 (U.S. 12/7/09):**
Holding: Where police were called to a residence in response to a disturbance and saw a vehicle car outside, and heard yelling inside and saw items being thrown, they were allowed to enter the house without a warrant under the "emergency aid exception" to the 4th Amendment warrant requirement, and this exception does not depend on the officers' subjective intent.

*** Arizona v. Gant, 85 Crim. L. Rep. 95, 2009 WL 1045962, ___ U.S. ___ (4/21/09):**

Holding: 4th Amendment's search incident to arrest doctrine does not allow police to conduct a warrantless search of an arrestee's vehicle after the arrestee has been handcuffed or otherwise prevented from gaining access to car; police can search car incident to arrest only if arrestee is within reaching distance of passenger compartment or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

*** Stafford v. Unified School District No. 1 v. Redding, 85 Crim. L. Rep. 457, ___ U.S. ___ (6/25/09):**
Holding: Strip-search of middle school student by school officials to search for non-dangerous, over-the-counter drugs was unreasonable under 4th Amendment; there was no showing the drugs were dangerous to others or that officials had reason to believe student had drugs in her underwear.

*** Arizona v. Johnson, 84 Crim. L. Rep. 443, ___ U.S. ___ (1/26/09):**
Holding: (1) The 4th Amendment is not violated when officers conducting a lawful traffic stop frisk passengers; officers may frisk passengers they have lawfully detained so long as they have reason to believe passengers are armed and dangerous; and (2) Officer's questions about matters unrelated to the traffic stop "do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop;" thus, police can ask questions about matters other than the traffic stop.

*** Herring v. United States, 84 Crim. L. Rep. 399, 2009 WL 77886, ___ U.S. ___ (1/14/09):**
Holding: The good faith exception to the exclusionary rule applies to searches in violation of the 4th Amendment which were caused by isolated police mistakes or negligence; thus, even though police arrested Defendant pursuant to what they thought was an outstanding warrant that later turned out to be false, drugs found on Defendant as part of a search incident to arrest need not be suppressed.

*** Virginia v. Moore, ___ U.S. ___, 83 Crim. L. Rep. 143 (4/23/08):**
Holding: Even though arrest violated State law, this was not an "unreasonable" seizure for 4th Amendment purposes; States are free to regulate arrests however they desire, but State restrictions do not alter the 4th Amendment's more limited protections.

*** Brendlin v. California, 81 Crim. L. Rep. 375, ___ U.S. ___, 127 S.Ct. 2400 (6/18/07):**
Holding: Passengers in vehicles have standing to challenge the traffic stop under 4th Amendment.

*** Scott v. Harris, 81 Crim. L. Rep. 131, ___ U.S. ___ (4/30/07):**
Holding: Use of deadly force to stop a driver from fleeing from police following an attempted traffic stop was "reasonable" under the 4th Amendment, and thus, plaintiff's Section 1983 suit should have been dismissed. The plaintiff was the driver who fled police and was rendered a quadriplegic when police rammed his car to stop him.

* **Georgia v. Randolph, 2006 WL 707380, ___ U.S. ___ (2006):**
Holding: Even though wife had given consent to search residence she shared with husband, where husband was present and refused to consent to search of the residence, the husband's refusal to permit entry made the warrantless search unreasonable and invalid as to him. Consent is not valid when another co-habitant of the residence, who is also present, objects to the search.

* **U.S. v. Grubbs, 2006 WL 693453, ___ U.S. ___ (2006):**
Holding: The 4th Amendment does not require that the triggering event for an anticipatory search warrant be in set forth in the warrant itself.

* **Brigham City, Utah v. Stuart, 2006 WL 1374566, ___ U.S. ___ (2006):**
Holding: Police can enter home without warrant if they have objectively reasonable basis to believe that an occupant is seriously injured or threatened with serious injury.

* **Hudson v. Michigan, 79 Crim. L. Rep. 331, ___ U.S. ___ (2006):**
Holding: The exclusionary rule does not require suppression of evidence seized by police pursuant to a search warrant that they execute without complying with the "knock and announce" rule.

* **Samson v. California, 79 Crim. L. Rep. 332, ___ U.S. ___ (2006):**
Holding: 4th Amendment's prohibition on unreasonable searches and seizures is not violated by a policy that subjects parolees to investigatory searches and seizures at any time without reasonable suspicion.

U.S. v. Proctor, 2007 WL 1745311 (D.C. Cir. 2007):
Holding: Where police failed to follow inventory procedures which allowed a Defendant arrested in a car to direct what to do with the car, the inventory search was invalid.

U.S. v. Spinner, 2007 WL 92701 (D.C. Cir. 2007):
Holding: Where police told Defendant that his car was illegally parked and Defendant got out of the car and walked to the trunk, police did not have reasonable suspicion that Defendant was armed and dangerous so as to allow them to search the car.

U.S. v. Powell, 2006 WL 1715683 (D.C. Cir. 2006):
Holding: Where police searched Defendant's car before any arrest and before any restraint of Defendant indicating custody, the search could not be justified as a "search incident to arrest" under the 4th Amendment.

Sanchez v. Pereira-Castillo, 86 Crim. L. Rep. 400 (1st Cir. 12/23/09):
Holding: Forcing prisoner to undergo exploratory surgery to see if cell phone was hidden in his rectum or abdomen stated a claim of violating 4th Amendment; the operation found no cell phone; Defendant had denied having a cell phone in his rectum or abdomen and various other tests conducted before the surgery failed to find one either.

U.S. v. Garcia-Alvarez, 83 Crim. L. Rep. 805 (1st Cir. 9/4/08):
Holding: Line-up was unduly suggestive where persons were asked to repeat phrase and only Defendant had a Dominican accent like the perpetrator of crime.

U.S. v. McKoy, 78 Crim. L. Rep. 205 (1st Cir. 11/1/05):
Holding: Fact that Defendant was in "high crime" area, was nervous, avoided eye contact with police, and leaned toward center console of car did not give police grounds to frisk him.

U.S. v. Falso, 84 Crim. L. Rep. 89, 2008 WL 4349232 and 4376828 (2d Cir. 9/25/08):
Holding: Even though Defendant had an 18-year old conviction for child sex abuse, there was not probable cause for a search warrant of his home for child pornography where it was alleged he only "appeared" to have tried to access a child pornography website.

U.S. v. Valentine, 2008 WL 3822668 (2d Cir. 2008):
Holding: Even though (1) police took a controlled mail package to an apartment building for delivery and Defendant put police in touch with someone to claim the package, and (2) police later saw Defendant outside talking to men in a nearby lot, there was not probable cause to arrest Defendant for sale of drugs.

U.S. v. Hamilton, 2008 WL 3543554 (2d Cir. 2008):
Holding: Even though a house was titled in name of mother of Defendant's child and Defendant did not live there, Defendant had standing to contest search of house where he had paid for the house, had free access to it, and had been to the house several times a week for years

U.S. v. Heath, 2006 WL 1900880 (2d Cir. 2006):
Holding: There needed to be more than a valid later arrest to apply the "inevitable discovery" doctrine to uphold a search and seizure since it cannot be determined that the later valid arrest would have actually occurred were it not for the prior illegal search and seizure.

U.S. v. Shakir, 87 Crim. L. Rep. 780 (3d Cir. 8/10/10):
Holding: The more limited "search incident to arrest" rule of *Arizona v. Gant* can extend to other searches besides vehicles, such as gym bags, but search of bag was proper here since Defendant had access to possible weapon in bag.

U.S. v. Tracey, 86 Crim. L. Rep. 697 (3d Cir. 3/1/10):
Holding: Search warrant's lack of particularity cannot be cured by references to an attached affidavit unless the words of incorporation indicate that the affidavit contains the required particularity.

U.S. v. Whitted, 83 Crim. L. Rep. 796 (3d Cir. 9/4/08):
Holding: 4th Amendment prohibits border agents from searching sleeping compartments of ships without a warrant.

U.S. v. Mosley, 79 Crim. L. Rep. 657 (3d Cir. 7/21/06):
Holding: When vehicle is illegally stopped, passenger has standing to move to suppress evidence resulting from stop.

U.S. v. Coles, 2006 WL 302243 (3d Cir. 2006):
Holding: Police cannot create the "exigent circumstances" to support a warrantless search of a hotel room. Police had probable cause to search a hotel room, but instead of waiting to get a warrant, decided to enter the room by identifying themselves and trying to enter, which caused the occupants to start disposing of drugs.

U.S. v. Crabtree, 2009 WL 1384966 (4th Cir. 2009):
Holding: Statute prohibiting use of illegally intercepted communications as evidence at trial did not have a "clean hands" provision allowing Gov't to use the information when it was not involved in the illegal interception.

U.S. v. Tate, 83 Crim. L .Rep. 242 (4th Cir. 5/6/08):
Holding: Where search warrant affidavit omitted fact that officer may have had to trespass on Defendant's property to obtain bags that were the subject of the warrant, this required a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), to determine if the warrant affidavit was materially misleading.

U.S. v. Reaves, 82 Crim. L. Rep. 397, 2008 WL 73287 (4th Cir. 1/8/08):
Holding: Even though an anonymous caller gave accurate descriptions of a suspect's movements while he was being followed by police, that did not show the tip was sufficiently reliable to provide reasonable suspicion to justify an investigatory stop.

U.S. v. Mowatt, 2008 WL 203581 (4th Cir. 2008):
Holding: Even though police got complaint of loud music and marijuana odor coming from apartment, no exigent circumstances existed to justify not obtaining warrant

U.S. v. Oscar-Torres, 82 Crim. L. Rep. 207 (4th Cir. 11/8/07):
Holding: Fingerprints taken following an unconstitutional arrest are subject to suppression if taken for "investigative" purposes rather than "administrative" purposes.

U.S. v. Menchaca-Castruita, 2009 WL 3468562 (5th Cir. 2009):
Holding: Even though (1) police were called to an apartment because of a fight between landlord and tenant, and (2) when they arrived at the apartment they smelled marijuana coming from an open front door, where the tenant had left by the time the police arrived and there was no threat to officers or indication anyone would destroy evidence, their warrantless entry into apartment was not justified by exigent circumstances.

U.S. v. Rangel-Portillo, 2009 WL 3429563 (5th Cir. 2009):
Holding: Even though vehicle stop occurred 500 feet from border and after car exited a parking lot of an area known for drugs and illegal aliens, this did not provide reasonable suspicion to stop the car.

U.S. v. Zavala, 83 Crim. L. Rep. 806 (5th Cir. 8/22/08):
Holding: Officer exceeded bounds of lawful investigative stop where he flipped open cell phone to find phone number.

U.S. v. Troop, 2008 WL 134120 (5th Cir. 2008):
Holding: Even though officer had seen footprints for four miles leading to a house in 90 degree heat, there were not reasonable grounds to believe persons in house were having a medical emergency so as to allow warrantless entry under exigent circumstances.

U.S. v. Mata, 2008 Crim. L. Rep. 538 (5th Cir. 2/11/08):
Holding: Where police officers arrested drug Defendants outside a gated fence surrounding a building, police could not conduct a warrantless search of the building absent reasonable suspicion someone in the building might launch an attack against them.

U.S. v. German, 2007 WL 1393685 (5th Cir. 2007):
Holding: Suppression remedy was available for violation of pen-trap statute.

U.S. v. Martinez, 2007 WL 1412538 (5th Cir. 2007):
Holding: Where police received a general tip that a man with Defendant's middle name could possess firearms used in a crime, police lacked reasonable suspicion to stop man's car because police lacked specific information about the informant, the informant's reliability, or specifics of what the informant said.

U.S. v. Jenson, 79 Crim. L. Rep. 754 (5th Cir. 8/23/06):
Holding: A motorist's 30 to 60 second delay in pulling over, followed by nervousness, was not enough to create reasonable suspicion to detain the motorist beyond the time needed to issue traffic ticket.

U.S. v. Pope, 2006 WL 1531545 (5th Cir. 2006):
Holding: Good-faith exception to warrant requirement not apply where officer obtained warrant on basis of misleading affidavit.

U.S. v. Gross, 88 Crim. L. Rep. 111 (6th Cir. 10/19/10):
Holding: 4th Amendment exclusionary rule applied where police learned of outstanding arrest warrant only after conducting an unconstitutional stop.

U.S. v. Domenech, 88 Crim. L. Rep. 171 (6th Cir. 10/7/10):
Holding: Even though another person rented Defendant a hotel room using an alias, Defendant had an expectation of privacy in the room under the 4th Amendment.

U.S. v. Lazar, 2010 WL 1753373 (6th Cir. 2010):
Holding: Inevitable discovery doctrine does not apply to evidence seized due to overbroad search warrant.

U.S. v. Taylor, 87 Crim. L. Rep. 151 (6th Cir. 4/13/10):
Holding: Female resident of apartment lacked apparent authority to consent to search of a shoebox in apartment closet that contained men's clothing.

U.S. v. Archibald, 2009 WL 4795304 (6th Cir. 2009):
Holding: Where police arrested Defendant in his doorway, they were not authorized to conduct a warrantless sweep of Defendant's home, even though they said they always assumed others were in a house in such circumstances.

U.S. v. Washington, 85 Crim. L. Rep. 614 (6th Cir. 7/22/09):
Holding: Even though Defendants were trespassing (squatting) in an apartment, where the landlord did not ask the police to evict the Defendants, the Defendants had a reasonable expectation of privacy in the apartment even though they were engaged in criminal activity; police could not conduct a warrantless entry just because Defendants were trespassing, using drugs and had gun in apartment.

U.S. v. Davis, 84 Crim. L. Rep. 385 (6th Cir. 12/19/08):
Holding: Statute forbidding objects in cars that obstruct driver's vision was unconstitutionally vague; but good-faith exception to exclusionary rule applies to officers who stopped and searched car (finding drugs) because of Tweety-Bird air freshener hanging from mirror since they were enforcing presumptively valid law.

U.S. v. Gross, 2008 WL 5273293 (6th Cir. 2008):
Holding: Even though Defendant drove on the lane marker for about 100 yards while changing lanes, where there was no evidence of erratic driving, officer did not have objectively reasonable belief for stopping Defendant for not driving within a single lane.

U.S. v. Hodson, 84 Crim. L. Rep. 11 (6th Cir. 9/19/08):
Holding: Even though Defendant admitted child molestation, this alone did not provide probable cause to search his home for child pornography.

U.S. v. Hardin, 83 Crim. L. Rep. 775, 2008 WL 3891265 (6th Cir. 8/25/08):
Holding: Even though police had an arrest warrant for Defendant, where police asked an apartment manager to ask to enter Defendant's apartment under guise that there was a water leak, this vitiated any consent to enter, and items found in a search had to be suppressed; also, police need "probable cause" to believe a subject of an arrest warrant is in a home to enter the home, not just "reasonable suspicion."

U.S. v. Purcell, 83 Crim. L. Rep. 350, 2008 WL 2200096 (6th Cir. 5/29/08):
Holding: Even though woman gave permission to search luggage, police should have stopped searching it when they saw it contained men's clothes because this dissipated the woman's apparent authority to give consent.

U.S. v. Urrieta, 2008 WL 731224 (6th Cir. 2008):
Holding: Even though Defendant-driver had Mexican driver's license, failed to produce his passport, was nervous and was towing a car, there was not reasonable suspicion to prolong an initial traffic stop and search Defendant's car for drugs.

U.S. v. Garcia, 81 Crim. L. Rep. 637, 2007 WL 2254435 (6th Cir. 8/8/07):
Holding: Police executing a search warrant for cocaine violated 4th Amendment by reading financial documents of Defendant found during the search.

U.S. v. Cohen, 81 Crim. L. Rep. 60 (6th Cir. 4/13/07):
Holding: Even though police received a "hang-up" 911 call from a cul-de-sac on which there were several houses, police did not have reasonable suspicion to stop a car which drove out of the cul-de-sac.

U.S. v. Rice, 80 Crim. L. Rep. 621 (6th Cir. 3/2/07):
Holding: Good-faith exception to exclusionary rule does not apply to defective warrant obtained under federal wiretap statute, 18 U.S.C. Section 2510-20, because statutory procedure is governed by statute, not 4th Amendment.

U.S. v. McPhearson, 80 Crim. L. Rep. 306 (6th Cir. 11/27/06):
Holding: Even though Defendant was arrested outside his house with crack in his pocket, this did not supply probable cause to search the house, and the "good faith" exception to the exclusionary rule did not apply.

U.S. v. Hython, 2006 WL 870495 (6th Cir. 2006):
Holding: Good faith exception to exclusionary rule did not apply to justify a search where the warrant was stale, since the warrant did not specify when drugs had been in the house.

U.S. v. Davis, 78 Crim. L. Rep. 285 (6th Cir. 11/22/05):
Holding: Where a drug-dog sniffed a car that had been stopped for a traffic stop, but the dog did not alert to drugs, there had to be probable cause to justify continued detention of the car in order to get a second dog to do a second sniff.

Gentry v. Seiver, 2010 WL 668901 (7th Cir. 2010):
Holding: State court unreasonably applied federal law in holding that "inevitable discovery" doctrine allowed admission of evidence seized when police stopped and searched Defendant at 2:30 a.m. for pushing a wheelbarrow down street, which led to evidence from victim's house.

U.S. v. Hicks, 2008 WL 3853384 (7th Cir. 2008):
Holding: In determining if officer's pretextual statement to occupant of house vitiated consent to search, court must decide if there was a reasonable factual basis for police to believe they had probable cause for a search warrant, and not whether officer who made statement about being able to get search warrant personally believed a search warrant could be obtained.

U.S. v. Collins, 82 Crim. L. Rep. 344, 2007 WL 4355361 (7th Cir. 12/14/07):
Holding: Even though police heard "sounds of movement" at a drug house after they knocked on the door, this did not create exigent circumstances to enter without a warrant.

Wagner v. Washington County, 81 Crim. L. Rep. 527 (7th Cir. 7/12/07):
Holding: Police lacked probable cause to arrest Defendant for violating a protective order when he attended a public meeting that he had a right to attend, and the meeting was also attended by the person with the protective order. The order did not prevent Defendant from "being on" the premises with the other person, but merely told him to "avoid" being on the premises with the other person.

U.S. Villa-Gonzalez, 88 Crim. L. Rep. 169 (8th Cir. 11/1/10):
Holding: Where (1) Officer, who went to a residence, ordered Defendant to talk to an immigration officer who, without *Miranda* warnings, learned that Defendant used false documents to enter the U.S., and then (2) Officer used that information to obtain a search warrant for Defendant's residence where they found drugs, the exclusionary rule applies to exclude the physical evidence because Defendant had been initially detained in violation of the 4th Amendment and unconstitutionally interrogated in violation of the 5th. The rule of *U.S. v. Pantane*, 542 U.S. 630 (2004), that physical evidence seized in violation of *Miranda* need not be suppressed, did not apply since Defendant's initial seizure violated 4th Amendment since without reasonable suspicion.

U.S. v. McMullin, 85 Crim. L. Rep. 661 (8th Cir. 8/17/09):
Holding: Where homeowner gave police permission to enter his home, then police went outside to arrest someone in the backyard and then came back into house, the second entry exceeded the scope of consent; the issue is not whether homeowner withdrew his consent but whether police obtained consent for the second entry after leaving and then coming back inside.

U.S. v. Alvarez-Manzo, 85 Crim. L. Rep. 561 (8th Cir. 7/6/09):
Holding: Drug investigators "seized" luggage when they took it out of a bus cargo hold during a layover at a bus depot without the direction or permission of the bus company.
Holding: Gov't cannot rely on plain view doctrine to seize computer records not covered by search warrant, and search warrants and execution procedures must contain procedures to segregate electronic data that is not seizable from data which is.

U.S. v. Castellanos, 2008 WL 649126 (8th Cir. 2008):
Holding: Where Defendant had initially refused consent to search his residence without a warrant, Defendant did not impliedly consent when he "kind of flipped his hand" in the direction of his bedroom after officers asked for identification.

U.S. v. Hughes, 2008 Crim. L. Rep. 585 (8th Cir. 2/25/08):
Holding: 4th Amendment allows investigative detention (*Terry* stop) for a completed misdemeanor only when the offense poses a threat to public safety that outweighs the intrusion on suspect's privacy rights.

U.S. v. Hudspeth, 79 Crim. L. Rep. 739 (8th Cir. 8/25/06):
Holding: A suspect's refusal to give police permission to search a residence bars police from relying on a co-inhabitant's later consent to search, regardless of whether the suspect who earlier refused consent is on the premises or not.

U.S. v. Kennedy, 78 Crim. L. Rep. 198 (8th Cir. 11/7/05):
Holding: (1) Police lacked probable cause to believe Defendant had drugs in car where his girlfriend spoke in present tense and said Defendant "deals" drugs and "keeps" drugs in his car because this didn't give a time-frame for when the drug dealing was supposed to have occurred; and (2) police inventory procedures which allowed searches of unlocked containers in car did not authorize a search of space behind a loosened stereo speaker.

U.S. v. Maddox, 87 Crim. L. Rep. 806 (9th Cir. 8/12/10):
Holding: Once Defendant was secured in a patrol car away from his belongings, police could not search a bag Defendant had had in his hand as a "search incident to arrest."

Millender v. County of Los Angeles, 87 Crim. L. Rep. 853 (9th Cir. 8/24/10):
Holding: Even though there was probable cause to believe Defendant used sawed-off shotgun in domestic assault, this did not support a search warrant for all firearms and evidence of gang activity.

U.S. v. Cha, 86 Crim. L. Rep. 721 (9th Cir. 3/9/10):
Holding: Where officers prevented occupants from going into their residence for 24 hours while they obtained a warrant, this was an unreasonable seizure of the residence under 4th Amendment and required suppression of evidence.

U.S. v. Struckman, 87 Crim. L. Rep. 207 (9th Cir. 5/4/10):
Holding: Even though police received report of a man climbing a fence to enter a backyard of a house, their immediate seizure of man by ordering him to ground (and subsequently finding evidence) violated 4th Amendment where man turned out to have lived there.

Bryan v. McPherson, 86 Crim. L. Rep. 480 (9th Cir. 12/28/09):
Holding: Where police officer, without warning, used a Taser on a driver stopped for a seatbelt violation, this was an unreasonable use of force under 4th Amendment.

U.S. v. Monghur, 2009 WL 4432567 (9th Cir. 2009):
Holding: Even though Defendant made phone calls from jail about a "thing" stored in his apartment, Defendant did not waive his privacy rights in a closed container in his apartment such as to allow a warrantless search of it.

U.S. v. Guzman-Padilla, 2009 WL 2182818 (9th Cir. 2009):
Holding: Where police used a controlled tire deflation device to stop a car they had been following, they needed reasonable suspicion of criminal activity to stop the car this way;

even though the car was close to the Mexican border, police did not know if the car had crossed the border.

U.S. v. Young, 2009 WL 2020126 (9th Cir. 2009):
Holding: Even though hotel found gun in Defendant's room and had policy of evicting such guests, where hotel had not yet informed Defendant he was being evicted, Defendant retained reasonable expectation of privacy in his room and luggage in hotel room.

Ramirez v. City of Buena Park, 85 Crim. L. Rep. 85 (9th Cir. 3/25/09):
Holding: Even though Officer saw a motorist sleeping in a car and thought motorist was under influence of drugs, there was not reasonable suspicion to frisk the motorist.

U.S. v. Comprehensive Drug Testing, Inc., 85 Crim. L. Rep. 647, 2009 WL 2605397 (9th Cir. 8/26/09):

U.S. v. Gonzalez, 85 Crim. L. Rep. 649, 2009 WL 2581738 (9th Cir. 8/24/09):
Holding: The good-faith exception to 4th Amendment exclusionary rule does not apply where police relied on caselaw that was subsequently overturned.

U.S. v. Payton, 85 Crim. L. Rep. 568 (9th Cir. 7/21/09):
Holding: Even though police had a search warrant to search Defendant's house for financial records related to drug trafficking, police could not search a computer in Defendant's house because the warrant did not refer to a computer search, and so evidence of child pornography on the computer was suppressed.

Friedman v. Boucher, 85 Crim. L. Rep. 464 (9th Cir. 6/23/09):
Holding: 4th Amendment violated where officers forcibly took DNA sample from pretrial detainee without a warrant or any basis to suspect he had committed a particular crime under investigation.

Lopez-Rodriguez v. Mukasey, 83 Crim. L. Rep. 757 (9th Cir. 8/8/08):
Holding: Even though exclusionary rule generally does not apply to deportation cases, where immigration agents went into a home without warrant, consent or exigent circumstances to investigate fraudulent birth certificate, the conduct was so egregious to warrant suppression.

U.S. v. Murphy, 82 Crim. L. Rep. 615 (9th Cir. 2/20/08):
Holding: Where Defendant, who was arrested at storage unit, refused to allow police to search unit, police should not have then gotten consent from renter of unit to search.

U.S. v. Grigg, 81 Crim. L. Rep. 651, 2007 WL 2379615 (9th Cir. 8/22/07):
Holding: 4th Amendment does not allow officers to conduct investigatory stop to investigate a possible misdemeanor that is not a threat to public safety; thus, evidence found when officers stopped a car to investigate a violation of noise ordinance must be suppressed.

U.S. v. Washington, 81 Crim. L. Rep. 500, 2007 WL 1746331 (9th Cir. 6/19/07):
Holding: Defendant, an African-American, would not have felt free to leave when police approached his parked car and asked to search him, especially since there were recent police shootings of African-American motorists. Thus, Defendant's consent to search was invalid.

U.S. v. Lulong, 80 Crim. L. Rep. 299 (9th Cir. 12/12/06):
Holding: When reviewing a "bare bones" search warrant to determine if "good faith" exception to 4th Amendment applies, court should not consider facts which the affiant revealed to the issuing magistrate, but which are not in the warrant affidavit.

U.S. v. Mendez, 80 Crim. L. Rep. 143 (9th Cir. 10/30/06):
Holding: Even though police knew that Defendant-driver had ties to a gang and had been in prison before, this did not give police reasonable suspicion to question Defendant-driver about matters unrelated to the purpose of the traffic stop.

U.S. v. Arellano-Ochoa, 79 Crim. L. Rep. 781 (9th Cir. 8/31/06):
Holding: Police cannot open a screen door to a residence and enter without the consent of a resident or an exception to the 4th Amendment's warrant requirement.

U.S. v. Thomas, 79 Crim. L. Rep. 222 (9th Cir. 5/18/06):
Holding: Driver has expectation of privacy in rental car even though he did not rent car, where he had permission to drive car from person who rented it.

U.S. v. Manzo-Jurado, 2006 WL 1679413 (9th Cir. 2006):
Holding: Police lacked reasonable suspicion to conduct investigatory stop of group of Hispanic men speaking in Spanish; without more, this does not indicate the people were illegal aliens.

U.S. v. Staffeldt, 2006 WL 1727357 (9th Cir. 2006):
Holding: Where DOJ memo attached to warrant for wiretap related to a totally different case and did not even mention Defendant, the warrant was invalid on its face and wiretap evidence obtained under it must be suppressed.

U.S. v. Fox, 2010 WL 1027609 (10th Cir. 2010):
Holding: Where police without reasonable suspicion entered wife's car and directed her where to drive, Gov't failed to show sufficient attenuation between her illegal seizure and subsequent consent to search her and Defendant-husband's house.

Manzanares v. Higdon, 85 Crim. L. Rep. 607 (10th Cir. 8/10/09):
Holding: Where police officer ignored homeowner's revocation of consent to be in his residence because officer believed homeowner would tip off his friend suspecting of committing a crime, this violated 4th Amendment.

U.S. v. Clarkson, 84 Crim. L. Rep. 380 (10th Cir. 1/6/09):
Holding: The good-faith exception to the exclusionary rule will not save evidence found during a search by a drug dog of "unknown reliability" from court rulings where a drug dog has to be deemed "reliable" in order to support probable cause.

U.S. v. Valadez-Valadez, 83 Crim. L. Rep. 243 (10th Cir. 5/12/08):
Holding: Even though Defendant was driving 45 mph in a 55 mph zone, there was no reasonable suspicion under the 4th Amendment to stop Defendant for impeding traffic.

U.S. v. Cos, 2007 WL 2372376 (10th Cir. 2007):
Holding: Guest did not have authority to give consent to search Defendant's apartment.

Callahan v. Millard County, 81 Crim. L. Rep. 541 (10th Cir. 7/16/07):
Holding: Even though Defendant invited a confidential informant into his house to sell him methamphetamine, it violated the 4th Amendment for the informant to then give a signal to police to come in and arrest Defendant; informant had no authority to consent to entry of the home.

U.S. v. Freeman, 80 Crim. L. Rep. 643 (10th Cir. 3/8/07):
Holding: Even though the U.S. Supreme Court held in *Samson v. California* (2006) that police can conduct warrantless, suspicionless searches of parolees' homes, such searches will still violate the 4th Amendment where they violated a state law which requires reasonable suspicion.

U.S. v. Guerrero-Espinoza, 79 Crim. L. Rep. 806 (10th Cir. 9/15/06):
Holding: Where (1) officer stopped a driver and passenger/Defendant for a traffic stop; (2) officer completed the stop for the driver, who was outside the vehicle, by finishing the paperwork, but officer did not tell passenger that the stop was completed; and (3) officer asked passenger/Defendant for consent to search, the passenger's consent was not valid because passenger/Defendant did not know the stop was over and that driver and passenger/Defendant were free to leave.

U.S. v. Herrera, 2006 WL 1017642 (10th Cir. 2006):
Holding: 4th Amendment violated where officer stopped a vehicle which he mistakenly believed was a "commercial vehicle" subject to random stops and inspection under state law.

U.S. v. Mitchell, 85 Crim. L. Rep. 133, 2009 WL 1067212 (11th Cir. 4/22/09):
Holding: Where officer seized Defendant's computer for pornography investigation and then waited 21 days before obtaining a warrant to search hard drive, this delay was unreasonable under 4th Amendment and evidence must be suppressed, even though delay was caused by officer attending a training event.

Bruce v. Beary, 82 Crim. L. Rep. 12 (11th Cir. 9/6/07):
Holding: 4th Amendment administrative search doctrine does not allow police to send a SWAT team into a business without a warrant, round up the employees, and search every file in the business for evidence.

U.S. v. Virden, 2007 WL 1672331 (11th Cir. 2007):
Holding: Where police seized a Defendant in a rental car without probable cause after seeing him leave a suspected "drug house" and took the car to another location for a drug dog-sniff when the dog wasn't available at the scene, the search and seizure could not be upheld under "inevitable discovery" because it was improper to take the car to another location.

U.S. v. Long, 80 Crim. L. Rep. 71 (C.A.A.F. 9/27/06):
Holding: Military servicemember had reasonable expectation of privacy in her email account and messages, even though the account was located on a gov't computer network and had a log-on message advising that the email was subject to "monitoring;" this is because the log-on warning mentioned only "monitoring," not searching email for law enforcement purposes.

Brown v. Short, 2010 WL 2989837 (D.D.C. 2010):
Holding: Even though Public Defender was taken into custody for civil contempt in courtroom, 4th Amendment prohibited strip searching Public Defender.

U.S. v. Garrott, 2010 WL 3021525 (M.D. Ala. 2010):
Holding: Even though marijuana plants were growing 20 feet away from house in Defendant's backyard and there were cars parked between the house and plants, the plants were within the curtilage of the house and searching for them without a warrant violated 4th Amendment.

U.S. v. Landeros-Lopez, 2010 WL 2347025 (D. Ariz. 2010):
Holding: Federal agent's affidavit in support of search warrant recklessly omitted information required by wiretap statute that traditional investigative procedures had been tried and failed.

U.S. v. Gates, 2010 WL 3515762 (N.D. Cal. 2010):
Holding: Even though confidential informant told police that a Probationer was living at a house and that there were firearms and marijuana in house, this did not allow a warrantless search of house because the basis of knowledge was never provided, informant did not identify the Probationer/Defendant by name, and his description of the house was consistent with what anyone could identify from the outside.

U.S. v. Quintana, 2009 WL 129603 (M.D. Fla. 2009):
Holding: Where Officer stopped Defendant for driving with a suspended license, Officer's search of Defendant's cell phone photos violated 4th Amendment, because search had nothing to do with Officer's safety or preservation of evidence for driving with suspended license offense.

U.S. v. Virden, 2006 WL 692486 (M.D. Ga. 2006):
Holding: Where police seized a car without probable cause or consent and drove it to a police station where a dog sniffed it, the seizure and search were invalid, and could not be upheld under doctrine of inevitable discovery, even though police may have been able to seize and search the car by constitutional means if they had acted in a different manner.

U.S. v. Esparza, 81 Crim. L. Rep. 24 (D. Idaho 9/7/07):
Holding: 4th Amendment violated by having a dog sniff a car parked on a public street without reasonable suspicion.

U.S. v. Guzman-Cornejo, 2009 WL 1470043 (N.D. Ill. 2009):
Holding: Even though officer was in house pursuant to arrest warrant, "plain view" doctrine did not justify seizing a gun inside a sock or drugs inside an opaque plastic bag because an ordinary observer would not have known the items were a gun or drugs.

U.S. v. Conrad, 2008 WL 4330766 (N.D. Ill. 2008):
Holding: The deck at the back of Defendant's father's house was curtilage, and could not be searched without a warrant.

U.S. v. Osborne, 2007 WL 192586 (C.D. Ill. 2007):
Holding: Where there were no police department criteria for conducting an inventory search and officers could just decide when to do it or not, the inventory search of Defendant's car was invalid.

U.S. v. West, 2009 WL 960798 (S.D. Iowa 2009):
Holding: Even though Defendant gave false testimony that cocaine was not his and police officers had just picked it up and attributed it to him, this did not prevent Defendant from challenging the search and seizure of the cocaine; court could disregard Defendant's testimony to determine he had standing to challenge the search.

U.S. v. Lopez, 2007 WL 1246829 (D. Kan. 2007):
Holding: Even though officer believed that Defendant had violated a State traffic law by driving over the line on the right side of the road, where this was not a State law violation, officer's mistake of law could not provide reasonable suspicion to stop the vehicle.

Tardiff v. Knox County, 2008 WL 3198422 (D. Me. 2008):
Holding: Even though Defendant was arrested for felony witness tampering, there was no individualized reasonable suspicion to do a strip-search at the jail.

U.S. v. Srivastava, 2007 WL 716799 (D. Md. 2007):
Holding: Where search warrant provided that police could search Defendant's business for evidence of "health care fraud," police could only seize documents related to the fraud, and not Defendant's personal financial records or tax returns.

U.S. v. Gonzalez, 2010 WL 2598031 (D. Mass. 2010):
Holding: Application of inevitable discovery rule to permit admission of Defendant's statements and evidence found in a search of Defendant's residence would abet police misconduct and weaken 5th Amendment protections where police violated Defendant's *Miranda* rights and testified falsely about punching Defendant in stomach.

U.S. v. Alix, 2009 WL 1883903 (D. Mass. 2009):
Holding: Even though investigatory stop was initiated at request of drug agents who believed car might contain drugs, where Defendants were questioned about what was in the car and refused consent to search and had valid licenses and registration, police exceeded permissible duration and scope of the stop by continuing to hold and frisk defendants.

In re Applications of the U.S. for Orders Pursuant to 18 U.S.C. Section 2703(d), 2007 WL 2296406 (D. Mass. 2007):
Holding: Gov't had to show probable cause to get cell site information from telecom providers under the Stored Communications Act. "Specific and articulable facts" standard under Act was not sufficient.

U.S. v. Silva, 2007 WL 628458 (D. Mass 2007):
Holding: Even though Defendant and his brother shared a residence and brother contacted police about Defendant to report criminal activity, where police instructed brother to bring Defendant's documents to police, brother was acting as a gov't agent in violation of 4th Amendment when he then searched Defendant's room.

In re Applications of the U.S. for Orders Pursuant to 18 U.S.C. Section 2703(d), 2007 WL 2296406 (D. Mass. 2007):
Holding: Gov't had to show probable cause to get cell site information from telecom providers under the Stored Communications Act. "Specific and articulable facts" standard under Act was not sufficient.

U.S. v. Botchway, 2006 WL 1581963 (D. Mass. 2006):
Holding: Even though passenger could consent to search of car where driver said he didn't know whom car belonged to, passenger did not have authority to consent to search of Defendant's closed briefcase which was in the trunk.

U.S. v. Espinoza, 2006 WL 1652456 (D. Mass. 2006):
Holding: Where a van was legally registered and wasn't breaking any traffic laws, police lacked reasonable suspicion to conduct an investigatory stop merely because the van had out-of-state license plates and looked like other vans in which illegal aliens had been passengers.

U.S. v. Griffin, 2006 WL 1359381 (D. Mass. 2006):
Holding: Even though Defendant had waived his *Miranda* rights and made a statement, Defendant did not consent to a warrantless search of his safe where armed officers ordered Defendant to show them where his safe was and open it.

U.S. v. Muse, 2010 WL 3064391 (E.D. Mich. 2010):
Holding: Where search warrant authorized search of "Suite 218," this did not authorize search of "Suite 218A," which was a distinct, different Suite identified as such.

U.S. v. Peoples, 2009 WL 3586546 (W.D. Mich. 2009):
Holding: Even though police officer relied on existing caselaw, the exclusionary rule still applied where the caselaw was later overruled and "good faith" exception to exclusionary rule did not apply; without this outcome, the police interpretation of 4th Amendment would not be reviewable by courts in new situations.

U.S. v. Billups, 2006 WL 2061358 (D. Minn. 2006):
Holding: No reasonable suspicion to stop vehicle for driving a few miles under speed limit, keeping both hands on wheels, not looking at passing officer, and having tinted windows, because tinted windows were lawful in State where car was licensed, and other activity was lawful, even though officer testified that in his experience these types of motorists were trying to avoid being stopped by police.

U.S. v. Sims, 2006 WL 1726759 (S.D. Miss. 2006):
Holding: Even though police claimed they had entered residence under exigent circumstances to ensure officer safety, where the entry occurred after police refused to let Defendant close his front door on police, there were no exigent circumstances.

U.S. v. Lane, 2009 WL 1912521 (W.D. Mo. 2009):
Holding: Even though an anonymous caller told police she had seen a video playing on Defendant's computer that showed a boy with his genitals exposed, where there was nothing independent of the caller's allegation to corroborate that Defendant committed a crime, there was no probable cause to support the warrant authorizing search of Defendant's residence for computers.

U.S. v. Lopez-Lopez, 2006 WL 2253055 (W.D. Mo. 2006):
Holding: Where officer falsely told Defendant that officer knew there were no drugs in Defendant's apartment and officer just wanted to go to the apartment to get some documents, Defendant's consent to search the apartment was involuntary and unintelligent because officer had used trickery and deceit to obtain the consent, and drugs found in the apartment search must be suppressed.

U.S. v. Crandell, 2009 WL 3756999 (D.N.J. 2009):
Holding: Even though Officers said Defendant was free to leave, where three officers surrounded Defendant on street and said they wanted to pat him down for weapons and Defendant would have had to go through Officers to leave, Defendant was "seized" under 4th Amendment.

U.S. v. Juarez-Torres, 2006 WL 2129037 (D.N.M. 2006):
Holding: No reasonable suspicion to stop mini-van to search for illegal aliens because mini-van looked "overloaded" and occupants weren't "interacting" with each other.

In re Application of U.S. for an order Authorizing Release of Historical Cell-Site Information, 2010 WL 3463132 (E.D. N.Y. 2010):
Holding: Gov't was not entitled to a court order to obtain cell-site information for a phone under the Stored Communications Act without obtaining a warrant under the 4th Amendment, which required a showing of probable cause based oath.

Farag v. U.S., 2008 WL 4965167 (E.D. N.Y. 2008):
Holding: Police could not use Arab ethnicity alone as probable cause to arrest airline passengers.

In re U.S. Orders (1) Authorizing Use of Pen Registers, 2007 WL 2729668 (E.D.N.Y. 2007):
Holding: The Pen-Trap statute does not authorize trapping "post-cut-through" dialed numbers (which are numbers used after a connection is made and communicate content).

U.S. v. Irizarry, 2007 WL 2460468 (E.D. N.Y. 2007):
Holding: Merely carrying a folding utility knife does not give reasonable suspicion to conduct a *Terry* stop.

U.S. v. Guzman, 2010 WL 2802298 (S.D. N.Y. 2010):
Holding: Even though Defendant's girlfriend gave permission to enter apartment, where seven officers fanned out and swept through apartment and Defendant signed consent to search only after being told that all occupants of the apartment would be arrested and charged if he did not sign, the consent to search was not voluntary.

McBean v. City of New York, 2009 WL 2524617 (S.D. N.Y. 2009):
Holding: Where defendants are arraigned on misdemeanor narcotics or weapons offenses, this does not by itself provide reasonable suspicion to conduct strip searches for contraband or weapons.

U.S. v. Stewart, 2009 WL 859288 (S.D. N.Y. 2009):
Holding: Where police were only briefly glimpsing traffic while driving through a complicated 10-lane intersection, they could not have observed reasonable suspicion to stop a vehicle driving nearby for a traffic violation.

U.S. v. Paige, 2007 WL 1828020 (W.D. N.Y. 2007):
Holding: Even though a victim was stabbed near an apartment building and Defendant was seen throwing a bicycle at the building, there were no exigent circumstances to enter Defendant's apartment where nothing indicated Defendant was the assailant.

U.S. v. Gilkeson, 2006 WL 1226530 (N.D. N.Y. 2006):
Holding: Where Defendant's repeated requests for counsel were ignored and Defendant was not given *Miranda* rights, his later consent to search his computer was invalid because was direct result of the *Miranda* violation.

U.S. v. Massey, 79 Crim. L. Rep. 179 (W.D.N.C. 4/11/06):
Holding: A vehicle stop that violates a police department policy is objectively unreasonable for purposes of the 4th Amendment, even if the stop would have been constitutional in the absence of the police policy.

U.S. v. Fofana, 2009 WL 1529815 (N.D. Ohio 2009):
Holding: Where officer at airport checkpoint had already determined Defendant did not have weapons or explosives, officer could not continue to search Defendant for other contraband.

U.S. v. Delano, 2008 WL 525431 (N.D. Ohio 2008):
Holding: Even though car left a drug house, stopped abruptly to let officer pass, had 3 cell phones in it but only two occupants, and passenger had something in her tight-fitting pants that was not a gun, there was no probable cause to arrest passenger and search her.

U.S. v. Thompson, 2009 WL 3584126 (S.D. Ohio 2009):
Holding: Where officers executing search warrant refused to produce the warrant or identification despite being asked, and required a resident of the house to sit outside partially unclothed for five hours while the search was conducted, this was unreasonable conduct requiring suppression of the evidence.

U.S. v. Kersey, 2006 WL 4632552 (S.D. Ohio 2006):
Holding: Where a warrant affidavit stated that an informant had provided information in the past which was verified by independent information, but this was not true, the trial court would not consider the statement in determining whether there was probable cause for the search warrant.

U.S. v. Wecht, 2009 WL 1361298 (W.D. Pa. 2009):
Holding: Even though warrant affidavit established probable cause to search computer for wire and mail fraud, such probable cause did not apply to all the computer's contents, so warrant authorizing search of all files was overbroad.

U.S. v. Parson, 2009 WL 482243 (W.D. Pa. 2009):
Holding: Where police falsely told Defendant that he may be an identity theft victim and they wanted to look at his computer for this, this false ruse violated 4th Amendment and evidence of child pornography found on his computer had to be suppressed.

U.S. v. Taylor, 2010 WL 264052 (W.D. Tenn. 2010):
Holding: Officer's search of Defendant's backyard was not within scope of a lawful protective sweep of Defendant's house incident to his arrest; even if Officer had been searching for people hiding in backyard, it was not reasonable to believe a person could be hiding on top of a lawnmower under a cover, where Officer found evidence.

U.S. v. Kim, 2009 WL 5185389 (S.D. Tex. 2009):
Holding: Where search warrant only authorized search for evidence about Defendant's prior employer, gov't exceeded scope of warrant in opening encrypted files on Defendant's computer and finding child pornography.

In re Appication of U.S. for an order Authorizing Use of Pen Register etc., 2010 WL 3021950 (W.D. Tex. 2010):
Holding: Where application for warrant did not include any evidence of the frequency with which target phones were the subject of criminal conduct, the Gov't failed to show probable cause that a warrant for disclosure of cell-site location information would result in discovery of evidence of crime.

U.S. v. Gereb, 2008 WL 577173 (W.D. Tex. 2008):
Holding: Even though search warrant authorized search of Defendant's residence, there was no authority to search Defendant's car, which was parked on a city street and not on his property.

U.S. v. Debruhl, 87 Crim. L. Rep. 107 (D.C. 4/22/10):
Holding: Even though officers relied on pre-*Gant* caselaw allowing search of car before *Gant*, the good-faith exception to exclusionary rule does not apply to save the evidence.

U.S. v. Debruhl, 2010 WL 1608116 (D.C. 2010):
Holding: Police did not rely on "settled law" when they conducted car search under *Belton* rule (overruled in *Arizona v. Gant*), so good faith exception to exclusionary rule not apply.

U.S. v. Debruhl, 87 Crim. L. Rep. 107 (D.C. 4/22/10):
Holding: Even though officers relied on pre-*Gant* caselaw allowing search of car before *Gant*, the good-faith exception to exclusionary rule does not apply to save the evidence.

Martin v. U.S., 2008 WL 2676619 (D.C. 2008):
Holding: Where adult Defendant refused to give consent to search mother's home, but then mother gave consent, the police still could not search home without warrant absent a clear revocation of son's refusal to consent.

Shelton v. U.S., 81 Crim. L. Rep. 576 (D.C. 7/19/07):
Holding: Even though officer observed a motorist hand cash to a pedestrian and the pedestrian gave motorist something, this did not, by itself, give probable cause to arrest and search motorist. There was no other indication that this was a drug transaction, such as being a high-crime area.

Duckett v. U.S., 78 Crim. L. Rep. 271 (D.C. 11/17/05):
Holding: Traffic stop held invalid where only reason car was stopped was because license plate failed to show up in a national or local computer database.

U.S. v. Marcelino, 2010 WL 3368112 (N.D. Ga. 2010):
Holding: Even though Defendant and another person were walking in high crime area and wearing baggy pants, this did not provide reasonable suspicion to conduct a *Terry* stop.

Beltz v. State, 86 Crim. L. Rep. 374 (Alaska 12/18/09):
Holding: Alaska Constitution's privacy guarantee prevents police from conducting warrantless search of garbage without reasonable suspicion of criminal activity.

State v. Gant, 81 Crim. L. Rep. 565 (Ariz. 7/27/07):
Holding: Once an arrestee has been handcuffed and placed in a police vehicle, police cannot search arrestee's vehicle incident to arrest. Court construes *Belton v. New York*, 453 U.S. 454 (1981) narrowly.

People v. Hernandez, 2008 WL 5171080 (Cal. 2008):
Holding: Even though Officer knew that temporary car display tags were often forged, Officer did not have reasonable suspicion to stop car merely because it had a temporary display tag instead of a license plate.

In re Jamie P., 80 Crim. L. Rep. 275 (Cal. 11/30/06):
Holding: In order to uphold search of juvenile under 4th Amendment, police must have known that juvenile had agreed to random searches as a condition of probation before they searched him.

People v. McCarty, 2010 WL 1840822 (Colo. 2010):
Holding: There is no exception to exclusionary rule even though officers had good-faith reliance on pre-*Arizona v. Gant* caselaw.

People v. Arias, 81 Crim. L. Rep. (Colo. 6/4/07):
Holding: Even though there was a state statute which prohibited driving with an obstructed view, police officer did not have reasonable suspicion to stop a driver who had a tree-shaped deodorizer hanging from the rear-view mirror.

People v. Fines, 2006 WL 156986 (Colo. 2006):
Holding: Where (1) car in which Defendant was a passenger was stopped for a traffic violation; (2) Defendant was, without reasonable suspicion, taken out of the car and questioned about possession of drugs; and (3) Defendant left her purse in the car, the evidence seized from her purse and her statements must be suppressed.

State v. Boyd, 87 Crim. L. Rep. 174 (Conn. 4/27/10):
Holding: Even though telephone company can access cell phone log, cell phone owner has reasonable expectation of privacy in cell phone log stored on his phone.

Riley v. State, 2006 WL 58826 (Del. 2006):
Holding: Where police did not see Defendant carry anything when he entered minors' vehicle, police did not have reasonable suspicion to stop the vehicle in the belief that Defendant was buying alcohol for minors.

Jones v. State, 82 Crim. L. Rep. 184 (Ga. 10/29/07):
Holding: Mere status as a probationer does not diminish expectation of privacy so as to make warrantless searches "reasonable" under 4th Amendment, in absence of condition of probation authorizing warrantless searches.

State v. Estabillio, 86 Crim. L. Rep. 156 (Haw. 10/26/09):
Holding: State Constitution prohibits police from asking motorists stopped for routine traffic stops about offenses unrelated to the stop without particularized suspicion, even if this does not prolong the length of the stop.

State v. Heapy, 80 Crim. L. Rep. 462 (Haw. 1/11/07):
Holding: Even though driver turned off a road to avoid a sobriety checkpoint, this does not by itself provide reasonable suspicion to stop the vehicle.

State v. Willoughby, 2009 WL 1296105 (Idaho 2009):
Holding: Even though police received a call of a fight in a parking lot, when they got to the lot and saw nothing, they lacked reasonable suspicion to justify investigatory stop of Defendant.

State v. Doe, 87 Crim. L. Rep. 374 (Idaho 6/1/10):
Holding: Sentencing judge violated 4th Amendment by requiring parent of Juvenile-Defendant to submit to drug tests as part of Juvenile's probation.

State v. Willoughby, 85 Crim. L. Rep. 280 (Idaho 5/12/09):
Holding: Where police parked in a parking lot with their emergency lights flashing, they "seized" motorist who was parked in the lot.

State v. Henage, 80 Crim. L. Rep. 483 (Idaho 1/26/07):
Holding: Even though Defendant stopped during a traffic stop admitted he had a knife when asked if he had any "contraband," where officer found the knife and Defendant was polite and cooperative, officer could not continue with a *Terry* pat-down search of Defendant and drugs found in pat-down had to be suppressed.

State v. Henage, 78 Crim. L. Rep. 691 (Idaho 2/23/06):
Holding: A Defendant's admission during a traffic stop that he had a knife in his pocket was not enough to justify a *Terry* frisk of Defendant, and drugs found in the frisk had to be suppressed. The *Terry* frisk can only occur if there is reasonable suspicion the Defendant is armed *and* dangerous. Here, Defendant was cooperative and told about the knife, so it was apparent he wasn't dangerous.

People v. Bridgewater, 2009 WL 3471289 (Ill. 2009):
Holding: Where Defendant exited his car and went into a store, and Officer arrested Defendant and handcuffed him outside the store for "obstruction of a peace officer," the subsequent search of Defendant's car as a "search incident to arrest" was not justified because Defendant was outside his car and the Officer could not have found evidence of "obstruction of a peace officer" in the car.

Armfield v. State and Holly v. State, 86 Crim. L. Rep. 395, 2009 WL 4891832 (Ind. 12/18/09):
Holding: Where motor vehicle record check indicates that registered owner of vehicle has a suspended license, that does provide justification for a traffic stop of the car, but once the police determine that the person driving the car is not the registered owner, police must discontinue the stop even if it means not be able to run a records check on the driver; this is because the basis for the initial stop no longer is present.

State v. Quirk, 2006 WL 328819 (Ind. 2006):
Holding: Under state constitution, there was no reasonable suspicion to further detain Defendant after receiving a traffic ticket, merely because Defendant had a driver's license from a "drug source" State (California) and had picked up cargo in another "drug source" State (Arizona). Given the substantial number of "drug sources," a motorist would almost always be traveling from, through, or to a "drug source" State.

State v. McGrane, 81 Crim. L. Rep. 418 (Iowa 6/15/07):
Holding: Where police called a suspect downstairs from a 2-story residence and arrested suspect pursuant to a warrant, the police could not then go upstairs and look around under the search incident to arrest doctrine.

State v. Marx, 86 Crim. L. Rep. 17, 215 P.3d 601 (Kan. 9/18/09):
Holding: Even though vehicle crossed shoulder fog line one time and then momentarily crossed center line of two northbound lanes, this was not by itself sufficient to create reasonable suspicion of a violation of state law requiring driver to maintain in his lane; drug evidence found as result of stop is suppressed.

State v. Henning, 85 Crim. L. Rep. 555 (Kan. 6/26/09):
Holding: Statute authorizing police to search an arrestee and area immediately around him for evidence of "a crime" violates 4th Amendment in light of *Arizona v. Gant*, ___ U.S. ___ (2009), which allows police to search area within reach of arrestee only to protect themselves or to find evidence that relates to the offense of arrest.

State v. Bennett, 2009 WL 211762 (Kan. 2009):
Holding: Probation condition that required Defendant submit to suspicionless search was unconstitutional.

State v. Fisher, 81 Crim. L. Rep. 3 (Kan. 3/16/07):
Holding: Even though police were able to see from the road a garbage bag that appeared to contain items to make methamphetamine, where the bag was within the curtilage of

Defendant's house, police could not seize it without a warrant and could not go on to the property to do a "knock and talk" and then claim they seized it in "plain view."

State v. Ibarra, 2006 WL 3524148 (Kan. 2006):
Holding: Strong odor of ether coming from vehicle, standing alone, is not probable cause to search vehicle, since this is also consistent with lawful events.

Rose v. Com., 2010 WL 3722550 (Ky. 2010):
Holding: Where Defendant-Passenger was secured in a patrol car, search of vehicle "incident to arrest" violated *Arizona v. Gant*.

King v. Com., 86 Crim. L. Rep. 538 (Ky. 1/21/10):
Holding: Even though police smelled burnt marijuana coming from a house, this did not provide exigent circumstances to justify a warrantless entry.

Quintana v. Com., 2008 WL 4691054 (Ky. 2008):
Holding: Defendant's backyard was curtilage of his house, so police could not go into backyard, and warrant obtained based on odor of marijuana police smelled when in backyard was invalid.

Crum v. Commonwealth, 2007 WL 1532095 (Ky. 2007):
Holding: A warrant describing the things to be seized in a house as "illegal contraband" did not describe the things with reasonable particularity.

Commonwealth v. Jones, 80 Crim. L. Rep. 246 (Ky. 11/22/06):
Holding: Where police officer conducting a frisk of Defendant for firearms felt a prescription pill bottle in Defendant's pocket, there was not probable cause under "plain feel" doctrine to remove the bottle and search it.

Williams v. Commonwealth, 80 Crim. L. Rep. 245 (Ky. 11/22/06):
Holding: Where State licensing board cooperated with police in searching doctor's office, the "excessive entanglement" between the administrative body and police rendered this a non-administrative search, but instead one to investigate crime, and warrant was needed.

Krause v. Commonwealth, 80 Crim. L. Rep. 170 (Ky. 10/19/06):
Holding: Where police deceived Defendant into giving consent to search his house by falsely telling Defendant they were investigating a girl's rape, the deception vitiated Defendant's consent and drugs found in the search had to be suppressed.

Commonwealth v. Hatcher, 79 Crim. L. Rep. 299 (Ky. 5/18/06):
Holding: Police officer who entered home with resident's permission did not act within plain view doctrine when he picked up a pipe and smelled it before seizing it as drug paraphernalia.

State v. Skinner, 85 Crim. L. Rep. 212 (La. 5/5/09):
Holding: 4th Amendment protects persons' privacy in prescription records, so police must satisfy warrant requirement to obtain prescription drug records.

State v. Nadeau, 87 Crim. L. Rep. 814 (Me. 7/29/10):
Holding: A "preview search" of Defendant's computer to determine information to obtain a search warrant of the computer violated the 4th Amendment.

State v. Sargent, 86 Crim. L. Rep. 373 (Me. 12/17/09):
Holding: Even though Defendant gave police permission to search his car during a "safety check" roadblock, this did not provide consent to search a shaving kit/bag inside the passenger compartment.

State v. Bailey, 86 Crim. L. Rep. 695 (Me. 3/4/10):
Holding: Even though police could have accessed Defendant's computer peer-to-peer files remotely, where police went to Defendant's house to view the computer files on Defendant's computer, Defendant retained a 4th Amendment privacy interest in the files.

Henderson v. State, 88 Crim. L. Rep. 125 (Md. 10/7/10):
Holding: Even though police arrested Driver on a failure to appear warrant and found $741 in cash on Driver, this did not provide reasonable suspicion under 4th Amendment to detain Defendant-Passenger for 9 minutes following the arrest to wait for a drug dog.

Agurs v. State, 2010 WL 1880087 (Md. 2010):
Holding: Even though officers relied on search warrant to search house for drugs, where affidavit supporting warrant was vague and stated only general information such as that Defendant kept expensive assets at his house and had met with a man with something hin his pocket, the warrant was invalid and "good faith" exception to exclusionary rule did not apply.

Belote v. State, 86 Crim. L. Rep. 107 (Md. 10/13/09):
Holding: Where police officer on bicycle patrol smelled marijuana near Defendant and frisked him and found marijuana, but then released Defendant and did not fill out the paper work to arrest Defendant until two months later, the marijuana had to be suppressed because its seizure did not occur during a search incident to arrest; the officer's intent indicated he had not made up his mind whether to arrest Defendant or not.

Wilson v. State, 85 Crim. L. Rep. 554 (Md. 7/20/09):
Holding: Even though Defendant was lying in the road, where Defendant got up and ran when Officer stopped to investigate, Officer's stop and handcuffing of Defendant was not reasonable under "emergency aid" doctrine.

McDowell v. State, 2009 WL 396277 (Md. 2009):
Holding: Officer who conducted *Terry* search of gym bag for weapons was allowed to feel outside of gym bad, but not to open it.

Dowell v. State, 84 Crim. L. Rep. 560 (Md. 2/19/09):
Holding: Even though police officer reasonably believes a suspect is dangerous and may gain access to a weapon inside an opaque container, the officer must first try to determine what is in the container without opening it, or be able to explain why that was not reasonable; just as officers under *Terry* must initially limit a pat-down to outer clothing, so they must limit their search of containers.

State v. Williams, 2007 WL 3034928 (Md. 2007):
Holding: Officer lacked reasonable suspicion to stop Defendant for window tinting violation where officer only said the window was "darker than normal," but did not have reasonable suspicion to believe the window violated state law.

Longshore v. State, 81 Crim. L. Rep. 381 (Md. 6/8/07):
Holding: Where police received a tip that Defendant had just committed a drug transaction, police had reasonable suspicion to stop Defendant for investigation, but did not have probable cause to place him in handcuffs where there was no showing that Defendant was dangerous or a flight risk. Thus, this was not a "mere detention," but an "arrest," and the arrest lacked probable cause.

Paulino v. State, 81 Crim. L. Rep. 349 (Md. 6/4/07):
Holding: Even though police received a tip that Defendant had drugs in his buttocks, stopping and arresting Defendant in a parking lot and searching his buttocks in the parking lot was unreasonable under the 4th Amendment. The location of the search and the lack of exigency made the search unreasonable, notwithstanding the authority to conduct a search incident to arrest.

Lewis v. State, 2007 WL 1075145 (Md. 2007):
Holding: Police did not have reasonable suspicion to stop car that "almost hit" a police car when it was pulling onto the street; Defendant didn't commit a traffic violation.

Swift v. State, 79 Crim. L. Rep. 403 (Md. 6/2/06):
Holding: Officer effected "stop" of Defendant requiring reasonable suspicion where officer parked his patrol car in the path of Defendant who was walking down a street at 3:00 a.m. and officer asked for identification.

Com. v. Tyree, 2010 WL 27540 (Mass. 2010):
Holding: Warrantless search of residence where robbery suspect lived was not justified by "exigent circumstances," where police did not have objectively reasonable belief that the money stolen would change hands or that clothing used in the robbery would be destroyed before a search warrant could be obtained.

Com. v. Mubdi, 2010 WL 1137051 (Mass. 2010):
Holding: Even though police received anonymous tip to be on lookout for a car with two black males with a Georgia license plate, where the veracity of the information was not established, police lacked reasonable suspicion to conduct investigatory stop of

Defendant and search of his vehicle; police were able to corroborate only innocent information about the existence of the car and occupants.

Com. v. Narcisse, 87 Crim. L. Rep. 413 (Mass. 5/27/10):
Holding: Even though encounter with police may be voluntary, police cannot search someone for weapons without reasonable suspicion of wrongdoing.

Com. v. Hernandez, 87 Crim. L. Rep. 108 (Mass. 4/16/10):
Holding: Where officer arrested Defendant without statutory authority, the evidence seized had to be suppressed as a matter of state law, even though evidence would be admissible under *Virginia v. Moore,* 553 U.S. 164 (2008).

Com. v. Porter P., 86 Crim. L. Rep. 748 (Mass. 3/11/10):
Holding: Where police seek to rely on non-resident third-party's consent to search premises (such as a landlord), they must see a written document purporting to give landlord authority to consent to a police search.

Com. v. Narcisse, 87 Crim. L. Rep. 413 (Mass. 5/27/10):
Holding: Even though encounter with police may be voluntary, police cannot search someone for weapons without reasonable suspicion of wrongdoing.

Com. v. Lyles, 2009 WL 1333003 (Mass. 2009):
Holding: Consensual encounter with police turned into a seizure when police took Defendant's identification to run a warrants check without Defendant's consent.

Com. v. Gomes, 85 Crim. L. Rep. 85 (Mass. 4/2/09):
Holding: Even though Officer saw Defendant give a handful of unidentified items to another person at 4:00 a.m. in a high crime (drug) area, Officer did not have reasonable concern for their safety to conduct a weapons frisk.

Com. v. Kaupp, 2009 WL 91865 (Mass. 2009):
Holding: Even though child pornography was found on an unauthorized office computer, this did not provide probable cause to search a different unauthorized office computer, even though Defendant admitted collecting pornography and "couldn't guarantee" there was not child pornography on the computer.

People v. Chowdhury, 2009 WL 2913882 (Mich. 2009):
Holding: City Ordinance that required persons under 21 years old to submit to a breath test if police had reasonable cause to believe they had consumed alcoholic beverages did not fall within "special needs" exception to 4th Amendment and was unconstitutional on its face.

State v. Allen, 88 Crim. L. Rep. 140, 2010 WL 3927976 (Mont. 10/6/10):
Holding: Montana Constitution prohibits warrantless recording of phone calls, even where one of the call's participants consents to the recording.

State v. Ellis, 85 Crim. L. Rep. 387, 2009 WL 1578996 (Mont. 6/5/09):
Holding: Montana rule providing that children under age 16 are incapable of providing valid consent to search does not contain an exception that applies to search of their own bedroom; thus, even though child sex victim gave consent to search her bedroom, evidence found there may not necessarily be used against Defendant-parent.

State v. Saale, 85 Crim. L. Rep. 87, 2009 WL 862888 (Mont. 3/31/09):
Holding: The possibility that an auto collision caused serious injuries to a Driver who left scene of accident did not provide exigent circumstances to justify a warrantless entry into Driver's home.

State v. Lewis, 82 Crim. L. Rep. 208 (Mont. 11/8/07):
Holding: Re-entering residence without warrant to search for evidence of arson after fire was put out violated 4th Amendment.

State v. Schwarz, 2006 WL 1522639 (Mont. 2006):
Holding: 13-year old daughter's consent to search parent/Defendant's house was invalid, since child under age 16 lacked capacity to consent to search parent/Defendant's house.

State v. Gorup, 2010 WL 1927807 (Neb. 2010):
Holding: Where police conducted an illegal search of Defendant's apartment and handcuffed him outside, his subsequent consent to search the apartment was a fruit of poisonous tree.

State v. Gorup, 87 Crim. L. Rep. 316 (Neb. 5/14/10):
Holding: Where Defendant-resident knew that police had already conducted a search of his residence (which search was illegal), and afterwards police asked for his consent to search, which Defendant gave and police searched again, the consent was invalid because a reasonable person would have concluded that refusing to consent was pointless; this is true even though Defendant-resident did not know what police had found in the first search.

Hannon v. State, 2009 WL 1439472 (Nev. 2009):
Holding: Even though officer was called to house for domestic disturbance, where woman answered the door and said there was no disturbance and just a verbal altercation, there was no emergency justifying warrantless entry into house.

Ramet v. State, 2009 WL 1562978 (Nev. 2009):
Holding: State cannot present evidence that Defendant refused consent to search his residence, and argue this as evidence of guilt.

State v. Rincon, 2006 WL 3513133 (Nev. 2006):
Holding: Driving slowly, without other evidence of erratic or unusual driving, does not provide reasonable suspicion to conduct a traffic stop.

State v. Rincon, 80 Crim. L. Rep. 304 (Nev. 12/7/06):
Holding: Where there was no indication that Defendant was drunk driving other than that he was driving slower than speed limit, there was no reasonable suspicion to stop for drunk driving.

State v. Boutin, 88 Crim. L. Rep. 318 (N.H. 11/24/10):
Holding: Where Officer saw Defendant's car legally parked at night in a "pull off area" and sought to check on it under community caretaking function, New Hampshire Constitution prohibits seizing the occupants of the car by activating the flashing lights of the patrol car.

State v. Joyce, 86 Crim. L. Rep. 360 (N.H. 12/4/09):
Holding: Officer investigating marijuana use by Defendant in a car "seized" Defendant when, within hearing of Defendant, they called another officer to bring a drug dog; reasonable Defendant would not have felt free to leave.

In re Search Warrant for Medical Records of C.T., 2010 WL 1791275 (N.H. 2010):
Holding: Under New Hampshire law, where a hospital receives a search warrant for privileged records, it must give them to court for in camera inspection and patient shall be given notice and opportunity to object to disclosure.

State v. Robinson, 85 Crim. L. Rep. 394, 2009 WL 1636645 (N.H. 6/12/09):
Holding: Even though a stabbing and robbery occurred at a store 40 minutes earlier, this did not provide exigent circumstances to make warrantless entry into suspect's house.

State v. Sodoyer, 81 Crim. L. Rep. 663 (N.H. 8/24/07):
Holding: Even though Defendant denied living at an apartment and said nothing when police searched his bedroom, Defendant could still challenge search of his belongings because his denial of residency was not a complete disavowal of any privacy interest in his belongings.

State v. Pepin, 2007 WL 1246201 (N.H. 2007):
Holding: Officer did not have reasonable suspicion to stop Defendant for violating a road-racing statute or for suspicion of DWI where officer only heard Defendant's tires squeal upon accelerating from a stop.

State v. Privott, 87 Crim. L. Rep. 711 (N.J. 6/29/10):
Holding: Where police officer received a tip Defendant might have weapons, *Terry* allowed Officer to pat down Defendant for weapons but not lift up his shirt where he found packet of drugs.

State v. Marshall, 85 Crim. L. Rep. 569, 2009 WL 2145521 (N.J. 7/21/09):
Holding: Where search warrant left it up to police to determine which unit of a duplex to search, the warrant violated the particularity requirement of the New Jersey Const. by allowing police to assume role of magistrate in determining probable cause to search.

State v. Pena-Flores, 84 Crim. L. Rep. 627 (N.J. 2/25/09):
Holding: New Jersey Constitution requires police with probable cause to search a car to obtain a warrant, unless they can show threat to safety or evidence.

State v. Elders, 81 Crim. L. Rep. 588, 2007 WL 2164037 (N.J. 7/30/07):
Holding: New Jersey Constitution forbids a police officer who comes across a disabled vehicle from asking the occupant for consent to search the car absent reasonable suspicion of a crime.

State v. Lee, 81 Crim. L. Rep. 142 (N.J. 4/19/07):
Holding: Defendant seeking discovery on claim that vehicle stop resulted from racial profiling was entitled to have trial court rule on that discovery request, before deciding whether the evidence found as a result of the stop was too attenuated from the stop to suppress it.

State v. Rivera, 88 Crim. L. Rep. 112 (N.M. 10/19/10):
Holding: Where bus company employee opened suspicious package and saw bags, and then DEA agent opened bags along with employee and found drugs, this violated the New Mexico Constitution, which requires a search warrant when police seek to expand the scope of the private search.

State v. Garcia, 85 Crim. L. Rep. 675 (N.M. 9/1/09):
Holding: Under New Mexico Constitution, Officer's words or actions that would cause a reasonable person to believe he is not free to leave constitute a "seizure" regardless of whether the person actually submits to the authority; court rejects ruling in *California v. Hodari D.*, 499 U.S. 621 (1991).

State v. Nyce, 2006 WL 1786853 (N.M. 2006):
Holding: Search warrant to search for drugs was not justified where Defendant purchased legal items of hydrogen peroxide and iodine at two stores using a self-check out, and delivered them to her boyfriend's house.

People v. Devone, 87 Crim. L. Rep. 402 (N.Y. 6/8/10):
Holding: New York Constitution prohibits suspicion-less dog sniffs for routine traffic violations.

People v. Mothersell, 87 Crim. L. Rep. 39 (N.Y. 4/1/10):
Holding: A warrant authorizing search of "all persons present" requires police have a factual basis for believing that there is a substantial probability that anyone present will be concealing drugs; also, a strip search can only be performed when specific facts support reasonable suspicion that a particular person has secreted contraband on their body.

People v. Devone, 87 Crim. L. Rep. 402 (N.Y. 6/8/10):
Holding: New York Constitution prohibits suspicion-less dog sniffs for routine traffic violations.

People v. Weaver, 85 Crim. L. Rep. 231 (N.Y. 5/12/09):
Holding: Where police without a warrant or any particularized suspicion put a GPS device on Defendant's car to track its movements, this violated the New York Constitution's warrant requirement.

People v. Havrish, 81 Crim. L. Rep. 27 (N.Y. 4/3/07):
Holding: Defendant's act of producing an unlicensed gun in response to a protective order to surrender all firearms was protected by Defendant's 5th Amendment right against compelled self-incrimination, where police had not known about the gun beforehand; producing the gun was testimonial and incriminating.

People v. Gomez, 2005 WL 2759218 (N.Y. 2005):
Holding: Police exceeded scope of Defendant's consent to search car, where officer removed carpet and metal with a crowbar to find a hidden compartment in the gas tank. A reasonable person would not have understood the officer's request to search to include prying a hole in the floorboard.

State v. Stone, 82 Crim. L. Rep. 284 (N.C. 12/7/07):
Holding: Even though Defendant consented to search of his person for drugs, it was not reasonable for police to pull open Defendant's waistband and look in his underwear.

State v. Smith, 86 Crim. L. Rep. 347, 2009 WL 4826991 (Ohio 12/15/09):
Holding: The exception to the 4th Amendment warrant requirement for searches incident to arrest does not authorize police to look through the call log of arrestee's cell phone.

State v. Vondehn, 2010 WL 2607155 (Or. 2010):
Holding: Under Oregon Constitution, where police violate *Miranda* rights, the derivative physical evidence they obtain from this must be suppressed.

State v. Vondehn, 87 Crim. L. Rep. 683 (Or. 7/1/10):
Holding: Oregon Constitution requires that physical evidence obtained as fruit of violation of *Miranda* be suppressed. (Rejecting *U.S. v. Patane*, 542 U.S. 630 (2004) which held that violation of *Miranda* does not require suppressing physical evidence if statements were voluntary.)

State v. Rudder, 2009 WL 2959875 (Or. 2009):
Holding: Even though Defendant sought to thwart Officer's pat down search of him for weapons, Officer's removal of a packet from Defendant's pants pocket and opening it was unreasonable under Oregon Constitution during routine search on grounds that person might be armed.

State v. Guest, 2006 WL 2423551 (Or. 2006):
Holding: Even though Defendant was in a car parked in a closed public park, police officer did not have reasonable suspicion to stop and question Defendant because there

was no evidence that being in a closed public park was a crime; drugs seized had to be suppressed.

Commonwealth v. Mistler, 2006 WL 3797969 (Pa. 2006):
Holding: Suspicionless stop of Defendants at fraternity party to investigate underage drinking violated 4th Amendment.

State v. Berrios, 81 Crim. L. Rep. 696 (Tenn. 8/17/07):
Holding: 4th Amendment prohibits frisking a driver and putting him in a patrol car without any suspicion that he is armed and dangerous; thus, Defendant was unlawfully seized and his consent to search of car after frisk and being put in patrol car was invalid and drugs found in car must be suppressed.

State v. Nicholson, 2003 WL 24307120 (Tenn. 2006):
Holding: Officer did not have reasonable suspicion of criminal activity to seize Defendant solely because Defendant ran from officer when officer told him to "hold up" during investigation of gang activity.

State v. Baker and **State v. Gettling, 86 Crim. L. Rep. 720 (Utah 3/12/10):**
Holding: *Gant* holding on vehicle searches that police may search vehicle incident to arrest only if arrestee is within reaching distance of vehicle compartment applies even if there are also passengers with the car; also, officers cannot do canine sniff of passenger compartment after the lawful purpose of stop has concluded.

State v. Worwood, 81 Crim. L. Rep. 455 (Utah 6/22/07):
Holding: Where police officer (1) encountered driver-Defendant stopped on a dirt road; (2) suspected Defendant was drunk; but (3) rather than conduct sobriety tests there, transported Defendant more than a mile away to have another officer conduct tests, the investigative detention escalated into a de facto arrest, and there was no probable cause for the arrest, even though there was reasonable suspicion of drunk driving. Thus, results of the sobriety tests were suppressed.

State v. Moreno, 84 Crim. L. Rep. 599 (Utah 2/20/09):
Holding: 4th Amendment was violated where court ordered parents of juvenile defendant to submit to random drug testing.

State v. Rodriguez, 80 Crim. L. Rep. 476 (Utah 1/30/07):
Holding: Even though blood alcohol content may disappear rapidly, police still need a warrant to take blood from a vehicular homicide suspect.

State v. Harris, 2009 WL 2401758 (Vt. 2009):
Holding: Evidentiary hearing was required to determine whether Defendant-driver was legally required to use his turn signal when exiting from a "rotary" because this involved factual and legal issues, and if Defendant was not required to signal, then Officer lacked any grounds to stop Defendant.

State v. Pitts, 85 Crim. L. Rep. 358 (Vt. 5/22/09):
Holding: Where police who were serving a subpoena on another person followed Defendant who left the scene and then questioned him about drugs and frisked him, this was a "seizure" under the 4th Amendment requiring objective, articulable suspicion.

State v. Bauder, 81 Crim. L. Rep. 138 (Vt. 3/16/07):
Holding: Vermont Constitution prohibits police from routinely searching a vehicle incident to an arrest without a warrant. Thus, Vermont gives greater protection than *New York v. Belton*, 453 U.S. 454 (1981), which held that police may search passenger compartment of car incident to an arrest.

State v. Quigley, 2005 WL 3501841 (Vt. 2005):
Holding: Even though police obtained a warrant to search an apartment after they found marijuana in the common area of the apartment shared by roommates, the probable cause for the warrant did not extend to search of Defendant's locked bedroom in the apartment.

Whitehead v. Com., 86 Crim. L. Rep. 6, 2009 WL 2972896 (Va. 9/18/09):
Holding: Even though a drug dog alerted on a vehicle and a police search of the vehicle failed to turn up drugs, there was no probable cause to then search the passenger of the vehicle; passenger's mere presence in a vehicle that may have or had drugs in it is not sufficient to arrest or search the passenger.

Grandison v. Commonwealth, 81 Crim. L. Rep. 424, 2007 WL 1651231 (Va. 6/8/07):
Holding: Where officer was conducting a pat-down search of Defendant, officer could not open a dollar bill that was folded in a manner officer said was known to conceal cocaine. The plain view doctrine did not allow the opening of the dollar bill because it was not immediately apparent that it was contraband, and it was a lawful item with a legitimate purpose, despite the officer's prior experience.

State v. Afana, 2010 WL 2612616 (Wash. 2010):
Holding: Where police arrested passenger in car for trespassing, police could not search the car "incident to arrest."

State v. Tibbles, 87 Crim. L. Rep. 814 (Wash. 8/5/10):
Holding: Even though cars are inherently mobile, without more facts, Washington Constitution forbids searching them without a warrant.

State v. Garcia-Salgado, 88 Crim. L. Rep. 96 (Wash. 10/7/10):
Holding: Even though court rule authorizes taking DNA samples, the 4th Amendment requires that this be done in accord with constitutional principles similar to obtaining a warrant, and so taking of DNA sample from rape Defendant-Suspect was improper where the information on which this was done was not supported by oath or affirmation.

State v. Valdez, 2009 WL 4985242 (Wash. 2009):
Holding: Even though there was an outstanding warrant for Defendant's arrest, where officers had removed Defendant from his car and put him in the backseat of the police

car, officers could not then search Defendant's car without a warrant as a "search incident to arrest."

People v. Winterstein, 86 Crim. L. Rep. 327, 2009 WL 4350257 (Wash. 12/3/09):
Holding: (1) Washington Constitution's privacy provision prohibits courts from applying "inevitable discovery" doctrine; (2) probation officer conducting warrantless home visit of probationer must have probable cause to believe probation resides on the premises.

State v. King, 86 Crim. L. Rep. 161, 2009 WL 3298059 (Wash. 10/15/09):
Holding: Even though officer observed Defendant speed up to 100 mph when passing a truck but then Defendant resumed lawful speed, and even though this would have justified an arrest at the time it happened, this did not justify officer arresting Defendant outside his territorial jurisdiction, because there was no immediate threat to life or property at that time.

State v. Evans, 80 Crim. L. Rep. 405 (Wash. 1/11/07):
Holding: Even though Defendant claimed that a briefcase found in his car was not his, where he objected to police opening it, there was no abandonment of briefcase and Defendant could challenge the search of the briefcase because Defendant had reasonable expectation of privacy in his car and he objected to briefcase being opened.

State v. Day, 82 Crim. L. Rep. 92 (Wash. 10/11/07):
Holding: Even though there was reasonable suspicion Defendant was engaged in a parking violation, the Washington Constitution does not authorize a Terry "stop and frisk" for a parking violation.

State v. Jorden, 81 Crim. L. Rep. 203 (Wash. 4/26/07):
Holding: Washington Constitution's privacy protections prohibit police from conducting random, warrantless searches of hotel registries to look for fugitives.

State v. Mullens, 2007 WL 4099850 (W.Va. 2007):
Holding: West Virginia constitution prohibits police from having an informant secretly record a person in the person's home.

State v. Mullens, 80 Crim. L. Rep. 593 (W.Va. 2/28/07):
Holding: State constitution requires a warrant before police can send a wired informant into a suspect's house to tape him.

State v. Hess, 87 Crim. L. Rep. 723, 2010 WL 2773581 (Wis. 7/15/10):
Holding: Where judge had never ordered Defendant to cooperate with a presentence report writer, and then issued a civil search warrant when Defendant failed to keep appointment with writer, the warrant was invalid, and police could not rely on "good faith" exception to exclusionary rule to overcome the judicial mistake in issuing the warrant; suppression of evidence was necessary to preserve the integrity of the judicial process.

State v. Johnson, 2007 WL 840486 (Wis. 2007):
Holding: Even though Defendant moved his head and shoulders as if he was concealing something during a traffic stop, officer did not have reasonable suspicion to search for weapons since Defendant was not suspected of a crime associated with weapons, and there was no indication Defendant was dangerous. Defendant's movement of head and shoulders was consistent with innocent activities like reaching for a purse or looking for a license.

State v. Payano-Roman, 2006 WL 1348397 (Wis. 2006):
Holding: Administration of a laxative to Defendant was a government search, even though another purpose was medical.

State v. Gant, 80 Crim. L. Rep. 49 (Ariz. Ct. App. 9/20/06):
Holding: Even though *New York v. Belton*, 453 U.S. 454 (1981) allows searches of cars incident to arrest, where Defendant was arrested standing near his car, police could not search the car unless they had reason to believe the Defendant posed a threat to them or evidence in the car.

State v. Barnes, 81 Crim. L. Rep. 467 (Ariz. Ct. App. 6/20/07):
Holding: Even though police were conducting a lawful strip search incident to an arrest, the search turned unlawful when they pulled a bag out of Defendant's rectum. The State must get a warrant for a body cavity search. The bag did not qualify as a "plain view" seizure because part of the bag was unexposed in the rectum.

Conner v. State, 2007 WL 104409 (Ark. Ct. App. 2007):
Holding: Where Defendant and owner of car were life-long friends and owner had implicitly let Defendant drive the car, Defendant had standing to challenge search of car.

People v. Maikhio, 2010 WL 11290 (Cal. App. 2010):
Holding: Even though officer saw Defendant using a fishing method that could be used to illegally catch lobsters, where officer "did not necessarily" suspect Defendant had broken the law, the 4th Amendment prohibited officer from stopping Defendant's car to see if Defendant was in compliance with law.

People v. Hughston, 84 Crim. L. Rep. 293 (Cal. Ct. App. 11/26/08):
Holding: Where Defendant had created a tent-type structure around his SUV to stay in, police could not search it without a warrant because there was a reasonable expectation of privacy in the tent, even though the hood of the SUV was outside the tent.

People v. Garry, 82 Crim. L. Rep. 210 (Cal. Ct. App. 11/13/07):
Holding: Police "seized" Defendant under 4th Amendment when they shined patrol car spotlight on him, exited the car and walked quickly toward him, and asked if he was on probation or parole; because there was no reasonable suspicion of criminal activity to justify seizure, evidence found on Defendant was suppressed.

People v. Pereiram, 81 Crim. L. Rep. 270 (Cal. App. 5/15/07):
Holding: Even though Defendant mailed a package using a fictitious name, there are many legitimate reasons a person mailing a package may wish to remain anonymous (such as sending mail to a journalist), and this alone did not support a finding that Defendant had "abandoned" the package negating an expectation of privacy in it.

People v. Cantor, 2007 WL 1111455 (Cal. App. 2007):
Holding: Where officer asked if he could do a "real quick" search of car and Defendant consented, officer could not search car for 15 minutes and open a record cleaner container, because this exceeded the scope of the consent.

People v. Perrusquia, 2007 WL 1203644 (Cal. App. 2007):
Holding: Even though Defendant was in a high-crime area, police did not have reasonable suspicion to detain and pat-down Defendant where Defendant was parked in an idling car near a store and exited the car to try to avoid contact with police.

People v. Sun, 2007 WL 678259 (Cal. App. 2007):
Holding: The National Firearms Act's privilege and immunity provision prohibits evidence obtained through registering a firearm under the Act from being used to obtain a search warrant of Defendant, who was not accused of falsifying NFA records.

People v. Superior Court, 80 Crim. L. Rep. 146 (Cal. Ct. App. 10/11/06):
Holding: Even though a college dorm contract allowed college officials to search a dorm room if they suspected a crime was being committed, this did not give a college security officer authority to give third-party consent to police to search the room, because the dorm contract was more like a landlord-tenant or hotel-occupant relationship.

People v. Garcia, 2006 WL 3628101 (Cal. App. 2006):
Holding: Officer who stopped bicycler for having an inoperative headlight did not have reason to pat-down bicycler when bicycler denied having any identification, absent concern bicycler was armed and dangerous.

People v. Barrus, 2009 WL 4981892 (Colo. App. 2009):
Holding: Where Defendant reasonably believes police officer is using unreasonable or excessive force, self-defense is an available defense.

State v. Vellejo, 2007 WL 2051108 (Conn. App. 2007):
Holding: Even though a car was owned by Defendant's friend, Defendant had standing to challenge search of car where Defendant possessed the car, since Defendant had reasonable expectation of privacy in it.

Byrd v. State, 2009 WL 2870197 (Fla. Ct. App. 2009):
Holding: Where officer followed Defendant into an apartment in the belief that "something was not right," the warrantless entry was unreasonable under the 4th Amendment where Officer gave no facts in support of his belief.

Ortiz v. State, 2009 WL 1097258 (Fla. Dist. Ct. App. 2009):
Holding: Even though child's parent had not picked up child from school and deputy was unable to reach parent by phone, this was not exigent circumstances justifying deputy entering parent's home, where he found drugs in a locked room, since there was no evidence of foul play or that parent was even home.

Mestral v. State, 2009 WL 2762684 (Fla. Ct. App. 2009):
Holding: Where police were called to Defendant's house on a burglary call by a neighbor and found Defendant in his front yard, this did not give officers cause to conduct a warrantless "protective sweep" of Defendant's house.

Harris v. State, 2009 WL 188049 (Fla. Ct. App. 2009):
Holding: Even though statute required license plate to be "clear and free from defacement," Officer could not stop car which had a trailer hitch obscuring the license number.

State v. Moninger, 2007 WL 28249 (Fla. Ct. App. 2007):
Holding: Where police told a minor sex victim she could go into her Defendant-father's house and "grab" some condoms and the victim did this, victim was acting as an agent of the police and the retrieval violated Defendant's 4th Amendment rights.

Wheeler v. State, 2007 WL 1296024 (Fla. Dist. Ct. App. 2007):
Holding: Even though police received an anonymous call that a man was battering a woman in a driveway of a house, where police arrived at the house and did not see anything suspicious, they did not have exigent circumstances to enter house without a warrant.
State v. Rabb, 78 Crim. L. Rep. 608 (Fla. Ct. App. 2/15/06):
Holding: Drug-dog sniff outside door of a residence violated 4th Amendment.

Marganet v. State, 2006 WL 846752 (Fla. Ct. App. 2006):
Holding: Defendant's girlfriend lacked authority to consent to search Defendant's shaving kit in a hotel room they shared.

Preston v. State, 2009 WL 656302 (Ga. Ct. App. 2009):
Holding: Where Defendant and another person shared a residence, police search of residence based on consent of the other person who was away from the residence was unreasonable as to Defendant.

Bell v. State, 2009 WL 129978 (Ga. Ct. App. 2009):
Holding: Even though Defendant had a baton in his car when he was stopped for speeding, this did not justify a search of the car for weapons; otherwise, officers could search any speeder caught with a baseball bat in his car.

St. Fleur v. State, 2007 WL 2004425 (Ga. Ct. App. 2007):
Holding: Affidavit did not provide probable cause to issue a search warrant where it said an unnamed informant had purchased drugs at a house before, and the informant had

agreed to let police listen in on a drug buy, where there was no corroborating information that the house was used for drug activity and no definitive time was ever set for the alleged drug buy.

State v. Dixson, 2006 WL 1826855 (Ga. Ct. App. 2006):
Holding: Police did not have reasonable suspicion for an investigatory stop of a car which came up "unknown" as to insurance status in NCIC.

State v. McKinney, 2005 WL 2715865 (Ga. Ct. App. 2005):
Holding: Teenage-son did not have authority to consent to search of father's bedroom, where son did not use bedroom.

State v. Bunting, 79 Crim. L. Rep. 299 (Idaho Ct. App. 5/17/06):
Holding: Police cannot conduct warrantless search of burned building based on exigency that allowed the firefighters to enter the building.

State v. Jenkins, 2006 WL 572202 (Idaho Ct. App. 2006):
Holding: Defendant's expectation of privacy in his attached garage was not diminished by the open garage door and visibility from the street; thus, police could not enter garage for *Terry* purposes absent exigent circumstances or probable cause to cause to arrest.

People v. Arnold, 2009 WL 2661136 (Ill. App. 2009):
Holding: The good-faith exception to exclusionary rule would not be applied where Officer handcuffed Defendant before confirming whether there was a valid arrest warrant; the need to deter police from handcuffing people before determining if there is an arrest warrant outweighed the harm to the state in suppressing the evidence here.

People v. Prinzing, 85 Crim. L. Rep. 222 (Ill. App. 4/21/09):
Holding: Where police falsely told Defendant that someone might have stolen his credit card information through his computer using a computer virus, but police were really searching for child pornography, Defendant's consent to search computer was invalid and evidence must be suppressed.

People v. Morgan, 2009 WL 385482 (Ill. Ct. App. 2009):
Holding: Where Defendant was arrested pursuant to an invalid warrant, the good faith exception to exclusionary rule did not justify search of Defendant's house after his arrest.

People v. Oliver, 2009 WL 169367 (Ill Ct. App. 2009):
Holding: Where Officer's search of car's interior pursuant to consent of driver found nothing, Officer's request to search the trunk constituted a new "seizure" of driver.

People v. Jackson, 85 Crim. L. Rep. 107 (Ill. App. 3/30/09):
Holding: 4th Amendment required Officer who approached pedestrian to have particularized suspicion before ordering pedestrian to take his hands out of his pockets.

Lacey v. State, 2010 WL 2916461 (Ind. Ct. App. 2010):
Holding: Where police department had a systematic, routine practice of not knocking before entering residences with a search warrant, suppression of evidence was an appropriate remedy to this unjustified no-knock policy.

State v. Brown, 900 N.E.2d 820 (Ind. Ct. App. 2009):
Holding: Where police were called to investigate a loud party and the guests then quieted down, there was no reasonable suspicion to stop a car which then arrived at the party because the driver and car were not part of the original police call.

State v. Washington, 82 Crim. L. Rep. 132, 2007 WL 3053317 (Ind. Ct. App. 10/22/07):
Holding: Indiana Constitution forbids police who stop motorists for traffic violations from asking motorists whether they possess illegal drugs, absent an independent basis to believe motorist is involved in criminal activity.

Howard v. State, 2007 WL 799114 (Ind. Ct. App. 2007):
Holding: Even though officer knew Defendant from a prior drug arrest, officer was not justified in conducting a pat-down search of defendant for weapons during a traffic stop, where he saw Defendant's hands and interior of car, and did not testify that he was concerned about his safety.

Pearson v. State, 2007 WL 2177893 (Ind. Ct. App. 2007):
Holding: When conducting a limited pat-down weapons search during a traffic stop initiated under the state Seatbelt Enforcement Act, officer was not permitted to ask Defendant if he had anything on his person. The Act can be interpreted to prohibit an officer from asking for consent to search.

Sapen v. State, 2007 WL 2068645 (Ind. Ct. App. 2007):
Holding: Where officer followed Defendant into his driveway but never ordered him to stop and allowed him to go in the garage to get his license, a warrantless entry into the garage was not justified by exigent circumstances even though alcohol would dissipate in the blood.

State v. Brown, 2006 WL 91353 (Ind. Ct. App. 2006):
Holding: Good faith exception to warrant requirement did not allow use of evidence which was seized during execution of a search warrant which had been issued following a probable cause hearing that was not supported by the requesting officer's sworn testimony.

State v. Thomas, 2009 WL 928531 (Iowa Ct. App. 2009):
Holding: State cannot use Defendant's refusal to consent to search of her home as evidence of guilt.

State v. Geraghty, 2007 WL 2066513 (Kan. Ct. App. 2007):
Holding: Even though officer knew that Defendant's daughter suspected Defendant of running a meth lab, there were no exigent circumstances for police to enter Defendant's apartment without a warrant where there was no information that the meth lab was active.

State v. Lemons, 155 P.3d 732 (Kan. Ct. App. 2007):
Holding: Officer could not conduct protective sweep of Defendant's residence where Defendant was not being arrested, Defendant was cooperative, and nothing indicated danger other than a sheet over a bedroom doorway.

State v. Poulton, 2007 WL 622200 (Kan. Ct. App. 2007):
Holding: Defendant's mere acquiescence to police's warrantless entry into his home is insufficient to prove Defendant voluntarily consented to search of home.

State v. Taylor, 2010 WL3993704 (La. Ct. App. 2010):
Holding: Even though high school student was smoking in school bathroom, subsequent search of student's shoes for cigarettes was unreasonable, since the shoes were an unlikely place for cigarettes to be found.

State v. Lala, 2008 WL 5192223 (La. Ct. App. 2008):
Holding: Even though officer saw Defendant in street and thought she might be intoxicated and a danger, officer's hot pursuit of Defendant into her house was not reasonable; concerns for public safety were alleviated when Defendant entered her home.

State v. Manuel, 2006 WL 3691038 (La. Ct. App. 2007):
Holding: The search of Defendant "incident to arrest" was invalid, where the officers "arrested" Defendant for fleeing from them, but this fleeing was not itself a crime.

State v. Chauvin, 2006 WL 3093761 (La. Ct. App. 2006):
Holding: Where officer conducted a frisk of Defendant for weapons, and felt an object that officer thought was a marijuana joint but was really only a folded up dollar bill, officer could not under "plain feel" doctrine unfold the dollar bill, and cocaine found inside had to be suppressed.

State v. Ledford, 2005 WL 2810690 (La. Ct. App. 2005):
Holding: Search of Defendant's residence under exigent circumstances exception to search warrant requirement was invalid, where resident in home told police that Defendant wasn't at home.

Epps v. State, 2010 WL 2139228 (Md. Ct. Spec. App. 2010):
Holding: Even though Defendant did not raise *Terry* analysis for why evidence should be suppressed, where he filed motion to suppress on other non-valid basis, motion should have been granted on violation of *Ter*

Com. v. Vanya, 86 Crim. L. Rep. 109 (Mass. Ct. App. 2009):
Holding: Even though police inventory policy called for inspection of "any closed container or article found on arrestee's person," this was not sufficiently specific to permit police to cut open a zippered, locked banker's bag found on Defendant when arrested, and evidence in bag had to be suppressed.

Commonwealth v. DePeiza, 2006 WL 1493809 (Mass. App. Ct. 2006):
Holding: Police did not have reasonable suspicion to stop Defendant where he was walking using a "straight arm method" of concealing gun, because how a person walks is too idiosyncratic to serve as a basis for reasonable suspicion of criminal activity.

Commonwealth v. Kirschner, 2006 WL 3718054 (Mass. Ct. App. 2006):
Holding: Even though police received a report of illegal fireworks being set off, where police arrived and saw no fireworks and Defendant told them that the persons with the fireworks had left, police were not justified in entering curtilage of Defendant's residence under emergency exception to 4th Amendment.

State v. Lussier, 2009 WL 2499290 (Minn. Ct. App. 2009):
Holding: Even though Defendant was arrested for sex crime, a warrantless search of his genitalia and collection of bodily evidence as part of a "sexual assault examination" was not justified as a search incident to arrest; officer should have obtained a warrant for this.

State v. Maldanado-Arreaga, 86 Crim. L. Rep. 13 (Minn. Ct. App. 9/15/09):
Holding: 4th Amendment exclusionary rule applies to biographical (identity-related) evidence obtained as a result of an unconstitutional search and seizure.

State v. Shriner, 2007 WL 2832448 (Minn. Ct. App. 2007):
Holding: Suspected presence of alcohol in Defendant's blood is not a *per se* exigent circumstance to allow warrantless blood draw; moreover, statute allowing taking of blood sample without driver's consent upon probable cause is unconstitutional where a warrant can be obtained.

State v. Shriner, 2007 WL 2832448 (Minn. Ct. App. 2007):
Holding: Suspected presence of alcohol in Defendant's blood is not a *per se* exigent circumstance to allow warrantless blood draw; moreover, statute allowing taking of blood sample without driver's consent upon probable cause is unconstitutional where a warrant can be obtained.

In re J.W.L., 81 Crim. L. Rep. 381 (Minn. Ct. App., 6/5/07):
Holding: Even though police lawfully entered a house under the emergency-aid exception to 4th Amendment after they had received a hang-up 911 call, once police were inside the house and found no emergency, police could not take photos of things in the house and use those to connect Defendant to another crime. The photography was not justified under the plain view doctrine because there was not probable cause to believe a crime was committed and the items photographed (graffiti) were not of an immediately incriminating character.

State v. Timberlake, 2007 WL 92800 (Minn. Ct. App. 2007):
Holding: Even though officers received a tip that Defendant was in possession of a gun, officers did not have reasonable suspicion to stop Defendant's car for an investigatory stop where there was no evidence that this was a criminal activity.

In re C.T.L., 80 Crim. L. Rep. 6 (Minn. Ct. App. 10/10/06):
Holding: Police must obtain a search warrant to obtain DNA from a suspect who is charged but not yet convicted of a crime.

State v. Davis, 79 Crim. L. Rep. 157 (Minn. Ct. App. 4/11/06):
Holding: Minnesota constitution's ban on unreasonable searches prohibited drug-dog sniff outside apartment door from common hallway.

State v. Kouba, 78 Crim. L. Rep. 689 (Minn. Ct. App. 2/7/06):
Holding: Authorities cannot search a Defendant's home as a condition of probation where the Defendant's probation had been unlawfully extended.

State v. Hisey, 80 Crim. L. Rep. 144 (Neb. Ct. App. 10/17/06):
Holding: Where police make a stop or arrest based on erroneous records provided by the Dept. of Motor Vehicles, the "good faith" exception to the exclusionary rule does not apply, and evidence seized must be suppressed because sloppy record-keeping by the DMV must be attributed to law-enforcement.

State v. Reid, 80 Crim. L. Rep. 476 (N.J. Super. Ct. App. 1/22/07):
Holding: State constitution provides privacy right that protects identifying information Internet Service Provider maintains about its users.

State v. Vargas, 81 Crim. L. Rep. 13 (N.M. Ct. App. 3/6/07):
Holding: Police are required under "knock and announce" to announce not only their identity, but also that they have a warrant, before forcibly entering a residence.

State v. Vargas, 80 Crim. L. Rep. 461 (N.M. Ct. App. 1/17/07):
Holding: Under knock and announce rule, police must announce both their identity and that they have a warrant before they can forcibly enter a residence; where they fail to announce they have a warrant, they cannot forcibly enter under exigent circumstances exception.

State v. Aguilar, 2007 WL 1113526 (N.M. Ct. App. 2007):
Holding: Even though car was driving at 2:00 a.m. with "dealer plates," police lacked reasonable suspicion to stop car where police had no information that car was stolen.

State v. Scott, 78 Crim. L. Rep. 550 (N.M. Ct. App. 11/9/05, released 1/17/06):
Holding: Defendant was "seized" when officer went to his home at night, insisted he be awakened, and asked him questions about a traffic offense; evidence found as a result of

seizure must be suppressed because officer did not have reasonable suspicion to "seize" Defendant.

People v. All State Properties, 2010 WL 2771909 (N.Y.J. Ct. 2010):
Holding: Statute creating presumption that two or more cars parked at a single family home registered to two or more different surnames showed nonconforming conduct was unconstitutional and could not support issuance of search warrant.

People v. Sampson, 2009 WL 4981326 (N.Y. App. Div. 2009):
Holding: Even though anonymous tip identified Defendant and said he was bringing drugs to city, the tip did not provide any information that it was reliable, so stop of Defendant was not supported by reasonable suspicion.

People v. Davis, 2010 WL 27965 (N.Y. App. 2010):
Holding: Even though Defendant put his knapsack down on the porch of his residence inside a fenced yard, this did not constitute abandonment of the knapsack so as to allow police to search it without a warrant.

People v. Liggins, 2009 WL 1981760 (N.Y. App. Div. 2009):
Holding: Even though police had a report of shots fired at an apartment, where they did not know the source of the report, when the shots had been fired, or the identity of a suspect or victim, their warrantless entry into the apartment was not justified under the emergency exception to the warrant requirement.

People v. Molina, 2009 WL 1911941 (N.Y. Sup. 2009):
Holding: Where in DWI cases police gave both a breath test and coordination test to defendants who spoke English, but only a breath test to defendants who spoke Spanish, this violated Spanish defendant's equal protection rights.

People v. Creary, 877 N.Y.S.2d 208 (App. Div. 2009):
Holding: Even though officer testified that a car in a parking lot "stood out," the officer saw men in the car look quickly at him and turn back, and one person moved toward the center console, this did not provide reasonable suspicion to stop the car.

State v. Johnson, 2010 WL 2162655 (N.C. Ct. App. 2010):
Holding: Warrantless search of Defendant's car following his arrest for driving with suspended license violated 4th Amendment because Officer could not expect to find evidence of the offense of arrest in the car.

State v. Peele, 675 S.E.2d 682 (N.C. Ct. App. 2009):
Holding: Even though anonymous caller accurately described a car's location in saying car was recklessly driving, there was no reasonable suspicion to stop car where there was no information about who the caller was and no details about what the caller had seen.

State v. Reed, 80 Crim. L. Rep. 654 (N.C. Ct. App. 3/6/07):
Holding: Where Defendant refused to give police a DNA sample when they came to his house to request one, it violated 4th Amendment for police to seize without a warrant a cigarette butt out of a pile of trash on porch of Defendant's house to get a DNA sample, since trash can was within cartilage of house, even though police saw Defendant throw the butt on trash pile.

State v. Little, 2009 WL 2675157 (Ohio. Ct. App. 2009):
Holding: Ariel surveillance of Defendant's property in search of marijuana was a warrantless search in violation of 4th Amendment.

State v. Hackett, 2007 WL 1165519 (Ohio Ct. App. 2007):
Holding: Police exceeded scope of *Terry* investigative stop when, after receiving a tip that Defendant was carrying drugs, they searched Defendant twice and found no drugs, then contacted the informant again and were told the drugs were in the pants pocket, and then searched Defendant a third time.

State v. Rivera, 2006 WL 964726 (Ohio Ct. App. 2006):
Holding: Police did not have reasonable suspicion to conduct investigatory stop of Defendant where confidential informant told police that Defendant was his drug supplier, but only verification police did of informant's story was that informant identified a photo of Defendant.

Baxter v. State, 87 Crim. L. Rep. 862 (Okla. Crim. App. 8/23/10):
Holding: Good-faith exception to exclusionary rule does not justify admission of evidence in violation of *Arizona v. Gant*, even though searched occurred before *Gant*.

State v. Regnier, 2009 WL 2032096 (Or. Ct. App. 2009):
Holding: Even though there may have been minors with alcohol at a gathering at a bonfire, police did not have reasonable suspicion to stop adults who were leaving the bonfire where officer made no observation connecting the adults to the minors-in-possession.

State v. Bentz, 2007 WL 520087 (Or. App. 2007):
Holding: Even though it was later discovered that there was an outstanding warrant for Defendant's arrest, this did not purge the taint of illegality from police's earlier entry into Defendant's residence without a warrant.

State v. Guerrero, 2007 WL 1990176 (Or. App. 2007):
Holding: Administrative policy concerning jail inventories did not authorize police to open a black leather case; the policy did not require police to open closed container.

State v. Fugate, 80 Crim. L. Rep. 351 (Or. Ct. App. 12/20/06):
Holding: Where police officer asked Defendant if he could "see" a small foil packet and Defendant handed him the packet, this did not constitute consent to opening the packet,

and drugs found inside had to be suppressed.

State v. Williams, 2006 WL 16289612 (Or. Ct. App. 2006):
Holding: Officer impermissibly extended time of traffic stop by asking Defendant questions that had nothing to do with the traffic stop.

Com. v. Cruttenden, 85 Crim. L. Rep. 391 (Pa. Super. Ct. 6/8/09):
Holding: Even though police obtained arrestee's consent to use his cell phone to exchange text messages with an unknowing suspect, this violated the Penn. Wiretapping and Surveillance Law when done without a wiretap order.

Crain v. State, 2010 WL 2595077 (Tex. Crim. App. 2010):
Holding: Where Officer shined spotlight on Defendant-pedestrian and told him to "come over here and talk to me," this was an investigatory detention for which Officer was required to have reasonable suspicion of criminal activity.

Hereford v. State, 2009 WL 5173932 (Tex. App. 2009):
Holding: Where police handcuffed Defendant and used a Taser on him 11 times to get him to disgorge drugs in his mouth, this was an unreasonable search and seizure and required suppression of the drug evidence.

Foster v. State, 2009 WL 2410580 (Tex. App. 2009):
Holding: Even though Defendant drove his car close to patrol car at stop light and made revving sounds with his engine and two males in the car made forward lurching movements, this did not provide reasonable suspicion to stop the car for an investigatory stop.

Hall v. State, 2009 WL 2949746 (Tex. Crim. App. 2009):
Holding: Where officer stopped Defendant for allegedly speeding using Light Detection and Ranging Device (LIDAR), but there was no showing that LIDAR was reliable, there was no probable cause to stop and Defendant's motion to suppress DWI results following stop was granted.

Baldwin v. State, 85 Crim. L. Rep. 48 (Tex. Crim. App. 3/11/09):
Holding: Officer exceeded scope of investigative detention when he asked handcuffed Defendant where his identification was, was told it was in his wallet, and then Officer reached in Defendant's pocket to get wallet and found drugs in it.

Parker v. State, 2006 WL 122453 (Tex. Crim. App. 2006):
Holding: Defendant had standing to challenge search of girlfriend's rental car he was driving, even though he had not rented car and rental agreement did not give him permission to drive it, but girlfriend had.

State v. Morris, 2009 WL 1886866 (Utah App. 2009):
Holding: Even though Officer originally thought car lacked a license plate, where Officer saw a temporary license tag as he got closer to car, Officer no longer had any

cause to stop car, despite Officer's claim that he wanted to explain to driver why he initially tried to stop car; Officer's desire to "explain his mistake" was outweighed by driver's constitutional right not to be stopped.

State v. Dominguez, 2009 WL 706662 (Utah. Ct. App. 2009):
Holding: Rule requiring magistrates to keep all supporting documents for a search warrant includes warrants issued by telephone.

Moore v. Commonwealth, 2007 WL 445895 (Va. Ct. App. 2007):
Holding: Officer cannot stop a car for having a peeling inspection sticker because a peeling sticker is not unlawful and does not provide reasonable suspicion for a stop.

State v. Leffler, 2007 WL 2380774 (Wash. Ct. App. 2007):
Holding: Even though police received a tip of acid smells coming from a property, they could not search property under "emergency exception" to warrant requirement because there was no information that any person or property were in imminent danger.

State v. Valdez, 80 Crim. L. Rep. 632 (Wash. Ct. App. 2/13/07):
Holding: Washington Constitution prohibits warrantless canine sniff search of passenger compartment of car after driver has been removed from car and arrested, and visual search did not find anything to give probable cause to search. Opinion disagrees with *New York v. Belton*, 453 U.S. 454 (1981), which held that police may search passenger compartment of car incident to an arrest.

State v. Chavez, 2007 WL 1081108 (Wash. Ct. App. 2007):
Holding: Even though officer saw three people in a bathroom stall with a dollar bill with white powder on it, where he did not see Defendant holding the dollar bill, officer lacked probable cause to believe Defendant was engaged in criminal conduct and thus officer could not search Defendant's wallet.

State v. Link, 2007 WL 102737 (Wash. Ct. App. 2007):
Holding: Defendant, who was a house-guest at his girlfriend's house, had a reasonable expectation of privacy at the house and had standing to challenge search of house.

State v. Lawson, 80 Crim. L. Rep. 153 (Wash. Ct. App. 10/10/06):
Holding: Even though police detected a strong chemical odor coming from a shed which they thought was a methamphetamine lab, this did not allow a warrantless entry under the emergency aid doctrine.

State v. Carlson, 2005 WL 3211375 (Wash. Ct. App. 2005):
Holding: Police did not have reasonable suspicion to stop Defendant's car after he and a companion had separately purchased ingredients, which when mixed together would make methamphetamine.

State v. Sloan, 2007 WL 1412249 (Wis. Ct. App. 2007):
Holding: Even though a shipping company thought a package was suspicious and notified police, there was no probable cause to justify searching the sender's residence.

Self-Defense

State v. Hiltibidal, No. WD69620 (Mo. App. W.D. 8/18/09):
Even though self-defense instruction was not requested by Defendant, where evidence viewed in light most favorable to defense supported the instruction, court was required to give it.
Facts: Defendant was convicted of second degree domestic assault, Sec. 565.073. Victim testified that she and Defendant were arguing and Defendant beat her up, breaking her ribs. Defendant testified that he was trying to leave Victim's residence, but Victim took his car keys and then hit him over head with beer bottle, and Defendant fought Victim in "defensive mode." Defendant did not request a self-defense instruction, but raised this as plain error on appeal.
Holding: MAI-CR3d 306.00 contains instructions that are required to be given whether requested or not. A jury instruction on self-defense is required to be given when substantial evidence supports it. The elements of self-defense are that the Defendant (1) did not provoke the attack; (2) reasonably believed he was faced with necessity of defending himself from serious bodily harm; (3) used no more force than necessary; and (4) attempted to avoid the confrontation. Evidence is viewed in the light most favorable to the defendant in determining if self-defense instruction must be given. Here, while it may be "tempting" to disbelieve Defendant's version of events, it was for the jury to determine credibility. Trial court erred in failing to sua sponte give self-defense instruction.

State v. Stiers, No. WD65559 (Mo. App., W.D. 6/19/07):
Counsel ineffective in failing to request self-defense instruction.
Facts: Movant claimed that girlfriend broke into his house at night, and was going through his wallet and briefcase. Movant confronted girlfriend, and she pulled out a knife. Movant fought with girlfriend for several minutes to disarm her. Girlfriend claimed that she went to Movant's house and entered when nobody came to the door, and Movant began beating her, tied her up and sodomized her. The jury acquitted Movant of sodomy, but convicted of felonious restraint. Movant later filed Rule 29.15 motion alleging counsel was ineffective in not requesting a self-defense instruction. Counsel believed the instruction was not warranted because the State's evidence indicated that Movant restrained girlfriend for several hours.
Holding: This is not a case where counsel did not request an instruction as a matter of strategy; rather, counsel believed the instruction was not available as a matter of law. However, self-defense may be justification for use of physical force when a person reasonably believes such force is needed to defend himself from what that person believes to be the use or imminent use of unlawful force of another. This extends to use of physical restraint provided the actor takes all reasonable measures to end the restraint as soon as reasonable to do so. In determining whether to give an instruction, the

evidence must be viewed in the light most favorable to defendant. Viewing the evidence favorably to Movant, the evidence shows he acted in self-defense. Movant had two available defenses: (1) convince the jury he did not use deadly force, or (2) convince the jury he used deadly force in self-defense. These defenses are not inconsistent. A self-defense instruction must be given where there is substantial evidence to support it, even if it conflicts with a defendant's testimony. Here, a competent attorney would have requested the instruction.

State v. White, No. WD65067 (Mo. App., W.D. 4/10/07):
Plain error to fail to give an instruction on self-defense where instruction was supported by the evidence.
Facts: A man became angry and confronted Defendant. The man hit Defendant, and a fight broke out. During the fight, a gun fell out of Defendant's pants. The man and Defendant wrestled for control of the gun. Defendant grabbed the gun, and fired one shot, which killed the man. Defendant was charged with second-degree murder. The defense was accident. Defendant was convicted of second-degree murder.
Holding: Defendant argues the trial court erred in failing to give MAI-CR3d 306.06 and 306.08 on self-defense and defense of third persons, even though he did not request them at trial. Upon evidence of self-defense or defense of third persons, the State has the burden to prove beyond a reasonable doubt that defendant did not act in lawful self-defense, and the jury must be so instructed, regardless of whether the instructions are requested. In general an accident defense and self-defense are inconsistent because accident involves unintentional conduct while self-defense involves intentional but justified killing. But self-defense is submissible if the inconsistent evidence is offered by the State or the defendant through a third party witness. A witness for the State testified Defendant fired the gun as a defensive measure against the man. This was sufficient to show self-defense, and the court plainly erred in failing to give a self-defense instruction.

U.S. v. Leahy, 80 Crim. L. Rep. 480 (1st Cir. 1/19/07):
Holding: Defendant charged with felon in possession of firearm may assert affirmative defenses of self-defense, duress and necessity.

U.S. v. Gore, 86 Crim. L. Rep. 582 (4th Cir. 1/12/10):
Holding: Prisoner-Defendant can assert self-defense to charge of assault on a prison guard.

U.S. v. Biggs, 2006 WL 827314 (9th Cir. 2006):
Holding: Defendant in assault with dangerous weapons case did not have to show there were no reasonable alternatives to use of force in order to be able to claim self-defense.

State v. Marx, 86 Crim. L. Rep. 17, 215 P.3d 601 (Kan. 9/18/09):
Holding: Even though vehicle crossed shoulder fog line one time and then momentarily crossed center line of two northbound lanes, this was not by itself sufficient to create reasonable suspicion of a violation of state law requiring driver to maintain in his lane; drug evidence found as result of stop is suppressed.

People v. Dupree, 87 Crim. L. Rep. 727 (Mich. 7/23/10):
Holding: Common law affirmative defense of self-defense is a defense to charge of being a felon in possession of a firearm.

State v. Sandoval, 81 Crim. L. Rep. 36 (Or. 3/29/07):
Holding: Oregon statute on use of deadly force in self-defense does not require duty to retreat, since statute not use words "retreat," "escape" or "other means of avoiding."

State v. Harden, 85 Crim. L. Rep. 389 (W.Va. 6/4/09):
Holding: Under "castle doctrine," person has no duty to retreat before using lethal force in response to an attack by a cohabitant inside the residence.

State v. Beal, 2007 WL 3431 (N.C. Ct. App. 2007):
Holding: Where landlord detained tenant with a pitchfork, this was deadly force which allowed tenant to use deadly force in self-defense.

State v. Williams, 2005 WL 3412416 (S.C. Ct. App. 2005):
Holding: Defendant may, under some circumstances, use the amount of resistance reasonably necessary to defend himself if excessive force is used during a lawful arrest.

Sentencing Issues

Vaca v. State, No. SC90554 (Mo. banc 6/15/10):
Holding: *Where (1) defense counsel retained a mental health expert for guilt phase but did not use expert in guilt phase and (2) guilt-phase jury inquired about Defendant's mental health, counsel was ineffective in failing to consider calling expert in separate penalty phase.*
Facts: Defendant was charged with various robberies. Prior to trial, defense counsel hired Psychologist to evaluate Defendant. Psychologist found that Defendant suffered from schizophrenia. The trial was a bifurcated trial under Sec. 577.036 RSMo. Supp. 2008. The guilt phase defense was ultimately actual innocence based on misidentification of Defendant. During guilt phase deliberations, the jury wrote notes asking about Defendant's mental health, but found Defendant guilty. At sentencing phase, counsel called Defendant's parents, but did not call Psychologist. After Defendant received a life sentence plus 102 years, Defendant (Movant) filed a 29.15 motion alleging counsel was ineffective at sentencing phase.
Holding: Counsel testified that this was his first bifurcated trial, and he did not consider whether to call Psychologist at sentencing. Counsel's failure to consider this was unreasonable when the jury had asked about Defendant's mental health. Reversed and remanded for new sentencing trial.

State v. Severe, No. SC89948 (Mo. banc 1/12/10):
Where while case was pending on appeal the Supreme Court decided Turner (holding that prior SIS municipal convictions cannot be used to enhance a subsequent DWI

offense), Defendant receives the benefit of Turner, and remand to allow the State to prove up additional prior convictions is prohibited because Sec. 558.021.2 requires State to prove up prior convictions prior to submission to jury.
Facts: Defendant was convicted at jury trial of Class D felony DWI. Prior to submission to jury, the State submitted two prior DWI convictions to enhance the offense to a felony. One of these convictions was a prior municipal SIS conviction. While the case was pending on direct appeal, the Supreme Court decided *State v. Turner*, 245 S.W.3d 826 (Mo. banc 2008), which held that prior municipal SIS convictions cannot be used to enhance a subsequent DWI offense under the then-existing DWI statute. The State argued that it had additional prior convictions that could be shown, and that a remand should occur to allow the State to prove up the prior convictions.
Holding: Defendant can raise the issue here as plain error because a sentence greater than the maximum authorized by law is plain error resulting in manifest injustice. Here, under the then-existing DWI statute, the State should not have been allowed to use a prior municipal SIS conviction to enhance the instant offense. While the State requests remand to prove up additional DWI convictions, this is prohibited because Sec. 558.021.2 states that in a jury trial, prior convictions must be pleaded and proven before submission to the jury. To the extent that *State v. Bizzell*, 265 S.W.3d 892 (Mo. App. 2008) is to the contrary, it is overruled.

F.R. v. St. Charles County Sheriff's Dept. and State v. Raynor, No. SC89834 and SC90164 (Mo. banc 1/12/10):
(1) "Halloween law," Sec. 589.426, banning sex offenders from certain activities is unconstitutional as applied to persons convicted before the effective date of the statute because this is retrospective; and (2) Residency law, Sec. 566.147, banning sex offenders from living within 1000 feet of certain places is unconstitutional as applied to persons convicted before the effective date of the statute because this is retrospective.
Facts: Defendant Raynor was charged with violation of the "Halloween law," Sec. 589.426, which bans sex offenders from certain activities on Halloween. Raynor had been convicted of a sex offense in 1990. The "Halloween law" became effective in August 2008. Raynor allegedly violated the "Halloween law" on Halloween 2008. F.R. was convicted of sex offenses in 1999. The residency law became effective in 2004. In 2008, he sought to move within 1000 feet of a child-care facility.
Holding: Article I, Sec. 13, of the Mo. Constitution forbids enactment of laws that are "retrospective" in operation. A retrospective law is one that creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. A later law that requires a sex offender to do something -- with a criminal penalty for not doing what the new law requires -- is the imposition of a new obligation or duty solely as a result of the pre-statute conviction. The laws here, as applied to persons who were convicted before the laws' effective dates, are retrospective.

State ex rel. Zinna v. Steele, No. SC90000 (Mo. banc 1/12/10):
Even though trial court may have intended to impose consecutive sentences, where its oral pronouncement of sentence did not state this, sentence is concurrent by operation of law and Defendant can raise this in habeas corpus proceeding.

Facts: Defendant (Petitioner) entered into a plea agreement for a consecutive sentence to one Defendant was already serving. The plea and sentencing record indicated the court intended to impose a consecutive sentence, but when it actually pronounced sentence, the court said nothing about it being consecutive. The written judgment stated the sentence was consecutive. Several years later, Defendant filed a habeas corpus petition alleging he should be released because his sentence was actually concurrent.
Holding: Section 558.026.1 and Rule 29.09 provide that sentences run concurrently unless the court specifies that they run consecutively. Rule 29.09 provides that if a court fails to make a sentence consecutive when pronouncing sentence, then it is concurrent. Here, even though the court may have intended to make the sentence consecutive, it said nothing about this when orally pronouncing sentence. The oral pronouncement controls, and the sentence is concurrent. The State contends Defendant could only raise this issue in a 24.035 motion, and failed to do so. However, failure to file a 24.035 motion does not bar later habeas relief in cases of (1) actual innocence, (2) jurisdictional defect, or (3) a procedural defect external to the defense and prejudice. A court acts beyond its authority when it sentences someone in excess of that authorized by law. While under *Wyciskilla*, 275 S.W.3d 249 (Mo. banc 2009), the issue may no longer be "jurisdictional," it is an issue of excess authority, and hence habeas relief is available. Habeas relief granted.

State ex rel. Manion v. Elliott, No. SC90222 (Mo. banc 2/23/10):
(1) Change of judge in probation revocation proceeding is governed by civil rule 51.05; (2) where Defendant filed his motion for change of judge within 22 days of the application to revoke probation, the motion was timely under Rule 51.05 and judge was required to recuse.
Facts: Defendant pleaded guilty to offense in 2006. Over the next two years, several probation revocation hearings occurred, with Defendant being continued on probation each time. In March 2009, a new probation violation report was filed. On March 31, 2009, a warrant was served on Defendant. On April 6, 2009, the prosecutor filed a third application to revoke probation. On April 28, 2009, Defendant filed a motion for change of judge. Judge denied this, and Defendant sought writ of prohibition.
Holding: A probation revocation hearing is a civil proceeding. Therefore, Rule 51.05 applies, not criminal Rule 32.07, regarding change of judge. Rule 51.05(b) provides that an application for change of judge must be filed within 60 days from service of process or 30 days from designation of the trial judge, whichever is longer. The motion to revoke probation was filed on April 6, 2009. Defendant filed his application for change of judge on April 28, 2009, which was 22 days after the motion to revoke was filed and well within the 60 day limit, so his application was timely. Writ granted.

Doe v. Keathley, No. SC89727 (Mo. banc 6/16/09):
Holding: Even though Petitioners were convicted of sex offenses before January 1, 1995 (of felonies), or August 28, 2000 (of misdemeanors) they still have to register as sex offenders in Missouri under the federal Sexual Offenders Registration and Notification Act (SORNA), 42 USC Sec. 16913, because the federal law is independent of Missouri law and, thus, independent of any anti-retrospective provision in the Missouri Constitution.

State v. Pribble, No. SC89473 (Mo. banc 5/26/09):
Holding: Section 566.151 RSMo Cum. Supp. 2008 prohibiting attempted enticement of a child and requiring a 5-year minimum sentence without probation or parole does not constitute cruel and unusual punishment; is not void for vagueness; does not infringe on protected free speech; and its emergency clause is valid.

State v. Holden, No. SC89635 (Mo. banc 3/17/09):
Even though Defendant committed his sex offense before the effective date of the sex offender registration law, Sec. 589.400, where he pleaded guilty to the offense after the law's effective date, he was required to register and failure to do so can support a criminal conviction.
Facts: Defendant was charged with failure to register as a sex offender, Sec. 589.414. Defendant had committed his sex offense in 1994. He had pleaded guilty to it in 1995. Defendant claimed he could not be convicted of failure to register because his offense occurred before the registration law's effective date of January 1, 1995.
Holding: *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006) held that the registration law is retrospective only as applied to those persons whose were "convicted or pleaded guilty" prior to the law's effective date of January 1, 1995. Here, although Defendant's offense occurred in 1994, he did not plead guilty until 1995. So long as the plea or conviction occurs after the effective date of the statute, January 1, 1995, the statute is not retrospective, regardless of the date of the underlying offense.

Editor's note by Greg Mermelstein: There is a concurring opinion by Judge Teitelman in which he notes that Defendant's failure to register was very technical in nature in that he did voluntarily register, but did so shortly outside the 10-day deadline under the statute. He was sentenced to four years. "If the purpose of the registration requirement is to permit the authorities and the public to stay apprised of an offender's residence, then it may prove unwise to impose harsh punishment on those offenders, like Mr. Holden, who undertake good faith but technically erroneous efforts at compliance," since such persons may fail to register or abscond if they cannot in good faith register late. "There is little evidence that criminal sanctions cure innocent oversights."

State v. Teer, No. SC89501 (Mo. banc 1/27/09):
Where State failed to charge Defendant as a prior offender before case was submitted to jury, State could not do so afterwards because Section 558.021.2 provides that prior offender status be pleaded and proven before case is submitted to jury.
Facts: Defendant killed four people in a drunken driving crash and injured a fifth. He was found guilty of four counts of involuntary manslaughter and one count of assault. Before the end of trial, the State moved to charge Defendant as a prior offender because he had a prior stealing conviction. The court sustained this after the case was submitted to the jury but before verdict. The jury recommended sentences of several months to be served in the county jail. The court, however, imposed a 20-year sentence as a prior offender.
Holding: Section 558.021.2 RSMo 1994 provides that all facts necessary to establish prior offender status "shall" be pleaded and found prior to submission to the jury. While there are appellate cases that have excused failing to strictly comply with the statute, if the courts continue to indulge in such laxity, a judicial emasculation of the legislative

direction in the statute will occur. Here, the statute was not followed, and Defendant was prejudiced because the court sentenced him to 20 years, but the jury only months. Sentence reversed and remanded for resentencing consistent with jury's recommendation as if Defendant were not prior offender.

State ex rel. Poucher v. Vincent, No. SC88721 (Mo. banc 7/29/08):
Where the trial court stated that Defendant receive concurrent sentences, the court could not later impose consecutive sentences nunc pro tunc, even though the court had lacked authority to impose concurrent sentences under the facts.
Facts: In 2003, Poucher was sentenced to consecutive sentences, given a suspended execution of sentence, and placed on probation. On November 3, 2005, the trial court revoked probation and ordered the sentence executed, but stated orally and in its written judgment that the sentences run "concurrently." On December 12, 2005, 39 days after final judgment, the trial court entered a nunc pro tunc order running Poucher's sentences consecutively. Poucher sought a writ of mandamus to vacate the nunc pro tunc order.
Holding: A nunc pro tunc order is to correct clerical errors. It is designed to correct the recording of what was actually done, but which was not properly recorded. It cannot be used to change what was actually done. Thus, the trial court exceeded its authority in entering the nunc pro tunc after the final judgment. The trial court may have intended to impose consecutive sentences, but it actually stated the sentences were concurrent. A further issue, however, is that the trial court did not have authority to run the sentences concurrently, because they were originally consecutive. The State argues that if a nunc pro tunc cannot be used to correct the November 3 error, then there should be some alternative procedure for fixing it, but the State has not suggested what that procedure should be, and has not sought a writ itself. Therefore, that issue is not before the Court. Writ vacating nunc pro tunc order granted.

State ex rel. Doe v. Moore, No. SC89130 (Mo. banc 8/26/08):
Even though Defendant was convicted of endangering the welfare of a child and convicted before House Bill 1698, trial court could modify conditions of probation to require sex offender treatment and this was not retrospective.
Facts: Defendant (Petitioner) was convicted of endangering the welfare of a child for physically touching a child through clothing. He was given an SIS. Later, the trial court amended the probation conditions to require sex offender treatment.
Holding: Defendant contends the modification is retrospective because he was convicted before H.B. 1698 which applies similar conditions of probation. However, Sec. 559.021 allows a court to modify or enlarge conditions of probation at any time. The conditions here were authorized even before H.B. 1698 was passed, so there is no retrospective application or ex post facto violation.

State v. Fassero, No. SC88894 (Mo. banc 6/30/08):
Trial court erred in admitting in penalty phase evidence that Defendant was previously indicted for sex offense, because an indictment is not evidence that the sex offense occurred.

Facts: Defendant was convicted of first degree child molestation. At the sentencing penalty phase, the State introduced an indictment from Illinois charging Defendant with another sex offense.
Holding: Sec. 557.036.3 allows the State to present evidence about the Defendant's "history and character." The State may present evidence of prior criminal conduct for which Defendant was never convicted, but the State must prove that evidence by a preponderance of evidence. The State could have presented evidence that Defendant committed the acts charged in the indictment, but the State did not do this. It just admitted the indictment. The indictment not relevant to prove that Defendant engaged in the conduct charged in the indictment. New penalty phase ordered.

R.L. v. Department of Corrections, No. SC88644 (Mo. banc 2/19/08):
Holding: Section 566.147 RSMo 2006, which prohibits certain sex offenders from living within 1,000 of a school, cannot be applied retrospectively to persons who where living near the schools before enactment of the statute, because that violates the ban on retrospective laws under Article I, Section 13 of the Mo. Constitution.

Donaldson v. Crawford, No. SC88231 (Mo. banc 8/21/07):
Under Sections 558.031 and 559.100, the determination of whether credit should be given when probation is revoked is made by the sentencing court and not the DOC.
Facts: Defendant was convicted of selling drugs. He was placed on probation. While on probation, he was arrested for rape. He escaped and was recaptured. He was convicted of escape and sent to prison. When eligible for release from the escape offense, he was violated on his probation for the drug offense and his probation revoked. He claimed that the time he was detained on the escape offense must be credited to his drug offense.
Holding: The time cannot be credited by the DOC. Section 558.031.1(3) provides that a person shall receive credit for all time in prison, jail or custody after the offense occurred and before commencement of the sentence when the time in custody was related to that offense except as provided in Section 559.100. Section 559.100 provides that when a circuit court revokes probation or parole, the "circuit court may, in its discretion, credit any period of probation or parole as time served on a sentence." An earlier version of Section 558.031.1 contemplated that the DOC would determine whether credit applied. But the amended version clarifies that the circuit court determines whether any credit applies. Thus, whether the time on probation is credited is determined by the circuit court.

Doe v. Blunt, No. SC87786 (Mo. banc 6/12/07):
Holding: Where Petitioner pleaded guilty to a sexual offense before Section 589.400.1(2) RSMo. Cum. Supp. 2005 took effect which requires such persons to register as sex offenders, Petitioner was not required to register because this would violate the prohibition on retrospective laws under Article I, Section 13, of the Missouri Constitution. Declaratory judgment for Petitioner should have been granted.

State ex rel. Lute v. Mo. Board of Probation & Parole, No. SC88026 (Mo. banc 4/17/2007):

Holding: Where Governor commuted two inmates' sentences from life without parole to life with eligibility for parole, the Governor's commutation necessarily considered the facts of the crimes, and the Parole Board could not then deny release on the grounds that to release the inmates would "deprecate the seriousness of the offenses." Writs of habeas corpus converted to writs of mandamus, and Parole Board ordered to conduct hearings where facts of crime would not be considered.

State ex rel. Kauble v. Hartenbach, No. SC87864 (Mo. banc 3/13/07):
Petitioner who pleaded guilty under sexual misconduct of a child statute, Section 566.083.1(1) that was later declared unconstitutional, and who received SIS, may petition to remove his name from sexual offender registry by bringing action against the parties who maintain registry.
Facts: In 1999, Petitioner pleaded guilty to sexual misconduct of a child, Section 566.083.1(1) and received an SIS. Petitioner completed probation. Statute was declared unconstitutional in 2005. Petitioner sought to remove his name from sex offender registry.
Holding: Petitioner cannot pursue his remedy under Rule 24.04(b)(2), as he tried to do in circuit court, because that rule applies only "during the pendency of the proceeding." Assuming that the proceeding on an SIS is pending during the time of probation, it is clearly complete when the probation ends. Petitioner cannot use Rule 29.07(d) either because that rule only allows withdrawal of a guilty plea before sentence is imposed or when imposition is suspended, or where there has been a judgment of conviction and manifest injustice. A court loses authority to alter its judgment under this rule once a defendant is discharged from probation. Also, since he received an SIS, he did not have a judgment of conviction. If he had pled guilty and received an SES, he would have a judgment of conviction and be able to withdraw his plea for manifest injustice under the rule. However, Petitioner may petition to remove his name from sexual offender registry by bringing action against the parties who maintain registry.

Dudley v. Agniel, No. SC87652 (Mo. banc 12/05/06) and Jones v. Fife, No. SC87778 (Mo. banc 12/05/06):
A first-time incarceration in a 120-day callback program under Section 559.115 or a long-term drug treatment program under Section 217.362 does not count as a "prior commitment" for determining minimum prison terms, and this applies retroactively to persons sentenced before the statute was amended in 2003.
Facts: In 2003, Section 559.115.7 was amended to provide that an offender's first-time incarceration in a 120-day callback program does not count as a prior prison commitment for purposes of calculating minimum prison terms under Section 558.019.2. Also, Section 217.362.5 was amended to provide that an offender's first-time incarceration in a long-term drug treatment program does not count as a prior prison commitment. Dudley and Jones were convicted before 2003. They claimed that their prior incarcerations in 120-day callbacks or in long-term drug treatment should not be counted as prior prison commitments. The DOC claimed that 2003 statute did not apply retroactively to them.
Holding: The 2003 statute applies retroactively. Section 1.160 does not bar retroactive application of the 2003 statutes because the latter statutes do not change the offenders' punishment or shorten the offenders' sentence. Instead, the 2003 statutes only change the

location or circumstances under which sentences are served. Moreover, there is no ex post facto violation because the amended statutes at issue do not alter the offenders' substantive rights in a manner that disadvantages them.

State ex rel. Mertens v. Brown, NO. SC87564 (Mo. banc 9/8/06):
Where (1) trial court sentenced Defendant to a 120 program under Section 559.115; (2) DOC reported that Defendant successfully completed the program; and (3) trial court failed to hold a hearing on the matter within 90 to 120 days of the Defendant's original sentence, Defendant must be released on probation because of the failure to hold a hearing within the time specified in the statute, and trial court cannot execute the sentence after expiration of the 90 to 120 day period.
Facts: Trial court sentenced Defendant to a 120 day program under Section 559.115. The DOC reported that Defendant successfully completed the program. The trial court failed to hold hearing within 90 to 120 days of the original sentence, but ultimately denied probation and executed Defendant's original sentence.
Holding: Section 559.115.3 provides: "When the court recommends and receives placement of an offender in a DOC 120-day program, the offender shall be released on probation if the DOC determines that the offender has successfully completed the program. … The court shall release the offender unless such release constitutes an abuse of discretion. If the court determined that there is an abuse of discretion, the court may order the execution of the offender's sentence only after conducting a hearing on the matter within 90 to 120 days of the offender's sentence." The statute requires the trial court conduct a hearing within 90 to 120 days of the original sentencing if the court wishes to execute a sentence. Here, the trial court failed to hold such a hearing. Therefore, the time to order execution of the sentence expired, and the Defendant is required to be released on probation. Writ of mandamus granted ordering that Defendant be placed on probation.

State v. Clark, No. SC87473 (Mo. banc 8/8/06):
In penalty phase of non-capital trial, State may introduce evidence of prior crimes of which Defendant had been acquitted.
Facts: Defendant had been acquitted of two prior murders. In the penalty phase of a subsequent non-capital trial, the State introduced evidence through witnesses that Defendant had committed these prior murders. Defendant claimed this evidence was inadmissible because he had been acquitted.
Holding: In *U.S. v. Watts*, 519 U.S. 148 (1997), the Court ruled that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. Section 557.036.3 RSMo allows the sentencing court to consider "the history and character of the defendant." An acquittal does not prove the defendant is innocent; it merely proves the existence of reasonable doubt as to guilt, and failure of the government to prove an element of the offense beyond a reasonable doubt. *State v. Jaco*, 156 S.W.3d 775 (Mo. banc 2005) held that the punishment phase of trial is generally subject to a lower standard of proof. *Jaco* held that since the defendant's sentence was within the original unenhanced range of punishment, any facts that would have tended to assess punishment within that range were not required to be found beyond a reasonable doubt by a jury.

Here, Defendant Clark did not receive enhanced sentences. Thus, any facts that would have tended to assess his punishment within the unenhanced range were not required to be found beyond a reasonable doubt by a jury. Since those facts were subject to a lower standard of proof than beyond a reasonable doubt, the State was not precluded from introducing evidence of Defendant's prior murders during penalty phase.

Editor's Note by Greg Mermelstein: Footnote 3 states that Clark did not request a jury instruction be given clarifying that the jury was to consider the prior crimes only for purposes of determining the history and character of Defendant, and did not request any other instructions concerning the prior crimes. Thus, "[t]he Court does not decide whether any such instruction is appropriate."

Jane Doe I v. Phillips, No. SC86573 (Mo. banc 6/30/06):

Persons convicted of sexual offenses before enactment of Sections 589.400 – 589.425 (Megan's Law) on January 1, 1995, do not have to register as sexual offenders because application of the law to them violates Missouri's constitutional prohibition on "retrospective" laws.

Facts: Plaintiffs convicted of various sexual and child abuse offenses prior to January 1, 1995, brought suit making various claims as to why they should not be required to register as sexual offenders under Sections 589.400 to 589.425 (Megan's Law). None of the plaintiffs had been adjudged to be a Sexually Violent Predator.

Holding: Article I, Section 13 of the Missouri Constitution prohibits laws that are "retrospective in … operation." The provision has no analogue in the U.S. Constitution. A retrospective law is one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions already past. The obligation to register imposes a new duty or obligation to those who were convicted prior to its effective date on January 1, 1995. Thus, the law is invalid as to those persons who were convicted or pled guilty prior to January 1, 1995. The law is effective as to all persons who were convicted after that date. SVP's are still required to register whether their convictions are pre-January 1, 1995 or after that date because of the finding that they are SVP's.

State v. Sanchez, 186 S.W.3d 260 (Mo. banc 2006):

Defendant could not be sentenced as a "persistent offender" because his two prior felony offenses were part of a single course of conduct and did not occur at "different times."

Facts: Over objection, Defendant was sentenced as a prior and persistent offender. He contended his prior felonies did not occur at "different times," so he could not be a "persistent offender." Defendant's two prior felonies occurred on the same date at roughly the same time: he had had a concealed gun and then exhibited it in a threatening manner when police stopped him. He was convicted of (1) carrying a concealed weapon, and (2) exhibiting the gun in a threatening manner.

Holding: Section 558.016.3 states: "A 'persistent offender' is one who has pleaded guilty to or been found guilty of two or more felonies *committed at different times*." Defendant's felonies are not committed at different times because they were committed as part of a continuous course of conduct in a single episode. Thus, it was error to sentence him as a "persistent offender."

State v. Primm, No. ED93919 (Mo. App. E.D. 11/16/10):
Holding: Where court's oral pronouncement of sentence was different than the written judgment, the oral pronouncement controls and case is remanded to correct this clerical error under Rule 29.12(c).

State v. Chambers, No. ED93538 (Mo. App. E.D. 11/30/10):
Holding: Where court's written sentence and judgment differed from the oral pronouncement of sentence, the oral pronouncement controls. Defendant had been orally sentenced to consecutive sentences totaling 30 years, but written judgment said "Count I consecutive to Count I," and "Count II consecutive to Count II," leading to an infinite sentence.

Moore v. State, No. ED93295 (Mo. App. E.D. 7/6/10):
Holding: Where Movant pleaded guilty to a felony as a prior and persistent offender, but the written judgment and sentence stated only a misdemeanor without any prior and persistent findings, the case is remanded for correction of this clerical error under 29.12(c).

State v. Walker, No. ED93101 (Mo. App. E.D. 8/31/10):
Holding: Where Defendant's judgment and sentence form stated he was a "prior domestic violence offender," but he was really a "persistent domestic violence offender," the Court of Appeals corrects this under Rule 30.23.

Briley v. State, No. ED94274 (Mo. App. E.D. 9/14/10):
Holding: Where on appeal of 24.035 motion it was discovered that the oral pronouncement of sentence was for seven years, but the written sentence was for 10 years, the oral pronouncement controls and Court of Appeals corrects written sentence under Rule 30.23.

Head v. State, No. ED93893 (Mo. App. E.D. 9/28/10):
Where Defendant-Movant was charged with a Class B felony but defense counsel told court at sentencing it was a Class A felony and court gave Defendant a higher sentence than recommended by State or defense, counsel was ineffective and sentence is vacated and remanded for resentencing.
Facts: Defendant was convicted of kidnapping at trial, which was a class B felony with a range of punishment of 5 to 15 years. At sentencing, defense counsel stated that Defendant had been convicted of a class A felony. The prosecutor attempted to correct that by saying "that's 5 to 15" but defense counsel said "It's charged as an A." Both the State and defense recommended a sentence of 10 years. The court imposed 12 years. The presumptive sentence for a B felony is 7 years. Defendant filed a 29.15 motion alleging his lawyer was ineffective in misinforming the court of the range of punishment.
Holding: The trial court sentenced Defendant-Movant on a materially false foundation created by defense counsel overstating the offense class. Even though Defendant's sentence remained within the B range, we cannot say that the judge still would have imposed 12 years where the presumptive sentence was 7 and the maximum 15 rather than 30. Sentence vacated and remanded for resentencing.

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Holding: The trial court sentenced Defendant-Movant on a materially false foundation created by defense counsel overstating the offense class. Even though Defendant's sentence remained within the B range, we cannot say that the judge still would have imposed 12 years where the presumptive sentence was 7 and the maximum 15 rather than 30. Sentence vacated and remanded for resentencing.

State v. Hawkins, No. ED92691 (Mo. App. E.D. 4/27/10):
Where Defendant was convicted of attempted second-degree statutory sodomy, this was not a C felony, but a D felony because it was an "attempt," and court plainly erred in sentencing Defendant for a C felony.
Facts: Defendant was convicted of attempted second-degree statutory sodomy. He was sentenced to the maximum for a C felony.
Holding: Plain error and manifest injustice occur when a sentence exceeds the maximum punishment authorized by law. While second-degree statutory sodomy is a C felony, an attempt to commit the offense is reduced to a D felony. Section 564.011.3(3). Remanded for resentencing as a D felony.

Williams v. Lee, No. ED93827 (Mo. App. E.D. 5/4/10):
Where Defendant pleaded guilty in 2000 to a sex offense committed when the victim was 15 and he was 19, he was not required to register as a sex offender under Missouri's subsequent registration law because that would be retrospective, and he was not required to register under SORNA because 42 USC 16911(5)(c) exempts from registration crimes for consensual sex where the victim is at least 13 and the offender not more than 4 years older.

Facts: In 2000, Defendant pleaded guilty to the military crimes of carnal knowledge and sodomy with a child under 16. No law required him to register as a sex offender at that time. Subsequently, Missouri enacted 589.400.1(5) RSMo. Supp. 2002 requiring registration of anyone who committed an offense that would be a violation of Chapter 566. The State claimed Defendant was required to register under this statute, or under the federal SORNA.
Holding: Defendant does not have to register under the subsequently enacted Missouri law because he committed his offense before this law took effect and, thus, application of the law to him would violate the Mo. constitutional ban on retrospective laws. And, Defendant does not have to register under SORNA because 42 USC 16911(5)(c) exempts from registration consensual sexual conduct when the victim was at least 13 years old and the offender was not more than four years older than the victim. Here, the sex offense was consensual and Defendant was 19 and the victim 15. Therefore, he is exempt from registration under SORNA.

State v. Partain, No. ED91872 (Mo. App. E.D. 5/18/10):
Holding: Where judgment and sentence incorrectly stated Defendant had pleaded guilty but he had been convicted after trial, this clerical error can be corrected by nunc pro tunc.

State v. Stuerman, No. ED93209 (Mo. App. E.D. 6/22/10):
Holding: Where written sentence was not the same as the oral pronouncement, the oral pronouncement controls and sentence may be corrected under Rule 29.12(c).

State v. Williams, No. ED92751 (Mo. App. E.D. 2/23/10):
Holding: Even though Defendant was charged and convicted of misdemeanor resisting lawful detention, where the trial court sentenced Defendant to three years as felony resisting arrest, this was erroneous; remanded for resentencing as misdemeanor.

State v. Gibbs, No. ED92690 (Mo. App. E.D. 3/16/10):
Holding: Where Defendant was orally sentenced as a prior and persistent offender, but written sentence and judgment characterized this as a prior and persistent *drug* offender, this was a clerical error that should be corrected by nunc pro tunc under Rule 29.12(c).

State v. Williams, No. ED92466 (Mo. App. E.D. 3/16/10):
Holding: Even though Defendant was charged as a prior and persistent offender, where State only proved up that he was a prior offender, the sentence and judgment designating Defendant a persistent offender is plainly erroneous and is corrected under Rule 30.23.

However, Defendant is not entitled to resentencing because he has not demonstrated prejudice in the term of years imposed.

State v. Boesing, No. ED91829 (Mo. App. E.D. 3/30/10):
Where trial court sentenced Defendant to 20 years for attempted first degree statutory rape committed before 2002, this exceeded the maximum authorized term of punishment of 15 years.
Facts: Defendant was convicted of attempted first-degree statutory rape committed between 1995 and 2002, and sentenced to 20 years.
Holding: The court plainly erred in sentencing Defendant to 20 years because this exceeded the maximum authorized penalty for this crime committed prior to 2002. The statute that existed at the time of the crime controls. Before 2002, first-degree statutory rape was an unclassified offense with a term of years up to life imprisonment. Sec. 577.021 governs offenses outside the code. Where an offense constitutes a felony, it is a Class A felony if the punishment includes life, Sec. 577.021.3(1)(a). An attempt to commit a Class A felony constitutes a B felony, Sec. 564.011.3(1). Because the offense here was a B felony, Defendant should not have been sentenced to more than 15 years.
State v. Scott, No. ED92774 (Mo. App. E.D. 12/1/09):
Even though the State alleged multiple prior drug offenses, where the court's only verbal finding was that Defendant was a "prior drug offender," it was plain error for the written sentence and judgment to find Defendant to be a "persistent drug offender," and this can be corrected by nunc pro tunc.
Facts: The State alleged Defendant had multiple prior drug convictions, but only presented evidence of one of them. The court verbally found Defendant to be a "prior drug offender." However, the written sentence and judgment found Defendant to be a "persistent drug offender."
Holding: An unauthorized sentence results in manifest injustice and plain error. The trial court did not find Defendant to be a "prior drug offender." This error in the judgment and sentence is a clerical error that can be corrected by nunc pro tunc.

U.S. v. Smedley, 2009 WL 1086972 (E.D. Mo. 2009):
Holding: Adam Walsh Act provision requiring pretrial mandatory home detention with electronic monitoring as condition for release of pornography Defendant violated due process.

State v. Bynum, No. ED92157 (Mo. App. E.D. 11/24/09):
(1) Where trial court sentenced Defendant to life imprisonment for sexual misconduct involving a child, this was plain error because it exceeded the maximum statutorily authorized punishment; and (2) where trial court admitted 911 call reporting child sex abuse that happened years earlier, this violated Defendant's confrontation rights because caller did not testify at trial and call was "testimonial" (but harmless here).
Holding: (1) Defendant was convicted of two counts of sexual misconduct involving a child and sentenced to life and 15 years. However, Sec. 566.083 makes this offense only a Class D felony except for a second offense, which is a Class C felony. The authorized terms of imprisonment for a Class D and C felony are 4 and 7 years. Here, the trial court inexplicably sentenced Defendant to life and 15 years. A sentence in excess of the

statutory authority is beyond the jurisdiction of the sentencing court, and constitutes plain error. As charged, Defendant can only be sentenced to 7 years. (2) The State introduced a 911 call in which Witness reported that Defendant had sexually abused victim several years earlier. Although Witness was available, State did not call Witness to testify. The admission of the 911 call violated Defendant's Confrontation Clause rights because Witness' statements were "testimonial" in that there was no ongoing emergency and the primary purpose was to prove past events relevant to later prosecution. However, because there was other evidence of guilt, the admission was harmless here.

State v. Nesbitt, No. ED92407 (Mo. App. E.D. 11/17/09):
Even though Defendant was originally charged as a "persistent" offender, where a subsequent information failed to charge as a "persistent" offender, the subsequent information controlled, and it was plain error to sentence Defendant as "persistent" offender following trial; sentence vacated and remanded for resentencing by judge as non-persistent offender.
Facts: Defendant was originally charged as a "persistent" offender and admitted the prior felony convictions at his arraignment. The court found him to be a "persistent" offender at his arraignment. The State subsequently filed a new information which omitted the "persistent" offender allegations. The case proceeded to trial as if Defendant was a "persistent" offender and the judge imposed an enhanced 10-year sentence on the Class C felony because of it.
Holding: Plain error results when a court sentences a Defendant to a sentence in excess of that authorized by law. The last indictment or information filed supersedes all prior ones under Sec. 545.110 and Rule 23.10(b). Therefore, the trial court plainly erred in sentencing Defendant to an enhanced sentence as a "persistent" offender, since he was not so charged by the final information. Although the State argues the remedy is to remand so that the State can file a new information alleging "persistent" offender status, that would violate Sec. 558.021.2 which requires that prior and persistent offender status be alleged and proven before submission to the jury. However, Defendant is not entitled to a jury-recommended sentence either because Defendant waived that by not objecting to the lack of punishment being submitted to the jury at trial. The remedy is to remand for resentencing by the judge within the range for non-"persistent" offenders.

State v. Drudge, No. ED92145 (Mo. App. E.D. 10/27/09) & State v. Jones, No. ED91669 (Mo. App. E.D. 10/27/09):
Even though the indictment failed to charge Defendants as prior offenders, finding Defendants to be prior offenders was not plain error where Defendants admitted the prior convictions and did not object to non-jury sentencing before submission to the jury, but judgment will be corrected to reflect they were not a prior offenders.
Facts: In two different cases, the indictments did not charge Defendants as prior offenders. Nevertheless, before trial, the parties proceeded as if Defendants had been so charged. Defendants admitted to prior felony convictions, and the State presented evidence of them. Defendants did not object to non-jury sentencing prior to submission of case to jury.
Holding: On appeal, Defendants claim the trial court plainly erred in sentencing them as a prior offender. Sec. 558.021.2 requires that prior offender status be pleaded and proven

prior to submission to the jury. It was error to not plead the prior offender status here, but no manifest injustice resulted, because Defendants did not object to non-jury sentencing prior to submission of the case to the jury. The remedy, therefore, is not resentencing, but merely to strike the prior offender finding from the written judgment under Rule 30.23.

State v. Anderson, No. ED91625 (Mo. App. E.D. 9/29/09):
Where court sentenced Defendant to a longer sentence under a statute that became effective after Defendant's crime, this was plain error.
Facts: Defendant was convicted of a Class B second-degree robbery, which occurred on June 5, 2003. The trial court found Defendant to be a persistent offender and sentenced him to life imprisonment under Section 558.016.7(2) RSMo. Cum. Supp. 2003.
Holding: A trial court plainly errs in sentencing a defendant in excess of that authorized by law. Section 1.160 provides that a defendant will be sentenced according to the law in effect at the time of the crime, unless a lesser punishment is required by a change in the law. On the date of the crime, June 5, 2003, Section 558.016.7(2) authorized a maximum punishment for a persistent offender who committed a Class B felony of 30 years. Section 558.016.7(2) RSMo. Cum. Supp. 2003 authorized such punishment to be "any sentence authorized for a Class A felony," but this new statute did not take effect until June 27, 2003. Therefore, the maximum punishment Defendant could receive was 30 years, and a life sentence exceeded this maximum. Case remanded for resentencing.

State v. Robinson, No. ED91896 (Mo. App. E.D. 9/15/09):
Holding: (1) Even though the State violated Sec. 558.021.2 by not submitting a certified copy of Defendant's prior conviction until after the case was submitted to the jury, where Defendant had testified at trial that he had a prior felony conviction, Defendant was not prejudiced by court finding him to be a prior offender and doing judge-sentencing; (2) Even though the court wrote in its sentence and judgment that Defendant was a "persistent offender" when he had only been charged as a prior offender, Defendant was not entitled to resentencing because the sentences imposed were within the authorized range of punishment for a prior offender, and the remedy is merely to strike the "persistent offender" finding from the written sentence and judgment.

State v. Jarvis, No. ED91711 (Mo. App. E.D. 6/16/09):
Holding: Remedy for improper revocation of probation is an extraordinary writ, not a direct appeal from sentencing.

State v. Peeples, No. ED90975 (Mo. App. E.D. 5/26/09):
(1) Even though Defendant touched Victim's vagina through her clothing, this did not constitute first degree statutory sodomy, but instead first degree child molestation; (2) under the version of Section 566.032.2 in effect during the time of the crime in 2002 - 2005, attempted first degree statutory rape was only a Class B felony, and the court erred in sentencing as a Class A felony.
Facts: Defendant touched Victim's vagina through her clothing, and was convicted of first degree statutory sodomy. Defendant also was convicted of attempted first degree statutory rape for events between 2002 and 2005, and sentenced as a Class A felony.

Holding: First degree statutory sodomy, Sec. 566.062.1, requires "deviate sexual intercourse" as defined in Sec. 566.010(1). Deviate sexual intercourse does not involve touching through clothing. Touching through clothing is "sexual contact" under Sec. 566.010(3), and constitutes first degree child molestation. Thus, first degree sodomy conviction vacated, and conviction for lesser offense of first degree child molestation entered. (2) Under the version of Sec. 566.032.2 in effect during the time of the crime in 2002-2005, statutory rape in the first degree was an unclassified offense with a range of punishment of five years to life. This would make the completed offense a Class A felony, Sec. 577.021.3(1)(1). An attempt to commit the offense would fall under the general inchoate offense statute and make the attempt a Class B felony, Sec. 564.011.3(1). Thus, the court erred in sentencing Defendant as a Class A felony.

State v. Broom, No. ED91239 (Mo. App. E.D. 4/14/09):
Holding: Where Defendant was charged only as a prior offender, the trial court erred in entering a written sentence that classified him as a persistent offender, but Defendant is not entitled to resentencing because he did not receive an extended term of imprisonment; judgment corrected to reflect only prior offender.

State v. Goodloe, No. ED91807 (Mo. App. E.D. 3/24/09):
Holding: Where the trial court denied Defendant's motion to give him credit for time served on probation and parole, this was not an appealable order because there was no statutory authority to appeal it.

State v. McGee, No. ED90630 (Mo. App. E.D. 3/24/09):
(1) Where the State sought to establish Defendant's status as a "persistent offender" after the case had been submitted to the jury and sought to use convictions not pleaded in the information, this violated the persistent offender statute, but Defendant was not entitled to resentencing because he was properly found to be a prior offender, and he did not receive an enhanced sentence: (2) where the court's written sentence and judgment sentenced Defendant to a higher sentence than what the court pronounced orally, the oral pronouncement controls and the judgment is amended to reflect the oral pronouncement.
Facts: Defendant was charged as a prior and persistent offender, Section 558.021. Prior to submission to the jury, the court found Defendant was a prior offender. After the jury returned its guilty verdict, the court held another hearing to determine if Defendant was a persistent offender. The State presented different convictions than those charged in the information to show this. The court found Defendant was a persistent offender.
Holding: Sec. 558.021.2 requires that the State prove the Defendant's status as a prior and persistent offender "prior to submission to the jury." Here, the trial court erred in allowing the State to use convictions not pleaded in the information to show persistent offender status, and also in finding Defendant to be a persistent offender after the case was submitted to the jury. However, Defendant was not prejudiced because he was properly found to be a prior offender before the case was submitted to the jury, so he was not entitled to jury sentencing, and he did not receive an enhanced sentence. The remedy is to strike from the judgment the persistent offender finding.

Doe v. Keathley, No. ED90404 (Mo. App. E.D. 1/6/09):
Even though Defendant was convicted and sentenced in Iowa for his sex offense before January 1, 1995, and was not required to register under Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006), the federal sex registration law preempts Missouri law under the Supremacy Clause so Defendant is required to register in Missouri.
Facts: Defendant was convicted and sentenced for a sex offense in 1994. In *Doe v. Phillips*, the Mo. Supreme Court held that the state sex offender registration law did not apply to persons convicted before January 1, 1995, because that would be a retrospective law.
Holding: In 2006, Congress enacted the Sexual Offenders Registration and Notification Act (SORNA), 42 U.S.C. Sec. 16911-16917. On February 28, 2007, the U.S. Attorney General promulgated regulations under the Act in 28 C.F.R. Sec. 72.3. The effect SORNA and the regulations is that Defendant is required to register in Missouri in accordance with SORNA regardless of the fact that his Iowa conviction predated both Missouri's sex offender law and SORNA. The Missouri Supreme Court's decision in *Doe v. Phillips* is subordinate to the federal Supremacy Clause. Any opinion applying *Doe v. Phillips* to stop registration would violate SORNA and the federal regulations.

State v. Thurman, No. ED90806 (Mo. App., E.D. 12/23/08):
Even though State may present the "history and character" of Defendant in penalty phase, State could not present mere fact that Defendant had previously been charged with a rape, or that Defendant allegedly sexually abused another child (but no prejudice in this case).
Facts: Defendant was convicted of sexual abuse of a stepdaugher. In penalty phase, the State presented a police officer and the child's mother, who testified that Defendant had previously been charged with a rape, but the charges were dropped, and the mother also testified that Defendant sexually abused another stepdaughter.
Holding: Sec. 557.036.3 allows the State to present evidence of the "history and character" of Defendant in penalty phase. Although the State may present evidence of criminal conduct for which Defendant was not convicted, the penalty phase jury may only consider such evidence if proven by a preponderance of evidence. *State v. Fassero*, 256 S.W.3d 109, 119 (Mo. banc 2008). The evidence that Defendant was charged with rape, which was later dropped, violated *Fassero*. Further, the mother's testimony about another stepdaughter was not "history and character" evidence authorized by Sec. 577.036.3 and *Fassero*.

Lynch v. Missouri Dept. of Corrections, No. ED90685 (Mo. App., E.D. 10/21/08):
Where Plaintiff-inmate was held in Missouri jails for a robbery that was charged as both a federal and State offense, Plaintiff may be entitled to jail time credit against his State sentence.
Facts: Plaintiff robbed a bank, and was held in Missouri jails in federal custody from Feb. 28, 2003, until April 29, 2004, when he pleaded guilty to federal bank robbery and then served a federal sentence. On February 2, 2007, Plaintiff was sentenced to a State 10-year sentence to run concurrently with the federal sentence. Plaintiff sought jail time credit for Feb. 28, 2003 until April 29, 2004.

Holding: Sec. 558.031.1 allows credit for time spent in custody when the time in custody was related to that offense. Plaintiff's position is that he is entitled to credit because his time in federal custody in Missouri jails was related to his state robbery conviction. The trial court interpreted Sec. 558.031.2 to mean that the time in custody had to be compelled exclusively by Missouri, and that because Plaintiff was held for federal officials, the time did not count. This is not the proper interpretation of the statute.

Bizzell v. State, No. ED90303 (Mo. App., E.D. 10/7/08):
Where one of Defendant's prior DWI convictions was a municipal court SIS which should not have been used to enhance his DWI to a felony, Defendant could raise this issue for the first time on direct appeal and case is remanded for resentencing and to permit State to produce other evidence of prior DWI convictions.
Facts: Defendant was convicted of Class D felony DWI. His offense was enhanced to a felony because the State alleged two prior DWI convictions, one of which was a municipal SIS. After Defendant's trial, *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), was decided, which held that prior municipal court SIS convictions cannot be used to enhance subsequent DWI's.
Holding: *Turner* held that prior municipal offenses resulting in an SIS cannot be used to enhance punishment under Sec. 577.023. Because *Turner* was decided before Defendant's direct appeal was complete, we are bound by its interpretation. Defendant's sentence is reversed and remanded with instructions to allow the State to present other evidence to prove Defendant's persistent DWI offender status.

Editor's note by Greg Mermelstein: But see ***State v. Severe***, No. WD69162 (Mo. App., W.D. 11/25/08), holding that on resentencing, the State cannot present additional evidence of prior convictions.

State v. Wurtzberger, No. ED89960 (Mo. App., E.D. 9/23/08):
(1) Even though Defendant was a prior and persistent offender, this did not increase the base level of the offense to a Class A felony; and (2) Even though Defendant did not obey bond conditions to not further break the law or consume alcohol or drugs, where Defendant always appeared in court, trial court abused discretion in ordering forfeiture of bond without proof Defendant violated bond conditions and this was not necessary to protect the community because the bond was forfeited after Defendant was sentenced.
Facts: Defendant was charged as a prior and persistent offender with attempt to manufacture methamphetamine, Sec. 191.211. The sentence and judgment classified this as a Class A felony. Also, Defendant's father had posted $100,000 bond. Various bond conditions required Defendant to obey the law and not consume alcohol or drugs. While on bond, Defendant committed new offenses and consumed alcohol or drugs. After Defendant was sentenced, the trial court ordered the $100,000 bond forfeited.
Holding: (1) A prior and persistent offender finding increases the range of punishment, but does not increase the classification of offense. Defendant's offense was a Class B felony. Case is remanded for correction of this clerical error in the sentence and judgment. (2) A court can set as bond conditions to obey the law and not abuse substances. However, the trial court abused its discretion in ordering forfeiture here. The trial court found that "justice requires forfeiture," but there is nothing in the record

supporting this finding. Defendant was alleged to have violated the law and abused substances, but no evidence was presented to show this. Moreover, the purpose of the bond conditions is to protect the community. "[W]e fail to understand how the forfeiture of Defendant's bond after Defendant had been sentenced" to DOC protects the community.

State ex rel. Dorsey v. Wilson, No. ED91691 (Mo. App., E.D. 9/16/08):
Where Defendant had been placed in 120-day institutional treatment program, and DOC recommended release, if trial court wanted to deny release, it had to do so within 90 to 120 days of the original sentencing; the failure to do so requires Defendant be released.
Facts: On October 17, 2007, Defendant pleaded guilty and was sentenced to five years in prison. The trial court ordered he be placed in an institutional treatment program under Section 559.115. Within 120 days, the DOC recommended Defendant be released. On February 13, 2008, the trial court ruled it would be an abuse of discretion to release Defendant. Defendant filed for a writ of mandamus.
Holding: Sec. 559.115.3 provides that when the court places an offender in a DOC 120-day program, the offender shall be released if the DOC determines the offender successfully completed the program unless the court orders execution of sentence after conducting a hearing within 90 to 120 days of the original sentence. Here, the trial court did not timely hold a hearing within 90 to 120 days. Therefore, it had no power to order execution of sentence. Mandamus granted.

Rupert v. State, No. ED89980 (Mo. App., E.D. 4/22/08):
(1) Defendant who pleads guilty can only challenge sufficiency of indictment or information by direct appeal, not 24.035; (2) where judge's written sentence was different than the oral pronouncement of sentence, the oral pronouncement controls; (3) judge is not required to give consecutive sentences for statutory rape.
Facts: Defendant pleaded guilty to four counts of second-degree statutory rape, Sec. 566.034. The judge sentenced him to "three years on each count." Later that day, the judge entered a written sentence saying the sentences were consecutive. When Defendant sought to fix this, the judge offered Defendant the opportunity to appear for resentencing, but Defendant refused. Defendant ultimately filed a 24.035 motion.
Holding: Regarding Defendant/Movant's claim that the information was insufficient, this is not cognizable in a 24.035 action. The remedy was to raise this on direct appeal. Regarding the sentence, Sec. 558.026.1 provides that sentences shall run concurrently unless the court specifies they run consecutively. Also, the general rule is that oral pronouncements of sentence control over later written judgments. The court believed it was required to give consecutive sentences under Sec. 558.026.1, which states that certain sex offenses shall run consecutively, but statutory rape is not among the listed offenses mandating consecutive sentences. Once the court reduced its sentence to writing, it could not call Defendant back to court and resentence him. The oral sentence controls here, and Defendant's sentences are not consecutive. His sentences must run concurrently.

State v. Barnes, No. ED88792 (Mo. App., E.D. 1/15/08):
Monetary damages for making a false statement to obtain health care under Sec. 191.905.1 are limited to those acts for which Defendant was convicted.
Facts: Defendant-pharmacist was convicted of one count of stealing by deceit, Section 570.030, and 13 counts of making a false statement to obtain health care, Section 191.905.1, for billing Medicaid for fake prescriptions. The trial court imposed various monetary damages for the false statement convictions, including damages for acts that weren't charged.
Holding: Sec. 191.905.10 begins with "any person convicted of a violation of this section." Thus, monetary damages can only be imposed for convictions under the statute, and not for additional uncharged Medicaid losses. Restitution can be imposed for the stealing by deceit conviction, but it's limited to a maximum of $20,000 under Sec. 560.111.1(2).

State v. Myers, No. ED89170 (Mo. App., E.D. 1/15/08):
A felony conviction for sale of imitation controlled substance, Sec. 195.101(21) RSMo. Cum. Supp. 2004, is a conviction "relating to controlled substances" and makes a defendant a "persistent drug offender" under Sec. 195.275.1(2) RSMo. Cum. Supp. 2004.
Facts: Defendant was found to be a "persistent drug offender" because he had two prior felony drug convictions, one of which was for sale of an imitation controlled substance. He claimed that conviction could not be used to enhance his sentence.
Holding: Sec. 195.275.1(2) RSMo. Cum. Supp. 2004 defines persistent drug offender as one who has been convicted of two or more felonies "relating to controlled substances." There is no definition of "relating to controlled substances." However, "relate" means "to have a relationship or connection" to. An imitation controlled substance does have a connection to the controlled substance it seeks to imitate.

State v. Johnson, No. ED88355 (Mo. App., E.D. 11/6/07):
(1) Even though trial court sentenced Defendant below the statutory minimum, trial court could not resentence Defendant after the final judgment was entered and Notice of Appeal filed. However, appellate court can remand for proper resentencing. (2) Notice of Appeal filed more than 10 days after sentencing did not vest jurisdiction in appellate court.
Facts: In February 2006, trial court sentenced Defendant as a prior and persistent drug offender, Section 195.285, to eight years for possession of drugs. However, the actual statutory minimum is 10 years. Defendant filed a timely notice of appeal regarding this conviction. Then, in June 2006, trial court purported to fix its sentencing error by "resentencing" Defendant to 10 years. Defendant filed his notice of appeal from this 13 days after "resentencing."
Holding: The notice of appeal filed 13 days after the purported "resentencing" does not vest jurisdiction in the Court of Appeals because it was filed more than 10 days after sentencing. Rule 30.01(d). That appeal is dismissed. However, the earlier appeal is timely. There, however, the trial court lost jurisdiction of the case in February 2006 when final judgment was entered and notice of appeal filed. Thus, the judge could not "resentence" in June 2006. The sentence is erroneous, however, because it's below the

statutory minimum. Sentence vacated in timely appeal and remanded for resentencing to not less than statutory minimum.

State v. Young, No. ED87415 (Mo. App., E.D. 7/24/07):
Holding: Where Defendant stipulated that he was a "prior offender" and there was no evidence presented that he was a "persistent offender" with two or more felony convictions, but Defendant was sentenced to a longer term authorized only for "persistent offenders," sentence is vacated and remanded for sentencing within the range authorized for a "prior offender." Although the trial court mentioned another case, that case had not been disposed of at the time of sentencing.

State v. White, No. ED87951 (Mo. App., E.D. 4/17/07):
Holding: Where Defendant who exposed victim to HIV had sex with victim before August 28, 2002, Defendant could only be convicted and sentenced under the 2000 version of Section 191.677, which makes it a Class D felony to expose another person to HIV; Defendant could not be convicted and sentenced under the post-August 28, 2002, version of Section 191.677, which makes it a Class B felony, because that would violate ex post facto.

State v. Johnson, No. ED87550 (Mo. App., E.D. 3/13/07):
Holding: Where trial court erroneously sentenced Defendant for an offense the jury acquitted him of instead of the lesser-included offense the jury found, the case is remanded to correct the sentence and judgment to reflect the correct conviction. However, this does not affect the term of the sentence because the sentence was in the allowable statutory range.

Editor's Note by Greg Mermelstein: The attorney who did this case is considering filing a motion for rehearing or transfer. The judge may not have given the same sentence if he had known the correct conviction he was sentencing for. The fact that the sentence happens to fall within the statutory range is merely coincidental. In my view, the judge should have to do resentencing at which he'd consider the correct offense and appropriate punishment for that offense.

State v. LaJoy, No. ED88009 (Mo. App., E.D. 3/13/07):
Holding: Defendant may file "nunc pro tunc motion" under Rule 29.12(c) many years after his sentence to correct the written judgment and sentence, which had declared him to be a "persistent drug offender" under Section 195.295, but the trial court's finding and oral pronouncement was only as "persistent offender" under Section 558.016. Defendant was prejudiced because "persistent drug offender" is not eligible for parole, but "persistent offender" is eligible.

State v. Carroll, No. ED86261 (Mo. App., E.D. 9/19/06):
Holding: Even tough trial court did not mention at sentencing that Defendant had been found to be a persistent offender and the written judgment did not say this, where trial court had found him to be a persistent offender during trial, the court was not required to repeat this at sentencing and the failure to include this in the written judgment is a clerical error which must be corrected by nunc pro tunc.

State v. Rowan, No. ED87067 (Mo. App., E.D. 9/12/06):
Trial court must consider post-sentencing good behavior before imposing new sentence.
Facts: Defendant was convicted of second degree murder. His original sentence was vacated. At new sentencing hearing, trial judge refused to consider evidence of Defendant's good behavior in prison after he received his original sentence. Judge called such evidence "irrelevant."
Holding: Other jurisdictions have held that judges may consider favorable information about a defendant's good behavior after original sentencing. The trial judge was permitted to consider this. Defendant was prejudiced, since it is not for Court of Appeals to decide what sentence trial judge would have given if judge would have considered the favorable information

State v. Decker, No. ED87245 (Mo. App., E.D. 6/30/06):
(1) Denial of motion for credit for time served on house arrest toward a prison sentence is not an appealable judgment; (2) trial court does not have authority to grant motion to file late notice of appeal because this relief must be requested from the Court of Appeals under Rule 30.03.
Facts: Defendant filed motion for credit for time served on house arrest to apply toward his prison sentence. The trial court denied the motion. Several months later, the trial court entered an order purporting to allow Defendant to file a late notice of appeal.
Holding: (1) A ruling denying a motion for jail time credit is not an appealable judgment. A prisoner seeking credit toward a sentence must request it from the Department of Corrections, and if the DOC does not act, the remedy is through a petition for declaratory judgment or extraordinary writ. (2) Furthermore, Defendant's notice of appeal is not timely. The trial court lacks authority to allow filing of a late notice of appeal because this must be requested from the Court of Appeals under Rule 30.03. Appeal dismissed.

State v. Pruitt, No. ED85993 (Mo. App., E.D. 5/23/06):
Nunc pro tunc order entered correcting written sentence where Defendant was convicted of "Class C" felonies, but written judgment called them "Class A" felonies.
Facts: Defendant was charged with two "Class C" felonies of drug possession. On the day of trial, the State filed a substitute information in lieu of indictment alleging Defendant committed "Class A" felonies of drug possession, and charging her as a prior and persistent offender and prior and persistent drug offender. The trial court sentenced Defendant to "Class A" felonies.
Holding: The underlying offenses for which Defendant was convicted remained "Class C" felonies regardless of the use of the "Class A" language in the substitute information. This was a clerical error. A nunc pro tunc correction is warranted to conform the judgment and sentence form to the verdict rendered at trial. Case remanded to correct the written judgment and sentence to reflect "Class C" felonies.

Hall v. State, No. ED86029 (Mo. App., E.D. 4/25/06):
Oral pronouncement of sentence controls over later written sentence.
Facts: Movant pleaded guilty pursuant to plea agreement that he would be sentenced as "predatory sexual offender" under Section 558.018.5. Plea court orally sentenced Movant to this, but later entered written judgment sentencing him as "persistent sexual offender" under Section 558.018.2. Movant filed 24.035 motion.
Holding: The oral pronouncement of sentence controls over the later written judgment. Movant was prejudiced because predatory offenders are eligible for parole, but persistent sexual offenders are not. Case is remanded with directions to correct written judgment to reflect oral pronouncement.
Remanded for resentencing.

State v. Collins, 188 S.W.3d 69 (Mo. App., E.D. 2006):
(1) Evidence was insufficient to convict of ACA because evidence did not show Defendant used gun or deadly weapon to enter victim's residence; (2) where trial court orally said it was sentencing Defendant to "480 years," but written judgment said "510 years," and the actual total of the 20 counts was "540 years," the "480 years" statement was not controlling because it is surplusage, and the "510 years" is a clerical error which can be corrected by nunc pro tunc order.
Facts: Evidence showed that victim was awakened in her bed by Defendant, who had entered her residence. Defendant committed various sex offenses on victim, and used a gun to do this. He was convicted of 20 different counts from this incident. At sentencing, the trial court sentenced Defendant on 20 different counts and said the sentence totaled "480 years." However, the court later entered a written judgment saying the sentence totaled "510 years." When the counts are really added up, however, the actual total is "540 years." On appeal, Defendant contended evidence was insufficient to support his conviction for ACA arising out of his first degree burglary conviction.
Holding: (1) The crime of ACA is committed in a burglary if the weapon *is used to gain entry* for the purpose of committing the crime therein. Examples would include shooting the door open or demanding the victim open the door at gunpoint. Here, however, there was no evidence that Defendant used the gun *to gain entry*. Thus, evidence is insufficient to support conviction for ACA arising from the burglary conviction. (2) Generally, an oral pronouncement of sentence controls over the written sentence. However, the record here shows the trial court's oral sentences actually total "540 years." The statement that they total "480 years" was mere surplusage. Moreover, the written sentence was in error because the sentences do not total "510 years" either. This is a clerical error which can be corrected by nunc pro tunc to reflect correct sentence of "540 years."

State v. Collins, No. SD29516 (Mo. App. S.D. 3/29/10):
(1) Where State admitted driving record of Defendant to prove up prior convictions for DWI enhancement purposes, this was insufficient to prove this because a driving record does not show whether Defendant was represented by counsel or waived counsel in his prior cases; but (2) where Defendant had a court-tried case (as opposed to a jury-tried case), the remedy is to vacate his enhanced conviction and sentence and remand the case to allow the State an opportunity to properly prove up the prior convictions.

Holding: Here, the driving record was not sufficient to prove the prior convictions to enhance Defendant's DWI to a Class B felony, because the driving record did not show whether Defendant was previously represented by counsel or waived counsel. This was plain error requiring vacating Defendant's sentence. The issue here is one of remedy. Defendant claims he can only be sentenced to DWI as an unenhanced Class B misdemeanor. Section 577.023.9 provides that in a court-tried case, the court may defer proof of prior convictions "to a later time, but prior to sentencing." By vacating Defendant's sentence on appeal, Defendant is again "prior to sentencing." Defendant should not be allowed to sandbag by not objecting to lack of proof of prior convictions below, and then use that to have his sentence vacated on appeal, leaving only a misdemeanor conviction. Because Defendant failed to object below and give the State an opportunity to correct the error, the remedy is to remand to allow the State to properly prove up the prior convictions. Defendant's case is different from *State v. Severe*, No. SC89948, 2010 WL 97997 (Mo. banc Jan. 12, 2010), because Severe was a jury trial situation and a different statute, Sec. 577.023.8 governs jury trial cases.

State v. Collins, No. SD29516 (Mo. App. S.D. 12/22/09):
(1) Where State submitted only a Dept. of Revenue Driver's Record showing Defendant had eight prior DWI's, this was not sufficient to prove that Defendant was a "chronic offender" because there was no evidence Defendant had been represented by counsel or waived counsel in writing in the prior cases and this was plain error; but (2) where this was a bench trial, the case is remanded to allow the State an opportunity to properly prove the prior convictions.
Facts: Defendant was charged with DWI as a "chronic offender." The State submitted a certified copy of Defendant's Dept. of Revenue Driver's Record showing he had eight prior DWI convictions. The trial court found Defendant to be a chronic offender and sentenced him accordingly after a bench trial.
Holding: Sec. 577.023.1(3) requires the State to prove that in prior DWI offenses, the defendant was represented by or waived counsel in writing. The Driver's Record was insufficient to prove this. Plain error occurs where it appears a defendant has been improperly sentenced as a repeat offender. Representation by counsel or waiver thereof cannot be presumed by a silent record. Hence, plain error occurred here. The next question is whether Defendant can only be sentenced for a misdemeanor or whether the State should receive a remand to properly prove Defendant's prior convictions. Sec. 577.023.9 provides that in a trial without a jury, the court may defer the proof of prior convictions to a later time, but prior to sentencing. By vacating Defendant's sentence on appeal, he is again prior to sentencing, so the State can prove up Defendant's prior convictions on remand. The result would be different if Defendant had had a jury trial because in a jury trial the prior convictions shall be "found prior to submission to the jury" under Sec. 577.023.8. Case remanded for opportunity to prove up prior convictions and resentencing.

Barr v. Steele, No. SD29691 (Mo. App. S.D. 10/9/09):
Where after Petitioner was charged but before he pleaded guilty and was sentenced a statute reduced the offense from a B to a C felony, the version of Section 1.160 in effect

on the date of original sentencing controls, and requires Petitioner be sentenced to the lower punishment.
Facts: On July 20, 2004, Petitioner was charged with stealing anhydrous ammonia, which was a B felony under Sec. 570.030.4 RSMo. Cum. Supp. 2003. On August 28, 2004, SB 1211 lowered the offense to a C felony (it was later raised back to a B). On September 27, 2004, Petitioner pleaded guilty and was sentenced to 15 years for a B felony in October 2004. Petitioner filed a habeas petition alleging he should have been sentenced to a C felony.
Holding: At the time of Petitioner's sentencing, Sec. 1.160 RSMo. 2000 provided that when punishment is reduced or lessened after the commission of an offense but while the prosecution is still pending, the accused is entitled to the lesser amended punishment. Therefore, Petitioner was entitled to be sentenced to a C felony with a maximum of 7 years. The State claims that under the current version of Sec. 1.160 RSMo. Cum. Supp. 2008, an accused is not entitled to the benefit of an amended law reducing punishment and that the current law should apply. However, the applicable version of 1.160 is the version in effect on the date of original sentencing. Even though the offense was later raised back to a B felony, Petitioner still is entitled to sentencing for the lower C felony.

State v. Whiteley, No. SD29179 (Mo. App. S.D. 10/5/09):
Holding: (1) Where judgment erroneously indicated Defendant was found guilty of a Class C felony, but it was really a D felony, this is a clerical error that can be corrected under Rule 29.15(c); but (2) Defendant was not entitled to resentencing because his sentence is within range for Class D felony.

State ex rel. Whittenhall v. Conklin, No. SD29470 (Mo. App. S.D. 9/29/09):
(1) Where Probationer sought to raise a claim that trial court was without statutory authority to revoke probation, Probationer could raise this claim either in writ of prohibition, under Rule 24.035, or in habeas corpus; and (2) Even though Probationer had requested one continuance of his probation revocation hearing, where the court and State delayed having a hearing for three years after probation expired, court was without authority to revoke probation.
Facts: On September 18, 2000, Probationer was placed on probation for five years. On July 1, 2005, a probation violation report was filed, and the State filed a motion to revoke on July 21, 2005. The court tolled the probationary period. For the next three years, the probation revocation hearing was continued, one time at the request of Probationer. Additionally, the State filed various additional motions to revoke probation. In 2008, the court revoked probation and ordered sentence executed. Probationer brought a writ of prohibition.
Holding: (1) The State argues a writ of prohibition is not the correct remedy, and that Probationer must file a 24.035 motion. However, Rule 24.035 states that a person convicted of a felony who claims the court imposing sentence was without jurisdiction "may" file a 24.035 motion; the word "may" indicates 24.035 is an optional remedy, not an exclusive one. Probationers may challenge revocation of probation by writ of prohibition, by 24.035, or by habeas corpus. (2) Section 559.036.6 requires a trial court to make every reasonable effort to notify a Probationer of a probation violation and to conduct the hearing before expiration of the term of probation. Here, the only timely

probation revocation motion filed was the one filed before September 18, 2005. The subsequent motions were all outside the period of probation and voidable. Even though Probationer asked for one continuance, he did not do so until 2006 and the hearing still was not held until 2008. The three-year delay in having a revocation hearing did not show that the trial court made every reasonable effort to hold a hearing within a reasonable time. Writ granted.

State v. Sinyard, No. SD29365 (Mo. App. S.D. 9/21/09):
Holding: Where the written judgment stated Appellant was sentenced to 10 years for sodomy and 15 years for child molestation, but the verdict form and transcript showed the sentences were the opposite, this mixup is a clerical error and case remanded for entry of corrected judgment under Rule 29.12.

State v. Placke, No. SD29207 (Mo. App. S.D. 8/5/09):
Holding: Where jury recommended 7 years on Count I and 10 years on Count II, but trial court imposed 10 years on Count I and 7 years on Count II, this mixup was plain error; case remanded for resentencing on both counts, not just Count I.

State v. Thomas, No. SD29218 (Mo. App. S.D. 6/30/09):
Holding: Where written sentence differed from oral sentence in whether sentences were consecutive or concurrent, this was a clerical error that can be corrected under Rule 29.12 to conform to the oral pronouncement.

State v. Cain, No. SD29090 (Mo. App. S.D. 5/15/09):
(1) Even though the parties stipulated in trial court that Defendant's sentence would be reduced and the appeal waived, this did not waive Defendant's appeal because the trial court had no power to reduce Defendant's sentence long after sentencing; (2) where Defendant's prior DWI offense conduct occurred more than five years before the charged DWI offense, Defendant was not a "prior offender," Sec. 577.023.1(5) RSMo. Cum. Supp. 2005; and (3) Point Relied On must state that trial court erred in admitting evidence at trial, not just in denying motion to suppress.
Facts: In April 2007, Defendant was charged with DWI as a prior offender for having "been convicted on August 27, 2002" of DWI in Jefferson County. The conduct giving rise to the Jefferson County charge occurred in 2000. After Defendant was convicted in the new case, he filed an appeal. Meanwhile, six months after sentencing, the parties in the trial court stipulated that Defendant's sentence would be reduced to time served and "in exchange for this outcome, Defendant has agreed to waive" his appeal.
Holding: (1) The State argued that Defendant has waived this appeal because of the stipulation in the trial court. However, there was no authority for the trial court to reduce Defendant's sentence; therefore, Defendant's purported waiver of his right to appeal, based on the mutual false assumption by the parties as to the trial court's authority to reduce Defendant's sentence, was not and could not have been voluntarily made. Once sentencing occurs in a case, the trial court loses jurisdiction, and cannot reduce a sentence as was done here. The trial court could have granted Defendant parole under Sec. 559.100 RSMo. Cum. Supp. 2006, but that's not what the court purported to do here. (2) Although the date of Defendant's prior DWI conviction was August 27, 2002, the

conduct giving rise to that conviction occurred in 2000. Sec. 577.023.1(5) RSMo. Cum. Supp. 2005 provides that a prior offender is one whose "prior offense occurred within five years" of the newly charged offense. The 2000 DWI conduct is not within five years of April 6, 2007, the date of the new DWI offense. Therefore, Defendant cannot be sentenced as a "prior offender," and can only be sentenced for a Class B misdemeanor. (3) Defendant's Point Relied On on appeal raises an issue that the trial court erred in denying a motion to suppress. The Point Relied On does not claim error in admitting the evidence at trial. A trial court's ruling on a motion to suppress is interlocutory. A motion to suppress by itself preserves nothing for appeal, and a Point Relied On that refers only to such a ruling preserves nothing for appeal. However, the Court reviews the claim here because the motion was preserved at trial and in the new trial motion, so the State had notice Defendant was raising this issue.

State v. Bunch, No. SD29049 (Mo. App. S.D. 5/11/09):
Holding: Where the written judgment and sentence erroneously stated Defendant was found guilty of second degree sodomy, but he was actually charged and convicted of first degree sodomy, this was a clerical error that should be corrected under Rule 29.12.

State v. Tyler, No. SD28713 (Mo. App. S.D. 3/23/09):
Holding: Where sentence and judgment document erroneously stated Defendant had pleaded guilty when he actually had a trial, this was a clerical error correctable under Rule 29.12.

State ex rel. Moore v. Brown, No. SD29089 (Mo. App., S.D. 11/19/08):
Rule 29.07 does not provide authority to resentence a Defendant, but only to withdraw a guilty plea.
Facts: Defendant pleaded guilty, and received an SES sentence. Several months later, Defendant sought to change her sentence on grounds of manifest injustice under Rule 29.07(d). The trial court changed the sentence. The State sought a writ of mandamus to prevent this.
Holding: 29.07(d) authorizes a trial court to withdraw a guilty plea, but does not grant authority for a re-sentencing. Defendant did not seek to withdraw her guilty plea. Rule 29.13(a) allows courts after a judgment of conviction to set aside a judgment for lack of jurisdiction or because the information does not charge an offense, but this is only allowed for 30 days after judgment and those grounds were not alleged here. No statute or Rule authorizes the court to resentence Defendant several months after her sentencing. Writ granted.

State v. Fuller, No. 28853 (Mo. App., S.D. 9/10/08):
Holding: Where sentence and judgment erroneously stated that Defendant pleaded guilty when, in fact, he had a trial, this was a clerical error that could be corrected under Rule 29.12.

State v. Goss, No. 28880 (Mo. App., S.D. 8/14/08):
Holding: Where written sentence and judgment erroneously stated Defendant had a "Guilty Plea," but there was really a trial, this was a clerical error that could be corrected under Rule 29.12.

State v. Spry, No. 28754 (Mo. App., S.D. 5/16/08) and **State v. Butchee, No. 28821 (Mo. App., S.D. 6/17/08):**
Holding: Where the written sentence and judgment stated Defendants had been convicted after a "guilty plea," but they really had had a trial, this was a clerical error that could be corrected under Rule 29.12.

State v. Yung, No. 27547 (Mo. App., S.D. 2/29/08):
Holding: Where Defendant was found to be a "prior offender," but sentence and judgment did not reflect this, this was a clerical error that can be corrected under Rule 29.12.

State ex rel. Breeding v. Seay, No. 28696 (Mo. App., S.D. 2/8/08):
Even though court purported to "suspend" Defendant's probation before it expired for failure to pay restitution, where there was a two-year delay in conducting a revocation hearing and Defendant ultimately paid the restitution before probation expired, court lacked jurisdiction to later revoke.
Facts: On August 18, 2003, Defendant received an SIS, was placed on 3 years probation and ordered to pay restitution. On July 15, 2005, a motion to revoke probation was filed for failure to pay restitution. The case then was passed several times, but Defendant paid his restitution in full. On February 16, 2006, Defendant was charged with another crime. In July 2006, the court "suspended" probation and ordered a review of restitution payments. On April 12, 2007, a motion to revoke was filed based on the new crime. Meanwhile, Defendant filed a motion to be discharged from probation, which the court denied because his probation had been "suspended." Defendant filed a writ of prohibition.
Holding: Jurisdiction to revoke probation expired on August 18, 2006, three years after it was imposed. Sec. 559.036.6 allows the power to revoke to be extended when reasonably necessary for adjudication of matters that arise before expiration, but only if there is some affirmative manifestation of an intent to conduct a revocation hearing, and every reasonable effort is made to notify the probationer and conduct the hearing before expiration. Here, the court acted unreasonably in not having a revocation hearing until 2007. The tardiness from 2005 to 2007 in not holding a hearing was prejudicial, and is "offensive" since Defendant paid his restitution in full before his probation expired in August 2006. While Defendant was charged with a new crime in 2005, a motion to revoke for this was not filed until 2007, and the court did not set a hearing until 2007. Writ of prohibition granted.

Hansen v. State, No. 28626 (Mo. App., S.D. 1/24/08):
Where there was an issue of fact as to whether Defendant's federal conviction for harassing phone calls was "sexual" in nature, the State was not entitled to summary judgment on Hansen's claim he should not have to register as sex offender.

Facts: Hansen was convicted of a federal crime of making harassing phone calls. One type of offense under the federal statute at issue was making calls of a "sexual" nature, but Hansen claimed he was not convicted under this section. The State claimed Hansen was required to register as a sex offender because his federal prison release stated that he was convicted of a sex offense. Hansen sought a declaratory judgment that he was not required to register. The circuit court granted summary judgment for the State.
Holding: Missouri residents who must register as federal sex offenders must also register under Missouri law. However, there is a genuine issue of material fact whether Hansen is required to register, since Hansen disputes that his offense was "sexual" in nature. Summary judgment should not have been granted, and case remanded for further proceedings to determine if Hansen is required to register.

State v. Bryant, No. 28673 (Mo. App., S.D. 10/31/07):
Once trial court enters final judgment and sentence, trial court cannot modify sentence under Rule 29.05.
Facts: After final judgment and sentence, Defendant filed a motion with the trial court under Rule 29.05 to reduce his sentence. The trial court denied it, and Defendant appealed.
Holding: Rule 29.05 states "the court shall have the power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive." A criminal judgment becomes final at the time sentence is pronounced. At that time, the trial court's jurisdiction is exhausted. Defendant's sentence was within the statutory range. The trial court had no power to modify the sentence after final judgment. Since appellate jurisdiction is derived from the trial court's jurisdiction, there is no jurisdiction to appeal. Appeal dismissed.

State v. Kimes, No. 28138 (Mo. App., S.D. 8/15/07):
(1) Police officer's opinion testimony that Defendant was speeding 35 mph in a 20 mph zone is sufficient to convict of speeding; and (2) it was plain error to sentence Defendant to jail for speeding, since only a fine is authorized by Sections 304.140 and 560.016 for this offense.
Facts: Defendant was charged with the infraction of speeding, Section 304.130. The evidence at trial consisted of a police officer's opinion testimony that Defendant was driving about 35 mph in a 20 mph zone. There was no radar evidence. Defendant was convicted and given an SES of 10 days in jail.
Holding: (1) It is a matter of first impression in Missouri whether the uncorroborated testimony of police officer is sufficient substantial evidence to support a conviction where the variance between the estimated speed and speed limit is not slight. Here, there was a 75 percent variance between the officer's estimated speed and the speed limit. In cases with a smaller variance, the evidence has been found insufficient, because it is harder to estimate if a driver is speeding when the driver is going only a small amount over the speed limit. But because of this large variance, a reasonable fact-finder could conclude beyond a reasonable doubt that an experienced officer could determine that the driver was speeding. (2) The maximum sentence for the infraction of speeding is a $200 fine, Sections 304.140 and 560.016. It was plain error for the trial court to impose a 10-day jail sentence.

Allen v. State, No. 27699 (Mo. App., S.D. 4/5/07):
(1) Even though Defendant who had been sentenced to 120-day treatment program absconded, rather than report to the program, the trial court could not rescind the program and impose a prison sentence, since the trial court's jurisdiction expired upon imposing sentence, and it was part of the plea agreement that Defendant would be put in the treatment program; and (2) "escape rule" did not bar Defendant's Rule 24.035 claim that trial court lacked jurisdiction to impose prison sentence, since the imposition of sentence occurred after Defendant was recaptured, and "escape rule" only applies to pre-escape errors.
Facts: Defendant pleaded guilty per an agreement that he would be placed in a 120-day treatment program under Section 559.115 and released upon successful completion of the program. The judge imposed this as the sentence. Defendant remained free on bond, however, while waiting for a "bed date" to the program. When the "bed date" arrived, Defendant absconded, rather than report to the program. He was captured a year later. At that time, the judge rescinded the 120-day treatment program, and imposed a five-year prison sentence. Defendant filed a 24.035 motion claiming the judge lacked jurisdiction to impose this sentence.
Holding: (1) The sentencing court exceeded its jurisdiction when it rescinded the 120-day program and imposed a prison sentence more than one year after it entered its original judgment imposing the 120-day program. This program was part of Defendant's plea agreement and Defendant had been sentenced to it. A trial court exhausts jurisdiction once judgment and sentence occur in a criminal case, and can take no further action. When Defendant was captured, the court only had jurisdiction to enforce its earlier sentence and judgment. It could not rescind the 120-day treatment sentence. (2) The "escape rule" does not apply here because Defendant's claim relates to a post-capture error by the trial court. The "escape rule" does not apply to errors that occur after a defendant is returned to custody.

State v. Vanlue, No. 27755 (Mo. App., S.D. 3/20/07):
Holding: Where trial court had found Defendant to be a prior and persistent offender but did not restate this at sentencing and the written judgment and sentence did not reflect this, trial court had no discretion not to include this in the written judgment and sentence, and the case is remanded to correct this clerical error under Rule 29.12.

State v. Freeman, No. 27750 (Mo. App., S.D. 1/26/07):
Where the prosecutor informed the trial court that Defendant's sentence for ACA had to run consecutively to the underlying felony sentence, and the trial court did not correct this misstatement and imposed consecutive sentences, plain error resulted because the trial court may not have exercised its discretion whether to run the sentences concurrently or consecutively.
Facts: Defendant was convicted of first degree assault and ACA, Section 571.015. At sentencing, the prosecutor told the trial court that Defendant's ACA sentence was required to be consecutive to his sentence for assault. *State v. Treadway*, 558 S.W.2d 646, 653 (Mo. banc 1977) had held that the ACA statute did not mandate consecutive

sentences. The trial court did not correct the prosecutor's statement, and sentenced Defendant to consecutive sentences.
Holding: The court followed the prosecutor's recommendation without comment. Thus, it appears the trial court may have believed it was required to impose consecutive sentences. It is plain error for the trial court not to exercise its discretion in determining whether the sentences should be concurrent or consecutive. Remanded for resentencing at which court may exercise discretion to run the sentences concurrently or consecutively.

State v. Destefano, No. 27387 (Mo. App., S.D. 1/10/07):
Holding: Where trial court found Defendant before trial to be a prior drug offender under Sections 195.275 and 195.291.1, but trial court did not state this at sentencing and the written judgment and sentence did not reflect this, this was a clerical error since the trial court has no discretion not to so sentence Defendant once it made the prior drug offender finding. Remanded to correct written judgment and sentence under Rule 29.12.

State v. Lloyd, No. 26737 (Mo. App., S.D. 11/27/06):
Holding: Where the trial court found Defendant to be a persistent offender, but the written sentence and judgment did not reflect this, this is a clerical error and case is remanded to enter correct written sentence and judgment.

State v. Coyles, No. 27195 (Mo. App., S.D. 10/23/06):
(1) Trial court plainly erred in instructing the jury on statutory rape in first degree, Section 566.032.1, and child molestation, Section 566.067, because child molestation is not a lesser-included offense of statutory rape in first degree; (2) where trial court found Defendant to be a" prior offender," but written sentence and judgment did not reflect that, case is remanded with directions to correct this clerical error under Rule 29.12 to reflect that Defendant is a "prior offender."
Facts: Defendant was charged with statutory rape in the first degree, Section 566.032.1. The trial court, without objection, submitted a jury instruction on child molestation in the first degree as a lesser-included offense. Defendant was convicted of child molestation in the first degree, Section 566.067.
Holding: Due process requires a Defendant not be convicted of an offense not charged. Thus, a trial court may not instruct on an offense not specifically charged unless it is a lesser-included offense. All of the statutory elements of the proposed lesser included offense must be encompassed by the statutory elements of the greater offense. The crime of child molestation required proof of additional facts other than those required for the proof of the crime of statutory rape. The additional facts include the touching of various private parts of the body, as well as the requirement that the touching be for "the purpose of arousing or gratifying sexual desire of any person." Section 566.010(3). The touching for "the purpose of arousing or gratifying sexual desire of any person" is not an element of the crime of statutory rape. Section 566.032.1. Thus, child molestation cannot be considered a lesser-included offense of statutory rape, because statutory rape does not contain an express mental element. Conviction vacated.

State v. Boydston, No. 27210 (Mo. App., S.D. 8/23/06):
Holding: Where trial court found Defendant to be prior and persistent offender and orally pronounced this at sentencing, but the written judgment and sentence made no mention of prior and persistent status, case is remanded to correct this "clerical error" under Rule 29.12 and enter judgment reflecting the oral pronouncement.

State v. Tabor, No. 27206 (Mo. App., S.D. 6/27/06):
Holding: Where the trial record showed that the trial court found Defendant to be a prior and persistent offender and sentenced him as such, but the written sentence and judgment said prior and persistent was "not applicable," the Court of Appeals remands the case pursuant to Rule 29.12 regarding clerical errors to enter an amended written judgment reflecting the sentence announced on the record, i.e., that Defendant is a prior and persistent offender.

State v. Palmer, No. 27062 (Mo. App., S.D. 6/21/06):
Holding: Where the written sentence and judgment said that Defendant was a "prior, persistent and Class X offender," but Defendant had never been charged as such and the record did not reflect that the trial court found Defendant to be such, the Court of Appeals remands the case pursuant to Rule 29.12 regarding clerical errors to strike the incorrect sentencing classification, because Defendant cannot be found to be a prior or persistent offender if he was not charged as such.

State v. Goodine, No. 26827 (Mo. App., S.D. 5/30/06):
Where written judgment stated that sentences were to run concurrently, but court had said at sentencing that sentences were to run consecutively, the oral pronouncement controls over the written judgment.
Facts: At sentencing, trial judge stated that Defendant's sentences were to run consecutively. However, trial judge later entered written sentence and judgment which checked a box saying that sentences were to run concurrently.
Holding: As a general rule, where there is a discrepancy between the oral pronouncement of sentence, and the written judgment, the oral pronouncement controls. Defendant's sentences should run consecutively. Case remanded to correct "clerical error" in written sentence and judgment.

Bantle v. Dwyer, No. 27465 (Mo. App., S.D. 5/5/06):
Commitment to DOC under long-term drug treatment program, Section 217.362, does not count as prior prison commitment for purpose of calculating minimum prison term under Section 558.019.
Facts: Defendant was sentenced on September 27, 2002. DOC informed Defendant that he had three prior prison commitments under Section 558.019, and had to serve 80% of his sentence prior to parole-eligibility. Defendant argued that one of his commitments was for long-term drug treatment under Section 217.362, and should not be counted as part of the "three" prison commitments.
Holding: On June 27, 2003, Section 217.362.5 became effective, providing that long-term drug treatment is not considered a "prior commitment" for purposes of calculating mandatory minimum sentences under Section 558.019. This statute applies to Defendant

and is retroactive. Therefore, Defendant has only two prior commitments, and is parole-eligible after having served 50% of his sentence.

State v. Dorris, No. 27313 (Mo. App., S.D. 2006):
Where trial court orally sentenced Defendant as "prior drug offender" but written judgment did not include this, case is remanded to correct written judgment to include "prior drug offender" status.
Facts: Trial transcript reflected that Defendant was found to be a "prior drug offender" and that the trial judge had sentenced him as such. However, the written judgment omitted this.
Holding: The failure to memorialize accurately the decision announced in open court is a "clerical error." Case remanded with directions to correct written judgment to reflect oral pronouncements.

Dykes v. Missouri Department of Corrections, No. WD72641 (Mo. App. W.D. 11/30/10):
Inmate was entitled to jail time credit against St. Louis sentence for time spent before trial in Scott County since St. Louis sentence was related to the pretrial incarceration in Scott County.
Facts: Inmate was charged with forgery in Scott County on September 1, 2004, and held in the Scott County jail. Bond was set on the Scott County case, which would have allowed Inmate's release if he could afford bond. On October 30, 2004, St. Louis issued an arrest warrant/detainer for Inmate for stealing in St. Louis. On May 27, 2005, Inmate pled guilty to the Scott County case and was sentenced to 18 months in prison. On August 24, 2005, Inmate was released from DOC on his forgery charge, but was sent to St. Louis on his stealing charge. Inmate then posted bond in St. Louis. On February 29, 2008, Inmate was convicted in St. Louis and sentenced to 15 years. Inmate filed a declaratory judgment action seeking credit against his St. Louis sentence for time served in Scott County.
Holding: Inmate is entitled to credit against his St. Louis sentence for the time period from the lodging of the detainer by St. Louis to the time he pled guilty in Scott County (October 30, 2004 to May 27, 2005). Sec. 558.031.1 provides that an inmate should receive credit against an offense when the time in prior custody was related to that offense. Incarceration is related to the later offense where the person is eligible for release on bail on the prior offense, but the subsequent charge prevents the person's release from custody. Even if Inmate had posted bond on the Scott County charge, he would have been held on the St. Louis charge pending posting bond on that charge. Thus, he is entitled to credit for the period Oct. 30, 2004 to May 27, 2005. However, after May 27, 2005, he would have been in prison anyway on the Scott County case, and so is not entitled to any credit against his St. Louis sentence.

State v. Pesce, No. WD71559 (Mo. App. W.D. 11/30/10):
Even though one of Defendant's prior convictions imposed a two-year prison sentence, where the statute for the offense termed the crime a "misdemeanor," the offense cannot be counted as a prior felony to support a persistent offender finding.

Facts: Defendant was charged and found to be a "persistent" offender based on one prior felony and another conviction from Iowa for which the Defendant was sentenced to two years in prison.
Holding: A "persistent offender" is one who has been convicted of two or more felonies committed at different times. Sec. 558.016. Here, Defendant contends there was insufficient evidence to sentence as a "persistent offender" since one of Defendant's prior convictions was not a felony as a matter of law. The conviction at issue was an Iowa conviction for an "aggravated misdemeanor," an offense for which Defendant received two years in prison. Sec. 556.016 defines "felony" and "misdemeanor." The statute says a "felony" is one so designated by statute "or" if the person may be sentenced in excess of one year. A "misdemeanor" is one if so designated by statute "or" if the person may be sentenced to one year or less. Here, Defendant's conviction falls both within the definition of "felony" because of the more than one year sentence and "misdemeanor" because it was so designated under Iowa law. Where the legislature designates certain conduct as constituting a misdemeanor, that is what it is, regardless of the punishment that can be imposed. Also, under the rule of lenity, an ambiguity in a penal statute must construed in favor of persons on whom such penalties are imposed. Thus, the prior Iowa offense is a misdemeanor and cannot be counted as a prior felony. Judgment amended to find that Defendant is only a "prior offender." (A footnote states that even though the record appears to show Defendant had another felony conviction that could have been counted, it cannot be counted on appeal because the State did not charge this offense in the information.)

Starry v. State, No. WD71557 (Mo. App. W.D. 8/31/10):
Where more than six years had elapsed from time when Defendant/Movant was sentenced to time when court began probation revocation proceedings, the court was without power to revoke probation because probation could only extend up to six years.
Facts: On October 22, 2001, Movant pleaded guilty to a Class C felony and was placed on five years probation. On October 17, 2006, a probation violation hearing was held which in April 2007 led the court to extend the probation for one year. On November 6, 2007, the court issued a warrant for a new probation violation, and ultimately revoked probation. Movant filed a 24.035 motion alleging that her revocation was invalid because her probation had expired.
Holding: Sec. 559.016.3 provides that the total time on probation could not exceed five years plus one extension of one year, for a total of six years. Once a term of probation expires, the court has no authority over a defendant. Here, Movant's probation expired October 21, 2007, six years after her sentence was imposed. The State claims that because the court issued various warrants for Movant during the six years, that the term was somehow stayed. But there is no tolling of the time for probation here because the court never suspended the probation.

State v. Allison, No. WD70395 (Mo. App. W.D. 9/14/10):
Holding: Where trial court's written sentence and judgment erroneously stated which counts had been dismissed and which Defendant had been convicted of, the Court of Appeals corrects this under Rule 30.23.

Cherco v. State, No. WD70071 (Mo. App. W.D. 2/9/10):
Holding: Rule 24.035 movants may claim that counsel was ineffective at sentencing without seeking vacation of the guilty plea; prejudice test for counsel's failure to call character witnesses is whether there is a reasonable probability the sentence would have been lower.

State ex rel. Koster v. Jackson, No. WD71165 (Mo. App. W.D. 1/26/10):
Even though Defendant did not file a 24.035 motion, where he had pleaded guilty before the Turner case and one of his prior convictions was a municipal SIS, the municipal SIS could not be used to enhance his sentence and habeas relief is granted.
Facts: In 2002, Defendant (Petitioner) pleaded guilty to DWI as a "persistent offender" and was sentenced to five-years SES. In 2005, his 5-year sentence was executed. In 2008, *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), held that municipal SIS convictions could not be used to enhance sentence. Defendant had a prior municipal SIS used to enhance his sentence. Without it, his sentence could not have exceeded one year. He sought habeas corpus relief. The circuit court granted it, and the State appealed by writ of certioriari.
Holding: The State argues that because Defendant did not file a Rule 24.035 motion he waived his right to seek postconviction relief under *Turner*. However, a habeas petitioner can overcome such a procedural default by showing (1) actual innocence, (2) a jurisdictional defect, or (3) the procedural default was caused by something external to the defense and prejudice. A sentence in excess of that authorized by statute falls under the jurisdictional defect exception, even though it is now a matter of a court's "authority" rather than jurisdiction under *Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). Here, the sentencing court exceeded its authority in imposing a 5-year sentence because municipal SIS convictions cannot be used to enhance sentence under the then-DWI statute. Grant of habeas relief affirmed.

State ex rel. Scroggins v. Kellogg, No. WD71763 (Mo. App. W.D. 3/9/10):
Once consecutive sentences are imposed, they are final and court has no authority under Rule 29.05 to change the sentences to order that they be concurrent.
Facts: In 2002, Defendant pleaded guilty and was given two consecutive sentences, with execution suspended. In 2004, Defendant's probation was revoked and the consecutive sentences executed. In 2009, Defendant asked the court under Rule 29.05 to run the sentences concurrently. The trial court granted this. The State sought a writ of mandamus to stop it.
Holding: A trial court lacks authority to amend a judgment once a sentence becomes final. This is true even in cases where the court suspended execution of sentence. Rule 29.05 applies only in trial cases, and allows a court to reduce a sentence recommended by a jury between the time of trial and sentencing. Once sentence is imposed, it becomes final and the court cannot alter it under 29.05. Writ granted.

State ex rel. Zahnd v. Shafer, No. WD69983 (Mo. App. W.D. 1/27/09):
Where trial court had previously imposed a 12-year sentence but suspended execution of that sentence, the trial court was without power to reduce the sentence to six years when it later revoked probation.

Facts: Defendant pleaded guilty to robbery and was sentenced to 12 years, with execution suspended. Two years later, the trial court revoked probation, but reduced the 12-year sentence to six years and ordered sentence executed. The State sought a writ of mandamus to compel a 12-year sentence.
Holding: A sentence is final when entered, even though execution of sentence is suspended. A trial court generally has no authority to alter the sentence previously imposed, even though execution was suspended. This is confirmed by Section 559.036.3 which provides that if the court revokes probation, it will "order that any sentence previously imposed be executed." Therefore, the court was not authorized to reduce the 12-year sentence to six years. However, the court can "mitigate" the sentence under Section 559.036.3 by reducing the prison term by all or part of the time Defendant was on probation. Writ issued.

Editor's note by Greg Mermelstein: In footnote 3, the Western District noted that a court can reduce a sentence for nonviolent crimes that involve alcohol or illegal drugs under certain conditions specified in Section 558.046.

Calvin v. Missouri Dept. of Corrections, No. WD69157 (Mo. App. W.D. 1/13/09):
Where Defendant was serving a 1996 sentence and a consecutive 1998 sentence, but he successfully had the 1998 conviction and sentence vacated in a postconviction case, the DOC was required to credit Defendant with all time served in DOC and could not refuse to count time served on the vacated sentence so as to require Defendant to remain longer in prison on the 1996 case.
Facts: Defendant (Calvin) pleaded guilty in 1996 to criminal non-support and was sentenced to five years, which was suspended following a treatment program. In 1998, Defendant pleaded guilty to another criminal non-support case, and was sentenced to two years. In 2002, Defendant's probation was revoked in both the 1996 and 1998 cases, and he was ordered to serve a 5-year sentence and consecutive 2-year sentence. Then, Defendant filed a Rule 24.035 motion to vacate his 1998 conviction and sentence. He was successful in vacating his 1998 conviction and sentence on grounds of lack of factual basis. Before Defendant won his Rule 24.035 case, he was scheduled for release from DOC on January 20, 2007. However, the DOC then recalculated his release date to be July 28, 2008, meaning that the DOC extended his prison term, even though he got one sentence vacated. The DOC did this under a theory that 556 of the days Defendant served could only count against the 1998 sentence that was vacated. Defendant moved for declaratory judgment that he had served every day of his 5-year sentence from 1996. The circuit court decided for Defendant, and DOC appealed.
Holding: There is no authority to support the DOC's position that when a court sets aside a sentence, that the vacated sentence remains in effect, such that the time served on the sentence continues to apply only to that sentence. Defendant's sentence on the 1996 case was 5 years, and he has been held more than 5 years by DOC. Any further incarceration on that sentence would violate due process, his right to be free from cruel and unusual punishment, and double jeopardy.

State v. Severe, No. WD69162 (Mo. App., W.D. 11/25/08):
Where one of Defendant's prior DWI convictions was a municipal SIS, this conviction could not be used to enhance Defendant's subsequent DWI to a felony, and while the case

is remanded for resentencing, the State cannot present additional evidence to show other DWI convictions.
Facts: Defendant was charged and convicted of being a "persistent" DWI offender under Sec. 577.023.1(4)(a) because she allegedly had two prior DWI offenses. One of the offenses, however, was a municipal SIS, which can no longer be used to enhance under *Turner v. State*, 245 S.W.2d 826 (Mo. banc 2008). On appeal, the State claimed that the appellate court should remand the case for resentencing, and allow the State to present additional evidence of other DWI convictions.
Holding: Sec. 577.023.8 specifies that in a jury trial the facts establishing persistent offender status "shall be pleaded, established and found *prior* to submission to the jury." Allowing the State to now present additional evidence of other convictions would violate the timing of the statute, that the factual finding be made before submission to the jury. The State is precluded from presenting additional evidence at resentencing of any other DWI convictions. The Court declines to follow *Bizzell v. State*, 2008 WL 4540395 (Mo. App., E.D. Oct. 8, 2008), which allowed the State to present additional evidence of DWI convictions on resentencing.

Mikel v. McGuire, No. WD69475 (Mo. App., W.D. 9/30/08):
There did not have to be a detainer on Defendant for his earlier offense to be "related to" his later one, so that he should receive jail time credit.
Facts: On July 9, 2004, Defendant was arrested for stalking and other offenses in St. Louis City (City). On November 19, 2004, he pleaded guilty and was given concurrent four year sentences. He was delivered to the DOC on November 23, 2004. In December 2004, St. Louis County filed a robbery count (County). Defendant was transferred to County jail in 2005, pleaded guilty on October 7, 2005, and was sentenced to five years, to run concurrently with the City offenses. Defendant claimed he was entitled to jail time credit for July 9, 2004, to November 23, 2004, or entitled to credit from July 9, 2004 to October 7, 2005, against his County sentence, because it was "related to" his City offenses. DOC claimed he was not entitled to credit because there was no detainer on him when he was in the City.
Holding: Sec. 558.031 states a person is entitled to credit toward a sentence when the time in jail was "related to that offense." Under a prior version of the statute, a detainer was required to receive credit, but that was repealed. Incarceration is related to a later offense where the person is eligible for release on bail on the prior offense, but the later offense prevents the person's release from custody. A detainer or arrest warrant is not needed. Rather, the person must prove the later offense would have prevented his release on the prior offense. Here, there was evidence City initially arrested Defendant for the County because County had a robbery warrant out for him. Thus, Defendant would have been in jail for robbery from July 9, 2004 to November 23, 2004, and may be entitled to jail time for this. Defendant started serving his City sentence on November 23, 2004, and is not entitled to any days of credit thereafter because he would have been in prison anyway had he not been awaiting disposition of his robbery offense.

Charron v. State, No. WD69016 (Mo. App., W.D. 6/17/08):
Holding: Even though Petitioner claimed his sentence violated a state statute, he could not challenge this in a declaratory judgment action under Sec. 527.010, but might be able

to do so in state habeas if he could show cause and prejudice for failing to raise the claim in a 24.035 or 29.15 action. Petitioner could challenge eligibility for parole via a declaratory judgment action, but not attack the "validity" of his sentence.

Doe v. Phillips, No. WD68910 (Mo. App., W.D. 6/17/08):
Holding: Where Movant was not required to register as a sex offender because his offense occurred before the sex offender statute, Secs. 589.400 to 589.425, was amended to require registration (because application of the statute to him would violate the prohibition on retrospective laws), but Movant had already registered, trial court did not err in issuing an injunction requiring State remove all information relating to Movant from sex offender registries, including information accessible only to law enforcement, because this information was obtained through an unconstitutional statutory provision.

Editor's Note by Greg Mermelstein: The Western District decided a similar case, with the same name, earlier: **Doe v. Phillips**, No. WD68066, 2008 WL 842485 (Mo. App., W.D. April 1, 2008). The Southern District decided a similar case with a similar holding in **Doe v. Merritt**, No. 28882 (Mo. App., S.D. 7/3/08).

State v. Banks, No. WD66035 (Mo. App., W.D. 4/15/08):
Holding: Where Defendant was convicted of a rape and sodomy that occurred in 1984, he should have been sentenced under the statutes in effect at the time of the offenses, and not sentenced to higher penalties that were imposed by later statutes.

State v. Washington, No. WD68016 (Mo. App., W.D. 4/8/08):
Where trial court originally imposed a sentence exceeding that recommended by the jury and the Court of Appeals remanded for "resentencing," Defendant had a right to be present at resentencing under Sec. 546.550 and Rule 29.07(b)(2).
Facts: The trial court originally sentenced Defendant to a prison term above that recommended by the jury. The Court of Appeals remanded for "resentencing." The trial court then reduced Defendant's sentence to that recommended by the jury. However, Defendant was not present for this. Defendant appealed.
Holding: The State claims the trial court was merely correcting a sentence. But while the Court of Appeals could have ordered a mere "correction," it didn't. It ordered "resentencing." Sec. 546.550 and Rule 29.07(b)(2) require Defendant to be present for sentencing. Thus, it was plain error for trial court to resentence without Defendant being present. Even though there may be little chance trial court will further reduce the sentence, a further resentencing is ordered.

State v. Cowan, No. WD67254 (Mo. App., W.D. 3/18/08):
(1) Prior and persistent offender statute increases the maximum sentence, but not the minimum sentence; and (2) the issue is preserved for appeal where Defendant raised the issue at sentencing, even though Defendant did not "object" to his sentence; he could not have raised it in his New Trial Motion because that was filed before sentencing.
Facts: Defendant was charged as a prior and persistent offender with the class B felony of first degree burglary. The trial court stated that the range of punishment was for a class A felony of 10 to 30 years or life. Defendant argued at sentencing after a trial that the minimum punishment was 5 years. Defendant did not include this claim in the New

Trial Motion because that was filed before sentencing. Defendant was sentenced to 10 years.
Holding: (1) Section 558.016.7 states: "The total authorized maximum terms of imprisonment for a persistent or a dangerous offender are … for a class B felony, any sentence authorized for a class A felony." The statute extends the maximum sentence, but not the minimum sentence. Thus, the minimum remains 5 years. Remanded for resentencing.

State v. Lewis, No. WD67640 (Mo. Ap., W.D. 1/22/08):
Holding: Where court orally pronounced sentence at 25 years, but written judgment stated 30 years, the oral pronouncement controls and this was a clerical error that can be corrected under Rule 29.12.

State v. Norris, No. WD67406 (Mo. App., W.D. 8/14/07):
Appellate court lacks jurisdiction to hear appeal of grant of Rule 29.07 motion to withdraw a guilty plea where an SIS was imposed; remedy is by writ of mandamus.
Facts: Defendant pleaded guilty to speeding and was assessed a fine. Six weeks later, he filed a Rule 29.07 motion to withdraw his plea, because he did not know that points would be assessed against his license. The trial court granted the motion to withdraw, refunded the fine, and allowed a new plea with an SIS. The State then appealed the order setting aside the plea.
Holding: A trial court's ruling on a motion to withdraw a guilty plea under Rule 29.07 is not a final, appealable judgment if imposition of sentence has been suspended. The appropriate appellate remedy is by writ of mandamus.

State v. Manley, No. WD66609 (Mo. App., W.D. 5/15/07):
Holding: Even though Defendant was a "persistent misdemeanor offender" under Section 558.016, the effect of that is only to take sentencing away from the jury, not to increase the range of punishment for a felony. Thus, it was plain error for judge to sentence Defendant to 20 years for a Class B felony; maximum punishment was 15 years under Section 558.011.1(2).

State v. Riley, No. WD65138 (Mo. App., W.D. 11/21/06):
Manufacturing methamphetamine and possession of methamphetamine under Sections 195.211 and 195.202 remain Class B and C felonies, respectively, even though the sentences can be enhanced for prior and persistent drug offenders.
Facts: The sentence and judgment for Defendant, a prior and persistent drug offender, declared he was sentenced for the "Class A" felonies of manufacturing and possession of methamphetamine.
Holding: The trial court plainly erred in sentencing Defendant for "Class A" felonies. The offenses of manufacturing and possession of methamphetamine, Sections 195.211 and 195.202, are classified as Class B and C felonies, respectively, even though subject to enhanced sentences the same as Class A felonies when the Defendant is a prior and persistent drug offender, Sections 195.291.2 and 195.285.2. A sentence enhancement does not reclassify the underlying conviction. Case remanded to correct sentence and judgment regarding classification of felonies.

Donaldson v. Crawford, No. WD66268 (Mo. App., W.D. 11/14/06):

Under Sections 558.031.1(3), the DOC must grant jail time credit to prisoner who was in custody on "related" offenses while on probation.

Facts: On June 12, 2000, prisoner was sentenced to 10 years on a drug conviction and put on probation in Camden County (Case 1). In January 2002, prisoner was arrested in Phelps County on sex offenses and held in Maries County on those offenses. In Maries County, he escaped from the jail and was recaptured on January 30. On February 15, 2002, Camden County issued a capias warrant for violation of probation. On October 1, 2002, prisoner pled guilty to escape and was sentenced to three years (Case 2). From January 30, 2002, until October 2, 2002, prisoner was held in the Maries County Jail. DOC credited prisoner with 245 days spent in the Maries County Jail. On January 29, 2004, DOC released prisoner to Camden County regarding the probation violation in Case 1. Prisoner was received back at DOC on February 11, 2004, in Case 1, and only given 27 days jail credit toward that sentence. Prisoner claimed he was entitled to credit for time from January 30, 2002, to January 29, 2004, because he was in custody during that time regarding the probation violation.

Holding: Prisoner's calculation is correct. The question is whether the time in custody on Case 2 "related to" the execution of the original sentence of 10 years in Case 1. Prisoner was subject to a capias warrant on his probation violation in Case 1, the basis of which was related, in part, to his escape from confinement in Case 2. With the capias warrant, prisoner was not eligible to be free on bail prior to a hearing on Case 2, but was in custody awaiting the circuit court's determination of the probation violation in Case 1. Custody can be related to both offenses and the statutory credit will apply to both offenses.

Wolfe v. Missouri Department of Corrections, No. WD65866 (Mo. App., W.D. 8/29/06):

Where Defendant was sentenced to a life sentence and a consecutive 10-year sentence, the minimum prison term under Section 558.019 which Defendant must serve prior to parole eligibility is 85% of the total sentence, or 34 years.

Facts: Defendant pleaded guilty to a second degree murder and robbery committed at the same time, and was sentenced to life in prison for the murder and a consecutive 10-year sentence for the robbery. The DOC declared that Defendant would not be eligible for parole until he was 70 years old, which was 49 years from the date of his sentencing.

Holding: Section 558.019.3 provides that an offender convicted of a dangerous felony shall be required to serve a minimum prison term of 85% of his sentence, or until the offender reaches age 70 and has served at least 40% of his sentence, whichever occurs first. Section 558.019.4(1) provides that "[a] sentence of life shall be calculated to be 30 years." Section 558.019.4(2) provides that "[a]ny sentence either alone or in the aggregate with other consecutive sentences for crimes committed at or near the same time which is over 75 years shall be calculated to be 75 years." The DOC makes various arguments, including that the 10-year consecutive sentence has "no start date" because a life sentence is indefinite, so any sentence consecutive to a life sentence is in excess of 75 years. However, the language of Section 558.019 is clear and unambiguous. Under Section 558.019.3, Defendant must serve 85% of his two sentences or until he reaches

age 70 and has served at least 40% of his sentences, whichever occurs first. Section 558.019.4(1) explicitly provides that a life sentence shall be calculated to be 30 years. 85% of 30 years is 25.5 years. 85% of 10 years is 8.5 years. Thus, the correct calculation for Defendant's minimum parole eligibility is 25.5 years plus 8.5 years equals 34 years.

Dade v. Missouri Board of Probation and Parole, No. WD65957 (Mo. App., W.D. 6/27/06):

Incarceration following revocation of probation on a 120-day callback program counts as a prior commitment under Section 558.019, even if the original 120 days is not counted.

Facts: In December 1991, Petitioner was sentenced to DOC on a 120-day call back program under Section 559.115 and was released. However, this probation was revoked on August 31, 1994. In March 1993, Petitioner was sentenced to DOC in a second case and sentenced to a 120-day callback program. However, this probation was revoked on July 26, 1994. In June 1994, DOC received Petitioner for a third case. Petitioner was sentenced to the DOC for a fourth case in 2002.

Holding: Petitioner has three prior commitments for minimum prison term purposes under Section 558.019 and must serve 80% of his sentences imposed in 2002. Incarceration following a probation revocation counts as a qualifying prison commitment for purposes of Section 558.019.2, even though the corresponding original 120-day callback itself is excluded under Section 559.115.7.

Canale v. Department of Corrections, No. WD65239 (Mo. App., W.D. 6/20/06):

Incarceration following revocation of probation on a 120-day callback program counts as a prior commitment under Section 558.019, even if the original 120 days is not counted.

Facts: In February 1996, Petitioner was convicted of two drug offenses and sentenced to a 120-day callback program. He was released in May 1996, but was returned to prison in July 1996 following a probation violation. In April 1998, while on parole, he was convicted of forgery and resisting arrest and sentenced to prison in September 1998. He was released in February 2001. In March 2002, he was convicted of stealing and tampering and sentenced to five years, but was released after completing a 120-day program. However, that probation was revoked in May 2003 after he was convicted of new offenses. He began serving the new sentences in April 2004.

Holding: Petitioner's 1996 120-day callback program was properly excluded from counting by virtue of Section 559.115. However, when his probation was revoked in July 1996, this counts as a prior commitment under Section 558.019, because incarceration following a probation revocation counts as a commitment, even if the original 120-day callback is excluded. The July 1996 commitment was Petitioner's first commitment. The September 1998 commitment was his second commitment. Based on this, Petitioner had two prior commitments when he began serving his stealing and tampering sentences in May 2003. Thus, he must serve 50% of those sentences. Moreover, he had three prison commitments at the time he began serving his newest sentences in April 2004, so he must serve 80% of those under Section 558.019.

Furey v. Missouri Department of Corrections, No. WD65921 (Mo. App., W.D. 6/20/06):

For purposes of Section 558.019, revocation of probation following a statutorily excluded "shock" or rehab program counts as a prior commitment only if commitment on the revocation occurred prior to the current commitment.

Facts: Petitioner has been in DOC three times. In 1989, he was committed to DOC and released. In 2001, for new offenses, he entered a 120-day DOC program under Section 559.115. At the end of the program, he received probation. In 2002, in connection with new offenses and breach of conditions of probation, he was received again. This third incarceration involves a new sentence for a new offense and reinstatement of his sentence for the 2001 offenses.

Holding: The question is how many prior commitments Petitioner has for purposes of Section 558.019. The 1989 commitment indisputably counts as one commitment. Section 559.115 states that the first 120-day shock incarceration is not a commitment for purposes of Section 558.019. Thus, the 2001 120-day program does not count. The issue is whether the revocation of probation on the 2001 120-day program must be counted. Receipt by the DOC pursuant to revocation of probation on a sentence for which the defendant served a regimented discipline program constitutes a prior commitment only if the revocation occurred prior to the receipt for the current commitment. In this case, the 2002 revocation of probation on the 2001 case is a "commitment," but it is not "prior." Thus, only the 1989 case is a "prior commitment" for purposes of calculating the minimum time to be served under Section 558.019.

Talley v. Missouri Department of Corrections, No. WD65319 (Mo. App., W.D. 6/20/06):

The minimum prison term required to be served for armed criminal action is determined by Section 571.015 and not Section 558.019.

Facts: Petitioner was convicted of ACA. The DOC ruled that he had to serve 80% of his ACA sentence under Section 558.019 because he had three prior prison commitments.

Holding: Section 558.019.1 states that the general minimum prison terms "shall not affect" the specific minimum prison term for ACA as set out in Section 571.015 (which provides for a three-year term). The general minimum prison terms of Section 558.019 cannot be applied to a sentence for ACA, regardless of whether such application would result in an increase or decrease in the minimum time to be served. The Legislature intended to exclude ACA from the general minimum prison term provisions of Section 558.019 by setting forth minimum prison terms in Section 571.015 for ACA. Thus, Petitioner's minimum prison term is determined by Section 571.015.

Norfolk v. State, No. WD64831 (Mo. App., W.D. 4/4/06):

After trial court discharged Movant from probation, it thereafter lacked any jurisdiction to rescind the termination order, reinstate probation, revoke probation, or execute a sentence.

Facts: In 1996 Movant pleaded guilty to an offense and was sentenced to five years, execution of which was suspended and Movant placed on five years probation. In January 2000, probation was revoked after Movant failed to pay restitution while incarcerated on an unrelated offense. The court imposed a new five year period of

probation. On August 15, 2002, the court made a docket entry ordering early termination of probation, based on a finding that restitution had been paid. Three weeks later, the court rescinded the probation termination based on information that Movant or someone acting with him made fraudulent representations regarding paying restitution. The State then filed motions to revoke probation. The court revoked probation and ordered the five-year sentence executed. Movant filed a 24.035 motion to vacate the prison sentence, contending the trial court lacked jurisdiction.

Holding: As a preliminary matter, State argues the sole remedy for Movant is by way of habeas corpus. However, the cases cited by the State are distinguishable as the movants in those cases had not been discharged from probation. A discharge from probation terminates the trial court's jurisdiction. Once Movant's probationary period ended, his challenge of the trial court's jurisdiction to revoke probation could be brought in a 24.035 proceeding. The trial court's typewritten docket entry of August 15, 2002, qualifies as an "order" of the court under Rule 74.02. The unsigned docket entry was no less valid to terminate probation than a formally prepared order. When an order discharges the Defendant from probation, it also discharges the trial court's jurisdiction with respect to that case. The State argues that Rule 74.06(b) allowed the court to reopen the issue because of fraudulent conduct. But Rule 74.06 is not applicable to an order that is not a "judgment," and the August 15, 2002, order is not a "judgment" under the Rules because there is no appeal from an order terminating probation. The trial court lacked jurisdiction to act after it terminated Movant from probation. Movant discharged from sentence.

Ridinger v. Missouri Board of Probation and Parole, 189 S.W.3d 658 (Mo. App., W.D. 2006):

Because Sections 559.115.7 and 217.362.5 apply retroactively and the term "previous prison commitment" in Section 558.019.2 requires a receipt by the Department of Corrections (DOC) at a time prior to receipt on the current offense, Petitioner had only two qualifying previous prison commitments before his most recent conviction.

Facts: In "Case #1," Petitioner was sentenced on January 8, 1993 to 120-day shock incarceration. He completed that and was released, but then he was revoked on April 8, 1994, and received by the DOC to serve a six-year sentence. Petitioner conceded in "Case #2" that he had been received by the DOC on another offense. In "Case #3," Petitioner was sentenced on November 20, 1997, to long-term drug treatment under Section 217.362. However, on July 12, 2001, his probation in "Case #3" was revoked and he was ordered sent to DOC. Also on July 12, 2001, the trial court sentenced Petitioner to new offenses in "Case No. 4." Petitioner was then told by DOC he had three previous prison commitments and had to serve 80% of his sentence.

Holding: Petitioner only has two prior commitments – one in "Case #1" and the other in "Case #2." His commitment in "Case #3" is not counted under the statute because it is not a "previous" commitment since he was received by the DOC to serve it at the same time as "Case #4." Petitioner is correct that he was initially sentenced in Cases #1 and #3 to 120-day callback and long-term drug treatment, and that those do not qualify as previous commitments under Section 558.109.2. However, Petitioner was later revoked in "Case #1" and his sentence executed and he was received by DOC; thus, this counts as a prior commitment. Similarly, regarding "Case #3," Petitioner was later revoked on that, too, so it would count as a prior commitment if Petitioner had been received by

DOC prior to "Case #4." However, because the DOC received Petitioner on July 19, 2001, in "Case #3" which was the *same date* as his receipt by DOC in "Case #4," "Case #3" does not qualify as a "previous" prison commitment because it did not occur "prior to" "Case #4." Also, the fact that Petitioner was already in DOC on "Case #1" due to the revocation when he was received in "Case #2" does not preclude DOC from counting "Case #2" as a prior commitment. In sum, Petitioner has two prior commitments – "Case #1" and "Case #2." Thus, Petitioner must serve 50% of his sentence prior to parole-eligibility.

State v. St. John, 186 S.W.3d 847 (Mo. App., W.D. 2006):
Defendant could not be sentenced as prior and persistent domestic violence offender based on conviction from another State.
Facts: Defendant was convicted of one count of domestic assault in the first degree, Section 565.072, and was sentenced as a prior and persistent domestic violence offender to life in prison. The State charged Defendant as a prior and persistent domestic violence offender because he had two prior felony convictions in Illinois for domestic battery.
Holding: By definition under Section 565.063, the prior convictions from Illinois cannot be used to prove prior and persistent domestic violence offender status because Section 565.063.1 plainly states that only convictions under Sections 565.050, 565.060, 565.072 or 565.073 can be used to prove this. The Legislature is presumed to intend what the statute says. The statute does not mention any domestic violence crimes from other States, so the Legislature is presumed to have intended to limit the definition of domestic assault offense to Missouri crimes. Defendant was prejudiced by the court's finding him to be a prior and persistent domestic violence offender because that made him parole-ineligible. Defendant's sentence is vacated and remanded for re-sentencing.

*** Abbott v. U.S., 88 Crim. L. Rep. 183, ___ U.S. ___ (U.S. 11/15/10):**
Holding: Defendants are subject to mandatory minimums under Sec. 924(c)(1)(a) (regarding using firearms in drug offenses) and cannot escape them by virtue of receiving a higher mandatory minimum on a different count of conviction, but they are not subject to stacked sentences under 924. Defendants are subject to the highest mandatory minimum specified for their conduct in 924(c), unless another provision of law imposes an even greater mandatory minimum.

*** Graham v. Florida, ___ U.S. ____, 87 Crim. L. Rep. 195 (U.S. 5/17/10):**
Holding: 8th Amendment's cruel and unusual punishment clause prohibits giving a life without parole sentence to juveniles convicted of non-homicides.

*** U.S. v. O'Brien, ___ U.S. ___, 87 Crim. L. Rep. 267 (U.S. 5/24/10):**
Holding: 18 USC 924(c)(1), which prohibits using, carrying or possessing a firearm in connection with a violent crime, treats the type of firearm as an element of the offense that must be proved to the jury beyond a reasonable doubt.

*** Carr v. U.S., ___ U.S. ___, 87 Crim. L. Rep. 313 (U.S. 6/1/10):**
Holding: SORNA's provision that makes it a crime for sex offenders to travel in interstate commerce without registering does not apply to offenders whose travel was completed before the law went into effect in 2006.

*** Barber v. Thomas, ___ U.S. ___, 87 Crim. L. Rep. 363 (U.S. 6/7/10):**
Holding: Bureau of Prisons' "good time" credit is calculated under 18 USC 3624(b)(1) by adding 54 days at the end of each year actually served, not by multiplying the number of years sentenced by 54 at the start of a sentence.

*** Carachuri-Rosendo v. Holder, ___ U.S. ___, 87 Crim. L. Rep. 409 (U.S. 6/14/10):**
Holding: Even though Lawful Permanent Resident could have been charged under a recidivist statute for a second drug offense, where Lawful Permanent Resident was not in fact charged with the recidivist offense but only simple possession, Lawful Permanent Resident could seek cancellation of deportation; to reach threshold level of "aggravated felony" under Immigration and Nationality Act that would require deportation, the second conviction must contain an element of recidivism.

*** Dolan v. U.S., ___ U.S. ___, 87 Crim. L. Rep. 401 (U.S. 6/14/10):**
Holding: Even though a sentencing judge misses the deadline under Mandatory Victims Restitution Act, 18 USC 3664(d)(5), for determining victims' losses, the court still has power to order restitution, at least where the court made clear prior to the deadline's expiration that it would order restitution, leaving the amount undecided.

*** Dillon v. U.S., ___ U.S. ___, 87 Crim. L. Rep. 455 (U.S. 6/17/10):**
Holding: *U.S. v. Booker*, 543 U.S. 220 (2005) does not apply to Sec. 3582(c)(2) proceedings to reduce sentence in light of retroactive amendment to USSG, and thus, does not require treating Sec. 1B1.10(b)'s prohibition on reducing the sentence below the amended guideline range as advisory.

*** Johnson v. U.S., 86 Criminal Law Rep. 613, ___ U.S. ___ (U.S. 3/2/10):**
Holding: Conviction for battery committed by intentionally touching another person is not a "violent felony" under ACCA, because ACCA requires physical force, meaning violent force.

*** Dean v. U.S., 85 Crim. L. Rep. 173, ___ U.S. ___ (4/29/09):**
Holding: Accidental discharge of a firearm qualifies for mandatory minimum sentence for using a firearm during crime of violence or drug trafficking under 18 USC 924(c)(1)(A)(iii); gov't need not prove that Defendant intended to discharge the weapon.

*** Spears v. United States, 84 Crim. L. Rep. 446, ___ U.S. ___ (1/21/09):**
Holding: The 8th Circuit has misapplied *Kimbrough v. U.S. (2007)*; Supreme Court holds that district courts can adopt a replacement ratio for the 100:1 crack cocaine ratio based on their policy disagreement with the Sentencing Guidelines.

*** Oregon v. Ice, 84 Crim. L. Rep. 400, 2009 WL 77896, ___ U.S. ___ (1/14/09):**
Holding: The 6th Amendment's right to jury fact-finding as stated in *Apprendi* and its progeny does not require a jury to find facts that authorize a judge to run sentences consecutively.

*** Chambers v. United States, 84 Crim. L. Rep. 402, 129 S. Ct. 687, ___ U.S. ___ (1/13/09):**
Holding: Failure to report to confinement is not a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. Sec. 924(e), for purposes of enhanced sentencing.

*** Nelson v. United States, 2009 WL 160585, ___ U.S. ___ (2009):**
Holding: Where sentencing judge had said the Sentencing Guidelines were "presumptively reasonable," the judge erroneously applied a presumption of reasonableness.

*** Greenlaw v. U.S., ___ U.S. ___, 83 Crim. L. Rep. 456, 2008 WL 2484861 (6/23/08):**
Holding: U.S. Court of Appeals cannot sua sponte increase a Defendant's sentence to correct a mistake by the District Court; the Gov't has to either appeal or cross-appeal for a Court of Appeals to raise a mistakenly low sentence.

*** Irizarry v. U.S., ___ U.S. ___, 83 Crim. L. Rep. 377, 128 S.Ct. 2198 (6/12/08):**
Holding: Federal judges do not have to give notice to parties before sentencing of intent to deviate from sentencing guideline range.

*** U.S. v. Rodriquez, ___ U.S. ___, 83 Crim. L. Rep. 227 (5/19/08):**
Holding: A prior conviction for a State offense that is normally punishable by a sentence that is too low to qualify under the Armed Career Criminal Act, 18 U.S.C. 924(e), can still be used to enhance the federal sentence if the punishment to which the defendant was exposed under a State recidivist statute increased the State sentence to the ACCA threshold.

*** Begay v. U.S., ___ U.S. ___, 83 Crim. L. Rep. 76 (4/16/08):**
Holding: The "catch-all provision" of the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(ii), defining a prior felony as "otherwise involves conduct that presents a serious potential risk of physical injury to another" is limited to felonies similar in kind and dangerousness to the listed felonies of burglary, arson, extortion or use of explosives. Thus, a felony conviction for DWI does not qualify under the statute.

*** Burgess v. U.S., ___ U.S. ___, 83 Crim. L. Rep. 78 (4/16/08):**
Holding: Even though State law may qualify a prior drug offense as a misdemeanor, the offense can still qualify as a "felony drug offense" for mandatory minimum sentence purposes under 21 U.S.C. 841(b)(1)(A) if it is punishable by more than one year in prison.

*** Logan v. U.S., ___ U.S. ___, 82 Crim. L. Rep. 247 (12/4/07):**
Holding: 18 U.S.C. 921(a)(20)'s sentence enhancement for firearms offenses applies even to prior state convictions which were sufficiently minor that the defendant's civil rights were not suspended.

*** Watson v. U.S., ___ U.S. ___, 82 Crim. L. Rep. 277 (12/10/07):**
Holding: A person who accepts a gun in payment for drugs does not "use" the firearm in relation to drug trafficking for purposes of sentencing enhancement under 18 U.S.C. Section 924(c)(1)(A).

*** Kimbrough v. U.S., ___ U.S. ___, 82 Crim. L. Rep. 286 (12/10/07):**
Holding: Trial courts do not abuse their discretion by considering the sentencing disparity under federal sentencing guidelines between crack and powder cocaine.

*** Gall v. U.S., ___ U.S. ___, 82 Crim. L. Rep. 286 (12/10/07):**
Holding: The deferential abuse of discretion standard that applies on appeal of federal sentences imposed outside the guideline range prohibits appellate courts from requiring either extraordinary circumstances to justify a variance or a rigid mathematical formula that uses a percentage of departure.

*** Rita v. U.S., 81 Crim. L. Rep. 411, ___ U.S. ___, 2007 WL 1772146 (6/21/07):**
Holding: Court of Appeals may apply a "presumption of reasonableness" when reviewing sentences that fall within federal sentencing guideline range.

*** Cunningham v. California, 2007 WL 135687, ___ U.S. ___ (2007):**
Holding: Defendant's 6th and 14th Amendment right to have a jury determine all facts was violated by sentencing law that allowed judge to enhance sentence based on the judge finding aggravating factors.

*** James v. U.S., 81 Crim. L. Rep. 71, ___ U.S. ___ (4/18/07):**
Holding: Prior attempted burglary conviction is a "violent felony" for purposes of Armed Career Criminal Act, 18 U.S.C. 924(e).

*** Washington v. Recuenco, 79 Crim. L. Rep. 392, ___ U.S. ___ (2006):**
Holding: Harmless-error analysis can be applied on appeal to uphold pre-*Blakely & Booker* sentences where *Apprendi* error occurred.

U.S. v. Burroughs, 2010 WL 2794303 (D.C. Cir. 2010):
Holding: Supervised release condition that monitored Defendant's computer use was not reasonably related to Defendant's sex crime, which did not involve a computer.

U.S. v. Russell, 87 Crim. L. Rep. 77 (D.C. Cir. 4/2/10):
Holding: A 30-year prohibition on Defendant's use of "computers" for conviction for sex crime which could not be modified by probation office was substantively unreasonable because would prevent Defendant from having many jobs such as fast-food cashier.

In re Sealed Case, 85 Crim. L. Rep. 576, 2009 WL 2224838 (D.C. Cir. 7/28/09):
Holding: Even though judge thought Defendant would benefit from a drug treatment program in prison, 18 USC 3582(a) prohibits using rehabilitation to give a longer prison sentence. Note: There is a split of authority on this, and 8th Circuit has ruled the opposite.

U.S. v. McCants, 2009 WL 204739 (D.C. Cir. 2009):
Holding: Even though Defendant was convicted of possessing false-document-making instruments, where Gov't failed to show Defendant used them to commit his separate bank fraud offense, Gov't could not use bank losses to calculate sentencing guideline offense level in instrument case.

U.S. v. Ventura, 85 Crim. L. Rep. 331 (D.C. Cir. 5/15/09):
Holding: Virginia conviction for felonious abduction is not categorically a "crime of violence."

U.S. v. Maldonado, 2010 WL 2898250 (1st Cir. 2010):
Holding: Prior misdemeanor conviction for placing a wrong license plate on a car is "similar" to driving while suspended or revoked and should not count as part of Defendant's criminal history at sentencing.

U.S. v. Santiago-Rivera, 2010 WL 396386 (1st Cir. 2010):
Holding: Upon revocation of supervised release, trial court could not impose a sentence that was designed to control implementation of a different sentence in an unrelated crime in another court.

U.S. v. Hernandez-Ferrer, 86 Crim. L. Rep. 751 (1st Cir. 3/19/10):
Holding: Even though Defendant absconds from supervision, the period of supervised release is not tolled; thus, Defendant cannot be revoked on basis of acts committed after period ended.

U.S. v. Aguirre-Gonzalez, 86 Crim. L. Rep. 699 (1st Cir. 3/2/10):
Holding: Victim cannot appeal a Defendant's sentence.

U.S. v. Ahrendt, 2009 WL 709410 (1st Cir. 2009):
Holding: Remand warranted for sentencing court to consider Sentencing Commission's updated views on consideration of prior offenses sentenced on the same date, even though this was not retroactive.

U.S. v. Perazza-Mercado, 84 Crim. L. Rep. 503, 2009 WL 136744 (1st Cir. 1/21/09):
Holding: In sex abuse case, supervised release condition that barred Defendant from having any Internet access was invalid because had no relationship to the crime.

U.S. v. Corey, 2009 WL 1693285 (1st Cir. 2009):
Holding: Where trial court ignored remand instructions to make credibility determinations regarding drug quantity, appellate court would not apply deferential review and would find Defendant's testimony credible.

U.S. v. Riccio, 2009 WL 1538535 (1st Cir. 2009):
Holding: Where there was dispute over whether court had ordered out-patient or in-patient mental health treatment at sentencing, the oral pronouncement of sentence would control over the written one.

U.S. v. Bryant, 85 Crim. L. Rep. 539 (1st Cir. 7/8/09):
Holding: Where Defendant disputes existence of prior convictions, State cannot prove up Defendant's prior convictions through nonjudicial criminal records such as NCIC records or State Police Information Records.

U.S. v. Giggey, 84 Crim. L. Rep. 346, 2008 WL 5274834 (1st Cir. 12/22/08):
Holding: Nonesidential burglary is not a "crime of violence" under the career offender provision of the U.S. Sentencing Guidelines.

U.S. v. O'Brien, 84 Crim. L. Rep. 7 (1st Cir. 9/23/08):
Holding: Where 18 USC 924(c)(1)(B) enhances sentence for type of firearm used, the type of gun must be pleaded in the indictment and found by a jury under the 6th Amendment.

U.S. v. Herrick, 2008 WL 4603551 (1st Cir. 2008):
Holding: Wisconsin crime of "negligent homicide by motor vehicle" is not a "crime of violence" for federal sentencing purposes.

U.S. v. Woltmann, 2010 WL 2652470 (2d Cir. 2010):
Holding: Even though plea agreement said Defendant waived any appeal if his sentence was less than 27 months, where the plea agreement also called for judge to consider a Gov't letter advocating for a more lenient sentence, the judge abdicated his responsibility and breached the agreement by sentencing Defendant to less than 27 months without considering the letter; therefore, the appeal waiver was unenforceable.

U.S. v. Pfaff, 87 Crim. L. Rep. 838 (2d Cir. 8/27/10):
Holding: Imposition of a fine double the maximum statutory penalty in the absence of the judge's finding regarding the amount of loss, violated Defendant's 6th Amendment right to a jury-finding under *Apprendi*.

U.S. v. Green, 87 Crim. L. Rep. 839 (2d Cir. 8/13/10):
Holding: Supervised release condition that prohibited wearing any colors commonly worn by street gangs was unconstitutionally vague.

U.S. v. Ortiz, 87 Crim. L. Rep. 857 (2d Cir. 9/1/10):
Holding: Even though sentencing guidelines are only advisory, application of a harsher guideline that was amended after the offense can be ex post facto.

U.S. v. Dorvee, 2010 WL 1852930 (2d Cir. 2010):
Holding: Imposition of statutory maximum sentence on Defendant for distribution of child pornography was substantively unreasonable where court believed Defendant was likely to actually sexually assault children even though evidence showed Defendant was unlikely to engage in personal relationships.

U.S. v. Hernandez, 2010 WL 17890364 (2d Cir. 2010):
Holding: Where 15 years elapsed between Defendant's original sentence and re-sentencing, court erred in imposing same sentence without considering mitigating factors in interim including Defendant's rehabilitation.

U.S. v. Malki, 87 Crim. L. Rep. 691 (2d Cir. 6/29/10):
Holding: The sentencing guideline to apply to unauthorized retention of national defense information is "unauthorized receipt" under 2M3.3 not unauthorized "gathering" under 2M3.2.

Besser v. Walsh, 87 Crim. L. Rep. 4, 2010 WL 1223194 (2d Cir. 3/31/10):
Holding: New York sentencing law that allows enhanced sentence if judge is "of the opinion" that the history, character of the defendant and nature of crime warrants enhanced sentence violates *Apprendi* right to have jury determine facts.

U.S. v. Kyles, 87 Crim. L. Rep. 49 (2d Cir. 4/2/10):
Holding: Even though a federal court has equitable authority under Victim and Witness Protection Act, 18 USC 3663, to amend a restitution schedule to speed it up while defendant is in prison, court cannot do this based on Bureau of Prison regulation since that is an impermissible delegation of judicial power.

U.S. v. Sabhnani, 2010 WL 1131436 (2d Cir. 2010):
Holding: Even though Defendant was convicted of forced labor for making maids work for him, the maids were exempt from the Fair Labor Standards Act overtime provisions for purposes of calculating the maids' restitution because FSLA exempts domestic household servants who live in the household.

U.S. v. Janvier, 87 Crim. L. Rep. 121, 2010 WL 1133895 (2d Cir. 3/26/10):
Holding: Even though federal statute allows revocation of release after the release term expired so long as a warrant for violation was issued before expiration, this was not satisfied by only a court order directing clerk to issue a warrant.

U.S. v. Dorvee, 87 Crim. L. Rep. 199 (2d Cir. 5/11/10):
Holding: Federal sentencing guildelines for child pornography can result in irrationally high sentences under 2G2.2 and judges should exercise their discretion in fashioning appropriate sentences, including a noncustodial sentence.

U.S. v. Reeves, 86 Crim. L. Rep. 442 (2d Cir. 1/7/10):
Holding: Release condition that required Defendant convicted of child pornography offense to notify probation office if he entered into a "significant romantic relationship" was vague and unrelated to the purposes of sentencing.

U.S. v. Varrone, 2009 WL 214544 and 2009 WL 223890 (2d Cir. 2009):
Holding: Where Defendant was ordered to pay restitution based on failure to file Currency Transaction Reports, this was invalid because victim's loss was not related to failure to file Reports.

U.S. v. Ayon-Robles, 84 Crim. L Rep. 611 (2d Cir. 2/24/09):
Holding: A State felony conviction for drug possession that would only be a misdemeanor under the federal Controlled Substances Act cannot be an "aggravated felony" under the Sentencing Guidelines, even if it could have been prosecuted by the State as a recidivist felony.

U.S. v. McKee, 84 Crim. L. Rep. 502 (2d Cir. 1/23/09):
Holding: Defendants who qualified as "career offenders" but who were granted downward departures so that they were sentenced under the crack cocaine guidelines are eligible for the reduced sentences authorized by the 2007 guideline amendments.

U.S. v. Gamez, 2009 WL 2568124 (2d Cir. 2009):
Holding: New York conviction for criminal possession of a weapon was not crime of violence because did not include as an element unlawful use of weapon or threatened use of force.

U.S. v. Jass, 2009 WL 1676113 (2d Cir. 2009):
Holding: Even though Defendant used computer images to desensitize victim to have sex with adults, where Defendant did not solicit a third party to engage in sex, this action did not qualify for enhancement for use of a computer to solicit participation with minor.

U.S. v. Ray, 85 Crim. L. Rep. 671, 2616247 (2d Cir. 8/27/09):
Holding: 6th Amendment's speedy trial clause does not prohibit delays in sentencing, but 5th Amendment's due process clause does; Defendant who had 15-year delay between her conviction and sentencing should have her sentence vacated.

U.S. v. Dharfir, 85 Crim. L. Rep. 636 (2d Cir. 8/18/09):
Holding: District Judge does not have to determine recommended guideline range if the calculation would be complicated and judge intends to deviate from it anyway.

U.S. v. Gray, 2008 WL 2853470 (2d Cir. 2008):
Holding: Prior conviction for "reckless endangerment" is not crime of violence for federal sentencing guidelines purposes.

U.S. v. Confredo, 83 Crim. L. Rep. 525 (2d Cir. 6/10/08):
Holding: Defendant convicted of fraudulent loans should be allowed at sentencing to convince judge that "intended loss" was less than loan amounts.

U.S. v. Griffin, 82 Crim. L. Rep. 342 (2d Cir. 12/21/07):
Holding: Gov't breached plea agreement not to oppose acceptance-of-responsibility sentence reduction where Prosecutor said he was "troubled" by Defendant's objections to statements in PSI, even though Prosecutor also said he was not abandoning promise not to oppose downward departure. Different judge must conduct resentencing.

U.S. v. Liriano-Blanco, 2007 WL 4302708 (2d Cir. 2007):
Holding: Where trial judge mistakenly thought there was a right to appeal a sentence (but there wasn't), appellate court nevertheless remands for resentencing because judge's mistaken belief may have affected severity of sentence.

U.S. v. Kaba, 2007 WL 687002 (2d Cir. 2007):
Holding: Defendant was entitled to resentencing before a different judge, where original judge made remarks at sentencing suggesting he was giving a harsher sentence because of Defendant's non-U.S. nationality.

U.S. v. Flemming, 87 Crim. L. Rep. 747, 2010 WL 2902725 (3d Cir. 7/27/10):
Holding: Defendants who qualified as career offenders under 4B1.1 but who received "overrepresentation" departures under 4A1.3 are allowed sentence reductions.

U.S. v. Ward, 88 Crim. L. Rep. 318 (3d Cir. 11/24/10):
Holding: Where judge initially sought to impose restitution upon Defendant, but when it was learned that victim's losses could not be determined because victim could not be found, summarily imposed a fine in the same amount, this violated Defendant's sentencing rights because judge did not consider factors under 18 USC 3353(a) and 3572(a).

Renchenski v. Williams, 88 Crim. L. Rep. 87 (3d Cir. 10/4/10):
Holding: Even though police report showed victim's clothing was removed, Defendant convicted of murder could not be labeled a sex offender without due process.

U.S. v. Hoffa, 2009 WL 4349323 (3d Cir. 2009):
Holding: Trial court was prohibited from giving Defendant higher prison sentence on grounds that court believed Defendant needed medical care.

U.S. v. Heckman, 86 Crim. L. Rep. 519 (3d Cir. 1/11/10):
Holding: Where sex Defendant had no history of using internet to lure children for sex, court cannot impose a lifetime ban on internet use because this is overbroad.

U.S. v. Miller, 86 Crim. L. Rep. 559 (3d Cir. 2/5/10):
Holding: Even though Defendant had been convicted of an internet child pornography crime, trial court should not have imposed a lifetime ban on accessing the internet.

U.S. v. Olhovsky & U.S. v. Tomko, 85 Crim. L. Rep. 134 (3d Cir. 4/16/09 & 4/17/09):
Holding: Even though Guidelines recommended much higher sentences for child pornography Defendant and tax evader Defendant than district court imposed, district courts must still engage in individualized sentencing and appellate court will review for substantive reasonableness; appellate court upholds lower sentences under abuse of discretion standard.

U.S. v. Olhovsky, 2009 WL 1014482 (3d Cir. 2009):
Holding: Sentencing court erred in believing it could not subpoena a psychologist from pretrial services to testify on behalf of Defendant in child pornography case, and error was not harmless.

U.S. v. Kennedy, 84 Crim. L. Rep. 541 (3rd Cir. 2/4/09):
Holding: Where persons were reimbursed by a third-party for their financial losses, they do not necessarily qualify as "victims" for the number-of-victims enhancement provisions of the Sentencing Guidelines.

U.S. v. Berry, 84 Crim. L. Rep. 449, 2009 WL 22890 (3d Cir. 1/6/09):
Holding: Where a judge considered Defendant's prior arrest record in sentencing and concluded that Defendant must have done something else in the past for which he was not punished, due process was violated; the arrest record did not provide the preponderance of evidence required by due process.

U.S. v. Washington, 84 Crim. L. Rep. 330 (3d Cir. 12/11/08):
Holding: Even though Defendant obtained his sentence through fraud on the court, the court had no authority to change the sentence once the jurisdictional time for sentence modification had expired.
U.S. v. Cole, 2009 WL 1495402 (3d Cir. 2009):
Holding: Court cannot toll the supervised release of Defendant for period Defendant is outside of the U.S. due to being deported.

U.S. v. Hopkins, 2009 WL 2579611 (3d Cir. 2009):
Holding: Misdemeanor conviction for escape is not crime of violence.

U.S. v. Rigas, 86 Crim. L. Rep. 130 (3d Cir. 10/21/09):
Holding: Section 371 which makes it a crime to conspire to "commit offenses" against the U.S. or "defraud" the U.S. does not authorize separate punishments for the "commit offenses" act and the "defraud" act when the same agreement gives rise to both charges. (The 8th Circuit has held the opposite in *U.S. v. Ervasti*, 201 F.3d 1029 (8th Cir. 2000)).

U.S. v. Arrelucea-Zamudio, 85 Crim. L. Rep. 703 (3d Cir. 9/14/09):
Holding: Even though a district lacks a "fast-track" early disposition program, the judge has discretion to deviate downward from the guidelines to account for the disparity created by lower immigration sentences in "fast-track" districts.

U.S. v. Lloyd, 85 Crim. L. Rep. 324 (3d Cir. 5/27/09):
Holding: 5th Amendment due process right to confront adverse witnesses requires Gov't to show some good cause for a declarant's absence before presenting hearsay testimony in parole revocation proceeding.

Doe v. Pennsylvania Bd. of Probation and Parole, 2008 WL 183732 (3d Cir. 2008):
Holding: Sex offender registration statute violated equal protection where it required any sex offender who moved into State to register as sex offenders, but only required in-state offenders to register if they were found to be a "sexually violent predators."

U.S. v. Voelker, 81 Crim. L. Rep. 353 (3d Cir. 6/5/07):
Holding: A lifetime ban on computer usage and a lifetime ban on possession of adult pornography could not be imposed as a condition of supervised release.

U.S. v. Alston, 2010 WL 2635796 (4th Cir. 2010):
Holding: Prior conviction did not qualify as crime of violence under ACCA where Defendant had entered an *Alford* plea to the prior.

U.S. v. Nicholson, 2010 WL 2723144 (4th Cir. 2010):
Holding: Counsel had actual conflict of interest where he failed to move for a downward departure of Defendant's sentence on the basis of self-defense, where counsel was also representing the person who had threatened Defendant's life.

U.S. v. Alston, 87 Crim. L. Rep. 682 (4th Cir. 7/2/10):
Holding: Recidivist enhancement cannot be based on prior *Alford* plea proffer.

U.S. v. Bethea, 2010 WL 1695608 (4th Cir. 2010):
Holding: Escape conviction not crime of violence under ACCA.

U.S. v. Fennell, 2010 WL 251591 (4th Cir. 2010):
Holding: Where court was permitted to reduce a sentence under statute authorizing reductions of sentences subsequently lowered by Sentencing Commission, court was not required to follow its original method of calculating departure.

U.S. v. Herder, 2010 WL 476657 (4th Cir. 2010):
Holding: Court's refusal to impose a sentence below Guidelines for crack offense was unreasonable where court failed to understand its authority to sentence below the applicable crack range.

U.S. v. Munn, 2010 WL 546486 (4th Cir. 2010):
Holding: Court had authority to reduce crack sentence based on amendments to Guidelines even though Defendant was a career offender.

U.S. v. Lewis, 87 Crim. L. Rep. 364 (4th Cir. 5/27/10):
Holding: Even though Sentencing Guidelines are only advisory, an amendment increasing the range can be ex post facto.

U.S. v. Stewart, 2010 WL 546492 (4th Cir. 2010):
Holding: The "original term of imprisonment" for purposes of sentence reduction motion was the previously-lowered sentence the Defendant was currently serving.

U.S. v. Rivers, 2010 WL 668928 (4th Cir. 2010):
Holding: Failure to stop for blue light is not "violent felony" under ACCA.

U.S. v. Mendoza-Mendoza, 2010 WL 746431 (4th Cir. 2010):
Holding: Where court said it was "obligated" to impose a Guideline sentence "unless I find a reason for departure," this indicated that the court gave Guidelines quasi-mandatory effect and required resentencing.

U.S. v. Maroquin-Bran, 86 Crim. L. Rep. 264 (4th Cir. 11/9/09):
Holding: Prior conviction for selling or transporting marijuana under Calif. law is not a prior conviction for "drug trafficking offense" under 2L1.2(b)(1)(A)(i) for defendants convicted of illegally reentering U.S. after deportation.

U.S. v. Munn, 86 Crim. L. Rep. 614 (4th Cir. 2/17/10):
Holding: Defendant's career offender designation does not bar a 3582(c)(2) reduction. 8th Circuit has held the opposite in *U.S. v. Blackmon*, 584 F.3d 1115 (8th Cir. 2009).

U.S. v. Lynn, 86 Crim. L. Re. 538 (4th Cir. 1/28/10):
Holding: Where Defendant had argued that guidelines called for different sentence than the one the court ultimately imposed, Defendant was not required to make a formal, post-sentencing objection to the sentence to preserve a challenge to the procedural reasonableness of the sentence.

U.S. v. Stewart, 86 Crim. L. Rep. 672 (4th Cir. 2/17/10):
Holding: Even though defendants received substantial assistance reductions under Rule 35, they are eligible for resentencing to reflect a subsequent guidelines amendment.

U.S. v. Squirrel, 86 Crim. L. Rep. 338, 2009 WL 4578715 (4th Cir. 12/7/09):
Holding: Accessory-after-fact to murder cannot be ordered to pay restitution to Victim's estate.

U.S. v. Mehta, 86 Crim. L. Rep. 576 (4th Cir. 2/5/10):
Holding: Calculation of "tax loss" under sentencing guidelines from a nonrandom sample of audited returns was erroneous.

U.S. v. Harvey, 83 Crim. L. Rep. 674 (4th Cir. 7/14/08):
Holding: In fraudulent contract case, the amount of restitution is not the profit the Defendant made on the contract, but the loss suffered by the person defrauded.

U.S. v. Thornton, 2009 WL 242382 (4th Cir. 2009):
Holding: Virginia conviction for statutory rape not "violent felony" under Armed Career Criminal Act.

U.S. v. Hatcher, 85 Crim. L. Rep. 15, 2009 WL 638964 (4th Cir. 3/13/09):
Holding: Where sex offenders were charged with failing to register as sex offender under SORNA before the Attorney General made SORNA retroactive, the convictions had to be reversed, because the alleged failures to register happened before there was a duty to register.

U.S. v. Thorton, 84 Crim. L. Rep. 522 (4th Cir. 2/23/09):
Holding: Conviction for nonforcible statutory rape of child between ages 13 and 15 is not "violent felony" under Armed Career Criminal Act.

U.S. v. Dews, 2008 WL 5413465 (4th Cir. 2008):
Holding: Even though Defendant's sentence was agreed upon as a plea bargain, district court had authority to consider reducing it after relevant sentencing guidelines range was lowered.

U.S. v. Smith, 2009 WL 1452045 (4th Cir. 2009):
Holding: Where court stated Guideline range was presumptively reasonable, this required resentencing.

U.S. v. Cameron, 85 Crim. L. Rep. 575 (4th Cir. 7/21/09):
Holding: Even though Defendant in counterfeit conspiracy produced and gave out bogus bills to others, he was not subject to leadership-role enhancement unless Gov't showed he supervised others.

U.S. v. Bustillos-Pena, 2010 WL 2891632 (5th Cir. 2010):
Holding: Sentence for illegal reentry into U.S. should not be enhanced on ground that Defendant had previously been convicted of a drug trafficking offense for which the sentence imposed exceeded 13 months.

U.S. v. Ortiz, 2010 WL 2990044 (5th Cir. 2010):
Holding: Where Defendant was convicted of marijuana trafficking offense, court erred in counting cocaine found in a suitcase as "relevant conduct" where the two offenses were not part of common scheme or plan.

U.S. v. Gonzales, 2010 WL 3432601, 2010 WL 3583930 (5th Cir. 2010):
Holding: Where, upon revocation of probation, judge ordered Defendant to immediately pay balance of $4,000 fine, judge was required to consider Defendant's financial circumstances.

U.S. v. Roberts, 88 Crim. L. Rep. 122, 2010 WL 4053921 (5th Cir. 10/15/10):
Holding: Prosecutor breached plea agreement by arguing that Defendant be sentenced

under "career offender" provisions of USSG as an "adjustment" under 1B1.1(f) because this raised Defendant's base offense level from the one in the plea agreement.

U.S. v. Garcia, 2010 WL 1816619 (5th Cir. 2010):
Holding: Court could resentence Defendant under crack amendments, even though he had stipulated to minimum sentence.

U.S. v. Morales-Sanchez, 2010 WL 2375820 (5th Cir. 2010):
Holding: Even though Defendant while in patrol car after arrest called someone and asked them to report a car as stolen, this did not "materially hinder" the police investigation to qualify for an obstruction of justice enhancement under USSG 3C1.1.

Meza v. Livingston, 2010 WL 2000517 (5th Cir. 2010):
Holding: Parolee who was convicted of non-sex offense but who was required to comply with sex offender treatment program as part of parole was denied due process.

U.S. v. John, 2010 WL 432405 (5th Cir. 2010):
Holding: Failure to grant three-level reduction due to offense being only partially completed was plain error.

U.S. v. Cooley, 86 Crim. L. Rep. 361 (5th Cir. 12/9/09):
Holding: Even though Defendant bargained for a plea in exchange for waiving right to appeal or collaterally attack sentence, this did not preclude Defendant from moving to modify sentence under 18 USC 3582(c)(2) to reflect subsequent revision in Sentencing Guildelines.

U.S. v. Sandlin, 2009 WL 4265480 (5th Cir. 2009):
Holding: Where record was devoid of evidence that the bank extended credit because of Defendant's false statements, Gov't failed to prove Defendant derived more than $1 million in receipts as "a result of" the offense to warrant this sentencing factor enhancement.

U.S. v. Sauseda, 86 Crim. L. Rep. 583 (5th Cir. 2/4/10):
Holding: Even though Defendant produced methamphetamine which caused strong chemical odor, sentencing guideline enhancement for discharge of toxic or hazardous substances did not apply because that only applies where a defendant violates certain federal environmental laws.

U.S. v. Delgado-Martinez, 2009 WL 902390 (5th Cir. 2009):
Holding: Where court calculated Guideline range incorrectly, this was not harmless error because there was no indication the court would have selected the same sentence if the range had been calculated correctly.

U.S. v. Ollison, 2009 WL 27250 (5th Cir. 2009):
Holding: School secretary who stole funds from school was not in a "position of trust" for sentence enhancement purposes under Sentencing Guidelines because job did not involve complex decisionmaking.

U.S. v. Armendariz-Moreno, 2009 WL 1653551 (5th Cir. 2009):
Holding: Texas offense of unauthorized use of vehicle is not crime of violence.

U.S. v. Jasso, 86 Crim. L. Rep. 246 (5th Cir. 11/9/09):
Holding: A court counting criminal history points under 4A1.2(k), which concerns prior revocations of parole or supervised release, should count only the portions of the prior sentence that was not suspended.

U.S. v. Woods, 84 Crim. L. Rep. 163 (5th Cir. 10/28/08):
Holding: Probation condition could not order Defendant to only live with relatives.

U.S. v. Quintana-Gomez, 83 Crim. L. Rep. 15 (5th Cir. 3/25/08):
Holding: District court has no authority to order a sentence it is imposing run consecutively to an as-yet-unimposed sentence of another court (disagreeing with 8th Circuit's opposite conclusion in *U.S. v. Mayotte*, 249 F.3d 797 (8th Cir. 2001)).

U.S. v. Rosa-Pulido, 2008 WL 1903779 (5th Cir. 2008):
Holding: Conviction for "unlawful sexual contact" was not a "crime of violence" for Sentencing Guideline purposes.

U.S. v. Torres, 2008 WL 2416222 (5th Cir. 2008):
Holding: Probation condition prohibiting Defendant from living with anyone but a blood relative or spouse violated due process in drug case.

U.S. v. Conner, 2008 WL 2876564 (5th Cir. 2008):
Holding: Card owners who were reimbursed by their credit cards in fraud scheme were not "victims" for sentencing enhancement purposes.

U.S. v. Hollis, 82 Crim. L. Rep. 180, 2007 WL 3151700 (5th Cir. 10/30/07):
Holding: Even though Defendant stipulated to existence of prior felony for underlying crime of felon in possession of firearm, Defendant could later challenge conviction from serving as basis for recidivist enhancement under Armed Career Criminal Act.

U.S. v. Gomez-Gomez, 2007 WL 2070276 (5th Cir. 2007):
Holding: "Forcible rape" conviction was not a "crime of violence" for federal purposes because did not have as an element the use, attempted use, or threat of force.

U.S. v. Jones, 2007 WL 92557 (5th Cir. 2007):
Holding: Judge could not rely on presentence report's statement of Medicare reimbursement losses as a factor in sentencing Defendant because such reliance was

unreasonable given that there was no showing that the amounts paid by Medicare were unreasonable.

U.S. v. Maturin, 2007 WL 1575362 (5th Cir. 2007):
Holding: Defendant cannot be ordered to pay restitution in excess of losses caused by him.

U.S. v. Wilson, 87 Crim. L. Rep. 793 (6th Cir. 7/19/10):
Holding: Judges should not prepare a written sentencing opinion before actual sentencing hearing, since this creates appearance that judge has decided sentencing before hearing the parties.

U.S. v. Bowers, 2010 WL 3168260 (6th Cir. 2010):
Holding: Statute establishing appellate jurisdiction to review a final sentence provides jurisdiction to review appeal of a sentence reduction of prison term based on USSG that was subsequently lowered.

U.S. v. Woods, 2010 WL 1655580 (6th Cir. 2010):
Holding: Defendant's sentence should not have been enhanced for possession of firearm in drug conspiracy because evidence did not show that presence of firearm was reasonably foreseeable to Defendant.

U.S. v. Camacho-Arellano, 87 Crim. L. Rep. 699 (6th Cir. 7/16/10):
Holding: Federal judges can vary from USSG on basis of disparities caused by "fast-track" program.

U.S. v. Almany, 2010 WL 785648 (6th Cir. 2010):
Holding: Where Defendant was given a 5 year mandatory minimum for possession of firearm in furtherance of drug trafficking and a consecutive 10 year mandatory minimum for cocaine offense, this was prohibited because firearm statute exempted the mandatory minimum where Defendant was sentenced to another greater mandatory minimum.

U.S. v. Anglin, 2010 WL 1330106 (6th Cir. 2010):
Holding: Court of Appeals' decision that a federal escape conviction was "crime of violence" was not the "law of the case" because intervening Supreme Court decision of *Chambers v. U.S.*

Villagarcia v. Wardne, Noble Correctional Inst., 2010 WL 1068203 (6th Cir. 2010):
Holding: Imposition of seven year sentence based on a judicial finding that the shorter sentence of two years would demean the seriousness of Defendant's conduct violated right to jury fact-finding under *Apprendi* and *Blakely*.

U.S. v. Utesch, 2010 WL 693288 (6th Cir. 2010):
Holding: Defendant convicted of sex offense before enactment of SORNA was not subject to SORNA's registration requirements.

U.S. v. Wallace, 87 Crim. L. Rep. 53 (6th Cir. 3/16/10):
Holding: District court's failure to explain why Defendant's sentence was twice as long as co-defendant's was plain error requiring reversal.

U.S. v. Utesch, 87 Crim. L. Rep. 143 (6th Cir. 3/2/10):
Holding: SORNA does not apply retroactively to defendants who were charged after the close of the administrative comment period for the retroactivity provision and more than 30 days after publication of the rule.

U.S. v. Barahona-Montenegro, 2009 WL 1323526 (6th Cir. 2009):
Holding: District court's failure to properly calculate or explain sentence under Guidelines required reversal.

U.S. v. Cox, 2009 WL 1422015 (6th Cir. 2009):
Holding: Even though indictment said Defendant in conspiracy had five kilograms of cocaine, where evidence showed Defendant was responsible for only two kilograms, court was permitted to sentence Defendant for the two kilograms only.

U.S. v. Garcia-Robles, 2009 WL 937244 (6th Cir. 2009):
Holding: Where court issued written opinion on sentencing variance and then entered judgment two days later, the court left insufficient time for Defendant to object to the variance.

U.S. v. Herrera-Zuniga, 2009 WL 1940382 (6th Cir. 2009):
Holding: District court's authority to reject sentencing guideline on policy grounds was not limited to crack cocaine context.

U.S. v. Mosley, 2009 WL 2176634 (6th Cir. 2009):
Holding: Michigan conviction for resisting and obstructing police officer is not categorically crime of violence.

U.S. v. O'Georgia, 2009 WL 1766717 (6th Cir. 2009):
Holding: Even though Defendant filed meritless appeals and recusal motions, this did not justify upward departure of his sentence.

U.S. v. Recla, 2009 WL 763594 (6th Cir. 2009):
Holding: Remand was warranted for re-sentencing consideration where Gov't filed postsentencing motion based on Defendant's future cooperation.

U.S. v. White, 2009 WL 1010895 (6th Cir. 2009):
Holding: Where district court relied on an estimate of cocaine dealt by Defendant that was far higher than what gov't informant said, remand was required for reconsideration of sentence; life sentence on 29 year old Defendant should not be imposed lightly.

U.S. v. Cain, 86 Crim. L. Rep. 103 (6th Cir. 10/13/09):
Holding: (1) SORNA registration provisions may not be applied retroactively to certain sex offenders convicted prior to 2006 effective date, and (2) regulations issued by the DOJ were not exempt from the Administrative Procedure Act's notice and comment requirements. (The 8th Circuit issued a contrary ruling on retroactivity in *U.S. v. May*, 535 F.3d 912 (8th Cir. 2008).

U.S. v. Stall, 85 Crim. L. Rep. 715 (6th Cir. 9/11/09):
Holding: One-day sentence for downloading child pornography followed by restrictive release provisions upheld, but court criticizes gov't for not offering "affirmative argument" for a higher, within guidelines sentence.

U.S. v. O'Georgia, 85 Crim. L. Rep. 462 (6th Cir. 6/24/09):
Holding: Even though Defendant filed numerous vexatious and obnoxious pro se motions, this did not justify increasing his sentence under the Sentencing Guidelines, because filing pro se motions does not amount to obstruction of justice.

U.S. v. Beltran, 85 Crim. L. Rep. 418 (6th Cir. 6/12/09):
Holding: "Sentencing factor manipulation" can justify a downward variance from Guidelines; "sentencing factor manipulation" is when gov't engages in outrageous conduct to create a sentencing factor enhancement, such as inducing a drug Defendant to use firearms in drug offense.

U.S. v. Grant, 85 Crim. L. Rep. 384 (6th Cir. 6/9/09):
Holding: Fed. Rule Criminal Procedure 35(b) no longer restricts judges considering a sentence below the mandatory minimum from only looking at extent of Defendant's assistance to authorities.

U.S. v. May, 85 Crim. L. Rep. 386 (6th Cir. 6/9/09):
Holding: Abuse of trust enhancement provision does not ordinarily apply to business owners who evade personal or payroll taxes.

Terrell v. U.S., 85 Crim. L. Rep. 10, 2009 WL 775434 (6th Cir. 3/26/09):
Holding: Where statute provided that prisoner "shall be allowed to appear and testify," then Parole Commission could not conduct its hearing by videoconferencing without allowing prisoner to appear in person at hearing.

U.S. v. Ford, 85 Crim. L. Rep. 14 (6th Cir. 3/18/09):
Holding: Conviction for "walkaway" escape is not crime of violence for federal sentencing.

U.S. v. Christman, 2007 WL 4105053 (6th Cir. 2007):
Holding: Sentencing judge cannot rely on ex parte information from probation officers that contradicts the record evidence, because Defendant had right to notice of evidence against him.

U.S. v. Christman, 82 Crim. L. Rep. 253 (6th Cir. 11/20/07):
Holding: Judge's undisclosed, ex parte contacts with probation officer required remand for resentencing, because denied Defendant opportunity to comment on matters affecting sentencing.

U.S. v. Hamad, 81 Crim. L. Rep. 540 (6th Cir. 7/19/07):
Holding: Due process does not allow judge to consider confidential letters at sentencing which Defendant does not have an opportunity to rebut.

U.S. v. Collier, 2007 WL 2001638 (6th Cir. 2007):
Holding: Prior conviction for "prison escape" is not a "crime of violence."

U.S. v. Neal, 2010 WL 2652463 (7th Cir. 2010):
Holding: Where judge delayed in amending the explanation for denying a sentence reduction until day for filing notice appeal and then denied the reduction due to Defendant's prison behavior, Defendant was entitled to evidentiary hearing to factually contest his alleged prison behavior.

U.S. v. Hernandez, 2010 WL 3431625 (7th Cir. 2010):
Holding: Even though Defendant faced a mandatory minimum of 120 months for distribution of more than 50 grams of cocaine base, the trial court had discretion to run this concurrently to an unrelated state sentence for possession of firearm.

U.S. v. Campbell, 2010 WL 3221830 (7th Cir. 2010):
Holding: Court was authorized to credit federal sentence with time served on a state term, even though guideline did not expressly authorize downward adjustment, unlike guideline governing time served on undischarged state sentence resulting from an offense that was relevant conduct.

U.S. v. Figueroa, 2010 WL 3528847 (7th Cir. 2010):
Holding: District court failed to adequately explain Defendant's sentence sufficiently for appellate review where court made comments about Defendant being a Mexican, about Mexicans' involvement in drug trade, about Defendant and his family being illegal immigrants, and about the drug trade and terrorism.

U.S. v. Reyes-Hernandez, 88 Crim. L. Rep. 144, 2010 WL 3911336 (7th Cir. 10/7/10):
Holding: Judges in districts without "fast track" authority for immigration offenders have authority to deviate from USSG on basis of sentencing disparity caused by such programs.

U.S. v. Boyd, 87 Crim. L. Rep. 663 (7th Cir. 6/11/10):
Holding: Federal court lacks authority to order Defendant to pay fine through BOP's Inmate Financial Responsibility Program because such program is voluntary.

U.S. v. Thompson, 2010 WL 986548 (7th Cir. 2010):
Holding: Where rule gave Defendant right to appear and present evidence before his probation could be revoked, this meant that Defendant had right to appear in same courtroom as judge and revocation hearing via videoconference violated rule.

U.S. v. Barnes, 2010 WL 1375405 (7th Cir. 2010):
Holding: Dist. Ct. was not bound by stipulation entered into by parties for sentencing purposes because ct. is not a party to the contract, but ct. erred in rejecting stipulation where it had accepted identical stipulations in co-defendants' cases.

U.S. v. McDonald, 2010 WL 252279 (7th Cir. 2010):
Holding: Wisc. conviction for first-degree reckless injury not a "crime of violence."

U.S. v. Bell, 86 Crim. L. Rep. 754 (7th Cir. 3/16/10):
Holding: Sentencing Guideline of enhancement for violating a court order cannot be applied to Defendant convicted of federal failure to pay child support because this would be impermissible double enhancement.

U.S. v. Jumah, 2010 WL 1235844 (7th Cir. 2010):
Holding: Ct. plainly erred in sentencing Defendant based on the gross weight of pseudoephedrine pills used to make meth rather than weight of the pure drugs contained in them.

Welch v. U.S., 87 Crim. L. Rep. 208 (7th Cir. 5/4/10):
Holding: *Begay v. U.S.*, 553 U.S. 137 (2008), narrowly construing ACCA's prior "violent felonies" provision, is retroactive.

U.S. v. Goodpasture, 2010 WL 424577 (7th Cir. 2010):
Holding: Calif. conviction for lewd act on person under 14 was not "violent felony."

U.S. v. Corner, 2010 WL 935754 (7th Cir. 2010):
Holding: Sentencing court may disagree with career offender guidelines.

U.S. v. Hines, 2010 WL 606020 (7th Cir. 2010):
Holding: Even though Defendant purchased 1.5 kilos of powder cocaine, there was no basis to assume he would convert all of this to crack, so his sentence for crack distribution should not have been calculated using that assumption.

U.S. v. Marion, 86 Crim. L. Rep. 392 (7th Cir. 12/29/09):
Holding: District judges' rulings on motion to reduce sentences under crack amendments must be sufficiently explained to allow meaningful appellate review.

U.S. v. Kirkpatrick, 2009 WL 4756227 (7th Cir. 2009):
Holding: Court erred in not considering what Defendant's sentence would be under guidelines for post-arrest acts of confession to crimes he did not commit.

U.S. v. Goodpasture, 86 Crim. L. Rep. 624 (7th Cir. 2/8/10):
Holding: Lewd or lascivious conduct conviction for lewd behavior with person under age 14 does not qualify as a "violent felony" under ACCA.

Buchmeier v. U.S., 2009 WL 2882819 (7th Cir. 2009):
Holding: Where Illinois sent Defendant a notice after he served his burglary sentences that his right to vote and hold public office had been restored, this qualified as a "restoration of civil rights" so his burglary convictions could not be counted as predicate violent felonies under ACCA.

U.S. v. Evans, 2009 WL 2461367 (7th Cir. 2009):
Holding: Illinois conviction for aggravated battery is not crime of violence because offense can be committed by making non-forcible contact of an insulting or provoking nature.

U.S. v. Gear, 2009 WL 2487096 (7th Cir. 2009):
Holding: Illinois conviction for reckless discharge of a firearm is not crime of violence.

U.S. v. Woods, 2009 WL 2382700 (7th Cir. 2009):
Holding: Illinois offense for involuntary manslaughter was not crime of violence for career offender purposes because offense is committed recklessly.

U.S. v. Monroe, 85 Crim. L. Rep. 677 (7th Cir. 9/1/09):
Holding: Even though Defendant waived his right to appeal and collateral attack, this did not preclude him from seeking a sentence reduction under 18 USC 3582(c)(2) because a sentence reduction is different than appeal or collateral attack.

U.S. v. Villegas-Miranda, 85 Crim. L. Rep. 685 (7th Cir. 8/27/09):
Holding: District judge who rejects sentencing argument with some merit must explain its decision with more than a general comment that the argument is denied.

U.S. v. Knox, 85 Crim. L. Rep. 576 (7th Cir. 7/20/09):
Holding: Even though crack traffickers were sentenced as "career offenders," they can still get resentencing under *Kimbrough* as long as they were convicted of conspiracy, not the substantive drug offense.

U.S. v. Osborne, 84 Crim. L. Rep. 412 (7th Cir. 1/5/09):
Holding: A prior state conviction for a sexual offense that covers many offenses including consensual sex between teenagers does not necessarily qualify as a conviction relating to "sexual abuse" of a minor requiring an enhanced sentence for child pornography under Sec. 2252(b)(1).

U.S. v. Alldredge, 84 Crim. L. Rep. 412 (7th Cir. 12/29/08):
Holding: Even though counterfeit bills were printed outside the U.S., Defendant convicted of distributing counterfeit currency did not merit enhanced sentence for

offenses where "any part" was committed outside the U.S. under U.S.S.G. Sec. 2B5.1(b)(5).

U.S. v. Ryals, 2008 WL 90083 (7th Cir. 2008):
Holding: Where attorney and client had genuine disagreement regarding course of representation, trial court abused discretion in not appointing new counsel for sentencing hearing.

U.S. v. Tanner, 84 Crim. L. Rep. 3 (7th Cir. 9/12/08):
Holding: District court cannot grant a continuance of sentencing in order to be able to use new sentencing guidelines to take effect later.

U.S. v. Smith, 2008 WL 4182648 (7th Cir. 2008):
Holding: Crimes requiring only mens rea of recklessness are not violent felonies under ACCA.

U.S. v. Lawrence, 2008 WL 2854151 (7th Cir. 2008):
Holding: Even though trial court inadvertently sentenced Defendant to time served, this was not reviewable when the gov't failed to appeal.

U.S. v. Luepke, 81 Crim. L. Rep. 568 (7th Cir. 7/24/07):
Holding: Where judge announced how judge would sentence of Defendant and then asked if Defendant wanted to say anything "before" imposing sentence, Defendant was denied right to allocution and this was plain error.

U.S. v. Cochrane, 2010 WL 2557384 (8th Cir. 2010):
Holding: Defendant was entitled to evidentiary hearing to contest alleged state court convictions which were used to increase her criminal history; the trial court had erroneously relied on disputed state court docket sheets which were not entered into evidence to show the prior convictions.

Sun Bear v. U.S., 87 Crim. L. Rep. 757 (8th Cir. 7/20/10):
Holding: (1) *Begay v. U.S.*, 553 U.S. 137, which limited sentence enhancements under ACCA, applies retroactively on collateral review of convictions that were final when the case was handed down; (2) prior Utah conviction for attempted theft of vehicle was not crime of violence.

U.S. v. Simons, 87 Crim. L. Rep. 758, 2010 WL 2836619 (8th Cir. 7/21/10):
Holding: Supervised release condition barring Defendant from possession of material containing "nudity" was a greater restraint on liberty than was reasonable necessary, and violated 1st Amendment rights; court could ban possession of "pornography" but mere "nudity" would ban biology textbooks or art books of the Venus de Milo.

U.S. v. Durham, 2010 WL 3341251 (8th Cir. 2010):
Holding: Even though peer-to-peer file sharing program allowed sharing of child pornography, he should not have been subject to a distribution enhancement under USSG where he did not know that the program was distributing (uploading).

U.S. v. Steward, 2010 WL 934251 (8th Cir. 2010):
Holding: Iowa conviction for operating a vehicle without owner's consent is not "crime of violence" under career offender guideline.

U.S. v. Brown, 87 Crim. L. Rep. 7, 2010 WL 1076057 (8th Cir. 3/25/10):
Holding: Prior state convictions for delivering "fake" meth and cocaine do not qualify as "felony drug offenses" under recidivism provision of Controlled Substances Act, 21 USC 801, since the Act is concerned with actual controlled substances.

U.S. v. Nguyen, 87 Crim. L. Rep. 43 (8th Cir. 4/2/10):
Holding: Even though plea agreement contained exception to appeal waiver for constitutional errors, Defendant cannot appeal a sentence imposed by judge who applied the "extraordinary circumstances" restriction on variances condemned in *Gall*, because the U.S. Supreme Court's repudiation of the extraordinary-circumstances standard was rooted in the remedial holding of *Booker*, not the constitutional holding of the case.

Hodge v. U.S., 87 Crim. L. Rep. 152 (8th Cir. 4/27/10):
Holding: Defendants whose convictions were final when *Gall* struck down certain sentencing practices cannot obtain postconviction relief on that basis; *Gall* is not retroactive.

U.S. v. Hull, 87 Crim. L. Rep. 314 (8th Cir. 5/26/10):
Holding: Where Defendant used a computer in his home to send child pornography, the home and surrounding acerage were "used" to distribute child pornography and were forfeitable under 18 USC 2253(a)(3).

U.S. v. Almeida-Perez, 2008 WL 5214949 (8th Cir. 2008):
Holding: In order to give an enhanced sentence to illegal immigrants in possession of firearms in connection with possession of cocaine, court had to find the defendants were engaged in drug trafficking at the same time they possessed the guns, or that the firearms facilitated the possession offense.

U.S. v. Spotted Elk, 2008 WL 4999125 (8th Cir. 2008):
Holding: District court erred in holding Defendant accountable for same amount of drugs as the leader of the conspiracy without determining if Defendant could have foreseen amount of drugs.

U.S. v. Lovelace, 2009 WL 1375168 (8th Cir. 2009):
Holding: Where judge relied on a previously undisclosed irrelevant factor regarding his personal knowledge of Defendant's criminal history in sentencing Defendant, this affected the fairness and integrity of the proceedings, and required resentencing.

U.S. v. Parks, 2009 WL 987825 (8th Cir. 2009):
Holding: Remand for resentencing was required to determine if Missouri conviction for escape was a "violent felony" under the career offender provisions of Sentencing Guidelines.

U.S. v. Burns, 85 Crim. L. Rep. 635, 2009 WL 2525585 (8th Cir. 8/20/09)(en banc):
Holding: Sentences below guidelines must be judged by deferential standard in *Gall*, not by prior 8th Cir. standard; question is whether sentence reduction is substantively unreasonable.

U.S. v. Feemster, 85 Crim. L. Rep. 591 (8th Cir. 7/13/09)(en banc):
Holding: Substantial downward variance from guidelines was justified for crack dealer whose criminal career began when he was just 17, who was still young, and where no weapon was involved in offense.

U.S. v. Bender, 85 Crim. L. Rep. 420 (8th Cir. 6/2/09):
Holding: (1) Even though sex offender had used a library computer to view child pornography, supervised release condition that banned him from going to any public or private library was overbroad and infringed on "important" constitutional rights; (2) supervised release condition that required Defendant to have an adult chaperone whenever he went to a place where children were likely to be also overbroad.

U.S. v. Chase, 85 Crim. L. Rep. 50 (8th Cir. 3/25/09):
Holding: The standards covering departures do not bind a district court when employing its discretion with respect to variances.

U.S. v. Viezcas-Soto, 2009 WL 961277 (8th Cir. 2009):
Holding: Gov't failed to prove that California conviction for unlawful sexual intercourse qualified as felony within meaning of guidelines authorizing 16-level enhancement.

U.S. v. Gordon, 84 Crim. L. Rep. 632 (8th Cir. 2/24/09):
Holding: A Missouri felony conviction for endangering the welfare of a child is not a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S. Sec. 924(e)(B).

U.S. v. Howell, 84 Crim. L. Rep. 451, 2009 WL 66068 (8th Cir. 1/13/09):
Holding: (1) The federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. Sec. 16913, is valid under the Commerce Clause; and (2) Venue for prosecuting a defendant for leaving one State and not registering in the new State may lie in the State the defendant left.

U.S. v. Espinoza, 2008 WL 3915001 (8th Cir. 2008):
Holding: Even though Defendant was charged with possession firearm as an unlawful methamphetamine user and other drug offenses, where the firearm offense was not closely related with the other drug offenses, this did not warrant grouping the firearms offense with the drug offenses for sentencing purposes.

U.S. v. Garate, 2008 WL 4527760 (8th Cir. 2008):
Holding: Even though sentence was below guideline range, district court did not abuse discretion in imposing 30-month sentence for travel with intent to solicit sex with minor where court considered mitigating circumstances.

U.S. v. Spikes, 2008 WL 4527759 (8th Cir. 2008):
Holding: Where Defendant was being sentenced for drug conspiracy, an offense level increase for committing the offense while under another sentence was not applicable where Defendant's only sentence in state court was a fine and her conditions of deferred prosecution were not incorporated into her sentence.

U.S. v. Heikes, 2008 WL 2051085 (8th Cir. 2008):
Holding: DWI convictions are not "crimes of violence" under Armed Career Criminal Act.

U.S. v. Boal, 2008 WL 2853211 (8th Cir. 2008):
Holding: Judge does not have equitable authority to order restitution paid into court be given to anyone other than the crime victim.

U.S. v. Williams, 2008 WL 3266912 (8th Cir. 2008):
Holding: Prior Missouri conviction for auto tampering is not "crime of violence."

U.S. v. May, 83 Crim. L. Rep. 708 (8th Cir. 7/31/08):
Holding: SORNA's provision making it criminal offense to travel in interstate commerce and not register as sex offender is not ex post facto as applied to persons convicted of sex crimes before its enactment, and the statute does not exceed the Commerce Clause.

U.S. v. Smith, 83 Crim. L. Rep. 719 (8th Cir. 7/30/08):
Holding: Where Defendant was convicted of felony drug possession on basis of drug residue in plastic bag, Defendant was not subject to increased offense level for also possessing firearm in connection with another felony, U.S.S.G. 2K2.1(b)(6), because evidence was insufficient to show Defendant's gun facilitated the possession of the residue.

U.S. v. Rhone, 2008 WL 2875831 (8th Cir. 2008):
Holding: Defendant's prior juvenile conviction for assault with intent to commit sexual abuse did not require registration under SORNA as condition attached to later non-sex offense absent determination that Defendant's prior conviction was comparable to aggravated sexual abuse.

U.S. v. Spears, 83 Crim. L. Rep. 527 (8th Cir. 6/23/08):
Holding: The discretion given federal judges under *Kimbrough* to deviate from the 100:1 crack/powder sentencing ratio in U.S. Sentencing Guidelines does not allow judges

to come up with their own ratios, uninformed by the general sentencing factors in 18 U.S.C. 3553(a).

U.S. v. Desantiago-Esquivel, 83 Crim. L. Rep. 305 (8th Cir. 5/22/08):
Holding: Judge could not make Defendant's sentence contingent upon a choice by Defendant, and thus, could not make the length of her sentence contingent on whether she voluntarily chose to be deported.

U.S. v. Wiley, 2007 WL 4258623 (8th Cir. 2007):
Holding: Where Defendant did not know that court would upwardly adjust his sentence until it was imposed, Defendant was not required to object to the sentence after it was imposed to preserve for appeal whether it was statutorily reasonable.

U.S. v. Icaza, 81 Crim. L. Rep. 552 (8th Cir. 7/10/07):
Holding: Even though Defendant stole from several different Walgreen's stores, there was only one victim (the Walgreen's corporation) for purposes of sentencing enhancement; each store was not a different victim.

U.S. v. Davis, 79 Crim. L. Rep. 629 (8th Cir. 7/11/06):
Holding: Condition of supervised release that prohibited Defendant convicted of possession of child pornography from having unsupervised contact with his own daughter was plain error because there was no evidence presented that this was necessary to protect daughter or rehabilitate Defendant.

Pirtle v. California Bd. of Prison Terms, 2010 WL 2732888 (9th Cir. 2010):
Holding: Decision denying parole after serving 20 years for murder violated due process where there was no evidence prisoner posed current threat to public safety, and there was no characteristic of the crime that made it especially cruel or callous.

U.S. v. Denton, 2010 WL 2704898 (9th Cir. 2010):
Holding: Where Defendant has committed an uncharged "wobbler" offense that could be either a felony or misdemeanor, no presumption applies that offense is a felony for purposes of determining the grade of Defendant's supervised release under USSG.

U.S. v. Wahid, 87 Crim. L. Rep. 825 (9th Cir. 8/10/10):
Holding: 18 USC 1028A, which mandates a consecutive sentence for aggravated identity theft, does not limit court's discretion to offset that penalty by reducing the sentence for a separate, nonpredicate felony.

U.S. v. Espinoza-Morales, 2010 WL 3516769 (9th Cir. 2010):
Holding: Illegal re-entry Defendant's prior convictions for sexual battery and penetration did not qualify as "crimes of violence" under modified categorical approach to justify 16-level increase.

U.S. v. Munoz-Camerena, 2010 WL 344100 (9th Cir. 2010):
Holding: Applying 8-level enhancement to illegal re-entry Defendant due to prior convictions for drug possession and illegal reentry was error.

U.S. v. Grob, 88 Crim. L. Rep. 227 (9th Cir. 11/10/10):
Holding: Prior misdemeanor of "criminal mischief" was similar to "disorderly conduct" and should not count in criminal history score under USSG 4A1.2(c).

U.S. v. Lazarenko (Kiritchenko), 88 Crim. L. Rep. 160 (9th Cir. 11/3/10):
Holding: Co-conspirator could not qualify as a "victim" for restitution.

U.S. v. Mitchell, 2010 WL 4105220 (9th Cir. 2010):
Holding: Even when Defendant is sentenced as career offender, court has discretion to depart downward due to disparity in crack and powder cocaine.

U.S. v. Castro, 2010 WL 2220598 (9th Cir. 2010):
Holding: Calif. conviction for lewd or lascivious acts on child aged 14 or 15 was not "crime of violence."

U.S. v. Brooks, 87 Crim. L. Rep. 713 (9th Cir. 7/8/10):
Holding: Even though Defendant was victim's pimp, Defendant was not subject to USSG 2G1.3(b)(1) which provides enhancement when a minor is in custody, care or supervisory control of a caretaker. Pimp does not act in loco parentis apart from the offense.

U.S. v. Christensen, 2010 WL 1052344 (9th Cir. 2010):
Holding: An amendment to the commentary to the USSG that the offense level enhancement for influencing a minor to engage in sexual conduct should not apply where "minor" was actually an undercover police officer was a clarification of the law, not a substantive change, so the amendment can be applied retroactively.

U.S. v. Juvenile Male, 2010 WL 10970 (9th Cir. 2010):
Holding: SORNA's retroactive application of sex registration for juveniles is punitive and violates ex post facto.

U.S. v. Denton, 2010 WL 1052346 (9th Cir. 2010):
Holding: Presumption that a charged offense is a felony under "wobbler" statute does not apply to uncharged conduct.

U.S. v. Garrido, 2010 WL 653439 (9th Cir. 2010):
Holding: Defendant was entitled to resentencing for Hobbs Act robbery where sentencing court erroneously though it could not consider acceptance of responsibility reduction because Defendant had contested the charge of using and carrying a firearm during a crime of violence.

U.S. v. Castro, 87 Crim. L. Rep. 120, 2010 WL 1135786 (9th Cir. 3/26/10):
Holding: Calif. conviction for committing lewd acts on 14 or 15 year old does not categorically constitute sexual abuse of minor or statutory rape, so is not "crime of

violence" under Sentencing Guideline enhancement provisions for immigration offenders.

U.S. v. Rich, 87 Crim. L. Rep. 175 (9th Cir. 5/3/10):
Holding: Death of Defendant during direct appeal abates conviction and sentence of restitution.

U.S. v. Andrews, 2010 WL 1338138 (9th Cir. 2010):
Holding: Even though Defendant was convicted of assault, sentencing court should not have excluded at a restitution proceeding medical expert's testimony that Defendant's offense did not cause the victim's physical and mental condition.

U.S. v. Coronado, 87 Crim. L. Rep. 182 (9th Cir. 5/3/10):
Holding: Calif. conviction for negligently discharging firearm cannot be predicate offense for enhanced sentence for firearms possession under USSG 2k2.1(a)(2).

U.S. v. Garrido, 86 Crim. L. Rep. 671 (9th Cir. 2/25/10):
Holding: Even though Defendant did not accept responsibility under 3D1.1(b), he is eligible for 3E1.1 reduction where he accepts responsibility for counts under 3D1.1-3D1.5.

U.S. v. Napulou, 86 Crim. L. Rep. 534 (9th Cir. 2/1/10):
Holding: Release condition that barred Defendant from having contact with her "life partner," who was a convicted felon, required individualized review of the relationship and a justification of the condition on the record.

U.S. v. Aguila-Montes, 2009 WL 115727 (9th Cir. 2009):
Holding: California conviction for first degree residential burglary was not "crime of violence" under Sentencing Guidelines.

U.S. v. Chaney, 2009 WL 2928947 (9th Cir. 2009):
Holding: In determining whether to reduce Defendant's sentence for crack, district court is not required to determine what sentence it would have imposed under former guidelines.

U.S. v. Contreras, 2009 WL 2960623 (9th Cir. 2009):
Holding: A prison cook did not hold a professional or managerial position so as to be classified as a "position of trust" for sentencing purposes.

U.S. v. Cruz-Gramajo, 2009 WL 1813336 (9th Cir. 2009):
Holding: Even though Defendant committed state-law offenses before being caught by immigration authorities, those offenses were not relevant for sentencing for illegal re-entry into U.S.

U.S. v. Juvenile Male, 2009 WL 2883017 (9th Cir. 2009):
Holding: Retroactive application of SORNA's sex registration requirement to person whose sex offense was a juvenile conviction was punitive and violated ex post facto because juvenile adjudications are traditionally permanently closed from the public.

Chioino v. Kernan, 86 Crim. L. Rep. 14 (9th Cir. 9/21/09):
Holding: When federal district court grants federal habeas sentencing relief for violation of *Cunningham v. Calif.*, the remedy is to send the case back to state court for sentencing rather than have the federal court impose sentence.

U.S. v. Amezcua-Vasquez, 85 Crim. L. Rep. 349 (9th Cir. 6/1/09):
Holding: Even though a sentence was within Guideline range, where it was based on an old prior conviction, it was substantively unreasonable.

U.S. v. Showalter, 85 Crim. L. Rep. 526 (9th Cir. 6/26/09):
Holding: Sentencing judge cannot "estimate" the number of victims in financial fraud case for purposes of enhancing sentence under Guidelines.

U.S. v. Calderon-Espinosa, 85 Crim. L. Rep. 545 (9th Cir. 6/24/09):
Holding: Defendant's prior conviction for "loitering for drug activities" is one of the loitering convictions that Guidelines say may not be used to increase Defendant's criminal history score.

U.S. v. Paul, 85 Crim. L. Rep. 79 (9th Cir. 4/2/09):
Holding: Where 9th Circuit had found that a within-guidelines sentence was unreasonable, district court's subsequent imposition of "nearly identical" sentence on remand violated the appellate mandate.

U.S. v. Christensen, 85 Crim. L. Rep. 49 (9th Cir. 3/23/09):
Holding: Statutory rape does not categorically qualify as "violent felony" under ACCA.

State v. Esparza, 84 Crim. L. Rep. 455 (9th Cir. 1/20/09):
Holding: Court may not delegate to probation officer the decision on whether sex treatment is outpatient or inpatient; inpatient treatment involves more restrictions on Defendant's liberty so only court can impose it.

Gonzalez v. Duncan, 84 Crim. L. Rep. 343, 2008 WL 5399079 (9th Cir. 12/30/08):
Holding: Where Defendant registered as a sex offender three months late, a sentence of 28 years to life imprisonment under a three-strikes sentence was disproportionate to the crime and constituted cruel and unusual punishment under the 8th Amendment.

U.S. v. Gomez-Leon, 84 Crim. L. Rep. 12, 2008 WL 4330559 (9th Cir. 9/24/08):
Holding: "Vehicular manslaughter without gross negligence" is not a crime of violence for federal sentencing purposes.

U.S. v. Locklin, 2008 WL 2512923 (9th Cir. 2008):
Holding: Conviction for failure to appear on underlying offense of felon in possession of firearm required a jury-finding that Defendant had the underlying conviction; lack of jury-finding was not harmless error under *Apprendi*.

U.S. v. Locklin, 83 Crim. L. Rep. 527 (9th Cir. 6/25/08):
Holding: Where failure to appear charge required a factual finding that the underlying offense was a felony in order to give an enhanced sentence, the 6th Amendment required this finding be made by a jury.

Butler v. Curry, 83 Crim. L. Rep. 378 (9th Cir. 6/9/08):
Holding: *California v. Cunningham*, 80 Crim. L. Rep. 399 (U.S. 2007), regarding the right to a jury-finding for sentencing is "retroactive" and applies on federal habeas review to sentences that were final before *Cunningham*.

U.S. v. Barsumyan, 82 Crim. L. Rep. 616 (9th Cir. 2/28/08):
Holding: Where Defendant was convicted of credit card fraud, trial court could not impose supervised release condition that Defendant have no access to computers.

U.S. v. Soltero, 82 Crim. L. Rep. 137 (9th Cir. 10/19/07):
Holding: Release condition which required gang-member-Defendant not to associate with any "disruptive group" violated 1st Amendment.

U.S. v. Horvath, 81 Crim. L. Rep. 527 (9th Cir. 7/10/07):
Holding: Lying to a probation officer preparing a PSI is exempt from the federal statute criminalizing making a false statement to a gov't official, 18 USC 1001, because the statute excludes statements made to judges, and this was similar to a statement made to a judge.

U.S. v. Beltran-Munguia, 81 Crim. L. Rep. 388 (9th Cir. 6/7/07):
Holding: A prior conviction for sexual abuse without consent is not a "crime of violence" for federal sentence enhancement purposes because the state statute did not contain an element of force and thus was not a "forcible sexual offense."

U.S. v. Blanton, 80 Crim. L. Rep. 570 (9th Cir. 2/12/07):
Holding: 5th Amendment's double jeopardy clause bars the gov't from appealing a trial judge's finding that a prior juvenile adjudication was insufficient to prove a prior conviction for sentence enhancement purposes.

Gautt v. Lewis, 2007 WL 1515123 (9th Cir. 2007):
Holding: State's failure to inform Defendant pretrial that he was subject to enhanced sentencing violated 6th Amendment right to be informed of charges, where Defendant would have defended differently had he known of the more serious enhancement.

U.S. v. Napier, 2006 WL 2671009 (9th Cir. 2006):
Holding: Defendant's right to be present at sentencing was violated where trial court included in written judgment nonstandard terms of probation.

U.S. v. Washington, 88 Crim. L. Rep. 59 (10th Cir. 9/30/10):
Holding: Counsel was ineffective in failing to warn federal Defendant prior to his presentence investigation interview about the "relevant conduct" concept and that his admissions to the probation office would lead to an increased sentence under the "relevant conduct" guidelines.

U.S. v. Huyoa-Jimenez, 88 Crim. L. Rep. 172 (10th Cir. 10/21/10):
Holding: USSG for immigration offenders who have prior felony drug trafficking offense of less than 13 months does not apply where suspended sentence was imposed on the prior.

U.S. v. Martinez, 2010 WL 1530673 (10th Cir. 2010):
Holding: Arizona conviction for second-degree burglary is not "crime of violence."

U.S. v. De La Torre, 2010 WL 1221710 (10th Cir. 2010):
Holding: Even though Defendant did not formally meet with Gov't for debriefing, where Defendant's trial testimony gave Gov't all information to qualify him for safety-valve offense reduction, court should consider the reduction.

U.S. v. Caldwell, 86 Crim. L. Rep. 264 (10th Cir. 11/9/09):
Holding: Criminal history increase for Defendant who committed offense while under "any criminal justice sentence" does not apply when a probationary term Defendant was serving at the time qualified as a "criminal justice sentence" only because of events that occurred after he committed the offense of conviction.

U.S. v. Shipp, 86 Crim. L. Rep. 362 (10th Cir. 12/16/09):
Holding: *Chambers v. U.S.* (U.S. 2009), holding that a conviction for escape based upon failure to report to penal confinement is not a "violent felony" for ACCA purposes, retroactively applies on collateral review to convictions that were final at the time *Chambers* was decided.

U.S. v. Speakman, 86 Crim. L. Rep. 551 (10th Cir. 2/2/10):
Holding: Trial court cannot order Defendant to pay into the crime victims' restitution fund where victim in case specifically did not want restitution.

U.S. v. Barwig, 2009 WL 1678108 (10th Cir. 2009):
Holding: Oral pronouncement of sentence controls over written one.

U.S. v. Cobb, 86 Crim. L. Rep. 152 (10th Cir. 10/26/09):
Holding: Even though defendant bargained for a stipulated sentence at a plea, he can still receive benefit of retroactive amendments to sentencing guidelines.

U.S. v. Nacchio, 85 Crim. L. Rep. 584, 2009 WL 2343716 (10th Cir. 7/31/09):
Holding: "Gain" in sentencing guideline for insider trading means the profits gained from the use of inside information without profits from market gain.

U.S. v. Serafin, 85 Crim. L. Rep. 99 (10th Cir. 4/14/09):
Holding: Possession of unregistered weapon in violation of federal law is not a "crime of violence" under 18 USC 924(c)(1), which mandates a consecutive sentence for firearm possession in furtherance of a crime of violence.

U.S. v. Barraza-Ramos, 2008 WL 5401417 (10th Cir. 2008):
Holding: Defendant's conviction for aggravated battery was not a "crime of violence" where the statute did not have as an element the use, attempted use, or threat of force.

U.S. v. Dennis, 84 Crim. L. Rep. 382 (10th Cir. 12/22/08):
Holding: Wyoming conviction for taking immoral or indecent liberties with a child is not a "crime of violence" supporting enhanced sentence for firearms possession.

U.S. v. Jarvi, 83 Crim. L. Rep. 781 (10th Cir. 8/21/08):
Holding: Defendant was denied right to allocution where court did not allow him to speak on issues raised in pro se motion which court properly refused to consider earlier.

U.S. v. Husted, 84 Crim. L. Rep. 179 (10th Cir. 11/5/08):
Holding: SORNA does not apply to persons whose travel in interstate commerce was complete before the law took effect.

U.S. v. Pinson, 83 Crim. L. Rep. 831 (10th Cir. 9/17/08):
Holding: Federal judge should not sentence above sentencing guidelines because judge believes Defendant is mentally ill, even though judge may think that makes Defendant a danger to self or others; civil commitment is remedy to mental illness.

U.S. v. Zuniga-Soto, 2008 WL 225261 (10th Cir. 2008):
Holding: Assaulting a public servant is not a "crime of violence," since could be based o reckless conduct.

U.S. v. Brown, 83 Crim. L. Rep. 525, 2008 WL 2485933 (10th Cir. 6/23/08):
Holding: Even though Defendant was previously convicted under Uniform Code of Military Justice Article 134 for actions involving child pornography, this was not a prior pornography conviction for purposes of 18 U.S.C. 2252A, since Article 134 is only a general provision allowing prosecution for conduct that brings discredit on armed services, not a pornography statute.

U.S. v. Wittig, 83 Crim. L. Rep. (10th Cir. 6/17/08):
Holding: Even though corporate executive made illegal loan, supervised release condition that banned him from any employment as an executive or any financial dealings involving businesses without court approval was unreasonable.

U.S. v. Cachucha, 81 Crim. L. Rep. 210 (10th Cir. 4/26/07):
Holding: Prosecutor breached plea agreement when he said at sentencing that the agreed-upon sentence was "way too low," even though prosecutor ultimately requested the agreed-upon sentence.

U.S. v. McGill, 87 Crim. L. Rep. 892 (11th Cir. 9/8/10):
Holding: Prior conviction for possession sawed-off shotgun is not "violent felony" under ACCA.

Gilbert v. U.S., 2010 WL 2473560 (11th Cir. 2010):
Holding: Where Defendant's sentence had previously been enhanced because he had a "crime of violence" that subsequent caseload held was not such a violent crime, he was entitled to relief from his enhanced sentence.

U.S. v. Sneed, 87 Crim. L. Rep. 15 (11th Cir. 3/24/10):
Holding: Defendant convicted of firearms offenses is not subject to recidivist sentence under Armed Career Criminal Act on basis of police report indicating that his prior felony drug offenses took place on different occasions.

U.S. v. Garcia, 87 Crim. L. Rep. 408 (11th Cir. 5/21/10):
Holding: Arizona aggravated assault conviction that can reach conduct caused by recklessly injuring law enforcement officer is not a "crime of violence" under USSG for immigration offenders.

U.S. v. Whitson, 86 Crim. L. Rep. 662 (11th Cir. 2/24/10):
Holding: Conviction for non-overt-act conspiracy is not "crime of violence" under career-offender provisions of sentencing guidelines.

U.S. v. Harrison, 2009 WL 395237 (11th Cir. 2009):
Holding: Willfully fleeing from a police vehicle is not a "violent felony" under ACCA.

U.S. v. Martinez, 2009 WL 3170314 (11th Cir. 2009):
Holding: Even though Defendant assisted in transfer of drug proceeds and used other people to do this, Defendant did not exercise a decision-making role in the drug conspiracy so was not eligible for "leadership enhancement" under the Guidelines.

U.S. v. Jordan, 86 Crim. L. Rep. 16 (11th Cir. 9/11/09):
Holding: Even though sheriff was convicted of misusing information from Nat'l Crime Information Center database for personal gain, a probationary sentence was not unreasonable; after losing election, sheriff ran voters names through NCIC to see if voters were convicted felons who shouldn't have voted.

U.S. v. Louis, 84 Crim. L. Rep. 626 (11th Cir. 2/27/09):
Holding: Even though Defendant was a federally licensed gun dealer who sold a firearm to a felon, Defendant did not occupy a "position of public trust" to warrant an enhanced

sentence under the U.S. Sentencing Guidelines, because gun dealers do not have "substantial discretionary judgment" under the law.

U.S. v. Dodge, 84 Crim. L. Rep. 504, 2009 WL 80979 (11th Cir. 1/14/09):
Holding: Federal conviction for attempting to transmit obscene material to a minor is not a "sex offense against a minor" that requires registration under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16911; SORNA requires "contact" with a minor that an Internet transaction does not entail.

U.S. v. Archer, 83 Crim. L. 629 (11th Cir. 6/26/08):
Holding: Prior conviction for carrying concealed weapon is not a "crime of violence" under Armed Career Criminal Act.

U.S. v. Madera, 83 Crim. L. Rep. 318, 2008 WL 2151267 (11th Cir. 5/23/08):
Holding: Where Defendant's conviction for a sex offense occurred before the Attorney General made the federal sex offender registration law (SORNA) retroactive, Defendant could not be convicted for failure to register during the time the law was not retroactive.

U.S. v. Dorsey, 2008 WL 115428 (11th Cir. 2008):
Holding: Gov't violated due process by refusing to file substantial assistance reduction because Defendant wanted jury trial; gov't cannot punish Defendant for what law plainly allows Defendant to do.

U.S. v. Evans, 80 Crim. L. Rep. 578 (11th Cir. 2/16/07):
Holding: Threatening to use a weapon of mass destruction against federal "property" is not a "serious violent felony" under federal statute that mandates life sentence for serious violent felonies.

U.S. v. Lewis, 2009 WL 1591633 (D.D.C. 2009):
Holding: District court as matter of policy will apply same guidelines for powder and crack offenses.

Smith v. U.S., 86 Crim. L. Rep. 383 (D.C. 12/3/09):
Holding: A judicial rule establishing a 120-day statute of limitations for filing motions to reduce sentence is a "claim-processing" rule which is waived if prosecutors fail to object to late-filed petitions; Court overturns prior cases holding the late filing is a "jurisdictional" issue.

Holloway v. U.S., 2008 WL 2444533 (D.C. 2008):
Holding: Defendant's age at time he pleaded guilty and not his age at time of sentencing determined his eligibility for sentencing under the Youth Rehabilitation Act.

Haugen v. Marshall, 2010 WL 3747082 (C.D. Cal. 2010):
Holding: Federal habeas relief granted where Governor and state appellate court reversed granting of parole based on erroneous finding that Defendant, who had pleaded

guilty, had not accepted responsibility or demonstrated remorse, and erroneous finding regarding Defendant's prison disciplinary history.

Hill v. Hartley, 2008 WL 5390038 (E.D. Cal. 2008):
Holding: Trial court violated due process where it refused to allow Defendant to admit at sentencing hearing medical records demonstrating that Defendant did not cause a victim in a prior conviction to break her leg, where the State was arguing Defendant had done so in his prior case.

Ruvalcaba v. Curry, 2010 WL 1461568 (N.D. Cal. 2010):
Holding: Denying parole based on circumstances of the offense (attempted murder) violated due process where parole board failed to give any consideration to fact that offense was aberration in Defendant's life, he had no violent history, had family support, and realistic parole plans.

Thomas v. Brown, 2006 WL 3783555 (N.D. Cal. 2006):
Holding: Governor violated due process by not paroling Defendant after parole board recommended release because of Gov.'s belief about unchanging severity of crime; Gov. ignored extensive evidence of good behavior and rehabilitation in prison.

U.S. v. Powers, 2008 WL 1757721 (M.D. Fla. 2008):
Holding: Congress exceeded its power under Commerce Clause in criminalizing failure to register as a sex offender (SORNA), because there was no nexus between failing to register and interstate travel.

U.S. v. Beiermann, 2009 WL 467628 (N.D. Iowa 2009):
Holding: Court rejects Sentencing Guideline for transporting child pornography because it did not reflect empirical analysis and illogically skewed sentences upward for even "average" Defendants.

U.S. v. Gulley, 85 Crim. L. Rep. 273 (N.D. Iowa 5/18/09):
Holding: District court rejects ratios for crack-to-powder cocaine altogether and instead treats the drugs the same and increases sentences in particular cases only where harms associated with crack manifest themselves.

U.S. v. Dicus, 2008 WL 4402214 (N.D. Iowa 2008):
Holding: Where gov't breached plea agreement, the remedy was to resentence Defendant to low end of sentencing range in order to deter prosecutorial misconduct and encourage Defendants to raise misconduct claims.

U.S. v. Payton, 2010 WL 2228461 (S.D. Iowa 2010):
Holding: Federal court could order Defendant's sentence to run concurrently to a subsequently imposed state court sentence.

U.S. v. Wilkinson, 2009 WL 1740358 (D. Mass. 2009):
Holding: Adam Walsh Act provisions regarding civil commitment as sexually dangerous person was not supportable under Commerce Clause or Necessary and Proper Clause.

U.S. v. Coleman, 2009 WL 212190 (D. Mass. 2009):
Holding: Even though Defendant had been sentenced within Guideline range based on plea agreement, court could consider reducing sentence after the relevant Guideline range for cocaine base was reduced.

U.S. v. Gautier, 2008 WL 5396469 (D. Mass. 2008):
Holding: Conviction for resisting arrest is not a "violent felony" under Armed Career Criminal Act.

U.S. v. Mills, 2010 WL 814486 (E.D. Mich. 2010):
Holding: Where Gov't presented only docket sheets from Missouri which showed Defendant pleaded guilty to drug offense and was sentenced to one year probation, this did not meet burden to prove this offense was a felony; there was no reference to the statute under which Defendant was convicted and the short sentence was consistent with a misdemeanor.

Robinson v. U.S., 2009 WL 2230745 (E.D. Mich. 2009):
Holding: Counsel was ineffective in failing to challenge the quantity of drugs attributable to Defendant where the quantity was element of how long a sentence Defendant would receive.

U.S. v. Kladek, 2009 WL 2835158 (D. Minn. 2009):
Holding: Ex post facto prevents use of current Guidelines if they would result in a greater sentence than the Guidelines in effect at time of the offense.

Sumrell v. Mississippi, 2009 WL 973330 (N.D. Miss. 2009):
Holding: Where state trial court had imposed a habitual offender sentence on Defendant that lacked any evidentiary support, this showed "actual innocence" of the sentence imposed so as to allow federal habeas review despite procedural default.

U.S. v. Waybright, 2008 WL 2380946 (D. Mont. 2008):
Holding: SORNA not a valid exercise of Congress' power under Commerce Clause.

U.S. v. Larson, 2008 WL 2315742 (D. Mont. 2008):
Holding: Mandatory minimum sentence for possession of child pornography violated 8th Amendment where applied to Defendant who had mental capacity of 9 year old child.

Doe v. Nebraska, 2010 WL 3259366 (D. Neb. 2010):
Holding: Sex offender registration law violated 4th Amendment rights of previously convicted sex offenders who were not presently on probation or parole, where it required

offenders to consent to search of their computers and required installation of software to monitor their computer use.

U.S. v. Hubel, 2008 WL 5434383 (D. Neb. 2008):
Holding: Where Defendant had long-standing drug addiction from age 13, but had successfully completed drug rehab, this warranted downward departure where incarceration would interfere with rehabilitation.

American Civil Liberties Union v. Cortez Maso, 2008 WL 8088482 (D. Nev. 2008):
Holding: Sex offender registration law was ex post facto, violated double jeopardy and due process where it automatically classified past offenders who had been determined to be unlikely to reoffend and had not committed additional crimes.

U.S. v. Grober, 2008 WL 5395768 (D.N.J. 2008):
Holding: Even though Guideline range for child pornography downloading case was 235 to 293 months, where Defendant was first-time offender and had not actively abused children, downward departure to 60 months was warranted.

U.S. v. Taylor, 2009 WL 3754164 (D.N.M. 2009):
Holding: Even though plea agreement provided a sentence below the statutory mandatory minimum, where court had already accepted it, it would enforce the agreement and impose a sentence below the statutory minimum.

U.S. v. Carbajal-Hernandez, 2009 WL 1563891 (D.N.M. 2009):
Holding: Felony conviction for coercion was not a crime of violence.

U.S. v. Polouizzi, 2010 WL 1048192 (E.D. N.Y. 2010):
Holding: Provision of Adam Walsh Act requiring pretrial curfew and electronic monitoring violated due process as applied to Defendant.

U.S. v. Hall, 2008 WL 4307196 (N.D. N.Y. 2008), and U.S. v. Guzman, 2008 WL 4601446 (N.D. N.Y. 2008):
Holding: SORNA provision requiring sex registration regardless of whether Defendant traveled in interstate commerce violated Commerce Clause.

U.S. v. Sweeney, 2010 WL 2222264 (S.D. N.Y. 2010):
Holding: Even though sentencing guidelines are only advisory, it was error to apply guidelines in effect at time Defendant was sentenced (which were higher) than at time of offense, since the higher guidelines might result in a higher sentence; this was ex post facto.

U.S. v. Harris, 2010 WL 723762 (S.D. N.Y. 2010):
Holding: Even though Defendant still owed millions of dollars in restitution, where he had been a model prisoner, later found productive employment, and his employment advancement was hindered by being on supervised release, an early termination of supervised release was in the interest of justice.

U.S. v. Madoff, 2009 WL 56987 (S.D. N.Y. 2009):
Holding: Even though Defendant might dispose of assets that could be used to pay restitution to victims, this was not grounds for denying bail.

Barney v. Conway, 2010 WL 3081335 (W.D. N.Y. 2010):
Holding: 6th Amendment right to jury finding violated where trial judge engaged in supplemental fact-finding under persistent offender statute.

Stalnaker v. Bobby, 2008 WL 4878120 (N.D. Ohio. 2008):
Holding: 6th Amendment right to jury trial was violated where court enhanced rape sentence based on judicially found facts.

U.S. v. Crist, 84 Crim. L. Rep. 160 (M.D. Pa. 10/22/08):
Holding: Even though a private party looked at Defendant's computer and saw child pornography and turned the computer over to police, police could not search computer hard drive without a warrant under the "private search doctrine," because police searched more of the hard drive than what the private party saw.

Fross v. County of Allegheny, 2009 WL 763557 (W.D. Pa. 2009):
Holding: A county sex offender law which restricted where offenders could live was preempted by State's law on same subject.

U.S. v. Matias-Maestres, 2010 WL 3622031 (D.P.R. 2010):
Holding: Even though Driver was in possession of firearm, police did not have reasonable suspicion that Defendant-Passenger was armed or dangerous to justify a frisk of him under 4th Amendment.

U.S. v. McElheney, 2009 WL 1904565 (E.D. Tenn. 2009):
Holding: A guideline sentence of 135-168 months for receiving child pornography was greater than necessary to achieve statutory goals; the lesser statutory maximum for possession of child pornography created a disparity.

U.S. v. Horn, 2008 WL 5348817 (M.D. Tenn. 2008):
Holding: Resentencing was warranted due to post-sentencing reduction in range resulting from retroactive change in Guidelines providing that all cases sentenced on a single day were related for criminal history purposes; Guidelines policy statement cannot dictate which guidelines can be applied retroactively because this unconstitutionally limits district courts' discretion.

Meza v. Livingston, 2009 WL 1604999 (W.D. Tex. 2009):
Holding: Parole "hearing" must meet requirements of due process such as notice and opportunity to be heard to be able to impose sex offender conditions on person who had not committed sex crime.

U.S. v. Greer, 2010 WL 1223089 (E.D. Tex. 2010):
Holding: Policy reasons warranted rejection of 100 to 1 crack and powder cocaine ratio.

Jennings v. Owens, 2008 WL 5264633 (W.D. Tex. 2008):
Holding: Defendant had protected liberty interest in imposition of sex-offender conditions upon his parole, where he was not currently serving a sentence for a sex offense but had had a sex offense 30 years earlier.

U.S. v. Lewis, 2009 WL 691216 (E.D. Va. 2009):
Holding: Where Sentencing Guidelines in effect at time of sentencing provided higher penalties than those in effect at time of crime, application of new Guidelines would violate ex post facto, even though Guidelines are only advisory.

Jefferson v. Berkebile, 2010 WL 391508 (S.D. W.Va. 2010):
Holding: Where Defendant's plea agreement called for concurrent state and federal sentences, but state authorities failed to run sentence concurrently, Defendant was entitled to vacate federal sentence.

U.S. v. Cruikshank, 2009 WL 3673096 (S.D. W. Va. 2009):
Holding: 24-month sentence for possession of child pornography was appropriate even though guideline sentence was higher.

U.S. v. Kennedy, 2008 WL 5517643 (W.D. Wash. 2008):
Holding: The pretrial release conditions of Adam Walsh Act in child pornography case, including electronic monitoring and curfew, violated Excessive Bail Clause.

Doe v. State, 83 Crim. L. Rep. 709 (Alaska 7/25/08):
Holding: Applying Alaska's sex registration scheme to those convicted before its enactment is ex post facto under Alaska Const.; lengthy discussion of how such laws are, in reality, "punitive."

Donaldson v. State, 2007 WL 1367553 (Ark. 2007):
Holding: Where jury verdict sentenced Defendant to "zero" years in prison and "zero" fine, the trial court had no authority to impose a prison sentence, since the statute did not set a lower limit for sentences the jury could impose, but only an "up to" maximum sentence.

People v. Feyrer, 2010 WL 1071384 (Cal. 2010):
Holding: Trial court had discretion upon early termination of probation to reduce Defendant's "wobbler" offense to a misdemeanor.

People v. Rodriguez, 2009 WL 2526446 (Cal. 2009):
Holding: Sentence could not be enhanced for both "firearm enhancement" and "gang firearm enhancement."

In re Lawrence, 2008 WL 3863606 (Cal. 2008):
Holding: Where Parole Board recommends parole, Governor cannot use the unchangeable facts of the crime to deny parole.

State v. Bell, 81 Crim. L. Rep. 705 (Conn. 9/11/07):
Holding: Sentencing scheme where judge can impose extended sentence if it is in "public interest" violates 6th Amendment jury-trial guarantee under *Apprendi*.

Heath v. State, 86 Crim. L. Rep. 214 (Del. 11/4/09):
Holding: Where sex offender received an unconditional pardon from Governor, that relieved offender of legal obligation to register as sex offender.

State v. Fletcher, 85 Crim. L. Rep. 330 (Del. 5/27/09):
Holding: Even though juvenile was required to register as sex offender, that statute did not preclude him from moving to expunge his conviction and if expungement occurred, the duty to register ends.

Harris v. State, 83 Crim. L. Rep. 784 (Del. 8/28/08):
Holding: Delay of six years between conviction and sentencing violated 6th Amendment right to "speedy sentencing."

Tasker v. State, 88 Crim. L. Rep. 191 (Fla. 11/10/11):
Holding: An error in Defendant's sentence score sheet could be raised for first time when probation was revoked.

Sanders v. State, 2010 WL 1609876 (Fla. 2010):
Holding: Where statute provided enhancement if additional offense is "pending before the court" at sentencing, court could not count offenses for which Defendant's probation had ended because those were not "pending."

State v. Rabedeau, 2009 WL 196391 (Fla. 2009):
Holding: Where Defendant had served 5 years on three concurrent sentences, which were later turned into consecutive sentences, Defendant was entitled to 5 years of credit against each sentence when they were later made consecutive.

State v. Kelly, 84 Crim. L. Rep. 377 (Fla. 12/30/08):
Holding: Fla. constitution prohibits using prior uncounseled misdemeanor convictions to enhance later misdemeanor to felony.

Kasischke v. State, 83 Crim. L. Rep. 654, 2008 WL 2678449 (Fla. 7/10/08):
Holding: State law prohibiting possession of pornography by sex offenders on probation or parole is limited to pornography that is relevant to the particular offender's deviant behavior.

Bradshaw v. State, 84 Crim. L. Rep. 255 (Ga. 11/25/08):
Holding: Life sentence for second failure to register as sex offender violates 8th Amendment ban on cruel and unusual punishment.

Forde v. State, 2008 WL 518139 (Ga. 2008):
Holding: Where in child sex case, the conduct was alleged to have occurred over a period of time during which the offense was reclassified from a misdemeanor to a felony, conviction and sentence for a felony violated ex post facto, since jury could have convicted of conduct that occurred when offense was a misdemeanor.

Humphrey v. Wilson, 82 Crim. L. Rep. 129 (Ga. 10/26/07):
Holding: 17-year old Defendant's 10-year sentence for consensual oral sex with 15-year-old violated 8th Amendment and was disproportionate, where after Defendant's sentencing, Legislature lowered punishment for this offense.

State v. Jess, 83 Crim. L. Rep. 54 (Haw. 3/31/08):
Holding: Even though statute stated "the court" had to make certain factual findings regarding sentencing, the court could still empanel a jury to comply with 6th Amendment right to jury making factual findings.

State v. Maugaotega, 2007 WL 2823760 (Haw. 2007):
Holding: Sentencing statute which allowed judge alone to increase punishment when certain criteria were met violated *Apprendi*.

State v. Doe, 87 Crim. L. Rep. 374 (Idaho 6/1/10):
Holding: Sentencing judge violated 4th Amendment by requiring parent of Juvenile-Defendant to submit to drug tests as part of Juvenile's probation.

State v. Rogers, 2007 WL 3052943 (Idaho 2007):
Holding: Defendant who pleaded guilty in exchange for a diversionary drug court program was entitled to due process protections before being terminated from the program.

Wallace v. State, 85 Crim. L. Rep. 214, 2009 WL 1176528 (Ind. 4/30/09):
Holding: Indiana's sex offender law is ex post facto as to those whose crimes were committed before it was enacted.

State v. Pollard, 85 Crim. L. Rep. 577, 2009 WL 1883731 (Ind. 6/30/09):
Holding: State law prohibiting sex offender from living within 1000 feet of school cannot be applied retroactively to person who owned their house and committed their offense before law's enactment.

Hunter v. State, 83 Crim. L. Rep. 62 (Ind. 4/1/08):
Holding: Probation condition prohibiting "contact" with minors did not give fair notice to Defendant that he could not be present in home when minors arrived there, even if Defendant quickly left.

State v. Lathrop, 87 Crim. L. Rep. 183 (Iowa 4/23/10):
Holding: (1) Iowa statute authorizing lifetime parole for sex offenders is punitive for ex post facto purposes; and (2) probation condition prohibiting contact with anyone under 18 was "unnecessarily excessive."

State v. Bruegger, 86 Crim. L. Rep. 69, 2009 WL 3151180 (Iowa 10/2/09):
Holding: Long, mandatory sentences for repeat offenders can constitute cruel and unusual punishment when applied to Defendant whose predicate convictions were juvenile adjudications.

State v. Bearse, 2008 WL 1758899 (Iowa 2008):
Holding: Where State had agreed to recommend against incarceration as part of a plea bargain, Prosecutor breached agreement by saying that although Prosecutor was "abiding by agreement," judge was "not bound by agreement" and pointing out that the PSI recommended incarceration.

State v. Valin, 80 Crim. L. Rep. 308 (Iowa 12/1/06):
Holding: Trial court could not impose a sex offender program as a condition of probation in a DWI case, even though Defendant had prior sex offense; conditions of probation must be related to instant crime.

State v. Gilley, 2010 WL 204099 (Kan. 2010):
Holding: Where Defendant was charged with three counts of forgery and pleaded guilty to one count, the two remaining charged counts could not be counted as "convictions" to enhance the count on which Defendant pleaded guilty.

State v. Case, 85 Crim. L. Rep. 603 (Kan. 8/7/09):
Holding: A stipulation to facts during an *Alford* plea is not an admission of those facts for right-to-jury trial purposes under *Apprendi*, because an *Alford* plea does not involve admission of guilt.

State v. Bennett, 2009 WL 211762 (Kan. 2009):
Holding: Probation condition that required Defendant submit to suspicionless search was unconstitutional.

State v. Gary, 2006 WL 3040153 (Kan. 2006):
Holding: Where trial court granted Defendant probation, court could not then revoke probation for a crime which occurred three days before the sentencing; Defendant did not have independent obligation to incriminate himself at sentencing by revealing other crime.

Jones v. Com., 87 Crim. L. Rep. 184 (Ky. 4/22/10):
Holding: Where statute gave courts power to revoke sex offenders' post-incarceration conditional discharge, this violated separation of powers by conferring executive power on the judiciary.

Com. v. Baker, 86 Crim. L. Rep. 79, 2009 WL 3161371 (Ky. 10/1/09):
Holding: State law that prohibits sex offenders from living within 1,000 feet of schools and other places is punitive and cannot be applied retroactively to offenders who committed their crimes before the law's enactment, because this would violate ex post facto.

State v. Letalien, 86 Crim. L. Rep. 399, 2009 WL 4912711 (Me. 12/22/09):
Holding: Sex registration requirement violate ex post facto where applied to persons sentenced before the effective date of registration law.

State v. Duran, 84 Crim. L. Rep. 687 (Md. 3/11/09):
Holding: Defendant convicted of sex offense not listed in sex offender registration statute is not required to register as sex offender; "indecent exposure" is not crime that "by its nature" is sexual.

Montgomery v. State, 2008 WL 2356952 (Md. 2008):
Holding: Trial court lacked authority to defer Defendant's prison sentence for 3 years with promise that trial court would reconsider it then, where court did not put Defendant on probation.

Com. v. Goodwin, 87 Crim. L. Rep. 889 (Mass. 9/17/10):
Holding: Once probation is granted to sex offender, judge cannot add an additional condition that requires wearing a GPS device absent a probation violation or some change in circumstance.

Com. v. Cory and Doe v. Chairperson of Mass. Bd. of Parole, 85 Crim. L. Rep. 631, 911 N.E.2d 187 (Mass. 8/18/09):
Holding: Sex offenders who committed crimes prior to legislation requiring them to wear a GPS device cannot be required to wear the device because this is punitive and would violate ex post facto.

Com. v. Ruiz, 903 N.E.2d 201 (Mass. 2009):
Holding: Even though a probation condition of Defendant required that he not contact victim who was a victim in two different cases involving Defendant "on or after" his release from prison on one of the cases, where Defendant contacted victim while he was incarcerated, Defendant did not have sufficient notice that this violated the conditions of probation.

Kenniston v. Dept. of Youth Services, 84 Crim. L. Rep. 610 (Mass. 2/210/09):
Holding: Where a juvenile statute allowed State to retain juvenile for three additional years if youth was "physically dangerous to the public," this violated due process because civil commitment requires a link between dangerousness and difficulty in controlling behavior due to mental illness or abnormality; also the term "physically dangerous" is unconstitutionally vague.

Commonwealth v. Ly, 82 Crim. L. Rep. 213 (Mass. 11/6/07):
Holding: Where Defendant had lost his appeal 16 years earlier but his appeal bond was never revoked and Defendant remained free, due process and fundamental fairness precluded court from now executing his prison sentence.

People v. Holder, 2009 WL 1677548 (Mich. 2009):
Holding: Once Dept. of Corrections entered a final discharge order from parole, Dept. could not later revoke the order.

State v. Rodriguez, 83 Crim. L. Rep. 780 (Minn. 8/21/08):
Holding: 6th Amendment right to confront witnesses applies to jury trial to determine facts used to enhance sentence.

Johnson v. Fabian, 81 Crim. L. Rep. 503, 2007 WL 1839677 (Minn. 6/28/07):
Holding: A prison treatment program that required sex offenders to admit their crimes in order to obtain release violated their 5th Amendment rights against self-incrimination.

State v. Samples, 84 Crim. L. Rep. 327 (Mont. 12/11/08):
Holding: Where sex offender registration statute had different levels, due process entitled Defendant to learn what information was used to set his level and to contest that information.

State v. Nelson, 84 Crim. L. Rep. 163 (Mont. 10/28/08):
Holding: Court cannot impose sentencing conditions that conflict with State's medical marijuana law.

State v. Payan, 85 Crim. L. Rep. 243 (Neb. 5/1/09):
Holding: Findings of fact necessary to support lifetime supervision under Neb. Sex Offender law require a jury finding under 6th Amendment and *Apprendi*.

Mendoza-Lobos v. State, 86 Crim. L. Rep. 297 (Nev. 10/29/09):
Holding: Even though a state statute can require judges to consider certain sentencing factors, it violated separation of powers for the statue to require judges to state "on the record" that they had considered each factor.

State v. Mohamed, 2009 WL 5150351 (N.H. 2009):
Holding: Even though Defendant received stolen property of a handgun, Defendant did not qualify for mandatory sentence for person convicted of crime involving a "deadly weapon," because a handgun is not a deadly weapon per se, but is only deadly depending on how it is used.

State v. Abram, 82 Crim. L. Rep. 421, 2008 WL 151127 (N.H. 1/15/08):
Holding: Where Defendant was sentenced on multiple counts to a term of years, and then succeeded on appeal in getting some counts vacated, and the trial judge subsequently imposed the same total sentence on the remaining counts, there was a presumption of improper judicial vindictiveness at resentencing.

State v. Burgess, 82 Crim. L. Rep. 606 (N.H. 2/26/08):
Holding: Under N.H. constitution, trial judge cannot increase a Defendant's sentence for remaining silent at sentencing as showing lack of remorse.

G.H. v. Township of Galloway, 85 Crim. L. Rep. 234 (N.J. 5/7/09):
Holding: City ordinances that further restrict where sex offenders can live are preempted by New Jersey's state sex offender law.

People v. Fiammegta (N.Y. 2/16/10) and **Harris v. Commonwealth (Va. 2/25/10), 86 Crim. L. Rep. 669:**
Holding: Where defendants are terminated from drug courts, due process requires that they have some opportunity to present evidence and be heard on claims that they were wrongfully terminated.

People v. Williams, 2010 WL 605257 (N.Y. 2010):
Holding: Where Defendants had been released from prison, they had a legitimate expectation in the finality of their originally-imposed sentences, even though the sentences were wrong, and resentencing them to any higher sentence would violate double jeopardy.

People v. Zephrin, 2010 WL 1189417 (N.Y. 2010):
Holding: Defendant was entitled to credit toward his term of probation for time spent in custody prior to sentencing where he received a "split sentence."

People v. Williams, 86 Crim. L. Rep. 663 (N.Y. 2/23/10):
Holding: Even though court erroneously omitted period of post-release supervision mandated by statute, where Defendant's had completed his incarceration sentence, double jeopardy would be violated for the court to impose the post-release supervision after the incarceration sentence had expired.

People v. Mingo, 2009 WL 1585819 (N.Y. 2009):
Holding: Documents generated by prosecutor's office are not "reliable hearsay" in Sex Offender Registration Act risk assessment hearing.

State v. Bodyke, 87 Crim. L. Rep. 407 (Ohio 6/3/10):
Holding: Ohio sex offender law that requires Attorney General to reclassify sex offenders who had previously been classified by courts violates separation of powers because it gives Executive branch power to review and interfere with final Judicial branch decisions.

State v. Harrison, 2009 WL 2341829 (Ohio 2009):
Holding: Even though trial court made an error in failing to impose mandatory post-release conditions on sex Defendant when he completed his original sentence, the court lacked authority to correct its mistake by forcing Defendant to choose between withdrawing his guilty plea or resentencing; withdrawal of plea was, therefore, invalid.

State v. Sarkozy, 82 Crim. L. Rep. 545, 2008 WL 417690 (Ohio 2/14/08):
Holding: Plea court's failure to inform Defendant at plea that his sentence will include mandatory post-release control is grounds for later collaterally attacking validity of plea.

State v. Rodriguez, 86 Crim. L. Rep. 79, 2009 WL 3047236 (Or. 9/24/09):
Holding: Even though a voter-approved statute called for a mandatory 75-month sentence for first-degree sex abuse, such a sentence violated the proportionality and cruel and unusual punishment provisions of the state constitution as applied to Defendants who touched children only through their clothing; in once case, female-Defendant allowed 12-year old boy to lean back of his head against her clothed breasts while she stroked his hair.

State v. Ice, 82 Crim. L. Rep. 79, 2007 WL 2949148 (Or. 10/11/07):
Holding: Where a statute required judge to make certain factual findings to be able to impose consecutive sentences rather than concurrent sentences, these factual findings had to be made by a jury under *Apprendi*, *Blakely* and *Booker*.

Commonwealth v. Teeter, 2007 WL 2684822 (Pa. 2007):
Holding: Sentencing enhancement for selling drugs within 500 feet of a "school bus stop" did not apply when school was not in session, because there was then no "bus stop."

Commonwealth v. Holmes, 82 Crim. L. Rep. 114 (Pa. 10/16/07):
Holding: Even though a trial court's jurisdiction had expired under a statute, trial court still had inherent power to correct a sentence that was unauthorized by law.

Major v. South Carolina Dept. of Probation, Parole and Pardon Services, 2009 WL 1679664 (S.C. 2009):
Holding: Where inmate received a non-parolable 5-year sentence consecutive to a sentence of life with parole, this did not render the inmate ineligible for parole ever.

Berry v. State, 2009 WL 744399 (S.C. 2009):
Holding: Drug paraphernailia conviction did not qualify as prior offense for enhancement purposes because conviction did not "relate to" drugs under the statute.

In the Interest of Z.B., 84 Crim. L. Rep. 207 (S.D. 11/5/08):
Holding: Sex offender registration law which allows certain offenders to remove their names from the registry but does not allow juvenile offenders to do this violated equal protection rights of juveniles.

State v. Briggs, 84 Crim. L. Rep. 328 (Utah 12/12/08):
Holding: Where sex offender registration law published defendants' "primary and secondary targets," due process required that defendants be allowed to challenge that information, since it implies future dangerousness.

State v. Ferguson, 2007 WL 57119 (Utah 2007):
Holding: Uncounseled misdemeanor conviction cannot be used to enhance later offense to a felony.

People v. Fiammegta (N.Y. 2/16/10) and **Harris v. Commonwealth (Va. 2/25/10), 86 Crim. L. Rep. 669:**
Holding: Where defendants are terminated from drug courts, due process requires that they have some opportunity to present evidence and be heard on claims that they were wrongfully terminated.

State v. Sanchez Valencia, 87 Crim. L. Rep. 889 (Wash. 9/9/10):
Holding: A condition of community release that prohibited possession of "any paraphernalia" that could be used for drugs was unconstitutionally vague.

In re Personal Restraint of Bush, 84 Crim. L. Rep. 82 (Wash. 10/2/08):
Holding: Governor's conditional commutation of sentence gives a liberty interest in the commutation, so that it cannot be revoked without due process protections.

State v. Bahl, 84 Crim. L. Rep. 111, 2008 WL 4512855 (Wash. 10/9/08):
Holding: Probation condition prohibiting possession of "pornography" or "sexual stimulus for his deviancy" was unconstitutionally vague, and Defendant could raise this on direct appeal even before he would be released on probation (parole).

State v. Amidon, 2008 WL 3982509 (Vt. 2008):
Holding: Statements Defendant made in a PSI after a guilty plea were not admissible at a trial on the charges, even for impeachment, when the plea was later withdrawn.

Rawls v. Com., 86 Crim. L. Rep. 78, 2009 WL 2972890 (Va. 9/18/09):
Holding: Where a sentence imposed on Defendant exceeded the statutory maximum, he was entitled to a new sentencing hearing and not just to reduction of sentence to the statutory cap.

Billips v. Commonwealth, 82 Crim. L. Rep. 188 (Va. 11/02/07):
Holding: Same standard governing admissibility of scientific evidence at trial also governs at sentencing hearings.

State v. Mendoza, 85 Crim. L. Rep. 183 (Wash. 4/16/09):
Holding: Even though Defendant's counsel agreed to a "sentencing range" for Defendant, this did not relieve State of burden of proving the prior criminal history necessary to support the range.

Forster v. State, 2010 WL 2977500 (Alaska Ct. App. 2010):
Holding: Where trial court's sentence limited Defendant's eligibility for good-time credit and parole, this required a jury-finding under *Apprendi*, which requires any fact that increases penalty to be submitted to and found by a jury.

Wooley v. State, 2009 WL 4724633 (Alaska Ct. App. 2009):
Holding: Where Defendant committed his second theft offense before he was sentenced on his first theft offense, Defendant had not been convicted of two prior theft offenses committed at different times for purposes of enhancement of a third theft offense.

Marunich v. State, 2006 WL 3759372 (Alaska Ct. App. 2006):
Holding: Due process violated where court imposed additional condition of probation after sentencing without notice or hearing.

State v. Zinsmeyer, 2009 WL 3518252 (Ariz. Ct. App. 2009):
Holding: "Catch-all" sentencing factor defined as any other factor relevant to Defendant's background or character or circumstances of crime was patently vague, if used to supply the sole aggravating factor.

State v. Payne, 2009 WL 2211036 (Ariz. Ct. App. 2009):
Holding: A county ordinance-imposed fee of $1,000 assessed against felony defendants at sentencing was invalid, because counties were not statutorily empowered to impose such prosecution fees.

State v. Streck, 2009 WL 1069957 (Ariz. Ct. App. 2009):
Holding: Even though theft victim expended personal funds to try to locate stolen property, this expenditure could not be charged to Defendant as restitution.

State v. Lewandowski, 2009 WL 838581 (Ariz. Ct. App. 2009):
Holding: Where restitution order was entered too early under State law such that it required Defendant to pay interest on the restitution, the additional interest payments were not authorized by law.

People v. Mendez, 2010 WL 3420939 (Cal. App. 2010):
Holding: Imposition of 84 year sentence on 16 year old for carjacking, assault and robbery was cruel and unusual punishment, where this was effectively a life without parole sentence.

In re E.O., 2010 WL 3769290 (Cal. App. 2010):
Holding: Probation condition restricting Defendant from going near 25 feet of a courthouse when minor knows that a witness or victim of gang-related violence will be there was unconstitutionally vague, and violated Defendant's 1st Amendment rights to attend court proceedings; this was especially true since Defendant was convicted of possessing a knife at school, which had nothing to do with a courthouse.

People v. Kelly, 88 Crim. L. Rep. 142, 2010 WL 3960750 (Cal. App. 10/12/10):
Holding: A recording trade association group was not a "victim" of music piracy for restitution purposes.

People v. Camino, 2010 WL 3836763 (Cal. App. 2010):
Holding: Where no principal in a murder discharged a firearm, Defendant's sentence could not be enhanced for this reason.

People v. Mosley, 2010 WL 3769299 (Cal. App. 2010):
Holding: Residency restrictions imposed pursuant to a discretionary sex offender registration statute had a punitive effect, and thus Defendant had a right to a jury trial as to the facts requiring him to register.

People v. Thang Yang, 2010 WL 3993702 (Cal. App. 2010):
Holding: A sentence enhancement for a shooting caused by a co-principal did not apply where Defendant was not convicted of any of the qualifying offenses in the enhancement statute.

People v. Valdez, 2010 WL 3960753 (Cal. App. 2010):
Holding: Even though Defendant fled the scene of an injury car accident, the victim's injuries were not inflicted "in the commission of" the offense (fleeing the scene) such as to support a sentencing enhancement for infliction of great bodily harm.

People v. Chappelone, 2010 WL 1450762 (Cal. App. 2010):
Holding: Victim restitution order awarding full value for unsellable goods was an improper windfall.

In re Moses, 2010 WL 916391 (Cal. App. 2010):
Holding: Governor's reversal of grant of parole failed to meet the "some evidence" standard of review, where Gov's reasons simply repeated relevant factors and mischaracterized the evidence.

People v. Botello, 2010 WL 1408925 (Cal. App. 2010):
Holding: Where evidence was insufficient to support firearms enhancement, appellate court could not "save" an enhancement by applying an uncharged enhancement on appeal.

In re Loresch, 2010 WL 1078388 (Cal. App. 2010):
Holding: Gov. could not deny parole based on expert's stated hypothetical belief that if Defendant were to feel worthless in the future he could be violent.

People v. Goodliffe, 2009 WL 2917795 (Cal. App. 2009):
Holding: Defendant was not subject to full consecutive sentences under Jessica's Law because his offenses did not involve the same victim on the same occasion.

Alex O. v. Superior Court of San Diego County, 85 Crim. L. Rep. 544 (Cal. Ct. App. 6/10/09):
Holding: Probation condition imposed on juvenile U.S. citizen who smuggled drugs from Mexico to U.S. that effectively banished Defendant from U.S. was overbroad.

People v. Ranscht, 85 Crim. L. Rep. 419 (Cal. Ct. App. 5/15/09):
Holding: Where sex offender statute required lifetime supervision for sex crimes that used fingers for sex, but not crimes that engaged in ordinary sexual intercourse, this violated equal protection.

People v. Murillo, 2009 WL 387022 (Cal. App. 2009):
Holding: Probation condition requiring Defendant to take "any and all" medications prescribed by her doctor was unconstitutionally vague.

In re Nunez, 85 Crim. L. Rep. 211, 2009 WL 1154200 (Cal. Ct. App. 4/30/09):
Holding: LWOP sentence on juvenile for non-injury kidnapping violated 8th Amendment.

People v. Mosley, 84 Crim. L. Rep. 258 (Cal. Ct. App. 11/19/08):
Holding: Requiring Defendant who was not convicted of sex offense to register as a sex offender was "punitive" and, therefore, required a jury trial under 6th Amendment.

People v. Flucker, 81 Crim. L. Rep. 388 (Cal. Ct. App. 5/29/07):
Holding: Even though Defendant said "I'm not staying here" when he unsuccessfully moved for a continuance to hire a lawyer and the judge ordered Defendant not to escape and assigned deputies to him, the judge could not enhance Defendant's sentence based on the judge finding an attempted escape because this violated Defendant's 6th Amendment right to have a jury find facts that increase sentence under *Apprendi* and *Cunningham*.

People v. Zaidi, 2007 WL 587737 (Cal. App. 2007):
Holding: Before accepting Defendant's guilty plea to sex offense, trial court was required to advise Defendant that he would be subject to lifetime registration as sex offender.

People v. Padilla-Lopez, 2010 WL 2853753 (Colo. App. 2010):
Holding: Court could not order Defendant to pay restitution to Dept. of Human Services in child abuse case, because criminal child abuse statute requires conduct against a "child" and the Dept. is not a "child."

People v. Perry, 2010 WL 3035729 (Colo. App. 2010):
Holding: Defendant who successfully completed deferred judgment program was not "convicted" and was eligible for removal from the sex offender registry.

People v. Guatney, 82 Crim. L. Rep. 233, 2007 WL 3197097 (Colo. Ct. App. 11/1/07):
Holding: Sex offender's probation may not be revoked during pendency of his direct appeal for failure to admit offense during a sex-offender treatment program.

Nawaz v. State, 2010 WL 325915 (Fla. Dist. Ct. App. 2010):
Holding: Where sentencing judge made remarks that indicated he had considered Defendant's non-American national origin in imposing sentence, Defendant was entitled to re-sentencing before a different judge.

Sharrad v. State, 2009 WL 18709 (Fla. Dist. Ct. App. 2009):
Holding: Trial court's order to DOC to arrest probationers who failed drug tests violated separation of powers because this usurped DOC's discretion whether to arrest violators.

Pettit v. State, 2008 WL 3165588 (Fla. Ct. App. 2008):
Holding: Even though Defendant had fully served his sentence, he could file a motion to correct his sentence claiming he was imprisoned too long, if doing so would show that sex offender commitment law would not apply to him if he had been sentenced properly in the first place, because would have been released before effective date of law.

King v. State, 2008 WL 4265182 (Fla. Dist. Ct. App. 2008):
Holding: Even though Defendant failed to provide an address where he would be living when released from prison for sex offense, he did not violate the prohibition against living within 1000 feet of school since he had not yet been released from prison.

Brinkley v. State, 2009 WL 5154254 (Ga. Ct. App. 2009):
Holding: Trial court should not have accepted secondary sources to prove Defendant's prior conviction status based solely on prosecutor's statement that he "was told" the original documents had been destroyed.

State v. Asuncion, 2009 WL 807559 (Haw. Ct. App. 2009):
Holding: Even though Defendant violated a condition of probation, criminal contempt was not available for that violation, only revocation of probation.

State v. Hanson, 2010 WL 4157277 (Idaho Ct. App. 2010):
Holding: Defendant may invoke 5th Amendment right against self-incrimination regarding participation in a presentence investigation report, but still may choose to participate in a psychological evaluation for sentencing. PSI and psychological exam cover different purposes and there is less danger Defendant may use his 5th Amendment right to manipulate system by choosing what to disclose.

State v. Cobler, 2009 WL 260618 (Idaho Ct. App. 2009):
Holding: Even though Defendant was charged with child sex crimes, a no contact order that prohibited Defendant from contact with his own children violated fundamental rights as parent.

State v. Wakefield, 2007 WL 2936096 (Idaho Ct. App. 2007):
Holding: Setting monthly restitution amount above a level Defendant could reasonably pay was reversible error where the amount was "just setting Defendant up to fail" and would not further the ultimate goal of rehabilitation.

People v. Anderson, 2010 WL 2571349 (Ill. App. 2010):
Holding: Where Defendant had two convictions for sex offenses stemming from a single incident during which two sex acts were performed, this did not meet the definition of an offender who committed a "second or subsequent" offense, as stated in enhancement statute.

People v. Gibson, 2010 WL 33308389 (Ill. App. 2010):
Holding: Sentence for "aggravated kidnapping" that was higher than sentence for identical offense of "armed violence predicated on kidnapping" violated proportionate penalties clause.

People v. Wuebbels, 2009 WL 4896614 (Ill. App. 2009):
Holding: Even though a statute provided that sentences for crimes committed in DOC were to be consecutive to sentences already being served, court lacked authority to impose a consecutive sentence on Defendant who was already serving a life sentence, since Defendant would not be able to serve a sentence at the end of his natural life.

People v. Jardon, 2009 WL 2357094 (Ill. App. 2009):
Holding: Where Juvenile had been charged with first degree murder, but convicted of second degree murder, trial court was not authorized to sentence Juvenile as an adult because second degree murder was not an offense that required Juvenile to be sentenced as an adult and State had failed to comply with time and notice deadline for purposes of sentencing Juvenile as an adult for unenumerated offense.

People v. Herrin, 2008 WL 4426886 (Ill. Ct. App. 2008):
Holding: Where probation officer (rather than prosecutor) filed a petition to revoke probation, this did not toll the original term of probation because only the prosecutor has authority to file a petition to revoke.

Blakemore v. State, 2010 WL 1524878 (Ind. Ct. App. 2010):
Holding: Where there was no registration requirement at time Defendant was convicted, application of sex registration requirement to Defendant was ex post facto.

Ben-Yisrayl v. State, 2009 WL 2003964 (Ind. Ct. App. 2009):
Holding: Court lacked statutory authority to impose death penalty and an alternative term of year sentence.

Dowdell v. City of Jeffersonville, 2009 WL 160573 (Ind. Ct. App. 2009):
Holding: Sex offender provision prohibiting sex offenders from entering city parks was ex post factor as applied to persons convicted before the law and whose duty to register had expired.

Rich v. State, 2008 WL 2746501 (Ind. Ct. App. 2008):
Holding: Court cannot order burglary-Defendant to pay for burglar alarm installation for victim as part of restitution.

State v. Pollard, 2008 WL 20226371 (Ind. Ct. App. 2008):
Holding: Sex offender registration statute as applied to Defendant was ex post facto, because it prohibited him from living in his residence near schools, even though Defendant had been living in his residence before enactment of the statute.

State v. Cluck, 2010 WL 1376121 (Kan. Ct. App. 2010):
Holding: Trial court had no authority to sentence manslaughter Defendant to have to display photo of victim in his prison cell.

State v. Curtis, 2009 WL 1705733 (Kan. Ct. App. 2009):
Holding: Where State delayed 393 days between Defendant's arrest and time it brought probation violation to hearing, this delay was unreasonable in violation of due process.

State v. Reese, 20090 WL 2341445 (Kan. Ct. App. 2009):
Holding: Sex offender juvenile adjudication for sex offense would not count as prior conviction for purposes of determining lifetime sex registration requirement.

Lisle v. Com., 2009 WL 1811105 (Ky. Ct. App. 2009):
Holding: Even though State had Circuit Clerk authenticate case jackets, uniform citations, and dockets for alleged prior cases, where the Clerk did not authenticate or introduce the prior convictions themselves, this evidence was insufficient to prove up the prior convictions.

Nicely v. Com., 2009 WL 1097905 (Ky. Ct. App. 2009):
Holding: Court cannot impose contempt citations for same conduct used to revoke probation.

Parker v. State, 2010 WL 2636116 (Md. Ct. Spec. App. 2010):
Holding: Where Defendant originally had a concurrent sentence but after appeal it was changed to a consecutive one, Defendant was entitled to credit for all time he served while the sentence had been concurrent.

People v. Dowdy, 86 Crim. L. Rep. 559 (Mich. Ct. App. 2009):
Holding: Sex offender registration law that requires offenders to report their domicile or residence does not apply to homeless people.

People v. Dipiazza, 86 Crim. L. Rep. 247 (Mich. Ct. App. 11/3/09):
Holding: Even though 18 year old had a conviction for sexual relationship with 15 year old girlfriend, it would constitute cruel and unusual punishment to require Defendant to register as a sex offender for such a "Romeo and Juliet" consensual sexual relationship.

Johnson v. Fabian, 79 Crim. L. Rep. 89 (Minn. Ct. App. 4/4/06):
Holding: Prisoner cannot be subjected to longer prison sentence for refusing to participate in sex-offender program that required that he admit guilt.

G.H. v. Township of Galloway, 2008 WL 2726635 (N.J. Super. Ct. 2008):
Holding: Municipal ordinance restricting where sex offenders can live was invalid because preempted by State's "Megan's Law."

State v. V.D., 2008 WL 2811322 (N.J. Super. Ct. 2008):
Holding: Probation condition that required Defendant to report immigration status to ICE was invalid; trial court should not report defendants to ICE because impairs courts' ability to independently protect those who may seek court remedies.

State v. Atcitty, 85 Crim. L. Rep. 394 (N.M. Ct. App. 6/4/09):
Holding: New Mexico sex offender registration law does not apply to Native Americans who were convicted of sex offenses in courts other than the State's.

State v. Diaz, 2007 WL 656871 (N.M. Ct. App. 2007):
Holding: After it had already imposed its sentence, trial court could not later impose an enhanced sentence for DWI when the State discovered an additional conviction that had not been used to enhance sentence at the original sentencing hearing.

People v. Jordan, 2010 WL 3326863 (N.Y. County Ct. 2010):
Holding: Defendant was not ineligible for a diversion program, even though there was also a non-qualifying offense charged.

People v. Boyd, 2008 WL 1746726 (N.Y. App. Div. 2008):
Holding: Due process violated where guilty plea judge did not inform Defendant of duration of post-release supervision or permissible statutory range for such supervision.

State v. Morrow, 2009 WL 3320291 (N.C. Ct. App. 2009):
Holding: Where court requires sex offender to wear GPS device, court must impose a time limit for when this requirement will end.

State v. Stines, 2009 WL 3320276 (N.C. Ct. App. 2009):
Holding: Where State sought to require sex offender to wear GPS device, Defendant was entitled to notice of the reasons the State sought this.

State v. Swann, 2009 WL 1413041 (N.C. Ct. App. 2009):
Holding: Even though the prosecutor presented a restitution worksheet which showed rape victim was claiming $510 in restitution, where the prosecution presented no evidence showing what losses the restitution was for, there was insufficient evidence to order it.

State v. Hoover, 2007 WL 3131871 (Ohio Ct. App. 2007):
Holding: Court could not enhance DUI sentence merely because Defendant exercised his right to revoke his implied consent to a breath test.

Holloway v. State, 2008 WL 1735670 (Okla. Crim. App. 2008):
Holding: Where indigent Defendant unable to post bail was required to remain in county jail, Defendant was entitled to jail time credit against his sentence under the Equal Protection Clause.

Anderson v. State, 78 Crim. L. Rep. 662 (Okla. Crim. App. 2/22/06):
Holding: Defendant who would be required to serve 85% of his sentence before becoming eligible for parole is entitled to have sentencing jury informed of this fact.

State v. Boitz, 2010 WL 2926041 (Or. Ct. App. 2010):
Holding: A variance in enhancement fact-notice that Defendant was "facing pending criminal charges" at time he committed offense, and proof at sentencing that he had been on probation, was prejudicial.

State v. Hopson, 2008 WL 2357346 (Or. Ct. App. 2008):
Holding: Where trial court had to make factual findings to sentence Defendant as sexually violent dangerous offender, this violated *Blakely v. Washington*, since factual findings must be made by jury.

Com. v. Karth, 2010 WL 1593119 (Pa. Super. 2010):
Holding: Trial court cannot order monthly restitution payments that extend beyond the term of probation.

Com. v. Fink, 2010 WL 522806 (Pa. Super. 2010):
Holding: A polygraph exam that required sex offenders to answer questions about their prior sexual history without regard to whether their conduct had resulted in criminal charges had the potential to be incriminating and failure to answer could not support parole revocation, since this would violate privilege against self-incrimination.

Com v. Wilgus, 2009 WL 1841781 (Pa. Super. 2009):
Holding: Where Defendant was homeless, this precluded possibility of a "residence" or fixed address within the meaning of Megan's Law for sex registration; the law did not cover the situation presented by homeless people.

Nesbit v. State, 2007 WL 1695394 (Tex. Crim. App. 2007):
Holding: The duration of a 1-year community release begins on the day the restrictions upon a Defendant's freedom begin, but does not include the anniversary date.

Griffith v. State, 2009 WL 2914128 (Tex. App. 2009):
Holding: Even though sex Defendant's probation required that he not frequent areas where children congregate, his visit to a public library where he used a computer while sitting next to at 15 year old girl did not violate this, nor did his sitting next to a stairway that led to a children's area.

Johnson v. State, 2009 WL 1675761 (Tex. Crim. App. 2009):
Holding: Where judge imposed jail time after haring victim-impact statements, this was not harmless where Texas law only allowed victim-impact statements to be read after judge had imposed sentence.

Hernandez v. State, 2008 WL 2970873 (Tex. App. 2008):
Holding: Where judge had a policy of sentencing defendants to twice whatever previous sentence they had received, this showed bias and denied due process.

State v. Cabrera, 81 Crim. L. Rep. 387 (Utah Ct. App. 6/7/07):
Holding: Defendant has right to counsel at a restitution hearing where the imposition of restitution is part of probation and includes actual or suspended jail time.

State v. Jones, 151 P.3d 1056 (Wash. Ct. App. 2007):
Holding: Trial court's imposition of consecutive sentences required a jury to make a factual determination that concurrent sentences would have been too lenient.

State v. Goodson, 771 N.W.2d 385 (Wis. Ct. App. 2009):
Holding: Trial judge's unequivocal promise to sentence Defendant to maximum time if he violated his supervised release constituted objective bias, indicating judge had made up his mind about release revocation and sentencing.

Sexual Predator

In re: Care and Treatment of Holtcamp v. State, No. SC88914 (Mo. banc 7/31/08):
Even though Defendant was incarcerated for a non-sexually violent offense, the State could apply the sexually violent predator statute to him to prevent his release, because Defendant had previously been convicted of a sexually violent offense.
Facts: In 1983, Defendant pleaded guilty to attempted forcible rape; he served a prison sentence and was released. Fourteen years later, he pleaded guilty to statutory sodomy and was imprisoned. Prior to his release, the State sought to civilly commit him as a sexually violent predator. The forcible rape conviction is a sexually violent predicate offense. The statutory sodomy offense is not. Defendant contended there was no jurisdiction to civilly commit him.
Holding: Sec. 632.480(5)(a) provides that a person may be committed as a sexually violent predator if they have been convicted of "a sexually violent offense." Attempted forcible rape was a sexually violent offense, even though statutory sodomy was not. Defendant argues for a narrow reading of the statute that one must currently be serving a sentence for a sexually violent offense to be civilly committed, but such a reading is not justified. The plain reading of the statute permits civil commitment against any inmate convicted of a predicate offense, regardless of when the offense occurred.

In the Matter of the Care and Treatment of Coffman, No. SC87803 (Mo. banc 6/12/07):

Holding: (1) Section 632.498 RSMo. 2000, which requires that a sexually violent offender make an initial showing by "preponderance of the evidence" why he should be released, does not violate due process or equal protection; and (2) even though Movant did not allege that his mental abnormality had changed, where Movant alleged that due to deteriorating physical health he was no longer a danger, this allegation was not frivolous and was sufficient to warrant a hearing.

In the Matter of the Care and Treatment of Bernat, No. SC87415 (Mo. banc 6/30/06):

Trial court abused its discretion in permitting State to argue adverse inference from Defendant's failure to testify.

Facts: In SVP trial, State did not call Defendant to testify. State then argued an adverse inference from Defendant's failure to testify, saying jurors did not get to judge Defendant's credibility about how he had changed and did not hear him testify.

Holding: The 5th Amendment right to remain silent does not apply to SVP proceedings because they are civil, not criminal. However, a Defendant in an SVP proceeding may have an equal protection claim under the 14th Amendment. The State has a compelling interest in ensuring a jury makes a reliable determination of whether a person is SVP. However, this reasoning does not apply to this case because the State did not attempt to call Defendant as a witness at trial, and Defendant did not testify. When the State does not call an SVP defendant to testify, allowing the State to comment on his failure to testify is not narrowly tailored to further the State's compelling interest and fails equal protection analysis. Commenting on the failure to testify does not further the truth-seeking process. Thus, trial court abused its discretion in allowing State to argue an adverse inference from Defendant's failure to testify.

In re: Fogle v. State, No. WD69618 (Mo. App. W.D. 7/7/09):

Holding: Where trial court in SVP proceeding imposed "special conditions" on the commitment of a person, the Attorney General could not appeal those special conditions without joining the Department of Mental Health as a party, because DMH is the responsible party for carrying out the "special conditions."

In the Matter of the Care and Treatment of Tyson, No. WD66469 (Mo. App., W.D. 7/10/07):

Where court found no probable cause that Defendant had pedophilia, State could not proceed to trial and commit Defendant on theory that Defendant had pedophilia.

Facts: Under the SVP law, the probate court found that it lacked probable cause to believe Defendant suffered from pedophilia. Over Defendant's objection, the State proceeded to trial on this theory and other mental abnormalities. The jury committed Defendant.

Holding: The effect of the SVP preliminary hearing is an issue of first impression. A preliminary hearing serves to narrow the scope of issues for trial by apprising Defendant of the operative facts that will be used against him. When the probate court made its finding of no pedophilia, it weeded out one theory of mental abnormality. The State is

bound by that determination. The State proceeded to trial on a theory for which the probate court found no probable cause. The State lacked authority to proceed, and the finding of confinement cannot stand. Footnote 12 notes, however, that the State might be able to request a new preliminary hearing to present new evidence of pedophilia.

*** U.S. v. Comstock, ___ U.S. ___, 87 Crim. L. Rep. 197 (U.S. 5/17/10):**
Holding: Necessary and Proper Clause provides basis for federal civil commitment law for mentally ill, dangerous sex offenders.

U.S. v. Comstock, 84 Crim. L. Rep. 374 (4th Cir. 1/8/09):
Holding: Congress lacked constitutional authority to enact "civil commitment" statute, 18 U.S.C. Sec. 4248, for sexual offenders; unlike States, the Congress has no general police power and the statute does not fall within the Commerce Clause.

U.S. v. Tom, 85 Crim. L. Rep. 233 (8th Cir. 5/13/09):
Holding: Congress had power to enact civil commitment law for sexually dangerous persons (disagreeing with *U.S. v. Comstock*, 551 F.3d 274 (4th Cir. 2009).

Merryfield v. Jordan, 85 Crim. L. Rep. 139 (10th Cir. 10/19/09):
Holding: A person civilly committed as a sexual predator is not a "prisoner" for purposes of Prison Litigation Reform Act (PRLA).

Bauder v. Dept. of Corrections, 87 Crim. L. Rep. 879, 2010 WL 3527536 (11th Cir. 9/13/10):
Holding: Where guilty plea counsel erroneously advised Defendant that his plea to stalking could not be used as a basis to later commit him as a sexually violent predator, counsel was ineffective.

U.S. v. Graham, 2010 WL 457445 (D. Mass. 2010):
Holding: Gov't failed to prove Defendant should be committed for SVP where Defendant had a sex paraphilia but there was no evidence that he was aroused by or fantasized about nonconsenting partners; further, the Gov't expert's findings on this, which were different than the court appointed expert's, showed the Gov't expert was biased.

U.S. v. Wilkinson, 2009 WL 1740358 (D. Mass. 2009):
Holding: Adam Walsh Act provisions regarding civil commitment as sexually dangerous person was not supportable under Commerce Clause or Necessary and Proper Clause.

U.S. v. Wilkinson, 2009 WL 2591157 (D. Mass. 2009):
Holding: Even though Defendant had three prior convictions for sex offenses and was diagnosed with Antisocial Personality Disorder, where he had a long history of drug abuse that contributed to his sexual offenses and he had since successfully completed sex treatment and no expert diagnosed him as having pedophilia or abnormal sexual urges,

there was insufficient evidence to commit Defendant as a sexual predator under Adam Walsh Act.

U.S. v. Volungus, 2009 WL 489838 (D. Mass. 2009):
Holding: Congress lacked authority under Commerce Clause to enact civil commitment law for sexually dangerous persons in Adam Walsh Act.

People v. Castillo, 2010 WL 2025548 (Cal. 2010):
Holding: Under judicial estoppel doctrine, where prosecutor, defense and court had agreed to seek only two year commitment for SVP Defendant, this was binding on them even though later appellate decisions held such stipulations could not be negotiated.

People v. Lara and **People v. Cobb, 86 Crim. L. Rep. 728 (Cal. 3/8/10):**
Holding: Where State seeks to extend a person's civil commitment, State must file petition to extend before the expiration of the current commitment term.

People v. McKee, 2010 WL 308811 (Cal. 2010):
Holding: Equal protection requires that SVP persons be treated the same as NGRI persons in terms of procedural protections; NGRI persons were receiving greater protection than SVP.

People v. McKee, 86 Crim. L. Rep. 533 (Cal. 1/28/10):
Holding: Calif. statute for commitment of sexually violent predators violates equal protection unless State can provide a reason for treating these persons differently than other offenders.

People v. Allen, 83 Crim. L. Rep. 734, 2008 WL 2875298 (Cal. 7/28/08):
Holding: SVP Defendant has due process right to testify at SVP trial, even though defense counsel do not want him to.

In re Smith, 83 Crim. L. Rep. 39, 2008 WL 755259 (Calif. 3/24/08):
Holding: Where conviction for offense is reversed on appeal, Defendant cannot be civilly committed as an SVP.

Larimore v. State, 84 Crim. L. Rep. 334 (Fla. 12/11/08):
Holding: Fla. statute for sexual civil commitment requires that Defendant be in lawful custody when the State begins commitment proceedings.

Smith v. State, 84 Crim. L. Rep. 572 (Idaho 2/9/09):
Holding: Where sexual violent predator statute minimized Defendant's opportunity to be heard to defend and provided only minimal discovery on why he was an SVP, the statute violated due process.

In re Foster, 78 Crim. L. Rep. 608 (Kan. 2/3/06):
Holding: Prosecutor denied Defendant fair SVP trial by saying in opening statement that a "multidisciplinary team" including a judge had already examined Defendant's records and background and determined he was at risk of re-offending.

Poe v. Sex Offender Registry Bd., 2010 WL 1931098 (Mass. 2010):
Holding: Sex offender has right to effective assistance of counsel in hearing in front of Sex Offender Registration Board.

Coffin v. Superintendant, Mass. Treatment Center, 88 Crim. L. Rep. 193 (Mass. 11/4/10):
Holding: Where Defendant was in custody under a statute that was later found unconstitutional, he was not a "prisoner" who could be considered for SVP commitment.

Kenniston v. Dept. of Youth Services, 84 Crim. L. Rep. 610 (Mass. 2/210/09):
Holding: Where a juvenile statute allowed State to retain juvenile for three additional years if youth was "physically dangerous to the public," this violated due process because civil commitment requires a link between dangerousness and difficulty in controlling behavior due to mental illness or abnormality; also the term "physically dangerous" is unconstitutionally vague.

Commonwealth v. Gillis, 80 Crim. L. Rep. 579 (Mass. 2/14/07):
Holding: State's sexually violent predator commitment law applies only to persons currently serving a criminal sentence or those with charges pending, and does not apply to persons who are currently civilly committed to a mental hospital following a period of incarceration.

State v. Voisine, 86 Crim. L. Rep. 625 (N.D. 1/26/10):
Holding: Incest between consenting adults cannot constitute the conduct to civilly commit someone as a sexually violent predator.

Hood v. Com., 88 Crim. L. Rep. 228 (Va. 11/4/10):
Holding: Offender who is being considered for SVP commitment has procedural due process right to change his mind about an uncounseled decision not to cooperate with State mental health examiners, once counsel has been appointed. This would allow Offender to lift the bar to presentation of his own expert evidence.

Lawrence v. Com., 2010 WL 653455 (Va. 2010):
Holding: Even though SVP law allows expert to state basis for his opinions, this does not authorize expert to give details of hearsay allegations of sexual misconduct.

State v. McCuistion, 87 Crim. L. Rep. 885 (Wash. 9/2/10):
Holding: Amendments to statute allowing annual review of SVP commitment, which limited the type of information that could be considered, violated due process because this allowed the detention of persons who are no longer mentally ill or dangerous.

In re Detention of Hawkins, 87 Crim. L. Rep. 920 (Wash. 9/9/10):
Holding: State cannot compel sex offender to submit to polygraph exam about his sex history in order to determine whether to civilly commit him as SVP.

In re Detention of Post, 88 Crim. L. Rep. 164 (Wash. 10/28/10):
Holding: In civil commitment trial for SVP, State cannot admit evidence about treatment Defendant would receive if committed or about the possibility that Defendant might be released one day; these facts are irrelevant to the initial determination of whether Defendant should be committed.

In re Lucas, 2010 WL 746376 (Cal. App. 2010):
Holding: A regulation that allowed a prison to extend a defendant's release when there was "good cause" to believe defendant would likely reoffend was invalid, since it swallowed the general rule that SVP evaluations must be done before a defendant's parole date.

People v. Litmon, 2008 WL 1813122 (Cal. App. 2008):
Holding: Delay in trying Defendant on civil sex predator proceedings violated due process and speedy trial, where unavailability of witnesses was fault of State.

In re James H., 81 Crim. L. Rep. 695 (Cal. Ct. App. 8/31/07):
Holding: Juvenile court records of Defendant sealed under state law could not be used against Defendant to prove he was a sexually violent predator as an adult.

People v. Shazier, 2006 WL 1217184 (Cal. App. 2006):
Holding: Prosecutor committed misconduct by telling jury in closing argument that if they found Defendant to be SVP, he'd be civilly committed.

King v. State, 2005 WL 2372723 (Fla. Dist. Ct. App. 2005):
Holding: Defendant can challenge designation as a sexual predator via State postconviction motion to correct, vacate or set aside sentence.

Statute Of Limitations

State v. Graham, No. SC87424 (Mo. banc 11/7/06):
Three-year statute of limitations of Section 541.200 RSMo 1969 barred prosecution for sodomy committed in 1975-1978.
Facts: Defendant was charged with sodomy which allegedly occurred in 1975-1978. Defendant filed a pretrial motion to dismiss, claiming that Section 541.200 RSMo 1969's three-year statute of limitation barred prosecution. His motion was overruled. Defendant was convicted, and appealed.
Holding: Section 541.190 RSMo 1969 provided no time limitation for prosecution of offenses which carried the punishments of death or life in prison. Section 541.190 is ambiguous as to whether it applies to all offenses for which life in prison is a punishment, or applies *only* to offenses, such as first degree murder, which provide alternative

punishments of "death or life in prison." The rule of lenity requires that the statute be interpreted most favorably to Defendant, i.e., that Section 541.190 applies only to offenses which provide alternative punishments of "death or life in prison." Although sodomy carries up to life in prison, it does not carry a death sentence, so Section 541.190 does not apply. Thus, the applicable statute is the three-year statute of limitations under Section 541.200, and the prosecution is time-barred.

State v. Cotton, No. ED91528 (Mo. App. E.D. 6/23/09):
Holding: Where statute of limitations defense was not raised at trial, it was waived; statute of limitations is an affirmative defense that must be asserted by the defense at trial.

State v. Corley, No. 28249 (Mo. App., S.D. 5/7/08):
(1) Even though the State had dismissed a timely-filed charge of second degree assault and allowed another year to pass and then refiled a similar charge, the statute of limitation had not run because it was tolled by the original filing; (2) where the trial court's written judgment found Defendant guilty of a count different than the court's oral verdict, this is a clerical error and the case is remanded for correction of this error.
Facts: In 1998, Defendant was charged with second degree assault for causing an injury while driving a car in an intoxicated condition. The State dismissed this charge in 2003 without prejudice. In 2004, the State filed a new information charging Defendant with second degree assault for recklessly causing serious physical injury by driving the car at an excessive rate of speed. Defendant moved to dismiss on grounds that the statute of limitation has expired. After being found guilty, Defendant appealed.
Holding: (1) Several factors are used to determine if a previously charged offense can serve to toll the statute of limitations for a later charged offense: whether the later information essentially contains the same facts as the original charge; whether the later charge is charged under the same statute as the original charge; and whether the later charge is a different level of offense than the original charge. Here, while the later information charged somewhat different facts, both charges arose out of the same incident (auto crash), both were charged under the same statute, and under the same level of offense. Therefore, the original charge was the "same offense" as the later charge, and the statute of limitations was tolled by the original filing and did not expire. (2) The trial court's written judgment found Defendant guilty of a different count than the court's oral verdict. This is a clerical error in the judgment, and the case is remanded to correct this error under Rule 29.12.

State v. Moran, No. WD69397 (Mo. App. W.D. 9/29/09):
Holding: *"Emotional abuse" under Section 455.501(1) for violating order of protection means an injury to the child's psychological capacity or emotional stability demonstrated by an observable or substantial change in child's behavior, emotional response, or cognition, including anxiety, depression, withdrawal or aggressive behavior.*
Facts: An order of protection had been entered against Defendant-Mother to stay away from her former child. Mother parked car in child's neighborhood and yelled, "I'll get you back" at him. Mother was convicted of violating order of protection by inflicting "emotional abuse."

Holding: Sec. 455.501(1) defines abuse, in part, as "emotional abuse" inflicted on a child. The definition of "emotional abuse" is an issue of first impression in Missouri. Using definitions from other states and the dictionary definition, "emotional abuse" means an injury to the child's psychological capacity or emotional stability, demonstrated by observable or substantial changes in child's behavior, emotional response, or cognition, including anxiety, depression, withdrawal, or aggressive behavior. The State may use lay or expert witnesses to establish that the child's injury resulted in observable or substantial change. Here, witnesses testified child changed after Defendant-Mother yelled, "I'll get you back." Conviction affirmed.

*** Holland v. Florida, ___ U.S. ___, 2010 WL 2346549 (U.S. 2010):**
Holding: One year limitation period in AEDPA, 28 USC 2244(d) is subject to equitable tolling.

U.S. v. Kozeny, 83 Crim. L. Rep. 778 (2d Cir. 8/29/08):
Holding: 18 USC 3292, which allows the gov't to toll the statute of limitations to search for evidence in foreign countries, requires the gov't to apply for tolling before the statute of limitations expires.

Dorn v. Lafler, 2010 WL 1266813 (6th Cir. 2010):
Holding: Where prison officials received Defendant's appeal papers seven days before they were due but did not mail them until after deadline, this violated Defendant's constitutional right of access to the courts.

Riddle v. Kemna, No. 06-2542 (8th Cir. 4/8/08)(en banc):
Holding: *(1) Time for filing federal habeas petition where Petitioner appealed only to Mo. Court of Appeals and did not file for transfer begins on date mandate issues; Petitioner does not get benefit of time to file cert. since cert. could not have been filed; but (2) where Petitioner relied on advice by Public Defender as to when to file federal habeas and that advice was based on existing 8th Circuit precedent, Petitioner may be entitled to equitable tolling to deem his habeas timely.*
Facts: Riddle (Petitioner) appealed to the Mo. Court of Appeals for his direct appeal. The Mo. Court of Appeals issued its mandate on February 15, 2001. Riddle did not file an application for transfer to the Mo. Supreme Court and thus could not have filed a cert. petition with the U.S. Supreme Court. Riddle filed a 29.15 PCR on May 4, 2001. His PCR appeal mandate issued on April 21, 2004. Riddle filed his federal habeas on March 22, 2005. The district court held it was untimely because the due date was February 3, 2005.
Holding: (1) Riddle argues that the time for filing a federal habeas did not begin to run after his direct appeal until the 90 days for seeking cert. with the U.S. Supreme Court expired. However, this is wrong. The Missouri Supreme Court is Missouri's court of last resort, and Riddle did not seek transfer of his direct appeal to the Missouri Supreme Court. Therefore, Riddle could not have sought cert. from the U.S. Supreme Court, because a ruling by the Missouri Supreme Court is a prerequisite to filing for cert. The 8th Circuit had held in *Nichols v. Bowerox*, 172 F.3d 1068 (8th Cir. 1999)(en banc) that the time did not begin to run until after the time for cert. expired. *Nichols* relied on *Smith*

v. Bowersox, 159 F.3d 345 (8th Cir. 1998), but Smith had his case heard by the Missouri Supreme Court, and Nichols (and Riddle) did not; this distinction is critical, but was overlooked by the 8th Circuit in *Nichols*. *Nichols v. Bowersox* is now overruled. Thus, Riddle's federal habeas time began to run at the "conclusion of direct review" which is when the Mo. Court of Appeals issued its direct appeal mandate. The time was then tolled when Riddle filed his PCR, and began running again when the PCR mandate issued from the Court of Appeals. "To recap, the district court properly began the statute of limitations in 28 U.S.C. 2244(d) the day after the direct-appeal mandate issued, tolled it while the state postconviction proceedings were pending, and did not allow the 90-day period for filing for certiorari. Riddle's petition was thus untimely." (2) But at the time Riddle filed his federal habeas, *Nichols v. Bowersox* was the controlling precedent, which would render the habeas timely. Riddle has shown that the Public Defender System routinely told petitioners that the time did not begin to run until 90 days for cert. expired after direct appeal. This advice was based on *Nichols*. Riddle may receive equitable tolling if he can show he did not file his habeas because he was lulled into inaction through relying on 8th Circuit precedent.

Editor's Note by Greg Mermelstein: The Attorney General argued that the time began to run at the conclusion of the time when a motion for rehearing could have been filed on direct appeal, i.e., 15 days after the direct appeal opinion. The 8th Circuit rejects this and holds it is the later mandate-date that controls. However, the 8th Circuit is relying on *Payne v. Kemna*, 441 F.3d 570 (8th Cir. 2006), and not directly on a U.S. Supreme Court case. I know the Attorney General continues to contest *Payne*, so the most conservative advice is to count from the date when a rehearing motion could have been filed, not from the mandate date (although you are following 8th Circuit law in doing that, so equitable tolling may apply if the caselaw later changes).

U.S. v. McNair, 2010 WL 1881884 (11th Cir. 2010):
Holding: The limitations period for bribery conspiracy was not extended when university disbursed funds from Defendant's son's tuition because this was not an "overt act" in the conspiracy since university was not one of the conspirators, even though government contractor in bribery scheme had paid the tuition.

Smith v. U.S., 86 Crim. L. Rep. 383 (D.C. 12/3/09):
Holding: A judicial rule establishing a 120-day statute of limitations for filing motions to reduce sentence is a "claim-processing" rule which is waived if prosecutors fail to object to late-filed petitions; Court overturns prior cases holding the late filing is a "jurisdictional" issue.

Lecates v. State, 85 Crim. L. Rep. 466 (Del. 6/22/09):
Holding: "Possession" of a firearm during commission of a felony is more limited than "possession" of a firearm by a prohibited person; possession during commission of felony requires evidence of physical availability and accessibility.

State v. Fletcher, 85 Crim. L. Rep. 330 (Del. 5/27/09):
Holding: Even though juvenile was required to register as sex offender, that statute did not preclude him from moving to expunge his conviction and if expungement occurred, the duty to register ends.

Chase v. State, 2009 WL 1649690 (Ga. 2009):
Holding: Where State's age of consent was 16 and victim was 16, it was a defense to crime of "sexual assault of a person enrolled in school" that victim consented to sex.

State v. Dudley, 85 Crim. L. Rep. 353 (Iowa 5/29/09):
Holding: Where statute required indigent Defendants to reimburse State for cost of their appointed counsel but provided no determination of ability to pay when Defendants were acquitted, the statute violated constitutional right to counsel and equal protection.

State v. Garcia, 82 Crim. L. Rep. 163 (Kan. 10/26/07):
Holding: Even though the legislature extended the time for prosecuting cases where there was a suspect identifiable by DNA, the legislature could not apply this retroactively because this violates ex post facto; thus, where Defendant's original statute of limitations on a rape expired in 2000, but the legislature in 2001 extended the statute of limitations for DNA matches, the extension could not be applied retroactively to Defendant.

People v. Monaco, 2006 WL 241119 (Mich. 2006):
Holding: Failure to pay child support is not a continuing offense, but is complete at time of the failure to pay. Prosecution for failure to pay child support more than 8 years after the failure to pay was barred by the 6-year statute of limitations.

State v. Wertheimer, 2010 WL 1609730 (Minn. 2010):
Holding: The time computation statute which excluded the first day of a period did not apply to whether Defendant's second DWI was within 10 years of the prior one; thus, Defendant's second DWI offense exactly 10 years to day from prior offense was not subject to enhancement.

State v. Ferrante, 84 Crim. L. Rep. 169 (Tenn. 10/28/08):
Holding: Where complaint was void at its inception, it did not toll the statute of limitations even though Defendant had appeared in court on the complaint.

State v. Suarez, 2009 WL 1311819 (Fla. App. 2009):
Holding: Even though Defendant was incarcerated in a federal prison in the State (Florida), the statute of limitations for prosecution of a State (Florida) offense was not tolled during his incarceration.

People v. Herrin, 2008 WL 4426886 (Ill. Ct. App. 2008):
Holding: Where probation officer (rather than prosecutor) filed a petition to revoke probation, this did not toll the original term of probation because only the prosecutor has authority to file a petition to revoke.

Cox v. State, 2006 WL 38610170 (Okla. Crim. App. 2006):
Holding: Defendant can raise statute of limitations issue for first time on appeal because this is a jurisdictional defect.

Statutes – Constitutionality -- Interpretation – Vagueness

F.R. v. St. Charles County Sheriff's Dept. and State v. Raynor, No. SC89834 and SC90164 (Mo. banc 1/12/10):
(1) "Halloween law," Sec. 589.426, banning sex offenders from certain activities is unconstitutional as applied to persons convicted before the effective date of the statute because this is retrospective; and (2) Residency law, Sec. 566.147, banning sex offenders from living within 1000 feet of certain places is unconstitutional as applied to persons convicted before the effective date of the statute because this is retrospective.
Facts: Defendant Raynor was charged with violation of the "Halloween law," Sec. 589.426, which bans sex offenders from certain activities on Halloween. Raynor had been convicted of a sex offense in 1990. The "Halloween law" became effective in August 2008. Raynor allegedly violated the "Halloween law" on Halloween 2008. F.R. was convicted of sex offenses in 1999. The residency law became effective in 2004. In 2008, he sought to move within 1000 feet of a child-care facility.
Holding: Article I, Sec. 13, of the Mo. Constitution forbids enactment of laws that are "retrospective" in operation. A retrospective law is one that creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. A later law that requires a sex offender to do something -- with a criminal penalty for not doing what the new law requires -- is the imposition of a new obligation or duty solely as a result of the pre-statute conviction. The laws here, as applied to persons who were convicted before the laws' effective dates, are retrospective.

City of Springfield v. Belt, No. SC09234 (Mo. banc 3/2/10):
A traffic "red light camera" violation is a municipal violation and "moving" violation which cannot be determined by administrative proceedings, but must be heard by a judge of the circuit court.
Facts: Defendant was charged with running a red light. His offense was recorded through use of a red light camera. Defendant's case was heard by a "Hearing Examiner" in an administrative proceeding. Following that, Defendant demanded a trial de novo in circuit court. The City claimed there could be no trial de novo because this was an administrative proceeding, not a criminal conviction by a municipal division of the circuit court.
Holding: Section 479.010 provides that violations of municipal ordinances shall be heard only before a division of the circuit court. Section 479.040 allows cities of less than 400,000 (such as Springfield) to chose to have violations heard by an associate circuit judge, or a municipal judge, or at a county municipal court if one has been created. However, there is no provision for a city such as Springfield to have ordinance violations heard in an administrative proceeding. Section 479.011 allows for cities with more than 400,000 inhabitants to hear parking, civil and *non*moving violations, but even considering this section, a red light violation is typically considered a *moving* violation. Using an

administrative procedure for moving violation is not allowed. Hearing examiner decision is vacated.

State v. Richard, No. SC89832 (Mo. banc 11/17/09):
Holding: Where (1) Defendant's wife had called police because of a domestic disturbance; and (2) Defendant was found in a chair unconscious, intoxicated and with a loaded handgun, this was within the purview of Sec. 571.030.1(5) prohibiting possession of a loaded firearm while intoxicated, and the statute was not unconstitutional under Art. I, Sec. 23 of the Mo. Const., giving the right to bear arms, because the right is not unlimited and the State can regulate guns as an exercise of its police power to provide public safety.

State v. Pribble, No. SC89473 (Mo. banc 5/26/09):
Holding: Section 566.151 RSMo Cum. Supp. 2008 prohibiting attempted enticement of a child and requiring a 5-year minimum sentence without probation or parole does not constitute cruel and unusual punishment; is not void for vagueness; does not infringe on protected free speech; and its emergency clause is valid.

Mo. Ass'n of Club Executives v. State, No. SC87154 (Mo. banc 12/19/06):
Holding: Portions of HB 972 which prohibited certain activities in the "adult entertainment" industry are invalid because they violate Article III, Section 21, Mo.Const., which provides that no bill shall be passed through the Legislature to change its "original purpose." Since the "original purpose" of HB 972 related to certain intoxication-related traffic offenses, its "adult entertainment" industry provisions could not be added later.

Editor's Note by Greg Mermelstein: Footnote 1 states that the Supreme Court did not consider in this case the constitutionality of other provisions of HB 972 which do not relate to intoxication-related traffic offenses. The Supreme Court seems to be inviting a challenge to those other provisions. Area 50 District Defender Ellen Flottman provided the following list of the other portions of HB 972, which might be challenged: Section 217.735 (lifetime supervision of sex offenders); Section 559.106 (electronic monitoring of sex offenders); Section 566.083 (sexual misconduct involving a child); Section 575.205 (tampering with electronic monitoring equipment); Section 575.206 (violating a condition of lifetime supervision).

State v. Dienstbach, No. ED93837 (Mo. App. E.D. 6/15/10):
Holding: Even though MSHP Trooper saw Defendant driving on the wrong side of a city street, Trooper had legal authority to stop Defendant because a city street is a "highway" under prior caselaw defining the term.

State v. Molsbee, No. WD70399 (Mo. App. W.D. 8/10/10):
Where (1) Defendant had pleaded guilty to sex offense in 1999, and (2) in 2008 moved within 1000 feet of a school, his guilty plea to violating Sec. 566.147 (2004) was set aside because the law could not be applied retrospectively to him, and he could raise this matter on direct appeal after a guilty plea because the law (caselaw) on this changed while his appeal was pending.

Facts: Defendant was convicted of a sex crime in 1999. In 2008, he moved within 1000 feet of a school, in violation of Sec. 566.147, which was enacted in 2004. In 2009, he pleaded guilty to this offense and was sentenced, but then filed a direct appeal.
Holding: While Defendant's direct appeal was pending, the Mo. Supreme Court ruled in *F.R. v. St. Charles County Sheriff's Dept*., 301 S.W.3d 56 (Mo. banc 2010), that Sec. 566.147 does not apply to persons convicted before the effective date of the statute in 2004 because that would be a retrospective law. The issue here is whether Defendant can raise this issue on direct appeal after a guilty plea. Usually, a guilty plea waives defenses. A direct appeal of a guilty plea is limited to whether a trial court has subject matter jurisdiction (now construed as "authority") and whether the information was sufficient. Here, the issue is not precisely whether the court had authority to accept the plea, but that the statute was unconstitutional as applied to Defendant. However, prior cases have held that if there is a change in law after judgment but before the appellate court's decision is rendered, the appellant/defendant gets the benefit of the changed law. Here, the *F.R.* case was decided while Defendant's appeal was pending, and Defendant should get the benefit of *F.R.* The "change of law" principle is, in effect, an exception to the principle that a guilty plea waives defenses. Plea and conviction vacated.

State v. Arteaga, No. WD71425 (Mo. App. W.D. 3/9/10):
Where Defendant was acquitted, Sec. 550.040 authorizes him to recover from State cost of depositions, transcripts, and interpreter fees.
Facts: Defendant was charged of second degree murder and acquitted at trial. He then filed a motion to have the State pay his costs for depositions, interpreter's fees, suppression hearing transcripts, and cost of copying the prosecutor's file.
Holding: Sec. 550.040 provides that in all cases where prison is the sole punishment, if the defendant is acquitted, the costs shall be paid by the State; and in all other cases, if the Defendant is acquitted, the costs shall be paid by the county which filed the charge. Second degree murder is an offense with imprisonment as the sole punishment. Hence, the State is responsible for Defendant's costs under Sec. 550.040.

State v. Smothers, No. WD70361 (Mo. App. W.D. 11/17/09):
(1) Where Defendant, who was required to have urine testing as a bond condition, provided a urine sample that was not his to authorities, Defendant could be charged with forgery; (2) even though trial court's dismissal order was "without prejudice," it had the practical effect of terminating the litigation, so the State could appeal the dismissal; (3) the appeal of the trial court's dismissal of the charge did not violate double jeopardy because Defendant was never placed in jeopardy since the trial court had not begun to hear evidence on the question of guilt but merely decided a pretrial motion to dismiss charge.
Holding: To prove forgery under Sec. 570.090.1(4), the State must prove that Defendant with the purpose to defraud used an inauthentic item as genuine, possessed an inauthentic item as genuine, or transferred an inauthentic item with the knowledge it would be used as genuine. The State does not have to prove the Defendant made or altered anything himself. Forgery against the gov't need not deprive it of money or property. So long as the Defendant has the purpose to frustrate the administration of justice, the "purpose to

defraud" element is met. The forgery statute does not cover only writings, but is broad enough to cover false urine samples. Dismissal of charge reversed.

State v. Wade, No. WD67363 (Mo. App., W.D. 9/11/07):
Section 568.045 does not authorize prosecution of pregnant mothers for child endangerment for ingesting drugs during pregnancy.
Facts: Defendant-mother delivered a baby who tested positive for marijuana and methamphetamine. The State charged mother with child endangerment. The trial court dismissed the charge.
Holding: Section 568.045 provides a person commits first-degree child endangerment by "knowingly act[ing] in a manner that creates a substantial risk to the life, body or health of a child less than 17 years old." The State argues that Section 1.205.1 which provides that life begins at conception allows prosecution. However, Section 1.205.4 states that "[n]othing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care." This provision precludes the prosecution of a mother who indirectly harms her fetus by ingesting illegal drugs.

*** McDonald v. City of Chicago, ___ U.S. ___, 2010 WL2555188 (U.S. 2010):**
Holding: 2nd Amendment right to keep and bear arms for purpose of self-defense is applicable to states.

*** Skilling v. U.S., ___ U.S. ___, 2010 WL 2518587 (U.S. 2010):**
Holding: 18 USC 1346 regarding honest-services fraud criminalizes only bribery and kickback schemes.

*** U.S. v. Stevens, ___ U.S. ___, 87 Crim. L. Rep. 63 (U.S. 4/20/10):**
Holding: Federal statute that criminalizing making, sale or possession of "depictions of animal cruelty" violates 1st Amendment as overbroad; Supreme Court declines to declare this "unprotected speech."

*** U.S. v. O'Brien, ___ U.S. ___, 87 Crim. L. Rep. 267 (U.S. 5/24/10):**
Holding: 18 USC 924(c)(1), which prohibits using, carrying or possessing a firearm in connection with a violent crime, treats the type of firearm as an element of the offense that must be proved to the jury beyond a reasonable doubt.

*** Carr v. U.S., ___ U.S. ___, 87 Crim. L. Rep. 313 (U.S. 6/1/10):**
Holding: SORNA's provision that makes it a crime for sex offenders to travel in interstate commerce without registering does not apply to offenders whose travel was completed before the law went into effect in 2006.

*** Holder v. Hummanitarian Law Project, ___ U.S. ___, 87 Crim. L. Rep. 456 (U.S. 6/21/10):**
Holding: 18 USC 2339B(a)(1), which makes it unlawful to provide "material support or resources" to foreign terrorist organizations, is not unconstitutionally vague and does not violate freedom of speech or association.

*** Flores-Figueroa v. U.S., 85 Crim. L. Rep. 172, ___ U.S. ___ (5/4/09):**
Holding: Conviction under aggravated identify theft statute, 18 USC 1028A, requires that Defendant was aware that the false identifying information belonged to an actual person.

*** Boyle v. U.S., 85 Crim. L. Rep. 347, ___ U.S. ___ (6/8/09):**
Holding: RICO applies to 'association-in-fact" enterprises.

*** Abuelhawa v. U.S., 85 Crim. L. Rep. 268, ___ U.S. ___ (5/26/09):**
Holding: 21 USC 844, which makes it a felony to "use any communication facility" to commit a drug crime does not apply to using a telephone to buy a personal-use quantity of drugs.

*** Haywood v. Drown, 85 Crim. L. Rep. 269, ___ U.S. ___ (5/26/09):**
Holding: State statute that bars prisoners from bringing Section 1983 claims against correctional officers in State courts violates the U.S. Constitution's Supremacy Clause.

*** U.S. v. Williams, ___ U.S. ___, 83 Crim. L. Rep. 228 (5/19/08):**
Holding: 18 U.S.C. 2252A(a)(3)(B) which criminalizes pandering or solicitation of child pornography is not overbroad under the 1st Amendment's free speech clause or unduly vague in violation of the 5th Amendment's due process clause.

*** District of Columbia v. Heller, ___ U.S. ___, 83 Crim. L. Rep. (6/26/08):**
Holding: DC's ban on handguns in the home violates 2nd Amendment right to have weapons for self-defense.

*** Lopez v. Gonzales, 80 Crim. L. Rep. 243, ___ U.S. ___ (2006):**
Holding: For deportation purposes, term "aggravated felony" does not include crimes that are treated as felonies under State law but misdemeanors under federal law.

U.S. v. Stevens, 83 Crim. L. Rep. 666 (3rd Cir. 7/18/08):
Holding: 18 U.S.C. 48, which prohibits creation or possession of images of animal cruelty, violates the First Amendment, because it creates a new category of unprotected speech not currently recognized by the U.S. Supreme Court.

Ostergren v. Cuccinelli, 87 Crim. L. Rep. 812 (4th Cir. 7/26/10):
Holding: 1st Amendment free speech clause bars enforcement of a Virginia law prohibiting intentional disclosure of Social Security numbers, where a "privacy advocate" published land records with Social Security numbers on them to "publicize her message that governments are mishandling SSNs and generate pressure for reform."

U.S. v. White, 2010 WL 2169487 (4th Cir. 2010):
Holding: Virginia conviction for misdemeanor assault against a family member was not a "misdemeanor crime of domestic violence" for purposes of felony possession of firearms statute, where offense did not have as an element use of force, but included just touching.

In re DNA Ex Post Facto Issues, 2009 WL 783391 (4th Cir. 2009):
Holding: Statute requiring a $250 processing fee be paid by prisoners for DNA samples before they could be paroled or released was ex post facto.

U.S. v. Hayes, 81 Crim. L. Rep. 74 (4th Cir. 4/16/07):
Holding: The crime of possession of firearm following a conviction for "misdemeanor crime of domestic violence," 18 U.S.C. 922(g)(9), requires the prior conviction have as an element a domestic relationship between the defendant and the prior victim. Although the victim was Defendant's wife, with whom he lived, the statute did not have as an element a domestic relationship.

U.S. v. Nichols, 2010 WL 1286846 (5th Cir. 2010):
Holding: Statute criminalizing dissemination of any visual image of child pornography did not apply only to permanently stored data.

U.S. v. Key, 86 Crim. L. Rep. 702 (5th Cir. 3/5/10):
Holding: Even though a broader federal manslaughter law existed, the Assimilative Crimes Act, 18 USC 13(a) (which applies state law in certain federal prosecutions), assimilates the Texas offense of intoxication manslaughter.

U.S. v. Faulkenberry, 87 Crim. L. Rep. 735 (6th Cir. 7/28/10):
Holding: Transaction money laundering under 18 USC 1956(a)(2)(B)(i) requires proof that an "animating purpose" of the transaction was to conceal the illicit funds.

U.S. v. Davis, 84 Crim. L. Rep. 385 (6th Cir. 12/19/08):
Holding: Statute forbidding objects in cars that obstruct driver's vision was unconstitutionally vague; but good-faith exception to exclusionary rule applies to officers who stopped and searched car (finding drugs) because of Tweety-Bird air freshener hanging from mirror since they were enforcing presumptively valid law.

Wagner v. Washington County, 81 Crim. L. Rep. 527 (7th Cir. 7/12/07):
Holding: Police lacked probable cause to arrest Defendant for violating a protective order when he attended a public meeting that he had a right to attend, and the meeting was also attended by the person with the protective order. The order did not prevent Defendant from "being on" any premises with the other person, but merely told him to "avoid" being on the premises with the other person.

U.S. v. Fincher, 83 Crim. L. Rep. 752 (8th Cir. 8/13/08):
Holding: Even though Defendant claimed his possession of machine gun and saw-off shotgun was exercise of 2nd Amendment right to be in private militia and to possess guns under *District of Columbia v. Heller*, 83 Crim. L. Rep. 514 (U.S. 2008), federal statute making this illegal was valid.

Niederstadt v. Nixon, No. 05-4329 (8th Cir. 10/17/06):
Where the Missouri Supreme Court found that Petitioner had used "forcible compulsion" when he put his finger in a sleeping girl's vagina, this was a new construction of the sodomy statute, Section 566.060 RSMo Supp. 1991, which did not give notice to defendants that this conduct constituted "forcible compulsion." Habeas relief granted.
Facts: Habeas Petitioner was convicted of sodomy under Section 566.060 RSMo Supp. 1991. He had placed his finger in the vagina of a sleeping girl. Section 566.060 RSMo Supp. 1991 required "deviate sexual intercourse with another person without that person's consent by the use of forcible compulsion."
Holding: Due process requires that criminal statutes give fair warning of what conduct constitutes a crime. Due process is violated if a court gives a criminal statute a construction that is unexpected by reference to the statute. The Missouri Supreme Court held in Petitioner's case that the act of penetrating the vagina satisfied the physical force element of the statute. However, a fair reading of the statute and caselaw interpreting the statute prior to Petitioner's case would not have given notice that intercourse itself can be the force used to accomplish the intercourse, or that a sleeping or unconscious victim can be "compelled." The statutory language did not give "fair warning" that Petitioner's conduct constituted sodomy. Petitioner's due process rights were violated. Habeas relief granted. However, the 8th Circuit notes that Missouri courts are free to apply the new construction of the statute to cases which occurred *after* Petitioner's Missouri Supreme Court case because defendants after that case would have notice of the criminal conduct.
U.S. v. Alvarez, 87 Crim. L. Rep. 804 (9th Cir. 8/17/10):
Holding: Stolen Valor Act, 18 USC 704(b), which prohibits falsely claiming to have military honors, violates 1st Amendment protection of free speech; 1st Amendment protects false speech.

U.S. v. Havelock, 87 Crim. L. Rep. 827, 2010 WL 3293614 (9th Cir. 8/23/10):
Holding: 18 USC 876(c), which criminalizes the mailing of threatening communications, applies only if mailed to a natural person, not a corporation.

Powell's Books Inc. v. Kroger, 87 Crim. L. Rep. 910, 2010 WL 3619949 (9th Cir. 9/20/10):
Holding: Oregon statute prohibiting furnishing pornography to children was overbroad under 1st Amendment because it covered works that are not obscene to children when viewed as a whole.

U.S. v. Rocha, 87 Crim. L. Rep. 11 (9th Cir. 3/18/10):
Holding: Assimilative Crimes Act, 18 USC 13(a), does not assimilate Calif.'s assault statute.

U.S. v. Kilbride, 86 Crim. L. Rep. 153, 2009 WL 3448360 (9th Cir. 10/28/09):
Holding: Courts should apply "national community standards" in evaluating whether speech transmitted on the internet is obscene.

U.S. v. Horvath, 81 Crim. L. Rep. 527 (9th Cir. 7/10/07):
Holding: Lying to a probation officer preparing a PSI is exempt from the federal statute criminalizing making a false statement to a gov't official, 18 USC 1001, because the statute excludes statements made to judges, and this was similar to a statement made to a judge.

Merryfield v. Jordan, 85 Crim. L. Rep. 139 (10th Cir. 10/19/09):
Holding: A person civilly committed as a sexual predator is not a "prisoner" for purposes of Prison Litigation Reform Act (PRLA).

Herrington v. Hill, 88 Crim. L. Rep. 192 (D.C. 11/4/10):
Holding: 2nd Amendment right to keep handgun found in *District of Columbia v. Heller*, 554 U.S. 570 (2008), also protects the right to possess handgun ammunition in one's residence.

Plummer v. U.S., 86 Crim. L. Rep. 204 (D.C. 11/12/09):
Holding: Because city ordinance at time of arrest prevented the licensing of handgun because the gun was then illegal, Defendant could assert a Second Amendment defense to charge of possession of unlicensed gun.

Garcia v. Benov, 2009 WL 6498193 (C.D. Cal. 2009):
Holding: District Court can review under Administrative Procedure Act decision by Sec. of State to deport under Convention Against Torture.

U.S. v. Drew, 2009 WL 2872855 (C.D. Cal. 2009):
Holding: Conviction under the Computer Fraud and Abuse Act based only on violation of the terms of use of internet web site violates the void for vagueness doctrine, because normal breaches of contract and are not subject to criminal prosecution and CFAA does not explicitly state which violations of terms of service are criminalized.

U.S. v. Saathoff, 2010 WL 1406327 (S.D. Cal. 2010):
Holding: Mail and wire fraud and honest service fraud statutes were void for vagueness as applied to Defendants failure to disclose conflicts of interest while serving as board members for pension fund.

U.S. v. Berdeal, 2009 WL 230082 (S.D. Fla. 2009):
Holding: Where there was uncertainty whether regulation which prohibited catching certain fish applied outside Florida waters, the rule of lenity applies to preclude applying regulation there.

U.S. v. Jackson, 87 Crim. L. Rep. 815 (E.D. Va. 8/17/10):
Holding: 18 USC 1651, which criminalizes "piracy as defined by the law of nations," prohibits only "sea robbery."

Russell v. State, 2006 WL 3094840 (Ark. 2006):
Holding: In considering the value of stolen property to meet the statutory minimum, courts do not "add on" the sales tax that would have been charged on the property.

Mejak v. Granville, 2006 WL 1409105 (Ariz. 2006):
Holding: Defendant could not be convicted of luring a "minor" or a "peace officer" for sex, where the person who did the luring was a TV reporter; statute requires that the person be a minor or peace officer posing as a minor.

People v. Kelly, 2010 WL 184253 (Cal. 2010):
Holding: Medical marijuana law which capped the amount of marijuana a person could have at a lower level than authorized by a voter-approved constitutional amendment was unconstitutional.

State v. Scruggs, 2006 WL 2472672 (Conn. 2006):
Holding: Statute governing risk of injury to child was unconstitutionally vague when applied to a Defendant-parent who had an unclean residence. The prosecution claimed the unclean residence contributed to child's poor mental health and suicide.

Polite v. State, 82 Crim. L. Rep. 64, 2007 WL 2790770 (Fla. 9/27/07):
Holding: To convict of resisting an officer with violence, State must show Defendant knew the person was a law enforcement officer.

Santos v. State, 84 Crim. L. Rep. 169 (Ga. 10/27/08):
Holding: Georgia's sex offender registration statutes are unconstitutionally vague as applied to homeless persons who have no street or route address.

State v. Woodfall, 2009 WL 1144009 (Haw. 2009):
Holding: Identity theft statute prohibiting "transmission of personal information of another" requires the transmission of information of an actual person; statute does not prohibit transmission of information associated with fictitious person.

People v. Williams, 86 Crim. L. Rep. 258 (Ill. 11/19/09):
Holding: Federal Copyright Act preempts state law imposing criminal penalties for bootlegging sound recordings.

People v. Carpenter, 2008 WL 1746725 (Ill. 2008):
Holding: Statute making it a crime to have a secret compartment in a car violates due process.

People v. Woodrum, 2006 WL 2827638 (Ill. 2006):
Holding: State statute which provided that the luring of a child into a building, vehicle or other place "shall be prima facie evidence of other than a lawful purpose" was unconstitutional since it created mandatory presumption that shifted burden to defendant.

Brown v. State, 81 Crim. L. Rep. 469 (Ind. 6/22/07):
Holding: Statute making it a crime to move a person from one place to another by means of fraud or enticement was unconstitutionally vague. Defendant had convinced two men to come to his house and remove their clothes by pretending to be a radio employee conducting a contest.

State v. Garrity, 85 Crim. L. Rep. 280 (Iowa 5/15/09):
Holding: Iowa statute that allows arrestee's to make a phone call requires arresting officer to tell them they can call almost anyone.

State v. Muhlenbruch, 80 Crim. L. Rep. 603 (Iowa 2/23/07):
Holding: Where statute made it a crime to possess child pornography on "a computer," the Defendant could only be prosecuted for one unit of prosecution regarding the computer and not for each image on the computer.

State v. Henning, 85 Crim. L. Rep. 555 (Kan. 6/26/09):
Holding: Statute authorizing police to search an arrestee and area immediately around him for evidence of "a crime" violates 4th Amendment in light of *Arizona v. Gant*, ___ U.S. ___ (2009), which allows police to search area within reach of arrestee only to protect themselves or to find evidence that relates to the offense of arrest.

Com. v. Zubiel, 86 Crim. L. Rep. 586 (Mass. 2/5/10):
Holding: Even though statute prohibited transmission of "any matter harmful to minors" including "any handwritten or printed material," this did not apply to a Defendant who sent inappropriate text via computer to a person he thought was a 13-year-old girl, because computer text messages are not written with a pen or pencil or printed on paper.

Com. v. LeBlanc, 86 Cri. L. Rep. 672 (Mass. 2/18/10):
Holding: Statute criminalizing giving alcohol or drugs to a person to have sex with them requires more than just giving alcohol or drugs; requires force, deceit or trickery to convict; thus, where victim voluntarily consumed alcohol and drugs with Defendant and then had sex with Defendant, this was insufficient to convict.

Com. v. Weston W., 86 Crim. L. Rep. 77, 2009 WL 3032320 (Mass. 9/25/09):
Holding: Criminal sanctions provided by city's juvenile curfew ordinance violated state constitution's right to move freely because they were not sufficiently narrow.

People v. Hill, 87 Crim. L. Rep. 756 (Mich. 7/23/10):
Holding: Statute that applies to anyone who "produces, makes or finances" any child pornography, does not apply to Defendant who downloaded pornography from internet and burned it onto a disc for his own use.

State v. Cannady, 80 Crim. L. Rep. 524 (Minn. 2/8/07):
Holding: Due process was violated by a child pornography statute that made it an affirmative defense to show that the people depicted were 18 years old or older because this placed the burden of proof on Defendant concerning age.

Gallegos v. State, 81 Crim. L. Rep. 639, 2007 WL 2200028 (Nev. 8/2/07):
Holding: Statute prohibiting possession of firearm by "fugitive from justice" is so vague as to violate due process.

State v. Mohamed, 2009 WL 5150351 (N.H. 2009):
Holding: Even though Defendant received stolen property of a handgun, Defendant did not qualify for mandatory sentence for person convicted of crime involving a "deadly weapon," because a handgun is not a deadly weapon per se, but is only deadly depending on how it is used.

State v. Lamy, 85 Crim. L. Rep. 103, 2009 WL 928763 (N.H. 4/8/09):
Holding: (1) Even though State had a records law defining a "live birth" differently than the common law "born alive" doctrine, where Defendant killed a fetus in a drunken driving incident, the common law "born alive" rule applied to determine if Defendant could be prosecuted; (2) where jurors made unauthorized visit to crime scene, prejudice was presumed.

State v. Theriault, 84 Crim. L. Rep. 287 (N.H. 12/4/08):
Holding: Prostitution statute is overbroad as applied to makers of pornographic films.

State v. Offen, 82 Crim. L. Rep. 284 (N.H. 11/15/07):
Holding: In order to convict sex offender of failing to report residency in State, prosecution must prove that 30 days elapsed since Defendant established residency.

G.H. v. Township of Galloway, 85 Crim. L. Rep. 234 (N.J. 5/7/09):
Holding: City ordinances that further restrict where sex offenders can live are preempted by New Jersey's state sex offender law.

State v. D.A., 81 Crim. L. Rep. 360 (N.J. 6/4/07):
Holding: Witness-tampering statute requires proof that Defendant threatened witness with knowledge that a crime he committed is actually being or about to be investigated by police. Acting to prevent an investigation from happening is the crime of hindering.

State v. Wilson, 2010 WL5945505 (N.M. 2010):
Holding: State must prove Defendant had knowledge he was selling drugs in a "drug-free school zone."

City of Las Cruces v. Rogers, 2009 WL 2868714 (N.M. 2009):
Holding: City lacked authority to enforce DWI ordinance on private property without consent of owner, but offense could be prosecuted under State DWI law.

Britt v. State, 85 Crim. L. Rep. 649, 681 S.E.2d 320 (N.C. 8/28/09):
Holding: North Carolina Constitution's provision identical to 2nd Amendment prohibits application of felon-in-possession statute to person convicted of non-violent felony more than 30 years ago and who had not been in trouble since; the legislature's blanket firearms exclusion was not rationally related to public safety when applied to particular defendant.

Am. Booksellers Found. for Free Expression v. Cordray, 2010 WL 323304 (Ohio 2010):
Holding: Even though statute prohibits dissemination of materials harmful to minors, the statute is not violated by persons who post harmful materials on generally accessible websites and chat rooms, since the sites do not permit persons from preventing juveniles from accessing the material.

State v. Clay, 84 Crim. L. Rep. 331 (Ohio 12/11/08):
Holding: Where statute made it unlawful to possess a gun while under indictment, this was not a strict liability offense and State needed to prove Defendant was aware he was under indictment or was reckless in remaining unaware.

State v. Johnson, 83 Crim. L. Rep. 756 (Or. 8/14/08):
Holding: Harassment statute which criminalized speech "likely to provoke violent response" was overly broad; thus, Defendant could not be convicted in road-rage incident for yelling obscenity and racial epithets at another driver because risk of violence was not imminent.

Com. v. Omar, 86 Crim. L. Rep. 73 (Pa. 10/5/09):
Holding: Statute which criminalized sale or distribution of goods that had trademarks on them without the authorization of the trademark holder was overly broad and violated First Amendment free speech rights.

Com. v. McMullen, 84 Crim. L. Rep. 383 (Pa. 12/18/08):
Holding: Legislature's attempt to regulate indirect criminal contempt (i.e., violation of court orders outside judge's presence) violated separation of powers.

City of Greenville v. Bane, 88 Crim. L. Rep. 194 (S.C. 11/8/10):
Holding: Ordinance that prohibited making "obscene remarks" or remarks and actions "as would humiliate, insult or scare any person" was unconstitutionally vague on its face; Defendant had been prosecuted for yelling anti-gay remarks at persons.

Waters v. Farr, 85 Crim. L. Rep. 590 (Tenn. 7/24/09):
Holding: Tax on illegal drugs exceeded state constitutional taxing authority because taxes are paid by taxpayers to State in return for a protective environment for their business, but here, the tax is on something illegal.

State v. Gallegos, 82 Crim. L. Rep. 190 (Utah 10/26/07):
Holding: Law making it crime to cause a child "to be exposed to" controlled substances requires proof of a real, physical risk of harm to child.

In re Z.C., 81 Crim. L. Rep. 577 (Utah, 7/17/07):
Holding: A statute that forbids "a person" from touching someone under age 14 in a sexual manner may not be applied to a Defendant who was under 14 and had consensual sexual activity with the alleged victim.

State v. Mattinson, 80 Crim. L. Rep. 462 (Utah 1/19/07):
Holding: Communications fraud statute that made it a felony to make fraudulent communications "when the object of the scheme to defraud is other than the obtaining of something of monetary value" was unconstitutionally vague.

Thompson v. Com., 673 S.E.2d 469 (Va. 2009):
Holding: A "butterfly knife" is not a "like kind" of knife to a "dirk, bowie knife, switchblade, ballistic knife, razor, machete" or other knives under a statute prohibiting possession of such weapons.

City of Auburn v. Hedlund, 2009 WL 331666 (Wash. 2009):
Holding: Even though passenger rode with a DWI driver, where the passenger was injured in a crash, passenger could not be charged as an accomplice to DWI because passenger was the "victim" of the crime.

Lucas v. State, 2009 WL 4980327 (Ala. Crim. App. 2009):
Holding: Where enhancement statute defined "firearm" as a "weapon from which shot is discharged by gunpowder" or "deadly weapon" or weapon to cause "death or serious physical injury," then a toy gun was not a "firearm" under the enhancement statute that enhanced an offense for use of a firearm.

Myers v. Municipality of Anchorage, 2006 WL 893644 (Alaska Ct. App. 2006):
Holding: Ordinance prohibiting possession and sale of items used to manufacture, dispense, store or use controlled substances, without a culpable mental state, was unconstitutionally vague; the ordinance required the State to show only that the circumstances of possession "reasonably indicate" the possessor or seller intended illegal use.

Williams v. State, 2006 WL 3387268 (Alaska Ct. App. 2006):
Holding: Statute prohibiting alleged domestic assault perpetrator from returning to a shared residence with alleged victim before trial, without any opportunity for judicial review, violated equal protection.

State v. Payne, 2009 WL 2211036 (Ariz. Ct. App. 2009):
Holding: A county ordinance-imposed fee of $1,000 assessed against felony defendants at sentencing was invalid, because counties were not statutorily empowered to impose such prosecution fees.

People v. Saleem, 2009 WL 4852440 (Cal. App. 2009):
Holding: Statute prohibiting possession of "body armor" was unconstitutionally vague where there was no list of prohibited vests so as to give fair notice of prohibited items.

People v. Jackson, 2009 WL 3380646 (Cal. App. 2009):
Holding: Where statute made it illegal to make a threat, trial court erred in not sua sponte giving an instruction on the reasonableness of the threat to cause sustained fear in victim; otherwise, the statute may punish speech protected by the 1st Amendment.

People v. Wilson, 2006 WL 1074017 (Cal. App. 2006):
Holding: Word "likely" in child endangerment statute referring to "circumstances or conditions likely to produce great bodily injury or death" means a substantial danger, i.e., a serious and well founded risk of great bodily harm, not that death or serious injury is "probable" or "more likely than not."

State v. Montas, 84 Crim. L. Rep. 211 (Fla. Dist. Ct. 10/31/08):
Holding: Fla. law prohibiting unauthorized wearing of military uniforms was overbroad and violated free speech and due process.

State v. Wells, 2007 WL 2609461 (Fla. Ct. App. 2007):
Holding: Statue prohibiting racing on highways was unconstitutionally vague where it prohibited "use of one or more motor vehicles in an attempt to outgain or outdistance another motor vehicle," since this could encompass lawful passing.

Frix v. State, 2009 WL 1799323 (Ga. Ct. App. 2009):
Holding: A cell phone is not an "electronic storage device" similar to floppy disks or CD-ROMS named in statute, so Defendant's conduct of sending sexually explicit messages to minor by cell phone did not violate statute.

State v. Reyes, 2008 WL 4471365 (Idaho Ct. App. 2008):
Holding: Where a city ordinance made an offense a misdemeanor when State law made it only an infraction, the ordinance was in conflict with the State law and State law prevailed.

People v. Rosenthal, 2008 WL 5454241 (Ill. App. 2008):
Holding: The offense of "aggravated battery with a firearm" in inherent in offense of murder, so cannot serve as predicate felony for felony-murder.

State v. Lopez, 2006 WL 3849943 (La. Ct. App. 2006):
Holding: State statue making it a crime to drive without proof of lawful presence in the U.S. was preempted by federal REAL ID law.

State v. Crawley, 2010 WL 3744111 (Minn. Ct. App. 2010):
Holding: Statute that criminalized making a false statement alleging police misconduct, but did not criminalize making a false statement to absolve police of wrongdoing, violated 1st Amendment's prohibition on viewpoint discrimination.

Frazier v. Northern State Prison DOC, 2007 WL 1295997 (N.J. Super. Ct. 2007):
Holding: A simple assault under N.J. law is not a "misdemeanor crime of domestic violence" for purposes of the Lautenberg Amendment prohibiting possession of firearms by persons convicted of a "misdemeanor crime of domestic violence."

State v. Vance, 2008 WL 5731944 (N.M. Ct. App. 2008):
Holding: Even though state law required showing identification to buy pseudoephredrine cold tablets and the tablets are kept behind a counter, the tablets remain within the definition of "over-the-counter" drugs that do not require prescriptions and the tablets are not "drug precursors."

People v. James, 2010 WL 1911349 (N.Y. City Crim. Ct. 2010):
Holding: Given a statute specifically addressing trespassing on public housing property, Defendant could only be charged under that statute and not under general trespassing statute.

People v. All State Properties, 2010 WL 2771909 (N.Y.J. Ct. 2010):
Holding: Statute creating presumption that two or more cars parked at a single family home registered to two or more different surnames showed nonconforming conduct was unconstitutional and could not support issuance of search warrant.

People v. Griswold, 2006 WL 2380401 (N.Y. City Ct. 2006):
Holding: Aggressive panhandling statute was unconstitutionally vague where applied to a Defendant who stood on a street holding up a sign.

State v. Boyd, 2010 WL 3565414 (Ohio Ct. App. 2010):
Holding: State's prosecution of Defendant for record piracy was preempted by federal copyright law.

State v. Moorer, 2008 WL 2220399 (Ohio Ct. App. 2008):
Holding: Crime of firing a gun into a habitable structure requires the gun be fired "at or into" the structure from the outside, and not fired inside the house.

State v. Singfield, 2009 WL 2516121 (Ohio Ct. App. 2009):
Holding: Where aggravated robbery statute provided that a defendant "have a deadly weapon on … the offender's person or under the offender's control" and display or brandish it, this was not a strict liability offense but required a mens rea of recklessness as applied to the weapons element.

Lakewood v. El-Hayek, 2006 WL 4700685 (Ohio Mun. Ct. 2006):
Holding: The operator of a motorized scooter is not a "pedestrian" for purposes of statute on failure to yield right of way to "pedestrian" because a scooter is gas-powered, not human-powered.

State v. Mayes, 2008 WL 2357407 (Or. Ct. App. 2008):
Holding: Definition of "nudity" in statute prohibiting invasion of privacy applied only to post-pubescent adults. Thus, Defendant could not be convicted of secretly videotaping prepubescent girl.

State v. Lanier, 2010 WL 4068493 (S.C. Ct. App. 2010):
Holding: Where statute provided that it was unlawful for person confined in prison to escape, this applies to a prisoner who leaves a designated work-release location, but not another location.

Bailey v. State, 2009 WL 3460324 (Tex. App. 2009):
Holding: Offense of "obstructing a highway" requires a mental state at time obstruction occurred of either intentionally, knowingly, or recklessly.

Scott v. State, 2009 WL 1789240 (Tex. App. 2009):
Holding: Harassment statute's prohibition of making "repeated communications" in a manner reasonably likely to harass or annoy another person was unconstitutionally vague; among other reasons, the statute did not specific how many unwanted communications were required to violate it.

Karenev v. State, 2008 WL 902799 (Tex. App. 2008):
Holding: Statute providing that person commits harassment if he sends repeated electronic communications reasonably likely to harass, annoy, alarm or offend another was unconstitutionally vague.

Parmelee v. O'Neel, 2008 WL 2447831 (Wash. Ct. App. 2008):
Holding: Criminal statute prohibiting publication of "malicious" content about persons was unconstitutional on its face.

Sufficiency Of Evidence

State ex rel. Laughlin v. Bowersox, No. SC90542 (Mo. banc 8/23/10):
(1) Where Defendant was charged with burglarly and property damage at a U.S. Post Office, Missouri state courts had no jurisdiction to try Defendant because the State had ceded jurisdiction over the property to the federal gov't and jurisdiction was exclusively federal; and (2) even though Defendant failed to raise this issue in his postconviction appeal, habeas relief can be granted because the issue is jurisdictional.
Facts: In 1993, Defendant was convicted of burglary and property damage for crimes occurring at U.S. Post Office in Neosho. He was convicted in state court and sentenced to a lengthy prison sentence. In the 1990's, Defendant raised in a 29.15 motion in circuit

court that he could not be prosecuted in state court, but did not raise this claim on appeal of his postconviction motion. In 2010, he sought habeas corpus relief.
Holding: Under the U.S. Constitution, if a State cedes jurisdiction over federal property, the U.S. has exclusive jurisdiction to hear cases involving offenses committed on that property. When the U.S. acquired the land to build the Neosho Post Office, Missouri ceded jurisdiction over the land to the federal gov't. Art. I, Sec. 8, Clause 17, of the U.S. Const. deprives Missouri courts of the authority to enforce state laws on this federal property. Hence, the circuit court lacked jurisdiction to try Defendant. Even though Defendant could have raised this issue on appeal of his 29.15 motion, the issue is not waived because it is a true jurisdictional issue. Habeas relief is available where a petitioner can show a jurisdictional defect. Rule 29.15 provides the exclusive procedure for claims in the "sentencing court," but the Supreme Court is not the "sentencing court" and Rule 91 allows a judge to issue writs of habeas corpus to persons illegally constrained. Defendant ordered discharged.

State v. Stewart, No. SC90503 (Mo. banc 5/25/10):
Where newly discovered evidence likely would have produced a different result at trial, trial court erred in not granting New Trial Motion on this basis.
Facts: Defendant was convicted at trial of first degree murder. Victim had said before he died that two people shot him, and one was "the Eby girl's boyfriend." Defendant was the son of Eby. Defendant's sister was married to Tim, and another sister was living with Leo. Defendant denied the crime to police and at trial. The State presented two "jail-house snitch" witnesses who claimed that Defendant, while in jail with them, had said he did the crime with Leo. At trial, the jury heard evidence that DNA test results did not find Defendant's DNA on a hat connected to the murder, but that DNA from Victim, Tim and an "unknown person" was on the hat. After trial, the defense filed a New Trial Motion alleging a new trial should be granted based on "newly discovered evidence." At the New Trial Motion hearing, the defense presented a police detective who testified that he had information that Tim had said he had "taken someone's life," and Tim's nephew testified that Tim had told him he was at Victim's house when Tim was killed. The trial court denied the New Trial Motion.
Holding: To obtain a new trial based on newly discovered evidence, Defendant must show: (1) the evidence came to his attention after trial; (2) the lack of knowledge before trial was not due to lack of diligence; (3) the evidence is so material that it is likely to produce a different result at trial; and (4) the evidence was not merely cumulative or impeaching. Here, the parties agree that conditions 1, 2 and 4 are satisfied. The State argues, however, that the evidence is not material and is hearsay. The evidence may be hearsay, but in considering a New Trial Motion on basis of newly discovered evidence, a court is not to conjecture about the evidence's future admissibility; the evidence may not be offered the same at trial. Prior cases have found that self-incriminatory statements made to close family members shortly after a crime, that are corroborated by DNA, carry substantial reliability. Here, the State's theory was that Defendant and Leo committed the crime. But no forensic evidence connected them to the crime scene. The newly discovered evidence of Tim's incriminating remarks, when considered with the DNA testing linking Tim's DNA to the crime scene, raises serious doubt as to Defendant's

guilt. The jury could conclude that Tim and another person (not Defendant) killed Victim. Reversed and remanded for new trial.

State v. Latall, No. SC89322 (Mo. banc 12/16/08):
Even though Defendant left a $100,000 per year job for another job, eventually became unemployed, and eventually bought a money-losing bar, where he then became unable to pay his child support, he injected the issue of good cause for failure to pay into the case, and the evidence was insufficient to convict of criminal nonsupport.
Facts: Defendant originally had a $100,000 per year job. He quit that job and accepted another, similar job. However, he was laid off from the job when the company closed. He then sought other work, but could only find a $10 per hour job. He then took his remaining money and bought a money-losing bar to own and operate. The bar continued to lose money, and Defendant stopped paying his child support. He was convicted of criminal nonsupport.
Holding: Sec. 568.040.3 places the burden on Defendant to inject the issue of good cause into a criminal nonsupport case. Sec. 556.051 specifies the meaning of injecting the issue as follows: (1) The issue referred to is not submitted to the trier of fact unless supported by evidence; and (2) If the issue is submitted, any reasonable doubt on the issue requires a finding for the defendant on that issue. Sec. 556.051 imposes on the State the burden of proving, beyond a reasonable doubt, that Defendant did not have good cause in failing to pay. Defendant does not have to produce substantial evidence of good cause, or prove good cause with substantial evidence. Defendant's burden is merely to produce evidence of good cause. Once that is done, then the State must prove Defendant did not have good cause. Here, Defendant showed he was heavily in debt and had no income, given the unprofitability of his bar business. He also tried to pursue other employment without success. Although the former wife testified she thought Defendant seemed to have a prosperous bar, her unsubstantiated speculations do not provide sufficient evidence to reasonably find Defendant guilty. The State failed to prove Defendant did not have good cause. Conviction reversed.

State v. Minner, No. SC88986 (Mo. banc 6/30/08):
Sec. 195.218 RSMo. 2003 requires State to prove Defendant "knowingly" sold drugs within 1000 feet of public housing.
Facts: Defendant was convicted of selling drugs within 1000 feet of public housing. He sold drugs to an undercover informant 427 feet from public housing.
Holding: Sec. 195.218 prohibits distribution of drugs within 1000 feet of public housing. *State v. Hatton*, 918 S.W.2d 790 (Mo. banc 1996), held that the statute is only a sentencing enhancer for violating Sec. 195.211. However, the Court now overrules *Hatton* and holds that the Sec. 195.218 creates a separate offense. Sec. 562.021.3 provides that if a statute does not set forth a mental state, the mental state is purposely or knowingly. Hence, the State had to prove Defendant was aware that he was selling drugs within 1000 feet of public housing. The State offered no such evidence. Conviction reversed, but conviction entered for delivery of controlled substance, Sec. 195.211, because the evidence supports this offense.

State v. Salazar, No. SC88438 (Mo. banc 10/30/07):
A default administrative order issued by the Division of Child Support Enforcement and docketed with the circuit court finding paternity is not "any child legitimated by legal process" so as to be able to sustain a conviction for failure to pay child support.
Facts: Defendant was charged with failure to pay child support. Defendant was married to Mother of child, but they were separated. Mother testified Defendant was not the child's biological father. The State claimed Defendant was required to pay child support by reason of a DCSE administrative default order which had been entered against Defendant and docketed with the circuit court.
Holding: The issue is whether a default administrative order issued by DCSE constitutes a "legal process" sufficient to support a criminal nonsupport conviction. The DCSE order finding Defendant financially responsible for child is based on Section 210.822.1 which provides that a man is presumed to be the father of a child born during wedlock. The DSCE order is enforceable in supplementary civil proceedings once it docketed per Section 454.490. But that does not mean that the order constitutes "legal process" for purpose of sustaining a criminal conviction. *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238 (Mo. banc 2006) holds that the State has the burden to prove a *judgment* was entered establishing a child was "legitimated by legal process." Although Section 454.490 gives a docketed administrative order the force of a circuit court order, the statute does not provide that the order becomes a "judgment" of the circuit court. Holding otherwise would impermissibly substitute an executive agency determination for the independent power of the courts to render final "judgments." Unlike *Sauer*, there is no final judgment and, thus, no "legal process" that judicially determined Defendant's parentage. In the absence of a judgment, Defendant can collaterally attack the administrative order, and the State did not prove beyond a reasonable doubt that the child was "legitimated by legal process."

State ex rel. Verweire v. Moore, No. SC87445 (Mo. banc 12/19/06):
(1) Habeas corpus may be used to assert "actual innocence" claim following a guilty plea where there was no factual basis; (2) Petitioner was "actually innocent" of first degree assault, Section 565.050, because his briefly pointing a gun at victim and threatening him was not a substantial step toward causing serious bodily injury.
Facts: Petitioner was confronted by a guy at an arcade, and Petitioner pulled out a gun and said he would "blow [guy's] head off," but then Petitioner retreated. Petitioner pled guilty to first degree assault, Section 565.050. There was no direct appeal or 24.035 case. Petitioner filed a habeas in circuit court and the Missouri Court of Appeals, and the Court of Appeals issued an opinion denying the writ. *Verweire v. Moore*, 168 S.W.3d 518 (Mo. App., S.D. 2005). Petitioner then filed a new habeas at the Supreme Court, raising the same issue as below.
Holding: Habeas relief is available, even after a guilty plea, where a petitioner can show that a manifest injustice has resulted probably resulted in the conviction of one who is actually innocent. The precise issue is whether Petitioner's conduct was a substantial step toward first-degree assault. A person commits first degree assault if he "attempts to cause serious bodily injury to another person." The evidence was insufficient to show this. Petitioner did not pull the trigger, and soon retreated from the altercation. He merely threatened harm. There was no showing of a conscious object to carry out the

threat. Thus, Petitioner is actually innocent of first degree assault, and his plea was not knowing and voluntary. Conviction vacated, but case remanded to await proceedings regarding lesser included offenses.

State v. Germany, No. ED93245 (Mo. App. E.D. 10/26/10):
Even though Defendant charged with sexual contact with a student touched victim's butt, this is not the same as touching an anus, as required by the statute.
Facts: Defendant, a teacher, was convicted of three counts of having sexual contact with a student, Sec. 566.086, for touching her breasts, vagina and butt through her clothing.

Holding: Sec. 566.010(3) defines sexual contact as touching of the genitals, anus, or breasts. The terms "butt" and "anus" are not the same, and evidence of touching a student's butt is insufficient to demonstrate contact with the anus. The evidence here did not show Defendant touched victim's anus. The evidence was that Defendant had touched victim's breasts one time though her clothes, touched her vagina one time through her clothes, and touched her butt multiple times. This constituted only two counts of the offense, not three, because touching the butt does not violate the statute. One count vacated.

State v. Fernow, No. ED94384 (Mo. App. E.D. 11/9/10):
Even though Defendant escaped from his probation revocation hearing, he could not be charged with escape from custody because he was not being held after arrest for a crime, since probation violations are not criminal offenses.
Facts: Defendant, who was on probation, failed to appear at a probation revocation hearing. After he was arrested on a capias warrant, he ran out of the courtroom. The State charged him with escape from custody. He moved to dismiss. The trial court dismissed. The State appealed.
Holding: Sec. 577.200 provides that a person commits the crime of escape from custody if they escape "while being held in custody after an arrest for any crime." Defendant was not in custody after an arrest for a crime. He was in custody pursuant to a capias warrant for failure to appear at a probation revocation hearing. Violating conditions of probation is not a crime. Probation operates independently of a criminal sentence. Thus, the motion to dismiss was properly granted. Court notes, however, that under the new version of Section 544.665 RSMo. Cum. Sup. 2009, a person can be charged with failure to appear at a probation revocation hearing.

State v. Tomes, No. ED94494 (Mo. App. E.D. 11/30/10):
Even though methamphetamine residue was found in an open manicure case on Defendant's dresser, where Defendant shared the bedroom with a man who used drugs and another man who used drugs was also in the house, evidence was insufficient to convict Defendant of possession.
Facts: Defendant shared a bedroom with another man. Police came to their house because of an assault, and Defendant was initially arrested for assault. Police searched the house and found in Defendant's bedroom a small bag with white residue inside an open manicure case on Defendant's dresser. Defendant was convicted of possession of methamphetamine.

Holding: Where, as here, actual possession is not the issue, the State must prove constructive possession by circumstantial evidence. Here, Defendant shared her bedroom with a man who was a known meth user. Additionally, there was another man in the house who appeared under the influence of drugs that day. The amount of meth found was tiny. The State did not present any evidence that the manicure case belonged to Defendant or whether it was a man's or woman's case. There was no evidence that Defendant's personal belongings were intermingled with the case. Even though there was evidence of marijuana also found in the house, the presence of marijuana does not permit an inference that Defendant knew of the meth. The evidence was insufficient to prove possession of meth.

State v. Burton, No. ED93331 (Mo. App. E.D. 8/31/10):
Where the State did not present evidence that Defendant had notice that an order of protection was in effect, evidence was insufficient to convict of violation of protection order.
Facts: Defendant was charged with violation of a protection order. The order was obtained in Illinois by victim. Defendant later assaulted victim in Missouri. The parties introduced a stipulation that an order of protection was in effect against Defendant.
Holding: During jury deliberations, the jury sent a note asking if Defendant knew of the order of protection. Sec. 455.085 requires that to be convicted of violation of an order of protection, a Defendant must have had legal or actual notice of the order. Here, the State presented no evidence of this. The Illinois court file would have shown it, but the State did not introduce any certified copies from the file. No witness testified that Defendant knew of the order. The State argues that a jury could "infer" from other evidence that Defendant must have known of the order, and also seeks to now claim that there were two violations of the order – one on April 13 and another on April 23 – and since Defendant was first arrested for violating the order on April 13, then he would have had to know about it on April 23. However, Defendant was charged here with violating the order on April 13 and the verdict director covered this date. The State claims time is not of the essence to the charge, but the indictment cannot be stretched to cover Defendant's violation on April 23. Conviction reversed.

St. Louis County v. Skaer, No. ED94279 (Mo. App. E.D. 6/29/10):
Where Defendant was charged with not having a valid waste management plan, trial court could not take judicial notice that all households generate waste because that is not a fact of common knowledge and it also shifts the burden of proof to Defendant.
Facts: Defendant was charged with an ordinance violation for not having a waste management plan. Defendant claimed he did not produce any waste, and therefore, was not required to have a plan. The State asked the trial court to take judicial notice that all households generate a "possibly small amount of non-recyclable waste." The court took judicial notice and found Defendant guilty.
Holding: Judicial notice may be taken of facts which are within the common knowledge of people of ordinary intelligence. Whether or not someone could recycle all their waste is not a matter of common knowledge and should not be accepted as such. To carry its burden, the State was required to put on evidence that Defendant in fact produced non-recyclable waste. Taking judicial notice of a necessary element of the offense for which

there is no evidentiary support improperly shifts the burden to Defendant to prove his innocence. The burden is on the State to prove guilt. Conviction reversed.

State v. Nylon, No. ED92172 (Mo. App. E.D. 3/30/10):
Where (1) police were arresting Defendant; (2) Defendant fell in a hole and tried to crawl away from police; and (3) police held onto Defendant's leg, the evidence was insufficient to convict of resisting arrest by fleeing because Defendant did not get away from police.
Facts: Police approached Defendant on a street and ultimately sought to arrest him for a drug offense. Defendant started to walk away, but fell. Police grabbed Defendant's leg and he kept trying to crawl away. Defendant was convicted of resisting arrest by fleeing.
Holding: Here, the State elected to charge Defendant with resisting arrest by fleeing, Sec. 571.150.1(1) and had the burden to prove that Defendant actually fled consistent with the plain and ordinary meaning of the word "flee" because there is no statutory definition. The State's evidence only showed that Defendant attempted to crawl away from police, who held onto Defendant's leg. This was insufficient to prove that Defendant "ran away." Conviction vacated.

State v. Kalk, No. ED92326 (Mo. App. E.D. 11/24/09):
Where Wife had faxed to court a motion dismissing an Order of Protection, the Order was dissolved immediately and Defendant did not violate the Order by subsequently going to Wife's house, even though no judge had acted on the dismissal and Wife was trying to withdraw her dismissal.
Facts: Wife obtained an ex parte Order of Protection against Defendant prohibiting him from entering her house. During divorce proceedings, Defendant's attorney negotiated with Wife's attorney for dismissal of the Order. On February 17, Wife's attorney faxed to court a dismissal notice asking to dismiss the Order. However, on February 21, Wife's attorney filed a motion to "withdraw" the dismissal, which was granted over Defendant's objection. Also on February 21, Defendant went to Wife's house. Defendant was charged with the Class A misdemeanor of violation of an Order of Protection. After he was found guilty at trial, the court granted a motion for judgment of acquittal. The State appealed.
Holding: Defendant contends he cannot be guilty for violating the Order of Protection because the Order was an ex parte Order that had been voluntarily dismissed by Wife under Rule 67.02(a) of February 17, and the dismissal was effective immediately upon filing of the dismissal notice, because Wife voluntarily dismissed before the taking of any evidence. This case turns on whether the Order was in effect at the time Defendant went to Wife's house. Sec. 455.060.5 provides that any order of protection entered under Secs. 455.010 to 455.085 "shall terminate upon the filing of a motion to terminate the order of protection by the petitioner" except with regarding to custody of minor children not at issue here. Here, the dismissal notice was faxed to court on February 17 by Wife's attorney. It was effective immediately upon faxing it to court, even though no judge ruled on it. Local court Rule 3.4(2) provides that a document received by fax will be deemed filed as of the date and time recorded by the fax, which was February 17. The dismissal having been filed and effective on February 17, Defendant's actions of going to Wife's house on February 21 could not have violated the Order because it was dismissed

by operation of law upon filing the dismissal notice. The motion for judgment of acquittal was properly granted.

State v. Sears, No. ED92394 (Mo. App. E.D. 11/17/09):
Where (1) Defendant was 22 and victim less than 15; (2) Defendant told victim he was in 11th grade and went to her house; (3) inside house, Defendant kissed and touched victim and lifted up victim's shirt; (4) Defendant asked her if she'd ever had sex and his friends think sex is "pretty cool;" and (5) Defendant fled house when victim's grandmother came home, the evidence was sufficient to convict of attempted enticement of a child, Sec. 566.151.
Holding: This is a case of first impression in that prior attempted enticement cases have all involved attempts to solicit sex over the internet from persons who defendants thought were minors. Defendant claims the evidence is insufficient to convict because the State did not prove he suggested having sex. Sec. 566.151 does not require a completes sexual act to support conviction. The offense is committed if a person persuades, solicits, coaxes, entices or lures by words, actions or through communication via the Internet a minor to engage in sexual contact. The State is not required to show Defendant explicitly asked victim to have sex. Here, the conduct showed Defendant suggested having sex. Conviction affirmed.

State v. Tolen, No. ED91541 (Mo. App. E.D. 10/27/09):
Even though Victim testified Defendant touched her "privates," and sat her on his lap and pulled her "butt" close to him, evidence was insufficient to convict of child molestation for touching Victim's anus.
Facts: Defendant was charged with child molestation for touching his minor daughter's anus through her clothing. Victim testified at trial that Defendant touched her on her "privates;" that Defendant would put her on his lap and pull her "butt" close to his "privates;" and that the touching was "nasty." A social worker testified Victim described her "privates" as her vaginal area and buttocks. Victim's brother testified Defendant touched Victim on her "butt."
Holding: Sec. 566.010(3) defines sexual contact as touching of the anus. "Anus" is defined as "the posterior opening of the alimentary canal." A "buttock" is either the rounded parts of the back of the hips or either half of the rump. Here, evidence that Defendant touched the "butt" or "buttocks" was insufficient to prove touching of the anus.

In the Interest of J.A.H., No. ED92114 (Mo. App. E.D. 9/15/09):
(1) Even though Juvenile who was 8 or 9 years old touched another child's penis with a sponge and put other child's penis in Juvenile's mouth, evidence was insufficient to convict of first degree statutory sodomy because there was no evidence this was done for purposes of arousing or gratifying the sexual desire of any person; (2) two different acts of sodomy cannot be charged in the same charge.
Facts: The State charged in a single count that in 2003 or 2004 Juvenile committed first degree statutory sodomy by touching the penis of his Cousin with a sponge and putting his penis in the mouth of Cousin. Cousin, however, testified at trial that these events occurred when Cousin was "5 or 6," which would put the events in 2000 or 2001, making

Juvenile 8 or 9 years old at that time. Cousin testified that Juvenile and Cousin took a shower together and Juvenile touched his penis with a sponge and rubbed it, but stopped when Cousin asked him to. Also, Cousin testified that Juvenile and Cousin were playing "hospital" or "doctor" and Juvenile put his penis in Cousin's mouth. Juvenile told Cousin not to tell anyone. Juvenile denied the acts at trial. The trial court convicted Juvenile.
Holding: To convict of first degree statutory sodomy, Section 566.010(1) requires that the deviate sexual acts be "done for the purpose of arousing or gratifying the sexual desire of any person." Here, there was no evidence this, or any evidence that the trial court found this. The State argues that because Juvenile denied the offenses, intent was not an issue in the case, but the State always has the burden of proving every element of the offense beyond a reasonable doubt. Regarding the shower incident, the boys took a shower together because they were late for a family function. Even though Juvenile touched Cousin's penis with the sponge and rubbed it, the circumstances fail to give rise to an inference that Juvenile touched the penis for the purpose of sexual arousal or gratification. In the other incident, Juvenile and Cousin were playing "doctor" or "hospital." Court finds it significant that Juvenile was 8 or 9 when this happened, as this is relevant to intent. Even though Juvenile told Cousin not to tell anyone, this only shows Juvenile knew the act was wrong, not an intent to cause sexual arousal or gratification. There was no evidence of Juvenile's behavioral development or knowledge of sexual subject matter. Juvenile discharged. (2) Although Juvenile did not raise issue on appeal, it was error for State to charge the two separate acts of sodomy in a single charge.

State v. Hogan, No. ED91919 (Mo. App. E.D. 9/8/09):
(1) Even though Defendant who contracted with homeowner to make home repairs only completed part of the job, evidence was insufficient to convict of unlawful merchandising practices, Sec. 407.020, because deception cannot be inferred solely from the fact that the work was not completed; (2) where court "admitted" certain exhibits, the court should not have prohibited them from being seen by or going to the jury.
Facts: Defendant contracted with homeowner to make certain home repairs, and homeowner paid Defendant. Defendant started the job, but never finished it. Defendant was convicted of unlawful merchandising practices. Also, the State sought to show that Defendant was previously convicted of this offense. The trial court let the State argue this in opening and closing statements and "admitted" an exhibit showing prior convictions, but would not publish it to the jury.
Holding: (1) Historically, the State typically charged such offenses as larceny by trick or deceit, so the statutory definition of "deceit" is relevant. Sec. 570.010(7) states that "deception as to the actor's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise." Here, the State merely showed that Defendant started a repair job, but did not finish it. This was insufficient to prove guilt. (2) While the State attempted to show Defendant's intent through prior convictions, this attempt was ineffective because of the court's inexplicable rulings regarding exhibits. The court allowed the State to argue that Defendant had prior convictions, and the court admitted an exhibit purporting to be prior convictions but did not allow the jury to see it, and the jury was not told what the exhibit was. "We frankly do not understand the trial court's ruling. When a judge admits evidence, the fact-finder may by virtue of such admission, consider it." The State's argument was not evidence by

itself. Court of Appeals does not decide whether prior conviction should have been considered in light of ruling on sufficiency and procedural posture of case. Defendant discharged.

State v. Mabry, No. ED91163 (Mo. App. E.D. 5/12/09):
Even though Defendant swerved his car toward Victim's car, where Defendant was charged with stalking for repeatedly "yelling" at Victim, the swerving of the car did not constitute "yelling," so the evidence was insufficient to convict.
Facts: Defendant and Victim had had a personal relationship, but had separated. In April, Defendant drove up to Victim, rolled down his car window, and "screamed at her." In June, Defendant drove up to Victim's car on the highway, and swerved toward her, which scarred her. Defendant was convicted of stalking, Sec. 565.225 RSMo. Cum. Supp. 2004, for "repeatedly and purposefully [harassing Victim] by yelling at her."
Holding: The statutory language in Sec. 565.225 RSMo. Cum. Supp. 2004 requires that to convict of stalking, the defendant must commit more than one act of harassment toward a victim. Here, the jury was instructed to convict if it found Defendant "repeatedly and purposefully harassed Victim by yelling at her." The evidence showed Defendant "yelled" at Victim in the April incident, but not in the June incident. Swerving a car toward someone does not comport with the plain meaning or dictionary definition of the word "yelling." Swerving the car could constitute harassment under the statute, but Defendant was charged with "yelling," so the conviction cannot be upheld.

State v. Hale, No. ED91490 (Mo. App. E.D. 5/19/09):
Where in 2001 Defendant touched Victim through clothing, this was insufficient to convict of first degree child molestation because statute in effect at that time required touching underneath clothing.
Facts: Defendant was convicted of first degree child molestation for touching Victim through her clothing in 2001.
Holding: First degree child molestation requires "sexual contact" under Sec. 566.067. Before 1995, the statutory definition in Section 566.010(1) included the phrase "or such touching through the clothing." However, that definition was removed in 1995 and not put back until 2002. Thus, to support a conviction for 1st degree child molestation in 2001, the State had to show touching beneath clothing. Here, all the State showed was that Defendant touched Victim over her clothes. This was insufficient to convict.

State v. Peeples, No. ED90975 (Mo. App. E.D. 5/26/09):
(1) Even though Defendant touched Victim's vagina through her clothing, this did not constitute first degree statutory sodomy, but instead first degree child molestation; (2) under the version of Section 566.032.2 in effect during the time of the crime in 2002 - 2005, attempted first degree statutory rape was only a Class B felony, and the court erred in sentencing as a Class A felony.
Facts: Defendant touched Victim's vagina through her clothing, and was convicted of first degree statutory sodomy. Defendant also was convicted of attempted first degree statutory rape for events between 2002 and 2005, and sentenced as a Class A felony.
Holding: First degree statutory sodomy, Sec. 566.062.1, requires "deviate sexual intercourse" as defined in Sec. 566.010(1). Deviate sexual intercourse does not involve

touching through clothing. Touching through clothing is "sexual contact" under Sec. 566.010(3), and constitutes first degree child molestation. Thus, first degree sodomy conviction vacated, and conviction for lesser offense of first degree child molestation entered. (2) Under the version of Sec. 566.032.2 in effect during the time of the crime in 2002-2005, statutory rape in the first degree was an unclassified offense with a range of punishment of five years to life. This would make the completed offense a Class A felony, Sec. 577.021.3(1)(1). An attempt to commit the offense would fall under the general inchoate offense statute and make the attempt a Class B felony, Sec. 564.011.3(1). Thus, the court erred in sentencing Defendant as a Class A felony.

State v. Moore, No. ED91056 (Mo. App. E.D. 3/17/09):
Where Defendant was given a "furlough" from the county jail before he was to report to DOC but he then did not report to DOC on time, this did not support a conviction for failure to return to confinement because Defendant was not yet confined in DOC.
Facts: Defendant was ordered to report for a 120-day Missouri Dept. of Corrections treatment program to begin in February 2007. However, he was ordered to be held in the county jail before then, so that the Sheriff could deliver him to DOC. Further, the court granted Defendant a "furlough" from the county jail until December 27, 2006. Defendant did not report to the jail on December 27, but instead did so on January 2, 2007. He was convicted of the Class D felony of failure to return to confinement, Section 575.220.
Holding: Section 575.220 provides that a person commits the crime of failure to return to confinement if while serving any sentence, he is permitted to go at large without guard, and purposely fails to return to confinement when he is required to do so. Here, the State failed to prove that Defendant was serving a sentence of confinement in the DOC or any other place. Section 558.031.1 provides that a prison sentence begins when a person is received into the custody of the DOC. Defendant was not in DOC custody when he failed to return. Defendant was sentenced to the DOC, not "any other place of confinement." It is irrelevant that Defendant was in the custody of the county jail because Defendant was not sentenced to serve his time there. Defendant discharged.

State v. Power, No. ED91172 (Mo. App. E.D. 3/10/09):
(1) Even though Defendant was smoking marijuana in another person's trailer and the other person's children were in the trailer, Defendant could not be convicted of endangering the welfare of a child because he did not encourage, aid or cause a child to enter the trailer; and (2) even though Defendant was in the living room of a trailer where a "bong" was present, where there were "bongs" in other rooms of the trailer and Defendant did not own the trailer, the State failed to prove Defendant constructively possessed the "bong."
Facts: Defendant was visiting another person's trailer. When police entered the trailer, they saw the other person's baby in the living room, and smelled marijuana. Defendant was sitting on a couch in the living room. Police found a "bong" in the living room and other "bongs" in the bedroom. Police asked, "You guys just sitting here babysitting and smoking marijuana," and Defendant said "yes." Defendant was convicted of endangering the welfare of a child, and possession of drug paraphernalia.
Holding: (1) Section 568.050.1(4) states a person commits child endangerment if he encourages, aids of causes a child to enter a public nuisance. Section 195.130 defines

public nuisance as any room or building which is used for illegal drugs. This case is a case of first impression. The State argues Defendant helped make the trailer a public nuisance by smoking marijuana in it. But the statute does not criminalizing making a building a public nuisance. The statute states a person must *encourage, aid or cause* a child *to enter* a public nuisance. The State failed to present evidence that Defendant brought the children into the trailer, or smoked marijuana in their presence. Since the other person was the children's father, it stands to reason that the other person had custody of them. The State merely showed that children were present in the trailer when police arrived. Conviction for endangering welfare of child reversed. (2) Other than Defendant's admission that he had been smoking marijuana, nothing connects Defendant to the "bong" in the living room. Other "bongs" were in a bedroom. The trailer did not belong to Defendant. While Defendant may have been aware of the "bong," the State failed to proved actual or constructive possession. Paraphernalia conviction reversed.

State v. Moses, No. ED90009 (Mo. App., E.D. 9/30/08):
Even though Defendant ran from police, evidence was insufficient to convict of possession of drugs found in trailer where Defendant was not only person in trailer.
Facts: When police came to trailer Defendant was living in, Defendant and others ran away. Police found drugs in the kitchen. Defendant was convicted of possession of drugs.
Holding: The evidence is insufficient to prove Defendant constructively possessed the drugs. Many other people also had access to the residence and were in the residence. Defendant did not have drugs in his personal possession. The drugs were in the kitchen and not his bedroom. Even though Defendant ran from police and admitting to knowing there were drugs in the kitchen, his flight is consistent with that knowledge and not sufficient to show he exercised dominion or control over the drugs.

C.B. v. Claude Buchheit, No. ED90349 (Mo. App., E.D. 5/20/08) and C.B. v. Susan Buchheit, No. ED90373 (Mo. App., E.D. 5/20/08):
Holding: Even though Victim (who is daughter-in-law of Buchheits) claimed Buchheits made oral threats to her, trial court erred in granting a full order of protection, Secs. 455.005-.090, because there was not substantial evidence that Buchhheits' conduct met the statutory definition of "stalking" since they had legitimate reason to go to Victim's residence since they were engaging in family visitation, and Victim's fear of physical harm and alleged emotional distress was unreasonable under the circumstances.

State v. Ecford, No. ED88967 (Mo. App., E.D. 11/20/07):
Even though mechanic had performed work on a car consisting of $1,525 in labor and $368 in parts, where owner-Defendant took car from mechanic and didn't pay for the work, owner could only be convicted of misdemeanor stealing because the amount taken is $368 for parts, since the definition of "services" in Section 570.010 does not include automobile repair labor.
Facts: Defendant-owner of car took car to mechanic. Mechanic fixed car and charged $1,525 for labor and $368 for parts. Defendant told mechanic he was taking car for a "test drive," but left without paying and disappeared. Defendant was convicted of felony stealing by deceit in excess of $500, Section 570.030.3 RSMo Cum. Supp. 2004.

Holding: The evidence is insufficient to convict of felony stealing because the definition of "services" in Section 570.010 has been held not to include repairs to an automobile. Thus, Defendant cannot be guilty of stealing "services" of mechanic. However, mechanic installed $368 in parts in car. Mechanic had a common-law artisans' lien on car until he was paid, and Defendant could not take car by deceit without paying. By claiming he was going for a "test drive," but then disappearing, Defendant could be guilty of stealing both the car and the parts, because mechanic had a right to possession of the car until paid. The evidence at trial was only that the parts were $368. This is not in excess of $500, the amount required for felony stealing, Section 570.030.3. Felony stealing conviction vacated and conviction for lesser-included misdemeanor entered.

State v. Simmons, No. ED87655 (Mo. App., E.D. 9/18/07):
Holding: Where State presented no affirmative evidence that Defendant forced victim to touch his penis, evidence was insufficient to convict of second-degree sodomy, Section 566.064, because the statute requires "any act involving the genitals of one person and the hand" of another.

State v. Cushshon, No. ED87764 (Mo. App., E.D. 4/3/07):
Even though Defendant-inmate was in same cell as another inmate who took something out of Defendant's jail mattress, there was insufficient evidence to prove Defendant knowingly possessed marijuana found in the mattress.
Facts: Defendant was a jail inmate. An officer discovered a bag of marijuana wrapped in mattress foam in a common shower stall. A subsequent dog sniff-searched found a small amount of loose marijuana inside Defendant's mattress. Before this was found, another inmate had Defendant's mattress in the other inmate's cell, and Defendant was seen being present when the other inmate took foam out of the mattress. Defendant was charged with possession of the marijuana in the mattress by "acting in concert" with the other inmate, and convicted of possession in a correctional facility, Section 221.111.
Holding: The evidence is insufficient to prove Defendant knowingly possessed the marijuana in the mattress, actually or constructively. The State argued Defendant jointly controlled the marijuana with the other inmate who was seen taking the foam out of the mattress, but viewed in the light most favorably to the State, the evidence merely shows that for "some unknown reason" the other inmate had Defendant's mattress in his cell and took foam out of it, and Defendant was present when this happened. Defendant was not charged with possessing the foam-wrapped marijuana found in the shower stall. There simply was insufficient evidence to prove that Defendant knowingly possessed the marijuana in his mattress.

State v. Castilleja, No. ED87363 (Mo. App., E.D. 1/9/07):
Evidence was insufficient to convict of criminal non-support where the State failed to show that the Defendant or the child lived in the county where the prosecution occurred.
Facts: Defendant was convicted of criminal non-support, Section 568.040. Defendant contended the trial court should have sustained his motion for judgment of acquittal at the close of all evidence because the State had not shown that either he or the child lived in St. Louis County, where he was being prosecuted. An exhibit, which was not shown to

the jury, and a defense offer of proof, which the jury did not hear either, showed Defendant did live in St. Louis County.
Holding: Venue must be proven in a criminal case. Section 568.040.6 states that a defendant may be prosecuted for criminal non-support in the county where the Defendant or child lived during the period of non-support. There was no evidence before the jury from which the jury could infer that either the child or Defendant lived in St. Louis County. The jury could not have relied on the exhibit or the offer of proof because the jury did not see or hear these. The evidence did show that Defendant owned property in St. Louis County, but it is not reasonable to assume that mere ownership of property shows Defendant lived there – especially in light of other testimony that this property was condemned and Defendant never moved into it.

State v. Burgin, No. ED86200 (Mo. App., E.D. 5/16/06):
Conviction for sexual misconduct under former Section 556.083.1 must be reversed and Defendant discharged because statute was found unconstitutional by Missouri Supreme Court.
Facts: Defendant exposes his penis to two children. He was convicted of two counts of sexual misconduct under former Section 566.083.1. Defendant filed his Notice of Appeal on April 22, 2005. On April 26, 2005, the Missouri Supreme Court held that Section 566.083.1 was unconstitutional in *State v. Beine*, 162 S.W.3d 483 (Mo. banc 2005). (The statute was subsequently amended by the Legislature).
Holding: Defendant is entitled to plain error relief and discharge. The State argued Defendant was not entitled to challenge constitutionality of Section 566.083.1 because he failed to raise the issue in the trial court. But Defendant was not raising a constitutional challenge on appeal. He was contending his conviction under the statute is invalid. An unconstitutional statute is void. Therefore, the trial court had no jurisdiction. If there is no law because that law is unconstitutional, the trial court transcends its jurisdiction when it acts under the law, and Defendant is entitled to discharge.

Flores v. State, 186 S.W.3d 389 (Mo. App., E.D. 2006):
Movant was not guilty of kidnapping under Section 565.110 because a parent's removal of his or her own children from "court ordered care, custody and control" does not constitute "inference with the performance of any governmental or political function," an essential element of the offense of kidnapping.
Facts: Movant was the mother of four children who were in the care of the DFS. On a supervised visit with the children, Movant took the children from DFS and left with them. Movant was charged with kidnapping, and pleaded guilty. Movant then filed a Rule 24.035 postconviction motion claiming there was no factual basis for her plea because her acts did not constitute kidnapping under the statute.
Holding: Section 565.110.1(3) defines kidnapping as unlawfully removing another without his or her consent for the purpose of "[i]nterfering with the performance of any governmental or political function." This statute is based on the Model Penal Code. The comments to the Model Penal Code say that the statute is intended to apply to political terrorism, abduction of political candidates, party leaders, officials and voters. The Model Penal Code specifically says that this statute "would exclude from kidnapping cases where a parent out of affection takes his child away from another parent or lawful

custodian." It must be presumed that the Legislature indented to adopt the interpretation of the statute set forth in the Model Penal Code. Hence, Movant's plea of guilty was predicated on an information that failed to state an essential element of kidnapping, and the motion court clearly erred in not vacating her convictions.

State v. Christian, 184 S.W.3d 597 (Mo. App., E.D. 2006):
Evidence was insufficient to sustain conviction for first degree burglary for entering house while "resisting arrest" because an actual arrest had not yet commenced when Defendant entered the house, even though police officer intended to arrest Defendant and Defendant knew he would be arrested when he was found.
Facts: Witnesses called police when they saw Defendant beating up his girlfriend. Defendant ran into a neighbor's house to hide. Defendant told neighbor, "I'm not here to rob you. I'm hiding from the cops." Defendant was convicted of first degree burglary for entering the house to commit the crime of resisting arrest. Defendant claimed evidence was insufficient to support this.
Holding: A person commits burglary first degree if, in relevant part, he enters an inhabitable structure for the purpose of committing a crime therein, Section 569.160.1. The State charged Defendant with entering the house for the crime of "resisting arrest," Section 575.150.1(1). The gravamen of the offense of resisting arrest is "resisting," not flight from an officer. The arrest must be *in progress* when the "resistance" occurs. An arrest is in progress once the officer is attempting to actually restrain or control the defendant. Here, although the police intended to arrest Defendant and although Defendant knew he would be arrested, the arrest was not *in progress* when Defendant entered the house. The police had not made any attempt to restrain or control Defendant at that time. Therefore, Defendant's conviction for burglary first degree is vacated. However, when a conviction is overturned for insufficiency of evidence, the Appellate Court may enter a conviction for a lesser included offense if the evidence supports it. Here, first degree trespass is a lesser included offense, so Appellate Court enters conviction for that.

State v. Collins, 188 S.W.3d 69 (Mo. App., E.D. 2006):
(1) Evidence was insufficient to convict of ACA because evidence did not show Defendant used gun or deadly weapon to enter victim's residence; (2) where trial court orally said it was sentencing Defendant to "480 years," but written judgment said "510 years," and the actual total of the 20 counts was "540 years," the "480 years" statement was not controlling because it is surplusage, and the "510 years" is a clerical error which can be corrected by nunc pro tunc order.
Facts: Evidence showed that victim was awakened in her bed by Defendant, who had entered her residence. Defendant committed various sex offenses on victim, and used a gun to do this. He was convicted of 20 different counts from this incident. At sentencing, the trial court sentenced Defendant on 20 different counts and said the sentence totaled "480 years." However, the court later entered a written judgment saying the sentence totaled "510 years." When the counts are really added up, however, the actual total is "540 years." On appeal, Defendant contended evidence was insufficient to support his conviction for ACA arising out of his first degree burglary conviction.

Holding: (1) The crime of ACA is committed in a burglary if the weapon *is used to gain entry* for the purpose of committing the crime therein. Examples would include shooting the door open or demanding the victim open the door at gunpoint. Here, however, there was no evidence that Defendant used the gun *to gain entry*. Thus, evidence is insufficient to support conviction for ACA arising from the burglary conviction. (2) Generally, an oral pronouncement of sentence controls over the written sentence. However, the record here shows the trial court's oral sentences actually total "540 years." The statement that they total "480 years" was mere surplusage. Moreover, the written sentence was in error because the sentences do not total "510 years" either. This is a clerical error which can be corrected by nunc pro tunc to reflect correct sentence of "540 years."

State v. Metcalf, 182 S.W.3d 272 (Mo. App., E.D. 2006):
Where Defendant and his wife were arrested in a motel room, and methamphetamine residue was found with wife's belongings, evidence was insufficient to convict Defendant (husband) of possession of methamphetamine, Section 195.202, even though Defendant had list of materials to make methamphetamine.
Facts: Defendant (husband) and wife were arrested in a motel room. Defendant had in his pocket a list of materials needed to make methamphetamine. Items containing methamphetamine residue were found near women's clothing. Wife pleaded guilty to possession of methamphetamine. Defendant contended evidence was insufficient to convict him of possession.
Holding: Constructive possession necessitates proof that Defendant had access to and control over the premises where the drugs were discovered. The State's evidence not only failed to prove control, but also failed to show sufficient facts to show an inference of possession. Although Defendant had access to the area where the residue was found, he possessed the motel room jointly with his wife. Wife had pleaded guilty to possession. Only wife had actual, physical possession of any items containing the controlled substance. Defendant's personal belongings were not co-mingled with wife's. Considering the minute amount of residue found, it cannot be concluded that methamphetamine was in plain view of husband. Although the list in Defendant's pocket could be relevant to a charge of manufacturing, it did not show Defendant's knowledge or control over the methamphetamine residue in the room.

State v. Kopp, No. SD29987 (Mo. App. S.D. 9/17/10):
Even though Defendant was in a house being searched by police for drugs and had a syringe in his pocket, where methamphetamine in the syringe was not visible and had no measurable weight, the evidence was insufficient to convict of possession of methamphetamine.
Facts: Police executed a search warrant for drugs at a residence. Defendant and several other people were at the house. The owner of the house was not at home. Police found a syringe in Defendant's pocket. The syringe contained methamphetamine residue that was not visible or weighable. Defendant was convicted of possession of a controlled substance, Sec. 195.202.
Holding: Missouri statutes do not establish a minimum amount necessary to support conviction, but the State must show that Defendant knowingly possessed the drug under

all the circumstances. Here, the drug could not be seen, so no inference can be drawn that Defendant knew of it by seeing it. Defendant did not make any incriminating statement. Defendant put the syringe in his pocket, but there were not facts in addition to concealment, such as attempted flight or nervousness. Even though Defendant said he put the syringe in his pocket "to get it out of sight," he did not say he was hiding it because it contained drugs. He also told police he had the syringe, when asked. This is less indicative of consciousness of guilt. Also, methamphetamine was not found in the house. Evidence was insufficient to convict.

State v. Henderson, No. SD29944 (Mo. App. S.D. 5/13/10):
Even though Defendant "brushed" store clerk's arm when he pulled money out of cash drawer, this was de minimus contact incidental to a money snatch and was not use of force to support conviction for robbery.
Facts: Defendant went into a convenience store and when the store clerk opened the cash drawer, he jumped over the counter to grab the money, "kind of brushed her," she "jerked back" and he grabbed the money and fled. Per store policy, the clerk did not resist, and there was no struggle. Defendant was convicted of robbery at a bench trial.
Holding: Robbery requires stealing by threat or use of force. Here, the trial court believed that reaching into the drawer and pulling out the money was an act of force. However, this was only a snatching. There was no struggle between clerk and Defendant. Even though clerk's arm was "brushed," this was de minimus contact incidental to the money snatch, not a threat or use of force to overcome resistance. Robbery conviction reversed and remanded for entry of stealing conviction.

State v. Osborn, No. SD29677 (Mo. App. S.D. 5/14/10):
Even though Defendant knew Victim was not old enough to drive a car, this only showed that Defendant knew Victim was under 16 and not under 15, so evidence was insufficient to convict of child enticement, Sec. 566.151, which requires proof that Defendant knew Victim was under 15.
Facts: Defendant would allow Victim to drive Defendant's car even though Defendant knew Victim was not old enough to drive. Defendant also bought alcohol for Victim at times and knew Victim was not old enough to drink. Defendant asked Victim for oral sex, but Victim refused. He was convicted of child enticement.
Holding: Sec. 566.151.1 prohibits enticement of a child who is less than 15 years old. Although the statute itself does not contain a requirement that Defendant know Victim is under 15, MAI-CR3d 320.37 requires that a Defendant must have (1) known or been aware that Victim was under 15 or (2) intended to pursue sexual conduct with a person under 15. Here, Defendant knew Victim was not old enough to drive or drink. This would show that Defendant knew Victim was under 16, but has no bearing on whether Defendant knew Victim was under 15. Even though Defendant had spent four months around Victim, that did not prove Defendant knew Victim was under 15 either. Nor was any evidence introduced as to what Victim looked like on the date in question, such as a photo of Victim that would allow an inference Victim was under 15. Enticement conviction reversed.

Dennis v. Henley, No. SD30012 (Mo. App. S.D. 6/30/10):
Where Defendant only had one altercation with Victim, this was not sufficient to prove "stalking" to support a full order of protection, even though Defendant later made an obscene gesture toward Victim and parked near Victim's house.
Facts: Defendant was a real estate developer who sold property to Victim. Victim and Defendant got into a physical fight over riding four-wheelers off common roads. Victim testified this was the only incident that caused him to fear Defendant. Later, Defendant drove by Victim's house and made an obscene gesture with his finger, and Defendant also parked near Victim's house. Defendant claimed he parked there because he needed to show property to other buyers. Victim sought an order of protection, which trial court granted.
Holding: Since Defendant and Victim are not members of the same household, Victim could only seek an order of protection for stalking under Sec. 455.020. Victim had to show that Defendant (1) purposely and repeatedly, (2) engaged in an unwanted course of conduct, (3) that caused alarm to Victim, (4) when it was reasonable to have been alarmed. Here, Victim testified the only incident that caused him fear was the one physical fight. One event alone is insufficient to prove stalking. While Defendant also parked near Victim's house, Victim did not testify that this caused him to be afraid and it would not be reasonable here. Also, although Defendant's rude hand gesture was vulgar, it is not behavior that would reasonably cause fear of physical harm. Evidence was insufficient to enter protection order.

State v. Simpkins, No. SD29376 (Mo. App. S.D. 1/12/10):
Even though Defendant attempted to cash a check on a closed account of another person, where there was no evidence how Defendant came into possession of the check, the evidence was insufficient to convict of forgery.
Facts: Defendant attempted to cash a check allegedly signed by Harris on a closed account of Harris. Harris testified he did not sign the check. The check had been taken in a break-in of Harris' mobile home. The check was for $217 but was not made out to anyone. Defendant told police that he took the check to the bank to see if they would cash it. Defendant was convicted of forgery.
Holding: Here, there was no evidence as to how Defendant came into possession of the check. Defendant was not one of the persons associated with the break-in at Harris' mobile home. Defendant merely had unexplained possession of a forged instrument. He took the check to a bank, produced identification, and waited while the bank attempted to verify the check. This was insufficient to prove forgery.

State v. Buford, No. SD39601 (Mo. App. S.D. 3/3/10):
Even though Defendant was riding in car and was nervous when crack cocaine was found on floorboard and near passenger door of car, and even though Defendant said to police they "knew" who the drugs belonged to, where there were other nervous persons in the car, it was dark outside, and there was no evidence how long Defendant had been in the car, evidence was insufficient to convict of possession of drugs.
Facts: Police stopped a car for a broken taillight. Defendant was a passenger in the right front passenger seat. The driver and another passenger were also in the car. Police discovered that all three people had active warrants, arrested each and searched the car.

Police found crack cocaine in a bag between the right front seat and passenger door, and also on the floorboard in plain view where Defendant's feet would have been. Defendant said police "knew who those drugs belonged to" or "knew where the drugs came from." Defendant was convicted of felony possession.
Holding: In order to prove possession, the state must prove Defendant (1) had conscious and intentional possession, either constructive or actual, and (2) was aware of the presence and nature of the substances. Where premises are shared, there must be additional circumstances to inculpate the accused; the mere fact Defendant was in the car is not enough. Here, Defendant did not own the car. There was no evidence how long Defendant had been in the car. It was dark outside. All three car occupants were "nervous." All three had active warrants. Defendant's statements are not the equivalent of an admission of guilt. The evidence here was not sufficient to prove Defendant's guilt. Defendant discharged.

State v. Oliver, No. SD28820 (Mo. App., S.D. 12/16/08):
Even though Defendant had shown other pornographic images to children, where there were images on his computer that had not been shown to anyone, the evidence was insufficient to convict of promoting child pornography for the images on the computer.
Facts: Defendant had shown images of child pornography on his digital camera to children. Defendant also had other images of child pornography on his computer. However, there was no evidence he had shown these to anyone. Defendant was convicted of promoting child pornography for the images on the computer.
Holding: A person commits the offense of promoting child pornography, Secs. 573.025.1 and 573.010(12), if they knowingly possess child pornography with the intent to "exhibit" it. The State claims that since Defendant exhibited pornography on his camera to children, then it can be inferred that he intended to exhibit the pornography on his computer to other people. However, the evidence does not show Defendant attempted to do this or did this. The Court will not supply missing evidence or give the State the benefit of speculative or forced inferences. Evidence was insufficient to prove guilt of promoting child pornography for the images on the computer.

State v. Bush, No. 28623 (Mo. App., S.D. 4/16/08):
Even though Defendant walked in a courthouse hallway toward petitioner, this did not constitute violating a full order of protection, since Defendant never communicated with petitioner.
Facts: Petitioner obtained a full order of protection against Defendant. Immediately afterwards, both parties left the courtroom. In the courthouse hallway, Petitioner yelled "Stop coming toward me," and Defendant "smirked" at her. Deputies came and stopped Defendant, and he "said stuff" but nothing directed at Petitioner. Defendant was convicted of violating a full order of protection.
Holding: As relevant here, Sec. 455.085.8 prohibits violating a full order of protection by "communication initiated by [Defendant]." The statute requires proof that Defendant began communicating with Petitioner by expressing or exchanging information through speech, writing, gestures or conduct. There was no evidence Defendant initiated communication. Petitioner began yelling at Defendant. Defendant's act of walking down a public hallway toward Petitioner does not support conviction because Defendant's

conduct did not express or exchange information. The offense was not charged as violating the order by stalking. Defendant's "smirk" did not initiate communication, since he was responding to Petitioner's yelling at him. Conviction reversed; Defendant discharged.

State v. Freeman, 2008 WL 142299 (Mo. App., S.D. 1/16/08):
Even though (1) trace amounts of Defendant's DNA were found on stockings used to kill victim and a tissue in victim's home and (2) Defendant and victim were arguing earlier in the evening, the evidence was insufficient to prove Defendant killed victim because the DNA could have been transferred to the items through other means than Defendant killing victim.
Facts: Defendant and victim were at a VFW Hall for several hours on night victim was killed. Defendant and victim were near each other part of this time, and had argued. Victim was strangled in her home with her stockings. A microscopic amount of Defendant's DNA was found on the stockings and on a tissue in victim's home. The crime happened in 1992; Defendant was charged in 2005.
Holding: The evidence was insufficient to convict of first degree murder. The State's DNA expert testified DNA can transfer to objects through a variety of methods. The expert testified that "potentially a way that the DNA" got on the stockings was that Defendant had his hand around victim's neck and strangled her. But there were other ways the DNA could have got there, such as coughing, sneezing, or because object to person transfer. Defendant and victim had been at the VFW Hall for several hours and were in close proximity to each other. A reasonable juror could not infer that direct physical contact was more likely than not the cause of the DNA being on the stockings and tissue. Nor did the fact that Defendant was seen with a liquor bottle earlier in the evening and the victim's vagina was bruised with something prove Defendant committed the crime, because there was nothing to show the victim's vagina was bruised with a liquor bottle. Defendant discharged.

State v. Minner, No. 27757 (Mo. App., S.D. 11/07/07):
State need not prove Defendant knew he was within 1000 feet of public housing when he sold drugs to sustain conviction under Section 195.281 RSMo Cum. Supp. 2003.
Facts: Defendant was convicted of sale of drugs within 1000 feet of public housing. He claimed the evidence was insufficient to convict because the State did not prove he knew he was within 1000 feet of public housing.
Holding: Under *State v. Hatton*, 918 S.W.2d 790, 794 (Mo. banc 1996), the State does not have to show that a defendant knew he was within 1000 feet of public housing, because the 1000 feet provision is a sentencing enhancement provision, not a separate crime. *State v. White*, 70 S.W.3d 644 (Mo. App., W.D. 2002) appears to conflict with *Hatton* because *White* holds that the State had to put on evidence a defendant "could have known" he was within 2000 feet of a school. However, assuming there is a conflict, the Southern District chooses to follow *Hatton*, because the Southern District is bound to follow Supreme Court opinions.

State v. Cryderman, No. 27876 (Mo. App., S.D. 8/20/07):
Where the State only presented the "gross" weight of crack which included the weight of plastic bags, there was insufficient evidence to prove that the crack weighed 2.0 grams or more to support conviction for first degree trafficking.
Facts: Defendant was convicted of first degree trafficking, Section 195.222, which requires sale of crack 2.0 grams or greater in weight. At trial, the State's expert testified the "gross" weight of the drugs was greater than 2.0 grams, but the State included the weight of the plastic bags in which the drugs were packaged in the calculation. The State presented the "net" weight of some other crack. The State contended the jury could determine the weight of the crack at issue from the weight of the other crack.
Holding: The weight of the drugs is an essential element of first degree trafficking. There was no evidence presented concerning the weight of the plastic bags, or testimony indicating the weight of the bags was not enough to take the crack below 2.0 grams. The State's argument that the jury could determine the weight by extrapolating from the other crack is not supported by law or facts, since not all crack rocks are of the same size or weight.

State v. Kimes, No. 28138 (Mo. App., S.D. 8/15/07):
(1) Police officer's opinion testimony that Defendant was speeding 35 mph in a 20 mph zone is sufficient to convict of speeding; and (2) it was plain error to sentence Defendant to jail for speeding, since only a fine is authorized by Sections 304.140 and 560.016 for this offense.
Facts: Defendant was charged with the infraction of speeding, Section 304.130. The evidence at trial consisted of a police officer's opinion testimony that Defendant was driving about 35 mph in a 20 mph zone. There was no radar evidence. Defendant was convicted and given an SES of 10 days in jail.
Holding: (1) It is a matter of first impression in Missouri whether the uncorroborated testimony of police officer is sufficient substantial evidence to support a conviction where the variance between the estimated speed and speed limit is not slight. Here, there was a 75 percent variance between the officer's estimated speed and the speed limit. In cases with a smaller variance, the evidence has been found insufficient, because it is harder to estimate if a driver is speeding when the driver is going only a small amount over the speed limit. But because of this large variance, a reasonable fact-finder could conclude beyond a reasonable doubt that an experienced officer could determine that the driver was speeding. (2) The maximum sentence for the infraction of speeding is a $200 fine, Sections 304.140 and 560.016. It was plain error for the trial court to impose a 10-day jail sentence.

State v. Gonzalez, No. 27968 (Mo. App., S.D. 7/26/07):
(1) Appellate court does not consider evidence presented at a motion to suppress hearing, but not at trial, in determining sufficiency of evidence to convict; and (2) even though 40 pounds of marijuana were found hidden in car Defendant was driving, evidence was insufficient to sustain conviction where there was no evidence Defendant knowingly possessed the marijuana.
Facts: Defendant and a passenger were stopped for a traffic stop. They had Arizona license plates, and no luggage. Defendant said they were going to meet friends in St.

Louis. The passenger said they were going to call friends from a pay phone. Defendant consented to search the car. The backseat carpet and seat were loose. Police found under the seat marijuana. More marijuana was found concealed in speakers in the trunk and also in door panels. Defendant was convicted of possession with intent to distribute.
Holding: (1) The State contends that evidence admitted at the pretrial motion to suppress hearing can be used to support the conviction. This is not true. Although such evidence can be used regarding the motion to suppress, the only evidence that can be reviewed to support a conviction is that presented at trial, i.e., between opening statement and closing argument. (2) The evidence is insufficient to prove Defendant had knowledge of the marijuana. Defendant made no confession or statements. Even though the officer said the marijuana smelled like axle grease, there was no evidence Defendant knew this. Even though the carpet and seat were loose, there was no evidence Defendant knew that, since he was in the front seat. Defendant's and the passenger's statements about going to St. Louis and calling friends from a pay phone are not inconsistent, and don't show consciousness of guilt. The fact that there was no luggage in the car does not show inference of guilt, since the car could have been driven from many locations outside Missouri without needing luggage, even though it had Arizona plates. There was no evidence where the trip started.

State v. Baumann, No. 27713 (Mo. App., S.D. 3/28/07):
(1) Even though Defendant used a knife to puncture tires, where no one else was present, Defendant could not be convicted of ACA because the knife was not a dangerous instrument capable of causing death or serious physical injury "under the circumstances in which it was used;" and (2) Defendant could not be convicted of violating an order of protection for entering the employment premises of victim because Section 455.085.8 states that a violation can only occur at a "dwelling unit," i.e., a residence.
Facts: Defendant was convicted of ACA for puncturing tires with a knife at a Post Office. No one else was present when Defendant did this. Defendant was also convicted of violating an order of protection by going to the Post Office, when an employee there had an order of protection against Defendant.
Holding: (1) The question is whether "under the circumstances in which [the knife was] used" it was "readily capable of causing death or other serious physical injury" such that it was a dangerous instrument for purposes of the ACA statutes, Section 556.061(9) and 571.015.1. The plain reading of Section 556.061(9) requires that the instrument "under the circumstances in which it is used" be readily capable of causing death or serious physical injury. Here, the knife cannot be considered a dangerous instrument because there was no one present at the time Defendant committed the acts of puncturing the tires. (2) Section 455.085.8 states that a person may violate a protective order by entering the victim's "dwelling unit." Here, Defendant went to a Post Office where the person who had the order of protection worked. This was not the victim's dwelling unit, i.e., residence. Even though Defendant's actions might have been in violation of the court's protective order, they are not elements constituting a criminal offense under Section 455.085.8.

State v. Joos, No. 27323 (Mo. App., S.D. 1/26/07):
Where Defendant fled from an attempted traffic stop during which no arrest was originally contemplated, Defendant could not be convicted of the class D felony of resisting arrest under Section 575.150 RSMo Cum. Supp. (2004)(since amended).
Facts: Police officer activated his sirens and tried to stop Defendant because officer could not read Defendant's license plate. Defendant tried to evade the officer by driving fast in the middle of the road. Defendant was eventually apprehended. He was discovered to be driving without a driver's license. He was charged and convicted of operating a vehicle without a license, and the Class D felony of resisting arrest, Section 575.150 RSMo Cum. Supp (2004).
Holding: 575.150 RSMo Cum. Supp. (2004) provided that resisting "an *arrest* by fleeing in such a manner that the person fleeing creates a substantial risk of serious physical injury or death … is a Class D felony." This statute was amended in 2005 to state that resisting an "*arrest, detention or stop*" in such manner is a Class D felony. When the Legislature amends a statute, it is presumed to effect some change in the law. Thus, under the 2004 statute, it was not a Class D felony to resist a detention or stop in this manner. Here, the police officer was not trying to arrest Defendant for a felony while Defendant was fleeing. The officer was only trying to stop Defendant. The evidence is insufficient under the 2004 statute to support the conviction for the Class D felony. Nor can the Court of Appeals impose a conviction for misdemeanor resisting arrest because the jury was not required to find all necessary elements of the misdemeanor, i.e., that the officer was making a stop, and that Defendant knew the officer was making a stop and fled for the purpose of resisting the stop. The Court of Appeals does not decide whether the State could retry Defendant for the misdemeanor, because the State did not request this.

State v. Chambers, No. 27329 (Mo. App., S.D. 10/19/06):
Even though Defendant was passed out and slumped over the steering wheel in a driveway (not his own) next to the road with the windshield wipers running and said "next question" when asked if he had been driving and had .208 BAC, where the engine was not running, the evidence was insufficient to convict of DWI, Section 577.010.
Facts: Defendant was found asleep, slumped over car's steering in a driveway (not his own) by the road. The engine was not running, but the windshield wipers were on even though it was not raining. The keys were in the ignition. Police asked Defendant if he had been driving and he said "next question." He had a .208 BAC.
Holding: In cases where the Defendant's engine is not running at the time in question, the State must present significant additional evidence of driving and the connection of driving in an intoxicated state to sustain a conviction. The State claims the additional evidence is dogs barking near the time the car was found in the driveway to show that the car just arrived there, and Defendant's answer "next question" when asked if he had been driving. However, the dogs' barking does not show sufficient proof of when the car arrived in the driveway, since the driveway owner admitted he couldn't tell how long Defendant had been parked there. Also, the "next question" answer occurred after *Miranda* warnings and was an exercise of the right to remain silent. Conviction reversed.

State v. Mace, No. 27220 (Mo. App., S.D. 10/16/06):
Having a "tire thumper" under a car seat could not sustain a conviction for unlawful use of a weapon, Section 571.030.1, where there was no evidence that the "tire thumper" was a "weapon."
Facts: Police were called to investigate drug activity on a store parking lot. Police found drugs in Defendant's car, along with a "tire thumper" under his car seat. "Tire thumpers" are used to test truck tires. Defendant was convicted of unlawful use of a weapon.
Holding: Section 571.030.1 provides that it is unlawful to knowingly carry a concealed "knife, firearm, a blackjack or any other weapon capable of lethal use." The dictionary defines "weapon" as "an instrument of offensive or defensive combat." The "tire thumper" has a peaceful use, and there was no evidence Defendant used it as a weapon or to threaten anyone. The State argues that because defendant was involved in the "drug culture," one can infer the "tire thumper" was to be used as a weapon. However, this is a speculative inference unsupported by the evidence and does not supply proof the tire thumper was an "instrument of offensive or defensive combat." Conviction reversed.

State v. Slavens, 190 S.W.3d 410 (Mo. App., S.D. 2006):
(1) Parent's conduct in taking own child from DFS does not constitute kidnapping under Section 565.110; (2) evidence was insufficient to prove conviction for interference with custody, Section 565.150, because no evidence showed parent-defendant knew child was in DFS custody.
Facts: Defendant-parent's own baby was in the ICU at a hospital after birth. A deputy juvenile officer told Defendant that officer was taking baby into custody. Officer never told Defendant that "DFS" was taking custody. Defendant went to hospital and took baby out of ICU and fled. Defendant was convicted of kidnapping, and interference with custody.
Holding: (1) Section 565.110.1(3) provides, in relevant part, that a person commits kidnapping if she unlawfully removes another for the purpose of "[i]ntefering with the performance of any governmental or political function[.]" The Model Penal Code, on which this section is based, states the section is intended to "exclude from kidnapping cases where a parent out of affection takes his child away from another parent or lawful custodian." The Model Penal Code indicates this section is intended to apply to political terrorism and similar conduct. From the Model Penal Code and other statutes, it is clear the Legislature did not intend to apply this section to parental kidnapping. (2) Interference with custody requires a showing that defendant knew she had no legal right to take custody of baby from DFS. Here, the juvenile officer told Defendant that she was taking baby into custody, but never said DFS was taking custody. Thus, there was no evidence that Defendant knew she had no legal right to take custody. Convictions reversed.

State v. Kopp, No. SD29987 (Mo. App. S.D. 9/17/10):
Even though Defendant was in a house being searched by police for drugs and had a syringe in his pocket, where methamphetamine in the syringe was not visible and had no measurable weight, the evidence was insufficient to convict of possession of methamphetamine.

Facts: Police executed a search warrant for drugs at a residence. Defendant and several other people were at the house. The owner of the house was not at home. Police found a syringe in Defendant's pocket. The syringe contained methamphetamine residue that was not visible or weighable. Defendant was convicted of possession of a controlled substance, Sec. 195.202.
Holding: Missouri statutes do not establish a minimum amount necessary to support conviction, but the State must show that Defendant knowingly possessed the drug under all the circumstances. Here, the drug could not be seen, so no inference can be drawn that Defendant knew of it by seeing it. Defendant did not make any incriminating statement. Defendant put the syringe in his pocket, but there were not facts in addition to concealment, such as attempted flight or nervousness. Even though Defendant said he put the syringe in his pocket "to get it out of sight," he did not say he was hiding it because it contained drugs. He also told police he had the syringe, when asked. This is less indicative of consciousness of guilt. Also, methamphetamine was not found in the house. Evidence was insufficient to convict.

State v. Henderson, No. SD29944 (Mo. App. S.D. 5/13/10):
Even though Defendant "brushed" store clerk's arm when he pulled money out of cash drawer, this was de minimus contact incidental to a money snatch and was not use of force to support conviction for robbery.
Facts: Defendant went into a convenience store and when the store clerk opened the cash drawer, he jumped over the counter to grab the money, "kind of brushed her," she "jerked back" and he grabbed the money and fled. Per store policy, the clerk did not resist, and there was no struggle. Defendant was convicted of robbery at a bench trial.
Holding: Robbery requires stealing by threat or use of force. Here, the trial court believed that reaching into the drawer and pulling out the money was an act of force. However, this was only a snatching. There was no struggle between clerk and Defendant. Even though clerk's arm was "brushed," this was de minimus contact incidental to the money snatch, not a threat or use of force to overcome resistance. Robbery conviction reversed and remanded for entry of stealing conviction.

State v. Osborn, No. SD29677 (Mo. App. S.D. 5/14/10):
Even though Defendant knew Victim was not old enough to drive a car, this only showed that Defendant knew Victim was under 16 and not under 15, so evidence was insufficient to convict of child enticement, Sec. 566.151, which requires proof that Defendant knew Victim was under 15.
Facts: Defendant would allow Victim to drive Defendant's car even though Defendant knew Victim was not old enough to drive. Defendant also bought alcohol for Victim at times and knew Victim was not old enough to drink. Defendant asked Victim for oral sex, but Victim refused. He was convicted of child enticement.
Holding: Sec. 566.151.1 prohibits enticement of a child who is less than 15 years old. Although the statute itself does not contain a requirement that Defendant know Victim is under 15, MAI-CR3d 320.37 requires that a Defendant must have (1) known or been aware that Victim was under 15 or (2) intended to pursue sexual conduct with a person under 15. Here, Defendant knew Victim was not old enough to drive or drink. This would show that Defendant knew Victim was under 16, but has no bearing on whether

Defendant knew Victim was under 15. Even though Defendant had spent four months around Victim, that did not prove Defendant knew Victim was under 15 either. Nor was any evidence introduced as to what Victim looked like on the date in question, such as a photo of Victim that would allow an inference Victim was under 15. Enticement conviction reversed.

Dennis v. Henley, No. SD30012 (Mo. App. S.D. 6/30/10):
Where Defendant only had one altercation with Victim, this was not sufficient to prove "stalking" to support a full order of protection, even though Defendant later made an obscene gesture toward Victim and parked near Victim's house.
Facts: Defendant was a real estate developer who sold property to Victim. Victim and Defendant got into a physical fight over riding four-wheelers off common roads. Victim testified this was the only incident that caused him to fear Defendant. Later, Defendant drove by Victim's house and made an obscene gesture with his finger, and Defendant also parked near Victim's house. Defendant claimed he parked there because he needed to show property to other buyers. Victim sought an order of protection, which trial court granted.
Holding: Since Defendant and Victim are not members of the same household, Victim could only seek an order of protection for stalking under Sec. 455.020. Victim had to show that Defendant (1) purposely and repeatedly, (2) engaged in an unwanted course of conduct, (3) that caused alarm to Victim, (4) when it was reasonable to have been alarmed. Here, Victim testified the only incident that caused him fear was the one physical fight. One event alone is insufficient to prove stalking. While Defendant also parked near Victim's house, Victim did not testify that this caused him to be afraid and it would not be reasonable here. Also, although Defendant's rude hand gesture was vulgar, it is not behavior that would reasonably cause fear of physical harm. Evidence was insufficient to enter protection order.

State v. Simpkins, No. SD29376 (Mo. App. S.D. 1/12/10):
Even though Defendant attempted to cash a check on a closed account of another person, where there was no evidence how Defendant came into possession of the check, the evidence was insufficient to convict of forgery.
Facts: Defendant attempted to cash a check allegedly signed by Harris on a closed account of Harris. Harris testified he did not sign the check. The check had been taken in a break-in of Harris' mobile home. The check was for $217 but was not made out to anyone. Defendant told police that he took the check to the bank to see if they would cash it. Defendant was convicted of forgery.
Holding: Here, there was no evidence as to how Defendant came into possession of the check. Defendant was not one of the persons associated with the break-in at Harris' mobile home. Defendant merely had unexplained possession of a forged instrument. He took the check to a bank, produced identification, and waited while the bank attempted to verify the check. This was insufficient to prove forgery.

State v. Buford, No. SD39601 (Mo. App. S.D. 3/3/10):
Even though Defendant was riding in car and was nervous when crack cocaine was found on floorboard and near passenger door of car, and even though Defendant said to

police they "knew" who the drugs belonged to, where there were other nervous persons in the car, it was dark outside, and there was no evidence how long Defendant had been in the car, evidence was insufficient to convict of possession of drugs.
Facts: Police stopped a car for a broken taillight. Defendant was a passenger in the right front passenger seat. The driver and another passenger were also in the car. Police discovered that all three people had active warrants, arrested each and searched the car. Police found crack cocaine in a bag between the right front seat and passenger door, and also on the floorboard in plain view where Defendant's feet would have been. Defendant said police "knew who those drugs belonged to" or "knew where the drugs came from." Defendant was convicted of felony possession.
Holding: In order to prove possession, the state must prove Defendant (1) had conscious and intentional possession, either constructive or actual, and (2) was aware of the presence and nature of the substances. Where premises are shared, there must be additional circumstances to inculpate the accused; the mere fact Defendant was in the car is not enough. Here, Defendant did not own the car. There was no evidence how long Defendant had been in the car. It was dark outside. All three car occupants were "nervous." All three had active warrants. Defendant's statements are not the equivalent of an admission of guilt. The evidence here was not sufficient to prove Defendant's guilt. Defendant discharged.

C.H. v. Wolfe, No. WD70695 (Mo. App. W.D. 12/15/09):
Even though Defendant stared in Victim's window for 10 minutes and verbally harassed Victim and taunted Victim with a dog, where Victim did not claim to have been placed in fear of physical harm, the evidence was insufficient to enter full protection order.
Facts: Victim and Defendant, both men, were neighbors. Victim and Defendant did not get along, and had various verbal disputes over where Defendant parked his car and also over their dogs, one of whom bit Victim. Victim filed for an order of protection on grounds that Defendant let his dog off his leash and then "stared in Victim's window for 10 minutes" and "verbally harassed" Victim when Victim would pick up his mail. Victim did not check the boxes on the protection order form for "caused or attempted to cause me physical harm" or "placed or attempted to place me in apprehension of immediate physical harm." Trial court entered full order of protection and Defendant appealed.
Holding: Sec. 455.010.1 provides that any adult who has been subject to abuse by a present or former adult family or household member, or who has been a victim of stalking can apply for a protection order. Since Victim was not a family or household member of Defendant, the only way Victim can obtain a protection order is to show stalking. Stalking occurs when an adult purposefully and repeatedly engages in an unwanted course of conduct that reasonably causes alarm to another person. Alarm is defined as causing fear of danger of physical harm. Sec. 455.010(10)(b). Here, although Victim testified that Defendant's actions were "kind of scary" because Defendant was a deputy and also carried a gun, Victim did not assert that Defendant's actions put him in reasonable fear of physical harm. Full order of protection vacated.

Leimkuhler v. Gordon, No. WD70003 (Mo. App. W.D. 11/10/09):
Even though full order of protection had expired, the Court of Appeals could use the remedy of vacatur to order the judgment below vacated, rather than dismiss the appeal as moot.
Facts: Appellant appealed entry of a full order of protection against her. Appellant was a co-worker of another worker who sought an order of protection. The trial court entered the order for "abuse" and "stalking" at work. However, the full order of protection expired during the pendency of the appeal.
Holding: Under Sec. 455.020.1 protection orders can only be entered for "abuse" if the perpetrator is a family member or household member, which is not the case here. The only possible basis of the order here was "stalking," but regarding stalking the parties only saw each other two times at work in "non-eventful" events, once in passing in a hallway and once getting off an elevator. The Court of Appeals questions whether this constitutes "stalking." Nevertheless, the protection order has expired here, which would normally render the appeal moot and require dismissal of the appeal. However an appellate court can use the remedy of vacatur to grant relief when a judgment becomes moot through no fault of the appellant. Vacatur is appropriate where there are equitable considerations supporting the fairness of vacating the judgment. Here, court remands with order to vacate the judgment.

H.K.R. v. Stemmons, No. WD70560 (Mo. App. W.D. 10/13/09):
(1) Even though Defendant exposed his penis to petitioner-victim at an office, Defendant was not subject to an order of protection for sexual abuse because he was not a "present or former adult family or household member" of victim as required for an order of protection under Sec. 455.020.1; and (2) where Defendant exposed his penis to victim only one time, this was not "stalking" because it was not a repeated course of conduct and so could not support an order of protection for stalking.
Facts: Petitioner-victim ran a business, at which Defendant was a tenant. While Defendant was in victim's office one time, he moved close to her three times and his penis was exposed through his zipper. Victim sought an order of protection against Defendant, which was granted. Defendant appealed.
Holding: Sec. 455.020.1 states that "any adult who has been subject to abuse by a present or former adult family or household member, or who has been the victim of stalking," may seek an order of protection under the statute. Here, although exposing a penis would be "abuse," Defendant was not a "present or former adult family or household member" of victim. Further, "stalking" requires repeated incidents or a course of conduct. Here, the offending behavior occurred only one time, so cannot be "stalking." Order of protection reversed.

State v. Moran, No. WD69397 (Mo. App. W.D. 9/29/09):
Holding: *"Emotional abuse" under Section 455.501(1) for violating order of protection means an injury to the child's psychological capacity or emotional stability demonstrated by an observable or substantial change in child's behavior, emotional response, or cognition, including anxiety, depression, withdrawal or aggressive behavior.*
Facts: An order of protection had been entered against Defendant-Mother to stay away from her former child. Mother parked car in child's neighborhood and yelled, "I'll get

you back" at him. Mother was convicted of violating order of protection by inflicting "emotional abuse."
Holding: Sec. 455.501(1) defines abuse, in part, as "emotional abuse" inflicted on a child. The definition of "emotional abuse" is an issue of first impression in Missouri. Using definitions from other states and the dictionary definition, "emotional abuse" means an injury to the child's psychological capacity or emotional stability, demonstrated by observable or substantial changes in child's behavior, emotional response, or cognition, including anxiety, depression, withdrawal, or aggressive behavior. The State may use lay or expert witnesses to establish that the child's injury resulted in observable or substantial change. Here, witnesses testified child changed after Defendant-Mother yelled, "I'll get you back." Conviction affirmed.

State v. Calvert, No. WD70004 (Mo. App. W.D. 8/18/09):
Even though Defendant lived within sight of a "Senior Housing" development in a small town and sold drugs from his home, the evidence was insufficient to prove Defendant knowingly sold drugs within 1000 feet of public housing, because nothing indicted the "Senior Housing" was public housing and court will not infer that Defendant knew this from living in small town.
Facts: Defendant, who sold drugs from his home, lived within sight of a development that had a sign saying, "Keytesville Senior Housing -- Equal Opportunity Housing." Defendant was charged with sale of drugs within 1000 feet of public or gov't housing, Section 195.218. The State presented evidence that there was a "Senior Housing" development within sight of Defendant's house, and that this was less than 1000 feet from Defendant's property. Also, the State claimed this was a small town and everyone knew that the "Keytesville Senior Housing" was public housing.
Holding: To sustain the conviction, the State must prove Defendant knew he was within 1000 feet of public housing when he sold drugs. There was no evidence Defendant was familiar with the residents of the Senior Housing development, or evidence of how long Defendant lived in his home. The housing was ranch-style housing and non-institutional looking. The only arguable thing identifying it as public housing is the "Keytesville Senior Housing" sign, which does not indicate it is "public" or governmental, even though it also said "equal housing opportunity." While the evidence would allow inference that Defendant was aware of the "Senior Housing," the evidence did not prove Defendant knew it was public or gov't housing. Also, "[w]e fail to see that the fact that Keytesville is a small community would automatically impart this kind of knowledge" to Defendant. Conviction for sale within 1000 feet of public or gov't housing vacated (Class A felony), but case remanded for entry of conviction and sentencing for distributing controlled substance, Section 195.211 (Class B felony).

State v. Redifer, No. WD69708 (Mo. App. W.D. 8/14/09):
Even though Defendant fled from officer, where (1) officer was only stopping Defendant to investigate whether Defendant had a driver's license and was not making an arrest at that time and (2) jury instruction did not allow jury to convict for flight only, the evidence was insufficient to convict of resisting arrest, Sec. 575.150.

Facts: Police officer thought Defendant was driving with a revoked license, and so activated his emergency lights and observed Defendant pull into a private driveway. Defendant got out of the car and ran away. Defendant was convicted of resisting arrest.
Holding: Sec. 575.150 allows conviction if a person "resists the arrest, stop or detention of such person by threatening the use of violence or physical force or by fleeing from such officer." Although 575.150 allows conviction for fleeing from police, court cannot affirm Defendant's conviction on that ground because the jury instruction only allowed for a finding of guilt if Defendant was being arrested. The jury had no instruction on resisting a lawful stop or detention or fleeing from the officer. To resist arrest, an arrest must be in progress. While officer thought Defendant did not have a license, he testified he would check with dispatch to confirm Defendant was unlicensed, and if so, would arrest him. Thus, officer was just stopping Defendant to investigate him, and was not arresting Defendant when Defendant fled.

In the Interest of N.R.C. v. Juvenile Officer, No. WD69088 (Mo. App. W.D. 2/10/09):
Where the owner of property was equivocal about whether the value was more than $500, evidence was insufficient convict of felony stealing for stealing over $500.
Facts: Defendant (juvenile) was convicted of felony of stealing over $500. The only evidence of the stolen property's value came from the owner. Owner testified on direct exam that he "did not know" if the property's value was over $500, but "you could say that." On cross-exam, owner "couldn't tell" the value and when asked if it was possible it was less than $500, answered "maybe."
Holding: A prior case held that there was insufficient evidence to convict of felony stealing where the owner "guessed" the property exceeded a certain value and stated it "probably" did. The State must prove value beyond a reasonable doubt. Here, the evidence is speculative as to value. Thus, felony stealing is not proven, but misdemeanor stealing is.

City of Kansas City v. Heather, No. WD68653 (Mo. App. W.D. 1/20/09):
Even though Defendant threatened to "put a shammy" on people, this did not constitute harassment for threatening to commit a felony since there was no evidence what "put a shammy" on someone reasonably meant.
Facts: Defendant left a voicemail for victim that he was going to "put on shammy" on everyone she knew. Victim did not know Defendant, and victim testified she thought this meant Defendant was going to kill or harm her. Defendant was convicted under a city harassment ordinance which made it unlawful to "communicate by telephone a threat to commit any felony."
Holding: The evidence was insufficient to prove Defendant intended to commit a felony. Other than victim's testimony, there was no evidence as to what "put a shammy" on someone means. A search of dictionaries and the internet does not reveal any understood meaning for this word. There is no indication it means to kill or harm someone. Whatever the police or victim may have thought of the term is immaterial, since the question is whether there is evidence that the phrase is reasonably understood to mean a threat to kill or harm. Conviction vacated.

State v. Owens, No. WD68830 (Mo. App., W.D. 12/16/08):
Where jury acquitted Defendant of sodomy, the jury's verdict convicting him of attempted witness tampering on the basis of the sodomy was an inconsistent verdict, and Defendant's conviction was vacated.
Facts: Defendant was charged with sodomy and attempted witness tampering, Sec. 575.270.2. The alleged sodomy was of a child. The alleged witness tampering occurred because Defendant had called the child's mother and tried to get her to have the child drop charges. The child ultimately recanted her allegations, but claimed that Defendant and mother never asked her to. The jury acquitted Defendant of sodomy, but convicted him of attempted witness tampering.
Holding: Generally, a Defendant must object at trial to an inconsistent verdict before the jury is discharged, or else the claim is waived. This did not happen here, but appellate court finds plain error. Sec. 575.270.2 states that a person commits the crime of victim tampering if they attempt to dissuade "any person who has been a victim of any crime" from pursuing prosecution. One of the elements of the offense is that the person "has been a victim of [a] crime." Because Defendant was acquitted of sodomy, the child was not a victim of a crime, and the acquittal of sodomy was inconsistent with the conviction of attempted witness tampering. Where a finding of guilt on one count depends on the jury's verdict on another, acquittal of the predicate crime precludes conviction of the dependent offense. The fact that Defendant was charged with only "attempted" tampering does not change the outcome. The judge had a duty to refuse to accept the inconsistent verdicts. He should have sent the case back for further deliberations. Having not done so, the only remedy is to vacate the attempted tampering conviction.

M.A.A. v. Juvenile Officer, No. WD69051 (Mo. App., W.D. 12/9/08):
Even though Defendant was in a group of four boys when one of the boys stole an MP3 player and the group fled, where there was no evidence all of the boys intended to do the offense, the evidence was insufficient to convict Defendant.
Facts: Defendant, a juvenile, was in a group of four boys, when one of the boys stole an MP3 player from a victim. All of the boys then fled. The victim chased the boys, and other boys (not Defendant) hit the victim. Defendant was found guilty of robbery as an accessory.
Holding: To convict Defendant, the State had to prove he affirmatively participated in the crime to make him liable as an accomplice. Although Defendant was present when the MP3 player was taken from the victim, and Defendant ran from the scene with the other boys, there was no evidence the group of boys planned to take the MP3 player, or encouraged the boy who actually took it to do so, or that Defendant hit the victim. Conviction reversed.

State v. Wilson, No. WD69083 (Mo. App., W.D. 11/4/08):
Where the only evidence was that Defendant had been in an accident at some unknown time in the past and was later intoxicated at a hospital, the evidence was insufficient to convict of DWI.
Facts: Defendant was involved in a one-car accident. Police arrived after Defendant had been taken to a hospital. At trial, the State presented evidence that Defendant was

intoxicated at the hospital. A passenger in the car testified Defendant had "drunk a little, not very much."
Holding: The evidence presented showed only that Defendant drove a car, was involved in an accident, and was intoxicated at a hospital some time on December 17. There was no testimony when the accident occurred, when the trooper arrived at the scene, when the trooper arrived at the hospital or when the blood test was given; these were fatal omissions in proof. Proof Defendant was intoxicated at time of arrest, when remote from operation of the vehicle, is insufficient by itself to prove intoxication at time the person was driving.

State v. Ward, No. WD68614 (Mo. App., W.D. 10/21/08):
Even though Defendant and co-Defendant attempted a jail escape together, there was insufficient evidence to convict Defendant of destruction of jail property where co-Defendant's jail blanket was torn up because it was speculative that this Defendant did this.
Facts: Defendant and co-Defendant were fellow inmates in a jail cell. One night, they attempted an escape together, but failed. The two were separated, and co-Defendant was left in the cell they had shared. The next day, a torn-up blanket was found on co-Defendant's bed in the cell they had shared. A few weeks later, a torn t-shirt was found in Defendant's cell, and made into a rope. Defendant was convicted of destruction of jail property for the torn-up blanket.
Holding: Although the State contends the torn-up blanket was part of the escape attempt, it is speculative that Defendant tore up the blanket or aided in tearing it up, rather than the co-Defendant having done it.

State v. M.L.S., No. WD68568 (Mo. App., W.D. 10/21/08):
Even though Defendant riding in patrol car moved his handcuffs from back to front, this did not constitute obstructing government operations because the transportation of Defendant was not impeded.
Facts: Defendant was arrested for domestic assault. While riding in the patrol car, Defendant was able to move his handcuffs from his back to his front. He was convicted of obstructing gov't operations.
Holding: To prove obstruction of a gov't operation, Sec. 576.030, the State must show (1) the defendant purposely impaired a gov't function; (2) the defendant did so by using or threatening violence or force; and (3) the defendant did so for the purpose of obstructing the performance of a gov't function. The transportation of a suspect to the police station is a gov't function, but the evidence here did not show that the transportation of Defendant was impaired by him. The transportation was not stopped because of the moving of the handcuffs and Defendant was cooperative.

State v. Robertson, No. WD68097 (Mo. App., W.D. 9/2/08):
Where the damage to property was only $250, evidence was insufficient to convict of first degree property damage because that requires damage of at least $750.
Facts: Defendant was charged with first degree property damage, and other offenses. The evidence showed that the damage to a door was $250.

Holding: First degree property damage, Sec. 569.100, requires proof that the damage exceeded $750. Defendant's conviction for first degree property damage must be reversed because the damage was only $250. Conviction reversed and case remanded for entry of conviction for second degree property damage and sentencing accordingly.

State v. Roper, No. WD66668 (Mo. App., W.D. 8/5/08):
Where State presented no proof that Defendant "knowingly" sold drugs within 2000 feet of a school, evidence was insufficient to convict under Sec. 195.214.1.
Facts: Defendant sold drugs to an undercover officer within 2000 feet of a school. He was convicted under Sec. 195.214.1 making this a Class A felony.
Holding: Under *State v. Minner*, 2008 WL 2583045 (Mo. banc June 30, 2008), the State must prove that a defendant had knowledge he was selling drugs within 2000 feet of public housing to convict under Sec. 195.218. The same is true of the instant statute, Sec. 195.214.1: the State must prove Defendant knew he sold drugs within 2000 feet of a school. Here, there was no such proof. Defendant's conviction reversed, and case remanded for conviction for lesser felony under Sec. 195.211.

In the interest of C.G.M. v. Juvenile Office, No. WD68865 (Mo. App., W.D. 6/10/08):
Even though Juvenile said he may get dynamite for his birthday and asked another kid if he wanted to help blow up the school, where the other kid did not report this for five months and principal would not have evacuated the school in any event, the evidence was insufficient to convict of making a terroristic threat, Sec. 574.115.1(4).
Facts: Juvenile told another kid in December that he "may get dynamite" for his birthday in December, and asked if the other kid "wanted to help him blow up the school." Five months later, the other kid reported this. The principal testified that he would not have evacuated the school because Juvenile did not say he had dynamite in his possession yet, so there was no immediate threat.
Holding: Under Sec. 574.115.1(4), the State had to prove that Juvenile communicated a threat involving danger to life, and failed to be aware of a substantial and unjustifiable risk that his statement would cause an evacuation of the school. True threats are where a speaker means to communicate a serious expression of an intent to commit an act of unlawful violence against a group. Juvenile's statements – while coming close to being unlawful – were only that he "may" get dynamite for his birthday from his parents. A statement that a juvenile would be receiving dynamite from his parents for his birthday makes a reasonable listener question whether the speaker is serious. Indeed, the other kid testified he did not believe Juvenile would receive dynamite, and the other kid was not in fear of Juvenile. Further, the principal testified he would not have evacuated the school.

State v. Payne, No. WD67999 (Mo. App., W.D. 4/29/08):
Even though victim suffered puncture wounds on his body, where there was no evidence of what type of weapon caused the wounds, the evidence was insufficient to convict of second degree assault and ACA for use of a "deadly weapon."
Facts: Defendant was involved in a fight with victim, and hit victim and caused "puncture wounds" to victim's body. The weapon was never identified or found. Defendant was convicted of second degree assault for attempting to cause physical injury

by means of a "deadly weapon," and armed criminal action for use of a "deadly weapon." The deadly weapon was alleged to be a "dagger."
Holding: Second degree assault occurs when a person causes physical injury by means of a "deadly weapon or dangerous instrument." Sec. 565.060.1(2). Armed criminal action was charged in this case for use of a "deadly weapon." Sec. 571.015.1. Despite that the State could have charged use of a "dangerous instrument," the State chose "deadly weapon," and is held to this proof of the elements of the offense. "Deadly weapon" is defined, in relevant part, as a "dagger." Defendant's use of a weapon to stab victim did not mean that the unidentified weapon was a "dagger." Sec. 556.061(10). "Dagger" does not mean any sharp or pointed object, but is generally a short weapon used for stabbing. There was no evidence Defendant used a "dagger." He could have used a screwdriver, pen, scissors or other object. Conviction for second degree assault and ACA vacated, but conviction for less-included third degree assault is entered.

State v. Ingram, No. WD67787 (Mo. App., W.D. 4/15/08):
Even though a crack rock was found on Defendant's car seat, evidence was insufficient to prove Defendant possessed the crack where Defendant did not have exclusive access to the car, and an officer who searched the car before the crack was found did not testify about anything.
Facts: Defendant was stopped for a traffic violation. She and another passenger were in a car, to which other people also had access. Both women were arrested for outstanding warrants. While the women were being arrested, Officer Gormant searched the car, which was dirty and full of trash. Officer Crum then returned to the car and saw a crack rock on the driver's seat. Officer Gormant did not testify at trial. Defendant was convicted of drug possession.
Holding: Defendant was the driver, but not the owner of the car, and other people also had access to the car. Since Defendant did not have exclusive control over the car, the State had to prove constructive possession of the crack. Officer Crum testified the crack was on the driver's seat, but Officer Gormant did not testify at trial where the crack may have been when he was searching the car. Defendant was not nervous and did not make any incriminating statements. The evidence was insufficient to prove Defendant possessed the crack.

State v. Harris, No. WD67312 (Mo. App., W.D. 1/22/08):
Where Defendant stabbed victim three times in an assault that lasted about one minute, this was a single act of assault, and conviction for three counts of first degree assault violated double jeopardy.
Facts: Defendant went to victim's house and stabbed him three times, in the face, arm, and back. The assault was a continuous fight that lasted about one minute. Defendant was charged and convicted of three counts of first degree assault.
Holding: Double jeopardy prohibits multiple punishments for the same offense. Separate assault offenses can be charged from a single event each time Defendant forms a new intent to assault. However, the evidence here showed the assault was a single, continuous battle and lasted about one minute. This must be considered one assault, and not three separate assaults. Two of the assault convictions are vacated.

State v. Guinn, No. WD67569 (Mo. App., W.D. 1/15/08):
Even though Defendant was in bedroom where scale with methamphetamine was found, where Defendant had been in bedroom only 7 seconds, and the methamphetamine was on a cluttered area and not immediately visible, evidence was insufficient to convict of possession with intent to distribute.
Facts: Police, while executing a search warrant at someone's house other than Defendant's, arrested Defendant who had been in a bedroom which contained a scale with methamphetamine. The scale was in a cluttered area and not immediately visible amongst the clutter. The Defendant had been in the bedroom 7 seconds when police arrested him.
Holding: Proof of constructive possession requires that Defendant have control over the premises. Defendant may have joint control over the premises, but being a mere guest where drugs are found is not sufficient. Being in the bedroom for a short period of time did not connect Defendant with the drugs, because they weren't immediately visible amongst the clutter. Nor do guns or night goggles in the house connect Defendant to drug dealing, since these weren't illegal or necessarily observable.

State v. Smith, No. WD67404 (Mo. App., W.D. 12/26/07):
Even though child was in apartment where Defendant-mother and boyfriend were fighting and a pot was thrown in the fight, there was insufficient evidence to convict of endangering welfare of child because mother's conduct did not create a substantial, "practically certain" risk to the child.
Facts: Police were called to a domestic fight in progress at Defendant-mother's apartment. Mother was fighting with her boyfriend. Both mother and boyfriend were beaten up by each other, and there was blood on the wall and floor. Mother said she threw a pot in self-defense. The child said he heard his parents arguing, and saw his mother throw the pot.
Holding: To convict of second degree endangering welfare of a child, Section 568.050, the State had to prove that mother's conduct created a substantial risk and that she acted with criminal negligence. A substantial risk is an actual or "practically certain" risk. Here, there was no substantial risk to the child shown. The child was not involved in the fight or in close proximity to it, even though he was in the apartment. There is no evidence of where the child was standing when the pot was thrown. The child may have witnessed this from a safe distance.

State v. Porter, No. WD66921 (Mo. App., W.D. 12/18/07):
Father who had equal custody rights to his children could not be convicted of "traditional kidnapping," Section 565.110, because he cannot unlawfully remove the children.
Facts: Defendant-father who shared custody of his children with wife, from whom he was separated, took children for weekend, and then the children disappeared. Father refused to say what happened to the children and told various stories, including that he "sold them" and "killed them." Father was convicted of "traditional kidnapping" under Section 565.110 and parental kidnapping under Section 565.153.
Holding: The State charged unlawful removal of the children to support "traditional kidnapping." Father's removal of the children was not unlawful because father had an

equal legal right to the children. The Legislature did not intend "traditional kidnapping" to apply to a parent with full rights of custody who violates no legal restrictions in removing a child, regardless of a wrongful intent in doing so. Father can be convicted of "parental kidnapping," however.

State v. Dublo, No. WD67202 (Mo. App., W.D. 10/30/07):
Even though Defendant held a knife to victims' throats, the evidence was insufficient to prove first degree assault because there was no evidence of an attempt to cause serious physical injury.
Facts: Defendant held a knife to victims' throats to find out information about who threatened his dog. Defendant was convicted of first degree assault and ACA.
Holding: The assault charges were based on holding a knife to the victims' throats in an attempt to cause serious physical injury, Section 565.050.1. Assault in the first degree, without injury to the victim, requires proof of a very specific intent to cause serious physical injury. In *State ex rel. Verweire v. Moore*, 211 S.W.3d 89 (Mo. banc 2006), Defendant jabbed a loaded pistol into victim and threatened to shoot him, but soon retreated. The Supreme Court found no intent to cause serious physical injury. Here, Defendant held a knife close to the necks of victims, but did not injure or attempt to injure them. Defendant's first-degree assault convictions reversed, related ACA convictions reversed, and case remanded for trial on lesser-included offense of third-degree assault.

State v. Ollison, No. WD66722 (Mo. App., W.D. 9/11/07):
Evidence was insufficient to prove Defendant drove his truck while intoxicated where truck was wrecked by road and police found Defendant more than an hour later at a house in an intoxicated state.
Facts: Police found Defendant's truck overturned in a ditch at 1:33 a.m. They found Defendant at 2:40 a.m. at a house. He was intoxicated and had a BAC of .154%. At 3:09 a.m., he had a BAC of .168%. He said he had been at a bar around 7:00 p.m. and drank 5 beers. He said he had not consumed any alcohol since the accident.
Holding: The State's evidence showed only that the accident occurred between 7:00 p.m. and 1:20 a.m., when Defendant called some people to report he had an accident. Defendant's statements do not prove he was intoxicated while driving because there is no evidence as to when he operated the truck. If the accident occurred close to 1:20 a.m., and Defendant did most of his drinking less than 30 minutes before, he might not have been intoxicated while driving, but the alcohol effects would show up later. The fact that his BAC was rising at 3:09 a.m. suggests he consumed some of the alcohol late in the evening.

State v. Wade, No. WD67363 (Mo. App., W.D. 9/11/07):
Section 568.045 does not authorize prosecution of pregnant mothers for child endangerment for ingesting drugs during pregnancy.
Facts: Defendant-mother delivered a baby who tested positive for marijuana and methamphetamine. The State charged mother with child endangerment. The trial court dismissed the charge.

Holding: Section 568.045 provides a person commits first-degree child endangerment by "knowingly act[ing] in a manner that creates a substantial risk to the life, body or health of a child less than 17 years old." The State argues that Section 1.205.1 which provides that life begins at conception allows prosecution. However, Section 1.205.4 states that "[n]othing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care." This provision precludes the prosecution of a mother who indirectly harms her fetus by ingesting illegal drugs.

State v. Byron, No. WD66807 (Mo. App., W.D. 5/22/07):
Evidence insufficient to prove Defendant operated car while intoxicated so as to convict of DWI where Defendant left car at accident scene and was not found by police until more than one hour later, at which time he was intoxicated.
Facts: Defendant's car ran off the road near a construction site. Police found the car abandoned, but learned it was Defendant's car. More than one hour later, police went to Defendant's house and found him intoxicated. When asked about the accident, Defendant said he knew nothing about it, and said his father had had his car. The father denied having the car, but said he had picked up Defendant near the accident scene, and Defendant was sober at that time. Defendant's shoeprint was by the accident scene. When police asked Defendant to take a breathalyzer, Defendant said, "You didn't see me driving. You didn't catch me driving."
Holding: The evidence does not prove Defendant operated the car while intoxicated. Defendant was not contacted by police for as much as an hour and 20 minutes after the accident. While Defendant's statements show he was afraid he would be accused of DWI, they did not demonstrate Defendant actually was intoxicated at the time of the accident.

State v. Davis, 217 S.W.3d 358 (Mo. App., W.D. 3/27/07):
Even though (1) officer arrived at crash scene and found a crashed car; (2) a woman told the officer that the crash happened shortly before and told the officer where the driver fled; and (3) the officer found the driver and he was intoxicated, the evidence was insufficient to sustain conviction for DWI because the only evidence of when the accident occurred was the hearsay statement of the woman to the officer, which could not be considered for its truth.
Facts: Officer arrived at scene where car had crashed. A woman told the officer that the car had crashed shortly before, and told the officer where the driver had fled. The officer went to another address and found the driver, who was intoxicated. Empty beer cans were found in the car. At trial, the woman did not testify. The defense objected to the officer's testimony about the woman's statements as hearsay, but the court admitted them to show officer's subsequent conduct.
Holding: The woman's statements were admitted at trial for a limited purpose, and not as substantive proof of the time of the accident. The court could not consider the woman's out-of-court statements about when the accident occurred for the truth. Thus, there was no substantive evidence to establish the time that Defendant was driving the vehicle or the time the accident occurred. Proof of intoxication at the time of arrest,

when remote from operation of the vehicle, is insufficient to prove intoxication at the time the person was driving. The fact that Defendant had blood on him does not prove intoxication while driving because there was no testimony if the blood was wet or dry; also, mere presence of beer cans does not prove intoxication while driving.

State v. Herndon, No. WD66610 (Mo. App., W.D. 3/27/07):
Where the evidence and jury instruction was that Defendant placed his penis "on" child victim's vagina, this was not sufficient evidence to prove sodomy, Section 566.062, because there was no evidence that the penis penetrated the vagina.
Facts: The evidence and jury instruction showed that Defendant placed his penis "on" child victim's vagina. Defendant was convicted of sodomy, Section 566.062.
Holding: Sodomy requires deviate sexual intercourse defined as an "act involving the genitals of one person and the hand, mouth, tongue or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object…." Putting a penis on a vagina without penetrating the vagina did not meet the definition of deviate sexual intercourse. Thus, sodomy conviction cannot be sustained. However, appellate court enters conviction for first-degree child molestation, Section 566.067.1, because this is a lesser-included offense of sodomy, and the evidence was sufficient to sustain that offense.

State v. Redifer, No. WD65665 (Mo. App., W.D. 12/26/06):
Where Defendant charged with resisting arrest, Section 575.150, was arrested when he failed to report to jail following conviction and sentence, this was insufficient to convict of resisting arrest since the statute requires arrest for a "crime, infraction or ordinance violation" and this arrest wasn't for those.
Facts: Defendant was convicted and sentenced for DWI, and was given period of time to report to jail. When he failed to report, a capias warrant was issued. When he was arrested, he fought with officers. Defendant was charged with resisting arrest, Section 575.150. Defendant filed a pretrial motion to dismiss, which was overruled. Defendant was convicted.
Holding: The State failed to prove an essential element of the crime because Section 575.150.2 requires that the arrest be for a "crime, infraction or ordinance violation." An arrest for a probation violation or for failure to appear on a probation violation is not considered a "re-arrest" on the underlying offense. Even if the police were trying to arrest Defendant for a probation violation on the underlying offense of DWI, this would not constitute an arrest for a crime to make a submissible case under Section 575.150. The State claims Defendant failed to appear before "any court or judicial officer" under Section 544.665. But this is not the case because Defendant was being arrested for failure to report to jail.

State v. McCleod, 186 S.W.3d 439 (Mo. App., W.D. 2006):
Fact that Defendant possessed 7.5 ounces of marijuana was insufficient by itself to prove that Defendant intended to distribute the marijuana. Conviction for possession with intent to distribute reversed.
Facts: Federal Express discovered that a package intended for Defendant contained 7.5 ounces of marijuana. FedEx arranged to have Defendant pick up the package where

police could arrest him. When Defendant came to pick up the package, he ran from police. When arrested, he had some rolling papers and "roaches. Defendant was convicted of possession with intent to distribute, Section 195.211.1.
Holding: The State was required to prove beyond a reasonable doubt that Defendant intended to deliver the marijuana in the package. The State contends that the mere fact that Defendant had 7.5 ounces of marijuana shows an intent to distribute. At some point, the amount of marijuana possessed can establish beyond a reasonable doubt that Defendant intended to distribute it, but proof of possession of a small amount, standing alone, does not show an intent to distribute. The State has not cited any cases showing that an amount as small as 7.5 ounces shows an intent to distribute. The evidence is insufficient to show an intent to distribute. Since the jury found Defendant guilty of possession with intent to deliver, Section 195.211, it did not consider whether Defendant was guilty of possession of over 35 grams of marijuana, Section 195.202.2. While the evidence was sufficient to support a conviction of over 35 grams, because Section 195.202 is not a lesser included offense of Section 195.211 and because the jury only needed to find Defendant in possession of 5 grams or more to support his conviction under Section 195.211.3, the case is remanded for a new trial to determine if Defendant is guilty of possession of over 35 grams.

*** U.S. v. Stevens, ___ U.S. ___, 87 Crim. L. Rep. 63 (U.S. 4/20/10):**
Holding: Federal statute that criminalizing making, sale or possession of "depictions of animal cruelty" violates 1st Amendment as overbroad; Supreme Court declines to declare this "unprotected speech."

*** Carr v. U.S., ___ U.S. ___, 87 Crim. L. Rep. 313 (U.S. 6/1/10):**
Holding: SORNA's provision that makes it a crime for sex offenders to travel in interstate commerce without registering does not apply to offenders whose travel was completed before the law went into effect in 2006.

*** Flores-Figueroa v. U.S., 85 Crim. L. Rep. 172, ___ U.S. ___ (5/4/09):**
Holding: Conviction under aggravated identify theft statute, 18 USC 1028A, requires that Defendant was aware that the false identifying information belonged to an actual person.

*** Abuelhawa v. U.S., 85 Crim. L. Rep. 268, ___ U.S. ___ (5/26/09):**
Holding: 21 USC 844, which makes it a felony to "use any communication facility" to commit a drug crime does not apply to using a telephone to buy a personal-use quantity of drugs.

*** U.S. v. Hayes, 84 Crim. L. Rep. 559, ___ U.S. ___ (2/24/09):**
Holding: 18 U.S.C. 922(g)(9), which makes possession of a firearm a federal crime when the possessor has been convicted of a "misdemeanor crime of domestic violence," does not require the Gov't to prove that a domestic relationship was an element of the underlying misdemeanor offense; a misdemeanor crime of domestic violence includes an offense committed by a person who had a domestic relationship with the victim, whether

or not the misdemeanor statute itself designates the domestic relationship as an element of the crime.

*** Cuellar v. U.S., ___ U.S. ___, 83 Crim. L. Rep. 304 (6/2/08):**
Holding: More proof than merely hiding cash during transportation is required for conviction for concealing cash under the federal money laundering statute, 18 U.S.C. 1956(a)(2)(B)(i). Prosecutors must show a purpose to conceal the nature or ownership of the cash.

*** U.S. v. Santos, ___ U.S. ___, 83 Crim. L. Rep. 303 (6/2/08):**
Holding: Only net profits, not gross receipts, qualify as "proceeds" under the federal money laundering statute, 18 U.S.C. 1956(a)(1)(A)(i).

*** U.S. v. Ressam, ___ U.S. ___, 83 Crim. L. Rep. 229 (5/19/08):**
Holding: The statute criminalizing carrying an explosive during a felony, 18 U.S.C. 844(h)(2), requires only a temporal link between the carrying and the felony, and not a relationship between that act and the underlying crime.

U.S. v. Villanueva-Sotelo, 82 Crim. L. Rep. 541 (D.C. Cir. 2/15/08):
Holding: Federal statute on aggravated "identify theft," Sec. 18 U.S.C. 1028A, requires proof Defendant knew the false identification belonged to a real person; Congress intended to enhance penalties for defendants who steal real identities, as opposed to using merely fraudulent documents.

U.S. v. Lacey, 2008 WL 65508 (D.C. Cir. 2008):
Holding: Where there was no testimony that the cocaine base was "crack" or that it was "smokable," conviction for distributing crack is vacated and lesser-included conviction for distributing cocaine is entered.

U.S. v. Crooker, 87 Crim. L. Rep. 690 (1st Cir. 6/18/10):
Holding: A silencer for an airgun that could not be attached to a firearm without an adapter does not qualify as a "firearm" under federal law.

U.S. v. Tobin, 84 Crim. L. Rep. 408 (1st Cir. 1/7/09):
Holding: Where 47U.S.C. Sec. 223(a)(1)(D) made it a crime to "make or cause the telephone of another repeatedly or continuously to ring with intent to harass," the State must prove the caller acted with a subjective intent to upset the recipient, not merely with knowledge that distress would probably result.

U.S. v. Godin, 83 Crim. L. Rep. 670 (1st Cir. 7/18/08) and U.S. v. Miranda-Lopez, 83 Crim. L. Rep. 670, 2008 WL 2762392 (9th Cir. 7/17/08):
Holding: Federal aggravated identify theft statute requires proof that Defendant knew the false identification belonged to another person.

U.S. v. Nieves-Castano, 2007 WL 901647 (1st Cir. 2007):
Holding: Where it was not obvious from looking at a gun that the gun had been modified to fit the definition of a "machine gun," the evidence was insufficient to convict defendant of knowing possession of a "machine gun," since there was no evidence defendant had any expertise in firearms or had ever fired the gun.

U.S. v. Garcia, 86 Crim. L. Rep. 336, 2009 WL 4254582 (2d Cir. 12/1/09):
Holding: Even though Defendant admitted in guilty plea that he knew that crime proceeds he was transporting were not going to be declared as income by their recipients, this was not enough to sustain conviction for conspiring to engage in concealment money laundering.

U.S. v. Rodriguez, 86 Crim. L. Rep. 362 (2d Cir. 11/30/09):
Holding: Even though Defendant had an extortion scheme and confined Victim in a car for 15 minutes, this did not violate federal Hostage Taking Act, 18 USC 1203, because the Act requires confinement for an appreciable period of time.

U.S. v. Draper, 2009 WL 116963 (2d Cir. 2009):
Holding: In federal witness retaliation prosecution, Gov't was required to prove that at least one of the law enforcement officials contacted was employed by the federal gov't, and that witness had had contact with them before witness was attacked.

U.S. v. McGeehan, 86 Crim. L. Rep. 151 (2d Cir. 10/22/09):
Holding: Even though Defendants mishandled funds related to a Navy contract, "honest services" fraud requires proof of a fiduciary duty and violation of fair dealing implicit in a contract is not enough.

U.S. v. Shim, 86 Crim. L. Rep. 77 (2d Cir. 10/1/09):
Holding: Where jury did not make finding that Defendant knew that the prostitutes she conspired to transport traveled in interstate commerce, evidence was insufficient to sustain Mann Act conviction.

U.S. v. Kerley, 84 Crim. L. Rep. 80 (2d Cir. 9/25/08):
Holding: Defendant who violates single child support order covering multiple children can be convicted of only one count of failure to pay child support.

U.S. v. Wexler, 2008 WL 878582 (2d Cir. 2008):
Holding: Where witnesses did not testify they had received Dilaudid from a patient, the evidence was insufficient to convict Defendant-doctor of conspiring with patient to distribute Dilaudid.

U.S. v. Hassan, 2008 WL 6714873 (2d Cir. 2008):
Holding: Even though Defendant imported "Khat," this fact alone was not sufficient to support conviction for importing a controlled substance because not all "Khat" contains the prohibited cathinone and the evidence showed cathinone dissipates within 48 hours of harvest.

U.S. v. Schiff, 87 Crim. L. Rep. 67 (3d Cir. 4/7/10):
Holding: Corporate executive-defendant is not liable under 1934 SEC Act 10(b) for omissions in quarterly financial filings based on his alleged misstatements in conference calls with analysts.

U.S. v. Cuevas-Reyes, 2009 WL 1976049 (3d Cir. 2009):
Holding: Where Defendant assisted illegal aliens to leave U.S. Virgin Islands and go to Dominican Republic and told them to meet him on the airplane and not go through customs, this did not constitute shielding illegal aliens because that requires assisting them to remain in the U.S.

U.S. v. Saybolt, 85 Crim. L. Rep. 634 (3d Cir. 8/18/09):
Holding: 18 USC 286 criminalizing defrauding of the U.S. by a "false, fictitious or fraudulent claim" requires proof that the defendant's false statement was "material."

U.S. v. Stevens, 83 Crim. L. Rep. 666 (3rd Cir. 7/18/08):
Holding: 18 U.S.C. 48, which prohibits creation or possession of images of animal cruelty, violates the First Amendment, because it creates a new category of unprotected speech not currently recognized by the U.S. Supreme Court.

U.S. v. Ozcelik, 83 Crim. L. Rep. 355, 2008 WL 2169398 (3d Cir. 5/27/08):
Holding: Giving illegal alien advice on how to avoid immigration authorities does not constitute shielding, harboring or concealing an alien under 8 U.S.C. 1324.

U.S. v. White, 2010 WL 2169487 (4th Cir. 2010):
Holding: Virginia conviction for misdemeanor assault against a family member was not a "misdemeanor crime of domestic violence" for purposes of felony possession of firearms statute, where offense did not have as an element use of force, but included just touching.

U.S. v. Madrigal-Valadez, 85 Crim. L. Rep. 88, 2009 WL 858200 (4th Cir. 4/1/09):
Holding: A single "no trespassing" sign posted on road to military base did not give notice that entry to the base constituted illegal trespassing.

U.S. v. Hatcher, 85 Crim. L. Rep. 15 (4th Cir. 3/13/09):
Holding: Where sex offenders were charged with failing to register as sex offender under SORNA before the Attorney General made SORNA retroactive, the convictions had to be reversed, because the alleged failures to register happened before there was a duty to register.

U.S. v. Mitchell, 82 Crim. L. Rep. 630, 2008 WL 607483 (4th Cir. 3/6/08):
Holding: Defendant who picked name out of phone book in false identification scheme did not commit "aggravated identify theft" unless Defendant used other specific information about that person; using real name alone is not enough.

U.S. v. Hayes, 81 Crim. L. Rep. 74 (4th Cir. 4/16/07):
Holding: The crime of possession of firearm following a conviction for "misdemeanor crime of domestic violence," 18 U.S.C. 922(g)(9), requires the prior conviction have as an element a domestic relationship between the defendant and the prior victim.

U.S. v. Nichols, 2010 WL 1286846 (5th Cir. 2010):
Holding: Statute criminalizing dissemination of any visual image of child pornograph did not apply only to per

U.S. v. Trejo, 87 Crim. L. Rep. 705 (5th Cir. 6/28/10):
Holding: Promotion of money laundering requires more than knowing transportation of illegal cash; otherwise, every drug offense involving cash would be money laundering. manently stored data.

U.S. v. Whitfield, 86 Crim. L. Rep. 349, 2009 WL 4723467 (5th Cir. 12/11/09):
Holding: 18 USC 666, which prohibits bribery "in connection with" state gov't entities that receive federal program funds, does not apply to Defendant-State Judges, even though the administrative judicial office takes federal money.

U.S. v. Herrera, 84 Crim. L. Rep. 634 (5th Cir. 2/11/09):
Holding: Even though Defendant's funds were shifted to his wife's account after he was warned by the IRS that it would levy his funds, this was insufficient to prove willful tax evasion where his funds were managed by a third party.

U.S. v. Ramos, 83 Crim. L. Rep. 712 (5th Cir. 7/28/08):
Holding: 18 U.S.C. 1512(c), making it a crime to obstruct an "official proceeding," does not apply to interference with a gov't agency's informal internal investigation into an employee's violation of agency policy.

U.S. v. Rojas-Alvarez, 2006 WL 1494959 (5th Cir. 2006):
Holding: Evidence was insufficient to prove that Defendant committed drug offense within 1000 feet of a "playground," since, although State showed that there were two parks nearby, the State was required to prove that the parks had child-play equipment to prove the element of "playground."

U.S. v. Faulkenberry, 87 Crim. L. Rep. 735 (6th Cir. 7/28/10):
Holding: Transaction money laundering under 18 USC 1956(a)(2)(B)(i) requires proof that an "animating purpose" of the transaction was to conceal the illicit funds.

U.S. v. Silwo, 87 Crim. L. Rep. 916 (6th Cir. 9/8/10):
Holding: Even though Defendant got a van and acted as a lookout for co-defendants, this was insufficient to prove that Defendant engaged in a marijuana conspiracy absent proof that Defendnat knew that marijuana possession was the ultimate purpose of the conspiracy.

U.S. v. Gagnon, 2009 WL 196352 (6th Cir. 2009):
Holding: "Simple assault" on federal officers does not necessarily show intent to commit a felony.

U.S. v. Bailey, 2009 WL 113561 (6th Cir. 2009):
Holding: Even though gun was found under seat of stolen car Defendant was driving and Defendant had sought to evade police, evidence was insufficient to convict of possession of gun because Defendant also had drugs in car and may have evaded police to conceal drugs; Defendant testified he was unaware of gun; his fingerprints were not on gun; and other people had also been driving the car.

U.S. v. Driver, 2008 WL 2938548 (6th Cir. 2008):
Holding: Even though Defendant motorcycle club member attended a club "bosses meeting," he could not be convicted of drug distribution under RICO where there was no evidence he intended to further the club's drug distribution.

U.S. v. Grubbs, 2007 WL 3010434 (6th Cir. 2007):
Holding: Even though a witness had seen Defendant with a gun in the past, evidence was insufficient to convict of gun possession charge where the evidence was that a gun was found at Defendant's mother's house under his brother's bed, but there was no evidence that this was the gun the witness had seen.

U.S. v. Sanchez, 2010 WL 3155919 (7th Cir. 2010):
Holding: Where Gov't presented no evidence that Defendant knew that witness had testified against conspiracy leader, evidence was insufficient to convict of conspiracy to retaliate against a witness; instead, evidence showed that Defendant targeted victim because victim owed money to conspiracy leader.

F.T.C. v. Trudeau, 2010 WL 1994593 (7th Cir. 2010):
Holding: Even though Defendant radio DJ got his listeners to send emails to judge using the court's computers, Defendant was not "present" in court sufficient to allow judge to impose summary criminal contempt.

U.S. v. Johnson, 2010 WL 154798 (7th Cir. 2010):
Holding: Even though police presented phone recordings of Defendant buying drugs from a supplier and Defendant warned supplier about police, where the supplier had not sold drugs to Defendant more than 4 times and never sold on credit, the evidence was insufficient to convict Defendant of conspiracy to possess and distribute drugs.

U.S. v. Katz, 2009 WL 2998048 (7th Cir. 2009):
Holding: Even though Defendant's fingerprints were found on a gun, where there was no evidence as to when the prints got there, and the gun was found at Defendant's girlfriend's house where Defendant did not live or stay, the evidence was insufficient to convict of being a felon-in-possession of firearm.

U.S. v. Thorton, 83 Crim. L. Rep. 832, 2008 WL 3905894 (7th Cir. 8/26/08):
Holding: 18 USC 2113(a) which makes it a crime to take money from a bank "by intimidation" requires actual intimidation even when charged with attempt.

U.S. v. Gladish, 83 Crim. L. Rep. 733, 2008 WL 2927127 (7th Cir. 7/31/08):
Holding: (1) Even though Defendant exposed himself to alleged minor in internet chat and talked generally about traveling to set up a meeting for sex, evidence was insufficient to prove attempted enticement of a minor because there was no substantial step toward completion of the crime; Defendant's general remarks were "hot air"; and (2) trial court erred in barring defense psychologist from testifying in support of Defendant's "hot air" theory; while expert cannot testify Defendant did not intend to have sex with minor, expert could testify it was unlikely, given Defendant's psychological profile, that he would act on his intent.

U.S. v. Salgado, 82 Crim. L. Rep. 9 (7th Cir. 3/17/08):
Holding: Even though Defendant tried to rob a drug person (who unbeknownst to Defendant was a gov't agent), where the agent had no money, Defendant could not be convicted of attempted robbery of money, Sec. 18 U.S.C. 2114(a); a person cannot steal something the victim does not actually possess.

U.S. v. Thompson, 81 Crim. L. Rep. 135 (7th Cir. 4/20/07):
Holding: Federal fraud and bribery statute was not violated by gov't official who awarded gov't contract to a party favored by her politically appointed boss, since taking "political considerations" into account is not the same as theft or bribery.

U.S. v. Mendoza-Gonzales, 83 Crim. L. Rep. 44 (8th Cir. 3/28/08):
Holding: The aggravated identify theft statute, 18 U.S.C. 1028A(a)(1), requires proof that the victim is a real person, but does not require Defendant to know this.

Niederstadt v. Nixon, No. 05-4329 (8th Cir. 10/17/06):
Where the Missouri Supreme Court found that Petitioner had used "forcible compulsion" when he put his finger in a sleeping girl's vagina, this was a new construction of the sodomy statute, Section 566.060 RSMo Supp. 1991, which did not give notice to defendants that this conduct constituted "forcible compulsion." Habeas relief granted.
Facts: Habeas Petitioner was convicted of sodomy under Section 566.060 RSMo Supp. 1991. He had placed his finger in the vagina of a sleeping girl. Section 566.060 RSMo Supp. 1991 required "deviate sexual intercourse with another person without that person's consent by the use of forcible compulsion."
Holding: Due process requires that criminal statutes give fair warning of what conduct constitutes a crime. Due process is violated if a court gives a criminal statute a construction that is unexpected by reference to the statute. The Missouri Supreme Court held in Petitioner's case that the act of penetrating the vagina satisfied the physical force element of the statute. However, a fair reading of the statute and caselaw interpreting the statute prior to Petitioner's case would not have given notice that intercourse itself can be the force used to accomplish the intercourse, or that a sleeping or unconscious victim can be "compelled." The statutory language did not give "fair warning" that Petitioner's

conduct constituted sodomy. Petitioner's due process rights were violated. Habeas relief granted. However, the 8th Circuit notes that Missouri courts are free to apply the new construction of the statute to cases which occurred *after* Petitioner's Missouri Supreme Court case because defendants after that case would have notice of the criminal conduct.

U.S. v. Lopez, 79 Crim. L. Rep. 120 (8th Cir. en banc 4/17/06):
Holding: Court overrules prior cases that say prosecution need only prove "slight evidence" of conspiracy, and holds that prosecutor must prove Defendant's involvement in a conspiracy beyond a reasonable doubt, but the Defendant's role can be minor.

U.S. v. Millis, 87 Crim. L. Rep. 861, 2010 WL 3435003 (9th Cir. 9/2/10):
Holding: Even though Defendant left plastic water bottles in wildlife area, where he did this to provide water for illegal immigrants, this did not violate law that forbids "disposal of waste" in wildlife area.

U.S. v. Rocha, 2010 WL 1006501 (9th Cir. 2010):
Holding: Defendant's hands are not a "dangerous weapon" under federal assault statute.

U.S. v. Begay, 2009 WL 1508522 (9th Cir. 2009):
Holding: Even though Defendant had a gun in his truck and fired it at victims, where (1) Defendant kept the gun in his truck for recreational purposes, (2) there was no evidence of motive, and (3) Defendant shot in an "agitated" state, the evidence was insufficient to support first degree murder because there was no cool reflection.

U.S. v. Van Alstyne, 86 Crim. L. Rep. 129 (9th Cir. 10/22/09):
Holding: The distributions the operator of a pyramid scheme pays out to make the scheme look like a legitimate investment are not covered by the federal money laundering statute.

U.S. v. Lazarenko, 2009 WL 961532 (9th Cir. 2009):
Holding: Even though evidence showed money went into and out of Defendant's foreign bank account, evidence was insufficient to convict of interstate transportation of stolen property where the money was not "directly traceable" to Defendant's fraud, and no bank records were produced.

U.S. v. Nevils, 84 Crim. L. Rep. 259 (9th Cir. 11/20/08):
Holding: Even though Defendant was asleep on a couch with a gun on his lap and one next to him, evidence was insufficient to convict of possession of firearm by felon where Defendant had innocent explanation.

U.S. v. Lazarenko, 2008 WL 4368219 (9th Cir. 2008):
Holding: Even though the gov't showed money flowing into and out of Defendant's foreign bank account, where this money was not directly traceable to Defendant's fraud, this evidence was insufficient to sustain conviction for interstate transportation of stolen property.

U.S. v. Locklin, 2008 WL 2512923 (9th Cir. 2008):
Holding: Conviction for failure to appear on underlying offense of felon in possession of firearm required a jury-finding that Defendant had the underlying conviction; lack of jury-finding was not harmless error under *Apprendi*.

Brown v. Farrell, 83 Crim. L. Rep. 235 (9th Cir. 5/5/08):
Holding: Where State DNA examiner overstated the probability of a match to Defendant, no weight should be given to the DNA evidence on habeas review and the State court unreasonably applied federal law regarding sufficiency of evidence.

U.S. v. Horvath, 81 Crim. L. Rep. 527 (9th Cir. 7/10/07):
Holding: Lying to a probation officer preparing a PSI is exempt from the federal statute criminalizing making a false statement to a gov't official, 18 USC 1001, because the statute excludes statements made to judges, and this was similar to a statement made to a judge.

U.S. v. Caldwell, 86 Crim. L. Rep. 438 (10th Cir. 12/29/09):
Holding: Even though Defendant-drug dealer introduced a common supplier to another dealer, this was insufficient to prove conspiracy.

U.S. v. Phillips, 84 Crim. L. Rep. 80 (10th Cir. 10/1/08):
Holding: 18 USC 1546(a) which makes it a crime to falsely make a document to get into the U.S. does not cover false applications for such documents.

U.S. v. Hays, 83 Crim. L. Rep. 290, 2008 WL 2108079 (10th Cir. 5/20/08):
Holding: Conviction making it illegal to possess a firearm if Defendant has been convicted of "misdemeanor crime of domestic violence," 18 U.S.C. 922(g)(n), cannot be predicated on State statute that requires only a de minimus use of force.

U.S. v. Woody, 74 Fed. R. Evid. Serv. 1022 (10th Cir. 2007):
Holding: Even though a witness saw Defendant hitting a murder victim, where the victim was found stabbed to death, and (1) at least 3 other people stayed in the shack where the body and knife were found, (2) no blood or forensic evidence linked Defendant to the killing; and (3) a police officer did not believe Defendant could have stabbed anyone due to the physical condition of his hand, the evidence was insufficient to sustain conviction for murder.

U.S. v. Schaefer, 82 Crim. L. Rep. 4 (10th Cir. 9/5/07):
Holding: Even though Defendant admitted possession of child pornography on his computer which he received from the Internet, the evidence was insufficient to convict under 18 U.S.C. 2252(a)(2) and (a)(4)(B) because there was no proof the images moved in interstate commerce.

U.S. v. Hall, 2007 WL 155298 (10th Cir. 2007):
Holding: Evidence was insufficient to sustain conviction for possession and distribution of drugs on a certain day where the only evidence was recorded conversations between

Defendant and supplier about the price of drugs, and there was no testimony about Defendant actually having drugs or selling drugs on that day.

U.S. v. Langston, 86 Crim. L. Rep. 371 (11th Cir. 12/22/09):
Holding: School director was not an "agent" of the State for purposes of 18 USC 666 regarding theft and bribery in connection with local officials who receive federal program funds.

U.S. v. Hernandez Gari, 2009 WL 1857337 (11th Cir. 2009):
Holding: Where alien had authorization to enter U.S., trial court plainly erred in convicting Defendant of illegally smuggling alien into U.S.

U.S. v. Mendez, 83 Crim. L. Rep. 318 (11th Cir. 5/21/08):
Holding: Even though Defendant used a fake U.S. military form to fraudulently obtain a driver's license, Defendant did not have requisite intent to be convicted of defrauding the U.S. in violation of 18 U.S.C. 371, because the U.S. was not the target of the crime.

U.S. v. Lopez-Vanegas, 81 Crim. L. Rep. 584, 2007 WL 2126554 (11th Cir. 7/26/07):
Holding: Even though Defendants in Miami, Fla., discussed committing a drug crime in another country, they could not be prosecuted in the U.S. for conspiracy to commit a drug crime, because they did not have drugs in the U.S. or any plans to bring them to the U.S.

U.S. v. Moore, 2007 WL 3121598 (11th Cir. 2007):
Holding: Even though gov't presented testimony that Defendants received VA benefits after the beneficiary had died, the evidence was insufficient to convict of theft of gov't property because there was no evidence that Defendants were ever notified or knew they were no longer eligible for benefits after the death.

U.S. v. Navrestad, 83 Crim. L. Rep. 310 (C.A.A.F. 5/14/08):
Holding: Sending a hyperlink linking to child pornography does not constitute distribution of child pornography, since the hyperlink itself does not contain any images.

Plummer v. U.S., 86 Crim. L. Rep. 204 (D.C. 11/12/09):
Holding: Because city ordinance at time of arrest prevented the licensing of handgun because the gun was then illegal, Defendant could assert a Second Amendment defense to charge of possession of unlicensed gun.

U.S. v. Safavian, 83 Crim. L. Rep. 459 (D.C. 6/17/08):
Holding: 18 U.S.C. 1001(a)(1) prohibiting covering up facts in a gov't matter does not apply to an agency's ethics committee; thus, an official's misleading omissions to an agency ethics committee did not violate the statute.

U.S. v. Infante, 2010 WL 1268140 (D. Ariz. 2010):
Holding: Evidence was insufficient to prove internet stalking at preliminary hearing where only evidence was that Defendant went to another city where alleged victim

resided to try to pursue romantic relationship and Defendant sent emails and gifts to victim, but there was no evidence of any intention to harass or bother victim.

U.S. v. Check, 2008 WL 4943132 (D. Ariz. 2008):
Holding: Where a national park ranger was assisting city police in investigating drive-offs from gas stations, this was not an investigation of a federal "law or regulation," so Defendant could not be federally convicted of failing to give a truthful answer to the ranger.

U.S. v. Drew, 2009 WL 2872855 (C.D. Cal. 2009):
Holding: Conviction under the Computer Fraud and Abuse Act based only on violation of the terms of use of internet web site violates the void for vagueness doctrine, because normal breaches of contract and are not subject to criminal prosecution and CFAA does not explicitly state which violations of terms of service are criminalized.

U.S. v. Zhang, 88 Crim. L. Rep. 316 (N.D. Cal. 11/19/10):
Holding: Even though company had an employee-computer usage agreement that limited what employees were allowed to access in company's database, employee who accessed prohibited portions of database could not be prosecuted under Computer Fraud and Abuse Act.

U.S. v. Berdeal, 2009 WL 230082 (S.D. Fla. 2009):
Holding: Where there was uncertainty whether regulation which prohibited catching certain fish applied outside Florida waters, the rule of lenity applies to preclude applying regulation there.

U.S. v. Peterson, 2008 WL 55391 (M.D. Ga. 2008):
Holding: Even though Defendant-Sheriff charged inmates for room and board and remitted funds to county, this was not extortion.

U.S. v. White, 2009 WL 2244639 (N.D. Ill. 2009):
Holding: Even though white supremacist Defendant posted a juror's personal information on the Internet and commented on the juror's sexual orientation and racial views, this was protected First Amendment speech and did not support prosecution for solicitation to commit violence.

U.S. v. Salazar-Montero, 2007 WL 3102096 (N.D. Iowa 2007):
Holding: *Mens rea* requirement for identify theft requires that Defendant knew that the identification he used belonged to another person.

U.S. v. Denham, 2009 WL 2913954 (E.D. Ky. 2009):
Holding: In prosecution for threatening witness who provided information to federal law enforcement officer, the Gov't must prove as an element of the offense that the Defendant knew of the involvement of the federal law enforcement officer.

U.S. v. Waybright, 83 Crim. L. Rep. 461 (D. Mont. 6/11/08):
Holding: Congress exceeded authority under Commerce Clause when it enacted sex offender registration requirement for offenders to register locally regardless of whether they travel in interstate commerce, 42 U.S.C. 16913. Based on this, Court vacates Defendant's conviction for failing to register locally after he traveled in interstate commerce.

Hayes v. Farwell, 2007 WL 923946 (D. Nev. 2007):
Holding: Where child sex assault victim's testimony was derived from leading questions by prosecutor, victim recanted her testimony after trial and before sentencing, and victim's mother had coached or coerced her to make the allegations, the evidence was insufficient to sustain conviction for child sex assault.

U.S. v. Tobin, 2008 WL 505738 (D.N.H. 2008):
Holding: Even though Defendant-political operative jammed phone lines of opponents, evidence insufficient to convict of telephone harassment without proof Defendant was intending to provoke adverse emotional reactions from those telephoned.

Petronio v. Walsh, 2010 WL 3564269 (E.D. N.Y. 2010):
Holding: Even though Defendant intended to harm victim, slammed victim's head against wall, pepper-sprayed victim, and kicked victim causing death, where the altercation lasted only a few minutes, this did not show the mens rea necessary to support "depraved murder" conviction.

U.S. v. Polizzi, 2008 WL 877164 (E.D.N.Y. 2008):
Holding: Defendant had 6th Amendment right to have jury be informed of 5-year minimum sentence for conviction for receiving child pornography; jury has right to know sentence so as to be able to apply the law in light of severity of punishment.

U.S. v. Navedo, 2006 WL 2289228 (W.D.N.Y. 2006):
Holding: Even though Defendant admitted to taking an unspecified amount of crack from a table, the evidence was insufficient to convict Defendant of knowingly possessing 22 grams of crack found hidden in a house where Defendant was arrested.

U.S. v. Bonner, 2010 WL 2509981 (M.D. N.C. 2010):
Holding: Even though (1) Defendant's wallet was found inside girlfriend's car near a robbery scene, (2) Defendant's DNA was found on a hat at scene, and (3) a dog tracked the scent from the hat to a pay phone where a call was placed to Defendant's girlfriend, the evidence was insufficient to convict of robbery where the hat contained DNA of more than one person and no eyewitnesses identified the robber.

U.S. v. Jones, 2009 WL 3633976 (W.D. Tex. 2009):
Holding: Even though Defendant mailed an envelope that contained a fraudulent scheme, where Defendant had no knowledge of the scheme, he was an innocent third-party and could not be convicted of mail fraud.

U.S. v. Blunt, 2008 WL 850315 (E.D. Va. 2008):
Holding: Even though Defendant received two firearms as payment for drugs, Defendant did not "use" a firearm in connection with drug trafficking.

Russell v. State, 2006 WL 3094840 (Ark. 2006):
Holding: In considering the value of stolen property to meet the statutory minimum, courts do not "add on" the sales tax that would have been charged on the property.

People v. Perez, 2010 WL 2948491 (Cal. 2010):
Holding: Firing a single shot at group of eight people constituted only one offense of attempted murder, not eight.

In re: David V., 2010 WL 424479 (Cal. 2010):
Holding: A cylindrical bicycle footrest did not qualify as "metal knuckles" under weapons statute.

Lexin v. Superior Court, 86 Crim. L. Rep. 512 (Cal. 1/25/10):
Holding: Even though pension board members took certain actions which benefitted them, where the actions also benefitted other pensioners generally, this did not violate conflict of interest statute; but where pension board members took certain actions that benefitted only one person, this did violate conflict of interest statute.

Rowe v. Superior Court, 2008 WL 5061135 (Conn. 2008):
Holding: Even though witness refused to answer numerous questions at trial, this was a single act of contempt, not multiple acts.

State v. Salamon, 83 Crim. L. Rep. 646 (Conn. 7/1/08):
Holding: Offense of kidnapping when charged with another felony offense requires proof that Defendant intended to prevent the victim's release "for a longer period of time or to a greater degree than necessary to commit the other felony," according to the intent of the Model Penal Code; thus, where Defendant accosted a victim and pulled her down some stairs for five minutes to assault her, the kidnapping conviction was reversed and remanded for a jury to decide if this constituted kidnapping under the Model Penal Code definition.

Pennewell v. State, 85 Crim. L. Rep. 593 (Del. 7/21/09) and State v. Lasu, 85 Crim. L. Rep. 593, 2009 WL 2195045 (Neb. 7/24/09):
Holding: Mere abandonment of contraband in presence of law enforcement officer, without more, is not "tampering;" hence, where Defendant dropped plastic bag of drugs, this was not sufficient to convict him of tampering for destruction of evidence in an official proceeding.

Harris v. State, 2009 WL 195855 (Del. 2009):
Holding: Even though Officer suffered a scraped knee and felt a "jarring sensation" when Defendant elbowed him in the head, these injuries were de minimis and did not constitute "physical injury" for purposes of second degree assault.

Buchanan v. State, 85 Crim. L. Rep. 711 (Del. 9/8/09):
Holding: Even though the court had issued an eviction and contempt order for Defendant from his house in a divorce case, where Defendant returned to the house, the violation of the eviction and contempt order could not be the predicate offense to make the return a burglary.

Lecates v. State, 85 Crim. L. Rep. 466 (Del. 6/22/09):
Holding: "Possession" of a firearm during commission of a felony is more limited than "possession" of a firearm by a prohibited person; possession during commission of felony requires evidence of physical availability and accessibility.

Dolan v. State, 2007 WL 1366511 (Del. 2007):
Holding: Burglary conviction requires that the intent to commit a crime inside the dwelling be formed before or at the time the person enters the dwelling.

State v. Kettell, 83 Crim. L. Rep. 189 (Fla. 4/24/08):
Holding: State statute criminalizing "wantonly or maliciously" shooting into a building requires proof a requisite mental state, and not merely proof of shooting in a building.

Polite v. State, 82 Crim. L. Rep. 64, 2007 WL 2790770 (Fla. 9/27/07):
Holding: To convict of resisting an officer with violence, State must show Defendant knew the person was a law enforcement officer.

Forde v. State, 2008 WL 518139 (Ga. 2008):
Holding: Where in child sex case, the conduct was alleged to have occurred over a period of time during which the offense was reclassified from a misdemeanor to a felony, conviction and sentence for a felony violated ex post facto, since jury could have convicted of conduct that occurred when offense was a misdemeanor.

Garza v. State, 84 Crim. L. Rep. 186 (Ga. 11/3/08):
Holding: "Kidnapping" offense requires movement of victim serving to substantially isolate the victim from protection or rescue, and does not apply to actions merely incidental to other crimes.

Turner v. State, 82 Crim. L. Rep. 474 (Ga. 1/8/08):
Holding: Jury verdict acquitting Defendant of a shooting because shooting was justified necessarily precluded the jury from simultaneously convicting Defendant of felony-murder; was an inconsistent verdict.

State v. Woodfall, 2009 WL 1144009 (Haw. 2009):
Holding: Identity theft statute prohibiting "transmission of personal information of another" requires the transmission of information of an actual person; statute does not prohibit transmission of information associated with fictitious person.

State v. Gomes, 2008 WL 458298 (Haw. 2008):
Holding: Even though Defendant offered money to witness "not to show up and testify" and not to come back to the State, this did not establish an intent to induce to the witness to "avoid legal process," since the clear intent was to avoid the witnesses testifying, rather than refuse to receive a subpoena.

People v. Diggins, 86 Crim. L. Rep. 108 (Ill. 10/8/09):
Holding: Where state law required that firearms in cars be kept in "cases," Defendant did not violate the statute by keeping his firearm in the center console of his car, because this qualified as a case or container.

Fortson v. State, 86 Crim. L. Rep. 539 (Ind. 1/21/10):
Holding: State cannot prove that Defendant knew goods were stolen only by showing "mere possession" of the goods shortly after they were stolen.

A.B. v. State, 83 Crim. L. Rep. 293 (Ind. 5/13/08):
Holding: Juvenile's posting of profane rants about her school principal on her MySpace page did not violate State harassment statute, because the comments were intended to legitimately communicate anger and criticism of principal's policies.

State v. McCullah, 2010 WL 3273491 (Iowa 2010):
Holding: Even though prison guard bled himself, Defendant-Inmate could not be convicted under inmate assault statute making it a felony for inmate to commit offense that caused prison staff to come into contact with blood, semen, urine and feces.

State v. Sluyter, 2009 WL 792298 (Iowa 2009):
Holding: Even though Iowa law allowed criminal contempt to be used for refusal to pay court-imposed costs, criminal contempt could not be used against acquitted indigent Defendants to force them to pay for their appointed counsel.

State v. Lane, 82 Crim. L. Rep. 431 (Iowa 12/28/07):
Holding: Even though when Defendant was arrested he said he was going to "take care" of police, that is not a prohibited terroristic threat under Iowa's threatening terrorism statute.

State v. Heemstra, 79 Crim. L. Rep. 744 (Iowa 8/26/06):
Holding: An assault that caused a death cannot serve as the basis for conviction of felony-murder; the assault merges into the homicide. Thus, jury instruction that allowed finding guilt for murder based on assault was erroneous.

State v. Gilley, 2010 WL 204099 (Kan. 2010):
Holding: Where Defendant was charged with three counts of forgery and pleaded guilty to one count, the two remaining charged counts could not be counted as "convictions" to enhance the count on which Defendant pleaded guilty.

State v. Scott, 2007 WL 4270596 (Kan. 2007):
Holding: Even though a bar patron served a drink to victim and victim died from alcohol intoxication, evidence was insufficient to show that this particular drink was proximate cause of victim's death to support involuntary manslaughter.

Hobson v Com., 2010 WL 997399 (Ky. 2010):
Holding: Where Defendant fought with a police officer in a parking lot after he left merchandise he intended to steal in the store, this force was not done with the intent to accomplish theft, so Defendant was not guilty of robbery.

State v. Duran, 84 Crim. L. Rep. 687 (Md. 3/11/09):
Holding: Defendant convicted of sex offense not listed in sex offender registration statute is not required to register as sex offender; "indecent exposure" is not crime that "by its nature" is sexual.

Price v. State, 83 Crim. L. Rep. 463, 2008 WL 2330222 (Md. 6/9/08):
Holding: Defendant's conviction for firearm possession during drug trafficking was inconsistent with his acquittal on the drug trafficking charges themselves.

Ishola v. State, 83 Crim. L. Rep. 89 (Md. 4/10/08):
Holding: Identity theft statute regarding stealing of "another" requires proof that the identity stolen is that of a real person rather than a fictitious one.

State v. Manosh, 87 Crim. L. Rep. 151 (Me. 4/1/10):
Holding: The fact that Defendant phoned former girlfriend who had a protective order was not enough to sustain conviction for violating order because Defendant had visitation rights with respect to their child.

Twine v. State and Jeandell v. State, 80 Crim. L. Rep. 282 (Md. 11/15/06):
Holding: Homeless defendants could not be convicted under sexual offender registry law for failure to notify authorities of change of "residence" when they did not have a permanent residence.

Com. v. Bell, 2009 WL 4351270 (Mass. 2009):
Holding: Even though Defendant met with undercover officer to arrange for sex with a child and agreed to follow the officer to a location and pay him $200, evidence was insufficient to show an overt act in attempted rape prosecution where Defendant had yet to see a child, did not know the location of the liason, and had not yet paid the officer.

Com. v. LeBlanc, 86 Cri. L. Rep. 672 (Mass. 2/18/10):
Holding: Statute criminalizing giving alcohol or drugs to a person to have sex with them requires more than just giving alcohol or drugs; requires force, deceit or trickery to convict; thus, where victim voluntarily consumed alcohol and drugs with Defendant and then had sex with Defendant, this was insufficient to convict.

Com. v. Zubiel, 86 Crim. L. Rep. 586 (Mass. 2/5/10):
Holding: Even though statute prohibited transmission of "any matter harmful to minors" including "any handwritten or printed material," this did not apply to a Defendant who sent inappropriate text via computer to a person he thought was a 13-year-old girl, because computer text messages are not written with a pen or pencil or printed on paper.

Com. v. Medeiros, 86 Crim. L. Rep. 626 (Mass. 2/11/10):
Holding: Where two defendants are jointly tried for rape as a "joint enterprise" and one is acquitted, a guilty verdict against the other defendant must be set aside as an inconsistent verdict.

Com. v. Life Care Centers of America, 87 Crim. L. Rep. 270 (Mass. 5/19/10):
Holding: A corporation cannot be found guilty of criminal conduct based on a combination of acts by employees when no single employee could be criminally liable for commission of the crime.

Commonwealth v. Stuckich, 2008 WL 131947 (Mass. 2008):
Holding: Even though officer called out-of-state Defendant and told him complaints had "issued" regarding a sexual offense against him and asked him to contact the Prosecutor, but officer did not tell Defendant to return to the state, report to police, appear in court, or restrict his travel, Defendant's failure to do any of these things did not show "consciousness of guilt."

Suliveres v. Commonwealth, 81 Crim. L. Rep. 271 (Mass. 5/10/07):
Holding: Even though Defendant at night went into his brother's girlfriend's bedroom and had sex with her when she thought he was the brother, Defendant could not be convicted of rape on theory of obtaining intercourse through "fraud or deceit" because this did not satisfy the statutory requirement of "by force." "By force" is not the same as lack of consent.

People v. Hill, 87 Crim. L. Rep. 756 (Mich. 7/23/10):
Holding: Statute that applies to anyone who "produces, makes or finances" any child pornography, does not apply to Defendant who downloaded pornography from internet and burned it onto a disc for his own use.

People v. Tennyson, 87 Crim. L. Rep. 892 (Mich. 9/7/10):
Holding: Mere presence of children in home where drugs or firearms are present is insufficient to convict of contributing to delinquency or neglect of minor.

People v. Freezel, 2010 WL 2291834 (Mich. 2010):
Holding: Metabolite 11-carboxy-tetrahydrocannabinol, which was a natural byproduct created by bread down of THC after marijuana use, was not a schedule 1 controlled substance, so that Defendant did not operate a motor vehicle with the presence of a schedule 1 controlled substance.

State v. Al-Naseer, 87 Crim. L. Rep. 917 (Minn. 9/16/10):
Holding: Heightened scrutiny applies to examine sufficiency of evidence in circumstantial evidence cases, including when proof of an element of crime rests on circumstantial evidence.

State v. Back, 2009 WL 4670861 (Minn. 2009):
Holding: Where Defendant in manslaughter case did not have any duty to protect the victim from a shooter, Defendant could not be culpably negligent in failing to prevent shooter from shooting victim.

State v. Peck, 84 Crim. L. Rep. 144, 2008 WL 4472867 (Minn. 10/7/08):
Holding: Law criminalizing "mixture" of drugs based on weight does not include water-based byproduct of methamphetamine in a "meth bong."

Tipton v. State, 2010 WL 2521762 (Miss. 2010):
Holding: Where Defendant was an employee of company that provided alternatives to incarceration, State failed to prove he was covered by a statute regarding extortion by government employees or contractors of companies providing "incarceration services."

Baxter v. State, 86 Crim. L. Rep. 431 (Mont. 12/31/09):
Holding: Because suicide is not a crime under Montana law, doctors cannot be liable for homicide for providing a lethal dose of medication for self-administration to a dying, mentally competent patient.

State v. Graham, 2007 WL 4574969 (Mont. 2007):
Holding: Even though officer saw man and woman in car engaging in apparent sexual activity in a remote place, but visible from a road, there was not reasonable suspicion of criminal activity to conduct an investigatory stop.

State v. Drahota, 88 Crim. L. Rep. 68 (Neb. 9/24/10):
Holding: Even though Defendant sent emails to political candidate that Defendant wanted to "puke" on him and thought candidate should be forced out of U.S., this was protected by 1st Amendment because it would not tend to provoke an immediate breach of peace.

Nay v. State, 82 Crim. L. Rep. 11, 2007 WL 2770211 (Nev. 9/20/07):
Holding: Conviction for felony-murder requires the intent to commit the felony to arise before or during the conduct resulting in death; it is not felony murder where Defendant killed victim in self-defense and then, after victim was dead, robbed him.

Moore v. State, 2006 WL 133668 (Nev. 2006):
Holding: Defendant's mere presentment of stolen credit card to store for payment of goods was not "use" of the card, as required to support conviction; State must also show credit account was actually charged.

State v. Durgin, 84 Crim. L. Rep. 190 (N.H. 11/6/08):
Holding: Defendant must do more than lie to police about whereabouts of a fugitive in order to violate statute prohibiting harboring or concealing a fugitive.

State v. Zidel, 82 Crim. L. Rep. 456 (N.H. 1/18/08):
Holding: Placing photos of children's heads on photos of adults engaged in sexual activity is protected by 1st Amendment and does not violate child pornography statute (distinguishing *U.S. v. Bach*, 400 F.3d 622 (8th Cir. 2005)).

State v. Offen, 82 Crim. L. Rep. 284 (N.H. 11/15/07):
Holding: In order to convict sex offender of failing to report residency in State, prosecution must prove that 30 days elapsed since Defendant established residency.

State v. Lamy, 85 Crim. L. Rep. 103, 2009 WL 928763 (N.H. 4/8/09):
Holding: (1) Even though State had a records law defining a "live birth" differently than the common law "born alive" doctrine, where Defendant killed a fetus in a drunken driving incident, the common law "born alive" rule applied to determine if Defendant could be prosecuted; (2) where jurors made unauthorized visit to crime scene, prejudice was presumed.

State v. Whitaker, 2009 WL 4573153 (N.J. 2009):
Holding: Where Principal had already robbed and killed victim, Defendant could not be held liable as an accomplice for acts taken after the fact.

State v. Froland (Kindt), 82 Crim. L. Rep. 404 (N.J. 12/12/07):
Holding: Stepmother who removed her stepchildren with consent of their father, but not their mother, could not be convicted of kidnapping.

State v. D.A., 81 Crim. L. Rep. 360 (N.J. 6/4/07):
Holding: Witness-tampering statute requires proof that Defendant threatened witness with knowledge that a crime he committed is actually being or about to be investigated by police. Acting to prevent an investigation from happening is the crime of hindering.

State v. Morrison, 79 Crim. L. Rep. 665 (N.J. 7/26/06):
Holding: A defendant who buys drugs with pooled money and then gives the drugs to the person he pooled the money with, who was also present when the drugs were bought, cannot be convicted of distributing drugs to the other person.

State v. Simms, 2010 WL 2793792 (N.M. 2010):
Holding: DWI conviction requires proof that Defendant actually exercised control over vehicle as well as general intent to drive.

State v. Wilson, 2010 WL5945505 (N.M. 2010):
Holding: State must prove Defendant had knowledge he was selling drugs in a "drug-free school zone."

People v. McKinnon, 2010 WL 4005780 (N.Y. 2010):
Holding: Where Defendant bit victim on her arm with two small bite marks that did not require any stitches, this did not support the "seriously" disfigured element necessary for first degree assault, even though police had described victim's bite marks as "severe" and "deep."

People v. Bailey, 2009 WL 1616506 (N.Y. 2009):
Holding: Even though Defendant said he knew dollar bills found on his person were counterfeit and he was present in a shopping district, evidence was insufficient to establish Defendant's intent to defraud so as to support conviction for possession of forged instrument.

People v. Cabrera, 2008 WL 1900404 (N.Y. 2008):
Holding: Even though Defendant-driver violated his junior driver's license, drove at excessive speed downhill, and had passengers not wearing seat belts, evidence was insufficient to support negligent homicide where Defendant did not engage in morally blameworthy risky behavior such as driving too fast to impress peers.

People v. Finley, 2008 WL 2338613 (N.Y. 2008):
Holding: Small amounts of marijuana the Defendants possessed while in detention facilities weren't "dangerous contraband" under statutes making possession of dangerous prison contraband a felony. If the defendants hadn't been confined, the amounts they possessed would have resulted in a "non-criminal violation."

People v. Litto, 81 Crim. L. Rep. 528 (N.Y. 6/27/07):
Holding: New York's driving under the influence of drugs statute did not prohibit driving while under the influence of "huffed" aerosol, because this wasn't listed in the list of prohibited substances under the statute. Nor could this fit under the general DWI statute, because that only applies to alcohol-related offense.

Britt v. State, 85 Crim. L. Rep. 649, 681 S.E. 2d 320 (N.C. 8/28/09):
Holding: North Carolina Constitution's provision identical to 2nd Amendment prohibits application of felon-in-possession statute to person convicted of non-violent felony more than 30 years ago and who had not been in trouble since; the legislature's blanket firearms exclusion was not rationally related to public safety when applied to particular defendant.

State v. Harris, 2007 WL 1839151 (N.C. 2007):
Holding: Presence of marijuana metabolites in Defendant's urine was insufficient to prove knowing possession of marijuana.

State v. Hinton, 2007 WL 188702 (N.C. 2007):
Holding: Defendant's hands, by themselves, cannot be "dangerous weapons" for purposes of robbery with a dangerous weapon.

State v. Geiser, 85 Crim. L. Rep. 88 (N.D. 4/2/09):
Holding: Child endangerment statute does not cover endangerment of a fetus.

State v. Nucklos, 84 Crim. L. Rep. 661 (Ohio 3/4/09):
Holding: Where doctor was accused of illegally dispensing drugs, State had burden to prove doctor did not act in accord with State drug dispensing laws, rather than it be an affirmative defense for doctor to show he had right to dispense drugs.

Am. Booksellers Found. for Free Expression v. Cordray, 2010 WL 323304 (Ohio 2010):
Holding: Even though statute prohibits dissemination of materials harmful to minors, the statute is not violated by persons who post harmful materials on generally accessible websites and chat rooms, since the sites do not permit persons from preventing juveniles from accessing the material.

State v. Malone, 84 Crim. L. Rep. 551 (Ohio 2/3/09):
Holding: Even though witness intimidation statute made it a crime to intimidate a "witness involved in a criminal action or proceeding," where witness saw a crime and Defendant threatened witness *before* the crime was reported to police, Defendant could not be convicted of witness intimidation because there was not yet a pending "criminal action or proceeding" before the crime was reported.

State v. Clay, 84 Crim. L. Rep. 331 (Ohio 12/11/08):
Holding: Where statute made it unlawful to possess a gun while under indictment, this was not a strict liability offense and State needed to prove Defendant was aware he was under indictment or was reckless in remaining unaware.

State v. Baker-Krofft, 87 Crim. L. Rep. 859 (Or. 8/19/10):
Holding: Even though Defendant-Parents' house was cluttered and this allegedly endangered the children, where the children were otherwise healthy, this did not constitute criminal mistreatment of children.

State v. Gaines, 85 Crim. L. Rep. 224, 2009 WL 1151759 (Or. 4/30/09):
Holding: Even though Defendant under arrest refused to go to booking room to have booking photos re-done, this failure to follow a directive did not constitute crime of obstruction of gov't or judicial administration.

State v. Casey, 84 Crim. L. Rep. 661 (Or. 3/5/09):
Holding: Where felon-Defendant went into his house to get items to show to police, he did not "constructively possess" a firearm which a guest had left in the house when all the occupants went outside to talk to police.

State v. Werdell, 79 Crim. L. Rep. 405 (Or. 5/25/06):
Holding: Where statute required proof of "any act of concealment, alteration or destruction of physical evidence which might aid in the discovery and apprehension" of a wanted person, the Defendant did not commit offense of hindering prosecution where he disposed of a gun belonging to his son after his son was already in jail.

State v. Murray, 2006 WL 1429066 (Or. 2006):
Holding: Evidence insufficient to support kidnapping where Defendant entered car and pushed victim, but victim fled and Defendant stole car.

Commonwealth v. Laudadio, 2007 WL 4276412 (Penn. 2007):
Holding: Even though Defendant exposed himself to multiple persons in one incident, this was punishable as one offense, and not multiple offense per victim.

Commonwealth v. Teeter, 2007 WL 2684822 (Pa. 2007):
Holding: Sentencing enhancement for selling drugs within 500 feet of a "school bus stop" did not apply when school was not in session, because there was then no "bus stop."

State v. Andujar, 2006 WL 1613131 (R.I. 2006):
Holding: Offense of solicitation to commit murder requires that the soliciting message actually be received by the intended recipient.

State v. Reed, 87 Crim. L. Rep. 790 (S.D. 8/4/10):
Holding: A verbal agreement to purchase drugs in the future, without any indication that the sale is imminent, does not constitute attempt to possess drugs.

State v. Suhn, 84 Crim. L. Rep. 381 (S.D. 12/30/08):
Holding: Even though Defendant yelled at cops that they were "fucking cops, pieces of shit, assholes," this did not rise to the level of "fighting words" and hence was protected by 1st Amendment; thus, Defendant could not be convicted of disorderly conduct for this.

State v. Marshall, 87 Crim. L. Rep. 892 (Tenn. 9/3/10):
Holding: Even though Defendant misrepresented his income so that he could receive public housing, this did not constitute theft of "services" within the meaning of theft statute.

State v. James, 87 Crim. L. Rep. 689 (Tenn. 6/24/10):
Holding: Even though Defendant had unbelievable explanation for his possession of recently stolen goods, the possession is not sufficient to support a conviction for burglary. At common law such a presumption arose.

State v. Miller, 2008 WL 3980873 (Utah 2008):
Holding: Where Defendant possesses a controlled substance for purpose of returning it to its lawful owner, defendant can assert "innocent possession" defense and Defendant cannot be convicted of illegal possession.

State v. Gallegos, 82 Crim. L. Rep. 190 (Utah 10/26/07):
Holding: Law making it crime to cause a child "to be exposed to" controlled substances requires proof of a real, physical risk of harm to child.

In re Z.C., 81 Crim. L. Rep. 577 (Utah, 7/17/07):
Holding: A statute that forbids "a person" from touching someone under age 14 in a sexual manner may not be applied to a Defendant who was under 14 and had consensual sexual activity with the alleged victim.

State v. Ireland, 2006 WL 572804 (Utah 2006):
Holding: Existence of methamphetamine in Defendant's blood was insufficient to prove possession.

Thompson v. Com., 673 S.E.2d 469 (Va. 2009):
Holding: A "butterfly knife" is not a "like kind" of knife to a "dirk, bowie knife, switchblade, ballistic knife, razor, machete" or other knives under a statute prohibiting possession of such weapons.

Welch v. Commonwealth, 79 Crim. L. Rep. 178 (Va. 4/21/06):
Holding: Testimony that Defendant had "sexual relationship" with minor was not enough to sustain conviction where crime required proof of sexual intercourse.

City of Auburn v. Hedlund, 2009 WL 331666 (Wash. 2009):
Holding: Even though passenger rode with a DWI driver, where the passenger was injured in a crash, passenger could not be charged as an accomplice to DWI because passenger was the "victim" of the crime.

State v. Leyda, 79 Crim. L. Rep. 661 (Wash. 7/20/06):
Holding: Defendant's use of single credit card multiple times did not create multiple counts of identify theft under identify theft statute.

State v. Harden, 85 Crim. L. Rep. 389 (W.Va. 6/4/09):
Holding: Under "castle doctrine," person has no duty to retreat before using lethal force in response to an attack by a cohabitant inside the residence.

State v. Cummings, 81 Crim. L. Rep. 386, 2007 WL 1660841 (W.Va. 6/7/07):
Holding: Even though Defendant possessed a small amount of methamphetamine, and the car Defendant was in contained six boxes of cold medicine, six boxes of matches and 20 syringes, evidence was insufficient to convict of plotting to manufacture methamphetamine.

U.S. v. Kozlowski, 2009 WL 2383357 (W.D. Wis. 2009):
Holding: Even though Defendant-truck driver had false entries in his driver's log book, this was not sufficient to convict of using a false document in the absence of proof that Defendant-driver presented the falsified book to law enforcement.

Lucas v. State, 2009 WL 4980327 (Ala. Crim. App. 2009):
Holding: Where enhancement statute defined "firearm" as a "weapon from which shot is discharged by gunpowder" or "deadly weapon" or weapon to cause "death or serious

physical injury," then a toy gun was not a "firearm" under the enhancement statute that enhanced an offense for use of a firearm.

State v. Lockwood, 2009 WL 3048906 (Ariz. Ct. App. 2009):
Holding: A stillborn fetus is not a "dead human body" within the meaning of the statute criminalizing abandonment or concealment of a corpse.

Boveia v. State, 2006 WL 337558 (Ark. App. 2006):
Holding: Where Defendant had merely written a false letter to a bank that she did not receive an ATM card and someone had withdrawn money from her account, and then Defendant filed a police report, this did not support her conviction for the felony of filing a false police report, because such a felony required "other criminal activity" and the letter did not show Defendant had, in fact, engaged in any criminal fraud; conviction reduced to misdemeanor.

People v. Powers-Monachello, 2010 WL 4108822 (Cal. App. 2010):
Holding: Prosecutor failed to show a conspiratorial agreement with independent evidence to satisfy corpus delecti for conspiracy to possess drugs for sale, even though two defendants lived at a house where a third defendant stored drugs, a third defendant made frequent out of county trips and gave a box to a fourth defendant, and cocaine was found in the fourth defendant's home. The evidence failed to establish the destinations of the out of county trips or what was in the box.

In re E.R., 2010 WL 4123785 (Cal. App. 2010):
Holding: Even though conspiracy to commit murder is first degree murder, juvenile court could find that the actual murder that Juvenile-Defendant committed was second degree murder.

People v. Mathers, 2010 WL 1617478 (Cal. App. 2010):
Holding: Checks drawn on Defendant's closed bank account were not "fictitious" as required for prosecution for passing "fictitious" checks.

People v. Strider, 86 Crim. L. Rep. 76 (Cal. Ct. App. 9/29/09):
Holding: Even though Defendant had a handgun in the fenced front yard of a private home, the fenced front yard was not a "public place" under statute that prohibits having a loaded firearm in "public place."

People v. Babaali, 2009 WL 522897 (Cal. App. 2009):
Holding: "Sexual battery" is not a lesser-included offense of "sexual battery by fraudulent representation" because sexual battery requires touching "against the will" of victim, but "sexual battery by fraud" requires victim to be "unconscious" of the nature of the touching because Defendant has fraudulently represented a professional purpose for touching.

People v. Wagner, 84 Crim. L. Rep. 511 (Cal. Ct. App. 1/22/09):
Holding: Even though statute made it a crime to induce someone "to become a prostitute," the statute was not violated where Defendant-pimp tried to persuade prostitute to come work for him.

People v. Luna, 2009 WL 106660 (Cal. App. 2009):
Holding: Even though Defendant purchased equipment to manufacture hashish and had enough cash to purchase marijuana to make it, this was insufficient to convict of attempted manufacture of controlled substance because Defendant still lacked any marijuana.

People v. Singleton, 2007 WL 2875022 (Cal. App. 2007):
Holding: Even though an apartment resident was in the building's common hallway when Defendant burglarized the individual apartment, that was not sufficient to show the resident was "present in the residence" for purposes enhancement when a burglary is committed when a person is in the residence.

People v. Newton, 2007 WL 2994330 (2007):
Holding: Even though Defendant injured several persons in a "hit and run" accident, the incident could only be charged as one "hit and run," not a separate crime for each person injured.

People v. Ryan, 2006 WL 864278 (Cal. App. 2006):
Holding: Defendant's acts of signing checks and uttering them did not violate more than one statute, so Defendant could only be convicted of one offense; the State had tried to use subparts of forgery statute to convict Defendant of two offenses.

State v. Fagg, 2010 WL 3000037 (Fla. Ct. App. 2010):
Holding: Defendant-employee could not be convicted of destroying computer data for deleting former employer's computer where (1) employer was able to recover the data from the hard drive, and (2) only the last four days were missing, and it was not known whether there was any data lost from those days.

Ginn v. State, 2010 WL 391815 (Fla. Dist. Ct. App. 2010):
Holding: Even though hologram on traveler's checks was not correct, where the checks were very similar to authentic checks, evidence was insufficient to convict Defendant of using forged instruments where Defendant had received the checks from someone else as payment for a mortgage and then used them; State failed to show Defendant knew checks were not genuine.

King v. State, 2008 WL 4265182 (Fla. Dist. Ct. App. 2008):
Holding: Even though Defendant failed to provide an address where he would be living when released from prison for sex offense, he did not violate the prohibition against living within 1000 feet of school since he had not yet been released from prison.

Edmund v. State, 2007 WL 2376639 (Fla. Ct. App. 2007):
Holding: Even though Defendant's identification was found in a bedroom and "wet" cocaine was found in the house which Defendant fled, where other people had access to the bedroom and there was no evidence of how long cocaine stayed "wet" after cooking, evidence was insufficient to prove Defendant's possession of drugs.

Avrich v. State, 2006 WL 2422824 (Fla. Dist. Ct. App. 2006):
Holding: Evidence insufficient to convict Defendant for making obscene and harassing phone calls to a place where victim had reasonable expectation of privacy, where the calls were made to a business phone number, even though the business phone was located in victim's house.

Darwish v. State, 2006 WL 2621781 (Fla. Ct. App. 2006):
Holding: Even though Defendant took free bottled water from hurricane relief distributor which Defendant then resold, evidence was insufficient to support false pretenses conviction because distributor did not testify that Defendant obtained the water by claiming he would not resell it.

Frix v. State, 2009 WL 1799323 (Ga. Ct. App. 2009):
Holding: A cell phone is not an "electronic storage device" similar to floppy disks or CD-ROMS named in statute, so Defendant's conduct of sending sexually explicit messages to minor by cell phone did not violate statute.

Ratana v. State, 2009 WL 1299034 (Ga. Ct. App. 2009):
Holding: Even though there was evidence that Defendant drove principal away from crime scene, where there was no evidence Defendant drove the principal to the crime scene or went to the scene with the intent to commit assault or murder, the evidence was insufficient to convict Defendant as accessory.

Mahone v. State, 2009 WL 514323 (Ga. Ct. App. 2009):
Holding: Even though Officer testified that drug sale was within 1000 feet of public housing, evidence insufficient to convict of selling drugs within 1000 feet of public housing where Officer did not testify that the housing development was owned by the municipal housing authority, or that the housing was occupied by low income persons.

Florence v. State, 2006 WL 2987927 (Ga. Ct. App. 2006):
Holding: Even though officer testified that Defendant's crack was broken into small rocks for resale, where the only evidence was that Defendant threw crack out of a car, evidence was insufficient to convict of possession with intent to distribute.

Gillespie v. State, 2006 WL 1806405 (Ga. Ct. App. 2006):
Holding: Few-week-old fetus was not a "child" within battery statute for battery committed between "persons who are parents of the same child."

State v. Estes, 2009 WL 4263561 (Idaho Ct. App. 2009):
Holding: Even though Officer testified he was certified as an expert to determine speeds, Officer's visual estimation of Defendant's speed, standing alone, was insufficient to convict of speeding.

State v. Culbreth, 2008 WL 2331635 (Idaho Ct. App. 2008):
Holding: Even though Defendant intended to dodge payment of animal shelter fee by surreptitiously taking her dog, this did not constitute an intent to steal something of value so as to satisfy the theft element of felony burglary.

People v. Gutman, 2010 WL 1255248 (Ill. App. 2010):
Holding: In money laundering prosecution, court must consider profits not gross receipts.

People v. Rosenthal, 2008 WL 5454241 (Ill. App. 2008):
Holding: The offense of "aggravated battery with a firearm" in inherent in offense of murder, so cannot serve as predicate felony for felony-murder.

People v. Davit, 2006 WL 1873742 (Ill. App. Ct. 2006):
Holding: Where protective order prohibited Defendant from being "in the household of premises" of Defendant's former spouse, Defendant could not be convicted for violating the order where he was only in the driveway after dropping off his daughter.

People v. Dorsey, 2005 WL 3277961 (Ill. App. Ct. 2005):
Holding: Even though Defendant possessed 552 pseudoephedrine pills and told police he wanted to make 100 grams of methamphetamine, evidence was insufficient to convict for attempt to manufacture 30 to 150 grams of meth because Defendant had less than half the amount of pseudoephedrine to make even 30 grams.

State v. Boadi, 2009 WL 1330808 (Ind. Ct. App. 2009):
Holding: Driver's failure to stop at red light, without more, was not criminally reckless conduct, even though this resulted in fatal accident.

Salter v. State, 906 N.E.2d 212 (Ind. Ct. App. 2009):
Holding: Where Defendant downloaded nude photos of minors and put them on a CD, this did not constituted creation of digitialized images for purposes of child exploitation statute, because Defendant only saved copies of images; he did not create them.

Briggs v. State, 2007 WL 2594940 (Ind. Ct. App. 2007):
Holding: Even though Defendant grabbed officer's arm, where the officer was providing stand-by assistance to a third party who was retrieving belongings from Defendant's residence, and Defendant was not under arrest, in custody or suspected of committing a crime, the evidence was insufficient to convict of resisting law enforcement.

Scuro v. State, 2006 WL 1716870 (Ind. Ct. App. 2006):
Holding: Defendant could not be convicted on more than one count of dissemination of harmful material (pornographic movie) to minors when Defendant showed the movie simultaneously to three boys, since statute did not provide for multiple convictions based on number of viewers.

State v. Hernandez, 2008 WL 4527599 (Kan. Ct. App. 2008):
Holding: Even though Defendant allowed 18 month old child to play outside after recent flooding and child almost-drown in a nearby pond, where child was playing with other children and Defendant was watching child "off and on" through a window while cooking dinner, evidence was insufficient to establish probable cause at preliminary hearing for reckless endangerment of child.

State v. Brooks, 2009 WL 3021652 (La. Ct. App. 2009):
Holding: Even though a statute made burglary "aggravated" if a defendant committed battery while "leaving such a place" of burglary, the evidence was insufficient to prove aggravated burglary where the battery happened in a yard 50 feet from the burglary residence.

State v. Dunbar, 2007 WL 128246 (La. Ct. App. 2007):
Holding: Evidence was insufficient to convict of tampering where the only evidence that the car did not belong to Defendant was police officer's testimony that he ran a check on the license plate and learned that the car belonged to someone else.

Brown v. State, 2008 WL 4427214 (Md. Ct. Spec. App. 2008):
Holding: Where the only evidence was bullets found at the scene, jury could not infer the bullets were fired from a handgun (which was prohibited) or rifle (which was not prohibited), when either weapon could have used such bullets.

Com. v. LeBlanc, 84 Crim. L. Rep. 550 (Mass. App. Ct. 2/3/09):
Holding: Even though Defendant offered victim alcohol and cocaine then had sex with her, Defendant could not be convicted under a statute prohibiting drugging people for sex, because the statute requires an aspect of forcefulness or deceit that goes beyond "merely supplying drugs or alcohol to a willing individual."

Com. v. Swan, 2008 WL 5076565 (Mass. Ct. App. 2008):
Holding: Even though Defendant had inappropriate behavior in urinal area of school bathroom, where the area was open and relatively public, he could not be charged with being a "Peeping Tom" or voyeurism.

People v. Rideout, 2006 WL 306921 (Mich. App. 2006):
Holding: Defendant's actions were not proximate cause of victim's death where victim was injured in a car accident by a third-party and safely left the roadway, but then re-entered the roadway and was hit by Defendant.

State v. Holmes, 2010 WL 3237223 (Minn. Ct. App. 2010):
Holding: Theft by non-payment for real estate improvements requires proof that Defendant knowingly failed to use payment proceeds to pay others who contributed labor, skills and material to the improvement; proof of failure only to use contract proceeds to pay for the improvement itself was insufficient.

State v. Morin, 2007 WL 1815635 (Minn. Ct. App. 2007):
Holding: Conviction for "obstructing legal process" requires some act directed at a law enforcement officer, and does not include acts such as warning a person with outstanding warrants that police were pursuing him and helping look for an escape route.

State v. Spence, 2007 WL 4303208 (Minn. Ct. Ap. 2007):
Holding: Defendant cannot be convicted of burglary of a home he co-owned with another resident for purposes of assaulting co-owner.

State v. Al-Naseer, 2006 WL 2729200 (Minn. Ct. App. 2006):
Holding: Defendant's awareness that he "hit something" while driving was not sufficient by itself to support conviction for vehicular homicide based on leaving scene of accident; statute required Defendant know he hit a person.

Summeral v. State, 2010 WL 2270406 (Miss. Ct. App. 2010):
Holding: Illegal "dirk knife" requires at least one sharpened edge which tapers to a point and the knife be designed primarily as a stabbing weapon.

Bartolo v. State, 2009 WL 2436698 (Miss. Ct. App. 2009):
Holding: Even though Defendant took and used cell phone from Victim, evidence was insufficient to establish that the value of the phone services stolen was more than $50 to support a felony where the State did not call any telephone company representatives to testify as to the value of the phone calls made by Defendant.

State v. McAllister, 2007 WL 2026489 (N.J. Super Ct. 2007):
Holding: Where Defendant was the live-in boyfriend of victim's mother, Defendant could not be convicted of first degree endangering the welfare of a child for production of child pornography since he was not "legally charged" with victim's care or custody.

State v. Cruz, 86 Crim. L. Rep. 265 (N.M. Ct. App. 10/27/09):
Holding: Employer-Defendant's wage checks that were issued for work performed a week earlier represented payments toward a preexisting debt, not a contemporaneous value transaction, and hence, were not covered by the state insufficient funds statute.

State v. Jackson, 2009 WL 2380161 (N.M. Ct. App. 2009), state cert. granted. (7/23/09):
Holding: Even though Defendant provided probation officer with false urine sample, where State did not show whether probation conditions included nonuse of controlled substances or merely nonuse of alcohol, evidence was insufficient to convict of disrupting a police investigation or the prosecution of crime.

State v. Jackson, 85 Crim. L. Rep. 51 (N.M. Ct. App. 3/23/09):
Holding: Where probationer tried to pass off a clean urine specimen as his own, this did not violate evidence-tampering statute, because that statute only applies to conduct that interferes with investigation or prosecution of crime.

State v. Vance, 2008 WL 5731944 (N.M. Ct. App. 2008):
Holding: Even though state law required showing identification to buy pseudoephredrine cold tablets and the tablets are kept behind a counter, the tablets remain within the definition of "over-the-counter" drugs that do not require prescriptions and the tablets are not "drug precursors."

State v. Mondragon, 2008 WL 5070364 (N.M. Ct. App. 2008):
Holding: Even though Defendant beat mother and caused fetus' death, the fetus was not a child under the child-abuse statute and so Defendant could not be convicted of child abuse, even though fetus was born alive and then died.

State v. Cole, 2007 WL 2316004 (N.M. Ct. App. 2007):
Holding: Defendant could not be convicted of bringing drugs into a jail where he had been arrested for another offense and had marijuana on him when taken to jail; Defendant must have taken drugs into jail voluntarily.

People v. Saxton, 2010 WL 2680178 (N.Y. App. 2010):
Holding: Defendant could not be convicted of failure to pay benefits because New York labor law was preempted by ERISA.

People v Kent, 88 Crim. L. Rep. 142 (N.Y. App. 10/12/10):
Holding: Possession of pornography conviction requires more than presence of pornography in temporary internet files cache of computer.

People v. Small, 2010 WL 2198199 (N.Y. App. Div. 2010):
Holding: Even though Defendant entered Victim's home through window, sat her on bedroom floor, "tried" to kiss her, "tried" to unbutton her blouse and said she was "hot," evidence was insufficient to convict of attempted rape where Defendant did not undress and Vicitm did not testify that Defendant tried to rape her.

People v. James, 2010 WL 1911349 (N.Y. City Crim. Ct. 2010):
Holding: Given a statute specifically addressing trespassing on public housing property, Defendant could only be charged under that statute and not under general trespassing statute.

Vinluan v. Doyle, 84 Crim. L. Rep. 506 (N.Y. App. Div. 1/13/09):
Holding: (1) Even though attorney told nurses they could resign their jobs en masse, which potentially left ill children without care, attorney had 1st Amendment right of expression and association to give this legal advice, and could not be prosecuted for child endangerment; and (2) Even though nurses resigned their jobs en masse, which

potentially left ill children without care, the constitution's ban on involuntary servitude prohibits prosecuting nurses for child endangerment for resigning.

People v. Coombs, 2008 WL 4891398 (N.Y. App. Div. 2008):
Holding: Even though police officer was injured trying to enter Defendant's hotel room through a window, where Defendant had only tried to stop police from entering through door, evidence was insufficient to convict Defendant of assault on a police officer for causing serious physical injury to police officer.

People v. Oldacre, 2008 WL 2608006 (N.Y.App.Div. 2008):
Holding: Defendant did not constructively possess drugs found in camera bag found in another person's hotel room, even though Defendant visited hotel room and had speculative list of names of possible drug persons.

People v. Richardson, 2008 WL 4425918 (N.Y. App. Div. 2008):
Holding: Even though two arson investigators testified fire was arson, evidence insufficient to convict of arson where they conceded they couldn't pinpoint exact cause of fire and there court have been other causes such as improper appliances and storage of paint thinner and combustibles.

People v. Rosenfeld, 2007 WL 2044243 (N.Y. Sup. 2007):
Holding: Even though defendant forged a deed transferring title to himself only, Defendant could not be convicted of stealing real property where he owned the property as tenant-in-common with the victim.

State v. Yarborough, 2009 WL 1980998 (N.C. Ct. App. 2009):
Holding: A defendant cannot kidnap a person for purpose of facilitating felony-murder; thus, where Defendant was indicted for kidnapping for purpose of committing murder State has to prove deliberate murder and a fatal variance existed between evidence and indictments.

State v. Conway, 2008 WL 5056022 (N.C. Ct. App. 2008):
Holding: The entire weight of liquid which contained methamphetamine could not be used to show Defendant possessed 28 grams of meth as required by trafficking statute.

State v. Garris, 2008 WL 2726650 (N.C. Ct. App. 2008):
Holding: Even though Defendant possessed two firearms, he could only be convicted of one count of possession of firearm by felon.

State v. Turnage, 2008 WL 1944975 (N.C. Ct. App. 2008):
Holding: Even though exterior house door was broken, Defendant's fingerprint was on the outside of the door, and Defendant was found in the backyard with blood on his hand, the evidence was insufficient to convict of first-degree burglary because there was no evidence Defendant entered residence.

State v. Adams, 654 S.E.2d 711 (N.C. Ct. App. 2007):
Holding: Where rape convictions required use of a "dangerous or deadly weapon," the Defendant's hands did not meet this test.

State v. Carter, 2007 WL 2032945 (N.C. Ct. App. 2007):
Holding: Even though Defendant's identification and photographs were found in a drug house, where the house did not belong to Defendant, he did not rent it, and none of his identification listed that as his address, and there was insufficient evidence to convict Defendant of "keeping" a drug house.

State v. Harris, 2006 WL 2128909 (N.C. Ct. App. 2006):
Holding: Positive urine test for cocaine and marijuana, without more, is insufficient for conviction of possession of those substances.

State v. Shustar, 2010 WL 1553568 (Ohio Ct. App. 2010):
Holding: In case for furnishing alcohol to minors, evidence was insufficient to establish that Defendant's children were under influence of alcohol at time officer saw them.

In re S.R., 2009 WL 1845254 (Ohio Ct. App. 2009):
Holding: Even though Defendant made a bottle bomb out of a plastic water bottle, toilet-bowl cleaner and aluminum foil, this was not "dangerous ordinance" because there was no evidence Defendant intended to use the bomb as a weapon and none of the substances in the bottle were regulated by fire regulations.

State v. Singfield, 2009 WL 2516121 (Ohio Ct. App. 2009):
Holding: Where aggravated robbery statute provided that a defendant "have a deadly weapon on … the offender's person or under the offender's control" and display or brandish it, this was not a strict liability offense but required a mens rea of recklessness as applied to the weapons element.

State v. Kilgore, 2008 WL 755013 (Ohio Ct. App. 2008):
Holding: To convict of failing to obey traffic control device, State had to present some proof of a "one-way" sign that Defendant failed to obey.

State v. Moorer, 2008 WL 2220399 (Ohio Ct. App. 2008):
Holding: Crime of firing a gun into a habitable structure requires the gun be fired "at or into" the structure from the outside, and not fired inside the house.

State v. Turner, 2007 WL 2955639 (Ohio Ct. App. 2007):
Holding: Defendant cannot be convicted of inciting to violence where he did not incite "another" to violence against a third party, but incited violence against himself.

Lakewood v. El-Hayek, 2006 WL 4700685 (Ohio Mun. Ct. 2006):
Holding: The operator of a motorized scooter is not a "pedestrian" for purposes of statute on failure to yield right of way to "pedestrian" because a scooter is gas-powered, not human-powered.

State v. Kerrigan, 2006 WL 2381945 (Ohio Ct. App. 2006):
Holding: Video showing large group of naked men and boys did not show lewd exhibition or graphic focus on genitals so did not support conviction for illegal use of minor in nude performance.

State v. Kurtz, 2010 WL 535156 (Or. Ct. App. 2010):
Holding: Even though officer who stopped Defendant was an "Indian tribal police officer" and the pursuit began within the reservation, this did not meet the statutory definition of "police officer," so Defendant did not violate statute prohibiting eluding a "police officer" in a vehicle.

State v. Cervantes, 2009 WL 4930685 (Or. Ct. App. 2009):
Holding: Even though Defendant-mother ingested methamphetamine while pregnant, this did not create a risk of harm to "another person" to support criminal charge of recklessly endangering another person.

State v. Odnorozhenko, 2008 WL 5071898 (Or. Ct. App. 2008):
Holding: Where Defendant succeeded in dragging victim only about two feet, this was insufficient to convict of first-degree kidnapping.

State v. Mayes, 2008 WL 2357407 (Or. Ct. App. 2008):
Holding: Definition of "nudity" in statute prohibiting invasion of privacy applied only to post-pubescent adults. Thus, Defendant could not be convicted of secretly videotaping prepubescent girl.

State v. Turner, 2008 WL 3386058 (Or. Ct. App. 2008):
Holding: Even though Defendant had the handle of a sword sticking out between his back and backpack, there was no reasonable suspicion to stop Defendant for carrying a "concealed weapon," because the sword was not "concealed."

State v. Litscher, 2006 WL 2555971 (Or. App. 2006):
Holding: Even though Defendant entered girlfriend's apartment in violation of a restraining order, this did not constitute first degree burglary because violation of the order was contempt of court rather than a crime.

State v. Riley, 2009 WL 5879349 (N.J. Super. 2009):
Holding: Where Defendant used his own computer password at work to access portions of his employer's database that he was not supposed to access, this did not constitute criminal "unauthorized access" of employer's computer; to hold otherwise would criminalize breach of employment policies governing access of computers by those who are already granted some access.

Frazier v. Northern State Prison DOC, 2007 WL 1295997 (N.J. Super. Ct. 2007):
Holding: A simple assault under N.J. law is not a "misdemeanor crime of domestic violence" for purposes of the Lautenberg Amendment prohibiting possession of firearms by persons convicted of a "misdemeanor crime of domestic violence."

State v. Powell, 2006 WL 3306874 (Or. App. 2006):
Holding: Defendant's struggle to resist police from taking a blood sample did not constitute "resisting arrest" where Defendant had not resisted his custodial status, but only taking blood.

Com. v. Payne, 2010 WL 2044875 (Pa. Super. 2010):
Holding: Even though Defendant shot deer 25 feet from road, where he had gotten out of his vehicle 45 minutes earlier, this was not "road-hunting" prohibited by statute.

Com. v. Rodriquez, 2010 WL 325792 (Pa. Super. 2010):
Holding: Even though Defendant took a stereo off a store shelf and tried to "return it" for cash using a false receipt, this was insufficient to prove retail theft, which required a showing that Defendant took the stereo with the intent to deprive the store of possession of it.

Com v. Wilgus, 2009 WL 1841781 (Pa. Super. 2009):
Holding: Where Defendant was homeless, this precluded possibility of a "residence" or fixed address within the meaning of Megan's Law for sex registration; the law did not cover the situation presented by homeless people.

Commonwealth v. Austin, 2006 WL 2390845 (Pa. Super. 2006):
Holding: Where jury acquitted Defendant of robbery, jury could not convict him of second degree murder based on predicate offense of robbery.

State v. Lanier, 2010 WL 4068493 (S.C. Ct. App. 2010):
Holding: Where statute provided that it was unlawful for person confined in prison to escape, this applies to a prisoner who leaves a designated work-release location, but not another location.

State v. Brannon, 2008 WL 2788085 (S.C. Ct. App. 2008):
Holding: Where Defendant merely ran from police when asked to stop and was not being sought for arrest, Defendant could not be convicted of resisting arrest.

Winningham v. State, 2010 WL 2636175 (Tex. App. 2010):
Holding: Even though Victim's blood was in Defendant's car trunk and fibers connected to Victim were on Defendant's bumper, where the amount of blood in trunk was not consistent with State's theory that Defendant put Victim in trunk after he murdered her, the evidence was insufficient to convict of murder.

Winfrey v. State, 2010 WL 3656064 (Tex. Crim. App. 2010):
Holding: Even though (1) Defendant told investigators he thought he was prime suspect in murder and told a cellmate that he heard about the murder, and (2) Defendant's scent was found on victim's clothes by a dog, evidence was insufficient to convict of murder.

Bailey v. State, 2009 WL 3460324 (Tex. App. 2009):
Holding: Offense of "obstructing a highway" requires a mental state at time obstruction occurred of either intentionally, knowingly, or recklessly.

Roberts v. State, 84 Crim. L. Rep. 353 (Tex. Crim. App. 12/17/08):
Holding: Where Defendant did not know Victim was pregnant when he murdered her, Defendant cannot be convicted of murder of two individuals.

Grotti v. State, 2008 WL 2512832 (Tex. Crim. App. 2008):
Holding: In prosecution of Defendant-doctor for alleged homicide of patient regarding blocking a life support tube, the definition of "death" set out in the Health and Safety Code rather than the Penal Code should be used to review sufficiency of evidence; evidence was thus insufficient.

Williams v. State, 2007 WL 2848986 (Tex. Crim. App. 2007):
Holding: Even though Defendant-mother left her children at a house without utilities and a lit candle under the supervision of another adult, where the house then burned and killed the children, the evidence was legally insufficient to show mother consciously disregarded a substantial or unjustifiable risk children would suffer serious bodily injury by leaving them at the house to support child endangerment conviction.

McKinney v. State, 80 Crim. L. Rep. 226 (Tex. Crim. App. 11/15/06):
Holding: Defendant, who requested and received a lesser-included offense instruction and was convicted of the lesser, could challenge sufficiency of evidence to sustain conviction for lesser on appeal.

Ward v. State, 2006 WL 798072 (Tex. App. 2006):
Holding: Defendant-mother's ingestion of cocaine and transfer of it to unborn baby did not constitute knowing delivery of controlled substance to a child.

State v. Draper, 2006 WL 59784 (Utah Ct. App. 2006):
Holding: Alleged exposure of infant to marijuana through breast-feeding was insufficient to bind Defendant over for trial on charge of endangerment of child; investigator from Family Services was not qualified as an expert to testify as to presence of marijuana in breast-milk, and State did not present any expert testimony that marijuana can contaminate breast-milk.

State v. Flowers, 2010 WL 436462 (Wash. Ct. App. 2010):
Holding: Where sex offender registration law did not require "transient" offenders to give their weekly locations, "transient" Defendant could not be convicted of failing to fulfill a Sheriff's requirement that he disclose his weekly locations.

Parmelee v. O'Neel, 2008 WL 2447831 (Wash. Ct. App. 2008):
Holding: Criminal statute prohibiting publication of "malicious" content about persons was unconstitutional on its face.

State v. Shumaker, 2007 WL 4532845 (Wash. Ct. App. 2007):
Holding: Where marijuana was found in a car passenger's backpack, a jury instruction allowing conviction for driver for constructive possession if driver had dominion or control over the premises was erroneous.

State v. Durrett, 2009 WL 1508567 (Wash. Ct. App. 2009):
Holding: Where Defendant was convicted of two counts of failure to register as sex offender for failing to register each week, this was double jeopardy because failure to register is only one "unit of prosecution" that cannot be divided into separate time periods to support multiple charges.

State v. Drake, 2009 WL 489966 (Wash. Ct. App. 2009):
Holding: Even though Defendant's landlord removed Defendant's property from apartment for failing to pay rent, where there was no evidence Defendant knew he was evicted or had changed addresses, evidence insufficient to convict for failing to register as sex offender.

State v. Hirschfelder, 2009 WL 73254 (Wash. Ct. App. 2009):
Holding: Even though statute made it a crime for teacher to have sex with student "who is at least 16 years old," statute was not violated where teacher had sex with student who was 18 years old; only 16 and 17 year-old students are covered by statute.

State v. Nam, 2007 WL 102868 (Wash. Ct. App. 2007):
Holding: Where defendant took a purse off the seat of a car, evidence was insufficient to prove he took it "from the person" of the victim to sustain conviction for robbery.

State v. Wilson, 2007 WL 49665 (Wash. Ct. App. 2007):
Holding: Even though girlfriend had a no-contact order against Defendant, Defendant could not be convicted of burglary for entering the house he shared with girlfriend.

Transcript – Right To

Smith v. State, No. ED90768 (Mo. App., E.D. 10/28/08):
Holding: Even though Sec. 512.180.2 required the Associate Circuit Court to make a record of this expungement proceeding, where neither party below requested a hearing be held on the record, the Court of Appeals will not grant relief merely for failure of the hearing to be on the record.

Kreamalmyer v. Director of Revenue, No. SD29105 (Mo. App. S.D. 2/6/09):
Holding: Where an error with the sound recording of the trial failed to record certain testimony which the trial court relied upon in reaching its decision, so that a complete transcript for appeal could not be produced, the Appellant was entitled to a new trial.

In the Interest of R.R.M., No. WD67064 (Mo. App., W.D. 6/12/07):
(1) Even though alleged child-victim testified at trial, her hearsay statements made to police could not be admitted under Section 491.075 without the trial court determining that the statements had "sufficient indicia of reliability;" and (2) where through either human or mechanical error a transcript could not be produced of the child-victim's testimony or some of the police testimony, the Court of Appeals could not review Defendant's claim of insufficiency of evidence, and Defendant was entitled to a new trial due to lack of transcript.
Facts: Defendant-juvenile was charged with sexually molesting a six year old child. At trial, the child testified, and denied Defendant molested her. Subsequently, the State under Section 491.075 sought to introduce child's statements to police that Defendant molested her. Defendant objected on grounds of hearsay and no indicia of reliability. The trial court admitted the statements on the grounds that the child had testified. On appeal, a transcript could not be made of the child-victim's testimony or portions of the police testimony due to either human or mechanical error regarding the trial recording equipment.
Holding: Section 491.075 provides that in offenses under Chapter 566 for children under 14, their statements can be introduced as substantive evidence to prove the truth of the matter asserted if the court finds the statements provide "sufficient indicia of reliability" and "the child testifies at the proceedings." Under the statute, in addition to the child testifying, the court must find "indicia of reliability." Defendant objected to the reliability of the statements. However, the trial court did not rule on their reliability. This was error. Also, the case must be reversed for a new trial because there is not a sufficient transcript on appeal to review Defendant's claim of insufficiency of evidence. Defendant exercised due diligence in trying to obtain a transcript, and has been prejudiced by the lack of transcript, since the Court of Appeals cannot review his claim on appeal.

In re Grand Jury, 2009 WL 1286334 (1st Cir. 2009):
Holding: A non-target grand jury witness only needed to show a low standard of particularized need to gain access to a transcript of his prior grand jury testimony so that he could avoid inconsistencies in further testimony.

Lebron v. Sanders, 2009 WL 161735 (2d Cir. 2009):
Holding: Pro se Defendant was entitled to printed copies of opinions cited in opposing counsel's brief where those were only available on fee-based electronic databases.

Boyd v. Newland, 2006 WL 3026021 (9th Cir. 2006):
Holding: Defendant was entitled to whole voir dire transcript on appeal in order to raise *Batson* claim.

People v. Cervantes, 2007 WL 1429433 (Cal. App. 2007):
Holding: Where court reporter could not produce transcript of trial and appellate counsel was not the trial attorney, remand for further proceedings was required.

Trial Procedure

State v. Seeler, No. SC90583 (Mo. banc 7/16/10):
Where (1) Defendant was charged with involuntary manslaughter for "leaving the highway right of way," and (2) after the close of the State's evidence, the State amended the charge to involuntary manslaughter for "drove in a lane closed to traffic," this prejudiced Defendant because his defense was based on showing he never left the highway's right of way.
Facts: Defendant, while drunk, drove his car into a highway worker and killed him. Defendant was charged with the B felony of involuntary manslaughter, Sec. 565.024.1(3)(a) for causing the death of a person "that results from the defendant's vehicle leaving a highway … or the highway's right of way." The simple version of involuntary manslaughter is a C felony contained in Sec. 565.024.1(2), which requires operating a vehicle with criminal negligence which results in the death of someone. Defendant's defense was that he never left the highway or right of way because the decedent was working on the highway. When Defendant moved for acquittal at the close of the State's evidence, the State replaced "leaving the highway's right of way" with "drove into a lane closed to traffic." Defendant claimed this prejudiced him because he was prepared to defend against a charge that he left the highway. The trial court allowed the amendment. Defendant was convicted of B felony involuntary manslaughter.
Holding: Rule 23.08 allows an information to be amended or substituted for an indictment if the Defendant's substantial rights are not prejudiced. The test for prejudice is whether the planned defense to the original charge would still be available after the amendment. Here, Defendant's defense was that he never left the highway's right of way. The amendment caused this defense to become unavailable. Reversed and remanded for new trial.

State v. Stewart, No. SC90503 (Mo. banc 5/25/10):
Where newly discovered evidence likely would have produced a different result at trial, trial court erred in not granting New Trial Motion on this basis.
Facts: Defendant was convicted at trial of first degree murder. Victim had said before he died that two people shot him, and one was "the Eby girl's boyfriend." Defendant was the son of Eby. Defendant's sister was married to Tim, and another sister was living with Leo. Defendant denied the crime to police and at trial. The State presented two "jail-house snitch" witnesses who claimed that Defendant, while in jail with them, had said he did the crime with Leo. At trial, the jury heard evidence that DNA test results did not find Defendant's DNA on a hat connected to the murder, but that DNA from Victim, Tim and an "unknown person" was on the hat. After trial, the defense filed a New Trial Motion alleging a new trial should be granted based on "newly discovered evidence." At the New Trial Motion hearing, the defense presented a police detective who testified that he had information that Tim had said he had "taken someone's life," and Tim's nephew

testified that Tim had told him he was at Victim's house when Tim was killed. The trial court denied the New Trial Motion.
Holding: To obtain a new trial based on newly discovered evidence, Defendant must show: (1) the evidence came to his attention after trial; (2) the lack of knowledge before trial was not due to lack of diligence; (3) the evidence is so material that it is likely to produce a different result at trial; and (4) the evidence was not merely cumulative or impeaching. Here, the parties agree that conditions 1, 2 and 4 are satisfied. The State argues, however, that the evidence is not material and is hearsay. The evidence may be hearsay, but in considering a New Trial Motion on basis of newly discovered evidence, a court is not to conjecture about the evidence's future admissibility; the evidence may not be offered the same at trial. Prior cases have found that self-incriminatory statements made to close family members shortly after a crime, that are corroborated by DNA, carry substantial reliability. Here, the State's theory was that Defendant and Leo committed the crime. But no forensic evidence connected them to the crime scene. The newly discovered evidence of Tim's incriminating remarks, when considered with the DNA testing linking Tim's DNA to the crime scene, raises serious doubt as to Defendant's guilt. The jury could conclude that Tim and another person (not Defendant) killed Victim. Reversed and remanded for new trial.

Fleshner v. Pepose Vision Institute, No. SC90032 (Mo. banc 2/9/10):
(1) Where after trial Defendant obtained an affidavit of a juror who claimed that during jury deliberations another juror made anti-Semitic comments directed at Defendant, the trial court abused its discretion in not holding a hearing on the matter; (2) where a party shows that jurors made remarks during deliberations showing bias on basis of race, gender, religion or national origin, a new trial must be granted because this denies the party 12 impartial, fair jurors.
Facts: Plaintiff-employee sued Defendant-employer for wrongful termination. Jury returned verdict for Plaintiff. After trial, Defendant filed a new trial motion alleging juror bias. Defendant included an affidavit from a juror who claimed that during deliberations, another juror had made anti-Semitic remarks about the owner of the Defendant business, who was also a witness in the case. The trial court denied a hearing on the motion on grounds that the verdict could not be impeached by showing what occurred in jury deliberations.
Holding: This Court has never considered whether a trial court may hear testimony about juror statements during deliberations evincing ethnic or religious bias or prejudice. Other States have held that courts may hear testimony that a verdict may have been the result of racial, national origin, religious or gender bias. When a juror makes remarks during deliberations showing ethnic or religious prejudice, the juror's mental processes have been exposed to other jurors. The juror has revealed that he is not fair and impartial. "Whether the statements may have had a prejudicial effect on other jurors is not necessary to determine. Such statements evincing ethnic or religious bias or prejudice deny the parties their constitutional rights to a trial by 12 fair and impartial jurors and equal protection of the law." Thus, if a party files a new trial motion alleging such statements during deliberations, the trial court should hold a hearing to determine whether such statements occurred. If yes, a new trial must be granted.

City of Springfield v. Belt, No. SC09234 (Mo. banc 3/2/10):
A traffic "red light camera" violation is a municipal violation and "moving" violation which cannot be determined by administrative proceedings, but must be heard by a judge of the circuit court.
Facts: Defendant was charged with running a red light. His offense was recorded through use of a red light camera. Defendant's case was heard by a "Hearing Examiner" in an administrative proceeding. Following that, Defendant demanded a trial de novo in circuit court. The City claimed there could be no trial de novo because this was an administrative proceeding, not a criminal conviction by a municipal division of the circuit court.
Holding: Section 479.010 provides that violations of municipal ordinances shall be heard only before a division of the circuit court. Section 479.040 allows cities of less than 400,000 (such as Springfield) to chose to have violations heard by an associate circuit judge, or a municipal judge, or at a county municipal court if one has been created. However, there is no provision for a city such as Springfield to have ordinance violations heard in an administrative proceeding. Section 479.011 allows for cities with more than 400,000 inhabitants to hear parking, civil and *non*moving violations, but even considering this section, a red light violation is typically considered a *moving* violation. Using an administrative procedure for moving violation is not allowed. Hearing examiner decision is vacated.

Johnson v. McCullough, No. SC90401 (Mo. banc 3/9/10):
(1) Where juror failed to answer on voir dire whether she had been a party to prior lawsuits, this was intentional nondisclosure requiring a new trial; (2) Until Supreme Court can promulgate a written rule, attorneys must check Casenet after jury selection but before trial commences to ensure the selected jurors do not have prior litigation histories in order to preserve this issue for future review.
Facts: Plaintiff sued Defendant for medical malpractice. During voir dire, Plaintiff asked venire persons, "Now not including family law, has anyone ever been a plaintiff or a defendant in a lawsuit before?" Several persons answered, but Juror did not. Juror subsequently served on the actual jury, which ruled for Defendant. After trial, Plaintiff discovered via Casenet that Juror had been a defendant in debt collection and personal injury cases in the past two years. Plaintiff moved for a new trial on grounds of the Casenet entries. The trial court granted a new trial. Defendant appealed.
Holding: (1) Venierpersons have a duty to give full, fair and truthful answers to all questions. Here, the question was clear and unambiguous. Failure to answer is a nondisclosure. Bias and prejudice are presumed for "intentional" nondisclosure. Defendants argue that a Casenet entry is not sufficient to prove intentional nondisclosure, and that Plaintiff was required to have deposed Juror, obtained an affidavit from Juror, or had her testify. Although this may have been the better practice, under the facts here where the question was clear and Juror's litigation history is of such significance as to make it unreasonable to forget to answer, the trial court did not abuse its discretion in finding that the nondisclosure was "intentional." (2) Parties, however, should not be allowed to wait until after a trial is finished before raising the issue here. Modern technology, specifically Casenet, allows parties to search for jurors' prior litigation histories after the jurors are selected for trial, but before the jurors are actually

empanelled. "Until a Supreme Court rule can be promulgated to provide specific direction, to preserve the issue of a juror's nondisclosure, a party must use reasonable efforts to examine the litigation history on Casenet of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial. To facilitate this search, trial courts are directed to ensure the parties have an opportunity to make a timely search prior to the jury being empanelled and shall provide the means to do so, if counsel indicates that such measures are not reasonably otherwise available." "Searches of other computerized record systems, such as PACER, are not required."

State v. Teer, No. SC89501 (Mo. banc 1/27/09):
Where State failed to charge Defendant as a prior offender before case was submitted to jury, State could not do so afterwards because Section 558.021.2 provides that prior offender status be pleaded and proven before case is submitted to jury.
Facts: Defendant killed four people in a drunken driving crash and injured a fifth. He was found guilty of four counts of involuntary manslaughter and one count of assault. Before the end of trial, the State moved to charge Defendant as a prior offender because he had a prior stealing conviction. The court sustained this after the case was submitted to the jury but before verdict. The jury recommended sentences of several months to be served in the county jail. The court, however, imposed a 20-year sentence as a prior offender.
Holding: Section 558.021.2 RSMo 1994 provides that all facts necessary to establish prior offender status "shall" be pleaded and found prior to submission to the jury. While there are appellate cases that have excused failing to strictly comply with the statute, if the courts continue to indulge in such laxity, a judicial emasculation of the legislative direction in the statute will occur. Here, the statute was not followed, and Defendant was prejudiced because the court sentenced him to 20 years, but the jury only months. Sentence reversed and remanded for resentencing consistent with jury's recommendation as if Defendant were not prior offender.

In the Interest of D.J.M., No. SC89095 (Mo. banc 7/29/08):
Where Juvenile did not waive counsel, trial court was required to appoint counsel for indigent Juvenile in juvenile proceeding, and the parents' counsel did not satisfy the right to counsel, since the parents' counsel was not representing Juvenile.
Facts: Juvenile was charged with an offense that would be a misdemeanor if he were an adult. The parents hired an attorney to represent them in the proceedings. Juvenile, however, had no attorney representing him. Juvenile was ordered into supervision and treatment, and appealed.
Holding: Sec. 211.211 gives juveniles a statutory right to counsel in all delinquency proceedings. Sec. 211.211.3 requires that after a petition is filed, the trial court "shall appoint counsel for the child when necessary to assure a full and fair hearing." The child may waive counsel, but only with approval of the trial court and only when the record shows that the trial court obtained a knowing and intelligent waiver of counsel from the juvenile. Here, the trial court did not obtain a waiver of counsel. Although the parents were represented by counsel, that counsel was not representing Juvenile and might have had a conflict of interest if he had represented the Juvenile and the parents

simultaneously. The trial court's failure to comply with Sec. 211.211 requires that the judgment be reversed.

State v. Fassero, No. SC88894 (Mo. banc 6/30/08):
Trial court erred in admitting in penalty phase evidence that Defendant was previously indicted for sex offense, because an indictment is not evidence that the sex offense occurred.
Facts: Defendant was convicted of first degree child molestation. At the sentencing penalty phase, the State introduced an indictment from Illinois charging Defendant with another sex offense.
Holding: Sec. 557.036.3 allows the State to present evidence about the Defendant's "history and character." The State may present evidence of prior criminal conduct for which Defendant was never convicted, but the State must prove that evidence by a preponderance of evidence. The State could have presented evidence that Defendant committed the acts charged in the indictment, but the State did not do this. It just admitted the indictment. The indictment not relevant to prove that Defendant engaged in the conduct charged in the indictment. New penalty phase ordered.

State v. Couch, No. SC88922 (Mo. banc 6/24/08):
(1) Trial court did not abuse discretion in child sex case in excluding evidence that victim had previously made allegedly false allegation of sexual abuse, because she did not make the allegation to persons in authority and did not acknowledge the allegation was false, and did not err in excluding prior false allegation of physical abuse because this was remote in time and had a different motive than the current sexual allegation. (2) Procedurally, where trial court sustained a motion in limine to exclude this evidence before trial, court should not have precluded defense counsel from seeking to make an offer of proof at trial and introduce this evidence at trial.
Facts: Defendant, charged with child sex offenses, sought to introduce evidence that victim had previously falsely accused a brother of sexual abuse, had previously falsely accused her prior stepfather of physical abuse. The brother testified in an offer of proof that victim had falsely accused him of sexual abuse, but she did not report this to authorities. Defendant also sought to introduce evidence that victim falsely reported to authorities that a prior stepfather physically abused her, and later told another person that her claims were false.
Holding: (1) In *State v. Wilson*, No. SC88899 (Mo. banc 6/24/08), the Court held that prior false allegations are admissible only if they have been made to law enforcement or other authorities, are false, and concern a matter that is the same or substantially similar to the current allegation. Regarding the prior sex abuse claim, victim did not report this to authorities. Further, although the brother denied the claim, this does not establish the allegations' falsity. The victim never said the sex claim was false, and the trial court could have disbelieved brother and determined the claim was not false, since the trial court determines credibility. The prior claim of physical abuse is a closer legal question. Victim made the claim five years ago to DFS authorities apparently with the motive to get out of a different home. Here, there is no claim that victim made the current sex abuse claim to get out of the home. Given that the prior physical abuse allegation is remote in time, concerns a different type of abuse, and was made for a different motive,

the court did not abuse its discretion in excluding it. (2) The trial court followed the wrong procedure in dealing with this evidence, however. It sustained a motion in limine before trial to exclude it, and ordered defense counsel not to raise the issue again at trial. There is a very real purpose in requiring counsel to request permission at trial to offer the testimony that has been excluded in response to a pretrial motion in limine: when considered in context, the trial court may reconsider its ruling and admit the evidence; it cannot prejudge the matter. This does not mean it must permit counsel to offer the witnesses testimony again as part of the offer of proof, but the court must permit counsel to ask the court at an appropriate point to reconsider its pretrial motion in limine. The court did not allow that here.

State v. Ward, No. SC88409 (Mo. banc 1/15/08):
Holding: A Defendant is not allowed to testify where Defendant refuses to take an oath or acknowledge that his testimony is subject to penalties of perjury under Sec. 492.030, even though Defendant says he would "tell the truth."

State v. Taylor, No. SC88426 (Mo. banc 11/20/07):
(1) Venue is not element of offense, and must be objected to in a pretrial hearing; and, (2) if venue is wrong, case must be transferred to correct county.
Facts: Defendant claimed that venue was an element of forcible rape, and was not proven beyond a reasonable doubt by the State.
Holding: Even though MAI-CR 320.01 appears to make venue an element of the offense of rape, the MAI is incorrect, because the forcible rape statute does not make location of the crime an element of the offense. Venue is an important procedural right, but it is not jurisdictional, and can be waived. Section 476.410 allows a case filed in a wrong county to be transferred to the correct county. Thus, transfer is the proper remedy for wrong venue, not dismissal of a case. A defendant's objection to venue must be made before trial. The prosecution must show by a preponderance of evidence that the crime occurred in that county. The judge will then determine where venue lies. If venue is in a different county, the judge shall transfer the case to the correct county under Section 476.410. Previous cases that hold the State must prove venue at trial are overruled.

State v. Clark, No. SC87473 (Mo. banc 8/8/06):
In penalty phase of non-capital trial, State may introduce evidence of prior crimes of which Defendant had been acquitted.
Facts: Defendant had been acquitted of two prior murders. In the penalty phase of a subsequent non-capital trial, the State introduced evidence through witnesses that Defendant had committed these prior murders. Defendant claimed this evidence was inadmissible because he had been acquitted.
Holding: In *U.S. v. Watts*, 519 U.S. 148 (1997), the Court ruled that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. Section 557.036.3 RSMo allows the sentencing court to consider "the history and character of the defendant." An acquittal does not prove the defendant is innocent; it merely proves the existence of reasonable doubt as to guilt, and failure of the government to prove an element of the offense beyond a reasonable doubt. *State v. Jaco*, 156 S.W.3d 775 (Mo.

banc 2005) held that the punishment phase of trial is generally subject to a lower standard of proof. *Jaco* held that since the defendant's sentence was within the original unenhanced range of punishment, any facts that would have tended to assess punishment within that range were not required to be found beyond a reasonable doubt by a jury. Here, Defendant Clark did not receive enhanced sentences. Thus, any facts that would have tended to assess his punishment within the unenhanced range were not required to be found beyond a reasonable doubt by a jury. Since those facts were subject to a lower standard of proof than beyond a reasonable doubt, the State was not precluded from introducing evidence of Defendant's prior murders during penalty phase.

Editor's Note by Greg Mermelstein: Footnote 3 states that Clark did not request a jury instruction be given clarifying that the jury was to consider the prior crimes only for purposes of determining the history and character of Defendant, and did not request any other instructions concerning the prior crimes. Thus, "[t]he Court does not decide whether any such instruction is appropriate."

State v. Bracken, No. ED94242 (Mo. App. E.D. 11/30/10):

Even though jury only convicted Defendant on some counts and hung on others, Court of Appeals had jurisdiction to hear appeal of the convicted counts before the remaining counts were re-tried (disagreeing with Southern District).

Facts: Defendant was convicted at a jury trial of two counts, and the jury hung on other counts. Defendant appealed his conviction on the two counts. The State alleged the appeal should be dismissed because the hung counts had not yet been retried.

Holding: The Southern District has held that lack of disposition as to all criminal counts bars appellate review. E.g., *State v. Storer*, 2010 WL 3872756 (Mo. App. S.D. 2010). However, the Eastern District has followed the rule that a judgment becomes final in a criminal case when the sentence is entered and imposed. We decline to follow the Southern District's reasoning. The instant case is ripe for appeal because a final judgment has been imposed on the counts of which Defendant was convicted. State's motion to dismiss is denied.

State ex rel. Eckelkamp v. Mason, No. ED94859 (Mo. App. E.D. 6/22/10):

Where (1) appellate court reversed and remanded for a new trial in St. Louis City, and (2) case was randomly reassigned to same judge who heard original trial, Relator was entitled to automatic change of judge under Rule 51.05 because a St. Louis City local rule makes a remand from an appellate court a "new case filing," so this restarted the right and time to file for automatic change of judge.

Facts: Previously, the Court of Appeals reversed and remanded this case for a new trial. On remand, the case was ultimately reassigned to the same judge who heard the original trial, but this was only because of a "random assignment." Relators sought to use Rule 51.05 to automatically disqualify the judge, which was denied. Relators filed for a writ of prohibition.

Holding: The issue is whether Relators' application for change of judge is timely. Rule 51.05(b) allows for automatic change of judge in a civil case within 60 days from service of process or 30 days from designation of the trial judge, whichever is longer. When a timely application is filed under 51.05, a judge must recuse. Because the St. Louis City Circuit Court has adopted a central docketing system for assignment of cases, each

remand from the Court of Appeals is treated as a "new filing" and assigned randomly to a judge under Local Rule 6.2.1. Thus, the assignment of the original judge was a new assignment under 51.05 and restarted the time for filing an application for change of judge. Because Relators filed their application within 30 days of the judge's designation, it was timely. Writ of prohibition granted.

St. Louis County v. Skaer, No. ED94279 (Mo. App. E.D. 6/29/10):
Where Defendant was charged with not having a valid waste management plan, trial court could not take judicial notice that all households generate waste because that is not a fact of common knowledge and it also shifts the burden of proof to Defendant.
Facts: Defendant was charged with an ordinance violation for not having a waste management plan. Defendant claimed he did not produce any waste, and therefore, was not required to have a plan. The State asked the trial court to take judicial notice that all households generate a "possibly small amount of non-recyclable waste." The court took judicial notice and found Defendant guilty.
Holding: Judicial notice may be taken of facts which are within the common knowledge of people of ordinary intelligence. Whether or not someone could recycle all their waste is not a matter of common knowledge and should not be accepted as such. To carry its burden, the State was required to put on evidence that Defendant in fact produced non-recyclable waste. Taking judicial notice of a necessary element of the offense for which there is no evidentiary support improperly shifts the burden to Defendant to prove his innocence. The burden is on the State to prove guilt. Conviction reversed.

State v. Dowell, No. ED92846 (Mo. App. E.D. 3/23/10):
Where Defendant had been acquitted of first degree murder and lesser-included offenses and State subsequently sought to try Defendant for an alleged violent rape arising out of the murder, the subsequent prosecution was barred by collateral estoppel.
Facts: Defendant was originally charged with first degree murder and rape with serious physical injury. Because the State was seeking the death penalty, the rape charge was severed as required by Sec. 565.004. The State's theory at trial was that Defendant killed Victim during a violent rape, and that the rape was the motive for the homicide. The Defendant's theory was that a third-party committed the acts. Defendant was acquitted at a jury trial. Subsequently, the State sought to try Defendant for the rape. The trial court granted a defense motion to dismiss on grounds of collateral estoppel. The State appealed.
Holding: Collateral estoppel applies when the issue determined in the prior case is the same issue as the pending case. Collateral estoppel is embodied in the 5th Amendment guarantee against double jeopardy. Defendant has the burden to show that the prior verdict necessarily decided the issues now in litigation. That burden is met here. The State's entire theory at the prior trial was that Defendant committed the homicide because of the violent rape. The State now argues that it is possible the jury found that Defendant committed the violent rape by beating Victim in the head with a blunt instrument but did not mean to kill her. This illogical argument flies in the face of the theory the State relied on at trial, i.e., that the reason he killed Victim was because of the rape. The MAI for aggravated rape requires serious physical injury that creates a substantial risk of death or causes serious impairment. There is no rational basis that a jury could conclude that

Defendant committed the violence constituting the aggravated rape charge, after the jury in the murder trial found Defendant did not commit the violence that resulted in Victim's death. Dismissal affirmed.

State v. Cotton, No. ED91528 (Mo. App. E.D. 6/23/09):
Holding: Where statute of limitations defense was not raised at trial, it was waived; statute of limitations is an affirmative defense that must be asserted by the defense at trial or guilty plea.

Smith v. State, No. ED90768 (Mo. App., E.D. 10/28/08):
Holding: Even though Sec. 512.180.2 required the Associate Circuit Court to make a record of this expungement proceeding, where neither party below requested a hearing be held on the record, the Court of Appeals will not grant relief merely for failure of the hearing to be on the record.

City of Sunset Hills v. Wymer, No. ED90028 (Mo. App., E.D. 9/9/08):
(*(1) Even though Defendant charged with municipal offense waived jury trial in Associate Circuit Court, misdemeanor rules of criminal procedure applied; (2) Where trial court sentenced Defendant on same day it found her guilty, the sentencing was premature since the time for filing a new trial motion had not expired, and there was no jurisdiction on appeal.*
Facts: Defendant was charged with a municipal offense. She requested a jury trial, and the case was transferred to an Associate Circuit Judge. She then waived a jury trial. Defendant was found guilty at a bench trial, and sentenced on the same day.
Holding: The initial question is whether the Court of Appeals has jurisdiction. Rule 37.61(e) states in municipal cases where a jury trial is requested, the misdemeanor rules of criminal procedure apply. Rule 29.11(c), which applies to misdemeanors, states no judgment shall be rendered until the time for filing a new trial motion expires. The City contends the misdemeanor rules do not apply because Defendant ultimately had a bench trial. This is an issue of first impression. Rule 37.61(f) states that where a defendant waives jury trial, the case "may" be remanded to municipal court. The permissive language indicates that remand is not required, and a Circuit Court can still hear the case. Here, the Associate Circuit Judge retained jurisdiction and held a bench trial, so the misdemeanor rules apply. Under 29.11(c), the judge could not sentence Defendant until the time for filing a new trial motion expired. Premature sentencing renders the Court of Appeals without jurisdiction, since there is not a valid final judgment. Appeal dismissed, and case remanded for filing of new trial motion and new sentencing.

Rupert v. State, No. ED89980 (Mo. App., E.D. 4/22/08):
(1) Defendant who pleads guilty can only challenge sufficiency of indictment or information by direct appeal, not 24.035; (2) where judge's written sentence was different than the oral pronouncement of sentence, the oral pronouncement controls; (3) judge is not required to give consecutive sentences for statutory rape.
Facts: Defendant pleaded guilty to four counts of second-degree statutory rape, Sec. 566.034. The judge sentenced him to "three years on each count." Later that day, the judge entered a written sentence saying the sentences were consecutive. When

Defendant sought to fix this, the judge offered Defendant the opportunity to appear for resentencing, but Defendant refused. Defendant ultimately filed a 24.035 motion.
Holding: Regarding Defendant/Movant's claim that the information was insufficient, this is not cognizable in a 24.035 action. The remedy was to raise this on direct appeal. Regarding the sentence, Sec. 558.026.1 provides that sentences shall run concurrently unless the court specifies they run consecutively. Also, the general rule is that oral pronouncements of sentence control over later written judgments. The court believed it was required to give consecutive sentences under Sec. 558.026.1, which states that certain sex offenses shall run consecutively, but statutory rape is not among the listed offenses mandating consecutive sentences. Once the court reduced its sentence to writing, it could not call Defendant back to court and resentence him. The oral sentence controls here, and Defendant's sentences are not consecutive. His sentences must run concurrently.

Springer v. Springer, No. ED87995 (Mo. App., E.D. 6/5/07):
Holding: Where in bench tried divorce case, trial judge belittled wife's attorney by calling attorney's motions "ridiculous" and "absurd;" refused to allow attorney to make an offer of proof; and said "I assume you attended law school so you should understand what the problem is," trial judge showed bias, and judgment is reversed and remanded for hearing before a different judge. Rule 73.01 requires the judge receive an offer of proof.

Grass v. State, No. ED87708 (Mo. App., E.D. 2/27/07):
Holding: Where additional Findings by trial court were necessary, but trial judge who heard the evidence had died during the appeal, the case could not be remanded for additional Findings, and a new trial had to be granted.

State v. Corley, No. 28249 (Mo. App., S.D. 5/7/08):
(1) Even though the State had dismissed a timely-filed charge of second degree assault and allowed another year to pass and then refiled a similar charge, the statute of limitation had not run because it was tolled by the original filing; (2) where the trial court's written judgment found Defendant guilty of a count different than the court's oral verdict, this is a clerical error and the case is remanded for correction of this error.
Facts: In 1998, Defendant was charged with second degree assault for causing an injury while driving a car in an intoxicated condition. The State dismissed this charge in 2003 without prejudice. In 2004, the State filed a new information charging Defendant with second degree assault for recklessly causing serious physical injury by driving the car at an excessive rate of speed. Defendant moved to dismiss on grounds that the statute of limitation has expired. After being found guilty, Defendant appealed.
Holding: (1) Several factors are used to determine if a previously charged offense can serve to toll the statute of limitations for a later charged offense: whether the later information essentially contains the same facts as the original charge; whether the later charge is charged under the same statute as the original charge; and whether the later charge is a different level of offense than the original charge. Here, while the later information charged somewhat different facts, both charges arose out of the same incident (auto crash), both were charged under the same statute, and under the same level of offense. Therefore, the original charge was the "same offense" as the later charge, and

the statute of limitations was tolled by the original filing and did not expire. (2) The trial court's written judgment found Defendant guilty of a different count than the court's oral verdict. This is a clerical error in the judgment, and the case is remanded to correct this error under Rule 29.12.

State v. Lawrence, No. 28199 (Mo. App., S.D. 4/3/08):
(1) Plain error resulted when trial court found Defendant guilty of offense at a purported "trial," when the only "evidence" presented was statements of a prosecutor and Defendant; (2) Plain error resulted when trial court convicted Defendant of an offense at a purported "trial" without obtaining a jury trial waiver from him.
Facts: Defendant was charged with Count I (assault) and Count II (unlawful use of a weapon). Defendant filed a motion to waive jury sentencing. Defendant then filed a petition to plead guilty to *Count II*. A proceeding then occurred in which the trial court asked the Prosecutor what evidence would be presented in support of *both* Count I and Count II. The Prosecutor stated the evidence for both, and Defendant agreed with this. The court then found Defendant guilty of *both* Counts I and II. Defendant then appealed the "trial" on Count I, claiming there was insufficient evidence to convict.
Holding: This case presents glaring procedural irregularities which, although not briefed, present plain error. (1) While the proceeding below was satisfactory for a guilty plea, it does not constitute a trial on Count I. Statements of counsel are not evidence. The Prosecutor's statements of the facts did not constitute evidence for a trial. Also, the Defendant's statements at the hearing cannot be used to convict him under Rule 24.02(d)(5). Defendant was convicted on Count I without ever being tried or without any evidence. (2) While Defendant waived jury sentencing, he did not waive a jury trial. At the hearing, Defendant was only pleading guilty to Count II. Defendant did not waive his right to jury trial on Count I.

State v. Storer, No. SD30391 (Mo. App. S.D. 10/5/10):
Where trial court granted defense motion to dismiss four counts, but two counts remained pending, the State could not appeal the dismissal of the four counts because Sec. 547.200 did not authorize such appeal and there was not a final judgment to appeal.
Facts: Defendant was originally charged with four counts. That case went to trial, but a mistrial was declared. Subsequently, the State nolle prossed those four counts, and without seeking leave of court, re-filed them along with two new counts. The defense moved to dismiss the original four counts alleging that re-prosecution would violate double jeopardy. The trial court dismissed the original four, and left the two new counts pending. The State appealed the dismissal of the four counts.
Holding: The appeal must be dismissed. Sec. 547.200 authorizes the State to appeal when a court quashes an arrest warrant; when a court finds an accused incompetent; and when a court suppresses evidence or a confession. The State claims the appeal here is a quashing of an arrest warrant. However, this is not the case, since Defendant remains charged with two counts and continues to be incarcerated awaiting trial. Furthermore, since two counts remain pending, there is not a "final judgment" in this case, which is necessary for an appeal. Appeal dismissed.

Neal v. Director of Revenue, No. SD27758 (Mo. App. S.D. 5/26/10):
Holding: Where Director made a request for a continuance on or before the "return date," the Associate Circuit Judge was required to grant the continuance because Sec. 517.071.1 provides that a case "shall" be continued upon request of any party made on or before the return date of the summons; this was true even though Director's attorney did not appear personally to argue for a continuance, but merely filed a motion requesting one.

State v. Hopper, No. SD29638 (Mo. App. S.D. 2/19/10):
(1) Even though Defendant failed to disclose his alibi defense until 10 days before trial, where Defendant had told police he wasn't present at crime scene, the sanction of excluding Defendant's alibi evidence was too drastic; (2) even though Defendant failed to appear before trial and escaped from jail before trial, the "escape rule" does not apply to the appeal because the alleged trial error occurred after Defendant was back in custody.
Facts: Defendant was charged with a rape at his girlfriend's house which allegedly occurred on July 5, 2004. The rape was not reported until 2005. When Defendant was arrested in 2005, he told police he had been at his father's house that day, not his girlfriend's. In 2006, the State filed a discovery request under Rule 25.05 asking for notice to rely on alibi. Defendant's counsel did not respond. Defendant then went through several different counsel, and the final counsel filed notice of alibi three years later and 10 days before trial. The State requested that the alibi evidence be excluded for a discovery violation, and the trial court excluded it.
Holding: Defendant should have provided notice of alibi three years earlier. However, the exclusion of alibi evidence as a sanction for a discovery violation is a drastic remedy, because it deprives a defendant of a defense. Here, there were less drastic alternatives available. Defense counsel informed the State of the alibi evidence 10 days before trial. At a minimum, the State could have requested a recess to interview the alibi witnesses. Defendant was prejudiced by exclusion of the alibi evidence because, if believed, Defendant was not at the scene of the crime and could not have committed the offense.

State v. Connell, No. WD72643 (Mo. App. 12/14/10):
Even though State's appeal purported to be an appeal of a grant of a motion to suppress, where trial court had held a bench trial and only after the entire trial entered a "Judgment" purporting to grant the motion to suppress, this Judgment was in reality an acquittal, and State could not appeal.
Facts: Defendant was charged with drug possession. Prior to trial, the trial court overruled Defendant's motion to suppress. Defendant proceeded to a bench trial. At trial, the State introduced the drugs without any objection from the defense. After closing arguments, the court entered an order that stated: "Judgment – Defendant's motion to suppress is sustained." The State appealed.
Holding: Defendant correctly claims that this is not an interlocutory appeal of a grant of a motion to suppress, but is an impermissible appeal of an acquittal. Sec. 547.200.1(3) allows the State to appeal a denial of a motion to suppress. However, the State cannot appeal if this would result in double jeopardy to a defendant, Sec. 547.200.2. Here, the trial court's order is nonsensical since the court admitted the evidence without objection at trial, but then purported to suppress the evidence after trial in a "Judgment."

Suppression of evidence should be ruled upon before, not after, evidence has been admitted at trial. For double jeopardy purposes, the court looks to the entire proceedings. Here, the entire trial was concluded. The practical effect of the trial court's judgment is that after hearing all the evidence, the court concluded as a matter of law that the State could not meet its burden, and thus, Defendant was acquitted. Jeopardy has attached and the appellate court cannot review this appeal as "interlocutory." Appeal dismissed.

State v. Arteaga, No. WD71425 (Mo. App. W.D. 3/9/10):
Where Defendant was acquitted, Sec. 550.040 authorizes him to recover from State cost of depositions, transcripts, and interpreter fees.
Facts: Defendant was charged of second degree murder and acquitted at trial. He then filed a motion to have the State pay his costs for depositions, interpreter's fees, suppression hearing transcripts, and cost of copying the prosecutor's file.
Holding: Sec. 550.040 provides that in all cases where prison is the sole punishment, if the defendant is acquitted, the costs shall be paid by the State; and in all other cases, if the Defendant is acquitted, the costs shall be paid by the county which filed the charge. Second degree murder is an offense with imprisonment as the sole punishment. Hence, the State is responsible for Defendant's costs under Sec. 550.040.

State v. Moad, No. WD70527 (Mo. App. W.D. 9/29/09):
Where trial court excluded evidence as a discovery sanction and not because the evidence was illegally obtained, the State could not appeal the trial court's ruling as an interlocutory appeal (but could seek a writ of prohibition).
Facts: Defendant was charged with vehicular manslaughter resulting from the death of a person in a car. Defendant claimed he was not the driver of the car, but was only a passenger. The car was owned by the victim's family. Before Defendant could conduct an independent examination of the car, the Highway Patrol released the car to the victim's family. The Patrol claimed this was done pursuant to a Patrol policy. Defendant sought discovery of the policy, and despite a court order to produce it, the State never produced it. The trial court then excluded all evidence from the car. The State appealed.
Holding: The question is whether the State has a right to appeal here. Sec. 574.200.1(3) permits an interlocutory appeal by the State where an order suppresses evidence. There is a difference between "suppression" and "exclusion," however. Suppression is a term used when the evidence is not objectionable as violating any rule of evidence, but the evidence has been illegally obtained. Suppression of evidence is linked to the reasons in Sec. 542.296. Here, there was never an argument that the evidence from the car was illegally obtained. Hence, the order here is one of exclusion, not suppression. It is akin to a discovery violation sanction. This is not appealable by interlocutory appeal, but the State may challenge it via writ of prohibition. Appeal dismissed.

State v. Allen, No. WD70295 (Mo. App. W.D. 9/22/09):
Even though the State sought "clarification" of trial court's ruling on motion to suppress from the trial court, where State did not appeal the ruling within 5 days of the original suppression order, State's appeal was untimely under Sec. 547.200.4.
Facts: Defendant filed a motion to suppress statements, which the trial court sustained on September 8, 2008. The court entered a docket entry on September 8, saying "Deft's

motion to suppress statements sustained." The State requested a "more specific ruling" on certain statements, and the court further explained its ruling in chambers on September 9. On November 3, the State asked for "further clarification" of the suppression order, and the court issued another order on November 4. On November 4, the State filed an appeal.

Holding: Sec. 547.200.4 only permits the State to appeal "within 5 days of the entry of the [suppression] order of the trial court." The State argues it is appealing the November 4 order, so its appeal is timely. However, the November 4 order was, in substance, the same as the court's prior rulings on September 8 and 9. The November 4 order, in substance, merely reaffirmed the in chambers conference on September 9. While an appeal within 5 days of September 9 would have been timely, the appeal on November 4 was outside the 5-day time limit for a State's appeal. Appeal dismissed.

Coleman v. State, No. WD68014 (Mo. App., W.D. 5/13/08):

Trial counsel was ineffective in failing to adduce evidence of Defendant's pre-existing injury which made it impossible for him to run, and which would have refuted State's inference that Defendant did not run from police because his foot was injured in the charged burglary.

Facts: A witness saw two men burglarizing a house, and called police. When police arrived, the men ran. Police arrested the men and Defendant, who was also walking in the neighborhood. The witness could not identify any of the men as the burglars, but said their clothing was similar. Defendant claimed he was visiting a woman in the subdivision and was walking to a bus stop. Defendant denied having anything to do with a burglary. A police officer testified at trial that Defendant "could not" run from police, and the jury was left to infer that Defendant "could not" run because he had injured his foot in kicking in the door to the burglary. Defendant claimed counsel was ineffective in failing to present evidence that Defendant had a pre-existing foot injury that made it impossible for him to run.

Holding: It was not reasonable for counsel to fail to present evidence of Defendant's pre-existing foot injury, because this left the false impression with jurors that Defendant did not run from police because he had injured his foot in kicking in the door. A reasonable counsel would have foreseen that the State would draw this inference, and prepared to rebut it. Defendant was prejudiced because the lack of such evidence may have caused the jury to reject Defendant's defense that he was not involved in the burglary and was walking to a bus stop.

Editor's Note by Greg Mermelstein: There was a second claim of ineffectiveness which the Court of Appeals rejected, but which may have been important to the outcome here. Defendant also claimed counsel was ineffective in not calling the co-defendants to testify that they did not know Defendant and he was not involved in the burglary. Counsel had not called the co-defendants because their attorneys had said they would invoke their 5th Amendment rights. However, in the PCR case, the co-defendants testified that they did not know Defendant that he was not involved in the burglary; and that they would have testified to this at trial. The motion court found this testimony incredible, and the Court of Appeals found it was bound by this, but "note[d] that testimony from [codefendants] that they did not know [Defendant] would not have

violated their rights against self-incrimination," thus suggesting that they could have been called to testify to this at trial.

State v. Payne, No. WD67999 (Mo. App., W.D. 4/29/08):
Even though victim suffered puncture wounds on his body, where there was no evidence of what type of weapon caused the wounds, the evidence was insufficient to convict of second degree assault and ACA for use of a "deadly weapon."
Facts: Defendant was involved in a fight with victim, and hit victim and caused "puncture wounds" to victim's body. The weapon was never identified or found. Defendant was convicted of second degree assault for attempting to cause physical injury by means of a "deadly weapon," and armed criminal action for use of a "deadly weapon." The deadly weapon was alleged to be a "dagger."
Holding: Second degree assault occurs when a person causes physical injury by means of a "deadly weapon or dangerous instrument." Sec. 565.060.1(2). Armed criminal action was charged in this case for use of a "deadly weapon." Sec. 571.015.1. Despite that the State could have charged use of a "dangerous instrument," the State chose "deadly weapon," and is held to this proof of the elements of the offense. "Deadly weapon" is defined, in relevant part, as a "dagger." Defendant's use of a weapon to stab victim did not mean that the unidentified weapon was a "dagger." Sec. 556.061(10). "Dagger" does not mean any sharp or pointed object, but is generally a short weapon used for stabbing. There was no evidence Defendant used a "dagger." He could have used a screwdriver, pen, scissors or other object. Conviction for second degree assault and ACA vacated, but conviction for less-included third degree assault is entered.

City of Kansas City v. Dudley, No. WD67675 (Mo. App., W.D. 1/22/08):
Even though Defendant stipulated to the evidence in municipal court, this was a "trial" and, thus, Defendant was entitled to a trial de novo in circuit court under Sec. 479.200.
Facts: Defendant, charged with a municipal offense, pleaded not guilty but stipulated to the City's evidence in the case. This is known in municipal court as a "technical not guilty" plea. Defendant then sought a trial de novo in circuit court. The circuit court held it did not have jurisdiction because Defendant stipulated to the evidence and wasn't "tried."
Holding: Sec. 497.200 provides that a Defendant tried in municipal court has a right to a trial de novo in circuit court. A stipulation of fact dispenses with matters of proof not in dispute, but does not constitute a guilty plea. Defendant has not conceded his guilt and reserves the right to challenge sufficiency of the evidence to convict. The stipulated record met the requirements for a trial. There was jurisdiction under Sec. 479.200 for a trial de novo in circuit court.

State v. Seuferling, No. WD67866 (Mo. App., W.D. 11/20/07):
(1) Even though the trial court denied the State an opportunity to appeal its motion to suppress ruling by suppressing the evidence and granting a judgment of acquittal at the same time, double jeopardy required the Court of Appeals to dismiss the appeal because Defendant could not be retried after a grant of a judgment of acquittal; and (2) Even though the trial court entered its judgment on a Sunday, where that was the last day of the judge's term of office, this was allowed by "exigent" circumstances.

Facts: Defendant was tried at a bench trial. Defendant had filed a motion to suppress evidence. The judge heard the evidence at trial and on the suppression motion and took all matters under advisement. On Sunday, December 31, 2006, the judge issued an order acquitting Defendant of all charges, and granting Defendant's motion to suppress. The judge's term of office expired that day.
Holding: The State claims the judge could not enter judgment on a Sunday, and also that it can appeal the motion to suppress ruling. The State also claims that the Clerk didn't enter the judgment until after the judge left office. However, the controlling date is the day the judge signed the order, not when the Clerk entered it. Section 476.250 allows a court to conduct business on Sunday "as exigencies may require." Since Sunday was the last day of the judge's term of office, and since another judge could not rule on the suppression motion or motion for acquittal, the judge could issue orders that day, since this was an exigent circumstance. Usually, the State has five days to appeal a grant of a suppression motion, Section 547.200. However, the cases are clear that when a court enters a final judgment of acquittal, the State is barred from appealing either the judgment itself or the actions leading to the judgment, no matter how erroneous the judge's actions may have been, because this would violate double jeopardy. Thus, even though the judge may have erred in entering the acquittal at the same time as a ruling on the motion to suppress, the State cannot appeal. Appeal dismissed.

State v. Dunmore, No. WD65590 (Mo. App., W.D. 6/26/07):
Holding: Where 14 years after conviction and direct appeal, Defendant filed a second New Trial Motion alleging various errors involving his conviction, the motion was untimely because not filed within 15 days of the verdict, Rule 29.11(b); furthermore, there was no plain error in the trial court denying the motion because the motion did not completely exonerate Defendant for the crime, and Defendant's claims were not supported by affidavits from witnesses.

State v. Morris, No. WD65899 (Mo. App., W.D. 8/8/06):
Where State dismissed charges against Defendant before trial commenced, Defendant was not entitled to recovery of costs under Section 550.040, which allows recovery of costs "if defendant is acquitted," because Defendant was not "acquitted."
Facts: State dismissed charge of sodomy against Defendant before any trial. Defendant claimed he was entitled to $4,443 in costs under Section 550.040.
Holding: Section 550.040 requires the State to pay costs "if the Defendant is acquitted." This provision is inapplicable to Defendant because he was not "acquitted." The sodomy charge was dismissed before a jury was impaneled or a bench trial began, and jeopardy never attached. The State's voluntary dismissal is not a bar to subsequent prosecution for the offense.

*** Presley v. Georgia, 86 Crim. L. Rep. 427, ___ U.S. ___ (U.S. 1/19/10):**
Holding: 6th Amendment public trial clause prohibits judges from closing jury selection to the public without considering all reasonable alternatives, including those not suggested by the parties.

*** Kansas v. Ventris, 85 Crim. L. Rep. 171, ___ U.S. ___ (4/29/09):**
Holding: Even though police planted a jail-house informant in Defendant's cell in order to elicit statements from Defendant in the absence of counsel, the statements taken in violation of the 6th Amendment right to counsel could be used to impeach Defendant's testimony at trial.

*** Gonzalez v. U.S., ___ U.S. ___, 83 Crim. L. Rep. 195 (5/12/08):**
Holding: Personal consent of Defendant is not required to have federal magistrate preside over jury selection; consent of counsel is sufficient.

*** Indiana v. Edwards, ___ U.S. ___, 83 Crim. L. Rep. 455 (6/19/08):**
Holding: Even though Defendant may be competent under *Dusky* to stand trial, the trial court can still require Defendant to be represented by counsel at trial where Defendant is so mentally ill so as not be able to adequately conduct a trial.

*** Hamdan v. Rumsfeld, 2006 WL 1764793, ___ U.S. ___ (2006):**
Holding: Military commission convened by President to try terrorism suspects violated Uniform Code of Military Justice and Geneva Conventions.

U.S. v. Villar, 2009 WL 3738787 (1st Cir. 2009):
Holding: Court could hear juror testimony as to whether jurors made anti-Hispanic remarks against Hispanic Defendant.

U.S. v. Bryant, 85 Crim. L. Rep. 539 (1st Cir. 7/8/09):
Holding: Where Defendant disputes existence of prior convictions, State cannot prove up Defendant's prior convictions through nonjudicial criminal records such as NCIC records or State Police Information Records.

U.S. v. Wecht, 83 Crim. L. Rep. 823 (3d Cir. 9/5/08):
Holding: Even though trial judge originally consulted with parties about a jury note indicating deadlock, where jury returned to deliberations and again said they were deadlocked two days later, trial court erred in not again consulting the parties.

Terrell v. U.S., 85 Crim. L. Rep. 10, 2009 WL 775434 (6th Cir. 3/26/09):
Holding: Where statute provided that prisoner "shall be allowed to appear and testify," then Parole Commission could not conduct its hearing by videoconferencing without allowing prisoner to appear in person at hearing.

Benitez v. U.S., 2008 WL 942048 (6th Cir. 2008):
Holding: Where Defendant told court at sentencing he had "fired" his private counsel, court had duty to inquire about circumstances.

U.S. v. Sykes, 87 Crim. L. Rep. 755 (7th Cir. 7/19/10):
Holding: Where court allows jurors to question witnesses, it must do so through written questions rather than jurors directly questioning witnesses.

U.S. v. Thompson, 2010 WL 986548 (7th Cir. 2010):
Holding: Where rule gave Defendant right to appear and present evidence before his probation could be revoked, this meant that Defendant had right to appear in same courtroom as judge and revocation hearing via videoconference violated rule.

In re Hajazi, 86 Crim. L. Rep. 350, 2009 WL 4723277 (7th Cir. 12/11/09):
Holding: (1) Alien Defendant who resides abroad has no obligation to appear in person before U.S. district judge in order to challenge the validity of federal indictment; (2) Appellate Court issues writ of mandamus to resolve issue since no "usual procedure" would work to resolve it since Defendant was under no obligation to appear.

U.S. v. Williams, 2009 WL 2366121 (7th Cir. 2009):
Holding: Where Defendant was originally charged with a two-defendant robbery, and five days before trial the State endorsed a new witness who claimed it was a three-defendant robbery and he would testify against Defendant in exchange for immunity, this changed the nature of the case and the trial court erred in denying a defense motion for a continuance of trial.

U.S. v. Shaaban, 2008 WL 1823300 (7th Cir. 2008):
Holding: Appointed counsel allowed to withdraw where Defendant would not permit counsel to raise the non-frivolous issue in case.

Bies v. Bagley, 82 Crim. L. Rep. 612 (7th Cir. 2/27/08):
Holding: Where Defendant had been found mentally retarded by a state court, the State was barred by double jeopardy and collateral estoppel from getting another chance to prove Defendant was not mentally retarded.

U.S. v. Jung, 80 Crim. L. Rep. 458 (7th Cir. 1/18/07):
Holding: Defense counsel's out-of-court statements to a third-party which were intended to placate the victims but which also conveyed incriminating statements of Defendant could not be admitted against Defendant at trial.

U.S. v. Ward, 87 Crim. L. Rep. 52, 2010 WL 1171697 (8th Cir. 3/29/10):
Holding: Before court can exclude disruptive Defendant from trial, court must not rely only on counsel's representation as to whether Defendant is willing to behave but should question Defendant personally before restricting his 6th Amendment right to presence.

U.S. v. Ward, No. 09-1882 (8th Cir. 3/29/10):
Holding: (1) Where trial judge removed Defendant from his trial because he talked loudly to his attorney in a disruptive way, this violated Defendant's 5th and 6th Amendment rights to be present at trial, due process, and confrontation rights; (2) it was further erroneous for the court to make defense counsel the intermediary between Defendant and the court as to whether Defendant wanted to return to trial since there was some evidence that counsel didn't want Defendant to return; Defendant should waive his right to be present and right to testify personally, not through counsel in these situations.

U.S. v. Al-Esawi, 85 Crim. L. Rep. 107 (8th Cir. 3/31/09):'
Holding: Even though an exception to an immunity agreement allowed the Gov't to use evidence from Defendant's proffer session that contradicted Defendant's trial statements, this evidence could not be used preemptively in Gov't's case-in-chief.

Earp v. Cullen, 2010 WL 4069332 (9th Cir. 2010):
Holding: Trial court erred in allowing witness to anticipatorily invoke her 5th Amendment right not to incriminate herself, because it believed witness was going to testify untruthfully and subject herself to prosecution.

Taylor v. Sisto, 87 Crim. L. Rep. 369 (9th Cir. 5/25/10):
Holding: Where judge told jury that they could use their "common sense" but had to leave outside the courtroom "all the decisions that you have made, all the opinions about how people act, how people behave, what kind of people behave in what way, what makes them do that" and that jurors "can't depend" on such "biases and prejudices," this violated Defendant's 6th Amendment right to an impartial jury that was representative of the community.

U.S. v. Castillo-Basa, 80 Crim. L. Rep. 626 (9th Cir. 2/26/07):
Holding: Defendant, who testified in earlier trial and was acquitted, cannot be prosecuted for perjury for having given false testimony because prosecution was barred based on collateral estoppel and double jeopardy.

U.S. v. Sandoval-Mendoza, 80 Crim. L. Rep. 343 (9th Cir. 12/27/06):
Holding: Overnight ban preventing defense counsel from discussing Defendant's upcoming testimony with Defendant violates 6th Amendment right to counsel.

Comer v. Schriro, 2006 WL 2613669 (9th Cir. 2006):
Holding: Due process violated where Defendant appeared in front of judge at sentencing in wheelchair, virtually naked, in shackles, with blood oozing from wounds.

Hooks v. Workman, 87 Crim. L. Rep. 371 (10th Cir. 5/25/10):
Holding: (1) Prosecutor's remarks that jurors' work would be wasted if they didn't reach a unanimous verdict and that failing to reach a verdict would be "jury nullification" and outside the law misstated the law; (2) where jury told judge it was deadlocked 11 to l for death and judge instructed jurors to keep deliberating so that the "case may be completed" and suggested jurors could not go home until they reached a verdict, this improperly coerced a death verdict.

U.S. v. Hasan, 83 Crim. L. Rep. 290, 2008 WL 2097393 (10th Cir. 5/20/08):
Holding: Court committed plain error by finding that Defendant on trial for perjury at a grand jury needed an interpreter at trial, but that he had not been entitled to one at the grand jury; Defendant argued that without an interpreter, he didn't understand the rights advisory.

Ward v. Hall, 86 Crim. L. Rep. 402 (11th Cir. 1/4/10):
Holding: Even though bailiff, in response to a jury question, had given death-penalty jury accurate information that life without parole was not one of their sentencing options, this was error requiring vacating death sentence because it was role of judge, not bailiff, to answer jurors' question and only judge should have answered it.

In re M.C., 88 Crim. L. Rep. 225 (D.C. 11/18/10):
Holding: Where, during a bench trial, judge received emails from a fellow judge about a gov't witness, judicial ethics required that the judge disqualify herself from the rest of the bench trial.

Martin v. U.S., 87 Crim. L. Rep. 52 (D.C. 4/1/10):
Holding: Even though Defendant failed to object to trial court precluding him from talking to counsel over weekend break from trial, this did not waive Defendant's 6th Amendment right to counsel and appellate court found trial court's action constituted plain error.

U.S. v. Graham, 2006 WL 3877345 (E.D. N.C. 2006):
Holding: Providing "bad acts" evidence to defense only three days before trial was not reasonable.

U.S. v. Lopez, 2009 WL 837697 (S.D. Tex. 2009):
Holding: Where gov't elicited information from Defendant in a proffer agreement, and then corroborated that information through co-defendant and used it against Defendant, the use was not sufficiently independent of Defendant's proffer to be proper.

Torres v. Uttecht, 2008 WL 189560 (W.D. Wash. 2008):
Holding: Non-English-speaking pro se Defendant's right to self-representation was violated where judge refused to allow a jury question during deliberations translated into Defendant's language, so Defendant could respond.

Fushek v. State, 82 Crim. L. Rep. 578, 2008 WL 384376 (Ariz. 2/18/08):
Holding: Defendant constitutionally entitled to jury trial on misdemeanor charge that would result in having to register as sex offender, because this is a sufficiently serious consequence to warrant a jury trial, even though offense has a short jail sentence.

People v. Castillo, 2010 WL 2025548 (Cal. 2010):
Holding: Under judicial estoppel doctrine, where prosecutor, defense and court had agreed to seek only two year commitment for SVP Defendant, this was binding on them even though later appellate decisions held such stipulations could not be negotiated.

State v. Angel T., 85 Crim. L. Rep. 544 (Conn. 6/30/09):
Holding: Due process prohibits Prosecutor from presenting evidence or argument that Defendant's prearrest retention of counsel indicates Defendant's guilt or impeaches his trial testimony that he was innocent.

Czech v. State, 83 Crim. L. Rep. 8 (Del. 3/17/08):
Holding: Court may allow a child witness-victim to have a "support person" with them during court testimony if there is a "substantial need" for it, but safeguards must include (1) allowing defense to suggest alternative; (2) cautioning the support person not to prompt the child to give testimony or approve or disapprove of testimony; (3) instructing jurors that the presence of the support person should not affect their credibility determination; and (4) the support person cannot be from the Prosecutor's Office.

Petion v. State, 88 Crim. L. Rep. 139 (Fla. 10/21/10):
Holding: Even though judges in bench trial are presumed not to have considered inadmissible evidence, this presumption is rebutted where judge made findings on the record that the evidence was admissible.

Turner v. State, 82 Crim. L. Rep. 474 (Ga. 1/8/08):
Holding: Jury verdict acquitting Defendant of a shooting because shooting was justified necessarily precluded the jury from simultaneously convicting Defendant of felony-murder; was an inconsistent verdict.

State v. Mundon, 2009 WL 2791659 (Haw. 2009):
Holding: Hawaii Const. provides right for pro se Defendant to consult with stand-by counsel during a recess taken during his cross-examination.

State v. Patrick, 84 Crim. L. Rep. 527 (Ill. 1/23/09):
Holding: Where Defendant filed motion in limine to exclude his prior convictions from being used for impeachment, the trial court was required to rule on the motion in limine before Defendant testified.

Tyler v. State, 85 Crim. L. Rep. 83, 2009 WL 885879 (Ind. 3/31/09):
Holding: Indiana statute providing a hearsay exception in child sex cases does not permit the State to present both the child-declarant as a witness and the same matters through other witnesses, even though the statute's language appears to authorize this.

State v. Taeger, 2010 WL 1727642 (Iowa 2010):
Holding: Prosecution was not entitled to voluntarily dismiss a prosecution for DWI before Defendant's motion to suppress was decided.

Morrow v. Com., 85 Crim. L. Rep. 524 (Ky. 6/25/09):
Holding: Defendant can both deny commission of offense and assert an alternative defense of entrapment.

State v. Gutweiler, 83 Crim. L. Rep. 62 (La. 4/8/08):
Holding: Dismissal of indictment was required where prosecutor violated grand jury secrecy rules by releasing transcripts, but witnesses could still testify at new grand jury or trial.

Moore v. State, 86 Crim. L. Rep. 703 (Md. 2/26/10):
Holding: Trial court, upon request, must ask venirepersons if they would be more likely to view defense witnesses with skepticism over prosecution witnesses.

Johnson v. State, 85 Crim. L. Rep. 106 (Md. 4/8/09):
Holding: Prosecutors could not engage in "anticipatory rehabilitation" of their witness in their case-in-chief by asking about U.S. currency having drug residue to rebut anticipated defense evidence about this; "anticipatory rehabilitation" is unduly prejudicial.

Gonzales v. State, 85 Crim. L. Rep. 242 (Md. 5/7/09):
Holding: Where on day of trial Defendant's retained attorney did not appear but sent a partner and Defendant did not want to be represented by partner, court erred in making Defendant proceed pro se because he was denied counsel of his choice.

Myer v. State, 2008 WL 623323 (Md. 2008):
Holding: Trial court abused discretion in not allowing defense to recall child sex victim to testify where, after her in-court testimony, the State, over Defendant's objection, played a video of child that contained inconsistent statements; Defendant had a right to cross-examine about the inconsistencies and did not need to do so during the child's original examination because that would open the door to the video.

Price v. State, 83 Crim. L. Rep. 463, 2008 WL 2330222 (Md. 6/9/08):
Holding: Defendant's conviction for firearm possession during drug trafficking was inconsistent with his acquittal on the drug trafficking charges themselves.

McDonough, 87 Crim. L. Rep. 784 (Mass. 8/11/10):
Holding: Even though trial court found Victim-Witness to be mentally incompetent to testify, Victim-Witness had no standing to appeal this ruling; appeal could only be pursued by a party to the criminal case (i.e., the prosecutor).

Com. v. Medeiros, 86 Crim. L. Rep. 626 (Mass. 2/11/10):
Holding: Where two defendants are jointly tried for rape as a "joint enterprise" and one is acquitted, a guilty verdict against the other defendant must be set aside as an inconsistent verdict.

Com. v. Silva-Santiago, 85 Crim. L. Rep. 275 (Mass. 5/15/09):
Holding: Mass. Supreme Court sets standards for police photographic arrays, including making eyewitness aware that alleged wrongdoer may not be in any of the photos, and that investigation will continue regardless of whether eyewitness makes a photo identification.

State v. Cannady, 80 Crim. L. Rep. 524 (Minn. 2/8/07):
Holding: Due process was violated by a child pornography statute that made it an affirmative defense to show that the people depicted were 18 years old or older because this placed the burden of proof on Defendant concerning age.

State v. Solomon, 83 Crim. L. Rep. 12, 2008 WL 762461 (N.H. 3/20/08):
Holding: Double jeopardy attached when trial judge in middle of trial left for military duty in Iraq; Defendant was entitled to have trial concluded by a single particular judge, and the State did not take steps to protect that right, even though they knew the judge could be called away.

State v. Grenci, 84 Crim. L. Rep. 630 (N.J. 2/24/09):
Holding: Even though New Jersey has a rule that a Defendant waives presence at trial by absconding after receiving notice of a trial date, this waiver does not apply to new, additional charges on which Defendant has not yet been arraigned.

State v. Ingram, 83 Crim. L. Rep. 697 (N.J. 7/21/08):
Holding: Trial court erred in instructing jurors that Defendant's absence from trial showed consciousness of guilt; Defendant had right to waive presence at trial, and his absence was not to avoid apprehension.

State v. Belanger, 85 Crim. L. Rep. 523 (N.M. 6/23/09):
Holding: Judge can grant immunity to defense witnesses even over prosecutor's objection.

People v. Fiammegta (N.Y. 2/16/10) and **Harris v. Commonwealth (Va. 2/25/10), 86 Crim. L. Rep. 669:**
Holding: Where defendants are terminated from drug courts, due process requires that they have some opportunity to present evidence and be heard on claims that they were wrongfully terminated.

People v. Buchanan, 2009 WL 1850959 (N.Y. 2009):
Holding: Defendant charged with murder could not be required to wear stun belt even if not visible to jury absent specifically identified security reasons.

State v. Williams, 80 Crim. L. Rep. 385 (N.C. 12/15/06):
Holding: Trial judge abused his discretion in only giving defense counsel five minutes to consider whether to present evidence in murder case after State had rested its case.

State v. Speer, 2010 WL 756988 (Ohio 2010):
Holding: Even though court provided hearing-impaired juror with a transcript of a police call made by Defendant, this did not enable the juror to discern the demeanor, speech patterns or excitement of Defendant; thus, Defendant was denied his right to a fair trial by 12 jurors.

Com. v. Weigle, 2010 WL 1063990 (Pa. 2010):
Holding: Where robbery charges were dismissed at preliminary hearing, State could not reassert them as cognate offenses of retail theft, which was bound over for trial.

Com. v. McMullen, 84 Crim. L. Rep. 383 (Pa. 12/18/08):
Holding: Legislature's attempt to regulate indirect criminal contempt (i.e., violation of court orders outside judge's presence) violated separation of powers.

In re Richland County Magistrate's Court, 87 Crim. L. Rep. 890 (S.C. 9/7/10):
Holding: Even though a state statute allowed non-lawyers to represent businesses in court, a non-lawyer for a business could not serve as a Prosecutor in a case against a Defendant who wronged the business; prosecutors are expected to represent the public and be impartial in deciding whether to prosecute and whether to negotiate a plea bargain.

State v. Jordan, 88 Crim. L. Rep. 64, 2010 WL 3668513 (Tenn. 9/22/10):
Holding: Even though witness sequestration rule was violated at capital sentencing proceeding, trial judge should not automatically exclude witness but should consider impact of proffered testimony and other relevant factors.

State v. Scarbrough, 78 Crim. L. Rep. 290 (Tenn. 11/30/05):
Holding: State cannot use collateral estoppel to bar Defendant from re-litigating elements of offense in subsequent case because this would be inconsistent with Defendant's right to a jury trial.

People v. Fiammegta (N.Y. 2/16/10) and **Harris v. Commonwealth (Va. 2/25/10), 86 Crim. L. Rep. 669:**
Holding: Where defendants are terminated from drug courts, due process requires that they have some opportunity to present evidence and be heard on claims that they were wrongfully terminated.

State v. Brillon, 2010 WL 988514 (Vt. 2010):
Holding: Defendant was entitled to bifurcate the aggravated portion of a domestic assault charge where enhancement was based on violating a condition-of-release order, since this was highly prejudicial and of limited probative value regarding the elements of the domestic assault charge.

State v. Brillon, 87 Crim. L. Rep. 49 (Vt. 3/19/10):
Holding: Where Defendant was charged with domestic assault and the aggravating factor to elevate offense to a felony was violation of a protective order, trial court should have bifurcated the trial and sentencing phases because of undue prejudice in guilt phase from evidence about violating protective order.

State v. Amidon, 2008 WL 3982509 (Vt. 2008):
Holding: Statements Defendant made in a PSI after a guilty plea were not admissible at a trial on the charges, even for impeachment, when the plea was later withdrawn.

State v. Dixon, 83 Crim. L. Rep. 760 (Vt. 8/14/08):
Holding: In considering whether juvenile should be certified as adult, court must give no weight to whether certification would allow greater public access to the proceedings, since goal of juvenile court is to protect Defendant from publicity.

Singleton v. Com., 86 Crim. L. Rep. 242 (Va. 11/5/09):
Holding: A defense counsel who reached an agreement with a prosecutor to continue a case and then told client not to appear, without the judge's approval, should not be held in criminal contempt in this instance because proof was lacking that the counsel intended to obstruct justice, but in the future, attorneys should not presume that judges will grant continuances just because the parties agree to them.

State v. Turner, 87 Crim. L. Rep. 834 (Wash. 8/19/10):
Holding: Where Defendant is convicted at trial of both greater and lesser offense, it constitutes double jeopardy for trial court to conditionally vacate the conviction on the lesser while directing that the conviction remain valid in anticipation of the greater offense getting reversed on appeal.

State v. Jaime, 87 Crim. L. Rep. 368 (Wash. 5/27/10):
Holding: Where judge held jury trial in jailhouse courtroom without any specific finding as to the need for this, this violated Defendant's presumption of innocence and right to fair trial.

State v. Abrams, 2008 WL 732744 (Wash. 2008):
Holding: Perjury statute which required judge to determine materiality of statement violated 6th Amendment right to have jury find facts.

Gibson v. McBride, 83 Crim. L. Rep. 390 (W.Va. 6/12/08):
Holding: Fair trial was violated where judge forced jailed defense witnesses to testify in jail clothes, but allowed jailed prosecution witnesses to appear in street clothes.

State v. Finley, 80 Crim. L. Rep. 222 (W.Va. 11/16/06):
Holding: In non-capital trial, Defendant cannot be required to appear at sentencing hearing in jail clothes absent circumstances particular to that Defendant.

Oviuk v. State, 2008 WL 901785 (Alaska Ct. App. 2008):
Holding: Even though Defendant would be shackled, this did not justify refusing to allow him to waive counsel and proceed pro se.

People v. Traugott, 2010 WL 1797247 (Cal. App. 2010):
Holding: Even though Defendant absented herself from trial, she did not forfeit right to a 12-person jury verdict and jury of 11 was not sufficient to convict (1 juror left before verdict).

People v. Kiney, 81 Crim. L. Rep. 387 (Cal. Ct. App. 5/30/07):
Holding: A *pro se* Defendant's admissions made in closing argument at trial can be used against Defendant at a subsequent trial.

People v. Arko, 2006 WL 2828868 (Colo. Ct. App. 2006):
Holding: Where counsel and Defendant disagree about whether a lesser-included offense instruction should be requested, court should follow wishes of Defendant.

People v. Knight, 2006 WL 3437553 (Colo. Ct. App. 2006):
Holding: Murder Defendant who called incarcerated defense witnesses was entitled to have those witnesses appear in front of jurors unshackled and in street clothes, so as not to undermine their credibility.

Barrow v. State, 2010 WL 445388 (Fla. Dist. Ct. App. 2010):
Holding: Where jury requested transcripts of testimony, trial judge abused discretion in not telling jurors they could request a read back of testimony and instead told them that no transcripts were available and they had to use their recollection, when statute allowed a read back.

Shootes v. State, 2009 WL 3353139 (Fla. Dist. Ct. App. 2009):
Holding: Where Defendant was charged with assaulting law enforcement, he was denied his rights to a fair trial and impartial jury because a large number of police officers packed the courtroom as spectators and sat together in seats closest to the jury; this was inherently prejudicial.

Milton v. State, 2008 WL 514996 (Fla. Ct. App. 2008):
Holding: Defendant was denied right to confrontation where Prosecutor called co-defendant to stand and had co-defendant refuse to testify; Prosecutor improperly tried to create impression that co-defendant had incriminating evidence against Defendant by doing this.

State v. Ruperd, 2009 WL 279965 (Idaho Ct. App. 2009):
Holding: Even though Defendant failed to appear at motion to suppress hearing, this did not justify court holding that hearing was waived, because personal presence was not required at a motion to suppress hearing.

People v. Jones, 2006 WL 3780691 (Ill. Ct. App. 2006):
Holding: Where trial judge notices a potential sleeping juror, judge has independent duty to inquire about it.

Edwards v. State, 2010 WL 2749654 (Ind. Ct. App. 2010):
Holding: Testimony from two eyewitnesses that Defendant was not at the crime scene was not an "alibi defense," and therefore, was admissible even though Defendant did not comply with notice of alibi rule.

Hape v. State, 2009 WL 866857 (Ind. Ct. App. 2009):
Holding: Where party seeks to admit telephone text message, the message must be authenticated before admission.

State v. Johnson, 2008 WL 5411974 (Kan. Ct. App. 2008):
Holding: Where trial court failed to follow the statutory mandate to inquire into whether jury's verdict was actually their verdict, this was reversible error.

Schroering v. Hickman, 2007 WL 542745 (Ky. Ct. App. 2007):
Holding: Where trial court held attorney in direct contempt for making remarks to judge, but ordered that another judge later sentence Defendant-attorney, Defendant-attorney was entitled to a hearing on the contempt because by sending the case to another judge, there was no emergency, which is the purpose of direct contempt.

State v. Jones, 2009 WL 3446347 (La. Ct. App. 2009):
Holding: Where trial court received a letter from a juror accusing another juror of using racial epithets, trial court should have conducted a hearing to hear testimony from jurors.

Maye v. State, 2009 WL 3823287 (Miss. Ct. App. 2009):
Holding: Where Defendant who had obtained a change of venue then moved to have venue retransferred to original county, trial court did not give sufficient rationale for not allowing venue to be retransferred to original county.

State v. Campbell, 2010 WL 269280 (N.J. Super. Ct. App. 2010):
Holding: A jury trial waiver for an original trial does not carry over to a retrial after a mistrial is declared.

State v. Robinson, 2007 WL 471131 (N.J. Super. Ct. 2007):
Holding: Instead of substituting a juror who was discharged with an alternate juror, trial court should have granted Defendant's motion for mistrial where it was clear that the dismissed juror was the only hold-out juror, and it was clear that the other 11 jurors were not likely to have been able to follow instruction to begin deliberations anew with the alternate juror.

People v. Smith, 2010 WL 2774487 (N.Y. Sup. 2010):
Holding: Defendant's right of self-representation was violated where, although Defendant was allowed to represent himself at trial, he wasn't allowed to participate in side-bar conferences at bench.

Gorman v. Rice, 2010 WL 3326860 (N.Y. Sup. 2010):
Holding: Where judge had already declared a mistrial, and then asked Defendant to choose between the mistrial or continuing the trial, Defendant's choice was only acquiescence and Defendant did not waive her double jeopardy rights.

State v. Dale R., 2009 WL 1789338 (N.Y. Sup. 2009):
Holding: Where statute prohibited testimony by remote video feed, trial court did not have discretion to allow this.

People v. Wrotten, 2008 WL 5396862 (N.Y. App. Div. 2008):
Holding: Even though assault victim was in poor health and unable to travel to court, reversible error occurred in allowing victim to testify via 2-way television since this was not authorized by statute in non-sex cases.

State v. Hurt, 2010 WL 4608708 (N.C. Ct. App. 2010):
Holding: 6th Amendment right to confrontation applies at non-capital sentencing trials which require a finding by the jury.

State v. Hay, 2006 WL 2795181 (Ohio Ct. App. 2006):
Holding: Where trial court dismissed one charge after it found that Defendant did not furnish alcohol to a minor, res judicata required trial court to dismiss contributing to delinquency of minor charge, too, because this was based on furnishing alcohol.

State v. Barrie, 2009 WL 997156 (Or. Ct. App. 2009):
Holding: Where Defendant was charged with manslaughter and had rejected a plea offer for that offense, trial court erred in, sua sponte, entering conviction for lesser-included offense of negligent homicide where Defendant did not request the lesser and had no notice court might enter it.

Com. v. Garzone, 2010 WL 1445193 (Pa. Super. 2010):
Holding: Defendant could not be charged salaries of prosecutors as "costs" for his case.

Commonwealth v. Kriner, 2007 WL 5749 (Pa. Super. 2007):
Holding: Child victim who died before trial was not an "unavailable" witness for purpose of statute allowing out-of-court statements of child sex victim to be admitted, because the statute required a determination of whether testifying would be emotionally harmful to the child, and death didn't satisfy this definition of unavailability.

Wiseman v. State, 2006 WL 2773088 (Tex. App. 2006):
Holding: Shackling Defendant during child abuse trial was abuse of discretion where trial court shackled Defendant based on seriousness of charge, and not based on particular circumstances of Defendant.

Garcia v. State, 2008 WL 4184645 (Tex. App. 2008):
Holding: To warrant evidentiary hearing on new trial motion for newly discovered evidence, Defendant need only show affidavits reflecting reasonable grounds for granting a new trial, and need not show the new evidence would probably bring about a different result in a new trial.

State v. Sadler, 84 Crim. L. Rep. 147 (Wash. Ct. App. 10/14/08):
Holding: Where trial court held its *Batson* hearing outside the courtroom, this violated Defendant's right to a public trial.

Venue

State v. Taylor, No. SC88426 (Mo. banc 11/20/07):
(1) Venue is not element of offense, and must be objected to in a pretrial hearing; and, (2) if venue is wrong, case must be transferred to correct county.
Facts: Defendant claimed that venue was an element of forcible rape, and was not proven beyond a reasonable doubt by the State.
Holding: Even though MAI-CR 320.01 appears to make venue an element of the offense of rape, the MAI is incorrect, because the forcible rape statute does not make location of the crime an element of the offense. Venue is an important procedural right, but it is not jurisdictional, and can be waived. Section 476.410 allows a case filed in a wrong county to be transferred to the correct county. Thus, transfer is the proper remedy for wrong venue, not dismissal of a case. A defendant's objection to venue must be made before trial. The prosecution must show by a preponderance of evidence that the crime occurred in that county. The judge will then determine where venue lies. If venue is in a different county, the judge shall transfer the case to the correct county under Section 476.410. Previous cases that hold the State must prove venue at trial are overruled.

State ex rel. Devlin v. Sutherland, No. ED87231 (Mo. App., E.D. 5/16/06):
Trial court has no jurisdiction to, on its own motion, order change of venue to another county; Defendant had constitutional and statutory right to be prosecuted in county where crime occurred.
Facts: Defendant was charged with sodomy in Montgomery County. Trial court, on its own motion under Rule 32.09(c), ordered venue changed to Audrain County due to extensive publicity. Defendant sought writ of prohibition to keep case in Montgomery County.
Holding: A reading of Rules 32.01 to 32.09 demonstrates that only the defendant can request a change of venue. This is because the Sixth Amendment provides that the defendant has a right to be tried in the "district wherein the crime shall have been committed." Article I, Section 18(a) of the Missouri Constitution also provides that the defendant has a right to trial in the county where the crime was committed. Section 541.033.1(1) also directs that defendants be tried in the county in which the offense was committed. Thus, the trial court had no jurisdiction to order venue be changed to Audrain County in the absence of a request by Defendant. Writ made absolute.

Sabatucci v. State, No. SD30380 (Mo. App. S.D. 11/19/10):
Holding: Where Movant timely filed his 24.035 motion in the wrong county, the motion court should have transferred it to the proper county under Sec. 476.410 instead of dismissing it.

U.S. v. Perlitz, 2010 WL 2794103 (D. Conn. 2010):
Holding: Even though Defendant listed a Connecticut address, used a Conn. travel agency, and used a car service to travel from his home in Conn. to the airport in New York, this did not support venue in Conn. for offense of traveling in foreign commerce to engage in sex with minor, where Defendant flew from New York to foreign country.

U.S. v. Wright, 2009 WL 737638 (E.D. N.Y. 2009):
Holding: Where Defendant was charged with assault for having assaulted prosecutor at a sentencing hearing, change of venue was warranted to avoid having case tried in courthouse where crime occurred and surrounded by court personnel who may have witnessed the crime and known the prosecutor.

Com. v. Armstrong, 84 Crim. L. Rep. 312 (Mass App. Ct. 12/3/08):
Holding: Where Defendant took victim out-of-State and raped her and then returned to State, the only rapes that could be prosecuted in State were those occurring in State; State cannot get jurisdiction over out-of-State rapes through "effects doctrine."

Maye v. State, 2009 WL 3823287 (Miss. Ct. App. 2009):
Holding: Where Defendant who had obtained a change of venue then moved to have venue retransferred to original county, trial court did not give sufficient rationale for not allowing venue to be retransferred to original county.

Waiver of Appeal

State v. Black, No. SC87785 (Mo. banc 5/29/07):
Where death penalty Defendant repeatedly and unequivocally demanded to represent himself, trial court erred in denying his motions to proceed pro se on grounds that he would be better represented by counsel.
Facts: Defendant was charged with first degree murder. The State sought the death penalty. Defendant filed numerous motions before trial to represent himself. On the day of trial, Defendant renewed his request to represent himself. The trial court overruled the motions, finding that Defendant was not a licensed attorney and his Public Defenders were "more capable than you" of providing representation. Defendant was convicted and sentenced to death. He appealed, claiming he was denied his right to represent himself.
Holding: Defendants have a 6th Amendment right to self-representation. The 6th Amendment contemplates counsel aiding a willing defendant – not counsel being thrust upon an unwilling defendant as an organ of the State. To be entitled to proceed pro se, a defendant must make an unequivocal and timely motion, and his waiver of counsel must be knowing and intelligent. To refuse to honor a request to go pro se merely because the trial court felt Defendant's attorneys could do a better job was structural error. Reversed and remanded for new trial.

Chaney v. State, No. ED93798 (Mo. App. E.D. 11/2/10):
Where (1) plea court had already accepted Movant's guilty pleas and sentenced him before court and prosecutor brought up idea that Movant was waiving his postconviction

rights as part of the plea, and (2) defense counsel said he had not advised Movant about this, the alleged waiver was invalid because it came after the pleas were entered and was without counsel.

Facts: Movant pleaded guilty to various offenses. After the court accepted the plea and sentenced Movant, the State listed several other offenses it said it was agreeing not to file, and said that Movnant was agreeing that if Movant filed a postconviction motion, then the State would file those charges. Defense counsel said he had not discussed this with Movant and it would be a conflict of interest for him to advise Movant on this matter. The court told defense counsel to discuss it with Movant but not advise him. The proceedings went off the record. Counsel said he advised Movant not to waive his rights, but Movant said he was pleading anyway without advice of counsel. Movant later filed a 24.035 motion, and the State moved to dismiss it on grounds that Movant waived his postconviction rights.

Holding: It bears emphasizing that the purported waiver, which the State claims was part of the plea agreement, did not occur until after the court had accepted Movant's pleas and sentenced him. Thus, it is clear that the waiver of postconviction rights was not part of the plea agreement. A defendant can waive his postconviction rights only if the record clearly demonstrates he was properly informed of his rights, and the waiver was made knowingly, voluntarily and intelligently. Implicit in this is that a waiver can only be valid if defendant is represented by counsel and fully informed of his rights. Here, Movant did not have the benefit of counsel when he purportedly waived his rights. Thus, his waiver was not knowing, voluntary or intelligent. Motion to dismiss denied.

State v. Cain, No. SD29090 (Mo. App. S.D. 5/15/09):

(1) Even though the parties stipulated in trial court that Defendant's sentence would be reduced and the appeal waived, this did not waive Defendant's appeal because the trial court had no power to reduce Defendant's sentence long after sentencing; (2) where Defendant's prior DWI offense conduct occurred more than five years before the charged DWI offense, Defendant was not a "prior offender," Sec. 577.023.1(5) RSMo. Cum. Supp. 2005; and (3) Point Relied On must state that trial court erred in admitting evidence at trial, not just in denying motion to suppress.

Facts: In April 2007, Defendant was charged with DWI as a prior offender for having "been convicted on August 27, 2002" of DWI in Jefferson County. The conduct giving rise to the Jefferson County charge occurred in 2000. After Defendant was convicted in the new case, he filed an appeal. Meanwhile, six months after sentencing, the parties in the trial court stipulated that Defendant's sentence would be reduced to time served and "in exchange for this outcome, Defendant has agreed to waive" his appeal.

Holding: (1) The State argued that Defendant has waived this appeal because of the stipulation in the trial court. However, there was no authority for the trial court to reduce Defendant's sentence; therefore, Defendant's purported waiver of his right to appeal, based on the mutual false assumption by the parties as to the trial court's authority to reduce Defendant's sentence, was not and could not have been voluntarily made. Once sentencing occurs in a case, the trial court loses jurisdiction, and cannot reduce a sentence as was done here. The trial court could have granted Defendant parole under Sec. 559.100 RSMo. Cum. Supp. 2006, but that's not what the court purported to do here. (2) Although the date of Defendant's prior DWI conviction was August 27, 2002, the

conduct giving rise to that conviction occurred in 2000. Sec. 577.023.1(5) RSMo. Cum. Supp. 2005 provides that a prior offender is one whose "prior offense occurred within five years" of the newly charged offense. The 2000 DWI conduct is not within five years of April 6, 2007, the date of the new DWI offense. Therefore, Defendant cannot be sentenced as a "prior offender," and can only be sentenced for a Class B misdemeanor. (3) Defendant's Point Relied On on appeal raises an issue that the trial court erred in denying a motion to suppress. The Point Relied On does not claim error in admitting the evidence at trial. A trial court's ruling on a motion to suppress is interlocutory. A motion to suppress by itself preserves nothing for appeal, and a Point Relied On that refers only to such a ruling preserves nothing for appeal. However, the Court reviews the claim here because the motion was preserved at trial and in the new trial motion, so the State had notice Defendant was raising this issue.

State v. Green, 189 S.W.3d 655 (Mo. App., S.D. 2006):
Where Defendant, after trial, waived his right to appeal in exchange for a minimum sentence, Appellate Court would enforce the waiver. Appeal dismissed.
Facts: Defendant was a prior and persistent offender. He was convicted at a jury trial. After trial, Defendant and the State agreed that the State would recommend a minimum sentence if Defendant waived his right to appeal and postconviction relief. The trial court at sentencing questioned Defendant on the record about this agreement, and imposed the minimum sentence. Defendant then appealed claiming that the evidence was insufficient to convict him.
Holding: The right of appeal may be voluntarily waived by a criminal defendant. When a defendant agrees to voluntarily waive an appeal in exchange for a reduced sentence and then receives the "benefit of the bargain," an Appellate Court will hold the defendant to his part of the bargain. Appeal dismissed.

U.S. v. Woltmann, 2010 WL 2652470 (2d Cir. 2010):
Holding: Even though plea agreement said Defendant waived any appeal if his sentence was less than 27 months, where the plea agreement also called for judge to consider a Gov't letter advocating for a more lenient sentence, the judge abdicated his responsibility and breached the agreement by sentencing Defendant to less than 27 months without considering the letter; therefore, the appeal waiver was unenforceable.

U.S. v. Goodson, 84 Crim. L. Rep. 112 (3d Cir. 10/16/08):
Holding: Even though Defendant did not challenge his appeal waiver in his opening brief, this did not waive a challenge to the waiver.

U.S. v. Poindexter, 2007 WL 1845119 (4th Cir. 2007):
Holding: Counsel was ineffective in not filing notice of appeal at Defendant's request, even though he executed an appeal waiver as part of his plea.

U.S. v. Cooley, 86 Crim. L. Rep. 361 (5th Cir. 12/9/09):
Holding: Even though Defendant bargained for a plea in exchange for waiving right to appeal or collaterally attack sentence, this did not preclude Defendant from moving to

modify sentence under 18 USC 3582(c)(2) to reflect subsequent revision in Sentencing Guildelines.

U.S. v. Tapp, 2007 WL 1839277 (5th Cir. 2007):
Holding: Failure to file notice of appeal when requested to do so is per se ineffective, even when Defendant waived his right to direct appeal and collateral review.

U.S. v. Monroe, 85 Crim. L. Rep. 677 (7th Cir. 9/1/09):
Holding: Even though Defendant waived his right to appeal and collateral attack, this did not preclude him from seeking a sentence reduction under 18 USC 3582(c)(2) because a sentence reduction is different than appeal or collateral attack.

U.S. v. Nguyen, 87 Crim. L. Rep. 43 (8th Cir. 4/2/10):
Holding: Even though plea agreement contained exception to appeal waiver for constitutional errors, Defendant cannot appeal a sentence imposed by judge who applied the "extraordinary circumstances" restriction on variances condemned in *Gall*, because the U.S. Supreme Court's repudiation of the extraordinary-circumstances standard was rooted in the remedial holding of *Booker*, not the constitutional holding of the case.

Watson v. U.S., 2007 WL 2049697 (8th Cir. 2007):
Holding: Even though Defendant's plea agreement limited his right to appeal, counsel was ineffective in failing to file an appeal where Defendant requested it.

U.S. v. Charles, 85 Crim. L. Rep. 713 (9th Cir. 2009):
Holding: Even though Defendant waived his right to appeal a sentence within the guideline range, where Defendant reserved the right to appeal trial court's "determination of criminal history category," this was ambiguous enough to allow appeal with respect to career-offender guidelines.

U.S. v. Castillo, 81 Crim. L. Rep. 546 (9th Cir. 7/25/07):
Holding: Even though Defendant executed a waiver of appeal when he pleaded guilty, where the prosecutor argues the merits on appeal, the Court of Appeals may consider the merits.

U.S. v. Wilken, 2007 WL 2372381 (10th Cir. 2007):
Holding: Trial court's statements to Defendant about agreement to waive appeal created ambiguity about agreement which rendered waiver invalid.

People v. Johnson, 87 Crim. L. Rep. 206 (N.Y. 5/4/10):
Holding: Where trial court did not honor certain aspects of a plea agreement, this caused an appeal wavier as part of the plea agreement to be invalidated.

Harris v. State, 2007 WL 866214 (Ala. Crim. App. 2007):
Holding: Non-indigent defendant's discharge of counsel one week before trial was not an implied waiver of constitutional right to counsel.

People v. Billings, 85 Crim. L. Rep. 222 (Mich. Ct. App. 4/23/09):
Holding: Requiring indigent Defendant to waive appellate counsel as a condition of pleading guilty violates Equal Protection and Due Process.

Waiver Of Counsel

In the Interest of M.M., No. ED93857 (Mo. App. E.D. 8/31/10):
Where (1) Public Defender withdrew from Juvenile's case shortly before trial; (2) Juvenile authorities and court told Juvenile she would be held in detention if she requested continuance of trial; (3) court's remarks indicated Juvenile could "explain" herself if she pleaded guilty; and (4) court did not explain nature of charges, range of punishments or possible defenses, Juvenile's waiver of counsel was not voluntary or intelligent.
Facts: Juvenile was charged with tampering. Shortly before trial, Public Defender withdrew from Juvenile's case because Juvenile's parents were not indigent. Juvenile authorities told Mother that they would recommend Juvenile be held in detention if the trial was continued because family wanted more time to obtain counsel. On day of trial, Juvenile authorities and court again told Juvenile that she would be detained pending trial if the case was continued, unless they could arrange for electronic monitoring, which was uncertain. However, court said Juvenile had option of entering guilty plea. The court indicated Juvenile would have opportunity to "explain" herself. Juvenile then pleaded guilty, and in doing said, said she thought she had permission from a friend to drive the car, but later learned that the friend didn't have permission. After the plea, Juvenile filed a motion to vacate the plea on grounds that her waiver of counsel was not voluntary or intelligent.
Holding: The constitutional standard for waiver of counsel by juveniles is no less than for adults. The validity of a waiver depends on the totality of circumstances. Here, Juvenile had no prior history with a court. She thought she would be represented by the Public Defender, but the Public Defender withdrew shortly before trial. She was told she would be detained if she sought a continuance to obtain private counsel. At trial, Mother asked for more time to obtain counsel, but was told Juvenile would be detained. The court said that Juvenile could plead guilty and could "offer an explanation" of what happened, but would not be allowed to withdraw plea. Mother then said Juvenile would plead. This did not show that Juvenile's waiver was voluntary. Also, the court never discussed the nature of the charges, the range of punishment or possible defenses prior to waiver of counsel. This made the waiver not intelligent. Case reversed.

State v. Constance, No. 28503 (Mo. App., S.D. 4/03/08):
Where indigent Defendant was appointed a Public Defender for appeal, but then "fired" that Public Defender, Defendant was not entitled to counsel of his choice on appeal or hybrid counsel.
Holding: An indigent defendant has a constitutional right to counsel in pursuing a direct appeal, and trial courts are required to appoint such counsel, Rule 31.02(c). Although there is no constitutional right to proceed pro se on appeal, courts may permit it. Defendants are not entitled to counsel of their choice, or to hybrid counsel or joint

representation. Here, Defendant was appointed a Public Defender for appeal, but then fired her. Defendant cannot then complain that he was denied his right to counsel.

State v. Nichols, No. 27047 (Mo. App., S.D. 12/04/06):
Defendant's waiver of counsel was not knowing, voluntary and intelligent where trial court failed to warn of dangers of self-representation on the record, and failed to obtain written waiver of counsel.
Facts: Defendant proceeded pro se at trial. On appeal, Defendant contended his waiver of counsel was not knowing, voluntary and intelligent.
Holding: Defendant's waiver of counsel was not properly obtained. Section 600.051 requires that a defendant be advised of various rights and sign a written waiver of counsel before he can be allowed to waive counsel. There must be an inquiry on the record so that there is evidence that the defendant understood the ramifications of waiver. Here, even though there was a docket entry showing Defendant was advised regarding self-representation, the hearing was not on the record. Moreover, the proceedings on the record indicate Defendant was only told he "would be crazy" to proceed pro se. Finally, there was no written waiver, nor any indication that Defendant refused to sign a written waiver. New trial granted.

State v. Rawlins, No. WD67773 (Mo. App., W.D. 4/1/08):
Where there was no record showing Defendant was warned of the perils of self-representation before trial, her waiver of counsel was not knowing and voluntary.
Facts: Defendant refused to meet with her Public Defender in person, and only wanted to meet by phone. The Public Defender moved to withdraw because of Defendant's lack of cooperation. The trial court allowed the Public Defender to withdraw. Defendant appeared pro se at trial, and said she did not want to represent herself. The trial court held a pro se trial, at which Defendant was convicted.
Holding: There is no written waiver of counsel under Sec. 600.051 or any record of the hearing at which the trial court allowed the Public Defender to withdraw. A defendant must be given warnings of the perils of self-representation on the record before trial to ensure a knowing and voluntary waiver. The problem here is an inadequate record. To avoid such a result in the future, where no record is made, a court should have the waiver under Sec. 600.051 read to the Defendant and then have the Defendant sign the waiver.

State v. Freeman, 189 S.W.3d 605 (Mo. App., W.D. 2006):
Where record did not show that Defendant knowingly and voluntarily waived right to jury trial, new trial was granted under plain error rule for felony conviction, but not for misdemeanor conviction.
Facts: Defendant was convicted of a felony and a misdemeanor at a bench trial. On appeal, Defendant contended he was entitled to a new trial under plain error rule because record did not show that Defendant knowingly and voluntarily waived his right to jury trial.
Holding: There is a constitutional right to a jury trial. Rule 27.01 provides that "[i]n felony cases … [a] waiver [of jury trial] by the defendant shall be made in open court and entered of record." In the absences of such an unmistakably clear waiver in a felony case, a Defendant is entitled to a new trial under the plain error rule. In misdemeanor

cases, however, Section 543.200 provides that if no jury trial was demanded by Defendant, the case will not have a jury trial. Here, there was nothing in the record showing an on-the-record waiver of jury trial by Defendant. Felony conviction reversed for new trial; misdemeanor conviction affirmed.

*** Indiana v. Edwards, ___ U.S. ___, 83 Crim. L. Rep. 455 (6/19/08):**
Holding: Even though Defendant may be competent under *Dusky* to stand trial, the trial court can still require Defendant to be represented by counsel at trial where Defendant is so mentally ill so as not be able to adequately conduct a trial.

Alongi v. Ricci, 2010 WL 663630 (3d Cir. 2010):
Holding: Trial court failed to conduct appropriate *Faretta* examination and denied Defendant right to represent self.

Benitez v. U.S., 2008 WL 942048 (6th Cir. 2008):
Holding: Where Defendant told court at sentencing he had "fired" his private counsel, court had duty to inquire about circumstances.

Moore v. Haviland, 83 Crim. L. Rep. 652 (6th Cir. 7/15/08):
Holding: Even though Defendant did not ask to go pro se until the fourth day of a five-day trial, Defendant was denied his right to self-representation when trial court refused to allow him to go pro se.

Smith v. Grams, 2009 WL 1349707 (7th Cir. 2009):
Holding: Where Defendant rejected a Public Defender under belief that the Public Defender Office would appoint a new counsel for him, but the Office did not, Defendant did not voluntarily waive counsel.

U.S. v. Shaaban, 2008 WL 1823300 (7th Cir. 2008):
Holding: Appointed counsel allowed to withdraw where Defendant would not permit counsel to raise the non-frivolous issue in case.

U.S. v. Crawford, 2007 WL 1610468 (8th Cir. 2007):
Holding: Defendant did not effectively waive his right to counsel at sentencing where trial judge failed to warn of dangers of self-representation.

U.S. v. Mendez-Sanchez, 2009 WL 1082288 (9th Cir. 2009):
Holding: Defendant did not unequivocally waive counsel where he told judge it would be "better" if he had a lawyer, but he hoped for a "good lawyer, not these guys."

Bradley v. Henry, 2007 WL 4410355 (9th Cir. 2007):
Holding: Court violated Defendant's due process rights by excluding her from her retained counsel's motion to withdraw hearing for failure to pay counsel, and that Defendant would be given appointed counsel; Defendant had to be given opportunity to contest her attorney's withdrawal.

Jones v. Walker, 2007 WL 2376275 (11th Cir. 2007):
Holding: Where Defendant did not like appointed counsel and trial court told him he could choose to proceed *pro se* or with appointed counsel, and court interpreted Defendant's refusal to choose as a desire to waive counsel, Defendant was denied right to counsel.

Torres v. Uttecht, 2008 WL 189560 (W.D. Wash. 2008):
Holding: Non-English-speaking pro se Defendant's right to self-representation was violated where judge refused to allow a jury question during deliberations translated into Defendant's language, so Defendant could respond.

People v. Butler, 86 Crim. L. Rep. 361 (Cal. 12/10/09):
Holding: Even though Defendant had record of violent conduct and had only limited access to a law library, these reasons were not sufficient to deny Defendant right to represent himself at trial.

People v. Burgener, 2009 WL 1230525 (Cal. 2009):
Holding: Where trial judge told Defendant that he probably had more knowledge about his case than anyone else, Defendant's waiver of counsel was not knowing and intelligent because trial judge did not sufficiently warn Defendant of dangers of self-representation but instead actively encouraged him to represent himself.

People v. Halvorsen, 64 Cal. Rptr. 3d 721 (Cal. 2007):
Holding: Where Defendant made timely motion to represent self in penalty phase of capital trial, trial court had no discretion to deny motion.

People v. Bergerud, 2010 WL 59254 (Colo. 2010):
Holding: Where Defendant had unsuccessfully sought to waive appointed counsel at trial, remand was required to determine if appointed counsel had failed to investigate Defendant's possible defenses and also whether Defendant was deprived of his right to testify while represented by the appointed counsel.

Pasha v. State, 2010 WL 2518196 (Fla. 2010):
Holding: Defendant's request to proceed pro se was unequivocal and should have been granted.

State v. Mundon, 2009 WL 2791659 (Haw. 2009):
Holding: Hawaii Const. provides right for pro se Defendant to consult with stand-by counsel during a recess taken during his cross-examination.

Hopper v. State, 2010 WL 3767296 (Ind. 2010):
Holding: Where Defendant wishes to plead guilty pro se, the court must warn Defendant that an attorney is better able to engage in plea negotiations and identify potential defenses.

Hannan v. State, 2007 WL 1518940 (Iowa 2007):
Holding: Defendant did not voluntarily waive counsel where court's explanations of trial procedures occurred after Defendant had essentially been forced to represent himself.

State v. Jones, 87 Crim. L. Rep. 110 (Kan. 4/15/10):
Holding: Denial of Defendant's right to self-representation at preliminary hearing requires reversal of conviction; can never be harmless error.

Gonzales v. State, 85 Crim. L. Rep. 242 (Md. 5/7/09):
Holding: Where on day of trial Defendant's retained attorney did not appear but sent a partner and Defendant did not want to be represented by partner, court erred in making Defendant proceed pro se because he was denied counsel of his choice.

Joseph v. State, 2010 WL 338000 (Md. Ct. Spec. App. 2010):
Holding: Trial court erred in denying Defendant's request to discharge counsel without inquiring into reasons Defendant wanted to do this.

Com. v. Clemens, 2010 WL 2674050 (Mass. 2010):
Holding: Where trial judge allowed Defendant to discharge counsel without warning of the risks of self-representation, the waiver was invalid.

Com. v. Kulesa, 86 Crim. L. Rep. 361 (Mass. 12/7/09):
Holding: Even though Defendant waived his right to counsel at trial, this did not waive his right to counsel at a "subsequent offender" hearing which immediately followed the trial.

In re Andrew, 84 Crim. L. Rep. 36 (Ohio 9/25/08):
Holding: Even though Defendant was now over 18, where Ohio statute said that Juvenile Court who declared someone a delinquent had jurisdiction to age 21, Defendant was not an "adult" and could not waive counsel on his own in juvenile court.

In re C.S., 82 Crim. L. Rep. 57 (Ohio 9/27/07):
Holding: Statutory right to counsel given to juveniles can only be waived after juvenile has been advised by a parent or guardian.

State v. Holmes, 86 Crim. L. Rep. 518 (Tenn. 1/12/10):
Holding: Even though Defendant attacked his attorney by knocking his glasses off, this was not such egregious misconduct to deem this a waiver of counsel requiring Defendant to stand trial pro se.

State v. Rafay, 86 Crim. L. Rep. 351, 2009 WL 4681215 (Wash. 12/10/09):
Holding: Washington Constitution provides right to defendants to represent themselves on appeal, even though U.S. Constitution provides no such right.

Oviuk v. State, 2008 WL 901785 (Alaska Ct. App. 2008):
Holding: Even though Defendant would be shackled, this did not justify refusing to allow him to waive counsel and proceed pro se.

People v. Kiney, 81 Crim. L. Rep. 387 (Cal. Ct. App. 5/30/07):
Holding: A *pro se* Defendant's admissions made in closing argument at trial can be used against Defendant at a subsequent trial.

People v. Miller, 2007 WL 2152886 (Cal. App. 2007):
Holding: Defendant's request to proceed *pro se* made after trial but before sentencing was not untimely regarding sentencing.

People v. Bergerud, 84 Crim. L. Rep. 37 (Colo. Ct. App. 9/18/08):
Holding: Counsel cannot make decision to forgo innocence-based trial defense in favor of lesser-included defense, where client wants an innocence-based defense at trial; this is decision only client can make; thus, judge violated right to counsel by forcing client to proceed to trial with attorney who would not present innocence-defense, or proceeding pro se.

State v. Lehman, 2008 WL 2020347 (Minn. Ct. App. 2008):
Holding: Defendant forfeited right to Public Defender by assaulting Public Defender in court.

Lay v. State, 82 Crim. L. Rep. 516 (Okla. Crim. App. 2/12/08):
Holding: Though not required by constitution, stand-by counsel should be appointed in all death penalty cases where defendants go pro se.

People v. Smith, 2010 WL 2774487 (N.Y. Sup. 2010):
Holding: Defendant's right of self-representation was violated where, although Defendant was allowed to represent himself at trial, he wasn't allowed to participate in side-bar conferences at bench.

People v. McClam, 2009 WL 790410 (N.Y. App. Div. 2009):
Holding: Where Defendant pleaded guilty after his counsel said he wanted to hit Defendant, Defendant was the worst client he ever had and he didn't think he could represent Defendant in good faith, the trial court failed to make sufficient inquiry into Defendant's request for substitution of counsel.

Waiver of Jury Trial

State v. Lawrence, No. 28199 (Mo. App., S.D. 4/3/08):
(1) Plain error resulted when trial court found Defendant guilty of offense at a purported "trial," when the only "evidence" presented was statements of a prosecutor and Defendant; (2) Plain error resulted when trial court convicted Defendant of an offense at a purported "trial" without obtaining a jury trial waiver from him.

Facts: Defendant was charged with Count I (assault) and Count II (unlawful use of a weapon). Defendant filed a motion to waive jury sentencing. Defendant then filed a petition to plead guilty to *Count II*. A proceeding then occurred in which the trial court asked the Prosecutor what evidence would be presented in support of *both* Count I and Count II. The Prosecutor stated the evidence for both, and Defendant agreed with this. The court then found Defendant guilty of *both* Counts I and II. Defendant then appealed the "trial" on Count I, claiming there was insufficient evidence to convict.
Holding: This case presents glaring procedural irregularities which, although not briefed, present plain error. (1) While the proceeding below was satisfactory for a guilty plea, it does not constitute a trial on Count I. Statements of counsel are not evidence. The Prosecutor's statements of the facts did not constitute evidence for a trial. Also, the Defendant's statements at the hearing cannot be used to convict him under Rule 24.02(d)(5). Defendant was convicted on Count I without ever being tried or without any evidence. (2) While Defendant waived jury sentencing, he did not waive a jury trial. At the hearing, Defendant was only pleading guilty to Count II. Defendant did not waive his right to jury trial on Count I.

U.S. v. Diaz, 2008 WL 3876478 (11th Cir. 2008):
Holding: Where Defendant did not sign jury waiver form, waiver was invalid.

State v. Gore, 84 Crim. L. Rep. 8 (Conn. 9/23/08):
Holding: Waiver of jury trial is decision that can only be made by Defendant personally, not counsel; counsel's statement that Defendant wishes to waive jury, while Defendant stands mute, is not a valid waiver.

State v. Lessley, 86 Crim. L. Rep. 760 (Minn. 3/11/10):
Holding: Minn. Constitution does not require the State's consent to waive a jury in criminal case.

State v. Campbell, 2010 WL 269280 (N.J. Super. Ct. App. 2010):
Holding: A jury trial waiver for an original trial does not carry over to a retrial after a mistrial is declared.