Case Law Update: 2011-2015 Cumulative Edition

(Contains all 2011-2015 Case Law Update Cases)

Prepared by:

Greg Mermelstein
Deputy Director
Woodrail Centre
Building 7, Suite 100
1000 West Nifong
Columbia, MO 65203
Telephone: (573) 777-9977 x 314
E-mail:Greg.Mermelstein@mspd.mo.gov

INDEX

Editor's Note

Dear Readers:

This cumulative edition of *Case Law Update* contains the 2011 – 2015 *Case Law Updates* combined into this single volume. It contains all Missouri appellate opinions from January 1, 2011 to December 31, 2015, which resulted in reversals, or in my opinion, were otherwise "noteworthy," and federal and foreign state opinions from the *Criminal Law Reporter* and *Criminal Law News (WL)*, which I found "noteworthy." I have also included a few "noteworthy" cases from other sources.

U.S. Supreme Court opinions have an asterisk in front of them.

This edition does not track subsequent history on any case. The case may have been overruled. Before citing a case, be sure to Shepardize it to be sure it remains good law.

Sincerely,

Greg Mermelstein
Deputy Director

(This page is intentionally left blank.)

Abandonment (Rule 24.035 and 29.15)

Moore v. State, 458 S.W.3d 822 (Mo. banc 2015):
(1) Where amended postconviction motion is filed untimely, motion court must conduct independent inquiry to determine if Movant was "abandoned" by counsel; (2) if the untimely filing was not due to fault of Movant personally, court should deem the amended motion timely filed. If Movant caused the untimely filing, court should consider only the pro se Form 40, not the amended motion; and (3) where a motion court fails to conduct an independent inquiry on abandonment, the appellate court must remand the case to the motion court for such inquiry in the first instance.
Facts: Appointed counsel filed an untimely amended motion. The motion court and Court of Appeals, apparently without noticing this, ruled the case on the merits.
Holding: When an untimely amended motion is filed, the motion court has a duty to make independent inquiry to determine whether Movant was "abandoned" by counsel. If the court finds that counsel was at fault for the late filing (i.e., that counsel "abandoned" Movant), the court should accept the amended motion. But if the untimely filing resulted from Movant's personal negligence or intentional failure to act, the court shall not consider the amended motion, but only the pro se Form 40. When the independent inquiry is not done, the appellate court must remand to the motion court for such an inquiry. The result of the inquiry on abandonment will determine which motion – the pro se motion or the amended motion – the court should adjudicate.

Vogl v. State, 437 S.W.3d 218 (Mo. banc 2014):
Even though 24.035 motion appeared to have been untimely due to its file-stamp date, appointed postconviction counsel abandoned Movant by filing motion to rescind appointment on grounds of untimeliness; postconviction rules require counsel to file an amended motion or statement explaining why an amended motion is not necessary.
Facts: Movant filed a Rule 24.035 motion, the file-stamp date on which was one day "late." Counsel was appointed, but filed a motion to rescind appointment on grounds that the 24.035 motion was untimely. The court allowed counsel to withdraw, and dismissed the case. Later, Movant filed a motion claiming he was abandoned by postconviction counsel, in which he alleged facts showing that his motion was, in fact, timely filed. This motion was denied, but not appealed. He then filed a second motion claiming abandonment on the same grounds. The second motion is at issue here.
Holding: As an initial matter, the second motion is not a prohibited "successive" motion under 24.035(l) because 24.035(l) does not deal with procedures for claims of abandonment, and thus, does not prohibit the motion here. Movant could have shown that his *pro se* motion was timely by filing an amended motion alleging the facts that would prove timeliness. However, because appointed counsel failed to file an amended motion, Movant was deprived of the opportunity to use his method of proving timeliness. Rule 24.035(e) requires counsel to either file an amended motion or a statement in lieu of amended motion stating what actions were taken to ensure that an amended motion is not necessary. Here, counsel abandoned Movant by failing to file either an amended motion or statement in lieu. The Court of Appeals has held that no abandonment occurs when appointed counsel notifies the motion court that a *pro se* motion is untimely without filing an amended motion or statement in lieu. *See Stewart v. State*, 261 S.W.3d 678, 679

(Mo. App. 2008); *Morgan v. State*, 8 S.W.3d 151, 154 (Mo. App. 1999). This Court disagrees. *Stewart* and *Morgan* are now overruled.

Price v. State, 2014 WL 712956 (Mo. banc Feb. 25, 2014):

(1) Even though Movant hired a postconviction counsel to handle his Rule 29.15 proceeding, where counsel failed to file an initial postconviction motion (Form 40) within the time required, Movant waived his postconviction proceeding, and counsel's failure is merely ineffective assistance of postconviction counsel, not abandonment; (2) abandonment is limited to situations where counsel fails to timely file an amended motion, and to situations where "third-party interference" prevents timely filing of an initial motion (Form 40).

Facts: Movant hired an attorney to file a Rule 29.15 motion for him. However, the attorney misunderstood the time limits for filing, and failed to file an initial motion (Form 40) within 90 days of the mandate on direct appeal. Movant claimed he was "abandoned" by his attorney, and should be allowed to proceed with his Rule 29.15 case.

Holding: The abandonment doctrine of *Sanders* and *Luleff* was created to excuse the untimely filing of *amended motions* by counsel, and was intended to ensure that Rule 29.15(e)'s requirement of an amended motion is fulfilled. The abandonment doctrine of *Sanders* and *Luleff* was not created to police the performance of postconviction counsel generally. Since there is no constitutional right to counsel in postconviction proceedings, there is no right to effective assistance of postconviction counsel. *Bullard* held that where counsel fails to timely file an initial postconviction motion, this is a complete bar to relief and is not an "abandonment," because a movant can file a pro se initial motion (Form 40) without the assistance of counsel. This Court holds that, as in *Bullard*, the abandonment doctrine of *Sanders* and *Luleff* cannot excuse an inmate's (movant's) failure to file his initial postconviction motion on time and will not protect an inmate from the provisions of Rule 29.15(b) that deem any failure to comply with those deadlines to be a complete waiver of relief. However, there are limited exceptions where an untimely initial filing may be deemed timely, but those exceptions must involve "third party interference" with a Movant's initial filing. For example, where an inmate has mailed his motion to an outdated address, this is "third party interference." Inmates, unlike other litigants, cannot file initial postconviction proceedings without relying on the assistance of one or more third parties to take the motion from the inmate and deliver it to the circuit clerk for filing. *McFadden* is properly understood as a "third party interference" case, not an abandonment case. In *McFadden*, a movant filled out an initial pro se motion (Form 40) on time, but his attorney told him to give it to her for filing. The attorney, however, failed to file it on time. The inmate in *McFadden* did all he could to express an intent to seek relief under Rule 29.15 and would have filed his motion on time but for the active interference of the third party, who happened to be an attorney, and who did not file the motion he gave her. Here, however, Movant Price retained counsel for his initial pleading. While he was entitled to retain counsel, he took the same risk as every other litigant who retains counsel, i.e., he was bound by his counsel's actions as if they were his own. Movant's claim is really one of ineffective assistance of postconviction counsel, which is not cognizable. To the extent *McFadden* is contrary to today's opinion, it should no longer be followed.

Stanley v. State, 2014 WL 439505 (Mo. banc Feb. 4, 2014):
Even though first postconviction counsel's amended motion failed to allege certain claims and first postconvcition counsel was permitted to withdraw, second postconviction counsel's subsequently-filed second amended motion could not be considered where it was outside the original time limits of Rule 24.035(g), and any defects in first counsel's amended motion did not constitute "abandonment" of Movant, but rather "ineffective assistance of postconvction counsel," which is not cognizable.
Facts: Movant filed a *pro se* Rule 24.035 motion. Counsel was appointed and filed an amended motion that alleged certain claims. Counsel was then permitted to withdraw. Later, a second counsel was appointed. Second counsel determined that the amended motion failed to allege other claims, and was allowed by the motion court to file a second amended motion.
Holding: The primary issue on appeal is whether the second amended motion is cognizable. It is not, because it was untimely. Second counsel could not have timely filed any amended motion because he wasn't appointed to the case until after the time for filing any amended motion had already expired. Rule 24.035(g) sets forth the time for filing an amended motion. Under 24.035(g), the date of first appointment of counsel controls the time for filing an amended motion, regardless of whether the court later appoints new counsel or allows new counsel to enter. The purpose of the postconviction rules is to promote finality. Postconviction counsel cannot usurp this purpose by withdrawing and replacing lawyers to re-establish the time limits for filing an amended motion, and neither can the motion court by permitting counsel to withdraw and "reappointing" another lawyer. The earlier of the date of first appointment or entry of appearance controls, regardless of whether new lawyers appear. Therefore, second counsel could not timely file a "second amended motion." Movant next contends that first counsel abandoned him by not filing a sufficient amended motion. However, abandonment occurs when there is a "complete absence of performance" by appointed counsel, or when appointed counsel fails to file an amended motion in a timely fashion. Here, first counsel filed a timely amended motion. Movant's claim is really one of "ineffective assistance of postconviction counsel" for not including all claims, but this is not cognizable.

Eastburn v. State, No. SC92927 (Mo. banc 6/25/13):
While Rule 75.01 allows a motion court to reopen a Rule 24.035 or 29.15 case for 30 days after a judgment (Findings) is entered because the judgment is not yet final, a motion court cannot reopen such cases later unless there has been an "abandonment" by counsel, which means only failure to file or timely file an amended motion or actively preventing Movant from filing an original Form 40; the term "motion to reopen" should no longer be used, and attorneys should file a "motion for postconviction relief due to abandonment."
Facts: Movant had a Rule 29.15 case with an amended motion in the 1990's. In 2010, she filed a "motion to reopen" her 29.15 case on various grounds, including that her sentence to life without parole was unconstitutional since she was a juvenile at the time of her offense.
Holding: Under Rule 75.01 a motion court has authority to reopen a 29.15 case for 30 days after a judgment (Findings) is entered because its judgment is not yet final. A late-

filing may be accepted where "abandonment" occurs, but abandonment is narrow and limited to where an attorney fails to file or timely file an amended motion, or interferes with filing an original Form 40. Here, while the parties refer to this case as a "motion to reopen" the 29.15 case, such nomenclature does not exist in our rules and should not be used henceforth. Here, Movant's claim is really a motion claiming ineffective assistance of postconviction counsel because she wishes postconviction counsel would have raised additional issues. This is prohibited by Rule 29.15. "[F]iling a motion to reopen does not exist in our rules. Henceforth, attorneys should file a motion for postconviction relief due to abandonment."

Price v. State, No. SD31725 (Mo. banc 12/28/12):
Where Movant's direct appeal counsel had been retained to also file a Rule 29.15 motion for Movant but failed to do so, Movant was abandoned and the motion court did not clearly err in granting a motion to reopen the PCR and allow a late filing.
Facts: Following trial, Movant retained a new Attorney to represent him at sentencing, on direct appeal and in a Rule 29.15 case. At sentencing, the trial court explained the time limits for filing a Rule 29.15 motion, and Movant said he understood them. Movant lost his direct appeal. Attorney then failed to file a Rule 29.15 motion for Movant. Attorney had repeatedly assured Movant's mother on behalf of Movant that he (Attorney) would file a 29.15 motion. Movant then retained different counsel who filed a habeas corpus case on behalf of Movant, but the Southern District quashed relief in *State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277 (Mo. App. S.D. 2008), upon grounds that habeas relief can only be granted due to an objective factor external to the defense or actual innocence. Movant then filed a motion to reopen the 29.15 proceedings on grounds of abandonment by original Attorney, who had promised to file a 29.15 motion. The motion court granted relief under *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008). The State appealed.
Holding: The motion court found that Attorney actively interfered with Movant's ability to file a *pro se* Rule 29.15 motion by stating that he would timely prepare and file the motion on Movant's behalf, but failed to do so. The State argues that *McFadden* is distinguishable, but none of the cited cases by the State deal with a retained counsel who assumed responsibility to timely file a Rule 29.15 motion for an imprisoned client and then failed to do so. Movant is in the same position as *McFadden*, whose counsel undertook to perform a necessary filing and then failed to so do. The State also argues that Movant's motion to reopen was not filed within a reasonable time after the abandonment, but was filed four years later. There is no express time limit for when a motion to reopen must be filed. The State argues that the court should analogize to the one-year time limit of Rule 30.03 for notices of appeal for policy reasons, but because the State did not raise this claim in the motion court, the appellate court will not consider it.

Silver v. State, 2015 WL 8230807 (Mo. App. E.D. Dec. 8, 2015):
Even though private counsel entered Rule 29.15 case after public defender had been appointed, and private counsel was granted an extension of time to file amended motion, the due date for the amended motion began when the public defender was appointed, not when private counsel later entered; to hold otherwise would allow Movants to indefinitely extend the Rule's time limits by changing counsel.

Facts: On January 7, 2015, the Rule 29.15 court appointed the Public Defender to represent Movant. On Feb. 5, private counsel entered and filed an extension of time allowing counsel 90 days to file an amended motion. Private counsel filed the amended motion on April 30.
Holding: Rule 29.15(g) provides that the time for filing an amended motion starts to run the earlier of the date counsel is appointed, *or* counsel who is not appointed enters an appearance. The time does not "restart" whenever new counsel enters an appearance. Here, the time started running when the Public Defender was appointed, making the amended motion due no later than 90 days after Jan. 7 (or April 7). Private counsel's filing on April 30 was untimely. Thus, remand is required to allow the motion court to determine if private counsel abandoned Movant.

Hawkins v. State, 2015 WL 7253165 (Mo. App. E.D. Nov. 17, 2015):
Holding: Where 29.15 amended motion was filed late, appellate court must remand to motion court for abandonment hearing to determine whether court should adjudicate the *pro se* or amended motion.

Mann v. State, 2015 WL 6927149 (Mo. App. E.D. Nov. 10, 2015):
Holding: Where counsel filed Movant's 29.15 amended motion late, case must be remanded for abandonment hearing; this is true even though both parties requested that the appeal be heard on the merits; the only exception to remand may be where the motion court ruled on both the pro se and amended motion, so that remand would have no effect on the relief available.

Harris v. State, 2015 WL 6925859 (Mo. App. E.D. Nov. 10, 2015):
Holding: Where Movant filed his pro se 29.15 motion prematurely while the direct appeal was pending and counsel was appointed at that time, the time for filing an amended motion began to run when the mandate issued; counsel's amended motion filed later than 90 days from that date was untimely, so case must be remanded for an abandonment hearing.

Roberts v. State, 2015 WL 6689507 (Mo. App. E.D. Nov. 3, 2015):
Holding: Where amended 29.15 motion was filed late, appellate court must remand case to motion court for abandonment inquiry.

Gales v. State, 2015 WL 5432785 (Mo. App. E.D. Sept. 15, 2015):
Holding: Appellate court is required to, sua sponte, determine if Amended Rule 24.035 motion was timely filed, and when not, must remand for abandonment hearing; if the motion court determines Movant was not abandoned, the court should not consider the Amended motion and should decide only the initial Form 40 claims; if Movant was abandoned, the court should permit the untimely filing.

Clay v. State, 2015 WL 5135603 (Mo. App. E.D. Sept. 1, 2015):
Holding: Even though the docket sheets reflected that counsel's amended 29.15 motion was filed late, where the file-stamp date on the motion showed it was timely filed,

appellate court concludes that the motion was timely even though there is no explanation in the record for the discrepancy.

Blackburn v. State, 2015 WL 5135192 (Mo. App. E.D. Sept. 1, 2015):
Holding: Where postconviction counsel filed the amended 29.15 motion late, appellate court must, sua sponte, remand case to motion court for inquiry into abandonment.

Lomax v. State, 2015 WL 3961195 (Mo. App. E.D. June 30, 2015):
Holding: Appellate court is required, sua sponte, to determine timeliness of amended motion under Rules 24.035 and 29.15, and where motion was untimely, remand to motion court for finding on abandonment by counsel, even where counsel acknowledges on appeal that the untimely filing was due to counsel's error, not Movant's.

Childers v. State, 2015 WL 3485578 (Mo. App. E.D. June 2, 2015):
Holding: Even though appellate court has a *sua sponte* duty to determine if the Amended Motion was untimely and, if so, usually must remand to the motion court for an abandonment hearing, the appellate court need not remand where *all* of the claims in both the *pro se* and Amended Motions were decided by the motion court with written Findings.
Discussion: Postconviction counsel acknowledges that the untimely filing of the Amended Motion was her fault because she forgot to request the 30-day extension of time authorized by Rule 29.15. However, remand for an abandonment hearing is not necessary here. In a remand, if the motion court were to determine Movant was abandoned, it would decide the Amended Motion claims; if the motion court were to determine Movant was not abandoned, it would only decide the timely-filed *pro se* claims. Here, the motion court has already decided by written Findings *all* the *pro se* and Amended Motion claims, so remand would be pointless. Movant has received all the process he's entitled to from the motion court regarding deciding his claims, and the appellate court can decide them on the merits.

Pennell v. State, 2015 WL 2393272 (Mo. App. E.D. May 19, 2015):
Even though postconviction counsel filed a statement in lieu of amended motion "late," this did not give rise to a presumption of abandonment; but abandonment can be found where the statement in lieu itself is defective in not demonstrating on its face that counsel reviewed the case, or where the statement is filed in a manner that unduly delays the finality of the criminal conviction.
Discussion: Rule 29.15 counsel filed a statement in lieu of amended motion more than 90 days from her appointment date. The statement said that counsel had discussed the case with Movant, reviewed the record, trial and appellate files, and found no additional issues. The issue is whether this creates a presumption of abandonment. It does not. Rule 29.15(g) provides a time limit for amended motions, but not for statements in lieu. Although there is no presumption of abandonment, a motion court could find abandonment under facts such as (1) when the statement itself is defective by not demonstrating on its face that counsel conducted a thorough review of the initial motion or (2) when the statement was filed in a manner that prevents the finality of criminal convictions without undue delay. Court notes that its opinion conflicts with *Harper v.*

State, 404 S.W.3d 378 (Mo. App. S.D. 2013), which held that an untimely statement in lieu creates a presumption of abandonment.

Stanley v. State, No. ED97795 (Mo. App. E.D. 12/04/12):
(1) Even though a second postconviction counsel filed a second amended motion which was untimely, the motion court can grant relief on it if Movant was abandoned by his first postconviction counsel thereby excusing the untimely filing of the second amended motion; and (2) where the guilty plea court failed to advise Movant prior to his plea that he could not withdraw from his non-binding plea agreement if the court chose not to follow the State's recommendation, Movant was entitled to postconviction relief from the plea where the judge imposed a higher sentence.
Facts: Movant/Defendant pleaded guilty pursuant to a non-binding plea agreement under which the State was going to argue for two concurrent three-years sentences, and the defense could argue for probation. The court did not inform Movant prior to his plea that if the court did not follow the State's recommendation, Movant could not withdraw the plea. The court ultimately did not follow the State's recommendation, but instead, sentenced Movant to two consecutive four-year sentences. Movant filed a 24.035 motion, which was timely amended by a first postconviction attorney. Subsequently, the first postconviction attorney withdrew from the case. A second postconviction attorney entered the case and filed a second amended motion alleging that the plea court failed to inform Movant that, should it reject the State's recommendation, Movant could not withdraw his guilty plea. The second amended motion, however, was untimely because the time for filing any amended motion had expired before the second postconviction counsel entered the case.
Holding: (1) The Missouri Supreme Court has recognized limited exceptions to the timeliness requirements of the postconviction rules. A motion court can permit the filing of an untimely amended motion and consider a movant's claims if it determines that a movant was abandoned by postconviction counsel. Counsel abandons a movant when he or she is aware of the need to file an amended motion but fails to do so. In such a case, the court may consider an untimely postconviction motion only when the Movant is free of responsibility for failure to comply with the postconviction rule. Here, a remand is required to determine why the second amended motion was untimely, i.e., whether Movant's first postconviction attorney abandoned him. "If the motion court finds that Movant's second amended motion was untimely due to no fault of Movant, the motion court must permit Movant to withdraw his plea" based on the second amended motion. (2) Under Rule 24.02(d)(2), the plea court was required to tell Movant that his plea could not be withdrawn if the court did not accept the State's recommendation. The court failed to do this before he entered his guilty plea. Due process requires that a defendant understand the true nature of his agreement before his plea is accepted by a court. The court must tell a defendant clearly and specifically whether he will or will not be able to withdraw the guilty plea if the court exceeds the recommendation. That did not happen here.

James v. State, 2015 WL 8732195 (Mo. App. S.D. Dec. 14, 2015):
Where (1) motion court dismissed Movant's Rule 24.035 case for failure to prosecute before a transcript was filed, (2) counsel filed a motion seeking to reinstate the case, and

(3) counsel filed a notice of appeal within 30 days of the dismissal but without a ruling by the motion court, there is a presumption that counsel "abandoned" Movant and the case must be remanded for an abandonment hearing. This is because (1) the time for filing an amended motion did not begin until the transcript was filed (but no amended was filed before the extended date), and (2) the filing of the motion to reinstate extended the time for the motion court to rule on the motion to reinstate because of Rule 81.05. Further, the notice of appeal was initially premature because the time for the motion court to rule had been extended; the notice of appeal was deemed filed after the extended time expired.
Facts: The Rule 24.035 court appointed the Public Defender to represent Movant on Nov. 19, 2014. First attorney entered an appearance on Dec. 16. On Jan. 14, 2015, the motion court held a case review, at which no one appeared. Pursuant to local rule, the court placed the case on an "inactive docket" which required the case be automatically dismissed without prejudice on March 16. On March 16, the case was dismissed. On March 30, the guilty plea and sentencing transcript was filed with the court. On April 13, a second attorney entered and filed a motion alleging first attorney had "abandoned" Movant and asking the case be "re-instated." On April 23, a third attorney filed a notice of appeal.
Holding: As relevant here, Rule 24.035(g) provides that an amended motion is due within 60 days of the date both a transcript is filed and counsel is appointed. Here, the transcript was not filed until March 30, making an amended motion due on or before June 1. The motion court retained jurisdiction over its March 16 dismissal order for 30 days. But Rule 81.05(a)(2) provides that that time is extended by the filing of "authorized after-trial motions." If an authorized after-trial motion is filed, the judgment becomes final the earlier of (a) 90 days from the date the last timely motion was filed, on which date all motions shall be deemed overruled, or (b) if all motions have been ruled, then the date of ruling of the last motion or 30 days after entry of judgment, whichever is later. Second attorney's motion was essentially a motion for relief under Rule 74.06(b), seeking relief from judgment for excusable neglect; thus, it was an "authorized after trial motion." Hence, the motion court's control over the case was extended for 90 days, or until July 13. The filing of the notice of appeal was premature. Rule 81.04(a) provides that a premature notice of appeal shall be deemed filed immediately after the time for judgment becomes final. Thus, the notice of appeal is deemed filed on July 14, 2015. Because neither first, second nor third attorney filed an amended motion before the *June 1* deadline, there is a presumption of abandonment. Case remanded to motion court to determine if Movant was abandoned.

Lewis v. State, 2015 WL 9241357 (Mo. App. S.D. Dec. 16, 2015):
Holding: Even though 29.15 Movant's counsel filed a motion in the motion court asking that the late amended motion be deemed timely, where the motion court took no action on this, the case must be remanded for an abandonment hearing.

Hicks v. State, 2015 WL 6274805 (Mo. App. S.D. Oct. 21, 2015):
Holding: Where 24.035 counsel failed to file either an amended motion or statement in lieu of amended motion, after which the motion court dismissed the case, appellate court remands for an abandonment hearing.

Gasa v. State, 2013 WL 6198248 (Mo. App. S.D. Nov. 27, 2013):
Holding: (1) Where postconviction counsel filed an amended motion "late," i.e., beyond the time permitted by Rule 29.15(g), and the motion court ruled only on the claims in the timely *pro se* motion, the case must be remanded to determine if counsel "abandoned" Movant by the late filing; (2) even though the motion court purported to grant postconviction counsel additional time beyond that allowed in Rule 29.15(g) to file an amended motion, a motion court does not have authority to extend the time beyond that allowed by the Rule.

Harper v. State, 2013 WL 554013 (Mo. App. S.D. Feb. 14, 2013):
Holding: Postconviction counsel's filing of a statement in lieu of amended motion one day late technically abandoned Movant, but the remedy is to treat the statement in lieu as timely filed where, as here, postconviction counsel ensured that Movant received meaningful review of his *pro se* postconviction claims by filing a motion to amend judgment after the motion court had failed to consider several of them.

Vogl v. State, 2013 WL 173009 (Mo. App. S.D. Jan. 16, 2013):
Postconviction counsel abandoned Movant where Movant's Form 40 (24.035 motion) was file-stamped one day late and counsel moved to withdraw based on this, but could have shown that the motion was timely filed.
Facts: Movant's Form 40 was file stamped one day late. Subsequently, the Public Defender was appointed to his Rule 24.035 case, but moved to withdraw on grounds that the Form 40 was untimely and the court had no jurisdiction to proceed. The withdrawal motion was granted and the motion court dismissed the case as untimely. Subsequently, Movant, acting *pro se*, filed a motion to reopen his 24.035 action on grounds that he was abandoned by counsel. He alleged facts showing that he actually had filed his motion timely, even though it was file-stamped a day late. The motion court denied his motion without a hearing. He appealed.
Holding: Abandonment by postconviction counsel can occur where postconviction counsel takes no action with respect to filing an amended motion and, thus, a movant is denied of meaningful review of his claims. Here, postconviction counsel took no action to file an amended motion which would have alleged facts showing that the Form 40 was timely. In Movant's motion to reopen, he alleges that he filed his motion timely at the courthouse in Carthage – Jasper County has two courthouses – but that Carthage forwarded it to the courthouse in Joplin, and it was received in Joplin one day late. If these facts are true, then Movant's Form 40 was timely. The failure of counsel to file an amended motion to allege these facts was an abandonment which deprived Movant of his opportunity to show that his Form 40 was timely. Case remanded for an abandonment hearing.

White v. State, No. SD31300 (Mo. App. S.D. 5/11/12):
Holding: Where counsel filed an amended 24.035 motion, a claim that counsel "abandonned" Movant could not be raised for the first time on appeal because it was not presented to the motion court. However, court notes in a footnote that the Western District has suggested that such a claim might be raised in a motion filed in the motion court to reopen the postconviction proceeding.

Williams v. State, 2013 WL 6592768 (Mo. App. W.D. Dec. 17, 2013):
(1) Motion court had "jurisdiction" to hear a "motion to file an untimely postconviction relief motion based on abandonment" which alleged that Movant's postconviction counsel had abandoned him in 1991 by promising to file a Form 40 for Movant but failing to timely do so; and (2) Even though the appellate court in 1993 affirmed dismissal of Movant's 29.15 motion as untimely filed, the issue of whether Movant was abandoned was not res judicata because abandonment (though alleged in 1993) was not necessary to the appellate court's decision.
Facts: In 1991, Defendant/Movant was convicted of various offenses at trial. He hired a postconviction attorney to represent him in a Rule 29.15 case. The attorney promised Movant that the attorney would timely file a postconviction motion (Form 40), but the attorney filed it three days late. Shortly thereafter, the public defender eventually began representing Movant, and filed an affidavit from the postconviction counsel in which counsel stated that the untimeliness of the Form 40 was entirely counsel's fault. The motion court held a hearing on the matter at which counsel testified that he promised he would file a postconviction motion (Form 40) on time, but failed to do so because he did not "check the dates" correctly. The motion court and appellate court dismissed the 29.15 motion as untimtely, citing *State v. Bullard*, 853 S.W.2d 921 (Mo. banc 1993), which held that a movant's reliance on erroneous advice of counsel does not excuse an untimely filing. In 2010, Movant filed a "motion to reopen" his 29.15 case on grounds of abandonment, citing *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008), which found abandonment where counsel had assured a movant that counsel would file a Form 40 for him, but then did so late. The motion court held that it did not have "jurisdiction" to hear Movant's case, and dismissed it.
Holding: As an initial matter, the Supreme Court in *Eastburn v. State*, 400 S.W.3d 770 (Mo. banc 2013), held that a "motion to reopen" does not exist, and that motions such as Movant's should be styled "motion to file an untimely postconviction relief motion based on abandonment." The appellate court will treat Movant's motion as such. The State claims that Movant's case must be dismissed on grounds of *res judicata*, but the appellate court in 1993 did not make a finding on abandonment and such a finding would not have been necessary to the appellate court's decision because that court concluded that Movant's Form 40 had to be dismissed as untimely regardless of whether Movant was abandoned, stating "reliance on counsel's erroneous advice does not excuse the untimely filing" of a Form 40. In 2008, in *McFadden*, the Supreme Court held that abandonment can occur where the untimely filing was caused by the overt action of postconviction counsel. Although Movant contends that his case is indistinguishable from *McFadden*, the Western District need not decide that issue now, because the motion court dismissed Movant's motion regarding abandonment on grounds that the court lacked "jurisdiction" to hear it. That is clearly erroneous because Movant filed his motion regarding abandonment in the original motion court, and the court was authorized to hear it. Movant articulated a colorable ground for abandonment. Dismissal is reversed and case remanded for further proc

Middleton v. State, No. WD73290 (Mo. App. W.D. 10/18/11):
Holding: Where Movant filed a second motion to reopen postconviction proceedings on grounds of "abandonment," which the motion court denied via a docket entry, this was not an appealable "judgment" under Rule 74.01(a) but only a non-appealable "order"; however, the motion court does have "jurisdiction" to consider a second motion to reopen.
eedings.

State v. Besendorfer, No. WD73968 (Mo. App. W.D. 8/14/12):
Where Defendant was sentenced on same date as his bench trial and had not waived his right to file a new trial motion, this violated Rule 29.11, made the judgment void, and an appeal is premature since there is no judgment to appeal; this is true even though Defendant requests the appellate court decide the case on the merits.
Facts: Defendant was convicted at a bench trial in a DWI case. Although he had 15 days after trial to file a new trial motion, he was sentenced on the same day as the trial. He then filed a notice of appeal.
Holding: Rule 29.11(c) prohibits a trial court from rendering judgment until the time for filing a new trial motion has expired. Unless there was an express waiver of the right to file a new trial motion by Defendant, any judgment rendered before the time for filing a motion for new trial is premature and void. Where judgments are premature and void, there is no judgment to appeal. Here, there was no express waiver. Even though Defendant requests that the appellate court resolve the case on the merits and says that this will promote judicial economy since there will not need to be a second appeal, the appellate court must dismiss because the judgment is not final.

Lindner v. State, 404 S.W.3d 926 (Mo. App. W.D. 2013):
Holding: Where Movant alleged for the first time on appeal that postconviction counsel had abandoned him by filing a defective amended motion, the appellate court would not consider this claim because Movant had not filed in the motion court a "motion to reopen the proceeding due to abandonment," or a motion to amend judgment under Rule 78.07(c) to allege abandonment; to preserve the issue of abandonment for appeal, a Movant must have first complied with Rule 78.07(c) by filing a motion to amend judgment in the motion court.

*** Christeson v. Roper, ___ U.S. ___, 96 Crim. L. Rep. 415 (U.S. 1/20/15):**
Holding: 18 USC 3559 allows habeas petitioners to receive substitute appointed counsel where original appointed counsel failed to file petitioner's habeas petition on time and thereby created a conflict of interest regarding whether their abandonment of petitioner should allow equitable tolling.

*** Ryan v. Schad, 133 S.Ct. 2548 (2013):**
Holding: 9th Circuit abused its discretion in failing to issue a mandate immediately upon receiving a copy of Supreme Court's order denying death-sentenced petitioner's cert. petition, which challenged the denial of federal habeas relief; Rule 41(d)(2)(D) of the federal appellate rules states that an appellate court "must issue the mandate immediately" when a copy of the Supreme Court's order denying cert. is filed.

*** Maples v. Thomas, ___ U.S. ___, 90 Crim. L. Rep. 539 (U.S. 1/18/12):**
Holding: Where petitioner's state postconviction counsel abandoned him without telling him and thus petitioner missed a state postconviction filing deadline, this constituted "cause" to excuse the procedural default for federal habeas purposes.

U.S. v. Orti-Garcia, 2011 WL 6061352 (1st Cir. 2011):
Holding: Defendant's appellate waiver was not knowing and voluntary, where district court did question defendant about his understanding of the waiver provision, but did not ascertain whether defendant understood the maximum penalty.

Blackman v. Ercole, 2011 WL 5084322 (2d. Cir. 2011):
Holding: Where the ruling by the Clerk of the United States District Court consisted only of an "X" above the "Granted" option on a memorandum for a certificate of appealability, the case was remanded for a determination of which issues were worthy of appeal.

Ross v. Varano, 2013 WL 1363525 (3d Cir. 2013):
Holding: Petitioner was entitled to equitable tolling of time to file habeas where his direct appeal appellate attorney misled him as to the status of his appeal, the appellate court's refusal to replace his attorney, and neglect by his attorney including refusal to accept petitioner's calls and misstatements of law.

Rodriguez v. Thaler, 2011 WL 6184481 (5th Cir. 2011):
Holding: While defendant signed a document indicating that, upon his guilty plea, the State would recommend to the court that defendant waived any rights he might have to appeal, the transcript of his sentencing revealed that the State did not actually make the recommendation, and so defendant did not waive his right to direct appeal.

Luna v. Kernan, 97 Crim. L. Rep. 130 (9th Cir. 4/28/15):
Holding: Even though habeas attorney did not completely abandon Petitioner, Petitioner was entitled to equitable tolling where attorney dismissed Petitioner's timely-filed petition, failed to timely file a new one, and falsely told Petitioner for the next six years that his habeas litigation was proceeding.

Mackey v. Hoffman, 2012 WL 2369301 (9th Cir. 2012):
Holding: Where an attorney's abandonment causes a notice of appeal not to be filed, district court may grant relief under the "catch-all" clause of the Federal Rules of Civil Procedure.

U.S. v. Lonjose, 90 Crim. L. Rep. 451 (10th Cir. 12/28/11):
Holding: Even though Defendant waives his right to "appeal any sentence within the statutory range," this did not prevent Defendant from appealing post-sentencing modifications to his conditions of supervised release.

People v. Maultsby, 2012 WL 19370 (Cal. 2012):
Holding: Certificate of probable cause is not required for appeal where defendant does not plead guilty or no contest.

State v. Wang, 95 Crim. L. Rep. 387 (Conn. 6/17/14):
Holding: Indigent defendants who choose to proceed pro se are entitled to the same funding for experts that is available to clients of the Public Defender, and funding should come from the Public Defender, not the judicial branch.

State v. Gault, 90 Crim. L. Rep. 74 (Conn. 4/10/12):
Holding: Victims-rights' amendment does not grant victims the right to appeal an adverse ruling in a defendant's criminal case; hence, an alleged crime victim lacked standing to prosecute an appeal of an order issued in a prosecution of the defendant for kidnapping for the purpose of committing sexual assault denying her motion to extend indefinitely the sealing of an affidavit in support of an arrest warrant for the defendant.

Gordon v. State, 2011 WL 4596660 (Fla. 2011):
Holding: Defendant's may not proceed pro se in postconviction appeals if they have been sentenced to death.

Gable v. State, 2011 WL 6258458 (Ga. 2011):
Holding: Extensions of time may be granted for filing discretionary applications to appeal.

State v. Bogguess, 2012 WL 167334 (Kan. 2012):
Holding: Lack of objection by defendant to the admission of defendant's statements to the police did not preclude appellate review the previous denial of defendant's motion to suppress the statements.

Brown v. State, 2014 WL 7079925 (Miss. 2014):
Holding: Even though Defendant had retained private counsel, he was entitled to a hearing to determine if he could receive court funding for an expert.

Grayson v. State, 93 Crim. L. Rep. 157 (Miss. 4/18/13):
Holding: Mississippi recognizes right to effective assistance of counsel in postconviction death penalty cases (but finds was harmless here); "Because this Court has recognized that PCR proceedings are a critical stage of the death-penalty appeal process at the state level, today we make clear that PCR petitioners who are under sentence of death have a right to the effective assistance of PCR counsel"; petitioner had alleged that appointed PCR's counsel large caseload prohibited him from investigating case.

State v. Benn, 2012 WL 458609 (Mont. 2012):
Holding: A criminal proceeding is not abated ab initio in its entirety upon the death of a defendant.

State v. Penado, 2011 WL 4635057 (Neb. 2011):
Holding: State's petition for appeal of trial court's finding that defendant was not competent to stand trial was denied because the finding of incompetency was not a final order, in that further action was required to completely dispose of the case.

People v. Bradshaw, 2011 WL 6157282 (N.Y. 2011):
Holding: Defendant did not willingly waive right to appeal by pleading guilty to rape, where the trial court asked whether defendant understood its remarks about the appeal waiver in the plea agreement and defendant responded by asking about the mandatory fees associated with his plea.

State ex rel. DeWine v. Court of Claims of Ohio, 2011 WL 5009412 (Ohio 2011):
Holding: Ohio Court of Claims lacks jurisdiction to review Attorney General's decisions granting or denying payment of attorney fees in connection with an award for reparations where a statute giving Attorney General the authority to grant or deny reparations and attorney fees allows for appeal of his decision regarding reparations but is silent on the issue of attorney fees.

Whitehead v. State, 2013 WL 1163919 (Tenn. 2013):
Holding: Time for filing postconviction motion was tolled where direct appeal appellate counsel abandoned petitioner by incorrectly calculating the deadline for filing, failing to notify him that the U.S. Supreme Court had denied cert in his case, failing to tell him that their attorney-client relationship had ended, and failing to send petitioner his file until after the deadline passed.

In re Heidari, 2012 WL 1355964 (Wash. 2012):
Holding: Following the reversal of a conviction for second-degree child molestation due to insufficient evidence, the appellate court could not remand for resentencing on the lesser included offense of attempted child molestation because the jury was not instructed on the attempt offense.

People v. Arriaga, 2011 WL 6002931 (Cal. App. 2011):
Holding: Appeal challenging denial of a motion to vacate a judgment entered upon a guilty plea based on inadequate advisement of the potential immigration consequences does not require a certificate of probable cause, as it affects the substantial rights of defendant.

State v. Barajas, 2011 WL 6188502 (Or. Ct. App. 2011):
Holding: Defendant's failure to object to trial court's unilateral decision to waive defendant's right to closing arguments did not waive the issue for appellate review, where an attempt to object would have been futile.

Ake Issues

*** Hinton v. Alabama, ___ U.S. ___, 94 Crim. L. Rep. 613, 134 S.Ct. 1081 (U.S. 2/24/14):**
Holding: Counsel in capital case was ineffective for erroneously believing that he could not seek extra funding to hire a more qualified forensic expert; even though choice of expert is usually a strategy decision, the attorney's decision here was not based on any strategy but on a mistaken belief that the only available funds were capped at $1,000 and that there was only one ballistics expert available at that rate; "[a]n attorneys' ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."

Lowe v. State, 94 Crim. L. Rep. 364 (Miss. 12/12/13):
Holding: Indigent Defendant charged with downloading child pornography from Internet had due process right under *Ake* to a court-appointed expert to help him rebut State forensic expert's opinion that only Defendant, rather than someone else, downloaded the images.

Evans v. State, 92 Crim. L. Rep. 522 (Miss. 1/31/13):
Holding: Defendant was entitled to funding for an expert on PTSD to prepare a defense for murdering his father.

State v. Parduhn, 90 Crim. L. Rep. 11 (Utah 9/27/11):
Holding: Indigent defendant with private counsel can obtain state-paid expert assistance.

Doe v. Sex Offender Registry Bd., 2014 WL 657958 (Mass. App. 2014):
Holding: At sex offender classification hearing, Defendant was entitled to funding to present expert testimony about how to interpret complex statistical and scientific studies demonstrating that age affected recidivism rates in sex cases.

Appellate Procedure

In the Interest of S.C. v. Juvenile Officer, 2015 WL 6949338 (Mo. banc Nov. 10, 2015):
Holding: Even though Juvenile had been adjudicated guilty of first-degree attempted rape and was required to register on the juvenile sex offender registry, Sec. 211.425, where the juvenile court did not order that Juvenile register on the adult registry, his claim that requiring juveniles to register for life on the adult registry is unconstitutional is not ripe of judicial review; since there has been no attempt to compel Juvenile to register on the adult registry, there is no immediate, concrete dispute at this time; Juvenile's claim dismissed without prejudice.

Tupper v. City of St. Louis, 2015 WL 4930313 (Mo. banc Aug. 18, 2015):
(1) City red-light camera Ordinance which created rebuttable presumption that owner of vehicle was the driver of the vehicle violated due process because it shifts burden of persuasion to defendants; (2) even though Drivers had been charged with Ordinance violation but had their charges dismissed by Prosecutor, they could challenge constitutionality of Ordinance in a declaratory judgment action; (3) Drivers were not allowed attorney's fees because City's action in passing unconstitutional Ordinance did not constitute intentional misconduct; (4) Director of Revenue had no standing to appeal trial court's judgment granting relief to Drivers where court's judgment did not order DOR to do anything, so DOR was not aggrieved by case.
Facts: Drivers were charged with violation of red-light camera Ordinance. Ordinance created a "rebuttable presumption" that the owner of a vehicle was the driver. Before Drivers could challenge Ordinance in their Ordinance violation cases, City dismissed the charges against them. Drivers then brought declaratory judgment action to invalidate Ordinance, claiming they had no other adequate legal remedy to do so. Trial court found for Drivers, but denied attorney's fees. Drivers, City and Department of Revenue appealed.
Holding: (1) Prosecutions for Ordinance violations are civil proceedings with quasi-criminal aspects. While rebuttable presumptions in civil cases are generally permitted, they are not generally permitted in criminal cases because they relieve the State of its burden of proof and shift the burden of persuasion to defendants. Prior parking Ordinance cases have held that strict liability can be imposed on owners without violating due process because parking fines are "relatively small," and do not impact a driver's license or insurance. Here, however, a red-light camera violation fine is $100 – not small – and violators will be assessed two points on their license. These factors, along with the quasi-criminal nature of municipal court proceedings, leads this Court to apply the law regarding presumptions in criminal cases. Presumptions which shift only the burden of production may be constitutional, but the Ordinance expressly shifts the burden of persuasion, which is unconstitutional. The Ordinance states that if an owner furnishes "satisfactory evidence" that they were not driving the car, the charges may be terminated. This shows City's intent to require an owner to prove to the fact-finder that they were not the driver. (2) Drivers can challenge Ordinance in declaratory judgment action. A pre-enforcement challenge is sufficiently ripe to raise a justiciable controversy when (a) the facts needed to adjudicate the claim are fully developed, and (b) the laws at issue affect plaintiffs in a manner that gives rises to an immediate, concrete dispute. Cases presenting predominantly legal questions are particularly amendable to conclusive determination in a pre-enforcement context because they require less factually development. Here, Drivers' claim is predominantly legal because it involves the constitutionality of the rebuttable presumption. Also, Drivers have been affected by Ordinance because they were previously facing prosecution under it. (3) Even though Drivers prevailed in their lawsuit, they aren't entitled to attorney's fees. In general, the "American Rule" is that absent statutory authorization or contractual agreement, each party pays their own attorney's fees. This rule can be overcome if a party shows "intentional misconduct" by a defendant. But City's actions in enacting the Ordinance did not constitute "intentional misconduct." (4) The DOR (among others) appealed the trial court's judgment invalidating the Ordinance. However, the trial court's judgment had no effect on DOR

and did not order DOR to do anything. DOR is not an aggrieved party, and has no standing to appeal.

Moore v. State, 458 S.W.3d 822 (Mo. banc 2015):
(1) Where amended postconviction motion is filed untimely, motion court must conduct independent inquiry to determine if Movant was "abandoned" by counsel; (2) if the untimely filing was not due to fault of Movant personally, court should deem the amended motion timely filed. If Movant caused the untimely filing, court should consider only the pro se Form 40, not the amended motion; and (3) where a motion court fails to conduct an independent inquiry on abandonment, the appellate court must remand the case to the motion court for such inquiry in the first instance.
Facts: Appointed counsel filed an untimely amended motion. The motion court and Court of Appeals, apparently without noticing this, ruled the case on the merits.
Holding: When an untimely amended motion is filed, the motion court has a duty to make independent inquiry to determine whether Movant was "abandoned" by counsel. If the court finds that counsel was at fault for the late filing (i.e., that counsel "abandoned" Movant), the court should accept the amended motion. But if the untimely filing resulted from Movant's personal negligence or intentional failure to act, the court shall not consider the amended motion, but only the pro se Form 40. When the independent inquiry is not done, the appellate court must remand to the motion court for such an inquiry. The result of the inquiry on abandonment will determine which motion – the pro se motion or the amended motion – the court should adjudicate.

State v. Ess, 2015 WL 162008 (Mo. banc Jan. 13, 2015):
(1) Even though New Trial Motion was filed one-day late when Circuit Clerk would not accept it the day before because an attached affidavit was not notarized, Circuit Clerk had no authority to reject the filing and New Trial Motion would be deemed timely-filed; (2) Juror engaged in intentional nondisclosure when Juror failed to answer questions on voir dire about bias, and later said to other Jurors that this was "an open and shut case;" and (3) the 1995 through 2002 version of first-degree child molestation, Secs. 566.067.1 and 566.010(3) (1995 – 2002) did not include touching a victim "through clothing;" thus, evidence was insufficient to convict even though Defendant put Victim's hand on Defendant's clothed penis.
Facts: Defendant was convicted of various sex offenses. After trial, Defendant sought to timely file a New Trial Motion, which had attached an affidavit from a juror about juror misconduct. The Circuit Clerk refused to accept the New Trial Motion because the affidavit was not notarized. This could not be resolved until the next day, by which time the New Trial Motion was untimely. At the New Trial Motion hearing, Defendant sought to have the New Trial Motion deemed timely-filed. On the merits, a Juror submitted an affidavit and testified that during a recess during voir dire, a different Juror (No. 3) said this was an "open and shut case."
Holding: (1) The State contends the juror nondisclosure issue is not preserved because the New Trial Motion was untimely filed. Generally, a trial court has no authority to extend the time for filing a New Trial Motion beyond that allowed in Rule 29.11(b). Here, however, the Circuit Clerk refused to file the tendered New Trial Motion in the absence of some clear prohibition in law, rule or specific court order. The Clerk was

obligated to accept the filing when tendered. Thus, the New Trial Motion should be deemed timely filed because it was tendered (but rejected) within the time allowed by Rule 29.11(b). If the motion was defective, the remedy was for a party to move to strike it, not for the Clerk to refuse to file it. (2) Juror No. 3 was asked numerous questions on voir dire about whether he could be fair and impartial. Defense counsel specifically asked if any juror held any preconceived notions of guilt or innocence. Juror No. 3 did not answer. Intentional nondisclosure occurs when there is no reasonable inability to comprehend the information asked by a question, and the prospective juror's forgetfulness in failing to answer is unreasonable. Given the extensive questions asked of the venire, there is no possibility that Juror No. 3 failed to comprehend the issue being asked. Any purported forgetfulness is not reasonable here. Thus, the non-disclosure was "intentional." Bias and prejudice is presumed where "intentional" nondisclosure occurs. The State argues that Defendant did not call Juror No. 3 to testify, but Defendant is permitted to prove his claim of nondisclosure through other evidence than Juror No. 3. Defendant called another Juror to testify that No. 3 said this was an "open and shut case." The State argues that this statement does not mean that Juror No. 3 favored the State because Juror No. 3 could have favored the defense. But this is inconsequential because a bias toward *either* side is material. New trial ordered on all counts except first degree child molestation, for which evidence was insufficient because the relevant version of the statute in effect at time of crime did not criminalize touching "through clothing."

State v. Sisco, 2015 WL 1094821 (Mo. banc March 10, 2015):
(1) Even though State delayed trial three years and then entered a nolle prosequi to effectively get a further continuance, the State has complete discretion to dismiss and refile as long as double jeopardy has not attached and the statute of limitations has not expired; and (2) in issue of first impression, the standard of review for whether Defendant's constitutional right to speedy trial was violated is de novo review, not "abuse of discretion."
Facts: Defendant was charged in 2006. In 2008, Defendant announced ready and requested a speedy trial. Various delays occurred thereafter due to problems with a State's witness and the State providing late discovery. Trial was then scheduled in April 2009, but in order to effectively get a continuance, the State entered a *nolle prosequi* on the trial date, and re-filed the charges later that same day. Defendant filed a motion to dismiss with prejudice claiming violation of his right to speedy trial. Defendant was eventually tried and convicted in late 2009.
Holding: (1) Under Sec. 56.087, the State has complete discretion to dismiss and re-file a case as long as double jeopardy has not attached and the statute of limitations has not expired. Once the State dismisses, the trial court has no power to dismiss with prejudice. Defendant argues that allowing the State to dismiss and refile violates *Klopfer v. North Carolina*, 386 U.S. 213 (1967), because it would allow a case to go on indefinitely. Missouri courts have distinguished *Klopfer* in the past, but here, Defendant never raised this argument to the trial court, so it is not preserved. (2) This Court has never articulated the standard of review for determining whether the constitutional right to speedy trial has been violated. Under the post-1986 version of Sec. 545.780.5 and the constitution, if there is a violation of the constitutional right to speedy trial, the case must be dismissed. While an abuse of discretion standard might have been appropriate before

the 1986 statute, it no longer is. The correct standard is *de novo*. The Court does not apply a deferential standard of review, but makes its own conclusions with regard to whether a violation occurred. Here, balancing the *Barker v. Wingo* factors, the Court finds no violation, although it does weigh the *nolle prosequi* "heavily" against the State.

State v. Porter, 2014 WL 3729864 (Mo. banc July 29, 2014):
Holding: The "corroboration rule" (which provided that an appellate court is to disregard sex victim's testimony if contradictory and uncorroborated) and the "destructive contradictions doctrine" (which allowed an appellate court to disregard testimony relevant to an element of the crime if the testimony was inconsistent and contradictory) are abolished because they are inconsistent with the appellate standard of review, whereby the appellate court defers to factual findings of the trial court or jury.

State v. Bolden, No. SC92175 (Mo. banc 7/3/12):
Holding: Trial court has no duty to *sua sponte* correct an erroneous jury instruction proffered by the defense, and appellate court will not conduct plain error review of such an instruction. To the extent that *State v. Beck*, 167 S.W.2d 767, 777-78 (Mo. App. 2005) holds to the contrary, it is overruled.

Shaefer v. Koster, No. SC91130 (Mo. banc 6/14/11):
Holding: (1) Criminal defendant cannot bring declaratory judgment action to challenge constitutionality of statute under which they are charged because there is an adequate other remedy, i.e., to raise the alleged unconstitutionality in their criminal case; (2) Sec. 516.500 which places a time limit on when a person can challenge the constitutionality of a statute does not apply to a criminal defendant who raises a challenge to the statute as a defense to the criminal case.

Editor's Note: The dissenting opinion would allow the declaratory judgment action and would find that the 2008 version of Sec. 577.023.16 which enacted certain DWI penalty enhancements (since repealed and replaced by a new statute) violates the Missouri Constitution's prohibitions about clear title, original purpose and single subject, Art. III, Secs. 21 and 23, Mo.Const. The bill's title dealt with "watercraft," the bill was originally only about "watercraft" and adding DWI provisions violated the title, original purpose and single-subject provisions. The majority opinion did not reach the merits of the case.

State v. Nettles, 2015 WL 7738413 (Mo. App. E.D. Dec. 1, 2015):
Holding: Claim that defense counsel operated under actual conflict of interest in representing Defendant and previously representing co-Defendant in same case (who then became State's witness against Defendant) is not cognizable on direct appeal, but must be raised as claim of ineffective assistance of counsel in Rule 29.15 proceedings, even where trial court failed to make independent inquiry about the conflict.
Discussion: Defendant claims that counsel's prior representation of co-Defendant in same case, who then became a key prosecution witness against Defendant, created an actual conflict of interest, and that the trial court erred in failing to independently inquire about this, and disqualify counsel. An actual conflict of interest occurs from successive representation where an attorney's former client serves as a government witness against

the attorney's current client. Here, there is a significant risk that counsel's representation of Defendant may have been materially limited by his duty of confidentiality to the co-Defendant/client. Nevertheless, this claim is not cognizable on direct appeal. It should be raised in a Rule 29.15 proceeding as one of ineffective assistance of counsel.

Depriest v. State, 2015 WL 7455009 (Mo. App. E.D. Nov. 24. 2015):
(1) Plea counsel had actual conflict of interest where he simultaneously represented Movant and her Brother on charges for marijuana found in their residence, and it was apparent that Movant was less culpable than Brother; (2) "Group guilty plea" proceeding prejudiced Movant because plea court failed to inquire about the conflict of interest; (3) where Movant rejected a more favorable plea offer due to her counsel's conflict of interest, remedy is to require State to re-offer the rejected offer; and (4) transcript of "group guilty plea" should not be redacted so as only to include Movant's and Brother's responses, because redacted transcript does not give appellate court a complete picture of what transpired at plea.
Facts: Movant and her Brother were charged with marijuana offenses for marijuana found growing in their residence. Movant and Brother both retained the same counsel, and signed counsel's waiver of conflict of interest. The State offered Movant a 10-year deal with possibility of probation after 120 days. Counsel advised Movant to reject the offer. Movant and Brother ultimately pleaded guilty together under a deal whereby the State would dismiss certain other charges against Movant, if she and Brother pleaded guilty together. The court held a "group guilty plea" with other defendants in order to "save time." Movant was sentenced to the maximum term. She filed a 24.035 motion.
Holding: Movant's plea was involuntary due to counsel's conflict of interest and the group guilty plea procedure. Counsel believed Movant was less culpable than Brother; thus, Movant's and Brother's interests were conflicting. Prejudice is presumed when counsel operates under an actual conflict of interest. Further, the plea court had a duty to inquire about the conflict, but did not because of the group guilty plea. The plea court should not have valued its own time more than the fair administration of justice. The remedy here is to order the State to reoffer the rejected plea offer. Lastly, a full and complete transcript of the group plea should have been prepared, not just a transcript with Movant's and Brother's responses. A full transcript was necessary to give appellate court a complete picture of what occurred.

Depriest v. State, 2015 WL 6473150 (Mo. App. E.D. Oct. 27, 2015):
(1) Plea counsel operated under an actual conflict of interest and prejudice is presumed where counsel represented both Movant and co-defendant, advised Movant to reject a favorable plea offer, and pleaded Movant and co-defendant guilty to a deal whereby Movant had to accept a blind plea to allow a favorable plea for co-defendant; (2) "group guilty plea" violated Movant's right to fundamental fairness and rendered his plea involuntary, especially where trial court had duty to inquire about conflict of interest but did not; (3) remedy is to allow Movant opportunity to accept the favorable plea offer that was rejected; (4) appellate court grants foregoing relief without an evidentiary hearing; (5) plea court's closure of courtroom during guilty plea violated Movant's right to a public trial; and (6) "redacted" transcript from "group guilty plea" which only

contained Movant's and co-defendant's statements was improper; a full transcript should be prepared for appellate review.

Facts: Movant and co-defendant (his sister) were charged with various drug crimes for marijuana found in their residence. The same attorney represented both prior to their guilty pleas. The State offered Movant a 10-year deal with 120 days shock. Counsel advised Movant to reject this offer, and to proceed to preliminary hearing. This caused the favorable offer to be withdrawn. After various pretrial litigation, Movant and co-defendant ultimately pleaded guilty in "blind pleas," but only co-defendant received anything in exchange from the State in doing so. The State agreed that if Movant pleaded guilty with co-defendant, the State would dismiss various charges against co-defendant and allow her to be released from jail pending sentencing. The plea court accepted the pleas in a "group plea" with five other non-related cases in order to "save a great deal of time." Movant was ultimately sentenced to 22 years. He filed a Rule 24.035 motion, which the motion court denied without an evidentiary hearing.

Holding: (1) Counsel operates under a conflict of interest where something was done which was detrimental to Movant's interests and advantageous to a person whose interests conflict with Movant's. Upon such a showing, prejudice is presumed. Here, Movant lost the opportunity to plead to the most favorable terms because counsel chose to proceed with pretrial litigation, which was in co-defendant's interests, but not Movant's. Counsel should have withdrawn. Because counsel's actions favored co-defendant's interests, prejudice is presumed. Even if prejudice were not presumed, the fact that Movant received 22 years after being advised to reject a 10-year probation offer supports that counsel was conflicted and shows that counsel failed to advocate for Movant. (2) The appellate courts have repeatedly warned the plea court here that "group pleas" are disfavored. Given all the circumstances in this case, the "group plea" rendered Movant's plea involuntary, and appellate court grants relief without the need for an evidentiary hearing. The plea court had a duty to inquire about the conflict of interest, but did not. The fact that the State's promises to co-defendant were contingent on Movant's own blind plea should have been a red flag to the plea court, as should the fact that both had the same counsel. The plea court did not protect the interest of justice, but was only interested in "saving time." The scene "smacks of intimidation." Regardless of what Movant actually said on the record at his plea, it is obvious Movant would have felt pressured since Movant's sister was standing right beside him and was the co-defendant. (3) Where ineffective assistance causes a defendant to reject a favorable plea offer, the remedy is order the State to re-offer the favorable plea offer. (5) The plea court further added to the intimidating atmosphere by closing the courtroom during the "group plea." Although the appellate court does not decide the issue because it reverses on other grounds, appellate court notes that the closure likely violated Movant's right to a public trial. (5) Finally, appellate court notes that the transcript submitted on appeal is a redacted transcript containing only the responses of Movant and co-defendant. Although it is not clear whether this was done by Movant's attorney, the court or court reporter, it is improper. A full transcript is necessary for appellate review, and would have been useful here to see all the responses during the "group plea."

State v. Turner, 2015 WL 5829664 (Mo. App. E.D. Oct. 6, 2015):
Holding: (1) Standard of review for determining whether trial court was required to grant hearing under *Franks v. Delaware*, 438 U.S. 154 (1978)(allowing challenge to veracity of police statements in warrant affidavit) is unclear in Missouri, but Eastern District deems it to be abuse of discretion; and (2) even though defense counsel failed to object to testimony about physical evidence that was the subject of a motion to suppress, where counsel objected to the actual physical exhibits and photographs thereof when they were "offered" at trial, this preserved the issue for appeal.

State v. Green, 2015 WL 5432954 (Mo. App. E.D. Sept. 15, 2015):
Holding: Even though defense counsel initially stated "no objection" to admission of evidence at trial which had been the subject of a motion to suppress, where (1) counsel realized her error during the State's case-in-chief, and stated for the record that she erroneously failed to preserve the issue and then objected, and (2) the trial court noted the "now proper" objection and overruled it, the appellate court deems the issue preserved (not waived) for appeal.

Gales v. State, 2015 WL 5432785 (Mo. App. E.D. Sept. 15, 2015):
Holding: Appellate court is required to, sua sponte, determine if Amended Rule 24.035 motion was timely filed, and when not, must remand for abandonment hearing; if the motion court determines Movant was not abandoned, the court should not consider the Amended motion and should decide only the initial Form 40 claims; if Movant was abandoned, the court should permit the untimely filing.

State v. Meine, 2015 WL 5135420 (Mo. App. E.D. Sept. 1, 2015):
Holding: (1) Since second-degree involuntary manslaughter (negligently causing death) is a "nested" lesser-included offense of first-degree murder (knowingly causing death with deliberation), trial court erred in not giving requested second-degree involuntary instruction; but where court gave instructions for the "nested" lessers of second degree murder (knowingly causing death) and first-degree involuntary manslaughter (recklessly causing death) and jury convicted of first-degree murder, Defendant was not prejudiced since the failure to give a different lesser is not prejudicial when instructions for one lesser were given and Defendant was found guilty of the greater; and (2) even though defense counsel stated "no objection" when photographs of weapons unrelated to the offense were introduced, where the trial court had granted counsel a continuing objection to this evidence moments earlier, the subsequent statement of "no objection" reasonably meant "no other objection than the continuing one," and the issue was not waived for appeal (but was not winning on the merits).

Clay v. State, 2015 WL 5135603 (Mo. App. E.D. Sept. 1, 2015):
Holding: Even though the docket sheets reflected that counsel's amended 29.15 motion was filed late, where the file-stamp date on the motion showed it was timely filed, appellate court concludes that the motion was timely even though there is no explanation in the record for the discrepancy.

Blackburn v. State, 2015 WL 5135192 (Mo. App. E.D. Sept. 1, 2015):
Holding: Where postconviction counsel filed the amended 29.15 motion late, appellate court must, sua sponte, remand case to motion court for inquiry into abandonment.

Lomax v. State, 2015 WL 3961195 (Mo. App. E.D. June 30, 2015):
Holding: Appellate court is required, sua sponte, to determine timeliness of amended motion under Rules 24.035 and 29.15, and where motion was untimely, remand to motion court for finding on abandonment by counsel, even where counsel acknowledges on appeal that the untimely filing was due to counsel's error, not Movant's.

Childers v. State, 2015 WL 3485578 (Mo. App. E.D. June 2, 2015):
Holding: Even though appellate court has a *sua sponte* duty to determine if the Amended Motion was untimely and, if so, usually must remand to the motion court for an abandonment hearing, the appellate court need not remand where *all* of the claims in both the *pro se* and Amended Motions were decided by the motion court with written Findings.
Discussion: Postconviction counsel acknowledges that the untimely filing of the Amended Motion was her fault because she forgot to request the 30-day extension of time authorized by Rule 29.15. However, remand for an abandonment hearing is not necessary here. In a remand, if the motion court were to determine Movant was abandoned, it would decide the Amended Motion claims; if the motion court were to determine Movant was not abandoned, it would only decide the timely-filed *pro se* claims. Here, the motion court has already decided by written Findings *all* the *pro se* and Amended Motion claims, so remand would be pointless. Movant has received all the process he's entitled to from the motion court regarding deciding his claims, and the appellate court can decide them on the merits.

State v. McAfee, 2015 WL 1915290 (Mo. App. E.D. April 28, 2015):
An appeal after a denial of a Rule 29.07(d) motion to withdraw a guilty plea may allow for "plain error" review of claims not raised in the trial court.
Facts: Movant pleaded guilty to second degree murder. Before sentencing, Movant filed a 29.07(d) motion to withdraw his guilty plea, which the trial court denied. He appealed.
Holding: A defendant is not allowed to withdraw a plea as a matter of right. He must prove "manifest injustice" to be allowed to withdraw a plea. Generally, a defendant must prove that his plea was unknowing and involuntary because he was misled by mistake, fraud, misapprehension, coercion, fear, persuasion or the holding out of false hopes. On appeal, the appellate court reviews for abuse of discretion. There is no appellate jurisdiction to hear an appeal of an *order* denying a 29.07(d) motion. However, there is jurisdiction to appeal from the *judgment of conviction*, which is what Defendant is appealing here. On the merits, Defendant seeks plain error review of a claim he failed to raise in the trial court. It is an issue of first impression whether plain error review applies to Rule 29.07(d) motions. Plain error review does not apply to Rule 24.035 motions because Rule 24.035 contains express language that claims not raised in the motion court are waived. By contrast, Rule 29.07(d) does not contain the waiver language. Further, Rule 29.07(d) expressly provides that a plea may be withdrawn "to correct manifest

injustice" – which is the identical standard for plain error review. Thus, the Court of Appeals assumes plain error review is possible under 29.07(d). However, Court does not find it here.

Westergaard v. State, 2014 WL 1225223 (Mo. App. E.D. March 25, 2014):
Holding: (1) Even though the *in forma pauperis* motion was filed before the Notice of Appeal, it is considered filed with the Notice of Appeal for purposes of Rule 81.04, which states that a trial court shall file a Notice of Appeal on the date it was received if it is accompanied by a motion to appeal *in forma pauperis*, and (2) The filing date of the Notice of Appeal is the date it was actually filed, even if the *forma pauperis* motion itself is not granted until a later date.

A.L.C. v. D.A.L., 2014 WL 707163 (Mo. App. E.D. Feb. 25, 2014):
Holding: Where Associate Circuit Court failed to make a recording of the order of protection hearing so that no transcript was available for appeal, judgment is reversed and remanded for new trial since Sec. 512.180.1 requires a record be kept in all contested civil matters before an Associate Circuit Judge.

State v. Famous, 2013 WL 6498989 (Mo. App. E.D. Dec. 10, 2013):
Holding: Order denying post-sentence petition for credit for time spent on probation is not appealable because it is not a "final judgment" under Sec. 547.070.

State v. Brooks, 2013 WL 798853 (Mo. App. E.D. March 5, 2013):
Holding: Alleged evidentiary errors at a sentencing hearing after a guilty plea are not cognizable on direct appeal because they do not involve subject matter jurisdiction or sufficiency of the information or indictment; the proper remedy for challenging the legality of a sentence following a guilty plea is a Rule 24.035 motion.

State v. Hudson, No. ED96609-01 (Mo. App. E.D. 11/20/12):
Where after Defendant's trial but while his appeal was pending the Supreme Court declared a portion of the harassment statute as unconstitutionally overbroad, Defendant's conviction under that statute must be set aside because it is plain error to convict under an unconstitutional statute.
Facts: Defendant was convicted of harassment under Sec. 565.090.1(5) for text messages, phone calls and name-calling to an ex-girlfriend. Sec. 565.090.1(5) provided that a person commits the crime of harassment if he knowingly makes repeated unwanted communication to another person. After Defendant's trial but while his appeal was pending, the Supreme Court found in *State v. Vaughn*, 366 S.W.3d 513 (Mo. banc 2012), that Sec. 565.090.1(5) was overbroad under the First Amendment because it criminalized protected speech. Defendant contends that his conviction constitutes plain error.
Holding: Even though Defendant did not raise the constitutional issue in the trial court, plain error results if a person is convicted under an unconstitutional statute. Such a conviction is not merely erroneous, but is illegal and void. Where the law changes after a judgment but before the appellate court renders its decision, the change in law must be followed. Conviction vacated.

State v. Barber, No. WD742879 (Mo. App. E.D. 11/13/12):
Where (1) a recording machine malfunction caused most of Defendant's testimony at trial to not have been recorded; (2) the State refused to stipulate to Defendant's testimony on appeal; and (3) the testimony was crucial to Defendant's points raised on appeal, Defendant was prejudiced by the lack of a transcript and entitled to a new trial.
Discussion: Rule 30.04(h) allows parties to correct an omission from a transcript by stipulation. Although Defendant submitted an affidavit as to what his testimony was, the State refused to stipulate to its accuracy. The State argues that Defendant was not prejudiced by the missing testimony since the jury found him guilty and, thus, the missing evidence must not have been helpful to his defense. "Were we to accept this argument, however, it would render transcripts of trials meaningless." The missing portion of the transcript is necessary for meaningful appellate reviews of Defendant's points on appeal, including sufficiency of evidence. Even though the prosecutor did not cause the recording machine to malfunction, it is the State that seeks to take Defendant's liberty from him. Due process requires that the State ensure that Defendant has access to a transcript of his testimony or at least a stipulation as to the specific contents of his testimony. Here, Defendant has neither, through no fault of his own.

State v. Harris, No. ED96045 (Mo. App. E.D. 12/20/11):
(1) Where defense counsel's offer of proof was cut short by the trial judge and the parties all understood the issues, the appellate court would consider it sufficient; and (2) to admit a text message, the proponent must offer some proof (even circumstantial) that the message was sent by the purported author of the message.
Facts: Defendant at trial sought to admit text messages which Victim allegedly sent to another Witness. The trial court would not allow this. The defense attempted to make an offer of proof on this matter, but was cut short by the trial judge. After conviction, Defendant appealed.
Holding: (1) The State claims this issue is not preserved because there was no offer of proof. However, Defendant tried to make an offer of proof but was cut off by the judge. The parties discussed this issue for 10 pages of transcript, which shows that everyone understood the issue. Given all this, the appellate court will not fault Defendant for not making an offer of proof. (2) On the merits, the proponent of text messages must present some proof (even circumstantial) that the texts were sent by the purported author of the text. This could be in the form of an admission by the author that he wrote them, or an admission by the author that the number from which the texts were sent was his number and he had control of his phone. Such proof could also be made by the person who received them testifying that he regularly receives texts from this author, or something distinctive about the texts, such as a personal signature. Here, however, Defendant did not question the Victim (who allegedly sent the texts) whether she did send them to the Witness. There was no foundation to admit the texts, so court did not err in excluding them.

Williams v. State, No. ED95386 (Mo. App. E.D. 11/15/11):
Where there was no evidence that a gun Defendant-Movant used in an unlawful use of weapon case was readily capable of lethal use, Movant was entitled to an evidentiary

hearing on claim that appellate counsel was ineffective in failing to raise sufficiency of evidence on direct appeal.
Facts: Defendant pointed a gun at various persons. He was convicted at a trial of unlawful use of a weapon, and other offenses. After losing his direct appeal, he filed a 29.15 motion alleging that appellate counsel was ineffective in failing to appeal the issue of sufficiency of evidence to support the unlawful use of weapon conviction. The motion court denied the claim without a hearing.
Holding: To show ineffective appellate counsel, Movant must show that counsel failed to raise a claim that was so obvious that a competent attorney would have recognized it and asserted it, and that there is a reasonable probability the outcome of the appeal would have been different. Unlawful use of a weapon requires display of a weapon "readily capable of lethal use." Sec. 571.030.1(4). Here, Movant contends that the State presented no evidence that the gun was readily capable of lethal use. The State had the burden of proof and was required to produce evidence that the gun used was capable of lethal use. The State's assertion that a gun is generally capable of lethal use is not unreasonable, but a verdict cannot rest upon stacked inferences when there are not supporting facts in the first inference. Denial of postconviction relief reversed, and case remanded for evidentiary hearing on whether appellate counsel was ineffective.

State v. Moore, No. ED95643 (Mo. App. E.D. 11/8/11):
Holding: Where Defendant receives an SIS on an offense, he cannot direct appeal because there is no final judgment, but a remedy may be available by writ.

State ex rel. Thompson v. Dueker, No. ED96570 (Mo. App. E.D. 8/9/11):
Even though Husband consulted with Attorney about a potential divorce case, where Husband did not end up hiring Attorney, Husband was only a "prospective client" of Attorney under Rule 4-1.18, and where Wife later hired Attorney in regard to the divorce, Husband could not disqualify Attorney without showing that Attorney received confidential information that could be significantly harmful to Husband in the matter.
Facts: Husband met with Attorney about a potential divorce case, and Husband claimed he discussed confidential matters with Attorney. Husband ended up, however, hiring a different lawyer for the case. Wife later hired Attorney in relation to the divorce case. Husband moved to disqualify Attorney, claiming he was a former client of Attorney under Rule 4-1.9. Trial court disqualified Attorney.
Holding: A writ of prohibition is proper where a court disqualifies a lawyer from representing a client because the judgment, if erroneously entered, would cause considerable hardship and expense and the issue would otherwise escape appellate review. Rule 4-1.9(a) applies to conflict of interest with former clients. To establish a conflict under Rule 4-1.9, a movant for disqualification must prove (1) the Attorney had a former attorney-client relationship with movant; (2) the interests of Attorney's current client are materially adverse to movant's interests; and (3) the current representation involves the same or substantially related matter as Attorney's former representation of movant. Here, however, Husband (movant) did not have an attorney-client relationship with Attorney because Husband did not seek or receive any legal advice from Attorney. Rule 4-1.18(a) provides that "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."

Rule 4-1.18(b) provides that an Attorney must keep information of prospective clients confidential. However, Rule 4-1.18(c) provides that a lawyer shall not represent former prospective clients in the same or substantially related matter only if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. This provides a more restrictive standard for disqualification than does 4-1.9 for former clients. Under 4-1.18(c), the movant asserting disqualification bears the burden of proving that Attorney received "significantly harmful" information. Mere speculation of receipt of such information is not enough. Here, Husband did not demonstrate what "significantly harmful" information Attorney had received. Disqualification of Attorney reversed.

Burston v. State, No. ED98228 (Mo. App. E.D. 6/21/11):
Holding: Dismissal of postconviction motion under 24.035 and 29.15 is immediately appealable because this effectively terminates the litigation, since successive motions are not allowed.

State v. Beckemeyer, No. ED94412 (Mo. App. E.D. 2/15/11):
Holding: In misdemeanor direct appeal, Court of Appeals considers claim of ineffective assistance of trial counsel.

Editor's note: In felony direct appeals, ineffective assistance of trial counsel cannot be raised, but must be raised in a Rule 29.15 motion. *See State v. Wheat*, 775 S.W.2d 155 (Mo. banc 1989).

Mercer v. State, 2015 WL 9481403 (Mo. App. S.D. Dec. 29, 2015):
Holding: Where trial court denied a motion seeking DNA testing under Sec. 547.035 with a docket entry stating that the motion was "overruled and denied," this was not a final appealable judgment, because it was not signed by a judge nor dominated a "judgment" as required by Rule 74.01(a); appellate court, sua sponte, dismisses appeal.
Dissenting opinion: Failure to comply with Rule 74.01(a) is not "jurisdictional" for the appellate court, but is merely error which appellate court is not required to address, unless raised by the parties (who didn't raise the matter).

Jendro v. State, 2014 WL 7183607 (Mo. App. S.D. Dec. 17, 2014):
Holding: Where (1) PCR counsel filed an amended motion, (2) Movant retained new counsel who alleged that prior counsel's amended motion was defective, and (3) the motion court entered a "judgment and order" overruling Movant's "abandonment" motion but did not rule on the merits of the amended motion that was filed, the appeal is premature because the motion court did not resolve Movant's PCR claims on the merits; because the motion court did not decide the PCR claims on the merits, the abandonment judgment is not a final judgment, and appeal must be dismissed.

Cates v. State, 2015 WL 7265121 (Mo. App. S.D. Nov. 17, 2015):
Holding: (1) Motion court did not clearly err in finding that 24.035 Movant was affirmatively misadvised by counsel that he would not receive more than 30 years and would not receive consecutive sentences in open plea, where plea counsel's file notes indicated that he had, in fact, assured Movant of this; even though other evidence on this

issue was conflicting, it was within exclusive province of motion court to determine which evidence to believe; (2) State's brief lacked "any analytical value" where it failed to acknowledge any substantial evidence supporting the motion court's ruling.

State v. Evans, 2015 WL 5672638 (Mo. App. S.D. Sept. 25, 2015):
Holding: Even though the court conducted a *Frye* hearing before trial on the admissibility of certain scientific evidence, the court's pretrial ruling was interlocutory and subject to change at trial, and Defendant failed to preserve his *Frye* challenge for appeal by failing to object to admission of the scientific evidence testimony at trial on grounds that it failed to satisfy the *Frye* test.

State v. Love, 2014 WL 4723124 (Mo. App. S.D. Sept. 23, 2014):
Where trial court granted a motion to set aside judgment or for new trial, but then took no further action in case, the State could not appeal since there was no "final judgment."
Facts: After conviction at trial, Defendant filed a "Motion to Set Aside Judgment or for New Trial," which was sustained. However, the trial court took no further action. The State appealed.
Holding: In order to appeal, there must be a "final judgment" which disposes of all issues and leaves nothing for future determination. Here, the trial court merely set aside the judgment of conviction, apparently because the court thought the evidence was insufficient. However, the court failed to enter a judgment of acquittal, failed to convict of a lesser-included offense, or failed to finalize the case in any other legally permissible way. Therefore, there is no final judgment to support an appeal.

List v. Director of Revenue, 2015 WL 5576343 (Mo. App. S.D. Sept. 22, 2015):
(1) Even though trial court stated that it was continuing an evidentiary hearing to allow the parties to provide written arguments, where the court then apparently mistakenly entered a judgment, the judgment became final 30 days later and the court lacked authority to set it aside after 30 days; (2) where trial court entered a second judgment more than 30 days later, which the Director then appealed, the appellate court, sua sponte, corrects the excess of authority by the trial court and vacates the second judgment and reinstates the first judgment.
Facts: Driver filed a petition to review his license revocation. The court held an evidentiary hearing, and continued the case to allow the parties to submit written arguments. Shortly after, the court apparently mistakenly entered a judgment for Director. No after-trial motions were filed. More than 30 days later, the court apparently recognized its mistake, and reset the case for additional evidence. After another hearing, the court entered a judgment for Driver. Director appealed.
Holding: Although neither party raises the issue, the appellate court must, *sua sponte*, determine if it has authority to hear the merits of the second judgment. Under Rule 75.01, trial courts retain control over judgments for 30 days, but once the 30 days expires, the judgments are final unless an authorized after-trial motion was filed. Here, the court lost authority over the "first" judgment once it became final after 30 days, and the court could not set it aside. The appellate court has jurisdiction, but cannot consider the merits of the "second" unauthorized judgment. Appellate court must correct the trial court's

excess of authority. Second judgment is vacated, and case remanded for reinstatement of first judgment.

State ex re. Phillips v. Hackett, 2015 WL 5298946 (Mo. App. S.D. Sept. 10, 2015):
Holding: Even though Relator (who was seeking a writ of prohibition) failed to properly object to a discovery request in the trial court, the appellate court in a writ action is not restricted only to the issues that were properly raised or preserved in the trial court; "[a] writ of prohibition is a discretionary remedy, and we may accept limitation on the issues or examine new points not offered ab initio."

State v. Henderson, 2015 WL 4627424 (Mo. App. S.D. Aug. 4, 2015):
Holding: (1) The 25-day requirement for filing a New Trial Motion under Rule 29.11(b) is not jurisdictional, and can be waived by the State; where State had asked trial judge to rule on the merits of "late" New Trial Motion, State could not argue the opposite on appeal to bar appellate court from ruling issue on the merits; appellate court decides issue on the merits; (2) where the written judgment and sentence misstated the offense Defendant was convicted of, this was a clerical error that can be corrected nunc pro tunc.

State v. Thompson, No. SD33492 (Mo. App. S.D. April 8, 2015):
Holding: Where trial court entered an order on a suppression motion that "suppressing the evidence for inadequate probable cause is consistent with the cases supplied by defense counsel," the order was too vague for the appellate court to have jurisdiction to consider the State's appeal; the trial court's order was not a definitive ruling on a motion to suppress.
Discussion: The State appeals what purports to be an order granting Defendant's motion to suppress. Sec. 547.200 authorizes the State to appeal grants of motions to suppress. But here, the order does not have the substantive effect of suppressive evidence; it is too vague. The order never definitely rules on the motion to suppress; the trial court's conclusion is unclear. As a result, the appellate court lacks jurisdiction to hear an appeal under 547.200.

State v. McMillian, 2015 WL 392674 (Mo. App. S.D. Jan. 29, 2015):
Where court dismissed charge before preliminary hearing, State could not appeal dismissal because this was not a final judgment, but State can re-file charge before a different judge.
Facts: State charged Defendant with felony stealing for receiving unemployment benefits unlawfully. Prior to preliminary hearing, Defendant filed a motion to dismiss on various grounds, including double jeopardy, and that the legislature had made this a different offense than felony stealing. The court granted the motion to dismiss. The State appealed.
Holding: Sec. 547.200.2 and Rule 30.01(a) require a final judgment as a prerequisite to appeal in a criminal case. A dismissal without prejudice is not a final judgment. Also, the State cannot appeal a dismissal at a preliminary hearing. Here, there is no final judgment, so appellate court lacks jurisdiction to consider the appeal. The State's remedy is to re-file the charge and have a different judge hear the new case. The general rule is that where the State re-files a complaint after a finding of no probable cause, the judge

who failed to find probable cause must recuse so that the new case can be heard by a different judge.

State v. Stone, 430 S.W.3d 288 (Mo. App. S.D. 2014):
Even though trial court suppressed evidence and State filed an interlocutory appeal, where none of the arguments presented by the State on appeal were presented to the trial court, State failed to preserve anything for appeal.
Facts: The trial court granted Defendant's motion to suppress evidence. The State filed an interlocutory appeal raising various legal arguments as to why the trial court erred. However, none of these arguments were presented to the trial court.
Holding: The State has failed to preserve anything for appeal by not presenting its arguments to the trial court. Motions to suppress typically involve complicated legal issues. Requiring arguments and claims to be presented to the trial court first in order to preserve them for appellate review allows the trial court to rule intelligently on, and fix, any errors itself. Here, the State did not give the trial court that opportunity. The trial court would have been free to reconsider its ruling on the motion to suppress, and to consider the State's arguments, if the State had availed itself of that opportunity, but the State didn't do so. Interlocutory order suppressing evidence affirmed.

State v. Jacobs, 2013 WL 5028984 (Mo. App. S.D. Sept. 13, 2013):
Holding: Even though the trial court sentenced Defendant and entered judgment before the 15 days for filing a new trial motion expired, this was merely trial error which can be waived by Defendant and not "jurisdictional" after *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009); Southern District rejects prior cases that held this is "jurisdictional" such that there is no jurisdiction to hear appeal.

State v. DeLong, No. SD30928 (Mo. App. S.D. 9/30/11):
Holding: Footnote 3 states that where appellate court is reviewing an issue under *de novo* standard (such as whether interstate agreement on detainers applied), it does not matter whether party "properly preserved" issue for appellate review or whether there is a transcript of the legal arguments in the court below.

Shaw v. State, No. SD30814 (Mo. App. S.D. 8/17/11):
Even though trial judge "thought" he imposed consecutive sentences, where the transcript said "concurrent" and State did not challenge the accuracy of the transcript pursuant the procedures of Rule 30.04(g), the appellate court must accept the accuracy of the transcript and the oral pronouncement of sentence controls.
Facts: Defendant entered into a plea bargain whereby prosecutor would recommend consecutive sentences, but Defendant could argue for something less. However, the plea and sentencing transcript refer to the State's offer as being for "concurrent" sentences and the transcript of the oral pronouncement of sentence said the sentences were "concurrent." However, the written sentence and judgment said they were "consecutive." Defendant filed a 24.035 motion alleging the oral pronouncement controlled. At the evidentiary hearing on the 24.035 motion, the trial judge said he "thought" he had said "consecutive," and his notes reflected that. Also, the plea attorney and prosecutor testified they thought it was "consecutive." The motion court denied relief based on this.

Holding: The law is clear that where an oral pronouncement of sentence differs from the written sentence and judgment, the oral pronouncement controls. Here, the State argues that the court implicitly found that the transcript of the plea and sentencing was wrong. However, there is an established procedure for challenging the accuracy of a transcript under Rule 30.04(g), which would have required the State to file a motion to correct the transcript and have a hearing at which the court reporter could testify about the accuracy of the transcript and perhaps a backup tape recording as well. Because the procedure of Rule 30.04(g) was not followed, this Court is bound by the certified transcript of the proceedings which clearly states that the sentences are "concurrent." Consecutive sentences vacated and remanded for entry of written sentence and judgment with concurrent sentences.

Jack v. State, No. SD30512 (Mo. App. S.D. 8/9/11):
Holding: Denial of Rule 29.07(d) motion to correct manifest injustice is appealable and is governed by rules of civil procedure; judgment becomes final 30 days after entry and notice of appeal is due not later than 10 days thereafter.

State v. Cannafax, No. SD30327 (Mo. App. S.D. 7/22/11):
Where Defendant's sexual offenses occurred during a time span from early 2006 to 2008, but it was unclear if they occurred after August 28, 2006, and the trial court's judgment made no findings about this, it is unclear whether the lifetime supervision requirements of Sec. 217.735 apply to Defendant, but the issue is not ripe until the Board of Probation and Parole attempts to apply them to him; at that time, he may bring a writ of mandamus to challenge their applicability.
Facts: Defendant was convicted of sexual offenses alleged to have occurred between June 7, 2006 and November 2008. The trial court did not expressly find that the offenses occurred after August 28, 2006 and did not state in its judgment that Defendant was subject to lifetime supervision under Sec. 217.735, which provides that offenders are subject to lifetime supervision for certain sexual offenses "based on an act committed on or after August 28, 2006."
Holding: Defendant's claim on appeal is that he is improperly subject to lifetime supervision under Sec. 217.735 because there was not sufficient evidence to prove his offenses happened after August 28, 2006. However, since the trial court made no findings about this and made no mention of it in its judgment, it is unclear if Defendant will be subjected to lifetime supervision when he completes his prison sentence. Thus, this issue is not ripe for review. However, if the Board of Probation and Parole seeks to apply Sec. 217.735 to him in the future, he may challenge that via a writ of mandamus.

Epkins v. State, No. SD30349 (Mo. App. S.D. 2/10/11):
Even though Movant's 24.035 motion only generally alleged that counsel had "coerced" him into waiving a jury, but the evidentiary hearing evidence was that counsel told him he'd get medical treatment faster if he did this, appellate court will review the claim on the merits; general pleading sufficient.
Holding: We acknowledge Movant's amended motion more generally refers to trial counsel's allegedly coercive conduct and does not specifically mention Movant's medical condition. However, during the evidentiary hearing, claims of coercion based upon

counsel's alleged inducement stemming from Movant's medical condition was clearly presented. Since Movant's argument on appeal was generally encompassed in Movant's amended motion, and presented to the motion court at the hearing, we choose to review the claim on the merits.

In re the Matter of R.M.A. v. Blue Springs R-IV School Dist., 2015 WL 8242999 (Mo. App. W.D. Dec. 8, 2015):

Holding: (1) Even though the trial court appeared to rule a writ of mandamus on the merits, an "appeal" lies only where (a) the lower court has issued a preliminary order in mandamus but then denies a permanent writ or (b) when the lower court issues a summons, the functional equivalent of a preliminary order, and then denies a permanent writ; (2) where the lower court did not issue a preliminary order or a summons, the remedy is to file a new writ petition in the higher court, not to "appeal"; (3) cases which hold that an "appeal" will lie from a trial court's denial of a writ petition on the merits are likely no longer valid in light of *U.S. Dep't of Veterans Affairs v. Boresi*, 396 S.W.3d 356 (Mo. banc 2013), which sets forth the foregoing principles in accord with Rule 94.

State v. Pickering, 2015 WL 6919826 (Mo. App. W.D. Nov. 10, 2015):

Where State failed to show that breathalyzer machine had been certified against the NIST standard between Jan. 1, 2013 and Dec. 31, 2013, as required by 19 CSR 25-30.051, the State failed to lay an adequate foundation for admission of the BAC result, and Defendant was prejudiced because trial court at bench trial relied on BAC result in finding guilt; because there was other evidence sufficient to prove guilt, which the trial court may not have considered, the remedy is to remand for new trial.

Facts: Defendant was charged with DWI. The evidence was that he was driving erratically, failed field sobriety tests, and had a breathalyzer result of .136. Defendant claimed the court erred in admitting the BAC result because the State did not present any evidence that the breathalyzer machine had been certified against the National Institute of Standards and Technology standard.

Holding: Breathalyzer results are admissible only if the State complies with the requirements of Chapter 577. This requires following the methods approved by the Dept. of Health. 19 CSR 25-30.051 provides that any breath alcohol simulator shall be certified against a NIST traceable reference thermometer or thermocouple between Jan. 1, 2013 and Dec. 31, 2013 and annually thereafter. The State's evidence at trial did not establish that this regulation was followed. Although the State presented evidence that the machine was subjected to monthly maintenance in 2013, the State presented no evidence that the breath alcohol simulator was NIST certified in 2013. Absent such evidence, the State failed to lay a sufficient foundation to support admission of the BAC result. Defendant was prejudiced because the trial judge relied on the BAC result in finding Defendant guilty. The remedy is to remand for a new trial. The State was not required to prove an actual measure of Defendant's blood alcohol content. Defendant could be found guilty even without a BAC result. The evidence of erratic driving and failed sobriety tests was sufficient to prove guilt. There is no clear indication that the trial court considered this evidence without the BAC result. Remanded for new trial.

Powell v. City of Kansas City, 2015 WL 5821845 (Mo. App. W.D. Oct. 6, 2015):
Holding: (1) Even when a civil litigant is granted leave to proceed as a poor person, Sec. 514.040 allows a court discretion to assess whatever costs the court believes the litigant may be able to pay, except in postconviction cases under Rules 24.035 and 29.15, where a court cannot assess any costs against Movants; and (2) Rule 81.08(a) requires a notice of appeal to specify the judgment or order appealed from; where Appellant's notice of appeal stated only that Appellant was appealing from an entry of summary judgment, appellate court would not review on appeal Appellant's claim that trial court erred in overruling a new trial motion, because the notice of appeal did not specify that Appellant was appealing such ruling (which was different than the summary judgment order) and Appellant failed to attach the new trial motion to her notice of appeal.

Davis v. Davis, 2015 WL 5432111 (Mo. App. W.D. Sept. 15, 2015):
Even though Defendant posted an "appeal bond" in conjunction with an appeal of a civil contempt order for failure to pay child support, a contempt order is not appealable and remains interlocutory until there is either a warrant of commitment or actual confinement in jail.
Facts: Defendant-Father attempted to appeal an order finding him in civil contempt for failure to pay child support. The trial court set an appeal bond of $55,000 and set a deadline for Defendant to pay or report to county jail. Defendant posted the appeal bond, and appealed.
Holding: A civil contempt order does not become "final" for appeal until it is enforced. The trial court must issue both a judgment of contempt and a proper order of commitment that explains what Defendant must do to purge the contempt, and that Defendant has the ability to purge the contempt. Here, the contempt judgment has never been enforced either by a warrant of commitment or actual incarceration. No order of commitment was ever issued by the trial court. Even though Defendant posted an "appeal bond," he can't appeal at this time because the trial court's actions are not final. Appeal dismissed.

In re Marriage of Long v. Long, 2015 WL 5025130 (Mo. App. W.D. Aug. 25, 2015):
Holding: A civil contempt judgment becomes "final" for purposes of appeal when it is actually enforced, i.e., on the date the contemnor is first incarcerated, and notice of appeal is due within 10 days thereafter under Rule 81.04(a) and Sec. 512.050; appeal dismissed where notice of appeal was filed more than 10 days after contemnor was first incarcerated.

State v. Dudley, 459 S.W.3d 499 (Mo. App. W.D. 2015):
Holding: Appellate court, sua sponte, dismisses 24.035 motion as untimely filed where Amended Motion alleged only that Movant "attempted" to timely file his pro se 24.035 motion but that the motion was "not received by the court." Movant's Amended Motion failed to allege *why* his pro se motion was not received, and did not allege that circumstances beyond his control, or that negligence or misconduct by others, prevented his attempted filing from being successful. In the absence of such allegations, there is no exception to 24.035's time limits that applies.

Powell v. Dept. of Corrections, 2015 WL 3856355 (Mo. App. W.D. June 23, 2015):
(1) Circuit courts are not authorized to issue summonses in writ of mandamus cases; instead, the courts should only issue preliminary writs; (2) where circuit court issued an unauthorized summons before denying a permanent writ, the denial was not appealable; petitioner's remedy was to file a new writ in higher court; (3) if a circuit court issues a preliminary writ before denying a final writ on the merits, then the remedy is direct appeal.
Facts: Petitioner applied for a writ of mandamus in circuit court. The circuit court did not issue a preliminary order in mandamus as per Rule 94.04 but instead issued a summons to the DOC. The DOC then filed suggestions in opposition. The circuit court then issued a judgment on merits denying the writ. Petitioner appealed.
Holding: The initial question is does the appellate court have jurisdiction to hear the appeal? Under Rule 94, as a general rule, *an appeal will lie* from the denial of a writ petition when the lower court has issued a preliminary order in mandamus but then denies a permanent writ. (However, the Western and Eastern Districts have held that even when a preliminary order has issued, the final decision is still not reviewable by appeal if it does not reach the merits of the petition, such as dismissal for lack of jurisdiction.) But if the circuit court does not grant a preliminary order in mandamus, the petitioning party must file its writ petition in the next higher court. A preliminary order in mandamus directs respondent to file an answer within a specified time, and may also order respondent to refrain from some action. If the circuit court issued a preliminary order, a final decision is reviewable by appeal. The Missouri Supreme Court has, as a matter of discretion, considered a summons to be the functional equivalent of a preliminary order and allowed appellate review in one case, but the Supreme Court has stated that the practice of issuing summonses in lieu of preliminary writs is not authorized by Rule 94. The Supreme Court has directed circuit courts to stop issuing summonses in lieu of preliminary writs. Since the circuit court here issued an unauthorized summons instead of a preliminary order before denying the writ, an appeal does not lie. Instead, the proper remedy is a new writ in the appellate court. All circuit courts should read and follow the writ procedures in Rule 94 (mandamus) and 97 (prohibition). Appeal dismissed.

McCoy v. State, 2015 WL 1246556 (Mo. App. W.D. March 17, 2015):
Holding: (1) A denial of a Rule 29.07(d) motion to withdraw a guilty plea for manifest injustice after an SES is an appealable judgment because an SES is a final criminal conviction; by contrast, a denial of a 29.07(d) motion after an SIS is not a final appealable judgment because no final criminal conviction has been entered. (2) Where Defendant received an SES and, thus, was not delivered to the Department of Corrections, he was not eligible to pursue relief under Rule 24.035 (which requires delivery to DOC), but he could pursue his ineffective assistance claim via a Rule 29.07(d) motion to withdraw guilty plea for manifest injustice. But (3) even though plea counsel failed to inform Juvenile-Defendant that he would be subject to lifetime GPS monitoring as a sex offender, counsel was not ineffective because this was a collateral consequence of conviction, and also there was no prejudice because there was no a reasonable probability that Defendant would have rejected the plea offer and gone to trial, since he was facing a lengthy sentence upon conviction at trial, rather than probation, and the evidence of guilt was strong. (4) Court refuses to consider claim that automatically

imposing lifetime supervision and monitoring on juveniles constitutes cruel and unusual punishment and violates *Graham v. Florida*, 560 U.S. 48 (2010), because this issue was not raised in the trial court or briefed by the parties, but raised for the first-time at oral argument.

Bridgewater v. State, 2015 WL 160833 (Mo. App. W.D. Jan. 13, 2015):
A motion to recall mandate can be used to present newly discovered evidence of guilty plea counsel's ineffectiveness, which evidence was not available at the time of the original Rule 24.035 evidentiary hearing.
Facts: Movant pleaded guilty, in an open plea, to three counts. At the plea, the judge informed him he could receive up to life sentences on each count, but never informed him that the sentences could run consecutively. The judge imposed three consecutive life sentences. Movant later filed a Rule 24.035 motion, alleging that plea counsel had affirmatively misrepresented that he would receive concurrent sentences if he pleaded guilty. At the evidentiary hearing, plea counsel testified that she did not have a "specific recall" or "specific details" of her discussion with Movant without looking at her notes, which were missing at the time of the hearing. Counsel testified it was her "practice" to tell a client the "worst case scenario," which would be consecutive sentences. The motion court denied relief. The Western District affirmed on appeal. Subsequently, counsel's notes were found. The notes supported Movant's claim that counsel indicated he would receive concurrent sentences. Movant filed a motion to recall the mandate in his appeal, claiming this newly discovered evidence warranted relief.
Holding: This is a case of first impression whether a motion to recall mandate can be used to present newly discovered evidence. A motion to recall mandate can be used to remedy a deprivation of a defendant's federal constitutional rights. Here, unless the mandate is withdrawn, Movant's ability to challenge whether he received effective assistance of counsel at his plea will be impaired. Counsel's notes were missing through no apparent fault or lack of diligence on the part of Movant. The notes clearly corroborate Movant's version of events. The notes are contrary to counsel's evidentiary hearing testimony and refute that she followed her standard "practice" of warning of consecutive sentences. Further, the plea judge, in violation of Rule 24.02(b)(1), failed to warn Movant of the possibility of consecutive sentences. Movant has no other apparent remedy besides a motion to recall mandate. A Rule 29.07(d) motion cannot be used because it cannot be a substitute for the timely assertion of a claim in a Rule 24.035 motion. Habeas corpus does not appear to be available, since this is not a claim of actual innocence or a procedurally defaulted claim that Movant was deprived of a fair trial. Appellate court recalls its mandate, and remands case for further evidentiary hearing and new Findings on Movant's claim that counsel misadvised him.

State v. Oerly, 446 S.W.3d 304 (Mo. App. W.D. 2014):
Even though bench trial judge sentenced Defendant immediately upon finding him guilty and did not wait 15 days to allow the filing of a new trial motion under Rule 29.11(c), appellate court had power to hear appeal were Defendant requested to be sentenced the same day; a judgment entered in violation of Rule 29.11(c)'s timing requirement is not "void," but merely voidable and the Defendant can waive noncompliance with Rule 29.11(c) where Defendant does not object in the trial court, or raise the issue on appeal.

Discussion: Prior cases had held that an appellate court lacks "jurisdiction" to hear an appeal where the trial court did not follow the timing requirement of Rule 29.11(c), which requires the trial court to wait 15 days between trial and sentencing in order to allow for a new trial motion to be filed. However, these prior cases are no longer valid after *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), regarding jurisdiction. A circuit court judgment is "void" only if the court lacked jurisdiction, but here the trial court had personal and subject-matter jurisdiction. Court Rules merely set limits on remedies but do not limit subject-matter jurisdiction. Rules merely affect the court's authority to act. Failure to follow Rule 29.11(c)'s timing requirement does not divest a trial court of jurisdiction or render its judgment "void" but merely "voidable" if and when a defendant wishes to challenge a premature judgment. Here, Defendant waived his right to a new trial motion and requested immediate sentencing. Thus, the appellate court may hear the case.

State v. Johnston, 2014 WL 4823628 (Mo. App. W.D. Sept. 30, 2014):
Where trial court granted new trial on basis that guilty verdict was "against the weight of the evidence," this was not a "final judgment" subject to appeal since the trial proceedings would continue; granting a new trial on this basis does not implicate double jeopardy because this is not a judgment of acquittal or finding of insufficient evidence.
Facts: Defendant was convicted of first degree murder. The trial court then granted Defendant's motion for new trial. The court found that the guilty verdict was "against the weight of the evidence," establishing good cause under Rule 29.11 which provides that a trial court may grant a new trial upon good cause shown. Additionally, Sec. 547.020(5) allows a trial court to grant a new trial "when the verdict is contrary to the law or evidence." The State appealed.
Holding: There is no "final judgment" here to allow an appeal. The judgment granting a new trial did not dispose of all issues and leave nothing for future adjudication. Here, everything is left for future adjudication since a new trial is pending. The State argues that the judgment was a *de facto* acquittal and that the State should be allowed to appeal because double jeopardy precludes retrial. But double jeopardy precludes retrial only if a conviction is set aside for insufficient evidence to support the verdict. However, when a new trial is granted because the verdict is "against the weight of the evidence," rather than that the evidence was insufficient to support the verdict, double jeopardy does not bar a retrial. The trial court made its own credibility determinations and assessed the evidence, which indicates a weight of the evidence rather than a sufficiency of the evidence analysis. Appeal dismissed.

State v. Wright, 2014 WL 1592530 (Mo. App. W.D. April 22, 2014), and **State v. Lovett, 2014 WL 1592299 (Mo. App. W.D. April 22, 2014):**
Even though trial court purported to dismiss an information against Defendants, where the trial court's order was unclear as to whether it was a dismissal and additional counts were apparently still pending, the appellate court was unable to discern what the trial court did and the judgment was not final, so there was no jurisdiction for the State to appeal.
Facts: Defendants were charged, in relevant part, with delivering or possessing an imitation controlled substance, Sec. 195.242, and other drug charges. Defendants were

possessing or selling "Sedation Incense," claiming it had an effect "similar" to marijuana. They did *not* claim it was marijuana. Defendants filed motions to dismiss. Among their claims was that Sec. 195.010(21)(the definition of imitation controlled substance) was void for vagueness because it failed to give fair notice of what conduct was illegal, and alternatively, the information was insufficient for failure to charge a crime because the Defendants never represented their substance to be marijuana. In accordance with an agreement with the parties, the trial court entered Findings of Fact, Conclusions of Law. The trial court found that there were no appellate cases addressing the sufficiency of evidence in situations where a defendant is alleged to have possessed or have sold an item knowing that it was not a controlled substance, but claiming it was "similar" to a controlled substance. The trial court found that appellate cases under the statute all involved imitations which the defendants represented to be illegal drugs. The trial court concluded that "[i]t is hoped that an appellate decision will help clear up this area of law. So Ordered." The State appealed.

Holding: The appellate court cannot conduct appellate review on this record, because the appellate court cannot determine what the trial court did, or whether its action is a final judgment. The trial court's Findings fail to state what relief, if any, the trial court is actually granting. The Findings simply say, "So Ordered." Although the parties seem to believe that the trial court dismissed the information, the Findings never state that. Even assuming that this was a dismissal, there are other counts on other charges that apparently are still pending. Judgments resulting in dismissal of *all* counts charged are final judgments from which the State can appeal. Missouri law is "unclear" as to whether the dismissal of some, but not all, counts in a multi-count information constitutes a final judgment for purposes of appeal, and Western District declines to address that issue here, because it doesn't want to speculate on the meaning of the Findings. Lastly, the trial court appears to have wanted to enter something akin to "summary judgment" in favor of Defendants, but there is no procedure for summary judgment in a criminal case in Missouri. In passing, however, the Western District notes in *Wright* in footnote 12 that Rule 24.04(b)(1), which provides that "[a]ny defense or objection which is capable of determination without trial of the general issue may be raised before trial by motion," could arguably create a procedure for dismissal of informations or indictments for insufficient evidence under an analogous federal case.

State v. Hopkins, 2014 WL 928973 (Mo. App. W.D. March 11, 2014):

Holding: Even though Defendant who pleaded guilty was denied his right of allocution at sentencing, the appellate court has no authority to hear this on direct appeal from a guilty plea, but the issue may be raised in a Rule 24.035 motion; a direct appeal of a guilty plea is limited to issues relating to subject matter jurisdiction and the sufficiency of the charging documents.

State v. Castro, 417 S.W.3d 390 (Mo. App. W.D. 2014):

Where Defendant voluntarily pays his sentencing fine prior to appeal, appellate case is moot and must be dismissed.

Facts: Defendant was convicted of a felony at trial, and sentenced to a $100 fine. He paid the fine the day after he was sentenced, and then appealed.

Holding: In order to preserve any issue for appeal in a criminal case where the sentence consists of a fine and costs, the defendant must make payment of the fine under circumstances that record the payment as not voluntarily made. Here, Defendant voluntarily paid his fine. He did not request a stay of payment from the trial court pending appeal. He did not file an appeal bond in lieu of paying the fine. He did not make any record that his payment was under protest or anything other than voluntary. The appellate court must examine its jurisdiction *sua sponte*. Here, there is no jurisdiction for the appeal and it is moot, because Defendant voluntarily paid his fine.

Damon v. City of Kansas City, 2013 WL 6170565 (Mo. App. W.D. Nov. 26, 2013): *(1) Claims that municipal ordinances are unconstitutional are not within the "exclusive" jurisdiction of the Missouri Supreme Court, but are also within the jurisdiction of the Court of Appeals; (2) Plaintiffs who have received a notice of violation but have not yet gone to court or paid their fine have standing to assert their claims in this action because they do not have an adequate remedy in their ordinance violation cases since Private Company which administers the red light fine collection program is allowed to act in law enforcement, prosecutorial and adjudicative roles under the ordinance (disagreeing with Eastern District cases); (3) the "notice of violation" under the ordinance appears to conflict with Rule 37 because it does not state the address of a court (but rather directs payment to a private company) and does not command appearance before a court; (4) Plaintiffs have alleged sufficient facts to survive a motion to dismiss in contending that the ordinance does not have a substantial relationship to public safety because it actually increases accidents, reduces the number of police officers, and is really a revenue collection program; (5) the ordinance conflicts with state law which requires assessment of points for moving violations; and (6) if the ordinance is "criminal" in nature, then the rebuttal presumption that the owner of the vehicle is the driver is unconstitutional because it violates the presumption of innocence as to every element of the crime and because it invades the fact-finding function of the jury.*

Facts: Plaintiffs raise numerous claims about validity of City "red light" ordinance. The ordinance provides that no vehicle shall be "driven" into an intersection with a red light. The ordinance also creates a "rebuttable presumption" that the owner of the vehicle is the driver. Finally, the ordinance provides that upon filing of an information in municipal court, a summons will issue pursuant to Missouri Supreme Court Rule 37.

Holding: As an initial matter, the Court of Appeals determines that it has jurisdiction in this case because claims that municipal ordinances are unconstitutional are not within the "exclusive" jurisdiction of the Missouri Supreme Court, but may also be decided by the Court of Appeals. Additionally, contrary to rulings by the Eastern District, the Western District finds that plaintiffs who have received notices of violation but who have not paid their fines do have standing to proceed as plaintiffs here because they do not have an adequate remedy at law in their ordinance violation cases since the ordinance allows the private company which collects the fines to play law enforcement, prosecutorial and/or adjudicative roles. The Supreme Court has recognized that subjecting a defendant to criminal sanctions involving his liberty before a tribunal that has a direct, personal and substantial pecuniary interest in convicting him is a denial of due process. Further, to allow private prosecutors, employed by private citizens, to participate in the prosecution of a defendant is fundamentally unfair. On the merits, the ordinance is invalid or

unconstitutional for several reasons. First, there are multiple problems with the "summons procedure" for contesting a violation under the ordinance. The "notice of violation" is not delineated a "summons" and gives confusing and conflicting instructions on how to pay a fine or contest a violation. The notice conflicts with Rule 37 because it does not state the address of a municipal court, and does not command appearance in any court. Second, Plaintiffs have alleged sufficient facts to survive a motion to dismiss in contending that the ordinance does not have a substantial relationship to public safety because it actually increases accidents, reduces the number of police officers, and is really a revenue collection program. Third, the ordinance conflicts with state law, Sec. 302.302.1(1), which requires assessment of points for moving violations. Finally, if the ordinance is "criminal" (as opposed to "civil"), then the rebuttal presumption that the owner of the vehicle is the driver is unconstitutional because it violates the presumption of innocence as to every element of the crime and because it invades the fact-finding function of the jury.

State v. Woodworth, 2013 WL 5979203 (Mo. App. W.D. Nov. 12, 2013):
Where trial court excluded certain State's evidence on grounds of lack of proper chain of custody, the State could not appeal under Sec. 547.200 because the statute authorizes appeal only where the trial court "suppresses" evidence, which means excludes evidence that was illegally obtained. However, State may pursue appellate review via appropriate writ.
Facts: The defense filed a "Motion to Suppress" certain ballistics evidence on grounds that the State did not have a proper chain of custody for the evidence. The trial court sustained the motion. The State appealed.
Holding: Sec. 547.200 authorizes an appeal by the State where a trial court "suppress[es] evidence." However, the right to appeal under Sec. 547.200 has been limited to cases where the trial court found the evidence to be "illegally obtained." If evidence is excluded for other evidentiary reasons, there is no right to appeal under the statute. It is irrelevant that the defense styled their motion a "motion to suppress." The substance is what is relevant. Here, the evidence was excluded on grounds of improper chain of custody, which is an evidentiary rule, not a matter of illegally obtained evidence. Therefore, there is no authority to appeal. However, the State may pursue appellate relief via writ of prohibition. Court expresses no opinion on the merits of such a writ here.

State v. Lilly, 2013 WL 5458940 (Mo. App. W.D. Oct. 1, 2013):
Where trial court excluded certain evidence of State on grounds of corpus delecti rule, the trial court's ruling was not one "suppressing evidence" or "suppressing a confession or admission" within the meaning of Sec. 547.200.1(3) or (4) because the evidence was not illegally obtained; therefore, State's appeal was not authorized by Sec. 547.200.1, and appeal must be dismissed. However, State may pursue appellate review via an appropriate writ.
Facts: Prior to trial, the trial court granted Defendant's "Motion To Suppress Evidence," and excluded certain statements made by Defendant because the State failed to establish the corpus delecti of the offense, and on grounds of *Miranda*. The State appealed.
Holding: Sec. 547.200 authorizes the State to appeal a trial court's "suppressing evidence" or "suppressing a confession or admission." Even though Defendant styled his

motion a "Motion To Suppress," the title is not significant. Caselaw has given the term "suppressing" a very specific meaning under the statute. "Suppression" of evidence is not the same as "exclusion" of evidence. An exclusion order is not considered to be a "suppression" order unless it has the effect of suppressing evidence on grounds that the evidence was *illegally* obtained. Here, the trial court excluded evidence based on the corpus delecti rule. The corpus delecti rule is evidentiary in nature; it does not depend on whether the evidence was *illegally obtained*. Therefore, the "exclusion" of evidence here was no appealable under Sec. 547.200. However, the State may seek appellate review by proper remedial writ.

State v. Paul, No. WD75775 (Mo. App. W.D. 6/25/13):
Where circuit court merely made a docket entry about convicting and sentencing Defendant/Appellant, this was not a "judgment" under Rule 29.07(c) and, thus, the appellate court lacks jurisdiction to hear appeal.
Facts: Movant was convicted at a bench trial and sentenced for a misdemeanor, and appealed. The only documentation of the sentence imposed was a docket entry.
Holding: Under Sec. 547.070, appeals are allowed only after entry of a final judgment. Rule 29.07(c) requires that a judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. Here, the trial court issued a letter finding Defendant guilty after a bench trial, but the letter can't be a final judgment because it was issued before the time for filing a new trial motion expired and before sentencing. The docket entry made after sentencing is not a final judgment because it doesn't comply with Rule 29.07(c). Therefore, the appellate court has no jurisdiction to hear the appeal.

State v. O'Neal, 2013 WL 815981 (Mo. App. W.D. March 12, 2013):
Holding: Even though defense counsel stated at a bench trial that they had "no objection" to stipulating to any evidence from a pretrial motion to suppress hearing, the suppression issue was preserved for appeal since the record is clear that it was mutually understood by the State and defense that the suppression hearing record was being admitted into evidence at trial so that the judge would not have to hear it twice and that the defense was not waiving its objections to the evidence at trial.

Harvey v. Director of Revenue, No. WD72606 (Mo. App. W.D. 5/9/12):
Holding: (1) Where trial court reinstated Driver's license because Driver had alcohol soaked tobacco in his mouth when he gave his breath test and trial court believed Driver's cross-examination that this would have affected the validity of BAC test, the appellate court defers to the trial court's assessment of credibility; and (2) where a trial court enters a written judgment (even a generic one), an appellate court is not required to consider the court's oral comments in reviewing the judgment.

Ewing v. Denney, No. WD74807 (Mo. App. W.D. 3/6/12):
Where trial counsel undertook to file a notice of appeal for Defendant but failed to properly do so and Defendant did not learn of this until after time for late notice of appeal expired, trial counsel was ineffective and habeas relief is granted to allow Defendant to be resentenced so can file a new notice of appeal.

Facts: In 2007, Defendant (Petitioner) was convicted at trial. His trial counsel filed a notice of appeal for him, but failed to timely pay a filing fee. That appeal was dismissed in 2007, but counsel never told Defendant. In 2008, Defendant wrote other attorneys and legal authorities to try to find out what was happening regarding his appeal. The Supreme Court told him to contact the Public Defender. In 2010, Defendant brought a habeas case in DeKalb County seeking to have Defendant re-sentenced so he could appeal. The DeKalb County Circuit Court granted relief and ordered the Jackson County Circuit Court to resentence Defendant, but the Jackson County Circuit Court refused to do so on grounds that the DeKalb court had no authority to order the Jackson court to do so. In 2011, Defendant re-filed his habeas case in the Western District Court of Appeals.
Holding: One of the exceptions to allow review of procedurally defaulted claims is "cause and prejudice." The question here is whether Defendant can meet this test. A defendant is entitled to effective assistance of counsel on appeal and failure to perfect a notice of appeal is ineffective. "Cause" requires that the procedural default be "external" to the defense, which might at first blush appear to not be met here. But the U.S. Supreme Court has held that where the procedural default is the result of ineffective assistance of counsel, the default is imputed to the State and this renders the "cause" "external" to the defense. Here, counsel was ineffective in failing to perfect the appeal, and Defendant was prejudiced by being denied an appeal. Sentence vacated so Defendant can be resentenced, and then file a timely notice of appeal.

Johnson v. Missouri Board of Probation and Parole, No. WD74090 (1/31/12):
(1) Sec. 217.735.1 RSMo (as amended 2006) requires lifetime supervision of persons convicted under 556.030 (rape), 566.032 (statutory rape in first degree), 566.060 (forcible sodomy) and 566.062 (statutory sodomy in first degree), even if Defendant is not a prior sex offender and the victim is not less than 14 years old; and (2) although the normal remedy for denial of a writ is to file a new writ in a higher court, where trial court disposed of a writ of prohibition on the merits, the remedy is via an appeal.

In the Interest of A.G.R. Juvenile Officer v. A.G.R., No. WD73007 (Mo. App. W.D. 12/27/11):
(1) Where Juvenile is charged with only a "status offense," Juvenile does not need to be competent for case to proceed; (2) even though Juvenile had been released from court supervision, appeal was not moot where it raised important issues of first impression which might otherwise evade appellate review.
Facts: Juvenile was originally charged with a "delinquency offense" that would have resulted in a felony sex charge if Juvenile were an adult. However, the State filed an amended petition charging only "status offense" acts constituting behavior injurious to the welfare of the child. After a court-ordered competency evaluation, the court found Juvenile to be incompetent. Defense counsel filed a motion to dismiss or to suspend proceedings while Juvenile was incompetent. The court denied the motions. The status offense proceeded to disposition, and Juvenile was ordered placed in care and custody of his mother under supervision of the Children's Division and court. Juvenile appealed.
Holding: As an initial matter, since the appeal was filed, Juvenile has been released from court supervision, and hence, there is a question whether the appeal is moot. Because the appeal raises important issues of first impression that may otherwise evade

appellate review, the appellate court will decide the case. Regarding the merits, this case is not one where Juvenile was charged with a "delinquency offense," i.e., a criminal-type offense. Instead, he was ultimately charged with a "status offense." A status offense is unique to juveniles and is an infraction that allows the juvenile court to take jurisdiction of a child alleged to be in need of care due to behavior injurious to welfare. Such status cases are fundamentally different from delinquency cases under Sec. 211.031.1(3), in which the juvenile is alleged to have violated a state law or municipal ordinance. Missouri law treats "status offenses" differently than "delinquency offenses." How the offense is charged determines what rights will be accorded the juvenile. Here, the court did not err in denying the motion to dismiss or suspend proceedings while Juvenile was incompetent because Juvenile was charged with a "status offense."

State v. Triplett, No. WD73486 (Mo. App. W.D. 12/20/11):
Holding: (1) Where (a) Defendant filed a motion which appeared to be a hybrid motion to suppress and motion to dismiss, (b) the trial court sustained the motion by dismissing the charge without prejudice, and (c) the State attempted to appeal only the motion to dismiss, the appeal must be dismissed because the State is not appealing the motion to suppress, and the appeal does not meet the requirements for the State to be able to appeal under Sec. 547.200. There is no final judgment because the dismissal was without prejudice. The State can just refile the charge in the trial court. (2) Although civil rule 73.01 gives parties the right to request Findings of Fact and Conclusions of Law before introduction of evidence, there is no similar rule in the criminal rules that requires a trial court to issue Findings in connection with a motion to suppress or other motions. A party (or appellate court) may request them, however, and the trial court may choose to do them, but they aren't mandatory.

Middleton v. State, No. WD73290 (Mo. App. W.D. 10/18/11):
Holding: Where Movant filed a second motion to reopen postconviction proceedings on grounds of "abandonment," which the motion court denied via a docket entry, this was not an appealable "judgment" under Rule 74.01(a) but only a non-appealable "order"; however, the motion court does have "jurisdiction" to consider a second motion to reopen.

T.C.T. v. Shafinia, No. WD72336 (Mo. App. W.D. 9/20/11):
Holding: Where order of protection had expired during pendency of appeal, the appeal was moot and Appellant "does not argue that the order's mere existence subjects him to significant collateral consequences that might justify us in exercising our discretion to consider his claims."

State v. Burns, No. WD73127 (Mo. App. W.D. 4/12/11):
Trial court's pretrial ruling excluding certain hospital drug-test results was not appealable by the State because this was a ruling in limine based on violation of an evidentiary rule, not a ruling on a motion to suppress illegally seized evidence; but State may seek writ of prohibition.
Facts: Defendant was charged with DWI for driving under influence of drugs. The State indicated it would introduce hospital records of Defendant showing the presence of drugs

in her blood or urine. Defendant filed a "Motion to Suppress or in the Alternative Motion in Limine." The trial court believed that the evidence could only be admitted if certain state regulation and evidentiary foundations were followed, and so excluded the evidence before trial. The State appealed. Defendant contended the appeal had to be dismissed because the statute allowing a State's appeal only covers illegally seized evidence, which is not at issue here.

Holding: Sec. 547.200.1(3) permits a State's appeal of suppression of illegally seized evidence. Sec. 542.296.5 sets forth five grounds on which a motion to suppress can be based, each of which involves illegal searches and seizures. Courts read these two statutes together to allow State's appeals only about illegally seized evidence. Here, the trial court's ruling is really a pretrial grant of a motion in limine (despite that the motion was also called "motion to suppress") and such a ruling is subject to change at trial. The grounds of the motion were not that the blood or urine was illegally seized, but that an evidentiary rule requires exclusion. Thus, the State is not statutorily authorized to appeal, and the appeal must be dismissed. However, the State may be able to seek a writ of prohibition as a remedy, but the appellate court expresses no opinion on the merits.

Editor's note: The Western District issued an identical ruling in **State v. Pfleiderer**, No. WD73407 (Mo. App. W.D. 6/14/11), a DWI case where trial judge excluded evidence of blood test results taken by a hospital for treatment purposes without following the requirements of Chapter 577 pertaining to the collection of samples of blood for BAC analysis.

Pittman v. State, No. WD72020 (Mo. App. W.D. 2/22/11):

Sec. 195.291.2 increases the sentence for drug offense but not its felony classification; wrong classification can be corrected under Rule 84.14 allowing appellate court to give necessary relief.

Facts: Defendant was charged with delivery of drugs as a class B felony with sentence enhanced to a class A range of punishment because of persistent drug offender status. The sentence and judgment stated that Defendant was guilty of a class A felony.

Holding: Sec. 195.291.2 provides that any person convicted of violating Sec. 195.211 "when punishable as a class B felony, shall be sentenced to the authorized term of imprisonment for a class A felony…." However, an enhanced sentence does not reclassify the underlying conviction. It remains a B felony. Therefore, the sentence and judgment classifying this as an A felony is wrong. While Defendant raised this in a 24.035 motion, his counsel withdrew this claim, apparently believing it should be fixed in another way. It could be fixed by a nunc pro tunc motion. Here, however, appellate court corrects the sentence and judgment under Rule 84.14, which allows appellate court to give appropriate relief.

*** Jennings v. Stephens, ___ U.S. ___, 135 S.Ct. 793 (Jan. 14, 2015):**

Holding: Habeas petitioners who are granted relief on some grounds, but not others, may in an appeal by the State defend the judgment on grounds rejected by the district court, without a taking a cross-appeal or a obtaining a certificate of appealability.

*** Whitman v. U.S., 96 Crim. L. Rep. 190 (U.S. 11/10/14):**
Holding: Justices Scalia and Thomas issue statement that they would grant cert. in an appropriate case to determine whether a court owes "deference" to an executive agency's interpretation of a criminal law in a criminal and administrative enforcement action. They write that "[a] court owes no deference to the prosecutor's interpretation of a criminal law," and that the Legislature defines crimes, not the Executive (prosecutor).

* **Ryan v. Schad, 93 Crim. L. Rep. 451, ___ U.S. ___ (U.S. 6/24/13):**
Holding: U.S. Supreme Court vacates a stay issued in a death penalty case by the 9th Circuit where the 9th Circuit, instead of immediately issuing a mandate after denial of cert. as required by Rule 41, granted reconsideration, remanded the case and stayed the execution; Supreme Court holds that 9th Circuit must follow the procedures of Rule 41(d)(2)(D).

*** Henderson v. U.S., 92 Crim. L. Rep. 610, ___ U.S. ___ (U.S. 2/20/13):**
Holding: Defendants who did not raise objections at trial on the basis of particular points of unsettled law can still raise subsequent rulings that clarify the law on appeal under the plain error rule; Court approves a time-of-appeal standard for determining when an error is "plain."

*** U.S. v. Juvenile Male, ___ U.S. ___, 89 Crim. L. Rep. 574 (U.S. 6/27/11):**
Holding: Where Juvenile challenged certain provisions of SORNA as violating ex post facto, but the court order of juvenile supervision which required Juvenile to register as sex offender has expired, the case is moot.

*** Bond v. U.S., ___ U.S. ___, 89 Crim. L. Rep. 466 (U.S. 6/16/11):**
Holding: Criminal defendant charged with possession of certain chemicals for other than peaceful purposes, 18 USC 229, has standing to challenge the constitutionality of the law under the 10th Amendment on grounds that Congress exceeded its powers in enacting the federal law.

*** Camereta v. Greene, ___ U.S. ___, 89 Crim. L. Rep. 309 (U.S. 5/26/11):**
Holding: Even though appellate court found that Defendant-child-protective-investigators had qualified immunity, the Supreme Court could review Defendants' challenge to the appellate court's finding that their warrantless interview of an elementary school student violated the 4th Amendment; even though under Article III of the Constitution prevailing parties usually cannot appeal because there is no "case" or "controversy", the immunized Defendants were entitled to review of the constitutional ruling because they will be subject to prospective application of the holding. (However, the Supreme Court did not reach the 4th amendment issue on the merits because it was moot for other reasons.)

U.S. v. Del Valle-Cruz, 97 Crim. L. Rep. 52 (1st Cir. 4/6/15):
Holding: Even though Defendant's plea deal to failure to register waived the right to appeal, this did not bar him from challenging supervised release condition that effectively prevented him from living with his with his minor son and family; prohibiting Defendant

from living with his son and family was not related to his offense of failing to register or his history and character.

U.S. v. Mahoney, 2013 WL 2382596 (1st Cir. 2013):
Holding: Defendant's challenge to an initial order of incompetency was not rendered moot by a later finding that there was not substantial likelihood he would regain competency, since Defendant continued to have an interest in the initial order since this triggered Defendant's continuing confinement.

Vu v. U.S., 89 Crim. L. Rep. 416 (2d Cir. 6/7/11):
Holding: Petitioner's unsuccessful 2255 motion seeking reinstatement of his right to direct appeal does not render a subsequent 2255 motion challenging his conviction and sentence "second or successive" under AEDPA.

Vu v. U.S., 89 Crim. L. Rep. 416 (2d Cir. 6/7/11):
Holding: Petitioner's unsuccessful 2255 motion seeking reinstatement of his right to direct appeal does not render a subsequent 2255 motion challenging his conviction and sentence "second or successive" under AEDPA.

U.S. v. Flores-Mejia, 95 Crim. L. Rep. 507 (3d Cir. 7/16/14):
Holding: To preserve a claim that sentencing judge failed to consider an issue, Defendant must object in the district court immediately after the judge imposes the sentence.

Gov't of Virgin Islands v. Mills, 2011 WL 420672 (3d Cir. 2011):
Holding: Even though Defendant's notice of appeal listed the wrong case number and date from an older case, the notice was still effective because it was reasonably clear that Defendant intended to appeal his conviction and State was not prejudiced.

U.S. v. Wilson, 92 Crim. L. Rep. 577 (3d Cir. 2/14/13):
Holding: An appeal waiver does not preclude appeal of order modifying terms of supervised release.

U.S. v. Saferstein, 90 Crim. L. Rep. 788 (3d Cir. 1/26/12):
Holding: A district judge's botched summary of the terms of a plea bargain during a plea colloquy had the effect of expanding the defendant's right to appeal, notwithstanding specific limitations to the contrary laid out in the written agreement.

Gov't of Virgin Islands v. Mills, 2011 WL 420672 (3d Cir. 2011):
Holding: Even though Defendant's notice of appeal listed the wrong case number and date from an older case, the notice was still effective because it was reasonably clear that Defendant intended to appeal his conviction and State was not prejudiced.

U.S. v. Pileggi, 2013 WL 14305 (4th Cir. 2013):
Holding: Even though appellate reversed and remanded case based on a sentencing issue, the "mandate rule" barred the trial court from reconsidering the amount of restitution owed since the Gov't waived any challenge to this by not raising it on appeal.

Escamilla v. Stephens, 2014 WL 146531 (5th Cir. 2014):
Holding: Defendant was entitled to certificate of appealability regarding whether death penalty counsel failed to investigate and present mitigating evidence at penalty phase; reasonable jurists could debate whether state courts unreasonably applied *Strickland* in finding no prejudice.

U.S. v. Vargas-Ocampo, 2014 WL 1303364 (5th Cir. 2014):
Holding: Use of "equipoise" rule not appropriate for determining sufficiency of evidence on appeal.

U.S. v. Moreno, 96 Crim. L. Rep. 88 (5th Cir. 9/30/14):
Holding: Where an attorney files an *Anders* brief in a case where Client does not speak English, attorney must certify that he has communicated with Client in a language Client understands both as to the substance of the brief and the client's right to file a pro se response.

U.S. v. Murray, 92 Crim. L. Rep. 153 (5th Cir. 10/30/12):
Holding: (1) Even though Defendant waived his right to appeal, this did not apply to a later order on restitution because this wasn't part of the original sentencing process; and (2) Even though restitution amounts in large or complex fraud cases may be difficult to calculate, a judge cannot later reopen sentencing to add restitution when the Gov't comes up with more information.

U.S. v. Slovacek, 2012 WL 4801637 (5th Cir. 2012):
Holding: A "nonparty victim" of a bribery scheme lacks any right to direct appeal from denial of his request for restitution for himself and his company under the Crime Victims' Rights Act or Mandatory Victims Restitution Act.

Tanner v. Yukins, 2015 WL 234738 (6th Cir. 2015):
Holding: Where prison guard violated Defendant's right of access to courts by taking action which prevented timely filing of notice of appeal, Defendant was entitled to habeas relief.

U.S. v. Noble, 95 Crim. L. Rep. 672 (6th Cir. 8/8/14):
Holding: Where Gov't failed to raise in district court that Defendant lacked "standing" to bring 4th Amendment claim, Gov't's can only raise this issue on appeal under plain error standard.

U.S. v. Bowman, 88 Crim. L. Rep. 590 (6th Cir. 2/7/11):
Holding: Plea agreement waiving right to appeal sentence under sentencing guidelines did not preclude appeal of federal judge's making federal sentence consecutive to state sentence; ambiguities in an appeal waiver must be resolved against the government.

U.S. v. Freeman, 89 Crim. L. Rep. 69, 2011 WL 1226091 (6th Cir. 4/4/11):
Holding: Even though Defendant bargained for an appeal waiver, this did not preclude him from appealing that the restitution order was greater than the losses caused by his crime.

Ajan v. U.S., 94 Crim. L. Rep. 118, 2013 WL 5477192 (6th Cir. 10/3/13):
Holding: Where habeas Petitioner was granted some sentencing relief in the form of a new sentencing judgment under 28 USC 2255 (though Petitioner sought a new sentencing hearing), Petitioner need not obtain a certificate of appealability to appeal the relief granted, because it was not a "final order" in the 2255 proceeding but a new judgment that did not exist at the time the motion was brought.

U.S. v. Freeman, 89 Crim. L. Rep. 69, 2011 WL 1226091 (6th Cir. 4/4/11):
Holding: Even though Defendant bargained for an appeal waiver, this did not preclude him from appealing that the restitution order was greater than the losses caused by his crime.

U.S. v. Bowman, 88 Crim. L. Rep. 590 (6th Cir. 2/7/11):
Holding: Plea agreement waiving right to appeal sentence under sentencing guidelines did not preclude appeal of federal judge's making federal sentence consecutive to state sentence; ambiguities in an appeal waiver must be resolved against the government.

U.S. v. Bokhari, 95 Crim. L. Rep. 534 (7th Cir. 7/3/14):
Holding: Appellate court would review trial court's denial of motion to dismiss charges against a Pakistani Defendant who was in Pakistan even though such motions to dismiss are usually not final, appealable orders and even though Defendant had left the country (so the "fugitive disentitlement" rule might ordinarily bar relief).

U.S. v. Volpendesto, 95 Crim. L. Rep. 353 (7th Cir. 6/6/14):
Holding: Defendant's death during pendency of direct appeal abates the conviction and restitution order.

U.S. v. Lee, 95 Crim. L. Rep. 558 (7th Cir. 7/29/14):
Holding: Denying a Defendant the right to represent himself at a suppression hearing cannot be harmless error, but remedy is a new suppression hearing with self-representation, not an automatic new trial.

U.S. v. Davis, 95 Crim. L. Rep. 670 (7th Cir. 9/8/14):
Holding: Where Gov't asked for and received a dismissal of a case without prejudice because Gov't refused to comply with a discovery order seeking evidence of racial

profiling, the order isn't a final judgment subject to immediate appeal because Gov't has the power to cure the problem that led to the dismissal if it chooses to re-indict.

U.S. v. Adkins, 94 Crim. L. Rep. 535, 2014 WL 325254 (7th Cir. 1/30/14):
Holding: Even though Defendant waived his right to appeal, this did not prohibit appealing a condition of supervised release prohibiting him from patronizing any place where pornography or sexually oriented material was available; the condition was so vague that no reasonable person would know what is prohibited, and Defendant should be allowed to obtain appellate review of it; the condition would arguably ban going to a grocery store or library.

Grandberry v. Keever, 94 Crim. L. Rep. 244, 2013 WL 5912520 (7th Cir. 11/5/13):
Holding: State prisoner who challenged a prison disciplinary action in habeas corpus (as opposed to relief from conviction) need not obtain a certificate of appealability to appeal denial of relief.

U.S. v. Spear, 2014 WL 2523694 and 2014 WL 2526120 (9th Cir. 2014):
Holding: Even though Defendant waived right to appeal bargained-for sentence, this agreement did not bar him from appealing if there was a sufficient factual basis for his plea.

U.S. v. Tsosie, 2011 WL 1758785 (9th Cir. 2011):
Holding: Where plea agreement to sex offense did not set forth any specific amount of restitution or an estimate as to amount, Defendant could challenge the restitution order on appeal even though he waived his appellate rights; he lacked sufficient notice of restitution to have a valid waiver.

U.S. v. Lightfoot, 88 Crim. L. Rep. 294 (9th Cir. 11/30/10):
Holding: Defendant's bargained-for waiver of appeal or postconviction rights does not preclude a motion to modify sentence under 18 USC 3582(c)(2) to reflect subsequent USSG revisions.

Mackey v. Hoffman, 2012 WL 2369301 (9th Cir. 2012):
Holding: Where an attorney's abandonment causes a notice of appeal not to be filed, district court may grant relief under the "catch-all" clause of the Federal Rules of Civil Procedure.

U.S. v. Tsosie, 2011 WL 1758785 (9th Cir. 2011):
Holding: Where plea agreement to sex offense did not set forth any specific amount of restitution or an estimate as to amount, Defendant could challenge the restitution order on appeal even though he waived his appellate rights; he lacked sufficient notice of restitution to have a valid waiver.

U.S. v. Lightfoot, 88 Crim. L. Rep. 294 (9th Cir. 11/30/10):
Holding: Defendant's bargained-for waiver of appeal or postconviction rights does not preclude a motion to modify sentence under 18 USC 3582(c)(2) to reflect subsequent USSG revisions.

U.S. v. Rollings, 95 Crim. L. Rep. 318 (10th Cir. 5/20/14):
Holding: Appellate court should look to all the circumstances of a guilty plea to determine if an appellate waiver is binding.

U.S. v. Luna-Acosta, 2013 WL 1848761 (10th Cir. 2013):
Holding: Even though judge orally announced sentence at a first sentencing hearing, this was not final for purposes of appeal where judge also scheduled a later second sentencing hearing to "finalize" issues regarding the sentence, including allocution and supervised release issues.

U.S. v. Mendoza, 2012 WL 5419236 (10th Cir. 2012):
Holding: A sealed entry of judgment is not "entered on the criminal docket" for purposes of filing a notice of appeal where such judgment is not publicly accessible; thus, a notice of appeal filed after sentencing but before entry of the sealed judgment was timely.

U.S. v. Muzio, 95 Crim. L. Rep. 486 (11th Cir. 7/8/14):
Holding: A judgment imposing a prison sentence and restitution but leaving the specific amount of restitution open is a final judgment that can be appealed.

U.S. v. Meister, 94 Crim. L. Rep. 391 (11th Cir. 12/17/13):
Holding: (1) Even though the Mandatory Detention Act, 18 USC 3145(c), provides that certain defendants cannot be released pending sentencing if their crimes are violent, there is an exception where a "Judicial Officer" determines that the defendant is neither a seafety threat nor a flight risk and that detention is inappropriate; (2) a judge qualifies as a "Judicial Officer" under the statute; therefore, a judge can release Defendant under the statute for medical reasons pending his sentence appeal.

U.S. v. Dillon, 94 Crim. L. Rep. 443 (D.C. Cir. 12/24/13):
Holding: Appellate review of a trial court's order to involuntarily medicate a defendant for competency is reviewed de novo for legal issues but under "clear error" standard regarding findings of fact.

U.S. v. Godoy, 2013 WL 425334 (D.C. Cir. 2013):
Holding: Even though Defendant waived his appeal, where trial court told him he was waiving his appeal "except for something illegal, such as imposing a period of imprisonment longer than the statutory maximum," then Defendant did not waive his right to appeal an illegal sentence; the judge's oral pronouncement controls.

Obaydullah v. Obama, 2012 WL 3250940 (D.C. Cir. 2012):
Holding: The provision for tolling the appeal filing deadline is a claims processing rule, and thus a habeas petitioner's late motion for reconsideration did not bar hearing of his appeal.

In re Sealed Case, 2012 WL 6632927 (D.C. Cir. 2012):
Holding: Even though Defendant waived right to appeal his "sentence," this did not waive right to appeal restitution order.

U.S. v. Paul, 95 Crim. L. Rep. 321 (C.A.A.F. 5/29/14):
Holding: Appellate court cannot take judicial notice that "ecstacy" is a Schedule I controlled substance to uphold sufficiency of evidence, where Prosecution failed to present this element of the crime at trial; "[W]hen judicial notice of an element is taken outside the context of the trial itself, the defendant is denied his due process right to confront or challenge an essential fact establishing an element, whether or not the fact is indisputable."

U.S. v. Silva, 2011 WL 841050 (D. Mass. 2011):
Holding: Court's grant of pro se motion to appoint counsel constituted excusable neglect for extension of time to file notice of appeal.

U.S. v. DiMattina, 2012 WL 3260216 (E.D. N.Y. 2012):
Holding: Exceptional circumstances justified releasing Defendant pending appeal so that he could pursue demonstrating his actual innocence.

Stone v. State, 89 Crim. L. Rep. 167, 2011 WL 1519382 (Alaska 4/22/11):
Holding: Where state law permitted a sentence review of guilty plea, Defendant had right to counsel for the appeal since *Halbert v. Michigan*, 545 U.S. 605 (2005) held that 14th Amendment requires states to provide counsel to guilty-pleading indigent defendants for first-tier appellate review.

Coleman v. Johnsen, 2014 WL 2619990 (Ariz. 2014):
Holding: Ariz. Constitution guarantees right to self-representation on appeal.

People v. Arriaga, 320 P.3d 1141 (Cal. 2014):
Holding: Appeal challenging denial of *Padilla* claim regarding immigration consequences of a guilty plea does not require a certificate of probable cause to appeal.

Hoang v. People, 2014 WL 1619013 (Colo. 2014):
Holding: The *Barker* speedy trial factors apply to claim of denial of speedy appeal, even though right at issue is 5th Amendment due process right to fairness on appeal.

Hagos v. People, 92 Crim. L. Rep. 189 (Colo. 11/5/12):
Holding: The "plain error" standard on direct appeal is not the same as the showing of prejudice required under *Strickland*, which is a lower "reasonable probability of a different outcome" standard; thus, while a jury instruction may not have been "plain

error" on direct appeal, counsel can be ineffective for failing to object to the erroneous instruction.

State v. Elson, 95 Crim. L. Rep. 363 (Conn. 6/3/14):
Holding: Appellate court changes rule that appellants had to expressly request of review of unpreserved constitutional claims, and will now review them where the violation is supported by the record and is of a fundamental constitutional right.

Williamson v. State, 2015 WL 1324351 (Del. 2015):
Holding: Standard of review for sufficiency of evidence after bench trial where no motion for judgment of acquittal was filed is the same as with such a motion.

LaFave v. State, 2014 WL 5285860 (Fla. 2014):
Holding: State could not appeal order granting early termination of probation, even though this violated the plea agreement; the order terminating probation was a final judgment and there was no statutory right for State to appeal.

Nazario v. State, 2013 WL 3475330 (Ga. 2013):
Holding: Even though Defendant pleaded guilty to 17 counts, this did not waive claim that some of the counts had legally "merged."

Leitch v. Fleming, 732 S.E.2d 401 (Ga. 2012):
Holding: State could not bring declaratory judgment action to challenge court's evidentiary ruling at a preliminary hearing, because since there is no right to appeal the court's ruling, State should not be able to do indirectly what it can't do directly.

State v. Davis, 94 Crim. L. Rep. 710 (Haw. 2/26/14):
Holding: Hawaii Constitution requires appellate court to consider a sufficiency of evidence claim before vacating a conviction and remanding for a new trial on other issues.

State v. Lee, 94 Crim. L. Rep. 586 (Idaho 2/10/14):
Holding: Where appellate court had previously ordered case remanded to enter a judgment of acquittal for Defendant, trial court should not have then entered a judgment acquitting Defendant but declaring him a "serious pedophile" who should be "closely watched;" while there were not specific rules prohibiting the judge from entering such an order, appellate courts have struck unnecessary verbiage from civil orders, and does so here.

Oswalt v. State, 96 Crim. L. Rep. 160 (Ind. 10/22/14):
Holding: Appellate court may review denial of motion to strike potential juror for cause, regardless of whether potential juror actually served on jury, where the party making the challenge was unable to remove the juror because it had used up all its peremptories.

State v. Breeden, 2013 WL 2712181 (Kan. 2013):
Holding: In sex case, trial court was required to provide limiting instruction regarding prior bad act evidence that Defendant had punched and threatened to kill victim before the charged sex act, and Defendant did not waive appeal of this issue even though Defendant failed to object to the evidence at trial because the issue was not admissibility of the evidence.

Hallum v. Com., 2011 WL 1620593 (Ky. 2011):
Holding: Where state enacted a "mailbox rule" statute for filing postconviction motions, statute would apply retroactively to cases pending on appeal when the statute was enacted.

Hollon v. Com., 88 Crim. L. Rep. 244 (Ky. 11/18/10):
Holding: Even though appellate counsel raised some claims on appeal, Defendant may still claim ineffective appellate counsel where counsel failed to raise other possibly winning claims.

Nalls v. State, 2014 WL 1613399 (Md. 2014):
Holding: Remedy for failure to make proper record of jury trial waiver is new trial rather than remand for findings on whether waiver was voluntary; remand was inappropriate given fundamental nature of right at issue, and circuit court would be reviewing a waiver on a cold record.

Cure v. State, 89 Crim. L. Rep. 771 (Md. 8/16/11):
Holding: Even though Defendant preemptively acknowledged a prior conviction in his direct examination testimony, this did not waive the right to appeal the trial court's overruling of a motion in limine to exclude the prior conviction.

Seney v. Morhy, 2014 WL 278358 (Mass. 2014):
Holding: Appeal of order of protection was not rendered moot by order's expiration because Defendant still had stake in the appeal in that she would suffer stigma and collateral consequences as a result of order.

State v. Kelly, 2014 WL 5358361 (Minn. 2014):
Holding: Whether erroneous jury instruction was plain error, when law was unsettled at time of trial but settled by time of appeal, was determined by law at time of appeal.

State v. Burrell, 94 Crim. L. Rep. 94, 2013 WL 54690887 (Minn. 10/2/13):
Holding: Where Defendant dies during pendency of direct appeal, his conviction and any restitution order abate, because the prosecution is deemed void ab initio. (The minority view among 14 states, but not the federal courts, is that the conviction and restitution order remain and a successor appellant can be appointed to proceed with appellant's appeal.)

State v. Sahr, **2012 WL 1414306 (Minn. 2012):**
Holding: Where a trial court's dismissal of a complaint charging first-degree criminal sexual conduct constituted an acquittal on the merits after jeopardy had attached, double jeopardy protections precluded the reviewing court from considering the merits of the State's claim that the defendant had a duty to bring a pretrial motion to dismiss the complaint.

Jones v. City of Ridgeland, 88 Crim. L Rep. 255 (Miss. 11/18/10):
Holding: State which limits appeals to state Supreme Court violates separation of powers.

State v. Filholm, 95 Crim. L. Rep. 48 (Neb. 3/28/14):
Holding: Defendant can raise ineffective assistance of counsel claims on direct appeal without alleging prejudice, because allegations of prejudice would likely require proof of facts outside the appellate record.

Brass v. State, 2014 WL 2396055 (Nev. 2015):
Holding: Even though Defendant-Appellant died during appeal, appeal could continue by substituting his personal representative as party; Defendant's family should have opportunity to clear Defendant's name from conviction by pursuing appeal.

Bass v. State, 2013 WL 3864450 (Nev. 2013):
Holding: Where Defendant/Appellant died while direct appeal was pending, the appeal could continue only if a personal representative was substituted for Appellant within 90 days of "suggestions of death."

State v. Kay, 2011 WL 2975616 (N.H. 2011):
Holding: Appeals of probation revocations are determined under a de novo standard of review.

State v. K.P.S., 2015 WL 1809224 (N.J. 2015):
Holding: Even though appellate court had affirmed denial of motion to suppress in co-defendant's case on same facts, the law-of-the-case doctrine did not apply in Defendant's case to bar consideration of the issue; Defendant had due process right to have his claim decided independently.

People v. Walston, 2014 WL 2608462 (N.Y. 2014):
Holding: Appellate preservation rules did not apply where trial judge failed to share full contents of jury note with trial counsel; claim about note was reviewable on appeal.

People v. Kordish, 2013 WL 5637741 (N.Y. 2013):
Holding: Appellate court erroneously failed to appoint counsel for indigent defendant/appellant before dismissing the appeal for failure to perfect appeal.

People v. Cantave, 2013 WL 3185171 (N.Y. 2013):
Holding: Prosecutor violated Defendant's right against self-incrimination where he cross-examined Defendant at trial about a prior, unrelated conviction that was pending on direct appeal and thus Defendant remained at risk of self-incrimination.

People v. Griffin, 93 Crim. L. Rep. 71, 2013 WL 1294579 (N.Y. 4/2/13):
Holding: Even though there is usually not a right to appeal a guilty plea, Defendant can appeal on grounds that the plea court improperly disqualified his original defense counsel since this claim goes to the fundamental fairness of court system.

People v. Ventura, 90 Crim. L. Rep. 160 (N.Y. 10/25/11):
Holding: Court should not dismiss an appeal because Defendant has been involuntarily deported since appeal was filed.

State v. Hampton, 92 Crim. L. Rep. 304 (Ohio 12/2/12):
Holding: Where trial judge acquitted Defendant on the basis of the State's failure to establish venue, State could not appeal.

Cleveland Hts. v. Lewis, 2011 WL 2275817 (Ohio 2011):
Holding: Completion of a sentence will not render an appeal moot where Defendant did not acquiesce in the sentence or abandon the right to appeal.

State v. McAnulty, 2014 WL 5474266 (Or. 2014):
Holding: Even though death-sentenced Defendant pleaded guilty, Supreme Court would review plea court's ruling on pretrial motion to suppress; Supreme Court's scope of review was not limited by statute governing non-mandatory appeals.

State v. Vanornum, 2013 WL 6842788 (Or. 2013):
Holding: Even though a state statute made a rule of civil procedure (which allowed appellate review only for preserved instructional error) applicable to criminal cases, this did not affect the appellate court's ability to review for plain error.

In re L.J., 94 Crim. L. Rep. 177 (Pa. 10/30/13):
Holding: Appellate courts reviewing a denial of a motion to suppress should not consider any evidence other than that adduced at the suppression hearing; this will protect defendants' due process concerns where they may be unable to cross-examine certain witnesses at trial about suppression matters, or could be forced to testify at trial about suppression matters.

Com. v. Harris, 90 Crim. L. Rep. 324 (Pa. 11/23/11):
Holding: Under Penn. law, orders requiring disclosure of privileged information are immediately appealable despite contrary decision in *Mowhawk Industries v. Carpenter*, ___ U.S. ___ (U.S. 2009).

Com. v. Foster, 2011 WL 1124597 (Pa. 2011):
Holding: Defendant's challenge to mandatory minimum sentence is a legal question and is not waivable.

State v. Hepburn, 94 Crim. L. Rep. 359 (S.C. 12/11/13):
Holding: Even though South Carolina follows the rule that a defendant waives her motion for directed verdict at close of the State's evidence if the defendant presents evidence, where Defendant and co-defendant were tried jointly and co-defendant testified in the defense part of the case that Defendant did the crime, and subsequently Defendant testified to rebut co-Defendant, the Defendant did not waive for appeal her motion for directed verdict at close of State's case; "where a defendant's evidence does not serve to fill gaps in the state's evidence, her testimony does not operate to waive consideration of the evidence as it stood at the close of the State's case" on appeal; if Defendant were deemed to have waived the right to test the sufficiency of evidence of the State's case by rebutting the testimony of co-defendant, the State will in effect have been able to use the coercive power of the codefendant's testimony as part of its case-in-chief, even though the State was prohibited from calling the co-defendant to testify for the prosecution; under this test, the State's evidence was insufficient to convict, and the motion for directed verdict at close of State's evidence should have been granted.

State v. Scott, 2014 WL 2895406 (S.D. 2014):
Holding: Where a different judge heard a *Batson* remand hearing than the original trial judge, appellate court on re-appeal was not required to defer to remand judge and would review claim de novo, because the remand judge did not have the usual advantage of firsthand observation of venirepersons or prosecutor when the strikes were made.

Com. v. Amos, 2014 WL 782828 (Va. 2014):
Holding: Where trial court prevented Defendant's attorney from making a contemporaneous objection, this was preserved for appeal under an exception to the contemporaneous objection rule.

State v. Toliver, 2014 WL 3605681 (Wis. 2014):
Holding: If adult court's determination of probable cause in preliminary examination of juvenile charged in adult court relates to an unspecified felony, the appellate court may review the record independently to determine whether the adult court properly found probable cause to believe juvenile committed one of the enumerated offenses over which adult court has exclusive jurisdiction.

Beamon v. State, 2014 WL 1744100 (Ala. App. 2014):
Holding: Where a court denies a request to proceed in forma pauperis, it should give Petitioner a reasonable time, such as 30 days, to pay the filing fee, and such reasonable time may include a period extending beyond a limitations period.

People v. Rivera, 2014 WL 2535946 (Cal. App. 2014):
Holding: Where defense counsel admitted that he failed to file a timely notice of appeal due to a mistaken belief about the law and filed a motion to appeal late, appellate court

would treat the motion as a habeas petition and grant it; judicial economy was best served by avoiding the cumbersome habeas process to allow counsel to be found ineffective for failing to appeal.

In re Anthony, 2015 WL 1886904 (Cal. App. 2015):
Holding: Where the State had not appealed a grant of habeas relief setting aside Defendant's conviction, the State could not appeal a later order of a finding of factual innocence.

People v. Wortham, 2013 WL 5755193 (Cal. App. 2013):
Holding: Trial court's denial of inmate's petition to recall his sentence under the Three Strikes Reform Act was appealable, because it affects substantial rights and the trial court's action foreclosed possibility of reduced sentence.

People v. Cornett, 2010 WL 4925421 (Cal. App. 2010):
Holding: Rule of strict construction of penal statutes (rule of lenity) has a constitutional dimension because it is associated with the "vagueness doctrine" and also is a means of avoiding constitutional issues regarding due process concerns, and thus cannot be abrogated by a legislative statute which purported to abolish the rule.

People v. Ruch, 2013 WL 3480249 (Colo. App. 2013):
Holding: Revocation of Defendant's probation for his refusal to admit the offense during court-ordered treatment (which was a probation condition) while his direct appeal was pending violated his 5th Amendment right against self-incrimination.

State v. Thompson, 2011 WL 836748 (Kan. Ct. App. 2011):
Holding: Even though a district judge heard guilt portion of trial, where sentencing was done by magistrate judge, Defendant could appeal for a trial de novo before district court.

Causion v. State, 2013 WL 254669 (Md. Ct. Spec. App. 2013):
Holding: Order denying Defendant's request for records of grand jury was final and appealable.

State v. Miller, 2014 WL 5803053 (Ohio App. 2014):
Holding: "Cumulative error" doctrine required reversal where trial court denied Defendant self-representation and admitted prejudicial prior bad act evidence.

Com. v. Weathers, 2014 WL 2944912 (Penn. Super. 2014):
Holding: After Defendant filed his notice of appeal, trial court lacked jurisdiction to increase Defendant's restitution.

Com. v. Melvin, 2013 WL 6096222 (Penn. Super. 2013):
Holding: Sentencing condition requiring Defendant to write apology letters while his case was pending on appeal violated right against self-incrimination.

Lundgren v. State, 2014 WL 2865806 (Tex. App. 2014):
Holding: A valid waiver of appeal does not waive Defendant's right to file a new trial motion in trial court.

Samaripas v. State, 96 Crim. L. Rep. 113 (Tex. App. 10/15/14):
Holding: Where trial court sustains a prosecutor's objection to a defense question in voir dire, any error is preserved for appeal even though defense did not object to the ruling at trial.

Grado v. State, 96 Crim. L. Rep. 113 (Tex. App. 10/15/14):
Holding: Where both Defendant and judge mistakenly believed that offense carried a 10-year minimum sentence, Defendant did not forfeit his right to appeal the sentence via his plea agreement; the right to have the sentencing authority consider the appropriate sentencing range is a matter of due process.

Whitfield v. State, 95 Crim. L. Rep. 224 (Tex. Crim. App. 5/7/14):
Holding: An unfavorable finding on postconviction DNA testing is appealable.

Johnson v. State, 2014 WL 714736 (Tex. App. 2014):
Holding: A bill for court costs did not have to be brought to the trial court's attention for Defendant to be able to challenge it on appeal.

Thomas v. State, 2013 WL 5336800 (Tex. App. 2013):
Holding: Defendant did not waive his suppression motion for appeal even though defense counsel said "no objection" admission of certain evidence, where trial judge told defendant of his right to appeal and said that the suppression issue would be the main issue on appeal.

Landers v. State, 2013 WL 3329332 (Tex. App. 2013):
Holding: Defendant could appeal trial court's imposing prosecutor fees as court costs even though he failed to object, because he wasn't given an opportunity to object and was not required to file a new trial motion about this issue.

Jacobson v. State, 2013 WL 440069 (Tex. Crim. App. 2013):
Holding: Even though Defendant testified at sentencing stage and admitted guilt, this does not forfeit the right to appeal errors from guilt phase.

State v. Harrison, 96 Crim. L. Rep. 492 (Wis. 1/22/15):
Holding: Erroneous denial of change of judge cannot be harmless error, because this would nullify the statutory right to change of judge.

Armed Criminal Action

State v. Evans, 2014 WL 4832217 (Mo. App. E.D. Sept. 30, 2014):
(1) A hand or a fist is not a "dangerous instrument" for purposes of the ACA statute, so cannot support a conviction for ACA; and (2) trial court abused discretion in admitting a Facebook photo of Defendant apparently making a gang symbol with his hand, where Defendant's identity was not an issue in case.
Facts: Defendant, using his fists, beat up victim outside a bar, causing serious injuries. Defendant was convicted of first degree assault and ACA. At trial, a Witness to the fight testified that he learned Defendant's name after the fight by seeing Defendant on Facebook. The State then admitted the Facebook photo, which showed Defendant apparently making a gang symbol with his hand.
Holding: (1) Sec. 571.015.1 provides that a person is guilty of ACA when that person commits another felony through use of a "dangerous instrument." "Dangerous instrument" is defined in Sec. 566.061(9) as any instrument which under the circumstances is readily capable of causing death or serious physical injury. The issue here is whether a body part can be a "dangerous instrument." A common-sense definition and reading of "instrument" indicates an external object or item, rather than part of a person's body. The dictionary defines "instrument" as a "tool or implement." Body parts are not normally called "tools or implements." This interpretation is consistent with the pre-1979 version of ACA, which required the use of actual weapons. The Legislature intended to impose additional punishment on people who felonies with an item or weapon, rather than those who just use their hands. Interpreting "dangerous instrument" to include body parts would unduly expand the reach of the ACA statute, and result in a significant departure from the historical intent of enhanced punishment. ACA conviction vacated. (2) Regarding the Facebook photo, it should not have been admitted because Defendant's identity was not contested at trial. The defense was self-defense. The photo was irrelevant, and more prejudicial than probative because of its apparent gang affiliation, which was not an issue at trial. However, the photo was harmless due to overwhelming evidence of guilt.

State v. Murphy, 2014 WL 4832262 (Mo. App. E.D. Sept. 30, 2014):
A hand or a fist is not a "dangerous instrument" for purposes of the ACA statute, so cannot support a conviction for ACA.
Facts: Defendant hit elderly Victim with his fists as part of a "knockout game." Victim died. Defendant was convicted of second degree murder, first degree assault, and two counts of ACA.
Holding: For the reasons stated in *State v. Evans*, 2014 WL 4832217 (Mo. App. E.D. Sept. 30, 2014), a hand or fist is not a "dangerous instrument" for purposes of the ACA statute. The plain meaning of the word "instrument" does not include a body part. Such an interpretation is consistent with the historical intent and use of the ACA statute. ACA convictions vacated.

State v. Donelson, No. ED95132 (Mo. App. E.D. 7/5/11):
Where in 2009, Defendant was charged with two counts of murder and two counts of armed criminal action, for offenses which occurred in 2000 and 2005 respectively, the ACA charges were barred by the three-year statute of limitations for ACA.
Holding: Under Sec. 556.036 RSMo Cum. Supp. 2009, the prosecution of the felony of ACA is limited to three years because armed criminal action is an unclassified code felony and cannot be designated an A felony, which has no statute of limitations. Convictions for ACA vacated.

State v. Summers, 2014 WL 7171572 (Mo. App. W.D. Dec. 16, 2014):
Armed criminal action statute, Sec. 571.015.1, does not mandate consecutive sentences.
Facts: Defendant was convicted of second degree murder, first degree robbery and armed criminal action. At sentencing, the trial court said "I think the armed criminal action has to run consecutive" and imposed a consecutive sentence for it.
Holding: Sec. 571.015.1 provides that the punishment imposed for armed criminal action shall be "in addition to any punishment" provided by law for the crime with a deadly weapon. However, this statute does not mandate that the punishment be consecutive to the other crime. The trial court misunderstood the statute, and this resulted in plain error. Remanded for resentencing where court may consider concurrent sentencing.

Attorney's Fees

Tupper v. City of St. Louis, 2015 WL 4930313 (Mo. banc Aug. 18, 2015):
(1) City red-light camera Ordinance which created rebuttable presumption that owner of vehicle was the driver of the vehicle violated due process because it shifts burden of persuasion to defendants; (2) even though Drivers had been charged with Ordinance violation but had their charges dismissed by Prosecutor, they could challenge constitutionality of Ordinance in a declaratory judgment action; (3) Drivers were not allowed attorney's fees because City's action in passing unconstitutional Ordinance did not constitute intentional misconduct; (4) Director of Revenue had no standing to appeal trial court's judgment granting relief to Drivers where court's judgment did not order DOR to do anything, so DOR was not aggrieved by case.
Facts: Drivers were charged with violation of red-light camera Ordinance. Ordinance created a "rebuttable presumption" that the owner of a vehicle was the driver. Before Drivers could challenge Ordinance in their Ordinance violation cases, City dismissed the charges against them. Drivers then brought declaratory judgment action to invalidate Ordinance, claiming they had no other adequate legal remedy to do so. Trial court found for Drivers, but denied attorney's fees. Drivers, City and Department of Revenue appealed.
Holding: (1) Prosecutions for Ordinance violations are civil proceedings with quasi-criminal aspects. While rebuttable presumptions in civil cases are generally permitted, they are not generally permitted in criminal cases because they relieve the State of its burden of proof and shift the burden of persuasion to defendants. Prior parking Ordinance cases have held that strict liability can be imposed on owners without violating

due process because parking fines are "relatively small," and do not impact a driver's license or insurance. Here, however, a red-light camera violation fine is $100 – not small – and violators will be assessed two points on their license. These factors, along with the quasi-criminal nature of municipal court proceedings, leads this Court to apply the law regarding presumptions in criminal cases. Presumptions which shift only the burden of production may be constitutional, but the Ordinance expressly shifts the burden of persuasion, which is unconstitutional. The Ordinance states that if an owner furnishes "satisfactory evidence" that they were not driving the car, the charges may be terminated. This shows City's intent to require an owner to prove to the fact-finder that they were not the driver. (2) Drivers can challenge Ordinance in declaratory judgment action. A pre-enforcement challenge is sufficiently ripe to raise a justiciable controversy when (a) the facts needed to adjudicate the claim are fully developed, and (b) the laws at issue affect plaintiffs in a manner that gives rises to an immediate, concrete dispute. Cases presenting predominantly legal questions are particularly amendable to conclusive determination in a pre-enforcement context because they require less factually development. Here, Drivers' claim is predominantly legal because it involves the constitutionality of the rebuttable presumption. Also, Drivers have been affected by Ordinance because they were previously facing prosecution under it. (3) Even though Drivers prevailed in their lawsuit, they aren't entitled to attorney's fees. In general, the "American Rule" is that absent statutory authorization or contractual agreement, each party pays their own attorney's fees. This rule can be overcome if a party shows "intentional misconduct" by a defendant. But City's actions in enacting the Ordinance did not constitute "intentional misconduct." (4) The DOR (among others) appealed the trial court's judgment invalidating the Ordinance. However, the trial court's judgment had no effect on DOR and did not order DOR to do anything. DOR is not an aggrieved party, and has no standing to appeal.

Chasnoff v. Mokwa, 2015 WL 1743088 (Mo. App. E.D. April 14, 2015):
(1) Police Officers lacked "privacy" interest in records of police misconduct and could not bar disclosure of such records under Sunshine Law; (2) even though Officers were given "Garrity" warning that their statements made to internal affairs investigators would not be used against them, this applied only to use in later "criminal proceedings," not disclosure under Sunshine Law; and (3) Plaintiff was entitled to attorney's fees for Police Board's conduct in failing to reveal various records subject to Sunshine Law disclosure and "sham" conduct to prevent disclosure.
Facts: Plaintiff sought disclosure under Sunshine Law, Sec. 610.010, of police records involving police misconduct in confiscating "scalped" tickets during the 2006 World Series and then using the tickets themselves. Police Internal Affairs Division (IAD) investigated the matter. Before interviewing Officers, IAD warned Officers under *Garrity v. New Jersey* , 385 U.S. 493 (1967), that if they did not answer questions, they could be fired, but if they did answer questions, "these statements may be used against you in relation to subsequent department charges, but not in any subsequent criminal proceedings." In various prior litigation to the instant case, a trial court ordered disclosure of the records. Subsequently, Officers sought to prevent disclosure to protect their "privacy" interest. The Police Board, which was the defendant in all the litigation, then entered into a "consent judgment" with Officers whereby the Police Board "agreed"

not to release the records which trial court had ordered released. This "consent judgment" was done without Plaintiff's participation or consent. Later, the trial court again ordered release of the records and attorney's fees for Plaintiff. Officers and Police Board appealed.

Holding: Officers claim the Sunshine Law grants them a "privacy" interest that mandates closure of the records. However, the exemptions from disclosure in Sec. 610.021 are permissive, not mandatory. The Sunshine Law lists exempt records that "may" be closed, but does not prohibit disclosure. Officers can assert "privacy" interests as an independent action under a different statute or constitutional provision, but here, there is no other statute or constitutional provision barring disclosure. The "*Garrity* warnings" did not create a constitutional right to prevent disclosure; at most, the warnings told Officers that their statements would not be used in "criminal proceedings," which a Sunshine Law request is not. Even if the "custom and practice" of the Police Board was not to disclose *Garrity* statements, this does not create any enforceable right by Officers; disclosure is determined by law, not the "custom and practice" of the Police Board. There is no overriding constitutional right to privacy in employment records of public employees. Any right to privacy extends only to disclosure of "personal" matters. Information regarding Officers' performance of their official duties, including discipline imposed for misconduct involving citizens, is not a *personal* matter. In short, Officers have no right under the Sunshine Law, constitution, common law, or statute to compel closure of public records regarding Officers' substantiated misconduct in performance of their official duties. Trial court did not err in awarding Plaintiff $100,000 in attorney's fees. The Police Board's failure to reveal the existence of various records until late in the litigation, and entry into a "sham consent agreement with the police officers that bypassed [Plaintiff] in order to avoid the ordered disclosure" support such an award to enforce Plaintiff's rights under Sunshine Law

Bail – Pretrial Release Issues

State v. Jackson, No. SC92532 (Mo. banc 10/30/12):

Holding: "Cash-only" bonds do not violate the Missouri Constitution, because third parties who are not "commercial sureties" may still post the "cash-only" bonds, and such bonds cannot be "excessive." Courts must consider a variety of factors in setting bonds set out in Rule 33.01(e).

Discussion: Art. I, Sec. 20 of the Missouri Constitution states that "all persons shall be bailable by sufficient sureties, except for capital offenses." But this does not mean that "cash-only" bonds are prohibited. Such bonds are permissible because they can be posted by third-party sureties such as family members. But "10% bonds" posted by commercial sureties are not mandated by this provision. Cash-only bonds should not be used to keep a defendant in jail unnecessarily pending trial, however. Art I, Sec. 32(c) of the Missouri Constitution provides that bail may be denied or special conditions imposed only when a defendant poses a danger to the victim, the community or another person. A judge must consider the factors in Rule 33.01(e) in setting bond. If bail is set higher than necessary to secure the defendant's appearance or to protect the public, it constitutes an

impermissible punishment contrary to the presumption of innocence and may be challenged under Article I, Sec. 21 which prohibits "excessive bail."

State v. Atkins, 2015 WL 5575237 (Mo. App. E.D. Sept. 22, 2015):
Holding: Bond forfeiture for a Surety is a two-step process whereby the court must first enter an order of forfeiture when the bond is breached (where Defendant fails to appear), and second, must give notice to the parties and allow Surety an opportunity to show good cause why a judgment should not be entered on the forfeiture. Where trial court entered a "default judgment" against Surety when Defendant failed to appear, this should have been denominated an initial "order of forfeiture" triggering a further hearing, and where Surety proved that it located and produced Defendant within 30 days, trial court abused discretion in denying Surety's motion to set aside the "default judgment."

Lopez-Valenzuela v. Maricopa County, 96 Crim. L. Rep. 108 (9th Cir. 10/15/14):
Holding: Law which limits bail for illegal aliens in "serious felony offenses" is unconstitutional because it doesn't address an acute problem, isn't narrowly tailored to specific crimes, and uses unsupported assumptions about illegal aliens to punish them before trial.

U.S. v. Meister, 94 Crim. L. Rep. 391 (11th Cir. 12/17/13):
Holding: (1) Even though the Mandatory Detention Act, 18 USC 3145(c), provides that certain defendants cannot be released pending sentencing if their crimes are violent, there is an exception where a "Judicial Officer" determines that the defendant is neither a seafety threat nor a flight risk and that detention is inappropriate; (2) a judge qualifies as a "Judicial Officer" under the statute; therefore, a judge can release Defendant under the statute for medical reasons pending his sentence appeal.

U.S. v. Tapia, 2013 WL 557278 (D.S.D. 2013):
Holding: Even though Defendant was an illegal alien, he was not a flight risk and was allowed bail under Bail Reform Act.

Treacy v. Lamberti, 2013 WL 556077 (Fla. 2013):
Holding: Since juveniles cannot receive LWOP for non-homicide offenses, Juvenile was eligible for bond even though their charged crime would carry LWOP if committed by an adult and would not be eligible for bond.

State v. Kiese, 2012 WL 1213352 (Haw. 2012):
Holding: A defendant who had been convicted of harassment and given a sentence of six months' probation, as a petty misdemeanant on bail after the conviction, was entitled to a continuance of bail pending appellate review.

Fry v. State, 93 Crim. L. Rep. 512, 2013 WL 3193328 (Ind. 6/25/13):
Holding: The State bears the burden of proving conditions that justify denying bail to a person charged with murder or treason; placing the burden on defendants to prove they

are entitled to bail violates the presumption of innocence and the State's burden of proof beyond a reasonable doubt.

Big Louie Bail Bonds v. State, 94 Crim. L. Rep. 157 (Md. 10/23/13):
Holding: Bond is not forfeited when an alien-defendant is deported because defendant did voluntarily leave the country or evade prosecution.

DeWolfe v. Richmond, 2012 WL 10853 (Md. 2012):
Holding: Bail hearing was a "stage" of criminal proceedings, requiring appointment of counsel for indigent arrestees.

Com. v. Gautreaux, 88 Crim. L. Rep. 543 (Mass. 1/20/11):
Holding: Article 36 of the Vienna Convention on Consular Relations creates an individually enforceable right to consular notification, but to obtain a new trial for violation, Defendant must show a substantial risk of miscarriage of justice.

Smith v. Banks, 2014 WL 338842 (Miss. 2014):
Holding: Habeas corpus was available to challenge denial of pretrial bail.

State v. Brown, 2014 WL 5769468 (N.M. 2014):
Holding: Even though Defendant was charged with felony murder, court abused discretion in requiring $250,000 cash or surety bond, where Defendant had ties to community, had good behavior awaiting trial for two years, there was no indication Defendant would commit future crimes, that he would be unlikely to appear, or that he was dangerous.

People ex rel. Mcmanus v. Horn, 2012 WL 952409 (N.Y. 2012):
Holding: The statute providing that a court "may direct that the bail be posted in any one of two or more" of the listed forms prohibits a court from fixing only one form of bail.

State v. Haynes, 90 Crim. L. Rep. 602 (N.D. 1/12/12):
Holding: A bail condition requiring a defendant to consent to a warrantless search at any time of her person, vehicle, and residence was invalid under the state's criminal rules

State ex rel. Sylvester v. Neal, 2014 WL 3360614 (Ohio 2014):
Holding: Requiring 10% of bond be paid in cash violated Ohio Constitution's right to post bail with sufficient sureties and protection from excessive bail.

Collins v. Com., 2012 WL 112250 (Va. 2012):
Holding: Common law allowing out-of-state bail bondsmen and bounty hunters to enter another state to apprehend fugitive bailees was abrogated by statutes requiring bail bondsmen and bounty hunters to be licensed in the state.

State v. Barton, 2014 WL 3765937 (Wash. 2014):
Holding: State constitutional provision that Defendant "shall be bailable by sufficient sureties" required that Defendant be allowed to post by with sureties, i.e., a third-party promise to pay.

Hagg v. Steinle, 2011 WL 1815443 (Ariz. Ct. App. 2011):
Holding: Statute mandating pretrial electronic monitoring "where available" did not require nonresident Defendant to stay in county where charged.

People v. Safety Nat'l Casualty Ins. Co., 169 Cal. Rptr. 3d 887 (Cal. App. 2014):
Holding: Even though a court rule required defendants on bail to be present at "readiness" conference, this did not apply to general pretrial hearings, so Defendant did not forfeit his bail for failure to appear.

People v. International Fidelity Insurance Company, 152 Cal. Rptr.3d 52 (Cal. App. 2012):
Holding: Trial court lacked authority to order forfeiture of bail in misdemeanor case where Defendant appeared through counsel and court had not ordered a personal appearance by Defendant.

Babalola v. Superior Court, 2011 WL 489934 (Cal. App. 2011):
Holding: Even though Defendant had in the past hit victims and there was "bad blood" between them, this did not constitute good cause to issue a criminal protective order against Defendant because there was no evidence that Defendant attempted to intimidate or dissuade victims from testifying at trial.

Reeves v. Nocco, 2014 WL 3377083 (Fla. App. 2014):
Holding: Even though there was no constitutional right to pretrial release on bail, trial court had discretion to release Defendant.

Satterfield v. State, 2015 WL 2215016 (Ind. App. 2015):
Holding: Defendant has right to present exculpatory evidence, including an affirmative defense, at a bail hearing.

Com. v. Gomez, 2011 WL 61886 (Mass. Ct. App. 2011):
Holding: Court cannot order bail forfeited when defendant is in custody on a separate charge.

State v. Segura, 2014 WL 295237 (N.M. App. 2014):
Holding: Defendant, who was on pretrial bail, was denied due process where trial court revoked his bail for alleged violation of conditions of release without any opportunity to be heard or examine witnesses.

Ex parte Melartin, 2015 WL 1544805 (Tex. App. 2015):
Holding: Even though Defendant was a noncitizen and while on bail for a sex charge he committed a new DWI, trial court abused discretion in setting bail at $800,000 per charge

($7M total) where Defendant had not attempted to flee when previously on bail, was employed and had a wife and children.

Ex Parte Gill, 94 Crim. L. Rep. 282, 2013 WL 6081449 (Tex. App. 11/20/13):
Holding: Texas statute which requires release on bond or reduction in bond if State fails to timely bring a Defendant to trial does not allow a judge to consider the safety of the victim or the community when choosing between the two options.

Brady Issues

State ex rel. Clemons v. Larkins, 2015 WL 7572030 (Mo. banc Nov. 24, 2015):
(1) Habeas relief granted where State violated Brady by failing to disclose that a probation office-Witness had seen injuries on Defendant's face which would have supported his allegation that his confession was coerced by police; Defendant was prejudiced because this evidence could have led to granting his motion to suppress, or affected the fairness of the trial because the jury was asked to decide if his confession was voluntary and Defendant was precluded from presenting evidence that it was coerced; (2) Even though the habeas special master drew a negative inference from Defendant's assertion of his 5th Amendment privilege against self-incrimination when the State questioned him in the habeas proceedings about whether he committed the crime, Defendant had a constitutional right to choose not to testify at his trial, and his silence cannot factor into whether Defendant was prejudiced at his trial by the Brady violation.
Facts: Defendant alleged in a pretrial suppression motion and attempted to allege at trial that his confession was coerced because police beat him. Before trial, Defendant called his attorney and family members to testify as to injuries on his face. Police testified they did not see any injuries, and did not coerce him. The trial court overruled the motion to suppress. At trial, Defendant presented family members to testify about injury to his face. The State moved to prohibit Defendant from arguing that police caused the injuries, because Defendant's evidence was only that he had injures, not how they were caused. The trial court precluded Defendant from arguing that his confession was coerced, even though the jury was instructed that it had to find whether the confession was voluntary. Defendant was convicted and sentenced to death. After state direct appeal and postconviction proceedings, and various federal proceedings, Defendant sought state habeas relief on grounds of a newly discovered *Brady* violation, in that the State failed to disclose a probation office-Witness who had observed facial injuries on Defendant, and had reported this to prosecutors and prepared a written report about it, which prosecutors apparently altered to conceal the information about the facial injuries.
Holding: (1) Evidence that has been deliberately concealed by the State is not reasonably available to counsel and constitutes "cause" for raising otherwise procedurally barred claims in habeas. Defendant was prejudiced by the failure to reveal the Witness. The Witness would have lent substantial credibility to Defendant's claim that his confession was coerced. The Witness worked for the State probation office, so did not have the same potential bias that Defendant's family members and attorney had. Even though family members and Defendant's attorney testified about Defendant's injuries, the Witness' testimony would not have been "merely cumulative" because it went to the very

root of the matter in controversy, the decision of which turned on the weight of the evidence. Witness offered independent, objective and impartial corroboration of Defendant's allegation of police coercion; the credibility of this allegation turned exclusively on the weight of the evidence. The Witness' testimony may have caused a different ruling on the motion to suppress, and Defendant was denied a fair trial because the jury was not able to hear Witness' testimony in determining if Defendant's confession was voluntary. (2) During the habeas hearing, Defendant asserted his 5th Amendment privilege against self-incrimination when the State questioned him about whether he committed the crime. The habeas special master drew a negative inference from this. At trial, Defendant had a constitutional right to choose not to testify, and the constitutional guarantees that no adverse inference be drawn from that. As such, Defendant's silence in response to the State's questions cannot factor into this Court's determination of whether Defendant was prejudiced at his trial by the State's failure to reveal with Witness information.

State ex rel. Woodworth v. Denney, 2013 WL 85427 (Mo. banc Jan. 8, 2013):
Holding: (1) In habeas action, State's failure to disclose exculpatory evidence before trial constitutes "cause" to overcome a procedural default for failure to raise *Brady* violations on appeal or in Rule 29.15 action; (2) State's failure to disclose letters between trial judge, attorney general and murder victim's husband which would have impeached husband's testimony and supported defense theory at trial violated *Brady* and warranted habeas relief, even though habeas petitioner did not open the entire defense file to the State in the habeas case or call all prior defense counsel to testify in the habeas proceeding; (3) State's failure to disclose that murder victim's daughter had reported to police that another suspect in the murder had violated a protection order against her violated *Brady* and warranted habeas relief because such evidence would have impeached daughter's testimony and supported the defense theory that this other suspect committed the murder; even though the prosecutor may not have had knowledge of this protection-order evidence, the State was still responsible under *Brady* for the police's failure to disclose it, and even though the defense knew before trial of some matters about the protection order because daughter had mentioned it in her pretrial deposition, daughter's deposition testimony on this was misleading and incomplete because she did not testify that suspect had made any threats or that she had reported them to police; (4) in assessing *Brady* prejudice in habeas proceeding, court can consider newly discovered evidence of innocence in addition to the *Brady* violations and the matters presented at trial to determine if the trial verdict is no longer "worthy of confidence."

State ex rel. Griffin v. Denney, No. SC91112 (Mo. banc 8/2/11):
Even though State prosecutors may not have known about a DOC incident report that was favorable to Defendant in a prison stabbing case, State is responsible for its disclosure under Brady and failure to disclose it prejudiced Defendant; habeas corpus relief is available and granted.
Facts: In the 1980's, Defendant (Petitioner) was convicted of first degree murder due to a fatal stabbing that occurred at a DOC prison. The primary witnesses against Defendant were two fellow inmates of questionable credibility. No physical evidence connected Defendant to the murder. In 2005, Defendant filed a habeas petition alleging newly

discovered evidence that the State failed to disclose a DOC report that prison guards had seized a sharpened screwdriver from another inmate immediately after the stabbing.
Holding: To prevail in habeas, Defendant must show "cause" for failure to raise his claim previously, and "prejudice." "Cause" must be some objective factor external to the defense. Here, the State's failure to disclose the DOC report is "cause." To show prejudice, Defendant does not need to prove definitively that he would have received a different verdict if the report had been disclosed, but whether in its absence, he received a fair trial resulting in a verdict worthy of confidence. In assessing *Brady* violations, the Court reviews all available evidence discovered after trial. Here, the undisclosed evidence would have provided an alternative perpetrator and further impeached the State's witnesses because it places another inmate with a weapon at the murder scene just minutes after the murder. Even if the prosecutor was unaware of this, the State has a duty to discover and disclose this evidence because the prison guards were acting on the State's behalf. Defendant was further prejudiced when other post-trial evidence is considered, including that one of the State's witnesses has recanted his testimony, and that another person has confessed to the murder. Habeas relief granted. State must retry Defendant within 60 days or discharge him.

State v. Moore, 2013 WL 5726075 (Mo. App. E.D. Oct. 22, 2013):
State was obligated under Brady to disclose its Witness' prior SIS (but was not prejudicial here since evidence of guilt was strong).
Facts: After trial, the State learned that its complaining Witness in rape prosecution had a prior SIS for misdemeanor stealing. The defense moved for a new trial under Rule 25.03 and *Brady*.
Holding: The State's discovery obligations under Rule 25.03 and *Brady* are separate legal concepts. Rule 25.03(A)(7) requires the State, upon request of Defendant, to provide prior criminal convictions of witnesses. However, this Rule does not require disclosure of SIS. If a defendant seeks disclosure of SIS, he must make a motion to the trial court under Rule 25.04, but that was not done here. *Brady* requires the State to learn of any favorable information known by others acting on behalf of the government and and to disclose that; the State must "diligently" search for this information. Here, even though the State didn't learn of the SIS until after trial, it was nevertheless obligated to have searched and found it before trial, and to have disclosed it. However, there was no prejudice here because other evidence of guilt was strong.

In re: Ferguson v. Dormire, 413 S.W.3d 40 (Mo. App. W.D. 2013):
(1) Even though a circuit court had denied habeas petition on the merits with written Findings, the remedy for Petitioner is to file a new habeas proceeding in the appellate court, and the appellate court does not review the circuit court's Findings but reviews the case de novo; (2) in the absence of statutory constraint, a habeas Petitioner is not barred from filing successive habeas corpus petitions asserting grounds previously denied by a circuit court. (However, where a higher court has denied a writ, Rule 91.22 prohibits returning to a lower court unless the higher court's denial was without prejudice.); and (3) where the State failed to disclose an interview of a State's witness which would have impeached another State's witness and allowed the defense to develop further evidence, Petitioner demonstrated cause and prejudice for habeas relief and violation of Brady.

Facts: Petitioner was convicted of murder. After appeal and postconviction remedies were concluded, he filed a habeas petition alleging, in relevant part, that the State failed to reveal an interview of a witness which would have impeached a key identification witness at trial. There was no physical evidence connecting Petitioner to the offense, and the identification evidence was hotly contested at trial. The circuit court denied the petition on the merits. Petitioner filed a new habeas petition in the appellate court.
Holding: (1) The State claims that because Petitioner's claims were denied by the circuit court after an evidentiary hearing, Petitioner's recourse is to file for a writ of certiorari. When a circuit court *grants* a habeas petition, the State's recourse is to file for a writ of certiorari. However, when a petition is *denied*, Petitioner's remedy is to file a new habeas petition in the appellate court. Further, the appellate court does not conduct appellate review of the circuit court's decision, but reviews de novo. (2) The State argues that the petition should be prohibited as "successive," but in the absence of any statutory constraint, a habeas Petitioner is not prohibited from filing a successive petition in the appellate court. Rule 91.22 does, however, prohibit returning to circuit court after a habeas writ is denied by a higher court unless the higher court denied the writ without prejudice. (3) Petitioner has established the cause and prejudice gateway for habeas relief because he has shown that the State's failure to disclose a witness interview which would have impeached a critical identification witness was an objective factor external to the defense, which he did not know about or have reason to know about at the time of his direct appeal and postconviction cases. In determining prejudice, Petitioner need only show a reasonable probability of a different result or undermined confidence in the outcome, not that discounting the inculpatory evidence in light of the nondisclosed evidence, there would not have been enough evidence left to convict. Even though the State did not reduce the witness interview to writing and the prosecutor did not know about it, the failure to disclose still violated *Brady*, because *Brady* obligations cover police and prosecutor investigators. Even though the State claims Petitioner could have learned about the *Brady* violation sooner, a rule that "prosecutor may hide, defendant must seek," does not comport with due process. The undisclosed evidence would have impeached a critical identification witness at trial, and allowed the defense to develop other evidence. Even though the State endorsed the undisclosed witness, endorsement cannot be a valid substitute for *Brady* disclosure because it is not enough to avoid active suppression of favorable evidence; *Brady* requires disclosure.

Wallar v. State, 403 S.W.3d 698 (Mo. App. W.D. 2013):
(1) The "form discovery response" of the Jackson County Prosecutor's Office is deceptive because it implies that the Office has checked the criminal histories of witnesses when the Office has not, in fact, done so; thus, the response violates Rule 25.03; (2) in a Rule 24.035 motion following a guilty plea, a mere violation of a discovery rule is not cognizable, but the issue can be cognizable if it has "constitutional significance" under Brady; to plead the claim, Movant must plead that had the Brady evidence been disclosed, he would not have pleaded guilty but would have insisted on going to trial; but (3) the failure to disclose mere impeachment evidence is insufficient, because the government is not constitutionally required to disclose impeachment evidence prior to entering a plea agreement with a defendant.

Facts: Following a guilty plea, Movant filed a 24.035 motion alleging that the Jackson County Prosecutor's Office had failed to disclose evidence to him in violation of Rule 25.03. The Western District ultimately affirms the denial of postconviction relief, but makes some notable comments about discovery law and postconviction relief.
Holding: (1) The Western District finds that the "form discovery response" of the Jackson County Prosecutor's Office is misleading because it implies that the Office has already run criminal histories on State's witnesses when it has not done so. Although this was not prejudicial in this case because the defense attorney testified that he knew the Office did this and knew he would not get discovery of this until closer to trial, the Office's "standard response" is deceptive and does not comply with Rule 25.03. The Jackson County Prosecutor's Office should alter this language in its standard response to clearly reflect either that the criminal histories have not been run, or that they have been run and revealed no prior convictions. (2) As for Movant's claim that he should receive postconviction relief due to violation of Rule 25.03, mere violation of a court rule is not cognizable under Rule 24.035 because court rules do not constitute the "laws of this state." For the claim to be cognizable, it must have and be pleaded as having "constitutional significance," i.e., it must violate the U.S. or Missouri Constitutions. Failure to disclose evidence could have constitutional significance if it can meet the test for *Brady* violations. To plead and prove such a claim, a movant must plead and prove that had the evidence at issue been disclosed, he would not have pleaded guilty, but would have insisted on going to trial. This Court recently held that when a defendant has pleaded guilty, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights … but may instead attack [only] the voluntary and intelligent character of the guilty plea by showing ineffectiveness of counsel." The State argues that this holds that movants cannot raise *Brady* claims or constitutional claims other than ineffective counsel. This reading is too narrow. Rule 24.035 contemplates raising constitutional claims. To be cognizable, the claim would have to be one the defense was unaware of prior to the plea, that could not have been raised prior to the plea, and that rendered the plea involuntary. While such claims are rare, an example would be a *Brady* claim, but "[s]uch a claim is more likely to be successful if the defendant entered an *Alford* plea." Also, the violation of other court rules can have "constitutional significance." For example, if there is not a factual basis under Rule 24.02(e), this violates due process, and Rule 24.035 allows relief as a violation of due process. (3) The U.S. Supreme Court has held, however, that the Constitution does not require the government to disclose impeachment evidence prior to entering a plea agreement with a defendant. The undisclosed evidence here is merely impeachment evidence, and therefore, does not affect the voluntary nature of the plea.

State ex rel. Koster v. Green, No. WD75820 (Mo. App. W.D. 12/26/12):
Even though Petitioner confessed to crime, it was not an abuse of discretion to grant habeas relief where police had committed numerous "Brady" violations by failing to disclose serological test results, fingerprints, a drawing of the crime scene, and that a key prosecution witness had been hypnotized – all of which would have aided the defense and which undermine confidence in the outcome.
Facts: Defendant/Petitioner was convicted of a murder in 1983. In 2011, he sought habeas relief on grounds that the police had committed various "*Brady*" violations. The

trial court granted relief. The State sought a writ of certiorari and claimed that there was no prejudice to Petitioner since he had confessed to the crime.
Holding: The undisclosed evidence in this case would have cast doubt on Petitioner's confession because such evidence was inconsistent with it. The defense was that Petitioner, who was mentally ill, had falsely confessed. To demonstrate prejudice, a Petitioner does not have to show that the suppressed evidence would have resulted in an acquittal or that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. Thus, it doesn't matter that even if the favorable evidence had been disclosed, there would still have been enough to convict based on Petitioner's confession. All that is required is a showing that the favorable evidence could reasonably be taken to have put the whole case into a different light so as to undermine confidence in the verdict. Here, all of the undisclosed evidence would have allowed defense counsel to greatly undercut the credibility of the police investigation, which was a critical issue in the jury's assessment of Petitioner's confession. Had the undisclosed evidence come to light, the defense easily could have shown evidence that was inconsistent with Petitioner's confession. It was not an abuse of discretion to grant habeas relief.

State ex rel. Jackson County Prosecuting Attorney v. Prokes, No. WD72996 (Mo. App. W.D. 12/20/11):
Where State engaged in repeated Brady violations and failed to comply with court order for discovery, trial court did not err in excluding all the State's evidence from any trial.
Facts: Defendant's case had previously been reversed in postconviction due to *Brady* violations. Before retrial, the court entered a detailed discovery order, with which the State failed to comply. As a sanction, the trial court entered an order excluding all evidence from trial, which effectively prevented the State from trying the case. The State sought a writ of prohibition.
Holding: In order to prevail on a writ, the State must show that the trial court's order was an abuse of discretion. Because the original conviction was reversed due to *Brady* violations, the trial court entered a detailed discovery order for the retrial, with which the State repeatedly failed to comply. Where the State has failed to respond promptly and fully to a disclosure request, the issue is whether the failure has resulted in fundamental unfairness or prejudice to the defendant. Rule 25.18 provides that a court may "enter such other order as it deems just under the circumstances" for discovery violations. Here, the State's discovery violations have gone on for more than 10 years. The State has continued to delay discovery, object to discovery, and failed to comply with court orders regarding discovery. Defendant has been subjected to fundamental unfairness and prejudice because he is no closer to receiving a fair trial than he was when he was charged more than 10 years ago. Willful violations require more serious sanctions than merely negligent violations because the willful violation shows an intentional disregard for the rules and orders of the court. The dissent argues that prior cases have held that due process concerns mean that a court should be cautious in excluding defense witnesses due to a discovery violation, but due process concerns do not apply to the State precisely because the State does not have due process rights. The dissent also argues that Missouri citizens are prejudiced here because the Defendant will not be brought to trial. However, the citizens have been prejudiced by the prosecutor's misconduct throughout the case.

The "balancing test" employed by the dissent is predisposed to an outcome in favor of the State based on the improper assumption that the State's overriding interest should be to prosecute and convict Defendant, but such is not the case. The prosecutor has a duty not to convict at any cost, but to see that justice is done and that a defendant receives a fair and impartial trial. The trial court did not abuse its discretion in excluding all the State's evidence.

State ex rel. Koster v. McElwain, No. WD73211 (Mo. App. W.D. 3/29/11):
(1) Petitioner was able to raise Brady claim and jury misconduct claim in state habeas case because he showed cause and prejudice for not raising them on direct appeal or in postconviction; (2) State violated Brady where it failed to disclose that Sheriff knew that another person had threatened murder victim and police knew of witness who would also indicate another person threatened victim; (3) jury committed misconduct in seeking out a map that was not introduced into evidence to determine Petitioner's guilt.
Facts: Petitioner was convicted at a jury trial of first degree murder of his mother. He lost his direct appeal and Rule 29.15 case. He won relief in U.S. District Court, but the 8th Circuit reversed. He then filed a state habeas corpus case alleging various claims. The habeas court granted relief, and the State sought a writ of certiorari challenging the grant of relief.
Holding: The State argues that Petitioner's claims are procedurally barred because he did not raise them in his direct appeal or Rule 29.15 case. However, claims are not barred in a habeas case if (1) the claim relates to a jurisdictional (authority) issue; or (2) the petitioner establishes manifest injustice because newly discovered evidence makes it more likely than not that no reasonable juror would have convicted him (a "gateway innocence" claim); or (3) the petitioner establishes the presence of an objective factor external to the defense, which impeded his ability to comply with the procedural rules for review of claims, and which worked to his actual and substantive disadvantage infecting his entire trial with constitutional error (a "gateway cause and prejudice" claim). Here, Petitioner's claims fall under exception number three. He has shown that the State engaged in *Brady* violations because the Sheriff knew that another person had threatened the murder victim and law enforcement also failed to disclose that another witness had similar knowledge. Even though there may not have been written reports about this, *Brady* still required the State to disclose it, and even though the prosecutor may not have personally known about it, *Brady* makes the State responsible for police nondisclosure. Since these thing weren't disclosed, Petitioner could not have known about them or raised them on direct appeal or in his Rule 29.15 case. Even though the Eastern District had held that Petitioner's evidence at that time was insufficient to allow Petitioner to introduce evidence that another person did the crime, Petitioner has introduced new evidence in the habeas case directly linking another person to the crime, so all this evidence would now be admissible. Furthermore, the jury committed misconduct by seeking out a map that was not in evidence to use to convict Petitioner. The State contends that Petitioner has the burden to prove prejudice from this, but there is nothing in Missouri law that deprives a habeas petitioner of the benefit of the presumption of prejudice from such jury misconduct; Petitioner would have had such a presumption if this matter was raised on direct appeal. Here, the presumption applies and the State failed to rebut it. Grant of writ of habeas corpus affirmed.

*** Smith v. Cain, 132 S.Ct. 627 (2012):**
Holding: *Brady* violation occurred where State failed to disclose police files that contained statements by a witness which directly contradicted his trial testimony and the witness was sole eyewitness linking Defendant to crime.

*** Wetzel v. Lambert, ___ U.S. ___, 90 Crim. L. Rep. 668 (U.S. 2/21/12):**
Holding: State court did not unreasonably apply federal law in ruling that *Brady* was not violated where State failed to disclose ambiguous information that would not have materially furthered the impeachment of witnesses.

*** Connick v. Thompson, ___ U.S. ___, 88 Crim. L. Rep. 805 (U.s. 3/29/11):**
Holding: Even though prosecutor failed to disclose evidence, a wrongfully convicted plaintiff cannot recover civil damages on a failure-to-train-about-*Brady* theory without evidence of a pattern of similar discovery violations.

Johnson v. Folino, 2013 WL 163841 (3d Cir. 2013):
Holding: Remand of habeas case was required to determine materiality of prosecutor's *Brady* violation in failing to disclose that State's star witness was a suspect in multiple open police investigations.

Lambert v. Beard, 2011 WL 353209 (3d Cir. 2011):
Holding: Even though co-conspirator was impeached by other evidence at trial, State violated *Brady* in failing to disclose that co-conspirator had said that there was another participant in the crime; the undisclosed evidence would have allowed Defendant to open a new line of impeachment evidence.

Wolfe v. Clarke, 2012 WL 3518481 (4th Cir. 2012):
Holding: Petitioner succeeded in establishing cause and a prejudice for procedurally defaulted *Brady* claim by concurrently establishing the elements of the *Brady* claim.

U.S. v. King, 628 F.3d 692 (4th Cir. 2011):
Holding: Defendant made sufficient showing under *Brady* that grand jury transcript of witness may contain exculpatory evidence; hence court was required to conduct in camera review of transcript.

In re Campbell, 95 Crim. L. Rep. 243 (5th Cir. 5/13/14):
Holding: Where prosecutors failed to disclose results of IQ tests of Defendant showing he had low IQ, Defendant was entitled to file a successive habeas petition and receive a stay of execution.

Eakes v. Sexton, 2014 WL 6657037 (6th Cir. 2014):
Holding: State violated *Brady* by failing to reveal impeaching evidence regarding victim's Mother in murder trial, where Mother was a key witness for State.

Gumm v. Mitchell, 96 Crim. L. Rep. 349 (6th Cir. 12/22/14):
Holding: Even though certain statements that another person did crime, which withheld by Prosecutor might not have been admissible, where other such statements would have been admissible, the *Brady* violation was material and warranted habeas relief" some of this evidence consists of rumors and double-hearsay which would likely have been inadmissible at trial, but much of the evidence could very well have been admitted or clearly led to the discovery of admissible evidence."

U.S. v. Tavera, 93 Crim. L. Rep. 449, 2013 WL 3064599 (6th Cir. 6/20/13):
Holding: The "due-diligence" rule, which excuses *Brady* violations if the defendant could have found the exculpatory information on his own, is no longer valid in light of *Banks v. Dretke*, 540 U.S. 668 (2004); hence, Defendant had no due diligence duty to discover exculpatory statements of a co-defendant that should have been disclosed under *Brady*; court rejects State's argument that counsel should have asked co-defendant if he had talked to the prosecutor.

Amado v. Gonzalez, 2014 WL 33777340 (9th Cir. 2014):
Holding: State violated *Brady* by failing to disclose key Witness' probation violation report that contained his prior convictions, probationary status, and connection to rival gang.

Comstock v. Humphries, 2015 WL 2214647 (9th Cir. 2015):
Holding: Where Defendant was convicted of possessing stolen property (a ring), Prosecutor violated *Brady* by failing to reveal alleged Victim's statement that he may have simply misplaced the allegedly stolen ring; Defendant's defense was predicated on theory that he simply found the ring.

U.S. v. Sedaghaty, 93 Crim. L. Rep. 712, 2013 WL 4490922 (9th Cir. 8/23/13):
Holding: (1) Where affidavit supporting warrant for search of computer was only to investigate suspected tax fraud, Agents exceeded scope of search warrant when they went through computer files to collect evidence of terrorist activity that Defendant cheated on his taxes to fund terrorist causes; and (2) Gov't committed *Brady* violation where they failed to reveal that FBI had paid persons who testified against Defendant $14,000 in "financial assistance."

U.S. v. Thomas, 2013 WL 4017239 (9th Cir. 2013):
Holding: Gov't's failure to disclose full history of drug dog's search skills was not harmless where dog had been evaluated as having only "marginal" skills in certification program; thus, his behavior in touching Defendant's toolbox provided an insufficient basis to search toolbox.

Mike v. Ryan, 92 Crim. L. Rep. 750 (9th Cir. 3/14/13):
Holding: State court unreasonably applied federal law and unreasonably determined the facts in light of the evidence presented in the state court proceedings where State failed to disclose impeachment evidence concerning a key Officer-witness.

Phillips v. Ornoski, **2012 WL 899634 (9th Cir. 2012):**
Holding: Prosecution's *Napue* violations in failing to correct a key witness' and prosecutor's own statements at trial that no immunity deal existed between them were material to a special circumstance finding.

Gonzalez v. Wong, 2011 WL 6061514 (9th Cir. 2011):
Holding: Remand to district court was warranted, with instructions to stay habeas petition to allow state court to consider *Brady* claim, as the claim was colorable in light of psychological reports, but the reports could not be considered by federal courts until they were made a part of the state court record.

Pickard v. Dept. of Justice, 89 Crim. L. Rep. 690 (9th Cir. 7/27/11):
Holding: After a drug informant has been identified in court, the DEA cannot refuse to provide records about the informant under Freedom of Information Act.

U.S. v. Kohring, 88 Crim. L. Rep. 778 (9th Cir. 3/11/11):
Holding: Prosecutor was required under *Brady* and *Giglio v. U.S.*, 405 U.S. 150 (1972), to disclose that one of its witnesses was under investigation for sex offense.

Maxwell v. Roe, 88 Crim. L. Rep. 293 (9th Cir. 11/30/10):
Holding: *Brady* was violated where State failed to reveal that State had originally cut a far less favorable deal with jailhouse-snitch-witness to testify against Defendant; State made a better deal with snitch after snitch offered to testify that Defendant confessed to him.

Browning v. Trammell, 93 Crim. L. Rep. 203, 2013 WL 1867412 (10th Cir. 5/6/13):
Holding: Prosecutor violated *Brady* in failing to disclose mental health records of key State's witness which indicated witness had a tendency to blur reality and fantasy and shift blame on others; such records could have been used to question witness' credibility.

Roth ex rel. Bower v. Dept. of Justice, 89 Crim. L. Rep. 621 (D.C. Cir. 6/28/11):
Holding: Death-sentenced Defendant is entitled to use FOIA to obtain records from FBI showing he is innocent; claim of innocence outweighs privacy rights of third parties mentioned in FBI investigative records.

Biles v. U.S., 2014 WL 5374625 (D.C. 2014):
Holding: *Brady* applies to State's failure to disclose information relevant to pretrial suppression motion.

Miller v. U.S., 2011 WL 721540 (D.C. 2011):
Holding: *Brady* violated where Gov't failed to disclose until night before opening statements the grand jury testimony of a gov't witness that the shooter used his left hand; Defendant was right-handed and could have focused their investigation on an alternative suspect who had signed a police document with their left hand.

Pizzuti v. U.S., 2011 WL 3652293 (S.D. N.Y. 2011):
Holding: On their motions to vacate, set aside, or correct their sentences, defendants were entitled to all FBI reports concerning witnesses, as well as an explanation for any differences between the disclosed documents and the documents actually used at trial.

U.S. v. Edwards, 2011 WL 1454077 (E.D. N.C. 2011):
Holding: *Brady v. Maryland* applies to SVP proceedings.

Gillispie v. Timmerman-Cooper, 2011 WL 6258450 (S.D. Ohio 2011):
Holding: Petitioner was entitled to federal habeas relief as to his *Brady* claim because the state failed to disclose to the defense, prior to trial, supplemental reports written by the original investigating detectives that eliminated the petitioner as a suspect.

Dennis v. Wetzel, 2013 WL 4457047 (E.D. Pa. 2013):
Holding: Even if withheld documents individually would not have violated *Brady*, their cumulative non-disclosure violated *Brady* because documents would have allowed defense to attack adequacy of State investigation and impeached important witnesses, while corroborating Defendant's alibi.

Munchinski v. Wilson, 2011 WL 3439270 (W.D. Pa. 2011):
Holding: Superior Court erred in denying habeas relief based on the discovery of alleged evidence in that the Court erroneously used a heightened standard of review (that prisoner must show that the new facts would have changed the outcome of the trial) (1) which did not take into account that evidence favorable to the petitioner could not be suppressed by the prosecution under *Brady*; and (2) required that petitioner show materiality by demonstrating that the evidence "would have changed the outcome" of the trial when all that is required is that petitioner shows there is a "reasonable probability" that it would have done so.

Lapointe v. Commissioner of Correction, 2015 WL 1600208 (Conn. 2015):
Holding: State violated *Brady* by failing to disclose exculpatory evidence regarding the burn time of a fire which resulted in death, where this would have corroborated Defendant's alibi.

Wright v. State, 2014 WL 2085826 (Del. 2014):
Holding: State violated *Brady* by failing to disclose that Witness had previously cooperated with law enforcement by testifying against former acquaintances, and by failing to disclose evidence that a defense Witness lied during direct examination concerning his association with another suspect.

Swafford v. State, 2013 WL 5942382 (Fla. 2013):
Holding: Where State's case was built on theory that Defendant's motive in murder was to engage in sexual assault, Defendant was entitled to new trial for newly discovered evidence that no seminal fluid was found inside victim because this gave rise to reasonable doubt as to guilt.

Wyatt v. State, 2011 WL 2652195 (Fla. 2011):
Holding: FBI letters created after trial that said that an expert on bullet lead analysis testified beyond the science were "newly discovered" evidence.

DeSimone v. State, 2011 WL 3962862 (Iowa 2011):
Holding: Where witness' timecard would have impeached their credibility, State's failure to disclose it violated *Brady*.

Com. v. Scott, 2014 WL 815335 (Mass. 2014):
Holding: Where Gov't forensic lab engaged in misconduct regarding representations on a drug certificate, the misconduct is attributable to the State and there is a conclusive presumption that misconduct occurred in this case; case must be remanded to determine if there is a reasonable probability Defendant would not have pleaded guilty if he had known of the misconduct.

Com. v. Murray, 90 Crim. L. Rep. 294 (Mass. 11/22/11):
Holding: Prosecutors violated *Brady* by not disclosing that murder victim was a member of a criminal gang; this could have been used to impeach various witnesses.

People v. Chenault, 95 Crim. L. Rep. 52 (Mich. 4/4/14):
Holding: Michigan abandons "due diligence" rule that excused *Brady* violations if the defense could have discovered the undisclosed exculpatory evidence by reasonable diligence; imposing a duty on the defense to find undisclosed favorable evidence known by the State is inconsistent with fairness and *Brady*.

People v. Gutierrez, 2013 WL 940786 (Cal. App. 2013):
Holding: State's duty to disclose *Brady* material applies at preliminary hearings.

People v. Corson, 2013 WL 174450 (Colo. App. 2013):
Holding: Juvenile adjudication of a Witness is required to be disclosed as *Brady* impeachment material.

People v. Hubbard, 2014 WL 3709668 (N.Y. Sup. 2014):
Holding: Prosecutor violated *Brady* by failing to disclose a false confession obtained in another case by same Officer who interrogated Defendant; Defendant had expressly requested any information from State witnesses about previously making false or misleading reports.

Ex Parte Coty, 2014 WL 128002 (Tex. App. 2014):
Holding: Remedy in habeas proceeding for misconduct by crime lab technician at trial was to shift the burden of falsity to the State, but the burden of persuasion with respect to materiality remained with Petitioner.

Johnson v. State, 2011 WL 6157492 (Tenn. Crim. App. 2011):
Holding: In determining whether relief was warranted based on newly discovered evidence, the appellate court would take into account the entire record, including improperly withheld exculpatory evidence, rather than just the admitted evidence.

Pena v. State, 90 Crim. L. Rep. 8 (Tex. Crim. App. 9/28/11):
Holding: Even though State mistakenly thought audio had been erased, the audio of a videotape where Defendant denied the crime should have been disclosed under *Brady*.

Ex parte Ghahremani, 2011 WL 798640 (Tex. Crim. App. 2011):
Holding: Where State concealed a police report that would have shown that child sex victim's parents gave false testimony at trial, this violated due process and excused Defendant's failure to raise this on direct appeal; habeas relief granted.

Child Support

State v. Mecham, 470 S.W.3d 744 (Mo. banc Oct. 13, 2015):
The child nonsupport statute, Sec. 568.040, requires the State prove only that Defendant "knowingly" failed to pay support, and does not violate due process because it makes failure to pay "without good cause" an affirmative defense; Due Process allows the burden of proof for an affirmative defense to be placed on the defense.
Facts: Father, charged with child nonsupport under the post-2011 version of Sec. 568.040, claims that the statute violates due process because it makes failure to pay an affirmative defense.
Holding: Sec. 568.040.1, as amended in 2011, provides that a parent commits nonsupport "if such parent knowingly fails to provide adequate support which such parent is legally obligated to provide." Sec. 568.040.3 provides that "[i]nability to provide support for good cause shall be an affirmative defense" which Defendant "has the burden of proving … by a preponderance of the evidence." Sec. 568.040.2(2) provides that "good cause" is "any substantial reason why the defendant is unable to provide adequate support." Under the statute, "without good cause" is not an element of nonsupport. The culpable mental state is "knowingly," and there is no requirement that Defendant act with criminal intent. Since "without good cause" is not an element, the burden of proof is not shifted to Defendant. The Due Process Clause allows the burden of proof for an affirmative defense to be placed on the defense. Hence, the statute is not unconstitutional.

State v. Claycomb, 2015 WL 3979728 (Mo. banc June 30, 2015):
(1) A sufficiency of evidence claim is preserved for appellate review even if it was not raised in the trial court in a new trial motion or otherwise; and (2) in nonsupport case for failure to pay monetary child support, State is not required to prove as part of its case that Defendant failed to provide in-kind support, such as food, clothing, lodging, or medicine.
Facts: Defendant was convicted at a bench trial of failure to pay monetary child support, Sec. 568.040. Defendant contended the evidence was insufficient to convict because,

although the State showed he did not pay monetary child support, the State did not show he failed to support his children with in-kind contributions.
Holding: (1) As an initial matter, there is a question whether Defendant has preserved his sufficiency claim for appeal, since he failed to raise it below. It is preserved. As relevant here, Rule 29.11(e) states that in a bench trial, a new trial motion is not necessary to preserve issues for appeal, but if a new trial motion is filed, allegations of error must be included in the new trial motion *except* for questions regarding sufficiency of evidence. Similarly, Rule 29.11(d)(3) provides that in jury-tried cases, allegations of error to be preserved for appeal must be included in a motion for new trial *except* for questions regarding the sufficiency of evidence. To the extent that some prior cases have held that a sufficiency claim can only be reviewed for plain error if not included in a motion for new trial, they should no longer be followed, because they are inconsistent with Rule 29.11. No Rule requires the filing of a motion for judgment of acquittal in a court tried case. Rule 27.07 provides for filing of a motion for judgment of acquittal in a jury case, but even then, 27.07(c) provides that the court may enter a judgment of acquittal of its own motion based on insufficiency, and that no motion for judgment of acquittal need be filed prior to submission of the case in order for a defendant to seek a judgment of acquittal after the verdict. (2) Defendant argues the State is required to prove that he failed to provide in-kind support. The version of Sec. 568.040 in effect at the time of the offense provided that a parent commits nonsupport if such parent fails to provide "adequate support" for the child. Sec. 568.040.2(3) defines "support" as food, clothing, lodging, and medical care. As relevant here, Sec. 568.040.4 states that nonsupport is a Class D felony if Defendant fails to pay support he is obligated to pay in six out of 12 months. Here, the State showed that Defendant failed to pay financial support for six months. And, even though Defendant later paid in full, his late payment is no defense, since a child's needs are continuous. The State does not have to negate every possibility that the defendant provided in-kind support. The State does not have a duty to disprove every reasonable hypothesis of innocence. Had the evidence shown that Defendant provided substantial monetary or other support, and the question was whether that support was "adequate" to meet the child's needs, more specific evidence of the child's needs might well have been required. However, while evidence that the charged parent did provide in-kind support would be relevant and admissible, it is not the State's burden to introduce it to make a prima facie case where, as here, the State presented evidence that Defendant failed to pay monetary support.

State v. Holmes, 2013 WL 2631045 (Mo. banc June 11, 2013):
Holding: The pre-2012 child nonsupport statute, Sec. 568.040.1, is not unconstitutional because it does not shift the burden of proof to the defense to prove good cause for failure to pay. The Court notes, however, that the new 2012 version of the statute makes good cause an affirmative defense, and the Court expressly does not decide the constitutionality of the new statute.

Davis v. Davis, 2015 WL 5432111 (Mo. App. W.D. Sept. 15, 2015):
Even though Defendant posted an "appeal bond" in conjunction with an appeal of a civil contempt order for failure to pay child support, a contempt order is not appealable and

remains interlocutory until there is either a warrant of commitment or actual confinement in jail.
Facts: Defendant-Father attempted to appeal an order finding him in civil contempt for failure to pay child support. The trial court set an appeal bond of $55,000 and set a deadline for Defendant to pay or report to county jail. Defendant posted the appeal bond, and appealed.
Holding: A civil contempt order does not become "final" for appeal until it is enforced. The trial court must issue both a judgment of contempt and a proper order of commitment that explains what Defendant must do to purge the contempt, and that Defendant has the ability to purge the contempt. Here, the contempt judgment has never been enforced either by a warrant of commitment or actual incarceration. No order of commitment was ever issued by the trial court. Even though Defendant posted an "appeal bond," he can't appeal at this time because the trial court's actions are not final. Appeal dismissed.

Cafferty v. State, 2014 WL 5648639 (Mo. App. W.D. Nov. 4, 2014):
Even though guilty plea form stated that Movant understood the charge of child nonsupport, where Movant told judge during guilty plea that he didn't pay his child support because he couldn't find a job after being released from jail, Movant's guilty plea (1) lacked a sufficient factual basis because he asserted "good cause" for not paying, and (2) was not knowing and voluntary because the record did not show that he understood the specific nature of the charge against him.
Facts: Movant pleaded guilty to criminal nonsupport. During the guilty plea hearing, the judge read the charge to Movant, asked if he had failed to pay child support as alleged, and asked "why was that?" Movant said, "Because I couldn't find work. Ever since I got out of prison it has been hard to find work." The Court accepted the plea. Movant subsequently filed a Rule 24.035 motion.
Holding: Movant claims that no factual basis established that he failed to pay child support "without good cause." At the time Movant pleaded guilty, Sec. 568.040 provided that a person commits the crime of nonsupport if he "knowingly fails to provide, without good cause, adequate support." Given Movant's explanation for why he failed to pay, he did not unequivocally state that he lacked good cause to provide support. Even though Movant signed a petition to enter a plea of guilty and stated that he fully understood the charges against him, a plea petition is not a substitute for a judge insuring that a defendant understands the charge. Movant's answer as to why he didn't pay required that the judge explore further to determine either that Movant had the ability to pay or purposely maintained his inability in order to avoid paying. Here, the record does not show that Movant understood the specific nature and elements of the charge. Conviction vacated and remanded.

State ex rel. State of Missouri Dept. of Social Services Family Support Division v. Campbell, No. WD75408 (Mo. App. W.D. 11/27/12):
Holding: Judge cannot order State to pay for paternity testing under Sec. 210.854, since statute says that petitioner (alleged father) shall pay for such testing.

State v. Buckler, No. WD72794 (Mo. App. W.D. 10/18/11):
Even though DNA testing showed that Defendant was not the father of child to whom child support was owed, where child had been legitimated by legal process, trial court did not err in excluding DNA test from trial and Court of Appeal must uphold conviction for failure to pay support, but Defendant has until Dec. 31, 2011, to avail himself of procedures of Sec. 210.854 to have himself declared not to be the father and have his conviction expunged.
Facts: Defendant was charged with criminal nonsupport. The child-support obligation stemmed from a court judgment entered in 2004 in which Defendant was declared to be the father. Defendant did not contest this finding in 2004 because he believed he was the father. However, he subsequently learned that he was not, and a subsequent DNA test showed that he was not the father. At trial, the trial court excluded the DNA evidence that he was not the father because the child had been "legitimated by legal process." After conviction, he appealed.
Holding: The trial court did not err in excluding the DNA test at the criminal trial because under *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238 (Mo. banc 2006), the State need only prove that the child was "legitimated by legal process," not that the defendant is the actual father. Hence, whether Defendant was the actual father was irrelevant to the charge. Defendant also contends that since the DNA test shows he's not the father, he was denied due process by his conviction. Under *Sauer*, however, he has no legal defense to the charge, and while the contention that something is "not fair" may be relevant to proceedings in equity, it is not a recognized legal defense to a criminal charge. However, there is a statutory remedy which Defendant can pursue: Sec. 210.854.1 and .8 provide that Defendant has until Dec. 31, 2011, to file an action to set aside the judgment that he is the father, and once that is done, he can have his conviction expunged under those sections. Defendant "is the ideal candidate under section 210.854 to have his conviction set aside and all records concerning his conviction expunged," but he needs to follow the procedures set forth in that statute.

Editor's Note: The statute provides that after Dec. 31, 2011, petitions under the statute have to be filed "within two years of the entry of the original judgment of paternity and support or within two years of entry of the later judgment in the case of separate judgments of paternity and support and shall be filed in the county which entered the judgment or judgments of paternity and support."

Com. v. Marshall, 2011 WL 3760858 (Ky. 2011):
Holding: Before court can revoke probation for failure to pay child support, due process requires that court must consider whether Defendant is unable to pay through no fault of his own and if so, must consider alternatives to incarceration; this is true even if Defendant had agreed to pay support as condition of probation.

Civil Procedure

Tupper v. City of St. Louis, 2015 WL 4930313 (Mo. banc Aug. 18, 2015):
(1) City red-light camera Ordinance which created rebuttable presumption that owner of vehicle was the driver of the vehicle violated due process because it shifts burden of

persuasion to defendants; (2) even though Drivers had been charged with Ordinance violation but had their charges dismissed by Prosecutor, they could challenge constitutionality of Ordinance in a declaratory judgment action; (3) Drivers were not allowed attorney's fees because City's action in passing unconstitutional Ordinance did not constitute intentional misconduct; (4) Director of Revenue had no standing to appeal trial court's judgment granting relief to Drivers where court's judgment did not order DOR to do anything, so DOR was not aggrieved by case.

Facts: Drivers were charged with violation of red-light camera Ordinance. Ordinance created a "rebuttable presumption" that the owner of a vehicle was the driver. Before Drivers could challenge Ordinance in their Ordinance violation cases, City dismissed the charges against them. Drivers then brought declaratory judgment action to invalidate Ordinance, claiming they had no other adequate legal remedy to do so. Trial court found for Drivers, but denied attorney's fees. Drivers, City and Department of Revenue appealed.

Holding: (1) Prosecutions for Ordinance violations are civil proceedings with quasi-criminal aspects. While rebuttable presumptions in civil cases are generally permitted, they are not generally permitted in criminal cases because they relieve the State of its burden of proof and shift the burden of persuasion to defendants. Prior parking Ordinance cases have held that strict liability can be imposed on owners without violating due process because parking fines are "relatively small," and do not impact a driver's license or insurance. Here, however, a red-light camera violation fine is $100 – not small – and violators will be assessed two points on their license. These factors, along with the quasi-criminal nature of municipal court proceedings, leads this Court to apply the law regarding presumptions in criminal cases. Presumptions which shift only the burden of production may be constitutional, but the Ordinance expressly shifts the burden of persuasion, which is unconstitutional. The Ordinance states that if an owner furnishes "satisfactory evidence" that they were not driving the car, the charges may be terminated. This shows City's intent to require an owner to prove to the fact-finder that they were not the driver. (2) Drivers can challenge Ordinance in declaratory judgment action. A pre-enforcement challenge is sufficiently ripe to raise a justiciable controversy when (a) the facts needed to adjudicate the claim are fully developed, and (b) the laws at issue affect plaintiffs in a manner that gives rises to an immediate, concrete dispute. Cases presenting predominantly legal questions are particularly amendable to conclusive determination in a pre-enforcement context because they require less factually development. Here, Drivers' claim is predominantly legal because it involves the constitutionality of the rebuttable presumption. Also, Drivers have been affected by Ordinance because they were previously facing prosecution under it. (3) Even though Drivers prevailed in their lawsuit, they aren't entitled to attorney's fees. In general, the "American Rule" is that absent statutory authorization or contractual agreement, each party pays their own attorney's fees. This rule can be overcome if a party shows "intentional misconduct" by a defendant. But City's actions in enacting the Ordinance did not constitute "intentional misconduct." (4) The DOR (among others) appealed the trial court's judgment invalidating the Ordinance. However, the trial court's judgment had no effect on DOR and did not order DOR to do anything. DOR is not an aggrieved party, and has no standing to appeal.

State v. Ess, 2015 WL 162008 (Mo. banc Jan. 13, 2015):

(1) Even though New Trial Motion was filed one-day late when Circuit Clerk would not accept it the day before because an attached affidavit was not notarized, Circuit Clerk had no authority to reject the filing and New Trial Motion would be deemed timely-filed; (2) Juror engaged in intentional nondisclosure when Juror failed to answer questions on voir dire about bias, and later said to other Jurors that this was "an open and shut case;" and (3) the 1995 through 2002 version of first-degree child molestation, Secs. 566.067.1 and 566.010(3) (1995 – 2002) did not include touching a victim "through clothing;" thus, evidence was insufficient to convict even though Defendant put Victim's hand on Defendant's clothed penis.

Facts: Defendant was convicted of various sex offenses. After trial, Defendant sought to timely file a New Trial Motion, which had attached an affidavit from a juror about juror misconduct. The Circuit Clerk refused to accept the New Trial Motion because the affidavit was not notarized. This could not be resolved until the next day, by which time the New Trial Motion was untimely. At the New Trial Motion hearing, Defendant sought to have the New Trial Motion deemed timely-filed. On the merits, a Juror submitted an affidavit and testified that during a recess during voir dire, a different Juror (No. 3) said this was an "open and shut case."

Holding: (1) The State contends the juror nondisclosure issue is not preserved because the New Trial Motion was untimely filed. Generally, a trial court has no authority to extend the time for filing a New Trial Motion beyond that allowed in Rule 29.11(b). Here, however, the Circuit Clerk refused to file the tendered New Trial Motion in the absence of some clear prohibition in law, rule or specific court order. The Clerk was obligated to accept the filing when tendered. Thus, the New Trial Motion should be deemed timely filed because it was tendered (but rejected) within the time allowed by Rule 29.11(b). If the motion was defective, the remedy was for a party to move to strike it, not for the Clerk to refuse to file it. (2) Juror No. 3 was asked numerous questions on voir dire about whether he could be fair and impartial. Defense counsel specifically asked if any juror held any preconceived notions of guilt or innocence. Juror No. 3 did not answer. Intentional nondisclosure occurs when there is no reasonable inability to comprehend the information asked by a question, and the prospective juror's forgetfulness in failing to answer is unreasonable. Given the extensive questions asked of the venire, there is no possibility that Juror No. 3 failed to comprehend the issue being asked. Any purported forgetfulness is not reasonable here. Thus, the non-disclosure was "intentional." Bias and prejudice is presumed where "intentional" nondisclosure occurs. The State argues that Defendant did not call Juror No. 3 to testify, but Defendant is permitted to prove his claim of nondisclosure through other evidence than Juror No. 3. Defendant called another Juror to testify that No. 3 said this was an "open and shut case." The State argues that this statement does not mean that Juror No. 3 favored the State because Juror No. 3 could have favored the defense. But this is inconsequential because a bias toward *either* side is material. New trial ordered on all counts except first degree child molestation, for which evidence was insufficient because the relevant version of the statute in effect at time of crime did not criminalize touching "through clothing."

Shaefer v. Koster, No. SC91130 (Mo. banc 6/14/11):
Holding: (1) Criminal defendant cannot bring declaratory judgment action to challenge constitutionality of statute under which they are charged because there is an adequate other remedy, i.e., to raise the alleged unconstitutionality in their criminal case; (2) Sec. 516.500 which places a time limit on when a person can challenge the constitutionality of a statute does not apply to a criminal defendant who raises a challenge to the statute as a defense to the criminal case.

Editor's Note: The dissenting opinion would allow the declaratory judgment action and would find that the 2008 version of Sec. 577.023.16 which enacted certain DWI penalty enhancements (since repealed and replaced by a new statute) violates the Missouri Constitution's prohibitions about clear title, original purpose and single subject, Art. III, Secs. 21 and 23, Mo.Const. The bill's title dealt with "watercraft," the bill was originally only about "watercraft" and adding DWI provisions violated the title, original purpose and single-subject provisions. The majority opinion did not reach the merits of the case.

Dunivan v. State, 2014 WL 5471471 (Mo. App. S.D. Oct. 29, 2014):
Attorney General's Office did not have unconditional or absolute legal right to intervene in an action to remove Petitioner from sex offender registry.
Facts: Pursuant to the procedures of Sec. 589.400.9, Petitioner sought to remove his name from the sex offender registry. He properly served County Prosecutor, who represented the State in the petition action. After the court removed Petitioner's name, the Attorney General filed a motion to intervene on behalf of "the State" and the Highway Patrol, which maintains the registry. The trial court denied the motion. The Attorney General appealed.
Holding: The Attorney General appeals only the denial of the motion to intervene. The Attorney General claims that Sec. 27.060 confers an unconditional legal right to intervene. Sec. 27.060 provides that the Attorney General "may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved." The language "may" is not synonymous with an unconditional or absolute right to intervene, especially where the State is already being represented by the County Prosecutor in a lawsuit. The statute on sex offender name removal does not require notice to the Attorney General, or mandate that the Attorney General be made a party. Instead, the statute requires the County Prosecutor be served. To be able to intervene under Rule 52.12, a person must show (1) an interest in the property or transaction that is the subject of the lawsuit, (2) disposition of the lawsuit may impair that interest, and (3) his interest is not adequately represented by other parties. The Attorney General claims an "interest" in the lawsuit because the Highway Patrol maintains the registry. However, the Highway Patrol has no input into whether Petitioner should be on or off the registry; the Highway Patrol's sole duty is to maintain the registry. Thus, the Highway Patrol has no "interest." Further, the State's interests are represented by County Prosecutor.

State ex rel. Isselhard v. Dolan, 2015 WL 4095458 (Mo. App. E.D. July 7, 2015):
(1) Electronically submitted filing is deemed filed when it is submitted (received), even if clerk office only "accepts" it later; (2) clerk had no authority to reject submission merely

because Plaintiff-filer failed to enter the name of Defendant and check his party status box on the electronic filing page, where the petition itself was in proper form.
Facts: On the last day of a statute of limitations period, Plaintiff submitted a petition through the Case.net electronic filing system. Two days later, the clerk returned the petition due to "Missing/Incorrect Parties – All parties need to be added into the e-filing system prior to submission." Plaintiff then resubmitted the petition and it was "accepted" two days late. The trial court deemed the petition timely filed when originally submitted. Defendant sought a writ of mandamus challenging this.
Holding: Rule 103.06(e) states that a document is submitted for filing when the electronic system receives the document and sends a confirmation to the filer. Rule 103.06(f) states that if a clerk accepts a document, the date of filing entered into the case management system shall be the date and time the electronic filing system received the document. Here, the clerk rejected the filing because Plaintiff failed to enter the name of Defendant and check his party status box on the electronic filing page. The name and address of Defendant were on the petition. No law, court rule, or specific court order authorized the clerk to reject the filing of the petition for the minor technical deficiency. The clerk was obligated to accept the filing. The pleading is deemed filed when it was received by the electronic filing system. Writ of mandamus denied.

List v. Director of Revenue, 2015 WL 5576343 (Mo. App. S.D. Sept. 22, 2015):
(1) Even though trial court stated that it was continuing an evidentiary hearing to allow the parties to provide written arguments, where the court then apparently mistakenly entered a judgment, the judgment became final 30 days later and the court lacked authority to set it aside after 30 days; (2) where trial court entered a second judgment more than 30 days later, which the Director then appealed, the appellate court, sua sponte, corrects the excess of authority by the trial court and vacates the second judgment and reinstates the first judgment.
Facts: Driver filed a petition to review his license revocation. The court held an evidentiary hearing, and continued the case to allow the parties to submit written arguments. Shortly after, the court apparently mistakenly entered a judgment for Director. No after-trial motions were filed. More than 30 days later, the court apparently recognized its mistake, and reset the case for additional evidence. After another hearing, the court entered a judgment for Driver. Director appealed.
Holding: Although neither party raises the issue, the appellate court must, *sua sponte*, determine if it has authority to hear the merits of the second judgment. Under Rule 75.01, trial courts retain control over judgments for 30 days, but once the 30 days expires, the judgments are final unless an authorized after-trial motion was filed. Here, the court lost authority over the "first" judgment once it became final after 30 days, and the court could not set it aside. The appellate court has jurisdiction, but cannot consider the merits of the "second" unauthorized judgment. Appellate court must correct the trial court's excess of authority. Second judgment is vacated, and case remanded for reinstatement of first judgment.

Powell v. City of Kansas City, 2015 WL 5821845 (Mo. App. W.D. Oct. 6, 2015):
Holding: (1) Even when a civil litigant is granted leave to proceed as a poor person, Sec. 514.040 allows a court discretion to assess whatever costs the court believes the

litigant may be able to pay, except in postconviction cases under Rules 24.035 and 29.15, where a court cannot assess any costs against Movants; and (2) Rule 81.08(a) requires a notice of appeal to specify the judgment or order appealed from; where Appellant's notice of appeal stated only that Appellant was appealing from an entry of summary judgment, appellate court would not review on appeal Appellant's claim that trial court erred in overruling a new trial motion, because the notice of appeal did not specify that Appellant was appealing such ruling (which was different than the summary judgment order) and Appellant failed to attach the new trial motion to her notice of appeal.

Taylor v. Brown, 97 Crim. L. Rep. 277 (7th Cir. 6/2/15):

Holding: "Mail-box" rule applies to e-filings made by prison official on behalf of inmates, i.e., the document is deemed filed when prisoner delivers it to prison officials (not when officials actually send the document to court); this is because prisoners are no more able to guarantee that properly tendered documents will be e-filed by the prison than they are to guarantee that the prison will mail documents.

Powell v. Dept. of Corrections, 2015 WL 3856355 (Mo. App. W.D. June 23, 2015):

(1) Circuit courts are not authorized to issue summonses in writ of mandamus cases; instead, the courts should only issue preliminary writs; (2) where circuit court issued an unauthorized summons before denying a permanent writ, the denial was not appealable; petitioner's remedy was to file a new writ in higher court; (3) if a circuit court issues a preliminary writ before denying a final writ on the merits, then the remedy is direct appeal.

Facts: Petitioner applied for a writ of mandamus in circuit court. The circuit court did not issue a preliminary order in mandamus as per Rule 94.04 but instead issued a summons to the DOC. The DOC then filed suggestions in opposition. The circuit court then issued a judgment on merits denying the writ. Petitioner appealed.

Holding: The initial question is does the appellate court have jurisdiction to hear the appeal? Under Rule 94, as a general rule, *an appeal will lie* from the denial of a writ petition when the lower court has issued a preliminary order in mandamus but then denies a permanent writ. (However, the Western and Eastern Districts have held that even when a preliminary order has issued, the final decision is still not reviewable by appeal if it does not reach the merits of the petition, such as dismissal for lack of jurisdiction.) But if the circuit court does not grant a preliminary order in mandamus, the petitioning party must file its writ petition in the next higher court. A preliminary order in mandamus directs respondent to file an answer within a specified time, and may also order respondent to refrain from some action. If the circuit court issued a preliminary order, a final decision is reviewable by appeal. The Missouri Supreme Court has, as a matter of discretion, considered a summons to be the functional equivalent of a preliminary order and allowed appellate review in one case, but the Supreme Court has stated that the practice of issuing summonses in lieu of preliminary writs is not authorized by Rule 94. The Supreme Court has directed circuit courts to stop issuing summonses in lieu of preliminary writs. Since the circuit court here issued an unauthorized summons instead of a preliminary order before denying the writ, an appeal does not lie. Instead, the proper remedy is a new writ in the appellate court. All circuit courts should read and follow the writ procedures in Rule 94 (mandamus) and 97 (prohibition). Appeal dismissed.

T.T. v. Burgett, No. WD74467 (Mo. App. W.D. 6/26/12):
Holding: Even though a clerk's docket entry stated that the clerk had notified Defendant by telephone and mail about a court date for an Order of Protection Hearing, where the return of service was blank, Defendant was not personally served by the sheriff or police, and the mail was not sent by certified mail, Defendant could move to set aside the default judgment against him because he denied having received notice.

*** Coleman v. Tollefson, ___ U.S. ___, 135 S.Ct. 1759 (U.S. May 18, 2015):**
Holding: Even though one of indigent petitioner's three prior lawsuits (which had been dismissed by the district court) was still pending on appeal, that suit counted as a "third strike" under 18 USC 1915 "third strike" provision for purposes of whether petitioner could file new, additional suits *in forma pauperis* without cost.

In re Grand Jury Proceedings, 94 Crim. L. Rep. 668, 2014 WL 702193 (1st Cir. 2/20/14):
Holding: Prosecutors who empanel a new grand jury cannot enforce by civil contempt a subpoena duces tecum issued by an earlier, now-defunct grand jury.

State v. K.P.S., 2015 WL 1809224 (N.J. 2015):
Holding: Even though appellate court had affirmed denial of motion to suppress in co-defendant's case on same facts, the law-of-the-case doctrine did not apply in Defendant's case to bar consideration of the issue; Defendant had due process right to have his claim decided independently.

State v. Hewins, 2014 WL 3461758 (S.C. 2014):
Holding: Even though Defendant litigated a motion to suppress of items in his car in Municipal Court in an open container case, collateral estoppel did not preclude Defendant from re-litigating the motion in State court in drug possession case; the suppression issues weren't necessarily the same, and Defendant had little incentive to pursue the motion in Municipal Court given the minimal penalty for open container.

Beamon v. State, 2014 WL 1744100 (Ala. App. 2014):
Holding: Where a court denies a request to proceed in forma pauperis, it should give Petitioner a reasonable time, such as 30 days, to pay the filing fee, and such reasonable time may include a period extending beyond a limitations period.

Civil Rights

Bell v. Phillips, 465 S.W.3d 544 (Mo. App. W.D. July 28, 2015):
(1) Inmate stated a claim for civil rights violation where he alleged prison failed to give him postage to mail a habeas corpus petition, which caused the petition to be late, because this violated Inmate's right of access to the courts, and (2) a petition needs to plead only ultimate facts, not detailed, operative or evidentiary facts.

Facts: Inmate filed Sec. 1983 action, alleging that prison failed to give him $5.10 to mail his federal habeas petition. As a result, his petition was filed late. Trial court dismissed civil rights case for failure to state a claim. Inmate appealed.
Holding: Inmates have a constitutional right of access to the courts. To protect that right, prisons must provide inmates with access to some legal materials or assistance so that inmates can prepare and mail legal complaints. The constitution requires that inmates be provided with the tools needed to attack their sentences directly or collaterally. To succeed on an access-to-courts claim, an inmate must show (1) he was denied a reasonably adequate opportunity to present a constitutional violation to courts, and (2) actual injury. Here, Inmate's allegation that he was denied money for postage states a valid access-to-courts claim, and his allegation that he was prejudiced because his petition was filed late shows injury. While it may have been preferable for Inmate to make more detailed factual allegations, a petition does not have to plead operative or evidentiary facts, and will survive dismissal if it pleads ultimate facts, not conclusions. Dismissal reversed.

*** Mullenix v. Luna, ___ U.S. ___, 136 S.Ct. 305 (U.S. Nov. 9, 2015):**
Holding: A police officer who shot at a fleeing car in an attempt to disable it, but who killed the driver, was entitled to qualified immunity from suit, because the shooting did not violate clearly established precedent; Supreme Court has "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity."

*** Ashcroft v. al-Kidd, ___ U.S. ___, 89 Crim. L. Rep. 308 (U.S. 5/31/11):**
Holding: (1) Policy initiated by Atty. General Ashcroft to detain suspected terrorists as material witnesses did not violate any clearly established 4th Amendment right, and thus, Ashcroft was entitled to qualified immunity; and (2) an arrest warrant that is validly obtained under the material witness statute, 18 USC 3144, cannot be held unconstitutional on the basis of subjective intent.

Tyler v. Hillsdale County Sheriff's Dept., 96 Crim. L. Rep. 332 (6th Cir. 12/18/14):
Holding: 18 USC 922(g)(4), which permanently prohibits anyone who has been committed to a mental institution from owning a gun, is overbroad as applied to a man briefly committed 28 years ago; "the government's interest in keeping firearms out of the hands of the mentally ill is not sufficiently related to depriving the mentally healthy, who had a distant episode of commitment, from their constitutional rights."

Dupont v. Nashau Police Dep't, 96 Crim. L. Rep. 550 (N.H. 2/20/15):
Holding: Defendant, who lost right to possess a gun after a felony conviction under 18 USC 922(g)(1), regained right to possess gun under 18 USC 921(a)(33)(B)(ii) and 921(a)(20) when state firearms licensing board later granted him a gun license; the federal statute allows possession of a gun if a conviction has been expunged, set aside, or the person has been pardoned or had civil rights restored; the grant of the gun license was restoration of civil rights.

Closing Argument & Prosecutor's Remarks

State v. Jones, 2013 WL 519548 (Mo. App. E.D. Feb. 13, 2013):
Holding: Trial court erred in prohibiting defense counsel from arguing in closing that Defendant's "liberty" was at stake (but was not prejudicial here); even though the State contended that "liberty" was not relevant to whether the Defendant committed the crime but was relevant to sentencing only, the concept of liberty is relevant for a jury to consider in guilt phase because it is a fundamental constitutional right, and the defense may emphasize the jury's duty to carefully weigh the evidence and the significant impact a criminal conviction will have on Defendant.

State v. O'Neal, No. ED95274 (Mo. App. E.D. 11/29/11):
Where prosecutor objected to admission of Defendant's medical records in front of the jury by saying they were "simply a way to avoid the defendant testifying," this was a direct comment on Defendant's failure to testify and a mistrial should have been granted.
Facts: Defendant was charged with attempted stealing. As part of his defense, he sought to introduce his medical records with a business records affidavit. The prosecutor objected to the records in front of the jury as "simply a way to avoid the defendant testifying." Defense counsel objected as violating defendant's rights not to testify and requested a mistrial, which the trial court overruled.
Holding: A direct reference to a defendant's failure to testify violates the rights of freedom from self-incrimination and right not to testify under the 5th and 14th Amendments, and Art. I, Sec. 19 Mo. Const. A "direct reference" uses words such as "testify," "accused" and "defendant." Here, the prosecutor's speaking objection in front of the jury was egregious because there had been a prior bench conference about the records at which the State had made an objection that had been overruled. The objection in front of the jury may have prejudiced the jury against Defendant for using the medical records rather than testifying himself. Reversed for new trial.

State v. Brightman, No. WD74299 (Mo. App. W.D. 10/2/12):
Where in DWI case prosecutor argued to jury that State did not have to prove that Defendant was "drunk" but only that he was "intoxicated" and the jury could determine what that means, this misstated the law and lowered the State's burden of proof because to convict, the jury had to find that Defendant's use of alcohol impaired his ability to operate the vehicle.
Facts: Defendant was charged with DWI. In closing argument, the State argued that "we didn't set out to prove today … that the Defendant was drunk. … We never proved – tried to go out and prove that he was drunk driving. We came here to prove that he was intoxicated. ... We are trying to prove beyond a reasonable doubt that he was driving and he was intoxicated. So what does that mean with the instructions? … [The definition there] is a very vague definition of 'intoxicated condition' which means under the influence of alcohol. There is a reason for that. The reason is that you can decide what it means." Defense counsel objected to this as misstating the law, but was overruled. In defense counsel's closing, defense counsel argued "that intoxication means that your ability to drive was," but the prosecutor objected at that point and the trial court sustained the objection.

Holding: Missouri's appellate courts have ruled that "intoxicated condition" for DWI purposes means that Defendant's use of alcohol impairs his ability to drive the vehicle. The Western District recommends that the applicable MAI be changed to reflect this definition, but says that is for the Supreme Court to do. Here, however, the State's closing argument effectively invited jurors to ignore the given instruction and substitute their own subjective understanding of "intoxicated condition" that did not include any level of drunkenness. Courts should exclude argument that misstates the law. The State contends on appeal that the prosecutor was trying to make the point that Defendant did not have to be "falling down drunk." But that is not what the prosecutor argued or how a reasonable juror would understand the argument. When a term is not defined for the jury, the jury can decide what the term means. But here the State refused to acknowledge that being drunk and intoxicated are generally synonymous, and attempted to say the two were different concepts. The trial court compounded this confusion by sustaining the State's objection to defense counsel's closing argument which tried to correctly state the law. An objection to improper argument which is overruled has the impression of giving the court's approval to the argument. Here, reasonable jurors could have understood the State's argument to lower the State's burden of proof on a key element of the offense. When the State misstates the law so as to lower the burden of proof, it is error. Here, the evidence of guilt was not overwhelming so Defendant was prejudiced. New trial ordered.

Cauthern v. Colson, 2013 WL 603891 (6th Cir. 2013):
Holding: Prosecutor's reference at capital sentencing hearing comparing Defendant to notorious recent murderers were inflammatory and personalized to jurors by making them feel personally unsafe if they did not return a death verdict.

Frost v. Van Boening, 95 Crim. L. Rep. 189 (9th Cir. 4/29/14):
Holding: State court unreasonably applied federal law in upholding limitation on counsel's closing argument which prohibited counsel from arguing both reasonable doubt as to guilt and duress; this violated right to present a closing argument, and right to have a jury determine all elements of guilt.

Trillo v. Biter, 95 Crim. L. Rep. 457 (9th Cir. 6/16/14):
Holding: Prosecutor cannot argue in closing that acquitting Defendant would endanger jurors' neighbors, make jurors feel uncomfortable explaining to their neighbors why they acquitted, or telling jurors that neighbors would ask them, "you did what?"

U.S. v. Sanchez, 2011 WL 5149141 (9th Cir. 2011):
Holding: Prosecutor's statement that acquitting defendant of importation and possession of cocaine for duress would "send a memo" to other drug couriers to use the defense was improper.

U.S. v. Sanchez, 90 Crim. L. Rep. 201 (9th Cir. 11/1/11):
Holding: Prosecutor's closing argument that if jurors bought Defendant's duress defense, they'd be "sending a memo" to drug traffickers in how to beat drug cases was plain error because had nothing to do with Defendant's culpability; prosecutors may not

ask jurors to convict to protect society, deter future crimes, or deal with a particular societal crisis.

U.S. v. Marsh, 89 Crim. L. Rep. 422 (C.A.A.F. 6/2/11):
Holding: Prosecutor's argument that jurors should imagine themselves having to fly on a plane serviced by Defendant-mechanic was improper personalizing about future risk in case having nothing to do with fact that Defendant worked as flight mechanic.

Turner v. State, 2011 WL 3715029 (D.C. 2011):
Holding: Plain error where prosecutor argued matters about Defendant's motive that were not supported by evidence.

U.S. v. Ganadonegro, 2012 WL 592168 (D.N.M. 2012):
Holding: The prosecutor's statement during closing argument in the defendant's first trial, which resulted in a mistrial, would be admissible against the Government in the second trial.

Adams v. State, 2011 WL 4111079 (Alaska 2011):
Holding: Prosecutor's comments on Defendant's pre- and post-arrest silence as diminishing his credibility amounted to plain error.

People v. Centeno, 2014 WL 6804508 (Cal. 2014):
Holding: Prosecutor's closing that explained concept of proof beyond reasonable doubt using a visual aid of outline of State of Calif. or Statute of Liberty did not accurately explain reasonable doubt and trivialized the deliberative process by turning deliberations into a game where jurors could jump to conclusions; counsel was ineffective in failing to object.

State v. Maguire, 2013 WL 5989742 (Conn. 2013):
Holding: (1) Prosecutor's argument that Defendant and defense counsel were asking jury to "condone child abuse" and to find that "child abuse that happens in secret is legal" was highly improper in that it appealed to emotions and demeaned defense counsel; and (2) Prosecutor's objection during defense counsel's cross-examination of forensic interviewer which left misleading impression that redacted portions of interview refuted defense counsel's assertions was improper.

Kirkley v. State, 91 Crim. L. Rep. 75 (Del. 4/3/12):
Holding: Prosecutor improperly vouched for State's case when he argued he was "bringing this charge because it is exactly what the Defendant did."

State v. Schnabel, 2012 WL 1981217 (Haw. 2012):
Holding: Where prosecutor argued that jurors need not get "too caught up in the mumbo jumbo of all the words" of the jury instructions and could decide the case based on their "gut feeling," this abrogated the State's burden to prove every element of the offense beyond a reasonable doubt and lowered the State's burden of proof.

People v. Adams, 2012 WL 169702 (Ill. 2012):
Holding: Closing arguments that officers' testimony should be believed because they would not risk their jobs or credibility by lying were improper, in that there was no evidence that their jobs were at risk and the statements implied that the police have a greater reason to testify truthfully than a person with another job.

State v. Greene, 95 Crim. L. Rep. 561 (Kan. 7/11/14):
Holding: Even though Defendant submitted and then withdrew a notice of alibi, the Prosecutor is not allowed to comment at trial on the nonproduction of alibi witnesses because this shifts the burden of proof to Defendant.

State v. Ochs, 306 P.3d 294 (Kan. 2013):
Holding: Prosecutor's closing argument that a child sex victim-witness was protected by the truth was error (but harmless here).

Simpson v. State, 97 Crim. L. Rep. 58 (Md. 4/7/15):
Holding: Defendant was denied his 5th Amendment right against self-incrimination where Prosecutor said in opening statement that Defendant himself would testify to his involvement in the crime, but Defendant never actually testified at trial.

State v. Glover, 94 Crim. L. Rep. 14 (Me. 3/27/14):
Holding: State should not have been permitted to argue that Defendant's refusal to consent to DNA test in rape case showed consciousness of guilt; constitutional right to refuse consent would be destroyed if State could penalize anyone who refused consent by arguing consciousness of guilt; probative value of evidence was outweighed by unfair prejudice.

State v. Woodard, 2013 WL 1197921 (Me. 2013):
Holding: Prosecutor's "send a message" closing argument was improper because it urged jurors to render their verdict based on factors outside the evidence in the case.

Beads v. State, 2011 WL4374969 (Md. 2011):
Holding: Prosecutor's requests during opening statement and closing argument for jurors to say "Enough!" improperly implored jurors to consider their own safety and required reversal of defendant's conviction.

Com. v. Lewis, 93 Crim. L. Rep. 246 (Mass. 5/4/13):
Holding: Prosecutor's references to Defendant as a "street thug," references to the defense as a "sham," and condemnation of defense counsel as a "liar among liars" were improper.

State v. Franks, 96 Crim. L. Rep. 87 (Mont. 10/8/14):
Holding: A newspaper article that Defendant apparently had abused a different child was admissible to explain why Victim did not come forward sooner, but trial court erred

in allowing State to argue that the article showed Defendant's propensity to commit sex crimes and that he was a habitual child abuser.

State v. Demond-Surace, 2011 WL 1833256 (N.H. 2011):
Holding: Where court had excluded evidence of Defendant's alcohol impairment, prosecutor's closing argument that Defendant had lied about alcohol use was improper.

People v. Fisher, 91 Crim. L. Rep. 74 (N.Y. 4/3/12):
Holding: Counsel was ineffective in sex abuse case by failing to object to closing argument that (1) improperly bolstered State's case by saying girl told same story over and over to police, social workers and others; (2) told jurors they could consider evidence of girl's misbehavior at school as evidence that she was sexually abused; and (3) told jurors that "the day that the voice of a child is not evidence is the day that the [courthouse] doors should be locked forever."

State v. Kirkland, 95 Crim. L. Rep. 243 (Ohio 5/13/14):
Holding: Prosecutor's argument that Defendant who was already serving a life sentence for another murder would get "freebies" (free murders) if the jury didn't sentence him to death was improper because it invited jury to ignore the duty to base its sentence on the aggravating and mitigating factors of the case.

State v. Jackson, 2014 WL 4161966 (Tenn. 2014):
Holding: Prosecutor's closing argument asking Defendant, "Just tell us where you were; that's all we are asking," violated Defendant's right not to testify.

State v. Sexton, 2012 WL 4800459 (Tenn. 2012):
Holding: Prosecutor was not permitted to state in opening statement that Wife gave prior statements against Defendant but Wife could not be forced to testify due to spousal privilege; this evidence was inadmissible under spousal privilege and led jury to infer that Husband-Defendant was preventing Wife from testifying.

State v. Walker, 2015 WL 276363 (Wash. 2015):
Holding: Prosecutor's use of slides in closing argument superimposed with words such as "Defendant guilty" and which contained racially inflammatory text denied Defendant fair trial.

In re Glassman, 92 Crim. L. Rep. 131 (Wash. 10/18/12):
Holding: Prosecutor's use of PowerPoint in closing argument, which showed pictures of Defendant with the word "Guilty" across them and which had other captions such as "Do you believe him?" and "Why should you believe anything he says about the assault?", was unduly inflammatory and prejudicial.

State v. Monday, 89 Crim. L. Rep. 548 (Wash. 6/9/11):
Holding: Prosecutor injected racial bias into trial by pronouncing the word "police" as "po-leese" during questioning and by arguing that the reason the state's witnesses weren't

more forthcoming was that "black folk" follow a code that frowns on cooperating with authorities.

People v. Garcia, 2014 WL 4247729 (Cal. App. 2014):
Holding: Defendant was denied fair trial and due process by Prosecutor's evidence and argument that female Defendant was gay, in prosecution for sexual abuse of a child; Prosecutor argued that this was relevant to motive, but the argument allowed the jury to decide the case based on sexual orientation bias.

People v. Batchelor, 2014 WL 4588043 (Cal. App. 2014):
Holding: Court was required to instruct jury that Defendant had previously been convicted of the lesser related offense of gross vehicular manslaughter while intoxicated based on the same incident that formed the basis for the second degree implied malice murder charge at the instant trial; the prosecutor misleadingly argued at the instant trial that Defendant would not be "held accountable" if the jury did not convict him.

People v. Otero, 2012 WL 5305736 (Cal. App. 2012):
Holding: Prosecutor's use of a diagram during closing argument which showed missing puzzle-type pieces to illustrate that proof beyond a reasonable doubt does not preclude missing information improperly lowered the burden of proof.

People v. Shazier, 2012 WL 6734681 (Cal. App. 2012):
Holding: Prosecutor's closing argument in SVP case asking jurors to imagine what their family, friends, co-workers or the community would think if they turned loose a dangerous predator and that they would have to "explain their verdict" to people denied Defendant due process.

People v. Higgins, 2011 WL 106083 (Cal. App. 2011):
Holding: Prosecutor's argument denigrated defense counsel by arguing without evidence that witness had been "coached," by criticizing the length of counsel's cross-exam of victim, and by saying counsel and expert witness had previously worked together "to attack a victim in a rape trial."

Diaz v. State, 2014 WL 2199810 (Fla. App. 2014):
Holding: Prosecutor's closing which said that non-testifying Victim would have testified to same matters as on the 911 calls was an improper comment on the accuracy and truthfulness of the 911 call evidence.

State v. Iverson, 2014 WL 30558 (Idaho App. 2014):
Holding: Prosecutor closing argument that jury could find self-defense only if Defendant's use of force was the "only and best" option was misstatement of law, since the use of force need merely be reasonable.

Frazier v. State, 2011 Wl 326306 (Md. Ct. Spec. App. 2011):
Holding: Prosecutor improperly commented on Defendant's exercise of his right to trial by asking why Defendant wanted a trial after signing a confession and then saying guilty people have a right to a trial and "that's what we had today."

State v. Rivera, 2014 WL 5042454 (N.J. Super. 2014):
Holding: Cumulative effect of Prosecutor's antics during trial – including climbing into jury box, improper opening and closing, and prejudicial visual aids – deprived Defendant of fair trial.

State v. Land, 2014 WL 1010745 (N.J. App. 2014):
Holding: Even if Prosecutor did not act in bad faith, his opening statement referring to incriminating evidence that Prosecutor never actually presented at trial denied Defendant fair trial.

People v. Forbes, 975 N.Y.S.2d 490 (N.Y. App. 2013):
Holding: Prosecutor's argument was improper in that it vouched for credibility of State witnesses, said that if you believe Defendant then I have a "bridge in Brooklyn" to sell you, speculated about why Defendant wasn't involved in other robberies, and said that to believe Defendant, jury would have to accept that there was a wide-ranging conspiracy against Defendant, which included the trial judge.

People v. Mehmood, 977 N.Y.S.2d 78 (N.Y. App. 2013):
Holding: Cumulative effect of prosecutor's improper closing argument required new trial; prosecutor misstated Defendant's testimony about whether he touched child's vagina, improperly suggested that Defendant committed other bad acts, and improperly suggested Defendant lied in his testimony.

Pryor v. State, 2011 WL 2649978 (Okla. Crim. App. 2011):
Holding: Prosecutor improperly denigrated defense counsel and appealed to emotions by arguing the defense created a "bizarro world" where "nothing makes sense" and "rules of right and wrong" and "fairness" "don't apply."

State v. Spieler, 2015 WL 1246839 (Or. App. 2015):
Holding: Prosecutor's opening statement and closing argument which referenced a child victim's recorded interview that was never introduced into evidence was improper comment outside the evidence and invited jury to speculate the tape was favorable to the State.

State v. Barajas, 2011 WL 6188502 (Or. Ct. App. 2011):
Holding: Defendant's failure to object to trial court's unilateral decision to waive defendant's right to closing arguments did not waive the issue for appellate review, where an attempt to object would have been futile.

State v. Esprey, 2014 WL 5651693 (Wash. App. 2014):
Holding: Prosecutor's remarks that Defendant's meeting with counsel helped formulate the story he gave police violated 6th Amendment right to counsel because it created impression Defendant was lying.

Confrontation & Hearsay

State v. Clark, No. SC92003 (Mo. banc 5/1/12):
Even though Witness' pending criminal case had been referred to drug court and Witness might never face sentencing, Defendant should have been permitted to cross-examine Witness about whether Witness hoped for leniency in testifying for the State, since this showed Witness' bias.
Facts: Defendant was charged with murder. The State's case rested on two witnesses with questionable credibility. At the time of trial, one "Witness" had been charged in an unrelated case, but that case had been referred to drug court for disposition. Before trial, Defendant had deposed Witness and knew that Witness would testify that he hoped for leniency in his own criminal case because of his testimony in Defendant's case. At trial, Defendant sought to cross-examine Witness about this. However, the State objected on grounds that there was no deal in exchange for Witness' testimony and since Witness' case was in drug court, he might never face an actual sentencing so there was no expectation of leniency. The trial court sustained the objection. Defendant made an offer of proof and appealed.
Holding: A witness may be cross-examined by questions to test his credibility, and show bias and interest. The trial court relied heavily on the fact that there was no plea deal. But this reasoning fails to account for the subjective nature of "bias." The term "bias" includes all varieties of hostility or prejudice, and includes all circumstances that make it probable that Witness potentially favors one side. Witness' belief that he may get a more favorable outcome in his drug court case if he testified for the State may be mistaken or speculative, but what is important is what Witness believed. A reasonable jury could have concluded that Witness' misplaced hope made him want to help the State. Reversed for new trial.

State v. Boykins, 2015 WL 5209471 (Mo. App. E.D. Sept. 8, 2015):
Holding: Officer's testimony, in response to general questions as to why police "focused" investigation on Defendant, that multiple anonymous tipsters had called police and said that Defendant was the shooter in a murder was hearsay and violated Defendant's confrontation rights; although out-of-court statements that implicate a defendant are admissible if they are necessary to explain subsequent police conduct, here there was no testimony as to what police actually did as a result of learning the information; also, there was no need for this background information for Officer to be able to testify about other aspects of his investigation. (But testimony was harmless in light of other evidence of guilt).

State v. Walker, 2014 WL 6476054 (Mo. App. E.D. Nov. 18, 2014):
(1) Even though Defendant was charged with first degree murder, trial court abused discretion in not allowing defense to voir dire on range of punishment for second-degree murder where parties knew in advance that second-degree murder would be submitted to jury; and (2) trial court erred in not allowing Defendant who claimed self-defense to testify to what Victim said before shooting because statements were not offered to prove truth of matter but to show Defendant's subsequent conduct (but not reversible here because there was similar evidence presented).
Facts: (1) Defendant was charged with first degree murder arising out of a shooting. The defense was self-defense. The trial court sustained the State's motion in limine to preclude the defense from asking anything during voir dire about the range of punishment for second-degree murder. The defense claimed it should be allowed to voir dire on the range of punishment for second- degree murder because the parties anticipated that such an instruction would be given, and the defense was entitled to know if jurors could follow the law and range of punishment on it. The State was allowed to voir dire on the range of punishment for first degree murder. During guilt phase deliberations, the jury sent a note asking what the range of punishment was for second-degree murder. The court did not specifically answer. The jury convicted of second-degree murder. During penalty deliberations, the jury sent a note saying they were deadlocked on punishment. After a hammer instruction was given, the jury sentenced to 30 years. (2) During the Defendant's testimony, the trial court sustained a "hearsay" objection to the Defendant testifying about what Victim said before Defendant shot Victim.
Holding: (1) Although the defense did not make an offer of proof as to specific voir dire questions which the defense was precluded from asking, the defense did state in response to the motion in limine that they expected the law and facts to support a second-degree murder instruction, and that they wanted to voir dire on the range of punishment for second-degree murder to see if the jurors could follow the law. Thus, the issue is preserved for appeal. The Defendant's right to an impartial jury is meaningless without the opportunity to show bias. As long as the Defendant's question is in proper form, the trial court should allow the defense to determine whether the jurors can consider the entire range of punishment for a lesser-included form of homicide. The trial court precluded this because Defendant was charged with first degree murder, but this was unreasonable. The trial court allowed the State to voir dire extensively on the range of punishment for first degree murder. Defendant was prejudiced here because by being denied any opportunity to voir dire on the range of punishment for second-degree murder, he could not determine if jurors were able to follow the full range of punishment. The jury sent a note during guilt phase deliberations about the range of punishment. During penalty phase, the jury sent a note saying they were deadlocked on punishment. After a hammer instruction, the jury sentenced to the maximum, 30 years. The State argues that since the punishment did not exceed the maximum range there is no prejudice, but under that logic, a defendant could never show prejudice unless the punishment was beyond the authorized range, which would be plain error anyway. The State also argues there is no prejudice because the judge could reduce the jury's recommended sentence. "While it is true that the judge might impose a lesser sentence, we do not conclude that trial judges are unaffected by the jury's recommendation." Further, the fact that a judge might impose a lesser sentence should not be confused with the jury's ability to consider the full

range of punishment in the first instance. Case remanded for new penalty phase trial. (2) The trial court erred in sustaining the State's "hearsay" objection during Defendant's testimony about what Victim said before Defendant shot him. This was not "hearsay" because not offered for the truth of the matter asserted, i.e., not offered to show the truth of the Victim's statements. Instead, it was offered to explain Defendant's conduct after the statements were made. Although this error facially shows manifest injustice, the error is not reversible because the jury heard similar evidence that would allow it to conclude Defendant was in fear of his life when he shot Victim.

State v. Francis, 2014 WL 1686538 (Mo. App. E.D. April 29, 2014):
Even though Defendant possessed a BlackBerry at time of his arrest, where the State never showed that Defendant owned the BlackBerry, the trial court erred in admitting the text messages on it because (1) the State did not authenticate that this was Defendant's own phone or that the messages were written by him, and (2) the messages were hearsay and were not admissions of a party opponent or adoptive admissions since the State emphasized the incoming messages, not outgoing messages which would be those allegedly written by Defendant or "adopted" by him.
Facts: Defendant was charged with a drug offense. He was arrested in his car. When he was arrested, a BlackBerry fell out of his lap. At trial, the trial court admitted text messages from the BlackBerry that were mostly incoming messages. Defendant objected based on hearsay and confrontation grounds, and that there was no proof that he owned the BlackBerry.
Holding: The State claims the BlackBerry texts were admissible because there is a "logical inference" that Defendant owned the phone since he possessed it, and that the texts are admissions of a party opponent. This argument is flawed, however, because the State failed to establish that the outgoing messages were written by Defendant. For a statement to be admitted as an admission of a party opponent, the party seeking to admit the evidence must show that *the opposing party made the statement*. Here, the State simply argues that there is a "logical inference" that Defendant owned the phone. However, this is inconsistent with the requirement that the State lay a proper foundation for authentication of text messages. To admit text messages, the State was required to present some proof that the messages were actually authored by the person who allegedly sent them. Here, the State did not even attempt to establish who owned the BlackBerry. The fact that Defendant possessed the phone at the time of his arrest is insufficient to establish that Defendant sent the text messages, especially those from earlier days before the arrest. Furthermore, most of the texts presented by the State were the *incoming* text messages. These could be adoptive admissions if it could be proven that Defendant replied to them, but the State often did not even present the *outgoing* replies. It is clear that the State was using incoming messages of unknown, unidentified third parties to convict Defendant. This was hearsay and denied him his right to confront and cross-examine witnesses.

E.G.D. v. S.L.D., No. ED94767 (Mo. App. E.D. 4/5/11):
Holding: In order of protection case, Mother's and Police Officers' testimony about what alleged Child sex victim told them about Defendant sexually abusing her was hearsay and not admissible without a reliability hearing as required by Sec. 491.075(1)

and evidence that Child was unavailable or would suffer emotional or psychological harm as a result of testifying. Order of protection reversed and case remanded.

Woods v. State, No. ED94540 (Mo. App. E.D. 2/15/11):
Where State made no effort to secure out-of-state Witness' attendance at trial under Uniform Law to Secure Attendance of Witnesses, it violated Defendant's confrontation rights to admit Witness' deposition at Defendant's trial.
Facts: Defendant was charged with robbery and burglary of Witness-Victim (Witness). Before trial, the State took a video deposition of Witness. At time of trial, Witness was attending medical school in Pennsylvania. The trial court admitted Witness' deposition at trial over Defendant's objection that this violated his right to confront and cross-examine witnesses.
Holding: Rule 25.14 allows the trial court to order a deposition to preserve testimony upon motion by the State. However, it does not appear from the record that this Rule was followed; there is nothing indicating a hearing was held on this, or that there was any finding by the trial court that this was necessary. However, the dispositive issue here is whether the admission of the video deposition violated Defendant's confrontation rights. An exception to the right to confront witnesses is if the State shows a witness is unavailable, has testified before, and was subject to cross-examination. If the State meets its burden of showing the witness is "otherwise unavailable," a deposition of the witness can be taken and used at trial. Rule 25.16(b)(4) provides that a deposition can be used if "the state has made a good faith effort to obtain the presence of the witness at … trial, but has been unable to procure" their attendance. Here, the State argued it could not produce Witness at trial because it doesn't have out-of-state subpoena power. But both Missouri and Pennsylvania allow for out-of-state subpoenas under the Uniform Law to Secure Attendance of Witnesses, Secs. 491.400 to 491.450. Here, the State made no effort to use this law and no effort to otherwise get Witness to appear. Instead, the State claims Witness was unavailable because he was attending medical school in Pennsylvania. Such circumstances are not sufficient to establish unavailability of a witness within the meaning of Rule 25.16(b)(4). Convictions reversed and remanded for new trial.

State v. Sanders, 2015 WL 6869359 (Mo. App. S.D. Nov. 6, 2015):
Holding: (1) Where Forensic Interviewer who conducted taped interviews of child-victims was unavailable for trial, court did not abuse discretion in finding that taped interviews were reliable under Sec. 491.075.1 and in admitting the interviews where the children-victims testified and where a supervisor of Forensic Interviewer testified about how the interviews were conducted and tapes made; (2) admission of the taped interviews did not violate Confrontation Clause because Forensic Interviewer was not a "witness against" Defendant; the children-victims were the witnesses against Defendant, not the person who interviewed them.

State v. Newton, 465 S.W.3d 919 (Mo. App. S.D. Aug. 4, 2015):
Holding: (1) Trial court abused discretion in prohibiting Defendant from cross-examining confidential informant about the prosecutor dismissing a municipal charge against him in exchange for "working off" the charge by being a confidential informant, because such evidence showed bias, interest or prejudice; evidence of a witness' arrests

and pending charges not resulting in convictions is admissible where it shows possible motivation of the witness to testify favorably for the State or where testimony was given in expectation of leniency (but error was harmless in light of evidence of guilt); and (2) trial court abused discretion in not allowing Defendant on voir dire to ask any questions about whether jurors would hold it against him not to testify; Defendant was entitled to ask questions on critical issue of whether jurors would draw no negative inference from his failure to testify (but error was harmless here).

State v. Reed, 2014 WL 4457266 (Mo. App. S.D. Sept. 10, 2014):
Holding: Where preliminary hearing Witness died before trial and even though the preliminary hearing was not recorded, Defendant's confrontation rights were not violated by State calling a different witness to testify to what Witness had said at the preliminary hearing.
Discussion: Under the Sixth Amendment Confrontation Clause, prior preliminary hearing testimony and other 'testimonial' proof is inadmissible unless the witness is unavailable and the Defendant had a prior opportunity for cross-examination. Defendant had that at the preliminary hearing. He does not contend the opportunity to cross-examine there was "inadequate." Therefore, testimony about what Witness testified to at preliminary hearing did not violate Confrontation Clause.

State v. Benitez, 2013 WL 2474511 (Mo. App. S.D. June 10, 2013):
Holding: Allowing child-victim to testify behind a screen so that child could not see Defendant, without a specific finding of necessity for this, violated Defendant's 6th Amendment confrontation rights (but was harmless under facts of case).
Discussion: *Maryland v. Craig*, 497 U.S. 836 (1990), allows face-to-face confrontation to be dispensed with but only if the State makes an adequate showing of necessity to protect the child from trauma in testifying. The requisite finding of necessity must be a case-specific one. The trial court must find that the emotional trauma suffered by the child in the presence of defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify. Here, the trial court made none of the case-specific findings required by *Craig* before allowing the screen. The trial court relied on a generalized finding that because of the child's young age and nature of the charge, that the screen was permissible. But *Craig* does not allow this generalized finding. However, here the evidence was harmless because the child's testimony was cumulative of other evidence, and Defendant chose not to cross-examine child at all which indicates that child's statements contained no important infirmities.

State v. Tindle, 2013 WL 1195426 (Mo. App. S.D. March 25, 2013):
Holding: In sex abuse case, statements made by Child who was 14 years old to a CAC interviewer and police officer were not admissible under the hearsay exception in Sec. 491.075 because Child was not "under the age of 14" as required by the statute; however, this was not plain error where defense counsel failed to object on this basis, and the Child and interviewers were cross-examined at trial.

State v. Reynolds, 2015 WL 1090005 (Mo. App. W.D. March 10, 2015):
Holding: "Screen shots" of a cell phone's call logs were not hearsay because they were not statements made by a human declarant; they were admissible as computer-generated data that was not the result of human entries. The admissibility of electronic data should be determined on the basis of the reliability and accuracy of the process used to create and obtain the data.

State v. Crews, 2013 WL 4418844 (Mo. App. W.D. August 20, 2013):
Medicaid-Case Manager's testimony that Victim-Wife told him she had been beaten by Defendant-Husband was hearsay in domestic abuse trial, and not admissible under physician exception to hearsay rule because Medicaid-Case Manager was not a doctor and the statements were not made to him for diagnosis or treatment purposes.
Facts: Victim-Wife received Medicaid for various health problems, and was assigned a Medicaid caseworker/administrator to visit her home to see if she qualified for additional services. When Case-Manager visited the home, he noticed that Victim-Wife had a black eye and bruises, and he asked what happened. She said Defendant-Husband beat her and she wanted a divorce. Case-Manager took Victim-Wife to police station to make a report. Defendant-Husband was then charged with domestic abuse. At trial, Victim-Wife refused to testify, and provided a letter to the defense recanting her statements. The State's only evidence, received over Defendant's hearsay and confrontation objection, was the testimony of the Case Manager of what Victim-Wife told him.
Holding: Hearsay is out-of-court statements used to prove the truth of the matter asserted in the statements. Here, Case Manager's testimony about what wife told him is hearsay, in that it is being used for its truth, i.e., that Defendant-Husband caused Victim-Wife's injuries. The State contends that Case Manager's testimony is admissible under the physician exception to hearsay. However, that exception is narrow, and can only be used to cover statements made to a physician in the course of diagnosis and treatment. Here, Case Manager is not a physician, and even if he were, the statements were not made in the course of diagnosis or treatment, but rather were made for the purpose of identifying Defendant-Husband as the perpetrator. Since this was the only evidence of guilt, Defendant was prejudiced by its admission. Reversed for new trial.

*** Ohio v. Clark, ___ U.S. ___, 135 S.Ct. 2173 (U.S. June 18, 2015):**
Holding: Statements by non-testifying witnesses to persons other than law enforcement officers may be covered by the Confrontation Clause and be "testimonial," but are less likely to be so than statements made to law enforcement officers; non-testifying child's statement to his teachers, identifying his abuser, were not testimonial because made in context of ongoing emergency to determine whether it was safe to release boy to alleged abuser (Defendant); child's statements were not made with the primary purpose of creating evidence for Defendant's prosecution.

*** Williams v. Illinois, ___ U.S. ___, 132 S.Ct. 1222 (2012):**
Holding: In a plurality opinion, Court holds that State's expert does not violate Confrontation Clause by discussing other experts' testimonial statements if the statements themselves are not admitted as evidence; thus, State DNA expert could testify about a report that Defendant's DNA profile "matched" the profile taken from sexual assault

victim; since the "match" was made before Defendant was identified or arrested, the purpose of the "match" was to catch a suspect still at large and not for the purpose of obtaining evidence to be used against Defendant, and "[i]t has long been accepted than an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts"; although the expert vouched for the "match" of the profile, the expert did not vouch for the quality of the lab work performed and the lab report was not introduced into evidence.

*** Hardy v. Cross, ___ U.S. ___, 90 Crim. L. Rep. 358 (U.S. 12/12/11):**
Holding: In a habeas case where only pre-*Crawford v. Washington*, 541 U.S. 36 (2004), law applied, habeas relief should not have been granted to sex offense petitioner on grounds that State did not try hard enough to locate the complaint before declaring her unavailable and admitting her prior testimony.

*** Bullcoming v. New Mexico, ___ U.S. ___, 2011 WL 2472799 (U.S. 6/23/11):**
Holding: Confrontation Clause prohibits prosecution from introducing lab report through in-court testimony of an analyst who did not personally conduct the test.

*** Michigan v. Bryant, ___ U.S. ___, 88 Crim. L. Rep. 629, 131 S.Ct. 1143 (U.S. 2/28/11):**
Holding: In determining whether police interrogation of a crime victim is to enable police to meet an "ongoing emergency" or instead "to prove past events relevant a later criminal prosecution," courts must consider the purpose that reasonable participants would have had as ascertained from their statements and actions, and on additional factors such as whether the threat to the victim has been neutralized, the type of weapon used, the medical condition of the victim, and the degree of information the police elicit. Where police found dying shooting victim lying next to his car and he said someone named Rick shot him, this was interrogation in response to an "ongoing emergency" and, thus, its admission after victim died did not violate confrontation clause.

U.S. v. Cameron, 699 F.3d 621 (1st Cir. 2012):
Holding: Even if child pornography reports generated by an online service provider Yahoo! were "business records," they were prepared with the primary purpose of establishing or proving past events relevant to criminal prosecution and thus were "testimonial" for Confrontation Clause purposes.

U.S. v. Meises, 89 Crim. L. Rep. 257, 2011 WL 1817855 (1st Cir. 5/13/11):
Holding: Even though Officer actually participated in the drug sting, this did not make his "overview testimony" about the sting about which he had no personal knowledge admissible; this was still hearsay and inadmissible lay opinion testimony.

Alvarez v. Ercole, 95 Crim. L. Rep. 616 (2d Cir. 8/18/14):
Holding: Defendant's confrontation rights were violated where court preclude cross-examination of Officer about failing to follow leads that another suspect committed the crime; this precluded Defendant from his only defense that the police investigation had been incomplete and that this created reasonable doubt.

U.S. v. Taylor, 2014 WL 814861 (2d Cir. 2014):
Holding: Redaction of a co-defendant's confession was not sufficient to protect Defendant's Confrontation Clause rights where jurors would be able to infer that the purpose of the redaction was to corroborate a cooperating co-defendant's testimony against the rest of the group.

Eley v. Erickson, 2013 WL 1405923 (3d Cir. 2013):
Holding: Admission of witness' statement that a non-testifying co-defendant admitted to shooting the victim but "it was the other two's idea" violated Defendant's confrontation rights under *Bruton*.

Adamson v. Cathel, 88 Crim. L. Rep. 780, 2011 WL 692977 (3d Cir. 3/1/11):
Holding: Trial court was required to give a limiting instruction under *Tennessee v. Street*, 471 U.S. 409 (1985) when Defendant was impeached using the co-defendant's confession after Defendant claimed his own confession was fabricated by police; Defendant's confrontation rights were violated without the limiting instruction.

U.S. v. Cone, 93 Crim. L. Rep. 95 (4th Cir. 4/15/13):
Holding: (1) Contents of emails are not necessarily admissible under "business records" exception to hearsay without further analysis since email is a more casual form of communication than other records usually kept in the course of business such that email may not be assumed to have the same degree of accuracy and reliability; and (2) Materially altering a good that bears a genuine trademark and passing it off as a more expensive product is not prohibited by the criminal trademark counterfeiting statute, 18 USC 2320.

U.S. v. Williams, 2011 WL 184541 (4th Cir. 2011):
Holding: Admission of a stipulation as to weight and proof of a controlled substance, over Defendant's objection, violated his 6th Amendment right to confrontation.

U.S. v. Duron-Caldera, 94 Crim. L. Rep. 385 (5th Cir. 12/16/13):
Holding: (1) Plurality 4-4-1 opinion in *Williams v. Illinois*, __ U.S. __ (U.S. 2012) is not binding as precedential authority because there was no "narrowest ground" that was supported by a majority of justices; (2) 5th Circuit adopts "primary purpose" test of dissenters, and concludes that the Gov't failed to prove that an affidavit which it admitted was obtained for the primary purpose of an administrative investigation rather than for purposes of a criminal prosecution; thus, affidavit was "testimonial" and required cross-examination under *Crawford*.

U.S. v. Powell, 94 Crim. L. Rep. 121 (5th Cir. 10/3/13):
Holding: Even though Officer-Witness was allowed to testify to non-testifying co-defendant's statements about her whereabouts at time of crime because this was only about her conduct, it violated *Bruton* for Gov't to ask Defendant when he testified to explain the co-defendant's statements.

U.S. v. Nelson, 93 Crim. L. Rep. 646 (6th Cir. 8/7/13):
Holding: Officer should not have been permitted to testify to what anonymous caller had said in 911 call where caller had given identifying description of suspect because this was inadmissible hearsay.

U.S. v. Jordan, 2014 WL 292396 (7th Cir. 2014):
Holding: Trial court erred in admitting Officer's hearsay evidence during supervised release revocation hearing without balancing Defendant's confrontation rights against Gov't's stated reasons for denying them.

Cross v. Hardy, 88 Crim. L. Rep. 511, 2011 WL 102587 (7th Cir. 1/13/11):
Holding: Where after Defendant won a retrial the prosecution made only "half-hearted" efforts to find the victim and instead used transcript of victim's prior testimony at new trial, this violated Defendant's confrontation rights, even though prosecution contacted victim's family and had investigator do some looking to try to find victim.

U.S. v. Causevic, 2011 WL 1517911 (8th Cir. 2011):
Holding: A Bosnian judgment admitted at alien Defendant's jury trial resulting in conviction of making a false statement in an immigration matter violated the Confrontation Clause.

U.S. v. Johnson, 2014 WL 4473957 (9th Cir. 2014):
Holding: In order to use the forfeiture by wrongdoing exception to Confrontation Clause, State must prove by preponderance of evidence that Defendant intentionally secured the declarant's absence.

U.S. v. Brooks, 96 Crim. L. Rep. 248 (9th Cir. 11/24/14):
Holding: Even when an Officer testifies to a "summary" or "the substance" of what a witness told him, this violates a Defendant's 6th Amendment confrontation rights; court rejects Gov't's argument that no confrontation violation occurred because Officer's testimony wasn't the witness' verbatim statement.

Ortiz v. Yates, 2012 WL 6052251 (9th Cir. 2012):
Holding: Where trial court in spouse abuse case prohibited Defendant from cross-examining spouse-victim as to whether the prosecutor had threatened her, this violated Defendant's Confrontation Clause rights.

U.S. v. Duenas, 2012 WL 3517605 (9th Cir. 2012):
Holding: Even though Officer was unavailable because he had died by the time of trial, his testimony at a pretrial suppression hearing could not be admitted as non-hearsay former testimony since the Defendant's motive at the suppression hearing was solely to demonstrate that his statements to the Officer were involuntary and his motive for cross-examining Officer at trial would be different in that it would be to challenge the substance of the statements.

U.S. v. Bustamante, 687 F.3d 1190 (9th Cir. 2012):
Holding: Admission of an affidavit purporting to be a copy of Defendant's Phillipine birth certificate in case involving illegal reentry and making a false statement to get a passport and government benefits violated confrontation rights.

Ocampo v. Vail, 2011 WL 2275798 (9th Cir. 2011):
Holding: Admission of police detective's testimony about a non-testifying witness who confirmed that Defendant was at scene of crime and was the shooter violated Confrontation Clause.

U.S. v. Woodward, 2012 WL 5458402 (10th Cir. 2012):
Holding: Defendant's confrontation rights were violated where trial court prohibited cross-examination of a state inspector with a prior judicial credibility determination of him that would have shown that inspector was willing to exaggerate or fabricate an odor of marijuana to obtain a conviction.

U.S. v. Shaw, 2014 WL 3377652 (10th Cir. 2014):
Holding: Defendant's Confrontation rights were violated by Officer's testimony about co-defendant's confession implicating Defendant, even though Defendant's name was replaced with a neutral pronoun.

U.S. v. Gutierez de Lopez, 95 Crim. L. Rep. 553 (10th Cir. 8/1/14):
Holding: Trial court violated Defendant's confrontation rights in allowing Gov't Witnesses to testify without disclosing their true identity to defense counsel, where Gov't's claim that there was a threat to their safety was not sufficiently specific.

Rivers v. U.S.., 96 Crim. L. Rep. 508 (11th Cir. 2/5/15):
Holding: Residual exception to hearsay rule in Fed. Rule Evid. 807 requires a judge to determine the trustworthiness of the declarant's statements, not the reliability of a Witness' recollection of those statements; the declarant must have made the statements under guarantees of trustworthiness similar to the specific hearsay exceptions in Rules 803 and 804, such as declarant's statement was subject to cross-examination, was a dying declaration, or was a statement against interest.

U.S. v. Charles, 2013 WL 3827664 (11th Cir. 2013):
Holding: Defendant had Confrontation Clause right to confront the interpreter who translated his alleged statements made to police during interrogation.

U.S. v. Charles, 93 Crim. L. Rep. 581 (11th Cir. 7/25/13):
Holding: Prosecutor must call translator who translated Defendant's statement for police to testify, because the 6th Amendment confrontation right of *Crawford* applies to such translators; when Officer testified as though the statements were made by Defendant in English, he was actually testifying to the out-of-court statements of the interpreter; "the interpreter made the testimonial statements to [officer], and, accordingly, is the declarant of the English language statements that [officer] heard and testified to at trial."

U.S. v. Smith, 2011 WL 1437378 (D.C. Cir. 2011):
Holding: Letters from state court clerk describing Defendant's prior convictions and prepared at request of prosecutor were testimonial and not admissible without opportunity to cross-examine the clerk.

U.S. v. Blazier, 88 Crim. L. Rep. 372 (C.A.A.F. 12/1/10):
Holding: Confrontation Clause prohibits expert who did not perform test results from testifying to the non-testifying examiner's tests.

Andrade v. U.S. , 96 Crim. L. Rep. 421 (D.C. 1/8/15):
Holding: Domestic assault victim's statements to police were "testimonial" where police went to her residence in response to a domestic assault call and asked her "what happened?" and she told her version; there was no on-going emergency in this situation because emergency was over and police were taking her statement to collect evidence of crime.

Hagans v. U.S., 95 Crim. L. Rep. 362 (D.C. 6/5/14):
Holding: Confrontation Clause violated where redacted statement of non-testifying co-defendant referred to himself and "five others" because it would have been obvious to jurors that this was referring to Defendant.

U.S. v. Williams, 2010 WL 4071538 (D.D.C. 2010):
Holding: Autopsy report and death certificate are testimonial.

Jenkins v. U.S., 93 Crim. L. Rep. 744 (D.C. 9/12/13):
Holding: Defendant's confrontation rights were violated when DNA analyst testified about a DNA match based on DNA profiles developed by another analyst; appellate court holds that Supreme Court's split decision in *Williams v. Illinois* (U.S. 2013) only applies in cases based on identical facts; "the splintered decision in *Williams*, which failed to produce a common view shared by at least five Justices, creates no new rule of law that we can apply in this case."

Young v. U.S., 2013 WL 1349179 (D.C. 2013):
Holding: FBI examiner's testimony that she matched a DNA profile which had been derived by her staff was "testimonial" under Confrontation Clause, and not admissible.

Longus v. U.S., 2012 WL 4122913 (D.C. 2012):
Holding: Where trial court refused to allow defense to questions Officer about his "coaching" of witnesses in another case, this violated Defendant's confrontation rights.

U.S. v. Dupree, 2011 WL 5884219 (E.D. N.Y. 2011):
Holding: Defendants were entitled to cross-examine a government witness regarding her use of antianxiety medication because it was probative of her ability to recall the events about which she was expected to testify.

U.S. v. Stitt, 2010 WL 5600986 (E.D. Va. 2010):
Holding: Confrontation Clause applies to capital penalty phase.

James v. State Dep't of Corrections, 2011 WL 3862750 (Alaska 2011):
Holding: Confrontation rights violated in prison administrative proceeding where inmate did not get to cross-examine witnesses to prison incident.

Vankirk v. State, 90 Crim. L. Rep. 107 (Ark. 10/13/11):
Holding: 6th Amendment right to confront witnesses applies to non-capital jury sentencing proceedings.

State v. Maguire, 94 Crim. L. Rep. 242 (Conn. 11/19/13):
Holding: Child sex abuse victim's statements during a forensic interview were "testimonial" for Confrontation Clause purposes. (According to the *Criminal Law Reporter*, the admissibility of hearsay statements to health care personnel who conduct examinations of apparent victims of abuse is among the most significant questions the U.S. Supreme Court has yet to address under *Crawford v. Washington*, 541 U.S. 36 (2004)).

Martin v. State, 92 Crim. L. Rep. 539 (Del. 2/4/13):
Holding: Even though lab manager certified the results of testing performed by another lab employee, the Confrontation Clause does not allow lab manager to be the Witness who presents the results in court.

Wheeler v. State, 90 Crim. L. Rep. 664 (Del. 2/7/12):
Holding: A defendant's confrontation rights were violated when a detective was allowed to testify that, after interviewing several witnesses who were not present at trial, he had no reason to believe that anyone other than the defendant was involved in a shooting.

Parker v. State, 90 Crim. L. Rep. 331 (Fla. 12/1/11):
Holding: Hearsay is not admissible at a suppression hearing, and defense counsel was ineffective in stipulating to it.

Corona v. State, 89 Crim. L. Rep. 477 (Fla. 6/9/11):
Holding: A defense discovery deposition of a prosecution witness at which Defendant was not present does not provide an opportunity for cross-examination that is sufficient to satisfy the Confrontation Clause.

Hatley v. State, 90 Crim. L. Rep. 649 (Ga. 2/6/12):
Holding: The state child hearsay statute requires pretrial notice of the state's intent to present a child victim's hearsay statements.

State v. Nofoa, 97 Crim. L. Rep. 70 (Haw. 4/14/15):
Holding: Even though Defendant had opportunity to cross-examine Witness at preliminary hearing (who later died before trial), this was not an adequate opportunity for

confrontation under 6th Amendment where Defendant had not yet received discovery at time of preliminary hearing and such discovery would have impeached Witness; *Crawford* left open question of whether opportunity for cross-examination at preliminary hearing satisfies 6th Amendment.

State v. Torres, 90 Crim. L. Rep. 649 (Ill. 2/1/12):
Holding: A defendant's opportunity to cross-examine a witness at a preliminary hearing was not sufficient to justify the admission at trial of the preliminary hearing testimony after the witness became unavailable.

State v. Kennedy, 95 Crim. L. Rep. 245 (Iowa 5/9/14):
Holding: Certificates of mailing showing that Defendant's driver's license was revoked are "testimonial" if they are created after charges are filed against Defendant.

State v. Rogerson, 96 Crim. L. Rep. 141 (Iowa 10/24/14):
Holding: The 6th Amendment confrontation clause requires the same test be used to evaluate whether two-way video testimony is permitted as one-way video, i.e., under *Maryland v. Craig*, State must prove the denial of face-to-face confrontation is necessary to further an important public policy and that the reliability of the testimony is otherwise assured; in general, "the screen and the physical distance between the [witness and Defendant] tend to reduce the truth-inducing effect of the confrontation."

State v. Bennington, 90 Crim. L. Rep. 191 (Kan. 10/28/11):
Holding: Where woman was raped and then interviewed at hospital by a nurse and police officer, her statements were "testimonial;" there was little medical purpose in the interview and the nurse conducted it mostly for forensic purposes, and the presence of a police officer further indicates the statements were intended to be used for court purposes and "testimonial."

Hacker v. Com., 2014 WL 1664232 (Ky. 2014):
Holding: Even though Defendant gave direct examination testimony designed to preemptively address his prior felony conviction, his Confrontation rights were violated when State then admitted a police report about the prior conviction which contained hearsay statements of the victim in the instant murder prosecution.

Jones v. Com., 2011 WL 6543010 (Ky. 2011):
Holding: Restitution based solely on unsworn statements by victim's mother, who defendant was not given the opportunity to cross-examine, violated defendant's due process rights.

State v. Koederitz, 97 Crim. L. Rep. 11 (La. 3/17/15):
Holding: In domestic violence prosecution, even though Victim's initial statements at emergency room were nontestimonial, her later statements to a psychiatrist were testimonial because the purpose of that session was designed to encourage Victim to report incident.

State v. Larson, 2013 WL 1247690 (Me. 2013):
Holding: Admission of out-of-court statement made by a declarant, who was unavailable for trial due to his assertion of privilege against self-incrimination, which incriminated both declarant and Defendant violated Defendant's confrontation rights.

Duylz v. State, 91 Crim. L. Rep. 73 (Md. 3/21/12):
Holding: Where a judge restricted Defendant's right to cross-examine a witness at a pretrial motion to suppress hearing, this precluded the State from later using the testimony at trial when the witness did not appear.

Derr v. State, 2011 WL 4483937 (Md. 2011):
Holding: Though an expert may base his opinion on inadmissible evidence, if that evidence is comprised of the conclusions of other analysts then it is prohibited by the Confrontation Clause.

Derr v. State, 90 Crim. L. Rep. 63 (Md. 9/29/11):
Holding: Admission of DNA testimony by expert other than one who conducted the test violated Defendant's 6th Amendment confrontation rights.

Com. v. Tassone, 2014 WL 2619649 (Mass. 2014):
Holding: Defendant's Confrontation rights were violated where the DNA expert called by the State to testify that DNA matched Defendant was not affiliated with the lab that conducted the testing; thus, Defendant had no meaningful opportunity to cross-examine the expert about the lab's work, procedures or protocol.

Com. v. Tassone, 95 Crim. L. Rep. 484 (Mass. 6/16/14):
Holding: DNA results are not admissible unless Defendant has right to cross-examine DNA expert who examined State's evidence, distinguishing *Williams v. Illinois* (U.S. 2012).

Com. v. Housewright, 96 Crim. L. Rep. 549 (Mass. 2/19/15):
Holding: Even though Prosecutor submitted a doctor's letter on day of trial that elderly Witness would be "stressed" by testifying, this did not make Witness "unavailable" for confrontation purposes because the doctor's letter was untimely; Prosecutor must submit such doctor's excuses to court and defendant substantially in advance of trial so that defendant can rebut them or explore alternatives such as depositions or continuances.

Com. v. Montoya, 92 Crim. L. Rep. 763, 984 N.E.2d 793 (Mass. 2013):
Holding: Confrontation Clause violation where Defendant was not able to cross-examine lab analyst about drugs was not rendered harmless by jurors' own potential to view drugs and determine that their weight exceeded a certain required amount.

Com. v. Barbosa, 2012 WL 255786 (Mass. 2012):
Holding: Confrontation Clause violation in admitting ballistics certificate of examination without testimony of examiner was not harmless.

In re Santos, 90 Crim. L. Rep. 791 (Mass. 2/22/12):
Holding: A Massachusetts law that provides for the admission of state experts' reports in proceedings to re-evaluate an individual's commitment as a sexually dangerous person must be construed to allow admission of reports from experts hired by the committed person as well.

Com v. Parenteau, 2011 WL 2239003 (Mass. 2011):
Holding: A certificate of mailing from the Dept. of Motor Vehicles verifying that a notice of driver's license suspension had been sent to Defendant was "testimonial" and its admission violated the Confrontation Clause in prosecution for operating vehicle after license had been revoked.

People v. Douglas, 2014 WL 3397201 (Mich. 2014):
Holding: Child sex victim's statements to forensic investigator were inadmissible hearsay, and were prejudicial because investigator's testimony added credibility and detail to child's testimony.

People v. Burns, 832 N.W.2d 738 (Mich. 2013):
Holding: Even though Defendant told child sex victim "not to tell" anyone and she would "get in trouble" if she did, this did not invoke the forfeiture-by-wrongdoing exception to hearsay so as to permit the statement to be admitted without the victim testifying, since the alleged threat was made before any report of abuse was made, Defendant had no contact with victim once abuse was reported, and there was no evidence Defendant attempted to influence victim apart from the statement at issue.

People v. Burns, 93 Crim. L. Rep. 452 (Mich. 6/18/13):
Holding: Even though Defendant charged with child molestation told child-victim not to tell anyone, this was insufficient to serve as a basis for applying the "forfeiture by wrongdoing" doctrine regarding the right to confront witnesses.

Goforth v. State, 89 Crim. L. Rep. 847 (Miss. 9/15/11):
Holding: (1) Where Witness gave a statement in child sex case and then suffered a brain injury that rendered Witness unable to remember events, the total lack of memory violated Defendant's confrontation rights because he had no opportunity to cross-examine Witness' past recollection recorded statement; (2) where all counts were identically worded and Defendant was acquitted of some counts and convicted of others, double jeopardy barred retrial on all counts.

State v. Gai, 92 Crim. L. Rep. 127 (Mont. 10/23/12):
Holding: Even though this jurisdiction requires that if the defense wants to cross-examine a forensic expert who prepared a report the defense has to make such a demand for appearance before trial, this does not preclude the defense from arguing that the report is not credible at a trial in the absence of such a demand; "The rule speaks to the admission of the reports not the effect of the admitted evidence."

State v. Lavalleur, 96 Crim. L. Rep. 15 (Neb. 9/19/14):
Holding: Rape-shield law does not prevent Defendant from cross-examining Victim about a prior relationship with a third party where the purpose of the cross-exam was to explore whether Victim might have motive to lie about her interaction with Defendant; purpose was not to impugn Victim's character; "The rape shield statute is not meant to prevent defendants from presenting relevant evidence, but to deprive them of the opportunity to harass and humiliate the complaining witness and divert the jury's attention to irrelevant matters."

State v. Shambley, 89 Crim. L. Rep. 97, 2011 WL 1327864 (Neb. 4/8/11):
Holding: Defendant facing termination from diversion program is entitled to same process due at a probation or parole revocation hearing; thus, Defendant has right to cross-examine witnesses at hearing.

City of Reno v. Howard, 2014 WL 784065 (Nev. 2014):
Holding: Statute, which provided that DWI defendants waive their right to confront collectors of blood evidence unless the defendant can show a substantial and bona fide dispute regarding the facts in the declaration, violates the Confrontation Clause.

State v. Langill, 88 Crim. L. 292 (N.H. 11/30/10):
Holding: Hearsay rule prohibited fingerprint examiner from testifying that her fingerprint results were confirmed by a second examiner, even though the ACE-V method requires two examiners to compare results.

State v. Slaughter, 2014 WL 3905898 (N.J. 2014):
Holding: Even though Girlfriend-Witness testified at pretrial hearing that she did not remember any statements that Defendant made to her, Defendant's Confrontation rights were violated where State admitted his alleged statements to Girlfriend through an Officer without subjecting Girlfriend, who was available, to cross-examination at trial.

State v. McLaughlin, 88 Crim. L. Rep. 745 (N.J. 3/3/11):
Holding: The 6th Amendment redaction rules of *Bruton v. U.S.*, 391 U.S. 123 (1968) apply to hearsay admitted through the "state of mind" exception; thus, testimony by co-defendant's girlfriend that co-defendant said he and Defendant planned to rob victim required redaction.

State v. Navarette, 92 Crim. L. Rep. 457 (N.M. 1/17/13):
Holding: Where pathologist offered his "subjective observations" regarding an autopsy report prepared by a different pathologist, this violated 6th Amendment Confrontation Clause.

People v. Garcia, 2015 WL 1423499 (N.Y. 2015):
Holding: Officer's testimony that Victim's sister said there had been friction between Victim and Defendant was "testimonial" and violated Confrontation Clause because the statement was procured for the primary purpose of prosecution and exceeded what was necessary to explain police pursuit of Defendant.

In re D.C., 96 Crim. L. Rep. 358 (N.C. 12/15/14):
Holding: Where child victim took stand but refused to testify, Defendant's 6th Amendment confrontation rights were violated by admission of victim's forensic interview.

State ex rel. Roseland v. Herauf, 2012 WL 3031380 (N.D. 2012):
Holding: A signed statement from a nurse who drew Defendant's blood for DWI case was testimonial.

State v. Clark, 94 Crim. L. Rep. 170, 2013 WL 5832253 (Ohio 10/30/13):
Holding: Child-victim's statements to Teacher were "testimonial" because teachers are agents of State who have legal duty to report child abuse; because the circumstances objectively indicate that there was no ongoing emergency, Child was not making statements for medical care, and the primary purpose of Teacher's questioning was to prove past events potentially relevant to later prosecution, the 6th Amendment right to cross-examine accuser Child was implicated.

State v. Tribble, 67 A.3d 210 (Vt. 2012):
Holding: Defendant's trial counsel could not waive Defendant's Confrontation rights, over Defendant's personal objection, by stipulating to admission of medical examiner's prior deposition testimony, and this error was not harmless.

Crawford v. Com., 88 Crim. L. Rep. 515 (Va. 1/13/11):
Holding: Witness' statements in affidavit seeking a civil order of protection are "testimonial."

State v. Jasper, 90 Crim. L. Rep. 809 (Wash. 3/15/12):
Holding: Defendants' Sixth Amendment right to confrontation was violated by the admission at their criminal trials of certifications regarding the statuses of their driver's or professional licenses.

State v. Jasper, 2012 WL 862196 (Wash. 2012):
Holding: Certified records declaring the presence or absence of public records relating to facts at issue in prosecutions for driving while license suspended and unregistered were testimonial in nature, requiring custodians in order to satisfy the defendants' rights of confrontation.

State v. Kennedy, 92 Crim. L. Rep. 234 (W.Va. 11/21/12):
Holding: Confrontation Clause was violated when State was allowed to present autopsy report without the pathologist who wrote it, but was not violated when the State presented a different pathologist to testify to expert opinions he could have formed based on autopsy photographs.

Spradley v. State, 2011 WL 4511226 (Ala. Crim. App. 2011):
Holding: Testimony of detectives regarding the statements of a witness who refused to testify was inadmissible and plain error where it was used to fill a void in the state's case.

People v. Murillo, 2014 WL 5864409 (Cal. App. 2014):
Holding: Defendant was denied fair trial and right to confront witnesses where Prosecutor was allowed to call alleged attempted murder victim who, in front of jury, refused to testify and who refused to answer 110 different leading questions about his out-of-court statements that Defendant was the shooter.

People v. Espinoza, 2015 WL 358798 (Cal. App. 2015):
Holding: Even though pro se Defendant intentionally failed to appear for second day of trial with the intention of causing a mistrial, court violated due process right to present a defense and Defendant's confrontation rights by proceeding with the trial without him; there was no evidence Defendant knew the trial would proceed without him, and court could have appointed counsel to represent Defendant.

People v. Archuleta, 170 Cal. Rptr. 3d 361 (Cal. App. 2014):
Holding: A statement made during custodial interrogation of a fellow gang member of Defendant which implicated Defendant in a robbery was "testimonial."

In re Fratus, 2012 WL 1231947 (Cal. App. 2012):
Holding: In refusing to allow a prisoner to call a witness during a disciplinary hearing because the witness "could not provide any additional/relevant information," the department of corrections violated the prisoner's due process right to call witnesses in his defense.

People v. Starks, 2012 WL 504635 (Ill. App. Ct. 2012):
Holding: New exculpatory serology and DNA evidence meant that the defendant did not have adequate ability to examine now-deceased complainant, barring her prior testimony from being admitted in the defendant's new trial.

State v. Simmons, 2011 WL 1938385 (La. Ct. App. 2011):
Holding: Even though Defendant failed to follow statute which required that he make a timely pretrial demand to be able to cross-examine criminalist, the State's presentation of criminalist's report violated the Confrontation Clause because the burden cannot be shifted to Defendant to call this prosecution witness.

Com. v. Ramsey, 2011 Wl 2520143 (Mass. App. 2011):
Holding: Admission of drug analysis certificate to prove substance was drugs violated Confrontation Clause and was not harmless.

Com. v. Ellis, 2011 WL 1520027 (Mass. App. 2011):
Holding: A probation certification used to prove Defendant had a prior DWI conviction was testimonial for Confrontation Clause purposes.

Dionas v. State, 2011 WL 2585962 (Md. Ct. Spec. App. 2011):
Holding: Trial court erred in limiting cross-examination of State's witness as to whether they had an expectation of leniency from State for testifying at Defendant's probation revocation hearing.

People v. Roscoe, 2014 WL 128114 (Mich. App. 2014):
Holding: Murder Victim's hearsay statement identifying Defendant as attacker was not admissible under forfeiture by wrong-doing rule, where there was no finding that Defendant killed Victim specifically to prevent Victim from testifying; Defendant's confrontation rights were violated by admission of the statement.

Green v. State, 2011 WL 2578562 (Md. Ct. Spec. App. 2011):
Holding: SAFE nurses sexual assault report was written under circumstances that would lead an objective observer to believe the statements would be available for use at trial, so nurse's report was "testimonial."

State v. Heisler, 2011 WL 1885670 (N.J. Super. Ct. App. Div. 2011):
Holding: Ten-day period in which defendant must object to the admission into evidence of a lab certificate does not begin to toll until after defendant is served with notice of the submission.

State v. Rehmann, 2011 WL 1598660 (N.J. Super. Ct. App. 2011):
Holding: Confrontation Clause is not satisfied by State calling just anyone to the stand to testify about lab results; the State must provide a witness who has made an independent determination as to the results offered.

State v. Smith, 2013 WL 4017321 (N.M. App. 2013):
Holding: Defendant's confrontation rights were violated where court allowed lab analyst to testify via 2-way video, absent adequate showing of necessity.

People v. Lin, 2014 WL 6980420 (N.Y. App. 2014):
Holding: Officer who was certified with breath test machines did not qualify as a substitute witness for another Officer who actually administered the test; Defendant's Confrontation rights were violated where test results were admitted with calling the Officer who administered test.

People v. Diaz, 2011 WL 2475182 (N.Y. App. Div. 2011):
Holding: Trial court violated Defendant's confrontation rights in child sex case by not allowing Defendant to present testimony from child's mother's ex-boyfriend that child had falsely accused him of sex abuse and then recanted; testimony was offered for impeachment and to show bias.

People v. Canales, 2011 WL 2347617 (N.Y. Sup. 2011):
Holding: Co-conspirator's statements made after conspiracy ended were not admissible against Defendant/co-conspirator.

People v. Waters, 2011 WL 240753 (N.Y. City Ct. 2011):
Holding: Simulator solution documents and an instrument calibration certificate, containing electronic signatures, were not admissible under business records exception to hearsay rule; documents were not made in regular course of business, were not a true and accurate representation of electronic records and were incomplete.

State v. Hurt, 2010 WL 4608708 (N.C. Ct. App. 2010):
Holding: Defendant's 6th Amendment confrontation rights apply in non-capital sentencing hearing.

Com. v. Parker, 2014 WL 5765394 (Pa. Super. 2014):
Holding: A person's statement in the form of a question can constitute "hearsay" if the question contains an implied assertion offered for the truth of the matter.

Burch v. State, 2013 WL 2196934 (Tex. App. 2013):
Holding: Confrontation Clause violated where State introduced lab report stating type and quantity of drugs through a different analyst than that who did the actual testing.

Burch v. State, 93 Crim. L. Rep. 540 (Tex. Crim. App. 6/26/13):
Holding: 6th Amendment right to confrontation is violated by having a "reviewing analyst" testify to crime lab results performed by another analyst.

Bays v. State, 93 Crim. L. Rep. 190 (Tex. App. 4/17/13):
Holding: Even though Texas has a statute that creates a hearsay exception to admission of testimony by the first person to whom a child sex victim reports sexual abuse, this statute does not allow introduction of a videotaped interview of child given to an investigator for Texas Dept. of Family Services; statute was intended to apply to persons like a child's mother or other adult to whom child first reported abuse, not to a later investigator who was investigating the incident.

Coronado v. State, 89 Crim. L. Rep. 848 (Tex. Crim. App. 9/14/11):
Holding: Even though Defendant was allowed to question child sex victim by submitting written questions to be asked through a forensic interviewer, this violated Defendant's confrontation rights.

State v. Hudlow, 2014 WL 3932418 (Wash. App. 2014):
Holding: Defendant's Confrontation rights were violated where Officer was allowed to testify to hearsay of what he heard a confidential informant say over the telephone to Defendant.

State v. Turnipseed, 2011 WL 1991752 (Wash. Ct. App. 2011):
Holding: Defendant's 6th Amendment right to confrontation was violated by a partially distorted and inaudible video of defense counsel's earlier cross-examination of an expert. 6th Amendment confrontation rights apply in non-capital sentencing hearing.

Continuance

State v. Litherland, 2015 WL 5706732 (Mo. App. E.D. Sept. 29, 2015):
(1) Even though case had been pending for more than three years, where Defendant's sole exculpatory Witness in murder trial was unavailable because she went into labor the morning of trial, trial court abused discretion in not granting continuance; and (2) even though Defendant had taken discovery deposition of Witness, Defendant was not required to use deposition at trial in lieu of her in-court testimony.
Facts: Defendant was charged with first-degree murder in a case involving a shooting of a family member. Various other family members were also charged in the murder, and were State's witnesses; many of them had made various deals with the State to testify. On the morning of trial, defense counsel announced that the defense needed a continuance. The judge stated he was going to "go ballistic." Defense counsel then said that their sole defense Witness – who was also a family member, but the only family member not charged in the offense – was unavailable because she had gone into early labor that morning. The judge stated that the defense had taken a discovery deposition of Witness and could use that instead. Defense counsel said the deposition would not show Witness' "non-verbals." The defense opted not to use the deposition at trial. The defense at trial was that Defendant was not involved in the murder at all. Defendant was convicted and appealed.
Holding: The trial court abused discretion in denying the motion for a continuance. Although Rule 25.13 provides a Defendant *may* use a deposition at trial where a witness is unavailable, appellate court finds no precedent requiring use of such deposition, where, as here, Witness was temporarily unavailable, went into labor "early" on the morning of trial, and would shortly become available again. Although the court may have been rightly concerned that the case had been delayed more than three years, this does not override Defendant's constitutional right to present a defense, especially in a case of first-degree murder carrying a sentence of life without parole. One of the fundamental rights of due process is the right to present witnesses in defense. The court's statement that it would go "ballistic" made before the court even heard the reason for continuance is concerning because it indicates the court may have prejudged the continuance motion, without having even heard the reason for it. The State argues Defendant was not prejudiced because various State witnesses testified to similar matters as Witness would. Courts have found no prejudice from denial of a continuance where a witness' testimony would be cumulative to other *defense witnesses*; appellate court rejects notion that there can be no prejudice because the testimony may have been cumulative to *State's witnesses*. Further, Witness was a critical witness whose testimony may have been more significant than State witnesses because she was the only family member who was not charged in the murder. Reversed and remanded for new trial.

Pherigo v. State, 2015 WL 7460218 (Mo. App. S.D. Nov. 24, 2015):
(1) Where State did not disclose tape-recorded statements of co-Defendants until morning of trial and the statements indicated Defendant was innocent of the charged offense, trial counsel was ineffective in failing to move for a continuance due to the late disclosure and in proceeding to trial without knowing the contents of the tapes; and (2)

even though Defendant did not want a continuance, trial counsel was ineffective in not moving for one, where counsel believed this was counsel's decision to make.
Facts: Movant/Defendant was charged with burglary, tampering and stealing for theft of a car from a residence. Police found Movant with the car. Movant said he had borrowed the car from another person. On the morning of trial, the State disclosed various tape recordings of Movant's co-Defendants. Counsel did not listen to the tapes, but successfully moved to have them excluded from trial. Movant did not want a continuance, and counsel did not ask for one. After trial, counsel listened to the tapes and discovered that the co-Defendants said Movant was not involved in the charged offenses. Movant filed a 29.15 motion. Counsel testified at the 29.15 hearing that even though Movant did not want a continuance, counsel believed that was a decision for counsel to make. Counsel did not ask for a continuance because the trial court was going to exclude the recordings, which counsel assumed to be harmful. The motion court found counsel ineffective. The State appealed.
Holding: Even though the police apparently did not tell the prosecutor about the tapes until shortly before trial, Rule 25.03 and due process require the prosecutor to take affirmative steps to learn of information possessed by the police. The late disclosure would have authorized the grant of a continuance as a sanction. The strategic decision to forgo requesting a continuance was made by counsel, not Movant. Counsel made this decision under the mistaken assumption that the tapes would inculpate Movant. Movant apparently did not know the contents of the tapes either, when Movant said he did not want a continuance. The motion court was free to find that counsel was ineffective in not moving for a continuance.

U.S. v. Sellers, 2011 WL 1935735 (7th Cir. 2011):
Holding: Denial of Defendant's pretrial motion for a continuance to change counsel, without conducting a balancing test to determine if a continuance was warranted, denied Defendant his 6th Amendment right to counsel of his choice.

People v. Brown, 322 P.3d 214 (Colo. 2014):
Holding: Trial judges must consider following factors in determining whether to continue case to allow Defendant to hire counsel of his choice: (1) Defendant's actions and motive surrounding request; (2) availability of chosen counsel; (3) length of continuance necessary; (4) potential prejudice to State beyond mere inconvenience; (5) inconvenience to witnesses; (6) age of case; (7) number of continuances already granted; (8) the timing of the continuance request; (9) impact on the court's docket; (10) the victim's position, if the Victim Rights Act applies; and (11) any other case-specific factors.

Oliver v. State, 2013 WL 427236 (Del. 2013):
Holding: Granting 24-hour recess during trial to allow defense counsel to be able to review forensic reports which State had failed to disclose was not an appropriate sanction for State's non-disclosure before trial, since defense counsel would not have time to adequately prepare for cross-examination of the highly technical information or be able to consult with their own forensic expert.

Darcy v. Com., 96 Crim. L. Rep. 35 (Ky. 9/18/14):
Holding: Defendant can be granted continuance even though this would delay a co-defendant's trial under state 180-day speedy trial law, because the speedy trial law expressly allows continuances that are reasonable and necessary; this is true even though the continuance will result in the co-defendant being tried more than 180 days later.

Com. v. Ross, 2012 WL 4801433 (Pa. Super. 2012):
Holding: Trial court abused discretion in refusing to grant a continuance to death penalty counsel where counsel had not interviewed 50 witnesses and had not completed interviewing his own experts.

Blackshear v. State, 2011 WL 1991424 (Tex. App. 2011):
Holding: Trial court erred in second trial in not granting a continuance to allow Defendant to obtain a transcript from the first trial; defense should have been able to use the transcript to cross-examine witnesses from first trial, even though second trial was for punishment only.

Costs

City of Moline Acres v. Brennan, 2015 WL 4930167 (Mo. banc Aug. 18, 2015):
(1) City Ordinance which prohibited vehicle owners from "permitting" their vehicle to be operated at a speed in excess of the speed limit requires that City prove that the owner gave the driver specific permission to do this; it violates due process and shifts burden of proof to create rebuttal presumption that proof of ownership proves consent to unlawful speeding; and (2) City Ordinance system which sent defendants a "notice" that they would be charged in Municipal Court with Ordinance violation unless they paid City an alleged "fine" violated due process because this was a shortcut "around" the judicial system; only courts are authorized to impose "fines" and only after a judicial determination of guilt.
Facts: City Ordinance prohibited vehicle owners from "permitting" their vehicle to be operated in excess of a speed limit. Defendant's car was caught speeding by an automated enforcement camera. City sent him an alleged Notice of violation that informed him that unless he paid a fine to City, the matter would be referred to Prosecutor for prosecution. Defendant was ultimately charged with violating Ordinance. Defendant challenged Ordinance on various grounds.
Holding: The Ordinance here does not prohibit speeding. The Court is required to take the Ordinance at "face value." What Ordinance prohibits is owners *permitting* their vehicle from being operated at an unlawful speed. The identity of the driver is not an element of the offense. Ordinance requires proof (1) that a vehicle was speeding, (2) that the person charged was the owner of the vehicle, and (3) that the owner gave the driver specific permission to operate the vehicle at an unlawful speed. City argues that proof of ownership creates a rebuttable presumption of consent to operation and unlawful speeding. But such a presumption is not constitutionally permissible in either a civil or criminal case. Even if this Court assumes there is some rational connection between ownership of a vehicle and permission to use that vehicle generally, this does not stretch

far enough to allow the fact-finder to infer from ownership the very specific permission to exceed the speed limit that the Ordinance requires. City can charge the violation, however, if it can state facts in the Notice charging the offense showing probable cause that the owner gave the driver specific permission to use owner's vehicle for speeding. But the Notice here did not conform to Rule 37.33 for various reasons. First, it did not state the name, division and street address of the circuit court. Second, it did not show any facts to establish probable cause that Defendant violated the Ordinance; instead the blank merely contains the phrase, "Violation of Public Safety on Roadways." Third, the Notice fails to tell defendants that they can plead not guilty and appear at trial. Rule 37.49 creates a process to allow defendants to plead guilty and pay a fine to a "violations bureau." But the Notice and Ordinance here do not do that. Instead, the payment system creates an unauthorized extra-judicial process. The Ordinance creates a system whereby owners of vehicles are accused of violating the Ordinance in a letter from police, and then told that by paying money to the City, charges will not be filed in the first place. "When a 'fine' is paid to a court, the court must report the conviction and distribute the proceeds according to law. When money is paid directly to the City in order to keep from being charged … that payment is in no sense a 'fine' and is not subject to [judicial] oversight and reporting." The power to inflict punishment requires a judicial determination that a law has been violated. Before there can be such judicial determination, due process requires City prove guilt beyond a reasonable doubt. These two principles prevent City from threatening prosecution as a means of forcing a person to pay City with no due process and no proof of guilt. Under Rule 37.33, it is improper for any notice to demand payment of money. The only exception is for notices that are subject to a "violation bureau." The system here is an unauthorized one that is a shortcut "around" the judicial system and its protections for the accused. As a result, both Ordinance and the Notice are invalid. Judgment dismissing charge affirmed.

Concurring opinion (Draper, Stith, Teitleman, JJ.): When confronting matters of public safety, courts should skeptically scrutinize manufactured legal fictions that may obscure the actual danger confronted. Prior cases have held that traffic ordinances cannot be a tax ordinance in the guise of an ordinance enacted under the police power. It is for the court to determine whether the primary purpose of the ordinance is regulation under the police power or revenue under the tax power. Ordinance comes across as a mechanism for generating City revenue, not as public safety measure. This Court should be cognizant of the times in which these ordinances are being enforced in light of recent criticism of St. Louis County municipalities, which have used traffic violations and the revenue they generate to enrich their coffers to the financial detriment of the citizens they are ostensibly protecting.

State ex rel. Patterson v. Powell, 2015 WL 9241558 (Mo. App. S.D. Dec. 17, 2015):
(1) Where trial court at sentencing had ordered a Defendant to "pay costs," court lacked authority to later waive Defendant's payment of witness fees; (2) Sec. 491.280.2 authorizes a court to determine the amount of witness fees, but does not authorize waiver of the fees.

Facts: A Defendant was convicted at a trial of misdemeanors. At sentencing, the court ordered him to "pay costs" within six months. A State's witness was owed witness fees

totaling $206.88. Six months later, the court entered an order "waiving" the witness fees. The State sought a writ of mandamus.
Holding: Once judgment and sentencing occur in a criminal case, the court has exhausted its jurisdiction and cannot take further action except as authorized by statute or rule. The court purported to act under Sec. 491.280.2, which provides that "each witness may be examined on oath by the court … as to factors relevant to the proper amount" of witness fees. This statute authorizes courts to determine the *amount* of fees, but does not authorize a court to *waive* fees. Further, there was no examination of the witness under oath here, so the court's purported exercise of authority under the statute was wrong as a matter of law, and thus, an abuse of discretion. Writ issued; trial court ordered to rescind its order "waiving" fees.

McVeigh v. Fleming, 410 S.W.3d 287 (Mo. App. E.D. 2013):
Holding: Attorney must give client the attorney file without charge because the file is the property of the client. "If a lawyer wishes to keep a copy of the file for his own use or protection, the lawyer must bear the cost of copying the file….Therefore, the trial court erred in ordering [client] to pay [attorney] 4 cents per page in duplication costs because a client's file is property that belongs to the client, a lawyer must return the client's property once representation has been terminated, and a lawyer must bear the cost of copying the file."

Powell v. City of Kansas City, 2015 WL 5821845 (Mo. App. W.D. Oct. 6, 2015):
Holding: (1) Even when a civil litigant is granted leave to proceed as a poor person, Sec. 514.040 allows a court discretion to assess whatever costs the court believes the litigant may be able to pay, except in postconviction cases under Rules 24.035 and 29.15, where a court cannot assess any costs against Movants; and (2) Rule 81.08(a) requires a notice of appeal to specify the judgment or order appealed from; where Appellant's notice of appeal stated only that Appellant was appealing from an entry of summary judgment, appellate court would not review on appeal Appellant's claim that trial court erred in overruling a new trial motion, because the notice of appeal did not specify that Appellant was appealing such ruling (which was different than the summary judgment order) and Appellant failed to attach the new trial motion to her notice of appeal.

*** Coleman v. Tollefson, ___ U.S. ___, 135 S.Ct. 1759 (U.S. May 18, 2015):**
Holding: Even though one of indigent petitioner's three prior lawsuits (which had been dismissed by the district court) was still pending on appeal, that suit counted as a "third strike" under 18 USC 1915 "third strike" provision for purposes of whether petitioner could file new, additional suits *in forma pauperis* without cost.

State ex rel. State of Missouri Dept. of Social Services Family Support Division v. Campbell, No. WD75408 (Mo. App. W.D. 11/27/12):
Holding: Judge cannot order State to pay for paternity testing under Sec. 210.854, since statute says that petitioner (alleged father) shall pay for such testing.

U.S. v. Moore, 90 Crim. L. Rep. 650 (4th Cir. 1/25/12):
Holding: Before a federal district judge may invoke the Criminal Justice Act to order a defendant to repay the government for his or her court-appointed attorney, the judge must find that there are specific funds, assets, or asset streams available to the defendant.

U.S. v. Siegel, 2014 WL 2210762 (7th Cir. 2014):
Holding: Where judge imposed various costly conditions (such as treatment programs and internet monitoring) on Defendant's supervised release, judge was required to explicitly state that Defendant was not required to pay the expense if he could not afford it and that revoking Defendant for inability to pay would be improper.

Buster v. Com., 2012 WL 5285665 (Ky. 2012):
Holding: State statute does not permit trial court to retain jurisdiction until a Defendant finishes a sentence to determine whether court costs and public defender fees should be imposed.

Com. v. Garzone, 90 Crim. L. Rep. 606 (Pa. 1/19/12):
Holding: A state law providing that convicted defendants can be ordered to pay the prosecution's expenses does not mean that the state may recover the costs for the prosecutors' salaries.

Com. v. Garzone, 2012 WL 149334 (Pa. 2012):
Holding: Statute governing payment of costs of prosecution does not authorize recovery, from defendant, of costs relating to salaries of regularly staffed personnel.

Beamon v. State, 2014 WL 1744100 (Ala. App. 2014):
Holding: Where a court denies a request to proceed in forma pauperis, it should give Petitioner a reasonable time, such as 30 days, to pay the filing fee, and such reasonable time may include a period extending beyond a limitations period.

Collins v. City of Los Angeles, 2012 WL 1371978 (Cal. App. 2012):
Holding: Los Angeles' liability to DUI arrestees for improperly charging for overhead as a portion of emergency response costs was ascertainable when the arrestees made the payments.

People v. Palomo, 2011 WL 3332327 (Colo. App. 2011):
Holding: Court could only assess prosecution costs against Defendant for counts he was convicted of, not for counts he was not successfully prosecuted for.

State v. Harris, 2014 WL 2199829 (La. App. 2014):
Holding: Where Defendant was indigent, his judgment providing for a jail term in the event he could not pay his fine must be deleted.

Sturdivant v. State, 2014 WL 1258813 (Tex. App. 2014):
Holding: Trial court lacked authority to order Defendant to pay special prosecutor fees as court costs.

Johnson v. State, 2014 WL 714736 (Tex. App. 2014):
Holding: A bill for court costs did not have to be brought to the trial court's attention for Defendant to be able to challenge it on appeal.

Landers v. State, 2013 WL 3329332 (Tex. App. 2013):
Holding: Defendant could appeal trial court's imposing prosecutor fees as court costs even though he failed to object, because he wasn't given an opportunity to object and was not required to file a new trial motion about this issue.

State v. Villanueva, 311 P.3d 79 (Wash. App. 2013):
Holding: Acquitted Defendant can recover lost wages as restitution under state statute that allows certain acquitted Defendants to receive restitution for losses stemming from unsuccessful prosecution.

Counsel – Right To – Conflict of Interest

State v. Lemasters, 2015 WL 778400 (Mo. banc Feb. 24, 2015):
Even though Public Defender joined the Prosecutor's Office which was prosecuting her former client, where former Public Defender was screened from participation in the prosecution, the entire Prosecutor's Office was not disqualified; test for disqualification of entire office is whether a reasonable person would find an appearance of impropriety and doubt the fairness of the trial, though actual prejudice need not be shown.
Facts: Public Defender was representing Defendant. Public Defender wrote derogatory memos about Defendant's family and ability to mount a defense. Subsequently, Public Defender joined the Prosecutor's Office which was prosecuting Defendant. The Prosecutor's Office screened former Public Defender from participation in the prosecution. Defendant sought to disqualify the entire Prosecutor's Office.
Holding: The Rules of Professional Conduct do not require the entire Prosecutor's Office to be disqualified. Former Public Defender's prior representation of Defendant created a conflict for her, but not for the entire Prosecutor's Office. A former government attorney's conflict under Rule 4-1.11(a) is only imputed to lawyers in a "firm." The word "firm" does not include lawyers working as public employees. Thus, Public Defender's conflict is not imputed to the entire Prosecutor's Office because it is not a "firm" under Rule 4-1.11(b). The comment to Rule 4-1.11 states that it does not impute conflicts of a lawyer currently serving as a government employee to other associated government employees, although it would be prudent to screen such lawyers -- which occurred here. Even though the Rule of Professional Conduct do not require disqualification, the Prosecutor's Office must still be disqualified if there is an appearance of impropriety that casts doubt on the fairness of the trial. The test is whether a reasonable person would find an appearance of impropriety and doubt the fairness of the trial. Here, a reasonable person would not, because Public Defender was screened from the prosecution. Public Defender's derogatory memos were unprofessional but the Prosecutor's Office did not know about them until Defendant revealed them in his motion

to disqualify. The reasonable person standard does not require showing actual prejudice. There may be cases where a screening process will not be sufficient to prevent a reasonable person from finding an appearance of impropriety that casts doubt on the fairness of a trial. For example, an elected Prosecutor who is the "boss" of an office cannot be screened from the assistant prosecutors, and should result in disqualification.

State v. Nettles, 2015 WL 7738413 (Mo. App. E.D. Dec. 1, 2015):
Holding: Claim that defense counsel operated under actual conflict of interest in representing Defendant and previously representing co-Defendant in same case (who then became State's witness against Defendant) is not cognizable on direct appeal, but must be raised as claim of ineffective assistance of counsel in Rule 29.15 proceedings, even where trial court failed to make independent inquiry about the conflict.
Discussion: Defendant claims that counsel's prior representation of co-Defendant in same case, who then became a key prosecution witness against Defendant, created an actual conflict of interest, and that the trial court erred in failing to independently inquire about this, and disqualify counsel. An actual conflict of interest occurs from successive representation where an attorney's former client serves as a government witness against the attorney's current client. Here, there is a significant risk that counsel's representation of Defendant may have been materially limited by his duty of confidentiality to the co-Defendant/client. Nevertheless, this claim is not cognizable on direct appeal. It should be raised in a Rule 29.15 proceeding as one of ineffective assistance of counsel.

Depriest v. State, 2015 WL 7455009 (Mo. App. E.D. Nov. 24. 2015):
(1) Plea counsel had actual conflict of interest where he simultaneously represented Movant and her Brother on charges for marijuana found in their residence, and it was apparent that Movant was less culpable than Brother; (2) "Group guilty plea" proceeding prejudiced Movant because plea court failed to inquire about the conflict of interest; (3) where Movant rejected a more favorable plea offer due to her counsel's conflict of interest, remedy is to require State to re-offer the rejected offer; and (4) transcript of "group guilty plea" should not be redacted so as only to include Movant's and Brother's responses, because redacted transcript does not give appellate court a complete picture of what transpired at plea.
Facts: Movant and her Brother were charged with marijuana offenses for marijuana found growing in their residence. Movant and Brother both retained the same counsel, and signed counsel's waiver of conflict of interest. The State offered Movant a 10-year deal with possibility of probation after 120 days. Counsel advised Movant to reject the offer. Movant and Brother ultimately pleaded guilty together under a deal whereby the State would dismiss certain other charges against Movant, if she and Brother pleaded guilty together. The court held a "group guilty plea" with other defendants in order to "save time." Movant was sentenced to the maximum term. She filed a 24.035 motion.
Holding: Movant's plea was involuntary due to counsel's conflict of interest and the group guilty plea procedure. Counsel believed Movant was less culpable than Brother; thus, Movant's and Brother's interests were conflicting. Prejudice is presumed when counsel operates under an actual conflict of interest. Further, the plea court had a duty to inquire about the conflict, but did not because of the group guilty plea. The plea court should not have valued its own time more than the fair administration of justice. The

remedy here is to order the State to reoffer the rejected plea offer. Lastly, a full and complete transcript of the group plea should have been prepared, not just a transcript with Movant's and Brother's responses. A full transcript was necessary to give appellate court a complete picture of what occurred.

Depriest v. State, 2015 WL 6473150 (Mo. App. E.D. Oct. 27, 2015):
(1) Plea counsel operated under an actual conflict of interest and prejudice is presumed where counsel represented both Movant and co-defendant, advised Movant to reject a favorable plea offer, and pleaded Movant and co-defendant guilty to a deal whereby Movant had to accept a blind plea to allow a favorable plea for co-defendant; (2) "group guilty plea" violated Movant's right to fundamental fairness and rendered his plea involuntary, especially where trial court had duty to inquire about conflict of interest but did not; (3) remedy is to allow Movant opportunity to accept the favorable plea offer that was rejected; (4) appellate court grants foregoing relief without an evidentiary hearing; (5) plea court's closure of courtroom during guilty plea violated Movant's right to a public trial; and (6) "redacted" transcript from "group guilty plea" which only contained Movant's and co-defendant's statements was improper; a full transcript should be prepared for appellate review.
Facts: Movant and co-defendant (his sister) were charged with various drug crimes for marijuana found in their residence. The same attorney represented both prior to their guilty pleas. The State offered Movant a 10-year deal with 120 days shock. Counsel advised Movant to reject this offer, and to proceed to preliminary hearing. This caused the favorable offer to be withdrawn. After various pretrial litigation, Movant and co-defendant ultimately pleaded guilty in "blind pleas," but only co-defendant received anything in exchange from the State in doing so. The State agreed that if Movant pleaded guilty with co-defendant, the State would dismiss various charges against co-defendant and allow her to be released from jail pending sentencing. The plea court accepted the pleas in a "group plea" with five other non-related cases in order to "save a great deal of time." Movant was ultimately sentenced to 22 years. He filed a Rule 24.035 motion, which the motion court denied without an evidentiary hearing.
Holding: (1) Counsel operates under a conflict of interest where something was done which was detrimental to Movant's interests and advantageous to a person whose interests conflict with Movant's. Upon such a showing, prejudice is presumed. Here, Movant lost the opportunity to plead to the most favorable terms because counsel chose to proceed with pretrial litigation, which was in co-defendant's interests, but not Movant's. Counsel should have withdrawn. Because counsel's actions favored co-defendant's interests, prejudice is presumed. Even if prejudice were not presumed, the fact that Movant received 22 years after being advised to reject a 10-year probation offer supports that counsel was conflicted and shows that counsel failed to advocate for Movant. (2) The appellate courts have repeatedly warned the plea court here that "group pleas" are disfavored. Given all the circumstances in this case, the "group plea" rendered Movant's plea involuntary, and appellate court grants relief without the need for an evidentiary hearing. The plea court had a duty to inquire about the conflict of interest, but did not. The fact that the State's promises to co-defendant were contingent on Movant's own blind plea should have been a red flag to the plea court, as should the fact that both had the same counsel. The plea court did not protect the interest of justice, but

was only interested in "saving time." The scene "smacks of intimidation." Regardless of what Movant actually said on the record at his plea, it is obvious Movant would have felt pressured since Movant's sister was standing right beside him and was the co-defendant. (3) Where ineffective assistance causes a defendant to reject a favorable plea offer, the remedy is order the State to re-offer the favorable plea offer. (5) The plea court further added to the intimidating atmosphere by closing the courtroom during the "group plea." Although the appellate court does not decide the issue because it reverses on other grounds, appellate court notes that the closure likely violated Movant's right to a public trial. (5) Finally, appellate court notes that the transcript submitted on appeal is a redacted transcript containing only the responses of Movant and co-defendant. Although it is not clear whether this was done by Movant's attorney, the court or court reporter, it is improper. A full transcript is necessary for appellate review, and would have been useful here to see all the responses during the "group plea."

Whitfield v. State, 435 S.W.3d 700 (Mo. App. E.D. 2014):
Holding: Even though motion court believed that "justice is [not] served by the routine appointment of counsel for a movant who files a pro se motion … pursuant to Rule 24.035," the appointment of counsel for indigent movants is mandatory under Rule 24.035(e).

State v. Churchill, 2014 WL 839455 (Mo. App. E.D. March 4, 2014):
Holding: (1) Where Mother (Defendant) was called to testify at a child protective hearing and repeatedly requested counsel before testifying (but court denied her request), Mother was denied her right to counsel under Sec. 211.111 and Rule 115.03 because the statute grants an unconditional right to counsel to any party to a juvenile court proceeding for all stages of the proceeding and the Rule requires the court to inform the juvenile's parents of the right to appointed counsel; but (2) even though counsel was not provided, Mother-Defendant's statements made at the juvenile hearing should not be suppressed at her subsequent trial for perjury, because courts have held that the exclusionary rule does not immunize perjury when false statements were obtained in violation of a defendant's constitutional rights, so exclusion is not warranted for violation of Mother-Defendant's statutory rights either. (3) Furthermore, Mother-Defendant's Sixth Amendment right to counsel was not violated because there was no adversary judicial criminal proceeding pending against Mother-Defendant at the time she testified, so the Sixth Amendment right to counsel had not yet attached, and (4) even if her Fifth Amendment right against self-incrimination was violated (which appellate court does not decide), this does not mandate that her statements be suppressed because the Fifth Amendment privilege does not immunize perjury.

Conger v. State, No. ED96015 (Mo. App. E.D. 10/18/11):
Movant was entitled to evidentiary hearing on claim that he was coerced into pleading guilty because his counsel wanted more money for a trial than Movant could pay.
Facts: Movant (defendant) was charged with various offenses. He ultimately pleaded guilty. At the plea hearing, he said he was not threatened or coerced to plead guilty, and expressed general satisfaction with defense counsel. Later, he filed a 24.035 motion

claiming he was coerced to plead guilty because he could not afford the fee counsel demanded to go to trial. The motion court found the claim was refuted by the record. **Holding:** An attorney's statement to a client for additional fees to take a case to trial is not itself coercive. However, a financial conflict of interest arises when a defendant's inability to pay creates a divergence of interest between counsel and defendant such that counsel pressures or coerces a defendant to plead guilty. Here, Movant pleaded facts which, if true, would warrant relief: Counsel filed motions to withdraw, which were denied; Movant paid counsel $11,500, but counsel said it would cost an additional $20,000 to go to trial; plea counsel pressured Movant by telling him she would not take the cases to trial until additional fees were paid; Movant could not pay the additional $20,000; Movant would not have pleaded guilty had counsel not coerced his decision. The State argues the claim is refuted by the record. But the guilty plea court never informed Movant that if he could not afford counsel for trial, the court would appoint counsel for trial. Movant's general answers that he was not coerced or threatened and was satisfied with counsel do not refute allegations that Movant's counsel told him she would not take the case to trial until he paid more fees and that this pressured him to plead guilty. Remanded for evidentiary hearing.

State ex rel. Thompson v. Dueker, No. ED96570 (Mo. App. E.D. 8/9/11):
Even though Husband consulted with Attorney about a potential divorce case, where Husband did not end up hiring Attorney, Husband was only a "prospective client" of Attorney under Rule 4-1.18, and where Wife later hired Attorney in regard to the divorce, Husband could not disqualify Attorney without showing that Attorney received confidential information that could be significantly harmful to Husband in the matter.
Facts: Husband met with Attorney about a potential divorce case, and Husband claimed he discussed confidential matters with Attorney. Husband ended up, however, hiring a different lawyer for the case. Wife later hired Attorney in relation to the divorce case. Husband moved to disqualify Attorney, claiming he was a former client of Attorney under Rule 4-1.9. Trial court disqualified Attorney.
Holding: A writ of prohibition is proper where a court disqualifies a lawyer from representing a client because the judgment, if erroneously entered, would cause considerable hardship and expense and the issue would otherwise escape appellate review. Rule 4-1.9(a) applies to conflict of interest with former clients. To establish a conflict under Rule 4-1.9, a movant for disqualification must prove (1) the Attorney had a former attorney-client relationship with movant; (2) the interests of Attorney's current client are materially adverse to movant's interests; and (3) the current representation involves the same or substantially related matter as Attorney's former representation of movant. Here, however, Husband (movant) did not have an attorney-client relationship with Attorney because Husband did not seek or receive any legal advice from Attorney. Rule 4-1.18(a) provides that "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." Rule 4-1.18(b) provides that an Attorney must keep information of prospective clients confidential. However, Rule 4-1.18(c) provides that a lawyer shall not represent former prospective clients in the same or substantially related matter only if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter. This provides a more restrictive standard for disqualification than does 4-

1.9 for former clients. Under 4-1.18(c), the movant asserting disqualification bears the burden of proving that Attorney received "significantly harmful" information. Mere speculation of receipt of such information is not enough. Here, Husband did not demonstrate what "significantly harmful" information Attorney had received. Disqualification of Attorney reversed.

Waring v. State, 2015 WL 1548957 (Mo. App. S.D. April 7. 2015):
Holding: Where indigent Movant files postconviction case, appointment of counsel is mandatory under Rule 24.035(e).

State v. Lemasters, 2014 WL 2838613 (Mo. App. S.D. June 20, 2014)(en banc):
Even though Defendant's public defender joined the Prosecutor's Office during Defendant's case, where ex-public defender was screened from Defendant's case, trial court did not abuse discretion in denying a motion to disqualify Prosecutor's Office.
Facts: Defendant was represented by a public defender. During the pendency of his case, public defender joined the Prosecutor's Office. Defendant then moved to disqualify the Prosecutor's Office. The Prosecutor's Office claimed it did not have to be disqualified because ex-public defender was screened from Defendant's case. The trial court overruled the motion to disqualify.
Holding: The rules of professional responsibility prohibit a government attorney's participation in a matter where the attorney participated personally and substantially prior to joining the government agency, but, contrary to the practice involving private attorneys, *see* Rule 4-1.10, they do not impute the attorney's conflict to the entire agency. Because of the special problems raised by imputation with a government agency, Rule 4-1.11(d) does not impute the conflicts of a government lawyer currently serving as an employee of the government to other associated government officers or employees, although it will ordinarily be prudent to screen such lawyers. Here, the Prosecutor's Office screened ex-public defender from Defendant's case, so there was no abuse of discretion in overruling the motion to disqualify. The appellate court recognizes that prior cases, such as *State v. Reinschmidt*, 984 S.W.2d 189 (Mo. App. S.D. 1998) and *State v. Croka*, 646 S.W.2d 389 (Mo. App. 1983), held that an entire Prosecutor's Office is disqualified when an ex-public defender joins the Office. But those cases relied on a prior version of the rules of professional conduct which was repealed in 1986. These prior cases did not rely on current Rule 4-1.11, and are not persuasive in light of new Rule 4-1.11.

Wilson v. State, No. 2013 WL 6407682 (Mo. App. S.D. Dec. 9, 2013):
Holding: Where motion court denied *pro se* Rule 24.035 motion without appointing counsel even though Movant had completed the *in forma pauperis* section of his Form 40, this violated Rule 24.035(e) which provides that counsel "shall" be appointed for Movant; appointment of counsel is mandatory, not discretionary.

State ex rel. Volner v. Storie, No. SD32066 (Mo. App. S.D. 7/10/12):
Holding: Where judge failed to appoint counsel for indigent postconviction movant who filled out in forma pauperis affidavit on postconviction motion, writ of mandamus issues to require appointment of counsel as required by Rule 29.15(e).

Rollins v. State, 2015 WL 456261 (Mo. App. W.D. 2/3/15):
Holding: Even though Defendant / 29.15 Movant requested "standby counsel" at his trial where he was proceeding *pro se* after rejecting the public defender, where the court conducted a proper *Faretta* hearing, Defendant / Movant's waiver of counsel was unequivocal and direct appeal counsel was not ineffective in failing to challenge the waiver; Defendant / Movant has a constitutional right to counsel, but not a right to counsel of his own choosing.

Sanford v. State, No. WD72291 (Mo. App. W.D. 7/26/11):
Holding: Where motion court failed to appoint counsel for movant in 24.035 case who had indicated she was indigent, this was erroneous because Rule 24.035(e) mandates that counsel be appointed for indigent movants.

*** Woods v. Donald, ___ U.S. ___, 2015 WL 1400852 (U.S. March 30, 2015):**
Holding: (1) Even though defense counsel was not in the courtroom during a portion of trial where matters about jointly-tried co-defendants were discussed, this did not violate clearly established federal law to warrant granting habeas relief; and (2) even though situation was "similar" to *Cronic*, *Cronic* did not address counsel's absence during testimony about a jointly-tried co-defendant; "[I]f the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings of those cases."

*** Kaley v. U.S., ___ U.S. ___, 94 Crim. L. Rep. 597, 134 S.Ct. 1090 (U.S. 2/25/14):**
Holding: There is no constitutional right to revisit a grand jury's finding of probable cause in a pretrial hearing challenging the restraint of forfeitable assets needed to hire counsel; "With probable cause, a freeze [on assets] is valid"; "The grand jury gets to say – without any review, oversight or second-guessing – whether probable cause exists to think that a person committed a crime"; this rule avoids the inconsistent result of a judge finding no probable cause to restrain potentially forfeitable assets, but probable cause to allow the criminal case to proceed.

*** Martel v. Clair, ___ U.S. ___, 90 Crim. L. Rep. 749 (U.S. 3/5/12):**
Holding: Where federal habeas petitioners seek replacement of appointed counsel, the court should apply the "interest of justice" standard, and must also inquire into the reasons for the petitioner's request.

*** Turner v. Rogers, ___ U.S. __, 89 Crim. L. Rep. 472 (U.S. 6/20/11):**
Holding: Whether defendant in civil contempt proceeding for failure to pay child support is entitled to appointed counsel depends on applying the balancing test of *Mathews v. Edridge*, 424 U.S. 319 (1976).

Editor's Note: Missouri on this matter is case on this subject is *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).

U.S. v. Collins, 2012 WL 34044 (2d Cir. 2012):
Holding: During ex parte exchange which occurred without consultation with counsel, the trial court emphasized the importance of reaching a verdict to a dissenting juror, thereby depriving defendant of his right to be present, which was not harmless error.

U.S. v. Smith, 89 Crim. L. Rep. 244 (4th Cir. 5/17/11):
Holding: Even though Defendant pleaded guilty, this did not waive a claim that there was a breakdown of communication so bad as to constitute constructive denial of counsel.

McAfee v. Thaler, 2011 WL 38034 (5th Cir. 2011):
Holding: Defendant has 6th Amendment right to counsel for preparation of post-trial, preappeal new trial motion.

U.S. v. Sellers, 2011 WL 1935735 (7th Cir. 2011):
Holding: Denial of Defendant's pretrial motion for a continuance to change counsel, without conducting a balancing test to determine if a continuance was warranted, denied Defendant his 6th Amendment right to counsel of his choice.

U.S. v. Adejumo, 2015 WL 467933 (8th Cir. 2015):
Holding: Even though Gov't gave notice to amend judgment to add restitution to Defendant's former trial counsel, Defendant's right to due process was violated where Defendant had a new appointed counsel and Gov't did not move to amend judgment until a year after Defendant's original sentencing.

Plunk v. Hobbs, 2013 WL 3333101 (8th Cir. 2013):
Holding: Counsel had an actual conflict of interest that adversely affected his performance where he represented Defendant and his girlfriend in drug case, and negotiated a "package deal" whereby girlfriend got probation in exchange for Defendant getting a 99-year sentence; counsel should have advised Defendant of the conflict of interest that prevented counsel from exploring more favorable plea options for Defendant.

U.S. v. Brown, 2015 WL 2215899 (9th Cir. 2015):
Holding: Trial court denied Defendant right to discharge counsel by denying change of counsel (from private to public defender) two weeks before trial without inquiring whether change would delay trial or for how long, and where court actually continued the case for a month after denying Defendant's motion; court also could not deny change by believing that Defendant would be better represented by the private counsel than a public defender.

U.S. v. Bryant, 96 Crim. L. Rep. 86 (9th Cir. 9/30/14):
Holding: Tribal court convictions can be used for later federal enhancement purposes only if the tribal court guaranteed the 6th Amendment right to counsel.

Ayala v. Wong, 93 Crim. L. Rep. 755, 2013 WL 4865145 (9th Cir. 9/13/13):
Holding: Habeas relief granted where defense counsel was excluded from *Batson* hearing at state trial; federal court was not required to give deference to state court's ruling that this was not prejudicial.

U.S. v. Roy, 95 Crim. L. Rep. 574 (11th Cir. 8/5/14):
Holding: Where defense counsel was absent from an important State's witness' testimony for seven minutes because counsel was late returning from lunch, this violated Defendant's right to counsel and, under *Cronic*, he need not show prejudice; the absence of counsel deprived Defendant of the opportunity to make objections and conduct effective cross-examination based on the direct.

Becker v. Martel, 2011 WL 1630816 (S.D. Cal. 2011):
Holding: Even though Defendant had previously waived counsel, the subsequent addition of 12 new counts and increased penalty was a substantial change that required court to readvise Defendant about right to counsel; failure to do so was prejudicial per se under 6th Amendment.

Stokes v. Scutt, 2011 WL 5250848 (E.D. Mich. 2011):
Holding: State court unreasonably applied clearly established federal law in determining that petitioner waived right to counsel, where petitioner was compelled to represent himself after being informed by the trial judge that substitute counsel would not be appointed following petitioner's expression of dissatisfaction with counsel and the judge's failure to resolve the complaints.

U.S. v. Massimino, 2011 WL 6371883 (E.D. Pa. 2011):
Holding: The defendant's attorney's conflict of interest due to prior representation of codefendant who had pleaded guilty and would testify at the defendant's trial as a cooperating witness was waivable so long as both the defendant and the cooperating witness provided informed waivers.

U.S. v. Patel, 2012 WL 3629355 (W.D. Va. 2012):
Holding: Where the Gov't was holding certain assets for forfeiture, due process required that Defendant be granted a hearing to show that the assets were being wrongfully restrained and that he needed to use the assets to retain counsel of his choice.

Wilbur v. City of Mount Vernon, 2013 WL 6275319 (W.D. Wash. 2013):
Holding: City was liable in Sec. 1983 action for denial of indigent defendants' 6th Amendment right to counsel where city paid inadequate fees for contract counsel, did not control caseload or evaluate the quality of services provided.

Wilbur v. City of Mount Vernon, 94 Crim. L. Rep. 338 (W.D. Wash. 12/4/13):
Holding: Cities' Public Defender System resulted in systemic violation of 6th Amendment right to effective counsel, because the system essentially resulted in a "meet and plead" system. Court orders creation of a "Public Defender Supervisor" to review case files and ensure attorneys are providing effective assistance.

Stone v. State, 89 Crim. L. Rep. 167, 2011 WL 1519382 (Alaska 4/22/11):
Holding: Where state law permitted a sentence review of guilty plea, Defendant had right to counsel for the appeal since *Halbert v. Michigan*, 545 U.S. 605 (2005) held that 14th Amendment requires states to provide counsel to guilty-pleading indigent defendants for first-tier appellate review.

People v. Brown, 322 P.3d 214 (Colo. 2014):
Holding: Trial judges must consider following factors in determining whether to continue case to allow Defendant to hire counsel of his choice: (1) Defendant's actions and motive surrounding request; (2) availability of chosen counsel; (3) length of continuance necessary; (4) potential prejudice to State beyond mere inconvenience; (5) inconvenience to witnesses; (6) age of case; (7) number of continuances already granted; (8) the timing of the continuance request; (9) impact on the court's docket; (10) the victim's position, if the Victim Rights Act applies; and (11) any other case-specific factors.

People v. Hoskins, 95 Crim. L. Rep. 690 (Colo. 9/8/14):
Holding: Even though law firm represented a Defendant-marijuana dispensary and had previously represented a co-defendant dispensary, State did not meet burden to disqualify firm because State did not prove that the current and former clients had materially adverse interests in the criminal case.

People v. DeAtley, 95 Crim. L. Rep. 425 (Colo. 6/16/14):
Holding: Retained lawyer should have been permitted to withdraw for conflict of interest after Defendant fired him and sued him for malpractice.

In re People v. Nazolino, 93 Crim. L. Rep. 9 (Colo. 3/15/13):
Holding: Even though Public Defender's supervisor was going to be called as a witness at trial, court should not have disqualified Public Defender based only this potential conflict of interest; Defendant waived conflict and had a right to go forward with lawyers who had represented him from the beginning.

Public Defender v. State, 93 Crim. L. Rep. 271, 2013 WL 2248965 (Fla. 5/23/13):
Holding: Public Defender Office may withdraw from cases and refuse to take new ones when there is a substantial risk that its large caseload will prevent it from carrying out is ethical obligation to provide conflict-free representation.

Johnson v. State, 90 Crim. L. Rep. 512 (Fla. 1/5/12):
Holding: The state agency that steps in when the public defender's office must withdraw over a conflict of interest has no standing to challenge the public defender's good faith assertion that it has a disqualifying conflict.

State v. Harter, 2014 WL 6975719 (Haw. 2014):
Holding: Where Defendant expressed dissatisfaction with appointed counsel and filed Bar Complaint against appointed counsel, trial court had duty to inquire as to potential

conflict of interest between Defendant and counsel; denial of Defendant's motion for substitute counsel denied effective assistance of counsel.

State v. Harter, 96 Crim. L. Rep. 297 (Haw. 12/10/14):
Holding: Where trial counsel said she needed to withdraw "to protect myself" from subsequent claims of ineffective counsel, trial court abused discretion in refusing to allow her to withdraw without inquiring into the matter; attorney's remarks implicated Defendant's right to conflict-free counsel and raised possibility that attorney's personal interest influenced her strategic decisions.

State v. Pitts, 2014 WL 235462 (Haw. 2014):
Holding: Even though Defendant waived counsel mid-trial, he was allowed to reinvoke counsel and should have been provided counsel for his new trial motion and sentencing, as these were "critical stages" to which right to counsel attached.

State v. Cramer, 2013 WL 1797763 (Haw. 2013):
Holding: Where trial court refused to allow Defendant to substitute privately-retained counsel for a Public Defender at sentencing, this violated right to counsel of choice.

Hall v. State, 94 Crim. L. Rep. 338, 2013 WL 6225673 (Idaho 12/2/13):
Holding: Statutory right to counsel requires that postconviction counsel be free of conflicts and effective; "This statutory right to counsel would be a hollow right if it did not guarantee the defendant the right to effective assistance of counsel."

People v. Jolly, 2014 WL 6843571 (Ill. 2014):
Holding: The State's participation in what was supposed to be a pro se proceeding to determine if a Defendant should be appointed counsel to raise ineffective assistance claim improperly turned the proceeding into an adversarial proceeding, requiring a new proceeding.

People v. Holt, 96 Crim. L. Rep. 228 (Ill. 11/20/14):
Holding: The 6th Amendment right to counsel does not guarantee a defendant the right to an attorney who will argue that client is competent; where attorney believes client is not competent, attorney fulfills their obligation by investigating competency independently of the State, and taking appropriate action thereafter.

Jewell v. State, 90 Crim. L. Rep. 323 (Ind. 11/30/11):
Holding: Indiana Const. prohibits police from interrogating a person about an uncharged offense that is inextricably intertwined with a charged offense on which defendant has counsel.

Johnson v. State, 89 Crim. L. Rep. 471 (Ind. 6/8/11):
Holding: Trial judge had inherent obligation to inquire as to indigent defendant's complaints about appointed counsel and should not simply refer the complaint to the Public Defender's Office; judge "must at the very least receive assurances from the public defender's office that the complaint has been adequately addressed."

State v. Young, 2015 WL 1510577 (Iowa 2015):
Holding: Prior uncounseled misdemeanor conviction could not be used to enhance later conviction where Defendant had been denied right to counsel in misdemeanor case.

State v. McKinley, 96 Crim. L. Rep. 663 (Iowa 3/13/15):
Holding: Entire Public Defender's Office was not disqualified from case merely because office represented prosecution witnesses in prior unrelated matters; Rule 1.7(a) forbids representation that will be materially limited by a lawyer's loyalties to other clients, but there was no significant likelihood here that the lawyers would be foreclosed or inhibited from any defense strategy because of their office's former representation of witnesses; Rule 1.9's prohibition against subsequent representation adverse to a former client in a substantially related case was not implicated because the prior representation had nothing to do with the new case.

State v. Walker, 2011 WL 4501966 (Iowa 2011):
Holding: Defendant's statutory right to see and consult confidentially with an attorney was violated where defendant and his attorney were separated by a glass barrier, which prevented the attorney from giving defendant informed legal advice regarding whether defendant should submit to a breathalyzer test.

State v. Sharkey, 95 Crim. L. Rep. 95 (Kan. 4/11/14):
Holding: Defendant was entitled to appointment of conflict-free counsel for new trial motion where Defendant alleged he was denied effective assistance at trial.

In re Hawver, 96 Crim. L. Rep. 233 (Kan. 11/14/14):
Holding: Court disbars defense counsel for poor performance as counsel in death penalty case; among other problems, counsel's agreement to take a flat fee of $50,000 for the case violated Rule 1.5(a) which requires a fee to be reasonable, and Rule 1.7 which deals with conflicts of interest; counsel had a financial disincentive to devote the time necessary to Defendant's case.

State v. Stovall, 94 Crim. L. Rep. 280, 312 P.3d 1271 (Kan. 11/22/13):
Holding: Counsel had an actual conflict of interest that adversely affected her performance where counsel failed to pursue a theory on Defendant's behalf that a former client of counsel actually committed the offense.

State v. Cheatham, 92 Crim. L. Rep. 492 (Kan. 1/25/13):
Holding: Flat fee in capital murder case created a conflict of interest and ineffective assistance of counsel.

State v. Smith, 88 Crim. L. Rep. 591 (Kan. 2/11/11):
Holding: Even though defense counsel believes his client is guilty, counsel is not precluded from presenting truthful documentary evidence that would demonstrate client may not be guilty and arguing that the truthful evidence demonstrates client is not guilty; this is true even though counsel believed his client was the person shown on crime scene

video; trial court should have inquired further into whether counsel who refused to present documentary evidence of alibi for Defendant should have been replaced.

Mitchell v. Com., 2014 WL 68365 (Ky. 2014):
Holding: Trial court's denial of request for "hybrid" representation, based on mistaken belief that Defendant was required either to accept counsel or go pro se, misstated the law and was reversible error.

State v. Carter, 90 Crim. L. Rep. 604 (La. 1/24/12):
Holding: A defense lawyer did not have an actual conflict of interest requiring either his disqualification or an express waiver from the client absent any evidence that counsel's own troubles with the law undermined his ability to act with undivided loyalty.

Gambrill v. State, 94 Crim. L. Rep. 678, 2014 WL 775173 (Md. 2/27/14):
Holding: Where Defendant's public defender requested a "postponement" to allow Defendant to look into hiring private counsel, the trial court was required under state Rules to ask about the reasons for the desire for change of counsel and advise Defendant of his rights.

DeWolfe v. Richmond, 94 Crim. L. Rep. 7 (Md. 9/25/13):
Holding: Maryland Constitution gives indigent defendants right to appointment of counsel at initial appearance where bail will be set.

Taylor v. State, 2012 WL 3629058 (Md. 2012):
Holding: Where attorney filed suit against client for failing to pay legal fees before a case is concluded, this raised a presumption of prejudice and conflict of interest, though not necessarily ineffective assistance.

DeWolfe v. Richmond, 2012 WL 10853 (Md. 2012):
Holding: Bail hearing was a "stage" of criminal proceedings, requiring appointment of counsel for indigent arrestees.

State v. Goldsberry, 2011 WL 1544808 (Md. 2011):
Holding: Failure to develop factual record to support trial court's decision to remove defense counsel of Defendant's choice denied him 6th Amendment right to counsel.

In re Grand Jury Investigation, 96 Crim. L. Rep. 421 (Mass. 1/12/15):
Holding: Where a search warrant was needed to obtain a Defendant's cell phone (but warrant has not been sought), Grand Jury cannot obtain the cell phone by subpoenaing it, and this is true even though Defendant gave the cell phone to his lawyer; "If a client could not be compelled to produce materials because of the right against self-incrimination, and if the client transfers the material to the attorney for the provision of legal advice, an attorney likewise cannot be compelled to produce them."

Com. v. Gautreaux, 88 Crim. L. Rep. 543 (Mass. 1/20/11):
Holding: Article 36 of the Vienna Convention on Consular Relations creates an individually enforceable right to consular notification, but to obtain a new trial for violation, Defendant must show a substantial risk of miscarriage of justice.

Com. v. McNulty, 2010 WL 4630695 (Mass. 2010):
Holding: Police violated state constitutional right to counsel by not informing Defendant who was undergoing interrogation that an attorney wanted to speak with him and was telling him not to talk to police.

State v. Krause, 2012 WL 3023199 (Minn. 2012):
Holding: Failure to provide counsel at hearing to determine whether Defendant had forfeited his right to appointed counsel violated due process.

Hill v. State, 94 Crim. L. Rep. 554 (Miss. 2/6/14):
Holding: Even though there is no 6th Amendment right to "standby" or "advisory" counsel, where the trial court appointed such counsel and then ordered her not to reveal a confidential informant to Defendant even though this would have helped the defense, the Defendant was deprived of his right to effective assistance of counsel, because the trial court blocked counsel from rendering effective help.

Kiker v. State, 88 Crim. L. Rep. 696, 2011 WL 539065 (Miss. 2/17/11):
Holding: Defense counsel's actual conflict of interest was not cured by his co-counsel taking the lead role at defendant's trial.

People v. Washington, 95 Crim. L. Rep. 218 (N.Y. 5/6/14):
Holding: Police violated statutory right to counsel in DWI case where they did not tell Defendant that a lawyer hired by her family was trying to contact her at the police station before she took a Breathalyzer test.

People v. Carr, 2015 WL 140482 (N.Y. 2015):
Holding: Trial court violated Defendant's right to counsel when it excluded defense counsel from a hearing on why a State's witness failed to show up for court; the hearing was more than a ministerial discussion of scheduling, and went to the witness' drug use and credibility.

People v. Cortez, 94 Crim. L. Rep. 496 (N.Y. 1/21/14):
Holding: Trial court erred in deferring to defense counsel's representation that she had discussed a co-defendant conflict with Defendant and that he knowingly waived it; trial court must actively instruct a defendant about dangers of waiving conflicts of interest.

People v. Kordish, 2013 WL 5637741 (N.Y. 2013):
Holding: Appellate court erroneously failed to appoint counsel for indigent defendant/appellant before dismissing the appeal for failure to perfect appeal.

People v. Lopez, 88 Crim. L. Rep. 635 (N.Y. 2/22/11):
Holding: Under New York constitution's right to counsel, police are required to ask suspects whether they already have counsel if "there is a probable likelihood" that they do on the offense they are being interrogated about; suspect may not be questioned in counsel's absence.

State v. Schleiger, 2014 WL 4746610 (Ohio 2014):
Holding: The 6th Amendment right to counsel applies at a hearing for postrelease control because this is a critical stage that is an extension of actual sentence.

State v. Bode, 2015 WL 1841337 (Ohio 2015):
Holding: Prior uncounseled juvenile adjudication where juvenile faced incarceration was one where due process required counsel, so the prior adjudication cannot be used to enhance later offense.

State v. Chambliss, 89 Crim. L. Rep. 130 (Ohio 4/19/11):
Holding: Trial court's removal of retained defense counsel may be immediately appealed.

State v, Langley, 2012 WL 1038674 (Or. 2012):
Holding: No waiver of the defendant's constitutional right to counsel could be inferred from the defendant's pattern of misconduct and noncooperation prior to trial.

State v. Fuentes, 94 Crim. L. Rep. 560 (Wash. 2/6/14):
Holding: Where police (jailers) listened to taped phone conversations between Defendant and his lawyer, there is a presumption of prejudice, and the conviction must be vacated unless the State can prove beyond a reasonable doubt that the eavesdropping did not cause any prejudice.

State v. Bevel, 93 Crim. L. Rep. 398 (W.Va. 6/13/13):
Holding: Under West Virginia Constitution, a defendant who has been arraigned and appointed counsel can validly waive the right to counsel only if he initiates the conversation with police (disagreeing with *Montejo v. Louisiana*, 556 U.S. 778 (2009)).

Osterkamp v. Browning, 2011 WL 681098 (Ariz. Ct. App. 2011):
Holding: Indigent movant was entitled to appointment of counsel to represent him in second PCR proceeding alleging ineffective assistance of PCR counsel.

Harris v. Superior Court, 2014 WL l653133 (Cal. App. 2014):
Holding: Counsel was ineffective and had conflict of interest where counsel himself was being prosecuted on a separate felony charge by the same Prosecutor's Office that was prosecuting Defendant.

People v. Valasco-Palacios, 2015 WL 1312209 (Cal. App. 2015):
Holding: Prosecutor violated Defendant's right to counsel by inserting a fabricated confession to rape into a translated-from-Spanish-interrogation transcript and giving false

transcript to defense counsel at a time when Prosecutor knew that counsel was trying to persuade Defendant to settle the case; Prosecutor's misconduct was so egregious to warrant dismissal of charges.

People v. Smith, 2012 WL 1528804 (Cal. App. 2012):
Holding: The defendant should have been informed of his right to misdemeanor prosecution with a jury trial and appointed counsel for "woblette" offense (an offense categorized as a hybrid between an infraction and a misdemeanor) of being a minor in possession of an alcoholic beverage.

People v. Stidham, 2014 WL 4458928 (Colo. App. 2014):
Holding: The 6th Amendment right to counsel of choice is implicated where Defendant hires a law firm expecting to be represented by a particular lawyer at firm, but the firm sends a different lawyer to court to represent Defendant, whom Defendant does not want; court may be required to grant a continuance in such circumstance to allow Defendant to obtain counsel of choice.

Newland v. Com. of Corrections, 2014 WL 2723909 (Conn. App. 2014):
Holding: Even though Public Defender determined Defendant was ineligible, he did not validly waive counsel where he told court he did not want to represent himself, wanted counsel, but could not afford counsel; the finding of ineligibility was erroneously based on Defendant's ownership of property that was being foreclosed on; Defendant also was not informed of his right to appeal Public Defender's determination.

Penn v. State, 2011 WL 115941 (Fla. App. 2011):
Holding: Where counsel told court that "the last time she talked to Defendant, he wanted her off his case," the court was required to conduct a preliminary examination of effectiveness of counsel.

Gibson v. State, 2013 WL 363427 (Ga. App. 2013):
Holding: A restitution hearing is a critical stage of proceedings at which Defendant is entitled to counsel.

People v. Murphy, 2013 WL 3025202 (Ill. App. 2013):
Holding: Counsel's simultaneous representation of Defendant and state's witness in case was per se conflict of interest.

Camm v. State, 2011 WL 5546909 (Ind. Ct. App. 2011):
Holding: Permanent conflict of interest was created where prosecutor had entered into a contract to author a book about a murder prosecution, requiring a special prosecutor for defendant's third retrial, even though the prosecutor had cancelled the contract when defendant's conviction was reversed.

Camm v. State, 90 Crim. L. Rep. 267 (Ind. Ct. App. 11/15/11):
Holding: Where prosecutor had entered into book contract to write about case, he was disqualified under Model Rule 1.8(d) from prosecuting the case, even though the contract was ultimately cancelled.

Tigue v. Com., 2011 WL 3962504 (Ky. Ct. App. 2011):
Holding: Defendant was denied counsel at critical stage where his counsel failed or refused to file motion to withdraw guilty plea.

People v. Buie, 2011 WL 93003 (Mich. App. 2011), appeal granted, 489 Mich. 938, 797 N.W.2d 640 (2011):
Holding: Permitting witnesses to testify via two-way, interactive video technology without defendant's consent was plain error in that it violated defendant's right to confrontation.

Yarbrough v. State, 2014 WL 2091256 (Miss. App. 2014):
Holding: Counsel had actual conflict of interest in simultaneously representing both assault Victim and Defendant.

State v. Nunez, 2014 WL 2573988 (N.J. Super. Ct. App. 2014):
Holding: Defendant's right to counsel was violated where State was allowed to call defense investigator to testify about statements made by a witness; right to counsel includes the right to thoroughly investigate case; having to risk the State's introduction of results of defense investigation denies effective assistance of counsel.

State v. Raul L., 2014 WL 2503745 (N.Y. App. 2014):
Holding: Even though appointed counsel was allowed to withdraw due to inadequate time to prepare, where Defendant in SVP proceeding did not express any desire to go pro se until after court told him that appointing new counsel would delay trial by four or more months, Defendant's waiver of counsel was not unequivocal and was not voluntary.

People v. Washington, 2013 WL 1632694 (N.Y. App. 2013):
Holding: Even though Driver has already consented to a breath test for DWI, where their attorney then appears, police must make reasonable efforts to inform Driver of their counsel's appearance if such notification will not substantially interfere with the timely administration of the test.

People v. Bowles, 90 Crim. L. Rep. 264 (N.Y. App. Div. 11/1/11):
Holding: Defendant has due process right to effective assistance of counsel in assessment hearing under New York's Sex Offender Registration Law because of stigmatizing effect of registration.

People v. Strotehrs, 2011 WL 3503237 (N.Y. App. Div. 2011):
Holding: Beginning suppression hearing without defense counsel being present was fundamental error, even though counsel for co-defendant was present; defendant entitled to new suppression hearing.

Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Op. 2013-4 (10/11/13), reported in 94 Crim. L. Rep. 182:
Holding: A Public Defender generally will be permitted to impeach a former client with a prior conviction. Rule of professional conduct that lawyers have a continuing obligation to past clients including a duty to avoid using "information relating to the representation to the disadvantage of the former client" has an exception for information that "has become generally known." That exception applies where a Public Defender seeks to examine a former client about a prior conviction because the prior conviction is generally known as a matter of public record. However, counsel would be prohibited "from using any other information" learned during the prior representation. "For example, if the former client indicated to the public defender a willingness to lie under oath within the prior representation, the public defender may not use that information against the former client." A lawyer should not be forced against his own judgment to continue a representation that requires the lawyer to impeach a former client. Additionally, if a conflict is found, the conflict would be imputed to every lawyer in that Public Defender's office.

State v. Kasler, 2013 WL 4792539 (Ohio App. 2013):
Holding: Trial court abused discretion in denying appointed counsel to 21-year-old college student; even though Defendant lived with parents whose household income exceeded indigency limits, Defendant repeatedly said that her parents would not help her hire counsel; the trial court believed Defendant's parents "ought to" hire counsel, but the relevant inquiry was whether Defendant alone had the ability to hire counsel.

Faulkner v. State, 2011 WL 4089863 (Okla. Crim. App. 2011):
Holding: Where Prosecutor had represented Defendant 18 months earlier to enable him to adopt child, it was conflict of interest for Prosecutor to then prosecute Defendant for sex abuse of the adopted child.

State v. Lile, 2014 WL 7335174 (Or. App. 2014):
Holding: Presence of police officer within hearing of DWI Defendant who was trying to call his attorney before a breath test violated state constitution's right to counsel provision, and required suppression of breath test, even though Defendant only reached attorney's receptionist.

State v. Menefee, 2014 WL 7450769 (Or. App. 2014):
Holding: Even though pro se Defendant had disruptive behavior, trial court violated his right to representation by removing him from courtroom and continuing with trial; while Defendant can forfeit the right to be present and right to self-representation, he does not necessarily forfeit the right to any representation; judge should have terminated Defendant's right to self-representation and advised of right to representation.

Rubalcado v. State, 94 Crim. L. Rep. 763 (Tex. App. 3/19/14):
Holding: Defendant's invocation of counsel at a bail proceeding is enforceable against investigators from another county, even though they may not have actually been aware of

the invocation; one set of state actors (the police) cannot claim ignorance of Defendant's unequivocal request for counsel from another state actor (the court); the 6th Amendment requires imputation of knowledge from one State actor to another because it protects a person's encounter with the State.

Adams v. State, 2013 WL 6516398 (Tex. App. 2013):
Holding: Defendant was denied 6th Amendment right to counsel where on first day of trial he requested additional time to hire counsel, where he did not unequivocally waive counsel, and where the court appointed only a "shadow" counsel for the trial.

Bowen v. Carnes, 2011 WL 2408749 (Tex. Crim. App. 2011):
Holding: Trial court abused discretion in disqualifying Defendant's retained defense counsel because he had previously represented one of the State's witnesses in an unrelated case.

Death Penalty

State ex rel. Clayton v. Griffith, 2015 WL 1442957 (Mo. banc March 14, 2015):
Holding: Sec. 552.060.2 (regarding competency to be executed) is constitutional because it merely allows the DOC to assert that a Defendant is not competent to be executed; it does not limit a Defendant's own right to seek a judicial determination of competency. The Defendant may raise his incompetency via a writ of habeas corpus directly in the Supreme Court.

State ex rel. Taylor v. Russell, 2014 WL 6961207 (Mo. banc Dec. 9, 2014):
Even though Warden contended that allowing co-defendant/brother of Defendant to witness Defendant's execution would compromise safety of prison, Sec. 546.740 provides that Defendant may designate any witness who is not another inmate and who is at least 21 years old to be a witness; writ of mandamus granted to require Warden to allow co-defendant/brother as witness.
Facts: Death-sentenced Defendant sought to designate his co-defendant/brother to witness his execution. The State contended that since victims would be present, this would present a security risk for the prison, so the Warden was authorized to exclude him. Defendant brought a writ of mandamus to compel Warden to allow co-defendant/brother to attend.
Holding: Sec. 546.740 allows a death-sentenced Defendant to designate "any person, other than another incarcerated offender, relatives or friends, not to exceed five, to be present at the execution" provided such persons are at least 21 years old. Sec. 217.025.6 allows a Warden to take actions "necessary for the proper management" of prisons. Where one statute deals with the subject matter in a general way, and the other in a specific way, to the extent they conflict, the specific statute controls over the general one. Here, the statutes conflict, but Sec. 546.740 is the more specific so it controls. It requires that the Warden "shall" allow the designated witnesses. The designated witness is not incarcerated and is not under 21. Therefore, he must be allowed. To the extent Warden believes safety is at issue, he may provide security officers. Writ of mandamus granted.

State ex rel. Middleton v. Russell, 435 S.W.3d 83 (Mo. banc 2014):
Holding: Rule 91 habeas corpus is proper means to assert claim that Defendant is incompetent to be executed. However, Defendant failed to meet threshold showing of incompetence required by *Panetti* and *Ford*.
Dissenting opinion: Dissenting opinion questions constitutionality of competency to be executed statute, Sec. 552.060, because it has a "fundamental structural flaw" in that it places the decision to invoke the statute in the executive branch; *Ford* criticized Florida's statutory scheme for consolidating whether a defendant is competent in the governor and administrative officials in the executive branch.

State v. Bowman, No. SC90618 (Mo. banc 4/12/11):
State cannot present in penalty phase evidence about Defendant's prior convictions which were later reversed, even though this also constituted prior bad acts and non-statutory aggravating circumstances.
Facts: Defendant was charged with a murder which occurred in 1977. The evidence against Defendant was DNA in the victim's underwear and an eyewitness who picked Defendant out of a photo line up 30 years after the murder. After 1977, Defendant was convicted of two additional murders in Illinois, but those convictions were later vacated by Illinois courts. In the death penalty phase, the State was permitted to introduce evidence about Defendant's prior Illinois convictions. The jury imposed death.
Holding: *Johnson v. Mississippi*, 486 U.S. 578 (1988), held that the reversal of a prior conviction that the jury considered in imposing death undermines the validity of the death sentence. In *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007), this Court used *Johnson* to reverse a death sentence because two of six aggravating factors found by the jury consisted of McFadden's conviction and death sentence in another case. This case is similar to *McFadden*. The State argues that the evidence of Defendant's vacated convictions is admissible as unadjudicated prior bad acts, also referred to as non-statutory aggravating circumstances. Even if true, however, this Court cannot assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that Defendant previously had been convicted of two murders. Death sentence is vacated and remanded for new penalty phase trial.

Concurring and dissenting opinion: Judge Wolff would hold that the evidence, although (barely) sufficient to convict, is not sufficient to sustain a death sentence. He notes problems with the DNA evidence, problems with reliability of an eyewitness identification 30 years after the fact, and evidence that another person may have committed the crime. He would impose a sentence of life without parole under Sec. 565.035.5(2).

*** Brumfield v. Cain, ___ U.S. ___, 135 S.Ct. 2269 (U.S. June 18, 2015):**
Holding: State court unreasonably determined the facts in finding that a death-sentenced inmate had not made a sufficient showing that he was intellectually disabled to warrant an evidentiary hearing on his *Atkin*s claim, where inmate alleged he had an IQ of 75, a fourth-grade reading level, had been in special education, had a learning disability, and had been treated at a number of psychiatric hospitals as a child; petitioner-inmate was entitled to have his claim considered on the merits in federal habeas.

*** Glossip v. Gross, ___ U.S. ___, 135 S.Ct. 2726 (U.S. June 29, 2015):**
Holding: Death-sentenced inmates who challenged use of midazolam in execution protocol failed to identify a known, available alternative execution method that carried a lesser risk of pain, and failed to prove use of midazolam entails a substantial risk of severe pain; Justices Breyer and Ginsburg write notable dissent saying death penalty application of death penalty "highly likely" violates the Eighth Amendment because of (1) serious unreliability in that innocent persons have been sentenced to death, (2) arbitrariness in application based on geography, race and gender, and (3) unconscionably long delays that undermine the death penalty's penological purpose, and (4) declining use of the death penalty.

*** Hall v. Florida, 95 Crim. L. Rep. 261, ___ U.S. ___, 134 S.Ct. 1986 (U.S. 5/27/14):**
Holding: *Atkins* prohibits States from setting strict IQ limits to prove intellectual disability (mental retardation) and does not give States "unfettered discretion to define the full scope of the constitutional protection"; "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."

*** Hinton v. Alabama, ___ U.S. ___, 94 Crim. L. Rep. 613, 134 S.Ct. 1081 (U.S. 2/24/14):**
Holding: Counsel in capital case was ineffective for erroneously believing that he could not seek extra funding to hire a more qualified forensic expert; even though choice of expert is usually a strategy decision, the attorney's decision here was not based on any strategy but on a mistaken belief that the only available funds were capped at $1,000 and that there was only one ballistics expert available at that rate; "[a]n attorneys' ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."

*** Woodward v. Alabama, ___ U.S. ___, 94 Crim. L. Rep. 254, 134 S.Ct. 405 (U.S. 11/18/13):**
Holding: Justices Sotomayor and Breyer issue dissenting opinion from denial of cert. in which they suggest that Alabama's death penalty system which allows judges to override juries' sentences of life and judicially impose death (1) violates 8th Amendment because evidence indicates that judges are motivated to do this by electoral pressures of running for office, and (2) violates 6th Amendment right to have a jury decide factual findings that increase punishment under *Apprendi* and *Ring*.

***Valle v. Florida, 90 Crim. L. Rep. 33 (U.S. 9/28/11)(Breyer, J., dissenting):**
Holding: Justice Breyer dissents from denial of cert. posing question of whether decades of incarceration on death row violates 8th Amendment ban on cruel and unusual punishment; to those who say the Defendant is responsible for the delays, the "delay reflects the State's failure to provide the kind of trial and penalty procedures that the law requires."

*** Leal Garcia v. Texas, ___ U.S. ___, 89 Crim. L. Rep. 625 (U.S. 7/7/11):**
Holding: The mere introduction of legislation in the U.S. Senate to implement the Vienna Convention on Consular Rights (re: notification of consular officials that their national has been arrested) is not a sufficient reason to stay execution of a Mexican national because the legislation has not yet passed.

*** Bobby v. Mitts, ___ U.S. ___, 89 Crim. L. Rep. 163, 2011 WL 1631037 (U.S. 5/2/11):**
Holding: Habeas relief not warranted where jury instruction told jurors they must acquit Defendant of death penalty before considering lesser punishments; instruction told jurors not to deliberate on lesser punishments unless they have decided that prosecutors failed to prove that the aggravating circumstances outweighed the mitigating circumstances.

*** Cullen v. Pinholster, ___ U.S. ___, 89 Crim. L. Rep. 5, 131 S.Ct. 1388 (U.S. 4/4/11):**
Holding: Federal habeas court is limited to reviewing the evidence that was before the state court in determining under 28 USC 2254(d)(1) if state court decision is "contrary to, or an unreasonable application of clearly established federal law"; federal court should not have considered new mitigating evidence that was not presented to state court in considering ineffective assistance of counsel claim; it was not unreasonable for state court to conclude that counsel made a strategic decision not to present further evidence of defendant's mental problems because that could lead jury to believe that defendant could not be rehabilitated.

U.S. v. Pleau, 90 Crim. L. Rep. 100 (1st Cir. 10/13/11):
Holding: Where the federal gov't sought to obtain custody of Defendant for death penalty charges under Interstate Agreement on Detainers (IAD) but State governor refused to allow the transfer since State had no death penalty, the federal government was then precluded from seeking to obtain Defendant's custody through a writ of habeas corpus ad prosequendum since it had originally sought to use the IAD.

Blystone v. Horn, 2011 WL 6598166 (3rd Cir. 2011):
Holding: State appellate court's determination that petitioner did not experience ineffective assistance of counsel was contrary to clearly established federal law, where counsel failed to develop expert mental health testimony and institutional records in mitigation of a death sentence.

In re Campbell, 95 Crim. L. Rep. 243 (5th Cir. 5/13/14):
Holding: Where prosecutors failed to disclose results of IQ tests of Defendant showing he had low IQ, Defendant was entitled to file a successive habeas petition and receive a stay of execution.

Cauthern v. Colson, 2013 WL 603891 (6th Cir. 2013):
Holding: Prosecutor's reference at capital sentencing hearing comparing Defendant to notorious recent murderers were inflammatory and personalized to jurors by making them feel personally unsafe if they did not return a death verdict.

Woodall v. Simpson, 2012 WL 2855798 (6th Cir. 2012):
Holding: Death penalty Defendant had 5th Amendment right to a no adverse inference from his failure to testify in penalty phase instruction.

Black v. Bell, 2011 WL 6224560 (6th Cir. 2011):
Holding: State appellate court's assessment of capital defendant's level of intellectual and adaptive functioning for *Atkins* purposes was contrary to federal law, where the court did not specify which IQ scores it relied on and why.

Sowell v. Anderson, 2011 WL 5526381 (6th Cir. 2011):
Holding: Failure to conduct thorough investigation of defendant's childhood constituted ineffective assistance of counsel where the state was seeking the death penalty and reports on the record referenced defendant's horrific childhood.

Foust v. Houk, 2011 WL 3715155 (6th Cir. 2011):
Holding: Death penalty counsel ineffective in not obtaining records about client's life history and failing to interview family members.

U.S. v. Gabrion, 89 Crim. L. Rep. 713, 2011 WL 3319532 (6th Cir. 8/3/11):
Holding: Defendant charged with federal death penalty has right to present as mitigating evidence fact that State in which he is charged has abolished the death penalty.

Goodwin v. Johnson, 2011 WL 181468 (6th Cir. 2011):
Holding: Death penalty counsel ineffective in penalty phase in failing to present evidence of childhood abuse, alcoholic and drug using mother, sexual molestation and abandonment by both parents.

Pruitt v. Neal, 97 Crim. L. Rep. 274 (7th Cir. 6/2/15):
Holding: Trial court, in determining whether Defendant was too intellectually disabled to be executed under *Atkins*, placed too much weight on Defendant's history of having jobs, and not enough weight on his below average IQ scores; none of the jobs Defendant had required high intellectual functioning.

Zink v. Lombardi, 96 Crim. L. Rep. 622 (8th Cir. 3/6/15):
Holding: Defendants challenging lethal injection must not only show a substantial risk of severe pain but also that there exists a "reasonably available" alternative.

U.S. v. Johnson, 95 Crim. L. Rep. 669 (8th Cir. 8/25/14):
Holding: The Anti-Drug Abuse Act requires resentencing in capital cases to be a complete do-over of both the eligibility phase and the penalty-selection phase even though the error in the original proceedings affected only the second stage of the original, bifurcated sentencing hearing.

Wood v. Ryan, 95 Crim. L. Rep. 506 (9th Cir. 7/21/14):
Holding: Stay of execution granted so death-sentenced Defendant can pursue First Amendment claim that he is entitled to information about execution drugs.

James v. Schriro, 2011 WL 4820605 (9th Cir. 2011):
Holding: Defendant was prejudiced by ineffective counsel at penalty phase of capital murder trial where counsel failed to conduct a basic investigation of defendant's social history, mental health and drug abuse.

Dodd v. Trammell, 2013 WL 7753714 (10th Cir. 2013):
Holding: In death penalty case, where victim-impact witnesses were allowed to testify that they wanted Defendant to be sentenced to death, this violated 8th Amendment, warranted habeas relief, and was not harmless under *Brecht*.

Dodd v. Trammell, 93 Crim. L. Rep. 776 (10th Cir. 9/16/13):
Holding: Habeas relief granted where victim impact statement in death penalty case contained recommendation for death; prohibition on victim's sentencing recommendation in death penalty case in *Booth v. Maryland*, 482 U.S. 496 (1987) remains good law despite *Payne*.

Ochoa v. Workman, 2012 WL 130718 (10th Cir. 2012):
Holding: Inmate's habeas claims were *Atkins* claims, despite the fact that they implicated Fourteenth Amendment Due Process Clause protections.

DeBruce v. Alabama Dept. of Corrections, 95 Crim. L. Rep. 511 (11th Cir. 7/15/14):
Holding: Death penalty counsel was ineffective for not investigating serious mental health issues raised by a competency report, and instead limiting the search for mitigation to discussion with Defendant's mother.

Arthur v. Thomas, 91 Crim. L. Rep. 72 (11th Cir. 3/21/12):
Holding: Even though other cases have upheld lethal injection protocol, this does not preclude Defendant from trying to show that the protocol would be cruel and unusual in his particular case.

Magwood v. Warden, Alabama Dept. of Corrections, 2011 WL 6306665 (11th Cir. 2011):
Holding: Death sentence violated fair-warning requirement of the Due Process Clause, as it was based on an unforeseeable and retroactive judicial expansion of narrow and precise language of the death penalty statute.

Conner v. Hall, 89 Crim. L. Rep. 666 (11th Cir. 7/7/11):
Holding: *Atkins* mental retardation claim is not defaulted in federal habeas because state court had not been consistently and regularly applying a state default.

Johnson v. Secretary, 2011 WL 2419885 (11th Cir. 2011):
Holding: Death penalty counsel ineffective in failing to investigate bad childhood, abusive and alcoholic father, and family abandonment; counsel only interviewed Defendant about his background and waited to 11th hour to prepare for penalty phase.

Ferrell v. Hall, 2011 WL 1811132 (11th Cir. 2011):
Holding: Counsel was ineffective in failing to investigate mitigation where Defendant exhibited "red flags" of mental disorders, including facial tics, strange affect, obsessive religious beliefs, and odd behaviors; counsel failed to investigate and present abusive childhood, poverty and mental health as mitigation.

Roane v. Leonhart, 2014 WL 259659 (D.C. Cir. 2014):
Holding: Capital Defendant had right to intervene in lethal injection protocol litigation against Gov't.

Cook v. FDA, 93 Crim. L. Rep. 583 (D.C. Cir. 7/23/13):
Holding: The FDA's policy of not addressing state government's importation of drugs used for executions violates the FDA Act; thus, court affirms injunction that blocked importation of such drugs.

Roth ex rel. Bower v. Dept. of Justice, 89 Crim. L. Rep. 621 (D.C. Cir. 6/28/11):
Holding: Death-sentenced Defendant is entitled to use FOIA to obtain records from FBI showing he is innocent; claim of innocence outweighs privacy rights of third parties mentioned in FBI investigative records.

Jones v. Chappell, 2014 WL 3567365 (C.D. Cal. 2014):
Holding: California's death penalty system is arbitrary and capricious under 8th Amendment because of long delays and because only 13 of 900 defendants since 1978 have been executed; in effect, sentences are life sentences with remote possibility of death, which no rational legislature or jury could ever impose.

Johnson v. U.S., 2012 WL 1836282 (N.D. Iowa 2012):
Holding: Counsel was ineffective in penalty phase in failing to provide drug expert witness with data regarding Defendant's prior drug history.

Brumfield v. Cain, 2012 WL 602163 (M.D. La. 2012):
Holding: A capital murder defendant satisfied Louisiana's test for mental retardation, so that his execution was barred under *Atkins*.

U.S. v. Sampson, 2011 WL 5022335 (D. Mass. 2011):
Holding: Where juror provided inaccurate responses during voir dire, a new trial was required to determine whether the death penalty was justified.

Branch v. Epps, 2011 WL 6026516 (N.D. Miss. 2011):
Holding: Death penalty petitioner was entitled to habeas relief on grounds of mental retardation, as shown by Stanford-Benet Intelligence Scale, WAIS, adaptive functioning problems, and presence before age 18 with no signs of malingering.

Steele v. Beard, 2011 WL 5588711 (W.D. Pa. 2011):
Holding: Pennsylvania's standard jury instruction form on mitigating evidence and the verdict form violated Eighth Amendment in penalty phase of capital murder case in that the forms likely misled the jury to believe unanimity was required regarding mitigating evidence.

Wolfe v. Clarke, 2011 WL 3251494 (E.D. Va. 2011):
Holding: Even though venirepreson said initially that he couldn't impose death, where he later said there were times he could impose it and he'd follow the law and listen to the facts, he should not have been struck by the court under *Witherspoon/Witt*.

U.S. v. Stitt, 2010 WL 5600986 (E.D. Va. 2010):
Holding: Confrontation Clause applies to capital penalty phase.

Morehart v. Barton, 2011 WL 1599648 (Ariz. 2011):
Holding: Murder victim's family had no right to attend ex parte hearing on defense mitigation investigation.

Hobbs v. Jones, 2012 WL 2362712 (Ark. 2012):
Holding: Statute which delegated to the DOC the authority to determine which chemicals to use for lethal injection violated separation of powers because the Legislature gave unfettered discretion to DOC on all protocols and procedures.

Miller v. State, 2012 WL 129708 (Ark. 2012):
Holding: The trial court erred when it allowed witnesses, when giving victim impact statements, to tell the jury they wanted a death sentence.

People v. Smith, 2015 WL 1882201 (Cal. 2015):
Holding: Exclusion in death penalty phase of former Warden's testimony that prison security procedures made it unlikely that Defendant would be dangerous if sentenced to LWOP violated due process; this prevented Defendant from rebutting State's claim that Defendant would be dangerous in prison.

People v. Hensley, 95 Crim. L. Rep. 554 (Cal. 7/31/14):
Holding: Death sentence reversed where Juror consulted with his Minister about "mercy and sympathy" during penalty phase deliberations.

People v. Riccardi, 2012 WL 2874237 (Cal. 2012):
Holding: Trial court erred in striking death penalty venireperson based solely on written questionnaire which answers were ambiguous as to whether the venireperson could consider death penalty; court should have conducted actual voir dire of venireperson.

People v. Pearson, 2012 WL 34145 (Cal. 2012):
Holding: Automatic reversal of the death penalty was required, where prospective juror was erroneously excused for cause based on her indefinite views on the merits of the death penalty.

State v. Santiago, 97 Crim. L. Rep. 623 (Conn. 8/25/15):
Holding: State death penalty is cruel and unusual; it no longer comports with contemporary standards of decency or serves legitimate penological purposes.

State v. Komisarjevsky, 2011 WL 3557908 (Conn. 2011):
Holding: Defendant's 6th Amendment right to a fair trial and to prepare a defense allowed court to seal defense witness list from the media and public prior to trial.

Oyola v. State, 96 Crim. L. Rep. 582 (Fla. 2/19/15):
Holding: Sentencing judge improperly considered nonstatutory aggravating factor where he sentenced Defendant to death as added punishment to the life sentence Defendant previously received for a prior murder; Judge said he wanted to provide "additional consequence" for the prior murder.

Delago v. State, 162 So.3d 971 (Fla. 2015):
Holding: Death sentence disproportionate where Defendant who killed police officer had no significant prior criminal history, had severe mental health problems, and had not planned the killing.

Marquardt v. State, 96 Crim. L. Rep. 492 (Fla. 1/22/15):
Holding: In death penalty case, where Defendant waives presentation of mitigating evidence, court must appoint an independent counsel to present mitigation in order to fulfill the public interesting in consideration of mitigation.

Griffin v. State, 2013 WL 2096350 (Fla. 2013):
Holding: Counsel was ineffective in capital case in (1) having Defendant plead guilty based on unsubstantiated hunch that judge would not sentence Defendant to death; (2) failing to present evidence of drug use, family history of substance abuse and mental illness, history of depression and brain injury; (3) failing to obtain school and medical records, and (4) failing to rebut erroneous statements by State's medical expert in penalty phase.

Hall v. State, 2012 WL 6619321 (Fla. 2012):
Holding: Trial court's finding that Defendant was mentally retarded as mitigation in death penalty case did not estop a later claim under *Atkins*.

Gordon v. State, 2011 WL 4596660 (Fla. 2011):
Holding: Defendant's may not proceed pro se in postconviction appeals if they have been sentenced to death.

Ballard v. State, 2011 WL 2566348 (Fla. 2011):
Holding: Death penalty disproportionate where Defendant's age was mitigating, and there was only one aggravator factor and three mitigating factors, and Defendant was under influence of extreme mental and emotional disturbance, and his capacity to appreciate the criminality of his conduct was impaired.

State v. Coleman, 89 Crim. L. Rep. 475 (Fla. 6/2/11):
Holding: Where counsel's ineffectiveness led judge to override jury's verdict of life and impose death, the remedy for the ineffective assistance is for the trial court to impose a sentence of life.

Ellington v. State, 2012 WL 5833566 (Ga. 2012):
Holding: Defendant charged in death penalty case had right to ask venirepersons if they would automatically impose death if the victims were young children.

In re Brizzi, 91 Crim. L. Rep. 15 (Ind. 3/12/12):
Holding: Prosecutor violated ethical rules on trial publicity and special responsibility of prosecutors when he published press release that said the evidence was overwhelming and to not seek the death penalty would be a "travesty" in this case.

State v. Gleason, 2014 WL 3537404 (Kan. 2014):
Holding: Death penalty reversed where instructions filed to instruct jurors that mitigating circumstances need not be proven beyond a reasonable doubt.

State v. Carr, 2014 WL 3681049 (Kan. 2014):
Holding: Trial court's refusal to sever joint penalty phase of capital trial so that Defendant and co-Defendant could have their penalties decided separately was not harmless; joint trial rendered jury unable to consider how aggravating evidence and mitigating evidence applied to each defendant separately.

In re Hawver, 96 Crim. L. Rep. 233 (Kan. 11/14/14):
Holding: Court disbars defense counsel for poor performance as counsel in death penalty case; among other problems, counsel's agreement to take a flat fee of $50,000 for the case violated Rule 1.5(a) which requires a fee to be reasonable, and Rule 1.7 which deals with conflicts of interest; counsel had a financial disincentive to devote the time necessary to Defendant's case.

State v. Cheatham, 92 Crim. L. Rep. 492 (Kan. 1/25/13):
Holding: Flat fee in capital murder case created a conflict of interest and ineffective assistance of counsel.

St. Clair v. Com., 95 Crim. L. Rep. 671 (Ky. 8/21/14):
Holding: Even though murder Defendant escaped and then killed a second person, State cannot present victim-impact testimony about the second murder during the first murder's penalty phase; the victim impact statute allowing "the impact of the crime upon the victim" means such evidence is limited to the murder for which Defendant is on trial.

Mullikan v. Com., 89 Crim. L. Rep. 600 (Ky. 6/16/11):
Holding: Even though a statute allows jury in noncapital penalty phase to hear "the nature of prior offenses," the evidence of prior convictions must be limited to conveying only the elements of the crimes previously committed; "We suggest that this be done either by reading of the instructions of such crime from an acceptable form book or from the Kentucky Revised Statute itself"; details of the prior crimes beyond the statutory elements are improper.

Gillett v. State, 95 Crim. L. Rep. 422 (Miss. 6/12/14):
Holding: Where capital sentencing jury heard evidence of an aggravator that was later invalidated, this was not harmless.

Harrell v. State, 2014 WL 172125 (Miss. 2014):
Holding: Capital jury instruction for capital murder based on underlying felony of robbery was erroneous where it failed to instruct jury on what constituted the crime of robbery.

Grayson v. State, 93 Crim. L. Rep. 157 (Miss. 4/18/13):
Holding: Mississippi recognizes right to effective assistance of counsel in postconviction death penalty cases (but finds was harmless here); "Because this Court has recognized that PCR proceedings are a critical stage of the death-penalty appeal process at the state level, today we make clear that PCR petitioners who are under sentence of death have a right to the effective assistance of PCR counsel"; petitioner had alleged that appointed PCR's counsel large caseload prohibited him from investigating case.

Davis v. State, 2012 WL 1538303 (Miss. 2012):
Holding: The failure of counsel for a capital murder defendant to conduct a reasonable, independent investigation to seek out readily available mitigation witnesses, facts, and evidence for the sentencing phase, and instead solely relying on witnesses suggested by the defendant, was not a matter of trial strategy and constituted ineffective assistance of counsel.

People v. Taylor, 2010 WL 4642461 (N.Y. 2010):
Holding: Even though Defendant struck victim on head and then put bag over her head, this was legally insufficient to prove torture or brutal, prolonged course of conduct.

State v. Herring, 2014 WL 6780725 (Ohio 2014):
Holding: Capital counsel ineffective in failing to present mitigating evidence that Defendant's parents and other family had been involved with drugs, that Defendant dropped out of school, began selling drugs at a young age, was a gang member at a young age, and had a dysfunctional childhood.

State v. Kirkland, 95 Crim. L. Rep. 243 (Ohio 5/13/14):
Holding: Prosecutor's argument that Defendant who was already serving a life sentence for another murder would get "freebies" (free murders) if the jury didn't sentence him to death was improper because it invited jury to ignore the duty to base its sentence on the aggravating and mitigating factors of the case.

State v. McAnulty, 2014 WL 5474266 (Or. 2014):
Holding: Even though death-sentenced Defendant pleaded guilty, Supreme Court would review plea court's ruling on pretrial motion to suppress; Supreme Court's scope of review was not limited by statute governing non-mandatory appeals.

Haugen v. Kitzhaber, 2013 WL 3155366 (Or. 2013):
Holding: Governor's commutation of death sentence was valid and effective regardless of whether death-sentenced person "accepted" it or not.

Com. v. Tharp, 2014 WL 4745787 (Pa. 2014):
Holding: Where capital counsel was aware that Defendant suffered abusive childhood, was a domestic violence victim, and had mental health problems, counsel was ineffective in presenting no witnesses during penalty phase.

Com. v. Daniels, 96 Crim. L. Rep. 157 (Pa. 10/30/14):
Holding: Death penalty counsel was ineffective in failing to consult with a mental health expert after seeing school records indicating Defendant was a slow learner, moved a lot and was placed in classes for students with social or emotional problems.

Com. v. Murray, 2013 WL 6831852 (Pa. 2013):
Holding: Where the jury was repeatedly misinformed and instructed during a capital trial that the death of murder victim's unborn child was a "separate capital offense," this required a new sentencing hearing.

Com. v. Spell, 90 Crim. L. Rep. 103 (Pa. 10/7/11):
Holding: Even though victim was extensively beaten, this did not prove the "torture" aggravator in death penalty trial.

Weik v. State, 2014 WL 3610954 (S.C. 2014):
Holding: Even though counsel presented psychological testimony in capital penalty phase about Defendant's mental illness, counsel was ineffective in failing to present even a skeletal version of Defendant's social history of chaotic upbringing and dysfunctional family.

State v. Berget, 2013 WL 28400 (S.D. 2013):
Holding: Sentencing court erred in using Defendant's unwarned statements to a psychiatrist during a pretrial competency hearing to impose the death penalty, since this violated *Estelle v. Smith*, 451 U.S. 454 (1981).

Davidson v. State, 2014 WL 6645264 (Tenn. 2014):
Holding: Even though presentation of mental health evidence might open door to evidence that Defendant committed violent acts against women, capital counsel was ineffective in failing to present evidence of brain damage and cognitive disorders; jury already had heard that Defendant had a long history of violence against women.

State v. Sexton, 2012 WL 1918922 (Tenn. 2012):
Holding: Trial court improperly struck venirepersons based solely on their written responses to whether they would ever vote for the death penalty; actual voir dire questioning may have rehabilitated the venirepersons.

Smith v. State, 2011 WL 6318946 (Tenn. 2011):
Holding: Defense counsel were ineffective for failing to present evidence in support of capital defendant's motion to recuse sentencing judge, where the judge had prosecuted defendant for earlier crimes while he was an assistant district attorney general.

Coleman v. State, 89 Crim. L. Rep. 90, 2011 WL 1346932 (Tenn. 4/11/11):
Holding: To prove mental retardation, Defendant can rely on expert testimony that test scores do not accurately reflect Defendant's cognitive abilities; "functional IQ" is not limited to raw IQ scores.

State v. Ziegler, 2014 WL 1744098 (Ala. App. 2014):
Holding: Counsel was ineffective in failing to formally move to withdraw from a capital case or take any action for 8 months, where counsel mistakenly believed another counsel had assumed representation for case; even if counsel believed another counsel had assumed representation, he still had obligation to formally withdraw; Defendant was prejudiced because he lost opportunity to dissuade prosecutor from seeking death.

Smith v. State, 2013 WL 2458721 (Ala. Crim. App. 2013):
Holding: In death penalty case, Defendant could not be convicted of an aggravator that did not exist at the time of his offense.

Sims v. Department of Corrections and Rehabilitation, 157 Cal. Rprt. 3d 409 (Cal. App. 2013):
Holding: Death penalty lethal injection protocol did not comply with state Administrative Procedure Act.

Robinson v. Shanahan, 2014 WL 1016038 (N.C. App. 2014):
Holding: Where State changed its lethal injection procedure while death-sentenced Defendant's challenge to this was pending on appeal, Defendant was entitled to remand

for trial court to determine in first instance if State properly followed Administrative Procedure Act in enacting new procedure.

Miller v. State, 2013 WL 4805683 (Okla. App. 2013):
Holding: Double jeopardy barred State from seeking death penalty on first murder count on retrial, where Defendant had been previously tried for two counts of murder, but received life imprisonment on the first count at the first trial; thus, he had been acquitted of the death penalty on the first count.

Com. v. Ross, 2012 WL 4801433 (Pa. Super. 2012):
Holding: Trial court abused discretion in refusing to grant a continuance to death penalty counsel where counsel had not interviewed 50 witnesses and had not completed interviewing his own experts.

Druery v. State, 2013 WL 5808182 (Tex. App. 2013):
Holding: Even though capital Defendant knew at least some of the time that he was scheduled for execution, where because of mental illness he did not believe he committed the murder and did not think he would be executed some of the time, this was a substantial showing of incompetency to be executed.

Staley v. State, 93 Crim. L. Rep. 764, 2013 WL 4820128 (Tex. App. 9/11/13):
Holding: State cannot execute inmate who was made competent through a trial court's unauthorized forcible medication order.

Velez v. State, 2012 WL 2130890 (Tex. Crim. App. 2012):
Holding: Correction expert's false testimony in capital case in guilt phase that Defendant could be assigned a low classification level in prison if sentenced to LWOP rather than death was prejudicial as to future dangerousness; the State knew or should have known that prison regulations contradicted expert's testimony.

In re Crow, 2015 WL 1945114 (Wash. App. 2015):
Holding: Even though murder Victim had reported Defendant's alleged assault of a third-party to police more than a week before Victim was murdered, the "good Samaritan" aggravator did not apply, because Victim was not murdered while providing immediate aid to someone in peril.

Detainer Law & Speedy Trial

State v. Sisco, 2015 WL 1094821 (Mo. banc March 10, 2015):
(1) Even though State delayed trial three years and then entered a nolle prosequi to effectively get a further continuance, the State has complete discretion to dismiss and refile as long as double jeopardy has not attached and the statute of limitations has not expired; and (2) in issue of first impression, the standard of review for whether Defendant's constitutional right to speedy trial was violated is de novo review, not "abuse of discretion."

Facts: Defendant was charged in 2006. In 2008, Defendant announced ready and requested a speedy trial. Various delays occurred thereafter due to problems with a State's witness and the State providing late discovery. Trial was then scheduled in April 2009, but in order to effectively get a continuance, the State entered a *nolle prosequi* on the trial date, and re-filed the charges later that same day. Defendant filed a motion to dismiss with prejudice claiming violation of his right to speedy trial. Defendant was eventually tried and convicted in late 2009.
Holding: (1) Under Sec. 56.087, the State has complete discretion to dismiss and re-file a case as long as double jeopardy has not attached and the statute of limitations has not expired. Once the State dismisses, the trial court has no power to dismiss with prejudice. Defendant argues that allowing the State to dismiss and refile violates *Klopfer v. North Carolina*, 386 U.S. 213 (1967), because it would allow a case to go on indefinitely. Missouri courts have distinguished *Klopfer* in the past, but here, Defendant never raised this argument to the trial court, so it is not preserved. (2) This Court has never articulated the standard of review for determining whether the constitutional right to speedy trial has been violated. Under the post-1986 version of Sec. 545.780.5 and the constitution, if there is a violation of the constitutional right to speedy trial, the case must be dismissed. While an abuse of discretion standard might have been appropriate before the 1986 statute, it no longer is. The correct standard is *de novo*. The Court does not apply a deferential standard of review, but makes its own conclusions with regard to whether a violation occurred. Here, balancing the *Barker v. Wingo* factors, the Court finds no violation, although it does weigh the *nolle prosequi* "heavily" against the State.

State v. Pierce, 2014 WL 2866292 (Mo. banc June 24, 2014):
(1) Even though the uncontradicted evidence showed that Defendant had more than two grams of cocaine base, the trial court erred in second degree trafficking case in failing to give "nested" lesser-included offense instruction on possession of cocaine because a jury may always believe or disbelieve the State's evidence, and the only thing a defendant must do to put the elements of a crime "in dispute" is plead not guilty; and (2) Even though Court's term had ended before Defendant was retried, Defendant waived his claim that this violated Article I, Sec. 19 of the Missouri Constitution because he failed to object to the "untimely" trial before the Court's term ended at a time when the Court still had power to correct it.
Facts: (1) Defendant was charged with second degree trafficking. The jury instruction for second degree trafficking required the jury to find that Defendant possessed more than 2 grams of cocaine base. Defendant requested a lesser-included offense instruction for possession of drugs, Sec. 195.202.1. The trial court refused this instruction on grounds that all the evidence showed the cocaine base weighed more than 2 grams. Defendant was convicted of second degree trafficking. He appealed. (2) Defendant's original trial ended in a hung jury. Subsequently, the trial was continued several times without objection from the defense. It was ultimately tried during a much later "term" of the trial court.
Holding: (1) For the reasons set forth in *State v. Jackson*, No. SC93108 (Mo. banc June 24, 2014), Defendant was entitled to the lesser-included offense instruction. Guilt is determined by a jury, not the court. Even though the State contends that the issue of the weight of the drugs was not "in dispute," the jury is the sole arbiter of facts and is entitled

to believe or disbelieve the State's evidence. Under the trafficking instruction, the jury was told that the State had to prove that the substance weighed more than 2 grams. Because a jury may always believe or disbelieve the evidence, the State's burden is met only when a jury returns a guilty verdict. The only thing a defendant has to do to hold the State to this burden of proof, or to put the elements of a crime "in dispute," is plead not guilty. Once the defendant pleads not guilty, there will always be a basis in the evidence to acquit the defendant at trial because the jury is the final arbiter of what the evidence does or does not prove. New trial ordered. (2) Article I, Sec. 19, Mo. Const., provides that if a jury fails to render a verdict, the court may commit the prisoner to trial during the same or next term of court. Here, the trial court failed to retry Defendant during the "same or next term of court." However, this does not mean that the trial court lacked authority to try Defendant. Here, Defendant waived this issue because he did not object to the "untimely" trial until the date of the new trial. This waived the issue because the trial court must be given an opportunity to correct the error *while correction is still possible*. Thus, Defendant was required to object before the Court's term expired when there was still time to try him.

State v. McKay, 2013 WL 4813558 (Mo. App. E.D. Sept. 10, 2013):
Even though the Department of Corrections failed to timely forward Defendant's request for disposition of detainer under UMDDL to the prosecutor and court because the DOC mistakenly believed the detainer was for a probation violation, Defendant had done all he could do to obtain disposition of his criminal charge so this error is counted against the State, and case is remanded to determine if Defendant's constitutional speedy trial rights were violated, which would require dismissal of the charges.
Facts: In May 2010, Defendant was charged with various offenses in St. Charles. Shortly thereafter, he was scheduled to appear in court for an initial appearance, but failed to appear because he was incarcerated in DOC on an unrelated conviction. The St. Charles court then issued a warrant for his failure to appear, but the warrant was mistakenly designated a warrant for a probation violation. On January 20, 2011, Defendant filed a request with DOC for disposition of the St. Charles detainer. However, the DOC failed to forward the request to the prosecutor or court because DOC believed the request was for disposition of a probation violation, which is not covered under UMDDL. On December 2, 2011, Defendant filed a motion to dismiss the new charge because 180 days had expired after he filed for disposition of detainer. Subsequently, the DOC apparently realized it was mistaken in its original belief that the detainer was for a probation violation, and in January 2012, notified the prosecutor and court of the request for disposition of detainer. Defendant was tried in March 2012, which was 52 days after the prosecutor and court received the request for disposition. Defendant appealed, claiming the charge had to be dismissed.
Holding: UMDDL Sec. 217.450.1 requires a Defendant to deliver to the DOC a request for disposition of detainer, and the DOC is then to send it to the prosecutor and court. Here, Defendant timely and correctly delivered his request for disposition to the DOC. However, the DOC failed to deliver it because the DOC mistakenly believed the detainer was for a probation violation. This was not Defendant's fault. He fully complied with the statute. This error must be attributed to the State. The State argues that Defendant waived UMDLL by appearing in court and remaining silent on the issue at two later court

appearances. However, there is no requirement that a defendant make a second request for disposition of detainer, and furthermore, these appearances happened *after* the 180 days should have expired, so Defendant cannot be deemed to have waived the issue. UMDDL mandates the dismissal of a complaint not brought to trial within 180 days unless the 180 days is tolled *and* if the court finds that the constitutional right to a speedy trial has been denied. Here, there has never been a finding by the trial court whether the constitutional right to a speedy trial was violated. Case is remanded to trial court to apply the factors for determining this: (1) length of delay; (2) reason for delay; (3) defendant's assertion of the right; and (4) prejudice.

State v. Williams, No. ED99399 (Mo. App. E.D. 6/28/13):
Trial court does not have authority to dismiss a criminal case with prejudice in the absence of a speedy trial violation.
Facts: In early 2012, Defendant was charged with a drug offense. Later in 2012, he entered in a plea bargain with the State. However, on the day of the scheduled plea, the State failed to appear. Defense counsel moved to dismiss for failure to prosecute. The trial court dismissed the charge *with* prejudice. The State appealed.
Holding: Only the prosecutor has the authority to voluntarily dismiss or nolle prosequi a felony charge, because the prosecutor has more knowledge about all the circumstances of the cases. While a trial court has authority to dismiss a case *without* prejudice for failure to prosecute in certain circumstances, it has no inherent authority do so *with* prejudice absent a speedy trial violation, and no such violation was alleged here.

State v. Pierce, 2013 WL 682739 (Mo. App. E.D. Feb. 26, 2013):
Even though Article I, Sec. 19, of the Missouri Constitution provides that a case should be retried within the same or next term of court following a mistrial, this privilege is waived if not timely asserted, and Defendant waived the privilege by not objecting to multiple continuances after his mistrial. This was a case of first impression.
Facts: In 2010, Defendant's first trial ended in a hung jury. Subsequently, several continuances were granted due to scheduling conflicts and other reasons. The case was tried about one year later. On the day of trial, Defendant filed a motion to dismiss for violation of Article I, Sec. 19, Mo. Const., which was overruled. After conviction, Defendant appealed.
Holding: Article I, Sec. 19, states that "if the jury fail[s] to render a verdict the court may … discharge the jury and commit or bail the prisoner for trial at the same or next term of court." Since no local rule governs the terms of court of the City of St. Louis, this is determined by Sec. 478.205, which provides that terms of court begin in February, May, August and November of each year. Here, after the mistrial, Defendant's case was rescheduled during the same term of court, but ultimately continued approximately seven times for multiple reasons. Defendant never objected to the continuances or demanded a speedy trial. Like other speedy trial rights, a Defendant waives his privilege under Article I, Sec. 19, if he does not assert a timely demand for a trial. Because Defendant did not affirmatively demand an earlier trial date, he waived his privilege.

State v. Sisco, 2013 WL 324031(Mo. App. W.D. Jan. 29, 2013):
Even though the Western District upholds a trial court's finding that Defendant's speedy trial rights were not violated here because of the deferential standard of review, Western District notes this case could "easily" have supported a contrary conclusion because "[t]he State's repeated delays in producing additional discovery until the eve of the various trial dates and use of a nolle prosequi on the day of trial solely to avoid an in limine order and the denial of a motion for continuance, at a minimum, create an appearance of unfairness to a defendant who has requested a speedy trial." The Western District notes it has seen similar "suspect discovery practices" from the Jackson County Prosecutor's Office in *State ex rel. Jackson Cnty. Prosecuting Attorney v. Prokes*, 363 S.W.3d 71 (Mo. App. W.D. 2011).

State v. Brown, No. WD74114 (Mo. App. W.D. 9/25/12):
Even though a newer 2009 version of the detainer statute was in effect at the time Defendant invoked his rights to dispose of a detainer, where the Sheriff had notified the DOC of an arrest warrant for Defendant before the new version of the statute took effect, the old 2000 version of the statute applied; the 2000 version of the statute did not require a "certified copy of a warrant" or formal request for a detainer for there to be a "detainer."
Facts: On August 3, 2009, Defendant was incarcerated in the DOC on a 2004 drug conviction when another arrest warrant was issued for him in Henry County. On August 4, 2009, the Henry County Sheriff's Department faxed a copy of the arrest warrant to the DOC. The DOC generated a document stating that "a detainer has been placed" against Defendant. On August 12, 2009, the DOC sent the Sheriff a document stating that a detainer had been placed. On August 31, 2009, Defendant was given a "notice of detainer," which he immediately signed and mailed to the Henry County Prosecutor and clerk requesting disposition of detainer. However, the State took no action to prosecute. On March 19, 2010, Defendant filed a motion to dismiss based on the State's failure to try him with 180 days of his request for disposition of detainer. The trial court granted the request. The State appealed.
Holding: The State claims that Sec. 217.450.1 RSMo. Cum. Supp. 2009, which went into effect August 28, 2009, applies to Defendant, and that under this version of the statute, there was no actual "detainer" filed against Defendant because there was not a "certified copy of a warrant" or formal request that a detainer be lodged against Defendant. The State claims this version applies because Defendant made his request for disposition after this statute came into effect. However, the applicable statute is Sec. 217.450.1 RSMo. 2000. This is because the protections of the UMDDL were triggered when the Henry County Sheriff's Department faxed a copy of Defendant's arrest warrant to the DOC on August 4, 2009. The old statute did not require a certified copy of the warrant or a formal request for detainer. That statute provided only that an inmate "may request a final disposition of any untried indictment, information or complaint pending in this state on the basis of which a detainer has been lodged." This old statute did not define the term "detainer." Defendant followed the correct procedures under the old statute to require dismissal of his charge.

*** Boyer v. Louisiana, 93 Crim. L. Rep. 155, ___ U.S. ___ (U.S. 4/29/13):**
Holding: Supreme Court dismisses case on improvident cert. grounds which posed question of whether delay caused by lack of funding for appointed counsel violates 6th Amendment speedy trial rights; dissenting opinion by 4 justices states that Supreme Court should answer question affirmatively since *Barker v. Wingo*, 407 U.S. 514 (1972), states that "overcrowded courts" should count against the State and failure to adequately fund indigent defense is the same.

*** U.S. v. Tinklenberg, ___ U.S. ___, 89 Crim. L. Rep. 305 (U.S. 5/26/11):**
Holding: (1) The filing of a pretrial motion stops the running of the Speedy Trial Act clock, 18 USC 3161, regardless of whether the motion actually causes or is expected to cause a delay in starting the trial; thus, where Defendant filed pretrial motions two weeks before trial, the 9 days during which the motions were pending before they were resolved is excluded from the Speedy Trial calculation even though the motions did not delay the actual trial; and (2) Weekends and holidays count toward then number of days that can be excluded under the Act when a defendant is being transported for a competency hearing.

U.S. v. Gates, 92 Crim. L. Rep. 762 (1st Cir. 3/1/13):
Holding: Under federal Speedy Trial Act, a defense counsel can seek a continuance and resulting exclusion of time from the speedy trial clock without first securing Defendant's consent.

U.S. v. Pleau, 90 Crim. L. Rep. 100 (1st Cir. 10/13/11):
Holding: Where the federal gov't sought to obtain custody of Defendant for death penalty charges under Interstate Agreement on Detainers (IAD) but State governor refused to allow the transfer since State had no death penalty, the federal government was then precluded from seeking to obtain Defendant's custody through a writ of habeas corpus ad prosecquendum since it had originally sought to use the IAD.

U.S. v. Cuti, 2013 WL 3213343 (2d Cir. 2013):
Holding: Defendant's 6th Amendment speedy trial rights were violated where Gov't was not reasonably diligent in pursuing his arrest for marijuana offense; Gov't did not arrest Defendant for more than two years after his indictment, and although Gov't was initially diligent in trying to arrest Defendant, there were long periods where Gov't was making only minimal efforts to find Defendant and Gov't ultimately found him by reviewing phone records, something it could have done two years earlier.

U.S. v. Velazquez, 2014 WL 1410153 (3d Cir. 2014):
Holding: Defendant's 6th Amendment right to speedy trial was violated where Gov't failed to diligently pursue efforts to find Defendant for five years and merely ran his name a few times through a national crime database.

U.S. v. Velazquez, 95 Crim. L. Rep. 96 (3d Cir. 4/14/14):
Holding: Where police weren't diligent in searching for indicted-Defendant for five years, there is a presumption of prejudice from the delay in Defendant's prosecution.

U.S. v. Ortiz, 2012 WL 2892396 (5th Cir. 2012):
Holding: A co-defendant was not an "essential witness" whose absence would toll the Speedy Trial Act's 30-day time provision.

U.S. v. Burrell, 2011 WL 507431 (5th Cir. 2011):
Holding: Even though Officer-Witness was attending training, this time was not excluded from the Gov't's speedy trial clock because there was no evidence of where the Officer was attending the training, its hours of operation, or why it was not feasible for Officer to be able to testify.

U.S. v. Heshelman, 2013 WL 1489389 (6th Cir. 2013):
Holding: The Gov't's 39-month delay between indictment and attempting to seek extradition of Defendant who was living in Switzerland weighs heavily against Gov't, because Switzerland has extradition treaty with US and once the Gov't sought extradition, it was fast; Gov't deliberately chose not to extradite Defendant sooner to gain an advantage.

U.S. v. Ferreira, 90 Crim. L. Rep. 393 (6th Cir. 11/30/11):
Holding: 3-year delay in bringing a Defendant, who was already incarcerated on an unrelated charge, to trial violated 6th Amendment right to speedy trial.

U.S. v. Young, 89 Crim. L. Rep. 857 (6th Cir. 9/21/11):
Holding: A criminal trial begins with voir dire for purposes of determining speedy trial claims.

U.S. v. Ramirez, 97 Crim. L. Rep. 301 (7th Cir. 6/10/15):
Holding: Speedy trial clock under 18 USC 3161-74 was not tolled by judge's after-the-fact explanation that Defendant's case was continued due to its complexity, when court had said at the time that the case was being continued due to the court's crowded calendar.

U.S. v. Alvarez-Perez, 88 Crim. L. Rep. 393 (9th Cir. 12/22/10):
Holding: Even though Defendant changed his mind after waiving his right to indictment and filing a notice to plead guilty, this time was not excludable from the speedy trial clock under the Speedy Trial Act.

U.S. v. Hicks, 96 Crim. L. Rep. 645 (10th Cir. 3/6/15):
Holding: Under federal Speedy Trial Act, the Gov't's motion to set a trial date after all other pretrial motions have been ruled on does not toll more than 30 days of the speedy trial clock; to hold otherwise would allow the Gov't to have an indeterminate excusable period even though there were no pending motions.

U.S. v. Marshall, 2011 WL 7331763 (D.C. Cir. 2011):
Holding: The government's pretrial evidentiary notice of its intent to introduce defendant's prior conviction was not a "motion" that tolled the Speedy Trial Act clock.

U.S. v. Mackie, 93 Crim. L. Re. 191 (C.A.A.F. 4/19/13):
Holding: Defendant can claim violation of his due process rights to a speedy trial, even if much of the delay occurred after an appeal and remand of the case.

State v. Glushko, 2011 WL 5429691 (N.D. Ind. 2011):
Holding: Defendants' failures to appear at scheduled hearings did not constitute consent to delay under speedy trial statute.

U.S. v. Toma, 2012 WL 1371434 (D. Kan. 2012):
Holding: A 72-month delay after indictment in bringing Defendant to trial on charges of falsely claiming U.S. citizenship violated Defendant's rights to a speedy trial where the delay resulted primarily from Gov't negligence, the case was not complex, and Defendant made no effort to conceal his whereabouts while on release awaiting trial.

U.S. v. Dellinger, 2013 WL 5946086 (E.D. Mich. 2013):
Holding: Even though Defendant was mentally incompetent to stand trial for a period of time, this did not trump another provision in Speedy Trial Act that counts delay of more than 10 days resulting from transporting Defendant to hospital for examination; thus, three-month delay in transporting Defendant from jail to hospital was not excluded from the Act's time limits.

U.S. v. Montecalvo, 2012 WL 1862381 (E.D. N.Y. 2012):
Holding: Appropriate remedy for violation of Speedy Trial Act is dismissal of charge with prejudice, not without prejudice.

U.S. v. Moreno, 2014 WL 630701 (N.D. N.Y. 2014):
Holding: 837-day delay between Defendant's indictment and arrest violated right to speed trial, where Defendant was blameless for the delay and Gov't failed to exercise reasonable diligence to arrest Defendant, even though Gov't didn't act in bad faith.

U.S. v. Edwards, 2011 WL 1454077 (E.D. N.C. 2011):
Holding: *Brady v. Maryland* applies to SVP proceedings.

U.S. v. Salad, 2011 WL 1541358 (E.D. Va. 2011):
Holding: Gov't had a duty to produce a boat used in the offense for inspection by the defense under discovery rules, even though Gov't planned to turn the boat back over to its owners soon.

People v. Hajjaj, 2010 WL 4342331 (Cal. 2010):
Holding: Even though a courtroom only became available at 4:15 p.m. in a distant location on the day the speedy trial clock was scheduled to run out, this was not good cause to delay the trial beyond the speedy trial period.

Hoang v. People, 2014 WL 1619013 (Colo. 2014):
Holding: The *Barker* speedy trial factors apply to claim of denial of speedy appeal, even though right at issue is 5th Amendment due process right to fairness on appeal.

State v. Alexander, 2014 WL 1765951 (Ga. 2014):
Holding: Defendant was denied right to speedy trial by delay of 8 years between mistrial and case being placed on trial calendar, even though Defendant asserted his right late.

State v. Buckner, 92 Crim. L. Rep. 549 (Ga. 2/4/13):
Holding: Delay of 4 years between indictment and trial for murder violated right to speedy trial where there was evidence that police had tampered with evidence and that memories of witnesses had faded so that Defendant was prejudiced.

State v. Wing, 2010 WL 4912853 (Iowa 2010):
Holding: Even though police had a conditional plan to arrest Defendant only if he refused to be an informant for police, where a large amount of marijuana had been discovered in Defendant's car and he was put in handcuffs and read *Miranda*, a reasonable person would not have felt free to leave and, therefore, Defendant was "arrested" for speedy trial clock purposes.

Darcy v. Com., 96 Crim. L. Rep. 35 (Ky. 9/18/14):
Holding: Defendant can be granted continuance even though this would delay a co-defendant's trial under state 180-day speedy trial law, because the speedy trial law expressly allows continuances that are reasonable and necessary; this is true even though the continuance will result in the co-defendant being tried more than 180 days later.

Goncalves v. Com., 2013 WL 646171 (Ky. 2013):
Holding: In computing whether speedy trial rights were violated, the time to count is the total time from arrest to trial, and any intervening mistrials are just one factor to consider; the mistrial does not "restart" the speedy trial clock.

Com. v. Taylor, 14 N.E.3d 955 (Mass. 2014):
Holding: The time it takes to dispose of Defendant's motion to compel mandatory discovery is not automatically excludable from the 12-month speedy trial clock, because it is unfair to require Defendant to choose between his right to receive mandatory discovery and his right to a speedy trial.

Com. v. Denehy, 94 Crim. L. Rep. 502 (Mass. 1/8/14):
Holding: The time between a trial court's dismissal of charges and the Defendant's arraignment on new, identical charges counts against the State for speedy trial purposes.

Com. v. Butler, 93 Crim. L. Rep. 17, 2013 WL 1189144 (Mass. 3/26/13):
Holding: (1) The filing of a complaint, not the later indictment date, starts "speedy trial" clock," and (2) speedy-trial clock "resumes" rather than "restarts" when Prosecutor dismisses charges and then refiles them; to hold otherwise would allow Prosecutor to nullify speedy-trial clock whenever time was close to expiring.

State v. Tamayo, 88 Crim. L. Rep. 257 (Neb. 11/19/10):
Holding: Even though Defendant requested a mental exam to pursue NGRI defense, the time for the exam is not automatically excluded from the statutory speedy trial clock.

State v. Cahill, 93 Crim. L. Rep. 52 (N.J. 4/1/13):
Holding: Unexplained 16-month delay in setting a court date for a DWI trial violated 6th Amendment right to a speedy trial.

People v. Wells, 2014 WL 5285491 (N.Y. 2014):
Holding: Period of delay caused by various appellate events and mis-calendering of case for retrial was not automatically excludable from speedy-trial clock as a reasonable period of delay resulting from an appeal.

State v. Black, 96 Crim. L. Rep. 582 (Ohio 2/19/15):
Holding: Term "penal or correctional institution of a party state" in the Ohio Interstate Agreement on Detainers applies to county jails, as well as state prisons.

State v. Springer, 93 Crim. L. Rep. 542, 2013 WL 3156535 (Tenn. 6/24/13):
Holding: The phrase "term of imprisonment" under the Interstate Agreement on Detainers includes a convicted and sentenced defendant's stay in a temporary detention facility or county jail; the term of imprisonment indicates the time period begins when the prisoner is imprisoned after being sentenced, and does not refer to the place of incarceration.

State v. Peeler, 97 Crim. L. Rep. 157 (Wash. 5/7/15):
Holding: Inmate's request for speedy disposition of detainer triggers the Intrastate Detainer Act's 120-day deadline even if the inmate is no longer held by that custodian (but held in a different county) when the prosecutor with the pending charges receives notice of the request.

State v. Poore, 88 Crim. L. Rep. 256 (W.Va. 11/19/10):
Holding: Trial court should have ordered an evidentiary hearing, sua sponte, to determine if Defendant was prejudiced by delay of 25 years between offense and indictment.

People v. Nelson, 2014 WL 6844929 (Colo. App. 2014):
Holding: In deciding whether speedy trial rights were violated where prosecution began, then case was dismissed and refiled, court should count the time that case was originally pending (here, 229 days) and the time after case was refiled (here, 189 days) for a total of 418 days, which was presumptively prejudicial; the court cannot count the "in between" time during which the case was dismissed, but must count the original time (229 days) because to do otherwise would allow the State to avoid the speedy trial clock by just dismissing and refiling any time the State wanted to restart the clock.

People v. Maxey, 2013 WL 3192013 (Ill. App. 2013):
Holding: Even though Defendant filed three pre-trial motions, the period of time after the motions were ruled upon was not attributable to Defendant for speedy-trial time clock purposes.

People v. Hunter, 2012 WL 638069 (Ill. App. Ct. 1st Dist. 2012):
Holding: A cannabis charge and gun-related charges were based on the same act of constructive possession, requiring the State to comply with the compulsory joinder-speedy trial rule.

State v. Gill, 2012 WL 3537844 (Kan. App. 2012):
Holding: Whether constitutional speedy trial period begins anew with new charge depends on necessity of dismissing former charge or whether charges are identical; thus, when the State dismisses a charge against a Defendant but later files another charge, the speedy trial clock starts anew only if the State dismissed the first case because of necessity; if not dismissed because of necessity, the speedy trial clock is merely tolled and so the time period before dismissal and after re-filing will be counted together.

State v. Flemings, 2014 WL 2993567 (La. App. 2014):
Holding: Delay of 8 years after reinstatement of charges violated Defendant's speedy trial rights, where State had Defendant's correct address when charges were filed, but sent notice of the arraignment to an incorrect address, and Defendant had no obligation to keep the State apprised of his whereabouts after the original charges were dismissed.

State v. Bell, 2012 WL 6621448 (La. App. 2012):
Holding: 30-month delay in murder prosecution violated Defendant's speedy trial rights and warranted dismissal where State had sought six of eight continuances, State failed to make reasonable efforts to obtain missing supplemental police report, and State flaunted its authority by entering a nolle prosequi and re-filing changes in response to denial of another continuance.

State v. Vigil-Giron, 2014 WL 1600896 (N.M. App. 2014):
Holding: Defendant's right to speedy trial was violated by 36-month delay between indictment and trial, where the defense was prejudiced by the death of an important witness.

State v. Black, 2013 WL 1092775 (Ohio App. 2013):
Holding: A Maryland county jail in which Defendant was incarcerated was a "penal or correctional institution" within the meaning of the Interstate Agreement on Detainers (IAD) guaranteeing a speedy trial to incarcerated persons; thus, Defendant's request for disposition of all charges against him pursuant to the IAD triggered the period under which Ohio authorities were required to bring him to trial.

In re Dacus, 2011 WL 1331850 (Tex. App. 2011):
Holding: Trial court had to dismiss murder indictment with prejudice where State violated Interstate Agreement on Detainers by securing Defendant's temporary custody in Texas when he had been incarcerated in an out-of-state federal prison, but then returning him to the federal prison without proceeding to trial.

Discovery

State ex rel. Dept. of Social Services, Division of Children Services v. Tucker, 2013 WL 6198188 (Mo. banc Nov. 26, 2013):
Sec. 210.150 prevents a trial court from ordering disclosure of the identity of persons who voluntarily report suspected instances of child abuse to the Department where the reports are unsubstantiated.
Facts: Husband and Wife were involved in a contested divorce proceeding in which Husband sought to learn the identity of person who made hotline reports about their children. Husband claimed Wife made these unsubstantiated hotline reports. Trial court ordered the Department to reveal identity of the reporter. Department sought a writ of prohibition.
Holding: There are separate exceptions to the general rule of confidentiality of hotline reports depending on whether the allegations reported are substantiated or unsubstantiated. This case involves unsubstantiated allegations. Secs. 210.150.3 (2) and (3) allow a parent of a child or alleged perpetrator of abuse named in a report to have a copy of the report, but provides that "[t]he names or other identifying information of reporters shall not be furnished to persons in this category." Thus, since Husband is a parent or alleged perpetrator at issue, Husband may obtain the report, but not the identity of the reporter. The statutorily mandated confidentiality of the identity of the reporter is not overcome by demonstrating relevance or the absence of a traditional evidentiary privilege. Writ of prohibition made permanent.

Chasnoff v. Mokwa, 2015 WL 1743088 (Mo. App. E.D. April 14, 2015):
(1) Police Officers lacked "privacy" interest in records of police misconduct and could not bar disclosure of such records under Sunshine Law; (2) even though Officers were given "Garrity" warning that their statements made to internal affairs investigators would not be used against them, this applied only to use in later "criminal proceedings," not disclosure under Sunshine Law; and (3) Plaintiff was entitled to attorney's fees for Police Board's conduct in failing to reveal various records subject to Sunshine Law disclosure and "sham" conduct to prevent disclosure.
Facts: Plaintiff sought disclosure under Sunshine Law, Sec. 610.010, of police records involving police misconduct in confiscating "scalped" tickets during the 2006 World Series and then using the tickets themselves. Police Internal Affairs Division (IAD) investigated the matter. Before interviewing Officers, IAD warned Officers under *Garrity v. New Jersey* , 385 U.S. 493 (1967), that if they did not answer questions, they could be fired, but if they did answer questions, "these statements may be used against you in relation to subsequent department charges, but not in any subsequent criminal proceedings." In various prior litigation to the instant case, a trial court ordered

disclosure of the records. Subsequently, Officers sought to prevent disclosure to protect their "privacy" interest. The Police Board, which was the defendant in all the litigation, then entered into a "consent judgment" with Officers whereby the Police Board "agreed" not to release the records which trial court had ordered released. This "consent judgment" was done without Plaintiff's participation or consent. Later, the trial court again ordered release of the records and attorney's fees for Plaintiff. Officers and Police Board appealed.

Holding: Officers claim the Sunshine Law grants them a "privacy" interest that mandates closure of the records. However, the exemptions from disclosure in Sec. 610.021 are permissive, not mandatory. The Sunshine Law lists exempt records that "may" be closed, but does not prohibit disclosure. Officers can assert "privacy" interests as an independent action under a different statute or constitutional provision, but here, there is no other statute or constitutional provision barring disclosure. The "*Garrity* warnings" did not create a constitutional right to prevent disclosure; at most, the warnings told Officers that their statements would not be used in "criminal proceedings," which a Sunshine Law request is not. Even if the "custom and practice" of the Police Board was not to disclose *Garrity* statements, this does not create any enforceable right by Officers; disclosure is determined by law, not the "custom and practice" of the Police Board. There is no overriding constitutional right to privacy in employment records of public employees. Any right to privacy extends only to disclosure of "personal" matters. Information regarding Officers' performance of their official duties, including discipline imposed for misconduct involving citizens, is not a *personal* matter. In short, Officers have no right under the Sunshine Law, constitution, common law, or statute to compel closure of public records regarding Officers' substantiated misconduct in performance of their official duties. Trial court did not err in awarding Plaintiff $100,000 in attorney's fees. The Police Board's failure to reveal the existence of various records until late in the litigation, and entry into a "sham consent agreement with the police officers that bypassed [Plaintiff] in order to avoid the ordered disclosure" support such an award to enforce Plaintiff's rights under Sunshine Law.

Ballard v. City of Creve Coeur, 2013 WL 5458971 (Mo. App. E.D. Oct. 1, 2013):

Holding: Plaintiff, who is challenging "red light camera" ordinance, has right to discovery to develop claim that purpose of ordinance is to generate revenue, rather than ensure public safety. Missouri Supreme Court has previously held that a city can only use its police power to regulate traffic, not use a traffic ordinance as a tax ordinance in disguise.

State v. Henderson, 410 S.W.3d 760 (Mo. App. E.D. 2013):

Where the State failed to disclose a booking form that showed that Defendant admitted having a certain address that was at issue at trial, this violated Rule 25.03(A), which required disclosure of statements of Defendant.

Facts: Defendant was charged with unlawful possession of a firearm, for having a gun at a certain residence and address. The defense at trial was that this was not Defendant's residence or address. After opening statements in which the defense had claimed Defendant did not live at the address, the State obtained and introduced at trial Defendant's booking form, which listed the address at issue as his address; an officer

testified that Defendant had stated this as his address. The defense objected that the State had failed to disclose this form and statement under Rule 25.03(A).
Holding: Rule 25.03 requires the State to disclose statements of a defendant upon request. Here, the defense had filed a motion for disclosure under Rule 25.03. "Statements" are not limited to those made during police interrogation. Because statements of a defendant carry much weight with juries, a violation of discovery rules regarding them is treated with grave suspicion. Even though the State did not intend initially to use the booking form, it was still required to disclose it. The State contends that there can be no prejudice because Defendant knew of his own statements; however, if the State can avoid disclosure of a defendant's statements on this basis, then Rule 25.03 would be eviscerated. The timing of the disclosure, after Defendant had completed his opening statement where he said this was not his address, was prejudicial to Defendant's defense and left counsel with no time to investigate or employ another strategy.

State ex rel. Meeks v. Reaves, 2013 WL 6710350 (Mo. App. S.D. Dec. 20, 2013):
Person against whom Order of Protection is sought has right to take deposition of Petitioner under Rule 57.03 in order to prepare for hearing on whether a full Order of Protection should be granted.
Facts: Petitioner filed for an order of protection, Sec. 455.010, against Defendant. After an *ex parte* order was entered, Defendant, through counsel, sought to depose Petitioner to prepare for the hearing on whether a full order of protection should be granted. Petitioner refused. Defendant sought a motion to compel. The trial court ruled that Defendant did not have a right to depose Petitioner in an order of protection case. Defendant sought a writ of prohibition.
Holding: There are not any rules or statutes that make Rule 57.03 inapplicable to Chapter 455 actions. Respondent Judge compares Chapter 455 actions to unlawful detainer proceedings under Chapter 534, which are "summary in nature," and where the ordinary civil rules do not apply. However, unlawful detainer actions involve an immediate right of possession. Such "immediate" action is not required in Chapter 455 actions. The right to depose a witness is an absolute one in the absence of a civil rule or statute that makes Rule 57.03 inapplicable to Chapter 455. Thus, Defendant has the right to depose Petitioner to prepare his defense against a full order of protection. Writ made permanent.

State ex rel. Adkins v. Moore, No. SD31503 (Mo. App. S.D. 8/25/11):
Even though local rule said that discovery had to be complete at the time of trial setting, court could not preclude the parties from conducting additional discovery after the trial setting date because that would cause local rule to conflict with Rule 56.01(e).
Facts: Court had local rule which provided that "[r]equests for trial setting shall state that discovery is complete." Plaintiff requested a trial setting and trial was set in the future. After the setting, the parties sought to take additional depositions. The trial court ordered them to stop discovery under the local rule.
Holding: Prohibition is the proper remedy where a trial court issues a discovery order that is an abuse of discretion. Here, a plain reading of the local rule does not indicate that it is intended to bar discovery after a trial setting. Such an interpretation would be hard to reconcile with Rule 56.01(e)'s supplementation requirements and the practicalities

involved in setting a trial more than a year in the future. To bar discovery under these circumstances is against the logic of the circumstances, arbitrary and unreasonable.

State v. Jackson, No. SD30129 (Mo. App. S.D. 8/12/11):
"Internal affairs" report that contained a written statement of charged incident by Officer was discoverable under Rule 25.03 and was not shielded from discovery by the Sunshine Law.
Facts: Defendant was charged with assault on a law enforcement officer. Defendant filed a motion under Rule 25.03 for any written or recorded statements reporting or summarizing witnesses' testimony. During a deposition of the arresting officer, Officer testified that he had completed a "resistance control form" which contained his written statement of what happened and must be completed whenever a certain level of force is used. The prosecutor refused to provide the form, claiming it was under the control of the police department. Subsequently, Defendant served a subpoena duces tecum on the custodian of records of the police department to produce the document. The police department filed a motion to quash, claiming the document was a privileged personnel record under the Sunshine Law. The trial court denied a motion to compel and held the document was a privileged, closed record under the Sunshine Law. At trial, Defendant sought to question Officer about the report, but the trial court would not allow it.
Holding: The resistance control form was a written statement of a witness that the State was required to disclose to the defense pursuant to their written request under Rule 25.03(A)(1). As a prior statement by the State's primary witness, the resistance control form contains highly relevant and material information that could be used for impeachment or as substantive evidence if it contained anything inconsistent with Officer's police report, his deposition or trial testimony. *See* Sec. 491.074. The fact that the record is closed to the public under the Sunshine Law does not mean that the record is immune from discovery by a party in litigation. The report was not privileged, was discoverable, and its production was required by Rule 25.03. The trial court abused its discretion in denying the motion to compel. For the same reason, the court's preclusion of defense counsel's attempt to question Officer about this at trial was erroneous. Reversed and remanded for new trial.

State ex rel. Pulitzer Newspapers Inc. v. Seay, No. SD30704 (Mo. App. S.D. 1/24/11):
Holding: Even though Defendant received an SIS, his court file remained an "open record" until the SIS probationary period was completed, and trial court could not order the record sealed before that time; Newspaper was entitled to review file before probationary period was completed under Sec. 610.105.

Wallar v. State, 403 S.W.3d 698 (Mo. App. W.D. 2013):
(1) The "form discovery response" of the Jackson County Prosecutor's Office is deceptive because it implies that the Office has checked the criminal histories of witnesses when the Office has not, in fact, done so; thus, the response violates Rule 25.03; (2) in a Rule 24.035 motion following a guilty plea, a mere violation of a discovery rule is not cognizable, but the issue can be cognizable if it has "constitutional significance" under Brady; to plead the claim, Movant must plead that had the Brady evidence been disclosed, he would not have pleaded guilty but would have insisted on

going to trial; but (3) the failure to disclose mere impeachment evidence is insufficient, because the government is not constitutionally required to disclose impeachment evidence prior to entering a plea agreement with a defendant.

Facts: Following a guilty plea, Movant filed a 24.035 motion alleging that the Jackson County Prosecutor's Office had failed to disclose evidence to him in violation of Rule 25.03. The Western District ultimately affirms the denial of postconviction relief, but makes some notable comments about discovery law and postconviction relief.

Holding: (1) The Western District finds that the "form discovery response" of the Jackson County Prosecutor's Office is misleading because it implies that the Office has already run criminal histories on State's witnesses when it has not done so. Although this was not prejudicial in this case because the defense attorney testified that he knew the Office did this and knew he would not get discovery of this until closer to trial, the Office's "standard response" is deceptive and does not comply with Rule 25.03. The Jackson County Prosecutor's Office should alter this language in its standard response to clearly reflect either that the criminal histories have not been run, or that they have been run and revealed no prior convictions. (2) As for Movant's claim that he should receive postconviction relief due to violation of Rule 25.03, mere violation of a court rule is not cognizable under Rule 24.035 because court rules do not constitute the "laws of this state." For the claim to be cognizable, it must have and be pleaded as having "constitutional significance," i.e., it must violate the U.S. or Missouri Constitutions. Failure to disclose evidence could have constitutional significance if it can meet the test for *Brady* violations. To plead and prove such a claim, a movant must plead and prove that had the evidence at issue been disclosed, he would not have pleaded guilty, but would have insisted on going to trial. This Court recently held that when a defendant has pleaded guilty, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights … but may instead attack [only] the voluntary and intelligent character of the guilty plea by showing ineffectiveness of counsel." The State argues that this holds that movants cannot raise *Brady* claims or constitutional claims other than ineffective counsel. This reading is too narrow. Rule 24.035 contemplates raising constitutional claims. To be cognizable, the claim would have to be one the defense was unaware of prior to the plea, that could not have been raised prior to the plea, and that rendered the plea involuntary. While such claims are rare, an example would be a *Brady* claim, but "[s]uch a claim is more likely to be successful if the defendant entered an *Alford* plea." Also, the violation of other court rules can have "constitutional significance." For example, if there is not a factual basis under Rule 24.02(e), this violates due process, and Rule 24.035 allows relief as a violation of due process. (3) The U.S. Supreme Court has held, however, that the Constitution does not require the government to disclose impeachment evidence prior to entering a plea agreement with a defendant. The undisclosed evidence here is merely impeachment evidence, and therefore, does not affect the voluntary nature of the plea.

State v. Zetina-Torres, 2013 WL 791538 (Mo. App. W.D. March 5, 2013):

The State violated Rules 25.03(A)(1) and (6) where it failed to disclose until two days before trial documents (including fingerprint evidence) allegedly showing that Defendant had previously been arrested (which helped to establish his identity as owner of a truck that contained drugs), and documents from Defendant's wallet; Defendant had

insufficient time to rebut the newly-disclosed evidence, and even though Defendant may have known of documents in his wallet, Rule 25.03(A)(6) requires that the State disclose them if it intends to introduce them.
Facts: Defendant was charged with trafficking drugs found in a truck he was driving. He claimed that he had borrowed the truck. Two days before trial was to begin, the State disclosed documents allegedly showing that Defendant had previously been arrested, and the documents (which included mug shots, fingerprints and other information) would establish that Defendant owned the truck. Defense counsel moved to exclude the evidence or in the alternative a continuance. Counsel claimed that if he had known of this late-disclosed evidence, he may not have taken the case to trial, and also that he needed additional time to try to rebut the evidence in that he had not been able to contact an attorney associated with the prior arrest, had not been able to contact the prior arresting officer to rebut the evidence, and had not been able to rebut the newly disclosed fingerprint evidence.
Holding: Rules 25.03(A)(1) and (6) require the State to disclose the names and addresses of witness it intends to call, along with their statements, and any papers belonging to Defendant which the State intends to introduce. The relevant records here were not provided to defense counsel until two days before trial, which left just one day to investigate them. This violated the Rule and prejudiced the defense because the defense could not find the attorney associated with the prior case, could not contact the arresting officer from the prior case, and could not test the new fingerprint evidence in the one-day before trial. Regarding documents contained in Defendant's wallet at the time of his arrest, the State argues that since they belonged to the Defendant, he knew about them. But the Rule specifically requires disclosure of such documents. It is one thing for a defendant to know of incriminating documents; it is quite another for him to know that the State possesses the documents and intends to introduce them.

State ex rel. Jackson County Prosecuting Attorney v. Prokes, No. WD72996 (Mo. App. W.D. 12/20/11):
Where State engaged in repeated Brady violations and failed to comply with court order for discovery, trial court did not err in excluding all the State's evidence from any trial.
Facts: Defendant's case had previously been reversed in postconviction due to *Brady* violations. Before retrial, the court entered a detailed discovery order, with which the State failed to comply. As a sanction, the trial court entered an order excluding all evidence from trial, which effectively prevented the State from trying the case. The State sought a writ of prohibition.
Holding: In order to prevail on a writ, the State must show that the trial court's order was an abuse of discretion. Because the original conviction was reversed due to *Brady* violations, the trial court entered a detailed discovery order for the retrial, with which the State repeatedly failed to comply. Where the State has failed to respond promptly and fully to a disclosure request, the issue is whether the failure has resulted in fundamental unfairness or prejudice to the defendant. Rule 25.18 provides that a court may "enter such other order as it deems just under the circumstances" for discovery violations. Here, the State's discovery violations have gone on for more than 10 years. The State has continued to delay discovery, object to discovery, and failed to comply with court orders regarding discovery. Defendant has been subjected to fundamental unfairness and

prejudice because he is no closer to receiving a fair trial than he was when he was charged more than 10 years ago. Willful violations require more serious sanctions than merely negligent violations because the willful violation shows an intentional disregard for the rules and orders of the court. The dissent argues that prior cases have held that due process concerns mean that a court should be cautious in excluding defense witnesses due to a discovery violation, but due process concerns do not apply to the State precisely because the State does not have due process rights. The dissent also argues that Missouri citizens are prejudiced here because the Defendant will not be brought to trial. However, the citizens have been prejudiced by the prosecutor's misconduct throughout the case. The "balancing test" employed by the dissent is predisposed to an outcome in favor of the State based on the improper assumption that the State's overriding interest should be to prosecute and convict Defendant, but such is not the case. The prosecutor has a duty not to convict at any cost, but to see that justice is done and that a defendant receives a fair and impartial trial. The trial court did not abuse its discretion in excluding all the State's evidence.

*** Skinner v. Switzer, ___ U.S. ___, 88 Crim. L. Rep. 683 (U.S. 3/7/11):**
Holding: Prisoner can use 42 USC Sec. 1983 to obtain access to evidence for DNA testing after a conviction.

U.S. v. Treacy, 88 Crim. L. Rep. 818, 2011 WL 799781 (2d Cir. 3/9/11):
Holding: The standard for civil cases also applies to criminal cases for overcoming the journalist's privilege against the disclosure of nonconfidential information; movant is entitled to discovery if he can demonstrate that the material at issue is of likely relevance to a significant issue in the case and not reasonably available from other sources.

Han Tak Lee v. Glunt, 2012 WL 247993 (3rd Cir. 2012):
Holding: Federal habeas petitioner, convicted of first-degree murder and arson, satisfied the good cause standard for conducting discovery in that his petition relied upon scientific developments since his trial and that his expert's independent analysis of the fire scene would invalidate the expert testimony from the trial.

Detroit Free Press v. DOJ, 97 Crim. L. Rep. 629 (6th Cir. 8/12/15):
Holding: "Mug shots" of defendants must be disclosed under FOIA.

U.S. v. Llanez-Garcia, 94 Crim. L. Rep. 205 (6th Cir. 11/5/13):
Holding: Attorney should not have been sanctioned for abuse of subpoena power where there was no evidence attorney acted in "bad faith," but instead relied on her interpretation of an arguably ambiguous criminal procedural rule regarding service of subpoenas; attorney issued a Rule 17(c) subpoena to records custodians to produce materials or appear in court on June 3; the problem was there was no court hearing scheduled on June 3; Rule 17(c)(1) states that courts "may direct" the production of materials before they are offered into evidence, and attorney believed the use of the term "may" does not require advance court approval.

U.S. v. Daoud, 2014 WL 2696734 (7th Cir. 2014):
Holding: Foreign Intelligence Surveillance Act requires judge to conduct in camera review to determine whether certain information must be disclosed to defense.

U.S. v. Sheth, 2014 WL 3537852 (7th Cir. 2014):
Holding: Fraud Defendant was entitled to discovery and an evidentiary hearing on Gov't's motion for turnover of assets to enforce restitution.

U.S. v. Zaragoza-Moreira, 97 Crim. L. Rep. 37 (9th Cir. 3/18/15):
Holding: Officer acted in bad faith and violated due process right to present a defense by destroying a video which showed Defendant actions during an offense, where Defendant had told Officer she acted under duress; Officer should have known the tape had exculpatory value.

Lambright v. Ryan, 92 Crim. L. Rep. 114 (9th Cir. 10/17/12):
Holding: Since the waiver of attorney-client privilege that occurs when a Movant files an ineffectiveness claims is narrow, a court must enter a protective order stating the contours of the limited waiver before commencement of discovery and must strictly police the limits to discovery.

U.S. v. Carmen, 92 Crim. L. Rep. 15 (9th Cir. 9/14/12):
Holding: If Gov't deports an alien-witness who has exculpatory information before defense counsel has an opportunity to interview witness, this denies Defendant the right to present a complete defense.

U.S. v. Business of Custer Battlefiled Museam and Store Located on Interstate 90, 90 Crim. L. Rep. 71 (9th Cir. 9/30/11):
Holding: Where official investigation has ended, public has right to access materials filed in support of search warrant.

Pickard v. Dept. of Justice, 89 Crim. L. Rep. 690 (9th Cir. 7/27/11):
Holding: After a drug informant has been identified in court, the DEA cannot refuse to provide records about the informant under Freedom of Information Act.

World Publishing Co. v. Department of Justice, 90 Crim. L. Rep. 718 (10th Cir. 2/22/12):
Holding: A Freedom of Information Act request seeking mug shots from the U.S. Marshals Service was properly rejected as an "unwarranted invasion" of the subject's personal privacy.

Roth ex rel. Bower v. Dept. of Justice, 89 Crim. L. Rep. 621 (D.C. Cir. 6/28/11):
Holding: Death-sentenced Defendant is entitled to use FOIA to obtain records from FBI showing he is innocent; claim of innocence outweighs privacy rights of third parties mentioned in FBI investigative records.

In re Special Proceedings, 2012 WL 386471 (D.D.C. 2012):
Holding: The First Amendment compelled disclosure of a report on an investigation of alleged prosecutorial misconduct during the corruption trial of a United States senator.

Wilkey v. U.S., 2010 WL 4340833 (D.C. 2010):
Holding: Defendant seeking to challenge jury selection methods may get discovery of jury materials without a threshold showing that there is a reason to believe discovery will show a statutory or constitutional violation.

U.S. v. Loughner, 2011 WL 1705865 (D. Ariz. 2011):
Holding: Bureau of Prisons' intake assessment records of Defendant (including psych reports) were generated pursuant to routine prison protocols and were not barred from disclosure by either the doctor-patient privilege or the 5th or 6th Amendment because the records were not intended for diagnosis or treatment.

U.S. v. Sellars, 2011 WL 2671510 (D. Nev. 2011):
Holding: Indigent defendant can make ex parte application for pretrial subpoena duces tecum.

Pizzuti v. U.S., 2011 WL 3652293 (S.D. N.Y. 2011):
Holding: On their motions to vacate, set aside, or correct their sentences, defendants were entitled to all FBI reports concerning witnesses, as well as an explanation for any differences between the disclosed documents and the documents actually used at trial.

U.S. v. Edwards, 2011 WL 1454077 (E.D. N.C. 2011):
Holding: *Brady v. Maryland* applies to SVP proceedings.

U.S. v. Salad, 2011 WL 1541358 (E.D. Va. 2011):
Holding: Gov't had a duty to produce a boat used in the offense for inspection by the defense under discovery rules, even though Gov't planned to turn the boat back over to its owners soon.

State ex rel. Montgomery v. Chavez ex rel. County of Maricopa, 2014 WL 1244956 (Ariz. 2014):
Holding: Prosecutors are not permitted to unilaterally redact Victims' birth dates from police reports that are required to be disclosed to defense, but must seek a court order giving permission to do this; the Victim's Rights laws refer to Defendant's discovery requests directed to Victims, not prosecutors; defense counsel have good reason to have access to birth date information.

People v. Gonzales, 92 Crim. L. Rep. 787 (Cal. 3/18/13):
Holding: Even though Defendant was seeing a therapist as a condition of his parole, the statutory doctor-patient privilege applied and State could not obtain the therapy records to use in SVP proceeding against Defendant.

Catlin v. Superior Court, 2011 WL 240253 (Cal. 2011):
Holding: Court cannot deny as "untimely" a motion for postconviction discovery of materials to which Defendant would have been entitled at time of trial.

Oliver v. State, 2013 WL 427236 (Del. 2013):
Holding: Granting 24-hour recess during trial to allow defense counsel to be able to review forensic reports which State had failed to disclose was not an appropriate sanction for State's non-disclosure before trial, since defense counsel would not have time to adequately prepare for cross-examination of the highly technical information or be able to consult with their own forensic expert.

Ulloa v. CMI, Inc., 2013 WL 5942299 (Fla. 2013):
Holding: Criminal Defendant wishing to obtain documents held by a non-party in another State must use the Uniform Law to Secure Attendance of Witnesses by subpoenaing the out-of-state nonparty, rather than serve the in-state registered agent of the nonparty.

Wyatt v. State, 2011 WL 2652195 (Fla. 2011):
Holding: FBI letters created after trial that said that an expert on bullet lead analysis testified beyond the science were "newly discovered" evidence.

Corona v. State, 89 Crim. L. Rep. 477 (Fla. 6/9/11):
Holding: A defense discovery deposition of a prosecution witness at which Defendant was not present does not provide an opportunity for cross-examination that is sufficient to satisfy the Confrontation Clause.

People v. Kladis, 2011 WL 6851169 (Ill. 2011):
Holding: State's allowance of destruction of videotape of defendant's traffic stop was a discovery violation, and the trial court did not abuse its discretion by barring the arresting officer from testifying about events which occurred during the time period of the videotape as a sanction for the state's actions.

Grady v. Com., 88 Crim. L. Rep. 253 (Ky. 11/18/10):
Holding: Prosecutor's inability to produce records of pretrial lineup creates a rebuttal presumption that the lineup was unduly suggestive.

Com. v. Fajita, 96 Crim. L. Rep. 513 (Mass. 1/27/15):
Holding: Public access to judicial records requires courts to release juror names after trial unless there are special reasons for confidentiality, other than jurors' personal preference that their names not be released.

Com. v. Carney, 88 Crim. L. Rep. 349, 2010 WL 4948559 (Mass. 12/8/10):
Holding: Punitive monetary sanctions against a party are not appropriate for a discovery violation; such sanctions are limited to remedial measures aimed at curing prejudice and promoting fair trial.

Freeman v. State, 93 Crim. L. Rep. 362 (Miss. 5/30/13):
Holding: State's failure to preserve evidence that is subject to a court's discovery order violated Defendant's due process right to present a defense and entitled him to judgment in his favor regardless of whether State acted in bad faith; here, the defense had been granted an order to preserve all evidence, but state later destroyed a video of the DWI traffic stop.

In re A.B., 96 Crim. L. Rep. 32 (N.J. 9/24/14):
Holding: Defense counsel in sex abuse case is entitled to inspect crime scene (Victim's house) where counsel is able to articulate a reasonable basis to believe inspection will lead to relevant evidence on a material issue.

State v. Scoles, 93 Crim. L. Rep. 400 (N.J. 6/13/13):
Holding: Defense lawyers defending child pornography cases are entitled to view copies of seized computer images at their own workplace provided counsel's office is equipped to comply with a protective order designed to block further dissemination of the images; forcing defense counsel to view images only at Prosecutor's office is too restrictive in view of the meaningful role that disclosure of evidence to a defendant has in promoting the search for truth (disagreeing with approach taken in Adam Walsh Act).

State v. W.B., 2011 WL 1573862 (N.J. 2011):
Holding: An appropriate sanction is warranted when police fail to preserve police notes as required by a rule.

State v. Bray, 2012 WL6005708 (Or. 2012):
Holding: Even though state constitution gives victims the right to refuse discovery requests from a criminal defendant, court could order rape victim's computer hard drive to be preserved as potential evidence.

Com. v. Harris, 90 Crim. L. Rep. 324 (Pa. 11/23/11):
Holding: Under Penn. law, orders requiring disclosure of privileged information are immediately appealable despite contrary decision in *Mowhawk Industries v. Carpenter*, ___ U.S. ___ (U.S. 2009).

Town of Mt. Pleasant v. Roberts, 2011 WL 2682407 (S.C 2011):
Holding: Where statute required that police cars be equipped with video but Town refused to buy enough cameras for its police cars, this was not a valid reason for failure to produce a video of a DWI traffic stop.

Koenig v. Thurston County, 92 Crim. L. Rep. 59 (Wash. 9/27/12):
Holding: Crime victim's impact statement is a public record under state Sunshine Law, and is not exempt from disclosure under the "investigative records exception."

Johnson v. O'Connor ex rel. County of Maricopa, 2014 WL 2557700 (Ariz. App. 2014):
Holding: The Uniform Act to Secure Attendance of Witnesses From Outside State authorizes a subpoena for production of records.

Rivera-Longoria v. Slayton, 2010 WL 4102906 (Ariz. Ct. App. 2010):
Holding: A prosecutor's withdrawal of plea offer was a "deadline" under state rule that prohibited introduction of evidence not disclosed before "deadline"; purpose of rule was to ensure that Defendant had all discovery before making a decision on plea bargain.

In re Marcos B., 2013 WL 856637 (Cal. App. 2013):
Holding: Court abused its discretion in applying "public interest privilege" to not require Officer to reveal the location from which he observed juvenile Defendant's alleged conduct; the court had no basis to determine that revealing the surveillance location would harm future surveillance or officer safety.

Rezek v. Supreior Court, 141 Cal. Rptr. 3d 891 (Cal. App. 2012):
Holding: Even though three eyewitness statements of the crime at issue had been placed in Officers' personnel files as part of an internal affairs investigation, Defendant was entitled to court's in camera review of them for discovery purposes since Defendant's constitutional right for disclosure of favorable evidence outweighed Officer's privacy interest in personnel files.

Magallan v. Superior Court, 2011 WL 658651 (Cal. App. 2011):
Holding: Judge had power to grant discovery to prepare for motion to suppress hearing, and not just to prepare for trial.

People v. Corson, 2013 WL 174450 (Colo. App. 2013):
Holding: Juvenile adjudication of a Witness is required to be disclosed as *Brady* impeachment material.

Zimmerman v. State, 2013 WL 2449591 (Fla. App. 2013):
Holding: Defendant's attorney was entitled to depose the attorney for the murder victim's family about an interview attorney conducted with Witness because attorney was not an "opposing counsel" for the state, the deposition would not violate work product privilege, and attorney waived any privilege that might exist by conducting the interview in the presence of news reporters.

In re Commitment of Clark, 2014 WL 133040 and 2014 WL 2922491 (Ill. App. 2014):
Holding: An SVP Defendant has right to issue subpoena duces tecum, prior to probable cause hearing on State's petition for civil commitment, to the evaluator who recommended SVP commitment.

People v. Jakes, 2013 WL 6504817 (Ill. App. 2013):
Holding: Defendant was entitled to postconviction discovery on his claim that Officer beat him to obtain a confession and had lied under oath, where since his conviction, Defendant had learned of multiple cases of police misconduct and coerced confessions involving this same Officer.

People v. Wright, 2012 WL 1108504 (Ill. App. Ct. 1st Dist. 2012):
Holding: A defendant charged with aggravated criminal sexual assault demonstrated that DNA evidence would be material to the defense investigation or relevant at trial, and thus the defendant was entitled to a pretrial DNA database search.

People v. Duran, 2011 WL 1674842 (N.Y. City Crim. Ct. 2011):
Holding: Defendant was entitled to obtain by subpoena duces tecum Housing Authority videos which would likely show the crime.

Johnson v. Dept. of Public Safety Standards and Training, 2012 WL 5429461 (Or. App. 2012):
Holding: Oregon victim's rights law which provided that a victim must be informed "by defendant's attorney" that they are being contacted in a defense capacity did not require a private investigator hired by a defense attorney to disclose anything; the only obligation imposed by the law was on the attorney, not the investigator.

DNA Statute & DNA Issues

Fields v. State, 2014 WL 125205 (Mo. App. E.D. March 25, 2014):
Defendant, who was convicted in 1996, was entitled to an evidentiary hearing on his claim that DNA testing was still in its infancy in 1996 and was not reasonably available to him at the time.
Facts: Defendant was convicted at a jury trial in 1996 of forcible rape. A rape kit was collected, but never tested for DNA. Recently, he filed a motion for DNA testing under Sec. 547.035, which was denied without a hearing.
Holding: Sec. 547.035, as relevant here, provides a person is entitled to DNA testing to demonstrate innocence if (1) there is DNA evidence upon which testing can be conducted and (2) the technology for the testing was not reasonably available at the time of trial. To determine whether DNA testing was reasonably available, a court must consider the particular circumstances in the case at the time of trial. Here, Defendant acknowledges that DNA testing became recognized and admissible in Missouri in 1991. But Defendant claims the technology was still in its infancy and not reasonably available in 1996. Defendant cites a study by the Dept. of Justice in California in 1996 that DNA was still only being used in a small number of cases due to its high cost, time constraints and unavailability. Although Defendant cites no Missouri-specific data for 1996, he requested a hearing to prove similar circumstances existed here through testimony by a DNA expert, as well as his trial counsel from 1996. Defendant's claims are not conclusively refuted by the record, so he is entitled to an evidentiary hearing.

Mercer v. State, 2015 WL 9481403 (Mo. App. S.D. Dec. 29, 2015):
Holding: Where trial court denied a motion seeking DNA testing under Sec. 547.035 with a docket entry stating that the motion was "overruled and denied," this was not a final appealable judgment, because it was not signed by a judge nor dominated a "judgment" as required by Rule 74.01(a); appellate court, sua sponte, dismisses appeal.
Dissenting opinion: Failure to comply with Rule 74.01(a) is not "jurisdictional" for the appellate court, but is merely error which appellate court is not required to address, unless raised by the parties (who didn't raise the matter).

*** Maryland v. King, 93 Crim. L. Rep. 325, ___ U.S. ___ (U.S. 6/3/13):**
Holding: When Officers make an arrest supported by probable cause for a serious crime and detain Defendant in custody, the taking of a DNA sample is a reasonable booking procedure similar to photographing and fingerprinting does not violate the 4th Amendment.

*** Skinner v. Switzer, ___ U.S. ___, 88 Crim. L. Rep. 683 (U.S. 3/7/11):**
Holding: Prisoner can use 42 USC Sec. 1983 to obtain access to evidence for DNA testing after a conviction.

U.S. v. Hagler, 92 Crim. L. Rep. 233 (7th Cir. 11/21/12):
Holding: 18 USC 3297, which resets the limitations period for a federal crime "in a case in which DNA testing implicates an identified person," does not restart the limitations clock where the DNA testing produced a partial profile that implicated dozens of people.

Mitchell v. U.S., 94 Crim. L. Rep. 394 (D.C. 12/12/13):
Holding: Under DC's DNA statute, Gov't bears the burden of proving that it does not possess biological material that can be DNA tested, and that it has undertaken a reasonable search for such evidence.

State v. Cheeks, 94 Crim. L. Rep. 89, 2013 WL 5495257 (Kan. 10/4/13):
Holding: State law that allowed persons convicted of first degree murder and rape to petition for post-conviction DNA testing, but did not allow persons convicted of second degree murder to do so, violated Equal Protection because there was no rational basis to distinguish between these scenarios.

King v. State, 2012 WL 1392636 (Md. 2012):
Holding: The provision of the DNA Collection Act authorizing the warrantless collection of a DNA sample upon a person's arrest for a qualifying crime was unconstitutional under the 4th Amendment as applied to the defendant because, as an arrestee, he was entitled to the presumption of innocence.

Com. v. Donald, 95 Crim. L. Rep. 224 (Mass. 5/6/14):
Holding: Even though Defendant had DNA testing at his trial 15 years ago, where new and better DNA tests have since become available, Defendant is entitled to new testing under State DNA statute.

Com. v. Wade, 2014 WL 961125 (Mass. 2014):
Holding: Test as to whether Defendant can obtain postconviction DNA testing under DNA statute was not *Strickland*'s ineffective counsel standard, and in order to get testing, Defendant need not refute every theory of guilt the State could advance.

Com. v. Wade, 94 Crim. L. Rep. 771 (Mass. 3/14/14):
Holding: Massachusetts standard for DNA testing is lower than for most other states; testing is not conditioned on proof that the test results will raise doubt as to the conviction.

Shepard v. Houston, 96 Crim. L. Rep. 209 (Neb. 11/7/14):
Holding: New state statute that takes away "good time" credit from inmates if they refuse to give DNA samples cannot be applied retroactively to inmates who were convicted before the statute was passed.

State v. Pratt, 2014 WL 659678 (Neb. 2014):
Holding: To interpret the "physical integrity" requirement of DNA statute as requiring that the potential evidence have been stored in a way to avoid contamination would frustrate the purpose of the DNA statue, which was to allow defendants to obtain DNA testing in "old" cases where DNA testing was not previously available.

Com. v. Wright, 88 Crim. L. Rep. 684 (Pa. 2/23/11):
Holding: Even though Defendant's confession had been held to be voluntary at trial, this did not preclude him from seeking postconviction DNA testing; when a court determines whether a confession is voluntary, it is determining an issue of admissibility at trial, not whether the confession is true.

State v. Medina, 95 Crim. L. Rep. 540 (Vt. 7/11/14):
Holding: State law mandating collection of DNA from anyone arraigned for a felony violates Vermont Constitution.

State v. Thompson, 90 Crim. L. Rep. 760 (Wash. 2/23/12):
Holding: A court may not rely on evidence that was never admitted at a petitioner's rape trial to deny a request for post-conviction DNA testing.

People v. Buza, 96 Crim. L. Rep. 270 (Cal. App. 12/3/14):
Holding: Statute that requires DNA samples from persons arrested for felonies violates Calif. Constitution.

Jointer v. Superior Court, 158 Cal. Rptr. 3d 778 (Cal. App. 2013):
Holding: Postconviction court abused discretion in denying DNA testing of a water bottle that perpetrator drank from at the robbery scene, because if the DNA results were favorable, there is a reasonable probability that Defendant might have obtained a more favorable result at trial, since the water bottle was the only physical evidence in the case and two of three eyewitnesses were uncertain in their identification of Defendant.

People v. Wright, 2012 WL 1108504 (Ill. App. Ct. 1st Dist. 2012):
Holding: A defendant charged with aggravated criminal sexual assault demonstrated that DNA evidence would be material to the defense investigation or relevant at trial, and thus the defendant was entitled to a pretrial DNA database search.

Amato v. District Attorney, 89 Crim. L. Rep. 801 (Mass Ct. App. 8/25/11):
Holding: Where police told Defendant that his DNA sample would later be destroyed if he helped out with a murder investigation, Defendant can bring equitable action to have his DNA sample destroyed.

Whitfield v. State, 95 Crim. L. Rep. 224 (Tex. Crim. App. 5/7/14):
Holding: An unfavorable finding on postconviction DNA testing is appealable.

Double Jeopardy

State v. Smith, 2015 WL 1094826 (Mo. banc March 10, 2015):
Holding: (1) Even though Defendant was convicted of murder and assault for shooting at one person (the assault) but the bullet hit and killed another person (the murder), this did not violate double jeopardy because when the same conduct results in harm to two or more victims, Defendant may be convicted for the harm to each victim. (2) Where the written judgment and sentence stated that Defendant pleaded guilty, but he actually was convicted at trial, this was a clerical error that can be corrected nunc pro tunc under Rule 29.12(c).

State v. Hardin, 429 S.W.3d 417 (Mo. banc 2014):
(1) Where forcible rape statute stated the punishment as a "term of imprisonment of life imprisonment or a term of years not less than five," a sentence of 50 years was not outside the statutory range under the plain language of the statute since this was "not less than five," and (2) conviction for both "aggravated stalking" and "violation of protection order" did not violate double jeopardy because violation of protection order is not a lesser-included offense of "aggravated stalking" under the statutory elements test, which is the applicable test for determining lesser-included offenses.
Facts: Defendant was convicted of forcible rape for abducting and raping his wife. He was also convicted of "aggravated stalking" and five counts of "violation of a protective order" for telephoning his wife five times from jail. He was sentenced to 50 years for the rape. On appeal, he claimed that the 50-year sentence exceeded the permissible statutory range, and that his convictions for "aggravated stalking" and "violation of a protective order" violated double jeopardy.
Holding: (1) The rape statute, Sec. 566.030.2 RSMo Supp. 2009, provides that the authorized term is "life imprisonment or a term of years not less than five." Defendant claims the authorized term is five years *to* life. Defendant bases his argument on Sec. 558.019.4 which provides that a sentence of life shall be calculated to be 30 years for parole eligibility purposes. However, parole eligibility is not the same as the authorized term of imprisonment. Defendant's reading is inconsistent with the plain language of the rape statute. The statute says "life imprisonment *or* a term of years not less than five."

The "or" is disjunctive, meaning the Legislature intended *either* life imprisonment, *or* a term not less than five. To the extent that prior decisions of the Court of Appeals have held that the maximum punishment is life imprisonment (*State v. Williams*, 828 S.W.2d 894 (Mo. App. 1992), *State v. Anderson* , 844 S.W.2d 40 (Mo. App. 1992)), they should no longer be followed. (2) Double jeopardy protects against multiple punishments for the same offense, but does no more than prevent the sentencing court from imposing greater punishment than the Legislature intended. Sec. 556.041 says a defendant cannot be convicted of more than one offense if one offense is included in the other. One offense is "included" in the other where it is established by proof of the same or less than all the elements required to establish commission of the charged offense. The test is an *elements* test by comparing the elements of the relevant statutes; not a test based on how the offense is charged. A person commits "aggravated stalking," Sec. 565.225.3, if his course of conduct includes listed aggravated factors such as (1) making a threat, (2) violating a protective order, or (3) violating a condition of probation, parole or pretrial release. A person commits the crime of "violation of a protective order," Sec. 455.085.2, when they commit an act of abuse in violation of the order. Under the elements test, violating a protective order is not "included" in the offense of "aggravated stalking." "Aggravated stalking" requires proof of a course of conduct composed of two or more acts and "aggravated factors," whereas a protective order violation can be proven by a single act of abuse of the order. "Aggravated stalking" can be proven without demonstrating an order of violation of protection. For example, if the defendant makes a threat. Each offense requires proof of an element the other does not. Defendant assumes that whether the offense of "violating a protection order" is included in the offense of "aggravated stalking" depends on how "aggravated stalking" is charged, proved or submitted to the jury, and that where it is charged and submitted based on violating a protection order, this violated double jeopardy. However, the proper test focusses only on the *elements* of the statutes defining each offense. An indictment-based analysis is wrong. To the extent that *State v. Smith*, 370 S.W.3d 891 (Mo. App. 2012) is contrary, it should no longer be followed.

State v. Hicks, 2013 WL 811932 (Mo. banc Feb. 26, 2013):
Holding: Double jeopardy prohibits multiple convictions for first-degree robbery for stealing multiple items in the single incident; thus, where Defendant was convicted of two counts of robbery for stealing a victim's keys and a video recorder in a single continuous act of force, the conviction for the second count is vacated.

State v. Roggenbuck, No. SC92236 (Mo. banc 12/4/12):
Holding: Where there was evidence that Defendant acquired possession of five different photos of child pornography at different points in time during a three-week period, it did not constitute double jeopardy to convict of five separate counts under Sec. 573.037 RSMo. Cum. Supp. 2007, which defined the offense as possession of "any obscene material that has a child as one of its participants … as an observer or participant of sexual conduct."

State v. Miller, No. SC91948 (Mo. banc 7/3/12):

(1) Where the information charged various sex acts between Dec. 3, 2004 and Dec. 5, 2005, and the verdict director tracked these dates, but the evidence was that the offense was committed in 1998 or 1999, the evidence is insufficient to convict because the time span of the charged offense was different than the evidence actually presented and the charged offense did not give adequate notice to the defense of the evidence the State intended to present; because the evidence is insufficient, Defendant cannot be retried on these counts; and (2) where Defendant was charged with another sex offense alleged to have occurred in 1997 or 1998, the trial court erred in giving a jury instruction regarding the definition of sexual contact that was not enacted until 2002; because this jury instruction constitutes only "trial error," Defendant can be retried on this count.

Facts: Defendant was charged by information with child sex offenses alleged to have occurred between Dec. 3, 2004 and Dec. 3, 2005. The jury instruction tracked this time frame. However, the evidence presented at trial showed that these offenses occurred in 1998 or 1999. Regarding a separate charge of first degree child molestation, the verdict directed stated that Defendant touched the genitals of a child "through the clothing" in 1997 or 1998.

Holding: (1) There was no evidence that Defendant committed the first charged sex offenses in 2004 or 2005, as charged in the information and as instructed in the jury instruction. While the exact date of a sex offense is not an element of the crime, a time element cannot be so overbroad as to nullify an alibi defense or prevent application of double jeopardy principles. When the State chooses to file an information and submit a parallel jury instruction that charges a specific time frame, the evidence must conform to that time frame. Otherwise, the defense would not have adequate notice of the evidence the State intends to present. Here, there was no evidence Defendant committed the first sex acts during 2004 or 2005. Having not presented sufficient evidence to convict, the State cannot retry Defendant on these charges and he must be discharged. (2) Regarding a separate charge of first degree child molestation, at the time of this offense, Sec. 566.067 RSMo. 1994 applied and it did not define sexual contact as "touching through the clothing." That language was not added until the statute was revised in 2002. Hence, the jury instruction using the 2002 language was error. However, this is "trial error," so a new trial on this charge is permissible.

State v. Liberty, No. SC91821 (Mo. banc 5/29/12):

Sec. 573.037 RSMo. Supp. 2007 which prohibited possession of "any" obscene material is ambiguous as to the unit of prosecutor for multiple photos of child pornography, but double jeopardy does not bar retrial for multiple counts if State can show they were obtained at different times.

Facts: Defendant was convicted under Sec. 573.037 RSMo. Supp. 2007 of eight counts of possession of child pornography for possession of eight photos. He claimed this was only one unit of prosecution and violated double jeopardy.

Holding: Sec. 573.037 RSMo. Supp. 2007 (since amended) prohibited possession of "any" obscene material. The question here is whether 573.037 (2007) intended to impose separate punishments for *each item* of child pornography a person possesses, or whether the statute is ambiguous as to whether it intended this to only be a single crime. The use of the word "any" is ambiguous because it can be interpreted to permit either a single

prosecution or multiple prosecutions for eight photos. The ambiguity is shown, in part, by the legislative amendment in 2008, which more clearly evidenced the Legislature's intent as to unit of prosecution. 573.037 was amended in 2008, in relevant part, to provide that a possession of child pornography is a Class C felony unless the person possess more than 20 still images, in which case it is a Class B felony. The 2008 amendment makes clear that possession of 20 or more images is a single unit of prosecution for which only a single prosecution is permissible. To suggest that multiple prosecutions are permissible for possession of fewer than 20 images would produce the unreasonable result that a defendant could receive a harsher penalty for possessing fewer images; statutes must be interpreted to avoid absurd results. However, just because the 2007 statute is ambiguous, does not mean that double jeopardy bars retrial on eight counts. Double jeopardy bars retrial where the evidence is insufficient, not for "trial error." Defendant's claim is "trial error" here because it is based on erroneous application of 573.037 (2007). Accordingly, the proper remedy is to affirm Defendant's conviction on one count and remand to the trial court, at which point the State may determine whether to proceed on the remaining seven counts should it have evidence of separate offenses, e.g., possession of the photos by Defendant at different times or from different sources.

State v. Brandon, 2015 WL 9478190 (Mo. App. E.D. Dec. 29, 2015):
Where (1) Defendant abducted Victim, (2) held her at gunpoint in a car all night while sexually assaulting her, and (3) stole cash from her and then later stole jewelry, Double Jeopardy prohibited conviction for two counts of robbery and corresponding armed criminal action, because there were not two separate instances of robbery; there was only one threat of continuous force against Victim which never ceased all night.
Facts: Defendant and co-defendants abducted Victim, held her at gunpoint, and drove her around in a car all night. They sexually assaulted her, and made her provide cash early in the night and jewelry later in the night. Victim eventually escaped from the car. Defendant was convicted of various sex offenses, and two separate counts of robbery and corresponding ACA. He claimed plain error in convicting of two separate counts of robbery.
Holding: Double Jeopardy analysis here requires determination of whether cumulative punishments were intended by the legislature. The court examines the unit of prosecution allowed by the robbery statute. The distinctive characteristic of robbery is violence to the victim. The unit of prosecution is the person who is subject to the force. Convicting Defendant of two counts of robbery violated Double Jeopardy. Defendant held Victim all night. He forcibly stole cash and later jewelry. But only one threat of force was made toward Victim, and it never ceased. Thus, only one count of robbery and ACA can be supported by the facts.

Kilcrease v. State, 2015 WL 7455252 (Mo. App. E.D. Nov. 24, 2015):
Holding: Double Jeopardy does not preclude convicting Defendant of first-degree assault, Sec. 565.050 (2012), first-degree child abuse, Sec. 568.060 (2000) and endangering the welfare of a child, Sec. 568.045 (2012), for the same underlying conduct, because Sec. 566.041 provides that "[w]hen the same conduct … may establish the commission of more than one offense, [a Defendant] may be prosecuted for each such

offense," provided that one is not a lesser-included offense of the other; none of the offenses is a lesser of the other because they each require proof of a fact which the others do not.

State v. Spencer, 2014 WL 4085162 (Mo. App. E.D. Aug. 19, 2014):
Where trial court took motion to suppress "with the case" in a bench trial and at end of trial granted the motion and declared the proceedings to be concluded, the State's interlocutory appeal must be dismissed because it violates Double Jeopardy.
Facts: Defendant, charged with drug possession, filed a motion to suppress, and waived a jury trial. The trial court held a bench trial, during which the motion was taken "with the case." The State and defense made opening statements and the State presented police witnesses. Defendant moved for judgment of acquittal at the close of all evidence, and argued his motion to suppress. The trial court then stated, "Very well. I'm going to grant the motion to suppress the evidence, and that will conclude the matter….Court is in recess." The State filed an interlocutory appeal regarding the motion to suppress.
Holding: Sec. 547.200.2 allows the State an interlocutory appeal regarding a motion to suppress but not if "such an appeal would result in double jeopardy for the defendant." Here, the State presented its entire case. Although the trial court did not enter a not guilty verdict or enter an order labeled a judgment, the appellate court looks at the practical effect of the actions. Here, the trial court did not continue the trial pending an interlocutory appeal. The trial was "concluded." The practical effect is the trial court acquitted Defendant after the suppression of evidence. Double jeopardy applies as the State presented evidence, thus giving due deference to double jeopardy in bench trials. "While taking motions to suppress evidence with a bench trial may serve judicial economy, it is not good practice."

State v. Aston, 2014 WL 2853548 (Mo. App. E.D. 6/24/14):
Even though trial court conducted a "trial by police report" over the State's objection and found Defendant not guilty, the trial court denied the State the right to present evidence to prove its case and double jeopardy does not preclude retrial since this proceeding was not a "trial."
Facts: Defendant was charged with stealing over $500. Defendant waived a jury trial. The trial court then asked for the police reports, and voiced concern about the value of the property being less than $500. The State claimed it would show through witnesses that the value was more than $500. The trial court announced it was going to try the case on the police reports. The State objected. The trial court then found Defendant not guilty. The State appealed.
Holding: Rule 27.02(g) and Sec. 546.070(1) state that the State shall offer evidence at trial. Because the State has the burden of proof, it should not be unduly limited in how it presents evidence. Here, the trial court foreclosed the State from presenting witnesses as to value. The trial court, in effect, allowed Defendant to unilaterally stipulate that the police reports were the only evidence against him. No cases allow a Defendant to unilaterally, over objection, submit a case on the police reports. Having heard no evidence, the trial court never conducted an actual "trial," at which the State could present evidence. The court did not provide the State with a full and fair opportunity to

vindicate society's interest. Thus, Defendant's right to be free from double jeopardy would not be violated by a trial. Not guilty judgment reversed.

State v. Hardin, 2013 WL 2181218 (Mo. App. E.D. May 21, 2013):
Holding: Where four counts (convictions) of violation of a protective order alleged the same conduct as another count (conviction) for aggravated stalking, the four counts of violation of a protective order violated Double Jeopardy; this is because the offense of violating a protective order (Sec. 455.085.2) is included in the offense of aggravated stalking (Sec. 565.225) because proof of the same conduct is required to sustain both convictions, and the Fifth Amendment and Sec. 556.041 protect against multiple punishments for the same offense.

State v. Roach, No. ED97952 (Mo. App. E.D. 11/20/12):
Holding: Missouri follows principle of "dual sovereignty" for double jeopardy purposes such that an acquittal or conviction in federal court does not prevent a subsequent conviction for the same offense in Missouri state court if the offense is one over which both sovereigns have jurisdiction.

State v. Smith, No. ED96865 (Mo. App. E.D. 5/5/12):
(1) Convictions for both aggravated stalking, Sec. 565.225.2, and violation of a protective order, Sec. 455.085.2, violated double jeopardy; and (2) jury instruction which allowed conviction for violation of protective order by "disturbing the peace of victim by showing up at her home" was plain error because this was not one of the enumerated ways to commit the offense set out in MAI-CR3d 332.52.
Facts: Defendant was convicted of various counts of aggravated stalking, 565.225.2, and violation of a protective order, Sec. 455.085.2, based on the same conduct.
Holding: (1) Defendant argues that it constituted double jeopardy to convict of both aggravated stalking and violation of a protective order. Sec. 556.041 provides that a person may not be convicted of more than one offense if one offense is included in the other. Sec. 556.046 provides that an offense is included when it is established by proof of the same or less than all the facts required to establish commission of the offense charged. An offense is a lesser included offense if it is impossible to commit the greater without committing the lesser. Sec. 565.225.2 provides that a person commits aggravated stalking if through his course of conduct he harasses or follows with the intent of harassing another person and at least one of the acts constituting the course of conduct is in violation of an order of protection of which he has notice. Sec. 455.085.2 states that a person commits the offense of violating an order of protection where he commits an act of abuse in violation of such an order. The offense of violation of a protective order is included in the offense of aggravated stalking because proof of the same conduct is required for both convictions. It is impossible to commit aggravated stalking without violating the order of protection. Thus, the trial court plainly erred in accepting verdicts for both offenses, and the convictions for violating the order of protection are vacated. (2) MAI-CR3d 332.52 provides that a person commits the offense of violation of an order of protection if they violate the order by stalking, abusing victim in certain ways, entering the premises of victim, or initiating communication with victim. The jury instruction here submitted the offense of violating the order of protection by "disturbing

the peace of [victim] by showing up at her home." This is not one of the enumerated ways to commit the offense and this conduct was not even charged. It was plain error to give this instruction.

State v. Walker, No. ED95089 (Mo. App. E.D. 11/8/11):
Holding: Convictions for forcible rape, Sec. 566.030 RSMo. Cum. Supp. 1998, and statutory rape, Sec. 566.032 RSMo. Cum. Supp. 1998, for a single act of sexual intercourse do not violate double jeopardy; court emphasizes it is deciding case solely under 1998 statutes, and expresses no opinion on current versions of the statutes.

State v. Schallon, No. ED94181 (Mo. App. E.D. 5/24/11):
(1) Where Defendant was charged with having Victim touch his penis but Victim testified that she didn't recall touching the penis, the evidence was insufficient to convict of sodomy; (2) where Defendant was charged with two counts of sodomy for having Victim touch his penis, but this was really the same occurrence, double jeopardy prohibited conviction on both counts; and (3) where Defendant was convicted of attempted statutory sodomy but sentenced to 7 years in prison, the sentence was in excess of that authorized for a Class D felony.
Facts: Defendant was charged with multiple counts of various sexual offenses. Count 15 charged him with having Victim touch his penis. Counts 21 and 26 charged him with having Victim touch his penis "on the same day he instructed her to perform oral sex" and on the day "he threatened to tell her mother" about a boyfriend. Count 20 charged attempted statutory sodomy in the second degree.
Holding: Regarding Count 15, Victim testified that she did not recall touching Defendant's penis that day. Where the act constituting the crime is specified in the charge, the State is held to proof of that act. Thus, the evidence was insufficient to convict for Count 15. Regarding Counts 21 and 26, the evidence showed that these were part of the same event and that during this event, Defendant had Victim touch his penis only one time. Double Jeopardy prohibits multiple punishments for the same offense, so one of the Counts must be vacated. Lastly, Defendant was convicted in Count 20 of attempted second degree statutory sodomy, which is a Class D felony because an attempt offense is one class less than the completed offense, Sec. 564.011.3(3). The 7 year sentence exceeded the maximum allowed by law for a Class D felony.

State v. Storer, SD31303 (Mo. App. S.D. 4/25/12):
Where jury hung and then State dismissed charges and refiled them, the re-prosecution of Defendant was prohibited by Sec. 56.087 which states that a dismissal by a prosecutor after double jeopardy has attached is with prejudice unless the Defendant has consented to the dismissal, and which defines jeopardy as attaching when the jury is impaneled and sworn.
Facts: Defendant was charged with various offenses, and went to jury trial. After several hours of deliberation, the jury hung and the court declared a mistrial. Two weeks later, the State entered a nolle prosequi of the charges, and told Defendant it intended to re-file. Defendant never consented to the case being dismissed without prejudice. Thereafter, the State dismissed the charges and re-filed. Defendant filed a motion to

dismiss, claiming the re-filed charges were barred by double jeopardy. The trial court granted the motion to dismiss. The State appealed.
Holding: The State claims the re-filing is not barred by double jeopardy because the first trial ended in a hung jury. The State is confusing constitutional double jeopardy with the applicable statute here. Sec. 56.087 provides that a dismissal filed by the prosecutor "after double jeopardy has attached is with prejudice, unless the criminal defendant has consented to having the case dismissed without prejudice." The statute further provides that "double jeopardy attaches in a jury trial when the jury has been impaneled and sworn." The State argues the statute was not intended to apply when there has been a hung jury. But courts can only interpret statutes by applying the plain language of them. Sec. 56.087 provides that double jeopardy attaches when a jury is impaneled and sworn. Applying that clear definition, the clear result is that a dismissal after the jury has been impaneled and sworn is with prejudice unless the defendant has consented to the case being dismissed without prejudice. Here, Defendant never gave such consent. The dismissal served as a bar to the case being re-filed.

City of Joplin v. Marston, 2011 WL 2931075 (Mo. App. S.D. 7/21/11):
Where City failed to introduce city ordinance under which Defendant was convicted into evidence, the evidence is insufficient to convict because courts cannot take judicial notice of city ordinances, and double jeopardy precludes retrial.
Facts: Defendant was convicted at a trial de novo of violation of various city ordinances, including driving under the influence of drugs. The City at trial failed to introduce the ordinances into evidence. Defendant appealed.
Holding: Municipal prosecutions require proof of the ordinances upon which conviction rests. Courts cannot take judicial notice of municipal ordinances that are not properly introduced into evidence. There are three ways to introduce municipal ordinances: (1) introducing a certified copy under Sec. 490.240; (2) bringing the printed volume of ordinances to court and proving the ordinance through the book, Sec. 490.240; or (3) under Sec. 479.250, filing a certified copy with the court provided it is available for inspection by the parties. None of these were done here. Hence, the record is devoid of proof of the ordinance violation. Principles of double jeopardy preclude a retrial where the evidence is found to be legally insufficient. Reversed and remanded for entry of judgment of acquittal.

City of Joplin v. Klein, 2011 WL 2936401 (Mo. App. S.D. 7/21/11):
Even though City introduced ordinances making certain actions a municipal offense, where City failed to introduce the penalty portions of the ordinances, a court cannot judicially notice them and the charging information and proof were insufficient; furthermore, City is precluded from getting another opportunity to prove penalty.
Facts: Defendant was convicted of violation of various city ordinances. At trial, City properly placed the ordinances creating violations before the trial court by filing certified copies of the ordinances with the clerk of the circuit court under Sec. 479.250. However, the penalties for violation of these ordinances were in separate ordinances that were not provided. Defendant appealed.
Holding: A court cannot take judicial notice of a city ordinance that is not properly introduced into evidence. Here, the information (citation) charging the offenses failed to

list the ordinance providing a penalty, and the penalty ordinances were not admitted into evidence or otherwise properly before the court. Thus, the charging information does not comply with Rule 37.35(b)(4). *State v. Collins*, 328 S.W.3d 705 (Mo. banc 2011), held that where the State failed to offer sufficient evidence to prove enhanced DWI status, the State does not get a second opportunity to do so. Applying *Collins*, City does not get a second opportunity to prove penalty here. Because City failed to allege the penalty ordinances in the charging information or prove them during trial, it is prevented from doing so at a re-sentencing. The only remedy is discharge of Defendant.

State v. Bazell, 2015 WL 4463646 (Mo. App. W.D. July 21, 2015):
Defendant's convictions for two counts of stealing two firearms of unspecified value violated double jeopardy; Sec. 570.030 allows prosecution for stealing individual firearms only if the value of each firearm is over $500.
Facts: Defendant broke into a residence and stole two guns. She was convicted of two counts of stealing firearms, Sec. 570.030.3(3)(d). She appealed on grounds of double jeopardy.
Holding: Double jeopardy can be reviewed as a matter of plain error because it is a constitutional right that goes to the power of a court to enter a conviction. Double jeopardy bars multiple punishments for one offense. The test for double jeopardy is to determine what the legislature intended the unit of prosecution to be. Sec. 570.030.3(3)(d) makes stealing "any firearms" a Class C felony. 570.030.6 elaborates on the unit of prosecution for theft of specified property listed in subsection 3, and states that theft of any property which exceeds $500 may be considered a separate felony and charged in separate counts. Had the legislature wanted separate punishment for theft of each firearm under that value, it could have used the word "a" firearm instead of "any" firearm in Sec. 570.030.3(3)(d). But it did not. Read as a whole, 570.030 shows a legislative intent to not allow multiple punishments for a single incidence of theft of multiple firearms not valued over $500. Since the State did not allege or prove the value here, double jeopardy was violated by convicting of two counts. Conviction for one count reversed.

State v. Johnston, 2014 WL 4823628 (Mo. App. W.D. Sept. 30, 2014):
Where trial court granted new trial on basis that guilty verdict was "against the weight of the evidence," this was not a "final judgment" subject to appeal since the trial proceedings would continue; granting a new trial on this basis does not implicate double jeopardy because this is not a judgment of acquittal or finding of insufficient evidence.
Facts: Defendant was convicted of first degree murder. The trial court then granted Defendant's motion for new trial. The court found that the guilty verdict was "against the weight of the evidence," establishing good cause under Rule 29.11 which provides that a trial court may grant a new trial upon good cause shown. Additionally, Sec. 547.020(5) allows a trial court to grant a new trial "when the verdict is contrary to the law or evidence." The State appealed.
Holding: There is no "final judgment" here to allow an appeal. The judgment granting a new trial did not dispose of all issues and leave nothing for future adjudication. Here, everything is left for future adjudication since a new trial is pending. The State argues that the judgment was a *de facto* acquittal and that the State should be allowed to appeal

because double jeopardy precludes retrial. But double jeopardy precludes retrial only if a conviction is set aside for insufficient evidence to support the verdict. However, when a new trial is granted because the verdict is "against the weight of the evidence," rather than that the evidence was insufficient to support the verdict, double jeopardy does not bar a retrial. The trial court made its own credibility determinations and assessed the evidence, which indicates a weight of the evidence rather than a sufficiency of the evidence analysis. Appeal dismissed.

State v. Moad, 2013 WL 1838095 (Mo. App. W.D. April 23, 2013):
Even though jury was unable to reach a verdict at a jury trial, where Prosecutor subsequently dismissed the charge without Defendant's consent, Sec. 56.087 barred Prosecutor from re-filing the charge.
Facts: Defendant was charged with involuntary manslaughter, and went to jury trial. The jury was unable to reach a verdict. Subsequently, the Prosecutor dismissed the case *nolle prosequi*. Subsequently, Defendant was re-indicted on the same charge of involuntary manslaughter. He filed a motion to dismiss under Sec. 56.087, which was granted. The State appealed.
Holding: Sec. 56.087 clearly states that "[a] dismissal filed by the [prosecutor] after double jeopardy has attached is with prejudice, unless the criminal defendant has consented to having the case dismissed without prejudice. … For purposes of this section, double jeopardy attaches in a jury trial when the jury has been impaneled and sworn." Here, Defendant did not consent to the dismissal. Therefore, the dismissal was with prejudice and the Prosecutor cannot re-file the charge. Defendant's motion to dismiss was properly granted.

State v. Hicks, No. WD71650 (Mo. App. W.D. 1/17/12):
Holding: Where Defendant was convicted of two counts of robbery for stealing a victim's keys and cassette recorder in a single act, this violated double jeopardy because he cannot be subject to multiple convictions for taking multiple items of property from victim in a single incident.

State v. Lee, No. WD71924 (Mo. App. W.D. 6/7/11):
Holding: In case of first impression, Western District holds that even though police officer-witness intentionally gave testimony designed to provoke a mistrial, the prosecutor was not responsible for this misconduct, so the trial court did not have authority to order dismissal of the charges with prejudice; further, double jeopardy does not bar retrial of defendant.

State v. Liberty, No. WD71724 (Mo. App. W.D. 4/12/11):
Sec. 573.037 RSMo. Cum. Supp. 2007 does not authorize multiple convictions for possession of multiple photos of child pornography in a single event; this constitutes a single offense only.
Facts: Defendant was charged with eight counts of possession of child pornography under Sec. 573.037 RSMo. Cum. Supp. 2007 for possession eight photos of child pornography on his computer on May 2, 2008, as a second offense. He was convicted

and sentenced to eight consecutive prison sentences. He appealed, claiming violation of double jeopardy.
Holding: The Double Jeopardy Clause protects a defendant from successive prosecutions of the same offense after acquittal or conviction, and multiple punishments for the same offense. This latter protection ensures that the sentencing discretion of courts is confined to the limits established by the legislature. The issue here is whether multiple punishments were intended by the legislature. Sec. 573.037 as it existed at the time of the offense prohibited the possession of "any obscene material that has as a child one of its participants or portrays what appears to be a child as an observer or participant of sexual conduct." Had the legislature wished to permit separate convictions, it could have criminalized the possession of "an item" of child pornography rather than "any material." Here, we also find compelling that the actus reus the statute required the State to prove – the Defendant's possession – was a single event in the instant case, at a single time and place. Had the State alleged that Defendant "possessed" each photo at a different time when they were each placed on the computer, our analysis might be different, however. We also find the legislature's subsequent amendment informative; in 2008 the legislature added an enhanced penalty to the section on possession for possessing "more than 20 still images of child pornography." If the legislature intended separate convictions for each still image in the prior statute, amending it to add an enhanced penalty for multiple images becomes illogical. Defendant's eight possession counts are reversed and remanded for sentencing on a single count only.

*** Martinez v. Illinois, 95 Crim. L. Rep. 271, ___ U.S. ___, 134 S.Ct. 2070 (U.S. 5/27/14):**
Holding: Jeopardy attaches once a jury is sworn and State cannot avoid that by refusing to put on evidence; here, after the jury was sworn, the State refused to put on evidence because a State's witness was missing; since the State refused to put on evidence, the judge granted a not guilty verdict; Supreme Court rejects view that jeopardy did not attach because Defendant "was never at risk of conviction," and enforces bright-line rule that jeopardy attached when jury was sworn.

*** Evans v. Michigan, 92 Crim. L. Rep. 612, ___ U.S. ___ (U.S. 2/20/13):**
Holding: 5th Amendment Double Jeopardy Clause bars retrial of a Defendant who was acquitted by a judge, even though judge based acquittal on an erroneous interpretation of law; judge had erroneously believed the prosecution was required to prove a fact it was not required to prove.

*** Bleford v. Arkansas, 2012 WL 1868066, ___ U.S. ___ (U.S. 2012):**
Holding: Even though jury told the trial court that jury had acquitted Defendant of greater offenses, where jury then deadlocked on lesser offenses and a mistrial was declared, Double Jeopardy was not violated by re-trying Defendant on the greater offenses. This is because the first trial was not a "final resolution of anything" and "[e]ven if we assume that the instructions required a unanimous vote before the jury could consider a lesser offense … nothing in the instructions prohibited the jury from reconsidering such a vote." Thus, even though jury told judge that it had voted

unanimously to acquit of capital murder and first degree murder and was deadlocked on a lesser offense, Defendant can still be retried on the greater offenses after the mistrial.

U.S. v. Cioni, 89 Crim. L. Rep. 183 (4th Cir. 4/20/11):
Holding: Double jeopardy prohibits automatic elevation of an offense for reading someone else's email in violation of Computer Fraud & Abuse Act, 18 USC 1030, to a felony under the Stored Communications Privacy Act, 18 USC 2701.

Martinez v. Caldwell, 2011 WL 2347708 (5th Cir. 2011):
Holding: Pretrial detainee's challenge to state court's reversal of double jeopardy relief was subject to de novo review under AEDPA's section proving general grant of habeas authority.

U.S. v. Rabhan, 2010 WL 51113186 (5th Cir. 2010):
Holding: Even though Defendant made false statements to two different banks in two different states to obtain loans, this was a single conspiracy and not two separate conspiracies.

U.S. v. Farah, 95 Crim. L. Rep. 689 (6th Cir. 9/11/14):
Holding: Where Witness was convicted of criminal contempt for refusing to testify at a trial, double jeopardy precluded Witness from being convicted of criminal contempt again for refusing to testify at another person's trial regarding the same "area of refusal" from the first trial; the contempt was continuing and the Gov't cannot tack on multiple punishments for refusing to testify about the same matter.

U.S. Dudeck, 2011 WL 4478398 (6th Cir. 2011):
Holding: Double Jeopardy Clause required remand for the trial court to determine whether possession of child pornography was a lesser-included offense of receipt of child pornography or whether the two arose from separate conduct.

U.S. v. Ehle, 89 Crim. L. Rep. 256, 2011 WL 1794828 (6th Cir. 5/12/11):
Holding: Convictions for both receiving and possession of the same child pornography violates Double Jeopardy Clause's ban on multiple punishments for a single offense.

U.S. v. Cureton, 94 Crim. L. Rep. 473 (7th Cir. 1/13/14):
Holding: Law making it a crime to use a firearm in a crime of violence, 18 USC 924(c)(1), does not authorize multiple convictions for a defendant who commits two predicate offenses during one act with a single use of a single firearm; thus, Defendant could not be convicted of both attempted extortion and interstate communication of a ransom request where he held a gun to victim's head and demanded she call relatives to obtain cash.

U.S. v. Emly, 95 Crim. L. Rep. 46 (8th Cir. 4/3/14):
Holding: A defendant who copied the same images of child pornography onto three separate devices may be prosecuted for only one count of possession under 18 USC 2252(a)(4)(B), which makes it a crime to possess "1 or more" such items; this expresses

Congress' intent to include multiple materials in a single unit of prosecution, and is unlike 18 USC 2252A, which makes it a crime to possess "any" item of child pornography. The Gov't could have charged multiple counts under 2252A but did not.

U.S. v. Muhlenbruch, 2011 WL 536493 (8th Cir. 2011):
Holding: In case of first impression in 8th Circuit, convictions both for knowingly receiving and possession of child pornography violated Double Jeopardy because possession was a lesser-included offense of receipt, and the offenses were based on the same act or transaction.

U.S. v. Mancuso, 2013 WL 1811276 (9th Cir. 2013):
Holding: Where Defendant was charged with a single continuing offense of distributing cocaine over seven years, this was improperly duplicitous because Gov't was required to charge his numerous separate acts of drugs sales separately since they were not sufficiently related to be a continuing distribution offense.

U.S. v. Alvarez-Moreno, 2011 WL 4069170 (9th Cir. 2011):
Holding: Where Defendant had been convicted at a bench trial, double jeopardy barred him from being retried for failure to waive his constitutional right to a jury trial where Defendant had not moved for a new trial.

U.S. v. Jackson, 94 Crim. L Rep. 337 (10th Cir. 11/26/13):
Holding: Even though Defendant caused two deaths when he was fleeing from a bank robbery, the unit of prosecution under 18 USC 2113(e) for "kill[ing] any person" while fleeing from a bank robbery was ambiguous, so the rule of lenity allows only one prosecution in this situation, not two.

U.S. v. Benoit, 2013 WL 1298154 (10th Cir. 2013):
Holding: Conviction for both receiving and possessing child pornography violated Double Jeopardy.

Wood v. Milyard, 2013 WL 3369065 (10th Cir. 2013):
Holding: Double jeopardy prohibits simultaneous conviction for first and second degree murder for death of a single victim.

U.S. v. Frierson, 2012 WL 5290330 (10th Cir. 2012):
Holding: Where Defendant was convicted of both conspiracy to distribute and possession with intent to distribute, this violated Double Jeopardy's prohibition on multiplicitous counts.

Haye v. U.S., 92 Crim. L. Rep. 794 (D.C. 3/14/13):
Holding: Separate convictions for unlawfully entering a building and criminal contempt for violation of an order to say away from the building violated Double Jeopardy.

U.S. v. Mendian-Santiago, 2012 WL 682460 (M.D. Fla. 2012):
Holding: Where Defendant had been convicted in Puerto Rico for a cocaine conspiracy involving distribution of cocaine in Florida, it violate Double Jeopardy to later charge the same conspiracy in Florida.

U.S. v. Cabrera, 2011 WL 2681248 (M.D. Fla. 2011):
Holding: Where Defendant was convicted on one theory of wire fraud, but such convictions were later set aside on grounds of insufficient evidence, double jeopardy barred prosecution under alternative theory of wire fraud.

U.S. v. Ocampo, 2013 WL 317621 (E.D. Mich. 2013):
Holding: Convictions for both felon in possession of firearm and being a drug user in possession of firearm violated Double Jeopardy.

Litschewski v. Dooley, 2014 WL 7356915 (D.S.D. 2014):
Holding: Where (1) Defendant received multiple consecutive sentences, (2) he had already served the "first" sentence, and (3) he successfully sought habeas relief on grounds that one of the sentences was unauthorized, it violated double jeopardy for court to resentence and reorder the sentences in such a way so that Defendant did not benefit from the resentencing.

U.S. v. Martinovich, 2013 WL 4881019 (E.D. Va. 2013):
Holding: In prosecution for engaging in a monetary transaction involving proceeds from a criminal offense, where funds in Defendant's hedge fund were transferred from the fund to an investor in the fund as a redemption request, the issue of merger with the predicate offense arose, making it necessary to use the narrow definition of "proceeds" encompassing only actual profits from the criminal offense.

U.S. v. Salad, 2012 WL 6050326 (E.D. Va. 2012):
Holding: The different jurisdictional elements in the kidnapping statute and hostage taking statute indicate that Congress did not intend to punish them cumulatively under both provisions for Double Jeopardy purposes.

Ex parte T.D.M., 90 Crim. L. Rep. 202 (Ala. 10/28/11):
Holding: Even though as jury was leaving courtroom the foreperson told the judge that he had read the wrong form of "not guilty," double jeopardy barred the judge from re-calling the jurors to announce a guilty verdict because the jury had already been discharged.

People v. Gonzalez, 2014 WL 5315197 (Cal. 2014):
Holding: Oral copulation of an unconscious person and oral copulation of an intoxicated person are independent offenses; a Defendant can be convicted of both when he has oral sex with an intoxicated, unconscious person, but he cannot be punished for both offenses.

People v. Jones, 2012 WL 2345003 (Cal. 2012):
Holding: Defendant was subjected to impermissible multiple punishments for a single act when he was convicted of possession of a firearm by a felon, carrying a concealed weapon, and carrying an unregistered weapon.

Butler v. State, 2014 WL 2881151 (Del. 2014):
Holding: Defendant was goaded by judicial impropriety into seeking mistrial after jury was sworn, so that double jeopardy barred retrial; here, after jury was sworn, a new judge took over the trial; the new judge engaged in improper behavior such as demanding that portions of trial be off the record, pressuring both parties to reach a plea agreement, reopening voir dire over both parties' objection to change the jurors selected, putting unusual scheduling limitations on the trial, and denying defense counsel an opportunity to consult with her office about what to do.

Walker v. State, 2013 WL 5508541 (Ga. 2013):
Holding: Defendant could not be convicted of both felony murder (based on aggravated assault) and homicide by vehicle (based on reckless driving) from incident where Defendant hit and dragged a pedestrian, because one crime required criminal intent but the other criminal negligence.

Solomon v. State, 2013 WL 5302557 (Ga. 2013):
Holding: Defendant's aggravated assault conviction for pointing gun at victim merged into his malice murder conviction for showing same victim.

Durden v. State, 2013 WL 2371806 (Ga. 2013):
Holding: Defendant could not be convicted of both malice murder and aggravated assault with a deadly weapon.

State v. Baker, 95 Crim. L. Rep. 76 (Idaho 3/28/14):
Holding: A prosecutor's plea agreement not to charge Defendant with a particular charge binds all other prosecutors in State, because all are agents of the State; City Prosecutor's agreement not to prosecute on particular charge prevents State Prosecutor from charging Defendant with that charge.

Garrett v. State, 992 N.E.2d 710 (Ind. 2013):
Holding: Where Defendant was originally charged with two counts of rape (that apparently involved the same criminal episode), but was originally acquitted of one count and the jury hung on the second, a reasonable probability existed that the State used evidentiary facts from the acquitted rape at the retrial to prove the second rape, and this violated the double jeopardy clause of the Indiana Constitution.

State v. King, 2013 WL 4041563 (Kan. 2013):
Holding: In prosecution for making a criminal threat, there is only one crime regardless of number of victims who perceived the threat, and multiple convictions based on number of victims was multiplicitous.

State v. Snellings, **2012 WL 1144318 (Kan. 2012):**
Holding: The elements of two drug-related offenses were identical, requiring sentencing for the less severe offense.

Little v. Com., 2013 WL 6700106 (Ky. 2013):
Holding: Where the State had named two child victims in a charge, but instructed on only one of them at trial, the State abandoned the claims regarding the second victim and double jeopardy barred retrial regarding those claims.

State v. Fennell, 2013 WL 2121916 (Md. 2013):
Holding: Where jury sent note to judge that it intended to acquit Defendant of some charged, but had not agreed on what to do on others, there was no manifest necessity to declare a mistrial, so double jeopardy barred retrial.

Mansfield v. State, 90 Crim. L. Rep. 66 (Md. 9/30/11):
Holding: Where trial judge knew facts impairing his impartiality before the trial began, and then once trial was underway declared a mistrial over defense objection, a second trial is barred by double jeopardy.

Com. v. Rollins, 96 Crim. L. Rep. 184 (Mass. 10/30/14):
Holding: Statute is ambiguous as to unit of prosecution for possession of child pornography, so court holds that double jeopardy prohibited multiple convictions of a single cache of multiple images stored in the computer "in the same place at the same time."

Com. v. Suero, 2013 WL 2097368 (Mass. 2013):
Holding: Convictions for both "indecent assault and battery of a child under 14" and "statutory rape" were duplicative.

People v. Wilson, 95 Crim. L. Rep. 455 (Mich. 6/18/14):
Holding: Defendant whose felony-murder conviction was vacated on appeal cannot be retried for felony-murder where he was acquitted of the only predicate felony that supported the new felony-murder charge.

State v. Sahr, **2012 WL 1414306 (Minn. 2012):**
Holding: Where a trial court's dismissal of a complaint charging first-degree criminal sexual conduct constituted an acquittal on the merits after jeopardy had attached, double jeopardy protections precluded the reviewing court from considering the merits of the State's claim that the defendant had a duty to bring a pretrial motion to dismiss the complaint.

State v. Jeffries, 2011 WL 4949993 (Minn. 2011):
Holding: Defendant did not forfeit his double jeopardy claim by entering into a second plea agreement where trial court rejected the original plea agreement following a presentence investigation.

State v. Martinez-Mendoza, 2011 WL 3820760 (Minn. 2011):
Holding: Jeopardy attached when Defendant pleaded guilty, and State could not later move to vacate the plea.

Goforth v. State, 89 Crim. L. Rep. 847 (Miss. 9/15/11):
Holding: (1) Where Witness gave a statement in child sex case and then suffered a brain injury that rendered Witness unable to remember events, the total lack of memory violated Defendant's confrontation rights because he had no opportunity to cross-examine Witness' past recollection recorded statement; (2) where all counts were identically worded and Defendant was acquitted of some counts and convicted of others, double jeopardy barred retrial on all counts.

State v. Huff, 2011 WL 376380 (Neb. 2011):
Holding: Under same elements test for double jeopardy, the possible predicates of a compound offense should not be incorporated into the offense when determining whether it contains elements that the other does not.

Woods v. State, 92 Crim. L. Rep. 468 (Nev. 1/17/13):
Holding: Where State failed to respond to a motion to dismiss filed by Defendant at a preliminary hearing, and instead dismissed the charges and refilled in another case, this necessitated dismissal of the case under Nevada's "conscious indifference" doctrine and a second prosecution was not allowed due to the "willful failure of the prosecutor to comply with important procedural rules"; this was true even though the prosecutor in charge of the case apparently didn't get notice of the motion to dismiss, although the prosecutor who appeared in court did.

State v. Tate, 2013 WL 5975988 (N.J. 2013):
Holding: Convictions for possession of weapon for unlawful purpose and for aggravated manslaughter merged because the evidence did not support the existence of another unlawful purpose for the weapon possession.

State v. Gutierrez, 2014 WL 3867555 (N.M. 2014):
Holding: Even though child sex victim failed to appear after jury was sworn, there was no manifest necessity to declare a mistrial, so double jeopardy barred retrial.

State v. Silvas, 96 Crim. L. Rep. 529 (N.M. 2/5/15):
Holding: Double jeopardy violated where Defendant convicted of drug trafficking and conspiring to engage in drug trafficking based on a single drug transaction.

State v. Montoya, 2013 WL 2126472 (N.M. 2013):
Holding: Double jeopardy barred convictions for both voluntary manslaughter and causing great bodily harm by shooting at a vehicle.

State v. Gonzales, 93 Crim. L. Rep. 18 (N.M. 3/28/13):
Holding: Where State fails to join all possible charges arising from a single incident, Double Jeopardy bars subsequent prosecution of charges not brought; here Defendant

was acquitted of child endangerment and State subsequently tried to prosecute her for vehicular homicide from same incident.

State v. Gallegos, 89 Crim. L. Rep. 618 (N.M. 6/15/11):
Holding: Whether multiple conspiracy counts arising out of the same facts constitute double jeopardy is an issue of law for the court to decide, not a matter for the jury to decide as factfinder.

State v. Gutierrez, 89 Crim. L. Rep. 420 (N.M. 5/24/11):
Holding: Convictions for both robbery and carjacking violated double jeopardy's ban on multiple punishments for same offense.

People v. Gause, 2012 WL 1986507 (N.Y. 2012):
Holding: Where jury was instructed that it could convict of only one of two offenses which were submitted in the alternative (but jury convicted of both), the conviction on depraved indifference murder amounted to an implied acquittal of intentional murder for Double Jeopardy purposes.

State v. Hampton, 92 Crim. L. Rep. 304 (Ohio 12/2/12):
Holding: Where trial judge acquitted Defendant on the basis of the State's failure to establish venue, State could not appeal.

State v. Manatau, 94 Crim. L. Rep. 711 (Utah 3/7/14):
Holding: Where Defendant objects to a mistrial, the State has the burden of persuading a trial judge that there are reasonable alternatives so as to avoid triggering a double jeopardy bar; if the trial judge has not adequately justified terminating the proceeding, the State – not the defendant – must alert the court to the problem; "we do not require defense counsel to help pave the way for their clients to be subjected to jeopardy for a second time."

State v. Prion, 91 Crim. L. Rep. 70 (Utah 3/20/12):
Holding: Double jeopardy prohibited an increase in Defendant's sentence at a resentencing after he had been found "guilty [but] mentally ill."

Bowlsby v. State, 2013 WL 2501758 (Wyo. 2013):
Holding: Convictions for both incest and first degree sexual abuse of a minor arising out of the same act violated double jeopardy.

People v. Aranda, 2013 WL 4855952 (Cal. App. 2013):
Holding: Under Calif. Constitution, when a jury indicates that Defendant is not guilty of a greater offense, but is deadlocked only on the lesser offense, the court must give the jury the opportunity to return a verdict acquitting of the greater before a mistrial can be declared, and if court does not do so, the mistrial is deemed to be without legal necessity as to the greater, and double jeopardy precludes retrial on that offense (disagreeing with U.S. Supreme Court in *Blueford v. Arkansas*).

People v. Mason, 160 Cal. Rptr.3d 516 (Cal. App. 2013):
Holding: (1) Trial court erred in omitting a jury instruction for offense of failure to register as sex offender that the State prove that the prior spousal rape conviction involved force or violence, since this was an element of the crime here; (2) Because the evidence was insufficient to prove that the prior conviction involved force or violence, Defendant could not be retried for failure to register on the basis of the conduct at issue in the present case.

People v. Nunez, 2012 WL 5270177 (Cal. App. 2012):
Holding: Conviction for striking a motorist and stealing a car were indivisible and violated statutory prohibition against multiple punishments for an indivisible course of conduct.

People v. Eroshevich, 2012 WL 4962999 (Cal. App. 2012):
Holding: Where trial court in ruling on a new trial motion precisely stated that the evidence was insufficient to establish the charged conspiracy, double jeopardy precluded retrial on the charge even if trial court may not have intended to find the evidence insufficient or such a finding was legally erroneous.

People v. Daniels, 145 Cal. Rptr. 3d 33 (Cal. App. 2012):
Holding: A defendant's increased fine and restitution after a new trial violates Double Jeopardy only if the aggregated monetary sentence, not each component thereof, is greater than that originally imposed.

People v. Wensinger, 2012 WL 718548 (Cal. App. 4th Dist. 2012):
Holding: The double jeopardy clause required a trial court to review the sufficiency of the evidence at the defendant's first trial before retrying him on a criminal threat charge because, even though sufficiency of evidence was not an issue on appeal, the Attorney General conceded that the charge was supported by insufficient evidence.

People v. Phong Bui, 2011 WL 505353 (Cal. App. 2011):
Holding: Defendant cannot be convicted of both attempted murder and mayhem for firing the shots because this violates statutory prohibition against multiple punishments for crimes arising from same course of conduct.

People v. Duarte, 2010 WL 4629071 (Cal. App. 2010):
Holding: Defendant could not be punished for street terrorism in addition to underlying crime of discharging a firearm with gross negligence, since this violated statutory prohibition against multiple punishment for single course of conduct.

People v. Zadra, 2013 WL 5761415 (Colo. App. 2013):
Holding: Plain error review applied to claim that seven perjury convictions and one official misconduct conviction were multiplicitous.

Neal v. State, 2013 WL 1316692 (Fla. App. 2013):
Holding: The Florida statute governing offense of fraudulent use of a credit device requires consolidation of all unauthorized uses of the same card within 6 months into a single offense; the Florida statute is based on a Model Act, which was designed to distinguish between petty and more major criminal acts.

Losh v. State, 2011 WL 13729 (Fla. Ct. App. 2011):
Holding: Where plea agreement was silent as to whether Defendant had to serve mandatory minimum term and this was discretionary with prosecutor, court violated double jeopardy by sentencing Defendant without a minimum term and then a few days later entering a new sentence pronouncing a minimum term.

State v. Davenport, 2013 WL 3330505 (La. App. 2013):
Holding: Trial judge's grant of a mistrial following a grant of a motion for judgment of acquittal violated double jeopardy.

Savage v. State, 2013 WL 2338469 (Md. Spec. App. 2013):
Holding: Defendant's two convictions for conspiracy to commit burglary violated Double Jeopardy where State did not advance a two-conspiracy theory at trial, and jury was not instructed that it could not find two conspiracies unless it was convinced beyond a reasonable doubt of two separate agreements.

State v. Johnson, 2014 WL 3359884 (N.J. Super. Ct. 2014):
Holding: Where trial court accepted a "partial verdict" finding Defendant guilty of various lesser-included offenses in felony murder trial, but deadlocked on other greater offenses, double jeopardy barred retrial on the greater offenses.

People v. Alba, 984 N.Y.S.2d 267 (Sup. 2014):
Holding: Defendant's prior federal conviction for fraud had same elements as her later state prosecution for fraud, so state prosecution was barred by statutory double jeopardy.

People v. Sanders, 2011 WL 4638751 (N.Y. App. Div. 2011):
Holding: Defendant's prior conviction for second degree assault barred a later prosecution for first degree assault based upon the same incident, even though it was based on a jurisdictionally defective information.

State v. McKenzie, 2012 WL 149750 (N.C. App. 2012), writ allowed, 2013 WL 257378 (N.C. 2013):
Holding: Even though a 1-year suspension of trucker's commercial license was "civil," the 1-year suspension period was more punitive than remedial and promoted retribution and deterrence, and therefore a subsequent criminal prosecution for DWI violated Double Jeopardy.

Miller v. State, 2013 WL 4805683 (Okla. App. 2013):
Holding: Double jeopardy barred State from seeking death penalty on first murder count on retrial, where Defendant had been previously tried for two counts of murder, but

received life imprisonment on the first count at the first trial; thus, he had been acquitted of the death penalty on the first count.

Barnard v. State, 2012 WL 5356320 (Okla. Crim. App. 2012):
Holding: Convictions for both making a lewd proposal to a child and using a computer to commit a felony violated Double Jeopardy since they were identical crimes arising from the same conduct.

Com. v. Anderson, 2011 WL 5235232 (Pa. Super. 2011):
Holding: Where prosecutor acted intentionally and improperly to prejudice defendant's right to a fair retrial, a retrial was barred by double jeopardy.

Com. v. Jackson, 2010 WL 4970197 (Pa. Super. 2010):
Holding: Double jeopardy prohibits prosecution for trespass that had previously been subject of indirect criminal contempt.

Cooper v. State, 2014 WL 1909447 (Tex. App. 2014):
Holding: Two separate convictions for aggravated robbery based on theories of causing bodily injury and threatening same victim violated double jeopardy.

Ellison v. State, 2014 WL 1220401 (Tex. App. 2014):
Holding: Where Defendant pleaded guilty to a continuous series of assaults against a family member, double jeopardy prohibited the State from then charging Defendant with an additional assault against the same victim that occurred during same time period.

Aekins v. State, 96 Crim. L. Rep. 158 (Tex. App. 10/22/14):
Holding: Defendant may not be convicted for a completed sexual assault by penetration and also for conduct such as exposure or contact that is "inextricably part of [the] single sexual assault"; the legislature has not authorized multiple punishments for sexual acts that are part of a continuing sexual assault that results in one complete, ultimate act of penetration; steps along the way to a rape merge into the competed act.

Ex Parte Milner, 2013 WL 518496 (Tex. App. 2013):
Holding: Separate convictions for attempted capital murder involving multiple victims in same course of conduct violated Double Jeopardy.

State v. Howard, 2014 WL 2864397 (Wash. App. 2014):
Holding: Trial court could not enter a judgment which stated that a lesser offense for which Defendant was not convicted would remain "open for reinstatement" if the greater offense was overturned on appeal; this violated double jeopardy.

State v. Davis, 2013 WL 5883767 (Wash. App. 2013):
Holding: Convictions for second degree assault with a deadly weapon merged with convictions for second degree kidnapping based on pointing gun at victims.

State v. Morales, 2013 WL 1456939 (Wash. App. 2013):
Holding: Even though Defendant made two different communications on two days that he was going to kill the mother of his children, this was a single unit of prosecution for felony harassment, because the harassment statute focused on the threat to a victim, not the number of persons who might learn of the threat or communicate it to the victim.

DWI

State ex rel. Hodges v. Asel, 460 S.W.3d 926 (Mo. banc 2015) and **State ex rel. Mammen v. Chapman, 2015 WL 3385895 (Mo. banc May 26, 2015):**
Sec. 577.023.6(4) requires "chronic offenders" serve a minimum of two years in prison even when they successfully complete long term treatment under Sec. 217.362.3 prior to expiration of two years.
Facts: Defendants were convicted of DWI as "chronic offenders" under Sec. 577.023.6(4), sentenced to 5 and 10 years respectively, and placed in long term treatment under Sec. 217.362.3. Defendants successfully completed long term treatment in less than two years. The DOC recommended, and the trial courts approved, that they be released on probation after serving two years. Defendants sought their immediate release via writs of mandamus.
Holding: Sec. 577.023.6(4) unequivocally provides that no chronic offender shall be eligible for probation or parole until he has served a minimum of two years imprisonment. Sec. 217.362.4 does not require a trial court to grant probation to a chronic offender before serving two years. Defendants rely on statements in *State ex rel. Salm v. Mennemeyer*, 423 S.W.3d 319 (Mo. App. 2014), and *State ex rel. Sandknop v. Goldman*, 450 S.W.3d 499 (Mo. App. 2014), that upon successful completion of long term treatment a trial court must either (1) allow the defendant to be released on probation, or (2) determine probation is not appropriate and order execution of the sentence. But neither case dealt with the interplay between 577.023.6(4) and 217.362.3. The long term treatment statute does not require immediate release of a chronic offender before serving the minimum two years required by 577.023.6(4). Here, the DOC advised the trial courts that Defendants had successfully completed long term treatment and would be eligible for release in June 2015 – *upon having served two years*. The trial courts' approval of the two-year release date complied with 577.023.6(4) and 217.362.4. Writs of mandamus denied.

Doughty v. Director of Revenue, 387 S.W.3d 383 (Mo. banc 2013):
Holding: (1) Driver has a due process right to confront and cross-examine witnesses at a civil trial to revoke license; but (2) even though Director did not call arresting officer to testify at civil trial to revoke license, Sec. 302.312 authorizes admission of certified copies of the Director's records (which includes police reports, BAC reports, and driving records) and if Driver wished to cross-examine the officer at issue, Driver could have subpoenaed him because he was equally available to both parties; (3) Sec. 302.312 does not violate due process since Driver can subpoena witnesses he wishes to cross-examine.

State v. McNeely, 358 S.W.3d 65 (Mo. banc 1/17/12):

The 4th Amendment prohibits a non-consensual blood draw without a warrant in routine DWI arrest cases; the fact that alcohol may dissipate in blood over time does not justify a non-consensual blood draw without a warrant; exigent circumstances must exist (e.g., accident or injury) in order to do a warrantless blood draw.

Facts: Defendant, who was stopped for speeding, displayed classic characteristics of DWI and failed field sobriety tests. Defendant refused to consent to a breath test or blood test. Officer, believing that changes in Sec. 577.041 RSMo. Supp. 2010, now allowed a warrantless blood test, took Defendant to a hospital and had blood drawn. Defendant moved to suppress the blood test.

Holding: *Schmerber v. California,* 384 U.S. 757 (1966), held that a warrantless blood draw requires that there be "special facts" that might lead an officer to reasonably believe he was faced with an emergency situation in which delay in obtaining a warrant would lead to destruction of evidence. *Schmerber* involved an injury accident in which the officer had to investigate the accident and take defendant to the hospital, thus reducing time to get a warrant. Here, the issue before the court is whether the natural dissipation of blood-alcohol evidence alone is a sufficient exigency to dispense with the warrant? It is not under *Schmerber*. Officers must reasonably believe they are confronted with an emergency where the delay in obtaining a warrant would threaten destruction of evidence. In routine DWI cases, in which no special facts other than natural dissipation of alcohol in blood exist, a warrant must be obtained before blood can be drawn. Here, this is a routine DWI case with no special facts. Hence, a motion to suppress should be granted. Because the warrantless blood draw violated the 4th Amendment, the court need not address the State's arguments based on the implied consent law. *State v. Ikerman,* 698 S.W.2d 802 (Mo. App. 1985) and *State v. Setter,* 721 S.W.2d 11 (Mo. App. 1986)(holding that warrantless blood draws are permissible in DWI cases) are no longer to be followed.

Shaefer v. Koster, No. SC91130 (Mo. banc 6/14/11):

Holding: (1) Criminal defendant cannot bring declaratory judgment action to challenge constitutionality of statute under which they are charged because there is an adequate other remedy, i.e., to raise the alleged unconstitutionality in their criminal case; (2) Sec. 516.500 which places a time limit on when a person can challenge the constitutionality of a statute does not apply to a criminal defendant who raises a challenge to the statute as a defense to the criminal case.

Editor's Note: The dissenting opinion would allow the declaratory judgment action and would find that the 2008 version of Sec. 577.023.16 which enacted certain DWI penalty enhancements (since repealed and replaced by a new statute) violates the Missouri Constitution's prohibitions about clear title, original purpose and single subject, Art. I, Secs. 21 and 23, Mo.Const. The bill's title dealt with "watercraft," the bill was originally only about "watercraft" and adding DWI provisions violated the title, original purpose and single-subject provisions. The majority opinion did not reach the merits of the case.

State v. Collins, No. SC90839 (Mo. banc 1/11/11):

Where State failed to properly prove up Defendant's prior DWI convictions at bench trial before sentencing, this was a failure of proof that Defendant was a "chronic offender," and State could not offer additional evidence upon remand for resentencing to prove the prior offenses.

Facts: Defendant was charged with DWI as a "chronic offender" with having multiple prior DWI convictions. He had a bench trial. As evidence of prior convictions, the State offered a copy of Defendant's driving record showing prior DWI convictions. The exhibit did not specify whether Defendant was represented by counsel or waived counsel in the prior proceedings.

Holding: Defendant claims the trial court plainly erred in finding he was a "chronic offender" because the State did not properly prove up his prior convictions. Sentencing a defendant to a term greater than the maximum allowable punishment constitutes plain error. At the time of Defendant's conviction, Sec. 577.023.1(3) required the State to prove that Defendant had counsel or waived counsel in his prior offenses. Under Section 577.023.9, the presentation of evidence and court findings on the prior offenses must be done prior to sentencing. Here, the State concedes there was no evidence about representation by or waiver of counsel. However, the State contends it should be permitted to present such evidence on remand. This Court has rejected this contention in a jury trial context. The question is whether the rule should be different in a bench trial context. It should not. Allowing the State to present new evidence of prior convictions would give the State two bites of the apple. Under the timing requirements of the statute, the State is foreclosed from offering additional evidence at resentencing. The State argues that if the case is remanded for resentencing, then it is still "prior to sentencing" so that the State can present additional evidence. But this does not comport with the plain language of the statute, which makes no mention of vacated sentences. Remanded for resentencing as Class B misdemeanor.

State v. Smith, No. ED102586 (Mo. App. E.D. Dec. 22, 2015):

Where Defendant (1) was charged with involuntary manslaughter stemming from a car accident while allegedly intoxicated and (2) requested an instruction under MAI-CR3d 310.04 that if there was less than .08% BAC at the time blood was taken, the jury cannot find from this evidence alone that Defendant was under the influence of alcohol, trial court erred in failing to give the instruction because Notes on Use 3(a) requires the instruction be given at Defendant's request; Defendant was prejudiced because Defendant introduced extensive evidence at trial that the blood sample was unreliable and that Defendant's driving could be attributed to something other than alcohol intoxication.

Facts: Defendant was charged with involuntary manslaughter for a death caused when she drove on the wrong side of a highway and hit another car. Blood taken after the accident showed a BAC of .085. At trial, Defendant attacked the reliability of the blood test through expert testimony. Her expert testified that the failure to refrigerate the blood for 10 days after its collection caused the blood to ferment, resulting in a higher BAC at the time of the test than actually existed at the time of the blood draw. Defendant requested paragraph 3 of MAI-CR3d 310.04, which the trial court refused. During deliberations, the jury had multiple questions regarding the meaning of intoxication.

Holding: Paragraph 3 of MAI-CR3d 310.04 would have instructed the jury that if there was less than .08% BAC that they cannot find from this evidence alone that Defendant was under the influence of alcohol. Notes on Use paragraph 3(a) provides that if the only analysis admitted into evidence discloses .08% or more of alcohol in the blood, then paragraph 3 must be given if that paragraph is requested by Defendant. Here, Defendant requested the paragraph, so error occurred. The error was prejudicial because Defendant introduced extensive evidence (including expert testimony) that the blood sample was unreliable and that Defendant's driving could be attributed to something else. Reversed and remanded for new trial.

Schulze v. Director of Revenue, 2015 WL 6161056 (Mo. App. E.D. Oct. 20, 2015):
Holding: Where (1) Officer read Driver the Implied Consent Law, (2) Driver requested to contact an attorney, (3) Officer gave Driver 15 minutes to do so, during which time Driver tried calling his attorney, and (4) after 15 minutes, Officer asked Driver to take breath test, but Driver refused, Director did not show Driver voluntarily abandoned his 20-minute opportunity to contact an attorney. License reinstated.

Bartholomew v. Director of Revenue, 2015 WL 3378691 (Mo. App. E.D. May 26, 2015) and **McGough v. Director of Revenue, 2015 WL 3378686 (Mo. App. E.D. May 26, 2015):**
Holdings: Under the "savings clause" of 19 CSR 25-30.051(8), BAC results are admissible if the maintenance on the breathalyzer machine was done in compliance with the DHSS regulation in effect at the time the maintenance was actually performed; the maintenance need not have been done in compliance with more restrictive DHSS provisions in effect at the time of trial.

Stiers v. Director of Revenue, 2015 WL 343310 (Mo. App. E.D. Jan. 27, 2015):
A breathalyzer machine must be calibrated according to the method of calibration required by 19 CSR 25-30.051(2) at the time Driver was stopped for DWI, because the amended version of the CSR expressly intends this; thus, where three calibration standards were required in July 2013 when Driver was stopped, those three methods were required for the results to be admissible, even though the CSR was later changed to allow three different ways of calibration.
Facts: Driver was stopped for DWI in July 2013. After Director administratively revoked her license, Driver had a trial *de novo*. Driver objected to admission of her breath analyzer results because she claimed the version of 19 CSR 25-30.051(2) which was in effect at the time of her stop applied, and it required that the breathalyzer be calibrated in three different ways to be admissible. Director contended that the version of 19 CSR 25-30.051(2) in effect at the time of the trial *de novo* applied, and it allows a choice of method of calibration among three alternatives.
Holding: The version of CSR in effect in July 2013 required that simulator solutions be used which had values of .10%, .08% "***and***" .04% (emphasis added). The version in effect at the time of the trial de novo required simulator solutions be used which had values of .10%, .08% ***"or"*** .04% (emphasis added). The difference between the two versions is the word "and" vs. "or." A plain reading of the CSR in effect at the time Driver was stopped in July 2013 required use of all three calibration standards. But only

one standard was used here. Director claims that the new CSR should be applied retroactively. Procedural regulations that establish the method of enforcing substantive rights can be applied retroactively *unless the enactment reveals a contrary intent*. 19 CSR 25-30.051(8), the amended version, states that "maintenance reports completed prior to the effective date of this rule shall be considered valid … *if the maintenance report was completed in compliance with the rules in effect at the time maintenance was conducted.*" Thus, even the new CSR requires that the calibration be done in accord with the CSR in effect at the time of the stop, and that was not done here. Driver's breath test results were not admissible at the trial *de novo*.

McPhail v. Director of Revenue, 2014 WL 7157005 (Mo. App. E.D. Dec. 16, 2014):
Where Director submitted its license revocation case entirely on written AIR reports and narratives, and those were ambiguous as to whether Driver had unequivocally refused to take a chemical test, there was not substantial evidence to support revocation of license.
Discussion: Sec. 577.041.1 states that where Driver requests to contact an attorney, he must be allowed a 20-minute period to do so. Once that period expires, if Driver continues to refuse a test, it shall be deemed a refusal. Here, the written reports on which the case was tried state that Driver's 20-minute period for contacting an attorney began at 11:33 p.m., that Driver did contact an attorney, but also that Driver's refusal occurred at 11:33 p.m. It is unclear whether Driver's refusal occurred after being given an opportunity to contact an attorney. The Director bears the burden to show refusal. There is no legal principle or presumption that allows a court to divine the Officer's meaning or to supply clarification where the reports create ambiguity. Where Director has presented no live Officer testimony to explain the meaning of the reports, a court cannot be an advocate for the Director and supply the missing information, since Director has the burden of proof in the first place. Trial court's judgment revoking license is unsupported by substantial evidence.

Gannon v. Director of Revenue, 2013 WL 5726014 (Mo. App. E.D. Oct. 22, 2013):
Holding: (1) Where Director presented substantial evidence that Driver was intoxicated, and requested written findings about any indicia of intoxication that the trial court did not believe, but trial court merely checked a box of a standard form finding no probable cause to arrest for DWI based on insufficient evidence, trial court's judgment reinstating license is reversed because trial court did not make any finding regarding credibility (or incredibility) of Director's evidence, and Director presented sufficient evidence to prove probable cause to arrest for DWI. (2) Defendant's motion for "directed verdict" was inapplicable in a court-tried case, but Defendant's motion should have been treated as a motion for judgment under Rule 73.01(b) on grounds that the facts and law did not show that Director was entitled to relief. But (3) where after making a "motion for directed verdict," Defendant said he wanted to call an expert, but court said he "won't have to worry about that" and did not appear to rule on the motion (which should have been under 73.01(b)), case must be remanded for new trial to allow Defendant opportunity to rebut State's case with his expert testimony, since record is unclear if Defendant was denied right to present defense.

Tweedy v. Director of Revenue, 2013 WL 4715669 (Mo. App. E.D. Sept. 3, 2013):
(1) There is no presumption of validity in Director's evidence, and trial court is free to disbelieve it. (2) Even though Defendant admitted after his arrest that he was drunk driving, Director could not use this admission of party-opponent for purposes of proving if there was probable cause to arrest, because probable cause must be based on information known to Officer at time of arrest, not acquired after the fact; (3) Even though a driver usually has burden to subpoena law enforcement officers if the driver wishes to cross-examine them, where Director subpoenaed Officer, who then failed to appear, Driver was denied his right to confrontation through no fault of his own; and (4) Director was not permitted to call Driver as witness because even though license-suspension proceeding was civil, a witness has a constitutional right not testify against himself in a civil matter where his answers might incriminate him in a future criminal proceeding.
Facts: Deputy Hoelzer received a call about a DWI, and went to a vehicle scene. There, Deputy Burkard told Hoelzer that Driver was driving the car. Driver failed various sobriety tests and his BAC was .185. In a post-arrest interview, Driver admitted he was driving. Director suspended Driver's license. Driver demanded a trail *de novo*. At trial, Driver objected to Hoelzer's arrest narrative that contained "double hearsay," i.e., that Burkard told Hoelzer he had witnessed Driver driving. Although Director had subpoenaed Burkard, Burkard failed to appear. Director tried to call Driver to testify to admit he was driving, but the trial court refused to allow it. Director then stated he did not intend to present live testimony and submitted the case on the records under Sec. 302.312.1. Exhibit A was Hoelzer's arrest narrative. Exhibit B was an undated, unsigned narrative that contained information about the traffic stop that was inconsistent with the information in Exhibit A. The trial court found Exhibit B to be not credible and "fiction," and was "offended" that the Sheriff's office would submit it rather than provide live testimony. The court then sustained the "double hearsay" objection regarding Exhibit A and found that without this evidence, Director failed to prove there was probable cause to arrest Driver for driving with a BAC of .08 or more, and reinstated license. Director appealed.
Holding: (1) There is no presumption of validity of Director's evidence, and trial court was free to disbelieve it. Director had to prove that arresting officer had probable cause to arrest for DWI, and that Driver's BAC was .08 or more. There is no dispute about the BAC. Director is correct that it is not necessary for Officer to observe the person driving the vehicle. Rather, Officer may rely on information from police dispatch or other witnesses. Thus, the trial court should not have sustained the "double hearsay" objection to Burkhard's statement in Exhibit A. However, this error was harmless here because Exhibit B was intended by Director, in essence, to serve as the foundation for the "double hearsay" in Exhibit A. However, the trial court found Exhibit B to be a "fiction" and not credible. If Driver disputes Director's evidence "in any manner," the trial court has the right to disbelieve it. Here, Driver disputed Director's evidence by pointing out inconsistencies in Exhibits A and B. Appellate court defers to trial court's credibility determination. (2) Director argues that the trial court erred in not considering Defendant's post-arrest admission for purposes of determining whether he was driving because this was an admission of a party-opponent, which is an exception to hearsay. However, probable cause to arrest must be based on information officer had at time of

arrest, not on information acquired after the fact. (3) Director argues that if Driver wanted to cross-examine Burkard, Driver was required to subpoena him. While the language of *Doughty*, 387 S.W.3d 383 (Mo. banc 2013), places the initial burden to subpoena on Driver, *Doughty* did not answer whether Driver may rely on Director's subpoena of same witness. When Director agrees to undertake such responsibility, Driver may rely on it. Here, Director did not attempt to enforce his subpoena when Burkard failed to appear, but instead submitted Exhibit B. Driver was denied his right to confrontation through no fault of his own. (4) Director contends that he should have been allowed to call Driver to testify that he was driving. However, even though a license suspension trial is civil, a witness has a right not to testify against himself in a civil proceeding where his answers might incriminate him in a future criminal proceeding, here DWI.

O'Rourke v. Director of Revenue, No. ED98949 (Mo. App. E.D. 6/25/13):
Holdings: (1) Even though the trial court found Director's BAC evidence not to be credible based on an erroneous belief that Officer's breathalyzer test did not comply with DHSS rules, Director's argument on appeal relies on an implicit presumption that Director's prima facie evidence of intoxication is true and shifts the burden of proof to Driver, which is an incorrect interpretation of law under *White v. Dir. of Revenue*, 321 S.W.3d 298 (Mo. banc 2010); and (2) Even though Director submitted breathalyzer results showing a BAC over .08, Sec. 577.037 does not create a statutory presumption of the validity of breath test results in license revocation cases, but rather provides an alternative means of proving the element of "intoxicated condition" of DWI under Sec. 577.010.1.
Discussion: Director contends that since he introduced evidence that Driver's BAC was over .08, a statutory presumption under Sec. 577.037 arises that Driver had a BAC over the legal limit. However, the Western District rejected this argument in *Collins v. Dir. of Revenue*, 2013 WL 1876622 (Mo. App. W.D. May 7, 2013). Sec. 577.010 is the criminal statute for DWI. Under 577.010, it is not necessary for the State to prove the Defendant had a BAC of .08 or higher, only that the Defendant operated a vehicle in an intoxicated condition. However, if the State has credible evidence of excessive BAC, the State may use the presumption in Sec. 577.037 to prove the necessary element of intoxicated condition. In contrast, to support revocation or suspension of a license, the State must prove, in relevant part, that Driver's BAC exceeded .08. The presumption of intoxication in Sec. 577.037 does not aid the Director in establishing a case for revocation or suspension under 302.505.1. Trial court's reinstatement of license affirmed.

State v. Wilson, No. ED95423 (Mo. App. E.D. 7/12/11):
Where trial court failed to find Defendant's prior DWI convictions before the case was submitted to the jury but did so afterwards, this violated the timing requirements of 577.010 RSMo. Cum. Supp. 2008, and required that Defendant's sentence as a chronic offender be vacated.
Facts: Defendant was charged with DWI as a chronic offender under Sec. 577.010 RSMo. Cum. Supp. 2008. Before the case was submitted to the jury, the State introduced four exhibits showing four prior DWI convictions. However, the trial court did not make

any finding about Defendant being a chronic offender until after the jury's guilty verdict. Defendant was then sentenced to 12 years.
Holding: Sec. 577.023.7(3) RSMo. Cum. Supp. 2008 provided that in a jury trial, the facts pleaded for prior convictions shall be established and found prior to submission of the case to the jury. Here, the court violated the timing requirements of the statute by not doing this until after the jury's verdict. This was plain error, and requires that Defendant's sentence as a chronic offender be vacated. Case remanded for resentencing without any type of prior offender status.

State v. McArthur, No. ED95094 (Mo. App. E.D. 7/5/11):
Holding: Where Defendant charged with sodomy had a bifurcated trial, State may present in penalty phase testimony of a prior sexual assault victim of Defendant about that prior bad act.

Editor's Note: An interesting dissenting opinion argues that State went too far in being allowed to present prior victim and then argue jury should impose maximum sentence to avenge prior victim's assault, since that was not the subject matter of this particular case.

John Doe v. Roman Catholic Diocese of St. Louis, No. ED94720 (Mo. App. E.D. 7/5/11):
Holding: Alleged "grooming" of a victim to engage in sexual abuse does not constitute sexual abuse itself.

State v. Howell, 2015 WL 6437402 (Mo. App. S.D. Oct. 23, 2015):
Even though Paramedic who drew blood in DWI case did not follow the Missouri Highway Patrol checklist which required inverting the blood vile and labeling it, where Paramedic followed procedures promulgated by the Department of Health, the Health regulations take precedence over the MSHP regulations; further, Paramedic's actions complied with Sec. 577.029, which requires that blood be drawn in "strict accord with accepted medical practices" and Sec. 577.037, which requires that chemical analysis of blood be done "as provided in 577.020 to 577.041 and in accordance with methods and standards approved by the state department of health and senior services."
Discussion: Defendant's argument presumes that compliance with the MSHP checklist is the only way to draw blood in compliance with Sec. 577.029 and 577.037. However, the Department of Health has a checklist for chemical analysis of breath tests in 19 CSR 25-30.011 and 19 CSR 25-30.060. The Dept. of Health's regulations have priority over MSHP checklists. When a breathalyzer checklist exceeds the requirements of the Dept. of Health regulations, a proper foundation is laid for admission. At least under the facts of this case, the Paramedic's failure to invert the tube and failure to label the tube do not affect admissibility. There was no evidence that any standard medical practice required this.

List v. Director of Revenue, 2015 WL 5576343 (Mo. App. S.D. Sept. 22, 2015):
(1) Even though trial court stated that it was continuing an evidentiary hearing to allow the parties to provide written arguments, where the court then apparently mistakenly entered a judgment, the judgment became final 30 days later and the court lacked

authority to set it aside after 30 days; (2) where trial court entered a second judgment more than 30 days later, which the Director then appealed, the appellate court, sua sponte, corrects the excess of authority by the trial court and vacates the second judgment and reinstates the first judgment.

Facts: Driver filed a petition to review his license revocation. The court held an evidentiary hearing, and continued the case to allow the parties to submit written arguments. Shortly after, the court apparently mistakenly entered a judgment for Director. No after-trial motions were filed. More than 30 days later, the court apparently recognized its mistake, and reset the case for additional evidence. After another hearing, the court entered a judgment for Driver. Director appealed.

Holding: Although neither party raises the issue, the appellate court must, *sua sponte*, determine if it has authority to hear the merits of the second judgment. Under Rule 75.01, trial courts retain control over judgments for 30 days, but once the 30 days expires, the judgments are final unless an authorized after-trial motion was filed. Here, the court lost authority over the "first" judgment once it became final after 30 days, and the court could not set it aside. The appellate court has jurisdiction, but cannot consider the merits of the "second" unauthorized judgment. Appellate court must correct the trial court's excess of authority. Second judgment is vacated, and case remanded for reinstatement of first judgment.

Welch v. Director of Revenue, 465 S.W.3d 550 (Mo. App. S.D. July 31, 2015):

Holding: Where trial court questioned the accuracy of Director's driving record for Driver and found that it lacked credibility, the appellate court must defer to the trial court's credibility determination; judgment reinstating Driver's license is affirmed.

State v. Rattles, 2014 WL 4922970 (Mo. App. S.D. Oct. 1, 2014):

Holding: While Sec. 577.023.16 allows Department of Revenue certified driving records to be used to prove prior offender status for DWI enhancement purposes, appellate court does not decide if the statute violates due process by abrogating the constitutional requirement that the existence of prior convictions be supported by substantial evidence.

Discussion: The State enhanced defendant's DWI offense by using his certified driving records to prove prior DWI convictions. Sec. 577.023.16, which became effective in 2010, allows certified driving records of the Department of Revenue to prove evidence of prior convictions. When the legislature lists a particular source as authorizing the trial court to find the existence of a prior conviction, that source contains all the information necessary to prove the prior conviction. Hence, the evidence was sufficient here. Footnote 3 states, however, that "[w]e do not mean to imply by this analysis that the legislature could by statute abrogate the constitutional requirement that the existence of prior convictions be supported by substantial evidence. However, we need not, and do not, reach the issue of whether the statute here presents that problem as Defendant does not argue that the statute on its face violates due process in that manner."

Neff v. Director of Revenue, 437 S.W.3d 394 (Mo. App. S.D. 2014):

Holding: Where the only evidence at license revocation hearing was that Officer asked Driver to give a breath test but Driver refused, Director produced no evidence that Officer ever informed Driver of the Implied Consent Law, so revocation of license is

reversed. To revoke a license under Sec. 577.041 for refusal, the Driver must be given the Implied Consent Warning and an opportunity to contact counsel if Driver requests.

Clark v. Director of Revenue, 2014 WL 1609690 (Mo. App. S.D. April 22, 2014):
Holding: Trial court in license reinstatement case was free to disbelieve Trooper's testimony about the Driver at issue, and given trial court's specific credibility determination, appellate court was required to affirm trial court's finding that Trooper did not have reasonable grounds to believe Driver was driving in an intoxicated condition, under the deferential standard of review as set forth in *White v. Department of Revenue*, 321 S.W.3d 298 (Mo. banc 2010).

Warren v. Director of Revenue, 2013 WL 6493712 (Mo. App. S.D. Dec. 11, 2013):
Holding: Even though Driver was found in an intoxicated condition and injured about five miles from a crash scene where his car had been abandoned, where the trial court found that Officer did not have reasonable grounds to believe that Driver had driven while in an intoxicated condition because the time of the accident was unknown, Director failed to carry his burden to prove that Driver drove while intoxicated. Director's reliance on similar cases which found reasonable grounds to believe intoxication is misplaced here, because there is no longer a presumption of validity of Director's uncontroverted evidence after *White v. Dir. of Revenue*, 321 S.W.3d 298 (Mo. banc 2010), and trial court was free to disbelieve it. Trial court's reinstatement of license is affirmed.

Letterman v. Director of Revenue, 2013 WL 5786842 (Mo. App. S.D. Oct. 28, 2013):
Holding: Even though Officer smelled alcohol on Driver, who had crashed an ATV to avoid hitting a dog, and even though a portable breath test (PBT) was positive for alcohol, Director had burden to prove by preponderance of evidence that Officer had probable cause to arrest for DWI and that Driver was driving with BAC above the legal limit, and trial court was free to disbelieve PBT test results because the PBT machine was not properly calibrated, not properly maintained and not used in accord with the manufacturer's directions. Trial court's judgment reinstating license is affirmed.

Johnson v. Director of Revenue, 2013 WL 5786782 (Mo. App. S.D. Oct. 28, 2013):
Holding: Where Driver was given a breath test that showed an "invalid sample," and then given a second breath test five minutes later which showed a BAC of .209%, trial court was free to disbelieve the results on grounds that Officer had not waited at least 15 minutes to administer the second breath test, as some breathalyzer manuals say should happen. Further, even though there may be regulations and caselaw that do not require another 15-minute waiting period between tests, trial court did not erroneously declare the law, because it admitted the BAC evidence (did not exclude it), but chose to disbelieve it. As finder of fact, it was trial court's prerogative to believe or disbelieve the evidence. Trial court's judgment reinstating license is affirmed.

State v. Eisenhour, 2013 WL 5710545 (Mo. App. S.D. Oct. 21, 2013):
As matter of first impression, numeric results of Pre-arrest Portable Breath Test are not admissible as "exculpatory evidence" under Sec. 577.021.3.

Facts: Defendant was stopped for DWI, and failed several field sobriety tests. Defendant had alcohol on breath, and said he also had taken some pills and K2. He was given a pre-arrest portable breath test (PBT), which result was .002% BAC. He sought to use this test result at trial as exculpatory evidence, but the trial court excluded it. This test is not the same as a "Data Master" test at the police station, which is certified and calibrated. After conviction, he appealed.
Holding: Sec. 577.021 says a PBT "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." While a positive PBT is admissible to show whether there is probable cause to arrest, the statute demonstrates that the legislature had forbidden the test to be used to prove intoxication, because the PBT test is "too unreliable" to be used for that purpose. No case interprets what the statute means when it states that the result may be admissible as "exculpatory evidence." The State argues that the presence or absence of alcohol as indicated by the PBT is admissible under the statute, but not the numeric value itself because the legislature has found that the numeric value is "too unreliable" for that purpose. Appellant makes no statutory construction argument or other argument supporting the converse of this issue. An appellate court will not speculate on arguments that could be raised or become an advocate for Appellant. Thus, judgment excluding PBT numeric value is affirmed.

State v. Beck, 2013 WL 5524826 (Mo. App. S.D. Oct. 7, 2013):
Merely crossing the fog line of road does not provide reasonable suspicion to stop vehicle for DWI.
Facts: Officer testified he observed Defendant's vehicle cross the fog line separating the shoulder of the road from the driving lane, and stopped Defendant to investigate for DWI. Defendant then was arrested for DWI. Defendant filed a motion to suppress evidence of the stop, and prevailed. The State appealed.
Holding: Erratic or unusual driving will provide reasonable suspicion for a stop to investigate DWI. But prior cases have held that merely crossing the fog line does not, by itself, provide such suspicion. The trial court granted the motion to suppress on the basis that Officer only saw vehicle cross the fog line. Even though the State argues that the Officer also saw the car weave in the lane, the trial court apparently did not accept this fact, and appellate court is required to defer to the trial court on factual findings.

State v. Reed, 2013 WL 2285192 (Mo. App. S.D. May 24, 2013):
Even though (1) Officer thought Defendant-Driver's action in not parking near Officer and waiting in car while waiting to pick someone up from an unrelated traffic stop was "unusual," and (2) Officer was working on another traffic stop, where Officer failed to seek a search warrant before having a hospital draw Defendant-Driver's blood, this violated the 4th Amendment because the fact that alcohol dissipates in blood is not itself an exigent circumstance, and there were not special facts that excused failure to seek a warrant.
Facts: Defendant-Driver was called to pick up another person from an unrelated traffic stop. Defendant stopped and parked about 30 yards from the traffic stop and remained in his car. Officer thought this was "unusual." Without Defendant's consent or a warrant,

Officer took Defendant to a hospital for a blood draw about two hours later. Defendant was then charged with DWI. He moved to suppress the blood draw.
Holding: The State argues that since alcohol dissipates in blood, this is an exigent circumstance that doesn't require a warrant. The State also argues that the Officer was conducting another traffic stop and couldn't get a warrant. However, *Missouri v. McNeely*, 81 USLW 4250, ___ U.S. ___ (U.S. April 17, 2013), held that the natural metabolism of alcohol does not *per se* create an exigent circumstance to justify not obtaining a warrant. The correct test is totality of circumstances. The thrust of the State's case is that the Officer was too busy that night to get a warrant. However, the facts of this case indicate that this was a "routine" DWI case. There were no special facts or exigent circumstances justifying an exception to the warrant requirement. Blood-draw evidence suppressed.

Hasselbring v. Director of Revenue, 2013 WL 411483 (Mo. App. S.D. Feb. 4, 2013):
Holding: Even though Director claimed Driver "refused" to take a breath test, where (1) Driver agreed to take a test, but (2) during the test the machine's batteries ran out, and (3) Officer said at one point that this would be the only test and then seemed confused about what to do when batteries ran out, trial court did not err in making a "factual finding" that Driver did not refuse another test because at that point a reasonable person would have been confused as to whether they had "refused" a test; although Director met the burden of *production* by showing Driver didn't take a further test, Director did not meet the burden of *proof* because Director did not carry the burden of *persuasion* to convince the fact-finder to view the facts in a way favorable to that party. Trial court's reinstatement of license affirmed.

State v. Slavens, No. SD31613 (Mo. App. S.D. 9/12/12):
Sec. 577.010 does not authorize DWI conviction for operating a non-road "dirt bike" on private property in an intoxicated condition.
Facts: Defendant was driving a "dirt bike" on his own private property when he had an accident that resulted in him being injured, resulting in the Highway Patrol being called. His BAC was .226. He was charged and convicted of DWI.
Holding: The elements of DWI under Sec. 577.010 are (1) that the defendant operated a motor vehicle and (2) that he did so in an intoxicated condition. However, the term "motor vehicle" is not defined in the statute. The question is whether the legislature intended to criminalize operating a non-traditional motor vehicle on private property. The rule of lenity requires that all ambiguity in a statute be resolved in a defendant's favor. There is an ambiguity in Sec. 577.010 in its potential application to situations where a person operates a non-street legal motorized vehicle on private property. Since the statute allows for more than one interpretation, it has to be interpreted in Defendant's favor so as not to prohibit this. Also, a contrary interpretation would lead to illogical results in that persons who operate golf carts on private golf courses or persons who operate motorized wheelchairs in their homes could be convicted of DWI. The legislature could not have intended these illogical results. Conviction reversed.

Hilkemeyer v. Director of Revenue, No. SD30811 (Mo. App. S.D. 9/15/11):
Holding: Where Driver contended -- and trial court found -- that Officer did not satisfy the 15-minute observation period because Officer was not always looking directly at Driver during the period but was also doing other activities including driving the patrol car and entering data on a computer, the Director is wrong in contending that the only way the breathalyzer results could have been excluded by trial court was if Driver had presented evidence that she smoked vomited, or orally ingested something during the 15-minute period. *White v. Director of Revenue*, 321 S.W.3d 298 (Mo. banc 2010), held that nothing in Sec. 302.535 creates a presumption that the Director's evidence establishing a prima facie case is true or shifts the burden to Driver to produce evidence to rebut such a presumption. Prior cases implying a "presumption of validity" were overruled by *White*. Judgment in favor of Driver affirmed.

State v. Lemons, No. SD30959 (Mo. App. S.D. 8/25/11):
(1) Where State submits Defendant's "Driver's Record" to prove prior DWI convictions, the Driver's Record must specifically identify the convicting court; (2) State need no longer prove that Defendant had counsel or waived counsel in prior DWI convictions, but Defendant may prove that the prior convictions were unconstitutional.
Facts: Defendant was charged with DWI as a "chronic offender" for having four prior DWI convictions. To prove the convictions, the State submitted Defendant's Missouri "Driver's Record" which showed that Defendant was convicted "on 4-02-1991 in Arkansas by circuit court." Defendant claimed he never had such a conviction.
Holding: (1) The Driver Record was insufficient to prove the Arkansas conviction because it did not specifically indentify the convicting court. Some minimal information is necessary to use a Driver Record to prove prior convictions to allow Defendant the opportunity to rebut the conviction. The requirement of court identification for violations of foreign law is included in the Driver License Compact, Sec. 302.600, Article III, so that an aggrieved person would have only one county or city to contact in order to rebut the conviction. Here, the Driver's Record did not identify a specific Arkansas Circuit Court, but only the entire state of Arkansas. This was insufficient, and the Arkansas conviction should not have been counted as a prior DWI. Case remanded for resentencing as an "aggravated offender" (three priors). (2) On a separate issue, Defendant contends that the State didn't prove that his prior convictions were with counsel or counsel was waived. However, the DWI statute was amended in 2009 to no longer require proof that the defendant was represented by counsel or waived counsel. Sec. 577.023.1(4) RSMo. Cum. Supp. 2009. However, while the State need not prove this, a Defendant may still prove that the prior convictions were unconstitutional because he did not have counsel, but Defendant has not done that here.

Chamberlain v. Director of Revenue, No. SD30567 (Mo. App. S.D. 4/25/11):
Holding: (1) Even though under Sec. 577.041.4 Driver filed his petition for reinstatement of license in wrong county (because the arrest or stop did not occur there), where Director did not object to improper venue, this issue was waived by Director; and (2) Even though the evidence showed (a) that there was a one-vehicle accident; (b) that one person was injured; (c) the ambulance driver said they were taking the injured person to the hospital; (d) Driver owned the vehicle; and (e) Driver failed sobriety tests at the

hospital, the trial court could find that the evidence failed to show probable cause that Driver had been the person who was actually driving the car; appellate

Morse v. Director of Revenue, No. SD30653 (Mo. App. S.D. 4/18/11):
Holding: Where (1) in 2003 Driver had a 90-day license suspension, completed SATOP, filed an SR-22 and paid reinstatement fees; (2) in 2003 Driver received an SIS in her criminal DWI case; and (3) in 2008 Driver's probation was revoked in her criminal case and her sentence was executed, Driver was not required in 2008 to again complete SATOP, file an SR-22 and pay reinstatement fees because reading Secs. 302.525.4 and 302.540.4 together it is clear that the legislature did not intend for a driver to have to repeat programs based upon the same driving occurrence.
court does not re-weigh the evidence. Judgment reinstating license is affirmed.

Owens v. Missouri State Bd. of Nursing, 2015 WL 7252554 (Mo. App. W.D. Nov. 17, 2015):
Holding: First-time DWI offense is not crime involving "moral turpitude," i.e., not a crime involving baseness, vileness, depravity, or done contrary to justice, honesty or good morals; thus, AHC erred in revoking Nurse's nursing license for first-time DWI offense; in finding that DWI offense is not one involving moral turpitude, appellate court notes many states do not allow DWI offenses to be used for impeachment.

State v. Pickering, 2015 WL 6919826 (Mo. App. W.D. Nov. 10, 2015):
Where State failed to show that breathalyzer machine had been certified against the NIST standard between Jan. 1, 2013 and Dec. 31, 2013, as required by 19 CSR 25-30.051, the State failed to lay an adequate foundation for admission of the BAC result, and Defendant was prejudiced because trial court at bench trial relied on BAC result in finding guilt; because there was other evidence sufficient to prove guilt, which the trial court may not have considered, the remedy is to remand for new trial.
Facts: Defendant was charged with DWI. The evidence was that he was driving erratically, failed field sobriety tests, and had a breathalyzer result of .136. Defendant claimed the court erred in admitting the BAC result because the State did not present any evidence that the breathalyzer machine had been certified against the National Institute of Standards and Technology standard.
Holding: Breathalyzer results are admissible only if the State complies with the requirements of Chapter 577. This requires following the methods approved by the Dept. of Health. 19 CSR 25-30.051 provides that any breath alcohol simulator shall be certified against a NIST traceable reference thermometer or thermocouple between Jan. 1, 2013 and Dec. 31, 2013 and annually thereafter. The State's evidence at trial did not establish that this regulation was followed. Although the State presented evidence that the machine was subjected to monthly maintenance in 2013, the State presented no evidence that the breath alcohol simulator was NIST certified in 2013. Absent such evidence, the State failed to lay a sufficient foundation to support admission of the BAC result. Defendant was prejudiced because the trial judge relied on the BAC result in finding Defendant guilty. The remedy is to remand for a new trial. The State was not required to prove an actual measure of Defendant's blood alcohol content. Defendant could be found guilty even without a BAC result. The evidence of erratic driving and failed sobriety

tests was sufficient to prove guilt. There is no clear indication that the trial court considered this evidence without the BAC result. Remanded for new trial.

Courtney v. Director of Revenue, 2015 WL 6468508 (Mo. App. W.D. Oct. 27, 2015):
Holding: Trial court did not abuse discretion in ruling that breath test results were not admissible where Director failed to prove that the simulator for the breath testing device had been calibrated against a National Institute of Standards and Technology approved thermometer in connection with its maintenance, as required by 19 CSR 25-30.051.

Messner v. Director of Revenue, 2015 WL 4463644 (Mo. App. W.D. July 21, 2015):
(1) Even though a second breath test showed a BAC of .166%, where a prior breath test caused the machine to print an "Invalid Test – Subject Did Not Provide a Valid Sample" evidence ticket and the Director did not introduce any expert evidence as to what action is to be taken after such a reading, the trial court was permitted to find the second breath test result unreliable; (2) even though Sec. 577.026.1 provides that breath tests "to be considered valid...shall be performed according to methods and devices approved by the [DHSS]," the court is not required to find the results of the tests credible; tests performed according to DHSS regulations are admissible, but are not legally required to be found credible.
Facts: Driver was given a breath test at 2:17 a.m., which printed a ticket that said, "Invalid Test – Subject Did Not Provide a Valid Sample." Officer gave Driver a second test at 2:21, which reported a BAC of .166%. Defense counsel argued that Officer was required to conduct a second 15 minute observation period between the two tests, and failure to do so rendered the tests unreliable. Defense counsel also argued that Officer did not properly follow the operator's manual for the Intoxilyzer 5000. The trial court found the test result unreliable. Director appealed.
Holding: Director had the burden of proof and burden of persuasion, but failed to present evidence that Officer's actions complied with the manual. The manual is silent as to what corrective action must be taken when an "Invalid Test" message appears. By contrast, the manual gives detailed steps on what the Officer should do in the event of an "Invalid Sample" message. Director did not introduce any expert testimony whether another 15 minute observation period was needed for the machine to work properly. The manual states that an Officer should complete an Operational Checklist for each separate test conducted, but Officer did not do that here. The checklist contains a 15 minute observation period. Hence, the trial court's finding of unreliability is supported by substantial evidence. Further, even though Officer followed the DHSS regulations, these relate only to admissibility of breath test results, not their reliability. Director's argument that a court must accept the results as true is contrary to *White v. Director of Revenue*, 321 S.W.3d 298 (Mo. banc 2010).

Thornton v. Denney, 2015 WL 1245499 (Mo. App. W.D. March 17, 2015):
Petitioner/Defendant, who pleaded guilty in 2007 to DWI, was entitled to habeas relief on his claim that his prior municipal court SIS for DWI could not be used to enhance his sentence; this was true even though Defendant could have raised this claim in a Rule 24.035 motion, because habeas corpus is available to correct sentencing defects.

Facts: Petitioner/Defendant pleaded guilty in 2007 to DWI. His offense was enhanced from a Class A misdemeanor to a Class D felony because, as relevant here, he had a prior municipal court SIS for DWI. In 2011, Defendant's probation was revoked and his sentence executed. He filed a habeas corpus case alleging that under *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), his municipal court SIS could not be used to enhance his sentence to a felony.
Holding: Defendant is correct that if Turner applies, his offense cannot be enhanced to a felony. The State contends that because Defendant could have raised this issue in a Rule 24.035 case, he has waived it. However, habeas can be used to correct "sentencing defects" where a sentence exceeds that permitted by law. A petitioner seeking relief from a sentencing defect need not show "cause" for failure to raise the issue earlier. To the extent that cases such as *State ex rel. Simmons v.White*, 866 S.W.2d 443 (Mo. banc 1993), state a more restrictive rule, they no longer accurately state the law. The State also contends that *Turner* should not be applied retroactively. But Defendant is not seeking retroactive application. The statute at issue in *Turner* was in effect at the time of Defendant's plea in 2007; it is not being applied retroactively. No issue of retroactivity is presented when a later judicial decision interprets the meaning of a pre-existing statute. Thus, *Turner* applies to Defendant, and Defendant's offense is properly a Class A misdemeanor. Because jurisdiction to revoke misdemeanor probation expired in 2009, the trial court lacked authority to revoke probation in 2011. Defendant discharged and his conviction modified to a Class A misdemeanor.

Carter v. Director of Revenue, 2015 WL 658780 (Mo. App. W.D. Feb. 17, 2015):
Where Director presented no evidence that the breathalyzer machine had been certified in 2013 when Driver was stopped for DWI, as required by 19 CSR 25-20.051(4), the results were not admissible, even though the machine was certified in 2014.
Facts: Driver was stopped for DWI in 2013. At a trial *de novo*, Director presented a certification report showing that the breath testing machine used on Driver had been calibrated in February 2014.
Holding: 19 CSR 25-30.051(4) requires that breathalyzer machines be certified "between January 1, 2013 and December 31, 2013, and annually thereafter." Here, Driver's breath was tested in 2013, but Director presented no evidence that the machine was tested in 2013. Director's only evidence was that the machine was tested in Feb. 2014. Because Director failed to lay a proper foundation, the breath test results were inadmissible.

State v. Browning, No. WD76144 (Mo. App. W.D. Jan. 6, 2015):
For the horizontal gaze nystagmus (HGN) test to be admissible, the State must prove (1) that the Officer administering the test is adequately trained on how to administer and interpret the test, and (2) that the test was properly administered; failure to comply with the NHTSA Manual on how to administer the test renders it inadmissible (disagreeing with State v. Burks, 373 S.W.3d 1, 6-7 (Mo. App. S.D. 2012)).
Facts: Defendant was convicted of DWI. He challenged admission of the HGN test. The Western District affirms the conviction because of other overwhelming evidence of guilt, but strongly questions the admissibility of the HGN test in a lengthy footnote 3.

Holding: The HGN test, unlike other standard field sobriety tests, is an exclusively scientific test. Nystagmus, the involuntary jerking of the eyes, has many potential causes. The ability to reliably differentiate between these causes to permit an inference of intoxication requires scientific testing; for this reason, proponents of the HGN test were required to establish the test's scientific reliability under *Frye*. To be admissible, the State must show (1) that the Officer who administered the test was adequately trained on how to administer and interpret the test and (2) that the test was properly administered. The procedures for administering the test are set out in the NHTSA's DWI Detection and Standardized Field Sobriety Testing Manual. Where the administering Officer fails to substantially comply with proper testing procedures, most jurisdictions treat the issue as affecting the weight of HGN evidence, not its admissibility. In Missouri, however, proper administration of the HGN test is a foundational requirement. The Southern District, in *State v. Burks*, 373 S.W.3d 1, 6-7 (Mo. App. S.D. 2012), held that challenges to the administration of the HGN test go to the weight of the test, not its admissibility. "We question that holding. If applied in every case where an officer has failed to 'properly administer' the HGN test, the holding in *Burks* will effectively swallow and negate the State's burden to establish the foundational requirement that the HGN test was properly administered." We believe that "material deviations from the testing procedures set forth in the NHTSA Manual will require a trial court to deny admission of HGN test results."

Concurring opinion: The concurring opinion sets forth in detail 10 steps that must be followed for an HGN test to be properly administered. The opinion points out that the Officer here, despite attending many trainings, "had very little grasp of the proper way to administer and score the field sobriety tests." "[H]e acknowledged … that he had never bothered to even read the NHTSA manual, which was admitted into evidence and which was the source of his training." Without proper administration, the HGN test loses its scientific reliability and becomes irrelevant to the issues before the court. The State failed to lay a proper foundation here, and the HGN evidence should have been excluded.

State v. Browning, No. WD76144 (Mo. App. W.D. Jan. 6, 2015):

For the horizontal gaze nystagmus (HGN) test to be admissible, the State must prove (1) that the Officer administering the test is adequately trained on how to administer and interpret the test, and (2) that the test was properly administered; failure to comply with the NHTSA Manual on how to administer the test renders it inadmissible (disagreeing with State v. Burks, 373 S.W.3d 1, 6-7 (Mo. App. S.D. 2012)).

Facts: Defendant was convicted of DWI. He challenged admission of the HGN test. The Western District affirms the conviction because of other overwhelming evidence of guilt, but strongly questions the admissibility of the HGN test in a lengthy footnote 3.

Holding: The HGN test, unlike other standard field sobriety tests, is an exclusively scientific test. Nystagmus, the involuntary jerking of the eyes, has many potential causes. The ability to reliably differentiate between these causes to permit an inference of intoxication requires scientific testing; for this reason, proponents of the HGN test were required to establish the test's scientific reliability under *Frye*. To be admissible, the State must show (1) that the Officer who administered the test was adequately trained on how to administer and interpret the test and (2) that the test was properly administered. The procedures for administering the test are set out in the NHTSA's DWI Detection and

Standardized Field Sobriety Testing Manual. Where the administering Officer fails to substantially comply with proper testing procedures, most jurisdictions treat the issue as affecting the weight of HGN evidence, not its admissibility. In Missouri, however, proper administration of the HGN test is a foundational requirement. The Southern District, in *State v. Burks*, 373 S.W.3d 1, 6-7 (Mo. App. S.D. 2012) held that challenges to the administration of the HGN test go to the weight of the test, not its admissibility. "We question that holding. If applied in every case where an officer has failed to 'properly administer' the HGN test, the holding in *Burks* will effectively swallow and negate the State's burden to establish the foundational requirement that the HGN test was properly administered." We believe that "material deviations from the testing procedures set forth in the NHTSA Manual will require a trial court to deny admission of HGN test results."

Concurring opinion: The concurring opinion sets forth in detail 10 steps that must be followed for an HGN test to be properly administered. The opinion points out that the Officer here, despite attending many trainings, "had very little grasp of the proper way to administer and score the field sobriety tests." "[H]e acknowledged … that he had never bothered to even read the NHSTA manual, which was admitted into evidence and which was the source of his training." Without proper administration, the HGN test loses its scientific reliability and becomes irrelevant to the issues before the court. The State failed to lay a proper foundation here, and the HGN evidence should have been excluded.

Ayler v. Director of Revenue, 2014 WL 4065092 (Mo. App. W.D. Aug. 19, 2014):

Holding: Even though the uncontroverted evidence was that Driver had "at least one beer" prior to an accident that led to arrest by police several hours later, the trial court was free to find that Director had not shown that Officer had reasonable grounds to believe Driver was intoxicated *at the time of the accident*, Sec. 577.041.4(2)(a), and the appellate court defers to this factual finding. Judgment reinstating license affirmed.

Ridge v. Director of Revenue, 428 S.W.3d 735 (Mo. App. W.D. 2014):

Where Driver originally said he would take a blood test, but then in response to further Officer questioning said he didn't really "want" to, this was not an "unequivocal refusal" since not "wanting to" submit to the test and "refusing to" submit are distinguishable; judgment reinstating license is affirmed.

Facts: Officer arrested Driver for DWI. Officer asked Driver to provide a blood sample, and Driver agreed. While taking Driver to the place for a blood draw, Officer asked Driver whether he "really wanted to do this because I [Officer] don't want to get all the way down there and then you don't do it." Driver then said he "didn't want to do it." Director suspended Driver's license for refusal to submit to chemical testing. Driver testified that he did not believe that by answering Officer's question, he was refusing the test and that he didn't intend to lose his license. Trial court reinstated license. Director appealed.

Holding: The trial court found that because Driver had originally consented to the blood test, Driver did not "unequivocally refuse" a test. An inference can be made that Driver's refusal was prompted by or influenced by Officer's seemingly unnecessary inquiry into whether Driver really wanted to go through with the test. Such an inference reasonably casts doubt on whether Driver's statement actually was a refusal. Not "wanting to"

submit to the test and "refusing to" submit are distinguishable. Many drivers may not "want" to take the test, but take it to avoid revocation of their license.

State v. Avent, 2014 WL 1303418 (Mo. App. W.D. April 1, 2014):
Even though Officer testified that Defendant-Driver had glassy eyes, admitted to consuming beers, smelled of alcohol, failed a PBT test, and failed some sobriety tests, where there was also contrary evidence and trial court granted Defendant's motion to suppress statements and evidence by finding there was no probable cause to arrest Defendant, the appellate court's deferential standard of review requires that all credibility determinations and inferences be viewed in the light most favorable to the trial court's ruling, and therefore, granting of motion to suppress is affirmed.
Facts: Defendant-Driver was stopped for speeding. Officer smelled alcohol, and had Defendant perform various field sobriety tests. Defendant passed the walk-and-turn test and one-leg-stand test, but failed the HGN test and PBT. Officer arrested Defendant, and read her *Miranda* warnings. Her BAC was ultimately tested and was greater than .08. Defendant filed a motion to suppress her statements and test results, on grounds that Officer had no probable cause to arrest her for DWI. The trial court granted the motion. The State appealed.
Holding: On appeal, the State cites evidence in the record that supports a finding of probable cause to arrest. However, this is contrary to the appellate standard of review, which allows the trial court to make credibility determinations and which views evidence and inferences in the light most favorable to the trial court's ruling. Where the trial court makes no findings of fact, the trial court is presumed to have found all facts in accord with its ruling. The trial court will be deemed to have implicitly found contrary testimony not credible. Here, Defendant contested the State's claim that she was intoxicated by cross-examining the Officer about favorable facts to her side of the case. The court was not required to find the Officer credible. Properly viewed in accord with the standard of review, although some facts showed intoxication, Officer observed several tests that did not indicate intoxication, Officer did not observe Defendant not have control of her vehicle (although she was speeding), Defendant complied with requests for identification and license, Defendant was not incoherent or confused or uncooperative, and her eyes weren't impaired. The trial court weighed this evidence and determined there was no probable cause to believe Defendant was intoxicated. Judgment affirmed.

Rothwell v. Director of Revenue, 2013 WL 6447062 (Mo. App. W.D. Dec. 10, 2013):
Holding: Even though Driver initially refused to give a breath test at police station and requested an attorney, where Officer then took Driver to a hospital for a blood draw and Driver agreed to a blood draw and allowed blood to be taken, Driver did not refuse a chemical test under Sec. 577.041.
Discussion: Under Sec. 577.041 a license cannot be administratively revoked if Driver voluntarily submits to chemical testing that yields a satisfactory measure of Driver's BAC whether Driver consents to chemical testing initially, or following initial refusal. However, should a driver initially refuse to submit to chemical testing, the arresting officer has the choice of either permitting the driver to withdraw his refusal and submit to chemical testing, or of letting the driver's initial refusal stand as grounds to administratively revoke the license. Here, Officer chose to pursue additional testing and

Driver ultimately voluntarily submitted to a test which obtained usable BAC results. Trial court's reinstatement of license affirmed.

State v. Mignone, 2013 WL 5712452 (Mo. App. W.D. Oct. 22, 2013):
(1) As matter of first impression, standard of appellate review for dismissal of DWI charge pursuant to Sec. 577.037.5 is whether the trial court's dismissal was "clearly erroneous"; (2) State bears burden of persuasion and burden of proof regarding a motion to dismiss under the statute; and (3) where properly administered breath test showed Defendant had a BAC of less than .08, trial court did not clearly err in sustaining a motion to dismiss, even though tests took place an hour or more after Defendant's arrest.
Facts: Defendant was arrested for DWI at 3:06 a.m. He was administered a proper breath test at 4:38 that showed a BAC of .075%. He was administered a second test at 5:46 that showed a BAC of .051%. Defendant moved to dismiss under Sec. 557.037.5 on grounds that his BAC was less than .08%. The trial court dismissed. The State appealed.
Holding: Appellate courts have not heretofore promulgated a standard of review for reviewing dismissals pursuant to Sec. 577.037.5. The standard of review is whether the dismissal was "clearly erroneous." The appellate court will reverse only if left with a "definite and firm impression that a mistake has been made." Sec. 577.037.5 provides that where a Defendant shows that his BAC was less than .08%, his case "shall" be dismissed unless (1) there is evidence that the BAC test was unreliable, (2) there is evidence that Defendant was under the influence of drugs, or (3) there is substantial evidence of intoxication from physical observation of witnesses. Dismissal is the default position. Unlike an ordinary motion to dismiss where the defendant has the burden of persuasion, the clear implication of the statute is that the State has the burden of production and persuasion. Here, the State apparently argues that the dismissal was unwarranted because Defendant's blood alcohol content was in decline since the time of his arrest. However, the State did not present any expert testimony that this would be the case, and this is not subject to lay opinion. The trial court was free to accept or reject the testimony presented by the State, and chose to reject it. It was not necessary for Defendant to present evidence, and he contested the State's case via cross-examination. There was no evidence of erratic driving or evidence of intoxication. Dismissal affirmed.

Collins v. Director of Revenue, 2013 WL 1876622 (Mo. App. W.D. May 7, 2013):
Judge Gary Witt issued a concurring opinion questioning the reliability of breathalyzer test results in light of Missouri's failure to adopt national standards or protocols ensuing the scientific reliability and credibility of test results. Excerpts:
"I write separately to emphasize the importance of the fifteen-minute observation period in reaching a scientifically reliable result on the breathalyzer test and to suggest that it may be time for the Missouri breath alcohol testing program protocols to be updated to comply with the standards in the industry. … [E]ven if the results of a breathalyzer test may be admissible … it is still the job of the finder of fact to determine the test result's credibility or reliability. … [M]ost states have adopted protocols that require [an observation period for scientific reasons] … and that a suspected intoxicated driver be offered two separate breathalyzer tests [again for scientific reasons]. The National Safety Council … has made recommendations for 'Acceptable Practices for Evidential Breath

Alcohol Testing.' The Council set forth ten recommendations … Missouri has failed to adopt many of these protocols that assist in ensuring the scientific reliability or credibility of the test results. The Director argues in this case that the test results [in this case] are entitled to a presumption of validity. The Majority accurately points out that this argument fails based on [our] statute [which was what the case was largely about], *but the State's argument also fails based on the science* (emphasis added). … As the National Safety Council stated, 'The significant weight assigned to breath alcohol test results, along with the serious consequences arising from conviction … require evidential breath alcohol testing programs to implement appropriate quality assurance measures.' In the meantime, the reliability of and weight to be given to breathalyzer test results in Missouri clearly remains an issue for the trier of fact."

State v. Brightman, No. WD74299 (Mo. App. W.D. 10/2/12):

Where in DWI case prosecutor argued to jury that State did not have to prove that Defendant was "drunk" but only that he was "intoxicated" and the jury could determine what that means, this misstated the law and lowered the State's burden of proof because to convict, the jury had to find that Defendant's use of alcohol impaired his ability to operate the vehicle.

Facts: Defendant was charged with DWI. In closing argument, the State argued that "we didn't set out to prove today … that the Defendant was drunk. … We never proved – tried to go out and prove that he was drunk driving. We came here to prove that he was intoxicated. ... We are trying to prove beyond a reasonable doubt that he was driving and he was intoxicated. So what does that mean with the instructions? … [The definition there] is a very vague definition of 'intoxicated condition' which means under the influence of alcohol. There is a reason for that. The reason is that you can decide what it means." Defense counsel objected to this as misstating the law, but was overruled. In defense counsel's closing, defense counsel argued "that intoxication means that your ability to drive was," but the prosecutor objected at that point and the trial court sustained the objection.

Holding: Missouri's appellate courts have ruled that "intoxicated condition" for DWI purposes means that Defendant's use of alcohol impairs his ability to drive the vehicle. The Western District recommends that the applicable MAI be changed to reflect this definition, but says that is for the Supreme Court to do. Here, however, the State's closing argument effectively invited jurors to ignore the given instruction and substitute their own subjective understanding of "intoxicated condition" that did not include any level of drunkenness. Courts should exclude argument that misstates the law. The State contends on appeal that the prosecutor was trying to make the point that Defendant did not have to be "falling down drunk." But that is not what the prosecutor argued or how a reasonable juror would understand the argument. When a term is not defined for the jury, the jury can decide what the term means. But here the State refused to acknowledge that being drunk and intoxicated are generally synonymous, and attempted to say the two were different concepts. The trial court compounded this confusion by sustaining the State's objection to defense counsel's closing argument which tried to correctly state the law. An objection to improper argument which is overruled has the impression of giving the court's approval to the argument. Here, reasonable jurors could have understood the State's argument to lower the State's burden of proof on a key element of the offense.

When the State misstates the law so as to lower the burden of proof, it is error. Here, the evidence of guilt was not overwhelming so Defendant was prejudiced. New trial ordered.

McKay v. Director of Revenue, No. WD74458 (Mo. App. W.D. 8/7/12):
Holding: Even though Driver refused to submit to a "breath test," where she subsequently voluntarily consented to a "blood draw," she did not refuse to consent to chemical testing under Sec. 577.041 and Director should not have suspended her license for failure refusal of chemical testing.

Harvey v. Director of Revenue, No. WD72606 (Mo. App. W.D. 5/9/12):
Holding: (1) Where trial court reinstated Driver's license because Driver had alcohol soaked tobacco in his mouth when he gave his breath test and trial court believed Driver's cross-examination that this would have affected the validity of BAC test, the appellate court defers to the trial court's assessment of credibility; and (2) where a trial court enters a written judgment (even a generic one), an appellate court is not required to consider the court's oral comments in reviewing the judgment.

Mapes v. Director of Revenue, No. WD73303 (11/8/11):
Even though Driver failed portions of a walk-and-turn test and HGN test, where Driver passed other field sobriety tests and the portable breath-test machine showed a BAC of .08, the trial court was free to believe as fact-finder that there was no probable cause to arrest Driver for DWI and to reinstate license, even though the case was tried on driving records and police reports only.
Facts: Driver, whose license had been revoked for failing to consent to a breath test, claimed there was not probable cause to arrest him for DWI.
Holding: Director had the burden to prove whether the Officer had reasonable grounds to believe Driver was driving while intoxicated so as to be able to arrest Driver. There was evidence before the trial court that Driver had passed several field sobriety tests, but had failed a walk-and-turn test and HGN test. Given that Driver passed several field sobriety tests, it was not unreasonable for the trial court to not give weight to the walk-and-turn test. Regarding the HGN test, there was no evidence presented to establish the procedures used to conduct the test, or the Officer's qualifications to conduct it. Hence, the trial court was reasonable in not giving weight to the HGN test. Director claims that since the case was tried on documents only, the appellate court should re-weigh the evidence. However, the trial court acts as fact-finder, and the appellate court will not reweigh the evidence. There was substantial evidence supporting the trial court's finding that there was not probable cause to arrest driver. Hence, his license is reinstated.

Secrist v. Treadstone, LLC, No. WD73250 (Mo. App. W.D. 11/1/11):
Even though Plaintiff had a THC (marijuana) level of 50 ng/ml in his blood, this fact by itself was not admissible (for comparative fault or impeachment) to show that Plaintiff was "impaired" at the time of his accident without more evidence of the significance of such statistic.
Facts: Plaintiff was injured in a construction accident and sued Defendant. The trial court admitted evidence that at the time of the accident, Plaintiff had a THC level of 50

ng/ml (marijuana) in his blood for purposes of comparative fault and impeachment. Plaintiff appealed an adverse verdict.
Holding: A prima facie case for impairment from alcohol has been set by statute, Sec. 577.012.1, and is established when BAC reaches .08%. Drug impairment, however, is different. Different drugs have varying effects on behavior, and do not necessarily produce readily recognizable symptoms and behavior. In *State v. Friend*, 943 S.W.2d 800 (Mo. App. W.D. 1997), a drug test of a defendant-driver revealed that driver had methamphetamine in his system. However, there was no testimony as to the amount of methamphetamine, the effect of it, or whether it would cause Defendant's erratic behavior. Hence, the evidence was insufficient to convict because there was no evidence that the level of methamphetamine was sufficient to impair his driving. There must be evidence beyond the mere fact that a drug is present in someone's system before a reasonable inference can be made that the person is impaired therefrom. The fact that Plaintiff tested positive for 50 ng/ml of THC means nothing without context. THC may remain in the blood for weeks after marijuana use, and THC levels are no indication of impairment. Evidence regarding abnormal behavior is not sufficient without some evidence that the behavior is consistent with identifiable symptoms of ingestion of the particular drug. Popular stereotypes regarding the characteristics and behaviors of drug users are not sufficient in a court of law. The trial court erred in admitting the THC level without evidence of (1) what effect that level of drug would reasonably have on that individual; (2) that the behaviors exhibited by that person were consistent with having the drug and the amount in his system; and (3) the proximity in time between when the drug was ingested and the events to which impairment is relevant. Additionally, the evidence was not admissible for impeachment. Although it is the rule that impairment of a witness's ability to recall is relevant to credibility, the THC levels in the blood are not alone an indication of impairment and inability to recall. Judgment reversed.

Zahner v. Director of Revenue, No. WD72801 (Mo. App. W.D. 9/13/11):
Holding: Where (1) there was dispute between Officer and Driver about whether Driver was properly informed of Implied Consent Law, (2) Officer told court that he could produce a video to prove his version of events, and then (3) a week later, Officer said the video had been "destroyed as part of the post-arrest routine," trial court was permitted to discredit Officer's version of events due to the destruction of the video, even though the spoliation doctrine (which states that if a party intentionally destroys evidence, the party is subject to an adverse inference) does not apply to the Director of Revenue since when police destroy evidence, they don't do so at the direction of the Director. However, trial courts may still consider destruction of evidence in determining witness credibility in a case. Judgment crediting Driver's version of events and reinstating Driver's license affirmed.

State v. Hatfield, No. WD72468 (Mo. App. W.D. 8/30/11):
Even though Officer found intoxicated Defendant in a driveway by a wrecked car, evidence was insufficient to convict of DWI because there was no showing that Defendant had driven the car while intoxicated, as opposed to become intoxicated later.
Facts: Officer was called to a home at 11:00 a.m. for a motor vehicle accident, and found a wrecked car parked in the home's driveway. Defendant was next to it and was

intoxicated. Officer asked what happened, and Defendant said, "I lost it making the turn." Officer arrested Defendant for DWI. Defendant refused to provide a breath, blood or urine sample. Defendant was convicted of DWI at trial.
Holding: The evidence is insufficient to sustain a conviction for DWI because although the evidence showed that Defendant was intoxicated when standing by the car, there was insufficient evidence to prove that Defendant actually drove the car *while* intoxicated. Prior cases have made clear that where a Defendant is found outside the car, there must be some evidence linking in time the Defendant's intoxication and operation of the motor vehicle. Here, there was no evidence as to the time Defendant drove the car, or how much time elapsed between the accident and the arrest. There was no evidence that the car was running, whether the keys were in the car, the temperature of the car's motor, or other factors that would show that the car had recently been driven. The State argues that Defendant's refusal to take a BAC test establishes consciousness of guilt for DWI. However, this reasoning has previously been rejected in another case where the court held that such a denial could not be regarded as highly probative of DWI where there is a lapse of time between the defendant's driving and refusal, and the defendant's apparent access to alcohol in the interim. DWI conviction reversed.

*** Missouri v. McNeely, 93 Crim. L. Rep. 92, ___ U.S. ___ (U.S. 4/17/13):**
Holding: In DWI cases, the natural dissipation of alcohol in Driver's blood does not constitute an exigent circumstance in every case sufficient to justify a nonconsensual blood test without a search warrant.

U.S. v. Harrington, 2014 WL 1509017 (9th Cir. 2014):
Holding: Due process was violated where Officer failed to correctly inform DWI-Defendant about a law which would subject him to an additional misdemeanor conviction and six-month jail sentence for refusing to submit to a BAC test, regardless of whether he was convicted of the DWI offense.

U.S. v. Colon-Ledee, 2010 WL 6675045 (D.P.R. 2010):
Holding: Defendant's conviction for failure to pay child support was not a crime involving dishonesty or false statement and, hence, could not be used to impeach Defendant's credibility.

Fisher v. Ozaukee County Circuit Court, 2010 WL 3835098 (E.D. Wis. 2010):
Holding: Trial court's application of general law prohibiting admission of preliminary breath test (PBT) results so as to preclude defense expert from testifying that Defendant's BAC would have been lower violated right to present a defense.

State ex rel. Montgomery v. Harris, 2014 WL 8513998 (Ariz. 2014):
Holding: Statute making it illegal to drive with an illegal drug "or its metabolite" in person's body applied only to metabolites capable of causing impairment, and did not apply to Defendant who drove with non-impairing cannabis metabolite; interpreting statute to apply to non-impairing metabolites would lead to absurd results since it would create criminal liability for metabolites that say in body for long time.

State ex rel. Montgomery v. Harris, 95 Crim. L. Rep. 195 (Ariz. 4/22/14):
Holding: Having a non-impairing metabolite of marijuana in one's blood does not constitute prohibited DWI.

Leeka v. State, 97 Crim. L. Rep. 157 (Ark. 4/30/15):
Holding: Court erred in excluding Defendant's evidence of prescription "sleep driving" as defense to DWI, because DWI law requires proof of culpable mental state.

State v. Allen, 92 Crim. L. Rep. 578 (Ark. 2/7/13):
Holding: 4th Amendment does not allow state officials to stop boats for safety checks in the absence of reasonable suspicion or a plan with express, neutral limitations; Defendant had been charged with boating while intoxicated.

State v. Butler, 93 Crim. L. Rep. 313, 2013 WL 2353802 (Ariz. 5/30/13):
Holding: Even though State has an implied consent law for DWI, the voluntariness of Driver-Defendant's consent must still be based upon the totality of the circumstances, not just invocation of the implied-consent law because *Missouri v. McNeely* (U.S. 2013) teaches that a blood draw in DWI is subject to 4th Amendment constraints; here, Juvenile's consent was not voluntary because his parents were not notified before the chemical test.

Cain v. People, 2014 WL 2708632 (Colo. 2014):
Holding: Even though Defendant testified at DWI trial that he had not consumed alcohol, the preliminary breath test results were not admissible to impeach him; the statute about preliminary breath test results provided that such results were not admissible except for determining, outside a jury's presence, whether an Officer had probable cause to arrest; the statute did not authorize using the results to impeach Defendant's testimony at trial.

State v. Victor O., 2011 WL 2135671 (Conn. 2011):
Holding: Results of an Abel Assessment of Sexual Interest (Abel test), which purports to show sexual interest minors, were not sufficiently reliable in a nontreatment context to be admitted in criminal case.

Florida Dep't of Highway Safety and Motor Vehicles v. Hernandez, 89 Crim. L. Rep. 477 (Fla. 6/9/11):
Holding: Driver can challenge the lawfulness of her arrest under the 4th Amendment in a proceeding to suspend her driver's license for failure to submit to blood-alcohol test.

Williams v. State, 97 Crim. L. Rep. 32 (Ga. 3/27/15):
Holding: Defendant-Driver who "consented" to a blood draw after being told his license would be suspended under implied-consent law if he refused did not voluntarily waive his 4th Amendment rights; drivers who acquiesce thinking they have no choice haven't freely consented to a warrantless search.

Boring v. State, 2011 WL 2119377 (Ga. 2011):
Holding: Evidence of Defendant's "gothic" lifestyle was not admissible in murder prosecution where there was no nexus between victim's murder and Defendant's "gothic" beliefs or subculture.

State v. Hellstern, 2014 WL 6495949 (Iowa 2014):
Holding: DWI Defendant's statement before a breath test, "Can I have a moment with my attorney?," was sufficient to invoke statutory right to confidential meeting with his attorney; this in turn triggered Officer's obligation to inform Defendant that attorney would need to come to jail for confidential meeting, and Officer's response to Defendant "not on the phone" did not satisfy the statutory obligation to provide a confidential meeting; remedy was suppression of breath test results.

State v. Lukins, 95 Crim. L. Rep. 247 (Iowa 5/16/14):
Holding: DWI Defendant, who was deprived of statutory right to an independent blood-alcohol test, is entitled to suppression of the results of the State's test.

State v. Louwrens, 2010 WL 4750078 (Iowa 2010):
Holding: Where officer made a mistake of law in stopping Defendant for a U-turn (which was legal), this was a 4th Amendment violation and evidence of DWI found after the illegal stop had to be suppressed.

State v. Edgar, 92 Crim. L. Rep. 547 (Kan. 2/1/13):
Holding: Driver's consent to take breath test was rendered invalid by Officer's erroneous statement that Driver had no right to refuse.

Com. v. Canty, 94 Crim. L. Rep. 209, 2013 WL 5912050 (Mass. 11/6/13):
Holding: Although Officer can testify that Defendant-Driver appeared intoxicated, Officer cannot offer opinion that Driver's intoxication impaired his ability to operate a car, because this was tantamount to an opinion that Defendant was "guilty" of DWI.

People v. Koon, 93 Crim. L. Rep. 275, 2013 WL 2221602 (Mich. 5/21/13):
Holding: State statute that makes it a crime to drive with any amount of marijuana in bloodstream is superseded by the state's "medical marijuana" law for persons who are legally prescribed marijuana; however, medical marijuana law does not protect such persons from operating a vehicle "under the influence" of marijuana.

State v. Koppi, 89 Crim. L. Rep. 476 (Minn. 6/8/11):
Holding: Under Minnesota crime for refusal to take chemical test where Officer had probable cause to believe person was driving while intoxicated, jury instruction which states that "probable cause means officer can explain the reasons he believed it was more likely than not that defendant drove [impaired]", was improper because it failed to require Officer to cite actual observations and circumstances; failed to require the jury to consider the totality of the circumstances from the viewpoint of a reasonable Officer; and erroneously defined probable cause as "more likely than not" rather than "an honest and strong suspicion."

State v. Sommers, 2014 WL 6784368 (Mont. 2014):
Holding: Jury instruction impermissibly broadened whether DWI Defendant had "actual physical control" of vehicle; jurors are to consider a totality of factors to determine this including where in the vehicle Defendant was located; whether the key was in the vehicle; whether the engine was running; where the vehicle was parked and how it got there; and whether the vehicle was disabled.

State v. Chavez-Villa, 92 Crim. L. Rep. 222 (Mont. 11/7/12):
Holding: Where State introduced a video of drunk driving Defendant that showed him taking field sobriety tests, this triggered the requirement that the State lay a foundation for reliability of the sobriety tests.

Byars v. State, 96 Crim. L. Rep. 110 (Nev. 10/16/14):
Holding: (1) Even though Defendant was suspected of driving while drugged (marijuana), 4th Amendment requires a warrant to do a blood draw; the natural dissipation of TCH from blood does not create exigent circumstances, per se. (2) State implied consent law is unconstitutional because it allows forcible extraction of blood rather than a criminal or administrative penalty if Driver refused consent; for consent to be valid under 4th Amendment, the person must be allowed to modify or revoke consent after it is given.

State v. Eigth Judicial Dist. Court of State ex rel. County of Clark, 2011 WL 6840685 (Nev. 2011):
Holding: Danger of unfair prejudice outweighed relevance of retrograde extrapolation from single blood sample taken two hours after accident in a DUI case.

State v. Kuropchak, 2015 WL 1932144 (N.J. 2015):
Holding: Where trial court in DWI case erroneously admitted breath test results without foundational requirement showing that machine was properly calibrated, and also admitted a report with inadmissible hearsay, these cumulative errors warranted new trial.

State v. Adkins, 97 Crim. L. Rep. 151 (N.J. 5/4/15):
Holding: *McNeely*'s ruling that police must get a warrant to draw blood from DWI suspect applies retroactively to cases that were pending when the ruling was announced, and the good faith exception to the exclusionary rule does not apply.

People v. Smith, 90 Crim. L. Rep. 674 (N.Y. 2/16/12):
Holding: If a motorist insists on consulting a lawyer before agreeing to a chemical breath test, the police must warn him that a significant delay will be interpreted as a constructive refusal.

State v. Herring, 2010 WL 4904646 (Vt. 2010):
Holding: Exclusion of victim's prior inconsistent videotaped statement as impeachment evidence in child sexual assault prosecution was error.

State v. Kekolite, 2014 WL 3748299 (S.D. 2014):
Holding: Even though Defendant (while intoxicated) reached into vehicle through open window to get cigarettes and accidently popped gear shift into neutral, which caused the vehicle to roll away and hit another car, this was not actual physical control of the vehicle to support a DWI conviction; Defendant's actions did not amount to such control as would enable him to actually operate the vehicle in a usual and ordinary manner.

State v. Morales, 2012 WL 243576 (Wash. 2012):
Holding: State failed to prove that vehicular assault defendant, who was subject to a mandatory blood test, was actually read the required warning of his statutory right to have an additional test administered by a qualified person of his choosing, rendering the results of the test inadmissible.

People v. Covarrubias, 2015 WL 2199332 (Cal. App. 2015):
Holding: Even though before the instant DWI offense and vehicle crash which caused death, Defendant had been required to attend DWI prevention classes at which victims of DWI crashes spoke, testimony of such victims at the instant, unrelated DWI/death trial was not admissible because not relevant to whether Defendant had the requisite intent in this case for implied malice murder arising out of DWI.

People v. Bejasa, 2012 WL 1353122 (Cal. App. 2012):
Holding: A defendant's estimation of time during a Romberg sobriety test, in which a police officer asked the defendant to close his eyes and estimate when 30 seconds had passed, was testimonial and thus covered by the defendant's privilege against self-incrimination.

State v. Declerck, 317 P.3d 794 (Kan. App. 2014):
Holding: A statute providing that a traffic offense resulting in serious injury or death constituted probable cause to support a warrantless blood draw was unconstitutional because it authorized an automatic search and seizure of Driver without probable cause to believe Driver was under influence of alcohol or drugs.

State v. Weber, 2013 WL 3239493 (La. App. 2013):
Holding: Officer did not have probable cause for to believe unconscious Defendant who was brought to hospital after car accident was the driver of the vehicle to support a blood draw, where the vehicle had other occupants and no one ever asked who the driver was, and even though another officer knew the car belonged to Defendant, that officer never told the Officer who did the blood draw.

Com. v. Gibson, 2012 WL 5936023 (Mass. App. 2012):
Holding: Jury instruction which told jurors that a person does not have to take a breath test suggested to jury that Defendant had refused to take a blood test and violated the privilege against self-incrimination.

People v. Washington, 2013 WL 1632694 (N.Y. App. 2013):
Holding: Even though Driver has already consented to a breath test for DWI, where their attorney then appears, police must make reasonable efforts to inform Driver of their counsel's appearance if such notification will not substantially interfere with the timely administration of the test.

Prince v. Dept. of Motor Vehicles, 2011 WL 7975443 (N.Y. Sup. 2011):
Holding: Administrative Law Judge in license revocation violated due process due to bias when he offered, developed and coached Officers during the hearing to get them to show that arrestee was warned that her license would be suspended upon refusal to take BAC test.

People v. Waters, 2011 WL 240753 (N.Y. City Ct. 2011):
Holding: Simulator solution documents and an instrument calibration certificate, containing electronic signatures, were not admissible under business records exception to hearsay rule; documents were not made in regular course of business, were not a true and accurate representation of electronic records and were incomplete.

People v. Walters, 2010 WL 4976697 (N.Y. City Ct. 2010):
Holding: A statute requiring DWI defendants to finance installation of interlock device on their vehicles unless they could not afford to do so did not provide sufficient notice of punishment as required by due process, since the ultimate cost was determined by other administrators.

State v. McKenzie, 2012 WL 149750 (N.C. App. 2012), writ allowed, 2013 WL 257378 (N.C. 2013):
Holding: Even though a 1-year suspension of trucker's commercial license was "civil," the 1-year suspension period was more punitive than remedial and promoted retribution and deterrence, and therefore a subsequent criminal prosecution for DWI violated Double Jeopardy.

State v. Clark, 2014 WL 5510488 (Ohio App. 2014):
Holding: Defendant accused of DWI has a reasonable expectation of privacy in his medical records that pertain to any medical tests to determine alcohol or drugs, and Officers must obtain warrant to obtain records.

State v. Klembus, 2014 WL 3697685 (Ohio App. 2014):
Holding: The repeat DWI specification is not rationally related to a legitimate state interest, and thus, violated equal protection; the specification depends solely on a prosecutor's decision whether to present the issue to the grand jury; thus, repeat offenders may be treated differently from one another.

State v. Lile, 2014 WL 7335174 (Or. App. 2014):
Holding: Presence of police officer within hearing of DWI Defendant who was trying to call his attorney before a breath test violated state constitution's right to counsel

provision, and required suppression of breath test, even though Defendant only reached attorney's receptionist.

State v. Newman, 2013 WL 2370589 (Or. 2013):
Holding: DWI requires proof that Defendant's act of driving was volitional, and thus evidence that Defendant had suffered from "sleep driving" was relevant to whether Defendant was "conscious" at the time of driving.

State v. Almanza-Garcia, 2011 WL 1486076 (Or. App. 2011):
Holding: Admission of testimony of a diagnosis of child sexual abuse in the absence of physical evidence of abuse was plain error, even in a bench trial.

State v. Villarreal, 2014 WL 6734178 (Tex. App. 2014):
Holding: Even though State had implied consent law, this did not justify warrantless blood draw in DWI case.

Smith v. State, 2014 WL 5901759 (Tex. App. 2014):
Holding: Warrantless blood draw pursuant to a statute that required a blood draw in DWI cases where Defendant has two prior DWI convictions violated 4th Amendment.

State v. Anderson, 2014 WL 5033262 (Tex. App. 2014):
Holding: Mandatory blood draw statute did not relieve Officer from need to obtain search warrant for non-consensual blood draw in DWI case.

Sutherland v. State, 2014 WL 1370118 (Tex. App. 2014):
Holding: Statute which required warrantless blood draw from DWI arrestees with prior DWI offenses without any exigent circumstances violated 4th Amendment.

Weems v. State, 2014 WL 2532299 (Tex. App. 2014):
Holding: Statutory scheme which deemed prior DWI defendants to have consented to a blood draw in a subsequent DWI case involving an accident violated 4th Amendment's warrant requirement; statute created an unconstitutional, categorical per se rule for a warrantless search.

State v. Martines, 2014 WL 3611308 (Wash. App. 2014):
Holding: Even though State lawfully obtained blood sample from Defendant, State needed an independent search warrant that authorized the testing of the sample and the specific types of evidence for which the sample could be tested in DWI case; the warrant to take the blood did not limit Gov't's discretion to search only for evidence of alcohol or drugs, making the testing that occurred an unauthorized warrantless search.

Escape Rule

Davidson v. State, 2014 WL 2922499 (Mo. App. S.D. 6/27/14):
Holding: Even though Movant failed to appear for sentencing, the "escape rule" does not bar postconviction claims that arise post-capture; thus, Movant can raise claim that trial court breached the plea agreement at sentencing, and that she was denied effective assistance at sentencing when counsel failed to object to the trial court not honoring the plea agreement or allowing Movant to withdraw her plea.

Kindler v. Horn, 89 Crim. L. Rep. 185 (3d Cir. 4/29/11):
Holding: Even though Pennsylvania court applied that State's "escape rule," that rule does not bar federal habeas review.

U.S. v. Bokhari, 95 Crim. L. Rep. 534 (7th Cir. 7/3/14):
Holding: Appellate court would review trial court's denial of motion to dismiss charges against a Pakistani Defendant who was in Pakistan even though such motions to dismiss are usually not final, appealable orders and even though Defendant had left the country (so the "fugitive disentitlement" rule might ordinarily bar relief).

Ethics

U.S. v. Jimenez-Bencevi, 97 Crim. L. Rep. 271 (1st Cir. 6/3/15):
Holding: (1) Even though Defendant charged with death penalty had given an unaccepted proffer to Gov't in which he said he did the crime, trial court violated Defendant's immunity agreement by refusing to allow an expert to testify at his trial that surveillance video of the crime scene showed the shooter was taller than Defendant, unless the expert was told that Defendant had confessed during the proffer; a proffer, much less an unaccepted proffer, is not the same as a guilty plea. (2) Defense counsel was not prevented from presenting expert's testimony on grounds of ethical rule prohibiting counsel from presenting evidence counsel "knows" to be false, because Defendant had equivocated whether he really did crime, and may have confessed during the proffer to avoid the death penalty.

In re Favata, 97 Crim. L. Rep. 607 (Del. 7/27/15):
Holding: Prosecutor's statements that he would reveal that pro se Defendant was a snitch was improper attempt to intimidate Defendant, was prejudicial to administration of justice, and warranted 6 month suspension from practice.

U.S. v. Kentucky Bar Ass'n, 95 Crim. L. Rep. 613 (Ky. 8/21/14):
Holding: Prosecutors, including federal prosecutors working in the State, cannot ethically require Defendants to waive claims of ineffective assistance of counsel as a condition of accepting a plea bargain.

Editor's Note: Missouri Formal Ethics Opinion 126 adopts a similar rule in Missouri.

S.C. Bar Ethics Advisory Comm. Op. 14-02:
Holding: A lawyer cannot ethically serve as Prosecutor in a City that forbids dismissals or plea deals as a matter of City policy unless the police approve them; Rule 3.8(a) states that a prosecutor cannot pursue a charge he knows is not supported by probable cause; Rule 3.8(a) makes prosecutorial discretion an ethical requirement that City's policy vitiated.

Va. State Bar Standing Comm. On Legal Ethics, Proposed Opinion 1876, 96 Crim. L. Rep. 362 (Va. 11/20/14):
Holding: Va. Bar to adopt Rule that prosecutors cannot ethically offer an unrepresented alien Defendant a plea offer that can get Defendant (unknowingly) deported, even if the offer involves no jail time; such conduct purposely exploits a Defendant's lack of counsel.

Evidence

City of Moline Acres v. Brennan, 2015 WL 4930167 (Mo. banc Aug. 18, 2015):
(1) City Ordinance which prohibited vehicle owners from "permitting" their vehicle to be operated at a speed in excess of the speed limit requires that City prove that the owner gave the driver specific permission to do this; it violates due process and shifts burden of proof to create rebuttal presumption that proof of ownership proves consent to unlawful speeding; and (2) City Ordinance system which sent defendants a "notice" that they would be charged in Municipal Court with Ordinance violation unless they paid City an alleged "fine" violated due process because this was a shortcut "around" the judicial system; only courts are authorized to impose "fines" and only after a judicial determination of guilt.
Facts: City Ordinance prohibited vehicle owners from "permitting" their vehicle to be operated in excess of a speed limit. Defendant's car was caught speeding by an automated enforcement camera. City sent him an alleged Notice of violation that informed him that unless he paid a fine to City, the matter would be referred to Prosecutor for prosecution. Defendant was ultimately charged with violating Ordinance. Defendant challenged Ordinance on various grounds.
Holding: The Ordinance here does not prohibit speeding. The Court is required to take the Ordinance at "face value." What Ordinance prohibits is owners *permitting* their vehicle from being operated at an unlawful speed. The identity of the driver is not an element of the offense. Ordinance requires proof (1) that a vehicle was speeding, (2) that the person charged was the owner of the vehicle, and (3) that the owner gave the driver specific permission to operate the vehicle at an unlawful speed. City argues that proof of ownership creates a rebuttable presumption of consent to operation and unlawful speeding. But such a presumption is not constitutionally permissible in either a civil or criminal case. Even if this Court assumes there is some rational connection between ownership of a vehicle and permission to use that vehicle generally, this does not stretch far enough to allow the fact-finder to infer from ownership the very specific permission to exceed the speed limit that the Ordinance requires. City can charge the violation, however, if it can state facts in the Notice charging the offense showing probable cause

that the owner gave the driver specific permission to use owner's vehicle for speeding. But the Notice here did not conform to Rule 37.33 for various reasons. First, it did not state the name, division and street address of the circuit court. Second, it did not show any facts to establish probable cause that Defendant violated the Ordinance; instead the blank merely contains the phrase, "Violation of Public Safety on Roadways." Third, the Notice fails to tell defendants that they can plead not guilty and appear at trial. Rule 37.49 creates a process to allow defendants to plead guilty and pay a fine to a "violations bureau." But the Notice and Ordinance here do not do that. Instead, the payment system creates an unauthorized extra-judicial process. The Ordinance creates a system whereby owners of vehicles are accused of violating the Ordinance in a letter from police, and then told that by paying money to the City, charges will not be filed in the first place. "When a 'fine' is paid to a court, the court must report the conviction and distribute the proceeds according to law. When money is paid directly to the City in order to keep from being charged … that payment is in no sense a 'fine' and is not subject to [judicial] oversight and reporting." The power to inflict punishment requires a judicial determination that a law has been violated. Before there can be such judicial determination, due process requires City prove guilt beyond a reasonable doubt. These two principles prevent City from threatening prosecution as a means of forcing a person to pay City with no due process and no proof of guilt. Under Rule 37.33, it is improper for any notice to demand payment of money. The only exception is for notices that are subject to a "violation bureau." The system here is an unauthorized one that is a shortcut "around" the judicial system and its protections for the accused. As a result, both Ordinance and the Notice are invalid. Judgment dismissing charge affirmed.

Concurring opinion (Draper, Stith, Teitleman, JJ.): When confronting matters of public safety, courts should skeptically scrutinize manufactured legal fictions that may obscure the actual danger confronted. Prior cases have held that traffic ordinances cannot be a tax ordinance in the guise of an ordinance enacted under the police power. It is for the court to determine whether the primary purpose of the ordinance is regulation under the police power or revenue under the tax power. Ordinance comes across as a mechanism for generating City revenue, not as public safety measure. This Court should be cognizant of the times in which these ordinances are being enforced in light of recent criticism of St. Louis County municipalities, which have used traffic violations and the revenue they generate to enrich their coffers to the financial detriment of the citizens they are ostensibly protecting.

Tupper v. City of St. Louis, 2015 WL 4930313 (Mo. banc Aug. 18, 2015):

(1) City red-light camera Ordinance which created rebuttable presumption that owner of vehicle was the driver of the vehicle violated due process because it shifts burden of persuasion to defendants; (2) even though Drivers had been charged with Ordinance violation but had their charges dismissed by Prosecutor, they could challenge constitutionality of Ordinance in a declaratory judgment action; (3) Drivers were not allowed attorney's fees because City's action in passing unconstitutional Ordinance did not constitute intentional misconduct; (4) Director of Revenue had no standing to appeal trial court's judgment granting relief to Drivers where court's judgment did not order DOR to do anything, so DOR was not aggrieved by case.

Facts: Drivers were charged with violation of red-light camera Ordinance. Ordinance created a "rebuttable presumption" that the owner of a vehicle was the driver. Before Drivers could challenge Ordinance in their Ordinance violation cases, City dismissed the charges against them. Drivers then brought declaratory judgment action to invalidate Ordinance, claiming they had no other adequate legal remedy to do so. Trial court found for Drivers, but denied attorney's fees. Drivers, City and Department of Revenue appealed.
Holding: (1) Prosecutions for Ordinance violations are civil proceedings with quasi-criminal aspects. While rebuttable presumptions in civil cases are generally permitted, they are not generally permitted in criminal cases because they relieve the State of its burden of proof and shift the burden of persuasion to defendants. Prior parking Ordinance cases have held that strict liability can be imposed on owners without violating due process because parking fines are "relatively small," and do not impact a driver's license or insurance. Here, however, a red-light camera violation fine is $100 – not small – and violators will be assessed two points on their license. These factors, along with the quasi-criminal nature of municipal court proceedings, leads this Court to apply the law regarding presumptions in criminal cases. Presumptions which shift only the burden of production may be constitutional, but the Ordinance expressly shifts the burden of persuasion, which is unconstitutional. The Ordinance states that if an owner furnishes "satisfactory evidence" that they were not driving the car, the charges may be terminated. This shows City's intent to require an owner to prove to the fact-finder that they were not the driver. (2) Drivers can challenge Ordinance in declaratory judgment action. A pre-enforcement challenge is sufficiently ripe to raise a justiciable controversy when (a) the facts needed to adjudicate the claim are fully developed, and (b) the laws at issue affect plaintiffs in a manner that gives rises to an immediate, concrete dispute. Cases presenting predominantly legal questions are particularly amendable to conclusive determination in a pre-enforcement context because they require less factually development. Here, Drivers' claim is predominantly legal because it involves the constitutionality of the rebuttable presumption. Also, Drivers have been affected by Ordinance because they were previously facing prosecution under it. (3) Even though Drivers prevailed in their lawsuit, they aren't entitled to attorney's fees. In general, the "American Rule" is that absent statutory authorization or contractual agreement, each party pays their own attorney's fees. This rule can be overcome if a party shows "intentional misconduct" by a defendant. But City's actions in enacting the Ordinance did not constitute "intentional misconduct." (4) The DOR (among others) appealed the trial court's judgment invalidating the Ordinance. However, the trial court's judgment had no effect on DOR and did not order DOR to do anything. DOR is not an aggrieved party, and has no standing to appeal.

State v. Porter, 2014 WL 3729864 (Mo. banc July 29, 2014):
Holding: The "corroboration rule" (which provided that an appellate court is to disregard sex victim's testimony if contradictory and uncorroborated) and the "destructive contradictions doctrine" (which allowed an appellate court to disregard testimony relevant to an element of the crime if the testimony was inconsistent and contradictory) are abolished because they are inconsistent with the appellate standard of review, whereby the appellate court defers to factual findings of the trial court or jury.

State v. Ousley, 2013 WL 6822193 (Mo. banc Dec. 24, 2013):

(1) Even though trial court properly excluded certain defense witnesses in Defendant's case-in-chief as a sanction for failing to timely disclose the witnesses, trial court abused its discretion in not allowing those witnesses to testify in surrebuttal after State presented rebuttal evidence, because surrebuttal witnesses need not be disclosed; and (2) even though Defendant's defense was that he had consensual sex as a teenager with another teenager, trial court abused discretion in preventing Defendant from asking on voir dire whether jurors would consider the possibility or automatically rule out that two teenagers had consensual sex, because this did not seek a commitment but was necessary to uncover the bias of jurors who might punish all teenage sex, even though the law may allow it.

Facts: (1) Defendant was charged with forcible rape for rape of a teenage girl which happened on Dec. 26, 1999, when someone abducted Girl on a street and forced her to have sex. Defendant was arrested about 10 years later through a "cold hit" DNA match when samples found on Girl's clothing matched Defendant. On the Friday before trial, Defendant moved to endorse three witnesses – his Mother, Grandmother and a medical records custodian – who would testify that in December 1999, Defendant was generally bed-ridden and could only walk around with difficulty, because of a shooting injury. Defendant's defense was that, although he could not remember if he had sex with Girl, Defendant was very promiscuous and had sex with many girls, and if Defendant did have sex with Girl, it was consensual because he was not physically able to "force" anyone to have sex due to his injury. The trial court excluded Defendant's Mother and Grandmother from his case-in-chief as a sanction for his late disclosure, but allowed the medical records. Defendant testified consistent with his defense. The State then called a treating Doctor in rebuttal to testify that Defendant would have been able to "get around" (wasn't significantly disabled) in December 1999. Defendant then sought to call his Mother and Grandmother in surrebuttal, but the trial court continued to exclude them. (2) During voir dire by the Prosecutor, a juror asked if the Defendant and Girl were the same age, and the Prosecutor asked if juror would automatically say there could not be a rape if they were the same age. Later, defense counsel sought to ask jurors "whether they can consider the possibility or do they automatically rule out the possibility of two teenagers that had consensual sex." The trial court would not allow this question on grounds that it sought a "commitment."

Holding: (1) The purpose of surrebuttal is to give the defendant an opportunity to rebut the State's rebuttal evidence. The disclosure obligations of Rules 25.03 and 25.05 do not apply to witnesses whose testimony will be in the nature of rebuttal or surrebuttal. These witnesses do not have to be endorsed. When offering Mother and Grandmother as surrebuttal, defense counsel explained that they would contradict the State's rebuttal Doctor who testified that Defendant would have been able to get around (was not significantly disabled). Mother and Grandmother would have rebutted this crucial point of State's rebuttal evidence, and corroborated Defendant's testimony. Although there is no entitlement to surrebuttal as a matter of right, a trial court abuses discretion in denying surrebuttal where its decision is against the logic of the circumstances. Here, Defendant's physical condition was the central issue in the case. Mother and Grandmother would have rebutted the State's rebuttal Doctor with their personal

observations that Defendant was unable to get around well. Their testimony was the best evidence Defendant could offer to corroborate his physical condition and his own testimony. Once the trial court admitted the State's rebuttal evidence, its ability to exclude surrebuttal evidence was limited. Here, the trial court should have allowed Defendant to rebut the State's evidence with Mother and Grandmother, who would have directly contradicted the rebuttal evidence and allowed Defendant to present a complete defense. Further, their testimony was not "cumulative" of Defendant's testimony or the medical records because Mother and Grandmother's testimony would have corroborated Defendant's testimony and rehabilitated his credibility which was called into question by the rebuttal evidence. (2) In determining what questions to allow on voir dire, a court must strike a balance between competing mandates that "counsel may not try a case on voir dire" and that voir dire requires revelation of critical facts so that bias can be revealed. Here, the ages of Girl and Defendant as teenagers at the time of the offense was a critical fact that defense counsel should have been allowed to ask about. The State was allowed to essentially ask whether jurors would regard teen sex as consensual. Defendant sought to explore the opposite bias by asking if jurors would automatically think teen sex was not consensual. Some jurors may have believed that any sex between teens was such that a girl could never consent, but his is not the law. It was possible that Defendant and Girl had legal consensual sex. The question was designed to determine whether any jurors would find forcible compulsion as a foregone conclusion from the fact that both the alleged victim and Defendant were teenagers. Not every question that asks whether a juror would "automatically" decide something seeks a "commitment." Here, the proposed question merely sought to ensure, in light of the critical facts of the case of the ages involved, that jurors could follow the law regarding sex among minors and would not impose legal consequences even if they believed the sex was consensual.

State v. Liberty, No. SC91821 (Mo. banc 5/29/12):

Sec. 573.037 RSMo. Supp. 2007 which prohibited possession of "any" obscene material is ambiguous as to the unit of prosecutor for multiple photos of child pornography, but double jeopardy does not bar retrial for multiple counts if State can show they were obtained at different times.

Facts: Defendant was convicted under Sec. 573.037 RSMo. Supp. 2007 of eight counts of possession of child pornography for possession of eight photos. He claimed this was only one unit of prosecution and violated double jeopardy.

Holding: Sec. 573.037 RSMo. Supp. 2007 (since amended) prohibited possession of "any" obscene material. The question here is whether 573.037 (2007) intended to impose separate punishments for *each item* of child pornography a person possesses, or whether the statute is ambiguous as to whether it intended this to only be a single crime. The use of the word "any" is ambiguous because it can be interpreted to permit either a single prosecution or multiple prosecutions for eight photos. The ambiguity is shown, in part, by the legislative amendment in 2008, which more clearly evidenced the Legislature's intent as to unit of prosecution. 573.037 was amended in 2008, in relevant part, to provide that a possession of child pornography is a Class C felony unless the person possess more than 20 still images, in which case it is a Class B felony. The 2008 amendment makes clear that possession of 20 or more images is a single unit of prosecution for which only a single prosecution is permissible. To suggest that multiple

prosecutions are permissible for possession of fewer than 20 images would produce the unreasonable result that a defendant could receive a harsher penalty for possessing fewer images; statutes must be interpreted to avoid absurd results. However, just because the 2007 statute is ambiguous, does not mean that double jeopardy bars retrial on eight counts. Double jeopardy bars retrial where the evidence is insufficient, not for "trial error." Defendant's claim is "trial error" here because it is based on erroneous application of 573.037 (2007). Accordingly, the proper remedy is to affirm Defendant's conviction on one count and remand to the trial court, at which point the State may determine whether to proceed on the remaining seven counts should it have evidence of separate offenses, e.g., possession of the photos by Defendant at different times or from different sources.

State v. Clark, No. SC92003 (Mo. banc 5/1/12):

Even though Witness' pending criminal case had been referred to drug court and Witness might never face sentencing, Defendant should have been permitted to cross-examine Witness about whether Witness hoped for leniency in testifying for the State, since this showed Witness' bias.

Facts: Defendant was charged with murder. The State's case rested on two witnesses with questionable credibility. At the time of trial, one "Witness" had been charged in an unrelated case, but that case had been referred to drug court for disposition. Before trial, Defendant had deposed Witness and knew that Witness would testify that he hoped for leniency in his own criminal case because of his testimony in Defendant's case. At trial, Defendant sought to cross-examine Witness about this. However, the State objected on grounds that there was no deal in exchange for Witness' testimony and since Witness' case was in drug court, he might never face an actual sentencing so there was no expectation of leniency. The trial court sustained the objection. Defendant made an offer of proof and appealed.

Holding: A witness may be cross-examined by questions to test his credibility, and show bias and interest. The trial court relied heavily on the fact that there was no plea deal. But this reasoning fails to account for the subjective nature of "bias." The term "bias" includes all varieties of hostility or prejudice, and includes all circumstances that make it probable that Witness potentially favors one side. Witness' belief that he may get a more favorable outcome in his drug court case if he testified for the State may be mistaken or speculative, but what is important is what Witness believed. A reasonable jury could have concluded that Witness' misplaced hope made him want to help the State. Reversed for new trial.

Cash LLC v. Askew, No. SC91780 (Mo. banc 1/17/12):

Holding: Where purported "records custodian" of successor bank was unable to testify to mode of preparation of records of prior bank because she didn't know specifically how the records were prepared, the witness was not a proper "records custodian" for prior bank's records and the wsrecords weren't admissible under Sec. 490.680, even though the prior records were part of successor banks' records.

State v. Brown, No. SC90853, 2011 WL 1885183 (Mo. banc 5/17/11):
Where during closing argument the State used a gun as demonstrative evidence to rebut Defendant's defense theory, but there was no showing that the gun was similar to that used in the actual crime, the use of the gun was misleading to jurors and prejudicial.
Facts: Defendant was charged with murder. He claimed he shot victim in self-defense because victim had a gun in his pocket and was going to shoot Defendant. Various witnesses testified that victim had a gun in his pocket. However, no gun was admitted into evidence. During closing argument, the court, over defense objection, allowed the State to use a .38 revolver to demonstrate that the gun would not fit into the victim's pocket. During jury deliberations, the jury asked to see this gun, but the court did not allow it because it hadn't been admitted.
Holding: The State cannot use otherwise inadmissible evidence to rebut Defendant's defense theory. When assessing the relevance of demonstrative evidence, the court must ensure that the evidence is a fair representation of what is being demonstrated. Here, the relevance of the .38 revolver was dependent on its physical similarity to the victim's gun. If the .38 differed substantially in size or shape from the victim's gun, then the weapon likely would be inadmissible because it did not constitute a fair representation of what is being demonstrated. Various cases have held that using dissimilar guns not connected to the offense as demonstrative evidence is improper. Here, the State did not show that .38 was similar to the size or shape of the victim's gun. The .38 was misleading to jurors and prejudicial. Reversed for new trial.

State v. Winfrey, No. SC90830 (Mo. banc 4/12/11):
(1) Witness could be cross-examined on whether he told another person that he committed the crime because this is impeaching; and (2) evidence of other bad acts that occurred after the crime or that were not connected to Defendant were irrelevant.
Facts: Defendant was charged with first degree murder and robbery. At trial, the State called Witness (Lewis) to testify about getting a gun for Defendant. On cross-examination, the defense sought to ask Witness if Witness told a third-party (Reynolds) that Witness shot the victim. The defense knew through discovery that Witness had said this, and made an offer of proof on it. The trial court refused to admit this because it was "hearsay." Also at trial, the trial court admitted various evidence of other bad acts, which the State claimed showed motive.
Holding: (1) As an initial matter, if defense counsel had merely rephrased his question as "did you shoot the victim?" there would have been no hearsay problem. However, although Witness' (Lewis') out-of-court statement to prove the truth of the matter asserted is a hearsay use of the evidence, the evidence was admissible for the non-hearsay purpose of impeaching Witness' (Lewis') credibility. A hearsay statement is an out-of-court statement used to prove the truth of the matter asserted; hearsay is generally inadmissible. However, if the statement is independently admissible for some other purpose, then the statement is not hearsay. A witness can be asked if he admitted committing a crime to attack his credibility. Even if Witness' statement was untrue, it is still relevant for impeachment. The fact that Witness would falsely claim that he committed the murder for which Defendant was on trial affects his credibility. If Witness is willing to lie about committing the crime in the very case in which he is testifying, Witness might be equally willing to testify untruthfully about other matters in the case.

The statement also shows Witness' interest in testifying against Defendant. (2) The trial court admitted evidence that Defendant stole furniture, fraudulently obtained utilities and wrote bad checks after the murder. The State claimed this showed his motive because he was having financial problems and committed the murder and robbery to get money. However, the fact that Defendant had financial problems after the murder and robbery is not probative to his motive to commit crimes that have already occurred. The State also presented evidence that Defendant's car was broken into and his apartment above the murder scene were broken into. However, this evidence was irrelevant because it did not tend to prove or disprove any fact at issue. Reversed for new trial.

State v. Brown, 2014 WL 6464568 (Mo. App. E.D. Nov. 18, 2014):
(1) Sec. 570.020(1) regarding value (for determining if stealing is a felony or misdemeanor) abrogates prior case law holding that where property is secondhand, proof as to its cost and its length of use may be used to show value; instead, Sec. 570.020(1) requires that "value" be the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime; even though stolen television cost $749 when new in 2008, where it was stolen in 2011 and pawned for $140, evidence was insufficient to prove value was over $500 to support felony stealing; (2) Even though church sacristy was generally not open to the public, evidence was insufficient to convict of burglary of sacristy where sacristy was open to persons who wanted to speak to a priest and did not have a sign that indicated it was private or that no admittance was allowed; and (3) where Defendant was on trial for burglary of a church on June 18, trial court erred in admitting evidence that Defendant was suspiciously at a second church on June 21 because this was improper propensity evidence.
Facts: On June 18, Defendant entered and stole various items from a church sacristy. He also stole a television from the church. The television was purchased for $749 in 2008; Defendant pawned it for $140 after he stole it in 2011. At trial, the State also presented evidence that Defendant was at a second church on June 21, acting suspiciously.
Holding: (1) Defendant argues the State failed to prove the value of the television was more than $500 to support felony stealing. Often-cited case law such as *State v. Naper*, 381 S.W.2d 789, 791 (Mo. banc 1964), holds that were property is secondhand, proof as to its cost and its length of use may prove value. But Sec. 570.020, which went into effect 15 years later in 1979, abrogates *Naper*. Sec. 570.020 states that "'value' means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime." Here, the State did not present evidence that the television's value at the time of the crime was more than $500, did not assert that the value could not be ascertained, and did not present evidence as to replacement value. The evidence was insufficient to convict of felony stealing. Conviction entered for misdemeanor stealing. (2) Second degree burglary requires that a person enter a building unlawfully. Sec. 562.016.3 states that a person who, regardless of his purpose, enters premises which are open to the public does so with license unless he defies a lawful order to leave. While the sacristy was not generally open to the public, it was open to persons who wanted to speak to a priest. It may be disrespectful or sacrilegious to walk through an alter area to a

sacristy, but that does not equate with unlawful entry into a private area. There was no evidence that the sacristy was marked "private," "no admittance," or "authorized personnel only." The evidence was insufficient to prove unlawful entry of the sacristy. (3) Evidence that Defendant was at a second church, acting suspiciously, three days after the charged burglary was improper propensity evidence. The State argues the evidence was admissible to show intent, but appellate court finds it was adduced "purely as propensity evidence to assert that if [Defendant] was the person who went to the [second church], he likewise must have been the person who unlawfully entered and stole from [the first church]." Propensity evidence violates Defendant's right to be tried for the charged crime. Eastern District admonished prosecutor Philip Groenweghe for use of this propensity evidence, because he previously improperly used propensity evidence in a prior case, too.

State v. Walker, 2014 WL 6476054 (Mo. App. E.D. Nov. 18, 2014):
(1) Even though Defendant was charged with first degree murder, trial court abused discretion in not allowing defense to voir dire on range of punishment for second-degree murder where parties knew in advance that second-degree murder would be submitted to jury; and (2) trial court erred in not allowing Defendant who claimed self-defense to testify to what Victim said before shooting because statements were not offered to prove truth of matter but to show Defendant's subsequent conduct (but not reversible here because there was similar evidence presented).
Facts: (1) Defendant was charged with first degree murder arising out of a shooting. The defense was self-defense. The trial court sustained the State's motion in limine to preclude the defense from asking anything during voir dire about the range of punishment for second-degree murder. The defense claimed it should be allowed to voir dire on the range of punishment for second- degree murder because the parties anticipated that such an instruction would be given, and the defense was entitled to know if jurors could follow the law and range of punishment on it. The State was allowed to voir dire on the range of punishment for first degree murder. During guilt phase deliberations, the jury sent a note asking what the range of punishment was for second-degree murder. The court did not specifically answer. The jury convicted of second-degree murder. During penalty deliberations, the jury sent a note saying they were deadlocked on punishment. After a hammer instruction was given, the jury sentenced to 30 years. (2) During the Defendant's testimony, the trial court sustained a "hearsay" objection to the Defendant testifying about what Victim said before Defendant shot Victim.
Holding: (1) Although the defense did not make an offer of proof as to specific voir dire questions which the defense was precluded from asking, the defense did state in response to the motion in limine that they expected the law and facts to support a second-degree murder instruction, and that they wanted to voir dire on the range of punishment for second-degree murder to see if the jurors could follow the law. Thus, the issue is preserved for appeal. The Defendant's right to an impartial jury is meaningless without the opportunity to show bias. As long as the Defendant's question is in proper form, the trial court should allow the defense to determine whether the jurors can consider the entire range of punishment for a lesser-included form of homicide. The trial court precluded this because Defendant was charged with first degree murder, but this was unreasonable. The trial court allowed the State to voir dire extensively on the range of

punishment for first degree murder. Defendant was prejudiced here because by being denied any opportunity to voir dire on the range of punishment for second-degree murder, he could not determine if jurors were able to follow the full range of punishment. The jury sent a note during guilt phase deliberations about the range of punishment. During penalty phase, the jury sent a note saying they were deadlocked on punishment. After a hammer instruction, the jury sentenced to the maximum, 30 years. The State argues that since the punishment did not exceed the maximum range there is no prejudice, but under that logic, a defendant could never show prejudice unless the punishment was beyond the authorized range, which would be plain error anyway. The State also argues there is no prejudice because the judge could reduce the jury's recommended sentence. "While it is true that the judge might impose a lesser sentence, we do not conclude that trial judges are unaffected by the jury's recommendation." Further, the fact that a judge might impose a lesser sentence should not be confused with the jury's ability to consider the full range of punishment in the first instance. Case remanded for new penalty phase trial. (2) The trial court erred in sustaining the State's "hearsay" objection during Defendant's testimony about what Victim said before Defendant shot him. This was not "hearsay" because not offered for the truth of the matter asserted, i.e., not offered to show the truth of the Victim's statements. Instead, it was offered to explain Defendant's conduct after the statements were made. Although this error facially shows manifest injustice, the error is not reversible because the jury heard similar evidence that would allow it to conclude Defendant was in fear of his life when he shot Victim.

State v. Evans, 2014 WL 4832217 (Mo. App. E.D. Sept. 30, 2014):
(1) A hand or a fist is not a "dangerous instrument" for purposes of the ACA statute, so cannot support a conviction for ACA; and (2) trial court abused discretion in admitting a Facebook photo of Defendant apparently making a gang symbol with his hand, where Defendant's identity was not an issue in case.
Facts: Defendant, using his fists, beat up victim outside a bar, causing serious injuries. Defendant was convicted of first degree assault and ACA. At trial, a Witness to the fight testified that he learned Defendant's name after the fight by seeing Defendant on Facebook. The State then admitted the Facebook photo, which showed Defendant apparently making a gang symbol with his hand.
Holding: (1) Sec. 571.015.1 provides that a person is guilty of ACA when that person commits another felony through use of a "dangerous instrument." "Dangerous instrument" is defined in Sec. 566.061(9) as any instrument which under the circumstances is readily capable of causing death or serious physical injury. The issue here is whether a body part can be a "dangerous instrument." A common-sense definition and reading of "instrument" indicates an external object or item, rather than part of a person's body. The dictionary defines "instrument" as a "tool or implement." Body parts are not normally called "tools or implements." This interpretation is consistent with the pre-1979 version of ACA, which required the use of actual weapons. The Legislature intended to impose additional punishment on people who felonies with an item or weapon, rather than those who just use their hands. Interpreting "dangerous instrument" to include body parts would unduly expand the reach of the ACA statute, and result in a significant departure from the historical intent of enhanced punishment. ACA conviction vacated. (2) Regarding the Facebook photo, it should not have been admitted

because Defendant's identity was not contested at trial. The defense was self-defense. The photo was irrelevant, and more prejudicial than probative because of its apparent gang affiliation, which was not an issue at trial. However, the photo was harmless due to overwhelming evidence of guilt.

State v. Francis, 2014 WL 1686538 (Mo. App. E.D. April 29, 2014):
Even though Defendant possessed a BlackBerry at time of his arrest, where the State never showed that Defendant owned the BlackBerry, the trial court erred in admitting the text messages on it because (1) the State did not authenticate that this was Defendant's own phone or that the messages were written by him, and (2) the messages were hearsay and were not admissions of a party opponent or adoptive admissions since the State emphasized the incoming messages, not outgoing messages which would be those allegedly written by Defendant or "adopted" by him.
Facts: Defendant was charged with a drug offense. He was arrested in his car. When he was arrested, a BlackBerry fell out of his lap. At trial, the trial court admitted text messages from the BlackBerry that were mostly incoming messages. Defendant objected based on hearsay and confrontation grounds, and that there was no proof that he owned the BlackBerry.
Holding: The State claims the BlackBerry texts were admissible because there is a "logical inference" that Defendant owned the phone since he possessed it, and that the texts are admissions of a party opponent. This argument is flawed, however, because the State failed to establish that the outgoing messages were written by Defendant. For a statement to be admitted as an admission of a party opponent, the party seeking to admit the evidence must show that *the opposing party made the statement*. Here, the State simply argues that there is a "logical inference" that Defendant owned the phone. However, this is inconsistent with the requirement that the State lay a proper foundation for authentication of text messages. To admit text messages, the State was required to present some proof that the messages were actually authored by the person who allegedly sent them. Here, the State did not even attempt to establish who owned the BlackBerry. The fact that Defendant possessed the phone at the time of his arrest is insufficient to establish that Defendant sent the text messages, especially those from earlier days before the arrest. Furthermore, most of the texts presented by the State were the *incoming* text messages. These could be adoptive admissions if it could be proven that Defendant replied to them, but the State often did not even present the *outgoing* replies. It is clear that the State was using incoming messages of unknown, unidentified third parties to convict Defendant. This was hearsay and denied him his right to confront and cross-examine witnesses.

State v. McCleary, 2014 WL 930843 (Mo. App. E.D. March 11, 2014):
Even though Defendant (who was charged with methamphetamine offense) "opened door" to impeachment of a defense witness with their municipal conviction for stealing, State should not have been permitted to inquire about the details of that conviction, particularly that the defense witness had stolen pseudoephedrine because this suggested Defendant had propensity to engage in methamphetamine by associating with defense witness (but harmless here because evidence of guilt overwhelming).

Facts: Defendant was charged with a methamphetamine offense. He was arrested with his girlfriend (defense witness). At trial, Defendant called defense witness and asked her about contact with police. The trial court ruled this "opened the door" to the State asking her about a prior municipal conviction for stealing. The State then asked her if she had been convicted of stealing pseudoephedrine and other items.
Holding: Generally, municipal court convictions that are unrelated to the case being tried are inadmissible. However, here Defendant opened the door to the conviction by his direct examination. Even though the conviction was admissible, however, the cross-examiner can only elicit the nature, date and place of the prior conviction, not details. Here, the State elicited improper details. "We are … troubled by the State's mention of pseudoephedrine, and we do not believe it occurred by happenstance." The record suggests the State was eager to present this prior conviction and the details of it. The reference to pseudoephedrine would lead a jury to believe that the defense witness was previously involved in methamphetamine, and would, thus, lead a jury to believe Defendant had a propensity to be involved in methamphetamine because of his association with defense witness. However, the error was harmless here because evidence of Defendant's guilt was overwhelming.

State v. Patton, 2013 WL 5530599 (Mo. App. E.D. Oct. 8, 2013):
Holding: (1) Police lay witnesses should not have been permitted to testify that Defendant was near the cell phone tower with the strongest signal because such testimony is required expert testimony, since it requires many variables to determine cell phone location (however, error was harmless here since other evidence of guilt was overwhelming); and (2) trial court erred in murder trial in admitting family photos of victims which State used to have witnesses identify family members who had no connection to the crime, since was irrelevant (but was also harmless under facts here).

State v. Duncan, 2013 WL 1739720 (Mo. App. E.D. April 23, 2013):
State improperly impeached defense Witness with prior statement of Defendant that was not Witness' own prior statement; was not inconsistent with Defendant's prior statement; and that prejudicially implied Defendant was in a criminal gang.
Facts: Defendant was charged with trafficking drugs. At a pretrial suppression hearing, Defendant testified that he and Witness had been in a gang when they were growing up, but were not currently in a gang. Subsequently, at trial, Defendant did not testify, but the defense called Witness to testify. The State asked Witness, "Are you in the 51 block gangsters criminal street gang with Defendant?" When Witnessed answered "no," the State, over defense objection, cross-examined Witness by asking if Witness was aware that Defendant had testified at a prior proceeding that Defendant was in the gang with Witness. After conviction, Defendant appealed.
Holding: Generally, a witness may be impeached with his own prior inconsistent statements. Here, however, the State impeached Witness with the statements of someone else – the Defendant. Moreover, the questions asked by the State mischaracterized the Defendant's prior statements. The Defendant had testified he was in the gang in the past, but the State mischaracterized the statement as current gang affiliation. This impeachment was improper, and prejudicial because the evidence of guilt was not overwhelming and Witness' testimony was important to establish Defendant's

exculpatory version of events. Moreover, the State, in closing, alluded to Defendant's gang affiliation by saying he and Witness "were working together" to sell drugs in the neighborhood.

State v. Ousley, No. ED97047 (Mo. App. E.D. 11/20/12):
(1) Even though the trial court did not abuse its discretion in excluding Defendant's mother and grandmother as witnesses in Defendant's case-in-chief as a sanction for late disclosure of the witnesses, where the State presented rebuttal evidence, Defendant was entitled to call the mother and grandmother as surrebuttal witnesses because surrebuttal witnesses need not be disclosed; and (2) where Defendant was charged with forcible rape, Defendant should have been permitted to voir dire potential jurors on whether they could consider that teenagers would have consensual sex because this was a critical fact with a substantial potential for disqualifying bias.
Facts: Defendant, who was 19, was charged with forcible rape of a 14 year old. The trial court set a pretrial deadline for disclosure of witnesses, which Defendant failed to meet. As a sanction, the trial court excluded as witnesses Defendant's mother and grandmother, who were going to testify that Defendant's physical condition made it impossible for him to commit a forcible rape. After Defendant presented other evidence of this at trial, the State called a doctor in rebuttal. Defendant then sought to call his mother and grandmother in surrebuttal, but the trial court would not permit this because of its prior sanction.
Holding: (1) If the State introduces a new matter during rebuttal, the Defendant is entitled to offer surrebuttal. Because the nature of rebuttal requires a party to depend on the evidence presented in determining whether to offer rebuttal, rebuttal witnesses need not be disclosed or endorsed; this applies to surrebuttal evidence, too. Regardless of any initial discovery sanction, when Defendant offered his mother and grandmother as surrebuttal witnesses, it became a new inquiry for the trial court to determine whether Defendant was entitled to call them in light of the State's rebuttal evidence; this determination was to be made anew without reference to the rules of discovery or the trial court's earlier sanction. The trial court abused discretion in excluding the surrebuttal witnesses (but not prejudicial under facts of case). (2) During voir dire Defendant sought to ask potential jurors whether they could consider that two teenagers had consensual sex. The State objected that this was seeking a commitment, and the trial court sustained the objection. However, a party is entitled to ask about critical facts that have a substantial potential for disqualifying bias. Here, Defendant could not have been charged with statutory rape because it is defined as sex with a person who is less than 14, or a person who is at least 21 having sex with a person who is less than 17. Defendant's question sought to inquire as to whether jurors would impose consequences for such an act, even if it was not illegal. This did not require a commitment from jurors to acquit Defendant upon hearing that two teenagers had sex, but rather sought to ensure that jurors could follow the law as it relates to sex among minors if they believed the sex was consensual. The trial court abused discretion in prohibiting this question (but was not prejudicial in context of case).

State v. Jones, No. ED97595 (Mo. App. E.D. 10/2/12):
Defendant's incriminating statements should have been excluded under the corpus delicti rule because there was not independent corroboration that a murder had occurred where the only other evidence of guilt was police testimony that baby-decedent was on a bed near pillows and the medical examiner based his opinion that the baby died of suffocation on the Defendant's statements.
Facts: In 2008, Defendant's Baby died. At the time, the death was believed to have been caused by a seizure disorder. In 2009, a different baby of Defendant also almost died. This caused police to investigate the 2009 death. While questioning Defendant about that death, Defendant brought up first Baby's death, and said she had put Baby facedown on a pillow because Baby wouldn't stop crying, after which Baby stopped breathing. Defendant was then charged and convicted of second degree murder for death of first Baby. At trial, her statements to police were admitted against her. On appeal, she claimed that admission of such statements was plain error under the *corpus delicti* rule.
Holding: The *corpus delicti* rule bars the admission of extrajudicial statements by a defendant absent proof of the commission of an offense. In a murder case, the *corpus delitici* requires proof the death of the victim and evidence that the criminal agency of another person caused the death. The amount of corroborating evidence allowing the admission of out-of-court statements can be minimal, but here, there wasn't any corroboration. The police testified that Baby was found on an adult bed near pillows and not breathing. Although police referred the case to investigators for further investigation because they thought it was "suspicious," this is not corroboration of a murder. Importantly, the autopsy of Baby originally found the cause of death to be "seizure disorder." Later, the pathologist changed this to "suffocation," but only after Defendant's statements to police and not based on any new medical tests. If the pathologist had originally found the death to be caused by suffocation, that would be corroboration of a homicide, but he did not find this. The record is clear that the pathologist later revised his opinion solely because of Defendant's statements, not medical evidence. Without Defendant's statements, the cause of death would have remained seizure disorder. Defendant's statements should not have been admitted under the *corpus delicti* rule. New trial ordered.

State v. Harris, No. ED96045 (Mo. App. E.D. 12/20/11):
(1) Where defense counsel's offer of proof was cut short by the trial judge and the parties all understood the issues, the appellate court would consider it sufficient; and (2) to admit a text message, the proponent must offer some proof (even circumstantial) that the message was sent by the purported author of the message.
Facts: Defendant at trial sought to admit text messages which Victim allegedly sent to another Witness. The trial court would not allow this. The defense attempted to make an offer of proof on this matter, but was cut short by the trial judge. After conviction, Defendant appealed.
Holding: (1) The State claims this issue is not preserved because there was no offer of proof. However, Defendant tried to make an offer of proof but was cut off by the judge. The parties discussed this issue for 10 pages of transcript, which shows that everyone understood the issue. Given all this, the appellate court will not fault Defendant for not making an offer of proof. (2) On the merits, the proponent of text messages must present

some proof (even circumstantial) that the texts were sent by the purported author of the text. This could be in the form of an admission by the author that he wrote them, or an admission by the author that the number from which the texts were sent was his number and he had control of his phone. Such proof could also be made by the person who received them testifying that he regularly receives texts from this author, or something distinctive about the texts, such as a personal signature. Here, however, Defendant did not question the Victim (who allegedly sent the texts) whether she did send them to the Witness. There was no foundation to admit the texts, so court did not err in excluding them.

State v. O'Neal, No. ED95274 (Mo. App. E.D. 11/29/11):
Where prosecutor objected to admission of Defendant's medical records in front of the jury by saying they were"simply a way to avoid the defendant testifying," this was a direct comment on Defendant's failure to testify and a mistrial should have been granted.
Facts: Defendant was charged with attempted stealing. As part of his defense, he sought to introduce his medical records with a business records affidavit. The prosecutor objected to the records in front of the jury as "simply a way to avoid the defendant testifying." Defense counsel objected as violating defendant's rights not to testify and requested a mistrial, which the trial court overruled.
Holding: A direct reference to a defendant's failure to testify violates the rights of freedom from self-incrimination and right not to testify under the 5th and 14th Amendments, and Art. I, Sec. 19 Mo. Const. A "direct reference" uses words such as "testify," "accused" and "defendant." Here, the prosecutor's speaking objection in front of the jury was egregious because there had been a prior bench conference about the records at which the State had made an objection that had been overruled. The objection in front of the jury may have prejudiced the jury against Defendant for using the medical records rather than testifying himself. Reversed for new trial.

State v. Moore, No. ED95643 (Mo. App. E.D. 11/8/11):
(1) Even though Defendant was charged with driving while revoked in addition to assault on a law enforcement officer and a drug offense, admission of Defendant's full driving record showing 22 driving offenses spanning more than 20 years violated his right to be tried only for the crime charged; and (2) where Defendant receives an SIS on an offense, he cannot direct appeal because there is no final judgment, but a remedy may be available by writ.
Facts: Defendant was charged with driving while revoked, assault on a law enforcement officer, and a drug offense all stemming from a traffic stop. At trial, the State sought to admit Defendant's full driving record which contained 22 driving offenses over more than 20 years, including DWI and other offenses. The State claimed this was necessary to show Defendant's "knowledge" that he was driving with a revoked license. Defendant moved to exclude the full driving record, and offered to stipulate to all elements of the driving while revoked charge. The trial court admitted the full driving record.
Holding: Admission of the full driving record spanning more than 20 years violated Defendant's right to be tried only for the crime charged under Art. I, Secs. 17 and 18(a) of the Missouri Constitution. In order for intent, absence of mistake, or knowledge to serve as a basis for admission of prior bad acts, these must be controverted issues in the

case. Here, Defendant never asserted that he didn't know his license had been revoked. In fact, in his opening statement, he conceded he was guilty of driving while revoked, though not the other offenses. Therefore, his knowledge or intent were not issues, and evidence of his prior convictions were not admissible. (Defendant did not testify at trial.) Defendant was prejudiced because the State used his lengthy driving record to argue for conviction on all offenses. The State argued that it was "most troubling" that Defendant had 22 prior offenses, and "[i]t is time when we deal with this defendant to move beyond passing out traffic tickets because he's moved beyond that … [Y]ou need to find him guilty of everything else, too." Convictions for assault on law enforcement officer and drugs reversed and remanded for new trial.

State v. McArthur, No. ED95094 (Mo. App. E.D. 7/5/11):
Holding: Where Defendant charged with sodomy had a bifurcated trial, State may present in penalty phase testimony of a prior sexual assault victim of Defendant about that prior bad act.

Editor's Note: An interesting dissenting opinion argues that State went too far in being allowed to present prior victim and then argue jury should impose maximum sentence to avenge prior victim's assault, since that was not the subject matter of this particular case.

John Doe v. Roman Catholic Diocese of St. Louis, No. ED94720 (Mo. App. E.D. 7/5/11):
Holding: Alleged "grooming" of a victim to engage in sexual abuse does not constitute sexual abuse itself.

State v. Joyner, 458 S.W.3d 875 (Mo. App. 2015):
Where Defendant was charged with aggravated stalking, trial court abused discretion in allowing State to introduce evidence that Defendant was a registered sex offender (on the theory that this showed Victim's "state of mind"), because this was improper propensity evidence and Victim's "state of mind" was not an element of the offense.
Facts: Defendant, age 45, lived with Victim, age 12, and her parents. After Defendant said he had romantic feelings toward Victim, parents made Defendant move out of the house. Thereafter, Defendant continued to follow and observe Victim at her house, church and elswhere. The State charged Defendant with aggravated stalking based on this conduct. At trial, the State asked Victim if she was scared of Defendant and she testified she was because he was a registered sex offender. The State also argued that Defendant was a registered sex offender in closing argument.
Holding: Defendant's status as a registered sex offender is prior uncharged conduct which shows propensity. Generally, such evidence should not be admitted unless it shows (1) motive, (2) intent, (3) absence of mistake or accident, (4) common scheme or plan, or (5) identity of person charged. At trial, the State did not argue that the evidence was admissible under one of these exceptions. Rather, the State claimed it showed Victim's "state of mind." However, the Vicitm's subjective state of mind was not an element of the crime of aggravated stalking. Sec. 565.225.2 defines stalking as purposely, though a course of conduct, harasses or follows with the intent of harassing another person. "Aggravated stalking" applies here because the Defendant was more

than 21 years of age, and the Victim younger than 17, Sec. 565.225.3(4). Since Victim's subjective state of mind was not an element of aggravated stalking, it was an abuse of discretion to admit the registered sex offender evidence. Improperly admitted evidence can be outcome determinative even if other evidence of guilt is overwhelming. The factors to consider are (1) similarity of the charged offense to the improperly admitted evidence, (2) the amount of evidence erroneously admitted and how much it was referred to at trial, and (3) whether the State's elicitation of the evidence was not inadvertent. Here, the evidence that Defendant was a registered sex offender was highly prejudicial when considered in connection with stalking a minor Victim. This evidence was repeatedly referred to at trial. And the State's presentation of it was not inadvertent since this had been the subject of a defense motion in limine, which the trial court had previously sustained. Reversed and remanded for new trial.

State v. Sanders, 2015 WL 6869359 (Mo. App. S.D. Nov. 6, 2015):
Holding: (1) Where Forensic Interviewer who conducted taped interviews of child-victims was unavailable for trial, court did not abuse discretion in finding that taped interviews were reliable under Sec. 491.075.1 and in admitting the interviews where the children-victims testified and where a supervisor of Forensic Interviewer testified about how the interviews were conducted and tapes made; (2) admission of the taped interviews did not violate Confrontation Clause because Forensic Interviewer was not a "witness against" Defendant; the children-victims were the witnesses against Defendant, not the person who interviewed them.

State v. Eisenhour, 2013 WL 5710545 (Mo. App. S.D. Oct. 21, 2013):
As matter of first impression, numeric results of Pre-arrest Portable Breath Test are not admissible as "exculpatory evidence" under Sec. 577.021.3.
Facts: Defendant was stopped for DWI, and failed several field sobriety tests. Defendant had alcohol on breath, and said he also had taken some pills and K2. He was given a pre-arrest portable breath test (PBT), which result was .002% BAC. He sought to use this test result at trial as exculpatory evidence, but the trial court excluded it. This test is not the same as a "Data Master" test at the police station, which is certified and calibrated. After conviction, he appealed.
Holding: Sec. 577.021 says a PBT "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." While a positive PBT is admissible to show whether there is probable cause to arrest, the statute demonstrates that the legislature had forbidden the test to be used to prove intoxication, because the PBT test is "too unreliable" to be used for that purpose. No case interprets what the statute means when it states that the result may be admissible as "exculpatory evidence." The State argues that the presence or absence of alcohol as indicated by the PBT is admissible under the statute, but not the numeric value itself because the legislature has found that the numeric value is "too unreliable" for that purpose. Appellant makes no statutory construction argument or other argument supporting the converse of this issue. An appellate court will not speculate on arguments that could be raised or become an advocate for Appellant. Thus, judgment excluding PBT numeric value is affirmed.

State v. Brown, No. SD30787 (Mo. App. S.D. 11/18/11):
Holding: Where Defendant was charged with resisting arrest, testimony about his uncooperative demeanor at the police station after the arrest and at the station where he called an officer a "bitch" was not relevant to proof of resisting arrest (but was not prejudicial under the facts here).

State v. Thieman, No. SD30818 (Mo. App. S.D. 11/10/11):
Holding: Where Defendant's prior guilty plea had been withdrawn, his statements made in a SAR (sentencing assessment report) could not be used by the State at his trial because Rule 24.02(d)(5) provides that "evidence of a guilty plea, later withdrawn, or an offer to plead guilty …, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers is not admissible in any civil or criminal proceeding against the person who made the plea or offer."

State v. Reynolds, 2015 WL 1090005 (Mo. App. W.D. March 10, 2015):
Holding: "Screen shots" of a cell phone's call logs were not hearsay because they were not statements made by a human declarant; they were admissible as computer-generated data that was not the result of human entries. The admissibility of electronic data should be determined on the basis of the reliability and accuracy of the process used to create and obtain the data.

State v. Walter, 2014 WL 4976913 (Mo. App. W.D. Oct. 7, 2014):
Prosecutor's powerpoint slide during closing argument showing Defendant in jail clothes with word "GUILTY" superimposed across face violated right to fair trial and Prosecutor's duty to seek justice (but not plain error where counsel failed to timely object and request mistrial, and evidence of guilt overwhelming.)
Facts: During closing argument, the Prosecutor displayed a powerpoint slide of Defendant dressed in jail clothes with the word "GUILTY" superimposed across his face. However, defense counsel, who was listening to closing argument, failed to see the slide at the time or object. Defense counsel learned of the slide during jury deliberations, but did not object until after the jury returned a guilty verdict.
Holding: A defendant cannot be forced to appear in front of the jury in jail clothing because this disparages the presumption of innocence and a fair trial. Although Defendant wore street clothes at trial, the powerpoint slide had the same effect as making him appear in jail clothing. The word "GUILTY" across his face further disparaged the presumption of innocence. "It defies logic why even an overzealous prosecutor" would do this. Prosecutors have a duty to serve justice, not just win a case. Prosecutors have a duty to see that defendants receive a fair and impartial trial. There was "no rational justification for the prosecutor's use of the mug shot during closing argument." Nevertheless, defense counsel chose to wait to object until after the jury returned a guilty verdict, even though counsel knew of the slide during jury deliberation. A party cannot fail to request relief, gamble on the verdict, and then if adverse, claim error. Also, the evidence of guilt is overwhelming here, so conviction affirmed.
Holding: (1) The State argues that since proffered Witness had only spoken with at most 10 people about victim's reputation for truthfulness, this was not sufficient to show victim's reputation in the community. However, whether the knowledge of a character

witness is based on much or little evidence affects the weight of the evidence, not its admissibility. Here, the test for admissibility was met since Witness was familiar with community members who knew victim, had spoken to those people or overheard their conversations regarding victim's reputation for truthfulness, and that victim had reputation as being untruthful. The trial court abused its discretion in excluding Witness, but error was not prejudicial here since jury heard other evidence that victim was untruthful. (2) Reading Secs. 557.011, 559.021.2 and 559.100.2 together, a trial court cannot simultaneously order imprisonment for a felony and payment of restitution. Restitution can only be ordered if the defendant is placed on probation. Since Defendant was sentenced to prison and it is clear that trial court would not have sentenced to probation here, appellate court strikes order of restitution.

State v. Mignone, 2013 WL 5712452 (Mo. App. W.D. Oct. 22, 2013):
(1) As matter of first impression, standard of appellate review for dismissal of DWI charge pursuant to Sec. 577.037.5 is whether the trial court's dismissal was "clearly erroneous"; (2) State bears burden of persuasion and burden of proof regarding a motion to dismiss under the statute; and (3) where properly administered breath test showed Defendant had a BAC of less than .08, trial court did not clearly err in sustaining a motion to dismiss, even though tests took place an hour or more after Defendant's arrest.
Facts: Defendant was arrested for DWI at 3:06 a.m. He was administered a proper breath test at 4:38 that showed a BAC of .075%. He was administered a second test at 5:46 that showed a BAC of .051%. Defendant moved to dismiss under Sec. 557.037.5 on grounds that his BAC was less than .08%. The trial court dismissed. The State appealed.
Holding: Appellate courts have not heretofore promulgated a standard of review for reviewing dismissals pursuant to Sec. 577.037.5. The standard of review is whether the dismissal was "clearly erroneous." The appellate court will reverse only if left with a "definite and firm impression that a mistake has been made." Sec. 577.037.5 provides that where a Defendant shows that his BAC was less than .08%, his case "shall" be dismissed unless (1) there is evidence that the BAC test was unreliable, (2) there is evidence that Defendant was under the influence of drugs, or (3) there is substantial evidence of intoxication from physical observation of witnesses. Dismissal is the default position. Unlike an ordinary motion to dismiss where the defendant has the burden of persuasion, the clear implication of the statute is that the State has the burden of production and persuasion. Here, the State apparently argues that the dismissal was unwarranted because Defendant's blood alcohol content was in decline since the time of his arrest. However, the State did not present any expert testimony that this would be the case, and this is not subject to lay opinion. The trial court was free to accept or reject the testimony presented by the State, and chose to reject it. It was not necessary for Defendant to present evidence, and he contested the State's case via cross-examination. There was no evidence of erratic driving or evidence of intoxication. Dismissal affirmed.

State v. Stallings, 2013 WL 4520019 (Mo. App. W.D. August 27, 2013):
Even though Sec. 569.080.3 allows in tampering cases the admission of evidence that a defendant unlawfully possessed a stolen car on a prior occasion, trial court abused its discretion in allowing Prosecutor to cross-examine Defendant about details of his prior

convictions for stealing cars, because this was improper propensity evidence since it was not sufficiently similar to the charged offense.
Facts: Defendant was stopped on a highway driving a stolen car. At trial, Defendant testified that he did not know the car was stolen. Defendant testified that he had prior convictions for stealing by deceit and tampering. Over defense objection, the Prosecutor was allowed to question Defendant about details of the offenses, including that one involved stealing cars from car dealerships and another involved stealing from a rental car company. The State argued these details were admissible because they showed a "pattern." In closing argument, the State argued that defendant "has done it before, and did it again."
Holding: Prior criminal acts are not admissible for purposes of proving propensity. However, the State may use prior convictions to establish motive or intent. Here, Defendant claimed he did not know the car was stolen, so intent was at issue. Sec. 569.080.3 allows past acts of tampering to be used to establish the intent element of first-degree tampering. We interpret this statutory provision to be consistent with case law recognizing that evidence of uncharged bad acts may be relevant to show the defendant's state of mind. The evidence here, however, does not fall under this exception. The State did not elicit details of other crimes for the purpose of showing knowledge. For example, the State failed to adduce any evidence demonstrating that in the prior cases the vehicles stolen from dealerships had the same distinctive key tags, lacked a temporary or permanent license, or lacked registration or title, as here. If Defendant's prior offenses had involved such circumstances, his earlier convictions could arguably have defeated his claim of innocent state of mind. The evidence admitted, however, showed his prior offenses involved car dealerships and rental agencies, which lent itself to an argument based only on a "pattern" of similar offenses, which is not a permitted use of prior convictions. This prejudice was compounded by the State's closing argument.

Hemphill v. Pollina, 2013 WL l1197502 (Mo. App. W.D. March 26, 2013):
Holding: (1) Where Defendant entered an *Alford* plea to assault and received an SIS, the *Alford* plea was not admissible against Defendant in a later civil suit over the assault as an admission against interest because the *Alford* plea was not an admission of guilt and was not inconsistent with Defendant's position in the civil case; (2) Defendant's *Alford* plea was not admissible for purposes of impeachment of Defendant since it resulted in an SIS and the disposition of a criminal charge by SIS is not a conviction for purposes of impeachment; (3) Defendant's post-*Miranda* failure to speak to police was not admissible as an admission against interest because Defendant had no duty to speak.

State v. Schnelle, 2013 WL 1110698 (Mo. App. W.D. March 19, 2013):
(1) Even though proffered impeachment Witness had only spoken to "not more than 10 people" about victim's reputation for truthfulness, where Witness was familiar with community members who knew victim, had spoken to them about victim's reputation for truthfulness, and knew from this that victim had bad reputation for truthfulness, it was abuse of discretion for trial court to exclude witness (but not prejudicial in light of other evidence of untruthfulness that was admitted); and (2) where a trial court sentences a person to prison, it cannot also order restitution.

Facts: Defendant was convicted of assault and burglary. The defense was that the alleged victim had fabricated her story. The defense offered an impeachment Witness to testify as to the victim's reputation for lack of truthfulness, but the trial court excluded Witness. The trial court sentenced Defendant to prison and to pay about $41,000 in medical expenses of victim as restitution.

State v. Register, No. WD73390 (Mo. App. W.D. 5/22/12):
Trial court abused its discretion in allowing State to call a Witness to child sex abuse, who invoked her 5th Amendment privilege against self-incrimination, and then to allow State to argue that her invocation was to protect Defendant and showed Defendant's guilt.
Facts: Defendant was charged with various child sex offenses. His wife (Witness) allegedly witnessed some of the offenses. The State subpoenaed Witness (wife) to testify, but her counsel informed the court that she would not testify if called, and would invoke her right against self-incrimination. The State granted immunity to Witness. The State then called Witness, who invoked her right against self-incrimination. The State then argued that this showed Defendant was guilty. Defendant claimed this violated his rights to due process and a fair trial.
Holding: In general, it is not improper for a trial court to require a witness to invoke their privilege against self-incrimination in front of the jury. However, the witness' assertion of testimonial privilege cannot be used to argue a favorable or unfavorable inference of a defendant's guilt. Thus, allowing a prosecutor to deliberately build its case out of inferences arising from the use of testimonial privilege is error. The State argues there is no error here because Witness' invocation of her privilege was invalid, since she had been granted immunity. But juries are no less likely to draw improper inferences from an invalid assertion of privilege than from a valid one. Here, the record shows the prosecutor called Witness so the jury could draw negative inferences from her invocation of privilege. The prosecutor had asked Victim about the incidents about which Witness refused to testify. The prosecutor objected to Defendant's request for a jury instruction to prevent jurors from drawing negative inferences regarding Witness' invocation of privilege. The prosecutor expressly told the court he believed the jury could draw any reasonable inference it wanted from Witness' invocation of privilege. The prosecutor argued to the jury that Witness invoked the privilege to protect her husband and did not handle the abuse correctly by failing to protect the Victim because she did not testify. Reversed for new trial.

State v. Cochran, No. WD73766 (Mo. App. W.D. 5/1/12):
(1) Expert should not be permitted to testify that Defendant committed "animal abuse" under Sec. 578.012 because this invades the province of the jury; and (2) where Defendant was charged with county ordinance violation but State failed to introduce the ordinance into evidence at trial, a court cannot judicially notice a county or municipal ordinance and the failure to introduce it at trial made the evidence insufficient to convict.
Facts: Defendant was charged with and convicted of animal abuse under Sec. 578.012 and with violation of a county ordinance regarding vaccination of animals. At trial, an animal care official ("Expert") testified about the conditions in which the animals were found and that "animal abuse" occurred.

Holding: (1) It was proper for Expert to testify about the inadequate conditions in which the animals lived, such as inadequate food and water. The State, however, asked Expert whether "animal abuse" occurred. "Animal abuse" includes the element of whether the Defendant knowingly failed to provide adequate care for the animals. To the extent that Expert's testimony could be interpreted as Expert testifying that Defendant knowingly failed to provide adequate care, it exceeded his expertise and invaded the province of the jury. However, court finds the error harmless here in light of other evidence. (2) The State failed to prove guilt of the county ordinance violation because the State failed to introduce it into evidence. Sec. 479.250 and subsequent cases require that municipal and county ordinances be introduced into evidence either by formal presentation or by stipulation. A court cannot judicially notice an ordinance. The ordinance is an essential element of proof. No misconduct can be shown or conviction proven without it. The State's evidence being insufficient, it would violate double jeopardy to re-try Defendant on the county ordinance violation, so that conviction must be vacated.

Secrist v. Treadstone, LLC, No. WD73250 (Mo. App. W.D. 11/1/11):
Even though Plaintiff had a THC (marijuana) level of 50 ng/ml in his blood, this fact by itself was not admissible (for comparative fault or impeachment) to show that Plaintiff was "impaired" at the time of his accident without more evidence of the significance of such statistic.
Facts: Plaintiff was injured in a construction accident and sued Defendant. The trial court admitted evidence that at the time of the accident, Plaintiff had a THC level of 50 ng/ml (marijuana) in his blood for purposes of comparative fault and impeachment. Plaintiff appealed an adverse verdict.
Holding: A prima facie case for impairment from alcohol has been set by statute, Sec. 577.012.1, and is established when BAC reaches .08%. Drug impairment, however, is different. Different drugs have varying effects on behavior, and do not necessarily produce readily recognizable symptoms and behavior. In *State v. Friend*, 943 S.W.2d 800 (Mo. App. W.D. 1997), a drug test of a defendant-driver revealed that driver had methamphetamine in his system. However, there was no testimony as to the amount of methamphetamine, the effect of it, or whether it would cause Defendant's erratic behavior. Hence, the evidence was insufficient to convict because there was no evidence that the level of methamphetamine was sufficient to impair his driving. There must be evidence beyond the mere fact that a drug is present in someone's system before a reasonable inference can be made that the person is impaired therefrom. The fact that Plaintiff tested positive for 50 ng/ml of THC means nothing without context. THC may remain in the blood for weeks after marijuana use, and THC levels are no indication of impairment. Evidence regarding abnormal behavior is not sufficient without some evidence that the behavior is consistent with identifiable symptoms of ingestion of the particular drug. Popular stereotypes regarding the characteristics and behaviors of drug users are not sufficient in a court of law. The trial court erred in admitting the THC level without evidence of (1) what effect that level of drug would reasonably have on that individual; (2) that the behaviors exhibited by that person were consistent with having the drug and the amount in his system; and (3) the proximity in time between when the drug was ingested and the events to which impairment is relevant. Additionally, the evidence was not admissible for impeachment. Although it is the rule that impairment of a

witness's ability to recall is relevant to credibility, the THC levels in the blood are not alone an indication of impairment and inability to recall. Judgment reversed.

State v. Burns, No. WD73127 (Mo. App. W.D. 4/12/11):
Trial court's pretrial ruling excluding certain hospital drug-test results was not appealable by the State because this was a ruling in limine based on violation of an evidentiary rule, not a ruling on a motion to suppress illegally seized evidence; but State may seek writ of prohibition.
Facts: Defendant was charged with DWI for driving under influence of drugs. The State indicated it would introduce hospital records of Defendant showing the presence of drugs in her blood or urine. Defendant filed a "Motion to Suppress or in the Alternative Motion in Limine." The trial court believed that the evidence could only be admitted if certain state regulation and evidentiary foundations were followed, and so excluded the evidence before trial. The State appealed. Defendant contended the appeal had to be dismissed because the statute allowing a State's appeal only covers illegally seized evidence, which is not at issue here.
Holding: Sec. 547.200.1(3) permits a State's appeal of suppression of illegally seized evidence. Sec. 542.296.5 sets forth five grounds on which a motion to suppress can be based, each of which involves illegal searches and seizures. Courts read these two statutes together to allow State's appeals only about illegally seized evidence. Here, the trial court's ruling is really a pretrial grant of a motion in limine (despite that the motion was also called "motion to suppress") and such a ruling is subject to change at trial. The grounds of the motion were not that the blood or urine was illegally seized, but that an evidentiary rule requires exclusion. Thus, the State is not statutorily authorized to appeal, and the appeal must be dismissed. However, the State may be able to seek a writ of prohibition as a remedy, but the appellate court expresses no opinion on the merits.

Editor's note: The Western District issued an identical ruling in **State v. Pfleiderer**, No. WD73407 (Mo. App. W.D. 6/14/11), a DWI case where trial judge excluded evidence of blood test results taken by a hospital for treatment purposes without following the requirements of Chapter 577 pertaining to the collection of samples of blood for BAC analysis.

State v. Sprofera, No. WD73213 (Mo. App. W.D. 4/10/12):
Court abused discretion in allowing State to admit evidence that Defendant called Prosecutor a "cunt" because this had no logical relevance in proving the elements of the case or impeaching Defendant's testimony.
Facts: Defendant was charged with various child sex offenses. At trial, he testified he was a "calm" parent and did not have a significant temper. The State, over objection, was then allowed to cross-examine Defendant about an outburst he had made at a prior court appearance where he called the Prosecutor a "cunt" in court.
Holding: The State claims the cross-examination was relevant to impeaching Defendant's testimony that he was a calm parent and did not have a significant temper. However, we fail to see any logical relevance a profane outburst made to a prosecutor could have in proving the elements of the case against Defendant or in impeaching his testimony about his parenting. Given that the testimony was wholly irrelevant and could have prejudicial effect, the Prosecutor should not have been allowed to ask the question

and the objection should have been sustained. However, the evidence was harmless in light of other evidence of guilt here.

*** Kansas v. Cheever, ___ U.S. ___, 94 Crim. L. Rep. 353 (U.S. 12/11/13):**
Holding: Where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, it does not violate the 5th Amendment privilege against self-incrimination for the prosecution to offer evidence from a court-ordered evaluation for the limited purpose of rebutting the defendant's evidence; here, after Defendant gave notice that he intended to present a defense based on lack of mental capacity, the prosecution requested and the court ordered an evaluation by the State; the Supreme Court held it did not violate the 5th Amendment privilege against self-incrimination for the prosecution to use this at trial as rebuttal evidence to Defendant's mental health defense; "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal."

*** Smith v. U.S., 92 Crim. L. Rep. 421, 2013 WL 85299, __ U.S. ___ (U.S. 1/9/13):**
Holding: Defendant's claim that he withdrew from a conspiracy outside the statute of limitations period is an affirmative defense on which he bears the burden of proof by a preponderance of the evidence.

*** Perry v. New Hampshire, ___ U.S. ___, 90 Crim. L. Rep. 500 (U.S. 1/11/12):**
Holding: Even though an eyewitness identification may have been suggestive, it is not subject to suppression unless law enforcement engaged in improper conduct in orchestrating it; instead of suppression, defendants can rely on other safeguards such as cross-examination, expert testimony, jury instructions on the suspect reliability of eyewitness identification, the reasonable doubt standard, and the general rule that requires suppression of relevant evidence when it is more prejudicial than probative.

*** Perry v. New Hampshire, ___ U.S. ___, 90 Crim. L. Rep. 500 (U.S. 1/11/12):**
Holding: Eyewitness identifications are not subject to suppression unless police arranged the suggestive circumstances; however, defendants may counter identifications with cross-examination, expert testimony, and jury instructions on the reliability of eyewitness identification.

U.S. v. Jimenez-Bencevi, 97 Crim. L. Rep. 271 (1st Cir. 6/3/15):
Holding: (1) Even though Defendant charged with death penalty had given an unaccepted proffer to Gov't in which he said he did the crime, trial court violated Defendant's immunity agreement by refusing to allow an expert to testify at his trial that surveillance video of the crime scene showed the shooter was taller than Defendant, unless the expert was told that Defendant had confessed during the proffer; a proffer, much less an unaccepted proffer, is not the same as a guilty plea. (2) Defense counsel was not prevented from presenting expert's testimony on grounds of ethical rule prohibiting counsel from presenting evidence counsel "knows" to be false, because Defendant had equivocated whether he really did crime, and may have confessed during the proffer to avoid the death penalty.

U.S. v. Occasio-Ruiz, 96 Crim. L. Rep. 646 (1st Cir. 2/27/15):
Holding: A son's statement to his Mother that he alone had committed the killing with which Defendant was charged should have been admitted as a statement against interest under Rule 804(b)(3) (which requires "corroboration" and "trustworthiness") because statements to close family members meet that test.

U.S. v. Sanabria, 2011 WL 2802898 (1st Cir. 2011):
Holding: Trial court erred in allowing a Witness to testify that he did not believe Defendant's explanation for his arrest about mistaken identity because this was impermissible lay opinion testimony; whether Defendant was mistakenly identified was a jury question.

U.S. v. Meises, 89 Crim. L. Rep. 257, 2011 WL 1817855 (1st Cir. 5/13/11):
Holding: Even though Officer actually participated in the drug sting, this did not make his "overview testimony" about the sting about which he had no personal knowledge admissible; this was still hearsay and inadmissible lay opinion testimony.

U.S. v. Melvin, 93 Crim. L. Rep. 766, 2013 WL 5183116 (1st Cir. 9/17/13):
Holding: Where Gov't promised not to use "statements" or "other information" obtained from a proffer session with Defendant, due process was violated where Gov't then had Officer testify that he listened to Defendant's voice at the proffer session and matched it to a voice on an incriminating wiretap.

U.S. v. Meises, 89 Crim. L. Rep. 257, 2011 WL 1817855 (1st Cir. 5/13/11):
Holding: Even though Officer actually participated in the drug sting, this did not make his "overview testimony" about the sting about which he had no personal knowledge admissible; this was still hearsay and inadmissible lay opinion testimony.

U.S. v. Morgan, 97 Crim. L. Rep. 211 (2d Cir. 5/19/15):
Holding: Even though Defendant sent a letter from jail asking someone to help arrange the murder of an informant, this was too prejudicial to be admitted to show consciousness of guilt; the threats bore no relation to the charged offense and had a substantial capacity to cause jurors to find Defendant guilty for emotional reasons.

Alvarez v. Ercole, 95 Crim. L. Rep. 616 (2d Cir. 8/18/14):
Holding: Defendant's confrontation rights were violated where court preclude cross-examination of Officer about failing to follow leads that another suspect committed the crime; this precluded Defendant from his only defense that the police investigation had been incomplete and that this created reasonable doubt.

U.S. v. Vayner, 96 Crim. L. Rep. 80 (2d Cir. 10/3/14):
Holding: Even though a social media page profile had Defendant's picture and personal information displayed, this was not enough to authenticate the page; "the mere fact that a page with [Defendant's] name and photograph happened to exist on the Internet … does

not permit a reasonable conclusion that this page was created by [Defendant] or on his behalf."

U.S. v. Murray, 736 F.3d 652 (2d Cir. 2013):
Holding: Where State presented rebuttal cell-phone tower evidence that allegedly refuted Defendant's trial testimony and placed Defendant at scene of crime, trial court denied Defendant his right to present a meaningful defense when it precluded the defense surrebuttal evidence that would have refuted the State's cell-phone tower evidence.

Young v. Conway, 2012 WL 4876235 (2d Cir. 2012):
Holding: Robbery victim's in-court identification of Defendant did not have an independent basis from a tainted lineup, where victim's initial description of robber was very general and she could not identify Defendant from a photograph prior to the tainted lineup.

U.S. v. Scott, 91 Crim. L. Rep. 68 (2d Cir. 4/6/12):
Holding: Officer who arrested Defendant for drug offense should not have been allowed to testify that he recognized Defendant because they had spoken to him the past because a jury would assume there were prior bad acts.

U.S. v. Cedeno, 89 Crim. L. Rep. 178 (2d Cir. 5/2/11):
Holding: Under some circumstances, defense may be able to impeach a police officer with a prior judge's finding in another case that officer was not credible; factors to consider are whether there is any connection between the two cases, whether prior judge found that the witness was lacking credibility only in the prior case and not in general, whether the lie was under oath and about a significant matter, how much time had elapsed since the prior case, and the motive to lie and explanation for it.

U.S. v. Caldwell, 2014 WL 3674684 (3d Cir. 2014):
Holding: In prosecution for felon-in-possession of firearms, evidence of Defendant's prior possession of firearms was not relevant because knowledge is not an issue in the offense; evidence of the prior possession was nothing more than inadmissible propensity evidence.

U.S. v. Smith, 93 Crim. L. Rep. 648 (3d Cir. 8/16/13):
Holding: Where Defendant was charged with threatening officers with a gun, Gov't should not have been permitted to introduce evidence that Defendant had participated in drug activity at the same location two years earlier, because this was merely prior bad act evidence to show propensity, not evidence of intent or motive as the Gov't claimed.

U.S. v. Davis, 93 Crim. L. Rep. 660 (3d Cir. 8/9/13):
Holding: In drug distribution prosecution, Defendant's prior conviction for simple possession of cocaine was not admissible to show his knowledge that a parcel in his car was a cocaine brick absent any proof the drugs were similar in appearance or form.

U.S. v. Davis, 2013 WL 4035547 (3d Cir. 2013):
Holding: Defendant's prior convictions for "possession" of cocaine were not admissible as prior bad acts in "possession with intent to distribute" case, because possession and distribution are distinct offenses requiring different levels of knowledge.

U.S. v. Smith, 2013 WL 3985005 (3d Cir. 2013):
Holding: Evidence that Defendant, who was charged with threatening Officer with a gun, had been seen two years earlier at the same location dealing drugs was not admissible under the other acts rule, because Defendant's purported motive to "defend his turf" required one to assume that Defendant had been a drug dealer when previously seen and was acting in conformity with that character.

U.S. v. Cunningham, 2012 WL 4075875 (3d Cir. 2012):
Holding: Trial court's refusal to view child pornography, and instead just relying on written descriptions of it, before admitting it at trial was arbitrary and unreasonable.

U.S. v. Garcia, 95 Crim. L. Rep. 241 (4th Cir. 5/15/14):
Holding: Even though judge gave a cautionary instruction, trial court erred in allowing FBI agent who investigated the case to testify both as a fact witness and "expert" witness regarding the meaning of certain "drug lingo" used by witnesses in tapped telephone conversations.

U.S. v. Cone, 93 Crim. L. Rep. 95 (4th Cir. 4/15/13):
Holding: (1) Contents of emails are not necessarily admissible under "business records" exception to hearsay without further analysis since email is a more casual form of communication than other records usually kept in the course of business such that email may not be assumed to have the same degree of accuracy and reliability; and (2) Materially altering a good that bears a genuine trademark and passing it off as a more expensive product is not prohibited by the criminal trademark counterfeiting statute, 18 USC 2320.

U.S. v. Greene, 92 Crim. L. Rep. 426 (4th Cir. 1/3/13):
Holding: Prosecutor should not have been permitted to ask bank teller-victim to testify how Defendant's features resembled the bank robber because such a procedure was blatantly suggestive and rendered the witness' in-court identification unreliable since the witness likely felt pressured to identify similarities.

U.S. v. Hamilton, 93 Crim. L. Rep. 592, 2013 WL 3480200 (5th Cir. 7/11/13):
Holding: Where Defendant was charged with felon-in-possession of firearm, testimony that he was a gang member and that members of the gang usually carried guns was inadmissible propensity evidence.

U.S. v. Winters, 91 Fed. R. Evid. Serv. 958 (5th Cir. 2013):
Holding: Gov't failed to lay proper foundation in drug conspiracy case for admission of photos from Defendant's Facebook page of guns stacked on thousands of dollars and what looked like many kilos of cocaine, because although Defendant told Officer that the

website was his, there was no evidence that Defendant or any member of the conspiracy had actually possessed or owned the items pictured in the photos.

Blackson v. Rapelje, 96 Crim. L. Rep. 84 (6th Cir. 10/7/14):
Holding: Habeas relief granted where trial judge allowed Prosecutor to present evidence of unavailable Witness' prior testimony but prevented Defendant from presenting evidence that Witness had later recanted that testimony.

U.S. v. Washington, 2012 WL 6682015 (6th Cir. 2012):
Holding: Even though Witness stole utility services by hooking them up without paying, this was not a conviction involving misrepresentation or fraud which impact on trutfulness, so Witness could not be impeached with it.

Wooten v. Cauley, 2012 WL 1216288 (6th Cir. 2012):
Holding: The Supreme Court's new definition of a key phrase in the money laundering statute was a substantive change of law, increasing the government's burden of proof, and is to be applied retroactively.

U.S. v. Clay, 2012 WL 43592 (6th Cir. 2012):
Holding: Admission of evidence of uncharged prior offenses, portraying defendant as a violent man, was not harmless error in a prosecution for carjacking and brandishing a firearm during and in relation to the carjacking.

U.S. v. Armstrong, 2011 WL 3792363 (6th Cir. 2011):
Holding: Passenger's prior act of dropping contraband while fleeing police was not admissible under modus operandi exception.

Stumpf v. Houk, 89 Crim. L. Rep. 743, 2011 WL 3506101 (6th Cir. 8/11/11):
Holding: Prosecutor's use of factually inconsistent theories at two trials as to which co-defendant shot victim violated due process and precluded imposition of death sentence.

U.S. v. Bowling, 96 Crim. L. Rep. 208 (7th Cir. 11/7/14):
Holding: Defendant charged with making a false statement on a gun purchase form that he was not currently being charged with a felony should have been allowed to question Prosecutor from the underlying state case about a pending plea deal to dismiss the felony; this would have provided Defendant with a defense, even if a weak one.

U.S. v. Abair, 94 Crim. L. Rep. 771 (7th Cir. 3/19/14):
Holding: Gov't impeachment was improper where Gov't accused Defendant of previously filing false tax and financial aid forms, when Gov't lacked a good-faith basis to believe Defendant lied on those forms.

U.S. v. Phillips, 93 Crim. L. Rep. 717 (7th Cir. 9/4/13):
Holding: Defendants charged with committing mortgage fraud by lying about their income on a loan application should have been allowed to present evidence that their broker had assured them that their falsehoods would not affect the bank's decision about

the loan; this is because such assurances would negate Defendant's intent to "knowingly" make a false statement "for the purpose of influencing" the bank, as required by 18 USC 1014.

U.S. v. Lee, 2013 WL 3944256 (7th Cir. 2013):
Holding: Where Defendant claimed to be an innocent bystander in a drug distribution, his prior conviction for drugs should not have been admitted because Defendant's defense did not put his knowledge or intent at issue, and he was not claiming to have made a mistake.

U.S. v. Ramirez-Fuentes, 2013 WL 28261 (7th Cir. 2013):
Holding: Agent should not have been permitted to refer to drugs at Defendant's trial as "Mexican-methamphetamine" because this improperly called attention to Defendant's nationality, and was more prejudicial than probative.

Harris v. Thompson, 2012 WL 4944325 (7th Cir. 2012):
Holding: Defendant's 6th Amendment right to present a defense was violated when trial court refused to allow Defendant's 5-year-old son to testify about Defendant shooting his other son on grounds that the 5-year-old was incompetent to testify; the 5-year-old said he knew truth from a lie, even though he also believed in Santa Claus, the tooth fairy and Spiderman; the 5-year-old was the sole eyewitness to the shooting and his version of events was exculpatory.

U.S. v. Miller, 2012 WL 3059295 (7th Cir. 2012):
Holding: Where Defendant was charged with receiving child pornography and his granddaughter alleged he had inappropriately touched her, before admitting granddaughter's allegations of prior bad acts, the court should have first determined whether those allegations fell within the scope of the rule allowing prior bad acts, and second, whether such evidence was more prejudicial than probative and articulated its decision on the record.

U.S. v. Boros, 2012 WL 402048 (7th Cir. 2012):
Holding: Defendant on trial for conspiracy to import controlled substances was unduly prejudiced by expert testimony about the side effects and birth defects associated with drugs sold through defendant's internet pharmacy.

U.S. v. Miller, 90 Crim. L. Rep. 814 (7th Cir. 3/12/12):
Holding: A trial court abused its discretion in admitting evidence of a defendant's prior drug conviction at his trial for possession of crack cocaine with intent to distribute because the exception allowing other-crimes evidence to establish intent has just about swallowed the rule barring it to prove criminal propensity.

Tribble v. Evangelides, 90 Crim. L. Rep. 605 (7th Cir. 1/26/12):
Holding: When an arrestee sued the police for unlawful arrest and detention, it was improper for a prosecutor to testify that, in her opinion, the lack of criminal charges

flowing from the plaintiff's arrest for drug possession could be attributed to a busy criminal court's policy of tossing out low-weight cases.

U.S. v. Loughry, 90 Crim. L. Rep. 104 (7th Cir. 10/11/11):
Holding: Where Defendant was charged only with administering a website that had nude photos of girls, evidence that Defendant's home computer contained "hard core" images of girls being raped by adults was not admissible since its prejudicial effect was greater than its probative value in that Defendant wasn't charged with these "hard core" materials.

U.S. v. Courtright, 88 Crim. L. Rep. 550, 2011 WL 102591 (7th Cir. 1/13/11):
Holding: The word "accused" in Fed. R. Evid. 413 in sex offense cases means "charged," not just identified by the complainant.

U.S. v. Yarrington, 2011 WL 814057 (8th Cir. 2011):
Holding: Where Gov't jail-house snitch witness testified on direct examination that he never talked to Defense Witness about helping the prosecution in order to get his sentence reduced, the defense was entitled to present Defense Witness to testify to Gov't snitch witness' prior inconsistent statements that snitch told Defense Witness that snitch was going to make up information about Defendant because he did not like the nature of the charge against Defendant (child pornography).

U.S. v. Haischer, 97 Crim. L. Rep. 39 (9th Cir. 3/25/15):
Holding: Defendant can adopt inconsistent defenses, so need not admit guilt in order to claim an affirmative duress offense; Defendant can claim duress while holding Gov't to burden to prove mens rea by contending she did not commit the offense with the required intent.

U.S. v. Cazares, 97 Crim. L. Rep. 211 (9th Cir. 5/14/15):
Holding: Rule 703 on expert testimony was violated when Gov't gang expert testified that Defendant was one of the most violent and important members of the gang; expert should have been limited to testifying about more general information about the gang.

U.S. v. Christian, 95 Crim. L. Rep. 102 (9th Cir. 4/17/14):
Holding: Even though Expert had examined Defendant for competency, Expert should not have been precluded from testifying about Defendant's diminished capacity; trial court abused discretion in focusing on different standards for competency and diminished capacity, instead of whether the expert's testimony would have helped the jury.

U.S. v. Evans, 2013 WL 4516754 (9th Cir. 2013):
Holding: Defendant on trial for being an alien after deportation and for misrepresenting his citizenship was denied due process right to present a defense when court excluded evidence that he had a birth certificate issued by State of Idaho.

U.S. v. Alvirez, 92 Crim. L. Rep. 793 (9th Cir. 3/14/13):
Holding: "Certificate of Indian Blood" under 18 USC 1153 is not admissible as a self-authenticating document.

U.S. v. Juan, 92 Crim. L. Rep. 432 (9th Cir. 1/7/13):
Holding: Prosecutor violated due process by threatening its witness (Defendants' wife) into recanting her exculpatory trial testimony and giving testimony incriminating Defendant in domestic abuse case; Wife had initially told police that Defendant beat her, then changed her story to an exculpatory one, then changed her story back to an incriminating one after Prosecutor threatened to charge her with perjury and persuaded the judge to allow her to consult with a court-appointed counsel.

U.S. v. Wiggan, 2012 WL 5861808 (9th Cir. 2012):
Holding: In perjury prosecution, trial court erred in admitting testimony of grand jury foreman before whom Defendant had testified that grand jurors did not find Defendant's testimony to be credible.

Cudjo v. Ayers, 2012 WL 4490751 (9th Cir. 2012):
Holding: State court ruling that exclusion of trustworthy exculpatory evidence from Defendant's trial did not violate any clearly established federal law was contrary to U.S. Supreme Court precedent regarding due process and Defendant's 6th Amendment right to present a defense.

U.S. v. Carmen, 92 Crim. L. Rep. 15 (9th Cir. 9/14/12):
Holding: If Gov't deports an alien-witness who has exculpatory information before defense counsel has an opportunity to interview witness, this denies Defendant the right to present a complete defense.

Phillips v. Ornoski, 2012 WL 899634 (9th Cir. 2012):
Holding: Prosecution's *Napue* violations in failing to correct a key witness' and prosecutor's own statements at trial that no immunity deal existed between them were material to a special circumstance finding.

U.S. v. Onyesoh, 2012 WL 1109992 (9th Cir. 2012):
Holding: Usability of expired credit card number had to be proved by preponderance of the evidence when the defendant did not concede that fact or when the defendant challenged enhancement.

U.S. v. Richter, 97 Crim. L. Rep. 583 (10th Cir. 7/31/15):
Holding: In prosecution for improper export of "e-waste," a Department of Environmental Protection employee's testimony that once certain electronic parts are removed from their housing they are "waste" was improper expert testimony in the guise of lay testimony.

U.S. v. Medina-Copete, 95 Crim. L. Rep. 539 (10th Cir. 7/2/14):
Holding: Officer should not have been permitted to testify as an "expert" that Defendant's worship of Mexican saint "Santa Meurte" indicated that Defendant was involved in drug trafficking; his experience did not make him an expert on the connection between Santa Meurte and drug trafficking, his knowledge did not help the jury, and his opinion was not based on proper application of reliable scientific principles and methods.

Editor's Note: The 8th Circuit reached a contrary result regarding this same officer-"expert" in *U.S. v. Holmes*, 751 F.3d 846 (8th Cir. 2014).

U.S. v. Hill, 95 Crim. L. Rep. 190 (10th Cir. 4/28/14):
Holding: FBI agent trained in "deception in statements and truth in statements" should not have been permitted to testify that Defendant's statements to police were not credible, because this invaded province of jury to determine credibility.

U.S. v. Toombs, 93 Crim. L. Rep. 189 (10th Cir. 4/26/13):
Holding: Before court may admit Defendant's testimony from a prior trial, it must first rule on any of Defendant's admissibility objections at the second trial.

U.S. v. Goodman, 88 Crim. L. Rep. 573, 2011 WL 258282 (10th Cir. 1/28/11):
Holding: Trial court abused its discretion in NGRI case in limiting the defense to presenting lay witness testimony about Defendant's mental condition only to the days immediately before and after the charged crime.

U.S. v. Schmitz, 88 Crim. L. Rep. 746 (11th Cir. 3/4/11):
Holding: Prosecutor cannot cross-examine Defendant whether witnesses were "lying" because this invades province of jury since jury determines credibility of witnesses.

U.S. v. Martinez-Cruz, 94 Crim. L. Rep. 332, 2013 WL 6231562 (D.C. Cir. 12/3/13):
Holding: When a Defendant presents objective evidence giving rise to a reasonable inference that a prior conviction being used to enhance punishment involved an invalid waiver of counsel, the burden shifts to the prosecution to prove the waiver was valid.

U.S. v. Hampton, 93 Crim. L. Rep. 542, 2013 WL 3185044 (D.C. Cir. 6/25/13):
Holding: FBI agent should not have been permitted to testify as to the meaning of several cryptic phone calls because this was improper lay opinion testimony.

U.S. v. Moore, 89 Crim. L. Rep. 722, 2011 WL 3211511 (D.C. Cir. 7/29/11):
Holding: Gov't cannot present a law enforcement "overview" witness to give a preview summary of the case.

U.S. v. Knapp, 94 Crim. L. Rep. 473 (C.A.A.F. 1/15/14):
Holding: Investigator should not have been permitted to testify that he used "nonverbal cues" during interrogation of Defendant to determine that Defendant was not truthful; this is tantamount to "human lie detector" testimony.

U.S. v. Ellerbrock, 89 Crim. L. Rep. 829 (C.A.A.F. 8/31/11):
Holding: Rape Defendant should have been permitted to present evidence of complainant's prior marital affair in order to show a greater motive for her to falsely claim she did not consent to sex with Defendant.

Headspeth v. U.S., 2014 WL 959466 (D.C. 2014):
Holding: Probative value of Defendant's flight from arrest in showing consciousness of guilt was outweighed by the prejudice, such that giving an instruction stating that flight showed consciousness of guilt was error; here, jury wasn't informed of Defendant's prior bad history with particular arresting Officer which would have given Defendant particular reason to avoid arrest by Officer.

King v. U.S., 2013 WL 4779710 (D.C. 2013):
Holding: Trial court was required to consider argument that Defendant was absent from his home for 10 days after a murder due to a juvenile matter, and not due to "consciousness of guilt" of murder, when determining whether the evidence of absence was admissible in murder trial.

U.S. v. Rosario, 2013 WL 1141726 (D.D.C. 2013):
Holding: In prosecution for drug crime, the probative value of Defendant's 10-year old prior arrest for a drug crime of which Defendant was acquitted was outweighed by danger of unfair prejudice, especially where it would be difficult for defense counsel to attack the Gov't's evidence since a decade had passed.

Minor v. U.S., 2012 WL 6617802 (D.C. 2012):
Holding: Expert testimony about unreliability of eyewitness identification should have been allowed.

Brooks v. U.S., 2012 WL 850427 (D.C. 2012):
Holding: The Government's efforts to ensure an eyewitness' presence at the defendant's retrial for first-degree murder and other crimes were not reasonable, and thus, the Government failed to establish that the eyewitness was unavailable, as a prerequisite to admission of trial testimony from first trial.

Smith v. U.S., 2011 WL 2899126 (D.C. 2011):
Holding: (1) Where Witness identified Defendant as his assailant, Defendant should have been allowed to impeach Witness with prior statement that Witness did not know who stabbed him; and (2) where Detective testified that she did not coach a witness, Defendant should have been allowed to impeach Detective with evidence that she was being investigated for coaching witnesses in other cases to testify falsely.

Harrison v. U.S., 90 Crim. L. Rep. 201 (D.C. 10/27/11):
Holding: Even though Defendant was charged with sexual assault on a teenage girl, evidence that Defendant made sexually suggestive comments to other girls was improper propensity evidence, not evidence of motive.

U.S. v. Aranda-Diaz, 2014 WL 3563222 (D.N.M. 2014):
Holding: In drug prosecution, Defendant's statement that he was a gang member was more prejudicial than probative; statement would lead jury to convict based on gang membership, rather than on evidence of whether he committed the charged drug transaction.

U.S. v. Dupree, 2011 WL 5884219 (E.D. N.Y. 2011):
Holding: Defendants were entitled to cross-examine a government witness regarding her use of antianxiety medication because it was probative of her ability to recall the events about which she was expected to testify.

U.S. v. Taylor, 2010 WL 4963333 (S.D. N.Y. 2010):
Holding: Where Defendant was on trial for pharmacy robbery, evidence that Defendant previously sold heroin was more prejudicial than probative.

Young v. Conway, 2011 WL 240578 (W.D. N.Y. 2011):
Holding: Robbery victim's in-court identification of Defendant was not independently reliable where her recollection was tainted by pre-trial viewing of Defendant in line-up and hearing him speak.

U.S. v. Colon-Ledee, 2010 WL 6675045 (D.P.R. 2010):
Holding: Defendant's conviction for failure to pay child support was not a crime involving dishonesty or false statement and, hence, could not be used to impeach Defendant's credibility.

Fisher v. Ozaukee County Circuit Court, 2010 WL 3835098 (E.D. Wis. 2010):
Holding: Trial court's application of general law prohibiting admission of preliminary breath test (PBT) results so as to preclude defense expert from testifying that Defendant's BAC would have been lower violated right to present a defense.

U.S. v. Zajac, 2010 WL 3489597 (D. Utah 2010):
Holding: Pipe bombing in another city was not admissible to show Defendant's identify and knowledge in pipe bomb charge in different city.

Towles v. State, 2014 WL 4666538 (Ala. 2014):
Holding: Where Defendant was on trial for murder of a child, jury instruction that jurors could consider for purposes of "intent" and "identity" that Defendant had committed acts of physical abuse three years earlier against a different victim (his son) was plain error; the prior bad acts were not similar to the charged crime, and the State was required to prove that Defendant had the specific intent to kill the victim.

State v. Ketchner, 96 Crim. L. Rep. 339 (Ariz. 12/18/14):
Holding: Expert testimony about "separation violence" and other characteristics of couples in abusive relationships was inadmissible in murder trial of Defendant for killing his wife; such testimony invited jurors to find that Defendant's character matched that of a domestic abuser who intended to kill their spouse.

State v. Ferrero, 91 Crim. L. Rep. 93 (Ariz. 4/11/12):
Holding: To be admissible, prior bad acts must be directly linked to the charged crime; they may not be admitted "merely to complete the story or because the evidence arises out of the same course of events."

State v. VanWinkle, 2012 WL 1149345 (Ariz. 2012):
Holding: A police officer's testimony regarding the defendant's post-arrest pre-*Miranda* silence, coupled with the prosecutor's comment on that silence, violated the defendant's right to remain silent.

State v. Machado, 88 Crim. L. Rep. 593, 2011 WL 519752 (Ariz. 2/16/11):
Holding: Defendant may support a third-party culpability defense by presenting other bad acts of the third-party without the ban on propensity evidence that would apply if trying to admit evidence of other bad acts of the defendant.

Leeka v. State, 97 Crim. L. Rep. 157 (Ark. 4/30/15):
Holding: Court erred in excluding Defendant's evidence of prescription "sleep driving" as defense to DWI, because DWI law requires proof of culpable mental state.

Porta v. State, 2013 WL 3070389 (Ark. 2013):
Holding: Even though forensic mental health examiner had warned Defendant about the nonconfidential nature of his competency exam, trial court erred in allowing his inculpatory statements made during the exam to be admitted at trial, because this violated his constitutional right not to incriminate himself and forced him to choose between one constitutional right in order to claim another.

People v. Cottone, 159 Cal. Rptr. 3d 385 (Cal. 2013):
Holding: Even though prior sex conduct is admissible to show propensity in California, where the prior conduct occurred before Defendant was 14 years old, the State must show that Defendant knew his conduct was wrongful and such conduct can only be admitted if it constituted a "crime" under the law.

People v. Gonzales, 92 Crim. L. Rep. 787 (Cal. 3/18/13):
Holding: Even though Defendant was seeing a therapist as a condition of his parole, the statutory doctor-patient privilege applied and State could not obtain the therapy records to use in SVP proceeding against Defendant.

Cain v. People, 2014 WL 2708632 (Colo. 2014):
Holding: Even though Defendant testified at DWI trial that he had not consumed alcohol, the preliminary breath test results were not admissible to impeach him; the statute about preliminary breath test results provided that such results were not admissible except for determining, outside a jury's presence, whether an Officer had probable cause to arrest; the statute did not authorize using the results to impeach Defendant's testimony at trial.

O'Shaughnessy v. People, 90 Crim. L. Rep. 670 (Colo. 2/13/12):
Holding: A defendant charged with attempt can present an abandonment defense even if the victim was injured.

State v. Maguire, 2013 WL 5989742 (Conn. 2013):
Holding: (1) Prosecutor's argument that Defendant and defense counsel were asking jury to "condone child abuse" and to find that "child abuse that happens in secret is legal" was highly improper in that it appealed to emotions and demeaned defense counsel; and (2) Prosecutor's objection during defense counsel's cross-examination of forensic interviewer which left misleading impression that redacted portions of interview refuted defense counsel's assertions was improper.

State v. Favoccia, 92 Crim. L. Rep. 6 (Conn. 9/21/12):
Holding: State cannot present expert in child sex abuse case to testify that victim exhibits behavioral characteristics of an abused child.

State v. Victor O., 2011 WL 2135671 (Conn. 2011):
Holding: Results of an Abel Assessment of Sexual Interest (Abel test), which purports to show sexual interest minors, were not sufficiently reliable in a nontreatment context to be admitted in criminal case.

Noorwood v. State, 2014 WL 2881152 (Del. 2014):
Holding: Defendant should have been permitted to present evidence that another person and the same two co-defendants committed a prior armed robbery at the same store that Defendant was accused of robbing; this was admissible to show that Defendant was not the "third person" in the instant, charged robbery.

Watkins v. State, 2011 WL 2556913 (Del. 2011):
Holding: Defendant claiming mistaken identification in robbery at a bank's ATM should have been allowed to present evidence that another person who met general description of Defendant had pleaded guilty to robbery of a nearby bank as exculpatory evidence.

Mathis v. State, 2014 WL 113321 (Fla. 2014):
Holding: State could not use copies of non-testifying Defendant's prior convictions to impeach his exculpatory hearsay assertion of innocence during his arrest.

Gosciminski v. State, 93 Crim. L. Rep. 753 (Fla. 9/12/13):
Holding: Polygraph results are still considered unreliable in relevant scientific community so are not admissible under *Frye* test.

Jackson v. State, 2012 WL 5514937 (Fla. 2012):
Holding: Court erred in admitting lengthy video of interrogation of Defendant in which Officers stated their personal opinion that Defendant was guilty and stated positive things about victim, where Defendant did not confess, and even though Officers may have been using this as a technique to try to elicit a confession.

State v. Bowers, 90 Crim. L. Rep. 721 (Fla. 2/23/12):
Holding: Implementation of the Fourth Amendment's "fellow officer" rule does not open the door to testimony about a seizure by a police officer who did not observe the seizure.

Harris v. State, 89 Crim. L. Rep. 177 (Fla. 4/21/11):
Holding: For drug dog evidence to be admissible, State must not only show that dog had proper training and certification, but also evidence that particular dog is reliable; State failed to show this where there was no evidence of field performance records about the dog at issue or about dog's performance on false alerts. Tennessee issued a similar ruling in *State v. England*, 19 S.W.3d 762 (Tenn. 2000).

Lynn v. State, 96 Crim. L. Rep. 183 (Ga. 11/3/14):
Holding: Murder Defendant should have been allowed to present evidence of wife's extramarital affairs to show that he killed her in heat of passion during an argument over her infidelity.

Murphy v. State, 90 Crim. L. Rep. 651 (Ga. 2/6/12):
Holding: A defendant's conviction for murdering a baby must be reversed because the trial judge made remarks during the testimony of a prosecution witness that bolstered the witness' testimony.

Boring v. State, 2011 WL 2119377 (Ga. 2011):
Holding: Evidence of Defendant's "gothic" lifestyle was not admissible in murder prosecution where there was no nexus between victim's murder and Defendant's "gothic" beliefs or subculture.

State v. Nofoa, 2015 WL 1648150 (Haw. 2015):
Holding: Even though defense counsel may have opened door in closing to why victim was not available, trial court abused discretion by instructing prosecutor to inform jury in closing of fact that victim of kidnapping and terroristic threats was dead, when this fact was not in evidence; court had previously told jury not to speculate why victim did not testify.

State v. DeLeon, 2014 WL 144528 (Haw. 2014):
Holding: Trial court denied Defendant his right to present a defense where court excluded defense expert who would have testified that shooting-victim's ingestion of cocaine would have affected victim's behavior and would have supported Defendant's self-defense defense, even though expert did not know the amount of cocaine ingested or time of ingestion.

State v. Mundon, 92 Crim. L. Rep. 303, 2012 WL 6045001 (Haw. 12/5/12):
Holding: Where Defendant was acquitted of certain acts, that evidence is inadmissible at a later trial on other charges.

State v. Almaraz, 2013 WL 1285940 (Idaho 2013):
Holding: Identification procedure was impermissibly suggestive where Officer told witness that they had the suspect in custody, showed witness a single photo showing Defendant in the center of a group of men with a chandelier hanging over his head, and asked witness which man had the gun, implying the shooter was in the photo.

People v. Villa, 90 Crim. L. Rep. 393 (Ill. 12/1/11):
Holding: Prior juvenile adjudications can only be used to impeach a Defendant if he "opens the door" to them.

People v. Ward, 89 Crim. L. Rep. 595 (Ill. 6/16/11):
Holding: Where the State admits evidence of a prior unrelated sex offense against Defendant, Defendant is allowed to show that he was acquitted for that offense.

VanPatten v. State, 2013 WL 1844141 (Ind. 2013):
Holding: Statements made by alleged child sex victim to forensic nurse examiner were not admissible because they were hearsay, and the exception for treatment or diagnosis did not apply.

Hoglund v. State, 2012 WL 759416 (Ind. 2012):
Holding: Although the conviction was affirmed, the Indiana Supreme Court overruled prior case law to hold that testimony concerning whether an alleged child victim is not prone to exaggerate or fantasize about sexual matters is a functional equivalent of saying the child is telling the truth, and is thus inconsistent with the rule of evidence prohibiting witnesses from testifying as to whether another witness testified truthfully.

State v. Brown and **State v. Dudley, 96 Crim. L. Rep. 301 (Iowa 12/5/14):**
Holding: Forensic Interviewer may not testify that Victim's symptoms are consistent with sexual abuse trauma or that child Victim's story was so "significant" that it warranted further "investigation"; such testimony puts a "stamp of scientific certainty" on Forensic Interviewer's testimony and "tips the scales" against Defendant.

In re Detention of Stenzel, 92 Crim. L. Rep. 734 (Iowa 3/1/13):
Holding: In SVP case, expert should not have been allowed to testify that a person has already been carefully screened for sex offender status before SVP proceedings are instituted because this is unduly prejudicial in that it may prompt jury to find SVP status due to knowledge of this screening.

State v. Hutson, 92 Crim. L. Rep. 498 (Iowa 1/25/13):
Holding: Where Defendant was charged with child endangerment, a DFS worker should not have been permitted to testify that child abuse report against Defendant was administratively determined to be "founded."

State v. Nelson, 88 Crim. L. Rep. 342 (Iowa 12/10/10):
Holding: Evidence of other crimes can only be admitted under the "inextricable intertwinement" doctrine when they are so closely related in time and place and so

connected to the crime charged as to be a continuous transaction; in trial for murder, evidence of Defendant's drug dealing under rationale that victim was purchasing drugs was not admissible under this test.

State v. Greene, 2014 WL 3377251 (Kan. 2014):
Holding: Where Defendant ultimately did not present an alibi defense at trial, evidence and statements made in the pretrial alibi notice were not admissible by the State, because this shifted burden to defense and was a comment on defense's failure to call witnesses.

State v. Rochelle, 93 Crim. L. Rep. 101, 298 P.3d 293 (Kan. 4/12/13):
Holding: Judge has discretion to allow child witness to testify with a "comfort person" without a finding of necessity, but may also consider alternatives which may lessen potential prejudice such as whether the comfort person is related to the child, which may lessen prejudice; where the "comfort person" is seated in relation to child; the availability of items in the courtroom (such as child-sized chairs) that would eliminate the need for a "comfort person"; a cautionary instruction to jurors to disregard the "comfort person" and not permit the person's presence to influence credibility determinations; and a cautionary instruction to the "comfort person" not to speak or gesture to influence answers of child.

State v. Everett, 93 Crim. L. Rep. 18 (Kan. 3/29/13):
Holding: State can no longer circumvent evidentiary rules to admit otherwise inadmissible other-bad-act evidence on grounds that Defendant "opened the door" to its admission; court rejects "open the door" rule and holds that State's evidence must be independently admissible.

State v. Smith, 88 Crim. L. Rep. 591 (Kan. 2/11/11):
Holding: Even though defense counsel believes his client is guilty, counsel is not precluded from presenting truthful documentary evidence that would demonstrate client may not be guilty and arguing that the truthful evidence demonstrates client is not guilty; this is true even though counsel believed his client was the person shown on crime scene video; trial court should have inquired further into whether counsel who refused to present documentary evidence of alibi for Defendant should have been replaced.

Hall v. Com., 97 Crim. L. Rep. 644 (Ky. 8/20/15):
Holding: Admission of 28 duplicative and cumulative crime scene and autopsy photos was more prejudicial than probative; the numerous cumulative and duplicative photos added little, if any, evidence to proving the crime.

Southworth v. Com., 2014 WL 1116878 (Ky. 2014):
Holding: In Defendant's trial for murder of his wife, evidence that Defendant took a used condom from neighbor's garbage and inserted it into his mistress was not relevant and was improper bad character evidence, even though the State made allegations that the charged crime involved trying to implant semen.

St. Clair v. Com., 95 Crim. L. Rep. 671 (Ky. 8/21/14):
Holding: Even though murder Defendant escaped and then killed a second person, State cannot present victim-impact testimony about the second murder during the first murder's penalty phase; the victim impact statute allowing "the impact of the crime upon the victim" means such evidence is limited to the murder for which Defendant is on trial.

Ordway v. Com., 2013 WL 656175 (Ky. 2013):
Holding: Officer could not offer an opinion based on his experience investigating self-defense cases that Defendant did not act like people who have lawfully acted in self-defense, but acted like someone fabricating the claim.

Blount v. Com., 2013 WL 646202 (Ky. 2013):
Holding: Mother's testimony describing behavior changes in victim-daughter which she implied were symptoms of sexual abuse based on discussions she had had with a psychologist were inadmissible as evidence relating to child sexual abuse accommodation syndrome and were unreliable and unaccepted theories.

Webb v. Com., 2012 WL 5877963 (Ky. 2012):
Holding: In jury sentencing proceeding, trial court erred in admitting details of Defendant's prior convictions that included names of prior victims of Defendant and identified them as police officers; this exceeded the scope of permissible relevant evidence at sentencing.

Meyers v. Com., 2012 WL 5274650 (Ky. 2012):
Holding: Even though felon-in-possession charge was originally charged in the same indictment as other offenses where Defendant's Wife was a victim, where the possession charge was later severed, Defendant-Husband could then invoke spousal privilege to prevent Wife from testifying against him since she was not a victim of the possession charge.

Perry v. Com., 92 Crim. L. Rep. 157 (Ky. 10/25/12):
Holding: The "sheer volume" of sex abuse claims alleged child victim made against 12 family members and third-parties supported an inference that at least some of the claims were false and, thus, child could be cross-examined about them despite the rape shield statue since false claims do not relate to actual sexual behavior.

Mullikan v. Com., 89 Crim. L. Rep. 600 (Ky. 6/16/11):
Holding: Even though a statute allows jury in noncapital penalty phase to hear "the nature of prior offenses," the evidence of prior convictions must be limited to conveying only the elements of the crimes previously committed; "We suggest that this be done either by reading of the instructions of such crime from an acceptable form book or from the Kentucky Revised Statute itself"; details of the prior crimes beyond the statutory elements are improper.

Com. v. Adkins, 88 Crim. L. Rep. 572, 2011 WL 193397 (Ky. 1/20/11):
Holding: Drug possession statute implicitly recognizes "innocent possession" defense because some possessions are innocent (such as where teacher finds drugs in classroom and gives drugs to principal); "Whenever the evidence reasonably supports such a defense – where there is evidence that the possession was incidental and lasted no longer than necessary to permit suitable disposal – [a jury instruction] should [be given] to reflect this." Here, Defendant claimed he found drugs in a sock and was trying to turn them over to police.

State v. Oliphant, 2014 WL 812244 (La. 2014):
Holding: State failed to lay proper foundation to admit evidence from a tracking dog where dog was not a pure bloodhound, the State presented little information about dog's training, dog was not "certified," and dog's law enforcement history was uncertain.

State v. Lovejoy, 95 Crim. L. Rep. 51 (Me. 3/27/14):
Holding: Prosecutor should not have been allowed to present evidence of Defendant's pre-arrest, pre-*Miranda* silence after he told an investigator over the phone that he wanted to talk to a lawyer and then never called the investigator back.

Sublet v. State, 97 Crim. L. Rep. 102 (Md. 4/23/15):
Holding: Even though Witness testified she owned a Facebook account and sent some of the messages from that account depicted in screen images, this was not sufficient to authenticate other messages from the same account.

State v. Payne, 96 Crim. L. Rep. 334 (Md. 12/11/14):
Holding: Officer who seeks to testify about matching calls with cell tower location data must be qualified as an expert before being allowed to testify, even when Officer simply follows instructions that come with a batch of data from a cell phone provider.

Whack v. State, 93 Crim. L. Rep. 694 (Md. 8/21/13):
Holding: Trial court abused discretion by giving a curative instruction rather than granting a mistrial after prosecutor mischaracterized the statistical significance of DNA evidence in murder case.

Duylz v. State, 91 Crim. L. Rep. 73 (Md. 3/21/12):
Holding: Where a judge restricted Defendant's right to cross-examine a witness at a pretrial motion to suppress hearing, this precluded the State from later using the testimony at trial when the witness did not appear.

Thomas v. State, 2011 WL 4389167 (Md. 2011):
Holding: A showing that a witness committed the conduct underlying an unconstitutional guilty plea can be used to impeach the witness.

Hannah v. State, 2011 WL 25555406 (Md. 2011):
Holding: State's cross-examination of Defendant using violent rap lyrics which Defendant had written was unduly prejudicial in attempted murder prosecution.

Griffin v. State, 89 Crim. L. Rep. 179, 2011 WL 1586683 (Md. 4/28/11):
Holding: Police investigator's testimony that he accessed a MySpace page displaying a person's photo and date of birth was not sufficient to authenticate the page as having been created by that person, since this does not account for risks of account fabrication or unauthorized account access.

Com. v. Crayton, 21 N.E.3d 157 (Mass. 2014):
Holding: Where a witness has not participated before trial in an identification procedure, the witness' in-court identification is required to be treated as an in-court showup for purposes of determining if it is suggestive, and thus the in-court identification is admissible only where there is good reason for its admission.

Com. v. Brescia, 29 N.E.3d 837 (Mass. 2015):
Holding: Defendant entitled to new trial where he suffered a stroke between first and second day of his testimony, and Prosecutor used his apparent lack of memory to attack his credibility.

Com. v. Collins, 96 Crim. L. Rep. 330 (Mass. 12/17/14):
Holding: Prosecutors can no longer ask eyewitnesses to identify defendants in court because this is akin to an otherwise inadmissible show-up identification and violates state constitution's fairness guarantee; "under such circumstances, eyewitnesses may identify the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is reliable."

Com. v. Canty, 94 Crim. L. Rep. 209, 2013 WL 5912050 (Mass. 11/6/13):
Holding: Although Officer can testify that Defendant-Driver appeared intoxicated, Officer cannot offer opinion that Driver's intoxication impaired his ability to operate a car, because this was tantamount to an opinion that Defendant was "guilty" of DWI.

Com. v. Gray, 2012 WL 5503894 (Mass. 2012):
Holding: Defendant was denied a fair trial where court refused to allow Defendant to use grand jury testimony to impeach a trial witness.

Com. v. Woodbine, 2012 WL 1002763 (Mass. 2012):
Holding: A police officer could not testify at a first degree murder trial as to the unrecorded portion of the defendant's two-part statement because the defendant's only meaningful opportunity to cross-examine the officer would involve using the contents of the other portion of the statement, which had been suppressed.

Com. v. Heang, 88 Crim. L. Rep. 594 (Mass. 2/15/11):
Holding: Ballistics expert should avoid testifying that ballistics matches have more certainty than they do, and should avoid terms like "absolute certainty" and "reasonable degree of scientific certainty," but can say "reasonable degree of ballistic certainty."

People v. Bynum, 2014 WL 3397199 (Mich. 2014):
Holding: State "gang expert's" testimony describing what he saw in surveillance video as Defendant and other gang members looking for a reason to be violent and getting ready to shoot someone was inadmissible bad character evidence.

People v. Kowalski, 2012 WL 3078584 (Mich. 2012):
Holding: Expert testimony regarding false confessions and interrogation techniques may be admissible in some cases, because this is beyond the common knowledge of ordinary persons.

State v. Bustos, 2015 WL 1452894 (Minn. 2015):
Holding: Trial court erred in prohibiting defense counsel from arguing that State failed to prove prior domestic abuse beyond a reasonable doubt, and then giving jury instruction that domestic abuse included the prior acts.

State v. Brown, 2011 WL 13753 (Minn. 2011):
Holding: Defendant's statements made at pretrial hearing about a possible guilty plea were statements made in connection with a plea offer and were not admissible at trial.

Collins v. State, 97 Crim. L. Rep. 643 (Miss. 8/20/15):
Holding: In order for witness to be able to testify that phone records place Defendant in a certain location, the witness must be qualified as an expert in this subject matter.

Richardson v. State, 2014 WL 2994439 (Miss. 2014):
Holding: Victim's violent prior bad acts and criminal history were admissible to show Defendant's statement of mind where Defendant claimed self-defense to murder.

Smith v. State, 95 Crim. L. Rep. 103 (Miss. 4/17/14):
Holding: A Facebook account was not properly authenticated where State presented evidence that the account purported to belong to an author, had a "grainy" photo of the purported author, and a Witness testified that the purported author was the person who sent a message; there needed to be more evidence of authorship, and the State needed to present the basis for Witness' testimony that the message was from the purported author.

Butler v. State, 92 Crim. L. Rep. 309 (Miss. 12/6/12):
Holding: Photo lineup was unduly suggestive where the people were standing in front of a height ruler and everyone except Defendant was more than 6 inches taller than the perpetrator of the crime.

State v. Franks, 96 Crim. L. Rep. 87 (Mont. 10/8/14):
Holding: A newspaper article that Defendant apparently had abused a different child was admissible to explain why Victim did not come forward sooner, but trial court erred in allowing State to argue that the article showed Defendant's propensity to commit sex crimes and that he was a habitual child abuser.

City of Missoula v. Paffhausen, 2012 WL 5866259 (Mont. 2012):
Holding: Where Defendant alleged she had been involuntarily drugged by a "date rape" drug, she should have been allowed to present this as an affirmative defense in a DWI case.

State v. Chavez-Villa, 92 Crim. L. Rep. 222 (Mont. 11/7/12):
Holding: Where State introduced a video of drunk driving Defendant that showed him taking field sobriety tests, this triggered the requirement that the State lay a foundation for reliability of the sobriety tests.

State v. Gai, 92 Crim. L. Rep. 127 (Mont. 10/23/12):
Holding: Even though this jurisdiction requires that if the defense wants to cross-examine a forensic expert who prepared a report the defense has to make such a demand for appearance before trial, this does not preclude the defense from arguing that the report is not credible at a trial in the absence of such a demand; "The rule speaks to the admission of the reports not the effect of the admitted evidence."

State v. Lavalleur, 96 Crim. L. Rep. 15 (Neb. 9/19/14):
Holding: Rape-shield law does not prevent Defendant from cross-examining Victim about a prior relationship with a third party where the purpose of the cross-exam was to explore whether Victim might have motive to lie about her interaction with Defendant; purpose was not to impugn Victim's character; "The rape shield statute is not meant to prevent defendants from presenting relevant evidence, but to deprive them of the opportunity to harass and humiliate the complaining witness and divert the jury's attention to irrelevant matters."

State v. Pangborn, 93 Crim. L. Rep. 585 (Neb. 7/26/13):
Holding: Demonstrative exhibits should not be sent to the jury during deliberations unless the court first weighs their potential prejudice against usefulness and gives a limiting instruction to avoid prejudice; here, jury sought to see an exhibit prepared by the prosecutor that was a chart that outlined various charges against Defendant, various dates and injuries; "use of limiting instructions that advise a jury of the limited purpose [of such] demonstrative exhibits should be employed."

State v. Richardson, 2013 WL 1923390 (Neb. 2013):
Holding: Even though lab chemist testified to the general procedures he used in weighing drugs, the foundation required for admission of drug weights requires more detail about the scale used, including calibration and whether the scale was tested against a known weight.

State v. Riley, 89 Crim. L. Rep. 192, 2011 WL 1587118 (Neb. 4/28/11):
Holding: Trial court should have granted mistrial where State's witness, who Defendant claimed was the perpetrator of the charged offense, testified he had taken a polygraph test.

Coleman v. State, 2014 WL 1325742 (Nev. 2014):
Holding: Statements of Defendant's Girlfriend, who was Mother of Victim, that Victim's burns were caused by cooking meth, were statements against interest because they exposed Girlfriend/Mother to charges for child abuse, and thus, should have been admitted.

Rodriguez v. State, 2012 WL 1136437 (Nev. 2012):
Holding: In order to properly authenticate text messages, evidence in addition to the identity of the cellular telephone's owner is required to establish the identity of the sender; proponent of evidence must produce evidence of authorship.

State v. Eigth Judicial Dist. Court of State ex rel. County of Clark, 2011 WL 6840685 (Nev. 2011):
Holding: Danger of unfair prejudice outweighed relevance of retrograde extrapolation from single blood sample taken two hours after accident in a DUI case.

State v. Belonga, 90 Crim. L. Rep. 857 (N.H. 3/16/12):
Holding: Other-crimes evidence that an accused child abuser hit her child months before striking fatal blows should have been kept from the jury in view of its limited probative value and high potential for prejudice.

State v. McDonald, 90 Crim. L. Rep. 550 (N.H. 12/28/11):
Holding: Police Officer should not have been allowed to testify that Defendant's protestations of innocence were "very feigned," "flamboyant," and "over-exaggerated" in body language because this was tantamount to the Officer testifying to his belief that Defendant was lying.

State v. Langill, 88 Crim. L. 292 (N.H. 11/30/10):
Holding: Hearsay rule prohibited fingerprint examiner from testifying that her fingerprint results were confirmed by a second examiner, even though the ACE-V method requires two examiners to compare results.

State v. Kuropchak, 2015 WL 1932144 (N.J. 2015):
Holding: Where trial court in DWI case erroneously admitted breath test results without foundational requirement showing that machine was properly calibrated, and also admitted a report with inadmissible hearsay, these cumulative errors warranted new trial.

State v. Parker, 94 Crim. L. Rep. 472 (N.J. 1/15/14):
Holding: Even though Defendant was convicted of underlying crimes during which he gave police false names, his giving of the false names could not be used to impeach him at later unrelated trials because witnesses cannot be impeached with specific instances of untruthfulness that do not result in conviction, and the prior convictions weren't for giving false names.

State v. Sowell, 2013 WL 141620 (N.J. 2013):
Holding: State could not elicit testimony from Officer in the form of a "hypothetical" about "Person A" and "Person B" that described facts of the case, and then had Officer give his opinion that this was a drug transaction; an average juror did not need expert testimony that transferring an item from one person to another was a drug transaction.

State v. Lazo, 90 Crim. L. Rep. 646 (N.J. 2/1/12):
Holding: A police detective improperly bolstered a victim's identification testimony by testifying the he though a picture of the defendant used in a photo array closely resembled the composite sketch of the unknown assailant.

State v. Henderson & **State v. Chen**, **89 Crim. L. Rep. 817 (N.J. 8/24/11):**
Holding: New Jersey adopts new standards for eyewitness identification cases that require prosecutors to prove the reliability of identifications, require judges to determine reliability of identifications, and require use of jury instructions on factors affecting the reliability of identifications.

State v. Rose, 89 Crim. L. Rep. 467 (N.J. 6/8/11):
Holding: The "res gestae" doctrine should no longer be used to allow prosecutors to admit evidence of other bad acts intrinsic to the offense charged in light of the adoption of the formal Rules of Evidence.

State v. McLean, 89 Crim. L. Rep. 68 (N.J. 3/31/11):
Holding: Officer cannot testify as "lay opinion" that a series of roadside transactions involving Defendant looked like drug deals since this invaded fact-finding province of jury.

State v. Lebya, 92 Crim. L. Rep. 132 (N.M. 10/22/12):
Holding: Even though Defendant claimed self-defense, murder victim's diary that she was afraid of Defendant was not admissible under the "state of mind" exception to hearsay rule; the victim's state of mind was not relevant to the claim of self-defense, only the Defendant's state of mind was relevant.

People v. Williams, 97 Crim. L. Rep. 51 (N.Y. 4/7/15):
Holding: State cannot present evidence in case-in-chief that Defendant only selectively answered some police questions and not others; a defendant who refused to answer certain questions can have the same innocent or legitimate reasons for refusing to answer as someone who refused to speak to police at all.

People v. Cantave, 2013 WL 3185171 (N.Y. 2013):
Holding: Prosecutor violated Defendant's right against self-incrimination where he cross-examined Defendant at trial about a prior, unrelated conviction that was pending on direct appeal and thus Defendant remained at risk of self-incrimination.

People v. Williams, 2013 WL 1195635 (N.Y. 2013):
Holding: Expert testimony discussing Child Sexual Abuse Accommodation Syndrome (CSAAS) could not be tailored to facts of the case through use of hypotheticals, because this left impression that the expert had found the testimony of victim to be credible.

People v. Robinson, 90 Crim. L. Rep. 108 (N.Y. 10/13/11):
Holding: Court abused discretion in not allowing Defendant who testified to explain what he meant when he said "possession is 9/10th's of the law" when he was arrested for gun possession; Defendant should be allowed to explain ambiguous remarks.

People v. Fernandez, 89 Crim. L. Rep. 378, 2011 WL 2149523 (N.Y. 6/2/11):
Holding: Defendant charged with sex abuse of family-member Victim should have been allowed to present evidence that Victim had a bad reputation for truth and veracity in her circle of family and friends; family and friends constitute a "relevant community" for purposes of introducing testimony about an opposing witness' bad reputation for truthfulness.

State v. Hembree, 770 S.E.2d 77 (N.C. 2015):
Holding: Even though evidence of an uncharged killing appeared to be part of a common scheme or plan with charged killing, the probative value of the evidence was outweighed by its prejudice and would create risk that jury would convict based on the uncharged crime, rather than the evidence before it.

State v. King, 2012 WL 22136832 (N.C. 2012):
Holding: A lay witness can testify that they did not recall, forgot or had no memory of an incident, but cannot testify that they had "repressed" or "recovered" memory unless an expert testifies to this.

State v. Harris, 2015 WL 266924 (Ohio 2015):
Holding: Where Defendant had abandoned his NGRI defense before trial and was not pursuing a mental health defense, court violated Defendant's right against self-incrimination by allowing State in its case-in-chief to call psychologist who had examined Defendant for State to testify that he was faking mental illness.

Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Op. 2013-4 (10/11/13), reported in 94 Crim. L. Rep. 182:
Holding: A Public Defender generally will be permitted to impeach a former client with a prior conviction. Rule of professional conduct that lawyers have a continuing obligation to past clients including a duty to avoid using "information relating to the representation to the disadvantage of the former client" has an exception for information that "has become generally known." That exception applies where a Public Defender seeks to examine a former client about a prior conviction because the prior conviction is generally known as a matter of public record. However, counsel would be prohibited "from using any other information" learned during the prior representation. "For example, if the former client indicated to the public defender a willingness to lie under oath within the prior representation, the public defender may not use that information

against the former client." A lawyer should not be forced against his own judgment to continue a representation that requires the lawyer to impeach a former client. Additionally, if a conflict is found, the conflict would be imputed to every lawyer in that Public Defender's office.

State v. Newman, 2013 WL 2370589 (Or. 2013):
Holding: DWI requires proof that Defendant's act of driving was volitional, and thus evidence that Defendant had suffered from "sleep driving" was relevant to whether Defendant was "conscious" at the time of driving.

State v. Lawson, 92 Crim. L. Rep. 266 (Or. 11/29/12):
Holding: Noting that the rules followed by most state courts on eyewitness identification need updating, the court adopts new procedures that encourage expert testimony and jury instructions based on scientific research addressing the reliability of eyewitness identification.

State v. Sarich, 2012 WL 5490285 (Or. 2012):
Holding: The probative value of a video of Defendant's 19-year-old autistic son leading police to a murder victim's body was outweighed by its prejudicial effect where police made suggestive remarks that could have led the son to the body.

State v. Pitt, 92 Crim. L. Rep. 191 (Or. 10/18/12):
Holding: Evidence that child sex abuse Defendant had committed other uncharged acts of child sex abuse were not admissible because they weren't relevant to identity, absence of mistake or accident, or other reasons why such evidence may be admissible.

State v. Davis, 90 Crim. L. Rep. 9 (Or. 9/22/11):
Holding: Where Defendant's theory in child's death was that a prior injury caused the death not Defendant's conduct, court erred in not allowing evidence of the prior physical abuse of child.

Com. v. Walker, 95 Crim. L. Rep. 357 (Pa. 5/28/14):
Holding: Penn. overturns ban on expert testimony regarding the reliability of eyewitness identification.

Com. v. Molina, 96 Crim. L. Rep. 245 (Pa. 11/20/14):
Holding: Prosecutor violated Defendant's state constitutional right to silence by arguing that jury should infer guilt from non-testifying Defendant's pre-arrest refusal to answer questions by police about a missing person; pre-arrest silence cannot be used as evidence of guilt.

Com. v. Koch, 2011 WL 4336634 (Pa. 2011):
Holding: Police officer's testimony about how he transcribed text messages from cell phone was insufficient to authenticate who was the author of the messages; no testimony was presented from person who sent or received the texts.

State v. Arciliares, 2015 WL 304748 (R.I. 2015):
Holding: Defendant should have been permitted to question Officer about the meeting he had with Defendant where Officer discussed details of the investigation; the evidence was relevant because it would indicate that Defendant learned details of the investigation from the Officer and then shared them with his cellmate.

State v. Anderson, 97 Crim. L. Rep. 606 (S.C. 8/15/15):
Holding: (1) Expert testimony in child sex cases must come from an expert who did not actually examine Victim, because such testimony has tended to be presented as a "human lie-detector" and improperly bolsters Victim's credibility; (2) sole purpose of forensic interviewer's testimony must be to lay foundation for introduction of video interview; discussion of techniques and other means to establish trustworthiness impermissibly bolster's Vicitm's credibility.

In re Way and In re Gonzalez, 95 Crim. L. Rep. 692 (S.C. 9/3/14):
Holding: In SVP proceeding, State cannot question Defendant about an evaluation by an uncalled defense expert or urge jury to draw an adverse inference from Defendant's failure to call the expert; the probative value of such questioning and argument is outweighed by the prejudicial effect.

State v. Rivera, 2013 WL 518629 (S.C. 2013):
Holding: Trial court (under apparent prompting by defense counsel) violated Defendant's right to testify where it prevented Defendant from testifying at trial under paternalistic belief, shared by defense counsel, that such testimony would undermine his own defense.

State v. Kromah, 92 Crim. L. Rep. 500, 2013 WL 239070 (S.C. 1/23/13):
Holding: Forensic interviewers and nurses in child sex abuse cases should not be permitted to testify that the child was told to be truthful; to an opinion that the child told the truth; that any interview tests (such as the RATAC method of interviewing) or other statements showed a "compelling findings" of abuse; that the child's behavior indicated the child was telling the truth; or any statement to indicate to the jury that the interviewer believes the child's allegations.

State v. Black, 92 Crim. L. Rep. 90 (S.C. 10/3/12):
Holding: Court abused discretion in allowing impeachment of a witness who had a manslaughter conviction more than 10 years ago since violent crimes are not very probative of credibility.

State v. Sexton, 2012 WL 4800459 (Tenn. 2012):
Holding: Prosecutor was not permitted to state in opening statement that Wife gave prior statements against Defendant but Wife could not be forced to testify due to spousal privilege; this evidence was inadmissible under spousal privilege and led jury to infer that Husband-Defendant was preventing Wife from testifying.

State v. Turner, 90 Crim. L. Rep. 99 (Tenn. 10/12/11):
Holding: Even though Defendant claimed as his defense than other persons committed the crime, this did not open the door for the State to present evidence that the other persons had been acquitted of the crime; the evidence of prior acquittals did not make it more or less probable that Defendant committed it.

In re Commitment of Bohannan, 2012 WL 3800317 (Tex. 2012):
Holding: Even though proffered defense expert in SVP civil commitment case was not a psychologist or medical doctor, she should have been allowed to testify where she had a Ph.D. in family science and therapy, was a sex offender treatment provider, and the SVP statute did not require that an expert be limited to psychologists or medical doctors.

State v. Perea, 94 Crim. L. Rep. 273 (Utah 11/15/13):
Holding: Scientific evidence on false confessions has advanced to where expert should be permitted to testify about empirical research as to when people give false confessions, including sleep deprivation, presentation of false evidence, questioners' "minimization" techniques, defendant's age, defendant's intelligence, and certain personality traits.

State v. Verde, 92 Crim. L. Rep. 7 (Utah 9/25/12):
Holding: Propensity evidence is not admissible in sex case, even if relevant, where its probative value is outweighed by its prejudicial effect.

Gardner v. Com., 2014 WL 2534837 (Va. 2014):
Holding: Where Defendant was charged with child sex offenses, trial court erred in excluding character evidence of his reputation for being a good caretaker of children and not being sexually assaultive or abusive toward them; character evidence was not limited to reputation for truth and veracity; also, Defendant was not required to prove that his character witnesses had discussed his reputation before the charged incident.

State v. Memoli, 88 Crim. L. Rep. 641 (Vt. 2/10/11):
Holding: Rape shield law did not bar Defendant's defense that alleged rape victim had consented for sex in exchange for drugs, and Defendant should have been able to show alleged victim's cocaine habit.

State v. Herring, 2010 WL 4904646 (Vt. 2010):
Holding: Exclusion of victim's prior inconsistent videotaped statement as impeachment evidence in child sexual assault prosecution was error.

Allen v. Com., 752 S.E.2d 856 (Va. 2014):
Holding: Testimony by Defendant's daughter that he slept with and wrestled with alleged child victim provided only the opportunity to commit the corpus delicti of sexual battery, and was insufficient to provide slight corroboration of Defendant's confession of that crime to police.

State v. Memoli, 88 Crim. L. Rep. 641 (Vt. 2/10/11):
Holding: Rape shield law did not bar Defendant's defense that alleged rape victim had consented for sex in exchange for drugs, and Defendant should have been able to show alleged victim's cocaine habit.

State v. Franklin, 2014 WL 18479819 (Wash. 2014):
Holding: Where Defendant was charged with cyberstalking for sending emails to ex-girlfriend, court erred in excluding Defendant's evidence that another woman with whom he had a romantic relationship was the one who sent the emails; this denied him his right to present a defense.

State v. Gunderson, 96 Crim. L. Rep. 247 (Wash. 11/20/14):
Holding: Victim's testimony that the abuse with which Defendant was charged never occurred does not allow the State to impeach Victim with Defendant's history of domestic violence unless the Victim made inconsistent statements; the probative value of the prior abuse isn't sufficient to outweigh its potential to unfairly reflect Defendant's criminal propensity.

State v. W.R. , 96 Crim. L. Rep. 183 (Wash. 10/30/14):
Holding: Placing burden on Defendant to prove consent in a rape prosecution – even by preponderance of evidence -- violates due process.

State v. Humphries, 96 Crim. L. Rep. 138 (Wash. 10/23/14):
Holding: Defense counsel cannot stipulate to an element of the offense without the client's consent; here, defense counsel, over client's objection, had stipulated that client had prior convictions in felon-in-possession prosecution in order to prevent jury from hearing about the nature of the prior convictions.

State v. Kurtz, 94 Crim. L. Rep. 17, 309 P.3d 472 (Wash. 9/19/13):
Holding: Defendant charged with illegally growing marijuana should have been allowed to raise common law defense of medical necessity, even though state had a medical marijuana law making it legal for some persons to use marijuana.

State v. Gresham, 2012 WL 19664 (Wash. 2012):
Holding: Statute permitting admission of evidence of other prior sex offenses violated separation of powers doctrine, where the statute conflicted with rule of evidence barring introduction of prior acts evidence for the purpose of showing a defendant's character.

State v. Angle, 2014 WL 2560999 (W.Va. 2014):
Holding: Evidence of "other bad acts" of Defendant were not admissible because not proven by preponderance of evidence; the "other bad acts" consisted of charged (but not yet convicted) sexual assaults of two victims which happened at a party in a neighborhood where Defendant lived, Defendant said any sexual contact with one of the victims was consensual, and Defendant denied having any contact with the other victim.

State v. Maggard, 94 Crim. L. Rep. 121 (W.Va. 10/7/13):
Holding: Rape victim's testimony that she "had heard how he is" and that "he just wants to get one thing from girls" was inadmissible bad character and propensity evidence.

State v. Yonkman, 312 P.3d 1135 (Ariz. App. 2013):
Holding: Where State was allowed to admit evidence of prior sexual charges in Defendant's sex abuse trial, trial court erred in precluding Defendant from admitting evidence that he was acquitted of the prior charges.

State v. Bayardi, 281 P.3d 1063 (Ariz. App. 2012):
Holding: Statutory exception to driving with impermissible drug in body when a person takes prescribed medication is an affirmative defense requiring Defendant to prove by preponderance of evidence that he used the drug as prescribed by a licensed doctor.

Lear v. Fields, 2011 WL 102572 (Ariz. Ct. App. 2011):
Holding: Statute which adopted *Daubert* test for expert testimony violated separation of powers because Arizona courts had rejected *Daubert*.

People v. Garcia, 2014 WL 4247729 (Cal. App. 2014):
Holding: Defendant was denied fair trial and due process by Prosecutor's evidence and argument that female Defendant was gay, in prosecution for sexual abuse of a child; Prosecutor argued that this was relevant to motive, but the argument allowed the jury to decide the case based on sexual orientation bias.

People v. Murillo, 2014 WL 5864409 (Cal. App. 2014):
Holding: Defendant was denied fair trial and right to confront witnesses where Prosecutor was allowed to call alleged attempted murder victim who, in front of jury, refused to testify and who refused to answer 110 different leading questions about his out-of-court statements that Defendant was the shooter.

People v. Jandres, 2014 WL 2086569 (Cal. App. 2014):
Holding: In prosecution for forcible rape and kidnapping of an 18-year old, trial court abused its discretion in admitting propensity evidence under statute authorizing it, where prior incident was an attempted kidnapping of a 11-year old child where Defendant put his finger in child's mouth; the prior incident was too different from the instant offense to support an inference that Defendant was predisposed to rape an 18-year-old, and any probative value was outweighed by the inflammatory nature of the prior offense.

People v. Covarrubias, 2015 WL 2199332 (Cal. App. 2015):
Holding: Even though before the instant DWI offense and vehicle crash which caused death, Defendant had been required to attend DWI prevention classes at which victims of DWI crashes spoke, testimony of such victims at the instant, unrelated DWI/death trial was not admissible because not relevant to whether Defendant had the requisite intent in this case for implied malice murder arising out of DWI.

People v. Hendrix, 2013 WL 831199 (Cal. App. 2013):
Holding: Even though Defendant was charged with resisting arrest, his prior crimes were not admissible to show his "knowledge" that he was being arrested by police since the prior crimes were not similar to the charged incident.

People v. Frazen, 2012 WL 5395253 (Cal. App. 2012):
Holding: Officer's testimony that he identified a telephone number via an internet telephone information site was not admissible under the "published compilation" exception to hearsay since the internet site was not a traditional published compilation and the site used was not generally relied upon as accurate.

People v. Paniagua, 2012 WL 4127801 (Cal. App. 2012):
Holding: Admission in SVP civil commitment trial of (false) evidence of a Homeland Security document that Defendant had flown from Thailand on a flight that did not actually exist was prejudicial because Thailand is perceived as a place where pedophiles go to have sex with children.

People v. Self, 2012 WL 1109091 (Cal. App. 2012):
Holding: The defendant's prior DUI conviction in Arizona was not equivalent to a California DUI for the purpose of sentence enhancement because the Arizona conviction was for driving under the influence "to the slightest degree."

People v. Wells, 2012 WL 1025740 (Cal. App. 2012):
Holding: Evidence that defendant may have fallen asleep at the wheel due to an unrelated medical condition warranted a jury instruction on the unconsciousness defense to the offense of driving under the influence of marijuana and causing injury.

People v. Covarrubius, 2011 WL 6350541 (Cal. App. 2011):
Holding: Expert testimony regarding structure and practices of drug trafficking organizations was improper, absent evidence connecting drug defendant to such an organization.

People v. Cattone, 2011 WL 1744968 (Cal. App. 2011):
Holding: Where statute provided that a child under 14 cannot commit a crime unless State proves by clear and convincing evidence that defendant knew the wrongfulness of his conduct, this same standard must be applied to adult defendant who committed crime when he was less than 14 and State seeks to use that prior crime to show propensity to commit newly charged crime.

People v. Cortes, 2011 WL 83732 (Cal. App. 2011):
Holding: Trial court abused discretion in limiting psychiatrist's testimony about Defendant's diminished capacity to abstract conditions and their effect on the general population, rather than discussing Defendant's condition specifically as applied to Defendant.

People v. Soojian, 2010 WL 4751762 (Cal. App. 2010):
Holding: Where defense counsel had been surprised at trial by testimony that truck used in crimes may have belonged to Defendant's cousin, counsel should have been able to present new evidence discovered after trial about this in a new trial motion; this was an exception to rule that such evidence cannot be presented where counsel could have discovered it earlier by exercise of due diligence.

People v. Martin, 2014 WL 4242641 (Colo. App. 2014):
Holding: After Defendant rests but then moves to "reopen" proceedings to testify, trial court must consider factors such as the timeliness of the motion, the nature of Defendant's testimony, the effect of granting the motion, and the reasonableness of Defendant's explanation for failing to testify during his case-in-chief.

State v. Wright, 2014 WL 3906470 (Conn. App. 2014):
Holding: Defendant was denied a fair trial where court limited his cross-examination of Officers to what they actually investigated in Defendant's case; Defendant sought to examine Officers about what they did not do in investigating case to show inadequate police investigation.

Rolon v. State, 2011 WL 4809119 (Fla. Dist. Ct. App. 2011):
Holding: Where, during his first trial, defendant was deprived of effective assistance of counsel during his direct and cross-examination, the court erred in allowing the state to introduce defendant's statements from the first trial during the second trial.

Odeh v. State, 2011 WL 2694434 (Fla. Ct. App. 2011):
Holding: A police officer's statement of opinion during his interrogation of Defendant that officer did not believe Defendant had a legally valid claim of self-defense should not have been admitted, because it was a lay opinion on guilt or innocence.

McCoy v. State, 2010 WL 5540946 (Fla. Ct. App. 2010):
Holding: A prescription defense is available to an innocent possessor of another person's prescribed drugs where the innocent possessor had a legally recognized reason for having the drugs, such as an agency relationship with the other person.

Mitchell v. State, 2014 WL 998310 (Ga. App. 2014):
Holding: Trial court erred in excluding newly-discovered defense witness in robbery trial, whose testimony would have impeached victim who was sole eyewitness to robbery.

Robinson v. State, 2011 WL 923975 (Ga. Ct. App. 2011):
Holding: Rape-shield statute applies only to the enumerated offenses in the statute, which do not include child molestation.

State v. Barber, 2014 WL 6830807 (Idaho App. 2014):
Holding: Officer's testimony that a digital scale had an "internal calibration system that calibrates itself" lacked adequate foundation where there was no showing of the basis of

Officer's knowledge and no showing that the scale had ever been tested to verify it worked properly.

People v. Miranda, 2012 WL 171868 (Ill. App. Ct. 2012):
Holding: Defendant's refusal to submit to a urine sample resulted in revocation of his implied consent to chemical testing under the implied consent statute.

State v. Wade, 88 Crim. L. Rep. 434 (Kan. Ct. App. 12/30/10):
Holding: Where Defendant was charged with battery for striking his son, he was entitled to raise common-law defense of parental discipline, even though the legislature has not established this as a statutory affirmative defense.

State v. Oliphant, 2013 WL 6091712 (La. App. 2013):
Holding: Trial court abused discretion in admitting drug tracking dog evidence where there was no evidence of any qualifications or certifications of the two dogs, and their tracking raised questions as to accuracy since neither dog tracked the same trail.

Jones v. State, 2014 WL 2925050 (Md. App. 2014):
Holding: Witness' prior conviction for attempted murder was not admissible to impeach him, as such conviction was not relevant to credibility, honesty or veracity.

Simpson v. State, 2013 WL 5354206 (Md. Ct. Spec. App. 2013):
Holding: Officer's testimony in arson case regarding his observations of a dog that had been trained to detect accelerants was "expert testimony" subject to expert testimony rules; thus, this Witness should have been identified prior to trial as an expert and the court should have had to rule on whether he was an expert.

Banks v. State, 2013 WL 4710575 (Md. Ct. Spec. App. 2013):
Holding: Conviction for resisting arrest is not admissible to impeach Witness, because such offense does not tend to show a person is unworthy of belief.

Payne v. State, 2013 WL 706913 (Md. App. 2013):
Holding: Officer's lay testimony regarding details of cell phone tower tracking of Defendant was inadmissible because Officer was not qualified as an expert.

Correll v. State, 2013 WL 66867637 (Md. Spec. App. 2013):
Holding: Offense of failure to register as a sex offender is not an offense that tends to show a person is "unworthy of belief," and therefore, the person could not be impeached with such prior conviction; the elements of the crime of failure to register do not include an intent to deceive.

Hajireen v. State, 2012 WL 676470 (Md. Ct. Spec. App. 2012):
Holding: Alleged victim's statements to social worker regarding the alleged sexual assault by the defendant did not detract from or rebut logically defense counsel's claim that the victim made up the whole incident, and therefore the statements were not admissible to rehabilitate the victim's credibility in a sexual assault prosecution.

Dionas v. State, 2011 WL 2585962 (Md. Ct. Spec. App. 2011):
Holding: Trial court erred in limiting cross-examination of State's witness as to whether they had an expectation of leniency from State for testifying at Defendant's probation revocation hearing.

Com. v. Podgurski, 2012 WL 171725 (Mass. App. 2012):
Holding: Evidence of alleged informant's background and criminal past was admissible for entrapment defense.

Com. v. Buzzell, 2011 WL 1744241 (Mass. App. 2011):
Holding: Information regarding victims' immigration status was not connected to their credibility as witnesses and could not be used to impeach them.

State v. Nunez, 2014 WL 2573988 (N.J. Super. Ct. App. 2014):
Holding: Defendant's right to counsel was violated where State was allowed to call defense investigator to testify about statements made by a witness; right to counsel includes the right to thoroughly investigate case; having to risk the State's introduction of results of defense investigation denies effective assistance of counsel.

State v. Granskie, 2013 WL 5629000 (N.J. App. 2013):
Holding: Defendant can present expert psychiatric testimony about the impact of his opiate addiction and withdrawal symptoms on the reliability of his confession; a lay person may not understand the effects of withdrawal on an addict.

State v. Duran, 2014 WL 7202625 (N.M. App. 2014):
Holding: Forensic lay child abuse interviewer should not be permitted to testify as to the general behavior of abused children, since such testimony is not within the knowledge of lay persons; thus, lay interviewer should not have been permitted to testify that children she interviews often delay reporting abuse.

State v. Combs, 2011 WL 6130774 (N.M. Ct. App. 2011):
Holding: Showup procedure employed by deputy lacked indicia of reliability necessary to overcome suggestiveness of the procedure, where the deputy was shown a mug shot of the defendant and told that it was the driver the deputy had issued a citation to two months earlier.

People v. Thompson, 970 N.Y.S.2d 620 (N.Y. App. 2013):
Holding: Defendant was deprived of right to present a defense where court precluded Defendant from offering evidence that victim had repeatedly and consistently identified another person as the perpetrator in the year following the charged burglary.

People v. Quin, 2012 WL 751561 (N.Y. Sup 2012):
Holding: No statutory or other legal basis existed to permit the prosecution to be present at, or videotape, the defendant's competency hearing in an attempted assault prosecution.

People v. Donato, 2012 WL 231268 (N.Y. App. 2012):
Holding: The trial court committed reversible error when it prevented the defendant from offering a full account of the events surrounding the alleged traffic violation because it deprived the defendant of his constitutional right to testify in his own defense.

People v. Waters, 2011 WL 240753 (N.Y. City Ct. 2011):
Holding: Simulator solution documents and an instrument calibration certificate, containing electronic signatures, were not admissible under business records exception to hearsay rule; documents were not made in regular course of business, were not a true and accurate representation of electronic records and were incomplete.

People v. Stubbs, 2010 WL 4705163 (N.Y. App. 2010):
Holding: Even though prior robbery threatened use of a nonexistent gun and occurred on same road as charged robbery, the prior robbery was not sufficiently unique to establish Defendant's identity based on his modus operandi and was not admissible.

State v. Davis, 2010 WL 4608698 (N.C. Ct. App. 2010):
Holding: "Odor analysis" by which BAC was determined using Officer's report of smelling alcohol on Defendant 10 hours later was not sufficiently reliable to be admissible.

State v. Creech, 2014 WL 4629594 (Ohio App. 2014):
Holding: In felon-in-possession case, trial court abused discretion in denying Defendant's motion to stipulate that he had prior felonies; even though trial court gave a limiting instruction about the prior felonies, the prejudicial effect from the jury learning the nature of the prior felonies (assault, drug possession, drug trafficking near a school) outweighed the probative value.

Napoleon v. Green, 2014 WL 3585847 (Ohio App. 2014):
Holding: There was no foundation for Officer to testify that based on his "training and experience," he knew Defendant's truck weighed more than 10,000 pounds; there was no testimony as to what training or experience Officer had.

Harney v. State, 2011 WL 666319 (Okla. Crim. App. 2011):
Holding: Admission of driving record in DWI case that contained other crimes and bad acts was erroneous as to jury's determination of sentence.

State v. Fivecoats, 2012 WL 3594255 (Or. App. 2012):
Holding: A Defendant's demonstrating to a jury how he walks in order to show that his gait is not the same as the person's on a surveillance video is not "testimonial evidence" that waives a right against self-incrimination; walking is physical evidence and does not communicate beliefs, knowledge or state of mind.

State v. Almanza-Garcia, 2011 WL 1486076 (Or. App. 2011):
Holding: Admission of testimony of a diagnosis of child sexual abuse in the absence of physical evidence of abuse was plain error, even in a bench trial.

State v. Cordovoa-Contreras, 2010 WL 4867534 (Or. Ct. App. 2010):
Holding: Physician's "diagnosis" of "sexual abuse" was inadmissible absent supporting physical evidence; physician had not discovered any physical signs of abuse and his testimony was an impermissible comment on child's credibility.

Com. v. K.S.F., 2014 WL 5018092 (Penn. Super. 2014):
Holding: Rape Shield Law did not prevent admission of evidence that alleged sex victim posted on Facebook that she was a virgin; the statement would indicate that she had not had any sex, consensual or nonconsensual, which was a question for the jury; the statement impeached her claim about the charged crime ever happening.

Com. v. Brown, 2012 WL 3025112 (Pa. Super. 2012):
Holding: Where Defendant-Doctor was charged with unlawfully prescribing medicine, his prior bad act of fraudulently obtaining his medical degree should not have been admitted under the res gestae exception to prior bad acts because this took place decades before the charged crime, and was not interwoven with the charged crime.

State v. Johnson, 2011 WL 6347861 (S.C. Ct. App. 2011):
Holding: Officer's unexcused failure to comply with statutory requirement that administration of breath tests be videotaped for purposes of DUI prosecutions warranted dismissal of the DUI charges.

State v. Hill, 2011 WL 3568486 (S.C. Ct. App. 2011):
Holding: Where the jury was inadvertently sent written statements of Defendant to police which had not been admitted into evidence, this was error.

State v. Larkin, 2013 WL 1281858 (Tenn. App. 2013):
Holding: Test for determining whether an expert originally hired by defense would later be permitted to testify for the State in the case was whether an ordinary person knowledgeable of all relevant facts would conclude that allowing the expert to switch sides posed a substantial risk of disservice to the public interest and/or defendant's fundamental right to a fair trial.

Pawlak v. State, 2013 WL 5220872 (Tex. App. 2013):
Holding: Where Defendant was charged with child sex offense, the admission of thousands of extraneous photos of adult and child pornography was inherently prejudicial and inflammatory, where there was no allegation that the photos pertained to the child sex offense victims, and the victims' testimony about the offense was more probative than the photos.

Bays v. State, 93 Crim. L. Rep. 190 (Tex. App. 4/17/13):
Holding: Even though Texas has a statute that creates a hearsay exception to admission of testimony by the first person to whom a child sex victim reports sexual abuse, this statute does not allow introduction of a videotaped interview of child given to an investigator for Texas Dept. of Family Services; statute was intended to apply to persons

like a child's mother or other adult to whom child first reported abuse, not to a later investigator who was investigating the incident.

Lewis v. State, 2013 WL 1665835 (Tex. App. 2013):
Holding: Crime scene animation in murder case purporting to show scene from the perspective of a witness should not have been admitted where many details in the animation had no support in the record, even though the creator testified that he used crime scene measurements, photos and witness statements to do the animation.

Leonard v. State, 92 Crim. L. Rep. 271 (Tex. Crim. App. 11/21/12):
Holding: Even though sex-offender-Defendant's probation terms required that he submit to polygraphs as part of his sex therapy, polygraph evidence is so unreliable that it cannot be used to revoke Defendant's probation.

Velez v. State, 2012 WL 2130890 (Tex. Crim. App. 2012):
Holding: Correction expert's false testimony in capital case in guilt phase that Defendant could be assigned a low classification level in prison if sentenced to LWOP rather than death was prejudicial as to future dangerousness; the State knew or should have known that prison regulations contradicted expert's testimony.

Cornet v. State, 90 Crim. L. Rep. 604 (Tex. Crim. App. 1/25/12):
Holding: The "medical-care defense" to an alleged sexual abuse of a child may be asserted by untrained adults, not just licensed medical professionals, who have inspected a child's anatomy for evidence of sexual abuse.

Crider v. State, 2011 WL 5554806 (Tex. Crim. App. 2011):
Holding: An affidavit in support of a search warrant to draw blood did not establish probable cause where there was no indication in the affidavit of how much time had passed between its signing and when the stop was initially made.

State v. Dominguez, 2011 WL 3207766 (Tex. App. 2011):
Holding: A "scent lineup" used by police to have a dog identify Defendant's scent on items from crime scene was not scientifically reliable.

State v. Slocum, 2014 WL 4373184 (Wash. App. 2014):
Holding: In prosecution for sex abuse of child, evidence that Defendant had also molested child's mother and adult aunt were not admissible under common plan or scheme exception, because these prior bad acts weren't similar to abuse of child.

State v. Rainey, 2014 WL 2013362 (Wash. App. 2014):
Holding: A witness' assertion of 5th Amendment privilege against self-incrimination must generally be asserted only on the witness stand in open court.

State v. Gauthier, 2013 WL 1314971 (Wash. App. 2013):
Holding: The use of Defendant's invocation of his constitutional right to refuse to give a DNA sample without a warrant as substantive evidence of his guilt of rape violated

Defendant's right against unreasonable search and seizure; exercising right to refuse consent to a warrantless search may have had nothing to do with guilt, and a jury should not be allowed to infer guilt from exercise of a constitutional right.

State v. Lucas, 2012 WL 716552 (Wash. Ct. App. Div. 2 2012):
Holding: Psychiatrist's reliance, in trial testimony, on the defendant's statements to form the basis for the psychiatrist's expert opinion on defendant's mental health did not expose the defendant to the admission of prior crimes evidence to impeach the defendant.

State v. Allen, 89 Crim. L. Rep. 212 (Wash. Ct. App. 5/9/11):
Holding: Court of Appeals calls for approval of an instruction on reliability issues with cross-racial identification, even when Defendant does not call an expert on this; ABA has proposed a model instruction on this matter; "[a]lthough cross-examination is a powerful tool for exposing lies, it is not particularly effective when used against eyewitnesses who believe they are telling the truth"; the additional protection of a cross-racial jury instruction is needed "because the own-race effect strongly influences the accuracy of identification, because that influence is not understood by the average juror, because cross examination cannot reveal its effects, and because jurors are unlikely to discuss racial factors freely without some authorization for this."

Evidentiary Hearing (Rules 24.035 & 29.15)

McNeal v. State, 2013 WL 5989237 (Mo. banc Nov. 12, 2013):
Defendant/Movant was entitled to evidentiary hearing on claim that counsel was ineffective in failing to request lesser-included offense instruction for trespassing at burglary trial, where evidence would have supported such an instruction and defense suggested crime was merely trespassing.
Facts: Defendant/Movant was convicted of burglary and stealing for entering an apartment and stealing a drill. The defense was that Defendant went to the apartment to collect money for a debt from a friend, knocked and opened the door, went inside and discovered apartment was empty except for some tools, and then decided to take a drill he saw. Defendant admitted stealing the drill, but denied entering the apartment with the intent to steal. The defense argued that the offense was a trespassing, but did not request an instruction on trespassing. During deliberations, the jury sent a note asking when Defendant had to form the intent to steal in order to convict of burglary. After conviction for burglary, Defendant filed a 29.15 motion, alleging counsel was ineffective for failing to request a lesser-included offense instruction for trespassing. The motion court denied the claim without a hearing.
Holding: Defendant/Movant's motion alleged that counsel failed to request a lesser-included offense instruction and that this was not a strategic choice, but due to inadvertence. Although there is a presumption that counsel's performance is sufficient, Movant's claim is not refuted by the record. The evidence at trial supported a theory that when Movant entered the apartment, he did not have the intent to steal, which is necessary for burglary. Rather, the evidence supported that the intent to steal was formed after he entered. A trespassing instruction would have been consistent with the evidence

and defense counsel's argument. The State argues that because the jury convicted of the higher offense of burglary, there is no prejudice because the jury would never have gotten to the lesser offense of trespassing, even if it had been submitted. However, it is illogical to conclude that the jury's deliberative process would not have been impacted in any way if a lesser-included offense instruction were submitted. Where failure to give lesser-instructions is raised on direct appeal, the underlying rationale for giving relief is that the failure to instruct deprives a defendant of a fair trial, even if the jury ultimately convicted defendant of the greater offense. Without a lesser instruction, the jury was faced only with finding guilt of the greater, or acquittal. When one of the offense elements remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve doubts in favor of conviction, even though jurors are theoretically supposed to acquit. Thus, the jury's conviction of the greater offense does not foreclose the possibility that they would have convicted of the lesser if it had been submitted. Defendant was prejudiced. Case is remanded for evidentiary hearing.

Webb v. State, No. SC91012 (Mo. banc 3/29/11):

Even though Movant said no promises had been made to him to get him to plead guilty, where Movant claimed his attorney erroneously told him he'd only have to serve 40% of his sentence before being eligible for parole but he really had to serve 85%, this was affirmative misadvice and warranted an evidentiary hearing.

Facts: Movant pleaded guilty to first-degree involuntary manslaughter and ACA. Movant's plea deal was for a 10 year sentence. However, the trial court indicated it would reject this deal, impose a 12-year sentence, and allowed Movant the opportunity to withdraw his plea. Movant did not. Later, Movant filed a Rule 24.035 motion claiming that his plea was involuntary and unknowing because his attorney was ineffective for telling him he would only have to serve 40% of his sentence before being eligible for parole, but he really had to serve 85%. The motion court found the claim to be refuted by the record since Movant had said at his plea that no promises were made to him to plead guilty.

Holding: Prior Missouri cases have drawn a distinction between an attorney's failure to inform (which is not ineffective) and giving affirmative misinformation (which is ineffective). Here, Movant claims his attorney affirmatively misinformed him he would only have to serve 40% of his sentence. Movant's negative response to a routine question that no promises were made to him is too general to refute that no such information was given. The State claims that the SAR would have given correct information, but the Supreme Court reviews it and determines the SAR did not. The Supreme Court also notes that the SAR is part of the record of the case, and should be provided to the attorneys and appellate court where requested. (The circuit clerk had refused to provide it). Movant is entitled to an evidentiary hearing on his claim.

Concurring Opinion: *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010)(which held that attorneys must inform defendants of immigration consequences of their guilty pleas) indicates that attorneys have an obligation to inform clients of truly clear consequences of their guilty pleas. The Missouri Supreme Court's prior cases may need to be expanded to take into account *Padilla* when considering whether counsel rendered ineffective assistance. Other courts have recognized that *Padilla* applies to other situations besides deportation. The 85% rule in this case was even more "certain" than deportation in

Padilla and counsel has a duty to inform of "certain" consequences. There may be other situations where counsel must advise about consequences – a conviction may disqualify a person from professional licenses, used to deny gov't benefits, access to housing, student loans and health care. Until there is further specific guidance, counsel and courts should be as vigilant as possible to explain to defendants that a guilty plea may carry serious consequences beyond immediate punishment.

Dissenting Opinion: *Padilla* should not be expanded beyond the deportation context.

Randle v. State, 2015 WL 6468380 (Mo. App. E.D. Oct. 27, 2015):

Movant was entitled to evidentiary hearing on his claim that counsel misled him about his guilty plea where Movant had attempted to explain to judge at sentencing how he was misled and sought to withdraw his plea, but judge indicated he didn't have time to hear it.

Facts: Movant pleaded guilty to a drug offense. At a later sentencing, the Prosecutor recommended 15 years. Movant then said he felt confused by the situation and "misled" by his counsel. The court asked him if he wanted to withdraw his plea, and Movant said "yes." The court said Movant could not. When the court asked Movant if he had any complaints about counsel, the court said, "Just be quick about it….I got a whole courtroom of people here." Movant later filed a 24.035 motion, alleging that plea counsel had misled him by telling him that his plea case would be dismissed as a result of the outcome in a different pending case of Movant's. The motion court denied the claim without a hearing.

Holding: Movant's claim is not refuted by the record. Movant attempted to explain how he was misled at his sentencing, but the court effectively cut him off. While Movant said he was pleading guilty voluntarily, his statements at sentencing indicate otherwise. If Movant was misled into pleading guilty, he should be permitted to withdraw his plea. Movant has pleaded prejudice because he claims he would not have pleaded guilty had he not been misled by counsel. Remanded for evidentiary hearing.

Roberts v. State, 2015 WL 5823368 (Mo. App. E.D. Oct. 6, 2015):

Holding: To avoid mere conclusions, Movant alleging ineffective assistance of appellate counsel must plead *why* appellate counsel failed to appeal an issue.

Hayes v. State, 466 S.W.3d 39 (Mo. App. E.D. July 21, 2015):

Holding: Even though Movant said at his guilty plea that he had not been "promised" anything in exchange for his plea and even though the court explained the range of punishment and the plea agreement, Movant's claim that counsel was ineffective for affirmatively misadvising him that he would serve only a short time in prison (when he was subject to 85% rule) was not refuted by the record, and warranted an evidentiary hearing. A Movant's testimony that no "promises" have been made does not refute an allegation of affirmative misadvice, since an attorney's advice is not the same as a "promise."

Carroll v. State, 461 S.W.3d 43 (Mo. App. E.D. 2015):
Even though Movant's pro se Form 40 appeared untimely, where his amended motion alleged that Movant would testify and offer facts showing that the motion was in fact timely-filed, motion court was required to have evidentiary hearing on the matter.
Facts: Movant's pro se Form 40 was filed about eight months after its due date under Rule 29.15(b). Counsel was appointed and filed an amended motion. The amended motion alleged that the motion court had timely received a pro se motion but lost it, so Movant was forced to re-file another pro se motion eight months later. The State moved to dismiss on grounds that the motion was untimely. Movant filed a reply alleging additional facts and attaching affidavits and exhibits that would suggest that his motion was in fact timely. The motion court dismissed the case without an evidentiary hearing.
Holding: Movant's amended motion alleges sufficient facts which, if true, would support the conclusion that his pro se motion was timely filed. However, Movant never had an opportunity to prove his facts because he wasn't given an evidentiary hearing. The State claims that Movant's allegations are insufficient under *Morrow v. State*, 21 S.W.3d 819 (Mo. banc 2000), because Movant's amended motion does not list witnesses who will testify that the motion court timely received his motion but lost it. *Morrow* only applies to claims of ineffective counsel, not claims about the timeliness of a pro se motion. Given that Movant was incarcerated, he may not be able to allege with personal knowledge what happened to his motion after the clerk received it. It is enough that he alleged he timely submitted for mailing his original pro se motion, and that it was timely received by the clerk. He is entitled to an evidentiary hearing to prove this. Even though the court held a "status hearing" at which these matters may have been discussed, the "status hearing" was not a full evidentiary hearing.

Wiggins v. State, 2015 WL 1915324 (Mo. App. E.D. April 28, 2015):
Even though Movant (1) said he agreed with State's recitation of evidence at his guilty plea to second degree murder, (2) said he was satisfied with plea counsel's services, and (3) would have risked life without parole if he went to trial, Movant was entitled to an evidentiary hearing on claim that counsel was ineffective in not advising on possible lesser-included offense (voluntary manslaughter) as a defense.
Facts: Movant was originally charged with first degree murder. He pleaded guilty to second degree murder. At the plea, the State recited facts it expected to prove and Movant said he agreed with those facts. Movant also said he was satisfied with counsel. He later filed a 24.035 motion, alleging counsel failed to advise him of a defense of voluntary manslaughter. Movant alleged facts that would show that Movant acted under the influence of sudden passion arising from adequate cause during a fight with victim. The motion court denied the claim without a hearing.
Holding: Failure by counsel to advise a defendant of a possible defense may render a plea unknowing and involuntary. Even though Movant said he agreed with the State's recitation of facts, the factual basis underlying a guilty plea is not always a complete account of the circumstances surrounding the crime, nor is it meant to be. It is often simply a recital of elements the State expects to prove at trial. We do not agree that Movant's acknowledgement of the anticipated evidence conclusively refuted the facts alleged in Movant's Amended Motion. Although Movant may not have successfully convinced a jury that he committed voluntary manslaughter, he was entitled to weigh that

option before pleading guilty. The plea court's questions to Movant whether he was "satisfied" with counsel were too general to refute Movant's claim that counsel failed to advise him about the defense of voluntary manslaughter. Finally, even though Movant would have risked life without parole if he went to trial on first degree murder, he pleaded in his Amended Motion that he was prejudiced because he would have proceeded to trial if he had been advised of the voluntary manslaughter defense; without an evidentiary hearing, "we must take Movant at his word." Remanded for evidentiary hearing.

Moore v. State, 2014 WL 1597633 (Mo. App. E.D. April 22, 2014):
Movant was entitled to evidentiary hearing on claim that counsel was ineffective for withdrawing motion for automatic change of judge and not moving for change of judge for cause, where judge had previously prosecuted Movant.
Facts: Movant, who was convicted of various offenses at trial and sentenced to the maximum possible sentence by Judge, filed 29.15 motion alleging his counsel was ineffective in failing to move for change of judge. Judge had previously prosecuted Movant when Judge was a prosecutor. Counsel had filed a motion for automatic change of judge, but then withdrew it. Counsel failed to file a motion for change of judge for cause. The motion court (who was also the trial court Judge) denied relief without a hearing.
Holding: Here, there was a motion for automatic change of judge under Rule 32.07 filed, but then it was withdrawn by counsel. The motion court found that this withdrawal was done in Movant's "presence" and "with his consent" in open court, but the record does not indicate that Movant was even aware that the motion was withdrawn much less that it was done with his "consent." The motion court further found that Movant failed to allege prejudice sufficient to trigger postconviction relief, and that just because a trial judge received knowledge of facts through prior court hearings does not justify disqualification for cause. However, Movant's motion alleges that counsel lacked a strategic purpose for not pursuing a change of judge, and that Movant wanted a change of judge. Movant argues that Judge was biased against him, because she prosecuted him in another case before she became a judge. And Movant contends that a reasonable person would doubt Judge's impartiality where she had prosecuted him previously, and sentenced him to the maximum possible sentence here. All of this sufficiently alleged facts not refuted by the record which warrant an evidentiary hearing before a different judge.

Kyles v. State, 417 S.W.3d 873 (Mo. App. E.D. 2014):
Movant was entitled to hearing on claim that counsel was ineffective for failing to strike Juror who said she could "sympathize" with and could be partial to victim; motion court cannot conclude that counsel had reasonable trial strategy for not striking Juror without a hearing.
Facts: Movant was convicted at jury trial of first degree tampering. During voir dire, Juror said that someone had tried to steal her car recently, and she could find herself "sympathizing" with the victim, and not being impartial. Juror further said, "I can listen to the evidence. What I'm telling you is I might find myself sympathizing with … the

victim." Movant filed a 29.15 motion, alleging counsel was ineffective in failing to move to strike Juror. The motion court denied the claim without a hearing.
Holding: Where counsel fails to strike a biased venireperson who ultimately serves as a juror, a postconviction movant is entitled to a presumption of prejudice. Here, the record shows Juror expressed bias, and that she was not rehabilitated because she never gave unequivocal answers that her sympathy for the victim would not affect her ability to be fair and impartial. The State claims that counsel had a "trial strategy" for failing to strike Juror. Assuming there was a strategy, that strategy must be "reasonable." The record here does not show that. A hearing must be held so that defense counsel can explain whether his failure to strike Juror was a reasonable trial strategy.

Washington v. State, 2013 WL 6627968 (Mo. App. E.D. Dec. 17, 2013):
Movant was entitled to evidentiary hearing on his claim that counsel was ineffective in failing to move to suppress his statements on grounds that he could not knowingly and intelligently waive his Miranda rights due to his cognitive impairments, even though there was no evidence of police coercion.
Facts: Movant was convicted at trial of a child sex offense, to which he had confessed after *Miranda* warnings. In his Rule 29.15 motion, Movant claimed that counsel was ineffective in failing to move to suppress his statements on grounds that he was mentally impaired and could not knowingly and intelligently waive his rights. The motion court denied the claim on grounds that there was no evidence of police coercion.
Holding: The inquiry into whether a person has effectively waived his *Miranda* rights has two different prongs: (1) the waiver must have been voluntary, meaning it was the product of a free and deliberate choice without police intimidation or coercion, and (2) the waiver must have been knowing and intelligent, meaning made with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. Movant has alleged that he lacked mental capacity to knowingly and intelligently waive his rights due to mental and cognitive impairments. The motion court considered only the first prong of the waiver issue. Movant's claims of impairments are not refuted by the record. A reasonably competent counsel would have used all available evidence in an attempt to suppress Movant's statements since they were the critical evidence supporting his conviction at trial. There is a reasonable probability that if the statements had been suppressed, the outcome of trial may have been different.

States v. State, 2013 WL 6070034 (Mo. App. E.D. Nov. 19, 2013):
Holding: (1) Movant was entitled to evidentiary hearing on 24.035 claim that his plea was rendered involuntary by counsel's erroneous advice to him that he would receive pre-plea jail time credit; (2) even though receiving jail time credit is not cognizable in a 24.035 action (but should be pursued in habeas corpus; the 24.035 motion court has no power to order jail time credit), Movant's claim that he would not have pleaded guilty at all but for the erroneous advice regarding jail time credit is cognizable because it seeks to set aside his conviction (not just receive jail time credit); and (3) even though Movant said he was not "promised" anything at his plea, a "promise" is not the same as being given erroneous advice by counsel, so Movant's statements at his plea did not refute the claim of ineffective assistance of counsel of being told wrong information about whether he was going to receive jail time credit.

Greer v. State, 2013 WL 4419338 (Mo. App. E.D. August 20, 2013):
Movant was entitled to an evidentiary hearing on his claim that counsel was ineffective in failing to object when the sentencing judge, after trial, said he was sentencing Movant to a higher sentence than that recommended as a plea agreement in order to deter others from seeking trials in their cases, since this unconstitutionally punished the exercise of the right to trial.
Facts: At Movant's sentencing after having been found guilty at a trial, the judge said the "problem" the judge had was that if he sentenced Movant to a sentence lower than that recommended in the plea agreement before trial that Movant would go back to jail and say he went to trial and beat the recommendation, and this would cause "chaos" because "everyone's going to go to trial, because they're going to think they're going to get less than the recommended sentence or the same sentence. That's my problem." After the judge sentenced him to a high sentence, Movant filed a Rule 29.15 motion alleging his counsel was ineffective in failing to object to the judge's remarks. The motion court denied the claim without a hearing.
Holding: To be entitled to a hearing, Movant must alleges facts, not conclusions, warranting relief; the facts alleged must not be refuted by the record; and the matters complained of must have resulted in prejudice. If a defendant's exercise of a constitutional right was an actual factor considered by the sentencing court in imposing sentence, then the exercise of that right is considered to be a determinative factor in sentencing, and retaliation has been demonstrated, even if other factors could have been relied on by the sentencing court to support the same sentence. The State argues that the sentence here is designed to deter others. But the proper purpose of deterrence is to prevent others from committing a crime, not to deter those who have already committed a crime from exercising their right to a trial. Here, the record does not refute that counsel was not ineffective in failing to object, so Movant is entitled to an evidentiary hearing.

White v. State, No. ED97805 (Mo. App. E.D. 10/23/12):
(1) Even though the motion court had affidavits from court personnel that no one saw Movant shackled at trial, Movant was entitled to an evidentiary hearing on claim that jurors saw Movant shackled because by relying on affidavits, the court considered non-record evidence but did not allow Movant opportunity to present his own evidence; and (2) even though police testified that Movant possessed drugs in his pants, where Movant alleged counsel was ineffective in failing to call a witness who would testify that Movant did not have drugs, Movant was entitled to an evidentiary hearing and claim could not be denied without a hearing based on the police testimony.
Facts: Movant was convicted of possession of drugs. At trial, police testify that Movant had drugs in his pants. In his 29.15 motion, Movant alleged that jurors had seen him shackled, and that counsel was ineffective in failing to call a witness to testify that Movant had not had any drugs. The motion court denied relief without an evidentiary hearing on grounds that these matters were refuted by the record in that the court had affidavits from court personnel that no one had seen Movant shackled, and that the witness "would not establish that Movant did not possess the drugs." Movant appealed and claimed he was entitled to an evidentiary hearing.

Holding: Movant was entitled to a hearing if he alleged facts warranting relief; the facts are not refuted by the record; and he shows prejudice. Here, the motion court relied on affidavits of court personnel to deny Movant's claim that jurors had seen him shackled without a hearing. However, by relying on this non-record evidence, in essence, the motion court held a hearing without permitting Movant to present evidence and made factual determinations based on non-record evidence. Movant alleged in his 29.15 motion that jurors saw him shackled because his pants were too short. This is not refuted by the record. Regarding the witness, courts should not second guess counsel's decision to call a witness made after a thorough investigation of the facts; however, counsel must investigate potential witnesses before deciding whether to call them. A witness provides a viable defense when the witness negates an element of the crime. Here, Movant alleged that counsel knew of the witness, could have located him, that the witness would have testified, and that the testimony would have provided a viable defense. Movant alleged that counsel failed to investigate this witness. The motion court found that the witness' testimony "would not establish that Movant did not possess the drugs." However, this conclusion is based on the court believing the police officers' testimony. The record does not refute Movant's allegation because it contains no evidence about whether Movant's counsel chose not to call witness after investigating the nature of his testimony. Remanded for evidentiary hearing.

Wiley v. State, No. ED96782 (Mo. App. E.D. 3/20/12):
Where Movant gave his 24.035 motion to prison officials for mailing two months before due date and after due date the motion was returned in the mail for insufficient postage, this would constitute extraordinary circumstances beyond Movant's control and allow a late-filing; Movant was entitled to hearing to prove these matters.
Facts: Movant filed a late Rule 24.035 pro se motion and counsel filed an amended motion thereafter. When the State pointed out that the initial pro se motion was late, Movant filed a motion alleging the pro se motion was late due to the actions of prison authorities in mailing it. The motion court dismissed the motion without a hearing.
Holding: An exception to the time limits of Rules 24.035 and 29.15 is when a late filing is "caused by circumstances beyond the control" of Movant. *Howard v. State*, 289 S.W.3d 651 (Mo. App. E.D. 2009), held that actions of prison officials in not properly mailing a Movant's motion can constitute cause to excuse a late filing. Here, Movant's case is similar. Movant alleged that he followed prison procedures in giving his motion to prison authorities to mail two months before its due date. However, after the due date, it was returned for insufficient postage. These facts, if true, would excuse the late filing and Movant should have been granted a hearing on them. The State also claims that Movant was required to raise these timeliness issues in his amended motion; however, the appellate court finds that raising them in the separate motion was sufficient here.
Facts: Movant pleaded guilty to stealing pursuant to a plea bargain. At his plea, he asked the judge if he would receive jail time credit and the judge said yes. After Movant was delivered to the DOC, he learned that he would only be given 243 days credit instead of 407 days because he was not eligible for time served prior to the date of the offense. (Movant was serving other sentences). Movant filed a Rule 24.035 motion claiming his attorney had been ineffective in advising him that he would receive 407 days credit. The motion court denied the claim without a hearing.

Holding: Movant may be entitled to vacate his guilty plea if his attorney misinformed him about the number of days credit he would receive. Movant's claim is not refuted by the record, since he specifically asked the judge at his plea if he would be given credit. The State argues that because Movant asked this after his plea was accepted, Movant did not rely on it in pleading guilty. However, the immediacy of the question, the form of the question and the court's response all show the parties' and court's understanding that jail time credit was part of the plea agreement. Movant is entitled to an evidentiary hearing.

Williams v. State, No. ED95386 (Mo. App. E.D. 11/15/11):
Where there was no evidence that a gun Defendant-Movant used in an unlawful use of weapon case was readily capable of lethal use, Movant was entitled to an evidentiary hearing on claim that appellate counsel was ineffective in failing to raise sufficiency of evidence on direct appeal.
Facts: Defendant pointed a gun at various persons. He was convicted at a trial of unlawful use of a weapon, and other offenses. After losing his direct appeal, he filed a 29.15 motion alleging that appellate counsel was ineffective in failing to appeal the issue of sufficiency of evidence to support the unlawful use of weapon conviction. The motion court denied the claim without a hearing.
Holding: To show ineffective appellate counsel, Movant must show that counsel failed to raise a claim that was so obvious that a competent attorney would have recognized it and asserted it, and that there is a reasonable probability the outcome of the appeal would have been different. Unlawful use of a weapon requires display of a weapon "readily capable of lethal use." Sec. 571.030.1(4). Here, Movant contends that the State presented no evidence that the gun was readily capable of lethal use. The State had the burden of proof and was required to produce evidence that the gun used was capable of lethal use. The State's assertion that a gun is generally capable of lethal use is not unreasonable, but a verdict cannot rest upon stacked inferences when there are not supporting facts in the first inference. Denial of postconviction relief reversed, and case remanded for evidentiary hearing on whether appellate counsel was ineffective.

Conger v. State, No. ED96015 (Mo. App. E.D. 10/18/11):
Movant was entitled to evidentiary hearing on claim that he was coerced into pleading guilty because his counsel wanted more money for a trial than Movant could pay.
Facts: Movant (defendant) was charged with various offenses. He ultimately pleaded guilty. At the plea hearing, he said he was not threatened or coerced to plead guilty, and expressed general satisfaction with defense counsel. Later, he filed a 24.035 motion claiming he was coerced to plead guilty because he could not afford the fee counsel demanded to go to trial. The motion court found the claim was refuted by the record.
Holding: An attorney's statement to a client for additional fees to take a case to trial is not itself coercive. However, a financial conflict of interest arises when a defendant's inability to pay creates a divergence of interest between counsel and defendant such that counsel pressures or coerces a defendant to plead guilty. Here, Movant pleaded facts which, if true, would warrant relief: Counsel filed motions to withdraw, which were denied; Movant paid counsel $11,500, but counsel said it would cost an additional $20,000 to go to trial; plea counsel pressured Movant by telling him she would not take the cases to trial until additional fees were paid; Movant could not pay the additional

$20,000; Movant would not have pleaded guilty had counsel not coerced his decision. The State argues the claim is refuted by the record. But the guilty plea court never informed Movant that if he could not afford counsel for trial, the court would appoint counsel for trial. Movant's general answers that he was not coerced or threatened and was satisfied with counsel do not refute allegations that Movant's counsel told him she would not take the case to trial until he paid more fees and that this pressured him to plead guilty. Remanded for evidentiary hearing.

Brown v. State, No. ED94429-01 (Mo. App. E.D. 7/12/11):
Holding: Where (1) Movant claimed that guilty plea counsel was ineffective because counsel told him he'd only serve 3 to 5 years and (2) the plea record showed the court only asked Movant whether or not any threats or promises had been made to him, Movant's statements were insufficient to cleary refute the claim that counsel promised him a lesser sentence; Movant entitled to evidentiary hearing.

Collins v. State, No. ED94590 (Mo. App. E.D. 3/29/11):
Where Movant alleged his counsel told him he would receive 407 days jail time credit if he pleaded guilty but he later was not given this, Movant was entitled to evidentiary hearing on whether counsel was ineffective.

Brantley v. State, No. SD30868 (Mo. App. S.D. 4/20/12):
Holding: Where Movant claimed his plea counsel was ineffective in failing to provide him with timely discovery, which caused him to miss a favorable plea offer and later accept a less-favorable one, this stated a viable claim and required a hearing under *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

Bridgewater v. State, 2015 WL 160833 (Mo. App. W.D. Jan. 13, 2015):
A motion to recall mandate can be used to present newly discovered evidence of guilty plea counsel's ineffectiveness, which evidence was not available at the time of the original Rule 24.035 evidentiary hearing.
Facts: Movant pleaded guilty, in an open plea, to three counts. At the plea, the judge informed him he could receive up to life sentences on each count, but never informed him that the sentences could run consecutively. The judge imposed three consecutive life sentences. Movant later filed a Rule 24.035 motion, alleging that plea counsel had affirmatively misrepresented that he would receive concurrent sentences if he pleaded guilty. At the evidentiary hearing, plea counsel testified that she did not have a "specific recall" or "specific details" of her discussion with Movant without looking at her notes, which were missing at the time of the hearing. Counsel testified it was her "practice" to tell a client the "worst case scenario," which would be consecutive sentences. The motion court denied relief. The Western District affirmed on appeal. Subsequently, counsel's notes were found. The notes supported Movant's claim that counsel indicated he would receive concurrent sentences. Movant filed a motion to recall the mandate in his appeal, claiming this newly discovered evidence warranted relief.
Holding: This is a case of first impression whether a motion to recall mandate can be used to present newly discovered evidence. A motion to recall mandate can be used to remedy a deprivation of a defendant's federal constitutional rights. Here, unless the

mandate is withdrawn, Movant's ability to challenge whether he received effective assistance of counsel at his plea will be impaired. Counsel's notes were missing through no apparent fault or lack of diligence on the part of Movant. The notes clearly corroborate Movant's version of events. The notes are contrary to counsel's evidentiary hearing testimony and refute that she followed her standard "practice" of warning of consecutive sentences. Further, the plea judge, in violation of Rule 24.02(b)(1), failed to warn Movant of the possibility of consecutive sentences. Movant has no other apparent remedy besides a motion to recall mandate. A Rule 29.07(d) motion cannot be used because it cannot be a substitute for the timely assertion of a claim in a Rule 24.035 motion. Habeas corpus does not appear to be available, since this is not a claim of actual innocence or a procedurally defaulted claim that Movant was deprived of a fair trial. Appellate court recalls its mandate, and remands case for further evidentiary hearing and new Findings on Movant's claim that counsel misadvised him.

Thompson v. State, 2014 WL 4636393 (Mo. App. W.D. Sept. 9, 2014):
Postconviction claim that counsel was ineffective for failing to investigate and file a motion to suppress failed to state claim; rather, Movant must plead that counsel provided incompetent advice whether to plead guilty under all the circumstances of the case.
Facts: Rule 24.035 Movant alleged plea counsel was ineffective for failing to investigate and file a motion to suppress, and that Movant would not have pleaded guilty if counsel had done this. The motion court denied the claim without a hearing.
Holding: A plea of guilty is not subject to collateral attack on the ground that it was motivated by inadmissible evidence unless the Movant was incompetently advised by his attorney. The motion must allege that plea counsel provided incompetent advice regarding whether Movant should plead guilty, i.e., that counsel's advice under all circumstances of the case was outside the range of competence demanded of counsel in criminal cases. Merely providing no advice regarding suppression is not enough. Denial of motion affirmed.

Scott v. State, 2013 WL 6170608 (Mo. App. W.D. Nov. 26, 2013):
Defendant/Movant was entitled to evidentiary hearing on claim that counsel was ineffective in advising him that he would receive pre-plea jail time credit, which he ultimately did not receive.
Facts: Defendant/Movant, who was held in custody approximately 4 years prior to his guilty plea for a drug offense, filed a 24.035 motion, alleging his counsel was ineffective in advising him that he would receive 4 years of pre-guilty plea jail time credit. In the actual event, the Department of Corrections awarded him less credit than this. The motion court denied the claim without a hearing.
Holding: Movant claims that but for counsel's mistaken advice about jail time credit, he would not have pleaded guilty but would have insisted on going to trial. Movant would be entitled to relief if he relied on *positive* misrepresentations by counsel. At the plea colloquy, Movant said he thought he would be getting 4 years of jail time credit, and counsel said that that was true. Thus, it appears that counsel gave positive misadvice. Even though the plea court told Movant that the DOC would determine jail time credit, the court's advice did not fully disabuse counsel's advice because the court also said that it was "true" that Movant would get credit. Even though the plea court said that Movant

could be required to serve "every day" of his sentence, this did not disabuse counsel's advice because this statement could mean both pre-plea and post-plea service. Finally, any statements by the plea court about probation and parole didn't correct the misadvice because probation and parole is not the same as pre-plea jail time credit. Thus, the record does not *conclusively* refute Movant's claim. Reversed and remanded for hearing.

Epkins v. State, No. SD30349 (Mo. App. S.D. 2/10/11):
Even though Movant's 24.035 motion only generally alleged that counsel had "coerced" him into waiving a jury, but the evidentiary hearing evidence was that counsel told him he'd get medical treatment faster if he did this, appellate court will review the claim on the merits; general pleading sufficient.
Holding: We acknowledge Movant's amended motion more generally refers to trial counsel's allegedly coercive conduct and does not specifically mention Movant's medical condition. However, during the evidentiary hearing, claims of coercion based upon counsel's alleged inducement stemming from Movant's medical condition was clearly presented. Since Movant's argument on appeal was generally encompassed in Movant's amended motion, and presented to the motion court at the hearing, we choose to review the claim on the merits.

State v. Triplett, No. WD73486 (Mo. App. W.D. 12/20/11):
Holding: (1) Where (a) Defendant filed a motion which appeared to be a hybrid motion to suppress and motion to dismiss, (b) the trial court sustained the motion by dismissing the charge without prejudice, and (c) the State attempted to appeal only the motion to dismiss, the appeal must be dismissed because the State is not appealing the motion to suppress, and the appeal does not meet the requirements for the State to be able to appeal under Sec. 547.200. There is no final judgment because the dismissal was without prejudice. The State can just refile the charge in the trial court. (2) Although civil rule 73.01 gives parties the right to request Findings of Fact and Conclusions of Law before introduction of evidence, there is no similar rule in the criminal rules that requires a trial court to issue Findings in connection with a motion to suppress or other motions. A party (or appellate court) may request them, however, and the trial court may choose to do them, but they aren't mandatory.

U.S. v. Meises, 89 Crim. L. Rep. 257, 2011 WL 1817955 (1st Cir. 5/13/11):
Holding: Even though Officer actually participated in the drug sting, this did not make his "overview testimony" about the sting about which he had no personal knowledge admissible; this was still hearsay and inadmissible lay opinion testimony.

Matthews v. U.S., 2012 WL 2146320 (2d Cir. 2012):
Holding: Petitioner was entitled to evidentiary hearing on claim that counsel was ineffective in retaining a biased investigator to investigate his case; Petitioner should be allowed to show what an unbiased investigator would have discovered.

Lee v. Glunt, 90 Crim. L. Rep. 719 (3d Cir. 1/27/12):
Holding: A federal district court abused its discretion in refusing to grant a habeas corpus petitioner an evidentiary hearing to develop his due process claim that new

scientific evidence has proved that expert testimony underlying his conviction was fundamentally unreliable.

U.S. v. Reed, 93 Crim. L. Rep. 365 (5th Cir. 6/6/13):
Holding: Defendant was entitled to evidentiary hearing based on his claim that his trial counsel overestimated the amount of time he would get if he took a plea; motion court had denied an evidentiary hearing on the claim based on lack of evidence, but Defendant's own testimony, if found credible, would establish the claim; "It is hard to imagine what additional evidence Reed could present to establish what his trial counsel told him in a presumably private conversation."

U.S. v. Rivas-Lopez, 2012 WL 1326676 (5th Cir. 2012):
Holding: The district court should have held an evidentiary hearing before dismissing a federal prisoner's motion to vacate, set aside, or correct his sentence because the court could neither credit nor refute the defendant's allegation of ineffective assistance on the record before it.

Hooper v. Ryan, 2013 WL 4779579 (7th Cir. 2013):
Holding: Habeas petitioner was entitled to evidentiary hearing in federal court on *Batson*, where State court unreasonably concluded that striking all 7 African-American members of a venire did not make out a prima facie case of discrimination.

Coleman v. Hardy, 2010 WL 4670206 (7th Cir. 2010):
Holding: Defendant was entitled to hearing on actual innocence where his habeas petition alleged new evidence of innocence, including a co-defendant affidavit saying Defendant had nothing to do with crime, and affidavits of alibi witnesses.

Franco v. U.S., 2014 WL 3882545 (8th Cir. 2014):
Holding: Defendant was entitled to evidentiary hearing on claim that counsel was ineffective in failing to file notice of appeal; Defendant's affidavit claimed he asked counsel to file notice, and counsel's affidavit said he could not recall if Defendant requested this, but if Defendant had, he would have filed one.

Hurles v. Ryan, 2013 WL 21922 (9th Cir. 2013):
Holding: Petitioner would be entitled to habeas relief on his claims, if true, that judge was biased because judge had contacted Attorney General's office during case and commissioned or authorized a responsive pleading or provided input to the prosecution of the case, so evidentiary hearing was warranted.

Johnson v. Finn, 2011 WL 6091310 (9th Cir. 2011):
Holding: District court deprived habeas petitioners of due process by failing to conduct evidentiary hearing on *Batson* issue following a magistrate judge's proposed finding regarding prosecutor's lack of credibility.

Stouffer v. Trammell, 94 Crim. L. Rep. 445 (10th Cir. 12/26/13):
Holding: Even though State's evidence against capital Defendant was overwhelming, this did not justify failure to hold a hearing on alleged juror misconduct where Juror's Husband allegedly signaled to Juror-Wife his opinions about the trial.

U.S. v. Weeks, 2011 WL 3452053 (10th Cir. 2011):
Holding: Evidentiary hearing required on postconviction claim that Defendant received ineffective counsel at guilty plea because he had a valid defense to securities fraud in that he lacked knowledge of the illegality of his actions.

Fisher v. Ozaukee County Circuit Court, 2010 WL 3835098 (E.D. Wis. 2010):
Holding: Trial court's application of general law prohibiting admission of preliminary breath test (PBT) results so as to preclude defense expert from testifying that Defendant's BAC would have been lower violated right to present a defense.

State v. Victor O., 2011 WL 2135671 (Conn. 2011):
Holding: Results of an Abel Assessment of Sexual Interest (Abel test), which purports to show sexual interest minors, were not sufficiently reliable in a nontreatment context to be admitted in criminal case.

Harris v. State, 89 Crim. L. Rep. 177 (Fla. 4/21/11):
Holding: For drug dog evidence to be admissible, State must not only show that dog had proper training and certification, but also evidence that particular dog is reliable; State failed to show this where there was no evidence of field performance records about the dog at issue or about dog's performance on false alerts. Tennessee issued a similar ruling in *State v. England*, 19 S.W.3d 762 (Tenn. 2000).

State v. Neal, 2011 WL 3366418 (Kan. 2011):
Holding: Evidentiary hearing was required to determine if Defendant had counsel or validly waived counsel regarding prior convictions which were used to enhance later sentence.

Com. v. Heang, 88 Crim. L. Rep. 594 (Mass. 2/15/11):
Holding: Ballistics expert should avoid testifying that ballistics matches have more certainty than they do, and should avoid terms like "absolute certainty" and "reasonable degree of scientific certainty," but can say "reasonable degree of ballistic certainty."

Caldwell v. State, 2014 WL 4723521 (Minn. 2014):
Holding: Defendant was entitled to evidentiary hearing on his claim that trial Witness had recanted his testimony and lied at trial, and was distressed that Defendant was in prison for a crime he did not commit.

State v. Langill, 88 Crim. L. 292 (N.H. 11/30/10):
Holding: Hearsay rule prohibited fingerprint examiner from testifying that her fingerprint results were confirmed by a second examiner, even though the ACE-V method requires two examiners to compare results.

State v. Porter, 94 Crim. L. Rep. 393 (N.J. 12/19/13):
Holding: Where PCR judge denied an evidentiary hearing on ineffectiveness claim on basis that victim who identified Defendant was a credible witness and affidavits obtained for the PCR showing an alibi would not have changed the outcome, this was erroneous because "[t]here is no substitute for placing a witness [the affiants] on the stand and having the testimony scrutinized by an impartial factfinder" in the PCR case.

State v. McLean, 89 Crim. L. Rep. 68 (N.J. 3/31/11):
Holding: Officer cannot testify as "lay opinion" that a series of roadside transactions involving Defendant looked like drug deals since this invaded fact-finding province of jury.

Keough v. State, 90 Crim. L. Rep. 420 (Tenn. 12/9/11):
Holding: Movant seeking postconviction relief is entitled to testify at postconviction hearing without cross-examination under postconviction rule that states that "under no circumstances shall petitioner be required to testify regarding the facts of the conviction … unless necessary to establish the allegations of the petition." Court notes whether the privilege against self-incrimination applies to a postconviction case remains an open question, but the state rule was designed to accomplish the same goal; the movant should not be dissuaded from testifying due to fear of self-incrimination.

Abercrombie v. State, 2014 WL 2678413 (Ala. App. 2014):
Holding: Petitioner was entitled to evidentiary hearing on claim that counsel was ineffective in erroneously advising him that the plea court had discretion to deviate from Habitual Felony Offender Act and sentence him to something less than required by the Act.

Lear v. Fields, 2011 WL 102572 (Ariz. Ct. App. 2011):
Holding: Statute which adopted *Daubert* test for expert testimony violated separation of powers because Arizona courts had rejected *Daubert*.

People v. Gacho, 2012 WL 1343950 (Ill. App. 2012):
Holding: Even though a jury determined Defendant's guilt, Defendant was entitled to evidentiary hearing on postconviction claim that trial judge's corruption in accepting a bribe in a co-defendant's case indicated that the judge had a personal interest in the outcome of his case and violated his due process rights to a fair trial.

Experts

State v. Cochran, No. WD73766 (Mo. App. W.D. 5/1/12):
(1) Expert should not be permitted to testify that Defendant committed "animal abuse" under Sec. 578.012 because this invades the province of the jury; and (2) where Defendant was charged with county ordinance violation but State failed to introduce the ordinance into evidence at trial, a court cannot judicially notice a county or municipal ordinance and the failure to introduce it at trial made the evidence insufficient to convict.
Facts: Defendant was charged with and convicted of animal abuse under Sec. 578.012 and with violation of a county ordinance regarding vaccination of animals. At trial, an animal care official ("Expert") testified about the conditions in which the animals were found and that "animal abuse" occurred.
Holding: (1) It was proper for Expert to testify about the inadequate conditions in which the animals lived, such as inadequate food and water. The State, however, asked Expert whether "animal abuse" occurred. "Animal abuse" includes the element of whether the Defendant knowingly failed to provide adequate care for the animals. To the extent that Expert's testimony could be interpreted as Expert testifying that Defendant knowingly failed to provide adequate care, it exceeded his expertise and invaded the province of the jury. However, court finds the error harmless here in light of other evidence. (2) The State failed to prove guilt of the county ordinance violation because the State failed to introduce it into evidence. Sec. 479.250 and subsequent cases require that municipal and county ordinances be introduced into evidence either by formal presentation or by stipulation. A court cannot judicially notice an ordinance. The ordinance is an essential element of proof. No misconduct can be shown or conviction proven without it. The State's evidence being insufficient, it would violate double jeopardy to re-try Defendant on the county ordinance violation, so that conviction must be vacated.

*** Perry v. New Hampshire, ___ U.S. ___, 90 Crim. L. Rep. 500 (U.S. 1/11/12):**
Holding: Eyewitness identifications are not subject to suppression unless police arranged the suggestive circumstances; however, defendants may counter identifications with cross-examination, expert testimony, and jury instructions on the reliability of eyewitness identification.

U.S. v. Meises, 89 Crim. L. Rep. 257, 2011 WL 1817955 (1st Cir. 5/13/11):
Holding: Even though Officer actually participated in the drug sting, this did not make his "overview testimony" about the sting about which he had no personal knowledge admissible; this was still hearsay and inadmissible lay opinion testimony.

U.S. v. Garcia, 95 Crim. L. Rep. 241 (4th Cir. 5/15/14):
Holding: Even though judge gave a cautionary instruction, trial court erred in allowing FBI agent who investigated the case to testify both as a fact witness and "expert" witness regarding the meaning of certain "drug lingo" used by witnesses in tapped telephone conversations.

U.S. v. Christian, 95 Crim. L. Rep. 102 (9th Cir. 4/17/14):
Holding: Even though Expert had examined Defendant for competency, Expert should not have been precluded from testifying about Defendant's diminished capacity; trial court abused discretion in focusing on different standards for competency and diminished capacity, instead of whether the expert's testimony would have helped the jury.

U.S. v. Richter, 97 Crim. L. Rep. 583 (10th Cir. 7/31/15):
Holding: In prosecution for improper export of "e-waste," a Department of Environmental Protection employee's testimony that once certain electronic parts are removed from their housing they are "waste" was improper expert testimony in the guise of lay testimony.

U.S. v. Medina-Copete, 95 Crim. L. Rep. 539 (10th Cir. 7/2/14):
Holding: Officer should not have been permitted to testify as an "expert" that Defendant's worship of Mexican saint "Santa Meurte" indicated that Defendant was involved in drug trafficking; his experience did not make him an expert on the connection between Santa Meurte and drug trafficking, his knowledge did not help the jury, and his opinion was not based on proper application of reliable scientific principles and methods.

Editor's Note: The 8th Circuit reached a contrary result regarding this same officer-"expert" in *U.S. v. Holmes*, 751 F.3d 846 (8th Cir. 2014).

U.S. v. Hill, 95 Crim. L. Rep. 190 (10th Cir. 4/28/14):
Holding: FBI agent trained in "deception in statements and truth in statements" should not have been permitted to testify that Defendant's statements to police were not credible, because this invaded province of jury to determine credibility.

U.S. v. Hampton, 93 Crim. L. Rep. 542, 2013 WL 3185044 (D.C. Cir. 6/25/13):
Holding: FBI agent should not have been permitted to testify as to the meaning of several cryptic phone calls because this was improper lay opinion testimony.

Minor v. U.S., 2012 WL 6617802 (D.C. 2012):
Holding: Expert testimony about unreliability of eyewitness identification should have been allowed.

Fisher v. Ozaukee County Circuit Court, 2010 WL 3835098 (E.D. Wis. 2010):
Holding: Trial court's application of general law prohibiting admission of preliminary breath test (PBT) results so as to preclude defense expert from testifying that Defendant's BAC would have been lower violated right to present a defense.

U.S. v. Johnsted, 2013 WL 8812584 (W.D. Wisc. 2013):
Holding: Science of handwriting analysis was not reliable when applied to writings that were printed by hand.

State v. Ketchner, 96 Crim. L. Rep. 339 (Ariz. 12/18/14):
Holding: Expert testimony about "separation violence" and other characteristics of couples in abusive relationships was inadmissible in murder trial of Defendant for killing

his wife; such testimony invited jurors to find that Defendant's character matched that of a domestic abuser who intended to kill their spouse.

State v. Favoccia, 92 Crim. L. Rep. 6 (Conn. 9/21/12):
Holding: State cannot present expert in child sex abuse case to testify that victim exhibits behavioral characteristics of an abused child.

State v. Victor O., 2011 WL 2135671 (Conn. 2011):
Holding: Results of an Abel Assessment of Sexual Interest (Abel test), which purports to show sexual interest minors, were not sufficiently reliable in a nontreatment context to be admitted in criminal case.

Harris v. State, 89 Crim. L. Rep. 177 (Fla. 4/21/11):
Holding: For drug dog evidence to be admissible, State must not only show that dog had proper training and certification, but also evidence that particular dog is reliable; State failed to show this where there was no evidence of field performance records about the dog at issue or about dog's performance on false alerts. Tennessee issued a similar ruling in *State v. England*, 19 S.W.3d 762 (Tenn. 2000).

Hoglund v. State, 2012 WL 759416 (Ind. 2012):
Holding: Although the conviction was affirmed, the Indiana Supreme Court overruled prior case law to hold that testimony concerning whether an alleged child victim is not prone to exaggerate or fantasize about sexual matters is a functional equivalent of saying the child is telling the truth, and is thus inconsistent with the rule of evidence prohibiting witnesses from testifying as to whether another witness testified truthfully.

State v. Brown and **State v. Dudley, 96 Crim. L. Rep. 301 (Iowa 12/5/14):**
Holding: Forensic Interviewer may not testify that Victim's symptoms are consistent with sexual abuse trauma or that child Victim's story was so "significant" that it warranted further "investigation"; such testimony puts a "stamp of scientific certainty" on Forensic Interviewer's testimony and "tips the scales" against Defendant.

State v. Hutson, 92 Crim. L. Rep. 498 (Iowa 1/25/13):
Holding: Where Defendant was charged with child endangerment, a DFS worker should not have been permitted to testify that child abuse report against Defendant was administratively determined to be "founded."

State v. Payne, 96 Crim. L. Rep. 334 (Md. 12/11/14):
Holding: Officer who seeks to testify about matching calls with cell tower location data must be qualified as an expert before being allowed to testify, even when Officer simply follows instructions that come with a batch of data from a cell phone provider.

Com. v. Heang, 88 Crim. L. Rep. 594 (Mass. 2/15/11):
Holding: Ballistics expert should avoid testifying that ballistics matches have more certainty than they do, and should avoid terms like "absolute certainty" and "reasonable degree of scientific certainty," but can say "reasonable degree of ballistic certainty."

People v. Kowalski, 2012 WL 3078584 (Mich. 2012):
Holding: Expert testimony regarding false confessions and interrogation techniques may be admissible in some cases, because this is beyond the common knowledge of ordinary persons.

Collins v. State, 97 Crim. L. Rep. 643 (Miss. 8/20/15):
Holding: In order for witness to be able to testify that phone records place Defendant in a certain location, the witness must be qualified as an expert in this subject matter.

State v. Langill, 88 Crim. L. 292 (N.H. 11/30/10):
Holding: Hearsay rule prohibited fingerprint examiner from testifying that her fingerprint results were confirmed by a second examiner, even though the ACE-V method requires two examiners to compare results.

State v. McLean, 89 Crim. L. Rep. 68 (N.J. 3/31/11):
Holding: Officer cannot testify as "lay opinion" that a series of roadside transactions involving Defendant looked like drug deals since this invaded fact-finding province of jury.

People v. Inoa, 97 Crim. L. Rep. 300 (N.Y. 6/10/15):
Holding: Police Officers cannot testify as "experts" on the meaning of certain words in wiretap recordings when their opinions are based on their experience in the investigation, rather than some more general expertise, because this invades province of jurors to determine what slang words mean, and jurors are competent to decide such matters themselves.

People v. Williams, 2013 WL 1195635 (N.Y. 2013):
Holding: Expert testimony discussing Child Sexual Abuse Accommodation Syndrome (CSAAS) could not be tailored to facts of the case through use of hypotheticals, because this left impression that the expert had found the testimony of victim to be credible.

People v. Bedessie, 2012 WL 1032738 (N.Y. 2012):
Holding: In a proper case, although not this one, expert testimony on the phenomenon of false confessions should be admitted in a criminal trial.

State v. King, 2012 WL 22136832 (N.C. 2012):
Holding: A lay witness can testify that they did not recall, forgot or had no memory of an incident, but cannot testify that they had "repressed" or "recovered" memory unless an expert testifies to this.

State v. Lawson, 92 Crim. L. Rep. 266 (Or. 11/29/12):
Holding: Noting that the rules followed by most state courts on eyewitness identification need updating, the court adopts new procedures that encourage expert testimony and jury instructions based on scientific research addressing the reliability of eyewitness identification.

Com. v. Walker, 95 Crim. L. Rep. 357 (Pa. 5/28/14):
Holding: Penn. overturns ban on expert testimony regarding the reliability of eyewitness identification.

State v. Kromah, 92 Crim. L. Rep. 500, 2013 WL 239070 (S.C. 1/23/13):
Holding: Forensic interviewers and nurses in child sex abuse cases should not be permitted to testify that the child was told to be truthful; to an opinion that the child told the truth; that any interview tests (such as the RATAC method of interviewing) or other statements showed a "compelling findings" of abuse; that the child's behavior indicated the child was telling the truth; or any statement to indicate to the jury that the interviewer believes the child's allegations.

In re Commitment of Bohannan, 2012 WL 3800317 (Tex. 2012):
Holding: Even though proffered defense expert in SVP civil commitment case was not a psychologist or medical doctor, she should have been allowed to testify where she had a Ph.D. in family science and therapy, was a sex offender treatment provider, and the SVP statute did not require that an expert be limited to psychologists or medical doctors.

State v. Perea, 94 Crim. L. Rep. 273 (Utah 11/15/13):
Holding: Scientific evidence on false confessions has advanced to where expert should be permitted to testify about empirical research as to when people give false confessions, including sleep deprivation, presentation of false evidence, questioners' "minimization" techniques, defendant's age, defendant's intelligence, and certain personality traits.

State ex rel. Montgomery v. Whitten ex rel. County of Maricopa, 2011 WL 29828725 (Ariz. Ct. App. 2011):
Holding: Treating physicians who testified about treating child murder victim did not call for type of "expert testimony" for which they had to be compensated.

Lear v. Fields, 2011 WL 102572 (Ariz. Ct. App. 2011):
Holding: Statute which adopted *Daubert* test for expert testimony violated separation of powers because Arizona courts had rejected *Daubert*.

People v. Covarrubius, 2011 WL 6350541 (Cal. App. 2011):
Holding: Expert testimony regarding structure and practices of drug trafficking organizations was improper, absent evidence connecting drug defendant to such an organization.

People v. Cortes, 2011 WL 83732 (Cal. App. 2011):
Holding: Trial court abused discretion in limiting psychiatrist's testimony about Defendant's diminished capacity to abstract conditions and their effect on the general population, rather than discussing Defendant's condition specifically as applied to Defendant.

People v. Coyne, 2014 WL 4402593 (Ill. App. 2014):
Holding: The SVP Act authorized appointment of a non-testifying consulting expert for defense whose identity, work product and opinions were not discoverable absent extraordinary circumstances.

People v. Grant, 2015 WL 1248044 (Ill. App. 2015):
Holding: Defendant's due process rights were violated in SVP proceeding by court appointment of expert of State's choice and denial of expert of Defendant's choice; the SVP Act did not contemplate an expert of State's choosing.

Simpson v. State, 2013 WL 5354206 (Md. Ct. Spec. App. 2013):
Holding: Officer's testimony in arson case regarding his observations of a dog that had been trained to detect accelerants was "expert testimony" subject to expert testimony rules; thus, this Witness should have been identified prior to trial as an expert and the court should have had to rule on whether he was an expert.

Payne v. State, 2013 WL 706913 (Md. App. 2013):
Holding: Officer's lay testimony regarding details of cell phone tower tracking of Defendant was inadmissible because Officer was not qualified as an expert.

State v. Granskie, 2013 WL 5629000 (N.J. App. 2013):
Holding: Defendant can present expert psychiatric testimony about the impact of his opiate addiction and withdrawal symptoms on the reliability of his confession; a lay person may not understand the effects of withdrawal on an addict.

State v. Davis, 2010 WL 4608698 (N.C. Ct. App. 2010):
Holding: "Odor analysis" by which BAC was determined using Officer's report of smelling alcohol on Defendant 10 hours later was not sufficiently reliable to be admissible.

State v. Shalash, 2014 WL 2732700 (Ohio App. 2014):
Holding: A *Daubert* hearing was required to determine scientific reliability of visual assessment/comparison method State's expert used to identify substances as controlled substance analogues.

State v. Cordovoa-Contreras, 2010 WL 4867534 (Or. Ct. App. 2010):
Holding: Physician's "diagnosis" of "sexual abuse" was inadmissible absent supporting physical evidence; physician had not discovered any physical signs of abuse and his testimony was an impermissible comment on child's credibility.

State v. Larkin, 2013 WL 1281858 (Tenn. App. 2013):
Holding: Test for determining whether an expert originally hired by defense would later be permitted to testify for the State in the case was whether an ordinary person

knowledgeable of all relevant facts would conclude that allowing the expert to switch sides posed a substantial risk of disservice to the public interest and/or defendant's fundamental right to a fair trial.

Ex Post Facto

State v. Wade, 2013 WL 6916794 (Mo. banc Dec. 24, 2013):
Since Article I, Sec. 13's ban on "retrospective" laws applies only to "civil laws," it does not apply to Sec. 566.150, which is a "criminal law" which prohibits certain sex offenders from knowingly being in or loitering within 500 feet of a park with playground equipment or a public swimming pool. Therefore, Sec. 566.150 applies to sex offenders who were convicted of their crimes before enactment of the statute.
Facts: Various sex offenders, who were convicted of their offenses in the 1990's, were charged with violation of Sec. 566.150, which prohibits certain sex offenders from "knowingly be[ing] present in or lotier[ing] within 500 feet of any real property comprising any public park with playground equipment or a public swimming pool." They claimed Sec. 566.150 was an unconstitutional "retrospective" law, as applied to them, because they were convicted of their offenses before enactment of the law.
Holding: *State v. Honeycutt*, No. SC92229 (Mo. banc 11/26/13), recently held that Article I, Section 13's ban on "retrospective" laws does not apply to "criminal laws," but only to "civil laws." The question here is whether Sec. 566.150 is "civil" or "criminal." This is a two-part test: First, whether the legislature intended the statute to affect civil rights and remedies, or criminal proceedings. If the legislature intended to impose "punishment," that ends the inquiry. But if the legislature intended the law to be a "civil" regulatory scheme, the Court must determine if the scheme is "so punitive in purpose or effect as to negate the intention to affect civil rights or remedies." To analyze the effects of regulation, this Court asks whether the regulatory scheme (1) has been regarded historically as punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; or (5) is excessive with respect to the nonpunitive purpose. Sec. 566.150 is part of the criminal code, appears on its face to be criminal, and does not explicitly state that it has the purpose of protecting the public by alerting the public to sex offenders in the area. The statute uses criminal language – "shall not knowingly be present." It also proscribes a penalty, Class D felony, that increases to a Class C felony on a second violation. Most important, Sec. 566.150 does not depend on a sex offender's registration status. In fact, the statute does not reference the registration list. An offender is guilty of violating 566.150 independently of any duty to register, if he has committed certain listed offenses. Therefore, 566.150 is "criminal" in nature, and Article I, Sec. 13 does not apply. Although not before the Court, the issue of whether 566.150 violates *ex post facto* would not be successful. 566.150 makes it a crime for certain prior offenders to loiter near or be present in certain parks. The conduct of the Defendants here in being near the parks all occurred after enactment of 566.150, so there is no *ex post facto* violation. *R.L. v. Dep't of Corrections*, 245 S.W.3d 236 (Mo. banc 2008), held that a law prohibiting certain sex offenders from living within 1,000 of a school or child-care facility was "retrospective" to offenders who were convicted before enactment of that law. *F.R. v. St. Charles*

County Sheriff's Dep't, 301 S.W.3d 56 (Mo. banc 2010), held that a "Halloween law" which prohibited certain sex offenders from engaging in Halloween activity was "retrospective" to offenders who were convicted before enactment of that law. "To the extent that *R.L.* and *F.R.* conflict with *Honeycutt* due to their failure to perform any analysis to determine whether the statute being challenged was a criminal law, they should no longer be followed."

Concurring Opinion: Three judges join in a concurring opinion to "express concern" about the Court's "increased willingness" to characterize a law as "criminal" or "civil" merely from where it is placed in the RSMo. codification system. These judges note that where a statute is ultimately placed in RSMo. is determined by the Joint Committee on Legislative Research, not necessarily the Legislature as a whole. "Until recently, this Court had a long and unblemished record of refusing to recognize any probative value in the codification or structure of legislative enactments on the question of statutory construction."

Dissenting Opinion: Three judges would hold that Sec. 566.150 is a "civil" regulatory scheme subject to application of the ban on "retrospective" laws. Just as sexual predator and registration laws have been held to be "civil," even though they require incarceration, so, too, should this law be regarded as "civil."

State v. Honeycutt, 2013 WL 6188568 (Mo. banc Nov. 26, 2013):

Article I, Sec. 13's ban on "retrospective" laws does not apply to criminal laws; thus, since Sec. 571.070.1(1)'s ban on possession of firearms by felons is a "criminal" law, the statute is not unconstitutionally retrospective as applied to person whose prior felony pre-dated the statute.

Facts: Defendant was charged with being a felon in possession of a firearm, in violation of Sec. 571.070, which became effective in 2008. His prior felony was for drug possession in 2002. He claimed that Sec. 571.070 was unconstitutionally "retrospective" as applied to him, because his prior felony conviction pre-dated the law.

Holding: The U.S. Constitution and Missouri Constitution prohibit "ex post facto" laws. However, only a handful of state constitutions, such as Missouri's, also prohibit "retrospective" laws. A historical review of the term "retrospective" laws shows that it had a technical meaning at the time the constitution was adopted that limited its reach only to statutes affecting civil rights and remedies; the term was never intended to apply to criminal laws. The term has a separate meaning than ex post facto laws. In *R.L. v. Dep't of Corrections*, 245 S.W.3d 236 (Mo. banc 2008) and *F.R. v. St. Charles Cnty. Sheriff's Dept*., 301 S.W.3d 56 (Mo. banc 2010, this Court found that laws prohibiting certain sex offenders from living within 1,000 of a school or child-care facility and imposing restrictions on what sex offenders can do on Halloween were "retrospective" in operation. *R.L.* and *F.R.* did not expressly address whether Article I, Sec. 13 applies to criminal laws. This Court presumed the laws in those cases to be "civil," even though the laws carried criminal penalties. The determination of whether this Court's treatment of the statutes in *R.L.* and *F.R.* as civil in nature was accurate is not before the Court in this case. This Court will analyze that issue only when it is properly preserved and presented on appeal. To determine if a law is "criminal" or "civil" in nature, we must ascertain whether the legislature meant the statute to establish "civil" proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. But if the intention

was to enact a regulatory scheme that is civil and nonpunitive, we must examine whether the scheme is so punitive either in purpose or effect as to negate the intention to deem it "civil." This Court has held that sex registration laws are "civil" and "non-punitive," even though they have a punishment for not complying with them. The gun statute at issue here, however, appears on its face to be a "criminal" statute. The statute is in the criminal code, and is the type that has traditionally been regarded as punishment. Therefore, Article I, Sec. 13's ban on "retrospective" laws does not apply to it.
Concurring Opinion: The statutes at issue in *R.L.* and *F.R.* sought to regulate the actions of sexual offenders by punishing them for engaging in conduct – such as giving out Halloween candy or living near schools or parks – that is perfectly acceptable if performed by persons who are not sex offenders, and it was because of this "regulatory effect" that the laws addressed in these two cases were held invalid.

State v. Harris, 2013 WL 5460639 (Mo. banc Oct. 1, 2013):
Holding: Statute banning felons from possessing firearms, Sec. 571.070, is not an ex post facto law because it does not apply to conduct that occurred before its enactment, but only punishes possession of firearms after its enactment (even though the prior felony may have occurred before enactment).

State v. Davis, No. SC91368 (Mo. banc 8/30/11):
Supreme Court – on procedural grounds -- upholds trial court's ruling that Sec. 566.150 (which creates the crime of sex offenders being in certain parks), is retrospective as applied to offenders who committed their sex offenses before the effective date of the law; Supreme Court holds that the State failed to preserve claim that ban on retrospective laws applies only to civil laws, and not criminal laws.
Facts: Defendant was convicted of sex offense in 1983. Under SORNA, he has to register as a sex offender in Missouri. Sec. 566.150 makes it a Class D felony for a registered sex offender to knowingly be present or loiter within 500 feet of a public park that contains playground equipment or a public swimming pool. Sec. 566.150 became effective in August 2009. In 2010, Defendant was charged with violating Sec. 566.150. He filed a motion to dismiss, claiming that Sec. 566.150 violated the Mo. Constitution's ban on retrospective laws as applied to him because his sex conviction was before the law's effective date. The trial court granted the motion to dismiss. The State appealed.
Holding: The State claims that the prohibition on retrospective laws in Art. I, Sec. 13 applies only to civil statutes, and that Sec. 566.150 is a criminal statute. However, the State never presented this issue to the trial court, and cannot raise it for the first time on appeal. That issue is not preserved for appeal, and is not reviewed. Dismissal affirmed.

State v. Miller, No. WD71175 (Mo. App. W.D. 6/21/11):
(1) Where there was no evidence presented that Defendant touched victim's genitals through clothing, the evidence was insufficient to convict of first degree child molestation; (2) conviction can only be upheld if evidence supports the offense as instructed in the jury instruction, and not just any action illegal under the statute; and (3) where Defendant was charged with sexual acts that occurred in 1997 and 1998, the applicable statute was Sec. 566.010(3) RSMo 1994, which did not criminalize touching

through clothing and application of the subsequent law to Defendant would violate ex post facto.
Facts: Defendant was convicted of first degree child molestation for acts which occurred in 1997 and 1998. The jury instruction instructed jurors to convict if defendant touched the genitals of victim through clothing.
Holding: The State argues that Defendant's conviction can be upheld if the evidence supports any of the methods of committing first degree child molestation, but this is a wrong statement of law. The method of the charged offense is an essential element of the crime. To allow a conviction on a method never submitted to the jury would effectively deny Defendant of his right to a jury trial on the offense as charged. Here, there was no evidence submitted that Defendant touched victim though clothing, so the evidence is insufficient. Further, the offense here is governed by Sec. 566.010(3) RSMo 1994, which did not criminalize touching through clothing. The law was later amended to cover touching through clothing but it would be ex post facto to apply the law enacted after the offense to Defendant. Conviction reversed.

State v. Sharp, No. WD71895 (Mo. App. W.D. 5/31/11):
Where Defendant was charged in 2007 with "assault on a corrections officer," but the assault statute did not include "corrections officers" until 2009, Defendant could not be convicted of such offense, but because all elements of misdemeanor assault were established, appellate court enters conviction for misdemeanor assault.
Facts: In June 2007, Defendant pushed a lit cigarette into a corrections officer's hand at a prison. He was charged and convicted of second degree assault on a corrections officer.
Holding: Defendant contends that his conviction violates his rights to due process and to be free from ex-post facto laws. In June 2007, the assault statute, Sec. 565.082.1(2), did not list "corrections officers" among the class of persons protected under the statute. In 2009, the statute was amended to include them. Because of the amendment, it is presumed that the legislature did not intend "corrections officers" to be covered by the prior statute. Hence, the court erred in finding Defendant guilty of second degree assault under 565.082. However, because all the elements of third-degree assault were proven, appellate court enters conviction for third-degree misdemeanor assault.

*** Peugh v. U.S., 93 Crim. L. Rep. 353, ___ U.S. ___ (U.S. 6/10/13):**
Holding: Sentencing Defendant under new version of USSG that were promulgated after his crime was committed and which increased his punishment violated Ex Post Fatco Clause.

Price v. Warden, 2015 WL 2208422 (5th Cir. 2015):
Holding: The principle that a good-time forfeiture law, enacted after Petitioner's sentencing, is retrospective, even if forfeiture is triggered by post-enactment conduct, is clearly established, and Petitioner is entitled to habeas relief.

U.S. v. Wetherald, 89 Crim. L. Rep. 11 (11th Cir. 3/28/11):
Holding: Even though USSG are only advisory, ex post facto clause still precludes court from applying a USSG that is more severe than the version in effect at the time of the offense.

Gonzalez v. State, 92 Crim. L. Rep. 467 (Ind. 1/10/13):
Holding: Retroactive application of lifetime sex offender registration to a person convicted of the lowest level sex offense violated ex post facto.

Martin v. Kansas Parole Bd., 2011 WL 2279059 (Kan. 2011):
Holding: Amendment that lengthened postrelease supervision was ex post facto.

Massey v. Louisiana Dept. of Public Safety and Corrections, 2014 WL 5393041 (La. 2014):
Holding: Ex post facto was violated by retroactive application of statute that denied good-time credits and early release for Defendant's offense, where statute was in effect at the time of his conviction, but was not in effect at the earlier time of the actual criminal acts.

Department of Public Safety & Corrections v. Doe, 95 Crim. L. Rep. 538 (Md. 6/30/14):
Holding: Where Maryland had held that requiring certain sex offenders to register was ex post facto under the Maryland constitution, Maryland courts had the power to order their names be removed from the registry and this was consistent with the federal SORNA.

Doe v. Dept. of Public Safety and Correctional Services, 92 Crim. L. Rep. 724 (Md. 3/4/13):
Holding: Sex offender registration law was ex post facto under state ex post facto provision as applied to person whose crime occurred years before registration law was enacted.

Moe v. Sex Offender Registry Bd., 2014 WL 1188108 (Mass. 2014):
Holding: Retroactive application of law requiring publication on internet of sex Offenders who had previously not been published violated Offenders' due process rights under State Constitution; public identification of the persons posed serious adverse consequences and was a new legal consequence to events completed on or before the new law.

Shepard v. Houston, 96 Crim. L. Rep. 209 (Neb. 11/7/14):
Holding: New state statute that takes away "good time" credit from inmates if they refuse to give DNA samples cannot be applied retroactively to inmates who were convicted before the statute was passed.

Doe v. State, 96 Crim. L. Rep. 558 (N.H. 2/12/15):
Holding: Sex registration scheme which mandated lifetime registration without any judicial appeal was ex post facto because it was punitive; possibility of lifetime registration is constitutional only if the registrant has an opportunity for judicial review of whether continued registration is necessary.

Riley v. N.J. State Parole Bd., 96 Crim. L. Rep. 9 (N.J. 9/22/14):
Holding: Statute requiring sex offenders to wear GPS monitor cannot be applied to Offenders who committed their crimes before the GPS law was enacted; statute is ex post facto because it imposes additional punishment to an already completed crime.

State v. Ordunez, 2012 WL 2947787 (N.M. 2012):
Holding: Retroactive application of a new law prohibiting credit for time served on probation was ex post facto.

In re Bruce S., 2012 WL 6197528 (Ohio 2012):
Holding: New sex offender law could not be applied to offense committed after its enactment but before its effective date.

Smith v. State, 2013 WL 2458721 (Ala. Crim. App. 2013):
Holding: In death penalty case, Defendant could not be convicted of an aggravator that did not exist at the time of his offense.

People v. Douglas M., 2013 WL 57661105 (Cal. App. 2013):
Holding: Statute imposing additional conditions on probation for sex offenders did not apply retroactively because this likely would violate ex post facto in that, among other things, the statute required probationers to make additional payments and waive privileges against self-incrimination and psychotherapist privilege.

People v. Wade, 2012 WL 1150847 (Cal. App. 2012):
Holding: An amendment of the grand theft statute increasing the monetary threshold for the offense applied retroactively because the amendment was motivated by a desire to save the state money by avoiding sending certain defendants to prison.

People v. Gray, 2011 WL 4060299 (Cal. App. 2011):
Holding: Ex post facto principles were violated by retroactive application of One Strike law.

Strong v. Superior Court, 2011 WL 3796354 (Cal. App. 2011):
Holding: Where homicide statute was amended to remove requirement that victim die within three years, it was ex post facto to apply this to defendants whose three year period regarding their victims had already expired at time of the amendment.

In re Vicks, 2011 WL 1778224 (Cal. App. 2011):
Holding: Victim's Bill of Rights which increased interval between parole hearings was ex post facto when applied to prisoner sentenced before the law.

Ewell v. State, 2012 WL 5935988 (Ga. App. 2012):
Holding: Life sentence under new child molestation statute was ex post facto as applied to Defendant who committed his offense while the old statute was in effect.

Devine v. Annucci, 2014 WL 4912773 (N.Y. Sup. 2014):
Holding: Application of sex offender, statute which was enacted after Defendant's offense but before he was released from prison, which prohibited Defendant from living in his home and prohibited him from going to large segments of his community, was punitive in effect (rather than civil) and thus violated ex post facto.

Berlin v. Evans, 2011 WL 1466616 (N.Y. Sup. 2011):
Holding: Sex offender law which prohibited living within 1,000 feet of schools was ex post facto as applied to persons who committed crimes before the law.

Coppolino v. Noonan, 2014 WL 5140043 (Pa. Comm. Ct. 2014):
Holding: Statute that required sex offenders to update their vehicle registration or change of address, including for temporary lodging, in person within three business days was punitive (not civil), and thus, was ex post facto as applied to Defendant who was convicted prior to the statute.

Com. v. Rose, 2013 WL 6164348 (Pa. Super. 2013):
Holding: Where there was a several year delay between Defendant's acts and the time that murder victim died, it violated ex post facto to apply the murder statute in effect at time of victim's death since that statute increased the sentence; although the crime of murder was not consummated until victim actually died, all of Defendant's acts occurred prior to passage of the harsher statute.

Com. v. Rose, 2012 WL 2362578 (Pa. Super. 2012):
Holding: Application of sentencing statute in effect at time of victim's death was ex post facto; applicable statute was one in effect at time of the acts that gave rise to the death.

Phillips v. State, 2011 WL 2409307 (Tex. Crim. App. 2011):
Holding: Where the statute of limitations had already expired in sex case, it would be ex post facto to apply a new amendment extending the statute of limitations to the Defendant.

Expungement

Doe v. Missouri State Highway Patrol Criminal Records Repository, 2015 WL 4911851 (Mo. App. E.D. Aug. 18, 2015):
(1) A Petitioner seeking to expunge an arrest record under Sec. 610.122.1 need not produce "new evidence" of innocence to have his record expunged; (2) where Petitioner was arrested for third-degree assault for allegedly shooting an air gun out of a car, but Petitioner testified at his expungement hearing that his brother shot the gun without Petitioner's knowledge, the trial court properly found that this proved that that the arrest was based on false information, and there was no probable cause to believe Petitioner committed the offense, even though Petitioner pleaded guilty to an amended charge of illegal parking.

Facts: Petitioner was arrested and charged with third-degree assault for allegedly shooting an air gun out of a car at a pedestrian. He pleaded guilty to an amended charge of illegal parking. He then sought to expunge his arrest record. At the expungement hearing, he testified that his brother shot the gun without his knowledge. The court expunged the arrest record. The State appealed.
Holding: Under 610.122.1, an arrest record may be expunged if the court finds (1) the arrest was based on false information, (2) there was no probable cause, at the time of the expungement action, to believe petitioner committed the offense, (3) no charges will be pursued as a result of the arrest, and (4) the petitioner did not receive an SIS for the offense or related offenses. The State contends that the statute requires a petitioner to present "new evidence" of innocence, similar to what must be done in a habeas corpus action. However, the statute does not require this. Here, Petitioner's testimony established his actual innocence. The State presented no evidence to contradict Petitioner's testimony that his brother committed the offense. Petitioner's testimony also proved that there was no probable cause, at the time of the expungement hearing, to believe Petitioner committed the offense.

Adum v. St. Louis Metropolitan Police Dept., 2014 WL 839961 (Mo. App. E.D. March 4, 2014):
Even though Petitioner presented an affidavit of alleged assault victim that she did not wish to prosecute, Petitioner was not eligible for expungement of his arrest record because he did not affirmatively prove that his arrest was based on false information, i.e., he did not show prove his actual innocence of the offense.
Facts: Petitioner was arrested for a domestic assault offense, which ultimately was not prosecuted. He sought to expunge his arrest record. As evidence, he submitted an affidavit from the alleged victim (his wife) that she did not wish to prosecute Petitioner. In opposition, the State presented two Officers who testified that they observed injuries on the victim's body, and that she had said that Petitioner assaulted her. The trial court ordered expungement. The State appealed.
Holding: Sec. 610.122 allows for expungement of arrest records if certain conditions are met. Here, the only dispute is over conditions that "the arrest was based on false information" and that "[t]here is no probable cause, at the time of the action to expunge, to believe the individual committed the offense." Petitioner has the burden under Sec. 610.122 to show by a preponderance of evidence his actual innocence of the offense for which he was arrested. Here, Petitioner has presented no evidence that his arrest was based on false information. Even though the trial court found his arrest was based on false information, this was against the weight of the evidence because the two Officers testified that they saw injuries on the alleged victim, and there is nothing to show that the Officers were not credible. But even assuming that the court found the Officers to be not credible, the only evidence submitted by Petitioner was the affidavit from victim that she did not wish to prosecute. That is not the same as establishing actual innocence of the offense. Order of expungement reversed.

Stallworth v. State, 2015 WL 1737300 (Miss. 2015):
Holding: Where Defendant's foreign-state sex conviction had been expunged, he was no longer required to register as sex offender.

In re D.J.B., 94 Crim. L Rep. 539, 2014 WL 260560 (N.J. 1/16/14):
Holding: New Jersey statute which allowed expungement of an "adult" conviction if Defendant has not been convicted of a prior or subsequent crime allowed for expungement, even though another statute provided that for purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if committed by an adult, and Defendant had a prior delinquency adjudication; the "adult" expungment statute was not affected by the juvenile statute, which applied only to expungement of juvenile convictions.

People v. Christiansen, 2014 WL 4827853 (Cal. App. 2014):
Holding: Where a statute required that upon a finding of innocence, law enforcement must destroy Defendant's arrest records, this also required that fingerprint impressions obtained at the time of the arrest be destroyed.

Extradition

U.S. v. Kashamu, 89 Crim. L. Rep. 798, 2011 WL 3849642 (7th Cir. 9/1/11):
Holding: An English magistrate's findings that were made prior to Defendant's extradition to U.S. are not binding in U.S. underlying prosecution.

Skaftouros v. U.S., 2010 WL 5299871 (S.D. N.Y. 2010):
Holding: Extradition to Greece should not be granted where Greek arrest warrant was defective under Greek law.

In re LaPlante, 2014 WL 3559397 (Vt. 2014):
Holding: Vermont would not honor extradition request to New Hamphire, where N.H. failed to give any explanation for the 10-year delay in Defendant's sentencing, or evidence that the sentence imposed had not expired by the time of Defendant's arrest.

Factual Basis

Snow v. State, 461 S.W.3d 25 (Mo. App. E.D. 2015):
Even though Defendant/Movant altered a crime scene, there was no factual basis to convict of hindering prosecution, Sec. 575.030, where Defendant's actions did not prevent or obstruct police from the discovery or apprehension of the crime's perpetrator.
Facts: A Man approached Defendant/Movant at his house and began to attack him with a knife. Defendant fought Man off with a wrench. Defendant then threw the wrench in some woods and called police. Before police arrived, Defendant cleaned up the place where the attack occurred to make it look like a burglary was in progress, because Defendant was afraid that police wouldn't believe Defendant acted in self-defense. Man was ultimately charged with attempted murder of Defendant. Defendant was charged with and pleaded guilty to hindering prosecution. Defendant/Movant then filed Rule 24.035 motion, claiming there was no factual basis for the plea.

Holding: Hindering prosecution, Sec. 575.030, occurs if a defendant prevents or obstructs, by means of force, deception or intimidation, anyone from performing an act that might aid in the discovery or apprehension of another person wanted for a crime. The admitted facts here do not establish this. First, the statute requires that a defendant act to prevent arrest of *another* person; here, Defendant's actions in altering the crime scene were designed to prevent his *own* arrest. Second, Defendant's actions did not prevent police from arresting the wanted Man. Sec. 575.030 does not make deceiving law enforcement, by itself, a crime. The deception must prevent or obstruct police from performing an act aiding in the discovery or apprehension of another. The purpose of Rule 24.02(e)'s factual basis inquiry is to protect a defendant who may appear to be pleading voluntarily with an understanding of the charge, but who does so without realizing that his conduct does not actually fall within the charge. That is the case here.

Douglas v. State, 410 S.W.3d 290 (Mo. App. E.D. 2013):
Factual basis was lacking for guilty plea to second degree murder where plea colloquy did not unequivocally show that Defendant, who was the driver of a car from which a passenger shot a person from the car, aided or encouraged shooter to shoot the victim or acted with the purpose of promoting the shooting.
Facts: Defendant pleaded guilty to second degree murder and associated charges. At the plea colloquy, Defendant said that Shooter came and picked him up, and asked him to drive. Defendant drove Shooter where Shooter said to go, and then Shooter pulled out a gun and shot victim from the car. Defendant and Shooter then fled. Defendant said he didn't know Shooter was going to do this and didn't know Shooter had a motive to kill victim. At another point in the plea colloquy, however, Defendant said he knew this was going to happen. Defendant subsequently filed a Rule 24.035 motion, alleging there was not a factual basis for the plea.
Holding: Rule 24.02(e) requires a factual basis for a guilty plea. The dispositive issue here is whether the plea showed that Defendant (Movant) was aware of the nature of the charges necessary to prove that he aided or encouraged Shooter with the purpose of committing second degree murder or acted with the purpose of promoting or furthering Shooter's actions. While Defendant admitted to most of the elements of second degree murder, the plea court failed to unequivocally establish that Movant was driving the car "for the purpose" of committing the offense. The record does not establish that Defendant *unequivocally* understood the nature of the charge against him (emphasis in original). Although the plea court established the Defendant was present during the crime and fled from it, the plea court's questioning of Defendant failed to unequivocally establish that Defendant drove the car knowing that the purpose of the driving was for Shooter to commit the shooting.

Cafferty v. State, 2014 WL 5648639 (Mo. App. W.D. Nov. 4, 2014):
Even though guilty plea form stated that Movant understood the charge of child nonsupport, where Movant told judge during guilty plea that he didn't pay his child support because he couldn't find a job after being released from jail, Movant's guilty plea (1) lacked a sufficient factual basis because he asserted "good cause" for not paying, and (2) was not knowing and voluntary because the record did not show that he understood the specific nature of the charge against him.

Facts: Movant pleaded guilty to criminal nonsupport. During the guilty plea hearing, the judge read the charge to Movant, asked if he had failed to pay child support as alleged, and asked "why was that?" Movant said, "Because I couldn't find work. Ever since I got out of prison it has been hard to find work." The Court accepted the plea. Movant subsequently filed a Rule 24.035 motion.
Holding: Movant claims that no factual basis established that he failed to pay child support "without good cause." At the time Movant pleaded guilty, Sec. 568.040 provided that a person commits the crime of nonsupport if he "knowingly fails to provide, without good cause, adequate support." Given Movant's explanation for why he failed to pay, he did not unequivocally state that he lacked good cause to provide support. Even though Movant signed a petition to enter a plea of guilty and stated that he fully understood the charges against him, a plea petition is not a substitute for a judge insuring that a defendant understands the charge. Movant's answer as to why he didn't pay required that the judge explore further to determine either that Movant had the ability to pay or purposely maintained his inability in order to avoid paying. Here, the record does not show that Movant understood the specific nature and elements of the charge. Conviction vacated and remanded.

Frantz v. State, 2014 WL 4547840 (Mo. App. W.D. Sept. 16, 2014):
(1) Even though Movant said at his guilty plea that counsel had explained the charge to him, that Movant understood it and that Movant was guilty, this does not negate a claim of no factual basis for the charge because a defendant's counsel can misunderstand the elements and law of a charge in explaining them to Movant; and (2) even though Movant had $3,830 in cash that he said was from a drug sale, this did not constitute a factual basis for "money laundering" because there was no physical transfer of the money from one person to another with the purpose to conceal the nature, location, source, ownership or control of the money.
Facts: Movant was arrested with $3,830 in bundled money, and a small amount of marijuana. He admitted the money was from a drug sale. He pleaded guilty to "money laundering," Sec. 574.105.2(2). At the plea colloquy, the court read the charge, asked Movant if counsel had explained the charge and whether he understood it, and whether he was pleading guilty because he was guilty. Later, Movant filed a 24.035 motion alleging there was no factual basis for the plea.
Holding: Missouri case law suggests that the inquiry into whether a sufficient factual basis exists is satisfied by a defendant's assertion that counsel explained the charge and that Movant understood it. The problem, however, is that counsel might misunderstand the elements or law, and convey this misunderstanding to Movant. Thus, a Movant can honestly answer such questions affirmatively and believe himself to be guilty, but he may not, in fact, be guilty under a correct interpretation of law. The purpose of a factual basis inquiry is to protect a defendant from pleading guilty when his conduct does not actually fall within the charge. Sec. 574.105.2(2) requires proof of two transactions: (1) the underlying criminal activity that produces money, and (2) a subsequent transaction involving the physical transfer of the money from one person to another with the purpose to conceal the nature, location, source, ownership or control of the money. Here, there was nothing stated at the guilty plea that showed the second element. Simply reading the charging document which merely quotes the statute is not sufficient to establish a factual

basis. The better practice is for the plea court to ascertain facts on the record regarding a defendant's specific conduct that the State believes supports the elements of the offense charged. The record must reflect the defendant's actual, *factually specific conduct* leading to the charge. Conviction vacated.

U.S. v. Culbertson, 2012 WL 335765 (2d Cir. 2012):
Holding: Defendant's guilty plea to conspiracy to import five kilograms or more of cocaine was not supported by a factual basis, in that the defendant insisted he knew of and agreed to a conspiracy to transport only three kilograms.

U.S. v. Szymanski, 88 Crim. L. Rep. 350294 (6th Cir. 2011):
Holding: Where in child pornography plea the court failed to inform Defendant that the Gov't had to prove he knew that the material he had featured underage persons, this warranted allowing withdrawal of plea because Defendant in his PSI denied any knowledge that the material he had constituted child pornography.

U.S. v. Fard, 2015 WL 75275 (7th Cir. 2014):
Holding: Defendant permitted to withdraw guilty plea for wire fraud where terms "fraudulent intent" and "fraudulent scheme" were not explained; Defendant's knowledge of these concepts would not be greater than an average juror, who would have needed instruction the them.

U.S. v. Spear, 2014 WL 2523694 and 2014 WL 2526120 (9th Cir. 2014):
Holding: Even though Defendant waived right to appeal bargained-for sentence, this agreement did not bar him from appealing if there was a sufficient factual basis for his plea.

State v. Daughtry, 89 Crim. L. Rep. 180 (Md. 4/25/11):
Holding: Where a plea record reflects only that Defendant was represented by counsel and that Defendant was pleading guilty, court will not presume that counsel explained to Defendant the nature of the charges against him; plea is not voluntary on such a sparse record.

State v. Tate, 2015 WL 405339 (N.J. 2015):
Holding: Guilty plea to child abuse for using obscene language in presence of child lacked factual basis where record did not state exactly what the language was so that judge could independently determine if it was abusive.

People v. Worden, 2013 WL 6096113 (N.Y. 2013):
Holding: There was no factual basis for guilty plea for rape where prosecutor, defense counsel and judge all misunderstood definition of "lack of consent' under statute governing date-rape.

Findings of Fact, Conclusions of Law (Rules 24.035 and 29.15)

Burgess v. State, No. SC91571 (Mo. banc 7/19/11):
Holding: Where motion court dismissed postconviction motion without findings of fact and conclusions of law, case is remanded for entry of findings.

Editor's Note: This case is noteworthy not because of the holding, but because the case posed the question of whether a movant can waive his postconviction rights as part of a plea bargain. The Supreme Court did not decide this issue because of the remand. However, in a footnote, the Supreme Court discussed Formal Opinion 126 (which states that it is not being permissible for defense counsel to advise a client regarding waiver of ineffective assistance of counsel by defense counsel): "The binding effect of a formal opinion is limited to disciplinary proceedings that occur after the formal opinion is issued and, even then, is subject to review by this Court when petitioned by any member of the bar who is substantially and individually aggrieved by the opinion. Formal Opinion 126 expressly stated that analysis of whether a waiver of postconviction rights would violate the Constitution or other laws was beyond the scope of the opinion." There is currently pending another case at the Supreme Court which also raises the issue of the validity of waiver of postconviction rights as part of a plea bargain, so the Supreme Court will likely rule on the merits of that issue later.

Voegtlin v. State, 2015 WL 3876591 (Mo. App. E.D. June 23, 2015):
Holding: Motion court's Findings were insufficient under 24.035(j) to allow meaningful appellate review where, on claim that plea counsel was ineffective in failing to object to classification as prior and persistent offender, motion court merely stated general finding that Movant failed to allege facts not refuted by the record and that he was found to be a prior and persistent offender; motion court failed to address why counsel was not ineffective. Remanded for further Findings.

Henningfeld v. State, No. ED100922 (Mo. App. E.D. Dec. 23, 2014):
Holding: Where motion court failed to enter Findings on Movant's claim that counsel was ineffective in failing to object to alleged instructional error, case is remanded pursuant to Rule 29.15(j) for entry of Findings on this issue.

Sneed v. State, 2013 WL 5807392 (Mo. App. E.D. Oct. 29, 2013):
Holding: Where motion court denied Rule 29.15 motion without issuing Findings, this violated Rule 29.15(j) requiring Findings and warranted remand for them.

Henley v. State, No. ED97123 (Mo. App. E.D. 10/30/12):
Holding: Where the motion court failed to issue any Findings on one of Defendant's claims (that counsel was ineffective in waiving closing argument at trial), the motion court failed to comply with Rule 29.15(j) that requires Findings on all claims to allow for meaningful appellate review.

Gray v. State, No. ED97667 (Mo. App. E.D. 9/11/12):
Holding: (1) Claim of ineffective assistance of trial counsel for failure to preserve an issue for appeal is not cognizable in a 29.15 case, but the claim can be properly pleaded

as ineffective assistance of trial counsel for failing to object to admission of the evidence at trial, which likely would have led to the evidence being excluded and an acquittal; and (2) where motion court failed to issue Findings on all issues, case is remanded for Findings on omitted issues because 29.15(j) requires Findings on all issues.

Jackson v. State, No. ED97122 (Mo. App. E.D. 5/29/12):
Holding: Where (1) Movant alleged in a *pro se* Rule 24.035 claim that his counsel had told him he would receive a shorter sentence but not to tell this to the plea court; (2) the plea court did not ask Movant if he had been told to withhold information; and (3) counsel pursuant to *Reynolds v. State*, 994 S.W.2d 944 (Mo. banc 1999), physically attached Movant's *pro se* claim to the amended 24.035 motion filed by counsel, the motion court was required to issue Findings on the *pro se* claim pursuant to Rule 24.035(j), which requires sufficient Findings to permit meaningful appellate review.

Smith v. State, No. ED95666 (Mo. App. E.D. 6/21/11):
Holding: Where trial court issued docket entry "Denied" to conclude Rule 24.035 case, this did not satisfy Rule 24.035(j)'s requirement to issue findings which allow meaningful appellate review.

Dunlap v. State, 452 S.W.3d 257 (Mo. App. W.D. Jan. 13, 2015):
(1) Where Movant alleges ineffective assistance of guilty plea counsel in failing to take actions at sentencing, correct standard for prejudice is whether Movant would have received a lower sentence but for counsel's ineffectiveness; and (2) where motion court failed to make Findings on certain issues, Rule 78.07(c) requires that a motion to amend judgment be filed requesting Findings on those issues in order to preserve the issue for appeal.
Facts: Movant, who had pleaded guilty and received a lengthy sentence, alleged that counsel was ineffective in failing to bring certain sentencing matters to the judge's attention, which would have resulted in a lower sentence. The motion court denied the claim on grounds that Movant's decision to plead guilty would not have been different. Movant raised a separate postconviction issue, on which the motion court failed to make Findings. Movant filed a Rule 78.07(c) motion to amend judgment, but did not argue the failure to make Findings on that particular issue.
Holding: (1) For a claim of ineffective assistance at sentencing, Movant must show that but for counsel's failures, his sentence would have been lower. The motion court erroneously analyzed Movant's claim as to how counsel's performance affected the outcome of the plea, not the outcome of the sentencing phase of the proceeding. Applying the wrong legal standard is reversible error. Case remanded for new Findings applying correct legal standard. (2) Rule 78.07(c) requires that "error[s] relating to the form or language of the judgment, including the failure to make … required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." Here, although Movant filed a 78.07(c) motion, he did not raise the failure to make Findings on the specific issue raised on appeal. Therefore, the issue is not preserved for appeal and cannot be reviewed.

Burnett v. State, 2014 WL 6781291 (Mo. App. W.D. Dec. 2, 2014):
Holding: *Where Judge said at sentencing that he "did not believe in concurrent time" and sentenced Movant to consecutive sentences, this stated a claim that court failed to consider the full range of punishment and warranted specific Findings on the issue to allow for appellate review; case remanded for Rule 24.035 Findings.*
Discussion: The motion court denied Movant's claim on general grounds that Movant failed to meet his burden of proof. Movant then filed an appropriate Rule 78.07(c) motion seeking specific Findings on the court's unwillingness to consider the full range of punishment. The motion court's Findings are inadequate to engage in appellate review. Case remanded for specific Findings in compliance with Rule 24.035(j).

State v. Triplett, No. WD73486 (Mo. App. W.D. 12/20/11):
Holding: (1) Where (a) Defendant filed a motion which appeared to be a hybrid motion to suppress and motion to dismiss, (b) the trial court sustained the motion by dismissing the charge without prejudice, and (c) the State attempted to appeal only the motion to dismiss, the appeal must be dismissed because the State is not appealing the motion to suppress, and the appeal does not meet the requirements for the State to be able to appeal under Sec. 547.200. There is no final judgment because the dismissal was without prejudice. The State can just refile the charge in the trial court. (2) Although civil rule 73.01 gives parties the right to request Findings of Fact and Conclusions of Law before introduction of evidence, there is no similar rule in the criminal rules that requires a trial court to issue Findings in connection with a motion to suppress or other motions. A party (or appellate court) may request them, however, and the trial court may choose to do them, but they aren't mandatory.

Smith v. State, No. WD72074 (Mo. App. W.D. 7/19/11):
Holding: Where (1) motion court denied postconviction claims summarily by finding that "Movant failed to allege specific facts" and that counsel made "trial strategy" decisions regarding the claims; and (2) Movant filed a motion to amend the judgment pursuant to Rule 78.07(c) asking the court for additional findings (which was denied), the findings are not sufficient under Rule 29.15(j) for meaningful appellate review; reversed and remanded for detailed findings.

Gerlt v. State, No. WD72225 (Mo. App. W.D. 4/12/11):
(1) State cannot raise untimeliness of 24.035 motion for first time on appeal because issue is waived if not raised as an affirmative defense in motion court; and (2) claim that motion court's Findings were inadequate is not preserved for appeal unless Movant files a motion to amend judgment pursuant to Rule 78.07(c).
Facts: Movant filed a *pro se* Rule 24.035 motion late. This was not recognized in the motion court, and the motion court denied relief on the merits. Movant appealed, claiming that the motion court's Findings were inadequate. The State claimed the appeal should be dismissed because the *pro se* motion was untimely.
Holding: (1) After *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), failure to file a timely motion is not jurisdictional. Therefore, the untimeliness of a postconviction motion can only be raised as an affirmative defense, and the defense is waived if not timely raised. Here, the defense is not timely raised because it was not

raised in the motion court, but for the first time on appeal. This Court recognizes that the Eastern and Southern Districts have both held to the contrary, but this Court disagrees with them. Thus, the appeal should not be dismissed on this ground. (2) On the merits, Movant claims that the motion court's Findings are inadequate under Rule 24.035(j) for meaningful appellate review. However, Movant failed to file a motion to amend the judgment under Rule 78.07(c), which provides "[i]n all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." This Court now expressly holds that Rule 78.07(c) applies to postconviction proceedings. Since Movant failed to file a motion to amend judgment, the issue is not preserved.

State v. Neal, 2011 WL 1238314 (N.C. Ct. App. 2011):
Holding: Court was required to issue written findings to resolve a material conflict in the evidence over whether Defendant's motion to suppress should be granted.

Guilty Plea

Webb v. State, No. SC91012 (Mo. banc 3/29/11):
Even though Movant said no promises had been made to him to get him to plead guilty, where Movant claimed his attorney erroneously told him he'd only have to serve 40% of his sentence before being eligible for parole but he really had to serve 85%, this was affirmative misadvice and warranted an evidentiary hearing.
Facts: Movant pleaded guilty to first-degree involuntary manslaughter and ACA. Movant's plea deal was for a 10 year sentence. However, the trial court indicated it would reject this deal, impose a 12-year sentence, and allowed Movant the opportunity to withdraw his plea. Movant did not. Later, Movant filed a Rule 24.035 motion claiming that his plea was involuntary and unknowing because his attorney was ineffective for telling him he would only have to serve 40% of his sentence before being eligible for parole, but he really had to serve 85%. The motion court found the claim to be refuted by the record since Movant had said at his plea that no promises were made to him to plead guilty.
Holding: Prior Missouri cases have drawn a distinction between an attorney's failure to inform (which is not ineffective) and giving affirmative misinformation (which is ineffective). Here, Movant claims his attorney affirmatively misinformed him he would only have to serve 40% of his sentence. Movant's negative response to a routine question that no promises were made to him is too general to refute that no such information was given. The State claims that the SAR would have given correct information, but the Supreme Court reviews it and determines the SAR did not. The Supreme Court also notes that the SAR is part of the record of the case, and should be provided to the attorneys and appellate court where requested. (The circuit clerk had refused to provide it). Movant is entitled to an evidentiary hearing on his claim.

Concurring Opinion: *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010)(which held that attorneys must inform defendants of immigration consequences of their guilty pleas) indicates that attorneys have an obligation to inform clients of truly clear consequences of

their guilty pleas. The Missouri Supreme Court's prior cases may need to be expanded to take into account *Padilla* when considering whether counsel rendered ineffective assistance. Other courts have recognized that *Padilla* applies to other situations besides deportation. The 85% rule in this case was even more "certain" than deportation in *Padilla* and counsel has a duty to inform of "certain" consequences. There may be other situations where counsel must advise about consequences – a conviction may disqualify a person from professional licenses, used to deny gov't benefits, access to housing, student loans and health care. Until there is further specific guidance, counsel and courts should be as vigilant as possible to explain to defendants that a guilty plea may carry serious consequences beyond immediate punishment.

Dissenting Opinion: *Padilla* should not be expanded beyond the deportation context.

Depriest v. State, 2015 WL 7455009 (Mo. App. E.D. Nov. 24. 2015):
(1) Plea counsel had actual conflict of interest where he simultaneously represented Movant and her Brother on charges for marijuana found in their residence, and it was apparent that Movant was less culpable than Brother; (2) "Group guilty plea" proceeding prejudiced Movant because plea court failed to inquire about the conflict of interest; (3) where Movant rejected a more favorable plea offer due to her counsel's conflict of interest, remedy is to require State to re-offer the rejected offer; and (4) transcript of "group guilty plea" should not be redacted so as only to include Movant's and Brother's responses, because redacted transcript does not give appellate court a complete picture of what transpired at plea.
Facts: Movant and her Brother were charged with marijuana offenses for marijuana found growing in their residence. Movant and Brother both retained the same counsel, and signed counsel's waiver of conflict of interest. The State offered Movant a 10-year deal with possibility of probation after 120 days. Counsel advised Movant to reject the offer. Movant and Brother ultimately pleaded guilty together under a deal whereby the State would dismiss certain other charges against Movant, if she and Brother pleaded guilty together. The court held a "group guilty plea" with other defendants in order to "save time." Movant was sentenced to the maximum term. She filed a 24.035 motion.
Holding: Movant's plea was involuntary due to counsel's conflict of interest and the group guilty plea procedure. Counsel believed Movant was less culpable than Brother; thus, Movant's and Brother's interests were conflicting. Prejudice is presumed when counsel operates under an actual conflict of interest. Further, the plea court had a duty to inquire about the conflict, but did not because of the group guilty plea. The plea court should not have valued its own time more than the fair administration of justice. The remedy here is to order the State to reoffer the rejected plea offer. Lastly, a full and complete transcript of the group plea should have been prepared, not just a transcript with Movant's and Brother's responses. A full transcript was necessary to give appellate court a complete picture of what occurred.

Depriest v. State, 2015 WL 6473150 (Mo. App. E.D. Oct. 27, 2015):
(1) Plea counsel operated under an actual conflict of interest and prejudice is presumed where counsel represented both Movant and co-defendant, advised Movant to reject a favorable plea offer, and pleaded Movant and co-defendant guilty to a deal whereby

Movant had to accept a blind plea to allow a favorable plea for co-defendant; (2) "group guilty plea" violated Movant's right to fundamental fairness and rendered his plea involuntary, especially where trial court had duty to inquire about conflict of interest but did not; (3) remedy is to allow Movant opportunity to accept the favorable plea offer that was rejected; (4) appellate court grants foregoing relief without an evidentiary hearing; (5) plea court's closure of courtroom during guilty plea violated Movant's right to a public trial; and (6) "redacted" transcript from "group guilty plea" which only contained Movant's and co-defendant's statements was improper; a full transcript should be prepared for appellate review.

Facts: Movant and co-defendant (his sister) were charged with various drug crimes for marijuana found in their residence. The same attorney represented both prior to their guilty pleas. The State offered Movant a 10-year deal with 120 days shock. Counsel advised Movant to reject this offer, and to proceed to preliminary hearing. This caused the favorable offer to be withdrawn. After various pretrial litigation, Movant and co-defendant ultimately pleaded guilty in "blind pleas," but only co-defendant received anything in exchange from the State in doing so. The State agreed that if Movant pleaded guilty with co-defendant, the State would dismiss various charges against co-defendant and allow her to be released from jail pending sentencing. The plea court accepted the pleas in a "group plea" with five other non-related cases in order to "save a great deal of time." Movant was ultimately sentenced to 22 years. He filed a Rule 24.035 motion, which the motion court denied without an evidentiary hearing.

Holding: (1) Counsel operates under a conflict of interest where something was done which was detrimental to Movant's interests and advantageous to a person whose interests conflict with Movant's. Upon such a showing, prejudice is presumed. Here, Movant lost the opportunity to plead to the most favorable terms because counsel chose to proceed with pretrial litigation, which was in co-defendant's interests, but not Movant's. Counsel should have withdrawn. Because counsel's actions favored co-defendant's interests, prejudice is presumed. Even if prejudice were not presumed, the fact that Movant received 22 years after being advised to reject a 10-year probation offer supports that counsel was conflicted and shows that counsel failed to advocate for Movant. (2) The appellate courts have repeatedly warned the plea court here that "group pleas" are disfavored. Given all the circumstances in this case, the "group plea" rendered Movant's plea involuntary, and appellate court grants relief without the need for an evidentiary hearing. The plea court had a duty to inquire about the conflict of interest, but did not. The fact that the State's promises to co-defendant were contingent on Movant's own blind plea should have been a red flag to the plea court, as should the fact that both had the same counsel. The plea court did not protect the interest of justice, but was only interested in "saving time." The scene "smacks of intimidation." Regardless of what Movant actually said on the record at his plea, it is obvious Movant would have felt pressured since Movant's sister was standing right beside him and was the co-defendant. (3) Where ineffective assistance causes a defendant to reject a favorable plea offer, the remedy is order the State to re-offer the favorable plea offer. (5) The plea court further added to the intimidating atmosphere by closing the courtroom during the "group plea." Although the appellate court does not decide the issue because it reverses on other grounds, appellate court notes that the closure likely violated Movant's right to a public trial. (5) Finally, appellate court notes that the transcript submitted on appeal is a

redacted transcript containing only the responses of Movant and co-defendant. Although it is not clear whether this was done by Movant's attorney, the court or court reporter, it is improper. A full transcript is necessary for appellate review, and would have been useful here to see all the responses during the "group plea."

Wright v. State, 411 S.W.3d 381 (Mo. App. E.D. 2013):
Holding: Although Eastern District reluctantly upholds a "group guilty plea" despite prior criticism of the practice by the Eastern District and Missouri Supreme Court, a concurring opinion says that "[d]efense lawyers agreeing to such a procedure may well be presumptively ineffective."

Stanley v. State, No. ED97795 (Mo. App. E.D. 2012):
(1) Even though a second postconviction counsel filed a second amended motion which was untimely, the motion court can grant relief on it if Movant was abandoned by his first postconviction counsel thereby excusing the untimely filing of the second amended motion; and (2) where the guilty plea court failed to advise Movant prior to his plea that he could not withdraw from his non-binding plea agreement if the court chose not to follow the State's recommendation, Movant was entitled to postconviction relief from the plea where the judge imposed a higher sentence.
Facts: Movant/Defendant pleaded guilty pursuant to a non-binding plea agreement under which the State was going to argue for two concurrent three-years sentences, and the defense could argue for probation. The court did not inform Movant prior to his plea that if the court did not follow the State's recommendation, Movant could not withdraw the plea. The court ultimately did not follow the State's recommendation, but instead, sentenced Movant to two consecutive four-year sentences. Movant filed a 24.035 motion, which was timely amended by a first postconviction attorney. Subsequently, the first postconviction attorney withdrew from the case. A second postconviction attorney entered the case and filed a second amended motion alleging that the plea court failed to inform Movant that, should it reject the State's recommendation, Movant could not withdraw his guilty plea. The second amended motion, however, was untimely because the time for filing any amended motion had expired before the second postconviction counsel entered the case.
Holding: (1) The Missouri Supreme Court has recognized limited exceptions to the timeliness requirements of the postconviction rules. A motion court can permit the filing of an untimely amended motion and consider a movant's claims if it determines that a movant was abandoned by postconviction counsel. Counsel abandons a movant when he or she is aware of the need to file an amended motion but fails to do so. In such a case, the court may consider an untimely postconviction motion only when the Movant is free of responsibility for failure to comply with the postconviction rule. Here, a remand is required to determine why the second amended motion was untimely, i.e., whether Movant's first postconviction attorney abandoned him. "If the motion court finds that Movant's second amended motion was untimely due to no fault of Movant, the motion court must permit Movant to withdraw his plea" based on the second amended motion. (2) Under Rule 24.02(d)(2), the plea court was required to tell Movant that his plea could not be withdrawn if the court did not accept the State's recommendation. The court failed to do this before he entered his guilty plea. Due process requires that a defendant

understand the true nature of his agreement before his plea is accepted by a court. The court must tell a defendant clearly and specifically whether he will or will not be able to withdraw the guilty plea if the court exceeds the recommendation. That did not happen here.

Conger v. State, No. ED96015 (Mo. App. E.D. 10/18/11):
Movant was entitled to evidentiary hearing on claim that he was coerced into pleading guilty because his counsel wanted more money for a trial than Movant could pay.
Facts: Movant (defendant) was charged with various offenses. He ultimately pleaded guilty. At the plea hearing, he said he was not threatened or coerced to plead guilty, and expressed general satisfaction with defense counsel. Later, he filed a 24.035 motion claiming he was coerced to plead guilty because he could not afford the fee counsel demanded to go to trial. The motion court found the claim was refuted by the record.
Holding: An attorney's statement to a client for additional fees to take a case to trial is not itself coercive. However, a financial conflict of interest arises when a defendant's inability to pay creates a divergence of interest between counsel and defendant such that counsel pressures or coerces a defendant to plead guilty. Here, Movant pleaded facts which, if true, would warrant relief: Counsel filed motions to withdraw, which were denied; Movant paid counsel $11,500, but counsel said it would cost an additional $20,000 to go to trial; plea counsel pressured Movant by telling him she would not take the cases to trial until additional fees were paid; Movant could not pay the additional $20,000; Movant would not have pleaded guilty had counsel not coerced his decision. The State argues the claim is refuted by the record. But the guilty plea court never informed Movant that if he could not afford counsel for trial, the court would appoint counsel for trial. Movant's general answers that he was not coerced or threatened and was satisfied with counsel do not refute allegations that Movant's counsel told him she would not take the case to trial until he paid more fees and that this pressured him to plead guilty. Remanded for evidentiary hearing.

Brown v. State, No. ED94429-01 (Mo. App. E.D. 7/12/11):
Holding: Where (1) Movant claimed that guilty plea counsel was ineffective because counsel told him he'd only serve 3 to 5 years and (2) the plea record showed the court only asked Movant whether or not any threats or promises had been made to him, Movant's statements were insufficient to cleary refute the claim that counsel promised him a lesser sentence; Movant entitled to evidentiary hearing.

Collins v. State, No. ED94590 (Mo. App. E.D. 3/29/11):
Where Movant alleged his counsel told him he would receive 407 days jail time credit if he pleaded guilty but he later was not given this, Movant was entitled to evidentiary hearing on whether counsel was ineffective.
Facts: Movant pleaded guilty to stealing pursuant to a plea bargain. At his plea, he asked the judge if he would receive jail time credit and the judge said yes. After Movant was delivered to the DOC, he learned that he would only be given 243 days credit instead of 407 days because he was not eligible for time served prior to the date of the offense. (Movant was serving other sentences). Movant filed a Rule 24.035 motion claiming his

attorney had been ineffective in advising him that he would receive 407 days credit. The motion court denied the claim without a hearing.
Holding: Movant may be entitled to vacate his guilty plea if his attorney misinformed him about the number of days credit he would receive. Movant's claim is not refuted by the record, since he specifically asked the judge at his plea if he would be given credit. The State argues that because Movant asked this after his plea was accepted, Movant did not rely on it in pleading guilty. However, the immediacy of the question, the form of the question and the court's response all show the parties' and court's understanding that jail time credit was part of the plea agreement. Movant is entitled to an evidentiary hearing.

Brantley v. State, No. SD30868 (Mo. App. S.D. 4/20/12):
Holding: Where Movant claimed his plea counsel was ineffective in failing to provide him with timely discovery, which caused him to miss a favorable plea offer and later accept a less-favorable one, this stated a viable claim and required a hearing under *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

State v. Thieman, No. SD30818 (Mo. App. S.D. 11/10/11):
Holding: Where Defendant's prior guilty plea had been withdrawn, his statements made in a SAR (sentencing assessment report) could not be used by the State at his trial because Rule 24.02(d)(5) provides that "evidence of a guilty plea, later withdrawn, or an offer to plead guilty …, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers is not admissible in any civil or criminal proceeding against the person who made the plea or offer."

Jack v. State, No. SD30512 (Mo. App. S.D. 8/9/11):
Holding: Denial of Rule 29.07(d) motion to correct manifest injustice is appealable and is governed by rules of civil procedure; judgment becomes final 30 days after entry and notice of appeal is due not later than 10 days thereafter.

State v. Banks, 2015 WL 1546457 (Mo. App. W.D. April 7, 2015):
Where State had agreed as part of a plea bargain "not to file any other cases in which Defendant may have been a suspect in this series of offenses," trial court did not err in dismissing new charges that Defendant was previously suspected of committing.
Facts: In 1991, Defendant pleaded guilty to various sex offenses that occurred in the Westport area of Kansas City. The plea agreement included a provision that the State would "not file any other cases in which Defendant may have been a suspect in this series of offenses." In 2012, based on new DNA testing, the State charged Defendant with several pre-1991 sex offenses. Defendant filed a motion to dismiss based on the 1991 plea agreement. The court dismissed various offenses that took place in Westport and where there was evidence presented that Defendant was a suspect before 1991. The State appealed.
Holding: The 1991 plea agreement prohibits the State from prosecuting Defendant for (1) any new charges that were part of the same "series of offenses," and (2) in which Defendant was a known suspect at the time of the 1991 plea agreement. Because Defendant filed the motion to dismiss, he has the burden of proving the new charges violate the 1991 agreement. Here, the trial court found that Defendant was a known

suspect in some of the new charges based on a lab analysis request in 1991 that Defendant was being investigated for the crimes. The trial court found that Defendant was a known suspect in one home invasion rape, and that other charges were part of a small cluster of offenses occurring in Westport. It was reasonable for the court to believe that because Defendant was a suspect in one of the cases, he was a suspect in all of them. Motion dismissing charges affirmed.

Cafferty v. State, 2014 WL 5648639 (Mo. App. W.D. Nov. 4, 2014):
Even though guilty plea form stated that Movant understood the charge of child nonsupport, where Movant told judge during guilty plea that he didn't pay his child support because he couldn't find a job after being released from jail, Movant's guilty plea (1) lacked a sufficient factual basis because he asserted "good cause" for not paying, and (2) was not knowing and voluntary because the record did not show that he understood the specific nature of the charge against him.
Facts: Movant pleaded guilty to criminal nonsupport. During the guilty plea hearing, the judge read the charge to Movant, asked if he had failed to pay child support as alleged, and asked "why was that?" Movant said, "Because I couldn't find work. Ever since I got out of prison it has been hard to find work." The Court accepted the plea. Movant subsequently filed a Rule 24.035 motion.
Holding: Movant claims that no factual basis established that he failed to pay child support "without good cause." At the time Movant pleaded guilty, Sec. 568.040 provided that a person commits the crime of nonsupport if he "knowingly fails to provide, without good cause, adequate support." Given Movant's explanation for why he failed to pay, he did not unequivocally state that he lacked good cause to provide support. Even though Movant signed a petition to enter a plea of guilty and stated that he fully understood the charges against him, a plea petition is not a substitute for a judge insuring that a defendant understands the charge. Movant's answer as to why he didn't pay required that the judge explore further to determine either that Movant had the ability to pay or purposely maintained his inability in order to avoid paying. Here, the record does not show that Movant understood the specific nature and elements of the charge. Conviction vacated and remanded.

State v. Hopkins, 2014 WL 928973 (Mo. App. W.D. March 11, 2014):
Holding: Even though Defendant who pleaded guilty was denied his right of allocution at sentencing, the appellate court has no authority to hear this on direct appeal from a guilty plea, but the issue may be raised in a Rule 24.035 motion; a direct appeal of a guilty plea is limited to issues relating to subject matter jurisdiction and the sufficiency of the charging documents.

Frye v. State, 2013 WL 324029 (Mo. App. W.D. Jan. 29, 2013):
Holding: Where Rule 24.035 Movant alleged that plea counsel was ineffective in failing to communicate a plea offer to him (causing him to have entered a guilty plea on less favorable terms), case is remanded to motion court for Findings on prejudice, i.e., whether Movant demonstrated a reasonable probability that the State would not have withdrawn the offer and that the trial court would not have rejected a plea agreement based on the offer.

Dodson v. State, No. WD73680 (Mo. App. W.D. 4/24/12):
Where (1) plea agreement was for "four and defer," and (2) judge did not inform Defendant that if judge did not give probation that Defendant would not be able to withdraw his plea, this failure to warn failed to comply with Rule 24.02(d)1(B) and necessitated postconviction relief.
Facts: Defendant and State entered into a plea agreement for "four and defer." At the plea, the judge informed Defendant that the judge could impose 4 years in prison, that the State would not be taking a position on probation, and that no one had promised Defendant probation. The judge did not tell Defendant that if the judge denied probation, Defendant could not withdraw his plea. The judge ultimately sentenced Defendant to 4 years. The Defendant filed a motion to withdraw the plea. At a hearing on that motion, defense counsel testified that the parties' true agreement was for probation, but that the plea was phrased the way it was because the judge had a policy of refusing to accept agreements for probation. After the motion to withdraw was denied, the Defendant (Movant) filed a Rule 24.035 motion.
Holding: Rule 24.02(d)1(B) allows a prosecutor and defendant to reach an agreement whereby the prosecutor will make a recommendation or agree not to oppose the defendant's request for a particular disposition with the understanding that such recommendations or requests shall not be binding on the court. Where such an agreement is entered, Rule 24.02(d)2 provides that "if the agreement is pursuant to Rule 24.02(d)1(B), the court shall advise the defendant that the plea cannot be withdrawn if the court does not adopt the recommendation or request." Here, this was a non-binding plea agreement within the ambit of Rule 24.02(d)1(B) because of use of the term "defer," i.e., the State would neither recommend nor oppose probation. Therefore, the agreement fell within the scope of 24.02(d)2, which required the court to advise Defendant that the plea could not be withdrawn if the court did not accept it. Since the court did not so warn Defendant, postconviction relief is granted.

*** U.S. v. Davila, 93 Crim. L. Rep. 392, ___ U.S. ___ (U.S. 6/13/13):**
Holding: Federal judge's participation in plea negotiations in violation of Federal Rule 11 does not require vacating the guilty plea unless the record shows Defendant would not have pleaded guilty in the absence of the error.

*** Chaidez v. U.S., 92 Crim. L. Rep. 609, ___ U.S. ___ (U.S. 2/20/13):**
Holding: *Padilla*'s ruling that defense attorneys must warn clients about immigration consequences is a new rule that is not retroactive on collateral review.

*** Missouri v. Frye, ___ U.S. ___, 90 Crim. L. Rep. 849 (U.S. 3/21/12):**
Holding: (1) Failure to communicate plea offer to Defendant before it expired is ineffective assistance of counsel, and (2) to show prejudice a Defendant must show a reasonable probability he would have accepted the expired offer and a reasonable probability the prosecution would have adhered to the agreement and that it would have been accepted by the court.

*** Freeman v. U.S., ___ U.S. ___, 2011 WL 2472797 (U.S. 6/23/11):**
Holding: Even though a defendant pleads guilty with a particular recommended sentence as a condition of the plea, defendant may still be eligible for a sentence reduction if the U.S. Sentencing Commission later lowers the sentencing range

*** Premo v. Moore, ___ U.S. ___, 88 Crim. L. Rep. 474, 131 S.Ct. 733 (U.S. 1/19/11):**
Holding: State court decision that counsel was not ineffective in not moving to suppress statement to police before a guilty plea was not unreasonable, where Defendant had also confessed to other individuals.

U.S. v. Bui, 2014 WL 5315061 (3d Cir. 2014):
Holding: Plea counsel was ineffective in misadvising Defendant that he would be eligible for safety valve sentence reduction in pleading guilty, when he wasn't eligible.

U.S. v. Paladino, 96 Crim. L. Rep. 113 (3d Cir. 10/8/14):
Holding: Even though Defendant's plea agreement was for a stipulated sentence, he must still be given right of allocution.

U.S. v. Saferstein, 90 Crim. L. Rep. 788 (3d Cir. 1/26/12):
Holding: A district judge's botched summary of the terms of a plea bargain during a plea colloquy had the effect of expanding the defendant's right to appeal, notwithstanding specific limitations to the contrary laid out in the written agreement.

U.S. v. Orocio, 89 Crim. L. Rep. 620 (3d Cir. 6/29/11):
Holding: *Padilla* is retroactive to cases on collateral review.

U.S. v. Sanya, 96 Crim. L. Rep. 333 (4th Cir. 12/17/14):
Holding: Defendants who claim judge participated in plea negotiations in violation of Rule 11 must show only a "reasonable probability" they would not have pleaded guilty without the judge's actions; they need not show that "but for" the judge's actions, they would have gone to trial.

U.S. v. Fisher, 93 Crim. L. Rep. 43 (4th Cir. 4/1/13):
Holding: Officer's lies on a search warrant rendered the Defendant's guilty plea involuntary, where defense lawyer testified that she advised Defendant to plead guilty because there were no grounds to challenge the warrant (but there would have been if the lies had been known).

U.S. v. Smith, 89 Crim. L. Rep. 244 (4th Cir. 5/17/11):
Holding: Even though Defendant pleaded guilty, this did not waive a claim that there was a breakdown of communication so bad as to constitute constructive denial of counsel.

U.S. v. Chavful, 2015 WL 1283671 (5th Cir. 2015):
Holding: Where Gov't breached plea agreement that prohibited it from using information provided by Defendant against him, Defendant was entitled to resentencing before a different judge.

U.S. v. Batamula, 97 Crim. L. Rep. 267 (5th Cir. 6/2/15):
Holding: Even though guilty plea judge said Defendant was likely to be deported, counsel can still be deemed ineffective and Defendant prejudiced by counsel's failure to give immigration consequence warnings prior to plea; Defendant is entitled to advice about immigration prior to deciding whether to plead guilty.

U.S. v. Hemphill, 95 Crim. L. Rep. 195 (5th Cir. 5/2/14):
Holding: Comments by judge about strength of State's evidence and statements about how people who did not plead guilty got longer sentences constituted forbidden judicial participation in plea negotiations.

U.S. v. Pena, 93 Crim. L. Rep. 450 (5th Cir. 6/18/13):
Holding: Federal judge improperly participated in plea negotiations when he suggested at a status conference that the agreement being negotiated should be linked to resolution of other pending charges against Defendant.

U.S. v. Carreon-Ibarra, 90 Crim. L. Rep. 788 (5th Cir. 2/29/12):
Holding: A district court's admonition to a guilty-pleading defendant that he faced a sentence of five years to life was not sufficient to ensure that the defendant understood that he was pleading guilty to a machinegun possession offense with a mandatory minimum of 30 years.

U.S. v. Hogg, 2013 WL 38354009 (6th Cir. 2013):
Holding: Even though plea court advised Defendant of the then-correct range of punishment at time of plea, court's failure to anticipate that Fair Sentencing Act (which had just gone into effect) would apply to persons who were sentenced after the effective date and would thus substantially reduce Defendant's range of punishment entitled Defendant to withdraw his plea.

U.S. v. Mendez-Santana, 2011 WL 1901545 (6th Cir. 2011):
Holding: Defendant had absolute right to withdraw an unaccepted guilty plea, and did not have to show legal error to do so.

U.S. v. Szymanski, 88 Crim. L. Rep. 350294 (6th Cir. 2011):
Holding: Where in child pornography plea the court failed to inform Defendant that the Gov't had to prove he knew that the material he had featured underage persons, this warranted allowing withdrawal of plea because Defendant in his PSI denied any knowledge that the material he had constituted child pornography.

U.S. v. Mendez-Santana, 89 Crim. L. Rep. 318 (6th Cir. 5/20/11):
Holding: Federal district court has no discretion to deny a defendant's motion to withdraw a guilty plea before its acceptance by the court.

U.S. v. Fard, 2015 WL 75275 (7th Cir. 2014):
Holding: Defendant permitted to withdraw guilty plea for wire fraud where terms "fraudulent intent" and "fraudulent scheme" were not explained; Defendant's knowledge of these concepts would not be greater than an average juror, who would have needed instruction the them.

U.S. v. Lara, 2012 WL 3763617 (8th Cir. 2012):
Holding: Sentencing court erred in allowing plea agreement to be breached where sentencing court allowed Gov't to present evidence of drug quantity listed in the PSI after the Gov't had stipulated to the quantity in the agreement.

U.S. v. Heid, 2011 WL 3503314 (8th Cir. 2011):
Holding: Even though Defendant may have known that some drug money was being used when she posted bail for her son, there was no basis to reasonably determine that Defendant conspired to further an illegal purpose in posting bail, so there was no factual basis for money laundering conspiracy.

U.S. v. Morales Heredia, 96 Crim. L. Rep. 83 (9th Cir. 10/8/14):
Holding: Gov't implicitly breached plea agreement which called for recommending a low-end sentence when Gov't undermined that recommendation by arguing Defendant's criminal history and danger to the community.

U.S. v. Kyle, 94 Crim. L. Rep. 175 (9th Cir. 10/30/13):
Holding: Trial judge impermissibly participated in plea negotiations under Rule 11(c)(1) when he rejected a plea agreement as too lenient and then hinted that the Defendant would get a life sentence if he didn't accept a different plea deal.

U.S. v. Arqueta-Ramos, 94 Crim. L. Rep. 13 (9th Cir. 9/20/13):
Holding: "Group guilty plea" involving multiple defendants in an effort to deal with increases in court caseloads violated Rule 11.

U.S. v. Alcala-Sanchez, 2012 WL 45462 (9th Cir. 2012):
Holding: Government's admission that it mistakenly recommended a sentence which differed from that found in the plea agreement and its subsequent correction did not cure the breach of the plea agreement and required that the sentence be vacated and remanded for resentencing before a different judge.

U.S. v. Hunt, 89 Crim. L. Rep. 830 (9th Cir. 9/1/11):
Holding: Where the guilty plea did not admit what type of drug was involved, Defendant could only be sentenced to the maximum penalty for an unspecified drug.

U.S. v. Escamilla-Rojas, 89 Crim. L. Rep. 210 (9th Cir. 5/12/11):
Holding: "Cattle-call" guilty pleas where judge addresses a bunch of defendants in court about consequences of pleading guilty before accepting their individual pleas does not satisfy Rule 11's requirement that judge personally address defendants.

U.S. v. Bonilla, 88 Crim. L. Rep. 774, 2011 WL 833293 (9th Cir. 3/11/11):
Holding: Even though Defendant knew it was possible he might be deported if he pleaded guilty, counsel was ineffective under *Padilla* in not advising of the virtual certainty of deportation.

U.S. v. Symington, 2015 WL 1323149 (11th Cir. 2015):
Holding: Defendant was entitled to withdraw his guilty plea where his plea agreement called for a sentence that was legally unauthorized under ACCA.

U.S. v. Tobin, 2012 WL 1216220 (11th Cir. 2012):
Holding: The court's involvement in plea discussions warranted resentencing of the defendant before a different district judge.

U.S. v. Davila, 90 Crim. L. Rep. 416 (11th Cir. 12/21/11):
Holding: Magistrate who recommended that Defendant plead guilty to avoid long prison term violated federal Rule against judges' participation in plea negotiations.

U.S. v. Riley, 93 Crim. L. Rep. 99 (C.A.A.F. 4/16/13):
Holding: Military judges must inform persons pleading guilty to sex offenses that they will be required to register as sex offenders; failure to do so justifies withdrawal of guilty plea.

U.S. v. Hayes, 90 Crim. L. Rep. 670 (C.A.A.F. 2/13/12):
Holding: A servicemember who has pleaded guilty does not have to establish a prima facie case of duress before the military judge is required to reopen the issue of the providence of the guilty plea.

U.S. v. Hartman, 89 Crim. L. Rep. 76 (C.A.A.F. 3/15/11):
Holding: Judge in military court-martial must advise a defendant charged with consensual sodomy of how *Lawrence v. Texas*, 539 U.S. 558 (2003) applies in the military context alleged in the charge.

U.S. v. Guyton, 2014 WL 3940047 (E.D. La. 2014):
Holding: Defendant did not breach his plea agreement to testify in another case just because his attorney told the Prosecutor that he would not cooperate with Gov't; there was no showing that Defendant authorized counsel to breach the plea agreement.

U.S. v. Pressley, 2012 WL 1150826 (D.N.J. 2012):
Holding: Where Defendant entered into a plea agreement that the Gov't would not initiate any further criminal charges against him for accepting bribes, the later indictment

of Defendant on charge of illegally receiving Social Security Supplement Income (SSI) benefits by concealing his bribe income violated plea agreement.

Stone v. State, 89 Crim. L. Rep. 167, 2011 WL 1519382 (Alaska 4/22/11):
Holding: Where state law permitted a sentence review of guilty plea, Defendant had right to counsel for the appeal since *Halbert v. Michigan*, 545 U.S. 605 (2005) held that 14th Amendment requires states to provide counsel to guilty-pleading indigent defendants for first-tier appellate review.

People v. Clancey, 2013 WL 1667822 (Cal. 2013):
Holding: Record was ambiguous whether plea court engaged in prohibited plea negotiations, where there was no clear statement in the record that judges' statement as to possible sentence represented court's best judgment of what Defendant's sentence would be regardless of whether Defendant pleaded guilty or went to trial, and record was ambiguous as to whether court extended leniency because of a plea.

Barlow v. Commissioner of Correction, 2014 WL 2472145 (Conn. 2014):
Holding: Counsel was ineffective in conveying only the fact of a plea offer to Defendant without any advice on whether the offer was a good one or not in the context of the facts of the case; counsel had professional obligation to advise about the merits of a plea offer vs. a trial; Defendant passed up 9 year offer, and got 35 years at trial.

Alcorn v. State, 2013 WL 2631143 (Fla. 2013):
Holding: Motion court misapplied prejudice standard when it held that Movant could not have been prejudiced by misinformation about maximum sentence he could receive when he only received the lower (but erroneous) "maximum" sentence; motion court was required to consider whether Defendant would have accepted the plea offer if he had been correctly informed of the maximum sentence.

Alexander v. State, 97 Crim. L. Rep. 170 (Ga. 5/11/15):
Holding: Counsel's failure to advise client on parole ineligibility when advising about a plea offer was ineffective in light of *Padilla*'s analysis about advising of consequences of a plea; *Padilla* requires courts to rethink issue of direct vs. collateral consequences.

Nazario v. State, 2013 WL 3475330 (Ga. 2013):
Holding: Even though Defendant pleaded guilty to 17 counts, this did not waive claim that some of the counts had legally "merged."

Booth v. State, 89 Crim. L. Rep. 646, 2011 WL 2556035 (Idaho 6/29/11):
Holding: Where counsel erroneously told Defendant to take a plea because he would be subjected to a fixed life sentence if he went to trial (which was legally incorrect), the erroneous advice was ineffective.

People v. Snyder, 90 Crim. L. Rep. 391 (Ill. 12/1/11):
Holding: The remedy where a judge fails to inform a defendant entering a negotiated guilty plea that she would be required to pay restitution is to allow her to withdraw her plea, not to vacate the restitution order.

People v. Snyder, 2011 WL 5999261 (Ill. 2011):
Holding: Withdrawal of guilty pleas, and not vacatur of restitution, was appropriate remedy for failure to admonish defendant about possibility of restitution order before accepting guilty pleas.

Ponce v. State, 2014 WL 2535244 (Ind. 2014):
Holding: Defendant's guilty plea was not knowing and voluntary where he did not speak English and the plea colloquy was not communicated in a language he understood.

In re Flatt-Moore, 90 Crim. L. Rep. 624 (Ind. 1/12/12):
Holding: A prosecutor in a check fraud case engaged in conduct prejudicial to the administration of justice by giving the crime victim total veto power during plea bargaining with the defendant.

State v. Fannon, 2011 WL 1900285 (Iowa 2011):
Holding: Prosecutor's breach of plea agreement not to recommend consecutive sentences was not cured by the prosecutor's withdrawal of his remarks, for purposes of determining if Defendant's counsel was ineffective in failing to object to the breach or request appropriate relief.

State v. Fannon, 89 Crim. L. Rep. 315 (Iowa 5/20/11):
Holding: (1) Where prosecutor breaches a no-recommendation plea offer by arguing for a high sentence at the sentencing hearing, this is not cured by then withdrawing the recommendation; and (2) under these circumstances, counsel was ineffective in failing to request resentencing before a different judge.

State v. Peterson, 2013 WL 475775 (Kan. 2013):
Holding: State breached plea agreement to stand silent at sentencing by arguing that Defendant's dishonest answers in a psychological examination showed he was likely to reoffend.

U.S. v. Kentucky Bar Ass'n, 95 Crim. L. Rep. 613 (Ky. 8/21/14):
Holding: Prosecutors, including federal prosecutors working in the State, cannot ethically require Defendants to waive claims of ineffective assistance of counsel as a condition of accepting a plea bargain.

Editor's Note: Missouri Formal Ethics Opinion 126 adopts a similar rule in Missouri.

State v. Daughtry, 89 Crim. L. Rep. 180 (Md. 4/25/11):
Holding: Where a plea record reflects only that Defendant was represented by counsel and that Defendant was pleading guilty, court will not presume that counsel explained to

Defendant the nature of the charges against him; plea is not voluntary on such a sparse record.

Com. v. Dean-Ganek, 2012 WL 75663 (Mass. 2012):
Holding: Commonwealth lacked authority to require trial judge to vacate defendant's guilty plea to larceny from a person, where the trial court imposed a sentence less severe than that set forth in the plea agreement and the Commonwealth sought an increased sentence.

Com. v. Clarke, 2011 WL 2408984 (Mass. 2011) & State v. Golding, 2011 WL 1835274 (Tex. App. 2011):
Holding: *Padilla* is retroactive.

Com. v. Clarke, 89 Crim. L. Rep. 589 (Mass. 6/17/11):
Holding: *Padilla v. Kentucky*'s holding that defense counsel has 6th Amendment duty to advise noncitizens of immigration consequences is retroactive to cases on collateral review.

People v. Brown, 2012 WL 3537818 (Mich. 2012):
Holding: Before pleading guilty a Defendant must be advised of the maximum enhanced sentence he could receive, and failure to so advice requires that Defendant's guilty plea be vacated, not just that he be re-sentenced without the enhancement.

People v. C: Stephen Harris
Damien de Loyola**, 2012 WL 1918920 (Mich. 2012):**
Holding: Court was required at time of guilty plea to inform Defendant that he would be subject to lifetime electronic monitoring.

State v. Brown, 2011 WL 13753 (Minn. 2011):
Holding: Defendant's statements made at pretrial hearing about a possible guilty plea were statements made in connection with a plea offer and were not admissible at trial.

State v. Landera, 2013 WL 645822 (Neb. 2013):
Holding: State breached plea agreement that required it to recommend probation where prosecutor made remarks at sentencing suggesting that the State did not want probation after having reviewed the presentence report.

State v. Mena-Rivera, 88 Crim. L. Rep. 367 (Neb. 12/17/10):
Holding: Where statute required court to advise about immigration consequences "prior to acceptance of a guilty plea," statute was not satisfied where court did this only at arraignment; warning must be given immediately before plea.

State v. Tricas, 290 P.3d 255 (Nev. 2012):
Holding: Grant of transactional immunity to Defendant who had pleaded guilty but not yet been sentenced entitled Defendant to be able to withdraw her plea.

State v. Tate, 2015 WL 405339 (N.J. 2015):
Holding: Guilty plea to child abuse for using obscene language in presence of child lacked factual basis where record did not state exactly what the language was so that judge could independently determine if it was abusive.

State v. Lipa, 2014 WL 4745559 (N.J. 2014):
Holding: Even though Defendant pleaded guilty to sexual assault, he should be allowed to withdraw his plea where he asserted he was innocent and that counsel was ineffective in preparing the case; Defendant presented some evidence that contradicted the charges.

People v. Max, 2012 WL 6115635 (N.Y. 2012):
Holding: Where during guilty plea colloquy Defendant said he had been in a psychotic state and hearing voices at time of crime, plea court had a duty to inquire further as to Defendant's possible assertion of an NGRI defense before accepting the plea.

State v. Gilbert, 96 Crim. L. Rep. 156 (Ohio 10/21/14):
Holding: Once Defendant has been sentenced, trial court's jurisdiction ends and court has no authority to grant State's motion to vacate the plea due to Defendant's alleged breach of the plea agreement.

State v. Heisser, 2011 WL 814959 (Or. 2011):
Holding: Plea agreement that permitted State to seek upward departures and Defendant to seek presumptive sentences did not prevent Defendant from challenging the timeliness of the State in seeking the upward departures.

S.C. Bar Ethics Advisory Comm. Op. 14-02:
Holding: A lawyer cannot ethically serve as Prosecutor in a City that forbids dismissals or plea deals as a matter of City policy unless the police approve them; Rule 3.8(a) states that a prosecutor cannot pursue a charge he knows is not supported by probable cause; Rule 3.8(a) makes prosecutorial discretion an ethical requirement that City's policy vitiated.

State v. Fox, 93 Crim. L. Rep. 320 (S.D. 5/29/13):
Holding: Even though Defendant entered into a deferred prosecution agreement whereby Defendant agreed to plead guilty if he violated conditions of deferred prosecution within 24 months, where after he violated the conditions, his agreement to plead guilty was not enforceable because it led to an involuntary waiver of both his right to voluntarily enter a plea of his choice and his right to trial.

Calvert v. State, 89 Crim. L. Rep. 216 (Tenn. 4/28/11):
Holding: Defense counsel's failure to advise client that offense to which client was pleading guilty carried a mandatory lifetime term of community supervision was ineffective assistance.

State v. Alexander, **2012 WL 1564336 (Utah 2012):**
Holding: A defendant's guilty plea to burglary premised on his remaining in the victim's residence with the intent to commit a sexual battery was not knowing, voluntary, and intelligent because the trial court failed to explain and ensure the defendant understood the "intent to commit sexual battery" element.

State v. Lovell, 2011 WL 2683237 (Utah 2011):
Holding: Trial court's failure to strictly comply with rule setting out constitutional rights a defendant must understand before entering guilty plea constituted good cause to withdraw the plea.

State v. McDonald, 97 Crim. L. Rep. 53 (Wash. 4/9/15):
Holding: State violated plea agreement about sentencing when it had an investigating officer speak to the court from perspective of victim; prosecution cannot undercut a plea bargain by proxy through agents of the prosecution.

State v. Dillard, 96 Crim. L. Rep. 251 (Wis. 11/26/14):
Holding: Defendant was entitled to withdraw his plea where he was erroneously informed by his counsel, prosecutor and judge that he faced a mandatory sentence of LWOP if he did not accept the State's plea offer and was convicted at trial; the erroneous advice regarding sentence undermined the voluntariness of accepting the plea offer vs. going to trial.

Starrett v. State, 286 P.3d 1033 (Wyo. 2012):
Holding: Guilty plea in sex abuse case was set aside where plea court failed to advise Defendant that his guilty plea to a felony may result in his loss of right to possess a firearm or ammunition.

People v. Labora, 2010 WL 4968641 (Cal. App. 2010):
Holding: Trial court engaged in improper judicial plea bargaining.

People v. Wigod, 88 Crim. L. Rep. 402 (Ill. App. 12/3/10):
Holding: Guilty plea colloquy must inform Defendant about mandatory restitution.

Tigue v. Com., 2011 WL 3962504 (Ky. Ct. App. 2011):
Holding: Defendant was denied counsel at critical stage where his counsel failed or refused to file motion to withdraw guilty plea.

Kubrom v. State, 2015 WL 1414004 (Minn. App. 2015):
Holding: Where Defendant pleaded guilty to a definite-term sentence as part of a plea agreement, amendment of the sentence to include a five-year mandatory conditional-release term violated plea agreement by extending his total prison exposure, and allowed Defendant to withdraw his plea.

State v. Smullen, 2014 WL l3970238 (N.J. Super. Ct. App. 2014):
Holding: Plea counsel was ineffective in failing to inform sex Defendant that he would be subject to lifetime supervision.

State v. Barlow, 89 Crim. L. Rep. 211 (N.J. Super. Ct. App. 5/6/11):
Holding: Defense counsel has professional obligation to move to withdraw a guilty plea for a client if client requests this, and failure to do so is ineffective assistance.

People v. Williams, 995 N.Y.S.2d 559 (App. Div. 2014):
Holding: Guilty plea was not knowing and voluntary where none of the parties realized the plea called for a legally unauthorized sentence.

State v. Trammell, 2014 WL 3565667 (N.M. App. 2014):
Holding: State caselaw rule that a defendant must be advised by counsel that he will have to register as a sex offender was not a "new rule," and therefore, was retroactive.

State v. Favela, 2013 WL 4499459 (N.M. App. 2013):
Holding: Even though the trial court warned Defendant about immigration consequences, this never cures the prejudice from counsel's ineffectiveness in failure to warn under *Padilla*, because judges cannot know a defendant's priorities or use information strategically in negotiating pleas; also, advice by a judge is not the same as advice by counsel who knows more specific information about the case.

State v. Caldwell, 2013 WL 6047171 (Ohio App. 2013):
Holding: Trial court abused discretion in rejecting plea bargain where its statement that the plea agreement did not comport with interest of justice would preclude virtually any plea bargain.

People v. Brignolle, 971 N.Y.S.2d 866 (Sup. 2013):
Holding: Exceptional circumstances existed for Defendant charged with drug possession to enter diversion program without a guilty plea, because Defendant was a noncitizen and a conviction would make him deportable.

People v. Kollie, 2013 WL 91980 (N.Y. County Ct. 2013):
Holding: Where alien-Defendant would be deported if he pleaded guilty to drug possession, this was an exceptional circumstance warranting placement in a pretrial diversion program without requiring a plea of guilty.

Ex parte Zantos-Cuebas, 2014 WL 715057 (Tex. App. 2014):
Holding: Where habeas petitioner who spoke only Spanish alleged he did not understand the written advisements as to immigration consequences of his plea, this stated a claim that was not frivolous on its face.

Ex Parte Moussazadeh, 2012 WL 468518 (Tex. Crim. App. 2012):
Holding: Counsel's misinformation to defendant on parole eligibility, on which he relied in pleading guilty, was ineffective assistance of counsel.

Ex parte Tankleskaya, 2011 WL 2132722 (Tex. App. 2011):
Holding: Plea counsel was ineffective in failing to inform permanent legal resident-Defendant that her guilty plea to misdemeanor drug possession would render her presumptively inadmissible upon re-entry to the U.S. if she left the country; this rendered her plea involuntary, especially when counsel knew that Defendant was planning an out-of-country trip.

Immigration

*** Mellouli v. Lynch, ___ U.S. ___, 135 S.Ct. 1980 (June 1, 2015):**
Holding: The "categorical approach" must be used to determine whether a lawful alien is deportable for possession of drug paraphernalia; "[T]o trigger removal under Sec. 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug 'defined in [Sec. 802]," not to "the drug trade in general."

*** Moncrieffe v. Holder, 93 Crim. L. Rep. 121, ___ U.S. ___ (U.S. 4/23/13):**
Holding: If a legal alien's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the offense is not an "aggravated felony" under the Immigration and Nationality Act that is ineligible for discretionary relief from deportation by the Attorney General. Court adopts "categorical approach" to determine if the state offense of conviction is an aggravated felony under federal law by comparing the state statute to the the federal statute. Here, the federal Controlled Substances Act makes distribution of marijuana either a felony or misdemeanor. Since Georgia's statute (under which alien was convicted) does not reveal whether remuneration or more than a small amount was involved, the conviction did not necessarily involve facts that correspond to a felony offense under CSA.

*** Chaidez v. U.S., 92 Crim. L. Rep. 609, ___ U.S. ___ (U.S. 2/20/13):**
Holding: *Padilla*'s ruling that defense attorneys must warn clients about immigration consequences is a new rule that is not retroactive on collateral review.

U.S. v. Gill, 95 Crim. L. Rep. 224 (2d Cir. 5/7/14):
Holding: *Vartelas v. Holder* (U.S. 2012) allows certain noncitizens charged with illegally re-entering country after a felony conviction to collaterally challenge their deportation.

Kovacs v. U.S., 94 Crim. L. Rep. 704 (2d Cir. 3/3/14):
Holding: *Padilla* error will entitle Defendant to writ of error coram nobis where Defendant can show that he either would have litigated a meritorious defense, or would have negotiated a better deal with no adverse immigration consequences, or would have gone to trial but for counsel's mistaken advice regarding immigration.

U.S. v. Orocio, 2011 WL 2557232 (3d Cir. 2011), Com. v. Clarke, 2011 WL 2408984 (Mass. 2011), Denisyuk v. State, 90 Crim. L. Rep. 163 (Md. 10/25/11) & State v. Golding, 2011 WL 1835274 (Tex. App. 2011):
Holding: *Padilla* is retroactive.

U.S. v. Orocio, 89 Crim. L. Rep. 620 (3d Cir. 6/29/11):
Holding: *Padilla* is retroactive to cases on collateral review.

Amos v. Lynch, 97 Crim. L. Rep. 293 (4th Cir. 6/10/15):
Holding: A noncitizen's Maryland conviction for "causing abuse" of child does not equate to federal crime of "sexual abuse of minor," 8 USC 1101(a)(43)(a), for purposes of deportation of aliens who commit certain felonies; the state law allowed conviction if a defendant failed to act to stop child abuse, while the federal crime required some "affirmative act."

U.S. v. Akinsade, 2012 WL 3024723 (4th Cir. 2012):
Holding: Defendant was entitled to writ of coram nobis alleging ineffective assistance of counsel where he was no longer in custody on his criminal case; had no reason to challenge his prior conviction until he was detained by immigration authorities; and the risk of deportation was an adverse consequence sufficient to create an Article III case or controversy.

U.S. v. Batamula, 97 Crim. L. Rep. 267 (5th Cir. 6/2/15):
Holding: Even though guilty plea judge said Defendant was likely to be deported, counsel can still be deemed ineffective and Defendant prejudiced by counsel's failure to give immigration consequence warnings prior to plea; Defendant is entitled to advice about immigration prior to deciding whether to plead guilty.

U.S. v. Urias-Marrafo, 94 Crim. L. Rep. 705, 2014 WL 805455 (5th Cir. 2/28/14):
Holding: (1) Court must consider *Padilla* claim even if presented in motion to withdraw guilty plea, rather than in post-conviction collateral attack action, because a court should address *Padilla* claims sooner rather than later; and (2) even though guilty plea judge gave some warnings about immigration consequences, this did not cure counsel's ineffectiveness in failing to warn of such consequences, because it is counsel's duty, not the court's, to give such warnings.

U.S. v. Becerril-Pena, 93 Crim. L. Rep. 212 (5th Cir. 5/2/13):
Holding: USSG 5D1.1 which states that a sentencing court should not ordinarily impose a term of supervised release on a Defendant-alien who is likely to be deported does not limit supervised release to "extraordinary" cases.

U.S. v. Garcia-Rodriguez, 89 Crim. L. Rep. 213, 2011 WL 1631837 (5th Cir. 5/2/11):
Holding: Federal prisoner is "released from imprisonment" for purposes of supervised-release statute, 18 USC 3583, on the date he is transferred from Bureau of Prisons to Immigration and Customs Enforcement, regardless of whether he leaves the confinement of the facility.

U.S. v. Zamudio, 2013 WL 2402861 (7th Cir. 2013):
Holding: Without imposing any term of supervised release, sentencing court lacked authority to impose post-imprisonment requirement on Defendant to be turned over to immigration authorities for removal and to remain outside the U.S.

U.S. v. Aguelera-Rios, 95 Crim. L. Rep. 454 (9th Cir. 6/17/14):
Holding: Alien Defendant convicted of illegal re-entry can challenge the underlying deportation under *Moncrieffe v. Holder* (U.S. 2013).

U.S. v. Raya-Vaca, 96 Crim. L. Rep. 205 (9th Cir. 11/10/14):
Holding: Defendant convicted of illegal reentry following a prior deportation showed that he was prejudiced by the due process violations in the expedited removal proceedings because he may not have been removed since he came to U.S. very young, had a long-term relationship with a U.S. citizen, and had fathered U.S. children.

Valle del Sol Inc. v. Whitting, 94 Crim. L. Rep. 86 (9th Cir. 10/8/13):
Holding: Ariz. statute that makes it unlawful for a "person who is in violation of a criminal offense" to harbor or transport an alien is void for vagueness because this phrase is unintelligible, and the statute is also preempted by federal law.

U.S. v. Carmen, 92 Crim. L. Rep. 15 (9th Cir. 9/14/12):
Holding: If Gov't deports an alien-witness who has exculpatory information before defense counsel has an opportunity to interview witness, this denies Defendant the right to present a complete defense.

U.S. v. Reyes-Bonilla, 2012 WL 360771 (9th Cir. 2012):
Holding: Alien who could not read English did not waive his right to defense counsel and was denied his due process right during expedited removal because he was advised of his rights in a language that he could not understand.

U.S. v. Barajas-Alvarado, 89 Crim. L. Rep. 791 (9th Cir. 8/24/11):
Holding: Alien charged with illegal reentry can challenge the fairness of the original expedited removal process.

U.S. v. Sandoval-Gonzalez, 89 Crim. L. Rep. 159 (9th Cir. 4/25/11):
Holding: Defendant who claims derivative U.S. citizenship in contesting a charge of illegal reentry does not have to make the preliminary evidentiary showing required to assert an affirmative defense.

U.S. v. Bonilla, 88 Crim. L. Rep. 774, 2011 WL 833293 (9th Cir. 3/11/11):
Holding: Even though Defendant knew it was possible he might be deported if he pleaded guilty, counsel was ineffective under *Padilla* in not advising of the virtual certainty of deportation.

U.S. v. Reyes, 2012 WL 5389697 (N.D. Cal. 2012):
Holding: Alien-Defendant's prior conviction for possessing a short-barrel shotgun was not a crime of violence, and thus not an aggravated felony that would subject him to expedited removal from the U.S.

U.S. v. Trujillo-Alvarez, 2012 WL 5295854 (D. Or. 2012):
Holding: After a judge determined that alien-Defendant was eligible for release on bail and was not a flight-risk, the Executive Branch had the option of either releasing him from ICE detention, or abandoning the prosecution and proceeding immediately to deportation.

U.S. v. Bran, 2013 WL 2565518 (E.D. Va. 2013):
Holding: (1) Where Gov't deported a witness who would likely have provided favorable testimony for Defendant and Gov't was aware at time of deportation that witness had information about case, some sanction for the Gov't's conduct was appropriate; but (2) appropriate sanction was a "missing witness" jury instruction, not dismissal of case.

People v. Arriaga, 320 P.3d 1141 (Cal. 2014):
Holding: Appeal challenging denial of *Padilla* claim regarding immigration consequences of a guilty plea does not require a certificate of probable cause to appeal.

State v. Sarrabea, 94 Crim. L. Rep. 117, 2013 WL 5788888 (La. 10/15/13):
Holding: La. law making it a felony for an alien to drive without documentation demonstrating lawful presence in the U.S. is preempted by federal law in the area of alien registration.

Com. v. DeJesus, 95 Crim. L. Rep. 271 (Mass. 5/19/14):
Holding: Plea counsel's advice to Defendant that his guilty plea would make him "eligible for deportation" was not specific enough under *Padilla*; counsel was required to advise that his deportation would be "presumptively mandatory" under federal law.

Com. v. Sylvain, 2013 WL 4849098 (Mass. 2013):
Holding: Massachusetts applies *Padilla* retroactively under state constitution.

Com. v. Clarke, 89 Crim. L. Rep. 589 (Mass. 6/17/11):
Holding: *Padilla v. Kentucky*'s holding that defense counsel has 6th Amendment duty to advise noncitizens of immigration consequences is retroactive to cases on collateral review.

Com. v. Gautreaux, 88 Crim. L. Rep. 543 (Mass. 1/20/11):
Holding: Article 36 of the Vienna Convention on Consular Relations creates an individually enforceable right to consular notification, but to obtain a new trial for violation, Defendant must show a substantial risk of miscarriage of justice.

Ramirez v. State, 2014 WL 2773025 (N.M. 2014):
Holding: *Padillia* is retroactive as a matter of state law, since New Mexico had required attorneys to advise of immigration consequences as a matter of state law anyway. (U.S. Supreme Court has held that *Padillia* is not retroactive as a matter of federal law).

People v. Peque, 94 Crim. L. Rep. 298, 2013 WL 6062172 (N.Y. 11/19/13):
Holding: Trial judges are required to warn defendants pleading guilty to felonies of likely immigration consequences.

People v. Ventura, 90 Crim. L. Rep. 160 (N.Y. 10/25/11):
Holding: Court should not dismiss an appeal because Defendant has been involuntarily deported since appeal was filed.

Va. State Bar Standing Comm. On Legal Ethics, Proposed Opinion 1876, 96 Crim. L. Rep. 362 (Va. 11/20/14):
Holding: Va. Bar to adopt Rule that prosecutors cannot ethically offer an unrepresented alien Defendant a plea offer that can get Defendant (unknowingly) deported, even if the offer involves no jail time; such conduct purposely exploits a Defendant's lack of counsel.

Ortega-Araiza v. State, 95 Crim. L. Rep. 575 (Wyo. 8/6/14):
Holding: Counsel's failure to inform Defendant that he would be deported upon his guilty plea was not cured by Judge's generic warning that "certain felony convictions may be the basis for deportation"; *Padilla* required clear warning that deportation would result.

State v. Favela, 2013 WL 4499459 (N.M. App. 2013):
Holding: Even though the trial court warned Defendant about immigration consequences, this never cures the prejudice from counsel's ineffectiveness in failure to warn under *Padilla*, because judges cannot know a defendant's priorities or use information strategically in negotiating pleas; also, advice by a judge is not the same as advice by counsel who knows more specific information about the case.

People v. Brignolle, 971 N.Y.S.2d 866 (Sup. 2013):
Holding: Exceptional circumstances existed for Defendant charged with drug possession to enter diversion program without a guilty plea, because Defendant was a noncitizen and a conviction would make him deportable.

People v. Kollie, 2013 WL 91980 (N.Y. County Ct. 2013):
Holding: Where alien-Defendant would be deported if he pleaded guilty to drug possession, this was an exceptional circumstance warranting placement in a pretrial diversion program without requiring a plea of guilty.

Ex parte Zantos-Cuebas, 2014 WL 715057 (Tex. App. 2014):
Holding: Where habeas petitioner who spoke only Spanish alleged he did not understand the written advisements as to immigration consequences of his plea, this stated a claim that was not frivolous on its face.

Ex parte Tankleskaya, 2011 WL 2132722 (Tex. App. 2011):
Holding: Plea counsel was ineffective in failing to inform permanent legal resident-Defendant that her guilty plea to misdemeanor drug possession would render her presumptively inadmissible upon re-entry to the U.S. if she left the country; this rendered her plea involuntary, especially when counsel knew that Defendant was planning an out-of-country trip.

Indictment & Information

State v. Sisco, 2015 WL 1094821 (Mo. banc March 10, 2015):
(1) Even though State delayed trial three years and then entered a nolle prosequi to effectively get a further continuance, the State has complete discretion to dismiss and refile as long as double jeopardy has not attached and the statute of limitations has not expired; and (2) in issue of first impression, the standard of review for whether Defendant's constitutional right to speedy trial was violated is de novo review, not "abuse of discretion."
Facts: Defendant was charged in 2006. In 2008, Defendant announced ready and requested a speedy trial. Various delays occurred thereafter due to problems with a State's witness and the State providing late discovery. Trial was then scheduled in April 2009, but in order to effectively get a continuance, the State entered a *nolle prosequi* on the trial date, and re-filed the charges later that same day. Defendant filed a motion to dismiss with prejudice claiming violation of his right to speedy trial. Defendant was eventually tried and convicted in late 2009.
Holding: (1) Under Sec. 56.087, the State has complete discretion to dismiss and re-file a case as long as double jeopardy has not attached and the statute of limitations has not expired. Once the State dismisses, the trial court has no power to dismiss with prejudice. Defendant argues that allowing the State to dismiss and refile violates *Klopfer v. North Carolina*, 386 U.S. 213 (1967), because it would allow a case to go on indefinitely. Missouri courts have distinguished *Klopfer* in the past, but here, Defendant never raised this argument to the trial court, so it is not preserved. (2) This Court has never articulated the standard of review for determining whether the constitutional right to speedy trial has been violated. Under the post-1986 version of Sec. 545.780.5 and the constitution, if there is a violation of the constitutional right to speedy trial, the case must be dismissed. While an abuse of discretion standard might have been appropriate before the 1986 statute, it no longer is. The correct standard is *de novo*. The Court does not apply a deferential standard of review, but makes its own conclusions with regard to whether a violation occurred. Here, balancing the *Barker v. Wingo* factors, the Court finds no violation, although it does weigh the *nolle prosequi* "heavily" against the State.

State v. Mixon, No. SC92230 (Mo. banc 11/13/12):
Holding: Sec. 556.036.5 RSMo., which provides that a prosecution is commenced for a felony when a complaint is filed, does not violate Art. I, Sec. 17 Mo.Const. Thus, the applicable statute of limitations was tolled when the State filed a complaint against Defendant, even though there was not an information or indictment prior to expiration of the statute of limitations.

In the Interest of J.T., 2014 WL 5462402 (Mo. App. E.D. Oct. 28, 2014):
Holding: Where Juvenile was charged with second-degree assault, Sec. 565.060.1(2) for knowingly causing physical injury by means of a dangerous instrument, trial court plainly erred in convicting her of second –degree assault under Sec. 565.060.1(3) for recklessly causing serious physical injury, because this violated Juvenile's rights to notice of the charged offense and to be convicted only of the charged offense, since second-degree assault under Sec. 565.060.1(3) is not a lesser-included offense second-degree assault under Sec. 565.060.1(2). This is because it is possible to cause mere "physical injury" without causing "serious physical injury."

In the Interest of: T.P.B., 2014 WL 4411669 (Mo. App. E.D. Sept. 9, 2014) & In the Interest of J.L.T., 2014 WL 4411679 (Mo. App. E.D. Sept. 9, 2014):
Where Defendant-Juvenile was charged with second degree assault for "knowingly causing physical injury to another person by means of a dangerous instrument," Sec. 565.060.1(2), but trial court found Defendant guilty of second degree assault for "recklessly causing serious physical injury to another person," Sec. 565.060.1(3), this violated Defendant's rights to notice of the charged offense and to prepare a defense, since recklessly causing serious physical injury is not a lesser-included offense of knowingly causing physical injury by means of a dangerous instrument.
Facts: Defendant-Juveniles were charged with second degree assault for knowingly causing physical injury by means of a dangerous instrument, Sec. 565.060.1(2). The trial court found Defendants guilty of recklessly causing serious physical injury to another person, Sec. 565.060.1(3).
Holding: An uncharged offense is a "nested" lesser-included offense if it is impossible to commit the charged offense without necessarily committing the uncharged offense. To commit the uncharged offense, Defendants must have committed "serious physical injury." But to commit the charged offense, Defendants need only have caused an ordinary "physical injury." Because it is possible to commit an ordinary physical injury without causing serious physical injury, it is possible for Defendants to have committed the charged offense without committing the uncharged one. Thus, Sec. 565.060.1(3) is not a lesser-included offense of Sec. 565.060.1(2). The trial court violated due process by convicting of an uncharged offense. Defendants discharged.

State v. Diaz-Rey, 2013 WL 1314968 (Mo. App. E.D. April 2, 2013):
Holding: Charging alien-Defendant in Missouri state court with forgery, Sec. 570.090, for using a false Social Security number on a job application was not preempted by federal law involving employment of aliens.

State v. Beam, No. ED94457 (Mo. App. E.D. 3/8/11):
(1) Even though defense counsel announced in Defendant's presence that they were having a bench trial, where nothing in the record indicated that Defendant knew of her right to jury trial and voluntarily waived it, proceeding to bench trial was plain error; and (2) information was insufficient to charge making improper right turn under Sec. 304.015 because that statute only prohibits improper left turns or U-turns.
Facts: Defendant was charged with felony leaving the scene of an accident, misdemeanor making an improper right turn and other misdemeanors. At a pretrial hearing, defense counsel said "we're here to discuss an OR bond and set the case for a bench trial." The court then set the case for a "nonjury trial." At the later trial, defense counsel said in opening statement, "we're trying this case to the bench today because the case revolves around sufficiency of evidence." After being found guilty, Defendant appealed.
Holding: (1) The trial court plainly erred when it conducted the bench trial without obtaining a waiver of jury trial for the felony case from Defendant in open court and on the record as required by Rule 27.01(b). A waiver by the defendant of a jury trial in a felony case must appear from the record with unmistakable clarity. In misdemeanor cases, however, a defendant must demand a jury trial. Here, the record does not show that Defendant made a voluntary waiver of her right to a jury trial in her felony case. She was never questioned personally about her understanding of the right. The fact that her attorney requested a bench trial in her presence does not demonstrate that Defendant personally voluntarily waived the right. Thus, she is granted a new trial on her felony conviction, but not on other misdemeanors because she didn't demand a jury trial on those. (2) The information charged Defendant with making an improper right turn not at an intersection under Sec. 304.015. However, Sec. 304.015 does not prohibit this; it only prohibits "any left turn or semicircular or U-turn." Defendant correctly claims the information was insufficient to charge a violation of Sec. 304.015. This is an issue that can properly be raised for the first time on appeal. Defendant's conviction under 304.015 is reversed and case remanded to allow State to amend the information.

State v. Muhammad, No. ED94232 (Mo. App. E.D. 3/1/11):
(1) Even though Defendant was charged with false imprisonment, where court erroneously instructed on felonious restraint but then entered judgment for false imprisonment, this was not plain error since false imprisonment was a lesser-included offense of felonious restraint; but (2) where court sentenced Defendant to range for a Class D felony, this was plain error because false imprisonment, as found, was a Class A misdemeanor.
Facts: Defendant was charged with false imprisonment. At trial, however, the court without objection instructed the jury on the offense of felonious restraint. The court then entered judgment for false imprisonment as a Class D felony and sentenced Defendant to four years.
Holding: (1) A trial court cannot instruct on an offense not charged unless it is a lesser-included offense. Felonious restraint is not a lesser-included offense of false imprisonment; rather the opposite is true – false imprisonment is a lesser offense of felonious restraint. However, the variance between the charge and instructions is not fatal here. By finding the greater offense of felonious restraint, the jury necessarily found

the lesser of false imprisonment. Moreover, the trial court entered judgment for false imprisonment. (2) However, the four year sentence is plain error. This is because false imprisonment is a Class A misdemeanor unless the defendant took the victim from the state, which is not the case here, Sec. 565.130.2. The sentence should not have exceeded one year. Sentence vacated and remanded for resentencing.

U.S. v. Steffens, 2010 WL 4670504 (E.D. Mo. 2010):
Holding: Indictment for back fraud was insufficient where it failed to allege that Defendant made any misrepresentation or that his silence violated a duty of disclosure.

State v. Dozier, 2015 WL 545931 (Mo. App. S.D. Feb. 10, 2015):
Holding: Prosecutor may orally or in writing enter a *nolle prosequi* to a charge at any time before the case is submitted to a jury, and unless jeopardy has attached, the dismissal is without prejudice; after a prosecutor so dismisses a case, trial court has no jurisdiction to make the dismissal with prejudice.

State v. Shepherd, 2013 WL 2190152 (Mo. App. S.D. May 21, 2013):
Where Defendant was charged with first degree child molestation, Sec. 566.067.1, for allegedly touching Child's genitals, trial court abused its discretion in allowing State after close of evidence to submit an alternative charge of sexual misconduct, Sec. 566.083.1(3), for inducing Child to expose his genitals, since this was not a lesser-included offense of the original charge and violated due process by failing to give notice of the charged offense.
Facts: Defendant was charged with first degree child molestation, Sec. 566.067.1 RSMo. Cum. Supp. 2006, for allegedly touching Child's genitals. The case proceeded to trial on this charge. At the close of all the evidence, the trial court allowed the State to amend the information to submit, over defense objection, an alternative charge of sexual misconduct for knowingly inducing the Child to expose his genitals. Defendant was acquitted of first degree child molestation, but convicted of sexual misconduct.
Holding: Due process requires that a criminal defendant have fair notice of the charged crime. Sexual misconduct is not a lesser-included offense of first degree child molestation since it is not established by proof of the same or less than all the facts required to establish first degree child molestation. The amendment of the information to charge this at the close of all the evidence added a second offense to the case for which Defendant was not tried and did not receive fair notice or a meaningful opportunity to defend. Hence, the conviction must be vacated. Case is remanded with directions to dismiss the second amended information as an impermissible pleading, and to enter a new judgment acquitting Defendant of first degree child molestation as charged in the original information.

State v. Canaday, 2015 WL 8238881 (Mo. App. W.D. Dec. 8, 2015):
Amendment of child molestation charge at close of all evidence to charge different manner of committing offense prejudiced Defendant because the defense he presented became inapplicable under the amended charge; Rule 23.08 allows amendment of a charge during trial only if no additional or different offense is charged, and Defendant's substantial rights are not prejudiced.

Facts: Defendant was charged with child molestation, statutory rape, and intentionally exposing a person to HIV. The child molestation count was based on a charge that Defendant touched Victim's breast. At trial, Victim testified that Defendant placed his penis in her vagina, and touched her "front private" with his hand. At the close of all evidence, the State amended the child molestation count to charge that Defendant placed his hand on her vagina.
Holding: The amendment made Defendant's line of questioning throughout trial inapplicable because no witness testified Defendant touched Victim's breast. Knowing there was an absence of such testimony, Defendant argued that although damage to Victim's vagina was found, the damage was caused by digital penetration rather than penile penetration, making the evidence insufficient to prove the statutory rape charge. Being aware that digital penetration was not a lesser-included charge of statutory rape, Defendant believed it was a safe, strategic decision to essentially admit digital penetration, as opposed to penile penetration. By amending the charge, Defendant was left with no defense to child molestation. The State contends Defendant should have known the charge would be amended because there was nothing in discovery about touching Victim's breast; but the State chose to charge that, and Defendant wasn't required to predict the State's incompetence. Remanded for new trial on child molestation.

State v. Wright, 2014 WL 1592530 (Mo. App. W.D. April 22, 2014), and **State v. Lovett, 2014 WL 1592299 (Mo. App. W.D. April 22, 2014):**
Even though trial court purported to dismiss an information against Defendants, where the trial court's order was unclear as to whether it was a dismissal and additional counts were apparently still pending, the appellate court was unable to discern what the trial court did and the judgment was not final, so there was no jurisdiction for the State to appeal.
Facts: Defendants were charged, in relevant part, with delivering or possessing an imitation controlled substance, Sec. 195.242, and other drug charges. Defendants were possessing or selling "Sedation Incense," claiming it had an effect "similar" to marijuana. They did *not* claim it was marijuana. Defendants filed motions to dismiss. Among their claims was that Sec. 195.010(21)(the definition of imitation controlled substance) was void for vagueness because it failed to give fair notice of what conduct was illegal, and alternatively, the information was insufficient for failure to charge a crime because the Defendants never represented their substance to be marijuana. In accordance with an agreement with the parties, the trial court entered Findings of Fact, Conclusions of Law. The trial court found that there were no appellate cases addressing the sufficiency of evidence in situations where a defendant is alleged to have possessed or have sold an item knowing that it was not a controlled substance, but claiming it was "similar" to a controlled substance. The trial court found that appellate cases under the statute all involved imitations which the defendants represented to be illegal drugs. The trial court concluded that "[i]t is hoped that an appellate decision will help clear up this area of law. So Ordered." The State appealed.
Holding: The appellate court cannot conduct appellate review on this record, because the appellate court cannot determine what the trial court did, or whether its action is a final judgment. The trial court's Findings fail to state what relief, if any, the trial court is

actually granting. The Findings simply say, "So Ordered." Although the parties seem to believe that the trial court dismissed the information, the Findings never state that. Even assuming that this was a dismissal, there are other counts on other charges that apparently are still pending. Judgments resulting in dismissal of *all* counts charged are final judgments from which the State can appeal. Missouri law is "unclear" as to whether the dismissal of some, but not all, counts in a multi-count information constitutes a final judgment for purposes of appeal, and Western District declines to address that issue here, because it doesn't want to speculate on the meaning of the Findings. Lastly, the trial court appears to have wanted to enter something akin to "summary judgment" in favor of Defendants, but there is no procedure for summary judgment in a criminal case in Missouri. In passing, however, the Western District notes in *Wright* in footnote 12 that Rule 24.04(b)(1), which provides that "[a]ny defense or objection which is capable of determination without trial of the general issue may be raised before trial by motion," could arguably create a procedure for dismissal of informations or indictments for insufficient evidence under an analogous federal case.

State v. Jackson, No. WD73323 (Mo. App. W.D. 6/5/12):
Even though the State originally charged Defendant as a prior offender and he was found by the court to be such, where the State filed a later information that failed to charge prior offender status, the later information controls and Defendant was entitled to jury sentencing.
Facts: In December 2006, Defendant was indicted for various offenses. On the day of trial, the State filed an information in lieu of indictment charging Defendant as a prior offender. The trial court found him to be a prior offender based on a prior felony conviction. However, before final instructions were read to the jury, the State filed an amended information which omitted any reference to being a prior offender. The issue of punishment was not submitted to the jury. After conviction, Defendant appealed and claimed he was entitled to jury sentencing.
Holding: The State's last-filed amended information superseded all prior informations under Sec. 545.110. Sec. 558.021 requires that prior offender status be pleaded and proven prior to the case being submitted to the jury. Since the last-filed information contained no prior offender allegation, it wasn't before the court, and the State cannot try to plead this after the jury's verdict. Thus, the court's finding of prior offender status based on the prior information was a nullity. Case remanded for jury sentencing.

In re Grand Jury Proceedings, 94 Crim. L. Rep. 668, 2014 WL 702193 (1st Cir. 2/20/14):
Holding: Prosecutors who empanel a new grand jury cannot enforce by civil contempt a subpoena duces tecum issued by an earlier, now-defunct grand jury.

U.S. v. Whitefield, 2012 WL 3591038 (4th Cir. 2012):
Holding: Forced accompaniment for a bank robbery that results in death is an additional offense element, not just a sentencing factor, so instructing the jury on this offense when a different offense was charged violates the Fifth Amendment Grand Jury Clause.

U.S. v. Blevins, 2014 WL 2711159 (5th Cir. 2014):
Holding: Even though Gov't had filed information about a prior conviction as part of a first indictment, where that indictment was dismissed, the Gov't was required to file the prior conviction information again as part of the second indictment in order for it to be effective.

U.S. v. LaDeau, 94 Crim. L. Rep. 198, 2013 WL 5878214 (6th Cir. 11/4/13):
Holding: Where court had suppressed evidence that made prosecution for possession of child pornography impossible, and Gov't then charged conspiracy to receive child pornography (which carried a greater sentence), a judge may presume prosecutorial vindictiveness violative of due process if Defendant establishes that the Gov't has some "significant stake" in deterring Defendant's exercise of his rights and the Gov't's conduct was "somehow unreasonable;" here, Defendant met that test, warranting dismissal of new charge, because while it would have been reasonable to charge conspiracy to possess child pornography (which would have been possible), it was unreasonable to charge conspiracy to receive, since "receipt" carries a higher mandatory minimum sentence than conspiracy to possess.

U.S. v. Steffen, 687 F.3d 1104 (8th Cir. 2012):
Holding: Defendant's indictment failed to sufficiently allege a scheme to defraud where it failed to set forth sufficient facts of this.

U.S. v. Pietrantonio, 2011 WL 869477 (8th Cir. 2011):
Holding: Venue for violation of SORNA was not proper in Minnesota for a trip from Minnesota to Nevada, or for a second trip from Nevada to Massachusetts; although Minnesota had a connection to the first trip, it had no connection to the second trip, and the indictment was duplicitous, such that the appellate court could not vacate the conviction concerning the second trip without violating Defendant's right to a unanimous jury verdict.

U.S. v. Lang, 94 Crim. L. Rep. 40 (11th Cir. 10/3/13):
Holding: Multi-count indictment which alleged multiple transactions under $10,000 failed to adequately charge violation of 31 USC 5324(a)(3) because the unit of prosecution is each structuring of an amount over $10,000, not each transaction involving a lesser amount.

U.S. v. Madden, 93 Crim. L. Rep. 694 (11th Cir. 8/16/13):
Holding: District court's unobjected to constructive amendment of an indictment is subject to plain error review.

U.S. v. Schmitz, 2011 WL 754148 (11th Cir. 2011):
Holding: Indictment alleging theft of federal program funds was insufficient without a statement of the facts and circumstances of the offense sufficient to inform Defendant of the specific offense.

U.S. v. Rainey, 2013 WL 2181285 (E.D. La. 2013):
Holding: An indictment charging obstruction of a congressional inquiry or investigation violated the 5th Amendment Grand Jury Clause where it failed to allege that Defendant knew of the inquiry or investigation, which was an essential element of the offense.

U.S. v. Coiscou, 2011 WL 2518764 (S.D. N.Y. 2011):
Holding: Magistrate judge had authority to dismiss complaint for lack of probable cause at initial appearance, even though preliminary hearing had not yet been held.

U.S. v. Jackson, 2013 WL 782602 (E.D. N.C. 2013):
Holding: As employees of licensed firearms dealers, Defendants could not be charged with felony offense of making false statements with respect to information required to be kept in the records of a licensed firearms dealer; rather, they had to be charged under the misdemeanor provision covering any licensed dealer who made false statements about the records.

U.S. v. Lien, 2013 WL 5530537 (E.D. Wash. 2013):
Holding: Even though Defendant presented a check for $68,000 to a car dealership to buy a truck and Defendant knew he didn't have enough money in his checking account to cover this, that did not sufficient allege bank fraud in the indictment since there was no allegation that the account was fraudulent or that the check was altered, forged or not genuine.

Young v. State, 97 Crim. L. Rep. 174 (Ind. 5/14/15):
Holding: Even though attempted aggravated battery was a lesser included offense of murder, Defendant did not receive fair notice of this charge where State charged him as an accomplice to murder by shooting, but then argued at trial that Defendant committed attempted battery by beating victim with fists; this was a completely different offense, based on a completely different means used to commit the offense than charged.

State v. Turner, 2014 WL 4377356 (Kan. 2014):
Holding: Indictment should be dismissed where there were numerous errors in the grand jury proceeding, including questioning Defendant even after he invoked his 5th Amendment right against self-incrimination, and admitting irrelevant police testimony suggesting that indicting Defendant could help with investigation of an unrelated murder.

Com. v. Hamilton, 2013 WL 5763180 (Ky. 2013):
Holding: Trial court had jurisdiction to hear Defendant's claim the Health Department had violated laws of Kentucky in how it changed certain drug from Schedule V to Schedule III controlled substance.

Com. v. Humberto H., 94 Crim. L. Rep. 338 (Mass. 11/26/13):
Holding: Even though Defendant had five baggies of marijuana, that did not establish probable cause to charge intent to distribute, because there was no information about the weight or value of the marijuana.

Com. v. Clarke, 89 Crim. L. Rep. 589 (Mass. 6/17/11):
Holding: *Padilla v. Kentucky*'s holding that defense counsel has 6th Amendment duty to advise noncitizens of immigration consequences is retroactive to cases on collateral review.

State v. Buckhalter, 2013 WL 4027101 (Miss. 2013):
Holding: Indictment for manslaughter which alleged Defendant "willfully" caused death of her stillborn child was fatally flawed and provided inadequate notice, where it did not allege how Defendant "willfully" caused the death by culpable negligence.

Clay v. Eighth Judicial Dist. Ct., 2013 WL 3480306 (Nev. 2013):
Holding: Because the term "physical injury" as used in abuse and neglect statute would not be understood by lay people without a definition, prosecutor was required to instruct on that element in grand jury proceeding.

Rugamas v. Eighth Judicial Dist. Ct. ex rel. County of Clark, 2013 WL 336674 (Nev. 2013):
Holding: Statute that allows admission of statements made to others of a child under age 10 about sexual abuse does not apply in grand jury proceedings.

De Leon v. Hartley, 94 Crim. L. Rep. 444 (N.M. 12/30/13):
Holding: Trial court's delegation to Prosecutor of selection and excusal of grand jurors required quashing indictment without prejudice.

People v. Extale, 91 Crim. L. Rep. 74 (N.Y. 3/27/12):
Holding: Prosecutor cannot dismiss a count of a grand jury indictment over Defendant's objection.

People v. Credle, 90 Crim. L. Rep. 166 (N.Y. 10/25/11):
Holding: Where a grand jury deadlocks, prosecutors must get court approval to resubmit the charges to another grand jury.

State v. Borner, 93 Crim. L. Rep. 728 (N.D. 8/29/13):
Holding: The crime of "conspiracy" to commit extreme indifference murder does not exist, since indifference murder is an unintentional killing; "charging a defendant with conspiracy to commit unintentional murder creates an inconsistency in the elements of conspiracy and extreme indifference murder that is logically and legally impossible to rectify. An individual cannot intend to achieve a particular offense that by its definition is unintended."

State v. Baker, 96 Crim. L. Rep. 556 (S.C. 2/11/15):
Holding: Indictment charging Defendant with committing child sex act sometime during a six-year span was overbroad and lacked specificity as to when the charged act occurred; court was unable to discern how Defendant "could effectively defend himself against a six-year time frame."

State v. Hernandez, 90 Crim. L. Rep. 242 (Utah 11/8/11):
Holding: Where under Utah territorial law there was a right to preliminary hearing in some misdemeanor cases, this right continues to exist under Utah's Constitution even though it replaced indictments with informations.

State v. Zillyette, 2013 WL 3946066 (Wash. 2013):
Holding: Offense of "controlled substance homicide" requires the identity of the controlled substance which killed victim be disclosed in the information or indictment charging the offense.

People v. Ngo, 2014 WL 1325639 (Cal. App. 2014):
Holding: Where Defendant was charged with a child sex crime occurring within a one-year period, trial court erred in instructing jury to convict if crime took place within a two-year time period, because this allowed jury to convict based on acts outside the charged period.

People v. Rodriguez, 158 Cal. Reptr.3d 401 (Cal. App. 2013):
Holding: Even assuming that court had erroneously dismissed a prior indictment, Prosecutor was prohibited by statute from filing a new indictment, because the prior dismissal had been appealable by Prosecutor (though Prosecutor failed to appeal), and allowing Prosecutor to simply file a new indictment would allow new charges months or years after the time for appeal had expired.

Griffith v. Superior Court, 2011 WL 2449633 (Cal. App. 2011):
Holding: Misdemeanors joined with felonies may be set aside if not supported by evidence at a preliminary hearing.

McGill v. Superior Court, 2011 WL 2120179 (Cal. App. 2011):
Holding: Where a perjury charge against Defendant for testifying falsely before a grand jury was heard by the same grand jury that heard the underlying case where the perjury occurred, the perjury charge was subject to dismissal.

Barnett v. Antonacci, 2013 WL 4525322 (Fla. App. 2013):
Holding: Prosecutor's decision to file charges or nolle a case is not a "stage" of the criminal proceedings invoking victims' rights to intervene; such an interpretation would unconstitutionally impinge on a prosecutor's exclusive authority to decide when to bring or dismiss charges.

Jamison v. State, 2011 WL 5157768 (Miss. Ct. App. 2011):
Holding: An amendment to an indictment which increased the drug quantity defendant was accused of possessing, thereby exposing defendant to a greater sentence, was a substantive amendment and required approval by a grand jury.

People v. Haste, 966 N.Y.S.2d 660 (Sup. 2013):
Holding: Prosecutor's misleading and incomplete instruction to grand jury regarding defense of justification required dismissal of indictment for manslaughter.

People v. Jin Lu, 2013 WL 791296 (N.Y. City Crim. Ct. 2013):
Holding: Information charging Defendant with possession of a weapon was insufficient where it merely alleged Defendant had a metal pipe, which did not fall under the definition of a "per se" weapon.

People v. Martini, 2012 WL 2273438 (N.Y. City Crim. Ct. 2012):
Holding: Information was insufficient to charge menacing in the third degree where it only alleged that Defendant pushed victim and threatened to shoot her in the head, but did not allege that Defendant committed any physical act that objectively would cause victim to fear imminent physical injury.

People v. Figueroa, 2012 WL 2206889 (N.Y. City Crim. Ct. 2012):
Holding: The information charging an open container violation was insufficient where it only had an allegation that Officer saw Defendant drinking alcohol in open container, but lacked allegations that the alcohol was more than .005 by volume and did not occur at an authorized event where open containers are allowed.

People v. Pena, 2011 WL 4485976 (N.Y. App. 2011):
Holding: Information charging defendant with riding a bicycle on the sidewalk was jurisdictionally defective where defendant was riding a bicycle inside the entrance of a subway station and the Code defined a sidewalk narrowly.

People v. Sanders, 2011 WL 4638751 (N.Y. App. Div. 2011):
Holding: Defendant's prior conviction for second degree assault barred a later prosecution for first degree assault based upon the same incident, even though it was based on a jurisdictionally defective information.

People v. Suber, 2011 WL 1438667 (N.Y. App. 2011):
Holding: Information charging failure to register as sex offender within 10 days of any change of address did not satisfy the prima facie case requirement of corroboration of the Defendant's admissions that he had changed addresses twice since his initial registration.

People v. Valentine, 2011 WL 3274227 (N.Y. J. Ct. 2011):
Holding: Where State charges against Defendants for hosting a party where alcohol was served to juveniles had been dismissed after Defendants completed an alcohol awareness program, the interests of justice require that similar municipal charges be dismissed.

State v. Cooper, 2013 WL 6081452 (Tex. App. 2013):
Holding: Information was insufficient to charge property code violation where Ordinance required notice of violation before charging, and Information failed to allege that notice had been given.

\

Geick v. State, 2011 WL 4577578 (Tex. Crim. App. 2011):
Holding: Where the charging instrument unnecessarily narrows the manner and means of committing the offense, the narrower definition of the law will be used and must be proven beyond a reasonable doubt.

State v. Siers, 2010 WL 4813737 (Wash. Ct. App. 2010):
Holding: State's failure to allege "Good Samaritan" sentencing aggravator in information, which aggravator was then presented to jury in trial on second degree assault, vitiated the assault conviction as well as the sentence.

Ineffective Assistance of Counsel

McNeal v. State, 2013 WL 5989237 (Mo. banc Nov. 12, 2013):
Defendant/Movant was entitled to evidentiary hearing on claim that counsel was ineffective in failing to request lesser-included offense instruction for trespassing at burglary trial, where evidence would have supported such an instruction and defense suggested crime was merely trespassing.
Facts: Defendant/Movant was convicted of burglary and stealing for entering an apartment and stealing a drill. The defense was that Defendant went to the apartment to collect money for a debt from a friend, knocked and opened the door, went inside and discovered apartment was empty except for some tools, and then decided to take a drill he saw. Defendant admitted stealing the drill, but denied entering the apartment with the intent to steal. The defense argued that the offense was a trespassing, but did not request an instruction on trespassing. During deliberations, the jury sent a note asking when Defendant had to form the intent to steal in order to convict of burglary. After conviction for burglary, Defendant filed a 29.15 motion, alleging counsel was ineffective for failing to request a lesser-included offense instruction for trespassing. The motion court denied the claim without a hearing.
Holding: Defendant/Movant's motion alleged that counsel failed to request a lesser-included offense instruction and that this was not a strategic choice, but due to inadvertence. Although there is a presumption that counsel's performance is sufficient, Movant's claim is not refuted by the record. The evidence at trial supported a theory that when Movant entered the apartment, he did not have the intent to steal, which is necessary for burglary. Rather, the evidence supported that the intent to steal was formed after he entered. A trespassing instruction would have been consistent with the evidence and defense counsel's argument. The State argues that because the jury convicted of the higher offense of burglary, there is no prejudice because the jury would never have gotten to the lesser offense of trespassing, even if it had been submitted. However, it is illogical to conclude that the jury's deliberative process would not have been impacted in any way if a lesser-included offense instruction were submitted. Where failure to give lesser-instructions is raised on direct appeal, the underlying rationale for giving relief is that the failure to instruct deprives a defendant of a fair trial, even if the jury ultimately convicted defendant of the greater offense. Without a lesser instruction, the jury was faced only with finding guilt of the greater, or acquittal. When one of the offense elements remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve

doubts in favor of conviction, even though jurors are theoretically supposed to acquit. Thus, the jury's conviction of the greater offense does not foreclose the possibility that they would have convicted of the lesser if it had been submitted. Defendant was prejudiced. Case is remanded for evidentiary hearing.

Smith v. State, No. SC92127 (Mo. banc 7/3/12):
Where counsel failed to investigate a co-defendant in crime as to whether co-defendant committed crime alone, counsel was ineffective and Movant was prejudiced because co-defendant would have testified that Movant was not involved in crime.
Facts: Two people robbed a gas station. "Carroll" pleaded guilty to the crime. No other person was convicted at that time. Later, Snitch, who was in jail on other charges, told prosecutors that Movant (Defendant) confessed to him to being the other person in the robbery. Snitch made a favorable deal to testify against Movant at trial. Meanwhile, "Carroll" wrote a letter to prosecutors offering to "help get another conviction on the robbery" if he could get a sentence reduction. Movant's counsel did not contact "Carroll." Movant was convicted at a trial. "Carroll" did not testify at the trial. Movant later filed a Rule 29.15 claim, alleging that counsel was ineffective in failing to investigate and call "Carroll" to testify.
Holding: At the 29.15 hearing, Snitch testified he lied at trial that Movant confessed to him; Snitch testified he wanted to correct his prior false testimony. "Carroll" testified that Movant was not involved in the robbery; however, "Carroll" refused to name who his accomplice was. He said he sent his letter to prosecutors to seek a sentence reduction because he had no prior criminal convictions. Here, counsel "assumed" that "Carroll's" testimony would be "bad" for Movant, but counsel never contacted, questioned or interviewed "Carroll." Counsel further believed that even if the testimony would have been "good," "Carroll" would be impeached on it. However, failing to determine what "Carroll's" testimony might be, and then failing to call Carroll, falls outside the wide range of professional competence. The State argues that counsel made a "strategic" decision not to call "Carroll," but strategic decisions must be made after thorough investigation and, having not investigated "Carroll," counsel could only speculate as to what "Carroll" would say at trial. Counsel was unaware of the possible strategies available to the defense through the use or nonuse of "Carroll" because he had failed to investigate. Movant was prejudiced because "Carroll's" testimony would have exonerated Movant.

Webb v. State, No. SC91012 (Mo. banc 3/29/11):
Even though Movant said no promises had been made to him to get him to plead guilty, where Movant claimed his attorney erroneously told him he'd only have to serve 40% of his sentence before being eligible for parole but he really had to serve 85%, this was affirmative misadvice and warranted an evidentiary hearing.
Facts: Movant pleaded guilty to first-degree involuntary manslaughter and ACA. Movant's plea deal was for a 10 year sentence. However, the trial court indicated it would reject this deal, impose a 12-year sentence, and allowed Movant the opportunity to withdraw his plea. Movant did not. Later, Movant filed a Rule 24.035 motion claiming that his plea was involuntary and unknowing because his attorney was ineffective for telling him he would only have to serve 40% of his sentence before being eligible for

parole, but he really had to serve 85%. The motion court found the claim to be refuted by the record since Movant had said at his plea that no promises were made to him to plead guilty.

Holding: Prior Missouri cases have drawn a distinction between an attorney's failure to inform (which is not ineffective) and giving affirmative misinformation (which is ineffective). Here, Movant claims his attorney affirmatively misinformed him he would only have to serve 40% of his sentence. Movant's negative response to a routine question that no promises were made to him is too general to refute that no such information was given. The State claims that the SAR would have given correct information, but the Supreme Court reviews it and determines the SAR did not. The Supreme Court also notes that the SAR is part of the record of the case, and should be provided to the attorneys and appellate court where requested. (The circuit clerk had refused to provide it). Movant is entitled to an evidentiary hearing on his claim.

Concurring Opinion: *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010)(which held that attorneys must inform defendants of immigration consequences of their guilty pleas) indicates that attorneys have an obligation to inform clients of truly clear consequences of their guilty pleas. The Missouri Supreme Court's prior cases may need to be expanded to take into account *Padilla* when considering whether counsel rendered ineffective assistance. Other courts have recognized that *Padilla* applies to other situations besides deportation. The 85% rule in this case was even more "certain" than deportation in *Padilla* and counsel has a duty to inform of "certain" consequences. There may be other situations where counsel must advise about consequences – a conviction may disqualify a person from professional licenses, used to deny gov't benefits, access to housing, student loans and health care. Until there is further specific guidance, counsel and courts should be as vigilant as possible to explain to defendants that a guilty plea may carry serious consequences beyond immediate punishment.

Dissenting Opinion: *Padilla* should not be expanded beyond the deportation context.

State v. Nettles, 2015 WL 7738413 (Mo. App. E.D. Dec. 1, 2015):

Holding: Claim that defense counsel operated under actual conflict of interest in representing Defendant and previously representing co-Defendant in same case (who then became State's witness against Defendant) is not cognizable on direct appeal, but must be raised as claim of ineffective assistance of counsel in Rule 29.15 proceedings, even where trial court failed to make independent inquiry about the conflict.

Discussion: Defendant claims that counsel's prior representation of co-Defendant in same case, who then became a key prosecution witness against Defendant, created an actual conflict of interest, and that the trial court erred in failing to independently inquire about this, and disqualify counsel. An actual conflict of interest occurs from successive representation where an attorney's former client serves as a government witness against the attorney's current client. Here, there is a significant risk that counsel's representation of Defendant may have been materially limited by his duty of confidentiality to the co-Defendant/client. Nevertheless, this claim is not cognizable on direct appeal. It should be raised in a Rule 29.15 proceeding as one of ineffective assistance of counsel.

Depriest v. State, 2015 WL 7455009 (Mo. App. E.D. Nov. 24. 2015):

(1) Plea counsel had actual conflict of interest where he simultaneously represented Movant and her Brother on charges for marijuana found in their residence, and it was apparent that Movant was less culpable than Brother; (2) "Group guilty plea" proceeding prejudiced Movant because plea court failed to inquire about the conflict of interest; (3) where Movant rejected a more favorable plea offer due to her counsel's conflict of interest, remedy is to require State to re-offer the rejected offer; and (4) transcript of "group guilty plea" should not be redacted so as only to include Movant's and Brother's responses, because redacted transcript does not give appellate court a complete picture of what transpired at plea.

Facts: Movant and her Brother were charged with marijuana offenses for marijuana found growing in their residence. Movant and Brother both retained the same counsel, and signed counsel's waiver of conflict of interest. The State offered Movant a 10-year deal with possibility of probation after 120 days. Counsel advised Movant to reject the offer. Movant and Brother ultimately pleaded guilty together under a deal whereby the State would dismiss certain other charges against Movant, if she and Brother pleaded guilty together. The court held a "group guilty plea" with other defendants in order to "save time." Movant was sentenced to the maximum term. She filed a 24.035 motion.

Holding: Movant's plea was involuntary due to counsel's conflict of interest and the group guilty plea procedure. Counsel believed Movant was less culpable than Brother; thus, Movant's and Brother's interests were conflicting. Prejudice is presumed when counsel operates under an actual conflict of interest. Further, the plea court had a duty to inquire about the conflict, but did not because of the group guilty plea. The plea court should not have valued its own time more than the fair administration of justice. The remedy here is to order the State to reoffer the rejected plea offer. Lastly, a full and complete transcript of the group plea should have been prepared, not just a transcript with Movant's and Brother's responses. A full transcript was necessary to give appellate court a complete picture of what occurred.

<u>Depriest v. State</u>, 2015 WL 6473150 (Mo. App. E.D. Oct. 27, 2015):

(1) Plea counsel operated under an actual conflict of interest and prejudice is presumed where counsel represented both Movant and co-defendant, advised Movant to reject a favorable plea offer, and pleaded Movant and co-defendant guilty to a deal whereby Movant had to accept a blind plea to allow a favorable plea for co-defendant; (2) "group guilty plea" violated Movant's right to fundamental fairness and rendered his plea involuntary, especially where trial court had duty to inquire about conflict of interest but did not; (3) remedy is to allow Movant opportunity to accept the favorable plea offer that was rejected; (4) appellate court grants foregoing relief without an evidentiary hearing; (5) plea court's closure of courtroom during guilty plea violated Movant's right to a public trial; and (6) "redacted" transcript from "group guilty plea" which only contained Movant's and co-defendant's statements was improper; a full transcript should be prepared for appellate review.

Facts: Movant and co-defendant (his sister) were charged with various drug crimes for marijuana found in their residence. The same attorney represented both prior to their guilty pleas. The State offered Movant a 10-year deal with 120 days shock. Counsel advised Movant to reject this offer, and to proceed to preliminary hearing. This caused the favorable offer to be withdrawn. After various pretrial litigation, Movant and co-

defendant ultimately pleaded guilty in "blind pleas," but only co-defendant received anything in exchange from the State in doing so. The State agreed that if Movant pleaded guilty with co-defendant, the State would dismiss various charges against co-defendant and allow her to be released from jail pending sentencing. The plea court accepted the pleas in a "group plea" with five other non-related cases in order to "save a great deal of time." Movant was ultimately sentenced to 22 years. He filed a Rule 24.035 motion, which the motion court denied without an evidentiary hearing.

Holding: (1) Counsel operates under a conflict of interest where something was done which was detrimental to Movant's interests and advantageous to a person whose interests conflict with Movant's. Upon such a showing, prejudice is presumed. Here, Movant lost the opportunity to plead to the most favorable terms because counsel chose to proceed with pretrial litigation, which was in co-defendant's interests, but not Movant's. Counsel should have withdrawn. Because counsel's actions favored co-defendant's interests, prejudice is presumed. Even if prejudice were not presumed, the fact that Movant received 22 years after being advised to reject a 10-year probation offer supports that counsel was conflicted and shows that counsel failed to advocate for Movant. (2) The appellate courts have repeatedly warned the plea court here that "group pleas" are disfavored. Given all the circumstances in this case, the "group plea" rendered Movant's plea involuntary, and appellate court grants relief without the need for an evidentiary hearing. The plea court had a duty to inquire about the conflict of interest, but did not. The fact that the State's promises to co-defendant were contingent on Movant's own blind plea should have been a red flag to the plea court, as should the fact that both had the same counsel. The plea court did not protect the interest of justice, but was only interested in "saving time." The scene "smacks of intimidation." Regardless of what Movant actually said on the record at his plea, it is obvious Movant would have felt pressured since Movant's sister was standing right beside him and was the co-defendant. (3) Where ineffective assistance causes a defendant to reject a favorable plea offer, the remedy is order the State to re-offer the favorable plea offer. (5) The plea court further added to the intimidating atmosphere by closing the courtroom during the "group plea." Although the appellate court does not decide the issue because it reverses on other grounds, appellate court notes that the closure likely violated Movant's right to a public trial. (5) Finally, appellate court notes that the transcript submitted on appeal is a redacted transcript containing only the responses of Movant and co-defendant. Although it is not clear whether this was done by Movant's attorney, the court or court reporter, it is improper. A full transcript is necessary for appellate review, and would have been useful here to see all the responses during the "group plea."

Moore v. State, 2014 WL 1597633 (Mo. App. E.D. April 22, 2014):

Movant was entitled to evidentiary hearing on claim that counsel was ineffective for withdrawing motion for automatic change of judge and not moving for change of judge for cause, where judge had previously prosecuted Movant.

Facts: Movant, who was convicted of various offenses at trial and sentenced to the maximum possible sentence by Judge, filed 29.15 motion alleging his counsel was ineffective in failing to move for change of judge. Judge had previously prosecuted Movant when Judge was a prosecutor. Counsel had filed a motion for automatic change of judge, but then withdrew it. Counsel failed to file a motion for change of judge for

cause. The motion court (who was also the trial court Judge) denied relief without a hearing.
Holding: Here, there was a motion for automatic change of judge under Rule 32.07 filed, but then it was withdrawn by counsel. The motion court found that this withdrawal was done in Movant's "presence" and "with his consent" in open court, but the record does not indicate that Movant was even aware that the motion was withdrawn much less that it was done with his "consent." The motion court further found that Movant failed to allege prejudice sufficient to trigger postconviction relief, and that just because a trial judge received knowledge of facts through prior court hearings does not justify disqualification for cause. However, Movant's motion alleges that counsel lacked a strategic purpose for not pursuing a change of judge, and that Movant wanted a change of judge. Movant argues that Judge was biased against him, because she prosecuted him in another case before she became a judge. And Movant contends that a reasonable person would doubt Judge's impartiality where she had prosecuted him previously, and sentenced him to the maximum possible sentence here. All of this sufficiently alleged facts not refuted by the record which warrant an evidentiary hearing before a different judge.

States v. State, 2013 WL 6070034 (Mo. App. E.D. Nov. 19, 2013):
Holding: (1) Movant was entitled to evidentiary hearing on 24.035 claim that his plea was rendered involuntary by counsel's erroneous advice to him that he would receive pre-plea jail time credit; (2) even though receiving jail time credit is not cognizable in a 24.035 action (but should be pursued in habeas corpus; the 24.035 motion court has no power to order jail time credit), Movant's claim that he would not have pleaded guilty at all but for the erroneous advice regarding jail time credit is cognizable because it seeks to set aside his conviction (not just receive jail time credit); and (3) even though Movant said he was not "promised" anything at his plea, a "promise" is not the same as being given erroneous advice by counsel, so Movant's statements at his plea did not refute the claim of ineffective assistance of counsel of being told wrong information about whether he was going to receive jail time credit.

Wright v. State, 411 S.W.3d 381 (Mo. App. E.D. 2013):
Holding: Although Eastern District reluctantly upholds a "group guilty plea" despite prior criticism of the practice by the Eastern District and Missouri Supreme Court, a concurring opinion says that "[d]efense lawyers agreeing to such a procedure may well be presumptively ineffective."

Ervin v. State, 2013 WL 5629380 (Mo. App. E.D. Oct. 15, 2013):
Plea counsel was ineffective for failing to review discovery and failing to advice Defendant/Movant that the value of stolen property did not qualify as a felony, even though Movant wanted to plead guilty to "get it done" with.
Facts: Defendant/Movant was charged with felony stealing for stealing more than $500 in alcohol bottles. Plea counsel received discovery, but failed to review it and failed to provide it to Movant prior to his guilty plea. Movant pleaded guilty to a felony plea offer which was about to expire in order to "get it done" with. After his conviction, Movant filed a 24.035 motion alleging that counsel failed to review discovery and advise Movant

that the discovery showed that the value of the bottles was less than $500, which was a misdemeanor.

Holding: An attorney has a duty to investigate all aspects of a defendant's case, and can only make strategic choices after thorough investigation. Here, counsel failed to conduct any sort of investigation and did not carefully read the discovery in her possession. The State's discovery showed the value of the stolen bottles was less than $500, which was a misdemeanor. Even though Movant wanted to plead guilty to "get it done" with, the record does not show that Movant would have pleaded guilty regardless of what the discovery showed. He pleaded guilty trusting that counsel had reviewed the discovery and because a plea bargain was expiring. "[W]e hold that a defendant's desire to immediately plead guilty does not alleviate a counsel's duty to at least minimally review discovery. Counsel always has a duty to investigate appropriate defenses and to look at discovery." Movant's general responses of satisfaction with plea counsel at his plea were too general to refute his ineffectiveness claim. Conviction vacated.

Greer v. State, 2013 WL 4419338 (Mo. App. E.D. August 20, 2013):

Movant was entitled to an evidentiary hearing on his claim that counsel was ineffective in failing to object when the sentencing judge, after trial, said he was sentencing Movant to a higher sentence than that recommended as a plea agreement in order to deter others from seeking trials in their cases, since this unconstitutionally punished the exercise of the right to trial.

Facts: At Movant's sentencing after having been found guilty at a trial, the judge said the "problem" the judge had was that if he sentenced Movant to a sentence lower than that recommended in the plea agreement before trial that Movant would go back to jail and say he went to trial and beat the recommendation, and this would cause "chaos" because "everyone's going to go to trial, because they're going to think they're going to get less than the recommended sentence or the same sentence. That's my problem." After the judge sentenced him to a high sentence, Movant filed a Rule 29.15 motion alleging his counsel was ineffective in failing to object to the judge's remarks. The motion court denied the claim without a hearing.

Holding: To be entitled to a hearing, Movant must alleges facts, not conclusions, warranting relief; the facts alleged must not be refuted by the record; and the matters complained of must have resulted in prejudice. If a defendant's exercise of a constitutional right was an actual factor considered by the sentencing court in imposing sentence, then the exercise of that right is considered to be a determinative factor in sentencing, and retaliation has been demonstrated, even if other factors could have been relied on by the sentencing court to support the same sentence. The State argues that the sentence here is designed to deter others. But the proper purpose of deterrence is to prevent others from committing a crime, not to deter those who have already committed a crime from exercising their right to a trial. Here, the record does not refute that counsel was not ineffective in failing to object, so Movant is entitled to an evidentiary hearing.

Barmettler v. State, 2013 WL 2316813 (Mo. App. E.D. May 28, 2013):

Holding: (1) In child sex prosecution with two counts and some evidence of additional uncharged acts, trial and appellate counsel unreasonably failed to object to and raise on appeal that the verdict directors did not describe or distinguish the particular acts from

one another in violation of Note on Use 6 for MAI-CR3d 302.02 regarding the risks associated with non-specific verdict directors submitted in multiple acts cases and as illustrated by *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011); (2) even though Movant's trial was before *Celis-Garcia*, the verdict directors were still in violation of Note of Use 6 and Movant's right to a unanimous jury verdict; but (3) Movant was not prejudiced here because most of the trial testimony focused on the two specific alleged acts of abuse, so there was no reasonable risk that jurors would have convicted Movant based on the uncharged acts.

Gray v. State, No. ED97667 (Mo. App. E.D. 9/11/12):
Holding: (1) Claim of ineffective assistance of trial counsel for failure to preserve an issue for appeal is not cognizable in a 29.15 case, but the claim can be properly pleaded as ineffective assistance of trial counsel for failing to object to admission of the evidence at trial, which likely would have led to the evidence being excluded and an acquittal; and (2) where motion court failed to issue Findings on all issues, case is remanded for Findings on omitted issues because 29.15(j) requires Findings on all issues.

Williams v. State, No. ED95386 (Mo. App. E.D. 11/15/11):
Where there was no evidence that a gun Defendant-Movant used in an unlawful use of weapon case was readily capable of lethal use, Movant was entitled to an evidentiary hearing on claim that appellate counsel was ineffective in failing to raise sufficiency of evidence on direct appeal.
Facts: Defendant pointed a gun at various persons. He was convicted at a trial of unlawful use of a weapon, and other offenses. After losing his direct appeal, he filed a 29.15 motion alleging that appellate counsel was ineffective in failing to appeal the issue of sufficiency of evidence to support the unlawful use of weapon conviction. The motion court denied the claim without a hearing.
Holding: To show ineffective appellate counsel, Movant must show that counsel failed to raise a claim that was so obvious that a competent attorney would have recognized it and asserted it, and that there is a reasonable probability the outcome of the appeal would have been different. Unlawful use of a weapon requires display of a weapon "readily capable of lethal use." Sec. 571.030.1(4). Here, Movant contends that the State presented no evidence that the gun was readily capable of lethal use. The State had the burden of proof and was required to produce evidence that the gun used was capable of lethal use. The State's assertion that a gun is generally capable of lethal use is not unreasonable, but a verdict cannot rest upon stacked inferences when there are not supporting facts in the first inference. Denial of postconviction relief reversed, and case remanded for evidentiary hearing on whether appellate counsel was ineffective.

Collins v. State, No. ED94590 (Mo. App. E.D. 3/29/11):
Where Movant alleged his counsel told him he would receive 407 days jail time credit if he pleaded guilty but he later was not given this, Movant was entitled to evidentiary hearing on whether counsel was ineffective.
Facts: Movant pleaded guilty to stealing pursuant to a plea bargain. At his plea, he asked the judge if he would receive jail time credit and the judge said yes. After Movant was delivered to the DOC, he learned that he would only be given 243 days credit instead

of 407 days because he was not eligible for time served prior to the date of the offense. (Movant was serving other sentences). Movant filed a Rule 24.035 motion claiming his attorney had been ineffective in advising him that he would receive 407 days credit. The motion court denied the claim without a hearing.
Holding: Movant may be entitled to vacate his guilty plea if his attorney misinformed him about the number of days credit he would receive. Movant's claim is not refuted by the record, since he specifically asked the judge at his plea if he would be given credit. The State argues that because Movant asked this after his plea was accepted, Movant did not rely on it in pleading guilty. However, the immediacy of the question, the form of the question and the court's response all show the parties' and court's understanding that jail time credit was part of the plea agreement. Movant is entitled to an evidentiary hearing.

Pherigo v. State, 2015 WL 7460218 (Mo. App. S.D. Nov. 24, 2015):
(1) Where State did not disclose tape-recorded statements of co-Defendants until morning of trial and the statements indicated Defendant was innocent of the charged offense, trial counsel was ineffective in failing to move for a continuance due to the late disclosure and in proceeding to trial without knowing the contents of the tapes; and (2) even though Defendant did not want a continuance, trial counsel was ineffective in not moving for one, where counsel believed this was counsel's decision to make.
Facts: Movant/Defendant was charged with burglary, tampering and stealing for theft of a car from a residence. Police found Movant with the car. Movant said he had borrowed the car from another person. On the morning of trial, the State disclosed various tape recordings of Movant's co-Defendants. Counsel did not listen to the tapes, but successfully moved to have them excluded from trial. Movant did not want a continuance, and counsel did not ask for one. After trial, counsel listened to the tapes and discovered that the co-Defendants said Movant was not involved in the charged offenses. Movant filed a 29.15 motion. Counsel testified at the 29.15 hearing that even though Movant did not want a continuance, counsel believed that was a decision for counsel to make. Counsel did not ask for a continuance because the trial court was going to exclude the recordings, which counsel assumed to be harmful. The motion court found counsel ineffective. The State appealed.
Holding: Even though the police apparently did not tell the prosecutor about the tapes until shortly before trial, Rule 25.03 and due process require the prosecutor to take affirmative steps to learn of information possessed by the police. The late disclosure would have authorized the grant of a continuance as a sanction. The strategic decision to forgo requesting a continuance was made by counsel, not Movant. Counsel made this decision under the mistaken assumption that the tapes would inculpate Movant. Movant apparently did not know the contents of the tapes either, when Movant said he did not want a continuance. The motion court was free to find that counsel was ineffective in not moving for a continuance.

Cates v. State, 2015 WL 7265121 (Mo. App. S.D. Nov. 17, 2015):
Holding: (1) Motion court did not clearly err in finding that 24.035 Movant was affirmatively misadvised by counsel that he would not receive more than 30 years and would not receive consecutive sentences in open plea, where plea counsel's file notes indicated that he had, in fact, assured Movant of this; even though other evidence on this

issue was conflicting, it was within exclusive province of motion court to determine which evidence to believe; (2) State's brief lacked "any analytical value" where it failed to acknowledge any substantial evidence supporting the motion court's ruling.

Brantley v. State, No. SD30868 (Mo. App. S.D. 4/20/12):
Holding: Where Movant claimed his plea counsel was ineffective in failing to provide him with timely discovery, which caused him to miss a favorable plea offer and later accept a less-favorable one, this stated a viable claim and required a hearing under *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

Dunlap v. State, 452 S.W.3d 257 (Mo. App. W.D. Jan. 13, 2015):
(1) Where Movant alleges ineffective assistance of guilty plea counsel in failing to take actions at sentencing, correct standard for prejudice is whether Movant would have received a lower sentence but for counsel's ineffectiveness; and (2) where motion court failed to make Findings on certain issues, Rule 78.07(c) requires that a motion to amend judgment be filed requesting Findings on those issues in order to preserve the issue for appeal.
Facts: Movant, who had pleaded guilty and received a lengthy sentence, alleged that counsel was ineffective in failing to bring certain sentencing matters to the judge's attention, which would have resulted in a lower sentence. The motion court denied the claim on grounds that Movant's decision to plead guilty would not have been different. Movant raised a separate postconviction issue, on which the motion court failed to make Findings. Movant filed a Rule 78.07(c) motion to amend judgment, but did not argue the failure to make Findings on that particular issue.
Holding: (1) For a claim of ineffective assistance at sentencing, Movant must show that but for counsel's failures, his sentence would have been lower. The motion court erroneously analyzed Movant's claim as to how counsel's performance affected the outcome of the plea, not the outcome of the sentencing phase of the proceeding. Applying the wrong legal standard is reversible error. Case remanded for new Findings applying correct legal standard. (2) Rule 78.07(c) requires that "error[s] relating to the form or language of the judgment, including the failure to make … required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." Here, although Movant filed a 78.07(c) motion, he did not raise the failure to make Findings on the specific issue raised on appeal. Therefore, the issue is not preserved for appeal and cannot be reviewed.

Bridgewater v. State, 2015 WL 160833 (Mo. App. W.D. Jan. 13, 2015):
A motion to recall mandate can be used to present newly discovered evidence of guilty plea counsel's ineffectiveness, which evidence was not available at the time of the original Rule 24.035 evidentiary hearing.
Facts: Movant pleaded guilty, in an open plea, to three counts. At the plea, the judge informed him he could receive up to life sentences on each count, but never informed him that the sentences could run consecutively. The judge imposed three consecutive life sentences. Movant later filed a Rule 24.035 motion, alleging that plea counsel had affirmatively misrepresented that he would receive concurrent sentences if he pleaded guilty. At the evidentiary hearing, plea counsel testified that she did not have a "specific

recall" or "specific details" of her discussion with Movant without looking at her notes, which were missing at the time of the hearing. Counsel testified it was her "practice" to tell a client the "worst case scenario," which would be consecutive sentences. The motion court denied relief. The Western District affirmed on appeal. Subsequently, counsel's notes were found. The notes supported Movant's claim that counsel indicated he would receive concurrent sentences. Movant filed a motion to recall the mandate in his appeal, claiming this newly discovered evidence warranted relief.
Holding: This is a case of first impression whether a motion to recall mandate can be used to present newly discovered evidence. A motion to recall mandate can be used to remedy a deprivation of a defendant's federal constitutional rights. Here, unless the mandate is withdrawn, Movant's ability to challenge whether he received effective assistance of counsel at his plea will be impaired. Counsel's notes were missing through no apparent fault or lack of diligence on the part of Movant. The notes clearly corroborate Movant's version of events. The notes are contrary to counsel's evidentiary hearing testimony and refute that she followed her standard "practice" of warning of consecutive sentences. Further, the plea judge, in violation of Rule 24.02(b)(1), failed to warn Movant of the possibility of consecutive sentences. Movant has no other apparent remedy besides a motion to recall mandate. A Rule 29.07(d) motion cannot be used because it cannot be a substitute for the timely assertion of a claim in a Rule 24.035 motion. Habeas corpus does not appear to be available, since this is not a claim of actual innocence or a procedurally defaulted claim that Movant was deprived of a fair trial. Appellate court recalls its mandate, and remands case for further evidentiary hearing and new Findings on Movant's claim that counsel misadvised him.

Rollins v. State, 2015 WL 456261 (Mo. App. W.D. 2/3/15):
Holding: Even though Defendant / 29.15 Movant requested "standby counsel" at his trial where he was proceeding *pro se* after rejecting the public defender, where the court conducted a proper *Faretta* hearing, Defendant / Movant's waiver of counsel was unequivocal and direct appeal counsel was not ineffective in failing to challenge the waiver; Defendant / Movant has a constitutional right to counsel, but not a right to counsel of his own choosing.

McCoy v. State, 2015 WL 1246556 (Mo. App. W.D. March 17, 2015):
Holding: (1) A denial of a Rule 29.07(d) motion to withdraw a guilty plea for manifest injustice after an SES is an appealable judgment because an SES is a final criminal conviction; by contrast, a denial of a 29.07(d) motion after an SIS is not a final appealable judgment because no final criminal conviction has been entered. (2) Where Defendant received an SES and, thus, was not delivered to the Department of Corrections, he was not eligible to pursue relief under Rule 24.035 (which requires delivery to DOC), but he could pursue his ineffective assistance claim via a Rule 29.07(d) motion to withdraw guilty plea for manifest injustice. But (3) even though plea counsel failed to inform Juvenile-Defendant that he would be subject to lifetime GPS monitoring as a sex offender, counsel was not ineffective because this was a collateral consequence of conviction, and also there was no prejudice because there was no a reasonable probability that Defendant would have rejected the plea offer and gone to trial, since he was facing a lengthy sentence upon conviction at trial, rather than probation, and the

evidence of guilt was strong. (4) Court refuses to consider claim that automatically imposing lifetime supervision and monitoring on juveniles constitutes cruel and unusual punishment and violates *Graham v. Florida*, 560 U.S. 48 (2010), because this issue was not raised in the trial court or briefed by the parties, but raised for the first-time at oral argument.

Woods v. State, 2014 WL 6914632 (Mo. App. W.D. Dec. 9, 2014):
Holding: (1) 29.15 motion court clearly erred in granting relief for trial counsel's failure to have a *Frye* hearing where no scientific evidence was presented at the 29.15 evidentiary hearing as to what a *Frye* hearing would have actually shown; this is because in a 29.15 case, Movant has the burden of proof and had the burden to prove that the *Frye* evidence would have refuted the State's scientific evidence presented at trial. (2) Motion court clearly erred in granting relief for trial counsel's failure to call an Investigator-Witness at trial where Movant failed to ask the Investigator-Witness at the 29.15 evidentiary hearing exactly what she would have testified to if she had been called at trial; Movant failed to meet his burden of proof in the 29.15 case by presenting only conclusory testimony from Investigator-Witness that she had information that would "conflict" with State's witnesses' testimony, but not presenting exactly what that information was.

Scott v. State, 2013 WL 6170608 (Mo. App. W.D. Nov. 26, 2013):
Defendant/Movant was entitled to evidentiary hearing on claim that counsel was ineffective in advising him that he would receive pre-plea jail time credit, which he ultimately did not receive.
Facts: Defendant/Movant, who was held in custody approximately 4 years prior to his guilty plea for a drug offense, filed a 24.035 motion, alleging his counsel was ineffective in advising him that he would receive 4 years of pre-guilty plea jail time credit. In the actual event, the Department of Corrections awarded him less credit than this. The motion court denied the claim without a hearing.
Holding: Movant claims that but for counsel's mistaken advice about jail time credit, he would not have pleaded guilty but would have insisted on going to trial. Movant would be entitled to relief if he relied on *positive* misrepresentations by counsel. At the plea colloquy, Movant said he thought he would be getting 4 years of jail time credit, and counsel said that that was true. Thus, it appears that counsel gave positive misadvice. Even though the plea court told Movant that the DOC would determine jail time credit, the court's advice did not fully disabuse counsel's advice because the court also said that it was "true" that Movant would get credit. Even though the plea court said that Movant could be required to serve "every day" of his sentence, this did not disabuse counsel's advice because this statement could mean both pre-plea and post-plea service. Finally, any statements by the plea court about probation and parole didn't correct the misadvice because probation and parole is not the same as pre-plea jail time credit. Thus, the record does not *conclusively* refute Movant's claim. Reversed and remanded for hearing.

Chacon v. State, No. WD75646 (Mo. App. W.D. 9/24/13):
Holding: Although the Western District denies relief on a *Padilla* claim because the court finds that counsel did adequately advise defendant/movant of immigration

consequences, footnote 8 is notable because it holds that the test of prejudice is whether there is a reasonable probability that defendant would not have pleaded guilty but would have insisted on going to trial but for counsel's advice; Western District rejects motion court's finding that defendant cannot show prejudice because he cannot show he would have prevailed at trial.

Johnson v. State, No.WD74813 (Mo. App. W.D. 6/11/13):
Plea counsel was ineffective for failing to inform Movant that the State would have to prove he had knowledge that he was within 2,000 feet of a school, Sec. 195.214, when he sold drugs.
Facts: Movant pleaded guilty to three counts of sale of drugs within 2,000 feet of a school, Sec. 194.214, which offenses occurred in 2007. At the plea, when asked if the sales occurred within 2,000 feet of a school, Movant said he didn't know for sure, although the State said he was within 2,000 feet. Movant subsequently filed a 24.035 motion alleging that his plea counsel failed to inform him that the State had to prove that he knew he was within 2,000 feet of a school, and that there was not a factual basis for the plea under Rule 24.02(e) because the plea colloquy did not prove that he knew this. Movant's counsel could not recall if she discussed the matter with Movant, but also thought that his knowledge of being within 2,000 feet of a school would be irrelevant. The motion court denied relief.
Holding: In *State v. Minner*, 256 S.W.3d 92 (Mo. banc 2008), the Supreme Court held that knowledge of being within 1,000 feet of public housing was an element the State had to prove under Sec. 195.218, which is similar to the statute here. *Minner* overruled a prior Supreme Court case (*Hatton*), which had held that no knowledge of proximity to public housing was required. *Minner* was decided *after* Movant's sentencing, and because of that, the Southern District has held in *State v. Applewhite*, 276 S.W.3d 900 (Mo. App. S.D. 2009), that claims such as Movant's factual basis claim are not valid since courts were entitled to rely on the Supreme Court's pre-*Minner* holding in *Hatton*. However, the Western District believes *Applewhite* was incorrectly decided. This is because after the Supreme Court's *Hatton* holding, the Legislature enacted Sec. 562.021.3, which provides that if a statute does not contain a culpable mental state, a culpable mental state is nevertheless required and it is "purposely" or "knowingly." Also, the MAI for the offense, MAI-CR3d 325.30, was changed to require a mental state of knowingly. And several pre-*Minner* appellate cases held that such a mental state was now required. Thus, the motion court erred in denying relief based on *Hatton*. However, the case must be remanded for further factual findings on whether Movant knew he was within 2,000 feet of a school, and whether he would not have pleaded guilty, but would have taken the case to trial, if he knew this was an element of the crime.

Frye v. State, 2013 WL 324029 (Mo. App. W.D. Jan. 29, 2013):
Holding: Where Rule 24.035 Movant alleged that plea counsel was ineffective in failing to communicate a plea offer to him (causing him to have entered a guilty plea on less favorable terms), case is remanded to motion court for Findings on prejudice, i.e., whether Movant demonstrated a reasonable probability that the State would not have withdrawn the offer and that the trial court would not have rejected a plea agreement based on the offer.

Ewing v. Denney, No. WD74807 (Mo. App. W.D. 3/6/12):
Where trial counsel undertook to file a notice of appeal for Defendant but failed to properly do so and Defendant did not learn of this until after time for late notice of appeal expired, trial counsel was ineffective and habeas relief is granted to allow Defendant to be resentenced so can file a new notice of appeal.
Facts: In 2007, Defendant (Petitioner) was convicted at trial. His trial counsel filed a notice of appeal for him, but failed to timely pay a filing fee. That appeal was dismissed in 2007, but counsel never told Defendant. In 2008, Defendant wrote other attorneys and legal authorities to try to find out what was happening regarding his appeal. The Supreme Court told him to contact the Public Defender. In 2010, Defendant brought a habeas case in DeKalb County seeking to have Defendant re-sentenced so he could appeal. The DeKalb County Circuit Court granted relief and ordered the Jackson County Circuit Court to resentence Defendant, but the Jackson County Circuit Court refused to do so on grounds that the DeKalb court had no authority to order the Jackson court to do so. In 2011, Defendant re-filed his habeas case in the Western District Court of Appeals.
Holding: One of the exceptions to allow review of procedurally defaulted claims is "cause and prejudice." The question here is whether Defendant can meet this test. A defendant is entitled to effective assistance of counsel on appeal and failure to perfect a notice of appeal is ineffective. "Cause" requires that the procedural default be "external" to the defense, which might at first blush appear to not be met here. But the U.S. Supreme Court has held that where the procedural default is the result of ineffective assistance of counsel, the default is imputed to the State and this renders the "cause" "external" to the defense. Here, counsel was ineffective in failing to perfect the appeal, and Defendant was prejudiced by being denied an appeal. Sentence vacated so Defendant can be resentenced, and then file a timely notice of appeal.

Radmer v. State, No. WD 74014 (Mo. App. W.D. 3/27/11):
In bifurcated trial, counsel was ineffective in failing to present psychologist who would have testified to Defendant's borderline intellectual functioning and explained Defendant's sex offense in that context.
Facts: In 2003, Defendant had been charged with various sex offenses, and was examined by a psychologist who found that Defendant suffered from borderline intellectual functioning. The 2003 charges were dismissed when the victims refused to testify. In 2007, Defendant was charged with new child sex offenses. Defendant was represented by the same attorney in 2003 and 2007. The new case had a bifurcated jury trial under Sec. 557.036. In penalty phase, the State presented evidence that Defendant collected girl's underwear and other sex objects, and testimony that this leads sex offenders "to work up to the offense." The State also presented testimony about other uncharged sex acts and victims. Defendant presented the testimony of family members that they had never seen Defendant inappropriately touch children, and the testimony of his employer that he was a good worker. The jury sentenced Defendant to 90 years. Defendant filed a 29.15 motion claiming that counsel was ineffective in failing to present in penalty phase evidence of his borderline intellectual functioning. The motion court found counsel ineffective. The State appealed.

Holding: The psychologist who previously examined Defendant would have been able to testify that Defendant suffered from borderline intellectual functioning and had the functioning of a 10 year old. The psychologist would have also been able to testify that persons with borderline functioning who behave sexually inappropriately are doing so because they lack sexual knowledge, which is different than being a pedophile. Counsel knew about this psychologist but testified he didn't know why he didn't call him and didn't have a strategy about it one way or the other. Significant mental illness and intellectual deficits have been recognized as establishing a reasonable probability of a different sentencing outcome. The same judge who heard the trial also heard the 29.15 case, and would be in the best position to judge the prejudice from failure to present this testimony. The State claims that the psychologist's testimony would include that Defendant sexually abused "six to eight" other victims and demonstrates a "consistent pattern of sexual deviance," but the jury already had heard evidence from the State that Defendant had committed other uncharged acts of sex abuse against other victims. The State claims that the psychologist would be incredible because he had been hired by the public defender's office in the past, but he had also been hired by prosecutors and private attorneys for civil suits. Judgment granting new penalty phase on grounds of ineffective assistance of counsel affirmed.

*** Woods v. Donald, ___ U.S. ___, 2015 WL 1400852 (U.S. March 30, 2015):**
Holding: (1) Even though defense counsel was not in the courtroom during a portion of trial where matters about jointly-tried co-defendants were discussed, this did not violate clearly established federal law to warrant granting habeas relief; and (2) even though situation was "similar" to *Cronic*, *Cronic* did not address counsel's absence during testimony about a jointly-tried co-defendant; "[I]f the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings of those cases."

*** Hinton v. Alabama, ___ U.S. ___, 94 Crim. L. Rep. 613, 134 S.Ct. 1081 (U.S. 2/24/14):**
Holding: Counsel in capital case was ineffective for erroneously believing that he could not seek extra funding to hire a more qualified forensic expert; even though choice of expert is usually a strategy decision, the attorney's decision here was not based on any strategy but on a mistaken belief that the only available funds were capped at $1,000 and that there was only one ballistics expert available at that rate; "[a]n attorneys' ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."

*** Burt v. Titlow, ___ U.S. ___, 94 Crim. L. Rep. 197, 2013 WL 5904117 (U.S. 11/5/13):**
Holding: When federal courts review ineffective assistance of counsel claims, AEDPA combined with the already-deferential standard toward counsel's performance in *Strickland*, require federal courts to be doubly deferential to state courts' denial of Sixth Amendment claims; Supreme Court defers to state court finding that counsel was not ineffective under *Frye/Lafler* in advising Defendant to withdraw a guilty plea and

proceed to trial even though counsel failed to obtain the case file (discovery) from the prior attorney before giving this advice, and counsel had Defendant sign over the media rights to counsel of this high-profile case; record indicated that Defendant withdrew her guilty plea because she wanted to protest her innocence.

*** Chaidez v. U.S., 92 Crim. L. Rep. 609, ___ U.S. ___ (U.S. 2/20/13):**
Holding: *Padilla*'s ruling that defense attorneys must warn clients about immigration consequences is a new rule that is not retroactive on collateral review.

* **Lafler v. Cooper**, **2012 WL 932019 (U.S. 2012):**
Holding: The fact that a defendant received a full and fair trial after his counsel performed deficiently in advising him to reject the State's plea offer did not preclude the defendant from establishing the prejudice prong of a claim of ineffective assistance of counsel.

*** Missouri v. Frye, 132 S.Ct. 1399 (2012):**
Holding: (1) Failure to communicate plea offer to Defendant before it expired is ineffective assistance of counsel, and (2) to show prejudice a Defendant must show a reasonable probability he would have accepted the expired offer and a reasonable probability the prosecution would have adhered to the agreement and that it would have been accepted by the court.

*** Lafler v. Cooper, ___ U.S. ___, 90 Crim. L. Rep. 850 (U.S. 3/21/12):**
Holding: (1) Giving erroneous advice to a Defendant that leads him to reject a favorable plea offer and proceed to trial is ineffective assistance of counsel, and (2) the remedy after trial is to have a court resentence a Defendant or have the prosecutor reoffer the plea offer.

*** Martinez v. Ryan, ___ U.S. ___, 90 Crim. L. Rep. 805 (U.S. 3/20/12):**
Holding: A federal habeas petitioner may be excused from procedural default in federal habeas if the default was caused by state postconviction counsel who was constitutionally ineffective.

*** Maples v. Thomas, ___ U.S. ___, 90 Crim. L. Rep. 539 (U.S. 1/18/12):**
Holding: Prisoner who missed filing deadline in state postconviction proceeding because his lawyer abandoned him demonstrated "cause" needed to excuse the procedural default in federal habeas corpus.

*** Cavazos v. Smith, ___ U.S. ___, 90 Crim. L. Rep. 213 (U.S. 10/31/11):**
Holding: 9th Circuit unreasonably applied federal law in holding that evidence was insufficient in shaken baby case.

*** Cullen v. Pinholster, ___ U.S. ___, 89 Crim. L. Rep. 5, 131 S.Ct. 1388 (U.S. 4/4/11):**
Holding: Federal habeas court is limited to reviewing the evidence that was before the state court in determining under 28 USC 2254(d)(1) if state court decision is "contrary to,

or an unreasonable application of clearly established federal law"; federal court should not have considered new mitigating evidence that was not presented to state court in considering ineffective assistance of counsel claim; it was not unreasonable for state court to conclude that counsel made a strategic decision not to present further evidence of defendant's mental problems because that could lead jury to believe that defendant could not be rehabilitated.

*** Premo v. Moore, ___ U.S. ___, 88 Crim. L. Rep. 474, 131 S.Ct. 733 (U.S. 1/19/11):**
Holding: State court decision that counsel was not ineffective in not moving to suppress statement to police before a guilty plea was not unreasonable, where Defendant had also confessed to other individuals.

*** Premo v. Moore, ___ U.S. ___, 131 S.Ct. 733 (U.S. 2011):**
Holding: State court's finding that counsel was not ineffective was not unreasonable where counsel told Defendant to plead guilty without first challenging Defendant's confession; suppression would serve little purpose since there was a second admissible confession and there were strategic reasons to enter into a quick plea bargain to avoid the prosecution making a deal with a co-defendant.

*** Harrington v. Richter, ___ U.S. ___, 88 Crim. L. Rep. 474, 131 S.Ct. 770 (U.S. 1/19/11):**
Holding: Even though state court decision denying postconviction relief did not express any reasons for denial, this is still an "adjudication on the merits" that requires federal courts to apply a deferential reasonableness standard on federal habeas review; state court's decision that counsel was not ineffective in failing to get a blood expert was not unreasonable.

Rivas v. Fischer, 96 Crim. L. Rep. 669 (2d Cir. 3/11/15):
Holding: State court unreasonably applied federal law in holding that counsel was not ineffective in failing to examine pathologist as to why he suddenly changed his opinion about the time of death to an unfavorable time for the defense; the time of death was critical to the alibi defense and the pathologist should have been examined on whether he changed his opinion to please the prosecutor because the pathologist was under investigation for professional misconduct.

Kovacs v. U.S., 94 Crim. L. Rep. 704 (2d Cir. 3/3/14):
Holding: *Padilla* error will entitle Defendant to writ of error coram nobis where Defendant can show that he either would have litigated a meritorious defense, or would have negotiated a better deal with no adverse immigration consequences, or would have gone to trial but for counsel's mistaken advice regarding immigration.

Gonzalez v. U.S., 2013 WL 3455501 (2d Cir. 2013):
Holding: Counsel was ineffective at sentencing where counsel did little more than attend the hearing.

U.S. v. Bui, 2014 WL 5315061 (3d Cir. 2014):
Holding: Plea counsel was ineffective in misadvising Defendant that he would be eligible for safety valve sentence reduction in pleading guilty, when he wasn't eligible.

Grant v. Lockett, 92 Crim. L. Rep. 764 (3d Cir. 3/7/13):
Holding: State court unreasonably applied federal law in holding that counsel was not ineffective in failing to discover that a key prosecution witness was on parole at time of his testimony because there was no formal deal for the witness to receive favorable treatment; "Poison lurks in the bias that can arise from the witness's subjective state of mind, regardless of whether the witness's belief arose from an actual agreement with, or representation of, the prosecutor."

Blystone v. Horn, 2011 WL 6598166 (3rd Cir. 2011):
Holding: State appellate court's determination that petitioner did not experience ineffective assistance of counsel was contrary to clearly established federal law, where counsel failed to develop expert mental health testimony and institutional records in mitigation of a death sentence.

U.S. v. Orocio, 89 Crim. L. Rep. 620 (3d Cir. 6/29/11):
Holding: *Padilla* is retroactive to cases on collateral review.

Breakiron v. Horn, 89 Crim. L. Rep. 190 (3d Cir. 4/18/11):
Holding: Where Movant claims that trial counsel was ineffective in failing to strike a juror who heard another juror's remarks about Defendant's prior bad acts, *Strickland* requires an objective assessment of whether any juror who heard the remarks would have voted to acquit Movant; Movant does not have to show that the specific juror in question was actually prejudiced to win relief; here, Movant is entitled to relief because there was a reasonable probability he would not have been convicted had counsel acted when the juror was exposed to the improper remarks.

Showers v. Beard, 89 Crim. L. Rep. 71 (3d Cir. 3/28/11):
Holding: Where Defendant (Wife) was charged with murder of husband and State's theory was she poisoned him orally with drug that he didn't know he was taking, counsel was ineffective in failing to call an expert who would have testified that the taste of the drug could not be masked by food or drink; a psychiatrist in the case provided counsel with contact information for three such experts, but counsel failed to consult with any of them; the defense theory was that husband committed suicide.

Lee v. Clarke, 2015 WL 1275344 (4th Cir. 2015):
Holding: Counsel ineffective in failing to request heat of passion instruction in second degree murder trial; such instruction was only chance for Defendant to be found guilty of manslaughter.

Elmore v. Ozmint, 2011 WL 5843684 (4th Cir. 2011):
Holding: Gross failure by trial lawyer to investigate the state's forensic evidence was ineffective assistance of counsel.

U.S. v. Smith, 89 Crim. L. Rep. 244 (4th Cir. 5/17/11):
Holding: Even though Defendant pleaded guilty, this did not waive a claim that there was a breakdown of communication so bad as to constitute constructive denial of counsel.

Tice v. Johnson, 2011 WL 1491063 (4th Cir. 2011):
Holding: Where police resumed questioning Defendant only 13 minutes after he had invoked his right to silence, counsel was ineffective in failing to move to suppress his confession.

U.S. v. Batamula, 97 Crim. L. Rep. 267 (5th Cir. 6/2/15):
Holding: Even though guilty plea judge said Defendant was likely to be deported, counsel can still be deemed ineffective and Defendant prejudiced by counsel's failure to give immigration consequence warnings prior to plea; Defendant is entitled to advice about immigration prior to deciding whether to plead guilty.

U.S. v. Urias-Marrafo, 94 Crim. L. Rep. 705, 2014 WL 805455 (5th Cir. 2/28/14):
Holding: (1) Court must consider *Padilla* claim even if presented in motion to withdraw guilty plea, rather than in post-conviction collateral attack action, because a court should address *Padilla* claims sooner rather than later; and (2) even though guilty plea judge gave some warnings about immigration consequences, this did not cure counsel's ineffectiveness in failing to warn of such consequences, because it is counsel's duty, not the court's, to give such warnings.

U.S. v. Pham, 93 Crim. L. Rep. 565 (5th Cir. 7/8/13):
Holding: Where non-English speaking Defendant became distraught after he was sentenced and wanted to "do something about getting less time," this should have put counsel on notice that Defendant wanted to appeal and counsel was ineffective in failing to file a notice of appeal; "a lay defendant, particularly one who speaks no English, [need not] incant the magic word 'appeal' to trigger counsel's duty to advise him about one."

U.S. v. Juarez, 2012 WL 592861 (5th Cir. 2012):
Holding: Counsel's failure to research the derivative citizenship defense before advising the defendant to plead guilty to the offense of lying about his United States citizenship satisfied the deficiency element of ineffective assistance of counsel.

Gunner v. Welch, 2014 WL 1491860 (6th Cir. 2014):
Holding: Direct appeal counsel was ineffective in failing to advise Defendant/Petitioner of the time limits for seeking state postconviction relief, even though direct appeal counsel had no obligation to represent Defendant in the postconviction action; thus, "cause" was established in federal habeas for the procedural default regarding a claim of ineffective assistance of trial counsel.

U.S. v. Ross, 2012 WL 6734087 (6th Cir. 2012):
Holding: Where record was unclear whether standby counsel had provided meaningful adversarial testing of Defendant's competency, remand was required.; 6th Amendment requires counsel at a competency hearing even where Defendant previously waived counsel.

Rayborn v. U.S., 2012 WL 2948171 (6th Cir. 2012):
Holding: Counsel was ineffective for failing to conduct any re-direct examination of Defendant after he had testified to rehabilitate his cross-examination testimony, and denied Defendant his right to testify and present his version of events.

Campbell v. U.S., 2012 WL 2923492 (6th Cir. 2012):
Holding: Even though Defendant waived some or all appellate rights, counsel was ineffective in failing to file notice of appeal upon Defendant's request.

Foster v. Wolfenbarger, 2012 WL 2948523 (6th Cir. 2012):
Holding: Even though counsel interviewed alibi witnesses over the phone for 15 or 20 minutes and found their information to be vague, counsel was ineffective in failing to perform any additional investigation such as ascertaining if other people could support the alibi defense.

Sowell v. Anderson, 2011 WL 5526381 (6th Cir. 2011):
Holding: Failure to conduct thorough investigation of defendant's childhood constituted ineffective assistance of counsel where the state was seeking the death penalty and reports on the record referenced defendant's horrific childhood.

Foust v. Houk, 2011 WL 3715155 (6th Cir. 2011):
Holding: Death penalty counsel ineffective in not obtaining records about client's life history and failing to interview family members.

Goodwin v. Johnson, 2011 WL 181468 (6th Cir. 2011):
Holding: Death penalty counsel ineffective in penalty phase in failing to present evidence of childhood abuse, alcoholic and drug using mother, sexual molestation and abandonment by both parents.

Campbell v. Reardon, 96 Crim. L. Rep. 646 (7th Cir. 3/10/15):
Holding: State court unreasonably applied federal law in rejecting ineffective assistance claim where trial counsel failed to investigate three eyewitnesses identified in police reports who would have contradicted prosecution witnesses' version of events; the State court failed to recognize that any decision on strategy by counsel can only come after investigation by counsel; the adequacy of counsel's investigation was "clearly established" federal law under *Strickland*.

Newman v. Harrington, 2013 WL 4033898 (7th Cir. 2013):
Holding: Counsel was ineffective in failing to investigate mentally retarded Defendant's competency.

Hurlow v. U.S., 93 Crim. L. Rep. 670 (7th Cir. 8/9/13):
Holding: Even though Defendant waived his right to pursue an ineffectiveness claim as part of his plea bargain, the waiver was not valid where he alleged that he entered the plea agreement on the basis of advice that fell below constitutional standards; here, Defendant alleged he would not have taken the plea deal but for counsel's failure to recognize that there was a valid 4th Amendment suppression issue; it is an attorney's ineffectiveness with regard to the plea agreement as a whole, and not just the specific waiver provision at issue, that renders the waiver unenforceable.

Shaw v. Wilson, 93 Crim. L. Rep. 586 (7th Cir. 7/24/13):
Holding: Even though state court postconviction court had suggested that claim that appellate counsel had failed to raise lacked merit, this was not entitled to deference in federal habeas because the relevant issue is not the state court's determination of the merits of petitioner's state law claim but the strength of that claim relative to the weaker claim that counsel chose to pursue; hence, the state court unreasonably applied federal law, and habeas relief is granted on claim of ineffective assistance of appellate counsel.

Stitts v. Wilson, 2013 WL 1501959 (7th Cir. 2013):
Holding: State court unreasonably applied federal law in holding that counsel was not ineffective in limiting his investigation of Defendant's alibi to Defendant's father; at the time of the crime, Defendant was at a nightclub with many other witnesses.

Toliver v. Pollard, 2012 WL 3156310 (7th Cir. 2012):
Holding: Counsel was ineffective in failing to investigate wife and cousin who would have testified that murder-Defendant tried to stop the shooter from shooting victim.

Gardner v. U.S., 2012 WL 1889316 (7th Cir. 2012):
Holding: Counsel was ineffective for failing to move to suppress evidence found in a frisk of Defendant because counsel erroneously believed that the law prohibited him from doing so absent a confession from Defendant that he possessed the seized items; Defendant had a reasonable expectation of privacy in his person and clothing that would have supported a challenge to Officer's patdown of him on grounds that Officer lacked reasonable suspicion to frisk him.

Bear v. U.S., 2015 WL 457920 (8th Cir. 2015):
Holding: There is no per se rule that counsel was ineffective merely because counsel was suspended from practice of law; there was nothing inherent about the suspension that suggested counsel was unable to effectively represent Defendant.

Franco v. U.S., 2014 WL 3882545 (8th Cir. 2014):
Holding: Defendant was entitled to evidentiary hearing on claim that counsel was ineffective in failing to file notice of appeal; Defendant's affidavit claimed he asked counsel to file notice, and counsel's affidavit said he could not recall if Defendant requested this, but if Defendant had, he would have filed one.

Plunk v. Hobbs, 2013 WL 3333101 (8th Cir. 2013):
Holding: Counsel had an actual conflict of interest that adversely affected his performance where he represented Defendant and his girlfriend in drug case, and negotiated a "package deal" whereby girlfriend got probation in exchange for Defendant getting a 99-year sentence; counsel should have advised Defendant of the conflict of interest that prevented counsel from exploring more favorable plea options for Defendant.

U.S. v. Coutentos, 2011 WL 3477190 (8th Cir. 2011):
Holding: Trial counsel ineffective in failing to assert statute of limitations defense to child pornography charge.

Zapata v. Vasquez, 97 Crim. L. Rep. 333 (9th Cir. 6/9/15):
Holding: (1) Habeas relief granted for ineffective assistance of counsel for failure to object when Prosecutor, in closing argument and without any support in the evidence, made up words that Defendant allegedly said to Victim before killing Vicitm; not only was there no evidentiary support that Defendant said these words, but the words were inflammatory because they included a racial slur against Victim. (2) State court's conclusion that it was "conceivable" that defense counsel had a strategic reason for failing to object was objectively unreasonable.

Mann v. Ryan, 96 Crim. L. Rep. 355 (9th Cir. 12/29/14):
Holding: State court unreasonably applied federal law in applying a "preponderance of evidence" standard to a *Strickland* claim, rather than a standard of "reasonable probability" of a different outcome; a preponderance standard is higher than required by *Strickland*.

Vega v. Ryan, 95 Crim. L. Rep. 277 (9th Cir. 5/19/14):
Holding: Counsel was ineffective in failing to read prior counsel's trial file carefully enough to learn about helpful information in the file.

Vega v. Ryan, 94 Crim. L. Rep. 236, 735 F.3d 1093 (9th Cir. 11/13/13):
Holding: Successor counsel in child sex case was ineffective in failing to familiarize himself with prior counsel's file and investigate a Witness mentioned in prior counsel's file to whom alleged victim had recanted; even though Defendant himself knew of this Witness, it is "illogical" to hold Defendant responsible for failure to tell counsel about the Witness.

Griffin v. Harrington, 93 Crim. L. Rep. 669 (9th Cir. 8/16/13):
Holding: Habeas relief granted on claim that counsel was ineffective in failing to object to an important trial witnesses testifying without taking an oath.

Lambright v. Ryan, 92 Crim. L. Rep. 114 (9th Cir. 10/17/12):
Holding: Since the waiver of attorney-client privilege that occurs when a Movant files an ineffectiveness claims is narrow, a court must enter a protective order stating the contours of the limited waiver before commencement of discovery and must strictly police the limits to discovery.

Miles v. Martel, 2012 WL 4490756 (9th Cir. 2012):
Holding: Pretrial counsel's failure to properly advise on applicable penalties under the three-strikes law, which caused Defendant to reject a more favorable plea offer, was ineffective.

U.S. v. Manzo, 2012 WL 113027 (9th Cir. 2012):
Holding: Counsel provided ineffective assistance by not anticipating that drug manufacturing and distribution offenses would be grouped for sentencing purposes, the effect of which had a major impact on the calculation of discretionary Sentencing Guidelines.

James v. Schriro, 2011 WL 4820605 (9th Cir. 2011):
Holding: Defendant was prejudiced by ineffective counsel at penalty phase of capital murder trial where counsel failed to conduct a basic investigation of defendant's social history, mental health and drug abuse.

U.S. v. Bonilla, 88 Crim. L. Rep. 774, 2011 WL 833293 (9th Cir. 3/11/11):
Holding: Even though Defendant knew it was possible he might be deported if he pleaded guilty, counsel was ineffective under *Padilla* in not advising of the virtual certainty of deportation.

U.S. v. Weeks, 2011 WL 3452053 (10th Cir. 2011):
Holding: Evidentiary hearing required on postconviction claim that Defendant received ineffective counsel at guilty plea because he had a valid defense to securities fraud in that he lacked knowledge of the illegality of his actions.

U.S. v. Roy, 95 Crim. L. Rep. 574 (11th Cir. 8/5/14):
Holding: Where defense counsel was absent from an important State's witness' testimony for seven minutes because counsel was late returning from lunch, this violated Defendant's right to counsel and, under *Cronic*, he need not show prejudice; the absence of counsel deprived Defendant of the opportunity to make objections and conduct effective cross-examination based on the direct.

DeBruce v. Alabama Dept. of Corrections, 95 Crim. L. Rep. 511 (11th Cir. 7/15/14):
Holding: Death penalty counsel was ineffective for not investigating serious mental health issues raised by a competency report, and instead limiting the search for mitigation to discussion with Defendant's mother.

Johnson v. Secretary, 2011 WL 2419885 (11th Cir. 2011):
Holding: Death penalty counsel ineffective in failing to investigate bad childhood, abusive and alcoholic father, and family abandonment; counsel only interviewed Defendant about his background and waited to 11th hour to prepare for penalty phase.

Ferrell v. Hall, 2011 WL 1811132 (11th Cir. 2011):
Holding: Counsel was ineffective in failing to investigate mitigation where Defendant exhibited "red flags" of mental disorders, including facial tics, strange affect, obsessive religious beliefs, and odd behaviors; counsel failed to investigate and present abusive childhood, poverty and mental health as mitigation.

U.S. v. Bell, 2013 WL 765055 (D.C. Cir. 2013):
Holding: Counsel was ineffective for failing to advise client that he could receive a lower sentence under "safety valve" provision if he cooperated with Gov't.

Kigozi v. U.S., 2012 WL 592805 (D.C. 2012):
Holding: Counsel was ineffective in not calling a drug expert who would have testified that shooting victim's dying declaration identifying Defendant was not reliable since victim was under influence of drugs.

Krecht v. U.S., 2012 WL 640034 (S.D. Fla. 2012):
Holding: Trial counsel's failure to advocate for safety valve relief from defendant's sentence constituted ineffective assistance.

Green v. Georgia, 2014 WL 4960248 (N.D. Ga. 2014):
Holding: Counsel was ineffective in failure to register as sex offender case, where counsel failed to raise that underlying sodomy conviction was based on statute that was no longer a crime because had been found unconstitutional.

Rogers v. U.S., 2013 WL 2547852 (N.D. Iowa 2013):
Holding: Counsel's decision to withdraw objection to sentence enhancement based on claim that bad checks did not constitute an "access device" was not based on diligent preparation and investigation, and was ineffective; if he had investigated, he would have found that the enhancement did not apply in Defendant's case.

Escobedo v. Lund, 2013 WL 2420842 (N.D. Iowa 2013):
Holding: Trial counsel was ineffective in failing to object to replacement of a juror once deliberations had started, and Movant was prejudiced because there was a reasonable probability he would have obtained a mistrial if counsel had not failed to object.

Johnson v. U.S., 2012 WL 1836282 (N.D. Iowa 2012):
Holding: Counsel was ineffective in penalty phase in failing to provide drug expert witness with data regarding Defendant's prior drug history.

Johnson v. U.S., 2012 WL 992109 (N.D. Iowa 2012):
Holding: Trial counsel's failure to provide a psychiatric pharmacologist with date regarding the defendant's drug history prejudiced the defendant, thereby constituting ineffective assistance.

McGowan v. Burt, 2014 WL 4428389 (E.D. Mich. 2014):
Holding: Counsel was ineffective in misadvising Defendant of the range of punishment he faced if convicted at trial; counsel told Defendant he faced a lower range of punishment than he actually did, and the inaccurate advice caused Defendant to forgo a favorable plea offer and receive a lengthy sentence at trial; further, there was no showing the prosecutor would have withdrawn the offer or that the trial court would have rejected it.

Lopez v. Miller, 2013 WL 155015 (E.D. N.Y. 2013):
Holding: Counsel was ineffective failing to call Defendant's mother-in-law and sister-in-law to corroborate his alibi.

Moore v. Keller, 2012 WL 6839929 (E.D. N.Y. 2012):
Holding: Counsel was ineffective in failing to retain an expert on eyewitness identification where misidentification was the sole defense, and expert could have testified on unreliability of cross-racial identification.

U.S. v. Matthews, 2014 WL 785589 (N.D. N.Y. 2014):
Holding: Even though counsel investigated some alibi information, counsel was ineffective in investigation of Defendant's alibi where there was a wealth of information in the defense file that should have prompted further investigation into Defendant's location.

U.S. v. Daugerdas, 2012 WL 2149238 (S.D. N.Y. 2012):
Holding: New trial warranted where juror failed to disclose that she was a suspended attorney who had multiple criminal convictions and was on probation at time of trial.

Roberts v. Howton, 2014 WL 1400201 (D. Or. 2014):
Holding: Counsel was ineffective in advising Defendant to plead guilty based on prosecutor's claim that there was evidence "pinpointing" Defendant's location near the crime scene, where counsel failed to review this purported evidence or consult with an expert about it.

U.S. v. Miranda, 2014 WL 4063309 (D.P.R. 2014):
Holding: Counsel was ineffective in plea negotiations where counsel failed to convey a first plea offer and counsel's inertia and failure to follow professional norms in plea negotiations prevented a second plea offer.

Wilbur v. City of Mount Vernon, 94 Crim. L. Rep. 338 (W.D. Wash. 12/4/13):
Holding: Cities' Public Defender System resulted in systemic violation of 6th Amendment right to effective counsel, because the system essentially resulted in a "meet and plead" system. Court orders creation of a "Public Defender Supervisor" to review case files and ensure attorneys are providing effective assistance.

Young v. Washington, 2010 WL 3767596 (W.D. Wash. 2010):
Holding: Counsel was ineffective in failing to call Defendant's son who would have testified that he (son) shot the victim.

Ex parte Whited, 96 Crim. L. Rep. 559 (Ala. 2/16/15):
Holding: Defense counsel was ineffective in waiving closing argument before hearing the State's closing argument.

Montgomery v. State, 2014 WL 1096052 (Ark. 2014):
Holding: Counsel was ineffective in failing to object to Social Worker's testimony in child sex case where Social Worker testified that she did not think Child's mother coerced Child into making statements; this was direct comment on credibility of other witnesses and invaded province of jury.

People v. Centeno, 2014 WL 6804508 (Cal. 2014):
Holding: Prosecutor's closing that explained concept of proof beyond reasonable doubt using a visual aid of outline of State of Calif. or Statute of Liberty did not accurately explain reasonable doubt and trivialized the deliberative process by turning deliberations into a game where jurors could jump to conclusions; counsel was ineffective in failing to object.

People v. Martinez, 93 Crim. L. Rep. 669 (Cal. 8/8/13):
Holding: Where Defendant claimed prejudice from his trial court's failure to warn him about immigration consequences of his guilty plea, the test is whether he would have declined to take the plea if warned, not whether he ultimately would have obtained a different result (not guilty verdict).

Hagos v. People, 92 Crim. L. Rep. 189 (Colo. 11/5/12):
Holding: The "plain error" standard on direct appeal is not the same as the showing of prejudice required under *Strickland*, which is a lower "reasonable probability of a different outcome" standard; thus, while a jury instruction may not have been "plain error" on direct appeal, counsel can be ineffective for failing to object to the erroneous instruction.

Barlow v. Commissioner of Correction, 2014 WL 2472145 (Conn. 2014):
Holding: Counsel was ineffective in conveying only the fact of a plea offer to Defendant without any advice on whether the offer was a good one or not in the context of the facts of the case; counsel had professional obligation to advise about the merits of a plea offer vs. a trial; Defendant passed up 9 year offer, and got 35 years at trial.

H.P.T. v. Commissioner of Corrections, 2013 WL 6072992 (Conn. 2013):
Holding: Where counsel is found ineffective for failing to provide proper advice about a plea offer, remedy is to remand to trial court to consider whether it should vacate the convictions and accept the plea offer, leave the original convictions intact, or otherwise modify the conviction and sentence; trial court should nearly as possible place Petitioner in position he would have been absent ineffective assistance.

Gonzalez v. Commisioner of Corrections, 93 Crim. L. Rep. 239, 2013 WL 1895657 (Conn. 5/14/13):
Holding: Counsel was ineffective at arraignment where counsel filed to take steps that would have reduced time Defendant would ultimately serve on his sentence; arraignment was a "critical stage" of the proceedings to which right to effective counsel attached; counsel had failed to take action regarding a bond motion that would have resulted in Defendant receiving 73 days jail time credit for presentence incarceration.

Griffin v. State, 2013 WL 2096350 (Fla. 2013):
Holding: Counsel was ineffective in capital case in (1) having Defendant plead guilty based on unsubstantiated hunch that judge would not sentence Defendant to death; (2) failing to present evidence of drug use, family history of substance abuse and mental illness, history of depression and brain injury; (3) failing to obtain school and medical records, and (4) failing to rebut erroneous statements by State's medical expert in penalty phase.

Hernandez v. State, 92 Crim. L. Rep. 272 (Fla. 11/21/12):
Holding: Even though the plea judge gave some information about deportation to alien-Defendant, counsel can still be ineffective under *Padilla* for failure to advise on immigration consequences since counsel has an obligation to give more clear advice than the general advice given by a judge.

Parker v. State, 2011 WL 5984446 (Fla. 2011):
Holding: Trial counsel was deficient at capital resentencing proceeding in stipulating to hearsay evidence, where there was no strategic reason to do so, though defendant was not prejudiced by the deficiency.

State v. Coleman, 89 Crim. L. Rep. 475 (Fla. 6/2/11):
Holding: Where counsel's ineffectiveness led judge to override jury's verdict of life and impose death, the remedy for the ineffective assistance is for the trial court to impose a sentence of life.

Alexander v. State, 97 Crim. L. Rep. 170 (Ga. 5/11/15):
Holding: Counsel's failure to advise client on parole ineligibility when advising about a plea offer was ineffective in light of *Padilla*'s analysis about advising of consequences of a plea; *Padilla* requires courts to rethink issue of direct vs. collateral consequences.

Humphrey v. Walker, 95 Crim. L. Rep. 75 (Ga. 3/28/14):
Holding: Death penalty counsel was ineffective with respect to Defendant's competency to stand trial where counsel "gave up" trying to get a mental exam after Defendant refused to meet with a psychologist.

State v. Harter, 2014 WL 6975719 (Haw. 2014):
Holding: Where Defendant expressed dissatisfaction with appointed counsel and filed Bar Complaint against appointed counsel, trial court had duty to inquire as to potential

conflict of interest between Defendant and counsel; denial of Defendant's motion for substitute counsel denied effective assistance of counsel.

Booth v. State, 89 Crim. L. Rep. 646 (Idaho 6/29/11):
Holding: Where counsel erroneously told Defendant to take a plea because he would be subjected to a fixed life sentence if he went to trial (which was legally incorrect), the erroneous advice was ineffective.

Rhoades v. State, 95 Crim. L. Rep. 423 (Iowa 6/13/14):
Holding: Guilty plea counsel was ineffective in advising client to plead guilty to transmitting HIV when the evidence did not clearly show that there had been an exchange of bodily fluids sufficient to cause HIV/AIDS; having sex without notifying the partner of HIV status was insufficient proof of guilt, and also there was a question whether it was "medically true a person with a nondetectable viral load could transmit HIV."

State v. Fannon, 2011 WL 1900285 (Iowa 2011):
Holding: Prosecutor's breach of plea agreement not to recommend consecutive sentences was not cured by the prosecutor's withdrawal of his remarks, for purposes of determining if Defendant's counsel was ineffective in failing to object to the breach or request appropriate relief.

State v. Stovall, 94 Crim. L. Rep. 280, 312 P.3d 1271 (Kan. 11/22/13):
Holding: Counsel had an actual conflict of interest that adversely affected her performance where counsel failed to pursue a theory on Defendant's behalf that a former client of counsel actually committed the offense.

State v. Cheatham, 92 Crim. L. Rep. 492 (Kan. 1/25/13):
Holding: Flat fee in capital murder case created a conflict of interest and ineffective assistance of counsel.

State v. Galaviz, 2012 WL 6720627 (Kan. 2012):
Holding: Defendant has right to effective assistance of counsel in probation revocation proceedings as a matter of due process under 14th Amendment.

In re Ontiberos, 2012 WL 3537845 (Kan. 2012):
Holding: *Strickland* test applies to claims of ineffective counsel in SVP proceedings.

U.S. v. Kentucky Bar Ass'n, 95 Crim. L. Rep. 613 (Ky. 8/21/14):
Holding: Prosecutors, including federal prosecutors working in the State, cannot ethically require Defendants to waive claims of ineffective assistance of counsel as a condition of accepting a plea bargain.

Editor's Note: Missouri Formal Ethics Opinion 126 adopts a similar rule in Missouri.

Com. v. Pridham, 92 Crim. L. Rep. 124 (Ky. 10/25/12):
Holding: Counsel's failure to advise Defendant that his guilty plea would make him ineligible for parole for 20 years under state's "violent offender" law was ineffective; "We do not believe it unreasonable to expect of competent defense counsel an awareness of the violent offender statute and accurate advice concerning its effect on parole eligibility."

Hollon v. Com., 88 Crim. L. Rep. 244 (Ky. 11/18/10):
Holding: Even though appellate counsel raised some claims on appeal, Defendant may still claim ineffective appellate counsel where counsel failed to raise other possibly winning claims.

Taylor v. State, 2012 WL 3629058 (Md. 2012):
Holding: Where attorney filed suit against client for failing to pay legal fees before a case is concluded, this raised a presumption of prejudice and conflict of interest, though not necessarily ineffective assistance.

Com. v. DeJesus, 95 Crim. L. Rep. 271 (Mass. 5/19/14):
Holding: Plea counsel's advice to Defendant that his guilty plea would make him "eligible for deportation" was not specific enough under *Padilla*; counsel was required to advise that his deportation would be "presumptively mandatory" under federal law.

Com. v. Clarke, 89 Crim. L. Rep. 589 (Mass. 6/17/11):
Holding: *Padilla v. Kentucky*'s holding that defense counsel has 6th Amendment duty to advise noncitizens of immigration consequences is retroactive to cases on collateral review.

Hill v. State, 94 Crim. L. Rep. 554 (Miss. 2/6/14):
Holding: Even though there is no 6th Amendment right to "standby" or "advisory" counsel, where the trial court appointed such counsel and then ordered her not to reveal a confidential informant to Defendant even though this would have helped the defense, the Defendant was deprived of his right to effective assistance of counsel, because the trial court blocked counsel from rendering effective help.

Grayson v. State, 93 Crim. L. Rep. 157 (Miss. 4/18/13):
Holding: Mississippi recognizes right to effective assistance of counsel in postconviction death penalty cases (but finds was harmless here); "Because this Court has recognized that PCR proceedings are a critical stage of the death-penalty appeal process at the state level, today we make clear that PCR petitioners who are under sentence of death have a right to the effective assistance of PCR counsel"; petitioner had alleged that appointed PCR's counsel large caseload prohibited him from investigating case.

Davis v. State, 2012 WL 1538303 (Miss. 2012):
Holding: The failure of counsel for a capital murder defendant to conduct a reasonable, independent investigation to seek out readily available mitigation witnesses, facts, and evidence for the sentencing phase, and instead solely relying on witnesses suggested by

the defendant, was not a matter of trial strategy and constituted ineffective assistance of counsel.

State v. Filholm, 95 Crim. L. Rep. 48 (Neb. 3/28/14):
Holding: Defendant can raise ineffective assistance of counsel claims on direct appeal without alleging prejudice, because allegations of prejudice would likely require proof of facts outside the appellate record.

State v. Lipa, 2014 WL 4745559 (N.J. 2014):
Holding: Even though Defendant pleaded guilty to sexual assault, he should be allowed to withdraw his plea where he asserted he was innocent and that counsel was ineffective in preparing the case; Defendant presented some evidence that contradicted the charges.

State v. O'Neil, 96 Crim. L. Rep. 81 (N.J. 10/6/14):
Holding: Appellate counsel was ineffective in failing to bring to appellate court's attention new case law that likely would have caused reversal of Defendant's conviction, even though new case law was decided after Defendant's case had already been taken under submission; "appellate counsel could have no strategic reason for not raising a ruling that presumably would lead to a new trial for his client."

State v. Hess, 89 Crim. L. Rep. 719, 2011 WL 2899090 (N.J. 7/21/11):
Holding: (1) Counsel was ineffective for believing that plea agreement prohibited counsel from presenting mitigating evidence and argument at sentencing, and such a plea agreement would violate public policy because it undermines the adversarial process by denying the sentencing court information it needs; and (2) counsel was ineffective in failing to object to unduly prejudicial victim impact video entitled "A Tribute To [name of victim]," which included childhood photos, music, a segment about the victim's funeral, and a photo of their tombstone – these elements were not admissible evidence of the victim's life as related to family and friends.

Ramirez v. State, 2014 WL 2773025 (N.M. 2014):
Holding: *Padillia* is retroactive as a matter of state law, since New Mexico had required attorneys to advise of immigration consequences as a matter of state law anyway. (U.S. Supreme Court has held that *Padillia* is not retroactive as a matter of federal law).

State v. Leon, 2012 WL 6918125 (N.M. 2012):
Holding: Because under New Mexico law Defendant had right to counsel at probation violation hearing, counsel was responsible for filing a timely notice of appeal and was ineffective in failing to do so.

People v. Clermont, 2013 WL 5707868 (N.Y. 2013):
Holding: (1) Counsel was ineffective in pursuing motion to suppress where counsel's written motion contained erroneous facts about case (such as that it resulted from a traffic stop instead of an encounter on the street), counsel failed to marshal the facts for court or make legal argument at the suppression hearing, and counsel made no attempt to correct mistaken facts in the court's judgment which differed from the facts testified to at the

suppression hearing; and (2) appropriate relief was further proceedings on the suppression motion.

People v. Nesbitt, 2013 WL 1195696 (N.Y. 2013):
Holding: Counsel was ineffective in failing to argue that victim's injuries were not serious or protracted enough to constitute first degree assault.

People v. Colville, 2012 WL 5199390 (N.Y. 2012):
Holding: Where the trial court deferred to Defendant's personal decision contrary to judgment of his defense counsel not to submit lesser-included offense instructions in a murder prosecution, this deprived Defendant of the 6th Amendment benefit of effective assistance of counsel and warranted a new trial.

People v. Fisher, 91 Crim. L. Rep. 74 (N.Y. 4/3/12):
Holding: Counsel was ineffective in sex abuse case by failing to object to closing argument that (1) improperly bolstered State's case by saying girl told same story over and over to police, social workers and others; (2) told jurors they could consider evidence of girl's misbehavior at school as evidence that she was sexually abused; and (3) told jurors that "the day that the voice of a child is not evidence is the day that the [courthouse] doors should be locked forever."

State v. Herring, 2014 WL 6780725 (Ohio 2014):
Holding: Capital counsel ineffective in failing to present mitigating evidence that Defendant's parents and other family had been involved with drugs, that Defendant dropped out of school, began selling drugs at a young age, was a gang member at a young age, and had a dysfunctional childhood.

Com. v. Tharp, 2014 WL 4745787 (Pa. 2014):
Holding: Where capital counsel was aware that Defendant suffered abusive childhood, was a domestic violence victim, and had mental health problems, counsel was ineffective in presenting no witnesses during penalty phase.

Com. v. Daniels, 96 Crim. L. Rep. 157 (Pa. 10/30/14):
Holding: Death penalty counsel was ineffective in failing to consult with a mental health expert after seeing school records indicating Defendant was a slow learner, moved a lot and was placed in classes for students with social or emotional problems.

State v. Eddy, 2013 WL 3209536 (R.I. 2013):
Holding: Counsel was ineffective in failing to investigate the forensic evidence regarding the timing of a sexual encounter between Defendant and victim, because his failure to recognize or understand the science or weakness of State's case allowed State to inaccurately argue that it was scientifically impossible for anyone else to be involved.

Weik v. State, 2014 WL 3610954 (S.C. 2014):
Holding: Even though counsel presented psychological testimony in capital penalty phase about Defendant's mental illness, counsel was ineffective in failing to present even

a skeletal version of Defendant's social history of chaotic upbringing and dysfunctional family.

Walker v. State, 94 Crim. L. Rep. 770 (S.C. 3/19/14):
Holding: Counsel was ineffective in failing to investigate alibi witness who would have said they spent "every weekend together" with Defendant; even though this was not a model of clarity in alibi, it would have made a difference if believed by jurors.

Davidson v. State, 2014 WL 6645264 (Tenn. 2014):
Holding: Even though presentation of mental health evidence might open door to evidence that Defendant committed violent acts against women, capital counsel was ineffective in failing to present evidence of brain damage and cognitive disorders; jury already had heard that Defendant had a long history of violence against women.

Mobley v. State, 2013 WL 633201 (Tenn. 2013):
Holding: Appointed counsel was ineffective in failing to object to Defendant having to wear a stun belt at trial in the absence of necessity; record suggested that appointed counsel may have himself requested the stun belt because of conflict he was having with Defendant.

Smith v. State, 2011 WL 6318946 (Tenn. 2011):
Holding: Defense counsel were ineffective for failing to present evidence in support of capital defendant's motion to recuse sentencing judge, where the judge had prosecuted defendant for earlier crimes while he was an assistant district attorney general.

Calvert v. State, 89 Crim. L. Rep. 216 (Tenn. 4/28/11):
Holding: Defense counsel's failure to advise client that offense to which client was pleading guilty carried a mandatory lifetime term of community supervision was ineffective assistance.

State v. Larrabee, 94 Crim. L. Rep. 308, 2013 WL 6164424 (Utah 11/22/13):
Holding: Counsel was ineffective in failing to object to Prosecutor's closing argument which violated a motion in limine order not to present evidence about other claims of sex abuse by Defendant; there would be no sound trial strategy for counsel to fail to object to violation of the motion in limine order.

In re Williams, 2014 WL 3387988 (Vt. 2014):
Holding: Where Defendant was convicted of involuntary manslaughter for certain fire deaths and at sentencing Victims' family testified and demanded maximum penalty, counsel was ineffective at sentencing in failing to present defense witnesses who would have portrayed Defendant in favorable light; counsel merely made a few remarks based on the PSI.

State v. Maynard, 97 Crim. L. Rep. 236 (Wash. 5/28/15):
Holding: Where Juvenile's defense counsel failed to accept a plea offer before Defendant turned 18, Defendant should be allowed to take advantage of the original plea

offer; remedy is to put Defendant back in same position he would have been before the juvenile jurisdiction expired.

State v. Grier, 88 Crim. L. Rep. 592 (Wash. 2/10/11):
Holding: Even though Defendant acquiesced in decision to forgo a lesser-included offense instruction and go for "all or nothing" defense, this did not preclude Defendant from later claiming that his decision was based on ineffective assistance of counsel for deficient advice.

Ballard v. Ferguson, 94 Crim. L. Rep. 179 (W.Va. 10/25/13):
Holding: Counsel in murder case was ineffective in relying on a police report that said that third-party suspect had passed a polygraph test, and in failing to investigate Woman-Witness who told police that third-party suspect had told her that he had committed the murder.

Ortega-Araiza v. State, 95 Crim. L. Rep. 575 (Wyo. 8/6/14):
Holding: Counsel's failure to inform Defendant that he would be deported upon his guilty plea was not cured by Judge's generic warning that "certain felony convictions may be the basis for deportation"; *Padilla* required clear warning that deportation would result.

State v. Ziegler, 2014 WL 1744098 (Ala. App. 2014):
Holding: Counsel was ineffective in failing to formally move to withdraw from a capital case or take any action for 8 months, where counsel mistakenly believed another counsel had assumed representation for case; even if counsel believed another counsel had assumed representation, he still had obligation to formally withdraw; Defendant was prejudiced because he lost opportunity to dissuade prosecutor from seeking death.

Abercrombie v. State, 2014 WL 2678413 (Ala. App. 2014):
Holding: Petitioner was entitled to evidentiary hearing on claim that counsel was ineffective in erroneously advising him that the plea court had discretion to deviate from Habitual Felony Offender Act and sentence him to something less than required by the Act.

Osterkamp v. Browning, 2011 WL 681098 (Ariz. Ct. App. 2011):
Holding: Indigent movant was entitled to appointment of counsel to represent him in second PCR proceeding alleging ineffective assistance of PCR counsel.

Harris v. Superior Court, 2014 WL l653133 (Cal. App. 2014):
Holding: Counsel was ineffective and had conflict of interest where counsel himself was being prosecuted on a separate felony charge by the same Prosecutor's Office that was prosecuting Defendant.

People v. Rivera, 2014 WL 2535946 (Cal. App. 2014):
Holding: Where defense counsel admitted that he failed to file a timely notice of appeal due to a mistaken belief about the law and filed a motion to appeal late, appellate court

would treat the motion as a habeas petition and grant it; judicial economy was best served by avoiding the cumbersome habeas process to allow counsel to be found ineffective for failing to appeal.

People v. Pangan, 92 Crim. L. Rep. 574 (Cal. App. 2/4/13):
Holding: Counsel was ineffective in failing to argue that restitution for future lost earnings of victim who was killed in DWI accident had to be discounted to account for the time value of money.

People v. Smith, 152 Cal. Reptr. 3d 142 (Cal. App. 2013):
Holding: Counsel at SVP hearing was ineffective in agreeing to proceed on an SVP release petition under an SVP statute that was less favorable to petitioner seeking release than another SVP statute.

Rolon v. State, 2011 WL 4809119 (Fla. Dist. Ct. App. 2011):
Holding: Where, during his first trial, defendant was deprived of effective assistance of counsel during his direct and cross-examination, the court erred in allowing the state to introduce defendant's statements from the first trial during the second trial.

Penn v. State, 2011 WL 115941 (Fla. App. 2011):
Holding: Where counsel told court that "the last time she talked to Defendant, he wanted her off his case," the court was required to conduct a preliminary examination of effectiveness of counsel.

Cheeks v. State, 2013 WL 5993211 (Ga. App. 2013):
Holding: Counsel was ineffective in failing to object to Prosecutor's argument about Defendant's silence and failure to come forward to police.

Ottley v. State, 2013 WL 6085227 (Ga. App. 2013):
Holding: Counsel was ineffective in failing to investigate sexual assault nurse's credentials, and failing to interview nurse or victim's doctor before trial; counsel's strategy of attacking the child and her family's credibility and to accept the credibility of the medical evidence was not reasonable given the weak evidence in case.

People v. Gamino, 2012 WL 2369534 (Ill. App. 2012):
Holding: It is per se ineffective assistance of counsel for a Defendant to unknowingly be represented by a disbarred or suspended attorney.

State v. Greene, 2013 WL 6839119 (Ind. App. 2013):
Holding: Trial and appellate counsel were ineffective in failing to research and cite two cases which would have negated Defendant's assault conviction as a matter of law; counsel was obligated to research and bring matter of law to court's attention.

Com. v. Roberson, 2013 WL 1688357 (Ky. App. 2013):
Holding: Where trial court found that counsel had completely abdicated his responsibility to Defendant at critical stage of juvenile transfer, court was required to apply *Cronic* absence-of-counsel standard, not *Strickland* prejudice standard.

People v. Fonville, 2011 WL 222127 (Mich. App. 2011):
Holding: Counsel was ineffective in not informing defendant that sex offender registration was a consequence of a guilty plea.

Brown v. State, 2014 WL 5555001 (Miss. App. 2014):
Holding: Counsel was ineffective in failing to strike venireperson who said it "would be hard to be impartial" and who answered "yes" when asked if it "would be better if you didn't sit?"

State v. Smullen, 2014 WL l3970238 (N.J. Super. Ct. App. 2014):
Holding: Plea counsel was ineffective in failing to inform sex Defendant that he would be subject to lifetime supervision.

State v. Barlow, 89 Crim. L. Rep. 211 (N.J. Super. Ct. App. 5/6/11):
Holding: Defense counsel has professional obligation to move to withdraw a guilty plea for a client if client requests this, and failure to do so is ineffective assistance.

State v. Favela, 2013 WL 4499459 (N.M. App. 2013):
Holding: Even though the trial court warned Defendant about immigration consequences, this never cures the prejudice from counsel's ineffectiveness in failure to warn under *Padilla*, because judges cannot know a defendant's priorities or use information strategically in negotiating pleas; also, advice by a judge is not the same as advice by counsel who knows more specific information about the case.

People v. Jian Long Shi, 2014 WL 1344412 (N.Y. App. 2014):
Holding: Counsel was ineffective in failing to move for pretrial hearing to determine if probative value of Defendant's prior bad acts outweighed their prejudicial effect.

People v. Murray, 2013 WL 2915711 (N.Y. App. 2013):
Holding: Counsel was ineffective and had no legitimate trial strategy in DWI trial for arguing that since Defendant was asleep in the car, he couldn't be guilty of DWI, when state courts had previously held that being asleep in the driver's seat would constitute operation of a motor vehicle and guilt of DWI.

People v. Burgos, 2012 WL 2912498 (N.Y. Sup. 2012):
Holding: Failure to advise of immigration consequences was ineffective assistance, and Defendant was prejudiced because there is a reasonable probability Defendant would not have entered the plea and would have insisted on going to trial absent the deficient advice

People v. Bowles, 90 Crim. L. Rep. 264 (N.Y. App. Div. 11/1/11):
Holding: Defendant has due process right to effective assistance of counsel in assessment hearing under New York's Sex Offender Registration Law because of stigmatizing effect of registration.

People v. Nunez, 2010 WL 5186602 (N.Y. App. 2010):
Holding: *Padilla* holding (that counsel must advice defendants of immigration consequences of guilty plea) is retroactive.

Berg v. Nooth, 2013 WL 4451225 (Or. App. 2013):
Holding: Counsel was ineffective in failing to object to improper "vouching" by child sex victim's treating doctor and social service agent, and the State's closing argument that emphasized this testimony.

Rodriguez v. State, 2013 WL 5477366 (Tex. App. 2013):
Holding: Where counsel told Defendant to forego a 10-year plea offer because "acquittal would be easy at trial" and Defendant was convicted at trial and received eight life sentences, counsel was ineffective and remedy was to allow Defendant to plead guilty to original 10-year plea offer, though trial court retained power to accept or reject it.

Frangias v. State, 2013 WL 690859 (Tex. App. 2013):
Holding: Trial counsel was ineffective in failing to depose witness who was sick in lieu of live trial testimony, where witness would have provided critical corroboration of the defense version of events.

Ex Parte Moussazadeh, 2012 WL 468518 (Tex. Crim. App. 2012):
Holding: Counsel's misinformation to defendant on parole eligibility, on which he relied in pleading guilty, was ineffective assistance of counsel.

Riley v. State, 2011 WL 3209175 (Tex. App. 2011):
Holding: Trial counsel ineffective in murder case in advising Defendant to go to trial to try to obtain "community supervision," but trial resulted in sentence of 50 years.

State v. Fowers, 2011 WL 5438944 (Utah Ct. App. 2011):
Holding: Counsel rendered ineffective assistance by eliciting testimony about defendant's 25-year-old conviction for sodomy, which defendant had previously obtained a ruling to exclude.

Interrogation – Miranda – Self-Incrimination – Suppress Statements

State ex rel. Nothum v. Walsh, No. SC92268 (Mo. banc 7/31/12):
Even though Prosecutor had granted use immunity to Debtors under Sec. 513.380.2, Debtors could still assert their 5th Amendment privilege not to testify since use immunity is more limited than the constitutional privilege.

Facts: Creditors sought to compel Debtors to testify about various assets. Prosecutor had granted use immunity to Debtors under Sec. 513.380.2. Debtors asserted their 5th Amendment privilege against self-incrimination and refused to testify. Trial court held Debtors in contempt. Debtors sought writ of prohibition.
Holding: To supplant the privilege against compulsory self-incrimination, the scope of immunity granted must be co-extensive with the scope of the constitutional privilege, which includes both "use immunity" and "derivative use immunity." Here, Debtors received immunity pursuant to Sec. 513.380.2, which authorizes a prosecutor only to provide "use immunity" to a judgment debtor. A prosecutor has no inherent authority to provide immunity beyond the authority granted by Missouri statutes. The issue of whether a trial judge has inherent authority to grant immunity has not been addressed in Missouri and is not presented here. Here, the only immunity granted was "use immunity." Such immunity did not include "derivative use immunity" and so it was not co-extensive with the 5th Amendment privilege. Thus, the trial court abused its discretion in compelling Debtors to testify. Writ of prohibition granted.

State v. Churchill, 2014 WL 839455 (Mo. App. March 4, 2014):
Holding: (1) Where Mother (Defendant) was called to testify at a child protective hearing and repeatedly requested counsel before testifying (but court denied her request), Mother was denied her right to counsel under Sec. 211.111 and Rule 115.03 because the statute grants an unconditional right to counsel to any party to a juvenile court proceeding for all stages of the proceeding and the Rule requires the court to inform the juvenile's parents of the right to appointed counsel; but (2) even though counsel was not provided, Mother-Defendant's statements made at the juvenile hearing should not be suppressed at her subsequent trial for perjury, because courts have held that the exclusionary rule does not immunize perjury when false statements were obtained in violation of a defendant's constitutional rights, so exclusion is not warranted for violation of Mother-Defendant's statutory rights either. (3) Furthermore, Mother-Defendant's Sixth Amendment right to counsel was not violated because there was no adversary judicial criminal proceeding pending against Mother-Defendant at the time she testified, so the Sixth Amendment right to counsel had not yet attached, and (4) even if her Fifth Amendment right against self-incrimination was violated (which appellate court does not decide), this does not mandate that her statements be suppressed because the Fifth Amendment privilege does not immunize perjury.

State v. Beasley, 2013 WL 6818153 (Mo. App. E.D. Dec. 24, 2013):
Defendant's Fifth Amendment privilege against self-incrimination was violated where Officer asked Defendant, who was under investigation for a crime, whether he owned a black box (in which incriminating evidence was ultimately found) prior to giving Miranda warnings.
Facts: While Defendant was already in jail on a sex charge, Officer sought to question Defendant about different sex offenses, which Officer was investigating. Officer had Defendant brought to the police station, and asked his consent to search a black box which police had obtained as part of their investigation. Defendant consented to the search. Officer then asked Defendant who owned the box, and Defendant ultimately said he didn't know if the box was his but he owned one like it. Only after this did Officer

read Defendant his *Miranda* rights. Evidence of crime was ultimately found in the box. At trial, the State presented Officer's testimony that Defendant said he owned a box like the one at issue.

Holding: On appeal, Defendant argues that the trial court plainly erred in admitting his statements regarding ownership of the box because these statements were made prior to *Miranda* warnings and, thus, violated his Fifth Amendment privilege against self-incrimination. A request for consent to search a container is not itself deemed "interrogation," and therefore, Officer did not violate the Fifth Amendment when he asked Defendant for consent to search the box. However, when Defendant additionally answered that he did not know whether the black box was his, Officer's ensuing questioning constituted "interrogation," in that there was a reasonable likelihood Defendant would answer in a way that would incriminate him. Thus, the failure to give *Miranda* warnings prior to asking the questions here beyond consent to search violated Defendant's Fifth Amendment privilege, and his subsequent statements should have been suppressed. However, there is no plain error here because other evidence of guilt was overwhelming.

State v. Jones, No. ED97595 (Mo. App. E.D. 10/2/12):

Defendant's incriminating statements should have been excluded under the corpus delicti rule because there was not independent corroboration that a murder had occurred where the only other evidence of guilt was police testimony that baby-decedent was on a bed near pillows and the medical examiner based his opinion that the baby died of suffocation on the Defendant's statements.

Facts: In 2008, Defendant's Baby died. At the time, the death was believed to have been caused by a seizure disorder. In 2009, a different baby of Defendant also almost died. This caused police to investigate the 2009 death. While questioning Defendant about that death, Defendant brought up first Baby's death, and said she had put Baby facedown on a pillow because Baby wouldn't stop crying, after which Baby stopped breathing. Defendant was then charged and convicted of second degree murder for death of first Baby. At trial, her statements to police were admitted against her. On appeal, she claimed that admission of such statements was plain error under the *corpus delicti* rule.

Holding: The *corpus delicti* rule bars the admission of extrajudicial statements by a defendant absent proof of the commission of an offense. In a murder case, the *corpus delitici* requires proof the death of the victim and evidence that the criminal agency of another person caused the death. The amount of corroborating evidence allowing the admission of out-of-court statements can be minimal, but here, there wasn't any corroboration. The police testified that Baby was found on an adult bed near pillows and not breathing. Although police referred the case to investigators for further investigation because they thought it was "suspicious," this is not corroboration of a murder. Importantly, the autopsy of Baby originally found the cause of death to be "seizure disorder." Later, the pathologist changed this to "suffocation," but only after Defendant's statements to police and not based on any new medical tests. If the pathologist had originally found the death to be caused by suffocation, that would be corroboration of a homicide, but he did not find this. The record is clear that the pathologist later revised his opinion solely because of Defendant's statements, not medical evidence. Without Defendant's statements, the cause of death would have remained seizure disorder.

Defendant's statements should not have been admitted under the *corpus delicti* rule. New trial ordered.

State v. Smoot, No. ED95499 (Mo. App. E.D. 12/27/11):
Where Defendant contends his statements to police were not voluntary because they were physically coerced, the trial court must make a determination on voluntariness before they can be admitted, even for impeachment purposes.
Facts: Defendant made certain statements to police, and filed a motion to suppress claiming that the statements were the result of physical coercion. The State claimed that even if the statements were involuntary, they could be used to impeach Defendant's testimony at trial. The trial court admitted them for impeachment purposes without ruling whether they were voluntary. After conviction, Defendant appealed.
Holding: Statements made to police can only be admitted for impeachment purposes if they were voluntary. If a defendant challenges the voluntariness of a statement, the burden of proof is on the State to show the statements were voluntary. When the trial court fails to rule on this issue, it is impossible for the appellate court to decide the issue. However, a new trial is not required. Instead, the case is remanded to the trial court to determine if the statements were voluntary. If yes, then the record shall be resent to the appellate court and Defendant may challenge this on appeal. If not, the trial court should grant a new trial.

State v. O'Neal, No. ED95274 (Mo. App. E.D. 11/29/11):
Where prosecutor objected to admission of Defendant's medical records in front of the jury by saying they were"simply a way to avoid the defendant testifying," this was a direct comment on Defendant's failure to testify and a mistrial should have been granted.
Facts: Defendant was charged with attempted stealing. As part of his defense, he sought to introduce his medical records with a business records affidavit. The prosecutor objected to the records in front of the jury as "simply a way to avoid the defendant testifying." Defense counsel objected as violating defendant's rights not to testify and requested a mistrial, which the trial court overruled.
Holding: A direct reference to a defendant's failure to testify violates the rights of freedom from self-incrimination and right not to testify under the 5th and 14th Amendments, and Art. I, Sec. 19 Mo. Const. A "direct reference" uses words such as "testify," "accused" and "defendant." Here, the prosecutor's speaking objection in front of the jury was egregious because there had been a prior bench conference about the records at which the State had made an objection that had been overruled. The objection in front of the jury may have prejudiced the jury against Defendant for using the medical records rather than testifying himself. Reversed for new trial.

State ex rel. Nothum v. Kintz, No. ED95280 (Mo. App. E.D. 2/2/11):
Holding: Where judgment-debtors invoked their 5th Amendment privilege against self-incrimination and refused to answer interrogatories or give testimony about their property, the trial court could not compel them to testify absent a finding that, as a matter of law, the witness' response to the questions could not possibly intend to incriminate them. Here, the trial court failed to make such a finding. Writ of prohibition granted to preclude trial court from holding judgment-debtors in contempt.

State v. Thieman, No. SD30818 (Mo. App. S.D. 11/10/11):
Holding: Where Defendant's prior guilty plea had been withdrawn, his statements made in a SAR (sentencing assessment report) could not be used by the State at his trial because Rule 24.02(d)(5) provides that "evidence of a guilty plea, later withdrawn, or an offer to plead guilty …, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers is not admissible in any civil or criminal proceeding against the person who made the plea or offer."

State v. Avent, 2014 WL 1303418 (Mo. App. W.D. April 1, 2014):
Even though Officer testified that Defendant-Driver had glassy eyes, admitted to consuming beers, smelled of alcohol, failed a PBT test, and failed some sobriety tests, where there was also contrary evidence and trial court granted Defendant's motion to suppress statements and evidence by finding there was no probable cause to arrest Defendant, the appellate court's deferential standard of review requires that all credibility determinations and inferences be viewed in the light most favorable to the trial court's ruling, and therefore, granting of motion to suppress is affirmed.
Facts: Defendant-Driver was stopped for speeding. Officer smelled alcohol, and had Defendant perform various field sobriety tests. Defendant passed the walk-and-turn test and one-leg-stand test, but failed the HGN test and PBT. Officer arrested Defendant, and read her *Miranda* warnings. Her BAC was ultimately tested and was greater than .08. Defendant filed a motion to suppress her statements and test results, on grounds that Officer had no probable cause to arrest her for DWI. The trial court granted the motion. The State appealed.
Holding: On appeal, the State cites evidence in the record that supports a finding of probable cause to arrest. However, this is contrary to the appellate standard of review, which allows the trial court to make credibility determinations and which views evidence and inferences in the light most favorable to the trial court's ruling. Where the trial court makes no findings of fact, the trial court is presumed to have found all facts in accord with its ruling. The trial court will be deemed to have implicitly found contrary testimony not credible. Here, Defendant contested the State's claim that she was intoxicated by cross-examining the Officer about favorable facts to her side of the case. The court was not required to find the Officer credible. Properly viewed in accord with the standard of review, although some facts showed intoxication, Officer observed several tests that did not indicate intoxication, Officer did not observe Defendant not have control of her vehicle (although she was speeding), Defendant complied with requests for identification and license, Defendant was not incoherent or confused or uncooperative, and her eyes weren't impaired. The trial court weighed this evidence and determined there was no probable cause to believe Defendant was intoxicated. Judgment affirmed.

Hemphill v. Pollina, 2013 WL 1197502 (Mo. App. W.D. March 26, 2013):
Holding: (1) Where Defendant entered an *Alford* plea to assault and received an SIS, the *Alford* plea was not admissible against Defendant in a later civil suit over the assault as an admission against interest because the *Alford* plea was not an admission of guilt and was not inconsistent with Defendant's position in the civil case; (2) Defendant's *Alford* plea was not admissible for purposes of impeachment of Defendant since it resulted in an

SIS and the disposition of a criminal charge by SIS is not a conviction for purposes of impeachment; (3) Defendant's post-*Miranda* failure to speak to police was not admissible as an admission against interest because Defendant had no duty to speak.

State v. Clampitt, No. WD73943 (Mo. App. W.D. 1/24/12):
Where prosecutor used investigative subpoenas to subpoena cell phone records of text messages of Defendant for a month after a vehicle crash in an attempt to find out if Defendant would make an incriminating statement about the crash, the text messages must be suppressed because Defendant had a reasonable expectation of privacy in his text messages and the prosecutor's use of investigative subpoenas was an unlawful fishing expedition not limited in scope or relevant purpose.
Facts: Defendant was involved in a car accident. The State issued four investigative subpoenas to various cell phone providers for text messages of Defendant for 30 days after that, requesting all text messages. When one subpoena would expire, the State would issue another one. Defendant was ultimately charged with first degree involuntary manslaughter from the accident. He moved to suppress the text messages. The trial court suppressed them. The State appealed.
Holding: The State contends Defendant has no standing because he lacks any reasonable expectation of privacy in the text messages since they are accessible to a third-party (the cell phone company). Prior cases have held, however, that a person maintains a reasonable expectation of privacy in letters mailed in the mail, even though those letters are delivered through a third party. Similarly, prior cases have found a reasonable expectation of privacy in phone calls and emails, even though a phone company or email company could listen in on calls or read email. As text messaging becomes a substitute for more traditional forms of communication, it follows that society expects the content of text messages to receive the same 4th Amendment protection as letters and phone calls. The State claims that even if there is an expectation of privacy, the use of investigate subpoenas overrides this. However, the 4th Amendment applies to investigative subpoenas and requires that they be limited in scope, purpose and directive. Here, the subpoenas were not. The subpoenas were issued until such time as Defendant made incriminating remarks, i.e., that he was the driver of the car. If no evidence about this had yet come about, presumably the State would still be issuing subpoenas in the hopes of getting an incriminating admission. The subpoenas were nothing more than an improper fishing expedition. The State claims that the good faith exception to the exclusionary rule should apply here, but that rule applies to police conduct, not prosecutor misconduct, as here. The prosecutor was engaged in a fishing expedition to find evidence of incriminating statements. Moreover, the evidence here was suppressed under Sec. 542.296.1, not the exclusionary rule.

State v. Sparkling, No. WD73737 (Mo. App. W.D. 11/29/11):
Where an interrogation video showed that Defendant did not initial or read a Miranda waiver form but just quickly signed it, the State did not meet its burden to show that Defendant's waiver of Miranda rights and statements were intelligent or knowing.
Facts: Police Detective met with Defendant, at Defendant's request, after Defendant had been arrested for various offenses. Detective testified that before he interviewed Defendant, he read him the *Miranda* warning and had him sign a waiver form. However,

there are blank lines before each of the *Miranda* rights on the form which the person can initial, but none were initialed. Detective testified that he asked Defendant if he understood his rights, but did not remember if Defendant said he understood his rights. The video of the interrogation showed that when Detective asked Defendant if he understood his rights, Defendant made no reply or any gesture indicating that he understood. Detective gave Defendant the *Miranda* waiver form and told him to "sign right there." The video shows that Defendant signed the form without reading it. Defendant filed a motion to suppress statements, which the trial court granted. The State appealed.
Holding: The State had the burden to show that Defendant's waiver of *Miranda* rights was knowing and intelligent, i.e., must show that Defendant understood the rights he was waiving. The trial court noted that the State was relying on Defendant's signature on the waiver form as proof that Defendant's waiver was knowing and intelligent, but such conclusion was inconsistent with the statements purportedly ratified by the signature, "as indicated by my initials," because there were no initials. Defendant never said he understood his rights. Defendant did not read the form. The State introduced no evidence of Defendant's experience, education, background or familiarity with the criminal justice system to show he understood his rights. The trial court's ruling suppressing the statements was not clearly erroneous.

*** Salinas v. Texas, 93 Crim. L. Rep. 390, ___ U.S. ___ (U.S. 6/17/13):**
Holding: Mere silence during a noncustodial interview is not an invocation of the 5th Amendment privilege against self-incrimination, and thus, 5th Amendment does not bar prosecutors from arguing as evidence of guilt the fact that Defendant suddenly stopped answering police questions during a noncustodial interview.

*** Howes v. Fields, ___ U.S. ___, 90 Crim. L. Rep. 661 (U.S. 2/21/12):**
Holding: Even though Defendant was a prisoner on another offense, where police questioned him at the prison on a different offense and told him he was free to return to his cell, *Miranda* warnings were not required; the determination of whether a person is "in custody" for *Miranda* purposes requires review of the totality of the circumstances, not just merely being a prisoner.

*** Bobby v. Dixon, ___ U.S. ___, 90 Crim. L. Rep. 198 (U.S. 11/7/11):**
Holding: Even though (1) Defendant was arrested after his name was on a check of a missing person and police questioned him without intentionally giving him *Miranda* warnings and he denied involvement, and (2) later police re-questioned him about the murder of the missing person after giving him *Miranda* warnings, the second statements were admissible because this was not a two-step interrogation prohibited by *Missouri v. Seibert*, 542 U.S. 600 (2004).

*** Howes v. Fields, ___ U.S. ___, 90 Crim. L. Rep. 661 (U.S. 2/21/12):**
Holding: Even though Defendant was a prisoner serving time for another offense, he was not "in custody" for *Miranda* purposes when questioned about a different offense and police told him that he could leave and go back to his cell whenever he wanted; the determination of "custody" focusses on all factors of the interrogation.

*** J.D.B. v. North Carolina, ___ U.S. ___, 89 Crim. L. Rep. 463, 131 S.Ct. 2394 (U.S. 6/16/11):**
Holding: The age of a juvenile is a factor to consider in determining whether juvenile was "in custody" for *Miranda* purposes, where the child's age was known to the officer at the time of questioning or would have been objectively apparent to a reasonable officer; here, 13 year old had been taken from his classroom and questioned by police and school officials about a break-in without advising him he did not have to answer or was free to leave.

U.S. v. Rogers, 90 Crim. L. Rep. 66 (1st Cir. 10/4/11):
Holding: Where military commander ordered military Defendant to report home, and civilian police were at the home and questioned him about a crime, the inherently coercive nature of the military order home meant Defendant was "in custody" at home for *Miranda* purposes.

Jackson v. Conway, 2014 WL 3953234 (2d Cir. 2014):
Holding: Child protection caseworker's interview of Defendant required *Miranda* warnings, where caseworker knew Defendant had been arrested and was in police custody for the child sexual abuse she was investigating.

U.S. v. Bailey, 2014 WL 657932 (2d Cir. 2014):
Holding: Even though Officer told Defendant he was not being arrested but only being detained while a search warrant was executed, where Defendant was handcuffed and made incriminating statements without being given *Miranda* warnings, the statements must be suppressed under the Fourth Amendment because the initial handcuffing of Defendant violated the reasonable bounds of a *Terry* stop.

U.S. v. Taylor, 736 F.3d 661 (2d Cir. 2013):
Holding: Even if Defendant's initial waiver of his *Miranda* rights was voluntary, where Defendant had attempted suicide by taking a large amount of pills before his arrest, Police interrogation of Defendant while he was impaired on the pills took undue advantage of Defendant and rendered his statements involuntary.

U.S. v. Okatan, 93 Crim. L. Rep. 713 (2d Cir. 8/26/13):
Holding: 5th Amendment privilege against self-incrimination prohibits State from proving guilt with evidence that Defendant invoked his right to counsel when confronted with non-custodial, pre-*Miranda*-warnings interrogation; this was the question on which the U.S. Supreme Court granted cert in *Salinas v. Texas* (U.S. 2013), but it resolved that case without deciding the issue.

U.S. v. Murphy, 2012 WL 6013773 (2d Cir. 2012):
Holding: Even though *Miranda* warnings were clearly stated to Defendant by an officer near him, where he never acknowledged hearing them, he did not knowingly waive his right to silence.

Wood v. Ercole, 2011 WL 1663441 (2d Cir. 2011):
Holding: Where Petitioner had invoked his right to counsel, state court erred in admitting video of his confession and habeas relief is warranted.

U.S. v. Capers, 88 Crim. L. Rep. 285 (2d Cir. 12/1/10):
Holding: In applying *Seibert*, 542 U.S. 600 (2004), court should use objective factors test to determine if police deliberately evaded *Miranda*, and State bears burden to prove by preponderance of evidence that police did not violate *Miranda*; even though Officer testified he did not administer *Miranda* warnings when initially questioning suspect because he was in a hurry to track down other evidence and he needed to find another suspect, this did not justify delaying the *Miranda* warning.

U.S. v. Shannon, 2014 WL 4401054 (3d Cir. 2014):
Holding: Defendant's right to remain silent was violated where Gov't questioned him at trial why he had not come forward earlier to police, even though he had previously been given *Miranda* warning.

U.S. v. Thompson, 96 Crim. L. Rep. 228 (3d Cir. 11/19/14):
Holding: Even though Defendant expressed a desire to cooperate with authorities, delay in his presentment outside the six-hour safe harbor created by federal presentment rules required his confession be suppressed.

U.S. v. Hashmine, 94 Crim. L. Rep. 179 (4th Cir. 10/29/13):
Holding: Even though police never told 19-year-old Defendant that he was under arrest, where he was roused out of bed by police, separated from his family, and put in a small storage room and interrogated for three hours, he was "in custody" for *Miranda* purposes.

Tice v. Johnson, 2011 WL 1491063 (4th Cir. 2011):
Holding: Where police resumed questioning Defendant only 13 minutes after he had invoked his right to silence, counsel was ineffective in failing to move to suppress his confession.

U.S. Cavazos, 2012 WL 149331 (5th Cir. 2012):
Holding: Defendant was in custody for *Miranda* purposes even though he was interviewed at home and informed that the interview was "non-custodial" where he was in the presence of more than a dozen officers, initially handcuffed, separated from his family for at least an hour, and allowed to use the bathroom, get a snack, or make a phone call, but only if an officer accompanied him.

U.S. v. Scott, 2012 WL 3890947 (6th Cir. 2012):
Holding: Where Defendant wrote "no" on a *Miranda* waiver form asking if he wished to talk to police, this was an unequivocal invocation of his right to counsel.

Moore v. Berghuis, 2012 WL 5871205 (6th Cir. 2012):
Holding: Admission of Defendant's confession taken in violation of right to counsel was not harmless in murder case where other evidence against Defendant was circumstantial,

and even though Defendant had made other conflicting statements about shooting someone and had been seen with a gun near the time of the murder.

U.S. v. Borostowski, 96 Crim. L. Rep. 383 (7th Cir. 12/31/14):
Holding: Defendant was "in custody" for *Miranda* purposes where more than a dozen police executed a search warrant at his home and confined him to a small bedroom for three hours; a reasonable person would not have felt free to leave from the overwhelming show of police force.

U.S. v. Hunter, 92 Crim. L. Rep. 732 (7th Cir. 2/28/13):
Holding: Defendant's request "Can you call my lawyer?" and giving a lawyer's name was an unequivocal assertion of 5th Amendment right to counsel that should have caused police questioning to cease.

Aleman v. Village of Hanover Park, 2011 WL 5865654 (7th Cir. 2011):
Holding: Confession induced by false statement was not a valid premise for an arrest or valid as evidence.

U.S. v. Swanson, 89 Crim. L. Rep. 13 (7th Cir. 3/24/11):
Holding: Where Officer in absence of *Miranda* warnings told Defendant that the warrant under which he was being arrested conditioned any bond on his turning over any firearms and asked him if he had any firearms, and this prompted Defendant to make an incriminating statement that led to seizure of a hidden gun in his car, the Officer's questioning amounted to unwarned custodial interrogation in violation of 5th Amendment right against self-incrimination; statement and gun are suppressed.

U.S. v. Perry, 2011 WL 1900388 (8th Cir. 2011):
Holding: Where proffer agreement was ambiguous in that one provision stated that Defendant's statements may not be used in the case-in-chief (suggesting they could be used elsewhere), but another provision stated the statements could not be used in any legal proceedings unless Defendant made an inconsistent statement, the agreement had to be construed against the Gov't and the statements could not be used in determining the Sentencing Guidelines range.

U.S. v. Ramirez-Estrada, 749 F.3d 1129 (9th Cir. 2014):
Holding: The use of defendant's post-*Miranda* silence to impeach his trial testimony, that he approached primary inspection area of port of entry not in an attempt to reenter the United States illegally, but only to seek help for his jaw injury, for which he believed he would get treatment from federal officials based on court's recommendation during previous incarceration in United States, violated his rights under *Doyle v. Ohio*; defendant's negative response to booking officer's question asking if he had any health problems, like a heart condition or diabetes, which referred to potentially life-threatening conditions, and his statement that he had a broken nose in response to question asking if he had any tattoos or scars, were not directly inconsistent with his testimony, and it was only his silence as to his jaw injury that was relevant to impeach him.

U.S. v. Preston, 95 Crim. L. Rep. 213 (9th Cir. 5/12/14):
Holding: Police interrogation tactics do not have to be coercive before a court can consider the individual characteristics of Defendant (low intelligence) in deciding if confession was voluntary.

U.S. v. Pimental, 95 Crim. L. Rep. 452 (9th Cir. 6/24/14):
Holding: A four-day delay in Defendant's presentment before a judge caused by a Monday holiday and a Detective's decision to interrogate a cooperative accomplice wasn't "reasonable and necessary" under *McNabb/Mallory* rule on admissibility of confessions.

Sessoms v. Grounds, 96 Crim. L. Rep. 10 (9th Cir. 9/22/14):
Holding: Defendant unequivocally invoked 5th Amendment right to counsel where he asked police interrogator if there was "any possible way that I could have a lawyer present while we do this" and "that's what my dad asked me to ask you guys – give me lawyer."

Lujan v. Garcia, 2013 WL 5788761 (9th Cir. 2013):
Holding: State court holding that Defendant's inculpatory trial testimony could be considered as evidence of guilt even though his confession had been improperly admitted in the Prosecutor's case-in-chief violated 5th Amendment privilege against self-incrimination and warranted habeas relief.

U.S. v. Barnes, 93 Crim. L. Rep. 155, 2013 WL 1668966 (9th Cir. 4/18/13):
Holding: Officers who presented Defendant with evidence of a new crime by him before giving him *Miranda* warnings engaged in two-step interrogation procedure prohibited by *Missouri v. Seibert*, 542 U.S. 600 (2004).

Sessoms v. Runnels, 2012 WL 3517600 (9th Cir. 2012):
Holding: Where 40 seconds into interrogation by police Defendant twice requested counsel in rapid succession, this was a clear invocation of the right to counsel.

U.S. v. Krupa, 2011 WL 4526022 (9th Cir. 2011):
Holding: Public safety exception to *Miranda* rule did not apply to prearrest statements regarding the presence of firearms where defendant was the sole occupant of the apartment and the police were firmly in control of the situation.

Thompson v. Runnels, 89 Crim. L. Rep. 588 (9th Cir. 6/9/11):
Holding: Deliberate two-part interrogation tactic subverted *Miranda*'s effectiveness nad violated *Missouri v. Seibert*, 542 U.S. 600 (2004).

Doody v. Ryan, 2011 WL 1663551 (9th Cir. 2011):
Holding: *Miranda* was violated where warning told Defendant that the right to counsel applied only if the defendant is involved in a crime.

U.S. v. Mikolon, 93 Crim. L. Rep. 539 (10th Cir. 7/9/13):
Holding: Even though Defendant was carrying a firearm at a campground where he was arrested on an outstanding warrant, after Defendant was handcuffed and the firearm taken from him, Officers should have given *Miranda* warnings before asking Defendant if he had any other weapons or contraband, and failure to do so was not justified under the "public safety" exception to *Miranda* (but error was harmless).

U.S. v. Toombs, 93 Crim. L. Rep. 189 (10th Cir. 4/26/13):
Holding: Before court may admit Defendant's testimony from a prior trial, it must first rule on any of Defendant's admissibility objections at the second trial.

U.S. v. Santistevan, 2012 WL 6554750 (10th Cir. Dec. 17, 2012):
Defendant unambiguously invoked his right to counsel so that police questioning had to cease where, when police questioned him, he handed them a letter from his public defender stating that he did not want to be questioned without counsel, even though Defendant then proceeded to answer questions.
Facts: Defendant was being held in jail on various charges and was represented by a Public Defender. Public Defender told FBI Agent that that Defendant did not wish to speak to police, and that Public Defender had given Defendant a letter to this effect. Nevertheless, Agent went to the jail to interview Defendant. Agent asked if Defendant had a letter, and Defendant gave him a letter from Public Defender which stated, in relevant part, that "[Defendant] does not wish to speak with you without counsel." Agent then said that even though Defendant had been advised by counsel not to talk, that was totally up to Defendant and asked Defendant if he wanted to talk. Defendant said yes, and after being given *Miranda* warnings, proceeded to make incriminating statements. Defendant then filed a motion to suppress those statements.
Holding: *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), held that when a suspect has expressed his desire to deal with police only through counsel, he is not subject to further interrogation until counsel has been made available. *Davis v. United States*, 512 U.S. 452, 459 (1994), clarified that the invocation of counsel must be "unambiguous." Here, Defendant's action in handing the letter to the Agent was an unambiguous statement that he did not wish to speak without counsel. Even though *Moran v. Burbine*, 475 U.S. 412 (1986), held that only a defendant and not an attorney can invoke a Defendant's Fifth Amendment rights, *Burbine* does not apply here since Defendant, by handing the letter to Agent, ratified the contents of the letter as his own personal communication to Agent. Defendant, in effect, told Agent he did not wish to speak when he gave the letter to Agent. This clearly invoked his right to counsel. All questioning should have ceased after this. Statements suppressed.

U.S. v. Doe, 90 Crim. L. Rep. 712 (11th Cir. 2/23/12):
Holding: The government cannot compel a suspect to decrypt his computer hard drives without granting him full immunity from prosecution where the act of unlocking the devices would itself be testimonial.

U.S. v. Gilbreath, 96 Crim. L. Rep. 359 (C.A.A.F. 12/18/14):
Holding: Military-reservist-Defendant is entitled to same *Miranda*-type warnings as active duty personnel.

U.S. v. Hutchins, 93 Crim. L. Rep. 504 (C.A.A.F. 6/26/13):
Holding: Where Defendant had requested counsel, police violated his rights under *Miranda* and *Edwards* by requesting his consent to search his belongings before Defendant's request for counsel had been granted.

Broom v. U.S., 97 Crim. L. Rep. 325 (D.C. 6/18/15):
Holding: Even though Defendant and companion were told by police that they were not under arrest and were being handcuffed for their own safety while police searched for a gun at their residence, where (1) police also told them that if they found a gun they would be arrested and companion's child sent to protective services, and (2) companion then begged Defendant to say where the gun was, Defendant was "in custody" for *Miranda* purposes; Officers should have reasonably known that their statement about taking away companion's child was highly coercive; further, a reasonable person in Defendant's shoes would have known that Defendant was not speaking at companion's own initiative, but because of Officers' coercive statement to her.

Dorsey v. U.S., 2013 WL 28470 (D.C. 2013):
Holding: Defendant's 5th Amendment right to counsel was violated where, after invoking his right to counsel, police badgered him by emphasizing strength of state's case, public reaction against Defendant, and the punishment he'd receive at trial.

U.S. v. Savoy, 2012 WL 389154 (D.D.C. 2012):
Holding: Even though Officer-Agent did not raise her voice to Defendant, where 16 FBI agents swarmed into Defendant's house at 6:00 a.m., Defendant would not have felt free to leave and was "in custody" for *Miranda* purposes.

U.S. v. Sheffield, 2011 WL 5223594 (D.D.C. 2011):
Holding: Defendant was subject to a custodial interrogation, where he was in custody at the police station for a parole warrant and traffic bench warrant and was questioned by two officers regarding an unrelated homicide, in that the questioning escalated the nature and tenor of his interaction with the police.

Al-Yousif v. Trani, 2014 WL 252512 (D. Colo. 2014):
Holding: State court unreasonably applied federal law in finding that Defendant's *Miranda* waiver was voluntary where Defendant was foreign national who had limited understanding of English and his perception of rights was colored by his knowledge of the criminal justice system in Saudi Arabia.

U.S. v. Paetsch, 2012 WL 5213011 (D. Colo. 2012):
Holding: (1) Where Defendant said he wanted to speak with an attorney, Officer violated his 5th Amendment right to counsel by continuing to question him about weapons and whether he would consent to search of his vehicle, and (2) where Defendant

was handcuffed and in-custody away from his vehicle, the public safety exception to *Miranda* did not apply to allow questioning about weapons in his vehicle since there was no realistic risk of Defendant regaining access to any weapons in vehicle.

U.S. v. Faux, 2015 WL 1347041 (D. Conn. 2015):
Holding: Defendant was in custody for *Miranda* purposes where armed officers executed a search warrant at her home, officers physically separated from her husband, she was not permitted to move freely about the house, and was not told she was free to leave or could refuse to respond to questions.

U.S. v. Ramirez, 2014 WL 105320 (S.D. Fla. 2014):
Holding: Officer's statement to foreign Defendant that "it would be worse" for him if he did not speak to Officer's rendered his statement involuntary; Officer directly contradicted Miranda warning, and Defendant's status as foreign national likely contributed to his lack of understanding that his statements would be used against him.

U.S. v. Corey, 2012 WL 1792634 (S.D. Fla. 2012):
Holding: Where Officer knew Defendant had fled from police and tossed a firearm, Officer was required to give *Miranda* warning before asking Defendant what he was doing in the area because Defendant would reasonably believe Officer was asking why he was in the area with a firearm.

U.S. v. Chaidez-Reyes, 2014 WL 547178 (N.D. Ga. 2014):
Holding: Officer's question to Defendant while he was being booked as to why he was in the backyard of a house did not qualify under the "routine booking question" exception to *Miranda* warnings; the question was not related to booking but to elicit statements about the crime.

U.S. v. Cordova, 2011 WL 5325522 (N.D. Ga. 2011):
Holding: Defendant's statement to police five days after an illegal, warrantless search of his home, was the fruit of an illegal search and must be suppressed.

U.S. v. Williams, 2014 WL 642813 (N.D. Ill. 2014):
Holding: Defendants had reasonable expectation of privacy in post-arrest statements they whispered to each other in back of paddy wagon; paddy wagon was different than a patrol car because the back was a completely separate, portioned-off area from where Officers sat.

U.S. v. Wittich, 2014 WL 5430997 (E.D. La. 2014):
Holding: Where Officers (1) took ill Defendant from his home in a patrol car to his office by saying they were "required" to take him; (2) refused his wife's request to drive him, and (3) kept Defendant separated from other people at his office while searching the office pursuant to a warrant, Defendant was "in custody" for *Miranda* purposes, so Officers were required to give him *Miranda* warnings.

U.S. v. Cabral, 2013 WL 1684162 (D. Mass 2013):
Holding: Even though Officers offered Defendant a "choice" of waiting at a local mall or accompanying police to barracks while they searched his car after a traffic stop, where he "chose" to go to barracks, Defendant was in custody for *Miranda* purposes because there was an implied threat of arrest, and police held onto his wallet and only transportation.

U.S. v. Andrews, 2012 WL 744990 (D. Mass. 2012):
Holding: An agent's false statement to defendant that he could go to jail for the rest of his life if he did not admit that guns were his and the agent's false promise that he would help the defendant avoid spending the rest of his life in jail rendered the defendant's confession involuntary.

U.S. v. King, 2012 WL 3248242 (E.D. Mich. 2012):
Holding: For purposes of 6th Amendment right to counsel, Defendant's federal drug sales charge was the same as his state sales drug charge since both involved the same pills, same date and same arrest; thus, since right to counsel had attached in the state case, federal agent deprived Defendant of right to counsel by interviewing him without counsel.

U.S. v. Ortiz, 2013 WL 1908897 (S.D. N.Y. 2013):
Holding: Even though Police interrogation of Defendant was relatively brief and at his home, Defendant was "in custody" for *Miranda* purposes where three Officers were near him, he had been told there were bench warrants for his arrest, and Police threatened to arrest everyone in the apartment unless Defendant provided information about a gun.

U.S. v. Wilson, 2012 WL 6641492 (S.D. N.Y. 2012):
Holding: Even though Defendant, who arrested for threatening someone, told Officers he had fake guns in his apartment, Officers lacked a reasonable basis to believe they faced a dangerous situation, so the public safety exception to the requirements of *Miranda* did not apply.

U.S. v. Truong Son Do, 2014 WL 531203 (N.D. Okla. 2014):
Holding: Even though Defendant consented to search of his home and waived *Miranda* rights, the search and wavier were invalid because were tainted by Officer's prior unconstitutional stop of Defendant without reasonable suspicion.

U.S. v. Hampton, 2012 WL 406271 (E.D. Pa. 2012):
Holding: After waiving *Miranda* right to silence and answering one question, defendant's subsequent silence was not admissible adoptive admission evidence.

U.S. v. Archuleta, 2013 WL 5503186 (D. Utah 2013):
Holding: Defendant, whose car was stopped by police, was in custody for *Miranda* purposes when Officer returned from running a background check, but instead of issuing a citation, questioned Defendant about his drug use; a reasonable person would not have felt free to leave or refrain from answering Officer's questions.

U.S. v. Koerber, 93 Crim. L. Rep. 691 (D. Utah 8/15/13):
Holding: Where federal prosecutors directed FBI and IRS agents to go interview a Defendant-businessman suspected of running a Ponzi scheme without notifying Defendant's attorney, this violated ethical rules regarding contact with represented persons and warranted suppression of Defendant's statements; this was true even though this occurred before Defendant was indicted.

U.S. v. Pacheco, 2011 WL 1832815 (D. Utah 2011):
Holding: Defendant's confession to bank robbery during police interrogation was involuntary where officer told defendant the other robbery suspect had made a deal with the police, told defendant that the officer had the authority to make a deal with defendant if defendant confessed and indicated that he would be the one deciding how defendant would be charged.

U.S. v. Freeman, 2014 WL 6473961 (E.D. Va. 2014):
Holding: Where (1) 20 Homeland Security agents came to Defendant's home with handguns drawn to search pursuant to a warrant, (2) knocked a tissue out of Defendant's hand with a gun, and (3) continuously watched Defendant, a reasonable person would not have felt free to leave, so Defendant was "in custody" for *Miranda* purposes.

U.S. v. Robinson, 2011 WL 2604773 (D. Vt. 2011):
Holding: Defendant was in custody for *Miranda* purposes even though she was interviewed at her apartment complex where more than one officer questioned defendant, the interview occurred in a small room with the door closed, defendant was not permitted to go to the bathroom, and defendant was accompanied by an officer when she left to smoke a cigarette.

Kalmakoff v. State, 2011 WL 3241860 (Alaska 2011):
Holding: Where Juvenile was removed from school by police, had no prior contact with law enforcement, was never told he was free to leave and was told that he had to tell the truth, Juvenile was "in custody" for *Miranda* purposes.

Adams v. State, 89 Crim. L. Rep. 853 (Alaska 9/16/11):
Holding: Prosecutor should not have been permitted to ask Defendant about his pre-*Miranda* refusal to talk to police because under Fed. Rule Evidence 403 this had low probative value but its risk of prejudice was high.

State v. VanWinkle, 2012 WL 1149345 (Ariz. 2012):
Holding: A police officer's testimony regarding the defendant's post-arrest pre-*Miranda* silence, coupled with the prosecutor's comment on that silence, violated the defendant's right to remain silent.

Porta v. State, 2013 WL 3070389 (Ark. 2013):
Holding: Even though forensic mental health examiner had warned Defendant about the nonconfidential nature of his competency exam, trial court erred in allowing his

inculpatory statements made during the exam to be admitted at trial, because this violated his constitutional right not to incriminate himself and forced him to choose between one constitutional right in order to claim another.

People v. Ramadon, 94 Crim. L. Rep. 364 (Colo. 12/9/13):
Holding: Even though *Miranda* warnings had been given, Police Officer's statement to legal-alien-Defendant that he would likely be deported if he did not tell the truth (about an alleged sexual assault) rendered Defendant's subsequent inculpatory statements involuntary; Officer told Defendant he should realize he "needed" to tell the truth because his "being in this country is in jeopardy;" the U.S. had previously brought Defendant to U.S. for his safety after assisting U.S. in Iraq.

State v. Mangual, 94 Crim. L. Rep. 673, 2014 WL 726724 (Conn. 3/4/14):
Holding: Where police ordered Defendant to sit on her living room sofa while seven gun-toting officers executed a search warrant of her home, Defendant was in custody for *Miranda* purposes because a reasonable person would have believed they were in custody.

Taylor v. State, 89 Crim. L. Rep. 594 (Del. 6/22/11):
Holding: Where a state statute required that witness statements be voluntary to be admissible in court, then *Miranda* applies to the witnesses, even though they aren't defendants.

Deviney v. State, 2013 WL 627140 (Fla. 2013):
Holding: Defendant with limited mental abilities unequivocally invoked his right to remain silent during police questioning (rendering his confession involuntary) where he said six times that was "done" with questions, even though he said after one of them that he wanted police to "show me that I did do it;" Defendant also said he wanted to go home, asked to leave, and was blocked by police when he attempted to leave the interview room.

McDade v. State, 96 Crim. L. Rep. 302 (Fla. 12/11/14):
Holding: Even though child sex victim made secret recordings of Defendant pressuring her to have sex, such recordings must be suppressed under state law prohibiting interception of oral communications unless all parties consent; it was for the Legislature, not the court, to carve out an exception for recordings that provide evidence of crime; the court rejected the argument that Defendant had no expectation of privacy that society would accept as reasonable in his statements.

Jackson v. State, 2012 WL 5514937 (Fla. 2012):
Holding: Court erred in admitting lengthy video of interrogation of Defendant in which Officers stated their personal opinion that Defendant was guilty and stated positive things about victim, where Defendant did not confess, and even though Officers may have been using this as a technique to try to elicit a confession.

Mack v. State, 2014 WL 6090705 (Ga. 2014):
Holding: A defendant who previously invoked right to remain silent can be deemed to have renewed contact with police so as to permit further interrogation only if the renewed contact by the defendant was not the product of past police interrogation conducted in violation of defendant's previously-invoke rights.

Wheeler v. State, 2011 WL 2671305 (Ga. 2011):
Holding: Even though Defendant originally waived his right to counsel, where he later said he needed to discuss his situation with his attorney due to the seriousness of the charges, this was an unequivocal invocation of right to counsel and interrogation should have ceased, even though Defendant also said he was not trying to be hard to get along with.

State v. Monteil, 96 Crim. L. Rep. 359 (Haw. 12/23/14):
Holding: Judge, in advising defendants about right to testify or not, must also inform them that if they exercise their right not to testify, that fact can't be used by the fact-finder.

State v. McKnight, 94 Crim. L. Rep. 443 (Haw. 12/31/13):
Holding: Where Defendant had been given *Miranda* warnings and invoked his right to counsel, Officer improperly reinitiated questioning when Defendants asked to call his mother and asked "what would happen next" and Officer said police were seeking a search warrant for his home; Defendant's inquiry "what would happen next" did not evidence a desire to reinitiate a discussion and the statement about seeking a search warrant was "reasonably likely to elicit an incriminating response" and therefore constituted interrogation.

Bond v. State, 95 Crim. L. Rep. 245 (Ind. 5/13/14):
Holding: Defendant's confession was involuntary where police exploited racial fears by telling him he'd face a rural jury of "white people" who aren't "from your part of the hood"; this went to the "very fabric" of justice system by exploiting memories of "days gone by" when a man could spend his life in prison because of his race.

State v. I.T., 94 Crim. L. Rep. 747 (Ind. 3/12/14):
Holding: Indiana Juvenile statute which bars statements made to a mental health evaluator "in the evaluator's official capacity" from being used "as evidence against the child" on whether they committed a delinquent act provides both use immunity and derivative use immunity for Juvenile's statements.

Kelly v. State, 94 Crim. L. Rep. 307 (Ind. 11/21/13):
Holding: Where (1) Officers told Defendant before *Miranda* warnings that cocaine had been found in a hollowed-out screw driver in her car, and Defendant made incriminating remarks, and then (2) after *Miranda* warnings, when Defendant denied being part of a drug deal, Officers "reminded" her of her previous incriminating statements to the contrary, *Seibert* required suppression of all the incriminating statements; the reminder references "inevitably diluted the potency of the *Miranda* warning such that it was

powerless to cure the initial failure to warn, even if the failure was a … good faith mistake."

Hartman v. State, 93 Crim. L. Rep. 358 (Ind. 5/31/13):
Holding: Where Defendant had requested counsel, but then police used a ruse to tell him that they were required to read a search warrant to him, after which they asked him if he had any questions and he talked, Defendant's statements weren't voluntary, even though the "warrant reading" wasn't done until the next day; Defendant did not voluntarily reinitiate interrogation.

In re Prosecutor's Subpoena Regarding S.H. and S.C., 93 Crim. L. Rep. 11 (Ind. 3/27/13):
Holding: Where Prosecutor has not filed a charge or initiated a grand jury proceeding, Prosecutor may not compel a person to testify under a grant of use immunity when that person is the primary target of the investigation and has asserted a right against self-incrimination.

Jewell v. State, 90 Crim. L. Rep. 323 (Ind. 11/30/11):
Holding: Indiana Const. prohibits police from interrogating a person about an uncharged offense that is inextricably intertwined with a charged offense on which defendant has counsel.

State v. Hellstern, 2014 WL 6495949 (Iowa 2014):
Holding: DWI Defendant's statement before a breath test, "Can I have a moment with my attorney?," was sufficient to invoke statutory right to confidential meeting with his attorney; this in turn triggered Officer's obligation to inform Defendant that attorney would need to come to jail for confidential meeting, and Officer's response to Defendant "not on the phone" did not satisfy the statutory obligation to provide a confidential meeting; remedy was suppression of breath test results.

State v. Washington, 93 Crim. L. Rep. 359 (Iowa 6/7/13):
Holding: Where judge imposed additional community service on Defendant after he refused to answer a question at sentencing about drug use, this violated Defendant's 5th Amendment privilege against self-incrimination.

State v. Howard, 92 Crim. L. Rep. 356 (Iowa 12/21/12):
Holding: Officer's talk to Defendant about getting psychological treatment for whoever sodomized his girlfriend's infant was a promise of leniency that rendered Defendant's confession inadmissible.

State v. Madsen, 2012 WL 1366607 (Iowa 2012):
Holding: A police officer's statement during interrogation that a confession would keep the defendant's name out of the newspapers impermissibly promised the defendant leniency on sexual abuse charges.

State v. Rodriguez, 90 Crim. L. Rep. 454 (Iowa 12/23/11):
Holding: Privilege against self-incrimination limits use of incriminating statements made during psychiatric examination to determine competency to waive *Miranda* rights.

State v. Polk, 91 Crim. L. Rep. 103, 2012 WL 1138270 (Iowa 4/6/12):
Holding: Police made improper promise of leniency when they told Defendant that their child needed a father and that if he cooperated he would be viewed favorably by the prosecutor and be away from his children for less time.

State v. Garcia, 93 Crim. L. Rep. 188 (Kan. 4/26/13):
Holding: Where Defendant repeatedly asked police to take him to get medical treatment for a gunshot wound and they did not do so, Defendant's subsequent confession was not voluntary.

State v. Lawson, 93 Crim. L. Rep. 46, 2013 WL 1365342 (Kan. 4/5/13):
Holding: Defendant's post-*Miranda* confession during a police interrogation was not admissible where Defendant had already been arraigned and invoked his state statutory right to have a lawyer appointed to represent him; once the Defendant asserted his statutory right to counsel in open court, he could not waive it unless he returned to court and satisfied the judge on the record that he was making a knowing and intelligent waiver.

State v. Swindler, 92 Crim. L. Rep. 619 (Kan. 2/15/13):
Holding: Where police told Defendant he could halt an interview and leave whenever he wanted to, this rendered his subsequent confession involuntary.

State v. Stafford, 92 Crim. L. Rep. 364 (Kan. 12/17/12):
Holding: Even though Officer told Defendant he was investigating whether Defendant touched a minor child and Defendant did not deny it until much later in the interview, Prosecutor could not argue Defendant's initial silence as evidence of guilt.

State v. Bogguess, 2012 WL 167334 (Kan. 2012):
Holding: Defendant did not waive privilege against self-incrimination by testifying at suppression hearing, where the hearing was for the purpose of determining the voluntariness of defendant's statements and his testimony was only regarding the voluntariness of his statements, not their truthfulness.

Bartley v. Com., 2014 WL 5388168 (Ky. 2014):
Holding: At least in post-*Miranda* situations, 5th Amendment privilege against self-incrimination applies to Defendant's selective silence, so that due process bars selective silence from being used against Defendant.

Bartley v. Com., 96 Crim. L. Rep. 135 (Ky. 10/23/14):
Holding: Even though Defendant agreed to be interviewed by police but not about a murder, Defendant was allowed to selectively invoke the right to silence, and did not waive her right to silence; thus, State should not have been allowed to present her pre-

arrest, post-*Miranda* silence as substantive evidence of guilt; this was true even though Defendant talked some about the murder during the interview.

Dye v. Com., 2013 WL 3122823 (Ky. 2013):
Holding: Where police told a juvenile that he would get the death penalty and suffer violence in prison unless he confessed to his sister's murder, his subsequent confession was coerced, and evidence seized pursuant to a search warrant that was based on the confession was fruit of the poisonous tree.

Buster v. Com., 2013 WL 4607605 (Ky. 2013):
Holding: Social Worker was a state actor for *Miranda* purposes when Social Worker went to a prison and interviewed Defendant, where Social Worker was an investigator for DFS and was cooperating with police, turned over the interview information to police, and the Social Worker's investigation was likely to result in disclosure of information that would lead to prosecution.

Dunlap v. Com., 93 Crim. L. Rep. 454 (Ky. 6/20/13):
Holding: Police engaged in custodial interrogation where, while executing a search warrant at Defendant's home, they asked him "do you know why we're here?"; this interrogation should have been preceded by Miranda warnings because Defendant was in custody and police should have known that their question was reasonably likely to elicit an incriminating response.

N.C. v. Com., 93 Crim. L. Rep. 145 (Ky. 4/25/13):
Holding: Where "school resource officer" who assisted police was present when school principal questioned student about sharing prescription pills at school, student-Defendant should have been given *Miranda* warnings.

Baumia v. Com., 92 Crim. L. Rep. 242 (Ky. 11/21/12):
Holding: Even though Defendant told police that she didn't want to answer questions because her father told her not to before she was given *Miranda* warnings, this pre-*Miranda* invocation of right to silence was not admissible against her at trial.

State v. Lovejoy, 95 Crim. L. Rep. 51 (Me. 3/27/14):
Holding: Prosecutor should not have been allowed to present evidence of Defendant's pre-arrest, pre-*Miranda* silence after he told an investigator over the phone that he wanted to talk to a lawyer and then never called the investigator back.

State v. Wiley, 92 Crim. L. Rep. 763 (Me. 3/14/13):
Holding: Officer's statement that Defendant would receive a shorter jail sentence if he took advantage of a one-time offer and admitted his crime was promise of leniency that rendered confession involuntary.

Simpson v. State, 97 Crim. L. Rep. 58 (Md. 4/7/15):
Holding: Defendant was denied his 5th Amendment right against self-incrimination where Prosecutor said in opening statement that Defendant himself would testify to his involvement in the crime, but Defendant never actually testified at trial.

Phillips v. State, 90 Crim. L. Rep. 856 (Md. 3/16/12):
Holding: Once an arrestee has invoked his rights under *Miranda*, an officer's remark that the arrestee can reinitiate the conversation and tell his side of the story if he wants to constitutes the sort of continued interrogation that is prohibited under *Edwards*.

Lupfer v. State, 2011 WL 2437379 (Md. 2011):
Holding: Defendant did not open door to presentation of his post-arrest, post-*Miranda* silence; it was not inconsistent to testify that he at some undetermined point in the future intended to speak with police, and to have remained silent when first read *Miranda* rights.

Moore v. State, 90 Crim. L. Rep. 157 (Md. 10/25/11):
Holding: Where police intentionally delayed bringing Juvenile before a judge and also refused his requests to talk to his mother, his confession was involuntary.

Lee v. State, 2011 WL 288490 (Md. 2011):
Holding: Where Officer said mid-way through interrogation "this is just between you and me, bud," this was effectively a promise of confidentiality and vitiated the prior *Miranda* warning and waiver.

Hill v. State, 88 Crim. L. Rep. 569 (Md. 1/26/11):
Holding: Where police officer told Defendant about an offer from complainant to settle things with an apology, this was an improper inducement that rendered Defendant's incriminating apology involuntary; Defendant had an objectively reasonable belief, based on officer's statement, that by making confession and apology to the complaint this would lessen the likelihood of prosecution.

In re Grand Jury Investigation, 96 Crim. L. Rep. 421 (Mass. 1/12/15):
Holding: Where a search warrant was needed to obtain a Defendant's cell phone (but warrant has not been sought), Grand Jury cannot obtain the cell phone by subpoenaing it, and this is true even though Defendant gave the cell phone to his lawyer; "If a client could not be compelled to produce materials because of the right against self-incrimination, and if the client transfers the material to the attorney for the provision of legal advice, an attorney likewise cannot be compelled to produce them."

Com. v. Powell, 95 Crim. L. Rep. 392 (Mass. 6/6/14):
Holding: Mass. continues bright-line rule requiring suppression of any statements made by Defendant when the delay between arrest and arraignment is more than six hours.

Com. v. Woods, 94 Crim. L. Rep. 438, 2014 WL 12355 (Mass. 1/2/14):
Holding: Mass. Supreme Court exercises its "supervisory" authority to hold that Witnesses who testify before a grand jury must be advised of their 5th Amendment right

against self-incrimination if they are a "target" or may reasonably become a "target" of the investigation, even though this is not required under constitution.

Com. v. Fortunato, 94 Crim. L. Rep. 42, 2013 WL 5451772 (Mass. 10/3/13):
Holding: Under Mass. law, a defendant must have an initial appearance in court within 6 hours of arrest, and any statements made by Defendant after six hours without an initial appearance must be suppressed unless Defendant validly waived initial appearance.

Com. v. Woodbine, 2012 WL 1002763 (Mass. 2012):
Holding: A police officer could not testify at a first degree murder trial as to the unrecorded portion of the defendant's two-part statement because the defendant's only meaningful opportunity to cross-examine the officer would involve using the contents of the other portion of the statement, which had been suppressed.

Com. v. Clarke, 2012 WL 89250 (Mass. 2012):
Holding: Federal utmost-clarity standard for invoking right against self-incrimination does not apply under Mass. Constitution.

Com. v. McNulty, 2010 WL 4630695 (Mass. 2010):
Holding: Police violated state constitutional right to counsel by not informing Defendant who was undergoing interrogation that an attorney wanted to speak with him and was telling him not to talk to police.

State v. Heiges, 89 Crim. L. Rep. 809 (Minn. 8/17/11):
Holding: Even though Defendant made certain incriminating statements to friends before police began an investigation, the statements qualified as "confessions" under a state statute that requires corroboration to support conviction.

State v. Brown, 2011 WL 13753 (Minn. 2011):
Holding: Defendant's statements made at pretrial hearing about a possible guilty plea were statements made in connection with a plea offer and were not admissible at trial.

Downey v. State, 95 Crim. L. Rep. 621 (Miss. 8/7/14):
Holding: Defendant invoked *Miranda* rights by saying she had a lawyer and "I could use him," such that interrogation should have ceased.

Benjamin v. State, 93 Crim. L. Rep. 357 (Miss. 6/6/13):
Holding: Police violated Juvenile's rights under *Miranda* where Juvenile had invoked his right to counsel, but police then persuaded his mother to convince him to waive his rights and be interrogated.

State v. Plouffe, 2014 WL 3429595 (Mont. 2014):
Holding: Right against self-incrimination prohibited State from using confidential interviews of Defendant's drug court treatment program in later prosecution for drug crime; Defendant was not free to admit, deny or refuse to answer questions in drug court because this would have resulted in him being terminated.

State v. Stewart, 92 Crim. L. Rep. 392 (Mont. 12/27/12):
Holding: Even though Defendant's wife could overhear Defendant on his cellphone, Defendant could still challenge his statements under state constitution's privacy guarantee that forbids warrantless recording of telephone conversations based only on one-party consent where police persuaded a crime victim to telephone Defendant and elicit incriminating statements.

State v. Juranek, 95 Crim. L. Rep. 51 (Neb. 4/4/14):
Holding: Officer's personal knowledge that Defendant had a "propensity to talk without being interrogated" proved that Officer had, in fact, "interrogated" him before giving *Miranda* warnings; thus, where Defendant was talking to himself about the crime, and Officer said "do you want to tell it to me?", this was "interrogation" for *Miranda* purposes because Officer should have known his question was likely to elicit an incriminating response.

State v. McKenna, 96 Crim. L. Rep. 15 (N.H. 9/9/14):
Holding: Even though Defendant was stopped by police in his own yard, where he was told he was not free to leave and was accusatorily questioned for more than an hour, he was "in custody" for *Miranda* purposes and should have been warned.

In re B.C., 96 Crim. L. Rep. 509 (N.H. 1/29/15):
Holding: Whether an arrestee being detained at a police station is "in custody" for *Miranda* purposes is judged by the customary definition of "custody" and "interrogation," and not by the standards of *Maryland v. Shatzer*, 559 U.S. 98 (2010), which govern interrogation of persons already incarcerated in prison.

State v. Maltese, 97 Crim. L. Rep. 627 (N.J. 8/17/15):
Holding: Defendant invoked his 5th Amendment right to silence during police interrogation when he said he did not want to talk further until he consulted his uncle who was "better than a freaking attorney."

State v. Wessells, 2012 WL 639004 (N.J. 2012):
Holding: Holding of *Maryland v. Shatzer*, that 14-day break in custody is required to overcome the presumption of involuntariness of subsequent custodial statements, applied retroactively and required suppression of defendant's statements because break in custody was only nine days.

State v. Antonio T., 96 Crim. L. Rep. 160 (N.M. 10/23/14):
Holding: Even though school officials need not give *Miranda* warnings when questioning students about a school disciplinary matter, any statements elicited aren't admissible in a subsequent delinquency proceeding unless the State proves that Juvenile made a knowing, intelligent and voluntary waiver of their right to remain silent.

State v. King, 93 Crim. L. Rep. 103 (N.M. 4/15/13):
Holding: Defendant's statement that he did not want to answer Officer's questions "at the moment" and his refusal to sign a waiver form was an unequivocal invocation of 5th Amendment right to silence.

State v. Leyva, 88 Crim. L. Rep 636 (N.M. 2/17/11):
Holding: Under New Mexico constitution, police conducting a traffic stop can only ask questions reasonably related to the stop or otherwise supported by reasonable suspicion, and cannot engage in "fishing expeditions" asking about other matters not related to the stop.

People v. Williams, 97 Crim. L. Rep. 51 (N.Y. 4/7/15):
Holding: State cannot present evidence in case-in-chief that Defendant only selectively answered some police questions and not others; a defendant who refused to answer certain questions can have the same innocent or legitimate reasons for refusing to answer as someone who refused to speak to police at all.

People v. Thomas, 2014 WL 651516 (N.Y. 2014):
Holding: Where Officers told Defendant they were not seeking to arrest him for the death of his son but that if he did not take responsibility for the death Officers would arrest Defendant's wife, Defendant's subsequent confession was not voluntary.

People v. Dunbar, 96 Crim. L. Rep. 202 (N.Y. 10/28/14):
Holding: Where Officers prefaced their *Miranda* warnings with a scripted preamble telling suspects that this would be their "only opportunity" to tell their side of the story; if there is anything they want the police to investigate, they need to say so now; if they have an alibi; or if "your version of what happened is different from what we've been told," this was their opportunity to tell their side, these preambles rendered the *Miranda* warnings ineffective because a reasonable person would believe that it was in their best interest to tell their story immediately.

People v. Johnson, 96 Crim. L. Rep. 335 (N.Y. 12/17/14):
Holding: Even though represented-Defendant agreed to help police solve a second crime, Defendant's statements about the second crime cannot be used against Defendant if made in the absence of his lawyer; New York has rule that once an attorney enters a proceeding, police can't question the defendant in the attorney's absence unless the defendant and attorney execute a waiver.

People v. Thomas, 94 Crim. L. Rep. 614 (N.Y. 2/20/14):
Holding: Where Police told Defendant (1) that if he did not confess to injuring his baby, doctors would not be able to treat the baby and the baby would die, and (2) if he did not confess, police would arrest his wife and take her away from the dying baby's bedside, these were "highly coercive deceptions" which rendered Defendant's confession involuntary.

People v. Cantave, 2013 WL 3185171 (N.Y. 2013):
Holding: Prosecutor violated Defendant's right against self-incrimination where he cross-examined Defendant at trial about a prior, unrelated conviction that was pending on direct appeal and thus Defendant remained at risk of self-incrimination.

People v. Guilford, 93 Crim. L. Rep. 366 (N.Y. 6/4/13):
Holding: A police tag-team interrogation that totaled 49 hours was so inherently coercive that it not only tainted Defendant's initial statement, but also a second statement given after an 8-hour break and in the presence of defense counsel; the arrival of a lawyer does not magically neutralize the effect of extensive coercive interrogation before the lawyer's arrival.

People v. Lopez, 88 Crim. L. Rep. 635 (N.Y. 2/22/11):
Holding: Under New York constitution's right to counsel, police are required to ask suspects whether they already have counsel if "there is a probable likelihood" that they do on the offense they are being interrogated about; suspect may not be questioned in counsel's absence.

State v. Graham, 2013 WL 2350440 (Ohio 2013):
Holding: Statements obtained from public employees by an Inspector General were compelled by threat of job loss, and thus, were unconstitutionally coerced and inadmissible in subsequent prosecution of those employees.

State v. Miskell, 2012 WL 1437301 (Or. 2012):
Holding: Police were required to obtain a court order before recording a hotel room conversation between an informant and the defendants.

Com. v. Green, 2014 WL 868627 (Pa. 2014):
Holding: Compelling Defendant to disclose location of stolen items as a condition of probation violated his right against self-incrimination, because such disclosure could lead to additional charges or investigations.

Com. v. Molina, 96 Crim. L. Rep. 245 (Pa. 11/20/14):
Holding: Prosecutor violated Defendant's state constitutional right to silence by arguing that jury should infer guilt from non-testifying Defendant's pre-arrest refusal to answer questions by police about a missing person; pre-arrest silence cannot be used as evidence of guilt.

Com. v. Wright, 88 Crim. L. Rep. 684 (Pa. 2/23/11):
Holding: Even though Defendant's confession had been held to be voluntary at trial, this did not preclude him from seeking postconviction DNA testing; when a court determines whether a confession is voluntary, it is determining an issue of admissibility at trial, not whether the confession is true.

State v. Perea, 94 Crim. L. Rep. 273 (Utah 11/15/13):
Holding: Scientific evidence on false confessions has advanced to where expert should

be permitted to testify about empirical research as to when people give false confessions, including sleep deprivation, presentation of false evidence, questioners' "minimization" techniques, defendant's age, defendant's intelligence, and certain personality traits.

State v. Kipp, 317 P.3d 1029 (Wash. 2014):
Holding: Even though Defendant admitted committing sex offense on a secretly recorded conversation between him and his brother-in-law, the statements had to be suppressed under state Privacy Act because Defendant had expectation of privacy in conversation.

State v. Bevel, 745 S.W.2d 237 (W.Va. 2013):
Holding: Police-initiated interrogation after Defendant requested counsel at his arraignment violated West Virginia Constitution's right to counsel, even though police obtained a signed wavier from Defendant (disagreeing with U.S. Supreme Court's holding in *Montejo*).

People v. Friday, 95 Crim. L. Rep. 48 (Cal. App. 3/27/14):
Holding: State law requiring convicted sex offenders to waive "any privilege against self-incrimination as a condition of probation" violates 5th Amendment.

People v. Westmoreland, 2013 WL 428642 (Cal. App. 2013):
Holding: Defendant's confession to murder was not voluntary where police falsely told him that he would not receive a life sentence if he admitted to an unpremeditated killing during a robbery.

In re Z.A., 2012 WL 3031086 (Cal. App. 2012):
Holding: Even though Defendant asked how long her boyfriend (co-defendant) was "going to be here" after she had invoked her *Miranda* right to silence, that was not an implied waiver of her *Miranda* rights because it concerned routine custodial matters.

People v. Bejasa, 2012 WL 1353122 (Cal. App. 2012):
Holding: A defendant's estimation of time during a Romberg sobriety test, in which a police officer asked the defendant to close his eyes and estimate when 30 seconds had passed, was testimonial and thus covered by the defendant's privilege against self-incrimination.

People v. Tom, 2012 WL 899572 (Cal. App. 2012):
Holding: The prosecution violated a defendant's right to remain silent by presenting evidence of his post-arrest pre-*Miranda* failure to ask about the victims' condition as proof of his guilt of vehicular manslaughter.

People v. Manzo, 88 Crim. L. Rep. 575 (Cal. Ct. App. 1/31/11):
Holding: Defendant's 8-second silence followed by "I am doing my right" after police had given him *Miranda* warnings was an unambiguous invocation of right to silence.

People v. Carter, 2015 WL 1660977 (Colo. App. 2015):
Holding: Advising Defendant before interrogation only that he "had a right to an attorney" did not satisfy *Miranda*, because without a temporal element, this could be construed as meaning an attorney only after questioning or during trial.

People v. Ruch, 2013 WL 3480249 (Colo. App. 2013):
Holding: Revocation of Defendant's probation for his refusal to admit the offense during court-ordered treatment (which was a probation condition) while his direct appeal was pending violated his 5th Amendment right against self-incrimination.

State v. Topps, 2014 WL 3730009 (Fla. App. 2014):
Holding: Even though after arrest Defendant made an incriminating statement to emergency room doctor in the presence of an Officer, the statement was inadmissible at trial; Officer's presence was necessary for security and did not defeat the doctor-patient privilege; Defendant's statement was necessary for diagnosis and treatment and explained why he was at the emergency room.

Murdock v. State, 2013 WL 2494175 (Fla. App. 2013):
Holding: Defendant did not voluntarily and knowingly waive his *Miranda* rights during a second interview where he had been misinformed at the first interview that he was not entitled to counsel until after he had been charged, and the misinformation was not corrected at the second interview when he was read his *Miranda* rights.

Com. v. Ortiz, 2013 WL 5273074 (Mass. App. 2013):
Holding: Defendant's confession was not voluntary where Defendant was 19 years old; police misrepresented statements given by witnesses in getting him to confess; told him it was his "last chance" to tell his story; and made assurances to him that he would not be culpable if he had given the gun for a purpose other than to rob or kill someone.

State v. Olivas, 2011 WL 1563199 (N.M. Ct. App. 2011):
Holding: Even though Defendant initially voluntarily agreed to be questioned, where police handcuffed him, took him to the prosecutor's office, kept him escorted at all times, accused him of murder, directed him to confess, and never told him he was free to leave, Defendant was "in custody" for *Miranda* purposes.

People v. Shah, 980 N.Y.S.2d 724 (Sup. 2013):
Holding: Inmate who was brought to detention area of a jail for a fight with another inmate was "in custody" for *Miranda* purposes and such warnings were required before questioning him.

People v. O'Neil, 2014 WL 1097942 (N.Y. Dist. Ct. 2014):
Holding: Defendant's statements in a phone conversation with his attorney, which was overheard by police, had to be suppressed where Defendant was handcuffed to a wall and had no choice but to talk to his attorney within earshot of police.

People v. Rivera, 2013 WL 781793 (N.Y. Sup. 2013):
Holding: Even though Defendant was told he was not under arrest, Defendant was in custody for *Miranda* purposes since a reasonable person would not have believed he did not have to accompany police to the station, he was kept handcuffed and was placed in a locked interview room.

People v. Dunbar, 92 Crim. L. Rep. 516 (N.Y. App. 1/30/13):
Holding: Where police prior to giving *Miranda* warnings read Defendant a prosecutor-prepared script cautioning him that this would be his last chance to tell his side of the story, this rendered the *Miranda* warnings and subsequent waiver ineffective.

People v. Zouppas, 2012 WL 3538232 (N.Y. City Crim. Ct. 2012):
Holding: *Miranda* warnings were insufficient where police failed to advise that any statement could be used against Defendant.

People v. Perez, 2012 WL 1322887 (N.Y. Sup. 2012):
Holding: Where prior to *Miranda* warnings, Prosecutor interviewed Defendant and falsely told him that the State would investigate his side of the story if he told it at that time and that he would have no other opportunity to do so, this ethical violation warranted suppression of Defendant's statements.

People v. Harris, 2012 WL 89637 (N.Y. App. 2012):
Holding: Defendant's statement, "I think I want to talk to a lawyer," was an unequivocal invocation of his state right to counsel.

People v. Borukhova, 931 N.Y.S.2d 349 (App. Div. 2011):
Holding: Defendant's right to counsel attached when attorney retained by sister called the stationhouse and asked that no questioning take place until he had seen his client, even though, after being informed about the phone call, defendant indicated that she did not know the attorney and had not retained him.

Brown v. Blumenfeld, 90 Crim. L. Rep. 102 (N.Y. App. Div. 10/4/11):
Holding: Judge may consider whether prosecutor violated professional conduct rules in deciding whether to suppress Defendant's statements; prosecutor had prepared script to use to interrogate arrested people telling them that if they have a different story to tell, this is their only opportunity and that that this is the only opportunity they will have to tell something they would like law enforcement to investigate.

People v. Tucker, 2011 WL 4389681 (N.Y. App. 2011):
Holding: Defendant's denial of his involvement in a shooting did not amount to a waiver of his *Miranda* rights.

Com. v. Melvin, 2013 WL 6096222 (Penn. Super. 2013):
Holding: Sentencing condition requiring Defendant to write apology letters while his case was pending on appeal violated right against self-incrimination.

Rubalcado v. State, 94 Crim. L. Rep. 763 (Tex. App. 3/19/14):
Holding: Defendant's invocation of counsel at a bail proceeding is enforceable against investigators from another county, even though they may not have actually been aware of the invocation; one set of state actors (the police) cannot claim ignorance of Defendant's unequivocal request for counsel from another state actor (the court); the 6th Amendment requires imputation of knowledge from one State actor to another because it protects a person's encounter with the State.

State v. Ackerman, 2012 WL 2870568 (Tenn. Crim. App. 2012):
Holding: Where Mother, at behest of police, called Defendant-Father and got him to confess to a child sex offense, Mother was a "state actor" for purposes of 5th Amendment and Defendant's confession must be suppressed.

State v. Cruz, 2015 WL 2236982 (Tex. App. 2015):
Holding: Where Texas authorities went to Illinois to question Defendant about a Texas murder investigation after Defendant's unrelated arrest in Illinois, the questioning about his name, address and phone number was not reasonably related to administrative purposes to fall within the "booking" exception to *Miranda*, especially because Defendant had already been booked by Illinois authorities.

Ex parte Dangelo, 2010 WL 5118650 (Tex. App. 2010):
Holding: Defendant on probation had 5th Amendment right against self-incrimination not to answer questions on polygraph about whether he had sex with minor and other similar questions about criminal activity while on probation.

State v. Gallup, 2011 WL 6091688 (Utah Ct. App. 2011):
Holding: Evidence that defendant hung up on trooper without asking trooper for reason for the telephone call violated defendant's right to remain silent.

State v. I.B., 2015 WL 1944974 (Wash. App. 2015):
Holding: Where Defendant shook his head in the negative after police asked him if he wanted to talk, this was an unequivocal assertion of right to remain silent.

State v. DeLeon, 2014 WL 7335530 (Wash. App. 2014):
Holding: Defendant's statements, given in response to jail booking information about gang membership, were not voluntary; inmates face risk of harm with if housed with rival gang members and are led to believe they must answer gang-related questions to avoid that risk.

State v. Hunley, 2011 WL 1856074 (Wash. Ct. App. 2011):
Holding: Sentencing reform statute which provided that Defendant's silence in the face of State's presentation of a written summary was an acknowledgement of Defendant's criminal history violated due process.

Joinder/Severance

U.S. v. McRae, 2012 WL 6554691 (5th Cir. 2012):
Holding: (1) Even though police officer-Defendant burned a car with dead victim's body inside, the evidence was insufficient to convict of denying victim's relatives access to the courts to seek legal redress, since there was no evidence that the relatives were denied access to sue; and (2) Defendant's trial should have been severed from other codefendants where gruesome evidence was admissible solely against the other codefendants and it would have been impossible for jurors to compartmentalize that.

U.S. v. Mathison, 2012 WL 6585203 (N.D. Iowa 2012):
Holding: Defendant charged only with possession of short-barrel shotgun would be prejudiced if his trial weren't severed from co-defendants who were charged with robbery and possession of firearms in furtherance of crime of violence.

U.S. v. Rajaratnam, 2010 WL 4907625 (S.D.N.Y. 2010):
Holding: Count charging Defendant with conspiracy was improperly joined with count charging co-defendant with different conspiracy.

State v. Carr, 2014 WL 3681049 (Kan. 2014):
Holding: Trial court's refusal to sever joint penalty phase of capital trial so that Defendant and co-Defendant could have their penalties decided separately was not harmless; joint trial rendered jury unable to consider how aggravating evidence and mitigating evidence applied to each defendant separately.

State v. Paiz, 88 Crim. L. Rep. 637 (N.M. 2/17/11):
Holding: Murder and drug trafficking charges which had no logical relationship between each other were improperly joined.

Walker v. Com., 97 Crim. L. Rep. 108 (Va. 4/16/15):
Holding: Even though Defendant sold drugs to undercover officer on four separate occasions of 13 days, this was insufficient to prove "common scheme or plan" to justify joinder of all four cases; crimes may be tried together under a theory of a larger "common scheme or plan" only if the object of each offense was to help reach a particular goal that could not be achieved individually by any of the criminal acts.

People v. Hunter, 2012 WL 638069 (Ill. App. Ct. 1st Dist. 2012):
Holding: A cannabis charge and gun-related charges were based on the same act of constructive possession, requiring the State to comply with the compulsory joinder-speedy trial rule.

Com v. O'Neil, 2015 WL 233922 (Pa. Super. 2015):
Holding: Defendant charged with various non-murder offenses, such as theft and corrupt organization charges, was entitled to severance of her case from that of a co-Defendant doctor charged with capital murder stemming from shocking deaths of babies at an abortion clinic.

Judges – Recusal – Improper Conduct – Effect On Counsel – Powers

Anderson v. State, 2013 WL 2630992 (Mo. banc June 11, 2013):
Holding: Rule 29.15 judge should have sustained a motion to disqualify him where he had extrajudicial information about the jury foreperson (whom he had spoken to) about how the jury viewed mental health evidence at Defendant/Movant's trial, and where he had read a magazine article about an expert witness in the case and questioned the expert's credibility based on the article; these facts raised an appearance of prejudgment of Movant's postconviction claims about mental health and the expert, even though the judge expressly said he did not base his denial of postconviction relief on these matters.

Moore v. State, 2014 WL 1597633 (Mo. App. E.D. April 22, 2014):
Movant was entitled to evidentiary hearing on claim that counsel was ineffective for withdrawing motion for automatic change of judge and not moving for change of judge for cause, where judge had previously prosecuted Movant.
Facts: Movant, who was convicted of various offenses at trial and sentenced to the maximum possible sentence by Judge, filed 29.15 motion alleging his counsel was ineffective in failing to move for change of judge. Judge had previously prosecuted Movant when Judge was a prosecutor. Counsel had filed a motion for automatic change of judge, but then withdrew it. Counsel failed to file a motion for change of judge for cause. The motion court (who was also the trial court Judge) denied relief without a hearing.
Holding: Here, there was a motion for automatic change of judge under Rule 32.07 filed, but then it was withdrawn by counsel. The motion court found that this withdrawal was done in Movant's "presence" and "with his consent" in open court, but the record does not indicate that Movant was even aware that the motion was withdrawn much less that it was done with his "consent." The motion court further found that Movant failed to allege prejudice sufficient to trigger postconviction relief, and that just because a trial judge received knowledge of facts through prior court hearings does not justify disqualification for cause. However, Movant's motion alleges that counsel lacked a strategic purpose for not pursuing a change of judge, and that Movant wanted a change of judge. Movant argues that Judge was biased against him, because she prosecuted him in another case before she became a judge. And Movant contends that a reasonable person would doubt Judge's impartiality where she had prosecuted him previously, and sentenced him to the maximum possible sentence here. All of this sufficiently alleged facts not refuted by the record which warrant an evidentiary hearing before a different judge.

State ex rel. Stockman v. Frawley, 2015 WL 5432480 (Mo. App. E.D. Sept. 15, 2015):
Even though Judge heard some preliminary, non-contested motions, these did not constitute a "trial" for purposes of Rule 51.05(b) on automatic change of judge, so Defendant could still seek change; and (2) even though Defendant's change-of-judge motion did not contain a hearing date for the motion, where the motion was served on all

parties, this non-conformity with the Rule was not substantial and the motion must be granted.
Facts: In divorce action, Defendant filed motion for change of judge under Rule 51.05. Trial judge denied motion on grounds that judge had already decided certain non-contested motions, and that the change-of-judge motion did not specify a hearing date. Defendant filed for writ of prohibition.
Holding: The 51.05 motion was timely because was filed within 60 days from service of process or 30 days from designation of the trial judge, which ever time is longer. The Rule also says that if designation of the trial judge occurs less than 30 days before trial (as here), the motion must be filed before any appearance before the judge. Here, Judge ruled on some preliminary, non-contested motions. If that hearing constituted a "trial" under the Rule, then having appeared at it precluded Defendant from seeking change of judge thereafter. A "trial" under the Rule means a full trial on the merits. Where the matter before the court is not contested and the court settles no issue in dispute, its order cannot be considered a trial on the merits. Thus, the preliminary matters here were not a "trial." Rule 51.05(c) requires a party to serve notice of the time when the motion will be presented to the court. The purpose of this requirement is to allow an opposing party to contest the motion. Here, Defendant's failure to serve such notice is not fatal because the motion was served on the opposing party and a hearing was held at which the opposing party could contest the motion. The lack of notice is, thus, not a sufficient basis to deny the change of judge. Writ granted.

State v. Williams, No. ED99399 (Mo. App. E.D. 6/28/13):
Trial court does not have authority to dismiss a criminal case with prejudice in the absence of a speedy trial violation.
Facts: In early 2012, Defendant was charged with a drug offense. Later in 2012, he entered in a plea bargain with the State. However, on the day of the scheduled plea, the State failed to appear. Defense counsel moved to dismiss for failure to prosecute. The trial court dismissed the charge *with* prejudice. The State appealed.
Holding: Only the prosecutor has the authority to voluntarily dismiss or nolle prosequi a felony charge, because the prosecutor has more knowledge about all the circumstances of the cases. While a trial court has authority to dismiss a case *without* prejudice for failure to prosecute in certain circumstances, it has no inherent authority do so *with* prejudice absent a speedy trial violation, and no such violation was alleged here.

State ex rel. Deutsch v. Thornhill, NO. ED96430 (Mo. App. E.D. 4/12/11):
Where Plaintiff met the requirements for change of judge under Sec. 517.061, judge was required to recuse.
Facts: Civil plaintiff filed a petition on February 1, 2010. The initial return date was March 22, 2010. The case was originally set for trial on March 14, 2011. On February 10, 2011, the trial court reset the trial for March 21, 2011. This order setting the trial date was more than 15 days before a scheduled trial. On March 9, 2011, Plaintiff filed a motion to change judge. When the judge overruled it, Plaintiff sought a writ of prohibition.
Holding: Sec. 517.062 states that a change of judge shall be filed not later than five days before the return date, but if the case is not tried on the return date but continued and if all

parties are given 15 days advance notice of trial, then the motion shall be made not later than five days before trial. Here, the motion was filed more than five days before trial, so Plaintiff complied with the statute. Judge had to recuse. Writ of prohibition granted.

Snellen by Snellen v. Capital Region Medical Center, 2013 WL 5614115 (Mo. App. W.D. Oct. 15, 2013):
Trial judge's sua sponte questioning and strike of nursing-mother venireperson was improper because such venirepersons are not disqualified, even though she would need breaks every three or four hours.
Facts: During voir dire, Venireperson said she was a nursing mother and would need breaks every three or four hours. The trial judge then said, "Waah. Mama. Starving. I couldn't take the guilt," and asked counsel to agree to strike her, which counsel did. Later, Appellant raised this as plain error on appeal.
Holding: Although this does not rise to level of plain error since counsel failed to object to the court's action, "[w]e do not condone the actions of the trial judge…. This juror did not request to be excused for hardship; she merely informed the trial court of a need for a break every three to four hours so she could pump breast milk. Such limitation is not itself disqualifying" under Sec. 494.425. It would be a rare trial which did not stop every three or four hours for everyone to take a break. The trial court's actions may have brought inappropriate attention to Venireperson and embarrassed her or caused her stress.

Charron v. Missouri Bd. of Probation & Parole, No. WD74844 (Mo. App. W.D. 7/31/12):
Holding: Where petitioner filed his motion for change of judge within 60 days of service of process, judge had to grant it under Rule 51.05(b) and could not rule on any motions which had not been taken under submission at the time of filing of the motion for change of judge, even if the other pending motions were filed before the change of judge motion; once a timely change of judge motion is filed, judge lacks authority to rule on other motions not previously taken under submission; failing to grant timely change of judge motion can never be "harmless error."

Sampson v. State, 2013 WL 3828663 (1st Cir. 2013):
Holding: Federal judge in habeas case had duty to recuse under Due Process Clause where judge had previously been a state court judge and had previously disqualified himself from an unrelated state court trial against Defendant wherein judge acknowledged bias against Defendant in light of prior dealings with him.

In re Bulger, 92 Crim. L. Rep. 757 (1st Cir. 3/14/13):
Holding: Trial judge should have been disqualified from hearing murder case where judge had previously been a high Justice Department official who had supervisory authority over prosecutors when they had promised Defendant immunity if he worked as an FBI informant.

U.S. v. Ottaviano, 94 Crim. L. Rep. 425 (3d Cir. 12/24/13):
Holding: Even though federal judges are authorized to question witnesses, judge erred in questioning *pro se* Defendant-Witness in such a way that highlighted weaknesses in his

defense; a judge cannot "take over the cross-examination" or allow his questioning to "reach the point where it appears clear to the jury that the court believes the accused is guilty."

U.S. v. Sanya, 96 Crim. L. Rep. 333 (4th Cir. 12/17/14):
Holding: Defendants who claim judge participated in plea negotiations in violation of Rule 11 must show only a "reasonable probability" they would not have pleaded guilty without the judge's actions; they need not show that "but for" the judge's actions, they would have gone to trial.

U.S. v. Hemphill, 95 Crim. L. Rep. 195 (5th Cir. 5/2/14):
Holding: Comments by judge about strength of State's evidence and statements about how people who did not plead guilty got longer sentences constituted forbidden judicial participation in plea negotiations.

U.S. v. Pena, 93 Crim. L. Rep. 450 (5th Cir. 6/18/13):
Holding: Federal judge improperly participated in plea negotiations when he suggested at a status conference that the agreement being negotiated should be linked to resolution of other pending charges against Defendant.

U.S. v. Harden, 95 Crim. L. Rep. 505 (7th Cir. 7/14/14):
Holding: Magistrate judges are not authorized to accept guilty pleas even when the parties consent.

Weddington v. Zatecky, 93 Crim. L. Rep. 615, 721 F.3d 456 (7th Cir. 8/1/13):
Holding: Federal habeas judge who had presided over the first of two state trials when she was a state trial court judge must recuse herself from hearing the federal habeas case on the second trial, since she effectively would be reviewing issues on which she had already passed judgment in state court since she had denied a motion to suppress applicable to both cases.

U.S. v. Kyle, 94 Crim. L. Rep. 175 (9th Cir. 10/30/13):
Holding: Trial judge impermissibly participated in plea negotiations under Rule 11(c)(1) when he rejected a plea agreement as too lenient and then hinted that the Defendant would get a life sentence if he didn't accept a different plea deal.

Hurles v. Ryan, 2013 WL 21922 (9th Cir. 2013):
Holding: Petitioner would be entitled to habeas relief on his claims, if true, that judge was biased because judge had contacted Attorney General's office during case and commissioned or authorized a responsive pleading or provided input to the prosecution of the case, so evidentiary hearing was warranted.

U.S. v. Harris, 2012 WL 1889782 (9th Cir. 2012):
Holding: Visiting Judge should not have sentenced Defendant where there was no showing that the original trial judge was unable to perform his sentencing duties, and the Visiting Judge was not familiar with the trial transcript.

Brown v. U.S., 95 Crim. L. Rep. 67 (11th Cir. 4/7/14):
Holding: Federal magistrates lack authority to issue final judgments on habeas corpus motions under 28 USC 2255, and lack authority to try and sentence for federal misdemeanors.

U.S. v. Miller, 94 Crim. L. Rep. 421, 2013 WL 6818391 (D.C. Cir. 12/27/13):
Holding: Judge violated Defendant's 6th Amendment right to jury trial when, in response to a jury question, he gave his own view of how to reconcile discrepencies in the charges and evidence by explaining what specific proof supported specific charges.

U.S. v. Janssen, 95 Crim. L. Rep. 102 (C.A.A.F. 4/15/14):
Holding: Congress did not authorize appointment of a civilian to act as an appellate military judge.

Blaine v. U.S., 89 Crim. L. Rep. 191, 2011 WL 1584751 (D.C. 4/28/11):
Holding: Where jury sent a note asking for more guidance on burden of proof, judge erred in giving an additional instruction on reasonable doubt, even though the instruction was accurate, because the additional information about the State not having to prove guilt beyond a shadow of a doubt or to a mathematical or scientific certainty would have indicated to jury that judge believed Defendant was guilty and State met its burden of proof.

U.S. v. Coiscou, 2011 WL 2518764 (S.D. N.Y. 2011):
Holding: Magistrate judge had authority to dismiss complaint for lack of probable cause at initial appearance, even though preliminary hearing had not yet been held.

Ex parte Lightfoot, 93 Crim. L. Rep. 535 (Ala. 7/12/13):
Holding: When a judge has found by a preponderance of evidence a factor that triggers a mandatory sentence enhancement, the fact that the sentence imposed is below the statutory maximum does not render the 6th Amendment right to have a jury determine the factor harmless.

People v. Clancey, 2013 WL 1667822 (Cal. 2013):
Holding: Record was ambiguous whether plea court engaged in prohibited plea negotiations, where there was no clear statement in the record that judges' statement as to possible sentence represented court's best judgment of what Defendant's sentence would be regardless of whether Defendant pleaded guilty or went to trial, and record was ambiguous as to whether court extended leniency because of a plea.

Butler v. State, 2014 WL 2881151 (Del. 2014):
Holding: Defendant was goaded by judicial impropriety into seeking mistrial after jury was sworn, so that double jeopardy barred retrial; here, after jury was sworn, a new judge took over the trial; the new judge engaged in improper behavior such as demanding that portions of trial be off the record, pressuring both parties to reach a plea agreement, reopening voir dire over both parties' objection to change the jurors selected, putting

unusual scheduling limitations on the trial, and denying defense counsel an opportunity to consult with her office about what to do.

Murphy v. State, 90 Crim. L. Rep. 651 (Ga. 2/6/12):
Holding: A defendant's conviction for murdering a baby must be reversed because the trial judge made remarks during the testimony of a prosecution witness that bolstered the witness' testimony.

Gibson v. State, 88 Crim. L. Rep. 781 (Ga. 2/28/11):
Holding: Where judge declined deliberating jurors' request to see certain evidence by saying he wanted to avoid "reversible error," this implied that judge thought Defendant was guilty and required reversal of conviction.

State v. Easley, 2014 WL 1266125 (Idaho 2014):
Holding: Where Defendant was being sentenced following revocation of probation, Prosecutor could not determine eligibility for mental health court because this was a judicial function and Prosecutor's post-judgment determination violated separation of powers; any authority Prosecutor had to determine eligibility did not extend to after Defendant's adjudication of guilt.

State v. Lee, 94 Crim. L. Rep. 586 (Idaho 2/10/14):
Holding: Where appellate court had previously ordered case remanded to enter a judgment of acquittal for Defendant, trial court should not have then entered a judgment acquitting Defendant but declaring him a "serious pedophile" who should be "closely watched;" while there were not specific rules prohibiting the judge from entering such an order, appellate courts have struck unnecessary verbiage from civil orders, and does so here.

Com. v. Hamilton, 2013 WL 5763180 (Ky. 2013):
Holding: Trial court had jurisdiction to hear Defendant's claim the Health Department had violated laws of Kentucky in how it changed certain drug from Schedule V to Schedule III controlled substance.

State v. Pratt, 2012 WL 1859149 (Minn. 2012):
Holding: Retired Judge, who was sitting in Defendant's criminal case as a special judge, should have been disqualified where he was simultaneously serving as a retained expert witness for the prosecutor's office in a civil case; a reasonable observer would question his ability to be impartial under such circumstances.

State v. Gilbert, 96 Crim. L. Rep. 156 (Ohio 10/21/14):
Holding: Once Defendant has been sentenced, trial court's jurisdiction ends and court has no authority to grant State's motion to vacate the plea due to Defendant's alleged breach of the plea agreement.

State v. Harrison, 96 Crim. L. Rep. 492 (Wis. 1/22/15):
Holding: Erroneous denial of change of judge cannot be harmless error, because this would nullify the statutory right to change of judge.

State v. Melton, 2013 WL 3467123 (Wis. 2013):
Holding: Trial court lacked "inherent authority" to destroy a PSI of a Defendant in violation of a 50-year retention rule for court records.

Maas v. Superior Court, 2014 WL 6967630 (Cal. App. 2014):
Holding: Habeas Petitioner was deprived of right to automatic disqualification of judge where Petitioner's multiple requests to learn who the assigned judge was in his case were denied, and Petitioner did not learn this until receiving the judge's decision in the habeas case.

People v. Labora, 2010 WL 4968641 (Cal. App. 2010):
Holding: Trial court engaged in improper judicial plea bargaining.

Holt v. Sheehan, 94 Crim. L. Rep. 204 (Fla. App. 10/11/13):
Holding: Even though trial judge had authority to issue an order recusing herself from all of public defender's cases due to dispute with public defender, trial judge acted improperly in issuing an order that went beyond this and described public defender as "incompetent, untrustworthy and extremely dilatory," as such comments were "scandalous" and not necessary to carry out the judge's order recusing herself; "the order challenged in this case … is a scandalous comment having no place in a court record."

Domville v. State, 2012 WL 3826764 (Fla. App. 2012):
Holding: Where judge was "Facebook friend" of prosecutor, this provided sufficient grounds to disqualify judge for cause since a reasonable person would not believe they would receive a fair and impartial trial from judge.

People v. Gacho, 2012 WL 1343950 (Ill. App. 2012):
Holding: Even though a jury determined Defendant's guilt, Defendant was entitled to evidentiary hearing on postconviction claim that trial judge's corruption in accepting a bribe in a co-defendant's case indicated that the judge had a personal interest in the outcome of his case and violated his due process rights to a fair trial.

People v. Radcliff, 2011 WL 2520134 (Ill. App. 2011):
Holding: Where judge was absent during part of a cross-examination of a witness, this violated Defendant's due process right to a fair trial.

State v. Thompson, 2011 WL 836748 (Kan. Ct. App. 2011):
Holding: Even though a district judge heard guilt portion of trial, where sentencing was done by magistrate judge, Defendant could appeal for a trial de novo before district court.
\

Prince v. Dept. of Motor Vehicles, 2011 WL 7975443 (N.Y. Sup. 2011):
Holding: Administrative Law Judge in license revocation violated due process due to bias when he offered, developed and coached Officers during the hearing to get them to show that arrestee was warned that her license would be suspended upon refusal to take BAC test.

People v. Lockley, 2011 WL 1733894 (N.Y. App. 2011):
Holding: Trial court's procedure of reading jury notes in front of jury and immediately answering without giving defense an opportunity to be heard beforehand was inherently prejudicial.

Duffey v. State, 2014 WL 685560 (Tex. App. 2014):
Holding: Where trial judge had ex parte contacts with victim's family before sentencing and prayed with them for "justice" in the case, this created an appearance of partiality that required judge to recuse.

State v. Terry, 2014 WL 2772899 (Wash. App. 2014):
Holding: Where the trial court allowed jurors to ask questions (through the judge) during trial, trial court violated Defendant's due process rights by asking a question submitted by a juror that was an indirect comment on Defendant's right to post-arrest silence; question asked whether Defendant ever asked Officer why he was being arrested, and Prosecutor argued in closing that Defendant's failure to ask was probative of guilt.

State v. Sellhausen, 2010 WL 4770622 (Wis. Ct. App. 2010):
Holding: Judges must sua sponte remove their immediate family members from a voir dire panel and not require defendant to strike them for cause or exercise a peremptory strike.

Jury Instructions

State v. Roberts, 2015 WL 4627393 (Mo. banc Aug. 4, 2015):
Third-degree domestic assault is a "nested" lesser-included offense of second-degree domestic assault because it is impossible to commit second-degree domestic assault with "knowingly" as its mental state, without also committing third-degree domestic assault with "recklessness" as its mental state; these different mental states are differential elements on with the State bears the burden of proof, and a Defendant is always entitled to a lesser-included offense instruction for such "nested" lesser offenses without having to introduce affirmative evidence of "cast doubt" over the State's evidence in any way.
Facts: Defendant was convicted of second-degree domestic assault stemming from a fight between Defendant and a household member, where Defendant hit Victim with a shower rod and hammer. He requested a lesser-included instruction on third-degree domestic assault, which was refused.
Holding: Sec. 556.046.3 provides that a court must instruct with respect to an offense if there is a basis in the evidence for acquitting the defendant of the higher included offense and convicting of the lesser offense. Since a jury can always disbelieve the State's

evidence, there is always a basis for acquitting of the higher offense. The issue here is whether there was a basis for convicting of the lesser. A "nested" lesser offense consists of a subset of the elements of the greater, so that it is impossible to commit the greater without necessarily committing the lesser. Second-degree domestic assault has a mental state of "knowingly" causing injury to a household member. Third-degree domestic assault has a mental state of "recklessly causing" such injury. Sec. 562.021.4 provides that when recklessness suffices to establish a culpable mental state, it is also established if a person acts knowingly. Therefore, proof that Defendant acted "knowingly" to cause injury necessarily means there was also a basis to convict of acting "recklessly." Thus, Defendant was entitled to the lesser. The State claims Defendant's conduct was practically certain to cause injury and, thus, can only support an inference of "knowingly" causing injury. But such an argument is foreclosed by 562.021.4, where the Legislature provided that "knowing" conduct also establishes "reckless" conduct. Reversed and remanded for new trial.

State v. Randle, 2015 WL 4627381 (Mo. banc Aug. 4, 2015):
Third-degree assault is a "nested" lesser-included offense of second-degree assault because it is impossible to commit second-degree assault with "knowingly" as its mental state, without also committing third-degree assault with "recklessness" as its mental state; these different mental states are differential elements on which the State bears the burden of proof, and a Defendant is always entitled to a lesser-included offense instruction for such "nested" lesser offenses without having to introduce affirmative evidence or "cast doubt" on the State's evidence in any way.
Facts: Defendant was convicted of second-degree assault for repeatedly hitting a person over the head with a bottle. He requested a lesser-included offense instruction for third-degree assault, which was refused.
Holding: Sec. 556.046.3 provides that a court must instruct with respect to an offense if there is a basis in the evidence for acquitting the defendant of the higher included offense and convicting of the lesser offense. Since a jury can always disbelieve the State's evidence, there is always a basis for acquitting of the higher offense. The issue here is whether there was a basis for convicting of the lesser. A "nested" lesser offense consists of a subset of the elements of the greater, so that it is impossible to commit the greater without necessarily committing the lesser. Second-degree assault has a mental state of "knowingly" causing injury. Third-degree assault has a mental state of "recklessly causing" injury. Sec. 562.021.4 provides that when recklessness suffices to establish a culpable mental state, it is also established if a person acts knowingly. Therefore, proof that Defendant acted "knowingly" to cause injury necessarily means there was also a basis to convict of acting "recklessly." Thus, Defendant was entitled to the lesser. The State claims Defendant's conduct was practically certain to cause injury and, thus, can only support an inference of "knowingly" causing injury. But such an argument is foreclosed by 562.021.4, where the Legislature provided that "knowing" conduct also establishes "reckless" conduct. Reversed and remanded for new trial.

State v. Amick, 2015 WL 3759532 (Mo. banc June 16, 2015):
Trial court cannot substitute Alternate Juror after deliberations begin, because Sec. 494.485 requires that Alternates be discharged once deliberations begin.

Facts: After the evidence was presented and before deliberations, the trial court excused Alternate Juror, who then went home. The jury then deliberated for five hours, when a juror became sick. The trial court then called Alternate Juror to return to the courthouse and substituted them on the jury, over Defendant's objection that this was error and court "can't just throw somebody else into the ring" after hours of deliberation. After conviction, Defendant appealed.
Holding: Although defense counsel did not cite Sec. 494.485, the objection plainly informed the trial court that substitution of the Alternate was error. Trial judges are presumed to know the law, so the error is preserved for appeal. Sec. 494.485 provides that (1) once the jury begins to deliberate, the trial court cannot substitute one juror for another and (2) that after the jury retires to deliberate, alternate jurors must be discharged. Conviction reversed and remanded for new trial.

State v. Hunt, 2014 WL 7335208 (Mo. banc Dec. 23, 2014):
(1) Even though Defendant-Officer broke in Suspect's door and hit him while arresting him, evidence was insufficient to convict Defendant-Officer of first-degree burglary because Officer either had authority to enter the residence based on the arrest warrant for Suspect, or if Officer did not believe Suspect was inside residence, he could not have intended to assault him by breaking in (which was the alleged intended crime from the entry); (2) Even though Defendant-Officer broke in Suspect's door, evidence was insufficient to convict of conviction for property damage because Sec. 544.200 give officers authority to break open doors to arrest someone if, after notice, the person refuses to answer the door; and (3) the jury instructions for assault were plainly erroneous because they misled jury into considering whether Defendant-Officer was a "law enforcement officer," which was not a jury question but a matter of law under 195.505; the proper question was whether Defendant-Officer "exceeded" his authority, not whether he "had" authority.
Facts: Officers had an arrest warrant to arrest Suspect for two felonies. Officers banged on the door of Suspect's trailer (where an informer said he was) and announced "sheriff's department" but no one answered. Defendant-Officer looked in a window and saw drug-related items. Defendant-Officer then kicked in the door and went inside. Defendant-Officer employed "control tactics" by hitting Suspect and also cursed at him. Defendant-Officer apparently had had a different prior incident with Suspect where he also hit him. Defendant-Officer was charged and convicted of first degree burglary for unlawfully entering the trailer with the purpose of assaulting Suspect, second-degree property damage for breaking down the front door, and third degree assault for hitting Suspect.
Holding: (1) There is insufficient evidence to support the burglary conviction. Burglary requires proof of (a) unlawful entry and (b) an intent to commit a crime therein, i.e., the alleged assault. The lawfulness of the entry depends on whether Defendant-Officer had a reasonable belief that Suspect was inside the trailer at the time. If, as the State contends, he did not reasonably believe Suspect was inside the trailer, then he could not have formed the intent to assault the suspect (because he didn't believe the suspect was there). But if he did have such a belief that Suspect was inside, he had authority to enter by virtue of the arrest warrant. Thus, both elements needed to prove burglary can't be present here. (2) There is insufficient evidence to support the property damage conviction because Sec. 544.200 gives officers authority to break open a door if, after

notice, the officer is refused admittance. Here, officers had knocked, announced their presence and demanded entry, but were refused. As a matter of law, Defendant-Officer's action in breaking down the door was lawful under Sec. 544.200. (3) The jury instructions for the assault conviction were plainly erroneous because they required the jury to find Defendant-Officer was acting as a law enforcement officer, which was not an issue for the jury to decide because it was a legal question answered by statute, Sec. 195.505. The issue for the jury to decide was whether he used reasonable force. The proper question for the jury was not whether Defendant-Officer *had* authority, but whether he *exceeded* it. If the jury believed the State's theory at trial that Defendant-Officer was acting outside his authority, then it would never have considered the question of reasonable force at all, so the instruction was misleading. Burglary and property damage convictions vacated. New trial on assault conviction ordered.

State v. Jackson, 2014 WL 2861550 (Mo. banc June 24, 2014):
Even though the trial court believed that there was no reasonable basis in the evidence to acquit of first degree robbery and convict of second degree robbery because there was overwhelming evidence that Defendant used a gun in the offense, the trial court erred in failing to give a requested lesser-included offense instruction on second degree robbery because a jury can always disbelieve all or any part of the evidence; a trial court cannot refuse a defendant's request for a "nested" lesser-included offense instruction (i.e., those comprised of a subset of elements of the charged offense) based solely on its view of what evidence a reasonable juror must believe.
Facts: Defendant was charged with first degree robbery. At trial, Victim testified that Defendant held a revolver at her back. Also, a police detective testified that he reviewed video of the robbery and saw Defendant holding a pistol to the Victim's back. As relevant here, the distinction between first and second degree robbery was whether Defendant displayed a deadly weapon. Defense counsel requested a lesser-included offense instruction on second degree robbery on grounds that the jury could disbelieve Victim and police officer, and believe they were mistaken in seeing a gun. The trial court refused the instruction on grounds that "if I were to submit it, then I'd have to submit it every time there's a robbery first brought, and I don't think that's the law." Defendant was found guilty of first degree robbery. He appealed.
Holding: The outcome of this appeal depends on whether there was a basis in the evidence for acquitting Defendant of the charged offense. Here there was, because a jury can *always* disbelieve all or any part of the evidence, just as it always may refuse to draw inferences from that evidence. No matter how strong or even absolutely certain the evidence and inferences in support of the differential element in the greater instruction may seem to judges and lawyers, no evidence ever proves an element of the offense until all 12 jurors believe it, and no inference is ever drawn until all 12 jurors draw it. Accordingly, in a criminal case, the trial court cannot refuse a defendant's request for a "nested" lesser offense instruction based solely on its view of what evidence a reasonable juror must believe or what inferences a reasonable juror must draw. When dealing with "nested" lesser included offenses (i.e., those comprised of a subset of the elements of the charged offenses), it is impossible to commit the greater without necessarily committing the lesser. Today's opinion is consistent with Section 566.046. Even though the effect of this opinion will be that lesser-included offense instructions will be given virtually every

time they are requested (and even though trial courts likely will give them even when not requested to avoid postconviction claims), Sec. 566.046 must be applied in the context of the constitutional presumption of innocence and right to trial by jury. To the extent that *State v. Olson*, 636 S.W.2d 318 (Mo. banc 1982) is contrary to this opinion, it is overruled. New trial ordered.

State v. Pierce, 2014 WL 2866292 (Mo. banc June 24, 2014):

(1) Even though the uncontradicted evidence showed that Defendant had more than two grams of cocaine base, the trial court erred in second degree trafficking case in failing to give "nested" lesser-included offense instruction on possession of cocaine because a jury may always believe or disbelieve the State's evidence, and the only thing a defendant must do to put the elements of a crime "in dispute" is plead not guilty; and (2) Even though Court's term had ended before Defendant was retried, Defendant waived his claim that this violated Article I, Sec. 19 of the Missouri Constitution because he failed to object to the "untimely" trial before the Court's term ended at a time when the Court still had power to correct it.

Facts: (1) Defendant was charged with second degree trafficking. The jury instruction for second degree trafficking required the jury to find that Defendant possessed more than 2 grams of cocaine base. Defendant requested a lesser-included offense instruction for possession of drugs, Sec. 195.202.1. The trial court refused this instruction on grounds that all the evidence showed the cocaine base weighed more than 2 grams. Defendant was convicted of second degree trafficking. He appealed. (2) Defendant's original trial ended in a hung jury. Subsequently, the trial was continued several times without objection from the defense. It was ultimately tried during a much later "term" of the trial court.

Holding: (1) For the reasons set forth in *State v. Jackson*, No. SC93108 (Mo. banc June 24, 2014), Defendant was entitled to the lesser-included offense instruction. Guilt is determined by a jury, not the court. Even though the State contends that the issue of the weight of the drugs was not "in dispute," the jury is the sole arbiter of facts and is entitled to believe or disbelieve the State's evidence. Under the trafficking instruction, the jury was told that the State had to prove that the substance weighed more than 2 grams. Because a jury may always believe or disbelieve the evidence, the State's burden is met only when a jury returns a guilty verdict. The only thing a defendant has to do to hold the State to this burden of proof, or to put the elements of a crime "in dispute," is plead not guilty. Once the defendant pleads not guilty, there will always be a basis in the evidence to acquit the defendant at trial because the jury is the final arbiter of what the evidence does or does not prove. New trial ordered. (2) Article I, Sec. 19, Mo. Const., provides that if a jury fails to render a verdict, the court may commit the prisoner to trial during the same or next term of court. Here, the trial court failed to retry Defendant during the "same or next term of court." However, this does not mean that the trial court lacked authority to try Defendant. Here, Defendant waived this issue because he did not object to the "untimely" trial until the date of the new trial. This waived the issue because the trial court must be given an opportunity to correct the error *while correction is still possible*. Thus, Defendant was required to object before the Court's term expired when there was still time to try him.

State v. Stover, No. SC91760 (Mo. banc 9/25/12):
Trial court plainly erred in giving jury instruction in first degree trafficking case which, contrary to MAI-CR3d 325.10.2, omitted the phrase "knowing of the substance's content and character" from the definition of trafficking.
Facts: Defendant, a driver of a car, was charged with first degree trafficking after a large amount of PCP was found in a suitcase in the car's trunk during a traffic stop. Another passenger was in the car. At trial, Defendant's defense was that he did not know about the PCP.
Holding: The MAI submitted in this case stated that a person commits the crime of trafficking "if he knowingly distributes … 90 grams or more of a mixture or substance containing a detectable amount of PCP, a controlled substance." However, this was not in conformity with the applicable MAI. MAI-CR3d 325.10.2 would have required this instruction to read "if he knowingly distributes … 90 grams or more of a mixture or substance containing a detectable amount of PCP, a controlled substance *knowing of the substance's content and character."* The given-instruction violated Defendant's rights to due process and a fair trial because it did not require the jury to find that Defendant knew of the PCP's content and character. Plain error exists when an instruction omits an essential element of the crime and the evidence establishing the omitted element was seriously disputed, as it was here.

State v. Miller, No. SC91948 (Mo. banc 7/3/12):
(1) Where the information charged various sex acts between Dec. 3, 2004 and Dec. 5, 2005, and the verdict director tracked these dates, but the evidence was that the offense was committed in 1998 or 1999, the evidence is insufficient to convict because the time span of the charged offense was different than the evidence actually presented and the charged offense did not give adequate notice to the defense of the evidence the State intended to present; because the evidence is insufficient, Defendant cannot be retried on these counts; and (2) where Defendant was charged with another sex offense alleged to have occurred in 1997 or 1998, the trial court erred in giving a jury instruction regarding the definition of sexual contact that was not enacted until 2002; because this jury instruction constitutes only "trial error," Defendant can be retried on this count.
Facts: Defendant was charged by information with child sex offenses alleged to have occurred between Dec. 3, 2004 and Dec. 3, 2005. The jury instruction tracked this time frame. However, the evidence presented at trial showed that these offenses occurred in 1998 or 1999. Regarding a separate charge of first degree child molestation, the verdict directed stated that Defendant touched the genitals of a child "through the clothing" in 1997 or 1998.
Holding: (1) There was no evidence that Defendant committed the first charged sex offenses in 2004 or 2005, as charged in the information and as instructed in the jury instruction. While the exact date of a sex offense is not an element of the crime, a time element cannot be so overbroad as to nullify an alibi defense or prevent application of double jeopardy principles. When the State chooses to file an information and submit a parallel jury instruction that charges a specific time frame, the evidence must conform to that time frame. Otherwise, the defense would not have adequate notice of the evidence the State intends to present. Here, there was no evidence Defendant committed the first sex acts during 2004 or 2005. Having not presented sufficient evidence to convict, the

State cannot retry Defendant on these charges and he must be discharged. (2) Regarding a separate charge of first degree child molestation, at the time of this offense, Sec. 566.067 RSMo. 1994 applied and it did not define sexual contact as "touching through the clothing." That language was not added until the statute was revised in 2002. Hence, the jury instruction using the 2002 language was error. However, this is "trial error," so a new trial on this charge is permissible.

State v. Bolden, No. SC92175 (Mo. banc 7/3/12):
Holding: Trial court has no duty to *sua sponte* correct an erroneous jury instruction proffered by the defense, and appellate court will not conduct plain error review of such an instruction. To the extent that *State v. Beck*, 167 S.W.2d 767, 777-78 (Mo. App. 2005) holds to the contrary, it is overruled.

State v. Maura Celis-Garcia, No. SC90980 (Mo. banc 6/14/11):
(1) Where alleged child-victim testified to multiple acts of hand-to-genital contact at various locations and the verdict-director allowed the jury to convict if it found that Defendant touched Defendant between certain dates, this violated Defendant's right to a unanimous jury verdict because the verdict-director failed to require that the jury agree on the specific act Defendant committed which constituted the charged count of sodomy; (2) even though MAI-CR 3d 304.02 Note on Use 6 allows offenses to be described by location, this modification is insufficient to protect the right to a unanimous jury verdict in a multiple acts case without also instructing the jury to agree unanimously on at least one of the specific acts described in the verdict director.
Facts: Defendant was charged with two counts of sodomy for alleged acts involving two child victims. The victims testified that Defendant touched them during various incidents at various times on a porch, in a bedroom, and in a bathroom. The verdict director for each victim instructed the jury to find Defendant guilty if "between January 1, 2005 and March 31, 2006 … the defendant … placed her hand on [victim's] genitals."
Holding: The trial court plainly erred in submitting this verdict director because it denied Defendant her right to a unanimous jury verdict. As an initial matter, the State argues that Defendant cannot seek plain error review because she submitted a verdict director that contained this same defect, but a defendant does not waive plain error review by failing to submit a correct instruction. On the merits, Article I, Sec. 22(a) of the Missouri Constitution guarantees a right to a unanimous jury verdict. Here, the broad language of the verdict director allowed the jury to convict if they found that Defendant engaged in hand-to-genital contact in the bedroom, *or* the porch, *or* the bathroom. The jury was not required to agree on the specific act Defendant committed. "This Court agrees that a defendant's right to a unanimous verdict would be protected in a multiple acts case by either the state (1) electing the particular criminal act on which it will rely to support the charge or (2) the verdict director specifically describing the criminal acts presented to the jury and the jury being instructed that it must agree unanimously that one of those acts occurred." MAI-CR 3d 304.02 Note on Use 6 allows the acts to be described by location. But this is not sufficient to ensure a unanimous jury verdict. The instruction must not only describe the separate criminal acts with specificity, but must also instruct the jury to agree unanimously on at least one of the specific criminal acts

described. To the extent MAI-CR 3d 304.02 and its notes conflicts with this substantive law, they are not binding. New trial ordered.

State v. Johnson, 2015 WL 5572073 (Mo. App. E.D. Sept. 22, 2015):
In trial for first-degree assault for purposely causing serious physical injury, Defendant was entitled to instruction on second-degree assault for recklessly causing such injury, because the jury was not required to believe the State's evidence and could believe Defendant's evidence that he did not intend to cause serious physical injury to victim.
Facts: Defendant, after a heated argument with a school official, returned to school the next day and shot the official. Defendant testified he didn't intend to shoot the official, and didn't look when he shot him. The trial court refused an instruction for second-degree assault. Defendant was convicted of first-degree assault.
Holding: There was a basis to acquit of first-degree assault because the jury was not required to believe the State's evidence. The jury could have believed Defendant's testimony. There was a basis to convict of the lesser-included offense. The only difference between the two offenses was the mental state. Sec. 562.021.4 provides that when recklessness suffices to establish a mental state, it is also established if a person acts purposely or knowingly. Thus, trial court was required to give the second-degree assault instruction.

State v. Davis, 2015 WL 5232355 (Mo. App. E.D. Sept. 8, 2015):
Holding: (1) Second-degree assault based on sudden passion is a lesser-included offense of first-degree assault, but it is not a "nested" lesser, because it is not a subset of the elements of first-degree assault and it is not "impossible to commit" first-degree assault (knowingly causing serious injury) without necessarily committing the lower offense; also, second-degree assault includes an additional element not present in the greater offense, i.e, sudden passion arising from adequate cause. (2) To obtain second-degree assault instruction based on sudden passion, Defendant has burden of injecting issue of sudden passion and there must be evidence supporting it. (3) Sudden passion must arise from another person's provocation. (4) Trial court did not err in refusing to give second-degree assault instruction where Defendant's sudden passion arose from voluntary ingestion of illegal drugs, not from another person's provocation.

State v. Meine, 2015 WL 5135420 (Mo. App. E.D. Sept. 1, 2015):
Holding: (1) Since second-degree involuntary manslaughter (negligently causing death) is a "nested" lesser-included offense of first-degree murder (knowingly causing death with deliberation), trial court erred in not giving requested second-degree involuntary instruction; but where court gave instructions for the "nested" lessers of second degree murder (knowingly causing death) and first-degree involuntary manslaughter (recklessly causing death) and jury convicted of first-degree murder, Defendant was not prejudiced since the failure to give a different lesser is not prejudicial when instructions for one lesser were given and Defendant was found guilty of the greater; and (2) even though defense counsel stated "no objection" when photographs of weapons unrelated to the offense were introduced, where the trial court had granted counsel a continuing objection to this evidence moments earlier, the subsequent statement

of "no objection" reasonably meant "no other objection than the continuing one," and the issue was not waived for appeal (but was not winning on the merits).

State v. Dudley, 2015 WL 1815037 (Mo. App. E.D. April 21, 2015):
Sec. 575.150 for resisting arrest does not criminalize resisting one's own arrest by "physical interference;" jury instruction which submitted offense based on "physical interference" was plainly erroneous because it allowed jurors to convict based on conduct that was not an element of the crime.
Facts: When police sought to arrest Defendant for a drug offense, Defendant made his body stiff and sat on his hands to avoid being handcuffed. Police eventually used a Taser on him to get him to comply with arrest. He was charged with resisting arrest.
Holding: Sec. 575.150(1) provides that a person commits the crime of resisting their own arrest when they resist the arrest "by using or threatening the use of physical violence or force." The statute does not list "physical interference" as a method to resist one's *own* arrest; "physical interference" is contained only in the arrest of another person section of the statute, 575.150(2). Plain error in instructions results when it is apparent that the trial court has so misdirected or failed to instruct the jury that it affected the jury's verdict. Instructions are more likely to be found plainly erroneous where they excuse the State from the burden of proof on a contested element of the crime. Here, the instruction allowed the jury to convict if Defendant used "violence, physical force, or *physical interference*" to resist. This allowed the jury to find him guilty based on an element that was not a crime. Moreover, the State argued that Defendant should be convicted based on "physical interference." Conviction reversed and remanded for new trial.

State v. Amschler, 2015 WL 3485828 (Mo. App. E.D. June 2, 2015):
(1) Even though Victim was a considerable distance away from Defendant, did not try to hit Defendant and did not have a weapon, trial court erred in failing to give self-defense instruction where Victim was outside Defendant's residence threatening to kill his family, was walking toward the residence, had previously run over Defendant in a prior incident, and had a history and reputation for violence; and (2) even though Defendant's proffered self-defense instruction misstated the law, the failure to give the instruction was not waived for appeal because the trial court has an independent duty to give a correct self-defense instruction if the evidence supports it.
Facts: Defendant was convicted of unlawful use of a weapon while intoxicated, Sec. 571.030.1(5), for having shot a gun in the ground while intoxicated. Victim (against whom the shot was directed) came to Defendant's Father's residence, angry, and demanded payment for work done for Father. Victim argued outside the residence for 45 minutes and made threats to kill the family. Defendant had been asleep. Father woke him up and told him to get his gun because Victim was outside making threats. Defendant went outside while the arguing and threats continued. Defendant shot a gunshot into the ground. Defendant was afraid of Victim because Victim had previously run over Defendant with a truck in a prior incident, and had a history and reputation of violence. Defendant offered a self-defense instruction, which the trial court refused. During deliberations, the jury inquired whether it could consider self-defense; the trial court said the jury must be guided by the instructions.

Holding: As an initial matter, the State argues this issue is waived because Defendant submitted a proposed self-defense instruction which misstated the law. However, regarding self-defense, where substantial evidence shows that a party has injected the issue into the case, the trial court is required to instruct on self-defense even if such an instruction was offered but not in proper form; it was the trial court's duty to correct any errors. The question here is whether there was substantial evidence from which the jury could have found that Defendant had a reasonable belief deadly force was necessary to defend himself from what he reasonably believed to be an imminent use of unlawful force by Victim. Here, there was. Victim was outside the residence threatening to kill Defendant's family. Victim was walking toward the residence. Victim had previously run over Defendant with a truck. Defendant had a history and reputation for violence.

State v. Kuehnlein, 2015 WL 1119554 (Mo. App. E.D. March 10, 2015):
Even though the testimony did not fully support an acquittal of the greater offense of second-degree domestic assault or a conviction on the lesser offense of third-degree domestic assault, Defendant was entitled to instruction on third-degree domestic assault because jury was entitled to accept part of Victim's testimony, part of Defendant's, and reject the rest, which allowed for an acquittal of the greater offense and conviction on the lesser.
Facts: Defendant was charged with second-degree domestic assault, Sec. 565.073. Victim testified Defendant choked her during an argument. Defendant testified he became upset when he found that Victim had drugs, and that Victim bit Defendant on the thumb and wouldn't let go. Defendant testified he put his hands on Victim's throat to get her to release his thumb. The trial court refused Defendant's request for an instruction on third-degree domestic assault, Sec. 565.074.
Holding: The trial court must give a lesser-included offense instruction if there is a basis for acquitting the Defendant of the greater offense and convicting of the lesser. Sec. 565.074 provides that a person commits third-degree domestic assault if they attempt to cause or recklessly cause physical injury. Defendant contends that his putting his hands on Victim's throat intended to cause physical injury, but not choking, which is the differential element here. The State claims that there is no evidence to acquit of the greater because there is no evidence that Defendant intended to cause physical injury, since his testimony was that he put his hands on Victim's throat to get her to stop biting his thumb. The State's argument fails, however, because it limits the jury's discretion to either completely believe Victim or Defendant. "We reject the false dichotomy offered by the State because a fundamental principle of Missouri law recognizes the jury's discretion to believe all, none, or any part of any witness's testimony." The jury was free to believe part of Victim's testimony, part of Defendant's and reject the rest. Victim testified Defendant choked her, but she could breathe. Defendant testified he didn't choke Victim, but did put his hands on her throat to get her to release his thumb. Viewing the evidence in the light most favorable to Defendant, the jury could find that Defendant did not choke Victim, but attempted to cause physical injury. This provides a basis to acquit of second-degree domestic assault, and convict of third-degree domestic assault, so the instruction should have been given.

State v. Smith, No. ED102586 (Mo. App. E.D. Dec. 22, 2015):
Where Defendant (1) was charged with involuntary manslaughter stemming from a car accident while allegedly intoxicated and (2) requested an instruction under MAI-CR3d 310.04 that if there was less than .08% BAC at the time blood was taken, the jury cannot find from this evidence alone that Defendant was under the influence of alcohol, trial court erred in failing to give the instruction because Notes on Use 3(a) requires the instruction be given at Defendant's request; Defendant was prejudiced because Defendant introduced extensive evidence at trial that the blood sample was unreliable and that Defendant's driving could be attributed to something other than alcohol intoxication.
Facts: Defendant was charged with involuntary manslaughter for a death caused when she drove on the wrong side of a highway and hit another car. Blood taken after the accident showed a BAC of .085. At trial, Defendant attacked the reliability of the blood test through expert testimony. Her expert testified that the failure to refrigerate the blood for 10 days after its collection caused the blood to ferment, resulting in a higher BAC at the time of the test than actually existed at the time of the blood draw. Defendant requested paragraph 3 of MAI-CR3d 310.04, which the trial court refused. During deliberations, the jury had multiple questions regarding the meaning of intoxication.
Holding: Paragraph 3 of MAI-CR3d 310.04 would have instructed the jury that if there was less than .08% BAC that they cannot find from this evidence alone that Defendant was under the influence of alcohol. Notes on Use paragraph 3(a) provides that if the only analysis admitted into evidence discloses .08% or more of alcohol in the blood, then paragraph 3 must be given if that paragraph is requested by Defendant. Here, Defendant requested the paragraph, so error occurred. The error was prejudicial because Defendant introduced extensive evidence (including expert testimony) that the blood sample was unreliable and that Defendant's driving could be attributed to something else. Reversed and remanded for new trial.

State v. Meeks, 427 S.W.3d 876 (Mo. App. E.D. 2014):
(1) "Resisting arrest" instruction which instructed jury that Defendant could be convicted if he resisted his own arrest by "physical interference" was plainly erroneous because Sec. 575.150.1(1) does not include resisting one's own arrest by "physical interference," and thus, the State was relieved of its burden of proof; and (2) trial court plainly erred in sentencing Defendant to an extended term of imprisonment as a "persistent offender," where State only alleged and proved that Defendant was a "prior offender" with one prior felony conviction.
Facts: Defendant was charged with resisting his own arrest. When police sought to arrest him, he used "passive" resistance by locking up his body. The jury instruction stated that the jury should convict if "the defendant resisted by using physical force or physical interference."
Holding: (1) The jury instruction deviated from the charging statute, Sec. 575.150.1. That statute creates two distinct crimes – resisting one's own arrest and interfering with another's arrest. Sec. 575.150.1(1) provides that resisting one's own arrest is accomplished by "using or threatening the use of violence or physical force or by fleeing." Sec. 575.150.1(2) provides that resisting arrest of another can be accomplished by "physical force or physical interference." By omitting "physical interference" from

575.150.1(1), the legislature intended to exclude that as an element of resisting one's own arrest. Thus, the jury instruction allowed the jury to convict based on an element that was not in the statute, thereby misdirecting the jury as to the applicable law and excusing the State from its burden of proof. New trial ordered on resisting arrest. (2) The court found that Defendant was a "persistent offender" under Sec. 558.016.3, and sentenced him to an extended term. However, this was plainly erroneous since there was only evidence of one prior conviction, making Defendant only a prior offender under Sec. 558.016.2.

State v. Hunt, 2014 WL 298631 (Mo. App. E.D. Jan. 28, 2014):
Where Defendant-Police Officer was convicted of first degree burglary and second degree property damage for unlawfully entering a trailer and damaging property during an arrest, jury instructions were plainly erroneous in failing to define what constitutes "unlawful entry" in the context of a police officer making an arrest.
Facts: Defendant-Police Officer was one of several Officers at a trailer where a person for whom an arrest warrant had been issued might be staying. The trailer was not owned by the person who was wanted for arrest. Defendant-Police Officer went up to trailer, kicked in the front door to the porch, then took a knife and pried open the door to the trailer. Defendant-Police Officer then went in trailer, assaulted person who was to be arrested, and arrested him. As relevant here, Defendant-Police Officer was convicted of first degree burglary and second degree property damage for his entry into the trailer.
Holding: In general, Defendant had legal authority to arrest the wanted person, and per Sec. 544.200, Defendant, in general, also had authority to break open any outer or inner door or window to effect the arrest. The issue here, however, is not Defendant's "general" authority, but the specific circumstances of this particular case. Here, the State made a submissible case for first degree burglary because the evidence viewed in the light most favorable to the verdict showed that the trailer did not belong to the person who was to be arrested, and Defendant did not have a reasonable belief that the person was inside the trailer. Although the State made a submissible case, however, the jury instruction on first degree burglary was plainly erroneous because it failed to define "entered unlawfully" in the context of effecting an arrest. The court should have explained when a law enforcement officer might be privileged or justified in entering a residence to effect an arrest. Absent specific guidance about the law governing law enforcement officers' actions in entering a private residence, the jury may not have accurately understood whether Defendant's entry into the trailer was lawful. Notes on Use of MAI 323-52 Burglary in the First Degree provide that the term "enter unlawfully" may be defined by the court. For similar reasons, the second degree property damage instruction was plainly erroneous because the charge of property damage was also depending on whether Defendant "entered unlawfully" or was justified in entering. The jury instruction on property damage should define "enter unlawfully" as it pertains to the charge of property damage and should include any possible defenses of justification in its definition. New trial ordered on burglary and property damage.

State v. Mangum, 390 S.W.3d 853 (Mo. App. E.D. 2013):
(1) Defendant can claim plain error in self-defense instructions where there was no evidence in the record that the defense submitted the instructions; (2) where the evidence viewed in the light favorable to the defense showed that multiple assailants attacked

Defendant, it was plain error for self-defense jury instructions to instruct jury that they could acquit only if Defendant reasonably believed he needed to use force against a particular named person; (3) even though one of the assailants was only slapping and hitting Defendant and deadly force is not justified absent threat of death or serious physical injury, where Defendant was attacked by multiple people – some of whom were threatening serious bodily harm -- the acts of one attacker become the acts of another so Defendant can use deadly force against the common threat (all the assailants).
Facts: Viewed in the light most favorable to the defense, the evidence showed that Defendant was attacked by two assailants. He ultimately shot one of them. The jury instructions on self-defense instructed jurors that they could acquit Defendant only if he reasonably believed he needed to use force against one of the particular named assailants to protect himself.
Holding: (1) An appellant waives plain error review of an instruction that he himself submitted, even if the instruction is erroneous. Here, however, nothing in the record shows that Defendant submitted the self-defense instructions at issue; therefore, there is no waiver of plain error review. (2) MAI-CR3d 306.06, Note on Use 7, specifically provides for modification of the self-defense instruction to provide for multiple assailants. Here, however, the jury could find self-defense only if the jury believed that Defendant was protecting himself from a particular named assailant. The State argues that because Defendant did not face death or serious physical injury from the other assailant, who was only hitting and slapping him, he was not justified in using deadly force against her; therefore, no self-defense instruction about her was necessary. However, where a defendant is being attacked by multiple assailants, the act of one becomes the act of another. If two assailants are acting in concert to attack a defendant, the victim is entitled to an instruction hypothesizing multiple assailants. "We hold that a multiple assailant self-defense instruction is warranted even when the person the defendant assaulted never posed a direct threat of bodily harm to the defendant, as long as there is evidence that the person the defendant assaulted acted in concert with the assailant …. [W]hen two or more persons undertake overt action to harm another, the victim may use an appropriate amount of force to defend himself against either aggressor, or both of them." The Defendant was entitled to a self-defense instruction against all the assailants, not just the one against whom Defendant acted.

State v. Latrail, No. ED96491 (Mo. App. E.D. 5/15/12):
Holding: Trial court erred in violation of Notes on Use for MAI-CR3d 304.04 in giving jury instruction with phrase "acted together with or aided" rather than the phrase "aided or encouraged" as required by the Notes on Use, but the error was not so prejudicial so as to deprive Defendant of a fair trial under facts of this case.

State v. Smith, No. ED96865 (Mo. App. E.D. 5/5/12):
(1) Convictions for both aggravated stalking, Sec. 565.225.2, and violation of a protective order, Sec. 455.085.2, violated double jeopardy; and (2) jury instruction which allowed conviction for violation of protective order by "disturbing the peace of victim by showing up at her home" was plain error because this was not one of the enumerated ways to commit the offense set out in MAI-CR3d 332.52.

Facts: Defendant was convicted of various counts of aggravated stalking, 565.225.2, and violation of a protective order, Sec. 455.085.2, based on the same conduct.
Holding: (1) Defendant argues that it constituted double jeopardy to convict of both aggravated stalking and violation of a protective order. Sec. 556.041 provides that a person may not be convicted of more than one offense if one offense is included in the other. Sec. 556.046 provides that an offense is included when it is established by proof of the same or less than all the facts required to establish commission of the offense charged. An offense is a lesser included offense if it is impossible to commit the greater without committing the lesser. Sec. 565.225.2 provides that a person commits aggravated stalking if through his course of conduct he harasses or follows with the intent of harassing another person and at least one of the acts constituting the course of conduct is in violation of an order of protection of which he has notice. Sec. 455.085.2 states that a person commits the offense of violating an order of protection where he commits an act of abuse in violation of such an order. The offense of violation of a protective order is included in the offense of aggravated stalking because proof of the same conduct is required for both convictions. It is impossible to commit aggravated stalking without violating the order of protection. Thus, the trial court plainly erred in accepting verdicts for both offenses, and the convictions for violating the order of protection are vacated. (2) MAI-CR3d 332.52 provides that a person commits the offense of violation of an order of protection if they violate the order by stalking, abusing victim in certain ways, entering the premises of victim, or initiating communication with victim. The jury instruction here submitted the offense of violating the order of protection by "disturbing the peace of [victim] by showing up at her home." This is not one of the enumerated ways to commit the offense and this conduct was not even charged. It was plain error to give this instruction.

State ex rel. Koster v. Fulton, No. ED96413 (Mo. App. E.D. 3/29/11):
Holding: Associate Circuit Judge lacks power to order any party (here the Attorney General) to pay for a court reporter for a trial; Sec. 478.072 authorizes electronic recording of the trial but does not authorize judge to order Attorney General to hire a court reporter for it; appellate court notes that nothing would prevent the court reporters for the circuit judges from serving since they are state employees and don't work for individual circuit judges.

State v. Muhammad, No. ED94232 (Mo. App. E.D. 3/1/11):
(1) Even though Defendant was charged with false imprisonment, where court erroneously instructed on felonious restraint but then entered judgment for false imprisonment, this was not plain error since false imprisonment was a lesser-included offense of felonious restraint; but (2) where court sentenced Defendant to range for a Class D felony, this was plain error because false imprisonment, as found, was a Class A misdemeanor.
Facts: Defendant was charged with false imprisonment. At trial, however, the court without objection instructed the jury on the offense of felonious restraint. The court then entered judgment for false imprisonment as a Class D felony and sentenced Defendant to four years.

Holding: (1) A trial court cannot instruct on an offense not charged unless it is a lesser-included offense. Felonious restraint is not a lesser-included offense of false imprisonment; rather the opposite is true – false imprisonment is a lesser offense of felonious restraint. However, the variance between the charge and instructions is not fatal here. By finding the greater offense of felonious restraint, the jury necessarily found the lesser of false imprisonment. Moreover, the trial court entered judgment for false imprisonment. (2) However, the four year sentence is plain error. This is because false imprisonment is a Class A misdemeanor unless the defendant took the victim from the state, which is not the case here, Sec. 565.130.2. The sentence should not have exceeded one year. Sentence vacated and remanded for resentencing.

State v. Kasparie, 2015 WL 6951727 (Mo. App. S.D. Nov. 10, 2015):
Even though jurors are free to disbelieve any testimony (including Victim's), in order to receive a self-defense instruction, there must be affirmative evidence from which a reasonable inference can be drawn that Defendant was not the initial aggressor (or had thereafter withdrawn in such a manner as to qualify for the defense).
Facts: Defendant claimed the trial court plainly erred in failing to give a self-defense instruction because both the Victim and Defendant sustained injuries in the charged altercation.
Holding: Even if Defendant does not request a self-defense instruction at trial, it is error not to give it if substantial evidence supported it. A trial court must give the instruction regardless of whether the evidence supporting the justification defense is inconsistent with Defendant's testimony or theory of the case, because any conflict in the evidence must be resolved by a properly instructed jury. The State argues Defendant was not entitled to the instruction because Sec. 563.031.1(1) precludes the instruction where Defendant was "the initial aggressor." Defendant argues that the jury was free to disbelieve Victim's testimony that Defendant was the aggressor. The jury's right to disbelieve the State's evidence is not the same as having a basis in the evidence to support an instruction. The trial court did not err in failing to instruct in self-defense.

State v. Jensen, 2015 WL 5076702 (Mo. App. S.D. Aug. 27, 2015):
(1) Defendant in first degree murder trial was entitled to instruction on involuntary manslaughter because it is a "nested" lesser-included offense in that it is composed of a subset of the elements of first degree murder, and (2) even though the jury convicted of second degree murder and rejected a voluntary manslaughter verdict, reversal for failure to give involuntary manslaughter was still required since second-degree murder vs. voluntary manslaughter tested "sudden passion" but involuntary manslaughter would have tested a "knowing" vs. "reckless" mental state; court questions whether general rule that failure to give a different lesser instruction is not erroneous or prejudicial when one lesser is given and the Defendant is found guilty of the greater remains viable in light of newer cases mandating lesser instructions for nested offenses.
Facts: Defendant was tried for first degree murder. The jury was instructed on second degree murder and voluntary manslaughter. The court refused to instruction on involuntary manslaughter. After conviction for second degree murder, Defendant appealed.

Holding: Involuntary manslaughter is a "nested" lesser-included offense of first degree murder because it consists of a subset of the elements of the greater, so it is impossible to commit the greater without necessarily committing the lesser. A defendant, upon proper request, is entitled to instruction on a "nested" lesser, and does not have to introduce any affirmative evidence or "cast doubt" on the State's evidence. Second degree murder tests whether Defendant acted "knowingly." Involuntary manslaughter tests whether Defendant acted "recklessly." These different mental states are differential elements on which the State bears the burden of proof. Sec. 562.021.4 provides that recklessness includes acting knowingly. Thus, involuntary manslaughter is a "nested" lesser of second degree murder. The State claims Defendant is not entitled to the instruction under the general rule that where a jury was instructed on *one* lesser, it is not erroneous or prejudicial to fail to give another lesser when Defendant is found guilty of a greater offense. Assuming this general rule remains valid in light of newer cases on "nested" lessers, the rule doesn't apply because involuntary manslaughter does not test the same element as voluntary manslaughter. Voluntary manslaughter tests whether Defendant acted with sudden passion. Involuntary manslaughter tests whether Defendant acted "recklessly." Reversed and remanded for new trial.

State v. Stewart, 2015 WL 4985316 (Mo. App. S.D. Aug. 20, 2015):
Second-degree endangering welfare of child is a nested lesser-included offense of first-degree endangering welfare of child since it is composed of a subset of elements of the greater, and it is impossible to commit the greater without committing the lesser; thus, Defendant was entitled to lesser-included instruction on it.
Facts: Defendant shot a gun in the direction of two children. He was convicted of first-degree endangering welfare of child. The court refused an instruction on second-degree endangering welfare of child.
Holding: Second-degree endangering is a "nested" lesser-included offense of first-degree endangering because it is impossible to commit the greater without necessarily committing the lesser. A defendant is entitled upon request to an instruction on a "nested" lesser, and does not have to introduce affirmative evidence or "cast doubt" on the State's evidence. The differential element between the two offenses is the mental state. First-degree endangering provides a "knowing" mental state, whereby second-degree endangering provides for a mental state of "criminal negligence." Sec. 562.021 states that "knowingly" includes "recklessly" and "criminal negligence." Thus, proof that Defendant knowingly created a substantial risk of harm to the child necessarily means there was also a basis for jury to convict because Defendant did this with criminal negligence. ACA conviction based on first-degree endangering also reversed. Remanded for new trial.

State v. Halford, 2014 WL 2583681 (Mo. App. S.D. June 10, 2014):
Even though Defendant grabbed Victim by throat and left a red mark, where Victim testified that Defendant's actions were a "stop kind of thing," she could breathe, and she was more "mad than scared," trial court erred in trial for second-degree domestic assault in failing to give lesser-included offense instruction on third-degree domestic assault, because the evidence supported a finding that Defendant did not intend to cause physical injury (necessary for second-degree domestic assault), but only intended to

cause physical contact which the victim would find offensive (which constitutes third-degree domestic assault).
Facts: Defendant and Victim lived together. On the day of the offense, Defendant and Victim were arguing. Defendant grabbed Victim's throat until she was red in the face. Victim testified, however, that she could still breathe. Victim testified that the throat grabbing was a "stop kind of thing," and she was more "mad than scared." Defendant was charged with second-degree domestic assault. At trial, he requested a lesser-included offense instruction for third-degree domestic assault, which the trial court overruled.
Holding: Second-degree domestic assault, Sec. 565.073, requires proof that Defendant attempted to cause or knowingly caused physical injury to Victim. Third-degree domestic assault, Sec. 565.074, requires proof only that Defendant intended to cause physical contact which the Victim would find offensive. A court is obligated to give a lesser-included offense instruction if there is a basis for acquitting of the greater offense and convicting of the lesser. The evidence is viewed in the light most favorable to the Defendant. Here, Victim's testimony supported an inference that Defendant did not attempt to cause physical injury, but merely attempted to cause physical contact. Victim testified that Defendant was not trying to hurt her physically, but emotionally. Emotional pain and anger are associated with being offended. This would support a finding that Defendant attempted to cause offensive physical contact. The lesser-included offense instruction should have been given. Conviction reversed and new trial ordered.

State v. Rouse, No. SD32168 (Mo. App. S.D. 9/30/13):
Holding: Trial court erred under *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011), in giving generic jury instruction in sex case where Victim testified to multiple sexual touchings, but jury instruction instructed jurors to find Defendant guilty if he knowingly placed his finger in the vagina, because this violated Defendant's right to a unanimous jury verdict. However, error was harmless because the defense was not an act-specific defense, but was a general denial that any of the acts occurred.

State v. Arnold, 2013 WL 1319597 (Mo. App. S.D. April 2, 2013):
Jury instruction which omitted required definition of "identity theft" in prosecution for crime of trafficking in stolen identities, Sec. 570.224, was plainly erroneous where Defendant disputed at trial whether he knowingly possessed the means of identification.
Facts: As Officer approached car which Defendant was standing by, another man ran away. Officer saw in car two checkbooks, a driver's license, a credit card and two social security cards – all belonging to different persons. Defendant owned the car. Defendant was charged with trafficking in stolen identifies, Sec. 570.224. Defendant denied knowing anything about the various materials found in his car. At trial, the verdict director stated that jury should convict if "defendant intended to sell or transfer such information for purposes of committing identity theft." During deliberations, the jury asked for the statute defining identity theft, but the trial court responded that the jury must be guided by the instructions.
Holding: The crime of trafficking in stolen identities, Sec. 570.224.1, is committed when a defendant "manufactures, sells, transfers, purchases, or possesses, with intent to sell or transfer means of identification … for the purpose of committing identity theft." "Identity theft," Sec. 570.223.1, is a separate crime committed if a person "knowingly

and with the intent to deceive or defraud obtains, possesses, transfers, uses or attempts to obtain, transfer or use or one more means of identification not lawfully issued for his or her use." The crime of identity theft has different elements, including different knowledge and intent requirements, than the crime in trafficking in stolen identities. MAI-CR3d 324.41.1 provides a definition of "identity theft" that was omitted here. This was prejudicial because the required definition would have explained to the jury that Defendant had to knowingly possess the means of identification found in his car; that issue was disputed at trial; and the omission likely affected the jury's verdict in light of their question. Without a definition, jurors were given a roving commission to convict based upon their own beliefs of how the crime of identity theft is committed.

State v. Smith, 2015 WL 7253060 (Mo. App. W.D. Nov. 17, 2015):
First-degree trespassing is a "nested" lesser-included offense of first and second-degree burglary, so trial court must give trespassing instruction, whenever requested by Defendant.
Facts: Defendant was convicted of first-degree burglary and second-degree burglary for various incidents. He requested a lesser-included offense instruction for first-degree trespassing, which was refused.
Holding: First-degree trespassing is established by proof of the same or less than all facts required for first or second-degree burglary. It is a "nested" lesser-included offense of both. The jury never has to believe the State's evidence, so there is always a basis for acquitting of a higher nested offense, and convict of the lesser. The jury did not have to believe Defendant entered the premises with the intent to steal, which makes the offense burglary. The State claims there is no error because the jury was given an option of a lesser-included instruction for second-degree burglary in one instance, but did not find that. Assuming that this general rule regarding lessers on appeal is still viable, an exception applies where the lesser did not "test" the same element of the greater. Here, both burglary instructions required the jury to determine whether Defendant entered the premises with the purpose of committing a crime therein. But the trespassing instruction tested whether Defendant had an intent to steal; thus, it tested a different element and Defendant was prejudiced by the refusal to give it. The State also argues that because the jury also convicted Defendant of stealing, there is no prejudice. But the stealing conviction does not answer the question whether Defendant had the intent to steal *when he entered* the premises, which is what distinguishes trespass from burglary.

State v. Ramirez, 2015 WL 6468346 (Mo. App. W.D. Oct. 27, 2015):
Holding: (1) Defendant convicted of second-degree murder was entitled to lesser-included offense instruction on involuntary manslaughter because it is a "nested" lesser of second degree murder, and Defendant does not have to introduce affirmative evidence or "cast doubt" on the State's case to receive the instruction; (2) Defendant convicted of first-degree assault was entitled to lesser-included offense instruction on second-degree assault because it is a "nested" lesser of first degree assault, and Defendant does not have to introduce affirmative evidence or "cast doubt" on the State's case to receive the instruction; (3) Defendant was also entitled to instruction on voluntary manslaughter because Defendant's evidence that the charged incident started after one of the victims hit

Defendant first was sufficient evidence to inject the issue of sudden passion arising from adequate cause.

State v. Sanders, 2015 WL 456404 (Mo. App. W.D. Feb. 3. 2015):
Involuntary manslaughter is a "nested" lesser-included offense of second degree murder, and Defendant was entitled to the lesser instruction without having to present evidence in support of it.
Facts: Defendant was convicted of second degree murder. State's Witness testified that Defendant kicked Victim until she was nearly dead, and then wrapped a sheet around her head. Victim was found with a sheet and towel around her neck. Medical Examiner testified that Victim died of blunt force trauma and strangulation. Defendant testified he was acting in self-defense after Victim attacked him, and that he did not wrap anything around Victim's head. The court submitted instructions on voluntary manslaughter and self-defense, but refused an instruction on involuntary manslaughter.
Holding: Defendant was entitled to instruction on involuntary manslaughter because jury could have found he acted recklessly, rather than knowingly, in cause Victim's death, or that he acted in self-defense but recklessly used a degree of force that was a gross deviation from what a reasonable person would have used to protect himself. Involuntary manslaughter is a "nested" lesser-included offense of second degree murder, i.e., it is comprised of a subset of the elements of the charged offense and it is impossible to commit the greater without necessarily committing the lesser. When a defendant requests a "nested" lesser-included offense instruction, it must be given. Although "knowingly" and "recklessly" are different mental states, Sec. 562.021.4 provides that each mental state is included in the higher mental state. Thus, "knowingly" encompasses "recklessly." Thus, Defendant was entitled to an involuntary manslaughter instruction without any additional proof on his part. The Eastern District, in *State v. Randle* (Mo. App. E.D. Oct. 7, 2014), held that were the difference between a greater and lesser charge is a different mental element, there needs to be some affirmative evidence on the lesser in order to mandate an instruction, but the Western District disagrees. The State argues that the Medical Examiner's testimony about strangulation as the cause of death renders the evidence insufficient to submit involuntary manslaughter. But the jury is free to believe all, part or none of the Medical Examiner's testimony. The voluntary manslaughter instruction tested whether Defendant caused the victim's death under the influence of sudden passion arising from adequate cause. It did not test whether Defendant acted recklessly rather than knowingly. Conviction reversed and remanded for new trial.

State v. Roberts, 2014 WL 6476715 (Mo. App. W.D. Nov. 18, 2014):
In second-degree domestic assault case, Defendant was entitled to third-degree domestic assault instruction on basis that his mental state was "reckless" instead of "knowing" because it was impossible for Defendant to commit the greater offense without committing the lesser, and the jury was entitled to disbelieve any part of the State's evidence that Defendant acted "knowingly."
Facts: Defendant and Victim lived together, and got into a fight, with both hitting each other. A neighbor called police. Victim had marks on her head from the fight. Defendant was arrested and charged with second-degree domestic assault. Defendant sought a lesser-included instruction on third-degree domestic assault on grounds the jury

could have found that he recklessly injured Victim in a case of imperfect self-defense. The trial court refused the instruction.

Holding: The distinction between the two instructions was that second-degree domestic assault requires a jury to determine if Defendant "knowingly" caused physical injury, while third-degree assault requires the jury to determine if Defendant "recklessly" caused physical injury. A person acts "knowingly" when he is aware his conduct is practically certain to cause a result. Sec. 562.016.3(2). A person acts "recklessly" when he consciously disregards a substantial and unjustifiable risk that a result will follow. Sec. 562.016.4. Under Sec. 556.046, to be entitled to a lesser instruction, a Defendant must (1) request the instruction; (2) show there is a basis in the evidence for acquitting of the charged offense; and (3) show there is a basis in the evidence for convicting the Defendant of the lesser offenses. Here, Defendant requested the instruction, and there was a basis for acquitting of the charged offense since a jury can always disbelieve the State's evidence. The issue is where there is a basis to convict of the lesser. Defendant claims there is such a basis because the jury could have believed he recklessly caused physical injury, not knowingly did so. This is because the jury could have found he was acting in defense of himself when he punched Victim and yet also believed his conduct was too reckless to excuse as lawful self-defense. The State argues that there had to be affirmative evidence that Defendant acted recklessly. However, Defendant contends there is no need for affirmative evidence because third-degree domestic assault is a "nested" lesser-include offense of second-degree domestic assault. Where nested offenses are involved, it is impossible to commit the greater offense without necessarily committing the lesser. This is because any evidence that is sufficient to prove the elements of the charged (greater) offense must necessarily be sufficient to prove a crime that is composed of a subset of those elements, i.e., a "nested" lesser offense. Here, although knowingly and recklessly are different mental states, Sec. 562.021.4 provides that each culpable mental state is included in the higher mental states. Here, the jury could have disbelieved any part of the evidence that Defendant acted knowingly. Thus, instead of inferring that Defendant, in intentionally hitting Vicitm, was aware his conduct was practically certain to cause physical injury (knowingly), the jury could have inferred only that Defendant consciously disregarded a substantial and unjustifiable risk that his doing so would cause physical injury (recklessly). The Eastern District has reached a contrary result in *State v. Randle*, 2014 WL 4980347, at *1-2 (Mo. App. E.D. Oct. 7, 2014)(holding that lesser instruction is not required where the differential element between two offenses is "knowingly" vs. "recklessly"). But the Eastern District failed to consider the effect of Sec. 562.021.4's provision that evidence establishing that a defendant acted knowingly also establishes that he acted recklessly. Conviction for second-degree domestic assault reversed. Also, because second-degree domestic assault was the underlying crime for Defendant also being convicted of victim tampering (for trying to convince Victim to say assault didn't happen), that conviction is vacated.

State v. Nutt, 2014 WL 1202435 (Mo. App. W.D. March 25, 2014):

(1) Where Defendant was charged with first-degree assault for choking someone, he was entitled to a lesser-included offense instruction of assault-third because the evidence supported that he didn't intend to cause serious physical injury, and (2) even though the jury was instructed as to second-degree assault and did not convict of that, Defendant

was prejudiced because the second-degree instruction tested whether Defendant acted with sudden passion, not whether he didn't intend to cause serious physical injury.
Facts: Defendant, a jail inmate, was charged with first-degree assault for attempting to cause serious physical injury by choking another inmate. The evidence showed that Defendant put his hands on victim's neck, but also that victim did not claim that he could not breathe, and Defendant said he meant to touch victim's shoulders, not neck. Although victim turned "red" and had marks on neck at time of incident, the marks were gone by the next day. At trial, Defendant sought an instruction for third-degree assault, which was refused. The court instructed on second-degree assault.
Holding: Third-degree assault is a lesser-included offense of first and second-degree assault. Defendant was charged under Sec. 565.050.1 for "attempting to cause *serious* physical injury." The refused instruction for third-degree assault under Sec. 565.070.1(1) would have been for "attempting to cause physical injury." The degree of physical injury is the difference between first-degree and third-degree assault. Here, the evidence viewed in the light most favorable to Defendant would have supported that Defendant did not intend to cause "serious" physical injury, but only physical injury. Therefore, the failure to give the third-degree assault instruction was error. The State claims that the error wasn't prejudicial, however, because the jury didn't find the lesser offense of second-degree assault, so would not have convicted of third-degree assault. However, the second-degree assault instruction did not test whether Defendant intended to cause "serious" injury, but tested whether the attempt to cause "serious" physical injury was done with sudden passion. The jury did not have before it the question of whether Defendant intended to cause only non-serious physical injury. Therefore, Defendant was prejudiced. New trial ordered.

State v. Payne, 2013 WL 6170605 (Mo. App. W.D. Nov. 26, 2013):
Holding: Where Defendant was changed with a single count of sodomy but three different acts of sodomy were testified to at trial, the verdict director violated the right to a unanimous verdict because it did not describe the separate criminal acts with specificity as required by *State v. Celis-Garcia*, 344 S.W.3d 150, 155-56 (Mo. banc 2011). Although the State claims the three acts were virtually identical, they were distinguishable because one of them happened during the school year, but the others happened in the Summer; some of the events took place upstairs in a home, but others happened in the basement; and one of the acts involved threats that the others did not. However, this was not plain error because the defense was a general denial of all theacts, not an incident specific defense.

State v. Wadel, 2013 WL 1800231 (Mo. App. W.D. April 30, 2013):
Holding: (1) Where Defendant was charged with first-degree child endangerment and the verdict director stated only that the jury had to find that he engaged in "sexual contact," this was erroneous because mere use of the legal description of this term without describing the "sexual contact" did not meet the requirements of MAI-CR3d 322.10 (but was not plain error here); and (2) where Defendant was charged with first-degree child endangerment and the verdict director stated only that the jury had to find that Defendant "created a substantial risk to the life or health" of child, this was

erroneous because the MAI requires a description of Defendant's conduct (but was not plain error here).

State v. Doss, 2013 WL 1197484 (Mo. App. W.D. March 26, 2013):
(1) Where the State submits an instruction in the disjunctive for a single robbery, both alternatives must be supported by sufficient evidence; thus, even though the evidence may be sufficient to prove Defendant stole a cell phone, where it was not sufficient to prove that Defendant stole a wallet and the verdict director stated that Defendant "took a cell phone and/or wallet," the evidence was insufficient for robbery; and (2) in penalty phase, the State could not introduce Defendant's juvenile records which would show the equivalent of only misdemeanor conduct because such records are closed under Sec. 211.271.3, and the State could not introduce juvenile records which did not show by a preponderance of evidence that Defendant actually engaged in the conduct alleged.
Facts: Defendant was charged with two counts of first degree murder, first degree robbery, and ACA. Two murder victims were found in a home. There were no cell phones or wallets found in the home. There were some statements made that indicated that a cell phone may have been taken. The jury convicted Defendant of second degree murder, first degree robbery and ACA. At penalty phase, the State, over defense objection, introduced Defendant's juvenile records which showed offenses that would be felonies and misdemeanor if committed by an adult, and also showed other misconduct.
Holding: (1) Because the State submitted a disjunctive verdict director allowing the jury to convict if they found that he "took a cell phone and/or wallet," the State had to present sufficient evidence to support each alternative. Here, there was some evidence that a co-defendant may have taken a cell phone. However, there was no evidence that any wallet was taken. The State argues that it is "logical" to assume that the victims must have had wallets, and since none were found in the home, the wallets must have been taken as part of the charged crime. While the State's argument is logical, that is not the standard for judging sufficiency of evidence. Absent some evidence that wallets were present and available to be stolen that day, there simply was not enough evidence to support a conviction for stealing a wallet. Robbery conviction reversed. (2) The State argues that the juvenile records were admissible in penalty phase under Sec. 211.321.2(2) which allows juvenile records to be open "for an offense which would be a felony if committed by an adult." Here, however, the records at issue showed conduct that would be a misdemeanor if committed by an adult, and other conduct that would be a felony. Juvenile records regarding misdemeanors are closed under Sec. 211.271.3, while records regarding felonies are open under Sec. 211.321.2(2). Here, it is possible that the juvenile court found Defendant to have engaged in only the misdemeanor-equivalent acts, and thus, the records would not be admissible. Additionally, while the records demonstrate that Defendant engaged in at least some of the acts, the problem is that there are criminal acts alleged in the "motion to modify" the prior juvenile disposition for which there is not evidentiary support that Defendant committed the acts, and the documents do not show which acts Defendant was adjudicated as having committed. Defendant was prejudiced because the jury asked to review the juvenile records, and sentenced Defendant to high sentences despite having found second degree murder. On retrial of the penalty phase, where the records make reference only to "assaults," the State will have to present additional evidence showing that these were felony-equivalent assaults; otherwise, the

"assaults" are not admissible because they may have been misdemeanor-equivalent assaults.

State v. Kelso, 391 S.W.3d 515 (Mo. App. W.D. 2013):
Where Defendant had Child place a condom on his penis into which Defendant ejaculated, this constitutes first degree child molestation even though the verdict director stated that the jury had to find touching "through the clothing"; touching "through the clothing" is not an element of the offense.
Facts: Defendant was convicted of first degree child molestation for having a child less than 14 place a condom on his penis, into which he ejaculated. The verdict director directed the jury to find Defendant guilty if they found he caused Child to touch his genitals "through the clothing." Defendant claimed the evidence was insufficient to convict because the condom was not clothing.
Holding: Sexual contact required for first degree child molestation is defined in Sec. 566.010(3) as "any touching of another person with the genitals or any touching of the genitals or anus of another person … or such touching through the clothing, for the purpose of arousing or gratifying sexual desire…." The elements of this offense are (1) a prohibited touching, (2) of a child less than 14, (3) done with intent to arouse or gratify sexual desire. The verdict director stated that the jury had to find that Defendant caused Child "to touch defendant's genitals through the clothing." However, although the statute provides for various methods of commission regarding the type of touching (e.g., hand-to-genital, hand-to-anus, etc.), the presence or absence of clothing is inconsequential. The only method the State must prove is the type of touching; the State need not prove whether clothing was present during the touching. Here, the State elected to prove hand-to-genital touching; that was all that was required. Further, the State was not required to prove the existence of clothing simply because this was in the verdict director since "through the clothing' is not an element of the crime.

State v. Lumpkins, No. WD71602 (Mo. App. W.D. 9/20/11):
To the extent that MAI-CR3d 314.00 Notes on Use No. 4(C)2 requires that when felony murder is the highest degree of homicide submitted, an involuntary manslaughter in the second degree instruction "will be given," the Note conflicts with Sec. 565.025.2(2) because involuntary manslaughter in the second degree is not a lesser-included offense of felony murder. Thus, the Note should not be followed.
Holding: Defendant, who was convicted of felony murder, contends that the trial court erred in failing to give an instruction on second degree involuntary manslaughter because this was a lesser-included offense of felony murder. Sec. 565.025.2(2) says the lesser offenses of second degree murder are voluntary manslaughter under Sec. 565.023.1(1) and involuntary manslaughter under Sec. 565.024.1(1). Sec. 565.024 says a person commits involuntary manslaughter in the first degree if he "recklessly" causes the death. Defendant did not request an instruction under Sec. 565.024.1(1). Instead, Defendant asked for an instruction for second degree involuntary manslaughter based on a person causing a death with "criminal negligence." Second degree involuntary manslaughter is not listed as a lesser degree offense under Sec. 565.025.2(2). Hence, the court was correct in not instructing on it. To be clear, the lesson to be derived from this holding is that, in instructing down from the highest crime charged, there are two sources that must

be checked. The first source is all lesser included offenses are to be given if requested by either party or the court per Sec. 556.046. Here, the court properly refused to give an instruction on second degree involuntary manslaughter because it is not a lesser included offense of felony murder. The second source for instructing down are particular statutes specific to the highest crime charged, in this case Sec. 565.025.2(2). That statute specifies that voluntary manslaughter under Sec. 565.023.1(1) and first degree involuntary manslaughter under Sec. 565.024.1(1) are to be given in offenses of second degree murder, including felony murder. This is analogous to the treatment courts have given the statutory mandate that felony murder be given in first degree murder cases. In those cases in and this one, the legislature has mandated instructions for certain offenses when appropriate but that does not make those offenses lesser included offenses. Defendant argues that MAI-CR3d 314.00 Notes on Use 4(C)2 provides that when felony murder is the highest homicide submitted, an instruction on second degree involuntary manslaughter "will be given" if justified by the evidence and requested by one of the parties or on the court's own motion. However, the Notes on Use is wrong. To the extent that the Notes on Use requires the court to submit a second degree involuntary manslaughter instruction in a felony murder case it conflicts with Sec. 565.025.2(2) and should not be followed.

State v. Miller, No. WD71175 (Mo. App. W.D. 6/21/11):

(1) Where there was no evidence presented that Defendant touched victim's genitals through clothing, the evidence was insufficient to convict of first degree child molestation; (2) conviction can only be upheld if evidence supports the offense as instructed in the jury instruction, and not just any action illegal under the statute; and (3) where Defendant was charged with sexual acts that occurred in 1997 and 1998, the applicable statute was Sec. 566.010(3) RSMo 1994, which did not criminalize touching through clothing and application of the subsequent law to Defendant would violate ex post facto.

Facts: Defendant was convicted of first degree child molestation for acts which occurred in 1997 and 1998. The jury instruction instructed jurors to convict if defendant touched the genitals of victim through clothing.

Holding: The State argues that Defendant's conviction can be upheld if the evidence supports any of the methods of committing first degree child molestation, but this is a wrong statement of law. The method of the charged offense is an essential element of the crime. To allow a conviction on a method never submitted to the jury would effectively deny Defendant of his right to a jury trial on the offense as charged. Here, there was no evidence submitted that Defendant touched victim though clothing, so the evidence is insufficient. Further, the offense here is governed by Sec. 566.010(3) RSMo 1994, which did not criminalize touching through clothing. The law was later amended to cover touching through clothing but it would be ex post facto to apply the law enacted after the offense to Defendant. Conviction reversed.

*** Rosemond v. U.S., ___ U.S. ___, 94 Crim. L. Rep. 701, 134 S.Ct. 1240 (U.S. 3/5/14):**

Holding: A Defendant charged with aiding and abetting another person who uses or carries a firearm in a crime of violence or drug trafficking is entitled to an instruction to

determine whether he became aware that the person was armed in time to withdraw from the crime; 18 USC 924(c) requires that Defendant have "advance knowledge – or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice"; the Gov't must prove that Defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a participant would use or carry a gun during the crime's commission.

*** Bobby v. Mitts, ___ U.S. ___, 89 Crim. L. Rep. 163, 2011 WL 1631037 (U.S. 5/2/11):**
Holding: Habeas relief not warranted where jury instruction told jurors they must acquit Defendant of death penalty before considering lesser punishments; instruction told jurors not to deliberate on lesser punishments unless they have decided that prosecutors failed to prove that the aggravating circumstances outweighed the mitigating circumstances.

U.S. v. Gray, 96 Crim. L. Rep. 667 (1st Cir. 3/13/15):
Holding: In case for falsely making a bomb threat, jury instruction which defined "malice" as "evil purpose or improper motive" lowered the Gov't's burden of proof; correct definition of malice requires an evil purpose or motive, but the word "improper" carries several meanings which are not the equal of "evil."

U.S. v. Baird, 2013 WL 1364260 (1st Cir. 2013):
Holding: Where evidence indicated that Defendant had purchased a stolen handgun from a seller without knowing it was stolen, and shortly thereafter, upon learning it was stolen returned it to seller in exchange for the purchase price, Defendant was entitled to an innocent possession instruction in a prosecution for possession of a stolen firearm.

U.S. v. Sasso, 2012 WL 4074415 (1st Cir. 2012):
Holding: Where Defendant was charged with interfering with an aircraft, a jury instruction which stated that Defendant acted "willfully" if his actions were deliberate and intentional diluted the intent requirement because the instruction did not distinguish between negligent interference and willful interference.

U.S. v. Newell, 89 Crim. L. Rep. 670 (1st Cir. 7/11/11):
Holding: Counts of indictment charging misuse of funds were multiplicitous, and thus, jury should have been given instruction on unanimity.

U.S. v. Jadlowe, 88 Crim. L. Rep. 350 (1st Cir. 12/3/10):
Holding: Judge's instruction that jurors could discuss case throughout trial as long as they didn't express an opinion on it was erroneous but subject to harmless error.

U.S. v. Cain, 2012 WL 265882 (2d Cir. 2012):
Holding: The District Court's erroneous failure to instruct the jury that the government was required to show that the predicate acts were related to one another and threatened continued criminal activity in order to support a RICO conviction affected the defendant's substantial trial rights and seriously affected the fairness, integrity, and public reputation of the judicial proceedings.

Adamson v. Cathel, 88 Crim. L. Rep. 780, 2011 WL 692977 (3d Cir. 3/1/11):
Holding: Trial court was required to give a limiting instruction under *Tennessee v. Street*, 471 U.S. 409 (1985) when Defendant was impeached using the co-defendant's confession after Defendant claimed his own confession was fabricated by police; Defendant's confrontation rights were violated without the limiting instruction.

Lee v. Clarke, 2015 WL 1275344 (4th Cir. 2015):
Holding: Counsel ineffective in failing to request heat of passion instruction in second degree murder trial; such instruction was only chance for Defendant to be found guilty of manslaughter.

U.S. v. Whitefield, 2012 WL 3591038 (4th Cir. 2012):
Holding: Forced accompaniment for a bank robbery that results in death is an additional offense element, not just a sentencing factor, so instructing the jury on this offense when a different offense was charged violates the Fifth Amendment Grand Jury Clause.

U.S. v. Cessa, 97 Crim. L. Rep. 154 (5th Cir. 5/7/15):
Holding: (1) To convict a defendant with a legitimate business of conspiracy to engage in concealment money laundering, Gov't must prove more than Defendant's knowledge that his acceptance of drug dealer's money would have effect of laundering it; there is a distinction between doing business with known drug dealers and being in business with known drug dealers; (2) instruction that told jurors that Defendant's co-mingling of funds was evidence of intent to conceal was a correct statement of law, but failed to tell jurors that this inference was permissive, not mandatory.

U.S. v. Montgomery, 95 Crim. L. Rep. 10 (5th Cir. 3/28/14):
Holding: Where Defendant asserts good-faith defense from *Cheek v. U.S.*, 498 U.S. 192 (1991) in tax prosecution, judge is required to instruct jury that Defendant's belief that he was complying with the law is a complete defense even if the belief was unreasonable.

U.S. v. Miller, 2014 WL 4211198 (6th Cir. 2014):
Holding: Where in Matthew Shepard Hate Crimes Prevention Act prosecution Defendant presented evidence that his attack on Amish victims was for non-religious motives, trial court erred in rejecting Defendant's proposed jury instruction that Gov't was required to prove Defendant committed the offense "because of" the victims' religion; court erroneously instructed jury that victims' religion needed to be only a "significant factor" in the motivating the assault.

U.S. v. LaPointe, 2012 WL 3264062 (6th Cir. 2012):
Holding: Defendant charged with conspiracy to possess with intent to distribute drugs was entitled to lesser-included offense instruction of conspiracy to possess drugs, even though he was alternatively charged in the same count with conspiracy to distribute.

Woodall v. Simpson, 2012 WL 2855798 (6th Cir. 2012):
Holding: Death penalty Defendant had 5th Amendment right to a no adverse inference from his failure to testify in penalty phase instruction.

U.S. v. McGill, 2014 WL 2619719 (7th Cir. 2014):
Holding: Even though Defendant had previously attended a party at the insistence of a friend where guests viewed child pornography, where Defendant did not take any pornography from the party, this incident was not evidence of predisposition to preclude him from asserting an entrapment defense to a later charge of distribution of child pornography via a file-sharing network.

U.S. v. Macias, 97 Crim. L. Rep. 234 (7th Cir. 5/26/15):
Holding: Even though Defendant knew and believed he was participating in an illegal scheme to smuggle aliens, knew facts that suggested he might be participating in other illegal activities, but mentally restricted his curiosity to avoid learning the truth, Gov't was not entitled to willful blindness instruction in drug conspiracy prosecution; to obtain such instruction, Gov't must show evidence that Defendant deliberately took steps to preserve his ignorance.

U.S. v. Hawkins, 96 Crim. L. Rep. 484 (7th Cir. 1/26/15):
Holding: Jury instruction erroneously defined "honest services" bribery as including acceptance of a payment with an intent to be rewarded; treating bribery as including acceptance of a gratuity violates *Skilling v. U.S., 561 U.S. 358* (2010); a payment that does not entail a plan to change how the employee does his job is not a bribe or kickback.

U.S. v. Mayfield, 96 Crim. L. Rep. 204 (7th Cir. 11/13/14):
Holding: Trial court should have given an entrapment instruction; "When an accused is able to present 'some evidence' from which a reasonable jury could find inducement and lack of predisposition then the trial judge must instruct the jury on entrapment and the Gov't must prove beyond a reasonable doubt either that the accused was predisposed to commit the charged crime, or that there was no Gov't inducement." Court clarifies what is meant by "inducement" and "predisposition," and emphasizes that prior convictions for similar conduct do not automatically show predisposition.

U.S. v. Robinson, 2013 WL 3927719 (7th Cir. 2013):
Holding: Where Defendant had stipulated to a prior felony in felon-in-possession case, court erred when it orally read the limiting instruction to the jury on this matter but omitted the last sentence that the jury should consider this mater only as to whether Defendant had a prior felony conviction.

U.S. v. Natale, 93 Crim. L. Rep. 455, 2013 WL 2506660 (7th Cir. 6/11/13):
Holding: Jury instruction in prosecution under 18 USC 1035(a), which makes it a crime to lie in connection with a health care benefit program, was erroneous where it failed to instruct that the false statement must be in a matter involving a health care benefit program.

U.S. v. Pillado, 89 Crim. L. Rep. 858 (7th Cir. 9/7/11):
Holding: Even though Defendant possessed a ton of marijuana, he could still get an instruction on lesser included offense of simple possession.

U.S. v. Amaya, 94 Crim. L. Rep. 15, 2013 WL 5302725 (8th Cir. 9/23/13):
Holding: Jury form's lack of a place to indicate the verdict coupled with judge's decision to poll the jurors instead was plain error requiring new trial.

U.S. v. Haischer, 97 Crim. L. Rep. 39 (9th Cir. 3/25/15):
Holding: Defendant can adopt inconsistent defenses, so need not admit guilt in order to claim an affirmative duress offense; Defendant can claim duress while holding Gov't to burden to prove mens rea by contending she did not commit the offense with the required intent.

U.S. v. Sivilla, 93 Crim. L. Rep. 24, 2013 WL 1876649 (9th Cir. 5/7/13):
Holding: Where the Gov't has destroyed evidence before trial, Defendant need not show bad faith to get an adverse inference instruction, even though bad faith is required to get a dismissal of the charge.

U.S. v. Ramirez, 93 Crim. L. Rep. 188 (9th Cir. 4/29/13):
Holding: Trial court erred when it instructed jury that it could not "speculate" as to why Gov't did not call a witness who supposedly acted as a go-between in the charged drug transaction; jury could reasonably assume this witness was in the control of the Gov't and was entitled to draw a legitimate adverse inference from the witness' absence.

U.S. v. Garrido, 2013 WL 1501877 (9th Cir. 2013):
Holding: Jury instructions on charges of honest services wire and mail fraud that allowed conviction if official acted or made decision based on his own personal interests, including receiving benefit from undisclosed conflict of interest, permitted conviction based upon failure-to-disclose theory that was subsequently determined to be unconstitutional in Supreme Court's decision in *Skilling v. United States*, and was plain error.

U.S. v. Zepeda, 92 Crim. L. Rep. 463 (9th Cir. 1/18/13):
Holding: Where Defendant's bloodline is derived from an Indian tribe as required for jurisdiction under Major Crimes Act, 18 USC 1153, is a question of fact for the jury.

U.S. v. Munguia, 92 Crim. L. Rep. 277 (9th Cir. 11/27/12):
Holding: Defendant on trial for possessing pseudoephedrine "knowing or having reasonable cause to believe" it would be used to make meth is entitled to a jury instruction that reasonable cause is to be evaluated from the Defendant's perspective, based on her knowledge and sophistication.

Doe v. Busby, 2011 WL 5027506 (9th Cir. 2011):
Holding: Jury instruction on evidence of other unadjudicated sexual offenses and instruction on the preponderance of the evidence standard violated due process.

U.S. v. Madden, 2013 WL 4400388 (11th Cir. 2013):
Holding: Where the indictment charged Defendant with possessing a firearm "in furtherance of" a drug trafficking crime, but the jury instruction allowed conviction "during and in relation to" a drug trafficking offense, this was an improper constructive amendment of the indictment and plain error.

U.S. v. House, 2012 WL 2343665 (11th Cir. 2012):
Holding: Where Officer was charged with willfully violating a person's civil rights, jury instruction should have stated that a traffic stop is reasonable under 4th Amendment when supported by probable cause or reasonable suspicion even if contrary to agency policy or state law, not that a stop is unreasonable if was without jurisdiction or authority.

Owens v. U.S., 2014 WL 1923398 (D.C. 2014):
Holding: Jury instruction which told jurors to decide "what a reasonable person would have believed" was erroneous where the statute for receiving stolen property required that Defendant have subjective knowledge about the stolen property.

Douglas v. U.S., 2014 WL 4100664 (D.C. 2014):
Holding: Where jury had told trial court that it was deadlocked on a greater offense, but would convict of a lesser, trial court erred in giving hammer-type instruction telling jurors to reconsider the greater offense (and which jury then convicted of greater).

Headspeth v. U.S., 2014 WL 959466 (D.C. 2014):
Holding: Probative value of Defendant's flight from arrest in showing consciousness of guilt was outweighed by the prejudice, such that giving an instruction stating that flight showed consciousness of guilt was error; here, jury wasn't informed of Defendant's prior bad history with particular arresting Officer which would have given Defendant particular reason to avoid arrest by Officer.

Gray v. U.S., 2013 WL 6227617 (D.C. 2013):
Holding: In response to jury question as to whether Defendant could be convicted of aiding and abetting certain crimes, trial court erred in simply re-reading the jury instruction on aiding and abetting because under the facts here, this could have caused jury to improperly convict.

Brown v. U.S., 2013 WL 264656 (D.C. 2013):
Holding: Where during poll of jury one juror said he did not accept the guilty verdict, trial court improperly coerced verdict in then instructing jurors to resume deliberations without telling the non-dissenting jurors that they were permitted to change their votes.

Barbett v. U.S., 92 Crim. L. Rep. 91 (D.C. 10/11/12):
Holding: Trial judge abused discretion in giving a hammer instruction after jury appeared deadlocked where judge had a policy of always giving such an instruction since a "'uniform policy' without exercising her discretion … is the definition of an abuse of discretion."

Blaine v. U.S., 89 Crim. L. Rep. 191, 2011 WL 1584751 (D.C. 4/28/11):
Holding: Where jury sent a note asking for more guidance on burden of proof, judge erred in giving an additional instruction on reasonable doubt, even though the instruction was accurate, because the additional information about the State not having to prove guilt beyond a shadow of a doubt or to a mathematical or scientific certainty would have indicated to jury that judge believed Defendant was guilty and State met its burden of proof.

U.S. v. Stevens, 2011 WL 1033707 (D. Md. 2011):
Holding: Where prosecutor instructed grand jurors that Defendant's reliance on advice of counsel was irrelevant in prosecution for obstruction of an official proceeding, this was erroneous since if Defendant relied in good faith on advice of counsel she would have lacked the wrongful intent necessary to violate the law.

U.S. v. Binette, 2013 WL 2138908 (D. Mass. 2013):
Holding: In order to prove the offense of making a false statement to a gov't agent, the Gov't must prove that Defendant knew he was talking to a gov't agent, and Defendant was entitled to a jury instruction on this; here, Defendant testified that even though callers to his office said they were from the SEC, Defendant was unsure whether they were from the SEC and so did not tell them truthful information.

Horton v. Warden, Trumbell County Correctional Inst., 2011 WL 590259 (N.D. Ohio 2011):
Holding: Self-defense instruction should have been given where Defendant did not create the situation giving rise to the shooting and did not violate any duty to retreat or avoid danger.

Steele v. Beard, 2011 WL 5588711 (W.D. Pa. 2011):
Holding: Pennsylvania's standard jury instruction form on mitigating evidence and the verdict form violated Eighth Amendment in penalty phase of capital murder case in that the forms likely misled the jury to believe unanimity was required regarding mitigating evidence.

U.S. v. Bran, 2013 WL 2565518 (E.D. Va. 2013):
Holding: (1) Where Gov't deported a witness who would likely have provided favorable testimony for Defendant and Gov't was aware at time of deportation that witness had information about case, some sanction for the Gov't's conduct was appropriate; but (2) appropriate sanction was a "missing witness" jury instruction, not dismissal of case.

U.S. v. Wainwright, 2011 WL 2517013 (E.D. Va. 2011):
Holding: Defendant was entitled to new trial based on change in law about killing a witness to prevent communication with law enforcement and jury instruction at trial regarding elements of his offense was wrong based on change in law.

Towles v. State, 2014 WL 4666538 (Ala. 2014):
Holding: Where Defendant was on trial for murder of a child, jury instruction that jurors could consider for purposes of "intent" and "identity" that Defendant had committed acts of physical abuse three years earlier against a different victim (his son) was plain error; the prior bad acts were not similar to the charged crime, and the State was required to prove that Defendant had the specific intent to kill the victim.

Khan v. State, 2012 WL 2203049 (Alaska 2012):
Holding: Failure to instruct jury on unanimity requirement violated due process.

Fincham v. State, 93 Crim. L. Rep. 281, 2013 WL 2126833 (Ark. 5/16/13):
Holding: Arkansas' standard jury instruction on lesser-included offenses (which instructs jurors that they must consider the greater offense first and move on to a lesser offense only if the jury has a reasonable doubt of the greater offense) fails to accurately state the law when the offense is "extreme emotional disturbance manslaughter" because unlike most lesser-included offenses, this manslaughter adds an additional element to first and second degree murder, i.e., that Defendant acted under extreme emotional disturbance; the instruction tells jurors that they can find Defendant guilty of manslaughter only if they first find him guilty of murder; this puts jury in impossible scenario where they are told that they cannot consider manslaughter unless they have reasonable doubt as to murder, but they cannot find manslaughter unless the Defendant committed murder.

Smoak v. State, 2011 WL 6226110 (Ark. 2011):
Holding: Defendant charged with internet stalking of a child may be entitled to an entrapment instruction even if Defendant denied one or more elements of the crime.

People v. Diaz, 97 Crim. L. Rep. 59 (Cal. 4/6/15):
Holding: Instruction telling jurors to be skeptical of testimony by prosecution witnesses of unrecorded statements of a defendant should also be given where prosecution witnesses testify about unrecorded threats Defendant allegedly made; the risk that witnesses will inaccurately or falsely report alleged threats is just as great as in a case involving a confession or other statement by a defendant.

People v. Beltran, 93 Crim. L. Rep. 359, 2013 WL 2372307 (Cal. 6/3/13):
Holding: The level of emotional provocation that will reduce murder to voluntary manslaughter is not what would cause an ordinary person "to kill," but whether the ordinary person would be "induced to react from passion, not judgment."

People v. Wilkins, 2013 WL 828456 (Cal. 2013):
Holding: Where Defendant was charged with felony murder when a stolen refrigerator fell off a truck and caused a fatal collision 62 miles from where it was stolen, Defendant was entitled to a jury instruction which described the outer limits of the "continuous transaction" theory of felony murder liability.

People v. Mills, 92 Crim. L. Rep. 117 (Cal. 10/18/12):
Holding: Jury instruction in guilt phase that Defendant is presumed sane violates state law where competency will be resolved in a separate competency phase.

People v. Brents, 2012 WL 308116 (Cal. 2012):
Holding: Despite correct jury instructions, the trial court's erroneous answer to the jury's question that the predicate felony for felony murder was assault rather than kidnapping was prejudicial error.

People v. Mil, 2012 WL 171471 (Cal. 2012):
Holding: In a felony murder case, omission of elements from special circumstances instruction that defendant must have been a major participant in the underlying felony and have acted with reckless indifference to human life, was not harmless beyond a reasonable doubt.

People v. Moore, 2011 WL 322379 (Cal. 2011):
Holding: Jury instruction that said jurors must give Defendant the benefit of the doubt if they "unanimously" agree they have reasonable doubt was confusing to jurors about their individual roles.

State v. King, 2014 WL 1282567 (Conn. 2014):
Holding: Guilty verdicts on two counts of assault based on jury's finding that Defendant acted intentionally and recklessly were legally inconsistent in violation of due process.

Clark v. State, 93 Crim. L. Rep. 214 (Del. 5/2/13):
Holding: Defendant charged with offense involving mens rea of recklessness is not prevented having jury instructed on defense of justification.

State v. Brooks, 90 Crim. L. Rep. 758 (Del. 2/23/12):
Holding: Trial judges must issue cautionary instructions whenever prosecutors present accomplice testimony, even if the defense does not request it.

Haygood v. State, 2013 WL 535412 (Fla. 2013):
Holding: Jury instruction on manslaughter by act, which imposed additional element that Defendant intentionally killed victim, was fundamental error in second-degree murder case where there was no evidence that Defendant intended to kill.

Hamm v. State, 94 Crim. L. Rep. 749 (Ga. 3/17/14):
Holding: Defendants are entitled to jury instruction that accomplice testimony must be corroborated and is not enough by itself to support a guilty verdict.

Cheddersingh v. State, 2012 WL 603175 (Ga. 2012):
Holding: Under plain-error analysis, the error in a preprinted verdict form requiring that any finding of not guilty be made beyond a reasonable doubt was obvious and not subject to reasonable dispute.

Price v. State, 2011 WL 2610524 (Ga. 2011):
Holding: Where Defendant testified that he saw "for sale" and "open house" signs that led him to believe he was authorized to go into house, he was entitled to jury instruction on mistake of fact in burglary prosecution.

State v. Flores, 94 Crim. L. Rep. 339, 2013 WL 6218934 (Haw. 11/29/13):
Holding: Failure to give a lesser-included offense instruction is not harmless if the Defendant is convicted of the charged offense or a greater included offense; "Holding such error harmless perpetuates the risk that the jury in any given case did not actually reach the result that best conforms with the facts, because the jury was only presented two options – guilty of the charged offense or not guilty – when in fact, the evidence may admit of an offense of lesser magnitude than the charged offense."

People v. Bailey, 2013 WL 1150779 (Ill. 2013):
Holding: Trial court erred in failing to provide separate jury verdict forms for each of the three different theories of murder that were submitted to the jury.

Rosales v. State, 2015 WL 213347 (Ind. 2015):
Holding: In attempted murder trial tried under both direct and accomplice liability theory, jury instruction was erroneous where it did not require jury to find that Defendant had specific intent to kill.

McCowan v. State, 97 Crim. L. Rep. 38 (Ind. 3/25/15):
Holding: Indiana adopts presumption-of-innocence instruction which requires jurors be told that the presumption continues "throughout the trial. You should fit the evidence to the presumption that the defendant is innocent if you can reasonably do so."

Hampton v. State, 961 N.E.2d 480 (Ind. 2012):
Holding: DNA evidence in rape case was circumstantial evidence, equally consistent with the defendant's proposition that he engaged in consensual sex with the alleged victim, thus requiring a "reasonable theory of innocence" instruction.

State v. Miller, 2014 WL 26831 (Iowa 2014):
Holding: The crime of "absence from custody" is a lesser included offense of the crime of escape from a correctional institution.

State v. Smith-Parker, 2014 WL 7331577 (Kan. 2014):
Holding: Jury instruction, "If you do not have a reasonable doubt from all the evidence that the State has proven murder … then you will enter a verdict of guilty," was erroneous because it was tantamount to directing a verdict for the State and forbade jury from exercising power of nullification.

State v. Gleason, 2014 WL 3537404 (Kan. 2014):
Holding: Death penalty reversed where instructions filed to instruct jurors that mitigating circumstances need not be proven beyond a reasonable doubt.

State v. Hilt, 322 P.3d 367 (Kan. 2014):
Holding: *Alleyne* requires that a jury, not a judge, find the existence of aggravating factors to impose a "hard life" sentence.

State v. Breeden, 2013 WL 2712181 (Kan. 2013):
Holding: In sex case, trial court was required to provide limiting instruction regarding prior bad act evidence that Defendant had punched and threatened to kill victim before the charged sex act, and Defendant did not waive appeal of this issue even though Defendant failed to object to the evidence at trial because the issue was not admissibility of the evidence.

State v. Berry, 2011 WL 2937244 (Kan. 2011):
Holding: Even though Defendant fled from a traffic stop in a high speed chase causing a fatal accident, this was some evidence that he acted recklessly and supported a lesser-included offense instruction on second degree reckless murder and involuntary manslaughter.

Johnson v. Com., Kingrey v. Com., and Rodriguez v. Com. (Ky. 4/25/13):
Holding: Court adopts various standards to ensure unanimous jury verdicts in sex cases which involve testimony about multiple sexual acts, including having prosecutors charge each crime in a separate count and instructing the jury accordingly.

Day v. Com., 2012 WL 593160 (Ky. 2012):
Holding: The trial court was not permitted instruct the jury on the penalty range for a lesser included offense during the guilt phase of a sodomy prosecution.

Jones v. Com., 2011 WL 4431151 (Ky. 2011):
Holding: Prosecution was not entitled to a jury instruction on defensive force on behalf of victim because the law on justification applies only to those subject to prosecution.

Turner v. Com., 2011 WL 3764366 (Ky. 2011):
Holding: Where child sex offense was charged as happening during two-year timespan, but new sex offense statute covered only the last part of that span, jury instruction allowing them to convict Defendant under new statute for acts occurring at any time during that span was erroneous.

Com. v. Adkins, 88 Crim. L. Rep. 572, 2011 WL 193397 (Ky. 1/20/11):
Holding: Drug possession statute implicitly recognizes "innocent possession" defense because some possessions are innocent (such as where teacher finds drugs in classroom and gives drugs to principal); "Whenever the evidence reasonably supports such a defense – where there is evidence that the possession was incidental and lasted no longer than necessary to permit suitable disposal – [a jury instruction] should [be given] to reflect this." Here, Defendant claimed he found drugs in a sock and was trying to turn them over to police.

Stabb v. State, 2011 WL 5842794 (Md. 2011):
Holding: Jury instruction stating that the state of Maryland does not require any specific investigative technique or scientific test violated defendant's right to a fair trial, in that it effectively directed the jury not to consider the absence of scientific or physical evidence.

State v. Allen, 2011 WL 5110242 (Md. 2011):
Holding: Where court instructed jury that defendant had already been convicted of second degree murder and robbery with a deadly weapon in a previous trial arising under the same incident, defendant was deprived of his right to a jury trial in his felony murder trial, as the judge had already instructed the jury that two elements of felony murder were established.

Atkins v. State, 89 Crim. L. Rep. 769, 2011 WL 3611360 (Md. 8/18/11):
Holding: Jury instruction that "there is no legal requirement that the State use any specific investigative technique or scientific test to prove its case" violated due process right to a fair trial.

Com. v. Asher, 97 Crim. L. Rep. 296 (Mass. 6/9/15):
Holding: Police Officers charged with police brutality are entitled to instruction that they are permitted to use force where civilians are not; question is whether the defendant as a police officer had reasonable options available other than use of force, not whether a civilian would have had other options.

Com. v. Liebenow, 96 Crim. L. Rep. 275 (Mass. 11/25/14):
Holding: When rebutting Defendant's affirmative defense that he lacked specific intent to steal because he thought the property was abandoned, State must prove beyond a reasonable doubt that Defendant's subjective belief was a pretense or sham, not that it was unreasonable; the specific intent to steal is negated by a finding that Defendant held an honest, albeit mistaken, belief that he was entitled to the property; Defendant's intent must be judged subjectively, not objectively.

Com. v. Fajita, 96 Crim. L. Rep. 513 (Mass. 1/27/15):
Holding: Public access to judicial records requires courts to release juror names after trial unless there are special reasons for confidentiality, other than jurors' personal preference that their names not be released.

Com. v. Gomes, 96 Crim. L. Rep. 419 (Mass. 1/12/15):
Holding: Various principles of eyewitness identification are so well established that a jury instruction must be given on them regardless of whether an expert is called to testify; instruction must inform jury (1) that human memory does not operate like a video recorder that can replay what happened; (2) a witness' level of confidence in an identification may not indicate its accuracy; (3) high levels of stress reduce likelihood of accurate identification; (4) information from other witnesses or outside sources can affect reliability and inflate witness' confidence; (5) viewing the same person in multiple identification procedures increases risk of misidentification.

Com. v. Walczak, 979 N.E.2d (Mass. 2012):
Holding: Where grand jury seeks to indict a juvenile for murder, court is required to give instruction on mitigating circumstances and defenses because an indictment for murder would result in juvenile being tried as an adult.

State v. Kelly, 2014 WL 5358361 (Minn. 2014):
Holding: Whether erroneous jury instruction was plain error, when law was unsettled at time of trial but settled by time of appeal, was determined by law at time of appeal.

State v. Bustos, 2015 WL 1452894 (Minn. 2015):
Holding: Trial court erred in prohibiting defense counsel from arguing that State failed to prove prior domestic abuse beyond a reasonable doubt, and then giving jury instruction that domestic abuse included the prior acts.

State v. Koppi, 89 Crim. L. Rep. 476 (Minn. 6/8/11):
Holding: Under Minnesota crime for refusal to take chemical test where Officer had probable cause to believe person was driving while intoxicated, jury instruction which states that "probable cause means officer can explain the reasons he believed it was more likely than not that defendant drove [impaired]", was improper because it failed to require Officer to cite actual observations and circumstances; failed to require the jury to consider the totality of the circumstances from the viewpoint of a reasonable Officer; and erroneously defined probable cause as "more likely than not" rather than "an honest and strong suspicion."

Harrell v. State, 2014 WL 172125 (Miss. 2014):
Holding: Capital jury instruction for capital murder based on underlying felony of robbery was erroneous where it failed to instruct jury on what constituted the crime of robbery.

Decker v. State, 2011 WL 2418968 (Miss. 2011):
Holding: Where jury instruction materially differed from indictment's language, this prejudiced Defendant's ability to defend.

Newell v. State, 2010 WL 4882026 (Miss. 2010):
Holding: Where Defendant was attacked while getting into his vehicle, he was entitled to an instruction under "castle doctrine" that he shot victim-assailant in reasonable fear of harm to himself, even though Defendant had exited the vehicle when he shot victim-assailant.

State v. Sommers, 2014 WL 6784368 (Mont. 2014):
Holding: Jury instruction impermissibly broadened whether DWI Defendant had "actual physical control" of vehicle; jurors are to consider a totality of factors to determine this including where in the vehicle Defendant was located; whether the key was in the vehicle; whether the engine was running; where the vehicle was parked and how it got there; and whether the vehicle was disabled.

State v. E.M.R., 92 Crim. L. Rep. 469 (Mont. 1/8/13):
Holding: Jury instruction indicating that Juvenile would benefit from services if convicted injected irrelevant considerations into jury's determination of guilt.

State v. Pangborn, 93 Crim. L. Rep. 585 (Neb. 7/26/13):
Holding: Demonstrative exhibits should not be sent to the jury during deliberations unless the court first weighs their potential prejudice against usefulness and gives a limiting instruction to avoid prejudice; here, jury sought to see an exhibit prepared by the prosecutor that was a chart that outlined various charges against Defendant, various dates and injuries; "use of limiting instructions that advise a jury of the limited purpose [of such] demonstrative exhibits should be employed."

State v. Almasaudi, 2011 WL 3862397 (Neb. 2011):
Holding: Jury instruction that allowed conviction for receiving stolen property based on showing of objective, rather than subjective, knowledge or belief imposed broader liability than intended by the statute.

Clay v. Eighth Judicial Dist. Ct., 2013 WL 3480306 (Nev. 2013):
Holding: Because the term "physical injury" as used in abuse and neglect statute would not be understood by lay people without a definition, prosecutor was required to instruct on that element in grand jury proceeding.

Rose v. State, 2011 WL 2936010 (Nev. 2011):
Holding: Whether the felony of assault with a deadly weapon was actually assaultive was a jury question, and trial court should have submitted an instruction as to whether the assault merged with the homicide so as to preclude its use an underlying felony to support felony-murder.

State v. Letendre, 88 Crim. L. Rep. 516 (N.H. 1/13/11):
Holding: Where court allows child witness to have a "support person" with them to testify, court must give a cautionary instruction about the role of the support person, that the person's role is to put the child at ease, and that the support person's presence should not factor into the jury's assessment of the child's credibility.

State v. Dabas, 2013 WL 3880135 (N.J. 2013):
Holding: Where Prosecutor's Office withheld and destroyed interview notes of Defendant's statements, Defendant was entitled to an adverse inference instruction.

State v. Dowling, 2011 WL 1877716 (N.M. 2011):
Holding: Jury instruction which omitted word "extremely" from degree of recklessness that must be found to convict of depraved mind murder was erroneous.

People v. DeLee, 2014 WL 6607357 (N.Y. 2014):
Holding: Jury verdict finding Defendant guilty of manslaughter as a hate crime was inconsistent with jury verdict also acquitting him of manslaughter.

People v. Echevarria, 2013 WL 1798583 (N.Y. 2013):
Holding: Jury instruction on "agency defense" was erroneous where it provided that the lack of a prior relationship between Defendant and undercover police officer would negate the agency defense.

People v. Handy, 93 Crim. L. Rep. 19 (N.Y. 3/28/13):
Holding: Defendant is entitled to an adverse inference instruction where jail taped over video of his alleged assault; to get an adverse inference instruction for "missing evidence," Defendant need not show that evidence was destroyed in bad faith, but only that he made a request for such evidence and it was reasonably likely to be material.

People v. Colville, 2012 WL 5199390 (N.Y. 2012):
Holding: Where the trial court deferred to Defendant's personal decision contrary to judgment of his defense counsel not to submit lesser-included offense instructions in a murder prosecution, this deprived Defendant of the 6th Amendment benefit of effective assistance of counsel and warranted a new trial.

State v. McDonald, 2013 WL 6171154 (Ohio 2013):
Holding: Where the verdict directing form failed to follow a statute which required a verdict directing form to include either the degree of the offense of which Defendant was convicted or the aggravating factors that justified convicting of a felony offense, Defendant could only be convicted of the misdemeanor version of the offense, not the felony.

State v. Lopez-Minjarez, 89 Crim. L. Rep. 830, 2011 WL 3873792 (Or. 8/25/11):
Holding: Jury instruction which said that a person who aids in committing a crime is also responsible for any other crime that arises as a probable consequence of that initial crime was contrary to statute that imposes accomplice liability only for crimes that a defendant intended to commit.

State ex rel. Engweiler v. Felton, 2011 WL 3849545 (Or. 2011):
Holding: Under Oregon statute, Parole Board lacked authority to require juvenile defendants who were waived from juvenile court to undergo administrative intermediate review of their sentences as a prerequisite to parole.

Com. v. Newman, 2014 WL 4088805 (Pa. 2014):
Holding: Statute permitting trial court, as opposed to jury, to increase Defendant's minimum sentence upon a finding that a gun was used in drug offense violated Defendant's right to jury trial; the possession of gun must be pleaded in the indictment and found by a jury for a judge to be able to consider it.

State v. Vuley, 70 A.3d 940 (Vt. 2013):
Holding: Jury instruction which instructed on the "unlikelihood" of four accidental fires occurring at Defendant's house over an 8-week period erroneously used prohibited "propensity based reasoning" in allowing jury to infer Defendant's intent from this (though was not plain error).

State v. Myers, 2011 WL 1522346 (Vt. 2011):
Holding: Jury instruction that person may be presumed to have intended the consequences of his actions that might normally be expected unless there was some other reasonable explanation impermissibly shifted burden of proof to Defenant.

State v. Condon, 96 Crim. L. Rep. 424 (Wash. 1/8/15):
Holding: Defendant charged with premeditated murder is entitled to instruction on second degree intentional murder even though he is also charged with felony-murder, for which second degree murder is not a lesser included charge.

State v. Coristine, 93 Crim. L. Rep. 204, 300 P.3d 400 (Wash. 5/9/13):
Holding: Court violated Defendant's 6th Amendment right to control his defense by giving a jury instruction on an affirmative defense over a defense objection; court finds right to control one's defense is derived right to self-representation in *Faretta* and right to plead guilty while maintaining innocence in *Alford*.

State v. Surbaugh, 92 Crim. L. Rep. 276 (W.Va. 11/20/12):
Holding: If evidence of Defendant's good character has been properly admitted, jury should receive an instruction that such evidence can be considered to generate reasonable doubt.

People v. Batchelor, 2014 WL 4588043 (Cal. App. 2014):
Holding: Court was required to instruct jury that Defendant had previously been convicted of the lesser related offense of gross vehicular manslaughter while intoxicated based on the same incident that formed the basis for the second degree implied malice murder charge at the instant trial; the prosecutor misleadingly argued at the instant trial that Defendant would not be "held accountable" if the jury did not convict him.

People v. Delacerda, 2015 WL 1910694 (Cal. App. 2015):
Holding: Where Defendant was charged with domestic battery and kidnapping, the battery was an associated crime so that a jury instruction was required regarding the kidnapping as to whether movement of the victim (required for kidnapping) was incidental to commission of the battery rather than the kidnapping; jurors were required to have option of acquitting Defendant of kidnapping if they took the associated crime into account.

People v. Ngo, 2014 WL 1325639 (Cal. App. 2014):
Holding: Where Defendant was charged with a child sex crime occurring within a one-year period, trial court erred in instructing jury to convict if crime took place within a two-year time period, because this allowed jury to convict based on acts outside the charged period.

People v. Thomas, 160 Cal. Reptr.3d 468 (Cal. App. 2013):
Holding: Where Defendant puts provocation in issue by some showing that is sufficient to raise reasonable doubt whether a murder was committed, the failure to instruct on provocation (sudden quarrel/heat of passion) via a lesser included offense denies due process because it relieves State of burden to prove malice beyond a reasonable doubt.

People v. Mason, 160 Cal. Rptr.3d 516 (Cal. App. 2013):
Holding: (1) Trial court erred in omitting a jury instruction for offense of failure to register as sex offender that the State prove that the prior spousal rape conviction involved force or violence, since this was an element of the crime here; (2) Because the evidence was insufficient to prove that the prior conviction involved force or violence, Defendant could not be retried for failure to register on the basis of the conduct at issue in the present case.

People v. Aranda, 2013 WL 4855952 (Cal. App. 2013):
Holding: Under Calif. Constitution, when a jury indicates that Defendant is not guilty of a greater offense, but is deadlocked only on the lesser offense, the court must give the jury the opportunity to return a verdict acquitting of the greater before a mistrial can be declared, and if court does not do so, the mistrial is deemed to be without legal necessity as to the greater, and double jeopardy precludes retrial on that offense (disagreeing with U.S. Supreme Court in *Blueford v. Arkansas*).

People v. Hernandez, 2013 WL 3213052 (Cal. App. 2013):
Holding: Trial court erred in failing, sua sponte, to give unanimity instruction in firearm possession case where the evidence showed two different possession of firearm incidents, there was no evidence that the same gun was used in both incidents, and reasonable jurors could have found Defendant guilty based on either incident.

People v. Valasquez, 2012 WL 6200277 (Cal. App. 2012):
Holding: Jury instruction which stated that jury should convict of assault if Defendant applied force with a firearm "to a person" improperly allowed five convictions for five different victims; the instructions should have clarified that Defendant had to use force with each person.

People v. Bradley, 145 Cal. Rptr. 3d 67 (Cal. App. 2012):
Holding: Court erred in failing to instruct jury that criminal misappropriation or misuse of public funds required actual knowledge or criminal negligence.

People v. Wells, 2012 WL 1025740 (Cal. App. 2012):
Holding: Evidence that defendant may have fallen asleep at the wheel due to an unrelated medical condition warranted a jury instruction on the unconsciousness defense to the offense of driving under the influence of marijuana and causing injury.

People v. Hunter, 2011 WL 6413947 (Cal. App. 2011), opinion modified on denial of reh-g, People v. Hunter, 2012 WL 112762 (Cal. App. 2012):

Holding: Instruction regarding a firearm sentencing enhancement stating that "victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt as a matter of law that the gun was real" unconstitutionally lightened the prosecution's burden of proof, though the error was harmless beyond a reasonable doubt.

People v. Wiidanen, 2011 WL 6020163 (Cal. App. 2011)
Holding: Instruction on voluntary intoxication improperly prohibited the jury from considering the theory that defendant's false or misleading statements were made without the knowledge they were false or misleading because defendant was intoxicated while he made them.

People v. Santana, 2011 WL 5079512 (Cal. App. 2011), opinion modified on denial of reh'g, People v. Santana, 2011 WL 5439113 (Cal. App. 2011):
Holding: Jury instruction for attempted mayhem was improper where it deviated from the pattern instruction's examples of "serious bodily injuries" and instead used "a gunshot wound" as the example, as such an example focuses on the means by which the wound was caused, not its severity.

People v. Sojka, 2011 WL 2319945 (Cal. App. 2011):
Holding: Even though both victim and Defendant agreed that victim had rejected Defendant's attempt to have intercourse, where other evidence about the encounter between them was contested, trial court erred in failing to instruct on reasonable and honest belief of victim's consent in attempted rape case.

Piggott v. State, 2014 WL 1464655 (Fla. App. 2014):
Holding: Where Defendant was charged with aggravated battery with a deadly weapon when the weapon was a car, Defendant was entitled to a lesser-included instruction on reckless driving.

Mann v. State, 2014 WL 1094617 (Fla. App. 2014):
Holding: A jury instruction on Victim's right to use force in defense of his property improperly shifted focus away from Defendant's self-defense claim, were Victim was not charged with any crime and, thus, Victim's use of force was irrelevant.

Alexander v. State, 2013 WL 5354419 (Fla. App. 2013):
Holding: Jury instruction, which stated that Defendant had to prove self-defense "beyond a reasonable doubt," improperly relieved State of burden to prove guilt beyond a reasonable doubt.

Martin v. State, 2013 WL 646231 (Fla. App. 2013):
Holding: Evidence that Defendant, on account of his paranoid delirium, believed he was being threatened or attacked was admissible for purposes of supporting his self-defense claim for assault on officer, and supported a jury instruction on self-defense.

Stewart v. State, 2013 WL 275577 (Fla. App. 2013):
Holding: Where jury instruction instructed jurors that affirmative defense of justifiable use of force was not available where Defendant committed "felony battery," but instruction did not define "felony battery," this created confusion which warranted a new trial.

Cliff Berry, Inc. v. State, 2012 WL 10846 (Fla. Dist. Ct. App. 2012):
Holding: Rule of lenity required that defendant was entitled to requested instruction that a disagreement over the interpretation of a contract may result in a civil lawsuit but does not create criminal culpability.

McCoy v. State, 2010 WL 5540946 (Fla. Ct. App. 2010):
Holding: A prescription defense is available to an innocent possessor of another person's prescribed drugs where the innocent possessor had a legally recognized reason for having the drugs, such as an agency relationship with the other person.

People v. Kidd, 2013 WL 5352328 (Ill. App. 2013):
Holding: Counsel was ineffective in failing to request jury instruction on meaning of "delivery" of drugs in prosecution for drug-induced homicide, which would have allowed jury to distinguish between whether Defendant and victim bought and possessed drugs together, or whether each bought and possessed alone, since if alone, then Defendant would not be guilty of drug-induced homicide.

People v. Wilcox, 2010 WL 5487517 (Ill. App. 2010):
Holding: Judge coerced verdict when, after jury sent note that they were deadlocked, the judge answered, "when you were sworn in as jurors and placed under oath you pledged to obtain a verdict. Please continue to deliberate and obtain a verdict."

Cupello v. State, 2015 WL 1065387 (Ind. App. 2015):
Holding: Where Officer without a warrant put his foot in door of Defendant's residence while speaking to him, this was an unlawful entry under Fourth Amendment, and Defendant was entitled to use reasonable force to prevent the unlawful entry under Castle Doctrine; Defendant used reasonable force to terminate the unlawful entry when he slammed the door, even though door hit officer, and Defendant was entitled to Castle Doctrine defense to assault-on-law-enforcement-officer charge.

State v. Sood, 2012 WL 3055856 (Kan. App. 2012):
Holding: Computer fraud is a specific intent crime for purposes of determining whether to give a jury instruction on ignorance or mistake of fact.

State v. Flynn, 2011 WL 2507820 (Kan. Ct. App. 2011):
Holding: Court erred in failing to give instruction in rape case that a defendant has a reasonable time to act (stop) after victim withdraws consent to sex.

State v. Wade, 88 Crim. L. Rep. 434 (Kan. Ct. App. 12/30/10):
Holding: Where Defendant was charged with battery for striking his son, he was entitled to raise common-law defense of parental discipline, even though the legislature has not established this as a statutory affirmative defense.

Robinson v. State, 2014 WL 294285 (Md. App. 2014):
Holding: Court erred in giving "CSI Instruction," which told jurors that there was no legal requirement for the State to use any specific technique or scientific test to prove its case, because this lowered the State's burden to prove guilt beyond a reasonable doubt, and there is no conclusive empirical proof of an actual "CSI effect" on jurors.

Allen v. State, 2012 WL 1450605 (Md. Ct. Spec. App. 2012):
Holding: The "anti-CSI" instruction, which provided that there was no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case, violated a defendant's right to a fair trial, and the ruling also applied to cases that were pending on direct appeal.

Com. v. Groman, 2013 WL 5832527 (Mass App. 2013):
Holding: Omission from jury instruction for armed home invasion that Defendant knew that his co-Defendant was armed required reversal.

Com. v. Gibson, 2012 WL 5936023 (Mass. App. 2012):
Holding: Jury instruction which told jurors that a person does not have to take a breath test suggested to jury that Defendant had refused to take a blood test and violated the privilege against self-incrimination.

Com. v. Hughes, 2012 WL 2330272 (Mass. App. 2012):
Holding: Defendant was entitled to jury instruction that jury should weigh the fact that Witness was paid $1,000 to be a drug informant in Defendant's case.

Com. v. Tavares, 2011 WL 6793771 (Mass. App. 2011):
Holding: Where an audio recording of a defendant's interrogation is not made, a cautionary instruction is mandatory, even where defendant refused to have a recording made.

People v. Jones, 2013 WL 4823162 (Mich. App. 2013):
Holding: Statute prohibiting trial courts in prosecution for "reckless driving causing a death" from instructing on lesser-included offense of "moving violation causing death" violated separation of powers and due process right to trial by jury; while the Legislature's duty is to create the law, the court's duty is to instruct on the law, including lesser-included offenses.

State v. Moore, 2015 WL 2184306 (Minn. App. 2015):
Holding: Statutory definition of word "force" was needed in jury instruction on third-degree sexual misconduct because the statutory definition of "force" was different from a lay person's understanding of the term.

State v. McCauley, 2012 WL 3792117 (Minn. App. 2012):
Holding: Dissemination of child pornography is not a strict liability offense in the absence of legislative intent to make it such and given its severe penalty, but rather requires "knowledge" that one is doing it; thus, jury instruction failing to instruct that Defendant acted "knowingly" was error.

State v. Singleton, 2011 WL 676976 (N.J. Super. Ct. App. Div. 2011):
Holding: NGRI Defendant who believed he killed victim as part of command from God was entitled to a jury instruction that insanity includes both "legal wrong" and "moral" wrong" in determining the right-wrong test.

State v. Tindell, 2011 WL 43479 (N.J. Super. Ct. App. Div. 2011):
Holding: Where Defendant was charged with making terroristic threats against a number of distinct people, the State was required to identify individual victims for the offense; otherwise, the verdict could possibly have lacked unanimity as some jurors could have based the verdict on one threat, but others based it on a different threat.

State v. Alvarado, 2012 WL 8467506 (N.M. App. 2013):
Holding: Where Defendant was charged with three degrees of an offense and also with tampering, and the jury instructions on the tampering count failed to require a jury finding on which degree of offense the tampering count was related to, the instruction failed to require jury unanimity, and sentencing Defendant to the highest penalty violated *Apprendi* and its progeny.

State v. Dickert, 2012-NMCA-004, 2011 WL 7090595 (N.M. Ct. App. 2011:
Holding: Defendant's reliance on noninvolvement defense did not preclude jury instruction on intoxication defense, despite the fact that the two defenses were contradictory.

People v. Campbell, 2014 WL 1394692 (N.Y. Sup. 2014):
Holding: Where grand jury had not voted either to indict or dismiss, it was improper to read a hammer instruction intended for use at petit jury trials.

People v. Minor, 2013 WL 5477143 (N.Y. App. 2013):
Holding: Jury instruction on affirmative defense of assisted suicide was confusing because jurors could erroneously believe that if they found an intentional murder, the affirmative defense of assisted suicide was not applicable; instruction told jurors that the assisted suicide defense was not available if Defendant "actively caused" the death.

People v. Delee, 969 N.Y.S.2d 350 (N.Y. App. 2013):
Holding: Jury verdict finding Defendant guilty of manslaughter as a hate crime, but not guilty of manslaughter in the first degree, was inconsistent as legally impossible, so as to require reversal of conviction.

People v. Lessey, 966 N.Y.S.2d 848 (Sup. 2013):
Holding: Where Defendant was charged with first degree assault with depraved indifference to human life for showing someone onto a subway track, Defendant was

entitled to an instruction that Defendant's voluntary intoxication made him incapable of forming the mental state of depraved indifference.

People v. Johnson, 2011 WL 4637476 (N.Y. App. Div. 2011):
Holding: Error in annotated verdict sheet would not be harmless if defense counsel did not consent to the annotated verdict sheet.

State v. Foster, 761 S.E.2d 208 (N.C. App. 2014):
Holding: Evidence supported an entrapment instruction in prosecution for drug delivery where undercover Officer who bought drugs from Defendant indicated a romantic interest in him.

State v. Davis, 2014 WL 4236250 (Or. App. 2014):
Holding: In prosecution for perjury stemming from Defendant's testimony at his DWI trial, Defendant was denied right to a jury trial, where trial court applied doctrine of issue preclusion and instructed jury that based on Defendant's DWI conviction, it was established beyond a reasonable doubt that certain facts were true; this essentially removed an element of the perjury charge from a finding by the jury.

State v. Wier, 2013 WL 6834844 (Or. App. 2013):
Holding: Instruction which failed to inform jurors that the State was required to prove that Defendant knew he subjected sex victim to forcible compulsion was incorrect statement of law.

State v. Wolf, 2013 WL 6834955 (Or. App. 2013):
Holding: Evidence supported jury instruction on an exception to felon-in-possession statute, i.e., exception which allowed carrying a gun in a defendant's residence; here, Defendant lived in a tent and possessed a gun outside at the campsite; this was his residence, and the statute did not limit carrying a gun to inside a structure.

State v. Zolotoff, 2012 WL 5876502 (Or. App. 2012):
Holding: Where inmate-Defendant had a sharpened spoon handle that was not yet a weapon, trial court erred in failing to give a lesser included attempted possession instruction.

Kent v. State, 2014 WL 4244070 (Tex. App. 2014):
Holding: In prosecution for aggregate theft totally $200,000 over several years stemming from real estate transactions, jury had to unanimously agree which funds were unlawfully appropriated and who the owners of the funds were.

Irielle v. State, 2014 WL 3908119 (Tex. App. 2014):
Holding: Where jury instruction listed five different ways in the disjunctive that Defendant could have committed sexual offense, this violated Defendant's right to unanimous jury verdict.

Arrington v. State, 2013 WL 4082305 (Tex. App. 2013):
Holding: Jury instruction failed to require unanimity for each criminal incident, where there were multiple instances of criminal acts involving child sex abuse presented at trial.

Alonzo v. State, 89 Crim. L. Rep. 856 (Tex. Crim. App. 9/14/11):
Holding: Even though charged offense had a recklessness mens rea, Defendant could still get instruction on self-defense because jury would be deciding if Defendant acted recklessly or acted in self-defense; by arguing self-defense, Defendant is claiming that his actions were justified and he did not act recklessly.

Freeman v. State, 2011 WL 3627697 (Tex. App. 2011):
Holding: Trial court's failure to issue, sua sponte, a jury instruction on the accomplice witness rule was egregious error where non-accomplice evidence was weak.

Taylor v. Com., 2015 WL 324627 (Va. App. 2015):
Holding: Even though Defendant went to trial on a felony offense, he could not be convicted of a lesser-included misdemeanor where the one-year statute of limitations on misdemeanors had already run when the State commenced the prosecution of greater offense; Defendant was not indicted for the greater offense for more than a year after the offense occurred.

State v. Fehr, 2015 WL 263640 (Wash. App. 2015):
Holding: Jury instruction relieved State of burden of proof where it asked jurors to find that Defendant sold drugs within "1,000 feet of a school bus *route*," as opposed to the correct definition of "1,000 feet of a school bus route *stop*."

State v. Bauer, 2013 WL 864843 (Wash. App. 2013):
Holding: Where Defendant was charged with assault for having left a gun on a dresser where a child got it and shot someone, the question of whether leaving the gun in the open was the proximate cause of the victim's injury was a jury question.

Jury Issues – Batson – Striking of Jurors – Juror Misconduct

State v. Ess, 2015 WL 162008 (Mo. banc Jan. 13, 2015):
(1) Even though New Trial Motion was filed one-day late when Circuit Clerk would not accept it the day before because an attached affidavit was not notarized, Circuit Clerk had no authority to reject the filing and New Trial Motion would be deemed timely-filed; (2) Juror engaged in intentional nondisclosure when Juror failed to answer questions on voir dire about bias, and later said to other Jurors that this was "an open and shut case;" and (3) the 1995 through 2002 version of first-degree child molestation, Secs. 566.067.1 and 566.010(3) (1995 – 2002) did not include touching a victim "through clothing;" thus, evidence was insufficient to convict even though Defendant put Victim's hand on Defendant's clothed penis.
Facts: Defendant was convicted of various sex offenses. After trial, Defendant sought to timely file a New Trial Motion, which had attached an affidavit from a juror about juror

misconduct. The Circuit Clerk refused to accept the New Trial Motion because the affidavit was not notarized. This could not be resolved until the next day, by which time the New Trial Motion was untimely. At the New Trial Motion hearing, Defendant sought to have the New Trial Motion deemed timely-filed. On the merits, a Juror submitted an affidavit and testified that during a recess during voir dire, a different Juror (No. 3) said this was an "open and shut case."

Holding: (1) The State contends the juror nondisclosure issue is not preserved because the New Trial Motion was untimely filed. Generally, a trial court has no authority to extend the time for filing a New Trial Motion beyond that allowed in Rule 29.11(b). Here, however, the Circuit Clerk refused to file the tendered New Trial Motion in the absence of some clear prohibition in law, rule or specific court order. The Clerk was obligated to accept the filing when tendered. Thus, the New Trial Motion should be deemed timely filed because it was tendered (but rejected) within the time allowed by Rule 29.11(b). If the motion was defective, the remedy was for a party to move to strike it, not for the Clerk to refuse to file it. (2) Juror No. 3 was asked numerous questions on voir dire about whether he could be fair and impartial. Defense counsel specifically asked if any juror held any preconceived notions of guilt or innocence. Juror No. 3 did not answer. Intentional nondisclosure occurs when there is no reasonable inability to comprehend the information asked by a question, and the prospective juror's forgetfulness in failing to answer is unreasonable. Given the extensive questions asked of the venire, there is no possibility that Juror No. 3 failed to comprehend the issue being asked. Any purported forgetfulness is not reasonable here. Thus, the non-disclosure was "intentional." Bias and prejudice is presumed where "intentional" nondisclosure occurs. The State argues that Defendant did not call Juror No. 3 to testify, but Defendant is permitted to prove his claim of nondisclosure through other evidence than Juror No. 3. Defendant called another Juror to testify that No. 3 said this was an "open and shut case." The State argues that this statement does not mean that Juror No. 3 favored the State because Juror No. 3 could have favored the defense. But this is inconsequential because a bias toward *either* side is material. New trial ordered on all counts except first degree child molestation, for which evidence was insufficient because the relevant version of the statute in effect at time of crime did not criminalize touching "through clothing."

State v. Ousley, 2013 WL 6822193 (Mo. banc Dec. 24, 2013):

(1) Even though trial court properly excluded certain defense witnesses in Defendant's case-in-chief as a sanction for failing to timely disclose the witnesses, trial court abused its discretion in not allowing those witnesses to testify in surrebuttal after State presented rebuttal evidence, because surrebuttal witnesses need not be disclosed; and (2) even though Defendant's defense was that he had consensual sex as a teenager with another teenager, trial court abused discretion in preventing Defendant from asking on voir dire whether jurors would consider the possibility or automatically rule out that two teenagers had consensual sex, because this did not seek a commitment but was necessary to uncover the bias of jurors who might punish all teenage sex, even though the law may allow it.

Facts: (1) Defendant was charged with forcible rape for rape of a teenage girl which happened on Dec. 26, 1999, when someone abducted Girl on a street and forced her to have sex. Defendant was arrested about 10 years later through a "cold hit" DNA match

when samples found on Girl's clothing matched Defendant. On the Friday before trial, Defendant moved to endorse three witnesses – his Mother, Grandmother and a medical records custodian – who would testify that in December 1999, Defendant was generally bed-ridden and could only walk around with difficulty, because of a shooting injury. Defendant's defense was that, although he could not remember if he had sex with Girl, Defendant was very promiscuous and had sex with many girls, and if Defendant did have sex with Girl, it was consensual because he was not physically able to "force" anyone to have sex due to his injury. The trial court excluded Defendant's Mother and Grandmother from his case-in-chief as a sanction for his late disclosure, but allowed the medical records. Defendant testified consistent with his defense. The State then called a treating Doctor in rebuttal to testify that Defendant would have been able to "get around" (wasn't significantly disabled) in December 1999. Defendant then sought to call his Mother and Grandmother in surrebuttal, but the trial court continued to exclude them. (2) During voir dire by the Prosecutor, a juror asked if the Defendant and Girl were the same age, and the Prosecutor asked if juror would automatically say there could not be a rape if they were the same age. Later, defense counsel sought to ask jurors "whether they can consider the possibility or do they automatically rule out the possibility of two teenagers that had consensual sex." The trial court would not allow this question on grounds that it sought a "commitment."

Holding: (1) The purpose of surrebuttal is to give the defendant an opportunity to rebut the State's rebuttal evidence. The disclosure obligations of Rules 25.03 and 25.05 do not apply to witnesses whose testimony will be in the nature of rebuttal or surrebuttal. These witnesses do not have to be endorsed. When offering Mother and Grandmother as surrebuttal, defense counsel explained that they would contradict the State's rebuttal Doctor who testified that Defendant would have been able to get around (was not significantly disabled). Mother and Grandmother would have rebutted this crucial point of State's rebuttal evidence, and corroborated Defendant's testimony. Although there is no entitlement to surrebuttal as a matter of right, a trial court abuses discretion in denying surrebuttal where its decision is against the logic of the circumstances. Here, Defendant's physical condition was the central issue in the case. Mother and Grandmother would have rebutted the State's rebuttal Doctor with their personal observations that Defendant was unable to get around well. Their testimony was the best evidence Defendant could offer to corroborate his physical condition and his own testimony. Once the trial court admitted the State's rebuttal evidence, its ability to exclude surrebuttal evidence was limited. Here, the trial court should have allowed Defendant to rebut the State's evidence with Mother and Grandmother, who would have directly contradicted the rebuttal evidence and allowed Defendant to present a complete defense. Further, their testimony was not "cumulative" of Defendant's testimony or the medical records because Mother and Grandmother's testimony would have corroborated Defendant's testimony and rehabilitated his credibility which was called into question by the rebuttal evidence. (2) In determining what questions to allow on voir dire, a court must strike a balance between competing mandates that "counsel may not try a case on voir dire" and that voir dire requires revelation of critical facts so that bias can be revealed. Here, the ages of Girl and Defendant as teenagers at the time of the offense was a critical fact that defense counsel should have been allowed to ask about. The State was allowed to essentially ask whether jurors would regard teen sex as consensual.

Defendant sought to explore the opposite bias by asking if jurors would automatically think teen sex was not consensual. Some jurors may have believed that any sex between teens was such that a girl could never consent, but his is not the law. It was possible that Defendant and Girl had legal consensual sex. The question was designed to determine whether any jurors would find forcible compulsion as a foregone conclusion from the fact that both the alleged victim and Defendant were teenagers. Not every question that asks whether a juror would "automatically" decide something seeks a "commitment." Here, the proposed question merely sought to ensure, in light of the critical facts of the case of the ages involved, that jurors could follow the law regarding sex among minors and would not impose legal consequences even if they believed the sex was consensual.

State ex rel. Sitton v. Norman, 2013 WL 3984732 (Mo. banc July 30, 2013):
Even though trial court allowed prospective jurors to avoid jury service by performing community service instead, this was not a failure to substantially comply with Secs. 494.400-505 absent proof of how this affected the randomness of the process or undermined confidence in the verdict.
Facts: Defendant was convicted at a jury trial. Several years later, he learned that the Lincoln County judge in his case had allowed otherwise qualified jurors to opt out of jury service before trial by agreeing to perform community service. He sought habeas relief, alleging that this violated Missouri's jury selection procedures.
Holding: Petitioner is correct that the opt-out practice here was not authorized by Missouri's jury selection statutes. However, to be entitled to a new trial, Petitioner must show that there was a "substantial failure" to comply with the jury selection statute, which means one that rises to the level of a constitutional violation or that prejudices a defendant. In rare cases, a violation of the statute may be so fundamental or systemic that failure to comply is "substantial" even absent a showing of prejudice, e.g., excluding jurors before trial because they would be "too harsh or too lenient," or inadvertently excluding jurors due to their age. Here, however, the exclusion of five prospective jurors was not a "substantial" failure. Petitioner does not allege how many people were summoned for jury duty. There is no way to assess the extent to which improper excusal of five jurors impacted the randomness of jury selection, substantially interfered with the selection of jurors, or undermined confidence in the verdict.

State v. Letica, No. SC91849 (Mo. banc 12/20/11):
Holding: Even though the trial court erred in ruling on a reverse-*Batson* challenge by not allowing the defense to peremptorily strike a venireperson, the error was harmless and not a "structural error" where Defendant failed to show that an unqualified person ended up on his jury of 12.

Editor's note: This ruling that the *Batson* error is "harmless" and not "structural error" may be wrong under federal law, and should continue to be challenged.

State v. Johnson, 2015 WL 7455477 (Mo. App. E.D. Nov. 24, 2015):
(1) Sec. 558.018.5(3), which provides that a Defendant may be classified as a predatory sexual offender if he "has committed" first-degree statutory rape or sodomy against more than one victim, does not require that the acts be prior to the instant case; the acts in the instant case count under the statute; (2) even though Sec. 558.021 requires that a

finding of predatory sexual offender be made before submission to the jury, the trial court did not plainly err in finding this at sentencing because Defendant waived jury sentencing and also was not sentenced to a higher sentence than allowed under the unenhanced range; (3) to the extent that Secs. 558.018.5 and 558.021 require a court, rather than a jury, make factual findings that increase Defendant's minimum sentence, the statutes are subject to attack under Alleyne v. U.S., 133 S.Ct. 2151 (2013)(holding that any fact that increases a defendant's mandatory minimum sentence for a crime must be submitted to a jury and proven beyond a reasonable doubt).

Facts: Defendant was charged with various sex offenses against three children. After submission to the jury, the trial court, at sentencing, found Defendant to be a predatory sexual offender, Sec. 558.018.5(3), because of the acts against three children, and sentenced him to mandatory life imprisonment with possibility of parole after 25 years.

Holding: (1) Sec. 558.018.5(3) provides that a person may be classified as a predatory sexual offender where he "has committed an act or acts against more than one victim which would constitute [first-degree statutory rape or first-degree statutory sodomy], whether or not defendant was charged with an additional offense or offenses as a result." Defendant argues that this section applies only to *prior* criminal conduct based on the word "has." However, "has" does not refer only to conduct before the crimes charged. Sections 558.018.5(1) and (2) deal with previously committed convictions or conduct. To avoid rendering 558.018.5(3) meaningless, it must be interpreted to include acts of criminal sexual conduct against more than one victim, including charges in the instant case. **(2)** Sec. 558.021.2 requires the trial court make a finding of predatory sexual offender prior to submission of the case to the jury. Here, the trial court did not make the finding until sentencing. However, this was not plain error under the facts here. While a predatory sexual offender loses the right to jury sentencing, here, Defendant expressly waived his right to jury sentencing. Further, Defendant was not sentenced to a higher sentence than he could have received under the "unenhanced" statutory range. Even though he received a mandatory life sentence, he could have received this anyway, and he will be subject to parole after 25 years, which is actually less than the 85% (25 and one-half) he would have had to serve under the "unenhanced range" for the same life sentence. **(3)** The court does not decide the constitutionality of 558.018 and 558.021 under *Alleyne* here. *Alleyne* requires that any fact that increases a defendant's mandatory minimum sentence must be submitted to a jury and proven beyond a reasonable doubt. Sec. 558.021.1(3) requires a court, instead of a jury, make the predatory sexual offender finding. Here, the jury had determined that Defendant committed acts against multiple victims, because the trial court did not decide predatory sexual offender until sentencing (contrary to statute). But "in similar circumstances if a trial judge follows the statute and makes a finding before submission [to the jury], the resulting sentence would be subject to attack under *Alleyne*."

State ex rel. Roe v. Goldman, 471 S.W.3d 814 (Mo. App. E.D. Oct. 30, 2015):

(1) Judge, on apparent suggestion of prosecutor, abused discretion in removing grand Juror on basis of "conflict of interest" where Juror (a former ACLU attorney) had previously been attorney in lawsuit against St. Louis County over "Ferguson"-related events, because existing record did not contain testimony under oath from juror, as required by 494.470.3; (2) service on a grand jury is an obligation, but not a "right;" (3)

instead of reinstating Juror to jury, appellate court orders as a remedy that the entire grand jury be dismissed and a new one empaneled, even though this was not a remedy requested by the parties; this remedy is necessary due to the extensive publicity over this writ petition and the compromised secrecy of the grand jury process.
Facts: Judge impaneled a grand jury in St. Louis County, which had as its foreman a former ACLU attorney ("Juror") who had been a lawyer in a lawsuit against St. Louis County over the shooting by Officer Wilson of Michael Brown in Ferguson. During voir dire, Judge learned that Juror was now a federal attorney, but Judge did not learn that Juror formerly was the ACLU lawsuit attorney. After the grand jury began meeting and hearing cases, Judge learned from Prosecutor of a purported "conflict of interest" arising from Juror's former representation in the Ferguson-related lawsuit. Judge held a hearing, at which Judge stated that he had not seen "any particular problem" with Juror's service, but based on the information from Prosecutor, Judge was concerned about an "appearance" of a conflict of interest. Thus, Judge removed Juror from grand jury. Juror then brought writ of prohibition, requesting that he be ordered back on the grand jury.
Holding: A presiding judge can remove a juror in Missouri *only* for reasons set forth by certain statutes – Secs. 540.045, 540.050, 494.470, and 540.045 to 540.070. Sec. 494.470 authorizes removal of a Juror for cause if Juror has already formed an opinion on the case, or if Juror's opinions preclude him from following the law. 494.470.3 requires that a challenge for cause to a juror include testimony of the juror under oath. Appellate court emphasizes that it is reviewing *only* the record made in the trial court, and not other memorandum, affidavits and factual assertions filed and made by the parties in the writ proceeding, including a new affidavit from Judge giving additional reasons for striking juror. On the trial court record, there were not proper grounds to remove Juror. Among other things, there was no testimony by Juror under oath. Thus, there was not an adequate record to justify removing Juror based on an alleged conflict of interest. This writ has been the subject of much publicity. The secrecy and independence of the Grand Jury have been compromised in part due to the public filings of both parties. There is no "right" to serve on a grand jury. Thus, even though Juror requests to be reinstated to the grand jury, the proper remedy is to dismiss the current Grand Jury and impanel a new one.

State v. Walker, 2014 WL 6476054 (Mo. App. E.D. Nov. 18, 2014):
(1) Even though Defendant was charged with first degree murder, trial court abused discretion in not allowing defense to voir dire on range of punishment for second-degree murder where parties knew in advance that second-degree murder would be submitted to jury; and (2) trial court erred in not allowing Defendant who claimed self-defense to testify to what Victim said before shooting because statements were not offered to prove truth of matter but to show Defendant's subsequent conduct (but not reversible here because there was similar evidence presented).
Facts: (1) Defendant was charged with first degree murder arising out of a shooting. The defense was self-defense. The trial court sustained the State's motion in limine to preclude the defense from asking anything during voir dire about the range of punishment for second-degree murder. The defense claimed it should be allowed to voir dire on the range of punishment for second- degree murder because the parties anticipated that such an instruction would be given, and the defense was entitled to know if jurors could follow

the law and range of punishment on it. The State was allowed to voir dire on the range of punishment for first degree murder. During guilt phase deliberations, the jury sent a note asking what the range of punishment was for second-degree murder. The court did not specifically answer. The jury convicted of second-degree murder. During penalty deliberations, the jury sent a note saying they were deadlocked on punishment. After a hammer instruction was given, the jury sentenced to 30 years. (2) During the Defendant's testimony, the trial court sustained a "hearsay" objection to the Defendant testifying about what Victim said before Defendant shot Victim.
Holding: (1) Although the defense did not make an offer of proof as to specific voir dire questions which the defense was precluded from asking, the defense did state in response to the motion in limine that they expected the law and facts to support a second-degree murder instruction, and that they wanted to voir dire on the range of punishment for second-degree murder to see if the jurors could follow the law. Thus, the issue is preserved for appeal. The Defendant's right to an impartial jury is meaningless without the opportunity to show bias. As long as the Defendant's question is in proper form, the trial court should allow the defense to determine whether the jurors can consider the entire range of punishment for a lesser-included form of homicide. The trial court precluded this because Defendant was charged with first degree murder, but this was unreasonable. The trial court allowed the State to voir dire extensively on the range of punishment for first degree murder. Defendant was prejudiced here because by being denied any opportunity to voir dire on the range of punishment for second-degree murder, he could not determine if jurors were able to follow the full range of punishment. The jury sent a note during guilt phase deliberations about the range of punishment. During penalty phase, the jury sent a note saying they were deadlocked on punishment. After a hammer instruction, the jury sentenced to the maximum, 30 years. The State argues that since the punishment did not exceed the maximum range there is no prejudice, but under that logic, a defendant could never show prejudice unless the punishment was beyond the authorized range, which would be plain error anyway. The State also argues there is no prejudice because the judge could reduce the jury's recommended sentence. "While it is true that the judge might impose a lesser sentence, we do not conclude that trial judges are unaffected by the jury's recommendation." Further, the fact that a judge might impose a lesser sentence should not be confused with the jury's ability to consider the full range of punishment in the first instance. Case remanded for new penalty phase trial. (2) The trial court erred in sustaining the State's "hearsay" objection during Defendant's testimony about what Victim said before Defendant shot him. This was not "hearsay" because not offered for the truth of the matter asserted, i.e., not offered to show the truth of the Victim's statements. Instead, it was offered to explain Defendant's conduct after the statements were made. Although this error facially shows manifest injustice, the error is not reversible because the jury heard similar evidence that would allow it to conclude Defendant was in fear of his life when he shot Victim.

In the Interest of J.T., 2014 WL 5462402 (Mo. App. E.D. Oct. 28, 2014):
Holding: Where Juvenile was charged with second-degree assault, Sec. 565.060.1(2) for knowingly causing physical injury by means of a dangerous instrument, trial court plainly erred in convicting her of second –degree assault under Sec. 565.060.1(3) for recklessly causing serious physical injury, because this violated Juvenile's rights to notice of the

charged offense and to be convicted only of the charged offense, since second-degree assault under Sec. 565.060.1(3) is not a lesser-included offense second-degree assault under Sec. 565.060.1(2). This is because it is possible to cause mere "physical injury" without causing "serious physical injury."

State v. Ess, 2013 WL 4715352 (Mo. App. E.D. Sept. 3, 2013):
(1) Where after trial the defense discovered that a juror who had failed to answer questions on voir dire about whether they had preconceived notions about guilt had said during a pretrial recess that this was an "open and shut case," the nondisclosure was likely intentional and case is remanded for more detailed factual findings or new trial; and (2) even though Defendant had victim touch his penis through clothing in 1995 or 1996, during that time period the act of touching through the clothing was not a violation of Sec. 566.010(3)(1995 version), so the evidence was insufficient to support attempted first-degree child molestation.
Facts: Defendant was charged with various child sex offenses. (1) During voir dire, jurors were asked whether anyone had a "preconceived notion about the guilt or innocence" of Defendant. Juror did not answer. After trial, the defense learned that Juror had said during a pretrial recess that this was an "open and shut case." The defense obtained an affidavit from another juror stating this, and also called this other juror to testify at a hearing on the New Trial Motion, which raised this issue. (However, the New Trial Motion was filed late in this case, so all appellate issues are decided under plain error standard.) The trial court made no credibility findings regarding the other juror's testimony, but denied a new trial. (2) Defendant was originally charged with first-degree child molestation for acts which occurred in 1995 or 1996 during which Defendant had victim touch Defendant's penis through clothing. During trial, however, State discovered that in 1995 and 1996, the act of touching through the clothing did not violate Sec. 566.010(3)(1995 version). Thus, the State submitted to the jury "attempt" first-degree child molestation. Jury convicted of this offense.
Holding: (1) No person who has formed an opinion on a matter is qualified to serve as a juror. In determining whether to grant a new trial, the court must determine whether a nondisclosure occurred, and whether it was intentional or unintentional. If intentional, bias is presumed and a new trial should be ordered. If unintentional, a defendant must prove that prejudice resulted from the nondisclosure that may have influenced the jury's verdict. Here, jurors were asked various questions about their ability to be fair and impartial, including directly being asked whether they had any "preconceived notion" about guilt or innocence. Juror at issue failed to answer, but said to another juror during a pretrial recess that this was an "open and shut case." The direct questions on voir dire indicate that Juror's failure to understand the questions or answer was unreasonable. Thus, juror's failure to disclose was likely intentional. The State argues that since Defendant did not produce any evidence from Juror at issue, the Defendant fails to prove his claim of bias. "But to require a defendant to produce an affidavit from a biased juror confessing to intentional nondisclosure of material information, or to forgo any relief, places an impossible burden on a defendant." Nevertheless, the trial court made no finding on whether it found the other juror's testimony about what Juror at issue said to be credible, and no finding on whether the nondisclosure was intentional or not. Thus, case must be remanded for more findings. If the court finds that the testimony is

credible, however, the court must find that the nondisclosure was intentional and grant a new trial. (2) In 1995 and 1996, touching a penis through the clothing was not prohibited by then-Sec. 566.010(3). (The statute was amended in 2002 to prohibit touching through the clothing.) Defendant's acts here of having the victim touch his penis through clothing was not a substantial step toward the offense of first-degree child molestation. Thus, the evidence is insufficient to convict of attempted first-degree child molestation.

State v. Wright, 2013 WL 324044 (Mo. App. E.D. Jan. 29, 2013):
Holding: Where Defendant discovers alleged irregularities in jury selection after the time for filing a direct appeal or postconviction action have expired, the remedy is to file a petition for habeas corpus; even though Sec. 494.465.1 states that a party alleging jury irregularities may move for "appropriate relief" within 14 days of discovering them, this statute does not authorize a "new trial motion" to do so after the time for filing a new trial motion under Rule 29.11(b) has expired.

State v. Ousley, No. ED97047 (Mo. App. E.D. 11/20/12):
(1) Even though the trial court did not abuse its discretion in excluding Defendant's mother and grandmother as witnesses in Defendant's case-in-chief as a sanction for late disclosure of the witnesses, where the State presented rebuttal evidence, Defendant was entitled to call the mother and grandmother as surrebuttal witnesses because surrebuttal witnesses need not be disclosed; and (2) where Defendant was charged with forcible rape, Defendant should have been permitted to voir dire potential jurors on whether they could consider that teenagers would have consensual sex because this was a critical fact with a substantial potential for disqualifying bias.
Facts: Defendant, who was 19, was charged with forcible rape of a 14 year old. The trial court set a pretrial deadline for disclosure of witnesses, which Defendant failed to meet. As a sanction, the trial court excluded as witnesses Defendant's mother and grandmother, who were going to testify that Defendant's physical condition made it impossible for him to commit a forcible rape. After Defendant presented other evidence of this at trial, the State called a doctor in rebuttal. Defendant then sought to call his mother and grandmother in surrebuttal, but the trial court would not permit this because of its prior sanction.
Holding: (1) If the State introduces a new matter during rebuttal, the Defendant is entitled to offer surrebuttal. Because the nature of rebuttal requires a party to depend on the evidence presented in determining whether to offer rebuttal, rebuttal witnesses need not be disclosed or endorsed; this applies to surrebuttal evidence, too. Regardless of any initial discovery sanction, when Defendant offered his mother and grandmother as surrebuttal witnesses, it became a new inquiry for the trial court to determine whether Defendant was entitled to call them in light of the State's rebuttal evidence; this determination was to be made anew without reference to the rules of discovery or the trial court's earlier sanction. The trial court abused discretion in excluding the surrebuttal witnesses (but not prejudicial under facts of case). (2) During voir dire Defendant sought to ask potential jurors whether they could consider that two teenagers had consensual sex. The State objected that this was seeking a commitment, and the trial court sustained the objection. However, a party is entitled to ask about critical facts that

have a substantial potential for disqualifying bias. Here, Defendant could not have been charged with statutory rape because it is defined as sex with a person who is less than 14, or a person who is at least 21 having sex with a person who is less than 17. Defendant's question sought to inquire as to whether jurors would impose consequences for such an act, even if it was not illegal. This did not require a commitment from jurors to acquit Defendant upon hearing that two teenagers had sex, but rather sought to ensure that jurors could follow the law as it relates to sex among minors if they believed the sex was consensual. The trial court abused discretion in prohibiting this question (but was not prejudicial in context of case).

State ex rel. Koster v. McCarver, No. ED97414 (Mo. App. E.D. 5/15/12):
Where Petitioner did not know during his trial, direct appeal or time for filing a 29.15 case that Lincoln County employed an impermissible jury selection procedure that allowed venirepersons to opt-out of jury service by paying $50 and performing community service, this constitutes "cause and prejudice" to allow Petitioner to raise such a claim in habeas corpus.
Facts: Petitioner was convicted at a jury trial in 2008 in Lincoln County. Unbeknownst to him or his trial counsel, Lincoln County used a jury selection procedure that allowed venirepersons to opt-out of jury service by paying $50 and performing community service. 10 venirepersons out of 1200 chose this option in his case. Petitioner's direct appeal counsel testified that she was unaware of this opt-out program during his direct appeal. Petitioner subsequently did not file a Rule 29.15 motion. Subsequently, this opt-out program was declared unlawful in *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010). After this, Petitioner learned of the opt-out program and filed a motion for new trial under Sec. 494.465.1. After this was denied by operation of law, Petitioner filed a state habeas corpus action. The habeas court granted a new trial. The State sought a writ of certiorari to reverse this.
Holding: Sec. 494.465.1 provides that a defendant may make a motion for new trial regarding errors in selecting a jury within 14 days after learning of such errors. Even though Defendant filed his new trial motion within 14 days of learning of the factual basis for his claim in 2010, 494.465.1 does not provide a remedy here because to allow this would subvert postconviction Rule 29.15. However, where a defendant fails to file a Rule 29.15 motion, he can still proceed in a state habeas action on a claim about which he was previously unaware if he can show "cause and prejudice" to overcome his procedural default in failing to raise the claim in a 29.15 action. Here, Defendant has shown cause and prejudice. His trial attorney did not know about the jury opt-out program, and his appellate attorney did not either. Although the State claims the appellate attorney knew about it because she received an email on the matter from another attorney, assuming this is true, we know of no authority that we may impute an attorney's knowledge of a defaulted claim to their client. The State further contends that Petitioner could have filed a 29.15 motion without stating any grounds. However, the State cites no authority that a defendant must file a 29.15 motion even when he has no knowledge of any grounds for relief. Conviction vacated and new trial granted.

State v. Newton, 465 S.W.3d 919 (Mo. App. S.D. Aug. 4, 2015):
Holding: (1) Trial court abused discretion in prohibiting Defendant from cross-examining confidential informant about the prosecutor dismissing a municipal charge against him in exchange for "working off" the charge by being a confidential informant, because such evidence showed bias, interest or prejudice; evidence of a witness' arrests and pending charges not resulting in convictions is admissible where it shows possible motivation of the witness to testify favorably for the State or where testimony was given in expectation of leniency (but error was harmless in light of evidence of guilt); and (2) trial court abused discretion in not allowing Defendant on voir dire to ask any questions about whether jurors would hold it against him not to testify; Defendant was entitled to ask questions on critical issue of whether jurors would draw no negative inference from his failure to testify (but error was harmless here).

In re: Brooks v. Bowersox, 2014 WL 5241645 (Mo. App. S.D. Oct. 15, 2014):
Holding: *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which barred automatic life-without-parole sentences for juveniles convicted of first degree murder, does not apply to Juvenile-Defendants convicted before *Miller* and whose direct appeals and Rule 29.15 amended motions were completed or already filed without a such a claim; such defendants are procedurally barred for not raising the claim on direct appeal or in their Rule 29.15 cases.

State v. Kalter, 2014 WL 1873808 (Mo. App. S.D. 5/9/14):
Even though Jurors said they could be fair and impartial and were instructed about Defendant's right not to testify, where they said during voir dire that they would have to hear from Defendant, trial court abused its discretion in not striking Jurors for cause.
Facts: During voir dire, the State asked jurors generally if they could be fair and impartial, and all jurors agreed. Under subsequent questioning by the defense, two Jurors indicated that they would have to hear from Defendant. The defense moved to strike Jurors for cause, but the trial court overruled the motion. Jurors served on the jury. Defendant did not testify.
Holding: When the defense asked Jurors if they would have to hear from Defendant, the reasonable interpretation of their positive response was not that Defendant would have to testify for them to know his side of the story but that Jurors would have to hear from him in order to acquit him. Even though Jurors said they could be fair and impartial, this was *before* they were asked about whether they would have to hear from Defendant. And even though Jurors were instructed about Defendant's right not to testify, this is not the equivalent of unequivocal assurances of impartiality. The last responses from Jurors were that they would need to hear from Defendant. They were not subsequently rehabilitated. These Jurors served on the jury. Defendant did not testify at trial, so he was prejudiced. New trial ordered.

Smotherman v. Cass Regional Medical Ctr., 2015 WL 6914974 (Mo. App. W.D. Nov. 10, 2015):
Holding: (1) Even though jurors generally may not impeach their verdict, there are exceptions where ethnic or religious bias was expressed during deliberations, and where a juror independently gathered evidence outside the courtroom; (2) even though jurors said

they were not influenced by a juror's independent gathering of a weather report that was not introduced into evidence, given the high standard necessary to overcome the presumption of prejudice caused by juror misconduct, the jurors' testimony does not overcome the presumption.

In the Interest of A.B. v. Juvenile Officer, 2014 WL 5877703 (Mo. App. W.D. Nov. 12, 2014):

Even though (1) 12-year-old Juvenile touched other child's genitals, including with his mouth, and (2) trial court believed that the "only inference" that could be drawn if a 12-year-old boy engages in such conduct is that it is done for sexual gratification, the evidence was insufficient to prove first-degree sexual molestation because such offense requires proof that the acts were done for sexual gratification, and other evidence showed that Juvenile was immature for his age, had little sexual knowledge, and did not have an erection or other sexual arousal.

Facts: Juvenile boy, who was 12 years old, was charged with first degree sexual molestation for acts with a five-year-old boy. Both boys touched each other's genitals and put their penises in each other's mouth. There was no evidence that either child had an erection or ejaculation. Juvenile told other boy not to tell anyone what happened. The defense presented evidence that Juvenile was immature and had less understanding of sexual matters than the average 12 year old. The State called a rebuttal witness who did not examine Juvenile but testified that mouth-to-penis contact was an "advance stage of sexual whatever" and that the "only reason" a person would engage in oral sex is to satisfy sexual desire. The trial court found that the "only inference" from touching a five-year-old's penis was sexual gratification.

Holding: While we accept as true all inferences favorable to the State, they must be reasonably drawn from the evidence. The "integrity of the inference" must be established before it can sufficiently support a judgment that the act was committed. Secs. 566.067 and 566.010 require proof that the touching of the genitals was done for sexual arousal or gratification. Here, the incidents lasted only a few seconds. There was no evidence of physical arousal. Neither boy described the incident in sexual terms. There were no words spoken indicating sexual arousal or sexual intent, or additional actions such as rubbing, moving a hand up and down, or use of a lubricant to show this. The issue here is whether an inference based solely on the act's occurrence has sufficient "integrity" to prove beyond a reasonable doubt that Juvenile acted for the purpose of satisfying sexual desire. "We are not persuaded that intent can be inferred from the act alone" when dealing with a juvenile. Juvenile's sexual knowledge was much lower than his stated age. Judgment reversed and Juvenile discharged.

Snellen by Snellen v. Capital Region Medical Center, 2013 WL 5614115 (Mo. App. W.D. Oct. 15, 2013):

Trial judge's sua sponte questioning and strike of nursing-mother venireperson was improper because such venirepersons are not disqualified, even though she would need breaks every three or four hours.

Facts: During voir dire, Venireperson said she was a nursing mother and would need breaks every three or four hours. The trial judge then said, "Waah. Mama. Starving. I

couldn't take the guilt," and asked counsel to agree to strike her, which counsel did. Later, Appellant raised this as plain error on appeal.
Holding: Although this does not rise to level of plain error since counsel failed to object to the court's action, "[w]e do not condone the actions of the trial judge…. This juror did not request to be excused for hardship; she merely informed the trial court of a need for a break every three to four hours so she could pump breast milk. Such limitation is not itself disqualifying" under Sec. 494.425. It would be a rare trial which did not stop every three or four hours for everyone to take a break. The trial court's actions may have brought inappropriate attention to Venireperson and embarrassed her or caused her stress.

State ex rel. Koster v. McElwain, No. WD73211 (Mo. App. W.D. 3/29/11):
(1) Petitioner was able to raise Brady claim and jury misconduct claim in state habeas case because he showed cause and prejudice for not raising them on direct appeal or in postconviction; (2) State violated Brady where it failed to disclose that Sheriff knew that another person had threatened murder victim and police knew of witness who would also indicate another person threatened victim; (3) jury committed misconduct in seeking out a map that was not introduced into evidence to determine Petitioner's guilt.
Facts: Petitioner was convicted at a jury trial of first degree murder of his mother. He lost his direct appeal and Rule 29.15 case. He won relief in U.S. District Court, but the 8th Circuit reversed. He then filed a state habeas corpus case alleging various claims. The habeas court granted relief, and the State sought a writ of certiorari challenging the grant of relief.
Holding: The State argues that Petitioner's claims are procedurally barred because he did not raise them in his direct appeal or Rule 29.15 case. However, claims are not barred in a habeas case if (1) the claim relates to a jurisdictional (authority) issue; or (2) the petitioner establishes manifest injustice because newly discovered evidence makes it more likely than not that no reasonable juror would have convicted him (a "gateway innocence" claim); or (3) the petitioner establishes the presence of an objective factor external to the defense, which impeded his ability to comply with the procedural rules for review of claims, and which worked to his actual and substantive disadvantage infecting his entire trial with constitutional error (a "gateway cause and prejudice" claim). Here, Petitioner's claims fall under exception number three. He has shown that the State engaged in *Brady* violations because the Sheriff knew that another person had threatened the murder victim and law enforcement also failed to disclose that another witness had similar knowledge. Even though there may not have been written reports about this, *Brady* still required the State to disclose it, and even though the prosecutor may not have personally known about it, *Brady* makes the State responsible for police nondisclosure. Since these thing weren't disclosed, Petitioner could not have known about them or raised them on direct appeal or in his Rule 29.15 case. Even though the Eastern District had held that Petitioner's evidence at that time was insufficient to allow Petitioner to introduce evidence that another person did the crime, Petitioner has introduced new evidence in the habeas case directly linking another person to the crime, so all this evidence would now be admissible. Furthermore, the jury committed misconduct by seeking out a map that was not in evidence to use to convict Petitioner. The State contends that Petitioner has the burden to prove prejudice from this, but there is nothing in Missouri law that deprives a habeas petitioner of the benefit of the presumption of

prejudice from such jury misconduct; Petitioner would have had such a presumption if this matter was raised on direct appeal. Here, the presumption applies and the State failed to rebut it. Grant of writ of habeas corpus affirmed.

*** Warger v. Shauers, ___ U.S. ___, 96 Crim. L. Rep. 293 (U.S. 12/9/14):**
Holding: Fed. R. Evid. 606(b), which bars the use of statements made in the course of jury deliberations from being used to impeach a verdict (with certain exceptions), prohibits trial court from considering a juror affidavit detailing alleged juror dishonesty; however, footnote 3 states that there may be cases of "juror bias so extreme" where 606(b) would not apply. According to commentators for the *Criminal Law Reporter*, footnote 3 leaves open the door that juror bias regarding racial, ethnic or religious prejudice may be so egregious to violate fair trial rights and may possibly be shown by juror affidavits or testimony.

*** Jones v. U.S., 96 Crim. L. Rep. 93, ___ U.S. ___ (U.S. 10/14/14):**
Holding: Justices Scalia, Thomas, Ginsburg issue statement opposing denial of cert. on whether a jury (as opposed to a judge) must do the fact-finding necessary for a sentence not to be "substantively unreasonable." These Justices state that under *Apprendi* and its progeny, "any fact necessary to prevent a sentence from being substantively unreasonable – thereby exposing the defendant to the longer sentence – is an element that must be either admitted by the defendant or found by the jury. It may not be found the by the judge." The Justices believe the Supreme Court should decide this issue.

*** Rehberg v. Paulk, ___ U.S. ___, 91 Crim. L. Rep. 8 (U.S. 4/2/12):**
Holding: Grand jury witnesses have absolute immunity from civil suits.

*** Kaley v. U.S., ___ U.S. ___, 94 Crim. L. Rep. 597, 134 S.Ct. 1090 (U.S. 2/25/14):**
Holding: There is no constitutional right to revisit a grand jury's finding of probable cause in a pretrial hearing challenging the restraint of forfeitable assets needed to hire counsel; "With probable cause, a freeze [on assets] is valid"; "The grand jury gets to say – without any review, oversight or second-guessing – whether probable cause exists to think that a person committed a crime"; this rule avoids the inconsistent result of a judge finding no probable cause to restrain potentially forfeitable assets, but probable cause to allow the criminal case to proceed.

In re Grand Jury Proceedings, 94 Crim. L. Rep. 668, 2014 WL 702193 (1st Cir. 2/20/14):
Holding: Prosecutors who empanel a new grand jury cannot enforce by civil contempt a subpoena duces tecum issued by an earlier, now-defunct grand jury.

Sampson v. U.S., 93 Crim. L. Rep. 587 (1st Cir. 7/25/13):
Holding: New penalty-phase trial was warranted where juror repeatedly gave dishonest answers in voir dire regarding her and her family members' employment, drug use and experience with criminal justice system.

U.S. v. Wu, 92 Crim. L. Rep. 788 (1st Cir. 3/19/13):
Holding: Offense of selling items qualifying as weapons-grade technology without a license requires a jury determination of whether the items actually qualified.

U.S. v. Collins, 2012 WL 34044 (2d Cir. 2012):
Holding: During ex parte exchange which occurred without consultation with counsel, the trial court emphasized the importance of reaching a verdict to a dissenting juror, thereby depriving defendant of his right to be present, which was not harmless error.

U.S. v. Mitchell, 2012 WL 3171563 (3d Cir. 2012):
Holding: Close relatives of a principal in a case are impliedly biased as jurors under the kinship principle, but implied bias does not extend to jurors who are coworkers of a key witness.

Breakiron v. Horn, 89 Crim. L. Rep. 190 (3d Cir. 4/18/11):
Holding: Where Movant claims that trial counsel was ineffective in failing to strike a juror who heard another juror's remarks about Defendant's prior bad acts, *Strickland* requires an objective assessment of whether any juror who heard the remarks would have voted to acquit Movant; Movant does not have to show that the specific juror in question was actually prejudiced to win relief; here, Movant is entitled to relief because there was a reasonable probability he would not have been convicted had counsel acted when the juror was exposed to the improper remarks.

U.S. v. Catone, 96 Crim. L. Rep. 113 (4th Cir. 10/15/14):
Holding: Before Defendant's offense of making false statements to receive federal benefits can be enhanced to a felony because the amount is over $1,000, a jury (not judge) must find that the amount was over $1,000; under *Apprendi*, a jury must find the facts that increase the maximum penalty for a crime.

Barnes v. Jones, 95 Crim. L. Rep. 219 (4th Cir. 5/5/14):
Holding: State court unreasonably applied federal law in not granting hearing on claim that juror discussed a Bible passage with her pastor during deliberations, and then shared that information with other jurors.

U.S. v. Lawson, 2012 WL 1372172 (4th Cir. 2012):
Holding: A presumption of prejudice applied to a juror's use of a dictionary definition of the term "sponsor" during deliberations in a prosecution for violating the animal fighting prohibition of the Animal Welfare Act.

U.S. v. King, 628 F.3d 692 (4th Cir. 2011):
Holding: Defendant made sufficient showing under *Brady* that grand jury transcript of witness may contain exculpatory evidence; hence court was required to to conduct in camera review of transcript.

Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014):
Holding: Habeas court was not required to defer to state court's findings that procedure to select grand jury foreman did not violate equal protection; Petitioner showed racial disparity of more than 20% between African-Americans in general population and grand jury foremen.

U.S. v. Salazar, 95 Crim. L. Rep. 194 (5th Cir. 5/2/14):
Holding: Even though Defendant confessed at trial, judge erred in instructing jury to find him guilty because 6th Amendment right to jury trial still requires that the jury be the determiner of guilt and the jury could choose not to believe the confession.

Amborse v. Booker, 2012 WL 2428803 (6th Cir. 2012):
Holding: Petitioner showed cause for failure to raise jury selection issue earlier where unbeknownst to Petitioner, a computer glitch caused minorities to be underrepresented in the venire pool.

U.S. v. Reid, 95 Crim. L. Rep. 319 (6th Cir. 5/20/14):
Holding: Where Defendant was entitled to 10 peremptory challenges but only got 9 due to a mistake by the judge, this violated Fed. Rule Crim. P. 24, even though the jury that was empaneled was fair; however, Defendant wasn't prejudiced because he didn't use all the 9 peremptories.

U.S. v. Tomlinson, 95 Crim. L. Rep. 671 (6th Cir. 8/20/14):
Holding: *Batson* objection must be raised contemporaneously with opponent's peremptory strikes or, at the latest, before the jury is sworn and the rest of the voir dire panel is dismissed.

U.S. v. Moore, 2014 WL 4065700 (7th Cir. 2014):
Holding: Trial court erred erred in accepting a partial verdict, whereby it accepted a verdict of carjacking, which was the predicate crime for another charge, but allowed jury to continue to deliberate on the other charge; accepting the partial verdict precluded a scenario whereby the jury might have later realized that since it didn't agree on the other charge, it should revisit the carjacking guilty verdict, too.

Hooper v. Ryan, 2013 WL 4779579 (7th Cir. 2013):
Holding: Habeas petitioner was entitled to evidentiary hearing in federal court on *Batson*, where State court unreasonably concluded that striking all 7 African-American members of a venire did not make out a prima facie case of discrimination.

Wiston v. Boatwright, 89 Crim. L. Rep. 767 (7th Cir. 8/19/11):
Holding: Using peremptory challenges against venirepersons in violation of *Batson* is "structural error" requiring automatic reversal.

U.S. v. Taylor, 2011 WL 799775 (7th Cir. 2011):
Holding: On remand from appellate court to determine credibility of race-neutral reasons for striking jurors proffered by prosecutor under *Batson*, trial court is limited to

considering the reasons originally offered at trial and cannot consider new reasons offered by the prosecutor on remand.

Castellanos v. Small, 2014 WL 4413439 (9th Cir. 2014):
Holding: Prosecutor's strike of minority venireperson violated *Batson*; explanation for strike was not race-neutral where Prosecutor's reason was that venireperson had no children (when juror actually said she had adult children) and Prosecutor failed to strike other similar jurors.

U.S. v. Hernandez-Estrada, 95 Crim. L. Rep. 187 (9th Cir. 4/30/14):
Holding: There are multiple permissible ways to show underrepresentation in jury pools, including absolute disparity, comparative disparity, statistical significance, absolute impact, and disparity of risk.

SmithKline Beecham Corp. v. Abbott Labs, 94 Crim. L. Rep. 499 (9th Cir. 1/21/14):
Holding: Striking gay venireperson on basis of sexual orientation in civil trial involving HIV medications violated *Batson* and Equal Protection Clause.

U.S. v. Cortes, 94 Crim. L. Rep. 85 (9th Cir. 10/9/13):
Holding: Since the 6th Amendment requires that juries, not judges, resolve questions of fact that increase a sentence, jury instructions must instruct on issue of "sentencing entrapment," which occurs when a defendant, although predisposed to commit a minor or lesser offense, is entrapped to commit a greater offense subject to greater punishment; here, Defendant was induced by a Gov't agent to steal 100 kilograms of cocaine, which carried a harsher mandatory minimum than stealing of lesser amounts.

Ayala v. Wong, 93 Crim. L. Rep. 755, 2013 WL 4865145 (9th Cir. 9/13/13):
Holding: Habeas relief granted where defense counsel was excluded from *Batson* hearing at state trial; federal court was not required to give deference to state court's ruling that this was not prejudicial.

Jamerson v. Runnels, 93 Crim. L. Rep. 179, 2013 WL 1749212 (9th Cir. 4/24/13):
Holding: Even though federal habeas courts generally cannot hear evidence that wasn't presented in state court, this did not prohibit federal court in reviewing *Batson* claim from considering evidence of veniremembers' race (here, venirepersons' driver's license photos) that was not part of the state court record.

U.S. v. Wiggan, 2012 WL 5861808 (9th Cir. 2012):
Holding: In perjury prosecution, trial court erred in admitting testimony of grand jury foreman before whom Defendant had testified that grand jurors did not find Defendant's testimony to be credible.

Johnson v. Finn, 90 Crim. L. Rep. 360 (9th Cir. 12/8/11):
Holding: District judge cannot overturn magistrate's Batson finding that turned on prosecutor credibility unless the district judge holds another hearing at which the prosecutor testifies.

Johnson v. Finn, 2011 WL 6091310 (9th Cir. 2011):
Holding: District court deprived habeas petitioners of due process by failing to conduct evidentiary hearing on *Batson* issue following a magistrate judge's proposed finding regarding prosecutor's lack of credibility.

Love v. Cate, 2011 WL 3874873 (9th Cir. 2011):
Holding: Race motivated prosecutor's peremptory strike against the only black venire-member where prosecutor's stated reason was that he thought she was a social worker and that he did not believe social workers or teachers made good jurors, yet he did not question the venire-member and did not dismiss nonblack teachers.

U.S. v. Evanston, 89 Crim. L. Rep. 646, 2011 WL 2619277 (9th Cir. 7/5/11):
Holding: Judge's decision, over defense objection, to allow parties to make supplemental closing arguments after jury had deadlocked was abuse of discretion.

Wilson v. Knowles, 88 Crim. L. Rep. 565 (9th Cir. 2/8/11):
Holding: *Apprendi* does not allow state judge to find disputed evidentiary type facts about a prior conviction (such as severity of injury to victim and whether victim was an accomplice) to apply the 3-strikes law, and AEDPA does not required deference to the state judge's ruling in violation of *Apprendi*.

Stouffer v. Trammell, 94 Crim. L. Rep. 445 (10th Cir. 12/26/13):
Holding: Even though State's evidence against capital Defendant was overwhelming, this did not justify failure to hold a hearing on alleged juror misconduct where Juror's Husband allegedly signaled to Juror-Wife his opinions about the trial.

U.S. v. McKye, 93 Crim. L. Rep. 692 (10th Cir. 8/20/13):
Holding: Whether a "note" qualifies as a "security" under 15 USC 78j(b) is a mixed question of law and fact on which Defendant is entitled to a jury determination.

U.S. v. Miller, 94 Crim. L. Rep. 421, 2013 WL 6818391 (D.C. Cir. 12/27/13):
Holding: Judge violated Defendant's 6th Amendment right to jury trial when, in response to a jury question, he gave his own view of how to reconcile discrepencies in the charges and evidence by explaining what specific proof supported specific charges.

U.S. v. Peters, 96 Crim. L. Rep. 552 (C.A.A.F. 2/12/15):
Holding: Judge must err on side of caution and remove a member of court marital panel if they have an "unusually strong bond" (relationship) with the Prosecutor that would undermine perceptions of fairness; here, Prosecutor served as legal counsel to court martial panel member on other matters, which created appearance of unfairness.

U.S. v. Nash, 91 Crim. L. Rep. 137 (C.A.A.F. 4/13/12):
Holding: Military judge abused discretion in failing to remove a panel member (juror) for bias after juror asked a defense expert witness in a child sex case if she believed pedophiles could ever be rehabilitated, even though the juror said he was impartial.

Fortune v. U.S., 2013 WL 1831695 (D.C. 2013):
Holding: Where in response to jury's third declaration of deadlock, judge told jurors that he did not agree with them and it was his job to make that kind of decision, this impermissibly coerced the verdict after judge sent jurors back to deliberate more.

Kittle v. U.S., 2013 WL 21021150 (D.C. 2013):
Holding: Trial judges have discretion to consider juror testimony in exceptional circumstances such as claims of racial or ethnic bias amongst jurors.

Wilkey v. U.S., 2010 WL 4340833 (D.C. 2010):
Holding: Defendant seeking to challenge jury selection methods may get discovery of jury materials without a threshold showing that there is a reason to believe discovery will show a statutory or constitutional violation.

Hall v. Thomas, 2013 WL 5446105 (S.D. Ala. 2013):
Holding: White Defendant/Petitioner was entitled to habeas relief on his *Batson* claim that Prosecutor improperly struck African-Americans from his jury.

Sifuentes v. Brazelton, 2013 WL 6253008 (N.D. Cal. 2013):
Holding: State court unreasonably applied *Batson* in finding no *Batson* violation where record did not reflect a clear refusal on juror's part to impose death penalty or that juror (who was a Minister) was not in a position to judge anyone, and regarding another juror, her statements indicated that her religious beliefs caused her to view death penalty more favorably.

Richardson v. Hardy, 2012 WL 850723 (N.D. Ill. 2012):
Holding: Prosecutor's striking of black jurors on grounds that they were not crime victims, not homeowners, or not stably employed was pretextual and violated *Batson* where similarly situated white jurors were not struck.

Woodfox v. Cain, 2013 WL 705394 (M.D. La. 2013):
Holding: In case alleging that judges were racially biased in choice of grand jury forepersons, evidence that the judges allegedly used race-neutral criteria such as employment and education was insufficient to rebut the prima facie case of discrimination where judges had only been given information with names and addresses of potential jurors that did not contain employment or education information, and further, one judge testified that he selected based on persons he personally knew.

Ingram v. Goodwin, 2013 WL 5934498 (W.D. La. 2013):
Holding: Federal habeas relief granted due to juror bias where a Juror shortly before trial committed a crime similar to the crime committed by murder victim before she was killed; Juror was subject to prosecution by the same prosecutor as Petitioner; and jurors discussed the matter about Juror during deliberations.

Com. v. Woods, 94 Crim. L. Rep. 438, 2014 WL 12355 (Mass. 1/2/14):
Holding: Mass. Supreme Court exercises its "supervisory" authority to hold that Witnesses who testify before a grand jury must be advised of their 5th Amendment right against self-incrimination if they are a "target" or may reasonably become a "target" of the investigation, even though this is not required under constitution.

U.S. v. Sampson, 2011 WL 5022335 (D. Mass. 2011):
Holding: Where juror provided inaccurate responses during voir dire, a new trial was required to determine whether the death penalty was justified.

Ambrose v. Booker, 2014 WL 2479769 (E.D. Mich. 2014):
Holding: Petitioner established actual prejudice to overcome procedural default on claim that county's jury selection software had a glitch that systematically excluded African-Americans from jury pool in violation of 6th Amendment fair cross-section.

De Leon v. Hartley, 94 Crim. L. Rep. 444 (N.M. 12/30/13):
Holding: Trial court's delegation to Prosecutor of selection and excusal of grand jurors required quashing indictment without prejudice.

U.S. v. Morrison, 2013 WL 5933928 (E.D. N.Y. 2013):
Holding: Defendant's conviction vacated where Juror was approached by someone during deliberations and offered a bribe, and Juror was disturbed and troubled by it but did not report it until after trial; Juror's failure to report it during trial raised questions about Juror's fitness to serve.

Coombs v. Diguglilmo, 2012 WL 6562816 (E.D. Pa. 2012):
Holding: Prosecutor's striking of multiple African-American jurors, one because juror gave him "bad looks," was not race neutral under *Batson*.

U.S. v. Southern Union Co., 2013 WL 1776028 (D.R.I. 2013):
Holding: Gov't's request for a second jury trial to have a jury determine the number of days Defendant-company stored hazardous waste for purposes of imposing a daily fine was waived because Gov't failed to request this jury-finding at the original trial; *Apprendi* requires that a jury determine the number of days because *Apprendi* applies to fines; thus, the only fine that could be imposed was for a single day that the jury verdict supported.

Wolfe v. Clarke, 2011 WL 3251494 (E.D. Va. 2011):
Holding: Even though venirepreson said initially that he couldn't impose death, where he later said there were times he could impose it and he'd follow the law and listen to the facts, he should not have been struck by the court under *Witherspoon/Witt*.

Dunaway v. State, 2014 WL 1508697 (Ala. 2014):
Holding: Where venirepersons in capital case had been asked if a family member had been a crime victim, Juror's failure to disclose that cousin had been a shooting victim prejudiced Defendant and warranted new trial.

Ex parte Lightfoot, 2013 WL 3481945 (Ala. 2013):
Holding: *Apprendi* occurred where trial court enhanced Defendants' sentence for drugs based on a finding that Defendant possessed a firearm during the crime; this finding had to be made by a jury; error was not harmless even though the enhancement did not increase Defendant's sentence beyond the statutory maximum for the offense.

Ex parte T.D.M., 90 Crim. L. Rep. 202 (Ala. 10/28/11):
Holding: Even though as jury was leaving courtroom the foreperson told the judge that he had read the wrong form of "not guilty," double jeopardy barred the judge from re-calling the jurors to announce a guilty verdict because the jury had already been discharged.

Dimas-Martinez v. State, 2011 WL 6091330 (Ark. 2011):
Holding: Defendant was denied a fair trial where juror posted comments on a blog during trial in violation of a court order not to do so.

People v. Hensley, 95 Crim. L. Rep. 554 (Cal. 7/31/14):
Holding: Death sentence reversed where Juror consulted with his Minister about "mercy and sympathy" during penalty phase deliberations.

People v. Riccardi, 2012 WL 2874237 (Cal. 2012):
Holding: Trial court erred in striking death penalty venireperson based solely on written questionnaire which answers were ambiguous as to whether the venireperson could consider death penalty; court should have conducted actual voir dire of venireperson.

People v. Pearson, 2012 WL 34145 (Cal. 2012):
Holding: Automatic reversal of the death penalty was required, where prospective juror was erroneously excused for cause based on her indefinite views on the merits of the death penalty.

Sells v. State, 96 Crim. L. Rep. 482 (Del. 1/27/15):
Holding: Jointly tried co-defendants who exercise peremptory challenges independently cannot be held jointly responsible for each other's *Batson* violation, absent evidence the two defense counsel were colluding.

McCoy v. State, 96 Crim. L. Rep. 492 (Del. 1/20/15):
Holding: Court erred in determining that Defendant violated *Batson* against a 15th juror where court had ruled that the first 14 peremptories were proper; remedy for erroneous denial of the 15th peremptory is new trial.

Knox v. State, 2011 WL 4713229 (Del. 2011):
Holding: Juror who was alleged victim of robbery in separate and pending criminal trial involving the same prosecutor's office was biased.

Matarranz v. State, 94 Crim. L. Rep. 34, 2013 WL 5355117 (Fla. 9/26/13):
Holding: Fla. Supreme Court holds that the partiality of venirepersons who express bias based on their unfamiliarity with the judicial system can be rehabilitated; venirepersons who express bias based on their personal life experience cannot. Such a rule will prevent venirepersons from expressing bias under examination by one counsel, only to recant bias when questioned by opposing counsel or the judge and embarrassed "to produce a socially and politically correct recantation." "When a juror expresses his or her unease and reservations based upon actual life experiences, as opposed to stating such attitudes in response to vague or academic questioning, it is not appropriate for the trial court to attempt to 'rehabilitate' a juror into rejection of those expressions – as occurred here." "[T]rial courts must take great care to ensure that prospective jurors are not pressured or embarrassed by counsel or the court in an attempt to 'rehabilitate' them when they have expressed sincere doubt about their ability to be fair when their doubt stems from actual adverse past personal experiences." Here, in this burglary case, appellate court holds that trial court erroneously refused to strike venireperson for cause who had had her family's Christmas ruined by a burglary, even though she said she would keep an "open mind" and overcome her negative feelings.

Hazuri v. State, 2012 WL 1947979 (Fla. 2012):
Holding: Even though trial transcripts are not allowed in jury room, where jury requested trial transcripts during deliberations, trial court was required to tell jury that it had a right to a "read back" of testimony it wished to review, and should not have merely told them to rely on their collective recollection of the evidence.

State v. Fleming, 88 Crim. L. Rep. 597 (Fla. 2/3/11):
Holding: *Apprendi* is retroactive to cases that are reversed and remanded for resentencing.

Dennis v. State, 88 Crim. L. Rep. 436, 2010 WL 5110231 (Fla. 12/16/10):
Holding: Under "Stand Your Ground" law (which provides immunity from prosecution for justifiably using force to resist certain arrests), the trial judge is to resolve factual questions via pretrial motion as to whether to grant immunity, and not deny the motion and let the jury decide the factual questions.

Ellington v. State, 2012 WL 5833566 (Ga. 2012):
Holding: Defendant charged in death penalty case had right to ask venirepersons if they would automatically impose death if the victims were young children.

Ward v. State, 2011 WL 680213 (Ga. 2011):
Holding: Trial court's removal of juror after closing argument without Defendant's presence violated Defendant's right to be present at trial.

Oswalt v. State, 96 Crim. L. Rep. 160 (Ind. 10/22/14):
Holding: Appellate court may review denial of motion to strike potential juror for cause, regardless of whether potential juror actually served on jury, where the party making the challenge was unable to remove the juror because it had used up all its peremptories.

Ramirez v. State, 95 Crim. L. Rep. 223 (Ind. 4/29/14):
Holding: Where a Defendant shows that jurors had improper extra-judicial contact about a matter before the jury, there is a rebuttable presumption of prejudice, and burden shifts to the prosecution to show the contact was harmless.

Addison v. State, 2012 WL 560081 (Ind. 2012):
Holding: State's race-neutral reason for striking African American prospective juror was pretext for race discrimination, requiring new trial, in that the State did not seek to strike non-African American jurors who gave similar answers to voir dire question.

State v. Mootz, 2012 WL 246093 (Iowa 2012):
Holding: Automatic reversal of defendant's conviction is required when the trial court's erroneous ruling on a reverse-*Batson* challenge leads to the denial of one of the defendant's peremptory challenges.

State v. Halstead, 88 Crim. L. Rep. 370, 2010 WL 5129875 (Iowa 12/17/10):
Holding: Iowa rejects majority rule on inconsistent verdicts and holds that when Defendant is acquitted of the underlying predicate crime, the conviction for other crime cannot stand; thus, where Defendant was convicted in a single trial of assault while participating in a felony but acquitted of the predicate felony of theft, the assault conviction was inconsistent and could not stand.

State v. Turner, 2014 WL 4377356 (Kan. 2014):
Holding: Indictment should be dismissed where there were numerous errors in the grand jury proceeding, including questioning Defendant even after he invoked his 5th Amendment right against self-incrimination, and admitting irrelevant police testimony suggesting that indicting Defendant could help with investigation of an unrelated murder.

State v. Soto, 95 Crim. L. Rep. 69 (Kan. 4/11/14):
Holding: Procedure that allows judges to impose LWOP for 50 years if they find certain aggravating circumstances violates 6th Amendment right to have a jury find all elements of the criminal offense.

Ross v. Com., 96 Crim. L. Rep. 583 (Ky. 2/19/15):
Holding: Prosecutor's explanation that he didn't single out any jurors he struck peremptorily but simply chose jurors he "liked" and then struck the rest was insufficient to rebut claim of discrimination under *Batson*.

Johnson v. Com., 96 Crim. L. Rep. 358 (Ky. 12/18/14):
Holding: Prosecutor's strike of juror violated *Batson* where explanation given was he went to high school with juror and had "personal knowledge" of her; this wasn't a specific, race-neutral reason.

McAtee v. Com., 94 Crim. L. Rep. 35 (Ky. 9/26/13):
Holding: Jurors should not receive "testimonial" statements in the jury room; thus, trial court erred in allowing jury to privately view a witness' videotaped statement because this is akin to sending a witness back to the jury room, allowing the jury to give undue weight to the testimony; testimonial exhibits must be viewed in public.

State v. Nelson, 2012 WL 798767 (La. 2012):
Holding: After one defendant improperly used peremptory challenges to strike prospective jurors due to purposeful racial discrimination, the trial court's decision to regard the two co-defendants as a single entity and not to allow either one to use his remaining peremptory challenges on any of the re-seated prospective jurors violated each defendant's constitutional and statutory right to use his peremptory challenges.

State v. Chinn, 2011 WL 414360 (La. 2012):
Holding: Due to a state constitutional provision prohibiting a noncapital defendant's waiver of a jury trial later than 45 days prior to the scheduled trial date, the trial court's sole course of action, when the state requested a trial date for the noncapital trial only 43 days away, was to consider the waiver, and if the waiver was accepted, to set a trial date beyond the 45-day period.

State v. Allen, 90 Crim. L. Rep. 200 (Md. 10/28/11):
Holding: Where Defendant's felony-murder conviction but not the underlying robbery had been reversed, it violated his 6th Amendment right to a jury trial for the judge to instruct jury at retrial of the felony-murderthat Defendant had already been convicted of robbery; this use of "collateral estoppel" against Defendant was prohibited.

Valonis v. State, 2013 WL 2150507 (Md. 2013):
Holding: For a waiver of jury trial to be valid, court must strictly comply with rule requiring waiver to be on the record.

Grade v. State, 93 Crim. L. Rep. 51 (Md. 4/13/13):
Holding: Where court substituted a regular juror with an alternate without notifying defense counsel, this violated Defendant's right to be present at trial.

Perez v. State, 2011 WL 2421029 (Md. 2011):
Holding: Court erred in not disclosing jury notes to counsel before court answered the questions because this deprived Defendant of opportunity to have input in answering jury notes.

State v. Shim, 88 Crim. L. Rep. 510 (Md. 1/25/11):
Holding: Court must allow defense counsel to ask if venirepersons have such strong feelings about the crime that they could not be fair.

Com. v. Tavares, 2015 WL 2236167 (Mass. 2015):
Holding: Trial court erred in responding to jury question in manner that eliminated possibility that Defendant could have been found guilty of a lesser offense than co-Defendant.

In re Grand Jury Investigation, 96 Crim. L. Rep. 421 (Mass. 1/12/15):
Holding: Where a search warrant was needed to obtain a Defendant's cell phone (but warrant has not been sought), Grand Jury cannot obtain the cell phone by subpoenaing it, and this is true even though Defendant gave the cell phone to his lawyer; "If a client could not be compelled to produce materials because of the right against self-incrimination, and if the client transfers the material to the attorney for the provision of legal advice, an attorney likewise cannot be compelled to produce them."

Com. v. McGhee, 96 Crim. L. Rep. 559 (Mass. 2/13/15):
Holding: Trial judge presented with a report that a juror was sleeping, should have done more than just monitor the juror for the rest of the trial.

Hardison v. State, 2012 WL 3211614 (Miss. 2012):
Holding: Trial court erred in failing to properly apply *Batson* where it failed to require the State to show that Defendant's reason for striking white juror was pretext for discrimination; defense counsel had struck a white juror who expressed disappointment that a previous jury he sat on had not reached a verdict due to prosecutorial error.

State v. Pangborn, 93 Crim. L. Rep. 585 (Neb. 7/26/13):
Holding: Demonstrative exhibits should not be sent to the jury during deliberations unless the court first weighs their potential prejudice against usefulness and gives a limiting instruction to avoid prejudice; here, jury sought to see an exhibit prepared by the prosecutor that was a chart that outlined various charges against Defendant, various dates and injuries; "use of limiting instructions that advise a jury of the limited purpose [of such] demonstrative exhibits should be employed."

State v. Smith, 90 Crim. L. Rep. 303 (Neb. 11/18/11):
Holding: Even though a killing was intentional, it can still constitute sudden-quarrel manslaughter.

Manning v. State, 97 Crim. L. Rep. 175 (Nev. 5/7/15):
Holding: Defendant has due process right to be informed of and be able to respond to a jury note to judge saying that jury is deadlocked.

Rugamas v. Eighth Judicial Dist. Ct. ex rel. County of Clark, 2013 WL 336674 (Nev. 2013):
Holding: Statute that allows admission of statements made to others of a child under age 10 about sexual abuse does not apply in grand jury proceedings.

Saletta v. State, 89 Crim. L. Rep. 644 (Nev. 7/7/11):
Holding: Judge's questioning a juror about reasons why they disavowed the guilty verdict during post-verdict polling of the jury was an undue intrusion into the deliberative process and plain error; after the polling, the jury had deliberated again and found Defendant guilty.

State v. Town, 2012 WL 2913193 (N.H. 2012):
Holding: Even though juror said she would "try" to be fair and not consider personal experience as a sexual abuse victim, where she also said she was "not sure" if she could be fair, trial court erred in failing to strike her for cause.

State v. Soto, 90 Crim. L. Rep. 302 (N.H. 11/22/11):
Holding: Where Defendant presents some evidence that he caused the death at issue under influence of extreme mental or emotional disturbance caused by extreme provocation, the State must prove the absence of provocation beyond a reasonable doubt.

State v. Grate, 2015 WL 176343 (N.J. 2015):
Holding: Imposition of mandatory minimum sentence based on a finding by trial court that Defendant was involved in organized crime violated 6th Amendment right to jury-finding on that issue.

People v. Walston, 2014 WL 2608462 (N.Y. 2014):
Holding: Appellate preservation rules did not apply where trial judge failed to share full contents of jury note with trial counsel; claim about note was reviewable on appeal.

People v. Extale, 2012 WL 995213 (N.Y. 2012):
Holding: A prosecutor did not have unilateral power to dismiss a count of a grand jury indictment over the defendant's objection.

People v. Credle, 90 Crim. L. Rep. 166 (N.Y. 10/25/11):
Holding: Where a grand jury deadlocks, prosecutors must get court approval to resubmit the charges to another grand jury.

People v. Steward, 2011 WL 2183309 (N.Y. 2011):
Holding: 5 minute limit on voir dire was abuse of discretion in case involving well-known victim.

People v. Steward, 89 Crim. L. Rep. 601 (N.Y. 6/7/11):
Holding: Trial court's limiting voir dire to 5 minutes per panel in complex felony trial denied fair opportunity to explore jurors' qualifications.

People v. Hecker, 88 Crim. L. Rep. 284 (N.Y. 11/30/10):
Holding: Where trial judge erroneously disallowed Defendant's strikes under *Batson*, this requires automatic reversal of conviction.

State v. Rogers, 92 Crim. L. Rep. 159 (Or. 10/11/12):
Holding: Even though counsel had access to jurors' names, where the names were withheld from the defendant personally and the public, the jury was "anonymous" and this required special findings by the court.

State v. Sundberg, 88 Crim. L. Rep. 755, 2011 WL 537845 (Or. 2/17/11):
Holding: Trial court cannot impanel an anonymous jury without giving jurors a neutral explanation for withholding juror identifies; otherwise, jurors may assume that identities are being withheld because Defendant is dangerous and more likely to be guilty.

State v. Brown, 93 Crim. L. Rep. 73 (R.I. 4/5/13):
Holding: Even though there is a general rule that courts may not inquire into jury deliberations, this rule does not preclude inquiry about a claim of juror racial bias because such inquiry is necessary to the constitutional right to a fair trial by an impartial jury.

State v. Inman, 2014 WL 2765674 (S.C. 2014):
Holding: Even though Defendant struck a juror for being a farmer, this was a race-neutral reason and the burden should have shifted back to the Prosecutor, in reverse-*Batson* challenge, to prove that the strike was pretextual.

State v. Giles, 94 Crim. L. Rep. 538 (S.C. 1/15/14):
Holding: Defendant's claim that he struck 10 white jurors because they were "not right for the jury" was too nonspecific to rebut presumption of discrimination under *Batson*.

State v. Apodaca, 90 Crim. L. Rep. 550 (S.C. 1/10/12):
Holding: Once juror was excused for illness during trial, juror could not later be put back on the jury.

State v. Scott, 2014 WL 2895406 (S.D. 2014):
Holding: Where a different judge heard a *Batson* remand hearing than the original trial judge, appellate court on re-appeal was not required to defer to remand judge and would review claim de novo, because the remand judge did not have the usual advantage of firsthand observation of venirepersons or prosecutor when the strikes were made.

State v. Adams, 2013 WL 2102683 (Tenn. 2013):
Holding: Where a discharged alternate juror had improperly communicated with other jurors by leaving a note for the foreperson that the alternative thought Defendant was guilty, the trial court erred in allowing State to question foreman as to what role the note played in the jury's thoughts or discussions (but error was harmless here).

State v. Sexton, 2012 WL 1918922 (Tenn. 2012):
Holding: Trial court improperly struck venirepersons based solely on their written responses to whether they would ever vote for the death penalty; actual voir dire questioning may have rehabilitated the venirepersons.

State v. Abdi, 90 Crim. L. Rep. 629 (Vt. 1/26/12):
Holding: A Somali Bantu immigrant convicted of sexual assault in a prosecution that involved arguments about culture and religion must receive a new trial where a juror researched Somali mores and beliefs on the internet and shared the results with fellow jurors.

State v. Lamar, 95 Crim. L. Rep. 393 (Wash. 6/12/14):
Holding: Where trial court substituted an alternate juror during deliberations, this violated the constitutional right to a unanimous jury since new juror had not participated in prior deliberations.

State v. Saintcalle, 93 Crim. L. Rep. 643 (Wash. 8/1/13):
Holding: Criticizes *Batson*'s "purposeful discrimination" standard because "racism is often unintentional, institutional or unconscious"; advocates for adoption of a standard where a *Batson* challenge should be sustained where there is "a reasonable probability that race was a factor in the exercise of the peremptory" or "where the judge finds it is more likely than not that, but for the defendant's race, the peremptory would not have been exercised."

People v. Garcia, 2012 WL 918861 (Cal. App. 2012):
Holding: A trial court violated a criminal defendant's constitutional right to trial by jury in accepting a partial verdict from eleven jurors after the court had already discharged and replaced one of the jurors who had purportedly voted in favor of the verdicts.

People v. Mata, 2012 WL 579864 (Cal. App. 2012):
Holding: A defendant's waiver or consent to the trial court's failure to dismiss the venire is a prerequisite to the use of alternative remedies or sanctions for a prosecutor's racially motived peremptory challenge.

McGill v. Superior Court, 2011 WL 2120179 (Cal. App. 2011):
Holding: Where a perjury charge against Defendant for testifying falsely before a grand jury was heard by the same grand jury that heard the underlying case where the perjury occurred, the perjury charge was subject to dismissal.

People v. Khoa Khac Long, 2010 WL 4261441 (Cal. App. 2010):
Holding: Appellate court would not defer to trial court's implicit finding that prosecutor's strike of juror for "body language" was proper under *Batson*, where record was devoid of any mention or description of such "body language."

People v. Wilson, 2012 WL 4829487 (Colo. App. 2012):
Holding: Prosecutor's reasons for striking juror based on inability to consider DNA or eyewitness evidence were not race-neutral where they were refuted by the record since juror said he could consider scientific and other evidence.

People v. Harmon, 2011 WL 4837289 (Colo. App. 2011):
Holding: Trial court's failure to take action in response to juror's note indicating he had reached a conclusion prior to deliberations based on his misconception that defendant had conceded guilt in opening statement violated defendant's right to a fair trial.

Morris Publishing Group v. State, 2014 WL 1665920 (Fla. App. 2014):
Holding: Even though a live audio feed of jury selection was available to news media, court violated First Amendment openness of judicial proceedings by excluding media from jury selection.

Chambers v. State, 2013 WL 1277731 (Ga. App. 2013):
Holding: Defendant was denied right to be present at all stages of trial and to be tried by a fair and impartial jury where juror performed Internet research and shared her findings with other jurors during deliberations, and State could not overcome presumption of prejudice even though it submitted affidavits from the other 11 jurors that this juror's information did not influence their verdict.

Fuller v, State, 2012 WL 247854 (Ga. Ct. App. 2012):
Holding: Trial court abused its discretion by failing to grant a mistrial after juror initiated a conversation with the victim.

Kenerly v. State, 2011 WL 2623837 (Ga. Ct. App. 2011):
Holding: A "special purpose" grand jury convened to investigate acquisition of real property was not authorized to return bribery indictment.

People v. Brown, 2013 WL 1870082 (Ill. App. 2013):
Holding: Where trial judge allowed State to exercise another peremptory challenge of a juror after the trial had begun, this violated Defendants's due process rights, even if the challenge was allowed as a sanction for Defendant's violation of an evidentiary order; allowing the State to invade an impartial jury was not a proper sanction for violation of an evidentiary rule.

People v. Reimer, 2012 WL 1108312 (Ill. App. Ct. 2012):
Holding: An indictment alleged violations of the Illinois Home Repair Fraud Act would be dismissed without prejudice because the State misled the grand jury by misinforming it in regard to the intent element.

Cartwright v. State, 950 N.E.2d 807 (Ind. Ct. App. 2011):
Holding: *Batson* was violated where State's reasons for strike were that juror had "health issues" but problems did not prevent him from serving, and juror said he would try to listen to evidence even though he also said he wasn't a good listener.

Wright v. Com., 2013 WL 845020 (Ky. App. 2013):
Holding: Trial court abused discretion in allowing jury to take Prosecutor's laptop into jury room to listen to audio recording; laptop likely contained inadmissible and irrelevant evidence, and jury was not instructed not to access other files on the laptop or internet.

State v. Pierce, 2013 WL 6516404 (La. App. 2013):
Holding: Where Defendant's reasons for striking a white juror (that they had been a crime victim and voted for a defendant in a civil trial) were racially neutral, the trial court impermissibly shifted burden to Defendant in "reverse-*Batson*" claim when it rejected this explanation without requiring State to prove purposeful discrimination.

State v. Bender, 2013 WL 3753555 (La. App. 2013):
Holding: Prosecutor's claim that he struck African-American juror because of his prior conviction was not race-neutral under *Batson*, where Prosecutor never revealed what the nature of the prior conviction was, and where defense counsel was precluded from asking juror if he had a conviction, and from asking other jurors if they had a similar conviction.

State v. Wilkins, 2012 WL 2434762 (La. App. 2012):
Holding: *Batson* was violated where State struck African-American jurors on grounds that they were African-American and might be offended by racially offensive language used by the crime's victim; this explanation was not race-neutral.

State v. Dorsainvil, 2014 WL 1716053 (N.J. Super. Ct. 2014):
Holding: Physical altercation between jurors during deliberations and report that jurors were deadlocked necessitated mistrial.

State v. Pruitt, 2013 WL 1729222 (N.J. Super. 2013):
Holding: Prosecutor's peremptory strike of only African-American on panel was sufficient to draw an inference of discrimination so as to require prosecutor to give race-neutral reasons.

People v. Giuliani, 2014 WL 3765412 (N.Y. App. 2014):
Holding: Nurse-Juror should have been struck for cause where she said she could not disregard her medical knowledge and would decide case based on medical facts outside record.

People v. Cridelle, 976 N.Y.S.2d 713 (N.Y. App. 2013):
Holding: Where after receiving a note from jury, a juror repeatedly said she could not make a decision, court erred in failing to remove juror; further error occurred where the 11 other jurors continued deliberations while the court conducted a hearing on the indecisive juror, so that Defendant was deprived of his right to 12 jurors.

People v. Members, 2012 WL 5692597 (N.Y. App. 2012):
Holding: Court erred in accepting guilty verdict from 11 jurors, because Defendant had constitutional right to trial by a jury of 12.

People v. Wisdom, 2012 WL 2818248 (N.Y. App. 2012):
Holding: Where a grand jury witness was not administered an oath, and was later called back, given an oath and asked only if her prior testify was true, this did not cure the earlier failure to administer an oath.

People v. Lockley, 2011 WL 1733894 (N.Y. App. 2011):
Holding: Trial court's procedure of reading jury notes in front of jury and immediately answering without giving defense an opportunity to be heard beforehand was inherently prejudicial.

People v. Lewis, 2010 WL 4237712 (N.Y. App. 2010):
Holding: Trial court's failure to read into record a jury note and failure to give counsel notice of content of note warranted new trial.

State v. Davis, 2014 WL 4236250 (Or. App. 2014):
Holding: In prosecution for perjury stemming from Defendant's testimony at his DWI trial, Defendant was denied right to a jury trial, where trial court applied doctrine of issue preclusion and instructed jury that based on Defendant's DWI conviction, it was established beyond a reasonable doubt that certain facts were true; this essentially removed an element of the perjury charge from a finding by the jury.

Colyer v. State, 2013 WL 173772 (Tex App. 2013):
Holding: Where juror testified that during deliberations he spoke to a doctor who caused him to change his vote, court abused its discretion in denying new trial motion on basis of outside juror influence.

McQuarrie v. State, 2012 WL 4796001 (Tex. Crim. App. 2012):
Holding: Defendant should have been allowed a post-trial hearing on claim that juror conducted unauthorized internet research about case during trial.

State v. Berniard, 2014 WL 2866228 (Wash. App. 2014):
Holding: Even though court received information during deliberations that a juror was stressed and feared "that all the jurors would be against her," the court violated Defendant's rights to a fair and impartial jury when the court dismissed her without questioning her; the information suggested she was a lone holdout juror, and by dismissing her, the court may have suggested to other jurors that the court preferred a guilty verdict.

State v. Terry, 2014 WL 2772899 (Wash. App. 2014):
Holding: Where the trial court allowed jurors to ask questions (through the judge) during trial, trial court violated Defendant's due process rights by asking a question submitted by a juror that was an indirect comment on Defendant's right to post-arrest silence; question asked whether Defendant ever asked Officer why he was being arrested, and Prosecutor argued in closing that Defendant's failure to ask was probative of guilt.

State v. Bauer, 2013 WL 864843 (Wash. App. 2013):
Holding: Where Defendant was charged with assault for having left a gun on a dresser where a child got it and shot someone, the question of whether leaving the gun in the open was the proximate cause of the victim's injury was a jury question.

State v. Sellhausen, 2010 WL 4770622 (Wis. Ct. App. 2010):
Holding: Judges must sua sponte remove their immediate family members from a voir dire panel and not require defendant to strike them for cause or exercise a peremptory strike.

Juvenile

In the Interest of S.C. v. Juvenile Officer, 2015 WL 6949338 (Mo. banc Nov. 10, 2015):
Holding: Even though Juvenile had been adjudicated guilty of first-degree attempted rape and was required to register on the juvenile sex offender registry, Sec. 211.425, where the juvenile court did not order that Juvenile register on the adult registry, his claim that requiring juveniles to register for life on the adult registry is unconstitutional is not ripe of judicial review; since there has been no attempt to compel Juvenile to register on the adult registry, there is no immediate, concrete dispute at this time; Juvenile's claim dismissed without prejudice.

State v. Hart, 404 S.W.3d 232 (Mo. banc 2013):
(1) Where Juvenile-Defendant was convicted of first degree murder and sentenced to life in prison without parole (LWOP) without the sentencer having considered mitigating factors, the sentence violates the 8th Amendment and must be remanded for a new sentencing; (2) at the new sentencing, the sentencer must first determine whether a sentence of LWOP is appropriate considering mitigating factors; (3) if the sentencer determines LWOP is not appropriate, then the first degree murder statute is unconstitutional as applied to Defendant, and the court must enter a conviction for second degree murder and the sentencer then sentence for second degree murder; and (4) even though Defendant had waived his right to jury sentencing before his original trial, that waiver was not knowing because it was made without considering the new, qualitatively different decision a sentencer must make about mitigating circumstances after Miller v. Alabama.
Facts: Juvenile-Defendant was convicted of first degree murder and armed criminal action, and sentenced to LWOP and a concurrent term of 30 years. He waived jury sentencing before trial. While Juvenile's direct appeal was pending, the U.S. Supreme Court decided *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which forbids sentencing a juvenile to LWOP when there has been no consideration of mitigating circumstances.
Holding: Juvenile's sentence of LWOP violates the 8th Amendment after *Miller* because there was no consideration of mitigating circumstances prior to imposing LWOP under Sec. 565.020, since LWOP was the only sentence authorized for first degree murder. The question is what remedy must be given. *Miller* holds that an LWOP sentence is permissible as long as the sentencer determines it is just and appropriate given Juvenile's age, maturity and other mitigating factors. On remand, the State must persuade the sentencer beyond a reasonable doubt that an LWOP sentence is just and appropriate under all the circumstances. As an initial matter, the State argues that the sentencer must be the judge here because Juvenile waived his right to jury sentencing before trial, so he was willing to have a judge determine the entire range of punishment, regardless of what

offense he was ultimately convicted of. While the State's waiver argument would usually be correct, here it is not because Juvenile's decision to waive a jury was mistaken as to the role of the sentencer in light of *Miller*, which created a qualitatively new decision that the sentencer must make. Therefore, Juvenile's jury waiver will not be enforced on remand. Regarding the procedure to follow, the jury must be properly instructed that it may not find LWOP unless it is persuaded beyond a reasonable doubt that LWOP is just and appropriate under all the circumstances. However, the jury should not be given a choice of punishments for first degree murder because this would violate the separation of powers since the legislature, not courts, determines punishments for crimes. Therefore, the jury should be instructed that if it is not persuaded that LWOP is just and appropriate, additional instructions concerning additional punishments will be given. If the jury finds LWOP, the judge must impose that sentence. However, if the jury does not find LWOP, the judge must declare Sec. 565.020 void as applied to Juvenile on grounds that it fails to provide a constitutionally valid punishment. In that case, the judge must vacate the finding of guilt of first-degree murder, and enter a new finding of guilt of second-degree murder. In that case, the judge must also vacate the finding of armed criminal action based on having been found guilty of first degree murder, and enter a new finding of ACA in connection with second-degree murder. After the trial court enters those findings, the jury must then determine Juvenile's sentences within the statutory ranges for those crimes. This procedure may require two separate submissions to the sentencer in a single penalty phase, but is required to carry out *Miller* without violating the legislature's prerogative to decide which punishments are authorized for which crimes.

State v. Nathan, 404 S.W.3d 253 (Mo. banc 2013):

(1) Once a Juvenile is certified to stand trial in circuit court, the State is not limited to the charges alleged in the juvenile petition, and may bring whatever charges it believes are justified regardless of whether such charges or underlying facts were included in the juvenile petition; (2) where Defendant-Juvenile was convicted of first degree murder and sentenced to LWOP without consideration of mitigating circumstances, such sentence violates the 8th Amendment and the case is remanded for resentencing per the procedure set forth in State v. Hart, No. SC93153 (Mo. banc 7/30/13); but (3) even though Juvenile contends he must also be resentenced for various non-homicide offenses if he is ultimately resentenced for second-degree murder, Juvenile did not appeal these convictions or argue that the non-homicide sentences (individually or combined) are unlawful or unconstitutional so resentencing on those is not addressed, and his implication that the combined effect of such sentences may be unconstitutional is premature until after the resentencing procedure, and will be moot if Juvenile is sentenced to LWOP.

Facts: Defendant-Juvenile was convicted of first degree murder from a robbery and home invasion. He was sentenced to LWOP. He was also convicted of many other offenses stemming from the home invasion, and given multiple consecutive life sentences. While his appeal was pending, the U.S. Supreme Court decided *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which forbids sentencing a juvenile to LWOP when there has been no consideration of mitigating circumstances. On appeal, Defendant challenged his LWOP sentence, and also challenged the certification procedure used in

his case because he was ultimately allowed to be charged with and convicted of various crimes that were not alleged in the juvenile petition in juvenile court.
Holding: (1) Regarding the certification procedure, Juvenile argues that some of the offenses of which he was convicted had not been "certified" by the juvenile court, and thus, could not be brought or tried in circuit court. The flaw in this argument, however, is that the certification procedure created in Section 211.071 pertains to *individuals*, not to specific conduct or crimes or charges. The statute speaks in terms of "transfer[ing] a child" to circuit court for prosecution. The focus in a certification proceeding is on the juvenile, not the conduct alleged in the petition. The petition serves only to invoke the juvenile court's exclusive jurisdiction by identifying the individual as being younger than 17 and alleging the juvenile has engaged in conduct that would be a crime if committed by an adult. Under 211.017, the juvenile court may dismiss the petition and "transfer the child" to circuit court. When that occurs, the jurisdiction of the juvenile court over the child is terminated unless the child is found not guilty in circuit court. Nothing in 211.071 allows a juvenile court to retain jurisdiction over the juvenile for some parts of a petition but not others. If a juvenile court relinquishes its exclusive jurisdiction by transferring a child to circuit court, the state is not bound solely to the factual allegations raised or violations of law asserted in the juvenile petition, but may bring whatever charges it believes are justified, regardless of whether those charges or the underlying facts were included in the petition. (2) For the reasons discussed in *State v. Hart, No. SC93153 (Mo. banc 7/30/13)*, Juvenile must be resentenced pursuant to the procedures there. Juvenile argues that if he is ultimately found guilty of second degree murder, he must be resentenced on his multiple non-homicide offenses, too. However, he has not argued that any of those sentences or the combined effect thereof is unlawful or unconstitutional. Because this claim is not preserved or presented, it will not be addressed here. To the extent that Juvenile is trying to assert a claim that the combined effect of the sentences is unconstitutional, such a claim is premature until after resentencing, and will be moot if Juvenile is sentenced to LWOP.

Willbanks v. Missouri Dept. of Corrections, 2015 WL 6468489 (Mo. App. W.D. Oct. 27, 2015):
Holding: Even though Juvenile was sentenced to multiple consecutive sentences totally 355 years for non-homicide offenses, and will not be eligible for parole until age 85, this did not violate the prohibition on life without parole sentences for juveniles under *Graham*; Western District rejects notion of de facto life without parole sentences due to difficulty in determining exactly what constitutes such sentences.

In re: Branch v. Cassady, 2015 WL 160718 (Mo. App. W.D. Jan. 13, 2015)(transferred to Supreme Court 3/31/15):
Miller (banning mandatory life without parole sentences for juveniles) is retroactive in Missouri, which uses the Linkletter-Stovall test for retroactivity.
Facts: Petitioner, who was 17 at time of guilty plea to first degree murder in 2000, brought state habeas action, alleging that he was entitled to relief under *Miller v. Alabama*, 132 S.Ct. 2455 (2012).
Holding: Habeas review guards against legally unauthorized sentences. *Miller* held that a sentence of life-without-parole imposed on juveniles violates the 8th Amendment unless

mitigating factors were considered prior to imposition of the sentence. In deciding whether *Miller* is retroactive, there are two dominant approaches – the *Linkletter-Stovall* test, and the *Teague* test. The U.S. Supreme Court uses the *Teague* test for determining retroactivity in federal court, but states are free to use less-restrictive tests, such as the older *Linkletter-Stovall*. Missouri uses the *Linkletter-Stovall* test, which considers (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice by retroactive application of the new standards. Here, the purpose of *Miller* is to protect juveniles from cruel and unusual punishment. *Miller* goes to the integrity of the process by which liberty is taken – this favors retroactivity. There is no evidence law enforcement relied on mandatory life without parole in performing its duties, so this factor is neutral. Regarding the third factor, although there will be some burden on courts, prosecutors and law enforcement, the gravity of the right involved outweighs the burden. Western District also notes that although *Teague* does not control its analysis, most courts which have applied *Teague* have found that *Miller* is retroactive. When *Miller* is considered to have been in effect at the time of Petitioner's sentencing, mandatory LWOP without considering mitigating factors was not a sentence that was lawfully authorized. Therefore, Petitioner's case is remanded for resentencing.

McCoy v. State, 2015 WL 1246556 (Mo. App. W.D. March 17, 2015):
Holding: (1) A denial of a Rule 29.07(d) motion to withdraw a guilty plea for manifest injustice after an SES is an appealable judgment because an SES is a final criminal conviction; by contrast, a denial of a 29.07(d) motion after an SIS is not a final appealable judgment because no final criminal conviction has been entered. (2) Where Defendant received an SES and, thus, was not delivered to the Department of Corrections, he was not eligible to pursue relief under Rule 24.035 (which requires delivery to DOC), but he could pursue his ineffective assistance claim via a Rule 29.07(d) motion to withdraw guilty plea for manifest injustice. But (3) even though plea counsel failed to inform Juvenile-Defendant that he would be subject to lifetime GPS monitoring as a sex offender, counsel was not ineffective because this was a collateral consequence of conviction, and also there was no prejudice because there was no a reasonable probability that Defendant would have rejected the plea offer and gone to trial, since he was facing a lengthy sentence upon conviction at trial, rather than probation, and the evidence of guilt was strong. (4) Court refuses to consider claim that automatically imposing lifetime supervision and monitoring on juveniles constitutes cruel and unusual punishment and violates *Graham v. Florida*, 560 U.S. 48 (2010), because this issue was not raised in the trial court or briefed by the parties, but raised for the first-time at oral argument.

In the Interest of J.N.C.B. v. Juvenile Officer, No. WD75299 (Mo. App. W.D. 6/28/18):
Mere entry into a building with valuables in it, without more, is not sufficient to prove an intent to steal necessary for conviction for burglary.
Facts: In response to an alarm at 7:00 p.m., police were called to a former school building which contained various property. When they arrived, they found the door propped open, and Defendant-juvenile and several other juveniles in the building

laughing and talking. One of the juveniles had a broom from the building, although police did not think they intended to steal the broom. Defendant was ultimately convicted at trial of second degree burglary. He appealed.
Holding: A person commits second degree burglary if he knowingly enters unlawfully in a building for the purpose of committing a crime therein. The parties agree that Defendant entered the building unlawfully (which is first degree trespassing), but Defendant argues the evidence is insufficient to prove that he intended to commit a crime therein. The State argues that intent to steal is presumed when there are items of value in a building, and that the mere presence of valuables alone, with no other indicia of intent to steal, is sufficient to prove intent to steal beyond a reasonable doubt. Although cases often cite this inference, it has always been in connection with additional supportive facts and inferences, such as forced entry, flight, weapons, burglary tools, confessions, or movement of valuables. Here, there are none of these additional facts, except possession of the broom, but police testified they didn't believe anyone intended to steal the broom. Where a permissible inference is the sole basis for a finding of guilt, due process requires that the conviction may not rest entirely on that inference unless other proven facts are sufficient to support the inference of guilt beyond a reasonable doubt. The State is required to prove Defendant's intent beyond a reasonable doubt. The evidence here is insufficient to do that. The State also argues that since Defendant did not offer any other reasons for being in the building other than to steal, this proves his intent, but the 5th Amendment requires the State to bear the burden of proving every element of the crime beyond a reasonable doubt. Conviction reversed.

State v. Olivas, 2014 WL 2190897 (Mo. App. W.D. May 27, 2014):
Holding: (1) Where 16-year-old Juvenile-Defendant was convicted of first degree murder as an adult and given a mandatory sentence of life in prison without parole, Juvenile's sentence violates *Miller v. Alabama*, 132 S.Ct. 2455 (2012), because there was no consideration of individualized circumstances in his case, and he must be re-sentenced pursuant to the procedures set forth in *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013); and (2) even though Juvenile-Defendant waived jury sentencing, such waiver will not be enforced on remand because Juvenile's waiver was made prior to *Miller*, and he is entitled to be able to choose jury sentencing under *Hart*.

State v. Williams, 2014 WL 705429 (Mo. App. W.D. Feb. 25, 2014):
Where (1) Juvenile-Defendant was convicted of first degree murder and sentenced to LWOP, and (2) while direct appeal was pending, the U.S. Supreme Court held in Miller that a mandatory sentence of LWOP for juveniles without considering mitigating circumstances and the possibility of a lesser sentence violated the 8th Amendment, case must be remanded for further proceedings to determine sentence pursuant to Missouri Supreme Court's direction in State v. Hart, 404 S.W.3d 232 (Mo. banc 2013).
Facts: Defendant, who was a juvenile at time of offense, was convicted of first degree murder and sentenced to LWOP. While his direct appeal was pending, the U.S. Supreme Court decided *Miller v. Alabama*, 132 S.Ct. 2544 (2012), which held that automatic sentences of LWOP for juveniles violate the 8th Amendment.
Holding: Because Defendant's conviction was pending on direct appeal when *Miller* was decided, his conviction was not "final" and *Miller* applies. The Missouri Supreme

Court in *Hart* established a procedure to apply *Miller* . Defendant's case is remanded to apply that procedure. A new sentencing proceeding must be held at which the jury will be instructed that if it is not persuaded that LWOP is the just and appropriate sentence under all the circumstances, additional instruction regarding punishment will be given. If the jury does not then impose LWOP, the court must declare Sec. 565.020 void as applied to Defendant on grounds that it does not provide a constitutionally valid punishment. The court must then vacate the jury's verdict of first degree murder, and enter a verdict of second degree murder under Sec. 565.020.1(1) as a lesser-included offense. The court must then instruct the jury as to the range of punishment for second degree murder.

State v. Doss, 2013 WL 1197484 (Mo. App. W.D. March 26, 2013):
(1) Where the State submits an instruction in the disjunctive for a single robbery, both alternatives must be supported by sufficient evidence; thus, even though the evidence may be sufficient to prove Defendant stole a cell phone, where it was not sufficient to prove that Defendant stole a wallet and the verdict director stated that Defendant "took a cell phone and/or wallet," the evidence was insufficient for robbery; and (2) in penalty phase, the State could not introduce Defendant's juvenile records which would show the equivalent of only misdemeanor conduct because such records are closed under Sec. 211.271.3, and the State could not introduce juvenile records which did not show by a preponderance of evidence that Defendant actually engaged in the conduct alleged.
Facts: Defendant was charged with two counts of first degree murder, first degree robbery, and ACA. Two murder victims were found in a home. There were no cell phones or wallets found in the home. There were some statements made that indicated that a cell phone may have been taken. The jury convicted Defendant of second degree murder, first degree robbery and ACA. At penalty phase, the State, over defense objection, introduced Defendant's juvenile records which showed offenses that would be felonies and misdemeanor if committed by an adult, and also showed other misconduct.
Holding: (1) Because the State submitted a disjunctive verdict director allowing the jury to convict if they found that he "took a cell phone and/or wallet," the State had to present sufficient evidence to support each alternative. Here, there was some evidence that a co-defendant may have taken a cell phone. However, there was no evidence that any wallet was taken. The State argues that it is "logical" to assume that the victims must have had wallets, and since none were found in the home, the wallets must have been taken as part of the charged crime. While the State's argument is logical, that is not the standard for judging sufficiency of evidence. Absent some evidence that wallets were present and available to be stolen that day, there simply was not enough evidence to support a conviction for stealing a wallet. Robbery conviction reversed. (2) The State argues that the juvenile records were admissible in penalty phase under Sec. 211.321.2(2) which allows juvenile records to be open "for an offense which would be a felony if committed by an adult." Here, however, the records at issue showed conduct that would be a misdemeanor if committed by an adult, and other conduct that would be a felony. Juvenile records regarding misdemeanors are closed under Sec. 211.271.3, while records regarding felonies are open under Sec. 211.321.2(2). Here, it is possible that the juvenile court found Defendant to have engaged in only the misdemeanor-equivalent acts, and thus, the records would not be admissible. Additionally, while the records demonstrate that Defendant engaged in at least some of the acts, the problem is that there are criminal

acts alleged in the "motion to modify" the prior juvenile disposition for which there is not evidentiary support that Defendant committed the acts, and the documents do not show which acts Defendant was adjudicated as having committed. Defendant was prejudiced because the jury asked to review the juvenile records, and sentenced Defendant to high sentences despite having found second degree murder. On retrial of the penalty phase, where the records make reference only to "assaults," the State will have to present additional evidence showing that these were felony-equivalent assaults; otherwise, the "assaults" are not admissible because they may have been misdemeanor-equivalent assaults.

In the Interest of A.G.R. Juvenile Officer v. A.G.R., No. WD73007 (Mo. App. W.D. 12/27/11):
(1) Where Juvenile is charged with only a "status offense," Juvenile does not need to be competent for case to proceed; (2) even though Juvenile had been released from court supervision, appeal was not moot where it raised important issues of first impression which might otherwise evade appellate review.
Facts: Juvenile was originally charged with a "delinquency offense" that would have resulted in a felony sex charge if Juvenile were an adult. However, the State filed an amended petition charging only "status offense" acts constituting behavior injurious to the welfare of the child. After a court-ordered competency evaluation, the court found Juvenile to be incompetent. Defense counsel filed a motion to dismiss or to suspend proceedings while Juvenile was incompetent. The court denied the motions. The status offense proceeded to disposition, and Juvenile was ordered placed in care and custody of his mother under supervision of the Children's Division and court. Juvenile appealed.
Holding: As an initial matter, since the appeal was filed, Juvenile has been released from court supervision, and hence, there is a question whether the appeal is moot. Because the appeal raises important issues of first impression that may otherwise evade appellate review, the appellate court will decide the case. Regarding the merits, this case is not one where Juvenile was charged with a "delinquency offense," i.e., a criminal-type offense. Instead, he was ultimately charged with a "status offense." A status offense is unique to juveniles and is an infraction that allows the juvenile court to take jurisdiction of a child alleged to be in need of care due to behavior injurious to welfare. Such status cases are fundamentally different from delinquency cases under Sec. 211.031.1(3), in which the juvenile is alleged to have violated a state law or municipal ordinance. Missouri law treats "status offenses" differently than "delinquency offenses." How the offense is charged determines what rights will be accorded the juvenile. Here, the court did not err in denying the motion to dismiss or suspend proceedings while Juvenile was incompetent because Juvenile was charged with a "status offense."

*** Miller v. Alabama, ___ U.S. ___, 2012 WL 236859 (U.S. 2012):**
Holding: Mandatory life without parole for juveniles convicted of homicide offenses violates 8th Amendment.

In re Pendleton, 2013 WL 5486170 (3d Cir. 2013):
Holding: Juvenile Petitioners made a prima facie showing that new constitutional rule banning juvenile LWOP was retroactive, so as to permit filing of second habeas petition.

U.S. v. Howard, 96 Crim. L. Rep. 272 (4th Cir. 12/4/14):
Holding: Upward variance under USSG was "substantively unreasonable" for a repeat offender whose prior felonies were committed when he was 18 years old or younger; court should recognize recent U.S. Supreme Court cases regarding diminished culpability of juveniles, and take into account that the prior offenses were committed when Defendant was a juvenile.

Martin v. Symmes, 97 Crim. L. Rep. 55 (8th Cir. 4/6/15):
Holding: 8th Amendment prohibition on juvenile life without parole sentences announced in *Miller* is not retroactive.

Moore v. Biter, 93 Crim. L. Rep. 642, 2013 WL 4011011 (9th Cir. 8/7/13):
Holding: The Ninth Circuit ordered federal habeas relief based on *Graham* for Juvenile-Defendant who would not become eligible for parole until he was 144 years old, for non-homicide sentences totaling 254 years. Sentence of 254 years is materially indistinguishable from a life sentence without parole because Juvenile will not be eligible for parole within his lifetime, regardless of his remorse, reflection, or growth.

Songster v. Beard, 2014 WL 3731459 (E.D. Pa. 2014):
Holding: *Miller*'s ban on automatic juvenile LWOP is retroactive.

State v. Butler, 93 Crim. L. Rep. 313, 2013 WL 2353802 (Ariz. 5/30/13):
Holding: Even though State has an implied consent law for DWI, the voluntariness of Driver-Defendant's consent must still be based upon the totality of the circumstances, not just invocation of the implied-consent law because *Missouri v. McNeely* (U.S. 2013) teaches that a blood draw in DWI is subject to 4th Amendment constraints; here, Juvenile's consent was not voluntary because his parents were not notified before the chemical test.

Mario W. v. Kaipio, 2012 WL 2401343 (Ariz. 2012):
Holding: Taking DNA samples from juveniles who had been charged but not yet adjudicated violated 4th Amendment.

People v. Gutierrez, 95 Crim. L. Rep. 214 (Cal. 5/5/14):
Holding: Statutory presumption in favor of life in prison without parole violates *Miller*'s ban on mandatory LWOP sentences for juveniles.

In re Alonzo J., 95 Crim. L. Rep. 50 (Cal. 4/3/14):
Holding: California's Rules of Court, which expressly require counsel for Juvenile to consent to Juvenile pleading guilty before Juvenile can plead, also require counsel's consent for Juvenile to enter *Alford* plea, even though the Rules state Juvenile "may enter a plea of no contest…subject to approval of the court."

People v. Caballero, 2012 WL 3516135 (Cal. 2012):
Holding: Juvenile's sentence of 110 years for non-homicide offense of attempted murder violated 8th Amendment because it did not provide a realistic opportunity to be released prior to end of term, since it exceeded a person's natural life.

Casiano v. Commissioner of Corrections, 97 Crim. L. Rep. 229 (Conn. 5/26/15):
Holding: Miller's ban on mandatory LWOP for juveniles is retroactive, and applies to "functional" LWOP; sentence of 50 years is "functional" LWOP.

State v. Riley, 96 Crim. L. Rep. 618 (Conn. 3/10/15):
Holding: 8th Amendment prohibits even discretionary LWOP for juveniles unless sentence actually considered mitigating evidence regarding youth.

Moore v. State, 94 Crim. L. Rep. 119, 2013 WL 5508540 (Ga. 10/7/13):
Holding: Even though under-age-18 Defendant agreed to a life without parole sentence to avoid the death penalty, he was entitled to sentencing relief because *Roper v. Simmons*, 543 U.S. 551 (2005), subsequently held that the 8th Amendment bans the death penalty for all offenses committed before the 18th birthday.

People v. Davis, 94 Crim. L. Rep. 769 (Ill. 3/20/14):
Holding: *Miller*'s ban on mandatory life without parole for juveniles is retroactive.

State v. I.T., 94 Crim. L. Rep. 747 (Ind. 3/12/14):
Holding: Indiana Juvenile statute which bars statements made to a mental health evaluator "in the evaluator's official capacity" from being used "as evidence against the child" on whether they committed a delinquent act provides both use immunity and derivative use immunity for Juvenile's statements.

State v. Lyle, 95 Crim. L. Rep. 539 (Iowa 7/18/14):
Holding: State law mandating that certain Juveniles serve mandatory minimum sentences violates Iowa Constitution because it deprives sentencing judges of ability to consider mitigating circumstances.

In re Geltz, 94 Crim. L. Rep. 366 (Iowa 12/6/13):
Holding: A juvenile adjudication on a charge of sexual abuse does not qualify as a predicate "conviction" that can trigger civil commitment under Iowa's SVP law.

State v. Ragland, 2013 WL 4309970 (Iowa 2013):
Holding: Even though Governor commuted Juvenile's unconstitutional life without parole sentence to "life without parole for 60 years," this was the functional equivalent of life without parole because Defendant would not be eligible for parole until age 78, and did not remove the 8th Amendment prohibition on such sentences without individualized consideration of Defendant's youth.

State v. Null and State v. Pearson, 93 Crim. L. Rep. 681, 2013 WL 4250939 and 2013 WL 4309189 (Iowa 8/16/13):

Holding: Iowa Constitution goes beyond *Miller* and *Graham*, and recognizes "effective" juvenile life without parole, such as multiple consecutive sentences that are so long in total that a juvenile would never be released; Iowa Supreme Court adopts "special procedures" judges must follow, including on-the-record findings of principles set forth in *Roper*, *Graham* and *Miller*, before imposing a lengthy sentence; a lengthy sentence "is appropriate, if at all, only in rare and uncommon cases.

State v. Dull, 97 Crim. L. Rep. 297 (Kan. 6/5/15):
Holding: State law requiring mandatory lifetime supervision of sex offenders violates 8th Amendment when applied to Juveniles; Juveniles are different under *Graham* (U.S. 2010), *Roper* (U.S. 2005) and *Miller* (U.S. 2012).

State v. Shaffer, 90 Crim. L. Rep. 330 (La. 11/23/11):
Holding: State cannot enforce statutes that require life without parole for juveniles convicted of nonhomicide offenses because this violates *Graham v. Florida*, ___ U.S. ___ (U.S. 2010).

Diatchenko v. District Attorney for Suffolk District, 97 Crim. L. Rep. 4 (Mass. 3/23/15):
Holding: Because juveniles serving life without parole must be given a meaningful opportunity for release, they are entitled to appointed counsel, experts and judicial review of their parole hearings.

Diatchenko v. District Attorney and Com. v. Brown, 94 Crim. L. Rep. 418, 2013 WL 6726856 (Mass. 12/24/13):
Holding: (1) *Miller v. Alabama* (U.S. 2013) ban against mandatory LWOP for juvenile offenders is retroactive, and (2) all prisoners who received LWOP before turning 18 must be afforded opportunity to apply for parole.

Com. v. Walczak, 979 N.E.2d (Mass. 2012):
Holding: Where grand jury seeks to indict a juvenile for murder, court is required to give instruction on mitigating circumstances and defenses because an indictment for murder would result in juvenile being tried as an adult.

State v. Ali, 96 Crim. L. Rep. 86 (Minn. 10/8/14):
Holding: Where Juvenile was sentenced to LWOP in violation of *Miller*, remedy is re-sentencing under a procedure that complies with *Miller*.

Jones v. State, 2013 WL 3756564 (Miss. 2013):
Holding: *Miller*'s prohibition against mandatory juvenile LWOP applies retroactively to cases on collateral review.

Benjamin v. State, 93 Crim. L. Rep. 357 (Miss. 6/6/13):
Holding: Police violated Juvenile's rights under *Miranda* where Juvenile had invoked his right to counsel, but police then persuaded his mother to convince him to waive his rights and be interrogated.

Parker v. State, 93 Crim. L. Rep. 401 (Miss. 6/6/13):
Holding: Even though Juvenile's sentence would allow him to be eligible for conditional release at age 65, this was tantamount to a life without parole sentence and violated *Miller v. Alabama* (U.S. 2012).

State v. Mantich, 94 Crim. L. Rep. 549 (Neb. 2/7/14):
Holding: *Miller*'s ban on automatic JLWOP sentences is retroactive.

In re State, 95 Crim. L. Rep. 671 (N.H. 8/29/14):
Holding: *Miller*'s ban on automatic LWOP for juveniles is retroactive on collateral review.

State ex rel. K.O., 94 Crim. L. Rep. 709 (N.J. 2/24/14):
Holding: Where juvenile recidivist statute called for higher sentence when a juvenile has been adjudged delinquent on two separate occasions, this required two separate *prior* adjudications, and does not count the current offense; the rule of lenity should apply in interpreting the statute given the rehabilitative goal of the juvenile system.

In re D.J.B., 94 Crim. L Rep. 539, 2014 WL 260560 (N.J. 1/16/14):
Holding: New Jersey statute which allowed expungement of an "adult" conviction if Defendant has not been convicted of a prior or subsequent crime allowed for expungement, even though another statute provided that for purposes of expungement, any act which resulted in a juvenile being adjudged a delinquent shall be classified as if committed by an adult, and Defendant had a prior delinquency adjudication; the "adult" expungment statute was not affected by the juvenile statute, which applied only to expungement of juvenile convictions.

State v. Antonio T., 96 Crim. L. Rep. 160 (N.M. 10/23/14):
Holding: Even though school officials need not give *Miranda* warnings when questioning students about a school disciplinary matter, any statements elicited aren't admissible in a subsequent delinquency proceeding unless the State proves that Juvenile made a knowing, intelligent and voluntary waiver of their right to remain silent.

People v. Santiago, 2013 WL 5610128 (N.Y. 2013):
Holding: Even though Defendant was convicted of third-degree murder in Pennsylvania at age 15, this offense could not be counted under New York's recidivist statute because under New York law, Defendant was a juvenile and could not have been prosecuted for a similar offense in New York.

State v. Arot, 2013 WL 5718189 (N.D. 2013):
Holding: Even though immigrant-Defendant's birthday was listed as "1/1/1993" on official documents, where various witnesses testified that it was common for immigrants from Sudan to have their birthdate be arbitrarily assigned by the U.S. Gov't upon their entry to the U.S. as the first day of the year of their birth, and Defendant's father testified

Defendant was born in Summer of 1993, State failed to prove that Defendant was 18 years old at time of offense, and thus, court did not have jurisdiction over Defendant.

In re C.P., 91 Crim. L. Rep. 62 (Ohio 4/3/12):
Holding: Imposing lifetime registration requirement on juvenile sex offenders violates 8th Amendment.

Com. v. Green, 2014 WL 868627 (Pa. 2014):
Holding: Compelling Defendant to disclose location of stolen items as a condition of probation violated his right against self-incrimination, because such disclosure could lead to additional charges or investigations.

In re J.B., 96 Crim. L. Rep. 350 (Pa. 12/29/14):
Holding: Automatic lifetime registration and supervision of Juvenile sex offenders violates due process in light of evidence showing Juveniles have low recidivism rates and *Miller v. Alabama*'s (U.S. 2012) direction that juvenile factors be considered.

Com. v. In re M.W., 90 Crim. L. Rep. 760 (Pa. 2/21/12):
Holding: Before entering an adjudication of delinquency under Pennsylvania's Juvenile Act, a juvenile court must find not only that the juvenile committed the acts alleged in the delinquency petition but also that the juvenile is in need of treatment, supervision, or rehabilitation.

Aiken v. Byars, 96 Crim. L. Rep. 201 (S.C. 11/12/14):
Holding: *Miller* bars non-mandatory LWOP for juveniles where judge failed to consider Juvenile's youth and mitigating circumstances; "*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."

State v. Maynard, 97 Crim. L. Rep. 236 (Wash. 5/28/15):
Holding: Where Juvenile's defense counsel failed to accept a plea offer before Defendant turned 18, Defendant should be allowed to take advantage of the original plea offer; remedy is to put Defendant back in same position he would have been before the juvenile jurisdiction expired.

State v. Toliver, 2014 WL 3605681 (Wis. 2014):
Holding: If adult court's determination of probable cause in preliminary examination of juvenile charged in adult court relates to an unspecified felony, the appellate court may review the record independently to determine whether the adult court properly found probable cause to believe juvenile committed one of the enumerated offenses over which adult court has exclusive jurisdiction.

Bear Cloud v. State, 92 Crim. L. Rep. 575 (Wyo. 2/8/13):
Holding: Statute providing life imprisonment for juveniles "according to law" is constitutional only if it specifies the time when the juveniles will be eligible for parole.

In re Wilson, 2015 WL 273186 (Cal. App. 2015):
Holding: Even though there was a "recall" procedure which allowed Juvenile who received LWOP sentence to be paroled in future, it violated *Miller* for sentencing court to not take Defendant's youth and mitigating circumstances into account at the time of the actual sentencing to LWOP.

In re Heard, 166 Cal. Rptr. 3d 824 (Cal. App. 2014):
Holding: Even though a statute provided for a mandatory youth parole hearing in the future, this did not cure *Miller* error in effective juvenile LWOP sentence of 80 years to life because the youth parole statute cannot allow the sentencing court to disregard the constitutional duty to consider juveniles and adults separately when sentencing juvenile-Defendant.

People v. Lewis, 94 Crim. L. Rep. 392 (Cal. App. 12/16/13):
Holding: Where a Juvenile has both homicide and non-homicide offenses, court must look at the sentence as a whole to determine how 8th Amendment restrictions on LWOP for juveniles applies.

People v. Ramirez, 2013 WL 4850302 (Cal. App. 2013):
Holding: Sentences imposed on juveniles which were equivalent to LWOP for first and second degree murder violated 8th Amendment; neither defendant was "the rare juvenile offender whose crime reflects irreparable corruption," even though one of the shootings was for gang affiliation; there is no reason to make a decision at sentencing to imprison a juvenile for life, since this decision is a judgment that can be made at a later parole hearing.

People v. Moffett, 148 Cal. Rptr. 3d 47 (Cal. App. 2012):
Holding: Statutory presumption in favor of LWOP of 16 and 17 year olds convicted of murder violated *Miller v. Alabama*.

People v. Argeta, 2012 WL 6028241 (Cal. App. 2012):
Holding: Sentence of 100 years without parole for 75 years was functional equivalent of LWOP as applied to a juvenile and thus violated 8th Amendment.

People v. P.A., 92 Crim. L. Rep. 244 (Cal. App. 11/15/12):
Holding: Probation condition that required Juvenile to keep his parents and probation officer informed of his "whereabouts, associates and activities" was unconstitutionally vague.

People v. J.I.A., 2011 WL 2206910 (Cal. App. 2011):
Holding: Even though 14-year old Defendant would be eligible for parole at age 70, his sentence of 50 years plus consecutive life sentences was a *de facto* life without parole sentence and violated 8th Amendment ban on such sentences for nonhomicide juveniles.

People v. Rainer, 2013 WL 1490107 (Colo. App. 2013):
Holding: Aggregate sentence of 112 years for Juvenile-Defendant, under which he would not be eligible for parole until age 75, violated 8th Amendment under *Graham*.

Peters v. State, 2013 WL 6083405 (Fla. App. 2013):
Holding: Application of Florida sentencing law after *Graham v. Florida*, which resulted in some Juveniles getting sentenced more harshly than others who had committed more serious crimes, violated the gross proportionality element of 8th Amendment.

Shingler v. State, 90 Crim. L. Rep. 300 (Fla. App. 11/16/11):
Holding: Florida recidivist statute cannot apply to juveniles to create life without parole for nonhomicide offenses because this violates *Graham v. Florida*, ___ U.S. ___ (U.S. 2010), and the statute on its face does not authorize a 40 year term of years either – only life sentences; thus, such juveniles can only be sentences under non-enhanced robbery statute.

People v. Williams, 2012 WL 6028833 (Ill. App. 2012):
Holding: *Miller* decision banning automatic LWOP for juveniles is retroactive.

State v. Williams, 2012 WL 6176856 (La. App. 2012):
Holding: Juvenile offender who was sentenced to life was eligible for parole.

In re Contempt of Dorsey, 2014 WL 4435591 (Mich. App. 2014):
Holding: 4th Amendment prohibited juvenile court, as part of adjudication of Juvenile, from ordering that juvenile's Mother submit to random drug tests; Mother did not have diminished expectation of privacy merely because her son had been adjudicated delinquent.

People v. Woolfolk, 2014 WL 783564 (Mich. App. 2014):
Holding: For determining when a juvenile turns 18 for *Miller* / mandatory life without parole purposes, court adopts the "birthday rule" whereby a person attains a given age on the anniversary date of his birth, rather than the common-law rule where a person attains that age the first moment of the day before his birth; thus, Defendant was a "juvenile" where he committed murder one day before his 18th birthday under "birthday rule."

Lewis v. State, 95 Crim. L. Rep. 193 (Tex. Crim. App. 4/30/14):
Holding: States can comply with *Miller* by modifying juvenile sentences of LWOP to life in prison with parole, without providing individualized sentencing hearings to present mitigating evidence.

Ex parte Maxwell, 94 Crim. L. Rep. 745 (Tex. App. 3/12/14):
Holding: *Miller v. Alabama*'s ban on mandatory life without parole for juveniles is retroactive.

Bear Cloud v. State, 95 Crim. L. Rep. 684 (Wyo. 9/10/14):
Holding: 8th Amendment prohibits juvenile life sentences that are the functional equivalent of LWOP; "functional equivalent" means a bright-line 39 years or more, because this is the rule the U.S. Sentencing Commission uses as the equivalent of a life sentence.

State v. Mares, 96 Crim. L. Rep. 140 (Wyo. 10/9/14):
Holding: *Miller*'s ban on automatic LWOP for juveniles is retroactive.

Malpractice

Goodman v. Wampler, 2013 WL 3548739 (Mo. App. S.D. July 15, 2013):
Holding: Even though defense counsel could have taken steps to have Plaintiff (former criminal defendant) released from prison sooner after trial court had improperly denied probation after shock incarceration without holding a hearing required by Sec. 559.115, Missouri public policy prohibits a legal malpractice claim against a defense counsel unless the Plaintiff has demonstrated actual innocence; to hold otherwise would allow plaintiffs to benefit financially from their criminal conduct.

Mental Disease or Defect – Competency – Chapter 552

State ex rel. Clayton v. Griffith, 2015 WL 1442957 (Mo. banc March 14, 2015):
Holding: Sec. 552.060.2 (regarding competency to be executed) is constitutional because it merely allows the DOC to assert that a Defendant is not competent to be executed; it does not limit a Defendant's own right to seek a judicial determination of competency. The Defendant may raise his incompetency via a writ of habeas corpus directly in the Supreme Court.

State v. O'Neal, No. ED95274 (Mo. App. E.D. 11/29/11):
Where prosecutor objected to admission of Defendant's medical records in front of the jury by saying they were "simply a way to avoid the defendant testifying," this was a direct comment on Defendant's failure to testify and a mistrial should have been granted.
Facts: Defendant was charged with attempted stealing. As part of his defense, he sought to introduce his medical records with a business records affidavit. The prosecutor objected to the records in front of the jury as "simply a way to avoid the defendant testifying." Defense counsel objected as violating defendant's rights not to testify and requested a mistrial, which the trial court overruled.
Holding: A direct reference to a defendant's failure to testify violates the rights of freedom from self-incrimination and right not to testify under the 5th and 14th Amendments, and Art. I, Sec. 19 Mo. Const. A "direct reference" uses words such as "testify," "accused" and "defendant." Here, the prosecutor's speaking objection in front of the jury was egregious because there had been a prior bench conference about the records at which the State had made an objection that had been overruled. The objection

in front of the jury may have prejudiced the jury against Defendant for using the medical records rather than testifying himself. Reversed for new trial.

In the Interest of A.G.R. Juvenile Officer v. A.G.R., No. WD73007 (Mo. App. W.D. 12/27/11):

(1) Where Juvenile is charged with only a "status offense," Juvenile does not need to be competent for case to proceed; (2) even though Juvenile had been released from court supervision, appeal was not moot where it raised important issues of first impression which might otherwise evade appellate review.

Facts: Juvenile was originally charged with a "delinquency offense" that would have resulted in a felony sex charge if Juvenile were an adult. However, the State filed an amended petition charging only "status offense" acts constituting behavior injurious to the welfare of the child. After a court-ordered competency evaluation, the court found Juvenile to be incompetent. Defense counsel filed a motion to dismiss or to suspend proceedings while Juvenile was incompetent. The court denied the motions. The status offense proceeded to disposition, and Juvenile was ordered placed in care and custody of his mother under supervision of the Children's Division and court. Juvenile appealed.

Holding: As an initial matter, since the appeal was filed, Juvenile has been released from court supervision, and hence, there is a question whether the appeal is moot. Because the appeal raises important issues of first impression that may otherwise evade appellate review, the appellate court will decide the case. Regarding the merits, this case is not one where Juvenile was charged with a "delinquency offense," i.e., a criminal-type offense. Instead, he was ultimately charged with a "status offense." A status offense is unique to juveniles and is an infraction that allows the juvenile court to take jurisdiction of a child alleged to be in need of care due to behavior injurious to welfare. Such status cases are fundamentally different from delinquency cases under Sec. 211.031.1(3), in which the juvenile is alleged to have violated a state law or municipal ordinance. Missouri law treats "status offenses" differently than "delinquency offenses." How the offense is charged determines what rights will be accorded the juvenile. Here, the court did not err in denying the motion to dismiss or suspend proceedings while Juvenile was incompetent because Juvenile was charged with a "status offense."

State v. Wilkerson, No. WD71314 (Mo. App. W.D. 2/1/11):

Even though Defendant refused to participate in mental health evaluation, where trial court had previously found reasonable cause to believe Defendant was incompetent and had ordered a mental health exam and report, Sec. 552.020 required that the trial court have a mental health report before proceeding to trial; expert could have tried to see Defendant again or used other sources to evaluate competency.

Facts: Defendant was charged with endangering a correctional officer. Defendant refused to meet with defense counsel before trial. At an initial trial, a mistrial was declared because Defendant was nonresponsive, spoke nonsense talk, and spit on defense counsel. The court then entered an order finding reasonable cause to believe Defendant had a mental disease or defect excluding fitness to proceed, and ordered a mental exam under Sec. 552.020.3. Defendant then refused to see the 552 examiner. The 552 examiner informed the court that he could not do a mental evaluation due to Defendant's refusal. Defendant was then tried again. Again at trial he was nonresponsive and

engaged in nonsense talk. Neither the court nor defense counsel raised the competency issue. After conviction, Defendant appealed.
Holding: The trial court plainly erred in proceeding to trial without a report on Defendant's competency under 552. Once a court has sufficient facts to reasonably believe a defendant may be incompetent, the court is mandated to order a 552.020 mental exam. Here, the trial court ordered a 552.020 exam, but because of Defendant's refusal to see the doctor, a report was never done. There is no precedent standing for the proposition that the mandatory requirements of 552.020.3 are rendered discretionary by a defendant's single refusal to participate in the process. The doctor could have sought to see the Defendant again, or used other sources to evaluate competency such as records and witness interviews. As a remedy, it is not adequate to remand the case simply to determine if Defendant was competent at his 2009 trial. To protect his due process rights not to have been tried while incompetent, the conviction and sentence are reversed, and a new trial ordered.

*** Kansas v. Cheever, ___ U.S. ___, 94 Crim. L. Rep. 353 (U.S. 12/11/13):**
Holding: Where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, it does not violate the 5th Amendment privilege against self-incrimination for the prosecution to offer evidence from a court-ordered evaluation for the limited purpose of rebutting the defendant's evidence; here, after Defendant gave notice that he intended to present a defense based on lack of mental capacity, the prosecution requested and the court ordered an evaluation by the State; the Supreme Court held it did not violate the 5th Amendment privilege against self-incrimination for the prosecution to use this at trial as rebuttal evidence to Defendant's mental health defense; "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal."

*** Ryan v. Gonzales, 2013 WL 68690, ___ U.S.___ (U.S. 2013):**
Holding: Federal habeas petitioners do not have a right to a stay of habeas proceedings under the 6th Amendment right to counsel or statutory right to counsel even though the petitioners are incompetent during the proceedings.

U.S. v. Mahoney, 2013 WL 2382596 (1st Cir. 2013):
Holding: Defendant's challenge to an initial order of incompetency was not rendered moot by a later finding that there was not substantial likelihood he would regain competency, since Defendant continued to have an interest in the initial order since this triggered Defendant's continuing confinement.

Carter v. Bradshaw, 89 Crim. L. Rep. 317 (6th Cir. 5/26/11):
Holding: Petitioners have right to be mentally competent to assist counsel in federal habeas proceedings.

U.S. v. Grigsby, 93 Crim. L. Rep. 152 (6th Cir. 4/11/13):
Holding: Gov't failed to demonstrate sufficient interest in forcibly medicating Defendant to make him competent to stand trial where the Defendant's civil commitment

would likely exceed any jail time he might receive and the side effects of the drugs might interfere with his ability to assist counsel.

U.S. v. Ross, 2012 WL 6734087 (6th Cir. 2012):
Holding: Where record was unclear whether standby counsel had provided meaningful adversarial testing of Defendant's competency, remand was required.; 6th Amendment requires counsel at a competency hearing even where Defendant previously waived counsel.

Ata v. Scutt, 2011 WL 5903658 (6th Cir. 2011):
Holding: Habeas petitioner was entitled to evidentiary hearing regarding whether his mental incompetence warranted tolling the habeas limitations period because his motion alleged specific enough facts to create a causal link between his untimely petition and his mental incompetence and his allegations were consistent with the record.

U.S. v. Debenedetto, 2014 WL 2723871 (7th Cir. 2014):
Holding: Gov't failed to prove it had an important interest in involuntarily medicating Defendant to make him competent for trial; court failed to consider length of sentence by referencing USSG or statutory maximum, or his current or future confinement.

U.S. v. Gillenwater, 93 Crim. L. Rep. 444, 2013 WL 2930502 (9th Cir. 6/17/13):
Holding: In a case of first impression in the federal circuits, 9th Circuit holds that defendants have a constitutional right to testify at their own pretrial competency hearings, and only the defendants, not their lawyers, can waive that right; however, a defendant may be deemed to have waived the right if he sits mute when defense counsel elects not to call him as a witness. Constitutional right to testify stems from 6th and 14th Amendments' right to testify at trial.

U.S. v. LKAV, 93 Crim. L. Rep. 48 (9th Cir. 4/2/13):
Holding: Commitment of Juvenile for competency exam must be done under the Federal Juvenile Delinquency Act, not the general criminal commitment statute.

U.S. v. Chavez, 94 Crim. L. Rep. 239, 734 F.3d 1247 (10th Cir. 11/13/13):
Holding: A court order authorizing involuntary medication of non-dangerous Defendant to make him competent for trial must include the specific maximum dosages; "[g]ranting the government … unfettered discretion in determining which drugs will be administered to a defendant does not conform with the findings of *Sells*."

U.S. v. Goodman, 88 Crim. L. Rep. 573, 2011 WL 258282 (10th Cir. 1/28/11):
Holding: Trial court abused its discretion in NGRI case in limiting the defense to presenting lay witness testimony about Defendant's mental condition only to the days immediately before and after the charged crime.

U.S. v. Diaz, 2011 WL 112495 (11th Cir. 2011):
Holding: Gov't has burden of proof in seeking involuntary medication of Defendant.

U.S. v. Dillon, 94 Crim. L. Rep. 443 (D.C. Cir. 12/24/13):
Holding: Appellate review of a trial court's order to involuntarily medicate a defendant for competency is reviewed de novo for legal issues but under "clear error" standard regarding findings of fact.

U.S. v. Duncan, 2013 WL 4827742 (E.D. Va. 2013):
Holding: Gov't lacked important governmental interest to forcibly medicate Defendant charged with unlawful possession of firearm to make him competent.

Porta v. State, 2013 WL 3070389 (Ark. 2013):
Holding: Even though forensic mental health examiner had warned Defendant about the nonconfidential nature of his competency exam, trial court erred in allowing his inculpatory statements made during the exam to be admitted at trial, because this violated his constitutional right not to incriminate himself and forced him to choose between one constitutional right in order to claim another.

People v. Mills, 92 Crim. L. Rep. 117 (Cal. 10/18/12):
Holding: Jury instruction in guilt phase that Defendant is presumed sane violates state law where competency will be resolved in a separate competency phase.

People v. Lightsey, 2012 WL 2685249 (Cal. 2012):
Holding: Trial court erred in allowing questionably competent Defendant to represent himself at a competency hearing; *Faretta* right to self-representation did not override Penal Code provision requiring appointment of counsel at competency hearing where trial court has reason to doubt Defendant's competency.

People v. Holt, 96 Crim. L. Rep. 228 (Ill. 11/20/14):
Holding: The 6th Amendment right to counsel does not guarantee a defendant the right to an attorney who will argue that client is competent; where attorney believes client is not competent, attorney fulfills their obligation by investigating competency independently of the State, and taking appropriate action thereafter.

State v. I.T., 94 Crim. L. Rep. 747 (Ind. 3/12/14):
Holding: Indiana Juvenile statute which bars statements made to a mental health evaluator "in the evaluator's official capacity" from being used "as evidence against the child" on whether they committed a delinquent act provides both use immunity and derivative use immunity for Juvenile's statements.

State v. Beck, 2014 WL 4746700 (Iowa App. 2014):
Holding: Defendant charged with assault can assert diminished capacity defense, since assault requires proof of specific intent to cause pain or injury; diminished capacity is an available defense to specific intent crimes.

State v. Rodriguez, 90 Crim. L. Rep. 454 (Iowa 12/23/11):
Holding: Privilege against self-incrimination limits use of incriminating statements made during psychiatric examination to determine competency to waive *Miranda* rights.

Com. v. Shin, 2014 WL 4745347 (Mass. App. 2014):
Holding: Even though Defendant claims lack of responsibility due to failure to take prescribed mental health medication, the only issue is whether at the time of the crime, Defendant was criminally responsible; the court should not add additional analysis of whether the failure to take the medication caused the lack of responsibility.

Coleman v. State, 2013 WL 3067576 (Miss. 2013):
Holding: Defendant whose motion for mental exam was granted was entitled to a full hearing on his competency where he could challenge the conclusions of the examiner, and this was not harmless error.

Haraden v. State, 90 Crim. L. Rep. 301 (Me. 11/17/11):
Holding: Movant has right to be competent during PCR proceedings.

State v. Penado, 2011 WL 4635057 (Neb. 2011):
Holding: State's petition for appeal of trial court's finding that defendant was not competent to stand trial was denied because the finding of incompetency was not a final order, in that further action was required to completely dispose of the case.

State v. Tamayo, 88 Crim. L. Rep. 257 (Neb. 11/19/10):
Holding: Even though Defendant requested a mental exam to pursue NGRI defense, the time for the exam is not automatically excluded from the statutory speedy trial clock.

People v. Gonzalez, 94 Crim. L Rep. 585 (N.Y. 2/13/14):
Holding: Defendant is not required to give pretrial notice of a mental defense where he relies solely on the State's evidence to request a jury instruction on the matter and does not present any evidence for the defense; the notice requirement is designed to prevent prosecutors from being surprised, and they cannot be surprised by their own evidence; also, it would be "impractical" to require such notice, before the prosecution has presented the evidence on which the defense is based.

People v. Max, 2012 WL 6115635 (N.Y. 2012):
Holding: Where during guilty plea colloquy Defendant said he had been in a psychotic state and hearing voices at time of crime, plea court had a duty to inquire further as to Defendant's possible assertion of an NGRI defense before accepting the plea.

State v. Harris, 2015 WL 266924 (Ohio 2015):
Holding: Where Defendant had abandoned his NGRI defense before trial and was not pursuing a mental health defense, court violated Defendant's right against self-incrimination by allowing State in its case-in-chief to call psychologist who had examined Defendant for State to testify that he was faking mental illness.

State v. Lopes, 2014 WL 1101466 (Or. 2014):
Holding: State's interest in prosecuting Defendant for sexual abuse was not sufficiently important to justify involuntary medication under *Sell* to restore Defendant to

competency, where Defendant had been confined longer in a mental hospital than he would be if convicted of the crime.

State v. Berget, 2013 WL 28400 (S.D. 2013):
Holding: Sentencing court erred in using Defendant's unwarned statements to a psychiatrist during a pretrial competency hearing to impose the death penalty, since this violated *Estelle v. Smith*, 451 U.S. 454 (1981).

State v. Prion, 91 Crim. L. Rep. 70 (Utah 3/20/12):
Holding: Double jeopardy prohibited an increase in Defendant's sentence at a resentencing after he had been found "guilty [but] mentally ill."

State v. Dang, 94 Crim. L. Rep. 208 (Wash. 10/31/13):
Holding: Where statute for revoking NGRI acquittees who have violated the terms of their release provided that "the issue to be determined is whether the conditionally released person did or did not adhere to the terms of conditions of his release, or whether the person presents a threat to public safety," the only constitutional interpretation of the statute is that the acquittee's failure to adhere to the terms of release is not sufficient by itself to support a revocation, but the court must also make a specific finding of dangerousness; under *Foucha v. Louisiana*, 504 U.S. 71 (1992), mental illness is not sufficient alone to restrict a person's liberty, and there must also be evidence that the person poses a danger to others.

State v. Daniel, 2015 WL 1917031 (Wis. 2015):
Holding: Once defense attorney raised issue of Movant's competency in postconviction case, burden was on state to prove by preponderance of evidence that Movant was competent to proceed.

In re Greenshields, 2014 WL 3408692 (Cal. App. 2014):
Holding: Persons found NGRI have same rights to challenge involuntary medication as persons committed for other reasons, such as sexually violent predator; NGRI persons must be granted a hearing on issue to determine if they can refuse medications and if they are "recently dangerous."

People v. Blackburn, 2013 WL 1736497 (Cal. App. 2013):
Holding: Where there is cause to doubt a mentally disordered offender-committee's capacity to decide whether a bench trial or jury trial is in his best interests in a petition to extend his commitment, his counsel can make this decision even over committee's objection.

People v. Cortes, 2011 WL 83732 (Cal. App. 2011):
Holding: Trial court abused discretion in limiting psychiatrist's testimony about Defendant's diminished capacity to abstract conditions and their effect on the general population, rather than discussing Defendant's condition specifically as applied to Defendant.

Martin v. State, 2013 WL 646231 (Fla. App. 2013):
Holding: Evidence that Defendant, on account of his paranoid delirium, believed he was being threatened or attacked was admissible for purposes of supporting his self-defense claim for assault on officer, and supported a jury instruction on self-defense.

People v. Quin, 2012 WL 751561 (N.Y. Sup 2012):
Holding: No statutory or other legal basis existed to permit the prosecution to be present at, or videotape, the defendant's competency hearing in an attempted assault prosecution.

State v. Handy, 2011 WL 3328794 (N.J. Super. Ct. App. 2011):
Holding: Where Defendant wants to have a trial to force the State to prove his guilt, the State is not allowed to first require Defendant to have a trial on the issue of his sanity, which could lead to his indefinite commitment in mental institution.

State v. Singleton, 2011 WL 676976 (N.J. Super. Ct. App. Div. 2011):
Holding: NGRI Defendant who believed he killed victim as part of command from God was entitled to a jury instruction that insanity includes both "legal wrong" and "moral" wrong" in determining the right-wrong test.

Druery v. State, 2013 WL 5808182 (Tex. App. 2013):
Holding: Even though capital Defendant knew at least some of the time that he was scheduled for execution, where because of mental illness he did not believe he committed the murder and did not think he would be executed some of the time, this was a substantial showing of incompetency to be executed.

Staley v. State, 93 Crim. L. Rep. 764, 2013 WL 4820128 (Tex. App. 9/11/13):
Holding: State cannot execute inmate who was made competent through a trial court's unauthorized forcible medication order.

Ex Parte Reinke, 2012 WL 2327840 (Tex. Crim. App. 2012):
Holding: Maximum period of commitment in mental health facility for Defendant found incompetent to stand trial was the un-enhanced maximum punishment for the underlying offense.

Presence at Trial

U.S. v. Salim, 2012 WL 3631159 (2d Cir. 2012):
Holding: Defendant's wavier of his right to be present at resentencing was not voluntary where he said he was waiving his right to be present because he had previously been mistreated by jail guards.

U.S. v. Collins, 2012 WL 34044 (2d Cir. 2012):
Holding: During ex parte exchange which occurred without consultation with counsel, the trial court emphasized the importance of reaching a verdict to a dissenting juror, thereby depriving defendant of his right to be present, which was not harmless error.

U.S. v. Williams, 89 Crim. L. Rep. 211 (5th Cir. 5/11/11):
Holding: Defendant cannot be forced to appear at sentencing only via videoconferencing; this violates Rule 43(a), which requires actual presence.

U.S. v. Williams, 2011 WL 1774516 (6th Cir. 2011):
Holding: Conducting sentencing hearing by videoconference violated Defendant's right to be present at sentencing.

U.S. v. Lewis, 89 Crim. L. Rep. 381 (8th Cir. 5/27/11):
Holding: Plea agreement which provided that Defendant, his attorney or the Gov't can make whatever comment they deem appropriate at sentencing gave Defendant the right to be present when his sentence was reduced pursuant to Rule 35(b).

Morehart v. Barton, 2011 WL 1599648 (Ariz. 2011):
Holding: Murder victim's family had no right to attend ex parte hearing on defense mitigation investigation.

Ward v. State, 2011 WL 680213 (Ga. 2011):
Holding: Trial court's removal of juror after closing argument without Defendant's presence violated Defendant's right to be present at trial.

State v. Kaulia, 2013 WL 68332 (Haw. 2013):
Holding: Trial court was required to advise Defendant of rights he was losing by absenting himself from trial.

People v. Phillips, 89 Crim. L. Rep. 75 (Ill. 3/24/11):
Holding: Even though a bail bond paper advised defendants that if they failed to appear for trial the trial could proceed in their absence, the written advisory did not satisfy state law that a judge presiding at arraignment personally advise a defendant of this.

People v. Rivera, 95 Crim. L. Rep. 392 (N.Y. 6/10/14):
Holding: Defendant's absence when trial judge provided supplemental jury instructions to jurors was structural error requiring new trial, even though defense counsel did not object.

State v. Irby, 88 Crim. L. Rep. 544, 2011 WL 241971 (Wash. 1/27/11):
Holding: Where judge and counsel conducted discussions about specific venirepersons via email without any involvement of Defendant, this violated Defendant's right to be present during voir dire.

People v. Espinoza, 2015 WL 358798 (Cal. App. 2015):
Holding: Even though pro se Defendant intentionally failed to appear for second day of trial with the intention of causing a mistrial, court violated due process right to present a defense and Defendant's confrontation rights by proceeding with the trial without him;

there was no evidence Defendant knew the trial would proceed without him, and court could have appointed counsel to represent Defendant.

State v. Menefee, 2014 WL 7450769 (Or. App. 2014):
Holding: Even though pro se Defendant had disruptive behavior, trial court violated his right to representation by removing him from courtroom and continuing with trial; while Defendant can forfeit the right to be present and right to self-representation, he does not necessarily forfeit the right to any representation; judge should have terminated Defendant's right to self-representation and advised of right to representation.

Privileges

State ex rel. Clemons v. Larkins, 2015 WL 7572030 (Mo. banc Nov. 24, 2015):
(1) Habeas relief granted where State violated Brady by failing to disclose that a probation office-Witness had seen injuries on Defendant's face which would have supported his allegation that his confession was coerced by police; Defendant was prejudiced because this evidence could have led to granting his motion to suppress, or affected the fairness of the trial because the jury was asked to decide if his confession was voluntary and Defendant was precluded from presenting evidence that it was coerced; (2) Even though the habeas special master drew a negative inference from Defendant's assertion of his 5th Amendment privilege against self-incrimination when the State questioned him in the habeas proceedings about whether he committed the crime, Defendant had a constitutional right to choose not to testify at his trial, and his silence cannot factor into whether Defendant was prejudiced at his trial by the Brady violation.
Facts: Defendant alleged in a pretrial suppression motion and attempted to allege at trial that his confession was coerced because police beat him. Before trial, Defendant called his attorney and family members to testify as to injuries on his face. Police testified they did not see any injuries, and did not coerce him. The trial court overruled the motion to suppress. At trial, Defendant presented family members to testify about injury to his face. The State moved to prohibit Defendant from arguing that police caused the injuries, because Defendant's evidence was only that he had injures, not how they were caused. The trial court precluded Defendant from arguing that his confession was coerced, even though the jury was instructed that it had to find whether the confession was voluntary. Defendant was convicted and sentenced to death. After state direct appeal and postconviction proceedings, and various federal proceedings, Defendant sought state habeas relief on grounds of a newly discovered *Brady* violation, in that the State failed to disclose a probation office-Witness who had observed facial injuries on Defendant, and had reported this to prosecutors and prepared a written report about it, which prosecutors apparently altered to conceal the information about the facial injuries.
Holding: (1) Evidence that has been deliberately concealed by the State is not reasonably available to counsel and constitutes "cause" for raising otherwise procedurally barred claims in habeas. Defendant was prejudiced by the failure to reveal the Witness. The Witness would have lent substantial credibility to Defendant's claim that his confession was coerced. The Witness worked for the State probation office, so did not have the same potential bias that Defendant's family members and attorney had. Even

though family members and Defendant's attorney testified about Defendant's injuries, the Witness' testimony would not have been "merely cumulative" because it went to the very root of the matter in controversy, the decision of which turned on the weight of the evidence. Witness offered independent, objective and impartial corroboration of Defendant's allegation of police coercion; the credibility of this allegation turned exclusively on the weight of the evidence. The Witness' testimony may have caused a different ruling on the motion to suppress, and Defendant was denied a fair trial because the jury was not able to hear Witness' testimony in determining if Defendant's confession was voluntary. (2) During the habeas hearing, Defendant asserted his 5th Amendment privilege against self-incrimination when the State questioned him about whether he committed the crime. The habeas special master drew a negative inference from this. At trial, Defendant had a constitutional right to choose not to testify, and the constitutional guarantees that no adverse inference be drawn from that. As such, Defendant's silence in response to the State's questions cannot factor into this Court's determination of whether Defendant was prejudiced at his trial by the State's failure to reveal with Witness information.

State ex rel. Nothum v. Walsh, No. SC92268 (Mo. banc 7/31/12):
Even though Prosecutor had granted use immunity to Debtors under Sec. 513.380.2, Debtors could still assert their 5th Amendment privilege not to testify since use immunity is more limited than the constitutional privilege.
Facts: Creditors sought to compel Debtors to testify about various assets. Prosecutor had granted use immunity to Debtors under Sec. 513.380.2. Debtors asserted their 5th Amendment privilege against self-incrimination and refused to testify. Trial court held Debtors in contempt. Debtors sought writ of prohibition.
Holding: To supplant the privilege against compulsory self-incrimination, the scope of immunity granted must be co-extensive with the scope of the constitutional privilege, which includes both "use immunity" and "derivative use immunity." Here, Debtors received immunity pursuant to Sec. 513.380.2, which authorizes a prosecutor only to provide "use immunity" to a judgment debtor. A prosecutor has no inherent authority to provide immunity beyond the authority granted by Missouri statutes. The issue of whether a trial judge has inherent authority to grant immunity has not been addressed in Missouri and is not presented here. Here, the only immunity granted was "use immunity." Such immunity did not include "derivative use immunity" and so it was not co-extensive with the 5th Amendment privilege. Thus, the trial court abused its discretion in compelling Debtors to testify. Writ of prohibition granted.

State ex rel. Nothum v. Kintz, No. ED95280 (Mo. App. E.D. 2/2/11):
Holding: Where judgment-debtors invoked their 5th Amendment privilege against self-incrimination and refused to answer interrogatories or give testimony about their property, the trial court could not compel them to testify absent a finding that, as a matter of law, the witness' response to the questions could not possibly intend to incriminate them. Here, the trial court failed to make such a finding. Writ of prohibition granted to preclude trial court from holding judgment-debtors in contempt.

U.S. v. Treacy, 88 Crim. L. Rep. 818, 2011 WL 799781 (2d Cir. 3/9/11):
Holding: The standard for civil cases also applies to criminal cases for overcoming the journalist's privilege against the disclosure of nonconfidential information; movant is entitled to discovery if he can demonstrate that the material at issue is of likely relevance to a significant issue in the case and not reasonably available from other sources.

U.S. v. Shannon, 2014 WL 4401054 (3d Cir. 2014):
Holding: Defendant's right to remain silent was violated where Gov't questioned him at trial why he had not come forward earlier to police, even though he had previously been given *Miranda* warning.

U.S. v. Nelson, 94 Crim. L. Rep. 114 (5th Cir. 10/14/13):
Holding: Although a prior defense counsel can be called by the Gov't to testify about some matters which occurred at a proffer after Defendant backed out of the plea deal (such as the voluntariness of Defendant's signature on documents), Defendant's attorney-client privilege was violated where Gov't called prior defense counsel to testify at trial that Defendant "understood" and "agreed with" the criminal charge against her.

Lampton v. Diaz, 89 Crim. L. Rep. 123 (5th Cir. 4/18/11):
Holding: Absolute prosecutorial immunity does not apply to a U.S. attorney who after trial gave private federal tax records to a state ethics commission; immunity does not extend to "post-trial conduct relating to a new action before a new tribunal."

Convertino v. DOJ, 97 Crim. L. Rep. 608 (6th Cir. 7/31/15):
Holding: Reporter has 5th Amendment privilege against self-incrimination, and cannot be forced to reveal his source who leaked government documents regarding a former prosecutor's alleged misconduct.

U.S. v. Gonzalez, 2012 WL 206266 (9th Cir. 2012):
Holding: Defendants' filing of motion to vacate does not unilaterally waive joint defense privilege.

U.S. v. Martoma, 2013 WL 4502829 (S.D. N.Y. 2013):
Holding: Gov't lacked standing to assert attorney-client privilege on behalf of a cooperating witness from whom Defendant was seeking documents via a motion to compel; Witness did not authorize the Gov't to assert his rights and moved to assert them himself.

People v. Gonzales, 92 Crim. L. Rep. 787 (Cal. 3/18/13):
Holding: Even though Defendant was seeing a therapist as a condition of his parole, the statutory doctor-patient privilege applied and State could not obtain the therapy records to use in SVP proceeding against Defendant.

State v. Lenarz, 89 Crim. L. Rep. 636, 2011 WL 2638158 (Conn. 7/19/11):
Holding: Where law enforcement seized Defendant's computer pursuant to a search warrant for child sex abuse and the computer contained confidential communications

between Defendant and his attorney about trial strategy, the charges must be dismissed to protect the attorney-client privilege and 6th Amendment right counsel, even though the discovery of the confidential information was inadvertent and there was no showing of prejudice.

Neuman v. State, 97 Crim. L. Rep. 331 (Ga. 6/15/15):
Holding: Reports and notes of two mental health experts hired by defense as consulting experts in murder prosecution regarding Defendant's mental capacity were protected by attorney-client privilege; court rejects State's argument that Defendant forfeited attorney-client privilege regarding these experts by asserting a mental capacity defense to murder; court rejects State's argument that mental health evidence is "unique" because the evidence can only come from Defendant himself.

In re Prosecutor's Subpoena Regarding S.H. and S.C., 93 Crim. L. Rep. 11 (Ind. 3/27/13):
Holding: Where Prosecutor has not filed a charge or initiated a grand jury proceeding, Prosecutor may not compel a person to testify under a grant of use immunity when that person is the primary target of the investigation and has asserted a right against self-incrimination.

State v. Washington, 93 Crim. L. Rep. 359 (Iowa 6/7/13):
Holding: Where judge imposed additional community service on Defendant after he refused to answer a question at sentencing about drug use, this violated Defendant's 5th Amendment privilege against self-incrimination.

State v. Rodriguez, 90 Crim. L. Rep. 454 (Iowa 12/23/11):
Holding: Privilege against self-incrimination limits use of incriminating statements made during psychiatric examination to determine competency to waive *Miranda* rights.

State v. Holton, 89 Crim. L. Rep. 692 (Md. 7/13/11):
Holding: Where statute gave legislators "speech and debate" immunity from criminal prosecution, an indictment resulting from evidence derived from legislative votes had to be dismissed.

Com v. Leclair, 2014 WL 5041477 (Mass. 2014):
Holding: Even though Prosecutor said he did not intent to charge Witness, non-immunized Witness was entitled to invoke 5th Amendment privilege against self-incrimination in response to illegal drug use on day of incident, where answers could implicate Witness in criminal activity and provide leads for a subsequent investigation.

In re Grand Jury Investigation, 96 Crim. L. Rep. 421 (Mass. 1/12/15):
Holding: Where a search warrant was needed to obtain a Defendant's cell phone (but warrant has not been sought), Grand Jury cannot obtain the cell phone by subpoenaing it, and this is true even though Defendant gave the cell phone to his lawyer; "If a client could not be compelled to produce materials because of the right against self-

incrimination, and if the client transfers the material to the attorney for the provision of legal advice, an attorney likewise cannot be compelled to produce them."

State v. Plouffe, 2014 WL 3429595 (Mont. 2014):
Holding: Right against self-incrimination prohibited State from using confidential interviews of Defendant's drug court treatment program in later prosecution for drug crime; Defendant was not free to admit, deny or refuse to answer questions in drug court because this would have resulted in him being terminated.

State v. Harris, 2015 WL 266924 (Ohio 2015):
Holding: Where Defendant had abandoned his NGRI defense before trial and was not pursuing a mental health defense, court violated Defendant's right against self-incrimination by allowing State in its case-in-chief to call psychologist who had examined Defendant for State to testify that he was faking mental illness.

State v. Babson, 95 Crim. L. Rep. 248 (Or. 5/15/14):
Holding: Legislators' "speech or debate" privilege does not shield them from answering questions about their roles in enforcing a law regulating protests on the capitol grounds.

People v. Rivera, 97 Crim. L. Rep. 153 (N.Y. 5/5/15):
Holding: Even though state mandatory reporting law required Doctor-Psychiatrist to report Defendant's statement that he sexually abused a child to police (which Doctor did), the mandatory reporting law did not waive the doctor-patient privilege for Doctor's testimony at trial; the Legislature did not create an express exception permitting Doctor to testify concerning admissions made by a criminal defendant when the admissions were made during diagnosis and treatment.

Keough v. State, 90 Crim. L. Rep. 420 (Tenn. 12/9/11):
Holding: Movant seeking postconviction relief is entitled to testify at postconviction hearing without cross-examination under postconviction rule that states that "under no circumstances shall petitioner be required to testify regarding the facts of the conviction … unless necessary to establish the allegations of the petition." Court notes whether the privilege against self-incrimination applies to a postconviction case remains an open question, but the state rule was designed to accomplish the same goal; the movant should not be dissuaded from testifying due to fear of self-incrimination.

People v. Petrilli, 2014 WL 2210883 (Cal. App. 2014):
Holding: Even though Defendant's wife testified at grand jury, this did not waive her right to assert spousal privilege at the later trial.

State v. Topps, 2014 WL 3730009 (Fla. App. 2014):
Holding: Even though after arrest Defendant made an incriminating statement to emergency room doctor in the presence of an Officer, the statement was inadmissible at trial; Officer's presence was necessary for security and did not defeat the doctor-patient privilege; Defendant's statement was necessary for diagnosis and treatment and explained why he was at the emergency room.

State v. Expose, 2014 WL 3396262 (Minn. App. 2014):
Holding: There is no "threats exception" to statutory psychologist-client privilege; unless Defendant knowingly and intentionally waives the privilege, psychologist cannot testify at Defendant's criminal trial.

State v. Nunez, 2014 WL 2573988 (N.J. Super. Ct. App. 2014):
Holding: Defendant's right to counsel was violated where State was allowed to call defense investigator to testify about statements made by a witness; right to counsel includes the right to thoroughly investigate case; having to risk the State's introduction of results of defense investigation denies effective assistance of counsel.

People v. O'Neil, 2014 WL 1097942 (N.Y. Dist. Ct. 2014):
Holding: Defendant's statements in a phone conversation with his attorney, which was overheard by police, had to be suppressed where Defendant was handcuffed to a wall and had no choice but to talk to his attorney within earshot of police.

Dansby v. State, 2014 WL 6733698 (Tex. App. 2014):
Holding: Even though Defendant did not object at time conditions of community supervision were imposed, where he did not have notice that the conditions would require him to take polygraphs as part of sex offender treatment, Defendant did not waive his claim that this violated 5th Amendment privilege against self-incrimination.

State v. Rainey, 2014 WL 2013362 (Wash. App. 2014):
Holding: A witness' assertion of 5th Amendment privilege against self-incrimination must generally be asserted only on the witness stand in open court.

Probable Cause To Arrest

State v. Beck, 2013 WL 5524826 (Mo. App. S.D. Oct. 7, 2013):
Merely crossing the fog line of road does not provide reasonable suspicion to stop vehicle for DWI.
Facts: Officer testified he observed Defendant's vehicle cross the fog line separating the shoulder of the road from the driving lane, and stopped Defendant to investigate for DWI. Defendant then was arrested for DWI. Defendant filed a motion to suppress evidence of the stop, and prevailed. The State appealed.
Holding: Erratic or unusual driving will provide reasonable suspicion for a stop to investigate DWI. But prior cases have held that merely crossing the fog line does not, by itself, provide such suspicion. The trial court granted the motion to suppress on the basis that Officer only saw vehicle cross the fog line. Even though the State argues that the Officer also saw the car weave in the lane, the trial court apparently did not accept this fact, and appellate court is required to defer to the trial court on factual findings.

U.S. v. Camacho, 2011 WL 5865650 (1st Cir. 2011):
Holding: Where the only thing associating defendant with a reported street fight was defendant's proximity to the scene of the fight, police officers did not have a reasonable suspicion of criminal activity when they stopped the defendant.

Santos v. Frederick County Bd. of Commissioners, 93 Crim. L. Rep. 637 (4th Cir. 8/7/13):
Holding: Due to federal preemption, State and local police do not have authority to detain people, even briefly, based on civil violations of federal immigration law; civil violations do not provide probable cause to believe a suspect is engaged in "criminal activity."

United States v. King, 90 Crim. L. Rep. 808 (9th Cir. 3/13/12):
Holding: Uncorroborated "double hearsay" from tipsters of unknown reliability cannot give police reasonable suspicion to believe that a defendant is engaged in criminal activity.

Wesby v. District of Columbia, 95 Crim. L. Rep. 691 (D.C. Cir. 9/2/14):
Holding: Even though party guests were trespassing at a residence (some unwittingly), Officers violated 4th Amendment by arresting everyone at the party when Officers knew that one of the trespassers had told the other party guests that she lived at the residence.

U.S. v. Campbell, 2011 WL 1883044 (D. Vt. 2011):
Holding: Even though (1) Defendant was in "trunk" portion of out-of-state SUV, (2) there were air fresheners in the SUV, and (3) Officer thought another person in the SUV answered questions falsely and had red, watery eyes, there was no probable cause to arrest Defendant.

U.S. v. Cole, 2013 WL 2435567 (W.D. Wash. 2013):
Holding: Even though Defendant was driving a quarter mile with his left turn light activated, this did not provide probable cause to stop Defendant for violating state negligent driving laws where the highway had left exits.

Ochser v. Funk, 90 Crim. L. Rep. 513 (Ariz. 12/21/11):
Holding: When an arrestee insists he has proof that an arrest warrant was quashed and police officers can easily and safely retrieve proof of the order quashing it, the Fourth Amendment requires them to do so.

Com. v. Jackson, Com. v. Pacheco, & Com. v. Daniel, 93 Crim. L. Rep. 41 (Mass. 4/5/13):
Holding: Where Mass. had decriminalized possession of small amounts of marijuana, Officers' observations of people smoking marijuana does not provide probable cause to stop them to search for possibly distributing marijuana or possession of an illegal quantity.

Com. v. Washington, 2011 WL 711441 (Mass. 2011):
Holding: Probable cause, rather than reasonable suspicion, is the standard to justify issuance of a citation for violation of seat belt law.

State v. Ortega, 93 Crim. L. Rep. 17, 2013 WL 1163954 (Wash. 3/21/13):
Holding: Officer cannot arrest person for misdemeanor based on probable cause from another Officer's observations; Washington Constitution does not allow "fellow officer" rule to form basis for information for probable cause.

In re S.F., 169 Cal. Rptr.3d 714 (Cal. App. 2014):
Holding: There was no probable cause to arrest Juvenile, who, when stopped for jaywalking and asked if he had anything illegal, said he had a marker called a "streaker"; there was no evidence Juvenile knew possession of the marker was illegal only if he intended to commit vandalism; evidence Juvenile had marijuana was fruit of poisonous tree and suppressed.

Walker v. State, 2013 WL 3481859 (Ga. App. 2013):
Holding: Officer escalated his consensual encounter with Defendant into an investigatory stop, requiring reasonable suspicion of criminal activity, when Officer ordered Defendant to remove his hands from his pockets; even though Defendant was walking off school property after midnight, this did not provide reasonable suspicion of criminal activity to stop Defendant.

State v. Rinehart, 90 Crim. L. Rep. 359 (Ill. App. 11/30/11):
Holding: Even though an anonymous person flagged down an officer and said someone had a gun, this did not provide reasonable suspicion to stop a person who matched the description where the person who flagged down the officer had not given their name.

Corwin v. State, 2011 WL 6282365 (Ind. Ct. App. 2011):
Holding: Officer did not have probable cause to arrest defendant based on pill bottle found in defendant's pocket during a *Terry* frisk, and so the officer was not justified in opening the bottle as a search incident to arrest.

People v. Delvillartron, 992 N.Y.S.2d 363 (N.Y. App. 2014):
Holding: Even though two robbery suspects were in Defendant's parked car several blocks from a robbery scene, police lacked probable cause to arrest Defendant where his car was lawfully parked, he did not resist police in any way, and his behavior in fumbling for his keys was innocuous.

People v. Walker, 2014 WL 2782023 (N.Y. Sup. 2014):
Holding: Even though police received a message that an undercover drug buy had occurred, police did not have probable cause to go into a building and arrest everyone, where police had not been given any physical description of the suspects, including race or gender.

Crider v. State, 2011 WL 5554806 (Tex. Crim. App. 2011):
Holding: An affidavit in support of a search warrant to draw blood did not establish probable cause where there was no indication in the affidavit of how much time had passed between its signing and when the stop was initially made.

Prosecutorial Misconduct

State v. Polk, 2013 WL 6632015 (Mo. App. E.D. Dec. 17, 2013):
Holding: Prosecutor's public "tweets" on Twitter about Defendant's rape charge and trial shortly before and during trial possibly violated Rule 4-3.8(f), which limits prosecutor's public statements to those that "serve a legitimate law enforcement purpose" and prohibits statements that have a "substantial likelihood of heightening public condemnation of the accused," but in the absence of any evidence that jurors were influenced by the statements, the fairness of the trial was not implicated.
Discussion: Extraneous statements on Twitter or other social media, particularly during the time frame of trial, can taint the jury and result in reversal of the verdict. We doubt that using social media to highlight the evidence against the accused and publicly dramatize the plight of the victim serves any legitimate law enforcement purpose, or is necessary to inform the public of the nature or extent of the prosecutor's actions. We are concerned that broadcasting that Defendant is a "child rapist" is likely to arouse heightened public condemnation. We are especially troubled by the timing of the tweets, because tweets before and during trial magnify the risk that the jury will be tainted by extrajudicial influences. However, there was no evidence here that the jury knew of or was influenced by the tweets.

State v. Avent, 2014 WL 1303418 (Mo. App. W.D. April 1, 2014):
Even though Officer testified that Defendant-Driver had glassy eyes, admitted to consuming beers, smelled of alcohol, failed a PBT test, and failed some sobriety tests, where there was also contrary evidence and trial court granted Defendant's motion to suppress statements and evidence by finding there was no probable cause to arrest Defendant, the appellate court's deferential standard of review requires that all credibility determinations and inferences be viewed in the light most favorable to the trial court's ruling, and therefore, granting of motion to suppress is affirmed.
Facts: Defendant-Driver was stopped for speeding. Officer smelled alcohol, and had Defendant perform various field sobriety tests. Defendant passed the walk-and-turn test and one-leg-stand test, but failed the HGN test and PBT. Officer arrested Defendant, and read her *Miranda* warnings. Her BAC was ultimately tested and was greater than .08. Defendant filed a motion to suppress her statements and test results, on grounds that Officer had no probable cause to arrest her for DWI. The trial court granted the motion. The State appealed.
Holding: On appeal, the State cites evidence in the record that supports a finding of probable cause to arrest. However, this is contrary to the appellate standard of review, which allows the trial court to make credibility determinations and which views evidence and inferences in the light most favorable to the trial court's ruling. Where the trial court makes no findings of fact, the trial court is presumed to have found all facts in accord

with its ruling. The trial court will be deemed to have implicitly found contrary testimony not credible. Here, Defendant contested the State's claim that she was intoxicated by cross-examining the Officer about favorable facts to her side of the case. The court was not required to find the Officer credible. Properly viewed in accord with the standard of review, although some facts showed intoxication, Officer observed several tests that did not indicate intoxication, Officer did not observe Defendant not have control of her vehicle (although she was speeding), Defendant complied with requests for identification and license, Defendant was not incoherent or confused or uncooperative, and her eyes weren't impaired. The trial court weighed this evidence and determined there was no probable cause to believe Defendant was intoxicated. Judgment affirmed.

State v. Sprofera, No. WD73213 (Mo. App. W.D. 4/10/12):
Court abused discretion in allowing State to admit evidence that Defendant called Prosecutor a "cunt" because this had no logical relevance in proving the elements of the case or impeaching Defendant's testimony.
Facts: Defendant was charged with various child sex offenses. At trial, he testified he was a "calm" parent and did not have a significant temper. The State, over objection, was then allowed to cross-examine Defendant about an outburst he had made at a prior court appearance where he called the Prosecutor a "cunt" in court.
Holding: The State claims the cross-examination was relevant to impeaching Defendant's testimony that he was a calm parent and did not have a significant temper. However, we fail to see any logical relevance a profane outburst made to a prosecutor could have in proving the elements of the case against Defendant or in impeaching his testimony about his parenting. Given that the testimony was wholly irrelevant and could have prejudicial effect, the Prosecutor should not have been allowed to ask the question and the objection should have been sustained. However, the evidence was harmless in light of other evidence of guilt here.

State v. Avent, 2014 WL 1303418 (Mo. App. W.D. April 1, 2014):
Even though Officer testified that Defendant-Driver had glassy eyes, admitted to consuming beers, smelled of alcohol, failed a PBT test, and failed some sobriety tests, where there was also contrary evidence and trial court granted Defendant's motion to suppress statements and evidence by finding there was no probable cause to arrest Defendant, the appellate court's deferential standard of review requires that all credibility determinations and inferences be viewed in the light most favorable to the trial court's ruling, and therefore, granting of motion to suppress is affirmed.
Facts: Defendant-Driver was stopped for speeding. Officer smelled alcohol, and had Defendant perform various field sobriety tests. Defendant passed the walk-and-turn test and one-leg-stand test, but failed the HGN test and PBT. Officer arrested Defendant, and read her *Miranda* warnings. Her BAC was ultimately tested and was greater than .08. Defendant filed a motion to suppress her statements and test results, on grounds that Officer had no probable cause to arrest her for DWI. The trial court granted the motion. The State appealed.
Holding: On appeal, the State cites evidence in the record that supports a finding of probable cause to arrest. However, this is contrary to the appellate standard of review, which allows the trial court to make credibility determinations and which views evidence

and inferences in the light most favorable to the trial court's ruling. Where the trial court makes no findings of fact, the trial court is presumed to have found all facts in accord with its ruling. The trial court will be deemed to have implicitly found contrary testimony not credible. Here, Defendant contested the State's claim that she was intoxicated by cross-examining the Officer about favorable facts to her side of the case. The court was not required to find the Officer credible. Properly viewed in accord with the standard of review, although some facts showed intoxication, Officer observed several tests that did not indicate intoxication, Officer did not observe Defendant not have control of her vehicle (although she was speeding), Defendant complied with requests for identification and license, Defendant was not incoherent or confused or uncooperative, and her eyes weren't impaired. The trial court weighed this evidence and determined there was no probable cause to believe Defendant was intoxicated. Judgment affirmed.

U.S. v. Bowen, 97 Crim. L. Rep. 647 (5th Cir. 8/18/15):
Holding: Prosecutors denied Police Officers, who were accused of shooting civilians after Hurricane Katrina, a fair trial where Prosecutors engaged in anonymous online comments designed to impugn Officers; "just as a mob protesting outside the courthouse has the potential to intimidate parties and witnesses, so do streams of adverse online comments;" the Gov't conduct was so egregious that proof of prejudice is not required.

U.S. v. LaDeau, 94 Crim. L. Rep. 198, 2013 WL 5878214 (6th Cir. 11/4/13):
Holding: Where court had suppressed evidence that made prosecution for possession of child pornography impossible, and Gov't then charged conspiracy to receive child pornography (which carried a greater sentence), a judge may presume prosecutorial vindictiveness violative of due process if Defendant establishes that the Gov't has some "significant stake" in deterring Defendant's exercise of his rights and the Gov't's conduct was "somehow unreasonable;" here, Defendant met that test, warranting dismissal of new charge, because while it would have been reasonable to charge conspiracy to possess child pornography (which would have been possible), it was unreasonable to charge conspiracy to receive, since "receipt" carries a higher mandatory minimum sentence than conspiracy to possess.

Stumpf v. Houk, 89 Crim. L. Rep. 743 (6th Cir. 8/11/11):
Holding: Prosecutor's use of factually inconsistent theories at two trials as to which co-defendant shot victim violated due process and precluded imposition of death sentence.

U.S. v. Abair, 94 Crim. L. Rep. 771 (7th Cir. 3/19/14):
Holding: Gov't impeachment was improper where Gov't accused Defendant of previously filing false tax and financial aid forms, when Gov't lacked a good-faith basis to believe Defendant lied on those forms.

U.S. v. Zaragoza-Moreira, 97 Crim. L. Rep. 37 (9th Cir. 3/18/15):
Holding: Officer acted in bad faith and violated due process right to present a defense by destroying a video which showed Defendant actions during an offense, where Defendant had told Officer she acted under duress; Officer should have known the tape had exculpatory value.

Melendres v. Arpaio, 97 Crim. L. Rep. 111 (9th Cir. 4/15/15):
Holding: County's history of losing evidence documenting traffic stops justifies a federal court order that County videotape all stops.

Dow v. Virga, 2013 WL 4750062 (9th Cir. 2013):
Holding: State court unreasonably applied federal law in applying test of whether it was reasonably probable that a result more favorable to the defense would have occurred absent prosecutor's knowing presentation of false evidence, rather than correct test of whether there is any reasonable likelihood that the false evidence could have affected the judgment of the jury.

U.S. v. Whitney, 90 Crim. L. Rep. 816 (9th Cir. 3/7/12):
Holding: A prosecutor breached an immunity provision of a plea agreement when she exercised a government prerogative reserved in another provision.

U.S. v. Juan, 92 Crim. L. Rep. 432 (9th Cir. 1/7/13):
Holding: Prosecutor violated due process by threatening its witness (Defendants' wife) into recanting her exculpatory trial testimony and giving testimony incriminating Defendant in domestic abuse case; Wife had initially told police that Defendant beat her, then changed her story to an exculpatory one, then changed her story back to an incriminating one after Prosecutor threatened to charge her with perjury and persuaded the judge to allow her to consult with a court-appointed counsel.

Sivak v. Hardison, 2011 WL 3907111 (9th Cir. 2011):
Holding: Prosecutor's presentation of false testimony by snitch witness denying that he expected any favorable treatment in exchange for testimony violated *Napue*.

U.S. v. Schmitz, 88 Crim. L. Rep. 746 (11th Cir. 3/4/11):
Holding: Prosecutor cannot cross-examine Defendant whether witnesses were "lying" because this invades province of jury since jury determines credibility of witnesses.

In re Howes, 90 Crim. L. Rep. 786 (D.C. 3/8/12):
Holding: The District of Columbia Court of Appeals disbarred a former assistant U.S. attorney for handing out thousands of dollars of witness vouchers to ineligible people in murder cases and actively concealing the improper payments from defendants and the courts.

U.S. v. Aguilar, 2011 WL 6097144 (C.D. Cal. 2011):
Holding: Government's misconduct warranted exercise of the trial court's supervisory powers to dismiss the indictment, where the misconduct included search warrants procured through materially false and misleading affidavits, improperly obtained privileged communications between defendant and defense counsel, and other flagrant acts.

U.S. v. Williams, 2014 WL 1572424 (N.D. Okla. 2014):
Holding: Defendant's conviction for drug sales is vacated due to prosecutorial and police misconduct where clear and convincing evidence showed that the controlled buy to which Officer testified never occurred, Officer falsified search warrant affidavit, and others involved were later convicted of corruption charges.

State v. Maguire, 2013 WL 5989742 (Conn. 2013):
Holding: (1) Prosecutor's argument that Defendant and defense counsel were asking jury to "condone child abuse" and to find that "child abuse that happens in secret is legal" was highly improper in that it appealed to emotions and demeaned defense counsel; and (2) Prosecutor's objection during defense counsel's cross-examination of forensic interviewer which left misleading impression that redacted portions of interview refuted defense counsel's assertions was improper.

In re Favata, 97 Crim. L. Rep. 607 (Del. 7/27/15):
Holding: Prosecutor's statements that he would reveal that pro se Defendant was a snitch was improper attempt to intimidate Defendant, was prejudicial to administration of justice, and warranted 6 month suspension from practice.

State v. Easley, 2014 WL 1266125 (Idaho 2014):
Holding: Where Defendant was being sentenced following revocation of probation, Prosecutor could not determine eligibility for mental health court because this was a judicial function and Prosecutor's post-judgment determination violated separation of powers; any authority Prosecutor had to determine eligibility did not extend to after Defendant's adjudication of guilt.

In re Flatt-Moore, 90 Crim. L. Rep. 624 (Ind. 1/12/12):
Holding: A prosecutor in a check fraud case engaged in conduct prejudicial to the administration of justice by giving the crime victim total veto power during plea bargaining with the defendant.

State v. Vrabel, 97 Crim. L. Rep. 133 (Kan. 4/24/15):
Holding: Statutory limits on city police officers' territorial jurisdictions applies not just to searches and seizures but also to undercover drug buys.

Bridgeman v. Dist. Attorney for Suffolk Dist., 97 Crim. L. Rep. 210 (Mass. 5/18/15):
Holding: Where Defendants' convictions were set aside due to misconduct by State Crime Lab, due process requires that Defendants not receive harsher penalties for exercising their right to challenge their tainted convictions; thus, Defendants' sentences at further plea or trial must not exceed what it was under their vacated plea agreements; although Defendants who challenge guilty pleas are ordinarily subject to harsher sentences later, this would ignore the misconduct of the Crime Lab here.

Com. v. Scott, 2014 WL 815335 (Mass. 2014):
Holding: Where Gov't forensic lab engaged in misconduct regarding representations on a drug certificate, the misconduct is attributable to the State and there is a conclusive

presumption that misconduct occurred in this case; case must be remanded to determine if there is a reasonable probability Defendant would not have pleaded guilty if he had known of the misconduct.

State v. McDonald, 97 Crim. L. Rep. 53 (Wash. 4/9/15):
Holding: State violated plea agreement about sentencing when it had an investigating officer speak to the court from perspective of victim; prosecution cannot undercut a plea bargain by proxy through agents of the prosecution.

State v. Inman, 90 Crim. L. Rep. 513 (S.C. 12/28/11):
Holding: A prosecutor intimidated an expert witness into silence when, during voir dire, the prosecutor found out that the witness was not licensed to practice in the state and directed the judge's attention to the statute dealing with the unauthorized practice of social work and told the witness that the statute provided for criminal penalties.

State v. Fuentes, 94 Crim. L. Rep. 560 (Wash. 2/6/14):
Holding: Where police (jailers) listened to taped phone conversations between Defendant and his lawyer, there is a presumption of prejudice, and the conviction must be vacated unless the State can prove beyond a reasonable doubt that the eavesdropping did not cause any prejudice.

State v. Monday, 89 Crim. L. Rep. 548 (Wash. 6/9/11):
Holding: Prosecutor injected racial bias into trial by pronouncing the word "police" as "po-leese" during questioning and by arguing that the reason the state's witnesses weren't more forthcoming was that "black folk" follow a code that frowns on cooperating with authorities.

People v. Valasco-Palacios, 2015 WL 1312209 (Cal. App. 2015):
Holding: Prosecutor violated Defendant's right to counsel by inserting a fabricated confession to rape into a translated-from-Spanish-interrogation transcript and giving false transcript to defense counsel at a time when Prosecutor knew that counsel was trying to persuade Defendant to settle the case; Prosecutor's misconduct was so egregious to warrant dismissal of charges.

People v. Puentes, 2010 WL 5143520 (Cal. App. 2010):
Holding: Prosecution was presumptively vindictive where charge was dismissed following two mistrials due to hung juries and Defendant was retried a third time only after another conviction was reversed on appeal.

Camm v. State, 90 Crim. L. Rep. 267 (Ind. Ct. App. 11/15/11):
Holding: Where prosecutor had entered into book contract to write about case, he was disqualified under Model Rule 1.8(d) from prosecuting the case, even though the contract was ultimately cancelled.

Brown v. Blumenfeld, 90 Crim. L. Rep. 102 (N.Y. App. Div. 10/4/11):
Holding: Judge may consider whether prosecutor violated professional conduct rules in deciding whether to suppress Defendant's statements; prosecutor had prepared script to use to interrogate arrested people telling them that if they have a different story to tell, this is their only opportunity and that that this is the only opportunity they will have to tell something they would like law enforcement to investigate.

Ex Parte Coty, 2014 WL 128002 (Tex. App. 2014):
Holding: Remedy in habeas proceeding for misconduct by crime lab technician at trial was to shift the burden of falsity to the State, but the burden of persuasion with respect to materiality remained with Petitioner.

Public Trial

State v. Davis, 434 S.W.3d 549 (Mo. App. S.D. 2014):
Defendant's 6th Amendment right to public trial was violated where family members were excluded during voir dire, even though there were empty seats in the jury box; defense made timely record that family members were wanting to attend voir dire but were being excluded, and that there were empty chairs in the courtroom's jury box.
Facts: Prior to voir dire, defense counsel informed the court that Defendant's family and possibly the press wanted to attend voir dire. The trial court denied the request on grounds that there were too many venirepersons. The court confirmed that there were 14 empty seats in the jury box but sated that they would "remain empty during voir dire selection." During voir dire, defense counsel continued to notify the court that Defendant's family were asking to come in, but were being told that they could not. The court granted a continuing objection.
Holding: The 6th Amendment guarantees a public trial. Trial proceedings can only be closed if the proponent for closure advances an overriding interest; closure can be no broader than to protect that interest; the court considered reasonable alternatives to closure; and the court made adequate findings to support closure. The trial court considered none of these factors here. Here, defense counsel made a proper record to support reversal by timely showing that persons were actually being excluded from the courtroom, even though there were seats available for them. New trial ordered.

Depriest v. State, 2015 WL 6473150 (Mo. App. E.D. Oct. 27, 2015):
(1) Plea counsel operated under an actual conflict of interest and prejudice is presumed where counsel represented both Movant and co-defendant, advised Movant to reject a favorable plea offer, and pleaded Movant and co-defendant guilty to a deal whereby Movant had to accept a blind plea to allow a favorable plea for co-defendant; (2) "group guilty plea" violated Movant's right to fundamental fairness and rendered his plea involuntary, especially where trial court had duty to inquire about conflict of interest but did not; (3) remedy is to allow Movant opportunity to accept the favorable plea offer that was rejected; (4) appellate court grants foregoing relief without an evidentiary hearing; (5) plea court's closure of courtroom during guilty plea violated Movant's right to a public trial; and (6) "redacted" transcript from "group guilty plea" which only

contained Movant's and co-defendant's statements was improper; a full transcript should be prepared for appellate review.

Facts: Movant and co-defendant (his sister) were charged with various drug crimes for marijuana found in their residence. The same attorney represented both prior to their guilty pleas. The State offered Movant a 10-year deal with 120 days shock. Counsel advised Movant to reject this offer, and to proceed to preliminary hearing. This caused the favorable offer to be withdrawn. After various pretrial litigation, Movant and co-defendant ultimately pleaded guilty in "blind pleas," but only co-defendant received anything in exchange from the State in doing so. The State agreed that if Movant pleaded guilty with co-defendant, the State would dismiss various charges against co-defendant and allow her to be released from jail pending sentencing. The plea court accepted the pleas in a "group plea" with five other non-related cases in order to "save a great deal of time." Movant was ultimately sentenced to 22 years. He filed a Rule 24.035 motion, which the motion court denied without an evidentiary hearing.

Holding: (1) Counsel operates under a conflict of interest where something was done which was detrimental to Movant's interests and advantageous to a person whose interests conflict with Movant's. Upon such a showing, prejudice is presumed. Here, Movant lost the opportunity to plead to the most favorable terms because counsel chose to proceed with pretrial litigation, which was in co-defendant's interests, but not Movant's. Counsel should have withdrawn. Because counsel's actions favored co-defendant's interests, prejudice is presumed. Even if prejudice were not presumed, the fact that Movant received 22 years after being advised to reject a 10-year probation offer supports that counsel was conflicted and shows that counsel failed to advocate for Movant. (2) The appellate courts have repeatedly warned the plea court here that "group pleas" are disfavored. Given all the circumstances in this case, the "group plea" rendered Movant's plea involuntary, and appellate court grants relief without the need for an evidentiary hearing. The plea court had a duty to inquire about the conflict of interest, but did not. The fact that the State's promises to co-defendant were contingent on Movant's own blind plea should have been a red flag to the plea court, as should the fact that both had the same counsel. The plea court did not protect the interest of justice, but was only interested in "saving time." The scene "smacks of intimidation." Regardless of what Movant actually said on the record at his plea, it is obvious Movant would have felt pressured since Movant's sister was standing right beside him and was the co-defendant. (3) Where ineffective assistance causes a defendant to reject a favorable plea offer, the remedy is order the State to re-offer the favorable plea offer. (5) The plea court further added to the intimidating atmosphere by closing the courtroom during the "group plea." Although the appellate court does not decide the issue because it reverses on other grounds, appellate court notes that the closure likely violated Movant's right to a public trial. (5) Finally, appellate court notes that the transcript submitted on appeal is a redacted transcript containing only the responses of Movant and co-defendant. Although it is not clear whether this was done by Movant's attorney, the court or court reporter, it is improper. A full transcript is necessary for appellate review, and would have been useful here to see all the responses during the "group plea."

State v. Salazar, 2013 WL 5477215 (Mo. App. S.D. Oct. 2, 2013):
Holding: Trial court erred in effectively closing voir dire to public because there were not enough seats to accommodate the venire panels and the public, but this error was not prejudicial in absence of a showing by the defense that some member of the public actually attempted to attend voir dire but was prevented from doing so by the closure; defense failed to make any offer of proof that any member of the public was actually excluded; the ruling on prejudice was one of first impression in Missouri.

U.S. v. Gupta, 699 F.3d 682 (2d Cir. 2012):
Holding: Exclusion of Defendant's brother and girlfriend from voir dire violated right to a public trial.

U.S. v. Cardenas-Guillen (Hearst Newspapers LLC), 89 Crim. L. Rep. 252, 2011 WL 1844189 (5th Cir. 5/17/11):
Holding: Press and public have 1st Amendment right to access criminal sentencing hearing.

U.S. v. Thompson, 93 Crim. L. Rep. 151 (8th Cir. 4/23/13):
Holding: 6th Amendment right to public trial applies at sentencing, but court did not err in excluding family of Defendant where a jail-house snitch witness was going to testify about another crime the Defendant had admitted to him.

U.S. v. Rivera, 2012 WL 2362531 (9th Cir. 2012):
Holding: Defendant's 6th Amendment right to public trial was violated where his family was excluded from sentencing.

State v. Cox, 93 Crim. L. Rep. 511, 2013 WL 3122599 (Kan. 6/21/13):
Holding: Defendant's right to a public trial was violated where court closed the courtroom while photos of the alleged victim's genitals were displayed, without first balancing the compelling interests or considering less drastic alternatives.

Com. v. Fajita, 96 Crim. L. Rep. 513 (Mass. 1/27/15):
Holding: Public access to judicial records requires courts to release juror names after trial unless there are special reasons for confidentiality, other than jurors' personal preference that their names not be released.

Com. v. Maldonado, 94 Crim. L. Rep. 437 (Mass. 1/8/14):
Holding: Trial judge cannot require members of the public entering the courtroom to show identification, absent on-the-record findings that justify such a security measure.

Com. v. Barnes, 2012 WL 798754 (Mass. 2012):
Holding: Commonwealth did not demonstrate that psychological or physical harm to the minor victim could result from live internet streaming of audio and video recordings of criminal dangerous hearing.

State v. Turrietta, 2013 WL 3242337 (N.M. 2013):
Holding: When a trial court is deciding whether closure of a courtroom in appropriate, it should apply the more stringent "overriding interest" standard, not the "substantial reason" standard.

People v. Floyd, 2013 WL 1759557 (N.Y. 2013):
Holding: 6th Amendment right to public trial violated where court excluded Defendant's mother from courtroom during jury selection.

People v. Martin, 2011 WL 1752223 (N.Y. 2011):
Holding: Even though trial court was concerned that there may not be enough seats for venirepersons and concerned that Defendant's father could intimidate jurors, Defendant's right to public trial was violated when court closed courtroom during voir dire and ejected the father.

State v. Wise, State v. Paumier and In re Personal Restraint Petition of Morris, 92 Crim. L. Rep. 236 (Wash. 11/21/12):
Holding: Judge cannot conduct non-public voir dire without first articulating a compelling reason to override Defendant's 6th Amendment right to a public trial.

Circuit Court of Eighth Judicial Circuit v. Lee Newspapers, 2014 WL 3908002 (Wyo. 2014):
Holding: Trial court violated First Amendment's presumption of openness in court proceedings in closing preliminary hearing and sealing court record in sexual assault case without making any findings as to a compelling reason for doing so.

Morris Publishing Group v. State, 2014 WL 1665920 (Fla. App. 2014):
Holding: Even though a live audio feed of jury selection was available to news media, court violated First Amendment openness of judicial proceedings by excluding media from jury selection.

Com. v. Lavoie, 2011 WL 4507161 (Mass. App. 2011):
Holding: Courtroom was closed to the public in the constitutional sense where defendant's family was required to leave during jury selection, even though (1) a large portion of jury selection took place at sidebar and could not have been heard by spectators; and (2) there was no express judicial order.

Com. v. Downey, 2010 WL 4371391 (Mass. App. 2010):
Holding: Closing courtroom during voir dire when jurors were questioned about their criminal history violated 6th Amendment right to public trial.

People v. Moise, 2013 WL 3984581 (N.Y. Ap. 2013):
Holding: Defendant's right to public trial was violated where court excluded defense counsel's co-counsel from courtroom while undercover officer testified.

Cameron v. State, 2014 WL 4996290 (Tex. App. 2014):
Holding: Even though trial court was concerned that courtroom would be too crowded during voir dire, this did not justify closure of courtroom and violated Defendant's 6th Amendment right to public trial; the proper remedy would have been to move to a larger courtroom or split the jury panel in half.

Lilly v. State, 91 Crim. L. Rep. 130, 2012 WL 1314088 (Tex. Crim. App. 4/18/12):
Holding: Defendant's right to a public trial was violated where the trial was held at a prison, which as a practical matter was closed, because it severely limited public entry.

State v. Rocha, 2014 WL 2751013 (Wash. App. 2014):
Holding: Recusal of judge motion is subject to Washington Constitution's requirement that court proceedings be public.

State v. Rainey, 2014 WL 700164 (Wash. App. 2014):
Holding: Even though attorney told court that Witness would assert 5th Amendment right against self-incrimination if called to testify, Defendant's right to a public trial was violated where court did not require Witness to be sworn and assert her 5th Amendment right in open court.

State v. Slert, 282 P.3d 101 (Wash. App. 2012):
Holding: Court violated right to public trial by conducting a portion of voir dire in chambers.

Rule 24.035/29.15 & Habeas Postconviction Procedural Issues

State ex rel. Clemons v. Larkins, 2015 WL 7572030 (Mo. banc Nov. 24, 2015):
(1) Habeas relief granted where State violated Brady by failing to disclose that a probation office-Witness had seen injuries on Defendant's face which would have supported his allegation that his confession was coerced by police; Defendant was prejudiced because this evidence could have led to granting his motion to suppress, or affected the fairness of the trial because the jury was asked to decide if his confession was voluntary and Defendant was precluded from presenting evidence that it was coerced; (2) Even though the habeas special master drew a negative inference from Defendant's assertion of his 5th Amendment privilege against self-incrimination when the State questioned him in the habeas proceedings about whether he committed the crime, Defendant had a constitutional right to choose not to testify at his trial, and his silence cannot factor into whether Defendant was prejudiced at his trial by the Brady violation.
Facts: Defendant alleged in a pretrial suppression motion and attempted to allege at trial that his confession was coerced because police beat him. Before trial, Defendant called his attorney and family members to testify as to injuries on his face. Police testified they did not see any injuries, and did not coerce him. The trial court overruled the motion to suppress. At trial, Defendant presented family members to testify about injury to his face. The State moved to prohibit Defendant from arguing that police caused the injuries, because Defendant's evidence was only that he had injures, not how they were caused.

The trial court precluded Defendant from arguing that his confession was coerced, even though the jury was instructed that it had to find whether the confession was voluntary. Defendant was convicted and sentenced to death. After state direct appeal and postconviction proceedings, and various federal proceedings, Defendant sought state habeas relief on grounds of a newly discovered *Brady* violation, in that the State failed to disclose a probation office-Witness who had observed facial injuries on Defendant, and had reported this to prosecutors and prepared a written report about it, which prosecutors apparently altered to conceal the information about the facial injuries.
Holding: (1) Evidence that has been deliberately concealed by the State is not reasonably available to counsel and constitutes "cause" for raising otherwise procedurally barred claims in habeas. Defendant was prejudiced by the failure to reveal the Witness. The Witness would have lent substantial credibility to Defendant's claim that his confession was coerced. The Witness worked for the State probation office, so did not have the same potential bias that Defendant's family members and attorney had. Even though family members and Defendant's attorney testified about Defendant's injuries, the Witness' testimony would not have been "merely cumulative" because it went to the very root of the matter in controversy, the decision of which turned on the weight of the evidence. Witness offered independent, objective and impartial corroboration of Defendant's allegation of police coercion; the credibility of this allegation turned exclusively on the weight of the evidence. The Witness' testimony may have caused a different ruling on the motion to suppress, and Defendant was denied a fair trial because the jury was not able to hear Witness' testimony in determining if Defendant's confession was voluntary. (2) During the habeas hearing, Defendant asserted his 5th Amendment privilege against self-incrimination when the State questioned him about whether he committed the crime. The habeas special master drew a negative inference from this. At trial, Defendant had a constitutional right to choose not to testify, and the constitutional guarantees that no adverse inference be drawn from that. As such, Defendant's silence in response to the State's questions cannot factor into this Court's determination of whether Defendant was prejudiced at his trial by the State's failure to reveal with Witness information.

<u>Moore v. State</u>, 458 S.W.3d 822 (Mo. banc 2015):
(1) Where amended postconviction motion is filed untimely, motion court must conduct independent inquiry to determine if Movant was "abandoned" by counsel; (2) if the untimely filing was not due to fault of Movant personally, court should deem the amended motion timely filed. If Movant caused the untimely filing, court should consider only the pro se Form 40, not the amended motion; and (3) where a motion court fails to conduct an independent inquiry on abandonment, the appellate court must remand the case to the motion court for such inquiry in the first instance.
Facts: Appointed counsel filed an untimely amended motion. The motion court and Court of Appeals, apparently without noticing this, ruled the case on the merits.
Holding: When an untimely amended motion is filed, the motion court has a duty to make independent inquiry to determine whether Movant was "abandoned" by counsel. If the court finds that counsel was at fault for the late filing (i.e., that counsel "abandoned" Movant), the court should accept the amended motion. But if the untimely filing resulted from Movant's personal negligence or intentional failure to act, the court shall not

consider the amended motion, but only the pro se Form 40. When the independent inquiry is not done, the appellate court must remand to the motion court for such an inquiry. The result of the inquiry on abandonment will determine which motion – the pro se motion or the amended motion – the court should adjudicate.

State ex rel. Clayton v. Griffith, 2015 WL 1442957 (Mo. banc March 14, 2015):
Holding: Sec. 552.060.2 (regarding competency to be executed) is constitutional because it merely allows the DOC to assert that a Defendant is not competent to be executed; it does not limit a Defendant's own right to seek a judicial determination of competency. The Defendant may raise his incompetency via a writ of habeas corpus directly in the Supreme Court.

State ex rel. Middleton v. Russell, 435 S.W.3d 83 (Mo. banc 2014):
Holding: Rule 91 habeas corpus is proper means to assert claim that Defendant is incompetent to be executed. However, Defendant failed to meet threshold showing of incompetence required by *Panetti* and *Ford*.
Dissenting opinion: Dissenting opinion questions constitutionality of competency to be executed statute, Sec. 552.060, because it has a "fundamental structural flaw" in that it places the decision to invoke the statute in the executive branch; *Ford* criticized Florida's statutory scheme for consolidating whether a defendant is competent in the governor and administrative officials in the executive branch.

McIntosh v. State, 413 S.W.3d 320 (Mo. banc 2013):
A Rule 29.07 inquiry to counsel about their effectiveness will not preclude an evidentiary hearing in a subsequent postconviction case if Movant in the postconviction motion raises a question of fact as to the accuracy of defense counsel's claims of reasonable trial strategy, and if the other requirements for an evidentiary hearing are met.
Facts: Following trial and sentencing, the trial court asked counsel at a Rule 29.07 hearing why counsel failed to call a witness. Counsel answered that he interviewed the witness and the witness did not provide helpful information for the defense. Subsequently, Movant filed a Rule 29.15 motion, alleging counsel was ineffective in failing to call the witness. The motion court denied the claim without a hearing, finding that the claim was refuted by counsel's statement at the 29.07 hearing.
Holding: Rule 29.07 proceedings are only intended to be a "preliminary hearing" on the effectiveness of counsel to determine if there is "probable cause" to believe counsel was ineffective. Rule 29.07 proceedings are not intended to replace an evidentiary hearing under Rule 29.15. However, to receive a hearing, a Movant must plead facts to rebut the statements counsel made at the 29.07 hearing. Here, for example, Movant did not claim in his amended motion that counsel had failed to discuss the witness with Movant. Movant has not asserted any factual allegations in his amended motion to contradict or rebut counsel's stated reasons for choosing not to call the witness. Movant has not put forth any facts demonstrating counsel was untruthful, mistaken or unreasonable when he stated on the record that the witness would not be helpful to the defense. "[I]f in his or her postconviction motion the movant raises a question of fact as to the accuracy of defense counsel's claims of reasonable trial strategy, and if the other requirements for an

evidentiary hearing are met, the movant may be entitled to an evidentiary hearing on the issue." However, that did not happen here.

Eastburn v. State, No. SC92927 (Mo. banc 6/25/13):
While Rule 75.01 allows a motion court to reopen a Rule 24.035 or 29.15 case for 30 days after a judgment (Findings) is entered because the judgment is not yet final, a motion court cannot reopen such cases later unless there has been an "abandonment" by counsel, which means only failure to file or timely file an amended motion or actively preventing Movant from filing an original Form 40; the term "motion to reopen" should no longer be used, and attorneys should file a "motion for postconviction relief due to abandonment."
Facts: Movant had a Rule 29.15 case with an amended motion in the 1990's. In 2010, she filed a "motion to reopen" her 29.15 case on various grounds, including that her sentence to life without parole was unconstitutional since she was a juvenile at the time of her offense.
Holding: Under Rule 75.01 a motion court has authority to reopen a 29.15 case for 30 days after a judgment (Findings) is entered because its judgment is not yet final. A late-filing may be accepted where "abandonment" occurs, but abandonment is narrow and limited to where an attorney fails to file or timely file an amended motion, or interferes with filing an original Form 40. Here, while the parties refer to this case as a "motion to reopen" the 29.15 case, such nomenclature does not exist in our rules and should not be used henceforth. Here, Movant's claim is really a motion claiming ineffective assistance of postconviction counsel because she wishes postconviction counsel would have raised additional issues. This is prohibited by Rule 29.15. "[F]iling a motion to reopen does not exist in our rules. Henceforth, attorneys should file a motion for postconviction relief due to abandonment."

Swallow v. State, 2013 WL 1974339 (Mo. banc May 14, 2013):
(1) Where Movant had a single judgment which sentenced him to DOC on one count but suspended execution of sentence on the other count, his Rule 24.035 motion on the other count was due within 180 days of his original delivery to the DOC on the first count; and (2) claim of ineffective assistance of counsel for representation at a probation violation hearing is not cognizable under Rule 24.035 but can be raised in habeas corpus.
Facts: In 2006, Defendant pleaded guilty to assault and ACA in a single case. He was sentenced to three years for the ACA and 20 years for the assault. The ACA sentence was executed, but he received an SES on the assault. In 2008, Defendant was released from DOC on the ACA. In 2010, his probation was revoked on the assault. Movant subsequently filed a Rule 24.035 motion within 180 days of his delivery to the DOC on the assault.
Holding: (1) Movant's Rule 24.035 motion was not timely because it was not filed within 180 days of his original delivery to the DOC on the ACA count, even though his assault count had an SES. Here, there was a single judgment for both cases. While Rule 24.035 does not specifically address multiple deliveries for the same judgment, the purpose of the rule is prompt resolution of claims in a unitary proceeding. If Movant were to be able to bring multiple postconviction cases from the same judgment, this would introduce complex issues relating to claim preclusion that a prompt resolution will

prevent. (2) Movant also attempts to challenge his attorney's effectiveness at the probation revocation hearing. But such claims are not cognizable in a Rule 24.035 action. The remedy is habeas corpus.

State ex rel. Woodworth v. Denney, 2013 WL 85427 (Mo. banc Jan. 8, 2013):
Holding: (1) In habeas action, State's failure to disclose exculpatory evidence before trial constitutes "cause" to overcome a procedural default for failure to raise *Brady* violations on appeal or in Rule 29.15 action; (2) State's failure to disclose letters between trial judge, attorney general and murder victim's husband which would have impeached husband's testimony and supported defense theory at trial violated *Brady* and warranted habeas relief, even though habeas petitioner did not open the entire defense file to the State in the habeas case or call all prior defense counsel to testify in the habeas proceeding; (3) State's failure to disclose that murder victim's daughter had reported to police that another suspect in the murder had violated a protection order against her violated *Brady* and warranted habeas relief because such evidence would have impeached daughter's testimony and supported the defense theory that this other suspect committed the murder; even though the prosecutor may not have had knowledge of this protection-order evidence, the State was still responsible under *Brady* for the police's failure to disclose it, and even though the defense knew before trial of some matters about the protection order because daughter had mentioned it in her pretrial deposition, daughter's deposition testimony on this was misleading and incomplete because she did not testify that suspect had made any threats or that she had reported them to police; (4) in assessing *Brady* prejudice in habeas proceeding, court can consider newly discovered evidence of innocence in addition to the *Brady* violations and the matters presented at trial to determine if the trial verdict is no longer "worthy of confidence."

Price v. State, No. SD31725 (Mo. banc 12/28/12):
Where Movant's direct appeal counsel had been retained to also file a Rule 29.15 motion for Movant but failed to do so, Movant was abandoned and the motion court did not clearly err in granting a motion to reopen the PCR and allow a late filing.
Facts: Following trial, Movant retained a new Attorney to represent him at sentencing, on direct appeal and in a Rule 29.15 case. At sentencing, the trial court explained the time limits for filing a Rule 29.15 motion, and Movant said he understood them. Movant lost his direct appeal. Attorney then failed to file a Rule 29.15 motion for Movant. Attorney had repeatedly assured Movant's mother on behalf of Movant that he (Attorney) would file a 29.15 motion. Movant then retained different counsel who filed a habeas corpus case on behalf of Movant, but the Southern District quashed relief in *State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277 (Mo. App. S.D. 2008), upon grounds that habeas relief can only be granted due to an objective factor external to the defense or actual innocence. Movant then filed a motion to reopen the 29.15 proceedings on grounds of abandonment by original Attorney, who had promised to file a 29.15 motion. The motion court granted relief under *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008). The State appealed.
Holding: The motion court found that Attorney actively interfered with Movant's ability to file a *pro se* Rule 29.15 motion by stating that he would timely prepare and file the motion on Movant's behalf, but failed to do so. The State argues that *McFadden* is

distinguishable, but none of the cited cases by the State deal with a retained counsel who assumed responsibility to timely file a Rule 29.15 motion for an imprisoned client and then failed to do so. Movant is in the same position as *McFadden*, whose counsel undertook to perform a necessary filing and then failed to so do. The State also argues that Movant's motion to reopen was not filed within a reasonable time after the abandonment, but was filed four years later. There is no express time limit for when a motion to reopen must be filed. The State argues that the court should analogize to the one-year time limit of Rule 30.03 for notices of appeal for policy reasons, but because the State did not raise this claim in the motion court, the appellate court will not consider it.

Dorris v. State, No. SC91652 (Mo. banc 1/17/12):
Where Movant files a 24.035 or 29.15 motion out of time (and an exception to the time limits does not apply), this is a complete waiver of postconviction relief, even if the State does not contest the time limits; the time limits cannot be waived in the motion court or on appeal.
Facts: Various 24.035 and 29.15 movants filed their *pro se* motions late.
Holding: Rules 24.035(b) and 29.15(b) provide that failure to file a motion within the time provided by the rules shall be a "complete waiver" of the right to proceed under the Rules and a "complete waiver" of any claim that could be raised in a motion filed under the Rules. A movant must allege facts establishing that his motion is timely filed in addition to proving his substantive claims. A movant can show his motion was timely filed by (1) having a file-stamp on his *pro se* motion which shows it was timely filed; (2) alleging and proving by a preponderance of the evidence in his motion that he falls within a recognized exception to the time limits; or (3) alleging and proving by a preponderance of the evidence that the court misfiled his motion. It is the court's duty to enforce the time limits even if the State does not raise them. The State cannot waive a movant's noncompliance with the time limits. The time limits of Rules 24.035 and 29.15 are not the same as statutes of limitations (which can be waived) because the postconvction rules are concerned with upholding the "finality" of judgments, not just ensuring speedy filing of claims.

Cooper v. State, No. SC91695 (Mo. banc 12/6/11):
Where Movant waived his postconviction rights as part of his plea bargain and his later postconviction motion failed to allege or prove the presence of an actual conflict of interest, i.e., "a claim of ineffective assistance of counsel that pertains to the knowing, voluntary, and intelligent waiver of postconviction rights," then the postconviction motion should be dismissed.
Facts: Movant pleaded guilty in a plea bargain which also required that he waive his rights to later pursue postconviction relief. At the plea hearing, the court inquired whether Movant understood this, whether he had any complaints about his attorney, and whether he understood that he was waiving his posconviction rights. Later, Movant filed a Rule 24.035 motion.
Holding: Movant argues that his waiver of postconviction rights was unknowing, unintelligent and involuntary because of defense counsel's potential conflict of interest in advising him to waive his postconviction rights. However, a movant can waive his postconviction rights in exchange for a plea bargain if the record clearly demonstrates

that the movant was properly informed of his rights and that the waiver was knowing, voluntary and intelligent. A movant's plea agreement to waive postconviction rights does not waive the right to argue that the decision to enter the plea agreement was not knowing, voluntary or intelligent; this may be done through a state habeas petition. Additionally, a movant's plea agreement to waive postconviction rights does not waive the right to argue that the decision to enter the plea agreement was not knowing and voluntary because it was the result of ineffective assistance of counsel. There must be a factual basis for the claim of ineffective assistance in order to survive a wavier of postconviction relief. A court must determine whether there is any basis for a claim of ineffective assistance and whether the ineffectiveness claims pertain to the validity of the plea. Movant relies on Advisory Committee Opinion 126 (May 19, 2009) for his claim that the waiver is invalid here. Opinion 126 held that it was not permissible for defense counsel to advise a defendant regarding waiver of postconviction rights because this would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel. In addition, Opinion 126 held that it was "inconsistent" with the prosecutor's duties as minister of justice to seek a waiver of postconviction rights based on ineffective assistance of counsel. It is important to note that the instant plea agreement predates Opinion 126 so the attorneys at issued did not violate the formal opinion. Additionally, no attorneys have sought to have the Supreme Court review Opinion 126, even though there is a procedure for an aggrieved attorney to do so. A violation of a professional rule does not equate to a constitutional violation, however. Here, Movant "has neither alleged nor proven the presence of an actual conflict of interest – that is to say, a claim of ineffective assistance of counsel that pertains to the knowing, voluntary, and intelligent waiver of the postconviction rights." Therefore, the wavier is valid, and the case should be dismissed.

Editor's Note: Footnote 1 notes that courts will recognize an exception to waiver if it can be determined from the indictment, information and transcript that the court lacked power to enter the plea. Also, footnote 1 states motion courts must still enter Findings in postconviction cases, even if there was a purported waiver of postconviction rights. "In the future, if a movant alleges that a waiver of postconviction relief was not given knowingly, voluntarily or intelligently because an actual conflict of interest adversely affected defense counsel's performance," the court must still enter Findings.

Krupp v. State, No. SC91613 (Mo. banc 12/6/11):

Where Movant had a jury trial but prior to sentencing entered into an agreement with the State for a favorable sentence in exchange for waiving his appeal and postconviction rights and his later postconviction motion failed to allege an actual conflict of interest by defense counsel, the postconviction case should be dismissed.

Facts: Movant was convicted at a jury trial of various offenses. Before sentencing, he entered into an agreement with the State for a favorable sentence in exchange for waiving his appeal and postconviction rights. At sentencing, the court asked if he understood the agreement, had any complaints about his attorney, and understood the waiver. Movant received the favorable sentence. Later, he filed a Rule 29.15 motion.

Holding: Movant claims that his waiver of postconviction rights was not knowing, intelligent or voluntary because of defense counsel's potential conflict of interest in

advising him to waive his postconviction rights. Movant relies on Advisory Committee Opinion 126 (May 19, 2009), which held that it was not permissible for defense counsel to advise a defendant regarding waiver of postconviction rights because this would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel, and that it was "inconsistent" with the prosecutor's duties as minister of justice to seek a waiver of postconviction rights based on ineffective assistance of counsel. It is important to note that the agreement in this case was before Opinion 126, so the attorneys did not violate the Opinion. Also, there is a procedure for aggrieved attorneys to challenge a formal opinion in the Supreme Court, but no attorney has yet done so. For the reasons set forth in *Cooper v. State*, No. SC91695 (Mo. banc 12/6/11), the waiver here is valid. Movant has only alleged that this waiver was not voluntary, knowing or intelligent because of a potential conflict of interest by defense counsel. It must be alleged and demonstrated that the waiver was not knowing, voluntary and intelligent because there was an actual conflict of interest that adversely affected counsel's performance. Something must have been done by counsel or something must have been forgone by counsel which was detrimental to the Movant and advantageous to the counsel. In the absence of that, the case should be dismissed.

State ex rel. Griffin v. Denney, No. SC91112 (Mo. banc 8/2/11):
Even though State prosecutors may not have known about a DOC incident report that was favorable to Defendant in a prison stabbing case, State is responsible for its disclosure under Brady and failure to disclose it prejudiced Defendant; habeas corpus relief is available and granted.
Facts: In the 1980's, Defendant (Petitioner) was convicted of first degree murder due to a fatal stabbing that occurred at a DOC prison. The primary witnesses against Defendant were two fellow inmates of questionable credibility. No physical evidence connected Defendant to the murder. In 2005, Defendant filed a habeas petition alleging newly discovered evidence that the State failed to disclose a DOC report that prison guards had seized a sharpened screwdriver from another inmate immediately after the stabbing.
Holding: To prevail in habeas, Defendant must show "cause" for failure to raise his claim previously, and "prejudice." "Cause" must be some objective factor external to the defense. Here, the State's failure to disclose the DOC report is "cause." To show prejudice, Defendant does not need to prove definitively that he would have received a different verdict if the report had been disclosed, but whether in its absence, he received a fair trial resulting in a verdict worthy of confidence. In assessing *Brady* violations, the Court reviews all available evidence discovered after trial. Here, the undisclosed evidence would have provided an alternative perpetrator and further impeached the State's witnesses because it places another inmate with a weapon at the murder scene just minutes after the murder. Even if the prosecutor was unaware of this, the State has a duty to discover and disclose this evidence because the prison guards were acting on the State's behalf. Defendant was further prejudiced when other post-trial evidence is considered, including that one of the State's witnesses has recanted his testimony, and that another person has confessed to the murder. Habeas relief granted. State must retry Defendant within 60 days or discharge him.

Ross v. State, No. SC90807 (Mo. banc 4/26/11):
Holding: Constitutionality of statute is not cognizable in Rule 24.035 proceeding; constitutional issues must be raised at earliest opportunity, not in a postconviction proceeding after a guilty plea.

Miller v. State, 2015 WL 9303038 (Mo. App. E.D. Dec. 22, 2015):
Holding: Even though 29.15 Movant's amended motion contained a request for an evidentiary hearing as part of the amended motion (rather than as a separate document), the circuit clerk was not authorized to reject the electronic filing; Rule 29.15 does not require the request for an evidentiary hearing be in a separate document; amended motion was timely where Movant attempted to file it on time, but clerk "rejected" it for this reason.
Discussion: Movant's counsel timely tendered the amended motion by e-filing, but the clerk rejected it because Movant's request for an evidentiary hearing was part of the same document and not filed as a separate document. Noting in Rule 29.15 dictates that the request for an evidentiary hearing be in a separate document. Rule 103 governing electronic filings also provides no basis for rejection of the filing here. The clerk should have accepted the filing. Amended motion is deemed filed on date it was tendered in the e-filing system.

Silver v. State, 2015 WL 8230807 (Mo. App. E.D. Dec. 8, 2015):
Even though private counsel entered Rule 29.15 case after public defender had been appointed, and private counsel was granted an extension of time to file amended motion, the due date for the amended motion began when the public defender was appointed, not when private counsel later entered; to hold otherwise would allow Movants to indefinitely extend the Rule's time limits by changing counsel.
Facts: On January 7, 2015, the Rule 29.15 court appointed the Public Defender to represent Movant. On Feb. 5, private counsel entered and filed an extension of time allowing counsel 90 days to file an amended motion. Private counsel filed the amended motion on April 30.
Holding: Rule 29.15(g) provides that the time for filing an amended motion starts to run the earlier of the date counsel is appointed, *or* counsel who is not appointed enters an appearance. The time does not "restart" whenever new counsel enters an appearance. Here, the time started running when the Public Defender was appointed, making the amended motion due no later than 90 days after Jan. 7 (or April 7). Private counsel's filing on April 30 was untimely. Thus, remand is required to allow the motion court to determine if private counsel abandoned Movant.

State v. Nettles, 2015 WL 7738413 (Mo. App. E.D. Dec. 1, 2015):
Holding: Claim that defense counsel operated under actual conflict of interest in representing Defendant and previously representing co-Defendant in same case (who then became State's witness against Defendant) is not cognizable on direct appeal, but must be raised as claim of ineffective assistance of counsel in Rule 29.15 proceedings, even where trial court failed to make independent inquiry about the conflict.
Discussion: Defendant claims that counsel's prior representation of co-Defendant in same case, who then became a key prosecution witness against Defendant, created an

actual conflict of interest, and that the trial court erred in failing to independently inquire about this, and disqualify counsel. An actual conflict of interest occurs from successive representation where an attorney's former client serves as a government witness against the attorney's current client. Here, there is a significant risk that counsel's representation of Defendant may have been materially limited by his duty of confidentiality to the co-Defendant/client. Nevertheless, this claim is not cognizable on direct appeal. It should be raised in a Rule 29.15 proceeding as one of ineffective assistance of counsel.

Hawkins v. State, 2015 WL 7253165 (Mo. App. E.D. Nov. 17, 2015):
Holding: Where 29.15 amended motion was filed late, appellate court must remand to motion court for abandonment hearing to determine whether court should adjudicate the *pro se* or amended motion.

Mann v. State, 2015 WL 6927149 (Mo. App. E.D. Nov. 10, 2015):
Holding: Where counsel filed Movant's 29.15 amended motion late, case must be remanded for abandonment hearing; this is true even though both parties requested that the appeal be heard on the merits; the only exception to remand may be where the motion court ruled on both the pro se and amended motion, so that remand would have no effect on the relief available.

Harris v. State, 2015 WL 6925859 (Mo. App. E.D. Nov. 10, 2015):
Holding: Where Movant filed his pro se 29.15 motion prematurely while the direct appeal was pending and counsel was appointed at that time, the time for filing an amended motion began to run when the mandate issued; counsel's amended motion filed later than 90 days from that date was untimely, so case must be remanded for an abandonment hearing.

Roberts v. State, 2015 WL 6689507 (Mo. App. E.D. Nov. 3, 2015):
Holding: Where amended 29.15 motion was filed late, appellate court must remand case to motion court for abandonment inquiry.

Roberts v. State, 2015 WL 5823368 (Mo. App. E.D. Oct. 6, 2015):
Holding: To avoid mere conclusions, Movant alleging ineffective assistance of appellate counsel must plead *why* appellate counsel failed to appeal an issue.

Gales v. State, 2015 WL 5432785 (Mo. App. E.D. Sept. 15, 2015):
Holding: Appellate court is required to, sua sponte, determine if Amended Rule 24.035 motion was timely filed, and when not, must remand for abandonment hearing; if the motion court determines Movant was not abandoned, the court should not consider the Amended motion and should decide only the initial Form 40 claims; if Movant was abandoned, the court should permit the untimely filing.

Clay v. State, 2015 WL 5135603 (Mo. App. E.D. Sept. 1, 2015):
Holding: Even though the docket sheets reflected that counsel's amended 29.15 motion was filed late, where the file-stamp date on the motion showed it was timely filed,

appellate court concludes that the motion was timely even though there is no explanation in the record for the discrepancy.

Blackburn v. State, 2015 WL 5135192 (Mo. App. E.D. Sept. 1, 2015):
Holding: Where postconviction counsel filed the amended 29.15 motion late, appellate court must, sua sponte, remand case to motion court for inquiry into abandonment.

Carroll v. State, 461 S.W.3d 43 (Mo. App. E.D. 2015):
Even though Movant's pro se Form 40 appeared untimely, where his amended motion alleged that Movant would testify and offer facts showing that the motion was in fact timely-filed, motion court was required to have evidentiary hearing on the matter.
Facts: Movant's pro se Form 40 was filed about eight months after its due date under Rule 29.15(b). Counsel was appointed and filed an amended motion. The amended motion alleged that the motion court had timely received a pro se motion but lost it, so Movant was forced to re-file another pro se motion eight months later. The State moved to dismiss on grounds that the motion was untimely. Movant filed a reply alleging additional facts and attaching affidavits and exhibits that would suggest that his motion was in fact timely. The motion court dismissed the case without an evidentiary hearing.
Holding: Movant's amended motion alleges sufficient facts which, if true, would support the conclusion that his pro se motion was timely filed. However, Movant never had an opportunity to prove his facts because he wasn't given an evidentiary hearing. The State claims that Movant's allegations are insufficient under *Morrow v. State*, 21 S.W.3d 819 (Mo. banc 2000), because Movant's amended motion does not list witnesses who will testify that the motion court timely received his motion but lost it. *Morrow* only applies to claims of ineffective counsel, not claims about the timeliness of a pro se motion. Given that Movant was incarcerated, he may not be able to allege with personal knowledge what happened to his motion after the clerk received it. It is enough that he alleged he timely submitted for mailing his original pro se motion, and that it was timely received by the clerk. He is entitled to an evidentiary hearing to prove this. Even though the court held a "status hearing" at which these matters may have been discussed, the "status hearing" was not a full evidentiary hearing.

Lomax v. State, 2015 WL 3961195 (Mo. App. E.D. June 30, 2015):
Holding: Appellate court is required, sua sponte, to determine timeliness of amended motion under Rules 24.035 and 29.15, and where motion was untimely, remand to motion court for finding on abandonment by counsel, even where counsel acknowledges on appeal that the untimely filing was due to counsel's error, not Movant's.

Wright v. State, 2015 WL 3874726 (Mo. App. E.D. June 23, 2015):
Holding: (1) Under Rule 24.035(b), Movant's *pro se* Rule 24.035 motion was timely where it was filed within 180 days of his delivery to the Department of Corrections; and (2) under Rule 24.035(g), Movant's Amended Motion was timely where it was filed within 90 days of the appointment of counsel (and filing of the plea transcript) and counsel had been granted the additional 30 days allowed by the Rule to file the Amended Motion.

Childers v. State, 2015 WL 3485578 (Mo. App. E.D. June 2, 2015):
Holding: Even though appellate court has a *sua sponte* duty to determine if the Amended Motion was untimely and, if so, usually must remand to the motion court for an abandonment hearing, the appellate court need not remand where *all* of the claims in both the *pro se* and Amended Motions were decided by the motion court with written Findings.
Discussion: Postconviction counsel acknowledges that the untimely filing of the Amended Motion was her fault because she forgot to request the 30-day extension of time authorized by Rule 29.15. However, remand for an abandonment hearing is not necessary here. In a remand, if the motion court were to determine Movant was abandoned, it would decide the Amended Motion claims; if the motion court were to determine Movant was not abandoned, it would only decide the timely-filed *pro se* claims. Here, the motion court has already decided by written Findings *all* the *pro se* and Amended Motion claims, so remand would be pointless. Movant has received all the process he's entitled to from the motion court regarding deciding his claims, and the appellate court can decide them on the merits.

Federhofer v. State, 2015 WL 85666 (Mo. App. E.D. June 2, 2015):
Holding: Even though Rule 24.035 counsel did not request a 30-day extension of time until after the initial 60 days had expired, the Amended Motion was timely where the motion court granted the extension and the Amended Motion was filed within the maximum 90 days allowed by Rule 24.035.

Pennell v. State, 2015 WL 2393272 (Mo. App. E.D. May 19, 2015):
Even though postconviction counsel filed a statement in lieu of amended motion "late," this did not give rise to a presumption of abandonment; but abandonment can be found where the statement in lieu itself is defective in not demonstrating on its face that counsel reviewed the case, or where the statement is filed in a manner that unduly delays the finality of the criminal conviction.
Discussion: Rule 29.15 counsel filed a statement in lieu of amended motion more than 90 days from her appointment date. The statement said that counsel had discussed the case with Movant, reviewed the record, trial and appellate files, and found no additional issues. The issue is whether this creates a presumption of abandonment. It does not. Rule 29.15(g) provides a time limit for amended motions, but not for statements in lieu. Although there is no presumption of abandonment, a motion court could find abandonment under facts such as (1) when the statement itself is defective by not demonstrating on its face that counsel conducted a thorough review of the initial motion or (2) when the statement was filed in a manner that prevents the finality of criminal convictions without undue delay. Court notes that its opinion conflicts with *Harper v. State*, 404 S.W.3d 378 (Mo. App. S.D. 2013), which held that an untimely statement in lieu creates a presumption of abandonment.

State v. McAfee, 2015 WL 1915290 (Mo. App. E.D. April 28, 2015):
An appeal after a denial of a Rule 29.07(d) motion to withdraw a guilty plea may allow for "plain error" review of claims not raised in the trial court.

Facts: Movant pleaded guilty to second degree murder. Before sentencing, Movant filed a 29.07(d) motion to withdraw his guilty plea, which the trial court denied. He appealed.
Holding: A defendant is not allowed to withdraw a plea as a matter of right. He must prove "manifest injustice" to be allowed to withdraw a plea. Generally, a defendant must prove that his plea was unknowing and involuntary because he was misled by mistake, fraud, misapprehension, coercion, fear, persuasion or the holding out of false hopes. On appeal, the appellate court reviews for abuse of discretion. There is no appellate jurisdiction to hear an appeal of an *order* denying a 29.07(d) motion. However, there is jurisdiction to appeal from the *judgment of conviction*, which is what Defendant is appealing here. On the merits, Defendant seeks plain error review of a claim he failed to raise in the trial court. It is an issue of first impression whether plain error review applies to Rule 29.07(d) motions. Plain error review does not apply to Rule 24.035 motions because Rule 24.035 contains express language that claims not raised in the motion court are waived. By contrast, Rule 29.07(d) does not contain the waiver language. Further, Rule 29.07(d) expressly provides that a plea may be withdrawn "to correct manifest injustice" – which is the identical standard for plain error review. Thus, the Court of Appeals assumes plain error review is possible under 29.07(d). However, Court does not find it here.

State v. Lucas, 2014 WL 734405 (Mo. App. E.D. Dec. 23, 2014):
Holding: Where the oral pronouncement of sentence for Rule 24.035 Movant was "life" but the written sentence and judgment stated "99 years," Movant was prejudiced because the 99-year sentence carries a later parole-eligibility date, and in any event, an oral pronouncement of sentence controls over a written one; sentence modified to reflect "life" sentence.

Johnson v. State, 2014 WL 5358322 (Mo. App. E.D. Oct. 21, 2014):
Holding: Where Movant pleaded guilty to felony stealing and court orally stated that for "the misdemeanor theft, [Movant] is sentenced to six months" but later entered a written sentence of 12 years, Rule 24.035 relief must be granted because the controlling oral pronouncement is different than the written sentence; however, because the sentence is ambiguous (since Defendant was being sentenced for a felony but the court said misdemeanor) the proper remedy is re-sentencing, not entry of a nunc pro tunc judgment. Nunc pro tunc can only be used where the oral pronouncement is unambiguous and the court's intention was clear.

Whitfield v. State, 435 S.W.3d 700 (Mo. App. E.D. 2014):
Holding: Even though motion court believed that "justice is [not] served by the routine appointment of counsel for a movant who files a pro se motion … pursuant to Rule 24.035," the appointment of counsel for indigent movants is mandatory under Rule 24.035(e).

McArthur v. State, 428 S.W.3d 774 (Mo. App. E.D. 2014)
Holding: Even though there is no "plain error review" under Rule 29.15, where Movant appealed a denial of Rule 29.15 relief and claimed on appeal for the first time that the

oral pronouncement of sentence differed from the written sentence and judgment, this is a "clerical error" that can be corrected *nunc pro tunc* under Rule 29.12(c); it does not require "plain error" review under Rule 29.15.

Warren v. State, 429 S.W.3d 480 (Mo. App. E.D. 2014):
Holding: Even though Rule 24.035 does not allow for "plain error review," where the written sentence and judgment mistakenly designated Movant to be a prior and persistent offender when the State had not proven this, this is a "clerical error" that the appellate court can correct under Rule 84.14; it does not require "plain error" review.

State v. Ahmad, 2014 WL 1041165 (Mo. App. E.D. March 18, 2014):
Holding: Where Defendant had received an SIS and completed his probation, Rule 29.07(d) was not available to withdraw his guilty plea, because there is no final judgment or conviction.

State v. Gibbs, 2013 WL 5979514 (Mo. App. E.D. Nov. 12, 2013):
Holding: Proper procedure to challenge revocation of probation is writ of prohibition or habeas corpus.

State v. Wright, 2013 WL 324044 (Mo. App. E.D. Jan. 29, 2013):
Holding: Where Defendant discovers alleged irregularities in jury selection after the time for filing a direct appeal or postconviction action have expired, the remedy is to file a petition for habeas corpus; even though Sec. 494.465.1 states that a party alleging jury irregularities may move for "appropriate relief" within 14 days of discovering them, this statute does not authorize a "new trial motion" to do so after the time for filing a new trial motion under Rule 29.11(b) has expired.

Ziebol v. State, 2013 WL 11897 (Mo. App. E.D. Jan. 2, 2013):
Holding: Where (1) Movant was originally sentenced under the juvenile dual jurisdiction law to DYS and a suspended 20-year sentence, and (2) Movant subsequently failed the DYS program and the court executed the 20-year sentence, Movant's claim that counsel was ineffective at the hearing where the court executed the sentence was not cognizable under Rule 24.035 because that hearing was analogous to a probation revocation hearing where sentence is executed, about which claims of ineffective assistance are not cognizable. As with challenges to probation revocation, however, appellate court suggests relief may be available via habeas corpus. This was a case of first impression. (A footnote indicates that claims of ineffective assistance are cognizable at a sentencing following an SIS because any additional jail time has Sixth Amendment significance, but here, the issue involved only suspended execution of a sentence because that's the only option authorized under the DYS dual jurisdiction law, Sec. 211.073.1.)

Stanley v. State, No. ED97795 (Mo. App. E.D. 12/04/12):
(1) Even though a second postconviction counsel filed a second amended motion which was untimely, the motion court can grant relief on it if Movant was abandoned by his first postconviction counsel thereby excusing the untimely filing of the second amended motion; and (2) where the guilty plea court failed to advise Movant prior to his plea that

he could not withdraw from his non-binding plea agreement if the court chose not to follow the State's recommendation, Movant was entitled to postconviction relief from the plea where the judge imposed a higher sentence.

Facts: Movant/Defendant pleaded guilty pursuant to a non-binding plea agreement under which the State was going to argue for two concurrent three-years sentences, and the defense could argue for probation. The court did not inform Movant prior to his plea that if the court did not follow the State's recommendation, Movant could not withdraw the plea. The court ultimately did not follow the State's recommendation, but instead, sentenced Movant to two consecutive four-year sentences. Movant filed a 24.035 motion, which was timely amended by a first postconviction attorney. Subsequently, the first postconviction attorney withdrew from the case. A second postconviction attorney entered the case and filed a second amended motion alleging that the plea court failed to inform Movant that, should it reject the State's recommendation, Movant could not withdraw his guilty plea. The second amended motion, however, was untimely because the time for filing any amended motion had expired before the second postconviction counsel entered the case.

Holding: (1) The Missouri Supreme Court has recognized limited exceptions to the timeliness requirements of the postconviction rules. A motion court can permit the filing of an untimely amended motion and consider a movant's claims if it determines that a movant was abandoned by postconviction counsel. Counsel abandons a movant when he or she is aware of the need to file an amended motion but fails to do so. In such a case, the court may consider an untimely postconviction motion only when the Movant is free of responsibility for failure to comply with the postconviction rule. Here, a remand is required to determine why the second amended motion was untimely, i.e., whether Movant's first postconviction attorney abandoned him. "If the motion court finds that Movant's second amended motion was untimely due to no fault of Movant, the motion court must permit Movant to withdraw his plea" based on the second amended motion. (2) Under Rule 24.02(d)(2), the plea court was required to tell Movant that his plea could not be withdrawn if the court did not accept the State's recommendation. The court failed to do this before he entered his guilty plea. Due process requires that a defendant understand the true nature of his agreement before his plea is accepted by a court. The court must tell a defendant clearly and specifically whether he will or will not be able to withdraw the guilty plea if the court exceeds the recommendation. That did not happen here.

Gray v. State, No. ED97667 (Mo. App. E.D. 9/11/12):

Holding: (1) Claim of ineffective assistance of trial counsel for failure to preserve an issue for appeal is not cognizable in a 29.15 case, but the claim can be properly pleaded as ineffective assistance of trial counsel for failing to object to admission of the evidence at trial, which likely would have led to the evidence being excluded and an acquittal; and (2) where motion court failed to issue Findings on all issues, case is remanded for Findings on omitted issues because 29.15(j) requires Findings on all issues.

State ex rel. Koster v. McCarver, No. ED97414 (Mo. App. E.D. 5/15/12):

Where Petitioner did not know during his trial, direct appeal or time for filing a 29.15 case that Lincoln County employed an impermissible jury selection procedure that

allowed venirepersons to opt-out of jury service by paying $50 and performing community service, this constitutes "cause and prejudice" to allow Petitioner to raise such a claim in habeas corpus.

Facts: Petitioner was convicted at a jury trial in 2008 in Lincoln County. Unbeknownst to him or his trial counsel, Lincoln County used a jury selection procedure that allowed venirepersons to opt-out of jury service by paying $50 and performing community service. 10 venirepersons out of 1200 chose this option in his case. Petitioner's direct appeal counsel testified that she was unaware of this opt-out program during his direct appeal. Petitioner subsequently did not file a Rule 29.15 motion. Subsequently, this opt-out program was declared unlawful in *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010). After this, Petitioner learned of the opt-out program and filed a motion for new trial under Sec. 494.465.1. After this was denied by operation of law, Petitioner filed a state habeas corpus action. The habeas court granted a new trial. The State sought a writ of certiorari to reverse this.

Holding: Sec. 494.465.1 provides that a defendant may make a motion for new trial regarding errors in selecting a jury within 14 days after learning of such errors. Even though Defendant filed his new trial motion within 14 days of learning of the factual basis for his claim in 2010, 494.465.1 does not provide a remedy here because to allow this would subvert postconviction Rule 29.15. However, where a defendant fails to file a Rule 29.15 motion, he can still proceed in a state habeas action on a claim about which he was previously unaware if he can show "cause and prejudice" to overcome his procedural default in failing to raise the claim in a 29.15 action. Here, Defendant has shown cause and prejudice. His trial attorney did not know about the jury opt-out program, and his appellate attorney did not either. Although the State claims the appellate attorney knew about it because she received an email on the matter from another attorney, assuming this is true, we know of no authority that we may impute an attorney's knowledge of a defaulted claim to their client. The State further contends that Petitioner could have filed a 29.15 motion without stating any grounds. However, the State cites no authority that a defendant must file a 29.15 motion even when he has no knowledge of any grounds for relief. Conviction vacated and new trial granted.

Wiley v. State, No. ED96782 (Mo. App. E.D. 3/20/12):

Where Movant gave his 24.035 motion to prison officials for mailing two months before due date and after due date the motion was returned in the mail for insufficient postage, this would constitute extraordinary circumstances beyond Movant's control and allow a late-filing; Movant was entitled to hearing to prove these matters.

Facts: Movant filed a late Rule 24.035 pro se motion and counsel filed an amended motion thereafter. When the State pointed out that the initial pro se motion was late, Movant filed a motion alleging the pro se motion was late due to the actions of prison authorities in mailing it. The motion court dismissed the motion without a hearing.

Holding: An exception to the time limits of Rules 24.035 and 29.15 is when a late filing is "caused by circumstances beyond the control" of Movant. *Howard v. State*, 289 S.W.3d 651 (Mo. App. E.D. 2009), held that actions of prison officials in not properly mailing a Movant's motion can constitute cause to excuse a late filing. Here, Movant's case is similar. Movant alleged that he followed prison procedures in giving his motion to prison authorities to mail two months before its due date. However, after the due date,

it was returned for insufficient postage. These facts, if true, would excuse the late filing and Movant should have been granted a hearing on them. The State also claims that Movant was required to raise these timeliness issues in his amended motion; however, the appellate court finds that raising them in the separate motion was sufficient here.

Peeples v. State, No. ED96864 (Mo. App. E.D. 2/14/12):
Where (1) appellate court on direct appeal affirmed some convictions but remanded others for resentencing; (2) Movant subsequently filed a late 29.15 motion regarding the affirmed convictions; and (3) it was unclear from the record when Movant was resentenced on the remanded convictions, the 29.15 motion could be timely regarding the remanded convictions, and further remand was required to determine when sentencing occurred on those counts.
Facts: On August 14, 2009, the appellate court affirmed multiple convictions of appellant/movant, but reversed two counts and ordered different convictions and resentencing on those. Under Rule 29.15(b), appellant/movant had 90 days after the direct appeal mandate to file a 29.15 motion regarding the affirmed counts. He filed the motion too late (in 2010). The motion court ultimately denied relief on the merits. Appellant/Movant appealed.
Holding: The appellate court determines timeliness *sua sponte*. The 29.15 motion is untimely regarding the convictions that were affirmed on direct appeal. However, it is unclear from the record when Movant was resentenced on the two counts that had been remanded. Appellant would have had 180 days after entry of a new judgment on the resentenced counts to bring a 29.15 motion. Since the appellate court is unable to determine when resentencing occurred, it cannot determine if the 29.15 motion is timely regarding the resentenced counts. Case remanded to determine date of resentencing.

Burston v. State, No. ED98228 (Mo. App. E.D. 6/21/11):
Holding: Dismissal of postconviction motion under 24.035 and 29.15 is immediately appealable because this effectively terminates the litigation, since successive motions are not allowed.

State v. Beckemeyer, No. ED94412 (Mo. App. E.D. 2/15/11):
Holding: In misdemeanor direct appeal, Court of Appeals considers claim of ineffective assistance of trial counsel.

Editor's note: In felony direct appeals, ineffective assistance of trial counsel cannot be raised, but must be raised in a Rule 29.15 motion. *See State v. Wheat*, 775 S.W.2d 155 (Mo. banc 1989).

Green v. State, No. SD33569 (Mo. App. S.D. Dec. 23, 2015):
Even though motion court found that Movant's untimely pro se 29.15 motion should be deemed "timely" filed because Movant had delivered his motion to DOC personnel before the deadline, where neither Movant's pro se nor amended motions pleaded facts about this, appellate court sua sponte dismisses case due to untimely pro se motion.
Facts: Movant filed his pro se 29.15 motion 107 days after the mandate on his direct appeal. The motion court appointed counsel in 2010, who timely filed an amended motion. In 2012, the motion court held a hearing on the issue of whether the pro se

motion was timely filed. Movant's counsel filed a motion to accept the Form 40 as timely filed. Movant testified at the hearing that he gave his motion to DOC personnel to mail before the deadline. The motion court found that the failure to file on time was "beyond the control of Movant" since he delivered his motion to prison authorities on time. The motion court then proceeded to decide the case on the merits. After losing on the merits, Movant appealed.

Holding: An appellate court must, *sua sponte*, determine if the pro se motion was timely. Movant had 90 days from the date of the mandate to file his pro se motion, but did not. As relevant here, *Dorris v. State*, 360 S.W.3d 260 (Mo. banc 2012) and *Vogl v. State*, 437 S.W.3d 218 (Mo. banc 2014) allow a motion to court to deem a pro se motion timely if a Movant *alleges* and proves that he falls within a recognized exception to the time limits. Here, however, Movant's pro se and amended motions did not allege any facts related to the timeliness of the pro se motion. Thus, Movant waived his right to proceed. Judgment vacated and case dismissed.

Laub v. State, No. SD33759 (Mo. App. S.D. Dec. 22, 2015):

Where motion court "notified" the Public Defender that a pro se 29.15 motion had been filed but expressly noted that it was "not appointing" the Public Defender due to caseload reasons, the time for filing an amended motion did not begin to run until Public Defender entered an appearance.

Facts: Movant filed a timely pro se 29.15 motion. In April 2014, the motion court sent a "notice" to the Public Defender that Movant had filed the motion. The notice stated that it was being sent to "assist" the Public Defender in "managing case overload." The notice stated that the court was "not appointing" the Public Defender, but asked a Public Defender to enter an appearance as soon as possible. In June, a Public Defender entered and filed an amended motion within 90 days of entry.

Holding: The State contends that the amended motion is untimely, and the case must be remanded for an abandonment hearing. As relevant here, Rule 29.15(g) provides that an amended motion is due within 60 (or 90, if extended) days of the earlier of (1) the date counsel is appointed, or (2) the date of entry of counsel that is not appointed. Here, the second part of 29.15(g) applies because there was no "appointment" of counsel, but was an "entry" by counsel. The "notice" to the Public Defender was not a de facto appointment of counsel. The notice expressly stated that it was not an appointment. Rule 29.15(e) provides that a motion court shall appoint counsel for an indigent movant, but does not provide any specific time limit for doing so. The Eastern District, in *State v. Creighton*, 2015 WL 9240967 (Mo. App. E.D. Dec. 15, 2015), held that notification to the Public Defender is an appointment. But that notice stated, in relevant part, "The court hereby notifies [Public Defender] that Movant … has filed a postconviction motion." This unqualified notice is different than the instant case, where the notice expressly stated it was "not appointing" the Public Defender. To construe the instant notice as an appointment would be disingenuously unfair to Movant and the Public Defender. Amended motion was timely here.

Lewis v. State, 2015 WL 9241357 (Mo. App. S.D. Dec. 16, 2015):
Holding: Even though 29.15 Movant's counsel filed a motion in the motion court asking that the late amended motion be deemed timely, where the motion court took no action on this, the case must be remanded for an abandonment hearing.

James v. State, 2015 WL 8732195 (Mo. App. S.D. Dec. 14, 2015):
Where (1) motion court dismissed Movant's Rule 24.035 case for failure to prosecute before a transcript was filed, (2) counsel filed a motion seeking to reinstate the case, and (3) counsel filed a notice of appeal within 30 days of the dismissal but without a ruling by the motion court, there is a presumption that counsel "abandoned" Movant and the case must be remanded for an abandonment hearing. This is because (1) the time for filing an amended motion did not begin until the transcript was filed (but no amended was filed before the extended date), and (2) the filing of the motion to reinstate extended the time for the motion court to rule on the motion to reinstate because of Rule 81.05. Further, the notice of appeal was initially premature because the time for the motion court to rule had been extended; the notice of appeal was deemed filed after the extended time expired.
Facts: The Rule 24.035 court appointed the Public Defender to represent Movant on Nov. 19, 2014. First attorney entered an appearance on Dec. 16. On Jan. 14, 2015, the motion court held a case review, at which no one appeared. Pursuant to local rule, the court placed the case on an "inactive docket" which required the case be automatically dismissed without prejudice on March 16. On March 16, the case was dismissed. On March 30, the guilty plea and sentencing transcript was filed with the court. On April 13, a second attorney entered and filed a motion alleging first attorney had "abandoned" Movant and asking the case be "re-instated." On April 23, a third attorney filed a notice of appeal.
Holding: As relevant here, Rule 24.035(g) provides that an amended motion is due within 60 days of the date both a transcript is filed and counsel is appointed. Here, the transcript was not filed until March 30, making an amended motion due on or before June 1. The motion court retained jurisdiction over its March 16 dismissal order for 30 days. But Rule 81.05(a)(2) provides that that time is extended by the filing of "authorized after-trial motions." If an authorized after-trial motion is filed, the judgment becomes final the earlier of (a) 90 days from the date the last timely motion was filed, on which date all motions shall be deemed overruled, or (b) if all motions have been ruled, then the date of ruling of the last motion or 30 days after entry of judgment, whichever is later. Second attorney's motion was essentially a motion for relief under Rule 74.06(b), seeking relief from judgment for excusable neglect; thus, it was an "authorized after trial motion." Hence, the motion court's control over the case was extended for 90 days, or until July 13. The filing of the notice of appeal was premature. Rule 81.04(a) provides that a premature notice of appeal shall be deemed filed immediately after the time for judgment becomes final. Thus, the notice of appeal is deemed filed on July 14, 2015. Because neither first, second nor third attorney filed an amended motion before the *June 1* deadline, there is a presumption of abandonment. Case remanded to motion court to determine if Movant was abandoned.

Waring v. State, 2015 WL 1548957 (Mo. App. S.D. April 7. 2015):
Holding: Where indigent Movant files postconviction case, appointment of counsel is mandatory under Rule 24.035(e).

Hicks v. State, 2015 WL 6274805 (Mo. App. S.D. Oct. 21, 2015):
Holding: Where 24.035 counsel failed to file either an amended motion or statement in lieu of amended motion, after which the motion court dismissed the case, appellate court remands for an abandonment hearing.

Jendro v. State, 2014 WL 7183607 (Mo. App. S.D. Dec. 17, 2014):
Holding: Where (1) PCR counsel filed an amended motion, (2) Movant retained new counsel who alleged that prior counsel's amended motion was defective, and (3) the motion court entered a "judgment and order" overruling Movant's "abandonment" motion but did not rule on the merits of the amended motion that was filed, the appeal is premature because the motion court did not resolve Movant's PCR claims on the merits; because the motion court did not decide the PCR claims on the merits, the abandonment judgment is not a final judgment, and appeal must be dismissed.

In re: Brooks v. Bowersox, 2014 WL 5241645 (Mo. App. S.D. Oct. 15, 2014):
Holding: *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which barred automatic life-without-parole sentences for juveniles convicted of first degree murder, does not apply to Juvenile-Defendants convicted before *Miller* and whose direct appeals and Rule 29.15 amended motions were completed or already filed without a such a claim; such defendants are procedurally barred for not raising the claim on direct appeal or in their Rule 29.15 cases.

Harrell v. State, 2014 WL 702631 (Mo. App. S.D. Feb. 24, 2014):
Holding: Even though Movant's claim concerning his eligibility for a long-term drug treatment sentence was "trial error" that normally should have been raised on direct appeal and normally cannot be raised in a 29.15 action, the appellate court considers the claim because the Movant did not learn until after his direct appeal that DOC would not place him in the treatment program.

Wilson v. State, 2013 WL 6407682 (Mo. App. S.D. Dec. 9, 2013):
Holding: Where motion court denied *pro se* Rule 24.035 motion without appointing counsel even though Movant had completed the *in forma pauperis* section of his Form 40, this violated Rule 24.035(e) which provides that counsel "shall" be appointed for Movant; appointment of counsel is mandatory, not discretionary.

Arington v. State, 2013 WL 3486745 (Mo. App. S.D. July 12, 2013):
Holding: Claim that counsel was ineffective at probation revocation hearing is not cognizable under Rule 24.035; remedy is habeas corpus.

Vogl v. State, 2013 WL 173009 (Mo. App. S.D. Jan. 16, 2013):
Postconviction counsel abandoned Movant where Movant's Form 40 (24.035 motion) was file-stamped one day late and counsel moved to withdraw based on this, but could have shown that the motion was timely filed.
Facts: Movant's Form 40 was file stamped one day late. Subsequently, the Public Defender was appointed to his Rule 24.035 case, but moved to withdraw on grounds that the Form 40 was untimely and the court had no jurisdiction to proceed. The withdrawal motion was granted and the motion court dismissed the case as untimely. Subsequently, Movant, acting *pro se*, filed a motion to reopen his 24.035 action on grounds that he was abandoned by counsel. He alleged facts showing that he actually had filed his motion timely, even though it was file-stamped a day late. The motion court denied his motion without a hearing. He appealed.
Holding: Abandonment by postconviction counsel can occur where postconviction counsel takes no action with respect to filing an amended motion and, thus, a movant is denied of meaningful review of his claims. Here, postconviction counsel took no action to file an amended motion which would have alleged facts showing that the Form 40 was timely. In Movant's motion to reopen, he alleges that he filed his motion timely at the courthouse in Carthage – Jasper County has two courthouses – but that Carthage forwarded it to the courthouse in Joplin, and it was received in Joplin one day late. If these facts are true, then Movant's Form 40 was timely. The failure of counsel to file an amended motion to allege these facts was an abandonment which deprived Movant of his opportunity to show that his Form 40 was timely. Case remanded for an abandonment hearing.

State ex rel. Volner v. Storie, No. SD32066 (Mo. App. S.D. 7/10/12):
Holding: Where judge failed to appoint counsel for indigent postconviction movant who filled out in forma pauperis affidavit on postconviction motion, writ of mandamus issues to require appointment of counsel as required by Rule 29.15(e).

White v. State, No. SD31300 (Mo. App. S.D. 5/11/12):
Holding: Where counsel filed an amended 24.035 motion, a claim that counsel "abandonned" Movant could not be raised for the first time on appeal because it was not presented to the motion court. However, court notes in a footnote that the Western District has suggested that such a claim might be raised in a motion filed in the motion court to reopen the postconviction proceeding.

State v. Cannafax, No. SD30327 (Mo. App. S.D. 7/22/11):
Where Defendant's sexual offenses occurred during a time span from early 2006 to 2008, but it was unclear if they occurred after August 28, 2006, and the trial court's judgment made no findings about this, it is unclear whether the lifetime supervision requirements of Sec. 217.735 apply to Defendant, but the issue is not ripe until the Board of Probation and Parole attempts to apply them to him; at that time, he may bring a writ of mandamus to challenge their applicability.
Facts: Defendant was convicted of sexual offenses alleged to have occurred between June 7, 2006 and November 2008. The trial court did not expressly find that the offenses occurred after August 28, 2006 and did not state in its judgment that Defendant was

subject to lifetime supervision under Sec. 217.735, which provides that offenders are subject to lifetime supervision for certain sexual offenses "based on an act committed on or after August 28, 2006."
Holding: Defendant's claim on appeal is that he is improperly subject to lifetime supervision under Sec. 217.735 because there was not sufficient evidence to prove his offenses happened after August 28, 2006. However, since the trial court made no findings about this and made no mention of it in its judgment, it is unclear if Defendant will be subjected to lifetime supervision when he completes his prison sentence. Thus, this issue is not ripe for review. However, if the Board of Probation and Parole seeks to apply Sec. 217.735 to him in the future, he may challenge that via a writ of mandamus.

Jack v. State, No. SD30512 (Mo. App. S.D. 8/9/11):
Holding: Denial of Rule 29.07(d) motion to withdraw guilty plea to correct manifest injustice is appealable and is governed by rules of civil procedure, even though it is filed in the criminal case; judgment becomes final 30 days after entry, and notice of appeal is due not later than 10 days thereafter.

Counts v. State, No. SD30658 (Mo. App. S.D. 6/7/11):
Holding: Claim that trial judge violated Sec. 559.115 by failing to hold a hearing within 120 days after Movant's incarceration where DOC recommended release, but judge ultimately denied it, is not cognizable in 24.035 proceeding, because this is an attack on a ruling on probation. However, judge's action can be challenged by an appropriate writ.

Roderick v. State, No. SD30588 (Mo. App. S.D. 6/20/11):
Holding: Claim that Movant rejected favorable plea offer and proceeded to trial due to ineffective assistance of counsel is not cognizable in 29.15 case, because this did not affect the fairness of the trial.

Editor's Note: As of June 2011, the U.S. Supreme is currently considering this issue in *Lafler v. Cooper*.

Epkins v. State, No. SD30349 (Mo. App. S.D. 2/10/11):
Even though Movant's 24.035 motion only generally alleged that counsel had "coerced" him into waiving a jury, but the evidentiary hearing evidence was that counsel told him he'd get medical treatment faster if he did this, appellate court will review the claim on the merits; general pleading sufficient.
Holding: We acknowledge Movant's amended motion more generally refers to trial counsel's allegedly coercive conduct and does not specifically mention Movant's medical condition. However, during the evidentiary hearing, claims of coercion based upon counsel's alleged inducement stemming from Movant's medical condition was clearly presented. Since Movant's argument on appeal was generally encompassed in Movant's amended motion, and presented to the motion court at the hearing, we choose to review the claim on the merits.

Gunn v. State, 2015 WL 8776885 (Mo. App. W.D. Dec. 15, 2015):
Holding: Even though direct appeal counsel failed to notify client-Movant that the mandate had issued in his direct appeal, this did not excuse the subsequent untimely

filing of his Rule 29.15 motion (Form 40); this was not active interference by a third-party which prevented his filing.

Powell v. City of Kansas City, 2015 WL 5821845 (Mo. App. W.D. Oct. 6, 2015):
Holding: (1) Even when a civil litigant is granted leave to proceed as a poor person, Sec. 514.040 allows a court discretion to assess whatever costs the court believes the litigant may be able to pay, except in postconviction cases under Rules 24.035 and 29.15, where a court cannot assess any costs against Movants; and (2) Rule 81.08(a) requires a notice of appeal to specify the judgment or order appealed from; where Appellant's notice of appeal stated only that Appellant was appealing from an entry of summary judgment, appellate court would not review on appeal Appellant's claim that trial court erred in overruling a new trial motion, because the notice of appeal did not specify that Appellant was appealing such ruling (which was different than the summary judgment order) and Appellant failed to attach the new trial motion to her notice of appeal.

Bell v. Phillips, 465 S.W.3d 544 (Mo. App. W.D. July 28, 2015):
(1) Inmate stated a claim for civil rights violation where he alleged prison failed to give him postage to mail a habeas corpus petition, which caused the petition to be late, because this violated Inmate's right of access to the courts, and (2) a petition needs to plead only ultimate facts, not detailed, operative or evidentiary facts.
Facts: Inmate filed Sec. 1983 action, alleging that prison failed to give him $5.10 to mail his federal habeas petition. As a result, his petition was filed late. Trial court dismissed civil rights case for failure to state a claim. Inmate appealed.
Holding: Inmates have a constitutional right of access to the courts. To protect that right, prisons must provide inmates with access to some legal materials or assistance so that inmates can prepare and mail legal complaints. The constitution requires that inmates be provided with the tools needed to attack their sentences directly or collaterally. To succeed on an access-to-courts claim, an inmate must show (1) he was denied a reasonably adequate opportunity to present a constitutional violation to courts, and (2) actual injury. Here, Inmate's allegation that he was denied money for postage states a valid access-to-courts claim, and his allegation that he was prejudiced because his petition was filed late shows injury. While it may have been preferable for Inmate to make more detailed factual allegations, a petition does not have to plead operative or evidentiary facts, and will survive dismissal if it pleads ultimate facts, not conclusions. Dismissal reversed.

State v. Dudley, 459 S.W.3d 499 (Mo. App. W.D. 2015):
Holding: Appellate court, sua sponte, dismisses 24.035 motion as untimely filed where Amended Motion alleged only that Movant "attempted" to timely file his pro se 24.035 motion but that the motion was "not received by the court." Movant's Amended Motion failed to allege *why* his pro se motion was not received, and did not allege that circumstances beyond his control, or that negligence or misconduct by others, prevented his attempted filing from being successful. In the absence of such allegations, there is no exception to 24.035's time limits that applies.

Hendrix v. State, 2015 WL 3751386 (Mo. App. W.D. June 16, 2015):
Holding: Even though plea counsel failed to investigate Defendant-Movant's mental health, Movant failed to prove that he was prejudiced by the failure to investigate because Movant did not present evidence at his 24.035 hearing as to what a mental health investigation would have shown; thus, Movant failed to prove prejudice.

McCoy v. State, 2015 WL 1246556 (Mo. App. W.D. March 17, 2015):
Holding: (1) A denial of a Rule 29.07(d) motion to withdraw a guilty plea for manifest injustice after an SES is an appealable judgment because an SES is a final criminal conviction; by contrast, a denial of a 29.07(d) motion after an SIS is not a final appealable judgment because no final criminal conviction has been entered. (2) Where Defendant received an SES and, thus, was not delivered to the Department of Corrections, he was not eligible to pursue relief under Rule 24.035 (which requires delivery to DOC), but he could pursue his ineffective assistance claim via a Rule 29.07(d) motion to withdraw guilty plea for manifest injustice. But (3) even though plea counsel failed to inform Juvenile-Defendant that he would be subject to lifetime GPS monitoring as a sex offender, counsel was not ineffective because this was a collateral consequence of conviction, and also there was no prejudice because there was no a reasonable probability that Defendant would have rejected the plea offer and gone to trial, since he was facing a lengthy sentence upon conviction at trial, rather than probation, and the evidence of guilt was strong. (4) Court refuses to consider claim that automatically imposing lifetime supervision and monitoring on juveniles constitutes cruel and unusual punishment and violates *Graham v. Florida*, 560 U.S. 48 (2010), because this issue was not raised in the trial court or briefed by the parties, but raised for the first-time at oral argument.

Thornton v. Denney, 2015 WL 1245499 (Mo. App. W.D. March 17, 2015):
Petitioner/Defendant, who pleaded guilty in 2007 to DWI, was entitled to habeas relief on his claim that his prior municipal court SIS for DWI could not be used to enhance his sentence; this was true even though Defendant could have raised this claim in a Rule 24.035 motion, because habeas corpus is available to correct sentencing defects.
Facts: Petitioner/Defendant pleaded guilty in 2007 to DWI. His offense was enhanced from a Class A misdemeanor to a Class D felony because, as relevant here, he had a prior municipal court SIS for DWI. In 2011, Defendant's probation was revoked and his sentence executed. He filed a habeas corpus case alleging that under *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), his municipal court SIS could not be used to enhance his sentence to a felony.
Holding: Defendant is correct that if Turner applies, his offense cannot be enhanced to a felony. The State contends that because Defendant could have raised this issue in a Rule 24.035 case, he has waived it. However, habeas can be used to correct "sentencing defects" where a sentence exceeds that permitted by law. A petitioner seeking relief from a sentencing defect need not show "cause" for failure to raise the issue earlier. To the extent that cases such as *State ex rel. Simmons v.White*, 866 S.W.2d 443 (Mo. banc 1993), state a more restrictive rule, they no longer accurately state the law. The State also contends that *Turner* should not be applied retroactively. But Defendant is not seeking retroactive application. The statute at issue in *Turner* was in effect at the time of

Defendant's plea in 2007; it is not being applied retroactively. No issue of retroactivity is presented when a later judicial decision interprets the meaning of a pre-existing statute. Thus, *Turner* applies to Defendant, and Defendant's offense is properly a Class A misdemeanor. Because jurisdiction to revoke misdemeanor probation expired in 2009, the trial court lacked authority to revoke probation in 2011. Defendant discharged and his conviction modified to a Class A misdemeanor.

Dunlap v. State, 452 S.W.3d 257 (Mo. App. W.D. Jan. 13, 2015):
(1) Where Movant alleges ineffective assistance of guilty plea counsel in failing to take actions at sentencing, correct standard for prejudice is whether Movant would have received a lower sentence but for counsel's ineffectiveness; and (2) where motion court failed to make Findings on certain issues, Rule 78.07(c) requires that a motion to amend judgment be filed requesting Findings on those issues in order to preserve the issue for appeal.
Facts: Movant, who had pleaded guilty and received a lengthy sentence, alleged that counsel was ineffective in failing to bring certain sentencing matters to the judge's attention, which would have resulted in a lower sentence. The motion court denied the claim on grounds that Movant's decision to plead guilty would not have been different. Movant raised a separate postconviction issue, on which the motion court failed to make Findings. Movant filed a Rule 78.07(c) motion to amend judgment, but did not argue the failure to make Findings on that particular issue.
Holding: (1) For a claim of ineffective assistance at sentencing, Movant must show that but for counsel's failures, his sentence would have been lower. The motion court erroneously analyzed Movant's claim as to how counsel's performance affected the outcome of the plea, not the outcome of the sentencing phase of the proceeding. Applying the wrong legal standard is reversible error. Case remanded for new Findings applying correct legal standard. (2) Rule 78.07(c) requires that "error[s] relating to the form or language of the judgment, including the failure to make … required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." Here, although Movant filed a 78.07(c) motion, he did not raise the failure to make Findings on the specific issue raised on appeal. Therefore, the issue is not preserved for appeal and cannot be reviewed.

Bridgewater v. State, 2015 WL 160833 (Mo. App. W.D. Jan. 13, 2015):
A motion to recall mandate can be used to present newly discovered evidence of guilty plea counsel's ineffectiveness, which evidence was not available at the time of the original Rule 24.035 evidentiary hearing.
Facts: Movant pleaded guilty, in an open plea, to three counts. At the plea, the judge informed him he could receive up to life sentences on each count, but never informed him that the sentences could run consecutively. The judge imposed three consecutive life sentences. Movant later filed a Rule 24.035 motion, alleging that plea counsel had affirmatively misrepresented that he would receive concurrent sentences if he pleaded guilty. At the evidentiary hearing, plea counsel testified that she did not have a "specific recall" or "specific details" of her discussion with Movant without looking at her notes, which were missing at the time of the hearing. Counsel testified it was her "practice" to tell a client the "worst case scenario," which would be consecutive sentences. The

motion court denied relief. The Western District affirmed on appeal. Subsequently, counsel's notes were found. The notes supported Movant's claim that counsel indicated he would receive concurrent sentences. Movant filed a motion to recall the mandate in his appeal, claiming this newly discovered evidence warranted relief.
Holding: This is a case of first impression whether a motion to recall mandate can be used to present newly discovered evidence. A motion to recall mandate can be used to remedy a deprivation of a defendant's federal constitutional rights. Here, unless the mandate is withdrawn, Movant's ability to challenge whether he received effective assistance of counsel at his plea will be impaired. Counsel's notes were missing through no apparent fault or lack of diligence on the part of Movant. The notes clearly corroborate Movant's version of events. The notes are contrary to counsel's evidentiary hearing testimony and refute that she followed her standard "practice" of warning of consecutive sentences. Further, the plea judge, in violation of Rule 24.02(b)(1), failed to warn Movant of the possibility of consecutive sentences. Movant has no other apparent remedy besides a motion to recall mandate. A Rule 29.07(d) motion cannot be used because it cannot be a substitute for the timely assertion of a claim in a Rule 24.035 motion. Habeas corpus does not appear to be available, since this is not a claim of actual innocence or a procedurally defaulted claim that Movant was deprived of a fair trial. Appellate court recalls its mandate, and remands case for further evidentiary hearing and new Findings on Movant's claim that counsel misadvised him.

State v. Hopkins, 2014 WL 928973 (Mo. App. W.D. March 11, 2014):
Holding: Even though Defendant who pleaded guilty was denied his right of allocution at sentencing, the appellate court has no authority to hear this on direct appeal from a guilty plea, but the issue may be raised in a Rule 24.035 motion; a direct appeal of a guilty plea is limited to issues relating to subject matter jurisdiction and the sufficiency of the charging documents.

Thompson v. State, 2014 WL 4636393 (Mo. App. W.D. Sept. 9, 2014):
Postconviction claim that counsel was ineffective for failing to investigate and file a motion to suppress failed to state claim; rather, Movant must plead that counsel provided incompetent advice whether to plead guilty under all the circumstances of the case.
Facts: Rule 24.035 Movant alleged plea counsel was ineffective for failing to investigate and file a motion to suppress, and that Movant would not have pleaded guilty if counsel had done this. The motion court denied the claim without a hearing.
Holding: A plea of guilty is not subject to collateral attack on the ground that it was motivated by inadmissible evidence unless the Movant was incompetently advised by his attorney. The motion must allege that plea counsel provided incompetent advice regarding whether Movant should plead guilty, i.e., that counsel's advice under all circumstances of the case was outside the range of competence demanded of counsel in criminal cases. Merely providing no advice regarding suppression is not enough. Denial of motion affirmed.

State v. Hopkins, 2014 WL 928973 (Mo. App. W.D. March 11, 2014):
Holding: Even though Defendant who pleaded guilty was denied his right of allocution at sentencing, the appellate court has no authority to hear this on direct appeal from a

guilty plea, but the issue may be raised in a Rule 24.035 motion; a direct appeal of a guilty plea is limited to issues relating to subject matter jurisdiction and the sufficiency of the charging documents.

In re: Ferguson v. Dormire, 413 S.W.3d 40 (Mo. App. W.D. 2013):
(1) Even though a circuit court had denied habeas petition on the merits with written Findings, the remedy for Petitioner is to file a new habeas proceeding in the appellate court, and the appellate court does not review the circuit court's Findings but reviews the case de novo; (2) in the absence of statutory constraint, a habeas Petitioner is not barred from filing successive habeas corpus petitions asserting grounds previously denied by a circuit court. (However, where a higher court has denied a writ, Rule 91.22 prohibits returning to a lower court unless the higher court's denial was without prejudice.); and (3) where the State failed to disclose an interview of a State's witness which would have impeached another State's witness and allowed the defense to develop further evidence, Petitioner demonstrated cause and prejudice for habeas relief and violation of Brady.
Facts: Petitioner was convicted of murder. After appeal and postconviction remedies were concluded, he filed a habeas petition alleging, in relevant part, that the State failed to reveal an interview of a witness which would have impeached a key identification witness at trial. There was no physical evidence connecting Petitioner to the offense, and the identification evidence was hotly contested at trial. The circuit court denied the petition on the merits. Petitioner filed a new habeas petition in the appellate court.
Holding: (1) The State claims that because Petitioner's claims were denied by the circuit court after an evidentiary hearing, Petitioner's recourse is to file for a writ of certiorari. When a circuit court *grants* a habeas petition, the State's recourse is to file for a writ of certiorari. However, when a petition is *denied*, Petitioner's remedy is to file a new habeas petition in the appellate court. Further, the appellate court does not conduct appellate review of the circuit court's decision, but reviews de novo. (2) The State argues that the petition should be prohibited as "successive," but in the absence of any statutory constraint, a habeas Petitioner is not prohibited from filing a successive petition in the appellate court. Rule 91.22 does, however, prohibit returning to circuit court after a habeas writ is denied by a higher court unless the higher court denied the writ without prejudice. (3) Petitioner has established the cause and prejudice gateway for habeas relief because he has shown that the State's failure to disclose a witness interview which would have impeached a critical identification witness was an objective factor external to the defense, which he did not know about or have reason to know about at the time of his direct appeal and postconviction cases. In determining prejudice, Petitioner need only show a reasonable probability of a different result or undermined confidence in the outcome, not that discounting the inculpatory evidence in light of the nondisclosed evidence, there would not have been enough evidence left to convict. Even though the State did not reduce the witness interview to writing and the prosecutor did not know about it, the failure to disclose still violated *Brady*, because *Brady* obligations cover police and prosecutor investigators. Even though the State claims Petitioner could have learned about the *Brady* violation sooner, a rule that "prosecutor may hide, defendant must seek," does not comport with due process. The undisclosed evidence would have impeached a critical identification witness at trial, and allowed the defense to develop other evidence. Even though the State endorsed the undisclosed witness, endorsement

cannot be a valid substitute for *Brady* disclosure because it is not enough to avoid active suppression of favorable evidence; *Brady* requires disclosure.

Lindner v. State, 404 S.W.3d 926 (Mo. App. W.D. 2013):
Holding: Where Movant alleged for the first time on appeal that postconviction counsel had abandoned him by filing a defective amended motion, the appellate court would not consider this claim because Movant had not filed in the motion court a "motion to reopen the proceeding due to abandonment," or a motion to amend judgment under Rule 78.07(c) to allege abandonment; to preserve the issue of abandonment for appeal, a Movant must have first complied with Rule 78.07(c) by filing a motion to amend judgment in the motion court.

Wallar v. State, 403 S.W.3d 698 (Mo. App. W.D. 2013):
(1) The "form discovery response" of the Jackson County Prosecutor's Office is deceptive because it implies that the Office has checked the criminal histories of witnesses when the Office has not, in fact, done so; thus, the response violates Rule 25.03; (2) in a Rule 24.035 motion following a guilty plea, a mere violation of a discovery rule is not cognizable, but the issue can be cognizable if it has "constitutional significance" under Brady; to plead the claim, Movant must plead that had the Brady evidence been disclosed, he would not have pleaded guilty but would have insisted on going to trial; but (3) the failure to disclose mere impeachment evidence is insufficient, because the government is not constitutionally required to disclose impeachment evidence prior to entering a plea agreement with a defendant.
Facts: Following a guilty plea, Movant filed a 24.035 motion alleging that the Jackson County Prosecutor's Office had failed to disclose evidence to him in violation of Rule 25.03. The Western District ultimately affirms the denial of postconviction relief, but makes some notable comments about discovery law and postconviction relief.
Holding: (1) The Western District finds that the "form discovery response" of the Jackson County Prosecutor's Office is misleading because it implies that the Office has already run criminal histories on State's witnesses when it has not done so. Although this was not prejudicial in this case because the defense attorney testified that he knew the Office did this and knew he would not get discovery of this until closer to trial, the Office's "standard response" is deceptive and does not comply with Rule 25.03. The Jackson County Prosecutor's Office should alter this language in its standard response to clearly reflect either that the criminal histories have not been run, or that they have been run and revealed no prior convictions. (2) As for Movant's claim that he should receive postconviction relief due to violation of Rule 25.03, mere violation of a court rule is not cognizable under Rule 24.035 because court rules do not constitute the "laws of this state." For the claim to be cognizable, it must have and be pleaded as having "constitutional significance," i.e., it must violate the U.S. or Missouri Constitutions. Failure to disclose evidence could have constitutional significance if it can meet the test for *Brady* violations. To plead and prove such a claim, a movant must plead and prove that had the evidence at issue been disclosed, he would not have pleaded guilty, but would have insisted on going to trial. This Court recently held that when a defendant has pleaded guilty, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights … but may instead attack [only] the voluntary and intelligent

character of the guilty plea by showing ineffectiveness of counsel." The State argues that this holds that movants cannot raise *Brady* claims or constitutional claims other than ineffective counsel. This reading is too narrow. Rule 24.035 contemplates raising constitutional claims. To be cognizable, the claim would have to be one the defense was unaware of prior to the plea, that could not have been raised prior to the plea, and that rendered the plea involuntary. While such claims are rare, an example would be a *Brady* claim, but "[s]uch a claim is more likely to be successful if the defendant entered an *Alford* plea." Also, the violation of other court rules can have "constitutional significance." For example, if there is not a factual basis under Rule 24.02(e), this violates due process, and Rule 24.035 allows relief as a violation of due process. (3) The U.S. Supreme Court has held, however, that the Constitution does not require the government to disclose impeachment evidence prior to entering a plea agreement with a defendant. The undisclosed evidence here is merely impeachment evidence, and therefore, does not affect the voluntary nature of the plea.

Rennick v. State, 2013 WL 791541 (Mo. App. W.D. March 5, 2013):
Holding: Even though Movant wrote "do not know" on his Form 40 where it asked the date of the mandate on direct appeal, where Movant's Form 40 was file-stamped by the Circuit Clerk within 90 days of the mandate, the motion court clearly erred in dismissing the Form 40 as untimely because Movant met his burden of timeliness by, in fact, having his motion file-stamped within the time required by Rule 29.15(b); to dismiss Movant's Form 40 as untimely for failing to plead the date of the mandate does nothing to serve the purpose of Rule 29.15 which is to avoid delay in processing claims.

State ex rel. Koster v. Green, No. WD75820 (Mo. App. W.D. 12/26/12):
Even though Petitioner confessed to crime, it was not an abuse of discretion to grant habeas relief where police had committed numerous "Brady" violations by failing to disclose serological test results, fingerprints, a drawing of the crime scene, and that a key prosecution witness had been hypnotized – all of which would have aided the defense and which undermine confidence in the outcome.
Facts: Defendant/Petitioner was convicted of a murder in 1983. In 2011, he sought habeas relief on grounds that the police had committed various "*Brady*" violations. The trial court granted relief. The State sought a writ of certiorari and claimed that there was no prejudice to Petitioner since he had confessed to the crime.
Holding: The undisclosed evidence in this case would have cast doubt on Petitioner's confession because such evidence was inconsistent with it. The defense was that Petitioner, who was mentally ill, had falsely confessed. To demonstrate prejudice, a Petitioner does not have to show that the suppressed evidence would have resulted in an acquittal or that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. Thus, it doesn't matter that even if the favorable evidence had been disclosed, there would still have been enough to convict based on Petitioner's confession. All that is required is a showing that the favorable evidence could reasonably be taken to have put the whole case into a different light so as to undermine confidence in the verdict. Here, all of the undisclosed evidence would have allowed defense counsel to greatly undercut the credibility of the police investigation, which was a critical issue in the jury's assessment of Petitioner's

confession. Had the undisclosed evidence come to light, the defense easily could have shown evidence that was inconsistent with Petitioner's confession. It was not an abuse of discretion to grant habeas relief.

Miller v. State, No. WD74785 (Mo. App. W.D. 11/27/12):
Where (1) Movant's pro se 29.15 motion was untimely filed but Movant filed with the motion a letter claiming that the late filing was due to an error in the prison mailroom, and (2) the motion court failed to make any finding about the timeliness of the pro se motion, case is remanded to determine if the "mailroom error" exception to the timeliness requirement of 29.15 applies.
Facts: Movant filed his pro se 29.15 motion late. However, Movant sent a letter to the clerk when he filed his pro se motion, claiming that the late filing was due to an error in the prison mailroom over postage and mailing. An amended motion was filed, but made no mention of the timeliness issue. The motion court denied relief on the merits and made no mention of the timeliness issue. On appeal, Movant filed a motion to remand for a hearing to resolve the timeliness of the pro se motion.
Holding: The timeliness of the pro se motion cannot be waived by the State or appellate court. What is critical here is the letter which Movant wrote to the clerk accompanying his pro se motion and explaining the late filing. If there was nothing in the record about this, the case would have to be dismissed. But here Movant has alleged a possible exception to the time limits of the postconviction rules, i.e., an error by the prison mailroom under *Howard v. State,* 289 S.W.3d 651 (Mo. App. E.D. 2009). If this is proven by a preponderance of evidence, the pro se motion should be deemed timely filed. Case remanded to determine timeliness.

Taylor v. State, No. WD74275 (Mo. App. W.D. 8/28/12):
Holding: *Claim that judge punished Movant for appealing the conditions of his probation to an appellate court by revoking his probation and sentencing him to the maximum sentence was cognizable in a 24.035 motion.*
Facts: Movant pleaded guilty to first degree endangering the welfare of a child. The court imposed various sex offender conditions as part of his probation. Movant appealed some the sex offender conditions to the appellate courts. Later, the judge revoked Movant's probation and said he had "manipulated the probation system and manipulated this Court." Movant filed a 24.035 motion alleging that the judge had revoked his probation and imposed the maximum sentence "only because he had exercised his constitutional right to challenge a condition of probation" on appeal.
Holding: Revocation of probation determinations generally are not subject to a challenge in a 24.035 action, but that is not the claim here. Here, Movant is contesting the legality of the sentence imposed upon revocation of probation by contending the judge punished him for exercising his right to appeal the conditions of his probation. It is unconstitutional to use enhanced sentencing to punish or penalize a defendant for exercising his constitutional rights. Movant's claim of retaliatory sentencing is cognizable. However, relief is denied because Movant did not demonstrate that retaliation was the determinative factor in the judge's revocation of probation.

Graves v. State, No. WD74282 (Mo. App. W.D. 6/29/12):
Even though the motion court judge and prosecutor conceded that Movant's Form 40 should be deemed timely filed due to the clerk's failure to properly file-stamp the motion, where the file-stamp was "late," the appellate court does not have authority to hear the appeal and the case must be remanded for a hearing on the timeliness of the motion.
Facts: Defendant filed a Form 40 which appeared to be file-stamped "late." Counsel filed an amended motion which alleged that his Form 40 was actually timely due to the court being without an assistant clerk for some period of time, and the motion not being filed stamped until much later after it was received. Movant sought to present evidence about this at the evidentiary hearing, but the judge stated that there was "no way" to determine when the motion was received, and the judge was going to "pull that out of the case" and decide the case on the merits. The prosecutor agreed with this. After the court denied relief on the merits, Movant appealed.
Holding: The appellate court has a duty to enforce the time limits of Rule 29.15. The appellate court cannot accept the judge's and prosecutor's agreement that the motion was timely filed. The Movant must prove this by a preponderance of the evidence. Here, the file-stamp reflects that the motion was untimely. Movant has alleged facts in his amended motion, however, which if true, would show that his motion was, in fact, timely filed. Thus, the case should be remanded to allow Movant to present those facts. It may be that it cannot be determined when the motion was received by the court. However, the motion court is free to determine timeliness based solely on testimony by Movant of when he mailed his motion, if the court finds this credible.

State v. Reynolds, No. WD73306 (Mo. App. W.D. 3/6/12):
Holding: Claims of ineffective assistance of counsel in misdemeanor cases should be raised in habeas corpus, not direct appeal.

Ewing v. Denney, No. WD74807 (Mo. App. W.D. 3/6/12):
Where trial counsel undertook to file a notice of appeal for Defendant but failed to properly do so and Defendant did not learn of this until after time for late notice of appeal expired, trial counsel was ineffective and habeas relief is granted to allow Defendant to be resentenced so can file a new notice of appeal.
Facts: In 2007, Defendant (Petitioner) was convicted at trial. His trial counsel filed a notice of appeal for him, but failed to timely pay a filing fee. That appeal was dismissed in 2007, but counsel never told Defendant. In 2008, Defendant wrote other attorneys and legal authorities to try to find out what was happening regarding his appeal. The Supreme Court told him to contact the Public Defender. In 2010, Defendant brought a habeas case in DeKalb County seeking to have Defendant re-sentenced so he could appeal. The DeKalb County Circuit Court granted relief and ordered the Jackson County Circuit Court to resentence Defendant, but the Jackson County Circuit Court refused to do so on grounds that the DeKalb court had no authority to order the Jackson court to do so. In 2011, Defendant re-filed his habeas case in the Western District Court of Appeals.
Holding: One of the exceptions to allow review of procedurally defaulted claims is "cause and prejudice." The question here is whether Defendant can meet this test. A defendant is entitled to effective assistance of counsel on appeal and failure to perfect a notice of appeal is ineffective. "Cause" requires that the procedural default be "external"

to the defense, which might at first blush appear to not be met here. But the U.S. Supreme Court has held that where the procedural default is the result of ineffective assistance of counsel, the default is imputed to the State and this renders the "cause" "external" to the defense. Here, counsel was ineffective in failing to perfect the appeal, and Defendant was prejudiced by being denied an appeal. Sentence vacated so Defendant can be resentenced, and then file a timely notice of appeal.

Phelps v. State, No. WD73263 (Mo. App. W.D. 11/1/11):
Holding: For purposes of day-counting under Rule 24.035's requirement that a pro se motion be filed within 180 days of delivery to the Department of Corrections, the day of the triggering event (i.e., the day Movant was delivered to the DOC) is not included in computing the 180 days per Rule 44.01(a), which provides that "in computing any period of time [under the rules] … the day of the act, event, or default after which the designated period of time begins to run is not to be included."

Middleton v. State, No. WD73290 (Mo. App. W.D. 10/18/11):
Holding: Where Movant filed a second motion to reopen postconviction proceedings on grounds of "abandonment," which the motion court denied via a docket entry, this was not an appealable "judgment" under Rule 74.01(a) but only a non-appealable "order"; however, the motion court does have "jurisdiction" to consider a second motion to reopen.

Cornelious v. State, No. WD72866 (Mo. App. W.D. 9/27/11):
Holding: Even though 29.15 movant filed multiple amended motions and the last motion was beyond the time limit for filing an amended motion, the Western District considers the claims in the last amended motion because the State failed to raise a timeliness objection in the motion court, so the timeliness issue is waived.

Editor's note: The Eastern District holds that timeliness is not waived despite failure to raise it in the motion court. *See Swofford v. State*, 323 S.W.3d 60 (Mo. App. E.D. 2010). As of October 2011, the Missouri Supreme Court is considering the issue.

Sanford v. State, No. WD72291 (Mo. App. W.D. 7/26/11):
Holding: Where motion court failed to appoint counsel for movant in 24.035 case who had indicated she was indigent, this was erroneous because Rule 24.035(e) mandates that counsel be appointed for indigent movants.

Gerlt v. State, No. WD72225 (Mo. App. W.D. 4/12/11):
(1) State cannot raise untimeliness of 24.035 motion for first time on appeal because issue is waived if not raised as an affirmative defense in motion court; and (2) claim that motion court's Findings were inadequate is not preserved for appeal unless Movant files a motion to amend judgment pursuant to Rule 78.07(c).
Facts: Movant filed a *pro se* Rule 24.035 motion late. This was not recognized in the motion court, and the motion court denied relief on the merits. Movant appealed, claiming that the motion court's Findings were inadequate. The State claimed the appeal should be dismissed because the *pro se* motion was untimely.

Holding: (1) After *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), failure to file a timely motion is not jurisdictional. Therefore, the untimeliness of a postconviction motion can only be raised as an affirmative defense, and the defense is waived if not timely raised. Here, the defense is not timely raised because it was not raised in the motion court, but for the first time on appeal. This Court recognizes that the Eastern and Southern Districts have both held to the contrary, but this Court disagrees with them. Thus, the appeal should not be dismissed on this ground. (2) On the merits, Movant claims that the motion court's Findings are inadequate under Rule 24.035(j) for meaningful appellate review. However, Movant failed to file a motion to amend the judgment under Rule 78.07(c), which provides "[i]n all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." This Court now expressly holds that Rule 78.07(c) applies to postconviction proceedings. Since Movant failed to file a motion to amend judgment, the issue is not preserved.

State ex rel. Koster v. McElwain, No. WD73211 (Mo. App. W.D. 3/29/11):
(1) Petitioner was able to raise Brady claim and jury misconduct claim in state habeas case because he showed cause and prejudice for not raising them on direct appeal or in postconviction; (2) State violated Brady where it failed to disclose that Sheriff knew that another person had threatened murder victim and police knew of witness who would also indicate another person threatened victim; (3) jury committed misconduct in seeking out a map that was not introduced into evidence to determine Petitioner's guilt.
Facts: Petitioner was convicted at a jury trial of first degree murder of his mother. He lost his direct appeal and Rule 29.15 case. He won relief in U.S. District Court, but the 8th Circuit reversed. He then filed a state habeas corpus case alleging various claims. The habeas court granted relief, and the State sought a writ of certiorari challenging the grant of relief.
Holding: The State argues that Petitioner's claims are procedurally barred because he did not raise them in his direct appeal or Rule 29.15 case. However, claims are not barred in a habeas case if (1) the claim relates to a jurisdictional (authority) issue; or (2) the petitioner establishes manifest injustice because newly discovered evidence makes it more likely than not that no reasonable juror would have convicted him (a "gateway innocence" claim); or (3) the petitioner establishes the presence of an objective factor external to the defense, which impeded his ability to comply with the procedural rules for review of claims, and which worked to his actual and substantive disadvantage infecting his entire trial with constitutional error (a "gateway cause and prejudice" claim). Here, Petitioner's claims fall under exception number three. He has shown that the State engaged in *Brady* violations because the Sheriff knew that another person had threatened the murder victim and law enforcement also failed to disclose that another witness had similar knowledge. Even though there may not have been written reports about this, *Brady* still required the State to disclose it, and even though the prosecutor may not have personally known about it, *Brady* makes the State responsible for police nondisclosure. Since these thing weren't disclosed, Petitioner could not have known about them or raised them on direct appeal or in his Rule 29.15 case. Even though the Eastern District had held that Petitioner's evidence at that time was insufficient to allow Petitioner to

introduce evidence that another person did the crime, Petitioner has introduced new evidence in the habeas case directly linking another person to the crime, so all this evidence would now be admissible. Furthermore, the jury committed misconduct by seeking out a map that was not in evidence to use to convict Petitioner. The State contends that Petitioner has the burden to prove prejudice from this, but there is nothing in Missouri law that deprives a habeas petitioner of the benefit of the presumption of prejudice from such jury misconduct; Petitioner would have had such a presumption if this matter was raised on direct appeal. Here, the presumption applies and the State failed to rebut it. Grant of writ of habeas corpus affirmed.

Snyder v. State, No. WD72071 (Mo. App. W.D. 3/22/11):
Even though Movant filed his Rule 24.035 motion late, where the State did not raise this in the motion court as a defense, this could not be raised for the first time on appeal since statutes of limitation can be waived.
Facts: Movant filed a Rule 24.035 motion late. However, neither the State nor the motion court raised this issue in the motion court. The motion court denied relief on the merits. Movant appealed the merits. The State claimed for the first time on appeal that the appeal should be dismissed because the motion was untimely filed.
Holding: Rule 24.035(b) provides that failure to timely file a postconviction motion waives the postconviction claims. In *Andrews v. State*, 282 S.W.2d 372 (Mo. App. W.D. 2009), the Western District held that failure to challenge timeliness is not an issue of jurisdiction but just an issue of trial error. The Eastern District disagreed with this in *Swofford v. State*, 323 S.W.3d 60 (Mo. App. E.D. 2010). However, *Swofford* is in conflict with the rule that statutes of limitation are not jurisdictional and can be waived. Rule 55.08 requires that statute of limitations and waiver defenses be pleaded by the defendant (State). Hence, this cannot be raised for the first time on appeal.

* **Davis v. Ayala, ___ U.S. ____, 135 S.Ct. 2187 (U.S. June 18, 2015):**
Holding: Even though defense counsel was excluded from the portion of a *Batson* hearing where the prosecutor was allowed to explain peremptory strikes, this alleged error was harmless in federal habeas; the *Brecht* standard "subsumes" the requirements that 28 U.S.C. 2254(d) imposes when a habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman*; when a *Chapman* decision is reviewed under AEDPA, a federal court may not award habeas relief under Sec. 2254 unless the harmlessness determination itself was unreasonable.

*** Brumfield v. Cain, ___ U.S. ___, 135 S.Ct. 2269 (U.S. June 18, 2015):**
Holding: State court unreasonably determined the facts in finding that a death-sentenced inmate had not made a sufficient showing that he was intellectually disabled to warrant an evidentiary hearing on his *Atkin*s claim, where inmate alleged he had an IQ of 75, a fourth-grade reading level, had been in special education, had a learning disability, and had been treated at a number of psychiatric hospitals as a child; petitioner-inmate was entitled to have his claim considered on the merits in federal habeas.

*** Lopez v. Smith, ___ U.S. ___, 96 Crim. L. Rep. 33 (U.S. 10/6/14):**
Holding: Federal courts can rely only on U.S. Supreme Court precedent, not circuit precedent, in determining whether a constitutional principle is "clearly established" under AEDPA; State court did not violate "clearly established" federal law when it gave an accomplice liability instruction even though the State tried the case on a theory that Defendant personally killed victim.

*** Glebe v. Frost, ___ U.S. ____, 96 Crim. L. Rep. 206 (U.S. 11/17/14):**
Holding: Circuit court cannot use its own circuit precedent to determine if a state court violated "clearly established" federal law in denying relief; only U.S. Supreme Court rulings constitute "clearly established" federal law under AEDPA; Petitioner had contended he was entitled to habeas relief based on limitation of his defense counsel's closing argument.

*** Jennings v. Stephens, ___ U.S. ___, 135 S.Ct. 793 (Jan. 14, 2015):**
Holding: Habeas petitioners who are granted relief on some grounds, but not others, may in an appeal by the State defend the judgment on grounds rejected by the district court, without a taking a cross-appeal or a obtaining a certificate of appealability.

*** Woods v. Donald, ___ U.S. ___, 2015 WL 1400852 (U.S. March 30, 2015):**
Holding: (1) Even though defense counsel was not in the courtroom during a portion of trial where matters about jointly-tried co-defendants were discussed, this did not violate clearly established federal law to warrant granting habeas relief; and (2) even though situation was "similar" to *Cronic*, *Cronic* did not address counsel's absence during testimony about a jointly-tried co-defendant; "[I]f the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings of those cases."

*** Christeson v. Roper, ___ U.S. ___, 96 Crim. L. Rep. 415 (U.S. 1/20/15):**
Holding: 18 USC 3559 allows habeas petitioners to receive substitute appointed counsel where original appointed counsel failed to file petitioner's habeas petition on time and thereby created a conflict of interest regarding whether their abandonment of petitioner should allow equitable tolling.

*** White v. Wheeler, ___ U.S. ___, 136 S.Ct. 456 (U.S. Dec. 14, 2015):**
Holding: Federal habeas court, in deciding *Witherspoon-Witt* claim as to whether state trial court improperly struck a juror who could consider death penalty, must be "doubly deferential" to state court's ruling under AEDPA; a habeas petitioner must show that the state ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement;" where juror's answers are ambiguous, state court may decide issue in favor of State.

*** White v. Woodall, 95 Crim. L. Rep. 131, ___ U.S. ___, 134 S.Ct. 1697 (U.S. 4/23/14):**
Holding: State court did not unreasonably apply existing U.S. Supreme Court precedent in holding that 5th Amendment does not require a judge in a capital penalty phase to give

a no-adverse-inference instruction on a defendant's failure to testify in penalty phase. Sec. 2254(d)(1) provides a remedy only where a state court unreasonably "applies" U.S. Supreme Court precedent; "it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." Court expresses no opinion on whether a no-adverse-inference instruction would be required in a case not reviewed under the high standard for habeas relief under AEDPA.

*** Burt v. Titlow, ___ U.S. ___, 94 Crim. L. Rep. 197 (U.S. 11/5/13):**
Holding: When federal courts review ineffective assistance of counsel claims, AEDPA combined with the already-deferential standard toward counsel's performance in *Strickland*, require federal courts to be doubly deferential to state courts' denial of Sixth Amendment claims; Supreme Court defers to state court finding that counsel was not ineffective under *Frye/Lafler* in advising Defendant to withdraw a guilty plea and proceed to trial even though counsel failed to obtain the case file (discovery) from the prior attorney before giving this advice, and counsel had Defendant sign over the media rights to counsel of this high-profile case; record indicated that Defendant withdrew her guilty plea because she wanted to protest her innocence.

*** Trevino v. Thaler, 93 Crim. L. Rep. 292, ___ U.S. ___ (U.S. 5/28/13):**
Holding: Where a state's procedural framework appears to allow a claim of ineffective assistance of trial counsel to be raised on direct appeal but in operation makes it highly unlikely that such a claim can be raised, the exception to procedural default recognized in *Martinez v. Ryan*, 566 U.S. 1 (2012) will apply, i.e., a procedural default will not bar a federal habeas court from hearing a substantive claim of ineffective assistance of counsel at trial if, in the state's initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

*** Ryan v. Gonzales, 2013 WL 68690, ___ U.S.___ (U.S. 2013):**
Holding: Federal habeas petitioners do not have a right to a stay of habeas proceedings under the 6th Amendment right to counsel or statutory right to counsel even though the petitioners are incompetent during the proceedings.

*** Marshall v. Rodgers, 93 Crim. L. Rep. 13, ___ U.S. ___ (U.S. 2013):**
Holding: In determining whether a state court decision is contrary to clearly established federal law, a federal appellate court may look to circuit precedent to determine if it has already held that a particular issue is clearly established by Supreme Court precedent, but the federal appellate court may not canvass circuit decisions to determine whether a particular rule is so widely accepted among Federal Circuits that it would be accepted by the Supreme Court.

*** Chaidez v. U.S., 92 Crim. L. Rep. 609, ___ U.S. ___ (U.S. 2/20/13):**
Holding: *Padilla*'s ruling that defense attorneys must warn clients about immigration consequences is a new rule that is not retroactive on collateral review.

*** Johnson v. Williams, 92 Crim. L. Rep. 614, ___ U.S. ___ (U.S. 2/20/13):**
Holding: When a state postconviction court addresses some claims but not others, the

federal habeas court must presume that the federal claim was adjudicated on the merits, even though not mentioned by the state court.

*** Metrish v. Lancaster, 93 Crim. L. Rep. 233, ___ U.S. ___ (U.S. 5/20/13):**
Holding: State court did not unreasonably apply federal law when it held that there was no due process violation when State retroactively abolished a diminished capacity defense to make it inapplicable at Defendant/Petitioner's retrial.

*** McQuiggin v. Perkins, 93 Crim. L. Rep. 265, ___ U.S. ___ (U.S. 5/28/13):**
Holding: Habeas petitioners who miss 1-year deadline under AEDPA may still have their petition heard if they can demonstrate that no reasonable juror would have convicted them after hearing new evidence of "actual innocence" raised in petition.

*** Nevada v. Jackson, 93 Crim. L. Rep. 318, ___ U.S. ___ (U.S. 6/3/13):**
Holding: 9th Circuit exceeded its authority under AEDPA to grant habeas relief where it framed Supreme Court precedents with great generality in holding that state had unreasonably applied federal law; Supreme Court had not directly held that a defendant should be able to use extrinsic evidence of sex assault victim's prior false allegations against him to impeach victim.

*** Coleman v. Johnson, 2012 WL 1912196, ___ U.S. ___ (U.S. 2012):**
Holding: (1) A federal habeas court may overturn a state court decision finding the evidence sufficient only if the state court decision is "objectively unreasonable" and (2) while the federal court looks to state law to determine the elements of the offense, the minimum amount of evidence required to sustain the conviction is determined by reference to federal due process law, not state law; applying these standards, Supreme Court held evidence was sufficient to support verdict that Defendant had requisite intent to kill victim.

*** Wood v. Milyard, 2012 WL 1392558 (U.S. 2012):**
Holding: In exceptional cases, federal appellate courts have the authority to raise *sua sponte* a forfeited timeliness defense to a state prisoner's habeas petition.

*** Parker v. Matthews, 2012 WL 2076341, ___ U.S. ___ (U.S. 2012):**
Holding: (1) A federal habeas court cannot second-guess reasonable decisions of state courts, and (2) the 6th Circuit erred in looking to its own precedents rather than U.S. Supreme Court decisions in assessing the reasonableness of a state court's rejection of a due process challenge to prosecutor's closing argument.

*** Wood v. Milyard, ___ U.S. ___, 91 Crim. L. Rep. 125 (U.S. 4/24/12):**
Holding: Federal appellate courts reviewing federal habeas claims have authority to raise the federal statute of limitations against a petitioner's petition even though it was not raised by the State, but it is an abuse of discretion for the court to do so where the State affirmatively waived the statute of limitations.

*** Martinez v. Ryan, ___ U.S. ___, 90 Crim. L. Rep. 805 (U.S. 3/20/12):**
Holding: Where claim of ineffective assistance of trial counsel was not presented to State court, federal habeas court may excuse this procedural default if postconviction counsel failed to provide effective assistance or there was no postconviction counsel at all in the State proceeding.

*** Martinez v. Ryan, ___ U.S. ___, 90 Crim. L. Rep. 805 (U.S. 3/20/12):**
Holding: A federal habeas petitioner may be excused from procedural default in federal habeas if the default was caused by state postconviction counsel who was constitutionally ineffective.

*** Martinez v. Ryan, 2012 WL 912950 (U.S. 2012):**
Holding: When state law provides that claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

*** Maples v. Thomas, ___ U.S. ___, 90 Crim. L. Rep. 539 (U.S. 1/18/12):**
Holding: Where petitioner's state postconviction counsel abandoned him without telling him and thus petitioner missed a state postconviction filing deadline, this constituted "cause" to excuse the procedural default for federal habeas purposes.

*** Gonzalez v. Thaler, ___ U.S. ___, 90 Crim. L. Rep. 441 (U.S. 1/10/12):**
Holding: (1) For federal habeas time limit purposes, "for a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires," and (2) habeas statute's requirement that a certificate of appealability identify the constitutional issue worthy of consideration is not jurisdictional.

*** Greene v. Fisher, ___ U.S. ___, 90 Crim. L. Rep. 232 (U.S. 11/8/11):**
Holding: "Clearly established federal law" used by AEDPA means law in place when the state court adjudicated petitioner's claim, not law in place when petitioner's conviction became final.

*** Cullen v. Pinholster, ___ U.S. ___, 89 Crim. L. Rep. 5, 131 S.Ct. 1388 (U.S. 4/4/11):**
Holding: Federal habeas court is limited to reviewing the evidence that was before the state court in determining under 28 USC 2254(d)(1) if state court decision is "contrary to, or an unreasonable application of clearly established federal law"; federal court should not have considered new mitigating evidence that was not presented to state court in considering ineffective assistance of counsel claim; it was not unreasonable for state court to conclude that counsel made a strategic decision not to present further evidence of defendant's mental problems because that could lead jury to believe that defendant could not be rehabilitated.

*** Felkner v. Jackson, ___ U.S. ___, 88 Crim. L. Rep. 794, 2011 WL 940865 (U.S. 3/21/11):**
Holding: Where 9th Circuit, without much explanation, overturned a state court's determination that *Batson* was not violated, this violated AEDPA because the *Batson* issue turned on credibility of prosecutor's explanations and AEDPA imposes a highly deferential standard of evaluating state court rulings and requires such rulings be given the benefit of the doubt.

*** Skinner v. Switzer, ___ U.S. ___, 88 Crim. L. Rep. 683 (U.S. 3/7/11):**
Holding: Prisoner can use 42 USC Sec. 1983 to obtain access to evidence for DNA testing after a conviction.

*** Wall v. Kholi, ___ U.S. ___, 88 Crim. L. Rep. 685, 2011 WL 767700 (U.S. 3/7/11):**
Holding: 28 USC 2244(d)(2) of AEDPA, which tolls the time for filing a federal habeas corpus petition while a properly filed application for state "collateral review" is pending, is triggered by a state judicial review of a defendant's motion for sentencing reduction that amounts to a plea for leniency; "collateral review" means judicial review of a judgment in a proceeding that is not part of direct review.

Ramos-Martinez v. U.S., 88 Crim. L. Rep. 818, 2011 WL 768966 (1st Cir. 3/7/11):
Holding: Equitable tolling is available to federal habeas petition.

*** Walker v. Martin, ___ U.S. ___, 88 Crim. L. Rep. 631, 2011 WL 611627 (U.S. 2/23/11):**
Holding: California's discretionary deadline for filing state post-conviction motions is applied firmly and consistently enough, that even if there are some inconsistencies, failure to comply with it is an "adequate and independent state ground" for barring federal habeas relief.

*** Swarthout v. Cooke, ___ U.S. ___, 88 Crim. L. Rep. 464, 2011 WL 197627 (U.S. 1/24/11):**
Holding: Federal habeas relief is not available for an error of state law; thus, federal court cannot grant habeas relief on grounds that state court violated state law in denying parole.

*** Harrington v. Richter, ___ U.S. ___, 88 Crim. L. Rep. 474, 131 S.Ct. 770 (U.S. 1/19/11):**
Holding: Even though state court decision denying postconviction relief did not express any reasons for denial, this is still an "adjudication on the merits" that requires federal courts to apply a deferential reasonableness standard on federal habeas review; state court's decision that counsel was not ineffective in failing to get a blood expert was not unreasonable.

Sanchez v. Roden, 95 Crim. L. Rep. 320 (1st Cir. 5/28/14):
Holding: Federal court can consider new evidence once it determines state court unreasonably applied federal law.

Cuevas v. U.S., 96 Crim. L. Rep. 520 (1st Cir. 2/11/15):Holding: Even though errors in applying USSG aren't usually cognizable under Sec. 2255, prisoners whose punishments were increased under USSG on basis of prior state convictions may use 2255 to challenge their sentences when the state priors were vacated due to "exceptional circumstances"; here, prisoner's state conviction was vacated due to falsification of test results by state crime lab.

U.S. v. Gill, 95 Crim. L. Rep. 224 (2d Cir. 5/7/14):
Holding: *Vartelas v. Holder* (U.S. 2012) allows certain noncitizens charged with illegally re-entering country after a felony conviction to collaterally challenge their deportation.

Kovacs v. U.S., 94 Crim. L. Rep. 704 (2d Cir. 3/3/14):
Holding: *Padilla* error will entitle Defendant to writ of error coram nobis where Defendant can show that he either would have litigated a meritorious defense, or would have negotiated a better deal with no adverse immigration consequences, or would have gone to trial but for counsel's mistaken advice regarding immigration.

Young v. Conway, 92 Crim. L. Rep. 108 (2d Cir. 10/16/12):
Holding: (1) Habeas relief granted where state court's admission of eyewitness identification evidence failed to account for empirical studies on the issue, and (2) rule of abstention from *Stone v. Powell* that prevents federal courts from addressing 4th Amendment claims does not apply where state fails to raise the issue in district court.

Rivas v. Fischer, 2012 WL 2686117 (2d Cir. 2012):
Holding: Petitioner qualified for "actual innocence" exception to statute of limitations for federal habeas corpus where he presented a pathologist who testified that time victim was killed would been consistent with Defendant's alibi, which contradicted the State's trial pathologist, who had been the subject of numerous investigations for official misconduct.

Vu v. U.S., 89 Crim. L. Rep. 416 (2d Cir. 6/7/11):
Holding: Petitioner's unsuccessful 2255 motion seeking reinstatement of his right to direct appeal does not render a subsequent 2255 motion challenging his conviction and sentence "second or successive" under AEDPA.

Dillon v. Conway, 89 Crim. L. Rep. 165, 2011 WL 1548955 (2d Cir. 4/26/11):
Holding: Where habeas petitioner's attorney erroneously calculated due date for petition and falsely assured petitioner that attorney would file early, this justified equitable tolling of statute of limitations after petition was filed late.

Cox v. Horn, 95 Crim. L. Rep. 676 (3d Cir. 8/7/14):
Holding: U.S. Supreme Court's decisions in *Martinez v. Ryan* (2012) and *Trevino v. Thaler* (2013), which created grounds to allow certain habeas petitioners to raise

ineffective assistance claims they did not raise in state court, can justify reopening a case through Rule 60(b)(6).

In re Pendleton, 2013 WL 5486170 (3d Cir. 2013):
Holding: Juvenile Petitioners made a prima facie showing that new constitutional rule banning juvenile LWOP was retroactive, so as to permit filing of second habeas petition.

U.S. v. Tyler, 94 Crim. L. Rep. 33, 2013 WL 5480709 (3d Cir. 10/3/13):
Holding: U.S. Supreme Court's new interpretation of federal obstruction of justice statute set forth in *Fowler v. U.S.* (U.S. 2011), rendered petitioner "actually innocent" to overcome procedural bar for filing second habeas petition; here, the record failed to show that petitioner contemplated a particular federal proceeding, or that it is reasonably likely at least one of the murder victim's communications with law enforcement would have been with a federal agent.

Grant v. Lockett, 92 Crim. L. Rep. 764 (3d Cir. 3/7/13):
Holding: State court unreasonably applied federal law in holding that counsel was not ineffective in failing to discover that a key prosecution witness was on parole at time of his testimony because there was no formal deal for the witness to receive favorable treatment; "Poison lurks in the bias that can arise from the witness's subjective state of mind, regardless of whether the witness's belief arose from an actual agreement with, or representation of, the prosecutor."

U.S. v. Thomas, 93 Crim. L. Rep. 61, 2013 WL 1442489 (3d Cir. 4/10/13):
Holding: Federal prisoners seeking habeas relief under 28 USC 2255 can receive requests to extend the limitations period for relief even before they have filed their substantive claims, unlike state prisoners seeking relief under 28 USC 2254 (2d Circuit has disagrees with this).

Ross v. Varano, 2013 WL 1363525 (3d Cir. 2013):
Holding: Petitioner was entitled to equitable tolling of time to file habeas where his direct appeal appellate attorney misled him as to the status of his appeal, the appellate court's refusal to replace his attorney, and neglect by his attorney including refusal to accept petitioner's calls and misstatements of law.

Johnson v. Folino, 2013 WL 163841 (3d Cir. 2013):
Holding: Remand of habeas case was required to determine materiality of prosecutor's *Brady* violation in failing to disclose that State's star witness was a suspect in multiple open police investigations.

Han Tak Lee v. Glunt, 2012 WL 247993 (3rd Cir. 2012):
Holding: Federal habeas petitioner, convicted of first-degree murder and arson, satisfied the good cause standard for conducting discovery in that his petition relied upon scientific developments since his trial and that his expert's independent analysis of the fire scene would invalidate the expert testimony from the trial.

Blystone v. Horn, 90 Crim. L. Rep. 511 (3d Cir. 12/22/11):
Holding: A motion to alter or amend a judgment denying habeas relief filed pursuant to Fed. R. Civ. P. 59(e) does not have to satisfy the federal statute's requirements for second or successive habeas petitions.

U.S. v. Orocio, 89 Crim. L. Rep. 620 (3d Cir. 6/29/11):
Holding: *Padilla* is retroactive to cases on collateral review.

Kindler v. Horn, 89 Crim. L. Rep. 185 (3d Cir. 4/29/11):
Holding: Even though Pennsylvania court applied that State's "escape rule," that rule does not bar federal habeas review.

Gordon v. Braxton, 96 Crim. L. Rep. 627 (4th Cir. 3/3/15):
Holding: Where state court refused to consider the entirety of Petitioner's factual allegations in state court by refusing to consider anything outside a formal affidavit, federal court was not required to defer to state court's factual findings under AEDPA because the State court had not fully adjudicated the claim on the merits.

Whiteside v. U.S., 95 Crim. L. Rep. 66 (4th Cir. 4/8/14):
Holding: Erroneous application of career offender guidelines is a "fundamental miscarriage of justice" that can be corrected on collateral review, even though the motion was filed late under 28 USC 2255

Barnes v. Jones, 95 Crim. L. Rep. 219 (4th Cir. 5/5/14):
Holding: State court unreasonably applied federal law in not granting hearing on claim that juror discussed a Bible passage with her pastor during deliberations, and then shared that information with other jurors.

MacDonald v. Moose, 92 Crim. L. Rep. 749 (4th Cir. 3/12/13):
Holding: Virginia state court unreasonably applied federal law when it upheld conviction for adult who had oral sex with a minor under state statute that criminalizes oral sex since this violates *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down an anti-sodomy law between consenting adults under due process clause; 4th Circuit holds that although State can proscribe oral sex between adults and minors, it cannot convict petitioner/Defendant under a general, anti-oral sex law (not a "child sex" law), which it did here.

Wolfe v. Clarke, 2012 WL 3518481 (4th Cir. 2012):
Holding: Petitioner succeeded in establishing cause and a prejudice for procedurally defaulted *Brady* claim by concurrently establishing the elements of the *Brady* claim.

Teleguz v. Pearson, 2012 WL 3125990 (4th Cir. 2012):
Holding: District court judgment was vacated where several prosecution witnesses had recanted their testimony and it was unclear whether the district court had properly applied *Schlup*'s gateway actual innocence exception to procedurally defaulted habeas claims.

U.S. v. Akinsade, 2012 WL 3024723 (4th Cir. 2012):
Holding: Defendant was entitled to writ of coram nobis alleging ineffective assistance of counsel where he was no longer in custody on his criminal case; had no reason to challenge his prior conviction until he was detained by immigration authorities; and the risk of deportation was an adverse consequence sufficient to create an Article III case or controversy.

Jackson v. Kelly, 2011 WL 1534571 (4th Cir. 2011):
Holding: Even though petitioner submitted an oversized brief to the Virginia Supreme Court along with a motion to file extra pages, where the initial brief was not rejected but petitioner was directed to file a "corrected brief" with fewer pages, the initial filing was a "properly filed application" under AEDPA.

U.S. v. MacDonald, 89 Crim. L. Rep. 122 (4th Cir. 4/19/11):
Holding: (1) Petitioner can bring successive habeas petition by using "actual innocence" gateway and court should consider all previously presented evidence in considering claim; (2) once district court has jurisdiction to consider a successive petition, it has jurisdiction to consider a motion to amend that petition to add a claim.

U.S. v. Thomas, 88 Crim. L. Rep. 435 (4th Cir. 12/29/10):
Holding: *Watson v. U.S.*, 552 U.S. 74 (2007)(holding that a person does not "use" a firearm under 18 USC 924(c)(1)(A) when he receives it in trade for drugs) applies retroactively on collateral review.

Escamilla v. Stephens, 2014 WL 146531 (5th Cir. 2014):
Holding: Defendant was entitled to certificate of appealability regarding whether death penalty counsel failed to investigate and present mitigating evidence at penalty phase; reasonable jurists could debate whether state courts unreasonably applied *Strickland* if finding no prejudice.

Griffin v. Ebbert, 2014 WL 1257067 (5th Cir. 2014):
Holding: Where Petitioner filed a 2241 habeas petition in District where he was incarcerated, but Petitioner was then moved to different prisons in different districts, petition should be transferred back to the original District rather than dismissed without prejudice for lack of jurisdiction; the original petition was filed in the correct District, stated a claim for good-time credits, and properly named the prison warden as respondent.

In re Campbell, 95 Crim. L. Rep. 243 (5th Cir. 5/13/14):
Holding: Where prosecutors failed to disclose results of IQ tests of Defendant showing he had low IQ, Defendant was entitled to file a successive habeas petition and receive a stay of execution.

U.S. v. Urias-Marrafo, 94 Crim. L. Rep. 705, 2014 WL 805455 (5th Cir. 2/28/14):
Holding: (1) Court must consider *Padilla* claim even if presented in motion to withdraw guilty plea, rather than in post-conviction collateral attack action, because a court should

address *Padilla* claims sooner rather than later; and (2) even though guilty plea judge gave some warnings about immigration consequences, this did not cure counsel's ineffectiveness in failing to warn of such consequences, because it is counsel's duty, not the court's, to give such warnings.

Higgins v. Cain, 93 Crim. L. Rep. 446 (5th Cir. 6/18/13):
Holding: Even though federal courts are generally prohibited from hearing evidence outside the record of the state court proceeding, federal judges presented with claims of racial discrimination in jury selection may consider evidence that was not before the state court; here, the state postconviction court did not have before it the transcript of voir dire; the 5th Circuit holds that the federal court can consider the transcript because it is not "new evidence" introduced in federal court "in the first instance."

Smith v. Cain, 92 Crim. L. Rep. 576 (5th Cir. 2/11/13):
Holding: *Pinholster*'s limitation on federal evidentiary hearings does not apply once a district court has determined that the state court unreasonably applied federal law.

Strickland v. Thayer, 2012 WL 5418369 (5th Cir. 2012):
Holding: Where a federal habeas court had decided one claim and dismissed unexhausted claims without prejudice stating that Petitioner could return to state court on them, Petitioner's new petition after exhausting the state claims was not a second or successive one.

Mark v. Thaler, 2011 WL 2627896 (5th Cir. 2011):
Holding: Even though inmate voluntarily dismissed his direct appeal, the time for filing a federal habeas petition began to run at the end of the 30-day period in which inmate could have sought further direct review in State court, rather than on the dismissal date.

Martinez v. Caldwell, 2011 WL 2347708 (5th Cir. 2011):
Holding: Pretrial detainee's challenge to state court's reversal of double jeopardy relief was subject to de novo review under AEDPA's section proving general grant of habeas authority.

In re Sparks, 2011 WL 4137762 (5th Cir. 2011):
Holding: Second habeas petition was authorized where Supreme Court issued new retroactive law that prohibited life without parole sentences for juveniles who did not commit homicides.

Tanner v. Yukins, 2015 WL 234738 (6th Cir. 2015):
Holding: Where prison guard violated Defendant's right of access to courts by taking action which prevented timely filing of notice of appeal, Defendant was entitled to habeas relief.

Clark v. U.S., 2014 WL 4357568 (6th Cir. 2014):
Holding: Defendant's second habeas petition filed after her first petition was dismissed but before the period to appeal the district court's judgment expired, was not a prohibited

"second" or "successive" petition; the petition was filed before adjudication of her motion was decisively complete.

Gunner v. Welch, 2014 WL 1491860 (6th Cir. 2014):
Holding: Direct appeal counsel was ineffective in failing to advise Defendant/Petitioner of the time limits for seeking state postconviction relief, even though direct appeal counsel had no obligation to represent Defendant in the postconviction action; thus, "cause" was established in federal habeas for the procedural default regarding a claim of ineffective assistance of trial counsel.

Pola v. U.S., 96 Crim. L. Rep. 582 (6th Cir. 2/19/15):
Holding: Even though Alien-habeas Petitioner had been deported, he meets the "in custody" requirement of 28 USC 2255 because he filed his petition while incarcerated and he will suffer serious disability due to his conviction; here deportation was a serious disability that vacating his conviction could remedy.

Clifton v. Carpenter, 96 Crim. L. Rep. 357 (6th Cir. 12/24/14):
Holding: Petitioner did not fail to exhaust state remedies for federal habeas purposes even though his state appeal was denied over failure to pay fees and court costs; "access to the courts cannot be contingent on wealth."

Harris v. Haeberlin, 95 Crim. L. Rep. 313 (6th Cir. 5/28/14):
Holding: Where the 6th Circuit had previously found in this case that the state court had unreasonably applied federal law and had remanded the case, the district court was not barred by *Pinholster* in hearing newly discovered evidence (of a *Batson* violation) because the purpose of this evidence was not to determine if the state court unreasonably applied federal law, since that had already been determined affirmatively.

Sutton v. Carpenter, 94 Crim. L. Rep. 770 (6th Cir. 3/19/14):
Holding: 6th Circuit applies procedural default exception of *Martinez v. Ryan* to petitioners from Tennesee, because state's procedures make it "highly unlikely" an ineffective counsel claim can be raised on direct appeal.

Jefferson v. U.S., 2013 WL 4838793 (6th Cir. 2013):
Holding: AEDPA's one-year statute of limitations for claims that could have been discovered through "due diligence," does not require a petitioner to repeatedly seek out evidence that the Gov't had a constitutional duty to disclose; this is particularly so where Gov't assured petitioner that it had fulfilled its disclosure obligations.

Ajan v. U.S., 94 Crim. L. Rep. 118 (6th Cir. 10/3/13):
Holding: Where habeas Petitioner was granted some sentencing relief in the form of a new sentencing judgment under 28 USC 2255 (though Petitioner sought a new sentencing hearing), Petitioner need not obtain a certificate of appealability to appeal the relief granted, because it was not a "final order" in the 2255 proceeding but a new judgment that did not exist at the time the motion was brought.

Lovins v. Parker, 2013 WL 1235611 (6th Cir. 2013):
Holding: State court unreasonably applied federal law in holding that *Blakely*, 542 U.S. 296 (2004)(regarding facts judges can or cannot find for sentencing purposes) did not apply to petitioner whose conviction and sentence were not yet final at time *Blakely* was decided.

McClellan v. Rapalje, 92 Crim. L. Rep. 423 (6th Cir. 1/11/13):
Holding: Despite *Harrington v. Richter* (U.S. 2011) that a state court's summary decision constitutes an adjudication on the merits requiring deference, a federal habeas court is not required to defer to a state appellate court decision where the state court did not have the trial record when it denied Petitioner's claims.

Cleveland v. Bradshaw, 2012 WL 3890945 (6th Cir. 2012):
Holding: Petitioner was entitled to equitable tolling of the statute of limitations for his federal habeas petition where he alleged a credible actual innocence claim based on witness recantation, an expert which shortened the time period when the murder could have occurred, and evidence that Defendant could not have returned from another city to the place of the murder in time.

Amborse v. Booker, 2012 WL 2428803 (6th Cir. 2012):
Holding: Petitioner showed cause for failure to raise jury selection issue earlier where unbeknownst to Petitioner, a computer glitch caused minorities to be underrepresented in the venire pool.

Perkins v. McQuiggin, 2012 WL 661782 (6th Cir. 2012):
Holding: A habeas petitioner's credible claim of actual innocence equitably tolled the Antiterrorism and Effective Death Penalty Act's (AEDPA) statute of limitation, regardless of whether the petitioner pursued the writ with reasonable diligence.

Rashad v. Lafler, 91 Crim. L. Rep. 104 (6th Cir. 4/5/12):
Holding: State court judgment was final for habeas purposes only after direct review of a resentencing that was ordered at the same time the conviction was affirmed.

Ata v. Scutt, 2011 WL 5903658 (6th Cir. 2011):
Holding: Habeas petitioner was entitled to evidentiary hearing regarding whether his mental incompetence warranted tolling the habeas limitations period because his motion alleged specific enough facts to create a causal link between his untimely petition and his mental incompetence and his allegations were consistent with the record.

Black v. Bell, 90 Crim. L. Rep. 381 (6th Cir. 12/15/11):
Holding: Habeas petitioners in Tenn. can seek Atkins relief for mental retardation on basis of new Tenn. caselaw, even if the state court had rejected the Atkins claim before the new caselaw.

Storey v. Vasbinder, 90 Crim. L. Rep. 16 (6th Cir. 9/16/11):
Holding: Habeas petition that reinstated Defendant's wrongfully denied direct appeal does not trigger bar on "successive or second" habeas petitions, even if claims could have been brought in the earlier petition.

D'Amrosio v. Bagley, 89 Crim. L. Rep. 800, 2011 WL 3795171 (6th Cir. 8/29/11):
Holding: Federal court has jurisdiction to bar a state retrial of a habeas corpus petitioner when the state has failed to comply with a previous conditional habeas writ.

Carter v. Bradshaw, 89 Crim. L. Rep. 317 (6th Cir. 5/26/11):
Holding: Petitioners have right to be mentally competent to assist counsel in federal habeas proceedings.

Price v. U.S., 97 Crim. L. Rep. 603 (7th Cir. 8/4/15):
Holding: *Johnson v. U.S.* (U.S. 6/26/15), which struck down ACCA's residual clause, is retroactive, and allows a habeas petitioner whose prior habeas petition was rejected on a *Johnson*-type ACCA claim to have a new habeas case heard under 2255(h)(2) allowing successive petitions based on new rules of constitutional law that are retroactive.

Taylor v. Brown, 97 Crim. L. Rep. 277 (7th Cir. 6/2/15):
Holding: "Mail-box" rule applies to e-filings made by prison official on behalf of inmates, i.e., the document is deemed filed when prisoner delivers it to prison officials (not when officials actually send the document to court); this is because prisoners are no more able to guarantee that properly tendered documents will be e-filed by the prison than they are to guarantee that the prison will mail documents.

Webster v. Daniels, 2015 WL 1951921 (7th Cir. 2015):
Holding: AEDPA's savings clause allows a second or successive motion to vacate where new evidence shows that the constitution categorically prohibits a certain penalty

Socha v. Boughton, 95 Crim. L. Rep. 596 (7th Cir. 8/14/14):
Holding: Petitioner was entitled to equitable tolling for his habeas petition where "unusual obstacles" prevented him from filing; Petitioners' lawyer didn't timely turn over the trial file, and Petitioner's ability to do legal research on the prison computers was very limited.

Hooper v. Ryan, 2013 WL 4779579 (7th Cir. 2013):
Holding: Habeas petitioner was entitled to evidentiary hearing in federal court on *Batson*, where State court unreasonably concluded that striking all 7 African-American members of a venire did not make out a prima facie case of discrimination.

Weddington v. Zatecky, 93 Crim. L. Rep. 615 (7th Cir. 8/1/13):
Holding: Federal habeas judge who had presided over a state trial when she was a state trial court judge must recuse herself from hearing the federal habeas case, since she effectively would be reviewing issues on which she had already passed judgment in state court.

Estremera v. U.S., 93 Crim. L. Rep. 647, 2013 WL 38890210 (7th Cir. 7/30/13):
Holding: Federal time limit for filing federal habeas petition was tolled during time that petitioner was in ad-seg and had no access to law library, because Sec. 2255(f)(2) provides that prisoners who fail to timely file a petition due to a government-initiated "impediment" must be given one-year from time impediment was lifted to file.

Shaw v. Wilson, 93 Crim. L. Rep. 586 (7th Cir. 7/24/13):
Holding: Even though state court postconviction court had suggested that claim that appellate counsel had failed to raise lacked merit, this was not entitled to deference in federal habeas because the relevant issue is not the state court's determination of the merits of petitioner's state law claim but the strength of that claim relative to the weaker claim that counsel chose to pursue; hence, the state court unreasonably applied federal law, and habeas relief is granted on claim of ineffective assistance of appellate counsel.

U.S. v. Obeid, 2013 WL 646511 (7th Cir. 2013):
Holding: Habeas petition was not prohibited second or successive petition where the factual predicate for the petition did not come into existence until after time had expired; Gov't had promised to treat petitioner and co-defendant equally but later gave co-defendant a more favorable sentence.

Warren v. Baenen, 93 Crim. L. Rep. 72 (7th Cir. 4/3/13):
Holding: State court decision rejecting ineffectiveness claim was not entitled to deference when the decision was based on a rationale that was different from the one the prisoner asserted in his federal habeas petition.

Woolley v. Rednour, 92 Crim. L. Rep. 359 (7th Cir. 12/14/12):
Holding: SCOTUS decision in *Harrington v. Richter* (U.S. 2011) did not change usual rule that habeas court review of a state decision that rested on one prong of *Strickland* should be analyzed under the other prong de novo.

Purvis v. U.S., 90 Crim. L. Rep. 295 (7th Cir. 11/28/11):
Holding: Where federal defendant seeks to attack a state conviction underlying a federal recidivist state, federal court can use "stay and abbey" procedure.

Vitrano v. U.S., 89 Crim. L. Rep. 545 (7th Cir. 6/21/11):
Holding: A motion to amend a habeas petition under 28 USC 2255 was not a successive petition, but was actually a second petition filed after petitioner had abandoned the petition he wanted to amend.

Coleman v. Hardy, 2010 WL 4670206 (7th Cir. 2010):
Holding: Defendant was entitled to hearing on actual innocence where his habeas petition alleged new evidence of innocence, including a co-defendant affidavit saying Defendant had nothing to do with crime, and affidavits of alibi witnesses.

Ragland v. U.S., 2015 WL 1919095 (8th Cir. 2015):
Holding: Defendant's claim that a change in caselaw narrowed the scope of the criminal statute under which he was convicted (distribution of heroin resulting in death) was a challenge to the validity of his conviction (not an attack on his sentence) so it was cognizable in a motion to vacate.

U.S. v. Sellner, 96 Crim. L. Rep. 335 (8th Cir. 12/15/14):
Holding: Where a pro se prisoner/petitioner files a second motion for federal habeas relief before the first one has been adjudicated, the second motion should be liberally construed as a motion to amend the pending motion, not a prohibited successive motion.

Camacho v. Hobbs, 96 Crim. L. Rep. 491 (8th Cir. 1/21/15):
Holding: The one-year time for filing habeas didn't start to run until the 30-day period for filing a direct appeal expired, even if the defendant wasn't entitled to appeal his guilty plea under state law; AEDPA intends finality to be determined through uniform federal principles not by reference to rules that may vary from state to state.

Sasser v. Hobbs, 735 F.3d 833 (8th Cir. 2013):
Holding: (1) Because Arkansas does not as a matter of course provide new counsel for a Defendant on direct appeal but has trial counsel conduct the appeal, the Arkansas system violates *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), because it does not "as a matter of its structure, design [or] operation" allow a "meaningful opportunity to present a claim of ineffective assistance of counsel on direct appeal." This is especially true because in *Trevino*, Texas provided new counsel on direct appeal, but the Supreme Court still found Texas' procedure to be insufficient; and (2) Because Arkansas did not allow for a meaningful opportunity to raise ineffective assistance of counsel on direct appeal, Arkansas' postconviction proceeding was the first opportunity to raise ineffective assistance, and *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), creates an exception to the *Coleman* rule that ineffective assistance of postconviction counsel does not provide cause to excuse procedural default for failure to raise postconviction claims. Thus, under *Trevino* and *Martinez*, postconviction counsel's alleged ineffectiveness establishes "cause" for any procedural default Defendant may have had in not presenting his claims to the Arkansas courts in the first instance.

U.S. v. Daily, 92 Crim. L. Rep. 465, 2013 WL 149809 (8th Cir. 1/15/13):
Holding: Even though the one-year deadline for a habeas petition expired under 28 USC 2255, a court can still fix a sentencing error, sua sponte, similar to plain error.

Paulson v. Newton Correctional Facility Warden, 2013 WL 105652 (8th Cir. 2013):
Holding: Remand of habeas case was required to determine whether State court's application of *Strickland* was contrary to clearly established federal law; state court had used a "preponderance of evidence" standard but *Strickland* uses a "reasonable probability" standard.

Rudin v. Myles, 2015 WL 1019959 (9th Cir. 2015):
Holding: Even though Petitioner knew for three years that her habeas counsel had abandoned her by failing to file a postconviction petition in state court, she was entitled to equitable tolling where she was affirmatively misled by the court's finding of extraordinary circumstances that would extend the one-year deadline and by the State's failure to question timeliness.

Luna v. Kernan, 97 Crim. L. Rep. 130 (9th Cir. 4/28/15):
Holding: Even though habeas attorney did not completely abandon Petitioner, Petitioner was entitled to equitable tolling where attorney dismissed Petitioner's timely-filed petition, failed to timely file a new one, and falsely told Petitioner for the next six years that his habeas litigation was proceeding.

U.S. v. Reeves, 96 Crim. L. Rep. 339 (9th Cir. 12/15/14):
Holding: Where prisoner/petitioner's sentence ended on a Sunday, district court had no jurisdiction to hear petitioner's habeas petition that was filed on the following Monday, even though usual civil rules extend a limitations period ending on a weekend to the following Monday; 18 USC 2255 by its express terms requires a petitioner be "in custody" to seek habeas relief.

Gibbs v. Legrand, 96 Crim. L. Rep. 8 (9th Cir. 9/17/14):
Holding: Habeas petitioner was allowed equitable tolling where his attorney failed to tell him that his state postconviction case had been decided and failed to answer repeated requests for updates on the case.

Mann v. Ryan, 96 Crim. L. Rep. 355 (9th Cir. 12/29/14):
Holding: State court unreasonably applied federal law in applying a "preponderance of evidence" standard to a *Strickland* claim, rather than a standard of "reasonable probability" of a different outcome; a preponderance standard is higher than required by *Strickland*.

Hernandez v. Spearman, 95 Crim. L. Rep. 671 (9th Cir. 8/22/14):
Holding: The prison "mailbox rule" applies to a habeas petition even though petitioner got a fellow inmate to deliver the petition to prison authorities.

Ezell v. U.S., 96 Crim. L. Rep. 490 (9th Cir. 1/23/15):
Holding: Court deciding whether to allow petitioner to file a second or successive habeas can still allow petitioner to proceed even if the court has missed the 30-day statutory deadline under 2244(b)(3)(D) for granting or denying such motion.

Hurles v. Ryan, 95 Crim. L. Rep. 264 (9th Cir. 5/16/14):
Holding: Where state postconviction judge made factual findings about her own conduct in regard to allegation of her bias without an adversarial evidentiary hearing, this was a defect in the state fact-finding that rendered the determination of facts unreasonable for AEDPA purposes.

Frost v. Van Boening, 95 Crim. L. Rep. 189 (9th Cir. 4/29/14):
Holding: State court unreasonably applied federal law in upholding limitation on counsel's closing argument which prohibited counsel from arguing both reasonable doubt as to guilt and duress; this violated right to present a closing argument, and right to have a jury determine all elements of guilt.

Blake v. Baker, 94 Crim. L. Rep. 748 (9th Cir. 3/14/14):
Holding: Petitioner who shows that postconviction counsel was ineffective under *Martinez v. Ryan* can also obtain a stay to exhaust a claim in State court.

Clabourne v. Ryan, 94 Crim. L. Rep. 706 (9th Cir. 3/5/14):
Holding: Under *Martinez v. Ryan*, Petitioner must show "cause" for default, i.e., his post-conviction counsel was ineffective under *Strickland*, and that there was a reasonable probability the result of the postconviction proceeding would have been different, and must show *Coleman* "prejudice," i.e., that the trial-level ineffectiveness claim was "substantial" or had "some merit;" here, Petitioner claimed his capital re-sentencing counsel was ineffective in failing to object to a confession which had been admissible at the time of the original trial, but which became inadmissible as a result of new case law before the re-sentencing; the 9th Circuit remands to the district court to make *Martinez* findings in the first instance.

Vosigien v. Persson, 94 Crim. L. Rep. 580 (9th Cir. 2/13/14):
Holding: Even though Defendant pleaded guilty to offense, he can use "actual innocence" gateway to later present an otherwise-untimely habeas petition on the offense for which he was innocent, without making a showing that he was also innocent of other the offenses to which he also pleaded guilty; here, Defendant was legally innocent of some counts due to change in interpretation of statute under which he was convicted.

Nguyen v. Curry, 94 Crim. L. Rep. 330, 2013 WL 6246285 (9th Cir. 12/4/13):
Holding: *Martinez* applies to overcome default in federal habeas where State postconviction counsel failed to raise ineffective assistance of direct appeal counsel (disagreeing with 8th and 10th Circuits).

Smith v. Ore. Bd. of Parole and Post-Prison Supervision, 94 Crim. L. Rep. (9th Cir. 11/26/13):
Holding: A constitutional claim that a habeas Petitioner failed to raise at his state trial is not barred from federal habeas review if the state courts summarily denied the claim without expressly stating that they were relying on the default.

Lujan v. Garcia, 2013 WL 5788761 (9th Cir. 2013):
Holding: State court holding that Defendant's inculpatory trial testimony could be considered as evidence of guilt even though his confession had been improperly admitted in the Prosecutor's case-in-chief violated 5th Amendment privilege against self-incrimination and warranted habeas relief.

James v. Ryan, 2013 WL 5763203 (9th Cir. 2013):
Holding: Federal court was not required to defer to state court findings of no ineffective assistance where the state courts never discussed or analyzed the merits of the claim, denied it on procedural grounds, and merely concluded that no evidentiary hearing was necessary.

Detrich v. Ryan, 2013 WL 4712729 (9th Cir. 2013):
Holding: Claim of ineffective assistance for failure to interview Defendant's sister and brother-in-law who saw Defendant after the murder was sufficiently plausible, such that remand was required to determine whether this defaulted claim, which was not raised by state postconviction counsel, could be raised in federal habeas under *Martinez v. Ryan*.

Larsen v. Soto, 2013 WL 5066813 (9th Cir. 2013):
Holding: Petitioner's petition showed "actual innocence" enough to overcome procedural bar, where it alleged that 5 different witnesses saw a different person throw a knife (in possession of deadly weapon case) thus undercutting the reliability of proof of guilt, even though this did not affirmatively prove innocence.

Sossa v. Diaz, 93 Crim. L. Rep. 746, 2013 WL 4792941 (9th Cir. 9/10/13):
Holding: Petitioner was entitled to equitable tolling of habeas deadline for filing *pro se* petition, where habeas court affirmatively misled petitioner by granting him extensions of time to file his petition, and petitioner relied on those extensions.

Dow v. Virga, 2013 WL 4750062 (9th Cir. 2013):
Holding: State court unreasonably applied federal law in applying test of whether it was reasonably probable that a result more favorable to the defense would have occurred absent prosecutor's knowing presentation of false evidence; rather than correct test of whether there is any reasonable likelihood that the false evidence could have affected the judgment of the jury.

Dubrin v. California, 93 Crim. L. Rep. 448, 2013 WL 3215521 (9th Cir. 6/20/13):
Holding: Even though federal courts are generally barred from hearing challenges to expired prior convictions, when a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence for a later offense, he may challenge the enhanced sentence under 28 USC 2254 on the ground that the prior conviction was unconstitutionally obtained.

Jamerson v. Runnels, 93 Crim. L. Rep. 179 (9th Cir. 4/24/13):
Holding: Even though federal habeas courts generally cannot hear evidence that wasn't presented in state court, this did not prohibit federal court in reviewing *Batson* claim from considering evidence of veniremembers' races that was not part of the state court record.

Mike v. Ryan, 92 Crim. L. Rep. 750 (9th Cir. 3/14/13):
Holding: State court unreasonably applied federal law and unreasonably determined the facts in light of the evidence presented in the state court proceedings where State failed to disclose impeachment evidence concerning a key Officer-witness.

Henderson v. Johnson, 710 F.3d 872 (9th Cir. 2013):
Holding: Court improperly dismissed mixed habeas petition without giving petitioner an opportunity to amend it to delete unexhausted claims.

Cannedy v. Adams, 92 Crim. L. Rep. 537 (9th Cir. 2/7/13):
Holding: *Harrington v. Richter* (U.S. 2011) does not require federal courts faced with a state appellate court's summary denial of a constitutional claim to consider all possible reasonable bases for the decision when there is a lower state court that addressed specific arguments.

Cudjo v. Ayers, 2012 WL 4490751 (9th Cir. 2012):
Holding: State court ruling that exclusion of trustworthy exculpatory evidence from Defendant's trial did not violate any clearly established federal law was contrary to U.S. Supreme Court precedent regarding due process and Defendant's 6th Amendment right to present a defense.

Dickens v. Ryan, 2012 WL 3140348 (9th Cir. 2012):
Holding: Where state postconviction counsel failed to raise a claim of ineffective trial counsel, remand of the federal habeas case was required to determine if petitioner's defaulted habeas claim can be raised under *Martinez v. Ryan*.

Mackey v. Hoffman, 2012 WL 2369301 (9th Cir. 2012):
Holding: Where an attorney's abandonment causes a notice of appeal not to be filed, district court may grant relief under the "catch-all" clause of the Federal Rules of Civil Procedure.

Noble v. Adams, 2012 WL 1353564 (9th Cir. 2012):
Holding: A state prisoner's four and a half month delay in filing his state habeas petition in an appellate court after its denial by a lower court may have been reasonable if his explanation for the delay was adequate such that his first petition remained "pending" for the purpose of tolling.

Wentzell v. Neven, 2012 WL 1071638 (9th Cir. 2012):
Holding: A state prisoner's habeas petition was not second or successive due to an intervening amended judgment of conviction.

U.S. v. Gonzalez, 2012 WL 206266 (9th Cir. 2012):
Holding: Defendants' filing of motion to vacate does not unilaterally waive joint defense privilege.

Johnson v. Finn, 2011 WL 6091310 (9th Cir. 2011):
Holding: District court deprived habeas petitioners of due process by failing to conduct evidentiary hearing on *Batson* issue following a magistrate judge's proposed finding regarding prosecutor's lack of credibility.

Gonzalez v. Wong, 2011 WL 6061514 (9th Cir. 2011):
Holding: Remand to district court was warranted, with instructions to stay habeas petition to allow state court to consider *Brady* claim, as the claim was colorable in light of psychological reports, but the reports could not be considered by federal courts until they were made a part of the state court record.

Bills v. Clark, 88 Crim. L. Rep. 340 (9th Cir. 12/18/10):
Holding: Petitioner may be able to obtain equitable tolling of AEDPA's filing deadline if he can show his mental impairment prevented him from filing and he made some diligent effort to pursue his claims to the extent he could understand them.

Gonzalez v. Wong, 90 Crim. L. Rep. 349 (9th Cir. 12/7/11):
Holding: Habeas petitioners can use "stay and abey" procedure to make record in state court to overcome bar by *Cullen v. Pinholster*, ___ U.S. ___ (U.S. 2011).

Doe v. Busby, 90 Crim. L. Rep. 165 (9th Cir. 10/24/11):
Holding: Even though Petitioner's retained habeas counsel had apparently done nothing to file a habeas petition for a long time, Petitioner was still entitled to equitable tolling of the statute of limitations because a lay person isn't in a position to know that his attorney's explanations for the delays aren't valid.

Trigueros v. Adams, 89 Crim. L. Rep. 857, 2011 WL 4060503 (9th Cir. 9/14/11):
Holding: Where Calif. Supreme Court summarily denied postconviction petition after requesting informal briefing on the merits, this was a ruling that the petition was timely for purposes of the federal limitations period.

Lee v. Lampert, 89 Crim. L. Rep. 720, 2011 WL 3275947 (9th Cir. 8/2/11):
Holding: An "actual innocence" exception applies to one-year federal statute of limitations for filing federal habeas petition.

Williams v. Cavazos, 89 Crim. L. Rep. 372 (9th Cir. 5/23/11):
Holding: Deference-triggering presumption of *Harrington v. Richter* does not apply to claims that were presented to state court on appeal but not mentioned in the state court's opinion when it denied other claims.

Wilson v. Knowles, 88 Crim. L. Rep. 565 (9th Cir. 2/8/11):
Holding: *Apprendi* does not allow state judge to find disputed evidentiary type facts about a prior conviction (such as severity of injury to victim and whether victim was an accomplice) to apply the 3-strikes law, and AEDPA does not required deference to the state judge's ruling in violation of *Apprendi*.

Doe v. Jones, 95 Crim. L. Rep. 597 (10th Cir. 8/12/14):
Holding: "Stay and abey" procedure for mixed habeas petitions can be used in some circumstances where a petition contains only a single, unexhausted claim.

LeBere v. Abbott, 94 Crim. L Rep. 176 (10th Cir. 10/18/13):
Holding: Even though Colorado state courts used a successive bar to deny Petitioner's new *Brady* claim, this did not prevent the federal courts from hearing this claim because no state court had actually heard and ruled on the *Brady* claim.

In re Weathersby, 2013 WL 1960578 (10th Cir. 2013):
Holding: Defendant's habeas petition was not successive or second where the basis for his claim did not exist at the time his prior motion was filed.

In re Pickard, 681 F.3d 1201 (10th Cir. 2012):
Holding: Where Prosecutor improperly withheld exculpatory evidence during a first PCR hearing, a second PCR motion to litigate this issue was not successive.

Brown v. U.S., 95 Crim. L. Rep. 67 (11th Cir. 4/7/14):
Holding: Federal magistrates lack authority to issue final judgments on habeas corpus motions under 28 USC 2255, and lack authority to try and sentence for federal misdemeanors.

Bryant v. Warden, 94 Crim. L. Rep. 419, 2013 WL 6768086 (11th Cir. 12/24/13):
Holding: Defendant can challenge a recidivist sentence under ACCA in a second or successive habeas petition under the "savings clause" of 28 USC 2255 and 2241 when intervening U.S. Supreme Court precedent (*Begay*) has made a predicate offense ineligible.

Spencer v. U.S., 2013 WL 4106367 (11th Cir. 2013):
Holding: Defendant, who unsuccessfully raised on direct appeal a claim that his prior Florida conviction for third-degree felony child abuse was not "crime of violence," could raise this issue in motion to vacate sentence because the *Begay* decision, which validated his arguments, is retroactive.

Zack v. Tucker, 92 Crim. L. Rep. 422, 2013 WL 105166 (11th Cir. 1/9/13):
Holding: 11th Circuit adopts "claim by claim" approach to assessing timeliness of federal habeas petition under AEDPA (joining 3d, 6th and 9th Circuits).

Figuereo-Sanchez v. U.S., 2012 WL 1499871 (11th Cir. 2012):
Holding: A federal prisoner's previously expressed intent to challenge his conviction pro se on a motion to vacate, set aside, or correct his sentence did not absolve a district court of the obligation to issue *Castro* warnings in the even that it recharacterized the prisoner's motion for relief from final judgment to ineffective assistance of counsel.

Zack v. Tucker, 2012 WL 34125 (11th Cir. 2012):
Holding: Timely assertion in habeas petition of one claim made all other claims in the petition timely, barring the district court from reviewing the timeliness of claims on an individual basis.

Aamer v. Obama, 94 Crim. L. Rep. 579 (D.C. Cir. 2/11/14):
Holding: Prisoner can use habeas corpus to challenge extreme, illegal conditions of confinement.

U.S. v. Caso, 93 Crim. L. Rep. 556 (D.C. Cir. 7/19/13):
Holding: Petitioner who had pleaded guilty to honest services fraud before *Skilling* may move to set aside the conviction under the "actual innocence" exception to procedural default.

U.S. v. McDade, 2012 WL 5457675 (D.C. 2012):
Holding: Where Movant had diligently and timely provided postconviction claims and affidavits from potential witnesses to postconviction counsel, Movant was entitled to equitable tolling of statute of limitations for his motion where his postconviction counsel subsequently failed to file Movant's motion on time.

Al-Oshan v. Obama, 2010 WL 4873307 (D.D.C. 2010):
Holding: Even though Petitioner was on hunger strike, where his health had deteriorated such that it was difficult to communicate with counsel or participate in habeas proceeding, an order compelling the gov't to allow an independent doctor or psychiatrist to examine him was warranted.

Stayton v. U.S., 2011 WL 691238 (M.D. Ala. 2011):
Holding: *Skilling* decision on honest services fraud is retroactive to cases on collateral review.

Harris v. State, 2010 WL 5298902 (S.D. Fla. 2010):
Holding: Where Defendant claimed that one of his three prior convictions did not qualify as a "crime of violence" for sentencing enhancement purposes, Defendant could use "actual innocence" exception to procedural default to excuse failure to raise this earlier; Defendant could be "actually innocent" of having three prior qualifying convictions.

Duguay v. Spencer, 2011 WL 3584495 (D. Mass. 2011):
Holding: Reasonable jurists could consider grounds for ineffective assistance of counsel beyond those in the habeas petition, warranting issuance of a certificate of appealability.

Williams v. Birkett, 2012 WL 4513414 (E.D. Mich. 2012):
Holding: Petitioner was entitled to equitable tolling of the time for filing his habeas petition where he had limited mental abilities and the trial judge in his case gave him confusing and legally erroneous information about when to file a habeas.

Butler v. Walsh, 2012 WL 677973 (E.D. Pa. 2012):
Holding: The one-year limitations period for a habeas petition under the Antiterrorism and Effective Death Penalty Act (AEDPA) was equitably tolled because prison officials ran out of habeas forms and prevented the defendant from obtaining the forms from outside the prison.

Ex parte Ward, 2011 WL 2164032 (Ala. 2011):
Holding: Even though postconviction case was brought 17 years after trial, Movant's postconviction motion should not have been dismissed on grounds that trial counsel failed to exercise reasonable diligence, where Movant alleged that he did not know about the existence of certain scientific test results of the state Department of Forensic Sciences lab, and counsel had no reason to have suspected that any additional forensic test results existed or that any further investigation of the matter would have been anything more than a fishing expedition.

Osborne v. State Dept. of Corrections, 2014 WL 4377830 (Alaska 2014):
Holding: Proper forum for challenging DOC's sentence calculation is through postconvction relief motion.

Ex parte Collier, 2010 WL 4910831 (Ala. 2010):
Holding: Habeas was proper way to challenge improper calculation of pretrial jail credit.

Catlin v. Superior Court, 2011 WL 240253 (Cal. 2011):
Holding: Court cannot deny as "untimely" a motion for postconviction discovery of materials to which Defendant would have been entitled at time of trial.

Swafford v. State, 2013 WL 5942382 (Fla. 2013):
Holding: Where State's case was built on theory that Defendant's motive in murder was to engage in sexual assault, Defendant was entitled to new trial for newly discovered evidence that no seminal fluid was found inside victim because this gave rise to reasonable doubt as to guilt.

Henry v. Santana, 89 Crim. L. Rep. 193 (Fla. 4/28/11):
Holding: Habeas petition seeking immediate release should not be dismissed on grounds that petitioner failed to exhaust his administrative remedies, where neither party raised this issue.

Hall v. State, 94 Crim. L. Rep. 338, 2013 WL 6225673 (Idaho 12/2/13):
Holding: Statutory right to counsel requires that postconviction counsel be free of conflicts and effective; "This statutory right to counsel would be a hollow right if it did not guarantee the defendant the right to effective assistance of counsel."

People v. Wrice, 2011 WL 312121 (Ill. 2012):
Holding: Defendant's successive postconviction petition alleging that his confession was the result of physical coercion by police officers satisfied the prejudice prong of the cause-and-prejudice test for determining whether a defendant may proceed on his successive postconviction relief petition.

People v. Patrick, 2011 WL 6851170 (Ill. 2011):
Holding: Court was required to conduct preliminary inquiry into factual basis of defendant's pro se post-trial ineffective assistance claims.

People v. Snyder, 2011 WL 5999261 (Ill. 2011):
Holding: Withdrawal of guilty pleas, and not vacatur of restitution, was appropriate remedy for failure to admonish defendant about possibility of restitution order before accepting guilty pleas.

Baker v. State, 2013 WL 2450537 (Kan. 2013):
Holding: Where a direct appeal had resulted in a remand for resentencing, the statute of limitations for filing a state postconviction action began to run on the date for filing a notice of appeal from the new sentence on remand; appellate court rejected State's claim that time began to run when appellate court issued its original mandate.

Hallum v. Com., 2011 WL 1620593 (Ky. 2011):
Holding: Where state enacted a "mailbox rule" statute for filing postconviction motions, statute would apply retroactively to cases pending on appeal when the statute was enacted.

Com. v. Clarke, 89 Crim. L. Rep. 589 (Mass. 6/17/11):
Holding: *Padilla v. Kentucky*'s holding that defense counsel has 6th Amendment duty to advise noncitizens of immigration consequences is retroactive to cases on collateral review.

Haraden v. State, 90 Crim. L. Rep. 301 (Me. 11/17/11):
Holding: Movant has right to be competent during PCR proceedings.

People v. Trakhtenberg, 92 Crim. L. Rep. 355 (Mich. 12/21/12):
Holding: An adverse judgment in a legal malpractice suit does not estop a criminal defendant from later pursuing postconviction relief regarding the same matter.

Smith v. Banks, 2014 WL 338842 (Miss. 2014):
Holding: Habeas corpus was available to challenge denial of pretrial bail.

Jones v. State, 2013 WL 3756564 (Miss. 2013):
Holding: *Miller*'s prohibition against mandatory juvenile LWOP applies retroactively to cases on collateral review.

Grayson v. State, 93 Crim. L. Rep. 157 (Miss. 4/18/13):
Holding: Mississippi recognizes right to effective assistance of counsel in postconviction death penalty cases (but finds was harmless here); "Because this Court has recognized that PCR proceedings are a critical stage of the death-penalty appeal process at the state level, today we make clear that PCR petitioners who are under sentence of death have a right to the effective assistance of PCR counsel"; petitioner had alleged that appointed PCR's counsel large caseload prohibited him from investigating case.

Nava v. State, 2011 WL 1474794 (Mont. 2011):
Holding: Court should have allowed pro se PCR motion to be amended by counsel.

State v. Nash, 2013 WL 216300 (N.J. 2013):
Holding: Where teacher convicted of sex with special education student found "newly discovered evidence" that student had an aide who was with him at all times so teacher could not have been alone with student, which contradicted testimony at trial that student had no aide, this presented an actual innocence claim that should be heard to prevent fundamental miscarriage of justice.

State v. Gilbert, 96 Crim. L. Rep. 156 (Ohio 10/21/14):
Holding: Once Defendant has been sentenced, trial court's jurisdiction ends and court has no authority to grant State's motion to vacate the plea due to Defendant's alleged breach of the plea agreement.

Com. v. Wright, 88 Crim. L. Rep. 684 (Pa. 2/23/11):
Holding: Even though Defendant's confession had been held to be voluntary at trial, this did not preclude him from seeking postconviction DNA testing; when a court determines whether a confession is voluntary, it is determining an issue of admissibility at trial, not whether the confession is true.

Campbell v. State, 56 A.3d 448 (R.I. 2012):
Holding: Where postconviction counsel files a "no merit" memo, Movant must be given opportunity to respond to it.

McCoy v. State, 92 Crim. L. Rep. 576 (S.C. 2/6/13):
Holding: Postconviction motion alleging jury misconduct should not be judged under "actual innocence" standard typical for such motions, but should be judged under a standard of whether juror intentionally failed to disclose information and whether such information would have been material to exercise of peremptory challenges.

Whitehead v. State, 2013 WL 1163919 (Tenn. 2013):
Holding: Time for filing postconviction motion was tolled where direct appeal appellate counsel abandoned petitioner by incorrectly calculating the deadline for filing, failing to notify him that the U.S. Supreme Court had denied cert in his case, failing to tell him that their attorney-client relationship had ended, and failing to send petitioner his file until after the deadline passed.

Wlodarz v. State, 2012 WL 581210 (Tenn. 2012):
Holding: A guilty plea proceeding is a "trial" within the meaning of a statute providing that a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment had it been presented at trial.

Keough v. State, 90 Crim. L. Rep. 420 (Tenn. 12/9/11):
Holding: Movant seeking postconviction relief is entitled to testify at postconviction hearing without cross-examination under postconviction rule that states that "under no circumstances shall petitioner be required to testify regarding the facts of the conviction

… unless necessary to establish the allegations of the petition." Court notes whether the privilege against self-incrimination applies to a postconviction case remains an open question, but the state rule was designed to accomplish the same goal; the movant should not be dissuaded from testifying due to fear of self-incrimination.

Gressman v. State, 2013 WL 5674557 (Utah 2013):
Holding: Even though postconviction movant died during pendency of his case, where his petition raised actual innocence, it qualified as an action for "personal injury" under Utah's survival statute, and thus, his case survives his death and his widow can be substituted for him as the movant.

In re Chandler, 67 A.3d 261 (Vt. 2013):
Holding: Even though Defendant is released prior to his postconvcition case being concluded, this does not moot the postconviction case.

State v. Sinclair, 2012 WL 2052785 (Vt. 2012):
Holding: Common law remedy of coram nobis can be used to challenge criminal conviction where there are no other means available, but cannot be used to supplant a direct appeal or PCR petition.

Montgomery v. Com., 751 S.E.2d 692 (Va. 2013):
Holding: Defendant was entitled to writ of actual innocence, where alleged sex assault victim had recanted her testimony and had subsequently been convicted of perjury based on her false testimony at Defendant's trial.

In re Yung-Cheng Tsai, 2015 WL 2164187 (Wash. 2015):
Holding: *Padilla* was a significant change in law that warranted exemption from one-year time limit for postconviction petition.

In re Personal Restraint of Carter, 263 P.2d 1241 (Wash. 2011):
Holding: Where a Defendant/Petitioner claims that he is actually innocent of prior convictions used to enhance a later sentence, then he may use an actual innocence exception to the postconviction time limits to challenge the prior convictions.

Elder v. Scolapia, 738 S.E.2d 924 (W.Va. 2013):
Holding: Defendant sentenced to home incarceration was incarcerated under sentence of imprisonment (in custody) for purposes of being able to bring a habeas corpus case.

State v. Daniel, 2015 WL 1917031 (Wis. 2015):
Holding: Once defense attorney raised issue of Movant's competency in postconviction case, burden was on state to prove by preponderance of evidence that Movant was competent to proceed.

Osterkamp v. Browning, 2011 WL 681098 (Ariz. Ct. App. 2011):
Holding: Indigent movant was entitled to appointment of counsel to represent him in second PCR proceeding alleging ineffective assistance of PCR counsel.

People v. Rivera, 2014 WL 2535946 (Cal. App. 2014):
Holding: Where defense counsel admitted that he failed to file a timely notice of appeal due to a mistaken belief about the law and filed a motion to appeal late, appellate court would treat the motion as a habeas petition and grant it; judicial economy was best served by avoiding the cumbersome habeas process to allow counsel to be found ineffective for failing to appeal.

In re Anthony, 2015 WL 1886904 (Cal. App. 2015):
Holding: Where the State had not appealed a grant of habeas relief setting aside Defendant's conviction, the State could not appeal a later order of a finding of factual innocence.

People v. Soojian, 2010 WL 4751762 (Cal. App. 2010):
Holding: Where defense counsel had been surprised at trial by testimony that truck used in crimes may have belonged to Defendant's cousin, counsel should have been able to present new evidence discovered after trial about this in a new trial motion; this was an exception to rule that such evidence cannot be presented where counsel could have discovered it earlier by exercise of due diligence.

Gaston v. State, 2014 WL 2587722 (Fla. App. 2014):
Holding: Even though Defendant filed a third pro se successive postconviction motion, this did not warrant an order prohibiting him from filing any further postconviction motions, because although his prior motions failed, the issues raised in all of them were not repetitive or frivolous, and appeared to have been raised in good faith.

State v. Johnson, 2011 WL 1886475 (Idaho Ct. App. 2011):
Holding: "Mailbox rule" applies to postconviction motions because prisoner loses control over delivery of such motions once he gives them to prison authorities.

People v. Jakes, 2013 WL 6504817 (Ill. App. 2013):
Holding: Defendant was entitled to postconviction discovery on his claim that Officer beat him to obtain a confession and had lied under oath, where since his conviction, Defendant had learned of multiple cases of police misconduct and coerced confessions involving this same Officer.

People v. Henderson, 2011 WL 5838686 (Ill. App. 2011):
Holding: Summary judgment was not warranted in a postconviction petition where the motion was based merely on the fact that the verification affidavit was unnotarized.

People v. Barrow, 954 N.E.2d 895 (Ill. App. 2011):
Holding: Where statute authorizing the use of scientific evidence in postconviction proceedings regarding a claim of actual innocence was silent on the use of witnesses, the court determined that witnesses could also be utilized; while the issue in this case was whether the state could utilize witnesses, the court suggested that witnesses could also be used by the defense.

State v. Trammell, 2014 WL 3565667 (N.M. App. 2014):
Holding: State caselaw rule that a defendant must be advised by counsel that he will have to register as a sex offender was not a "new rule," and therefore, was retroactive.

People v. Bailey, 2014 WL 7653584 (N.Y. County Ct. 2014):
Holding: Defendant's sentence for murder in "shaken baby" case was vacated where new scientific research about "shaken baby syndrome" called into question how the baby actually died; the new research could not have been discovered before trial.

People v. Hamilton, 2014 WL 128496 (N.Y. App. 2014):
Holding: A freestanding claim of actual innocence can be brought under portion of statute for motions to vacate providing for vacation of a conviction based on violation of petitioner's constitutional rights.

People v. L.G., 2013 WL 4402830 (N.Y. City Crim. Ct. 2013):
Holding: Even though Defendant was convicted of a weapons offense, it was the direct result of her being sex trafficked as a prostitute because she was forced to work under dangerous conditions, so her conviction should be vacated.

People v. G.M., 2011 WL 1815413 (N.Y. City Crim. Ct. App. 2011):
Holding: Even though Defendant was convicted of drug and other crimes in addition to prostitution, she was allowed to move to vacate all her convictions under a rule that allows vacation of convictions for sex trafficking victims for prostitution related offenses.

People v. Bronson, 2011 WL 1631919 (N.Y. City Crim. Ct. 2011):
Holding: Alleged sex abuse victim's recantation warranted vacation of Defendant's conviction where such evidence would have created a reasonable probability of a different verdict if it had been presented at trial.

State v. Keeley, 2013 WL 544055 (Ohio App. 2013):
Holding: Even though Movant did not raise certain issues in his earlier direct appeal, res judicata did bar raising those issues in his later postconviction case.

Knox v. Nooth, 2011 WL 2555841 (Or. App. 2011):
Holding: PCR court should have appointed new counsel for Movant after prior counsel was permitted to withdraw.

Com. v. Rykard, 2012 WL 4077380 (Pa. Super. 2012):
Holding: Movant's response to State's motion to dismiss postconviction petition was not itself a prohibited "successive" petition.

Ex parte Robbins, 2014 WL 6751684 (Tex. App. 2014):
Holding: Habeas relief granted in murder case where medical examiner changed her opinion post-trial as to cause of death from strangulation to "undetermined" though "suspicious."

Ex parte Zantos-Cuebas, 2014 WL 715057 (Tex. App. 2014):
Holding: Where habeas petitioner who spoke only Spanish alleged he did not understand the written advisements as to immigration consequences of his plea, this stated a claim that was not frivolous on its face.

Ex Parte Coty, 2014 WL 128002 (Tex. App. 2014):
Holding: Remedy in habeas proceeding for misconduct by crime lab technician at trial was to shift the burden of falsity to the State, but the burden of persuasion with respect to materiality remained with Petitioner.

Ex Parte Hernandez, 2013 WL 1247678 (Tex. App. 2013):
Holding: Motion court improperly limited its review of habeas proceeding to the guilty plea record despite habeas counsel's efforts to offer other clearly relevant evidence about what plea counsel had advised Petitioner regarding immigration consequences of conviction.

Ex parte Henderson, 92 Crim. L. Rep. 306 (Tex. Crim. App. 12/5/12):
Holding: Defendant was entitled to habeas relief where medical examiner recanted his testimony in a shaken-baby case regarding cause of death based on new scientific evidence.

Ex parte Rendon, 2010 WL 4628527 (Tex. Crim. App. 2010):
Holding: Petitioner need not personally verify his habeas petition, but can be verified by another person "according to his belief."

Brown v. State, 93 Crim. L. Rep. 592 (Utah, 7/12/13):
Holding: A post-conviction determination of actual innocence can be based on combination of both newly discovered evidence and evidence that was previously available to petitioner.

State v. Miller, 2014 WL 1911424 (Wash. App. 2014):
Holding: Change in state caselaw that allowed a court to give concurrent sentences instead of consecutive ones was a significant change in law that allows an exception to the one-year time limit for collateral attack on sentences.

Sanctions

Fuller v. Moore, No. ED96398 (Mo. App. E.D. 11/1/11):
Holding: (1) Where Plaintiff's request for sanctions was premature because Plaintiff did not wait the required 30-days under Rule 55.03(d)(1)(A) to allow Defendant to correct their alleged misconduct, the premature filing deprived the trial court of authority to rule on the sanctions motion; and (2) a trial court errs when it grants a request for sanctions that is not "made separate from" other motions as required by Rule 55.03(d)(1)(A).

In re: Marriage of Younker v. Younker, 2014 WL 849879 (Mo. App. S.D. March 4, 2014):

Holding: Before imprisoning someone for civil contempt for failure to pay a civil judgment, court must find that Contemnor has the present ability to pay; absent the ability to pay, the coercive purpose of civil contempt is frustrated because Contemnor has no key to the jailhouse door, and this is true even if Contemnor acted in "bad faith" in some of their dealings in the case.

Davis v. Davis, 2015 WL 5432111 (Mo. App. W.D. Sept. 15, 2015):

Even though Defendant posted an "appeal bond" in conjunction with an appeal of a civil contempt order for failure to pay child support, a contempt order is not appealable and remains interlocutory until there is either a warrant of commitment or actual confinement in jail.

Facts: Defendant-Father attempted to appeal an order finding him in civil contempt for failure to pay child support. The trial court set an appeal bond of $55,000 and set a deadline for Defendant to pay or report to county jail. Defendant posted the appeal bond, and appealed.

Holding: A civil contempt order does not become "final" for appeal until it is enforced. The trial court must issue both a judgment of contempt and a proper order of commitment that explains what Defendant must do to purge the contempt, and that Defendant has the ability to purge the contempt. Here, the contempt judgment has never been enforced either by a warrant of commitment or actual incarceration. No order of commitment was ever issued by the trial court. Even though Defendant posted an "appeal bond," he can't appeal at this time because the trial court's actions are not final. Appeal dismissed.

In re Marriage of Long v. Long, 2015 WL 5025130 (Mo. App. W.D. Aug. 25, 2015):

Holding: A civil contempt judgment becomes "final" for purposes of appeal when it is actually enforced, i.e., on the date the contemnor is first incarcerated, and notice of appeal is due within 10 days thereafter under Rule 81.04(a) and Sec. 512.050; appeal dismissed where notice of appeal was filed more than 10 days after contemnor was first incarcerated.

State ex rel. Jackson County Prosecuting Attorney v. Prokes, No. WD72996 (Mo. App. W.D. 12/20/11):

Where State engaged in repeated Brady violations and failed to comply with court order for discovery, trial court did not err in excluding all the State's evidence from any trial.

Facts: Defendant's case had previously been reversed in postconviction due to *Brady* violations. Before retrial, the court entered a detailed discovery order, with which the State failed to comply. As a sanction, the trial court entered an order excluding all evidence from trial, which effectively prevented the State from trying the case. The State sought a writ of prohibition.

Holding: In order to prevail on a writ, the State must show that the trial court's order was an abuse of discretion. Because the original conviction was reversed due to *Brady* violations, the trial court entered a detailed discovery order for the retrial, with which the State repeatedly failed to comply. Where the State has failed to respond promptly and fully to a disclosure request, the issue is whether the failure has resulted in fundamental

unfairness or prejudice to the defendant. Rule 25.18 provides that a court may "enter such other order as it deems just under the circumstances" for discovery violations. Here, the State's discovery violations have gone on for more than 10 years. The State has continued to delay discovery, object to discovery, and failed to comply with court orders regarding discovery. Defendant has been subjected to fundamental unfairness and prejudice because he is no closer to receiving a fair trial than he was when he was charged more than 10 years ago. Willful violations require more serious sanctions than merely negligent violations because the willful violation shows an intentional disregard for the rules and orders of the court. The dissent argues that prior cases have held that due process concerns mean that a court should be cautious in excluding defense witnesses due to a discovery violation, but due process concerns do not apply to the State precisely because the State does not have due process rights. The dissent also argues that Missouri citizens are prejudiced here because the Defendant will not be brought to trial. However, the citizens have been prejudiced by the prosecutor's misconduct throughout the case. The "balancing test" employed by the dissent is predisposed to an outcome in favor of the State based on the improper assumption that the State's overriding interest should be to prosecute and convict Defendant, but such is not the case. The prosecutor has a duty not to convict at any cost, but to see that justice is done and that a defendant receives a fair and impartial trial. The trial court did not abuse its discretion in excluding all the State's evidence.

State v. Lee, No. WD71924 (Mo. App. W.D. 6/7/11):
Holding: In case of first impression, Western District holds that even though police officer-witness intentionally gave testimony designed to provoke a mistrial, the prosecutor was not responsible for this misconduct, so the trial court did not have authority to order dismissal of the charges with prejudice; further, double jeopardy does not bar retrial of defendant.

*** Turner v. Rogers, ___ U.S. __, 89 Crim. L. Rep. 472 (U.S. 6/20/11):**
Holding: Whether defendant in civil contempt proceeding for failure to pay child support is entitled to appointed counsel depends on applying the balancing test of *Mathews v. Edridge*, 424 U.S. 319 (1976).

Editor's Note: Missouri on this matter is case on this subject is *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).

In re Grand Jury Proceedings, 94 Crim. L. Rep. 668, 2014 WL 702193 (1st Cir. 2/20/14):
Holding: Prosecutors who empanel a new grand jury cannot enforce by civil contempt a subpoena duces tecum issued by an earlier, now-defunct grand jury.

U.S. v. Agosto-Vega, 94 Crim. L. Rep. 49, 2013 WL 5394175 (1st Cir. 9/27/13):
Holding: Even though defense counsel filed certain motions "late," trial court was not justified in imposing a fine on defense counsel, since the motions could have been

presented orally at trial anyway, and "the sua sponte issuance of a sanction order, staking out a view and judgment without any warning or opportunity to be heard, increases the likelihood of unfairness."

In re Fengling Liu, 90 Crim. L. Rep. 327 (2nd Cir. 11/22/11):
Holding: Attorneys may "ghost write" pleadings for pro se litigants without violating duty of candor to court because "ghost writing" is a form of limited representation under Model Rule 1.2(c).

Brandt v. Gooding, 2011 WL 567469 (4th Cir. 2011):
Holding: The introduction of fraudulent letter at a deposition did not occur under the eye of the court and, thus, did not allow for summary criminal contempt.

U.S. v. Farah, 95 Crim. L. Rep. 689 (6th Cir. 9/11/14):
Holding: Where Witness was convicted of criminal contempt for refusing to testify at a trial, double jeopardy precluded Witness from being convicted of criminal contempt again for refusing to testify at another person's trial regarding the same "area of refusal" from the first trial; the contempt was continuing and the Gov't cannot tack on multiple punishments for refusing to testify about the same matter.

U.S. v. Llanez-Garcia, 94 Crim. L. Rep. 205 (6th Cir. 11/5/13):
Holding: Attorney should not have been sanctioned for abuse of subpoena power where there was no evidence attorney acted in "bad faith," but instead relied on her interpretation of an arguably ambiguous criminal procedural rule regarding service of subpoenas; attorney issued a Rule 17(c) subpoena to records custodians to produce materials or appear in court on June 3; the problem was there was no court hearing scheduled on June 3; Rule 17(c)(1) states that courts "may direct" the production of materials before they are offered into evidence, and attorney believed the use of the term "may" does not require advance court approval.

U.S. v. Ali, 2012 WL 1970776 (8th Cir. 2012):
Holding: Where Defendant refused to stand in courtroom when court convened, in determining whether to find criminal contempt, court must evaluate this under the Religious Freedom Restoration Act which applies to any sincerely held religious belief, not the First Amendment, which requires only a substantial burden on a central religious belief.

U.S. v. Tillman, 95 Crim. L. Rep. 488 (9th Cir. 6/30/14):
Holding: Even though court-appointed Attorney told court he would "suspend work" unless he was paid more quickly by the court, this was not an attempt to "extort" the court and did not warrant referring Attorney to the State Bar for discipline; attorneys are allowed to criticize the court for slow payment of fees.

U.S. v. Kimsey, 2012 WL 386338 (9th Cir. 2012):
Holding: Violations of local court rules cannot serve as predicates for criminal convictions under the federal criminal contempt statute.

U.S. v. Aguilar, 2011 WL 6097144 (C.D. Cal. 2011):
Holding: Government's misconduct warranted exercise of the trial court's supervisory powers to dismiss the indictment, where the misconduct included search warrants procured through materially false and misleading affidavits, improperly obtained privileged communications between defendant and defense counsel, and other flagrant acts.

In re Grand Jury Proceedings, 2014 WL 297538 (S.D. N.Y. 2014):
Holding: Even though civil Contemnor who was jailed for refusing to testify at grand jury was continuing to refuse to testify, where he had publicly staked out a position of noncooperation, had public supporters and was willing to risk deteriorating health to refuse to testify, it was clear that Contemnor would never testify and, thus, had to be released because the jailing for contempt was not inducing him to testify.

U.S. v. Bran, 2013 WL 2565518 (E.D. Va. 2013):
Holding: (1) Where Gov't deported a witness who would likely have provided favorable testimony for Defendant and Gov't was aware at time of deportation that witness had information about case, some sanction for the Gov't's conduct was appropriate; but (2) appropriate sanction was a "missing witness" jury instruction, not dismissal of case.

Bloodman v. State, 2010 WL 1507065 (Ark. 2010):
Holding: Even though the trial judge wrote a letter to Attorney informing him that a hearing would be held on a specific date " to determine what happened" regarding Attorney's alleged misrepresentations to the court, this did not provide proper notice to Attorney that court was going to consider criminal contempt at the hearing.

Oliver v. State, 2013 WL 427236 (Del. 2013):
Holding: Granting 24-hour recess during trial to allow defense counsel to be able to review forensic reports which State had failed to disclose was not an appropriate sanction for State's non-disclosure before trial, since defense counsel would not have time to adequately prepare for cross-examination of the highly technical information or be able to consult with their own forensic expert.

People v. Kladis, 2011 WL 6851169 (Ill. 2011):
Holding: State's allowance of destruction of videotape of defendant's traffic stop was a discovery violation, and the trial court did not abuse its discretion by barring the arresting officer from testifying about events which occurred during the time period of the videotape as a sanction for the state's actions.

In re Brizzi, 91 Crim. L. Rep. 15 (Ind. 3/12/12):
Holding: Prosecutor violated ethical rules on trial publicity and special responsibility of prosecutors when he published press release that said the evidence was overwhelming and to not seek the death penalty would be a "travesty" in this case.

Com. v. Carney, 88 Crim. L. Rep. 349, 2010 WL 4948559 (Mass. 12/8/10):
Holding: Punitive monetary sanctions against a party are not appropriate for a discovery violation; such sanctions are limited to remedial measures aimed at curing prejudice and promoting fair trial.

Freeman v. State, 93 Crim. L. Rep. 362, 2013 WL 2350373 (Miss. 5/30/13):
Holding: State's failure to preserve evidence that is subject to a court's discovery order violated Defendant's due process right to present a defense and entitled him to judgment in his favor regardless of whether State acted in bad faith; here, the defense had been granted an order to preserve all evidence, but state later destroyed a video of the DWI traffic stop.

State v. Dabas, 93 Crim. L. Rep. 613 (N.J. 7/30/13):
Holding: Where Officer destroyed his interrogation notes of Defendant in violation of State's disclosure obligation, Defendant was entitled to an adverse-inference instruction because the destruction allowed the State to present a sanitized version of the interrogation.

Concah v. Sanchez, 2011 WL 2477141 (N.M. 2011):
Holding: Where judge imposed contempt and incarceration on 32 spectators in court who may have interrupted the court proceedings, but judge did not observe each of the 32 actually being disruptive, this indiscriminate contempt finding violated due process.

State v. Beeler, 2012 WL 5524982 (Tenn. 2012):
Holding: Defendant's attorney, who asked a co-defendant a question while co-defendant's counsel was examining a witness, did not engage in misbehavior to warrant contempt where both attorneys were working closely together on a joint defense.

Hunter v. Virginia State Bar, 92 Crim. L. Rep. 697 (Va. 2/28/13):
Holding: Under Virginia Rule 1.6 on attorney-client confidentiality (which prohibits disclosure of information a lawyer obtains in an attorney-client relationship that would be embarrassing or detrimental unless client consents beforehand), a defense counsel who uses public information from a trial to blog about a client's completed case does not have to obtain his former client's consent before doing so, even if the client will be embarrassed or suffer detriment if details about their case are on the internet; "A lawyer is no more prohibited than any other citizen from reporting [publicly available information of] what transpired in the courtroom."

Gaston v. State, 2014 WL 2587722 (Fla. App. 2014):
Holding: Even though Defendant filed a third pro se successive postconviction motion, this did not warrant an order prohibiting him from filing any further postconviction motions, because although his prior motions failed, the issues raised in all of them were not repetitive or frivolous, and appeared to have been raised in good faith.

State v. Jones, 2014 WL 7344404 (Minn. App. 2014):
Holding: Criminal contempt charge is not authorized for violation of probation; statute does not authorize it, and violation of probation agreement does not hinder administration of justice, which is the primary reason for criminal contempt.

Johnson v. Dept. of Public Safety Standards and Training, 2012 WL 5429461 (Or. App. 2012):
Holding: Oregon victim's rights law which provided that a victim must be informed "by defendant's attorney" that they are being contacted in a defense capacity did not require a private investigator hired by a defense attorney to disclose anything; the only obligation imposed by the law was on the attorney, not the investigator.

In re McCann, 94 Crim. L. Rep. 277 (Tex. App. 11/20/13):
Holding: Because an attorney's "trial file" belongs to the Defendant, the Defendant can direct that the file not be given to successor counsel; thus, trial court cannot hold prior counsel in contempt for refusing to turn over file where counsel was following Defendant's directions.

Search and Seizure – Suppression Of Physical Evidence

State v. McNeely, 358 S.W.3d 65 (Mo. banc 1/17/12):
The 4th Amendment prohibits a non-consensual blood draw without a warrant in routine DWI arrest cases; the fact that alcohol may dissipate in blood over time does not justify a non-consensual blood draw without a warrant; exigent circumstances must exist (e.g., accident or injury) in order to do a warrantless blood draw.
Facts: Defendant, who was stopped for speeding, displayed classic characteristics of DWI and failed field sobriety tests. Defendant refused to consent to a breath test or blood test. Officer, believing that changes in Sec. 577.041 RSMo. Supp. 2010, now allowed a warrantless blood test, took Defendant to a hospital and had blood drawn. Defendant moved to suppress the blood test.
Holding: *Schmerber v. California*, 384 U.S. 757 (1966), held that a warrantless blood draw requires that there be "special facts" that might lead an officer to reasonably believe he was faced with an emergency situation in which delay in obtaining a warrant would lead to destruction of evidence. *Schmerber* involved an injury accident in which the officer had to investigate the accident and take defendant to the hospital, thus reducing time to get a warrant. Here, the issue before the court is whether the natural dissipation of blood-alcohol evidence alone is a sufficient exigency to dispense with the warrant? It is not under *Schmerber*. Officers must reasonably believe they are confronted with an emergency where the delay in obtaining a warrant would threaten destruction of evidence. In routine DWI cases, in which no special facts other than natural dissipation of alcohol in blood exist, a warrant must be obtained before blood can be drawn. Here, this is a routine DWI case with no special facts. Hence, a motion to suppress should be granted. Because the warrantless blood draw violated the 4th Amendment, the court need not address the State's arguments based on the implied consent law. *State v. Ikerman*, 698 S.W.2d 802 (Mo. App. 1985) and *State v. Setter*, 721 S.W.2d 11 (Mo. App.

1986)(holding that warrantless blood draws are permissible in DWI cases) are no longer to be followed.

State v. Johnson, No. SC91173 (Mo. banc 12/6/11):
Holding: Where an officer conducts a search incident to arrest in objectively reasonable reliance on binding appellate precedent that is later overturned, the exclusionary rule does not suppress the evidence obtained as a result of the search; hence, where Officer conducted search of vehicle incident to arrest and the search was lawful at the time it was conducted before *Arizona v. Gant*, 129 S.Ct. 1710 (2009), the evidence would not be suppressed where Officer relied on pre-*Gan*t law.

State v. Grayson, No. SC90971 (Mo. banc 3/29/11):
Where (1) Officer received anonymous tip that certain person was driving a certain vehicle while intoxicated, and (2) Officer stopped different vehicle, saw that it was a different person (Defendant) but knew Defendant had history of arrests and then discovered Defendant had warrant for his arrest, the stop of the car and detention of Defendant were without reasonable suspicion and drugs later found were not attenuated from the unlawful stop, would not have been inevitably discovered, and were not abandoned, even though they were found in the back of police car after Defendant was put there.
Facts: Officer received anonymous tip that that a Mr. Reed was driving while intoxicated on 5th Street in a red Ford truck. Officer then saw a red Mazda truck on a different street and stopped it. Officer then recognized that the driver was not Mr. Reed, but instead Defendant. Because Officer new Defendant had a history of prior arrests, Officer then detained Defendant to check on current warrants, and found a current warrant for Defendant. Officer arrested Defendant and put him in patrol car. After Defendant was taken to jail, Officer found drugs in the back of the patrol car. Defendant was charged with possession of drugs, and filed motion to suppress.
Holding: The State claims this was a valid *Terry* stop. However, a *Terry* stop must be based on reasonable suspicion that criminal activity is taking place. Where a stop is based on an anonymous tip, there must be independent corroboration of the tip. Here, the Officer stopped a different make of truck in a different location and did not observe any evidence of intoxication before stopping the truck. Thus, there was no indication of criminal activity taking place. The stop was unjustified. Further, once Officer identified the driver as someone other than Mr. Reed, the stop should have ended. An investigative detention can last no longer than necessary to effectuate the purpose of the stop. Knowledge of a person's criminal background is alone insufficient to give rise to reasonable suspicion, so there was no justification for detaining Defendant to run a warrant search. The discovery of drugs was not attenuated from the illegal stop because this happened close in time to the stop and the Officer's conduct in conducting an illegal stop and detention is the type of conduct the exclusionary rule is designed to prevent. *State v. Lamaster*, 652 S.W.2d 885 (Mo. App. 1983), which is to the contrary, should no longer be followed. The inevitable discovery rule does not save the stop either because while the State may have properly arrested Defendant at some later date, it is not the arrest on the warrant but the possession of drugs found in the patrol car that was objected to here, and the State was put in a better position than it would have been if the illegal

stop and detention had not occurred. Finally, there was no abandonment of the drugs because abandonment is only found where the item is abandoned voluntarily, and voluntary abandonment does not result from an illegal seizure. Motion to suppress should have been granted.

State v. Turner, 2015 WL 5829664 (Mo. App. E.D. Oct. 6, 2015):
Holding: (1) Standard of review for determining whether trial court was required to grant hearing under *Franks v. Delaware*, 438 U.S. 154 (1978)(allowing challenge to veracity of police statements in warrant affidavit) is unclear in Missouri, but Eastern District deems it to be abuse of discretion; and (2) even though defense counsel failed to object to testimony about physical evidence that was the subject of a motion to suppress, where counsel objected to the actual physical exhibits and photographs thereof when they were "offered" at trial, this preserved the issue for appeal.

State v. Selvy, 2015 WL 1549036 (Mo. App. E.D. April 7, 2015):
Where Officer stopped Defendant for a license plate violation but repeatedly requested that Defendant consent to a search, drugs found during the search must be suppressed because Officer prolonged stop longer than necessary to carry out its original lawful purpose, and the alleged consent was not voluntary because Officer used an overwhelming show of authority to badger Defendant into consenting.
Facts: Officer was on "drug patrol." He stopped Defendant-Driver for a license plate violation; Defendant did not have a front license plate. Officer had Defendant come to Officer's car, and patted down Defendant. Officer found nothing illegal in this pat down. As the stop continued, Officer repeatedly asked Defendant for consent to search his car. Defendant repeatedly said "no." Officer said he was going to have to call a drug dog. Defendant continued to respond that he did not want to consent to search. Officer eventually sat Defendant on the curb and said "Last chance, man." At that point, Defendant consented. Officer searched car and found drugs. Defendant filed a motion to suppress. At the hearing, Officer testified he thought Defendant was participating in criminal activity because he was nervous, he answered questions deceptively and he was in a high-crime area known for drugs. The stop was recorded on video. Based on the video, the trial court found that Defendant did not look particularly nervous, although he may have looks "stoned." The trial court suppressed the drugs. The State appealed.
Holding: The initial stop for the license plate violation was a valid stop. However, a lawful stop for a traffic offense can continue only for the time necessary for reasonable investigation of the traffic offense. The State argues that because the total time here was only 15 minutes, the stop time was reasonable. However, a traffic stop does not pass constitutional muster merely because of the length of time elapsed. It is the events surrounding the stop by which the 4th Amendment analyzes the stop. Here, Officer clearly abandoned the original purpose of the stop and began investigating for drugs. Officer did not even write a citation for the missing license plate. Officer can prolong a traffic stop beyond the initial purpose only if there is reasonable suspicion of illegal activity, but here the court found none. Even though the court thought Defendant looked "stoned," this was a gratuitous remark; neither the Officer nor the State sought to uphold the search on this basis in the trial court, so appellate court won't consider it. Defendant's consent was not voluntarily given because Office was in full uniform with a

gun, emphasized his authority, made Defendant sit on a curb, repeatedly asked for consent, and told him "last chance." Suppression affirmed.

State v. Hastings, 2014 WL 6679395 (Mo. App. E.D. Nov. 25, 2014):
Even though Defendant retreated into his house when police came to the door, this did not provide exigent circumstances for police to enter the house without a warrant.
Facts: Police received a tip that a stolen car might be at a house. They went to the house and saw the car in the driveway. Police knocked on the door of the house. A woman answered. While police were talking to the woman, Defendant approached the door from inside the house, saw police, and "briskly" turned around and went further inside, out of view. Police entered the house and detained Defendant. They asked for identification. When Defendant opened his wallet, police saw and seized identification documents belonging to the owner of the stolen car. The trial court overruled a motion to suppress the documents and admitted them at trial.
Holding: Physical entry into the home is the primary evil against which the Fourth Amendment is directed. Here, the State claims the police were allowed an exception to the warrant requirement because exigent circumstances existed in that Defendant could flee or destroy evidence. However, police entry into the home was not necessary to prevent an escape. Other officers were at the house and were guarding the stolen car. Even when police entered the home, they didn't handcuff Defendant or restrain him in any way until after he produced his wallet and they found the stolen identification documents. These circumstances do not suggest urgency attendant to imminent flight of a suspect. Defendant had a legal right not to talk to police, and to retreat into his home. The mere withdrawal of a suspect into their home does not create exigent circumstances because such an exception to the warrant requirement would swallow the Fourth Amendment's protections. Even though police may have believed there was incriminating evidence inside the house, this does not by itself justify a belief that Defendant was trying to destroy it. The mere presence of contraband in a home does not create an exception to the warrant requirement. Police entry into the home violated Fourth Amendment. Evidence should have been suppressed.

State v. Spencer, 2014 WL 4085162 (Mo. App. E.D. Aug. 19, 2014):
Where trial court took motion to suppress "with the case" in a bench trial and at end of trial granted the motion and declared the proceedings to be concluded, the State's interlocutory appeal must be dismissed because it violates Double Jeopardy.
Facts: Defendant, charged with drug possession, filed a motion to suppress, and waived a jury trial. The trial court held a bench trial, during which the motion was taken "with the case." The State and defense made opening statements and the State presented police witnesses. Defendant moved for judgment of acquittal at the close of all evidence, and argued his motion to suppress. The trial court then stated, "Very well. I'm going to grant the motion to suppress the evidence, and that will conclude the matter….Court is in recess." The State filed an interlocutory appeal regarding the motion to suppress.
Holding: Sec. 547.200.2 allows the State an interlocutory appeal regarding a motion to suppress but not if "such an appeal would result in double jeopardy for the defendant." Here, the State presented its entire case. Although the trial court did not enter a not guilty verdict or enter an order labeled a judgment, the appellate court looks at the practical

effect of the actions. Here, the trial court did not continue the trial pending an interlocutory appeal. The trial was "concluded." The practical effect is the trial court acquitted Defendant after the suppression of evidence. Double jeopardy applies as the State presented evidence, thus giving due deference to double jeopardy in bench trials. "While taking motions to suppress evidence with a bench trial may serve judicial economy, it is not good practice."

State v. Nebbitt, 2014 WL 3729808 (Mo. App. E.D. July 29, 2014):
Trial court court erred in denying motion to suppress on grounds that it "cannot determine as a matter of law" whether certain facts were true, because trial court was required to make factual findings, and court failed to apply proper burden of proof which places the burden of proof and nonpersuasion on the State.
Facts: Defendant filed a pretrial motion to suppress, which turned on whether Officer could see certain evidence in plain view. After the motion to suppress hearing, the trial court ruled that it "cannot determine as a matter of law whether or not the officer could or could not see" the evidence allegedly in plain view, and that this issue was for the jury to determine. Defendant objected to the evidence at trial based on the motion to suppress, and was overruled. After conviction, Defendant appealed.
Holding: Under Sec. 542.296.6, the State bears the burden of producing evidence and burden of persuasion to convince a trial court by preponderance of the evidence that a motion to suppress should be overruled. The trial court's duty is to resolve any issues of fact and credibility before ruling on the motion. Here, although the trial court characterized its actions as overruling the motion to suppress, the trial court actually failed to make the required factual and credibility findings. Further, the trial court failed to apply to the proper burden of proof and persuasion because if it was not convinced by the State's evidence, it was required to sustain the motion. Case is remanded for supplemental hearing, if necessary, and for trial court to make required factual findings and apply correct burden of proof. If trial court determines the evidence was not in plain view, it must suppress the evidence and grant a new trial. If trial court determines the evidence was in plain view, it shall certify the issue for further appeal.

State v. Norfolk, No. ED95468 (Mo. App. E.D. 11/15/11):
Even though Officer saw Defendant adjust his pants in a way that made Officer think that Defendant had a gun and Defendant cussed at Officer, this was not reasonable suspicion to stop and search Defendant.
Facts: Officer was patrolling in an area where there had been several robberies in the past. Officer saw Defendant adjust his pants and believed that he had a gun because he had adjusted his pants from the back. Officer asked to speak with Defendant, and Defendant refused and cussed at Officer. Officer then said if you're not doing anything wrong, you'll speak to me. Officer then had Defendant place his hands on a wall, and checked for weapons. She found a gun and drugs. Defendant filed a motion to suppress, which was overruled. He was convicted at trial of unlawful use of a weapon and possession of drugs.
Holding: The evidence fails to support a reasonable suspicion that criminal activity was afoot when Officer stopped and searched Defendant. Officer was on a routine patrol in a high crime area and saw Defendant adjust his pants from the back. Officer believed this

indicated that Defendant had a gun. However, this activity could be wholly innocent. Officer did not see any bulge or shape of a gun before searching Defendant, Officer had no knowledge of Defendant engaging in any criminal activity, and there was no report of an immediate crime in the area. The motion to suppress should have been granted due to the illegal stop. However, the appellate court does not reverse the conviction because this was harmless error since Defendant testified at trial that he possessed the gun and drugs; this confession at trial makes the evidence of guilt overwhelming and precludes any claim of relief from the motion to suppress on appeal.

State v. Ingram, No. ED94866 (Mo. App. E.D. 5/24/11):
(1) Even though State had Officer testify at motion to suppress hearing, where State failed to introduce the search warrant and affidavits that were the subject of the motion to suppress physical evidence, the State failed to meet its burden to show the search was based on probable cause because the validity of the search is determined only by a review of the warrant; and (2) taking motions to suppress "with the case" is "discouraged."
Facts: Defendant filed a motion to suppress physical evidence and a motion to suppress statements. At the suppression hearing, the State had Officer who conducted the search testify. He did not testify about any information in the search warrant that was used to search Defendant's house. The State did not admit into evidence the search warrant, the search warrant application or the supporting affidavits. The trial court denied the motion to suppress. The trial court never ruled on the voluntariness of Defendant's statements. Defendant appealed after he was convicted at trial of various drug offenses.
Holding: The trial procedures for motions to suppress physical evidence and statements are different. For a motion to suppress statements, the court is required to conduct a pretrial hearing or a hearing outside the jury's presence to determine the voluntariness of the statements. A motion to suppress physical evidence may be taken "with the case" but this is "discouraged." "This case illustrates the substantial problems associated with taking *any* motion to suppress with the case. It is a better practice to conduct an evidentiary hearing on any motion to suppress outside the presence of the jury *prior* to the start of trial." In reviewing for probable cause to issue a warrant, the court may not look beyond the four corners of the warrant application and supporting affidavits. Under Sec. 542.296.6, the State had the burden to prove by a preponderance of the evidence that the court should overrule the motion to suppress. The State failed, however, to introduce the search warrant, the application and supporting affidavits. Hence, the court cannot determine if there was probable cause, and there was no evidence to overrule the motion to suppress. The State failed to meet its burdens of production and proof as to the validity of the search warrant. As a result, the court was required to suppress the physical evidence and statements. The statements were the fruit of an unlawful arrest stemming from a search warrant that was not supported by probable cause. However, Defendant is not entitled to discharge. Conviction reversed and case remanded. On remand, the State may choose not to retry the case; may proceed to retrial without the seized evidence and Defendant's statements; or may proceed to retrial and seek to introduce the disputed evidence, after a hearing to determine the voluntariness of the statements, and by offering additional evidence sufficient to carry its burden to allow for admission of the physical evidence.

State v. Thompson, No. SD33492 (Mo. App. S.D. April 8, 2015):
Holding: Where trial court entered an order on a suppression motion that "suppressing the evidence for inadequate probable cause is consistent with the cases supplied by defense counsel," the order was too vague for the appellate court to have jurisdiction to consider the State's appeal; the trial court's order was not a definitive ruling on a motion to suppress.
Discussion: The State appeals what purports to be an order granting Defendant's motion to suppress. Sec. 547.200 authorizes the State to appeal grants of motions to suppress. But here, the order does not have the substantive effect of suppressive evidence; it is too vague. The order never definitely rules on the motion to suppress; the trial court's conclusion is unclear. As a result, the appellate court lacks jurisdiction to hear an appeal under 547.200.

State v. Stone, 430 S.W.3d 288 (Mo. App. S.D. 2014):
Even though trial court suppressed evidence and State filed an interlocutory appeal, where none of the arguments presented by the State on appeal were presented to the trial court, State failed to preserve anything for appeal.
Facts: The trial court granted Defendant's motion to suppress evidence. The State filed an interlocutory appeal raising various legal arguments as to why the trial court erred. However, none of these arguments were presented to the trial court.
Holding: The State has failed to preserve anything for appeal by not presenting its arguments to the trial court. Motions to suppress typically involve complicated legal issues. Requiring arguments and claims to be presented to the trial court first in order to preserve them for appellate review allows the trial court to rule intelligently on, and fix, any errors itself. Here, the State did not give the trial court that opportunity. The trial court would have been free to reconsider its ruling on the motion to suppress, and to consider the State's arguments, if the State had availed itself of that opportunity, but the State didn't do so. Interlocutory order suppressing evidence affirmed.

State v. Beck, 2013 WL 5524826 (Mo. App. S.D. Oct. 7, 2013):
Merely crossing the fog line of road does not provide reasonable suspicion to stop vehicle for DWI.
Facts: Officer testified he observed Defendant's vehicle cross the fog line separating the shoulder of the road from the driving lane, and stopped Defendant to investigate for DWI. Defendant then was arrested for DWI. Defendant filed a motion to suppress evidence of the stop, and prevailed. The State appealed.
Holding: Erratic or unusual driving will provide reasonable suspicion for a stop to investigate DWI. But prior cases have held that merely crossing the fog line does not, by itself, provide such suspicion. The trial court granted the motion to suppress on the basis that Officer only saw vehicle cross the fog line. Even though the State argues that the Officer also saw the car weave in the lane, the trial court apparently did not accept this fact, and appellate court is required to defer to the trial court on factual findings.

State v. Flowers, 2013 WL 3027866 (Mo. App. S.D. June 18, 2013):
Where police received an anonymous tip that Defendant was threatening another man and a vehicle, but when they arrived at the location Defendant was sitting on an outside stairs and said only that he'd been in a fight with his girlfriend, the uncorroborated tip did not provide reasonable suspicion to detain Defendant, and drugs found after Defendant's detention were suppressed.
Facts: Police received an anonymous call that Defendant was threatening another man and a vehicle. When police went to the location, they found Defendant sitting on some trailer steps next to some duffle bags. They asked him what happened, and he said he and his girlfriend had gotten into an argument, and he was moving out with his belongings. Meanwhile, another officer was let inside the trailer by a woman. This Officer observed a spoon with apparent drug residue. Meanwhile, another Officer detained Defendant, frisked him because he had put his hands in his pocket after being told not to do so, and eventually found a syringe in his pocket. Meanwhile, Officers saw the woman washing the spoon. Next, they saw drug paraphernalia around the stairs, which they had apparently overlooked earlier. Police then saw drug paraphernalia in an open duffle bag. They then searched the bags and found more drug evidence. Defendant moved to suppress the drug evidence.
Holding: An anonymous tip rarely provides reasonable suspicion that a person has committed a crime warranting a *Terry* stop absent corroboration of the tip. An accurate description of a subject's readily observable location and appearance is reliable in a limited sense in that it correctly identifies the person whom the tipster accused. But such a tip does not show that the tipster had knowledge of concealed criminal activity. Here, the tipster stated that Defendant had threatened a male and a vehicle. But when police found Defendant, the only thing that they could corroborate was the Defendant was arguing with this girlfriend. This is not the same as the tip. At the time Officer detained and frisked Defendant, Officer was not aware of any evidence regarding a completely different kind of criminal activity than the tip – drug activity. Thus, Defendant was seized in violation of the 4th Amendment without a warrant and without reasonable suspicion of specific, articulable facts that criminal activity was occurring or had occurred. The drug evidence at issue was the fruit of an unconstitutional stop, and no exception to the exclusionary rule applies. Evidence suppressed.

State v. Reed, 2013 WL 2285129 (Mo. App. S.D. May 24, 2013):
Even though (1) Officer thought Defendant-Driver's action in not parking near Officer and waiting in car while waiting to pick someone up from an unrelated traffic stop was "unusual," and (2) Officer was working on another traffic stop, where Officer failed to seek a search warrant before having a hospital draw Defendant-Driver's blood, this violated the 4th Amendment because the fact that alcohol dissipates in blood is not itself an exigent circumstance, and there were not special facts that excused failure to seek a warrant.
Facts: Defendant-Driver was called to pick up another person from an unrelated traffic stop. Defendant stopped and parked about 30 yards from the traffic stop and remained in his car. Officer thought this was "unusual." Without Defendant's consent or a warrant, Officer took Defendant to a hospital for a blood draw about two hours later. Defendant was then charged with DWI. He moved to suppress the blood draw.

Holding: The State argues that since alcohol dissipates in blood, this is an exigent circumstance that doesn't require a warrant. The State also argues that the Officer was conducting another traffic stop and couldn't get a warrant. However, *Missouri v. McNeely*, 81 USLW 4250, ___ U.S. ___ (U.S. April 17, 2013), held that the natural metabolism of alcohol does not *per se* create an exigent circumstance to justify not obtaining a warrant. The correct test is totality of circumstances. The thrust of the State's case is that the Officer was too busy that night to get a warrant. However, the facts of this case indicate that this was a "routine" DWI case. There were no special facts or exigent circumstances justifying an exception to the warrant requirement. Blood-draw evidence suppressed.

State v. Foster, 2013 WL 1150035 (Mo. App. S.D. March 20, 2013):
Even though Officers observed Defendant's left tires cross the centerline twice in less than a mile, where Defendant turned into his driveway and went in the garage, Officers did not have probable cause to enter the garage and arrest him, and exigent circumstances did not justify the warrantless entry.
Facts: Officers at night observed Defendant's left tires cross centerline twice. As Defendant signaled to pull into his driveway, Officers activated emergency lights. Defendant pulled into his garage and parked. As the garage door was closing, one Officer got under the door and entered the garage. Officer asked Defendant to step outside. Defendant refused. Officer grabbed Defendant by the shoulder, took him outside and made him perform field sobriety tests. Officers then arrested Defendant for DWI and not driving on the right side of the road. The trial court suppressed all evidence obtained after the warrantless entry.
Holding: The State contends that the warrantless entry into the garage was justified by exigent circumstances and probable cause to arrest for DWI. A warrantless arrest within a home cannot be justified upon hot pursuit alone. A warrantless arrest in the home must be justified by exigent circumstances in addition to the pursuit. The State's burden of proving exigent circumstances is especially heavy if the offense is relatively minor. A failure to drive on the right side of the road offense does not justify a warrantless entry. The State asserts that Officers had probable cause to arrest for DWI when they entered the garage, although the State concedes this case "is not the strongest case for probable cause or reasonable suspicion" and "seems to incorrectly suggest that one is as good as the other for arrest purposes." There was not sufficient evidence to show probable cause here. Suppression affirmed.

State v. Emmett, 2011 WL 3610431 (Mo. App. S.D. 8/16/11):
Where (1) store clerk "assumed" Defendant had shoplifted; (2) Officer searched Defendant and her car and found drugs; (3) Defendant cross-examined witnesses at motion to suppress hearing; and (4) trial court suppressed the evidence, the State's contention that the evidence was uncontested is wrong because Defendant cross-examined witnesses, and trial court was free to believe Defendant's version of events and suppress evidence.
Facts: Although a store clerk did not see Defendant take anything from convenience store, clerk "assumed" Defendant took something and called police. Officer asked Defendant to empty her pockets and found pills. Officer then read Defendant her

Miranda rights, and obtained her consent to search her car. Officer saw through the car window a bottle of oil that looked like one that was missing from the store. Officer searched car and found drug residue and other drug evidence. Defendant filed a motion to suppress, claiming that her arrest was unlawful because made without probable cause and the evidence in the car must be suppressed as a fruit of the poisonous tree. The trial court suppressed the evidence. The State appealed.

Holding: The State claims that the evidence was found during a search incident to a lawful arrest. The State begins its argument by saying that "the essential facts are not in dispute" and then treats all its witnesses' testimony as true. However, nothing reveals that the facts were not disputed. Defendant cross-examined witnesses and elicited testimony such as "I don't recall" and admissions that the clerk "assumed" Defendant had shoplifted. Facts may be contested by simple argument or cross-examination. Here, Defendant contested the facts, so we must view the facts in the light most favorable to the trial court's ruling. The trial court was free to believe or disbelieve the State's evidence, and evidently was not persuaded that the State legally seized Defendant, legally searched her pockets or legally arrested her. Motion to suppress affirmed.

State v. Bates, No. SD30701 (Mo. App. S.D. 5/13/11):

Where (1) bondsmen and sheriff's deputies went to house to search for person who skipped bond; (2) in backyard of house deputy saw marijuana plant in a bucket; and (3) deputy then obtained a warrant to search house and found drugs in a shed, the drugs are suppressed because the backyard was within the curtilage of the house and should not have been searched without a warrant; the subsequent warrant was fruit of poisonous tree.

Facts: Two bondsmen and sheriff's deputies went to Defendant's house because they thought another person, who had skipped bond and was a fugitive, was at the house. To prevent the person from possibly escaping, they surrounded the house. At the back of the house, deputy saw a marijuana plant in a bucket. Deputy then obtained a search warrant, and found drugs in a shed.

Holding: The narrow issue in this case is whether the deputy was performing a search of a constitutionally protected area when he found the marijuana plant. The protections of the 4th Amendment extend to curtilage of a house. The State concedes the backyard was curtilage, but claims that when police come on to private property for a legitimate purpose and restrict their movements to places like walkways, driveways or porches (as they did here), then observations made from such vantage points are not covered by the 4th Amendment. However, the trial court found that Defendant had a reasonable expectation of privacy in her backyard, and the appellate court defers to this finding. The State next argues that the drugs would have been inevitably discovered because the private bondsmen would have gone into the backyard, seen the marijuana plant, alerted the sheriffs and then a warrant would have been obtained. However, this is pure speculation. Order suppressing evidence is affirmed.

State v. Humble, 2015 WL 6689225 (Mo. App. W.D. Nov. 3, 2015):

Even though Defendant-Driver told Officer that illegal prescription drugs were in the passenger area of the car, where Defendant did not give consent to search the entire car, Officer was not authorized to search trunk without a warrant; the "search incident to

arrest" exception did not apply because it authorizes searching only the area within an arrestee's reaching distance, or search for evidence of the offense of arrest; the "automobile exception" did not apply because there was probable cause to believe contraband was only in the passenger compartment of the car, not the trunk, and the exception is limited to the area of the car where police have probable cause.
Facts: Defendant-Driver was stopped for erratic driving. Defendant displayed evidence of intoxication, but passed field sobriety tests. Officer asked Defendant if a dog sniff would reveal drugs. Defendant said he had Suboxone in the center console of the car. Officer said he was going to search the car. Defendant refused consent, but produced the Suboxone for the Officer. Officer placed Defendant in patrol car. Officer said he was going to search rest of car. Defendant said there were syringes in the center console, but again refused consent to search. Officer searched passenger compartment and found syringes and Roxicodone. Officer then searched trunk and found 18 pounds of marijuana. The trial court found that the search of the trunk was without consent and without lawful authority, and suppressed the marijuana. The State appealed.
Holding: First, the state asserts the trunk search was authorized as a search incident to lawful arrest, since Defendant had been arrested for the Suboxone and Roxicodone. A search incident to arrest requires the arrestee be within reaching distance of the passenger compartment at the time of search, or that it is reasonable to believe the car contains evidence of the *offense of arrest*. Here, Defendant was in the patrol car, and it was not reasonable to believe that anything relevant to Suboxone or Roxicodone would be in the trunk. Second, the State claims the "automobile exception" authorizes the search. But that exception is limited to the object of the search and the places in which there is probable cause to believe it may be found. Probable cause to search a passenger compartment does not automatically establish probable cause to search a trunk. If police have probable cause to believe contraband is *in only one part of the car, they are limited to that area.* If police have probable cause to believe the car has contraband *somewhere*, but they don't know where, they can search the entire car. Here, the State did not prove how the fact that the console contained Suboxone and Roxicodone – which was consistent with Officer's suspicion that Defendant was driving while impaired – would lead a reasonably prudent person to believe contraband would be in the *trunk*. Suppression of marijuana affirmed.

State v. Plunkett, 2015 WL 4911767 (Mo. App. W.D. Aug. 18, 2015):
Holding: Defendant has no Fourth Amendment expectation of privacy in bank records under *U.S. v. Miller*, 425 U.S. 435 (1976), so State can use investigative subpoena under Sec. 56.085 to obtain them; but appellate court, *sua sponte*, states in footnote 8 that parties have not raised issue whether the 1989 enactment of the Missouri Right to Financial Privacy Act, Sec. 408.675, makes *Miller* nonapplicable and creates a right of privacy in financial records, and declines to address issue since parties have not raised it.

State ex rel. Koster v. Charter Communications, 2015 WL 337215 (Mo. App. W.D. May 26, 2015):
Holding: (1) Even though voters in 2014 amended Article I, Sec. 15, Mo.Const., to add that people shall be secure in their "electronic communications and data" from unreasonable searches and seizures, the Fourth Amendment had already been interpreted

to cover electronic data, so Article I, Sec. 15 is not more restrictive on government conduct than the Fourth Amendment; (2) the Missouri Attorney General is authorized by the Missouri Telemarketing and No-Call Law to issue Civil Investigative Demands (administrative subpoenas) to phone companies for customer records; this procedure does not violate the federal Electronic Communications Privacy Act (ECPA) or Article I, Sec. 15, because ECPA allows administrative subpoenas and the phone companies may contest the administrative subpoena by filing a petition to modify or set aside the subpoena, stating why compliance is unreasonable.

State v. Jewell, 458 S.W.3d 864 (Mo. App. W.D. 2015):
Even though Officer stopped Defendant for going through a stop sign at a state University campus, where the State did not show that University had promulgated traffic regulations authorizing the stop sign, the stop was without legal authority and evidence from the stop was suppressed.
Facts: Northwest Missouri State University Police Officer stopped Defendant for failing to stop at a stop sign on campus. Following the stop, Officer discovered that Defendant was intoxicated. Defendant was charged with DWI. He moved to suppress evidence of intoxication on grounds that the stop was illegal.
Holding: Sec. 174.709 authorizes State Universities' Boards to adopt traffic regulations that authorize stop signs. The State has the burden to show that a motion to suppress should be overruled. A court cannot take judicial notice of the regulation of a University. Here, the State failed to introduce any evidence of a regulation authorizing the stop sign. Without proof of any regulation, the State failed to prove that an actual violation of law occurred, which would allow the Officer to stop Defendant. Since the stop was not permissible, the evidence of intoxication obtained from the stop was properly suppressed.

State v. Robinson, 2015 WL 658741 (Mo. App. W.D. Feb. 17, 2015):
Search warrant affidavit based on "confidential informants" was invalid where the informants' reliability was alleged in only conclusory fashion, and the affidavit did not include a specific time and place when drugs were seen, the informants did not specifically state that they personally observed drugs, and the information was stale because more than 30 days old. However, evidence was admissible under "good faith" exception to exclusionary rule because police acted in reasonable reliance on a facially valid warrant and there was no showing of systemic negligence by police in careless preparation of warrants.
Facts: Police sought and obtained a search warrant based on information from "confidential informants." The search warrant affidavit said in conclusory fashion that the informants were "reliable." Defendant moved to suppress evidence based on the search warrant affidavit. The trial court granted the motion to suppress based solely on the search warrant affidavit. No evidentiary hearing was held. The State appealed.
Holding: Basing a warrant on hearsay statements of "confidential informants" requires that the informant learned the information through personal observation and that the informant's statements are corroborated through other sources. Here, the affidavit says the informants are "reliable" but provides no factual support for that. Nor does the affidavit indicate whether the informants personally witnessed any events. An Officer's statement that "affiants have received reliable information from a credible person and

believe" the information is likewise inadequate, because a mere conclusory statement that gives the judge no basis at all for making a judgment on probable cause is insufficient. Also, the informants say drugs were in the house in the "last 30 days." Probable cause must exist when a warrant is issued, not at some earlier time. There are no Missouri cases which approve of information that is 30 days old. The information here was stale. The warrant violated the 4th Amendment. Nevertheless, the appellate court applies the good faith exception to the exclusionary rule because Officers acted in reasonable reliance on a facially valid warrant. The trial court had refused to apply the good faith exception because it found that police were systematically negligent in regard to preparation of warrant affidavits. But appellate court holds that since there was no evidentiary hearing, there is no evidence to support this finding by the trial court.

State v. Cardwell, 452 S.W.3d 263 (Mo. App. W.D. Jan. 13, 2015):
Officer had no reasonable suspicion or probable cause to stop a car which was driving slowly on a narrow, gravel road at 1:00 a.m. and which signaled Officer to drive around the car.
Facts: At 1:00 a.m., Officer observed Defendant-Driver driving slowly on a gravel road. As Officer approached from behind, Defendant waved Officer to pass car. Officer activated his lights and stopped Defendant to investigate if "everything was okay." Defendant was intoxicated, and charged with DWI. Defendant argued the stop was without reasonable suspicion or probable cause of illegal activity, and evidence found after the stop must be suppressed.
Holding: An objective view of the facts leading up to the stop fails to reveal any specific, articulable facts or inferences that would reasonably warrant the stop. Officer had not observed Defendant commit any traffic offense. Driving slowly on a narrow, gravel road at night and stopping when approached quickly from behind is not conduct to cause a reasonable conclusion that criminal activity is taking place. Circumstances that may stimulate mere curiosity are insufficient to permit an investigatory stop. Motion to suppress should have been granted.

State v. Rouch, 2014 WL 7174236 (Mo. App. W.D. Dec. 16, 2014):
Even though Defendant made comments on Facebook or in person about wanting to shoot people or having a bomb, where all witnesses to the comment believed they were meant as jokes, search warrant to search Defendant's home for firearms was invalid because (1) there was no probable cause to believe Defendant had committed a criminal offense or that his possession of firearms would be illegal, and (2) police misled the issuing judge by omitting from affidavit that Defendant's remarks were intended as jokes; motion to suppress marijuana found in the home suppressed (there were no firearms found).
Facts: Defendant-college professor wrote a Facebook post that at "the beginning of the semester [,] I'm always optimistic [but] [b]y October, I'll be wanting to get up to the top of the belltower with a high powered rifle – with a good scope, and probably a gatling gun as well." Police interviewed Defendant and a co-worker, who both said the Facebook post was a sarcastic, flippant comment and joke. The next day, Defendant-college professor said at work that "[y]esterday they thought it was a gun. Today I've brought a bomb." Police arrested Defendant. When questioned, Defendant said his

remarks were meant as a sarcastic joke. Police again interviewed co-workers who all stated they thought the comments were flippant jokes. Nevertheless, police obtained a search warrant to search Defendant's home for a "rifle with a scope, a gatling gun, or other firearms," which were generically said to be "evidence of a criminal offense." The search warrant affidavit reported that Defendant had meant the Facebook post as a joke, but did not say the bomb remark was a joke. The affidavit did not mention co-workers saying the remarks were jokes. Police executed the warrant and found no firearms. They did, however, find marijuana in the home. Defendant was charged with marijuana production and possession. He moved to suppress the marijuana.

Holding: The search violated the 4th Amendment because there was no probable cause to believe that evidence of a crime would be found, and police misled the court by omitting significant information from the affidavit about the humorous nature of the remarks. The warrant was to search for firearms as "evidence of a criminal offense," but neither the warrant nor the police affidavit state that it would be illegal for Defendant to possess firearms or that such items were otherwise contraband. Neither the complaint nor affidavit state, "nor does common sense indicate," what criminal offense or offenses Defendant's possession of a firearm would serve as evidence of him committing. The State claims the firearms would support an offense of terroristic threat, Sec. 574.115, or making a false bomb report, Sec. 575.090, or electronic harassment, Sec. 565.090, or assault. But based on the totality of the circumstances, Defendant's possession of firearms inside his home would not have served as evidence that he intended for his comments to be taken seriously rather than in jest. Finally, the "good faith" exception to the exclusionary rule does not apply where the affidavit is so lacking in probable cause as to render official belief in its existence entirely unreasonable. That is the case here. Additionally, the police misled the issuing judge by omitting from the affidavit the context of Defendant's statements as jokes, and that all the witnesses believed they were jokes. Suppression of evidence affirmed.

State v. Lucas, 2014 WL 5337374 (Mo. App. W.D. Oct. 21, 2014):

"Good faith" exception to exclusionary rule did not apply where police did not properly execute an (invalid) search warrant in that they seized numerous items not covered by the warrant, thus showing a flagrant disregard of the scope of the warrant .

Facts: A judge issued a search warrant to search for drugs and drug-related materials at a residence. The police who executed the warrant seized the drug-related items, but also seized numerous items not covered by the warrant, including BB guns and a homemade video. Defendant moved to suppress all items, including his statements as fruit of the poisonous tree. The trial court held that the warrant was invalid because the issuing judge "did not have a substantial basis for concluding that there was a fair probability that evidence related to [drugs] would be found on [Defendant's] property," and that the "good faith" exception to the exclusionary rule did not apply because the police acted in bad faith by seizing items not contemplated by the warrant. The State appealed only the "good faith" ruling.

Holding: Where evidence is seized pursuant to an invalid search warrant, the evidence may still be admitted if the police who conducted the search did so in "good faith" reliance on the warrant. However, use of the "good faith" exception to the exclusionary rule assumes that the search warrant was properly executed. The trial court found that the

BB guns and homemade video that were seized were not contemplated in the search warrant, and were a bad faith effort by police to expand the search into a fishing expedition. The police seized about as many items not covered by the warrant as covered by the warrant, indicating a flagrant and widespread disregard for the scope of the warrant by the police. Thus, the "good faith" exception does not apply.

State v. Avent, 2014 WL 130418 (Mo. App. W.D. April 1, 2014):
Even though Officer testified that Defendant-Driver had glassy eyes, admitted to consuming beers, smelled of alcohol, failed a PBT test, and failed some sobriety tests, where there was also contrary evidence and trial court granted Defendant's motion to suppress statements and evidence by finding there was no probable cause to arrest Defendant, the appellate court's deferential standard of review requires that all credibility determinations and inferences be viewed in the light most favorable to the trial court's ruling, and therefore, granting of motion to suppress is affirmed.
Facts: Defendant-Driver was stopped for speeding. Officer smelled alcohol, and had Defendant perform various field sobriety tests. Defendant passed the walk-and-turn test and one-leg-stand test, but failed the HGN test and PBT. Officer arrested Defendant, and read her *Miranda* warnings. Her BAC was ultimately tested and was greater than .08. Defendant filed a motion to suppress her statements and test results, on grounds that Officer had no probable cause to arrest her for DWI. The trial court granted the motion. The State appealed.
Holding: On appeal, the State cites evidence in the record that supports a finding of probable cause to arrest. However, this is contrary to the appellate standard of review, which allows the trial court to make credibility determinations and which views evidence and inferences in the light most favorable to the trial court's ruling. Where the trial court makes no findings of fact, the trial court is presumed to have found all facts in accord with its ruling. The trial court will be deemed to have implicitly found contrary testimony not credible. Here, Defendant contested the State's claim that she was intoxicated by cross-examining the Officer about favorable facts to her side of the case. The court was not required to find the Officer credible. Properly viewed in accord with the standard of review, although some facts showed intoxication, Officer observed several tests that did not indicate intoxication, Officer did not observe Defendant not have control of her vehicle (although she was speeding), Defendant complied with requests for identification and license, Defendant was not incoherent or confused or uncooperative, and her eyes weren't impaired. The trial court weighed this evidence and determined there was no probable cause to believe Defendant was intoxicated. Judgment affirmed.

State v. Stoebe, 2013 WL 4520022 (Mo. App. W.D. August 27, 2013):
Even though Defendant-Driver, who was stopped for a dirty license plate, was "nervous" and consented to search of her purse after persistent questioning by Officer, the trial court did not clearly err in suppressing drugs found in the purse because the traffic stop was longer than necessary for its purpose, and Defendant's consent to search was involuntary under the totality of circumstances.
Facts: Defendant-Driver was stopped for having a dirty license plate. Officer placed Defendant in his patrol car. Officer testified that based on his experience, he can tell if a person has illegal items in their vehicle based on their nervousness. Officer testified that

Defendant's neck was beating and she was nervous. He asked her multiple times for consent to search the car, but she kept evading the question or refusing. She ultimately consented to search of her purse, in which drugs were found. The trial court granted a motion to suppress on grounds that Officer prolonged the stop longer than necessary, that Defendant's nervousness did not provide reasonable grounds to prolong the stop, and that even though Defendant ultimately consented to the search, her consent was involuntary in light of the illegal continued detention and other circumstances. The State appealed.
Holding: A traffic stop may only last for the time necessary to conduct a reasonable investigation of the traffic violation. Here, the trial court made a factual finding that Defendant's consent to search, if secured from Defendant at all, was secured *after* the time necessary for Officer to conduct a reasonable investigation of the traffic violation. Although the State claims there is "no evidence" to support that conclusion, and the State is technically correct that it failed to present evidence of exactly when the consent was obtained, it was the State's burden to establish that the search was conducted during a reasonable investigation of a traffic stop. The State failed to do that here. The State also argues that even if the stop was prolonged, the search was valid because Defendant consented. There is no bright line rule invalidating consensual searches after a traffic stop is completed. However, here the trial court found the consent was involuntary under the "totality of circumstances," which was the proper legal standard. Defendant had been asked numerous times for consent, and had been kept in detention due to nervousness. Finally, although there was some evidence of other crimes (open alcohol containers) that might have been used to justify prolonging the stop, the State has not argued that evidence as grounds for upholding the search, so the appellate court will not consider it either.

State v. Lovelady, 2013 WL 600195 (Mo. App. W.D. Feb. 19, 2013):
Even though police stopped Defendant because he had a gun, where police discovered the gun was a toy, they did not have reasonable suspicion to detain Defendant further to check for outstanding warrants; thus, even though an outstanding warrant was subsequently found leading to a search of Defendant's person and discovery of drugs, this evidence must be suppressed.
Facts: Defendant was riding a bike in circles in a "high crime" neighborhood at night, when he waved at passing police and said, "They went that way." Police saw a gun sticking out of Defendant's waistband, stopped him and handcuffed him. They seized the gun and discovered it was a toy. Subsequently, they checked for outstanding warrants for Defendant, discovered one, and arrested him. They then searched him and found cocaine. At his trial for possession of the cocaine, Defendant moved to suppress the evidence of the warrant and drugs.
Holding: There was reasonable suspicion of criminal activity to initially stop Defendant because he was riding a bike in circles at night in a "high crime" area and appeared to have a gun. However, there was not reasonable suspicion to continue to detain Defendant after the gun was discovered to be only a toy. The police did not testify to articulable facts supporting reasonable suspicion that were developed *during* the period of lawful detention, which would justify further detention. The officers' reasonable suspicion was dispelled prior to their warrant check. After investigating the gun, the handcuffs should

have been removed and Defendant allowed to leave, as he had requested to do. The subsequent evidence must be suppressed.

State v. Williams, No. WD73550 (Mo. App. W.D. 10/30/12):
Even though Officer claimed that drugs she found in Defendant's car after a traffic stop arrest were found pursuant to an "inventory search," where the search did not follow the police department's guidelines for such a search, the search was merely a pretext for searching for general criminal activity and drugs had to be suppressed.
Facts: Officer stopped Defendant after he ran a stop sign. Officer arrested Defendant and then conducted an extensive search of the car (including inside the gas tank cap area), allegedly pursuant to an "inventory search." She found a bottle containing drugs under the car's leather gearshift tower. Defendant moved to suppress. The trial court denied suppression. He appealed.
Holding: The purpose of an "inventory search" is to protect an owner's property, protect police from false claims of lost property, and protect police from danger. To be constitutionally valid, an "inventory search" must be conducted according to established police department procedures, and cannot be used as a ruse to search for general evidence of crime. Here, the stop of Defendant was valid, but the alleged "inventory search" was not. Officer violated the police department's written polices for inventory searches in several ways. First, there was nothing in the policy that authorized looking under the leather gearshift tower, which was essentially a "hidden" compartment. A search of a hidden compartment is not authorized as an "inventory search" because such explorations are not consistent with the permissible rationale of "inventory searches." Also, Officer searched inside the gas cap compartment. The trial court found this was irrelevant since the drugs weren't found there, but this was relevant to show that this was not a bona fide "inventory search." The department policy only authorizes listing items inside the car and trunk; it does not authorize searching a gas tank. The Officer also did things like feeling the inside of the car doors, which again is not consistent with an inventory search but is consistent with an impermissible general search for evidence of crime. Also, the video of the search shows that the Officer did not have a pen and did not take any notes while doing the "inventory search." This is inconsistent with doing an actual inventory. The Officer also made the decision to tow the car only *after* finding the drugs; again, this is inconsistent with doing an "inventory search." Drugs must be suppressed.

State v. Sachs, No. WD72821 (Mo. App. W.D. 4/24/12):
Even though State claimed "exigent circumstances" existed to justify search of a computer believed to contain child pornography because the computer might be unplugged later, a warrant should have been obtained because Officer admitted it was okay to unplug the computer and mere inconvenience to police did not justify failure to get a warrant.
Facts: Three Officers conducting child pornography investigation went to Defendant's apartment, informed Defendant they were investigating child pornography and believed his computer could be involved in it, and asked to view the computer. Defendant said he had accidently downloaded child pornography before but deleted it. Defendant refused a request to examine his computer. Officer told Defendant he was going to apply for a search warrant. Defendant then said he would probably find child pornography on the

computer. Officer then allowed Defendant to use the telephone. While Defendant was calling his parents, Officer clicked on icons on the computer and began to examine it. He saw files being uploaded and downloaded using LimeWire, many of which had names suggesting child pornography. Officer took pictures of these screens. Officer then unplugged computer and took it to Sheriff's Office. The next day, a warrant was obtained and the computer searched. This search also located child pornography. Defendant moved to suppress all evidence on the computer.
Holding: When Officer began clicking on icons to view different items on the computer, this was a search. The generally accepted practice is for law enforcement to stop and seek an explicit warrant when they encounter a computer they believed should be searched. The State claims exigent circumstances existed because the computer's RAM (random access memory) would disappear when the officer unplugged the computer. But the record here does not establish any pressing need to unplug the computer before obtaining a warrant. Three officers were present in the apartment to secure the scene. They could have stayed with the computer while obtaining a warrant. Getting a warrant was merely inconvenient. Moreover, the Officer here turned off the computer himself, so turning off the computer cannot justify exigent circumstances. However, a warrant was obtained later so evidence discovered after the warrant would have been inevitably discovered. The evidence prior to the warrant should have been suppressed, but not the evidence afterwards. Since the evidence afterwards is sufficient to convict, the failure to suppress was harmless here.

State v. Clampitt, No. WD73943 (Mo. App. W.D. 1/24/12):
Where prosecutor used investigative subpoenas to subpoena cell phone records of text messages of Defendant for a month after a vehicle crash in an attempt to find out if Defendant would make an incriminating statement about the crash, the text messages must be suppressed because Defendant had a reasonable expectation of privacy in his text messages and the prosecutor's use of investigative subpoenas was an unlawful fishing expedition not limited in scope or relevant purpose.
Facts: Defendant was involved in a car accident. The State issued four investigative subpoenas to various cell phone providers for text messages of Defendant for 30 days after that, requesting all text messages. When one subpoena would expire, the State would issue another one. Defendant was ultimately charged with first degree involuntary manslaughter from the accident. He moved to suppress the text messages. The trial court suppressed them. The State appealed.
Holding: The State contends Defendant has no standing because he lacks any reasonable expectation of privacy in the text messages since they are accessible to a third-party (the cell phone company). Prior cases have held, however, that a person maintains a reasonable expectation of privacy in letters mailed in the mail, even though those letters are delivered through a third party. Similarly, prior cases have found a reasonable expectation of privacy in phone calls and emails, even though a phone company or email company could listen in on calls or read email. As text messaging becomes a substitute for more traditional forms of communication, it follows that society expects the content of text messages to receive the same 4th Amendment protection as letters and phone calls. The State claims that even if there is an expectation of privacy, the use of investigate subpoenas overrides this. However, the 4th Amendment applies to investigative

subpoenas and requires that they be limited in scope, purpose and directive. Here, the subpoenas were not. The subpoenas were issued until such time as Defendant made incriminating remarks, i.e., that he was the driver of the car. If no evidence about this had yet come about, presumably the State would still be issuing subpoenas in the hopes of getting an incriminating admission. The subpoenas were nothing more than an improper fishing expedition. The State claims that the good faith exception to the exclusionary rule should apply here, but that rule applies to police conduct, not prosecutor misconduct, as here. The prosecutor was engaged in a fishing expedition to find evidence of incriminating statements. Moreover, the evidence here was suppressed under Sec. 542.296.1, not the exclusionary rule.

State v. Burns, No. WD73127 (Mo. App. W.D. 4/12/11):
Trial court's pretrial ruling excluding certain hospital drug-test results was not appealable by the State because this was a ruling in limine based on violation of an evidentiary rule, not a ruling on a motion to suppress illegally seized evidence; but State may seek writ of prohibition.
Facts: Defendant was charged with DWI for driving under influence of drugs. The State indicated it would introduce hospital records of Defendant showing the presence of drugs in her blood or urine. Defendant filed a "Motion to Suppress or in the Alternative Motion in Limine." The trial court believed that the evidence could only be admitted if certain state regulation and evidentiary foundations were followed, and so excluded the evidence before trial. The State appealed. Defendant contended the appeal had to be dismissed because the statute allowing a State's appeal only covers illegally seized evidence, which is not at issue here.
Holding: Sec. 547.200.1(3) permits a State's appeal of suppression of illegally seized evidence. Sec. 542.296.5 sets forth five grounds on which a motion to suppress can be based, each of which involves illegal searches and seizures. Courts read these two statutes together to allow State's appeals only about illegally seized evidence. Here, the trial court's ruling is really a pretrial grant of a motion in limine (despite that the motion was also called "motion to suppress") and such a ruling is subject to change at trial. The grounds of the motion were not that the blood or urine was illegally seized, but that an evidentiary rule requires exclusion. Thus, the State is not statutorily authorized to appeal, and the appeal must be dismissed. However, the State may be able to seek a writ of prohibition as a remedy, but the appellate court expresses no opinion on the merits.

Editor's note: The Western District issued an identical ruling in **State v. Pfleiderer**, No. WD73407 (Mo. App. W.D. 6/14/11), a DWI case where trial judge excluded evidence of blood test results taken by a hospital for treatment purposes without following the requirements of Chapter 577 pertaining to the collection of samples of blood for BAC analysis.

State v. Williams, No. WD72530 (Mo. App. W.D. 3/15/11):
Even though Officer testified that he stopped Defendant because his headlight was out, where trial court found that the police car video showed the light was on, there was no reasonable suspicion to stop the car and evidence of Defendant's intoxication is suppressed.

Facts: Officer stopped Defendant for having one headlight out. Upon stopping Defendant, Officer found that Defendant was intoxicated. Defendant was charged with DWI. He moved to suppress all evidence after the stop because he contended there was not reasonable suspicion to stop since the police car video showed the headlight was on. **Holding:** The trial court found that the police car video showed that the headlight was on. While Officer testified that the video was showing glare, the trial court was free to make a factual finding to the contrary. The trial court's findings are entitled to deference on appeal even though the video is equally available to the appellate court. Nevertheless, the appellate court reviews the video and holds the trial court's finding to be reasonable. Since the only justification for the stop was the headlight allegedly being out, there was no reasonable suspicion to stop the car. The State claims in the alternative that the Officer mistakenly thought the headlight was out. However, the Officer passed the car at a medium speed in good weather conditions. Officer's mistaken belief that the headlight was out was not objectively reasonable. All evidence after the stop suppressed as fruit of poisonous tree.

*** Rodriguez v. United States, ___ U.S. ___, 135 S.Ct. 1609 (April 21, 2015):**
Holding: The Fourth Amendment prohibits police from extending the time reasonably necessary to complete a routine traffic stop in order to have a drug dog sniff a car when police lack reasonable suspicion of drug activity.

*** City of Los Angeles v. Patel, ___ U.S. ___, 135 S.Ct. 2443 (June 22, 2015):**
Holding: City ordinance which required hotel operators to make their guest registries available to police without any opportunity for precompliance review violated the Fourth Amendment.

*** Grady v. North Carolina, ___ U.S. ___, 2015 WL 1400850 (U.S. March 30, 2015):**
Holding: (1) Requiring sex offenders to submit to GPS monitoring is a "search" under the Fourth Amendment, regardless of whether such requirement is "civil" or criminal, because attaching a GPS device to the body is a physical intrusion of a protected area; and (2) Fourth Amendment requires such a search be "reasonable" under the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.

*** Heien v. North Carolina, ___ U.S. ___, 135 S.Ct. 530 (2014):**
Holding: A reasonable mistake of law can support reasonable suspicion to uphold a seizure under the Fourth Amendment; thus, where law was ambiguous as to whether car had to have one or two working rear lights, and Officer stopped car with only one rear light, the stop was not invalid even though Officer was mistaken as to how many lights the law actually required, and drugs found during the stop need not be suppressed.

*** Riley v. California, ___ U.S. ___, 2014 WL 2864483 (U.S. June 25, 2014):**
Holding: 4th Amendment generally requires that police obtain a search warrant before searching a cell phone, even where the phone is seized incident to an arrest. Here, one defendant's phone was searched without a warrant after he was stopped for a traffic offense; the information on the phone was used to convict him of a prior shooting. The

other defendant was arrested after police observed him selling drugs, seized him and searched his phone without a warrant; the information on his phone was used to find his house and obtain a search warrant for the house, at which drugs were found.

*** Navarette v. California, 95 Crim. L. Rep. 89, ___ U.S. ___, 134 S.Ct. 1683 (U.S. 4/22/14):**
Holding: Even though 911 caller to police was anonymous, where caller reported nearly being run off the road by a specific vehicle, this provided reasonable suspicion for police to stop the vehicle for drunken driving; the single anonymous tip contained reasonable indicia of reliability because it described a specific vehicle and 911 technology safeguards against making false reports with impunity.

*** Maryland v. King, 93 Crim. L. Rep. 325, ___ U.S. ___ (U.S. 6/3/13):**
Holding: When Officers make an arrest supported by probable cause for a serious crime and detain Defendant in custody, the taking of a DNA sample is a reasonable booking procedure similar to photographing and fingerprinting does not violate the 4th Amendment.

*** Missouri v. McNeely, 93 Crim. L. Rep. 92, ___ U.S. ___ (U.S. 4/17/13):**
Holding: In DWI cases, the natural dissipation of alcohol in Driver's blood does not constitute an exigent circumstance in every case sufficient to justify a nonconsensual blood test without a search warrant.

*** Florida v. Jardines, 92 Crim. L. Rep. 796, ___ U.S. ___ (U.S. 3/26/13):**
Holding: Police who took a drug-sniffing dog onto homeowner's front porch to investigate the contents of the home conducted a search within the meaning of the 4th Amendment, because there is no customary invitation to enter the curtilage simply to conduct a search.

*** Fernandez v. California, ___ U.S. ___, 94 Crim. L. Rep. 599, 134 S.Ct. 1126 (U.S. 2/25/14):**
Holding: Even though a resident objected to a warrantless police search of residence, where police arrested this resident for domestic assault and removed him from the scene, and a second resident consented to search the residence, the 4th Amendment was not violated; a resident's objections to a warrantless search dissipate once that resident is no longer present, and it does not matter if the police removed them due to their arrest.

*** Bailey v. U.S., 92 Crim. L. Rep. 582, ___ U.S. ___ (U.S. 2/19/13):**
Holding: The rule of *Michigan v. Summers*, 452 U.S. 692 (1981), which allows officers executing a search warrant to detain occupants of the premises to ensure officer safety, prevent flight, and promote orderly search, does not allow them to detain former occupants who are no longer in the immediate vicinity of the premises to be searched.

*** Florida v. Harris, 92 Crim. L. Rep. 562, ___ U.S. ___ (U.S. 2/19/13):**
Holding: Certification of dog by a bona fide organization is generally sufficient to establish that dog is reliable enough in its reactions to establish probable cause for a search.

*** Florence v. Bd. Of Chosen Freeholders of Burlington County, N.J., ___ U.S. ___, 91 Crim. L. Rep. 5 (U.S. 4/2/12):**
Holding: Jails may conduct warrantless strip searches of persons admitted to the jail regardless of the seriousness of the crimes charged.

*** Messerschmidt v. Millender, ___ U.S. ___, 90 Crim. L. Rep. 709 (U.S. 2/22/12):**
Holding: Even though Officers executed a bad search warrant, they have qualified immunity from suit where they ran the warrant application past supervisory officers and the prosecutor before presenting it to the magistrate.

*** U.S. v. Jones, ___ U.S. ___, 90 Crim. L. Rep. 537 (U.S. 1/23/12):**
Holding: Placing a GPS monitoring device on vehicle and gathering its location information without a warrant violates 4th Amendment.

*** U.S. v. Jones, 2012 WL 171117 (U.S. 2012):**
Holding**:** Use of GPS tracking device constituted a "search" under the Fourth Amendment because the Government physically occupied private property for the purpose of obtaining information.

*** Perry v. New Hampshire, ___ U.S. ___, 90 Crim. L. Rep. 500 (U.S. 1/11/12):**
Holding: Even though an eyewitness identification may have been suggestive, it is not subject to suppression unless law enforcement engaged in improper conduct in orchestrating it; instead of suppression, defendants can rely on other safeguards such as cross-examination, expert testimony, jury instructions on the suspect reliability of eyewitness identification, the reasonable doubt standard, and the general rule that requires suppression of relevant evidence when it is more prejudicial than probative.

*** Kentucky v. King, ___ U.S. ___, 89 Crim. L. Rep. 205, 2011 WL 1832821 (U.S. 5/16/11):**
Holding: Police may rely on exigent circumstances exception to 4th Amendment even when they had a role in creating the exigency, so long as they did not engage in or threaten to engage in conduct that violates the 4th Amendment; hence, where police were in an apartment building, smelled marijuana outside a door, banged on the door and said "Police," and heard noise that they thought was destruction of evidence, police could enter the apartment without a warrant to search for illegal drugs.

*** Ashcroft v. al-Kidd, ___ U.S. ___, 89 Crim. L. Rep. 308 (U.S. 5/31/11):**
Holding: (1) Policy initiated by Atty. General Ashcroft to detain suspected terrorists as material witnesses did not violate any clearly established 4th Amendment right, and thus, Ashcroft was entitled to qualified immunity; and (2) an arrest warrant that is validly

obtained under the material witness statute, 18 USC 3144, cannot be held unconstitutional on the basis of subjective intent.

*** Davis v. U.S., ___ U.S. ___, 89 Crim. L. Rep. 461, 131 S.Ct. 2419 (U.S. 6/16/11):**
Holding: "Good faith" exception to exclusionary rule allows admission of evidence obtained by police in an unconstitutional search that, at the time it was conducted, complied with binding judicial precedent that was later overturned; although *Arizona v. Gant* (U.S. 2009) is retroactive to cases pending on direct review when *Gant* was decided, whether the exclusionary rule applies is a separate issue; the exclusionary rule applies when necessary to deter police misconduct, but an officer who conducts a search in reliance on binding appellate precedent acts reasonably and the deterrent effect of such exclusion can only be to discourage the officer from doing his job.

U.S. v. Tanguay, 97 Crim. L. Rep. 237 (1st Cir. 5/22/15):
Holding: Where Officer who was seeking a search warrant was told by a fellow officer that an informant was "quirky," had been in trouble with law before, and was a police "groupie," Officer had duty to investigate the reliability of informant before seeking the search warrant based on informant's information; Officer must investigate such red flags even if Officer doesn't think the information will vitiate probable cause.

U.S. v. Starks, 96 Crim. L. Rep. 79 (1st Cir. 10/8/14):
Holding: Even though Driver wasn't authorized to drive rental car under terms of rental car agreement, Driver had standing to challenge a traffic stop that led to his arrest.

U.S. v. Vazquez, 2013 WL 3752475 (1st Cir. 2013):
Holding: Where FBI Agent told Defendant that they would conduct a warrantless search of her house if she didn't consent, her acquiescence to the search was not valid consent.

U.S. v. Gifford, 2013 WL 4054496 (1st Cir. 2013):
Holding: Even though confidential informant said that Defendant was growing marijuana in a house, the search warrant affidavit did not establish probable cause where electric records indicating lower electric usage at a much smaller home offered as a comparator did not show a suspiciously high electric use at Defendant's home, thus corroborating the tip, and second home used as a comparator omitted certain facts that might explain higher usage at Defendant's home, such as a horse breeding operation.

U.S. v. Gifford, 93 Crim. L. Rep. 669 (1st Cir. 8/13/13):
Holding: (1) Probable cause for a search warrant was not provided by an unidentified informer's statements to police that Defendant had a marijuana growing operation in his house, since there was nothing in the warrant affidavit indicating the informer's basis for his knowledge or past reliability; and (2) the warrant affiant recklessly omitted fact from affidavit that a house used to compare electricity use with Defendant's residence was not similar to Defendant's house.
\

U.S. v. Vasquez, 93 Crim. L. Rep. 563 (1st Cir. 7/18/13):
Holding: Resident's consent to search of house was not valid where it was obtained by sincere, but erroneous representation by FBI agent that state parole officers were on the verge of executing a warrantless search regardless of whether resident consented; such consent were merely acquiescence; the touchstone of the 4th Amendment is reasonableness, not subjective good faith; "otherwise, unreasonable but honest officers could parlay unlawful grounds for conducting searches into lawful searches merely be using the prospect of the unlawful search as a means of securing acquiescence."

U.S. v. Wurie, 93 Crim. L. Re. 268, 2013 WL 2129119 (1st Cir. 5/17/13):
Holding: 4th Amendment's exception to warrant requirement for searches incident to arrest does not allow searches of data on arrestee's cellphones.

U.S. v. Dapolito, 2013 WL 1458733 (1st Cir. 2013):
Holding: Even though Defendant in alcove of public square appeared to be intoxicated and lacked photo identification (although he did have a government benefit card with his name on it), this did not provide reasonable suspicion to conduct a Terry stop and search where there was no evidence of any recent burglaries in area.

U.S. v. Camacho, 2011 WL 5865650 (1st Cir. 2011):
Holding: Where the only thing associating defendant with a reported street fight was defendant's proximity to the scene of the fight, police officers did not have a reasonable suspicion of criminal activity when they stopped the defendant.

U.S. v. D'Andrea, 89 Crim. L. Rep. 209 (1st Cir. 5/10/11):
Holding: Where a private hacker surreptitiously figured out Defendant's computer password and found evidence of sexual abuse of minors on the computer, the 4th Amendment private search doctrine should not be applied; "just because a private party violates a person's expectation of privacy does not mean that the expectation of privacy no longer exists or is not reasonable."

U.S. v. Bershchansky, 97 Crim. L. Rep. 266 (2d Cir. 6/5/15):
Holding: 4th Amendment requires suppression of evidence for search of wrong apartment, where police should have known that they were searching the wrong apartment; further, Officers could not have relied on warrant in good faith since they had facts indicating it was the wrong apartment.

U.S. v. Forseste, 96 Crim. L. Rep. 640 (2d Cir. 3/11/15):
Holding: Where police conduct two successive traffic stops of the same person, the reasonableness of them must be viewed collectively and not individually; to hold otherwise would allow police to game the system by having the first stop be legally invalid but then notifying other officers to look for a reason to stop the car again to conduct a legally better stop and search.

U.S. v. Raymond, 96 Crim. L. Rep. 647 (2d Cir. 3/2/15):
Holding: There was no probable cause to support a warrant to search for child pornography months after Defendant clicked on a link for 17 seconds that contained thumbnail images of child pornography and was not an obvious child pornography link; it was necessary to show that Defendant accessed them in circumstances sufficiently deliberate or willful to suggest he was an intentional collector of child pornography; here, the circumstances were equally consistent with an innocent internet user inadvertently stumbling on child pornography, being horrified at what he saw, and closing the window.

Harris v. O'Hare, 96 Crim. L. Rep. 252 (2d Cir. 11/24/14):
Holding: Even though Officers received a tip from a gang member that there was a handgun hidden in a car behind a residence, this did not create exigent circumstances for police to enter the residence's fenced yard without a search warrant.

U.S. v. Ganias, 95 Crim. L. Rep. 449 (2d Cir. 6/17/14):
Holding: Even though Officers had a search warrant to seize and copy Defendant's hard drives, they violated 4th Amendment by then waiting more than two years before searching through the drives for evidence of a different crime; "if the Government could seize and retain non-responsive electronic records indefinitely, so it could search them whenever it later developed probable cause, every warrant to search for particular electronic data would become, in essence, a general warrant."

U.S. v. Bailey, 2014 WL 657932 (2d Cir. 2014):
Holding: Even though Officer told Defendant he was not being arrested but only being detained while a search warrant was executed, where Defendant was handcuffed and made incriminating statements without being given *Miranda* warnings, the statements must be suppressed under the Fourth Amendment because the initial handcuffing of Defendant violated the reasonable bounds of a *Terry* stop.

U.S. v. Freeman, 94 Crim. L. Rep. 237 (2d Cir. 11/7/13):
Holding: Even though informers who call 911 emergency lines now have their phone numbers recorded by caller ID, this does not by itself make their tips sufficiently reliable to justify an investigative stop; there still must be additional indicia of reliability.

U.S. v. Galpin, 2013 WL 3185299 (2d Cir. 2013):
Holding: Warrant authorizing search for child pornography was overbroad and violated 4th Amendment, where the only crime specified in the warrant was failure of a sex offender to register their Internet service provider account or online identity; this did not provide probable cause to believe Defendant possessed child pornography, even though there was probable cause to believe Defendant was communicating with and luring young males to his residence.

Winfield v. Trotter, 92 Crim. L. Rep. 730 (2d Cir. 3/6/13):
Holding: Even though Driver consented to search of her car, the search exceeded scope of consent where Officer opened and read text of Driver's mail; a person who consents to

search of their car for contraband would not reasonably expect that they were consenting for Officer to read personal papers.

Swartz v. Insogna, 92 Crim. L. Rep. 431 (2d Cir. 1/3/13):
Holding: "Giving the finger" to police does not justify a traffic stop under 4th Amendment.

U.S. v. Voustianiouk, 2012 WL 2849655 (2d Cir. 2012):
Holding: Where search warrant explicitly authorized search of a building's first-floor apartment, the "good faith" exception to warrant requirement did not justify Officers' search of the second-floor apartment.

U.S. v. Simmons, 2011 WL 5067098 (2d Cir. 2011):
Holding: Exigent circumstances sufficient to justify a warrantless search of defendant's bedroom did not exist where defendant was roused from bed, placed outside his bedroom, was clad only in his underwear and had been searched for weapons, and was closely monitored.

U.S. v. Clark, 88 Crim. L. Rep. 754, 2011 WL 781597 (2d Cir. 3/8/11):
Holding: 4th Amendment's particularity provision requires a warrant that authorizes search of the entirety of multi-unit apartment building be supported by probable cause to believe the object of the search can be found in each unit of the building.

U.S. v. Hassock, 88 Crim. L. Rep. 573 (2d Cir. 1/28/11):
Holding: Where Officers knocked on door and a woman gave permission to enter to see who else was in the house, Officers' search under a bed (where they found a gun) could not be justified as a "protective sweep."

U.S. v. Mallory, 95 Crim. L. Rep. 667 (3d Cir. 9/3/14):
Holding: Even though Officer was allowed to pursue armed man into a house, Officer was required to get a warrant to keep searching for the gun after the man was handcuffed and house secured; exigent circumstances were over once man was handcuffed and house secured.

U.S. v. Katzin, 94 Crim. L. Rep. 140, 732 F.3d 187 (3d Cir. 10/22/13):
Holding: (1) 4th Amendment requires a search warrant for police to place GPS tracker on car; and (2) "good faith" exception to exclusionary rule based on reliance on (now) bad case law doesn't apply unless the case law was binding on the officers in that jurisdiction; "any … officer who acts primarily in reliance on the 4th Amendment proclamation of our sister circuits does so at his own peril for purposes of the exclusionary rule."

U.S. v. Pavulak, 2012 WL 5870742 (3d Cir. 2012):
Holding: Even though Defendant had prior child sex convictions, probable cause for a search warrant to search for child pornography required more than a conclusory statement that sought-after images were child pornography.

Virgin Islands v. John, 89 Crim. L. Rep. 774, 2011 WL 3559933 (3d Cir. 8/15/11):
Holding: Where Defendant was charged with child molestation, a warrant for his home to search for child pornography was invalid where the search warrant did not allege any connection between child molestation and child pornography, even assuming such a connection exists.

Ray v. Township of Warren, 88 Crim. L. Rep. 290 (3d Cir. 11/23/10):
Holding: 4th Amendment "community caretaking doctrine" never justifies warrantless search of a home.

U.S. v. Graham, 97 Crim. L. Rep. 599 (4th Cir. 8/5/15):
Holding: 4th Amendment requires police obtain warrant to obtain cell phone location data of mobile phone users, because users have expectation of privacy in records kept by phone company that reveal their location; "we cannot accept the proposition that cell phone users volunteer to convey their location information simply by choosing to … use their cell phones and to carry the devices on their person."

U.S. v. Hill, 96 Crim. L. Rep. 425 (4th Cir. 1/13/15):
Holding: Supervised release condition which allowed probation officer to "visit" Defendant's home and seize contraband did not authorize warrantless search of the home.

U.S. v. Robertson, 94 Crim. L. Rep. 336 (4th Cir. 12/3/13):
Holding: Where (1) Defendant and others were at a bus shelter when 4 or 5 police sought to search them, and (2) police blocked the exit, asked accusatory questions about whether Defendant had anything illegal, and never said the people were free to leave, Defendant's "begrudging submission" to a search when he raised his hands and let Officers search him in response to a request to search was not voluntary consent to search; Officers initial accusatory questioning, combined with a police dominated atmosphere, clearly communicated to Defendant that he was not free to leave or refuse the request to search.

U.S. v. Fisher, 93 Crim. L. Rep. 43 (4th Cir. 4/1/13):
Holding: Officer's lies on a search warrant rendered the Defendant's guilty plea involuntary, where defense lawyer testified that she advised Defendant to plead guilty because there were no grounds to challenge the warrant (but there would have been if the lies had been known).

U.S. v. Yengel, 92 Crim. L. Rep. 623, 2013 WL 563529 (4th Cir. 2/15/13):
Holding: Even though police were called to an armed domestic dispute and arrested a suspect there, they were not justified under the exigent circumstances exception to search a locked closet in the residence without a warrant.

U.S. v. Black, 92 Crim. L. Rep. 701, 707 F.3d 531 (4th Cir. 2013):
Holding: Police department's "rule of two" which instructs Officers to search for a second weapon whenever they find a first weapon at a scene does not justify detaining

and frisking all bystanders when a gun is found on a person; such a rule would lead to absurd results, such as searching all priests in a monastery if a person carrying a gun happened to walk on the premises.

U.S. v. Watson, 92 Crim. L. Rep. 384 (4th Cir. 1/2/13):
Holding: Even though police had probable cause to search a building for drugs, they were not permitted to detain the occupants of the building until they got a warrant where they had no probable cause to believe that the occupants were connected to the drug activity.

U.S. v. Sowards, 2012 WL 2386605 (4th Cir. 2012):
Holding: Officer's uncorroborated visual speed estimate that Defendant was driving 75 mph in a 70 mph zone did not provide reasonably trustworthy information to provide probable cause to stop the car; while Officer may have been able to stop car if there was a greater differential between the posted speed limit and Officer's estimate, Officer's naked-eye estimate that car was traveling only slightly faster than speed limit requires additional indicia of reliability to support probable cause.

U.S. v. Gaines, 90 Crim. L. Rep. 627 (4th Cir. 1/17/12):
Holding: A defendant's resistance of a lawful arrest following an illegal traffic stop will not always break the chain of causation between the stop and the arresting officers' seizure of evidence.

U.S. v. Gaines, 2012 WL 247991 (4th Cir. 2012):
Holding: Where discovery of a firearm was the product of an unlawful search, defendant's subsequent and independent act of assault was not an intervening event for the purpose of determining whether the "taint" of the unlawful search was purged.

U.S. v. Powell, 2011 WL 5517347 (4th Cir. 2011):
Holding: Police officers lacked reasonable suspicion that defendant was armed and dangerous where the only information they possessed was that defendant had "priors" for armed robbery and his driver's license had been suspended.

U.S. v. Hill, 2011 WL 3626788 (4th Cir. 2011):
Holding: Even though police heard unresponsive noise coming from a house, where they had an arrest warrant for a particular person and did not believe that person was in the house, police could not enter the house.

U.S. v. Edwards, 90 Crim. L. Rep. 510 (4th Cir. 12/29/11):
Holding: Police officers violated the defendant's Fourth Amendment rights when they searched his underwear subsequent to arrest on a public street and removed a baggie that was tied to his penis because the search was unreasonably intrusive.

U.S. v. Massenburg, 89 Crim. L. Rep. 766 (4th Cir. 8/15/11):
Holding: 4th Amendment "collective knowledge" doctrine cannot justify a search where one officer knew information but never communicated it to anyone else; doctrine is

limited to situations where one officer directs another officer to do a search and does not authorize a reviewing judge to aggregate the individual knowledge of all officers to justify cause to search.

U.S. v. Digiovanni, 89 Crim. L. Rep. 741 (4th Cir. 8/2/11):
Holding: Officer violated 4th Amendment during traffic stop by prolonging the stop in order to ask questions about drugs and consent to search.

U.S. v. Foster, 88 Crim. L. Rep. 751, 2011 WL 711858 (4th Cir. 3/2/11):
Holding: Even though (1) Officer knew Defendant had a prior marijuana offense; (2) Defendant sat up in parked car after seeing Officer; and (3) Defendant made "frenzied arm movements," this did not provide reasonable suspicion for a *Terry* stop; 4th Circuit expresses concern that prosecution in these search and seizure appeals always spins innocent facts into a "web of deception" to justify the police conduct.

Bellotte v. Edwards, 88 Crim. L. Rep. 548 (4th Cir. 1/11/11):
Holding: Even though home's occupants had concealed weapons permits, this did not authorize Officers to conduct a no-knock entry of home to search for child pornography; the search warrant did not authorize no-knock entry and the concealed weapons permits did not create exigent circumstances.

U.S. v. Iraheta, 95 Crim. L. Rep. 615 (5th Cir. 8/19/14):
Holding: Officers who stopped motorists couldn't use Driver's consent to search luggage in the trunk when that consent was obtained without Passengers' knowledge.

Trent v. Wade, 96 Crim. L. Rep. 418 (5th Cir. 1/9/15):
Holding: Even though Officers may be able to make a warrantless "hot pursuit" entry, 4th Amendment may still require that they knock and announce before entering.

U.S. v. North, 735 F.3d 212 (5th Cir. 2013):
Holding: Gov't failed to comply with the minimization protocols of the Wiretap Act when listening to drug-Defendant's phone call with a friend; Gov't listened to non-pertinent conversations for an hour and was not speaking to a member of the drug conspiracy.

U.S. v. North, 93 Crim. L. Rep. 711, 2013 WL 4516143 (5th Cir. 8/26/13), opinion withdrawn 94 Crim. L. Rep. 153 (5th Cir. 10/24/13):
Holding: Federal Wiretap Law, Title III, does not allow a judge to authorize interception of mobile phone calls when neither the phone nor listening post are within the court's territorial jurisdiction. Note: The foregoing opinion was withdrawn on 10/24/13, and a new opinion issued which decided the case on different grounds, i.e., that Gov't failed to follow the wiretap minimization procedures set out in the affidavit for the search warrant; Gov't claimed they would only "spot check" conversations to ensure they did not turn to criminal matters, but Gov't listened to a non-pertinent conversation for nearly one hour.

U.S. v. Cotton, 2013 WL 3329173 (5th Cir. 2013):
Holding: Where motorist gave consent to search for luggage, this did not authorize Officer to search car in places where luggage could not be found.

U.S. v. Gray, 90 Crim. L. Rep. 619 (5th Cir. 2/1/12):
Holding: The intrusiveness of having medical personnel conduct a proctoscopic examination of a suspect's rectum was so great that a search warrant was not enough to make the search "reasonable" for Fourth Amendment purposes.

U.S. v. Macias, 2011 WL 4447888 (5th Cir. 2011):
Holding: Firearm was found to be fruit of an unconstitutional search where trooper made a valid stop for failure to wear a seatbelt, but prolonged the stop by asking irrelevant and unrelated questions without reasonable suspicion of criminal activity.

U.S. v. Olivares-Pacheco, 2011 WL 456765 (5th Cir. 2011):
Holding: Even though truck was dragging a bit of brush and was carrying six Hispanic passengers, there was not reasonable suspicion to stop it.

Bishop v. Arcuri, 2012 WL 752525 (5th Cir. 2012):
Holding: At the time of officers' no-knock entry into a residence suspected of being the site of the sale of small, retail quantities of methamphetamine, the risk of evidence destruction had not yet ripened into exigent circumstances sufficient to justify officers' decision not to knock to announce their presence.

U.S. v. Noble, 2014 WL 3882493 (6th Cir. 2014):
Holding: Even though Defendant-Passenger appeared nervous, Officer had a report that the car was associated with drug trafficking, and Officer's experience taught him that drug traffickers often carried weapons, Officer lacked reasonable suspicion to frisk Defendant-Passenger where no specific fact linked Defendant to drugs other than being a passenger in the car.

U.S. v. Lichtenberger, 97 Crim. L. Rep. 202 (6th Cir. 5/20/15):
Holding: Even though Defendant's girlfriend originally discovered and showed police child pornography on Defendant's computer, the evidence was not admissible under the "private search doctrine" without a warrant where Officer asked her to open files other than those she previously opened and she could not recall if she showed Officer the same images as those sought to be used at trial; "private search doctrine" requires that Officer not exceed the boundaries of the initial private discovery.

U.S. v. Noble, 95 Crim. L. Rep. 672 (6th Cir. 8/8/14):
Holding: Where Gov't failed to raise in district court that Defendant lacked "standing" to bring 4th Amendment claim, Gov't's can only raise this issue on appeal under plain error standard.

U.S. v. Shaw, 92 Crim. L. Rep. 701 (6th Cir. 2013):
Holding: Even though police had a warrant to arrest a female suspect for trespass, where they arrived at the scene and there was no such house number and they knocked on a door, a woman answered, they saw scales in the house, and the woman let them in after they said they had a warrant, their actions in entering the house were unreasonable because they should have confirmed the correct address for the warrant and should not have lied to the woman about having a warrant (for an incorrect address).

G.C. v. Owensboro Public Schools, 93 Crim. L. Rep. 42 (6th Cir. 3/28/13):
Holding: Using a cell phone on school grounds in violation of school policy does not automatically permit school officials to seize phone and search all its contents; 4th Amendment requires reasonable searches, and any search must be related to the reason the phone was seized.

U.S. v. McCraney, 2012 WL 934020 (6th Cir. 2012):
Holding: A district court did not clearly err in finding that officers lacked reasonable suspicion that a defendant and the driver of the vehicle in which the defendant was a passenger were armed or could have gained immediate control of weapons.

O'Neill v. Louisville/Jefferson County Metro Gov't, 90 Crim. L. Rep. 270 (6th Cir. 11/8/11):
Holding: Even though Defendants invited into their home an undercover officer, where he went outside and then invited in uniformed officers, the reentry violated the 4th Amendment and was not justified under the "consent-once-removed doctrine."

U.S. v. Johnson, 89 Crim. L. Rep. 789 (6th Cir. 8/29/11):
Holding: A home's temporary resident's (divorcing husband who lived in wife's mother's house) objection to a search controls over the consent of a resident (wife and her mother) with a greater possessory or long-term interest in the home for purposes of *Georgia v. Randolph*, 547 U.S. 103 (2006).

State v. Hummons, 89 Crim. L. Rep. 540 (Ariz. 6/10/11) & U.S. v. Gross, 89 Crim. L. Rep. 540 (6th Cir. 6/15/11):
Holding: Even though police discovered a valid arrest warrant for Defendant after unconstitutionally stopping and detaining him, this does not necessarily purge the taint of the illegal stop from evidence subsequently seized.

U.S. v. Warshak, 88 Crim. L. Rep. 339 (6th Cir. 12/14/10):
Holding: The provision of the Stored Communications Act which permits the gov't to obtain emails from internet service providers without a warrant violates 4th Amendment.

U.S. v. Flores, 97 Crim. L. Rep. 651 (7th Cir. 8/19/15):
Holding: Officer's mistaken belief that Driver violated state license plate law because the edges of several letters were covered up by the license frame was unreasonable mistake of law, and does not justify traffic stop; to hold otherwise would allow police to stop almost anyone using a customary frame.

U.S. v. Walton, 95 Crim. L. Rep. 594 (7th Cir. 8/13/14):
Holding: Even though Defendant rented a car when his license was suspended (which violated the rental agreement) and the conditions of his parole prohibited him from interstate travel, Defendant still had a reasonable expectation of the privacy in the car.

White v. Stanley, 94 Crim. L. Rep. 747 (7th Cir. 3/11/14):
Holding: Even though Officer smelled burning marijuana coming from a residence, this did not create "exigent" circumstances to make a warrantless entry under 4th Amendment.

Huff v. Reichert, 94 Crim. L. Rep. 747 (7th Cir. 3/10/14):
Holding: Defendant-driver was not "free to leave" when he told Officer he would like to go and Officer said (1) he could leave but would have to leave his car behind, and (2) that he'd be arrested because it is illegal to walk on a highway or abandon a car on a highway; this turned the traffic stop into an arrest because no reasonable person would feel free to leave.

U.S. v. Williams, 94 Crim. L. Rep. 41, 2013 WL 5314594 (7th Cir. 9/24/13):
Holding: Even though police received an anonymous call to investigate a group of belligerent men outside a bar who were displaying guns, there was no reasonable suspicion to stop and frisk Defendant, who began walking away when police arrived; the situation was not "ominous" when police arrived, and the group was not displaying any guns; also, a group's general behavior cannot support reasonable suspicion that one of its members is armed and dangerous; and even though this was a "high crime area," that wasn't significant given the weakness of the other facts.

U.S. v. Uribe, 92 Crim. L. Rep. 622, 2013 WL 514213 (7th Cir. 2/13/13):
Holding: Even though Defendant's car had a different color than the registration indicated and was out late at night, this did not provide reasonable suspicion to stop the car; "nothing suggests that a repainted vehicle observed at 2:00 a.m. is any more suspicious than onwile observed at noon."

U.S. v. McMurtrey, 2013 WL 105787 (7th Cir. 2013):
Holding: Defendant's 4th Amendment rights were violated where Gov't received a "pre-*Franks*" hearing to explain discrepancies and contradictions in a search warrant affidavit without allowing Defendant an opportunity to respond.

U.S. v. $45,000.00 in U.S. Currency, 2014 WL 1465550 (8th Cir. 2014):
Holding: Even though a back-up camera partially covered the name of a license plate's state of issuance, where Officer could read the name of the state while traveling a safe distance behind car, the plate was "plainly visible" and did not violate license plate display statute to justify a traffic stop.

U.S. v. Lomeli, 91 Crim. L. Rep. 126 (8th Cir. 4/18/12):
Holding: Title III's exclusionary rule required suppression of intercepts where investigators failed to attach to their wiretap application the names of the officer who

made the application and the DOJ official who approved it; prosecutor's application for a wiretap, which used boilerplate language and referenced documents that were not attached, was not a mere technical defect but rather violated a core requirement of the federal wiretap statute.

U.S. v. Aquino, 2012 WL 952778 (8th Cir. 2012):
Holding: Officer exceeded *Terry*'s scope in lifting the defendant's pant leg instead of conducting pat down.

U.S. v. Taylor, 88 Crim. L. Rep. 640, 2011 WL 561979 (8th Cir. 2/18/11):
Holding: Officer's writing of "misc. tools" on vehicle inventory form rather than itemizing the hundreds of tools in Defendant's car spoiled the inventory search and rendered it unreaonsable under 4th Amendment; drugs found must be suppressed; Officer's actions in writing "misc. tools" and not following standard procedures for making a detailed inventory showed Officer's purpose was investigatory rather than to create an inventory.

U.S. v. Fowlkes, 2014 WL 4178298 (9th Cir. 2014):
Holding: Search of Defendant's rectum without a warrant after arrest was not justified by exigent circumstances; there was no finding that Defendant could have destroyed evidence or that there was a medical emergency.

U.S. v. McConnell, 97 Crim. L. Rep. 204 (9th Cir. 5/20/15):
Holding: Where Officer had already performed a regular license and warrants check on Defendant-Driver, Officer unreasonably prolonged the stop beyond time necessary to conduct a traffic stop when Officer prolonged stop to conduct an ex-felon registration check and dog sniff; independent suspicion of criminal activity was required to prolong the stop.

George v. Edholm, 95 Crim. L. Rep. 361 (9th Cir. 5/28/14):
Holding: Civil rights suit could proceed on claim that police tricked medical staff into using a metal probe to remove a baggie of drugs from Defendant's rectum by falsely claiming Defendant had a seizure; warrantless searches of a Defendant's body are reasonable only in response to an immediate medical emergency.

U.S. v. Camou, 96 Crim. L. Rep. 290 (9th Cir. 12/11/14):
Holding: Even though Officers have probable cause to believe a vehicle contains evidence of crime, 4th Amendment requires that they obtain a search warrant to search cell phones in the vehicle; neither the automobile exception nor the exigent circumstances exception allow search of cell phones in a car without a warrant.

U.S. v. Dreyer, 95 Crim. L. Rep. 683 (9th Cir. 9/12/14):
Holding: Where U.S. Navy had monitored all computers in Washington State and notified civilian law enforcement that Defendant's computer was sharing child pornography, this violated the Posse Comitatus Act (CPA), 18 USC 1385, and the evidence must be suppressed; the CPA forbids the military from participating in civilian

law enforcement activities; "So far as we can tell from the record, it has become a routine practice for the Navy to conduct surveillance of all the civilian computers in the entire state to see whether any child pornography can be found on them, and then to turn over the information to civilian law enforcement when no military connection exists."

Patel v. City of Los Angeles, 94 Crim. L. Rep. 413 (9th Cir. 12/24/13):
Holding: Ordinance that requires hotel owners to disclose their guest registry to police upon request violates 4th Amendment.

U.S. v. Arreguin, 94 Crim. L. Rep. 306, 2013 WL 6124722 (9th Cir. 11/22/13):
Holding: Even though a sleepy-looking person answered door of residence and said Officers could look around, their search violated 4th Amendment because Officers may rely on the apparent authority doctrine only if the Officers reasonably believe the person they spoke to had actual authority to grant consent; here, the person who consented was only a house guest; Officers knew "virtually nothing" about who this person was and cannot proceed on an "ignorance is bliss" theory.

U.S. v. Grandberry, 93 Crim. L. Rep. 765, 2013 WL 5184439 (9th Cir. 9/17/13):
Holding: Officer cannot conduct warrantless search of parolee's residence unless Officer has probable cause to believe parolee resides at that residence; here, Parolee challenged search of his girlfriend's apartment.

U.S. v. Lopez-Cruz, 93 Crim. L. Rep. 741, 2013 WL 4838908 (9th Cir. 9/12/13):
Holding: Officer exceeded scope of Defendant's consent to "search" or "look in" his cell phone when Officer answered an incoming call.

U.S. v. Sedaghaty, 93 Crim. L. Rep. 712, 2013 WL 4490922 (9th Cir. 8/23/13):
Holding: (1) Where affidavit supporting warrant for search of computer was only to investigate suspected tax fraud, Agents exceeded scope of search warrant when they went through computer files to collect evidence of terrorist activity that Defendant cheated on his taxes to fund terrorist causes; and (2) Gov't committed *Brady* violation where they failed to reveal that FBI had paid persons who testified against Defendant $14,000 in "financial assistance."

U.S. v. Thomas, 2013 WL 4017239 (9th Cir. 2013):
Holding: Gov't's failure to disclose full history of drug dog's search skills was not harmless where dog had been evaluated as having only "marginal" skills in certification program; thus, his behavior in touching Defendant's toolbox provided an insufficient basis to search toolbox.

U.S. v. Underwood, 2013 WL 3988675 (9th Cir. 2013):
Holding: "Good faith" exception to exclusionary rule did not apply where affidavit submitted in support of a state search warrant for Defendant's home failed to set forth sufficient facts to conclude that Defendant was a courier for a drug organization or that drug trafficking evidence would be found in the home.

U.S. v. Cotterman, 92 Crim. L. Rep. 721 (9th Cir. 3/8/13):
Holding: Homeland Security agents must have reasonable suspicion of criminal activity before they conduct a forensic search of a laptop or other digital device when travelers bring them into the U.S. across the border.

U.S. v. I.E.V., 92 Crim. L. Rep. 275 (9th Cir. 11/28/12):
Holding: Even though a drug dog alerted to a car near the border and the car's occupants were "nervous," this did not provide reasonable suspicion to stop and frisk occupants; the frisk of Defendant was the type of "general exploratory search for whatever evidence of criminal activity [police] might find," which is prohibited under *Terry*.

U.S. v. Cervantes, 2012 WL 5951618 (9th Cir. 2012):
Holding: Where Defendant who was stopped and arrested by police properly left his car parked by side of road in residential neighborhood, the subsequent impoundment and search of car by police was not justified under "community caretaker" exception to 4th Amendment.

U.S. v. Budziak, 92 Crim. L. Rep. 82 (9th Cir. 10/5/12):
Holding: Defendant was entitled to discovery of computer program FBI used to detect his child pornography on his computer because this was relevant to his defense that Defendant did not know he was sharing pornography or that the FBI may have overridden his shared settings.

U.S. v. Grant, 2012 WL 2086588 (9th Cir. 2012):
Holding: Even though Officer relied on a search warrant to search Defendant's home for a gun used in a homicide, where the affidavit for the warrant did not set out any plausible connection between the gun and Defendant's home but was based on a speculative idea that a relative of Defendant may have taken the gun there, the search was unreasonable and the good faith exception of *Leon* did not apply.

U.S. v. Oliva, 2012 WL 2948542 (9th Cir. 2012):
Holding: Electronic surveillance orders in case did not authorize Gov't to use unlawful "roving bugs" on cell phones calls.

United States v. King, 90 Crim. L. Rep. 808 (9th Cir. 3/13/12):
Holding: Uncorroborated "double hearsay" from tipsters of unknown reliability cannot give police reasonable suspicion to believe that a defendant is engaged in criminal activity.

Chism v. Washington, 89 Crim. L. Rep. 828 (9th Cir. 8/25/11):
Holding: Even though Defendant's credit card was used to pay for hosting fee for website that featured child pornography, this was not enough for probable cause for a search warrant to search Defendant's home and computer where the IP address was hundreds of miles from house and the warrant affidavit contained other falsehoods and omissions.

Doughtery v. City of Covina, 89 Crim. L. Rep. 774 (9th Cir. 8/16/11):
Holding: Where Defendant was charged with sexually touching children, this alone did not justify searching his house for child pornography even though the officer's warrant application stated that in his experience, people who molest children also have child pornography.

U.S. v. Sanders, 97 Crim. L. Rep. 625 (10th Cir. 8/7/15):
Holding: Police cannot impound car parked on private property after arresting its owner unless the car is impeding traffic or impairing public safety, and the car is seized by standardized criteria for seizure and a non-pretextual community caretaking rationale.

U.S. v. Nicholson, 2013 WL 3487743 (10th Cir. 2013):
Holding: Officer violated 4th Amendment by stopping Defendant for making a left turn that was not illegal, and Officer's mistake of law on this matter was unreasonable.

U.S. v. De La Cruz, 92 Crim. L. Rep. 431 (10th Cir. 1/9/13):
Holding: Even though an alien-passenger fled from Defendant-Driver's car, Officers were not permitted to detain Driver where they had a photo of an alien-suspect they were looking for and Driver did not match the photo.

Kaufman v. Higgs, 92 Crim. L. Rep. 132 (10th Cir. 10/23/12):
Holding: Even though Defendant refused to answer police questions during a consensual encounter, this did not provide probable cause to arrest him for obstruction of justice.

U.S. v. Neff, 2012 WL 1995064 (10th Cir. 2012):
Holding: Driver's exit from Interstate highway after seeing a drug checkpoint sign did not constitute reasonable suspicion to stop vehicle, even though Defendant also looked "surprised" to see police, and backed into a driveway to turn around.

U.S. v. Edwards, 2001 WL 36286643 (10th Cir. 2001):
Holding: Where police had a report that a bank was robbed but then learned the report was false, police could not then search trunk of Defendant's car without a warrant, even though Defendant was outside the bank with a bag of money that appeared to be stained with the dye banks use in bank robberies.

U.S. v. Trestyn, 2011 WL 1783008 (10th Cir. 2011):
Holding: Where Officer stopped car for license plate violation but should have observed when he got closer to car that there was no violation, Officer's questioning of driver and passenger about their travel destinations unnecessarily prolonged the stop and exceeded its original scope so as to violate 4th Amendment.

U.S. v. Harrison, 639 F.3d 1273 (10th Cir. 2011):
Holding: Where police used deception to obtain consent to search by telling Defendant that police had received a tip that there were bombs at his apartment, this vitiated his consent to search.

Klen v. City of Loveland, 90 Crim. L. Rep. 270 (10th Cir. 11/15/11):
Holding: Owners of commercial premises that were still under construction had an expectation of privacy in the premises protected by 4th Amendment.

U.S. v. Martinez, 89 Crim. L. Rep. 694, 2011 WL 2687276 (10th Cir. 7/12/11):
Holding: A static-only 911 call did not provide exigent circumstances for warrantless search of residence where call originated.

U.S. v. Harrison, 89 Crim. L. Rep. 206, 2011 WL 1782961 (10th Cir. 5/11/11):
Holding: Where police used deception to gain Defendant's consent to search his apartment by telling him that they received a tip about a bomb in his apartment, this violated the 4th Amendment; courts should be "especially cautious when [police] deception creates the impression that the defendant will be in physical danger if he or she refuses to consent to the search."

U.S. v. Timmann, 94 Crim. L. Rep. 389 (11th Cir. 12/18/13):
Holding: Even though there was bullet hole in a common wall of an apartment building and no one answered the door when police knocked, this did not provide exigent circumstances to enter the adjoining apartment without a warrant.

U.S. v. Davis, 2014 WL 2599917 (11th Cir. 2014):
Holding: Stored Communications Act provision which allows Gov't to obtain cell site location from cell providers without a warrant violated 4th Amendment; Defendant had reasonable expectation of privacy in his location.

U.S. v. Davis, 95 Crim. L. Rep. 382 (11th Cir. 6/11/14):
Holding: 4th Amendment warrant requirement applies to locations of mobile phones when calls were made from the phones; federal Stored Communications Act, which authorizes the government to use a court order based on less than probable cause to obtain such information from phones companies, is unconstitutional.

Gennusa v. Canova, 95 Crim. L. Rep. 71 (11th Cir. 4/8/14):
Holding: Officers who deliberately listened in on attorney-client communications in a police interview room did not have qualified immunity for the 4th Amendment violation; "The government has no weighty law-enforcement, security, or penological interest in recording, without a warrant, the attorney-client conversations of a person who has not been arrested, even if those conversations take place in a [police] interview room."

U.S. v. Barber, 96 Crim. L. Rep. 530 (11th Cir. 2/3/15):
Holding: Even though Driver gave permission to search car, Passenger had 4th Amendment privacy interest in a bag in the car that was on Passenger's floor board.

West v. Davis, 95 Crim. L. Rep. 668 (11th Cir. 9/8/14):
Holding: Plaintiff was subjected to unreasonable seizure in violation of 4th Amendment where courthouse security Officer grabbed her wrist and jerked her arm to get a cellphone

out of her hand; "The restraint on one's freedom of movement does not have to endure for any minimum time period before it becomes a seizure for 4th Amendment purposes."

U.S. v. Valerio, 2013 WL 3069300 (11th Cir. 2013):
Holding: *Terry* did not authorize police to conduct an investigate stop of Defendant a week after last observing him doing anything suspicious.

U.S. v. Gibson, 2013 WL 538007 (11th Cir. 2013):
Holding: Defendant has standing to challenge use of GPS device on car he did not own while he was in possession of car, but did not have standing to challenge use of device when he was not a driver or passenger.

U.S. v. Doe, 90 Crim. L. Rep. 712 (11th Cir. 2/23/12):
Holding: The government cannot compel a suspect to decrypt his computer hard drives without granting him full immunity from prosecution where the act of unlocking the devices would itself be testimonial.

Coffin v. Brandau, 89 Crim. L. Rep. 419 (11th Cir. 6/3/11):
Holding: Officers violated 4th Amendment by making a warrantless entry into open garage of a house to make arrest.

U.S. v. Brodie, 2014 WL 593264 (D.C. Cir. 2014):
Holding: Officers did not encounter Defendant "when" the search of a residence was underway so as to be able to arrest Defendant and search him incident to arrest, even if the search was in progress from the time Officers left their car to walk to the residence, where Officers observed Defendant merely in anticipation of the search; Officers approached Defendant only in order to talk to him.

U.S. v. Peyton, 2014 WL 1099576 (D.C. Cir. 2014):
Holding: Even though Grandmother gave consent to search a living room she shared with Defendant, Grandmother's authority to consent did not extend to search of a shoebox containing Defendant's possessions.

Wesby v. District of Columbia, 95 Crim. L. Rep. 691 (D.C. Cir. 9/2/14):
Holding: Even though party guests were trespassing at a residence (some unwittingly), Officers violated 4th Amendment by arresting everyone at the party when Officers knew that one of the trespassers had told the other party guests that she lived at the residence.

U.S. v. Peyton, 95 Crim. L. Rep. 14 (D.C. Cir. 3/21/14):
Holding: Even though Defendant lived with his Grandmother, she did not have apparent authority to give consent to search a shoebox by Defendant's bed in the living room; Grandmother's statement that Defendant kept his personal property around the bed should have made it obvious to police that the closed shoebox didn't belong to Grandmother, and police should have inquired further to determine who owned shoebox.

States v. Glover, 94 Crim. L. Rep. 233 (D.C. Cir. 11/8/13):
Holding: (1) The wiretapping statute, Title III, 18 USC 2518(3), prohibits a judge in one district from authorizing installation of an electronic listening device in another district; (2) violation of this territorial jurisdiction requires suppression of the intercepted communication; and (3) no good-faith exception to the statute's exclusionary rule applies for violation of territorial jurisdiction.

U.S. v. Wicks, 94 Crim. L. Rep. 603 (C.A.A.F. 2/20/14):
Holding: Search of text messages on cell phone requires a warrant, even though a third-party had taken Defendant's phone and searched the phone herself before turning it over to investigators.

U.S. v. Cote, 92 Crim. L. Rep. 749 (C.A.A.F. 3/18/13):
Holding: A delay in forensic search of a computer past expiration date for the search warrant required suppression of evidence found on computer.

Matter of Search of Information Associated with [Redacted]@mac.com that is Stoared at Premises Controlled by Apple, Inc., 2014 WL 1377793 (D.D.C.):
Holding: Search warrant requiring all emails associated with an email account in connection with a government kickback investigation was overbroad; Gov't failed to show necessity for all emails ever received or sent from the account and that the email company could not have performed the search at Gov't request and turned over only those emails that are relevant.

Matter of Search of ODYS LOOX Plus Tablet Serial No. 471721370341 In Custody of U.S. Postal Inspection Service, 1400 New York Ave., NW, Washington, DC, 2014 WL 1063996 (D.D.C. 2014):
Holding: Search warrant application to search electronic devices must specifically state the type of investigators who will search, how information will be returned to the owner, how long Gov't intends to keep information from the devices, and how the Gov't intends to technically conduct the search.

U.S. v. Nash, 96 Crim. L. Rep. 36 (D.C. 9/24/14):
Holding: Even though Officer found "open container" of alcohol in car, Officer can search car for additional evidence only if Officer has reasonable and articulable suspicion that evidence connected to the open container offense will be found.

Jackson v. U.S., 92 Crim. L. Rep. 363 (D.C. 12/13/12):
Holding: Even though Officer saw driver stopped for traffic violation switch places with passenger and make movements toward the dashboard area, this did not provide reasonable suspicion to search vehicle for weapons.

U.S. v. Taylor, 2012 WL 3243054 (D.C. 2012):
Holding: Even though Defendant-Driver was arrested for DWI, the search of his glove box could not be justified under the search incident to arrest exception to the warrant

requirement, since there was no reason to believe that evidence relevant to the crime of DWI would be in the glove box.

In re Search of Google Email Accounts identified in Attachment A, 2015 WL 926619 (D. Alaska 2015):
Holding: Search warrant to disclose email accounts for evidence of child sex exploitation was overbroad where it was not limited by any date restriction, and Gov't knew the precise dates for the problematic advertisements posted on the internet classified advertising site and the precise dates of the email correspondence relating to those advertisements.

In re Application for Tel. Info. Needed for Criminal Investigation, 97 Crim. L. Rep. 600 (N.D. Cal. 7/29/15):
Holding: Mobile phone users have reasonable expectation of privacy in phone company data that can track their location.

U.S. v. Conerly, 2014 WL 6900994 (N.D. Cal. 2014):
Holding: Even though Defendant fled from police when he saw them, this alone did not provide reasonable suspicion to stop Defendant.

U.S. v. Lundin, 2014 WL 2918102 (N.D. Cal. 2014):
Holding: Even though (1) Officers went to Defendant's house without a warrant, knocked on door and demanded that he come out with hands up, (2) Defendant came out and was handcuffed, and (3) Officers heard movement in house and backyard, Officers were not justified in then conducting a "protective sweep" or "search incident to arrest" of house; Officers could not order Defendant from his house to effectuate a warrantless arrest any more than they could enter the home to arrest him without a warrant, and thus, a necessary predicate for a protective sweep or search incident to arrest, i.e., a lawful arrest, was lacking.

U.S. v. Gilmore, 2013 WL 2138906 (D. Colo. 2013):
Holding: Even though police were called to a scene about a suspicious person and they found Defendant to be intoxicated and disoriented, police were not justified in conducting a *Terry* pat-down search of Defendant because police were not concerned that Defendant was armed or dangerous, and there was no indication that Defendant was aggressive or hostile.

U.S. v. Paetsch, 2012 WL 5213011 (D. Colo. 2012):
Holding: (1) Where Defendant said he wanted to speak with an attorney, Officer violated his 5th Amendment right to counsel by continuing to question him about weapons and whether he would consent to search of his vehicle, and (2) where Defendant was handcuffed and in-custody away from his vehicle, the public safety exception to *Miranda* did not apply to allow questioning about weapons in his vehicle since there was no realistic risk of Defendant regaining access to any weapons in vehicle.

Gennusa v. Shoar, 2012 WL 2918487 (M.D. Fla. 2012):
Holding: Attorney and client had reasonable expectation of privacy in attorney-client visiting room at sheriff's office, so that secret recordings by sheriff violated 4th Amendment.

Richardson v. Mason, 2013 WL 3325520 (M.D. Ga. 2013):
Holding: Even though Officer had reasonable suspicion that Defendant's vehicle contained drugs based on a tip, Officer violated 4th Amendment when he ordered Defendant to lower his pants and conducted a full body cavity search of Defendant by the road when there were not exigent circumstances.

U.S. v. Jaimez, 2013 WL 8336266 (N.D. Ga. 2013):
Holding: Even though Defendant consented to a search of his home for drugs or weapons, this did not authorize Officers to seize a notebook, even though it was in plain view; the nature of the notebook, which contained incriminating drug transaction evidence, was not immediately apparent.

U.S. v. Dixon, 2013 WL 6055396 (N.D. Ga. 2013):
Holding: Where Officer took Defendant's cell phone back to his office after Defendant's lawful arrest, and searched and extracted all data, this was not a valid "search incident to arrest" to under 4th Amendment even though Defendant was still being booked and interviewed; there was no indication that the data on the phone could be remotely wiped or destroyed.

U.S. v. Roberts, 2012 WL 3544838 (N.D. Ga. 2012):
Holding: The taint of an initial illegal entry into Defendant's room was not attenuated by later officers coming to the room as "back up" and securing a written consent to search form from Defendant.

U.S. v. Williams, 2015 WL 535446 (S.D. Ill. 2015):
Holding: Even though Officers saw a man in an upper apartment window that looked like the person wanted for arrest and no one answered the upper apartment door when Officers knocked, where the warrant was for a lower unit apartment, there were no exigent circumstances allowing Officers to enter the upper apartment without verifying which unit the wanted person lived in.

U.S. v. Flintroy, 2014 WL 3057088 (W.D. Ky. 2014):
Holding: Overnight guest did not have authority to consent to search of house.

U.S. v. Jarman, 2014 WL 5148208 (M.D. La. 2014):
Holding: Even though Gov't had probable cause to initially seize Defendant's hard drive, it was unreasonable and violated 4th Amendment for Gov't to hold the drive for 13 months.

U.S. v. Johnson, 2012 WL 1680786 (W.D. La. 2012):
Holding: The "workplace exception" to the warrant requirement set out in *O'Connor*, 480 U.S. 709 (1987), did not extend to search of a school resource officer's desk; the sole purpose of the search was to search for evidence of crime.

In re Application of U.S. for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone, 2011 WL 3423370 (D.Md. 2011):
Holding: Even though warrant was out for Defendant's arrest, 4th Amendment prohibited using future, real time cell phone information to locate Defendant because this raised legitimate privacy concerns; there was no probable cause to believe that Defendant was attempting to flee from his location or that his location itself constituted evidence of crime.

U.S. v. Janvier, 2011 WL 3100938 (D. Mass. 2011):
Holding: There was no reasonable suspicion to do *Terry* stop of Defendant after anonymous 911 call about a man with a gun where the location identified covered a lot of different houses, Defendant's clothing did not match suspect, Defendant weighed less than suspect, and Defendant was just on the porch of his own house.

U.S. v. Hermiz, 2014 WL 4265791 (E.D. Mich. 2014):
Holding: Search warrant was required to place GPS device on Defendant's rental car.

U.S. v. Powell, 2013 WL 1876761 (E.D. Mich. 2013):
Holding: Even though substantial evidence existed to find probable cause to believe Defendant was a drug dealer and that tracking his cell phone would lead to evidence of crime, the Gov't failed to set forth facts to show that there was a nexus between the cell phone and criminal activity, or between Defendant's location in protected areas and the criminal activity in order to have probable cause for a search warrant for long-term, real-time tracking of Defendant via his cell phone.

U.S. v. Culp, 2012 WL 1390182 (W.D. Mich. 2012):
Holding: Even though Officer had probable cause for initial traffic stop of Defendant, where Office had returned his driver's license, registration, insurance and had just issued a warning, the stop was over and Officer's subsequent extensive questioning and search of vehicle violated scope of detention and was unreasonable.

U.S. v. Lopez, 2011 WL 4790639 (S.D. Miss. 2011):
Holding: Where it was clear that defendant was not a native English speaker and was having difficulty understanding the officer's questions, the state failed to prove that defendant voluntarily consented to a search of his car.

U.S. v. Demings, 2011 WL 2050921 (D.N.J. 2011):
Holding: Even though Defendant's car was parked with the front end angled out in the street and Defendant in the driver's seat, this did not provide grounds to search Defendant's car.

U.S. v. Castro, 2013 WL 1010655 (D.N.M. 2013):
Holding: Even though Defendant-Driver made a U-turn one mile before a border patrol checkpoint, where there was no evidence that Defendant knew he was approaching a checkpoint, this did not provide reasonable suspicion to stop Defendant.

U.S. v. Christy, 2011 3933868 (D.N.M. 2011):
Holding: Exigent circumstances sufficient to justify a warrantless entry of defendant's house for the purpose of finding a 16-year-old girl police believed defendant had brought from another state without her parents' permission did not exist where officers had information from the girl's parents and from the girl's journal indicating that she had attempted suicide before, but where her last known suicide attempt had been seven months earlier.

U.S. v. Bershchansky, 2013 WL 3816570 (E.D. N.Y. 2013):
Holding: Agents exceeded scope of search warrant issued for "Apartment 2" when they searched "Apartment 1" instead, even though the search warrant described "Apartment 2's" location in the building incorrectly.

U.S. v. Metter, 2012 WL 1744251 (E.D. N.Y. 2012):
Holding: Even though Gov't imaged Defendant's hard drive and returned it to him promptly, the Gov't's retention of the imaged drive for 15-months before reviewing it for evidence was an unreasonable seizure under 4th Amendment.

U.S. v. DiTomasso, 2014 WL 5462467 (S.D. N.Y. 2014):
Holding: Even though Defendant's internet service provider had a standard agreement that the provider can monitor emails and chats, Defendant charged with child pornography had a reasonable expectation of privacy in the emails and chats, and Gov't was required to obtain a warrant to obtain them; to hold otherwise would destroy the 4th Amendment as applied to modern communications.

U.S. v. Fadul, 2014 WL 1584044 (S.D. N.Y. 2014):
Holding: Evidence obtained during a warrantless "protective sweep" of an apartment was inadmissible where Officers had no subjective fear that anyone dangerous was in the apartment, and the only person in the apartment was a person taking a shower.

U.S. v. Turner, 2014 WL 2453329 (S.D. N.Y. 2014):
Holding: Even though Defendant's girlfriend had apparent authority to authorize search of apartment, this consent did not extend to a closed backpack known by police to be Defendant's and located in Defendant's closet.

U.S. v. Lahey, 2013 WL 4792848 (S.D. N.Y. 2013):
Holding: Search warrant for Defendant's home was based on affidavit that contained recklessly made sequencing misrepresentations and related omissions, and was not corrected by a "hypothetical corrected affidavit" that contained further information.

U.S. v. Truong Son Do, 2014 WL 531203 (N.D. Okla. 2014):
Holding: Even though Defendant consented to search of his home and waived *Miranda* rights, the search and wavier were invalid because were tainted by Officer's prior unconstitutional stop of Defendant without reasonable suspicion.

U.S. v. Jones, 2015 WL 1945369 (D. Or. 2015):
Holding: Even though Officer was told that two men in a dark SUV had just left a bar fight, and Officer saw two light-colored SUV's at a traffic light and heard a report that one of them might have a known gang member as a passenger, this did not provide probable cause to stop the SUV's for an investigatory stop; Officer's information was no more than a guess or hunch that someone in the SUV's might have been involved in the bar fight, and having a gang member in the car was not a crime.

Schlossberg v. Solesbee, 2012 WL 141741 (D. Or. 2012):
Holding: A police officer's warrantless search of an environmental activist's digital camera, conducted incident to the activist's arrests while handing out leaflets, violated the Fourth Amendment.

U.S. v. Martinez, 2013 WL 5525107 (E.D. Pa. 2013):
Holding: A Penn. search warrant to obtain DNA from a suspect was not supported by probable cause where the affidavit in support of the warrant was sworn by a N.J. officer based on a "emergent order" obtained from a N.J. court without any credible reason to believe 5 years after the crime that emergent circumstances existed; the affidavit provided only that the victim had been murdered in a N.J. town and the suspect was a Penn. resident and may have been one of victim's drug couriers and had a serious criminal record.

U.S. v. Ortiz, 2012 WL 2951391 (E.D. Pa. 2012):
Holding: Even though (1) *Davis* holds that exclusionary rule should not apply when police rely on binding judicial precedent to search and (2) other circuits had held that GPS monitoring of people without a warrant was constitutional, the exclusionary rule would apply in circuit at issue because this circuit had not previously ruled on the constitutionally of GPS monitoring.

U.S. v. Gooch, 2012 WL 6737490 (W.D. Pa. 2012):
Holding: Even though Driver consented to allowing Officer to take a "quick peek" into her book bag in trunk, a reasonable person would not believe this consent extended to allowing Officer to pull down the trunk liner (where he found drugs), so such search exceeded the scope of consent.

U.S. v. Berry, 2014 WL 2572781 (N.D. Tex. 2014):
Holding: Even though Defendant appeared nervous at a bus station when he saw police watching him and Defendant gestured toward another man to go back to the terminal with him, this did not provide reasonable suspicion to conduct a pat-down.

In re the Application of the U.S. for an Order Authorizing the Installation and use of a Pen Register and Trap and Trace Device, 2012 WL 2120492 (S.D. Tex. 2012):
Holding: Equipment designed to capture cell phone numbers in vicinity of a criminal investigation required a warrant, not an application under the pen register statute which requires a telephone number or similar identifier.

U.S. v. Campbell, 2011 WL 1883044 (D. Vt. 2011):
Holding: Even though (1) Defendant was in "trunk" portion of out-of-state SUV, (2) there were air fresheners in the SUV, and (3) Officer thought another person in the SUV answered questions falsely and had red, watery eyes, there was no probable cause to arrest Defendant.

U.S. v. Cole, 2013 WL 2435567 (W.D. Wash. 2013):
Holding: Even though Defendant was driving a quarter mile with his left turn light activated, this did not provide probable cause to stop Defendant for violating state negligent driving laws where the highway had left exits.

U.S. v. Toan Phuong Nghe, 2013 WL 692649 (W.D. Wash. 2013):
Holding: Officer did not have reasonable belief that hotel manager had authority to consent to Officer's warrantless entry into Defendant's hotel room, where Officer knew that Defendant had not been required to sign registration papers consenting to search of room, since Defendant was frequent guest of hotel and hotel did not require him to sign registration papers.

State v. Schesso, 2011 WL 6989822 (W.D. Wash. 2011):
Holding: A search warrant for general search and seizure of any electronic storage devices was overbroad because the warrant application included generalized statements regarding cybercrime and pornography collector profiles, but the only crime described was a single incident of file sharing, and nothing in the affidavit demonstrated that the suspect was likely to have committed other crimes.

U.S. v. Taylor, 2013 WL 2102698 and 2013 WL 4059654 (S.D. W.Va. 2013):
Holding: Where Defendant refused to allow Officer to enter vehicle, Officer violated 4th Amendment when without probable cause he entered vehicle anyway, started the car, and turned on the fan in order to allow drug dog to smell the car better.

U.S. v. Ivory, 2014 WL 5591086 (E.D. Wisc. 2014):
Holding: Even though Defendant agreed to be interviewed as a Witness to a shooting, he did not consent to a pat-down search as a condition of the interview; Defendant merely acquiesced when Officer told him he had to be patted down before getting in squad car for interview.

U.S. v. Boarden, 2014 WL 2894904 (E.D. Wisc. 2014):
Holding: Even though Officer had seen Defendant exit a van and drop his phone earlier in the day, Officer did not have reasonable suspicion of criminal activity to stop Defendant later that day when he saw Defendant get out of van again and drop his keys.

U.S. v. Griffin, 2012 WL 330129 (E.D. Wis. 2012):
Holding: Even though Defendant was sitting in the driver's seat of a car for a minute or two and watching a house where a controlled delivery of drugs happened, there was not reasonable suspicion for an investigatory stop since there was no prior information connecting Defendant to the residence or the drugs.

U.S. v. Rock, 2011 WL 2945799 (E.D. Wis. 2011):
Holding: Even though Defendant had only moved into house a few hours before police arrived and lived there rent-free, he had standing to challenge search because he had permission from owners to live there and he planned to make the house his residence.

State v. Gibson, 90 Crim. L. Rep. 601 (Alaska 1/13/12):
Holding: The state constitution's emergency aid doctrine requires courts to consider law enforcement officers' subjective motives for making warrantless entries of homes.

State v. Serna, 95 Crim. L. Rep. 570 (Ariz. 8/7/14):
Holding: Even though Defendant admitted having a gun during a consensual encounter with police, this did not provide reasonable suspicion of criminal activity for police to then do a protective frisk of Defendant; police lacked a reasonable belief Defendant was committing a crime or was dangerous.

State v. Butler, 93 Crim. L. Rep. 313, 2013 WL 2353802 (Ariz. 5/30/13):
Holding: Even though State has an implied consent law for DWI, the voluntariness of Driver-Defendant's consent must still be based upon the totality of the circumstances, not just invocation of the implied-consent law because *Missouri v. McNeely* (U.S. 2013) teaches that a blood draw in DWI is subject to 4th Amendment constraints; here, Juvenile's consent was not voluntary because his parents were not notified before the chemical test.

Mario W. v. Kaipio, 2012 WL 2401343 (Ariz. 2012):
Holding: Taking DNA samples from juveniles who had been charged but not yet adjudicated violated 4th Amendment.

State v. Fisher, 2011 WL 1885952 (Ariz. 2011):
Holding: Even though a gun used in a crime was unaccounted for, police could not conduct a protective sweep of Defendant's apartment after all the occupants were outside, when police could not state any facts to show that they believed another person was still inside.

State v. Allen, 92 Crim. L. Rep. 578 (Ark. 2/7/13):
Holding: 4th Amendment does not allow state officials to stop boats for safety checks in the absence of reasonable suspicion or a plan with express, neutral limitations; Defendant had been charged with boating while intoxicated.

Robey v. Superior Court, 158 Cal. Rptr.3d 261 (Cal. 2013):
Holding: Where shipping company had alerted police that a package smelled of marijuana and police lawfully seized the package as a result, police still were required to obtain a warrant before opening the package, and opening it without a warrant was not justified under "exigent circumstances" exception since the package was already in police custody.

People v. Sotelo, 96 Crim. L. Rep. 109 (Colo. 10/14/14):
Holding: Unauthorized driver of rental car had expectation of privacy in giftwrapped packages in the car.

O'Hara v. People, 2012 WL 691541 (Colo. 2012):
Holding: Wiretapping statute's reference to application of attorney general or district attorney requires attorney general or district attorney to personally authorize application.

State v. Ryder, 2011 WL 3189182 (Conn. 2011):
Holding: Even though a parent thought their missing "disobedient" teenage son might be at Defendant's residence, the "emergency doctrine" did not justify the police searching the home without a warrant.

State v. Abel, 2012 WL 6055799 (Del. 2012):
Holding: Even though motorcyclist-Defendant who was stopped for speeding was a Hells Angel, this did not provide reasonable suspicion that he was armed to justify a pat down search.

McDade v. State, 96 Crim. L. Rep. 302 (Fla. 12/11/14):
Holding: Even though child sex victim made secret recordings of Defendant pressuring her to have sex, such recordings must be suppressed under state law prohibiting interception of oral communications unless all parties consent; it was for the Legislature, not the court, to carve out an exception for recordings that provide evidence of crime; the court rejected the argument that Defendant had no expectation of privacy that society would accept as reasonable in his statements.

State v. Teamer, 95 Crim. L. Rep. 489 (Fla. 7/3/14):
Holding: Even though the color of a car did not match the color in the DMV's database, this color discrepancy did not give police reasonable suspicion to pull over the car and investigate; if that were the case, all owners who choose to paint their cars different colors would be subject to stop.

Tracey v. State, 96 Crim. L. Rep. 105 (Fla. 10/16/14):
Holding: 4th Amendment requires a search warrant to track a suspect using the suspect's mobile phone and real-time cell site location information.

Smallwood v. State, 93 Crim. L. Rep. 177, 2013 WL 1830961 (Fla. 5/2/13):
Holding: 4th Amendment "search incident to arrest" exception does not authorize police to automatically search the contents of cell phones of persons they arrest.

Jardines v. State, 89 Crim. L. Rep. 85, 2011 WL 1405080 (Fla. 4/14/11):
Holding: 4th Amendment's prohibition against unreasonable searches prohibits a drug-dog sniff of threshold of a residence without probable cause.

State v. Cable, 88 Crim. L. Rep. 343, 2010 WL 4977491 (Fla. 12/9/10):
Holding: Under Florida law, violation of knock and announce rule requires suppression of evidence (disagreeing with *Hudson v. Michigan*, 547 U.S. 586 (2006)).

Williams v. State, 97 Crim. L. Rep. 32 (Ga. 3/27/15):
Holding: Defendant-Driver who "consented" to a blood draw after being told his license would be suspended under implied-consent law if he refused did not voluntarily waive his 4th Amendment rights; drivers who acquiesce thinking they have no choice haven't freely consented to a warrantless search.

State v. Colvard, 96 Crim. L. Rep. 491 (Ga. 1/20/15):
Holding: Even though homeowner consented to search of home, 4th Amendment did not allow police to break into locked bedroom for which homeowner did not have a key.

Williams v. State, 2013 WL 4708610 (Ga. 2013):
Holding: DWI checkpoint/roadblock violated 4th Amendment where Sheriff Office's two-sentence roadblock policy authorized "general roadblocks which serve legitimate law enforcement purposes" without limitation, and there was no testimony that the roadblock program excluded checkpoints for general crime control.

Luangkhot v. State, 92 Crim. L. Rep. 470 (Ga. 1/7/13):
Holding: Even though courts in Georgia have jurisdiction over crimes committed in other circuits, courts can only issue warrants for wiretaps within their own circuit's jurisdiction.

Brundige v. State, 92 Crim. L. Rep. 88 (Ga. 10/15/12):
Holding: State statute authorizing search warrants for "tangible evidence" does not authorize a warrant for a thermal imaging scan of a house since heat loss from a house is not "tangible evidence," i.e., evidence which can be touched.

Wilder v. State, 90 Crim. L. Rep. 235 (Ga. 11/7/11):
Holding: Where Officer instructed a third-party to bring a briefcase which was believed to contain evidence of crime to the police station and once at the station Officer obtained a search warrant for briefcase, the initial seizure violated the 4th Amendment and evidence should be suppressed as fruit of that initial illegality, even though Officer obtained a warrant; the independent source exception did not apply because this case involved only a single search preceded by an unlawful seizure.

State v. Walton, 2014 WL 594105 (Haw. 2014):
Holding: Even though the information associated with a store discount card is known by the third-party store, Defendant had reasonable expectation of privacy in that

information, which was violated when police took the card to the store and had the store give police the information without a warrant.

State v. Rodrigues, 92 Crim. L. Rep. 110 (Haw. 10/12/12):
Holding: "Inevitable discovery" doctrine did not allow admission of drugs found in Defendant's pocket during an illegal search after an arrest where the State failed to prove that Defendant would have had no opportunity to get rid of the drugs while being transported to the police station.

State v. Torres, 89 Crim. L. Rep. 120, 2011 WL 1549526 (Haw. 4/15/11):
Holding: Hawaii Constitution is broader than 4th Amendment on exclusionary rule because the Hawaii rule exists not only to deter illegal police conduct but also to protect citizen privacy rights; Hawaii rule applies even to evidence obtained by federal authorities in compliance with 4th Amendment.

State v. Russo, 2014 WL 3747159 (Idaho 2014):
Holding: Even though a search warrant to search warrant authorized seizure of various items from Defendant's house, including a cell phone, the warrant did not authorize Officer to open the phone and search its contents; a second search warrant authorizing search of the phone was required.

State v. Ruck, 94 Crim. L. Rep. 337 (Idaho 11/26/13):
Holding: Even though police could seize a laptop of Defendant-probationer because he was on probation, where the laptop was actually owned by Defendant's employer, the 4th Amendment required a search warrant to search it, because the employer was not on probation and had full 4th Amendment rights.

People v. Cumming, 2014 WL 1097188 (Ill. 2014):
Holding: Where (1) Officer stopped van because he believed van's registration had expired but (2) Officer subsequently learned the registration was current, Officer's reason for the stop expired and Officer illegally prolonged stop by requesting Driver's license; (3) even though Officer learned that the owner of the van was a woman who was wanted for arrest, where the Driver was a man, Officer had no reasonable suspicion to detain Driver and demand identification.

People v. Cummings, 94 Crim. L. Rep. 762 (Ill. 3/20/14):
Holding: Where Officer stopped car because it was registered to a woman with an outstanding arrest warrant, but a man was driving the car, Officer violated 4th Amendment by detaining male driver and asking for his license and proof of insurance; the reason for the stop ended once Officer knew woman was not driving car.

Carpenter v. State, 96 Crim. L. Rep. 142 (Ind. 10/21/14):
Holding: Even though police saw a bloodied dog go into a house, Indiana Constitution's 4th Amendment provision did not allow them to enter the house without a warrant; although police had an interest in protecting the public from violent animals, the dog was in a fenced-in yard and there was no indication that any person was in imminent danger.

State v. Clark, 94 Crim. L. Rep. 14 (Ind. 9/17/13):
Holding: Even though Officer's initial encounter with Defendant was consensual, where Officer ordered Defendant to sit on ground, this was a stop/seizure since no reasonable person would believe they were free to simply get up and walk away; where Officer was called to evict Defendant from a rental unit, Officer lacked reasonable suspicion to justify the stop/seizure of Defendant, and drugs found in his backpack were suppressed since they were the fruit of the unconstitutional order to sit on ground.

State v. Lukins, 95 Crim. L. Rep. 247 (Iowa 5/16/14):
Holding: DWI Defendant, who was deprived of statutory right to an independent blood-alcohol test, is entitled to suppression of the results of the State's test.

State v. Short, 95 Crim. L. Rep. 535 (Iowa 7/18/14):
Holding: Even though Defendant was on probation, the Iowa Constitution's protections against unreasonable search and seizure require a warrant before police can enter and search his residence.

State v. Kern, 93 Crim. L. Rep. 311 (Iowa 5/24/13):
Holding: 4th Amendment "special needs" doctrine does not justify warrantless search of a parole's home even though parole had agreed to warrantless searches as a condition of parole.

State v. Baldon, 93 Crim. L. Rep. 96 (Iowa 4/19/13):
Holding: The consent exception to the warrant requirement does not make it reasonable to conduct a warrantless search of a parolee who has been released subject to a warrantless-search condition; "Considering our obligation to ensure that consent remains a doctrine of voluntariness … we conclude a parole agreement containing a prospective search provision is insufficient evidence to establish consent."

State v. Lowe, 90 Crim. L. Rep. 626 (Iowa. 1/20/12):
Holding: Police officers' belief that a home contained a methamphetamine laboratory did not justify a warrantless entry to protect public safety.

State v. Pals, 2011 WL 5110244 (Iowa 2011):
Holding: Under state constitution, motorist's consent to search of automobile was involuntary where motorist was detained in police cruiser and never advised that he was free to leave or could refuse consent without any retaliation.

State v. Fleming, 2010 WL 4539193 (Iowa 2010):
Holding: Where Defendant rented a room in a single-family home, he had a reasonable expectation of privacy in room and a separate search warrant for room was required.

State v. Louwrens, 2010 WL 4750078 (Iowa 2010):
Holding: Where officer made a mistake of law in stopping Defendant for a U-turn (which was legal), this was a 4th Amendment violation and evidence of DWI found after the illegal stop had to be suppressed.

State v. Ochoa, 88 Crim. L. Rep. 426, 2010 WL 5129869 (Iowa 12/17/10):
Holding: Iowa constitution prohibits conditions of parole allowing suspicionless searches and seizures of parolees (disagreeing with *Samson v. California*, 547 U.S. 843 (2006)).

State v. Julian, 2014 WL 4377409 (Kan. 2014):
Holding: Warrantless search of vehicle incident to arrest was illegal under Kansas statute in effect at time of search, which prohibited searches for the purpose of discovering evidence.

State v. Pettay, 2014 WL 2557235 (Kan. 2014):
Holding: Search of Defendant's car incident to his arrest exceeded scope permissible under statute that limited scope of such searches, and good-faith exception to exclusionary rule did not apply since the State has an interest in ensuring that Officers comply with the statute; no other remedy but suppression would serve that interest.

State v. Stevenson, 2014 WL 1266092 (Kan. 2014):
Holding: Even though Officer smelled alcohol coming from car, this did not, standing alone, provide probable cause to search car for open containers.

State v. Talkington, 96 Crim. L. Rep. 641 (Kan. 3/6/15):
Holding: A social visitor to a house has standing to challenge a police search of the curtilage of the house.

State v. Powell, 95 Crim. L. Rep. 426 (Kan. 6/16/14):
Holding: Where a search warrant was based on an uncorroborated anonymous tip about a stolen car and failed to state the connection between DNA sought from a suspect and that evidence's relevance to the stolen car investigation, the warrant was so defective that the good-faith exception to the exclusionary rule did not apply; good-faith exception does not apply to "bare bones" warrants that contain little indicia of probable cause.

State v. Neighbors, 95 Crim. L. Rep. 194 (Kan. 4/25/14):
Holding: Even though police were permitted to enter apartment without a warrant under emergency-aid doctrine because a person may have been unconscious, once they determined no one inside was seriously injured or in danger, police could not begin searching for evidence of drugs.

State v. Moralez, 93 Crim. L. Rep. 278, 2013 WL 2129114 (Kan. 5/17/13):
Holding: When an illegal detention occurs before Officers discover of an outstanding arrest warrant, the discovery of the warrant is of "minimal importance" in deciding whether the taint of the illegal detention is attenuated from the discovery of evidence

during a search incident to arrest on the warrant; were it otherwise, Officers could stop and detain citizens and then run warrant checks despite not having had any reasonable suspicion to stop them, knowing that if the detention leads to finding a warrant that any evidence found in the subsequent search will be admissible; hence, the discovery of an arrest warrant during an unlawful detention is a relevant intervening circumstance for attenuation purposes but is not independently sufficient to purge the taint of the illegal detention.

State v. Campbell, 93 Crim. L. Rep. 178, 2013 WL 1850747 (Kan. 5/3/13):
Holding: Where Officer covered the peephole of a door he knocked on, this exceeded the scope of resident's implied consent to approach door and knock, and therefore, Officer could not use "exigent circumstances" to justify his warrantless entry into the house when the person who answered door had a handgun as potential protection for himself.

State v. Edgar, 92 Crim. L. Rep. 547 (Kan. 2/1/13):
Holding: Driver's consent to take breath test was rendered invalid by Officer's erroneous statement that Driver had no right to refuse.

State v. Bruce, 92 Crim. L. Rep. 190 (Kan. 11/2/12):
Holding: Congress has preempted the field of statutory wiretap authority under the federal wiretap statute, 18 USC 2515, so a Kansas statute cannot permit a broader wiretap authority than the federal law.

State v. Bogguess, 2012 WL 167334 (Kan. 2012):
Holding: Defendant did not waive privilege against self-incrimination by testifying at suppression hearing, where the hearing was for the purpose of determining the voluntariness of defendant's statements and his testimony was only regarding the voluntariness of his statements, not their truthfulness.

Milam v. Com., 97 Crim. L. Rep. 211 (Ky. 5/14/15):
Holding: Unlike hallways of hotels or apartment buildings, the hallways of a fraternity house are not "public areas" for purposes of Fourth Amendment, so a warrant is required.

Brumley v. Com., 94 Crim. L. Rep. 301 (Ky. 11/21/13):
Holding: Even though (1) Officers heard shuffling in Defendant's house when they arrested him outside of the house, and (2) Officers knew that Defendant possessed guns, Officers could not conduct a "protective sweep" inside the house; applying the protective-sweep exception to the 4th Amendment warrant requirement every time officers hear noises from a residence that they believe contains guns would swallow the rule.

Dye v. Com., 2013 WL 3122823 (Ky. 2013):
Holding: Where police told a juvenile that he would get the death penalty and suffer violence in prison unless he confessed to his sister's murder, his subsequent confession

was coerced, and evidence seized pursuant to a search warrant that was based on the confession was fruit of the poisonous tree.

Frazier v. Com., 93 Crim. L. Rep. 751 (Ky. 8/29/13):
Holding: Even though Defendant, who was stopped for failing to signal while turning, became belligerent, refused to cooperate by answering questions about passengers, refused a consent to search, and seemed nervous, this did not provide reasonable suspicion to frisk Defendant; refusal of consent to search does not create reasonable suspicion of criminal activity; the purpose of a frisk is protective, not investigative.

Com. v. Ousley, 92 Crim. L. Rep. 782 (Ky. 3/21/13):
Holding: Even though trash cans were placed in a driveway near a home where others could access them, the 4th Amendment still required a warrant to search them because they were within the home's curtilage, which distinguished case from *California v. Greenwood*, 486 U.S. 35 (1988), which held that trash cans outside the home's curtilage can be searched without a warrant.

Copley v. Com., 2012 WL 976052 (Ky. 2012):
Holding: When a criminal procedure rule is violated in obtaining a search warrant but a defendant's constitutional rights are not affected, suppression may still be warranted if there is prejudice to the defendant or if there is evidence of deliberate disregard of the rule.

State v. LaPlante, 2011 WL 3298509 (Me. 2011):
Holding: Police had no legal cause to stop Defendant's vehicle for the purpose of asking whether he had seen another unrelated vehicle speeding.

Jones v. State, 90 Crim. L. Rep. 711 (Md. 2/22/12):
Holding: The "public duty" doctrine does not shield the state from a lawsuit for negligently training its police force on Fourth Amendment law where the plaintiff's injuries were not attributable to the acts of another citizen but were inflicted by the officers when they improperly entered the plaintiff's home.

Com. v. Augustine, 2014 WL 901649 (Mass. 2014):
Holding: Police's obtaining of cellular site location data from cellular service to determine Defendant's whereabouts at time of murder was a search which required a warrant.

Com. v. Sheridan, 96 Crim. L. Rep. 625 (Mass. 2/27/15):
Holding: Because possession of small amount of marijuana has been decriminalized, Officers who observe lawful amounts of marijuana in a car during a traffic stop do not have probable cause or reasonable suspicion to believe a crime is being committed so as to allow them to search car.

Com. v. Canning, 97 Crim. L. Rep. 126 (Mass. 4/27/15):
Holding: In light of medical marijuana law, Officers seeking search warrants for manufacturing marijuana must show probable cause to believe the growers are not permitted by law to grow marijuana.

In re Grand Jury Investigation, 96 Crim. L. Rep. 421 (Mass. 1/12/15):
Holding: Where a search warrant was needed to obtain a Defendant's cell phone (but warrant has not been sought), Grand Jury cannot obtain the cell phone by subpoenaing it, and this is true even though Defendant gave the cell phone to his lawyer; "If a client could not be compelled to produce materials because of the right against self-incrimination, and if the client transfers the material to the attorney for the provision of legal advice, an attorney likewise cannot be compelled to produce them."

Com. v. Burgos, 2014 WL 252 (Mass. 11/21/14):
Holding: Wiretap application saying that Defendant was being investigated for the murder of a rival gang member failed to sufficiently connect the murder to Defendant's gang membership under state law that required wiretap to be "in connection with organized crime"; nothing in the application stated that the two gangs were involved in any turf war or dispute, and nothing connects the murder to the gangs' drug dealing operation.

Com. v. Augustine, 94 Crim. L. Rep. 601 (Mass. 2/18/14):
Holding: Massachusetts Constitution requires police obtain a search warrant to obtain mobile phone service's tower data to be able to track cell phone location.

Com. v. Gentile, 94 Crim. L. Rep. 501 (Mass. 1/14/14):
Holding: 4th Amendment was violated where Officers entered a home to execute an arrest warrant after an adult who answered the door said that Defendant wasn't there.

Preventive Medicine Associates v. Com., 93 Crim. L. Rep. 555 (Mass. 7/15/13):
Holding: Post-indictment search warrants must comply with special procedures needed to protect attorney-client privilege and 6th Amendment right to counsel including judicial supervision of and defense participation in the post-indictment screening process.

Com. v. Rousseau, 93 Crim. L. Rep. 354, 2013 WL 2402513 (Mass. 6/5/13):
Holding: State constitution prohibits warrantless GPS monitoring of both driver/owners of cars and passengers because it violates right to privacy.

Com. v. Nelson, 2011 WL 4057576 (Mass. 2011):
Holding: If Officer seeking search warrant did not make every reasonable effort to appear in front of warrant judge in person, evidence must be suppressed; fax and telephone warrant applications are not favored.

State v. Cruz, 2011 WL 1447590 (Mass. 2011):
Holding: In light of statute decriminalizing possession of small amounts of marijuana, where Police smelled odor of marijuana coming from a car, this did not give rise to

reasonable suspicion that Defendant (a passenger) was engaged in criminal activity so as to question and search Defendant.

Com. v. Gomes, 2010 WL 4609453 (Mass. 2010):
Holding: An anonymous tip of a man holding a gun in the air did not justify *Terry* stop of Defendant where there was no corroboration of tip and Defendant made no suspicious movements when approached by Officer.

Com. v. Carr, 2010 WL 4609908 (Mass. 2010):
Holding: Defendant's consent to search of dorm room was not voluntary where Officer demanded identifies and ordered one person to leave and then blocked the exit; Officer's statement that "I would like to search the room" was more an order than a request.

Com. v. Lopez, 88 Crim. L. Rep. 351 (Mass. 12/6/10):
Holding: Where police were expecting a man to open hotel room door but woman answered, police should have questioned woman about her authority to consent to search before relying on her consent to go inside.

State v. Rohde, 95 Crim. L. Rep. 621 (Minn. 8/20/14):
Holding: Even though Driver wasn't licensed and her car wasn't registered, where police did not arrest Driver, they could not impound her car and search it; impoundment can only be justified under 4th Amendment if police need to take custody of and inventory a car for public safety purposes; here, car was posing no threat to safety and Driver should have been allowed to make her own arrangements to tow car.

State v. Hester, 2011 WL 1563683 (Minn. 2011):
Holding: An Indian community police officer was not a "peace officer" where statute defined "peace officer" as a county police officer; thus, he lacked authority to ask Defendant to take an alcohol test in DWI stop.

Cook v. Rankin County, 2014 WL 5285642 (Miss. 2014):
Holding: Even though one anonymous caller gave accurate description of vehicle and location, where another caller said Driver was driving erratically and flashing a badge at people but Officers did not observe that behavior prior to stop, the anonymous tips lacked reliability and did not provide reasonable suspicion to stop car.

State v. Henderson, 96 Crim. L. Rep. 107 (Neb. 10/17/14):
Holding: 4th Amendment requires that a search warrant to search a mobile phone must limit the information that can be searched to content that is related to the probable cause that justifies the search.

J.P. v. Millard Public Schools, 93 Crim. L. Rep. 270 (Neb. 5/17/13):
Holding: The 4th Amendment's school-search doctrine does not justify a warrantless search of a student's vehicle that was parked off campus.

State v. Sprunger, 91 Crim. L. Rep. 18 (Neb. 3/23/12):
Holding: Even though Defendant asked if he could delete some files when police came to Defendant's house with a warrant to search computers for credit card fraud and Defendant's attorney later called police about the matter, this did not provide probable cause to obtain a second warrant to search the computer for child pornography.

State v. Nelson, 90 Crim. L. Rep. 326 (Neb. 12/2/11):
Holding: Even though driver was not listed on rental car agreement, he has standing to bring 4th Amendment challenge to search of car because he had permission from listed person to drive car.

Torres v. State, 96 Crim. L. Rep. 509 (Nev. 1/29/15):
Holding: Where young Defendant was stopped for underage drinking and curfew violation but produced identification showing he was old enough to drink, Officer's further detention of Defendant to run a warrants check violated 4th Amendment and required suppression of evidence that Officer later found during search incident to arrest on the warrant.

Byars v. State, 96 Crim. L. Rep. 110 (Nev. 10/16/14):
Holding: (1) Even though Defendant was suspected of driving while drugged (marijuana), 4th Amendment requires a warrant to do a blood draw; the natural dissipation of TCH from blood does not create exigent circumstances, per se. (2) State implied consent law is unconstitutional because it allows forcible extraction of blood rather than a criminal or administrative penalty if Driver refused consent; for consent to be valid under 4th Amendment, the person must be allowed to modify or revoke consent after it is given.

State v. Kincade, 2013 WL 6835028 (Nev. 2013):
Holding: Search warrant's failure to include a probable cause statement or an attached warrant affidavit rendered the search warrant invalid.

State v. Blesdell-Moore, 95 Crim. L. Rep. 100 (N.H. 4/15/14):
Holding: Officer violated state constitution and exceeded scope of traffic stop for tail-light violation where Officer asked Defendant-Driver to show Driver's tongue, after Officer saw that Driver was nervous and had bloodshot eyes; Officer lacked reasonable suspicion to begin a drug investigation.

State v. Broadus, 96 Crim. L. Rep. 492 (N.H. 1/22/15):
Holding: Even though Officer stopped Driver after observing her litter and seized a marijuana butt from Driver, this did not justify frisking the Passenger; it was not reasonable for Officer to believe Passenger was armed or dangerous, and Officer's belief that Passenger did not make eye contact and lied about not drinking didn't justify frisk either.

State v. Lantange, 94 Crim. L. Rep. 445 (N.H. 12/24/13):
Holding: (1) Even though Defendant was taking photos of young girls' "backsides" at a public swimming lake, this did not provide probable cause to arrest Defendant for

"disorderly conduct" because although the conduct may have caused discomfort to those who witnessed it, making people uncomfortable is not the same as threatening harm; photographing properly attired children at a public swimming pool would not have warranted a reasonable belief that Defendant posed a threat of imminent harm; and (2) this illegal arrest taints Defendant's subsequent confession to unrelated child pornography counts and subsequent discovery of child pornography on his home computer.

State v. Schulz, 2012 WL 4672023 (N.H. 2012):
Holding: Even though police had a warrant to search home for "firearms," where they found only a legal BB gun, they were required to stop their search since the warrant contained no other information authorizing continuing to search the home.

State v. Newcomb, 2011 WL 1399466 (N.H. 2011):
Holding: Officer's warrantless inventory search of truck was invalid where search did not follow standardized police department procedures.

State v. Keaton, 97 Crim. L. Rep. 602 (N.J. 8/3/15):
Holding: Even though car was disabled in accident and Officer had to write an accident report, 4th Amendment did not allow Officer to enter car to obtain Driver's registration and insurance information without Driver's permission.

State v. K.P.S., 2015 WL 1809224 (N.J. 2015):
Holding: Even though appellate court had affirmed denial of motion to suppress in co-defendant's case on same facts, the law-of-the-case doctrine did not apply in Defendant's case to bar consideration of the issue; Defendant had due process right to have his claim decided independently.

State v. Wright, 97 Crim. L. Rep. 203 (N.J. 5/19/15):
Holding: Even though a private person may have previously searched a home and notified police of its contents, police must still obtain a warrant to search the home and cannot search without a warrant under the "private search" doctrine.

State v. Adkins, 97 Crim. L. Rep. 151 (N.J. 5/4/15):
Holding: *McNeely*'s ruling that police must get a warrant to draw blood from DWI suspect applies retroactively to cases that were pending when the ruling was announced, and the good faith exception to the exclusionary rule does not apply.

State v. Coles, 95 Crim. L. Rep. 273 (N.J. 5/19/14):
Holding: Where (1) police detained Defendant on suspicion of a robbery; (2) Defendant gave his name and address but had no identification; and (3) the robbery victim then could not identify Defendant, police unreasonably prolonged the detention by then going to Defendant's address and asking his aunt for consent to search the house (where unlawful firearms were found); the consent was invalid because the detention of Defendant was unreasonably prolonged past its lawful purpose.

State v. Brown, 2014 WL 301355 (N.J. 2014):
Holding: Even though confidential informant told Officer that Defendant's house was "abandoned" and house was in a deteriorated condition, Officer's belief that he could search house without a warrant on grounds that it was "abandoned" property was unreasonable where the house's doors were locked with padlocks and Defendant kept house locked when he was not there.

State v. Earls, 93 Crim. L. Rep. 552 (N.J. 7/18/13):
Holding: New Jersey Constitution requires police to obtain search warrants before electronically tracking the location of suspects using cell phones.

State v. K.W., 2013 WL 3481698 (N.J. 2013):
Holding: Wiretap Act demands strict compliance, and where police failed to get approval of prosecutor before doing a consensual wiretap, evidence obtained from wiretap must be suppressed.

State v. Vargas, 92 Crim. L. Rep. 784, 2013 WL 1104072 (N.J. 3/18/13):
Holding: Even though landlord called 911 because tenant had not been seen for several weeks and their mail was piling up, police were not justified under "community care-taking doctrine" to enter home without warrant; the community care-taking doctrine requires some form of emergency.

State v. Shaw, 92 Crim. L. Rep. 329 (N.J. 12/13/12):
Holding: Officers' discovery of an arrest warrant for Defendant whom they unconstitutionally stopped did not purge the 4th Amendment violation for drugs found during the stop.

State v. Edmonds, 2012 WL 3032259 (N.J. 2012):
Holding: Even though a 911 call about a domestic disturbance at a residence was received from a pay phone, the search of the residence without a warrant was not justified under the emergency aid exception to the warrant requirement because there was no corroboration of a domestic disturbance and police found no weapons on Defendant at the residence after searching him.

State v. Handy, 89 Crim. L. Rep. 153, 2011 WL 1544500 (N.J. 4/26/11):
Holding: Where (1) police stopped Defendant for riding his bicycle on sidewalk, (2) dispatcher reported that there was a warrant for his arrest, and (3) police arrested and searched Defendant and found drugs, drugs must be suppressed because arrest was objectively unreasonable under 4th Amendment where dispatcher should have known that person to be arrested had a different middle initial, spelling of name, and date of birth than Defendant; *Herring v. U.S.*, 555 U.S. 135 (2009) does not apply because the police error here was not attenuated from the arrest and, thus, suppression would have greater deterrent value.

State v. Crane, 95 Crim. L. Rep. 483 (N.M. 6/30/14):
Holding: Even though Defendant threw his trash into a hotel dumpster, New Mexico Constitution provides an expectation of privacy in the trash in a shared trash bin.

State v. Leyva, 88 Crim. L. Rep 636 (N.M. 2/17/11):
Holding: Under New Mexico constitution, police conducting a traffic stop can only ask questions reasonably related to the stop or otherwise supported by reasonable suspicion, and cannot engage in "fishing expeditions" asking about other matters not related to the stop.

People v. Argyris, 2014 WL 6633480 (N.Y. 2014):
Holding: Stop of Defendant's vehicle was without reasonable suspicion where anonymous tipster made only conclusory allegation that Driver was intoxicated or sick, and Officer who observed vehicle commit minor traffic violation was outside his geographic area.

People v. Johnson, 2014 WL 1280304 (N.Y. 2014):
Holding: Even though Defendant and three other men were known gang members and were standing on a street corner, this did not provide probable cause to arrest Defendant for disorderly conduct and search him, because there was no evidence of any actual or threatened public harm; it was not disorderly conduct for Defendant to gather with others on a public street.

People v. Reid, 96 Crim. L. Rep. 339 (N.Y. 12/16/14):
Holding: Even though Officer had probable cause to arrest Defendant for DWI, where Officer admitted he had no intention of doing so until he found a knife on Defendant, the knife found during a pat-down of Defendant must be suppressed; the search incident to arrest exception to the warrant requirement did not apply because the purposes of that exception – officer safety and preservation of evidence -- aren't implicated where no arrest is about to occur.

People v. Jenkins, 96 Crim. L. Rep. 113 (N.Y. 10/16/14):
Holding: Even though police were allowed by exigent circumstances to pursue a fleeing armed man into an apartment, once police handcuffed the man and secured the premises, they did not have authority to search a closed box for the missing gun.

People v. Kevin W., 94 Crim. L. Rep. 307, 2013 WL 6096129 (N.Y. 11/21/13):
Holding: Once a trial court has ruled on a suppression motion, the State cannot "reopen" the hearing to present witnesses it chose not to present at the original hearing.

People v. Baker, 92 Crim. L. Rep. 549 (N.Y. 2/7/13):
Holding: Even though Defendant swore at Officer who was talking to his girlfriend, this did not constitute offense of "disorderly conduct" since there was no indication that this disrupted the public peace, so there was no probable cause to arrest Defendant and drugs found as a result of arrest had to be suppressed.

People v. Garcia, 92 Crim. L. Rep. 352 (N.Y. 12/18/12):
Holding: NY law prohibits police from asking motorists if they have a weapon during routine traffic stops unless the police have reasonable suspicion that criminal activity is afoot.

People v. Gavazzi, 2012 WL 5906686 (N.Y. 2012):
Holding: A warrant to search for child pornography issued by a village justice did not sufficiently comply with the statutory requirement that a warrant clearly identify the issuing court and signature of a judge.

People v. Brannon, 2011 WL 1671883 (N.Y. 2011):
Holding: Even though Officer saw part of knife protruding from Defendant's pocket, this did not provide reasonable suspicion to believe this was an illegal gravity knife, where office did not testify he thought knife was illegal and thought it was a pocketknife.

State v. Rahier, 2014 WL 3513272 (N.D. 2014):
Holding: Even though Defendant's vehicle circled an area 8 times for no apparent reason and flashed its high beams at another Officer, this did not provide reasonable suspicion to initiate a traffic stop.

State v. Zeller, 95 Crim. L. Rep. 52 (N.D. 4/3/14):
Holding: Even though police had not recovered funds used to make a nighttime controlled drug buy, this did not provide probable cause required by state law to execute a search warrant at night; there must be a particular showing that the contraband may be destroyed, sold or removed during the night; here, Officer had testified there was no reason to believe the money would not be at the residence in the morning.

State v. Hart, 2014 WL 116774 (N.D. 2014):
Holding: Where police arrested Defendant on a misdemeanor warrant while Defendant was in his garage, there was no reasonable suspicion for police to do a protective sweep of the entire house, even though Defendant had previously been at another location where drugs or weapons were found; police could have simply arrested Defendant in the garage and left.

State v. Gagnon, 92 Crim. L. Rep. 53 (N.D. 9/25/12):
Holding: Where home's occupants refused to consent to search of the home, police were not justified in subsequently walking through the home to secure the premises while seeking a search warrant, because mere suspicion that evidence may be destroyed does not create exigent circumstances to search without a warrant.

State v. Castagnola, 97 Crim. L. Rep. 128 (Ohio 4/28/15):
Holding: Officer's assumption in search warrant affidavit that a young person would have found harassment victim's address by doing an internet search "usurped the magistrate's inference-drawing authority" and rendered warrant to search Defendant's home for his computer invalid; in determining whether an affidavit supports probable

cause to issue a search warrant, a magistrate cannot infer online activities merely based on the age of the person to be searched.

State v. Gardner, 92 Crim. L. Rep. 309, 2012 WL 6553115 (Ohio 12/6/12):
Holding: Even though a warrant for Defendant was discovered after he was stopped, it cannot justify an unlawful stop and seizure of Defendant where the stopping Officer had no knowledge of the warrant.

State v. Bailey, 96 Crim. L. Rep. 178 (Or. 11/6/14):
Holding: Even though Officer may learn of an arrest warrant for Defendant during an illegal stop, this will not automatically purge the taint of the illegal stop; *Brown v. Illinois* (U.S. 1975) requires the court to consider the time elapsed, the presence of intervening circumstances, and the purpose and flagrancy of the Officer's misconduct in the stop.

State v. Miskell, 2012 WL 1437301 (Or. 2012):
Holding: Police were required to obtain a court order before recording a hotel room conversation between an informant and the defendants.

State v. Kurokawa-Lasciak, 2011 WL 4599663 (Or. 2011):
Holding: Automobile exception does not permit a warrantless search of a vehicle that is parked, immobile, and unoccupied at the time the police encounter it in connection to a crime.

State v. Parker, 2011 WL 1565356 (Or. 2011):
Holding: Officer unreasonably "seized" passenger before passenger gave consent to search his person where Officer asked passenger if there were any warrants for his arrest, wrote down his name and date of birth, and went to police car to run a records check on passenger; a reasonable person would not have felt free to leave.

State v. Guggenmos, 89 Crim. L. Rep. 256 (Or. 5/5/11):
Holding: Even though police saw two men run out of an apparent drug house and someone at the house consented to a search, this did not give them authority under 4th Amendment to conduct a protective sweep of the house.

Com. v. Enimpah, 96 Crim. L. Rep. 358 (Pa. 12/29/14):
Holding: Defendant charged with a possessory crime has automatic standing to file a motion to suppress and need not show a reasonable expectation of privacy before the prosecution's burden of production is triggered.

Com. v. Johnson, 94 Crim. L. Rep. 607 (Pa. 2/18/14):
Holding: The good-faith exception to exclusionary rule does not apply to searches conducted pursuant to an invalid arrest warrant; applying the exclusionary rule to such situations promotes privacy interests because it gives the State an incentive to keep its arrest warrant database current and purge no longer valid arrest warrants; here, Defendant was arrested and searched (resulting in drugs being found) pursuant to an invalid arrest

warrant; the warrant was invalid because it had previously been served on Defendant 9 days earlier, and therefore, had been fulfilled and should not have been served again.

Com. v. Lagenella, 2013 WL 6823057 (Pa. 2013):
Holding: Even though Defendant's car was parked two feet from curb, where it posed no safety concern, Officer was not authorized to tow the car upon learning the Defendant's license had been suspended; thus, Officer's warrantless inventory search of car was unconstitutional.

In re L.J., 94 Crim. L. Rep. 177 (Pa. 10/30/13):
Holding: Appellate courts reviewing a denial of a motion to suppress should not consider any evidence other than that adduced at the suppression hearing; this will protect defendants' due process concerns where they may be unable to cross-examine certain witnesses at trial about suppression matters, or could be forced to testify at trial about suppression matters.

Com. v. Jones, 2013 WL 2360949 (Pa. 2013):
Holding: The "four corners rule," which says that a trial court can only consider information contained in a search warrant affidavit in determining if probable cause existed to issue the warrant, does not apply to a defendant's suppression motion alleging that the statements in the affidavit are untrue or alleging omitted facts; thus, court could consider extrinsic evidence whether police had illegally entered the curtilage of Defendant's home to obtain his trash, examination of which led to probable cause to issue the warrant.

Com. v. Wilson, 93 Crim. L. Rep. 321 (Pa. 5/28/13):
Holding: Trial court had no authority to order Defendant to submit to suspicionless searches as a condition of probation because this violated state statute that allowed probation officers to conduct searches of property only is there is reasonable suspicion of the presence of contraband.

Com. v. Marconi, 92 Crim. L. Rep. 496, 2013 WL 309896 (Pa. 1/22/13):
Holding: Sheriffs' offices do not have authority to establish vehicle checkpoints under Penn. law that authorizes vehicle checkpoints because they do not qualify as "police officers" under the law.

Com. v. Wallace, 2012 WL 1434885 (Pa. 2012):
Holding: An affidavit of probable cause failed to provide a magistrate with a substantial basis to find probable cause to conclude that a controlled buy of drugs at the defendant's home would occur, which was the triggering condition for execution of the anticipatory search warrant.

Com. v. Grahame, 88 Crim. L. Rep. 254 (Pa. 11/17/10):
Holding: Even though drugs were being sold out of a house, where Officer's obtained consent to enter house, they did not have reasonable suspicion to make a warrantless search of Defendant's purse while Defendant was sitting on a couch next to it because

there was not reasonable suspicion under *Terry* to believe Officer's safety was in danger from the purse; court rejects presumption that "drugs and guns go hand in hand."

State v. Hewins, 2014 WL 3461758 (S.C. 2014):
Holding: Even though Defendant litigated a motion to suppress of items in his car in Municipal Court in an open container case, collateral estoppel did not preclude Defendant from re-litigating the motion in State court in drug possession case; the suppression issues weren't necessarily the same, and Defendant had little incentive to pursue the motion in Municipal Court given the minimal penalty for open container.

State v. Adams, 95 Crim. L. Rep. 682 (S.C. 9/10/14):
Holding: Even though Officer placed GPS tracking device on Defendant's car without a warrant before this was struck down in *U.S. v. Jones* (U.S. 2012), the 4th Amendment requires such evidence be suppressed; Officer's reliance on the pre-*Jones* "beeper case" to support his actions wasn't reasonable.

McHam v. State, 93 Crim. L. Rep. 564 (S.C. 7/17/13):
Holding: Where police open a door of a car during a traffic stop, this generally constitutes a search under the 4th Amendment.

State v. Liverman, 2012 WL 2018015 (S.C. 2012):
Holding: Even though eyewitness knew Defendant well, due process required trial court to conduct a *Neil v. Biggers*, 490 U.S. 188 (1972), hearing to determine reliability of eyewitness' out-of-court identification of Defendant to determine if it was impermissibly suggestive.

State v. Amrick, 93 Crim. L. Rep. 211 (S.D. 5/8/13):
Holding: Where Officer mistakenly stopped a car (here mistakenly believing it did not have a license plate), Officer may approach driver and explain mistake but cannot ask for identification, registration or proof of insurance.

State v. Rademaker, 2012 WL 1356687 (S.D. 2012):
Holding: Avoidance of a highway sobriety checkpoint alone is insufficient to form a basis for reasonable suspicion to support a traffic stop.

State v. Zahn, 2012 WL 862707 (S.D. 2012):
Holding: Law enforcement's attachment of a global positioning system to the defendant's vehicle constituted a search.

State v. Morales, 2012 WL 243576 (Wash. 2012):
Holding: State failed to prove that vehicular assault defendant, who was subject to a mandatory blood test, was actually read the required warning of his statutory right to have an additional test administered by a qualified person of his choosing, rendering the results of the test inadmissible.

State v. Moats, 2013 WL 1181967 (Tenn. 2013):
Holding: Where Officer activated blue lights behind a parked car in a parking lot even though there was no indication that the person in the car needed assistance, this was a "seizure" of the person that implicated constitutional protections and was not a permissible exercise of Officer's community care-taking functions.

State v. Strieff, 96 Crim. L. Rep. 460 (Utah 1/16/15):
Holding: Where Officers discovery outstanding warrants for suspects they have unlawfully detained, the admissibility of evidence found during search incident to arrest is governed by inevitable discovery exception, not attenuation of taint analysis; Officer lacked reasonable suspicion to stop Defendant who was driving away from a suspected drug house; evidence found in search incident to arrest (after warrant was discovered) should be suppressed.

State v. Gurule, 94 Crim. L. Rep. 90 (Utah 10/1/13):
Holding: Even though Officers had a tip that Defendant had exchanged cash for something in baggies and was previously associated with drugs, where Officers followed Defendant's car until it swerved and then stopped Defendant, they were justified in conducting a protective frisk of him but when that failed to find anything, Officers "improperly extended" their traffic stop of Defendant under 4th Amendment when they undertook a prolonged investigation and search.

Murry v. Com., 95 Crim. L. Rep. 691 (Va. 9/12/14):
Holding: A condition of probation requiring sex offender to consent to warrantless searches for the rest of his life violated 4th Amendment; such a provision would allow "harassing searches" that are unrelated to Offender's rehabilitation or public safety.

State v. Button, 2013 WL 5495300 (Vt. 2013):
Holding: Even though Defendant's car was stopped on shoulder of road with its engine running, where it was not posing any danger to oncoming traffic and Defendant did not appear in distress, the community caretaking exception did not justify warrantless seizure and search of car.

In re Appeal of Application for Search Warrant, 92 Crim. L. Rep. 249 (Vt. 12/14/12):
Holding: 4th Amendment authorizes magistrate to separate prosecutor and investigating agents from search of a computer by requiring search be done by a third party and then any evidence not related to the offense for which there is probable cause to be kept from the prosecutor and investigators.

State v. Kipp, 317 P.3d 1029 (Wash. 2014):
Holding: Even though Defendant admitted committing sex offense on a secretly recorded conversation between him and his brother-in-law, the statements had to be suppressed under state Privacy Act because Defendant had expectation of privacy in conversation.

State v. Hinton and State v. Roden, 94 Crim. L. Rep. 665, 2014 WL 766680 and 2014 WL 766681 (Wash. 2/27/14):
Holding: Washington Constitution requires a warrant to search Defendants' text messages, even those sent to another phone and obtained from the other phone; here, police had obtained a phone from an arrestee and used messages which had been received on the phone from Defendants to convict them; further, police pretended to be the arrestee and sent texts to Defendants and received texts in return; "Just as subjecting a letter to potential interception while in transit does not extinguish a sender's privacy interest in its contents, neither does subjecting a text communication to the possibility of exposure on someone else's phone."

State v. Snapp, 2012 WL 1134130 (Wash. 2012)
Holding: Warrantless vehicle searches incident to arrest of recent occupants are not permitted under the State Constitution's prohibition against disturbance of private affairs or invasion of home without authority of law; Wash. Const. provides greater protection than *Arizona v. Gant* and requires an officer to obtain a warrant to search a car.

State v. Schultz, 88 Crim. L. Rep. 545 (Wash. 1/13/11):
Holding: Where Officers responded to a report of a couple yelling in their apartment and woman opened door, this did not allow Officers to conduct a warrantless entry into the apartment (where they found drugs), even though they claimed to be acting under "emergency aid" exception to warrant requirement in a domestic violence situation.

State v. Robinson, 2011 WL 1434607 (Wash. 2011):
Holding: *Arizona v. Gant* is retroactive.

State v. Brown, 2014 WL 3446748 (Wisc. 2014):
Holding: Statutory requirement that taillights be in "good working order" did not require that every single light bulb be lit, but instead, only required that tail light be visible; thus, having one of three bulbs out did not provide probable cause or reasonable suspicion to stop vehicle.

State v. Brereton, 92 Crim. L. Rep. 542 (Wis. 2/6/13):
Holding: 4th Amendment requires police to obtain a warrant to place GPS device on Defendant's car.

State v. Juarez, 2011 WL 2989853 (Wyo. 2011):
Holding: Statute prohibiting turning left or right without signaling did not apply to merging into highway traffic from on-ramp because it would be obvious to other motorists that driver had to enter highway; therefore, Officer did not have reason to stop Defendant for failing to signal, and evidence found in subsequent search of car was suppressed.

Benson v. State, 2014 WL 2677916 (Ala. App. 2014):
Holding: Warrantless entry into Defendant's house to carry out arrest of a third-party for whom police had a warrant was not justified by exigent circumstances, where the sole

basis for entry was a tip that the third-party was at Defendant's house at the time and Officers had time to get a search warrant.

Kelly v. State, 2015 WL 1592043 (Alaska App. 2015):
Holding: Public access exception to 4th Amendment did not apply to officer who entered curtilage of defendant's home after midnight by driving down Defendant's private driveway, smelling marijuana, and then getting a search warrant based on the odor.

Dardy v. State, 2012 WL 6554233 (Ala. Crim. App. 2012):
Holding: Swabbing Defendant's hands to detect dried blood was a search within meaning of 4th Amendment.

State v. Wilson, 2014 WL 4086776 (Ariz. App. 2014):
Holding: Even though Defendant told police that mercury had spilled in his house, this did not constitute exigent circumstances to search house without a warrant, since mercury was not illegal and there was no showing of imminent health risk to the public.

State v. Blakley, 2010 WL 4705153 (Ariz. Ct. App. 2010):
Holding: Where Officer approached car in Defendant's driveway in an area not normally used by visitors, this violated Defendant's reasonable expectation of privacy.

People v. Michael E., 2014 WL 4947060 (Cal. App. 2014):
Holding: Even though a computer repairman saw images of underage girls on Defendant's computer and notified police, where police determined the images were not pornographic but (1) directed repairman to "search through and look at" more files and (2) directed repairman to place other files on a flash drive that police could take to the police department to review, the warrantless search exceeded the scope of the prior private search and violated Defendant's reasonable expectation of privacy; the subsequent search of the flash drive created at police direction clearly exceeded the scope of the private prior search.

In re S.F., 169 Cal. Rptr.3d 714 (Cal. App. 2014):
Holding: There was no probable cause to arrest Juvenile, who, when stopped for jaywalking and asked if he had anything illegal, said he had a marker called a "streaker"; there was no evidence Juvenile knew possession of the marker was illegal only if he intended to commit vandalism; evidence Juvenile had marijuana was fruit of poisonous tree and suppressed.

People v. Evans, 96 Crim. L. Rep. 78 (Cal. App. 10/3/14):
Holding: Even though a computer repairman searched some files on Defendant's computer, this didn't allow police to search other files on the computer without a warrant.

People v. Walker, 2012 WL 4948216 (Cal. App. 2012):
Holding: Even though Officer claimed he stopped African-American passenger of a train on basis that he matched a description of a sexual assault suspect, where the

description of the suspect was not similar to the passenger's appearance, there was no reasonable suspicion for the stop.

People v. Fulton, 2012 WL 1795126 (Cal. App. 2012):
Holding: Seizing evidence from a person's genitalia without a warrant as a search incident to arrest requires exigent circumstances, such as officer safety or imminent destruction of evidence; 4th Amendment was violated for warrantless seizure of Defendant's pubic hairs and swabs from his penis where Defendant was accused of rape.

People v. Carmona, 2011 WL 2090036 (Cal. App. 2011):
Holding: Statute requiring a turn signal "in the event any other vehicle may be affected by the movement" and statute requiring any signal be given "during the last 100 feet traveled before turning" had to be read together, meaning that a driver must signal for a turn 100 feet ahead of time *only if* another vehicle might be affected. Thus, Officer lacked reasonable suspicion to conduct a traffic stop where driver failed to signal but this could not have affected another vehicle.

People v. Xinos, 2011 WL 386864 (Cal. App. 2011):
Holding: Driver had reasonable expectation of privacy in vehicle's sensing and diagnostic module (SDM); police lacked probable cause for a warrantless download of raw SDM data from the vehicle after it was involved in a fatal crash.

Magallan v. Superior Court, 2011 WL 658651 (Cal. App. 2011):
Holding: Judge had power to grant discovery to prepare for motion to suppress hearing, and not just to prepare for trial.

People v. Buza, 89 Crim. L. Rep. 715 (Cal. App. 8/4/11):
Holding: DNA testing of all felony arrestees violates 4th Amendment's ban on unreasonable searches.

Robey v. Superior Court, 2011 WL 5027491 (Cal. App. 2011):
Holding: Even assuming officer's warrantless seizure of a package which smelled like marijuana had been legal, the officer was required to hold the package until he had obtained a warrant.

People v. Reyes, 2011 WL 2437829 (Cal. App. 2011):
Holding: Even though Defendant's vehicle had only one Florida license plate, where this did not violate either Florida or California law, this did not provide reasonable suspicion to stop car.

McClamma v. State, 2014 WL 1871510 (Fla. App. 2014):
Holding: Even though Officer knew that various burglaries had happened in an area and had a report of a man walking in the area, this did not provide reasonable suspicion to stop Defendant who he saw run from a house and into a taxi.

State v. Ojeda, 2013 WL 1810631 (Fla. App. 2013):
Holding: Officer's act of going on to private property to knock on door to arrest Defendant for an old drug charge without a warrant violated 4th Amendment, even if the property did not have a fence or "no trespassing" sign.

Teamer v. State, 2012 WL 6634135 (Fla. App. 2012):
Holding: Even though the color of vehicle did not match the vehicle's registration, this did not provide reasonable suspicion to stop the vehicle, since there was no law prohibiting changing a vehicle's color or requiring an owner to notify the State of a change in color, and this alone was not enough to provide suspicion that Defendant was driving with stolen tags.

Hernandez v. State, 92 Crim. L. Rep. 89 (Fla. App. 10/5/12):
Holding: Where police knew an occupant lacked authority to consent to search of locked bedroom in a house, they could not enter the bedroom under the guise of a "protective sweep" to make sure no one was in a position to ambush them.

Wiggs v. State, 2011 WL 3300139 (Fla. Dist. Ct. App. 2011):
Holding: Where drug dog had accuracy rate of only 29%, this was insufficient to provide probable cause to believe that drugs would be found in car after dog alerted.

Hentz v. State, 2011 WL 2200628 (Fla. Ct. App. 2011):
Holding: Even though Defendant knew his co-Defendant was at police station when phone call took place, Defendant had reasonable expectation of privacy in cell phone call for purposes of wiretap statute where Defendant was at home.

Brown v. State, 2014 WL 7130535 (Ga. App. 2014):
Holding: Warrantless search of DWI Defendant's cell phone violated 4th Amendment absent exigent circumstances; there were no such circumstances where Driver was arrested, handcuffed and put in patrol car.

Shaw v. State, 2013 WL 5992887 (Ga. App. 2013):
Holding: Impoundment of Defendant's car was not necessary incident to his arrest, so the subsequent inventory search was invalid and inevitable discovery was inapplicable; there was no evidence that the car was parked in a manner which presented a hazard to traffic or that he was given an opportunity to make alternative arrangements for car.

Walker v. State, 2013 WL 3481859 (Ga. App. 2013):
Holding: Officer escalated his consensual encounter with Defendant into an investigatory stop, requiring reasonable suspicion of criminal activity, when Officer ordered Defendant to remove his hands from his pockets; even though Defendant was walking off school property after midnight, this did not provide reasonable suspicion of criminal activity to stop Defendant.

State v. Barnett, **2012 WL 373352 (Ga. Ct. App. 2012):**
Holding: Boilerplate language that drug evidence was likely to be destroyed and that drug suspects often possess weapons did not constitute particular facts or circumstances justifying the no-knock provision of a search warrant.

People v. Burns, 2015 WL 404355 (Ill. App. 2015):
Holding: Use of drug dog to sniff outside Defendant's apartment door without a warrant violated 4th Amendment.

People v. Gaytan, 2013 WL 2253654 (Ill. App. 2013):
Holding: Even though a trailer hitch was partially obscuring vehicle's license plate, this did not provide cause for a traffic stop since the hitch did not violate the non-obstruction statute.

People v. Petty, 2012 WL 6194196 (Ill. App. 2012):
Holding: Even though Officer saw two people transfer an object hand-to-hand from one car to another, this did not provide reasonable suspicion of criminal activity to stop car.

State v. Rinehart, 90 Crim. L. Rep. 359 (Ill. App. 11/30/11):
Holding: Even though an anonymous person flagged down an officer and said someone had a gun, this did not provide reasonable suspicion to stop a person who matched the description where the person who flagged down the officer had not given their name.

People v. Nesbitt, 88 Crim. L. Rep. 254, 2010 WL 4542903 (Ill. App. 11/8/10):
Holding: Illinois Constitution protects privacy in bank records.

Cupello v. State, 2015 WL 1065387 (Ind. App. 2015):
Holding: Where Officer without a warrant put his foot in door of Defendant's residence while speaking to him, this was an unlawful entry under Fourth Amendment, and Defendant was entitled to use reasonable force to prevent the unlawful entry under Castle Doctrine; Defendant used reasonable force to terminate the unlawful entry when he slammed the door, even though door hit officer, and Defendant was entitled to Castle Doctrine defense to assault-on-law-enforcement-officer charge.

J.K. v. State, 2014 WL 1687790 (Ind. App. 2014):
Holding: Officers exceeded bounds of a permissible "knock and talk" investigation and violated 4th Amendment where they surrounded Defendant-Juvenile's house at 1:00 a.m., knocked on the door for 45 minutes, peeked in windows and continuously yelled at the occupant to come outside; "When a [defendant] exercises his constitutional right to remain inside his home, law enforcement may not pitch a tent on the front porch and wait in hopes of obtaining evidence."

Killebrew v. State, 2012 WL 5077159 (Ind. App. 2012):
Holding: Even though Defendant drove through an intersection with his turn signal on, this was not a traffic violation and did not provide reasonable suspicion to stop the car.

Corwin v. State, 2011 WL 6282365 (Ind. Ct. App. 2011):
Holding: Officer did not have probable cause to arrest defendant based on pill bottle found in defendant's pocket during a *Terry* frisk, and so the officer was not justified in opening the bottle as a search incident to arrest.

Gunn v. State, 2011 WL 5034299 (Ind. Ct. App. 2011):
Holding: Where officer misinterpreted traffic ordinance and mistakenly believed defendant had violated it, there was no reasonable suspicion to stop defendant's vehicle.

Willoughby v. Com., 2014 WL 92253 (Ky. Ct. App. 2014):
Holding: Record was insufficient to determine whether State's automated vehicle information system (AVIS), which signaled to a police officer to verify Defendant's proof of insurance, was sufficiently reliable to support reasonable suspicion for a traffic stop for lack of insurance; there was no evidence presented about the reliability of the system.

Turner v. Com., 2011 WL 3516289 (Ky. Ct. App. 2011):
Holding: Where Defendant-driver was in police custody and not in car, Officer could not search passenger compartment of car.

State v. Weber, 2013 WL 3239493 (La. App. 2013):
Holding: Officer did not have probable cause for to believe unconscious Defendant who was brought to hospital after car accident was the driver of the vehicle to support a blood draw, where the vehicle had other occupants and no one ever asked who the driver was, and even though another officer knew the car belonged to Defendant, that officer never told the Officer who did the blood draw.

State v. Bone, 2012 WL 3968515 (La. App. 2012):
Holding: Even though Defendant was not the owner or subscriber of a cell phone, where he was the exclusive user, he had a reasonable expectation of privacy in the phone and Gov't could not search text messages without showing probable cause.

State v. Mulder, 2011 WL 5066392 (La. App. 2011):
Holding: Where there were no factors indicating a safety concern, officers lacked reasonable suspicion to frisk defendant suspected of nonresidency in housing development in which he was walking.

Com. v. Damon, 2012 WL 2866129 (Mass. App. 2012):
Holding: Even though Officer smelled burnt marijuana coming from vehicle, this alone did not provide probable cause to order occupants out of car and search car; since small amounts of marijuana had been decriminalized, the odor of marijuana alone did not justify this without additional suspicion of criminal activity.

Com. v. Miller, 2011 WL 693010 (Mass. Ct. App. 2011):
Holding: Even though Defendant put a black strip across his car's license plate that covered up the words "Spirit of America," Officer's stop of car for this was invalid because this was not illegal; Officer erroneously believed this was illegal.

In re Contempt of Dorsey, 2014 WL 4435591 (Mich. App. 2014):
Holding: 4th Amendment prohibited juvenile court, as part of adjudication of Juvenile, from ordering that juvenile's Mother submit to random drug tests; Mother did not have diminished expectation of privacy merely because her son had been adjudicated delinquent.

State v. Barajas, 2012 WL 3023330 (Minn. App. 2012):
Holding: A defendant has the same reasonable expectation of privacy in the concealed digital contents of a cell phone as he does in the contents of a physical container; thus, even though Defendant's phone was seized from an apartment in which he was illegally residing, police were required to obtain a warrant to search the contents of the phone for photos.

State v. Nelson, 2011 WL 6004242 (Neb. Ct. App. 2011):
Holding: Even though defendant's name was not on the rental agreement for a rental car, but where he had permission from his uncle, whose name was on the agreement, to drive the vehicle, defendant had standing to challenge his detention and the search of the vehicle on Fourth Amendment grounds.

State v. Bivins, 2014 WL 1884230 (N.J. Super. Ct. 2014):
Holding: Even though Officer received report that someone was leaving the scene of a residential search and walking toward a gray car, this did not provide probable cause to stop Defendant who was sitting in a gray car five or six houses away from the scene; the Officer had not been told if the person had fled the scene with evidence, and Defendant was not acting suspiciously or nervously when approached by Officer.

State v. Kaltner, 2011 WL 2623555 (N.J. Super. Ct. App. 2011):
Holding: Even though police entry into home in response to a noise complaint was justified, they were not justified in doing a full-blown search of the house to carry out noise abatement or

State v. Davis, 2014 WL 130464 (N.M. App. 2014):
Holding: Under New Mexico Constitution, an aerial search of Defendant's greenhouse by police in a helicopter required a search warrant before conducting the surveillance.

State v. Almanzar, 2012 WL 3101686 (N.M. App. 2012):
Holding: Even though statute authorized police to make warrantless arrests at scene of a domestic disturbance, the statute did not authorize arresting a suspect away from the scene without a warrant.

State v. Almeida, 2011 WL 2207589 (N.M. Ct. App. 2011):
Holding: Officer lacked reasonable suspicion to stop driver-Defendant after he made a left turn but not into the left-most lane, because this did not violate any statute regarding left turns, even though Officer thought it did.

State v. Boyse, 2011 WL 5966492 (N.M. Ct. App. 2011), cert. granted, (Nov. 4, 2011):
Holding: State constitutional requirement that warrant be supported by written showing of probable cause did not permit warrant based on unrecorded telephone conversation between detective and magistrate.

State v. Combs, 2011 WL 6130774 (N.M. Ct. App. 2011):
Holding: Showup procedure employed by deputy lacked indicia of reliability necessary to overcome suggestiveness of the procedure, where the deputy was shown a mug shot of the defendant and told that it was the driver the deputy had issued a citation to two months earlier.

State v. Portillo, 2011 WL 3687637 (N.M. Ct. App. 2011):
Holding: Where (1) Defendant was passenger in vehicle stopped for speeding; (2) driver was told he was free to leave; and (3) Officer continued to question passenger about drugs in vehicle, Officer's questions unlawfully extended the traffic stop for Defendant-passenger without reasonable suspicion under New Mexico Constitution.

State v. Crane, 2011 WL 2554315 (N.M. Ct. App. 2011):
Holding: Under New Mexico Constitution, Defendant has reasonable expectation of privacy in garbage placed in motel waste container.

State v. Crane, 89 Crim. L. Rep. 128 (N.M. Ct. App. 4/7/11):
Holding: Under New Mexico Constitution, police violated Defendant's privacy interest by searching garbage bags in a dumpster at a hotel; by placing his garbage in a sealed bag and putting it in the dumpster used by hotel guests, Defendant demonstrated a reasonable expectation of privacy that the bags would not be searchd by police without a warrant.

People v. Delvillartron, 992 N.Y.S.2d 363 (N.Y. App. 2014):
Holding: Even though two robbery suspects were in Defendant's parked car several blocks from a robbery scene, police lacked probable cause to arrest Defendant where his car was lawfully parked, he did not resist police in any way, and his behavior in fumbling for his keys was innocuous.

In re Darryl C., 2012 WL 2383852 (N.Y. App. 2012):
Holding: Even though there had been recent gang violence in area, Officer lacked reasonable suspicion to stop and frisk Juvenile who was standing alone on a street in the daytime and who was holding an object that he put in his pocket when he saw the Officer.

People v. Smith, **2012 WL 895362 (N.Y. App. Div. 4th Dep't 2012):**
Holding: It was objectively unreasonable for officers to apply taser to compel suspect to open his mouth for DNA swab.

People v. Pomales, **2012 WL 539798 (N.Y. Sup 2012):**
Holding: A non-incarcerated parolee on release from his indeterminate prison sentence of two to six years qualified as "any person in custody" for the purposes of the Drug Law Reform Act (DLRA), which permitted defendants with indeterminate sentences to apply for resentencing to a lower determinate sentence.

People v. Hemmings, 2012 WL 127422 (N.Y. Sup 2012):
Holding: Defendant had reasonable expectation of privacy in closed booth in adult video store, despite the fact that the booth's door was not locked.

People v. Tashbaeva, **2012 WL 283587 (N.Y. City Crim. Ct. 2012):**
Holding: Police officers' previous plain view observation of bottles containing alcohol in the vehicle of a defendant arrested for operating a motor vehicle while intoxicated did not provide a predicate for a warrantless seizure of the bottles on the following day.

People v. Omowale, 2011 WL 1584859 (N.Y. App. Div. 2011):
Holding: Even though Defendant had previously been arrested for possession of a weapon in a car, this did not create reasonable suspicion to believe Defendant was armed at a later time when he was in a doubly-parked car.

State v. Cottrell, 2014 WL 2937052 (N.C. App. 2014):
Holding: Even though (1) Officer detained Defendant at traffic stop for only two additional minutes after original purpose of stop was concluded in order to get drug dog, and (2) Defendant consented to search, the consent was invalid because the traffic stop was over and this was not a "de minimis" intrusion.

State v. Smith, 729 S.E.2d 120 (N.C. App. 2012):
Holding: Drug dog's alert at driver's door of car did not create probable cause to search a recent passenger in the car.

State v. Pasour, 2012 WL 4867700 (N.C. App. 2012):
Holding: Even though Defendant failed to answer knock on front and side door to house, Officers lacked reasonable suspicion or justification to enter backyard of Defendant's house (where marijuana was found) since this was curtilage of house where Defendant had reasonable expectation of privacy.

State v.Mbacke, 2011 WL 13814 (N.C. Ct. App. 2011):
Holding: Even though Defendant was arrested for carrying a concealed weapon, it was not reasonable to believe his vehicle contained evidence of the offense and so, after Defendant had been arrested and placed in patrol car, the vehicle could not be searched without a warrant.

State v. Norman, 2014 WL 6156927 (Ohio App. 2014):
Holding: Where a co-tenant shares a residence with a probationer, a warrantless search of the residence pursuant to probation conditions must be limited to the areas over which there is joint control or exclusive control by the probationer.

State v. Littell, 2014 WL 535836 (Ohio App. 2014):
Holding: Even though aerial surveillance of Defendant's yard would have given police probable cause to obtain a search warrant for marijuana, there were no exigent circumstances justifying entering the curtilage of the residence without a warrant.

State v. Clark, 2014 WL 5510488 (Ohio App. 2014):
Holding: Defendant accused of DWI has a reasonable expectation of privacy in his medical records that pertain to any medical tests to determine alcohol or drugs, and Officers must obtain warrant to obtain records.

State v. Johnson, 2014 WL 688227 (Ohio App. 2014):
Holding: Even though Probationer was living with Defendant, the scope of Probationer's consent to search was limited to areas over which he had common authority; Officers were not permitted to search a locked bedroom possessed solely by Defendant.

State v. Gorby, 2014 WL 2567943 (Ohio App. 2014):
Holding: Where Officer testified at suppression hearing that she assumes that everyone has a weapon until proven otherwise, Officer lacked probable cause to search a lumpy plastic bag she felt under Defendant's waistband during a pat-down search (which ultimately contained drugs), where no other objective facts would have led Officer to believe Defendant had contraband.

State v. Brown, 2013 WL 6410442 (Ohio App. 2013):
Holding: Officer's stop of Defendant outside of Officer's jurisdiction, in violation of state law providing that state highway patrol and county sheriffs have exclusive authority to make arrests on interstate highways, violated unreasonable search and seizure provision of Ohio Constitution.

State v. Hoffman, 2013 WL 1190654 (Ohio App. 2013):
Holding: Warrant issued by deputy clerk without probable cause determination was invalid.

State v. Haas, 2012 WL 1926399 (Ohio App. 2012):
Holding: Defendant's act of stopping on a road in residential or business area did not violate statute prohibiting parking on a public highway, and thus, Officer did not have reasonable suspicion to stop Defendant on this basis even though Officer misunderstood the traffic statute.

State v. Gardner, 2011 WL 5328637 (Ohio Ct. App. 2011):
Holding: Where defendant's arrest warrant was discovered only as a result of an unlawful stop, the exclusionary rule applies.

State v. Stewart, 2011 WL 2434146 (Ohio Ct. App. 2011):
Holding: Even though police had a description of African-American man and woman involved in a shooting, police lacked reasonable suspicion to stop African-American Defendant and his girlfriend in African-American neighborhood, where suspects were described as 5'10" to 6" in late 20's or early 30's, and Defendant was 5'8" and 20 years old; one officer conceded they were stopped because of their race.

State v. Bass, 93 Crim. L. Rep. 238 (Okla. Crim. App. 5/1/13):
Holding: Even though Driver-Defendant was driving a rental car that was rented by another person, where the other person had given Driver permission to use car, Driver had reasonable expectation of privacy in vehicle.

State v, Groom, 2012 WL 1022909 (Or. Ct. App. 2012):
Holding: A police officer's search of a defendant's car was not within the automobile exception to the warrant requirement because the car was not moving when the officer first encountered it "in connection with a crime," as required by *State v. Kurokawa-Lasciak.*

State v. Zamaro-Martinez, 2011 WL 2698218 (Or. App. 2011):
Holding: Defendant was "seized" under Oregon Const. where Defendant produced an ID card and then Officer asked for more forms of identification; even though stop may have begun as "casual encounter," it escalated into a seizure because a reasonable person would not have felt free to leave.

Com. v. Dunnavant, 2013 WL 696500 (Pa. Super. 2013):
Holding : Where Gov't confidential informant wore a hidden video camera into Defendant's house, this was a per se unreasonable search of the house without a warrant, even if the conduct was inadvertent.

State v. Villarreal, 2014 WL 6734178 (Tex. App. 2014):
Holding: Even though State had implied consent law, this did not justify warrantless blood draw in DWI case.

Smith v. State, 2014 WL 5901759 (Tex. App. 2014):
Holding: Warrantless blood draw pursuant to a statute that required a blood draw in DWI cases where Defendant has two prior DWI convictions violated 4th Amendment.

Sutherland v. State, 2014 WL 1370118 (Tex. App. 2014):
Holding: Statute which required warrantless blood draw from DWI arrestees with prior DWI offenses without any exigent circumstances violated 4th Amendment.

Weems v. State, 2014 WL 2532299 (Tex. App. 2014):
Holding: Statutory scheme which deemed prior DWI defendants to have consented to a blood draw in a subsequent DWI case involving an accident violated 4th Amendment's warrant requirement; statute created an unconstitutional, categorical per se rule for a warrantless search.

Matthews v. State, 95 Crim. L. Rep. 388 (Tex. Crim. App. 6/11/14):
Holding: People driving borrowed cars have a reasonable expectation of privacy in the car for 4th Amendment purposes; the borrower has superior control of the car, excludes others, and privacy in a borrowed car is consistent with a bailee's privacy.

State v. Granville, 94 Crim. L. Rep. 667, 2014 WL 714730 (Tex. App. 2/26/14):
Holding: Even though police had seized Defendant's cell phone when he was arrested and Defendant was now in jail, police needed a warrant to search the phone; the court rejected the argument that because jailed inmates have a diminished expectation of privacy, there is no expectation of privacy in a seized cell phone that is stored at the jail, and rejected the argument that a search incident to arrest exception should apply, since this exception was designed to promote officer safety and prevent destruction of evidence, neither of which applied here.

Thomas v. State, 2013 WL 6878911 (Tex. App. 2013):
Holding: Where Officer stopped Defendant for driving on a shoulder, Officer improperly prolonged traffic stop after giving a citation where Officer lacked reasonable suspicion that Defendant was engaging in criminal activity; even though Defendant's trip did not seem logical, had a one-way rental car, had only a small backpack as luggage and refused consent to search, the Defendant's driver's license and criminal history were okay.

Arguellez v. State, 2013 WL 5220957 (Tex. App. 2013):
Holding: Even though Defendant took photos of women and children at a public swimming pool, this did not provide reasonable suspicion that Defendant was engaged in a crime to stop Defendant for investigation, because such conduct is not unusual, suspicious or criminal; further, because there was no indication that a crime was afoot, Defendant's leaving the scene of the photos was not flight or evasion from police.

State v. Betts, 93 Crim. L. Rep. 155 (Tex. App. 4/17/13):
Holding: Even though Officer observed malnourished dogs in fenced backyard of house, 4th Amendment did not allow Officer to enter yard without a search warrant.

Turrubiate v. State, 93 Crim. L. Rep. 150, 2013 WL 1428172 (Tex. App. 4/10/13):
Holding: Even though Officer smelled marijuana when house's occupant opened door, this did not create exigent circumstances to enter house without a warrant in the absence of any evidence that destruction of evidence was imminent.

Abney v. State, 2013 WL 1222711 (Tex. App. 2013):
Holding: Even though Defendant-Driver was driving in the left lane (passing lane) of a road without passing anyone, this did not create reasonable suspicion of a traffic violation to justify Officer's stop of Defendant.

State v. Elrod, 2013 WL 811828 (Tex. App. 2013):
Holding: Even though Defendant-Babysitter invited emergency personnel into house where child had stopped breathing, Defendant did not waive her expectation of privacy and had standing to challenge the legality of the search of house; neither the emergency aid doctrine nor plain view doctrine address the issue of standing.

Miller v. State, 92 Crim. L. Rep. 243 (Tex. Crim. App. 11/21/12):
Holding: Even though police heard yelling and throwing of objects at residence and suspected domestic violence, where woman opened door and said everything was okay, they violated the 4th Amendment when they refused to leave and searched around since they did not have reasonable suspicion to do this, even though the woman was intoxicated and looked distraught; concern about the possibility of domestic violence was unreasonable absent any physical injuries, sounds of a second voice, or evidence that another person was in the residence.

Orosco v. State, 2012 WL 2924473 (Tex. App. 2012):
Holding: Police cannot use an unreasonable show of force during a "knock and talk" to compel a Defendant to open their door.

Mahaffey v. State, 364 S.W.3d 908 (Tex. Crim. App. 2012):
Holding: Even though Defendant-Driver did not signal when he merged from a lane that was ending into another lane, there was not reasonable suspicion to stop Driver since Driver's merging did not require a signal.

Crider v. State, 2011 WL 5554806 (Tex. Crim. App. 2011):
Holding: An affidavit in support of a search warrant to draw blood did not establish probable cause where there was no indication in the affidavit of how much time had passed between its signing and when the stop was initially made.

State v. Weaver, 90 Crim. L. Rep. 15 (Tex. Crim. App. 9/28/11):
Holding: Loading dock area was a private area (not a public parking lot) and, thus, police could not use a drug dog to sniff vehicles there without a warrant.

Martinez v. State, 2011 WL 2555712 (Tex. Crim. App. 2011):
Holding: Officer lacked reasonable suspicion to stop truck (which ultimately led to DWI arrest) based on caller stating that a truck picked up two bicycles and drove west; the caller failed to report anything reasonably linking this activity to a theft.

State v. Martines, 2014 WL 3611308 (Wash. App. 2014):
Holding: Even though State lawfully obtained blood sample from Defendant, State needed an independent search warrant that authorized the testing of the sample and the

specific types of evidence for which the sample could be tested in DWI case; the warrant to take the blood did not limit Gov't's discretion to search only for evidence of alcohol or drugs, making the testing that occurred an unauthorized warrantless search.

State v. Gauthier, 2013 WL 1314971 (Wash. App. 2013):
Holding: The use of Defendant's invocation of his constitutional right to refuse to give a DNA sample without a warrant as substantive evidence of his guilt of rape violated Defendant's right against unreasonable search and seizure; exercising right to refuse consent to a warrantless search may have had nothing to do with guilt, and a jury should not be allowed to infer guilt from exercise of a constitutional right.

State v. Lohr, 2011 WL 4944297 (Wash. Ct. App. 2011):
Holding: Search of defendant's purse was not authorized under premises search warrant.

State v. Monaghan, 2011 WL 6957596 (Wash. Ct. App. 1 2011):
Holding: Where defendant gave consent to search the trunk of his car, that consent did not extend to search of locked container within the trunk.

Self-Defense

State v. Mangum, 390 S.W.3d 853 (Mo. App. E.D. 2013):
(1) Defendant can claim plain error in self-defense instructions where there was no evidence in the record that the defense submitted the instructions; (2) where the evidence viewed in the light favorable to the defense showed that multiple assailants attacked Defendant, it was plain error for self-defense jury instructions to instruct jury that they could acquit only if Defendant reasonably believed he needed to use force against a particular named person; (3) even though one of the assailants was only slapping and hitting Defendant and deadly force is not justified absent threat of death or serious physical injury, where Defendant was attacked by multiple people – some of whom were threatening serious bodily harm -- the acts of one attacker become the acts of another so Defendant can use deadly force against the common threat (all the assailants).
Facts: Viewed in the light most favorable to the defense, the evidence showed that Defendant was attacked by two assailants. He ultimately shot one of them. The jury instructions on self-defense instructed jurors that they could acquit Defendant only if he reasonably believed he needed to use force against one of the particular named assailants to protect himself.
Holding: (1) An appellant waives plain error review of an instruction that he himself submitted, even if the instruction is erroneous. Here, however, nothing in the record shows that Defendant submitted the self-defense instructions at issue; therefore, there is no waiver of plain error review. (2) MAI-CR3d 306.06, Note on Use 7, specifically provides for modification of the self-defense instruction to provide for multiple assailants. Here, however, the jury could find self-defense only if the jury believed that Defendant was protecting himself from a particular named assailant. The State argues that because Defendant did not face death or serious physical injury from the other

assailant, who was only hitting and slapping him, he was not justified in using deadly force against her; therefore, no self-defense instruction about her was necessary. However, where a defendant is being attacked by multiple assailants, the act of one becomes the act of another. If two assailants are acting in concert to attack a defendant, the victim is entitled to an instruction hypothesizing multiple assailants. "We hold that a multiple assailant self-defense instruction is warranted even when the person the defendant assaulted never posed a direct threat of bodily harm to the defendant, as long as there is evidence that the person the defendant assaulted acted in concert with the assailant …. [W]hen two or more persons undertake overt action to harm another, the victim may use an appropriate amount of force to defend himself against either aggressor, or both of them." The Defendant was entitled to a self-defense instruction against all the assailants, not just the one against whom Defendant acted.

State v. Kasparie, 2015 WL 6951727 (Mo. App. S.D. Nov. 10, 2015):
Even though jurors are free to disbelieve any testimony (including Victim's), in order to receive a self-defense instruction, there must be affirmative evidence from which a reasonable inference can be drawn that Defendant was not the initial aggressor (or had thereafter withdrawn in such a manner as to qualify for the defense).
Facts: Defendant claimed the trial court plainly erred in failing to give a self-defense instruction because both the Victim and Defendant sustained injuries in the charged altercation.
Holding: Even if Defendant does not request a self-defense instruction at trial, it is error not to give it if substantial evidence supported it. A trial court must give the instruction regardless of whether the evidence supporting the justification defense is inconsistent with Defendant's testimony or theory of the case, because any conflict in the evidence must be resolved by a properly instructed jury. The State argues Defendant was not entitled to the instruction because Sec. 563.031.1(1) precludes the instruction where Defendant was "the initial aggressor." Defendant argues that the jury was free to disbelieve Victim's testimony that Defendant was the aggressor. The jury's right to disbelieve the State's evidence is not the same as having a basis in the evidence to support an instruction. The trial court did not err in failing to instruct in self-defense.

Horton v. Warden, Trumbell County Correctional Inst., 2011 WL 590259 (N.D. Ohio 2011):
Holding: Self-defense instruction should have been given where Defendant did not create the situation giving rise to the shooting and did not violate any duty to retreat or avoid danger.

Dennis v. State, 88 Crim. L. Rep. 436, 2010 WL 5110231 (Fla. 12/16/10):
Holding: Under "Stand Your Ground" law (which provides immunity from prosecution for justifiably using force to resist certain arrests), the trial judge is to resolve factual questions via pretrial motion as to whether to grant immunity, and not deny the motion and let the jury decide the factual questions.

State v. Ultreras, 2013 WL 772264 (Kan. 2013):
Holding: The standard of proof for whether Defendant is immune from criminal liability based on justifiable use of force is probable cause, and State had burden of establishing proof that the force was not justified as part of the probable cause determination.

People v. Moreno, 2012 WL 1381039 (Mich. 2012):
Holding: Statute prohibiting people from resisting and obstructing a police officer did not abrogate common-law right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas; neither the language nor legislative history of the statute indicated that the Legislature intended to abrogate this common-law right.

Richardson v. State, 2014 WL 2994439 (Miss. 2014):
Holding: Victim's violent prior bad acts and criminal history were admissible to show Defendant's statement of mind where Defendant claimed self-defense to murder.

Newell v. State, 2010 WL 4882026 (Miss. 2010):
Holding: Where Defendant was attacked while getting into his vehicle, he was entitled to an instruction under "castle doctrine" that he shot victim-assailant in reasonable fear of harm to himself, even though Defendant had exited the vehicle when he shot victim-assailant.

State v. Duncan, 89 Crim. L. Rep. 256, 2011 WL 1744209 (S.C. 5/9/11):
Holding: Where Defendant was charged with killing a former guest who was trying to force his way back into Defendant's house, Defendant was entitled to a pretrial determination of immunity from prosecution under state's home-defense statute (castle doctrine).

People v. Clark, 2011 WL 5926182 (Cal. App. 2011):
Holding: Self-defense can be a defense to direct child abuse.

Heilman v. State, 2014 WL 1255319 (Fla. App. 2014):
Holding: Even though one statute "authorized" limited circumstances in which prison Officer could use force against an inmate, Officer was not precluded from using a "stand your ground" statute defense in case in which Officer was charged with battery against an inmate, because the two statutes were different, and "stand your ground" statute addressed "justifiable," rather than "authorized" use of force.

Dorsey v. State, 2014 WL 4995171 (Fla. App. 2014):
Holding: Defendant had no duty to retreat under Stand Your Ground Law even if he was engaged in unlawful activity at time of shooting; the law had no requirement that person not be engaged in unlawful activity.

Martin v. State, 2013 WL 646231 (Fla. App. 2013):
Holding: Evidence that Defendant, on account of his paranoid delirium, believed he was being threatened or attacked was admissible for purposes of supporting his self-defense claim for assault on officer, and supported a jury instruction on self-defense.

Cupello v. State, 2015 WL 1065387 (Ind. App. 2015):
Holding: Where Officer without a warrant put his foot in door of Defendant's residence while speaking to him, this was an unlawful entry under Fourth Amendment, and Defendant was entitled to use reasonable force to prevent the unlawful entry under Castle Doctrine; Defendant used reasonable force to terminate the unlawful entry when he slammed the door, even though door hit officer, and Defendant was entitled to Castle Doctrine defense to assault-on-law-enforcement-officer charge.

State v. White, 2012 WL 3570777 (Neb. App. 2012):
Holding: The right to self-defense and not to retreat when being attacked in a home applies equally whether the attacker is a cohabitant or an unlawful entrant.

Alonzo v. State, 89 Crim. L. Rep. 856 (Tex. Crim. App. 9/14/11):
Holding: Even though charged offense had a recklessness mens rea, Defendant could still get instruction on self-defense because jury would be deciding if Defendant acted recklessly or acted in self-defense; by arguing self-defense, Defendant is claiming that his actions were justified and he did not act recklessly.

Sentencing Issues

State ex rel. Hodges v. Asel, 460 S.W.3d 926 (Mo. banc 2015) and **State ex rel. Mammen v. Chapman, 2015 WL 3385895 (Mo. banc May 26, 2015):**
Sec. 577.023.6(4) requires "chronic offenders" serve a minimum of two years in prison even when they successfully complete long term treatment under Sec. 217.362.3 prior to expiration of two years.
Facts: Defendants were convicted of DWI as "chronic offenders" under Sec. 577.023.6(4), sentenced to 5 and 10 years respectively, and placed in long term treatment under Sec. 217.362.3. Defendants successfully completed long term treatment in less than two years. The DOC recommended, and the trial courts approved, that they be released on probation after serving two years. Defendants sought their immediate release via writs of mandamus.
Holding: Sec. 577.023.6(4) unequivocally provides that no chronic offender shall be eligible for probation or parole until he has served a minimum of two years imprisonment. Sec. 217.362.4 does not require a trial court to grant probation to a chronic offender before serving two years. Defendants rely on statements in *State ex rel. Salm v. Mennemeyer*, 423 S.W.3d 319 (Mo. App. 2014), and *State ex rel. Sandknop v. Goldman*, 450 S.W.3d 499 (Mo. App. 2014), that upon successful completion of long term treatment a trial court must either (1) allow the defendant to be released on probation, or (2) determine probation is not appropriate and order execution of the sentence. But neither case dealt with the interplay between 577.023.6(4) and 217.362.3.

The long term treatment statute does not require immediate release of a chronic offender before serving the minimum two years required by 577.023.6(4). Here, the DOC advised the trial courts that Defendants had successfully completed long term treatment and would be eligible for release in June 2015 – *upon having served two years*. The trial courts' approval of the two-year release date complied with 577.023.6(4) and 217.362.4. Writs of mandamus denied.

State v. Taylor, 2015 WL 4627927 (Mo. banc Aug. 4, 2015):
Holding: Court questions trial judge's practice of telling the attorneys what sentence Judge will give before Judge actually sentences defendants so that defendants will not be surprised or have "emotional trauma" over the sentence in open court, because this is contrary to the right of a defendant to personally be given the opportunity to speak and present mitigating evidence prior to sentencing; however, the practice does not violate Rule 29.07(b)(1), because its requirement of allocution is merely directory and not mandatory.

State ex rel. Richardson v. Green, 465 S.W.3d 60 (Mo. banc July 21, 2015):
Even though Sec. 558.046 allows a judge to reduce sentences for alcohol and drug-related crimes that do not "involve violence," Defendant's involuntary manslaughter conviction arising out of a DWI did not qualify for reduction; involuntary manslaughter "involves violence" since, under the statute, a perpetrator must cause death through criminal negligence.
Facts: Defendant was convicted of two counts of involuntary manslaughter for killing two people in a car accident involving DWI. He was sentenced to 15 years. Later, he sought a sentence reduction under Sec. 558.046. The trial court reduced his sentence to seven years. The State sought a writ of prohibition.
Holding: Sec. 558.046 allows a sentencing court to reduce any term of sentence, probation, conditional release or parole for persons convicted of an offense that "did not involve violence" or threat of violence, and that involved alcohol or illegal drugs. Defendant claims his offense did not "involve violence" since he did not intend violence. However, the phrase "involve violence" is broad and encompasses more than merely crimes of violence. The offense of involuntary manslaughter, Sec. 565.024.1(3)(a), inherently involves violence because it contains an element of causing death through criminal negligence, regardless of whether violence was intended by the perpetrator. The statute is not limited to violence that was intentionally or knowingly inflicted. The statute did not authorize the trial court to reduce Defendant's sentence here. Writ granted.

State v. Smith, 2015 WL 1094826 (Mo. banc March 10, 2015):
Holding: (1) Even though Defendant was convicted of murder and assault for shooting at one person (the assault) but the bullet hit and killed another person (the murder), this did not violate double jeopardy because when the same conduct results in harm to two or more victims, Defendant may be convicted for the harm to each victim. (2) Where the written judgment and sentence stated that Defendant pleaded guilty, but he actually was convicted at trial, this was a clerical error that can be corrected nunc pro tunc under Rule 29.12(c).

State v. Lemasters, 2015 WL 778400 (Mo. banc Feb. 24, 2015):
Holding: Where written sentence and judgment erroneously stated that Defendant was convicted of two counts instead of one, Rule 29.12(c) allows case to be remanded for entry of a nunc pro tunc order to reflect what actually occurred.

State v. Hardin, 429 S.W.3d 417 (Mo. banc 2014):
(1) Where forcible rape statute stated the punishment as a "term of imprisonment of life imprisonment or a term of years not less than five," a sentence of 50 years was not outside the statutory range under the plain language of the statute since this was "not less than five," and (2) conviction for both "aggravated stalking" and "violation of protection order" did not violate double jeopardy because violation of protection order is not a lesser-included offense of "aggravated stalking" under the statutory elements test, which is the applicable test for determining lesser-included offenses.
Facts: Defendant was convicted of forcible rape for abducting and raping his wife. He was also convicted of "aggravated stalking" and five counts of "violation of a protective order" for telephoning his wife five times from jail. He was sentenced to 50 years for the rape. On appeal, he claimed that the 50-year sentence exceeded the permissible statutory range, and that his convictions for "aggravated stalking" and "violation of a protective order" violated double jeopardy.
Holding: (1) The rape statute, Sec. 566.030.2 RSMo Supp. 2009, provides that the authorized term is "life imprisonment or a term of years not less than five." Defendant claims the authorized term is five years *to* life. Defendant bases his argument on Sec. 558.019.4 which provides that a sentence of life shall be calculated to be 30 years for parole eligibility purposes. However, parole eligibility is not the same as the authorized term of imprisonment. Defendant's reading is inconsistent with the plain language of the rape statute. The statute says "life imprisonment *or* a term of years not less than five." The "or" is disjunctive, meaning the Legislature intended *either* life imprisonment, *or* a term not less than five. To the extent that prior decisions of the Court of Appeals have held that the maximum punishment is life imprisonment (*State v. Williams*, 828 S.W.2d 894 (Mo. App. 1992), *State v. Anderson* , 844 S.W.2d 40 (Mo. App. 1992)), they should no longer be followed. (2) Double jeopardy protects against multiple punishments for the same offense, but does no more than prevent the sentencing court from imposing greater punishment than the Legislature intended. Sec. 556.041 says a defendant cannot be convicted of more than one offense if one offense is included in the other. One offense is "included" in the other where it is established by proof of the same or less than all the elements required to establish commission of the charged offense. The test is an *elements* test by comparing the elements of the relevant statutes; not a test based on how the offense is charged. A person commits "aggravated stalking," Sec. 565.225.3, if his course of conduct includes listed aggravated factors such as (1) making a threat, (2) violating a protective order, or (3) violating a condition of probation, parole or pretrial release. A person commits the crime of "violation of a protective order," Sec. 455.085.2, when they commit an act of abuse in violation of the order. Under the elements test, violating a protective order is not "included" in the offense of "aggravated stalking." "Aggravated stalking" requires proof of a course of conduct composed of two or more acts and "aggravated factors," whereas a protective order violation can be proven by a

single act of abuse of the order. "Aggravated stalking" can be proven without demonstrating an order of violation of protection. For example, if the defendant makes a threat. Each offense requires proof of an element the other does not. Defendant assumes that whether the offense of "violating a protection order" is included in the offense of "aggravated stalking" depends on how "aggravated stalking" is charged, proved or submitted to the jury, and that where it is charged and submitted based on violating a protection order, this violated double jeopardy. However, the proper test focusses only on the *elements* of the statutes defining each offense. An indictment-based analysis is wrong. To the extent that *State v. Smith*, 370 S.W.3d 891 (Mo. App. 2012) is contrary, it should no longer be followed.

State ex rel. Strauser v. Martinez, 2014 WL 120624 (Mo. banc Jan. 14, 2014):
Where trial court suspended probation and ordered Defendants to appear in court multiple times to continue to pay restitution or court costs, court could not revoke probation after the probation term expired because court did not make every reasonable effort to conduct a revocation hearing during the probation term.
Facts: Two separate Defendants with similar facts sought writs of prohibition to stop the trial court from revoking their probation after their probation terms had expired. Defendant-Strauser received an SIS in 2007 and was ordered to pay $8,389 in restitution. Later, in 2007, the State filed a motion to revoke probation due to failure to pay. The trial court passed the case numerous times, ordering Defendant each time to pay $100 per month. Eventually, the trial court suspended probation and ordered her to continue to appear in court periodically to make payments. Defendant appeared dozens of times from 2007 through 2013. Eventually, in 2013, the court sought to revoke her probation. Defendant-Edmonds received an SIS in 2003 and ordered to pay costs. In 2008, the court suspended probation for failure to pay. In 2008, on the last day of the probation term, the court held a probation violation hearing and ordered her to pay $55 per month. Between 2008 and 2013, the court continued the case and ordered Defendant to appear in court 22 times, with each appearance labeled as a "case review" or "hearing to monitor payments." In 2013, Defendant filed a motion to discharge probation.
Holding: Defendant-Strauser's probation term ended in 2012. Defendant-Edmonds' term ended in 2008. Section 559.036.8 RSMo. Supp. 2012 allows a court to revoke probation after a probation term has ended if (1) the court manifested its intent to conduct a revocation hearing during the probation term, and (2) the court made every reasonable effort to notify the probationer and hold a hearing before the term ends. Here, the court manifested an intent to hold a hearing and notified the Defendants, but the court did not make every reasonable effort to conduct revocation hearings during the Defendants' probation terms. The court could have held a hearing and revoked during the probationary period, but instead, through various orders, just required Defendants to appear and make payments. The court continued this even after the probationary terms ended. Because the court could have revoked probation on any of the numerous occasions Defendants appeared in court before the probation term expired, but the court chose not to do so, the court did not make every reasonable effort to hold the hearing during the probation term. Although the court may have had worthy goals of attempting to ensure maximum restitution while not imprisoning the Defendants, 559.036.8 does not permit what the court did. In the future, however, new Sec. 559.105 RSMo. 2013 will

give more "flexibility" in collecting restitution. 559.105.2 (2013) now provides that a probationer ordered to pay restitution shall not be released from probation until restitution is complete and "[i]f full restitution is not made … the court shall order the maximum term of probation allowed for such offense."

Concurring Opinion: The concurring opinion notes that judges may also use new 559.105.3 to revoke probation more often because 559.105.3 requires restitution be paid as a condition of parole. 559.105.3 repeals the prior prohibition against requiring a defendant both to serve a prison term and to pay restitution and, thus, relieves courts from having to choose between a prison term and restitution. Anytime a court believes a prison term is warranted – or does not believe the defendant will make full restitution within the maximum five-year probation period – the court can remand the defendant to the DOC for a lengthy term and be assured that defendant will be required to pay restitution during his parole term. This may disadvantage future defendants. However, any adjustments to the balance struck by Sec. 559.036.8 (as interpreted by today's opinion) and the 2013 amendments to Sec. 559.105 must be made by the Legislature.

Farish v. Missouri Department of Corrections, 2013 WL 6822231 (Mo. banc Dec. 24, 2013):

Even though Petitioner was being held in Kansas on a Missouri detainer, where he also was being held in Kansas on Kansas charges, Petitioner was not entitled to jail time credit against his Missouri sentence for the time spent in Kansas since that time was not "compelled exclusively," Sec. 558.031.1(2), by Missouri.

Facts: Petitioner was arrested by Kansas and held by Kansas for a robbery in Kansas. Missouri then issued a detainer for him for a robbery in Missouri. Petitioner was ultimately convicted in both Kansas and Missouri. He sought "jail time" credit against his Missouri sentence for time spent in Kansas.

Holding: Sec. 558.031.1(2) provides that a person shall receive jail time credit for time spent in jail prior to a sentence, but "[s]uch credit shall only be applied if the person convicted was in custody in the state of Missouri, unless such custody was compelled exclusively by the state of Missouri's action." Petitioner claims he is entitled to credit for time in Kansas after Missouri lodged its detainer. This Court has never construed the term "compelled exclusively," so this is a case of first impression. The plain meaning of such term is "single" or "sole." That is not the case here. The detainer did not unilaterally cause Petitioner to enter Kansas custody or remain in Kansas custody. A detainer is merely a "request" that an institution notify other authorities (here, Missouri) that a person's release is imminent. At most, Kansas may have been obligated under the Interstate Agreement on Detainers to deliver Petitioner to Missouri to be tried on his charges here. However, the custody in Kansas was compelled by Kansas' own charges against Petitioner, not the Missouri detainer. Therefore, he is not entitled to credit for that time against his Missouri sentence.

Roe I. v. Replogle, 408 S.W.3d 759 (Mo. banc 2013):

Holding: Federal sex offender registration act (SORNA) does not violate the nondelegation doctrine of U.S. Constitution, even though it delegates to Attorney General the decision on how SORNA applies to pre-Act offenders.

State v. Hart, 404 S.W.3d 232 (Mo. banc 2013):

(1) Where Juvenile-Defendant was convicted of first degree murder and sentenced to life in prison without parole (LWOP) without the sentencer having considered mitigating factors, the sentence violates the 8th Amendment and must be remanded for a new sentencing; (2) at the new sentencing, the sentencer must first determine whether a sentence of LWOP is appropriate considering mitigating factors; (3) if the sentencer determines LWOP is not appropriate, then the first degree murder statute is unconstitutional as applied to Defendant, and the court must enter a conviction for second degree murder and the sentencer then sentence for second degree murder; and (4) even though Defendant had waived his right to jury sentencing before his original trial, that waiver was not knowing because it was made without considering the new, qualitatively different decision a sentencer must make about mitigating circumstances after Miller v. Alabama.

Facts: Juvenile-Defendant was convicted of first degree murder and armed criminal action, and sentenced to LWOP and a concurrent term of 30 years. He waived jury sentencing before trial. While Juvenile's direct appeal was pending, the U.S. Supreme Court decided *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which forbids sentencing a juvenile to LWOP when there has been no consideration of mitigating circumstances.

Holding: Juvenile's sentence of LWOP violates the 8th Amendment after *Miller* because there was no consideration of mitigating circumstances prior to imposing LWOP under Sec. 565.020, since LWOP was the only sentence authorized for first degree murder. The question is what remedy must be given. *Miller* holds that an LWOP sentence is permissible as long as the sentencer determines it is just and appropriate given Juvenile's age, maturity and other mitigating factors. On remand, the State must persuade the sentencer beyond a reasonable doubt that an LWOP sentence is just and appropriate under all the circumstances. As an initial matter, the State argues that the sentencer must be the judge here because Juvenile waived his right to jury sentencing before trial, so he was willing to have a judge determine the entire range of punishment, regardless of what offense he was ultimately convicted of. While the State's waiver argument would usually be correct, here it is not because Juvenile's decision to waive a jury was mistaken as to the role of the sentencer in light of *Miller*, which created a qualitatively new decision that the sentencer must make. Therefore, Juvenile's jury waiver will not be enforced on remand. Regarding the procedure to follow, the jury must be properly instructed that it may not find LWOP unless it is persuaded beyond a reasonable doubt that LWOP is just and appropriate under all the circumstances. However, the jury should not be given a choice of punishments for first degree murder because this would violate the separation of powers since the legislature, not courts, determines punishments for crimes. Therefore, the jury should be instructed that if it is not persuaded that LWOP is just and appropriate, additional instructions concerning additional punishments will be given. If the jury finds LWOP, the judge must impose that sentence. However, if the jury does not find LWOP, the judge must declare Sec. 565.020 void as applied to Juvenile on grounds that it fails to provide a constitutionally valid punishment. In that case, the judge must vacate the finding of guilt of first-degree murder, and enter a new finding of guilt of second-degree murder. In that case, the judge must also vacate the finding of armed criminal action based on having been found guilty of first degree murder, and enter a new finding of ACA in connection with second-degree murder. After the trial court enters

those findings, the jury must then determine Juvenile's sentences within the statutory ranges for those crimes. This procedure may require two separate submissions to the sentencer in a single penalty phase, but is required to carry out *Miller* without violating the legislature's prerogative to decide which punishments are authorized for which crimes.

State v. Nathan, 404 S.W.3d 253 (Mo. banc 2013):
(1) Once a Juvenile is certified to stand trial in circuit court, the State is not limited to the charges alleged in the juvenile petition, and may bring whatever charges it believes are justified regardless of whether such charges or underlying facts were included in the juvenile petition; (2) where Defendant-Juvenile was convicted of first degree murder and sentenced to LWOP without consideration of mitigating circumstances, such sentence violates the 8th Amendment and the case is remanded for resentencing per the procedure set forth in State v. Hart, No. SC93153 (Mo. banc 7/30/13); but (3) even though Juvenile contends he must also be resentenced for various non-homicide offenses if he is ultimately resentenced for second-degree murder, Juvenile did not appeal these convictions or argue that the non-homicide sentences (individually or combined) are unlawful or unconstitutional so resentencing on those is not addressed, and his implication that the combined effect of such sentences may be unconstitutional is premature until after the resentencing procedure, and will be moot if Juvenile is sentenced to LWOP.
Facts: Defendant-Juvenile was convicted of first degree murder from a robbery and home invasion. He was sentenced to LWOP. He was also convicted of many other offenses stemming from the home invasion, and given multiple consecutive life sentences. While his appeal was pending, the U.S. Supreme Court decided *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which forbids sentencing a juvenile to LWOP when there has been no consideration of mitigating circumstances. On appeal, Defendant challenged his LWOP sentence, and also challenged the certification procedure used in his case because he was ultimately allowed to be charged with and convicted of various crimes that were not alleged in the juvenile petition in juvenile court.
Holding: (1) Regarding the certification procedure, Juvenile argues that some of the offenses of which he was convicted had not been "certified" by the juvenile court, and thus, could not be brought or tried in circuit court. The flaw in this argument, however, is that the certification procedure created in Section 211.071 pertains to *individuals*, not to specific conduct or crimes or charges. The statute speaks in terms of "transfer[ing] a child" to circuit court for prosecution. The focus in a certification proceeding is on the juvenile, not the conduct alleged in the petition. The petition serves only to invoke the juvenile court's exclusive jurisdiction by identifying the individual as being younger than 17 and alleging the juvenile has engaged in conduct that would be a crime if committed by an adult. Under 211.017, the juvenile court may dismiss the petition and "transfer the child" to circuit court. When that occurs, the jurisdiction of the juvenile court over the child is terminated unless the child is found not guilty in circuit court. Nothing in 211.071 allows a juvenile court to retain jurisdiction over the juvenile for some parts of a petition but not others. If a juvenile court relinquishes its exclusive jurisdiction by transferring a child to circuit court, the state is not bound solely to the factual allegations raised or violations of law asserted in the juvenile petition, but may bring whatever

charges it believes are justified, regardless of whether those charges or the underlying facts were included in the petition. (2) For the reasons discussed in *State v. Hart, No. SC93153 (Mo. banc 7/30/13)*, Juvenile must be resentenced pursuant to the procedures there. Juvenile argues that if he is ultimately found guilty of second degree murder, he must be resentenced on his multiple non-homicide offenses, too. However, he has not argued that any of those sentences or the combined effect thereof is unlawful or unconstitutional. Because this claim is not preserved or presented, it will not be addressed here. To the extent that Juvenile is trying to assert a claim that the combined effect of the sentences is unconstitutional, such a claim is premature until after resentencing, and will be moot if Juvenile is sentenced to LWOP.

Doe v. Franklin County Sheriff Toelke, No. SC92380 (Mo. banc 12/18/12):
Holding: Where Doe was convicted of a sex offense in 1983 and "had been" required to register under the federal SORNA at least until 2009, he is required to register under the Missouri registration statute, Sec. 589.400.1(7), which requires a person to register if he "has been … required to register under … federal … law"; "[e]ven if Doe presently is not required to register pursuant to SORNA, he 'has been' required to register as a sex offender, and therefore, is required to register pursuant to" Missouri's sex offender registration law.

State ex rel. Valentine v. Orr, No. SC92434 (Mo. banc 6/12/12):
A sentence to the Sex Offender Assessment Unit program is "120-day program" under Sec. 559.115.3, and where the DOC recommends release of a defendant, the court must hold a hearing on the matter within 90 to 120 days of sentencing in order to deny release.
Facts: Defendant pleaded guilty to a sex offense and, as part of his plea agreement, was sentenced to 120 days in the DOC Sex Offender Assessment Unit (SOAU). The court told Defendant that it would retain jurisdiction over him for 120 days after sentencing, but that successful completion of the program did not guarantee release on probation. The DOC ultimately issued a report that the court should grant Defendant probation. However, more than 120 days after sentencing, the court held a hearing and determined it would be an abuse of discretion to release Defendant. The court ordered that Defendant's prison sentence be executed. Defendant sought a writ of mandamus.
Holding: Sec. 559.115.3 requires that after a sentence has been imposed and the DOC timely reports that a defendant successfully completed an institutional program, the defendant must be released on probation unless a court determines that release is an abuse of discretion. However, the statute requires that a court hold a hearing within 90 to 120 days of sentencing before finding an abuse of discretion and ordering that a sentence be executed. Failure to hold a hearing within the 90 to 120 days mandates that a defendant be released. The SOAU is a 120 day "program" for purposes of Sec. 559.115.3. Here, the court's failure to hold a hearing within the mandatory time for denying release means that the court had no authority to deny release later. Writ issues to order release.

State v. Bowman, No. SC90618 (Mo. banc 4/12/11):
State cannot present in penalty phase evidence about Defendant's prior convictions which were later reversed, even though this also constituted prior bad acts and non-statutory aggravating circumstances.

Facts: Defendant was charged with a murder which occurred in 1977. The evidence against Defendant was DNA in the victim's underwear and an eyewitness who picked Defendant out of a photo line up 30 years after the murder. After 1977, Defendant was convicted of two additional murders in Illinois, but those convictions were later vacated by Illinois courts. In the death penalty phase, the State was permitted to introduce evidence about Defendant's prior Illinois convictions. The jury imposed death.
Holding: *Johnson v. Mississippi*, 486 U.S. 578 (1988), held that the reversal of a prior conviction that the jury considered in imposing death undermines the validity of the death sentence. In *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007), this Court used *Johnson* to reverse a death sentence because two of six aggravating factors found by the jury consisted of McFadden's conviction and death sentence in another case. This case is similar to *McFadden*. The State argues that the evidence of Defendant's vacated convictions is admissible as unadjudicated prior bad acts, also referred to as non-statutory aggravating circumstances. Even if true, however, this Court cannot assume that the jury's weighing process and sense of responsibility were unaffected by its knowledge that Defendant previously had been convicted of two murders. Death sentence is vacated and remanded for new penalty phase trial.

Concurring and dissenting opinion: Judge Wolff would hold that the evidence, although (barely) sufficient to convict, is not sufficient to sustain a death sentence. He notes problems with the DNA evidence, problems with reliability of an eyewitness identification 30 years after the fact, and evidence that another person may have committed the crime. He would impose a sentence of life without parole under Sec. 565.035.5(2).

State v. Collins, No. SC90839 (Mo. banc 1/11/11):
Where State failed to properly prove up Defendant's prior DWI convictions at bench trial before sentencing, this was a failure of proof that Defendant was a "chronic offender," and State could not offer additional evidence upon remand for resentencing to prove the prior offenses.
Facts: Defendant was charged with DWI as a "chronic offender" with having multiple prior DWI convictions. He had a bench trial. As evidence of prior convictions, the State offered a copy of Defendant's driving record showing prior DWI convictions. The exhibit did not specify whether Defendant was represented by counsel or waived counsel in the prior proceedings.
Holding: Defendant claims the trial court plainly erred in finding he was a "chronic offender" because the State did not properly prove up his prior convictions. Sentencing a defendant to a term greater than the maximum allowable punishment constitutes plain error. At the time of Defendant's conviction, Sec. 577.023.1(3) required the State to prove that Defendant had counsel or waived counsel in his prior offenses. Under Section 577.023.9, the presentation of evidence and court findings on the prior offenses must be done prior to sentencing. Here, the State concedes there was no evidence about representation by or waiver of counsel. However, the State contends it should be permitted to present such evidence on remand. This Court has rejected this contention in a jury trial context. The question is whether the rule should be different in a bench trial context. It should not. Allowing the State to present new evidence of prior convictions would give the State two bites of the apple. Under the timing requirements of the statute,

the State is foreclosed from offering additional evidence at resentencing. The State argues that if the case is remanded for resentencing, then it is still "prior to sentencing" so that the State can present additional evidence. But this does not comport with the plain language of the statute, which makes no mention of vacated sentences. Remanded for resentencing as Class B misdemeanor.

State v. Meeks, 2015 WL 3875204 (Mo. App. E.D. June 23, 2015):
Holding: Where the written sentence and judgment varied from the oral pronouncement, the oral pronouncement controls, and judgment is modified under Rule 30.23 to reflect correct sentence.

State ex rel. Davis-Demars v. Mennemeyer, 2015 WL 9478189 (Mo. App. E.D. Dec. 29, 2015):
Where Defendant successfully completes long term treatment, Sec. 217.362.2 requires judge to either (1) allow Defendant to be released on probation, or (2) determine that probation is not appropriate and execute the sentence; judge does not have authority to extend the Defendant's release date.
Facts: Defendant was convicted of various offenses. She was sentenced to multiple prison terms, some consecutive to each other, and placed in long-term treatment under Sec. 217.362. The DOC reported that Defendant successfully completed the program would be released on probation in October 2015. Judge issued an order that Defendant cannot be released until February 2016. Defendant brought writ of mandamus.
Holding: Upon successful completion of a long-term treatment program, Sec. 217.362.2 requires a court to either (1) allow a defendant to be released on probation, or (2) determine that probation is not appropriate and execute the sentence. Respondent-Judge issued an order purporting to begin probation in February 2016. Nothing in 217.362 authorizes a judge to delay a defendant's release from custody beyond that established by DOC. Because Judge has already determined that Defendant should be released on probation, Judge is directed to issue a new order releasing Defendant on probation immediately.

State v. Burns, 2015 WL 8802429 (Mo. App. E.D. Dec. 15, 2015):
Holding: Where the written sentence and judgment differed from the oral pronouncement of sentence in that the court orally pronounced an SIS but the written judgment stated an SES, the oral pronouncement controls and this clerical error may be corrected by a *nunc pro tunc* order where the trial court's intentions are clear from the record; remanded for entry of new judgment *nunc pro tunc* under Rule 29.12(c).

State v. Johnson, 2015 WL 7455477 (Mo. App. E.D. Nov. 24, 2015):
(1) Sec. 558.018.5(3), which provides that a Defendant may be classified as a predatory sexual offender if he "has committed" first-degree statutory rape or sodomy against more than one victim, does not require that the acts be prior to the instant case; the acts in the instant case count under the statute; (2) even though Sec. 558.021 requires that a finding of predatory sexual offender be made before submission to the jury, the trial court did not plainly err in finding this at sentencing because Defendant waived jury sentencing and also was not sentenced to a higher sentence than allowed under the

unenhanced range; (3) to the extent that Secs. 558.018.5 and 558.021 require a court, rather than a jury, make factual findings that increase Defendant's minimum sentence, the statutes are subject to attack under Alleyne v. U.S., 133 S.Ct. 2151 (2013)(holding that any fact that increases a defendant's mandatory minimum sentence for a crime must be submitted to a jury and proven beyond a reasonable doubt).
Facts: Defendant was charged with various sex offenses against three children. After submission to the jury, the trial court, at sentencing, found Defendant to be a predatory sexual offender, Sec. 558.018.5(3), because of the acts against three children, and sentenced him to mandatory life imprisonment with possibility of parole after 25 years.
Holding: (1) Sec. 558.018.5(3) provides that a person may be classified as a predatory sexual offender where he "has committed an act or acts against more than one victim which would constitute [first-degree statutory rape or first-degree statutory sodomy], whether or not defendant was charged with an additional offense or offenses as a result." Defendant argues that this section applies only to *prior* criminal conduct based on the word "has." However, "has" does not refer only to conduct before the crimes charged. Sections 558.018.5(1) and (2) deal with previously committed convictions or conduct. To avoid rendering 558.018.5(3) meaningless, it must be interpreted to include acts of criminal sexual conduct against more than one victim, including charges in the instant case. **(2)** Sec. 558.021.2 requires the trial court make a finding of predatory sexual offender prior to submission of the case to the jury. Here, the trial court did not make the finding until sentencing. However, this was not plain error under the facts here. While a predatory sexual offender loses the right to jury sentencing, here, Defendant expressly waived his right to jury sentencing. Further, Defendant was not sentenced to a higher sentence than he could have received under the "unenhanced" statutory range. Even though he received a mandatory life sentence, he could have received this anyway, and he will be subject to parole after 25 years, which is actually less than the 85% (25 and one-half) he would have had to serve under the "unenhanced range" for the same life sentence. **(3)** The court does not decide the constitutionality of 558.018 and 558.021 under *Alleyne* here. *Alleyne* requires that any fact that increases a defendant's mandatory minimum sentence must be submitted to a jury and proven beyond a reasonable doubt. Sec. 558.021.1(3) requires a court, instead of a jury, make the predatory sexual offender finding. Here, the jury had determined that Defendant committed acts against multiple victims, because the trial court did not decide predatory sexual offender until sentencing (contrary to statute). But "in similar circumstances if a trial judge follows the statute and makes a finding before submission [to the jury], the resulting sentence would be subject to attack under *Alleyne*."

State v. Hall, 2015 WL 5231566 (Mo. App. E.D. Sept. 8, 2015):
Holding: Where the State's indictment did not charge Defendant as a "persistent offender," the trial court erred in sentencing him as such, and this constituted manifest injustice because he was sentenced to a greater term of imprisonment than authorized.

State v. Johnson, 2015 WL 1090170 (Mo. App. E.D. March 10, 2015):
Holding: Where the written sentence and judgment did not conform to the oral pronouncement of sentence, the oral pronouncement controls and the mistake can be corrected nunc pro tunc.

State v. Weaver, 2015 WL 777660 (Mo. App. E.D. Feb. 24, 2015):
Holding: Where the written sentence and judgment contained an erroneously checked box which misclassified the offense, and where it differed from the oral pronouncement of sentence in erroneously stating how the sentences were to run consecutively, these were clerical errors that the appellate court corrects without necessity of remand.

State v. Lucas, 2014 WL 734405 (Mo. App. E.D. Dec. 23, 2014):
Holding: Where the oral pronouncement of sentence for Rule 24.035 Movant was "life" but the written sentence and judgment stated "99 years," Movant was prejudiced because the 99-year sentence carries a later parole-eligibility date, and in any event, an oral pronouncement of sentence controls over a written one; sentence modified to reflect "life" sentence.

State v. Dailey, 2014 WL 6914001 (Mo. App. E.D. Dec. 9, 2014):
Holding: Where Defendant was charged as a prior offender with first-degree assault, the offense was a Class B felony for which the maximum authorized punishment was 15 years, Sec. 558.011.1(2), and trial court plainly erred in sentencing him to 20 years; remanded for resentencing.

Sandknop v. Goldman, 2014 WL 6914952 (Mo. App. E.D. Dec. 9, 2014):
A person sentenced to long-term treatment under Sec. 217.362 must either be released upon successful completion of the program, or have their sentenced executed; court has no authority to execute any other sentencing outcome.
Facts: In 2013, Relator (Defendant) pleaded guilty as a chronic offender to DWI. He was sentenced to 10-years with long-term treatment under Sec. 217.362. On May 1, 2014, Relator successfully completed long-term treatment. Thereafter, the trial court issued an "Amended Order" which ordered that Relator remain incarcerated until Dec. 20, 2014, at which time he was to be released on five years probation. Relator sought a writ of mandamus ordering his immediate release or execution of his sentence. The State contended that Relator was required to serve a minimum two year sentence under Sec. 577.023 because he was a chronic offender.
Holding: Sec. 217.362 requires a judge at the end of successful completion of a long-term treatment program to either (1) release the defendant on probation immediately or (2) execute the defendant's sentence. There is no authority to craft any other remedy. Appellate court declines to decide question of whether Sec. 217.362 conflicts with Sec. 577.023 because under the terms of the "Amended Order," the trial court did not act under either statute. Writ of mandamus granted. On remand, trial court must comply with Sec. 217.362.

State v. Spears, 2014 WL 6679372 (Mo. App. E.D. Nov. 25, 2014):
Holding: Even though State charged Defendant as "persistent" offender and presented proof of two prior felony convictions, where the crimes were committed on the same day, the State failed to prove that the offenses were committed at "different times" to support persistent offender status and court plainly erred in finding persistent offender status.

Discussion: Sec. 558.016.3 defines a persistent offender as one who has pleaded guilty to or been found guilty of two or more felonies committed at different times. Here, the State showed that *Defendant* previously pleaded guilty to two felonies, but the crimes were committed on the same day. The State failed to show the offenses were committed at "different times." Court remands case with directions to enter a nunc pro tunc judgment correcting the judgment form to remove all references to "persistent offender."

State v. Norman, 2014 WL 2109076 (Mo. App. E.D. May 20, 2014):
Holding: Where the State did not charge Defendant as a "dangerous offender" under Sec. 558.021.1, and the State did not present any evidence that Defendant qualified as a "dangerous offender," the trial court plainly erred in "checking the box" on the sentence and judgment form that Defendant was a "dangerous offender;" appellate court corrects judgment and sentence to strike "dangerous offender" finding.

Johnson v. State, 2014 WL 5358322 (Mo. App. E.D. Oct. 21, 2014):
Holding: Where Movant pleaded guilty to felony stealing and court orally stated that for "the misdemeanor theft, [Movant] is sentenced to six months" but later entered a written sentence of 12 years, Rule 24.035 relief must be granted because the controlling oral pronouncement is different than the written sentence; however, because the sentence is ambiguous (since Defendant was being sentenced for a felony but the court said misdemeanor) the proper remedy is re-sentencing, not entry of a nunc pro tunc judgment. Nunc pro tunc can only be used where the oral pronouncement is unambiguous and the court's intention was clear.

Warren v. State, 429 S.W.3d 480 (Mo. App. E.D. 2014):
Holding: Even though Rule 24.035 does not allow for "plain error review," where the written sentence and judgment mistakenly designated Movant to be a prior and persistent offender when the State had not proven this, this is a "clerical error" that the appellate court can correct under Rule 84.14; it does not require "plain error" review.

McArthur v. State, 428 S.W.3d 774 (Mo. App. E.D. 2014)
Holding: Even though there is no "plain error review" under Rule 29.15, where Movant appealed a denial of Rule 29.15 relief and claimed on appeal for the first time that the oral pronouncement of sentence differed from the written sentence and judgment, this is a "clerical error" that can be corrected *nunc pro tunc* under Rule 29.12(c); it does not require "plain error" review under Rule 29.15.

State ex rel. Salm v. Mennemeyer, 2014 WL 839403 (Mo. App. E.D. March 4, 2014):
Where (1) trial court sentenced Defendant to long-term treatment under Sec. 217.362, and (2) Defendant was placed in a 12-month program, following which DOC recommended his release, trial court had no authority to extend Defendant's custody for another year, because the statute requires that a court either (a) release Defendant on probation or (b) execute his suspended sentence, but if the court executes the sentence, it cannot do so based solely on pre-sentence conduct.
Facts: Defendant pleaded guilty to stealing, was sentenced to 7 years SES, and was ordered into long-term treatment under Sec. 217.362. The DOC placed Defendant in a

12-month program, following which DOC recommended release on probation. The trial court ordered that Defendant remain in DOC custody for another year, and ordered another DOC report in a year. Defendant sought a writ of mandamus to compel his release.

Holding: Sec. 217.362.2 authorizes a long-term treatment program to last from 12 to 24 months, but the DOC determines the length of the program. Here, the DOC set the program length at 12 months, and reported that Defendant successfully completed the program. Therefore, under Sec. 217.362, the court was required to either (1) allow Defendant to be released on probation, or (2) issue an order executing his 7-year sentence. The court did not have authority to order that Defendant remain in custody for another year. Furthermore, if the court determines that release is not appropriate, that determination must be supported by evidence. Evidence of pre-sentence conduct, without more, will not be sufficient to support a determination that probation is not appropriate. Mandamus granted, and case remanded for court to either release Defendant or make determination that release is not appropriate.

State v. Meeks, 427 S.W.3d 876 (Mo. App. E.D. 2014):

(1) "Resisting arrest" instruction which instructed jury that Defendant could be convicted if he resisted his own arrest by "physical interference" was plainly erroneous because Sec. 575.150.1(1) does not include resisting one's own arrest by "physical interference," and thus, the State was relieved of its burden of proof; and (2) trial court plainly erred in sentencing Defendant to an extended term of imprisonment as a "persistent offender," where State only alleged and proved that Defendant was a "prior offender" with one prior felony conviction.

Facts: Defendant was charged with resisting his own arrest. When police sought to arrest him, he used "passive" resistance by locking up his body. The jury instruction stated that the jury should convict if "the defendant resisted by using physical force or physical interference."

Holding: (1) The jury instruction deviated from the charging statute, Sec. 575.150.1. That statute creates two distinct crimes – resisting one's own arrest and interfering with another's arrest. Sec. 575.150.1(1) provides that resisting one's own arrest is accomplished by "using or threatening the use of violence or physical force or by fleeing." Sec. 575.150.1(2) provides that resisting arrest of another can be accomplished by "physical force or physical interference." By omitting "physical interference" from 575.150.1(1), the legislature intended to exclude that as an element of resisting one's own arrest. Thus, the jury instruction allowed the jury to convict based on an element that was not in the statute, thereby misdirecting the jury as to the applicable law and excusing the State from its burden of proof. New trial ordered on resisting arrest. (2) The court found that Defendant was a "persistent offender" under Sec. 558.016.3, and sentenced him to an extended term. However, this was plainly erroneous since there was only evidence of one prior conviction, making Defendant only a prior offender under Sec. 558.016.2.

State ex rel. Lovelace v. Mennemeyer, 2014 WL 706695 (Mo. App. E.D. Feb. 25, 2014) & State ex rel. Kizer v. Mennemeyer, 2014 WL 707150 (Mo. App. E.D. Feb. 25, 2014):

Where (1) trial court sentences a defendant to the 120-day drug and alcohol treatment program under Sec. 559.115.3 and (2) the DOC reports that defendant successfully completed the program, defendant must be released unless the trial court holds a hearing before expiration of the 120 days and finds that release would be an abuse of discretion (not be appropriate).

Facts: In two separate cases, Defendants were sentenced to drug and alcohol treatment under the 120-day program of Sec. 559.115.3 (RSMo. Cum. Supp. 2012). The DOC reported that Defendants had successfully completed the program. The trial court then entered orders denying release without holding a hearing, and executing Defendants' prison sentences. Defendants sought writs of mandamus to compel their release.

Holding: Sec. 559.115.3 (2012) states that a defendant in a 120-day program shall be released on probation if the DOC determines he has successfully completed the program unless the court determines that release would be an abuse of discretion. However, the statute further requires that the court can order execution of the defendant's sentence "only after conducting a hearing on the matter within 90 to 120 days" of sentencing. Here, the court ordered the sentences executed without ever holding the mandatory hearing within 90 to 120 days of sentencing. The trial court cannot hold such hearings after 120 days has expired. Because the trial court never had hearings, mandamus is granted and Defendants must be released on probation. This result would be the same under the amended version of 559.115.3 that took effect in 2013, as well. The 2013 version of the statute states that the trial court can deny release if it determines probation is not appropriate, but the statute requires a hearing on the matter within 90 to 120 days from the date the defendant was delivered to the DOC.

State v. Davis, 2014 WL 116358 (Mo. App. E.D. Jan. 14, 2014):

Holding: Where trial court's written sentence and judgment did not conform to the oral pronouncement of sentence, the oral pronouncement controls and this is a clerical error that can be corrected nunc pro tunc.

State v. Famous, 2013 WL 6498989 (Mo. App. E.D. Dec. 10, 2013):

Holding: Order denying post-sentence petition for credit for time spent on probation is not appealable because it is not a "final judgment" under Sec. 547.070.

Greer v. State, 2013 WL 4419338 (Mo. App. E.D. August 20, 2013):

Movant was entitled to an evidentiary hearing on his claim that counsel was ineffective in failing to object when the sentencing judge, after trial, said he was sentencing Movant to a higher sentence than that recommended as a plea agreement in order to deter others from seeking trials in their cases, since this unconstitutionally punished the exercise of the right to trial.

Facts: At Movant's sentencing after having been found guilty at a trial, the judge said the "problem" the judge had was that if he sentenced Movant to a sentence lower than that recommended in the plea agreement before trial that Movant would go back to jail and say he went to trial and beat the recommendation, and this would cause "chaos" because "everyone's going to go to trial, because they're going to think they're going to get less than the recommended sentence or the same sentence. That's my problem." After the judge sentenced him to a high sentence, Movant filed a Rule 29.15 motion

alleging his counsel was ineffective in failing to object to the judge's remarks. The motion court denied the claim without a hearing.
Holding: To be entitled to a hearing, Movant must alleges facts, not conclusions, warranting relief; the facts alleged must not be refuted by the record; and the matters complained of must have resulted in prejudice. If a defendant's exercise of a constitutional right was an actual factor considered by the sentencing court in imposing sentence, then the exercise of that right is considered to be a determinative factor in sentencing, and retaliation has been demonstrated, even if other factors could have been relied on by the sentencing court to support the same sentence. The State argues that the sentence here is designed to deter others. But the proper purpose of deterrence is to prevent others from committing a crime, not to deter those who have already committed a crime from exercising their right to a trial. Here, the record does not refute that counsel was not ineffective in failing to object, so Movant is entitled to an evidentiary hearing.

Solomon v. St. Charles County Prosecuting Attorney's Office, 2013 WL 3943012 (Mo. App. E.D. July 23, 2013):
Holding: Even though Petitioner/Defendant was no longer required to register as sex offender under the federal SORNA because 15 years had elapsed since his conviction, he was still required to register under Sec. 589.400.1(7) because he "has been … required to register" under SORNA in the past.

State v. Johnson, No. ED98655 (Mo. App. E.D. 6/28/13):
Where the State's evidence that Defendant was a "persistent offender" was that he was convicted in Tennessee of four separate charges of burglary of a motor vehicle arising from his actions on one day, this evidence was insufficient to prove that the felonies were committed "at different times" so was not sufficient to prove "persistent offender" status.
Facts: Defendant was charged, convicted and sentenced as a "persistent offender." To prove such status, the State offered proof that he had been convicted in Tennessee of four felonies for burglary of a motor vehicle for actions that occurred on the same day.
Holding: Sec. 558.016.3 defines persistent offender as one who has been found guilty of two or more felonies "committed at different times." Felonies are not committed at different times if they are committed as part of a continuous course of conduct in a single episode. Here, it is unclear whether Defendant entered the four vehicles as part of a continuous action or as separate and discrete offenses. It is quite plausible that all four vehicles were in the same location, and this version would support a single-episode inference without further evidence from the State. Here, the State failed to prove beyond a reasonable doubt that the felonies were committed "at different times." However, since Defendant's sentences were within the range of punishment even without a persistent offender finding, appellate court merely strikes the persistent offender finding from the judgment.

Doe v. Neer, No. ED99249 (Mo. App. E.D. 6/25/13):
Holding: (1) Even though Petitioner was convicted of a Missouri sex offense before there was a duty to register for that offense, he is still required to register in Missouri because of the federal SORNA; and (2) Even though Defendant has never traveled in interstate commerce but has remained in Missouri, the federal SORNA is not

unconstitutional as applied to him because the 8th Circuit has held that SORNA is constitutional under the Commerce Clause combined with the Necessary and Proper Clause.

Grieshaber v. Fitch, No. ED98948 (Mo. App. E.D. 6/25/13):
Where Petitioner sex registrant had an independent duty to register as a sex offender under the federal SORNA, Petitioner cannot petition for removal from the Missouri sex offender registry under Sec. 589.400.8.
Facts: In 2001, Petitioner pleaded guilty to the Class C misdemeanor of attempted child molestation. At the time, Petitioner was 19 and the victim 13 years old. Petitioner subsequently was required to register and did so. In 2010, Petitioner petitioned under Sec. 589.400.8 for removal from the sex offender registry. Such removal was denied. He appealed.
Holding: Petitioner's duty to register in Missouri does not come solely from Missouri's SORA but comes from the federal SORNA. He is required to register pursuant to 589.400.1(7) of SORA because he "has been or is required to register under federal law" SORNA. Sec. 589.400.1 allows certain persons to petition for removal from the sex offender registry after two years have passed from the date of conviction and if the defendant was 19 or younger and the victim was 13 or older and no physical force was used. Although Petitioner meets these conditions, he nevertheless cannot be removed from the Missouri sex offender registry because he has an independent duty to register under the federal SORNA. Although Petitioner argues that this result renders Sec. 589.400.8 meaningless, the appellate court disagrees because a person can petition for removal under 589.400.8 when the person's crime requires the individual to register under SORA but does not require him to register under SORNA. For example, a person convicted of consensual sexual contact with a student when the offender was 19 and the victim was 18 would be required to register under Missouri's SORA, but not under the federal SORNA. Thus, such person could later petition for removal from Missouri's register since he has no independent federal duty to register.

State v. Powell, No. ED97161 (Mo. App. E.D. 10/2/12):
Where Defendant committed an attempted forcible rape and then later that night committed a resisting arrest when being arrested for the rape, these were separate offenses committed at different times, and the trial court was not required to give consecutive sentences under Sec. 558.026.1.
Facts: Defendant committed an attempt forcible rape at one location and then went to his home about a block away. Later the same night, police went to Defendant's home and arrested him, where he resisted arrest. He was convicted at trial of both offenses. At sentencing, the judge announced "concurrent" sentences, but then defense counsel said "consecutive," and the judge agreed that "the resisting arrest has to be run consecutive to Count I."
Holding: The trial court plainly erred in believing that it had to impose consecutive sentences. Sec. 558.026.1 provides that a sentence for forcible rape must run consecutively to "other sentences," which are defined as multiple sentences of imprisonment for other offenses committed during or at the same time. Here, although the trial court did not expressly mention Sec. 558.026.1, it is evidence that the trial court

believed it was "required" to give consecutive sentences. However, this is a misunderstanding of the statute because Defendant was convicted of one sex offense listed in the statute and a non-sex offense not listed in the statute; the two offenses did not occur at the same time. One was at the victim's house, the other at Defendant's house. Given that the court originally stated it was giving concurrent sentences until corrected by counsel, it is possible that the court would have given a non-consecutive sentence if it believed it had the ability to do so. Remanded for resentencing.

State v. Taylor, No. ED96299 (Mo. App. E.D. 8/21/12):
Even though the court properly found Defendant to be a prior and persistent "drug offender," where the State failed to offer proof that he was also a prior and persistent offender under Sec. 558.016, it was plain error to sentence Defendant under Sec. 558.016.
Facts: Defendant was charged as a prior and persistent "drug offender" under Secs. 195.275 and 195.285 and as a prior and persistent offender under Sec. 558.016. At trial, the State asked the court to take judicial notice of several prior drug convictions to prove prior and persistent "drug offender" status, which the court did. However, the prosecutor never asked the court to adjudicate Defendant as a prior and persistent offender under Sec. 558.016 and the trial court did not expressly find that. The court's written sentence and judgment, however, reflected that Defendant was a prior and persistent offender under Sec. 558.016.
Holding: A finding that a defendant is a prior and persistent "drug offender" does not automatically entail a finding that a defendant is a persistent offender under Sec. 558.016 because of the possibility that multiple drug felonies may be committed at the same time. Although a finding that Defendant is a prior and persistent "drug offender" would imply that he is also at least a "prior offender" under Sec. 558.016, we decline to make such a finding when the State made no attempt to prove the matter and the trial court did not address it. The written sentence and judgment may be corrected on remand nunc pro tunc as a clerical mistake.

State v. Kelly, No. ED96743 (Mo. App. E.D. 4/24/12):
Even though Defendant-sex offender left one address and didn't establish a new permanent address for several months, the registration statute, 589.414, required that he report changing from the prior address within three days.
Facts: Defendant-sex offender lived at one address but vacated it in December. He did not register a new address until March, when he said he obtained a new permanent address. Defendant was convicted of failure to report change of address as a sex offender for not reporting a change within three days after leaving the first address in December.
Holding: Defendant claims he was not required to update his address until he had a new "permanent" address and that he was transient between December and March. This appears to be an issue of first impression in Missouri. Federal courts have held, however, that the plain language of SORNA requires registration when one leaves a residence with no intent to return. 589.414.1 requires updating registration "not later than three business days after each change." The statute makes no reference to a "new" residence, but only to a "change" in residence. Thus, when a sex offender leaves a residence with no intention to return, even if he leaves to become homeless, his residence has changed as it

is no longer that of the original residence, and he must update his registration. Conviction affirmed.

State v. Robinson, No. ED94593 (Mo. App. E.D. 11/29/11):
Where Defendant had not been charged as a "prior offender," trial court plainly erred in entering written sentence and judgment finding him to be a "prior offender."
Facts: The trial court entered a written judgment finding Defendant to be a "prior offender," even though he was not charged as such.
Holding: Sec. 558.021 provides that all necessary facts to establish prior offender status must be pleaded, established and found prior to submission of the case to the jury. Here, Defendant was never charged with being a prior offender. The judgment is corrected to remove the prior offender classification.

State v. Adams, No. ED95976 (Mo. App. E.D. 10/25/11):
Holding: Where Defendant had only one prior felony conviction and court only found Defendant to be a "prior offender," the court plainly erred in checking a box on the sentence form that Defendant was a "persistent offender" and this finding is deleted from the judgment; re-sentencing not necessary because punishment was within the range for a prior offender.

State v. Greer, No. ED95206 (Mo. App. E.D. 9/20/11):
Holding: Where Defendant was sentenced to 15 years as a prior and persistent offender for endangering a corrections employee in violation of Sec. 565.085 RSMo. Cum. Supp. 2006, this was plain error because the offense is a Class D felony, but as a prior and persistent offender, the range of punishment is that for a C felony, which has a maximum of 7 years, Sec. 558.016.7(4) RSMo. Cum. Supp. 2006.

State v. Harvey, No. ED95689 (Mo. App. E.D. 9/20/11):
Holding: Where the trial court's orally pronounced sentence was for 15 years, but the written sentence and judgment was for 30 years, this was plain error because the oral pronouncement of sentence controls over the written one.

State v. Wilson, No. ED95423 (Mo. App. E.D. 7/12/11):
Where trial court failed to find Defendant's prior DWI convictions before the case was submitted to the jury but did so afterwards, this violated the timing requirements of 577.010 RSMo. Cum. Supp. 2008, and required that Defendant's sentence as a chronic offender be vacated.
Facts: Defendant was charged with DWI as a chronic offender under Sec. 577.010 RSMo. Cum. Supp. 2008. Before the case was submitted to the jury, the State introduced four exhibits showing four prior DWI convictions. However, the trial court did not make any finding about Defendant being a chronic offender until after the jury's guilty verdict. Defendant was then sentenced to 12 years.
Holding: Sec. 577.023.7(3) RSMo. Cum. Supp. 2008 provided that in a jury trial, the facts pleaded for prior convictions shall be established and found prior to submission of the case to the jury. Here, the court violated the timing requirements of the statute by not doing this until after the jury's verdict. This was plain error, and requires that

Defendant's sentence as a chronic offender be vacated. Case remanded for resentencing without any type of prior offender status.

State v. McArthur, No. ED95094 (Mo. App. E.D. 7/5/11):
Holding: Where Defendant charged with sodomy had a bifurcated trial, State may present in penalty phase testimony of a prior sexual assault victim of Defendant about that prior bad act.

Editor's Note: An interesting dissenting opinion argues that State went too far in being allowed to present prior victim and then argue jury should impose maximum sentence to avenge prior victim's assault, since that was not the subject matter of this particular case.

State v. Schallon, No. ED94181 (Mo. App. E.D. 5/24/11):
(1) Where Defendant was charged with having Victim touch his penis but Victim testified that she didn't recall touching the penis, the evidence was insufficient to convict of sodomy; (2) where Defendant was charged with two counts of sodomy for having Victim touch his penis, but this was really the same occurrence, double jeopardy prohibited conviction on both counts; and (3) where Defendant was convicted of attempted statutory sodomy but sentenced to 7 years in prison, the sentence was in excess of that authorized for a Class D felony.
Facts: Defendant was charged with multiple counts of various sexual offenses. Count 15 charged him with having Victim touch his penis. Counts 21 and 26 charged him with having Victim touch his penis "on the same day he instructed her to perform oral sex" and on the day "he threatened to tell her mother" about a boyfriend. Count 20 charged attempted statutory sodomy in the second degree.
Holding: Regarding Count 15, Victim testified that she did not recall touching Defendant's penis that day. Where the act constituting the crime is specified in the charge, the State is held to proof of that act. Thus, the evidence was insufficient to convict for Count 15. Regarding Counts 21 and 26, the evidence showed that these were part of the same event and that during this event, Defendant had Victim touch his penis only one time. Double Jeopardy prohibits multiple punishments for the same offense, so one of the Counts must be vacated. Lastly, Defendant was convicted in Count 20 of attempted second degree statutory sodomy, which is a Class D felony because an attempt offense is one class less than the completed offense, Sec. 564.011.3(3). The 7 year sentence exceeded the maximum allowed by law for a Class D felony.

Huck v. State, No. ED94584 (Mo. App. E.D. 4/26/11):
Holding: Where a defendant is charged as a "predatory sexual offender" under Sec. 558.018.7(5), the court may set the minimum time required to be served to be eligible for parole at "life," even though this means the defendant will never be eligible for parole or conditional release.

Torello v. State, No. ED94110 (Mo. App. E.D. 3/22/11):
Defendant was not a persistent misdemeanor offender under Sec. 558.016 where his prior misdemeanors occurred minutes apart at the same location, since this was a continuous

course of conduct in a single episode; remedy is to remand case for resentencing before a jury.
Facts: Defendant, charged with various felonies, was found to be a "persistent misdemeanor offender" under Sec. 558.016. The effect was to take sentencing away from the jury. The State's prior offender evidence showed that Defendant was convicted of misdemeanor resisting arrest occurring on December 13, 1998 at 1823 Parker Rd. at 2:02 p.m. and misdemeanor assault of a law enforcement officer occurring on Dec. 13, 1998 at 1823 Parker Rd. at 2:08 p.m. Defendant objected to these being two offenses.
Holding: Sec. 558.016.5 states that a persistent misdemeanor offender is one who has been found guilty of two or more Class A or B misdemeanors committed at different times. Crimes are not committed at different times, however, if they are part of a continuous course of conduct in a single episode. Here, the prior crimes occurred at roughly the same time and place within six minutes of each other, supporting an inference that they are a single episode. The remedy, however, is not a new trial on guilt, but only a new trial on sentence. The case is remanded for a jury trial on sentence.

State v. Muhammad, No. ED94232 (Mo. App. E.D. 3/1/11):
(1) Even though Defendant was charged with false imprisonment, where court erroneously instructed on felonious restraint but then entered judgment for false imprisonment, this was not plain error since false imprisonment was a lesser-included offense of felonious restraint; but (2) where court sentenced Defendant to range for a Class D felony, this was plain error because false imprisonment, as found, was a Class A misdemeanor.
Facts: Defendant was charged with false imprisonment. At trial, however, the court without objection instructed the jury on the offense of felonious restraint. The court then entered judgment for false imprisonment as a Class D felony and sentenced Defendant to four years.
Holding: (1) A trial court cannot instruct on an offense not charged unless it is a lesser-included offense. Felonious restraint is not a lesser-included offense of false imprisonment; rather the opposite is true – false imprisonment is a lesser offense of felonious restraint. However, the variance between the charge and instructions is not fatal here. By finding the greater offense of felonious restraint, the jury necessarily found the lesser of false imprisonment. Moreover, the trial court entered judgment for false imprisonment. (2) However, the four year sentence is plain error. This is because false imprisonment is a Class A misdemeanor unless the defendant took the victim from the state, which is not the case here, Sec. 565.130.2. The sentence should not have exceeded one year. Sentence vacated and remanded for resentencing.

State v. Hollins, No. ED93796 (Mo. App. E.D. 2/15/11):
Holding: Where Defendant was charged and convicted of a Class B felony, but sentence and judgment erroneously stated this was a Class A felony, this is corrected via nunc pro tunc.

State v. Miller, 2015 WL 2085481 (Mo. App. S.D. May 4, 2015):
Holding: Where written sentence and judgment stated Defendant was guilty of a B felony but he was in fact convicted of a C felony, this is a clerical error that can be corrected nunc pro tunc.

State ex rel. Patterson v. Powell, 2015 WL 9241558 (Mo. App. S.D. Dec. 17, 2015):
(1) Where trial court at sentencing had ordered a Defendant to "pay costs," court lacked authority to later waive Defendant's payment of witness fees; (2) Sec. 491.280.2 authorizes a court to determine the amount of witness fees, but does not authorize waiver of the fees.
Facts: A Defendant was convicted at a trial of misdemeanors. At sentencing, the court ordered him to "pay costs" within six months. A State's witness was owed witness fees totaling $206.88. Six months later, the court entered an order "waiving" the witness fees. The State sought a writ of mandamus.
Holding: Once judgment and sentencing occur in a criminal case, the court has exhausted its jurisdiction and cannot take further action except as authorized by statute or rule. The court purported to act under Sec. 491.280.2, which provides that "each witness may be examined on oath by the court … as to factors relevant to the proper amount" of witness fees. This statute authorizes courts to determine the *amount* of fees, but does not authorize a court to *waive* fees. Further, there was no examination of the witness under oath here, so the court's purported exercise of authority under the statute was wrong as a matter of law, and thus, an abuse of discretion. Writ issued; trial court ordered to rescind its order "waiving" fees.

State ex rel. Julian v. Hendrickson, 2015 WL 7466224 (Mo. App. S.D. Nov. 24, 2015):
Even though trial court "suspended" Defendant's probationary term, where the term subsequently expired before any motion to revoke was filed, the trial court lacked authority to revoke probation.
Facts: In April 2009, Defendant received an SES and was placed on probation for five years. Shortly after, in 2009, he was convicted of unrelated charges and sentenced to DOC. In July 2009, the trial court "suspended" Defendant's probation. In October 2014, the court "reinstated" probation but ordered that Defendant not receive credit for time spent in DOC between 2009 and 2014. In 2015, a probation violation report was filed, and a motion to revoke probation filed shortly thereafter. Defendant was arrested. He filed a motion to terminate probation, which the court denied. Defendant sought a writ of prohibition/mandamus.
Holding: Sec. 559.036 (2005) provides that a term of probation cannot exceed five years, but can be extended by one year where Defendant admits or the court finds that Defendant violated the conditions of probation. The statute provides that a court can suspend probation and order a Defendant's arrest, but only as a consequence of an alleged violation. Here, there was no motion to revoke probation or any allegation Defendant committed a violation at the time his probation was suspended in 2009. There was no motion to revoke or any allegation of violation within either five or six years of probation commencing (even assuming, without finding, that the six year time limit

applied). The court did not manifest any intent or make any effort to conduct a revocation hearing before probation expired. Writ granted.

State v. Henderson, 2015 WL 4627424 (Mo. App. S.D. Aug. 4, 2015):
Holding: (1) The 25-day requirement for filing a New Trial Motion under Rule 29.11(b) is not jurisdictional, and can be waived by the State; where State had asked trial judge to rule on the merits of "late" New Trial Motion, State could not argue the opposite on appeal to bar appellate court from ruling issue on the merits; appellate court decides issue on the merits; (2) where the written judgment and sentence misstated the offense Defendant was convicted of, this was a clerical error that can be corrected nunc pro tunc.

State v. Copher, 2015 WL 1119691 (Mo. App. S.D. March 11, 2015):
The enhancement provision of the third-degree domestic assault statute, Sec. 565.074.3, does not apply only to "out of state" prior convictions, but also applies to prior convictions for third degree assault which were committed in Missouri and would be a violation of the domestic assault statute.
Facts: Defendant was convicted of third degree domestic assault, which was enhanced to a felony because of a prior conviction in 2001 for third degree assault. Defendant claimed this conviction cannot be used to enhance because it was not an "out of state" prior conviction.
Holding: Sec. 565.074.3 allows a conviction for third-degree domestic assault to be enhanced to a felony if Defendant has pleaded guilty to or been found guilty of third-degree domestic assault more than two times "or of any offense committed in violation of any county or municipal ordinance in *any state*, *any state law*, any federal law, or any military law which, if committed in this state, would be a violation of this section." The question here is whether Defendant's prior conviction for third degree assault counts under the quoted section of the statute. The phrase "any state law" is not limited to States outside Missouri. Thus, the conviction counts.
Dissenting opinion: The plain meaning of Sec. 565.074.3 provides for two separate methods of enhancement. The first concerns prior convictions for third-degree domestic assault committed in Missouri. The second for convictions in "other" states. Construing the words "any state" as applying to Missouri renders the first prong of the statute redundant. Every word of a statute is to be given meaning.

Dunivan v. State, 2014 WL 5471471 (Mo. App. S.D. Oct. 29, 2014):
Attorney General's Office did not have unconditional or absolute legal right to intervene in an action to remove Petitioner from sex offender registry.
Facts: Pursuant to the procedures of Sec. 589.400.9, Petitioner sought to remove his name from the sex offender registry. He properly served County Prosecutor, who represented the State in the petition action. After the court removed Petitioner's name, the Attorney General filed a motion to intervene on behalf of "the State" and the Highway Patrol, which maintains the registry. The trial court denied the motion. The Attorney General appealed.
Holding: The Attorney General appeals only the denial of the motion to intervene. The Attorney General claims that Sec. 27.060 confers an unconditional legal right to intervene. Sec. 27.060 provides that the Attorney General "may also appear and

interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved." The language "may" is not synonymous with an unconditional or absolute right to intervene, especially where the State is already being represented by the County Prosecutor in a lawsuit. The statute on sex offender name removal does not require notice to the Attorney General, or mandate that the Attorney General be made a party. Instead, the statute requires the County Prosecutor be served. To be able to intervene under Rule 52.12, a person must show (1) an interest in the property or transaction that is the subject of the lawsuit, (2) disposition of the lawsuit may impair that interest, and (3) his interest is not adequately represented by other parties. The Attorney General claims an "interest" in the lawsuit because the Highway Patrol maintains the registry. However, the Highway Patrol has no input into whether Petitioner should be on or off the registry; the Highway Patrol's sole duty is to maintain the registry. Thus, the Highway Patrol has no "interest." Further, the State's interests are represented by County Prosecutor.

In re: Brooks v. Bowersox, 2014 WL 5241645 (Mo. App. S.D. Oct. 15, 2014):
Holding: *Miller v. Alabama*, 132 S.Ct. 2455 (2012), which barred automatic life-without-parole sentences for juveniles convicted of first degree murder, does not apply to Juvenile-Defendants convicted before *Miller* and whose direct appeals and Rule 29.15 amended motions were completed or already filed without a such a claim; such defendants are procedurally barred for not raising the claim on direct appeal or in their Rule 29.15 cases.

State v. Goff, 2014 WL 3386260 (Mo. App. S.D. July 11, 2014):
Holding: Where jury sentenced Defendant to "no imprisonment but a fine in an amount to be determined by the court," trial court plainly erred in sentencing Defendant to jail because a judge cannot impose a punishment greater than that recommended by a jury.

Timberlake v. State, 419 S.W.3d 224 (Mo. App. S.D. 2014):
Even though trial court scheduled a probation revocation hearing before probation expired, where the hearing was not held until after probation expired, probation could not be revoked because trial court did make every reasonable effort to hold the hearing before probation expired.
Facts: On June 26, 2006, Defendant pleaded guilty and received an SES. On May 6, 2011, probation violation reports were filed. On May 19, 2011, the court issued a capias warrant and scheduled a probation violation hearing for July 13, 2011. Probation expired on June 21, 2011. The trial court revoked probation in July. Defendant subsequently filed a Rule 24.035 motion.
Holding: Sec. 559.036.8 allows a court to revoke probation after a probationary term has expired if (1) the court manifested its intent to conduct a revocation hearing during the probationary term, and (2) the court made every reasonable effort to notify probationer and hold the hearing before the term ends. Here, there is no explanation in the record for why the revocation hearing was not held until July. Hence, the record does not show that the court made every reasonable effort to conduct a hearing before the probation term ended. The State argues that the hearing was only 23 days "late." However, the issue is not the length of the delay but whether the two conditions required by 559.036.8 were met. It was not Defendant's duty to ensure the trial court ruled on a probation revocation

prior to expiration; nor does the statute require Defendant to show prejudice. Defendant discharged.

State ex rel. Dotson v. Holden, 2013 WL 6228915 (Mo. App. S.D. Dec. 2, 2013):
Even though judge knew that Defendant was incarcerated in DOC and issued a warrant for his arrest before his probation expired, where Defendant did not receive notice of the violation or of the judge's intention to hold a revocation hearing until nearly a year after probation expired, Defendant must be discharged because judge failed to make reasonable efforts to notify Defendant or conduct a revocation hearing before expiration of probation.
Facts: On January 5, 2007, Defendant was placed on 5 years probation. On March 30, 2011, Probation Officer recommended revocation of probation. Judge made docket entry that noted Defendant was in DOC, that issued a capias warrant for Defendant, and that tolled his probation. On October 4, 2012, Defendant was arraigned on the probation violation, and a revocation hearing was scheduled for November 30 and later continued to December 20, 2012. Defendant filed a motion to order his probation terminated, arguing that his probation had expired on January 5, 2012. Judge denied the motion, finding that Defendant was not prejudiced because he could have filed a motion from prison requesting disposition of the warrant. Defendant sought a writ of prohibition to prohibit Judge from conducting a revocation hearing.
Holding: Rule 29.18 and Sec. 559.036 (RSMo. 2005), which was the version in effect when Defendant was sentenced, provide that probation shall extend for the duration of the term in effect and for any further period which is reasonably necessary for adjudication of matters arising before its expiration, provided that (1) some affirmative manifestation of an intent to conduct a revocation hearing occurs before expiration and (2) that every reasonable effort is made to notify probationer and to conduct the hearing before expiration. Here, Judge manifested an intent to conduct a hearing by issuing a capias warrant, but Judge failed to make every reasonable effort to notify Defendant and conduct a hearing before the 5 year term expired. Despite knowing where Defendant was in DOC, there is no evidence that court ever notified Defendant of the violation report at issue. The warrant was not served until October 2012, after the probation expired. Further, the record does not reflect any apparent effort to hold a revocation hearing during the nine months before expiration expired. Neither Judge nor State made any effort to set or conduct a hearing until nearly a year after probation had expired. Thus, Defendant met his burden of showing prejudice from the 19-month delay. Writ granted.

State ex rel. Norwood v. Sheffield, No. SD32261 (Mo. App. S.D. 10/18/12):
Even though Judge issued an order within 120 days of sentencing that it would be an abuse of discretion to release Defendant on probationi under Sec. 559.115.3, where there was no indication that Judge held a hearing on the matter within 120 days of sentencing, Defendant must be released on probation under the statute.
Facts: Defendant (Relator) pleaded guilty to possession of child pornography and was sentenced to 5 years on January 9, 2012, but Judge (Respondent) ordered him committed under Sec. 559.115 to the Sexual Offender Assessment Unit (SOAU). On April 23, 2012, the DOC recommended that Defendant be released on probation. On April 25, 2012, Judge entered an order that it would be an abuse of discretion to release Defendant

on probation and ordered his 5 year sentence executed. Defendant sought a writ of mandamus that he was required to be released because Judge did not hold a hearing on the matter within the time required by the statute.
Holding: Under 559.115.3, where the DOC recommends that a person who has been placed in SOAU be released on probation, the court may order the sentence be executed only if it holds a hearing on the matter within 90 to 120 days of the original sentencing date. If the court fails to hold a hearing within that time, the person must be released. Here, the Judge entered an order that it would be an abuse of discretion to release Defendant. But there is no indication that the Judge conducted a hearing within the time required under the statute. Writ of mandamus issues ordering Defendant's release.

State v. Nephew, No. SD31482 (Mo. App. S.D. 5/21/12):
Sec. 570.040 RSMo. Supp. 2005 requires that a "stealing third" offense be based on prior stealing convictions which occurred on different days.
Facts: Defendant was charged and convicted of a "stealing third" offense, which was enhanced to a felony based on two prior stealing convictions which were both entered on the same day.
Holding: The 2005 version of 570.040 (since repealed) required that a "stealing third" conviction be based on two prior stealing convictions which occurred on different days. Here, the two prior convictions were entered on the same date, so they cannot form the basis to enhance the instant offense. The State argues that the conviction can be withheld because the judicially-noticed prior court files show that Defendant had additional prior stealing convictions. However, these cannot be counted because (1) they weren't charged in the information as predicate offenses, (2) MACH-CR 24.021.1 Notes on Use states that the offenses used for enhancement have to be charged, and (3) 570.040 requires a trial court to determine the existence of the prior pleas of guilty. Under *Collins v. State*, 328 S.W.3d 705 (Mo. banc 2011), the State does not get a second chance to prove up prior convictions. Felony conviction reversed and misdemeanor conviction entered.

State ex rel. Stimel v. White, No. SD31664 (Mo. App. S.D. 4/11/12):
Even though the court entered a docket entry that Defendant's probation was "suspended" and that a violation report had been filed before the probation expired, where no formal revocation procedures were initiated before Defendant's probation expired, Sec. 559.036.6 prohibited revocation of probation after it had expired.
Facts: On January 5, 2009, Defendant pleaded guilty to stealing and was placed on two years probation. On December 10, 2010, the judge entered a docket entry stating that Defendant's probation was "suspended" and that a violation report had been filed on December 9, 2010, for not reporting, not paying probation fees, and not paying a public defender lien. A "review" was set for January 7, 2011. Defendant's probation expired on January 5, 2011. On January 18, 2011, the State filed a motion to revoke for failure to report, pay restitution or pay the public defender lien. Defendant sought a writ of prohibition, claiming that he could not be revoked because his probation had expired.
Holding: A probation term begins on the day it is imposed, and after it expires, there is generally no legal authority to revoke. However, Sec. 559.036.6 states that the power to revoke can be extended "for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative

manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period." Here, Defendant's probation expired on January 5, 2011. At that time, there were no revocation motions pending, no scheduled revocation hearings, no warrants issued for Defendant, and the only notation of the suspension was set out in a docket entry. The question here is whether under 559.036.6, there was some affirmative manifestation of an intent to conduct a revocation hearing prior to expiration of probation. There is no clear cut, bright line rule as to what an affirmative manifestation of intent to conduct a revocation hearing means. Here, however, the motion to revoke was not filed until two weeks after probation expired. Indeed, the trial court on December 10, 2010, merely set a "probation review" for January 7, 2011, two days after probation was to expire. Appellate court holds that there has to be something in addition to a docket entry such as issuance of a warrant, a motion to revoke probation, the scheduling of a revocation hearing, or something similar to satisfy Sec. 559.036.6. Here, there wasn't. Writ of prohibition made absolute.

State v. Thieman, No. SD30818 (Mo. App. S.D. 11/10/11):
Holding: Where Defendant's prior guilty plea had been withdrawn, his statements made in a SAR (sentencing assessment report) could not be used by the State at his trial because Rule 24.02(d)(5) provides that "evidence of a guilty plea, later withdrawn, or an offer to plead guilty …, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers is not admissible in any civil or criminal proceeding against the person who made the plea or offer."

State v. Lemons, No. SD30959 (Mo. App. S.D. 8/25/11):
(1) Where State submits Defendant's "Driver's Record" to prove prior DWI convictions, the Driver's Record must specifically identify the convicting court; (2) State need no longer prove that Defendant had counsel or waived counsel in prior DWI convictions, but Defendant may prove that the prior convictions were unconstitutional.
Facts: Defendant was charged with DWI as a "chronic offender" for having four prior DWI convictions. To prove the convictions, the State submitted Defendant's Missouri "Driver's Record" which showed that Defendant was convicted "on 4-02-1991 in Arkansas by circuit court." Defendant claimed he never had such a conviction.
Holding: (1) The Driver Record was insufficient to prove the Arkansas conviction because it did not specifically indentify the convicting court. Some minimal information is necessary to use a Driver Record to prove prior convictions to allow Defendant the opportunity to rebut the conviction. The requirement of court identification for violations of foreign law is included in the Driver License Compact, Sec. 302.600, Article III, so that an aggrieved person would have only one county or city to contact in order to rebut the conviction. Here, the Driver's Record did not identify a specific Arkansas Circuit Court, but only the entire state of Arkansas. This was insufficient, and the Arkansas conviction should not have been counted as a prior DWI. Case remanded for resentencing as an "aggravated offender" (three priors). (2) On a separate issue, Defendant contends that the State didn't prove that his prior convictions were with counsel or counsel was waived. However, the DWI statute was amended in 2009 to no longer require proof that the defendant was represented by counsel or waived counsel.

Sec. 577.023.1(4) RSMo. Cum. Supp. 2009. However, while the State need not prove this, a Defendant may still prove that the prior convictions were unconstitutional because he did not have counsel, but Defendant has not done that here.

Shaw v. State, No. SD30814 (Mo. App. S.D. 8/17/11):
Even though trial judge "thought" he imposed consecutive sentences, where the transcript said "concurrent" and State did not challenge the accuracy of the transcript pursuant the procedures of Rule 30.04(g), the appellate court must accept the accuracy of the transcript and the oral pronouncement of sentence controls.
Facts: Defendant entered into a plea bargain whereby prosecutor would recommend consecutive sentences, but Defendant could argue for something less. However, the plea and sentencing transcript refer to the State's offer as being for "concurrent" sentences and the transcript of the oral pronouncement of sentence said the sentences were "concurrent." However, the written sentence and judgment said they were "consecutive." Defendant filed a 24.035 motion alleging the oral pronouncement controlled. At the evidentiary hearing on the 24.035 motion, the trial judge said he "thought" he had said "consecutive," and his notes reflected that. Also, the plea attorney and prosecutor testified they thought it was "consecutive." The motion court denied relief based on this.
Holding: The law is clear that where an oral pronouncement of sentence differs from the written sentence and judgment, the oral pronouncement controls. Here, the State argues that the court implicitly found that the transcript of the plea and sentencing was wrong. However, there is an established procedure for challenging the accuracy of a transcript under Rule 30.04(g), which would have required the State to file a motion to correct the transcript and have a hearing at which the court reporter could testify about the accuracy of the transcript and perhaps a backup tape recording as well. Because the procedure of Rule 30.04(g) was not followed, this Court is bound by the certified transcript of the proceedings which clearly states that the sentences are "concurrent." Consecutive sentences vacated and remanded for entry of written sentence and judgment with concurrent sentences.

State v. Cannafax, No. SD30327 (Mo. App. S.D. 7/22/11):
Where Defendant's sexual offenses occurred during a time span from early 2006 to 2008, but it was unclear if they occurred after August 28, 2006, and the trial court's judgment made no findings about this, it is unclear whether the lifetime supervision requirements of Sec. 217.735 apply to Defendant, but the issue is not ripe until the Board of Probation and Parole attempts to apply them to him; at that time, he may bring a writ of mandamus to challenge their applicability.
Facts: Defendant was convicted of sexual offenses alleged to have occurred between June 7, 2006 and November 2008. The trial court did not expressly find that the offenses occurred after August 28, 2006 and did not state in its judgment that Defendant was subject to lifetime supervision under Sec. 217.735, which provides that offenders are subject to lifetime supervision for certain sexual offenses "based on an act committed on or after August 28, 2006."
Holding: Defendant's claim on appeal is that he is improperly subject to lifetime supervision under Sec. 217.735 because there was not sufficient evidence to prove his offenses happened after August 28, 2006. However, since the trial court made no

findings about this and made no mention of it in its judgment, it is unclear if Defendant will be subjected to lifetime supervision when he completes his prison sentence. Thus, this issue is not ripe for review. However, if the Board of Probation and Parole seeks to apply Sec. 217.735 to him in the future, he may challenge that via a writ of mandamus.

City of Joplin v. Klein, 2011 WL 2936401 (Mo. App. S.D. 7/21/11):
Even though City introduced ordinances making certain actions a municipal offense, where City failed to introduce the penalty portions of the ordinances, a court cannot judicially notice them and the charging information and proof were insufficient; furthermore, City is precluded from getting another opportunity to prove penalty.
Facts: Defendant was convicted of violation of various city ordinances. At trial, City properly placed the ordinances creating violations before the trial court by filing certified copies of the ordinances with the clerk of the circuit court under Sec. 479.250. However, the penalties for violation of these ordinances were in separate ordinances that were not provided. Defendant appealed.
Holding: A court cannot take judicial notice of a city ordinance that is not properly introduced into evidence. Here, the information (citation) charging the offenses failed to list the ordinance providing a penalty, and the penalty ordinances were not admitted into evidence or otherwise properly before the court. Thus, the charging information does not comply with Rule 37.35(b)(4). *State v. Collins*, 328 S.W.3d 705 (Mo. banc 2011), held that where the State failed to offer sufficient evidence to prove enhanced DWI status, the State does not get a second opportunity to do so. Applying *Collins*, City does not get a second opportunity to prove penalty here. Because City failed to allege the penalty ordinances in the charging information or prove them during trial, it is prevented from doing so at a re-sentencing. The only remedy is discharge of Defendant.

Counts v. State, No. SD30658 (Mo. App. S.D. 6/7/11):
Holding: Claim that trial judge violated Sec. 559.115 by failing to hold a hearing within 120 days after Movant's incarceration where DOC recommended release, but judge ultimately denied it, is not cognizable in 24.035 proceeding, because this is an attack on a ruling on probation. However, judge's action can be challenged by an appropriate writ.

Etenburn v. State, No. SD30503 (Mo. App. S.D. 5/17/11):
Holding: Where oral pronouncement of sentence differed from written judgment, postconviction case is remanded to correct the written sentence and judgment to reflect the oral pronouncement.

State v. Thesing, No. SD30188 (Mo. App. S.D. 2/14/11):
Trial court can impose SIS for offense of pharmacy robbery first degree, Sec. 569.025.
Facts: Defendant was convicted at a bench trial of pharmacy robbery first degree, 569.025. He argued at sentencing that the court should impose an SIS and probation. The trial court believed it was precluded from doing this by statute and imposed a 10 year prison sentence.
Holding: Sec. 569.025.3 provides: "Pharmacy robbery in the first degree is a class A felony, but, notwithstanding any other provision of law, a person convicted pursuant to this section shall not be eligible for suspended execution of sentence, parole or

conditional release until having served a minimum of 10 years imprisonment." Under the plain language of the statute, a suspended imposition of sentence is not prohibited. If the legislature had wanted to preclude that, it could have said so in the statute. Therefore, the court had discretion to give an SIS and probation. Sentence reversed and case remanded for resentencing.

Barnes v. Missouri Department of Corrections, 2015 WL 1814771 (Mo. App. W.D. April 21, 2015):

Even though Petitioner/Defendant's parole was revoked because of a new offense and Defendant served time in DOC on the parole revocation, where Defendant was placed on probation for the new offense and then later revoked on that offense, Defendant was not entitled to jail time credit for time in custody unless the trial court ordered that he receive credit at the time probation was revoked; even though the new offense was "related to" the prior offenses, Sec. 559.100.2 provides that a Defendant receives credit for time on probation only if ordered by the sentencing judge.

Facts: In 2004, Defendant began serving prison sentences from Greene and Howell Counties. He was paroled on these offenses in February 2007. In September 2007, Defendant was charged with a new offense in Holt County. As a result, his parole on the Greene and Howell cases was revoked. Defendant pleaded guilty to the Holt case and was placed on probation for that case in 2008, even though he was still in the Department of Corrections on the Greene and Howell cases. In 2009, he completed his Greene and Howell sentences and was released. He remained on probation in Holt County until 2012, when his probation was revoked and his Holt sentence executed. The DOC refused to give him any jail time credit for the Holt case. Defendant filed a declaratory judgment action seeking jail credit from the time he was placed on probation in Holt County in 2008 through the time he was released from DOC (on the Greene and Howell cases) in 2009.

Holding: Defendant contends that because his parole was revoked due to the Holt case, the Holt case is "related to" the prior cases and he is entitled to jail time credit on it under Sec. 558.031.1 and cases such as *Goings v. Missouri Dept. of Corrections*, 6 S.W.3d 906 (Mo. banc 1999). However, there are exceptions under 558.031.1, one of which is when the Defendant is on probation. When a Defendant is on probation, Sec. 559.100.2 applies. That section states that a trial court, at the time of revocation of probation, "may, in its discretion, credit any period of probation or parole as time served on a sentence." Here, the trial court did not order any credit for time spent on probation. Thus, regardless of whether the Holt case is "related to" the prior cases, Defendant is not entitled to credit. Sec. 559.100.2 takes precedence over 558.031.1. The trial court can only order credit at the time of revocation of probation; the trial court is without authority to do it later. Credit denied.

Elliott v. Norman, 2015 WL 3372165 (Mo. App. W.D. May 26, 2015):

(1) Where Petitioner was not eligible for bond on his federal offense because he was simultaneously charged with a Missouri offense, Petitioner was entitled to jail time credit against the later Missouri sentence because the Missouri offense was "related to" the federal one since the Missouri offense prevented his pretrial release on bond; but (2) once Petitioner was sentenced on the federal offense, he was not eligible for further jail

time credit against the later Missouri sentence because Petitioner was then serving the federal sentence and would not have been eligible for release from custody regardless of the Missouri offense; and (3) where Petitioner's later Missouri sentence was ordered to be concurrent with the federal sentence, he began to receive service time on his Missouri sentence on the date he was sentenced, so jail time credit after that date is not relevant.
Facts: Petitioner-inmate sought jail time credit. Beginning in April 1997, Petitioner committed a Missouri Offense in St. Louis County, and because the offense involved a firearm, he was also charged with a Federal felon-in-possession offense. He was held in the Ste. Genevieve County jail pending trial on Federal Offense and, at the same time, had a warrant pending from St. Louis County for Missouri Offense. The Federal court ordered that Petitioner could not be released on bond due to the St. Louis County warrant. In November 1997, Petitioner pled guilty to Federal Offense and was sentenced to 44 months in federal prison, where he was then taken. In June 1998, he was returned from federal prison to St. Louis County Jail to stand trial on Missouri Offense. In February 1999, he was sentenced to 20-years on Missouri Offense, to run concurrently with Federal Offense. Petitioner was returned to federal prison. Petitioner completed his federal sentence in August 2000, and was sent to Missouri DOC. He sought jail time credit against the Missouri Offense sentence for all time before August 2000.
Holding: As an initial matter, the trial court's analysis of the issue was wrong because the trial court concluded that the Missouri and Federal Offenses were "related to" each other because they involved the same conduct and elements. Sec. 558.031.1 requires jail time credit be given when offenses are "related to" each other, but the test is not a conduct or elements test, and has nothing to do with the underlying facts of the two cases. Instead, incarceration is "related to" the subsequent offense where the inmate is eligible for release on bail on the prior offense, but the subsequent charge prevents the inmate's release from custody; the inmate has to prove that the subsequent offense would have prevented his release on the prior offense. Time in custody is generally "related to" a sentence, and thus eligible for credit, if the inmate could have been free from custody absent the charge. Time is custody is not "related to" an offense if the prisoner would have been in custody regardless of the offense. There are three time periods at issue here. (1) Petitioner is entitled to the time spent in jail *before* his federal sentence was imposed in November 1997. This is because after Petitioner was arrested on Federal Offense, the federal court denied his release on bond because of Missouri Offense warrant; thus, Missouri Offense prevented his release on bond on Federal Offense, so the two offenses are "related to" each other. (2) Petitioner is not entitled to time spent in Missouri jails *after* his federal sentencing. Once Petitioner received his federal sentence in November 1997, he was ineligible for release on bond for Federal Offense; thus, Petitioner's time in custody in Missouri jails *after* federal sentencing was *not* "related to" Missouri Offense for purposes of receiving credit because he would have been in custody regardless of the Missouri Offense. (3) The last time period is for time spent in Missouri jails *after completion* of the federal sentence. The DOC started Petitioner's Missouri Offense sentence in February 1999, the day he was sentenced, and calculated his release date from February 1999. This is the correct procedure when a Missouri court makes a sentence run concurrently with another sentence. Sec. 558.031.1 allows a sentence to run concurrently with another sentence being served outside Missouri DOC. Since Petitioner's Missouri sentence commenced on the day it was imposed in February 1999,

as a matter of law, he is not eligible for jail time credit after this date because he was *already being credited with this time as part of regular service of his sentence*.

Woods v. Missouri Bd. of Probation and Parole, 2015 WL 7454730 (Mo. App. W.D. Nov. 24, 2015):
(1) Conditional release and parole are separate concepts, conditional release being determined by statute, while parole is left almost entirely to the discretion of the Parole Board; (2) conditional release date on consecutive sentences is determined by having Defendant serve all his prison terms consecutively, followed by the consecutive running of the conditional release terms; (3) parole eligibility date is determined by adding together the minimum parole eligibility terms for each sentence.
Facts: In Feb. 2007, Defendant was convicted of unlawful use of weapon and sentenced to four years. Because Defendant had a prior DOC commitment, he was required to serve 40% under Sec. 558.019. In Dec. 2007, Defendant was convicted of second-degree drug trafficking. He was sentenced as a prior drug offender to 25 years to run consecutively to the first sentence. The Board notified Woods that his conditional release date would be October 2029, and that he was not eligible for parole due to the drug conviction. Defendant challenged this in a declaratory judgment action.
Holding: To determine conditional release date, a defendant must serve all his prison terms consecutively, followed by the consecutive running of conditional release terms. Sec. 558.011.4(1) sets one-third of the term as the conditional release portion of a 4-year term, meaning Defendant must serve two years and 8 months of the first sentence. At that point, the calculation of the conditional release date on the 25 year sentence begins, of which 558.011.4(1) sets 20 years as the prison term. Thus, Defendant prison terms expires in October 2029, and that's the conditional release date. Sec. 217.690 and 14 CSR 80-2.010 govern calculation of parole eligibility, which is calculated by adding together the minimum parole eligibility terms of each sentence. Defendant must serve 40% of his 4-year sentence under 558.019.2(1), or 19 months. As a prior drug offender under 195.295.3, Defendant is not eligible for parole on the 25-year sentence. Thus, his parole eligibility date is September 2033.

Willbanks v. Missouri Dept. of Corrections, 2015 WL 6468489 (Mo. App. W.D. Oct. 27, 2015):
Holding: Even though Juvenile was sentenced to multiple consecutive sentences totally 355 years for non-homicide offenses, and will not be eligible for parole until age 85, this did not violate the prohibition on life without parole sentences for juveniles under *Graham*; Western District rejects notion of de facto life without parole sentences due to difficulty in determining exactly what constitutes such sentences.

Masters v. Lombardi, 2015 WL 5821525 (Mo. App. W.D. Oct. 6, 2015):
Sec. 559.115 does not prohibit Defendant convicted of first-degree assault (which is a "dangerous felony") from being given 120-day shock incarceration, even though Defendant would have to serve 85% of his sentence otherwise; the 85% Rule statute does not affect the trial court's power to release a person convicted of a dangerous felony during the first 120 days of their incarceration.

Facts: In 2010, Defendant (Masters) pleaded guilty to first-degree assault and was placed on probation. In 2013, the court revoked his probation and ordered that he be placed in a 120-day shock program under Sec. 559.115.3. Subsequently, the DOC issued a memorandum stating its position that Defendant was no longer eligible for probation consideration under the 120-day shock program. DOC argued that, under 559.115, because his conviction was for a dangerous felony, he was ineligible for parole until he had served 85% of his sentence, and because 559.115 precluded probation for those convicted of "any offense in which there exists a statutory prohibition against either probation or parole," Defendant could not be released on probation. Defendant brought a declaratory judgment action. The trial court ruled for DOC. Defendant appealed.
Holding: 559.115 allows a court to place a Defendant in a 120-day shock program. Sec. 559.115.2 provides that this power is limited only if "otherwise prohibited by subsection 8." Subsection 8 states that "notwithstanding any other provision of law, probation may not be granted pursuant to this section to offenders who have been convicted of" certain listed felonies (not first-degree assault) "or any offense in which there exists a statutory prohibition against either probation or parole." Although first-degree assault is a dangerous felony under 556.061(8), which would require Defendant to serve 85% of his sentence before becoming parole eligible, this does not affect the court's power to release him on probation within his first 120 days in DOC under 559.115. The same statute that provides for 85%, Sec. 558.019.1, explicitly states that it "shall not be construed to affect … the provisions of section 559.115, relating to probation." This plain language indicates that it does not override the court's power to grant Defendant probation upon successful completion of a 120-day program. DOC argues that the phrase "any offense in which there exists a statutory prohibition against either probation or parole" was intended as a catch-all phrase to cover other, unidentified dangerous felonies. But had the Legislature intended that, it could have referenced the dangerous felony definition in 556.061(8). The true meaning of the phrase "any offense in which there exists a statutory prohibition against either probation or parole" means offenses subject to a prohibition on either probation or parole arising from a statute *other than* 558.019. An example would be the armed criminal action statute, which by its terms requires a mandatory three-year minimum, and prohibits probation or parole during that three years.

State v. Williams, 465 S.W.3d 516 (Mo. App. W.D. July 21, 2015):
A persistent felony offender finding in a felony cases raises the maximum penalty to the next highest felony class, but does not raise the minimum penalty; Defendant was entitled to resentencing where Judge mistakenly believed that because Defendant was a persistent felony offender, the minimum sentence was that for the next highest felony.
Facts: Defendant was convicted at trial of DWI as a chronic offender, and prior and persistent felony offender. The Judge believed the minimum sentence was 10 years, and sentenced Defendant to 10 years.
Holding: Plain error relief is available here because where a court sentences a defendant based on a mistaken belief as to the authorized range of punishment, this is clear error that results in manifest injustice. Sec. 577.023.5 states that a "chronic" alcohol offense is a Class B felony. The range of punishment for B felonies is 5 to 15 years. Because Defendant was also found to be a prior and persistent felony offender under 558.016, the authorized maximum sentence is that for a Class A felony of 30 to life. However, the

effect of persistent offender status is to increase the *maximum* authorized sentence to a Class A felony, but the *minimum* remains as a Class B felony of 5 years. A sentence based on a materially false foundation violates due process. Remanded for resentencing.

Thornton v. Denney, 2015 WL 1245499 (Mo. App. W.D. March 17, 2015):
Petitioner/Defendant, who pleaded guilty in 2007 to DWI, was entitled to habeas relief on his claim that his prior municipal court SIS for DWI could not be used to enhance his sentence; this was true even though Defendant could have raised this claim in a Rule 24.035 motion, because habeas corpus is available to correct sentencing defects.
Facts: Petitioner/Defendant pleaded guilty in 2007 to DWI. His offense was enhanced from a Class A misdemeanor to a Class D felony because, as relevant here, he had a prior municipal court SIS for DWI. In 2011, Defendant's probation was revoked and his sentence executed. He filed a habeas corpus case alleging that under *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), his municipal court SIS could not be used to enhance his sentence to a felony.
Holding: Defendant is correct that if Turner applies, his offense cannot be enhanced to a felony. The State contends that because Defendant could have raised this issue in a Rule 24.035 case, he has waived it. However, habeas can be used to correct "sentencing defects" where a sentence exceeds that permitted by law. A petitioner seeking relief from a sentencing defect need not show "cause" for failure to raise the issue earlier. To the extent that cases such as *State ex rel. Simmons v.White*, 866 S.W.2d 443 (Mo. banc 1993), state a more restrictive rule, they no longer accurately state the law. The State also contends that *Turner* should not be applied retroactively. But Defendant is not seeking retroactive application. The statute at issue in *Turner* was in effect at the time of Defendant's plea in 2007; it is not being applied retroactively. No issue of retroactivity is presented when a later judicial decision interprets the meaning of a pre-existing statute. Thus, *Turner* applies to Defendant, and Defendant's offense is properly a Class A misdemeanor. Because jurisdiction to revoke misdemeanor probation expired in 2009, the trial court lacked authority to revoke probation in 2011. Defendant discharged and his conviction modified to a Class A misdemeanor.

Short v. Missouri Bd. of Probation and Parole, 2015 WL 777632 (Mo. App. W.D. Feb. 24, 2015):
Even though Defendant had three consecutive sentence groups, the last of which was for tampering with a witness (the statute for which does not allow for parole), Defendant was eligible for parole on all but the final sentence; the parole eligibility date is calculated by adding the minimum term for parole eligibility on the first two sentence groups, and then adding the full length of sentence for the tampering charge.
Facts: In 2005, Defendant received several sentences totaling five years ("sentence group one"). In 2007, Defendant received more sentences totaling 25 years, to run consecutively to sentence group one ("sentence group two"). Later, Defendant received a third sentence group, which included a sentence for tampering with a witness of 10 years. This third group was consecutive to the other two. The DOC held that because tampering with a witness is statutorily ineligible for parole, then Defendant was never eligible for parole.

Holding: The witness tampering statute, Sec. 575.270.3, states that "[p]ersons convicted *under this section* shall be ineligible for parole." The DOC argues that this means that persons with such convictions have a ban on parole, regardless of whether any other crime committed by the person allows for parole. However, the plain language of the statute shows that it applies only to the sentence for the tampering conviction, not to all other sentences. The statute uses the words convicted "under *this* section" not "this and any other section." Here, Defendant's other offenses in "sentencing group one" and "sentencing group two" are parole eligible. Under Sec. 217.690, Defendant's parole date is calculated by adding together the minimum parole eligibility for "sentence group one" (1 year, 8 months), the minimum parole eligibility for "sentence group two" (3 years, 4 months), and the minimum parole eligibility for "sentence group three (10 years because of the 10-year non-parole tampering conviction). Hence, Defendant is eligible for parole after serving 15 years.

In re: Branch v. Cassady, 2015 WL 160718 (Mo. App. W.D. Jan. 13, 2015)(transferred to Supreme Court 3/31/15):
Miller (banning mandatory life without parole sentences for juveniles) is retroactive in Missouri, which uses the Linkletter-Stovall test for retroactivity.
Facts: Petitioner, who was 17 at time of guilty plea to first degree murder in 2000, brought state habeas action, alleging that he was entitled to relief under *Miller v. Alabama*, 132 S.Ct. 2455 (2012).
Holding: Habeas review guards against legally unauthorized sentences. *Miller* held that a sentence of life-without-parole imposed on juveniles violates the 8th Amendment unless mitigating factors were considered prior to imposition of the sentence. In deciding whether *Miller* is retroactive, there are two dominant approaches – the *Linkletter-Stovall* test, and the *Teague* test. The U.S. Supreme Court uses the *Teague* test for determining retroactivity in federal court, but states are free to use less-restrictive tests, such as the older *Linkletter-Stovall*. Missouri uses the *Linkletter-Stovall* test, which considers (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice by retroactive application of the new standards. Here, the purpose of *Miller* is to protect juveniles from cruel and unusual punishment. *Miller* goes to the integrity of the process by which liberty is taken – this favors retroactivity. There is no evidence law enforcement relied on mandatory life without parole in performing its duties, so this factor is neutral. Regarding the third factor, although there will be some burden on courts, prosecutors and law enforcement, the gravity of the right involved outweighs the burden. Western District also notes that although *Teague* does not control its analysis, most courts which have applied *Teague* have found that *Miller* is retroactive. When *Miller* is considered to have been in effect at the time of Petitioner's sentencing, mandatory LWOP without considering mitigating factors was not a sentence that was lawfully authorized. Therefore, Petitioner's case is remanded for resentencing.

State v. Summers, 2014 WL 7171572 (Mo. App. W.D. Dec. 16, 2014):
Armed criminal action statute, Sec. 571.015.1, does not mandate consecutive sentences.

Facts: Defendant was convicted of second degree murder, first degree robbery and armed criminal action. At sentencing, the trial court said "I think the armed criminal action has to run consecutive" and imposed a consecutive sentence for it.
Holding: Sec. 571.015.1 provides that the punishment imposed for armed criminal action shall be "in addition to any punishment" provided by law for the crime with a deadly weapon. However, this statute does not mandate that the punishment be consecutive to the other crime. The trial court misunderstood the statute, and this resulted in plain error. Remanded for resentencing where court may consider concurrent sentencing.

State v. Chambers, 2014 WL 2933240 (Mo. App. W.D. July 1, 2014):
Even though Defendant's second drug conviction occurred after the acts in the instant (third) drug case, Defendant was a "persistent" drug offender because Sec. 195.275.1(2) does not have any requirement that the prior conviction be before the date of the commission of the instant offense; court notes, however, that the conduct of the prior offense occurred before the instant offense and so does not decide whether 195.275 permits consideration of convictions which are based on conduct which occurred after the instant charged offense.
Facts: Defendant had a drug conviction in 2004 (Conviction 1). In December 2010, Defendant committed acts that would lead to Conviction 2. In February 2011, Defendant committed acts that would lead to instant drug case (Conviction 3). In June 2011, Defendant was convicted of Conviction 2. In November 2012, he was convicted of instant drug case (Conviction 3) as a "persistent" drug offender, due to the two prior convictions.
Holding: Defendant argues that the June 2011 conviction cannot be used to enhance his instant conviction since the instant conviction related to acts that occurred in February 2011, four months before his June 2011 conviction. The general recidivist statute, Sec. 558.016.6, requires that prior convictions be before the date of commission of the present offense. However, the repeat drug offender statute, Sec. 195.275, contains no such limitation. It merely requires that Defendant have been found guilty of two or more drug felonies. The statute is not ambiguous on this. Therefore, Defendant qualifies as a persistent drug offender.

State v. Olivas, 2014 WL 2190897 (Mo. App. W.D. May 27, 2014):
Holding: (1) Where 16-year-old Juvenile-Defendant was convicted of first degree murder as an adult and given a mandatory sentence of life in prison without parole, Juvenile's sentence violates *Miller v. Alabama*, 132 S.Ct. 2455 (2012), because there was no consideration of individualized circumstances in his case, and he must be re-sentenced pursuant to the procedures set forth in *State v. Hart*, 404 S.W.3d 232 (Mo. banc 2013); and (2) even though Juvenile-Defendant waived jury sentencing, such waiver will not be enforced on remand because Juvenile's waiver was made prior to *Miller*, and he is entitled to be able to choose jury sentencing under *Hart*.

State v. Williams, 2014 WL 705429 (Mo. App. W.D. Feb. 25, 2014):
Where (1) Juvenile-Defendant was convicted of first degree murder and sentenced to LWOP, and (2) while direct appeal was pending, the U.S. Supreme Court held in Miller

that a mandatory sentence of LWOP for juveniles without considering mitigating circumstances and the possibility of a lesser sentence violated the 8th Amendment, case must be remanded for further proceedings to determine sentence pursuant to Missouri Supreme Court's direction in State v. Hart, 404 S.W.3d 232 (Mo. banc 2013).
Facts: Defendant, who was a juvenile at time of offense, was convicted of first degree murder and sentenced to LWOP. While his direct appeal was pending, the U.S. Supreme Court decided *Miller v. Alabama*, 132 S.Ct. 2544 (2012), which held that automatic sentences of LWOP for juveniles violate the 8th Amendment.
Holding: Because Defendant's conviction was pending on direct appeal when *Miller* was decided, his conviction was not "final" and *Miller* applies. The Missouri Supreme Court in *Hart* established a procedure to apply *Miller* . Defendant's case is remanded to apply that procedure. A new sentencing proceeding must be held at which the jury will be instructed that if it is not persuaded that LWOP is the just and appropriate sentence under all the circumstances, additional instruction regarding punishment will be given. If the jury does not then impose LWOP, the court must declare Sec. 565.020 void as applied to Defendant on grounds that it does not provide a constitutionally valid punishment. The court must then vacate the jury's verdict of first degree murder, and enter a verdict of second degree murder under Sec. 565.020.1(1) as a lesser-included offense. The court must then instruct the jury as to the range of punishment for second degree murder.

State v. Sprofera, 2014 WL 836576 (Mo. App. W.D. March 4, 2014):
(1) Where trial court's oral pronouncement of sentence failed to state whether sentence was concurrent or consecutive to a prior sentence, but written judgment stated it was consecutive, this was plainly erroneous because the failure to orally pronounce the sentence to be consecutive made it concurrent by operation of Rule 29.09; and (2) even though Defendant had been convicted of a felony in 2010, where he was tried in 2012 for a sex offense that occurred in 2002, trial court plainly erred in finding him to be a "prior offender" because Sec. 558.016.2 requires that the prior conviction occur before the commission of the charged offense, but (3) the failure to object means that Defendant is not entitled to a new sentencing hearing with jury sentencing, but only to have the prior offender allegation stricken from the judgment and sentence.
Facts: In the instant case, Defendant was charged in 2012 with a sex offense that occurred in 2002. He had previously been convicted in 2010 of another felony sex offense. Defendant was charged as a prior offender, based on the 2010 conviction. At sentencing, the trial court sentenced him to life in prison, but did not say whether this sentence was concurrent or consecutive to the 2010 sentence. The trial court's written sentence and judgment, however, stated that the life sentence was consecutive to the 2010 sentence.
Holding: (1) Rule 29.09 states that a court, when pronouncing sentence, shall state whether the sentence is concurrent or consecutive to prior sentences, but if it fails to do so at time of pronouncing sentence, the sentences shall be concurrent. This sets a bright-line rule that the oral pronouncement controls. Thus, the trial court plainly erred in entering a written sentence and judgment that made the sentence consecutive. Case must be remanded to correct the written sentence to reflect concurrent sentencing. (2) Sec. 558.016.2 provides that to be a "prior offender," the prior finding of guilt "shall be prior to the date of *commission* of the present offense." Here, the present offense occurred in

2002. This was not before the 2010 felony conviction. Thus, Defendant did not qualify as a "prior offender." However, Defendant failed to object to this at trial. The effect of the prior offender allegation meant that he would not have jury sentencing. However, Defendant waived his right to jury sentencing by failure to object. Thus, he does not get a new sentencing hearing with jury sentencing. The only remedy is to order that the prior offender finding be stricken from the judgment and sentence.

State v. Taborn, 2013 WL 5787416 (Mo. App. W.D. Oct. 29, 2013):
Holding: Where Defendant was charged and proven to be only a "prior offender," Sec. 558.016.2, but at sentencing, the parties all believed he was a "persistent offender," Sec. 558.016.3, trial court plainly erred in imposing a 25-year sentence for Class B felony because this exceeded the range of punishment allowed for "prior offender" (15 years) and required re-sentencing on that count only.

State v. Parson, 2013 WL 3804041 (Mo. App. W.D. July 23, 2013):
Holding: Where the written judgment of the trial court had a box "checked" indicating erroneously that Defendant pleaded guilty when he actually was convicted at trial, the appellate court, sua sponte, corrects this clerical error nunc pro tunc under Rule 29.12(c) and 30.23.

State v. Seay, 2013 WL 1197489 (Mo. App. W.D. March 26, 2013):
Holding: Even though a probation revocation proceeding is a "civil" proceeding, Sec. 544.665.1 as amended in 2009 makes failure to appear at the proceeding a crime; under Sec. 544.665.2(1) failure to appear is a felony if the crime for which the defendant was released was a felony.

State v. Doss, 2013 WL 1197484 (Mo. App. W.D. March 26, 2013):
(1) Where the State submits an instruction in the disjunctive for a single robbery, both alternatives must be supported by sufficient evidence; thus, even though the evidence may be sufficient to prove Defendant stole a cell phone, where it was not sufficient to prove that Defendant stole a wallet and the verdict director stated that Defendant "took a cell phone and/or wallet," the evidence was insufficient for robbery; and (2) in penalty phase, the State could not introduce Defendant's juvenile records which would show the equivalent of only misdemeanor conduct because such records are closed under Sec. 211.271.3, and the State could not introduce juvenile records which did not show by a preponderance of evidence that Defendant actually engaged in the conduct alleged.
Facts: Defendant was charged with two counts of first degree murder, first degree robbery, and ACA. Two murder victims were found in a home. There were no cell phones or wallets found in the home. There were some statements made that indicated that a cell phone may have been taken. The jury convicted Defendant of second degree murder, first degree robbery and ACA. At penalty phase, the State, over defense objection, introduced Defendant's juvenile records which showed offenses that would be felonies and misdemeanor if committed by an adult, and also showed other misconduct.
Holding: (1) Because the State submitted a disjunctive verdict director allowing the jury to convict if they found that he "took a cell phone and/or wallet," the State had to present sufficient evidence to support each alternative. Here, there was some evidence that a co-

defendant may have taken a cell phone. However, there was no evidence that any wallet was taken. The State argues that it is "logical" to assume that the victims must have had wallets, and since none were found in the home, the wallets must have been taken as part of the charged crime. While the State's argument is logical, that is not the standard for judging sufficiency of evidence. Absent some evidence that wallets were present and available to be stolen that day, there simply was not enough evidence to support a conviction for stealing a wallet. Robbery conviction reversed. (2) The State argues that the juvenile records were admissible in penalty phase under Sec. 211.321.2(2) which allows juvenile records to be open "for an offense which would be a felony if committed by an adult." Here, however, the records at issue showed conduct that would be a misdemeanor if committed by an adult, and other conduct that would be a felony. Juvenile records regarding misdemeanors are closed under Sec. 211.271.3, while records regarding felonies are open under Sec. 211.321.2(2). Here, it is possible that the juvenile court found Defendant to have engaged in only the misdemeanor-equivalent acts, and thus, the records would not be admissible. Additionally, while the records demonstrate that Defendant engaged in at least some of the acts, the problem is that there are criminal acts alleged in the "motion to modify" the prior juvenile disposition for which there is not evidentiary support that Defendant committed the acts, and the documents do not show which acts Defendant was adjudicated as having committed. Defendant was prejudiced because the jury asked to review the juvenile records, and sentenced Defendant to high sentences despite having found second degree murder. On retrial of the penalty phase, where the records make reference only to "assaults," the State will have to present additional evidence showing that these were felony-equivalent assaults; otherwise, the "assaults" are not admissible because they may have been misdemeanor-equivalent assaults.

State v. Schnelle, 2013 WL 1110698 (Mo. App. W.D. March 19, 2013):
(1) Even though proffered impeachment Witness had only spoken to "not more than 10 people" about victim's reputation for truthfulness, where Witness was familiar with community members who knew victim, had spoken to them about victim's reputation for truthfulness, and knew from this that victim had bad reputation for truthfulness, it was abuse of discretion for trial court to exclude witness (but not prejudicial in light of other evidence of untruthfulness that was admitted); and (2) where a trial court sentences a person to prison, it cannot also order restitution.
Facts: Defendant was convicted of assault and burglary. The defense was that the alleged victim had fabricated her story. The defense offered an impeachment Witness to testify as to the victim's reputation for lack of truthfulness, but the trial court excluded Witness. The trial court sentenced Defendant to prison and to pay about $41,000 in medical expenses of victim as restitution.
Holding: (1) The State argues that since proffered Witness had only spoken with at most 10 people about victim's reputation for truthfulness, this was not sufficient to show victim's reputation in the community. However, whether the knowledge of a character witness is based on much or little evidence affects the weight of the evidence, not its admissibility. Here, the test for admissibility was met since Witness was familiar with community members who knew victim, had spoken to those people or overheard their conversations regarding victim's reputation for truthfulness, and that victim had

reputation as being untruthful. The trial court abused its discretion in excluding Witness, but error was not prejudicial here since jury heard other evidence that victim was untruthful. (2) Reading Secs. 557.011, 559.021.2 and 559.100.2 together, a trial court cannot simultaneously order imprisonment for a felony and payment of restitution. Restitution can only be ordered if the defendant is placed on probation. Since Defendant was sentenced to prison and it is clear that trial court would not have sentenced to probation here, appellate court strikes order of restitution.

Farish v. Missouri Dept. of Corrections, 2013 WL 791842 (Mo. App. W.D. March 5, 2013):

(1) If Inmate was being held before trial in Kansas for a bailable Kansas offense and a Missouri offense, Inmate was entitled under Sec. 558.031.1(2) to jail time credit against his Missouri sentence for time spend in Kansas up to the time he started to serve his Kansas sentence; and (2) where Inmate's Missouri sentence was declared to run concurrently with the Kansas one, the concurrent time began to run on the date of the Missouri sentencing even though Inmate was not physically delivered to Missouri until later.

Facts: Plaintiff-Inmate brought a declaratory judgment action to determine how much jail time credit he should receive against his Missouri sentence. On February 21, 2008, Missouri issued an arrest warrant for Inmate. Meanwhile, beginning February 20, 2008, Inmate was being held in Kansas on a Kansas charge. On December 31, 2008, Inmate began serving a sentence in Kansas on the Kansas charge. On April 6, 2009, while still serving the Kansas sentence, Inmate was transferred to a Missouri jail for trial on the Missouri charge. On March 5, 2010, Inmate was sentenced on the Missouri charge, and returned to the Kansas DOC (KDOC). On August 19, 2010, Inmate was returned to a jail in Missouri for a court appearance. About two weeks later, KDOC paroled him to Missouri. Missouri Department of Corrections (MDOC) took custody of him on October 20, 2010. MDOC gave him jail time credit only for dates he was held in Missouri.

Holding: (1) Under Sec. 558.031.1(2), an inmate is entitled to credit for time in related custody that was compelled exclusively by Missouri but was not spent in Missouri; the statute does not require that the custody be both *in* Missouri and *compelled* by Missouri. "Compelled exclusively by Missouri" means that a person otherwise would not be in custody but for Missouri's actions. This would be the case here if Inmate's Kansas offense was bailable; if it was not bailable, then custody was not compelled exclusively by Missouri. Once Inmate began serving his Kansas sentence, however, then his custody was exclusively that of Kansas so he is not entitled to credit after his Kansas sentencing, even though he was still awaiting disposition of Missouri charges. Case remanded to determine if Kansas offense was bailable. (2) The Missouri sentencing court ordered that its sentence run "concurrently" with the Kansas sentence, but this means that the Missouri sentence starts on the day it was entered (March 5, 2010), not before. The sentence does run concurrently from the Missouri sentencing date, even though Inmate was not physically delivered to MDOC until October 20, 2010.

State v. Hays, 2013 WL 427343 (Mo. App. W.D. Feb. 5, 2013):
Holding: Where the trial court found Defendant to be both a prior and persistent offender, but the written sentence and judgment reflected only a finding of prior offender, this was a clerical error that the trial court should correct nunc pro tunc under Rule 29.12.

Taylor v. State, No. WD74275 (Mo. App. W.D. 8/28/12):
Holding: *Claim that judge punished Movant for appealing the conditions of his probation to an appellate court by revoking his probation and sentencing him to the maximum sentence was cognizable in a 24.035 motion.*
Facts: Movant pleaded guilty to first degree endangering the welfare of a child. The court imposed various sex offender conditions as part of his probation. Movant appealed some the sex offender conditions to the appellate courts. Later, the judge revoked Movant's probation and said he had "manipulated the probation system and manipulated this Court." Movant filed a 24.035 motion alleging that the judge had revoked his probation and imposed the maximum sentence "only because he had exercised his constitutional right to challenge a condition of probation" on appeal.
Holding: Revocation of probation determinations generally are not subject to a challenge in a 24.035 action, but that is not the claim here. Here, Movant is contesting the legality of the sentence imposed upon revocation of probation by contending the judge punished him for exercising his right to appeal the conditions of his probation. It is unconstitutional to use enhanced sentencing to punish or penalize a defendant for exercising his constitutional rights. Movant's claim of retaliatory sentencing is cognizable. However, relief is denied because Movant did not demonstrate that retaliation was the determinative factor in the judge's revocation of probation.

State v. Jackson, No. WD73323 (Mo. App. W.D. 6/5/12):
Even though the State originally charged Defendant as a prior offender and he was found by the court to be such, where the State filed a later information that failed to charge prior offender status, the later information controls and Defendant was entitled to jury sentencing.
Facts: In December 2006, Defendant was indicted for various offenses. On the day of trial, the State filed an information in lieu of indictment charging Defendant as a prior offender. The trial court found him to be a prior offender based on a prior felony conviction. However, before final instructions were read to the jury, the State filed an amended information which omitted any reference to being a prior offender. The issue of punishment was not submitted to the jury. After conviction, Defendant appealed and claimed he was entitled to jury sentencing.
Holding: The State's last-filed amended information superseded all prior informations under Sec. 545.110. Sec. 558.021 requires that prior offender status be pleaded and proven prior to the case being submitted to the jury. Since the last-filed information contained no prior offender allegation, it wasn't before the court, and the State cannot try to plead this after the jury's verdict. Thus, the court's finding of prior offender status based on the prior information was a nullity. Case remanded for jury sentencing.

State v. Harris, No. WD 73910 (Mo. App. W.D. 4/24/12):
Holding: Where Defendant was orally sentenced to "life" in prison but written sentence and judgment stated it was "99 years," the oral pronouncement controls and appellate court can correct the judgment under Rule 30.23.

Johnson v. Missouri Board of Probation and Parole, No. WD74090 (1/31/12):
(1) Sec. 217.735.1 RSMo (as amended 2006) requires lifetime supervision of persons convicted under 556.030 (rape), 566.032 (statutory rape in first degree), 566.060 (forcible sodomy) and 566.062 (statutory sodomy in first degree), even if Defendant is not a prior sex offender and the victim is not less than 14 years old; and (2) although the normal remedy for denial of a writ is to file a new writ in a higher court, where trial court disposed of a writ of prohibition on the merits, the remedy is via an appeal.
Facts: Petitioner was convicted in 2008 of statutory sodomy in the first degree. In 2010, the Board of Probation and Parole notified him that he was subject to lifetime supervision, including GPS monitoring. This notification was the result of a change in the Board's interpretation of Sec. 217.735.1 as amended in 2006. The Board had previously interpreted 217.735.1 as requiring lifetime supervision for these offenses only if the defendant was a prior sex offender and the victim was under 14 years old. However, the Board reinterpreted the 2006 amendment to eliminate these requirements. Petitioner filed a writ of prohibition in the circuit court, which was denied on the merits.
Holding: Sec. 217.735.1 (2005) provided that lifetime supervision was required "when the offender has pleaded guilty to or been found guilty of an offense under sections 556.030 (rape), 566.032 (statutory rape in the first degree), 566.060 (forcible sodomy), 566.062 (statutory sodomy in the first degree), 566.067 (child molestation in the first degree), 566.083 (sexual misconduct involving a child), 566.100 (sexual abuse), 566.151 (enticement of a child), 566.212 (sexual trafficking of a child), 566.020 (incest), 568.080 (child used in a sexual performance), or 568.090 (promoting sexual performance by a child) … against a victim who was less than 14 years old and the offender is a prior sex offender." However, 217.735.1 was amended in 2006 to state that lifetime supervision is required "when the offender has pleaded guilty to or has been found guilty of an offense under section 566.030 (rape), 566.032 (statutory rape in the first degree), 566.060 (forcible sodomy), or 566.062 (statutory sodomy in the first degree) … ***OR*** the offender has pleaded guilty to or has been found guilty of [other listed sex offenses] … against a victim who was less than 14 years old and the offender is a prior sex offender." The revised statute contains two distinct clauses separated by the word "or." Petitioner argues that the prior sex offender requirement of the second clause also applies to the first clause. But such an interpretation is contrary to the last antecedent rule which provides that relative and qualifying words are to be applied to the words immediately preceding and are not to be construed as extending or including more remote words. Hence, the requirements that a victim be less than 14 or that the defendant be a prior sex offender apply only to the second clause, not the first clause. Additionally, when the Legislature amends a statute, the court must assume the Legislature intended to effect some change in the law, so Petitioner's argument is rejected for this reason, too.

State v. Woods, No. WD72561 (Mo. App. W.D. 1/24/12):
Holding: Where written sentence differed from oral pronouncement of sentence by misstating the offense of conviction, the oral pronouncement controls, and this is a clerical error that can be corrected nunc pro nunc.

Howard v. Missouri Department of Corrections, No. WD72520 (Mo. App. W.D. 5/31/11):
Where Defendant (Petitioner) had been held in Canada on a Missouri detainer seeking his extradition to Missouri, he was entitled to this time as jail-time credit against his Missouri sentence.
Facts: In 1991, Defendant committed various offenses in Missouri and then went to Canada. There, he committed a Canadian offense, and served a brief period of incarceration for that offense. While he was in Canada, Missouri filed a detainer against him, and he was held in Canada on the detainer while he apparently opposed extradition for approximately four years. He was returned to Missouri and convicted of offenses in 1997. He filed a declaratory judgment action, claiming he was entitled to jail time credit for time served in Canada.
Holding: The 1991 version of Sec. 558.031 is applicable because Defendant committed his crimes then. Sec. 558.031.1(1)(1991 version) stated that time spent in jail awaiting trial because of a detainer for such offense shall be credited toward service of sentence of imprisonment for that offense. The circuit court denied Defendant relief by finding that his time in Canada was not spent awaiting trial, but was spent fighting extradition. However, *Jones v. Cooksey*, 830 S.W.2d 421, 424 (Mo. banc 1992), held that time served in a foreign jurisdiction is creditable to a sentence if the confinement is "because of" the Missouri detainer. The very purpose of the detainer here was to hold Defendant pending trial in Missouri on the offense for which he is now incarcerated here. Defendant is not entitled to credit for time served by him prior to filing the detainer because that time in Canada was not "because of" a detainer. And he is not entitled to credit for time spent serving his Canadian sentence, since he was not awaiting trial for some unrelated bailable offense then. But he is entitled for the time spent awaiting extradition because of the Missouri detainer.

Doe v. Keathley, No. WD72121 (Mo. App. W.D. 4/26/11):
An SIS is a "conviction" under federal law and, thus, sex registration under SORNA is required.
Facts: Doe pleaded guilty in 1992 to first degree sexual abuse, and received an SIS. He successfully completed his probation. He was not required to register as a sex offender under Missouri statute because his offense occurred before the effective date of the Missouri registration statute. He claimed he wasn't required to register under the federal SORNA in Missouri.
Holding: The federal Sex Offender Registration and Notification Act, 42 USC 16901 (SORNA), does require Doe to register. SORNA, enacted in 2006, mandates sex registration for sex offenses committed prior to SORNA's effective date, and this federal law is not subject to the Missouri Constitution's prohibition on retrospective laws. *Doe v. Keathley*, 290 S.W.3d 719 (Mo. banc 2009). Even though an SIS is not a "conviction" under Missouri law, whether it is a "conviction" under SORNA is determined by federal

law. Federal law makes an SIS a "conviction." Also, even though Doe did not travel in interstate commerce, he still must register. Finally, Doe argues he shouldn't have to register under the US Attorney General's guidelines which state that "it will be deemed sufficient for substantial implementation if jurisdictions register sex offenders with pre-SORNA or pre-SORNA-implementation sex offense convictions who remain in the system as prisoners, supervisees, or registrants, or who reenter the system through a subsequent conviction." However, the Attorney General's guidelines are addressed to the adequacy of States' efforts to implement SORNA, which efforts are required to receive certain federal funds. Also, Doe's petition alleged only that his SIS was not a "conviction." He did not allege he shouldn't have to register because he had completed his involvement in the criminal justice system, so this issue is not before the court.

State v. Liberty, No. WD71724 (Mo. App. W.D. 4/12/11):
Sec. 573.037 RSMo. Cum. Supp. 2007 does not authorize multiple convictions for possession of multiple photos of child pornography in a single event; this constitutes a single offense only.
Facts: Defendant was charged with eight counts of possession of child pornography under Sec. 573.037 RSMo. Cum. Supp. 2007 for possession eight photos of child pornography on his computer on May 2, 2008, as a second offense. He was convicted and sentenced to eight consecutive prison sentences. He appealed, claiming violation of double jeopardy.
Holding: The Double Jeopardy Clause protects a defendant from successive prosecutions of the same offense after acquittal or conviction, and multiple punishments for the same offense. This latter protection ensures that the sentencing discretion of courts is confined to the limits established by the legislature. The issue here is whether multiple punishments were intended by the legislature. Sec. 573.037 as it existed at the time of the offense prohibited the possession of "any obscene material that has as a child one of its participants or portrays what appears to be a child as an observer or participant of sexual conduct." Had the legislature wished to permit separate convictions, it could have criminalized the possession of "an item" of child pornography rather than "any material." Here, we also find compelling that the actus reus the statute required the State to prove – the Defendant's possession – was a single event in the instant case, at a single time and place. Had the State alleged that Defendant "possessed" each photo at a different time when they were each placed on the computer, our analysis might be different, however. We also find the legislature's subsequent amendment informative; in 2008 the legislature added an enhanced penalty to the section on possession for possessing "more than 20 still images of child pornography." If the legislature intended separate convictions for each still image in the prior statute, amending it to add an enhanced penalty for multiple images becomes illogical. Defendant's eight possession counts are reversed and remanded for sentencing on a single count only.

Burlew v. Missouri Dept. of Corrections, No. WD72135 (Mo. App. W.D. 4/5/11):
Where (1) Defendant was originally sentenced to 4 years for DWI and a consecutive 4 year sentence for another crime and (2) the DWI sentence was later vacated and a 6 month sentence imposed, Defendant's other sentence began to run at the time the DWI sentence was completed (6 months from his arrest).

Facts: On November 8, 2006, Defendant was arrested for DWI and another offense and held in jail. On July 27, 2007, Defendant was sentenced to 4 years for DWI and another 4 years for the other crime to run consecutively to the DWI. On October 20, 2008, Defendant won a postconviction case regarding his DWI offense on grounds that the offense should have been only a misdemeanor, and Defendant was resentenced to 6 months on the DWI. With jail time counted, Defendant completed the 6 months on the DWI on May 7, 2007. The DOC refused to give Defendant any credit on the consecutive sentence for time served between May 7, 2007 and October 20, 2008 because the DOC claimed that Defendant was not serving his consecutive 4 year sentence during that time. Defendant filed a declaratory judgment action seeking 532 days of credit against the consecutive sentence for this time.
Holding: The DOC claims that Defendant was only serving the DWI sentence until it was vacated on October 20, 2008, the therefore, can't get any credit for the unrelated consecutive sentence-offense. However, this position was rejected in *Calvin v. Missouri Dept. of Corrections*, 277 S.W.3d 282 (Mo. App. W.D. 2009). *Calvin* held that where one conviction and sentence in a consecutive sentence sequence is later vacated, the other sentences in the sequence should be recalculated as if the vacated sentence never existed. Thus, the consecutive sentence began running on the day Defendant completed his DWI sentence, which was May 7, 2007 (with jail time credit), not on October 20, 2008, when the DWI sentence was actually vacated in the postconviction case. *Calvin* agreed with the notion that the DOC's position of saying that a person's prison time counts toward nothing would deprive them of due process, the right to be free from cruel and unusual punishment and free from double jeopardy.

Pittman v. State, No. WD72020 (Mo. App. W.D. 2/22/11):
Sec. 195.291.2 increases the sentence for drug offense but not its felony classification; wrong classification can be corrected under Rule 84.14 allowing appellate court to give necessary relief.
Facts: Defendant was charged with delivery of drugs as a class B felony with sentence enhanced to a class A range of punishment because of persistent drug offender status. The sentence and judgment stated that Defendant was guilty of a class A felony.
Holding: Sec. 195.291.2 provides that any person convicted of violating Sec. 195.211 "when punishable as a class B felony, shall be sentenced to the authorized term of imprisonment for a class A felony…." However, an enhanced sentence does not reclassify the underlying conviction. It remains a B felony. Therefore, the sentence and judgment classifying this as an A felony is wrong. While Defendant raised this in a 24.035 motion, his counsel withdrew this claim, apparently believing it should be fixed in another way. It could be fixed by a nunc pro tunc motion. Here, however, appellate court corrects the sentence and judgment under Rule 84.14, which allows appellate court to give appropriate relief.

State ex rel. Scroggins v. Kellogg, No. WD73178 (Mo. App. W.D. 2/8/11):
Even though Sec. 559.100.2 allows a court to credit time on probation to a sentence, this can only be done at time sentence is executed when probation is revoked and not later.
Facts: Defendant pleaded guilty in 2002 to certain offenses and was placed on probation. In 2004, Defendant's probation was revoked and his 14-year sentence

executed. In 2010, Defendant filed a motion for credit for 852 days spent on probation, which the trial court granted. The State sought a writ prohibition.
Holding: Sec. 559.100.2 provides that a "circuit court may, in its discretion, credit any period of probation or parole as time served on a sentence." It is an issue of first impression as to *when* a court may do this, however. Once judgment and sentence occurs, a trial court has exhausted its jurisdiction and cannot take further action regarding sentence unless a statute or rule authorizes it. Reading 559.100 as a whole, we are left with the firm impression that the section is intended to permit a circuit court to afford credit for time spent on probation only in the limited context of imposing or revoking probation. Thus, the trial court can only do this at the time of execution of sentence as a result of a probation violation. A court cannot do this later. Writ granted.

*** Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (U.S. June 26, 2015):**
Holding: The federal Armed Career Criminal Act's residual clause, Sec. 924(e)(2)(B)(ii), which defines a "violent felony" as one which "involves conduct that presents a serious potential risk of physical injury to another," is unconstitutionally vague because it fails to give fair notice of prohibited conduct, and invites arbitrary enforcement.

*** Jones v. U.S., 96 Crim. L. Rep. 93, ___ U.S. ___ (U.S. 10/14/14):**
Holding: Justices Scalia, Thomas, Ginsburg issue statement opposing denial of cert. on whether a jury (as opposed to a judge) must do the fact-finding necessary for a sentence not to be "substantively unreasonable." These Justices state that under *Apprendi* and its progeny, "any fact necessary to prevent a sentence from being substantively unreasonable – thereby exposing the defendant to the longer sentence – is an element that must be either admitted by the defendant or found by the jury. It may not be found the by the judge." The Justices believe the Supreme Court should decide this issue.

*** Robers v. U.S., 95 Crim. L. Rep. 198, ___ U.S. ___, 134 S.Ct. 1854 (U.S. 5/3/14):**
Holding: The restitution owed to loan fraud victims (lenders) under Mandatory Victims Restitution Act must be offset by the amount actually recouped from a sale of returned collateral following foreclosure, not by the property's fair market value at time victim (lender) received it as collateral when the mortgage was made; thus, Defendant was responsible for restitution for the fall in value of the property between the time the property was originally mortgaged and the much lower price that was later brought at a foreclosure sale after the real estate market fell. The "property" lost by the victim was the money lent.

*** Paroline v. U.S., 95 Crim. L. Rep. 129, ___ U.S. ___, 134 S.Ct. 1710 (U.S. 4/23/14):**
Holding: Restitution for child pornography victims under 18 USC 2259 for counseling costs and other losses is limited to "an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." Statute does not authorize joint-causation and liability approach which imposed $3.4 million in restitution for all of victim's losses on a single Defendant who possessed two images of victim from Internet. In the absence of any practical way for defendants to seek contribution,

ordering each defendant to pay victim's full costs would raise questions under Excessive Fines Clause of the 8th Amendment. Restitution should reflect the consequences of Defendant's own conduct, not the conduct of thousands of geographically and temporally distant other offenders acting independently and with whom Defendant had no contact.

*** Burrage v. U.S., ___ U.S. ___, 94 Crim. L. Rep. 493, 134 S.Ct. 881 (U.S. 1/27/14):**
Holding: Statute that imposes greater penalty on drug distribution that results in death, 21 USC 841(b)(1)(C), requires proof that the drug user would not have died but for the use of the distributed drug (reversing 8th Circuit which had held that the drug need only be a "contributing factor" to the death); here, the decedent had taken multiple other drugs in addition to the drug at issue.

*** Dorsey v. U.S., ___ U.S. ___, 2012 WL 234463 (U.S. 2012):**
Holding: Fair Sentencing Act, which lowered mandatory minimums for certain crack offenses, applies to defendants whose offenses occurred before FSA's effective date of August 3, 2010, but who were sentenced after that date.

*** Miller v. Alabama, ___ U.S. ___, 2012 WL 236859 (U.S. 2012):**
Holding: Mandatory life without parole for juveniles convicted of homicide offenses violates 8th Amendment.

*** Southern Union Co. v. U.S., ___ U.S. ___, 2012 WL 2344465 (U.S. 2012):**
Holding: *Apprendi*, which holds that 6th Amendment requires a jury to find any fact other than prior convictions which increase maximum punishment, applies to criminal fines.

U.S. v. Kebodeaux, 2013 WL 3155231, ___ U.S. ___ (U.S. 6/24/13):
Holding: (1) Application of SORNA's registration requirements to Defendant who had been convicted of sex offense while in military was constitutional under the Military Regulation Clause and the Necessary and Proper Clause; and (2) Even though Defendant had completed his sex offense sentence before SORNA was enacted, he was still required to register where he had been required to register under a prior sex offender registration law.

Descamps v. U.S., 2013 WL 3064407, ___ U.S. ___ (U.S. 6/20/13):
Holding: (1) Courts may not apply the modified categorical approach to sentencing under ACCA when the crime of which the defendant was convicted has a single, indivisible set of elements, and (2) Defendant's prior burglary conviction under California law was not for a violent felony within the meaning of ACCA.

*** Alleyne v. U.S., 93 Crim. L. Rep. 405, ___ U.S. ___ (U.S. 6/17/13):**
Holding: 6th Amendment right to jury trial requires that a jury, not a judge, find any fact that increases a statutory mandatory minimum sentence (overruling *Harris v. U.S.*, 536 U.S. 545 (2002)); here, mandatory minimum increased from 5 to 7 years if a firearm was "brandished" and from 5 to 10 if "discharged"; the jury, not judge, was required to find these elements (facts).

*** Peugh v. U.S., 93 Crim. L. Rep. 353, ___ U.S. ___ (U.S. 6/10/13):**
Holding: Sentencing Defendant under new version of USSG that were promulgated after his crime was committed and which increased his punishment violated Ex Post Fatco Clause.

*** Setser v. U.S., ___ U.S. ___, 91 Crim. L. Rep. 6 (U.S. 3/28/12):**
Holding: District court imposing sentence for federal offense has discretion to make sentence consecutive to an anticipated state sentence that has not yet been imposed.

*** Reynolds v. U.S., 132 S.Ct. 975 (2012):**
Holding: Defendants convicted of sex crimes before SORNA took effect are not subject to registration unless and until the Attorney General exercises his authority to apply the law retroactively to them.

*** Freeman v. U.S., ___ U.S. ___, 2011 WL 2472797 (U.S. 6/23/11):**
Holding: Even though a defendant pleads guilty with a particular recommended sentence as a condition of the plea, defendant may still be eligible for a sentence reduction if the U.S. Sentencing Commission later lowers the sentencing range.

*** Tapia v. U.S., ___ U.S. ___, 89 Crim. L. Rep. 465 (U.S. 6/16/11):**
Holding: The 1987 Sentencing Reform Act prohibits judge from considering the need for rehabilitation in deciding whether and for how long to incarcerate the defendant; here, the district judge had imposed a longer sentence on defendant to make him eligible for certain drug treatment programs run by the Bureau of Prisons; the Act prohibits promoting rehabilitation by prolonging a prison term.

*** Sykes v. U.S., ___ U.S. ___, 89 Crim. L. Rep. 409 (U.S. 6/9/11):**
Holding: Prior felony conviction for fleeing from police in a car presents such a risk of physical injury to others that it qualifies as a "violent felony" for enhanced sentencing under ACCA, 18 USC 924(e); inquiry into the "purposeful, violent, and aggressive" nature of the offense such as in *Begay v. U.S.*, 553 U.S. 137 (2008) can also determine the nature of a prior conviction in rare cases where analysis into the level of risk is not dispositive.

*** DePierre v. U.S., ___ U.S. ___, 89 Crim. L. Rep. 411 (U.S. 6/9/11):**
Holding: The term "cocaine base" in federal mandatory-minimum statutes covers any base form of the drug, not just crack cocaine.

*** Pepper v. U.S., ___ U.S. ___, 88 Crim. L. Rep. 681, 131 S.Ct. 1229 (U.S. 3/2/11):**
Holding: (1) District court resentencing a defendant may rely on the defendant's rehabilitation efforts after initial sentencing to deviate downward from the recommended USSG range (overruling *U.S. v. Sims*, 174 F.3d 911 (8th Cir. 1999)) and finding Sec. 3742(g)(2)(A) inconsistent with *Booker*); and (2) law-of-the-case doctrine does not restrict extent to which judge at a de novo resentencing may deviate from USSG range.

*** McNeill v. U.S., ___ U.S. ___, 89 Crim. L. Rep. 369 (U.S. 6/6/11):**
Holding: Whether a prior state conviction qualifies as a "serious drug offense" for purposes of enhanced sentencing under ACCA is determined by the maximum prison term authorized for that offense at the time of conviction, even if the state later lowered the penalty.

*** Swarthout v. Cooke, ___ U.S. ___, 88 Crim. L. Rep. 464, 2011 WL 197627 (U.S. 1/24/11):**
Holding: Federal habeas relief is not available for an error of state law; thus, federal court cannot grant habeas relief on grounds that state court violated state law in denying parole.

U.S. v. Del Valle-Cruz, 97 Crim. L. Rep. 52 (1st Cir. 4/6/15):
Holding: Even though Defendant's plea deal to failure to register waived the right to appeal, this did not bar him from challenging supervised release condition that effectively prevented him from living with his with his minor son and family; prohibiting Defendant from living with his son and family was not related to his offense of failing to register or his history and character.

U.S. v. Alphas, 97 Crim. L. Rep. 151 (1st Cir. 5/7/15):
Holding: Where Defendant was convicted of insurance fraud by inflating the value of insured lost property, the Gov't could not invoke the void-for-fraud provisions in the insurance policy as the amount of restitution; the Gov't claimed that if the insurance company had known of the fraud, the company would have paid nothing, so the amount of loss was the entire amount paid on the claim; the Defendant did not defraud the insurer of proper amounts that would have been paid anyway.

U.S. v. Medina, 96 Crim. L. Rep. 643 (1st Cir. 3/4/15):
Holding: Defendant's challenge to supervised release condition of a penile plethysmography testing is ripe for review due to its intrusiveness and unreliability, even though the test had not actually been ordered yet.

U.S. v. Almonte-Nunez, 2014 WL 6090674 (1st Cir. 2014):
Holding: District court plainly erred in sentencing Defendant on firearms possession charge above statutory maximum; even though the charge had been grouped with convictions on other counts, the separate statutory maximum limited each sentence.

U.S. v. Ramos, 2014 WL 3938590 (1st Cir. 2014):
Holding: Even though Defendant was convicted of aiding and abetting production of child pornography, supervised release condition prohibiting internet access without probation officer's permission was not reasonably necessary to achieve sentencing goals, where Defendant had no history of improper internet use and the internet was not used in the instant conviction.

U.S. v. Fish, 94 Crim. L. Rep. 708, 2014 WL 715785 (1st Cir. 2/26/14):
Holding: State conviction for an offense that typically involves only intentional conduct but that has been applied to reckless conduct is not a "crime of violence."

U.S. v. Pena, 94 Crim. L. Rep. 558, 2014 WL 448439 (1st Cir. 2/5/14):
Holding: Where Defendant pleaded guilty but was unconstitutionally sentenced to a mandatory minimum sentenced based on a judge-found fact (*Alleyne* error), the Gov't does not get to have a sentencing jury trial to correct the error; rather, the remedy is to re-sentence without consideration of the judge-found factor.

5/13 U.S. v. Zavala-Marti, 2013 WL 1943825 (1st Cir. 2013):
Holding: Sentencing court committed plain error in imposing a general life sentence in prosecution for drug conspiracy, where Gov't had not sought life sentence at outset of case even though it could have done so, and the grand jury chose the drug-quantity and, thus, the statutory sentencing limits.

5/13 U.S. v. Candelaria-Silva, 2013 WL 1943818 (1st Cir. 2013):
Holding: Sentencing court clearly erred in attributing drug quantity found in ledgers of drug conspirators to Defendant, where the conspiracy was an immense operation, and there was no evidence linking Defendant to the location where the ledgers were seized.

U.S. v. Marquez, 2012 WL 5393494 (1st Cir. 2012):
Holding: Even though Defendant claimed in a recording that he had sold 152 grams of crack on more than one occasion, where there was no corroboration of this and Defendant was inclined to exaggerate his exploits to customers, this could not be considered when sentencing Defendant.

U.S. Farrell, 2012 WL 516069 (1st Cir. 2012):
Holding: Defendant's breaking-and-entering conviction was not a violent felony within the meaning of the Armed Career Criminal Act (ACCA).

U.S. v. Molignaro, 2011 WL 2628330 (1st Cir. 2011):
Holding: Court cannot extend defendant's sentence following revocation of supervised release to promote rehabilitation.

U.S. v. McGhee, 2011 WL 2465452 (1st Cir. 2011):
Holding: Mass. youthful offender adjudication for armed robbery is not a predicate crime under USSG for career offenders.

U.S. v. Davila-Felix, 2011 WL 6155721 (1st Cir. 2011):
Holding: Predicate conviction under the "three strikes" statute must occur before commission of the "third strike" offense.

U.S. v. Rodriguez, 88 Crim. L. Rep. 466 (1st Cir. 12/28/11):
Holding: Judge's use of post-offense USSG amendment that increased the recommended range was plain error.

U.S. v. Torres-Rosario, 90 Crim. L. Rep. 70 (1st Cir. 9/23/11):
Holding: Interests of justice allow Defendant to appeal ACCA sentence, even though he expressly waived ACCA challenges at sentencing.

U.S. v. Douglas, 89 Crim. L. Rep. 370 (1st Cir. 5/31/11):
Holding: Changes Congress made to sentences for crack apply to all defendants sentenced after November 1, 2010, even if their offenses were committed before then.

U.S. v. Anonymous Defendant, 88 Crim. L. Rep. 404 (1st Cir. 12/22/10):
Holding: After *U.S. v. Booker*, 543 U.S. 220 (2005), appellate court must review sentences for "reasonableness."

U.S. v. Rodriguez, 2014 WL 7331947 (2d Cir. 2014):
Holding: Maximum allowable supervised release following multiple revocations must be reduced by the aggregate length of any terms of imprisonment that have been imposed upon revocation.

U.S. v. Van Mead, 2014 WL 6863679 (2d Cir. 2014):
Holding: Even though New York law had requisite age difference between victim and Defendant, statutory rape was not categorically a "crime of violence" under ACCA.

U.S. v. Matta, 2015 WL 304209 (2d Cir. 2015):
Holding: District court could not delegate to probation officer whether Defendant's drug treatment would be in-patient or out-patient on supervised release; this was an improper delegation of court's sentencing authority, and differences on Defendant's liberty interest based on in-patient vs. out-patient treatment.

U.S. v. Sellers, 2015 WL 1881342 (2d Cir. 2015):
Holding: A prior drug conviction that was replaced by a youthful offender adjudication was not a qualifying prior conviction under ACCA.

U.S. v. Pierce, 2015 WL 2166141 (2d Cir. 2015):
Holding: Where the sentencing statute was ambiguous as to how convictions had to be sequenced, the rule of lenity required court to deem Defendant's possession of firearm count, rather than his discharging count, to be the first conviction, because this sequencing carried a lower mandatory minimum.

U.S. v. Dantzler, 96 Crim. L. Rep. 235 (2d Cir. 11/14/14):
Holding: The limits of *Shepard v. U.S.*, (U.S. 2005), on the records a judge may use when making a determination about the applicability of ACCA's recidivist sentences apply to a finding that predicate priors were committed at different times; the judge can consider only the facts set out in conclusive judicial sources such as plea agreements or charging documents underlying jury verdicts that establish the facts were either admitted by the defendant or found by the jury.

U.S. v. Baldwin, 94 Crim. L. Rep. 671 (2d Cir. 2/21/14):
Holding: Defendant who used file sharing program to view child pornography was not eligible for enhancement for those who distribute child pornography under USSG unless Gov't proved he was aware the files were accessible to others.

U.S. v. Christie, 94 Crim. L. Rep. 281 (2d Cir. 11/15/13):
Holding: Defendant who was eligible for sentencing modification under USSG was entitled to fuller explanation of a denial than court merely checking a "denied" box on a form.

U.S. v. McLaurin, 94 Crim. L. Rep. 93 (2d Cir. 10/3/13):
Holding: Court abused its discretion by requiring Defendant convicted of failing to register as a sex offender to take penile plethysmography testing as a condition of supervised release; such testing bears insufficient relation to correctional or medical treatment, the protection of the public or deterrence of crime.

U.S. v. Lundquist, 93 Crim. L. Rep. 773, 2013 WL 4779644 (2d Cir. 9/9/13):
Holding: Court erred in child pornography case in deciding restitution in failing to apportion some of the victim's losses to the relative who originally abused her and created the photos of abuse.

U.S. v. Wernick, 2012 WL 3194244 (2d Cir. 2012):
Holding: Sentencing court plainly erred in using Defendant's acts against children proved only at sentencing, not trial, as "relevant conduct" in calculating offense level.

U.S. v. Lacey, 2012 WL 5416466 (2d Cir. 2012):
Holding: USSG enhancement for offense "committed through mass-marketing" only applies when the targets of the mass-marketing are also victims of the scheme.

U.S. v. Zangari, 2012 WL 1323189 (2d Cir. 2012):
Holding: In calculating restitution, the defendant's actual gain from a kickback scheme could not be used a proxy for the victims' actual losses.

U.S. v. Gilliard, 90 Crim. L. Rep. 669 (2d Cir. 2/17/12):
Holding: The U.S. Supreme Court's decision in *Tapia v. United States*, 89 Crim. L. Rep. 465 (U.S. 2011), does not preclude a sentencing judge from considering a defendant's need for rehabilitative treatment so long as that factor does not increase the length of the defendant's sentence.

U.S. v. Rivera, 2011 WL 5022734 (2d Cir. 2011):
Holding: Defendant was eligible for a sentencing reduction pursuant to a retroactive amendment reducing the Sentencing Guidelines for his offense.

U.S. v. Archer, 2011 WL 4360013 (2d Cir. 2011):
Holding: Absent compelling extenuating circumstances, the government may not enter new evidence on remand where it knew of its obligation to present the evidence and did not do so.

U.S. v. Spencer, 2011 WL 1900930 (2d Cir. 2011):
Holding: Defendant did not violate probation condition that he notify probation office of a change in employment "10 days prior to" the change, where Defendant did not know 10 days in advance that he was to be terminated from his job.

U.S. v. Cossey, 2011 WL 257441 (2d Cir. 2011):
Holding: Trial court plainly erred in increasing sentence for child pornography possession based on unsupported belief that an undiscovered "gene" made Defendant incapable of controlling his behavior.

U.S. v. Espinal, 2011 WL 768021 (2d Cir. 2011):
Holding: Failure to follow specific procedure to be followed before an enhanced sentence is imposed based on prior felony was error.

U.S. v. Potes-Castillo, 2011 WL 855794 (2d Cir. 2011):
Holding: Prior DWI conviction is not categorically included in criminal history score.

U.S. v. Gonzalez, 2011 WL 2937901 (2d Cir. 2011):
Holding: Using donor lists from sham non-profit organization to calculate restitution was improper where court failed to determine if donors received anything of value form the organization in exchange for the donations.

U.S. v. Aumais, 89 Crim. L. Rep. 855 (2d Cir. 9/8/11):
Holding: Restitution statute for child pornography, 18 USC 2259, requires the Gov't prove that Defendant proximately caused the harm suffered by the child in the illegal image.

U.S. v. Lee, 89 Crim. L. Rep. 749 (2d Cir. 7/26/11):
Holding: Prosecutor cannot refuse to move for acceptance-of-responsibility reduction just because defense counsel objected to the presentence investigation report, which required the prosecutor to prepare for the sentencing hearing.

U.S. v. Spencer, 89 Crim. L. Rep. 314 (2d Cir. 5/20/11):
Holding: Defendant on supervised release who was unexpectedly fired from his job did not violate condition of release requiring him to provide notice "at least 10 days prior" to change in employment.

U.S. v. Turk, 2010 WL 4840135 (2d Cir. 2010):
Holding: Amount of loss caused by mortgage fraud is the unpaid principal of loans made by victims after they were misled.

U.S. v. Merlino, 2015 WL 2059594 (3d Cir. 2015):
Holding: In order to revoke supervised release, court must have issued a warrant or summons prior to expiration of the release term; this is a jurisdictional requirement not subject to equitable tolling.

U.S. v. Harris, 95 Crim. L. Rep. 218 (3d Cir. 5/9/14):
Holding: Even though Defendant enters nolo contendere plea, he remains eligible for acceptance of responsibility provision of USSG, 3E1.1(a).

U.S. v. Bagdy, 95 Crim. L. Rep. 621 (3d Cir. 8/21/14):
Holding: Even though Defendant squandered an inheritance that he could have used to pay all his restitution, this did not justify revocation of his supervised release where Defendant made the minimum required monthly restitution payments.

U.S. v. Flores-Mejia, 95 Crim. L. Rep. 507 (3d Cir. 7/16/14):
Holding: To preserve a claim that sentencing judge failed to consider an issue, Defendant must object in the district court immediately after the judge imposes the sentence.

U.S. v. Paladino, 96 Crim. L. Rep. 113 (3d Cir. 10/8/14):
Holding: Even though Defendant's plea agreement was for a stipulated sentence, he must still be given right of allocution.

U.S. v. Boney, 96 Crim. L. Rep. 87 (3d Cir. 9/15/14):
Holding: A judge choosing between multiple provisions of USSG listed in the manual's statutory index should make the choice based on the offense conduct listed in the indictment and not the conduct presented in the evidence at trial.

U.S. v. Solomon, 95 Crim. L. Rep. 688 (3d Cir. 9/15/14):
Holding: A position of trust enhancement is not allowed under USSG when the "cross-reference" provision of 2C1.1(c)(1) is used.

U.S. v. Thornhill, 95 Crim. L. Rep. 508 (3d Cir. 7/8/14):
Holding: Under federal statute setting forth conditions where revocation of supervised release is mandatory, district court must cite sentencing factors in 18 USC 3553(a) when setting the length of the prison term it imposes.

U.S. v. Brown, 95 Crim. L. Rep. 669 (3d Cir. 9/2/14):
Holding: Under *Descamps*, if a statute is divisible into multiple versions, but each version is overbroad (covers at least some conduct that is not a crime of violence) and indivisible (cannot be further divided into subversions based on the elements), extra-statutory documents are irrelevant: the prior conviction is not a predicate offense.

U.S. v. Jones, 94 Crim. L. Rep. 473 (3d Cir. 1/10/14):
Holding: Enhancement for assaulting law enforcement officer during flight, USSG

3A1.2(c)(1), does not apply where Officer did not see that Defendant had a gun until after Defendant was apprehended.

In re Pendleton, 2013 WL 5486170 (3d Cir. 2013):
Holding: Juvenile Petitioners made a prima facie showing that new constitutional rule banning juvenile LWOP was retroactive, so as to permit filing of second habeas petition.

U.S. v. Savani, 93 Crim. L. Rep. 146, 2013 WL 1876752 (3d Cir. 4/24/13):
Holding: Defendants who originally received downward departures from mandatory minimum sentences are eligible for further reductions under retroactive amendments to USSG.

U.S. v. Reynolds, 92 Crim. L. Rep. 758, 2013 WL 979058 (3d Cir. 3/14/13):
Holding: The Attorney General's interim rule specifying that the requirements of SORNA apply to all pre-Act offenders is invalid because the rule did not comply with the notice and comment period of the Administrative Procedure Act; this case was the remand from *Reynolds v. U.S.*, 123 Sup. Ct. 975 (2012), which held that for people convicted of sex crimes before SORNA's effective date, the Acts' registration requirements are inapplicable until the Attorney General validly specifies that they apply to such offenders; the circuits are split on whether the Attorney General's interim rule is valid.

U.S. v. Begin, 92 Crim. L. Rep. 87 (3d Cir. 10/9/12):
Holding: District court was required to address Defendant's disparity argument for a downward departure based on disparity between a federal sentence for using the internet to attempt to persuade a minor to have sex versus having actually committed statutory rape within the borders of a federal enclave.

Garrus v. Secretary of Penn. Dept. of Corrections, 2012 WL 4215922 (3d Cir. 2012):
Holding: State court unreasonably applied *Apprendi* where it allowed Defendant's sentence to be enhanced based upon a judicial finding that he previously burglarized an occupied building but he had actually been convicted of burglarizing an unoccupied building.

U.S. v. Diallo, 92 Crim. L. Rep. 467 (3d Cir. 1/15/13):
Holding: In applying USSG "intended loss" in credit card scam, court should not assume that Defendant intended to max out each stolen credit card.

U.S. v. Isaac, 2011 WL 3672479 (3d Cir. 2011):
Holding: Gov't's failure to provide notice of intent to seek enhanced penalty for drug distribution prejudiced Defendant because he made his decision to go to trial without being able to consider effect of enhancement; sentence vacated.

U.S. v. Dixon, 2011 WL 3449494 (3d Cir. 2011):
Holding: Fair Sentencing Act applies to defendants who are convicted of crack offenses before it was enacted, but sentenced afterwards.

U.S. v. Cespedes, 663 F.3d 685 (3d Cir. 2011):
Holding: Offense level increase for reckless endangerment while fleeing as a passenger in a getaway car was not warranted, where it was based on a co-conspirator's recklessness in driving the car.

U.S. v. Salinas-Cortez, 2011 WL 5345907 (3d Cir. 2011):
Holding: The Court of Appeals opinion vacating some sentences and remanding for resentencing on the final one did not clearly preclude the District Court from considering defendant's postsentencing rehabilitation.

U.S. v. West, 89 Crim. L. Rep. 254, 2011 WL 1602084 (3d Cir. 4/29/11):
Holding: USSG enhancement for possession of a gun "in connection with" another felony requires that in drug possession cases, mere proximity to a gun is not sufficient.

U.S. v. Kulick, 88 Crim. L. Rep. 437 (3d Cir. 12/29/10):
Holding: USSG authorizing a sentence-enhancing cross-reference to the guideline for an accompanying offense for a defendant who has been convicted of being felon in possession of firearm, 2K2.1(c)(1), requires the other offense be within the relevant conduct of the gun offense.

U.S. v. Spinks, 96 Crim. L. Rep. 153 (4th Cir. 10/28/14):
Holding: Judge who at resentencing decides to grant a gov't motion for a substantial-assistance departure from a mandatory minimum may not base the extent of departure on Defendant's efforts at rehabilitation while in prison since the original sentencing; 18 USC 3553(e) doesn't allow judges to consider anything other than defendants' assistance.

U.S. v. Howard, 96 Crim. L. Rep. 272 (4th Cir. 12/4/14):
Holding: Upward variance under USSG was "substantively unreasonable" for a repeat offender whose prior felonies were committed when he was 18 years old or younger; court should recognize recent U.S. Supreme Court cases regarding diminished culpability of juveniles, and take into account that the prior offenses were committed when Defendant was a juvenile.

U.S. v. Dowell, 96 Crim. L. Rep. 209 (4th Cir. 11/13/14):
Holding: USSG does not allow district court in child pornography offense to use enhancement that Victim was under age 12, and also a "vulnerable victim," when the sole vulnerability is the victim's youth; such is improper double enhancement.

U.S. v. Catone, 96 Crim. L. Rep. 113 (4th Cir. 10/15/14):
Holding: Before Defendant's offense of making false statements to receive federal benefits can be enhanced to a felony because the amount is over $1,000, a jury (not judge) must find that the amount was over $1,000; under *Apprendi*, a jury must find the facts that increase the maximum penalty for a crime.

Whiteside v. U.S., 95 Crim. L. Rep. 66 (4th Cir. 4/8/14):
Holding: Erroneous application of career offender guidelines is a "fundamental miscarriage of justice" that can be corrected on collateral review, even though the motion was filed late under 28 USC 2255.

U.S. v. Freeman, 94 Crim. L. Rep. 501 (4th Cir. 1/17/14):
Holding: Defendant-Minister who was convicted of obstructing a bankruptcy proceeding was not required to pay restitution to church members who took out loans to give money to the Defendant and church, because none of the church members' losses resulted from conduct underlying the elements of obstruction.

U.S. v. Montes-Flores, 736 F.3d 357 (4th Cir. 2013):
Holding: Defendant South Carolina conviction for assault and battery of high and aggravated nature was not "crime of violence."

U.S. v. Hemingway, 94 Crim. L. Rep. 173, 2013 WL 5833282 (4th Cir. 10/31/13):
Holding: Divisibility test for gauging whether an offense qualifies as a predicate violent felony for an enhanced sentence under "modified categorical approach" applies to common law crimes, as well as statutory offenses; common law offense of "assault and battery of a high and aggravated nature" was not "violent felony" under ACCA because the offense is not one of the enumerated offenses cited in Section 924 and does not otherwise involve conduct that presents a serious potential risk of physical injury to another.

U.S. v. McManus, 94 Crim. L. Rep. 207, 2013 WL 5814870 (4th Cir. 10/30/13):
Holding: Even though "closed" file-sharing program required users to agree to allow sharing of files, this did not support USSG enhancement for child pornography that involves distribution in the expectation of receiving a "thing of value," 2G2.2(b)(3)(B), because no user has any reason to assume that any other user possesses shared files which would be considered valuable because Gigatribe can host any type of music, picture or video file.

Miller v. U.S., 93 Crim. L. Rep. 694 (4th Cir. 8/21/13):
Holding: The rule announced in *U.S. v. Simmons*, 649 F.3d 237 (4th Cir. 2011), regarding how state convictions qualify as predicates for federal enhancement, applies retroactively on collateral review.

U.S. v. Carthorne, 2013 WL 4056052 (4th Cir. 2013):
Holding: Virginia conviction for assault and battery of police officer is not categorically a "crime of violence" because it includes common law battery, which does not categorically require use of physical force.

Karimi v. Holder, 93 Crim. L. Rep. 244 (4th Cir. 5/13/13):
Holding: Prior assault conviction for grabbing an officer's hand was not a "crime of violence" under 18 USC 16.

U.S. v. Grant, 2013 WL 1926408 (4th Cir. 2013):
Holding: Under Mandatory Victims Restitution Act, before imposing a condition of probation that required all of Defendant's tax refunds to go toward restitution, court had to consider whether Defendant could make such payments and still meet her family's financial needs.

U.S. v. Davis, 2013 WL 1811888 (4th Cir. 2013):
Holding: Even though Defendant was convicted of possession of a stolen firearm after stealing it from a home, the homeowner was not a "victim" under Victim and Witness Protection Act for purposes of restitution because although the burglary and theft were necessary steps to ultimately be in possession of the stolen firearm, the factual connection between the necessary steps and the offense of conviction was legally irrelevant for restitution purposes.

U.S. v. Rangel-Castaneda, 92 Crim. L. Rep. 731, 2013 WL 829149 (4th Cir. 3/7/13):
Holding: Tennessee statutory rape conviction is not categorically a "crime of violence."

U.S. v. Pileggi, 2013 WL 14305 (4th Cir. 2013):
Holding: Even though appellate reversed and remanded case based on a sentencing issue, the "mandate rule" barred the trial court from reconsidering the amount of restitution owed since the Gov't waived any challenge to this by not raising it on appeal.

U.S. v. Bennett, 92 Crim. L. Rep. 160 (4th Cir. 10/25/12):
Holding: In revocation of supervised release proceeding, a judge cannot use rehabilitation to justify imposing imprisonment or length of imprisonment.

U.S. v. Gomez, 2012 WL 3243512 (4th Cir. 2012):
Holding: Because there was no divisible use of force element under Maryland's child abuse statute, the district court erred in using the modified categorical approach to determine if this was a crime of violence.

U.S. v. Slade, 2011 WL 242339 (4th Cir. 2011):
Holding: Sentence enhancement for being a manager or supervisor of a drug conspiracy was not warranted where there was no showing that Defendant exercised any supervisory authority over those to whom he gave drugs, even though the drug quantities were large.

U.S. v. Trent, 2011 WL 3664300 (4th Cir. 2011):
Holding: Prior convictions for speeding to elude arrest did not qualify as predicates permitting a sentencing enhancement under the Armed Career Criminal Act.

U.S. v. Perez, 2011 WL 5188080 (4th Cir. 2011):
Holding: Because the court gave no indication that defendant's false testimony concerned a material matter or that it was willfully given, it erred in imposing a two-level enhancement for obstruction of justice based on perjury.

U.S. v. Bell, 90 Crim. L. Rep. 418 (4th Cir. 12/21/11):
Holding: USSG which call for including weight of controlled substances of co-conspirators do not apply to lawfully obtained prescription drugs.

U.S. v. Simmons, 89 Crim. L. Rep. 770, 2011 WL 3607266 (4th Cir. 8/17/11):
Holding: Prior sate conviction did not qualify as a felony triggering federal recidivist enhancement under Controlled Substances Act even though the state scheme authorized felony punishment for the offense when the offender, unlike the defendant, had a prior conviction.

U.S. v. Peterson, 88 Crim. L. Rep. 519, 2011 WL 117574 (4th Cir. 1/14/11):
Holding: "Manslaughter" in USSG 4B1.2(a) means the Model Penal Code definition of criminal homicide committed recklessly or intentionally if committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation; thus North Carolina's "involuntary manslaughter" is not "generic manslaughter" as used in 4B1.2(a) because its mental state is less than reckless.

U.S. v. Leftwich, 88 Crim. L. Rep. 403 (4th Cir. 12/20/10):
Holding: District court which orders restitution must specify on the record whether the restitution is awarded pursuant to the Victim and Witness Protection Act or the Mandatory Victims Restitution Act.

U.S. v. Divens, 2011 WL 2624434 (4th Cir. 2011):
Holding: Gov't cannot base its refusal to move for one-level sentence reduction for acceptance of responsibility on Defendant's refusal to sign a plea agreement that includes an appellate waiver.

U.S. v. Aguilera-Aguila, 2011 WL 2420276 (4th Cir. 2011):
Holding: Adding one point to criminal history score for offense of reentering U.S. was not harmless where Defendant's sentence with the recency enhancement put him at top of Guideline range.

U.S. v. Garcia-Perez, 96 Crim. L. Rep. 580 (5th Cir. 2/23/15):
Holding: Florida manslaughter conviction is not a "crime of violence" under USSG 2L1.2(b)(1)(A) because it is not a "force offense" and covers more than acts committed with intent to kill or with recklessness as to risk of death.

U.S. v. Castillo, 96 Crim. L. Rep. 578 (5th Cir. 2/26/15):
Holding: Prosecutors cannot refuse to move for acceptance-of-responsibility sentence reduction post-plea on grounds that Defendant's objection to a factual detail in a pre-sentence report deprived the Gov't of the benefit of not going to trial; reduction under USSG 3E1.1(b) is for when Defendant's timely plea allows Gov't to avoid preparing for trial, not sentencing; here, Defendant at her sentencing contested the amount of money Defendant stole.

Price v. Warden, 2015 WL 2208422 (5th Cir. 2015):
Holding: The principle that a good-time forfeiture law, enacted after Petitioner's sentencing, is retrospective, even if forfeiture is triggered by post-enactment conduct, is clearly established, and Petitioner is entitled to habeas relief.

U.S. v. Palacios, 2014 WL 2119096 (5th Cir. 2014):
Holding: Where Defendant's appeal was pending when new USSG went into effect which stated that Gov't should not withhold a one-level reduction for pretrial acceptance of responsibility based on interests not identified in USSG, Defendant was entitled to application of this USSG to reduce his sentence.

U.S. v. Jones, 2014 WL 2616892 (5th Cir. 2014):
Holding: Offense of escaping from a halfway house was not a "crime of violence," because did not serious risk of potential injury to another.

U.S. v. Mackay, 2014 WL 2900929 (5th Cir. 2014):
Holding: Clerical error in PSI report listing defendant's prior offenses as cocaine sales, when they actually were marijuana sales, was not harmless.

U.S. v. Blevins, 2014 WL 2711159 (5th Cir. 2014):
Holding: Even though Gov't had filed information about a prior conviction as part of a first indictment, where that indictment was dismissed, the Gov't was required to file the prior conviction information again as part of the second indictment in order for it to be effective.

U.S. v. Garcia-Figueroa, 2014 WL 2616889 (5th Cir. 2014):
Holding: Incorrectly grouping offense of conspiracy to bring illegal alien into U.S. and smuggling offense separately from illegal entry offense was not harmless where this resulted in two-level increase in sentence level.

U.S. v. Duke, 97 Crim. L. Rep. 300 (5th Cir. 6/5/15) and U.S. v. Ullmann, 97 Crim. L. Rep. 300 (10th Cir. 6/9/15):
Holding: Lifetime total ban on internet use as condition of supervised release is unreasonable, given the importance of internet to modern life.

U.S. v. Fernandez, 96 Crim. L. Rep. 491 (5th Cir. 1/14/15):
Holding: Court abused discretion in ordering as supervised release condition that Defendant convicted of failure to register be required to have installed on his computer software to monitor/block sex websites; the condition bore no relation to the nature or circumstance of the offense or Defendant's history when he did not use a computer in his crime; concern about recidivism or using a computer in a future crime does not justify the condition.

U.S. v. Martinez-Lugo, 96 Crim. L. Rep. 294 (5th Cir. 12/11/14):
Holding: Georgia conviction for possession with intent to distribute that covers

distribution for no remuneration is not a "drug trafficking" conviction for purposes of the USSG for immigration offenses.

U.S. v. Segura, 95 Crim. L. Rep. 50 (5th Cir. 3/31/14):
Holding: Defendant's prior conviction for failure to register as sex offender doesn't qualify as a sex offense for purposes of sentencing enhancement under USSG 5D1.2(b)(2).

U.S. v. Rodriguez-Rodriguez, 96 Crim. L. Rep. 388 (5th Cir. 1/2/15):
Holding: Texas stalking conviction is not crime of violence under USSG 2L1.2(b)(1)(A)(ii) because it is not a "force" offense.

U.S. v. Hagman, 2014 WL 291597 (5th Cir. 2014):
Holding: Even though certain firearms were missing, the Gov't did not prove that Defendant possessed them so as to apply sentence enhancement where the guns weren't found on Defendant, no witnesses saw Defendant with them, and no forensic evidence linked Defendant to the guns.

U.S. v. Salazar, 94 Crim. L. Rep. 709, 2014 WL 700077 (5th Cir. 2/24/14):
Holding: Where Defendant was convicted of failure to register, sentencing court abused discretion in requiring as a condition of supervised release that he avoid any "sexually stimulating or sexually oriented materials" where court did not adequately link the restriction to the sentencing goals in 18 USC 3553(a)(1) – (2).

U.S. v. Fernandez, 94 Crim. L. Rep. 677 (5th Cir. 2/24/14):
Holding: Where Defendant has a prior state conviction where the sentencing judge both awarded credit for time served and suspended the sentence, the period credited serves as the measure of assessing the criminal history points in accordance with 4A1.2(b)(2).

U.S. v. Robinson, 94 Crim. L. Rep. 538 (5th Cir. 1/24/14):
Holding: Defendant was entitled to resentencing where original sentencing court did not know that it had *sua sponte* authority to taken into account Defendant's cooperation, even though Gov't was not seeking a downward departure under USSG 5K1.1.

U.S. v. Mason, 2013 WL 3329033 (5th Cir. 2013):
Holding: Including losses from later transactions that were unrelated to the conviction in restitution was plain error.

U.S. v. Resendiz-Moreno, 2013 WL 173425 (5th Cir. 2013):
Holding: Ga. conviction for cruelty to children was not "crime of violence" because the use of force was not necessary to commit the crime.

U.S. v. Fraga, 2013 WL 127840 (5th Cir. 2013):
Holding: Where sentencing court stated that it usually required lifetime supervision in "these situations," this was an improper automatic imposition of a lifetime sentence

without engaging in analysis of the circumstances surrounding the crime, and was plain error.

U.S. v. Moore, 94 Crim. L. Rep. 156 (5th Cir. 10/23/13):
Holding: The "50 victim presumption" of USSG 2B1.1 Application Note 4(C)(ii)(I) when a Defendant steals mail should not be multiplied by six when a defendant steals mail from six mailboxes, because this would lead to absurd result of a defendant who steals on entire truckload of mail would have 50 victims, but a defendant who steals a much smaller amount of mail from six boxes would have 300 hundred victims.

U.S. v. Chandler, 94 Crim. L. Rep. 120 (5th Cir. 10/4/13):
Holding: Defendant-police officer should not have had his sentence increased upward under USSG merely because he was a police officer, since his conviction of child pornography was not related to his duties as a police officer; hence, the offense was not an abuse of position.

U.S. v. Stinson, 93 Crim. L. Rep. 693 (5th Cir. 8/21/13):
Holding: In order for the enhancement in USSG 2B1.1(b)(15)(A) relating to bank fraud to apply, the financial institution must "own" the funds at issue; a financial institution is not the source of all funds that have passed through the institution as occurs in a wire transfer; thus, mere tangential effect on the institution does not support the enhancement.

U.S. v. Windless, 93 Crim. L. Rep. 402 (5th Cir. 6/12/13):
Holding: The same due process considerations that prevent a court from sentencing a defendant on the basis of "bare arrest" records also bar courts from allowing such records to be used to craft conditions of supervised release.

U.S. v. Becerril-Pena, 93 Crim. L. Rep. 212 (5th Cir. 5/2/13):
Holding: USSG 5D1.1 which states that a sentencing court should not ordinarily impose a term of supervised release on a Defendant-alien who is likely to be deported does not limit supervised release to "extraordinary" cases.

U.S. v. Culbertson, 93 Crim. L. Rep. 7, 2013 WL 1187986 (5th Cir. 3/22/13):
Holding: Sentencing court violated rule that sentence cannot be lengthened to promote rehabilitation where it said it was giving sentence to allow Defendant to get "stabilized" and "clean and sober."

U.S. v. Garza, 92 Crim. L. Rep. 546 (5th Cir. 2/1/13):
Holding: Court imposing a prison term after revoking supervised release may not consider Defendant's need for rehabilitation.

U.S. v. Stoker, 92 Crim. L. Rep. 519 (5th Cir. 1/31/13):
Holding: A conviction for retaliation against a witness is not categorically a "crime of violence."

U.S. v. Rodriguez-Escareno, 2012 WL 5359486 (5th Cir. 2012):
Holding: Illegal re-entry Defendant's prior conviction for conspiring to commit a drug offense so as to permit a 16-level base offense increase under USSG 2L1.2(b)(1)(A)(i) had to be under a criminal statute that had an over act requirement, unlike the conspiracy provision of the Controlled Substances Act.

U.S. v. Teuschler, 2012 WL 3011030 (5th Cir. 2012):
Holding: Imposition of three-level enhancement was not warranted where Defendant pleaded guilty to distributing child pornography but there was no evidence that the 277 additional images on his computer occurred in preparation for or during that offense.

U.S. v. Hernandez, 2012 WL 3205573 (5th Cir. 2012):
Holding: Erroneous imposition of multi-count sentencing increase was plain error.

U.S. v. Slovacek, 2012 WL 4801637 (5th Cir. 2012):
Holding: A "nonparty victim" of a bribery scheme lacks any right to direct appeal from denial of his request for restitution for himself and his company under the Crime Victims' Rights Act or Mandatory Victims Restitution Act.

12/21 U.S. v. Medina-Torres, 2012 WL 6634990 (5th Cir. 2012):
Holding: Court erred in applying aggravating felony enhancement to a Defendant for being found in the U.S. after deportation.

U.S. v. Nevares-Bustamante, 2012 WL 205850 (5th Cir. 2012):
Holding: Sentencing enhancement for unlawfully remaining in the U.S. after felony conviction for crime of violence was inapplicable, where no removal order was issued after the conviction.

U.S. v. Chemical & Metal Industries, Inc., 2012 WL 1301166 (5th Cir. 2012):
Holding: A fine of $1,000,000, imposed on a corporation convicted of negligent endangerment that resulted in death, violated the statute governing the imposition of fines on organizations, given that the fine was more than $500,000 and no pecuniary gain or loss had been proven.

U.S. v. Espinoza, 2012 WL 1292513 (5th Cir. 2012):
Holding: Restitution to the pawn shop to which the defendant sold stolen firearms was not allowed because the pawn shop was not a "victim" under the Victim and Witness Protection Act.

U.S. v. Solis, 2012 WL 935198 (5th Cir. 2012):
Holding: In sentencing a defendant, a district court could not retroactively consider a provision of an amendment to the Sentencing Guidelines requiring that downward departures in criminal history were not to be considered when evaluating safety valve eligibility.

U.S. v. Miranda-Ortegon, 2012 WL 414604 (5th Cir. 2012):
Holding: Conviction for domestic assault and battery was not a "crime of violence" within the meaning of sentencing guidelines because only the slightest amount of touching was necessary to constitute force or violence element under Oklahoma law.

U.S. v. Greenough, 2012 WL 310793 (5th Cir. 2012):
Holding: The Sentencing Guideline providing a base offense level of 38 for a defendant's possession of heroin with intent to distribute conviction when death or serious bodily injury resulted only applies when the death or serious bodily injury element was charged in the indictment.

U.S. v. Broussard, 2012 WL 309102 (5th Cir. 2012):
Holding: Trial court's finding that defendant was "sick in the head" was insufficient justification for imposing sentence four times the defendant's recommended Guidelines sentence of ten years.

U.S. v. Murray, 92 Crim. L. Rep. 153 (5th Cir. 10/30/12):
Holding: (1) Even though Defendant waived his right to appeal, this did not apply to a later order on restitution because this wasn't part of the original sentencing process; and (2) Even though restitution amounts in large or complex fraud cases may be difficult to calculate, a judge cannot later reopen sentencing to add restitution when the Gov't comes up with more information.

U.S. v. Espinoza, 91 Crim. L. Rep. 135 (5th Cir. 4/17/12):
Holding: Even though Defendant sold stolen guns to a pawn shop, where he was convicted only of illegal possession of guns, the pawn shop was not entitled to restitution under MVRA because there is nothing inherent in illegal possession of guns that causes financial harm to a transferee.

U.S. v. Greenough, 90 Crim. L. Rep. 649 (5th Cir. 2/2/12):
Holding: The provision of the USSG that calls for a very stiff sentence for drug offenses that result in a death does not apply unless the indictment charged that death resulted from the crime.

U.S. v. Johnson, 2011 WL 3200287 (5th Cir. 2011):
Holding: It violated due process for sentencing court to rely on arrest reports of prior incidents to sentence Defendant for different offense.

U.S. v. Bernegger, 2011 WL 4990719 (5th Cir. 2011):
Holding: District court clearly erred in calculating total loss amount from defendant's fraudulent scheme for sentencing purposes where no factual basis supported the conclusion that certain loans obtained by defendant were the result of said scheme.

U.S. v. Reyes-Mendoza, 90 Crim. L. Rep. 383 (5th Cir. 12/15/11):
Holding: Prior conviction for manufacturing a chemical precursor used to produce a

controlled substance is not a "drug trafficking offense" for purposes of USSG enhancement for immigration offenders.

In re Sparks, 90 Crim. L. Rep. 15 (5th Cir. 9/16/11):
Holding: *Graham v. Florida*'s holding prohibiting life without parole for juveniles who commit non-homicide offenses is retroactive on federal habeas review.

U.S.v. Mudekunye, 89 Crim. L. Rep. 693 (5th Cir. 7/11/11):
Holding: Even though judge made comments suggesting he would impose the same sentence regardless of the USSG recommended range, where the range was miscalculated, this was plain error.

U.S. v. Cardenas-Guillen (Hearst Newspapers LLC), 89 Crim. L. Rep. 252, 2011 WL 1844189 (5th Cir. 5/17/11):
Holding: Press and public have 1st Amendment right to access criminal sentencing hearing.

U.S. v. Williams, 89 Crim. L. Rep. 211 (5th Cir. 5/11/11):
Holding: Defendant cannot be forced to appear at sentencing only via videoconferencing; this violates Rule 43(a), which requires actual presence.

U.S. v. Garcia-Rodriguez, 89 Crim. L. Rep. 213, 2011 WL 1631837 (5th Cir. 5/2/11):
Holding: Federal prisoner is "released from imprisonment" for purposes of supervised-release statute, 18 USC 3583, on the date he is transferred from Bureau of Prisons to Immigration and Customs Enforcement, regardless of whether he leaves the confinement of the facility.

U.S. v. Isiwele, 88 Crim. L. Rep. 749 (5th Cir. 3/7/11):
Holding: In Medicare fraud case, the total charges fraudulently billed are prima facie evidence of amount of loss for sentencing purposes, but parties can present additional evidence showing this over- or under-states loss.

U.S. v. Hoang, 88 Crim. L. Rep. 757 (5th Cir. 2/23/11):
Holding: Defendant cannot be convicted for failing to register under SORNA on the basis of interstate travel that was completed after the enactment of the statute but before the Attorney General's promulgation of an interim rule clarifying the statute's reach.

U.S. v. Johnson, 88 Crim. L. Rep. 599 (5th Cir. 2/4/11):
Holding: SORNA's provision making it a crime to fail to register may not be applied retroactively to sex offenders convicted prior to the 2006 effective date of the statute.

Editors' Note: The federal circuits are divided on this; the U.S. Supreme Court has granted cert. to decide the issue in *Reynolds v. U.S.* (cert. granted 1/24/11).

U.S. v. Ibarra-Luna, 88 Crim. L. Rep. 395 (5th Cir. 12/22/10):
Holding: District court's error in calculating sentence under USSG is harmless only if the proponent of the sentence shows that the court would have imposed the same

sentence absent the error and it would have done so for the same reasons underlying the original sentence.

Prewett v. Weems, 2014 WL 1408809 (6th Cir. 2014):
Holding: Where statute provided that a child pornography victim could recover their actual damages or presumptive damages no less than $150,000, the presumptive damages clause did not apply to each of seven movies of the victim (making the presumptive damage 7 x $150,000), but rather imposed a presumptive floor of $150,000 in damages per lawsuit.

U.S. v. Coppenger, 2105 WL 72833 (6th Cir. 2015):
Holding: Upward variance was not foreseeable or reasonable where it was not based on anything in Defendant's presentence report, but was based on undisclosed, inaccessible information in a co-defendant's presentence report; Defendant had no notice or fair opportunity to respond to the unforeseeable information.

U.S. v. Coppenger, 96 Crim. L. Rep. 381 (6th Cir. 1/7/15):
Holding: Sentencing court should have given fraud-Defendant advance notice that court intended to depart upward from USSG based on confidential information it received about co-conspirators who lost money in the scheme and were led into the scheme by Defendant; although court need not give notice of every upward departure, court must give notice here to give Defendant a reasonable opportunity to respond; court's upward departure was novel and not reasonably foreseeable.

U.S. v. Snelling, 96 Crim. L. Rep. 5 (6th Cir. 9/22/14):
Holding: Money that Ponzi scheme Defendants paid to victims as "investment returns" can offset the amount of "loss" from the fraud under USSG.

U.S. v. Barbour, 95 Crim. L. Rep. 100 (6th Cir. 4/18/14):
Holding: Gov't has burden to prove that prior felonies were committed at different times to qualify as predicates for mandatory minimum sentences under ACCA, 18 USC 924(e).

U.S. v. Emmett, 95 Crim. L. Rep. 136 (6th Cir. 4/17/14):
Holding: Trial court's statutory duty to explain its sentencing decision applies to disposition of motion for early termination of supervised release.

U.S. v. Covington, 738 F.3d 759 (6th Cir. 2014):
Holding: Conviction for escape from prison was not "crime of violence."

U.S. v. Manteen, 94 Crim. L. Rep. 434 (6th Cir. 1/7/14):
Holding: The recidivism enhancement for child pornography defendants with prior state convictions relating to sex abuse applies only if the state conviction involved a minor or a ward (disagreeing with other circuits); 18 USC 2252 (b)(2) says enhancement applies to anyone with a prior conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."

2/8 U.S. v. Macia-Farias, 2013 WL 465842 (6th Cir. 2013):
Holding: Court improperly imposed USSG enhancement for obstruction of justice based on Defendant's perjury without identifying portions of his testimony that court deemed to be perjury.

U.S. v. Doyle, 2013 WL 1316125 (6th Cir. 2013):
Holding: District court erred in imposing special conditions for supervised release for failure to register as sex offender where court failed to explain reasons in open court for imposing those conditions.

1/3 U.S. v. Mekediak, 2013 WL 49562 (6th Cir. 2013):
Holding: Defendant's Michigan juvenile offenses for possession of a short-barreled rifle and felonious assault could not be combined together under the modified categorical approach to make them a "violent felony" under ACCA.

3/28 Lovins v. Parker, 2013 WL 1235611 (6th Cir. 2013):
Holding: State court unreasonably applied federal law in holding that *Blakely*, 542 U.S. 296 (2004)(regarding facts judges can or cannot find for sentencing purposes) did not apply to petitioner whose conviction and sentence were not yet final at time *Blakely* was decided.

U.S. v. LaDeau, 94 Crim. L. Rep. 198, 2013 WL 5878214 (6th Cir. 11/4/13):
Holding: Where court had suppressed evidence that made prosecution for possession of child pornography impossible, and Gov't then charged conspiracy to receive child pornography (which carried a greater sentence), a judge may presume prosecutorial vindictiveness violative of due process if Defendant establishes that the Gov't has some "significant stake" in deterring Defendant's exercise of his rights and the Gov't's conduct was "somehow unreasonable;" here, Defendant met that test, warranting dismissal of new charge, because while it would have been reasonable to charge conspiracy to possess child pornography (which would have been possible), it was unreasonable to charge conspiracy to receive, since "receipt" carries a higher mandatory minimum sentence than conspiracy to possess.

U.S. v. Shultz, 94 Crim. L. Rep. 155 (6th Cir. 10/23/13):
Holding: Supervised release condition that forbids child pornography Defendant from possessing any material that he may use for the purpose of deviant sexual arousal was not sufficiently clear under 5th Amendment and was overly broad under 1st Amendment; term "deviant sexual arousal" should be replaced with something more definite pertaining to children, such as "arousal with sexual interest in children."

U.S. v. Blewett, 93 Crim. L. Rep. 234 (6th Cir. 5/17/13):
Holding: The Fair Sentencing Act applies to retroactively to all defendants who were sentenced to mandatory minimums before FSA's enactment.

U.S. v. Washington, 93 Crim. L. Rep. 236 (6th Cir. 5/10/13):
Holding: Defendant sentenced for multiple federal firearms violations is entitled to have the sentence enhancements in 18 USC 924(c) applied in the order that produces the lowest sentence, and applying them chronologically here would violate rule of lenity.

U.S. v. Williams, 92 Crim. L. Rep. 760 (6th Cir. 3/14/13):
Holding: Even though Defendant gave a false name to a magistrate during his initial appearance, this did not warrant an enhancement for obstruction of justice under USSG since this did not have a material impact on any decision the magistrate had to make.

U.S. v. Deen, 92 Crim. L. Rep. 575 (6th Cir. 2/7/13):
Holding: Defendant's need for rehabilitation cannot be considered in deciding length of prison sentence after revoking supervised release.

U.S. v. Catchings, 92 Crim. L. Rep. 467, 2013 WL 149863 (6th Cir. 1/15/13):
Holding: Court sentencing Defendant for misuse of clients' credit cards should not have included Defendant's misuse of a company credit card which he lawfully obtained in determining "relevant conduct."

U.S. v. Stubblefield, 2012 WL 22990870 (6th Cir. 2012):
Holding: Even though retail stores took a temporary loss in a check-cashing scheme, where the stores were reimbursed by the corporation which owned them, the stores were not "victims" under the USSG, although the corporation was.

U.S. v. Louchart, 2012 WL 1889314 (6th Cir. 2012):
Holding: Even though 75 firearms were charged in an indictment, Defendant's guilty plea was not an admission to controlling all of them and sentencing court needed to determine the number supported by a preponderance of evidence.

U.S. v. Corp., 2012 WL 399229 (6th Cir. 2012):
Holding: In sentencing the defendant for sexual exploitation of a minor, an offense level enhancement for an offense portraying sadistic or masochistic conduct required that the conduct be depicted in the photographs that the defendant took of the victim.

U.S. v. Inman, 2012 WL 232964 (6th Cir. 2012):
Holding: Trial court was required to consider statutory sentencing factors and explain its reasons for imposing lifetime term of supervised release.

U.S. v. Corp, 90 Crim. L. Rep. 669 (6th Cir. 2/9/12):
Holding: The federal sentencing enhancement for child pornography that depicts sadistic or masochistic conduct must be based on an image that "portrays conduct that would cause an objective viewer to believe—without regard to the undepicted circumstances of the sexual encounter—that the pictured activity is inflicting physical pain, emotional suffering, or humiliation of that minor."

U.S. v. Censke, **2011 WL 6005199 (6th Cir. 2011):**
Holding: A defendant's sentence for mailing threatening communications was substantively unreasonable where court impermissibly imposed an above-guidelines sentence to enable defendant to complete a treatment program.

U.S. v. Walker, 2011 WL 3506103 (6th Cir. 2011):
Holding: District court cannot base longer sentence on impermissible factor of promoting rehabilitation.

U.S. v. Priester, 2011 WL 2936008 (6th Cir. 2011):
Holding: Where judge made comments suggesting he did not believe he had authority to reject 100:1 crack ratio at sentencing, remand was warranted.

U.S. v. Vanhook, 2011 WL 1458656 (6th Cir. 2011):
Holding: Tenn. conviction for burglary of a building is not sufficiently purposeful or violent to constitute violent felony under "otherwise" clause of ACCA.

Evans v. Zych, 2011 WL 2685599 (6th Cir. 2011):
Holding: Unlawful receipt and possession of firearm are not "crimes of violence."

U.S. v. Oaks, 2011 WL 6224551 (6th Cir. 2011):
Holding: Defendant's escape from a courtroom was an escape from nonsecure custody, and not a violent felony, under the Armed Career Criminal Act.

U.S. v. Williams, 2011 WL 1774516 (6th Cir. 2011):
Holding: Conducting sentencing hearing by videoconference violated Defendant's right to be present at sentencing.

U.S. v. Brown, 2011 WL 1843377 (6th Cir. 2011):
Holding: Term of imprisonment imposed upon revocation of supervised release must be deducted from any supervised release period to which Defendant would be sentenced.

U.S. v. Oaks, 90 Crim. L. Rep. 391 (6th Cir. 12/15/11):
Holding: Escape from a non-secure courtroom was not a violent felony under ACCA.

U.S. v. Trent, 89 Crim. L. Rep. 777 (6th Cir. 8/5/11):
Holding: Sex offender who was convicted after enactment of SORNA on July 27, 2006, but before SORNA was implemented in that particular jurisdiction was not required to register under SORNA before 2008, when the DOJ promulgated valid rules specifying the application of SORNA to pre-implementation convictions.

U.S. v. Taylor, 89 Crim. L. Rep. 412 (6th Cir. 6/7/11):
Holding: Under *Pepper v. U.S.* (U.S. 2011), re-sentencing judge should not have a policy of not considering guideline amendments promulgated since a defendant's original sentencing.

U.S. v. Galaviz, 89 Crim. L. Rep. 214 (6th Cir. 5/6/11):
Holding: USSG's that set a 15-year age limit on counting priors are in conflict with each other, 4A1.2(e)(1) and 4A1.2(k)(2)(B); court resolves conflict by holding that parole must actually be revoked to bring the sentence within the 15-year period.

U.S. v. Phillips, 89 Crim. L. Rep. 127, 2011 WL 1304475 (6th Cir. 4/7/11):
Holding: Where Defendant commits crime of failure to appear to serve a reinstated prison term following revocation of supervised release, the underlying offense that determines the sentence for the failure to appear is the original crime, not the supervised release violation.

U.S. v. Howard, 89 Crim. L. Rep. 420 (6th Cir. 5/24/11):
Holding: Judge ruling on motion to reduce sentence under retroactive amendment to USSG must provide more than a check-the-box order to explain his decision.

U.S. v. Gibbs, 2010 WL 4781298 (6th Cir. 2010):
Holding: Sentencing court committed plain error in holding that walkaway prison escape and failure to comply resisting arrest were crimes of violence.

U.S. v. Lockett, 97 Crim. L. Rep. 60 (7th Cir. 3/31/15):
Holding: A recidivist enhancement that was not reflected on Defendant's record of conviction cannot qualify as a "violent felony" under ACCA.

U.S. v. Johnson, 2014 WL 538666 (7th Cir. 2014):
Holding: Even though Defendant had oral sex with Victim, this did not constitute use of force or threat to warrant six-level sentencing enhancement, because even though Victim did not consent to oral sex, she said it was because it was not the right place for it to occur, not because she felt overcome by force or threat.

U.S. v. Kappes, 97 Crim. L. Rep. 48 (7th Cir. 4/18/15):
Holding: Court should consider following factors in setting supervised release conditions: (1) importance of advance notice of conditions being imposed; (2) need to justify conditions and length of term by adequate statement of reasons reasonably related to sentencing factors; (3) specifically tailored provisions, avoiding vague and overbroad conditions; (4) orally pronouncing all conditions with the written judgment only clarifying the oral pronouncement in a consistent manner.

U.S. v. Jenkins, 2014 WL 6746590 (7th Cir. 2014):
Holding: Plain error resulted by increasing Defendant's criminal history score based on a prior conviction under a constitutionally invalidated state statute.

Price v. U.S., 97 Crim. L. Rep. 603 (7th Cir. 8/4/15):
Holding: *Johnson v. U.S.* (U.S. 6/26/15), which struck down ACCA's residual clause, is retroactive, and allows a habeas petitioner whose prior habeas petition was rejected on a *Johnson*-type ACCA claim to have a new habeas case heard under 2255(h)(2) allowing successive petitions based on new rules of constitutional law that are retroactive.

U.S. v. Spann, 2014 WL 2975268 (7th Cir. 2014):
Holding: Trial court failed to justify by reference to the statutory sentencing factors giving 97 months to drug Defendant; court said only that trafficking heroin was serious crime, that Defendant was an addict, and that the prison term would give Defendant time to obtain skills to use when he got out of prison.

U.S. v. Baker, 2014 WL 2736016 (7th Cir. 2014):
Holding: Even though Defendant had used a pseudonym on an Internet dating website, this did not support special condition of supervised release of computer monitoring for failure to register as sex offender under SORNA.

U.S. v. Siegel, 2014 WL 2210762 (7th Cir. 2014):
Holding: Where judge imposed various costly conditions (such as treatment programs and internet monitoring) on Defendant's supervised release, judge was required to explicitly state that Defendant was not required to pay the expense if he could not afford it and that revoking Defendant for inability to pay would be improper.

U.S. v. Castro-Alvarado, 2014 WL 2696730 (7th Cir. 2014):
Holding: Even though Defendant had six prior drug dealing convictions and various prior immigration-related convictions, court did not abuse discretion in imposing sentence on low end of range, where court considered mitigating circumstances of rehabilitation from drugs and alcohol, family and work history, and remoteness of prior convictions.

U.S. v. Sheth, 2014 WL 3537852 (7th Cir. 2014):
Holding: Fraud Defendant was entitled to discovery and an evidentiary hearing on Gov't's motion for turnover of assets to enforce restitution.

U.S. v. Volpendesto, 95 Crim. L. Rep. 353 (7th Cir. 6/6/14):
Holding: Defendant's death during pendency of direct appeal abates the conviction and restitution order.

U.S. v. Morris, 96 Crim. L. Rep. 359 (7th Cir. 1/5/15):
Holding: Sentencing judge was required to address Defendant's sentencing entrapment claim, even though it was weak; Defendant claimed he should get a below-USSG sentence because he didn't have the ability to provide the large amount of cocaine the sting operation informant requested, and what he did deliver was fake cocaine.

U.S. v. Price, 96 Crim. L. Rep. 295 (7th Cir. 12/5/14):
Holding: 18-year term for producing child pornography regarding Defendant's daughter was not "substantively unreasonable" even though USSG recommended more than 40 years; it was reasonable for district judge to rely on other circuits' harsh criticism of the pornography guidelines to vary steeply downward.

U.S. v. Sinclair, 96 Crim. L. Rep. 141 (7th Cir. 10/21/14):
Holding: Drug-trafficking count and count for felon-in-possession should not be grouped under SSG when Defendant is also convicted of possessing a firearm in furtherance of a drug-trafficking crime.

U.S. v. Davison, 95 Crim. L. Rep. 555 (7th Cir. 7/30/14):
Holding: Defendant's sentencing liability for joint conduct is narrower than for vicarious liability as a co-conspirator; whether Defendant is liable at sentencing for drug sales made by co-conspirators depends not only on whether the sales were foreseeable but also on whether he joined with others in a joint undertaking in which making the sales was the objective.

1/28 U.S. v. Jordan, 2014 WL 292396 (7th Cir. 2014):
Holding: Trial court erred in admitting Officer's hearsay evidence during supervised release revocation hearing without balancing Defendant's confrontation rights against Gov't's stated reasons for denying them.

1/10 U.S. v. Spencer, 2014 WL 97290 (7th Cir. 2014):
Holding: Wisconsin meth statute did not carry a "maximum term of imprisonment of 10 years of more, and thus Defendant's prior conviction under statute did not qualify as a predicate felony under ACCA.

U.S. v. Poulin, 94 Crim. L. Rep. 746 (7th Cir. 3/6/14):
Holding: Even though district court imposed sentence below the Guideline range, the court erred in failing to address Defendant's request for leniency based on a survey of federal judges indicating most believed the child pornography Guidelines are too harsh.

U.S. v. Adkins, 94 Crim. L. Rep. 535, 2014 WL 325254 (7th Cir. 1/30/14):
Holding: Even though Defendant waived his right to appeal, this did not prohibit appealing a condition of supervised release prohibiting him from patronizing any place where pornography or sexually oriented material was available; the condition was so vague that no reasonable person would know what is prohibited, and Defendant should be allowed to obtain appellate review of it; the condition would arguably ban going to a grocery store or library.

12/20 U.S. v. Doss, 2014 WL 6698046 (7th Cir. 2013):
Holding: Imposition of sentencing increase for various offenses of trafficking of unauthorized access devise was not authorized under USSG which prohibited simultaneous application of a sentencing increase for the transfer of a means of identification.

10/31 U.S. v. Johns, 2013 WL 5539608 (7th Cir. 2013):
Holding: In sentencing Defendant for felon-in-possession of firearm, the application of both the trafficking enhancement and the other felony offense enhancement, based on the same conduct of transferring the gun to an informant, constituted impermissible double counting.

U.S. v. Miller, 2013 WL 3215670 (7th Cir. 2013):
Holding: Mere possession of a short-barrel shot gun is not a "crime of violence."

U.S. v. Gulley, 2013 WL 2991794 (7th Cir. 2013):
Holding: Even though Defendant received a sentence within the range that would have been found under the Fair Sentencing Act, there was no showing that the court would have actually imposed the same sentence if FSA had actually applied at sentencing, so Defendant was entitled to resentencing.

U.S. v. Zamudio, 2013 WL 2402861 (7th Cir. 2013):
Holding: Without imposing any term of supervised release, sentencing court lacked authority to impose post-imprisonment requirement on Defendant to be turned over to immigration authorities for removal and to remain outside the U.S.

Brown v. Caraway, 2013 WL 1920931 (7th Cir. 2013):
Holding: Delaware conviction for arson in third degree was not "crime of violence."

U.S. v. Block, 2013 WL 376075 (7th Cir. 2013):
Holding: A co-conspirator's firearms possession was not reasonably foreseeable to Defendant to warrant sentence enhancement for possessing firearms by co-conspirator, where there was no evidence Defendant heard or knew about gun, and seeing a rifle at co-conspirator's home was not sufficient since Defendant did not see drugs at that house and that house was not base of drug distribution.

U.S. v. Diaz- Rios, 2013 WL 332277 (7th Cir. 2013):
Holding: Court did not adequately explain why it did not apply mitigating factors in sentencing Defendant, including his overall participation in the conspiracy.

U.S. v. Lyons, 94 Crim. L. Rep. 178, 2013 WL 5778958 (7th Cir. 10/28/13):
Holding: Even though Defendant proposed a 210-month sentence as his "second fallback" position, the trial court was still required under 18 USC 3553(c) to explain why she was imposing that sentence.

U.S. v. Rabiu, 93 Crim. L. Rep. 610 (7th Cir. 8/1/13):
Holding: Number-of-victims enhancement for identity theft in USSG 2B1.1(b)(2) does not apply unless the misappropriated information was actively used, and not merely possessed.

U.S. v. Walker, 93 Crim. L. Rep. 565, 2013 WL 3336720 (7th Cir. 7/3/13):
Holding: Before applying mandatory minimum 20-year sentence under 21 USC 841(a)(1) for causing a death during a drug conspiracy, the court must make findings beyond mere participation in the conspiracy such as foreseeability principles that govern co-conspirator liability.

U.S. v. Weaver, 93 Crim. L. Rep. 364 (7th Cir. 6/3/13):
Holding: Even though Defendant-drug dealer sold meth on credit to two buyers who paid off their debt by reselling it to their own customers, Defendant was not subject to USSG enhancement 3B1.1(b) for acting as a "manager or supervisor" of criminal activity.

U.S. v. Martin, 93 Crim. L. Rep. 319, 20123 WL 2302103 (7th Cir. 5/28/13):
Holding: Sentencing court erred when it sentenced Defendant for possessing child pornography without addressing his arguments that applying child-pornography USSG to defendants who have no history of personally contacting minors would not meet to goals of sentencing.

U.S. v. Goodwin, 93 Crim. L. Rep. 206, 2013 WL 1891302 (7th Cir. 5/18/13):
Holding: Crime of failing to register under SORNA does not qualify as a "sex offense" for purposes of USSG that calls for lifetime supervision of sex offenders.

U.S. v. Reynolds, 93 Crim. L. Rep. 212 (7th Cir. 5/8/13):
Holding: USSG that enhances sentence for kidnapping if ransom was demanded requires that the ransom demand be made to a third party other than the kidnapped person.

U.S. v. Robinson, 93 Crim. L. Rep. 68, 2013 WL 1405534 (7th Cir. 4/9/13):
Holding: Where Defendant used a file sharing program in his possession of child pornography case, the Gov't had to prove that he knew or recklessly disregarded that the program also shared files with others in order for sentence to be enhanced for distribution of pornography.

U.S. v. Peterson, 93 Crim. L. Rep. 15 (7th Cir. 3/28/13):
Holding: Even though Federal Rules allow judges to receive confidential sentencing recommendations from probation department, the better practice in most cases is to share the recommendation with Defendant.

U.S. v. Patrick, 92 Crim. L. Rep. 623, 2013 WL 537137 (7th Cir. 2/14/13):
Holding: Sentencing judge gave insufficient explanation for failing to follow Gov't sentencing recommendation for cooperating witness.

U.S. v. Wren, 92 Crim. L. Rep. 570 (7th Cir. 2/7/13):
Holding: Even though cocaine trafficking defendants originally received sentences below statutory minimums, they may still obtain lower sentences in under the USSG crack amendments.

Doe v. Prosecutor, Marion County, 92 Crim. L. Rep. 491 (7th Cir. 1/23/13):
Holding: Indiana statute that prohibits sex offenders from accessing chatrooms and social media sites violates First Amendment because it was too broad a prohibition.

Brown v. Rios, 2012 WL 3554093 (7th Cir. 2012):
Holding: Compelling a person to become a prostitute under Illinois pandering statute is not a "crime of violence."

U.S. v. Trujillo-Castillon, 2012 WL 3290154 (7th Cir. 2012):
Holding: Where sentencing court compared Defendant to Mariel Cuban boatlift people 30 years ago and contrasted the values of people from the U.S. with those "from Cuba," this made Defendant's national origin an impermissible factor in sentencing.

U.S. v. Dooley, 2012 WL 3056079 (7th Cir. 2012):
Holding: Sentencing court committed plain error in failing to expressly consider applicable note on concurrent and consecutive sentences for aggravated identity theft.

Kirkland v. U.S., 2012 WL 3002606 (7th Cir. 2012):
Holding: Proof of a "violent felony" conviction, plus an ambiguous record regarding the separate occasions inquire, was not sufficient for enhancement under ACCA.

U.S. v. Burge, 2012 WL 2401725 (7th Cir. 2012):
Holding: Defendant's state conviction for misdemeanor abandonment of an animal was similar to a fish and wildlife violation and should not count in criminal history points under the USSG.

U.S. v. Pennington, 2012 WL 310830 (7th Cir. 2012):
Holding: In order for a sentence to be imposed in a procedurally reasonable manner, the judge must consider the defendant's arguments based on a detailed analysis of the statutory sentencing factors rather than simply presuming that a sentence within the Guidelines range is reasonable.

U.S. v. Navarrete,2012 WL 147927 (7th Cir. 2012):
Holding: Restitution could not be based upon the proposition that any payment obtained by fraud enriched the seller, as that amount does not necessarily represent the loss to the purchaser.

U.S. v. Laraneta, 92 Crim. L. Rep. 210 (7th Cir. 11/14/12):
Holding: Victims in child pornography images are not entitled to restitution from a defendant unless the Gov't can show that the defendant distributed the images and that the distribution proximately caused the victims' harm (disagreeing with 5th Circuit).

U.S. v. Mount, 91 Crim. L. Rep. 93 (7th Cir. 4/12/12):
Holding: When a judge determines that a Defendant deserves a two-level adjustment under USSG 3E.1.1(a) for acceptance of responsibility, and prosecutors move for an extra third-level reduction, the judge lacks authority to deny the Gov't's motion.

U.S. v. Bradley, 91 Crim. L. Rep. 101 (7th Cir. 4/5/12):
Holding: Federal judge failed to adequately explain a 20-year sentence given to a child sex defendant where the USSG recommended 6 years.

U.S. v. Halliday, 2012 WL 447450 (7th Cir. 2012):
Holding: The sentencing court's plain error in relying on speculation that the defendant considered his possession of child pornography a victimless crime affected the defendant's substantial rights.

U.S. v. Robertson, 2011 WL 5555865 (7th Cir. 2011):
Holding: District court failed to consider adequately defendants' strong evidence of rehabilitation where such evidence directly related to statutory sentencing factors.

U.S. v. Brown, 2011 WL 4921715 (7th Cir. 2011):
Holding: Trial court committed plain error in imposing the mandatory minimum fine for each count of conviction for possession with intent to sell where the court considered itself obligated to impose a fine for each count, despite the fact that defendant was unable to pay.

U.S. v. Lee, 2011 WL 4583784 (7th Cir. 2011):
Holding: Periodic payments from a pension or retirement savings plan constituted earnings, thus prohibiting the United States from garnishing more than 25% pursuant to an order of restitution under the Mandatory Victims Restitution Act.

U.S. v. Robertson, 2011 WL 3559995 (7th Cir. 2011):
Holding: Where judge gave no explanation for sentencing above Guidelines other than to say he was "baffled" why Defendant grew marijuana and he should try "growing gardenias or something legal," case must be remanded for resentencing.

U.S. v. Burnett, 89 Crim. L. Rep. 475 (7th Cir. 6/6/11):
Holding: 7th Circuit adopts broad interpretation of rule that prior convictions for which defendants' civil rights have been restored do not count as predicates for sentences under ACCA.

U.S. v. Lopez, 88 Crim. L. Rep. 748 (7th Cir. 3/4/11):
Holding: District judge measuring the seriousness of an alien's prior drug-trafficking conviction for purposes of USSG enhancement for illegal re-entry should look to sentence imposed before defendant's removal and re-entry, and not to any later sentence increase based on a probation revocation.

U.S. v. Fuchs, 88 Crim. L. Rep. 813 (7th Cir. 3/17/11):
Holding: Mortgage broker who submitted false loan applications to lenders was not subject to enhancement under USSG for abuse of trust.

U.S. v. Johnson, 88 Crim. L. Rep. 815 (7th Cir. 3/24/11):
Holding: Even though district judge knew she could "disregard" the USSG range regarding the crack/cocaine disparity, where she said "the more prudent approach is to let Congress do whatever it chooses" rather than have judges "just winging it" and she imposed a life sentence, the sentence did not conform with the parsimony provision, 18

USC 3553(a), which requires a sentence be "sufficient, but not greater than necessary" to comply with sentencing purposes.

Narvaez v. U.S., 89 Crim. L. Rep. 421 (7th Cir. 6/3/11):
Holding: *Begay v. U.S.*, 553 U.S. 137 (2008) and *Chambers v. U.S.*, 555 U.S. 122 (2009) are retroactive.

U.S. v. Sonnenberg, 2010 WL 4962821 (7th Cir. 2010):
Holding: Prior conviction under Minnesota law for "intrafamilial sexual abuse" was not "crime of violence.

Martin v. Symmes, 97 Crim. L. Rep. 55 (8th Cir. 4/6/15):
Holding: 8th Amendment prohibition on juvenile life without parole sentences announced in *Miller* is not retroactive.

U.S. v. Adejumo, 2015 WL 467933 (8th Cir. 2015):
Holding: Even though Gov't gave notice to amend judgment to add restitution to Defendant's former trial counsel, Defendant's right to due process was violated where Defendant had a new appointed counsel and Gov't did not move to amend judgment until a year after Defendant's original sentencing.

U.S. v. Johnson, 95 Crim. L. Rep. 669 (8th Cir. 8/25/14):
Holding: The Anti-Drug Abuse Act requires resentencing in capital cases to be a complete do-over of both the eligibility phase and the penalty-selection phase even though the error in the original proceedings affected only the second stage of the original, bifurcated sentencing hearing.

U.S. v. Stokes, 95 Crim. L. Rep. 191 (8th Cir. 4/29/14):
Holding: Judge cannot refuse to grant downward variance based on speculation that because Defendant had been unemployed for a decade, he must be a long-time drug dealer.

U.S. v. Boose, 2014 WL 148738 (8th Cir. 2014):
Holding: Arkansas conviction was not "crime of violence" since could be violated with "reckless" mental state.

U.S. v. Sneed, 94 Crim. L. Rep. 558, 2014 WL 443973 (8th Cir. 2/5/14):
Holding: USSG 2K2.1(b)(6)(B)'s enhancement for firearms possession in connection with another felony offense does not require a sentencing judge to make a specific finding as to how a firearm facilitated a possessory drug offense (disagreeing with other 8th Circuit opinions).

10/9 U.S. v. Ashcraft, 2013 WL 5539599 (8th Cir. 2013):
Holding: Defendant's receipt of disability payments from her former employer due to work related injury were "earnings" and thus subject to the limitations in the Consumer

Protection Act on garnishment, when the Gov't tried to collect those payments to pay restitution for a criminal case.

U.S. v. Wroblewski, 2013 WL 2258432 (8th Cir. 2013):
Holding: Condition of supervised release, which prohibited Defendant from contact with his girlfriend's family, was not reasonably related to the sentencing factors and was more restrictive than necessary.

U.S. v. Higgins, 710 F.3d 839 (8th Cir. 2013):
Holding: Court erred in sentencing Defendant as career offender since he did not have two prior controlled substance convictions as required under USSG; his prior Missouri conviction for "felony trafficking" did not meet definition of a "controlled substance offense." Further, his non-predicate trafficking offense, rather than the delivery offense which occurred on the same day, received the criminal history points due to having a longer sentence, thereby making the delivery offense precluded from consideration as a prior felony conviction for sentencing purposes.

U.S. v. Logan, 710 F.3d 856 (8th Cir. 2013):
Holding: Even though Defendant was sentenced pursuant to a binding plea agreement, where the agreement was for a sentencing range rather than a specific sentence, Defendant was eligible for a sentence reduction under statute authorizing sentence reductions where the sentencing range was subsequently lowered by USSG.

U.S. v. Lunsford, 93 Crim. L. Rep. 639 (8th Cir. 8/5/13):
Holding: SORNA did not require a sex offender-Defendant who moved from his home in Missouri to the Philippines to notify state authorities of his change of residence; nothing in SORNA requires a sex offender to notify authorities that he is moving out of U.S. to a foreign county, and no public policy reason requires this since there is no danger to U.S. children when Defendant leaves the country.

U.S. v. Lara-Ruiz, 93 Crim. L. Rep. 562 (8th Cir. 7/22/13):
Holding: Error under the U.S. Supreme Court's decision in *Alleyne* (U.S. 2013)(requiring a jury find facts that increase mandatory minimum sentences) can be raised as plain error; "the fairness and integrity of the judicial proceedings in this case were affected by the expansion of [Defendant's] loss of liberty resulting from the erroneous increase in the mandatory minimum sentence, without the requisite jury finding."

U.S. v. Johnson, 93 Crim. L. Rep. 16, 2013 WL 1188037 (8th Cir. 3/25/13):
Holding: (1) Defendant's due process right to confront witnesses at supervised-release revocation hearing was violated when judge allowed Gov't to prove Defendant had committed a new crime by presenting the contents of an arrest report without testimony of arresting officer; (2) because Gov't had a full opportunity to present its evidence, it is not entitled to a second bite at apple on remand; rather, Defendant is to be resentenced without consideration of the contents of the police report.

U.S. v. Fast, 92 Crim. L. Rep. 761 (8th Cir. 3/11/13):
Holding: Joining the majority of other circuits that have ruled on this issue, 8th Circuit holds that victims depicted in child pornography must demonstrate a proximate link between the harm for which they seek restitution and each particular defendant's conduct (disagreeing with 5th Circuit in *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2013)).

U.S. v. Anderson, 2012 WL 3023497 (8th Cir. 2012):
Holding: Sentencing Commission acted within its authority by issuing its policy statement governing motions for sentence reduction under the provision regarding modification of an imposed term of imprisonment based on a subsequently amended Sentencing Guideline range.

U.S. v. Lara, 2012 WL 3763617 (8th Cir. 2012):
Holding: Sentencing court erred in allowing plea agreement to be breached where sentencing court allowed Gov't to present evidence of drug quantity listed in the PSI after the Gov't had stipulated to the quantity in the agreement.

U.S. v. Galaviz, 687 F.3d 1042 (8th Cir. 2012):
Holding: Even though Defendant pleaded guilty to a drug offense and being a felon in possession, where he later conspired to murder an informant in retaliation for cooperation with the Gov't, this was not a willful attempt to obstruct justice with respect to sentencing of the "instant offense of conviction;" the Defendant could not have intended to obstruct justice for an offense to which he had already pleaded guilty.

U.S. v. Gamble, 2012 WL 2742553 (8th Cir. 2012):
Holding: Even though Defendant committed his crime before Fair Sentencing Act, Defendant was entitled to application of the Act where he was sentenced after FSA's effective date.

U.S. v. Dawn, 2012 WL 2428414 (8th Cir. 2012):
Holding: Arkansas battery conviction was not categorically a "crime of violence" under career offender enhancement statute.

U.S. v. Olson, 2012 WL 97525 (8th Cir. 2012):
Holding: Where sentencing court stated that defendant would benefit from treatment in a federal program and rejected the presentence investigative report's recommendations, the resulting sentence may have been impermissibly lengthened to enable treatment and promote rehabilitation.

U.S. v. Jimenez-Perez, 2011 WL 4916585 (8th Cir. 2011):
Holding: Sentencing court in nonfast track district may consider sentencing disparities created by fast track programs.

U.S. v. Willoughby, 90 Crim. L. Rep. 15 (8th Cir. 9/6/11):
Holding: Drug sales Defendant made to informer and cop at same time were not separate events to qualify as multiple drug predicates under ACCA.

U.S. v. Frazier, 2011 WL 3715454 (8th Cir. 2011):
Holding: "Replacement value" of house is not proper standard of restitution under MVRA; "market value" of destroyed property was proper standard.

U.S. v. Renner, 89 Crim. L. Rep. 749 (8th Cir. 8/8/11):
Holding: Even though the jury rejected tax-evader Defendant's defense that he relied on tax preparation experts to prepare his taxes, this did not preclude the judge at sentencing from relying on this to sentence him to a below-guideline sentence.

U.S. v. Perry, 2011 WL 1900388 (8th Cir. 2011):
Holding: Where proffer agreement was ambiguous in that one provision stated that Defendant's statements may not be used in the case-in-chief (suggesting they could be used elsewhere), but another provision stated the statements could not be used in any legal proceedings unless Defendant made an inconsistent statement, the agreement had to be construed against the Gov't and the statements could not be used in determining the Sentencing Guidelines range.

U.S. v. Lewis, 2011 WL 2083330 (8th Cir. 2011):
Holding: The denial of the defendant's right to participate in a sentence reduction hearing violated due process and his plea agreement.

U.S. v. Behrens, 89 Crim. L. Rep. 640 (8th Cir. 7/13/11):
Holding: Even though Defendant pleaded guilty to securities fraud under 15 USC 78j(b) and other regulations, this does not preclude him from taking advantage of a provision that exempts from imprisonment those whose violations of securities rules or regulations were committed in ignorance of the rules or regulations.

Sun Bear v. U.S., 89 Crim. L. Rep. 643 (8th Cir. 7/12/11)(en banc):
Holding: *Begay v. U.S.*, 553 U.S. 137 (2008), regarding the types of prior convictions that will trigger sentence enhancements for firearms offenses, is not retroactive to cases on collateral review under 28 USC 2255.

U.S. v. Resinos, 88 Crim. L. Rep. 575, 2011 WL 309620 (8th Cir. 2/2/11)(en banc):
Holding: Judges cannot aggregate drug amounts derived from "relevant conduct" described in dismissed counts to determine whether a defendant is eligible for mandatory minimum sentence, overruling *U.S. v. Jenkins*, 537 F.3d 894 (8th Cir. 2008); "the only drug quantities that may trigger a mandatory minimum sentence for a discrete violation of Sec. 841(a) are those involved in the counts of conviction."

U.S. v. Wisecarver, 2011 WL 2569753 (8th Cir. 2011):
Holding: Where Defendant was convicted of depredation of government property, special condition of supervised release prohibiting use of alcohol and requiring blood and breath tests was improper where court failed to provide any explanation for such

conditions, and gov't contention that alcohol use could exacerbate Defendant's volatile temper was speculative.

U.S. v. Smith, 2011 WL 285056 (8th Cir. 2011):
Holding: Fair Sentencing Act (FSA), which increased quantity of crack needed to trigger a mandatory life sentence from 50 to 280 grams, does not apply retroactively to cases pending on appeal at time FSA was enacted.

U.S. v. Pietrantonio, 2011 WL 869477 (8th Cir. 2011):
Holding: Venue for violation of SORNA was not proper in Minnesota for a trip from Minnesota to Nevada, or for a second trip from Nevada to Massachusetts; although Minnesota had a connection to the first trip, it had no connection to the second trip, and the indictment was duplicitous, such that the appellate court could not vacate the conviction concerning the second trip without violating Defendant's right to a unanimous jury verdict.

U.S. v. Lewis, 89 Crim. L. Rep. 381 (8th Cir. 5/27/11):
Holding: Plea agreement which provided that Defendant, his attorney or the Gov't can make whatever comment they deem appropriate at sentencing gave Defendant the right to be present when his sentence was reduced pursuant to Rule 35(b).

U.S. v. Perry, 89 Crim. L. Rep. 316 (8th Cir. 5/20/11):
Holding: A proffer agreement that stated that Defendant understands that if he pleads guilty or goes to trial, the gov't under 18 USC 3661 must provide to his sentencing judge the contents of the proffer, did not allow the district court to rely on the contents of the proffer to apply a sentence enhancement.

U.S. v. Ossana, 89 Crim. L. Rep. 215, 2011 WL 1517492 (8th Cir. 4/22/11):
Holding: Prior crime with only recklessness as mens rea does not quality as a prior "crime of violence" under USSG.

U.S. v. Robinson, 89 Crim. L. Rep. 97 (8th Cir. 4/12/11):
Holding: Conviction under Iowa's drug-tax stamp law does not categorically qualify as a "controlled substance offense" for sentencing as a career offender under USSG, since law can apply to those who merely possess controlled substances.

U.S. v. Kelly, 2010 WL 4702445 (8th Cir. 2010):
Holding: Supervised release condition for Defendant convicted of possession of firearm that prohibited him from having any material containing nudity or alluding to sexual activity was overbroad under 1st Amendment.

U.S. v. Williams, 2010 WL 5071397 (8th Cir. 2010):
Holding: District court cannot consider a police report in determining whether prior crime is "crime of violence" for purposes of career offender status; while the police report might be probative of the factual circumstances of the offense, such facts do not

help in deciding if the statute under which Defendant was convicted was a "crime of violence."

U.S. v. Marcia-Acosta, 97 Crim. L. Rep. 6 (9th Cir. 3/23/15):
Holding: Defense counsel's remarks at prior plea hearing that crime involved assault is insufficient by itself to prove a prior "crime of violence" for sentence enhancement for illegal reentry under 2L1.2(b)(1)(A)(ii).

Zavala v. Ives, 97 Crim. L. Rep. 209 (9th Cir. 5/18/15):
Holding: Defendant-Alien, who was convicted of illegal re-entry, is entitled to jail time credit for time he was held by ICE pending potential criminal prosecution.

U.S. v. Castro-Ponce, 2014 WL 5394061 and 5421584 (9th Cir. 2014):
Holding: District court must make explicit findings on all elements needed for Defendant's perjury to be deemed obstruction of justice for a two-level increase in USSG.

In re Her Majesty the Queen in Right of Canada, 2015 WL 2193171 (9th Cir. 2015):
Holding: Even though Defendant perpetrated a similar fraud in Canada, Canada was not entitled to restitution under MVRA from Defendant's fraudulent scheme to obtain energy credits under U.S. law, where these were different schemes not causally linked.

U.S. v. Morales Heredia, 96 Crim. L. Rep. 83 (9th Cir. 10/8/14):
Holding: Gov't implicitly breached plea agreement which called for recommending a low-end sentence when Gov't undermined that recommendation by arguing Defendant's criminal history and danger to the community.

U.S. v. Brown, 96 Crim. L. Rep. 179 (9th Cir. 11/7/14):
Holding: Even though a 27 of 29 victims of a Ponzi scheme reported dire financial problems because of the scheme, district court should not have used this to extrapolate that 100 victims faced similar financial insecurity so as to apply the USSG enhancement for financial crimes that threaten the solvency of more than 100 victims.

U.S. v. Daniels, 95 Crim. L. Rep. 533 (9th Cir. 7/23/14):
Holding: Rule 32.1(b)(2)(E) requires court to offer allocution before imposing post-revocation sentence.

U.S. v. Gnirke, 96 Crim. L. Rep. 385 (9th Cir. 1/2/15):
Holding: Supervised release term prohibiting sex defendant from possessing any sexually explicit content or patronizing a business where such content is available violated First Amendment right to access nonpornographic depictions of adults; ban would prohibit Defendant from accessing many R-rated movies or patronizing businesses like Wal-Mart or libraries that may sell or loan such movies.

U.S. v. Bryant, 96 Crim. L. Rep. 86 (9th Cir. 9/30/14):
Holding: Tribal court convictions can be used for later federal enhancement purposes only if the tribal court guaranteed the 6th Amendment right to counsel.

U.S. v. Dominguez-Maroyoqui, 95 Crim. L. Rep. 74 (9th Cir. 4/7/14):
Holding: Prior federal conviction for assaulting a federal officer is not categorically a "crime of violence" because the statute does not require proof that Defendant used violent force.

U.S. v. Montes-Ruiz, 95 Crim. L. Rep. 13 (9th Cir. 3/21/14):
Holding: Federal judge cannot order Defendant's sentence run consecutively to an anticipated, but not-yet-imposed, federal sentence in a different matter.

U.S. v. Popov, 94 Crim. L. Rep. 584 (9th Cir. 2/11/14):
Holding: Amount fraudulently billed to insurers is prima facie evidence of Defendant's intended loss under USSG, but parties may introduce additional evidence to demonstrate that the amount billed overstated or understates the Defendant's intent.

U.S. v. Williams, 94 Crim. L. Rep. 556, 2014 WL 350078 (9th Cir. 2/3/14):
Holding: Even though Defendant entered an *Alford* plea to a new state crime, this was not enough to revoke Defendant's federal supervised release because it did not prove that he committed the new crime.

U.S. v. Caceres-Olla, 2013 WL 6847127 (9th Cir. 2013):
Holding: Florida conviction for lewd or lascivious batter is not "crime of violence."

U.S. v. Dejarnette, 2013 WL 6698063 (9th Cir. 2013):
Holding: SORNA did not require sex offender who was convicted before SORNA's enactment to register in the jurisdiction of his sex offense conviction when the offender resided in a different jurisdiction.

U.S. v. Cortes, 94 Crim. L. Rep. 85 (9th Cir. 10/9/13):
Holding: Since the 6th Amendment requires that juries, not judges, resolve questions of fact that increase a sentence, jury instructions must instruct on issue of "sentencing entrapment," which occurs when a defendant, although predisposed to commit a minor or lesser offense, is entrapped to commit a greater offense subject to greater punishment; here, Defendant was induced by a Gov't agent to steal 100 kilograms of cocaine, which carried a harsher mandatory minimum than stealing of lesser amounts.

U.S. v. Flores-Cordero, 2013 WL 3821604 (9th Cir. 2013):
Holding: Prior Arizona conviction for resting arrest was not categorically a "crime of violence."

In re Stake Center Locating, Inc., 2013 WL 5356871 (9th Cir. 2013):
Holding: Wire fraud victim had right to restitution for losses, but not a right to criminal forfeiture under Crime Victims' Rights Act and Mandatory Victim Restitution Act.

U.S. v. Flores, 93 Crim. L. Rep. 726, 2013 WL 4614993 (9th Cir. 8/30/13):
Holding: USSG enhancement that applies to firearms crimes involving a "missile" means a self-propelled device designed to deliver an explosive; cartridges fired by a grenade launcher are not "missiles" because they lack self-propulsion and a guidance system.

U.S. v. Thompson, 93 Crim. L. Rep. 774 (9th Cir. 8/29/13):
Holding: 18 USC 844(h)(1) enhancement for using "fire or an explosive to commit any felony" does not apply to Defendant who used a thermal lance to cut into a safe; even though the lance used extreme heat to cut through metal, there was no "fire" as the term is commonly understood.

U.S. v. Acosta-Chavez, 2013 WL 4082128 (9th Cir. 2013):
Holding: Illinois conviction for aggravated criminal assault was not categorically a "forcible sex offense" under crime of violence enhancement for illegally reentry after deportation, because Illinois definition of "minor" was broader than federal definition in that it included 17 year-olds (which federal law did not), and only part of the statute corresponded to generic federal crime of forcible sex offense.

Moore v. Biter, 93 Crim. L. Rep. 642 (9th Cir. 8/7/13):
Holding: The Ninth Circuit ordered federal habeas relief based on *Graham* for Juvenile-Defendant who would not become eligible for parole until he was 144 years old, for non-homicide sentences totaling 254 years. Sentence of 254 years is materially indistinguishable from a life sentence without parole because Juvenile will not be eligible for parole within his lifetime, regardless of his remorse, reflection, or growth.

U.S. v. Aguilar-Reyes, 93 Crim. L. Rep. 561 (9th Cir. 7/18/13):
Holding: Where alien-Defendant wins a new sentencing hearing on appeal but is unable to appear at sentencing because he has been deported, the proper remedy is to affirm the sentence without prejudice to a later resentencing request he may make if and when he should return to the U.S., or waive his right to be present at sentencing.

U.S. v. Huizar-Velazquez, 93 Crim. L. Rep. 540 (9th Cir. 7/2/13):
Holding: Where Defendant was convicted under 18 USC 371 for stamping "made in Mexico" on Chinese products he smuggled into U.S., the applicable USSG was 2T3.1, "evading import duties or restrictions (smuggling)," not 2C1.1 "conspiracy to defraud [a] governmental function" because 2C1.1 requires improper use of government influence, such as a bribery offense.

U.S. v. Gonzalez-Vazquez, 93 Crim. L. Rep. 452 (9th Cir. 6/18/13):
Holding: A term of unsupervised probation on a prior conviction will not count toward a criminal history score under USSG if the probation imposed no restraints beyond what the law imposes on everyone.

U.S. v. Joseph, 93 Crim. L. Rep. 364, 2013 WL 2321443 (9th Cir. 5/29/13):
Holding: 18 USC 1791 that mandates consecutive sentences for possessing or transferring drugs in federal prison applies only when the same drugs are both possessed and distributed; thus, where Defendant was convicted of two counts of possessing and transferring drugs in 2010, and a third count based on possession in 2011, the first two counts must be consecutive, but not the third count.

In re Amy & Vicky, 2013 WL 1847557 (9th Cir. 2013):
Holding: Sentencing court did not err in refusing to impose joint and several liability for child pornography restitution award.

U.S. v. Trujillo, 93 Crim. L. Rep. 186 (9th Cir. 4/16/13):
Holding: District court has jurisdiction to hear a second motion for sentencing reduction under 18 USC 3582(c)(2).

U.S. v. Yuman-Hernandez, 93 Crim. L. Rep. 69 (9th Cir. 4/8/13):
Holding: Defendants caught in stings involving robberies or thefts of fake drugs can show "sentencing entrapment" (a.k.a. "sentencing factor manipulation" or "sentencing manipulation") by showing that they lacked the intent regarding the quantity of drugs that police said existed without proving that they lacked the capability to deal with that large a quantity, and Defendants need not show "outrageous government conduct" to claim "sentencing entrapment"; "sentencing entrapment" is a claim challenging conduct by police to expand the scope of a crime by entrapping a target who intends to commit one offense to commit a greater offense subject to greater punishment.

U.S. v. Augustine, 2013 WL 1317037 (9th Cir. 2013):
Holding: Even though Defendant was eligible for only a one-month reduction in sentence under the Fair Sentencing Act, the sentence should be reduced.

U.S. v. Preston, 2013 WL 431951 (9th Cir. 2013):
Holding: Court did not follow necessary procedure in imposing release condition that Defendant could not be in company of any child, including his own children, even though he currently did not have any children.

U.S. v. Wolf Child, 2012 WL 5200347 (9th Cir. 2012):
Holding: Supervised release condition that prohibited Defendant from having contact with his own children or from dating his fiancée was unreasonable.

U.S. v. Catalan, 2012 WL 5825058 (9th Cir. 2012):
Holding: USSG guideline increasing base offense by 16 levels for unlawful reentry did not apply where Defendant was deported before being sentenced to a 360-day prison term upon revocation of his probation.

U.S. v. Nielsen, 2012 WL 3983770 (9th Cir. 2012):
Holding: (1) Prior adjudication as juvenile for sexual assault did not qualify as prior conviction for enhancement of sentence for adult sex offense; and (2) court used incorrect

legal standard in applying enhancement for vulnerable victim by comparing the victim to minors in the general population rather than to the typical victim of such offense.

U.S. v. Turner, 2012 WL 3185954 (9th Cir. 2012):
Holding: Rule of lenity required a finding that supervised release was not tolled during the time between expiration of a sentence and a decision regarding civil commitment under the Adam Walsh Act.

U.S. v. Suarez, 2012 WL 2362526 (9th Cir. 2012):
Holding: Prior guilty plea which resulted in a deferred judgment under Calif. deferred judgment scheme was not a "final" prior drug conviction which would trigger a mandatory minimum 20 year sentence.

U.S. v. Wing, 2012 WL 2354447 (9th Cir. 2012):
Holding: Court could not revoke a second period of supervised release based on violations of a previously revoked term of supervised release.

U.S. v. Harris, 2012 WL 1889782 (9th Cir. 2012):
Holding: Visiting Judge should not have sentenced Defendant where there was no showing that the original trial judge was unable to perform his sentencing duties, and the Visiting Judge was not familiar with the trial transcript.

U.S. v. Manzo, 91 Crim. L. Rep. 104 (9th Cir. 4/5/12):
Holding: Gov't breached plea agreement where it agreed to recommend a particular sentence under USSG, but then withdrew that after the court said the Gov't mistakenly calculated the applicable ranges.

U.S. v. Onyesoh, 2012 WL 1109992 (9th Cir. 2012):
Holding: Usability of expired credit card number had to be proved by preponderance of the evidence when the defendant did not concede that fact or when the defendant

U.S. v. Major, 2012 WL 1001188 (9th Cir. 2012):
Holding: The rule of lenity required the court to deem one co-defendants' brandishing firearm counts, rather than a discharging count, to be the first conviction when imposing mandatory minimum sentences for multiple crimes of violence.

U.S. v. Rodriguez-Ocampo, 2011 WL 6880654 (9th Cir. 2011):
Holding: Sentencing increase based on defendant's previous removal after a conviction for a violent felony required that the removal be pursuant to a constitutionally valid order of removal.

U.S. v. Munoz-Camarena, 2011 WL 257966 (9th Cir. 2011):
Holding: Trial court erred in applying 8-level enhancement, rather than 4-level, after Defendant was convicted of attempted illegal re-entry after deportation due to three prior Calif. convictions and three for illegal re-entry, even if court would have applied the

same sentence regardless of which enhancement applied; court was required to correctly calculate the USSG sentence and use that as a starting point for sentencing.

U.S. v. Tsosie, 2011 WL 1758785 (9th Cir. 2011):
Holding: Where plea agreement to sex offense did not set forth any specific amount of restitution or an estimate as to amount, Defendant could challenge the restitution order on appeal even though he waived his appellate rights; he lacked sufficient notice of restitution to have a valid waiver.

1U.S. v. Grant, 2011 WL 6016182 (9th Cir. 2011):
Holding: District court improperly considered rehabilitation in selecting prison term following revocation of supervised release, where the court concluded that prison would permit defendant to receive the substance abuse treatment he needed, but did not obtain outside prison.

U.S. v. Leal-Felix, 2011 WL 5966202 (9th Cir. 2011):
Holding: Defendant's citations for driving with a suspended license could not be considered "arrests" in calculating his criminal history.

U.S. v. Rudd, 2011 WL 5865897 (9th Cir. 2011):
Holding: Court erred in not explaining the imposition of a residency restriction that was not in the plea agreement.

U.S. v. Tadio, 2011 WL 5839660 (9th Cir. 2011):
Holding: District court may weigh statutory nonassistance factors against assistance factors in determining how much of a sentence reduction to give.

U.S. v. McEnry, 2011 WL 4840445 (9th Cir. 2011):
Holding: Application of a catchall provision to select an appropriate sentencing guideline for offenses not listed in the Statutory Index is in the first instance a statutory question determined by the elements of the offense.

Reina-Rodriguez v. U.S., 2011 WL 2465462 (9th Cir. 2011):
Holding: State burglary conviction was not a "crime of violence."

Reina-Rodriguez v. U.S., 2011 WL 4031205 (9th Cir. 2011):
Holding: New rule limiting definition of burglary for purposes of sentencing enhancement for crimes of violence is retroactive.

Estrella v. Ollison, 90 Crim. L. Rep. 511 (9th Cir. 12/29/11):
Holding: A convicted defendant's parole status is not a "prior conviction" under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

U.S. v. Grant, 90 Crim. L. Rep. 352 (9th Cir. 12/5/11):
Holding: District judge may not take into account Defendant's rehabilitation needs when imposing prison term following revocation of supervised release.

U.S. v. Hunt, 89 Crim. L. Rep. 830 (9th Cir. 9/1/11):
Holding: Where the guilty plea did not admit what type of drug was involved, Defendant could only be sentenced to the maximum penalty for an unspecified drug.

U.S. v. Espinoza-Baza, 89 Crim. L. Rep. 750 (9th Cir. 8/4/11):
Holding: Defendant's two convictions of being an alien in U.S. after having been deported for committing an aggravated felony should not be grouped for sentencing purposes under the USSG.

U.S. v. Yepez, 89 Crim. L. Rep. 684, 2011 WL 2988774 (9th Cir. 7/25/11):
Holding: Federal defendants can be eligible for "safety valve" sentence by persuading state courts to retroactively modify state sentences that would otherwise make them ineligible.

U.S. v. Henderson, 89 Crim. L. Rep. 215, 2011 WL 1613411 (9th Cir. 4/29/11):
Holding: Judges may vary from the USSG on child pornography offenses on the basis of policy disagreement with those Guidelines and hence, may sentence below the Guidelines range.

Miller v. Oregon Bd. of Parole and Post-Prison Supervision, 89 Crim. L. Rep. 167 (9th Cir. 4/25/11):
Holding: Statute that allows early parole hearing if certain conditions are met creates a presumption in favor of early hearing unless certain findings are made, and thus, creates a protected liberty interest.

U.S. v. Burgum, 88 Crim. L. Rep. 550, 2011 WL 208363 (9th Cir. 1/25/11):
Holding: Inability to pay restitution cannot be considered an "aggravating factor."

U.S. v. Valverde, 2010 WL 5263142 (9th Cir. 2010):
Holding: Attorney General could not waive notice and comment under Administrative Procedure Act in making SORNA registration retroactive.

U.S. v. Rivera-Gomez, 88 Crim. L. Rep. 353 (9th Cir. 12/6/10):
Holding: Under USSG, a prior state conviction for resisting arrest that led to the federal conviction should be included in the offense level, not the criminal history score.

U.S. v. Lightfoot, 88 Crim. L. Rep. 294 (9th Cir. 11/30/10):
Holding: Defendant's bargained-for waiver of appeal or postconviction rights does not preclude a motion to modify sentence under 18 USC 3582(c)(2) to reflect subsequent USSG revisions.

U.S. v. Johnson, 88 Crim. L. Rep. 295 (9th Cir. 11/29/10):
Holding: Supervised release provision that prohibited Defendant from "associating with persons associated" with a gang was unconstitutionally vague; while court could prohibit association with gang members, prohibiting association with persons who associate with gang members was too vague.

U.S. v. Figueroa-Labrada, 97 Crim. L. Rep. 13 (10th Cir. 3/24/15):
Holding: Even though Defendant didn't cooperate with Gov't until after his case was reversed on appeal, he is still eligible for "safety valve" sentencing below mandatory minimum.

U.S. v. Howard, 97 Crim. L. Rep. 132 (10th Cir. 4/28/15):
Holding: Determining restitution in mortgage fraud cases when the victim-lenders bought the mortgages on the secondary market requires that courts consider the discounted price the lenders paid for the mortgages in determining their losses.

U.S. v. Brooks, 2014 WL 2443032 (10th Cir. 2014):
Holding: In determining whether a prior conviction is a felony for purposes of imposition of career offender enhancement, the maximum amount of time a particular Defendant could have received controls, rather than the amount of time the worst imaginable recidivist could have received; where Defendant received six months on a prior offense, it was not a felony for enhancement purposes.

Dodd v. Trammell, 2013 WL 7753714 (10th Cir. 2013):
Holding: In death penalty case, where victim-impact witnesses were allowed to testify that they wanted Defendant to be sentenced to death, this violated 8th Amendment, warranted habeas relief, and was not harmless under *Brecht*.

U.S. v. Bear, 96 Crim. L. Rep. 184 (10th Cir. 10/31/14):
Holding: Supervised release condition that prohibited Defendant from having contact with his own children was not "reasonably necessary" under supervised release statute, 18 USC 3583(d)(2).

U.S. v. Ferdman, 96 Crim. L. Rep. 559 (10th Cir. 2/13/15):
Holding: Where Victim-Store seeks restitution for retail price of theft of property, Gov't must do more than just show the retail price of the stolen good; Gov't must also show Victim-Store would have actually sold those items.

U.S. v. Dunn, 96 Crim. L. Rep. 521 (10th Cir. 2/10/15):
Holding: Calculation of restitution for child pornography victim begins with estimate of harm caused by internet trafficking alone, without the harm caused by the original abuser; "we think it inconsistent with the bedrock principle that restitution should reflect the consequences of the defendant's own conduct to hold [Defendant] accountable for those harms initially caused by [victim's] abuser."

U.S. v. Wray, 96 Crim. L. Rep. 487 (10th Cir. 1/27/15):
Holding: Crime of statutory rape is not categorically a "violent" or "forcible" felony under USSG if the only thing that makes the conduct unlawful is the younger age of the participant.

U.S. v. Smith, 95 Crim. L. Rep. 482 (10th Cir. 6/30/14):
Holding: District judge imposing a mandatory consecutive sentence for a firearm can shorten the sentence for the underlying felony to be able to consider the entire, aggregate sentence; to hold otherwise would contradict the requirement that judge consider the history and character of Defendant.

U.S. v. Luna-Acosta, 2013 WL 1848761 (10th Cir. 2013):
Holding: Even though judge orally announced sentence at a first sentencing hearing, this was not final for purposes of appeal where judge also scheduled a later second sentencing hearing to "finalize" issues regarding the sentence, including allocution and supervised release issues.

U.S. v. Battle, 2013 WL 500643 (10th Cir. 2013):
Holding: Supplemental drug quantity calculations made by court at re-sentencing under retroactive USSG amendments were not supported by facts found at Defendant's original sentencing.

U.S. v. Boyd, 2013 WL 3491638 (10th Cir. 2013):
Holding: In resentencing Defendant based on retroactive application of crack USSG, court was required to use Defendant's applicable offense level and criminal history category, as determined without a departure granted at the original sentencing based on inadequacy of the criminal history category.

Dodd v. Trammell, 93 Crim. L. Rep. 776, 2013 WL 5124331 (10th Cir. 9/16/13):
Holding: Habeas relief granted where victim impact statement in death penalty case contained recommendation for death; prohibition on victim's sentencing recommendation in death penalty case in *Booth v. Maryland*, 482 U.S. 496 (1987) remains good law despite *Payne*.

U.S. v. Duran, 2012 WL 4947031 (10th Cir. 2012):
Holding: Texas conviction for aggravated assault was not a "crime of violence" because has mental state of only recklessness.

U.S. v. Mendiola, 2012 WL 4841278 (10th Cir. 2012):
Holding: Sentencing court could not sentence Defendant to a prison sentence that included drug rehabilitation in excess of recommended USSG sentence because this violated *Tapia*.

U.S. v. Butler, 2012 WL 4017378 (10th Cir. 2012):
Holding: For sentencing purposes, the market value of poached deer is the "fair market retail price" of the deer, and does not also include the costs of the expedition to hunt the deer.

U.S. v. Huizar, 2012 WL 3055930 (10th Cir. 2012):
Holding: Defendant's Calif. conviction for residential burglary was not a "crime of violence" because Calif. burglary statute allows for consensual entry in some circumstances.

U.S. v. Kieffer, 2012 WL 2087190 (10th Cir. 2012):
Holding: Court's error in calculating advisory guidelines sentencing range was not harmless where the range failed to account for concurrent sentencing provisions of USSG, and court did not indicate it would have given same sentence upon proper application of USSG.

U.S. v. Anderson, 2012 WL 1825183 (10th Cir. 2012):
Holding: An unsubstantiated letter that Defendant received an overpayment of Social Security disability benefits was not sufficient to support restitution.

U.S. v. Mendoza-Lopez, 90 Crim. L. Rep. 815 (10th Cir. 2/24/12):
Holding: A district court plainly erred when it told a defendant at sentencing that he could allocate only on a sentence within the presumptive range prescribed by the USSG.

U.S. v. Rosales-Garcia, 90 Crim. L. Rep. 641 (10th Cir. 2/7/12):
Holding: Courts calculating the seriousness of an alien's prior drug-trafficking offense for purposes of a stiff USSG enhancement for those convicted of re-entering the country illegally must look to the original sentence imposed before the defendant was deported and not to any sentence increases based on the defendant's probation revocation following the re-entry.

Doe v. Albuquerque, 90 Crim. L. Rep. 550 (10th Cir. 1/20/12):
Holding: Ban on sex offenders entering libraries violates First Amendment (but Court indicates statute could likely be rewritten to constitutionally create same result).

U.S. v. Mike, 2011 WL 538867 (10th Cir. 2011):
Holding: Condition of supervised release requiring sex offender to notify potential employers and schools of his criminal convictions required a finding that the occupational restriction was the minimum necessary.

U.S. v. West, 2011 WL 1844112 (10th Cir. 2011):
Holding: Even though Defendant resisted arrest and damaged property as a result, the underlying offense of possession of a firearm was not the proximate cause of the damage so as to require restitution under MVRA.

U.S. v. Lopez-Macias, 90 Crim. L. Rep. 235 (10th Cir. 11/7/11):
Holding: Federal judge without a "fast-track" program for immigration offenses can vary downward from USSG to address disparity from "fast track" jurisdictions.

U.S. v. Hoskins, 89 Crim. L. Rep. 742 (10th Cir. 8/12/11):
Holding: USSG do not prohibit judge from giving tax-evader Defendant credit for unclaimed tax deductions against income they failed to report.

U.S. v. Manatau, 89 Crim. L. Rep. 718 (10th Cir. 8/1/11):
Holding: "Intended loss" from economic crime means the loss Defendant purposely sought to inflict, not the loss Defendant merely knew would result or loss he might possibly have contemplated.

U.S. v. Vigil, 89 Crim. L. Rep. 254, 2011 WL 1798020 (10th Cir. 5/12/11):
Holding: USSG allowing enhancement for being a professional fence requires proof that Defendant not only received but also sold stolen property.

U.S. v. Salgado, 2014 WL 988537 (11th Cir. 2014):
Holding: Defendant's conduct in underlying drug conspiracy could not be used to impose role enhancement for money laundering offense; Defendant's relevant conduct was limited to role in money laundering.

U.S. v. Cruanes, 2014 WL 6845156 (11th Cir. 2014):
Holding: 11th Circuit issues writ of mandamus ordering district court to issue a certificate stating that Defendant's sentence was automatically set aside in 1983 based on the since-repealed Federal Youth Corrections Act which provided that youth offenders' sentences shall be set aside when discharged by the Parole Commission or a court; district court had granted a motion to reduce sentence in 1983, which had the effect of discharging Defendant.

U.S. v. Charles, 2014 WL 3031267 (11th Cir. 2014):
Holding: It was improper to impose two-level increase for trafficking in unauthorized credit access devices at the same time Defendant was convicted of aggravated identity theft, which had a two-year mandatory minimum; the USSG prohibited simultaneous application of a sentence increase for transfer of a means of identification.

U.S. v. Vandergrift, 95 Crim. L. Rep. 420 (11th Cir. 6/18/14):
Holding: 18 USC 3582, prohibiting reliance on defendant's rehabilitative needs in determining whether to impose imprisonment, is violated if those needs were a factor in the sentence, even if there were other factors, too.

U.S. v. Muzio, 95 Crim. L. Rep. 486 (11th Cir. 7/8/14):
Holding: A judgment imposing a prison sentence and restitution but leaving the specific amount of restitution open is a final judgment that can be appealed.

U.S. v. Salgado, 95 Crim. L. Rep. 50 (11th Cir. 3/14/14):
Holding: Where Defendant is sentenced for money laundering, the court cannot consider his conduct in an underlying drug conspiracy to impose a role-in-the-offense enhancement under USSG 2S1.1(a)1; only the money laundering offense itself is considered, not the underlying crime that generated the money that was laundered.

In re Wellcare Health Plans Inc., 95 Crim. L. Rep. 389 (11th Cir. 6/13/14):
Holding: A corporation that signed a deferred prosecution agreement was not a "victim" of its executives for recovering restitution under the Crime Victims' Rights Act or the Mandatory Victims Restitution Act.

U.S. v. Howard, 94 Crim. L. Rep. 672 (11th Cir. 2/19/14):
Holding: Third-degree burglary under Alabama law is not a "violent felony" under ACCA.

U.S. v. Bane, 2013 WL 3242669 (11th Cir. 2013):
Holding: Amounts that Medicare and others paid for medically necessary oxygen that the Defendant's company actually provided could not be included in restitution amount for conspiracy to commit health care fraud.

State v. Whatley, 2013 WL 2382278 (11th Cir. 2013):
Holding: Even though Defendant ordered bank employees to move around in the bank while he robbed it, the sentencing enhancement for abduction did not apply because Defendant never forced any employees to leave the bank.

U.S. v. Hinds, 2013 WL 1406005 (11th Cir. 2013):
Holding: Where Defendant's offense took place before Fair Sentencing Act took effect, but he was resentenced afterwards, the FSA applied to him.

Spencer v. U.S., 2013 WL 4106367 (11th Cir. 2013):
Holding: Defendant, who unsuccessfully raised on direct appeal a claim that his prior Florida conviction for third-degree felony child abuse was not "crime of violence," could raise this issue in motion to vacate sentence because the *Begay* decision, which validated his arguments, is retroactive.

U.S. v. Meister, 94 Crim. L. Rep. 391 (11th Cir. 12/17/13):
Holding: (1) Even though the Mandatory Detention Act, 18 USC 3145(c), provides that certain defendants cannot be released pending sentencing if their crimes are violent, there is an exception where a "Judicial Officer" determines that the defendant is neither a seafety threat nor a flight risk and that detention is inappropriate; (2) a judge qualifies as a "Judicial Officer" under the statute; therefore, a judge can release Defendant under the statute for medical reasons pending his sentence appeal.

Spencer v. U.S., 93 Crim. L. Rep. 657 (11th Cir. 8/15/13):
Holding: The *Begay* rule on the types of prior convictions that qualify as predicates for federal recidivist sentences may be applied retroactively on collateral review of sentences imposed under the career offender provisions of USSG (disagreeing with 8th Circuit).

U.S. v. Carillo-Ayala, 93 Crim. L. Rep. 14, 2013 WL 1173959 (11th Cir. 3/22/13):
Holding: Even though Defendant receives an enhances sentence for his drug offense due to possession of a firearm, this does not automatically preclude receiving "safety valve" relief from a mandatory minimum.

U.S. v. Hall, 92 Crim. L. Rep. 462, 2013 WL 160276 (11th Cir. 1/16/13):
Holding: Even though Defendant may have wrongfully obtained or transferred identifying information of people in violation of 42 USC 1320(d)-6(a)(2), these people do not qualify as "victims" for sentence enhancement purposes unless there is some further showing such as someone perpetrated a fraud with the identifying information.

U.S. v. Johnson, 2012 WL 3890136 (11th Cir. 2012):
Holding: Sentence enhancement for reckless endangerment by flight for Defendant-passenger in car required a finding that passenger aided or encouraged driver to flee from police.

U.S. v. Rosales-Bruno, 2012 WL 1138648 (11th Cir. 2012):
Holding: A defendant's conviction for false imprisonment, in violation of Florida law, did not qualify as a "crime of violence" under sentencing guidelines because it did not necessarily involve the threat or use of physical force.

U.S. v. Owens, 2012 WL 603233 (11th Cir. 2012):
Holding: Offenses of second degree rape and second degree sodomy were not "violent felonies" under the Armed Career Criminal Act (ACCA) because neither offense had an element of violent physical force against the victim.

U.S. v. Vadnais, 2012 WL 104661 (11th Cir. 2012):
Holding: Five-level enhancement for distribution of child pornography for expectation of receipt of thing of value did not apply to defendant, where defendant used peer-to-peer file-sharing to obtain child pornography from other users in a manner which permitted other users to obtain the files and the enhancement required that the distribution occur for a specified purpose and there was no showing that defendant expected to receive any other "thing of value."

U.S. v. McGarity, 90 Crim. L. Rep. 648 (11th Cir. 2/6/12):
Holding: Restitution in child pornography cases requires causation where the defendant possessed pornography but had no actual contact with the victim.

U.S. v. Spriggs, 90 Crim. L. Rep. 625 (11th Cir. 1/10/12):
Holding: The government did not meet its burden of proving a defendant qualified for a five-level enhancement for those who barter and trade child pornography simply by

showing that the defendant had installed a file-sharing program on his computer that gave others access to pornographic images.

U.S. v. McDaniel, 2011 WL 255151 (11th Cir. 2011):
Holding: The Mandatory Restitution for Sexual Exploitation of Children Act, 18 USC 2259, limits recoverable losses to those proximately caused by the defendant's conduct, rejecting the gov't's argument that a generalized showing of "harm" is sufficient.

Bowers v. Kelly, 2011 WL 3760891 (11th Cir. 2011):
Holding: Where Parole Board member prepared a memo for attorney general that portrayed Defendant in negative way so that attorney general could oppose parole, this violated Parole Board member's duty to act impartially and required Parole Board's decision to be vacated.

U.S. v. Fulford, 90 Crim. L. Rep. 262 (11th Cir. 11/14/11):
Holding: In order to enhance sentence for sending child pornography to a minor, the Gov't must prove the person to whom pornography was sent was an actual minor if the person was not a law enforcement officer; here, the person was an adult male posing as a minor, but was not a law enforcement officer, so the enhancement did not apply.

U.S. v. Martikainen, 89 Crim. L. Rep. 255 (11th Cir. 5/10/11):
Holding: USSG enhancement that applies to a defendant who creates a substantial risk of death or injury to another while fleeing from law enforcement requires that Defendant knew he was being pursued.

U.S. v. Wetherald, 89 Crim. L. Rep. 11 (11th Cir. 3/28/11):
Holding: Even though USSG are only advisory, ex post facto clause still precludes court from applying a USSG that is more severe than the version in effect at the time of the offense.

U.S. v. Julian, 88 Crim. L. Rep. 633 (11th Cir. 2/22/11):
Holding: The statute that requires consecutive sentences for gun offenses, 18 USC 924(c)(1)(A), is not applicable when a gun crime causes a death because the subsection that makes the death penalty on option if death results creates a separate crime, rather than a sentencing factor.

US. v. Shannon, 88 Crim. L. Rep. 639 (11th Cir. 1/26/11):
Holding: Prior conviction under Florida law that outlaws selling or purchasing drugs is not a "controlled substance offense" under USSG 4B1.2(b) because the guideline requires possession with intent to distribute, not purchase with intent to distribute.

U.S. v. Jerchower, 88 Crim. L. Rep. 551, 2011 WL 204751 (11th Cir. 1/25/11):
Holding: Amendment to USSG 2G1.3 that states that the enhancement for defendants who unduly influenced a minor to engage in sexual conduct does not apply if the "minor" is an undercover office applies retroactively on direct appeal to sentences imposed prior to its effective date.

U.S. v. Martinez-Cruz, 94 Crim. L. Rep. 332, 2013 WL 6231562 (D.C. Cir. 12/3/13):
Holding: When a Defendant presents objective evidence giving rise to a reasonable inference that a prior conviction being used to enhance punishment involved an invalid waiver of counsel, the burden shifts to the prosecution to prove the waiver was valid.

U.S. v. Malenya, 736 F.3d 554 (D.C. Cir. 2013):
Holding: In imposing special supervised release conditions on sex-Defendant, court failed to apply the correct statutory standard that the conditions had to be reasonably related to the statutory sentencing factors and involve no greater deprivation of liberty than necessary to carry out the statutory sentencing goals; court just said the conditions were "standard conditions imposed in these cases" and said the conditions were necessary to avoid re-offending.

In re Sealed Case, 93 Crim. L. Rep. 559, 2013 WL 3305706 (D.C. Cir. 7/2/13):
Holding: Defendant who received sentences below statutory mandatory minimum because of substantial assistance are eligible for sentence reductions under USSG.

U.S. v. Epps, 92 Crim. L. Rep. 569 (D.C. Cir. 2/12/13):
Holding: Even though crack defendants' sentences were not specifically rooted in the USSG, they may still be eligible for sentence reductions under the retroactive amendments to crack guidelines.

U.S. v. Fair, 2012 WL 5457679 (D.C. Cir. 2012):
Holding: Even though Defendant had made money from copyright infringement, Defendant's gain is not the same as victim's loss, so court erred in making the gain be restitution under MVRA without proof of victim's actual, provable loss.

U.S. v. Terrell, 92 Crim. L. Rep. 115 (D.C. Cir. 10/19/12):
Holding: Judge's statement that he needed to have a "compelling reason" to deviate from USSG was tantamount to giving guideline sentence an impermissible presumption of reasonableness.

U.S. v. Rodriguez, 2012 WL 1193763 (D.C. Cir. 2012):
Holding: The defendant was not precluded from obtaining safety-valve relief by waiting "until the last minute" to provide information.

U.S. v. Anderson, 2011 WL 281034 (D.C. Cir. 2011):
Holding: Defendant was prejudiced when court failed to consider his entire allocution at sentencing that was relevant to his background, character and offense.

U.S. v. Papagno, 89 Crim. L. Rep. 159 (D.C. Cir. 4/26/11):
Holding: MIRVA does not authorize as restitution reimbursement of costs of internal investigation to an institutional crime victim which undertook the internal investigation at its own initiative and not that of prosecutors.

U.S. v. Monzel, 89 Crim. L. Rep. 118 (D.C. Cir. 4/19/11):
Holding: Person depicted in child pornography image is not entitled to restitution unless the Gov't can tie the particular defendant's possession of the image to the harm for which the victim seeks restitution.

Robinson v. U.S., 2014 WL 4746291 (D.C. 2014):
Holding: For an unarmed accomplice to be subject to the enhanced penalties for committing a crime while armed, the accomplice must have had actual knowledge that the principal was armed; proof only that accomplice had "reason to know" the principal was armed was insufficient.

U.S. v. Emor, 2012 WL 983152 (D.D.C. 2012):
Holding: A nonprofit corporation was the defendant's alter ego, and thus was not entitled to restitution from the defendant.

U.S. v. Cotton, 2011 WL 180196 (D.D.C. 2011):
Holding: Effective date for persons with pre-SORNA convictions was August 1, 2008, 30 days after SORNA's final guidelines were published; the interim rule was invalid because the Attorney General did not have good cause to invoke the exception to 30 days' notice.

U.S. v. Flowers, 2013 WL 2250611 (M.D. Ala. 2013):
Holding: Sentence by downward variance to probation without monitored home confinement was appropriate for Defendant with mental illness who was convicted of passing a forged check.

U.S. v. Nash, 2014 WL 868628 (N.D. Ala. 2014):
Holding: 60 months probation was appropriate for possession of child pornography even though USSG called for 24-30 months imprisonment, where 22-year-old Defendant was convicted of "sexting" with his 16-year-old girlfriend and having images of the girlfriend; even though she was 16, the relationship itself was not illegal under Alabama law, and "sexting" is common among young adults.

Jones v. Chappell, 2014 WL 3567365 (C.D. Cal. 2014):
Holding: California's death penalty system is arbitrary and capricious under 8th Amendment because of long delays and because only 13 of 900 defendants since 1978 have been executed; in effect, sentences are life sentences with remote possibility of death, which no rational legislature or jury could ever impose.

Jones v. Chappell, 2014 WL 3567365 (C.D. Cal. 2014):
Holding: California's death penalty system is arbitrary and capricious under 8th Amendment because of long delays and because only 13 of 900 defendants since 1978 have been executed; in effect, sentences are life sentences with remote possibility of death, which no rational legislature or jury could ever impose.

Miranda v. Carey, 2010 WL 4010374 (E.D. Cal. 2010):
Holding: Denying parole based on gravity of offense alone violated state "some evidence standard."

U.S. v. Reyes, 2012 WL 5389697 (N.D. Cal. 2012):
Holding: Alien-Defendant's prior conviction for possessing a short-barrel shotgun was not a crime of violence, and thus not an aggravated felony that would subject him to expedited removal from the U.S.

U.S. v. Behren, 2014 WL 4214608 (D. Colo. 2014):
Holding: Supervised release condition, after child pornography conviction, that required Defendant to give a complete sexual history in a polygraph for sex treatment violated 5th Amendment privilege against self-incrimination; sexual history could include past sex offenses that would be incriminating.

U.S. v. Executive Recycling Inc., 2013 WL 3010821 (D. Colo. 2013):
Holding: Even though Defendant used mass mailings and a website to attract customers to his fraudulent scheme, this did not trigger the "sophisticated means" enhancement under USSG.

Harris v. State, 2010 WL 5298902 (S.D. Fla. 2010):
Holding: Where Defendant claimed that one of his three prior convictions did not qualify as a "crime of violence" for sentencing enhancement purposes, Defendant could use "actual innocence" exception to procedural default to excuse failure to raise this earlier; Defendant could be "actually innocent" of having three prior qualifying convictions.

U.S. v. Holloman, 2011 WL 607121 (C.D. Ill. 2011) & U.S. v. Hodges, 2011 WL 611804 (M.D. Ga. 2011):
Holding: Fair Sentencing Act (which changed crack quantifies to trigger mandatory minimum sentences from 5 to 28 grams) applies to defendants sentenced on or after FSA's effective date regardless of whether their crime occurred before the effective date.

U.S. v. Ortiz, 2011 WL 3836527 (N.D. Ill. 2011):
Holding: Even though Defendant lived at a house of a friend, an increase in offense level for maintaining premises for drug purposes was not warranted where Defendant did not own or rent the house and only used the house for drug purposes one time.

U.S. v. Hendrickson, 2014 WL 2600090 (N.D. Iowa 2014):
Holding: In sentencing for possession of stolen gun, Defendant's youth and drug addiction, which was a serious brain disease that diminished his capacity to make decisions, called for a sentence at low end of range.

U.S. v. Amaya, 2013 WL 2548393 (N.D. Iowa 2013):
Holding: 180-month downward variance was warranted for drug and money laundering conviction where Defendant was 25 years old and his prior criminal record was nonviolent misdemeanors.

U.S. v. Hayes, 2013 WL 2468038 (N.D. Iowa 2013):
Holding: Downward variance was warranted due to district court's policy disagreement with methamphetamine guidelines.

U.S. v. Newhouse, 2013 WL 346432 (N.D. Iowa 2013):
Holding: Downward departure from 262 months to statutory minimum of 120 months was warranted based on district court's quasi-categorical policy disagreement with USSG career offender provision as applied to low level, non-violent drug addict, and based on individualized assessment of statutory sentencing factors; career offender guideline had potential to overstate seriousness of Defendant's record and risk of re-offending.

U.S. v. Lander, 2012 WL 5237186 (N.D. Iowa 2012):
Holding: Sentence below statutory minimum based on "substantial assistance" could be based on third-party assistance provided by Defendant's Wife, who acted on Defendant's behalf.

Doe v. Jindal, 2012 WL 1068776 (E.D. La. 2012):
Holding: Equal Protection was violated when persons convicted of providing oral sex for money under the Louisiana Crime Against Nature by Solicitation Law (CANS) were required to register as sex offenders, but persons who engaged in same acts under the Louisiana prostitution statute were not required to register.

Doe v. Jindal, 90 Crim. L. Rep. 717 (M.D. La. 2/16/12):
Holding: A state law that bars certain unregistered sex offenders from accessing internet sites frequented by children, but that results in a "near total ban" on the offenders' internet access is overbroad in violation of the First Amendment.

U.S. v. Douglas, 2010 WL 4260221 (D. Me. 2010):
Holding: Fair Sentencing Act, which lowered certain penalties, applies to Defendant who pleaded guilty prior to enactment of law but was sentenced after enactment.

U.S. v. Dayi, 2013 WL 5878922 (D. Md. 2013):
Holding: Two-level downward variance for conspiracy to distribute large amount of marijuana was justified in light of federal gov't's expanding policy of non-enforcement of marijuana laws, as well as States moving to legalize marijuana.

U.S. v. Duval, 2013 WL 3786370 (D. Mass. 2013):
Holding: Maine conviction for assault is not a "crime of violence" under modified categorical approach, since offense included "offensive physical contact" and Defendant's PSI report did not describe the details of the offense, making it impossible to determine if the confrontation caused bodily injury.

U.S. v. Graham, 2012 WL 23667896 (D. Mass. 2012):
Holding: Defendant was eligible for sentence reduction for crack offense despite his binding plea agreement.

U.S. v. Whigham, 2010 WL 4959882 (D. Mass. 2010):
Holding: There was no justification to apply the USSG large disparity between crack and powder cocaine to Defendant who sold crack within 1000 feet of school.

U.S. v. Watts, 2011 WL 11282542 (D. Mass. 2011):
Holding: Fair Sentencing Act (FSA) applies to offense committed before enactment of FSA, even though a portion of FSA appears to conflict with General Saving Statute's prohibition against retroactive application.

U.S. v. Peguero-Martinez, 2010 WL 4955587 (D. Mass. 2010):
Holding: Defendant's prior guilty plea in Mass. juvenile court did not warrant 16-level enhancement for illegal reentry to U.S.

U.S. v. Wilson, 2011 WL 3706651 (E.D. Mich. 2011):
Holding: Sentencing procedure where judge enters sentencing hearing without "pre-prepared" material and makes a relatively quick determination based mostly on arguments presented at the hearing is inadequate.

U.S. v. Mann, 2013 WL 6037681 (D.N.M. 2013):
Holding: Involuntary manslaughter conviction was not "crime of violence" since mental state was gross negligence, not intent to cause victim's death.

U.S. v. C.R., 2011 WL 1901645 (E.D. N.Y. 2011):
Holding: Statutory minimum 5-year sentence for distribution of child pornography violated 8th Amendment's ban on cruel and unusual punishment as applied to developmentally immature young adult Defendant who downloaded pornography of children between 15 and 19 years old.

U.S. v. Taylor, 2011 Wl 1486621 (S.D. N.Y. 2011):
Holding: Impermissible double counting occurred when PSI recommended 360 months to life for Hobbs Act robbery plus a weapons offense and a consecutive statutory minimum sentence for the weapons offense.

U.S. v. Rodriguez-Cisneros, 2013 WL 120954 (D. Neb. 2013):
Holding: Use of social security number on a fake social security card did not, standing alone, qualify as an "authentication feature" requiring an enhanced sentence under USSG.

Doe v. Nebraska, 92 Crim. L. Rep. 113, 2012 WL 4923131 (D. Neb. 10/17/12):
Holding: Nebraska's ban on social network internet use for sex offenders (as well as other internet conditions such as requiring installation of monitoring equipment on sex

offenders' computers) violates 1st Amendment since not narrowly tailored and does not leave open ample alternative channels of communication; court also looks at legislative history of legislation and finds it was motivated by "rage" and "revulsion" against sex offenders.

U.S. v. Crisman, 2014 WL 4104415 (D.N.M. 2014):
Holding: District court, for sentencing purposes, would not rely on a study that concluded that persons convicted of child pornography offenses were likely guilty of additional crimes against children, including contact offenses, as proof of uncharged crimes; there were methodological flaws in the study, and in any event, reliance on the study would deviate from making individualized determinations of sentence.

U.S. v. Garcia, 2013 WL 1635514 (D.N.M. 2013):
Holding: Even though Defendant was eligible for safety-valve relief below statutory minimum, court was permitted to further vary downward.

U.S. v. Jim, 2012 WL 2574807 (D.N.M. 2012):
Holding: Even though sex abuse victim had lacerations to genital area as a result of sexual abuse, this did not qualify as serious bodily injury for purposes of a sentencing enhancement applicable when sex abuse victim sustains serious bodily injury, because the lacerations did not stem from conduct other than the sexual abuse.

U.S. v. Kelly, 2012 WL 2367084 (D.N.M. 2012):
Holding: USSG guideline range for receiving child pornography was greater than necessary where Defendant was not accused of creating child pornography or molesting children, and there was no evidence he would do so in the future.

Izaguirre v. Lee, 2012 WL 1415365 (E.D. N.Y. 2012):
Holding: Petitioner was entitled to habeas relief on claim that his sentence was unconstitutionally vindictive.

U.S. v. Mitchell, 2011 WL 6251754 (E.D. N.Y. 2011):
Holding: After sentencing ranges based on specific quantities of crack cocaine were lowered, a statute authorizing sentence reductions to previously-convicted defendants entitled the defendant to an evidentiary hearing because he had only stipulated to a quantity of at least 150 grams because, at that time, the offense level was the same for any amount from 150 to 500 grams.

U.S. v. Malloy, 2012 WL 603725 (N.D. N.Y 2012):
Holding: The defendant was entitled to a sentencing credit for a state-law conviction on which a parole violation was pending because the conviction was incomplete.

U.S. v. Karper, 2011 WL 7451512 (N.D. N.Y. 2011):
Holding: The Adam Walsh Act, which mandated home detention and electronic monitoring as conditions of release on charges involving minor victims, facially violated defendants' Due Process rights.

U.S. v. Gupta, 2012 WL 5246919 (S.D. N.Y. 2012):
Holding: Securities fraud Defendant who disclosed non-public information to an investor was allowed a below guidelines sentence where he had devoted substantial time to philanthropic causes and his offense conduct was atypical behavior for him.

U.S. v. Robles, 2011 WL 5928783 (S.D. N.Y. 2011):
Holding: Downward departure to the statutory minimum sentence was warranted in a sentencing for robbery and firearm offenses.

Castle v. U.S., 2014 WL 200366 (W.D. N.C. 2014):
Holding: Prior state drug conviction for distribution was not a predicate felony under Controlled Substances Act because Defendant could not have been sentenced to more than one year in prison on state conviction.

U.S. v. Kelly, 2013 WL 81370 (W.D. N.C. 2013):
Holding: North Carolina conviction for assault on female was not a crime of domestic violence because it did not have element of use or attempted use of physical force.

Bryant v. U.S., 2012 WL 119756 (E.D. N.C. 2012):
Holding: Breaking and entering conviction was not a "violent felony" under ACCA because did not carry imprisonment for more than 1 year.

U.S. v. Thompson, 2011 WL 4835704 (E.D. N.C. 2011):
Holding: Prior convictions for breaking and entering, for which defendant was sentenced to a suspended prison term of five years in custody and five years of probation with a special condition of serving six months in custody were not convictions for crimes "punishable by a term of imprisonment exceeding one year" within the definition of "violent felony" under the Armed Career Criminal Act.

U.S. v. Rojas, 2011 WL 2623579 (11th Cir. 2011) & U.S. v. Shull, 2011 WL 2559426 (S.D. Ohio 2011):
Holding: Fair Sentencing Act applies to defendants who committed crack offenses before its enactment but who are sentenced thereafter.

U.S. v. Williams, 2012 WL 5462763 (M.D. Pa. 2012):
Holding: Bail Reform Act allowed district court to release Defendant pending sentencing after guilty plea to conspiracy to distribute 280 grams or more of cocaine upon a finding of exceptional reasons making detention inappropriate.

Songster v. Beard, 2014 WL 3731459 (E.D. Pa. 2014):
Holding: *Miller*'s ban on automatic juvenile LWOP is retroactive.

Barnes v. Wenerowicz, 2012 WL 917163 (E.D. Pa. 2012):
Holding: The denial of re-parole of a state prisoner, whose initial parole was revoked on the basis of technical parole violations and a murder charge for which he was acquitted, violated the prisoner's substantive due process rights.

U.S. v. Ware, 2012 WL 38937 (E.D. Pa. 2012):
Holding: A statute authorizing sentence reductions to defendants who had been sentenced based on a subsequently-lowered sentencing range applied to defendant even though he originally received a nonguidelines sentence.

U.S. v. Nieves-Velez, 2014 WL 2925354 (D.P.R. 2014):
Holding: Defendant established sentencing factor manipulation, warranting re-sentencing in conspiracy regarding a controlled drug buy and possession of firearm case; Defendant was first-time offender and had no contact with agents or informants until he arrived at apartment where buy took place, and he claimed he let the buy take place and stayed silent due to safety concerns for him and his family.

U.S. v. Southern Union Co., 2013 WL 1776028 (D.R.I. 2013):
Holding: Gov't's request for a second jury trial to have a jury determine the number of days Defendant-company stored hazardous waste for purposes of imposing a daily fine was waived because Gov't failed to request this jury-finding at the original trial; *Apprendi* requires that a jury determine the number of days because *Apprendi* applies to fines; thus, the only fine that could be imposed was for a single day that the jury verdict supported.

Litschewski v. Dooley, 2014 WL 7356915 (D.S.D. 2014):
Holding: Where (1) Defendant received multiple consecutive sentences, (2) he had already served the "first" sentence, and (3) he successfully sought habeas relief on grounds that one of the sentences was unauthorized, it violated double jeopardy for court to resentence and reorder the sentences in such a way so that Defendant did not benefit from the resentencing.

U.S. v. Tallent, 2012 WL 2580275 (E.D. Tenn. 2012):
Holding: Restitution was not proper in child pornography case under mandatory restitution statute where Gov't failed to show that the losses proximately caused by Defendant could be calculated with reasonable certainty, and court could not rely on speculation to determine amount.

U.S. v. Keese, 2013 WL 3292718 (M.D. Tenn. 2013):
Holding: Defendant was eligible for lower sentence under new crack guidelines even though he qualified as a career offender.

U.S. v. Villalobos, 2014 WL 3687330 (S.D. Tex. 2014):
Holding: Even though Defendant acted as leader of criminal enterprise, where the enterprise likely did not involve five participants and was not extensive, only a two-level increase was warranted for Hobbs Act violation.

U.S. v. Lopez-Reyes, 2013 WL 1966883 (E.D. Va. 2013):
Holding: Virginia offense of unlawful bodily injury is not "crime of violence."

U.S. v. Ponce-Rodriguez, 2012 WL 1869252 (E.D. Va. 2012):
Holding: North Carolina conviction for possession of 10 to 50 pounds of marijuana was not a drug trafficking conviction where the conviction did not require proof of intent to distribute and the record of conviction did not indicate that Defendant had any such intent.

U.S. v. Major, 2011 WL 3320800 (E.D. Va. 2011):
Holding: Virginia statutory burglary convictions did not qualify as "generic" burglary convictions under ACCA because they were broader than generic burglary in that they allowed conviction for burglary of places other than buildings or structures.

U.S. v. Metz, 2011 WL 5027384 (N.D. W. Va. 2011):
Holding: District court lacked jurisdiction to determine validity of credit union members' restitution claims against a credit union employee convicted of embezzlement where the members failed to exhaust their administrative remedies in that they failed to submit documentary support for their claims.

U.S. v. Thompson, 2011 WL 5022792 (S.D. W. Va. 2011):
Holding: Prior conviction for theft of firearms from business licensed to sell firearms was not a crime of violence.

U.S. v. Johnson, 2011 WL 1776015 (E.D. Wisc. 2011):
Holding: Where pirated CD's were never actually put in stream of commerce, victim did not sustain actual losses and thus wasn't entitled to restitution under Mandatory Victims Restitution Act.

U.S. v. Bradford, 2011 WL 710463 (E.D. Wis. 2011):
Holding: Conviction for possession of short-barreled shotgun was not "crime of violence" under ACCA.

Osborne v. State Dept. of Corrections, 2014 WL 4377830 (Alaska 2014):
Holding: Proper forum for challenging DOC's sentence calculation is through postconvction relief motion.

Ex parte Lightfoot, 93 Crim. L. Rep. 535, 2013 WL 3481945 (Ala. 7/12/13):
Holding: When a judge has found by a preponderance of evidence a factor that triggers a mandatory sentence enhancement, the fact that the sentence imposed is below the statutory maximum does not render the 6th Amendment right to have a jury determine the factor harmless.

State v. Ketchner, 2014 WL 7180242 (Ariz. 2014):
Holding: Trial court should have evaluated whether forfeiture of home and vehicle was an excessive fine under 8th Amendment for an owner whose adult son sold marijuana out of the home.

Reed-Kaliher v. Hoggatt, 2015 WL 1529123 (Ariz. 2015) & **State ex rel. Polk v. Hancock, 2015 WL 1529193 (Ariz. 2015):**
Holding: Under state Medical Marijuana Act, State cannot make as a condition of a plea offer that Defendant not use medical marijuana while on probation, where Defendant is a qualified patient for medical marijuana.

Miller v. State, 2012 WL 129708 (Ark. 2012):
Holding: The trial court erred when it allowed witnesses, when giving victim impact statements, to tell the jury they wanted a death sentence.

Vankirk v. State, 90 Crim. L. Rep. 107 (Ark. 10/13/11):
Holding: 6th Amendment right to confront witnesses applies to non-capital jury sentencing proceedings.

Montoya v. State, 2010 WL 4366905 (Ark. 2010):
Holding: Where Defendant's prior felonies in another state had been expunged, they would not count under Arkansas' prior offender statute.

People v. Cross, 97 Crim. L. Rep. 206 (Cal. 5/18/15):
Holding: The supervisory rule that requires judges to personally advise Defendants of rights they are waiving when their attorneys stipulate to aggravating facts also requires judges to advise Defendants when their attorneys stipulate to prior convictions that increase the maximum penalty.

People v. Vargas, 2014 WL 3361238 (Cal. 2014):
Holding: Where two prior convictions of Defendant were based on the same act, this should only count as one prior strike under "three strikes" law.

People v. Smith, 2015 WL 1882201 (Cal. 2015):
Holding: Exclusion in death penalty phase of former Warden's testimony that prison security procedures made it unlikely that Defendant would be dangerous if sentenced to LWOP violated due process; this prevented Defendant from rebutting State's claim that Defendant would be dangerous in prison.

People v. Gutierrez, 95 Crim. L. Rep. 214 (Cal. 5/5/14):
Holding: Statutory presumption in favor of life in prison without parole violates *Miller*'s ban on mandatory LWOP sentences for juveniles.

People v. Park, 93 Crim. L. Rep. 245, 299 P.3d 1263 (Cal. 5/13/13):
Holding: Prior conviction that was reduced from a felony to a misdemeanor before the Defendant committed a subsequent offense did not qualify as a "prior serious felony" that can be used to enhance sentence for the subsequent offense.

People v. Leiva, 2013 WL 1395730 (Cal. 2013):
Holding: A summary revocation of probation preserves the trial court's authority to adjudicate a claim that Defendant violated probation during the probationary period, but a court can find a violation of probation and then reinstate and extend probation only if probation is reinstated based upon a violation that occurred during the unextended period of probation.

People v. Caballero, 2012 WL 3516135 (Cal. 2012):
Holding: Juvenile's sentence of 110 years for non-homicide offense of attempted murder violated 8th Amendment because it did not provide a realistic opportunity to be released prior to end of term, since it exceeded a person's natural life.

People v. Runyan, 2012 WL 2874238 (Cal. 2012):
Holding: Even though Victim died without family or heirs, Victim's "estate" was not a "direct victim" of the crime which caused Victim's death since the estate was not even in existence yet, and thus, estate was not entitled to restitution for Victim's death.

People v. Mesa, 2012 WL 1970864 (Cal. 2012):
Holding: Defendant's sentence for actively participating in a street gang violated prohibition against multiple punishments for indivisible course of conduct.

In re Shaputis, 90 Crim. L. Rep. 551 (Cal. 12/29/11):
Holding: Where Parole Board determined that inmate had gained sufficient insight into his criminal behavior, appellate court cannot reweigh that evidence to deny parole.

People v. Martin, 88 Crim. L. Rep. 428 (Cal. 12/30/10):
Holding: Trial judge cannot impose probation conditions based on a charge that was dropped pursuant to a plea bargain unless Defendant agrees there is a "transactional" connection between the dismissed charge and charge to which he pleaded guilty.

Nowak v. Suthers, 94 Crim. L. Rep. 678, 2014 WL 689349 (Colo. 2/24/14):
Holding: Colorado law requires prison officials to construe multiple sentences as one continuous sentence in determining when inmate is eligible for parole; this is true even though Defendant had reached his parole eligibility date on a first sentence before receiving a second, consecutive sentence; the State sought to count the consecutive sentence separately, which would have resulted in Defendant serving a longer time before parole.

Marquez v. People, 2013 WL 5309235 (Colo. 2013):
Holding: Convictions for robbery and assault did not "arise out of the same incident," (thus allowing consideration of concurrent sentences instead of consecutive sentences

under mandatory sentencing scheme), because this phrase means "arising out of a single criminal episode"; here, the crimes involved two distinct acts separated by 12 hours, different means of commission and different victims.

People v. Padilla-Lopez, 2012 WL 2393078 (Colo. 2012):
Holding: Even though Department of Human Services incurred costs in investigating Defendant's child abuse case, this did not make the Department a "victim" entitled to restitution.

State v. Riley, 96 Crim. L. Rep. 618 (Conn. 3/10/15):
Holding: 8th Amendment prohibits even discretionary LWOP for juveniles unless sentence actually considered mitigating evidence regarding youth.

Casiano v. Commissioner of Corrections, 97 Crim. L. Rep. 229 (Conn. 5/26/15):
Holding: Miller's ban on mandatory LWOP for juveniles is retroactive, and applies to "functional" LWOP; sentence of 50 years is "functional" LWOP.

Arnold v. State, 2012 WL 3090290 (Del. 2012):
Holding: Where Defendant received a pardon for an adult conviction, he was also automatically entitled to expungement of his juvenile record under a state statute providing for automatic expungement of juvenile records when a person receives a pardon for any crime.

Henry v. State and Gridine v. State, 97 Crim. L. Rep. 5 (Fla. 3/19/15):
Holding: 8th Amendment limits on life without parole sentences for juveniles also applies to sentences that are "functional" life without parole sentences.

LaFave v. State, 2014 WL 5285860 (Fla. 2014):
Holding: State could not appeal order granting early termination of probation, even though this violated the plea agreement; the order terminating probation was a final judgment and there was no statutory right for State to appeal.

Hawkins v. State, 2014 WL 2150017 (Fla. 2014):
Holding: Where Defendant failed to appear for sentencing because he had been arrested for something else, this was not a "willful" failure to appear that violated a furlough agreement.

Del Valle v. State, 2011 WL 6220783 (Fla. 2011):
Holding: Statute requiring probationer to prove inability to pay a monetary obligation, such as restitution, by clear and convincing evidence was unconstitutional.

Moore v. State, 94 Crim. L. Rep. 119, 2013 WL 5508540 (Ga. 10/7/13):
Holding: Even though under-age-18 Defendant agreed to a life without parole sentence to avoid the death penalty, he was entitled to sentencing relief because *Roper v. Simmons*, 543 U.S. 551 (2005), subsequently held that the 8th Amendment bans the death penalty for all offenses committed before the 18th birthday.

State v. Hudson, 94 Crim. L. Rep. 15, 2013 WL 5303244 (Ga. 9/23/13):
Holding: Test for determining whether a sentence imposed for multiple counts after a successful appeal was "vindictive" is to compare the total original sentence with the total new sentence ("aggregate approach" as opposed to "count-by-count approach") to determine whether the new one is more severe.

Hedden v. State, 88 Crim. L. Rep. 816 (Ga. 3/18/11):
Holding: Mandatory sentence minimum for "physically restraining" victim did not apply to a defendant who possessed child pornography photos of restrained victims, because the victim was not restrained during commission of the offense of possession of the photos.

State v. Easley, 2014 WL 1266125 (Idaho 2014):
Holding: Where Defendant was being sentenced following revocation of probation, Prosecutor could not determine eligibility for mental health court because this was a judicial function and Prosecutor's post-judgment determination violated separation of powers; any authority Prosecutor had to determine eligibility did not extend to after Defendant's adjudication of guilt.

People v. Davis, 94 Crim. L. Rep. 769 (Ill. 3/20/14):
Holding: *Miller*'s ban on mandatory life without parole for juveniles is retroactive.

People v. Snyder, 2011 WL 5999261 (Ill. 2011):
Holding: Withdrawal of guilty pleas, and not vacatur of restitution, was appropriate remedy for failure to admonish defendant about possibility of restitution order before accepting guilty pleas.

People v. Hammond, 2011 WL 36387388 (Ill. 2011):
Holding: State's attorney lacked authority to veto intermediate sanctions offered by probation officer in lieu of revocation.

Wilson v. State, 2014 WL 1302502 (Ind. 2014):
Holding: Statute giving judges authority to impose concurrent or consecutive sentences did not allow judge to make a sentence only "partially" consecutive to another one; judge had sentenced Defendant to 20 years, 5 of which were to be consecutive to another sentence; judge was required to choose between concurrent or consecutive sentence, and could not do hybrid.

Fuller v. State, 2014 WL 2466325 (Ind. 2014):
Holding: Even though trial court had discretion to sentence 15-year old to 150 years for murder (and did so), appellate court reduces sentence to 85 years where the murders were not particularly heinous and Defendant's youth was a mitigating factor.

Buelna v. State, 96 Crim. L. Rep. 211 (Ind. 11/13/14):
Holding: Sentencing enhancement for possessing three grams or more of "adulterated" methamphetamine cannot be based on the weight of an intermediate mixture that was not a "final" meth product; just as "cake batter is not a cake until it's done baking," the word adulterated describes meth in a final form that contains impurities or was diluted with a foreign substance.

Gonzalez v. State, 92 Crim. L. Rep. 467 (Ind. 1/10/13):
Holding: Retroactive application of lifetime sex offender registration to a person convicted of the lowest level sex offense violated ex post facto.

Abbott v. State, 2012 WL 560904 (Ind. 2012):
Holding: A 20 year sentence for possession of cocaine, enhanced because a police officer happened to pull over the car the defendant was riding in within 1000 feet of a school, was inappropriate.

State v. Young, 2015 WL 1510577 (Iowa 2015):
Holding: Prior uncounseled misdemeanor conviction could not be used to enhance later conviction where Defendant had been denied right to counsel in misdemeanor case.

State v. Lyle, 95 Crim. L. Rep. 539 (Iowa 7/18/14):
Holding: State law mandating that certain Juveniles serve mandatory minimum sentences violates Iowa Constitution because it deprives sentencing judges of ability to consider mitigating circumstances.

State v. Ragland, 2013 WL 4309970 (Iowa 2013):
Holding: Even though Governor commuted Juvenile's unconstitutional life without parole sentence to "life without parole for 60 years," this was the functional equivalent of life without parole because Defendant would not be eligible for parole until age 78, and did not remove the 8th Amendment prohibition on such sentences without individualized consideration of Defendant's youth.

State v. Null and State v. Pearson, 93 Crim. L. Rep. 681 (Iowa 8/16/13):
Holding: Iowa Constitution goes beyond *Miller* and *Graham*, and recognizes "effective" juvenile life without parole, such as multiple consecutive sentences that are so long in total that a juvenile would never be released; Iowa Supreme Court adopts "special procedures" judges must follow, including on-the-record findings of principles set forth in *Roper*, *Graham* and *Miller*, before imposing a lengthy sentence; a lengthy sentence "is appropriate, if at all, only in rare and uncommon cases."

Anderson v. State, 89 Crim. L. Rep. 749, 2011 WL 3209162 (Iowa 7/29/11):
Holding: Defendant whose probation was revoked is entitled to credit for time served on home electronic monitoring.

State v. Washington, 93 Crim. L. Rep. 359, 2013 WL 2450146 (Iowa 6/7/13):
Holding: Where judge imposed additional community service on Defendant after he refused to answer a question at sentencing about drug use, this violated Defendant's 5th Amendment privilege against self-incrimination.

State v. Fannon, 2011 WL 1900285 (Iowa 2011):
Holding: Prosecutor's breach of plea agreement not to recommend consecutive sentences was not cured by the prosecutor's withdrawal of his remarks, for purposes of determining if Defendant's counsel was ineffective in failing to object to the breach or request appropriate relief.

State v. Bruce, 88 Crim. L. Rep. 776, 2011 WL 832249 (Iowa 3/11/11):
Holding: Prosecutor cannot amend information after guilty verdict to add sentencing enhancements.

State v. Hilt, 322 P.3d 367 (Kan. 2014):
Holding: *Alleyne* requires that a jury, not a judge, find the existence of aggravating factors to impose a "hard life" sentence.

State v. Dull, 97 Crim. L. Rep. 297 (Kan. 6/5/15):
Holding: State law requiring mandatory lifetime supervision of sex offenders violates 8th Amendment when applied to Juveniles; Juveniles are different under *Graham* (U.S. 2010), *Roper* (U.S. 2005) and *Miller* (U.S. 2012).

State v. Soto, 95 Crim. L. Rep. 69 (Kan. 4/11/14):
Holding: Procedure that allows judges to impose LWOP for 50 years if they find certain aggravating circumstances violates 6th Amendment right to have a jury find all elements of the criminal offense.

State v. Hall, 94 Crim. L. Rep. 709 (Kan. 2/28/14):
Holding: Because restitution is part of Defendant's sentence, Defendant has right to be present in open court when it is imposed, even if the amount is not calculated until a later time after the original sentence is imposed.

State v. Hall, 2013 WL 3242252 (Kan. 2013):
Holding: Judge's use of retail value, rather than wholesale value, of stolen inventory was arbitrary in deciding on restitution amount.

State v. Galaviz, 2012 WL 6720627 (Kan. 2012):
Holding: Defendant has right to effective assistance of counsel in probation revocation proceedings as a matter of due process under 14th Amendment.

State v. Guder, 2012 WL 246662 (Kan. 2012):
Holding: District court could not modify previously imposed sentence on one conviction following remand from appellate court for resentencing based on a different conviction.

State v. Snellings, **2012 WL 1144318 (Kan. 2012):**
Holding: The elements of two drug-related offenses were identical, requiring sentencing for the less severe offense.

State v. Divine, 2011 Wl 262676 (Kan. 2011):
Holding: Expungement of sex offender's conviction terminated his requirement to register as sex offender under Kansas statute.

Martin v. Kansas Parole Bd., 2011 WL 2279059 (Kan. 2011):
Holding: Amendment that lengthened postrelease supervision was ex post facto.

Com. v. Andrews, 2014 WL 7238124 (Ky. 2014):
Holding: Statute regarding probation revocation requires court to consider whether Defendant's use of drugs constituted a significant risk to prior victims or the community at large, and whether the Defendant could not be managed in the community.

St. Clair v. Com., 95 Crim. L. Rep. 671 (Ky. 8/21/14):
Holding: Even though murder Defendant escaped and then killed a second person, State cannot present victim-impact testimony about the second murder during the first murder's penalty phase; the victim impact statute allowing "the impact of the crime upon the victim" means such evidence is limited to the murder for which Defendant is on trial.

Webb v. Com., 2012 WL 5877963 (Ky. 2012):
Holding: In jury sentencing proceeding, trial court erred in admitting details of Defendant's prior convictions that included names of prior victims of Defendant and identified them as police officers; this exceeded the scope of permissible relevant evidence at sentencing.

Jones v. Com., 2011 WL 6543010 (Ky. 2011):
Holding: Restitution based solely on unsworn statements by victim's mother, who defendant was not given the opportunity to cross-examine, violated defendant's due process rights.

Blackburn v. Com., 2011 WL 6543053 (Ky. 2011):
Holding: Statute providing that the period of confinement for a felony committed by a convicted felon while on parole, probation, shock probation, or conditional discharge is not to run concurrently with any other sentence does not allow a defendant to be sentenced so that the consecutive sentences exceed the allowable maximum aggregate duration.

Com. v. Marshall, 2011 WL 3760858 (Ky. 2011):
Holding: Before court can revoke probation for failure to pay child support, due process requires that court must consider whether Defendant is unable to pay through no fault of his own and if so, must consider alternatives to incarceration; this is true even if Defendant had agreed to pay support as condition of probation.

Massey v. Louisiana Dept. of Public Safety and Corrections, 2014 WL 5393041 (La. 2014):
Holding: Ex post facto was violated by retroactive application of statute that denied good-time credits and early release for Defendant's offense, where statute was in effect at the time of his conviction, but was not in effect at the earlier time of the actual criminal acts.

State v. Shaffer, 90 Crim. L. Rep. 330 (La. 11/23/11):
Holding: State cannot enforce statutes that require life without parole for juveniles convicted of nonhomicide offenses because this violates *Graham v. Florida*, ___ U.S. ___ (U.S. 2010).

Doe v. Dept. of Public Safety and Correctional Services, 92 Crim. L. Rep. 724, 2013 WL 7789337 (Md. 3/4/13):
Holding: Sex offender registration law was ex post facto under state ex post facto provision as applied to person whose crime occurred years before registration law was enacted.

In re Tyrell A., 2015 WL 1412704 (Md. 2015):
Holding: A student who voluntarily got into a fist-fight with Juvenile at school was not a "victim" entitled to restitution; the student was 50% responsible for the fight.

Alston v. State, 2013 WL 3213307 (Md. 2013):
Holding: Where two statutes prescribed different penalties for illegal possession of firearm, rule of lenity required that Defendant be sentenced under the more lenient statute where the Legislature had not explained or reconciled the differing statutes.

Silver v. State, 2011 WL 24372286 (Md. 2011):
Holding: Court could not order restitution to pay for crime for which Defendant was not convicted.

Gardner v. State, 89 Crim. L. Rep. 381 (Md. 5/24/11):
Holding: Where original sentence was imposed by a 3-judge review panel and Defendant subsequently won a new trial, the new sentence is limited by the term imposed by the panel.

Diatchenko v. District Attorney for Suffolk District, 97 Crim. L. Rep. 4 (Mass. 3/23/15):
Holding: Because juveniles serving life without parole must be given a meaningful opportunity for release, they are entitled to appointed counsel, experts and judicial review of their parole hearings.

Bridgeman v. Dist. Attorney for Suffolk Dist., 97 Crim. L. Rep. 210 (Mass. 5/18/15):
Holding: Where Defendants' convictions were set aside due to misconduct by State Crime Lab, due process requires that Defendants not receive harsher penalties for

exercising their right to challenge their tainted convictions; thus, Defendants' sentences at further plea or trial must not exceed what it was under their vacated plea agreements; although Defendants who challenge guilty pleas are ordinarily subject to harsher sentences later, this would ignore the misconduct of the Crime Lab here.

Com. v. Cole, 95 Crim. L. Rep. 393 (Mass. 6/11/14):
Holding: Scheme of community parole supervision for life which allows the parole board to impose a new and different sentence than the court violates separation of powers, by giving an executive agency the power to impose sentences, which is a judicial function.

Com. v. Maker, 2011 WL 711566 (Mass. 2011):
Holding: State Sex Offender Registry Board lacked statutory authority to create new sex offender registration requirements.

Doe v. Sex Offender Registry Bd., 2014 WL 657958 (Mass. App. 2014):
Holding: At sex offender classification hearing, Defendant was entitled to funding to present expert testimony about how to interpret complex statistical and scientific studies demonstrating that age affected recidivism rates in sex cases.

Moe v. Sex Offender Registration Bd., 95 Crim. L. Rep. 15 (Mass. 3/26/14):
Holding: Sex offender amendment that retroactively imposed public notification requirements on persons whose records were previously not open to the public violates Mass. Constitution's due process guarantee; these persons acted in reasonable reliance on prior law when they did not challenge their sex offender classification level.

Diatchenko v. District Attorney and Com. v. Brown, 94 Crim. L. Rep. 418, 2013 WL 6726856 (Mass. 12/24/13):
Holding: (1) *Miller v. Alabama* (U.S. 2013) ban against mandatory LWOP for juvenile offenders is retroactive, and (2) all prisoners who received LWOP before turning 18 must be afforded opportunity to apply for parole.

Doe v. Sex Offender Registry Board, 94 Crim. L. Rep. 366 (Mass. 12/11/13):
Holding: Under state sex offender law that requires individualized assessment of recidivism risk, female offender was entitled to new classification hearing where Board failed to consider different recidivism rates between male and female offenders.

Com. v. Bradley, 94 Crim. L. Rep. 283, 2013 WL 6085236 (Mass. 11/21/13):
Holding: Statutory amendment which reduced the "drug free zone" around schools applied to persons who committed their offenses before the amendment but who were not yet convicted; the rationale of the amendment was to reduce unfair racial disparities that occur in drug crimes which occur in urban areas where there are many schools nearby, and it would prolong the disparate impact not to apply the law retroactively; also, the rational was that the larger radius did not better protect school children from drug dealers.

Com. v. Galvin, 2013 WL 4464598 (Mass. 2013):
Holding: Law which reduced mandatory minimum sentences for drug offenders applied to persons who committed their offenses before the law's effective date, but who were not convicted or sentenced until after law's effective date; the primary purpose of the law was to significantly reduce mandatory minimum sentences; it would be "absurd" to conclude that the Legislature intended to provide reductions for everyone except the limited class of persons whose offenses were committed before the law's effective date but who weren't convicted and sentenced until afterwards.

Com. v. Rodriguez, 2012 WL 75660 (Mass. 2012):
Holding: Trial court had authority, on its own timely motion to revise or revoke defendant's sentence, to reduce the sentence.

Com. v. Dean-Ganek, 2012 WL 75663 (Mass. 2012):
Holding: Commonwealth lacked authority to require trial judge to vacate defendant's guilty plea to larceny from a person, where the trial court imposed a sentence less severe than that set forth in the plea agreement and the Commonwealth sought an increased sentence.

Doe v. Police Commissioner of Boston, 89 Crim. L. Rep. 751 (Mass. 8/5/11):
Holding: Law banning sex offenders from living in nursing homes is unconstitutional as applied to an infirm senior offender; court must make individualized determination of particular danger presented by offender, and consider the liberty interest in where offender can live vs. the need to protect the public.

Doe v. Sex Offender Registry Board, 89 Crim. L. Rep. 751 (Mass. 8/5/11):
Holding: Even though sex offender failed to appear at registration hearing without good cause, this cannot be deemed a waiver of the right to a hearing under the statute.

Makowski v. Governor, 2014 WL 2503758 (Mich. 2014):
Holding: Where Governor had commuted a sentence with words "I do hereby commute," the commutation was final and Governor could not later revoke it.

People v. McKinley, 2014 WL 2894917 (Mich. 2014):
Holding: Restitution cannot be tied solely to uncharged conduct; restitution must be linked to the convicted offenses.

State v. Her, 97 Crim. L. Rep. 110 (Minn. 4/22/15):
Holding: *Apprendi* and its progeny -- which require that facts used to enhance sentence other than prior convictions must be found by a jury, not a judge – prevent a judge from using a DOC finding that Defendant posed a high risk to public safety to enhance sentence.

State v. Ali, 96 Crim. L. Rep. 86 (Minn. 10/8/14):
Holding: Where Juvenile was sentenced to LWOP in violation of *Miller*, remedy is re-sentencing under a procedure that complies with *Miller*.

Tucker v. State, 2011 WL 2555635 (Minn. 2011):
Holding: Even though Defendant shot the victim and fled the scene, this did not justify an upward sentence from guidelines for felony murder since fleeing the scene and abandoning the victim are typical behavior for defendants convicted of felony murder.

Tipton v. State, 2014 WL 5473550 (Miss. 2014):
Holding: House arrest under "intensive supervision" constitutes "prison time" for purposes of reimbursement under wrongful incarceration statute.

Jones v. State, 2013 WL 3756564 (Miss. 2013):
Holding: *Miller*'s prohibition against mandatory juvenile LWOP applies retroactively to cases on collateral review.

Parker v. State, 93 Crim. L. Rep. 401 (Miss. 6/6/13):
Holding: Even though Juvenile's sentence would allow him to be eligible for conditional release at age 65, this was tantamount to a life without parole sentence and violated *Miller v. Alabama* (U.S. 2012).

In re Hooker, 2012 WL 745062 (Miss. 2012):
Holding: Facially valid pardons issued by outgoing governor could not be set aside solely for noncompliance with publication requirement.

Keys v. State, 2011 WL 3505307 (Miss. 2011):
Holding: Where prisoner had been released on parole from a life sentence, and then received a consecutive 5 year sentence, he was not required to serve his entire life sentence before the 5 year sentence began to run; it began to run when the imprisonment on the life sentence ended upon parole.

State v. Macy, 94 Crim. L. Rep. 615 (Mont. 2/11/14):
Holding: Even though restitution statute allowed restitution for "apprehending" an escapee, where Defendant escaped to another State, the restitution was owed to the other State which actually "apprehended" him, not to Montana from which he escaped and which sought extradition of him; costs of extradition aren't covered by the restitution statute because "extradition" is not the same as "apprehending" someone.

Shepard v. Houston, 96 Crim. L. Rep. 209 (Neb. 11/7/14):
Holding: New state statute that takes away "good time" credit from inmates if they refuse to give DNA samples cannot be applied retroactively to inmates who were convicted before the statute was passed.

State v. Mantich, 94 Crim. L. Rep. 549 (Neb. 2/7/14):
Holding: *Miller*'s ban on automatic JLWOP sentences is retroactive.

State v. Rieger, 2013 WL 5872222 (Neb. 2013):
Holding: Condition of probation that Defendant not have contact with her husband except as part of therapy was not narrowly tailored and reasonably related to goals of probation.

State v. Landera, 2013 WL 645822 (Neb. 2013):
Holding: State breached plea agreement that required it to recommend probation where prosecutor made remarks at sentencing suggesting that the State did not want probation after having reviewed the presentence report.

State v. Shambley, 89 Crim. L. Rep. 97, 2011 WL 1327864 (Neb. 4/8/11):
Holding: Defendant facing termination from diversion program is entitled to same process due at a probation or parole revocation hearing; thus, Defendant has right to cross-examine witnesses at hearing.

Goudge v. State, 92 Crim. L. Rep. 162 (Nev. 10/25/12):
Holding: Once a court has determined that a defendant has fulfilled the requirements for release from lifetime sex offender supervision, the court has no discretion not to release defendant.

In re State, 95 Crim. L. Rep. 671 (N.H. 8/29/14):
Holding: *Miller*'s ban on automatic LWOP for juveniles is retroactive on collateral review.

State v. Charest, 2012 WL 4874347 (N.H. 2012):
Holding: A firearm is not a "deadly weapon" *per se*, and so does not by itself rquire mandatory minimum sentence under deadly weapon statute.

State v. Willey, 2012 WL 1502901 (N.H. 2012):
Holding: A sentence of 8 to 20 years was improper to the extent that the trial court's comments indicated that it found to be an aggravating factor defense counsel's trial tactics to attack the credibility of the child victim.

State v. Laplaca, 89 Crim. L. Rep. 645, 2011 WL 2547352 (N.H. 6/28/11):
Holding: A prospective waiver of a probation hearing for future violations of probation violates New Hampshire Constitution's due process provision, because the Defendant's waiver of any future haring was akin to pleading guilty to any future allegations, and eliminated the State's burden to prove the allegations and Defendant's opportunity to contest them.

State v. Kay, 2011 WL 2975616 (N.H. 2011):
Holding: Appeals of probation revocations are determined under a de novo standard of review.

State v. Grate, 2015 WL 176343 (N.J. 2015):
Holding: Imposition of mandatory minimum sentence based on a finding by trial court that Defendant was involved in organized crime violated 6th Amendment right to jury-finding on that issue.

State v. Robinson, 2014 WL 2515932 (N.J. 2014):
Holding: Where statute prohibited imposing more than one extended term in a single sentencing proceeding and court was required by another statute to extend term for one of Defendant's offenses, court could not extend term for a second offense being sentenced at same time.

State v. Jaffe, 96 Crim. L. Rep. 337 (N.J. 12/15/14):
Holding: Sentencing court must consider Defendant's exemplary post-offense conduct as a mitigating factor at sentencing; "the trial court should view a defendant as he or she stands before the court on the day of sentencing."

Riley v. N.J. State Parole Bd., 96 Crim. L. Rep. 9 (N.J. 9/22/14):
Holding: Statute requiring sex offenders to wear GPS monitor cannot be applied to Offenders who committed their crimes before the GPS law was enacted; statute is ex post facto because it imposes additional punishment to an already completed crime.

State v. Bolvito, 95 Crim. L. Rep. 50 (N.J. 3/31/14):
Holding: A sentencing judge must consider a Defendant's ability to pay in determining how much money sex offender should be ordered to pay into a special fund for treating sexual assault victims.

State ex rel. K.O., 94 Crim. L. Rep. 709 (N.J. 2/24/14):
Holding: Where juvenile recidivist statute called for higher sentence when a juvenile has been adjudged delinquent on two separate occasions, this required two separate *prior* adjudications, and does not count the current offense; the rule of lenity should apply in interpreting the statute given the rehabilitative goal of the juvenile system.

State v. Schubert, 2012 WL 5190213 (N.J. 2012):
Holding: Even though statute required that Defendant be sentenced to lifetime supervision, where court failed to do this and did not discover this error until Defendant's probation had expired, it violated Double Jeopardy to later amend the judgment to require this; Defendant had a legitimate expectation of finality of his sentence once his probation had expired.

State v. Randolph, 2012 WL 2225477 (N.J. 2012):
Holding: Sentencing court was required to consider Defendant's rehabilitative efforts between time of original sentencing and re-sentencing.

State v. McDonald, 2012 WL 931105 (N.J. 2012):
Holding: Defendant could not be given separate extended-term sentence for offense that was committed prior to sentencing for another offense.

State v. Hess, 89 Crim. L. Rep. 719 (N.J. 7/21/11):
Holding: (1) Counsel was ineffective for believing that plea agreement prohibited counsel from presenting mitigating evidence and argument at sentencing, and such a plea agreement would violate public policy because it undermines the adversarial process by denying the sentencing court information it needs; and (2) counsel was ineffective in failing to object to unduly prejudicial victim impact video entitled "A Tribute To [name of victim]," which included childhood photos, music, a segment about the victim's funeral, and a photo of their tombstone – these elements were not admissible evidence of the victim's life as related to family and friends.

State v. Cabezuela, 2015 WL 2125674 (N.M. 2015):
Holding: Trial court was required to consider mitigating evidence before sentencing where a life sentence was not mandatory.

People v. Santiago, 2013 WL 5610128 (N.Y. 2013):
Holding: Even though Defendant was convicted of third-degree murder in Pennsylvania at age 15, this offense could not be counted under New York's recidivist statute because under New York law, Defendant was a juvenile and could not have been prosecuted for a similar offense in New York.

People v. Sosa, 90 Crim. L. Rep. 663 (N.Y. 2/14/12):
Holding: Repeat drug offenders who were originally sentenced under New York's tough so-called "Rockefeller drug laws" are entitled to credit toward the running of a 10-year "look-back period" for the time they avoided being convicted of drug offenses while incarcerated.

People v. Paulin, 89 Crim. L. Rep. 627 (N.Y. 6/28/11):
Holding: New York statute that reduces prison time for persons serving drug sentences also applies to people incarcerated for violation of parole.

State v. Bode, 97 Crim. L. Rep. 110 (Ohio 4/23/15):
Holding: Under state constitutional provision providing for right to counsel whenever a person faces possible incarceration, a prior juvenile adjudication could not be used to enhance a later prison term where there was no proof that Defendant had waived his right to counsel in the juvenile proceeding.

State v. Schleiger, 2014 WL 4746610 (Ohio 2014):
Holding: The 6th Amendment right to counsel applies at a hearing for postrelease control because this is a critical stage that is an extension of actual sentence.

State v. Bode, 2015 WL 1841337 (Ohio 2015):
Holding: Prior uncounseled juvenile adjudication where juvenile faced incarceration was one where due process required counsel, so the prior adjudication cannot be used to enhance later offense.

State v. Gilbert, 96 Crim. L. Rep. 156 (Ohio 10/21/14):
Holding: Once Defendant has been sentenced, trial court's jurisdiction ends and court has no authority to grant State's motion to vacate the plea due to Defendant's alleged breach of the plea agreement.

State v. Boykin, 2013 WL 5746116 (Ohio 2013):
Holding: Even though Defendant received a pardon from the Governor, this does not automatically create a legal right for Defendant to have her criminal records sealed.

State v. Swidas, 2012 WL 4820814 (Ohio 2012):
Holding: Statute which provided enhanced sentence for discharging a firearm from a vehicle did not apply where Defendant got out of car and fired gun while he had both feet on ground and no substantial connection to the car.

In re C.P., 91 Crim. L. Rep. 62, 2012 WL 1138035 (Ohio 4/3/12):
Holding: Imposing lifetime registration requirement on juvenile sex offenders violates 8th Amendment.

State v. Palmer, 90 Crim. L. Rep. 761 (Ohio. 2/21/12):
Holding: The Ohio Supreme Court's recent decision to strike down the state sex offender registration law's classification scheme does not prevent offenders from challenging their classifications.

State v. Williams, 89 Crim. L. Rep. 664, 2011 WL 2732261 (Ohio 7/13/11):
Holding: Although court had previously found sex offender registration law to be nonpunitive, subsequent amendments which increased the amount of reporting offenders had to do and for longer times made the amendments punitive and ex post facto as applied to offenders whose offenses predated the amendments.

Cleveland Hts. v. Lewis, 2011 WL 2275817 (Ohio 2011):
Holding: Completion of a sentence will not render an appeal moot where Defendant did not acquiesce in the sentence or abandon the right to appeal.

Hendricks v. Jones, 93 Crim. L. Rep. 769 (Okla. 9/17/13):
Holding: Application of sex offender registration statute to persons whose similar convictions arose in other states but not in Oklahoma violated Equal Protection; "discrimination based on the jurisdiction in which the conviction occurred has no rational basis for protecting the public."

Bollin v. Jones ex rel. State ex rel. Oklahoma Dept. of Corrections, 2013 WL 5204134 (Okla. 2013):
Holding: Controlling sex offender registration requirements were those in effect when Offender, who was convicted outside Oklahoma, entered Oklahoma, rather than those in effect later when Oklahoma authorities notified Offender about registration; therefore, Offender was not required to register.

Burk v. State ex rel. Dept. of Corrections, 2013 WL 5476403 (Okla. 2013):
Holding: Statutory amendment eliminating option to reduce a sex offender's level assignment did not apply to Offender whose reduction proceeding was begun before the effective date of the amendment.

Starkey v. Oklahoma Dept. of Corrections, 2013 WL 3193674 (Okla. 2013):
Holding: State Sex Offender Registration Act was punitive, not regulatory, and thus retroactive application of Act to extend offender's registration period was ex post facto; the Act's obligations were excessive in relations to its non-punitive public safety purpose.

Haugen v. Kitzhaber, 2013 WL 3155366 (Or. 2013):
Holding: Governor's commutation of death sentence was valid and effective regardless of whether death-sentenced person "accepted" it or not.

State v. Heisser, 2011 WL 814959 (Or. 2011):
Holding: Plea agreement that permitted State to seek upward departures and Defendant to seek presumptive sentences did not prevent Defendant from challenging the timeliness of the State in seeking the upward departures.

Com. v. Green, 2014 WL 868627 (Pa. 2014):
Holding: Compelling Defendant to disclose location of stolen items as a condition of probation violated his right against self-incrimination, because such disclosure could lead to additional charges or investigations.

Com. v. Melvin, 2014 WL 4100200 (Pa. 2014):
Holding: Even though Defendant-Judge was convicted of theft, trial court could not impose sentence which required Defendant-Judge to send photo of herself in handcuffs to all other members of the judiciary; the condition was not legitimately intended for Defendant's rehabilitation, but was imposed to shame and humiliate Defendant in eyes of her colleagues.

Com. v. Newman, 2014 WL 4088805 (Pa. 2014):
Holding: Statute permitting trial court, as opposed to jury, to increase Defendant's minimum sentence upon a finding that a gun was used in drug offense violated Defendant's right to jury trial; the possession of gun must be pleaded in the indictment and found by a jury for a judge to be able to consider it.

Com. v. Eisenberg, 2014 WL 4079968 (Pa. 2014):
Holding: Where Defendant stole only $200 in poker chips from a casino, which was a misdemeanor, mandatory statutory minimum fine of $75,000 for the offense violated State Constitution's prohibition on excessive fines; the fine was 375 times the amount of the theft and the minimum fine greatly exceeded the maximum statutory fines for other offenses, including murder.

In re J.B., 96 Crim. L. Rep. 350 (Pa. 12/29/14):
Holding: Automatic lifetime registration and supervision of Juvenile sex offenders

violates due process in light of evidence showing Juveniles have low recidivism rates and *Miller v. Alabama*'s (U.S. 2012) direction that juvenile factors be considered.

Com. v. Mazzetti, 2012 WL 1975370 (Pa. 2012):
Holding: Where State agreed to waive a mandatory minimum sentence in exchange for a guilty plea and probation, the State could not seek to impose the mandatory minimum when Defendant violated his probation.

Com. v. Foster, 2011 WL 1124597 (Pa. 2011):
Holding: Defendant's challenge to mandatory minimum sentence is a legal question and is not waivable.

Fross v. County of Allegheny, 89 Crim. L. Rep. 423 (Pa. 5/25/11):
Holding: County's sex offender living restrictions were pre-empted by state law.

State v. Graff, 2011 WL 1465465 (R.I. 2011):
Holding: Judge lacked authority to order Defendant to do work-release program two years after sentence was originally imposed; judge lacked authority to modify sentence after it was originally imposed.

Aiken v. Byars, 96 Crim. L. Rep. 201 (S.C. 11/12/14):
Holding: *Miller* bars non-mandatory LWOP for juveniles where judge failed to consider Juvenile's youth and mitigating circumstances; "*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."

State v. Miller, 2013 WL 3048635 (S.C. 2013):
Holding: Trial court lacked authority to toll Defendant's probation for his criminal offenses until he was released from involuntary SVP commitment; tolling of probation must be based on a violation of a condition of probation or a statutory directive.

State v. Medicine Eagle, 93 Crim. L. Rep. 695 (S.D. 8/7/13):
Holding: State's failure to file an information alleging a prior conviction that will be used to enhance sentence is a jurisdictional defect.

State v. Berget, 2013 WL 28400 (S.D. 2013):
Holding: Sentencing court erred in using Defendant's unwarned statements to a psychiatrist during a pretrial competency hearing to impose the death penalty, since this violated *Estelle v. Smith*, 451 U.S. 454 (1981).

State v. Bruce, 89 Crim. L. Rep. 89 (S.D. 4/6/11):
Holding: 100-year sentence for possession of child pornography for Defendant with no other record was disproportionate and violated 8th Amendment ban on cruel and unusual punishment.

State v. Richardson, 2012 WL 167330 (Tenn. 2012):
Holding: Appropriate remedy for prosecutors' improper denial of pretrial diversion applications is to remand cases to the prosecutor, where the impropriety stemmed from prosecutors' failure to weigh all relevant factors.

State v. Johnstone, 2013 WL 3957629 (Vt. 2013):
Holding: Even though Defendant made threatening statements about his probation officer to his girlfriend, this was insufficient to revoke probation without any evidence that he intended for the probation officer to ever hear or learn of the statements; Defendant was merely "mouthing off" to his girlfriend.

Murry v. Com., 95 Crim. L. Rep. 691 (Va. 9/12/14):
Holding: A condition of probation requiring sex offender to consent to warrantless searches for the rest of his life violated 4th Amendment; such a provision would allow "harassing searches" that are unrelated to Offender's rehabilitation or public safety.

State v. Hunley, 92 Crim. L. Rep. 182 (Wash. 11/1/12):
Holding: Due process does not permit a court to enhance sentence based on prior convictions which are proven solely by a prosecutor's unsworn summary of the defendant's record.

State v. Griffin, 2012 WL 19751 (Wash. 2012):
Holding: Evidence rules applied in fact-finding hearing to determine whether defendant was a rapid recidivist for sentencing purposes.

In re Heidari, 2012 WL 1355964 (Wash. 2012):
Holding: Following the reversal of a conviction for second-degree child molestation due to insufficient evidence, the appellate court could not remand for resentencing on the lesser included offense of attempted child molestation because the jury was not instructed on the attempt offense.

State v. Saenz, 2012 WL 3601846 (Wash. 2012):
Holding: Where State failed to show that Defendant's transfer of a prior juvenile case to adult court was proper, the prior conviction as a juvenile could not be used as a "strike" for a later adult charge.

In re Personal Restraint of Carter, 263 P.2d 1241 (Wash. 2011):
Holding: Where a Defendant/Petitioner claims that he is actually innocent of prior convictions used to enhance a later sentence, then he may use an actual innocence exception to the postconviction time limits to challenge the prior convictions.

State v. McGill, 92 Crim. L. Rep. 243, 2012 WL 5834573 (W.Va. 11/15/12):
Holding: State restitution statute does not permit police to recover cost of searching for Defendant in a "manhunt."

State v. Judge, **2012 WL 987479 (W. Va. 2012):**
Holding: A sex offender was not required by the Sex Offender Registration Act to re-register with the state police following his release from jail for an unrelated charge.

State v. Melton, 2013 WL 3467123 (Wis. 2013):
Holding: Trial court lacked "inherent authority" to destroy a PSI of a Defendant in violation of a 50-year retention rule for court records.

Bear Cloud v. State, 95 Crim. L. Rep. 684 (Wyo. 9/10/14):
Holding: 8th Amendment prohibits juvenile life sentences that are the functional equivalent of LWOP; "functional equivalent" means a bright-line 39 years or more, because this is the rule the U.S. Sentencing Commission uses as the equivalent of a life sentence.

State v. Mares, 96 Crim. L. Rep. 140 (Wyo. 10/9/14):
Holding: *Miller*'s ban on automatic LWOP for juveniles is retroactive.

Bear Cloud v. State, 92 Crim. L. Rep. 575 (Wyo. 2/8/13):
Holding: Statute providing life imprisonment for juveniles "according to law" is constitutional only if it specifies the time when the juveniles will be eligible for parole.

Solis v. State, 88 Crim. L. Rep. 374 (Wyo. 12/16/10):
Holding: Where Defendant stole goods "on sale," he is liable for restitution at the "sale price" and not the full retail price.

Gomillion v. State, 2011 WL 6279027 (Ala. Crim. App. 2011):
Holding: Prior guilty pleas were not "prior convictions" under Habitual Felony Offender Act.

State v. Adams, 2010 WL 4380236 (Ala. Crim. App. 2010):
Holding: Requiring indigent, homeless sex offender to provide an actual address where they would be living before they could be released from prison under violated Equal Protection Clause.

Reed-Kaliher v. Hoggatt, 2014 WL 3702518 (Ariz. App. 2014):
Holding: Where medical marijuana is legally authorized, trial court cannot prohibit Defendant from using medical marijuana as a condition of probation.

State v. Espinoza, **2012 WL 1511733 (Ariz. Ct. App. 2012):**
Holding: The trial court lacked subject matter jurisdiction, when imposing probation in a felony case, over the defendant's delinquency adjudication for a sex offense.

Williams v. Superior Court, 2014 WL 5147546 (Cal. App. 2014):
Holding: Where Realignment Act sets deadlines for parole hearings, parolee's due process rights are violated by failure to hold hearing within the time limits.

In re Wilson, 2015 WL 273186 (Cal. App. 2015):
Holding: Even though there was a "recall" procedure which allowed Juvenile who received LWOP sentence to be paroled in future, it violated *Miller* for sentencing court to not take Defendant's youth and mitigating circumstances into account at the time of the actual sentencing to LWOP.

People v. Martinez, 2014 WL 2535336 (Cal. App. 2014):
Holding: Court could not order that Defendant pay restitution for hit-and-run victim's injuries, where Defendant was not convicted or charged with any offense involving responsibility for the actual accident.

People v. Klatt, 2014 WL 1620971 (Cal. App. 2014):
Holding: Probation condition which prohibited Defendant from "socializing" with anyone who had physical custody of a minor unless approved by a probation officer was vague and overbroad.

People v. Bradford, 2014 WL 3427212 (Cal. App. 2014):
Holding: Use of wire-cutters during a burglary was not a "deadly weapon," and thus Defendant was eligible for resentencing under sentencing reform law; Defendant did not threated anyone with wire-cutters, and wire-cutters weren't modified to make them into a weapon.

People v. Osorio, 185 Cal. Rptr. 3d 881 (Cal. App. 2015):
Holding: Court abused discretion by revoking parole for violation of condition that Defendant was not to have contact with gang members, and Defendant only talked to gang member for 10 minutes; violation was not severe enough to warrant revocation.

People v. Friday, 95 Crim. L. Rep. 48 (Cal. App. 3/27/14):
Holding: State law requiring convicted sex offenders to waive "any privilege against self-incrimination as a condition of probation" violates 5th Amendment.

In re Heard, 166 Cal. Rptr. 3d 824 (Cal. App. 2014):
Holding: Even though a statute provided for a mandatory youth parole hearing in the future, this did not cure *Miller* error in effective juvenile LWOP sentence of 80 years to life because the youth parole statute cannot allow the sentencing court to disregard the constitutional duty to consider juveniles and adults separately when sentencing juvenile-Defendant.

People v. Lewis, 94 Crim. L. Rep. 392 (Cal. App. 12/16/13):
Holding: Where a Juvenile has both homicide and non-homicide offenses, court must look at the sentence as a whole to determine how 8th Amendment restrictions on LWOP for juveniles applies.

People v. Rodriguez, 166 Cal. Rptr.3d 187 (Cal. App. 2013):
Holding: A probation condition in receiving stolen property case that Defendant "stay away" from victims was fatally ambiguous because it did not specify whether it applied

to one or both victims, did not sufficiently identify the victims or the vehicles they operated, and there was no evidence Defendant even knew who the actual victims were, so he had no notice of how to stay away.

People v. Douglas M., 2013 WL 57661105 (Cal. App. 2013):
Holding: Statute imposing additional conditions on probation for sex offenders did not apply retroactively because this likely would violate ex post facto in that, among other things, the statute required probationers to make additional payments and waive privileges against self-incrimination and psychotherapist privilege.

People v. Tirey, 2013 WL 6047027 (Cal. App. 2013):
Holding: Statute allowing relief from sex offender registration for offenders convicted of sexual intercourse with children age 10 or younger, but not relief for offenders convicted of lewd acts with children under 14, violated Equal Protection.

People v. Wortham, 2013 WL 5755193 (Cal. App. 2013):
Holding: Trial court's denial of inmate's petition to recall his sentence under the Three Strikes Reform Act was appealable, because it affects substantial rights and the trial court's action foreclosed possibility of reduced sentence.

People v. Juhasz, 2013 WL 5492340 (Cal. App. 2013):
Holding: Even though Defendant had refused drug treatment in a prior case, this cannot be used in a later case to trigger the "refused drug treatment as a condition of probation" exception to mandatory treatment and probation for nonviolent drug offenders.

People v. Ramirez, 2013 WL 4850302 (Cal. App. 2013):
Holding: Sentences imposed on juveniles which were equivalent to LWOP for first and second degree murder violated 8th Amendment; neither defendant was "the rare juvenile offender whose crime reflects irreparable corruption," even though one of the shootings was for gang affiliation; there is no reason to make a decision at sentencing to imprison a juvenile for life, since this decision is a judgment that can be made at a later parole hearing.

In re Stoneroad, 2013 WL 1680513 (Cal. App. 2013):
Holding: Even though Defendant could not remember his charged murder due to intoxication, his lack of memory was insufficient to establish future dangerousness and deny parole.

People v. Schoop, 2012 WL 6705177 (Cal. App. 2013):
Holding: Statue which had a 10-year rehabilitation period before a person convicted of possession of child pornography could seek relief from registration but only a 7-year period for advertising or sending child pornography was not supported by a rational basis and, thus, violated Equal Protection.

People v. Lewis, 2013 WL 2144963 (Cal. App. 2013):
Holding: Three Strikes reform law applied to Defendant who was sentenced before the effective date of the Act, but whose conviction was not yet final on appeal.

People v. Daniels, 145 Cal. Rptr. 3d 33 (Cal. App. 2012):
Holding: A defendant's increased fine and restitution after a new trial violates Double Jeopardy only if the aggregated monetary sentence, not each component thereof, is greater than that originally imposed.

In re Martinez, 2012 WL 5278950 (Cal. App. 2012):
Holding: Parole Board's refusal to release quadriplegic inmate because he posed threat to public was not supported by evidence since his physical condition limited his ability to be a threat and he was being released to an acute care facility where he would be unlikely to harm anyone.

In re Taylor, 2012 WL 3968550 (Cal. App. 2012):
Holding: "Jessica's law," which made it illegal for sex offenders to live within 2000 feet of school, was unconstitutional if applied to all offenders because it was not tailored to type of victim or risk of reoffending, and made it impossible to find housing in 97% of county; law could, however, be applied to some offender in individual cases.

People v. Argeta, 2012 WL 6028241 (Cal. App. 2012):
Holding: Sentence of 100 years without parole for 75 years was functional equivalent of LWOP as applied to a juvenile and thus violated 8th Amendment.

D.M. v. Department of Justice, 147 Cal. Rptr. 3d 798 (Cal. App. 2012):
Holding: Sex offender registration statute which granted "certificates of rehabilitation" to persons who had sexual intercourse with certain minors but not to persons who had oral sex with minors violated Equal Protection.

People v. Moffett, 148 Cal. Rptr. 3d 47 (Cal. App. 2012):
Holding: Statutory presumption in favor of LWOP of 16 and 17 year olds convicted of murder violated *Miller v. Alabama*.

People v. Quarterman, 2012 WL 182881 (Cal. App. 2012):
Holding: Fully litigated probation revocation hearing had collateral estoppel effect in new hearing based on the same violation.

People v. Wade, 2012 WL 1150847 (Cal. App. 2012):
Holding: An amendment of the grand theft statute increasing the monetary threshold for the offense applied retroactively because the amendment was motivated by a desire to save the state money by avoiding sending certain defendants to prison.

People v. Kunath, **2012 WL 579879 (Cal. App. 2012):**
Holding: When sentenced on all charges to concurrent terms, the defendant's presentence custody credit must be applied to all charges to equalize the time in custody between those who obtain presentence release and those who do not.

In re Young, **2012 WL 834786 (Cal. App. 2012):**
Holding: Parole board failed to give due consideration to an indeterminate life prisoner's case, and thus violated due process in denying him parole.

People v. Scott, **2012 WL 615829 (Cal. App. 2012):**
Holding: The trial court lacked the authority to prohibit a defendant, who had been convicted for sexually abusing two minor females, from visiting one of the victims who had reached the age of 18 at the time of sentencing.

People v. Allexy, **2012 WL 1263500 (Cal. App. 3d Dist. 2012):**
Holding: Imposing but suspending the defendant's sentence while deferring the decision as to whether the defendant had to register as a sex offender was improper, and the court should have suspended imposition of sentence instead.

People v. P.A., 92 Crim. L. Rep. 244 (Cal. App. 11/15/12):
Holding: Probation condition that required Juvenile to keep his parents and probation officer informed of his "whereabouts, associates and activities" was unconstitutionally vague.

People v. Roberts, 2011 WL 1992028 (Cal. App. 2011):
Holding: Statements of record by Defendant, his counsel and the victim after a court accepted his guilty plea were not statements in the "record of conviction" and thus were not admissible to prove the assault involved great bodily harm so as to be a strike under Three Strikes Law.

People v. Gray, 2011 WL 4060299 (Cal. App. 2011):
Holding: Ex post facto principles were violated by retroactive application of One Strike law.

People v. Moses, 2011 WL 4357307 (Cal. App. 2011):
Holding: Probation conditions prohibiting contact with people in vehicles while on foot and vice versa were overbroad.

People v. Ruffin, 2011 WL 5178348 (Cal. App. 2011):
Holding: Mandatory sex offender registration for inmates but not guards for sex in prison violated equal protection.

People v. Ruffin, 90 Crim. L. Rep. 273 (Cal. App. 11/2/11):
Holding: Statute that required sex offender registration for prison inmates who engage in consensual oral sex with adults in prison, but did not require registration for prison guards who engage in the same conduct, violated equal protection; court notes that oral sex by consenting adults is legal outside of prison.

People v. J.I.A., 2011 WL 2206910 (Cal. App. 2011):
Holding: Even though 14-year old Defendant would be eligible for parole at age 70, his sentence of 50 years plus consecutive life sentences was a *de facto* life without parole sentence and violated 8th Amendment ban on such sentences for nonhomicide juveniles.

People v. Patel, 2011 WL 2452602 (Cal. App. 2011):
Holding: Probation conditions require that violations be undertaken knowingly.

People v. Cruz, 2011 WL 3278584 (Cal. App. 2011):
Holding: Where a statute purported to give probation officers sole discretion to determine if a probationer should be required to wear a GPS device, this violated separation of powers doctrine because the trial court determines the conditions of probation.

People v. Barajas, 2011 WL 3672076 (Cal. App. 2011):
Holding: Probation condition that prohibited Defendant from being "adjacent" to a school was impermissibly vague.

People v. Sharret, 2011 WL 61876 (Cal. App. 2011):
Holding: A criminal laboratory fee was punitive and should not have been imposed on a count that was stayed under the statutory prohibition against multiple punishment for crimes arising from a single course of conduct.

People v. Garcia, 2011 Wl 1467950 (Cal. App. 2011):
Holding: Where Defendant had unlawfully copied DVD's in his house (apparently for potential distribution), the DVD's represented only potential economic loss to the recording industry trade association, so restitution to them was not authorized.

People v. Zarate, 2011 WL 489751 (Cal. App. 2011):
Holding: Even though part of Defendant's sentence occurred before enactment of a good-time credit statute, Defendant was entitled to apply the statute to his whole sentence.

In re Vicks, 2011 WL 1778224 (Cal. App. 2011):
Holding: Victim's Bill of Rights which increased interval between parole hearings was ex post facto when applied to prisoner sentenced before the law.

People v. De Jesus Nunez, 2011 WL 1758995 (Cal. App. 2011):
Holding: Sentence on juvenile, for aggravated kidnapping and attempted murder, which precluded parole for 175 years violated 8th Amendment; juvenile had diminished responsibility as a juvenile.

People v. Trask, 119 Cal. Rptr. 3d 91 (Cal. App. 2010):
Holding: Defendant cannot be terminated from deferred entry of judgment program based on solely on inability to pay program fees.

In re Macias, 2010 WL 4457309 (Cal. App. 2010):
Holding: Defendant's failure to agree with Parole Board on version of the offense did not support denial of parole.

People v. Rosa, 2010 WL 5162124 (Cal. App. 2010):
Holding: Trial court could lower restitution and fines after remand from appellate court.

People v. Duarte, 2010 WL 4629071 (Cal. App. 2010):
Holding: Defendant could not be punished for street terrorism in addition to underlying crime of discharging a firearm with gross negligence, since this violated statutory prohibition against multiple punishment for single course of conduct.

People v. Rogers, 2014 WL 4242459 (Colo. App. 2014):
Holding: Even though Police Dept. paid a sexual assault nurse to conduct an exam on Victim, Police Dept. was not itself a "victim" of crime entitled to restitution to recoup cost of nurse.

People v. Rainer, 2013 WL 1490107 (Colo. App. 2013):
Holding: Aggregate sentence of 112 years for Juvenile-Defendant, under which he would not be eligible for parole until age 75, violated 8th Amendment under *Graham*.

People v. Ruch, 2013 WL 3480249 (Colo. App. 2013):
Holding: Revocation of Defendant's probation for his refusal to admit the offense during court-ordered treatment (which was a probation condition) while his direct appeal was pending violated his 5th Amendment right against self-incrimination.

People v. Torrez, 2013 WL 1240883 (Colo. App. 2013):
Holding: Where one statute required concurrent sentences for crimes based on identical evidence, but another statute required consecutive sentences in certain sex cases, the sex offender statute did not operate as an exception to the general rule of concurrent sentences because it did not discuss what should happen if the crimes were based on identical evidence.

People v. Henson, 2013 WL 1235859 (Colo. App. 2013):
Holding: In determining amount of restitution to be awarded for stolen diamond ring which had been repaired and altered during the time it was gone from its owner, the court should determine the replacement value of the ring and cost of repair, and subtract from that the fair market value of the ring as returned to its owner (and not use the low price paid for the damaged ring by a jeweler while it was stolen).

People v. Palomo, 2011 WL 3332327 (Colo. App. 2011):
Holding: Court could only assess prosecution costs against Defendant for counts he was convicted of, not for counts he was not successfully prosecuted for.

People v. Griffin, 2011 WL 915714 (Colo. App. 2011):
Holding: Definition of "residence" in sex offender registration law does not require that Defendant register where he merely intends to live, without ever being physically present there.

Musallam v. State, 2014 WL 562901 (Fla. App. 2014):
Holding: Even though Defendant had come to a park in a car with others in a high crime neighborhood and didn't have a driver's license, and even though Defendant returned to the car to retrieve something after Officer told Defendant and the others not to drive the car, Officer lacked reasonable suspicion to believe criminal activity was afoot to detain and search Defendant.

Peters v. State, 2013 WL 6083405 (Fla. App. 2013):
Holding: Application of Florida sentencing law after *Graham v. Florida*, which resulted in some Juveniles getting sentenced more harshly than others who had committed more serious crimes, violated the gross proportionality element of 8th Amendment.

Felder v. State, 2013 WL 3238157 (Fla. App. 2013):
Holding: Even though Defendant had previously been convicted of "attempted" sexual batter, this was not a qualifying felony under the Dangerous Sexual Offender Act because the Act clearly excludes prior "attempt" offenses.

Arrington v. State, 2012 WL 130276 (Fla. Ct. App. 2012):
Holding: Mandated life-without-parole sentence may be inappropriate in felony murder cases where juvenile defendant did not actually commit the murder; therefore trial court must have discretion to impose a lesser sentence.

State v. Chubbuck, 2012 WL 716136 (Fla. Dist. Ct. App. 4th Dist. 2012):
Holding: Defendant was not required to prove needed treatment was not available in prison system to obtain downward durational departure.

DeLuise v. State, 2011 WL 4808267 (Fla. Ct. App. 2011):
Holding: Where a statute authorized downward departure of sentence for defendant who offered to pay restitution, a trial court violated defendant's equal protection rights by offering to reduce his sentence if he paid restitution because in this case it equated to an imposition of a harsher sentence for not paying restitution, which violates equal protection by giving harsher punishment to those less able to pay.

Losh v. State, 2011 WL 13729 (Fla. Ct. App. 2011):
Holding: Where plea agreement was silent as to whether Defendant had to serve mandatory minimum term and this was discretionary with prosecutor, court violated double jeopardy by sentencing Defendant without a minimum term and then a few days later entering a new sentence pronouncing a minimum term.

Shingler v. State, 90 Crim. L. Rep. 300 (Fla. App. 11/16/11):
Holding: Florida recidivist statute cannot apply to juveniles to create life without parole for nonhomicide offenses because this violates *Graham v. Florida*, ___ U.S. ___ (U.S. 2010), and the statute on its face does not authorize a 40 year term of years either – only life sentences; thus, such juveniles can only be sentences under non-enhanced robbery statute.

Manuel v. State, 2010 WL 4260096 (Fla. Ct. App. 2010):
Holding: Life without parole sentence for juvenile for non-homicide offense violated 8th Amendment.

Gibson v. State, 2013 WL 363427 (Ga. App. 2013):
Holding: A restitution hearing is a critical stage of proceedings at which Defendant is entitled to counsel.

Ewell v. State, 2012 WL 5935988 (Ga. App. 2012):
Holding: Life sentence under new child molestation statute was ex post facto as applied to Defendant who committed his offense while the old statute was in effect.

State v. Martinez, 2013 WL 1458703 (Idaho App. 2013):
Holding: The 1st Amendment's qualified right of access to sentencing proceedings prohibited court from sealing Defendant-Senator's sentencing memorandum where this would not interfere with any on-going investigations since the persons and events named in the memo were already widely publicly known.

State v. Toyne, 2011 WL 5553716 (Idaho Ct. App. 2011):
Holding: Because the persistent violator statute did not contain language to the contrary, trial court was permitted to suspend defendant's sentence.

People ex rel. City of Chicago v. Le Mirage, Inc., 2013 WL 6044361 (Ill. App. 2013):
Holding: Even though 21 people were killed while panicking and trying to flee a nightclub's second floor, trial court could not consider as a sentencing factor in indirect criminal contempt proceeding that Defendant had violated a court order requiring closure of the second floor of the nightclub, because this was not the proximate cause of the panic/fleeing incident; the court order related to building code violations arising from unsafe construction of the second floor, not from issues of crowd control or security.

People v. Single Story House, 2012 WL 5205805 (Ill. App. 2012):
Holding: Term "thing of value" in forfeiture statute which listed items such as "books, records, tapes" etc., did not include real property, so house was not subject to forfeiture.

People v. Williams, 2012 WL 6028833 (Ill. App. 2012):
Holding: *Miller* decision banning automatic LWOP for juveniles is retroactive.

Burton v. State, 2012 WL 5451743 (Ind. App. 2012):
Holding: State ex post facto clause prohibited application of sex offender registration

law to Defendant for a crime from another jurisdiction prior to enactment of registration requirements in either jurisdiction.

Myers v. Coats, 2012 WL 1059600 (Ind. Ct. App. 2012):
Holding: An ex-offender was deprived of due process when there was no administrative opportunity for him to contest his erroneous sex offender registration.

Cottingham v. State, 2011 WL 2847417 (Ind. Ct. App. 2011):
Holding: Good time credit would apply to Defendant for time spent on home detention under doctrine of amelioration.

Coleman v. State, 2011 WL 3792830 (Ind. Ct. App. 2011):
Holding: Consecutive sentences for robbery conspiracy and firearm possession in single episode violated single episode of criminal conduct rule.

State v. Watson, 795 N.W.2d 94 (Iowa Ct. App. 2011):
Holding: Court cannot order Defendant to pay as "restitution" the cost of transporting him from Illinois to Iowa, since no statute expressly authorizes this as court costs to a defendant.

State v. Declerck, 317 P.3d 794 (Kan. App. 2014):
Holding: A statute providing that a traffic offense resulting in serious injury or death constituted probable cause to support a warrantless blood draw was unconstitutional because it authorized an automatic search and seizure of Driver without probable cause to believe Driver was under influence of alcohol or drugs.

State v. Proctor, 2012 WL 2620525 (Kan. App. 2012):
Holding: A probationary sentence that potentially would trigger a life-without-parole sentence if Defendant were to commit any other felony in his lifetime and which would require lifetime supervision constituted cruel and unusual punishment for offense of indecent solicitation.

Blevins v. Com., 2014 WL 2784748 (Ky. App. 2014):
Holding: Even though Defendant was convicted of animal abuse, Animal Rescue Society was not entitled to restitution for its expenses for housing Defendant's mistreated dogs, where Society had voluntarily accepted the State's request to care for the dogs.

State v. Urena, 2014 WL 1805346 (La. App. 2014):
Holding: Even though Defendant was convicted of incest with his stepdaughter, two consecutive 20-year sentences were constitutionally excessive where Defendant did not force victim to have sex with him, did not threaten victim and did not penetrate victim.

State v. Harris, 2014 WL 2199829 (La. App. 2014):
Holding: Where Defendant was indigent, his judgment providing for a jail term in the event he could not pay his fine must be deleted.

State v. Williams, 2012 WL 6176856 (La. App. 2012):
Holding: Juvenile offender who was sentenced to life was eligible for parole.

Walker v. State, 63 A.3d 575 (Md. App. 2013):
Holding: Where state statute was amended to increase the value of amount of property to constitute felony theft after Defendant's crime but before his trial and sentencing, the more lenient penalty provisions of the new statute applied to him.

Com. v. Bernard, 3 N.E.3d 1113 (Mass. App. 2014):
Holding: Statute prohibiting obscuring license plate numbers did not prohibit placing a tinted shield over license plate, so traffic stop of Defendant based on this was invalid; license plate remained visible and legible.

Doe v. Mass. Parole Bd., 2012 WL 6013993 (Mass. App. 2012):
Holding: Requiring GPS monitoring of re-paroled sex offender was arbitrary and violated due process where there was no evidence of changed circumstances from the first parole.

People v. Woolfolk, 2014 WL 783564 (Mich. App. 2014):
Holding: For determining when a juvenile turns 18 for *Miller* / mandatory life without parole purposes, court adopts the "birthday rule" whereby a person attains a given age on the anniversary date of his birth, rather than the common-law rule where a person attains that age the first moment of the day before his birth; thus, Defendant was a "juvenile" where he committed murder one day before his 18th birthday under "birthday rule."

State v. Jones, 2014 WL 7344404 (Minn. App. 2014):
Holding: Criminal contempt charge is not authorized for violation of probation; statute does not authorize it, and violation of probation agreement does not hinder administration of justice, which is the primary reason for criminal contempt.

State v. Nodes, 2014 WL 2687872 (Minn. App. 2014):
Holding: Where Defendant pleaded guilty to two sex offenses in a single plea proceeding, one of the offenses could not be counted as a "prior" offense necessary to invoke lifetime supervision; the pleas were simultaneous, so there was no "prior" offense.

Kubrom v. State, 2015 WL 1414004 (Minn. App. 2015):
Holding: Where Defendant pleaded guilty to a definite-term sentence as part of a plea agreement, amendment of the sentence to include a five-year mandatory conditional-release term violated plea agreement by extending his total prison exposure, and allowed Defendant to withdraw his plea.

Riley v. New Jersey State Parole Bd., 32 A.3d 190 (N.J. Super. Ct. App. Div. 2011):
Holding: Retroactive application of Sex Offender Monitoring Act violated ex post facto.

State v. Trung Ho, 2014 WL 295238 (N.M. App. 2014):
Holding: Sex crime to which Defendant pleaded guilty did not require registration under state sex offender registration law at the time Defendant pleaded guilty; even though the statute arguably required registration, the fact that the Legislature later amended the statute to require registration for Defendant's offense showed that at the time Defendant pleaded guilty, registration was not required.

State v. Alvarado, 2012 WL 8467506 (N.M. App. 2013):
Holding: Where Defendant was charged with three degrees of an offense and also with tampering, and the jury instructions on the tampering count failed to require a jury finding on which degree of offense the tampering count was related to, the instruction failed to require jury unanimity, and sentencing Defendant to the highest penalty violated *Apprendi* and its progeny.

People v. Brown, 2014 WL 306186 (N.Y. App. 2014):
Holding: A Defendant who is on parole is in state "custody" and, thus, can apply for resentencing.

People v. Everle, 2012 WL 4121162 (N.Y. App. 2012):
Holding: Even though court was allowed to impose a substantial fine and restitution order on Defendant, court could not enjoin Defendant from mortgaging or selling his real property as a penalty for failure to pay his fine or restitution, since this was not authorized under restitution or fine statutes.

People v. Marrero, 2012 WL 3079329 (N.Y. Sup. 2012):
Holding: In determining sex offender registration level for crime of possession of child pornography, courts are not to assess points for victims being strangers or multiple victims because such risk factors apply only to contact offenses.

People ex rel. Langone ex rel. Muniz v. New York State Dept. of Correctional Services, 2012 WL 899071 (N.Y. Sup. 2012):
Holding: A federal prisoner serving both state and federal sentences was entitled to a parole release hearing before the state parole board.

Miller v. New York State Dept. of Corrections and Community Supervision, 2011 WL 4346589 (N.Y. Sup 2011):
Holding: Even though petitioner's parole was interrupted for sentence calculation purposes, it was still considered unrevoked.

People v. Fernandez, 2011 WL 2039732 (N.Y. App. 2011):
Holding: Sentence of 9 years for manslaughter was unduly harsh where Defendant had been terrorized by victim and Defendant did not intend to kill victim but approached him to ask for an apology to be treated with respect and dignity.

Berlin v. Evans, 2011 WL 1466616 (N.Y. Sup. 2011):
Holding: Sex offender law which prohibited living within 1,000 feet of schools was ex post facto as applied to persons who committed crimes before the law.

State v. Hurt, 2010 WL 4608708 (N.C. Ct. App. 2010):
Holding: Defendant's 6th Amendment confrontation rights apply in non-capital sentencing hearing.

State v. Stout, 2014 WL 1326390 (Ohio App. 2014):
Holding: Possession of child pornography did not cause the children depicted in the images physical harm, as was necessary to sentence Defendant to prison rather than community supervision.

State v. Norman, 2014 WL 6156927 (Ohio App. 2014):
Holding: Where a co-tenant shares a residence with a probationer, a warrantless search of the residence pursuant to probation conditions must be limited to the areas over which there is joint control or exclusive control by the probationer.

State v. Johnson, 2014 WL 5421195 (Ohio App. 2014):
Holding: Defendant's movement and restraint of victim was incidental to the attempted rape; thus, the attempted rape and kidnapping offenses merged for purposes of sentencing.

State v. Klembus, 2014 WL 3697685 (Ohio App. 2014):
Holding: The repeat DWI specification is not rationally related to a legitimate state interest, and thus, violated equal protection; the specification depends solely on a prosecutor's decision whether to present the issue to the grand jury; thus, repeat offenders may be treated differently from one another.

State v. Scott, 2014 WL 495392 (Ohio App. 2014):
Holding: Where: (1) Police had previously arrested Defendant based on erroneous information and Defendant had informed police of the error (which was caused by someone stealing his identity), but (2) police department failed to correct this error in their records, and (3) Defendant was arrested a second time based on the same erroneous information, evidence found after the second arrest must be suppressed and the good-faith exception to the exclusionary rule does not apply, since police dept. should have corrected the erroneous information in their records to avoid re-arrest of Defendant.

State v. Venes, 2013 WL 1932857 (Ohio App. 2013):
Holding: Statute which allowed consecutive sentences required trial court to make detailed findings as to the purposes and goals of the consecutive sentence.

State v. Moore, 2012 WL 1567386 (Ohio App. 2012):
Holding: Trial court's imposition of maximum consecutive sentences on Defendant (33 years) was likely the result of his decision to proceed to trial given the disparity between

Defendant's sentence and a co-defendant who had pleaded guilty (9 years), even though co-defendant was the major actor in the crime.

State v. White, 2013 WL 139578 (Ohio App. 2013):
Holding: Statute that enhances sentence where a firearm was used was unconstitutional as applied to police officer-Defendant who was being prosecuted for shooting a suspect who he believed had a weapon, since applying it to police officer bore no reasonable relationship to the purpose for which the statute was enacted.

State v. Strunk, 2012 WL 4761906 (Ohio App. 2012):
Holding: Statute that permitted judicial release for those sentenced to more than 5 years but not to those sentenced to exactly 5 years violated Equal Protection.

Harney v. State, 2011 WL 666319 (Okla. Crim. App. 2011):
Holding: Admission of driving record in DWI case that contained other crimes and bad acts was erroneous as to jury's determination of sentence.

State v. Kuehner, 2012 WL 5285380 (Or. App. 2012):
Holding: Overtime pay for police officers who guarded Defendant was not recoverable as "costs" from Defendant because salaries of gov't employees involved in the prosecution of a defendant are exempt from recovery; salary payments to officers are not directly attributable to Defendant's conduct since the salaries are necessary to maintain a police department.

State v. Earls, 90 Crim. L. Rep. 299 (Or. Ct. App. 11/16/11):
Holding: Military court martial conviction is not a "federal conviction" for purposes of Oregon recidivist statute.

Com. v. Weathers, 2014 WL 2944912 (Penn. Super. 2014):
Holding: After Defendant filed his notice of appeal, trial court lacked jurisdiction to increase Defendant's restitution.

Com. v. Melvin, 2013 WL 6096222 (Penn. Super. 2013):
Holding: Sentencing condition requiring Defendant to write apology letters while his case was pending on appeal violated right against self-incrimination.

Com. v. Rose, 2013 WL 6164348 (Pa. Super. 2013):
Holding: Where there was a several year delay between Defendant's acts and the time that murder victim died, it violated ex post facto to apply the murder statute in effect at time of victim's death since that statute increased the sentence; although the crime of murder was not consummated until victim actually died, all of Defendant's acts occurred prior to passage of the harsher statute.

Com. v. Rose, 2012 WL 2362578 (Pa. Super. 2012):
Holding: Application of sentencing statute in effect at time of victim's death was ex post facto; applicable statute was one in effect at time of the acts that gave rise to the death.

Dansby v. State, 2014 WL 6733698 (Tex. App. 2014):
Holding: Even though Defendant did not object at time conditions of community supervision were imposed, where he did not have notice that the conditions would require him to take polygraphs as part of sex offender treatment, Defendant did not waive his claim that this violated 5th Amendment privilege against self-incrimination.

Simon v. State, 2014 WL 3734190 (Tex. App. 2014):
Holding: Trial court lacked jurisdiction to modify Defendant's probation to require sex offender counseling before receiving the Court of Appeals' mandate affirming the conviction; therefore, the court could not revoke probation for failure to do the counseling.

Grado v. State, 96 Crim. L. Rep. 113 (Tex. App. 10/15/14):
Holding: Where both Defendant and judge mistakenly believed that offense carried a 10-year minimum sentence, Defendant did not forfeit his right to appeal the sentence via his plea agreement; the right to have the sentencing authority consider the appropriate sentencing range is a matter of due process.

Lewis v. State, 95 Crim. L. Rep. 193 (Tex. Crim. App. 4/30/14):
Holding: States can comply with *Miller* by modifying juvenile sentences of LWOP to life in prison with parole, without providing individualized sentencing hearings to present mitigating evidence.

Ex parte Maxwell, 94 Crim. L. Rep. 745 (Tex. App. 3/12/14):
Holding: *Miller v. Alabama*'s ban on mandatory life without parole for juveniles is retroactive.

Plummer v. State, 94 Crim. L. Rep. 120, 2013 WL 553883 (Tex. App. 10/9/13):
Holding: Provision that enhances sentence when a defendant exhibits a weapon while committing a felony requires proof that the "exhibition" somehow facilitated the felony; here, Defendant (a security guard) wore a bulletproof vest and carried a gun, even though he had a prior felony conviction which made it illegal for him to possess both the vest and gun; the State claimed that wearing the vest with the gun triggered the sentence enhancement; however, the appellate court holds that the holstered gun had no relationship to the illegal possession of the vest; to hold otherwise would create absurd results whereby bankers who displayed antique guns in their offices could have sentences enhanced if they embezzled funds.

Anderson v. State, 2013 WL 1222745 (Tex. App. 2013):
Holding: Defendant's prior North Carolina offense of indecent liberties with a child was not substantially similar to those offenses listed in Texas habitual felony sentencing statute to trigger an automatic life sentence for new Texas offense.

Leonard v. State, 92 Crim. L. Rep. 271 (Tex. Crim. App. 11/21/12):
Holding: Even though sex-offender-Defendant's probation terms required that he submit to polygraphs as part of his sex therapy, polygraph evidence is so unreliable that it cannot be used to revoke Defendant's probation.

Ex parte Doan, 2012 WL 2327914 (Tex. Crim. App. 2012):
Holding: Where prosecutor in County X sought to revoke Defendant's probation based on a theft in County Y but the evidence was found to be insufficient, res judicata barred County Y from instituting theft charges against Defendant.

Blackshear v. State, 2011 WL 1991424 (Tex. App. 2011):
Holding: Trial court erred in second trial in not granting a continuance to allow Defendant to obtain a transcript from the first trial; defense should have been able to use the transcript to cross-examine witnesses from first trial, even though second trial was for punishment only.

Ex parte Evans, 2011 WL 1662384 (Tex. Crim. App. 2011):
Holding: Parolee not convicted of a sex offense was entitled to a hearing before imposition of sex-offender parole conditions.

Ex parte Thiles, 2011 WL 833347 (Tex. Crim. App. 2011):
Holding: Defendant, who was legitimately released on appeal bond and who (through no fault of his own) never knew that his conviction had been affirmed, was entitled to 22 years of credit against this sentence for the 22 years he had spent on bond after his affirmance.

Texas Dept. of Public Safety v. Garcia, 2010 WL 5019418 (Tex. App. 2010):
Holding: Oregon conviction for contributing to delinquency of minor did not contain elements substantially similar to Texas statute of sexual assault, and thus Defendant's Oregon conviction did not require sex offender registration under Texas registration law.

Ex parte Dangelo, 2010 WL 5118650 (Tex. App. 2010):
Holding: Defendant on probation had 5th Amendment right against self-incrimination not to answer questions on polygraph about whether he had sex with minor and other similar questions about criminal activity while on probation.

Dean v. Com., 2012 WL 6004214 (Va. App. 2012):
Holding: Robbery with a deadly weapon was not substantially similar to robbery in Virginia to count under Virginia's three-strikes law.

State v. Johnson, 2014 WL 1226456 (Wash. App. 2014):
Holding: Release condition which prohibited Defendant from having contact with any physically or mentally "vulnerable" people violated due process as vague, because it did not give sufficient notice of what a "vulnerable" person was.

State v. Miller, 2014 WL 1911424 (Wash. App. 2014):
Holding: Change in state caselaw that allowed a court to give concurrent sentences instead of consecutive ones was a significant change in law that allows an exception to the one-year time limit for collateral attack on sentences.

In re Crow, 2015 WL 1945114 (Wash. App. 2015):
Holding: Even though murder Victim had reported Defendant's alleged assault of a third-party to police more than a week before Victim was murdered, the "good Samaritan" aggravator did not apply, because Victim was not murdered while providing immediate aid to someone in peril.

State v. Hunley, 2011 WL 1856074 (Wash. Ct. App. 2011):
Holding: Sentencing reform statute which provided that Defendant's silence in the face of State's presentation of a written summary was an acknowledgement of Defendant's criminal history violated due process.

State v. Siers, 2010 WL 4813737 (Wash. Ct. App. 2010):
Holding: State's failure to allege "Good Samaritan" sentencing aggravator in information, which aggravator was then presented to jury in trial on second degree assault, vitiated the assault conviction as well as the sentence.

State v. Boyden, 2012 WL 280356 (Wis. Ct. App. 2012):
Holding: When the fruits of a defendant's substantial presentence assistance to law enforcement authorities are not known until after sentencing, those fruits can constitute a new factor for purposes of a post-conviction motion for sentence modification.

Sex Offender Issues -- Registration
(Note: such cases are indexed under "Sentencing Issues" before 2015)

In the Interest of S.C. v. Juvenile Officer, 2015 WL 6949338 (Mo. banc Nov. 10, 2015):
Holding: Even though Juvenile had been adjudicated guilty of first-degree attempted rape and was required to register on the juvenile sex offender registry, Sec. 211.425, where the juvenile court did not order that Juvenile register on the adult registry, his claim that requiring juveniles to register for life on the adult registry is unconstitutional is not ripe of judicial review; since there has been no attempt to compel Juvenile to register on the adult registry, there is no immediate, concrete dispute at this time; Juvenile's claim dismissed without prejudice.

Dunivan v. State, 2015 WL 5092055 (Mo. banc July 21, 2015):
Even though County Prosecutor was representing the State in an action by Petitioner to be removed from the sex offender registry, the Attorney General had an absolute right to intervene under Rule 52.12(1)(a) and Sec. 27.060, which permits the Attorney General to appear in any proceeding in which the State's interests are involved; further, the Missouri Highway Patrol had a right to intervene pursuant to Rule 52.12(a)(2) because

MSHP has an interest relating to the subject of the action due to its role in maintaining the sex offender registry that is not represented adequately by County Prosecutor.
Facts: Petitioner, a sex offender, filed a petition to be removed from the sex offender registry. The County Prosecutor was representing the State, when the Attorney General and MSHP sought to intervene. The circuit court denied the motion to intervene.
Holding: Rule 52.12(a)(1) allows anyone to intervene "when a statute of this state confers an unconditional right to intervene." Sec. 27.060 allows the Attorney General to "appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved." The State has an interest in whether Petitioner is removed from the registry. As a result, 27.060 gives Attorney General the unconditional statutory right to intervene. Rule 52.12(a)(2) allows intervention where a party has an interest in the subject matter of the action, that the ability to protect that interest is impaired, and that the existing parties are inadequately representing the applicant's interests. Here, MSHP has an interest because it maintains the registry. Further, County Prosecutor did not adequately represent MSHP's interests because County Prosecutor was not asserting that Petitioner had an independent obligation to register under federal law. MSHP is allowed to intervene.

State v. Johnson, 2015 WL 7455477 (Mo. App. E.D. Nov. 24, 2015):
(1) Sec. 558.018.5(3), which provides that a Defendant may be classified as a predatory sexual offender if he "has committed" first-degree statutory rape or sodomy against more than one victim, does not require that the acts be prior to the instant case; the acts in the instant case count under the statute; (2) even though Sec. 558.021 requires that a finding of predatory sexual offender be made before submission to the jury, the trial court did not plainly err in finding this at sentencing because Defendant waived jury sentencing and also was not sentenced to a higher sentence than allowed under the unenhanced range; (3) to the extent that Secs. 558.018.5 and 558.021 require a court, rather than a jury, make factual findings that increase Defendant's minimum sentence, the statutes are subject to attack under Alleyne v. U.S., 133 S.Ct. 2151 (2013)(holding that any fact that increases a defendant's mandatory minimum sentence for a crime must be submitted to a jury and proven beyond a reasonable doubt).
Facts: Defendant was charged with various sex offenses against three children. After submission to the jury, the trial court, at sentencing, found Defendant to be a predatory sexual offender, Sec. 558.018.5(3), because of the acts against three children, and sentenced him to mandatory life imprisonment with possibility of parole after 25 years.
Holding: (1) Sec. 558.018.5(3) provides that a person may be classified as a predatory sexual offender where he "has committed an act or acts against more than one victim which would constitute [first-degree statutory rape or first-degree statutory sodomy], whether or not defendant was charged with an additional offense or offenses as a result." Defendant argues that this section applies only to *prior* criminal conduct based on the word "has." However, "has" does not refer only to conduct before the crimes charged. Sections 558.018.5(1) and (2) deal with previously committed convictions or conduct. To avoid rendering 558.018.5(3) meaningless, it must be interpreted to include acts of criminal sexual conduct against more than one victim, including charges in the instant case. **(2)** Sec. 558.021.2 requires the trial court make a finding of predatory sexual offender prior to submission of the case to the jury. Here, the trial court did not make the

finding until sentencing. However, this was not plain error under the facts here. While a predatory sexual offender loses the right to jury sentencing, here, Defendant expressly waived his right to jury sentencing. Further, Defendant was not sentenced to a higher sentence than he could have received under the "unenhanced" statutory range. Even though he received a mandatory life sentence, he could have received this anyway, and he will be subject to parole after 25 years, which is actually less than the 85% (25 and one-half) he would have had to serve under the "unenhanced range" for the same life sentence. **(3)** The court does not decide the constitutionality of 558.018 and 558.021 under *Alleyne* here. *Alleyne* requires that any fact that increases a defendant's mandatory minimum sentence must be submitted to a jury and proven beyond a reasonable doubt. Sec. 558.021.1(3) requires a court, instead of a jury, make the predatory sexual offender finding. Here, the jury had determined that Defendant committed acts against multiple victims, because the trial court did not decide predatory sexual offender until sentencing (contrary to statute). But "in similar circumstances if a trial judge follows the statute and makes a finding before submission [to the jury], the resulting sentence would be subject to attack under *Alleyne*."

Keeney v. Fitch, 2015 WL 1384002 (Mo. App. E.D. March 24, 2015):
Even though Defendant pleaded guilty to attempted sexual misconduct for consensual homosexual acts in 1988, Defendant is not required to register as a sex offender because the U.S. Supreme Court subsequently held the type of statute under which Defendant was convicted to be unconstitutional and Missouri has repealed the statute.
Facts: In 1988, Defendant pleaded guilty to attempted sexual misconduct following a sting operation regarding consensual homosexual activity at a rest stop. In 2010, Missouri notified him that he was required to register as a sex offender. Defendant brought a declaratory judgment action to declare that he was not required to register.
Holding: The offense to which Defendant pleaded guilty is no longer a criminal offense. *Lawrence v. Texas*, 539 U.S. 558 (2003), held consensual same-sex conduct cannot be criminalized. Further, Missouri has repealed the statute under which Defendant pleaded guilty. Since same-sex conduct is no longer a criminal offense in Missouri, there is no logical reason to require Defendant to register as a sex offender. The State has submitted an affidavit in 2014 from the Officer who arrested Defendant, claiming that Defendant sexually touched the Officer, and thus, should be considered guilty of other sex offenses. The State's argument and affidavit are disingenuous, however, because the Officer was trying to get Defendant to commit an act to arrest him in the sting operation. Moreover, even assuming that Defendant could have been charged with other offenses, he wasn't and can't be now. The State cannot expand Defendant's alleged criminal conduct now to justify making him register. There is no procedure available to Defendant to vacate his SIS. However, he can use declaratory judgment to declare that he shall not be required to register and that his name be removed from the registry.

Horton v. State, 2015 WL 4082885 (Mo. App. S.D. April 13, 2015):
Holding: Even though Defendant was no longer required to register as a sex offender under the federal SORNA (because SORNA only required registration for a limited number of years), Defendant was still required to register under Missouri's SORA

because Sec. 589.400.1(7) requires registration of anyone who "has been" required to register under SORNA.

State v. Wilder, 2015 WL 263579 (Mo. App. S.D. Jan. 16, 2015):
Even though Defendant received notice in 1984 in California that he had to register as a sex offender, evidence was insufficient to prove failure to register as a sex offender where Defendant moved to Missouri in 1985 and was never notified he had to register here until he was arrested for another offense in 2010.
Facts: Defendant was convicted of a sex offense in California in 1979 and informed by California that he needed to register in 1984. Defendant moved to Missouri in 1985. Missouri had no registration requirement at that time. Defendant was arrested for another offense in 2010, and informed at that time that he had to register. He has registered ever since. He was charged with failure to register before 2010.
Holding: The evidence is insufficient to prove that Defendant *knowingly* failed to register. There was not sufficient circumstantial evidence to show Defendant's mental state. The State argues that failure to register is a strict liability offense, but Southern District "rejects this invitation" to find such. Conviction reversed.

*** Grady v. North Carolina, ___ U.S. ___, 2015 WL 1400850 (U.S. March 30, 2015):**
Holding: (1) Requiring sex offenders to submit to GPS monitoring is a "search" under the Fourth Amendment, regardless of whether such requirement is "civil" or criminal, because attaching a GPS device to the body is a physical intrusion of a protected area; and (2) Fourth Amendment requires such a search be "reasonable" under the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.

U.S. v. Ramos, 2014 WL 3938590 (1st Cir. 2014):
Holding: Even though Defendant was convicted of aiding and abetting production of child pornography, supervised release condition prohibiting internet access without probation officer's permission was not reasonably necessary to achieve sentencing goals, where Defendant had no history of improper internet use and the internet was not used in the instant conviction.

U.S. v. Gonzalez-Medina, 2014 WL 2977128 (5th Cir. 2014):
Holding: Circumstance-specific, rather than categorical approach, applies to determination whether a sex offense complied with the four-year age differential of SORNA, for registration requirements for offenses involving consensual sexual conduct if victim was at least 13 and Defendant was no more than four years older.

U.S. v. Segura, 95 Crim. L. Rep. 50 (5th Cir. 3/31/14):
Holding: Defendant's prior conviction for failure to register as sex offender doesn't qualify as a sex offense for purposes of sentencing enhancement under USSG 5D1.2(b)(2).

U.S. v. Fernandez, 96 Crim. L. Rep. 491 (5th Cir. 1/14/15):
Holding: Court abused discretion in ordering as supervised release condition that Defendant convicted of failure to register be required to have installed on his computer software to monitor/block sex websites; the condition bore no relation to the nature or circumstance of the offense or Defendant's history when he did not use a computer in his crime; concern about recidivism or using a computer in a future crime does not justify the condition.

U.S. v. Baker, 2014 WL 2736016 (7th Cir. 2014):
Holding: Even though Defendant had used a pseudonym on an Internet dating website, this did not support special condition of supervised release of computer monitoring for failure to register as sex offender under SORNA.

U.S. v. Brewer, 95 Crim. L. Rep. 686 (8th Cir. 9/10/14):
Holding: Attorney General's interim rule making reporting requirements of SORNA retroactive is invalid because it failed to follow the notice and comment procedure of the Administrative Procedure Act; (2) Defendant's conviction for failure to register for a sex offense that was pre-SORNA is reversed.

U.S. v. Gnirke, 96 Crim. L. Rep. 385 (9th Cir. 1/2/15):
Holding: Supervised release term prohibiting sex defendant from possessing any sexually explicit content or patronizing a business where such content is available violated First Amendment right to access nonpornographic depictions of adults; ban would prohibit Defendant from accessing many R-rated movies or patronizing businesses like Wal-Mart or libraries that may sell or loan such movies.

Doe v. Harris, 96 Crim. L. Rep. 225 (9th Cir. 11/18/14):
Holding: Calif. law that requires sex offenders to disclose their email address, screen names and other internet identifiers to law enforcement (who may then post or disclose it to others) likely violates First Amendment; sex offenders have right to anonymous speech on topics of public importance.

U.S. v. White, 2015 WL 1516385 (10th Cir. 2015):
Holding: The term "offense" listed in SORNA defining sex offender tiers refers to generic crimes, not Defendant's particular conduct; thus, the categorical approach is used to compare Defendant's prior sex offense and determine the tier level, combined with a circumstance-specific approach with respect to victim's age.

U.S. v. Black, 96 Crim. L. Rep. 339 (10th Cir. 12/9/14):
Holding: SORNA's "four year" age difference requirement between a defendant and victim for underage consensual sex means the defendant must be more than 48 months older (1,461 days older) than the underage sex partner; here, defendant argued that because he was 18 at the time of his offense, and his sex partner was 14, he was not "more than 4 years older than the victim" within the meaning of SORNA; however, there was a 55-month difference in their ages.

Does 1-5 v. Cooper, 2014 WL 4198389 (M.D. N.C. 2014):
Holding: Sex offender statute limiting where offenders can be was vague and failed to give adequate notice of where offenders were prohibited from being; among other provisions, statute excluded offenders from being in "places" where "regularly scheduled educational, recreational, or social programs" were conducted.

In re Taylor, 96 Crim. L. Rep. 620 (Cal. 3/2/15):
Holding: Law prohibiting sex offenders from living within 2000 feet of schools or parks is unconstitutional as applied to offenders in San Diego County because the restriction has left many offenders homeless since 97% of the county is off-limits; the law bears no rational relationship to protecting children and is arbitrary, unreasonable and oppressive because by making offenders homeless, the law makes it difficult for them to be tracked and to have access to social services, rehabilitation or family.

State v. Edwards, 2014 WL 928796 (Conn. 2014):
Holding: Even though Defendant was evicted from a residence but was still at that location living outside in a truck, this would not be a change of address for sex offender registration purposes; in order to show that Defendant violated probation by not notifying State of change of address, State had to prove that Defendant was living somewhere else.

State v. Dull, 97 Crim. L. Rep. 297 (Kan. 6/5/15):
Holding: State law requiring mandatory lifetime supervision of sex offenders violates 8th Amendment when applied to Juveniles; Juveniles are different under *Graham* (U.S. 2010), *Roper* (U.S. 2005) and *Miller* (U.S. 2012).

Department of Public Safety & Corrections v. Doe, 95 Crim. L. Rep. 538 (Md. 6/30/14):
Holding: Where Maryland had held that requiring certain sex offenders to register was ex post facto under the Maryland constitution, Maryland courts had the power to order their names be removed from the registry and this was consistent with the federal SORNA.

Moe v. Sex Offender Registry Bd., 2014 WL 1188108 (Mass. 2014):
Holding: Retroactive application of law requiring publication on internet of sex Offenders who had previously not been published violated Offenders' due process rights under State Constitution; public identification of the persons posed serious adverse consequences and was a new legal consequence to events completed on or before the new law.

Stallworth v. State, 2015 WL 1737300 (Miss. 2015):
Holding: Where Defendant's foreign-state sex conviction had been expunged, he was no longer required to register as sex offender.

Doe v. State, 96 Crim. L. Rep. 558 (N.H. 2/12/15):
Holding: Sex registration scheme which mandated lifetime registration without any judicial appeal was ex post facto because it was punitive; possibility of lifetime

registration is constitutional only if the registrant has an opportunity for judicial review of whether continued registration is necessary.

Riley v. N.J. State Parole Bd., 96 Crim. L. Rep. 9 (N.J. 9/22/14):
Holding: Statute requiring sex offenders to wear GPS monitor cannot be applied to Offenders who committed their crimes before the GPS law was enacted; statute is ex post facto because it imposes additional punishment to an already completed crime.

People v. Diack, 96 Crim. L. Rep. 583 (N.Y. 2/17/15):
Holding: Municipal ordinance restricting where sex offenders may live was preempted by State law.

In re J.B., 96 Crim. L. Rep. 350 (Pa. 12/29/14):
Holding: Automatic lifetime registration and supervision of Juvenile sex offenders violates due process in light of evidence showing Juveniles have low recidivism rates and *Miller v. Alabama*'s (U.S. 2012) direction that juvenile factors be considered.

Murry v. Com., 95 Crim. L. Rep. 691 (Va. 9/12/14):
Holding: A condition of probation requiring sex offender to consent to warrantless searches for the rest of his life violated 4th Amendment; such a provision would allow "harassing searches" that are unrelated to Offender's rehabilitation or public safety.

People v. Tirey, 2014 WL 1653278 (Cal. App. 2014):
Holding: Statute which allowed sex offenders who had sexual intercourse with children under 10 to obtain a certificate of rehabilitation but did not allow offenders who committed lewd acts with children under 14 to obtain a certificate violated Equal Protection.

Devine v. Annucci, 2014 WL 4912773 (N.Y. Sup. 2014):
Holding: Application of sex offender, statute which was enacted after Defendant's offense but before he was released from prison, which prohibited Defendant from living in his home and prohibited him from going to large segments of his community, was punitive in effect (rather than civil) and thus violated ex post facto.

Coppolino v. Noonan, 2014 WL 5140043 (Pa. Comm. Ct. 2014):
Holding: Statute that required sex offenders to update their vehicle registration or change of address, including for temporary lodging, in person within three business days was punitive (not civil), and thus, was ex post facto as applied to Defendant who was convicted prior to the statute.

Simon v. State, 2014 WL 3734190 (Tex. App. 2014):
Holding: Trial court lacked jurisdiction to modify Defendant's probation to require sex offender counseling before receiving the Court of Appeals' mandate affirming the conviction; therefore, the court could not revoke probation for failure to do the counseling.

State v. Trammell, 2014 WL 3565667 (N.M. App. 2014):
Holding: State caselaw rule that a defendant must be advised by counsel that he will have to register as a sex offender was not a "new rule," and therefore, was retroactive.

Sexual Predator

In the Matter of the Care and Treatment of Murphy, 2015 WL 3876588 (Mo. App. E.D. June 23, 2015):
The 2013 amendment to the definition of "sexually violent offense," Sec. 632.480(4), which listed additional offenses as qualifying offenses for civil commitment, can be applied to persons who were scheduled to be released from prison before the amendment, because the amendment can be applied retroactively since it does not impose new duties or obligations but merely considers the prior offense as the basis for future decision-making by the State.
Facts: In 1983, Defendant was convicted of first-degree sexual abuse. In April 2013, when Defendant was to be released from prison, the State filed a petition to have him committed as an SVP. In July 2013, House Bill 215 became law, and amended the definition of "sexually violent offense" to include first-degree sexual abuse. Defendant moved to dismiss on grounds that the new law could not be applied retroactively to him.
Holding: A retroactive law is unconstitutionally retrospective if it imposes an affirmative obligation or duty on a person based solely on conduct preceding the effective date of the law, but is not unconstitutionally retrospective if the law considers past conduct only as a basis for future decision-making by the State. Here, the law does not impose new obligation or duties on Defendant solely because of his prior offense. Instead, it merely considers his past offense as the basis for future decision-making by the State in deciding whether to civilly commit him.

State v. Kerns, No. SD31616 (Mo. App. S.D. 12/21/12):
Holding: Where the written sentence and judgment stated that Defendant had "pleaded guilty" but he actually had been convicted at a trial, this is a clerical error that can be corrected under Rule 29.12.

State ex rel. Whitaker v. Satterfield, No. SD31856 (Mo. App. S.D. 11/30/12):
The 1985 version of the Class C felony of sexual assault in the first degree is not a "sexually violent offense" as defined in the SVP law to allow for commitment as an SVP.
Facts: As relevant here, the State sought to commit Defendant as an SVP based on a 1985 conviction for sexual assault in the first degree. Defendant sought a writ of prohibition and claimed that this was not a qualifying offense under the SVP law.
Holding: The SVP law allows for civil commitment of persons who, as relevant here, have committed a prior "sexually violent offense." Sec. 632.480(4) defines sexually violent offense as "the felonies of forcible rape, rape, statutory rape in the first degree … [other listed felonies and] sexual assault…." Defendant was convicted of the Class C felony of sexual assault in the first degree as defined in Sec. 566.040 RSMo. 1985, which is not specifically listed in Sec. 632.480(4). The listed offenses are specific and precise and use the nomenclature of Missouri's criminal statutes. If the State were correct that

Sec. 632.480(4) uses generic terms to define categories, the inclusion of broad terms like "rape" would make much of the rest of the litany in Sec. 632.480(4) redundant and unnecessary. Further, as the sexual assault statute existed in 1985, it did not require proof of lack of consent by the victim. In 1995, the offense of "sexual assault" was changed to require proof of lack of consent. The 1995 offense is substantively different from the 1985 offense of which Defendant was convicted. The SVP law was enacted in 1998. The 1985 offense is not a qualifying offense.

In re Care and Treatment of Bradley, 2014 WL 2723014 (Mo. App. W.D. June 17, 2014):

(1) The 72-hour period for holding a probable cause hearing under SVP law, Sec. 632.489.1, is not jurisdictional, but can be waived by counsel and does not require waiver by Defendant personally; and (2) Probate court erred in SVP trial in holding that the multidisciplinary team assessment report (which found that Defendant was not an SVP) was inadmissible under the SVP law, Sec. 632.483.5.

Holding: (1) Sec. 632.489.1 provides a 72-hour period during which a Defendant is entitled to a hearing to determine if there is probable cause to believe he is an SVP. There is no language in the statute, however, that a case must be dismissed if such hearing is not held within 72 hours. Failure to comply with the statute is not "jurisdictional," but mere error, which can be waived. Here, Defendant's counsel consented to holding a hearing outside the 72-hour period. Even though Defendant contends on appeal that only *Defendant personally* could waive the time limit, this is a scheduling matter that counsel can waive. (2) At trial, Defendant sought to introduce the multidisciplinary team report (MDT) which found that Defendant was not an SVP. The State claimed the report was not admissible under Sec. 632.483.5. That section, however, concerns that the *prosecutor review committee*, and states that that committee's determination is not admissible. That section does not foreclose the admission of the *MDT committee* report. The State argues on appeal that the MDT report was hearsay. This argument was not raised below, however, so the appellate court does not address it. "We do not mean to express any opinion on the report's admissibility, other than to hold that is was not *in*admissible by virtue of Sec. 632.483.5." Defendant was prejudiced by exclusion of the report because Defendant's expert was a "paid expert" and the MDT members "were not paid to represent any particular position." Also, even though another expert for Defendant was not paid, it is not clear that this expert did the same type of evaluation as the MDT members. New trial ordered.

In re: Matter of Robertson v. State, No. WD74623 (Mo. App. W.D. 10/30/12):

The offense of deviate sexual assault in the first degree under Sec. 566.070 RSMo. 1986 is not a qualifying offense to allow for SVP commitment.

Facts: The State sought to have Defendant committed as an SVP because of a 1995 conviction for deviate sexual assault in the first degree. The State argued this was a "sexually violent offense" under Sec. 632.480(4). The probate court found that this offense was not a qualifying offense and dismissed the commitment case. The State appealed.

Holding: Sec. 632.480(4) defines "sexually violent offense" as various listed offenses and "deviate sexual assault." Sec. 632.480(4) was enacted in 1998 and effective in 1999.

Defendant pleaded guilty in 1995 to sexual assault in the first degree which was defined under the 1986 statute as "deviate sexual intercourse with another person to whom he is not married and who is … 14 or 15 years old." Prior to enactment of the SVP law, the Legislature changed the definition of deviate sexual assault to be when a person "has deviate sexual intercourse with another person knowing that he does so without that person's consent." This was the definition in 1998. The offense for which Defendant was convicted in 1995 did not have an element of lack of consent, and is not the same offense that was in effect when the SVP law was passed in 1998. That State argues that because "deviate sexual assault" is a listed offense in Sec. 632.480(4), it covers Defendant's offense. However, the SVP statute does not use generic classifications, but instead specifically and precisely defines the eligible offenses. "Deviate sexual assault in the first degree" is not one of the listed offenses. If the State were correct that the SVP law uses generic categories of offenses, then much of the specific offenses listed would be redundant and unnecessary. The Legislature was aware of the technical definitions of the offenses when it wrote the SVP law in 1998. The court must follow the statute.

In the Matter of the Care and Treatment of Fogle v. Koster, No. WD73815 (Mo. App. W.D. 8/28/12):
Holding: Even though an SVP court has statutory authority to impose special conditions on the conditional release of an SVP Defendant under Sec. 632.505.3, the court cannot impose special conditions on a Defendant's commitment or treatment to the Department of Mental Health; thus, court could not order DMH to allow Defendant to have art supplies during the course of his treatment.

U.S. v. Antone, 2014 WL 407390 (4th Cir. 2014):
Holding: Even though Defendant had antisocial personality disorder and polysubstance abuse, where he did not have any sexual misconduct during his extended incarceration, did not have disciplinary violations, successfully completed educational and treatment programs, and expressed remorse for his past acts, there was not clear and convincing evidence that Defendant was a sexually dangerous person subject to civil commitment as sexually violent predator.

U.S. v. Hall, 2012 WL 34481 (4th Cir. 2012):
Holding: Psychologist's testimony that offender would not have serious difficulty refraining from child molestation if released supported determination that offender was not a sexually dangerous person, making civil commitment unwarranted.

U.S. v. Turner, 2012 WL 3185954 (9th Cir. 2012):
Holding: Rule of lenity required a finding that supervised release was not tolled during the time between expiration of a sentence and a decision regarding civil commitment under the Adam Walsh Act.

U.S. v. Timms, 2011 WL 2610566 (E.D. N.C. 2011):
Holding: Defendant's due process rights were violated where Gov't did not give a speedy hearing on effort to commit him as SVP under Adam Walsh Act; Gov't had in its

possession information that Defendant was sexually dangerous during his entire incarceration, but waited until he completed his sentence to try to commit him.

People v. Gonzales, 92 Crim. L. Rep. 787 (Cal. 3/18/13):
Holding: Even though Defendant was seeing a therapist as a condition of his parole, the statutory doctor-patient privilege applied and State could not obtain the therapy records to use in SVP proceeding against Defendant.

In re Lucas, 2012 WL 686713 (Cal. 2012):
Holding: A showing of "good cause" for the Board of Parole Hearings to issue a 45-day hold to extend the custody of a possible sexually violent predator means a showing that good cause justified a delay in filing the petition beyond the inmate's schedule release date.

State v. Phillips, 2013 WL 1338042 (Fla. 2013):
Holding: Where a sex offender's sentence on a sex offense had legally expired once a corrected award of gain time credit was applied, State could not file an SVP petition against him and court lacked jurisdiction to proceed with an SVP commitment proceeding against him.

People v. Bingham, 2014 WL 2134387 (Ill. 2014):
Holding: Even though Defendant, while on probation for a sex crime, grabbed a teacher's breast through her clothing; had previously touched the butt of a fellow group home resident; and had 12 incidents of prior sexual misconduct involving people of approximately the same age as him, the details of which were unknown, the evidence was insufficient to support an SVP commitment based on a substantial probability that Defendant would commit a sex crime in the future, if not confined.

In re Geltz, 94 Crim. L. Rep. 366 (Iowa 12/6/13):
Holding: A juvenile adjudication on a charge of sexual abuse does not qualify as a predicate "conviction" that can trigger civil commitment under Iowa's SVP law.

In re Detention of Stenzel, 92 Crim. L. Rep. 734 (Iowa 3/1/13):
Holding: In SVP case, expert should not have been allowed to testify that a person has already been carefully screened for sex offender status before SVP proceedings are instituted because this is unduly prejudicial in that it may prompt jury to find SVP status due to knowledge of this screening.

In re Ontiberos, 2012 WL 3537845 (Kan. 2012):
Holding: *Strickland* test applies to claims of ineffective counsel in SVP proceedings.

In re Santos, 90 Crim. L. Rep. 791 (Mass. 2/22/12):
Holding: A Massachusetts law that provides for the admission of state experts' reports in proceedings to re-evaluate an individual's commitment as a sexually dangerous person must be construed to allow admission of reports from experts hired by the committed person as well.

Com. v. Suave, 89 Crim. L. Rep. 858, 2011 WL 4090464 (Mass. 9/16/11):
Holding: Even though Defendant repeatedly exposed himself to women, this was not a "menace" under the SVP statute because it would cause only a generalized fear or some other shock or alarm, not a reasonable fear of sexual contact.

In re Civil Commitment of Ince, 2014 WL 1628112 (Minn. 2014):
Holding: Remand for re-evaluation of whether SVP Defendant was "highly likely" to reoffend in future was required, where Defendant had been living successfully in the community for eight months.

In re Civil Commitment of Lonergan, 2012 WL 1192168 (Minn. 2012):
Holding: A blanket prohibition against defendants' motions for relief from judgment of commitment by sexually dangerous person or sexually psychopathic personality was error.

In re D.Y., 95 Crim. L. Rep. 562 (N.J. 7/24/14):
Holding: Defendant has right to represent himself in an SVP proceeding.

State v. Donald DD, 2014 WL 5430562 (N.Y. 2014):
Holding: SVP commitment cannot be based solely on a diagnosis of antisocial personality disorder, together with evidence of sex crimes.

Matter of State v. Enrique D., 94 Crim. L. Rep. 157 (N.Y. 10/22/13):
Holding: SVP Defendant, whom State was seeking to commit on grounds that he could to control his sexual behavior toward women, should have been allowed to call his girlfriend to testify that he can control his behavior; the pertinent issue was whether the witness – whether expert or lay – has material and relevant evidence to offer on the issues to be resolved.

In re Way and In re Gonzalez, 95 Crim. L. Rep. 692 (S.C. 9/3/14):
Holding: In SVP proceeding, State cannot question Defendant about an evaluation by an uncalled defense expert or urge jury to draw an adverse inference from Defendant's failure to call the expert; the probative value of such questioning and argument is outweighed by the prejudicial effect.

State v. Miller, 2013 WL 3048635 (S.C. 2013):
Holding: Trial court lacked authority to toll Defendant's probation for his criminal offenses until he was released from involuntary SVP commitment; tolling of probation must be based on a violation of a condition of probation or a statutory directive.

In re Commitment of Bohannan, 2012 WL 3800317 (Tex. 2012):
Holding: Even though proffered defense expert in SVP civil commitment case was not a psychologist or medical doctor, she should have been allowed to testify where she had a Ph.D. in family science and therapy, was a sex offender treatment provider, and the SVP statute did not require that an expert be limited to psychologists or medical doctors.

People v. Jernigan, 2014 WL 3362448 (Cal. App. 2014):
Holding: Prior offense of attempting to commit forcible oral copulation was not a "sexually violent offense" under SVP law.

People v. Smith, 157 Cal. Rptr.3d 208 (Cal. App. 2013):
Holding: Defendant's petition for SVP release should not have been dismissed without a hearing as frivolous, where Defendant alleged that his paraphilia diagnosis was currently in dispute and that the hospital's plan to change to another treatment model would prevent him from completing a program that would lead to his release.

People v. Paniagua, 2012 WL 4127801 (Cal. App. 2012):
Holding: Admission in SVP civil commitment trial of (false) evidence of a Homeland Security document that Defendant had flown from Thailand on a flight that did not actually exist was prejudicial because Thailand is perceived as a place where pedophiles go to have sex with children.

People v. Shazier, 2012 WL 6734681 (Cal. App. 2012):
Holding: Prosecutor's closing argument in SVP case asking jurors to imagine what their family, friends, co-workers or the community would think if they turned loose a dangerous predator and that they would have to "explain their verdict" to people denied Defendant due process.

People v. Coyne, 2014 WL 4402593 (Ill. App. 2014):
Holding: The SVP Act authorized appointment of a non-testifying consulting expert for defense whose identity, work product and opinions were not discoverable absent extraordinary circumstances.

In re Commitment of Clark, 2014 WL 133040 and 2014 WL 2922491 (Ill. App. 2014):
Holding: An SVP Defendant has right to issue subpoena duces tecum, prior to probable cause hearing on State's petition for civil commitment, to the evaluator who recommended SVP commitment.

People v. Grant, 2015 WL 1248044 (Ill. App. 2015):
Holding: Defendant's due process rights were violated in SVP proceeding by court appointment of expert of State's choice and denial of expert of Defendant's choice; the SVP Act did not contemplate an expert of State's choosing.

In re Civil Commitment of Spicer, 2014 WL 4056029 (Minn. App. 2014):
Holding: Trial court's findings lacked specificity to determine whether Defendant should be committed as SVP; the findings were merely recitations of evidence presented at trial, were conclusory and were not meaningfully tied to the conclusions of law.

State v. Raul L., 2014 WL 2503745 (N.Y. App. 2014):
Holding: Even though appointed counsel was allowed to withdraw due to inadequate time to prepare, where Defendant in SVP proceeding did not express any desire to go pro se until after court told him that appointing new counsel would delay trial by four or more months, Defendant's waiver of counsel was not unequivocal and was not voluntary.

State v. Calhoun, 2013 WL 1849064 (N.Y. App. 2013):
Holding: Even though Defendant (potential SVP candidate) was nearing the end of his state sentence, where he was then to be transferred to federal custody to serve a 20-year federal sex sentence, state court had no jurisdiction to commence SVP proceedings because by the time Defendant finishes his federal sentence, he might no longer present a danger of committing future sex crimes.

In re Commitment of Richard, 2014 WL 625427 (Wisc. App. 2014):
Holding: Where petitioner who had been committed as SVP filed a petition for release alleging he was no longer a sexually violent predator and attached a psychological evaluation showing new research that he was not likely to re-offend, petition was entitled to a hearing.

Statute of Limitations

State v. Mixon, No. SC92230 (Mo. banc 11/13/12):
Holding: Sec. 556.036.5 RSMo., which provides that a prosecution is commenced for a felony when a complaint is filed, does not violate Art. I, Sec. 17 Mo.Const. Thus, the applicable statute of limitations was tolled when the State filed a complaint against Defendant, even though there was not an information or indictment prior to expiration of the statute of limitations.

Dorris v. State, No. SC91652 (Mo. banc 1/17/12):
Where Movant files a 24.035 or 29.15 motion out of time (and an exception to the time limits does not apply), this is a complete waiver of postconviction relief, even if the State does not contest the time limits; the time limits cannot be waived in the motion court or on appeal.
Facts: Various 24.035 and 29.15 movants filed their *pro se* motions late.
Holding: Rules 24.035(b) and 29.15(b) provide that failure to file a motion within the time provided by the rules shall be a "complete waiver" of the right to proceed under the Rules and a "complete waiver" of any claim that could be raised in a motion filed under the Rules. A movant must allege facts establishing that his motion is timely filed in addition to proving his substantive claims. A movant can show his motion was timely filed by (1) having a file-stamp on his *pro se* motion which shows it was timely filed; (2) alleging and proving by a preponderance of the evidence in his motion that he falls within a recognized exception to the time limits; or (3) alleging and proving by a preponderance of the evidence that the court misfiled his motion. It is the court's duty to enforce the time limits even if the State does not raise them. The State cannot waive a movant's noncompliance with the time limits. The time limits of Rules 24.035 and 29.15 are not

the same as statutes of limitations (which can be waived) because the postconvction rules are concerned with upholding the "finality" of judgments, not just ensuring speedy filing of claims.

State v. Wright, 2015 WL 8780192 (Mo. App. E.D. Dec. 15, 2015):
Possession of child pornography is a "continuing course of conduct" under Sec. 556.036.4; therefore, the three-year statute of limitations does not begin to run until possession terminates, i.e., when police actually seize Defendant's computer.
Facts: In July 2010, police identified an IP address offering child pornography, and learned the address was linked to Defendant. In September 2010, police seized Defendant's computer pursuant to a warrant. Slightly less than three years later, in August 2013, Defendant was charged with possession of child pornography. Defendant moved to dismiss on grounds that the three-year statute of limitation had expired. The trial court dismissed. The State appealed.
Holding: Sec. 556.036.2(1) provides that a prosecution for a felony must be commenced within three years of a crime. However, 556.036.4 provides an exception for offenses prohibiting a "continuing course of conduct." There, the statute of limitations starts to run "when the course of conduct or the person's complicity therein is terminated." It is a matter of first impression whether possession of child pornography is a continuing course of conduct for purposes of 556.036.4. The child pornography statute applies if a person "possesses" child pornography. The term "possess" in the present tense indicates a legislative intent to prohibit an ongoing, continuing act. Possession is a continuing offense because it does not end when the Defendant acquires the pornography, but ends when the possession terminates. Thus, the statute of limitations begins to run when Defendant's possession terminates. Here, possession terminated when police seized his computer in September 2010. The August 2013 charge was within three years of that date, so the statute of limitations had not expired. The court erred in granting the motion to dismiss.

State v. Hudson, No. ED96609-01 (Mo. App. E.D. 11/20/12):
Where after Defendant's trial but while his appeal was pending the Supreme Court declared a portion of the harassment statute as unconstitutionally overbroad, Defendant's conviction under that statute must be set aside because it is plain error to convict under an unconstitutional statute.
Facts: Defendant was convicted of harassment under Sec. 565.090.1(5) for text messages, phone calls and name-calling to an ex-girlfriend. Sec. 565.090.1(5) provided that a person commits the crime of harassment if he knowingly makes repeated unwanted communication to another person. After Defendant's trial but while his appeal was pending, the Supreme Court found in *State v. Vaughn*, 366 S.W.3d 513 (Mo. banc 2012), that Sec. 565.090.1(5) was overbroad under the First Amendment because it criminalized protected speech. Defendant contends that his conviction constitutes plain error.
Holding: Even though Defendant did not raise the constitutional issue in the trial court, plain error results if a person is convicted under an unconstitutional statute. Such a conviction is not merely erroneous, but is illegal and void. Where the law changes after a judgment but before the appellate court renders its decision, the change in law must be followed. Conviction vacated.

Wiley v. State, No. ED96782 (Mo. App. E.D. 3/20/12):
Where Movant gave his 24.035 motion to prison officials for mailing two months before due date and after due date the motion was returned in the mail for insufficient postage, this would constitute extraordinary circumstances beyond Movant's control and allow a late-filing; Movant was entitled to hearing to prove these matters.
Facts: Movant filed a late Rule 24.035 pro se motion and counsel filed an amended motion thereafter. When the State pointed out that the initial pro se motion was late, Movant filed a motion alleging the pro se motion was late due to the actions of prison authorities in mailing it. The motion court dismissed the motion without a hearing.
Holding: An exception to the time limits of Rules 24.035 and 29.15 is when a late filing is "caused by circumstances beyond the control" of Movant. *Howard v. State*, 289 S.W.3d 651 (Mo. App. E.D. 2009), held that actions of prison officials in not properly mailing a Movant's motion can constitute cause to excuse a late filing. Here, Movant's case is similar. Movant alleged that he followed prison procedures in giving his motion to prison authorities to mail two months before its due date. However, after the due date, it was returned for insufficient postage. These facts, if true, would excuse the late filing and Movant should have been granted a hearing on them. The State also claims that Movant was required to raise these timeliness issues in his amended motion; however, the appellate court finds that raising them in the separate motion was sufficient here.

Peeples v. State, No. ED96864 (Mo. App. E.D. 2/14/12):
Where (1) appellate court on direct appeal affirmed some convictions but remanded others for resentencing; (2) Movant subsequently filed a late 29.15 motion regarding the affirmed convictions; and (3) it was unclear from the record when Movant was resentenced on the remanded convictions, the 29.15 motion could be timely regarding the remanded convictions, and further remand was required to determine when sentencing occurred on those counts.
Facts: On August 14, 2009, the appellate court affirmed multiple convictions of appellant/movant, but reversed two counts and ordered different convictions and resentencing on those. Under Rule 29.15(b), appellant/movant had 90 days after the direct appeal mandate to file a 29.15 motion regarding the affirmed counts. He filed the motion too late (in 2010). The motion court ultimately denied relief on the merits. Appellant/Movant appealed.
Holding: The appellate court determines timeliness *sua sponte*. The 29.15 motion is untimely regarding the convictions that were affirmed on direct appeal. However, it is unclear from the record when Movant was resentenced on the two counts that had been remanded. Appellant would have had 180 days after entry of a new judgment on the resentenced counts to bring a 29.15 motion. Since the appellate court is unable to determine when resentencing occurred, it cannot determine if the 29.15 motion is timely regarding the resentenced counts. Case remanded to determine date of resentencing.

Phelps v. State, No. WD73263 (Mo. App. W.D. 11/1/11):
Holding: For purposes of day-counting under Rule 24.035's requirement that a pro se motion be filed within 180 days of delivery to the Department of Corrections, the day of the triggering event (i.e., the day Movant was delivered to the DOC) is not included in

computing the 180 days per Rule 44.01(a), which provides that "in computing any period of time [under the rules] … the day of the act, event, or default after which the designated period of time begins to run is not to be included."

State ex rel. Greufe v. Davis, 2013 WL 4805778 (Mo. App. W.D. 2013):
The statute of limitations for possession of child pornography is three years under the general statute of limitation, Sec. 556.036.2(1), not 30 years under the statute of limitations for sexual offenses, Sec. 556.037.
Facts: In 2008, various images of child pornography were found on Defendant's computer. Three years and two months later, the State charged Defendant with possession of child pornography under Sec. 573.037. Defendant sought a writ of prohibition, contending that the 3-year statute of limitations had expired. The State argued that the 30-year statute of limitations for sexual offenses applied.
Holding: Sec. 556.036.2(1), the general statute of limitations, limits commencement of felony prosecutions to three years. Sec. 556.037, however, provides for a 30-year statute of limitations for "sexual offenses involving a person 18 years of age or under." The State argues that since it is known that the child depicted in the pornography here was under 18, the longer statute applies. However, under the State's argument, a person who possesses child pornography that contains a computer-generated image (non-real child) or a child who cannot be identified would be subject only to the three-year statute – yet the conduct of possessing the images is the same. Further, it is the age of the child at the time the image was created, not the age at the time of possession that is important to the offense. Under Respondent's reasoning, once a child in an image reached 48 years of age, no one possessing the image could be prosecuted for possession. This absurd result could not have been intended by the Legislature. Other cases have held that even though there may be some sexual component to conduct, the offense is not necessarily a "sexual offense" "by its own terms" under Sec. 556.037. Here, the act of possession itself does not involve any sexual conduct on the part of a defendant. The State argues that the offense is "sexual" because it requires Sex Offender Registration, but there are other non-sexual offenses (such as child kidnapping) that also require registration. Writ of prohibition granted with directions to dismiss case.

*** McQuiggin v. Perkins, 93 Crim. L. Rep. 265 (U.S. 5/28/13):**
Holding: Habeas petitioners who miss 1-year deadline under AEDPA may still have their petition heard if they can demonstrate that no reasonable juror would have convicted them after hearing new evidence of "actual innocence" raised in petition.

*** Wood v. Milyard, ___ U.S. ___, 91 Crim. L. Rep. 125 (U.S. 4/24/12):**
Holding: Federal appellate courts reviewing federal habeas claims have authority to raise the federal statute of limitations against a petitioner's petition even though it was not raised by the State, but it is an abuse of discretion for the court to do so where the State affirmatively waived the statute of limitations.

*** Maples v. Thomas, ___ U.S. ___, 90 Crim. L. Rep. 539 (U.S. 1/18/12):**
Holding: Where petitioner's state postconviction counsel abandoned him without telling

him and thus petitioner missed a state postconviction filing deadline, this constituted "cause" to excuse the procedural default for federal habeas purposes.

*** Gonzalez v. Thaler, ___ U.S. ___, 90 Crim. L. Rep. 441 (U.S. 1/10/12):**
Holding: (1) For federal habeas time limit purposes, "for a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires," and (2) habeas statute's requirement that a certificate of appealability identify the constitutional issue worthy of consideration is not jurisdictional.

U.S. v. Grimm, 94 Crim. L. Rep. 331 (2d Cir. 12/9/13):
Holding: Even though payments were made pursuant to a contract that was obtained by a bid-rigging conspiracy, the payments within the prescribed limitations period were not enough to bring the scheme within the limitations period; there is a distinction between regular payments that were made under the influence of a conspiracy, and a course of regular payments that are free from the corrupt intervention of the conspirators.

U.S. v. Praddy, 2013 WL 3884712 (2d Cir. 2013):
Holding: Even though Defendant had a gun more than five years earlier as part of a drug conspiracy, his possession of the gun was not a continuing offense so as to make the 5-year statute of limitations inapplicable; and even though Defendant continued to sell drugs, the notion that his possession of the a gun must be deemed to have continued was a fiction since the gun had in fact been seized by law enforcement and there was no evidence that Defendant had a gun after that.

Rivas v. Fischer, 2012 WL 2686117 (2d Cir. 2012):
Holding: Petitioner qualified for "actual innocence" exception to statute of limitations for federal habeas corpus where he presented a pathologist who testified that time victim was killed would been consistent with Defendant's alibi, which contradicted the State's trial pathologist, who had been the subject of numerous investigations for official misconduct.

U.S. v. Thomas, 93 Crim. L. Rep. 61, 2013 WL 1442489 (3d Cir. 4/10/13):
Holding: Federal prisoners seeking habeas relief under 28 USC 2255 can receive requests to extend the limitations period for relief even before they have filed their substantive claims, unlike state prisoners seeking relief under 28 USC 2254 (2d Circuit has disagrees with this).

Ross v. Varano, 2013 WL 1363525 (3d Cir. 2013):
Holding: Petitioner was entitled to equitable tolling of time to file habeas where his direct appeal appellate attorney misled him as to the status of his appeal, the appellate court's refusal to replace his attorney, and neglect by his attorney including refusal to accept petitioner's calls and misstatements of law.

U.S. v. Carter, 90 Crim. L. Rep. 603 (4th Cir. 1/23/12):
Holding: In a Second Amendment challenge to a statute that makes it a crime for anyone who is a user of or addicted to a controlled substance to possess a firearm, the court remanded the case and demanded the government provide a connection between the law and the governmental interest in protecting the public from gun violence.

Jefferson v. U.S., 2013 WL 4838793 (6th Cir. 2013):
Holding: AEDPA's one-year statute of limitations for claims that could have been discovered through "due diligence," does not require a petitioner to repeatedly seek out evidence that the Gov't had a constitutional duty to disclose; this is particularly so where Gov't assured petitioner that it had fulfilled its disclosure obligations.

Cleveland v. Bradshaw, 2012 WL 3890945 (6th Cir. 2012):
Holding: Petitioner was entitled to equitable tolling of the statute of limitations for his federal habeas petition where he alleged a credible actual innocence claim based on witness recantation, an expert which shortened the time period when the murder could have occurred, and evidence that Defendant could not have returned from another city to the place of the murder in time.

Estremera v. U.S., 93 Crim. L. Rep. 647, 2013 WL 38890210 (7th Cir. 7/30/13):
Holding: Federal time limit for filing federal habeas petition was tolled during time that petitioner was in ad-seg and had no access to law library, because Sec. 2255(f)(2) provides that prisoners who fail to timely file a petition due to a government-initiated "impediment" must be given one-year from time impediment was lifted to file.

U.S. v. Hagler, 92 Crim. L. Rep. 233 (7th Cir. 11/21/12):
Holding: 18 USC 3297, which resets the limitations period for a federal crime "in a case in which DNA testing implicates an identified person," does not restart the limitations clock where the DNA testing produced a partial profile that implicated dozens of people.

U.S. v. Turner, 2012 WL 3185954 (9th Cir. 2012):
Holding: Rule of lenity required a finding that supervised release was not tolled during the time between expiration of a sentence and a decision regarding civil commitment under the Adam Walsh Act.

U.S. v. Rojas, 93 Crim. L. Rep. 511 (11th Cir. 6/20/13):
Holding: Statute of limitations for federal marriage fraud starts on day of Defendant's wedding, not the date immigration authorities first become aware of the fraud.

U.S. v. Coutentos, 2011 WL 3477190 (8th Cir. 2011):
Holding: Trial counsel ineffective in failing to assert statute of limitations defense to child pornography charge.

Rudin v. Myles, 2015 WL 1019959 (9th Cir. 2015):
Holding: Even though Petitioner knew for three years that her habeas counsel had abandoned her by failing to file a postconviction petition in state court, she was entitled

to equitable tolling where she was affirmatively misled by the court's finding of extraordinary circumstances that would extend the one-year deadline and by the State's failure to question timeliness.

Lee v. Lampert, 89 Crim. L. Rep. 720 (9th Cir. 8/2/11):
Holding: An "actual innocence" exception applies to one-year federal statute of limitations for filing federal habeas petition.

Doe v. Busby, 90 Crim. L. Rep. 165 (9th Cir. 10/24/11):
Holding: Even though Petitioner's retained habeas counsel had apparently done nothing to file a habeas petition for a long time, Petitioner was still entitled to equitable tolling of the statute of limitations because a lay person isn't in a position to know that his attorney's explanations for the delays aren't valid.

World Publishing Co. v. Department of Justice, 90 Crim. L. Rep. 718 (10th Cir. 2/22/12):
Holding: A Freedom of Information Act request seeking mug shots from the U.S. Marshals Service was properly rejected as an "unwarranted invasion" of the subject's personal privacy.

Zack v. Tucker, 2012 WL 34125 (11th Cir. 2012):
Holding: Timely assertion in habeas petition of one claim made all other claims in the petition timely, barring the district court from reviewing the timeliness of claims on an individual basis.

Brown v. Aud, 2012 WL 2711397 (E.D. Mich. 2012):
Holding: Law making trenbolone a controlled substance except when administered to animals was unconstitutionally vague as not giving fair notice of prohibited conduct.

Williams v. Birkett, 2012 WL 4513414 (E.D. Mich. 2012):
Holding: Petitioner was entitled to equitable tolling of the time for filing his habeas petition where he had limited mental abilities and the trial judge in his case gave him confusing and legally erroneous information about when to file a habeas.

Study v. State, 2015 WL 468724 (Ind. 2015):
Holding: The statutory concealment-tolling provision requires a positive act by Defendant that was calculated to conceal the fact that a crime had been committed, not merely concealment of any evidence about the offense or who committed the offense.

Baker v. State, 2013 WL 2450537 (Kan. 2013):
Holding: Where a direct appeal had resulted in a remand for resentencing, the statute of limitations for filing a state postconviction action began to run on the date for filing a notice of appeal from the new sentence on remand; appellate court rejected State's claim that time began to run when appellate court issued its original mandate.

Ata v. Scutt, 662 F.3d 736 (Mich 2011):
Holding: Habeas petitioner was entitled to evidentiary hearing regarding whether his mental incompetence warranted tolling the habeas limitations period because his motion alleged specific enough facts to create a causal link between his untimely petition and his mental incompetence and his allegations were consistent with the record.

Whitehead v. State, 2013 WL 1163919 (Tenn. 2013):
Holding: Time for filing postconviction motion was tolled where direct appeal appellate counsel abandoned petitioner by incorrectly calculating the deadline for filing, failing to notify him that the U.S. Supreme Court had denied cert in his case, failing to tell him that their attorney-client relationship had ended, and failing to send petitioner his file until after the deadline passed.

State v. Kay, 2015 WL 1431877 (Utah 2015):
Holding: Communications fraud is not a "continuing offense" for statute of limitations purposes and is complete the moment a Defendant sends a communication for purposes of fraud.

In re Yung-Cheng Tsai, 2015 WL 2164187 (Wash. 2015):
Holding: *Padilla* was a significant change in law that warranted exemption from one-year time limit for postconviction petition.

Money v. State, 2012 WL 4475332 (Ala. Crim. App. 2012):
Holding: Even though Defendant was properly indicted on felony, he could not be convicted of less-included misdemeanor offense for which the statute of limitations had expired by the time the felony offense was filed.

People v. Milstein, 150 Cal. Rptr.3d 290 (Cal. App. 2012):
Holding: Conspiracy to defraud by false pretenses is subject to 3-year statute of limitations for conspiracies in general, not 4-year statute of limitations for felony offenses for fraud.

Phillips v. State, 2011 WL 2409307 (Tex. Crim. App. 2011):
Holding: Where the statute of limitations had already expired in sex case, it would be ex post facto to apply a new amendment extending the statute of limitations to the Defendant.

Taylor v. Com., 2015 WL 324627 (Va. App. 2015):
Holding: Even though Defendant went to trial on a felony offense, he could not be convicted of a lesser-included misdemeanor where the one-year statute of limitations on misdemeanors had already run when the State commenced the prosecution of greater offense; Defendant was not indicted for the greater offense for more than a year after the offense occurred.

State v. Miller, 2014 WL 1911424 (Wash. App. 2014):
Holding: Change in state caselaw that allowed a court to give concurrent sentences instead of consecutive ones was a significant change in law that allows an exception to the one-year time limit for collateral attack on sentences.

Statutes – Interpretation – Vagueness

State v. Mecham, 470 S.W.3d 744 (Mo. banc Oct. 13, 2015):
The child nonsupport statute, Sec. 568.040, requires the State prove only that Defendant "knowingly" failed to pay support, and does not violate due process because it makes failure to pay "without good cause" an affirmative defense; Due Process allows the burden of proof for an affirmative defense to be placed on the defense.
Facts: Father, charged with child nonsupport under the post-2011 version of Sec. 568.040, claims that the statute violates due process because it makes failure to pay an affirmative defense.
Holding: Sec. 568.040.1, as amended in 2011, provides that a parent commits nonsupport "if such parent knowingly fails to provide adequate support which such parent is legally obligated to provide." Sec. 568.040.3 provides that "[i]nability to provide support for good cause shall be an affirmative defense" which Defendant "has the burden of proving … by a preponderance of the evidence." Sec. 568.040.2(2) provides that "good cause" is "any substantial reason why the defendant is unable to provide adequate support." Under the statute, "without good cause" is not an element of nonsupport. The culpable mental state is "knowingly," and there is no requirement that Defendant act with criminal intent. Since "without good cause" is not an element, the burden of proof is not shifted to Defendant. The Due Process Clause allows the burden of proof for an affirmative defense to be placed on the defense. Hence, the statute is not unconstitutional.

State v. Merritt, 2015 WL 4929765 (Mo. banc Aug. 18, 2015) & State v. McCoy, 2015 WL 4930615 (Mo. banc Aug. 18, 2015):
(1) The "gun amendment," Article I, Sec. 23, is not retroactive because it does not contain any text stating it should be applied retroactively; thus, it does not apply to cases that were pending before its enactment; (2) "strict scrutiny" applied under prior and current Article I, Sec. 23 to review gun claims; and (3) the felon-in-possession law, Sec. 571.070.1(1), survives strict scrutiny because it is narrowly tailored to achieve a compelling governmental interest in public safety and reducing firearm-related crimes; felons are more likely to commit violent and gun related crimes.
Facts: Merritt was convicted of a drug felony in 1986. He was charged with being a felon-in-possession in 2012. The trial court granted a motion to dismiss on grounds that the felon-in-possession law violated the right to bear arms and was a retrospective law. The State appealed. While the appeal was pending, "new" Article I, Sec. 23 took effect. McCoy was convicted of prior felonies, and was charged with being a felon-in-possession in 2012. He filed a motion to dismiss, which was overruled. After he was convicted at trial, he appealed. He contended that the felon-in-possession law violated

the right to bear arms and was retrospective. While the appeal was pending, "new" Article I, Sec. 23 took effect.

Holding: The Court reviews constitutional claims *de novo*. As an initial matter, Defendants' "retrospective law" claims fail because Art. I, Sec. 13's ban on retrospective laws does not apply to criminal laws. Defendants claim the "new" Art. I, Sec. 23, applies to them because their cases were pending (not yet final) when the new amendment took effect. The Missouri rule is that statutory and constitutional provisions are prospective only, unless a different intent is evident beyond question. There is nothing in "new" Art. I, Sec. 23, that says it was intended to be retroactive. As a matter of state law, "strict scrutiny" applied under the "old" Art. I, Sec. 23, as well as the "new" amendment, because laws affecting fundamental rights are reviewed under "strict scrutiny." (The Court expressly states that it is not deciding whether "strict scrutiny" applies to Second Amendment claims.) The felon-in-possession law passes "strict scrutiny." The State has a compelling interest in public safety and reducing gun-related crimes. Prohibiting felons from possessing firearms is narrowly tailored to achieve this. Felons are more likely to commit violent and gun-related crimes.

City of St. Peters v. Roeder, 2015 WL 4929090 (Mo. banc Aug. 18, 2015):

(1) "Red light" camera ordinance conflicts with State law because it does not require the assessment of two points for a moving violation; (2) the invalid portion of the ordinance (no points) can be severed from the valid portions; but (3) such severance can be given only prospective application, because it would violate due process to impose points against Defendant when Defendant was affirmatively informed that a violation of the ordinance would not result in points.

Facts: Defendant, who ran a red light camera, was charged under city ordinance making running a red light an infraction punishable by fine up to $200 and no points shall be assessed against their license. Defendant challenged the validity of the ordinance on a number of grounds.

Holding: Sec. 302.302.1(1) requires that a person found guilty of a moving violation be assessed two points. The ordinance conflicts with State law by prohibiting what the state law requires. Nevertheless, the Court does not declare the entire ordinance invalid, because the "no points" provision can be severed from the rest of the ordinance. At the time Defendant violated the ordinance, though, it provided she would not be subject to points. Due process requires that a person receive notice not only of the conduct that will subject her to punishment, but also of the penalty the State may impose. This notion is partly enforced through the ex post facto prohibitions in the U.S. and Missouri Constitutions, and is also expressed in Missouri's constitutional ban against civil laws retrospective in operation. These notions require that this Court give effect to the severance and permit enforcement of the remainder of the ordinance prospectively only. Thus, the ordinance cannot be enforced against Defendant because it would violate her right to fair notice of a direct consequence of her conviction, since Defendant did not have fair notice that points would be assessed at the time of the violation. Judgment dismissing charges affirmed.

City of Moline Acres v. Brennan, 2015 WL 4930167 (Mo. banc Aug. 18, 2015):
(1) City Ordinance which prohibited vehicle owners from "permitting" their vehicle to be operated at a speed in excess of the speed limit requires that City prove that the owner gave the driver specific permission to do this; it violates due process and shifts burden of proof to create rebuttal presumption that proof of ownership proves consent to unlawful speeding; and (2) City Ordinance system which sent defendants a "notice" that they would be charged in Municipal Court with Ordinance violation unless they paid City an alleged "fine" violated due process because this was a shortcut "around" the judicial system; only courts are authorized to impose "fines" and only after a judicial determination of guilt.
Facts: City Ordinance prohibited vehicle owners from "permitting" their vehicle to be operated in excess of a speed limit. Defendant's car was caught speeding by an automated enforcement camera. City sent him an alleged Notice of violation that informed him that unless he paid a fine to City, the matter would be referred to Prosecutor for prosecution. Defendant was ultimately charged with violating Ordinance. Defendant challenged Ordinance on various grounds.
Holding: The Ordinance here does not prohibit speeding. The Court is required to take the Ordinance at "face value." What Ordinance prohibits is owners *permitting* their vehicle from being operated at an unlawful speed. The identity of the driver is not an element of the offense. Ordinance requires proof (1) that a vehicle was speeding, (2) that the person charged was the owner of the vehicle, and (3) that the owner gave the driver specific permission to operate the vehicle at an unlawful speed. City argues that proof of ownership creates a rebuttable presumption of consent to operation and unlawful speeding. But such a presumption is not constitutionally permissible in either a civil or criminal case. Even if this Court assumes there is some rational connection between ownership of a vehicle and permission to use that vehicle generally, this does not stretch far enough to allow the fact-finder to infer from ownership the very specific permission to exceed the speed limit that the Ordinance requires. City can charge the violation, however, if it can state facts in the Notice charging the offense showing probable cause that the owner gave the driver specific permission to use owner's vehicle for speeding. But the Notice here did not conform to Rule 37.33 for various reasons. First, it did not state the name, division and street address of the circuit court. Second, it did not show any facts to establish probable cause that Defendant violated the Ordinance; instead the blank merely contains the phrase, "Violation of Public Safety on Roadways." Third, the Notice fails to tell defendants that they can plead not guilty and appear at trial. Rule 37.49 creates a process to allow defendants to plead guilty and pay a fine to a "violations bureau." But the Notice and Ordinance here do not do that. Instead, the payment system creates an unauthorized extra-judicial process. The Ordinance creates a system whereby owners of vehicles are accused of violating the Ordinance in a letter from police, and then told that by paying money to the City, charges will not be filed in the first place. "When a 'fine' is paid to a court, the court must report the conviction and distribute the proceeds according to law. When money is paid directly to the City in order to keep from being charged … that payment is in no sense a 'fine' and is not subject to [judicial] oversight and reporting." The power to inflict punishment requires a judicial determination that a law has been violated. Before there can be such judicial determination, due process requires City prove guilt beyond a reasonable doubt. These two principles prevent City

from threatening prosecution as a means of forcing a person to pay City with no due process and no proof of guilt. Under Rule 37.33, it is improper for any notice to demand payment of money. The only exception is for notices that are subject to a "violation bureau." The system here is an unauthorized one that is a shortcut "around" the judicial system and its protections for the accused. As a result, both Ordinance and the Notice are invalid. Judgment dismissing charge affirmed.

Concurring opinion (Draper, Stith, Teitleman, JJ.): When confronting matters of public safety, courts should skeptically scrutinize manufactured legal fictions that may obscure the actual danger confronted. Prior cases have held that traffic ordinances cannot be a tax ordinance in the guise of an ordinance enacted under the police power. It is for the court to determine whether the primary purpose of the ordinance is regulation under the police power or revenue under the tax power. Ordinance comes across as a mechanism for generating City revenue, not as public safety measure. This Court should be cognizant of the times in which these ordinances are being enforced in light of recent criticism of St. Louis County municipalities, which have used traffic violations and the revenue they generate to enrich their coffers to the financial detriment of the citizens they are ostensibly protecting.

Tupper v. City of St. Louis, 2015 WL 4930313 (Mo. banc Aug. 18, 2015):

(1) City red-light camera Ordinance which created rebuttable presumption that owner of vehicle was the driver of the vehicle violated due process because it shifts burden of persuasion to defendants; (2) even though Drivers had been charged with Ordinance violation but had their charges dismissed by Prosecutor, they could challenge constitutionality of Ordinance in a declaratory judgment action; (3) Drivers were not allowed attorney's fees because City's action in passing unconstitutional Ordinance did not constitute intentional misconduct; (4) Director of Revenue had no standing to appeal trial court's judgment granting relief to Drivers where court's judgment did not order DOR to do anything, so DOR was not aggrieved by case.

Facts: Drivers were charged with violation of red-light camera Ordinance. Ordinance created a "rebuttable presumption" that the owner of a vehicle was the driver. Before Drivers could challenge Ordinance in their Ordinance violation cases, City dismissed the charges against them. Drivers then brought declaratory judgment action to invalidate Ordinance, claiming they had no other adequate legal remedy to do so. Trial court found for Drivers, but denied attorney's fees. Drivers, City and Department of Revenue appealed.

Holding: (1) Prosecutions for Ordinance violations are civil proceedings with quasi-criminal aspects. While rebuttable presumptions in civil cases are generally permitted, they are not generally permitted in criminal cases because they relieve the State of its burden of proof and shift the burden of persuasion to defendants. Prior parking Ordinance cases have held that strict liability can be imposed on owners without violating due process because parking fines are "relatively small," and do not impact a driver's license or insurance. Here, however, a red-light camera violation fine is $100 – not small – and violators will be assessed two points on their license. These factors, along with the quasi-criminal nature of municipal court proceedings, leads this Court to apply the law regarding presumptions in criminal cases. Presumptions which shift only the burden of production may be constitutional, but the Ordinance expressly shifts the burden of

persuasion, which is unconstitutional. The Ordinance states that if an owner furnishes "satisfactory evidence" that they were not driving the car, the charges may be terminated. This shows City's intent to require an owner to prove to the fact-finder that they were not the driver. (2) Drivers can challenge Ordinance in declaratory judgment action. A pre-enforcement challenge is sufficiently ripe to raise a justiciable controversy when (a) the facts needed to adjudicate the claim are fully developed, and (b) the laws at issue affect plaintiffs in a manner that gives rises to an immediate, concrete dispute. Cases presenting predominantly legal questions are particularly amendable to conclusive determination in a pre-enforcement context because they require less factually development. Here, Drivers' claim is predominantly legal because it involves the constitutionality of the rebuttable presumption. Also, Drivers have been affected by Ordinance because they were previously facing prosecution under it. (3) Even though Drivers prevailed in their lawsuit, they aren't entitled to attorney's fees. In general, the "American Rule" is that absent statutory authorization or contractual agreement, each party pays their own attorney's fees. This rule can be overcome if a party shows "intentional misconduct" by a defendant. But City's actions in enacting the Ordinance did not constitute "intentional misconduct." (4) The DOR (among others) appealed the trial court's judgment invalidating the Ordinance. However, the trial court's judgment had no effect on DOR and did not order DOR to do anything. DOR is not an aggrieved party, and has no standing to appeal.

Dotson v. Kander, 2015 WL 4036160 (Mo. banc June 30, 2015):
Holding: The ballot summary of the 2014 gun amendment (Art. I, Sec. 23, Mo.Const.) was sufficient and fair, so the amendment is not invalid on this basis; in reaching this ruling, the Court majority states that (1) "strict scrutiny" already applied to laws affecting fundamental rights, such as laws regulating gun rights, and (2) application of strict scrutiny does not mean that laws prohibiting possession of firearms by felons or the mentally ill are presumptively invalid. Majority holds that the "central purpose" of the amendment was not to change the right to bear arms, but only to make certain "declarations" about that right.
Dissenting opinion: Judge Teitelman was the only judge who dissented from the majority's major statements about the legal effect of the amendment. Judge Teitelman stated that (1) applying "strict scrutiny" to gun laws is new and means that they are presumptively invalid and will be upheld only if narrowly tailored to serve a compelling governmental interest; (2) the amendment arguably makes carrying a concealed weapon a constitutional right; and (3) it is "probable" that the amendment grants nonviolent felons a state constitutional right to have firearms. Judge Draper joined in Teitelman's dissent on the "strict scrutiny" issue only.

State ex rel. Clayton v. Griffith, 2015 WL 1442957 (Mo. banc March 14, 2015):
Holding: Sec. 552.060.2 (regarding competency to be executed) is constitutional because it merely allows the DOC to assert that a Defendant is not competent to be executed; it does not limit a Defendant's own right to seek a judicial determination of competency. The Defendant may raise his incompetency via a writ of habeas corpus directly in the Supreme Court.

State v. Wade, 2013 WL 6916794 (Mo. banc Dec. 24, 2013):

Since Article I, Sec. 13's ban on "retrospective" laws applies only to "civil laws," it does not apply to Sec. 566.150, which is a "criminal law" which prohibits certain sex offenders from knowingly being in or loitering within 500 feet of a park with playground equipment or a public swimming pool. Therefore, Sec. 566.150 applies to sex offenders who were convicted of their crimes before enactment of the statute.

Facts: Various sex offenders, who were convicted of their offenses in the 1990's, were charged with violation of Sec. 566.150, which prohibits certain sex offenders from "knowingly be[ing] present in or lotier[ing] within 500 feet of any real property comprising any public park with playground equipment or a public swimming pool." They claimed Sec. 566.150 was an unconstitutional "retrospective" law, as applied to them, because they were convicted of their offenses before enactment of the law.

Holding: *State v. Honeycutt*, No. SC92229 (Mo. banc 11/26/13), recently held that Article I, Section 13's ban on "retrospective" laws does not apply to "criminal laws," but only to "civil laws." The question here is whether Sec. 566.150 is "civil" or "criminal." This is a two-part test: First, whether the legislature intended the statute to affect civil rights and remedies, or criminal proceedings. If the legislature intended to impose "punishment," that ends the inquiry. But if the legislature intended the law to be a "civil" regulatory scheme, the Court must determine if the scheme is "so punitive in purpose or effect as to negate the intention to affect civil rights or remedies." To analyze the effects of regulation, this Court asks whether the regulatory scheme (1) has been regarded historically as punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; or (5) is excessive with respect to the nonpunitive purpose. Sec. 566.150 is part of the criminal code, appears on its face to be criminal, and does not explicitly state that it has the purpose of protecting the public by alerting the public to sex offenders in the area. The statute uses criminal language – "shall not knowingly be present." It also proscribes a penalty, Class D felony, that increases to a Class C felony on a second violation. Most important, Sec. 566.150 does not depend on a sex offender's registration status. In fact, the statute does not reference the registration list. An offender is guilty of violating 566.150 independently of any duty to register, if he has committed certain listed offenses. Therefore, 566.150 is "criminal" in nature, and Article I, Sec. 13 does not apply. Although not before the Court, the issue of whether 566.150 violates *ex post facto* would not be successful. 566.150 makes it a crime for certain prior offenders to loiter near or be present in certain parks. The conduct of the Defendants here in being near the parks all occurred after enactment of 566.150, so there is no *ex post facto* violation. *R.L. v. Dep't of Corrections*, 245 S.W.3d 236 (Mo. banc 2008), held that a law prohibiting certain sex offenders from living within 1,000 of a school or child-care facility was "retrospective" to offenders who were convicted before enactment of that law. *F.R. v. St. Charles County Sheriff's Dep't*, 301 S.W.3d 56 (Mo. banc 2010), held that a "Halloween law" which prohibited certain sex offenders from engaging in Halloween activity was "retrospective" to offenders who were convicted before enactment of that law. "To the extent that *R.L.* and *F.R.* conflict with *Honeycutt* due to their failure to perform any analysis to determine whether the statute being challenged was a criminal law, they should no longer be followed."

Concurring Opinion: Three judges join in a concurring opinion to "express concern" about the Court's "increased willingness" to characterize a law as "criminal" or "civil" merely from where it is placed in the RSMo. codification system. These judges note that where a statute is ultimately placed in RSMo. is determined by the Joint Committee on Legislative Research, not necessarily the Legislature as a whole. "Until recently, this Court had a long and unblemished record of refusing to recognize any probative value in the codification or structure of legislative enactments on the question of statutory construction."

Dissenting Opinion: Three judges would hold that Sec. 566.150 is a "civil" regulatory scheme subject to application of the ban on "retrospective" laws. Just as sexual predator and registration laws have been held to be "civil," even though they require incarceration, so, too, should this law be regarded as "civil."

State v. Honeycutt, 2013 WL 6188568 (Mo. banc Nov. 26, 2013):

Article I, Sec. 13's ban on "retrospective" laws does not apply to criminal laws; thus, since Sec. 571.070.1(1)'s ban on possession of firearms by felons is a "criminal" law, the statute is not unconstitutionally retrospective as applied to person whose prior felony pre-dated the statute.

Facts: Defendant was charged with being a felon in possession of a firearm, in violation of Sec. 571.070, which became effective in 2008. His prior felony was for drug possession in 2002. He claimed that Sec. 571.070 was unconstitutionally "retrospective" as applied to him, because his prior felony conviction pre-dated the law.

Holding: The U.S. Constitution and Missouri Constitution prohibit "ex post facto" laws. However, only a handful of state constitutions, such as Missouri's, also prohibit "retrospective" laws. A historical review of the term "retrospective" laws shows that it had a technical meaning at the time the constitution was adopted that limited its reach only to statutes affecting civil rights and remedies; the term was never intended to apply to criminal laws. The term has a separate meaning than ex post facto laws. In *R.L. v. Dep't of Corrections*, 245 S.W.3d 236 (Mo. banc 2008) and *F.R. v. St. Charles Cnty. Sheriff's Dept*., 301 S.W.3d 56 (Mo. banc 2010, this Court found that laws prohibiting certain sex offenders from living within 1,000 of a school or child-care facility and imposing restrictions on what sex offenders can do on Halloween were "retrospective" in operation. *R.L*. and *F.R*. did not expressly address whether Article I, Sec. 13 applies to criminal laws. This Court presumed the laws in those cases to be "civil," even though the laws carried criminal penalties. The determination of whether this Court's treatment of the statutes in *R.L*. and *F.R*. as civil in nature was accurate is not before the Court in this case. This Court will analyze that issue only when it is properly preserved and presented on appeal. To determine if a law is "criminal" or "civil" in nature, we must ascertain whether the legislature meant the statute to establish "civil" proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. But if the intention was to enact a regulatory scheme that is civil and nonpunitive, we must examine whether the scheme is so punitive either in purpose or effect as to negate the intention to deem it "civil." This Court has held that sex registration laws are "civil" and "non-punitive," even though they have a punishment for not complying with them. The gun statute at issue here, however, appears on its face to be a "criminal" statute. The statute is in the

criminal code, and is the type that has traditionally been regarded as punishment. Therefore, Article I, Sec. 13's ban on "retrospective" laws does not apply to it.
Concurring Opinion: The statutes at issue in *R.L.* and *F.R.* sought to regulate the actions of sexual offenders by punishing them for engaging in conduct – such as giving out Halloween candy or living near schools or parks – that is perfectly acceptable if performed by persons who are not sex offenders, and it was because of this "regulatory effect" that the laws addressed in these two cases were held invalid.

Lumetta v. Sheriff of St. Charles County, 2013 WL 6070481 (Mo. banc Nov. 19, 2013):
Holding: Concealed carry statute, Sec. 571.101.2(2), prohibits persons who pleaded guilty to or were convicted of any felony offense, or a misdemeanor involving explosive weapons or firearms, from receiving concealed-carry permit. Thus, Petitioner, who had pleaded guilty in 1986 to a misdemeanor of possessing a firearm while intoxicated, was not eligible for a permit.

State v. Wooden, 388 S.W.3d 522 (Mo. banc 2013):
Holding: (1) Application to Defendant of Sec. 565.090.1(2), which provides that a person commits crime of harassment if he communicates with another person using "coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of physical contact or harm," did not violate First Amendment where Defendant sent emails to city councilwoman (and others) which discussed using a sawed-off shotgun, domestic terrorism, the assassination of public officials, and called the woman a "bitch," since threatening speech is not protected by the First Amendment, and here, the emails would put city councilwoman in "reasonable apprehension of offensive physical contact or harm," but (2) a separate harassment conviction under Sec. 565.090.1(5) constituted plain error because that section was found unconstitutionally overbroad in *State v. Vaughn*, 366 S.W.3d 513 (Mo. banc 2012).

State v. Vaughn, No. SC91670 (Mo. banc 5/29/12):
(1) Sec. 565.090.1(5) which makes it harassment to "knowingly make[] repeated unwanted communication to another person" is unconstitutionally vague; however, (2) 565.090.1(6) which criminalizes a person who "without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress" is constitutional because it proscribes conduct, not merely speech.
Facts: Defendant was charged with two counts of "harassment" under Sec. 565.090.1. He was charged with violation of Sec. 565.090.1(5), which makes it a crime to knowingly make repeated unwanted communication to another person, because he had repeatedly telephoned his former wife after she had told him not to call again. He was also charged with violation of Sec. 565.090.1(6) for entering his former wife's home when she was not there with the purpose of scaring her. The trial court dismissed the charges on grounds that 565.090.1(5) and (6) violated the First Amendment. The State appealed.
Holding: Regarding 565.090.1(5), "repeated," "unwanted," and "communicate" are simply words that can be applied too broadly. Although subdivision (5) purports to criminalize "harassment," subdivision (5) does not require conduct to actually harass in any sense of the word. Rather, it criminalizes a person who "knowingly makes repeated

unwanted communication to another person." This would have a chilling effect on a broad range of everyday communication. For example, individuals picketing a private or public entity would have to cease once they were told that their protests were unwanted. Hence, subdivision (5) is unconstitutionally vague. Subdivision (6), however, is constitutional because it proscribes conduct, not merely speech.

City of Moline Acres v. Brennan, 2014 WL 295050 (Mo. App. Jan. 28, 2014):
Holding: City's "speed camera" Ordinance (which makes it only a civil violation for speeding, imposes a fine, and imposes strict liability on the owner of the vehicle, not the driver) is invalid (1) because it conflicts with State law which makes speeding over 5 mph a misdemeanor and which requires assessment of points for speeding, and (2) because State law does not permit prosecution of persons who are not drivers for violating traffic law; this is a municipal expansion of liability for a State traffic violation that conflicts with State statute regulating the same subject.

State v. Johnson, 2015 WL 7455477 (Mo. App. E.D. Nov. 24, 2015):
(1) Sec. 558.018.5(3), which provides that a Defendant may be classified as a predatory sexual offender if he "has committed" first-degree statutory rape or sodomy against more than one victim, does not require that the acts be prior to the instant case; the acts in the instant case count under the statute; (2) even though Sec. 558.021 requires that a finding of predatory sexual offender be made before submission to the jury, the trial court did not plainly err in finding this at sentencing because Defendant waived jury sentencing and also was not sentenced to a higher sentence than allowed under the unenhanced range; (3) to the extent that Secs. 558.018.5 and 558.021 require a court, rather than a jury, make factual findings that increase Defendant's minimum sentence, the statutes are subject to attack under Alleyne v. U.S., 133 S.Ct. 2151 (2013)(holding that any fact that increases a defendant's mandatory minimum sentence for a crime must be submitted to a jury and proven beyond a reasonable doubt).
Facts: Defendant was charged with various sex offenses against three children. After submission to the jury, the trial court, at sentencing, found Defendant to be a predatory sexual offender, Sec. 558.018.5(3), because of the acts against three children, and sentenced him to mandatory life imprisonment with possibility of parole after 25 years.
Holding: (1) Sec. 558.018.5(3) provides that a person may be classified as a predatory sexual offender where he "has committed an act or acts against more than one victim which would constitute [first-degree statutory rape or first-degree statutory sodomy], whether or not defendant was charged with an additional offense or offenses as a result." Defendant argues that this section applies only to *prior* criminal conduct based on the word "has." However, "has" does not refer only to conduct before the crimes charged. Sections 558.018.5(1) and (2) deal with previously committed convictions or conduct. To avoid rendering 558.018.5(3) meaningless, it must be interpreted to include acts of criminal sexual conduct against more than one victim, including charges in the instant case. **(2)** Sec. 558.021.2 requires the trial court make a finding of predatory sexual offender prior to submission of the case to the jury. Here, the trial court did not make the finding until sentencing. However, this was not plain error under the facts here. While a predatory sexual offender loses the right to jury sentencing, here, Defendant expressly waived his right to jury sentencing. Further, Defendant was not sentenced to a higher

sentence than he could have received under the "unenhanced" statutory range. Even though he received a mandatory life sentence, he could have received this anyway, and he will be subject to parole after 25 years, which is actually less than the 85% (25 and one-half) he would have had to serve under the "unenhanced range" for the same life sentence. **(3)** The court does not decide the constitutionality of 558.018 and 558.021 under *Alleyne* here. *Alleyne* requires that any fact that increases a defendant's mandatory minimum sentence must be submitted to a jury and proven beyond a reasonable doubt. Sec. 558.021.1(3) requires a court, instead of a jury, make the predatory sexual offender finding. Here, the jury had determined that Defendant committed acts against multiple victims, because the trial court did not decide predatory sexual offender until sentencing (contrary to statute). But "in similar circumstances if a trial judge follows the statute and makes a finding before submission [to the jury], the resulting sentence would be subject to attack under *Alleyne*."

Molette v. Wilson, 2015 WL 5134962 (Mo. App. E.D. Sept. 1, 2015):
Even though Sec. 545.250 permits a private citizen to file an affidavit with a court reporting a crime for use of the prosecuting attorney, the statute does not allow a private citizen to prosecute a criminal case in the name of the State.
Facts: Plaintiff filed an "affidavit for criminal complaint" under Sec. 545.250 alleging information to charge Officer Darren Wilson in the Michael Brown shooting in Ferguson. The trial court dismissed the case. Plaintiff appealed.
Holding: Sec. 545.250 allows a private citizen to file an affidavit with a court "for use of the prosecuting attorney" alleging information about crimes. However, only a prosecutor or grand jury can initiate criminal charges. The statute does nothing more than provide a vehicle for Plaintiff to provide information "for use of the prosecuting attorney." Plaintiff lacked capacity to prosecute a criminal case in the name of the State.

City of St. Peters v. Roeder, 2014 WL 2468832 (Mo. App. E.D. June 3, 2014):
Holding: (1) City's "red light" ordinance is invalid because conflicts with state law since ordinance does not require assessment of points against license; and (2) even though City claims appellate court can enter a conviction for violation of a different City ordinance, this rule applies only where evidence of a greater offense is held insufficient on appeal, but here, the "red light" ordinance is found invalid under state law; this is not a matter of evidentiary insufficiency.

Brunner v. City of Arnold, 2013 WL 6627959 (Mo. App. E.D. Dec. 17, 2013):
Holding: (1) City's "red light" camera Ordinance violates state law, Sec. 302.225, because it expressly prohibits assessment of points for violators, but Sec. 302.225 requires courts to report any moving violations to the Department of Revenue for assessment of points; (2) Ordinance is "criminal" in nature and creates an unconstitutional rebuttable presumption that the owner of the vehicle was the driver; this denies an accused's right to be presumed innocent until proven guilty; (3) Even though Plaintiff had paid his "red light violation" fine, he had standing to bring a challenge to Ordinance because the Ordinance was void *ab initio* since it was in conflict with state law, so the municipal court had no subject matter jurisdiction to enforce the Ordinance and all that court's rulings are void; (4) Plaintiffs state a colorable claim that the

Ordinance was in violation of the City's police power because the Ordinance does not actually promote public safety since it fails to keep dangerous drivers off the road by not assessing points for violation, and numerous studies show that red light cameras actually increase crashes and injuries; (5) Plaintiffs state a colorable claim that City surrendered its governmental functions in prosecuting violations of the Ordinance to the private company that operates the red light cameras; and (6) Plaintiffs state a colorable claim that Ordinance is a prohibited revenue generating Ordinance, not one designed to promote safety, because the Ordinance allows dangerous drivers to remain on the road by not assessing points, the cameras do not photograph the actual driver of the car, and the Ordinance generates more revenue than is necessary to offset the cost of enforcement

Edwards v. City of Ellisville, 2013 WL 5913628 (Mo. App. E.D. Nov. 5, 2013):
Holding: City "red light" ordinance that makes it a non-moving violation for a car to be "present" in an intersection with a red light and which makes the owner liable for the fine is invalid, because this conflicts with State law that makes running a red light a misdemeanor moving violation and which requires assessment of points against driver's license (overruling *City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252 (Mo. App. E.D. 2011)).
Discussion: To be valid, city ordinances cannot conflict with State law. Sec. 304.128 makes it a misdemeanor for a *driver* to run a red light. However, the City ordinance imposes strict liability on the *owner* of a car, if the car is present in an intersection with a red light. The ordinance regulates the same conduct as Sec. 304.128. The City cannot circumvent Sec. 304.128 by using semantics to say the ordinance only regulates the "presence" of cars in intersections. The ordinance conflicts with 304.128. The ordinance also conflicts with Secs. 302.225 and 302.302 which also require the assessment of points against a license for moving violations such as running a red light. The ordinance seeks to make running a red light a nonmoving violation with no points. However, by failing to require the municipal court to report a violation to the Director of Revenue for assessment of points, the ordinance conflicts with 302.225 and .302. To the extent that *City of Creve Coeur v. Nottebrok* is to the contrary, it is overruled.

Unverferth v. City of Florissant, 2013 WL 4813851 (Mo. App. E.D. Sept. 10, 2013):
Holding: (1) City's "red light camera" Ordinance conflicts with Missouri law because it regulates moving vehicles without requiring the municipal court to report the violation to the Department of Revenue as required by Missouri statutes; (2) Petitioner-Driver (who filed suit challenging the Ordinance) was entitled to discovery and to present facts on her claim that City exceeded its authority under its police power to enact the Ordinance because the purpose of the Ordinance (as alleged by Petitioner) is to raise municipal revenue, and not to regulate traffic or promote safety; and (3) Petitioner-Driver was entitled to discovery and to present facts on her claim that the Ordinance violates Supreme Court Rule 37.33 and denies procedural due process because traffic citations issued under it do not list a court date or how to contest a citation, and imply that there is no means to contest a violation.

State v. Diaz-Rey, 2013 WL 1314968 (Mo. App. E.D. April 2, 2013):
Holding: Charging alien-Defendant in Missouri state court with forgery, Sec. 570.090, for using a false Social Security number on a job application was not preempted by federal law involving employment of aliens.

State v. Kelly, No. ED96743 (Mo. App. E.D. 4/24/12):
Even though Defendant-sex offender left one address and didn't establish a new permanent address for several months, the registration statute, 589.414, required that he report changing from the prior address within three days.
Facts: Defendant-sex offender lived at one address but vacated it in December. He did not register a new address until March, when he said he obtained a new permanent address. Defendant was convicted of failure to report change of address as a sex offender for not reporting a change within three days after leaving the first address in December.
Holding: Defendant claims he was not required to update his address until he had a new "permanent" address and that he was transient between December and March. This appears to be an issue of first impression in Missouri. Federal courts have held, however, that the plain language of SORNA requires registration when one leaves a residence with no intent to return. 589.414.1 requires updating registration "not later than three business days after each change." The statute makes no reference to a "new" residence, but only to a "change" in residence. Thus, when a sex offender leaves a residence with no intention to return, even if he leaves to become homeless, his residence has changed as it is no longer that of the original residence, and he must update his registration. Conviction affirmed.

State v. Harrison, 390 S.W.3d 927 (Mo. App. S.D. 2013):
Holding: Even though Sec. 194.005 defines "death" as cessation of spontaneous respiration and two-month old fetus/victim had not yet begun respiration so respiration could not cease, Defendant can be found guilty of involuntary manslaughter for death of fetus/victim in vehicle crash because Sec. 1.205 defines life as beginning at conception and Sec. 565.024 provides that an unborn child can be a victim of involuntary manslaughter; this shows a legislative intent as to manslaughter of the unborn, and it would be unreasonable to hold that Sec. 194.005 negates that intent since Sec. 194.005 had the different purpose of defining death for artificial life support purposes. This was a case of first impression.

State v. Myers, No. SD31357 (Mo. App. S.D. 5/11/12):
Offense of "receiving" stolen property does not require proof that Defendant obtained the property from a "second person" than the owner.
Facts: Defendant sold some stolen auto parts to an auto part store. He was convicted of "receiving" stolen property.
Holding: Defendant argues that older cases (some of which pre-dated the current statute) had held that to convict of receiving stolen property, there must be at least two actors involved, i.e., the accused must receive the property from some person other than the owner; defendant also relies on older cases that stated that one cannot at the same time be the principal in a larceny and a receiver of stolen property. However, while no evidence of a second party was presented at trial, the statutory definition of "receive" as contained

in Sec. 570.010(13) does not require such proof. "Receives" as used in 570.080.1 references the definition of "receiving" contained in 570.010(13). This definition only required the State to prove that Defendant acquired possession or control of the property. The plain meaning of "acquire" is "to come into possession or control of [property] often by unspecified means." The statute does not require proof of how or from whom Defendant acquired the property. The statute only requires proof of actual possession or control of it. Conviction affirmed.

Damon v. City of Kansas City, 2013 WL 6170565 (Mo. App. W.D. Nov. 26, 2013): *(1) Claims that municipal ordinances are unconstitutional are not within the "exclusive" jurisdiction of the Missouri Supreme Court, but are also within the jurisdiction of the Court of Appeals; (2) Plaintiffs who have received a notice of violation but have not yet gone to court or paid their fine have standing to assert their claims in this action because they do not have an adequate remedy in their ordinance violation cases since Private Company which administers the red light fine collection program is allowed to act in law enforcement, prosecutorial and adjudicative roles under the ordinance (disagreeing with Eastern District cases); (3) the "notice of violation" under the ordinance appears to conflict with Rule 37 because it does not state the address of a court (but rather directs payment to a private company) and does not command appearance before a court; (4) Plaintiffs have alleged sufficient facts to survive a motion to dismiss in contending that the ordinance does not have a substantial relationship to public safety because it actually increases accidents, reduces the number of police officers, and is really a revenue collection program; (5) the ordinance conflicts with state law which requires assessment of points for moving violations; and (6) if the ordinance is "criminal" in nature, then the rebuttal presumption that the owner of the vehicle is the driver is unconstitutional because it violates the presumption of innocence as to every element of the crime and because it invades the fact-finding function of the jury.*

Facts: Plaintiffs raise numerous claims about validity of City "red light" ordinance. The ordinance provides that no vehicle shall be "driven" into an intersection with a red light. The ordinance also creates a "rebuttable presumption" that the owner of the vehicle is the driver. Finally, the ordinance provides that upon filing of an information in municipal court, a summons will issue pursuant to Missouri Supreme Court Rule 37.

Holding: As an initial matter, the Court of Appeals determines that it has jurisdiction in this case because claims that municipal ordinances are unconstitutional are not within the "exclusive" jurisdiction of the Missouri Supreme Court, but may also be decided by the Court of Appeals. Additionally, contrary to rulings by the Eastern District, the Western District finds that plaintiffs who have received notices of violation but who have not paid their fines do have standing to proceed as plaintiffs here because they do not have an adequate remedy at law in their ordinance violation cases since the ordinance allows the private company which collects the fines to play law enforcement, prosecutorial and/or adjudicative roles. The Supreme Court has recognized that subjecting a defendant to criminal sanctions involving his liberty before a tribunal that has a direct, personal and substantial pecuniary interest in convicting him is a denial of due process. Further, to allow private prosecutors, employed by private citizens, to participate in the prosecution of a defendant is fundamentally unfair. On the merits, the ordinance is invalid or unconstitutional for several reasons. First, there are multiple problems with the

"summons procedure" for contesting a violation under the ordinance. The "notice of violation" is not delineated a "summons" and gives confusing and conflicting instructions on how to pay a fine or contest a violation. The notice conflicts with Rule 37 because it does not state the address of a municipal court, and does not command appearance in any court. Second, Plaintiffs have alleged sufficient facts to survive a motion to dismiss in contending that the ordinance does not have a substantial relationship to public safety because it actually increases accidents, reduces the number of police officers, and is really a revenue collection program. Third, the ordinance conflicts with state law, Sec. 302.302.1(1), which requires assessment of points for moving violations. Finally, if the ordinance is "criminal" (as opposed to "civil"), then the rebuttal presumption that the owner of the vehicle is the driver is unconstitutional because it violates the presumption of innocence as to every element of the crime and because it invades the fact-finding function of the jury.

State v. Rodgers, 2013 WL 427363 (Mo. App. W.D. Feb. 5, 2013):
Even though Sec. 571.070.1(2) makes it unlawful to possess a firearm if a person is a "fugitive from justice," the phrase "fugitive from justice" is ambiguous because subject to multiple meanings, and must be construed strictly against the State; thus, even though Defendant had failed to appear in municipal court and a capias warrant had been issued for his arrest, the trial court did not err in dismissing an unlawful possession of firearm charge because Defendant was not necessarily a "fugitive from justice."
Facts: Defendant was charged with a municipal offense of leaving the scene of an accident. However, he failed to appear on the charge, and a capias warrant was issued. When police approached Defendant to arrest him, he initially ran and threw down a gun, but was caught and arrested. The State charged Defendant with unlawful possession of a firearm under Sec. 571.070.1(2). Defendant moved to dismiss the charge, which the trial court granted. The State appealed.
Holding: Sec. 571.070.1(2) provides that a person commits the crime of unlawful possession of a firearm if such person knowingly has a firearm and "is a fugitive from justice." The term "fugitive from justice" is not defined in the statute or anywhere else in the Criminal Code. Another Missouri statute, Sec. 319.303(16) defines it as a person who "has fled from the jurisdiction," but this statute is not dispositive because it is in a different Chapter than the Criminal Code and has a different regulatory purpose. Other states and legal dictionaries give the phrase different meanings. Where a criminal statute is ambiguous, the rule of lenity requires that it be construed strictly against the State and liberally in favor of the Defendant. The elements of a crime should be clearly defined to provide meaningful notice of proscribed conduct. Here, the phrase is ambiguous and the trial court did not err in dismissing the charge. The appellate court suggests that the Legislature amend the statute to define the phrase.

*** Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (U.S. June 26, 2015):**
Holding: The federal Armed Career Criminal Act's residual clause, Sec. 924(e)(2)(B)(ii), which defines a "violent felony" as one which "involves conduct that presents a serious potential risk of physical injury to another," is unconstitutionally vague because it fails to give fair notice of prohibited conduct, and invites arbitrary enforcement.

*** McCullen v. Coakley, ___ U.S. ___, 2014 WL 2882079 (U.S. June 26, 2014):**
Holding: Statute which makes it illegal to stand in a public way or sidewalk within 35 feet of an entrance to a place where abortions are performed was not narrowly tailored to serve significant government interests and violated 1st Amendment free speech guarantees.

*** Loughrin v. U.S., 95 Crim. L. Rep. 416, ___ U.S. ___, 2014 WL 2807180 (U.S. 6/23/14):**
Holding: A conviction under the federal bank fraud statute, 18 USC 1344, does not require proof that a financial institution was the target of the deception or that a financial institution was exposed to risk of loss; the statute's reference to obtaining property "by means of" a false statement (such as a false statement in an altered check) was the mechanism that induced the bank to part with control over the money.

*** Abramski v. U.S., 95 Crim. L. Rep. 381, ___ U.S. ___, 134 S.Ct. 2259 (U.S. 6/16/14):**
Holding: A defendant who purchases a gun for someone else while falsely claiming it is for himself is guilty of making a false statement in connection with "any fact material to the lawfulness of the sale," 18 USC 922(a)(6), even though the true buyer (other person) could have legally purchased the gun himself.

*** Bond v. U.S., 95 Crim. L. Rep. 312, ___ U.S. ___, 134 S.Ct. 2077 (U.S. 6/2/14):**
Holding: Sec. 229 of the Chemical Weapons Convention Implementation Act, which bans possession of chemicals that "can cause death, temporary incapacitation or permanent harm to humans or animals" was intended to prosecute acts of war, assassination and terrorism, not "purely local crimes"; hence, Gov't could not use statute to prosecute a Defendant who put toxic chemicals designed to cause a rash on her husband's mistress' doorknob; "[t]he global need to prevent chemical warfare does not require the Federal Government … to treat a local assault with a chemical irritant as the deployment of a chemical weapon."

*** U.S. v. Castleman, 95 Crim. L. Rep. 5, ___ U.S. ___, 134 S.Ct. 1405 (U.S. 3/26/14):**
Holding: A "misdemeanor crime of domestic violence" under 18 USC 921(a)33 means a misdemeanor with a degree of force supporting only common-law battery, i.e., an "offensive touching" against a present or former spouse, parent, guardian or similar person. Here, Defendant was convicted under a state law allowing conviction for minor minor "bodily injury" such as a bruise. This qualified as a "misdemeanor crime of domestic violence" and, thus, prohibited Defendant from possessing a firearm under 18 USC 922(g)(9), which prohibits possession of a firearm by anyone convicted of a "misdemeanor crime of domestic violence."

*** Rosemond v. U.S., ___ U.S. ___, 94 Crim. L. Rep. 701, 134 S.Ct. 1240 (U.S. 3/5/14):**
Holding: A Defendant charged with aiding and abetting another person who uses or carries a firearm in a crime of violence or drug trafficking is entitled to an instruction to

determine whether he became aware that the person was armed in time to withdraw from the crime; 18 USC 924(c) requires that Defendant have "advance knowledge – or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice"; the Gov't must prove that Defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a participant would use or carry a gun during the crime's commission.

U.S. v. Encarnacion-Ruiz, 97 Crim. L. Rep. 268 (1st Cir. 5/28/15):
Holding: Even though a principal can be convicted of producing child pornography without proof that principal knew that victim was a minor, a Defendant charged with aiding and abetting production of child pornography can assert a mistake-of-age defense; *Rosemond* (U.S. 2014) requires Gov't in prosecution for aiding and abetting to prove the aider and abettor knew the victim was a minor; otherwise, too much innocent behavior would become illegal, allowing people with minimal connection to the criminal activity to be convicted of aiding and abetting child pornography.

U.S. v. Caronia, 92 Crim. L. Rep. 265 (2d Cir. 12/3/12):
Holding: The FDA Act does not prohibit drug makers from making truthful statements promoting off-label uses of their drugs, because such a prohibition would violate the First Amendment.

U.S. v. Aleynikov, 2012 WL 1193611 (2d Cir. 2012):
Holding: The code that a defendant uploaded to a server and downloaded to his computer devices was intangible intellectual property, not "goods," "wares," or "merchandise," within the meaning of the National Stolen Property Act (NSPA).

U.S. v. Lanning, 93 Crim. L. Rep. 593 (4th Cir. 7/19/13):
Holding: 36 CFR 2.34(a)(2), which prohibits activity that is "obscene" or "physically threatening" in a federal park, was unconstitutionally vague as applied to Defendant where undercover Park Ranger had approached Defendant and indicated he would be interested in having sex, which then caused Defendant to grope Park Ranger; the regulation was vague because no reasonable person would know that acting in this way in response to a flirtatious conversation with a Park Ranger would lead to criminal liability, and the vagueness encourages arbitrary enforcement because there were no sting operations for heterosexual conduct.

MacDonald v. Moose, 92 Crim. L. Rep. 749, 2013 WL 935778 (4th Cir. 3/12/13):
Holding: Virginia state court unreasonably applied federal law when it upheld conviction for adult who had oral sex with a minor under state statute that criminalizes oral sex since this violates *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down an anti-sodomy law between consenting adults under due process clause; 4th Circuit holds that although State can proscribe oral sex between adults and minors, it cannot convict petitioner/Defendant under a general, anti-oral sex law (not a "child sex" law), which it did here.

U.S. v. Al-Maliki, 97 Crim. L. Rep. 277 (6th Cir. 5/27/15):
Holding: Sixth Circuit questions (but does not decide) whether 18 USC 2423(c), which prohibits sex crimes against children abroad, exceeds Congress' power to regulate commerce with foreign nations, since it punishes a citizen's noncommercial conduct while the citizen resides in a foreign nation.

Tyler v. Hillsdale County Sheriff's Dept., 96 Crim. L. Rep. 332 (6th Cir. 12/18/14):
Holding: 18 USC 922(g)(4), which permanently prohibits anyone who has been committed to a mental institution from owning a gun, is overbroad as applied to a man briefly committed 28 years ago; "the government's interest in keeping firearms out of the hands of the mentally ill is not sufficiently related to depriving the mentally healthy, who had a distant episode of commitment, from their constitutional rights."

Speet v. Schuette, 93 Crim. L. Rep. 690 (6th Cir. 8/14/13):
Holding: Law which criminalized begging (panhandling) violated First Amendment, which protects rights of individuals to solicit money.

Moore v. Madigan, 92 Crim. L. Rep. 330 (7th Cir. 12/11/12):
Holding: Illinois law prohibited most people from carrying a gun in public violates 2nd Amendment right to bear arms for self-defense.

U.S. v. Carlson, 97 Crim. L. Rep. 269 (8th Cir. 6/2/15):
Holding: 18 USC 876, which makes it a crime to mail extortionate letters to persons, does not apply to threats to corporations or legal entities other than actual people.

CPR for Skid Row v. City of Los Angeles, 96 Crim. L. Rep. 650 (9th Cir. 3/10/15):
Holding: Calif. law making it a crime to willfully disturb or break up a meeting does not apply to political meetings, which require a higher threshold of "threats, intimidation, or unlawful violence"; thus, police cannot arrest protesters at political meeting.

Desertrain v. Los Angeles, 95 Crim. L. Rep. 425 (9th Cir. 6/19/14):
Holding: Anti-vagrancy Ordinance making it illegal to use a car as "living quarters either overnight, day-by-day, or otherwise" is unconstitutionally vague, and was arbitrarily enforced where police were arresting people for using a mobile phone in their car or seeking shelter in car due to rain; Ordinance does not define "living quarters" or how long or when "otherwise" is.

Doe v. Harris, 96 Crim. L. Rep. 225 (9th Cir. 11/18/14):
Holding: Calif. law that requires sex offenders to disclose their email address, screen names and other internet identifiers to law enforcement (who may then post or disclose it to others) likely violates First Amendment; sex offenders have right to anonymous speech on topics of public importance.

Lopez-Valenzuela v. Maricopa County, 96 Crim. L. Rep. 108 (9th Cir. 10/15/14):
Holding: Law which limits bail for illegal aliens in "serious felony offenses" is unconstitutional because it doesn't address an acute problem, isn't narrowly tailored to

specific crimes, and uses unsupported assumptions about illegal aliens to punish them before trial.

Peruta v. San Diego County, 94 Crim. L. Rep. 573 (9th Cir. 2/13/14):
Holding: Law that allowed concealed carry permits only if applicant can show "good cause," or "pressing need for self-protection" beyond an ordinary citizen, violated Second Amendment.

Valle del Sol Inc. v. Whitting, 94 Crim. L. Rep. 86 (9th Cir. 10/8/13):
Holding: Ariz. statute that makes it unlawful for a "person who is in violation of a criminal offense" to harbor or transport an alien is void for vagueness because this phrase is unintelligible, and the statute is also preempted by federal law.

Comite de Jornaleros de Redondo Beach v. Redondo Beach, Calif., 89 Crim. L. Rep. 826 (9th Cir. 9/16/11):
Holding: Anti-soliciting ordinance designed to deter day laborers from congregating was not narrowly tailored as to time, place and manner.

U.S. v. Davis, 95 Crim. L. Rep. 382 (11th Cir. 6/11/14):
Holding: 4th Amendment warrant requirement applies to locations of mobile phones when calls were made from the phones; federal Stored Communications Act, which authorizes the government to use a court order based on less than probable cause to obtain such information from phones companies, is unconstitutional.

U.S. v. Bellaizac-Hurtado, 2012 WL 5395281 (11th Cir. 2012):
Holding: The Maritime Drug Law Enforcement Act (MDLEA) exceeds Congress' authority to define "Offences against the Law of Nations," since drug trafficking was not a violation of the law of nations during the founding period or under current customary international law.

Bahlul v. U.S., 97 Crim. L. Rep. 291 (D.C. Cir. 6/12/15):
Holding: Congress lacked authority to give military commissions power to try terrorism related crimes that are not offenses under the international law of war; such cases must be tried in civilian court; Article III exception for law of war military commissions does not extend to trial of domestic crimes in general or inchoate conspiracy in particular.

Conley v. U.S., 94 Crim. L. Rep. 95 (D.C. Cir. 9/26/13):
Holding: Statute making it illegal to knowingly be in a car where an illegal firearm is present – even if the person has no connection to or control over the firearm and is not engaged in wrongdoing – is unconstitutional because (1) given the long history of 2nd Amendment rights, ordinary citizens would have no reason to think that passive presence in a car with an illegal gun is itself illegal; (2) the statute sweeps in people who may be in the car for any number of "innocent reasons" and have nothing to do with the gun; and (3) the statute violates due process because it shifts the burden of proof to defendants by making them prove that their continued presence in the car was involuntary.

U.S. v. Ali, 93 Crim. L. Rep. 397 (D.C. Cir. 6/11/13):
Holding: Defendant cannot be tried in U.S. for conspiracy to commit high seas piracy if the acts occurred on dry land or in his country's territorial waters, but he can be tried for aiding and abetting piracy.

Palmer v. District of Columbia, 95 Crim. L. Rep. 560 (D.D.C. 7/24/14):
Holding: Ban on carrying a handgun in public violates 2nd Amendment.

In re National Security Letter, 92 Crim. L. Rep. 759 (N.D. Cal. 3/14/13):
Holding: The "gag order" and judicial review provisions of 18 USC 2709 governing the FBI's issuance of a national security letter to an internet service provider violate the First Amendment and separation of powers.

Shelton v. Sec'y, Dept. of Corrections, 89 Crim. L. Rep. 659, 2011 WL 3236040 (M.D. Fla. 7/27/11):
Holding: Drug trafficking law which authorizes conviction without any proof of criminal intent violates due process.

Warren v. State, 2014 WL 696339 (Ga. 2014):
Holding: Even though Defendant sent nude photo of self to victim's cell phone, this did not violate statute prohibiting unsolicited distribution of nude materials because the statute contemplated use of standard mail, involving tangible material in a tangible envelope or container.

McCormack v. Heideman, 90 Crim. L. Rep. 19 (D. Idaho 9/23/11):
Holding: Statute that imposes criminal penalties on women who get an abortion without requiring that their abortion provider comply with all state laws regarding abortion violates women's right to abortion.

People v. Clark, 94 Crim. L. Rep. 766 (Ill. 3/20/14):
Holding: Eavesdropping statute which criminalizes recoding of almost all conversations, public or private, without the consent of all parties is overbroad under 1st Amendment.

Doe v. Jindal, 90 Crim. L. Rep. 717 (M.D. La. 2/16/12):
Holding: A state law that bars certain unregistered sex offenders from accessing internet sites frequented by children, but that results in a "near total ban" on the offenders' internet access is overbroad in violation of the First Amendment.

U.S. v. Cassidy, 90 Crim. L. Rep. 388 (D. Md. 12/15/11):
Holding: 18 USC 2261A(2)(A) which criminalizes using a computer to harass or cause someone emotional distress violated First Amendment as applied to a Defendant who made blog posts which attacked a prominent religious leader who was a well-known public figure.

U.S. v. Cassidy, 2011 WL 6260872 (D. Md. 2011):
Holding: Interstate stalking statute criminalizing anyone for intentionally causing substantial emotional distress to another person using an interactive computer service was unconstitutional, as applied to defendant, where defendant used an Internet blog and Twitter to engage in conduct that caused substantial emotional distress to an easily recognizable public religious leader, and the victim had the ability to avert her eyes from the blog and ignore or block Twitter messages.

Com. v. Robertson, 94 Crim. L. Rep. 711, 2014 WL 815332 (Mass. 3/5/14):
Holding: State law that prohibited secretly photographing someone who is "nude or partially nude" where they have an expectation of privacy did not prohibit taking "upskirt" photos of female passengers on a train, because women in skirts were not "nude or partially nude, no matter what is or is not underneath the skirt by way of underwear or other clothing."

State v. Melchert-Dinkel, 94 Crim. L. Rep. 767 (Minn. 3/19/14):
Holding: Provision of assisted suicide law that prohibits encouraging or advising someone to commit suicide violates 1st Amendment right to speech.

U.S. v. Rubin/Chambers, 2011 WL 3041637 (S.D. N.Y. 2011):
Holding: 18 USC 1005 imposes criminal liability only on bank officers, directors and employees.

Does 1-5 v. Cooper, 2014 WL 4198389 (M.D. N.C. 2014):
Holding: Sex offender statute limiting where offenders can be was vague and failed to give adequate notice of where offenders were prohibited from being; among other provisions, statute excluded offenders from being in "places" where "regularly scheduled educational, recreational, or social programs" were conducted.

U.S. v. South Carolina, 2012 WL 5897321 (D.S.C. 2012):
Holding: South Carolina law making it a felony to transport, shelter, etc., an illegal alien to help them avoid detection is likely preempted by federal law, and so a preliminary injunction against the law issues.

U.S. v. Richards, 2013 WL 1683639 (S.D. Tex. 2013):
Holding: 18 USC 48, which criminalizes "animal crush" videos, violates 1st Amendment because such videos, although offensive, are not obscene in that they do not involve sexual conduct.

Utah Coalition of La Raza v. Herbert, 2014 WL 2765195 (D. Utah 2014):
Holding: Utah's immigration enforcement act, which criminalized helping aliens to enter Utah and allowed warrantless arrests, was pre-empted by federal immigration law.

U.S. v. Wainright, 2011 WL 2276992 and 2517013 (E.D. Va. 2011):
Holding: Defendant's conviction for killing witness to prevent them from reporting to law enforcement must be vacated in light of intervening law that witness' proposed communication must be to federal law officials.

State ex rel. Montgomery v. Harris, 2014 WL 8513998 (Ariz. 2014):
Holding: Statute making it illegal to drive with an illegal drug "or its metabolite" in person's body applied only to metabolites capable of causing impairment, and did not apply to Defendant who drove with non-impairing cannabis metabolite; interpreting statute to apply to non-impairing metabolites would lead to absurd results since it would create criminal liability for metabolites that say in body for long time.

Paschal v. State, 91 Crim. L. Rep. 65 (Ark. 3/29/12):
Holding: Statute that makes it a crime for teachers to have sex with students under age 21 violates constitutional right to privacy as applied to teacher who has sex with 18 year old student.

In re Taylor, 96 Crim. L. Rep. 620 (Cal. 3/2/15):
Holding: Law prohibiting sex offenders from living within 2000 feet of schools or parks is unconstitutional as applied to offenders in San Diego County because the restriction has left many offenders homeless since 97% of the county is off-limits; the law bears no rational relationship to protecting children and is arbitrary, unreasonable and oppressive because by making offenders homeless, the law makes it difficult for them to be tracked and to have access to social services, rehabilitation or family.

People v. Murphy, 2011 WL 2638136 (Cal. 2011):
Holding: If a general statute defines an offense and there is also a special statute, violation of which will result in violation of the general statute, then the special statute is interpreted as creating an exception to the general statute; thus, the statute making it a misdemeanor to file a false report of theft of a vehicle creates an exception to the general statute making it a felony to offer any false or forged instrument.

State v. Nowacki, 2015 WL 873480 (Conn. 2015):
Holding: State harassment statute which penalized communicating with a victim by email was unconstitutional as applied to Defendant since Defendant's conviction was dependent on the content of his email, not on the means of transmission; the content was protected under the First Amendment because all Defendant did was send an email to his employee (nanny of children) that threatened legal action for violation of employee's contract, which was permissible, even though nanny found the email upsetting.

Final Exit Network, Inc. v. State, 2012 WL 360523 (Ga. 2012):
Holding: Statue criminalizing offers of assistance in suicide was facially invalid under the free speech provisions of the state and federal constitutions because it was not narrowly tailored to promote the state's compelling interest in preventing suicide.

People v. Clark, 2014 WL 1097190 (Ill. 2014) and People v. Melonga, 2014 WL 1096905 (Ill. 2014):
Holding: Eavesdropping statute which prohibited secret recording of others was overbroad under First Amendment.

People v. Aguilar, 93 Crim. L. Rep. 775, 2013 WL 5080118 (Ill. 9/12/13):
Holding: Statute that makes it illegal for anyone other than police and certain others to carry a "ready to use" firearm that is "immediately accessible" violates 2nd Amendment.

State v. Sarrabea, 94 Crim. L. Rep. 117, 2013 WL 5788888 (La. 10/15/13):
Holding: La. law making it a felony for an alien to drive without documentation demonstrating lawful presence in the U.S. is preempted by federal law in the area of alien registration.

Com. v. Lucas, 97 Crim. L. Rep. 628 (Mass. 8/6/15):
Holding: Statute criminalizing making false statements about political candidates or voter initiatives violated free speech guarantees of state constitution.

People v. Moreno, 2012 WL 1381039 (Mich. 2012):
Holding: Statute prohibiting people from resisting and obstructing a police officer did not abrogate common-law right to resist illegal police conduct, including unlawful arrests and unlawful entries into constitutionally protected areas; neither the language nor legislative history of the statute indicated that the Legislature intended to abrogate this common-law right.

State v. Melchert-Dinkel, 2014 WL 1047082 (Minn. 2014):
Holding: Statute prohibiting advising or encouraging someone from committing suicide was overbroad under First Amendment.

Chunn v. State ex rel. Mississippi Dept. of Insurance, 2015 WL 270037 (Miss. 2015):
Holding: Statute barring felons from being bail bond agents was unconstitutional as applied to felon with 30-year old drug conviction, who committed no subsequent law violations and had been a bond agent for 20 years; State's reason for the statute – that felons lost trust of society – was not applicable to all felons and deprived many felons of employment.

State v. Gregori, 2014 WL 2958322 (Mont. 2014):
Holding: Defendant's niece was not a "family member" within meaning of domestic assault statute which defined "family member" as "mothers, fathers, children, brothers, sisters, and other past or present family members of a household."

State v. Dugan, 92 Crim. L. Rep. 734, 2013 WL 607824 (Mont. 2013):
Holding: (1) Even though Defendant, in talking to Gov't employee on phone, got angry and called her a "f***ing [obscene name]", these were not fighting words that lacked First Amendment protection since there was little likelihood of an immediate breach of peace or imminent violence since the employee was on the phone; "words spoken over

the telephone are not proscribable under the fighting words doctrine because the person listening on other end of the line is unable to react with imminent violence against the caller," and (2) harassment law provision which made use of profane language "prima facie" evidence of intimidation was overbroad under First Amendment.

Byars v. State, 96 Crim. L. Rep. 110 (Nev. 10/16/14):
Holding: (1) Even though Defendant was suspected of driving while drugged (marijuana), 4th Amendment requires a warrant to do a blood draw; the natural dissipation of TCH from blood does not create exigent circumstances, per se. (2) State implied consent law is unconstitutional because it allows forcible extraction of blood rather than a criminal or administrative penalty if Driver refused consent; for consent to be valid under 4th Amendment, the person must be allowed to modify or revoke consent after it is given.

State v. Pomianek, 96 Crim. L. Rep. 664 (N.J. 3/17/15):
Holding: Race-bias statute that allowed a jury to convict based on the victim's perception of whether the crime was race-biased, as opposed to whether the Defendant actually intended a race-biased crime, was void for vagueness.

People v. Golb, 2014 WL 1883943 (N.Y. 2014):
Holding: Statute defining harassment as when a person, with intent to harass, annoys, threatens, or alarms another person, or communicates in a manner likely to cause annoyance or alarm, is unconstitutionally vague.

People v. Marquan M., 2014 WL 2931482 (N.Y. 2014):
Holding: Law prohibiting cyberbullying against "any minor or person" where communication had no legitimate purpose and was intended to harass or annoy was overbroad; law was intended to be aimed at bullying school children but was so broadly written as to include many types of protected communication; court vacates Defendant's conviction for posting sexual information about his classmates on social network site.

State v. Romage, 94 Crim. L. Rep. 748 (Ohio 3/6/14):
Holding: Ohio solicitation statute which prohibited any adult, without permission from a child's parent, from soliciting, coaxing, enticing or luring a child to "accompany the person in any manner," including entering a vehicle, was overly broad in that it prohibited many innocent scenarios.

State v. Jones, 90 Crim. L. Rep. 10 (S.D. 9/21/11):
Holding: Even though rape statute authorized conviction for someone who did not know victim was too intoxicated to consent, the State was required to prove Defendant knew this since strict liability crimes are not favored.

State v. Medina, 95 Crim. L. Rep. 540 (Vt. 7/11/14):
Holding: State law mandating collection of DNA from anyone arraigned for a felony violates Vermont Constitution.

State v. Immelt, 2011 WL 5084574 (Wash. 2011):
Holding: County noise ordinance prohibiting honking of car horn for any reason other than safety purposes was overbroad in that it prohibited freedom of expression in some instances.

Williams v. State, 2014 WL 2677722 (Ala. App. 2014):
Holding: Statute saying that consent is no defense to consensual sodomy between adults violates 14th Amendment due process right of privacy.

State v. Boehler, 2011 WL 4047350 (Ariz. Ct. App. 2011):
Holding: Ordinance banning panhandlers from asking for cash after dark violated free speech right.

People v. Noyan, 2014 WL 7175120 (Cal. App. 2014) and 2015 WL 159499 (Cal. App. 2015):
Holding: Where a statute made bringing non-controlled substances into a jail punishable by state prison time, but bringing controlled substances into a jail punishable only by county jail time, the statute lacked a rational basis and violated Equal Protection.

People v. Mulcrevy, 2014 WL 7639837 (Cal. App. 2014):
Holding: Concentrated cannabis is covered by medical marijuana law because it covers resin and "concentrated cannabis" is resin.

People v. Tirey, 2014 WL 1653278 (Cal. App. 2014):
Holding: Statute which allowed sex offenders who had sexual intercourse with children under 10 to obtain a certificate of rehabilitation but did not allow offenders who committed lewd acts with children under 14 to obtain a certificate violated Equal Protection.

People v. Buza, 96 Crim. L. Rep. 270 (Cal. App. 12/3/14):
Holding: Statute that requires DNA samples from persons arrested for felonies violates Calif. Constitution.

People v. Nguyen, 2014 WL 10498 (Cal. App. 2014):
Holding: City Ordinance which prohibited sex offenders from entering parks and recreational facilities was preempted by State law regulating the daily life of sex offenders.

Dorsey v. State, 2014 WL 4995171 (Fla. App. 2014):
Holding: Defendant had no duty to retreat under Stand Your Ground Law even if he was engaged in unlawful activity at time of shooting; the law had no requirement that person not be engaged in unlawful activity.

Weeks v. State, 2013 WL 6818369 (Fla. App. 2013):
Holding: Felon-in-possession statute was unconstitutionally vague where it allowed possession of "antiques" and "replicas," but focused on the firing mechanism of both,

such that a reasonable person would not know what constituted a "replica" or what alterations could be made until it was no longer a "replica."

Neal v. State, 2013 WL 1316692 (Fla. App. 2013):
Holding: The Florida statute governing offense of fraudulent use of a credit device requires consolidation of all unauthorized uses of the same card within 6 months into a single offense; the Florida statute is based on a Model Act, which was designed to distinguish between petty and more major criminal acts.

Figueroa-Santiago v. State, 2013 WL 3198126 (Fla. App. 2013):
Holding: Statute that prohibited using electronic communication to benefit or promote a gang was overly broad under First Amendment because it also criminalized non-criminal speech.

Ramirez v. State, 2012 WL 1889282 (Fla. App. 2012):
Holding: Even though statute prohibiting a felon from working for a bondsman did not contain a mens rea requirement, such a requirement is logically required and courts must read a knowledge element into that portion of the statute.

Enoch v. State, 2012 WL 3047313 (Fla. App. 2012):
Holding: Law prohibiting electronic communication for purpose of benefiting or promoting a criminal gang was overbroad under First Amendment because it was not narrowly tailored to prohibit only illegal communication regarding the gang.

Gordon v. State, 2014 WL 2884035 (Ga. App. 2014):
Holding: A half-blood relationship between Defendant (uncle) and complainant (niece) was not one expressly enumerated by incest statute, so Defendant's acts were not criminal.

People v. Grant, 2014 WL 7141219 (Ill. App. 2014):
Holding: Unlawful weapon statute which prohibited carrying an uncased, loaded and immediately accessible firearm on any public street violated 2nd Amendment, because it amounted to a ban on carrying ready-to-use guns outside the home.

Morgan v. State, 2014 WL 561665 (Ind. App. 2014):
Holding: Public intoxication statute that prohibited behavior that "annoys" another person was unconstitutionally vague because it did not give notice of what conduct would be considered illegally annoying.

Harris v. State, 2013 WL 1223322 (Ind. App. 2013):
Holding: Offense of internet use (use of social networking site) by a sex offender violated the First Amendment as applied to Defendant who was accused of using the internet to engage in constitutionally protected speech; statue was not narrowly tailored in that it prohibited speech that did not involve harmful interaction with minors, and the state had already criminalized illicit communication for all sex offender registrants.

State v. Sarrabea, 2013 WL 1810228 & State v. Gomez, 2013 WL 2214552 (La. App. 2013):
Holding: Statute making it illegal for "aliens" to drive in the state without documentation demonstrating their lawful presence in U.S. was preempted by federal law regulating the field of alien registration.

People v. Jones, 2013 WL 4823162 (Mich. App. 2013):
Holding: Statute prohibiting trial courts in prosecution for "reckless driving causing a death" from instructing on lesser-included offense of "moving violation causing death" violated separation of powers and due process right to trial by jury; while the Legislature's duty is to create the law, the court's duty is to instruct on the law, including lesser-included offenses.

People v. Deroche, 829 N.W.2d 891 (Mich. App. 2013):
Holding: Statute prohibiting possession of firearms by intoxicated persons is unconstitutional as applied to constructive possession case; the gov't's legitimate concern was with actual physical possession of a firearm while intoxicated, not with a person who has consumed alcohol but is then merely in the vicinity of a firearm.

People v. Yanna, 2012 WL 2401400 (Mich. App. 2012):
Holding: Statute banning possession of stun guns violated Second Amendment and state constitutional right to keep and bear arms.

People v. Douglas, 2012 WL 6846218 (Mich. App. 2011):
Holding: The statute providing that a person shall not sell, rent, distribute, transport, or possess any audio or video recording, with knowledge that the recording did not provide the name and address of its manufacturer on the box, was facially overbroad in not limiting its application to commercial speech.

State v. Wenthe, 2012 WL 5896779 (Minn. App. 2012):
Holding: The "clergy sexual conduct law" violated Establishment Clause as applied to priest-Defendant because his trial caused excessive government entanglement with religion in that the court admitted extensive evidence regarding Catholic religious doctrine, policies and practices at trial.

State v. Packingham, 2013 WL 4441667 (N.C. App. 2013):
Holding: Statute prohibiting sex offenders from accessing social networking sites was not narrowly tailored to achieve a significant gov't interest, and arbitrarily abridged 1st Amendment rights by prohibiting a wide range of communication unrelated to statute's goal.

State v. Packingham, 93 Crim. L. Rep. 696 (N.C. App. 8/20/13):
Holding: Law prohibiting sex offenders from accessing social networking sites violated First Amendment because it prohibited activity that did not involve contact with children, and was overbroad in that it did not give fair notice to persons of what sites were actually prohibited; while a person of ordinary intelligence would interpret the statute to ban sites

such as Facebook, the language was much more expansive and could ban sites such as Google and Amazon, which contain social networking and user-comment pages.

State v. Daniels, 2012 WL 6737523 (N.C. App. 2012):
Holding: Statute prohibiting sex offenders from being in any place where minors gather for scheduled educational, recreational or social programs was unconstitutionally vague where Defendant was indicted for being in a parking lot of an adult softball field that was adjacent to a children's tee ball facility; the statute failed to give a person of ordinary intelligence reasonable notice of what conduct is prohibited.

People v. Gabriel, 2012 WL 3870024 (N.Y. County Ct. 2012):
Holding: Law criminalizing feeding wild deer was overbroad under First Amendment because it was not narrowly tailored to prevent disease and left no lawful way to feed deer.

State v. Walker, 2014 WL 1775682 (Ohio. App. 2014):
Holding: Where killing was result of an almost spontaneous eruption of events and involved a fight involving several people, evidence was insufficient to show prior intent necessary for aggravated murder.

State v. Klembus, 2014 WL 3697685 (Ohio App. 2014):
Holding: The repeat DWI specification is not rationally related to a legitimate state interest, and thus, violated equal protection; the specification depends solely on a prosecutor's decision whether to present the issue to the grand jury; thus, repeat offenders may be treated differently from one another.

State v. Goode, 2013 WL 620306 (Ohio App. 2013):
Holding: State child enticement statute that bans "solicit[ing]" minors is unconstitutionally overbroad because it would include within it, e.g., any adult who offers a child's friend a ride home from school; because there was no requirement that a person have ill-intent when asking a child to accompany him, the statute prohibited a wide variety of speech and association.

Lima v. Stepleton, 2013 WL 6834959 (Ohio App. 2013):
Holding: City Ordinance regarding vicious dogs was invalid because conflicted with state statute.

Wolf v. State, 2012 WL 6062550 (Okla. Crim. App. 2012):
Holding: Where the Methamphetamine Offender Registry Act did not provide notice to persons of their placement on the registry or duty to register under the Act, due process prohibits convicting a person without notice for purchasing pseudoephedrine.

Com. v. Cahill, 2014 WL 2921806 (Penn. Super. 2014):
Holding: A train "token" is not a "ticket" under statute prohibiting unauthorized sale of "tickets."

Crews v. City of Chester, 2011 WL 205928 (Pa. Comm. Ct. 2012):
Holding: Anti-loitering ordinance requiring police officer, on observing a person loitering in a high drug activity area, to request a "lawful and reasonable explanation" and disperse the person if the answer is unsatisfactory, was vague in that it did not define "lawful and reasonable explanation" or what a person was required to do to comply with the dispersal order.

Ex parte Thompson, 2014 WL 4627231 (Tex. App. 2014):
Holding: The Improper Photography Act, which prohibited taking photos of persons anywhere without their consent, with the intent to arouse or gratify the sexual desire of any person, violated First Amendment.

Ex parte Lo, 94 Crim. L. Rep. 172 (Tex. App. 10/30/13):
Holding: Statute making it illegal for adults to engage minors in sexually explicit online communication for purpose of sexual gratification was overbroad under 1st Amendment, because it could be used to prohibit discussion of such topics as "Lady Chatterly's Lover" or Miley Cyrus "twerking."

State v. Constantine, 2014 WL 3778168 (Wash. App. 2014):
Holding: Defendant asserting a "designated-provider" affirmative defense to marijuana manufacturing need not prove that patient actually had a terminal disease, but only that he had been diagnosed by a health care professional as having one.

Price v. Price, 2013 WL 2211685 (Wash. App. 2013):
Holding: Court lacked authority under civil anti-harassment statute to prohibit a majority owner in a property from visiting the property, even though minority owners obtained a protection order against him.

State v. McKellips, 2015 WL 1186146 (Wisc. App. 2015):
Holding: Using a "computerized communication system" to facilitate a child sex crime means acts such as sending an email message; a cell phone or computer, by themselves, are not a "computerized communication system."

State v. Stuckey, 2013 WL 3724768 (Wisc. App. 2013):
Holding: Statute which makes it illegal for a person to expose their genitals to a child violated 1st Amendment where it did not require State to prove that Defendant knew that the person to whom he sent a photo of his penis via internet was under age.

Subpoenas

Davenport v. State, 2011 WL 2436668 (Ga. 2011):
Holding: Standard under Uniform Act to Secure Attendance of Witnesses for deciding whether Georgia court should summon an out-of-state witness is whether witness is "material" not "necessary"; the judge in the other State is to make the determination whether the witness is "necessary.

Yeary v. State, 2011 WL 2436664 (Ga. 2011):
Holding: Where Defendant sought to obtain the source code for a breath-test machine under the Uniform Act to Secure Attendance of Witnesses, Defendant was not required to identify a specific corporate agent of the out-of-state corporation, but was permitted to request that the corporation be designated a "material" witness and let the corporation designate the witness.

Sufficiency Of Evidence

City of St. Peters v. Roeder, 2015 WL 4929090 (Mo. banc Aug. 18, 2015):
(1) "Red light" camera ordinance conflicts with State law because it does not require the assessment of two points for a moving violation; (2) the invalid portion of the ordinance (no points) can be severed from the valid portions; but (3) such severance can be given only prospective application, because it would violate due process to impose points against Defendant when Defendant was affirmatively informed that a violation of the ordinance would not result in points.
Facts: Defendant, who ran a red light camera, was charged under city ordinance making running a red light an infraction punishable by fine up to $200 and no points shall be assessed against their license. Defendant challenged the validity of the ordinance on a number of grounds.
Holding: Sec. 302.302.1(1) requires that a person found guilty of a moving violation be assessed two points. The ordinance conflicts with State law by prohibiting what the state law requires. Nevertheless, the Court does not declare the entire ordinance invalid, because the "no points" provision can be severed from the rest of the ordinance. At the time Defendant violated the ordinance, though, it provided she would not be subject to points. Due process requires that a person receive notice not only of the conduct that will subject her to punishment, but also of the penalty the State may impose. This notion is partly enforced through the ex post facto prohibitions in the U.S. and Missouri Constitutions, and is also expressed in Missouri's constitutional ban against civil laws retrospective in operation. These notions require that this Court give effect to the severance and permit enforcement of the remainder of the ordinance prospectively only. Thus, the ordinance cannot be enforced against Defendant because it would violate her right to fair notice of a direct consequence of her conviction, since Defendant did not have fair notice that points would be assessed at the time of the violation. Judgment dismissing charges affirmed.

City of Moline Acres v. Brennan, 2015 WL 4930167 (Mo. banc Aug. 18, 2015):
(1) City Ordinance which prohibited vehicle owners from "permitting" their vehicle to be operated at a speed in excess of the speed limit requires that City prove that the owner gave the driver specific permission to do this; it violates due process and shifts burden of proof to create rebuttal presumption that proof of ownership proves consent to unlawful speeding; and (2) City Ordinance system which sent defendants a "notice" that they would be charged in Municipal Court with Ordinance violation unless they paid City an alleged "fine" violated due process because this was a shortcut "around" the judicial

system; only courts are authorized to impose "fines" and only after a judicial determination of guilt.

Facts: City Ordinance prohibited vehicle owners from "permitting" their vehicle to be operated in excess of a speed limit. Defendant's car was caught speeding by an automated enforcement camera. City sent him an alleged Notice of violation that informed him that unless he paid a fine to City, the matter would be referred to Prosecutor for prosecution. Defendant was ultimately charged with violating Ordinance. Defendant challenged Ordinance on various grounds.

Holding: The Ordinance here does not prohibit speeding. The Court is required to take the Ordinance at "face value." What Ordinance prohibits is owners *permitting* their vehicle from being operated at an unlawful speed. The identity of the driver is not an element of the offense. Ordinance requires proof (1) that a vehicle was speeding, (2) that the person charged was the owner of the vehicle, and (3) that the owner gave the driver specific permission to operate the vehicle at an unlawful speed. City argues that proof of ownership creates a rebuttable presumption of consent to operation and unlawful speeding. But such a presumption is not constitutionally permissible in either a civil or criminal case. Even if this Court assumes there is some rational connection between ownership of a vehicle and permission to use that vehicle generally, this does not stretch far enough to allow the fact-finder to infer from ownership the very specific permission to exceed the speed limit that the Ordinance requires. City can charge the violation, however, if it can state facts in the Notice charging the offense showing probable cause that the owner gave the driver specific permission to use owner's vehicle for speeding. But the Notice here did not conform to Rule 37.33 for various reasons. First, it did not state the name, division and street address of the circuit court. Second, it did not show any facts to establish probable cause that Defendant violated the Ordinance; instead the blank merely contains the phrase, "Violation of Public Safety on Roadways." Third, the Notice fails to tell defendants that they can plead not guilty and appear at trial. Rule 37.49 creates a process to allow defendants to plead guilty and pay a fine to a "violations bureau." But the Notice and Ordinance here do not do that. Instead, the payment system creates an unauthorized extra-judicial process. The Ordinance creates a system whereby owners of vehicles are accused of violating the Ordinance in a letter from police, and then told that by paying money to the City, charges will not be filed in the first place. "When a 'fine' is paid to a court, the court must report the conviction and distribute the proceeds according to law. When money is paid directly to the City in order to keep from being charged … that payment is in no sense a 'fine' and is not subject to [judicial] oversight and reporting." The power to inflict punishment requires a judicial determination that a law has been violated. Before there can be such judicial determination, due process requires City prove guilt beyond a reasonable doubt. These two principles prevent City from threatening prosecution as a means of forcing a person to pay City with no due process and no proof of guilt. Under Rule 37.33, it is improper for any notice to demand payment of money. The only exception is for notices that are subject to a "violation bureau." The system here is an unauthorized one that is a shortcut "around" the judicial system and its protections for the accused. As a result, both Ordinance and the Notice are invalid. Judgment dismissing charge affirmed.

Concurring opinion (Draper, Stith, Teitleman, JJ.): When confronting matters of public safety, courts should skeptically scrutinize manufactured legal fictions that may

obscure the actual danger confronted. Prior cases have held that traffic ordinances cannot be a tax ordinance in the guise of an ordinance enacted under the police power. It is for the court to determine whether the primary purpose of the ordinance is regulation under the police power or revenue under the tax power. Ordinance comes across as a mechanism for generating City revenue, not as public safety measure. This Court should be cognizant of the times in which these ordinances are being enforced in light of recent criticism of St. Louis County municipalities, which have used traffic violations and the revenue they generate to enrich their coffers to the financial detriment of the citizens they are ostensibly protecting.

Tupper v. City of St. Louis, 2015 WL 4930313 (Mo. banc Aug. 18, 2015):
(1) City red-light camera Ordinance which created rebuttable presumption that owner of vehicle was the driver of the vehicle violated due process because it shifts burden of persuasion to defendants; (2) even though Drivers had been charged with Ordinance violation but had their charges dismissed by Prosecutor, they could challenge constitutionality of Ordinance in a declaratory judgment action; (3) Drivers were not allowed attorney's fees because City's action in passing unconstitutional Ordinance did not constitute intentional misconduct; (4) Director of Revenue had no standing to appeal trial court's judgment granting relief to Drivers where court's judgment did not order DOR to do anything, so DOR was not aggrieved by case.
Facts: Drivers were charged with violation of red-light camera Ordinance. Ordinance created a "rebuttable presumption" that the owner of a vehicle was the driver. Before Drivers could challenge Ordinance in their Ordinance violation cases, City dismissed the charges against them. Drivers then brought declaratory judgment action to invalidate Ordinance, claiming they had no other adequate legal remedy to do so. Trial court found for Drivers, but denied attorney's fees. Drivers, City and Department of Revenue appealed.
Holding: (1) Prosecutions for Ordinance violations are civil proceedings with quasi-criminal aspects. While rebuttable presumptions in civil cases are generally permitted, they are not generally permitted in criminal cases because they relieve the State of its burden of proof and shift the burden of persuasion to defendants. Prior parking Ordinance cases have held that strict liability can be imposed on owners without violating due process because parking fines are "relatively small," and do not impact a driver's license or insurance. Here, however, a red-light camera violation fine is $100 – not small – and violators will be assessed two points on their license. These factors, along with the quasi-criminal nature of municipal court proceedings, leads this Court to apply the law regarding presumptions in criminal cases. Presumptions which shift only the burden of production may be constitutional, but the Ordinance expressly shifts the burden of persuasion, which is unconstitutional. The Ordinance states that if an owner furnishes "satisfactory evidence" that they were not driving the car, the charges may be terminated. This shows City's intent to require an owner to prove to the fact-finder that they were not the driver. (2) Drivers can challenge Ordinance in declaratory judgment action. A pre-enforcement challenge is sufficiently ripe to raise a justiciable controversy when (a) the facts needed to adjudicate the claim are fully developed, and (b) the laws at issue affect plaintiffs in a manner that gives rises to an immediate, concrete dispute. Cases presenting predominantly legal questions are particularly amendable to conclusive determination in

a pre-enforcement context because they require less factually development. Here, Drivers' claim is predominantly legal because it involves the constitutionality of the rebuttable presumption. Also, Drivers have been affected by Ordinance because they were previously facing prosecution under it. (3) Even though Drivers prevailed in their lawsuit, they aren't entitled to attorney's fees. In general, the "American Rule" is that absent statutory authorization or contractual agreement, each party pays their own attorney's fees. This rule can be overcome if a party shows "intentional misconduct" by a defendant. But City's actions in enacting the Ordinance did not constitute "intentional misconduct." (4) The DOR (among others) appealed the trial court's judgment invalidating the Ordinance. However, the trial court's judgment had no effect on DOR and did not order DOR to do anything. DOR is not an aggrieved party, and has no standing to appeal.

State v. Claycomb, 2015 WL 3979728 (Mo. banc June 30, 2015):
(1) A sufficiency of evidence claim is preserved for appellate review even if it was not raised in the trial court in a new trial motion or otherwise; and (2) in nonsupport case for failure to pay monetary child support, State is not required to prove as part of its case that Defendant failed to provide in-kind support, such as food, clothing, lodging, or medicine.
Facts: Defendant was convicted at a bench trial of failure to pay monetary child support, Sec. 568.040. Defendant contended the evidence was insufficient to convict because, although the State showed he did not pay monetary child support, the State did not show he failed to support his children with in-kind contributions.
Holding: (1) As an initial matter, there is a question whether Defendant has preserved his sufficiency claim for appeal, since he failed to raise it below. It is preserved. As relevant here, Rule 29.11(e) states that in a bench trial, a new trial motion is not necessary to preserve issues for appeal, but if a new trial motion is filed, allegations of error must be included in the new trial motion *except* for questions regarding sufficiency of evidence. Similarly, Rule 29.11(d)(3) provides that in jury-tried cases, allegations of error to be preserved for appeal must be included in a motion for new trial *except* for questions regarding the sufficiency of evidence. To the extent that some prior cases have held that a sufficiency claim can only be reviewed for plain error if not included in a motion for new trial, they should no longer be followed, because they are inconsistent with Rule 29.11. No Rule requires the filing of a motion for judgment of acquittal in a court tried case. Rule 27.07 provides for filing of a motion for judgment of acquittal in a jury case, but even then, 27.07(c) provides that the court may enter a judgment of acquittal of its own motion based on insufficiency, and that no motion for judgment of acquittal need be filed prior to submission of the case in order for a defendant to seek a judgment of acquittal after the verdict. (2) Defendant argues the State is required to prove that he failed to provide in-kind support. The version of Sec. 568.040 in effect at the time of the offense provided that a parent commits nonsupport if such parent fails to provide "adequate support" for the child. Sec. 568.040.2(3) defines "support" as food, clothing, lodging, and medical care. As relevant here, Sec. 568.040.4 states that nonsupport is a Class D felony if Defendant fails to pay support he is obligated to pay in six out of 12 months. Here, the State showed that Defendant failed to pay financial support for six months. And, even though Defendant later paid in full, his late payment is

no defense, since a child's needs are continuous. The State does not have to negate every possibility that the defendant provided in-kind support. The State does not have a duty to disprove every reasonable hypothesis of innocence. Had the evidence shown that Defendant provided substantial monetary or other support, and the question was whether that support was "adequate" to meet the child's needs, more specific evidence of the child's needs might well have been required. However, while evidence that the charged parent did provide in-kind support would be relevant and admissible, it is not the State's burden to introduce it to make a prima facie case where, as here, the State presented evidence that Defendant failed to pay monetary support.

State v. Coleman, 2015 WL 3759611 (Mo. banc June 16, 2015):
Holding: Where Defendant (1) handed bank teller a grocery sack and said to put money in the bag, (2) told a bank manager to "stop where you are and don't move any farther," and (3) took the money-filled bag and ran out of the bank, this constituted forcibly stealing property by threatening the immediate use of physical force; thus, the evidence was sufficient to convict of second-degree robbery, Sec. 569.030.1.
Discussion: Sec. 569.030.1 provides that a person commits second degree robbery when he forcibly steals property. Sec. 569.010(1) defines "forcibly steals" as threatening the immediate use of physical force. Determining the existence of a threat is an objective test that depends on whether a reasonable person would believe the defendant's conduct was a threat of immediate use of force. Here, a reasonable person would find Defendant's actions to be threatening. The Court is not holding, however, that all thefts of money from a bank necessarily involve forcible stealing and, therefore, constitute robbery. Instead, the cases must be decided on their facts and context.

State v. Ess, 2015 WL 162008 (Mo. banc Jan. 13, 2015):
(1) Even though New Trial Motion was filed one-day late when Circuit Clerk would not accept it the day before because an attached affidavit was not notarized, Circuit Clerk had no authority to reject the filing and New Trial Motion would be deemed timely-filed; (2) Juror engaged in intentional nondisclosure when Juror failed to answer questions on voir dire about bias, and later said to other Jurors that this was "an open and shut case;" and (3) the 1995 through 2002 version of first-degree child molestation, Secs. 566.067.1 and 566.010(3) (1995 – 2002) did not include touching a victim "through clothing;" thus, evidence was insufficient to convict even though Defendant put Victim's hand on Defendant's clothed penis.
Facts: Defendant was convicted of various sex offenses. After trial, Defendant sought to timely file a New Trial Motion, which had attached an affidavit from a juror about juror misconduct. The Circuit Clerk refused to accept the New Trial Motion because the affidavit was not notarized. This could not be resolved until the next day, by which time the New Trial Motion was untimely. At the New Trial Motion hearing, Defendant sought to have the New Trial Motion deemed timely-filed. On the merits, a Juror submitted an affidavit and testified that during a recess during voir dire, a different Juror (No. 3) said this was an "open and shut case."
Holding: (1) The State contends the juror nondisclosure issue is not preserved because the New Trial Motion was untimely filed. Generally, a trial court has no authority to extend the time for filing a New Trial Motion beyond that allowed in Rule 29.11(b).

Here, however, the Circuit Clerk refused to file the tendered New Trial Motion in the absence of some clear prohibition in law, rule or specific court order. The Clerk was obligated to accept the filing when tendered. Thus, the New Trial Motion should be deemed timely filed because it was tendered (but rejected) within the time allowed by Rule 29.11(b). If the motion was defective, the remedy was for a party to move to strike it, not for the Clerk to refuse to file it. (2) Juror No. 3 was asked numerous questions on voir dire about whether he could be fair and impartial. Defense counsel specifically asked if any juror held any preconceived notions of guilt or innocence. Juror No. 3 did not answer. Intentional nondisclosure occurs when there is no reasonable inability to comprehend the information asked by a question, and the prospective juror's forgetfulness in failing to answer is unreasonable. Given the extensive questions asked of the venire, there is no possibility that Juror No. 3 failed to comprehend the issue being asked. Any purported forgetfulness is not reasonable here. Thus, the non-disclosure was "intentional." Bias and prejudice is presumed where "intentional" nondisclosure occurs. The State argues that Defendant did not call Juror No. 3 to testify, but Defendant is permitted to prove his claim of nondisclosure through other evidence than Juror No. 3. Defendant called another Juror to testify that No. 3 said this was an "open and shut case." The State argues that this statement does not mean that Juror No. 3 favored the State because Juror No. 3 could have favored the defense. But this is inconsequential because a bias toward *either* side is material. New trial ordered on all counts except first degree child molestation, for which evidence was insufficient because the relevant version of the statute in effect at time of crime did not criminalize touching "through clothing."

State v. Hunt, 2014 WL 7335208 (Mo. banc Dec. 23, 2014):
(1) Even though Defendant-Officer broke in Suspect's door and hit him while arresting him, evidence was insufficient to convict Defendant-Officer of first-degree burglary because Officer either had authority to enter the residence based on the arrest warrant for Suspect, or if Officer did not believe Suspect was inside residence, he could not have intended to assault him by breaking in (which was the alleged intended crime from the entry); (2) Even though Defendant-Officer broke in Suspect's door, evidence was insufficient to convict of conviction for property damage because Sec. 544.200 give officers authority to break open doors to arrest someone if, after notice, the person refuses to answer the door; and (3) the jury instructions for assault were plainly erroneous because they misled jury into considering whether Defendant-Officer was a "law enforcement officer," which was not a jury question but a matter of law under 195.505; the proper question was whether Defendant-Officer "exceeded" his authority, not whether he "had" authority.
Facts: Officers had an arrest warrant to arrest Suspect for two felonies. Officers banged on the door of Suspect's trailer (where an informer said he was) and announced "sheriff's department" but no one answered. Defendant-Officer looked in a window and saw drug-related items. Defendant-Officer then kicked in the door and went inside. Defendant-Officer employed "control tactics" by hitting Suspect and also cursed at him. Defendant-Officer apparently had had a different prior incident with Suspect where he also hit him. Defendant-Officer was charged and convicted of first degree burglary for unlawfully entering the trailer with the purpose of assaulting Suspect, second-degree property damage for breaking down the front door, and third degree assault for hitting Suspect.

Holding: (1) There is insufficient evidence to support the burglary conviction. Burglary requires proof of (a) unlawful entry and (b) an intent to commit a crime therein, i.e., the alleged assault. The lawfulness of the entry depends on whether Defendant-Officer had a reasonable belief that Suspect was inside the trailer at the time. If, as the State contends, he did not reasonably believe Suspect was inside the trailer, then he could not have formed the intent to assault the suspect (because he didn't believe the suspect was there). But if he did have such a belief that Suspect was inside, he had authority to enter by virtue of the arrest warrant. Thus, both elements needed to prove burglary can't be present here. (2) There is insufficient evidence to support the property damage conviction because Sec. 544.200 gives officers authority to break open a door if, after notice, the officer is refused admittance. Here, officers had knocked, announced their presence and demanded entry, but were refused. As a matter of law, Defendant-Officer's action in breaking down the door was lawful under Sec. 544.200. (3) The jury instructions for the assault conviction were plainly erroneous because they required the jury to find Defendant-Officer was acting as a law enforcement officer, which was not an issue for the jury to decide because it was a legal question answered by statute, Sec. 195.505. The issue for the jury to decide was whether he used reasonable force. The proper question for the jury was not whether Defendant-Officer *had* authority, but whether he *exceeded* it. If the jury believed the State's theory at trial that Defendant-Officer was acting outside his authority, then it would never have considered the question of reasonable force at all, so the instruction was misleading. Burglary and property damage convictions vacated. New trial on assault conviction ordered.

State v. Miller, No. SC91948 (Mo. banc 7/3/12):

(1) Where the information charged various sex acts between Dec. 3, 2004 and Dec. 5, 2005, and the verdict director tracked these dates, but the evidence was that the offense was committed in 1998 or 1999, the evidence is insufficient to convict because the time span of the charged offense was different than the evidence actually presented and the charged offense did not give adequate notice to the defense of the evidence the State intended to present; because the evidence is insufficient, Defendant cannot be retried on these counts; and (2) where Defendant was charged with another sex offense alleged to have occurred in 1997 or 1998, the trial court erred in giving a jury instruction regarding the definition of sexual contact that was not enacted until 2002; because this jury instruction constitutes only "trial error," Defendant can be retried on this count.

Facts: Defendant was charged by information with child sex offenses alleged to have occurred between Dec. 3, 2004 and Dec. 3, 2005. The jury instruction tracked this time frame. However, the evidence presented at trial showed that these offenses occurred in 1998 or 1999. Regarding a separate charge of first degree child molestation, the verdict directed stated that Defendant touched the genitals of a child "through the clothing" in 1997 or 1998.

Holding: (1) There was no evidence that Defendant committed the first charged sex offenses in 2004 or 2005, as charged in the information and as instructed in the jury instruction. While the exact date of a sex offense is not an element of the crime, a time element cannot be so overbroad as to nullify an alibi defense or prevent application of double jeopardy principles. When the State chooses to file an information and submit a parallel jury instruction that charges a specific time frame, the evidence must conform to

that time frame. Otherwise, the defense would not have adequate notice of the evidence the State intends to present. Here, there was no evidence Defendant committed the first sex acts during 2004 or 2005. Having not presented sufficient evidence to convict, the State cannot retry Defendant on these charges and he must be discharged. (2) Regarding a separate charge of first degree child molestation, at the time of this offense, Sec. 566.067 RSMo. 1994 applied and it did not define sexual contact as "touching through the clothing." That language was not added until the statute was revised in 2002. Hence, the jury instruction using the 2002 language was error. However, this is "trial error," so a new trial on this charge is permissible.

State v. Vaughn, No. SC91670 (Mo. banc 5/29/12):
(1) Sec. 565.090.1(5) which makes it harassment to "knowingly make[] repeated unwanted communication to another person" is unconstitutionally vague; however, (2) 565.090.1(6) which criminalizes a person who "without good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress" is constitutional because it proscribes conduct, not merely speech.
Facts: Defendant was charged with two counts of "harassment" under Sec. 565.090.1. He was charged with violation of Sec. 565.090.1(5), which makes it a crime to knowingly make repeated unwanted communication to another person, because he had repeatedly telephoned his former wife after she had told him not to call again. He was also charged with violation of Sec. 565.090.1(6) for entering his former wife's home when she was not there with the purpose of scaring her. The trial court dismissed the charges on grounds that 565.090.1(5) and (6) violated the First Amendment. The State appealed.
Holding: Regarding 565.090.1(5), "repeated," "unwanted," and "communicate" are simply words that can be applied too broadly. Although subdivision (5) purports to criminalize "harassment," subdivision (5) does not require conduct to actually harass in any sense of the word. Rather, it criminalizes a person who "knowingly makes repeated unwanted communication to another person." This would have a chilling effect on a broad range of everyday communication. For example, individuals picketing a private or public entity would have to cease once they were told that their protests were unwanted. Hence, subdivision (5) is unconstitutionally vague. Subdivision (6), however, is constitutional because it proscribes conduct, not merely speech.

E.M.B. v. A.L., 2015 WL 2393416 (Mo. App. E.D. May 19, 2015):
Even though former Co-Worker sent delivery-driver-Victim unwanted text messages, videotaped her from a parking lot, and sought to have her deliver a pizza to him at 1:53 a.m., where Co-Worker never threatened Victim with physical harm, evidence was insufficient to prove "stalking" to support a full order of protection.
Facts: Victim sought order of protection against former Co-Worker for stalking. Co-Worker had been fired from pizza delivery for sexually harassing Victim. After Co-Worker was fired, he sent text messages to Victim being upset that he was fired and alleging drug use by her. He also videotaped Victim from a parking lot. He also ordered a pizza for her to deliver to him at 1:53 a.m., but she refused when she saw who was ordering it. The trial court granted Victim a full order of protection for "stalking."
Holding: Sec. 455.010(13) defines "stalking" as when any person purposely and repeatedly engages in an unwanted course of conduct that causes alarm to another person

when it is reasonable in that person's situation to be alarmed by the conduct. "Alarm" means to cause fear of danger of physical harm. Here, even though Co-Worker's behavior was unwanted and inappropriate, there was no evidence that Co-Worker threatened Victim with physical harm. Thus, a reasonable person would not be alarmed or reasonably fear physical harm from the Co-Worker. Order of protection vacated.

Stephenson v. State, 2015 WL 1819108 (Mo. App. E.D. April 21, 2015):
Holding: Even though Defendant hit victim with his hands and feet and rendered victim comatose, there was an insufficient factual basis as a matter of law to convict of armed criminal action since hands and feet do not constitute a "dangerous instrument."
Discussion: The term "dangerous instrument" in Sec. 556.061(9) does not include a part of a person's body. "Instrument" refers to an external object or item. As a matter of law, Defendant/Movant's guilty plea to ACA lacked a factual basis because the assault was not done through the aid of a "dangerous instrument." ACA conviction vacated.

State v. Dudley, 2015 WL 1815037 (Mo. App. E.D. April 21, 2015):
Sec. 575.150 for resisting arrest does not criminalize resisting one's own arrest by "physical interference;" jury instruction which submitted offense based on "physical interference" was plainly erroneous because it allowed jurors to convict based on conduct that was not an element of the crime.
Facts: When police sought to arrest Defendant for a drug offense, Defendant made his body stiff and sat on his hands to avoid being handcuffed. Police eventually used a Taser on him to get him to comply with arrest. He was charged with resisting arrest.
Holding: Sec. 575.150(1) provides that a person commits the crime of resisting their own arrest when they resist the arrest "by using or threatening the use of physical violence or force." The statute does not list "physical interference" as a method to resist one's *own* arrest; "physical interference" is contained only in the arrest of another person section of the statute, 575.150(2). Plain error in instructions results when it is apparent that the trial court has so misdirected or failed to instruct the jury that it affected the jury's verdict. Instructions are more likely to be found plainly erroneous where they excuse the State from the burden of proof on a contested element of the crime. Here, the instruction allowed the jury to convict if Defendant used "violence, physical force, or *physical interference*" to resist. This allowed the jury to find him guilty based on an element that was not a crime. Moreover, the State argued that Defendant should be convicted based on "physical interference." Conviction reversed and remanded for new trial.

State v. Metzinger, 2015 WL 790463 (Mo. App. E.D. Feb. 24, 2015):
Even though Defendant tweeted during the World Series (1) that he was renting his loft to Boston with a separate "pressure cooker," (2) that Boston would not cross the finish line, and (3) that certain song lyrics about "blowin' away" "will go down very soon," trial court did not err in dismissing the information with prejudice because these were not "true threats" under the terrorist threat statute, Sec. 574.115.1(4); a reasonable listener would not interpret them as serious expressions of an intent to commit violence.
Facts: During the World Series between St. Louis and Boston, Defendant tweeted that he was "going to be tailgating with a pressure cooker … STLStrong, GoCards"; that he

was renting his loft on airbnb for a "ridiculous Boston-only rate" with a separate "pressure cooker"; that Boston would not cross the finish line at the World Series; and referencing a song with lyrics about "blowin' away" that "will go down very soon." Defendant was charged with making a terroristic threat in violation of Sec. 574.115.1(4) by making threatening tweets to cause an explosion, "an incident involving danger to life," and risk of closure of Busch stadium. Defendant moved to dismiss on grounds that the tweets were not "true threats" but were sarcastic comments made in the context of a sports rivalry. The trial court dismissed the information with prejudice. The State appealed.

Holding: Rule 24.04(b)(2) provides that defenses and objections based on defects in an information must be raised by motion before trial. Whether an information fails to charge an offense is a question of law, which is reviewed *de novo*. The State asserts that the charge here tracked the language of MACH-CR and alleged all the elements set forth in Sec. 574.115. The issue is whether the tweets constituted the type of threats that can be criminalized. If, in spite of tracking the MACH-CR and statute, the tweets did not, as a matter of law, constitute "true threats," the information is fatally deficient for failure to allege an essential element of a crime under 574.115, i.e., communication of a *threat* to cause an incident or condition involving danger to life. Although Missouri has not previously considered the propriety of a pretrial analysis of whether communications which the State seeks to criminalize are "true threats," federal courts have held that whether a prosecution encroaches on protected speech is a question to be decided by a court as a threshold matter. "True threats" are statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a person or group. However, the speaker need not actually intend to carry out the threat. A statement is not a "true threat" when a listener could not reasonably consider the statement to be a serious expression of an intent to cause injury to another. Here, the statements were made in the context of a sports rivalry, an area often subject to impassioned language and hyperbole. A reasonable listener would not interpret them as serious expressions of an intent to commit violence. Dismissal with prejudice affirmed.

State v. Chaney, 2014 WL 7345025 (Mo. App. E.D. Dec. 23, 2014):

Evidence was insufficient to convict of felony stealing over $500 where the only evidence of value presented by the State was the replacement cost of a fence; Sec. 570.020 requires that value be determined by the market value of the property at the time of the crime, and only if that is not ascertainable, is replacement cost considered.

Facts: Defendant was convicted of felony stealing over $500 for cutting and taking a portion of a fence, which he then sold for scrap. The State presented a witness who testified that the replacement cost of the fence was approximately $950. The witness testified he could not ascertain the value of the fence when it was damaged in the way it was.

Holding: Sec. 570.020 defines "value" as "the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime." Here, the State relied only on the replacement value of the fence. However, Sec. 570.020 directs that replacement cost may only be used if the market value of the property at the time and place of the crime cannot be satisfactorily determined. The State claims that its witness

was not able to ascertain the value of the fence at the time of the crime because it was damaged. But on its face, the State's witness' testimony only supports a finding that the market value of the fence *after* the crime, when it had been damaged, was unascertainable. To meet its burden, the State should have inquired of the witness as to the value of the fence before it was stolen and damaged, or explained why such value was unascertainable, e.g., if there was no market value for the property. Valuing the property at the time of the crime ensures that it is not undervalued by replacement cost. Conviction for felony stealing reversed. Remanded for entry of misdemeanor stealing and re-sentencing.

State v. Brown, 2014 WL 6464568 (Mo. App. E.D. Nov. 18, 2014):
(1) Sec. 570.020(1) regarding value (for determining if stealing is a felony or misdemeanor) abrogates prior case law holding that where property is secondhand, proof as to its cost and its length of use may be used to show value; instead, Sec. 570.020(1) requires that "value" be the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime; even though stolen television cost $749 when new in 2008, where it was stolen in 2011 and pawned for $140, evidence was insufficient to prove value was over $500 to support felony stealing; (2) Even though church sacristy was generally not open to the public, evidence was insufficient to convict of burglary of sacristy where sacristy was open to persons who wanted to speak to a priest and did not have a sign that indicated it was private or that no admittance was allowed; and (3) where Defendant was on trial for burglary of a church on June 18, trial court erred in admitting evidence that Defendant was suspiciously at a second church on June 21 because this was improper propensity evidence.
Facts: On June 18, Defendant entered and stole various items from a church sacristy. He also stole a television from the church. The television was purchased for $749 in 2008; Defendant pawned it for $140 after he stole it in 2011. At trial, the State also presented evidence that Defendant was at a second church on June 21, acting suspiciously.
Holding: (1) Defendant argues the State failed to prove the value of the television was more than $500 to support felony stealing. Often-cited case law such as *State v. Naper*, 381 S.W.2d 789, 791 (Mo. banc 1964), holds that were property is secondhand, proof as to its cost and its length of use may prove value. But Sec. 570.020, which went into effect 15 years later in 1979, abrogates *Naper*. Sec. 570.020 states that "'value' means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime." Here, the State did not present evidence that the television's value at the time of the crime was more than $500, did not assert that the value could not be ascertained, and did not present evidence as to replacement value. The evidence was insufficient to convict of felony stealing. Conviction entered for misdemeanor stealing.
(2) Second degree burglary requires that a person enter a building unlawfully. Sec. 562.016.3 states that a person who, regardless of his purpose, enters premises which are open to the public does so with license unless he defies a lawful order to leave. While the sacristy was not generally open to the public, it was open to persons who wanted to speak to a priest. It may be disrespectful or sacrilegious to walk through an alter area to a

sacristy, but that does not equate with unlawful entry into a private area. There was no evidence that the sacristy was marked "private," "no admittance," or "authorized personnel only." The evidence was insufficient to prove unlawful entry of the sacristy. (3) Evidence that Defendant was at a second church, acting suspiciously, three days after the charged burglary was improper propensity evidence. The State argues the evidence was admissible to show intent, but appellate court finds it was adduced "purely as propensity evidence to assert that if [Defendant] was the person who went to the [second church], he likewise must have been the person who unlawfully entered and stole from [the first church]." Propensity evidence violates Defendant's right to be tried for the charged crime. Eastern District admonished prosecutor Philip Groenweghe for use of this propensity evidence, because he previously improperly used propensity evidence in a prior case, too.

In the Interest of J.T., 2014 WL 5462402 (Mo. App. E.D. Oct. 28, 2014):
Holding: Where Juvenile was charged with second-degree assault, Sec. 565.060.1(2) for knowingly causing physical injury by means of a dangerous instrument, trial court plainly erred in convicting her of second –degree assault under Sec. 565.060.1(3) for recklessly causing serious physical injury, because this violated Juvenile's rights to notice of the charged offense and to be convicted only of the charged offense, since second-degree assault under Sec. 565.060.1(3) is not a lesser-included offense second-degree assault under Sec. 565.060.1(2). This is because it is possible to cause mere "physical injury" without causing "serious physical injury."

State v. Evans, 2014 WL 4832217 (Mo. App. E.D. Sept. 30, 2014):
(1) A hand or a fist is not a "dangerous instrument" for purposes of the ACA statute, so cannot support a conviction for ACA; and (2) trial court abused discretion in admitting a Facebook photo of Defendant apparently making a gang symbol with his hand, where Defendant's identity was not an issue in case.
Facts: Defendant, using his fists, beat up victim outside a bar, causing serious injuries. Defendant was convicted of first degree assault and ACA. At trial, a Witness to the fight testified that he learned Defendant's name after the fight by seeing Defendant on Facebook. The State then admitted the Facebook photo, which showed Defendant apparently making a gang symbol with his hand.
Holding: (1) Sec. 571.015.1 provides that a person is guilty of ACA when that person commits another felony through use of a "dangerous instrument." "Dangerous instrument" is defined in Sec. 566.061(9) as any instrument which under the circumstances is readily capable of causing death or serious physical injury. The issue here is whether a body part can be a "dangerous instrument." A common-sense definition and reading of "instrument" indicates an external object or item, rather than part of a person's body. The dictionary defines "instrument" as a "tool or implement." Body parts are not normally called "tools or implements." This interpretation is consistent with the pre-1979 version of ACA, which required the use of actual weapons. The Legislature intended to impose additional punishment on people who felonies with an item or weapon, rather than those who just use their hands. Interpreting "dangerous instrument" to include body parts would unduly expand the reach of the ACA statute, and result in a significant departure from the historical intent of enhanced punishment. ACA

conviction vacated. (2) Regarding the Facebook photo, it should not have been admitted because Defendant's identity was not contested at trial. The defense was self-defense. The photo was irrelevant, and more prejudicial than probative because of its apparent gang affiliation, which was not an issue at trial. However, the photo was harmless due to overwhelming evidence of guilt.

State v. Murphy, 2014 WL 4832262 (Mo. App. E.D. Sept. 30, 2014):
A hand or a fist is not a "dangerous instrument" for purposes of the ACA statute, so cannot support a conviction for ACA.
Facts: Defendant hit elderly Victim with his fists as part of a "knockout game." Victim died. Defendant was convicted of second degree murder, first degree assault, and two counts of ACA.
Holding: For the reasons stated in *State v. Evans*, 2014 WL 4832217 (Mo. App. E.D. Sept. 30, 2014), a hand or fist is not a "dangerous instrument" for purposes of the ACA statute. The plain meaning of the word "instrument" does not include a body part. Such an interpretation is consistent with the historical intent and use of the ACA statute. ACA convictions vacated.

In the Interest of: T.P.B., 2014 WL 4411669 (Mo. App. E.D. Sept. 9, 2014) & In the Interest of J.L.T., 2014 WL 4411679 (Mo. App. E.D. Sept. 9, 2014):
Where Defendant-Juvenile was charged with second degree assault for "knowingly causing physical injury to another person by means of a dangerous instrument," Sec. 565.060.1(2), but trial court found Defendant guilty of second degree assault for "recklessly causing serious physical injury to another person," Sec. 565.060.1(3), this violated Defendant's rights to notice of the charged offense and to prepare a defense, since recklessly causing serious physical injury is not a lesser-included offense of knowingly causing physical injury by means of a dangerous instrument.
Facts: Defendant-Juveniles were charged with second degree assault for knowingly causing physical injury by means of a dangerous instrument, Sec. 565.060.1(2). The trial court found Defendants guilty of recklessly causing serious physical injury to another person, Sec. 565.060.1(3).
Holding: An uncharged offense is a "nested" lesser-included offense if it is impossible to commit the charged offense without necessarily committing the uncharged offense. To commit the uncharged offense, Defendants must have committed "serious physical injury." But to commit the charged offense, Defendants need only have caused an ordinary "physical injury." Because it is possible to commit an ordinary physical injury without causing serious physical injury, it is possible for Defendants to have committed the charged offense without committing the uncharged one. Thus, Sec. 565.060.1(3) is not a lesser-included offense of Sec. 565.060.1(2). The trial court violated due process by convicting of an uncharged offense. Defendants discharged.

State v. Glass, 2014 WL 4289102 (Mo. App. E.D. Sept. 2, 2014):
(1) Even though Defendant claimed ownership of some drug paraphernalia, evidence was insufficient to support attempted manufacture of meth or possession of meth where the meth evidence was located in a van and outbuildings "within a block" outside a residence where Defendant was living with his parents; (2) Even though there was a gun

in Defendant's parents' bedroom, evidence was insufficient to prove felon-in-possession where there was no evidence that Defendant jointly controlled the gun or had regular access to the bedroom.
Facts: Defendant was convicted of attempted manufacture of meth, possession of meth, and felon-in-possession of a firearm. Police found drug paraphernalia in Defendant's parents' living room. Most of the paraphernalia was of a type used with marijuana, but a pipe was of a type used with meth, although no actual meth was found in the living room. Defendant claimed ownership of the paraphernalia. Police also found a gun in Defendant's parents' bedroom. Finally, police found various materials for manufacturing meth in a van, tent and shed on the property "within a city block" of the residence.
Holding: The evidence is insufficient for all convictions. Attempted manufacture of meth requires proof that (1) Defendant combined chemicals and meth precursors with paraphernalia, and (2) Defendant did so with the purpose of making meth. Here, the only evidence connecting Defendant with the meth materials outside the home was the fact that Defendant lived in the home with his parents. The pipe in the living room was for consumption of meth, not manufacturing it. There was no meth in the living room. There was no testimony by anyone who had allegedly seen Defendant make or consume meth. There was no evidence as to who owned the materials found in the van, tent or shed. Regarding possession of meth, there was no meth found in the living room, and Defendant was not in close proximity to the meth found outside in the van, tent or shed, such as to support an inference of knowledge. Regarding felon-in-possession, there was no evidence of who used or owned the gun in the parents' bedroom. There was no evidence that Defendant had joint constructive possession of the gun or that he had routine access to the bedroom. The State argues that Defendant has joint control over the gun "simply because his parents did not remove [it] from the home." However, "this is not the law in Missouri." Defendant discharged.

City of St. Peters v. Roeder, 2014 WL 22468832 (Mo. App. E.D. June 3, 2014):
Holding: (1) City's "red light" ordinance is invalid because conflicts with state law since ordinance does not require assessment of points against license; and (2) even though City claims appellate court can enter a conviction for violation of a different City ordinance, this rule applies only where evidence of a greater offense is held insufficient on appeal, but here, the "red light" ordinance is found invalid under state law; this is not a matter of evidentiary insufficiency.

State v. Brooks, 2014 WL 606526 (Mo. App. E.D. Feb. 18, 2014):
Even though Defendant gave bank teller a note demanding money and slammed his hand on the counter when teller left to get money, the evidence was insufficient to convict of second degree robbery, Sec. 569.030, because these actions did not constitute use or threatened use of physical force to obtain the property.
Fact: Defendant handed bank teller a note that said, "Fifties, hundreds, no bait money, and bottom drawer." When teller began to walk away, Defendant slammed his hand down on counter and said "get back here." Teller said she had to leave to get money. She ultimately gave Defendant money, and he left the bank. He was arrested shortly thereafter, with the bank money. He was convicted of second degree robbery.

Holding: Second degree robbery requires that a person "forcibly steal" property. Sec. 569.010(1) states that a person "forcibly steals" property when he uses or threatens the immediate use of physical force upon another person. Here, there was no explicit threat of force, or implied threat. E.g., Defendant did not have his hand in his pocket to imply he had a weapon. Defendant did not say "this is a holdup." Defendant did not try to touch or strike the teller. Thus, a fact-finder could not have reasonably found that Defendant used or threatened use of physical force. There must be some affirmative conduct beyond the mere act of stealing, which communicates immediate threat of physical force. Even though the evidence is insufficient for second degree robbery, the evidence is sufficient to support the lesser-included offense of stealing. Conviction for second degree robbery vacated, and case remanded for sentencing for stealing.

N.L.P. v. C.G.W., 2013 WL 6628008 (Mo. App. E.D. Dec. 17, 2013):
Holding: Neighbor's actions in (1) calling the building code enforcement division, police, the company building alleged Victim's home, and animal control regarding alleged Victim's property violations, parking, noise and dog; (2) following Victim to work at a grocery, which happened only once and which may have occurred because they live on the same road and were going to the same grocery; (3) calling Victim repeatedly to request financial contribution toward paying for the road; (4) threatening to reveal to authorities that Victim acquired her land by deceit; and (5) "flipping her off" while driving past her home, did not provide sufficient evidence for an order of protection, Sec. 455.010(13), because Victim did not testify that she had any fear of physical harm from Neighbor; the phone calls were to report unlawful behavior and had the legitimate purpose of ensuring compliance with governing laws; and although the phones calls may have been annoying and the hand gesture rude, Neighbor's actions did not constitute behavior that would cause a reasonable person in Victim's situation to fear physical harm. The stalking provisions of the Adult Abuse Act are not meant to be a panacea for the minor arguments that frequently occur between neighbors.

E.A.B. v. C.G.W., 2013 WL 6627981 (Mo. App. E.D. Dec. 17, 2013):
Holding: (1) Even though Neighbor one time brought his gun outside, waved it in the air and pointed it at alleged Victim when Victim was walking, this did not provide sufficient evidence to warrant a full order of protection because Sec. 455.010(13) requires "repeated" conduct, i.e., two or more incidents, and also Victim testified that this incident only "kind of worried" him; thus, Victim did not subjectively fear physical harm. (2) Even though Neighbor yelled at alleged Victim, "when are you going to talk to me, you fucking coward," and stood in the middle of the road with fists clenched yelling "a bunch of stuff that [Victim] couldn't understand," the evidence was insufficient to support a full order of protection, Sec. 455.010(13), because the acts had a legitimate purpose of trying to collect money toward repairing a shared road, and even if there was not a legitimate purpose, Victim did not subjectively fear physical harm, and there is no evidence that a reasonable person would have feared physical harm from such conduct. The stalking provisions of the Adult Abuse Act are not meant to be a panacea for the minor arguments that frequently occur between neighbors.

Brunner v. City of Arnold, 2013 WL 6627959 (Mo. App. E.D. Dec. 17, 2013):
Holding: (1) City's "red light" camera Ordinance violates state law, Sec. 302.225, because it expressly prohibits assessment of points for violators, but Sec. 302.225 requires courts to report any moving violations to the Department of Revenue for assessment of points; (2) Ordinance is "criminal" in nature and creates an unconstitutional rebuttable presumption that the owner of the vehicle was the driver; this denies an accused's right to be presumed innocent until proven guilty; (3) Even though Plaintiff had paid his "red light violation" fine, he had standing to bring a challenge to Ordinance because the Ordinance was void *ab initio* since it was in conflict with state law, so the municipal court had no subject matter jurisdiction to enforce the Ordinance and all that court's rulings are void; (4) Plaintiffs state a colorable claim that the Ordinance was in violation of the City's police power because the Ordinance does not actually promote public safety since it fails to keep dangerous drivers off the road by not assessing points for violation, and numerous studies show that red light cameras actually increase crashes and injuries; (5) Plaintiffs state a colorable claim that City surrendered its governmental functions in prosecuting violations of the Ordinance to the private company that operates the red light cameras; and (6) Plaintiffs state a colorable claim that Ordinance is a prohibited revenue generating Ordinance, not one designed to promote safety, because the Ordinance allows dangerous drivers to remain on the road by not assessing points, the cameras do not photograph the actual driver of the car, and the Ordinance generates more revenue than is necessary to offset the cost of enforcement

Edwards v. City of Ellisville, 2013 WL 5913628 (Mo. App. E.D. Nov. 5, 2013):
Holding: City "red light" ordinance that makes it a non-moving violation for a car to be "present" in an intersection with a red light and which makes the owner liable for the fine is invalid, because this conflicts with State law that makes running a red light a misdemeanor moving violation and which requires assessment of points against driver's license (overruling *City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252 (Mo. App. E.D. 2011)).
Discussion: To be valid, city ordinances cannot conflict with State law. Sec. 304.128 makes it a misdemeanor for a *driver* to run a red light. However, the City ordinance imposes strict liability on the *owner* of a car, if the car is present in an intersection with a red light. The ordinance regulates the same conduct as Sec. 304.128. The City cannot circumvent Sec. 304.128 by using semantics to say the ordinance only regulates the "presence" of cars in intersections. The ordinance conflicts with 304.128. The ordinance also conflicts with Secs. 302.225 and 302.302 which also require the assessment of points against a license for moving violations such as running a red light. The ordinance seeks to make running a red light a nonmoving violation with no points. However, by failing to require the municipal court to report a violation to the Director of Revenue for assessment of points, the ordinance conflicts with 302.225 and .302. To the extent that *City of Creve Coeur v. Nottebrok* is to the contrary, it is overruled.

D.A.T. v. M.A.T., 2013 WL 5913626 (Mo. App. E.D. Nov. 5, 2013):
Holding: Even though former Wife (against whom Husband obtained an order of protection) did not have custody of children, but attended children's football games, tapped on Husband's car window to get children's attention, temporarily parked behind

Husband's car, drove by Husband's house and parked nearby when Husband denied her visitation, and Husband did not "feel safe," the evidence was insufficient to constitute a "course of conduct that causes alarm to another person," Sec. 455.010(13)(a), as required for stalking because Husband proffered no evidence of threats, physical altercations or fear of physical harm; full order of protection reversed.

Unverferth v. City of Florissant, 2013 WL 4813851 (Mo. App. E.D. Sept. 10, 2013):
Holding: (1) City's "red light camera" Ordinance conflicts with Missouri law because it regulates moving vehicles without requiring the municipal court to report the violation to the Department of Revenue as required by Missouri statutes; (2) Petitioner-Driver (who filed suit challenging the Ordinance) was entitled to discovery and to present facts on her claim that City exceeded its authority under its police power to enact the Ordinance because the purpose of the Ordinance (as alleged by Petitioner) is to raise municipal revenue, and not to regulate traffic or promote safety; and (3) Petitioner-Driver was entitled to discovery and to present facts on her claim that the Ordinance violates Supreme Court Rule 37.33 and denies procedural due process because traffic citations issued under it do not list a court date or how to contest a citation, and imply that there is no means to contest a violation.

State v. Ess, 2013 WL 4715352 (Mo. App. E.D. Sept. 3, 2013):
(1) Where after trial the defense discovered that a juror who had failed to answer questions on voir dire about whether they had preconceived notions about guilt had said during a pretrial recess that this was an "open and shut case," the nondisclosure was likely intentional and case is remanded for more detailed factual findings or new trial; and (2) even though Defendant had victim touch his penis through clothing in 1995 or 1996, during that time period the act of touching through the clothing was not a violation of Sec. 566.010(3)(1995 version), so the evidence was insufficient to support attempted first-degree child molestation.
Facts: Defendant was charged with various child sex offenses. (1) During voir dire, jurors were asked whether anyone had a "preconceived notion about the guilt or innocence" of Defendant. Juror did not answer. After trial, the defense learned that Juror had said during a pretrial recess that this was an "open and shut case." The defense obtained an affidavit from another juror stating this, and also called this other juror to testify at a hearing on the New Trial Motion, which raised this issue. (However, the New Trial Motion was filed late in this case, so all appellate issues are decided under plain error standard.) The trial court made no credibility findings regarding the other juror's testimony, but denied a new trial. (2) Defendant was originally charged with first-degree child molestation for acts which occurred in 1995 or 1996 during which Defendant had victim touch Defendant's penis through clothing. During trial, however, State discovered that in 1995 and 1996, the act of touching through the clothing did not violate Sec. 566.010(3)(1995 version). Thus, the State submitted to the jury "attempt" first-degree child molestation. Jury convicted of this offense.
Holding: (1) No person who has formed an opinion on a matter is qualified to serve as a juror. In determining whether to grant a new trial, the court must determine whether a nondisclosure occurred, and whether it was intentional or unintentional. If intentional, bias is presumed and a new trial should be ordered. If unintentional, a defendant must

prove that prejudice resulted from the nondisclosure that may have influenced the jury's verdict. Here, jurors were asked various questions about their ability to be fair and impartial, including directly being asked whether they had any "preconceived notion" about guilt or innocence. Juror at issue failed to answer, but said to another juror during a pretrial recess that this was an "open and shut case." The direct questions on voir dire indicate that Juror's failure to understand the questions or answer was unreasonable. Thus, juror's failure to disclose was likely intentional. The State argues that since Defendant did not produce any evidence from Juror at issue, the Defendant fails to prove his claim of bias. "But to require a defendant to produce an affidavit from a biased juror confessing to intentional nondisclosure of material information, or to forgo any relief, places an impossible burden on a defendant." Nevertheless, the trial court made no finding on whether it found the other juror's testimony about what Juror at issue said to be credible, and no finding on whether the nondisclosure was intentional or not. Thus, case must be remanded for more findings. If the court finds that the testimony is credible, however, the court must find that the nondisclosure was intentional and grant a new trial. (2) In 1995 and 1996, touching a penis through the clothing was not prohibited by then-Sec. 566.010(3). (The statute was amended in 2002 to prohibit touching through the clothing.) Defendant's acts here of having the victim touch his penis through clothing was not a substantial step toward the offense of first-degree child molestation. Thus, the evidence is insufficient to convict of attempted first-degree child molestation.

M.L.G. v. R.G., 2013 WL 4419352 (Mo. App. E.D. August 20, 2013):
Even though Defendant verbally threated Petitioner and put a gun to his head, this was only a single incident (not two), and therefore, did not support issuance of a full order of protection for "stalking" because Sec. 455.010(13)(c) requires "two or more" incidents to obtain an order of protection.
Facts: Petitioner and Defendant were neighbors, and got into a dispute over the spraying of herbicide along their adjoining property line. When they discussed the dispute, Defendant pulled out a gun, threatened Petitioner, touched the gun to his head, and wrestled with him. Although police were called, no criminal charges were filed. Petitioner subsequently obtained a full order of protection against Defendant for "stalking." Defendant appealed.
Holding: Sec. 455.010(13) provides that "stalking" occurs whenever any person "repeatedly" engages in an unwanted course of conduct that would cause a reasonable person to be alarmed. Sec. 455.010(13)(c) defines "repeated" as "two or more incidents evidencing a continuity of purpose." The issue on appeal is whether the incident here was "two or more." The trial court found that the verbal threats to Petitioner constituted one incident, and the pulling out of the gun constituted a second incident. However, these events occurred during a single continuous episode. Although the trial court attempted to create two incidents from this single event, doing so was a misapplication of the law.

M.D.L. v. S.C.E., 391 S.W.3d 525 (Mo. App. E.D. 2013):
Holding: Even though (1) Man against whom order of protection was sought had followed Complainant by driving erratically behind her, had slashed Complainant's

boyfriend's tires, and had threatened to ruin her professional reputation by instituting legal actions against Complainant, and (2) Complaint testified she was "always in fear of her safety" around Man, this was insufficient to prove "fear of danger of physical harm" where Complainant did not testify that she feared physical harm from Man's specific alleged acts, and thus, was insufficient under Sec. 455.010(13)(a) for a full order of protection on grounds of "stalking" (but appellate court upholds protection order on other grounds).

State v. Hudson, No. ED96609-01 (Mo. App. E.D. 11/20/12):
Where after Defendant's trial but while his appeal was pending the Supreme Court declared a portion of the harassment statute as unconstitutionally overbroad, Defendant's conviction under that statute must be set aside because it is plain error to convict under an unconstitutional statute.
Facts: Defendant was convicted of harassment under Sec. 565.090.1(5) for text messages, phone calls and name-calling to an ex-girlfriend. Sec. 565.090.1(5) provided that a person commits the crime of harassment if he knowingly makes repeated unwanted communication to another person. After Defendant's trial but while his appeal was pending, the Supreme Court found in *State v. Vaughn*, 366 S.W.3d 513 (Mo. banc 2012), that Sec. 565.090.1(5) was overbroad under the First Amendment because it criminalized protected speech. Defendant contends that his conviction constitutes plain error.
Holding: Even though Defendant did not raise the constitutional issue in the trial court, plain error results if a person is convicted under an unconstitutional statute. Such a conviction is not merely erroneous, but is illegal and void. Where the law changes after a judgment but before the appellate court renders its decision, the change in law must be followed. Conviction vacated.

State v. Anderson, No. ED97522 (Mo. App. E.D. 11/20/12):
Even though Defendant had marijuana in his hotel room and made a statement "it's mine" at the police station, the evidence was insufficient to convict of possession of cocaine found in a straw between the hotel nightstand and bed.
Facts: Police received a report of a party and marijuana smell coming from a hotel room. They went to the room, and Defendant consented to let them in. They found in the room marijuana and scales in various parts of the room. They also found a straw between the hotel nightstand and bed that contained a small amount of cocaine residue. Defendant said he was the only person who lived in the hotel room, although his nephew had visited for a few hours. At the police station, the marijuana evidence and straw were on a table. Defendant at some point said "it's mine" but also said that he had never seen the straw before. Defendant was convicted of cocaine possession.
Holding: There is insufficient evidence to prove that Defendant constructively possessed the cocaine. Defendant did not have exclusive possession of the room, since other hotel staff had access. None of Defendant's belongings were close to the straw, and Defendant wasn't close to it when the police came. The amount of cocaine was minute; there were no other cocaine-related items in the room. There was no evidence how long Defendant rented the room to allow jurors to infer that everything was his. Other people were in the room. Defendant's conduct did not imply knowledge – he consented to a search, was not nervous and did not give false information. Defendant confessed to the marijuana

possession. The statement "it's mine" is ambiguous in this case because the jury would have to infer that Defendant saw the straw on a table at the police station and was referring to it, but he denied having seen the straw. Defendant's possession of marijuana does not prove that he knowingly possessed cocaine. Conviction vacated.

State v. Jones, No. ED97121 (Mo. App. E.D. 6/19/12):
Holding: Evidence was insufficient to convict of first degree statutory sodomy where there was no evidence that Defendant had put victim's hand on his penis.

State v. Richie, No. ED96753 (Mo. App. E.D. 6/5/12):
Even though Defendant ran into a parking garage, hid and did not have a car parked there, where this garage was open to the public, this did not constitute first degree trespassing, Sec. 569.140.
Facts: Defendant was charged with trespassing for "knowingly enter[ing] unlawfully upon real property located at 707 Pine and owned by the City of St. Louis, which said real property was enclosed in a manner designed to exclude intruders." Defendant had run through a public door into the garage and ultimately hid under a car. A sign stated the garage was "open to the public." After being found guilty at trial, Defendant appealed.
Holding: The evidence is insufficient to convict because the State charged Defendant with "knowingly enter[ing] unlawfully," yet there was a sign stating that the garage was "open to the public." The State did not present any evidence that "intruders" were not welcome in the garage or that a person had to have a car parked there to come into the garage. Even though Defendant's actions were suspicious, they weren't trespassing, as charged. Conviction reversed.

State v. Kelly, No. ED96743 (Mo. App. E.D. 4/24/12):
Even though Defendant-sex offender left one address and didn't establish a new permanent address for several months, the registration statute, 589.414, required that he report changing from the prior address within three days.
Facts: Defendant-sex offender lived at one address but vacated it in December. He did not register a new address until March, when he said he obtained a new permanent address. Defendant was convicted of failure to report change of address as a sex offender for not reporting a change within three days after leaving the first address in December.
Holding: Defendant claims he was not required to update his address until he had a new "permanent" address and that he was transient between December and March. This appears to be an issue of first impression in Missouri. Federal courts have held, however, that the plain language of SORNA requires registration when one leaves a residence with no intent to return. 589.414.1 requires updating registration "not later than three business days after each change." The statute makes no reference to a "new" residence, but only to a "change" in residence. Thus, when a sex offender leaves a residence with no intention to return, even if he leaves to become homeless, his residence has changed as it is no longer that of the original residence, and he must update his registration. Conviction affirmed.

Walters v. State, No. ED96196 (Mo. App. E.D. 2/21/12):
Holding: Where State charged multiple acts of sexual abuse and Victim testified to many different acts, but there was no testimony that Defendant touched Victim's vagina when she was less than 17 (as charged in one of the counts) or that he touched her breasts when she was less than 17 (as charged in another count), there was insufficient evidence to convict of second degree statutory sodomy and second degree child molestation on these counts.

State v. Smith, No. ED96004 (Mo. App. E.D. 12/27/11):
Where Defendant was only seen in yard of victim near time of burglary and when stopped by police shortly thereafter did not act suspiciously, evidence was insufficient to convict of burglary.
Facts: Homeowner saw Defendant walk past her side window toward the front of her house. She then heard a banging noise on her door, and she called 911. Homeowner ran out of the house through another door and heard someone yell "hello" from inside the house. Homeowner did not see who was in the house. Shortly thereafter, police stopped Defendant two blocks from Homeowner's house. He did not try to flee, behave suspiciously or have any stolen items. Defendant was convicted of first-degree burglary at trial.
Holding: The conviction here rests on the coincidence of Homeowner seeing Defendant walk through her yard, someone breaking into her home, and Defendant's presence two blocks away shortly thereafter. Homeowner never saw the person who entered her home, and the State never established a detailed timeline of events from when Homeowner saw Defendant to the time of the burglary. The evidence was not sufficient for a reasonable juror to find Defendant guilty beyond a reasonable doubt. Nor can the appellate court enter a conviction for trespassing because the State charged Defendant with unlawfully entering a habitable structure; where the charge specifies the act constituting the crime, the State must prove that act. The State could have alternatively charged the Defendant with burglary of the house and trespass of the yard, but did not do so. Defendant discharged.

State v. Williams, 2015 WL 4985359 (Mo. App. S.D. Aug. 20, 2015):
Evidence insufficient to support conviction for passing bad check where State failed to show that Defendant received 10-days actual notice in writing of insufficient funds in compliance with Sec. 570.120.2.
Facts: Defendant was convicted at a bench trial of passing a bad check. The prosecutor's bad check administrator testified that she mailed Defendant a "standard" 10-day letter informing him that he had 10 days to pay before criminal charges were filed, and that the letter was not returned by the Post Office. The trial court found that there was "insufficient" evidence to find that Defendant actually received notice, but also found this went only to the "weight" of the evidence.
Holding: Sec. 570.120.1(2) requires the State have the burden to prove Defendant received 10-days actual notice in writing of insufficient funds. Sec. 570.120.2 provides two non-exclusive means for notice, i.e., that the notice be included with service of summons or warrant, or that Defendant be given written notice which he "refuse[d] to accept." Here, neither condition was satisfied. The trial court found the evidence

"insufficient" to prove Defendant had received notice. Prior cases held that proof of notice is not an essential element of the crime of passing a bad check. But these cases pre-date the 1992 version of Sec. 570.120 at issue here. Under 570.120, proof of notice is an element, not merely a matter of weight. Defendant discharged.

Lawyer v. Fino, 459 S.W.3d 528 (Mo. App. S.D. 2015):
Even though Mother sent numerous texts to Father about their children and said she might use the information in litigation against Father, trial court erred in entering an order of protection against Mother because Mother's actions would not cause a reasonable person to suffer substantial emotional distress or fear of physical harm; even though Father testified there was a "prowler" at his home, there was no evidence presented that the prowler was Mother and it would be speculative to base on order of protection on this.
Facts: Father sought order of protection against Mother for sending him numerous text messages about custody of their children, and their health and education. Father testified the messages disrupted his home and work, and that he felt harassed and threatened by them. Father also testified there had been an unidentified "prowler" at his house. The trial court granted an order of protection against Mother.
Holding: Proof of harassment under Sec. 455.010(1)(d) requires proof that (1) the conduct would cause a reasonable person to suffer substantial emotional distress, and (2) the conduct actually caused that distress. Even if Father subjectively felt threatened, the messages here would not cause a reasonable person substantial distress. Most messages simply provided information about the children or sought to coordinate custody. Even though Mother made some comments about using the messages in ligation against Father, litigation is not the type of behavior the Adult Abuse Act seeks to prevent. Even though Father said he felt threatened, none of the messages involved an explicit or implied threat of physical harm. Regarding the "prowler" incident, mere speculation that Mother was involved is not sufficient to support an order of protection. Order of protection reversed.

State v. Livingston-Rivard, 2015 WL 2405432 (Mo. App. S.D. May 20, 2015):
Holding: Financial exploitation of elderly statute, Sec. 570.145, which requires deception, intimidation or undue influence to obtain control of an elderly person's property, does not require that the deception (misrepresentation) be made directly to the Victim; where Defendant made deceptive statements to Victim's wife, family and friends to help deceive Victim and enable Defendant to obtain the property, this was sufficient to convict under the statute. This is the first reported case addressing the issue of what constitutes sufficient evidence to support a conviction under Sec. 570.145.

State v. Wilder, 2015 WL 263579 (Mo. App. S.D. Jan. 16, 2015):
Even though Defendant received notice in 1984 in California that he had to register as a sex offender, evidence was insufficient to prove failure to register as a sex offender where Defendant moved to Missouri in 1985 and was never notified he had to register here until he was arrested for another offense in 2010.
Facts: Defendant was convicted of a sex offense in California in 1979 and informed by California that he needed to register in 1984. Defendant moved to Missouri in 1985. Missouri had no registration requirement at that time. Defendant was arrested for another

offense in 2010, and informed at that time that he had to register. He has registered ever since. He was charged with failure to register before 2010.
Holding: The evidence is insufficient to prove that Defendant *knowingly* failed to register. There was not sufficient circumstantial evidence to show Defendant's mental state. The State argues that failure to register is a strict liability offense, but Southern District "rejects this invitation" to find such. Conviction reversed.

State v. Koch, 2015 WL 364583 (Mo. App. S.D. Jan. 28, 2015):
Even though Defendant was obviously high on methamphetamine, evidence was insufficient to support conviction for possession of meth-related drug paraphernalia where it was found in a residence that Defendant did not own and where several other people were present, one of whom also appeared to be under influence of drugs.
Facts: Defendant was a visitor to mobile home of Woman. Woman called 911 to say she was about to be robbed. When police arrived, they found a "one-pot meth lab" consisting of a Mountain Dew bottle in the living room. Woman appeared to be under the influence of drugs. Other people, including Defendant, were in other rooms of the residence than the living room. Defendant appeared to be under influence of meth. Defendant was convicted of possession of the "one-pot meth lab."
Holding: Since Defendant did not actually possess the meth lab, the State had to prove constructive possession, i.e., that Defendant had the power and intention to exercise dominion or control over the meth lab either directly or through another person. Where there is joint control over an area, the State must also connect Defendant to the controlled substance. Here, the evidence is insufficient to convict. Defendant was not in close proximity to the lab; he was in another room. There was no evidence of meth smell in the residence. Defendant did not give false statements to police. Defendant's belongings were not intermingled with the meth lab. Defendant was at the residence as a visitor. Defendant did not own the residence. Even though guns were found, they were not near the meth pot or in the room where Defendant was. Although there was testimony that Defendant was under the influence of meth, this supported only that he was conscious of guilt from *using* meth, not that he was conscious of guilt of *possession* of the meth pot. Conviction reversed.

State v. Sanders, 2014 WL 6735132 (Mo. App. S.D. Nov. 25, 2014):
Evidence was insufficient to prove "forcible" sodomy, Sec. 566.060.1, where Victim's zipper was undone and Defendant put his hand inside her pants and Victim's vagina, even though Victim pulled his hand away and zipped up her pants.
Facts: Defendant was convicted of "forcible" sodomy of his daughter. Victim's zipper was undone, and she was not wearing underwear. Defendant put his finger in her zipper and in her vagina. Victim pulled his hand away and zipped up her pants.
Holding: The evidence is insufficient to prove "forcible" sodomy. Under Sec. 556.061(12), "forcible compulsion" is defined as "physical force that overcomes reasonable resistance," or a threat that places a person in reasonable fear of death, serious physical injury or kidnapping. The State claims Defendant used physical force that overcame reasonable resistance. However, at best, the evidence shows Defendant placed his finger in his mentally ill daughter's exposed vagina without her consent, as shown by her pushing his hand away and zipping her pants. To find otherwise would essentially

collapse the "reasonable resistance" component of the definition of forcible compulsion into the lack-of-consent element of deviate sexual assault under Sec. 566.070.

Washburn v. Kirk, 2014 WL 3932553 (Mo. App. S.D. Aug. 12, 2014):
Holding: Even though Mother of student tried to talk to Teacher at a store but Teacher rebuffed Mother's attempts, and subsequently Mother attended a school meeting which she was supposed to attend, trial court erred in entering an order of protection on behalf of Teacher against Mother on grounds of "stalking," since Mother's actions did not constitute a repeated course of conduct that served no legitimate purpose.
Facts: Mother saw Teacher at a store and sought to talk to her. Teacher told Mother to make an appointment at school. Mother kept insisting on talking to teacher, and said loudly that Teacher mistreated Mother's son and wouldn't talk to her. Later, Mother went to a parent event at the school. Teacher obtained an order of protection against Mother on grounds of stalking.
Holding: "Stalking" occurs when any person purposely and repeatedly engages in an unwanted course of conduct that serves no legitimate purpose, Sec. 455.010(13)(a) and (b). Here, the encounter at the store was a random event where Mother sought to talk to Teacher. This was not a repeated course of conduct that had no legitimate purpose. The school event had a legitimate purpose in that Mother was supposed to be there. The Adult Abuse Act was not intended to be a solution for minor arguments between adults. The potential for abuse is great because of the harm of being labeled a "stalker" and possible criminal prosecution for violation of the criminal stalking statute, Sec. 565.225. Trial courts must exercise caution to prevent abuse of the stalking provisions. This was a minor argument between adults. The entry of an order of protection was a misapplication of law.

State v. Hansen, 2014 WL 1512479 (Mo. App. S.D. April 18, 2014):
Even though (1) child was on a restricted vegetarian diet, had low weight, and sometimes was denied sweets as punishment, and (2) an expert suggested that child suffered a substantial risk of harm to his body, where Defendant was acquitted of endangering the welfare of a child in the first degree by creating a substantial risk of harm by failing to provide adequate nutrition, the evidence was insufficient to convict of abuse of a child, Sec. 568.060 RSMo. Cum. Supp. 1997, by knowingly inflicting cruel and inhuman punishment upon child by restricting food.
Facts: Defendant and his family held religious beliefs which called for eating a vegetarian diet and eating only two meals a day. Defendant would punish his children by taking away sweets and garnishes on their food, such as jelly. One of his children had low weight, but was healthy and participated in bike riding and long hikes. The State charged Defendant with abuse of a child for inflicting "cruel and inhuman punishment" on his child by restricting food in this way. The State also charged him with endangering the welfare of a child in the first degree by knowingly acting in a manner that created a substantial risk to child by failing to provide adequate nutrition. Defendant was acquitted of the endangering count, but convicted of the abuse of a child count.
Holding: The version of Sec. 568.060 in effect at the time of the crime was the 1997 version, which provided that a person commits the crime of abuse of a child if they knowingly inflict "cruel and inhuman punishment" on child. "Cruel and inhuman

punishment" was not defined in the statute, but was defined by caselaw as "severe, rough, or disastrous treatment." The current statute requires proof of "physical or mental injury as a result of abuse or neglect" or placing child "in a situation in which child may suffer physical or mental injury as a result of abuse or neglect." The State claims that Defendant inflicted "cruel and inhuman punishment" because the child was given only two meals a day, was sometimes withheld sweets, and the State's expert suggested that child suffered a substantial risk of harm. The problem with the State's argument is the acquittal of the child endangerment charge, which mirrored the charge here in that it called for conviction if Defendant created a substantial risk to child by failing to provide adequate nutrition. Furthermore, the evidence showed that the family ate a diet consistent with their sincerely held religious beliefs. It is not within common knowledge that being denied dinner or dessert is "cruel and inhuman punishment." The child was small, but otherwise healthy, and participated in bike riding and long hikes. "This is an unusual and troubling case, but it would be the first time that a conviction was obtained based on the sincere and religiously held diet choice of the parents. These food choices and the slight deprivation alone cannot stand as the basis for a claim that the son was the victim of severe, cruel, or unusual punishment." Conviction vacated.

Fowler v. Minehart, 2013 WL 5936385 (Mo. App. S.D. Nov. 6, 2013):
Holding: (1) Even though Person against whom order of protection was sought threatened a School Official by saying, "I'm going to get even with you. I'll catch you off school campus and I'll take care of you," the evidence was insufficient to support a full order of protection for "stalking," Sec. 455.010(13), because there was no evidence that Person initiated "repeated" contact with School Official; (2) Even though there were arguably two instances of contact (although they occurred on the same day), it was not disputed that School Official had initiated the second instance of contact because he wanted to talk to Person so this incident does not count under the statute.

State v. Politte, 2013 WL 658270 (Mo. App. S.D. 2/25/13):
Even though the evidence was sufficient to show that Defendant had "knowledge" of large amounts of marijuana in a trailer with multiple occupants, the evidence failed to show that Defendant had "control" over that marijuana, which was also necessary to convict.
Facts: An informant told police that he had "talked to Kientzel and several others" and had seen "Kientzel" with a quarter pound of marijuana at a trailer occupied by Kientzel and others. Police obtained a warrant to search the trailer and detached garage "occupied by Kientzel and others." "Kientzel" was not there, but multiple other occupants were. There was loose marijuana in plain view in the living room where Defendant was. A quarter-pound brick was found under the couch, and other bricks in the detached garage. When questioned about the marijuana, Defendant said police "should talk to Kientzel." The State charged Defendant with possession with intent to distribute, but he was found guilty at a bench trial of the lesser felony of possessing more than 35 grams of marijuana, Sec. 195.202. He appealed.
Holding: Defendant concedes that the evidence supports a conviction for possession of misdemeanor marijuana, but not felony possession of the bricks. To show possession of the bricks, the State had to prove that Defendant both knew of *and* controlled these drugs.

The State contends that Defendant's routine access to the living room, his proximity to the loose marijuana in the living room, and the large quantities of marijuana in the garage prove this, as well as the fact that Defendant did not feign surprise or ignorance when the bricks were found, but said to talk to Kientzel. These facts, however, may infer *knowledge* of the drugs (bricks), but do not infer *control* or *ownership* of them. Even though Defendant had access to the living room, multiple other occupants did, too, and there was no showing that Defendant used the detached garage. Hence, the evidence is insufficient to support felony possession. Conviction for misdemeanor possession entered.

State v. Slavens, No. SD31613 (Mo. App. S.D. 9/12/12):
Sec. 577.010 does not authorize DWI conviction for operating a non-road "dirt bike" on private property in an intoxicated condition.
Facts: Defendant was driving a "dirt bike" on his own private property when he had an accident that resulted in him being injured, resulting in the Highway Patrol being called. His BAC was .226. He was charged and convicted of DWI.
Holding: The elements of DWI under Sec. 577.010 are (1) that the defendant operated a motor vehicle and (2) that he did so in an intoxicated condition. However, the term "motor vehicle" is not defined in the statute. The question is whether the legislature intended to criminalize operating a non-traditional motor vehicle on private property. The rule of lenity requires that all ambiguity in a statute be resolved in a defendant's favor. There is an ambiguity in Sec. 577.010 in its potential application to situations where a person operates a non-street legal motorized vehicle on private property. Since the statute allows for more than one interpretation, it has to be interpreted in Defendant's favor so as not to prohibit this. Also, a contrary interpretation would lead to illogical results in that persons who operate golf carts on private golf courses or persons who operate motorized wheelchairs in their homes could be convicted of DWI. The legislature could not have intended these illogical results. Conviction reversed.

State v. Nephew, No. SD31482 (Mo. App. S.D. 5/21/12):
Sec. 570.040 RSMo. Supp. 2005 requires that a "stealing third" offense be based on prior stealing convictions which occurred on different days.
Facts: Defendant was charged and convicted of a "stealing third" offense, which was enhanced to a felony based on two prior stealing convictions which were both entered on the same day.
Holding: The 2005 version of 570.040 (since repealed) required that a "stealing third" conviction be based on two prior stealing convictions which occurred on different days. Here, the two prior convictions were entered on the same date, so they cannot form the basis to enhance the instant offense. The State argues that the conviction can be withheld because the judicially-noticed prior court files show that Defendant had additional prior stealing convictions. However, these cannot be counted because (1) they weren't charged in the information as predicate offenses, (2) MACH-CR 24.021.1 Notes on Use states that the offenses used for enhancement have to be charged, and (3) 570.040 requires a trial court to determine the existence of the prior pleas of guilty. Under *Collins v. State*, 328 S.W.3d 705 (Mo. banc 2011), the State does not get a second chance to prove up prior convictions. Felony conviction reversed and misdemeanor conviction entered.

State v. Myers, No. SD31357 (Mo. App. S.D. 5/11/12):
Offense of "receiving" stolen property does not require proof that Defendant obtained the property from a "second person" than the owner.
Facts: Defendant sold some stolen auto parts to an auto part store. He was convicted of "receiving" stolen property.
Holding: Defendant argues that older cases (some of which pre-dated the current statute) had held that to convict of receiving stolen property, there must be at least two actors involved, i.e., the accused must receive the property from some person other than the owner; defendant also relies on older cases that stated that one cannot at the same time be the principal in a larceny and a receiver of stolen property. However, while no evidence of a second party was presented at trial, the statutory definition of "receive" as contained in Sec. 570.010(13) does not require such proof. "Receives" as used in 570.080.1 references the definition of "receiving" contained in 570.010(13). This definition only required the State to prove that Defendant acquired possession or control of the property. The plain meaning of "acquire" is "to come into possession or control of [property] often by unspecified means." The statute does not require proof of how or from whom Defendant acquired the property. The statute only requires proof of actual possession or control of it. Conviction affirmed.

S.D. v. Wallace, No. SD31296 (Mo. App. S.D. 3/27/12):
Even though Defendant repeatedly drove near Petitioner and stared at her, this would not have caused a reasonable person to fear physical harm so did not constitute "stalking" to support issuance of an order of protection.
Facts: Petitioner for order of protection claimed that Defendant drove near Petitioner and stared at her when they'd see each other in the community. Petitioner and Defendant were involved in a feud involving Petitioner's daughter. Defendant appealed the trial court's entry of an order of protection.
Holding: To engage in stalking, the offender must have (1) purposely and repeatedly, (2) engaged in an unwanted course of conduct, (3) that caused alarm, (4) when it was reasonable to have been alarmed by the conduct. "Alarm" means to cause fear of danger of physical harm. Here, there was no evidence that a reasonable person in Petitioner's situation would have feared physical harm. Petitioner did not check the box on the form for getting an order of protection that she was in fear of physical harm, and she didn't testify to this. She didn't claim Defendant was following her, didn't claim Defendant had ever been violent, and didn't claim anything that would cause a reasonable person to be in fear of physical harm.

State v. Ramsey, No. SD30846 (Mo. App. S.D. 2/16/12):
(1) Where Defendant and woman shared a one-bedroom house and cocaine was found in a trash can in the bedroom, evidence was insufficient to prove that Defendant constructively possessed it; (2) even though State claimed that Defendant's sale of drugs proved constructive possession, this evidence could not be considered for that purpose since the State admitted this evidence at trial as hearsay and "not for its truth."

Facts: Police searched a house and found cocaine hidden in a trash can in the bedroom. Defendant and a woman shared the house. Defendant was convicted of possession of cocaine.
Holding: The State had to show constructive possession of the cocaine by Defendant. Where control of a house is not exclusive, the State must show some additional evidence to prove a defendant constructively possessed drugs. Here, the State claims that Defendant is tied to the drugs because he allegedly sold cocaine to an informer. However, at trial, the State declined to offer this hearsay for its truth; since it was not offered or admitted as substantive evidence, the State cannot rely on it on appeal as evidence. The State claims Defendant had access to the drugs because he slept in the bedroom. That Defendant slept in the bedroom of this one-bedroom house does not reasonably suggest that his female cohabitant did not, or that either had exclusive or even superior control of the room.

State v. Pickering, 2015 WL 6919826 (Mo. App. W.D. Nov. 10, 2015):
Where State failed to show that breathalyzer machine had been certified against the NIST standard between Jan. 1, 2013 and Dec. 31, 2013, as required by 19 CSR 25-30.051, the State failed to lay an adequate foundation for admission of the BAC result, and Defendant was prejudiced because trial court at bench trial relied on BAC result in finding guilt; because there was other evidence sufficient to prove guilt, which the trial court may not have considered, the remedy is to remand for new trial.
Facts: Defendant was charged with DWI. The evidence was that he was driving erratically, failed field sobriety tests, and had a breathalyzer result of .136. Defendant claimed the court erred in admitting the BAC result because the State did not present any evidence that the breathalyzer machine had been certified against the National Institute of Standards and Technology standard.
Holding: Breathalyzer results are admissible only if the State complies with the requirements of Chapter 577. This requires following the methods approved by the Dept. of Health. 19 CSR 25-30.051 provides that any breath alcohol simulator shall be certified against a NIST traceable reference thermometer or thermocouple between Jan. 1, 2013 and Dec. 31, 2013 and annually thereafter. The State's evidence at trial did not establish that this regulation was followed. Although the State presented evidence that the machine was subjected to monthly maintenance in 2013, the State presented no evidence that the breath alcohol simulator was NIST certified in 2013. Absent such evidence, the State failed to lay a sufficient foundation to support admission of the BAC result. Defendant was prejudiced because the trial judge relied on the BAC result in finding Defendant guilty. The remedy is to remand for a new trial. The State was not required to prove an actual measure of Defendant's blood alcohol content. Defendant could be found guilty even without a BAC result. The evidence of erratic driving and failed sobriety tests was sufficient to prove guilt. There is no clear indication that the trial court considered this evidence without the BAC result. Remanded for new trial.

State v. Zetina-Torres, 2015 WL 3607569 (Mo. App. W.D. June 9, 2015):
Where appellate court had found the evidence to convict Co-defendant insufficient, evidence was insufficient to later convict Defendant on a jury instruction that he "acted

together" with Co-defendant, even though there had been a prior direct appeal of Defendant's case where the evidence had been held sufficient.
Facts: Defendant-Driver was originally charged with Co-defendant-Passenger with drug trafficking for drugs found concealed in Driver's truck bed. Driver was originally convicted at a jury trial, and appealed. In Driver's first appeal, the appellate court found the evidence of guilt to be sufficient, but reversed and remanded for a new trial due to a discovery violation by the State. Meanwhile, Passenger was convicted at a trial and appealed. In Passenger's direct appeal, the appellate court held that the evidence was insufficient to convict Passenger. The State then tried Driver again. The jury instruction at trial required the jury to find that Driver "acted together with or aided" Passenger in the offense. After conviction, Driver appealed again.
Holding: Driver argues that since the State elected to include the element in the verdict director that he "acted together with" Passenger, the State was required to prove that element. That is true based on the unique facts here. Although Driver was charged with acting alone *or* together with Passenger, the verdict director submitted the case on "acting together with or aided" only. The Notes on Use 9(a) to the accomplice liability instruction, MAI-CR3d 304.04, state that the instruction is not to be used where the other person is not guilty. Here, the Notes on Use were not properly followed. After the appellate court found the evidence insufficient to convict Passenger, an instruction regarding accomplice liability should not have been submitted in Driver's second trial. The instruction that was submitted requires that Driver be discharged. Conviction reversed; Defendant-Driver discharged.

State v. Barcelona, 2015 WL 1400521 (Mo. App. W.D. March 24, 2015):
(1) Even though Defendant possessed a spoon and syringe to use methamphetamine, this did not support conviction for the felony offense of possession of drug paraphernalia, Sec. 195.233, because these items are not used to "manufacture" meth, and (2) under circumstances here, the offense of misdemeanor paraphernalia possession is not a lesser-included offense of the felony because it has different elements than the felony and requires different proof of purpose, depending on how it is charged.
Facts: When Defendant was stopped by police, he had a spoon, syringe and cotton ball, and he admitted using meth. The spoon tested positive for meth residue. He was convicted at trial of felony possession of drug paraphernalia, Sec. 195.233.
Holding: The evidence here is insufficient to convict of felony possession of drug paraphernalia because the paraphernalia must be capable of use in the manufacture of meth, not merely the preparation for ingestion. Sec. 195.233 makes it a felony to possess paraphernalia to "manufacture, compound, produce, prepare, test or analyze" meth. The use of the word "prepare" in this context means essentially "manufacture," because this meaning comes from the fact that the legislature omitted other intended uses from the misdemeanor offense. The felony offense has manufacturing and production as their purposes; the misdemeanor offense, other purposes. To interpret the word "prepare" the same as "manufacture" would obliterate the distinction between misdemeanor and felony when it comes to meth, because possession of paraphernalia, in and of itself, would always be deemed preparation for ingestion. Because the spoon, syringe and cotton ball cannot be used to "manufacture, compound, produce, test or analyze" meth, their possession is not a felony. An appellate court can enter a conviction on a lesser-included

offense if it is established by proof of the same or less than all the facts required to establish the greater. Comparing the statutory elements of the felony and misdemeanor here, the elements, although somewhat overlapping, are not necessarily the same. The misdemeanor, depending on how it is charged, requires proof of purposes distinct from the felony. In order to convict of the misdemeanor here, Defendant would have to be charged with and the jury find that he had the purpose to ingest meth. While there was evidence of this, this wasn't how he was charged and the jury wasn't instructed to find this. Thus, the court cannot enter a conviction for the misdemeanor. Defendant discharged.

State v. Shoemaker, 2014 WL 6463676 (Mo. App. W.D. Nov. 18, 2014):
Even though when Defendant-Driver was stopped by police he produced only an insurance card and business card as identification (not a driver's license), this was insufficient to prove driving with a suspended license where State failed to introduce Defendant's driving record or any evidence Defendant knew his license was suspended.
Facts: Officer stopped Defendant-Driver for speeding, and asked for identification. Defendant provided an insurance card and business card, but no license. Officer learned through police dispatch that Defendant's license was suspended. Defendant was charged with driving while suspended and convicted at trial.
Holding: This evidence is insufficient to sustain a conviction for driving while suspended. Under Sec. 302.321, the State was required to prove that Defendant's license had been revoked and that he drove with this knowledge. However, the State failed to introduce Defendant's driving record, and the sole evidence of revocation was the hearsay statement of police dispatch. The State claims it may be inferred that Defendant knew his license was revoked because he did not produce it during the traffic stop. But such an inference cannot stand absent additional evidentiary support. There was no evidence Defendant had been notified of the suspension or had any knowledge of it whatsoever. Conviction reversed.

In the Interest of A.B. v. Juvenile Officer, 2014 WL 5877703 (Mo. App. W.D. Nov. 12, 2014):
Even though (1) 12-year-old Juvenile touched other child's genitals, including with his mouth, and (2) trial court believed that the "only inference" that could be drawn if a 12-year-old boy engages in such conduct is that it is done for sexual gratification, the evidence was insufficient to prove first-degree sexual molestation because such offense requires proof that the acts were done for sexual gratification, and other evidence showed that Juvenile was immature for his age, had little sexual knowledge, and did not have an erection or other sexual arousal.
Facts: Juvenile boy, who was 12 years old, was charged with first degree sexual molestation for acts with a five-year-old boy. Both boys touched each other's genitals and put their penises in each other's mouth. There was no evidence that either child had an erection or ejaculation. Juvenile told other boy not to tell anyone what happened. The defense presented evidence that Juvenile was immature and had less understanding of sexual matters than the average 12 year old. The State called a rebuttal witness who did not examine Juvenile but testified that mouth-to-penis contact was an "advance stage of sexual whatever" and that the "only reason" a person would engage in oral sex is to

satisfy sexual desire. The trial court found that the "only inference" from touching a five-year-old's penis was sexual gratification.
Holding: While we accept as true all inferences favorable to the State, they must be reasonably drawn from the evidence. The "integrity of the inference" must be established before it can sufficiently support a judgment that the act was committed. Secs. 566.067 and 566.010 require proof that the touching of the genitals was done for sexual arousal or gratification. Here, the incidents lasted only a few seconds. There was no evidence of physical arousal. Neither boy described the incident in sexual terms. There were no words spoken indicating sexual arousal or sexual intent, or additional actions such as rubbing, moving a hand up and down, or use of a lubricant to show this. The issue here is whether an inference based solely on the act's occurrence has sufficient "integrity" to prove beyond a reasonable doubt that Juvenile acted for the purpose of satisfying sexual desire. "We are not persuaded that intent can be inferred from the act alone" when dealing with a juvenile. Juvenile's sexual knowledge was much lower than his stated age. Judgment reversed and Juvenile discharged.

State v. Gray, 446 S.W.3d 291 (Mo. App. W.D. 2014):
Evidence was insufficient to convict Defendant-bus driver of sexual contact with a student, Sec. 566.086.1, where Defendant touched victim during time he was receiving unemployment benefits, so Defendant was not then "employed" by the school bus company.
Facts: Defendant was a school bus driver during the school year, which ended in May 2012. In June 2012, Defendant visited one of the students at her house and touched her breasts. During June 2012, Defendant was receiving unemployment benefits. He was convicted of sexual contact with a student.
Holding: Sec. 566.086.1 provides that a person commits the crime of sexual contact with a student if he is "a person employed by an entity that contracts with the public school district to provide services." Defendant claims the State failed to prove he was "employed" by the bus company in June 2012, since he was receiving unemployment benefits. Missouri statutes define "employee" in at least three different chapters. However, they show that a person is an employee if that person is currently providing a service, not has provided a service in the past. Here, Defendant provided bus-driver services through May 2012, but not in June 2012 when the sexual contact occurred. He was unemployed under the law because he was not receiving actual work pay from the bus company. Thus, he was not "employed" by the bus company, and the evidence was insufficient to convict under Sec. 566.086.1. However, court enters conviction for lesser-included offense of first-degree sexual misconduct, Sec. 566.090. Remanded for resentencing on lesser offense.

State v. Coleman, 2014 WL 4815414 (Mo. App. W.D. Sept. 30, 2014):
Even though Defendant (1) went into bank with grocery bag and told teller to "do me a favor. Put the money in this bag," and (2) told a manager to "stop where you are and don't move any farther," the evidence was insufficient to convict of second degree robbery because this evidence didn't show use or threatened use of physical force.
Facts: Defendant went into a bank with a grocery bag, and told teller to "do me a favor. Put the money in this bag." When the bank manager approached, Defendant told her to

"stop where you are and don't move any farther." The teller gave Defendant money and he fled. He was convicted of second degree robbery.
Holding: Second degree robbery, Sec. 569.030.1, requires proof that Defendant used or threatened use of physical force to steal property. The State argues that Defendant's statements here were akin to "this is a holdup." But "holdup" implies possession of a weapon, and Defendant's statements did not. Even though the victims may have felt threatened, under 569.010, whether a defendant has impliedly threatened the immediate use of physical force is determined by the defendant's actions, not the reactions or perceptions of the victims. The video in this case showed that Defendant never placed his hand in his pocket or implied he had a weapon. The evidence is insufficient to support second degree robbery, but is sufficient to support the lesser-included offense of stealing, Sec. 570.030. Conviction for second degree robbery vacated, and conviction for stealing entered. Remanded for resentencing.

State v. Barker, 2014 WL 4547839 (Mo. App. W.D. Sept. 16, 2014):
Even though Defendant-Wife knew that Husband had viewed child pornography on their computer, had deleted it, and had later restored the computer after it crashed, the evidence was insufficient to convict Wife of promoting child pornography as an accessory, because Wife's actions were not with the purpose of committing the offense.
Facts: Husband was charged with a child pornography offense for pornography found on the family computer. Defendant-Wife was also charged as an accessory. Wife had known that Husband viewed child pornography on the computer, and had previously deleted it and installed parental controls. Also, the computer crashed several times, and Wife restored the computer.
Holding: Under Sec. 562.041, a person is criminally responsible for the conduct of another either before or during an offense if with the purpose of promoting the offense, he aids or agrees to aid or attempts to aid such other person in planning or committing the offense. The evidence must show that the accomplice had the mental state of having "the purpose to promote the offense." Conduct without the requisite mental state is insufficient to convict. Here, Wife saw Husband view child pornography, but this was long before she restored the computer. There was no evidence why the computer crashed and Wife restored it. The State argues that Wife's participation in restoring the computer when she had known her husband used it to access child pornography permits an inference that Wife restored it for that purpose. However, criminal intent cannot be inferred from circumstances that could or may give rise to a suspicion that a principal is or will commit a crime. If the State's argument were accepted, a person who buys a computer for someone previously convicted of child pornography could be an accessory if a crime is later committed. Someone who pays for internet access could be an accessory. A parent whose child has driven drunk before and who lets the child drive again could be an accessory to DWI. Giving money to a drug addict who uses it to buy drugs could be an accessory. Accomplice liability requires the State to prove not merely conduct that technically facilitates the commission of a crime, but that such conduct was engaged in with the purpose to aid or encourage the commission of the crime. Defendant discharged.

State v. Wright, 2014 WL 4547825 (Mo. App. W.D. Sept. 16, 2014):
Even though (1) police observed Defendant and other people go in and out of a known drug house numerous times, and some of them apparently exchanged things with different people driving up in cars, (2) police found large amounts of marijuana at the house when other people were there, but not Defendant, and (3) months later, Defendant told police that he hadn't sold marijuana for "more than a month," the evidence was insufficient to convict of possession with intent to deliver more than 5 grams of marijuana because the State failed to prove Defendant had access or control over the premises, or constructive possession of the marijuana.
Facts: On March 18, 2011, police conducted a controlled drug buy at a house. Defendant was on the porch, went in the house, and came out with the confidential informant. On March 28, 2011, police conducted surveillance at the house. They again saw Defendant, whose van was parked outside the house. Various people came and went to the house, and exchanged things outside the house, including with people in cars. Later that day, police executed a search warrant and found more than 100 grams of marijuana hidden in the house, but Defendant was not at the house. Defendant's daughter was at the house. In November 2011, Defendant was arrested. He was found with marijuana hidden in his vehicle. He said he hadn't sold marijuana "for more than a month." He was charged with possession with intent to distribute more than 5 grams of marijuana for conduct occurring on *March 28, 2011*.
Holding: The evidence fails to show that Defendant had constructive possession of the marijuana in the house on *March 28, 2011*. Defendant was not present at the house when the search warrant was executed. Most of the marijuana was hidden in the house, not in plain view. Defendant's involvement with the confidential informant at the controlled buy on March 18 is unclear, and the confidential informant did not testify. Defendant's admission that he last sold marijuana more than a month ago is vague; Defendant did not admit to selling marijuana on *March 28*, when police found the 100 grams. Defendant discharged.

State v. Blair, 2014 WL 3408294 (Mo. App. W.D. July 15, 2014):
Evidence was insufficient to support first-degree robbery where there was no evidence Defendant stole any property from Victim, and appellate court refuses to enter conviction for lesser-included offense of attempted first-degree robbery because State expressly refused to submit an instruction on that at jury trial.
Facts: Defendant was charged, in relevant part, with first-degree robbery and ACA. The evidence showed that Defendant and accomplices approached a victim, intending to rob him. However, Victim said he had nothing in his pockets. Defendant and accomplices shot victim, and ran away. A witness testified that one of the co-defendants had called someone before and after the incident. Later, Victim's cell phone was found in possession of another person. There was no evidence how that person obtained the cell phone.
Holding: The evidence was insufficient to support first-degree robbery because the evidence did not show that Defendant forcibly stole any property from Victim. The State suggests that the Victim's cell phone was taken. However, there was no evidence that Victim had a phone in his possession at the time of the incident. There was no evidence how the other person later obtained the phone. There cannot be an inference that the

phone call after the incident was made from Vicitm's cell phone, since another phone call was made before the incident. Usually, the appellate court would enter a conviction for the lesser-included offense of attempted first-degree robbery, which the evidence did support. However, the State made an express strategic decision at trial not to submit attempted first-degree robbery, and has not wavered from that position on appeal. "Under these circumstances, we so no reason to reward the State for its conscious and deliberate decision not to submit the lesser offense, and accordingly, we choose not to exercise our discretion to enter a conviction on the lesser offense. Robbery and ACA convictions vacated.

Damon v. City of Kansas City, 2013 WL 6170565 (Mo. App. W.D. Nov. 26, 2013): *(1) Claims that municipal ordinances are unconstitutional are not within the "exclusive" jurisdiction of the Missouri Supreme Court, but are also within the jurisdiction of the Court of Appeals; (2) Plaintiffs who have received a notice of violation but have not yet gone to court or paid their fine have standing to assert their claims in this action because they do not have an adequate remedy in their ordinance violation cases since Private Company which administers the red light fine collection program is allowed to act in law enforcement, prosecutorial and adjudicative roles under the ordinance (disagreeing with Eastern District cases); (3) the "notice of violation" under the ordinance appears to conflict with Rule 37 because it does not state the address of a court (but rather directs payment to a private company) and does not command appearance before a court; (4) Plaintiffs have alleged sufficient facts to survive a motion to dismiss in contending that the ordinance does not have a substantial relationship to public safety because it actually increases accidents, reduces the number of police officers, and is really a revenue collection program; (5) the ordinance conflicts with state law which requires assessment of points for moving violations; and (6) if the ordinance is "criminal" in nature, then the rebuttal presumption that the owner of the vehicle is the driver is unconstitutional because it violates the presumption of innocence as to every element of the crime and because it invades the fact-finding function of the jury.*

Facts: Plaintiffs raise numerous claims about validity of City "red light" ordinance. The ordinance provides that no vehicle shall be "driven" into an intersection with a red light. The ordinance also creates a "rebuttable presumption" that the owner of the vehicle is the driver. Finally, the ordinance provides that upon filing of an information in municipal court, a summons will issue pursuant to Missouri Supreme Court Rule 37.

Holding: As an initial matter, the Court of Appeals determines that it has jurisdiction in this case because claims that municipal ordinances are unconstitutional are not within the "exclusive" jurisdiction of the Missouri Supreme Court, but may also be decided by the Court of Appeals. Additionally, contrary to rulings by the Eastern District, the Western District finds that plaintiffs who have received notices of violation but who have not paid their fines do have standing to proceed as plaintiffs here because they do not have an adequate remedy at law in their ordinance violation cases since the ordinance allows the private company which collects the fines to play law enforcement, prosecutorial and/or adjudicative roles. The Supreme Court has recognized that subjecting a defendant to criminal sanctions involving his liberty before a tribunal that has a direct, personal and substantial pecuniary interest in convicting him is a denial of due process. Further, to allow private prosecutors, employed by private citizens, to participate in the prosecution

of a defendant is fundamentally unfair. On the merits, the ordinance is invalid or unconstitutional for several reasons. First, there are multiple problems with the "summons procedure" for contesting a violation under the ordinance. The "notice of violation" is not delineated a "summons" and gives confusing and conflicting instructions on how to pay a fine or contest a violation. The notice conflicts with Rule 37 because it does not state the address of a municipal court, and does not command appearance in any court. Second, Plaintiffs have alleged sufficient facts to survive a motion to dismiss in contending that the ordinance does not have a substantial relationship to public safety because it actually increases accidents, reduces the number of police officers, and is really a revenue collection program. Third, the ordinance conflicts with state law, Sec. 302.302.1(1), which requires assessment of points for moving violations. Finally, if the ordinance is "criminal" (as opposed to "civil"), then the rebuttal presumption that the owner of the vehicle is the driver is unconstitutional because it violates the presumption of innocence as to every element of the crime and because it invades the fact-finding function of the jury.

In the Interest of J.N.C.B. v. Juvenile Officer, No. WD75299 (Mo. App. W.D. 6/28/18):

Mere entry into a building with valuables in it, without more, is not sufficient to prove an intent to steal necessary for conviction for burglary.

Facts: In response to an alarm at 7:00 p.m., police were called to a former school building which contained various property. When they arrived, they found the door propped open, and Defendant-juvenile and several other juveniles in the building laughing and talking. One of the juveniles had a broom from the building, although police did not think they intended to steal the broom. Defendant was ultimately convicted at trial of second degree burglary. He appealed.

Holding: A person commits second degree burglary if he knowingly enters unlawfully in a building for the purpose of committing a crime therein. The parties agree that Defendant entered the building unlawfully (which is first degree trespassing), but Defendant argues the evidence is insufficient to prove that he intended to commit a crime therein. The State argues that intent to steal is presumed when there are items of value in a building, and that the mere presence of valuables alone, with no other indicia of intent to steal, is sufficient to prove intent to steal beyond a reasonable doubt. Although cases often cite this inference, it has always been in connection with additional supportive facts and inferences, such as forced entry, flight, weapons, burglary tools, confessions, or movement of valuables. Here, there are none of these additional facts, except possession of the broom, but police testified they didn't believe anyone intended to steal the broom. Where a permissible inference is the sole basis for a finding of guilt, due process requires that the conviction may not rest entirely on that inference unless other proven facts are sufficient to support the inference of guilt beyond a reasonable doubt. The State is required to prove Defendant's intent beyond a reasonable doubt. The evidence here is insufficient to do that. The State also argues that since Defendant did not offer any other reasons for being in the building other than to steal, this proves his intent, but the 5th Amendment requires the State to bear the burden of proving every element of the crime beyond a reasonable doubt. Conviction reversed.

State v. Whites, No. WD75236 (Mo. App. W.D. 6/25/13):
Evidence was insufficient to convict Defendant-passenger of possession with intent to distribute marijuana for marijuana found in backpack in truck bed, even though truck smelled of marijuana, the bag was on the passenger side, and Defendant had a large amount of cash.
Facts: Officer stopped a pickup truck for a license plate violation. Defendant was a passenger in the truck. After doing license checks, Officer saw plastic bags with drugs in them by the curb about 15 feet behind where the truck stopped. Officer arrested driver and Defendant-passenger. Officer found $1,346 in cash in Defendant's wallet and a receipt showing a $5,000 deposit into a Bank of America account. Driver and Defendant denied knowledge of the bags of drugs by the curb. Officer then searched truck and smelled "strong odor of marijuana." Officer then found a backpack in the bed of the truck behind the passenger side, which contained much marijuana and a scale. Defendant-passenger was convicted of possession of marijuana with intent to distribute due to the marijuana in the backpack.
Holding: In order to prove guilt, the State must show that Defendant had constructive possession of the marijuana in the backpack. Because Defendant did not have exclusive control of the truck, the State was required to show additional incriminating evidence to prove knowledge and control of the marijuana. The odor of marijuana could support an inference that Defendant was aware of the marijuana, but other evidence here does not. The fact that the backpack was in the bed of the truck on the passenger side does not prove that Defendant put it there. Also, the fact that Defendant had $1,346 in cash does not prove guilt since the cash was not in denominations typically used in drug sales. Also, the fact that someone had deposited $5,000 into a bank account does not support guilt because there are many legitimate reasons for a person to do this, and it is unlikely a person who made money selling drugs would make such a deposit because of the easy ability for law enforcement to trace bank deposits. Conviction reversed.

State v. Maldonado-Echeverria, 2013 WL 1800201 (Mo. App. W.D. April 30, 2013):
Even though Defendant-Passenger (1) was in a truck that pulled off interstate before a drug checkpoint; (2) was nervous when stopped by police and wouldn't look at Officer; (3) told a different story than Driver; (4) had a cellphone and sat next to a GPS device; (5) the vehicle had air freshener in it, and (5) Defendant-Passenger had a warrant out for his arrest, the evidence was insufficient to show that Defendant-Passenger had knowledge of methamphetamine hidden in the bed liner of the truck.
Facts: Defendant was a passenger in a truck. Police set up a ruse drug checkpoint on an interstate. The truck pulled off the interstate after seeing the checkpoint and was stopped for speeding. Driver and Defendant-Passenger would not look at Officer. The truck smelled of air freshener. Driver said they were going to Marshall to pick up a truck. Defendant said they were going to Sedalia, but when Officer again asked Driver about this, Driver said Defendant-Passenger had not been told they were going to Marshall. Defendant-Passenger was sitting next to a GPS device. Both men had cellphones, but neither had the other's contact information on their phones. Defendant-Passenger also had an outstanding warrant for his arrest, but he said he was "going to take care of it soon." Officer found methamphetamine hidden in the truck's bed liner behind Driver. Defendant was convicted of second-degree trafficking.

Holding: To convict, the State had to show that Defendant-Passenger had knowledge of the methamphetamine and constructively possessed it. Defendant's mere presence in the truck was not enough. The meth was not in plain view, and not easily accessible to Defendant. The inconsistent stories told by the men did not show that Defendant made false statements because after Officer re-asked Driver about the trip, Driver confirmed Defendant's destination. The GPS and cell phone evidence was not, in itself, incriminating. Even though the men were nervous and didn't look at Officer, nervousness is merely one factor to consider and there are equally probable reasons a person may be nervous. The air freshener alone cannot support a conviction either. Here, the evidence was insufficient to convict Defendant-Passenger.

Nenninger v. Smith, 2013 WL 1110894 (Mo. App. W.D. March 19, 2013):
Even though family-member-Victim had obtained a prior full order of protection against Defendant, Victim was required to show an immediate and present danger of further abuse to have the order renewed, and could not just let the order lapse and then file a new petition alleging the same allegations that formed the basis of the initial order, since this would allow an order to be renewed ad infinitem, whereas Sec. 455.040.1 only authorizes a maximum of two renewals.
Facts: Victim and Defendant had child together, and thus, qualify as "family members" under the Adult Abuse Act, Sec. 455.010(5). In 2010, Victim obtained an order of protection against Defendant because Defendant had assaulted her and child. Defendant complied with that order. That order expired in 2011. Subsequently, Victim obtained a new order of protection because – although Defendant was incarcerated – he wrote letters and phone calls to Victim after the protection order expired, seeking contact with child. Defendant appealed.
Holding: In order to have had the original protection order renewed, Victim was required to show that expiration of the full order would place her "in immediate and present danger of abuse." The only new allegations that did not form the basis for the prior protective order were the letters and phone calls. It would be illogical for Victim to be allowed to avoid the burden of proving an immediate and present danger of abuse, as required for renewal of a full order of protection, by simply letting the initial order lapse and then filing a new motion for a full order averring the same allegations of abuse that formed the basis for the initial order. This would enable a family-member-Victim to obtain an infinite number of orders, in violation of Sec. 455.040.1, which only authorizes a maximum of two renewals. Further, Victim's new allegations do not meet the test for harassment under the Act because the phone calls and letters would not have caused substantial emotional distress to a reasonable person. Even though Victim testified that the letters and phone calls caused her PTSD-like symptoms, made her fearful and that she did not want child to know who child's father was, the content of the letters and phone calls were not threatening; they were nothing more than legitimate attempts to communicate with child, which Defendant must do to avoid termination of parental rights. Evidence was insufficient for new order of protection.

State v. Rodgers, 2013 WL 427363 (Mo. App. W.D. Feb. 5, 2013):
Even though Sec. 571.070.1(2) makes it unlawful to possess a firearm if a person is a "fugitive from justice," the phrase "fugitive from justice" is ambiguous because subject

to multiple meanings, and must be construed strictly against the State; thus, even though Defendant had failed to appear in municipal court and a capias warrant had been issued for his arrest, the trial court did not err in dismissing an unlawful possession of firearm charge because Defendant was not necessarily a "fugitive from justice."
Facts: Defendant was charged with a municipal offense of leaving the scene of an accident. However, he failed to appear on the charge, and a capias warrant was issued. When police approached Defendant to arrest him, he initially ran and threw down a gun, but was caught and arrested. The State charged Defendant with unlawful possession of a firearm under Sec. 571.070.1(2). Defendant moved to dismiss the charge, which the trial court granted. The State appealed.
Holding: Sec. 571.070.1(2) provides that a person commits the crime of unlawful possession of a firearm if such person knowingly has a firearm and "is a fugitive from justice." The term "fugitive from justice" is not defined in the statute or anywhere else in the Criminal Code. Another Missouri statute, Sec. 319.303(16) defines it as a person who "has fled from the jurisdiction," but this statute is not dispositive because it is in a different Chapter than the Criminal Code and has a different regulatory purpose. Other states and legal dictionaries give the phrase different meanings. Where a criminal statute is ambiguous, the rule of lenity requires that it be construed strictly against the State and liberally in favor of the Defendant. The elements of a crime should be clearly defined to provide meaningful notice of proscribed conduct. Here, the phrase is ambiguous and the trial court did not err in dismissing the charge. The appellate court suggests that the Legislature amend the statute to define the phrase.

McAlister v. Strohmeyer, 2013 WL 68901 (Mo. App. W.D. Jan. 8, 2013):
Holding: (1) Where a petitioner for a full order of protection proves "assault" (knowingly placing another person in fear of physical harm) under the Adult Abuse Act, the plain language of Sec. 455.040.1 requires a trial court to grant the full order; but (2) even though Man (Respondent) pointed a gun at Petitioner, trial court did not err in denying order because Man was justified in his actions under Sec. 563.031.2(2) which allows a person to use deadly force against a person who unlawfully enters their home and Sec. 563.074.1 which states that a person who uses force under Sec. 563.031.2 has an "absolute defense to civil liability," and here, Petitioner forced her way inside Man's house, disabled his phone, ignored his requests to leave, and physically attacked him, only after which did he point a gun at her to get her to stop.

State v. Cochran, No. WD73766 (Mo. App. W.D. 5/1/12):
(1) Expert should not be permitted to testify that Defendant committed "animal abuse" under Sec. 578.012 because this invades the province of the jury; and (2) where Defendant was charged with county ordinance violation but State failed to introduce the ordinance into evidence at trial, a court cannot judicially notice a county or municipal ordinance and the failure to introduce it at trial made the evidence insufficient to convict.
Facts: Defendant was charged with and convicted of animal abuse under Sec. 578.012 and with violation of a county ordinance regarding vaccination of animals. At trial, an animal care official ("Expert") testified about the conditions in which the animals were found and that "animal abuse" occurred.

Holding: (1) It was proper for Expert to testify about the inadequate conditions in which the animals lived, such as inadequate food and water. The State, however, asked Expert whether "animal abuse" occurred. "Animal abuse" includes the element of whether the Defendant knowingly failed to provide adequate care for the animals. To the extent that Expert's testimony could be interpreted as Expert testifying that Defendant knowingly failed to provide adequate care, it exceeded his expertise and invaded the province of the jury. However, court finds the error harmless here in light of other evidence. (2) The State failed to prove guilt of the county ordinance violation because the State failed to introduce it into evidence. Sec. 479.250 and subsequent cases require that municipal and county ordinances be introduced into evidence either by formal presentation or by stipulation. A court cannot judicially notice an ordinance. The ordinance is an essential element of proof. No misconduct can be shown or conviction proven without it. The State's evidence being insufficient, it would violate double jeopardy to re-try Defendant on the county ordinance violation, so that conviction must be vacated.

State v. Buckler, No. WD72794 (Mo. App. W.D. 10/18/11):
Even though DNA testing showed that Defendant was not the father of child to whom child support was owed, where child had been legitimated by legal process, trial court did not err in excluding DNA test from trial and Court of Appeal must uphold conviction for failure to pay support, but Defendant has until Dec. 31, 2011, to avail himself of procedures of Sec. 210.854 to have himself declared not to be the father and have his conviction expunged.
Facts: Defendant was charged with criminal nonsupport. The child-support obligation stemmed from a court judgment entered in 2004 in which Defendant was declared to be the father. Defendant did not contest this finding in 2004 because he believed he was the father. However, he subsequently learned that he was not, and a subsequent DNA test showed that he was not the father. At trial, the trial court excluded the DNA evidence that he was not the father because the child had been "legitimated by legal process." After conviction, he appealed.
Holding: The trial court did not err in excluding the DNA test at the criminal trial because under *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238 (Mo. banc 2006), the State need only prove that the child was "legitimated by legal process," not that the defendant is the actual father. Hence, whether Defendant was the actual father was irrelevant to the charge. Defendant also contends that since the DNA test shows he's not the father, he was denied due process by his conviction. Under *Sauer*, however, he has no legal defense to the charge, and while the contention that something is "not fair" may be relevant to proceedings in equity, it is not a recognized legal defense to a criminal charge. However, there is a statutory remedy which Defendant can pursue: Sec. 210.854.1 and .8 provide that Defendant has until Dec. 31, 2011, to file an action to set aside the judgment that he is the father, and once that is done, he can have his conviction expunged under those sections. Defendant "is the ideal candidate under section 210.854 to have his conviction set aside and all records concerning his conviction expunged," but he needs to follow the procedures set forth in that statute.

Editor's Note: The statute provides that after Dec. 31, 2011, petitions under the statute have to be filed "within two years of the entry of the original judgment of paternity and support or within two years of entry of the later judgment in the case of

separate judgments of paternity and support and shall be filed in the county which entered the judgment or judgments of paternity and support."

State v. Caldwell, No. WD73194 (Mo. App. W.D. 11/8/11):
(1) Evidence insufficient to convict where State charged Defendant with trespass on property at a certain address but presented no evidence that Defendant was at that address, and even though prosecutor mentioned address in closing argument, closing argument is not evidence; and (2) evidence insufficient to convict of resisting arrest where Defendant refused to get out of her car at request of police and they had to use locksmith to open car's door and there was no evidence that Defendant used any force after door was opened.
Facts: Defendant was convicted at trial of trespassing at a certain address, Sec. 569.140, and resisting arrest, Sec. 575.150. Defendant was parked in a car at an airport after it was closed for the night. Police asked her repeatedly to leave, but she refused and remained in her locked car. Police had to use a locksmith device to open her car door. At trial, the State presented no evidence of the address Defendant was at (other than it was an airport), but the prosecutor argued in closing that she was at "160 NW 251" as charged. The State presented no evidence of what happened after police opened the Defendant's car door and took her into custody.
Holding: The evidence was insufficient to convict of either charge. Defendant was charged with trespassing at "160 NW 251" but no evidence was presented at trial that this is where Defendant's car was. The only time this address was mentioned was in the prosecutor's closing argument, but closing arguments are not evidence. Sec. 575.150.1 makes resisting arrest illegal only upon "using violence, threatening to use violence, using physical force, threatening to use physical force, or by fleeing." Even though police had to use a locksmith device to open Defendant's car door, there was no evidence presented of what happened after the car door was opened. In other resisting arrest cases where convictions were upheld, the Defendant used physical resistance to resist and this was "use of physical force." But there was no evidence of what happened after the car door was opened here or whether Defendant physically resisted once the door was opened. Convictions reversed and Defendant discharged.

*** Yates v. U.S., 96 Crim. L.Rep. 576, ___ U.S. ___, 135 S.Ct. 1074 (U.S. 2/25/15):**
Holding: Sarbanes-Oxley Act provision, 18 USC 1519, which criminalizes destroying or concealing "any record, document, or tangible object" with an intent to obstruct a federal matter applies only to objects that are used to "record or preserve information"; thus, Defendant-fisherman could not be convicted for throwing undersized fish overboard in violation of federal agent's instruction.

*** Henderson v. United States, ___ U.S. ___, 135 S.Ct. 1780 (U.S. May 18, 2015):**
Holding: A felon does not run afoul of 18 USC 922(g)'s prohibition on possession of firearms by seeking a court order directing that a gun be transferred to a third party chosen by the felon, who may sell the gun for the felon or own the gun independently of the felon; 922(g) does not affect "the right merely to sell or otherwise dispose" of the guns; so long as the "felon has nothing to do with his guns before, during, or after the transaction in question, except to nominate their recipient," the felon may ask – and the

court may direct – who can receive the guns, and the felon may receive any proceeds from sale of the guns; 922(g) "does not bar such a transfer unless it would allow the felon to later control the guns, so that he could either use them or direct their use."

*** Elonis v. United States, ___ U.S. ___, 135 S.Ct. 2001 (U.S. June 1, 2015):**
Holding: Conviction under federal threats statute, 18 USC 875(c) requires proof that Defendant had a culpable mental state in transmitting a threat; proof only that a reasonable person would feel threated by the communication is insufficient.

*** Whitfield v. U.S., ___ U.S. ___, 96 Crim. L. Rep. 413 (U.S. 1/13/15):**
Holding: 18 USC 2113 which imposes a mandatory minimum to a defendant who, in fleeing from or attempting to avoid capture by police, "forces any person to accompany him without the consent of such person," does not require that the defendant move the victim for any substantial distance; statute applies to bank robbery Defendant who moved victim entirely within a single building for a short distance; word "accompany" does not imply a long or substantial distance.

*** McFadden v. United States, ___ U.S. ___, 135 S.Ct. 2298 (June 18, 2015):**

Holding: Conviction under the federal Controlled Substance Analogue Enforcement Act can be established, first, "by evidence that a defendant knew that the substance with which he was dealing is some controlled substance – that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act – regardless of whether he knew the particular identity of the substance," or, second, "by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue."

*** Loughrin v. U.S., 95 Crim. L. Rep. 416, ___ U.S. ___, 2014 WL 2807180 (U.S. 6/23/14):**
Holding: A conviction under the federal bank fraud statute, 18 USC 1344, does not require proof that a financial institution was the target of the deception or that a financial institution was exposed to risk of loss; the statute's reference to obtaining property "by means of" a false statement is satisfied by a defendant's false statement (such as a false statement in an altered check) that causes a bank to part with money in its control.

*** Abramski v. U.S., 95 Crim. L. Rep. 381, ___ U.S. ___, 134 S.Ct. 2259 (U.S. 6/16/14):**
Holding: A defendant who purchases a gun for someone else while falsely claiming it is for himself is guilty of making a false statement in connection with "any fact material to the lawfulness of the sale," 18 USC 922(a)(6), even though the true buyer (other person) could have legally purchased the gun himself.

*** Bond v. U.S., 95 Crim. L. Rep. 312, ___ U.S. ___, 134 S.Ct. 2077 (U.S. 6/2/14):**
Holding: Sec. 229 of the Chemical Weapons Convention Implementation Act, which bans possession of chemicals that "can cause death, temporary incapacitation or permanent harm to humans or animals" was intended to prosecute acts of war,

assassination and terrorism, not "purely local crimes"; hence, Gov't could not use statute to prosecute a Defendant who put toxic chemicals designed to cause a rash on her husband's mistress' doorknob; "[t]he global need to prevent chemical warfare does not require the Federal Government … to treat a local assault with a chemical irritant as the deployment of a chemical weapon."

*** U.S. v. Castleman, 95 Crim. L. Rep. 5, ___ U.S. ___, 134 S.Ct. 1405 (U.S. 3/26/14):**
Holding: A "misdemeanor crime of domestic violence" under 18 USC 921(a)33 means a misdemeanor with a degree of force supporting only common-law battery, i.e., an "offensive touching" against a present or former spouse, parent, guardian or similar person. Here, Defendant was convicted under a state law allowing conviction for minor minor "bodily injury" such as a bruise. This qualified as a "misdemeanor crime of domestic violence" and, thus, prohibited Defendant from possessing a firearm under 18 USC 922(g)(9), which prohibits possession of a firearm by anyone convicted of a "misdemeanor crime of domestic violence."

*** Rosemond v. U.S., ___ U.S. ___, 94 Crim. L. Rep. 701, 134 S.Ct. 1240 (U.S. 3/5/14):**
Holding: A Defendant charged with aiding and abetting another person who uses or carries a firearm in a crime of violence or drug trafficking is entitled to an instruction to determine whether he became aware that the person was armed in time to withdraw from the crime; 18 USC 924(c) requires that Defendant have "advance knowledge – or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice"; the Gov't must prove that Defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a participant would use or carry a gun during the crime's commission.

*** U.S. v. Apel, ___ U.S. ___, 94 Crim. L. Rep. 675, 134 S.Ct. 1144 (U.S. 2/26/14):**
Holding: A portion of a military base that contains a designated "protest area" and an easement for a public road is a part of a "military installation," and therefore, a defendant who entered the protest area after having been barred from the base was properly convicted under 18 USC 1382, which prohibits re-entering a military installation after having been ordered not to do so; the limits of a "military installation" do not change simply because the commander invites the public to use a portion of the base for a road, school, bus stop or "protest area."

*** Burrage v. U.S., ___ U.S. ___, 94 Crim. L. Rep. 493, 134 S.Ct. 881 (U.S. 1/27/14):**
Holding: Statute that imposes greater penalty on drug distribution that results in death, 21 USC 841(b)(1)(C), requires proof that the drug user would not have died but for the use of the distributed drug (reversing 8th Circuit which had held that the drug need only be a "contributing factor" to the death); here, the decedent had taken multiple other drugs in addition to the drug at issue.

*** Sekhar v. U.S., 93 Crim. L. Rep. 513, 133 S.Ct. 2720 (U.S. 6/26/13):**
Holding: Even though Defendant threatened to expose Gov't general counsel's alleged affair to his wife if general counsel did not change his legal investment advice given to a

Gov't agency, this did not constitute extortion under the Hobbs Act, 18 USC 1951(a), which defines extortion as using threats to obtain of "property of another," because the property extorted must be transferable, i.e., capable of passing from one person to another, a defining feature lacking here.

*** Coleman v. Johnson, 2012 WL 1912196, ___ U.S. ___ (U.S. 2012):**
Holding: (1) A federal habeas court may overturn a state court decision finding the evidence sufficient only if the state court decision is "objectively unreasonable" and (2) while the federal court looks to state law to determine the elements of the offense, the minimum amount of evidence required to sustain the conviction is determined by reference to federal due process law, not state law; applying these standards, Supreme Court held evidence was sufficient to support verdict that Defendant had requisite intent to kill victim.

U.S. v. Encarnacion-Ruiz, 97 Crim. L. Rep. 268 (1st Cir. 5/28/15):
Holding: Even though a principal can be convicted of producing child pornography without proof that principal knew that victim was a minor, a Defendant charged with aiding and abetting production of child pornography can assert a mistake-of-age defense; *Rosemond* (U.S. 2014) requires Gov't in prosecution for aiding and abetting to prove the aider and abettor knew the victim was a minor; otherwise, too much innocent behavior would become illegal, allowing people with minimal connection to the criminal activity to be convicted of aiding and abetting child pornography.

U.S. v. Rodriguez-Martinez, 96 Crim. L. Rep. 629 (1st Cir. 2/20/15):
Holding: Even though Defendant, who was brother-in-law of driver, appeared nervous when the car was stopped by police, evidence was insufficient to support conviction for aiding and abetting brother-in-law's drug trafficking; aiding and abetting liability requires proof of "advance knowledge" of the elements of an offense sufficient to make a choice to facilitate or walk-away.

U.S. v. Fernandez, 93 Crim. L. Rep. 498 (1st Cir. 6/26/13):
Holding: 18 USC 666, which prohibits corruption with respect to state and local programs that receive federal funds, does not prohibit giving or accepting gratuities for official actions; violation of Sec. 666 requires proof of a quid pro quo.

U.S. v. Franco-Santiago, 2012 WL 1948890 (1st Cir. 2012):
Holding: Even though Defendant had participated in one robbery, the evidence was insufficient to support Defendant's conspiracy conviction for a series of additional robberies where there was no evidence Defendant had a common goal or purpose of participating the additional robberies them.

U.S. v. Rehlander, 2012 WL 104908 (1st Cir. 2012):
Holding: Weapons statute regarding person committed to mental institution did not apply, where subject was committed based on ex parte procedures for temporary involuntary emergency hospitalization, as such proceedings did not provide an adversary hearing to determine whether subject was actually mentally ill or dangerous.

U.S. v. Brock, 2015 WL 2191135 (2d Cir. 2015):
Holding: Even though Defendant bought drugs from Seller to re-sell, evidence was insufficient to prove a drug conspiracy with Seller, where there was no evidence Seller sold drugs to Defendant on credit, or that Defendant shared his profits with Seller, or that Defendant was anything but a customer of Seller.

U.S. v. Newman, 96 Crim. L. Rep. 292 (2d Cir. 12/10/14):
Holding: To convict stock trader of insider trading, Gov't must prove the trader knew that the tipper who disclosed the material, nonpublic information was personally benefitting from doing so.

U.S. v. Clark, 94 Crim. L. Rep. 501 (2d Cir. 1/17/14):
Holding: Appellate court holds it "taxes credulity" to believe that Defendant, who was handcuffed in the back of a police car, was responsible for a substantial quantity of drugs found tucked in the rear seat of the police car, when there was no trace of drugs on Defendant's clothing or person.

U.S. v. Macias, 2014 WL 114272 (2d Cir. 2014):
Holding: Where Defendant was on Canadian soil just across the border when he was apprehended by border patrol agents, Defendant was not "found" in the U.S. so as to support conviction for being "found" in the U.S. as a previously deported alien.

U.S. v. Vasquez, 94 Crim. L. Rep. 466 (2d Cir. 1/14/14):
Holding: Where alien-Defendant was prevented by Canada from entering Canada from U.S. and was turned over to U.S. custody, Defendant was not "found in" U.S. under 8 USC 1326(a) to permit conviction under that statute because he wasn't in U.S. voluntarily (disagreeing with 9th Circuit).

U.S. v. Davis, 93 Crim. L. Rep. 688 (2d Cir. 8/14/13):
Holding: Even though a crime may take place in a federal prison on federal land, this fact alone does not prove the jurisdictional requirement that a crime took place within the "special maritime and territorial jurisdiction of the U.S.," unless there is some indication that the State ceded jurisdiction or that the Gov't explicitly accepted jurisdiction.

U.S. v. Vargas-Cordon, 93 Crim. L. Rep. 667 (2d Cir. 8/12/13):
Holding: Even though Defendant gave shelter to an illegal alien, this did not violate the federal law against "harboring" illegal aliens unless there is some evidence that Defendant acted in a way designed to thwart authorities.

U.S. v. Nkansah, 2012 WL 5439902 (2d Cir. 2012):
Holding: Even though Defendant deposited fraudulently obtained Treasury checks at banks, there was insufficient evidence of Defendant's intent to commit bank fraud since the banks did not have a well-known exposure to loss permitting an inference of requisite intent.

U.S. v. Aleynikov, 2012 WL 1193611 (2d Cir. 2012):
Holding: The code that a defendant uploaded to a server and downloaded to his computer devices was intangible intellectual property, not "goods," "wares," or "merchandise," within the meaning of the National Stolen Property Act (NSPA); thus, even though employee-defendant took a computer source code from his employer to create a competing program, this did not violate the federal Economic Espionage Act.

U.S. v. Banki, 90 Crim. L. Rep. 153 (2d Cir. 10/24/11):
Holding: Treasury Dept.'s regulations imposing sanctions on Iran are too vague to support conviction for noncommercial family transaction to Iran.

Rivera v. Cuomo, 2011 WL 3447445 (2d Cir. 2011):
Holding: Where State's theory was either that Defendant deliberately shot victim or accidently did so, this did not prove "recklessness" for depraved indifference murder.

U.S. v. Husmann, 95 Crim. L. Rep. 668 (3d Cir. 9/3/14):
Holding: Conviction for distribution of child pornography, 18 USC 2252(a)(2), on the basis of file-sharing software requires the Gov't to prove that someone else actually downloaded the illegal images stored on Defendant's computer; "the issue we address is whether the mere act of placing child pornography materials in a shared computer folder, available to other users of a file sharing network, constitutes distribution of child pornography. We conclude that it does not."

U.S. v. Stock, 93 Crim. L. Rep. 718 (3d Cir. 8/26/13):
Holding: Federal statute regarding making threats, 18 USC 875(c), applies only to statements expressing intention of present or future harm, not to statements by Defendant that he wished he had injured someone in the past.

U.S. v. Ashurov, 93 Crim. L. Rep. 663 (3d Cir. 8/12/13):
Holding: Even though Defendant made a false statement on an immigration form, he could not be convicted under 18 USC 1546(a), which criminalizes making a false statement on such forms "under oath," because the statement wasn't under oath, and his conduct wasn't prohibited under the "knowingly presents" clause of the statute either because that, too, requires the statement be under oath.

U.S. v. Simmons, 94 Crim. L. Rep. 363 (4th Cir. 12/11/13):
Holding: The former federal money laundering statute as interpreted in *U.S. v. Santos*, 553 U.S. 507 (2008), does not allow Ponzi scheme operators to be convicted separately of money laundering on the basis of their payments to some of the investors victimized by the scheme.

U.S. v. Cone, 93 Crim. L. Rep. 95 (4th Cir. 4/15/13):
Holding: (1) Contents of emails are not necessarily admissible under "business records" exception to hearsay without further analysis since email is a more casual form of communication than other records usually kept in the course of business such that email may not be assumed to have the same degree of accuracy and reliability; and (2)

Materially altering a good that bears a genuine trademark and passing it off as a more expensive product is not prohibited by the criminal trademark counterfeiting statute, 18 USC 2320.

MacDonald v. Moose, 92 Crim. L. Rep. 749 (4th Cir. 3/12/13):
Holding: Virginia state court unreasonably applied federal law when it upheld conviction for adult who had oral sex with a minor under state statute that criminalizes oral sex since this violates *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down an anti-sodomy law between consenting adults under due process clause; 4th Circuit holds that although State can proscribe oral sex between adults and minors, it cannot convict petitioner/Defendant under a general, anti-oral sex law (not a "child sex" law), which it did here.

U.S. v. Hilton, 92 Crim. L. Rep. 327, 2012 WL 6200742 (4th Cir. 12/13/12):
Holding: 18 USC 1028(a)(7) on identify theft is ambiguous whether it includes a corporation; thus, it cannot be used to prosecute Defendants who opened bank accounts and cashed checks in a corporation's name.

U.S. v. Cloud, 2012 WL 1949367 (4th Cir. 2012):
Holding: Defendant's convictions for money laundering and mortgage fraud presented "merger problems," requiring Gov't to establish that the proceeds in the counts were actually profits.

U.S. v. Simmons, 2011 WL 2631404 (4th Cir. 2011):
Holding: Evidence insufficient to convict of resisting arrest with deadly weapon where Defendant discarded a gun while being pursued by police.

U.S. v. Cardenas, 2015 WL 452343 (5th Cir. 2015):
Holding: Acquiring and possessing means of identification does not qualify as "using" that means of identification; thus account numbers that Defendant acquired but did not "use" cannot be counted in the calculation of loss for conspiracy to commit fraud with counterfeit access devices.

U.S. v. Kaluza, 96 Crim. L. Rep. 648 (5th Cir. 3/11/15):
Holding: "Seaman's manslaughter" statute, 18 USC 1115, which applies to a "captain, engineer, pilot or other person," did not apply to the conduct of well-site managers of the BP Gulf of Mexico oil spill, because the statute applies only to those charged with navigation of a vessel.

U.S. v. Vargas-Ocampo, 2014 WL 1303364 (5th Cir. 2014):
Holding: Use of "equipoise" rule not appropriate for determining sufficiency of evidence on appeal.

U.S. v. Cessa, 97 Crim. L. Rep. 154 (5th Cir. 5/7/15):
Holding: (1) To convict a defendant with a legitimate business of conspiracy to engage in concealment money laundering, Gov't must prove more than Defendant's knowledge

that his acceptance of drug dealer's money would have effect of laundering it; there is a distinction between doing business with known drug dealers and being in business with known drug dealers; (2) instruction that told jurors that Defendant's co-mingling of funds was evidence of intent to conceal was a correct statement of law, but failed to tell jurors that this inference was permissive, not mandatory.

U.S. v. Campbell, 96 Crim. L. Rep. 353 (5th Cir. 12/30/14):
Holding: 18 USC 924(c)(1) requires that conviction for multiple counts of possessing a firearm in connection with a drug trafficking crime that the jury find Defendant possessed a different gun for each count, even in a case with two predicate drug trafficking crimes.

U.S. v. Davis, 93 Crim. L. Rep. 693 (5th Cir. 8/19/13):
Holding: When proving bank fraud arising out of credit card scam, the Gov't must prove that the credit card company victimized by the scam was also a depository institution that controlled an FDIC-insured bank.

U.S. v Demmitt, 92 Crim. L. Rep. 547 (5th Cir. 2/1/13):
Holding: Even though Defendant deposited a fraudulently obtained check into her account and then wired $3,000 to her son, this did not support conviction for concealment money laundering because there was nothing to rebut the son's testimony that the purpose of the wire transfer was to provide money to his own business and there was no evidence that Defendant used "classic" money laundering techniques like using cash or making transfers below $10,000 to avoid reporting requirements.

U.S. v. McRae, 2012 WL 6554691 (5th Cir. 2012):
Holding: (1) Even though police officer-Defendant burned a car with dead victim's body inside, the evidence was insufficient to convict of denying victim's relatives access to the courts to seek legal redress, since there was no evidence that the relatives were denied access to sue; and (2) Defendant's trial should have been severed from other codefendants where gruesome evidence was admissible solely against the other codefendants and it would have been impossible for jurors to compartmentalize that.

U.S. v. Harris, 2012 WL 10882 (5th Cir. 2012):
Holding: Payments for drugs did not constitute money laundering, where there was no showing that the money was the proceeds of unlawful activity.

U.S. v. Fontenot, 2011 WL 6413621 (5th Cir. 2011):
Holding: Because a "loan" agreement was an absolute nullity under Louisiana law, it did not create a "debt"; therefore a state senator did not make a false statement in not identifying the "loan" on a later loan application.

U.S. v. Moreland, 2011 WL 6187430 (5th Cir. 2011):
Holding: Evidence was not sufficient to support finding that defendant constructively possessed digital images found in two computers, where defendant shared the computers with two others and there was nothing to establish that defendant knew of or had access

to the images, which were accessible only to a knowledgeable person using special software.

U.S. v. Al-Maliki, 97 Crim. L. Rep. 277 (6th Cir. 5/27/15):
Holding: Sixth Circuit questions (but does not decide) whether 18 USC 2423(c), which prohibits sex crimes against children abroad, exceeds Congress' power to regulate commerce with foreign nations, since it punishes a citizen's noncommercial conduct while the citizen resides in a foreign nation.

U.S. v. Walli, 97 Crim. L. Rep. 156 (6th Cir. 5/8/15):
Holding: Even though Defendant-peace protesters broke into a gov't nuclear complex and spray-painted anti-war slogans and splashed blood, this did not violate the Sabotage Act, 18 USC 2155, because the Gov't failed to prove Defendants had the requisite intent to impair the nation's capacity to wage war or defend against attack.

U.S. v. Medlock, 97 Crim. L. Rep. 167 (6th Cir. 5/13/15):
Holding: Even though Defendant-ambulance operators used patient names to fraudulently seek Medicare reimbursement for ambulance services, this did not constitute "use" of the names for aggravated identity theft, 18 USC 1028A; Defendants misrepresented "how and why" the beneficiaries were transported by ambulance, but did not "use" those beneficiaries' identities to do so.

U.S. v. Toviave, 95 Crim. L. Rep. 557 (6th Cir. 8/4/14):
Holding: Even though Defendant used "reprehensible, abusive force" to make his children perform household chores and their homework, this did not violate the federal forced labor statute, 18 USC 1589; to hold otherwise would essentially federalize the crime of child abuse, which is a traditional state-law matter.

U.S. v. Sadler, 95 Crim. L. Rep. 139 (6th Cir. 4/24/14):
Holding: Even though Defendant-Pain Clinic Operator lied to Drug Company about providing drugs to indigent patients, where Defendant paid full price for the drugs, the evidence was insufficient to convict of wire fraud, 18 USC 1343 and 1346, because Defendant's scheme did not deprive Drug Company of "money," "property," or "the intangible right of honest services." The Gov't had argued the scheme deprive Drug Company of accurate information.

U.S. v. Miner, 96 Crim. L. Rep. 336 (6th Cir. 12/12/14):
Holding: Defendant cannot be convicted of obstructing or impeding the administration of federal tax laws absent proof he was aware of and tried to thwart a pending IRS action.

U.S. v. Miller, 94 Crim. L. Rep. 169, 2013 WL 5812046 (6th Cir. 10/30/13):
Holding: Even though Defendant falsely represented to bank that other members of his investment partnership authorized him to obtain a loan, this did not show that Defendant "used" the other people's names in violation of the aggravated identity theft statute, 18 USC 1028A; "lying about whether [the other people] gave him authority to act on behalf of the company is conceptually distinct from [Defendant] acting on their behalf."

U.S. v. Zabawa, 2013 WL 2372281 (6th Cir. 2013):
Holding: Even though police officer butted heads with Defendant and cut his head in doing so, Defendant did not "inflict" this injury on officer; "inflict" refers to physical, not proximate, causation, and the direct cause of the injury was the officer's action in head butting.

U.S. v. Kurlemann, 92 Crim. L. Rep., 566 (6th Cir. 2/13/13):
Holding: 18 USC 1014 which prohibits a borrower from making any false statement for the purpose of influencing a lender does not criminalize fraudulent omissions.

U.S. v. Zaleski, 2012 WL 2866301 (6th Cir. 2012):
Holding: Even though Defendant (who previously had been convicted of a felony and could not possess firearms) arranged to have firearms transferred to a dealer and received money from the sale, this did not constitute "constructive possession" to support a conviction for felon in possession of firearms.

U.S. v. Parkes, 2012 WL 310817 (6th Cir. 2012):
Holding: The evidence of a copy of an e-mail that a defendant had sent to the company's attorney reflecting that the defendant and another corporate officer had generated 10 new company names was insufficient to prove bank fraud beyond a reasonable doubt.

U.S. v. Dudeck, 2011 WL 3179902 (6th Cir. 2011):
Holding: Where record was unclear whether Defendant's convictions for possession of child pornography and receipt of child pornography were based on same conduct, case was remanded to determine if the possession offense is a lesser included offense of the receipt offense or based on different conduct.

U.S. v. Daniels, 2011 WL 2637274 (6th Cir. 2011):
Holding: A child exploitation enterprise (CEE) requires "three or more other persons" act in concert to participate; gov't failed to establish a CEE where it showed that two of Defendant's adult prostitutes participated in offenses underlying the CEE charge, but did not show that a third person acted in concert with Defendant.

U.S. v. Mayfield, 96 Crim. L. Rep. 204 (7th Cir. 11/13/14):
Holding: Trial court should have given an entrapment instruction; "When an accused is able to present 'some evidence' from which a reasonable jury could find inducement and lack of predisposition then the trial judge must instruct the jury on entrapment and the Gov't must prove beyond a reasonable doubt either that the accused was predisposed to commit the charged crime, or that there was no Gov't inducement." Court clarifies what is meant by "inducement" and "predisposition," and emphasizes that prior convictions for similar conduct do not automatically show predisposition.

U.S. v. Hawkins, 96 Crim. L. Rep. 484 (7th Cir. 1/26/15):
Holding: Jury instruction erroneously defined "honest services" bribery as including acceptance of a payment with an intent to be rewarded; treating bribery as including

acceptance of a gratuity violates *Skilling v. U.S., 561 U.S. 358* (2010); a payment that does not entail a plan to change how the employee does his job is not a bribe or kickback.

U.S. v. Barta, 96 Crim. L. Rep. 485 (7th Cir. 1/28/15):
Holding: Defendant was so clearly entrapped by bribery sting operation that case should not have been allowed to go to jury; Defendant ignored Agent's repeated emails and phone calls for about two months before finally responding to them; "the government's conduct here, including its persistence, posed an impermissible risk that [Defendant's] criminality was created rather than caught."

U.S. v. Spears, 93 Crim. L. Rep. 748, 2013 WL 4774514 (7th Cir. 9/6/13):
Holding: Even though Defendant sold a woman a false handgun permit bearing the woman's own name, this did not constitute aggravated identify theft, 18 USC 1028A, because no one's identity had been stolen or misappropriated.

U.S. v. Phillips, 93 Crim. L. Rep. 717 (7th Cir. 9/4/13):
Holding: Defendants charged with committing mortgage fraud by lying about their income on a loan application should have been allowed to present evidence that their broker had assured them that their falsehoods would not affect the bank's decision about the loan; this is because such assurances would negate Defendant's intent to "knowingly" make a false statement "for the purpose of influencing" the bank, as required by 18 USC 1014.

U.S. v. McBride, 2013 WL 3840816 (7th Cir. 2013):
Holding: Even though Defendant used gasoline to set a clothing store on fire that he used as a "front" for drug dealing, where there was no evidence as to the damage the fire caused, who owned the property, or whether anyone's safety was in jeopardy, the evidence was insufficient to convict of arson.

U.S. v. Jones, 2013 WL 1405876 (7th Cir. 2013):
Holding: Even though drug crime organization's was recorded telling Defendant that "he needed Defendant to do what Defendant had done for Sonny," this was insufficient to prove that Defendant had "cooked" cocaine and to convict him of possession with intent to distribute where there was no evidence who Sonny was or what Defendant did for him in the past.

U.S. v. Owens, 2012 WL 4820616 (7th Cir. 2012):
Holding: Even though Defendant-zoning inspector received two $600 bribes in exchange for issuing building permits, where the Gov't failed to link the issuance of the permits to the mortgages or construction costs, this was insufficient to meet the $5,000 amount for federal program bribery.

U.S. v. Costello, 90 Crim. L. Rep. 618 (7th Cir. 1/31/12):
Holding: A woman who gave her boyfriend a place to stay even though she knew he was in the country illegally was not guilty of harboring an illegal alien in violation of federal law.

U.S. v. Alvarado-Tizoc, 2011 WL 3904083 (7th Cir. 2011):
Holding: Even though drug companies supplied retailers with drugs, the companies could not be convicted of conspiracy regarding the drugs merely for supplying them where the companies weren't involved the conspiracy.

U.S. v. Wright, 89 Crim. L. Rep. 695 (7th Cir. 7/12/11):
Holding: Even though Defendant used criminal proceeds to buy a property that he later sold for a huge profit, this profit does not count toward the $10,000 threshold for prosecution under 18 USC 1957 for engaging in a transaction in criminally derived property worth more than $10,000.

U.S. v. Carlson, 97 Crim. L. Rep. 269 (8th Cir. 6/2/15):
Holding: 18 USC 876, which makes it a crime to mail extortionate letters to persons, does not apply to threats to corporations or legal entities other than actual people.

U.S. v. Petruk, 97 Crim. L. Rep. 1 (8th Cir. 3/25/15):
Holding: (1) Statute making it a crime to corruptly influence or impede a federal investigation, 18 USC 1512(c)(2), requires Gov't to prove that Defendant knew of or foresaw a particular federal proceeding; and (2) even though (a) Defendant stole an empty, parked truck (b) was chased by the owner who was driving another vehicle, and (c) swung a hammer at the owner during the chase, this did not prove "carjacking," 18 USC 2119, because Defendant already had control over the vehicle when he swung the hammer.

U.S. v. Nguyen, 95 Crim. L. Rep. 538 (8th Cir. 7/15/14):
Holding: Evidence was insufficient to convict Defendant of smuggling contraband cigarettes without tax stamps where there was no proof Defendant knew that the cigarettes she received had no tax stamps; the evidence merely showed that Defendant received packages from Vietnam and delivered them – unopened -- to her sister.

Union Pac. R.R. Co. v. DHS, 94 Crim. L. Rep. 390 (8th Cir. 12/12/13):
Holding: Tariff Act does not allow Gov't to fine Railroad for having drugs on trains that come into the U.S. from Mexico, where the Railroad does not own or control the trains while they are in Mexico.

U.S. v. Bruguier, 2013 WL 5911238 (8th Cir. 2013):
Holding: Defendant must have knowledge of victim's incapacity or inability to consent, rather than just knowingly engage in a sexual act with victim, in order to be convicted under the victim-incapacity element of sexual abuse statute; although the statute can be read otherwise, it was ambiguous enough that the rule of lenity requires such an interpretation.

U.S. v. Lunsford, 93 Crim. L. Rep. 639 (8th Cir. 8/5/13):
Holding: SORNA did not require a sex offender-Defendant who moved from his home in Missouri to the Philippines to notify state authorities of his change of residence;

nothing in SORNA requires a sex offender to notify authorities that he is moving out of U.S. to a foreign county, and no public policy reason requires this since there is no danger to U.S. children when Defendant leaves the country.

U.S. v. Rouillard, 701 F.3d 861 and U.S. v. Berguier, 2012 WL 6633897, 92 Crim. L. Rep. 333 (8th Cir. 12/13/12):
Holdings: In these two cases, different panels of the 8th Circuit reached opposite holdings about whether 18 USC 2242, which prohibits sex with incapacitated persons, requires proof that Defendant knew the victim was incapacitated.

U.S. v. Heid, 2011 WL 3503314 (8th Cir. 2011):
Holding: Even though Defendant may have known that some drug money was being used when she posted bail for her son, there was no basis to reasonably determine that Defendant conspired to further an illegal purpose in posting bail, so there was no factual basis for money laundering conspiracy.

U.S. v. Goldtooth, 2014 WL 2611276 (9th Cir. 2014):
Holding: Attempted robbery, 18 USC 2111, requires proof of specific intent.

U.S. v. Tanke, 94 Crim. L. Rep. 702 (9th Cir. 3/3/14):
Holding: Letters designed to avoid detection of a fraudulent scheme (post-fraud cover-up) will support a conviction for mail fraud only where there is evidence that Defendant came up with the idea of sending the letters before the fraud was completed; without this rule, no mail fraud scheme would ever end so long as Defendant took some action to avoid detection, prosecution or conviction as such action would be seen as carrying out the initial fraudulent scheme.

U.S. v. Wei Lin, 2013 WL 6768104 (9th Cir. 2013):
Holding: Statutes criminalizing fraud and misuse of visas, permits and other immigration documents did not criminalize the mere possession of an unlawfully obtained driver's license.

U.S. v. Dejarnette, 2013 WL 6698063 (9th Cir. 2013):
Holding: SORNA did not require sex offender who was convicted before SORNA's enactment to register in the jurisdiction of his sex offense conviction when the offender resided in a different jurisdiction.

Valle del Sol Inc. v. Whitting, 94 Crim. L. Rep. 86 (9th Cir. 10/8/13):
Holding: Ariz. statute that makes it unlawful for a "person who is in violation of a criminal offense" to harbor or transport an alien is void for vagueness because this phrase is unintelligible, and the statute is also preempted by federal law.

U.S. v. Liu, 2013 WL 5433753 (9th Cir. 2013):
Holding: The "willfully" element of federal copyright infringement requires the Gov't prove that Defendant knew he was acting illegally, not just that he knew he was making copies.

U.S. v. Mancuso, 93 Crim. L. Rep. 188 (9th Cir. 5/1/13):
Holding: 21 USC 856(a)(1), which makes it a crime to maintain any place "for the purpose of manufacturing, distributing or using" drugs, requires proof that drug activity was "a principal or primary purpose," even when the premises are not residential in a nature.

U.S. v. White Eagle, 2013 WL 3357920 (9th Cir. 2013):
Holding: Bureau of Indian Affairs employee could not be convicted of conversion of tribal funds she borrowed from a tribal credit program, because she never had control or custody of the funds, and (2) employee's supervisor's shepherding of employee's loan application through the approval process was not embezzlement.

U.S. v. Ermoian, 93 Crim. L. Rep. 687 (9th Cir. 8/14/13):
Holding: Even though Defendant told the Hell's Angel's motorcycle club that the FBI was investigating them, this did not violate 18 USC 1512(c), which makes it illegal to obstruct, influence or impair an "official proceeding," because a mere investigation is not an "official proceeding," as that term connotes some type of formal hearing and suggests that a person will appear at a formal hearing.

U.S. v. Burke, 2012 WL 4015774 (9th Cir. 2012):
Holding: Even though Defendant left a supervised release center where he'd been ordered to live as part of supervised release, he was not "in custody" there so could not be convicted of escape from custody where he was not serving a prison sentence, was free to leave during the day with permission, and free to hold employment.

U.S. v. Acosta-Sierra, 2012 WL 3326623 (9th Cir. 2012):
Holding: Even though Defendant threw a rock at Officer, where Officer did not see it and did not know what happened until the threat of bodily harm had passed, the Officer did not have an objectively reasonable apprehension of imminent bodily harm necessary to convict under a reasonable apprehension of imminent harm theory.

U.S. v. Apel, 2012 WL 1423914 (9th Cir. 2012):
Holding: The federal government's lack of the exclusive right or possession as to the stretch of highway that ran through and Air Force base upon which the alleged trespass occurred precluded the conviction for trespassing of a defendant who was barred from entering the base.

U.S. v. Nosal, 91 Crim. L. Rep. 89 (9th Cir. 4/10/12):
Holding: Statute, 18 USC 1030, that makes it a crime to "exceed authorized access" to a computer is limited to restrictions on "access" and not "use" of the computer; thus, even though Defendant may have violated his employer's computer use policy, that is not a crime under the statute.

U.S. v. Lequire, 90 Crim. L. Rep. 816 (9th Cir. 3/5/12):
Holding: An insurance agency treasurer could not be guilty of embezzling insurance company funds he misused because under state law the relationship between the agency and insurance companies was one of creditor and debtor and thus the funds were not held in trust.

U.S. v. Kimsey, 90 Crim. L. Rep. 647 (9th Cir. 2/8/12):
Holding: A defendant's failure to comply with local court rules regulating admission to practice law is not the type of willful disobedience of a court "rule" that will support a federal criminal contempt conviction.

U.S. v. Kimsey, 2012 WL 386338 (9th Cir. 2012):
Holding: Violations of local court rules cannot serve as predicates for criminal convictions under the federal criminal contempt statute.

U.S. v. Havelock, 2012 WL 29347 (9th Cir. 2012):
Holding: Mailings addressed to newspapers and Web sites could not support a conviction for mailing threatening communications, as addressee was required to be a natural person.

U.S. v. Kuok, 90 Crim. L. Rep. 545 (9th Cir. 1/17/12):
Holding: Even though the Arms Export Control Act, 22 USC 2778 criminalizes an attempt to export banned items, it does not criminalize someone from attempting to cause a third person to violate the law.

U.S. v. Parker, 2011 WL 365913 (9th Cir. 2011):
Holding: Evidence insufficient to convict of trespass on military base where Defendant was on a road passing through the base that was a public easement.

U.S. v. Heineman, 96 Crim. L. Rep. 34 (10th Cir. 9/15/14):
Holding: Violation of federal threat statute, 18 USC 875(c), requires proof that Defendant subjectively intended to instill fear in recipient of the threat.

U.S. v. Powell, 96 Crim. L. Rep. 36 (10th Cir. 9/22/14):
Holding: A forged check cannot be "of" the depository bank for purposes of the federal statute making it a crime to utter forged securities "of an organization," 18 USC 513(a).

U.S. v. Rufai, 2013 WL 5615053 (10th Cir. 2013):
Holding: Even though Defendant acted as a front for a third party to submit fraudulent Medicare bills by listing only himself as an incorporator or director of a medical supply business and opening bank accounts only in his name, the evidence was insufficient to convict of Medicare fraud because there was no evidence that Defendant knew of the fraud by the third party.

U.S. v. Grzybowicz, 95 Crim. L. Rep. 51 (11th Cir. 4/4/14):
Holding: Even though Defendant took photos with a mobile phone, emailed them to himself, and then downloaded them to his desktop computer that he used to visit a child pornography file-sharing site, this did not constitute "distribution" of the photos under 18 USC 2252A(a)(2); "distributing" means posting images to a website or downloading them to a computer connected to a file-sharing network; there was no evidence Defendant put the photos where they could be shared without further action on his part.

U.S. v. Mathauda, 94 Crim. L. Rep. 496 (11th Cir. 1/21/14):
Holding: Where Defendant was represented by counsel in an administrative proceeding which resulted in a cease and desist order against Defendant, but Defendant was never actually informed of the order, Defendant was not "willfully blind" of the order, and Gov't had the burden to prove that Defendant purposely contrived to avoid learning the facts or was aware of a high probability of a fact and consciously avoided confirming that fact.

U.S. v. Fries, 2013 WL 3991917 (11th Cir. 2013):
Holding: Even though Defendant subjectively believed he was transferring a firearm to an unlicensed person, evidence was insufficient to convict of transferring a firearm to an unlicensed person, where Gov't failed to present any evidence of transferee's licensure status; Defendant's subjective belief was not relevant to the objective facts.

U.S. v. Izurieta, 92 Crim. L. Rep. 620, 2013 WL 718325 (11th Cir. 2/22/13):
Holding: 18 USC 545 which prohibits importing merchandise "contrary to law" does not apply to those who violate a regulation requiring the holding of imported food for FDA inspection.

U.S v. v. Jimenez, 92 Crim. L. Rep. 489 (11th Cir. 1/25/13):
Holding: County official who was not the person who made procurement decisions could not be convicted of "intentionally misapplying" the funds under 18 USC 666.

U.S. v. Haile, 2012 WL 2467043 (11th Cir. 2012):
Holding: Evidence was insufficient to show that Defendant had knowledge of obliterated serial number on gun in prosecution for possessing a firearm with obliterated number where there was no evidence of how long Defendant had actually possessed the gun so he would reasonably know that the serial number was obliterated, and the gun was found in the flatbed of his pickup.

U.S. v. Fulford, 90 Crim. L. Rep. 262 (11th Cir. 11/14/11):
Holding: In order to enhance sentence for sending child pornography to a minor, the Gov't must prove the person to whom pornography was sent was an actual minor if the person was not a law enforcement officer; here, the person was an adult male posing as a minor, but was not a law enforcement officer, so the enhancement did not apply.

Hamdan v. U.S., 92 Crim. L. Rep. 109 (D.C. Cir. 10/16/12):
Holding: Support for terrorism did not violate "law of war" at the time Osama bin Laden's driver drove him so as to support conviction for such offense.

U.S. v. Paul, 95 Crim. L. Rep. 321 (C.A.A.F. 5/29/14):
Holding: Appellate court cannot take judicial notice that "ecstacy" is a Schedule I controlled substance to uphold sufficiency of evidence, where Prosecution failed to present this element of the crime at trial; "[W]hen judicial notice of an element is taken outside the context of the trial itself, the defendant is denied his due process right to confront or challenge an essential fact establishing an element, whether or not the fact is indisputable."

U.S. v. Bennitt, 93 Crim. L. Rep. 366 (C.A.A.F. 6/3/13):
Holding: Even though Defendant aided or abetted another person's wrongful drug use, this is legally insufficient to convict of involuntary manslaughter under military law.

U.S. v. Caldwell, 93 Crim. L. Rep. 214 (C.A.A.F. 4/29/13):
Holding: Marine-Defendant's genuine suicide attempt did not satisfy elements of the military offense of wrongful self-injury without intent to avoid military service.

U.S. v. Spicer, 92 Crim. L. Rep. 577 (C.A.A.F. 2/6/13):
Holding: Military law criminalizing making "false official statements" applies only to statements affecting military functions; thus, Defendant's false report that his child had been kidnapped did not fall within law.

U.S. v. Winckelmann, 70 M.J. 403 (C.A.A.F. 12/12/11):
Holding: Even though internet chat with alleged minor was briefly sexual, asking question "u free tonight" was not a substantial step toward enticement of a minor to support attempted enticement conviction.

Teneyck v. U.S., 2015 WL 1482550 (D.C. 2015):
Holding: Even though assault Victim when to hospital to have glass removed from their hand, where the wound did not require stiches and caused no long-term damage, this did not constituted significant physical injury to necessary for felony assault.

Winston v. U.S., 96 Crim. L. Rep. 492 (D.C. 1/22/15):
Holding: To convict of unlawfully entering public housing after being barred, State must prove an objectively reasonable basis for the original barring order.

Gayden v. U.S.., 96 Crim. L. Rep. 558 (D.C. 2/15/15):
Holding: Even though handcuffed-Defendant called out to an angry crowd to "get [police] off him," where crowd just yelled at police, this did not constitute an assault on an officer under statute prohibiting "obstructing," "intimidating" or "resisting" arrest.

Ruffin v. U.S., 2013 WL 4746792 (D.C. 2013):
Holding: The term "person" used in local statute setting out felony of threatening to kidnap or injure or damage his property, means an actual person; thus, Defendant could not be convicted under statute for threatening to damage a gov't police car.

Tarpeh v. U.S., 2013 WL 1338950 (D.C. 2013):
Holding: Even though Defendant-caretaker pushed patient's wheelchair across street to the nearest hospital while knowing that patient's paralyzed foot was dragging on the ground, this did not show reckless indifference to the patient's needs to prove criminal neglect of an adult where Defendant had just become aware of patient's screams and she was struggling to keep patient in the wheelchair.

Harrison v. U.S., 2012 WL 6618197 (D.C. 2012):
Holding: Even though Defendant talked to his father on phone from jail and discussed possibility of Witness not returning to testify, evidence was insufficient to convict Defendant of obstruction of justice when father told Witness to stay away from trial.

U.S. v. Ali, 2012 WL 3024763 (D.D.C. 2012):
Holding: Even though Somali-Defendant hijacked a Bahamian-flagged ship near the coast of Somalia, where the Gov't failed to show that there was any intended effect on the U.S., due process did not permit Defendant to be prosecuted in the U.S. for hijacking and hostage taking in the absence of proof that the offenses occurred while the ship was on the high seas.

U.S. v. Nitschke, 2011 WL 7272456 (D.D.C 2011):
Holding: Defendant could not be convicted of attempted coercion and enticement of a minor to engage in sexual activity because the defendant allegedly told another adult in an online chat that he would like to join him in sex that the adult claimed to have already prearranged with a minor.

U.S. v. Hudson, 2014 WL 960860 (C.D. Cal. 2014):
Holding: Dismissal of indictment due to entrapment was warranted in reverse sting operation where ATF engaged in outrageous Gov't conduct in inventing a drug house and the idea of robbing it, and goading Defendant into acquiring guns.

U.S. v. Martinez-Baez, 2013 WL 842647 (D. Mass. 2013):
Holding: Defendant's statement that he was born in Puerto Rico in response to police questioning was not, by itself, a violation of the statute which makes it a crime to make a false claim of U.S. citizenship.

U.S. v. Cassidy, 90 Crim. L. Rep. 388 (D. Md. 12/15/11):
Holding: 18 USC 2261A(2)(A) which criminalizes using a computer to harass or cause someone emotional distress violated First Amendment as applied to a Defendant who made blog posts which attacked a prominent religious leader who was a well-known public figure.

U.S. v. Binette, 2013 WL 2138908 (D. Mass. 2013):
Holding: In order to prove the offense of making a false statement to a gov't agent, the Gov't must prove that Defendant knew he was talking to a gov't agent, and Defendant was entitled to a jury instruction on this; here, Defendant testified that even though callers to his office said they were from the SEC, Defendant was unsure whether they were from the SEC and so did not tell them truthful information.

U.S. v. Famolare, 2011 WL 5170427 (D. Mass. 2011):
Holding: Trial court granted motion for acquittal for insufficient evidence where defendant was charged with mail fraud by submitting a fraudulent application for disability benefits.

U.S. v. Binder, 2014 WL 2767393 (E.D. Mich. 2014):
Holding: Evidence was insufficient to prove that Defendant-Doctor unlawfully dispensed controlled substances, where no expert testified as to whether Doctor's prescribing practices exceeded reasonable medical bounds; there was no evidence Doctor wrote an excessive number of prescriptions; and the experts who did testify could not say that Doctor's prescriptions had no legitimate purpose.

Sebrite Agency v. Platt, 2012 WL 3238281 (D. Minn. 2012):
Holding: Even though Defendant-employee accessed his employer's computer as part of scheme to steal from employer, where employee had access to the computer and information therein as part of his job, this access was not "without authorization" or "in excess of authorization" under the Computer Fraud and Abuse Act.

U.S. v. Dressel, 2014 WL 1404644 (D.N.J. 2014):
Holding: Evidence was insufficient to convict of embezzlement from a union for alleging having a non-working employee on payroll, where employee was an in-house caterer who catered various events and there was no evidence she was overpaid or that her hiring was unauthorized.

U.S. v. Manzo, 2012 WL 529578 (D.N.J. 2012):
Holding: Even if the defendant's alleged conduct of soliciting, accepting, or agreeing to accept bribes while he was an unsuccessful candidate for mayor came within the traditional definition of bribery, it was not prohibited under the New Jersey statute, so it was not "unlawful activity" under New Jersey law.

U.S. v. Bryant, 2012 WL 3286057 (D.N.J. 2012):
Holding: Even though Defendant-senator's law firm entered into a retainer agreement but never performed any work, this was insufficient to prove that the retainer agreement was intended to be a sham bribe.

U.S. v. Hakimi, 2011 WL 6826390 (N.D. N.Y. 2011):
Holding: The evidence that the defendant knew of and knowingly participated in the conspiracy to smuggle persons into U.S. was not sufficient to support his conviction for

conspiracy to possess with the intent to distribute a controlled substance even though others involved in the person-smuggling scheme also conspired to smuggle drugs.

U.S. v. Valle, 2014 WL 2980256 (S.D. N.Y. 2014):
Holding: Even though Defendant participated in fantasy sexual fetish website where people chatted about fantasies of kidnapping, rape and murder, evidence was insufficient to support conviction for conspiracy to commit kidnapping; the chats took place in context of fantasy role play, the agreed upon "dates" for kidnappings never happened, and no concrete steps were ever taken to kidnap anyone.

U.S. v. Facen, 2013 WL 3421972 (W.D. N.Y. 2013):
Holding: Where Defendant was merely an impromptu overnight guest at a house, evidence was insufficient to convict of drug possession for drugs found in house where the drugs weren't in plain view, and were found in cabinets or pants that didn't belong to Defendant.

U.S. v. Cicalese, 2012 WL 1957360 (E.D. N.Y. 2012):
Holding: Defendant's answer to ambiguous question cannot form basis for a perjury conviction.

U.S. v. Dimora, 2012 WL 29311331 (N.D. Ohio 2012):
Holding: Evidence was insufficient to convict of Hobbs Act conspiracy to extort where Gov't failed to show that the targeted business was a separate entity from Defendant's co-conspirator; since the co-conspirator testified that he was the sole owner of the business, there was nothing to show that the object of the conspiracy was to obtain anything from someone outside the conspiracy.

U.S. v. Jungers, 2011 WL 6046495 (D.S.D. 2011):
Holding: Attempting to purchase sex made available by traffickers did not constitute attempted commercial sex trafficking when he solicited a minor for sex, since Defendant did not attempt to engage in commercial sex trafficking but only attempted to purchase sex for himself from the traffickers.

U.S. v. Farah, 2013 WL 3010700 (M.D. Tenn. 2013):
Holding: Even though Defendant refused to answer questions at a court-ordered deposition, this did not support conviction for obstruction of justice, since there was no showing that the refusal delayed or harmed the prosecution or court.

U.S. v. Ecklin, 2011 WL 6749835 (E.D. Va. 2011):
Holding: The government was required to show that the defendant knew his codefendant was a convicted felon to support a conviction for aiding and abetting a felon possession of a firearm.

U.S. v. Wainright, 2011 WL 2276992 and 2517013 (E.D. Va. 2011):
Holding: Defendant's conviction for killing witness to prevent them from reporting to law enforcement must be vacated in light of intervening law that witness' proposed communication must be to federal law officials.

U.S. v. Lien, 2013 WL 5530537 (E.D. Wash. 2013):
Holding: Even though Defendant presented a check for $68,000 to a car dealership to buy a truck and Defendant knew he didn't have enough money in his checking account to cover this, that did not sufficient allege bank fraud in the indictment since there was no allegation that the account was fraudulent or that the check was altered, forged or not genuine.

Carrell v. U.S., 94 Crim. L. Rep. 308, 2013 WL 6227738 (D.C. 11/21/13):
Holding: Threat statute requires State to prove that Defendant used words "of such a nature as to convey fear of serious bodily harm or injury to the ordinary hearer," not merely that Defendant intended to utter the words as a threat.

Ex parte Pate, 2013 WL 3336985 (Ala. 2013):
Holding: Even though Defendant got a gun during an altercation with his tenant's employees during an eviction, this was, without more, insufficient to establish the physical action element of menacing.

Paschal v. State, 91 Crim. L. Rep. 65 (Ark. 3/29/12):
Holding: Statute that makes it a crime for teachers to have sex with students under age 21 violates constitutional right to privacy as applied to teacher who has sex with 18 year old student.

State ex rel. Montgomery v. Harris, 2014 WL 8513998 (Ariz. 2014):
Holding: Statute making it illegal to drive with an illegal drug "or its metabolite" in person's body applied only to metabolites capable of causing impairment, and did not apply to Defendant who drove with non-impairing cannabis metabolite; interpreting statute to apply to non-impairing metabolites would lead to absurd results since it would create criminal liability for metabolites that say in body for long time.

State ex rel. Montgomery v. Harris, 95 Crim. L. Rep. 195 (Ariz. 4/22/14):
Holding: Having a non-impairing metabolite of marijuana in one's blood does not constitute prohibited DWI.

Newman v. State, 2011 WL 913029 (Ark. 2011):
Holding: Even though Defendant-Sex-Offender had a job installing doors and baseboards at a child care facility, this did not violate law that prohibited sex offenders from working with children since this did not involve working directly with children.

People v. Chiu, 95 Crim. L. Rep. 392 (Cal. 6/2/14):
Holding: Even though it may have been reasonably foreseeable that victim would die in planned assault, Defendant could not be convicted of premeditated first-degree murder as

an accessory unless Defendant encouraged the murder with knowledge of the killer's specific unlawful purpose.

People v. Chandler, 95 Crim. L. Rep. 672 (Cal. 8/28/14):
Holding: Threat statute requires proof that the Defendant's statements would have caused a reasonable person to be in sustained fear.

People v. Williams, 93 Crim. L. Rep. 728, 305 P.3d 1241 (Cal. 8/26/13):
Holding: Evidence was insufficient to convict of robbery where Defendant used a fraudulent credit device to buy items at Wal-Mart and then tussled with a guard who tried to stop him from leaving store; any crime was complete before the confrontation with the security guard occurred; there was no physical taking of property by force required for robbery since the store voluntarily sold the items and the crime was complete by the time the store discovered the scam.

People v. Davis, 93 Crim. L. Rep. 619 (Cal. 7/25/13):
Holding: A jury cannot infer that MDMA a.k.a. "ecstacy" is a controlled substance based on the name alone; State must present evidence to prove this.

Magness v. Superior Court, 2012 WL 2138260 (Cal. 2012):
Holding: Defendant's use of a stolen remote control to "open" a garage door is not an "entry" for purposes of burglary; for an "entry" to occur, something that is outside the building must go inside the building; however, this use of the remote can be attempted burglary.

People v. Bailey, 2012 WL 2849317 (Cal. 2012):
Holding: Where the evidence to support "escape" is insufficient, appellate court cannot convict of "attempted escape" because "attempted escape" requires a specific criminal intent to escape, but "escape" requires only general criminal intent; thus, "attempted escape" is not a lesser-included offense of "escape."

People v. Rodriguez, 2012 WL 6699638 (Cal. 2012):
Holding: Where Defendant committed a robbery alone, this did not constitute active participation in a street gang.

Stark v. Superior Court, 2011 WL 3303462 (Cal. 2011):
Holding: Public embezzlement statute has mental element as to presence of legal obligation to do something.

Montez v. People, 2012 WL 439692 (Colo. 2012):
Holding: A firearm is not a deadly weapon per se because the term "intended to be used" refers to the defendant's, not the manufacturer's, intent.

State v. Nowacki, 2015 WL 873480 (Conn. 2015):
Holding: State harassment statute which penalized communicating with a victim by email was unconstitutional as applied to Defendant since Defendant's conviction was

dependent on the content of his email, not on the means of transmission; the content was protected under the First Amendment because all Defendant did was send an email to his employee (nanny of children) that threatened legal action for violation of employee's contract, which was permissible, even though nanny found the email upsetting.

State v. Edwards, 2014 WL 928796 (Conn. 2014):
Holding: Even though Defendant was evicted from a residence but was still at that location living outside in a truck, this would not be a change of address for sex offender registration purposes; in order to show that Defendant violated probation by not notifying State of change of address, State had to prove that Defendant was living somewhere else.

State v. Gonzalez, 2014 WL 1388878 (Conn. 2014):
Holding: Even though Defendant and Victim struggled and a gun fell to the floor, evidence was insufficient to convict of accessory to manslaughter where Principal took gun and shot Victim; there was no evidence Defendant directed or requested Principal shoot Victim.

State v. King, 2014 WL 1282567 (Conn. 2014):
Holding: Guilty verdicts on two counts of assault based on jury's finding that Defendant acted intentionally and recklessly were legally inconsistent in violation of due process.

State v. LaFleur, 2012 WL 4478423 (Conn. 2012):
Holding: Defendant's fist was not a "dangerous instrument" under assault statute since Legislature intended a "dangerous instrument" to be a tool, implement or device separate from Defendant's body.

Milton v. State, 96 Crim. L. Rep. 235 (Fla. 11/20/14):
Holding: The single act of firing a gun cannot satisfy the "intentional act" element needed to prove attempted felony-murder when the underlying felony is attempted murder and the same individuals are the victims of both crimes; the felony-murder statute requires the State prove that the Defendant committed an "intentional act that is not an essential element of the underlying felony."

Greenwade v. State, 94 Crim. L. Rep. 156, 2013 WL 5641794 (Fla. 10/17/13):
Holding: State didn't meet its burden of proof in drug trafficking case where it failed to lab test each individual baggie of white powder before dumping all of them into one container for weighing and testing.

Levitan v. State, 2012 WL 5477105 (Fla. 2012):
Holding: Even though Defendant stopped payment on a check, this was insufficient to prove that he stole "property" from the firm to which the check was issued.

Delgado v. State, 2011 WL 2060061 (Fla. 2011):
Holding: Evidence was insufficient to demonstrate that defendant knew there was a child in the backseat of the vehicle defendant stole, requiring reversal of defendant's kidnapping conviction.

Levin v. Morales, 2014 WL 4958171 (Ga. 2014):
Holding: Even though Defendant held victim hostage in her apartment for 12 hours and moved her around the apartment to some extent, this did not prove the asportation element necessary for kidnapping, since the movement did not allow Defendant to exercise more control over victim, did not place her in more danger, and did not isolate her from rescue.

Warren v. State, 2014 WL 696339 (Ga. 2014):
Holding: Even though Defendant sent nude photo of self to victim's cell phone, this did not violate statute prohibiting unsolicited distribution of nude materials because the statute contemplated use of standard mail, involving tangible material in a tangible envelope or container.

State v. Woodhall, 93 Crim. L. Rep. 361, 2013 WL 2383586 (Haw. 5/31/13):
Holding: There was in irreconcilable conflict between one section of medical marijuana law that allowed person to transport marijuana and another section that prohibited transporting of marijuana in places open to the public, which must be resolved in favor of Defendant, who had small amount of marijuana at airport.

State v. Gonzalez, 2012 WL 5970946 (Haw. 2012):
Holding: Offense of driving at an excessive speed is not a strict liability offense; State must prove Defendant acted knowingly or recklessly.

People v. Brown, 2013 WL 6698313 (Ill. 2013):
Holding: Defendant's endorsement of a counterfeit check did not constitute "making" the check for purposes of forgery by making; "forgery by making" was complete when the check was made.

People v. Lloyd, 2013 WL 168394 (Ill. 2013):
Holding: Even though Defendant knew victim was a minor, state sexual assault statute required that State prove that victim didn't consent to the sex act.

People v. Baskerville, 2012 WL 525462 (Ill. 2012):
Holding: A false statement by the defendant to a deputy that the defendant's wife was not home did not support a conviction for obstructing a police officer because the defendant invited the officer inside to look for her.

Gaddie v. State, 2014 WL 2922379 (Ind. 2014):
Holding: Evidence was insufficient to convict of resisting arrest by fleeing where Officer was called to a peace disturbance at a residence and tried to stop Defendant merely because he was walking alongside the house; the stop was unlawful; Supreme Court abrogates line of cases that had held the lawfulness of the stop was irrelevant in resisting arrest by fleeing cases.

State v. Love, 2014 WL 292059 (Iowa 2015):
Holding: Offense of assault with intent to inflict serious injury merged with offense of willful injury causing bodily injury.

State v. Hoyman, 97 Crim. L. Rep. 158 (Iowa 5/1/15):
Holding: Statute making it illegal to make a "false" public or business record requires proof of Defendant's intent to deceive; here, even though Defendant submitted false billing records to city, he claimed the records may have been incorrect but he did not bill more than hours he actually worked.

State v. Nicoletto, 2014 WL 1400077 (Iowa 2014):
Holding: Even though Defendant had a coaching authorization to coach at a school, he did not fall within the statute that prohibited "sexual exploitation by a school employee" where he worked as a pipefitter at a factory and did not have a teacher's license.

State v. Robinson, 96 Crim. L. Rep. 528 (Iowa 2/6/15):
Holding: Even though Defendant took away Victim's phone, dragged her to bedroom and locked door, this did not support conviction for kidnapping in addition to rape; Iowa does not recognize kidnapping that is merely "incidental" to another offense.

State v. Brubaker, 2011 WL 4407423 (Iowa 2011):
Holding: Testimony that pills were "consistent in appearance" with controlled substance was insufficient to identify pills.

State v. LeClair, 92 Crim. L. Rep. 185 (Kan. 10/26/12):
Holding: Where (1) sex offender Defendant properly informed authorities that he was moving from Kansas to Las Vegas, but (2) it took him three weeks of travel to get to Las Vegas via hitchhiking and finding a place to live there, and (3) he informed authorities once he found a residence, the evidence was not sufficient to convict for failing to register for his time spent traveling; "It is difficult to imagine how … an offender should inform law enforcement of his new residential address as a 'park bench in Albuquerque.' And it is equally difficult to imagine how that park bench for one night establishes a 'change in the address of the person's residence.'"

State v. O'Rear, 90 Crim. L. Rep. 721 (Kan. 2/17/12):
Holding: The defendant, a security guard at a bank who shot an innocent customer carrying a cane that the defendant thought was a gun, could not be convicted of "reckless aggravated battery" because the mental state of recklessness is incompatible with a mental state where a person acts with purposefulness.

State v. Brooks, 2011 WL 4634246 (Kan. 2011):
Holding: Compelling ex-wife to have sex through a threat of publicizing her affair with married coworker did not constitute rape.

Wilson v. Com., 2014 WL 4115908 (Ky. 2014):
Holding: Even though Defendant took possession of a locked box containing a gun during a burglary by him, this did not establish that Defendant was armed with a deadly weapon for purposes of first degree burglary, because the gun would only have been accessible if pried open or unlocked.

Com. v. Hamilton, 2013 WL 5763180 (Ky. 2013):
Holding: Trial court had jurisdiction to hear Defendant's claim the Health Department had violated laws of Kentucky in how it changed certain drug from Schedule V to Schedule III controlled substance.

Lewis v. Com., 2013 WL 1181950 (Ky. 2013):
Holding: Where (1) Defendant sought to obtain drugs for which he did not have a prescription and (2) pharmacy employees took steps to engage Defendant to try to keep him at the pharmacy until police arrived, Defendant was not unlawfully on the premises (since the employees were giving him license to stay) and, thus, could not be convicted of burglary.

State v. Sarrabea, 94 Crim. L. Rep. 117, 2013 WL 5788888 (La. 10/15/13):
Holding: La. law making it a felony for an alien to drive without documentation demonstrating lawful presence in the U.S. is preempted by federal law in the area of alien registration.

State v. Small, 2012 WL 4881413 (La. 2012):
Holding: Offense of cruelty to a juvenile based on neglect cannot form the underlying offense for felony-murder of a child who died in a house fire, because this would allow felony-murder any time a parent failed to supervise a child who died as a result of some intervening event, and be contrary to rule of lenity.

State v. Strong, 92 Crim. L. Rep. 625, 2013 WL 588230 (Me. 2/15/13):
Holding: Court dismisses charges against Defendant for invasion of privacy where he secretly videotaped customers having sex with prostitutes at place of prostitution; although state statute makes it illegal to secretly tape persons, this law did not apply to Defendant's conduct because prostitution customers have no expectation of privacy that society would recognize as reasonable since prostitution is illegal.

State v. Weems, 2012 WL 5846408 (Md. 2012):
Holding: In order to convict for "obtaining control of property by mistake," State had to show that Defendant knew that a check she cashed had been given to her by mistake.

Titus v. State, 2011 WL 5924292 (Md. 2011):
Holding: Evidence that defendant gave police officer a false name during a traffic stop was insufficient to show actual obstruction or hindrance of the officer's investigation, as required for conviction for obstructing and hindering.

Spencer v. State, 90 Crim. L. Rep. 166 (Md. 10/25/11):
Holding: Where Defendant merely told a cashier to "don't say nothing" and cashier handed him the cash drawer, evidence was insufficient to prove robbery because there was no threat of force; this was stealing but not theft due to lack of force.

Com. v. Sepheus, 2014 WL 1978637 (Mass. 2014):
Holding: Even though three rocks totaling 0.4 grams was individually packaged in torn off corners of plastic bags, evidence was insufficient to prove intent to distribute drugs where Officer said on cross-examination that such a small amount of crack was not inconsistent with personal use.

Com. v. Morse, 2014 WL 2609767 (Mass. 2014):
Holding: Even though Officer asked boat driver whether he had "consumed any substances that might have impaired his ability to know what was going on around him" and Defendant answered "no," this did not support conviction for misleading a police officer (where Defendant had used marijuana), because the Officer's question was vague and Defendant may not have personally, subjectively believed that marijuana affected him this way.

Com. v. Rex, 2014 WL 3116482 (Mass. 2014):
Holding: Even though Defendant had Xerox copies of nude children taken from geographic magazines, a sociology textbook, and a naturist catalogue, evidence was insufficient to convict of possession of child pornography because the material was not lascivious; the visibility of children's genitals was merely an inherent fact of them being naked, and there was nothing sexual about the photos; they were simply standing around engaged in ordinary activities.

Com. v. Ilya, 96 Crim. L. Rep. 555 (Mass. 2/13/15):
Holding: Even though Defendant was carrying 13 individually wrapped bags of marijuana and approached people on the street in furtive manner, evidence was insufficient to support intent to distribute; a person who intends only to smoke marijuana would fit this profile, too.

Com. v. Buswell, 95 Crim. L. Rep. 246 (Mass. 5/13/14):
Holding: Even though Defendant traveled to a place where he expected to meet a 13 year old girl (but was a police sting), this was insufficient to prove attempted rape and battery because although the evidence showed he intended to have sex, it was not certain that he would actually go through with it where the sex was to take place elsewhere, he seemed unlikely to use force, and he had repeatedly expressed qualms about the girl's age.

Com. v. Robertson, 94 Crim. L. Rep. 711, 2014 WL 815332 (Mass. 3/5/14):
Holding: State law that prohibited secretly photographing someone who is "nude or partially nude" where they have an expectation of privacy did not prohibit taking "upskirt" photos of female passengers on a train, because women in skirts were not "nude

or partially nude, no matter what is or is not underneath the skirt by way of underwear or other clothing."

Com. v. Humberto H., 94 Crim. L. Rep. 338 (Mass. 11/26/13):
Holding: Even though Defendant had five baggies of marijuana, that did not establish probable cause to charge intent to distribute, because there was no information about the weight or value of the marijuana.

Com. v. Romero, 92 Crim. L. Rep. 790 (Mass. 3/15/13):
Holding: Driver did not constructively possess gun that he knew his passenger was carrying absent any evidence he tried to exercise control over the gun; ruling otherwise would impose a rule of strict liability on drivers who simply tolerate the presence of a weapons or contraband in a vehicle.

Com. v. Pugh, 2012 WL 2146788 (Mass. 2012):
Holding: Even though baby died in childbirth, Mother's decision to proceed with unassisted home birth did not by itself permit a finding of reckless conduct necessary to establish involuntary manslaughter since pregnant women retain right to forgo medical treatment in life-threatening situations and requiring pregnant women to summon medical treatment during childbirth would effectively criminalize medically unassisted childbirth, such as use of a midwife.

People v. Smith-Anthony, 2013 WL 3924319 (Mich. 2013):
Holding: Even though Guard watched Defendant via camera steal an item from a store, this did not constitute "larceny from a person" because Guard was in another room watching; "larceny from a person" requires taking from the person or immediate, nearby presence of the victim to satisfy the from-the-person requirement.

People v. Janes, 2013 WL 3835839 (Mich. 2013):
Holding: Offense of owning a dangerous animal is not a strict liability offense; State must prove that owner knew animal was "dangerous" before the incident at issue.

People v. Koon, 93 Crim. L. Rep. 275, 2013 WL 2221602 (Mich. 5/21/13):
Holding: State statute that makes it a crime to drive with any amount of marijuana in bloodstream is superseded by the state's "medical marijuana" law for persons who are legally prescribed marijuana; however, medical marijuana law does not protect such persons from operating a vehicle "under the influence" of marijuana.

People v. Minch, 2012 WL 6861599 (Mich. 2012):
Holding: Felon-in-possession statute did not prevent police from delivering Defendant's lawfully seized gun to Defendant's mother, who would hold it as a bailee and not as an agent; if mother acted as bailee, Defendant has no control over firearm, but if she is an agent, Defendant would be in constructive possession of firearm and in violation of statute.

Barrow v. State, 97 Crim. L. Rep. 112 (Minn. 4/15/15):
Holding: Even though drug sale statute defined "sell" as to "deliver," "give away" or "dispose of to another," Defendant did not violate statute where he gave his wife a baggie of drugs to hide on her person while they drove home; the context of the statute requires relinquishing more than temporary control over the drugs and not a "limited purpose handoff."

State v. Nelson, 94 Crim. L. Rep. 615, 181 N.W.2d 433 (Minn. 2/12/14):
Holding: Nonsupport statute which criminalized failure to provide "care and support" for child required that Defendant fail to provide *both* (1) care and (2) financial support; here, evidence was insufficient to convict because although Defendant failed to provide monetary support, he had provided nonmonetary care to the children.

State v. Hayes, 2013 WL 692463 (Minn. 2013):
Holding: Even though drive-by shooting statute states that "anyone who violates this subdivision by….", the statute does not create a new offense of drive-by shooting, but is only a sentence enhancement statute; thus, evidence was insufficient to support Defendants' conviction for felony murder while committing a drive-by shooting.

Johnson v. State, 90 Crim. L. Rep. 300 (Miss. 11/17/11):
Holding: Where Officer testified that he thought Defendant's mother might have owned car but he could be mistaken, the evidence was insufficient to convict Defendant for drugs found in car.

State v. Gregori, 2014 WL 2958322 (Mont. 2014):
Holding: Defendant's niece was not a "family member" within meaning of domestic assault statute which defined "family member" as "mothers, fathers, children, brothers, sisters, and other past or present family members of a household."

State v. Burrell, 2013 WL 5940647 (Mont. 2013):
Holding: Evidence was insufficient to prove that substance Defendant gave witness was marijuana where only the lay witness testified it was marijuana, the witness was not an officer trained in identification of drugs, and there was no expert testimony what the substance was.

State v. Dugan, 92 Crim. L. Rep. 734, 2013 WL 607824 (Mont. 2013):
Holding: (1) Even though Defendant, in talking to Gov't employee on phone, got angry and called her a "f***ing [obscene name]", these were not fighting words that lacked First Amendment protection since there was little likelihood of an immediate breach of peace or imminent violence since the employee was on the phone; "words spoken over the telephone are not proscribable under the fighting words doctrine because the person listening on other end of the line is unable to react with imminent violence against the caller," and (2) harassment law provision which made use of profane language "prima facie" evidence of intimidation was overbroad under First Amendment.

State v. Hernandez, **2012 WL 678212 (Neb. 2012):**
Holding: Even though facts might have supported either conviction, the defendant was guilty of misdemeanor operating vehicle without ignition interlock device, rather than felony driving after revocation, because the former dealt specifically with ignition interlock permits and stated specifically that a person who operated a motor vehicle that was not equipped with an ignition interlock device in violation of a court order was guilty of a misdemeanor.

State v. White, 95 Crim. L. Rep. 540 (Nev. 7/10/14):
Holding: Estranged husband who had right to enter his own home cannot be convicted of burglary.

Clancy v. State, 313 P.3d 226 (Nev. 2013):
Holding: Offense of leaving scene of accident requires proof of knowledge on part of Driver that he was involved in an accident.

State v. Guay, 90 Crim. L. Rep. 19 (N.H. 9/20/11):
Holding: Where victim testified only that Defendant "touch[ed]" her vagina, this was insufficient to prove penetration.

State v. Rangel, 2013 WL 1788600 (N.J. 2013):
Holding: Even though statute stated that a person was guilty of aggravated sexual assault if they committed an act of sexual penetration with "another person" during the commission of crimes like robbery and kidnapping, the victim of the sexual assault is not the "another person" under the statute; rather, the statute is intended to punish violence against a third person as a means to exert control over the sexual assault victim.

State v. Olsson, 95 Crim. L. Rep. 141 (N.M. 4/21/14):
Holding: New Mexico's child pornography statute is ambiguous as to the unit of prosecution; thus, Defendant charged with storing "one or countless images" can only be charged with one count.

State v. Cabezuela, 2011 WL 5966498 (N.M. 2011):
Holding: Intentional child abuse resulting in death could not be premised on defendant's failure to act to prevent abuse.

People v. DeLee, 2014 WL 6607357 (N.Y. 2014):
Holding: Jury verdict finding Defendant guilty of manslaughter as a hate crime was inconsistent with jury verdict also acquitting him of manslaughter.

People v. Marquan M., 2014 WL 2931482 (N.Y. 2014):
Holding: Law prohibiting cyberbullying against "any minor or person" where communication had no legitimate purpose and was intended to harass or annoy was overbroad; law was intended to be aimed at bullying school children but was so broadly written as to include many types of protected communication; court vacates Defendant's conviction for posting sexual information about his classmates on social network site.

People v. Dubarry, 2015 WL 1524720 (N.Y. 2015):
Holding: Defendant cannot be convicted for both intentional murder based on theory of transferred intent and depraved indifference murder for the same victim, where Defendant kills one person while intending to kill another, because depraved indifference has a different mens rea than intentional murder.

People v. Ippolito, 93 Crim. L. Rep. 74 (N.Y. 4/2/13):
Holding: Even though accountant who had power of attorney for client did not sign client's checks with a power of attorney notation, accountant could not be convicted of forgery because a signature is not forged unless unauthorized, and accountant had authority to sign for client.

People v. Morales, 92 Crim. L. Rep. 338, 2012 WL 6115622 (N.Y. 12/11/12):
Holding: Statute enacted after Sept. 11, 2001, terrorist attacks which criminalized acts intended to "coerce a civilian population" does not cover gang activities; "[t]he concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act."

People v. Western Express International, 92 Crim. L. Rep. 107 (N.Y. 10/18/12):
Holding: Even though defendants used a common website to commit their financial crimes, this did not establish a "common purpose" or "ascertainable structure" required to prosecute under the state RICO statute.

People v. Plunkett, 2012 WL 2031113 (N.Y. 2012):
Holding: Saliva of HIV-positive Defendant is not a "dangerous instrument" necessary to support aggravated assault conviction upon Officer; the "dangerous instrument" cannot be a body part.

People v. Mack, 2012 WL 952111 (N.Y. 2012):
Holding: In prosecution for sexual contact, which allegedly occurred on a subway train, the fact that the victim could not move away due to the crowd of people on the train did not establish the element that the contact was compelled by use of physical force.

People v. Hightower, 2011 WL 6153097 (N.Y. 2011):
Holding: Defendant did not take property belonging to a transit authority, so as to support a petit larceny charge, when, in exchange for money, he swiped an unlimited ride fare card to allow another person to use the subway, as the authority never owned the funds defendant received for the transaction.

People v. Hall, 2011 WL 5827984 (N.Y. 2011):
Holding: Stun gun used during a robbery was not a "dangerous instrument" because the stun gun was not recovered, nor was a witness called to explain to the jury what a stun gun was capable of.

People v. Grant, 2011 WL 4973793 (N.Y. 2011):
Holding: Defendant's handwritten note to bank teller claiming defendant was armed did not support charge of first degree robbery.

People v. Grant, 90 Crim. L. Rep. 141 (N.Y. 10/20/11):
Holding: Even though Defendant-bank robber gave teller a note threatening to shoot teller, this was insufficient to prove that Defendant actually possessed a dangerous weapon for purposes of first-degree robbery conviction.

People v. Lewie, 89 Crim. L. Rep. 627 (N.Y. 6/9/11):
Holding: Even though Defendant-mother left her child with an abusive boyfriend while she was at work, this did not show the "depraved indifference" necessary to prove reckless endangerment, which requires a showing that Defendant "did not care at all" for child's life.

State v. Arot, 2013 WL 5718189 (N.D. 2013):
Holding: Even though immigrant-Defendant's birthday was listed as "1/1/1993" on official documents, where various witnesses testified that it was common for immigrants from Sudan to have their birthdate be arbitrarily assigned by the U.S. Gov't upon their entry to the U.S. as the first day of the year of their birth, and Defendant's father testified Defendant was born in Summer of 1993, State failed to prove that Defendant was 18 years old at time of offense, and thus, court did not have jurisdiction over Defendant.

State v. Borner, 93 Crim. L. Rep. 728 (N.D. 8/29/13):
Holding: The crime of "conspiracy" to commit extreme indifference murder does not exist, since indifference murder is an unintentional killing; "charging a defendant with conspiracy to commit unintentional murder creates an inconsistency in the elements of conspiracy and extreme indifference murder that is logically and legally impossible to rectify. An individual cannot intend to achieve a particular offense that by its definition is unintended."

State v. Stegall, 93 Crim. L. Rep. 75 (N.D. 4/4/13):
Holding: A pregnant woman who takes drugs that affect her child's post-birth development is not guilty of child endangerment; appellate court had previously ruled that a viable fetus is not a child for purposes of criminal prosecution of mother who takes drugs, so it would be absurd result to allow prosecution of mother after child is born.

State v. Stevens, 2014 WL 1924777 (Ohio 2014):
Holding: RICO prosecution for criminal enterprise requires that each individual Defendant meet the statutory monetary threshold of $500; where Defendant's drug sales amounted to less than $500, he could not be charged under RICO.

State v. Straley, 2014 WL 2210694 (Ohio 2014):
Holding: Even though Defendant attempted to throw out drugs after being stopped in a traffic stop, the evidence was insufficient to convict of tampering with evidence, because such conviction requires proof that there was an ongoing or likely investigation, that

Defendant knew of such investigation when he discarded the drugs, and that the availability or value of the evidence was impaired as a result.

State v. Nolan, 96 Crim. L. Rep. 183 (Ohio 11/5/14):
Holding: There is no crime of "attempted felony-murder" because the felony-murder rule imposes liability for an unintended death during a felony, but an attempt crime must be committed purposely or knowingly; it is impossible to purposely or knowingly cause an unintended death.

State v. Medina, 97 Crim. L. Rep. 172 (Or. 5/14/15):
Holding: Even though Defendant-arrestee gave a fake name for a police fingerprint card and property receipt, this did not constitute identity theft, because he did not put the false name into circulation or convert it to his own use.

State v. McBride, 2012 WL 2454088 (Or. 2012):
Holding: Even though Defendant allowed children to remain in house where illegal drug activity occurred, such evidence is insufficient to convict of child endangerment because the word "permit" in the statute is intended to connote some affirmative act by a defendant, not a passive act, and Defendant took no affirmative act that "permitted" the children to enter or remain in the house.

In re D.S., 90 Crim. L. Rep. 760 (Pa. 2/21/12):
Holding: A person cannot be convicted of giving a bogus identification to law enforcement authorities unless there is proof that officers first identified themselves and advised the suspect he was the subject of an official investigation.

Com. v. Hart, 90 Crim. L. Rep. 72 (Pa. 9/28/11):
Holding: Merely offering a child a ride without additional inducement is not an illegal "luring" of a child into a vehicle.

Com. v. Clegg, 89 Crim. L. Rep. 779, 2011 WL 3570056 (Pa. 8/16/11):
Holding: Even though state law prohibited possession of firearm by someone convicted of a crime "relating to burglary," this did not prohibit someone convicted of attempted burglary from having a gun.

State v. Hepburn, 94 Crim. L. Rep. 359 (S.C. 12/11/13):
Holding: Even though South Carolina follows the rule that a defendant waives her motion for directed verdict at close of the State's evidence if the defendant presents evidence, where Defendant and co-defendant were tried jointly and co-defendant testified in the defense part of the case that Defendant did the crime, and subsequently Defendant testified to rebut co-Defendant, the Defendant did not waive for appeal her motion for directed verdict at close of State's case; "where a defendant's evidence does not serve to fill gaps in the state's evidence, her testimony does not operate to waive consideration of the evidence as it stood at the close of the State's case" on appeal; if Defendant were deemed to have waived the right to test the sufficiency of evidence of the State's case by rebutting the testimony of co-defendant, the State will in effect have been able to use the

coercive power of the codefendant's testimony as part of its case-in-chief, even though the State was prohibited from calling the co-defendant to testify for the prosecution; under this test, the State's evidence was insufficient to convict, and the motion for directed verdict at close of State's evidence should have been granted.

State v. Kekolite, 2014 WL 3748299 (S.D. 2014):
Holding: Even though Defendant (while intoxicated) reached into vehicle through open window to get cigarettes and accidently popped gear shift into neutral, which caused the vehicle to roll away and hit another car, this was not actual physical control of the vehicle to support a DWI conviction; Defendant's actions did not amount to such control as would enable him to actually operate the vehicle in a usual and ordinary manner.

State v. Jones, 2011 SD 60, 2011 WL 4395823 (S.D. 2011):
Holding: Rape by intoxication requires proof that defendant knew or should have known that victim's intoxicated state made consent impossible.

State v. Robinson, 93 Crim. L. Rep. 190 (Tenn. 4/19/13):
Holding: Even though Defendant was arrested in co-defendant's truck during an undercover drug buy, evidence was insufficient to prove that Defendant constructively possessed drugs that were in co-defendant's house that was several miles away.

State v. Watkins, 93 Crim. L. Rep. 281, 2013 WL 1960623 (Utah 5/10/13):
Holding: Crime of "aggravated" sexual abuse of child requires both that the defendant have occupied a "position of authority" and that he have been "able to exercise undue influence" over victim; here, Defendant moved in with his niece's family but had no formal role of authority in the family.

Farhoumand v. Com., 2014 WL 5490877 (Va. 2014):
Holding: Statute prohibiting "exposure" of genitals to child required proof that child could see genitals; "exposure" did not include tactile contact with Defendant's genitals.

Farhoumand v. Com., 96 Crim. L. Rep. 161 (Va. 10/31/14):
Holding: State statute prohibiting exposing one's genitals to a child applies only to an actual visual display of the genitals, not to "tactile exposure," where genitals are felt but not seen; the plain meaning of word "expose" means actual visual display.

Allen v. Com., 752 S.E.2d 856 (Va. 2014):
Holding: Testimony by Defendant's daughter that he slept with and wrestled with alleged child victim provided only the opportunity to commit the corpus delicti of sexual battery, and was insufficient to provide slight corroboration of Defendant's confession of that crime to police.

Rushing v. Com., 2012 WL 2038204 (Va. 2012):
Holding: Even though Officer testified that in his opinion Defendant's wearing of black and blue beads in school showed he was in a gang, such testimony was not related in time

to Defendant's convictions and therefore was irrelevant in prosecution for gang participation.

State v. Bauer, 2014 WL 3537953 (Wash. 2014):
Holding: Even though (1) Defendant left a loaded gun at home, (2) a child found the gun, took it to school and shot someone, Defendant's acts were not the legal cause of the bodily harm to the person at school; Defendant's possession of a loaded, unsecured gun at his home was not a crime; legal causation extends further in tort cases, than criminal cases.

State v. Vaquez, 2013 WL 3864265 (Wash. 2013):
Holding: Even though a store security guard, who was investigating Defendant in connection with a shoplifting, found a fake Social Security and permanent resident card on Defendant, the evidence was insufficient to show that Defendant intended to defraud the security guard with these items, precluding a conviction for forgery based on that evidence.

State v. Veliz, 2013 WL 865413 (Wash. 2013):
Holding: Violation of a domestic protection order is not violation of a "court-ordered parenting plan," which is a necessary element of offense of custodial interference.

State v. Budik, 90 Crim. L. Rep. 721 (Wash. 2/16/12):
Holding: Merely refusing to divulge the identity of a criminal to police does not violate a state law outlawing the rendering of criminal assistance.

State v. Yocum, 2014 WL 2017843 (W.Va. 2014):
Holding: Even though Defendant, while handcuffed in a patrol car, threatened to sexually assault Officer's child, this was not a terrorist threat because it was not directed at intimidating or coercing the conduct of a branch or level of government; the terrorist threat statute uses terms "level" and "branch" for threats of terrorist activity, not individuals.

Davis v. Fox, 92 Crim. L. Rep. 192, 735 S.E.2d 259 (W.Va. 11/8/12):
Holding: Adopting the "majority rule," West Virgina holds that the felony-murder rule does not apply where the intended victim of the crime kills one of the co-perpetrators; the common law of felony murder always involved the death of an innocent person, not a co-felon.

State v. Dinkins, 2012 WL 798790 (Wis. 2012):
Holding: A sex offender who had no address at which to reside after his release from prison, despite his attempts to secure an address, could not be convicted of knowingly failing to comply with the sex offender registration statute.

Mraz v. State, 2014 WL 2583676 (Wyo. 2014):
Holding: Even though Defendant worked at a bar; had a brief opportunity to steal money from the bar's safe; and failed to disclose to police that she had left the bar, drove

toward her home and then returned, the evidence was insufficient to convict of stealing from the safe where no evidence was presented that Defendant ever possessed the stolen property, had threatened the bar, attempted to flee, or had any motive to steal.

Rodgers v. State, 90 Crim. L. Rep. 302 (Wyo. 11/18/11):
Holding: Even though Defendant used another person's I.D. to cash a check, this was not identity theft because it wasn't used to acquire financial advantage.

Ford v. State, 89 Crim. L. Rep. 809 (Wyo. 8/25/11):
Holding: Even though Defendant was not authorized to use business' letterhead, where Defendant signed her own name to the letter, this did not constitute forgery.

State v. Hankins, 2013 WL 5966894 (Ala. App. 2013):
Holding: The terms "sells, furnishes, gives away, delivers or distributes" in state drug law were not applicable to a licensed doctor writing a prescription.

Beecham v. State, 2013 WL 3716859 (Ala. App. 2013):
Holding: Even though Defendant failed to appear in court for a docket call, the evidence was insufficient to convict of bail jumping where the date and time of Defendant's appearance in court was not set in the bail documents.

State v. Lewis, 2014 WL 6982289 (Ariz. App. 2014):
Holding: Entry into "fenced commercial or residential yard" for purposes of burglary statute means a fenced residential yard; the statute is ambiguous whether a fence is required for a yard, and grammatical construction indicates that a modifier ("fenced") applies to both elements in a series.

State v. Gray, 2011 WL 2623677 and 2623832 (Ariz. Ct. App. 2011):
Holding: Offense of "tampering with a witness" requires that the witness actually alter his conduct or testimony; otherwise the offense is "attempted tampering."

People v. Noyan, 2014 WL 7175120 (Cal. App. 2014) and 2015 WL 159499 (Cal. App. 2015):
Holding: Where a statute made bringing non-controlled substances into a jail punishable by state prison time, but bringing controlled substances into a jail punishable only by county jail time, the statute lacked a rational basis and violated Equal Protection.

People v. Whitmer, 2014 WL 5338938 (Cal. App. 2014):
Holding: Term "automobile" in grand theft statute does not encompass motorcycles, motorized dirt bikes, all-terrain vehicles, and similar vehicles.

People v. James, 2014 WL 5449154 (Cal. App. 2014):
Holding: A train security officer was not a "station agent" within meaning of statute against assault on "station agents;" a "station agent" is someone who works in or has some responsibility over transit stations.

People v. Campuzano, 2014 WL 5795040 (Cal. App. 2014):
Holding: Ordinance prohibiting riding a bike only any sidewalk "fronting any commercial business establishment" does not apply to riding a bike in front of a business which is closed; the purpose of the law was to prevent bikes on sidewalks where there would be foot traffic in and out of an open business.

People v. Gonzales, 2015 WL 154737 (Cal. App. 2015):
Holding: Under statute prohibiting persons from carrying loaded guns in car, State was required that Defendant-Driver knew that passenger had loaded gun.

People v. Arevalo, 170 Cal. Rptr. 3d 286 (Cal. App. 2014):
Holding: Even though a rock with Defendant's DNA on it had been thrown through a store window, the evidence was insufficient to convict of burglary, where there was no evidence of the rock's custody or location prior to it being thrown through the window.

People v. Castillolopez, 170 Cal. Rptr. 3d 416 (Cal. App. 2014):
Holding: Where the open blade of Defendant's Swiss Army knife was not "locked into position," it was not a prohibited "dirk or dagger," even though it was open and made a clicking sound.

People v. Redd, 2014 WL 3704285 (Cal. App. 2014):
Holding: Even though Defendant conspired with prison cook to smuggle tobacco into prison, this did not constitute perversion or obstruction of justice or due administration of laws, because these acts were not a crime under common law, and the prison cook's duties did not include law enforcement.

In re D.W., 2015 WL 1910472 (Cal. App. 2015):
Holding: Even though Defendant spit in victim's eye and victim had temporary decline in vision, this did not constitute "injury" for battery of peace officer charge, since "injury" requires medical treatment, and it is the nature, extent, and seriousness of the "injury" which is legally significant, not the victim's inclination to seek medical treatment.

People v. Boatman, 165 Cal. Rptr.3d 521 (Cal. App. 2013):
Holding: There was insufficient evidence to prove premeditation necessary for first degree murder, where victim sent a text message saying she was "fighting" with Defendant "right now," a witness heard a loud argument going on, Defendant shot victim in face from a distance of one foot, and Defendant was distraught afterwards; the evidence supported reduction to second degree murder.

People v. Burkett, 163 Cal. Rptr. 3d 259 (Cal. App. 2013):
Holding: House was not an "inhabited" structure to qualify for first degree burglary where house was vacant of tenants and empty of possessions, and Owner/Landlord had not yet moved back into house or moved any possessions there.

People v. Williams, 160 Cal. Rptr.3d 779 (Cal. App. 2013):
Holding: Offense of "construction or maintenance of fire protection system in an unsafe manner" requires specific intent to install a system which is known to be inoperable or a specific intent to impair operation of a system.

People v. Mason, 160 Cal. Rptr.3d 516 (Cal. App. 2013):
Holding: (1) Trial court erred in omitting a jury instruction for offense of failure to register as sex offender that the State prove that the prior spousal rape conviction involved force or violence, since this was an element of the crime here; (2) Because the evidence was insufficient to prove that the prior conviction involved force or violence, Defendant could not be retried for failure to register on the basis of the conduct at issue in the present case.

People v. Pellecer, 2013 WL 1638175 (Cal. App. 2013):
Holding: Even though statute prohibits carrying a concealed weapon "upon his or her person," this does not prohibit carrying the weapon (knife) in a backpack or adjacent container; hence, Defendant could not be convicted for having a knife in a backpack he was leaning on when police searched him.

In re Caberera, 2013 WL 3328774 (Cal. App. 2013):
Holding: Even though Defendant-prisoner had two drawings from gang members, where he was enrolled in an art course and had large quantities of drawings by many artists, the evidence was insufficient to prove association with gang members.

People v. Diaz, 2012 WL 2447060 (Cal. App. 2012):
Holding: Latex gloves and a large bag were not "burglary tools" because such "tools" are limited to instruments and tools used to break into or gain access to property in a manner similar to items listed in the "burglary tool" statute; that the gloves or bag may be used in a burglary is not enough.

In re Villa, 2012 WL 4457772 (Cal. App. 2012):
Holding: Where prisoners were allowed to possess other prisoners' legal work to allow them to assist as pro se law clerks, such possession could not be used to establish that prisoner was member of a gang.

People v. Anguiano, 2012 WL 434661 (Cal. App. 2012):
Holding: Even though gang-member Defendant was sitting on a porch with a "personal use" amount of drugs, this did not support a finding that Defendant was promoting or furthering conduct of the gang.

People v. McCloud, 2012 WL 6057904 (Cal. App. 2012):
Holding: Even though Defendant fired 10 shots into a crowded building, this did not support liability under the "kill-zone" theory, which applies if a defendant tried to kill everyone in an area in order to kill a particular person.

People v. Johnson, 2012 WL 1435289 (Cal. App. 2012):
Holding: A charge of conspiracy to commit the crime of active participation in a criminal street gang was found to be invalid because a criminal street gang is inherently a form of conspiracy.

People v. Cardwell, 2012 WL 556222 (Cal. App. 2012):
Holding: Because the statutory phrase "vault, safe, or other secure place," in statute proscribing burglary by use of acetylene torch, is expressly conditioned on the fact that a defendant has already entered a building, defendant could not be convicted under the statute for using torch to break into the building.

Magness v. Superior Court, 2011 WL 2295135 (Cal. App. 2011):
Holding: A defendant who uses a garage remote control to open a garage door from a distance away does not "enter" the house for purposes of burglary; this is only attempted burglary.

People v. Gerber, 2011 WL 2206896 (Cal. App. 2011):
Holding: Defendant did not violate child pornography possession statute by placing a child's head on body of nude adult women because statute required that child be "personally engaging" in the sexual conduct depicted, which requires that a real child actually engage in the sex.

People v. Roldan, 2011 WL 2905598 (Cal. App. 2011):
Holding: Where Defendant was unconscious at a hospital, Defendant did not fail to provide proof of financial responsibility (insurance) after police searched through his vehicle but could find none; there was no evidence that police ever asked Defendant for proof of this and their failure to find this in the vehicle didn't prove that Defendant lacked insurance coverage.

In re Cabrera, 2011 WL 3930310 (Cal. App. 2011):
Holding: Even though Defendant possessed two Xerox copies of drawings signed by gang members, this was insufficient to prove gang affiliation.

People v. Reed, 2013 WL 3943246 (Colo. App. 2013):
Holding: Evidence insufficient to convict of possession of a financial device where Defendant possessed a victim's "gift card" which had no available funds; thus, the card was not a "financial device."

People v. Childress, 2012 WL 2926636 (Colo. App. 2012):
Holding: A person cannot be held criminally liable as a complicitor for vehicular assault (DUI) which is a strict liability crime and doesn't require a culpable mental state.

People v. Carbajal, 2012 WL 663165 (Colo. App. 2012):
Holding: In prosecution for possession of a weapon by a previous offender, the defendant was not required to show, as an element of the affirmative defense of a

constitutionally protected purpose for his possession, that he sought protection from what he reasonably believed to be a threat of imminent harm.

People v. Douglas, 2012 WL 1231807 (Colo. App. 2012):
Holding: Complicitor liability for internet luring or sexual exploitation requires commission of the underlying offenses.

Dorsey v. State, 2014 WL 4995171 (Fla. App. 2014):
Holding: Defendant had no duty to retreat under Stand Your Ground Law even if he was engaged in unlawful activity at time of shooting; the law had no requirement that person not be engaged in unlawful activity.

Carrosa v. State, 2013 WL 5224914 (Fla. App. 2013):
Holding: "Monetary value" as an element of workers compensation fraud cannot be measured by the administrative fine against Defendant, but instead is measured by the monetary loss sustained by the employer or insurance carrier.

Dorsett v. State, 2013 WL 331602 (Fla. App. 2013):
Holding: Conviction for leaving scene of injury accident requires proof of actual knowledge of the accident, not merely that Defendant "should have known" of it.

Stanley v. State, 2013 WL 1891325 (Fla. App. 2013):
Holding: Even though Defendant tied up sexual assault victim, this confinement did not constitute kidnapping because it was inherent in his sexual assault offense, but it could constitute lesser offense of false imprisonment.

State v. Little, 2013 WL 85436 (Fla. App. 2013):
Holding: Where concealed weapons statute allowed persons to carry concealed weapons at their "place of business," it was not unlawful for an elected union secretary to carry such a weapon at the union hall and in the union hall parking lot.

Ramirez v. State, 2012 WL 1889282 (Fla. App. 2012):
Holding: Even though statute prohibiting a felon from working for a bondsman did not contain a mens rea requirement, such a requirement is logically required and courts must read a knowledge element into that portion of the statute.

Pennington v. State, 2012 WL 5272927 (Fla. App. 2012):
Holding: Where the evidence indicated that victim-motorcyclist was doing a "wheelie" at 80-90 mph when collision occurred and motorcycle tire tracks were on top of Defendant's SUV, the evidence was insufficient to support a conviction for DWI-manslaughter since there was insufficient evidence that Defendant's intoxicated condition caused or contributed to victim-motorcyclist's death.

Sanchez v. State, **2012 WL 385475 (Fla. Dist. Ct. App. 2012):**
Holding: Evidence was not sufficient to support the defendant's conviction for racketeering because two predicate offenses were necessary to support the conviction, and the State proved only one predicate offense.

Willoughby v. State, 91 Crim. L. Rep. 100 (Fla. Ct. App. 4/11/12):
Holding: Where employee-defendant was authorized to use her laptop at work, she did not "unlawfully access" her employer's computer database when she emailed confidential files to the laptop.

Balzourt v. State, 2011 WL 6117113 (Fla. Dist. Ct. App. 2011):
Holding: Where evidence in first-degree murder trial showed that victim suffered injuries indicative of more than just manual strangulation, but where the State did not show that those injuries were inflicted in a manner that resulted in a prolonged strangulation or cause of death that would have allowed the killer sufficient time to reflect on his actions, the evidence was insufficient to establish premeditation.

Gordon v. State, 2014 WL 2884035 (Ga. App. 2014):
Holding: A half-blood relationship between Defendant (uncle) and complainant (niece) was not one expressly enumerated by incest statute, so Defendant's acts were not criminal.

State v. Hammonds, 2014 WL 685558 (Ga. App. 2014):
Holding: Even though Defendant was a school secretary and assistant coach of school team, she did not have supervisory or disciplinary authority over students, so statute prohibiting sex with students did not apply; this was true even though Defendant had authority to write up disciplinary referrals; also, the alleged victims were not on the team she coached.

Newton v. State, 2012 WL 6634068 (Ga. App. 2012):
Holding: Even though Defendant stole jewelry while touring a home for sale with a Realtor and used a fictitious name, the evidence was insufficient to support burglary because Defendant did not enter the home without authority to do so.

State v. Dowling, 2011 WL 3808076 (Haw. Ct. App. 2011):
Holding: Merely hitting child was not sufficient to negate parental discipline defense in abuse of family member prosecution; Defendant had to intend to cause "extreme mental distress" not merely "mental distress."

People v. Holm, 2014 WL 6871520 (Ill. App. 2014):
Holding: Even though Defendant made loud noises to interfere with hunters on adjacent property, he did not violate Hunters Interference Prohibition Act because he made the noises on his own property; the Act exempts landowners engaged in legal uses of their own land.

People v. Boykin, 2013 WL 5981390 (Ill. App. 2013):
Holding: Evidence was insufficient to establish sale of drugs within a prohibited school zone where there was no testimony whether the school in question was an "active" school and where the evidence didn't show that the building's name included any signage that would identify it as a school.

People v. McDaniel, 2012 WL 4862334 (Ill. App. 2012):
Holding: Even though Defendant stole items from a store, where he lawfully entered the store, this was not burglary but was shoplifting; to hold otherwise would convert every retail theft into burglary.

People v. Carreon, 2011 WL 5301636 (Ill. App. Ct. 2011):
Holding: Cigar did not constitute drug paraphernalia under the Drug Paraphernalia Control Act.

People v. McCarter, 2011 WL 2556916 (Ill. App. 2011):
Holding: Defendant did not "take" victim's car under carjacking statute where Defendant merely forced driver to drive to different location; Defendant had to dispossess driver of car to "take" it.

Holbert v. State, 2013 WL 5530681 (Ind. App. 2013):
Holding: Even though intoxicated Defendant's behavior alarmed a resident when he walked across her yard, when he then continued walking along a public sidewalk, the evidence was insufficient to convict of public intoxication because the statute requires intoxicated behavior in a "public place," the private yard did not qualify, and there was no such behavior on the sidewalk.

Gaddie v. State, 2013 WL 3366749 (Ind. App. 2013):
Holding: Defendant cannot be convicted of resisting law enforcement for fleeing during a consensual encounter with police; so long as a seizure has not taken place within the meaning of the 4th Amendment, a person is free to disregard Officer's order to stop.

Smith v. State, 2013 WL 342678 (Ind. App. 2013):
Holding: Even though school-principal-Defendant did not contact authorities until 4 hours after learning of suspected child abuse, evidence was insufficient to convict of violating "immediate" mandatory reporting law where Defendant notified child's guardian within 20 minutes of suspected child abuse, and had to attend to other duties before calling authorities.

Villagrana v. State, 2011 WL 3715572 (Ind. Ct. App. 2011):
Holding: Defendant's negligence in watching his child did not make him subjectively aware of a high probability that the child had been placed in a dangerous situation, as the child neglect statute requires intentional or knowing conduct.

State v. Ellis, 2014 WL 2875009 (La. App. 2014):
Holding: Evidence was insufficient to prove Defendant possessed drugs with intent to distribute, where Defendant and another person were only people in house, only 0.2 grams of cocaine was found, the other person was trying to flush this cocaine down the drain, the cocaine was valued at only $10-$20, and there were no drugs packaged for distribution or any controlled buys or confidential informants.

State v. Sarrabea, 2013 WL 1810228 (La. App. 2013):
Holding: Statute making it illegal for "aliens" to drive in the state without documentation demonstrating their lawful presence in U.S. was preempted by federal law regulating the field of alien registration.

Moulden v. State, 2013 WL 3213310 (Md. App. 2013):
Holding: Defendant's act of pointing a fake or inoperable firearm at a person could not create a "substantial risk of death or serious physical injury" necessary to support a conviction for reckless endangerment.

Rich v. State, 2012 WL 1959308 (Md. Ct. Spec. App. 2012):
Holding: Under Maryland law, mere fleeing from Officer is not sufficient to establish resistance by force or threat of force, which is a necessary element of offense of resisting arrest.

Williams v. State, 2011 WL 2684885 (Md. Ct. Spec. App. 2011):
Holding: An unmarked police car equipped with lights and sirens did not constitute a sufficiently marked patrol car within the meaning of the feeling and eluding statute.

Com. v. Hall, 2011 WL 3835049 (Mass. Ct. App. 2011):
Holding: The child enticement statute, which prohibits enticing a child to "enter" certain places or vehicles, requires that a child be enticed to a location chosen by the defendant; hence, getting a child to take nude photos of herself in a place of her choosing and give them to Defendant did not violate the enticement statute.

People v. Deroche, 829 N.W.2d 891 (Mich. App. 2013):
Holding: Statute prohibiting possession of firearms by intoxicated persons is unconstitutional as applied to constructive possession case; the gov't's legitimate concern was with actual physical possession of a firearm while intoxicated, not with a person who has consumed alcohol but is then merely in the vicinity of a firearm.

People v. Yanna, 2012 WL 2401400 (Mich. App. 2012):
Holding: Statute banning possession of stun guns violated Second Amendment and state constitutional right to keep and bear arms.

State v. Pegelow, 2012 WL 34030 (Minn. Ct. App. 2012):
Holding: Evidence that defendant posted nude and partially nude photographs of his ex-girlfriend in the men's bathroom at her place of employment met the statutory definition of harass, but was insufficient to support his conviction for gross misdemeanor

harassment in that the jury was required to determine that the defendant committed an act that was unlawful independent from the definition of harass.

State v. Harper, 2011 WL 2684887 (Neb. App. 2011):
Holding: Where a witness told Defendant that they were the owner of a damaged vehicle and took down license information from Defendant, the vehicle Defendant hit was not an "unattended vehicle" under statute regarding hit and run of unattended vehicles.

State v. Stephenson, 2014 WL 6454821 (N.M. App. 2014):
Holding: "Leaving or abandoning" a child requires proof that Defendant left child without any intent to return; evidence was insufficient to convict where Defendant left child in bedroom while Defendant remained inside the apartment.

State v. Archuleta, 2014 WL 5454826 (N.M. App. 2014):
Holding: Even though Defendant entered store during business hours, contrary to non-trespass order, with intent to steal, this was not the type of harmful conduct to violate commercial burglary statute.

State v. Earp, 2014 WL 1238903 (N.M. App. 2014):
Holding: Defendant cannot commit crime of damage to property in which Defendant has an equitable ownership interest.

State v. Alverson, 2013 WL 4499460 (N.M. App. 2013):
Holding: A dry ice bomb is not an "explosive" device or "bomb" within the meaning of the New Mexico Explosives Act, because it was not similar to an explosive bomb, grenade or missile within the meaning of the Act; a dry ice bomb does not use or cause fire; there was no indication the Legislature intended "explosive" to cover the reaction of dry ice and water in a jug or bottle.

State v. Webb, 2012 WL 7656636 (N.M. App. 2012):
Holding: Allowing a child to get a body piercing is not "child endangerment."

State v. Parvilus, 2012 WL 7656635 (N.M. App. 2012):
Holding: Under state burglary statute where neither husband nor wife can exclude the other from their residence, husband could not be convicted of burglary for entering wife's residence, even though he had felonious intent.

State v. Gonzalez, 2011 WL 3687729 (N.M. Ct. App. 2011):
Holding: Where Defendant-drunk driver struck another car and killed a child in that car, this was not sufficient to convict of "negligent child abuse by endangerment" because Defendant's drunk driving was directed toward the public generally, not a specific child.

Archie v. Fischer, 2014 WL 3743537 (N.Y. App. 2014):
Holding: Even though Defendant-prisoner, during a therapy session, said that he thought about choking a psychiatrist and wanted to wrap a wire around neck of a doctor, this did

not violate a prison disciplinary rule that prohibited making threats; it was unclear whether Defendant meant actual harm or was just speaking out of frustration.

People v. Stone, 2014 WL 1190088 (N.Y. City Crim. Ct. 2014):
Holding: Even though Defendant sent an email photo to his Girlfriend of him wearing a mask and holding a knife with the words "take that," this was just a photo and not an actual knife constituting "display" of a dangerous weapon within the meaning of the menacing statute.

People v. Lafont, 978 N.Y.S.2d 832 (N.Y. City Crim. Ct. 2014):
Holding: Where (1) Defendant-Wife had called 911 because she thought her husband was having post-surgical complications from open heart surgery only days before, (2) when Officer arrived, Defendant-Wife believed Officer was using unnecessary force to subdue husband, (3) Defendant-Wife sought to restrain Officer by putting her hands on him but did not injure Officer, and (4) Defendant-Wife had no prior criminal history, Information charging obstruction of government administration and harassment should be dismissed in the interest of justice.

People v. Delee, 969 N.Y.S.2d 350 (N.Y. App. 2013):
Holding: Jury verdict finding Defendant guilty of manslaughter as a hate crime, but not guilty of manslaughter in the first degree, was inconsistent as legally impossible, so as to require reversal of conviction.

People v. Sidarah, 2013 WL 3942915 (N.Y. App. 2013):
Holding: Even though Officer's allegations were that Defendant was "inside" a building and said that he found "her" on the Internet and agreed to pay "her" for sex, the evidence was insufficient to charge crime of patronizing a prostitute where there were no allegations of the preceding events, the type of sexual conduct agreed to, the time frame of this, or a description of the unnamed "her."

People v. Karlsen, 2013 WL 3923445 (N.Y. County Ct. 2013):
Holding: The offense of "concealment of a will" requires that the will be at least facially valid; thus, evidence was insufficient to convict Defendant where the "will" he concealed lacked the necessary formalities to be considered a legally valid will.

People v. Gaugh, 2012 WL 2332026 (N.Y. App. 2012):
Holding: Hazardous Transportation Law did not require truck driver-Defendant to unload contents at a certain place, or store hazardous materials at rear of truck for inspection.

Wilson v. N.Y.C. Police Dept. License Div., 2012 WL 6861589 (N.Y. Sup. 2012):
Holding: Even though Applicant answered "no" on a gun license application which asked which asked if she had ever been arrested and instructed applicants that they had to answer "yes" even if the charge was later dismissed, Applicant's "no" answer was correct as a matter of law since her prior arrest was a nullity since the charge against her was dismissed; thus, it was as if the prior arrest had never occurred.

People v. Shieh, 2012 WL 3892838 (N.Y. App. 2012):
Holding: Conviction for violation of building code was not supported by sufficient evidence where Officer "guesstimated" that the number of people in bar was "well over" the legal limit without doing an actual head count.

Haughey v. Lavalley, 2011 WL 5865004 (N.Y. App. 2011):
Holding: Substantial evidence did not support charge that prisoner was smuggling a brown shirt, where prisoner denied that he was smuggling, the shirt was clearly visible to corrections officers, and there was an area before the building exit for prisoners to hang their clothes.

People v. Hakim-Peters, 937 N.Y.S.2d 759 (App. Div. 2012):
Holding: Evidence was legally insufficient to support finding that assault defendant acted with depraved indifference to human life because after he realized that he had knocked his son unconscious, he attempted to provide first aid.

State v. Huckelba, 2015 WL 1788725 (N.C. App. 2015):
Holding: Conviction for possession of weapon on educational property requires that Defendant "know" she was on educational property; where Defendant claimed she did not "know" she was on educational property when she parked her car in front of an administration building, trial court erred in failing to instruct jury of the "knowingly" element.

State v. Daniels, 2012 WL 6737523 (N.C. App. 2012):
Holding: Statute prohibiting sex offenders from being in any place where minors gather for scheduled educational, recreational or social programs was unconstitutionally vague where Defendant was indicted for being in a parking lot of an adult softball field that was adjacent to a children's tee ball facility; the statute failed to give a person of ordinary intelligence reasonable notice of what conduct is prohibited.

City of Cleveland v. Castro, 2015 WL 2185563 (Ohio Mun. Ct. 2015):
Holding: Even though Defendant refused to give a DNA sample following arrest as required by statute, this did not support conviction for "obstruction of official business" because Defendant did not commit an affirmative act, as required for conviction, but only a passive refusal to act; also, the DNA statute itself did not provide a penalty for refusal.

State v. Anderson, 2012 WL 3517322 (Ohio App. 2012):
Holding: A condemned house was not an occupied structure as required to support a conviction for burglary.

State v. Arega, 2012 WL 6062030 (Ohio App. 2012):
Holding: Evidence was insufficient to support strict liability for a nursing assistant at a nursing home for a sexual battery to a nursing home patient; the nursing assistant did not have supervisory authority at the nursing home.

Wolf v. State, 2012 WL 6062550 (Okla. Crim. App. 2012):
Holding: Where the Methamphetamine Offender Registry Act did not provide notice to persons of their placement on the registry or duty to register under the Act, due process prohibits convicting a person without notice for purchasing pseudoephedrine.

State v. Olive, 2013 WL 5743818 (Or. App. 2013):
Holding: To convict of resisting arrest, State must prove that Defendant knew at the time of his resistance that a peace officer was making an arrest.

State v. Kinslow, 2013 WL 3215685 (Or. App. 2013):
Holding: Even though Defendant had restrained victim and made him move to different rooms in the same house, this did not prove taking victim "from one place to another" necessary to sustain conviction for kidnapping.

Johnson v. Dept. of Public Safety Standards and Training, 2012 WL 5429461 (Or. App. 2012):
Holding: Oregon victim's rights law which provided that a victim must be informed "by defendant's attorney" that they are being contacted in a defense capacity did not require a private investigator hired by a defense attorney to disclose anything; the only obligation imposed by the law was on the attorney, not the investigator.

State v. Tilden, 2012 WL 5285134 (Or. App. 2012):
Holding: Evidence was insufficient to convict of possession of child pornography where child pornography was only in Defendant's computer's cache as a consequence of the web browser's automatic "caching" function; this was insufficient to prove that Defendant "possessed" or "controlled" the images, though he viewed them.

State v. Martin, 2011 WL 2342628 (Or. App. 2011):
Holding: Even though Defendant possessed another person's personal identification, this was not by itself sufficient to convict of identity theft without proof of intent to deceive or defraud.

Com. v. Cahill, 2014 WL 2921806 (Penn. Super. 2014):
Holding: A train "token" is not a "ticket" under statute prohibiting unauthorized sale of "tickets."

Com. v. Lynn, 2013 WL 6834765 (Pa. Super 2013):
Holding: (1) Evidence was insufficient to prove that Defendant-Priest "supervised" a child who was sexually abused by another priest, and thus did not support conviction for endangering welfare of child, even though Defendant-Priest knew the other priest had a history of abusing minors yet placed child with the priest; (2) there was no evidence that Defendant-Priest knew of other priest's plan to abuse children in this case, so Defendant could not be an accomplice of other priest in offense either.

Com. v. Foster, 2011 WL 3850026 (Pa. Super. 2011):
Holding: A vehicle's grill is similar to a fixture of real property, as opposed to moveable.

Delay v. State, 2014 WL 483917 (Tex. App. 2014):
Holding: Even though Defendant's PAC exchanged its "soft money" derived from corporate donors with another state elections committee's "hard money," this did not violate the Elections Code and was not money laundering.

Chiarini v. State, 2014 WL 4627237 (Tex. App. 2014):
Holding: Owner of condominium unit did not violate law which prohibited carrying gun in certain areas, when owner carried gun in the common areas of the condo complex, because owner's undivided ownership interest in the condominium made the common areas his "own premises," where carrying a gun was allowed.

State v. Anderson, 2014 WL 5033262 (Tex. App. 2014):
Holding: Mandatory blood draw statute did not relieve Officer from need to obtain search warrant for non-consensual blood draw in DWI case.

Stobaugh v. State, 2014 WL 260576 (Tex. App. 2014):
Holding: Even though Wife was missing and Defendant-Husband lied about certain matters regarding her disappearance, where there was no body, murder weapon, witnesses to murder, no blood or other evidence showing Wife was actually dead or murdered, the evidence was insufficient to prove Defendant had mens rea for murder.

Crabtree v. State, 2012 WL 5348220 (Tex. Crim. App. 2012):
Holding: Where state sex offender registration statute required Department of Public Safety (DPS) to make a determination that other states' sex offenses were similar to Texas offenses but there was no evidence that DPS had done this in Defendant's case, the evidence was legally insufficient to convict of failure to register.

Mahaffey v. State, 2012 WL 1414108 (Tex. Crim. App. 2012):
Holding: A defendant was not required by the Texas signal statute to signal when two lanes merged to become one.

State v. Rincon, 2012 WL 6720469 (Utah App. 2012):
Holding: Defendant did not "obtain" another person's social security number in violation of identity theft statute where Defendant just made up a number that coincidentally matched a person; to "obtain" requires some planned action or method.

Doulgerakis v. Com., 2013 WL 424466 (Va. App. 2013):
Holding: Gun stored in a latched, but unlocked, glove compartment was "secured in a container or compartment," and thus, fell within this exception to prohibited concealed weapon statute.

State v. Lau, 2013 WL 2157686 (Wash. App. 2013):
Holding: Even though Defendant understated his business' revenues to avoid paying taxes, the underpayment of taxes did not constitute "theft" because his business' revenues were not "property of another" under the theft statute.

State v. Morales, 2013 WL 1456939 (Wash. App. 2013):
Holding: Even though Defendant made two different communications on two days that he was going to kill the mother of his children, this was a single unit of prosecution for felony harassment, because the harassment statute focused on the threat to a victim, not the number of persons who might learn of the threat or communicate it to the victim.

State v. Bauer, 2013 WL 864843 (Wash. App. 2013):
Holding: Where Defendant was charged with assault for having left a gun on a dresser where a child got it and shot someone, the question of whether leaving the gun in the open was the proximate cause of the victim's injury was a jury question.

State v. Stribling, 2011 WL 5420809 (Wash. Ct. App. 2011):
Holding: In order for a defendant to be convicted of sexual exploitation of a minor, there must have been an actual photograph taken or a live occurrence, and that the minor's consistent refusal to send nude photographs to defendant demonstrated that defendant did not know that a minor would engage in sexually explicit conduct that would be photographed or part of a live performance, as required by the statute.

State v. Kirwin, 2012 WL 593208 (Wash. Ct. App. 2012):
Holding: Defendant was entitled to dismissal for insufficient evidence of charges against her for first-degree custodial interference by being a relative of the child and keeping the child from a person who has a lawful right to physical custody, though state presented sufficient evidence of a different, uncharged offense that was mistakenly described in to-convict instruction, which was custodial interference by being a parent and keeping child from other parent who has a right to time with the child; conviction of defendant for uncharged crime was violation of due process.

State v. A.M., 2011 WL 3890747 (Wash. Ct. App. 2011):
Holding: For purposes of child rape statute, "sexual intercourse" means penetration of the anus, not merely penetration of the buttocks.

State v. McKellips, 2015 WL 1186146 (Wisc. App. 2015):
Holding: Using a "computerized communication system" to facilitate a child sex crime means acts such as sending an email message; a cell phone or computer, by themselves, are not a "computerized communication system."

Depriest v. State, 2015 WL 7455009 (Mo. App. E.D. Nov. 24. 2015):
(1) Plea counsel had actual conflict of interest where he simultaneously represented Movant and her Brother on charges for marijuana found in their residence, and it was apparent that Movant was less culpable than Brother; (2) "Group guilty plea" proceeding prejudiced Movant because plea court failed to inquire about the conflict of interest; (3) where Movant rejected a more favorable plea offer due to her counsel's conflict of interest, remedy is to require State to re-offer the rejected offer; and (4) transcript of "group guilty plea" should not be redacted so as only to include Movant's and Brother's responses, because redacted transcript does not give appellate court a complete picture of what transpired at plea.
Facts: Movant and her Brother were charged with marijuana offenses for marijuana found growing in their residence. Movant and Brother both retained the same counsel, and signed counsel's waiver of conflict of interest. The State offered Movant a 10-year deal with possibility of probation after 120 days. Counsel advised Movant to reject the offer. Movant and Brother ultimately pleaded guilty together under a deal whereby the State would dismiss certain other charges against Movant, if she and Brother pleaded guilty together. The court held a "group guilty plea" with other defendants in order to "save time." Movant was sentenced to the maximum term. She filed a 24.035 motion.
Holding: Movant's plea was involuntary due to counsel's conflict of interest and the group guilty plea procedure. Counsel believed Movant was less culpable than Brother; thus, Movant's and Brother's interests were conflicting. Prejudice is presumed when counsel operates under an actual conflict of interest. Further, the plea court had a duty to inquire about the conflict, but did not because of the group guilty plea. The plea court should not have valued its own time more than the fair administration of justice. The remedy here is to order the State to reoffer the rejected plea offer. Lastly, a full and complete transcript of the group plea should have been prepared, not just a transcript with Movant's and Brother's responses. A full transcript was necessary to give appellate court a complete picture of what occurred.

Depriest v. State, 2015 WL 6473150 (Mo. App. E.D. Oct. 27, 2015):
(1) Plea counsel operated under an actual conflict of interest and prejudice is presumed where counsel represented both Movant and co-defendant, advised Movant to reject a favorable plea offer, and pleaded Movant and co-defendant guilty to a deal whereby Movant had to accept a blind plea to allow a favorable plea for co-defendant; (2) "group guilty plea" violated Movant's right to fundamental fairness and rendered his plea involuntary, especially where trial court had duty to inquire about conflict of interest but did not; (3) remedy is to allow Movant opportunity to accept the favorable plea offer that was rejected; (4) appellate court grants foregoing relief without an evidentiary hearing; (5) plea court's closure of courtroom during guilty plea violated Movant's right to a public trial; and (6) "redacted" transcript from "group guilty plea" which only contained Movant's and co-defendant's statements was improper; a full transcript should be prepared for appellate review.
Facts: Movant and co-defendant (his sister) were charged with various drug crimes for marijuana found in their residence. The same attorney represented both prior to their

guilty pleas. The State offered Movant a 10-year deal with 120 days shock. Counsel advised Movant to reject this offer, and to proceed to preliminary hearing. This caused the favorable offer to be withdrawn. After various pretrial litigation, Movant and co-defendant ultimately pleaded guilty in "blind pleas," but only co-defendant received anything in exchange from the State in doing so. The State agreed that if Movant pleaded guilty with co-defendant, the State would dismiss various charges against co-defendant and allow her to be released from jail pending sentencing. The plea court accepted the pleas in a "group plea" with five other non-related cases in order to "save a great deal of time." Movant was ultimately sentenced to 22 years. He filed a Rule 24.035 motion, which the motion court denied without an evidentiary hearing.

Holding: (1) Counsel operates under a conflict of interest where something was done which was detrimental to Movant's interests and advantageous to a person whose interests conflict with Movant's. Upon such a showing, prejudice is presumed. Here, Movant lost the opportunity to plead to the most favorable terms because counsel chose to proceed with pretrial litigation, which was in co-defendant's interests, but not Movant's. Counsel should have withdrawn. Because counsel's actions favored co-defendant's interests, prejudice is presumed. Even if prejudice were not presumed, the fact that Movant received 22 years after being advised to reject a 10-year probation offer supports that counsel was conflicted and shows that counsel failed to advocate for Movant. (2) The appellate courts have repeatedly warned the plea court here that "group pleas" are disfavored. Given all the circumstances in this case, the "group plea" rendered Movant's plea involuntary, and appellate court grants relief without the need for an evidentiary hearing. The plea court had a duty to inquire about the conflict of interest, but did not. The fact that the State's promises to co-defendant were contingent on Movant's own blind plea should have been a red flag to the plea court, as should the fact that both had the same counsel. The plea court did not protect the interest of justice, but was only interested in "saving time." The scene "smacks of intimidation." Regardless of what Movant actually said on the record at his plea, it is obvious Movant would have felt pressured since Movant's sister was standing right beside him and was the co-defendant. (3) Where ineffective assistance causes a defendant to reject a favorable plea offer, the remedy is order the State to re-offer the favorable plea offer. (5) The plea court further added to the intimidating atmosphere by closing the courtroom during the "group plea." Although the appellate court does not decide the issue because it reverses on other grounds, appellate court notes that the closure likely violated Movant's right to a public trial. (5) Finally, appellate court notes that the transcript submitted on appeal is a redacted transcript containing only the responses of Movant and co-defendant. Although it is not clear whether this was done by Movant's attorney, the court or court reporter, it is improper. A full transcript is necessary for appellate review, and would have been useful here to see all the responses during the "group plea."

Gegg v. Director of Revenue, 2015 WL 5435359 (Mo. App. E.D. Sept. 15, 2015):

Holding: Where transcript of license revocation hearing was not available through no fault of Appellant, court must remand case for rehearing so proper record may be made for appeal.

A.L.C. v. D.A.L., 2014 WL 707163 (Mo. App. E.D. Feb. 25, 2014):
Holding: Where Associate Circuit Court failed to make a recording of the order of protection hearing so that no transcript was available for appeal, judgment is reversed and remanded for new trial since Sec. 512.180.1 requires a record be kept in all contested civil matters before an Associate Circuit Judge.

State v. Barber, No. WD742879 (Mo. App. E.D. 11/13/12):
Where (1) a recording machine malfunction caused most of Defendant's testimony at trial to not have been recorded; (2) the State refused to stipulate to Defendant's testimony on appeal; and (3) the testimony was crucial to Defendant's points raised on appeal, Defendant was prejudiced by the lack of a transcript and entitled to a new trial.
Discussion: Rule 30.04(h) allows parties to correct an omission from a transcript by stipulation. Although Defendant submitted an affidavit as to what his testimony was, the State refused to stipulate to its accuracy. The State argues that Defendant was not prejudiced by the missing testimony since the jury found him guilty and, thus, the missing evidence must not have been helpful to his defense. "Were we to accept this argument, however, it would render transcripts of trials meaningless." The missing portion of the transcript is necessary for meaningful appellate reviews of Defendant's points on appeal, including sufficiency of evidence. Even though the prosecutor did not cause the recording machine to malfunction, it is the State that seeks to take Defendant's liberty from him. Due process requires that the State ensure that Defendant has access to a transcript of his testimony or at least a stipulation as to the specific contents of his testimony. Here, Defendant has neither, through no fault of his own.

State v. Scott, 94 Crim. L. Rep. 113, 2013 WL 5637692 (Haw. 10/16/13):
Holding: Indigent defendant was entitled to state-paid transcript of co-defendant's trial for effective preparation and impeachment.

Precaido v. State, 318 P.3d 176 (Nev. 2014):
Holding: Due process required that bench and in-chambers conferences during trial be of record and transcribed; failure to do this denied Defendant the right to meaningful appellate review.

Blackshear v. State, 2011 WL 1991424 (Tex. App. 2011):
Holding: Trial court erred in second trial in not granting a continuance to allow Defendant to obtain a transcript from the first trial; defense should have been able to use the transcript to cross-examine witnesses from first trial, even though second trial was for punishment only.

Trial Procedure

State v. Amick, 2015 WL 3759532 (Mo. banc June 16, 2015):
Trial court cannot substitute Alternate Juror after deliberations begin, because Sec. 494.485 requires that Alternates be discharged once deliberations begin.

Facts: After the evidence was presented and before deliberations, the trial court excused Alternate Juror, who then went home. The jury then deliberated for five hours, when a juror became sick. The trial court then called Alternate Juror to return to the courthouse and substituted them on the jury, over Defendant's objection that this was error and court "can't just throw somebody else into the ring" after hours of deliberation. After conviction, Defendant appealed.
Holding: Although defense counsel did not cite Sec. 494.485, the objection plainly informed the trial court that substitution of the Alternate was error. Trial judges are presumed to know the law, so the error is preserved for appeal. Sec. 494.485 provides that (1) once the jury begins to deliberate, the trial court cannot substitute one juror for another and (2) that after the jury retires to deliberate, alternate jurors must be discharged. Conviction reversed and remanded for new trial.

State v. Ess, 2015 WL 162008 (Mo. banc Jan. 13, 2015):
(1) Even though New Trial Motion was filed one-day late when Circuit Clerk would not accept it the day before because an attached affidavit was not notarized, Circuit Clerk had no authority to reject the filing and New Trial Motion would be deemed timely-filed; (2) Juror engaged in intentional nondisclosure when Juror failed to answer questions on voir dire about bias, and later said to other Jurors that this was "an open and shut case;" and (3) the 1995 through 2002 version of first-degree child molestation, Secs. 566.067.1 and 566.010(3) (1995 – 2002) did not include touching a victim "through clothing;" thus, evidence was insufficient to convict even though Defendant put Victim's hand on Defendant's clothed penis.
Facts: Defendant was convicted of various sex offenses. After trial, Defendant sought to timely file a New Trial Motion, which had attached an affidavit from a juror about juror misconduct. The Circuit Clerk refused to accept the New Trial Motion because the affidavit was not notarized. This could not be resolved until the next day, by which time the New Trial Motion was untimely. At the New Trial Motion hearing, Defendant sought to have the New Trial Motion deemed timely-filed. On the merits, a Juror submitted an affidavit and testified that during a recess during voir dire, a different Juror (No. 3) said this was an "open and shut case."
Holding: (1) The State contends the juror nondisclosure issue is not preserved because the New Trial Motion was untimely filed. Generally, a trial court has no authority to extend the time for filing a New Trial Motion beyond that allowed in Rule 29.11(b). Here, however, the Circuit Clerk refused to file the tendered New Trial Motion in the absence of some clear prohibition in law, rule or specific court order. The Clerk was obligated to accept the filing when tendered. Thus, the New Trial Motion should be deemed timely filed because it was tendered (but rejected) within the time allowed by Rule 29.11(b). If the motion was defective, the remedy was for a party to move to strike it, not for the Clerk to refuse to file it. (2) Juror No. 3 was asked numerous questions on voir dire about whether he could be fair and impartial. Defense counsel specifically asked if any juror held any preconceived notions of guilt or innocence. Juror No. 3 did not answer. Intentional nondisclosure occurs when there is no reasonable inability to comprehend the information asked by a question, and the prospective juror's forgetfulness in failing to answer is unreasonable. Given the extensive questions asked of the venire, there is no possibility that Juror No. 3 failed to comprehend the issue being

asked. Any purported forgetfulness is not reasonable here. Thus, the non-disclosure was "intentional." Bias and prejudice is presumed where "intentional" nondisclosure occurs. The State argues that Defendant did not call Juror No. 3 to testify, but Defendant is permitted to prove his claim of nondisclosure through other evidence than Juror No. 3. Defendant called another Juror to testify that No. 3 said this was an "open and shut case." The State argues that this statement does not mean that Juror No. 3 favored the State because Juror No. 3 could have favored the defense. But this is inconsequential because a bias toward *either* side is material. New trial ordered on all counts except first degree child molestation, for which evidence was insufficient because the relevant version of the statute in effect at time of crime did not criminalize touching "through clothing."

State v. Sisco, 2015 WL 1094821 (Mo. banc March 10, 2015):
(1) Even though State delayed trial three years and then entered a nolle prosequi to effectively get a further continuance, the State has complete discretion to dismiss and refile as long as double jeopardy has not attached and the statute of limitations has not expired; and (2) in issue of first impression, the standard of review for whether Defendant's constitutional right to speedy trial was violated is de novo review, not "abuse of discretion."
Facts: Defendant was charged in 2006. In 2008, Defendant announced ready and requested a speedy trial. Various delays occurred thereafter due to problems with a State's witness and the State providing late discovery. Trial was then scheduled in April 2009, but in order to effectively get a continuance, the State entered a *nolle prosequi* on the trial date, and re-filed the charges later that same day. Defendant filed a motion to dismiss with prejudice claiming violation of his right to speedy trial. Defendant was eventually tried and convicted in late 2009.
Holding: (1) Under Sec. 56.087, the State has complete discretion to dismiss and re-file a case as long as double jeopardy has not attached and the statute of limitations has not expired. Once the State dismisses, the trial court has no power to dismiss with prejudice. Defendant argues that allowing the State to dismiss and refile violates *Klopfer v. North Carolina*, 386 U.S. 213 (1967), because it would allow a case to go on indefinitely. Missouri courts have distinguished *Klopfer* in the past, but here, Defendant never raised this argument to the trial court, so it is not preserved. (2) This Court has never articulated the standard of review for determining whether the constitutional right to speedy trial has been violated. Under the post-1986 version of Sec. 545.780.5 and the constitution, if there is a violation of the constitutional right to speedy trial, the case must be dismissed. While an abuse of discretion standard might have been appropriate before the 1986 statute, it no longer is. The correct standard is *de novo*. The Court does not apply a deferential standard of review, but makes its own conclusions with regard to whether a violation occurred. Here, balancing the *Barker v. Wingo* factors, the Court finds no violation, although it does weigh the *nolle prosequi* "heavily" against the State.

State v. Pierce, 2014 WL 2866292 (Mo. banc June 24, 2014):
(1) Even though the uncontradicted evidence showed that Defendant had more than two grams of cocaine base, the trial court erred in second degree trafficking case in failing to give "nested" lesser-included offense instruction on possession of cocaine because a jury may always believe or disbelieve the State's evidence, and the only thing a defendant

must do to put the elements of a crime "in dispute" is plead not guilty; and (2) Even though Court's term had ended before Defendant was retried, Defendant waived his claim that this violated Article I, Sec. 19 of the Missouri Constitution because he failed to object to the "untimely" trial before the Court's term ended at a time when the Court still had power to correct it.

Facts: (1) Defendant was charged with second degree trafficking. The jury instruction for second degree trafficking required the jury to find that Defendant possessed more than 2 grams of cocaine base. Defendant requested a lesser-included offense instruction for possession of drugs, Sec. 195.202.1. The trial court refused this instruction on grounds that all the evidence showed the cocaine base weighed more than 2 grams. Defendant was convicted of second degree trafficking. He appealed. (2) Defendant's original trial ended in a hung jury. Subsequently, the trial was continued several times without objection from the defense. It was ultimately tried during a much later "term" of the trial court.

Holding: (1) For the reasons set forth in *State v. Jackson*, No. SC93108 (Mo. banc June 24, 2014), Defendant was entitled to the lesser-included offense instruction. Guilt is determined by a jury, not the court. Even though the State contends that the issue of the weight of the drugs was not "in dispute," the jury is the sole arbiter of facts and is entitled to believe or disbelieve the State's evidence. Under the trafficking instruction, the jury was told that the State had to prove that the substance weighed more than 2 grams. Because a jury may always believe or disbelieve the evidence, the State's burden is met only when a jury returns a guilty verdict. The only thing a defendant has to do to hold the State to this burden of proof, or to put the elements of a crime "in dispute," is plead not guilty. Once the defendant pleads not guilty, there will always be a basis in the evidence to acquit the defendant at trial because the jury is the final arbiter of what the evidence does or does not prove. New trial ordered. (2) Article I, Sec. 19, Mo. Const., provides that if a jury fails to render a verdict, the court may commit the prisoner to trial during the same or next term of court. Here, the trial court failed to retry Defendant during the "same or next term of court." However, this does not mean that the trial court lacked authority to try Defendant. Here, Defendant waived this issue because he did not object to the "untimely" trial until the date of the new trial. This waived the issue because the trial court must be given an opportunity to correct the error *while correction is still possible*. Thus, Defendant was required to object before the Court's term expired when there was still time to try him.

State v. Ousley, 2013 WL 6822193 (Mo. banc 12/24/13):

(1) Even though trial court properly excluded certain defense witnesses in Defendant's case-in-chief as a sanction for failing to timely disclose the witnesses, trial court abused its discretion in not allowing those witnesses to testify in surrebuttal after State presented rebuttal evidence, because surrebuttal witnesses need not be disclosed; and (2) even though Defendant's defense was that he had consensual sex as a teenager with another teenager, trial court abused discretion in preventing Defendant from asking on voir dire whether jurors would consider the possibility or automatically rule out that two teenagers had consensual sex, because this did not seek a commitment but was necessary to uncover the bias of jurors who might punish all teenage sex, even though the law may allow it.

Facts: (1) Defendant was charged with forcible rape for rape of a teenage girl which happened on Dec. 26, 1999, when someone abducted Girl on a street and forced her to have sex. Defendant was arrested about 10 years later through a "cold hit" DNA match when samples found on Girl's clothing matched Defendant. On the Friday before trial, Defendant moved to endorse three witnesses – his Mother, Grandmother and a medical records custodian – who would testify that in December 1999, Defendant was generally bed-ridden and could only walk around with difficulty, because of a shooting injury. Defendant's defense was that, although he could not remember if he had sex with Girl, Defendant was very promiscuous and had sex with many girls, and if Defendant did have sex with Girl, it was consensual because he was not physically able to "force" anyone to have sex due to his injury. The trial court excluded Defendant's Mother and Grandmother from his case-in-chief as a sanction for his late disclosure, but allowed the medical records. Defendant testified consistent with his defense. The State then called a treating Doctor in rebuttal to testify that Defendant would have been able to "get around" (wasn't significantly disabled) in December 1999. Defendant then sought to call his Mother and Grandmother in surrebuttal, but the trial court continued to exclude them. (2) During voir dire by the Prosecutor, a juror asked if the Defendant and Girl were the same age, and the Prosecutor asked if juror would automatically say there could not be a rape if they were the same age. Later, defense counsel sought to ask jurors "whether they can consider the possibility or do they automatically rule out the possibility of two teenagers that had consensual sex." The trial court would not allow this question on grounds that it sought a "commitment."

Holding: (1) The purpose of surrebuttal is to give the defendant an opportunity to rebut the State's rebuttal evidence. The disclosure obligations of Rules 25.03 and 25.05 do not apply to witnesses whose testimony will be in the nature of rebuttal or surrebuttal. These witnesses do not have to be endorsed. When offering Mother and Grandmother as surrebuttal, defense counsel explained that they would contradict the State's rebuttal Doctor who testified that Defendant would have been able to get around (was not significantly disabled). Mother and Grandmother would have rebutted this crucial point of State's rebuttal evidence, and corroborated Defendant's testimony. Although there is no entitlement to surrebuttal as a matter of right, a trial court abuses discretion in denying surrebuttal where its decision is against the logic of the circumstances. Here, Defendant's physical condition was the central issue in the case. Mother and Grandmother would have rebutted the State's rebuttal Doctor with their personal observations that Defendant was unable to get around well. Their testimony was the best evidence Defendant could offer to corroborate his physical condition and his own testimony. Once the trial court admitted the State's rebuttal evidence, its ability to exclude surrebuttal evidence was limited. Here, the trial court should have allowed Defendant to rebut the State's evidence with Mother and Grandmother, who would have directly contradicted the rebuttal evidence and allowed Defendant to present a complete defense. Further, their testimony was not "cumulative" of Defendant's testimony or the medical records because Mother and Grandmother's testimony would have corroborated Defendant's testimony and rehabilitated his credibility which was called into question by the rebuttal evidence. (2) In determining what questions to allow on voir dire, a court must strike a balance between competing mandates that "counsel may not try a case on voir dire" and that voir dire requires revelation of critical facts so that bias can be

revealed. Here, the ages of Girl and Defendant as teenagers at the time of the offense was a critical fact that defense counsel should have been allowed to ask about. The State was allowed to essentially ask whether jurors would regard teen sex as consensual. Defendant sought to explore the opposite bias by asking if jurors would automatically think teen sex was not consensual. Some jurors may have believed that any sex between teens was such that a girl could never consent, but his is not the law. It was possible that Defendant and Girl had legal consensual sex. The question was designed to determine whether any jurors would find forcible compulsion as a foregone conclusion from the fact that both the alleged victim and Defendant were teenagers. Not every question that asks whether a juror would "automatically" decide something seeks a "commitment." Here, the proposed question merely sought to ensure, in light of the critical facts of the case of the ages involved, that jurors could follow the law regarding sex among minors and would not impose legal consequences even if they believed the sex was consensual.

State v. Turner, 2015 WL 5829664 (Mo. App. E.D. Oct. 6, 2015):
Holding: (1) Standard of review for determining whether trial court was required to grant hearing under *Franks v. Delaware*, 438 U.S. 154 (1978)(allowing challenge to veracity of police statements in warrant affidavit) is unclear in Missouri, but Eastern District deems it to be abuse of discretion; and (2) even though defense counsel failed to object to testimony about physical evidence that was the subject of a motion to suppress, where counsel objected to the actual physical exhibits and photographs thereof when they were "offered" at trial, this preserved the issue for appeal.

State v. Litherland, 2015 WL 5706732 (Mo. App. E.D. Sept. 29, 2015):
(1) Even though case had been pending for more than three years, where Defendant's sole exculpatory Witness in murder trial was unavailable because she went into labor the morning of trial, trial court abused discretion in not granting continuance; and (2) even though Defendant had taken discovery deposition of Witness, Defendant was not required to use deposition at trial in lieu of her in-court testimony.
Facts: Defendant was charged with first-degree murder in a case involving a shooting of a family member. Various other family members were also charged in the murder, and were State's witnesses; many of them had made various deals with the State to testify. On the morning of trial, defense counsel announced that the defense needed a continuance. The judge stated he was going to "go ballistic." Defense counsel then said that their sole defense Witness – who was also a family member, but the only family member not charged in the offense – was unavailable because she had gone into early labor that morning. The judge stated that the defense had taken a discovery deposition of Witness and could use that instead. Defense counsel said the deposition would not show Witness' "non-verbals." The defense opted not to use the deposition at trial. The defense at trial was that Defendant was not involved in the murder at all. Defendant was convicted and appealed.
Holding: The trial court abused discretion in denying the motion for a continuance. Although Rule 25.13 provides a Defendant *may* use a deposition at trial where a witness is unavailable, appellate court finds no precedent requiring use of such deposition, where, as here, Witness was temporarily unavailable, went into labor "early" on the morning of trial, and would shortly become available again. Although the court may have been

rightly concerned that the case had been delayed more than three years, this does not override Defendant's constitutional right to present a defense, especially in a case of first-degree murder carrying a sentence of life without parole. One of the fundamental rights of due process is the right to present witnesses in defense. The court's statement that it would go "ballistic" made before the court even heard the reason for continuance is concerning because it indicates the court may have prejudged the continuance motion, without having even heard the reason for it. The State argues Defendant was not prejudiced because various State witnesses testified to similar matters as Witness would. Courts have found no prejudice from denial of a continuance where a witness' testimony would be cumulative to other *defense witnesses*; appellate court rejects notion that there can be no prejudice because the testimony may have been cumulative to *State's witnesses*. Further, Witness was a critical witness whose testimony may have been more significant than State witnesses because she was the only family member who was not charged in the murder. Reversed and remanded for new trial.

State v. Walker, 2014 WL 6476054 (Mo. App. E.D. Nov. 18, 2014):
(1) Even though Defendant was charged with first degree murder, trial court abused discretion in not allowing defense to voir dire on range of punishment for second-degree murder where parties knew in advance that second-degree murder would be submitted to jury; and (2) trial court erred in not allowing Defendant who claimed self-defense to testify to what Victim said before shooting because statements were not offered to prove truth of matter but to show Defendant's subsequent conduct (but not reversible here because there was similar evidence presented).
Facts: (1) Defendant was charged with first degree murder arising out of a shooting. The defense was self-defense. The trial court sustained the State's motion in limine to preclude the defense from asking anything during voir dire about the range of punishment for second-degree murder. The defense claimed it should be allowed to voir dire on the range of punishment for second- degree murder because the parties anticipated that such an instruction would be given, and the defense was entitled to know if jurors could follow the law and range of punishment on it. The State was allowed to voir dire on the range of punishment for first degree murder. During guilt phase deliberations, the jury sent a note asking what the range of punishment was for second-degree murder. The court did not specifically answer. The jury convicted of second-degree murder. During penalty deliberations, the jury sent a note saying they were deadlocked on punishment. After a hammer instruction was given, the jury sentenced to 30 years. (2) During the Defendant's testimony, the trial court sustained a "hearsay" objection to the Defendant testifying about what Victim said before Defendant shot Victim.
Holding: (1) Although the defense did not make an offer of proof as to specific voir dire questions which the defense was precluded from asking, the defense did state in response to the motion in limine that they expected the law and facts to support a second-degree murder instruction, and that they wanted to voir dire on the range of punishment for second-degree murder to see if the jurors could follow the law. Thus, the issue is preserved for appeal. The Defendant's right to an impartial jury is meaningless without the opportunity to show bias. As long as the Defendant's question is in proper form, the trial court should allow the defense to determine whether the jurors can consider the entire range of punishment for a lesser-included form of homicide. The trial court

precluded this because Defendant was charged with first degree murder, but this was unreasonable. The trial court allowed the State to voir dire extensively on the range of punishment for first degree murder. Defendant was prejudiced here because by being denied any opportunity to voir dire on the range of punishment for second-degree murder, he could not determine if jurors were able to follow the full range of punishment. The jury sent a note during guilt phase deliberations about the range of punishment. During penalty phase, the jury sent a note saying they were deadlocked on punishment. After a hammer instruction, the jury sentenced to the maximum, 30 years. The State argues that since the punishment did not exceed the maximum range there is no prejudice, but under that logic, a defendant could never show prejudice unless the punishment was beyond the authorized range, which would be plain error anyway. The State also argues there is no prejudice because the judge could reduce the jury's recommended sentence. "While it is true that the judge might impose a lesser sentence, we do not conclude that trial judges are unaffected by the jury's recommendation." Further, the fact that a judge might impose a lesser sentence should not be confused with the jury's ability to consider the full range of punishment in the first instance. Case remanded for new penalty phase trial. (2) The trial court erred in sustaining the State's "hearsay" objection during Defendant's testimony about what Victim said before Defendant shot him. This was not "hearsay" because not offered for the truth of the matter asserted, i.e., not offered to show the truth of the Victim's statements. Instead, it was offered to explain Defendant's conduct after the statements were made. Although this error facially shows manifest injustice, the error is not reversible because the jury heard similar evidence that would allow it to conclude Defendant was in fear of his life when he shot Victim.

In the Interest of: T.P.B., 2014 WL 4411669 (Mo. App. E.D. Sept. 9, 2014) & In the Interest of J.L.T., 2014 WL 4411679 (Mo. App. E.D. Sept. 9, 2014):
Where Defendant-Juvenile was charged with second degree assault for "knowingly causing physical injury to another person by means of a dangerous instrument," Sec. 565.060.1(2), but trial court found Defendant guilty of second degree assault for "recklessly causing serious physical injury to another person," Sec. 565.060.1(3), this violated Defendant's rights to notice of the charged offense and to prepare a defense, since recklessly causing serious physical injury is not a lesser-included offense of knowingly causing physical injury by means of a dangerous instrument.
Facts: Defendant-Juveniles were charged with second degree assault for knowingly causing physical injury by means of a dangerous instrument, Sec. 565.060.1(2). The trial court found Defendants guilty of recklessly causing serious physical injury to another person, Sec. 565.060.1(3).
Holding: An uncharged offense is a "nested" lesser-included offense if it is impossible to commit the charged offense without necessarily committing the uncharged offense. To commit the uncharged offense, Defendants must have committed "serious physical injury." But to commit the charged offense, Defendants need only have caused an ordinary "physical injury." Because it is possible to commit an ordinary physical injury without causing serious physical injury, it is possible for Defendants to have committed the charged offense without committing the uncharged one. Thus, Sec. 565.060.1(3) is not a lesser-included offense of Sec. 565.060.1(2). The trial court violated due process by convicting of an uncharged offense. Defendants discharged.

State v. Spencer, 2014 WL 4085162 (Mo. App. E.D. Aug. 19, 2014):
Where trial court took motion to suppress "with the case" in a bench trial and at end of trial granted the motion and declared the proceedings to be concluded, the State's interlocutory appeal must be dismissed because it violates Double Jeopardy.
Facts: Defendant, charged with drug possession, filed a motion to suppress, and waived a jury trial. The trial court held a bench trial, during which the motion was taken "with the case." The State and defense made opening statements and the State presented police witnesses. Defendant moved for judgment of acquittal at the close of all evidence, and argued his motion to suppress. The trial court then stated, "Very well. I'm going to grant the motion to suppress the evidence, and that will conclude the matter….Court is in recess." The State filed an interlocutory appeal regarding the motion to suppress.
Holding: Sec. 547.200.2 allows the State an interlocutory appeal regarding a motion to suppress but not if "such an appeal would result in double jeopardy for the defendant." Here, the State presented its entire case. Although the trial court did not enter a not guilty verdict or enter an order labeled a judgment, the appellate court looks at the practical effect of the actions. Here, the trial court did not continue the trial pending an interlocutory appeal. The trial was "concluded." The practical effect is the trial court acquitted Defendant after the suppression of evidence. Double jeopardy applies as the State presented evidence, thus giving due deference to double jeopardy in bench trials. "While taking motions to suppress evidence with a bench trial may serve judicial economy, it is not good practice."

State v. Aston, 2014 WL 2853548 (Mo. App. E.D. 6/24/14):
Even though trial court conducted a "trial by police report" over the State's objection and found Defendant not guilty, the trial court denied the State the right to present evidence to prove its case and double jeopardy does not preclude retrial since this proceeding was not a "trial."
Facts: Defendant was charged with stealing over $500. Defendant waived a jury trial. The trial court then asked for the police reports, and voiced concern about the value of the property being less than $500. The State claimed it would show through witnesses that the value was more than $500. The trial court announced it was going to try the case on the police reports. The State objected. The trial court then found Defendant not guilty. The State appealed.
Holding: Rule 27.02(g) and Sec. 546.070(1) state that the State shall offer evidence at trial. Because the State has the burden of proof, it should not be unduly limited in how it presents evidence. Here, the trial court foreclosed the State from presenting witnesses as to value. The trial court, in effect, allowed Defendant to unilaterally stipulate that the police reports were the only evidence against him. No cases allow a Defendant to unilaterally, over objection, submit a case on the police reports. Having heard no evidence, the trial court never conducted an actual "trial," at which the State could present evidence. The court did not provide the State with a full and fair opportunity to vindicate society's interest. Thus, Defendant's right to be free from double jeopardy would not be violated by a trial. Not guilty judgment reversed.

State v. Williams, No. ED99399 (Mo. App. E.D. 6/28/13):
Trial court does not have authority to dismiss a criminal case with prejudice in the absence of a speedy trial violation.
Facts: In early 2012, Defendant was charged with a drug offense. Later in 2012, he entered in a plea bargain with the State. However, on the day of the scheduled plea, the State failed to appear. Defense counsel moved to dismiss for failure to prosecute. The trial court dismissed the charge *with* prejudice. The State appealed.
Holding: Only the prosecutor has the authority to voluntarily dismiss or nolle prosequi a felony charge, because the prosecutor has more knowledge about all the circumstances of the cases. While a trial court has authority to dismiss a case *without* prejudice for failure to prosecute in certain circumstances, it has no inherent authority do so *with* prejudice absent a speedy trial violation, and no such violation was alleged here.

State v. Pierce, 2013 WL 682739 (Mo. App. E.D. Feb. 26, 2013):
Even though Article I, Sec. 19, of the Missouri Constitution provides that a case should be retried within the same or next term of court following a mistrial, this privilege is waived if not timely asserted, and Defendant waived the privilege by not objecting to multiple continuances after his mistrial. This was a case of first impression.
Facts: In 2010, Defendant's first trial ended in a hung jury. Subsequently, several continuances were granted due to scheduling conflicts and other reasons. The case was tried about one year later. On the day of trial, Defendant filed a motion to dismiss for violation of Article I, Sec. 19, Mo. Const., which was overruled. After conviction, Defendant appealed.
Holding: Article I, Sec. 19, states that "if the jury fail[s] to render a verdict the court may … discharge the jury and commit or bail the prisoner for trial at the same or next term of court." Since no local rule governs the terms of court of the City of St. Louis, this is determined by Sec. 478.205, which provides that terms of court begin in February, May, August and November of each year. Here, after the mistrial, Defendant's case was rescheduled during the same term of court, but ultimately continued approximately seven times for multiple reasons. Defendant never objected to the continuances or demanded a speedy trial. Like other speedy trial rights, a Defendant waives his privilege under Article I, Sec. 19, if he does not assert a timely demand for a trial. Because Defendant did not affirmatively demand an earlier trial date, he waived his privilege.

State v. Ousley, No. ED97047 (Mo. App. E.D. 11/20/12):
(1) Even though the trial court did not abuse its discretion in excluding Defendant's mother and grandmother as witnesses in Defendant's case-in-chief as a sanction for late disclosure of the witnesses, where the State presented rebuttal evidence, Defendant was entitled to call the mother and grandmother as surrebuttal witnesses because surrebuttal witnesses need not be disclosed; and (2) where Defendant was charged with forcible rape, Defendant should have been permitted to voir dire potential jurors on whether they could consider that teenagers would have consensual sex because this was a critical fact with a substantial potential for disqualifying bias.
Facts: Defendant, who was 19, was charged with forcible rape of a 14 year old. The trial court set a pretrial deadline for disclosure of witnesses, which Defendant failed to meet. As a sanction, the trial court excluded as witnesses Defendant's mother and

grandmother, who were going to testify that Defendant's physical condition made it impossible for him to commit a forcible rape. After Defendant presented other evidence of this at trial, the State called a doctor in rebuttal. Defendant then sought to call his mother and grandmother in surrebuttal, but the trial court would not permit this because of its prior sanction.

Holding: (1) If the State introduces a new matter during rebuttal, the Defendant is entitled to offer surrebuttal. Because the nature of rebuttal requires a party to depend on the evidence presented in determining whether to offer rebuttal, rebuttal witnesses need not be disclosed or endorsed; this applies to surrebuttal evidence, too. Regardless of any initial discovery sanction, when Defendant offered his mother and grandmother as surrebuttal witnesses, it became a new inquiry for the trial court to determine whether Defendant was entitled to call them in light of the State's rebuttal evidence; this determination was to be made anew without reference to the rules of discovery or the trial court's earlier sanction. The trial court abused discretion in excluding the surrebuttal witnesses (but not prejudicial under facts of case). (2) During voir dire Defendant sought to ask potential jurors whether they could consider that two teenagers had consensual sex. The State objected that this was seeking a commitment, and the trial court sustained the objection. However, a party is entitled to ask about critical facts that have a substantial potential for disqualifying bias. Here, Defendant could not have been charged with statutory rape because it is defined as sex with a person who is less than 14, or a person who is at least 21 having sex with a person who is less than 17. Defendant's question sought to inquire as to whether jurors would impose consequences for such an act, even if it was not illegal. This did not require a commitment from jurors to acquit Defendant upon hearing that two teenagers had sex, but rather sought to ensure that jurors could follow the law as it relates to sex among minors if they believed the sex was consensual. The trial court abused discretion in prohibiting this question (but was not prejudicial in context of case).

State v. Moore, No. ED95952 (Mo. App. E.D. 2/21/12):

Where the person who served a subpoena was not a sheriff's deputy and failed to make an affidavit of service as required by Rule 26.02, the trial court did not err in failing to issue a writ of body attachment.

Facts: A subpoenaed defense witness did not appear for testimony. Trial counsel sought a writ of body attachment. Counsel presented an "Officer's Return" that stated that a copy of the subpoena was served on such date, and was signed by Joyce Conley, who was not a sheriff's deputy but who used to work for the prosecutor's office. The return did not have a copy of the subpoena attached. Counsel stated that the subpoena form was taken from the circuit court's website. Conley testified she served the subpoena on the witness and signed the return. The trial court found the return invalid, and refused to issue a writ of body attachment.

Holding: Rule 26.02 sets out the procedure for subpoenaing witnesses. As relevant here, 26.02(e) states that if the person serving the subpoena is not an officer, that person "shall" make an affidavit as to the time, place and manner of service. Here, no copy of the subpoena was ever before the court. Moreover, Conley failed to submit a proper return in that she failed to make an affidavit as to the time, place and manner of service, as required by Rule 26.02(e). We need not decide whether a process server may testify in

court in lieu of an affidavit to the Rule 26.02 requirement because, without a copy of the subpoena showing what it contained, we cannot say the subpoena was validly executed. Court did not abuse discretion in failing to issue writ of body attachment.

State v. O'Neal, No. ED95274 (Mo. App. E.D. 11/29/11):
Where prosecutor objected to admission of Defendant's medical records in front of the jury by saying they were"simply a way to avoid the defendant testifying," this was a direct comment on Defendant's failure to testify and a mistrial should have been granted.
Facts: Defendant was charged with attempted stealing. As part of his defense, he sought to introduce his medical records with a business records affidavit. The prosecutor objected to the records in front of the jury as "simply a way to avoid the defendant testifying." Defense counsel objected as violating defendant's rights not to testify and requested a mistrial, which the trial court overruled.
Holding: A direct reference to a defendant's failure to testify violates the rights of freedom from self-incrimination and right not to testify under the 5th and 14th Amendments, and Art. I, Sec. 19 Mo. Const. A "direct reference" uses words such as "testify," "accused" and "defendant." Here, the prosecutor's speaking objection in front of the jury was egregious because there had been a prior bench conference about the records at which the State had made an objection that had been overruled. The objection in front of the jury may have prejudiced the jury against Defendant for using the medical records rather than testifying himself. Reversed for new trial.

State v. Evans, 2015 WL 5672638 (Mo. App. S.D. Sept. 25, 2015):
Holding: Even though the court conducted a *Frye* hearing before trial on the admissibility of certain scientific evidence, the court's pretrial ruling was interlocutory and subject to change at trial, and Defendant failed to preserve his *Frye* challenge for appeal by failing to object to admission of the scientific evidence testimony at trial on grounds that it failed to satisfy the *Frye* test.

State v. Henderson, 2015 WL 4627424 (Mo. App. S.D. Aug. 4, 2015):
Holding: (1) The 25-day requirement for filing a New Trial Motion under Rule 29.11(b) is not jurisdictional, and can be waived by the State; where State had asked trial judge to rule on the merits of "late" New Trial Motion, State could not argue the opposite on appeal to bar appellate court from ruling issue on the merits; appellate court decides issue on the merits; (2) where the written judgment and sentence misstated the offense Defendant was convicted of, this was a clerical error that can be corrected nunc pro tunc.

State v. Chambers, 2015 WL 2375401 (Mo. App. S.D. May 18, 2015):
Even though Defendant did not call up for hearing his timely-filed motion to change venue under Rule 32.03 until the day of trial, it was mandatory that the trial court grant the motion.
Facts: Defendant filed a timely motion to change venue under Rule 32.03 in a county with less than 75,000 inhabitants. However, the court never ruled on it. On the day of trial, Defendant requested the court rule on the motion. The trial court held Defendant waived the motion by failing to bring it to the court's attention until the day of trial.

Holding: Rule 32.03(c) provides that if a timely motion for change of venue is filed, the court shall transfer the case to another county. Even though Defendant waited until the day of trial to have his motion heard, he did not waive it because he sought a ruling before trial proceedings began. Defendant would have waived the motion if he had waited until after voir dire, for example, but he asserted his motion before any trial proceedings began.

State v. Dozier, 2015 WL 545931 (Mo. App. S.D. Feb. 10, 2015):
Holding: Prosecutor may orally or in writing enter a *nolle prosequi* to a charge at any time before the case is submitted to a jury, and unless jeopardy has attached, the dismissal is without prejudice; after a prosecutor so dismisses a case, trial court has no jurisdiction to make the dismissal with prejudice.

State v. Reed, 2014 WL 4457266 (Mo. App. S.D. Sept. 10, 2014):
Holding: Where preliminary hearing Witness died before trial and even though the preliminary hearing was not recorded, Defendant's confrontation rights were not violated by State calling a different witness to testify to what Witness had said at the preliminary hearing.
Discussion: Under the Sixth Amendment Confrontation Clause, prior preliminary hearing testimony and other 'testimonial' proof is inadmissible unless the witness is unavailable and the Defendant had a prior opportunity for cross-examination. Defendant had that at the preliminary hearing. He does not contend the opportunity to cross-examine there was "inadequate." Therefore, testimony about what Witness testified to at preliminary hearing did not violate Confrontation Clause.

State v. Love, 2014 WL 4723124 (Mo. App. S.D. Sept. 23, 2014):
Where trial court granted a motion to set aside judgment or for new trial, but then took no further action in case, the State could not appeal since there was no "final judgment."
Facts: After conviction at trial, Defendant filed a "Motion to Set Aside Judgment or for New Trial," which was sustained. However, the trial court took no further action. The State appealed.
Holding: In order to appeal, there must be a "final judgment" which disposes of all issues and leaves nothing for future determination. Here, the trial court merely set aside the judgment of conviction, apparently because the court thought the evidence was insufficient. However, the court failed to enter a judgment of acquittal, failed to convict of a lesser-included offense, or failed to finalize the case in any other legally permissible way. Therefore, there is no final judgment to support an appeal.

State v. Benitez, 2013 WL 2474511 (Mo. App. S.D. June 10, 2013):
Holding: Allowing child-victim to testify behind a screen so that child could not see Defendant, without a specific finding of necessity for this, violated Defendant's 6th Amendment confrontation rights (but was harmless under facts of case).
Discussion: *Maryland v. Craig*, 497 U.S. 836 (1990), allows face-to-face confrontation to be dispensed with but only if the State makes an adequate showing of necessity to protect the child from trauma in testifying. The requisite finding of necessity must be a case-specific one. The trial court must find that the emotional trauma suffered by the

child in the presence of defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify. Here, the trial court made none of the case-specific findings required by *Craig* before allowing the screen. The trial court relied on a generalized finding that because of the child's young age and nature of the charge, that the screen was permissible. But *Craig* does not allow this generalized finding. However, here the evidence was harmless because the child's testimony was cumulative of other evidence, and Defendant chose not to cross-examine child at all which indicates that child's statements contained no important infirmities.

State v. Canaday, 2015 WL 8238881 (Mo. App. W.D. Dec. 8, 2015):
Amendment of child molestation charge at close of all evidence to charge different manner of committing offense prejudiced Defendant because the defense he presented became inapplicable under the amended charge; Rule 23.08 allows amendment of a charge during trial only if no additional or different offense is charged, and Defendant's substantial rights are not prejudiced.
Facts: Defendant was charged with child molestation, statutory rape, and intentionally exposing a person to HIV. The child molestation count was based on a charge that Defendant touched Victim's breast. At trial, Victim testified that Defendant placed his penis in her vagina, and touched her "front private" with his hand. At the close of all evidence, the State amended the child molestation count to charge that Defendant placed his hand on her vagina.
Holding: The amendment made Defendant's line of questioning throughout trial inapplicable because no witness testified Defendant touched Victim's breast. Knowing there was an absence of such testimony, Defendant argued that although damage to Victim's vagina was found, the damage was caused by digital penetration rather than penile penetration, making the evidence insufficient to prove the statutory rape charge. Being aware that digital penetration was not a lesser-included charge of statutory rape, Defendant believed it was a safe, strategic decision to essentially admit digital penetration, as opposed to penile penetration. By amending the charge, Defendant was left with no defense to child molestation. The State contends Defendant should have known the charge would be amended because there was nothing in discovery about touching Victim's breast; but the State chose to charge that, and Defendant wasn't required to predict the State's incompetence. Remanded for new trial on child molestation.

State v. Johnston, 2014 WL 4823628 (Mo. App. W.D. Sept. 30, 2014):
Where trial court granted new trial on basis that guilty verdict was "against the weight of the evidence," this was not a "final judgment" subject to appeal since the trial proceedings would continue; granting a new trial on this basis does not implicate double jeopardy because this is not a judgment of acquittal or finding of insufficient evidence.
Facts: Defendant was convicted of first degree murder. The trial court then granted Defendant's motion for new trial. The court found that the guilty verdict was "against the weight of the evidence," establishing good cause under Rule 29.11 which provides that a trial court may grant a new trial upon good cause shown. Additionally, Sec. 547.020(5) allows a trial court to grant a new trial "when the verdict is contrary to the law or evidence." The State appealed.

Holding: There is no "final judgment" here to allow an appeal. The judgment granting a new trial did not dispose of all issues and leave nothing for future adjudication. Here, everything is left for future adjudication since a new trial is pending. The State argues that the judgment was a *de facto* acquittal and that the State should be allowed to appeal because double jeopardy precludes retrial. But double jeopardy precludes retrial only if a conviction is set aside for insufficient evidence to support the verdict. However, when a new trial is granted because the verdict is "against the weight of the evidence," rather than that the evidence was insufficient to support the verdict, double jeopardy does not bar a retrial. The trial court made its own credibility determinations and assessed the evidence, which indicates a weight of the evidence rather than a sufficiency of the evidence analysis. Appeal dismissed.

State v. Cochran, No. WD73766 (Mo. App. W.D. 5/1/12):
(1) Expert should not be permitted to testify that Defendant committed "animal abuse" under Sec. 578.012 because this invades the province of the jury; and (2) where Defendant was charged with county ordinance violation but State failed to introduce the ordinance into evidence at trial, a court cannot judicially notice a county or municipal ordinance and the failure to introduce it at trial made the evidence insufficient to convict.
Facts: Defendant was charged with and convicted of animal abuse under Sec. 578.012 and with violation of a county ordinance regarding vaccination of animals. At trial, an animal care official ("Expert") testified about the conditions in which the animals were found and that "animal abuse" occurred.
Holding: (1) It was proper for Expert to testify about the inadequate conditions in which the animals lived, such as inadequate food and water. The State, however, asked Expert whether "animal abuse" occurred. "Animal abuse" includes the element of whether the Defendant knowingly failed to provide adequate care for the animals. To the extent that Expert's testimony could be interpreted as Expert testifying that Defendant knowingly failed to provide adequate care, it exceeded his expertise and invaded the province of the jury. However, court finds the error harmless here in light of other evidence. (2) The State failed to prove guilt of the county ordinance violation because the State failed to introduce it into evidence. Sec. 479.250 and subsequent cases require that municipal and county ordinances be introduced into evidence either by formal presentation or by stipulation. A court cannot judicially notice an ordinance. The ordinance is an essential element of proof. No misconduct can be shown or conviction proven without it. The State's evidence being insufficient, it would violate double jeopardy to re-try Defendant on the county ordinance violation, so that conviction must be vacated.

*** Perry v. New Hampshire, ___ U.S. ___, 90 Crim. L. Rep. 500 (U.S. 1/11/12):**
Holding: Eyewitness identifications are not subject to suppression unless police arranged the suggestive circumstances; however, defendants may counter identifications with cross-examination, expert testimony, and jury instructions on the reliability of eyewitness identification.

U.S. v. Jimenez-Bencevi, 97 Crim. L. Rep. 271 (1st Cir. 6/3/15):
Holding: (1) Even though Defendant charged with death penalty had given an unaccepted proffer to Gov't in which he said he did the crime, trial court violated

Defendant's immunity agreement by refusing to allow an expert to testify at his trial that surveillance video of the crime scene showed the shooter was taller than Defendant, unless the expert was told that Defendant had confessed during the proffer; a proffer, much less an unaccepted proffer, is not the same as a guilty plea. (2) Defense counsel was not prevented from presenting expert's testimony on grounds of ethical rule prohibiting counsel from presenting evidence counsel "knows" to be false, because Defendant had equivocated whether he really did crime, and may have confessed during the proffer to avoid the death penalty.

U.S. v. Millan-Isaac, 2014 WL 1613683 (1st Cir. 2014):
Holding: Even though Defendant's counsel made reference at Defendant's sentencing to text messages translated into English, this was not a waiver of Defendant's Jones Act right to have his proceedings conducted in English, when Gov't then introduced Spanish text messages for the court's review.

U.S. v. Ortiz-Garcia, 90 Crim. L. Rep. 354 (1st Cir. 12/7/11):
Holding: Guilty-pleading Defendant's waiver of appeal rights was rendered involuntary by judge's failure to ensure that Defendant was aware of the maximum sentence he faced.

U.S. v. Haynes, 93 Crim. L. Rep. 752 (2d Cir. 9/5/13):
Holding: Court erred in shackling Defendant, who had no prior criminal history, at drug trial, without indicating why shackling was necessary and whether there were less onerous ways to meet safety concerns.

U.S. v. Flores-Mejia, 95 Crim. L. Rep. 507 (3d Cir. 7/16/14):
Holding: To preserve a claim that sentencing judge failed to consider an issue, Defendant must object in the district court immediately after the judge imposes the sentence.

U.S. v. Moore, 2014 WL 4065700 (7th Cir. 2014):
Holding: Trial court erred erred in accepting a partial verdict, whereby it accepted a verdict of carjacking, which was the predicate crime for another charge, but allowed jury to continue to deliberate on the other charge; accepting the partial verdict precluded a scenario whereby the jury might have later realized that since it didn't agree on the other charge, it should revisit the carjacking guilty verdict, too.

U.S. v. Miller, 2012 WL 3059295 (7th Cir. 2012):
Holding: Where Defendant was charged with receiving child pornography and his granddaughter alleged he had inappropriately touched her, before admitting granddaughter's allegations of prior bad acts, the court should have first determined whether those allegations fell within the scope of the rule allowing prior bad acts, and second, whether such evidence was more prejudicial than probative and articulated its decision on the record.

U.S. v. Haischer, 97 Crim. L. Rep. 39 (9th Cir. 3/25/15):
Holding: Defendant can adopt inconsistent defenses, so need not admit guilt in order to claim an affirmative duress offense; Defendant can claim duress while holding Gov't to burden to prove mens rea by contending she did not commit the offense with the required intent.

U.S. v. Gillenwater, 93 Crim. L. Rep. 444, 2013 WL 2930502, 2013 WL 2930502 (9th Cir. 6/17/13):
Holding: In a case of first impression in the federal circuits, 9th Circuit holds that defendants have a constitutional right to testify at their own pretrial competency hearings, and only the defendants, not their lawyers, can waive that right; however, a defendant may be deemed to have waived the right if he sits mute when defense counsel elects not to call him as a witness. Constitutional right to testify stems from 6th and 14th Amendments' right to testify at trial.

U.S. v. Toombs, 93 Crim. L. Rep. 189 (10th Cir. 4/26/13):
Holding: Before court may admit Defendant's testimony from a prior trial, it must first rule on any of Defendant's admissibility objections at the second trial.

U.S. v. Ly, 89 Crim. L. Rep. 689, 2011 WL 2848477 (11th Cir. 7/20/11):
Holding: Trial court erred in failing to clarify for a confused pro se defendant that he had a right to testify in narrative form.

U.S. v. Martinez-Cruz, 94 Crim. L. Rep. 332, 2013 WL 6231562 (D.C. Cir. 12/3/13):
Holding: When a Defendant presents objective evidence giving rise to a reasonable inference that a prior conviction being used to enhance punishment involved an invalid waiver of counsel, the burden shifts to the prosecution to prove the waiver was valid.

U.S. v. Moore, 89 Crim. L. Rep. 722, 2011 WL 3211511 (D.C. Cir. 7/29/11):
Holding: Gov't cannot present a law enforcement "overview" witness to give a preview summary of the case.

In re Taylor, 2013 WL 3940827 (D.C. 2013):
Holding: Beneficiary of order of protection cannot prosecute an indirect criminal contempt against the person who the order of protection is against; allowing the beneficiary to prosecute the action compromises the public reputation of judicial proceedings.

U.S. v. Dupree, 2011 WL 5884219 (E.D. N.Y. 2011):
Holding: Defendants were entitled to cross-examine a government witness regarding her use of antianxiety medication because it was probative of her ability to recall the events about which she was expected to testify.

U.S. v. Martoma, 2013 WL 4502829 (S.D. N.Y. 2013):
Holding: Gov't lacked standing to assert attorney-client privilege on behalf of a cooperating witness from whom Defendant was seeking documents via a motion to

compel; Witness did not authorize the Gov't to assert his rights and moved to assert them himself.

U.S. v. Bran, 2013 WL 2565518 (E.D. Va. 2013):
Holding: (1) Where Gov't deported a witness who would likely have provided favorable testimony for Defendant and Gov't was aware at time of deportation that witness had information about case, some sanction for the Gov't's conduct was appropriate; but (2) appropriate sanction was a "missing witness" jury instruction, not dismissal of case.

Porta v. State, 2013 WL 3070389 (Ark. 2013):
Holding: Even though forensic mental health examiner had warned Defendant about the nonconfidential nature of his competency exam, trial court erred in allowing his inculpatory statements made during the exam to be admitted at trial, because this violated his constitutional right not to incriminate himself and forced him to choose between one constitutional right in order to claim another.

State v. King, 2014 WL 1282567 (Conn. 2014):
Holding: Guilty verdicts on two counts of assault based on jury's finding that Defendant acted intentionally and recklessly were legally inconsistent in violation of due process.

State v. Komisarjevsky, 2011 WL 3557908 (Conn. 2011):
Holding: Defendant's 6th Amendment right to a fair trial and to prepare a defense allowed court to seal defense witness list from the media and public prior to trial.

Hazuri v. State, 2012 WL 1947979 (Fla. 2012):
Holding: Even though trial transcripts are not allowed in jury room, where jury requested trial transcripts during deliberations, trial court was required to tell jury that it had a right to a "read back" of testimony it wished to review, and should not have merely told them to rely on their collective recollection of the evidence.

State v. Monteil, 96 Crim. L. Rep. 359 (Haw. 12/23/14):
Holding: Judge, in advising defendants about right to testify or not, must also inform them that if they exercise their right not to testify, that fact can't be used by the fact-finder.

State v. Greene, 2014 WL 3377251 (Kan. 2014):
Holding: Where Defendant ultimately did not present an alibi defense at trial, evidence and statements made in the pretrial alibi notice were not admissible by the State, because this shifted burden to defense and was a comment on defense's failure to call witnesses.

State v. Sampson, 93 Crim. L. Rep. 183 (Kan. 5/3/13):
Holding: Even though court has discretion to exempt police officer witnesses from rule excluding witnesses, court cannot allow police officer witness to sit at prosecution table.

State v. Rochelle, 93 Crim. L. Rep. 101 (Kan. 4/12/13):
Holding: Judge has discretion to allow child witness to testify with a "comfort person" without a finding of necessity, but may also consider alternatives which may lessen potential prejudice such as whether the comfort person is related to the child, which may lessen prejudice; where the "comfort person" is seated in relation to child; the availability of items in the courtroom (such as child-sized chairs) that would eliminate the need for a "comfort person"; a cautionary instruction to jurors to disregard the "comfort person" and not permit the person's presence to influence credibility determinations; and a cautionary instruction to the "comfort person" not to speak or gesture to influence answers of child.

Allen v. Com., 94 Crim. L. Rep. 15, 2013 WL 5406606 (Ky. 9/26/13):
Holding: Judge violated 6th Amendment right of self-representation where Defendant was representing himself at trial, but judge allowed only standby counsel to attend bench conferences.

Stacy v. Com., 92 Crim. L. Rep. 793 (Ky. 3/21/13):
Holding: Court should hold a hearing and make certain findings before requiring a defense witness to wear jail clothes at trial; the practice of requiring defense witnesses to appear shackled or in jail clothes can be inherently prejudicial to defense.

State v. Chinn, 2011 WL 414360 (La. 2012):
Holding: Due to a state constitutional provision prohibiting a noncapital defendant's waiver of a jury trial later than 45 days prior to the scheduled trial date, the trial court's sole course of action, when the state requested a trial date for the noncapital trial only 43 days away, was to consider the waiver, and if the waiver was accepted, to set a trial date beyond the 45-day period.

Com. v. Brescia, 29 N.E.3d 837 (Mass. 2015):
Holding: Defendant entitled to new trial where he suffered a stroke between first and second day of his testimony, and Prosecutor used his apparent lack of memory to attack his credibility.

Com. v. Maldonado, 94 Crim. L. Rep. 437 (Mass. 1/8/14):
Holding: Trial judge cannot require members of the public entering the courtroom to show identification, absent on-the-record findings that justify such a security measure.

Com. v. Barnes, 2012 WL 798754 (Mass. 2012):
Holding: Commonwealth did not demonstrate that psychological or physical harm to the minor victim could result from live internet streaming of audio and video recordings of criminal dangerous hearing.

Duylz v. State, 91 Crim. L. Rep. 73 (Md. 3/21/12):
Holding: Where a judge restricted Defendant's right to cross-examine a witness at a pretrial motion to suppress hearing, this precluded the State from later using the testimony at trial when the witness did not appear.

Thomas v. State, 2011 WL 4389167 (Md. 2011):
Holding: A showing that a witness committed the conduct underlying an unconstitutional guilty plea can be used to impeach the witness.

Precaido v. State, 318 P.3d 176 (Nev. 2014):
Holding: Due process required that bench and in-chambers conferences during trial be of record and transcribed; failure to do this denied Defendant the right to meaningful appellate review.

State v. Guild, 91 Crim. L. Rep. 105 (N.H. 4/10/12):
Holding: Where trial court fails to sequester a witness, this requires a new trial unless the error is harmless beyond a reasonable doubt.

State v. K.P.S., 2015 WL 1809224 (N.J. 2015):
Holding: Even though appellate court had affirmed denial of motion to suppress in co-defendant's case on same facts, the law-of-the-case doctrine did not apply in Defendant's case to bar consideration of the issue; Defendant had due process right to have his claim decided independently.

People v. Kevin W., 94 Crim. L. Rep. 307, 2013 WL 6096129 (N.Y. 11/21/13):
Holding: Once a trial court has ruled on a suppression motion, the State cannot "reopen" the hearing to present witnesses it chose not to present at the original hearing.

People v. Cantave, 2013 WL 3185171 (N.Y. 2013):
Holding: Prosecutor violated Defendant's right against self-incrimination where he cross-examined Defendant at trial about a prior, unrelated conviction that was pending on direct appeal and thus Defendant remained at risk of self-incrimination.

People v. Best, 92 Crim. L. Rep. 236 (N.Y. 11/20/12):
Holding: The same standard barring visible shackling at a jury trial also applies to a bench trial.

People v. Steward, 89 Crim. L. Rep. 601 (N.Y. 6/7/11):
Holding: Trial court's limiting voir dire to 5 minutes per panel in complex felony trial denied fair opportunity to explore jurors' qualifications.

State v. Harris, 2015 WL 266924 (Ohio 2015):
Holding: Where Defendant had abandoned his NGRI defense before trial and was not pursuing a mental health defense, court violated Defendant's right against self-incrimination by allowing State in its case-in-chief to call psychologist who had examined Defendant for State to testify that he was faking mental illness.

State v. Hewins, 2014 WL 3461758 (S.C. 2014):
Holding: Even though Defendant litigated a motion to suppress of items in his car in Municipal Court in an open container case, collateral estoppel did not preclude Defendant from re-litigating the motion in State court in drug possession case; the suppression

issues weren't necessarily the same, and Defendant had little incentive to pursue the motion in Municipal Court given the minimal penalty for open container.

State v. Rivera, 2013 WL 518629 (S.C. 2013):
Holding: Trial court (under apparent prompting by defense counsel) violated Defendant's right to testify where it prevented Defendant from testifying at trial under paternalistic belief, shared by defense counsel, that such testimony would undermine his own defense.

State v. Humphries, 96 Crim. L. Rep. 138 (Wash. 10/23/14):
Holding: Defense counsel cannot stipulate to an element of the offense without the client's consent; here, defense counsel, over client's objection, had stipulated that client had prior convictions in felon-in-possession prosecution in order to prevent jury from hearing about the nature of the prior convictions.

State v. Coristine, 93 Crim. L. Rep. 204, 300 P.3d 400 (Wash. 5/9/13):
Holding: Court violated Defendant's 6th Amendment right to control his defense by giving a jury instruction on an affirmative defense over a defense objection; court finds right to control one's defense is derived right to self-representation in *Faretta* and right to plead guilty while maintaining innocence in *Alford*.

State v. Herbert, 96 Crim. L. Rep. 250 (W.Va. 11/25/14):
Holding: Where a non-party Witness intends to invoke their right against self-incrimination, the trial court shall require the Witness to do that in the presence of the jury; judge does not have discretion to have this occur outside jury's presence.

State v. Harrison, 96 Crim. L. Rep. 492 (Wis. 1/22/15):
Holding: Erroneous denial of change of judge cannot be harmless error, because this would nullify the statutory right to change of judge.

Beamon v. State, 2014 WL 1744100 (Ala. App. 2014):
Holding: Where a court denies a request to proceed in forma pauperis, it should give Petitioner a reasonable time, such as 30 days, to pay the filing fee, and such reasonable time may include a period extending beyond a limitations period.

Johnson v. O'Connor ex rel. County of Maricopa, 2014 WL 2557700 (Ariz. App. 2014):
Holding: The Uniform Act to Secure Attendance of Witnesses From Outside State authorizes a subpoena for production of records.

People v. Murillo, 2014 WL 5864409 (Cal. App. 2014):
Holding: Defendant was denied fair trial and right to confront witnesses where Prosecutor was allowed to call alleged attempted murder victim who, in front of jury, refused to testify and who refused to answer 110 different leading questions about his out-of-court statements that Defendant was the shooter.

People v. Espinoza, 2015 WL 358798 (Cal. App. 2015):
Holding: Even though pro se Defendant intentionally failed to appear for second day of trial with the intention of causing a mistrial, court violated due process right to present a defense and Defendant's confrontation rights by proceeding with the trial without him; there was no evidence Defendant knew the trial would proceed without him, and court could have appointed counsel to represent Defendant.

People v. Gutierrez, 2013 WL 940786 (Cal. App. 2013):
Holding: State's duty to disclose *Brady* material applies at preliminary hearings.

People v. Martin, 2014 WL 4242641 (Colo. App. 2014):
Holding: After Defendant rests but then moves to "reopen" proceedings to testify, trial court must consider factors such as the timeliness of the motion, the nature of Defendant's testimony, the effect of granting the motion, and the reasonableness of Defendant's explanation for failing to testify during his case-in-chief.

Long v. State, 2014 WL 5462459 (Fla. App. 2014):
Holding: Even though court required advocacy group to remove their "insignia," the presence of "Bikers Against Child Abuse" in courtroom during child abuse trial created an inherently prejudicial atmosphere and denied Defendant his due process right to an impartial jury, even though jurors denied that the group's presence would affect their verdict.

Barnett v. Antonacci, 2013 WL 4525322 (Fla. App. 2013):
Holding: Prosecutor's decision to file charges or nolle a case is not a "stage" of the criminal proceedings invoking victims' rights to intervene; such an interpretation would unconstitutionally impinge on a prosecutor's exclusive authority to decide when to bring or dismiss charges.

Rolon v. State, 2011 WL 4809119 (Fla. Dist. Ct. App. 2011):
Holding: Where, during his first trial, defendant was deprived of effective assistance of counsel during his direct and cross-examination, the court erred in allowing the state to introduce defendant's statements from the first trial during the second trial.

Osborn v. State, 2011 WL 2697853 (Ga. App. 2011):
Holding: Holding voir dire in a church did not comply with statute which permitted trials in places other than courthouses.

People v. Buie, 2011 WL 93003 (Mich. App. 2011), appeal granted, 489 Mich. 938, 797 N.W.2d 640 (2011):
Holding: Permitting witnesses to testify via two-way, interactive video technology without defendant's consent was plain error in that it violated defendant's right to confrontation.

State v. Nunez, 2014 WL 2573988 (N.J. Super. Ct. App. 2014):
Holding: Defendant's right to counsel was violated where State was allowed to call defense investigator to testify about statements made by a witness; right to counsel includes the right to thoroughly investigate case; having to risk the State's introduction of results of defense investigation denies effective assistance of counsel.

People v. Delee, 969 N.Y.S.2d 350 (N.Y. App. 2013):
Holding: Jury verdict finding Defendant guilty of manslaughter as a hate crime, but not guilty of manslaughter in the first degree, was inconsistent as legally impossible, so as to require reversal of conviction.

People v. Quin, 2012 WL 751561 (N.Y. Sup 2012):
Holding: No statutory or other legal basis existed to permit the prosecution to be present at, or videotape, the defendant's competency hearing in an attempted assault prosecution.

People v. Strotehrs, 2011 WL 3503237 (N.Y. App. Div. 2011):
Holding: Beginning suppression hearing without defense counsel being present was fundamental error, even though counsel for co-defendant was present; defendant entitled to new suppression hearing.

State v. Creech, 2014 WL 4629594 (Ohio App. 2014):
Holding: In felon-in-possession case, trial court abused discretion in denying Defendant's motion to stipulate that he had prior felonies; even though trial court gave a limiting instruction about the prior felonies, the prejudicial effect from the jury learning the nature of the prior felonies (assault, drug possession, drug trafficking near a school) outweighed the probative value.

State v. Larkin, 2013 WL 1281858 (Tenn. App. 2013):
Holding: Test for determining whether an expert originally hired by defense would later be permitted to testify for the State in the case was whether an ordinary person knowledgeable of all relevant facts would conclude that allowing the expert to switch sides posed a substantial risk of disservice to the public interest and/or defendant's fundamental right to a fair trial.

Lundgren v. State, 2014 WL 2865806 (Tex. App. 2014):
Holding: A valid waiver of appeal does not waive Defendant's right to file a new trial motion in trial court.

Ex parte Doan, 2012 WL 2327914 (Tex. Crim. App. 2012):
Holding: Where prosecutor in County X sought to revoke Defendant's probation based on a theft in County Y but the evidence was found to be insufficient, res judicata barred County Y from instituting theft charges against Defendant.

State v. Rainey, 2014 WL 700164 (Wash. App. 2014):
Holding: Even though attorney told court that Witness would assert 5th Amendment right against self-incrimination if called to testify, Defendant's right to a public trial was

violated where court did not require Witness to be sworn and assert her 5th Amendment right in open court.

State v. Rainey, 2014 WL 2013362 (Wash. App. 2014):
Holding: A witness' assertion of 5th Amendment privilege against self-incrimination must generally be asserted only on the witness stand in open court.

State v. Terry, 2014 WL 2772899 (Wash. App. 2014):
Holding: Where the trial court allowed jurors to ask questions (through the judge) during trial, trial court violated Defendant's due process rights by asking a question submitted by a juror that was an indirect comment on Defendant's right to post-arrest silence; question asked whether Defendant ever asked Officer why he was being arrested, and Prosecutor argued in closing that Defendant's failure to ask was probative of guilt.

Venue

State v. Chambers, 2015 WL 2375401 (Mo. App. S.D. May 18, 2015):
Even though Defendant did not call up for hearing his timely-filed motion to change venue under Rule 32.03 until the day of trial, it was mandatory that the trial court grant the motion.
Facts: Defendant filed a timely motion to change venue under Rule 32.03 in a county with less than 75,000 inhabitants. However, the court never ruled on it. On the day of trial, Defendant requested the court rule on the motion. The trial court held Defendant waived the motion by failing to bring it to the court's attention until the day of trial.
Holding: Rule 32.03(c) provides that if a timely motion for change of venue is filed, the court shall transfer the case to another county. Even though Defendant waited until the day of trial to have his motion heard, he did not waive it because he sought a ruling before trial proceedings began. Defendant would have waived the motion if he had waited until after voir dire, for example, but he asserted his motion before any trial proceedings began.

U.S. v. Vilar, 93 Crim. L. Rep. 709 (2d Cir. 8/30/13):
Holding: The limits on extraterritorial application of U.S. securities fraud laws set forth in *Morrison v. National Austrialia Bank Ltd* (U.S. 2010) apply to criminal prosecutions.

U.S. v. Auernheimer, 95 Crim. L. Rep. 65 (3d Cir. 4/11/14):
Holding: Venue for prosecution under the Computer Fraud and Abuse Act, 18 USC 1030, lies in the place where the "essential conduct" of the offense occurred, not the location of the "circumstance elements." Thus, venue was not proper in New Jersey, even though certain email addresses were affected there, where Defendants' hacking conduct occurred in Arkansas and California, and various affected servers were located in Georgia and Texas.

Com. v. Toolan, 2011 WL 3659405 (Mass. 2011):
Holding: Change of venue should have been granted in small community where many jurors knew victim and her family or witnesses.

Com. v. Gross, 2014 WL 4745569 (Pa. 2014):
Holding: Because the State selects what county to charge a Defendant in, State has burden of proving that venue is proper in that county.

Lam Luong v. State, 2013 WL 598119 (Ala. App. 2013):
Holding: Pretrial publicity about Defendant's case, which involved murder of his four children by throwing them off bridge, was so extensive that prejudice is presumed, warranting a change of venue.

Fortner v. Superior Court, 159 Cal. Rptr. 3d 128 (Cal. App. 2013):
Holding: California did not have jurisdiction to try California-resident-Defendant for domestic abuse for hitting his domestic partner in Hawaii while they were on vacation there, since the act in Hawaii was spontaneous and Defendant did not do any "preparatory act" in California.

State v. Sparks, 2014 WL 1356651 (Ohio App. 2014):
Holding: Even though Defendant grew marijuana in Butler County for the benefit of someone else, where there was no evidence connecting Defendant or his actions to a group of marijuana defendants in Warren County, venue in Warren County was improper for a RICO charge against Defendant.

Waiver of Appeal & PCR

Cooper v. State, No. SC91695 (Mo. banc 12/6/11):
Where Movant waived his postconviction rights as part of his plea bargain and his later postconviction motion failed to allege or prove the presence of an actual conflict of interest, i.e., "a claim of ineffective assistance of counsel that pertains to the knowing, voluntary, and intelligent waiver of postconviction rights," then the postconviction motion should be dismissed.
Facts: Movant pleaded guilty in a plea bargain which also required that he waive his rights to later pursue postconviction relief. At the plea hearing, the court inquired whether Movant understood this, whether he had any complaints about his attorney, and whether he understood that he was waiving his posconviction rights. Later, Movant filed a Rule 24.035 motion.
Holding: Movant argues that his waiver of postconviction rights was unknowing, unintelligent and involuntary because of defense counsel's potential conflict of interest in advising him to waive his postconviction rights. However, a movant can waive his postconviction rights in exchange for a plea bargain if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was knowing, voluntary and intelligent. A movant's plea agreement to waive postconviction rights does not waive the right to argue that the decision to enter the plea agreement was not

knowing, voluntary or intelligent; this may be done through a state habeas petition. Additionally, a movant's plea agreement to waive postconviction rights does not waive the right to argue that the decision to enter the plea agreement was not knowing and voluntary because it was the result of ineffective assistance of counsel. There must be a factual basis for the claim of ineffective assistance in order to survive a wavier of postconviction relief. A court must determine whether there is any basis for a claim of ineffective assistance and whether the ineffectiveness claims pertain to the validity of the plea. Movant relies on Advisory Committee Opinion 126 (May 19, 2009) for his claim that the waiver is invalid here. Opinion 126 held that it was not permissible for defense counsel to advise a defendant regarding waiver of postconviction rights because this would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel. In addition, Opinion 126 held that it was "inconsistent" with the prosecutor's duties as minister of justice to seek a waiver of postconviction rights based on ineffective assistance of counsel. It is important to note that the instant plea agreement predates Opinion 126 so the attorneys at issued did not violate the formal opinion. Additionally, no attorneys have sought to have the Supreme Court review Opinion 126, even though there is a procedure for an aggrieved attorney to do so. A violation of a professional rule does not equate to a constitutional violation, however. Here, Movant "has neither alleged nor proven the presence of an actual conflict of interest – that is to say, a claim of ineffective assistance of counsel that pertains to the knowing, voluntary, and intelligent waiver of the postconviction rights." Therefore, the wavier is valid, and the case should be dismissed.

Editor's Note: Footnote 1 notes that courts will recognize an exception to waiver if it can be determined from the indictment, information and transcript that the court lacked power to enter the plea. Also, footnote 1 states motion courts must still enter Findings in postconviction cases, even if there was a purported waiver of postconviction rights. "In the future, if a movant alleges that a waiver of postconviction relief was not given knowingly, voluntarily or intelligently because an actual conflict of interest adversely affected defense counsel's performance," the court must still enter Findings.

Krupp v. State, No. SC91613 (Mo. banc 12/6/11):

Where Movant had a jury trial but prior to sentencing entered into an agreement with the State for a favorable sentence in exchange for waiving his appeal and postconviction rights and his later postconviction motion failed to allege an actual conflict of interest by defense counsel, the postconviction case should be dismissed.

Facts: Movant was convicted at a jury trial of various offenses. Before sentencing, he entered into an agreement with the State for a favorable sentence in exchange for waiving his appeal and postconviction rights. At sentencing, the court asked if he understood the agreement, had any complaints about his attorney, and understood the waiver. Movant received the favorable sentence. Later, he filed a Rule 29.15 motion.

Holding: Movant claims that his waiver of postconviction rights was not knowing, intelligent or voluntary because of defense counsel's potential conflict of interest in advising him to waive his postconviction rights. Movant relies on Advisory Committee Opinion 126 (May 19, 2009), which held that it was not permissible for defense counsel to advise a defendant regarding waiver of postconviction rights because this would

violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel, and that it was "inconsistent" with the prosecutor's duties as minister of justice to seek a waiver of postconviction rights based on ineffective assistance of counsel. It is important to note that the agreement in this case was before Opinion 126, so the attorneys did not violate the Opinion. Also, there is a procedure for aggrieved attorneys to challenge a formal opinion in the Supreme Court, but no attorney has yet done so. For the reasons set forth in *Cooper v. State*, No. SC91695 (Mo. banc 12/6/11), the waiver here is valid. Movant has only alleged that this waiver was not voluntary, knowing or intelligent because of a potential conflict of interest by defense counsel. It must be alleged and demonstrated that the waiver was not knowing, voluntary and intelligent because there was an actual conflict of interest that adversely affected counsel's performance. Something must have been done by counsel or something must have been forgone by counsel which was detrimental to the Movant and advantageous to the counsel. In the absence of that, the case should be dismissed.

U.S. v. Del Valle-Cruz, 97 Crim. L. Rep. 52 (1st Cir. 4/6/15):
Holding: Even though Defendant's plea deal to failure to register waived the right to appeal, this did not bar him from challenging supervised release condition that effectively prevented him from living with his with his minor son and family; prohibiting Defendant from living with his son and family was not related to his offense of failing to register or his history and character.

U.S. v. Orti-Garcia, 2011 WL 6061352 (1st Cir. 2011):
Holding: Defendant's appellate waiver was not knowing and voluntary, where district court did question defendant about his understanding of the waiver provision, but did not ascertain whether defendant understood the maximum penalty.

U.S. v. Torres-Rosario, 90 Crim. L. Rep. 70 (1st Cir. 9/23/11):
Holding: Interests of justice allow Defendant to appeal ACCA sentence, even though he expressly waived ACCA challenges at sentencing.

U.S. v. Wilson, 92 Crim. L. Rep. 577 (3d Cir. 2/14/13):
Holding: An appeal waiver does not preclude appeal of order modifying terms of supervised release.

U.S. v. Saferstein, 90 Crim. L. Rep. 788 (3d Cir. 1/26/12):
Holding: A district judge's botched summary of the terms of a plea bargain during a plea colloquy had the effect of expanding the defendant's right to appeal, notwithstanding specific limitations to the contrary laid out in the written agreement.

U.S. v. Castro, 92 Crim. L. Rep. 426, 2013 WL 69214 (3d Cir. 1/8/13):
Holding: Even though Defendant who pleaded guilty executed an appeal waiver, the waiver should not be applied where the evidence was legally insufficient to convict since this would result in a miscarriage of justice; here, Defendant was convicted of obstructing justice for making a statement that, although intended to be a lie, was in fact accurate.

Rodriguez v. Thaler, 2011 WL 6184481 (5th Cir. 2011):
Holding: While defendant signed a document indicating that, upon his guilty plea, the State would recommend to the court that defendant waived any rights he might have to appeal, the transcript of his sentencing revealed that the State did not actually make the recommendation, and so defendant did not waive his right to direct appeal.

U.S. v. Adkins, 94 Crim. L. Rep. 535, 2014 WL 325254 (7th Cir. 1/30/14):
Holding: Even though Defendant waived his right to appeal, this did not prohibit appealing a condition of supervised release prohibiting him from patronizing any place where pornography or sexually oriented material was available; the condition was so vague that no reasonable person would know what is prohibited, and Defendant should be allowed to obtain appellate review of it; the condition would arguably ban going to a grocery store or library.

Hurlow v. U.S., 93 Crim. L. Rep. 670 (7th Cir. 8/9/13):
Holding: Even though Defendant waived his right to pursue an ineffectiveness claim as part of his plea bargain, the waiver was not valid where he alleged that he entered the plea agreement on the basis of advice that fell below constitutional standards; here, Defendant alleged he would not have taken the plea deal but for counsel's failure to recognize that there was a valid 4th Amendment suppression issue; it is an attorney's ineffectiveness with regard to the plea agreement as a whole, and not just the specific waiver provision at issue, that renders the waiver unenforceable.

Dowell v. U.S., 2012 WL 403798 (7th Cir. 2012):
Holding: Even though plea agreement provided that Defendant could not collaterally attack certain issues, Defendant still could raise claim of ineffective assistance of counsel that had been specifically reserved in the plea agreement.

U.S. v. Spear, 2014 WL 2523694 and 2014 WL 2526120 (9th Cir. 2014):
Holding: Even though Defendant waived right to appeal bargained-for sentence, this agreement did not bar him from appealing if there was a sufficient factual basis for his plea.

U.S. v. Gonzalez-Melchor, 89 Crim. L. Rep. 641 (9th Cir. 7/8/11):
Holding: Where judge participated in getting Defendant to waive his appeal in exchange for a lower sentence, this waiver was unenforceable and invalid; judge's participation was analogous to impermissible participation in plea negotiations by a judge.

U.S. v. Rollings, 95 Crim. L. Rep. 318 (10th Cir. 5/20/14):
Holding: Appellate court should look to all the circumstances of a guilty plea to determine if an appellate waiver is binding.

U.S. v. Lonjose, 90 Crim. L. Rep. 451 (10th Cir. 12/28/11):
Holding: Even though Defendant waives his right to "appeal any sentence within the statutory range," this did not prevent Defendant from appealing post-sentencing modifications to his conditions of supervised release.

U.S. v. Godoy, 2013 WL 425334 (D.C. Cir. 2013):
Holding: Even though Defendant waived his appeal, where trial court told him he was waiving his appeal "except for something illegal, such as imposing a period of imprisonment longer than the statutory maximum," then Defendant did not waive his right to appeal an illegal sentence; the judge's oral pronouncement controls.

In re Sealed Case, 2012 WL 6632927 (D.C. Cir. 2012):
Holding: Even though Defendant waived right to appeal his "sentence," this did not waive right to appeal restitution order.

People v. Bradshaw, 2011 WL 6157282 (N.Y. 2011):
Holding: Defendant did not willingly waive right to appeal by pleading guilty to rape, where the trial court asked whether defendant understood its remarks about the appeal waiver in the plea agreement and defendant responded by asking about the mandatory fees associated with his plea.

Lundgren v. State, 2014 WL 2865806 (Tex. App. 2014):
Holding: A valid waiver of appeal does not waive Defendant's right to file a new trial motion in trial court.

Waiver of Counsel

Rollins v. State, 2015 WL 456261 (Mo. App. W.D. 2/3/15):
Holding: Even though Defendant / 29.15 Movant requested "standby counsel" at his trial where he was proceeding *pro se* after rejecting the public defender, where the court conducted a proper *Faretta* hearing, Defendant / Movant's waiver of counsel was unequivocal and direct appeal counsel was not ineffective in failing to challenge the waiver; Defendant / Movant has a constitutional right to counsel, but not a right to counsel of his own choosing.

U.S. v. Barton, 2013 WL 1296475 (2d Cir. 2013):
Holding: Even though Defendant did not hire a lawyer and refused to accept appointed counsel, he was entitled to proceed pro se and court erred in denying Public Defender's motion to withdraw.

U.S. v. Booker, 2012 WL 2510564 (3d Cir. 2012):
Holding: Defendant's waiver of counsel was not knowing and intelligent where trial court misinformed Defendant of the mandatory minimum sentence and maximum punishments for the charged offenses.

U.S. v. Ross, 2012 WL 6734087 (6th Cir. 2012):
Holding: Where record was unclear whether standby counsel had provided meaningful adversarial testing of Defendant's competency, remand was required.; 6th Amendment requires counsel at a competency hearing even where Defendant previously waived counsel.

U.S. v. Lee, 95 Crim. L. Rep. 558 (7th Cir. 7/29/14):
Holding: Denying a Defendant the right to represent himself at a suppression hearing cannot be harmless error, but remedy is a new suppression hearing with self-representation, not an automatic new trial.

U.S. v. Campbell, 2011 WL 4436001 (7th Cir. 2011):
Holding: Despite earlier indications that defendant sought to waive his right to counsel and proceed pro se, further ambiguous responses showed that the waiver and demand to proceed pro se were not unequivocal.

Tillman v. U.S., 93 Crim. L. Rep. 278, 2013 WL 227834 (D.C. 5/23/13):
Holding: The judicial warnings that must precede a waiver of counsel under *Faretta* do not carry over from a prior case to another one, i.e., Defendant wishing to waive counsel in a second case had to be given the warnings again.

Jensen v. Hernandez, 2012 WL 1130599 (E.D. Cal. 2012):
Holding: After the State filed for enhanced sentencing, trial court erred in not obtaining a second waiver of counsel from Defendant who was representing himself under *Farretta*.

Becker v. Martel, 2011 WL 1630816 (S.D. Cal. 2011):
Holding: Even though Defendant had previously waived counsel, the subsequent addition of 12 new counts and increased penalty was a substantial change that required court to readvise Defendant about right to counsel; failure to do so was prejudicial per se under 6th Amendment.

Holland v. Tucker, 2012 WL 1193294 (S.D. Fla. 2012):
Holding: The state supreme court unreasonably determined that a petitioner's right self-representation was not denied at his capital murder trial, so as to warrant federal habeas relief.

Stokes v. Scutt, 2011 WL 5250848 (E.D. Mich. 2011):
Holding: State court unreasonably applied clearly established federal law in determining that petitioner waived right to counsel, where petitioner was compelled to represent himself after being informed by the trial judge that substitute counsel would not be appointed following petitioner's expression of dissatisfaction with counsel and the judge's failure to resolve the complaints.

Coleman v. Johnsen, 2014 WL 2619990 (Ariz. 2014):
Holding: Ariz. Constitution guarantees right to self-representation on appeal.

State v. Pitts, 2014 WL 235462 (Haw. 2014):
Holding: Even though Defendant waived counsel mid-trial, he was allowed to reinvoke counsel and should have been provided counsel for his new trial motion and sentencing, as these were "critical stages" to which right to counsel attached.

Nunn v. Com., 97 Crim. L. Rep. 55 (Ky. 4/2/15):
Holding: Court denied Defendant right of self-representation where it imposed hybrid counsel and conditions on self-representation such that Defendant couldn't effectively participate in direct and cross-examination pro se.

Mitchell v. Com., 2014 WL 68365 (Ky. 2014):
Holding: Trial court's denial of request for "hybrid" representation, based on mistaken belief that Defendant was required either to accept counsel or go pro se, misstated the law and was reversible error.

Allen v. Com., 94 Crim. L. Rep. 15, 2013 WL 5406606 (Ky. 9/26/13):
Holding: Judge violated 6th Amendment right of self-representation where Defendant was representing himself at trial, but judge allowed only standby counsel to attend bench conferences.

State v. Krause, 2012 WL 3023199 (Minn. 2012):
Holding: Failure to provide counsel at hearing to determine whether Defendant had forfeited his right to appointed counsel violated due process.

In re D.Y., 95 Crim. L. Rep. 562 (N.J. 7/24/14):
Holding: Defendant has right to represent himself in an SVP proceeding.

People v. Crampe, 90 Crim. L. Rep. 109 (N.Y. 10/13/11):
Holding: Even though second judge properly advised about dangers of self-representation, this did not cure a prior judge's inadequate advice on this matter; the critical time for analysis is the point when Defendant first waived his right to counsel.

State v, Langley, 2012 WL 1038674 (Or. 2012):
Holding: No waiver of the defendant's constitutional right to counsel could be inferred from the defendant's pattern of misconduct and noncooperation prior to trial.

State v. Sampson, 2011 WL 2670182 (R.I. 2011):
Holding: Waiver of counsel was not knowing, intelligent and voluntary where trial court forced Defendant to proceed pro se or accept an appointed attorney who refused to carry out Defendant's personal right to waive a jury trial.

People v. Espinoza, 2015 WL 358798 (Cal. App. 2015):
Holding: Even though pro se Defendant intentionally failed to appear for second day of trial with the intention of causing a mistrial, court violated due process right to present a defense and Defendant's confrontation rights by proceeding with the trial without him;

there was no evidence Defendant knew the trial would proceed without him, and court could have appointed counsel to represent Defendant.

People v. Miranda, 2015 WL 2255077 (Cal. App. 2015):
Holding: Even though Defendant had bipolar disorder and schizophrenia, this did not require trial court to deny Defendant right to represent self, where Defendant explained a defense theory to jury and cross-examined witnesses with relevant questions.

Newland v. Com. of Corrections, 2014 WL 2723909 (Conn. App. 2014):
Holding: Even though Public Defender determined Defendant was ineligible, he did not validly waive counsel where he told court he did not want to represent himself, wanted counsel, but could not afford counsel; the finding of ineligibility was erroneously based on Defendant's ownership of property that was being foreclosed on; Defendant also was not informed of his right to appeal Public Defender's determination.

McDaniel v. State, 2014 WL 2782124 (Ga. App. 2014):
Holding: Even though court said on record that it would eventually advise *pro se* Defendant about the dangers of self-representation, where the court never did so, Defendant's waiver of counsel was not valid.

Perryman v. State, 2013 WL 4712499 (Miss. App. 2013):
Holding: Where trial court conducted only perfunctory examination of Defendant about dangers of self-representation at his resentencing hearing, and did not warn about its advantages and disadvantages, Defendant's waiver of counsel was not knowing and intelligent.

State v. Raul L., 2014 WL 2503745 (N.Y. App. 2014):
Holding: Even though appointed counsel was allowed to withdraw due to inadequate time to prepare, where Defendant in SVP proceeding did not express any desire to go pro se until after court told him that appointing new counsel would delay trial by four or more months, Defendant's waiver of counsel was not unequivocal and was not voluntary.

State v. Menefee, 2014 WL 7450769 (Or. App. 2014):
Holding: Even though pro se Defendant had disruptive behavior, trial court violated his right to representation by removing him from courtroom and continuing with trial; while Defendant can forfeit the right to be present and right to self-representation, he does not necessarily forfeit the right to any representation; judge should have terminated Defendant's right to self-representation and advised of right to representation.

Waiver of Jury Trial

State v. Williams, 2013 WL 6818208 (Mo. App. E.D. Dec. 24, 2013):
Record did not show with unmistakable clarity that Defendant personally waived his right to a jury trial where the only evidence of this in the record was counsel's motion and statement that Defendant was waiving this right.

Facts: Defendant was charged with felony nonsupport. Counsel filed a motion stating that "Defendant, by and through counsel, … hereby waives his right to a jury trial … and asks that this matter be tried to the Court." At the beginning of trial, the court asked if jury trial was waived, and defense counsel answered, "yes." Defendant was convicted at the bench trial. On appeal, Defendant claimed the trial court plainly erred by proceeding to trial without obtaining a valid wavier of jury trial from Defendant.
Holding: Since this issue was not raised below, the matter can only be reviewed for plain error and manifest injustice. Rule 27.01(b) requires that in felony cases, waiver of the constitutional right to jury trial shall be made in open court and entered of record with "unmistakable clarity." The judge is not required to question a defendant personally about this, but there must be something in the record that shows with "unmistakable clarity" that the defendant personally knowingly, voluntarily and intelligently waived this right. For example, waiver has been shown where a bench trial proceeded on reduced charges, or could be shown were counsel files a memorandum signed personally by defendant showing that counsel discussed the right to a jury trial and that defendant understands the consequences of the waiver. Here, the record reflects only that *counsel* waived the right to a jury trial, not Defendant personally. This resulted in manifest injustice. New trial granted.

State v. Frye, 2012 WL 1987192 (Kan. 2012):
Holding: Even though Defendant initially filed a hand-written waiver of jury trial, where that apparently occurred when he was charged with a misdemeanor for which there was no right to a jury trial, and Defendant was later charged with a felony and never warned by the court of his right to a jury trial, the waiver was invalid.

Com. v. Simmons, 92 Crim. L. Rep. 786 (Ky. 3/21/13):
Holding: Right to be tried by a 12-person jury under state constitution cannot unilaterally be waived by defense counsel, but requires Defendant's personal consent.

Nalls v. State, 2014 WL 1613399 (Md. 2014):
Holding: Remedy for failure to make proper record of jury trial waiver is new trial rather than remand for findings on whether waiver was voluntary; remand was inappropriate given fundamental nature of right at issue, and circuit court would be reviewing a waiver on a cold record.

Winters v. State, 2013 WL 5354333 (Md. 2013):
Holding: Defendant's wavier of jury trial was not knowing where trial court erroneously advised him that when proving he was not criminally responsible at trial, he would have to do so beyond a reasonable doubt.

Valonis v. State, 2013 WL 2150507 (Md. 2013):
Holding: For a waiver of jury trial to be valid, court must strictly comply with rule requiring waiver to be on the record.

State v. Little, 2014 WL 3973055 (Minn. 2014):

Holding: Even though Defendant had previously personally waived a jury, where State later amended the charge to add another offense, trial court was required to obtain a new personal waiver of jury trial for waiver to be effective.

State v. Kuhlmann, 90 Crim. L. Rep. 452 (Minn. 12/21/11):
Holding: Wavier of right to jury trial on existence of prior conviction can only be waived by Defendant personally, not his counsel.

State v. Harrell and State v. Wilson, 92 Crim. L. Rep. 696, 2013 WL 753094 (Or. 2/28/13):
Holding: Under Oregon Const., which unlike federal constitution explicitly gives defendants a right to waive a jury trial, court must weigh a variety of factors including interests of both defendant and state before denying a waiver.

State v. Umphenour, 2015 WL 1423789 (Idaho App. 2015):
Holding: Where Defendant did not personally waive a jury, this was structural error that warranted a new trial without showing of prejudice.